Pro Hac Vice Attorneys: How to Calculate Your Appearances in Florida Courts

Laura Brenner

The Florida Bar recently clarified the rule regulating non-Florida lawyers' appearances in Florida state courts.

Attention attorneys without a Florida law license wishing to appear in Florida courts: effective July 1, 2012, the rule regulating pro hac vice attorneys was amended. The amended rule clarifies how non-Florida lawyers should calculate the maximum number of appearances they can make in Florida courts each year.

The Florida Bar successfully petitioned the Florida Supreme Court to amend Rule 1-3.10 of the Rules Regulating the Florida Bar, which regulates non-Florida lawyers' appearances in Florida courts.[1] The amendment adds a comment that explains the rule, which helps non-Florida lawyers understand what they must do to represent their clients in Florida state courts. But the Comment does not change the substance of the Rule 1-3.10. The rule still requires that pro hac vice lawyers who wish to appear in Florida state courts must

- be "in good standing and currently eligible to practice,"[2]
- associate with a Florida Bar member while representing a client in a Florida state court,[3]
- comply with the Rules Regulating the Florida Bar and the Florida Rules of Judicial Administration,[4]
- not appear more than three times in a year in separate representations,[5] and
- move the court to appear on a client's behalf.[6]

Florida courts have discretion to accept or reject pro hac vice attorneys' motions even if they properly move the court to be heard.[7]

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[1] R. Regulating Fla. B. 1-3.10.
[2] *Id.* at 1-3.10(a).
[3] *Id.*
[4] *Id.* at 1-3.10(a)(1).
[5] *Id.* at 1-3.10(a)(2).
[6] *Id.* at 1-3.10(c).

So what does the *Comment* do?

The Florida Bar explained that it petitioned to add the Comment to Rule 1-3.10 "so that those using [the rule] can understand it better."[8] And the Comment does just that. Specifically, it helps attorneys wishing to appear in Florida courts on a client's behalf in two ways:

- It explains what it means for an attorney to make in "appearance" in Florida courts and even provides an example of how non-Florida lawyers can calculate the permissible number of appearances they can make each year, and
- It refers readers to Rule 2.510 of the Florida Rules of Judicial Administration so that non-Florida lawyers are aware of the rules for Florida courts.[9]

Crunching the numbers—how to calculate "appearances."

Now it's time for the math. The Comment explains how non-Florida lawyers should calculate the permissible number of appearances they can make Florida courts within a year.

The Comment defines an appearance as "the initial or first appearance by that non-Florida lawyer" in a Florida court in a particular matter, whether it be in person or by telephone, pleading, or motion.[10] Non-Florida lawyers cannot appear in Florida courts more than three times in 365-day period.[11] According to the Comment, Pro hac vice attorneys are prohibited from *making initial appearances* in more than three cases within a year. But they aren't prohibited from "*participating* in more than three cases during any 365-day period."[12] "Participating" means that a lawyer continues to work on an active case in a Florida court.[13]

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[7] *Id.* at Comment.
[8] *The Florida Bar Re Petition to Amend Rules Regulating the Florida Bar*, (Biannual Filing 2010, October 15, 2010) available at http://www.floridasupremecourt.org/decisions/probin/sc10-1967_Petition.pdf.
[9] R. Regulating Fla. B. 1-3.10.
[10] *Id.* at Comment.
[11] *Id.* at 1-3.10(a)(2).
[12] *Id.*at Comment (emphasis added).
[13] *Id.*

In other words, pro hac vice attorneys can participate in more than three cases in a Florida court in a given year, they just can't have *initial* appearances (initiate representation of different clients in a Florida court) more than three times in a year. As the Comment explains, an attorney can "appear pro hac vice in a new case. . .even if [] cases in which he or she made an appearance [in prior years] are still active."[14] So, pro hac vice attorneys can handle more than three cases at a time in Florida courts as long as they don't appear initially for different clients more than three times in a year.

The Comment gives a great example of a Georgia lawyer admitted as pro hac vice in Florida courts for three separate cases. The lawyer initially appeared for the cases on the following dates: January 10, 2008, February 3, 2008, and February 20, 2008.[15]

The Comment explains that this Georgia lawyer is unable to seek "another separate representation until the expiration of the 365-day period from his [] oldest of the 3 appearances (i.e., until January 10, 2009)."[16] But he can "seek to appear pro hac vice in a new case on January 10, 2009, even if the 3 cases in which he [] made an appearance are still active."[17] The Comment therefore helps pro hac vice attorneys distinguish between the number of permissible appearances in new cases within a year and permissible existing representations of cases in the same year.

Don't reinvent the wheel—use a form motion!

