2014 FLORIDA LEGAL ETHICS REVIEW

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Lawyers are busier than ever. Many things compete for their time and attention. Throughout it all, lawyers must remain on top of developments in their own fields of practice – and must stay abreast of changes in legal ethics, which can affect all lawyers. These materials are designed to help lawyers learn about significant developments in Florida legal ethics. The summaries of rule changes, cases, and ethics opinions highlight developments that occurred during 2014. The summaries are arranged by subject.

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

Subjects addressed in this *Florida Legal Ethics 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 withdraws "Guidelines for Advertising Past Results" after federal court finds them unconstitutional. *Rubenstein v. Florida Bar*, __ F.Supp.2d __ (S.D. Fla., No. 14-CIV-20786-BLOOM/Valle, 12/9/2014), 2014 WL 6979574.

The U.S. District Court for the Southern District of Florida granted summary judgment in favor of a lawyer who sued the Florida Bar seeking to invalidate the "Guidelines for Advertising Past Results" adopted by the Bar's Board of Governors in December 2013. In May 2013 the Supreme Court approved Bar-proposed rules allowing lawyers to advertise past results (as well as testimonials). See Rules of Professional Conduct 4-7.13(b)(2) and 4-7.14 (adopted in *In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules*, 108 So.3d 609 (Fla. 2013). The Bar's adoption of the "Guidelines" months later, however, effectively banned past results from "indoor and outdoor display and radio and television media."

The court ruled that the Guidelines' application of the rules "to completely prohibit the use of past results in attorney advertising in indoor and outdoor display, television and radio media, contained in the section of the Guidelines titled 'Unacceptable Media,' is UNCONSTITUTIONAL in violation of the First Amendment to the United States Constitution." Accordingly, the court enjoined the Bar "from enforcing Rules 4-7.13 and 4-7.14 to completely prohibit all reference to past results in attorney advertising in indoor and outdoor display, television and radio media."

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

In December 2013 the Board of Governors adopted "Guidelines for Advertising Past Results." The Board revised the "Guidelines" in February 2014.

Under the "Guidelines," website advertising could include references to past results, but the Guidelines mandate how those results could be used. If an ad indicated that a client received a specific dollar amount, the ad could list only the "net amount" received by the client (after deductions for attorney's fees and litigation-related expenses, but without subtracting medical expenses reimbursed to or paid on behalf of the client). If the ad included a dollar amount not linked to a specific client, it had could be the "gross amount" before deductions (along with the disclaimer "Before deduction for attorneys' fees and expenses.").

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

The Guidelines prohibited advertising "collective or aggregate results" under the rationale that they are inherently misleading under Rule 4-7.13.

Supreme Court approves most rule changes requested by Florida Bar, including revisions to rules governing conflicts and paying witnesses, but rejects proposal to further restrict

activities of suspended and disbarred lawyers. *In re: Amendments to the Rules Regulating The Florida Bar (Biennial Report)*, 140 So.3d 541 (Fla. 2014) (revised opinion).

Responding to a petition filed by the Florida Bar in October 2012, the Supreme Court approved all but one of the Bar's requested rule changes to the Rules Regulating The Florida Bar effective June 1, 2014. Notable changes are summarized below.

Rule 4-1.7(d) (conflicts, current clients). As amended, this rule clarifies that lawyers related by "blood, adoption, or marriage" as a parent, child, sibling, or spouse must not represent conflicting interests without the clients' informed consent. The Court also directed the Bar "to study the rule further and consider whether the current categories should be broadened beyond parent, child, sibling, and spouse to include other significant relationships."

Rule 4-1.9, Comment (conflicts, former clients). This example of misuse of confidential information concerning a former client was deleted from the Comment to Rule 4-1.9: "For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce."

Rule 4-3.4(b) (paying witnesses). This rule now allows lawyers to pay non-expert witnesses for "*time spent* preparing for, attending, or testifying at proceedings" (new language italicized). The amendment may broaden the ability of lawyers to pay witnesses; the former rule only allowed "reimburse[ment] . . . for preparing for, attending, or testifying" at proceedings.

Rule 5-1.2(c) (trust accounting). Every firm with more than one lawyer must have a written plan for compliance with trust accounting rules, and this plan must be "disseminated to each lawyer in the firm." This new rule also sets out requirements for reporting trust account problems within the firm and, if a satisfactory response is not received, to the Bar.

REJECTED proposal; Rule 3-6.1 (activities of suspended/disbarred lawyers). The Bar asked the Court to amend Rule 3-6.1 to prohibit suspended or disbarred lawyers "from representing clients in administrative proceedings and before administrative agencies which allow nonlawyer agents or 'qualified representatives' to represent clients in certain circumstances." The Court rejected this proposal, concluding that the Court does "not have the authority to prohibit a lawyer from doing non-legal work."

Supreme Court adopts minimum standards for lead counsel in capital postconviction proceedings and prohibits defendants sentenced to death from representing themselves in postconviction proceedings. *In re: Amendments to the Florida Rules of Judicial Administration; the Florida Rules of Criminal Procedure; and the Florida Rules of Appellate Procedure – Capital Postconviction Rules*, 148 So.3d 1171 (Fla. 2014).

See discussion in "Ineffective Assistance of Counsel" section.

Bar asks Supreme Court to approve proposed rules on diversion in discipline cases, attorney's fees, confidentiality obligations and exceptions, duties to prospective clients, supervision of nonlawyer assistants, unauthorized practice of law, lawyer referral services, and others.

On October 28, 2014, the Florida Bar made its biennial filing asking the Supreme Court to approve changes to the Rules Regulating The Florida Bar. The Bar divided the proposals into 4

separate petitions. The "Biennial" petition (SC14-2088) deals with "rules that the bar believes may require more consideration and reflection by the Court." The "Housekeeping" petition (SC14-2107) deals with editorial and stylistic changes. The "Rule 4-1.5" petition (SC14-2112) proposes changes to the rule governing attorney's fees and costs. The "Rule 4-7.22" petition proposes changes to the rule regarding lawyer referral services.

Copies of the petitions and related materials are on the Supreme Court's website. Below is a *sunEthics* summary of significant proposals.

Rule 3-5.3(c) (expansion of diversion of disciplinary cases). Currently a lawyer may have only one case every 7 years diverted out of the disciplinary system to a practice and professionalism program (e.g., advertising school, trust accounting school). This proposed amendment would expand the use of diversion by changing the limit to one case every 5 years "for the same type of rule violation." A second diversion for a different type of violation, however, could not occur until one year after the initial diversion.

Rule 4-1.5(e)(2) (defining types of fees and their trust account treatment). This proposed amendment defines "retainer," "flat fee," and "advance fee." A "retainer" is a payment to secure a lawyer's availability; it is not payment for past or future services. A "flat fee" is a payment for all legal services to be provided in a representation. An "advance fee" is a payment given before services are rendered and held in trust to be billed against when the services are provided. Retainers and flat fees may be made nonrefundable by agreement with the client; such fees belong to the lawyer on receipt and so do not go into the trust account. The Comment to Rule 4-1.5 notes that nonrefundable fees remain subject to the prohibition against excessive fees.

Rule 4-1.5(f)(4)(E) (extraordinary lien and subrogation resolution services). This is the second proposal for a rule to allow the "primary" lawyer in a personal injury or wrongful death case to bring in another lawyer to handle "extraordinary" lien or subrogation resolution services for a separate fee. The primary lawyer cannot share in the fee charged by the lawyer handling the lien or subrogation services. The fee charged by the other lawyer for lien or subrogation services does not count against the maximum continent fee cap mandated by Rule 4-1.5(f), but written client consent must be obtained if the combined fees would exceed the fee schedule applicable to the primary lawyer's fee. The Comment notes that the primary lawyer has an obligation to handle these matters in ordinary cases.

Rule 4-1.5, Comment (contingent fees in domestic relations cases). This proposal clarifies that, in domestic relations matters, any "bonus provision or additional fee to be determined at a later time and based on results obtained" violates the ban on contingent fees in domestic relations cases.

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

Rule 4-1.6(e) (inadvertent disclosure of confidential information). This new provision requires a lawyer to make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or

unauthorized access to, confidential information. The Comments discusses factors to be considered in determining whether the lawyer has acted reasonably under the circumstances.

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

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

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

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

Rule 4-7.22 (lawyer referral services). This proposal adds requirements that apply when lawyers participate in lawyer referral services. It resulted from recommendations by the Bar's Special Committee on Lawyer Referral Services and mostly relates to private (i.e., not bar-sponsored) referral services. A lawyer may not accept referrals from a lawyer referral service unless: the service does not require, or economically pressure, lawyers to refer clients to anyone for other services (e.g., medical services); and does not use a misleading name (e.g., one indicating that the service can provide legal services). Lawyers who accept referrals from a lawyer referral service must: designate a lawyer in the firm responsible for answering Bar inquiries; pay an administrative fee to the Bar; not make initial contact with a prospective client referred by the service in violation of advertising or solicitation rules; not refer clients to anyone in exchange for referrals from the service; not accept referrals that interfere with the lawyer's independence of professional judgment; not refer clients to the service or its owners without complying with conflict of interest rules; and provide written disclosure to clients that they were referred from the service and, if the lawyer paid to receive referrals, provide written disclosure of that fact.

CASES AND ETHICS OPINIONS (BY SUBJECT)

ADVERTISING

Florida Bar withdraws its "Guidelines for Advertising Past Results" after a federal court finds them unconstitutional. *Rubenstein v. Florida Bar*, __ F.Supp.2d __ (S.D. Fla., No. 14-CIV-20786-BLOOM/Valle, 12/9/2014), 2014 WL 6979574

See discussion in "Rule Changes" section.

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

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

Law firms file federal challenges to Board's "Guidelines for Advertising Past Results."

Federal suits were filed in Florida's Southern District and Middle District by law firms that wished to continue advertising past results in radio, television, and billboard ads. The suits alleged that the "Guidelines for Advertising Past Results" adopted in December 2013 by the Board of Governors unconstitutionally restrict the plaintiffs' First Amendment rights and seeks to enjoin enforcement of the Guidelines.

ATTORNEY-CLIENT RELATIONSHIP

Reversing Third DCA, Supreme Court applies "hot potato rule" in disqualifying lawyers for violating conflict of interest rules (even though lawyers were not "direct counsel" for some affiants who supported disqualification). *Young v. Achenbauch*, 136 So.3d 575 (Fla. 2014).

See discussion under "Conflicts of Interest" section.

Supreme Court denies motion to withdraw filed by lawyer representing convicted criminal defendant who wants to argue for death sentence. *Robertson v. State*, 143 So.3d 907 (Fla. 2014).

See discussion in "Withdrawal" section.

Settlement agreement conditioned on former client's withdrawal of Bar complaint is unenforceable term that is not severable from purported agreement. *Jaffe v. Guardianship of Jaffe*, 147 So.3d 578 (Fla. 3d DCA 2014).

Lawyer Carr represented Jaffe in setting up a limited guardianship to bring a probate action against an estate. Jaffe hired Carr to handle the probate case on a contingent fee basis. There was no fee agreement regarding the guardianship work done by Carr.

After settling the probate case, Jaffe discharged Carr. Carr billed Jaffe the guardianship work, which prompted Jaffe to file a complaint with the Florida Bar. The parties tried to negotiate a settlement, "but when Jaffe refused to withdraw the Florida Bar complaint as a condition of the settlement, the negotiations broke down." The court awarded fees to Carr.

The Third DCA affirmed. Jaffe argued that the portion of the purported agreement regarding withdrawal of the Bar complaint was "severable so as to render the remainder an effective agreement." The court disagreed. "[A]n agreement conditioned upon withdrawal of a Florida Bar complaint is unenforceable." (Citations omitted.) The offending provision was not severable "because the illegal term went to the essence of the settlement." (In a footnote, the court pointed out that attempting to negotiate a settlement conditioned on withdrawal of a Bar complaint is improper as conduct prejudicial to the administration of justice in violation of Rule 4-8.4(d).)

Lawyer who is "too personally involved with the issues" in client's case may violate ethics rules regarding competence and independence of professional judgment. *Lieberman v. Lieberman*, __ So.3d __ (Fla. 4th DCA, No. 4D14-509, 11/26/2014), 2014 WL 6674733.

See discussion in "Conflicts of Interest" section.

Second DCA indicates that one party had no standing to challenge authority of lawyer who appeared for opposing party. *Trans Health Management Inc. v. Nunziata*, __ So.3d __ (Fla. 2d DCA, Nos. 2D12-764, 2D12-809, 2D12-810, 2D12-2102, 12/19/2014), 2014 WL 7202711.

See discussion in "Candor Toward the Tribunal" section.

CANDOR TOWARD THE TRIBUNAL

Lawyer's failure to confess error regarding scope of disqualification order against opposing counsel treated as "self-evident violation" of Rule 4-3.3(a)(3) and results in sanctions. *Lieberman v. Lieberman*, __ So.3d __ (Fla. 4th DCA, No. 4D14-509, 11/26/2014), 2014 WL 6674733.

See discussion in "Conflicts of Interest" section.

Second DCA indicates that one party had no standing to challenge authority of lawyer who appeared for opposing party. *Trans Health Management Inc. v. Nunziata*, __ So.3d __ (Fla. 2d DCA, Nos. 2D12-764, 2D12-809, 2D12-810, 2D12-2102, 12/19/2014)), 2014 WL 7202711.

In the consolidated appeal of cases involving orders purporting to affect parties as well as non-parties, the Second DCA stated the following concerning a party's effort to strike a lawyer's notice of appearance for an opposing party: "[The trial court . . . also struck Attorney Rydberg's notice of appearance based on its conclusion that Attorney Rydberg had no authority to represent THMI. However, the Estate provided no Florida case law in the trial court – nor does it provide any here – that would support the notion that it had standing to challenge the authority of an attorney who appears on behalf of the opposing party. Given that an attorney's time is money, we find it almost inconceivable that an attorney would jump into the fray of complex litigation without the authority of the client whom he or she claims to represent. Further, we note that an attorney's obligation of candor as an officer of the court would generally preclude an attorney from purporting to represent a party without actually having the authority to do so. In light of these financial and ethical restraints, we are unwilling to create precedent that would allow parties to challenge the authority of their opponent's counsel."

COMMUNICATION

Court erred in denying post-trial motion for interviews of jurors who failed to disclose litigation history. *Pembroke Lakes Mall Ltd. v. McGruder*, 137 So.3d 418 (Fla. 4th DCA 2014).

The jury found for Plaintiff in a slip and fall case. Defendants filed a post-verdict motion asserting that the court erred in denying their motion to interview 4 jurors who answered "no" when asked during voir dire whether they or any family members ever participated in a suit. In reality, each of the jurors was involved in prior civil litigation.

The Fourth DCA reversed and remanded to allow Defendants to interview 3 of the 4 jurors. Defendants satisfied the 3-part test of *De La Rosa v. Zequeira*, 659 So.2d 239 (Fla. 1995), which applies when the basis of the juror interview motion is alleged non-disclosure of information during voir dire. The moving party must show: "(1) The concealed information was relevant and material to jury service in the case; (2) The juror concealed the information during questioning; and (3) The failure to disclose the information was not attributable to the complaining party's lack of diligence."

The non-disclosed information was relevant and potentially material to the slip-and-all case; 3 of the 4 jurors' litigation involvement occurred in the past 4 years, and one of the jurors was in a personal injury suit. The jurors clearly concealed the information sought. The jurors flatly answered "no" when asked about litigation history, and so counsel was not required to follow up.

Additionally, the trial court failed to hold a hearing as required by Fla.R.Civ.P. 1.431(h), which has been interpreted to "require the court to hold a hearing before denying the motion to interview jurors, at least if the motion is facially valid."

CONFIDENTIALITY AND PRIVILEGES

Supreme Court rejects constitutional challenges to portions of the "Timely Justice Act of 2013" concerning conflicts of interest and constitutionally deficient representation. *Abdool v. Bondi*, 141 So.3d 529 (Fla. 2104).

See discussion in "Conflicts of Interest" section.

Reversing Third DCA, Supreme Court applies "hot potato rule" in disqualifying lawyers for violating conflict of interest rules (even though lawyers were not "direct counsel" for some affiants who supported disqualification). *Young v. Achenbauch*, 136 So.3d 575 (Fla. 2014).

See discussion under "Conflicts of Interest" section.

Per Second DCA, client's fee arrangements with lawyer protected by attorney-client privilege. *Tumelaire v. Naples Estates Homeowners Ass'n, Inc*., 137 So.3d 596 (Fla. 2d DCA 2014).

Tumelaire was litigating with the homeowners association ("HOA") for the mobile home park in which she lived. Tumelaire sought items from the HOA, which asserted that she was not entitled to them because she was acting as the park owner's agent. The HOA moved to compel disclosure of Tumelaire's fee arrangements with her lawyer and her accountant. Tumelaire moved for protective order "to prevent the HOA from asking her questions about who was paying her legal and accounting fees and how she came to hire her attorney." The court granted the motion to compel disclosure of the fee arrangements.

The Second DCA quashed the order, rulng that the information was protected by attorney-client privilege. Under F.S. 90.502(2), "'[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.' 'The identity of a client and payment of a fee appear to be within the ambit of the statutory privilege and are not expressly or impliedly excluded exceptions.' . . . Thus, 'such matters are intended to be confidential and do constitute confidential communications.' *Id*. Billing records also contain information covered by attorney-client privilege." (Citations omitted.)

Third DCA upholds order requiring production of law firm's trust account wire receipt records over attorney-client privilege objections. *Sweetapple, Broeker & Varkas, P.L. v. Simmon*, ___ So.3d __ (Fla. 3d DCA, No. 3D14-1543, 10/29/2014), 2014 WL 5462531.

Judgment Creditor obtained judgments against Law Firm's client. Judgment Creditor subpoenaed Law Firm seeking wire receipts for transfers by the client of money into and out of Law Firm's trust account. Law Firm argued that the records were protected by the attorney-client privilege. After reviewing the wire receipts, the court ordered them produced.

The Third DCA dismissed Law Firm's petition for writ of certiorari for lack of jurisdiction; the records were not privileged and thus their production would not constitute irreparable harm. Because the financial information in the wire receipts "is not privileged in the hands of the client, it is not privileged in the hands of the attorney."

Whether offer of judgment was made in good faith is based on objective criteria, and claim for fees based on offer does not waive attorney-client privilege or work product protection. *Butler v. Harter*, __ So.3d __ (Fla. 1st DCA, No. 1D14-1342, 12/2/2014), 2014 WL 6755985.

In an auto accident case, defendant ("Petitioner") made a proposal for settlement to plaintiff ("Respondent") that was not accepted. After a favorable verdict, Petitioner moved for fees and costs pursuant to F.S. 78.79. Her motion included itemized invoices, as well as an affidavit from one of the attorneys of record stating that the invoices were correct and that the costs and fees were necessarily incurred.

