# 2011 FLORIDA LEGAL ETHICS REVIEW

By:

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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 2011. 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)

**Florida Bar asks Florida Supreme Court to approve major changes to lawyer advertising rules.**

On July 5, 2011, the Florida Bar filed a petition asking the Florida Supreme Court to approve a comprehensive overhaul of the rules governing lawyer advertising. The proposed rules, including their numbering and arrangement, represent a substantial revision of the rules that have applied to lawyer advertising and solicitation in recent years. Any changes to the rules must be approved by the Court. Highlights of the proposals include the following:

**Proposed Rule 4-7.1 (Application of Rules).** The proposed rules apply to "all forms of communication in any print or electronic forum." This includes "websites, social networking, and video sharing media." As for websites of multistate law firms, the proposed Comment explains that the Florida 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 proposed rules 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." The proposed rules do *not* apply to ads in "national media" (e.g., cable television) "if the disclaimer 'cases not accepted in Florida' is plainly noted in the advertisement."

**Proposed Rule 4-7.2 (Required Content).** All ads must contain 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).** The proposed Rule defines deceptive or inherently misleading ads, and provides a non-exclusive list of deceptive or inherently misleading statements. The list is significant primarily because of what the proposed rule would permit:

- References to past results are permitted if "objectively verifiable." (The proposed Comment notes that the affected client must give informed consent, even where "some or all of the information a lawyer may wish to advertise is in the public record.")
- Comparisons or characterizations of the advertiser's "skills, experience, reputation or record" are permitted if "objectively verifiable."
- The current rule requiring all non-lawyer spokespersons to be identified as such in ads 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 containing "dramatizations" of actual or fictitious events must contain a "prominently displayed" disclaimer, and a disclaimer must be "prominently displayed" when an actor "acting as a spokesperson" for the advertiser portrays someone "purporting to be engaged in a particular profession or occupation." (NOTE: The Board of Governors later modified the proposed rule to prohibit "authority figures" such as judges or police officers from appearing as spokespersons in ads.)
- The proposed rule generally allows the use of testimonials, but 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." "Testimonial" is defined in the Comment as "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."

- Ads may not contain an advertiser'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. A 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" and ads "that are literally accurate, but could reasonably mislead a prospective client regarding a material fact." 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."

**Proposed Rule 4-7.5 (Unduly Manipulative or Intrusive Advertisements).** This would prohibis 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). Neither the proposed Rule nor its Comment attempt to define what would be considered "intrusive."

**Proposed Rule 4-7.6 (Presumptively Valid Content).** Certain listed information is "presumed not to violate" the advertising rules. The items are almost identical that those contained in the current rules. One notable addition allows the 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).** The proposed Rule continues the prohibitions against a lawyer paying the costs of ads by a lawyer not in the same firm and a lawyer giving anything of value in exchange for a recommendation. A new section would prohibit a nonlawyer from paying all or a part of the cost of a lawyer's ad.

**Proposed Rule 4-7.8 (Direct Contact with Prospective Clients).** The proposed Rule continues to prohibit most in-person solicitation. Most of the rules governing direct mail communications remain unchanged, except 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 in advance of their first use. (Currently, only television and radio ads must be pre-filed.) "[A]n entire website" may *not* be filed 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."

The current rule mandates that 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). Significantly, 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's official Bar address. The ad review fees would remain unchanged 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 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 ad rules simply do not apply to requested information.) Additionally, websites would not be required to be filed for review.

**Proposed Rule 4-7.11 (Firm Names and Letterhead).** The standards governing firm names and letterhead are left intact. The proposed Comment adds that a sole practitioner's use of "and Associates," "Group," or "Team" is impermissible because it "implies that more than one lawyer is employed in the advertised firm and is therefore misleading."

**Proposed Rule 4-7.12 (Lawyer Referral Services).** The proposed rule mandates that all lawyer referral service ads affirmatively state "that lawyers who accept referrals from it pay to participate in the lawyer referral service." (This would be in addition to the affirmative "lawyer referral service" disclosure currently is required.)

**Proposed Rule 4-7.13 (Lawyer Directory).** The proposed Rule recognizes, for the first time, a "lawyer directory." This 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* come 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 Bar with a list of participants.

**Supreme Court amends Rules of Judicial Administration regarding withdrawal motions, pro hac vice admissions, electronic filing, and electronic testimony.** *In re: Amendments to the Florida Rules of Judicial Administration*, 73 So.3d 210 (Fla. 2011).

The Florida Supreme Court amended the Rules of Judicial Administration effective January 1, 2012. A sunEthics.com summary of the changes appears below.

**Motions to withdraw.** Amended Rule 2.505(f) requires that a motion to withdraw filed by a party's counsel include the client's last known telephone number and email address.

**Pro hac vice admission.** Amended Rule 2.510(a) requires a lawyer licensed in another state seeking pro hac vice admission in a Florida court to apply "in each court in which a case is filed even if a lower tribunal granted a motion to appear in the same case." Appearances at different levels of the court system in the same case are "deemed 1 appearance" for the purpose of determining whether a foreign lawyer has made more than 3 appearances within a 365-day period.

**Electronic filing.** New Rule 2.525(g) requires that all documents transmitted in any electronic form under this rule must comply with the accessibility requirements of Fla.R.Jud.Admin. 2.526. In turn, new Rule 2.526 requires that electronically-filed documents be formatted in a manner accessible to persons with disabilities.

**Electronic testimony.** Looking toward wider use of electronically-transmitted testimony, amended Rule 2.530(d) provides: "A county or circuit court judge, general magistrate, special magistrate, or hearing officer may allow testimony to be taken through communication equipment if all parties consent or if permitted by another applicable rule of procedure." This amendment "will allow the various Florida Bar rules committees to consider whether their bodies of rules should be amended to allow for the use of communication equipment without the parties consent."

**Supreme Court declines to amend Evidence Code to address inadvertent disclosure of privileged materials.** *In re: Amendments to the Florida Evidence Code*, 53 So.3d 1019 (Fla. 2011).

The Florida Bar Board of Governors proposed amendments to the Florida Evidence Code recommended by the Bar's Code and Rules of Evidence Committee. One proposal, originally suggested by the Bar's Attorney-Client Privilege Task Force, would have added a comment to F.S. 90.502 and 90.507 stating: "The concept of waiver by voluntary disclosure requires that the disclosing party intend by its disclosure to waive the applicable privilege. Inadvertent disclosure of a confidential matter or communication does not constitute a voluntary waiver of a privilege. Florida appellate courts addressing the issue have applied the 'relevant circumstances' test in determining whether a claimed inadvertent disclosure amounts to a waiver of the privilege." (Citations omitted.)

The Court declined to adopt the proposed comment, stating: "Because we have concerns with the comment, which appears to address an issue of law we have not yet ruled on, we decline to include it in those sections."

# CASES AND ETHICS OPINIONS (BY SUBJECT)

## ADVERTISING

**Some Florida lawyer advertising rules held unconstitutional by federal court.** *Harrell v. Florida Bar*, ___ F.Supp.2d ___ (M.D.Fla., No. 3:08-cv-15-J-34 TEM, 9/30/2011).

On remand from the Eleventh Circuit (see *Harrell v. Florida Bar*, 608 F.3d 1241 (11th Cir. 2010), the U.S. District Court for the Middle District of Florida held some of Florida's lawyer advertising rules to be unconstitutional and permanently enjoined the Bar from enforcing them. The case was decided on motions for summary judgment filed by Plaintiffs and by the Bar.

Plaintiffs argued that 5 Bar rules governing lawyer advertising are impermissibly vague and thus facially invalid under the Due Process Clause to the Fourteenth Amendment: Rule 4-7.2(c)(1)(G) (prohibits statements that 'promise results'); Rule 4-7.2(c)(2) (prohibits statements 'describing or characterizing the quality of the lawyer's services'); Rule 4-7.2(c)(3) (prohibits 'visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events' that are manipulative); Rule 4-7.5(b)(1)(A) (prohibits TV and radio ads containing any feature that is manipulative); and Comment to Rule 4-7.1 ('Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner'). Plaintiffs further contended that 2 rules were unconstitutional as applied: Rule 4-7.2(c)(2) (prohibits statements describing or characterizing quality of lawyer's services); and Rule 4-7.5(b)(1)(C) (prohibits TV and radio ads containing 'any background sound other than instrumental music'). The court held:

- Rule 4-7.2(c)(1)(G) (statements promising results) and Rule 4-7.2(c)(2) (statements characterizing quality of services) are constitutional;
- Rule 4-7.2(c)(3) (manipulative descriptions or portrayals) and Rule 4-7.5(b)(1)(A) (manipulative features in TV and radio ads) are unconstitutionally vague on their face;
- Comment to Rule 4-7.1 (ads should provide only useful, factual information) is unconstitutionally vague on its face;
- Rule 4-7.5(b)(1)(C) (prohibiting TV and radio ads with any background sound other than instrumental music) was unconstitutional as applied to Plaintiffs; and
- Rule 4-7.2(c)(2) (prohibiting use of statement "Don't Settle for Less Than You Deserve") was unconstitutional as applied to Plaintiffs.

The court declined the Bar's implied invitation to refrain from ruling on the case until the Florida Supreme Court acts on the Bar's proposed revisions to the advertising rules, which were filed with the Supreme Court in July 2011 (see summary above). The proposed rules would replace the prohibition on "manipulative" techniques and the blanket prohibition on background sounds with a rule that prohibits "unduly manipulative" sounds, images, or dramatizations.

**Florida Supreme Court denies the Bar's motion to dismiss the website advertising rules case and stays further proceedings until July 5, 2011.**

The Florida Bar previously filed a motion to dismiss the pending case (Fla. Sup. Ct. case no. SC10-1014) in which the Bar asked for changes to the rule governing law and law firm websites.

The reason behind the dismissal request was the comprehensive re-write of the lawyer advertising rules that is being conducted by the Florida Bar Board of Governors.

On February 28, 2011, the Florida Supreme Court denied the Bar's motion to dismiss without prejudice, stating in part in its order: "On the Court's own motion, the proceedings in this case are hereby stayed until July 5, 2011, by which time The Florida Bar has indicated that it will file a petition, with proposed rule amendments, recommending a comprehensive revision of the Rules Regulating The Florida Bar pertaining to attorney advertising."

**Supreme Court suspends lawyer who sent non-complying direct mail letter containing material false statements.** *Florida Bar v. Letwin*, 70 So.3d 578 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

## ATTORNEY-CLIENT RELATIONSHIP

**Professional Ethics Committee adopts proposed advisory opinion regarding representation of Department of Revenue in child support cases.**

At its September 21 meeting in Orlando the Bar's Professional Ethics Committee responded to an inquiry from the Eleventh Judicial Circuit State Attorney's Office by publishing for comment Proposed Advisory Opinion ("PAO") 11-1. The Florida Department of Revenue ("DOR") administers the Title IV-D child-support program, with the state attorney's office representing DOR. The law requires DOR to review child support obligations to determine whether the amounts remain consistent with current support guidelines and to seek adjustments when appropriate. In carrying out these duties DOR may find itself seeking to enforce a child support obligation against a non-custodial parent and later seeking a reduction of the same support order on that non-custodial parent's behalf. F.S. 409.2564(5) provides that "[a]n attorney-client relationship exists only between the department and the legal services providers in all Title IV-D cases."

Former Florida Ethics Opinion 92-2 had concluded that, despite F.S. 409.2564(5), "it would be unethical for an attorney who has received confidential information from one parent to later act adversely to that parent in a matter involving that confidential information " The Committee withdrew Opinion 92-2 and adopted PAO 11-1 was adopted to replace it. PAO 11-1 referenced *Department of Revenue v. Collingwood*, 43 So.3d 952 (Fla. 1st DCA 2010), and concludes: "Because the parent as a matter of law is not a client of the lawyer representing DOR, that lawyer owes the parent none of the ethical obligations that are premised on the existence of a lawyer-client relationship, including the obligations of loyalty and confidentiality. Accordingly, there are no ethical limitations on the lawyer's representing DOR in its (DOR's) providing services to a parent, regardless of a prior representation in which the services were provided to the other parent." The Committee acknowledged F.S. 90.502(5) but stated that "[a]lthough the Committee believes that this provision does not in itself create a lawyer-client relationship between the lawyer and the recipient of DOR's services, its impact is a legal question beyond the scope of an ethics opinion."

**Supreme Court suspends lawyer for providing improper financial assistance to client.** *Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Supreme Court imposes harsher sanction than referee recommended, suspending lawyer for 3 years for rule violations in representation of putative class.** *Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Supreme Court suspends lawyer whose sexual relationships with clients violated conflict rule and other rules.** *Florida Bar v. Roberto*, 59 So.3d 1101 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Enforcement of representation agreement clause requiring arbitration of legal malpractice claims is not against public policy, per Second DCA.** *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So.3d 315 (Fla. 2d DCA 2011).

See discussion in "Legal Malpractice" section.

**Court erred in denying motion to compel arbitration in legal malpractice case.** *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*, 59 So.3d 1173 (Fla. 4th DCA 2011).

See discussion in "Legal Malpractice" section.

**Relying on familiar rules and principles, Fourth DCA construes arbitration clause in lawyer-client contingent fee agreement.** *Feldman v. Davis*, 53 So.3d 1132 (Fla. 4th DCA 2011).

See discussion in "Fees (Including Attorney's Liens)" section.

**Court should not have disqualified lawyer despite unusual conflict of interest on the part of person who hired him.** *Razin v. A Milestone, LLC*, 67 So.3d 391 (Fla. 2d DCA 2011).

See discussion in "Conflicts of Interest" section.

**Private lawyer paid by State to represent defendant in capital postconviction case may also represent him pro bono in related non-capital case.** *Melton v. State*, 56 So.3d 868 (Fla. 1st DCA 2011).

See discussion in "Ineffective Assistance and Right to Counsel" section.

## CANDOR TOWARD THE TRIBUNAL

**Supreme Court disbars rather than suspends lawyer who practiced while suspended, with 3 concurring justices criticizing conduct of Bar prosecutor.** *Florida Bar v. Lobasz*, 64 So.3d 1167 (Fla. 2011).

Lawyer was charged with practicing law while suspended. The referee recommended that Lawyer be found in contempt and that he be suspended for 3 years. The Court agreed that he was guilty, but disbarred rather than suspended Lawyer.

When suspended, Lawyer had transferred most of his cases to another attorney. Lawyer advised that attorney, continued to go to the office, and met with clients. Lawyer even attended an immigration hearing at which he sat at counsel table, responded to the judge's questions, and conducted a direct examination. The Court stated that "a respondent's '[c]lear violation of any order or disciplinary status that denies an attorney the license to practice law generally is punishable by disbarment, absent strong extenuating factors.'" (Citation omitted .) The mitigating factors found by the referee were not strong enough to overcome the presumption of disbarment.

Justice Pariente, joined by 2 other justices, concurred in the result but criticized the conduct of the Bar's prosecutor. At oral argument the prosecutor represented to the Court that the Bar had "repeatedly and vociferously" objected to Lawyer's attempt to introduce certain evidence at trial. The concurring opinion stated, however, that "the record clearly demonstrates to the contrary – that there was no such objection." (Footnote omitted.) "After oral argument, the Bar never corrected its repeated misstatements. Bar counsel's inaccurate representations concerning the record are exceedingly troubling. All sides in bar proceedings must conduct themselves according to the applicable rules, without misleading the opposing party or this Court."

**Fourth DCA criticizes lawyer for "egregiously false" statement in reply brief.** *Pamphile v. State*, 65 So.3d 107 (Fla. 4th DCA 2011).

The Fourth DCA affirmed the conviction of Lawyer's criminal defense client. In a footnote, the court criticized Lawyer's use of an incorrect quotation in his reply brief. "We hope that [Lawyer] did not intend to intentionally mislead this tribunal. In his reply brief [Lawyer] offers a direct quotation from *Hawk* [*v. State*, 848 So.2d 475 (Fla. 5th DCA 2003)] . . . *Hawk* does not say what [Lawyer] says it says. Statements as egregiously false as those made by [Lawyer] are the type that ordinarily lead to sanctions or referral to the Florida Bar for disciplinary action or both."

## COMMUNICATION

**Lawyer publicly reprimanded for threatening to present criminal charges to gain advantage in civil matter.** *Florida Bar v. Knowles*, 64 So.3d 1195 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Rule 4-4.2 does not bar plaintiff's lawyers from communicating ex parte with treating physicians who are employed by defendant hospital.** *Lee Memorial Health System v. Smith*, 56 So.3d 808 (Fla. 2d DCA 2011).

Plaintiffs' child was injured and they sued Hospital for alleged negligence. The child's current treating physicians are employees of Hospital, but were not involved in the incident that resulted in the injuries. Previously Plaintiffs moved for a protective order to keep Hospital's lawyers from having ex parte communications with the treating physicians. The Second DCA quashed the order granting that motion. *Lee Memorial Health System v. Smith*, 40 So.2d 106 (Fla. 2d DCA 2010).

In the current dispute, Hospital moved for a protective order to bar Plaintiffs' lawyers from ex parte communications with the treating physicians. Hospital asserted that Rule 4-4.2 prohibited Plaintiffs' counsel from communicating with any of the child's treating physicians who are employed by Hospital without the consent of Hospital's counsel. The trial court denied the motion.

The Fifth DCA denied Hospital's petition for writ of certiorari. The court rejected Hospital's contentions regarding Rule 4-4.2, stating that "the scope of the rule is not as broad as [Hospital] would have it." The treating physicians were not involved in the incident giving rise to suit; they had no authority to bind Hospital regarding the suit, nor could their acts or omissions be imputed to Hospital in connection with the suit. Thus, "there is no evidence that these physicians are 'represented by counsel *concerning the matter to which the communication relates*.' See Fla. Rule of Prof'l Conduct 4-4.2 cmt. (emphasis added [by court])."

The court went on to "look at the broader picture" – one in which practicing physicians often are employed by a local hospital. It is "extremely important" for lawyers for plaintiffs in medical malpractice actions to consult with treating physicians. The court stated: "We seriously doubt that the drafters of rule 4-4.2 and (ABA) Model Rule 4.2 on which it is based anticipated the relatively recent trend toward the employment of physicians by hospitals. . . . The argument for the application of the rule under the circumstances of this case is based on happenstance – the accident that [Hospital] happens to employ some or all of the child's treating physicians. Here, informal contacts by plaintiffs' counsel with the child's treating physicians do not pose a threat that plaintiffs' counsel will overreach, interfere with [Hospital]'s relationship with its attorneys, or result in the uncounseled disclosure of information relating to the representation of [Hospital] by its attorneys."

**Court erred in granting motion to interview jurors that was not timely filed.** *Hannon v. Shands Teaching Hospital and Clinics, Inc.*, 56 So.3d 879 (Fla. 1st DCA 2011).

After the verdict in a jury trial Plaintiff filed a motion requesting to interview jurors 18 days after the deadline in Fla.R.Civ.P. 1.431(h). The rule gives the court discretion to accept an untimely

motion if "good cause is shown," but in its order the court struck through a finding that good cause existed. Nevertheless, the court granted the motion to interview jurors.

The First DCA quashed the order. The trial court departed from the essential requirements of the law by granting the motion without finding that good cause existed to excuse the untimely filing. The court noted that other means are available to lawyers seeking to communicate with jurors, citing Rule 4-3.5(d)(4) and *Ramirez v. State*, 922 So.2d 386 (Fla. 1st DCA 2006).

**Court abused its discretion in granting motion for post-trial juror interviews.** *Parra v. Cruz*, 59 So.3d 211 (Fla. 3d DCA 2011).

Plaintiffs filed a post-trial motion for juror interviews, alleging that "every single juror, including the alternate, had concealed litigation history during voir dire." The court held a brief hearing and then granted the motion.

The Third DCA quashed the order. Juror interviews are permitted in "rare instances" but are generally disfavored. In order to have a motion for interviews properly granted, the 3-part test in *De La Rosa v. Zequeira*, 659 So.2d 239, 241 (Fla. 1995), must be met: "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." Plaintiffs failed to satisfy this test. They did not show how the prior litigation history of the jurors would be relevant to the present case. Their allegation that "any prior litigation history coming to light after trial" was grounds for a new trial was "an untenable position." Also, there was a lack of diligence because Plaintiffs' counsel "never squarely asked for" the information.

**Court erred in denying post-trial motion to interview jurors in criminal case as legally insufficient.** *Gray v. State*, 72 So.3d 336 (Fla. 4th DCA 2011).

Convicted Defendant timely moved to interview jurors and for new trial, alleging that an alternate juror told defense counsel that several jurors engaged in premature deliberations. The court denied the motion as legally insufficient. The Fourth DCA reversed and remanded.

Under Fla.R.Crim.P. 3.575 a party with reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror(s). Upon finding that the verdict may be subject to challenge, the judge "shall enter an order permitting the interview." Because the timing of deliberations does not inhere in the verdict, "the trial court abused its discretion in denying the motion for juror interviews where the defendant's allegations gave rise to a prima facie case of premature jury deliberations." The court distinguished between allegations of a lone juror expressing an opinion and, as in this case, multiple jurors allegedly "improperly discussing the case during trial and . . . expressing opinions as to the defendant's guilt before the close of the evidence." (Citations omitted.) The appeals court also outlined the procedure to be followed on remand.

## CONFIDENTIALITY AND PRIVILEGES

**Supreme Court declines to amend Evidence Code to address inadvertent disclosure of privileged materials.** *In re: Amendments to the Florida Evidence Code*, 53 So.3d 1019 (Fla. 2011).

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

**Florida Supreme Court rules that attorney-client privileged communications are not discoverable in first-party bad faith action.** *Genovese v. Provident Life and Accident Ins. Co.*, 74 So.3d 1064 (Fla. 2011).

The Supreme Court ruled that its holding in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), which permitted discovery of attorney work product in first-party bad faith actions, did *not* apply to attorney-client privileged communications in the same circumstances.

Insured filed a statutory first-party bad faith action and sought production of Insurer's litigation file, "including all correspondence and communications made between the attorneys representing [Insurer] and [Insurer]'s agents regarding [Insured]'s claims." Production was ordered. Insurer petitioned the Fourth DCA to quash the order, arguing that *Ruiz* did not authorize discovery of attorney-client privileged documents. The Fourth DCA quashed the order compelling production of attorney-client privileged documents and certified the question to the Supreme Court. *Provident Life & Accident Ins. Co. v. Genovese*, 943 So.2d 321 (Fla. 4th DCA 2006).

The Supreme Court distinguished the attorney-client and work product privileges. Because of the "uniqueness of the attorney-client privilege" the Court held that "attorney-client privileged communications are not discoverable in a first-party [bad faith] action." Regarding work product, the Court explained: "In order for a party to bring a bad faith claim against an insurer, there must be an 'underlying claim for coverage or benefits or an action for damages which the insured alleges was handled in bad faith by the insurer.' *Ruiz*, 899 So. 2d at 1124. Consequently, the underlying claim materials are the evidence needed to determine whether an insurer acted in bad faith, which raises the issue of what materials are discoverable in bad faith actions. Because the underlying claim materials are 'necessary to advance [a first-party bad faith] action . . . [and] evaluate the allegations of bad faith,' see *Ruiz*, 899 So.2d at 1128-29, the materials fall within the confines of the exception to the work-product doctrine, and thus are discoverable."

Regarding attorney-client privileged communications, the Court stated: "[T]he attorney-client privilege, unlike the work-product doctrine, is not concerned with the litigation needs of the opposing party. . . . Instead, the purpose of the privilege is to 'encourage full and frank communication' between the attorney and the client. . . . This significant goal of the privilege would be severely hampered if an insurer were aware that its communications with its attorney, which were not intended to be disclosed, could be revealed upon request by the insured. Moreover, we note that there is no exception provided under section 90.502 that allows the discovery of attorney-client privileged communications where the requesting party has demonstrated need and undue hardship" [in contrast to the exception for work product in Fla.R.Civ.P. 1.280(b)(3)].

There may be cases in which an insurance company hires a lawyer to *both* investigate the underlying claim and provide it with legal advice. In such situations, "[w]here a claim of privilege is asserted, the trial court should conduct an in-camera inspection to determine whether the sought-

after materials are truly protected by the attorney-client privilege. If the trial court determines that the investigation performed by the attorney resulted in the preparation of materials that are required to be disclosed pursuant to *Ruiz* and did not involve the rendering of legal advice, then that material is discoverable."

The Court closed by cautioning that its decision "is not intended to undermine any statutory or judicially created waiver or exception to the privilege, such as the "at-issue doctrine."

**Supreme Court suspends lawyer for 3 years rather than 90 days; confidentiality gives way to fiduciary obligations when holding money in trust for non-client.** *Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011).

Lawyer represented developer Meyer in connection with a complex financing device called a "standby letter of credit." Potential investors apparently were told that their funds would be held in Lawyer's trust account and returned to them with "exceptional interest." Lawyer prepared and signed 5 letters addressed to possible investors inaccurately suggesting that the recipients had already given their funds to Lawyer. When ultimately received, funds were deposited in Lawyer's trust account and later disbursed by him upon instructions from Meyer. None of the investors were notified or gave their permission before the disbursement occurred.

The referee recommended that Lawyer be found guilty of violating Rule 5-1.1(b) (trust accounting), but not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) because Lawyer "acted negligently and, thus, did not intend to engage in misrepresentation." The referee recommended a 90-day suspension.

On review the Supreme Court agreed that Lawyer violated the trust accounting rules, disapproved the not-guilty recommendation as to Rule 4-8.4(c), and suspended Lawyer for 3 years instead of 90 days.

Lawyer acted intentionally rather than negligently. "The motive behind the attorney's action is not the determinative factor. Rather, the issue is whether the attorney deliberately or knowingly engaged in the activity in question." (Citations omitted.) The actions Lawyer took (e.g., writing and signing letters, transferring money out of his trust account) were deliberately or knowingly engaged in, and so his conduct was intentional and violated the rule.

The Court rejected Lawyer's contention that his conduct concerning the letters could not violate Rule 4-8.4(c) unless it was proven that someone relied on them. "Deceitful conduct does not have to be successful in order to be found dishonest."

Lawyer also asserted that Meyer was his client and so he could not provide the investors with the information that they requested regarding the status of their funds. The Court disagreed, noting that Lawyer owed fiduciary duties to the investors due to the express or implied-in-law escrow agreement.

**Order finding waiver of attorney-client and work product privilege objections due to "untimely" filing of privilege log is reversed.** *Fifth Third Bank v. ACA Plus, Inc.*, 73 So.3d 850 (Fla. 5th DCA 2011).