The Comment to Rule 1-3.10 is particularly helpful because it refers attorneys to Rule 2.510 of the Florida Rules of Judicial Administration, which gives instructions to pro hac vice attorneys and provides a form for making a motion to appear pro hac vice. The Comment improves upon Rule 1-3.10 because although the body of the rule instructs pro hac vice attorneys to comply with the Florida Rules of Judicial Administration, it does not give a specific rule for them to consult. With the addition of the Comment, pro hac vice attorneys now know exactly where to look for guidance. Thus, they should read Rule 2.510 carefully and use the form appearance motion it provides.[18]

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] Fla. R. Jud. Administration 2.510.

Overall, the Comment is tremendously helpful to pro hac vice attorneys who want to know whether they can initiate a client's representation in a Florida court while they are participating in other matters in Florida courts. It clarifies the language of the rule, leads readers through an example of permissible and impermissible appearances, and refers readers to the practice rules. Pro hac vice attorneys are advised to familiarize themselves with this rule and the Florida Rules of Judicial Administration. They should also start keeping track of their appearances in Florida courts. And, for lawyers wishing to appear for the first time in Florida courts, they should reach out to Florida attorneys to serve as local counsel.

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Supervised Non-Lawyers May File Via the E-Portal

Kelli Ragan

The Florida Professional Ethics Committee recently decided that supervised nonlawyers may use a lawyer's access credentials to file documents with a court via the E-Portal.[1] The Florida Supreme Court amended the court rules in 2012 requiring mandatory electronic filing for all documents in any Florida court.[2] The E-Portal was created, as a single website, to enable electronic filing for all Florida courts. Because only lawyers could file documents on the E-Portal, the E-Portal created an issue for non-lawyers attempting to file documents on behalf of their supervising lawyers. It has been frequent practice for a nonlawyer to transport a document, properly prepared and signed by the lawyer, to the clerk's office to file it. Therefore, many lawyers and others were asking clerk's offices to provide guidance on the operation of the process of filing court documents via the E-Portal.

Previously, the E-Portal Authority Board had unanimously agreed to allow a nonlawyer to electronically file documents via the E-Portal using his or her supervising lawyer's credentials.[3] But this vote was retracted only a few months

[1] Fla. Ethics Op. 12-2 (2012).
[2] *Id.*
[3] *Id.*

later thus creating the current issue. However, a Florida Ethics Rule addresses this issue. Florida Ethics Rule 4-5.3 makes a lawyer responsible for the behavior of all nonlawyer employees.[4] This ethics rule ensures that lawyers are diligent in supervising their nonlawyer employees. Yet, if a task requires a lawyer's independent judgment, it cannot be delegated to a nonlawyer employee. For example, a nonlawyer employee may not electronically sign for his or her supervising attorney.[5]

Reviewing the Authority Board, the Ethics Committee advised that a lawyer may allow a supervised nonlawyer to use his or her credentials to file documents via the E-Portal, and the lawyer will continue to be responsible for the nonlawyer's conduct.[6] This is because the Ethics Committee found that a competent lawyer will supervise all nonlawyers. However, a lawyer must revoke a nonlawyer's access to the E-Portal if the portal is used for an improper purpose, such as if the nonlawyer electronically signs a lawyer's name. The opinion concluded by clarifying that while the Ethics Committee allowed a nonlawyer to file documents via the E-portal, it specifically did not address electronic signing of pleadings.[7] Today, supervising attorneys should continue to monitor their nonlawyer employees to ensure compliance with the Florida Ethics rules, but they can allow their nonlawyer employees to file via the E-Portal.

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[4] R. Regulating Fla. B. 4-5.3.
[5] Fla. Ethics Op. 12-2.
[6] *Id.*
[7] *Id.*

To Recuse or Not Recuse: That is the Question

Jessica Ronay

The Florida Supreme Court's Judicial Ethics Advisory Committee responded to an inquiry from a judge whose close friend was a bank official who appeared before the judge in litigation.[1]

The Committee addressed issues of judicial disclosure and recusal and concluded the following:

> (1) the judge must recuse him or herself from any case in which his or her personal friend appears as a party, witness, or representative of the bank;
>
> (2) the judge must disclose the relationship to all parties if recusal is not required;
>
> (3) the judge must recuse him or herself, for a reasonable period of time, from other cases involving the attorney and law firm that represented the judge and the judge's family in a personal injury case that settled out of court; and
> (4) the judge, when recusal is no longer required, must disclose to all parties in other cases involving the attorney or law firm, for a reasonable period of time, the relationship between him or herself and the attorney or law firm.[2]

The Committee applied Florida Code of Judicial Conduct Canon 2,[3] which states that judges must act in a manner that promotes public confidence in the impartiality and integrity of the judiciary, in reasoning that judges must avoid impropriety or the appearance of impropriety in all activities. Impropriety is determined by whether others would reasonably perceive that the judge's ability to impartially carry out his or her duties is impaired.[4] The Committee also applied Canon 3,[5] which states that a judge is disqualified whenever the judge's