Respondent moved to compel discovery of Petitioner's entire litigation file, arguing that access to the file was necessary in order for her to determine whether the offer was made in good faith. Respondent also asserted that attorney-client privilege was waived by the filing of the supporting affidavit. The court granted the motion to compel, concluding that Petitioner "waived attorney-client privilege by her attorney's filing of the affidavit, which was tantamount to testifying" and that "a party cannot claim work-product privilege in connection with a claim for recovery of attorney fees."

The First DCA granted the petition for writ of certiorari, stating: "We find the trial court's rulings that the petitioner waived attorney-client privilege by filing an affidavit in support of a request for attorney's fees, and that a party cannot claim work-product privilege in connection with a claim for recovery of attorney's fees, constitute clear departures from the essential requirements of law which cannot be remedied on appeal."

Whether or not an offer is made in good faith is determined by objective criteria, and does not require disclosure of privileged communications. The affidavit supporting the fee motion was not a waiver of attorney-client privilege; hours expended and the hourly rate are not privileged information. Finally, the trial court erred in finding that work product privilege cannot be asserted in connection with an attorney's fee claim.

Court erred in ordering production of privileged documents based on crime-fraud exception without first holding evidentiary hearing. *Merco Group of the Palm Beaches, Inc. v. McGregor*, __ So.3d __, 39 FLW D1594 (Fla. 4th DCA, No. 4D14-696, 7/30/2014), 2014 WL 3729906.

Seeking discovery in aid of execution, Plaintiffs served third-party subpoenas for documents on Merco's counsel. Merco objected on grounds including attorney-client privilege. The court inspected the documents in camera, then held a hearing on relevance. The court ordered production of the documents without a further hearing, ruling that "the record showed prima facie evidence that Merco 'used its attorney/client relationship with [its lawyers] to promote an intended or actual fraud on the Plaintiffs and upon the Court in an effort to conceal assets' which were otherwise discoverable."

The Fourth DCA quashed the order, stating that "due process requires an evidentiary hearing when the crime-fraud exception is invoked." Evaluating whether the crime-fraud exception applies "requires an adversarial proceeding that would allow both parties to present evidence and argument." The evidentiary hearing is to take place "after the court determines that the prima facie showing of the crime-fraud exception has been established." The trial court departed from the essential requirements of law in ordering production of the documents without holding an evidentiary hearing at which Merco would have an opportunity to "explain the documents and why the fraud exception should not apply."

Due to qualified litigation privilege, Fourth DCA affirms dismissal of defamation counterclaim that arose out of statements made to potential witness. *Pomfret v. Atkinson*, 137 So.3d 1161 (Fla. 4th DCA 2014).

Atkinson sued Pomfret for repayment of $2 million, suggesting in the suit that Pomfret defrauded him. Pomfret counterclaimed for defamation and breach of fiduciary duty. Atkinson moved for directed verdict on the defamation claim that was based on his conversations with a potential witness in which Atkinson allegedly called Pomfret a "crook." Atkinson explained that he called the witness to tell him to prepare for his upcoming deposition and to suggest that the witness, to whom Pomfret had loaned money, should seek repayment. The court granted a directed verdict.

The Fourth DCA affirmed per curiam, citing to *DelMonico v. Traynor*, 50 So.3d 4 (Fla. 4th DCA 2010), concerning an absolute litigation privilege. The Supreme Court subsequently quashed *Delmonico* and ruled that the absolute privilege does not extend to defamatory statements made by a lawyer "during ex-parte, out-of-court questioning of a potential, nonparty witness in the course of investigating a pending lawsuit." *DelMonico v. Traynor*, 116 So.2d 1205, 1209 (Fla. 2013). Rather, there is a qualified privilege.

On remand, the Fourth DCA again affirmed. To overcome the qualified privilege, a plaintiff must prove that the statements were false and uttered with common law express malice – that is, that the defendant's primary motive in making the statements was the intent to injure the plaintiff's reputation. Pomfret failed to carry this burden. Atkinson's statement was related to the subject of inquiry in the suit. "Pomfret did not show that Atkinson was motivated *primarily* by a desire to harm Pomfret's reputation, as opposed to being motivated by the legitimate purpose of warning Cannavo to get his money back from Pomfret." (Emphasis by court.)

Law firm's defamation suit against former partner dismissed as barred under absolute litigation privilege, notwithstanding non-disparagement agreement. *James v. Leigh*, 145 So.2d 1006 (Fla. 1st DCA 2014).

Lawyer sought to set aside a martial settlement agreement with his former wife, alleging in filings that the agreement was entered into "based on the belief that [Lawyer]'s law partner would be disciplined for misconduct, allowing [Lawyer] to maintain his income by assuming control of the firm or starting a new firm and taking his existing clients with him." Lawyer's partner, however, was not disciplined; instead, the charges were dismissed and Lawyer was fired from the firm. His income dropped substantially as a result.

These statements by Lawyer in his divorce case led the former partner and law firm to sue Lawyer for defamation and breach of a non-disparagement agreement. Lawyer moved to dismiss, asserting that the absolute litigation privilege protected his statements. The motion to dismiss was denied because "applicability of the privilege was not clear from the face of the complaint."

The First DCA reversed. Courts "have not imposed a strict relevancy test in determining whether a statement made during the course of a judicial proceeding is entitled to immunity so long as the statement 'has some relation to the proceeding.'" (Citations omitted.) That standard was met. Lawyer's statements had some relation to his divorce proceeding because they attempted to explain why he entered into the marital settlement agreement based on the mistaken belief that his partner would be disciplined for misconduct, allowing him to maintain his income. Accordingly, the statements were absolutely privileged.

The appeals court rejected the plaintiffs' argument that Lawyer had waived the litigation privilege by entering into a non-disparagement agreement with the law firm.

Handwritten draft answers to interrogatories delivered by client to her lawyer are attorney-client privileged communications. *Montanez v. Publix Super Markets, Inc.*, 135 So.3d 510 (Fla. 5th DCA 2014).

Montanez sued Publix for a slip and fall. At her deposition she was asked about answers to a particular interrogatory. She responded that she signed the answers but the answer in question was not provided by her. Publix served a request for production seeking Montanez' original, handwritten responses to the interrogatories. The court ruled that Publix was entitled to see the draft answers because Montanez "revealed and placed her answers at issue during her deposition." Despite Montanez' filing of a blanket privilege log covering the entire document, the court ordered its production.

The Fifth DCA quashed the order. Citing F.S. 90.502(1)(c), the court ruled that the handwritten draft answers to interrogatories Montanez gave to her lawyer were privileged attorney-client communications. "Although signed and verified answers to interrogatories served on an opposing party are obviously intended to be disclosed to a third person, we reject Publix's suggestion that a client's unsigned and unverified draft answers, submitted directly to that client's lawyer for review, are likewise intended to be disclosed to others. Indeed, an attorney's role will often include assisting a client in the preparation of interrogatory answers, so as to best advance the client's interest while complying with all applicable legal and ethical requirements."

After motion for protective order was denied, insurer may file privilege log before producing documents. *State Farm Florida Ins. Co. v. Coburn*, 136 So.3d 711 (Fla. 2d DCA 2014).

State Farm was sued by the Coburns on a first-party bad faith claim. State Farm objected to the discovery requests as overbroad and burdensome, "as well as on the basis of attorney-client privilege and the work product doctrine." The court ordered production.

State Farm petitioned the Second DCA, arguing that the trial court should have conducted an in camera review to address its objections. The Coburns responded that State Farm waived that issue by failing to file a privilege log or request an in camera review.

The Second DCA denied the petition "without prejudice to State Farm's having the opportunity to file a privilege log with the circuit court before producing the requested discovery." A party has no obligation to file a privilege log prior to a ruling on a scope-of-discovery objection, so there was no waiver by State Farm.

In third-party bad faith suit, attorney-client privilege may protect communications between insurer and its counsel, per Fifth DCA. *Boozer v. Stalley*, 146 So.3d 139 (Fla. 5th DCA 2014).

Receding from a prior decision, the Fifth DCA ruled that attorney-client privilege may apply in a third-party bad faith action to protect communications between the insurer and its counsel.

Boozer was in an auto accident that injured Hintz. Hintz's guardian, Stalley, sued Boozer. Boozer's insurer hired defense counsel to defend the suit. Ultimately Stalley obtained a judgment against Boozer that was $10 million in excess of Boozer's insurance coverage of $1.1 million. The insurer paid the policy limits.

Seeking to collect on the excess judgment, and without an assignment of rights from Boozer, Stalley filed a bad faith suit against the insurer. Stalley sought to depose Boozer's counsel and obtain his file. Asserting attorney-client privilege on behalf of Boozer and the insurer, counsel moved for a protective order. The trial court denied the motion.

Counsel petitioned the Fifth DCA for a writ of certiorari, arguing that the attorney-client privilege applied to the communications. Stalley responded that "long-standing Florida precedent holds that in the context of third-party bad faith litigation, he stands in the shoes of Boozer and may obtain discovery of any materials that would be available to her, including those that would otherwise be protected by the attorney-client privilege."

The appellate court's opinion contained a lengthy and detailed analysis of prior cases, including the Supreme Court's decisions in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005) and *Genovese v. Provident Life & Accident Ins. Co*., 74 So.3d 1064 (Fla. 2011), as well as *Maharaj v. GEICO Casualty Co*., 289 F.R.D. 666 (S.D. Fla. 2013) and *Progressive Express Ins. Co. v. Scoma*, 975 So.2d 461 (Fla. 2d DCA 2007).

The court concluded: "The magistrate judge's order in *Maharaj* is a logical extension of the Florida Supreme Court's determinations in *Ruiz* and *Genovese*, and the second district's holding in *Scoma*. Thus, we believe that we should adopt the holdings of *Scoma* and *Maharaj* and recede from *Dunn* [*v. National Security Fire & Casualty Co*., 631 So.2d 1103 (Fla. 5th DCA 1993)] to the extent it allows the unqualified discovery of attorney-client protected material. The fact that Stalley may stand in Boozer's shoes, or have an independent right to bring a bad faith action under section 627.155, does not mean that Boozer gave up her statutory attorney-client privilege, codified in section 90.502, Florida Statutes (2009). There is no indication that Stalley obtained an assignment from Boozer, and it is clear that their interests are adverse."

Fourth DCA quashes order allowing discovery of litigation file of insurer's counsel in bad faith action. *GEICO General Ins. Co. v.Moultrop*, 148 So.3d 1284 (Fla. 4th DCA 2014).

In a bad faith action, a special master inspected documents from the litigation file of the insurer's counsel. The master determined that the documents were discoverable despite the fact that they were privileged, apparently reasoning that attorney-client information from the underlying suit was discoverable unless it pertained to bad faith aspects of the case.

The Fourth DCA quashed the order as contrary to *Genovese v. Provident Life & Accident Insurance Co.*, 74 So. 3d 1064 (Fla. 2011). "Availability of the attorney-client privilege does not depend on whether this is a bad faith case or whether the information related to legal advice about bad faith. '[W]hen an insured party brings a bad faith claim against its insurer, the insured may not discover those privileged communications that occurred between the insurer and its counsel during the underlying action.' *Id.* at 1068. Absent an exception, such as when the insurer places counsel's advice at issue, attorney-client privileged information from the underlying suit is not discoverable in a bad faith case. *Id.* at 1068-69."

In coverage dispute, court erred in ordering production of insurer's claim file from closed claim over insurer's work product objection. *State Farm Fla. Ins. Co. v. Marascuillo*, __ So.3d __, 39 FLW D1401 (Fla. 5th DCA, No. 5D13-4218, 7/3/2014), 2014 WL 2968831.

In 2004 Insureds made a claim with their homeowner's insurer for a sinkhole. Insurer paid the claim, which covered the cost of remediation through compaction grouting. Insureds, however, hired a contractor who used a different remediation method. In 2010 Insureds made another sinkhole claim. Insurer determined that the damage was not covered under the policy because Insureds did not have the repairs completed as agreed when Insurer paid the 2004 claim.

Insureds sued Insurer seeking payment and sought production of Insurer's 2004 claim file, arguing that it was directly relevant to the issue of coverage for the 2010 claim. Insurer moved for protective order. Without inspecting the 2004 claim file, the court ordered its production, noting: "Given the apparent resolved status of [the 2004] claim, this Court determines that case law would permit Plaintiffs' discovery from Defendant's claim file as to [the 2004 claim]." The court did not inspect the file before ordering production.

The Fifth DCA granted Insurer's petition for writ of certiorari. Although an insurer's claim file is work product, in *Allstate Indemnity Co. v. Ruiz*, 899 So.2d 1121 (Fla. 2005), the Supreme Court recognized a limited exception permitting discovery in a bad faith action after conclusion of the underlying coverage litigation. Here, the court erred "by implicitly concluding that the claim file lost the qualified work product privilege when the 2004 claim was closed with no litigation having materialized." The appeals court viewed *Ruiz* as "essentially concluding that the good faith exception (to the work product privilege) can always be met in a bad faith action because the coverage claim file 'presents virtually the only source of direct evidence with regard to the essential issue of the insurance company's handling of the insured's claim' such that its production will always be 'necessary to fairly evaluate the allegations of bad faith-information' and 'to advance [the bad faith] action . . . .' *Ruiz*, 899 So.2d at 1128-29. Because [Insureds'] action below is a coverage case, not sounding in bad faith, *Ruiz* does not authorize discovery of the 2004 claim file."

By filing action to reform contract to accurate reflect parties' intent, party seeking reformation does not automatically waive attorney-client privilege. *Markel American Ins. Co. v. Baker*, __ So.3d __ (Fla. 5th DCA, No. 5D14-295, 11/21/2014), 2014 WL 6488823.

Baker was injured in a motor vehicle accident due to the alleged negligence of a person insured by Markel American Insurance Company ("Markel"). Markel tendered its $10,000 policy limits, which was Baker's lawyer rejected on the ground that Markel had acted in bad faith. Baker sued Markel's insureds in state court, and Markel then filed a federal declaratory judgment action seeking a determination that it had not acted in bad faith or breached duties owed to its insured. Baker and Markel entered into a *Cunningham* agreement (*Cunningham v. Standard Guaranty Ins. Co*., 830 So.2d 179 (Fla. 1994) under which they agreed to try the bad faith case first.

The meaning of the *Cunningham* agreement was disputed. Markel pursued a claim for reformation of the agreement. Baker sought to discover all communications between Markel and its counsel, and to depose Markel's lead counsel. Markel moved for protective order, asserting attorney-client privilege and work product privilege. The court "concluded that Markel, by filing suit to reform a contract between the parties, waived protected attorney–client communications and

work-product privileges, and that Markel's counsel also waived these privileges by voluntarily disclosing privileged information at a hearing addressing the interpretation of the contract."

The Fifth DCA granted Markel's petition for writ of certiorari. Filing the reformation action, which involved the parties' intent, "does not automatically result in a waiver of the attorney-client privilege." Although Markel has to prove a mutual mistake or a unilateral mistake coupled with inequitable conduct, Baker could defend without using privileged communications. "In other words, Baker has not shown that she will be disadvantaged without the confidential information."

The appeals court further ruled that there had been no waiver of attorney-client or work product privilege under the facts of the case.

CONFLICTS OF INTEREST (INCLUDING DISQUALIFICATION)

Reversing Third DCA, Supreme Court applies "hot potato rule" in ordering disqualification of lawyers for violating conflict rules. *Young v. Achenbauch*, 136 So.3d 575 (Fla. 2014).

Lawyers Hunter and Gerson represented flight attendants in class action claims for second-hand smoke. There was a court-approved settlement, with class members waiving intentional tort and punitive damages claims but retaining the right to individually pursue compensatory damage claims. Defendants funded a foundation ("FAMRI") to sponsor research for early detection and cure of diseases caused by smoke. Hunter and Gerson represented some former class members in individual suits.

Hunter and Gerson were concerned about FAMRI's activities and sought an accounting. When FAMRI was "unresponsive," clients of Hunter and Gerson moved to enforce the settlement. FAMRI and 2 flight attendants on FAMRI's board of directors objected and moved to disqualify Hunter and Gerson, arguing that, because Hunter and Gerson were challenging the foundation formed under a settlement agreed to by all class members, they had "switched sides." The objectors alleged that they considered all of the plaintiffs' counsel in the class action case as their lawyers. The court disqualified Hunter and Gerson.

The Third DCA quashed the disqualification, seeing no conflict under the current client conflict rule (4-1.7) or the former client conflict rule (4-1.9). Observing that "Florida's Rules of Professional Conduct alone are inadequate to resolve conflict of interest problems typical to class actions," the court instead approved a test used by the Second Circuit that balances actual prejudice to the objector with the opponent's interest in continued representation by experienced counsel of their choice. *Broin v. Phillip Morris Cos., Inc.*, 84 So.3d 1107 (Fla. 3d DCA 2012).

The Supreme Court reversed the Third DCA and reinstated the disqualification. (The Court also asked the Florida Bar "to investigate whether any Rules of Professional Conduct were violated during the underlying proceedings or during the presentation of this case to the Court.")

The Court made it clear that the Florida Rules of Professional Conduct set "the standard for determining whether counsel should be disqualified in a given case."

The Court discussed affidavits submitted in support of the disqualification motion. In some cases Hunter and Gerson represented the clients in individual matters and withdrew when those clients objected to the action against FAMRI. Other affiants admitted that Hunter and Gerson had not been their attorneys of record, but alleged that they shared confidential information with them.

The trial court correctly concluded that the lawyers violated Rules 4-1.7 and 4-1.9. The Supreme Court expressed its approval of the "hot potato" rule, stating that a lawyer may not avoid the duty of loyalty owed to current clients under Rule 4-1.7 "by taking on representation in which a conflict of interest already exists and then convert a current client into a former client by withdrawing from the client's case. See [*ValuePart, Inc. v.*] *Clements*, [No. 06C2709, N.D. Ill. Aug. 2, 2006], 2006 WL 2252541, at *2 (explaining that a lawyer or law firm 'may not simply [choose] to drop one client 'like a hot potato' in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute'); *Unified Sewerage Agency v. Jelco, Inc*., 646 F.2d 1339, 1345 n.4 (9th Cir. 1981) (noting that, if the duty of loyalty did not prevent this practice, 'the challenged attorney could always convert a present client into a 'former client' by choosing when to cease to represent the disfavored client')."

Even as to affiants for whom Hunter or Gerson were not "direct counsel," a conflict of interest existed. "[G]iven the team approach to representation by the flight attendants' counsel in the progeny litigation and the sharing of information and confidences that occurred, the conflict of interest in pursuing the action against FAMRI should have been evident."

The lawyers also violated Rule 4-1.9; the suit against FAMRI was "substantially related" to the class action and the later individual suits "because they involve the same transaction or legal dispute." The class action settlement established FAMRI and set limits on the use of its funds, and the later suit attacked the board's handling of the foundation and would affect distribution of funds.

Supreme Court rejects constitutional challenges to portions of the "Timely Justice Act of 2013" concerning conflicts of interest and constitutionally deficient representation. *Abdool v. Bondi*, 141 So.3d 529 (Fla. 2104).