In May 2010 Bank was served with a Second Request to Produce. Bank timely responded and raised objections (including attorney-client privilege and work product) to some requests, but

stated that it would produce other documents. Requestors' counsel, however, moved to compel and sought sanctions. The court did not rule on the objections, but ordered production of all requested documents by August 6. Bank timely produced the documents along with a privilege log.

At the hearing on Bank's objections the court found that one document was work product and one document was attorney-client privileged. Nevertheless, the court ruled that Bank's filing of its privilege log was untimely because it was not filed within 30 days of being served with the Second Request to Produce. The court ordered production of the documents.

The Fifth DCA quashed both the production order and the sanction order. Fla.R.Civ.P. 1.280(b)(5) allows assertion of a privilege to protect otherwise-discoverable materials but "does not set forth a time by which a privilege log must be filed." Failure to submit a privilege log by the due date for a response to a request to produce does not automatically constitute a waiver of the right to assert privilege or work-product protection.

**Law firm disqualified from representing bank against guarantor due to unfair informational advantage gained by simultaneously representing guarantor's former lawyer in related malpractice suit.** *Frye v. Ironstone Bank*, 69 So.3d 1046 (Fla. 2d DCA 2011).

See discussion in "Conflicts of Interest" section.

**Court erred in ruling that crime-fraud exception to attorney-client privilege applied without first holding evidentiary hearing.** *Armoyan v. Armoyan*, 64 So.3d 198 (Fla. 4th DCA 2011).

Husband petitioned the Fourth DCA, seeking to quash an order ruling that the crime-fraud exception to the attorney-client privilege applied. The appellate court granted the petition. The trial court departed from the essential requirements of law when it ruled that the crime-fraud exception applied to Husband's claim of privilege without holding an evidentiary hearing at which Husband could testify.

**Court erred in ordering production in bad faith case of insurer's entire claim file over privilege and work product objections.** *State Farm Florida Ins. Co. v. Puig*, 62 So.3d 23 (Fla. 3d DCA 2011).

In a first-party bad faith action Insureds sought production of Insurer's "entire claim file." The court ordered production over Insurer's attorney-client privilege and work product objections.

Te Third DCA quashed most of the order. The lower court misapplied *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), in 2 ways: "(1) by impermissibly compelling, over [Insurer]'s assertions of work product protection, the production of claim file documents prepared after resolution of the underlying litigation; and (2) by failing to give any consideration to [Insurer]'s assertions of attorney-client privilege."

The work product privilege did not protect those portions of the claim file prepared prior to the resolution of the underlying litigation (over the amount of damages to be paid to Insureds for a covered loss). Those portions of the file prepared *after* that date, however, were considered work

product and Insureds made no showing of good cause that would entitle them to production. (See *Ruiz*, 899 So.2d at 1130; Fla.R.Civ.P. 1.280(b)(3).)

As to attorney-client privilege, the trial court's order showed a "complete misunderstanding of" *Ruiz*. *Ruiz* dealt only with work product protection, not the attorney-client privilege. The Third DCA also pointed out in a footnote that its decision was supported by the Supreme Court's decision in *Genovese v. Provident Life and Accident Ins. Co.*, 74 So.3d 1064 (Fla. 2011).

**Court erred in ordering production of party's claim file prior to deposition to refresh memory of witness who was formerly employed by party.** *Racetrac Petroleum, Inc. v. Cooper*, 69 So.3d 1077 (Fla. 5th DCA 2011).

Witness had been employed by Petitioner as its risk manager. While so employed Witness "assembled or prepared the contents of the claims file." Witness was to be deposed by Petitioner's opponent ("Respondent") in litigation. Respondent set the deposition and secured a court order directing Petitioner to produce the claim file "for the ostensible purpose of allowing [Witness] to refresh her memory prior to her deposition."

The Fifth DCA quashed the production order. Respondent conceded that, for these purposes, the claim file's content were immune from discovery as work product. Respondent also conceded that only Witness would view the file and that no privilege waiver would result. The court stated: "Although a theoretical case may be made for the production of work product to refresh a witness's memory when the evidence is not otherwise available, thus far, Respondent's showing is entirely conjectural."

**Although defendant's incident reports were protected by work product privilege, *facts* on which they were based were not.** *Universal City Development Partners, Ltd. v. Pupillo*, 54 So.3d 612 (Fla. 5th DCA 2011).

Plaintiff sued a corporate Defendant alleging battery. Plaintiff sought production of Defendant's incident reports for the past 3 years. Defendant objected, citing work product privilege. Plaintiff agreed that the report on the incident that was the subject of this suit was privileged, but insisted that the others were not. He also contended that he could not obtain the substantial equivalent without undue hardship. The court ordered the reports produced, with names and related information redacted.

The Fifth DCA quashed the order. The incident reports were protected as work product. Plaintiff failed to make the showing of "undue hardship" required by Fla.R.Civ.P. 1.280(b)(3) in order to obtain production notwithstanding the work product privilege. "[Plaintiff] can use the ordinary tools of discovery to learn the facts of the incident that he was involved in as well as the facts of the prior incidents on the property. . . . The documents are privileged, not the facts about which they pertain. . . . 'The fact that the incident report might yield additional information about the incident is not enough, without more, to show 'undue hardship.'" (Citations omitted.)

One judge concurred in part and dissented in part, vigorously contending that Defendant failed to carry its burden of proving that the reports were prepared in anticipation of litigation.

**Opinion work product did not extend so far as to require redaction of all opinions "no matter by whom made" from Amendment 7 adverse medical incident reports.** *Acevedo v. Doctors Hospital, Inc.*, 68 So.3d 949 (Fla. 3d DCA 2011).

In a medical negligence case Plaintiffs sought production of Defendant's adverse medical incident reports pursuant to "Amendment 7" (Art. X, sec. 25(a), Fla.Constit.). The court ordered production of the reports but ordered that "all 'opinions, comments, recommendations or findings, *no matter by whom made*' be redacted from the documents." (Emphasis by court.) The Third DCA quashed that portion of the order.

The court distinguished fact and opinion work product, then noted that "[t]he plain language of Amendment 7 evinces intent to abrogate any fact work privilege that may have attached to adverse medical incident reports prior to its passage. . . . However, there is nothing in Amendment 7 to suggest the voters intended to create a chilling effect within legal profession by mandating disclosure of opinion work product. . . . The only question that remains, therefore, is whether the redacted portions of respondent's reports are privileged as opinion work product. We hold they are not." (Citations omitted.) The opinion work product privilege did not extend to "the comments and findings of hospital personnel routinely contained in adverse medical incident reports."

**Litigation privilege applies to cause of action for abuse of process, and lack of subject matter jurisdiction does not preclude application of privilege.** *LatAm Investments, LLC v. Holland & Knight, LLP*, __ So.3d ___, 36 Fla.L.Weekly D2307 (Fla. 3d DCA, No. 3D10-3042, 10/19/2011), 2011 WL 4949997.

Clients of Law Firm sued Defendants in federal court based on diversity jurisdiction. The court entered a partial summary judgment for Clients. Law Firm later learned that the alleged basis of diversity jurisdiction against one Defendant did not exist. After the federal suit was dismissed for lack of subject matter jurisdiction, Defendant sued Law Firm in state court alleging that its post-judgment actions (issuing subpoenas and writs of garnishment) constituted abuse of process. Law Firm's motion to dismiss on the basis that its conduct was protected by the litigation privilege was granted.

The Third DCA affirmed, rejecting the 3 contentions raised by Defendant, which were: "(1) the litigation privilege does not apply to an action for abuse of process; (2) the application of the litigation privilege for a cause of action for abuse of process would abolish abuse of process as a cause of action; and (3) the litigation privilege cannot protect actions taken during a judicial proceeding where the trial court lacked subject matter jurisdiction over the proceedings."

Relying on Florida Supreme Court precedent, the court concluded: "Because it is undisputed that the acts complained of here occurred during and were related to the judicial proceedings, we agree with the trial court that the litigation privilege applies to [Defendant]'s cause of action against [Law Firm] for abuse of process."

Applying the litigation privilege does not abolish the cause of action for abuse of process because a claimant has remedies for action taken outside of the judicial proceeding, and also may pursue disciplinary action by the court or the bar.

Finally, as a policy matter the court stated that "limiting the protection afforded by the litigation privilege on a court having subject matter jurisdiction, as [Defendant] advises us to do, would severely undercut the public policy which inspired its creation. . . . If protection from

exposure to liability hinged on a complicated legal issue, it would render the litigation privilege virtually meaningless, as the privilege's protection would always be uncertain and, therefore, attorneys would have reason to hesitate before employing certain strategies. If faith in the litigation privilege is to remain uncompromised, its protections should not be premised on the existence of subject matter jurisdiction."

**Statements posted on internet website by party to litigation are not protected by litigation privilege.** *Ball v. D'Lites Enterprises, Inc.*, 65 So.3d 637 (Fla. 4th DCA 2011).

Plaintiffs, who had entered into license agreements with Defendants, sued Defendants alleging breach of contract, fraud, and other claims. Defendants then posted derogatory statements about Plaintiffs on their public website. Plaintiffs amended their complaint to allege defamation. The court ruled that "the statements on the website were directly related to the litigation and thus were absolutely immune" and dismissed the defamation claim.

The Fourth DCA reversed, holding that "statements made on a party's website are not protected by the litigation privilege." The court analogized publishing statements on a website to "calling a press conference with the media or otherwise publishing defamatory information to the newspapers or other media," which other courts – including the U.S. Supreme Court in *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993) – have concluded are not made in connection with a judicial proceeding and thus are not entitled to litigation privilege immunity. "[T]he website publication in this case was not made in connection with the judicial proceeding."

**Protective order allowing plaintiff's counsel to share confidential discovery with lawyers who have similar cases against same defendant quashed.** *Wal-Mart Stores East, L.P. v. Endicott*, __ So.3d ___, 36 Fla.L.Weekly D2707 (Fla. 1st DCA, No. 1D11-3568, 12/9/2011), 2011 WL 6117220.

Plaintiffs sued for alleged negligence in filling prescriptions and obtained discovery of information that was confidential and contained Defendant's trade secrets. In negotiating a confidentiality agreement, the parties disagreed over Plaintiffs' intent to include a "sharing provision" that would permit Plaintiffs' counsel to share the discovery "with 'collateral litigants,' which would include [Plaintiffs'] counsel in similar cases or other similarly situated litigants' attorneys." The court's protective order permitted the sharing of the discovery with "any attorneys, their staff, and any expert witnesses involved in any other past or present cases involving alleged prescription errors committed by pharmacists employed by [Defendant] . . ."

The First DCA quashed the order. Any sharing provision "must be specifically tailored to meet the needs of both parties while balancing the need to maintain confidentiality." The provision at issue failed this test. Any "collateral litigants are unknown, and the only affirmations as to their need to view confidential information are the assertions of [Plaintiffs'] counsel." Additionally, any sharing provision allowing dissemination of trade secrets to third parties without a court considering whether the material conceals a fraud or works an injustice "is contrary to [F.S. 90.506]."

**Florida Bar Board of Governors approves ethics opinion addressing how decedent's lawyer should respond to requests for confidential information.** Florida Ethics Opinion 10-3.

See discussion in “Rules and Ethics Opinions” section.

## CONFLICTS OF INTEREST (INCLUDING DISQUALIFICATION)

**Supreme Court suspends lawyer whose sexual relationships with clients violated conflict rule and other rules.** *Florida Bar v. Roberto*, 59 So.3d 1101 (Fla. 2011).

See discussion in “Disciplinary Proceedings” section.

**Party moving for disqualification lacked standing to do so where party had no relationship with subject law firm.** *Continental Casualty Co. v. Przewoznik*, 55 So.3d 690 (Fla. 3d DCA 2011).

Insurer paid Insureds for damage sustained when their boat sank. Insureds sued Insurer alleging various claims relating to that payment. Insurer was represented by Law Firm. Law Firm previously represented another insurance company that had, in an earlier suit, defended that company against Insureds' claims for damages relating to the same boat.

Insureds moved to disqualify Law Firm, asserting that because of Law Firm’s representation of both insurance companies there was an irrefutable presumption that confidential information had been disclosed to the Firm. The court disqualified Law Firm without finding that the Firm had violated any particular Rule of Professional Conduct. Rather, the court concluded that the Firm’s "involvement with so many aspects of the predecessor action and this action is so overweening [sic] that an *appearance of impropriety* is a natural consequence." (Emphasis by Third DCA).

The Third DCA quashed the disqualification order. The determinative issue was whether Insureds had standing to seek Law Firm's disqualification. The court concluded that they did not. Law Firm never represented Insureds; Insureds always had separate counsel representing them in the suits over the boat and Law Firm, "as opposing counsel in those lawsuits, has always been in an adversarial role to [Insureds]." *Citing Anderson Trucking Serv., Inc. v. Gibson*, 884 So.2d 1046 (Fla. 5th DCA 2004), the court stated that "a party generally does not have standing to seek disqualification where, as here, there is no privity of contract between the attorney and the party claiming a conflict of interest."

In conclusion, the court stated: "While the trial court’s ruling to the contrary was premised upon the fact that [Law Firm] represented another insurance company in a prior action involving the same sunken vessel that is involved in the instant lawsuit, this case does not involve circumstances where the law firm either disclosed confidences learned from representing [Insureds] or switched sides in violation of the Rules of Professional Conduct. See [Rule] 4-1.6; [Rule] 4-1.9."

**Law firm disqualified from representing bank against guarantor due to unfair informational advantage gained by simultaneously representing guarantor's former lawyer in related malpractice suit; movant not required to show attorney-client relationship where disqualification motion based on information advantage grounds.** *Frye v. Ironstone Bank*, 69 So.3d 1046 (Fla. 2d DCA 2011).

Bank sued a limited liability company to foreclose on a note and mortgage. Bank also sued Frye, who gave a personal guaranty of the note. Frye hired lawyer Trupp and his law firm (the "Arnstein firm") to defend him against Bank's claims. Frye later discharged Trupp and the Arnstein firm and sued them alleging legal malpractice in their representation of him in the Bank's action and other matters involving loans and personal guaranties. "Significantly, [Frye] alleged in his malpractice complaint that [Trupp] and [the Arnstein firm] firm obtained 'confidences of [Frye] during their representation, including, without limitation, information gleaned from performing estate and asset planning for [Frye] giving [Trupp and the Arnstein firm] intimate knowledge of [Frye's] financial circumstances.'"

After the malpractice suit was filed Bank switched lawyers, hiring the Henderson Franklin firm. Trupp and the Arnstein firm also retained Henderson Franklin to represent them in Frye's malpractice action against them. Thus, Henderson Franklin was simultaneously representing Bank against Frye and Frye's former counsel against Frye.

Frye moved to disqualify Henderson Franklin as Bank's counsel in the guaranty action. Frye alleged that Henderson Franklin had an unfair informational advantage because, due to its attorney-client representation with his former counsel, Henderson Franklin had access to files and confidential information that Trupp and the Arnstein firm had as a result of representing Frye in the case involving the Bank. The court denied disqualification on the ground that there had been no attorney-client relationship between Frye and Henderson Franklin.

The Second DCA quashed the order. Because Frye sought disqualification based on the unfair information advantage and not a conflict of interest theory, he did *not* have to show that he had an attorney-client relationship with Henderson Franklin. Rather, "the question presented is whether Henderson Franklin's access to confidential communications between Mr. Frye and his former lawyer through its representation of the lawyer in the legal malpractice action is sufficient to require the disqualification of Henderson Franklin from continued representation of the Bank in the action against Mr. Frye on the guaranty. We conclude that the unfair informational advantage accruing to Henderson Franklin through its representation of Mr. Frye in the legal malpractice action disqualifies it from further representation of the Bank in its action against Mr. Frye on the guaranty."

Frye's former lawyer, Trupp, "is irrefutably presumed to have obtained confidential information from his former client" in representing Frye in the Bank's action on the guaranty and in estate and asset planning matters. Trupp was ethically permitted to disclose confidential information to defend himself in the malpractice action brought by Fyre. See Rule 4-1.6. Thus, Trupp could disclose such information to his counsel, Henderson Franklin. As a result, Henderson Franklin would possess confidential information that it could use against Frye in the Bank's guaranty action. "It follows that Henderson Franklin must be disqualified from representing the Bank in its action against Mr. Frye because of the unfair informational advantage Henderson Franklin has gained by virtue of its representation of Mr. Trupp and the Arnstein firm in the defense of Mr. Frye's malpractice action." (Citations omitted.)

**Court should not have disqualified lawyer despite unusual conflict of interest on the part of person who hired him.** *Razin v. A Milestone, LLC*, 67 So.3d 391 (Fla. 2d DCA 2011).

Razin and Bahl were managing members of an LLC, "Milestone". Razin sued Milestone for monies allegedly due him. Razin hired lawyer Norman to represent Milestone in the suit. Bahl, however, hired lawyer McDermott to represent Milestone. Each lawyer moved to disqualify the other. The court disqualified both lawyers and appointed a custodian to represent Milestone.

The Second DCA reversed the order disqualifying Norman and affirmed the order disqualifying McDermott. Milestone's operating agreement provided that Razin had controlling authority in this situation, and the parties to that agreement (Razin and Bahl) were bound by it.

Unlike the trial court, the appeals court did not base its decision on the alleged conflict of interest under which Razin was operating. "[T]he trial court noted that it was troubled by what appeared to be Razin's conflict of interest in retaining counsel to represent Milestone in defense of Razin's collection action. But even though this scenario does not appear to be an arm's length transaction, the fact remains that Bahl agreed to the inclusion of article VII, section 1 [of the operating agreement], in return for Razin's $1,000,000 loan. Parties are free to waive any potential conflicts of interest, see *Rudolf v. Gray, Harris & Robinson, P.A.*, 901 So.2d 148, 150 (Fla. 5th DCA 2005) (noting that shareholders of corporation had expressly waived any conflicts of interest from law firm representing corporation and individual shareholders), and we are powerless to rewrite the agreement in order to make it more reasonable for Bahl."

Nothing in the record suggested that Norman was representing Milestone in name only and instead actually working to protect Razin. In a footnote, the court referred to the applicable attorney-client relationship principles: "[B]ecause Norman was hired to represent Milestone, he had no duty to either Razin or Bahl individually; Norman's duty ran only to Milestone. See *Rudolf*, 901 So. 2d at 150, 150 n.4 (discussing comments to [Rule] 4-1.13 which provide that when a lawyer represents an organization, the entity is the client, not the constituents of the organization)."

**Supreme Court suspends lawyer for providing improper financial assistance to client.** *Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Conviction reversed because trial court did not hold *Nelson* hearing, even though defendant never moved to discharge counsel.** *Penn v. State*, 51 So.3d 622 (Fla. 2d DCA 2011).

See discussion in "Ineffective Assistance of Counsel and Right to Counsel" section.

## DISCIPLINARY PROCEEDINGS

**Florida Supreme Court disbars rather than suspends lawyer who practiced while suspended, with 3 concurring justices criticizing conduct of Bar prosecutor.** *Florida Bar v. Lobasz*, 64 So.3d 1167 (Fla. 2011).

See discussion in "Candor Toward the Tribunal" section.

**Supreme Court suspends lawyer whose sexual relationships with clients violated conflict rule and other rules.** *Florida Bar v. Roberto*, 59 So.3d 1101 (Fla. 2011).

Lawyer was charged with ethical violations arising from his representation in separate cases of 2 female clients with whom he was found to have engaged in sexual relationships. Lawyer did not enter a written fee agreement with or receive fees from either client. The referee did *not* find that Lawyer traded legal services for sexual favors. Lawyer provided financial assistance to the clients on several occasions; for example, Lawyer gave one client $250 to buy clothes and groceries and deposited $130 into the other's jail commissary account. This assistance was not connected with costs or expenses of litigation. Lawyer also asked one of the clients to refer prospective clients to him, and provided the client with a cell phone for this purpose.

The referee found Lawyer guilty of violating Rule 4-1.8(e) (prohibited financial assistance) and Rule 4-7.4(a) (prohibited solicitation of clients). Although the referee found that Lawyer's "sexual relationship with his clients created a conflict of interest," the referee did not find a violation of Rule 4-1.7(a) (general conflict of interest rule). Apparently this was because the Bar "failed to prove by clear and convincing evidence that the sexual relationship was in exchange for legal services or that it exploited the attorney-client relationship." The referee recommended that Lawyer be placed on probation for one year.

The Florida Bar petitioned for review, contending that the referee erred in not finding a violation of the conflict rule and that the recommended sanction was too light. The Florida Supreme Court agreed with both contentions and suspended Lawyer for one year. The referee's factual findings supported the conclusion that the sexual relationships impaired Lawyer's exercise of his professional judgment, "which in turn led to additional unethical conduct. While [Lawyer] did not trade legal services for sexual favors, his conduct undoubtedly gave the appearance of impropriety. [Lawyer] never entered into a written fee agreement with either client, he never received any monetary fees from either client, and he repeatedly met both women at their homes or in restaurants to discuss their cases, rather than in a professional office setting. [Lawyer] also provided the clients with prohibited financial assistance in violation of rule 4-1.8(e), in that he used his personal funds to pay their bills, gave them money to buy clothes and other personal items, and made deposits to their commissary accounts in jail. Although this financial assistance may have been given, at least partially, from a misguided sense of philanthropy, we conclude that [Lawyer]'s behavior demonstrates that his involvement in sexual relationships with his clients clouded his professional judgment, creating a conflict of interest that ultimately led to additional ethical violations." (Footnote omitted.)

NOTE: As the Court explained in a footnote, "subsequent to the conduct in this case, rule 4-8.4(i) was amended to include the following presumption: 'If the sexual conduct commenced after the lawyer-client relationship was formed it shall be presumed that the sexual conduct exploits or adversely affects the interests of the client or the lawyer-client relationship.'"

**Supreme Court increases recommended suspension of lawyer who sent non-complying direct mail letter containing material false statements.** *Florida Bar v. Letwin*, 70 So.3d 578 (Fla. 2011).

Lawyer sent out more than 900 direct mail solicitation letters regarding a purported class action. The Bar charged Lawyer with rules violations. The referee found that the letters contained inaccurate and erroneous statements intended to induce prospective clients to hire Lawyer. Additionally, the letters did not comply with rules governing direct mail ads. The referee recommended that Lawyer be found guilty of violating rules 3-4.2 (violation of rules of professional conduct is cause for discipline), 4-7.4(a) (solicitation), and 4-8.4(d) (conduct prejudicial to administration of justice). The referee recommended a not guilty finding on other charges, and recommended a 90 day suspension.

The Supreme Court found additional rules violation and increased the disciplinary sanction to a 1-year suspension followed by 3 years of probation. The Court found Lawyer guilty of violating Rules 4-4.1 (false statement of material fact to third person), 4-8.4(a) (violating or attempting to violate rules of professional conduct), and 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). Lawyer's prior disciplinary history and "the seriousness of the misconduct" resulted in the stiffer sanction.

A defense raised by Lawyer was that "she already viewed the recipients of the letter as her 'clients' and that because of the multiple lawsuits she had filed, there was a 'budding attorney-client relationship' between her and the putative class members." The Court stated that "nothing in the record showed that a true attorney-client relationship had been established."

**Supreme Court makes additional guilty finding and increases recommended suspension from 10 to 91 days in disciplinary case.** *Florida Bar v. Berthiaume*, 78 So.3d 503 (Fla. 2011).

The Bar accused Lawyer of sending a fraudulent subpoena to a bank in order to obtain records of a client who had written checks to her. The referee recommended that Lawyer be found guilty of violating Rule 4-8.4(d) (conduct prejudicial to the administration of justice), but not guilty of several other charged violations, including Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The referee recommended a 10-day suspension.

The Supreme Court determined that Lawyer *did* violate Rule 4-8.4(c). The Court rejected Lawyer's contention that she did violate the rule because the Bar failed to prove she engaged in fraud. A showing of fraud is not required; conduct involving any element of the rule can result in a violation. The record showed that Lawyer "knowingly and deliberately sent" the misleading subpoena. The Court noted that "the motive behind the [Lawyer]'s action is not the determinative factor; rather, the issue is whether [Lawyer] deliberately or knowingly engaged in the activity."

The Court also rejected the recommended 10-day suspension and instead suspended Lawyer for 91 days. "In considering violations of rules 4-8.4(c) and 4-8.4(d), we have explicitly stated that 'basic, fundamental dishonesty . . . is a serious flaw, which cannot be tolerated [because] '[d]ishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members." [Citations omitted.] [Lawyer] has engaged in serious misconduct – she abused the subpoena power, which is a power of the court, for her personal investigation. Such dishonest conduct demonstrates the utmost disrespect for the court and is destructive to the legal system . . ."

**Supreme Court imposes harsher sanction than referee recommended, suspending lawyer for 3 years for rule violations in representation of putative class.** *Florida Bar v. Adorno*, 60 So.3d 1016 (Fla. 2011).

Lawyer represented 7 individual property owners who sued City alleging that City improperly assessed fees against them. Class certification was expected but never occurred. Lawyer settled the claims of the individual clients for $7 million. That settlement was set aside on appeal in an opinion by the Third DCA that was sharply critical of Lawyer's actions.

The Bar charged Lawyer with various violations. The referee found Lawyer guilty of violating Rule 4-1.7 (conflict of interest); Rule 4-1.5 (excessive or prohibited fee); and Rule 4-8.4 (misconduct). The referee recommended that Lawyer be publicly reprimanded.

The Florida Supreme Court approved the guilt findings but rejected the recommendation of a public reprimand, instead suspending Lawyer for 3 years.

The Court ruled that Lawyer owned a fiduciary duty to the putative class. Regarding the conflict of interest, the Court stated: "[Lawyer] negotiated to the detriment of the other class members when he settled for the named plaintiffs for an amount grossly disproportionate to the value of their individual claims. In doing so, he received a $2 million fee for the firm, while he ignored or abandoned the putative class members. The seven named plaintiffs had a total of $84,000 in claims, yet [Lawyer]'s meeting with City representative [] resulted in a settlement of $7 million. In comparison, the City had estimated its exposure for the entire class was approximately $23 or $24 million. . . . By abandoning the class for the few named plaintiffs and the substantial fee for his firm, [Lawyer] compromised the class claims. The named plaintiffs were disproportionately enriched, while [Lawyer]'s actions in reaching the 'inequitable settlement' left thousands of potential class plaintiffs unable to effectively pursue their claims against the City and placed them in a financially disadvantageous situation . . ."