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[1] Fla. Jud. Ethics Op. 2012-37.
[2] *Id.*
[3] Fla. Code Jud. Conduct Canon 2.
[4] Fla. Jud. Ethics Op. 2012-37.
[5] Fla. Code. Jud. Conduct Canon 3.

impartiality might reasonably be questioned.[6] Lastly, the Committee relied on *In re Frank*,[7] a Florida Supreme Court case that applied Canon 3's requirement of disqualification based on a judge's personal bias, in emphasizing a judge's duty to remain impartial under both an objective and subjective standard.[8]

The Committee reasoned that anyone aware of the close personal relationship between the judge and the judge's close friend reasonably would believe the judge could not be impartial in such a case.[9] But if the case over which the judge presided did not involve the close friend at all, disqualification is not warranted because no impartiality would be justified.[10] In cases in which disqualification is not required, the Committee reasoned that judges should disclose information relevant to the determination of disqualification to permit the parties to decide whether to file a motion to disqualify the judge or waive the disqualification under Canon 3E.[11]

In determining the time under which the judge must recuse, the Committee reasoned that waiting a sufficient amount of time before hearing a case involving the judge or the judge's family would decrease the chance that a litigant will blame his or her loss on the judge's past attorney-client relationship with opposing counsel.[12]

Finally, the Committee reasoned that the judge's disclosure of the prior attorney-client relationship for a reasonable period of time following the conclusion of the law firm's representation is not an admission of bias; rather, it is necessary to enable a party to make an informed decision as to whether to seek disqualification.[13]

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[6] *Id.*
[7] *In re Frank*, 753 So. 2d 1228 (Fla. 2000).
[8] Fla. Jud. Ethics Op. 2012-37.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*

The Supreme Court Applies the Reasonable Belief Standard to Confidentiality

Cayelan Loucks

Confidentiality is important to clients and their attorneys alike, and there are consequences for attorneys who fail to safeguard their clients confidential information. Attorneys must be aware of what information concerning a client can and cannot be disclosed in order maintain the utmost confidentiality and to avoid discipline by the Florida Bar.

Recently, the Supreme Court of Florida in *Florida Bar v. Knowles* ruled on whether an attorney violated the rules of confidentiality set out in the Florida Rules of Professional Conduct when she disclosed information relating to her client's upcoming court hearing; the lawyer stated to the Assistant State Attorney that "[the client] would do anything, including lying in court, to avoid deportation."[1]

The Florida Rules of Professional Conduct allow a lawyer to reveal confidential information without the consent of the lawyer, but only in limited circumstances.[2] In this case, the court analyzed the part of the rule that states that a lawyer can reveal confidential information without informed consent "only to the extent the lawyer reasonably believes it necessary to prevent a crime."[3] Knowles, the attorney in the case, called the Assistant State Attorney on the case stating that she had reason to believe, based on a conversation with her client, that her client would lie to the court in the upcoming immigration hearing.[4] Because of this disclosure she was charged with a violation of the rules. The Supreme Court found that there was not a sufficient basis for Knowles to have "reasonably believed" that her client would commit a crime by lying at the hearing.[5] Therefore, the disclosure of her client's information was improper. The Court suspended Knowles from practicing law for a period of one year for the

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[1] The Florida Bar v. Knowles, 99 So. 3d 918, 922 (Fla. 2012)
[2] R. Regulating Fla. B. 4-1.6
[3] Id.
[4] The Florida Bar v. Knowles, 99 So. 3d. at 920.
[5] Id.

breach of confidentiality in addition other behavior deemed unethical by the Florida Bar.[6]

This case reveals that there must be clear evidence showing that an attorney's belief that their client will commit a crime was reasonable before confidential information about the client is divulged. Stay informed of the constant changes in the law and of the decisions that shape the Florida Rules of Professional Conduct. Keeping up to date with the law will ensure that your client's information remains safe and confidential. That will also keep you from running into issues with the Florida Bar.

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[6] Id. at 925

Be Careful Who Your Friends Are

Melissa A. Foss

Didn't your parents always tell you to be careful who your friends were? To not hang with the wrong crowd? That classic parental advice leaned heavily on the thought that how people perceived you would be influenced by who you kept as friends. Well, that old adage has not disappeared. With the advent of social media sites with varied uses, that adage is being moved into modern times with a twist and far-reaching implications. Perceptions of an individual, because of who his or her friends are, is essentially what the Fourth District Court of Appeal tackles in *Domville v. State*[1] – how does online "friendship" affect the perception of judicial impartiality and does that "friendship" require recusal? After the *Domville* ruling, Facebook "friends" are sufficient to result in disqualification from cases and may even be a violation of the Code of Judicial Conduct.[2]