Inmates under death sentences challenged portions of the "Timely Justice Act of 2013" concerning conflicts of interest and constitutionally deficient representation (and other provisions). The Supreme Court rejected the constitutional challenges.

F.S. 27.703(1), Conflict of Interest and Substitute Counsel. This statute modified existing law "to require that Capital Collateral Regional Counsel (CCRC) not accept an appointment or take any action that creates an *actual* conflict of interest with his or her client." An "actual" conflict occurs when a lawyer "actively represents conflicting interests. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists." The revised conflict standard is more stringent than the old standard, "which only required that CCRC not accept an appointment that created *a conflict* of interest." In addition, the new law "places the responsibility of determining whether an actual conflict exists with the court, whereas the prior version of the statute required that the court appoint substitute counsel if the regional counsel of record determined that a conflict existed." (Emphasis by court.)

Petitioners argued that the statute violated the separation of powers by requiring a lawyer to disclose confidential information in violation of Rule 4-1.6. The Court disagreed. "While the scope of the duty of confidentiality is broad, it does not protect all information regarding a client. Rather, an attorney may generally disclose the identity of a client or the generalities of a conflict without disclosing confidential information or violating the duty of confidentiality." (Citations omitted.) The Court also noted that *Holloway v. Arkansas*, 435 U.S. 475 (1978), "demonstrates that an attorney can inform an inquiring court of the basis for a conflict of interest without disclosing confidential information."

F.S. 27.7045, Constitutionally Deficient Representation. This new statute "disqualifies appointed counsel from the representation of capital defendants for five years if it is determined that: (1) in two separate capital postconviction proceedings a court held that counsel provided constitutionally deficient representation; and (2) in both of those postconviction proceedings, the defendant was granted relief." The court rejected the challenge, ruling that "the disqualification provision of section 27.7045 does not facially violate the constitution because we conclude that the Legislature intended for the statutory disqualification provision to apply to all state-employed attorneys, *but not* to the twenty elected public defenders, whose qualifications are defined by the Florida Constitution." (Emphasis by court.)

Switching horses or clients in midstream is ill-advised, per First DCA, and results in law firm's disqualification. *Rombola v. Botchey*, 149 So.3d 1138 (Fla. 1st DCA 2014).

The First DCA thus opened its opinion reversing a disqualification order that was too narrow in scope: "Changing horses in midstream, cautioned President Lincoln, is a bad idea. Switching clients in midstream is equally ill-advised, resulting in attorney disqualification."

In an auto accident case, plaintiff Botchey sued the driver and the owner ("Rombola"). Botchey was represented by Block. Rombola was represented by Winicki and Ahmed of Kubicki Draper, P.A. Botchey got a $1.2 million jury verdict. Rombola filed a post-trial motion for new trial and remittitur. Winicki and Ahmed were on the signature block, with Winicki signing.

Two months later Ahmed left Kubicki Draper and joined Block's firm – making it a 2-lawyer firm. Despite the "obvious conflict" that Ahmed's new employment caused, the Block firm "undertook no steps to ameliorate the problem, such as getting a waiver from Rombola or instituting safeguards to prevent the use or sharing of confidential information gleaned from Ahmed's representation of Rombola in the same case." Rombola moved to disqualify the Block firm.

The Block firm did not respond to the disqualification motion, but filed a response to the pending post-trial motions. Ahmed was listed as attorney of record for Botchey, creating "the anomaly of Ahmed now being counsel of record for both sides in the litigation, his name appearing on both the defense's post-trial motions and the plaintiff's post-trial response."

A show cause order was issued on the disqualification motion. The Block firm submitted a proposed order that would disqualify it firm only from "any further representation of this Plaintiff, *regarding any further issues at the trial level regarding the trial* of this case." (Emphasis added.) The trial court entered that order.

The First DCA ordered the Block firm completely disqualified from all aspects of the case, including post-trial matters.

The court used strong language regarding protection of client interests in this situation. A suit is "a single, indivisible case to which the ethical obligations of [conflict] rules 4-1.9 and 4-1.10 continually attach." As a result, a lawyer's duties of loyalty and confidentiality "do not change or become divisible as a case moves from pre-lawsuit discussions, to a lawsuit's filing, through pre-trial activities and trial, and on to post-judgment and appeals; they remain inviolate absent client consent or such other lawful basis for waiver."

The court rejected the contention that any harm to Rombola due to Ahmed's side-switching was speculative. "[T]his is a real case, with real clients, not a moot court competition. . . . [T]he harm that was caused in this case – and that continues without a full disqualification order – is material because 'the obligation of an attorney to preserve the confidences and secrets of a client

lies at the very foundation of the attorney-client relationship' that is universally recognized in American jurisprudence." Actual use or disclosure of confidential information was immaterial; "what matters is that the change in representation was nonconsensual and that confidential information was in immediate need of ongoing protection."

NOTE: On rehearing, the First DCA denied Botchey's request to modify its opinion to remove implication "that Mr. Ahmed ever disclosed any confidences or that Mr. Block or his law firm did not take safeguards to ensure that no confidences were or could be disclosed." The court instead clarified that the potential and appearance of indifference to confidentiality obligations were enough to sustain its opinion without any finding that Ahmed acted wrongfully. The court also cautioned that "[y]oung attorneys such as Mr. Ahmed can be swept into situations beyond their control when they rely on their superiors to handle such matters, which is borne out in this case."

Lawyer who would testify for client at contempt hearing was properly disqualified from representing client at that hearing, but could continue to represent client in subsequent proceedings in case. *Lieberman v. Lieberman*, __ So.3d __ (Fla. 4th DCA, No. 4D14-509, 11/26/2014), 2014 WL 6674733.

In post-dissolution proceedings with Former Wife, Former Husband was represented by attorney Ferrer – who is Former Husband's current wife. Former Wife filed a motion to hold Former Husband in contempt. Former Wife also moved to disqualify Ferrer from representing Former Husband at the contempt hearing on the ground that Ferrer would be a material witness for Former Husband. Rule 4-3.7(a) provides that "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client . . ."

The trial court disqualified Lawyer from representing Former Husband in post-dissolution proceedings. The Fourth DCA ruled that the disqualification order "departs from the essential requirements of law because it is not limited to Ferrer's participation during the contempt hearing. As is well established by numerous Florida courts, the fact that Ferrer was a potentially necessary witness at the contempt hearing would not prevent her from serving as the former husband's attorney in other pre-trial, trial, and post-trial proceedings." (Citations omitted.)

The Fourth DCA criticized Former Wife's counsel, Kaplan, for not citing the court to the controlling cases. The court took the "extraordinary but not unprecedented step" of awarding appellate fees as a sanction." Kaplan's actions had "transformed this 'simple' matter into an unnecessary and protracted controversy by the failure of Kaplan to acknowledge clear and unambiguous controlling law directly adverse to his client's position." Further, Kaplan's failure to confess error at the over-broad disqualification order "was a self-evident violation" of his duty to disclosure legal authority adverse to his client's legal position under Rule 4-3.3(a)(3).

Finally, in a footnote the court criticized Ferrer, stating that she "does not aid her husband (and client's) case by lobbing acrimonious grenades in the form of unprofessional comments directed at opposing counsel and the trial court. We are stunned at Ferrer's disrespectful, offensive, and inflammatory argument directed at the trial judge." Citing rules regarding competence and exercising independent professional judgment in rendering candid advice, the court observed that a lawyer "who is too personally involved with the issues in a litigation should consider withdrawing or risk violating ethical duties owed to the client."

Partner of lawyer representing party may not serve as "disinterested" appraiser under insurance policy. *Florida Ins. Guaranty Ass'n v. Branco*, 148 So.3d 488 (Fla. 5th DCA 2014).

Insured homeowners sued their insurer for breach of contract after the insurer denied the insureds' claim for a sinkhole loss. The insurer became insolvent and the Florida Insurance Guaranty Association ("FIGA") was substituted. The insureds moved to compel appraisal pursuant to the policy. FIGA objected. After the court ordered appraisal, FIGA appealed.

FIGA argued that the appraisal order should be reversed because the trial court appointed a partner of the lawyer representing the insureds as one of the appraisers. FIGA contended that the partner was not "disinterested" as required by the policy. The Fifth DCA agreed and reversed. "The policy provision, which requires a 'disinterested appraiser,' expresses the parties' clear intention to restrict appraisers to people who are, in fact, disinterested. Given the duty of loyalty owed by an attorney to a client, we conclude that attorneys may not serve as their clients' arbitrators or appraisers when 'disinterested' arbitrators or appraisers are bargained for."

Criminal defendant's Sixth Amendment right to counsel violated when court denied his lawyer's request to conduct inquiry into potential conflict arising from state's alleged investigation of lawyer. *Rutledge v. State*, __ So.3d __ (Fla. 4th DCA, No. 4D10-5022, 10/29/2014), 2014 WL 5460628.

See discussion in "Ineffective Assistance of Counsel" section.

DISCIPLINARY PROCEEDINGS

In disciplining bar member who was judicial candidate, Supreme Court reaffirms constitutionality of prohibition against personal solicitation of campaign funds. *Florida Bar v. Williams-Yulee*, 138 So.3d 379 (Fla. 2014).

A county court judicial candidate "signed a campaign fundraising letter, in which she personally solicited campaign contributions." The candidate reviewed and approved the letter. The Florida Bar charged the candidate with violating Rule 4-8.2(b) (lawyer who is candidate for judicial office shall comply with applicable provisions of Code of Judicial Conduct). Canon 7C(1) of the Code prohibits judicial candidates from personally soliciting campaign funds. The referee recommended that the candidate be found guilty.

The candidate contended that Canon 7C(1) was an unconstitutional restriction on her right to engage in free speech. The Supreme Court rejected this defense, concluding that the canon serves the compelling state interests of "protecting the integrity of the judiciary and maintaining the public's confidence in an impartial judiciary." The canon was narrowly tailored to protect these interests. The candidate "was not completely barred from soliciting campaign funds, but was simply required to utilize a separate campaign committee to engage in the task of fundraising. In other words, Canon 7C(1) is narrowly tailored because it seeks to 'insulate judicial candidates from the solicitation and receipt of funds while leaving open, ample alternative means for candidates to raise the resources necessary to run their campaigns.'" (Citation omitted.)

The Court imposed a public reprimand as the disciplinary sanction.

Former judge disbarred rather than suspended for "dishonest conduct" and harm that her actions caused to administration of justice in capital first-degree murder case. *Florida Bar v. Gardiner*, __ So.3d __, 39 FLW S379 (Fla., No. SC11-2311, 6/5/2014), 2014 WL 2516419.

Circuit judge Gardiner presided over a first-degree murder case. From 4 days before the jury's guilty verdict to her imposition of the death penalty (as recommended by the jury) about 5 months later, Gardiner and the lead prosecutor engaged in what was described as "a significant personal and emotional relationship." They exchanged 949 cell phone calls and 471 text messages. There was no dispute that these communications did *not* pertain to the murder case. However, the existence of the communications and the relationship was not disclosed to the defense.

When the relationship between Gardiner and the prosecutor came to light, the Judicial Qualifications Commission ("JQC") investigated Gardiner. Before the JQC she "failed to disclose the honest and true nature of her relationship with" the prosecutor. Gardiner was admonished by the Supreme Court. Gardiner later resigned from the bench.

The Bar charged Gardiner with violations relating to non-disclosure of her relationship with the prosecutor and lack of candor before the JQC. The referee recommended that she be found guilty of violating Rule 3-4.3 (commission of unlawful or dishonest act), Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4(d) (conduct prejudicial to administration of justice) and that she be suspended from practice for 1 year.

The Supreme Court accepted the guilt findings but rejected the recommended discipline. Stating that Gardiner's conduct before the JQC was "dishonest and misleading" and that her actions "created an appearance of impropriety" in the murder case, the Court disbarred Gardiner.

(The prosecutor was charged by the Florida Bar with violating the rule against conduct prejudicial to the administration of justice and suspended by the Supreme Court for 2 years. See *Florida Bar v. Scheinberg*, 129 So.3d 315 (Fla. 2013).)

Although not charged with or convicted of crime, lawyer suspended by Supreme Court for 1 year rather than recommended 89 days for failure to file tax returns. *Florida Bar v. Erlenbach*, 138 So.3d 369 (Fla. 2014).

Stating that it "has repeatedly shown that it views an attorney's compliance with the tax laws as a very serious matter," the Supreme Court rejected a referee's proposed discipline of an 89-day suspension and instead suspended the offending lawyer for 1 year.

The lawyer admitted that her conduct violated Rule Regulating The Florida Bar 3-4.3 (act unlawful or contrary to honesty and justice) and Rule 4-8.4(c) (dishonesty, fraud, deceit, or misrepresentation). The lawyer failed to timely file tax returns for 9 years and "withheld funds for federal income tax, social security tax, and Medicare tax from her employees, but did not pay those funds to the Treasury Department as required by federal law." The fact that the lawyer was not charged with a crime and made substantial payments to reduce the amount owed, along with her acceptance of responsibility, helped mitigate the misconduct.

Supreme Court disbars lawyer for "continuing pattern of neglect" in divorce case. *Florida Bar v. Davis*, 149 So.3d 1121 (Fla. 2014).

Lawyer was retained by Client, who was serving as guardian for Client's sister. The sister had Alzheimer's disease and had been abandoned by her husband. Client paid Lawyer a $5000 retainer to file divorce proceedings for the sister. Lawyer never filed the divorce papers. Almost a year later, the sister's husband filed for divorce. Lawyer did not file anything in response, and Client was forced to file a response in the divorce case on her own.

The Bar charged Lawyer with violating Rules 4-1.3 (diligence), 4-1.4(a)(3) (keeping client reasonably informed), and 4-1.4(a)(4) (responding to client request for information). Lawyer did not appear at the final hearing in the Bar matter.

The Supreme Court disbarred Lawyer. "[Lawyer's] inaction amounts to serious misconduct, warranting a severe sanction. Indeed, because [Lawyer] charged the client a $5,000 retainer and then took no significant action in the case, causing harm to the client and her sister, we believe that her actions warrant a sanction similar to those attorneys who misuse or misappropriate client funds held in trust." Lawyer's failure to file an answer to the Bar's complaint or to participate in the disciplinary hearing "'calls into serious question" Lawyer's fitness for the practice of law.

Lawyer suspended for one year, rather than recommended 60 days, for failures in diligence and communication that led to clients spending time in jail for contempt. *Florida Bar v. Gass*, __ So.3d __ (Fla., No. SC12-937, 12/18/2014), 2014 WL 7178926.

Lawyer represented 2 clients in matters including defense of a civil suit involving their business. The clients were subpoenaed for deposition and to produce documents. Allegedly Lawyer advised them not to attend. Eventually a show cause order was issued. The clients contacted Lawyer's secretary about the matter and asked how to proceed; Lawyer did not respond. Ultimately the court issued capias and bench warrants for the clients, who were arrested. The clients spent several days in jail. They filed a complaint with the Florida Bar against Lawyer.

The referee recommended that Lawyer be found guilty of violating rules regarding diligent representation (Rule 4-1.3), communication with clients (Rules 4-1.4(a)(3), 4-1.4(a)(4), and 4-1.4(a)(5)), and conduct prejudicial to the administration of justice (Rule 4-8.4(d)). The referee recommended that Lawyer be suspended for 60 days.

The Supreme Court approved the guilty recommendations except for one (Rule 4-1.4(a)(5)). Lawyer's "failure to act diligently on behalf of the clients and his failure to keep the clients informed, causing significant delays in the case and ultimately resulting in the clients' arrests and incarceration, were prejudicial to the administration of justice."

The Court rejected the recommended 60-day suspension and instead agreed with the Bar that a 1-year suspension was appropriate. Lawyer's "conduct is particularly egregious because it ultimately results in his clients each spending three days in jail for contempt."

Finding lawyer guilty of additional rules violations, Supreme Court imposes 3 year suspension rather than recommended 91 days. *Florida Bar v. Committe*, 136 So.3d 1111 (Fla. 2014).

Lawyer represented Client in bringing a suit for interference with a business relationship and for slander. Summary judgment was granted for the defendant. The court found that Lawyer and Client "knew or should have known that the claims asserted in their complaint were not supported by the material facts; would not be supported by the application of then-existing law to those facts; and were frivolous." In October 2004 the court awarded the defendant $13,000 in fees and costs, to be paid by Lawyer and Client.

The defendant wrote to Lawyer in December 2007 and May 2008 seeking payment. Days after the May 2008 letter, Lawyer contacted the U.S. Attorney to accuse the defendant of attempted extortion and ask for criminal prosecution.

The Bar charged Lawyer with violating Rule 4-3.1 (frivolous proceeding), Rule 4-3.4(c) (disobeying obligation under rules of tribunal), Rule 4-3.4(g) (presenting criminal charges solely to gain advantage in civil matter), and Rule 4-8.4(d) (conduct prejudicial to administration of justice). The referee recommended that Lawyer be found not guilty of violating Rules 4-3.1 and 4-3.4(c), but recommended a guilty finding on the other rules and a 91-day suspension.

The Supreme Court rejected the not-guilty recommendations and found that Lawyer violated all 4 rules. The trial court in the underlying case found that the claims were frivolous, supporting a finding of a Rule 4-3.1 violation. Lawyer's failure to pay the fees and costs awarded against him violated Rule 4-3.4(c). Contrary to the referee's view, this rule does *not* require that the failure to comply with a court obligation be "willful" – rather, it only requires a "knowing" failure to obey. Lawyer knew of the order and failed to obey it.

As to the disciplinary sanction, the Court noted that its prior decisions suggested that "each of [Lawyer's] ethical violations, standing alone, would warrant a rehabilitative suspension." The violations, coupled with 6 aggravating factors, warranted a 3 year suspension.

Emphasizing deterrent effect of severe disciplinary sanctions, Supreme Court suspends lawyer for 3 years rather than 6 months for filing forged document and failing to promptly return funds to former client. *Florida Bar v. Ross*, 140 So.3d 518 (Fla. 2014).

Lawyer was charged with disciplinary violations. In Count I, he failed to properly respond to a former client's request for a fee refund and an accounting. He failed to return funds to the client for 3 years (not until after the filing of a Bar complaint) and never provided an accounting. In Count II, Lawyer forged the signature of another lawyer on a complaint filed in federal court. The Supreme Court stated: "Not only did [Lawyer] file a document with a forged signature in a court, he sought to make Waddington [the other lawyer] responsible for representation of the four family members. At the time, Waddington had not agreed to representation and was unaware of the filing. Forging the signature of an attorney in a legal action is not only unacceptable, it is outrageous. If lawyers and the public cannot rely upon the authenticity of legal papers, the very foundation of our legal system becomes fractured and unsustainable."

Rejecting the recommended disciplinary sanction of a 6-month suspension, the Supreme Court instead suspended Lawyer for 3 years. The Court emphasized that "discipline must protect the public from unethical conduct, must be fair to a respondent yet sufficient to sanction the misconduct and encourage reformation and rehabilitation, *and must be severe enough to deter others who might be prone or tempted to become involved in like situations*." (Emphasis by Court.)