As to the violation of Rule 4-1.5, the Court did not focus on whether the fee was "excessive" but determined that it was a "prohibited" fee: "[Lawyer] asserts that the $2 million fee was not excessive because it was less than 30% of the $7 million settlement. In this case, however, it is not the percentage of the settlement that renders the fee a violation of the Bar rules. Rather, it is that the fee was a prohibited fee as it was obtained through unethical means."

**Supreme Court suspends lawyer for 3 years rather than 90 days; confidentiality gives way to fiduciary obligations when holding money in trust for non-client.** *Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011).

See discussion in "Confidentiality and Privileges" section.

**By 4-3 vote Supreme Court rejects Bar's opposition and reinstates lawyer who failed to file delinquent tax returns until he petitioned for reinstatement**. *Florida Bar v. Hudson*, 75 So.3d 215 (Fla. 2011).

While on probation for a disciplinary offense, Lawyer was voluntarily placed on the Bar's inactive list for incapacity unrelated to misconduct. Lawyer later petitioned the Supreme Court for reinstatement, which the Bar opposed. By a 4-3 vote the Court reinstated him.

Three justices dissented on the ground that Lawyer failed prove that he had not been financially irresponsible during his inactive period. Lawyer willfully failed to file tax returns for 2007 and 2008, and did not file the returns until he filed them in conjunction with his petition for

reinstatement. The dissenting opinion pointed out that willful failure to file a tax return is a criminal offense, and the Comment to Rule 4-8.4 "expressly notes that the 'willful failure to file an income tax return' is 'illegal conduct [that] reflect[s] adversely on fitness to practice law.'"

**Supreme Court suspends lawyer for providing improper financial assistance to client.** *Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011).

Lawyer represented Client, a medical provider, against an insurer ("Progressive") on 2 personal injury protection claims. The contingent fee contract provided that, if Client prevailed, Progressive would pay Lawyer's fee. Each claim was for $24. At mediation Progressive offered $2500 to settle. Lawyer had spent 60 hours working on the case. Client rejected the offer.

Both claims were tried and resolved against Client, who ended up with nothing and also was liable for Progressive's fees and costs. Lawyer "retained" another attorney to represent Client in an unsuccessful appeal. Due to a contingent fee arrangement Client owed that attorney no fees.

Dissatisfied with the outcome, however, Lawyer then hired another attorney (Caldevilla) to "purse additional appellate remedies." Lawyer signed the engagement contract but Client did not. Lawyer paid some fees to Caldevilla. When Caldevilla contacted Client regarding additional fees, Client pointed out that he had never retained Caldevilla and was not responsible for the fees.

The Bar filed disciplinary charges against Lawyer. The referee found that Client rejected Progressive's settlement offer based on Lawyer's urging so that Lawyer could pursue the fee claim, and also found that Lawyer told Client that if Progressive won, Lawyer would pay the fees and costs that Client owed to Progressive. The referee recommended that Lawyer be found guilty of violating rules 3.4.3 (general misconduct) and 4-1.8(e) (improper financial assistance to client). The referee recommended a one-year suspension.

The Supreme Court agreed. Lawyer placed his personal interest of being compensated above the interest of his client "when he "wrongfully advised and induced his client to reject an offer for full compensation so that [Lawyer] could personally benefit." Lawyer violated Rule 4-1.8(e) "by paying a portion of the fees of appellate counsel. The determinative fact is that [Lawyer] funded Caldevilla's work because [Lawyer] wanted to continue the litigation and win the cases. Although this arrangement could be beneficial for both [Client] and [Lawyer], the fact that [Lawyer] moved from representing his client in the lower court to being an individual with a significant stake in the outcome of the appeal and paying a noteworthy portion of another person's attorney's fees to pursue that appeal shows a violation of the rule. This is the very type of situation that the rule seeks to prevent. [Lawyer] crossed the line from being an advocate for his client (at the trial level) to becoming an interested party (at the appellate level) by using his money to pay another attorney to pursue the cases so [Lawyer] could receive his attorney's fees."

**Lawyer disbarred for multiple trust account violations.** *Florida Bar v. Mirk*, 64 So.3d 1180 (Fla. 2011).

Lawyer was found guilty of 2 counts of violating trust account rules and disbarred.

In Count I Lawyer took a $750 payment from a client. Lawyer did not inform the client that it was a "non-refundable retainer" and put the money in his operating account rather than in his trust

account. Although Lawyer later returned the money when the client expressed dissatisfaction, the referee found that Lawyer violated the trust accounting rules.

In Count II Lawyer's conduct was more egregious. After stopping payment on a trust account check to the client, Lawyer removed the funds from his trust account in payment for services allegedly rendered under a flat fee agreement that Lawyer claimed he had with the client. The referee found that there was no such agreement and recommended disbarment

In disbarring Lawyer, the Supreme Court stated: "[W]e emphasize to the members of the Bar that an attorney is never permitted to withdraw or otherwise use client funds held in trust except as specifically authorized under the Bar Rules. To engage in such conduct, a lawyer risks full disciplinary sanctions under the Rules Regulating the Florida Bar, including disbarment. As we have stated, disbarment is presumed the appropriate discipline when an attorney misappropriates client money held in trust . . ."

**Lawyer publicly reprimanded for threatening to present criminal charges to gain advantage in civil matter.** *Florida Bar v. Knowles*, 64 So.3d 1195 (Fla. 2011).

The Bar charged Lawyer with violating Rule 4-3.4(g) (lawyers shall not "present, participate in presenting, or threaten to present criminal charges solely to obtain advantage in civil matter"). The referee found Lawyer guilty and recommended that she be sanctioned by a public reprimand.

The Florida Supreme Court approved the referee's report and ordered that Lawyer be publicly reprimanded. Chief Justice Canady dissented as to the discipline imposed, stating that "the misconduct here warrants a ninety-day suspension."

## EXPERT WITNESSES

**Court erred in imposing sanctions on party due to conduct of its expert witness.** *State Farm Mutual Auto. Ins. Co. v. Swindoll*, 54 So.3d 548 (Fla. 3d DCA 2011).

Insurer's expert witness was admonished by the court several times during his testimony. Ultimately the court declared a mistrial due to the expert's "highly inflammatory and uncalled for" remarks before the jury. The court also imposed sanctions against Insurer for the expert's conduct.

The Third DCA reversed. "Finding that there is no evidence, and no finding, of bad faith on the part of [Insurer] itself, we reverse the order. We do so without prejudice, however, to the appellee's right to seek the imposition of such a sanction against [the expert] personally." The court noted: "The power to regulate a party's use of expert witnesses is a matter respecting the conduct of trial that lies in the sound discretion of the trial judge. [Citation omitted.] As regards the imposition of sanctions against a party or its counsel for the misconduct of an expert, however, we find no rule of imputation that can justify such an award without some bad faith or egregious conduct on the part of the party or counsel as well."

## FEES

*Arbitration Cases:*

**Relying on familiar rules and principles, Fourth DCA construes arbitration clause in lawyer-client contingent fee agreement.** *Feldman v. Davis*, 53 So.3d 1132 (Fla. 4th DCA 2011).

Client appealed an order requiring arbitration to determine his obligations under his contingent fee agreement with Law Firm. The Fourth DCA concluded that the trial court read the agreement's arbitration provision too broadly, pointing out that the provision "was limited to the determination of a 'probable fee" if and when – and only if and when – the 'Client decides to terminate the case after the [law firm] has provided substantial legal services.'" The court remanded for a determination of whether these threshold conditions were met. In making its ruling, the court reviewed rules principles that often arise in attorney-client fee dispute situations

The arbitration clause was narrowly drawn, and it must be narrowly construed. It did not require arbitration of all fee disputes, but only those involving "calculation of a 'probable fee' if and when the client terminated representation . . . after the law firm provided substantial legal services."

Client claimed that Law Firm withdrew voluntarily following Client's threat to file a Bar grievance. Law Firm contended that it was forced to withdraw because Client's threat created a conflict of interest. A lawyer who voluntarily withdraws from representation under a contingent fee agreement before occurrence of the contingency forfeits the right to a fee. *Faro v. Romani*, 641 So.2d 69 (Fla. 1994). The *Faro* standard, however, does not apply if the client's conduct makes continued representation either legally impossible or would cause the lawyer's violation of an ethical rule. A client's threat to file a grievance did not qualify under this exception.

The court also questioned whether this arbitration provision might be void and unenforceable. A provision in a contingent fee agreement that does not comply with the Rules Regulating The Florida Bar is not enforceable by the lawyer who violated the rules. *Chandris, S.A. v. Yanakakis*, 668 So.2d 180, 185-86 (Fla. 1995). Rule 4-1.5(i) requires that before entering into an agreement with a client that provides for fee-dispute arbitration a lawyer must advise the client in writing that the client "should consider obtaining independent legal advice as to the advisability" of entering into the agreement. Additionally, Rule 4-1.5(i) requires that specific language be included in the agreement in bold print. Thus, on remand, if the trial court determined that the requirements of Rule 4-1.5(i) were not met "the provision may be unenforceable on its face."

**Florida's Lemon Law does not authorize award of fees incurred during arbitration of refund option.** *General Motors LLC v. Bowie*, 58 So.3d 934 (Fla. 4th DCA 2011).

Owner bought an auto from Manufacturer. Owner had trouble with the car and sought relief under Florida's Lemon Law (F.S. 681.112 (2006)). Manufacturer offered a full refund of the purchase price. Owner rejected it and went to arbitration. Manufacturer again offered to buy back the car. Owner again "rejected the offer because it did not include attorney's fees." Owner sued, seeking recovery for pecuniary loss and attorney's fees. The court granted Owner's motion for partial summary judgment "on the entitlement to recover attorney's fees incurred in the arbitration."

Manufacturer appealed, arguing that fees incurred in arbitrating a Lemon Law claim are not "damages" under F.S. 681.112. The Fourth DCA agreed and reversed the fee award. "The plain

language of the statute allows a consumer to 'file an action to recover damages' and provides for attorney's fees to a prevailing consumer, but only in 'such action.' The plain language does not authorize an action solely for attorney's fees." Owner filed suit *solely* in an attempt to recover fees incurred in pursuing the refund option through arbitration.

(NOTE: Accord, *Chrysler Group, LLC v. Musacchia*, 64 So.3d 141 (Fla. 4th DCA 2011); *Forest River, Inc. v. Gelinas*, 65 So.3d 537 (Fla. 4th DCA 2011); *Mercedes-Benz USA, LLC, v. Popham*, 65 So.3d 47 (Fla. 4th DCA 3300, 5/18/2011) ("'damages' under section 681.112 do not include attorney's fees incurred in pursuing the refund option through arbitration").)

## *Attorney's Liens:*

**Court erred in imposing charging lien and retaining lien sought by law firm against its former client.** *LaVere-Alvaro v. Syprett, Meshad, Resnick, Lieb, Dumbaugh, Jones, Krotec & Westheimer, P.A.*, 54 So.3d 1056 (Fla. 2d DCA 2011).

Law Firm sought imposition of a charging lien and a retaining lien against Former Client, whom the firm had represented in a dissolution of marriage action. The court granted both liens; the charging lien was imposed for fees and costs incurred during the representation, and the retaining lien was imposed on all of Former Client's property in Law Firm's possession. Former Client appealed. The Second DCA reversed regarding both liens.

**Charging lien.** A charging lien "'is an equitable right to have costs and fees due an attorney for services in the suit secured to him in the judgment or recovery in that particular suit.' *Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom*, 428 So.2d 1383, 1384 (Fla. 1983)." Because a charging lien attaches only to tangible fruits of the lawyer's services, in order to have a charging lien imposed a lawyer must show that the lawyer's services produced a positive judgment or settlement for the client. (Citations omitted.) Because the court failed to find that Law Firm's services produced a benefit for Former Client, it erred in imposing the charging lien.

**Retaining lien.** A retaining lien is a lawyer's "possessory interest in a client's papers, money, securities, and files that attaches to secure the client's payment of the fees and costs earned by the attorney to that point." (Citations omitted.) Imposition of a retaining lien was premature because Former Client's ownership interest in the subject property had yet to be determined.

**Lawyer who withdrew from matter and filed charging lien 3 years later is awarded fees on quantum meruit basis despite lack of enforceable attorney-client contract.** *Clark v. Estate of Elrod*, 61 So.3d 416 (Fla. 2d DCA 2011).

Lawyer represented Client in a probate matter over 3 separate time periods: September 1999 to November 2000 (Stint I); May 2001 to January 2002 (Stint II); and March 2005 to May 2005 (Stint III). Regarding Stint II, Client faxed Lawyer a letter stating that Lawyer would charge Client a reduced hourly rate ($130) and receive 10% of any net recovery from estate distributions. Lawyer did not prepare or sign this letter. In January 2002 Lawyer withdrew from the Stint II representation for "irreconcilable differences." Client paid Lawyer's bill for services rendered at $130 per hour.

Three years later Lawyer learned that Client received a large distribution from the probate action. Lawyer filed a charging lien claiming that Client owed him fees for Stint II "totaling ten percent of the net estate distributions that [Client] received after he withdrew as [Client]'s counsel." The court found that the oral Client-Lawyer agreement was not a valid and enforceable contract but nevertheless awarded fees to Lawyer on a quantum meruit basis at the rate of $300 per hour.

The Second DCA affirmed this award. Although there was no enforceable contract between Client and Lawyer, "[Lawyer] was still entitled to an award under quantum meruit" at the rate of $300 per hour.

**Order imposing charging lien in contingent fee case is reversed, where lawyer was suspended before occurrence of contingency.** *Santini v. Cleveland Clinic Florida*, 65 So.3d 22 (Fla. 4th DCA 2011).

The Fourth DCA began its opinion in this charging lien case this way: "In this matter, we undo a series of egregious wrongs perpetrated upon the appellants, all of which were compounded by the assertion of frivolous defenses of numerous and patently erroneous trial court orders."

Lawyer entered a contingent fee contract to represent Doctor in her claim against a clinic that employed her. When the agreement was signed Lawyer was managing partner at a law firm. Lawyer left that firm, moving on to two different firms. No new fee agreements were executed.

Lawyer filed suit in federal court for Doctor. The case was dismissed and the court sanctioned Lawyer for misrepresentation. Lawyer filed a state court suit asserting the same claims. The Bar brought disciplinary charges against Lawyer for his conduct in the federal case. Lawyer was suspended and withdrew from representing Doctor. Prior to his suspension Lawyer arranged for another attorney to handle Doctor's case.

New counsel negotiated a $500,000 settlement. The purported agreement provided for $250,000 to be paid in fees and costs. Doctor refused to sign the agreement and hired counsel to assist her in the dispute. Lawyer made a demand on Doctor for $157,650, which he claimed as his share of the fee – *despite* the absence of any fee-sharing agreement approved by Doctor. Lawyer then filed a motion to enforce his charging lien. The court "ruled that [Lawyer] could recover in quantum meruit because his contingency fee agreement with [Doctor] was not in writing, as required, and because [Lawyer] did not voluntarily withdraw but was forced to do so when he was suspended for unethical conduct." The court awarded Lawyer a fee $255,000 fee (plus costs) for his charging lien. (As a sanction for alleged conduct of Doctor and her new counsel, the court also awarded Lawyer fees and costs for fees and costs expended in pursuing his charging lien.)

The Fourth DCA reversed, reciting applicable principles from prior cases. A lawyer discharged *without cause* in a contingent fee case "can recover only the reasonable value of his services rendered prior to discharge, limited by the maximum contract fee." *Rosenberg v. Levin*, 409 So.2d 1016, 1021 (Fla. 1982). A lawyer discharged *for cause* from a contingent fee case can recover a fee "based on the modified quantum meruit fee as articulated in *Rosenberg* reduced by the amount of the damages suffered by the client as a result of the lawyer's conduct that led to the discharge." See *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Scheller*, 629 So.2d 947, 954 (Fla. 4th DCA 1993). A lawyer who voluntarily withdraws from a representation prior to the occurrence of the contingency forfeits any right to a fee. *Faro v. Romani*, 641 So.2d 69, 71 (Fla. 1994). The court rejected Lawyer's argument that these principles did not apply because the lower court found there was not a valid contingent fee agreement, stating: "[T]he rules of *Rosenberg*,

*Scheller*, and *Faro* still protect a client even where the contingency fee agreement between the client and attorney does not conform to the Rules Regulating The Florida Bar. An attorney who violates the rules of professional conduct by entering into a non-conforming agreement will not be able to collect more fees based merely on the non-conformance." Lawyer's suspension from practice equated to a voluntary withdrawal that was not occasioned by the client's conduct, and so under *Faro* Lawyer forfeited his right to any fee.

The trial court also erred in awarding fees to Lawyer for enforcing his charging lien

Finally, the Fourth DCA awarded appellate fees to Doctor, noting that, "[d]espite being given multiple opportunities to ethically concede error including a spirited oral argument session scheduled by this court on its own motion, [Lawyer] has callously proceeded in blatant bad faith." The court even directed that, on remand, the lower court consider imposing sanctions on Lawyer and his attorney.

**Court erred in applying equitable subordination doctrine to consent judgment obtained in law firm's suit for fees against former client.** *Carlton Fields, P.A. v. LoCascio*, 59 So.3d 246 (Fla. 3d DCA 2011).

Father was convicted of murdering his wife (Son's mother). Father was represented by Law Firm. Law Firm sued for unpaid fees and costs. Father agreed to a consent judgment. Son later obtained a $75 million judgment against Father in a wrongful death action. As Father had limited assets, Son moved to subordinate Law Firm's judgment to his. The court granted the motion based on the doctrine of equitable subordination. Law Firm appealed.

The Third DCA reversed. "In *Pepper v. Litton*, 308 U.S. 295, 311 (1939), the Supreme Court of the United States observed that the common thread in such cases is 'the violation of rules of fair play and good conscience by the claimant . . . in disregard of the standards of common decency and honesty.' There is simply no evidence of any of these elements in this case. The Father was entitled to retain legal counsel. [Law Firm] was entitled to agree to represent him. Any firm representing the Father would have been entitled to charge for its services. The firm took reasonable steps to legally protect and collect its claim for fees due. There is nothing inherently fraudulent or inequitable about these activities; they are not a 'violation of the rules of fair play and good conscience.' *Id*."

## *Domestic Relations Cases:*

**All child support cases administered by Department of Revenue are Title IV-D cases, per Third DCA in fee award case.** *Spano v. Bruce*, 62 So.3d 2 (Fla. 3d DCA 2011).

In reversing denial of fees to a parent in a child support modification case, the Third DCA concluded that *all* child support cases administered by the Department of Revenue are Title IV-D cases.

The Department was not named as a party in the case and had not intervened. The State Attorney's Office, however, did provide legal representation to the father. In Title IV-D cases, F.S.

61.16 (2009) provides that fees may be awarded against only the non-prevailing obligor. The father was the non-prevailing obligor (as a result of resolution of other issues in the appeal).

The court summarized: "The issue here is whether the presence of the Department of Revenue, as the state agency enforcing the child support payment of the mother, and the State Attorney's office as the legal services provider, automatically converts this case into a Title IV-D case. We find that all child support cases that are administered by the Department of Revenue are considered Title IV-D cases, despite the fact that the Department of Revenue has not been named a party to the case." Neither F.S. 61.16 nor F.S. 409.2564(4) require that the Department of Revenue be a party to the case in order for it to be a Title IV-D case. "Persons eligible for Title IV-D aid include all those who apply for enforcement or support of child support collection services. [Citation omitted.] The State Attorney's Office represented the father in his defense of the mother's child support proceeding, a right available to any parent, irrespective of whether the parent is indigent. This representation automatically converted this case into a Title IV-D case."

**Former wife's lawyer has no standing to challenge or enforce money judgment for fee award to former wife.** *Jankowski v. Dey*, 64 So.3d 183 (Fla. 2d DCA 2011).

Former Wife was awarded fees and costs. The award included Former Wife's fees and the charges of Consulting Group. The order "does not direct payment to her attorneys or otherwise address the issue of their entitlement to enforce the award." The award was reduced to a money judgment in favor of Former Wife. Not long after, Former Wife and Former Husband filed a joint stipulation stating that the award had been satisfied.

Former Wife's lawyer moved to set aside the joint stipulation, arguing that the satisfaction should be set aside as fraudulent because Former Husband and Former Wife misrepresented that the judgment was satisfied. The court set aside the joint stipulation and, citing to F.S. 61.16(1), awarded Former Wife's lawyer a judgment against Former Husband and also awarded Consulting Group a judgment against Former Husband. Former Husband appealed.

The Second DCA reversed. Although F.S. 61.16(1) authorizes the trial court to make a fee award directly to a party or the party's lawyer, in this case the court made the award only to Former Wife. Lawyers ordinarily do not have standing to seek or enforce a fee award in their own names. In this case, the award was not in the name of Former Wife's lawyer or Consulting Group and did not direct payment to them. F.S. 61.16(1) "does not give an attorney an independent right to seek a fee award for services rendered in a case under chapter 61. Furthermore, absent an order directing payment of a fee award to the attorney, the attorney does not have standing to enforce the award."

**Fee award against former husband reversed where both parties had been placed in relatively equal financial circumstances.** *Foster v. Foster*, __ So.3d ___ 36 Fla.L.Weekly D 1486(Fla. 5th DCA, No. 5D10-55, 7/8/2011), 2011 WL 2650851.

The trial court put the parties into basically equal financial positions, but awarded fees against Former Husband. He appealed. Concluding that the trial court abused its discretion, the Fifth DCA reversed. "If the trial court places the parties in relatively equal financial circumstances after the dissolution, then it should not award attorney's fees. . . . That is to say, one party should

not have to substantially deplete his or her overall equitable distribution, or cause the inequitable diminution of an alimony award in order to pay attorney's fee and costs for the other party."

**Court erred in partially denying fees to former wife who did not present evidence showing need for second lawyer.** *Grover v. Grover*, 59 So.3d 333 (Fla. 5th DCA 2011).

Former Wife sought fees in the modification of a divorce decree. She was entitled to an award due to an income disparity. Former Wife had 2 lawyers; the court reduced the fee sought by one and denied any fees to the second. The court denied fees to the second lawyer because "Former Wife did not present any evidence showing a need for more than one attorney."

The First DCA reversed the denial of fees to the second lawyer. The lower court erred in relying on a case in which fees were reduced because multiple lawyers billed for duplicative work. Here, in contrast, "[t]he issue is not whether there is a need to hire or have more than one attorney, but whether the attorneys engaged in duplicative billing, and, if so, the amount by which the award must be reduced."

**Statement in Husband's proposed final judgment bars him from arguing that court erred in awarding attorney's fees to Wife.** *David v. David*, 58 So.3d 336 (Fla. 5th DCA 2011).

Husband appealed the final order in a divorce case, contending that the court erred in awarding fees to Wife. The Fifth DCA disagreed. Husband's proposed final judgment "specifically stated: 'Based upon his superior income, Husband shall pay Wife's reasonable attorneys fees and costs incurred in these proceedings.' This proposed order operates to bar the husband from now claiming that the trial court erred in awarding the wife attorney's fees."

**Judgment in custody case is reversed because it failed to address party's request for fees or to reverse jurisdiction to do so.** *Flores v. Flores*, __ So.3d ___ (Fla. 4th DCA, No. 4D09-3743, 4/6/2011), 2011 WL 1261157.

Former Wife requested fees in her response to Former Husband's petition for change of child custody and in her closing arguments after trial. The final judgment, however, did not mention fees. Former Wife moved for rehearing or to amend the judgment, asserting that the court "erred in failing to retain jurisdiction in the final judgment to award attorney's fees in connection with the former husband's petition." The court denied the motion.

Agreeing with Former Wife, the Fourth DCA reversed. "Where the trial court fails to address a request for attorney's fees and costs or to reserve jurisdiction to consider the issue, the final judgment should be reversed and remanded for entry of a corrected judgment reserving jurisdiction to address the request for attorney's fees and costs."

**Income deduction order may be entered to collect only those fees incurred as a result of securing or collecting child support or alimony.** *Diaz v. Diaz*, 66 So.3d 983 (Fla. 3d DCA 2011).

Father secured an order requiring 60% of Mother's income be deducted to satisfy ongoing child support, arrearages, attorney's fees, and costs. Former Wife appealed. The Third DCA noted that F.S. 61.1301(1)(a) authorizes entry of an income deduction order "to collect attorney's fees incurred *as a result of securing and collecting child support and/or alimony*. This does not mean that any time an individual brings an action to secure and collect support or alimony, any and all attorney's fees can be automatically folded into the income deduction order." (Emphasis by court.) The court rejected Father's argument that the income deduction order should be upheld "because 'some portion' of the fees were related to the securing or collection of child support."

## *Insurance Cases:*

**Court erred in awarding fees under F.S. 627.428 where insurer voluntarily dismissed action without prejudice.** *Guarantee Ins. Co. v. Worker's Temporary Staffing, Inc.*, 61 So.3d 1233 (Fla. 5th DCA 2011).

Insurer sued Insured for failure to pay additional premiums under the policy. Insured moved to dismiss. The court entered an order dismissing the complaint but affording Insurer 20 days to file an amended complaint. Before the 20 days lapsed Insurer filed a notice of voluntary dismissal without prejudice. Insured was awarded fees under F.S. 627.428 (2006).

The First DCA reversed. The voluntary dismissal "was neither a judgment nor the functional equivalent of a confession of judgment – a precondition to an award under F.S. 627.428." Insurer "did not make a concession on the merits. Rather, it merely dismissed without prejudice to refile its lawsuit. The fact that it had not refiled suit prior to the date on which the motion for fees was filed is of no consequence."

**Court erred in denying fees under F.S. 627.428 on ground that insured's suit against insurer was premature and unnecessary.** *De Leon v. Great American Ins. Co.*, 78 So.3d 585 (Fla. 3d DCA 2011).

Insured made a claim under his auto policy. Insurer invoked its right to a pre-suit examination under oath. Insured appeared but became exasperated with the questioning, which revolved around his personal life. He terminated the session and filed suit against Insurer. Insured ultimately settled and paid the full claim. Insurer objected to Insured's demand for fees under F.S. 627.428 (2008). The court denied fees "based on the notion that the action had been premature and unnecessary and was thus not effective in securing the favorable result."

The Third DCA reversed, criticizing the conduct of Insurer: "[T]here was never a legitimate defense under the personal property section of his policy. Unfortunately, however, the carrier apparently decided to use the usual policy provision requiring a sworn statement as a license to make unwarranted and intrusive inquiries into the personal life of any insured who has the temerity to make a claim against it." Insured was "right" to refuse to respond to "impertinent and improper questions which had nothing to do with the merits of the claim." Insured's suit was not premature or unnecessary. The court concluded: "To hold in these circumstances, as did the trial court, that it was not necessary to file the action and thus that section 627.428 is inapplicable, is to turn reality

upon its head. . . . [F]ar from being improperly employed, the statute was enacted for the very purpose presented by this case – to discourage the games insurance companies play."