The *Domville* case arose from a criminal Defendant's Motion to Disqualify a trial judge, based on the alleged Facebook friendship between the trial judge and the prosecutor in the case.[3] Domville asserted that his own Facebook friends were only individuals that were close friends and that he "'could not perceive [those individuals] with anything but favor, loyalty[,] and partiality,'"[4] implicating that the judge's Facebook friends would be similar in manner. Further, Domville claimed that the judge's Facebook relationship with the prosecutor caused rulings adverse to him.[5] The trial judge denied Domville's motion and the case reached the Fourth District Court of Appeal on a writ of prohibition.[6]

The Fourth District Court of Appeal began its analysis by addressing the procedure for disqualification.[7] In reviewing a Motion to Disqualify, a judge applies Florida Rules of Judicial Administration 2.330, which provides the guidelines for the disqualification of trial judges.[8] For an initial motion to

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[1] *Domville v. State*, 103 So. 3d 184 (Fla. 4th Dist. App. 2012).
[2] *Id.*
[3] *Id.* at 185.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Domville*, 103 So. 3d at 185.
[8] Fla. R. Jud. Administration 2.330 (providing the procedure and needed substance for a motion to disqualify).

disqualify, the judge against whom the motion is made is required to grant the motion when the motion is "legally sufficient."[9] If "legally sufficient," the judge must grant the motion without determining the truth of the facts alleged in the motion.[10] Courts have found a motion to be legally sufficient when "the facts alleged (which must be taken as true) would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial" from the judge in the case.[11] In addition, "the fear must be objectively reasonable" to be legally sufficient.[12]

After setting forth the standards for disqualification, the court looked at a 2009 Florida Judicial Ethics Advisory Committee opinion for guidance.[13] The Committee's Opinion dealt with social networking site use amongst judges and outlined what is proper and what is not proper.[14] According to the Committee's Opinion, "the Florida Code of Judicial Conduct precludes a judge from both adding lawyers who appear before the judge as 'friends' on a social networking site and allowing such lawyers to add the judge as their 'friend.'"[15] Additionally, the court found that the Committee determined that such a situation, under certain circumstances, amounted to a violation of Florida Code of Judicial Conduct Canon 2B, which provides that "a judge shall not convey or permit others to convey the impression that they are in a special position to influence the judge."[16] Based on the potential violation of Canon 2B and the Committee's finding that social networking "friends" "'reasonably convey[ ] to others the impression that these lawyer "friends" are in a special position to influence the judge,'"[17] the Fourth District Court of Appeal found Domville's allegations to be legally sufficient, which required the trial judge to grant the motion.[18]

As the Court's opinion emphasizes, social networking friendships between attorneys and judges not only have disqualification implications under Florida Rule of Judicial Administration 2.330(f), but also may be the basis for a violation of the Florida Code of Judicial Conduct Canon 2B.[19] This poses potential

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[9] Fla. R. Jud. Administration 2.330(f); *Domville*, 103 So. 3d at 185.
[10] Fla. R. Jud. Administration 2.330(f).
[11] *Domville*, 103 So. 3d at 185 (internal quotation omitted) (citations omitted).
[12] *Id.* at 185.
[13] *Id.* at 185–186; Fla. Jud. Ethics Advisory Comm. Op. 2009–20.
[14] Fla. Jud. Ethics Advisory Comm. Op. 2009–20.
[15] *Domville*, 103 So. 3d at 185; Fla. Jud. Ethics Advisory Comm. Op. 2009–20.
[16] *Domville*, 103 So. 3d at 185–186; Fla. Jud. Ethics Advisory Comm. Op. 2009–20.
[17] *Domville*, 103 So. 3d at 186 (quoting Fla. Jud. Ethics Advisory Comm. Op. 2009–20).
[18] *Id.*
[19] *Id.* at 185–186.

difficulties for attorneys and judges in pending litigation and in ensuring compliance with their ethical responsibilities. With a final determination that social networking friendship between a prosecutor and judge was legally sufficient to require disqualification,[20] the *Domville* case highlights additional reasons to carefully consider your social networking activities. It may be wise for attorneys, and certainly judges, to review their "friends," remove certain individuals, and decline invitations to add others. Additionally, this ruling provides a potential ground for a motion to disqualify to be brought by attorneys on their client's behalf – you may want to add checking the judge's Facebook friends to your representation to-do list.

The implications of the *Domville* decision will affect both attorneys and judges.

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[20] *Id.* at 186.