Lawyer serving as court-appointed guardian treated as attorney of record for purposes of rule requiring notice to court when lawyer suspended from practice. *Florida Bar v. Townsend*, 145 So.3d 775 (Fla. 2014).

Lawyer was suspended for 30 days. The Bar later sought to have him held in contempt of court on several counts, including alleged failure to notify a court of his suspension in violation of Rule 3-5.1(h), Rules Regulating The Florida Bar. This rule requires that a suspended or disbarred lawyer furnish a copy of the Court's disciplinary order to "all courts, tribunals, or adjudicative agencies before which the respondent is counsel of record."

Lawyer contended that he was not "counsel of record" in the guardianship case because he was appointed to serve as guardian of an incapacitated person and never entered an appearance as attorney of record. The referee recommended that he be found not guilty.

The Supreme Court disagreed and held Lawyer in contempt. "[F]or all practical purposes, [Lawyer] was the attorney in the case." His actions in the case were those a lawyer might take. Lawyer performed legal tasks in the case that only a lawyer is authorized to perform.

Settlement agreement conditioned on former client's withdrawal of Bar complaint is unenforceable term that is not severable from purported agreement. *Jaffe v. Guardianship of Jaffe*, 147 So.3d 578 (Fla. 3d DCA 2014).

See discussion in "Attorney-Client Relationship" section.

FEES

Attorney's Liens:

Court erred in ordering production of law firm's file to former client despite firm's assertion of retaining lien. *Heims v. G.M.S. Marine Service Corp*., 143 So.3d 1188 (Fla. 4th DCA 2014).

Law Firm asserted a retaining lien over its file and refused to provide records until a former client paid its bill. At a hearing on a discovery issue between Law Firm and the former client, the trial court sua sponte ordered the firm to make its file available for inspection and copying by successor counsel, "but provided that its retaining lien would be preserved."

The Fourth DCA quashed the production order. "The order in this case departs from the essential requirements of law and causes material harm that cannot be remedied on appeal because the value of the retaining lien will be lost and because petitioners are not parties to the underlying action."

Error to deny charging lien on ground that successor counsel had to work long and hard before case settled years later. *Courtney v. Hall-Edwards*, 134 So.3d 543 (Fla. 3d DCA 2014).

After a settlement in the wake of a $19 million jury verdict, Lawyer moved to enforce a charging lien for $114,250 in fees. All stipulated that the amount was reasonable. The court denied

fees; although Lawyer was "a fine lawyer," he was involved only at the early stages of the 12-year-long case and his efforts "were dwarfed by the subsequent efforts of successor counsel."

The Third DCA quashed the order and remanded for entry of a fee award in the stipulated amount of $114,250, stating: "[A] client's desire to hire a more aggressive lawyer with greater 'expertise' than the lawyer initially hired does not deprive the initially discharged attorney of entitlement to be paid for his or her work. This would make charging liens all but superfluous."

Court lacked jurisdiction to reopen case 6 years after final judgment to consider law firm's charging lien. *Brody v. Broward County Sheriff's Office*, 137 So.3d 610 (Fla. 4th DCA 2014).

Six years after final judgment was entered, a law firm moved to reopen the case to have its charging lien addressed. The court granted the motion, but the Fourth DCA quashed the order. "A trial court lacks jurisdiction to entertain a charging lien where it has not been timely perfected; that is, filed before the trial court lost jurisdiction through settlement, dismissal or final judgment. . . . The trial court lost jurisdiction of this case by virtue of the final judgment. This is not a case, such as those relied upon by the firm, where there was fraud or collusion associated with the final judgment that resulted in the trial court's loss of jurisdiction, thereby depriving an attorney of the opportunity to timely file the lien." (Citations omitted.)

The appeals court also noted that the firm had an adequate avenue through which to seek relief, having "already commenced a separate, new action against the clients, the clients' attorney (formerly a member of the firm), and others."

Order denying motion to cancel lawyer's charging lien was not a final order and thus may not be appealed. *Bloomgarden v. Mandel*, __ So.3d __ (Fla.3d DCA, No. 3D14-556, 12/31/2014).

Former Clients were represented by Lawyer in a legal malpractice case against another attorney and her firm. Lawyer withdrew. The judge's order allowing Lawyer to withdraw "did not reference any potential charging lien," but Lawyer's contract with Former Clients "purports to grant" a charging lien." Former Clients (through new counsel) settled with the defendants in the malpractice case. The defendants wanted the issue of Lawyer's charging lien resolved before they would pay the settlement proceeds, so Former Clients filed a motion asking the court to cancel Lawyer's charging lien. The court denied the motion, and Former Clients appealed.

The Third DCA dismissed the "premature appeal" sua sponte for lack of jurisdiction. The order was not a final order, as further judicial labor is required to adjudicate the parties' dispute. "The trial court is still required to conduct an evidentiary hearing to determine the amount of any fee to which Lanza may be entitled. . . . Any such fee would be based on *quantum meruit* principles without regard to a lodestar, taking into account the amount of fees paid to [Former Clients'] current counsel. In no instance should [Former Clients] be responsible for fees exceeding their original Fee Contract with [Lawyer]." (Citations omitted.)

Order granting attorney's charging lien reversed as premature. *Higdon v. Higdon*, 135 So.3d 416 (Fla. 5th DCA 2014).

The law firm representing Wife in a divorce case moved to withdraw and filed a motion for imposition of a charging lien. Wife objected that the lien would be premature because at the time "there had been no distribution of the property subject to an order and therefore no recovery obtained by the attorney or his firm." The court granted the firm's motion.

The Fifth DCA reversed. Although the firm perfected its right to seek a charging lien by providing timely notice of its intent to do so, "the Order under review was premature in that it issued during the pendency of the underlying dissolution action, i.e., before it could be determined that [the law firm's] services resulted in a benefit to [Wife], in the form of assets awarded in the dissolution action, to which the charging lien could attach."

Domestic Relations Cases:

Court abused its discretion in ordering divorcing wife to pay fees that would result in "inequitable diminution" of her equitable distribution award. *Chadbourne v. Chadbourne*, 146 So.3d 75 (Fla. 1st DCA 2014).

In the dissolution of a 26-year marriage Husband was left with a net worth of $17 million and Wife had under $1 million. The First DCA reversed the trial court's denial of Wife's request for fees. To require Wife "to pay the remaining balance of her attorney's fees, about $200,000\, would require an 'inequitable diminution' of her equitable distribution award. . . . Given the significant disparity in wealth, her demonstrated need, and the husband's clear ability to pay, the trial court abused its discretion in denying the wife's request for attorneys' fees and costs." (Citation omitted.)

Error to award fees to former wife who had ample means to obtain counsel. *Eldridge v. Eldridge*, 147 So.3d 1048 (Fla. 5th DCA 2014).

The Fifth DCA reversed an award of attorney's fees and expert witness fees to Former Wife "because Former Wife had ample means to obtain counsel and experts." Former Wife's argument for fees focused "on the disparity between the parties' assets, which is not the correct standard."

F.S. 57.105 fee sanctions against Husband who challenged orally stipulated martial settlement agreement on basis of children's best interests are reversed. *Puglisi v. Puglisi*, 135 So.3d 1146 (Fla. 5th DCA 2014).

A dissolution and custody case was settled by oral stipulation just before final hearing. When Husband later refused to agree to entry of a written final judgment on the ground that the settlement was not in the children's best interests, Wife sought fee sanctions under F.S. 57.105, arguing that "there was no justiciable issue of either law or fact in the former husband's request to set aside the stipulated oral settlement." The court awarded fees.

The Fifth DCA reversed. An oral settlement ordinarily is binding according to contract principles, but a court is not bound by an agreement of parents regarding child custody or support.

The court must act in the best interests of the children. "Although section 57.105 fees have been awarded where there has been an unjustified refusal to honor the terms of a marital settlement agreement, see *Koch v. Koch*, 47 So.3d 320 (Fla. 2d DCA 2010), we cannot conclude that former husband's attempt to set aside the custody agreement prior to issuance of the final judgment, on the basis that the trial court had an independent obligation to determine the children's 'best interests' and repudiate the 'preliminary' agreement to the extent it was inconsistent with this standard, warrants such an award."

Court erred in dissolution case by awarding fees that included counsel's travel time. *Hahamovitch v. Hahamovitch*, 133 So.3d 1062 (Fla. 4th DCA 2014).

The court awarded fees to the wife that included travel time. The Fourth DCA reversed. There may be "special circumstance" in which travel fees may be taxed in a dissolution case, but here no such special circumstances were shown. "There was no evidence that competent counsel could not be obtained in Palm Beach County, nor was there a finding that the travel time was required due to any excessive or vexatious litigation by the husband."

Insurance Cases:

Payment of disputed insurance claim, "without more," after insured files suit is sufficient to support fee award under F.S. 627.428. *Do v. GEICO General Ins. Co.*, 137 So.3d 1039 (Fla. 3d DCA 2014).

Insured sued his insurer, Geico, after it denied an auto loss claim. Geico apparently suspected that Insured was complicit in theft of his auto. A year after suit was filed, Geico paid the vehicle lienholder named in Insured's policy. Insured moved for fees under F.S. 627.428, arguing that Geico's payment to the lienholder "was the functional equivalent of a confession of judgment," but the court denied the motion for fees.

The Third DCA reversed. Payment of a disputed claim after suit is filed but before judgment is rendered is the functional equivalent of a confession of judgment. The court rejected Geico's argument that the payment was not a confession of judgment, but instead represented the "purchase price" paid to the lienholder to preserve the auto for evidence in its counterclaims. "[T]he sole fact that the claim was paid, without more, constitutes a settlement or judgment within the meaning of section 627.428."

More than filing suit and obtaining payment of insurance claim is needed to support award of fees under confession of judgment doctrine. *Omega Ins. Co. v. Johnson*, __ So.3d __, 39 Fla.L.Weekly D1911 (Fla. 5th DCA, No. 5D13-1701, 9/5/2014), 2014 WL 4375189.

Insured filed a claim with her homeowner's Insurer for sinkhole damage. Insurer investigated under statutory provisions requiring insurers to meet certain standards in the investigation and handling of sinkhole claims. "The statutes also make provision for a neutral

evaluation procedure that offers an alternative to litigation." Insurer commissioned a professional engineering firm for testing. The firm reported that the damage was not caused by a sinkhole. Insurer forwarded a copy of the report to Insured, stating that it was denying the claim and informing Insured of her right to participate in the neutral evaluation program (at Insurer's expense). Insured did not respond.

Insured then sought an opinion from a different engineering firm, which concluded that sinkhole activity did cause the damage. Insured sued Insurer. Insurer moved for a neutral evaluation. After the evaluator concluded that there was a sinkhole loss, Insurer paid the claim.

Insured moved for fees under F.S. 627.428, arguing that Insurer essentially confessed judgment. The court granted the motion, "concluding that when [Insurer] agreed to pay the claim and tendered the policy benefits, it confessed judgment, thus rendering it liable for fees."

The Fifth DCA reversed, disagreeing with Insured's contention that filing suit and obtaining payment is all that is necessary for a fee award under F.S. 627.428. The fee statute is intended to penalize insurers from wrongfully denying claims. That did not occur here. "We do not believe that, under the facts and circumstances of this case, [Insurer]'s actions in investigating and handling [Insured]'s claim pursuant to the pertinent statutory provisions contained in chapter 627, and in relying on the presumptively correct report it commissioned to deny the claim, establish a wrongful or unreasonable denial of benefits that forced [Insured] to file suit to obtain her policy benefits."

Miscellaneous Fee Cases:

Supreme Court addresses timely filing of fee requests in original appellate proceeding under Fla.R.App.P. 9.100. *Advanced Chiropractic and Rehabilitation Center, Corp. v. United Auto. Ins. Co*., 140 So.3d 29 (Fla. 2014).

Exercising its conflict jurisdiction, the Supreme Court addressed the question of when a request for fees is timely in original proceedings under Fla.R.App.P. 9.100. The Court ruled that Fla.R.App.P. 9.400(b) does not apply to fee requests filed in Rule 9.100 original proceedings. Nor are *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991), and *Green v. Sun Harbor Homeowners' Ass'n, Inc*., 730 So.2d 1261 (Fla. 1998), applicable because they dealt with trial-level fee requests. Rather, the Court concluded: "[W]e hold that rule 9.300, which governs appellate motions, controls. Rule 9.300 states: 'Unless otherwise prescribed by these rules, an application for an order or other relief available under these rules shall be made by filing a motion therefor.' The rule does not specify any time period in which motions must be filed."

In the case before it, the Court concluded that the fee request filed pursuant to F.S. 627.428 by a party litigating against an insurance company under the insurance contract was timely even though it was filed 6 days after the Fourth DCA granted its petition for writ of certiorari.

Father's lawyer in paternity action ordered to disgorge funds held in trust account as unearned fees. *Baratta v. Costa-Martinez*, 139 So.3d 407 (Fla. 3d DCA 2014).

See discussion in "Trust Accounting" section.

30-day requirement for fee and cost motions under Fla.R.Civ.P. 1.525 does not apply in adversary probate proceedings. *Stone v. Stone*, 132 So.3d 377 (Fla. 4th DCA 2014).

Appellant's motion for costs was stricken as untimely filed under the 30-day rule in Fla.R.Civ.P. 1.525. The Fourth DCA reversed, ruling that Fla.R.Civ.P. 1.525 does not apply in adversary probate proceedings. See Fla. Probate Rule 5.025(d)(2).

Order reserving jurisdiction to enforce settlement agreement containing attorney's fees provision does not substitute for compliance with Fla.R.Civ.P. 1.525 (motion seeking fees must be served within 30 days of entry of judgment). *Finnegan v. Compton*, __ So.3d __ (Fla. 4th DCA, No. 4D13-4213, 11/19/2014), 2014 WL 6460627.

In approving the settlement of a will contest, the court entered an order with a provision for fees if legal action was brought to enforce the judgment. When one party failed to pay as agreed, the other party obtained a final judgment that "retained jurisdiction 'in order to enter further orders as are proper' but did not specifically mention attorney's fees." Judgment was entered on January 5, 2011, and on September 7, 2012, the party filed a motion for fees. The motion was denied.

The Fourth DCA affirmed. The motion was not timely filed under Fla.R.Civ.P. 1.525, which requires service of the fee motion within 30 days of entry of the final judgment. There is an rexception when the judgment has determined entitlement to fees, but that did not happen here.

"The appellant [movant] in this case essentially requests this court to create an exception to Rule 1.525 where an order approving a settlement agreement generally reserves jurisdiction to enforce the agreement's provisions and one of the provisions pertains to attorney's fees. However, doing so would gut Rule 1.525 by allowing a party – as was done in this case – to wait months, if not years, before claiming entitlement to attorney's fees. Since many final judgments reserve jurisdiction to enforce their terms, to create an exception to rule 1.525 in this case would be to nullify the rule's application in many cases."

Court erred in denying motion for fees on "failure to plead" grounds. *Tunison v. Bank of America, N.A.*, 144 So.3d 588 (Fla. 2d DCA 2014).

Bank filed a foreclosure action against Tunison. The mortgage had a clause for fees to Bank in an action to enforce its rights under the mortgage. Tunison moved to dismiss. Before the court could rule on Tunison's motion, Bank voluntarily dismissed the action without prejudice.

Within 30 days after Bank dismissed the action, Tunison filed a motion for fees. The court denied the motion on 2 grounds: (1) Tunison failed to raise the issue of fees in his motion to dismiss; and (2) Tunison failed to plead a statutory or contractual basis for fees in his motion.

The Second DCA reversed. Regarding failure to plead entitlement to fees in the motion to dismiss, the appeals court noted that *Stockman v. Downs*, 573 So.2d 835 (Fla. 1991), requires that a party seeking fees plead entitlement to fees must plead them or the claim is waived. A motion to dismiss, however, is not a "pleading" for purposes of the *Stockman* rule. Because Tunison was never required to file an answer to the complaint, he did not waive his claim for fees.

Nor was Tunison's fee claim waived because he did not specifically identify the statutory or contractual basis for his claim. "[A] party is not required to plead a ground for attorney's fees with specificity." (Citation omitted.)

Alleged incapacitated person may not be required to pay fees where guardianship not established. *Yazkzik v. Scott (In re Guardianship of Klatthaar)*, 129 So.3d 482 (Fla. 2d DCA 2014).

Petitioner and his lawyer sought appointment of an emergency temporary guardian for an alleged incapacitated person. The court appointed another lawyer to represent the person and denied the petition for appointment of a temporary guardian. The person died before a final determination of incapacity was made, and so the petition to determine incapacity was dismissed. The court awarded fees and costs to the lawyers and the 3 examining committee members, payable from the estate of the alleged incapacitated person.

The Second DCA reversed. Chapter 744 does not contemplate the payment of fees and costs from an alleged incapacitated person absent the establishment of a guardianship. The court urged the legislature to "address the gap in the statute by specifying who pays the attorney's fees and the examining committee's fees in this situation."

Error to consider court's overall budgetary situation in determining reasonable fee in individual court-appointed criminal defense case. *O'Donnell v. Justice Administrative Comm'n*, 129 So.3d 493 (Fla. 4th DCA 2014) (on reconsideration).

Lawyer was court-appointed counsel in a criminal case. He sought a fee in excess of the statutory rate ($27,165 for 362.5 hours of work at the statutory maximum rate of $75). The court awarded $18,000, without determining a reasonable number of hours or an hourly rate.

The Fourth DCA granted Lawyer's certiorari petition because the trial court did not make the necessary findings to support a fee award. Also, at the fee hearing the trial court had stated that it would consider not only Lawyer's fee request but also the court's other budgetary matters – that is, "what's being requested for everyone." This departed from the essential requirements of law. "By considering the effect of the award on the court's budget, and then apparently reducing the amount requested because of the impact on the budget, without regard to the reasonableness of the fee, the court could effectively 'confiscate' the reasonable amount due to a court-appointed attorney in order to pay for other programs and needs of the court system."

Offers of Judgment and Proposals for Settlement:

Third DCA recedes from precedent and concludes that, per federal maritime law, fees may not be awarded under offer of judgment statute. *Royal Caribbean Cruises, Ld. v. Cox*, 137 So.3d 1157 (Fla. 3d DCA 2014).

Sitting en banc, the Third DCA receded from *Royal Caribbean Corp. v. Modesto*, 614 So.2d 517 (Fla. 3d DCA 1992), and decided to "follow federal maritime law, which holds that attorney's fees may not be awarded pursuant to state fee-shifting statutes in an admiralty case." Federal substantive law governs in seaman cases brought in state court, and federal maritime law follows the "American Rule" on fees. Florida's offer of judgment statute, F.S. 768.79, is a "substantive state law" that conflicts with the general rule of federal maritime law that parties pay their own fees.

Proposal for settlement made earlier than 90 after party was added as defendant will not support award of fees to that party under offer of judgment statute and rule. *Design Home Remodeling Corp. v. Santana*, 146 So.3d 129 (Fla. 3d DCA 2014).