**Court cannot confirm insurance appraisal award that has already been paid and thereby create basis for fee award.** *State Farm Florida Ins. Co. v. Silber*, 72 So.3d 286 (Fla. 4th DCA 2011).

Insureds and Insurer disagreed over the amount of a covered loss. Insurer invoked the appraisal process. The appraisers selected by the parties initially could not agree on an umpire, and Insureds filed a petition for selection of a neutral umpire. The parties were able to select an umpire without court action. The umpire determined the amount of loss and Insurer paid.

Insureds filed a motion seeking interest, using the same case number assigned to the petition for appointment of an umpire. At the hearing Insureds "admitted they should have moved to confirm the appraisal award, and made an ore tenus motion to do so." The motion was granted. Insureds then filed a written motion to confirm the appraisal award and sought interest and fees. The trial court awarded both.

The Fourth DCA reversed. As to fees, the court ruled that "a trial court cannot confirm an appraisal award that has already been paid and thereby create a basis for an award [of] attorney's fees." The goal of the appraisal process is to "resolve disputes without litigation."

**Court erred in applying "prevailing party" test in denying insured's claim for fees under F.S. 627.428.** *Rodriguez v. Government Employees Ins. Co.*, __ So.3d ___, 36 Fla.L.Weekly D2788 (Fla. 4th DCA, No. 4D10-4617, 12/21/2011), 2011 WL 6373033.

Insured had a claim dispute with his auto insurer, GEICO, after receiving what he considered only partial payment toward a loss. Insured sued. GEICO counterclaimed, alleging that Insured made fraudulent misrepresentations about ownership of the vehicle and seeking refund of money paid toward repair. The court-ordered arbitrator ruled that Insured's material misrepresentation barred further recovery, but that Insured did not have to refund the partial payment already made.

GEICO was granted fees based on a $100.00 proposal for settlement that it made pursuant to F.S. 768.79. Insured's motion for fees under F.S. 627.428 was denied.

The Fourth DCA ruled that Insured was entitled to fees under F.S. 627.428 and that GEICO was entitled to fees under F.S. 768.79. The "parties' respective fee awards are mutually exclusive because they involve totally different claims and were based on different statutory provisions. [Citation omitted.] GEICO's proposal for settlement was strictly limited to [Insured]'s original complaint concerning insurance coverage. Conversely, [Insured]'s claim for fees was for successfully defending GEICO's counterclaim for fraud."

**Dispute over amount of loss does not constitute denial of coverage that exposes FIGA to fee award under F.S. 631.70.** *Florida Ins. Guaranty Ass'n v. Smothers*, 65 So.3d 541 (Fla. 4th DCA 2011).

Insured filed claim with his insurer, which did not pay the claim and went into receivership. The Florida Insurance Guaranty Association ("FIGA") stepped into the insurer's place. FIGA paid a portion of the claim. FIGA did not state that it was denying coverage.

Insured sued FIGA, asserting that he was entitled to an award of fees under F.S. 631.70 because FIGA "denied his claim by refusing to pay the additional amount prior to the filing of the lawsuit." FIGA responded by asserting that fees could not be awarded "because it did not deny the insured's claim by affirmative action other than delay." Per the statute, fees may be awarded when FIGA "denies by affirmative action, other than delay, a covered claim or a portion thereof." The court granted Insured's motion for fees.

The Fourth DCA reversed. "[W]e hold that a dispute about the amount of damages does not constitute a denial of coverage by affirmative action, other than delay, exposing FIGA to attorney's fees under section 631.70. As there was no denial of coverage by affirmative action, we therefore reverse the judgment for the insured and remand the case to the trial court for entry of judgment for FIGA."

**Fourth DCA reverses award of fees in insurance case involving FIGA; no voluntary denial of claim.** *Florida Ins. Guaranty Ass'n v. Ehrlich*, __ So.3d ___, 36 Fla.L.Weekly D939 (Fla. 4th DCA, No. 4D09-3886, 5/4/2011), 2011 WL 1661386.

Insureds filed a homeowners' insurance claim with Florida Insurance Guaranty Association ("FIGA") after their insurer became insolvent. A few weeks later Insureds sued FIGA, "ostensibly to avoid the expiration of the statute of limitations." At that point FIGA had not yet investigated the claim. FIGA sought a stay or dismissal of the complaint so it could complete its investigation. Insureds objected. The court denied the motion and ordered FIGA to answer the complaint within 10 days. FIGA filed an answer containing the affirmative defense that Insureds had not complied with all conditions precedent and that, consequently, there was no coverage.

The case settled and Insureds moved for fees, which the court granted. The Fourth DCA reversed. "Where an insured prevails in litigation against an insurance company, the insured is generally entitled to reasonable attorney's fees. . . . Likewise, where an insurance company pays on a claim after the insured files suit but before judgment is rendered, the payment constitutes a 'confession of judgment or verdict in favor of the insured, thereby entitling the insured to attorney's fees.'" (Citations omitted.) FIGA is excluded from the reach of section 627.428, "except when the association denies by affirmative action, *other than delay*, a covered claim or a portion thereof." (Emphasis by court.) FIGA did not voluntarily deny this claim; rather, it was required by the court to file an answer before it had completed its investigation. "Essentially, [FIGA] 'delayed' paying the claim until it had sufficient time to investigate." FIGA did not explicitly deny the claim.

**Insureds should have been awarded fees because FIGA denied their covered claim "by affirmative action;" *Ehrlich* distinguished.** *Rahabi v. Florida Ins. Guaranty Ass'n, Inc*., 71 So.3d 241 (Fla. 4th DCA 2011).

Insureds sued the Florida Insurance Guaranty Association ("FIGA") for breach of contract and declaratory relief. Insureds alleged that FIGA failed to pay their covered claim. FIGA filed a motion to dismiss. Insureds responded by dismissing the declaratory judgment count. FIGA filed

an answer denying the material allegations and asserting affirmative defenses in which "FIGA alleged that the insureds' damages '[were] not caused by a covered loss.'"

FIGA invoked the policy's appraisal process, and paid the full amount of the appraisal award. Insureds moved to recover fees from FIGA under F.S. 627.428(1) (2010). F.S. 631.70, however, provides that fees shall not be awarded against FIGA under section 627.428 "except when [FIGA] denies by affirmative action, other than delay, a covered claim or a portion thereof." The trial court denied the motion for fees on the ground that FIGA's affirmative defenses did not constitute an affirmative denial of the claim.

The Fourth DCA reversed, concluding that FIGA had denied Insureds' claim by affirmative action and remanding for a fee award. The court distinguished *Florida Ins. Guaranty Ass'n v. Ehrlich*, 36 Fla.L.Weekly D939 (Fla. 4th DCA, No. 4D09-3886, 5/4/2011): "This case differs from *Ehrlich*. Here, FIGA never filed a motion to stay the proceedings to complete its investigation. Instead, FIGA filed a motion to dismiss because the insureds' count for declaratory relief failed to state a cause of action and because the insureds allegedly 'fail[ed] to comply with all post-loss obligations.' FIGA also moved for an extension of time to respond to the insureds' count for breach of contract, not to complete its investigation, but because its counsel was 'awaiting receipt of the claim file . . . in order to determine [FIGA's] appropriate response and/or defenses.' FIGA then moved to compel the insureds to answer its discovery requests. Without obtaining a ruling on that motion, and without seeking a further extension of time to respond to the count for breach of contract, FIGA filed its answer to the count for breach of contract. In the answer, FIGA did not allege merely that the insureds had not complied with all conditions precedent to filing suit such that no coverage existed. Instead, FIGA asserted eight affirmative defenses, seven of which alleged that the insureds' damages 'were not caused by a covered loss.' Thus, without the circuit court ever compelling FIGA to answer the complaint, and without FIGA requesting more time to 'sufficiently' investigate the claim, FIGA explicitly denied the claim by alleging in seven affirmative defenses that the insureds' damages '[were] not caused by a covered loss.' We interpret that action, in the context of FIGA's overall course of conduct, as ' deni[al] by affirmative action.'"

**Second DCA recedes from practice of awarding conditional judgments of fees in insurance cases.** *Government Employees Ins. Co. v. King*, 68 So.3d 267 (Fla. 2d DCA 2011).

The Second DCA receded from an earlier decision allowing entry of conditional judgments of attorney's fees in insurance cases in which a bad faith case was expected to follow.

Insured obtained a judgment against Insurer in a claim for uninsured motorist benefits. Insured made a presuit offer to settle within the policy limits of $25,000. Insured filed suit and made a proposal for settlement of $100,000, which was not accepted. The jury awarded Insured over $1.5 million, but the judgment against Insurer was only for the policy limits. Insured was denied fees under the offer of judgment statute because the judgment was less than the proposal. That denial was affirmed.

Apparently a bad faith claim against Insurer was anticipated. Relying on *Allstate Ins. Co. v. Sutton*, 707 So.2d 760 (Fla. 2d DCA 1998, Insured argued "that this court allowed for a conditional judgment of attorneys' fees for work at the trial court level in *Sutton*, which is a very similar case. He argues that logically he should be entitled to a conditional judgment of attorneys' fees for the work in this case at the appellate level." Rather than conditionally awarding fees, the Fourth DCA

receded from *Sutton*. "In the twelve years that have passed since *Sutton*, the practice of entering contingent judgments does not appear to have gained any general acceptance." (Citations omitted.)

**UM carrier is prevailing party and is entitled to fees under offer of judgment statute where insured's recovery was below liability policy limits.** *Allstate Ins. Co. v. Staszower*, 61 So.3d 1245 (Fla. 4th DCA 2011).

See discussion under "Prevailing Party" subsection.

## *Miscellaneous Fee Cases:*

**Supreme Court rules that law firm hired by survivors in wrongful death case may be entitled to share in contingent fee received by personal representative's law firm.** *Wagner, Vaughn, McLaughlin & Brennan, P.A. v. Kennedy Law Group*, 64 So.3d 1187 (Fla. 2011).

Parents were killed in an auto accident and survived by sons Gary, Larry, and Robert. Gary was appointed personal representative ("P.R.") and, as P.R., hired the KLG law firm. KLG negotiated a settlement for the limits of the tortfeasor's insurance policy. This was divided equally among the brothers. At about the same time Larry retained the WVMB law firm. WVMB informed KLG that Larry did not approve of the distribution split. WVMB petitioned to remove Gary as P.R. and return the settlement to the trust account so Larry's objections could be heard. The court denied the petition. Larry cashed his settlement check without taking further legal action.

KLG made a demand on Parents' insurer for $2 million in uninsured motorist insurance coverage. On the day of mediation Robert retained WVMB to represent him. The demand was settled for $1.23 million. The court ruled that WVMB was not entitled to a portion of the fee because Larry and Robert had no competing claims with Gary.

The Second DCA affirmed. Applicability of F.S. 768.26 (portion of Wrongful Death Act concerning fees) was not limited to cases where suit was filed. In order to share in the fee WVMB had to show that Larry and Robert had a competing claim with the P.R.'s firm. WVMB did not make that showing. (Citation omitted.)

WVMB sought review in the Supreme Court, alleging conflict with a Third DCA decision. The Court approved in part and quashed in part the Second DCA's decision.

The Court agreed that applicability of F.S. 768.26 is not limited to litigation situations.

The Court, however, disagreed with the Second DCA's conclusion on apportionment of fees among the law firms involved in the case. The Wrongful Death Act limits the number of suits that may be filed in a wrongful death case but does *not* limit the number of lawyers who may represent the survivors. P.R.'s counsel prosecutes the action for the benefit of all of the survivors and the estate, and under F.S. 768.28 fees for litigating a wrongful death action "are to be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them." If the P.R.'s counsel cannot represent a survivor due to a conflict of interest, counsel is not entitled to a fee on that survivor's share of the recovery. A survivor who hires separate counsel creates a competing claim.

In *Wiggins v. Estate of Wright*, 850 So.2d 444 (Fla. 2003), the Court addressed allocation of fees in wrongful death actions when survivors with competing interests are represented by separate counsel. The Court approved the procedure adopted in *In re Estate of Catapane*, 759 So.2d 9 (Fla. 4th DCA 2000). "Under this procedure, 'a trial court determines the attorneys' fee awards by compensating the personal representative's attorney out of the total settlement proceeds, reduced by the amount necessary to reasonably compensate the other survivors' attorneys for their services in representing those survivors in the proceedings.' *Id*. Where it can be demonstrated that one attorney played a greater role in securing a total award in a wrongful-death action in which the decedent's survivors were represented by more than one attorney due to competing interests, a larger fee may be proper for that attorney. *Id*. When survivors have competing claims and are represented by separate attorneys, the attorney's fees from the wrongful-death suit should be awarded in a manner commensurate with the attorney's work, providing for the proportional payment of attorney's fees by all the survivors out of their respective awards. Id. In no instance, however, should a survivor be penalized for hiring separate counsel by having to pay a fee for recovery of the same amount twice. *Id*."

Applying that procedure to the instant case, the Court noted that Larry and Robert had a right to their own counsel and that their counsel was entitled to reasonable compensation for services rendered. The fact that Larry and Robert did not object to the amount or apportionment of the uninsured motorist settlement was immaterial. The Second DCA's conclusion that the failure to object meant that there was no conflict of interest between the 2 brothers and KLG was "unduly restrictive" and impinged on a survivor's right to retain separate counsel.

The Court remanded the case: "[I]t is unclear what part, if any, [WVMB] played in securing the overall settlement. There is also no record evidence that [WVMB] secured any increase in the settlement recovery for Larry and Robert. Accordingly, we conclude that the personal representative's attorney KLG should be compensated out of the total settlement proceeds, *reduced* by the amount necessary to reasonably compensate [WVMB] for the work they performed in representing Larry and Robert in the proceedings." (Emphasis by Court.)

**Fee award to law firm hired by personal representative is reversed because firm did not show that services were necessary or beneficial to estate.** *Davis v. Estate of Davis*, 77 So.3d 703 (Fla. 3d DCA 2011).

An estate was re-opened and a personal representative ("PR") was appointed for the purpose of seeking the return of assets to pay a judgment against the estate. PR hired a law firm to represent him. Despite entry of a tolling order and the willingness of the trustee of a devisee trust to fund her share of the claim, PR hired a second law firm ("Thomas"). Almost 9 months later Thomas moved to withdraw on the ground that it was "discharged" by PR. The court awarded fees to Thomas.

The Third DCA reversed. F.S. 733.106 (2008) authorizes a fee award to a lawyer who has rendered services to an estate that are be either necessary or beneficial to it. There was "nothing in the record demonstrating that Thomas' services were either necessary or beneficial to the Estate."

**Contingent fee agreement requiring immediate payment at hourly rate if client discharges lawyer is unenforceable as a matter of law.** *Guy Bennett Rubin, P.A. v. Guettler*, 73 So.3d 809 (Fla. 4th DCA 2011).

Lawyer entered a "Business Matter Contingency Fee Agreement" with Clients concerning a will contest and related litigation. In the Agreement was the following provision: "In the event I discharge the firm prior to resolution by judgment or settlement, or if I elect to no longer pursue the Anticipated Claims as identified herein-below, I agree to immediately thereafter pay LAW FIRM accrued hourly legal fees based upon the hourly rates as follows: Services of [] $500/hr., all other attorneys $400/hr., all paralegals $150/hr., all legal assistants $100/hr. . . ."

Clients discharged Lawyer before the contingency occurred. Lawyer sued Clients for breach of contract, account stated, and quantum meruit. The court ruled that, as there had been no recovery in the matters, Lawyer was not entitled to fees. Further, the discharge clause constituted a penalty clause in violation of Rule 4-1.5. Such penalty clauses are against public policy and unenforceable. The court explained: "A termination-of-services clause in a contingency-fee agreement, which provides for the client to pay the discharged law firm for all services rendered up through the date of termination at the prevailing hourly rate for firm members, if the client abandons or dismisses the claim, violates rule 4-1.5 on its face." (Citation omitted.)

The court also rejected Lawyer's argument that, in the absence of a valid contract, he should be allowed to claim fees on the basis of quantum meruit. An action for quantum meruit arises only on the successful occurrence of the contingency – which had not happened here.

**"Greater-of-contract-or-court-awarded" clause in lawyer-client fee agreement authorizes above-contract fee award *only* in contingent-fee cases, per Second DCA**. *Compass Construction, Inc. v. First Baptist Church of Cape Coral, Florida, Inc.*, 61 So.3d 1273 (Fla. 2d DCA 2011).

Church prevailed in a contractual indemnity claim against Compass and was entitled to court-awarded fees. The parties disagreed about the hourly rate. The fee agreement between Church's lawyer and the hiring insurer provided for a non-contingent, hourly rate of $170. The fee agreement also "contained an additional provision which – in the attorney's words – 'specifically states that if someone other than the insurance company is to pay the fees, then the amount will be the greater of the amount charged the insurance company and the amount to be determined by the Court.' Such provisions are generally seen in contingency fee agreements. . . . This court has previously described a similar provision as 'an alternative fee recovery clause.'" (Citations omitted.) The court ruled that Church "could recover from Compass 'a reasonable fee to be later determined by this Court even if that amount is greater than the amount [Church's] counsel charged [Church].'"

The Second DCA reversed. "Alternative recovery fee clauses" may be relied upon as a basis for a fee award only where the fee arrangement is contingent. Here, however, the fee arrangement was *non*-contingent. Church relied on the alternative fee recovery clause as the basis for the award of a fee calculated at an hourly rate greater than the hourly rate in the contract. "Where a fee agreement provides for the greater of a fee equal to a percentage of the recovery or the amount awarded by the court, the court may apply a contingency risk multiplier and award a fee that exceeds the amount recoverable under the percentage alternative of the fee arrangement. . . . But this rule applies only when the fee arrangement is contingent, i.e., the attorney has assumed the risk of nonpayment." (Citations omitted.)

The court certified conflict with *Wolfe v. Nazaire*, 758 So.2d 730 (Fla. 4th DCA 2000).

**Court erred by awarding fee that exceeded amount provided for in lawyer-client contract.** *Western and Southern Life Ins. Co. v. Beebe*, 61 So.3d 1215 (Fla. 3d DCA, No. 3D10-672, 5/18/2011).

Insured obtained a judgment in a coverage suit against Insurer. Insured was entitled to, and awarded, fees under F.S. 627.428. The award was based on an hourly rate of $350 with a multiplier of 1.5. Insured's contract with her attorney ("Lawyer"), however, set $300 as the hourly rate. Insurer appealed the amount of the fee award.

The Third DCA reversed. The Insured-Lawyer contract was a contingent one: under it, Lawyer "would only receive fees in the event that [Insured] prevailed on her claim, and then, only those awarded by the court against [Insurer]." (Footnote omitted.) The Insured-Lawyer contract provided that Lawyer's fee would be $300 per hour. *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), and its progeny "stand for the proposition that the amount of attorney's fees awarded by the trial court in a case involving a contingency fee agreement may not exceed the actual fee agreement between the prevailing party and his or her attorney." (In a footnote, the court contrasted the situation where, unlike here, "the client agrees that the attorney will be paid *either* a specific percentage of the recovery or the amount awarded by the court pursuant to a prevailing party statute, whichever is higher." (Emphasis by court.))

**Court erred in awarding appellate fees against guarantor where neither guaranty nor promissory note provided for such fees.** *Pardo v. Goldberg*, __ So.3d ___, 36 Fla.L.Weekly D2435 (Fla. 3d DCA, No. 3D10-3404, 11/9/2011), 2011 WL 5375107.

Individual guarantors signed a personal guaranty of a corporate promissory note payable to Goldberg. The note was not paid and Goldberg successfully sued the guarantors. Goldberg moved for appellate fees and costs. The Third DCA granted the motion as to costs, but denied an award of fees. Neither the guaranty nor the promissory note created an entitlement to appellate fees. Generally, a guarantor is not liable for fees and costs in an action to enforce a guaranty where there is no express provision in the guaranty for this liability. Also, "[a]ttorney's fees on appeal under a promissory note are not allowable where [as here] the promissory note contains no specific provision for appellate attorney's fees." (Citations omitted.)

**Court erred in denying law firm fees in quantum meruit because firm did not keep time records.** *Morgan & Morgan, P.A. v. Guardianship of Larry McKean*, 60 So.3d 575 (Fla. 2d DCA 2011).

On behalf of her brother who was hurt in a motorcycle accident, Sister contacted Law Firm and "signed a contingency fee agreement the law firm had sent her by way of a 'runner.'" In 4 weeks Law Firm obtained a settlement from the tortfeasor's insurance company. A week later Sister was appointed guardian of her brother. By that time she was unhappy with Law Firm and refused to sign any further agreements as guardian. She claimed that the contingency fee agreement she previously signed was invalid and asked the court to "determine the fees due to [Law Firm] on a quantum meruit basis." The court ruled that there was no valid continent fee agreement and denied

fees to Law Firm. The Firm did not introduce evidence of the time it spent on the case and "the court found that the lack of evidence of the time spent on the case was fatal to an award of fees."

The Second DCA affirmed the ruling that "a valid contingency contract did not exist and that the determination of fees was therefore proper under a quantum meruit theory." The court, however, reversed the denial of fees. Quantum meruit focuses on the actual value of services to the client. Time records are only one factor to be considered in awarding fees under quantum meruit. Consequently, the court "reverse[d] and remand[ed] for the trial court to reconsider whether to award fees under a 'totality of the circumstances' standard."

**"Notice of Intent" to seek fees is not a "pleading" and cannot support fee award, per Second DCA.** *BMR Funding, LLC v. DDR Corp.*, 67 So.3d 1137 (Fla. 2d DCA 2011).

BMR's predecessor in interest sued DDR. DDR filed an answer, which did not include a claim for attorney's fees. A year later DDR filed a supplemental answer that also lacked a claim for fees. Ten months after that the court granted summary judgment against DDR. At foreclosure sale the property was sold to BMR for less than the amount of the judgment. BMR moved for deficiency judgment against DDR. Seven days before the hearing DDR filed a "Notice of Intent to seek attorney's fees." The court denied the motion for deficiency judgment. DDR then moved for fees under the reciprocal fees provisions of F.S. 57.105 (2009). The court awarded fees.

The Second DCA reversed. The "Notice of Intent" was not a pleading. Because DDR did not claim entitlement to fees and costs in any pleading, as defined by[Fla.R.Civ.P. 1.100(a), the court erred in granting DDR's motion for attorneys' fees and costs." The court explained: "[T]he purpose of the pleading requirement is notice. . . . Not only was BMR deprived of any meaningful opportunity to consider whether to proceed with the deficiency judgment in light of possibly being assessed attorneys' fees, it was never put on notice of a potential claim for attorneys' fees during the pendency of the foreclosure action."

**Florida Consumer Collection Protection Act applies when law firm proceeds against former client for unpaid fees.** *Morgan v. Wilkins*, 74 So.3d 179 (Fla. 1st DCA 2011).

Law Firm sued Former Client for unpaid fees. Former Client counterclaimed, alleging that Firm and one of its partners, Lawyer, violated the Florida Consumer Collection Practice Act (the "FCCPA"). Lawyer moved to dismiss on the ground that defendants were not "debt collectors." The court granted the motion to dismiss.

The First DCA reversed. The court erred in ruling that the FCCPA only applied to "debt collectors." Further, a debt need not "flow from an extension of credit" in order to be considered a "debt" under the FCCPA. Former Client "incurred an obligation in connection to a transaction with [Lawyer and Law Firm] for the provision of legal services. [Former Client]'s obligation to the law firm falls within the definition of debt in section 559.55(1)."

**Implied-in-law contract cannot support fee award in lien enforcement action.** *Sheppard v. M & R Plumbing, Inc.*, __ So.3d ___, 36 Fla.L.Weekly D1697 (Fla. 1st DCA, No. 1D10-4551, 8/4/2011), 2011 WL 3331216.

It was error to award fees under F.S. 713.29 (2008) in a lien foreclosure action where only a contract implied in law was proven. "A contract implied in law – the basis for [the contractor]'s recovery in the main case – is not a true contract, and a lien does not arise where nothing more than a contract implied in law is proven." (Citations omitted.)

**Party that succeeded in having lis pendens discharged entitled to fees even without posting bond.** *Abner v. Johnson*, 56 So.3d 137 (Fla. 4th DCA 2011).

Homeowner had a dispute with Purchaser over the sale of a house. Homeowner filed a lis pendens, preventing Purchaser from being able to refinance the loan. Homeowner then filed suit to declare a previously-executed quit claim deed to Purchaser invalid. Purchaser prevailed at trial. The court, however, declined to award fees to Purchaser.

The Fourth DCA reversed on the denial of fees. Fees should have been awarded to Purchaser under F.S. 48.23 (2009). The dissolving of a lis pendens operates an an adjudication of its validity, thus entitling Purchaser to attorney's fees. That fact that Purchaser had never posted a bond was immaterial.

**F.S. 766.206(2) does not authorize award for post-suit expenses incurred litigating entitlement to fees.** *Staples v. Duerr*, 74 So.3d 1114 (Fla. 1st DCA 2011).

A fee award was entered against Staples based on F.S. 766.206(2) (2007). He appealed the portion of the order awarding post-suit costs, including fees incurred post-suit litigating entitlement to attorney's fees. Agreeing, the First DCA reversed. The statute "provides only for those fees incurred 'during the investigation and evaluation of the claim.' . . . This language limits the provision's reach to only fees incurred during the pre-suit phase. It does not extend to expenses incurred after the suit has been filed, such as the fees/costs associated with post-suit litigation over entitlement to fees."

**Order determining entitlement but not amount of fees is not ripe for appellate review.** *Crowell v. Crowell*, 72 So.3d 804 (Fla. 5th DCA 2011).

Former Wife appealed from an order awarding fees to Former Husband. The Fifth DCA dismissed the appeal. "Because the trial court only determined entitlement and did not determine the amount of fees, this issue is not ripe for appellate consideration." (Citation omitted.)

**Court erred in awarding fees for proceedings in Supreme Court when there was no motion requesting them filed in Supreme Court.** *UniFirst Corp. v. City of Jacksonville*, __ So.3d ___, 36 Fla.L.Weekly D68 (Fla. 1st DCA, No. 1D09-0820, 12/30/2011), 2011 WL6851240.