Changing to an Electronic World: How to Comply with the New Mandatory Electronic Filing and Email Service Rules

Cheryl Tevlin-Mason

To make Florida courts fully electronic,[1] and through collaboration with and input from the ten Florida Bar rules committees,[2] the Florida Supreme Court has amended its previously permissive rules for e-service and filing and adopted new rules that make email service and electronic filing of documents mandatory in all Florida courts.[3] An implementation schedule was adopted for these new and amended rules, with mandatory email service being implemented first, as a way to "prepar[e] practitioners to function in an electronic environment."[4] In addition, the various court divisions have different effective dates, and some divisions already require compliance.[5]

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[1] *In re Amendments to FL Rules of Civil Proc., et. al.* 102 So. 3d 451, 452 (Fla. 2012) (hereinafter "Amendments I").

[2] *In re Amendments to FL Rules of Civil Proc., et. al.*102 So. 3d 505, 506 (Fla. 2012) (hereinafter "Amendments II") and Amendments I, 102 So. 3d at 455.

[3] *See generally* Amendments I, 102 So. 3d at 452, 454; Amendments II, 102 So. 3d at 506.

[4] Amendments I, 102 So. 3d at 452.

[5] Amendments II, 102 So. 3d at 508-09.

E-Service

Email service is mandatory now in several court divisions and becomes mandatory in the remaining divisions on October 1, 2013.

Email service **mandatory *NOW*** for:[6]	Email service becomes mandatory on **October 1, 2013, at 12:01 a.m.** for:[7]

• Trial court divisions of:
  o Civil
  o Probate
  o Small Claims
  o Family Law
• Appeals to the circuit courts in civil, probate, small claims, and family law cases
	• Trial court divisions of:
	  o Criminal
	  o Traffic
	  o Juvenile
	• Appeals to the circuit courts in criminal, traffic, and juvenile cases
	• Baker Act proceedings
	• Jimmy Ryce proceedings

According to the new rules, "all documents required or permitted to be served on another party must be served by email."[8] Once an attorney appears in a proceeding, that attorney "must designate a primary email address, and may designate up to two secondary email addresses, for receiving service."[9] If an attorney fails to designate an email address, service may be sent to the email address on file with The Florida Bar.[10] The rule explicitly states, "*subsequent to the initial pleading*, all pleadings and documents filed in the action must be served by email"; the initial pleading, however, continues to be served in accordance with Florida Rule of Civil Procedure 1.070.[11]

To be exempt from this rule, the attorney must file a motion to be excused from email service and demonstrate "that he or she (1) has no email account and (2) lacks access to the Internet at the [attorney's] office."[12] Exceptions are also made

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[6] *Id*.
[7] *Id*.
[8] *Id.* at 507.
[9] *Id*.
[10] *Id*. at 516.
[11] *Id*. at 507 (emphasis added).
[12] *Id*.

for pro se litigants; applications for witness subpoenas; and documents served, or required to be served, by formal notice.[13]

There are several requirements for email service. First, the subject line of the email must contain the words "SERVICE OF COURT DOCUMENT," in all caps, followed by the case number.[14] Copies of the document to be served must either be attached to the email in PDF format or the email must include "a link to the documents on a website maintained by the clerk."[15] In addition, "the body of the email must identify the

- court in which the proceeding is pending,
- case number,
- name of the initial party on each side,
- title of each document served with that email, and
- sender's name and phone number."[16]

The email, including all attachments, cannot exceed 5 megabytes (MB) in size.[17] If an email exceeds this size, the email must be divided into separate emails (each being 5 MB or less) and sequentially numbered in the subject line.[18] The signature can be completed by using either "/s/," "/s," or "s/" formats; however, the original document filed with the clerk must be signed "in accordance with the applicable rule of procedure."[19] Finally, the service is deemed complete when the email is sent.[20]

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[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] Amendments II, 102 So. 3d at 507-08 (tabulation added).
[17] *Id*. at 508.
[18] *Id*.
[19] *Id*. at 517.
[20] *Id*. at 516.

E-Filing

Electronic filing will be mandatory in several court divisions on April 1, 2013, and will become mandatory in the remaining divisions on October 1, 2013.

Electronic filing becomes mandatory on **April 1, 2013, at 12:01 a.m.** for:[21]	Electronic filing becomes mandatory on **October 1, 2013, at 12:01 a.m.** for:[22]

• Trial court divisions of:
  o Civil
  o Probate
  o Small Claims
  o Family Law
• Appeals to the circuit courts in civil, probate, small claims, and family law cases
• District Courts of Appeal
• Florida Supreme Court[23]
	• Trial court divisions of:
	  o Criminal
	  o Traffic
	  o Juvenile
	• Appeals to the circuit courts in criminal, traffic, and juvenile cases
	• Baker Act proceedings
	• Jimmy Ryce proceedings

[Clerks are not required to electronically transmit the record on appeal until July 1, 2013, at 12:01 a.m.[24])