By an amended complaint, Design Home was added to a suit as a defendant. Sixty days later Design Home served 2 plaintiffs with individual proposals for settlement. The proposals were not accepted. After the subsequent entry of a final summary judgment for Design Home, it moved for fees under F.S. 768.79. The court denied the motion because the proposal was filed prematurely pursuant to Fla.R.Civ.P. 1.442(b).

The Third DCA affirmed. Rule 1.442(b) provides: "A proposal to a defendant shall be served no earlier than 90 days after service of process on that defendant; *a proposal to a plaintiff shall be served no earlier than 90 days after the action has been commenced*." (Emphasis by court.) Because the proposal was filed prior to 90 days after Design Home joined the action, it was premature and would not support a fee award.

The court noted that the result "may appear harsh," but was required by the rule. In a footnote, the court encouraged the Bar's Civil Procedure Rules Committee "to consider whether the rule should be amended to require an offeree to serve a limited response to a proposal (apart from the existing response provision in the rule), raising any procedural defects to the proposal, thereby providing the offeror with an opportunity to serve a corrected proposal, in an effort to effectuate the salutary purpose underlying a proposal for settlement. Should the offeree fail to serve such a response, the rule could provide that this failure waives any right to subsequently challenge the proposal based upon these procedural defects. Such an amendment would prevent situations in which an offeror might reasonably believe he has made a fair, valid and binding offer, only to find out (at the eventual conclusion of costly and lengthy litigation) that the offer was procedurally defective and therefore invalid *ab initio*. If the aim is to promote early and reasonable settlements, it seems worthwhile to consider whether the rule should be fashioned to give the offeror an opportunity to cure any procedural defects so that the offeree has a genuine opportunity to weigh the substantive merits of a proposal for settlement."

Court erred in awarding fees against party under offer of judgment statute after party voluntarily dismissed one of its two claims without prejudice. *Scherer Construction & Engineering of Central Florida, LLC v. Scott Partnership Architecture, Inc*., __ So.3d __ (Fla. 5th DCA, Nos. 5D13-1965, 5D13-3641, 11/7/2014), 2014 WL 5782033.

Scherer Construction filed a 2-count complaint for contribution and indemnification against third-party defendant TSPA. TSPA filed and served a proposal for settlement, which Scherer did not accept. The court granted summary judgment for TSPA on the contribution count, and Scherer

voluntarily dismissed the indemnification count. The court awarded fees to TSPA based on the rejected proposal for settlement.

The Fifth DCA affirmed the fee award on the contribution count but reversed the award on the indemnification count. "Because the indemnification count was voluntarily dismissed by Scherer without prejudice, it was improper for the trial court to render judgment awarding attorney's fees in favor of TSPA for its defense of the dismissed count for indemnification."

Fourth DCA reaffirms its "nominal exposure" standard for determining whether offer of judgment was made in good faith. *Citizens Property Ins. Corp. v. Perez*, __ So.3d __, 39 FLW D1271 (Fla. 4th DCA, No. 4D12-1412, 6/18/2014) (on rehearing), 2014 WL 2741467.

A trial court denied a motion by Citizens Property Insurance Corporation to recover fees based on a nominal proposal for settlement that was not accepted. The court ruled that Citizens did not make the offer in good faith.

The Fourth DCA reversed. The trial court used the wrong standard in determining whether the proposal was made in good faith. The court apparently relied on a Third DCA case (*Event Services America, Inc. v. Ragusa*, 917 So.2d 882 (Fla. 3d DCA 2005)), which determined that a nominal offer was made in good faith only if the undisputed record strongly indicated that the offeror had "no exposure" in the case. The Fourth DCA has adopted a more lenient, "nominal exposure" standard: the offer is made in good faith if the evidence shows that the offeror "had a *reasonable basis* to conclude that its *exposure was nominal*." *State Farm Mut. Auto Ins. Co. v. Sharkey*, 928 So.2d 1263, 1264 (Fla. 4th DCA 2006) (emphasis by court).

Whether offer of judgment was made in good faith is based on objective criteria, and claim for fees based on offer does not waive attorney-client privilege or work product protection. *Butler v. Harter*, __ So.3d __ (Fla. 1st DCA, No. 1D14-1342, 12/2/2014), 2014 WL 6755985.

See discussion in "Confidentiality and Privileges" section.

Once appeals court remanded and directed trial court to fix amount of fees due under offer of judgment statute, it was too late for opposing party to claim proposal was not made in good faith. *Arce v. Wackenhut Corp.*, 146 So.3d 1236 (Fla. 3d DCA 2014).

Plaintiff Arce did not accept defendant Wackenhut's proposal for settlement. Arce lost at trial, and the court granted Wackenhut's entitlement to fees under F.S. 768.79. Arce lost his appeal, with the appeals court granting Wackenhut's motion for appellate fees and remanding the case to the trial court "to fix amount."

On remand the trial court held an evidentiary hearing to determine the amount of fees. The court, however, directed Arce to submit a motion to vacate the entitlement order "due to the lack of good faith of Wackenhut's proposal for settlement." Up to that point, Arce had never filed any response or objection in either court to Wackenhut's 2 motions for fees. When Arce filed his motion to vacate the order granting entitlement to trial fees, the trial court granted it on the ground that the nominal settlement proposal had not been made in good faith. The court subsequently set

the amount of appellate fees, noting that it would have denied entitlement to them absent the appeals court's specific order "to fix amount."

Arce appealed, arguing that the trial court should have also vacated the appellate fees award. Wackenhut cross-appealed, contending that Arce waived his lack-of-good-faith argument "by failing to object, respond, or otherwise raise the claim of lack of good faith with this Court when Wackenhut initially moved for appellate fees and costs, and in failing to seek rehearing or clarification of this Court's order granting the motion and remanding for the trial court to fix the amount." The Third DCA agreed with Wackenhut.

The offeree bears the burden of showing a lack of good faith on the part of the offeror before a court may disallow a fee award to which the offeror is otherwise entitled. Good faith is a factor to be considered by a court in fixing the amount of a fee award, and so may not be raised for the first time at a motion to fix the amount. The appeals court concluded: "[O]nce this Court issued its order granting the motion and remanding with the single directive to the trial court 'to fix [the] amount' of fees and costs, Arce acted at his own peril in failing to seek rehearing, reconsideration or clarification whether this Court's order foreclosed his ability to raise lack of good faith on remand. In failing to seek a clarification of this Court's order, Arce and the trial court were bound by the plain meaning of the order, and the mandate that followed, which implicitly and necessarily excluded any consideration of lack of good faith and became law of the case." (Citation omitted.)

Fee award under offer of judgment statute reversed because offer was to settle claims for both damages and equitable relief. *Patel v. Nandigam*, __ So.3d __, 39 FLW D1223 (Fla. 2d DCA, No. 2D12-5790, 6/11/2014), 2014 WL 2596181.

Plaintiffs sued Defendants over a medical practice. Defendants made offers of settlement, which Plaintiffs rejected. The court ruled in favor of Defendants and granted Defendants' motion for fees under F.S. 768.79, and F.S. 44.103(6).

The Second DCA reversed the fee award under F.S. 768.79. "[W]e agree with [Plaintiffs] that attorney's fees are improper under the offer of judgment statute. The general offers made by [Defendants] both included language that each offer was to settle 'all claims for damages . . . and all claims for equitable relief.' Such language rendered these offers ineffective. *See Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So.3d 362, 374 (Fla. 2013) (holding that the offer of judgment statute 'does not apply to an action in which a plaintiff seeks both damages and equitable relief[ ] and in which the defendant has served a general offer of judgment that seeks release of all claims' even where the equitable claims lack serious merit)."

Fee award based on offer of judgment reversed because offer contained settlement condition beyond offeree's control. *Paduru v. Klinkenberg*, __ So.3d __ (Fla. 1st DCA, os. 1D12–5712, 1D13–2562, 1D13–4597, 12/17/2014), 2014 WL 7202828.

Plaintiff Klinkenberg sued Paduru (allegedly negligent driver) and Anugu (vehicle owner) for injuries following an auto accident. Klinkenberg served Paduru with a proposal for settlement, which Paduru did not accept. Paragraph 6 contained this non-monetary condition: "Plaintiff will dismiss with prejudice the above-styled action against Defendants Saritha Reddy Paduru and Ravi Anugu after the defendant Anugu (or his agents) tenders the proposed settlement amount."

After a favorable trial result, Klinkenberg moved for fees based on the proposal for settlement, pursuant to F.S. 768.79 and Fla.R.Civ.P. 1.442. The court granted the motion.

The First DCA reversed. The condition in paragraph 6 was a settlement condition over which Paduru had no control, rendering the proposal invalid. In *Attorneys' Title Ins. Fund v. Gorka*, 36 So.3d 646 (Fla. 2010), the Supreme Court ruled that: "[A]n offer of judgment must be structured such that either offeree can independently evaluate and settle his or her respective claim by accepting the proposal irrespective of the other parties' decisions. Otherwise, a party's exposure to potential consequences from the litigation would be dependently interlocked with the decision of the other offerees." Klinkenberg's proposal violated this principle because it linked dismissal of the case to payment of the settlement amounts by someone else (Anugu or his agents), "with the result that Paduru was unable to evaluate the terms of the proposal."

Offer that would settle "any" claims for punitive damages does not meet "particularity" requirement and so will not support fee award under offer of judgment statute and rule. *R.J. Reynolds Tobacco v. Ward*, 141 So.3d 236 (Fla. 1st DCA 2014).

Defendant tobacco companies rejected Plaintiff's offers of judgment. After prevailing at trial, Plaintiff was granted award of fees and costs under F.S. 768.79 and Fla.R.Civ.P. 1.442.

The First DCA reversed. Plaintiff's offers addressed claims for punitive damages by stating: "Punitive damages are included in the amount of this proposal, whether pled or unpled. Acceptance of this proposal will extinguish any present or future claims for punitive damages." Both the statute and the rule, however, require the offeror to "state with particularity" the amount proposed to settle claims for punitive damages. Plaintiff's offers "did not specify an amount for settling either of the punitive damages claims, or indicate in any way what portion of the total sum he offered either defendant should be allocated to punitive damages." Because the statute and rule are to be strictly construed, Plaintiff's offers could not support an award of fees and costs.

The appeals court further observed: "There is no ambiguity in [Plaintiff's] offers of judgment – it is clear the punitive damages claims would have been extinguished if the tobacco companies had accepted the offers – but the supreme court has made the test strict compliance, not the absence of ambiguity."

Proposal for settlement made to minor plaintiff and her mother, who was acting guardian, not ambiguous and thus would support fee award under offer of judgment statute. *DFC Tamarac, Inc. v. Jackson*, __ So.3d __ (Fla. 4th DCA, No. 4D12-3065, 11/12/2014), 2014 WL 5834778.

A minor, "by and through her mother and guardian," sued for injuries to the minor from a playground accident. Defendant served a proposal for settlement on the plaintiff pursuant to F.S. 768.79 and Fla.R.Civ.P. 1.442. "The proposal tracked the same language used by appellee in the complaint and stated that the offer was being made to 'Plaintiff, FATOU N. JACKSON, a minor, by and through her mother and guardian, COUMBA JACKSON, individually.'"

Plaintiff did not accept the proposal. After a defense verdict, Defendant moved for fees based on the proposal. The court found the proposal ambiguous and denied the motion.

The Fourth DCA reversed. The proposal was not ambiguous. "Since [Plaintiff, the minor] was the sole plaintiff in this case, with the mother acting only as her guardian, [Defendant] argues

that there was no ambiguity as to the offeree, and therefore it was not required to apportion its settlement offer between [Plaintiff, the minor] and the mother. We agree."

"All or nothing" proposal for settlement made by multiple offerors to a single offeree not ambiguous and thus valid. *Duong v. Ziadie*, __ So.3d __ (Fla. 4th DCA, No. 4D11-1492, 12/17/2014), 2014 WL 7150568.

Olivia Ziadie, as guardian of her injured son, sued doctor Duong for medical malpractice. The plaintiff was identified as Olivia, as guardian for her son and for her son's minor children. Olivia made a proposal for settlement, which Duong did not accept. After a favorable trial result, Olivia moved for fees based on the proposal for settlement. Rejecting Duong's two arguments that the proposal was ambiguous, the trial court awarded fees.

The Fourth DCA affirmed. First, the fact that a cover letter attached to the proposal for settlement did not exactly track the proposal did not render the proposal ambiguous. The cover letter was not part of the proposal; "[t]The Proposal for Settlement was clearly the operative document, and the letter is not inconsistent with that interpretation."

Second, the proposal itself was not ambiguous. The trial court correctly concluded that the proposal was "an appropriate 'all or nothing' proposal to which [*Attorneys' Title Ins. Fund v*]. *Gorka* [36 So.3d 646 (Fla. 2010)] did not apply." The appeals court explained: "Unlike *Gorka*, which involved an offer to multiple *offerees* conditioned on acceptance of all the offerees, this case involves an offer to a single offeree, conditioned on that single offeree accepting the offer as to all of the multiple *offerors*. Since *Gorka* was issued in 2010, this court and other district courts have upheld this type of offer." (Emphasis by court, citiations omitted.)

Fees for travel time and time spent litigating entitlement to fees may be awarded under offer of judgment statute. *Palm Beach Polo Holdings, Inc. v. Stewart Title Guaranty Co.*, 132 So.3d 858 (Fla. 4th DCA 2014).

During an insurer-insured title insurance dispute, Insurer made a proposal for settlement under F.S. 768.79. Insured did not accept. After a favorable jury verdict, Insurer was awarded fees. Insured appealed, contending that the court erred in awarding fees for travel time and time spent litigating entitlement to and amount of the fee award.

The Fourth DCA affirmed, except for time spent litigating the *amount* of the fee award. As to travel time, the court summarized: "Although travel time is generally not compensable, travel time may be awarded as part of a sanction under certain circumstances, such as where a party was aware that his actions could result in unnecessary litigation." A fee award under F.S. 768.79 is a "sanction against a party who unreasonably rejects a settlement offer," and so the appellate court found no error in awarding fees for travel time.

Section 57.105 and Other Sanctions:

Strict compliance with e-service of process rules required in order to obtain sanctions in form of fee award under F.S. 57.105. *Matte v. Caplan*, 140 So.3d 686 (Fla. 4th DCA 2014).

Defendant sought fees under F.S. 57.105(4). He served a motion to dismiss on Plaintiff's counsel 21 days before filing his motions to dismiss the complaint and for fees. At the hearing Plaintiff argued that F.S. 57.105 sanctions should not be granted because Defendant did not serve the motion in strict compliance with Fla.R.Jud.Admin. 2.516. The court denied the motion.

The Fourth DCA affirmed. Defendant had served the fee motion on Plaintiff's counsel by email; "the subject line of the e-mail stated: '6277 Caplan, Stacey vs. Quepasa Corporation, Inc.: Defendants' Motion for 57.105 Sanctions.doc.' The body of the e-mail stated: 'See attached motion.' Attached was a Word document entitled 'Defendants' Motion for 57.105 Sanctions.doc.'"

Defendant's motion did not comply with Fla.R.Jud.Admin. 2.516 in several respects. Specifically, the e-mail did not: (1) provide a PDF of the motion or a link to the motion on a website maintained by the clerk; (2) contain, in the subject line in all capital letters, the words 'SERVICE OF COURT DOCUMENT,' followed by the case number; (3) contain, in the body of the e-mail, the case number, name of the initial party of each side, title of each document served with that e-mail, and the sender's name and telephone number."

The appeals court rejected Defendant's contention that only substantial compliance with the rule was required. Because F.S. 57.105 authorizes an award of fees in derogation of common law, it is strictly construed. "We hold that strict compliance with Florida Rule of Judicial Administration 2.516 regarding e-mail service of pleadings is required before a court may assess attorney's fees pursuant to section 57.105."

Court may not award F.S. 57.105 sanctions against party that voluntarily dismissed suit before running of 21-day safe harbor period. *Pomeranz & Landsman Corp. v. Miami Marlins Baseball Club, L.P.*, 143 So.3d 1182 (Fla. 4th DCA 2014).

Defendant in a civil suit served a motion for sanctions under F.S. 57.105 on Plaintiff. Before the running of the 21-day safe harbor period, Plaintiff voluntarily dismissed the suit. Six days later, and within 21 days of serving the motion, Defendant filed the motion with the court. Plaintiff petitioned the Fourth DCA for a writ of prohibition.

The appellate court granted the petition. "[T]he sanctions motion was not filed until after the action was dismissed. The voluntary dismissal ended the trial court's jurisdiction."

Third DCA strikes motion for F.S. 57.105 fees as premature, when it was filed before opposing party filed any papers in case. *Reznek v. Chase Home Finance, LLC*, __ So.3d __ (Fla.3d DCA, No. 3D14-1499, 12/10/2014), 2014 WL 6990570.

Appellant filed a notice of appeal in a mortgage foreclosure case on June 20, 2014. On August 20, 2014, before she even filed her initial brief, Appellant served the Appellee (a finance company) with a motion for appellate fees pursuant to F.S. 57.105. Appellant's motion stated that Appellant would file the motion with the court if Appellee did not file a confession of error within 21 days of being served.

When Appellee did not confess error, Appellant filed the 57.105 motion with the court. Appellee moved to strike the motion, asserting "that neither section 57.105 nor [Fla.R.App.P.] 9.410(b) authorizes the filing of a motion seeking sanctions prior to the opposing party filing any type of paper, claim, contention, allegation or denial in the appeal."

The Third DCA struck the motion as premature. "Both section 57.105 and rule 9.410 (b) contemplate that a sanctions motion be directed toward a party's specific filing or assertion. Pursuant to the procedure expressly outlined in both the statute and the rule, before a movant may file the sanctions motion with the court, the non-moving party must have at least twenty one days (the 'safe harbor' period) to evaluate the efficacy of the motion and to determine whether to withdraw the challenged paper, claim, defense, contention, allegation or denial. If, as in this case, the non-moving party neither has filed a challenged paper with the appellate court nor has had the opportunity to assert in oral argument a challenged claim, defense, contention, allegation, or denial, then there is nothing for the non-moving party to withdraw."

Fifth DCA imposes 57.105 sanctions on party and her lawyer, noting that arguments on appeal were as frivolous as claim in underlying case. *Badgley v. SunTrust Mortgage, Inc.*, 134 So.3d 559 (Fla. 5th DCA 2014).

Badgley appealed from an order dismissing her quiet title action and imposing fees against her and her lawyer under F.S. 57.105(1). The Fifth DCA affirmed, noting that "[h]er arguments on appeal are just as frivolous as her quiet title claim." The court sua sponte ordered Badgley and her lawyer to pay, in equal amounts, the fees and costs incurred by Appellees in the appeal.

Appellate awarded under F.S. 57.105 for filing of appeal that appellant law firm "knew or should have known" was frivolous. *Law Offices of Lynn W. Martin, P.A. v. Madson*, 144 So.3d 707 (Fla. 1st DCA 2014).