A circuit court awarded fees for proceedings in the Florida Supreme Court after denial of a motion for rehearing in the appellate court. The First DCA reversed. "In the absence of even a

motion for attorney's fees in the supreme court, there is no basis for an award of attorney's fees incurred in proceedings in the supreme court." (Citations omitted.)

**Supreme Court suspends lawyer for providing improper financial assistance to client.** *Florida Bar v. Patrick*, 67 So.3d 1009 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Fifth DCA orders lawyer to show cause why sanctions should not be imposed for filing improper motion for rehearing.** *Marion v. Orlando Pain & Medical Rehabilitation*, 67 So.3d 264 (Fla. 5th DCA 2011).

See discussion in "Professionalism" section.

## *Offers of Judgment:*

**Supreme Court decides that party who settles pursuant to offer of judgment is "prevailing party" for purposes of fee award under Magnuson-Moss Warranty Act.** *Mady v. DaimlerChrysler Corp.*, 59 So.3d 1129 (Fla. 2001).

Plaintiff, an unsatisfied car buyer, filed a breach of warranty suit against Defendant under the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act (the "MMWA"). Defendant served an offer of judgment pursuant to F.S. 768.79 (2005) and Fla.R.Civ.P. 1.442. Defendant later served a second offer of judgment, which Plaintiff accepted.

Plaintiff moved for fees and costs. The trial court denied the motion, "finding that the plaintiff had not established he was a consumer who 'finally prevail[ed]' under 15 U.S.C. § 2310(d)(2)." The Fourth DCA affirmed, "holding that '[t]here simply was no court-ordered change in the relationship of the parties in this case by the plaintiffs acceptance of [Defendant]'s proposal for settlement.'" *Mady v. DaimlerChrysler Corp.*, 976 So.2d 1212 (Fla. 4th DCA 2008). The appeals court certified conflict with the Second DCA's decision in *Dufresne v. DaimlerChrysler Corp.*, 975 So.2d 555 (Fla. 2d DCA 2008) (settlement was "functional equivalent of a consent decree" and plaintiff could claim entitlement to fees under MMWA).

Exercising its conflict jurisdiction, the Florida Supreme Court quashed the Fourth DCA's decision in *Mady* and approved the decisions of the Second DCA and Third DCA in *Dufresne* and *San Martin v. DaimerChrysler Corp.*, 983 So.2d 620 (Fla. 3d DCA 2008). The Court concluded: "A consumer who has exhausted all non-judicial remedies as a condition required by the MMWA and later secures a favorable formal settlement offer of judgment from a defendant which is accepted in a Florida legal action filed under the MMWA, 15 U.S.C. § 2310, 'finally prevails' and may be entitled to recover costs, expenses, and attorneys' fees under the MMWA."

The Court explained: "Litigation had commenced, an offer was produced pursuant to the offer of judgment statute and corresponding rule of procedure, and the result necessarily falls under the auspices of a court, which is exactly the design of the MMWA. This interpretation is the only

method through which subsection (d)(2) of that act is implemented to afford the designed remedy. Further, this Court has long and consistently held that when a defendant settles a disputed case only after litigation has developed, the corresponding payment is tantamount to a final judgment when considering prevailing party type attorney fee assessments." [Citations omitted.]

**When plaintiff seeks both monetary damages and injunctive relief as part of same claim, offer of judgment statute does not apply.** *Winter Park Imports, Inc. v. JM Family Enterprises*, 66 So.3d 336 (Fla. 5th DCA 2011).

Plaintiff sued Defendants alleging violations of the Florida Motor Vehicle Dealer Act and seeking both monetary damages and injunctive relief. Each defendant served Plaintiff with a separate offer of judgment, "tendering a monetary amount as full settlement of all plaintiff's claims against that particular defendant." Plaintiff rejected each offer. After summary judgment was rendered for Defendants they moved for fees under F.S. 768.79 (2005) based on the rejected offers of judgment. The court denied the motions.

The Fifth DCA affirmed, concluding that where a plaintiff seeks both monetary damages and injunctive relief as part of the same claim, the offer of judgment statute does not apply. The statute "applies to 'any civil action for damages' and requires a court to compare the *monetary* amount offered (or demanded) against the *monetary* judgment ultimately obtained in order to determine whether a party has sufficiently 'beaten' an offer (or demand) so as to be entitled to an award of attorney's fees." (Emphasis by court.) There is no corresponding provision applying to claims for non-monetary relief. The court indicated that, in an appropriate case, it might be willing to recognize the validity of an offer or demand for judgment when a party has included separate claims for monetary and nonmonetary relief in the same pleading and the offer (or demand) is directed only to the monetary claim.

**In case of first impression, First DCA rules that valid proposal for settlement under F.S. 768.79 does not cut off prevailing party's fee claim after date of proposal.** *Tierra Holdings, Ltd. v. Mercantile Bank*, 78 So.3d 558 (Fla. 1st DCA 2011).

Mercantile sued Tierra for breach of contract. Tierra served a proposal for settlement under F.S. 768.79 that Mercantile did not accept. Mercantile prevailed at trial but in an amount at least 25% less than Tierra's offer. Each side moved for fees, Tierra under section 768.79 and Mercantile under the contract's prevailing party fee provision.

"Mercantile conceded that Tierra was entitled to recover some fees and costs under section 768.79, and Tierra conceded that Mercantile was the prevailing party in regard to the breach of contract claim and thus entitled to recover some fees and costs under the contract. Tierra argued, however, that Mercantile could recover only those fees and costs incurred up to the date of Tierra's proposal for settlement. In its order, the trial court rejected Tierra's argument that its proposal for settlement cut off Mercantile's contractual right to fees as of the date of the proposal.

Tierra appealed, "raising an issue of first impression" and contending that "a valid proposal for settlement under [F.S. 768.79] cuts off a prevailing party's claim for contractual attorney's fees and costs incurred after the date of the proposal." Rejecting Tierra's contention, the First DCA affirmed. F.S. 768.79 is to be strictly construed. "In the case before us, nothing in the language of

the contract limited a prevailing party's entitlement to an award of fees based upon the opposing party's offer to settle. Further, nothing in the language of section 768.79 authorizes the modification of a contractual right to attorney's fees. Reading an implicit cut-off into the offer of judgment statute, as advocated by Tierra, would deny Mercantile complete reimbursement for its litigation expenses and, thus, the contractual indemnification for which the parties bargained."

**Fee award reversed because proposal for settlement conditioned on opposing parties' joint acceptance.** *Schantz v. Sekine*, 60 So.3d 444 (Fla. 1st DCA 2011).

After a favorable verdict Defendants sought and were awarded fees and costs pursuant to the offer of judgment statute (F.S. 768.79). The First DCA reversed, reluctantly agreeing with Plaintiffs that the proposal was invalid under *Attorneys' Title Ins. Fund, Inc. v. Gorka*, 36 So.2d 646 (Fla. 2010) because it was conditioned on Plaintiffs' joint acceptance. Offending provisions in the proposal as identified by the appeals court included: "4. Plaintiffs shall execute a general release in favor of the Defendants . . . . The release will include a requirement that the terms of the settlement remain confidential. Furthermore, Plaintiffs shall hold harmless and defend the Defendants from all claims, liens, subrogation rights and all interests of all third parties which might exist as a result of the matters described in Plaintiffs' Complaint. (See attached Release). 5. *Plaintiffs shall dismiss this case* with prejudice as to the Defendants. . . . 7. *If this Proposal for Settlement is not accepted in writing within thirty (30) days of service, it shall be deemed rejected by the Plaintiffs*." (Emphasis by court.) The court agreed with the dissent in *Gorka* that *Gorka* "effectively eliminates the ability to make joint offers. *Gorka* 36 So.3d at 654) (Polston, J. dissenting)."

One judge wrote a concurring opinion in which he urged the legislature to "consider clarifying parties' rights and responsibilities in making and receiving offers of judgments."

**Rejected proposal for settlement did not support fee award under F.S. 768.79 because of condition that offeree could not perform.** *Gonzalez v. Claywell*, __ So.3d ___, 36 Fla.L.Weekly D1784 (Fla. 1st DCA, No. 1D10-5694, 8/15/2011), 2011 WL 3558161.

Plaintiff in a negligence case made a proposal for settlement to Defendant. The proposal offered to settle the suit for $240,000 if Defendant's insurance company tendered the check payable to Plaintiff. Defendant did not accept the offer. After Plaintiff got a judgment for $394,000, she was awarded fees as a result of the rejected offer of settlement.

The First DCA reversed. The settlement proposal "was invalid and unenforceable because it was impossible for Defendant to meet the conditions of the proposal." (Footnote omitted.) The proposal required that Defendant's insurer, a non-party, tender a check well in excess of its policy limits of $25,000. "Because the proposal contained a condition that [Defendant] could not possibly perform, and divested him 'of independent control of the decision to settle,' it was invalid and unenforceable. . . . At a minimum, the proposal is ambiguous because [Defendant] could not effectively evaluate the condition that GEICO tender the settlement check.'" (Citations omitted.)

**Proposals for settlement that did not include proposed release or summary of its terms did not comply with Fla.R.Civ.P. 1.442 and were unenforceable**. *Mix v. Adventist Health System/Sunbelt, Inc.*, 67 So.3d 289 (Fla. 5th DCA 2011).

Hospital prevailed in a medical malpractice action. Hospital had served Plaintiffs with proposals for settlement. The proposals required execution of a release. Neither the release nor a summary of contents was included with the proposals. Plaintiffs did not accept the proposals. The court awarded fees to Hospital as a result of the unaccepted proposals for settlement.

The Fifth DCA reversed, agreeing with Plaintiffs that the proposals were ambiguous and unenforceable. Hospital did not attach the release or a summary of it to the proposal offers, "thus failing to satisfy the particularity requirement [of Fla.R.Civ.P. 1.442] outlined in *State Farm Mutual Automobile Insurance Co. v. Nichols*, 932 So.2d 1067 (Fla. 2006)."

**Settlement proposal *not* ambiguous even though proposed release was not attached.** *Jones v. Publix Supermarkets, Inc.*, 68 So.3d 422 (Fla. 4th DCA 2011).

Plaintiff sued Publix Supermarkets after allegedly being hurt by a falling item. He served a proposal for settlement for $150,000, which provided in part: "'This proposal for settlement encompasses all damages and expenses associated with this claim even those damages or expenses as to which collateral source payments have been made,' and that [Plaintiff] 'will execute a full release of liability in favor of Publix Supermarkets, Inc., a Florida Corporation and it's [sic] affiliated insurance company, and a Stipulation for Voluntary Dismissal.' No further summary of the release was included, nor was a copy of the proposed release attached to the proposal." The proposal was not accepted.

Plaintiff won a jury verdict of more than $278,000 and moved for fees. The court denied the motion "because the release was neither summarized nor attached to the proposal for settlement."

The Fourth DCA reversed. It distinguished cases holding that a proposal for settlement was invalid due to ambiguities regarding the releases, noting that in those cases there were other actions pending between the parties or other potentially liable parties. "In this case, there are no other claims, and there are no other potentially liable related parties. Therefore, under these facts and circumstances, the release provisions of [Plaintiff's] proposal were sufficiently clear, 'leaving no ambiguities so that the recipient can fully evaluate its terms and conditions.'" (Citations omitted.)

The court pointed out that "the preferred practice [is] to set forth the terms of a release with particularity, either within the body of the proposal or by attaching the form of the release."

**Fourth DCA calls for statutory and rule changes to address increasing claims of "ambiguity" in proposals for settlement.** *Land & Sea Petroleum, Inc. v. Business Specialists, Inc.*, 53 So.3d 348 (Fla. 4th DCA 2011).

Defendant was sued for alleged breach of contract by brokers seeking a commission in connection with the attempted sale of Defendant's business. (The sale did not close.) Defendant prevailed on summary judgment. Defendant had served proposals for settlement on each broker. Neither broker accepted. Defendant's motion for an award of fees based due to the unaccepted proposals for settlement was denied.

The Fourth DCA reversed, concluding that Defendant was entitled to fees under, *inter alia*, F.S. 768.79 and Fla.R.Civ.P. 1.442. The court rejected the brokers' argument that the proposals were ambiguous as "nit-picking," stating: "The brokers' reliance on the fact that the seller did not expressly state that it would be the party paying the $500 seems to be the type of 'nit-picking' which the second district cautioned against . . ." (Citation omitted.)

In a footnote, the court stated that there was an increasing number of cases in which "ambiguity" was raised as a defense to a claim for fees under F.S. 768.79 and Fla.R.Civ.P. 1.442 and called on the Florida Legislature and the Florida Supreme Court take action to remedy the situation: "We believe this issue continues to arise because neither section 768.79 nor rule 1.442 requires the offeree to notify the offeror when the offeree considers a proposal to be ambiguous. . . . We encourage the Florida Bar's civil rules committee to consider proposing such an amendment."

**Court erred in applying wholly objective standard in determining whether offer of judgment made in good faith.** *Arrowood Indemnity Co. v. Acosta, Inc.*, 58 So.3d 286 (Fla. 1st DCA 2011).

Insurer Arrowood issued an excess directors' and officers' liability policy to Acosta. When Acosta was sued, Arrowood and the primary insurer refused to defend. Acosta later sued Arrowood and the primary insurer alleging they had a duty to defend and indemnify Acosta in the prior suit.

Arrowood made a $50,000 oral settlement offer that was not accepted; Acosta countered with a $1 million demand. Arrowood then made a $1,000 offer of judgment that Acosta also rejected. Summary judgment was granted for Arrowood, which then moved for fees pursuant to the offer of judgment statute. The court denied the motion for fees, finding that the offer was not made in good faith and "expressly stating that it was applying 'an objective standard' to determine the issue, citing two factors: the disparity between the $10 million in potential liability Arrowood faced and the $1,000 offer of judgment, and the court's belief that the case raised complex legal issues."

The First DCA reversed, concluding that the court erred by applying a wholly objective standard to determine whether the offer was made in good faith. "In the context of a nominal offer of judgment, this court has held that where the offeror has a reasonable basis to believe that exposure to liability is minimal, a nominal offer is appropriate. . . . Whether the offeror has a reasonable basis to support the offer is 'determined solely by the subjective motivations and beliefs of the offeror.'" (Citations omitted.) Although the trial court properly considered several objective factors, it erred by basing its ruling exclusively on the objective factors. "Rather, the trial court was required to consider Arrowood's explanation and then determine whether, despite consideration of the objective factors cited by the court, Arrowood had a subjectively reasonable belief on which to base its offer."

**UM carrier is prevailing party and is entitled to fees under offer of judgment statute where insured's recovery was below liability policy limits.** *Allstate Ins. Co. v. Staszower*, 61 So.3d 1245 (Fla. 4th DCA 2011).

See discussion under "Prevailing Party" subsection.

**UM carrier may recover prevailing party costs and is entitled to fees under offer of judgment statute where insured's recovery was below liability policy limits.** *Allstate Ins. Co. v. Staszower*, 61 So.3d 1245 (Fla. 4th DCA 2011).

Two Insureds sued a tortfeasor for auto accident injuries. Alleging that their injuries exceeded the liability policy limits, Insureds joined their uninsured/underinsured motorist insurance carrier, Allstate. Allstate made proposals for settlement of $100 each to Insureds, who refused the offers. At trial one of the insured received a verdict for $1670, with nothing to the other. Allstate sought fees and costs due to its rejected proposals for settlement. Ruling that Insureds were the prevailing parties, the court entered a cost judgment against Allstate and denied Allstate's motion for fees and costs.

The Fourth DCA reversed. Allstate was the prevailing party and so was entitled to costs. Allstate also was entitled to fees under F.S. 768.79. "[Insureds] contend that the trial court's cost judgment exceeded the $100.00 proposal for settlement, thereby rendering Allstate ineligible for attorney's fees. We disagree. '[T]he offer only applied to any potential recovery in excess of a net verdict within the . . . coverage of $10,000, section 768.79 entitles Allstate to an award of attorney's fees and costs, as the $100 offer clearly exceeded plaintiff's zero recovery from Allstate.' *Allstate Ins. Co. v. Silow*, 714 So. 2d 647, 650 (Fla. 4th DCA 1998)."

The Fourth DCA reversed. Allstate was the prevailing party and so was entitled to costs. Allstate also was entitled to fees under F.S. 768.79. Insureds argued that the *cost judgment* exceeded the $100.00 proposal for settlement and so rendered Allstate ineligible for a fee award. The court disagreed. The offer only applied to any potential recovery in excess of a net verdict within the coverage limits of $10,000. Allstate was entitled to an award of fees under F.S. 768.79 "as the $100 offer clearly exceeded plaintiff's zero recovery from Allstate." (Citation omitted.)

## *Prevailing Party:*

**Court erred in denying prevailing party fees on ground that neither party prevailed; Fourth DCA does not recognize "ties."** *Animal Wrappers and Doggie Wrappers, Inc. v. Courtyard Distribution Center, Inc.*, 73 So.3d 354 (Fla. 4th DCA 2011).

Tenant leased premises that later were damaged by fire. Tenant vacated and sought return of its security deposit, suing Landlord for breach of contract. Landlord counterclaimed alleging that Tenant wrongfully abandoned the premises and breached the lease. Landlord also demanded an acceleration of rent. Both parties sought fees under a prevailing party provision in the lease.

The final judgment provided that Tenant prevailed on its claim that the lease was terminated by the fire and so was entitled to return of its security deposit, minus a set-off for certain expenses incurred by Landlord. Tenant also prevailed against Landlord's counterclaim. The trial court denied fees to either party, concluding that "no party prevailed." Tenant appealed the denial of fees.

The Fourth DCA reversed. Tenant was entitled to fees because it "unquestionably prevailed on all of the significant issues raised" in the case. "Although some districts recognize that cases can sometimes effectively be 'ties,' such that the parties can both be viewed as winners or losers, we have maintained that '[i]n a breach of contract action, one party must prevail."

**Dismissal without prejudice entitles party to award of prevailing party attorney's fees.** *Henn v. Ultrasmith Racing, LLC*, 67 So.3d 444 (Fla. 4th DCA 2011).

Plaintiff's breach of contract suit was dismissed without prejudice as a sanction for failure to comply with an order to appear at a status conference with counsel. The court denied Defendant's motion for prevailing party fees, "concluding that since the dismissal was without prejudice, the litigation did not necessarily end with the trial court's order of dismissal."

The Fourth DCA reversed. Defendant "was entitled to attorney's fees as the prevailing party in the case under *Alhambra* [*Homeowners Ass'n v. Asad*, 943 So.2d 316 (Fla. 4th DCA 2006)] or *Valcarcel* [*v. Chase Bank USA NA*, 54 So.3d 989 (Fla. 4th DCA 2010)]. Althought the dismissal without prejudice was not an adjudication on the merits, under *Valcarcel* "a defendant may 'prevail' even where the case is not dismissed on the merits. The fact that the trial court dismissed the case without prejudice was sufficient to trigger appellant's entitlement to attorney's fees as the prevailing party under the rental contract."

**First DCA discusses application of "prevailing party" principle for purposes of fee and cost awards in workers' compensation cases.** *Aguilar v. Kohl's Dept. Stores, Inc.*, 68 So.3d 356 (Fla. 1st DCA 2011).

In reversing an order of a Judge of Compensation Claims ("JCC") denying an award of costs in a workers' compensation case, the First DCA discussed the principles governing "prevailing party" awards of fees and costs. The court noted that, *in contrast* to the typical civil case, for fee award purposes in a workers' compensation case the JCC may find that more than one party (or neither party) prevailed.

**Prevailing party fees awarded after order involuntarily dismissing action with prejudice even though motion to dismiss did not seek fees.** *Nudel v. Flagstar Bank, FSB*, 60 So.3d 1163 (Fla. 4th DCA 2011).

Defendant was sued by Bank in a mortgage foreclosure action. She filed a motion to dismiss, which was granted with prejudice. Defendant then moved for prevailing party fees under F.S. 57.105(7) (2009). The court denied the fee motion, ruling that Defendant waived her entitlement to fees by not seeking them in her motion to dismiss.

The Fourth DCA reversed and remanded for an award of fees. Defendant's motion for fees was not untimely under *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991). "Because a motion to dismiss is not a pleading, *Stockman* does not require the movant to raise the attorney's fee claim in the motion; rather, a defendant's claim for attorney fees is to be made either in the defendant's motion to dismiss or by a separate motion which must be filed within thirty days following a dismissal of the action. . . . [Defendant] timely moved for attorney's fees within thirty days of the dismissal, so she did not waive her claim."

Furthermore, Defendant was entitled to fees as the prevailing party. "For the purpose of determining a 'prevailing party' under section 57.105(7), we see no reason to distinguish between a voluntary dismissal without prejudice and a court's involuntary dismissal without prejudice."

**Homeowners who successfully resisted claim for a mechanic's lien were prevailing parties and entitled to fees.** *Medellin and MLA Consulting, Inc.*, 69 So.3d 372 (Fla. 5th DCA 2011).

A company that helps people act as their own general contractor ("UBuildIt") filed a mechanic's lien and later filed suit against Homeowners. The trial court ruled in favor of Homeowners but also found that UBuildIt had not filed a fraudulent lien. As a result, the court did not award prevailing party fees to Homeowners. The Fifth DCA reversed and remanded. A landowner who successfully resists a mechanic's lien claim is entitled to a fee award.

**Court did not abuse discretion in awarding fees to party relating to all claims with "common core" of facts, even though there was no statutory basis for awarding fees on one of the claims.** *Daddono v. Miele*, 69 So.3d 320 (Fla. 4th DCA 2011).

Burdett, a shareholder in Corporation, sued another shareholder, Meile, on behalf of Corporation for breach of fiduciary duty, declaratory relief, and accounting. The court awarded prevailing party Burdett fees relating to all of his claims. On cross-appeal Meile conceded that Burdett was entitled to fees for the breach of fiduciary duty claim but contended that Burdett was not entitled to fees on the remaining claims.

The Fourth DCA affirmed, noting "that 'where the claims involve a 'common core' of facts and are based on 'related legal theories,' a full fee may be awarded unless it can be shown that the attorneys spent a separate and distinct amount of time on counts as to which no attorney's fees were sought.' [Citations omitted.] Miele disputed Burdett's claim that he was a shareholder. Burdett's success on his declaratory relief action to determine if he was a shareholder conferred standing to pursue his derivative action as a shareholder of [Corporation]. We hold that the trial court did not abuse its discretion by awarding Burdett his attorney's fees for time spent on the declaratory relief action because a determination of the issue of Burdett's status as a shareholder raised in the declaratory relief action was dispositive of one of the elements of proof required in the derivative claim."

**Evidentiary hearing required to determine proper fee award after substantial underlying judgment is reversed.** *River Bridge Corp. v. American Somax Ventures*, 76 So.3d 986 (Fla. 4th DCA 2011).

An $8.5 million judgment was entered for ASV against River Bridge. About 85% of the amount was based on a contractual right of first refusal claim. The award for breach of the right of first refusal was reversed and, consequently, the judgment was lowered by 85%. River Bridge moved for relief from the $3.5 million award of prevailing party fees that was based on a lodestar amount and a contingency multiplier of 2.0. The court denied the motion without a hearing.

The Fourth DCA reversed, concluding that a hearing is necessary to determine the proper fee award. A fee award based on a judgment that is later reversed may also be "reversed or otherwise vacated." Fla.R.Civ.P. 1.540(b)(5). The question is complicated where, as here, the underlying action was brought on multiple counts. The party prevailing on the significant issues

usually is considered the prevailing party for purposes of a fee award. "However, in a multicount action, where each claim is separate and distinct and would support an independent action, as opposed to being an alternative theory of liability for the same wrong, the prevailing party on each distinct claim is entitled to an award of attorney's fees for those fees generated in connection with that claim."

An evidentiary hearing was required: (1) to determine whether the right of first refusal claim constituted a distinct claim that could be separated from the others; and (2) even if the claims are not separate, "the results obtained have drastically changed" and that "may or may not" require a reduction of the fee award. (The lower court was directed to review those significant portions of fees and costs related to the proof of damages for the rejected claim.)

**Calling its arguments "frivolous," Fourth DCA rejects Dept. of Agriculture's claim for prevailing party attorney's fees.** *Florida Dept. of Agriculture and Consumer Services v. Cox*, 54 So.3d 1026 (Fla. 4th DCA 2011).

The Florida Department of Agriculture was sued in an inverse condemnation action as a result of its destruction of citrus trees during a citrus canker eradication effort. The Department unsuccessfully asserted that no taking occurred and was ordered to pay damages resulting in a net award to the class of $4,000,000. Despite this, the Department sought prevailing party fees under F.S. 57.041. The Fourth DCA affirmed the denial of fees, calling the Department's arguments "frivolous" and stating: "The mere fact that the owners sought more in damages than the jury awarded does not mean that they did not prevail on both issues of liability and damages."

**In case of first impression, First DCA rules that valid proposal for settlement under F.S. 768.79 does not cut off prevailing party's fee claim after date of proposal.** *Tierra Holdings, Ltd. v. Mercantile Bank*, 78 So.3d 558 (Fla. 1st DCA 2011).

See discussion under "Offers of Judgment" subsection.

## *Proof Needed for Fee Award:*

**Fee award reversed and all fees denied because party seeking fees twice failed to meet burden of showing how much time was spent on successful claim.** *Dr. Gail Van Diepen, P.A. v. Brown*, 55 So.3d 612 (Fla. 5th DCA 2011).

Plaintiffs, former employees of Defendant, sued for a various claims but were successful on only one overtime pay count. The court awarded fees to Plaintiff. Plaintiffs were entitled to recover reasonable fees only attributable to the successful claim, but the court's order did not set forth the reasonable number of hours attributable to that claim. On appeal the Fifth DCA reversed and remanded, noting that the billing records showed hours spent on Plaintiff's unsuccessful claims. The trial court again entered a fee award, which Defendants appealed.

The Fifth DCA again reversed, remanding for an order denying *any* fees to Plaintiff. Plaintiffs' counsel argued that he could not separate one claim from the others for purposes of allocating the time spent, but the appeals court pointed out that it was Plaintiff's burden to do so and stated: "If the moving party cannot meet his burden for any reason, including inadequate, confusing or imprecise timesheets or record keeping, he or she should not be awarded attorney's fees for those vague or incomprehensible charges." (Citations omitted.)

## *Section 57.105 and Other Sanctions:*

**Supreme Court resolves conflict among DCAs regarding application of safe harbor provision in F.S. 57.105.** *Bionetics Corp. v. Kenniasty*, 69 So.3d 943 (Fla. 2011).