In addition to the mandatory email service rule, there are two new rules requiring mandatory electronic filing of all documents filed in Florida courts.[25] These rules require attorneys to electronically file "court records" with the trial and appellate courts.[26] Documents must be electronically filed through the state's electronic filing portal – referred to as ePortal.[27]

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[21] Amendments I, 102 So. 3d at 461.
[22] *Id*.
[23] Although the Florida Supreme Court originally set February 27, 2013 as the deadline, in a February 18, 2013 order the court set April 1, 2013 as the new deadline for mandatory e-filing. *See* The Florida Bar News March 11, 2013 web post at: http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/5d73f916f5ecd47a85257b160074f6d3!OpenDocument.
[24] Amendments I, 102 So. 3d at 461-62.
[25] *See* Amendments I, 102 So. 3d at 451. The new rules are Florida Rule of Judicial Administration Rules 2.520 (Documents) and 2.525 (Electronic Filing).
[26] *Id*. at 457. "Court records" as defined by Florida Rules of Judicial Administration Rule 2.430(a)(1).
[27] Florida State Courts website is accessed at http://www.flcourts.org/gen_public/technology/e-filinginfostatus.shtml#portal; ePortal access is found at: http://www.myflcourtaccess.com.

There are limited exceptions to the e-filing rules. E-filing is not required when

- the clerk lacks the ability to accept and retain documents by e-filing;
- the filer is a pro-se party, a pro-se nonparty, a nonparty governmental or public agency, or an agency, partnership, corporation, or business entity acting on behalf of any governmental or public agency;
- the filer is an attorney excused from email service;
- the filing is evidentiary exhibits or non-documentary materials;
- the filing involves documents in excess of 25 MB in size (in which case the documents may be transmitted to the court using an electronic storage medium, such as a CD-ROM or flash drive);
- the document is filed in open court;
- a paper filing is permitted by any approved state or local electronic filing procedure; or
- a court determines that justice so requires.[28]

When a filer submits a paper document to the clerk under one of these exceptions, the clerk's office must immediately convert the paper document to an electronic document.[29] The filer can provide a postage-paid envelope for the clerk to return the paper documents.[30] Unless the documents are required to be maintained, the clerk is permitted to recycle the paper documents once they have been converted.[31] The filing date for any electronically filed document is the date and time that the filing is acknowledged by an electronic stamp or the date that the last page of the filing is received by the clerk.[32] This means that an electronic filing may be submitted 24 hours a day, seven days a week.[33] There are additional minor provisions to the new rules, including additional exceptions for probate, appellate, and criminal cases.[34]

As compliance for all courts grows near, you should review your office procedures to ensure that you and your staff are in compliance with the new rules. In addition, you must obtain credentials in order to file through ePortal.[35]

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[28] Amendments I, 102 So. 3d at 471-72.
[29] *Id*. at 471.
[30] *Id*.
[31] *Id*.
[32] *Id*. at 472.
[33] Florida Clerk's website (http://www.flclerks.com/e-Filing_Authority/eFiling_faq1.html).
[34] *See generally* Amendments I, 102 So. 3d at 469-73 and Amendments II, 102 So. 3d at 515-19.
[35] Instructions on how to obtain ePortal credentials can be found through the Florida Courts E-Filing Authority Website at http://www.flclerks.com/eFiling_authority.html#Videos

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Court Officials Can Testify Against You!

Jennifer A. Tise

A court official's position in the judicial system is characterized as being neutral. An unbiased court official gives parties the confidence that their case will end with an equitable judgment. According to the Code of Judicial Conduct, a court official shall not lend the prestige of judicial office to advance the private interests of others.[1] However, the Judicial Ethics Advisory Committee has found in certain situations a part-time civil traffic infraction hearing officer may testify without a subpoena as an expert witness in a non-traffic court case.[2]

An issue was presented to the Judicial Ethics Advisory Committee as to whether a part-time civil traffic hearing infraction officer could testify as an expert witness in a non-traffic court case.[3] The civil traffic infraction hearing officer wanted to voluntarily testify as an expert witness in a construction lien foreclosure action in the same county where he held office.[4] Specifically, this part-time civil traffic infraction hearing officer wanted to testify as to the reasonableness of attorney's fees for legal services given in the foreclosure matter.[5] This particular civil traffic infraction hearing officer was a part-time court official who also was a practicing real estate lawyer.[6]

The Code of Judicial Conduct applies to civil traffic infraction hearing officers.[7] The Code declares that hearing officers and traffic magistrates should avoid any practice of law that could result in a conflict of roles or cause an erosion of the "public confidence in the integrity and impartiality of the judiciary."[8] Nonetheless, the Judicial Ethics Advisory Committee recognized limitations to the application of the Code of Judicial Conduct to civil traffic infraction hearing