After the trial court dismissed Appellant's amended complaint with prejudice, Appellant (a law firm) appealed. The First DCA affirmed and awarded fees to Appellee under F.S. 57.105(1). "An award of appellate fees under section 57.105 is appropriate here as the appellant knew or should have known the instant appeal was frivolous. The alleged guarantee claim against the appellee was within the Statute of Frauds and was neither reduced to writing nor signed by him. The law applicable to the case is clear and well-settled such that the appellant should have known that the relief sought was not supported by an application of the law."

Lawyer hit with award of appellate fees and referred to Florida Bar for pursuing frivolous appeal. *Schwades v. America's Wholesale Lender*, 146 So.3d 150 (Fla. 5th DCA 2014).

See discussion under "Professionalism" section.

Third DCA awards fees under F.S. 57.105(1) as sanction against insurer and its counsel. *Albelo v. Southern Oak Ins. Co.*, __ So.3d __, 38 FLW D301 (Fla. 3d DCA, No. 3D11-3012, 2/5/2014) (on rehearing), 2013 WL 440199.

"Octogenarian" Albelo sued her insurer for damages to her home allegedly suffered from a burglary. The insurer did not receive notice of the claim until a year after the burglary. Insurer paid $1690, but Albelo claimed her loss was $57,760. Insurer believed "the sworn claim is fraudulent

and instigated not by Albelo, but rather by her son" and was "concerned about the binding effect a judgment obtained by Albelo might have against it in the future." The son apparently was acting pursuant to a Durable Power of Attorney.

The court dismissed the suit because Albelo failed to file a petition in probate to determine her own incapacity. However, Insurer "[did] not contest the formalities of execution and [did not seek] to rescind the power of attorney on the ground Albelo was incompetent at the time."

The Third DCA reversed the order and granted Albelo's motion for appellate fees as a sanction under F.S. 57.105(1). F.S. 709.2119, concerning reliance on a power of attorney that appears to be genuine, "provides explicit protection to [Insurer] in the circumstances of this case." Accordingly, Insurer's and counsel's "persistence in arguing Albelo was required to seek a guardian for herself as a condition of continuing this action was frivolous."

On rehearing, the appeals court agreed with Insurer's argument that Albelo did not comply with the 21-day safe harbor provision in the statute, but nevertheless awarded sanctions against Insurer and its counsel on the court's own initiative.

Fifth DCA observes that spouse's "offensive" conduct during litigation – not during the marriage – may support F.S. 57.105 sanctions. *Shadwick v. Shadwick*, 132 So.3d 915 (Fla. 2d DCA 2014).

The court imposed fees against Husband as sanctions under F.S. 57.105. The Fifth DCA reversed because the order was a nonfinal order not ripe for appeal, but commented: "We do note our concern about the trial court's findings relating to sanctions under section 57.105. . . . The trial court did make findings regarding the Husband's conduct during the marriage, as opposed to in the litigation, in abandoning the home. The court found the Husband's behavior 'offensive.' Nothing in section 57.105 allows for a sanction based on offensive behavior during a marriage."

Court did not err in denying F.S. 57.105 sanctions sought by defendant in malicious prosecution case who was granted summary judgment on qualified immunity grounds. *Phillips v. Garcia*, 147 So.3d 569 (Fla. 3d DCA 2014).

Garcia sued police officer Phillips and others for false arrest and malicious prosecution. Phillips' motion for summary judgment was granted on the ground of qualified immunity. Phillips' motion for F.S. 57.105 sanctions against Garcia was denied.

The Third DCA affirmed. The trial court did not abuse its discretion. "The fact that the trial court determined, via summary judgment, that Phillips was entitled to qualified immunity, does not necessarily mean that Garcia's malicious prosecution claim lacked factual support – and was therefore sacntionable – under section 57.105. [Citations omitted.] The record supports the trial court's conclusion that Phillips did not establish that Garcia's malicious prosecution claim was meritless; Phillips simply proved that, in this instance, she was able to avoid Garcia's claim by successfully advancing her immunity defense."

First DCA declines to reverse unauthorized award of fees under section 57.105, concluding that "fundamental error" doctrine does not apply. *Yau v. IWDWarriors, Corp*., 144 So.3d 557 (Fla. 1st DCA 2014).

Fees were awarded against a lawyer under F.S. 57.105. The lawyer had a meritorious statutory defense but had failed to preserve it. The First DCA "could not reverse on this unpreserved claim of error absent fundamental error," which it declined to find.

"Because unauthorized awards of attorney's fees appear to generally fall outside the category of what might constitute fundamental error in a civil case, we are obliged to deny relief. We are mindful that the fundamental error doctrine 'functions to preserve the public's confidence in the judicial system. Relief is granted for a fundamental error not because the party has preserved a right to relief from a harmful error, but because the public's confidence in our system of justice would be seriously weakened if the courts failed to give relief as a matter of grace for certain, very limited and serious mistakes.' . . . While the fee award against [lawyer] was in error and thereby may appear undeserved, public confidence could be diminished if appellate courts too freely corrected 'fundamental errors' to overturn awards of this type in civil cases, particularly when more timely and substantively-helpful advocacy in the trial court could have averted the matter."

Trial court erred in awarding appellate fees as discovery sanction absent authorization from appellate court. *Bartow HMA, LLC v. Kirkland*, 146 So.3d 1213 (Fla. 2d DCA 2014).

Plaintiff sued Hospital in a medical malpractice case. The court ordered Hospital to produce documents. Hospital petitioned the Second DCA for a writ of certiorari, which was denied. Plaintiff did not seek fees in the appellate proceeding, and the appeals court did not authorize or award fees.

Back in the trial court, Plaintiff filed a renewed motion to compel production and sought a fee award "associated with the filing of this motion and for such other relief this court deems just and proper." The trial court entered an award for an amount including approximately $2500 in trial-level fees and $21,240 in appellate fees "purportedly incurred by [Plaintiff] . . . in 'obtaining the documents.'"

The Second DCA reversed the portion of the order awarding appellate fees. "Absent an appellate court's authorization, a circuit court has 'no authority to award attorneys' fees for services in [the appellate] court, *even as a sanction*.'" (Citation omitted; emphasis by court.) The court pointedly rejected Plaintiff's attempt "to sidestep this well-established law by arguing that the fees incurred in defending the certiorari proceedings were not "appellate" fees, but merely fees incurred in 'obtaining the documents.'" This argument was "so nonsensical, it borders on frivolity."

First DCA reverses trial court's award of costs as sanction under F.S. 57.105. *Jackmore v. Estate of Jackmore*, 145 So.3d 170 (Fla. 1st DCA 2014).

A trial court imposed sanctions under F.S. 57.105 (2001) by ordering payment of fees and costs. On appeal, the First DCA affirmed the fee award but reversed the award of costs. "An award of costs is not authorized under section 57.105."

Workers' Compensation Cases:

Section 57.105 fee awards not available in workers' compensation proceedings before Judge of Compensation Claims under Chapter 440. *Lane v. Workforce Business Services, Inc.*, __ So.3d __ (Fla. 1st DCA, No. 1D14-0959, 11/12/2014), 2014 WL 5836805.

Claimant in a workers' compensation case entered into a stipulation whereby the employer/ carrier accepted compensability of the claim. Claimant's motion for fees under F.S. 57.105 was denied by the Judge of Compensation Claims.

The First DCA affirmed, holding that "section 57.105 is not applicable to original proceedings in workers' compensation claims brought under chapter 440." The court explained: "We reject Claimant's argument that the attorney's fee provisions of section 57.105 are intended to supplement the provisions of chapter 440 with an additional sanction or remedy. The essentially self-contained workers' compensation law in chapter 440 already provides a host of specific sanctions and remedies which includes attorney's fees for frivolous claims and defenses under section 440.32, Florida Statutes (2011). Furthermore, section 57.105 contains no suggestion of legislative intent to include workers' compensation cases."

FILES

Court clerk, rather than public defender, has duty to provide indigent defendant with paper copy of record on appeal; question certified to Supreme Court. *Lewis v. State*, 142 So.3d 879 (Fla. 1st DCA 2014).

Defendant appealed her criminal conviction. The public defender's office moved to compel the court clerk to give Defendant a paper copy of the record on appeal. The clerk had provided a paper copy of some items but supplied the rest of the material on a computer disk. Apparently the Department of Corrections does not allow incarcerated defendants to receive computer disks.

After noting the absence of definitive authority, the Second DCA decided that the clerk's office was responsible for preparing the paper record for an indigent represented defendant. Due to the "rapid transition to electronic records in the courts of this state and the need to resolve this issue on a comprehensive basis," the appeals court certified this question of great importance to the Supreme Court: "In a criminal appeal, is the Clerk of the lower tribunal required to provide a paper copy of the record on appeal to an indigent defendant"?

INEFFECTIVE ASSISTANCE OF COUNSEL AND RIGHT TO COUNSEL

Supreme Court adopts minimum standards for lead counsel in capital postconviction proceedings and prohibits defendants sentenced to death from representing themselves in postconviction proceedings. *In re: Amendments to the Florida Rules of Judicial Administration;*

the Florida Rules of Criminal Procedure; and the Florida Rules of Appellate Procedure – Capital Postconviction Rules, 148 So.3d 1171 (Fla. 2014).

Responding to proposals by the Capital Postconviction Proceedings Subcommittee of the Criminal Court Steering Committee, the Supreme Court enacted changes to several court rules.

Two noteworthy changes were made to the Rules of Criminal Procedure. First, the Court added new subdivision (k) to Rule 3.112, establishing minimum qualifications for lead counsel in capital postconviction proceedings. "Specifically, the lead attorney must have been a member of any state Bar for at least five years, and must have at least three years of experience with postconviction litigation. Additionally, the lead counsel must have participated in a total of five proceedings in any of the following categories: (a) capital trials; (b) capital sentencings; (c) capital postconviction evidentiary hearings; (d) capital collateral postconviction appeals; or (e) capital federal habeas corpus proceedings. At least two of the five proceedings must have been capital postconviction evidentiary hearings or postconviction appeals, or federal habeas proceedings." The Court disagreed with comments submitted by Capital Collateral Regional Counsel, which urged an additional requirement of experience in handling federal habeas petitions. This new rule applies to lawyers appointed or retained after April 1, 2015.

The Court also added new subdivision (b)(6) ("Appointment of Postconviction Counsel") to rule 3.851 to provide that a defendant sentenced to death may not represent himself or herself in a capital postconviction case in state court. This new rule applies to all postconviction motions filed on or after January 1, 2015.

Criminal defendant's lawyer did not provide ineffective assistance of counsel by refusing to call witness who would testify falsely. *Kilpatrick v. State*, 144 So.3d 666 (Fla. 1st DCA 2014).

Convicted Criminal Defendant moved for postconviction relief under Fla.R.Crim.P. 3.850, alleging that his trial counsel provided ineffective assistance by failing to call a certain witness. The postconviction court denied relief.

The First DCA affirmed. "At the post-conviction hearing, the appellant's trial counsel testified that he had interviewed the witness before trial and had determined that she intended to offer false testimony in order to help the appellant. Trial counsel testified that he was ethically prohibited from offering false testimony to the court. See Florida Rule of Professional Conduct 4-3.3(a)(4). Trial counsel also testified that he was advised by the witness's own attorney that the witness would not be allowed to take the stand and perjure herself."

The appellate court concluded: "Trial counsel's decision not to call the witness was proper. The witness was effectively unavailable for trial based on trial counsel's reasonable belief that she would present perjured testimony."

Defense counsel's alleged failure to tell client of plea offer deadline, and then not returning client's calls, "may be tantamount to failing to communicate" offer and thus grounds for rule 3.850 motion. *Brown v. Florida*, 138 So.3d 510 (Fla. 4th DCA 2014).

Defendant filed a postconviction motion under Fla.R.Crim.P. 3.850, alleging that Counsel was ineffective for not giving him an opportunity to accept a plea offer for 40 months in prison.

Counsel told Defendant of the offer, then told him to call Counsel if he wished to accept the offer. Defendant alleged that he called the next day but did not reach Counsel and that Counsel did not return his calls. Shortly before trial Defendant spoke with Counsel and learned that the offer was no longer available. Defendant pleaded guilty and was sentenced to 10 years.

Defendant's postconviction motion argued that Counsel's "failure to give him an opportunity to accept the offer was equivalent to failing to convey it" and that, consequently, Defendant was entitled to relief. The postconviction court denied the motion.

The Fourth DCA reversed and remanded for an evidentiary hearing. "We agree with [Defendant] that his counsel's conduct in allegedly telling him to call his office if he wished to accept the plea offer, but then neither taking nor returning his calls the next day, without telling him there was a deadline for accepting, may be tantamount to failing to communicate a plea offer."

First DCA urges Supreme Court to adopt procedure for raising ineffective assistance of counsel claims in parental rights termination proceedings where ineffectiveness not apparent on face of record. *J.B. v. Dept. of Children and Families*, ___ So.3d __ (Fla. 1st DCA, No. 1D13-4346, 10/7/2014) 2014 WL 4976981.

Former Parent appealed from a parental rights termination case, arguing ineffective assistance of counsel. The First DCA affirmed because the alleged ineffectiveness was not apparent on the face of the record.

The court, however, decided to "join our sister courts in expressing concern regarding the lack of any effective procedure for raising ineffective assistance of counsel claims in termination proceedings where the alleged ineffectiveness is not apparent on the face of the record." The court stated that "a new procedural mechanism is required," perhaps one "similar to [Fla.R.Crim.P.] 3.800(b)(2), which permits a defendant to file a motion to correct sentencing error in the trial court at any time before the filing of the defendant's initial brief on appeal." Accordingly, the court certified to the Supreme Court the following questions of great public importance:

"I. Is the criminal standard of ineffective assistance of counsel announced in *Strickland v. Washington* applicable to claims of ineffective assistance of counsel in proceedings involving the termination of parental rights?

II. Is any procedure available following the termination of parental rights to raise claims of ineffective assistance of counsel that are not apparent on the face of the record?"

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

Certifying conflict with other DCAs, First DCA concludes that defendant does not have a right to counsel when charged with direct criminal contempt. *Plank v. State*, 130 So.3d 289 (Fla. 1st DCA 2014).

Defendant was found guilty of direct criminal contempt. On appeal he contended that the court erred "by not appointing him counsel or giving him an opportunity to seek counsel for the contempt proceeding." The First DCA affirmed, citing its prior cases holding "that a defendant does not have a right to counsel under the Sixth Amendment or the Florida Rules of Criminal

Procedure when charged with direct criminal contempt." The appeals court certified conflict with decisions of the Second and Fourth DCAs.

Criminal defendant's Sixth Amendment right to counsel violated when court denied his lawyer's request to conduct inquiry into potential conflict arising from state's alleged investigation of lawyer. *Rutledge v. State*, __ So.3d __ (Fla. 4th DCA, No. 4D10-5022, 10/29/2014), 2014 WL 5460628.

Lawyer represented Defendant, who was accused of murder. Shortly after the murder, Defendant visited an acquaintance and allegedly tried to convince the acquaintance to provide a false alibi. The state issued an "investigative" subpoena to the acquaintance's counsel, seeking to talk with him about conversations he had about Defendant with "somebody besides his client." Lawyer believed that the investigation was directed at her.

Lawyer moved to disqualify the state attorney's office or, alternatively, to exclude the acquaintance as a witness in Defendant's case. She also filed a "motion to Disclose Alleged Criminal Investigation." On the morning of jury selection in Defendant's case, Lawyer reminded the court that the motions were pending. The court denied the motions without an evidentiary hearing. Defendant was tried and convicted.

On appeal Defendant contended that his Sixth Amendment right to counsel was violated, asserting that "upon [Lawyer]'s notification and request for hearing, the trial court was required to permit an inquiry to determine whether a conflict of interest existed." The Fourth DCA agreed and reversed. Defendant did not waive his right to conflict-free counsel, and in any event the record established that Defendant "was not provided with the pertinent information to which he was fundamentally entitled."

The court stressed "the need for trial courts to take substantive action when this type of potential conflict is brought to" their attention. The court quoted from the Comment to Rule 4-1.7: "Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests."

The court roundly rejected the state's contention that "there was no evidence of an *actual* conflict" because it had suspended the investigation of Lawyer at the time of Defendant's trial. (Emphasis by court.) "At the risk of being redundant, we once again emphatically state that when a pretrial disclosure of a possible conflict of interest is raised, 'the trial court must either conduct an inquiry to determine whether the asserted conflict of interest will impair the defendant's [Sixth Amendment right] or appoint separate counsel.'" (Citations omitted.)

After reaffirming that there is no right to appointment of appellate counsel in postconviction proceedings, Second DCA adopts new procedure for handling postconviction appeals when appointed counsel find no arguable issues to brief. *Beliveau v. State*, 144 So.3d 634 (Fla. 2d DCA 2014).

In an appeal of an order denying postconviction relief, the Second DCA announced that it would stop permitting appointed appellate counsel to file *Anders* briefs in cases in which they can

find no arguable issue to brief. Instead, the court adopted "procedures comparable to those used in the First and Fourth Districts."

The court explained: "Our major concern with continuing the process of accepting *Anders* briefs is the implicit agreement on the part of the court to conduct an independent review of the record in search of issues that might have merit. That review is required in direct appeals of judgments and sentences, where defendants have a Sixth Amendment right to counsel, but no constitutional provision requires this court to perform the review in a postconviction case, where decisions on appointing appellate counsel derive from individualized due process concerns."

Under the new procedure, if counsel cannot in good faith sign and file a merits brief, counsel is to file a motion to withdraw with content demonstrating that counsel has fulfilled the obligations to the client but cannot in good faith find an arguable appellate issue. The court then will enter an order allowing the defendant 45 days in which to file a pro se brief. Only a conditional withdraw of counsel will be granted, with counsel remaining of record to "be called upon to serve if his [or her] services are needed." If the defendant files a pro se brief, the court "will review the case on the issues presented in that brief. If the defendant fails to file a brief, the case will be dismissed."

Court erred by applying wrong test to determine whether criminal defendant would be allowed to represent himself. *Tarver v. State*, 145 So.3d 911 (Fla. 2d DCA 2014).

Criminal Defendant filed motions seeking to represent himself, which the court denied because Defendant "was incompetent to represent himself." Defendant was convicted.

The Second DCA reversed, concluding that the court applied the wrong standard. "The standard is whether a defendant is competent to waive his right to counsel, not whether he is competent to represent himself." (Citations omitted.)

Criminal defendant's request to represent himself does not have to be in writing to trigger need for *Faretta* hearing. *Combs v. State*, 133 So.3d 564 (Fla. 2d DCA 2014).

The Second DCA reversed Defendant's conviction and remanded for a new trial. The lower court had held a hearing on Defendant's motion to discharge his counsel. Although Defendant orally stated that he was "notifying the court that I would like to represent myself," the court told him to file a motion. Defendant did not file a written motion, and no *Faretta* hearing was held.

The appeals court noted that "contrary to the implied assertion of the trial court, a written motion to proceed pro se is not required. Oral invocations of the right to self-representation are sufficient to warrant a *Faretta* inquiry provided the request is unequivocal, as here."