The Florida Supreme Court resolved a conflict among DCAs regarding application of the safe harbor provision in F.S. 57.105 (2002). That provision, effective July 1, 2002, allows a party accused of filing a frivolous claim or defense to withdraw it within 21 days and avoid sanctions.

The Court framed the issue as whether the safe harbor provision "applies where a party's frivolous claims were originally filed before the provision became effective, but the initial motion seeking attorney's fees was filed in court after the provision became effective without the motion first having been served on the opposing party twenty-one days before filing." Approving *Walker v. Cash Register Auto Ins. of Leon County, Inc.*, 946 So.2d 66 (Fla. 1st DCA 2006), the Court concluded: "[T]he safe harbor provision does not apply to a case where claims found to be frivolous by a trial court were originally filed before the safe harbor provision took effect."

**F.S. 57.105 does not authorize fee award solely against party's lawyer when case against lawyer's client has been dismissed and claim for fees against client was waived.** *Sexton v. Ferguson*, __ So.3d ___, 36 Fla.L.Weekly D2489 (Fla. 4th DCA, No. 4D10-2826, 11/16/2011), 2011 WL 5554809.

Appellants had an administrative dispute with Lawyer's Client. Lawyer filed a motion under F.S. 57.105(1) (2010) for fees against Appellants, alleging they knew or should have known that the claims in their petition were not supported by material facts. Appellants responded with a F.S. 57.105 motion for fees against Client and Lawyer.

Lawyer later withdrew. Client then settled with Appellants, who filed a notice of voluntary dismissal waiving their fee claim against Client. Appellants argued, however, that their withdrawal of their motion for fees did not release Client's prior attorney, Lawyer, from liability for fees. The ALJ denied the motion for fees against Lawyer.

The Fourth DCA affirmed. "The plain language of section 57.105(1) is clear and unambiguous; it does not authorize attorney's fees to be awarded solely against a party's attorney. . . . A plain reading of the statute does not support an attorney's fee award solely against a party's attorney where, as here, the case against the attorney's client had been dismissed and the claim for attorney's fees against the attorney's client has been waived."

**F.S. 57.105 fees not awarded where losing party presented competent evidence in support of claim but court ruled against it based on conflicting evidence.** *Siegel v. Rowe*, 71 So.3d 205 (Fla. 2d DCA 2011).

Plaintiffs sued Defendants on an alleged loan. Plaintiffs presented evidence to support their claims, but the court ruled for Defendants. The court awarded fees against Plaintiffs under F.S. 57.105(1). The Second DCA reversed. "Where, as in this case, the losing party presents competent, substantial evidence in support of the claims or defenses presented and the trial court determines the issues of fact adversely to the losing party based on conflicting evidence, section 57.105(1) does not authorize an award of attorney's fees against the attorney for the losing party and his or her client."

**Award under F.S. 57.105 may include not only fees but also "delay damages" resulting from improper delay.** *Korte v. US Bank National Ass'n*, 64 So.3d 134 (Fla. 4th DCA 2011).

Lawyer, defense counsel in a mortgage foreclosure suit filed by Bank, was sanctioned under F.S. 57.105(1)(a) and (3) (2008) for filing affirmative defenses that were not supported by material facts and were filed primarily for the purpose of unreasonable delay. The sanction amount included not just fees but "other amounts resulting from improper delay." These "delay damages" were calculated by Bank were based on the amount of interest that accrued on the note from the day the affirmative defenses were asserted until the day they were stricken.

Lawyer appealed the award of $18,682.99 in "delay damages." The Fourth DCA affirmed. "[T]hose who assert such knowingly unsupportable defenses may find themselves liable not just for a portion of the opposing party's attorney's fees, but also for other losses that a trial court finds resulted from the improper delay."

**Court erred in entering section 57.105 sanctions against party's counsel where there were no findings of frivolous claims or improper delay.** *Glarum v. LaSalle Bank National Association*, __ So.3d ___ (Fla. 4th DCA, No. 4D10-1372, 11/17/2011), 2011 WL 5573941.

In a foreclosure case the sanctioned Debtors' counsel under F.S. 57.105 for filing frivolous pleadings. Counsel was sanctioned for filing a "form affidavit" of an expert, Lord. In the affidavit Lord did not represent that she reviewed the papers at issue. The court was troubled "by appellants' counsel's habit of filing 'the same affidavit in ten different cases, when [Lord] hasn't seen the documents in this case.'" The Fourth DCA reversed. The trial court did not find that Debtors' claims were frivolous and did not rule that Lord's affidavit was filed to cause unreasonable delay. Accordingly, an award of fees under F.S. 57.105 was improper.

**Order imposing award of fees and costs award under F.S. 57.105 reversed on various grounds.** *Ferere v. Shure*, 65 So.3d 1141 (Fla. 4th DCA 2011).

Plaintiff sued a physician alleging negligence. During jury selection Plaintiff's counsel mentioned the "doctoring of records." The physician moved for mistrial, arguing that fraud or spoliation was not in the complaint. Plaintiff's counsel contended it was an evidentiary issue that

did not have to be pled. The court granted a mistrial, stating that "[i]t's not something that's pled." The court awarded the physician fees under F.S. 57.105(1), finding "no allegations of 'falsification of records' or 'removal of records' in the complaint or the pre-trial stipulation . . ."

The Fourth DCA reversed on several grounds. First, F.S. 57.105(1) did not apply because the defendant did not comply with subsection (4), which requires the filing of a motion and a 21-day waiting period to give the party time to withdraw or correct the conduct. Because Plaintiff's counsel alleged record-doctoring during jury selection there was no way for counsel to "'withdraw or appropriately correct' that allegation within 21 days after service of the defendants' post-mistrial motion. . . . We cannot rewrite the statute to fit this situation."

Second, even if F.S. 57.105(1) did apply, "it was impossible for the plaintiff to allege fraud or spoliation in the complaint. The fraud which the plaintiff's counsel was alleging was not a fraud on the plaintiff, but a fraud on the court."

**F.S. 57.105(1) fee award measured from time initial complaint was filed, rather than the filing of the amended complaint pending when fee motion was served.** *Wood v. Haack*, 54 So.3d 1082 (Fla. 4th DCA 2011).

Plaintiff's original complaint against Defendant had a single count for assault and battery. Eventually Plaintiff filed a third amended complaint. While the amended complaint was pending, Defendant filed and served a motion for fees against Plaintiff pursuant to F.S. 57.105(1). Defendant asserted that Plaintiff's own deposition showed that no assault occurred. More than one month later, Plaintiff voluntarily dismissed the assault claim. The court awarded fees against Plaintiff, "but limited the award to those fees incurred from the date of service of the third amended complaint."

The Fourth DCA reversed. The trial court erred by limiting the fees to those incurred from the service of the third amended complaint. "The motion for 57.105 fees plainly asserted that the suit had been without merit since its inception. . . . [I]t is not the bringing of the motion for 57.105 fees that starts the clock running for recoverable fees. Rather, once the twenty-one day safe harbor expires, '[t]he trial court is free to measure the attorney's fees from the time it was known or should have been known that the claim had no basis in fact or law.'" (Citations omitted.)

**Court erred in not awarding 57.105 fees against bank in dismissed mortgage foreclosure case; lawyers' professionalism criticized.** *South Bay Lakes Homeowners Association, Inc. v. Wells Fargo Bank, N.A.*, 53 So.3d 1239 (Fla. 2d DCA 2011).

Bank filed a mortgage foreclosure suit against Borrowers and also named their Homeowners Association ("HA") as a party. Bank failed to produce a copy of the note and mortgage. HA answered and served Bank with a request for admissions, "asking the bank to admit that it did not have an assignment of the mortgage in its possession or recorded." Bank did not respond.

HA moved for summary judgment and moved for fees under F.S. 57.105. Bank took no action and did not appear at the hearing. The court dismissed the case. The court denied the motion for fees, "reasoning that some lender was entitled to file an action to foreclose on the parcel described in the modification and owned by [Borrowers] and that the action was, therefore, not one entitling the association to attorney's fees." HA appealed.

The Third DCA reversed, concluding that the court abused its discretion in not awarding fees "under the unusual circumstances of this case." It was undisputed that Bank had filed the action without an assignment or other legal basis supporting it. Furthermore, the court noted that "[n]othing in the record suggests that [Bank] or its attorneys took any steps to confirm that [Bank] had the legal right to file this action."

The court also criticized the conduct of Bank's lawyers. "[T]he bank's attorney tried to justify this improper filing due to the vast volume of foreclosure cases in the judicial system. While this court is well aware of the volume of these cases, that circumstance is not a matter that relieves the bank and its attorneys of their obligation to file pleadings that are adequately supported by a reasonable investigation prior to suit. If anything, the volume of these cases and the obvious detrimental effect that such volume has upon the legal system should be a factor requiring attorneys who file the actions to engage in a higher degree of professionalism." In a footnote, the court continued in the same vein: "At oral argument, the bank's attorney claimed for the first time that [HA]'s attorney had not served the requests for admissions on the bank's law firm and that the trial court had not properly served the judgment on the law firm. These unsworn allegations more than a year after the entry of the final judgment are outside the record and otherwise entirely improper."

(NOTE: For another foreclosure case in which the conduct of counsel was criticized, see *Jade Winds Ass'n, Inc. v. Citibank, N.A.*, 63 So.3d 819 (Fla. 3d DCA 2011).)

**Court erred in granting fees under F.S. 57.105 due to non-compliance with 21-day "safe harbor" provision.** *City of North Miami Beach v. Berrio*, 64 So.3d 713 (Fla. 3d DCA 2011).

Claimant was stopped for a traffic violation and charged with a drug crime. The City seized his vehicle and filed a forfeiture action. The court granted summary judgment for Claimant and ordered the vehicle returned. When the vehicle had not been returned a month later, Claimant filed a motion for damages and fees under F.S. 57.105. City returned the vehicle a week later. The court awarded fees against City.

City appealed, pointing "to the undisputed fact that the claimant failed to serve his motion for fees on the City twenty-one days prior to filing the motion." The Third DCA reversed the fee award because Claimant failed to comply with the statute's notice provision.

## *Workers Compensation Cases:*

**First DCA upholds constitutionality of revised workers compensation attorney's fee statute.** *Kauffman v. Community Inclusions, Inc./Guarantee Ins. Co.*, 57 So.3d 919 (Fla. 1st DCA 2011).

The Florida Legislature amended the workers compensation attorney's fee statute (F.S. 440.34) after the Florida Supreme Court's decision in *Murray v. Mariner Health*, 994 So.2d 1051 (Fla. 2008). Applying the revised statute, the JCC "found the Employer/Carrier responsible for Claimant's attorney's fees pursuant to section 440.34(3), Florida Statutes (2009), and found a reasonable attorney's fee to be $25,075.00. The JCC nevertheless concluded that the amended statute limited the fee to a percentage of benefits obtained, and awarded Claimant's attorney a fee

of $684.41 for obtaining $3,417.03 in benefits." Claimant appealed, contending that the JCC misinterpreted the statute or that the revised statute is unconstitutional.

The First DCA affirmed. As to the constitutional challenges, the court concluded: "We reject Claimant's equal protection, due process, separation of powers, and access to courts challenges to the amended statute for the same reasons we rejected similar challenges to section 440.34, as previously amended in 2003, in *Lundy v. Four Seasons Ocean Grand Palm Beach*, 932 So.2d 506 (Fla. 1st DCA 2006). . . . The supreme court did not address any constitutional issues in *Murray*, see *id*. at 1053, however, and did not cast any doubt on the reasoning used in *Lundy* [*v. Four Seasons Ocean Grand Palm Beach*, 932 So.2d 506 (Fla. 1st DCA 2006)], *Campbell* [*v. Aramark*, 933 So.2d 1255 (Fla. 1st DCA 2006)], and *Wood* [*v. Florida Rock Industries*, 929 So.2d 542 (Fla. 1st DCA 2006)], in rejecting constitutional claims like those made here."

**JCC erred in determining reasonable hourly rate for fee award based on argument rather than evidence.** *McDermott v. United Parcel Service/Liberty Mutual*, 57 So.3d 933 (Fla. 1st DCA 2011).

In making a fee award in a workers compensations case, the Judge of Compensation Claims ("JCC") found the customary hourly rate in the district to be $200. The First DCA reversed. The JCC erred "in finding that the employer/carrier's attorney testified that the customary hourly rate in the locality for similar services was $200. The employer/carrier's attorney did not testify; he only offered argument to that effect." The JCC must rely upon *evidence* when determining a reasonable hourly rate, and unsworn argument of counsel is not evidence.

**Workers' comp claimant entitled to fee award for successfully resisting former employer's assertion of "fraud defense".** *Carrillo v. Case Engineering, Inc.*, 53 So.3d 1214 (Fla. 1st DCA 2011).

Claimant brought a workers' compensation claim against the employer/carrier ["E/C"]. Due to the accident, Claimant received temporary partial disability benefits and continued to receive payment for medical benefits. Several years later Claimant sought additional benefits. Former Employer raised the affirmative defense based on F.S. 440.09 and 440.105, often referred to as the "fraud defense." The Judge of Compensation Claims ("JCC") ruled that Claimant's testimony was "evasive, unreliable and inconsistent" but did not rise to the level of fraud. The JCC denied Claimant's petition and claim for fees.

The First DCA reversed the denial of fees. The medical benefits continued to be paid as a result of Claimant's successful resistance of the fraud defense. "Section 440.34(3)(c), Florida Statutes (1995), provides that 'a claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer . . . [i]n a proceeding in which a carrier or employer denies that an injury occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability.' Section 440.09(4)(a), Florida Statutes (2009), located within the 'coverage' provisions of chapter 440, provides that '[a]n employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims . . . determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 or any criminal act for the purpose of securing workers' compensation benefits. . . . When [the E/C] raised the defense

based on sections 440.09 and 440.105, they placed coverage of the accident and resulting injuries – and thus compensability – at issue." Because Claimant prevailed against the fraud defense, the appeals court reversed and remanded for an award of fees.

## INEFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO COUNSEL

**Supreme Court amends Florida Rule of Criminal Procedure 3.850 effective July 1, 2011.** *In re: Amendments to Florida Rules of Criminal Procedure 3.850 and 3.851; Amendments to Florida Rules of Appellate Procedure 9.141 and 9.142*, 72 So.3d 735 (Fla. 2011).

See discussion in "Rules and Ethics Opinions" section.

**Supreme Court reverses death penalty and remands for life sentence where trial counsel was ineffective for failing to do any investigation into possible mitigation.** *Coleman v. State*, 64 So.3d 1210 (Fla. 2011).

Defendant was convicted of first-degree murder. The judge overrode the jury's recommendation and sentenced Defendant to death. Defendant filed a postconviction motion alleging that trial counsel provided ineffective assistance during the penalty phase by failing to investigate, develop, and present available mitigating evidence that would have precluded a jury override. The motion was denied. On appeal, the Supreme Court concluded that counsel rendered ineffective assistance and vacated the death sentences.

The Court announced a new procedure whereby, in these types of cases, it will not remand for resentencing but instead will direct the lower court to impose life sentences. "[W]e now hold that the proper course – and the course that we will follow in future postconviction jury override cases in which the mitigation presented at the evidentiary hearing would have precluded a jury override – is to remand the case to the trial court for imposition of a life sentence. By eliminating the resentencing proceeding on remand, as well as any subsequent appeal, this approach will promote the timely resolution of these cases, and it will foster uniformity in this area of the law."

**Per Supreme Court, lawyer whose prepared witness "chokes" on stand has not rendered ineffective assistance of counsel.** *Buzia v. State*, __ So.3d ___, 36 Fla.L.Weekly S719 (Fla. Nos. SC10-31, 10-1645, 12/8/2011), 2011 WL 6090069.

Convicted Defendant appealed denial of his post-conviction motion under Fla.R.Crim.P. 3.851. He asserted that counsel was ineffective because a witness, Defendant's mother, was not adequately prepared and presented. The Supreme Court affirmed denial of Defendant's claim: "[I]n preparing [Defendant]'s mother to testify, counsel discussed with her the various issues of dysfunction within the family, especially regarding substance abuse, and relied on her to present such testimony. On the stand, however, [Defendant]'s mother apparently became embarrassed and resisted all efforts by trial counsel to develop any of this unflattering family history, except as to [Defendant]'s father. Counsel cannot be found deficient because a witness 'choked' on the stand."

**Per Third DCA, Florida's standard deportation warning in criminal cases is constitutionally deficient after *Padilla v. Kentucky*.** *Hernandez v. State*, 61 So.3d 1144 (Fla. 3d DCA 2011).

Convicted Defendant filed a Fla.R.Crim.P. 3.850 motion to vacate his plea, judgment, and sentence 3 months after the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). The postconviction court denied the motion. The Third DCA reversed, concluding that (1) "*Padilla* rendered Florida's existing standard deportation warning constitutionally deficient in cases such as this" and (2) "*Padilla* should not be applied retroactively in Florida."

The Third DCA stated that "*Padilla* goes to the very heart of a defendant's Sixth Amendment right to effective assistance of counsel when the defendant is entering a plea to a criminal charge as to which the plea and sentence, as here, *will* subject the defendant to deportation (and with no basis to apply for discretionary relief from that result)." (Emphasis by court.) The majority in *Padilla* distinguished "between those cases involving a mere 'risk of adverse immigration consequences,' and those with a 'truly clear' deportation consequence." In the instant case there was a "truly clear" deportation consequence to the plea. Neither the plea colloquy nor defense counsel's advice conveyed the warning that deportability was a clear, non-discretionary consequence of his plea. The court affirmed, however, because it concluded that, under *Witt v. State*, 387 So.2d 922 (Fla. 1980), *Padilla* should not be applied retroactively.

The court concluded: "It is now the law in this and every other state that constitutionally competent counsel must advise a noncitizen/defendant that certain pleas and judgments *will*, not 'may,' subject the defendant to deportation. We must respectfully disagree with the existing panel decision of the Fourth District in *Flores v. State* [57 So.3d 218 (Fla. 4th DCA 2010)], because in our view the ruling in *Padilla* does not turn on the fact that the Kentucky trial court and plea colloquy failed to include a 'may subject you to deportation' type of warning. It turns on the fact that a 'may' warning is deficient (and is actually misadvice) in a case in which the plea 'will' subject the defendant to deportation. We anticipate that [Fla.R.Crim.P.] 3.172(c)(8) will require an amendment to comport with the holding in *Padilla*." (Emphasis by court.)

The court certified the following questions to the Florida Supreme Court: "1. Does the immigration warning in [Fla.R.Crim.P.] 3.172(c)(8) bar immigration-based ineffective assistance of counsel claims based on the U.S. Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)? 2. If the preceding question is answered in the negative, should the ruling in *Padilla* be applied retroactively?"

**Motion for postconviction relief filed 25 years after alleged misadvice regarding deportation consequences of plea is denied.** *Baxter v. State*, 73 So.3d 333 (Fla. 5th DCA 2011).

Convicted Defendant pleaded guilty to a drug crime. Twenty-five years later Defendant filed a motion for postconviction relief under Fla.R.Crim.P. 3.850. Citing *Padilla v. Kentucky*, Defendant contended that his plea was involuntary because counsel failed to inform him about the deportation consequences of his plea. The court denied the motion.

The Fifth DCA affirmed. Defendant's motion was untimely. "A motion for postconviction relief based on the failure to advise a defendant regarding possible deportation consequences of a guilty plea is held to the same two-year time constraints as other postconviction motions. *State v.*

*Green*, 944 So.2d 208, 218 (Fla. 2006). Further, this Court has held that *Padilla* does not apply retroactively. See *Santiago v. State*, 65 So.3d 575, 576 (Fla. 5th DCA 2011); *State v. Shaikh*, 65 So.3d 539, 540 (Fla. 5th DCA 2011)."

**Court improperly shifted from court to defendant burden to cite to record in postconviction motion.** *Perez-Ocequeda v. State*, 62 So.3d 1228 (Fla. 5th DCA 2011).

Defendant filed a facially sufficient motion for postconviction relief. The court struck the motion because Defendant failed to allege which portions of the record supported his claims. The Fifth DCA reversed. "This was erroneous and an impermissible shifting of the burden from the court to refute the claims with record attachments. A defendant need not cite specific portions of the record to support his claim; rather, the burden is on the court to cite those portions of the record that refute the claim. . . . In fact, the defendant's factual allegations in a rule 3.850 motion must be accepted as true to the extent they are not conclusively refuted by the record." (Citations omitted.)

**Defendant not entitled to evidentiary hearing on postconviction claim that he lied under oath at plea hearing at counsel's direction.** *Polk v. State*, 56 So.3d 804 (Fla. 2d DCA, No. 2D10-2605, 1/28/2011), 2011 WL 252315.

Convicted Defendant filed a postconviction motion alleging that trial counsel was ineffective because he promised a sentence of no more than 20 years if Defendant entered a no contest plea and lied at the plea hearing by telling the judge that no promises had been made. Defendant was sentenced to 90 years. Defendant alleged that he would not have pleaded if he thought such a sentence would be imposed. The postconviction court summarily denied the claim.

The Second DCA affirmed. The DCAs have taken varying approaches regarding allegations of misrepresentation by trial counsel about sentencing. Defendant's claim took the issue "a step farther" by claiming under oath that counsel "promised that his sentence would not exceed twenty years' imprisonment and advised him that in order to achieve this result, he had to tell the judge he had not been promised anything. In short, he claims his lawyer instructed him to lie during the plea hearing. The issue then becomes whether [Defendant] is bound by the answers he gave during the plea colloquy in the face of his own sworn allegation that he was instructed to lie during that plea colloquy." The court answered that Defendant was, indeed, bound by his answers. "We conclude that a defendant should be estopped to receive an evidentiary hearing on a postconviction claim when the basis of the claim is that he lied under oath at the relevant hearing." (Citation omitted.)

Noting a conflict between the Second and Fourth DCAs, the court certified the following question to the Supreme Court as one of great public importance: "May prisoners in postconviction proceedings prevent the answers they gave under oath at plea or sentencing hearings from conclusively refuting their claim by alleging that their attorney instructed them to lie about whether the attorney made any promises before they entered their pleas?"

**"Courts are not required to hold evidentiary hearings on objectively unreasonable postconviction claims," per Fourth DCA**. *Capalbo v. State*, 73 So.3d 838 (Fla. 4th DCA 2011).

Convicted Defendant petitioned for postconviction relief, alleging that he pleaded no contest to murder because defense counsel misadvised him that a claim of self defense was "not applicable" to his situation as a matter of law. His motion was summarily denied.

The Fourth DCA affirmed. The plea colloquy refuted Defendant's "dubious claim that he believed counsel's alleged expert advice that self-defense can be asserted *only if the victim agrees with the defendant*." (Emphasis by court.) An evidentiary hearing on the claim was not required because, under the circumstances, there was no objectively reasonable probability that Defendant would not have pleaded. "Where, under the totality of the circumstances, no objectively reasonable probability of prejudice exists, the claim may be summarily denied. Courts are not required to hold evidentiary hearings on objectively unreasonable postconviction claims."

**Defendant who insisted on speedy trial could not later claim that lawyer ineffective assistance by failing to properly prepare for trial.** *Allen v. State*, 75 So.3d 333 (Fla. 3d DCA 2011).

Convicted Defendant petitioned for postconviction relief alleging that trial counsel provided ineffective assistance by failing to properly prepare. Defendant, however, had insisted on his right to a speedy trial over counsel's objections. The motion was denied.

The Third DCA affirmed. "[T]rial counsel attempted to conduct a reasonable investigation in preparation for trial, but was thwarted by his own client's adamant insistence on a speedy trial. . . A defendant who insists on pursuing a speedy trial against his trial counsel's advice – and with an understanding of the nature and consequences that will follow such a decision – will not later be heard to complain that he received ineffective assistance from trial counsel who failed to adequately investigate and prepare a proper defense."

**Trial counsel was ineffective as a matter of law for relying on sheriff's office webpage rather than underlying source documents.** *Thomas v. State*, 57 So.3d 291 (Fla. 4th DCA 2011).

Defendant's motion for postconviction relief based on counsel's failure to investigate a speedy trial rule violation was denied. The court made the "purely legal conclusion" that trial counsel acted reasonably in relying on information from a non-official sheriff's office webpage and not obtaining any of the underlying source documents that would have corroborated Defendant's claim that she was arrested 223 days before the information was filed.

The Fourth DCA reversed, holding that "counsel performed deficiently in failing to investigate and obtain available official-record information that his client told him existed and would prove she was entitled to discharge."

**Appellate counsel ineffective for not arguing that jury instruction was fundamental error based on conflict among DCAs.** *Lopez v. State*, 68 So.3d 332 (Fla. 5th DCA 2011). (See also *Ferrer v. State*, 69 So.3d 360 (Fla. 2d DCA 2011), and other cases.)

The court gave a jury instruction on the charged crime and lesser included offenses, including manslaughter by act, to which defense counsel did not object. Defendant was found guilty. Lawyer represented Defendant on appeal but did not argue that the jury instruction

constituted fundamental error, as the Fifth DCA had previously held that the instruction was proper. Prior to the filing of the initial appellate brief, however, the First DCA held that the manslaughter by act jury instruction was fundamentally erroneous and certified conflict with the Fifth DCA.

Defendant filed a petition alleging that Lawyer was ineffective for failing to argue that the jury instruction was fundamental error. The Fifth DCA agreed. Although appellate counsel is not required to anticipate changes in the law, "'there are cases that hold that appellate counsel is ineffective for failing to raise favorable cases decided by other jurisdictions during the pendency of an appeal, which could result in a reversal.'" That occurred here and Defendant's appellate lawyer "was tasked with being aware of these matters."

**Rule 3.850 claim based on unpreserved error is not facially sufficient where appellate court found the error did not constitute fundamental error.** *Sheppard v. State*, 62 So.3d 14 (Fla. 3d DCA 2011).

Defendant appealed his conviction, alleging prosecutorial misconduct. The conduct was not objected to at trial, and so the alleged error was unpreserved. The appeals court ruled there was no fundamental error and affirmed. Defendant later moved for postconviction relief, alleging that trial counsel "rendered ineffective assistance of counsel due to his failure to object to prosecutorial misconduct." The postconviction court summarily denied the claim.

The Third DCA affirmed. "In *Chandler v. State*, 848 So.2d 1031, 1046 (Fla. 2003), the Florida Supreme Court stated that '[b]ecause [the defendant] could not show the comments were fundamental error on direct appeal, he likewise cannot show that trial counsel's failure to object to the comments resulted in prejudice sufficient to undermine the outcome of the case under the prejudice prong of the *Strickland* test.'"