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[1] Fla. Code Jud. Conduct Canon 2B.
[2] Fla. JEAC Op. 12-38 (2012).
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] Fla. Code Jud. Conduct Canon 2A.

officers.[9] One limitation acknowledged by the Committee is that a part-time civil traffic infraction hearing officers may continue to practice law in the circuit where they hold their judicial position as long as they do not handle any county traffic violations in their practice of law.[10]

In addition to the limitation of applicability to the Code of Judicial Conduct toward civil traffic infraction hearing officers when practicing law, the Judicial Ethics Advisory Committee recognized another limitation when a part-time civil traffic infraction hearing officer seeks to testify as an expert witness in the same county where he holds his position.[11] The Committee expanded the confinements of the Code to include a part-time civil traffic infraction hearing officer's ability to voluntarily testify as an expert witness in non-traffic court cases in the county where he holds his position.[12] Therefore, according to the Judicial Ethics Advisory Committee, the part-time court official and practicing real estate attorney was permitted to voluntarily testify as to the reasonableness of attorney's fees in a construction lien foreclosure case in the same county where he holds his position.[13]

Although this information may be similar in other jurisdictions, civil traffic hearing officers that want to testify as an expert should construe the information provided by the Judicial Ethics Advisory Committee of the Sixth Judicial Circuit of Florida narrowly. The ethics opinion did not provide information as to whether civil traffic hearing officers may testify as a traffic expert in a county in Florida where they do not hold a judicial position or in another state. For more information on the ethical limitations of court, please visit the Judicial Ethics Advisory Committee opinions on the Sixth Judicial Circuit of Florida website.[14]

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[9] Fla. JEAC Op. 12-38.
[10] *Id.*
[11] *Id.*
[12] *Id,*
[13] *Id.*
[14] Sixth Judicial Circuit of Florida, *Opinions of the Judicial Ethics Advisory Committee*, http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/jeac.html (accessed March 21, 2013).

A Protocol for Responding to Indigent Defendants' Document Requests

Kacie Hohnadell

If you are a public defender, you have a duty to provide indigent clients with copies of certain documents without charging copying fees.[1] In *Brown v. State*,[2] Florida's Fourth District Court of Appeal confirmed that public defenders must provide indigent clients with free copies of any legal documents prepared at the public's expense but may charge the client a reasonable fee for copies of lawyer-prepared documents.

In *Brown*, an indigent defendant filed a petition for writ of mandamus requesting that the trial court order the public defender who had represented him in prior criminal proceedings to provide him with free copies of transcripts and other record documents.[3] Particularly, the client requested police reports, sentencing paperwork, charging documents, and his client file.[4] The client was incarcerated and needed these documents to write legal motions for his pro se appeal.[5]

The trial court denied the indigent defendant's petition, and the defendant appealed.[6] On appeal, the Fourth District reversed the trial court's decision, noting that "[b]ecause a public defender or court-appointed lawyer is an 'official,' mandamus is an appropriate remedy to compel such an official to provide a defendant with copies of legal documents prepared at public expense."[7]
The Fourth District further held that the client was entitled to free copies of transcripts or other record documents prepared at the public's expense, but he would have to pay a reasonable fee for copies of any lawyer-prepared documents.[8] In a footnote, the court explained that for lawyer-prepared documents, the public defender has a duty to inform the client of the availability

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[1] *Brown v. State*, 93 So. 3d 1194 (Fla.4th Dist. App. 2012).
[2] *Id.*
[3] *Id*. at 1195.
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.* at 1196.
[8] *Id.*

of such documents and the cost of reproducing them, even if the client does not have the financial ability to purchase them.[9]

Although the court made a clear distinction between a public defender's duties regarding documents "prepared at the public expense" and lawyer-prepared documents, the court did not explicitly define documents "prepared at the public expense."[10] The court, however, did provide the following guidance: "Apart from transcripts or record documents prepared on the defendant's behalf at public expense, the defendant's attorney cannot be required to provide other documents that are in the case file without adequate compensation."[11]

In light of this duty, public defenders need to be responsive to former client's document requests by sending the required documents and informing the client of the costs and availability of other documents. Although the court opinion did not specifically dictate how public defenders should comply with this duty, one way to comply is to have a protocol for responding to clients' document requests. Under this protocol, all document requests should go to a designated employee, such as a legal assistant or paralegal, who is trained on the proper response. This employee should then pull the client's file and determine which of the requested documents are available and which documents need to be located from another source, such as the clerk of court. This employee should then further determine which of requested documents must be provided to the client free of charge.