LAW FIRMS

Law firm's financial relationship with client's treating doctor subject to discovery on issue of bias. *Lytal, Reiter, Smith, Ivey & Fronrath, L.L.P. v. Malay*, 133 So.3d 1178 (Fla. 4th DCA 2014).

Law Firm represented Plaintiff in an auto accident case. The court ordered Law Firm "to 'provide a list of all payments made to [Plaintiff's treating doctor] over the last 3 years" (with client or patient information redacted). The discovery covered all payments made in connection with the present or past litigation. The doctor waas expected to provide expert opinions at trial.

The Fourth DCA denied Law Firm's petition to quash the order. A law firm's financial relationship with a doctor is discoverable on the issue of bias. At deposition the doctor denied having any records and provided "nebulous testimony" about the number of patients represented by the law firm. In this situation, "the law firm is an appropriate source of this information."

Fourth DCA allows financial discovery as to relationship between plaintiff's law firm and treating physician regardless of whether firm referred plaintiff to doctor. *Brown v. Mittelman*, __ So.3d __ (Fla. 4th DCA, No. 4D14-1748, 8/27/2014), 2014 WL 4209207.

Lawyer Goldstein represented Plaintiff in a personal injury case. Goldstein referred Plaintiff to Dr. Brown, who treated Plaintiff under a letter of protection ("LOP"). A law firm ("Lytal Reiter") was brought into the case as co-counsel. The defendant sought discovery from Dr. Brown, a non-party, "regarding patients previously represented by both law firms, LOP cases, and referrals from the plaintiff's attorneys." The trial court compelled discovery.

Dr. Brown petitioned the Fourth DCA, arguing that Fla.R.Civ.P. 1.280(b)(5) "prohibits this discovery and that his relationship with Lytal Reiter is not discoverable because there is no evidence that the firm directly referred the plaintiff to Dr. Brown."

The Fourth DCA denied the petition. The permissibility of discovery does not turn on whether the law firm directly referred the client to the treating physician. Rule 1.280(b)(5) limits discovery "to '[a]n approximation of the portion of the expert's involvement *as an expert witness*' based on data such as the 'percentage of earned income derived from *serving as an expert witness*,'" but it "neither addresses nor circumscribes discovery" of other financial relationships between a treating physician and lawyer (such as the physician's "continued financial interest in treating other patients referred by a particular law firm") that could conceivably be the source of bias. (Emphasis by court.)

The court concluded: "We again emphasize that the rule limiting financial discovery from retained experts cannot be used to hide relevant information regarding a treating physician's possible bias or the reasonableness of the charges at issue in the litigation."

LEGAL MALPRACTICE

Statute of limitations in legal malpractice case began to run when dismissal of underlying case became final, not when agreement to settle case was signed. *Arrowood Indemnity Co. v. Conroy, Simberg, Ganon, Krevans, Abel, Lurvey, Morrow & Schefer, P.A.*, 134 So.3d 1079 (Fla. 4th DCA 2014).

Insurer Arrowood and Estoril litigated over a construction project. Law Firm represented Arrowood for a time, but was replaced by other counsel. The case was settled effective December 22, 2008. The court entered an order of dismissal with prejudice on January 12, 2009.

On December 22, 2010, Arrowood sued Law Firm alleging legal malpractice. Law Firm moved to dismiss, arguing that the 2-year statute of limitations had run. The court granted the dismissal, relying on *Glucksman v. Persol North America, Inc*., 813 So.2d 122 (Fla. 4th DCA 2002) (when no judicial proceedings exist and dispute ends in settlement agreement, limitations period begins to run when parties execute settlement agreement).

The Fourth DCA reversed. Per *Glucksman*, "when a malpractice action is predicated on errors or omissions committed in the course of litigation, the cause of action accrues 'when the client incurs damages at the *conclusion* of the related or underlying judicial proceeding'" (citation omitted; emphasis by court). Consistent with the Supreme Court's bright-line rule established in *Silvestrone v. Edell*, 721 So.2d 1173 (Fla. 1998), the limitations period began to run when the order dismissing the underlying litigation became final.

Successor personal representative may bring legal malpractice action against lawyer hired by prior personal representative. *Bookman v. Davidson*, 136 So.3d 1276 (Fla. 1st DCA 2014).

Ford was appointed personal representative ("P.R.") of a decedent's estate. Ford hired Lawyer as counsel for the P.R. Bookman was appointed successor P.R., replacing Ford. Bookman sued Ford on various claims and sued Lawyer for legal malpractice. Lawyer moved for summary judgment, arguing that "successor personal representative is not in privity with the original personal representative's attorney, a necessary prerequisite to maintaining a malpractice claim under Florida law." The court granted summary judgment for Lawyer, finding that Bookman lacked standing to sue "because he was not in privity with" Lawyer.

The First DCA reversed and remanded. Noting that the case presented "a question of first impression in Florida," the court determined that a successor P.R. may bring a cause of action for legal malpractice against a lawyer hired by the predecessor P.R. to provide services necessary to the estate administration. The appeals court relied on the relevant statute (F.S. 733.614) and so did not reach the privity issue. Bookman, as successor P.R., "has every right and duty under the Florida Probate Code to pursue legal action for malpractice against [Lawyer] on behalf of the estate."

Court erred in dismissing malpractice claim of non-client who claimed to be intended third-party beneficiary of law firm's services. *Dingle v. Dillinger*, 134 So.3d 484 (Fla. 5th DCA 2014).

Kyreakakis, sole shareholder of a foreign corporation, hired lawyer Dillinger to prepare a deed to gift real property from the corporation to two individuals, the Dingles. Kyreakakis gave Dillinger a power of attorney purportedly authorizing him to do this. It was determined, however, that the power of attorney did not authorize the action and that the conveyance was invalid.

The Dingles sued Dillinger and her firm for legal malpractice. Defendants moved to dismiss on the ground that they owed the Dingles no duty because the Dingles were not parties to the attorney-client relationship. The court agreed and dismissed with prejudice.

The Fifth DCA reversed. A lawyer's liability for legal malpractice ordinarily is limited to the lawyer's clients, but there is an exception to this privity requirement for certain intended third-party beneficiaries of the lawyer's services. "To assert a third-party beneficiary claim, the complaint must allege: (1) a contract; (2) an intent that the contract primarily and directly benefit the third party; (3) breach of the contract; and (4) resulting damages to the third party." The

Dingles met these requirements. The third party beneficiary exception to the privity requirement is most often successfully asserted in the will-drafting context, but it is not limited to that situation.

The Fifth DCA rejected the contention that Dillinger did not owe a duty of care to the Dingles because the transaction was a two-sided transaction and "the requirement of privity in attorney malpractice actions has only been relaxed where there is only one 'side' to a transaction (e.g., wills, trusts, estate planning and adoptions)." The court acknowledged that "an attorney is not liable to the third party for malpractice alleged to have occurred during adversarial proceedings on the rationale that adversaries would never desire to benefit one another" but found that principle inapplicable under the facts. "This case involved a real estate transaction, typically a two-sided transaction. However, here, there was no adversarial relationship or differing interests to be protected, as the Dingles' interests were not in conflict with [the corporation] or Kyreakakis, thus suggesting a one-sided transaction."

PROFESSIONALISM

Second DCA:

Although lawyer's behavior was "not professional," court abused its discretion in imposing sanctions for creating "an atmosphere of anxiety and hostility" that disrupted compulsory medical exam. *Rush v. Burdge*, 141 So.3d 764 (Fla. 2d DCA 2014).

Lawyer had an argument with a doctor over a compulsory medical examination. Finding that Lawyer had "created an atmosphere of anxiety and hostility which disrupted the examination," the court ordered Lawyer to pay $5000 in fees and $3000 in costs to the opposing parties. The order was based on its inherent power to sanction lawyer misconduct and on Fla.R.Civ.P. 1.380.

The Second DCA reversed. A court may sanction a lawyer for bad faith conduct. In this case, however, the trial court did not make a finding that Lawyer acted in bad faith. Similarly, no findings supported a sanction against Lawyer for discovery violations under rule 1.380.

In closing, the court noted that it did not condone Lawyer's behavior, which "[s]imply . . . was not professional." A concurring opinion criticized "the lack of professionalism and common courtesy displayed by all of the participants" in the case. "Had professionalism by any of them prevailed, this matter could have been entirely avoided."

Third DCA:

Judge's apparent attempts at wit and humor fall flat, leading to his disqualification. *Great American Ins. Co. of New York v. 2000 Island Boulevard Condominium Ass'n, Inc.*, __ So.3d __ (Fla. 3d DCA,No. 3D1-2625, 12/17/2014), 2014 WL 7156894.

Judge presided over a suit that arose from an insurance coverage suit involving falling concrete in a condominium's parking garage. Although there was no record evidence that the insurer had actually denied coverage, Judge made comments suggesting that he believed coverage had been denied. When the insurer's counsel stated in a hearing that coverage had not been denied,

Judge responded: "Then fork over the money." Judge made other remarks indicating he had made up his mind in advance, and also invited the insured's counsel to seek sanctions against the insurer.

The insurer moved to disqualify Judge. After Judge denied the motion, the insurer petitioned the Third DCA for a writ of prohibition. The appellate court granted the petition.

The appeals court noted that the "startling remark" about forking over the money was by itself sufficient to leave the insurer with an objectively reasonable fear that it would not receive a fair trial. Other comments displayed Judge's animosity toward the insurer or its counsel.

The appeals court acknowledged that "some of the trial court's comments may have been intended as expressions of wit or erudition on his part." These attempts fell flat. The issue of disqualification "focuses not on what the judge intended, but rather how the message is received and the basis of the feeling." The court closed by suggesting that judges use attempts at humor with great caution, quoting from Sir Frances Bacon: "Judges ought to be more learned than witty; more reverend (sic) than plausible; and more advised than confident. . . . Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal."

Mumbling profanities in foreign language nets lawyer a contempt conviction in case where "counsel for neither party distinguished himself by his conduct." *Michaels v. Loftus*, 139 So.3d 324 (Fla. 3d DCA 2014).

In a case in which "counsel for neither party distinguished himself by his conduct," Lawyer was held in direct criminal contempt of court for two offenses: a hand gesture allegedly directed toward opposing counsel; and "the mumbling, in Romanian, of profanities at opposing counsel."

The Third DCA vacated the hand gesture conviction for insufficient evidence, but affirmed the contempt conviction for cursing in Romanian. Although Lawyer "somehow is under the impression that cursing in his native tongue is somehow less contemptuous than cursing in English," the court disagreed. The court further noted that it "cannot quarrel with [Lawyer's] self-assessment" that Lawyer had "blurted out" to the trial court: "I don't know what common sense is. I lost that a long time ago."

The appeals court referred Lawyer to the Florida Bar for disciplinary proceedings.

Third DCA imposes 57.105 sanctions in equal shares against party and lawyer for pursuing meritless appeal. *Nordt v. Nordt*, ___ So.3d __ (Fla. 3d DCA, Nos. 3D13-2415, 3D13-2845, 10/15/2014), 2014 WL 5151622.

In affirming an order, the Third DCA on its own initiative imposed sanctions under F.S. 57.105(1) on a party and his lawyer because the appeal "presented no justiciable question and on its face was devoid of merit." The court ordered the party and his lawyer, in equal shares, to pay the opponent's appellate fees.

One judge wrote a concurring opinion "to provide a written reminder to counsel for the appellant of his obligations under the Rules of Professional Conduct and as an officer of the Court. Specifically, counsel for the appellant is directed to Rule 4-3.1, Meritorious Claims and Contentions, and Rule 4-3.3, Candor Toward the Tribunal, of the Rules Regulating the Florida Bar."

The lawyer had argued that an arbitration clause in the retainer agreement did not apply, despite clear language to the contrary. The concurring judge explained: "What troubles me most is

appellant's counsel's lack of candor to this Court and his failure to admit to the error of his argument and failure to apologize to the Court when confronted by his omission of the clear, unequivocal, and dispositive evidence contrary to his position before the Court."

In closing, the concurring opinion offered this reminder: "Counsel for the appellant is required to follow these rules, and his reputation and livelihood depend on a consistent application of the minimum standards that these rules represent and which govern our noble profession."

Fourth DCA:

Fourth DCA publishes opinion serving as "primer" for prosecutors and criminal defense counsel on improper arguments and failure to preserve error. *Augustine v. State*, 143 So.3d 940 (Fla. 4th DCA 2014).

Criminal Defendant was convicted of felonies. He argued on appeal that the "cumulative effect of numerous improper arguments made by the prosecutor during closing argument constitutes fundamental error requiring reversal." The Fourth DCA was constrained to affirm. Although "[a]ny one of the improper arguments" may have warranted reversal if objected to, defense counsel's failure to object left Defendant with no option but to argue fundamental error on appeal. The appeals court rejected that argument.

The court also criticized the performance of the prosecutor and defense counsel. Due to the numerous improper arguments, "[t]he transcript of the state's closing argument reads like a primer for *prosecutors* entitled, "What **Not to Say** During Closing Argument." (Emphasis by court.) Similarly, due to defense counsel's failure to object to the improper arguments, "the transcript of the defense counsel's closing argument reads like a primer for *defense attorneys* entitled, "What **You Must Say** During Closing Argument." (Emphasis by court.)

Fourth DCA chastises lawyer for "lobbing acrimonious grenades in the form of unprofessional comments directed at opposing counsel and the trial court." *Lieberman v. Lieberman*, __ So.3d __ (Fla. 4th DCA, No. 4D14-509, 11/26/2014), 2014 WL 6674733.

See discussion in "Conflicts of Interest" section.

Fifth DCA:

Fifth DCA reverses criminal conviction for fundamental error in closing argument, calling prosecutor's conduct "unprofessional." *Crew v. State*, 146 So.3d 101 (Fla. 5th DCA 2014).

The Fifth DCA reversed a criminal conviction for second-degree felony murder and robbery, agreeing that the prosecutor's improper comments in closing argument constituted fundamental error and required a new trial. Among other things, the prosecutor "'abandoned any semblance of

professionalism and engaged in needless sarcasm'" and made verbal attacks on opposing counsel's personal integrity that were "'inconsistent with the prosecutor's role and are unprofessional.'"

The court's opinion outlined a number of the improper comments but did not recite all of them: "The prosecutor made numerous statements that violated Appellant's right to a fair trial. The transcript of the closing argument is replete with egregious statements. For us to identify each would require us to provide the entire transcript, which we decline to do."

Fifth DCA criticizes state's counsel in criminal appeal for ignoring relevant case law relied on by opposing party rather than trying to distinguish it. *Schepman v. State*, 146 So.3d 1278 (Fla. 5th DCA 2014).

Defense counsel in a criminal appeal filed a brief relying on 2 cases and their progeny as controlling (*Tindle v. State*, 832 So.2d 966 (Fla. 5th DCA 2002) and *James v. State*, 706 So.2d 64 (Fla. 5th DCA 1998)). In its response, counsel for the state apparently failed to address these cases. In a footnote the Fifth DCA criticized the state's counsel and labeled counsel's conduct "unprofessional":

> We note with incredulity that the State was able to brief this case without even referencing *James* or *Tindle*, or any of the subsequent cases following them. Rather than concede error, as in *Tindle*, or attempt to distinguish the cases that Defendants relied upon as controlling, the State simply ignored them. This briefing technique, if one can call it that, is wholly unhelpful and unprofessional. We expect more from the lawyers practicing before the court.

Lawyer hit with award of appellate fees and referred to Florida Bar for pursuing frivolous appeal. *Schwades v. America's Wholesale Lender*, 146 So.3d 150 (Fla. 5th DCA 2014).

Lawyer's clients appealed a judgment dismissing their quiet title action. They voluntarily dismissed the appeal. The grounds of the appeal were the same as those in a prior case handled by Lawyer. In that prior case, the court had dismissed the appeal and order Lawyer and her client to pay the party appellate attorney's fees pursuant to F.S. 47.105(1).

The Fifth DCA concluded that the instant appeal was "similarly frivolous" and pursued by Lawyer in "bad faith." Accordingly, it *sua sponte* awarded appellate fees against Lawyer and her clients. The court noted that "the filing of frivolous claims by [Lawyer] is not an isolated incident in our court, but rather, similar claims have been raised in federal courts" (citations to 5 cases omitted). The court referred Lawyer to the Florida Bar "for its examination of" Lawyer's conduct.

In "textbook case of why the legislature authorized an award of fees against obstinate public entities such as Appellant," Fifth DCA sanctions a county for filing frivolous appeal. *Orange County v. Hewlings*, __ So.3d __ (Fla. 5th DCA, No. 5D13-3775, 12/12/2014), 2014 WL 6990570.

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

Fifth DCA imposes F.S. 57.105 sanctions on party and her lawyer, noting that her arguments on appeal were as frivolous as her claim in the underlying case. *Badgley v. SunTrust Mortgage, Inc*., 134 So.3d 559 (Fla. 5th DCA 2014).

See discussion in "Fees" section.

PUBLIC OFFICIAL ETHICS AND PUBLIC RECORDS

Public Records and Meetings:

In "textbook case of why the legislature authorized an award of fees against obstinate public entities such as Appellant," Fifth DCA sanctions a county for filing frivolous appeal. *Orange County v. Hewlings*, __ So.3d __ (Fla. 5th DCA, No. 5D13-3775, 12/12/2014), 2014 WL 6990570.

Hewlings filed a public records request with County. County tried to require Hewlings to follow a procedure under which she would inspect the records and identify the ones she wanted copied. Hewlings filed suit, asserting that she wanted all of the records. Ultimately County was ordered to produce the records. Although it did not appeal the production order, County objected to an award of fees despite its violation of the public records law. The trial court denied fees, but the Fifth DCA reversed that denial on appeal. The appeals court remanded for a determination of whether County had unreasonably delayed in complying with Hewlings' request.

On remand the trial court found an unreasonable delay and awarded fees. On appeal for the second time, County argued that despite its delay the trial court was not authorized to award fees. Stating that it was "admittedly perplexed," the appellate court commented: "It is as if counsel for [County], who was the same counsel in [the first appeal], slept through the entire prior appellate proceeding and then failed to read either the opinion or order." The court further criticized counsel for making a "particularly disingenuous" argument, as well as for apparently failing to conduct "even superficial research" on a jurisdictional point. The court admonished: "We expect lawyers to thoroughly research and address all of the issues that are presented, especially one as important as our jurisdiction."

The court observed that County "turned a molehill into a mountain" and that the case provides a textbook example of why the legislature authorized an award of fees against obstinate public entities such as" County. The court closed by awarding fees "for this unnecessary appeal" as a sanction under Fla.R.App.P. 9.410.

Court erred in denying fees to public records requestor on ground that governmental entity's failure to promptly provide records was not "willful." *Lilker v. Suwannee Valley Transit Authority*, 133 So.3d 654 (Fla. 1st DCA 2014).