**Private lawyer paid by State to represent defendant in capital postconviction case may also represent him pro bono in related non-capital case.** *Melton v. State*, 56 So.3d 868 (Fla. 1st DCA 2011).

The Office of Capital Collateral Regional Counsel (CCRC), northern region, was appointed to represent Defendant in the collateral attack on his capital conviction. When the CCRC office was abolished, Lawyer, a private attorney on the registry of available attorneys, was appointed. Lawyer was paid for this representation with State funds.

Seeking to eliminate an aggravating factor relied on in imposing the death sentence, Lawyer filed a rule 3.850 motion for postconviction relief in another, non-capital case in which Defendant had been convicted. The State filed a motion to remove Lawyer from the 3.850 case "'arguing that, because [Lawyer] was appointed in [Defendant]'s capital case, he could not file a 3.850 motion in another, non-capital case. The trial court agreed, citing section 27.711(11), Florida Statutes (2009), and *State v. Kilgore*, 976 So.2d 1066 (Fla. 2007), even though [Lawyer] had made clear his willingness to represent appellant without charge, which the trial court acknowledged." The court ruled that state-appointed capital counsel may not represent a capital defendant in any other proceedings, regardless of whether or how counsel was paid.

In this case of first impression, the First DCA reversed. F.S. 27.711(11) did not apply where private counsel appears pro bono. Read together with F.S. 27.7002(4), F.S. 27.711(11), "merely

prohibits registry counsel from representing a capital defendant in a non-capital proceeding *at state expense*." (Emphasis by court.)

**Second DCA suggests procedure that trial courts should use to address postconviction claims in light of *Spera v. State*.** *Verity v. State*, 56 So.3d 77 (Fla. 2d DCA 2011).

Defendant filed a Fla.R.Crim.P. 3.850 motion for postconviction relief, alleging 14 grounds. The postconviction court denied all claims except one, and Defendant was given leave to amend within 30 days pursuant to *Spera v. State*, 971 so.2d 754 (Fla. 2007). Defendant amended within the 30-day time limit. The postconviction court then entered a final order denying all claims.

In affirming, the Second DCA concluded that Defendant was foreclosed from asserting *any* of the 14 grounds in another postconviction motion filed before the expiration of the 2-year time limit in Fla.R.Crim.P. 3.850(b). "Once the defendant has been given the opportunity to amend a facially insufficient claim, the final order on the motion is a disposition on the merits of all claims, even if the defendant's attempt to amend the claim results in another insufficiently pleaded ground for relief." (Citations omitted.)

**Conviction reversed due to ineffective assistance of counsel apparent on face of record.** *Benitez-Saldana v. State*, 67 So.3d 320 (Fla. 2d DCA 2011).

The Second DCA took the rare step of reversing a defendant's conviction due to ineffective assistance of counsel that was apparent on the face of the record. Counsel's factual concessions constituted ineffective assistance. Specifically, Lawyer and Client indicated to the court before trial that Client "agreed to the trial strategy of admitting to the commission of a grand theft but denying responsibility for a robbery or burglary with an assault or battery." At trial, however, Lawyer's statements "admitted that the evidence supported the conclusion that a burglary had occurred." The appeals court also observed that "we do not agree that admitting guilt in an attempt to convince the jury to misapply the law or pardon [the defendant] would have been a reasonable trial strategy."

**Conviction reversed for ineffective assistance of counsel that appeals court concluded was apparent on face of record.** *Gordon v. State*, __ So.3d ___, 36 Fla.L.Weekly D2590 (Fla. 3d DCA, No. 3D09-1396, 11/30/2011), 2011 WL 6016913.

Gordon was convicted of crimes including aggravated battery by great bodily harm. On appeal he argued that the court erred in denying his motion for acquittal on this charge because the evidence was insufficient. "Gordon asserts that his trial counsel rendered ineffective assistance of counsel by failing to properly move for a judgment of acquittal based upon the complete absence of evidence to establish the element of great bodily harm, and that such a failure constitutes ineffective assistance of counsel on its face. Gordon concedes that the issue was not properly preserved below and he raises this issue for the first time on direct appeal." The State argued that the ineffective assistance claim should be addressed in a postconviction motion rather than on direct appeal.

The Third DCA reversed and remanded for entry of the lesser-included charge of simple battery. Ineffective assistance claims ordinarily are not reviewable on direct appeal, but there is an

exception for situations where the facts giving rise to the claim are apparent on the face of the record. The appellate court concluded: "This case presents just such a circumstance, and it would serve no purpose to require Gordon to file a postconviction motion where the record necessary to decide the issue is already fully developed." (Footnote omitted.)

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

**Supreme Court clarifies that death-sentenced appellants may not proceed pro se in any postconviction appeals.** *Gordon v. State*, 75 So.3d 200 (Fla. 2011).

The Florida Supreme Court denied a death-sentenced prisoner's motion to discharge appellate counsel and proceed pro se in an appeal from the denial of his successive motion for postconviction relief. The Court also denied his counsel's motion to withdraw. The Court issued an interlocutory opinion to announce its procedure "regarding the issue of pro se representation by appellants in capital postconviction appeals." The Court stated: "Just as we previously held as to direct appeals in capital cases in *Davis v. State*, 789 So.2d 978, 979 (Fla. 2001), we hold that death-sentenced appellants may not proceed pro se in any postconviction appeals."

Death-sentenced appellants have no federal or state constitutional right to pro se appeals from postconviction proceedings. The Court decided, on policy grounds, to "exercise our discretion and make explicit our holding that Gordon and other death-sentenced appellants may not appear pro se in any postconviction appeals." The Court concluded: "Based on our solemn duty to ensure that the death penalty is imposed in a fair, consistent, and reliable manner – as well as our administrative responsibility to work to minimize the delays inherent in the postconviction process – we hold that death-sentenced appellants may not appear pro se in postconviction appeals." (Footnote omitted.)

**Shelter order reversed because trial court did not honor father's right to counsel at hearing.** *A.G. v. Florida Dept. of Children and Families*, 65 So.3d 1180 (Fla. 1st DCA 2011).

Father challenged a shelter order placing his child in the care of the maternal grandfather. The First DCA quashed the order. It had been entered in violation of his due process rights because the trial court did not honor his right to counsel during the shelter hearing. "[T]he trial court should have advised the father of his right to counsel and, depending on his response, should have appointed counsel or obtained a knowing and intelligent waiver before proceeding. Its failure to do so violated the father's due process rights and constituted a clear departure from the essential requirements of the law amounting to a miscarriage of justice." (Footnote omitted.)

**Summarizing the law, postconviction court did not err in denying defendant's motion to discharge counsel and appoint new counsel.** *Jones v. State*, 69 So.3d 329 (Fla. 4th DCA 2011).

Defendant was convicted of a non-capital crime. He moved for postconviction relief under Fla.R.Crim.P. 3.850. The court denied the motion. In affirming, the Fourth DCA summarized a number of legal principles that are relevant to this type of situation (citations are omitted):

-- "A motion for postconviction relief under Rule 3.850 is a civil proceeding challenging a conviction and sentence."
-- "Neither the Fifth nor the Sixth Amendment rights of a criminal defendant apply in postconviction relief proceedings."
-- "A defendant cannot claim ineffective assistance of postconviction counsel."
-- The requirements of *Nelson v. State*, 274 So.2d 256 (Fla. 4th DCA 1973), and *Faretta v. California*, 422 U.S. 806 (1975), which are founded on the Sixth Amendment, do not apply in postconviction relief proceedings. "Some inquiry into the voluntary and intelligent nature of a movant's decision to seek self-representation in postconviction proceedings is typically appropriate, and a movant should be provided a sufficient opportunity to make a record of his or her reasons for seeking discharge of counsel and/or self-representation. Nonetheless, formal *Faretta* and *Nelson* hearings are not required."
-- "In Florida, a non-capital postconviction movant has no absolute constitutional or statutory right to appointed counsel in postconviction relief proceedings."
-- "A postconviction movant has no constitutional right to selfrepresentation at an evidentiary hearing. The postconviction court has discretion as to whether to discharge appointed postconviction counsel, appoint new counsel, or to allow self-representation."

Applying these principles, the appeals court concluded: "The trial court did not abuse its discretion in refusing to discharge appointed counsel and refusing to appoint another postconviction attorney for [Defendant]. [Defendant] failed to show any valid basis for discharging his appointed counsel, and appellant's rambling and incoherent filings, and his unorthodox demands of postconviction counsel, demonstrate that he is substantially unable to abide by procedural rules and substantive law." (Footnote omitted.)

***Faretta* inquiry that did not inform defendant of advantages of having counsel was inadequate; conviction reversed.** *Vega v. State*, 57 So.3d 259 (Fla. 5th DCA 2011).

Defendant "was somehow able to convince a judge to give him six continuances in a case devoid of any real complexity." At Defendant's request his public defender was discharged. The court conducted a *Faretta* hearing. Despite a last-minute attempt to delay the proceedings, the case was tried with Defendant representing himself. Defendant was convicted.

The Fifth DCA reversed, concluding that the trial court's *Faretta* inquiry was inadequate. "Viewed in its totality, the inquiry can be characterized as ensuring that [Defendant] was competent, literate, and generally explaining the trial process. This is inadequate. A defendant cannot make an intelligent, knowing waiver of his right to counsel without being informed of the dangers and disadvantages of self-representation." (Citations omitted.)

**Court must hold *Faretta*-like hearing before exercising discretion to grant or deny request for self-representation in non-capital postconviction matter.** *Freeman v. State*, 65 So.3d 553 (Fla. 2d DCA 2011).

Convicted Defendant filed a motion for postconviction relief based on allegedly newly-discovered evidence. At the evidentiary hearing Defendant told the court that he wished to represent himself. The court denied the request and Defendant's postconviction motion.

The Second DCA reversed. The court erred by not holding a *Faretta*-type hearing after Defendant sought to represent himself. The court explained: "Since the postconviction court must exercise its discretion in determining whether to allow a noncapital postconviction defendant to proceed pro se and since the exercise of that discretion must be informed by the facts and circumstances of the individual case, we hold that a postconviction court must conduct a hearing 'within the rubric of *Faretta*' to determine whether the noncapital postconviction defendant understands the implications of self-representation before it exercises its discretion to either grant or deny that defendant's motion to discharge counsel and proceed pro se." (Citation omitted.)

## LAW FIRMS

**Attorney General lacked authority under FDUTPA to issue investigative subpoena to law firm seeking information on its representation of lenders in mortgage foreclosures.** *Law Office of David Stern, P.A. v. Dept. of Legal Affairs*, __ So.3d ___, 36 Fla.L.Weekly D2732 (Fla. 4th DCA, No. 4D10-4708, 12/14/2011), 2011 WL 6183590.

The Attorney General ("AGO") issued an investigative subpoena to Law Firm, ostensibly pursuant to the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA"). The scope of the investigation extended "to possible unfair and deceptive trade practices, unconscionable acts and/or unfair competition of" Law Firm. The subpoena sought information including: names and addresses of lawyers and law firms used by Law Firm to represent clients; names and addresses of lenders represented by Law Firm; names and addresses of servicing companies used by Law Firm; names of notaries who notarized documents; copies of non-disclosure agreements; and fee and bonus information. Law Firm sought to quash the subpoena, arguing that the AGO "lacked authority under FDUTPA because it was not involved in 'trade or commerce' as defined by the statute." The trial court denied the petition to quash.

The Fourth DCA quashed the subpoena, relying on its prior decision in *Florida Office of Attorney General v. Shapiro & Fishman, LLP*, 59 So.3d 353 (Fla. 4th DCA 2011). In each case, AGO lacked authority under the FDUTPA to issue the subpoena. "Though the subpoena in the instant case states a different purpose – 'deceptive trade practices, unconscionable acts and/or unfair competition' as opposed to 'advertising and marketing practices' – it seeks the same information sought in *Shapiro & Fishman*. Both subpoenas were designed to elicit information regarding the law firm's representation in foreclosure cases. Further, the investigator's testimony confirmed that the [AGO] was investigating the same allegations and complaints as those present in *Shapiro & Fishman*. Just as in *Shapiro & Fishman*, the instant alleged conduct by Law Firm does not constitute 'trade or commerce.'"

## LEGAL MALPRACTICE

**Enforcement of representation agreement clause requiring arbitration of legal malpractice claims is not against public policy, per Second DCA.** *Johnson, Pope, Bokor, Ruppel & Burns, LLP v. Forier*, 67 So.3d 315 (Fla. 2d DCA 2011).

Seller in a real estate deal was a long-time client of Law Firm. A Firm lawyer ("Lawyer") was pressed by Seller to represent Buyer in the closing. The representation agreement that Lawyer prepared included a clause providing that any attorney-client disputes would go to arbitration. Seller waived the conflict, Buyer signed the agreement, and the closing proceeded.

Buyer later sued Lawyer and Law Firm for legal malpractice. Law Firm moved to compel arbitration. The court denied the motion, indicating that Lawyer should have pointed out the arbitration clause to Buyer and making 2 conclusions of law: (1) the arbitration clause was neither substantively nor procedurally unconscionable; and (2) enforcement of the arbitration clause violated the public policy of the State of Florida.

The Second DCA reversed. "We are not aware of any Florida cases holding that it is against public policy for an attorney to include a clause in a legal services contract requiring arbitration of legal malpractice disputes. We are also not aware of any constitutional or statutory provisions prohibiting these agreements on public policy grounds. Although [Buyer] argues that we should affirm the trial court's decision because [Lawyer] breached his ethical duties to provide full disclosure, give candid advice, and avoid conflict when he submitted the arbitration clause to [Buyer] without first explaining the waiver of rights or recommending review by independent counsel, we do not agree. While there are arguably ethical issues that arise in this type of contract, there is currently no Florida Bar Rule which prohibits this sort of agreement." (Citation omitted.)

(Rule 4-1.5(i), adopted subsequently, sets forth requirements that apply when lawyers "make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes.")

**Court erred in denying motion to compel arbitration in legal malpractice case.** *Mintz & Fraade, P.C. v. Beta Drywall Acquisition, LLC*, 59 So.3d 1173 (Fla. 4th DCA 2011).

Former Client sued Law Firm alleging legal malpractice and breach of fiduciary duty. Law Firm moved to compel arbitration in New York based on an arbitration clause in the retainer agreement. The trial court denied the motion to compel arbitration.

The Fourth DCA reversed. The retainer agreement "involves interstate commerce and is governed by the Federal Arbitration Act (FAA)." Florida courts may enforce an arbitration clause in a agreement (such as the parties' retainer agreement) governed by the FAA, and may enforce a choice-of-law provision as long as the law of the foreign state is not in violation of Florida public policy. The court rejected Former Client's contention that the retainer agreement "contravenes Florida public policy against mandatory arbitration of fee disputes in retainer agreements." The court stated: "Arbitration clauses in retainer agreements may be enforceable, but are construed against the attorney and must comply with the Rules Regulating The Florida Bar. See, e.g., *Vargas v. Schweitzer-Ramras*, 878 So.2d 415, 417–18 (Fla. 3d DCA 2004) (construing arbitration clause in retainer agreement against attorney); see also *Feldman v. Davis*, [53 So.3d 1132 (Fla. 4th DCA 2011] (observing that a retainer agreement may not include a mandatory arbitration provision unless that agreement complies with rule 4-1.5(i) of the Rules Regulating The Florida Bar). New York takes a similar approach to fair and fully-disclosed arbitration clauses in retainer agreements and does not contravene the 'strong public policy of Florida.'" (Citation omitted.)

**Law firm may be liable in legal malpractice action for harm to former client occurring *after* firm withdrew from representation.** *Golden Gate Homes, LC v. Levey*, 59 So.3d 275 (Fla. 3d DCA 2011).

Law Firm represented plaintiff Client (an entity) in litigation. Law Firm did not file a witness list or exhibit list, nor did Client respond to interrogatories or a request for production. Client did not comply with a court order requiring responses. A month later and about a month before the trial date, Law Firm moved to withdraw. Withdrawal was granted and the court gave Client 15 days to find new counsel. A week later new counsel entered a conditional notice of appearance, requesting a continuance. Ten days later the court denied the motion for continuance and, thus, Client remained without counsel. The court granted the opponent's motion to dismiss Client's complaint.

Client filed a legal malpractice action alleging that Law Firm's actions during the litigation, together with its late withdrawal, left Client without counsel who could step in and prepare for trial. Law Firm moved to dismiss, contending that it was not the withdrawal "but rather the independent, superseding actions of [Client] and its subsequent counsel that caused whatever losses [Client] claims to have suffered." The court granted the motion to dismiss.

The Third DCA reversed, concluding that whether Law Firm acted negligently and whether such negligence was the proximate cause of harm to Client could not be determined at that point in the case. The fact that Law Firm withdrew "does not necessarily absolve them of any potential liability for subsequent events." The court cited to and discussed the Fourth DCA's decision in *Dadic v. Schneider*, 722 So.2d 921, 923-24 (Fla. 4th DCA 1999). The *Dadic* court had stated: "We recognize that the attorney-client relationship here ended before the ultimate conclusion of the underlying lawsuit. However, while employment is an element, an attorney need not be in privity with the client throughout the entire course of the underlying action."

The Third DCA concluded: "Whether [Law Firm] neglected a reasonable duty and proximately caused [Client]'s loss (and whether the actions of [Client] and successor counsel were an intervening, superseding cause) are, at this stage, questions of fact and not law. We conclude that [Client] pled a viable claim and the trial court erred in dismissing the complaint insofar as it alleges professional malpractice and negligence arising out of the" litigation.

**Legal malpractice claim fails on summary judgment because plaintiff dropped suit against party responsible for damages and thus suffered no redressable harm from lawyer's work**. *KJB Village Property, LLC v. Craig M. Dorne, P.A.*, 77 So.3d 727 (Fla. 3d DCA 2011.

Lawyer represented Clients in negotiating the purchase of a commercial condominium unit. The agreement required Seller to convey a title free and clear of liens or mortgages. Seller delivered a special warranty deed that failed to disclose that the unit was encumbered by a construction loan mortgage. Clients sued Seller and others including the Developer. Clients later dropped the suit against Developer, believing that Developer would be going into bankruptcy.

Clients then sued Lawyer for legal malpractice. Lawyer moved for summary judgment, "arguing that [Clients] could not establish the requisite redressable harm and proximate causation needed to prevail on its malpractice claim." The court entered judgment for Lawyer.

The Third DCA affirmed. For a lawyer to prevail on a motion for summary judgment against a client in a malpractice action, the lawyer must show that the client did not suffer

redressable harm due to the lawyer's work. Lawyer did this. The appeals court "examine[d] the agreement drafted by [Lawyer] to determine whether [Clients] would have been entitled to recover against the Developer under that agreement in the underlying action. [Citations omitted.] If so, [Clients] would not have suffered redressable harm from [Lawyer]'s action and would thus be barred from bringing a legal malpractice action."

The agreement drafted by Lawyer required the Developer to convey marketable title. Developer breached this agreement, and so Clients "would thus have been able to recover against the Developer had they not abandoned their earlier lawsuit against the Developer." The proximate cause of Clients' harm was abandoning the suit to enforce the agreement against the Developer, not the terms in the agreement drafted by Lawyer.

**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.*, __ So.3d ___, 36 Fla.L.Weekly D2782 (Fla. 4th DCA, No. 4D09-4869, 12/21/2011), 2011 WL 6372994.

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 was disbarred for misconduct unrelated to the instant case.

## PROFESSIONALISM

### *Florida Supreme Court:*

**Supreme Court amends the Oath of Admission to the Bar to stress civility.** *In re: Oath of Admission to the Florida Bar*, 73 So.3d 149 (Fla. 2011).

The Florida Supreme Court revised the Oath of Attorney administered to new members of the Florida Bar "to recognize '[t]he necessity for civility in the inherently contentious setting of the adversary process.' *In re Snyder*, 472 U.S. 634, 647 (1985)." (Footnote omitted.) The Court noted that the Code of Professionalism of the American Board of Trial Advocates and the Lawyer's Oath taken by admittees to the South Carolina Bar address this issue. The Court added this phrase to the Florida Oath: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications."

**Supreme Court disbars rather than suspends lawyer who practiced while suspended, with 3 concurring justices criticizing conduct of Bar prosecutor.** *Florida Bar v. Lobasz*, 64 So.3d 1167 (Fla. 2011).

See discussion in "Candor Toward the Tribunal" section.

### *First DCA:*

**Appeals court affirms grant of new trial due to improper argument by defense counsel.** *Linzy v. Rayburn*, 58 So.3d 424 (Fla. 1st DCA 2011).

Plaintiffs sued an employee and his corporate employer for injuries allegedly suffered in an auto accident. Defendants admitted negligence and the case was tried on damages. Motions in limine were filed to exclude any statements concerning insurance, financial status, or ability to pay damages. During his opening statement defense counsel made reference to Mr. Crews, owner of the corporate defendant. Plaintiffs' counsel filed another motion in limine "to exclude defense counsel from making any statements during his closing argument that Mr. Crews would be solely responsible for paying any damages awarded." Defense counsel's closing statement, however, suggested that Mr. Crews would be responsible for the jury's verdict. Following a defense verdict, the court granted Plaintiffs' motion for new trial.

The First DCA affirmed. "[D]efense counsel's statements during his closing argument were improper. Despite the fact that Mr. Crews was not a named defendant in the case and that defense counsel was retained by an insurance company to represent the defendants, defense counsel repeatedly stated that Mr. Crews would be solely responsible for any award of damages. By making such statements, defense counsel misled the jury and improperly attempted to appeal to the jury's sympathy for Mr. Crews, the small business owner he had repeatedly referred to in his opening statement, in order to protect the defendants from a harmful verdict."

## *Second DCA:*

**Second DCA criticizes professionalism of counsel in mortgage foreclosure cases.** *Land Development Services, Inc. v. Gulf View Townhomes, LLC*, 75 So.3d 865 (Fla. 2d DCA 2011).

The Second DCA reversed a summary judgment containing relief that the party neither sought in its motion or requested at the hearing. The court criticized trial counsel's conduct: "[W]e we cannot condone the actions of Gulf View's counsel in including relief in a proposed final judgment that it did not request in its motion or at the hearing." (In a footnote, the court pointed out that "[w]hile members of the same firm, appellate counsel was different from trial counsel").

**Court erred in not awarding 57.105 fees against bank in dismissed mortgage foreclosure case; lawyers' professionalism criticized.** *South Bay Lakes Homeowners Association, Inc. v. Wells Fargo Bank, N.A.*, 53 So.3d 1239 (Fla. 2d DCA 2011).

See discussion in "Fees (Including Attorney's Liens)" section.

## *Third DCA:*

**In unusual case, Third DCA sanctions debtors and their counsel for abusing the legal process in a mortgage foreclosure case.** *JPMorgan Chase Bank, N.A. v. Hernandez*, __ So.3d ___, 36 Fla.L.Weekly D1328 (Fla. 3d DCA, No. 3D10-1099, 6/22/2011), 2011 WL 2499641.

See discussion in "Trial Conduct" section.

**Court criticizes what it euphemistically calls "candor" and "courage" of insurer and its counsel.** *Ramirez v. United Auto Ins. Co.*, 67 So.3d 1174 (Fla. 3d DCA 2011).

Plaintiff was successful in a county court action against an insurer regarding a PIP (personal injury protection) claim. The circuit affirmed but denied Plaintiff's claim for appellate fees. The Third DCA granted Plaintiff's petition for certiorari review because the denial of fees was "directly contrary to the mandatory, non-discretionary requirements of law" under F.S. 627.428.

The appeals court took the opportunity to criticize the conduct of the insurer's counsel. Counsel apparently stated with what the court pointedly referred to as "candor" that if Petitioner's lawyer had contacted the insurer's counsel directly before filing the certiorari petition, the insurer likely would have agreed to a motion for rehearing "because the denial of his appellate attorney's fees was legally erroneous." Instead, the insurer fought the petition. The court remarked that the insurer had what it called the "courage" to "contend that, having sought judicial, rather than telephonic relief, by filing this completely appropriate petition, the [Petitioner] is out of luck."

In a footnote, the court explained its reference to the "candor" and "courage" of insurer and its counsel: "The reader, if any, is invited to substitute her own preferred equivalent expression. See, e.g., *Hayes v. Guardianship of Thompson*, 952 So.2d 498, 509 n.14 (Fla. 2006) (chutzpah); *Zabrani v. Riveron*, 495 So.2d 1195, 1197 n.2 (Fla. 3d DCA 1986) (same); *Price v. Gray's Guard Service, Inc.*, 298 So.2d 461, 464 (Fla. 1st DCA 1974) (intestinal fortitude)."

**Court criticizes counsel's use of discovery in insurance dispute as an attention-getting device.** *General Star Indemnity Co. v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (Fla. 3d DCA 2011).

Insured obtained orders compelling 2 senior officers of Insurer to appear for deposition in a windstorm policy dispute, despite the fact that Insurer filed an affidavit "establishing that these senior officers had no role in the investigation or adjustment" of the claims. (Footnote omitted.)

The Third DCA quashed the orders. "The order departs from essential requirements of law because [Insured] has not shown that the president's deposition is 'reasonably calculated to lead to the discovery of admissible evidence' under Florida Rule of Civil Procedure 1.280. . . . [Insurer] has shown that its president is a manager, not an adjuster or other employee with personal knowledge of the factual disputes involved in the lawsuit." (Citation and footnote omitted.)

The court criticized the conduct of Insured's counsel: "Trial and appellate counsel for the insured are too sophisticated and experienced to believe that a pre-printed signature on a standard form policy would subject the Connecticut-based president of the insurer to a deposition, or that receipt (with 40-plus other members of management) of one loss assessment authored by a field-level employee, warrants a deposition of the recipient before the adjuster has been asked about it. Discovery is intended to be part of the 'just, speedy, and inexpensive' determination of disputes – not a device to get greater attention at an adversary's headquarters." (Footnote omitted.)

**Dissenting opinion criticizes counsel and trial court for alleged ex parte communication as to merits of case**. *Phillips v. Centennial Bank*, __ So.3d ___, 36 Fla.L.Weekly D2316 (Fla. 3d DCA, No. 3D10-2910, 10/19/2011), 2011 WL 4949994.