Lilker sued to compel Transit Authority to provide requested public records. The Authority admitted that the records were subject to disclosure, and the court ordered them produced. But the court denied Lilker's motion for fees and costs "because it determined that the Authority's failure to

furnish the records before Mr. Lilker filed suit was not an unlawful and willful refusal to comply with chapter 119."

The First DCA reversed. The court erred by imposing a "willfulness" requirement not found in the statute, and the court failed to definitively state whether it otherwise found a violation of the law. The proper question before the court on Lilker's fee request was whether the Authority unlawfully refused to produce records, not whether the refusal was willful.

Unlawful refusal to produce public records also includes unjustified delay in producing them. The trial court did not make a finding on this issue, so the appeals court remanded for a finding whether the Authority's delay in producing the records "constituted an unlawful refusal."

Agency violated Public Records Act by delaying disclosure of non-exempt records to litigation opponent. *Promenade D'Iberville, LLC, v. Sundy*, 145 So.3d 980 (Fla. 1st DCA 2014).

Jacksonville Electric Authority ("JEA") was in contentious litigation in Mississippi with "Promenade." After fulfilling a number of public records requests from Promenade, JEA informed Promenade that it would respond to future requests with legal action. When Promenade made further public records requests, JEA moved for protective order in the Mississippi case. Promenade filed a public records enforcement action and sought fees. The parties agreed to postpone the enforcement action hearing until the Mississippi court ruled on the protective order motion.

The day after the Mississippi court denied the motion for protective order, JEA provided the requested records. The trial court in the enforcement action ruled that JEA had not willfully violated the Public Records Act. Promenade appealed.

The First DCA reversed. There was no statutory exemption available to JEA; rather, "JEA violated the Act by delaying Promenade's access to non-exempt public records for legally insufficient reasons. JEA imposed what amounted to a requester-specific barrier to records requests made by Promenade, because it was an adversary in out-of-state litigation. . . . Florida law doesn't allow public records custodians to play favorites on the basis of who is requesting records."

Email request for public records is sufficient to give standing to bring mandamus action to compel production of records sought. *Chandler v. City of Greenacres*, 140 So.3d 1080 (Fla. 4th DCA 2014).

Chandler filed a petition to compel production of public records from the City. He alleged that he had sent a public records request by email to the City. The email request did not include Chandler's name. The City clerk responded by stating that he must fill out a form on the City's website. Five months later Chandler sent another email request for the records. The clerk responded in the same fashion.

Chandler petitioned for writ of mandamus to compel production of the records and sought fees and costs under the Public Records Act. The City moved to dismiss the petition on the ground that Chandler "lacked standing to bring the petition because it did not allege that [Chandler] was a 'stakeholder in interest' in the controversy nor demonstrate that [Chandler] had a connection with the e-mail address from which the requests were sent." The trial court dismissed the petition.

The Fourth DCA reversed. Chandler had standing to bring the petition. "[T]he petition alleged that [Chandler] had made a public records request via e-mail, and attached the e-mails sent from the e-mail address at issue. The clear implication is that this e-mail address belongs to [Chandler], or at least

that [Chandler] utilized the address to make the public records request. . . . This is all that is required to establish standing to file a petition for mandamus seeking the production of public records. While [Chandler] will still be required to prove the allegations of the complaint, i.e., that he sent the e-mail requests for public records, his petition sufficiently alleged standing to preclude dismissal."

"Shade meeting" transcript becomes public record on conclusion of underlying lawsuit and remains that way, notwithstanding later filing of related suit. *Chmielewski v. City of St. Pete Beach, Florida*, __ So.3d __ (Fla. 2d DCA, No. 2D13-4923, 8/27/2014), 2014 WL 4212742.

Landowners sued City to quiet title to a parcel of land. That suit was settled and dismissed with prejudice. The parties agreed that any dispute over the meaning of the settlement agreement would be submitted to mediation. The trial court entered a stipulated final judgment.

While the quiet title action was pending, City engaged in discussions with its counsel. These discussions were transcribed pursuant to F.S. 286.011. Under that statute, the transcript of this "shade meeting" is to be made a matter of public record "upon the conclusion of the litigation."

A year after the quiet title action was settled, Landowners sued City for inverse condemnation. Landowners filed a public records request for a copy of the transcript of the "shade meeting" from the quiet title action. City refused to provide it, "arguing that the quiet title action lived on." Landowners sued for release of the transcript. The court granted City's request to dismiss the public records suit, ruling that the quiet title action was "still pending" and that, accordingly, the transcript was not subject to disclosure.

The Second DCA reversed and ordered the transcript disclosed, noting that "City's posture calls for an unwarranted expansion of a limited legislative exemption to the release of public records." The court concluded: "The shade meeting transcript became a matter of public record upon the conclusion of the quiet title action through entry of a final judgment. The transcript does not regain 'secret' status just because a new tangentially related lawsuit is filed."

Videotaped interview of minor victim of sexual battery may have to be produced to convicted defendant under public records laws. *Ingram v. State*, __ So.3d __, 39 FLW D412 (Fla. 5th DCA, No. 5D13-1519, 2/21/2014), 2014 WL 656734.

Incarcerated convicted Defendant sent a written public records request to the State Attorney's Office seeking recorded interviews of the minor victim and her mother. The State declined to produce the records, citing an allegedly applicable exception to the public records laws. Defendant moved to compel production. The court summarily denied the motion without a hearing.

The Fifth DCA quashed the order and remanded for hearing, offering "guidance to the trial court when it conducts a hearing." As to Defendant's request for copies of videotaped interviews, the court stated: "[I]f there is a videotaped interview of the minor victim, an unredacted copy must be provided to defendant or his attorney. All of the other records should be redacted in accordance with section 119.071(2)(h)."

The court certified the following question to the Supreme Court as one of great public importance: "Does Florida's Public Records Act, specifically section 119.071(2)(j)2.b., Florida Statutes (2013), require a state agency to provide a convicted, incarcerated inmate with an unredacted copy of the videotaped statement of the minor victim of his or her crime?"

Court erred in dismissing complaint for writ of mandamus to compel production of public records based solely on pleadings and without holding evidentiary hearing. *Clay County Education Ass'n v. Clay County School Board*, 144 So.3d 708 (Fla. 1st DCA 2014).

Clay County Education Association ("CCEA") requested records from School Board. When School Board did not provide all of the requested records, CCEA filed a complaint and asked for an immediate hearing under F.S. 119.11(1). The trial court issued an alternative writ of mandamus to School Board directing it to provide written defenses to CCEA's complaint. School Board responded that it "either had already provided the documents, did not have the information in the format requested, or could not produce the documents because they did not exist. Based solely on the pleadings before it, the trial court determined that CCEA failed to establish a clear legal right to the requested relief and dismissed CCEA's complaint." CCEA appealed.

The First DCA reversed and remanded for an immediate hearing. CCEA requested what could be considered public records, and so its complaint made a prima facie case for relief. "Because the complaint was not properly subject to dismissal, the court erred in failing to hold an evidentiary hearing to resolve disputed issues of fact. . . . Further, CCEA correctly observes that a hearing should have taken place immediately under section 119.11(1), which provides, 'Whenever an action is filed to enforce the provisions of this chapter, the court shall set an immediate hearing, giving the case priority over other pending cases.'" (Citations omitted.)

Court clerk, rather than public defender, has duty to provide indigent defendant with paper copy of record on appeal; question certified to Supreme Court. *Lewis v. State*, 142 So.3d 879 (Fla. 1st DCA 2014).

See discussion in "Files" section.

Closed-door mediation sessions between City and police and firefighters unions resulting in changes to unions' pension plan were collective bargaining sessions that should have been held in public. *Brown v. Denton*, __ So.3d __ (Fla. 1st DCA, Nos. 1D14-0443, 1D14-0444, 10/21/2014), 2014 WL 5333480.

City was sued in federal court by plaintiffs that included the chief negotiator of the firefighter's union. The parties engaged in closed-door mediation resulting in changes to the police and firefighter's unions pension plan that were memorialized in a Mediation Settlement Agreement ("MSA"). "No party informed the federal court that the negotiations would entail collective bargaining or that the provisions of the Florida Statutes and Constitution may require such collective bargaining to be conducted in public. There was no public notice of the mediation sessions nor was any transcript made of the proceedings."

A newspaper editor sued City, its mayor, and City's pension board, alleging that the mediation sessions were collective bargaining negotiations (under F.S. 447.605(2)) conducted in violation of the Sunshine Law (F.S. 286.011). The complaint sought a declaration that the MSA was void ab initio and to enjoin the parties from implementing the MSA or engaging in future mediation. The circuit court granted summary judgment for the editor.

The First DCA affirmed. F.S. 447.605(2) "requires collective bargaining to be conducted in the sunshine when negotiations involve a 'bargaining agent.' . . . [T]he fact that the [pension] Board had not been formally designated as the Unions' bargaining agent did not necessarily mean that it did not function as a representative of the Unions so as to qualify as a 'bargaining agent' for purposes of Sunshine Law application."

The court concluded: "We affirm the order on appeal under the broad public policy of Florida's Sunshine Law. We cannot condone hiding behind federal mediation, whether intentionally or unintentionally, in an effort to thwart the requirements of the Sunshine Law. Caution should be taken to comply with the Sunshine Law, and compliance should be the default rather than the exception. See [*Town of Palm Beach v.*] *Gradison*, 296 So. 2d [473] at 477 [(Fla. 1974)] ('The principle to be followed is very simple: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State.'). By holding closed-door negotiations that resulted in changes to public employee's pension benefits, the appellants ignored an important party who also had the right to be in the room – the public."

RULES AND ETHICS OPINIONS

Rule changes generally.

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

Supreme Court approves most rule changes requested by Florida Bar, including revisions to rules governing conflicts and paying witnesses, but rejects proposal to further restrict activities of suspended and disbarred lawyers. *In re: Amendments to the Rules Regulating The Florida Bar (Biennial Report)*, 140 So.3d 541 (Fla. 2014) (revised opinion).

See discussion in "Rule Changes" section.

Supreme Court amends the Rules of Criminal Procedure by adopting minimum standards for lawyers in felony cases (including postconviction matters). *In re: Amendments to the Florida Rules of Criminal Procedure – Rule 3.113*, 139 So.3d 292 (Fla. 2014).

The Supreme Court adopted new Rule of Criminal Procedure 3.113 as proposed by the Court's Criminal Court Steering Committee. The new rule "is intended to implement the Florida Innocence Commission's recommendation that the criminal rules be amended to require that any attorney who is practicing law in a felony case complete at least a two-hour course regarding the law of discovery and *Brady* [*v. Maryland*, 373 U.S. 83 (1963)] responsibilities." Trial judges will give effect to the rule "by not appointing counsel, or removing counsel, in the event that counsel is not in compliance with the rule." New rule 3.113 will be effective May 15, 2016.

Supreme Court adopts minimum standards for lead counsel in capital postconviction proceedings and prohibits defendants sentenced to death from representing themselves in postconviction proceedings. *In re: Amendments to the Florida Rules of Judicial Administration; the Florida Rules of Criminal Procedure; and the Florida Rules of Appellate Procedure – Capital Postconviction Rules*, 148 So.3d 1171 (Fla. 2014).

See discussion in "Ineffective Assistance of Counsel" section.

Florida Bar Board of Governors will not prosecute lawyers who give advice to clients regarding operating medical marijuana business that is legal under state, but not federal, law.

In May 2014 the Florida Bar Board of Governors addressed the issue of how to treat lawyers who may advise clients about operating medical marijuana businesses that are legal under state law but illegal under federal law. Rule 4-1.2(d) provides that lawyers may not counsel or assist a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.

After discussing a possible rule amendment or issuance of an ethics opinion, the Board decided to adopt the following policy: "The Florida Bar will not prosecute a Florida Bar member solely for advising a client regarding the validity, scope, and meaning of Florida statutes regarding medical marijuana or for assisting a client in conduct the lawyer reasonably believes is permitted by Florida statutes, regulations, orders, and other state or local provisions implementing them, as long as the lawyer also advises the client regarding related federal law and policy."

For more information, see the June 15, 2014, issue of the *Florida Bar News*.

Professional Ethics Committee approves allowing nonlawyers to affix electronic signatures to documents for lawyers and tables action on issues relating to lawyers advising clients to "clean up" their social media pages before suit is filed.

In June 2014 the Professional Ethics Committee addressed several issues of interest.

The Committee approved revisions to existing Opinion 87-11, which originally held that a lawyer may not authorize a nonlawyer to sign the lawyer's name to notices of hearing and other pleadings. In view of the Supreme Court's rules regarding electronic filings and electronic signatures (see, e.g., Fla.R.Jud.Admin. 2.515), the Committee amended the opinion to state that "regarding electronic signatures alone that a lawyer may permit a nonlawyer employee to affix the lawyer's electronic signature using the format indicated by subdivision (c)(1)(C)" of Rule 2.515.

On another issue, the Committee considered a draft opinion regarding the ethical obligations relating to lawyers advising clients to "clean up" their social media pages before suit is filed. The Committee will continue to study the issue.

TRIAL CONDUCT

Although party failed to meet 21-day safe harbor provision for F.S. 57.105 sanctions, appellate court imposed sanctions on its own motion. *Albelo v. Southern Oak Ins. Co.*, __ So.3d __, 39 FLW D301 (Fla. 3d DCA, No. 3D11-3012, 2/5/2014) (on rehearing), 2014 WL 440199.

The Third DCA initially reversed an order on appeal and granted Albelo's motion for appellate fees under section 57.105(1). Southern Oak's new counsel filed a motion for rehearing pointing out that Albelo failed to satisfy the 21-day "safe harbor" provision of the statute.

The court agreed that the safe harbor provision was not satisfied, but nevertheless imposed 57.105 sanctions. "While we agree with Rehearing Counsel that Albelo failed to satisfy the requirements of the safe harbor provision, we respectfully disagree with Rehearing Counsel that the argument made to us was non-frivolous. The twenty-one-day safe harbor provision does not apply to court-initiated sanctions."

Fifth DCA imposes 57.105 sanctions on party and lawyer, noting that her arguments on appeal were as frivolous as her claim in the underlying case. *Badgley v. SunTrust Mortgage, Inc*., 134 So.3d 559 (Fla. 5th DCA 2014).

See discussion in "Fees" section.

TRUST ACCOUNTING

Third DCA upholds order requiring production of law firm's trust account wire receipt records over attorney-client privilege objections. *Sweetapple, Broeker & Varkas, P.L. v. Simmon*, ___ So.3d __ (Fla. 3d DCA, No. 3D14-1543, 10/29/2014), 2014 WL 5462531.

See discussion in "Confidentiality and Privileges" section.

Father's lawyer in paternity action ordered to disgorge funds held in his trust account as unearned fees. *Baratta v. Costa-Martinez*, 139 So.3d 407 (Fla. 3d DCA 2014).

In a paternity action, Father was ordered to pay temporary fees of $83,670 to Mother. When he did not pay, Father was found to be in contempt of court. He was ordered to pay a $20,000 purge or face jail. At the same time, the court ordered Father's lawyer "to review his trust account and turn over to the mother's counsel any undisbursed funds held in trust for the father."

Lawyer appealed the portion of the order requiring him to disgorge any unearned fees held in his trust account for Father. The Third DCA affirmed.

Florida Ethics Opinion 12-4, concerning title insurers' audits of lawyers' trust accounts under Florida law, becomes final.

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

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

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

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

UNAUTHORIZED PRACTICE OF LAW

Florida Bar proposes formal advisory opinion regarding nonlawyer company or its non-Florida licensed in-house counsel directing Florida litigation on behalf of company's third party customers. Proposed Advisory Opinion FAO #2014-3.

In September 2014 the Florida Bar filed a petition asking the Supreme Court to approve Proposed Advisory Opinion FAO #2014-3. The Proposed Opinion addresses whether it is the unlicensed practice of law for a nonlawyer company, or its in-house counsel who are not licensed in Florida, to direct or manage Florida litigation on behalf of the company's third-party customers.

The Bar's website summarizes the Proposed Advisory Opinion's conclusions: "The proposed opinion finds that it does not constitute the unlicensed practice of law for a nonlawyer company or its in-house counsel who is not licensed to practice law in Florida to control, direct and manage Florida litigation on behalf of a nonlawyer company's third party customers when the control, direction and management is directed to a member of The Florida Bar who is representing the customer in litigation. While generally the answer is that the conduct is not the unlicensed practice of law, the committee recognized that there are circumstances where the activity of the nonlawyer company or its in-house counsel could constitute the unlicensed practice of law

depending on the level of involvement of the Florida lawyer. Consequently, whether the practice is or is not the unlicensed practice of law is dependent on the facts and circumstances of the case."

The Proposed Advisory Opinion is not effective unless and until approved by the Court.

Florida Bar proposes formal advisory opinion concerning Medicaid planning activities by nonlawyers. Proposed Advisory Opinion FAO #2011-4.

In January 2014 the Florida Bar filed a petition asking the Supreme Court to approve Proposed Advisory Opinion FAO #2011-4. The Proposed Opinion concludes that certain Medicaid planning activities are the unlicensed practice of law when conducted by nonlawyers.

The Bar's submission to the Court summarizes: "It is the opinion of the Standing Committee [on the Unlicensed Practice of Law] that it constitutes the unlicensed practice of law for a nonlawyer to draft a personal service contract and to determine the need for, prepare and execute a Qualified Income Trust including gathering the information necessary to complete the trust. Moreover, a nonlawyer should not be authorized to sell personal service or Qualified Income Trust forms or kits in the area of Medicaid planning. It is also the opinion of the Standing Committee that it constitutes the unlicensed practice of law for a nonlawyer to render legal advice regarding the implementation of Florida law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or Qualified Income Trust. It is the position of the Standing Committee that a nonlawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law as it is authorized by federal law."

The Proposed Advisory Opinion is not effective unless and until approved by the Court.

WITHDRAWAL

Supreme Court denies motion to withdraw filed by lawyer representing convicted criminal defendant who wants to argue for death sentence. *Robertson v. State*, 143 So.3d 907 (Fla. 2014).

Lawyer represented a defendant who was convicted of murder. Defendant wanted to argue in favor of imposition of a death sentence. Lawyer moved to withdraw, citing Rule 4-1.2(a) (lawyer must abide by client's decisions regarding objective of representation). Lawyer argued that withdrawal was necessary to avoid a violation of his ethical duty to his client.

The Supreme Court denied Lawyer's motion to withdraw. Noting its legal responsibility to ensure that the death penalty is not imposed in an arbitrary or capricious manner, the Court stated that the "only way" to fulfill this duty was to have "meaningful appellate review of each death sentence" – even where a defendant may wish to be executed.

The Court concluded: "[W]e discern no ethical violation in requiring current counsel to continue to prosecute this appeal fully for the benefit of the Court in meeting its statutory and constitutional duties. Accordingly, the motion to withdraw is hereby denied. Consistent with this Court's prior precedent in analogous situations, and as requested in the motion, [Defendant] may seek leave to file a pro se supplemental brief setting forth his personal positions and interests with regard to the subject matter of the appeal." Three justices dissented.