The Third DCA affirmed a judgment for Bank in a foreclosure case. One judge vigorously dissented "because I cannot condone the unprofessional and unethical means used by the bank's counsel, with the trial court's complicity, to obtain an amended final judgment in this case. Counsel for Centennial Bank admitted at oral argument that the amended final judgment, which more than doubled the amount of the deficiency judgment, was obtained after an ex parte communication with the judge's chambers. Either the judge or her staff then advised counsel on how to proceed. Not only was it improper for the trial court to give legal advice, but the advice was wrong – directing

counsel to send a letter with a proposed amended final judgment, rather than to file a motion seeking appropriate relief. This was then followed by another ex parte communication – a letter from the bank's counsel to the judge, that then resulted in a new final judgment two and half times larger than the previous final judgment. The bank did not even send a copy of the letter to the appellant. Incredibly, the majority of this panel is willing to condone and reward such behavior."

## *Fourth DCA:*

**Prosecutor's closing argument criticized as a "checklist" of improper argument.** *Roberts v. State*, 66 So.3d 401 (Fla. 4th DC 2011).

The Fourth DCA reversed a criminal conviction based on the trial court's failure to inquire into a situation that suggested juror bias. In concluding its opinion, the court criticized the prosecutor's closing argument. "Because we reverse the conviction and sentence for a new trial, we feel it necessary to comment on the prosecutor's closing argument, which was also raised by appellant as a ground for reversal. While some of the prosecutor's remarks may have been a fair reply to defense counsel's arguments, the prosecutor's closing argument was replete with improper comments which offered her opinion as to appellant's guilt, shifted the burden of proof, appealed to sympathy for the accuser, vouched for the accuser's credibility, and invited the jury to base its verdict on which witness the jury thought was most credible. In short, the prosecutor's closing argument reads like a checklist of nearly every form of improper argument under Florida case law. Were we not reversing for a new trial on the jury issue, we may have concluded that the argument was so flawed as to constitute fundamental error."

**Fourth DCA criticizes professionalism of counsel in mortgage foreclosure cases.** *Vilvar v. Deutsche Bank Trust Co. Americas*, __ So.3d ___, 36 Fla.L.Weekly D2779 (Fla. 4th DCA, No. 4D11-457, 12/21/2011), 2011 WL 6373035.

Defendant appealed a non-final order denying her motion to vacate an amended summary judgment of foreclosure. The appeals court found no merit in Defendant's claims. The court criticized the conduct of her counsel and cautioned other lawyers: "We remind counsel of their ethical obligation to know the legal precedent of this Court and to base their legal arguments on that precedent. Where counsel fails to do so and the result is an appeal that is so clearly devoid of merit both on the facts and the law as to be completely untenable, we will not hesitate to impose sanctions pursuant to [Fla.R.App.Proc.] 9.410(a) (2011) and [F.S. 57.105]. See *Sullivan v. Sullivan*, 54 So.3d 520, 522 (Fla. 4th DCA 2010) ('Section 57.105 permits an appellate court to impose appellate attorney's fees for conduct on appeal.') (citation omitted). This appeal comes mighty close to that point. See *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 569 (Fla. 2005) ('[A]llowing appellate courts to impose sanctions . . . will not chill representation, but instead will emphasize that counsels' obligations as officers of the court override their obligations to zealously represent their clients.')."

**Lawyer criticized for "egregiously false" statement in reply brief.** *Pamphile v. State*, 65 So.3d 107 (Fla. 4th DCA 2011).

See discussion in "Candor Toward the Tribunal" section.

## *Fifth DCA:*

**Lawyer ordered to show cause why sanctions should not be imposed for filing improper motion for rehearing.** *Marion v. Orlando Pain & Medical Rehabilitation*, 67 So.3d 264 (Fla. 5th DCA 2011).

Lawyer filed a motion for rehearing with the Fifth DCA following a per curiam affirmance. The statement of facts "contained not a single record reference and many of the facts are unsupported by the record," but did contain a "scandalous description" of the opposing party's conduct. Appellees sought sanctions for the "frivolous and non-compliant motion."

The Fifth DCA ordered Lawyer to show cause why he should not be sanctioned under Fla.R.App.P. 9.410 and F.S. 57.105 (2010). "We have repeatedly admonished the bar regarding the impropriety of motions such as this. . . . Motions for rehearing are not to be used for the purpose of venting counsel's frustrations with the form or substance of the court's decision. . . . They are rarely, if ever, warranted when the decision is without opinion. . . . In this motion, not only does counsel violate this admonition, he does so unabashedly – by admitting that it was his primary purpose in filing the motion. The motion itself completely fails to satisfy any of the requisites of a proper motion of this nature or of any other pleading filed by a professional lawyer for that matter." (Citations omitted.)

**Verdict reversed due to improper argument; court urges professionalism on retrial.** *City of Orlando v. Pineiro*, 66 So.3d 1064 (Fla. 5th DCA 2011).

City appealed a wrongful death verdict won by the estate of a man killed by a car involved in a high-speed police chase. City argued that reversal was warranted due to "numerous improper closing arguments of [plaintiff]'s counsel." The appellate court agreed and reversed, carefully analyzing the objected-to and unobjected-to portions of the closing argument. The court ended its opinion by cautioning: "Such comments cannot be condoned, and we urge vigilant adherence, on retrial, to professional standards during closing argument."

**Lawyer who tried to buy life insurance policy without insurable interest is referred to Florida Bar.** *TTSI Irrevocable Trust v. ReliaStar Life Ins. Co.*, 60 So.3d 1148 (Fla. 5th DCA 2011).

Lawyer also sold insurance. He applied for a life insurance policy on an 85-year old woman ("Insured") for whom he had served as an insurance broker. Lawyer was unrelated to Insured. Insured initially agreed to the arrangement and signed the application for a $370,912 policy. On the application Lawyer listed the beneficiary as "TTSI Irrevocable Trust, K.M. Kern, Trustee" and

described the relationship between Insured and beneficiary as "Family Trust." In reality, there was no relationship at all between Insured and the Trust or the Trustee. The beneficiaries of the Trust were Lawyer and his children.

After the policy was issued and premiums were paid by the Trust, Insured notified the insurance company that she had no knowledge of or relationship with the beneficiary. The insurance company investigated and concluded that the beneficiary had no insurable interest in Insured's life. The company declared the policy "void ab initio as contrary to public policy" and refused to return the premiums to the Trust. The Trust sued to obtain return of the premiums. The trial court held that the policy was void and no premium refund was owed.

The Fifth DCA affirmed. In a footnote, the court stated: "[Lawyer] is also an attorney licensed to practice law in the State of Florida. This court is forwarding a copy of this opinion to The Florida Bar for its consideration."

## PUBLIC OFFICIAL ETHICS AND PUBLIC RECORDS

### *Public Official Ethics:*

**Law requiring counties to pay overhead costs for Offices of Criminal Conflict and Civil Regional Counsel declared unconstitutional.** *Lewis v. Leon County*, 73 So.3d 151 (Fla. 2011).

The Supreme Court affirmed the First DCA's decision that held section 19 of chapter 2007-62, Laws of Florida, violates Fla.Constit. Art. V, Sec.14. The law in question (the "Act") "created a new system of court-appointed counsel to represent indigent defendants, primarily in those cases where the public defender has a conflict of interest" and "established the Offices of Criminal Conflict and Civil Regional Counsel (the 'RCC'), which consist of five offices located within the geographic boundaries of each of the five district courts of appeal." Section 19 amended F.S. 29.008 to include RCC within the term "public defenders' offices." The result was that counties, rather than the state, were required to pay certain overhead costs (e.g., communications services, information systems, facilities costs) of public defenders' offices (now defined to include RCC). Florida counties contended the law was unconstitutional under both Fla.Constit. art. V, sec. 14 and art. VII, sec. 18(a). The trial court ruled for the counties. The First DCA affirmed. *Lewis v. Leon County*, 15 So.3d 777 (Fla. 1st DCA 2009).

The Florida Supreme Court agreed with the lower courts that "the plain language of article V, section 14 provides that the state is responsible for funding the RCC, including the overhead costs outlined in subsection (c)." Subsection (c) states that counties are responsible for the costs of enumerated overhead items incurred by "trial courts, public defenders' offices, state attorneys' offices, and the offices of the clerks of the circuit and county courts." The RCC are "[n]oticeably missing" from this constitutional provision. As a result, section 19 of the Act "violates the constitutional requirement that the state fund overhead costs of all judicial offices that are not expressly listed in article V, section 14(c)."

**Administrative order ruling that state senator violated ethics laws reversed by Fifth DCA.** *Siplin v. Commission on Ethics*, 59 So.3d 150 (Fla. 5th DCA 2011).

A state senator with complimentary tickets to a football game allegedly used his position "to bully a deputy sheriff into permitting him access to a stadium parking lot through a barricaded roadway." Senator was cited for failure to obey traffic laws and, after an unsuccessful appeal, paid the fine. He was then charged by the Florida Commission on Ethics with violating F.S. 112.313(6) (2006): "No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others." An administrative law judge concluded that Senator had violated the statute.

The Fifth DCA, while not approving Senator's conduct, reversed. The statute requires not just that an official misuse his or her position but that the official do so "corruptly." The Commission failed to prove this element of the statute.

**Public officials do not become fact witnesses subject to deposition as a result of investigating a matter before them.** *City of Key West v. Havlicek*, 57 So.3d 900 (Fla. 3d DCA 2011).

A case involving enforcement of City tree protection ordinances was pending before the City's Tree Commission. Respondent sought to depose 3 Commission members. The circuit court entered an order permitting Respondent to take the depositions.

The Third DCA quashed the order. The lower court's "determination is in conflict with [F.S. 286.0115(1)(c)(3)], which provides that '[l]ocal public officials may conduct investigations and site visits and may receive expert opinions regarding quasi-judicial action pending before them' and '[s]uch activities shall not be presumed prejudicial to the action if the existence of the investigation, site visit, or expert opinion is made a part of the record before final action on the matter.'"

## *Public Records:*

**Supreme Court rules that Fla.R.Crim.P. 3.852 and F.S. 27.7081 did not unconstitutionally restrict death-penalty defendant's access to public records**. *Wyatt v. State*, 71 So.3d 86 (Fla. 2011).

Defendant, a prisoner under a death sentence, appealed denial of his motions for postconviction relief. He contended that Fla.R.Crim.P. 3.852 and F.S. 27.7081 (2006) unconstitutionally restricted his access to public records "because both provisions impermissibly mandate that his demand for public records not be 'overly broad or unduly burdensome' and that he make his own search for records." He cited no case law to support his argument. The Court rejected Defendant's contention and affirmed. "We conclude the requirement that a defendant make a diligent search through records already produced and narrow his or her request to provide adequate notice to the agency from which he or she seeks information is reasonable in the context of capital postconviction claims."

**Fourth DCA concludes that an email sent by a city official is not a public record, focusing on whether it was prepared in connection with official business.** *Butler v. City of Hallandale Beach*, 68 So.3d 278 (Fla. 4th DCA 2011).

City's Mayor sent an email from her personal computer using her personal email account. The brief email contained 3 articles that Mayor wrote as a contributor to a local newspaper, and also included 3 attachments: "(1) a transcript of the 2009 State of the City Address; (2) a transcript of Part Two of the State of the City Address; and (3) an article about tax questions raised at prior commission meetings." A citizen made a public records request for the names and email addresses of the recipients. City filed a declaratory judgment action. The trial court ruled that the requestor was not entitled to the requested information.

The Fourth DCA affirmed, and in its opinion the court discussed the public records law (F.S. Ch. 119 (2009)) as it applies to email communications. The Florida Supreme Court has "emphasized that the mere placement of an e-mail on a government network is not controlling in determining whether it is public record, but rather, whether the e-mail is prepared in connection with the official business of an agency and is 'intended to perpetuate, communicate, or formalize knowledge of some type'." (Citations omitted.) The court further observed: "Just as the supreme court concluded that the mere fact that the email was a product of the City's computer network did not automatically make it a public record, the City concedes that the mere fact that Cooper's email was sent from her private email on her own personal computer is not the determining factor as to whether the email was a public record. Once again, it is whether the email was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind."

In the instant case, the City had no role in the Mayor's email and it was "not intended to perpetuate, communicate, or formalize the City's business; it was simply to provide a copy of the articles to [Mayor]'s friends and supporters. The email was not made pursuant to law or in connection with the transaction of official business by the City, or [Mayor] in her capacity as Mayor." Consequently, the email was not a public record under Chapter 119.

**Complaint that facially states cause of action for violation of public records law requires evidentiary hearing.** *Johnson v. Jarvis*, 74 So.3d 168 (Fla. 1st DCA 2011).

Plaintiff brought an action against State Attorney under the public records law, Ch. 119. Plaintiff contended that State Attorney's failure to produce the records at his Lake City office, as Plaintiff requested and where the records ordinarily were used, rather than at the Live Oak location, violated the law. The court granted State Attorney's motion to dismiss, "finding that there had been no refusal to provide the requested records and 'the place, time, and conditions for compliance (providing the records) [was not] *un*reasonable.'" (Emphasis by court.)

The First DCA reversed. The complaint "alleged instances of refusal and facially stated a cause of action under chapter 119. Accordingly, we reverse the order dismissing the complaint and remand for an evidentiary hearing on the merits. . . . On remand, the trial court must determine whether there was a delay to produce the requested records and, if so, whether the delay was reasonable under the facts of this case. The reasonableness of [State Attorney]'s policy itself is not the subject of the inquiry. Rather, the inquiry centers on whether the application of the policy resulted in an unjustified delay that amounted to an unlawful refusal to comply with chapter 119."

## RULES AND ETHICS OPINIONS

**Rule changes generally.**

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

**Some Florida lawyer advertising rules held unconstitutional by federal court.** *Harrell v. Florida Bar*, ___ F.Supp.2d ___ (M.D.Fla., No. 3:08-cv-15-J-34 TEM, 9/30/2011).

See discussion in "Advertising" section.

**Supreme Court amends Florida Rule of Criminal Procedure 3.850 effective July 1, 2011.** *In re: Amendments to Florida Rules of Criminal Procedure 3.850 and 3.851; Amendments to Florida Rules of Appellate Procedure 9.141 and 9.142*, 72 So.3d 735 (Fla. 2011).

Effective July 1, 2011, the Florida Supreme Court amended rules of procedure regarding postconviction proceedings and belated appeals. Changes are summarized below.

Regarding the time limits for seeking postconviction relief in noncapital cases, the Court amended Fla.R.Crim.P. 3.850(b) as follows: "[W]e amend subdivision (b)(1) to include the requirement that any motion under the rule based upon a claim previously unknown to the defendant or his counsel that could not have been ascertained through the exercise of due diligence must be filed within two years of when the facts were or could have been discovered through due diligence. Subdivision (b)(2) adds the requirement that for any motion raising a claim of a fundamental right held retroactive which was not established within the time for seeking postconviction relief, the rule 3.850 motion must be filed within two years of the date of the mandate of the decision announcing retroactivity. Lastly, subdivision (b)(3) adds an additional two-year limitation period to the original period for seeking postconviction relief under the rule for motions alleging that the defendant retained counsel to file a timely rule 3.850 motion and counsel, through neglect, failed to file the motion."

The Court imposed a 50-page limit on postconviction motions in noncapital cases, and set out a procedure for imposing sanctions for filing frivolous or malicious pleadings. See amended rules 3.850(c) and 3.850(m).

The Court also amended the Rules of Appellate Procedure 9.141 and 9.142, relating primarily to belated appeals.

**Florida Bar Board of Governors approves ethics opinion addressing how decedent's lawyer should respond to requests for confidential information.** Florida Ethics Opinion 10-3.

The Board of Governors approved an advisory opinion published by the Professional Ethics Committee. Florida Ethics Opinion 10-3 addresses the ethical issues faced by a lawyer who

represented a decedent, but does not represent the personal representative, and is asked for confidential client information relating to the decedent by someone such as the personal representative, a beneficiary, or an heir.

The headnote summarizes: "A lawyer's ethical obligations regarding a request for confidential information of a deceased client by the personal representative, beneficiaries or heirs-at-law of a decedent's estate, or their counsel, will vary depending on the circumstances. A lawyer may disclose confidential information to serve the deceased client's interests, unless the deceased client previously instructed the lawyer not to disclose the information. Whether and what information may be disclosed will depend on who is making the request, the information sought, and other factors. Doubt should be resolved in favor of nondisclosure. When compelled to disclose information via subpoena, a lawyer must disclose all information sought that is not privileged, and raise privilege as to any information for which there is a good faith basis to do so."

## TRIAL CONDUCT

**In unusual case, Third DCA sanctions debtors and their counsel for abusing the legal process in a mortgage foreclosure case.** *JPMorgan Chase Bank, N.A. v. Hernandez*, __ So.3d ___, 36 Fla.L.Weekly D1328 (Fla. 3d DCA, No. 3D10-1099, 6/22/2011), 2011 WL 2499641.

Debtors were sued by Lender in a mortgage foreclosure case. A judgment was entered for Lender and the court scheduled the foreclosure sale for October 7, 2009. On September 9, 2009, however, Debtors "inexplicably recorded a new, unilateral promissory note which, by its terms, purported to change [Lender] into a borrower and the Debtors into lenders (the 'Unilateral Note')." In the words of the appellate court, the events that followed "are just as mind-boggling as the creation, recording, and filing of the Unilateral Note." Shortly before the rescheduled sale, Debtors filed documents containing notary certification indicating that they were acknowledged before the notary 3 days *after* they were filed in the court record.

Debtors moved to vacate the judgment and cancel the foreclosure sale. At the hearing Debtors and their counsel "managed to convince the trial court that a mere letter of 'tender' and a fabricated Unilateral Note, without payment of any kind, were sufficient to discharge the entire debt owed to" Lender. The court dismissed Lender's complaint with prejudice.

The Third DCA reversed, finding various problems with the actions of Debtors, their counsel, and the trial court. The court remanded with instructions to reinstate Lender's suit and final judgment. Furthermore, the court granted Lender's request for appellate attorney's fees and sanctions under F.S. 57.105, concluding that Debtors' appeal was frivolous.

**Conviction reversed because court abused its discretion in denying motion to substitute counsel and for short continuance.** *Alvarez v. State*, 75 So.3d 420 (Fla. 4th DCA 2011).

Defendant was represented by the public defender's office. He later retained private counsel, Skier, who on the day of trial informed the court that the day before Defendant, who had been represented by the public defender to that point, hired Skier for the matter. Skier noted that he filed a notice of appearance, a motion to substitute counsel, and a motion for continuance and asked

for a 30- to 45-day continuance to work out a plea or prepare for trial. The state objected, stating that it was prepared to go to trial but not asserting that it would be prejudiced by a delay.

The court briefly inquired about the history of the case and then, without further inquiry, denied the motion for substitution. The trial began, with Defendant represented by the public defender. Defendant was convicted.

The Fourth DCA reversed. The trial court erred in denying the motion for continuance. There was no finding that the motion was made in bad faith. The case had been pending for 10 months and set for trial just 2 weeks earlier. There was no evidence of delay by Defendant. The court denied the motion without questioning Defendant about why he wanted to change lawyers and without offering him the option of self-representation. "While the constitutional right to have counsel of one's own choosing represent a defendant at trial may yield to considerations of the administration of justice, not every request to substitute counsel on the eve of trial may sufficiently impact those considerations such that a request may be denied without inquiry and without the court making proper findings to show that the defendant's constitutional right is not being arbitrarily denied. Here, without such findings, we must find that the trial court abused its discretion."

**Motion to disqualify judge for denying continuance and "demeanor" with counsel properly denied as legally insufficient.** *Ramos v. State*, 75 So.3d 1277 (Fla. 4th DCA 2011).

Defendant changed counsel "at least four times" prior to trial. At calendar call on Thursday, with trial set for the following Monday, Defendant's counsel sought a continuance based on "paperwork" problems with the Judicial Administrative Commission over payment for deposition transcripts. The State did not object. The court, however, was determined to start the trial on Monday. On the day of trial, just prior to jury selection, defense counsel told the court about an alleged lack of time to review transcripts. Jury selection went forward and was completed at 8 pm.

The next morning defense counsel moved to disqualify the trial judge, alleging that the failure to grant a continuance "along with [the court's] demeanor with undersigned counsel ha[d] caused the Defendant to reasonably fear that he [would] not get a fair and impartial trial." The court denied the motion as legally insufficient. Defendant was tried and convicted.

The Fourth DCA affirmed. The trial court did not abuse its discretion in denying the motion for continuance. "[Defendant's] own actions and those of his private counsel of choice were responsible for the lack of adequate preparation time, if any." Furthermore, the motion to disqualify the judge was legally insufficient. "[T]he trial court's denial of a continuance is not a sufficient legal ground for judicial disqualification. . . . [Defendant]'s other allegation that the trial judge's 'demeanor with undersigned counsel' had caused him 'to reasonably fear that he [would] not get a fair and impartial trial' was also legally insufficient because [Defendant] failed to specifically describe any facts regarding the trial court's demeanor." (Citations omitted.)

**Court erred in imposing sanctions on party due to conduct of its expert witness.** *State Farm Mutual Auto. Ins. Co. v. Swindoll*, 54 So.3d 548 (Fla. 3d DCA 2011).

See discussion in "Expert Witness" section.

**Court erred in forbidding party from calling any witnesses other than herself and from introducing documents due to her lawyer's conduct.** *Cossio v. Arrondo*, 53 So.3d 1141 (Fla. 3d DCA 2011).

Defendant in a partnership dispute hired a lawyer, who later withdrew because he was listed as a witness. Defendant retained new counsel, who failed to file pretrial materials. The court sanctioned the new lawyer $250 for this conduct. The court also sanctioned Defendant, "precluding her from calling any witnesses other than herself and those listed by [plaintiff] and precluding her from introducing any exhibits into evidence." The case was tried. Defendant appealed from an adverse judgment, contending that the court erred "not only for sanctioning her for the behavior of her attorney, but also for imposing a sanction that far outweighed the wrongdoing at issue."

Agreeing, the Third DCA reversed "because a litigant should not be punished for failures of counsel and because sanctions imposed for failure to comply with an order such as that involved here should be commensurate with the wrongdoing[.]" The court observed: "The record in this case does not show that [Defendant] was in any manner responsible for her attorney's non-compliance with the trial court's pretrial order. Indeed, the order precluding [Defendant] from calling witnesses and introducing exhibits expressly sanctions [Defendant]'s attorney for his failure to comply with the court's pretrial order. It does not suggest any wrongdoing on [Defendant]'s part . . . The sanction was one of the harshest sanctions that could have been imposed, effectively preventing [Defendant] from presenting her case."

## TRUST ACCOUNTS

**Lawyer disbarred for multiple trust account violations.** *Florida Bar v. Mirk*, 64 So.3d 1180 (Fla. 2011).

See discussion in "Disciplinary Proceedings" section.

**Supreme Court suspends lawyer for 3 years rather than 90 days; confidentiality gives way to fiduciary obligations when holding money in trust for non-client.** *Florida Bar v. Watson*, 76 So.3d 915 (Fla. 2011).

See discussion in "Confidentiality and Privileges" section.

## UNAUTHORIZED PRACTICE OF LAW

**Florida Supreme Court amends Rules of Judicial Administration regarding withdrawal motions, pro hac vice admissions, electronic filing, and electronic testimony.** *In re: Amendments to the Florida Rules of Judicial Administration*, 73 So.3d 210 (Fla. 2011).

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

**Supreme Court disbars rather than suspends lawyer who practiced while suspended, with 3 concurring justices criticizing conduct of Bar prosecutor.** *Florida Bar v. Lobasz*, 64 So.3d 1167 (Fla. 2011).

See discussion in "Candor Toward the Tribunal" section.

**Fourth DCA reverses order striking pro se petition for administration in probate matter**. *Lituchy v. Estate of Lituchy*, 61 So.3d 506 (Fla. 4th DCA 2011).

The deceased's husband filed a pro se petition for formal administration of her estate. The court denied the petition because petitioner was not represented by counsel. The Fourth DCA reversed. "[T]he petition states that the appellant is his wife's sole beneficiary. Thus, he is entitled to file the petition without the necessity of an attorney. See Fla.Prob.R. 5.030(a) ('Every guardian and every personal representative, unless the personal representative remains the sole interested person, shall be represented by an attorney admitted to practice in Florida.') (emphasis added [by appeals court]); *Benedetto v. Columbia Park Healthcare Sys.*, 922 So.2d 416 (Fla. 5th DCA 2006)."

## WITHDRAWAL

**Fifth DCA denies motion to withdraw from appellate proceeding on ground of "irreconcilable differences."** *Benenati v. Chase Home Finance, LLC*, 70 So.3d 600 (Fla. 5th DCA 2011).

In an "over one-year-old appeal from an attempted collateral attack on a foreclosure judgment entered in 2008" Appellants' counsel sought to withdraw by filing a "Notice of Withdrawal of Appearance as Local Co-Counsel." The motion failed to give the reasons for withdrawal (stating only "irreconcilable differences have arisen"), did not request court permission to withdraw as required by Fla.R.App.P. 9.440(b), and did not indicate that it was served on the client. The Fifth DCA denied the motion for failure to comply with the rule. The court also "disapprove[d] the stated reason for withdrawal by Attorney [] given the vague nature of the request, the fact that briefing has been closed for many months, and that no oral argument was requested."

**Court erred in denying motion to withdraw filed by lawyer who was not being paid.** *Roth v. Cortina*, 59 So.2d 163 (Fla. 3d DCA 2011).

Lawyer represented Former Husband in contested post-dissolution of marriage proceedings. Months later Lawyer moved to withdraw on the ground that he had not been paid any fees, including a temporary fee that was supposed to have been paid by Former Wife. The court denied the motion.

The Third DCA reversed the order denying Lawyer's motion to withdraw. There was no showing that Former Husband could not proceed pro se. "Moreover, counsel wanted to, and was

fully justified in wanting to, terminate the relationship. As the record confirms, [Former Wife] was ordered to pay a temporary fee award to [Former Husband]. She has never done so. The record also confirms that [Former Husband]'s counsel has never been paid for any of his work and that there appeared to be no sign that an end to the litigation was imminent. As the court in *Fisher v. State*, 248 So.2d 479, 486 (Fla. 1971), observed: 'We hold that in a civil case any attorney of record has the right to terminate the attorney-client relationship and to withdraw as an attorney of record upon due notice to his client and approval by the court. Approval by the court should be rarely withheld and then only upon a determination that to grant said request would interfere with the efficient and proper functioning of the court.'"

**Criminal conviction reversed because court abused its discretion in denying motion to substitute counsel and for short continuance.** *Alvarez v. State*, 75 So.3d 420 (Fla. 4th DCA 2011).

See discussion in "Trial Conduct" section.