Once the employee makes these determinations, he or she should make or obtain copies of all documents required to be sent to the client free of charge. For all other documents, the employee should compile a list that indicates whether the document is available as well as the cost of obtaining and copying the document. Once the employee compiles all of this information, he or she should give the document request letter, the required copies, and the list of other documents to the attorney who handled the case for review. Once the attorney approves these materials, the employee should then scan all materials and save this electronic copy to the client's file. Keeping a log of these materials gives the lawyer a record

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[9] *Id.* n. 1 (citing *Raymond v. State*, 31 So. 3d 946 (Fla. 2d Dist. App. 2010) (finding that the public defender was not required to give his prior client free copies of lawyer-prepared documents)). In *Raymond*, the court stated that "[a]lthough [the defendant] may not have the financial wherewithal to purchase copies of the documents in the possession of his former attorney, there is no way for him to obtain these records unless the court-appointed attorney responds to the correspondence, informing him of the documents available and the cost of reproducing them." 31 So. 3d at 948.

[10] *Brown*, 93 So. 3d at 1195–1196.

[11] *Id.* at 1196.

of his or her response and proof of which documents the lawyer sent. The employee should then package these materials and mail them to the client.

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My, What Noticeable Self-Interests You Have: Avoid Becoming the Big Bad Wolf

Christine O'Shea

Attorneys in Florida must follow this important ethics rule:

> ***A lawyer shall not enter into a business transaction with a client OR knowingly acquire an . . . interest adverse to a client*** . . . ***unless***:
> (1) the transaction and terms . . . are ***fair and reasonable*** to the client ***and are fully disclosed and transmitted in writing*** to the client . . . ;
> (2) the ***client is advised in writing*** of . . . seeking . . . independent legal counsel on the transaction; and
> (3) the ***client gives informed consent, in a writing signed by the client*** . . . .[1]

The Supreme Court recently determined a lawyer violated this rule, looking more like the wolf-fleecing grandma than the helpful attorney, when he provided legal and financial services to an elderly client without informing her in writing of his potential self-interests.[2]

After this client was diagnosed with cancer, the attorney created a new will for her, which stated that the attorney would be her estate's personal representative and all of her estate would go into an established trust, for which he would be the

[1] Rule Regulating Fla. B. 4-1.8(a).
[2] *The Florida B. v. Doherty*, 94 So.3d 443 (Fla. 2012).

successor trustee.[3] On top of the estate planning services, the attorney's client also requested he reduce her six annuities to three.[4] The trust would have included those annuities had the client not passed away before the purchases were completed.[5]

The attorney also helped his client set up two new trusts separate from the will. The first was a real estate trust that only contained the client's condominium.[6] Instructions for this trust were for the trustee to sell the condominium and use the proceeds of the sale to purchase more annuities.[7] The attorney was designated as successor trustee to the client, who was the original trustee, and he was given sole discretion on deciding which annuities to purchase.[8] The second trust was set up for the education of the client's grandchildren. The attorney was also made successor trustee of that trust.[9]

At this point, the attorney's canines and big pointy ears started to show. At first, the attorney applied to purchase annuities from Conseco Insurance Company.[10] He would have made 10% commission, but he backed out; not because he stood to possibly gain from a business transaction that may be adverse to his client, but because 50% of that 10% commission would go back to Conseco as per a settlement agreement he had with them based on his past annuity sales.[11] The attorney owed Conseco over $85,000 in charge-backs because he kept selling annuities to people who died within one year of their purchase.[12] Conseco had a policy that required salespeople to return their commission from those sales if this occurred.[13] Instead, the attorney tried to purchase annuities from Washington National Insurance Company, a subsidiary of Conseco.[14] With them, he stood to gain a 7% commission off the sale, all of which he could keep.[15]

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[3] *Id*. at 445.
[4] *Id*.
[5] *Id*.
[6] *Id*. at 446.
[7] *Id*.
[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*.
[12] *Id*.
[13] *Id*.
[14] *Id*.
[15] *Id*.

Though the sale of these annuities fell through because the client died, it was clear to the Court that the attorney was being self-serving. The Court found that whether his interests were actually adverse to his client's did not matter when it came to violating 4-1.8(a).[16] The Court held if an attorney participates in a business transaction with his client, that attorney has a duty to disclose to his client any potential conflict, in writing.[17] The Court said a "business transaction" includes the transaction where the attorney could gain a commission from one sale over the other. The conflict was aggravated when the attorney only had authorization to sell annuities from those two companies.[18] Because of these issues, the Court found it stood to reason that the attorney's decisions as trustee would likely be biased because he had shown a history of self-serving decision-making. Even if the transaction may not have been directly adverse to the client, the Court said the attorney must disclose the potential conflict to his client in writing and gain his client's informed consent.[19] There, the attorney never disclosed this conflict to his client in writing.

The Supreme Court did not buy the attorney's sheepskin disguise that he was just a middleman between the true seller of annuities, Washington National, and the true buyer, his client. The attorney claimed he was not a party to the business transaction and, therefore, had no duty to inform his client in writing of the attorney's own personal interests. The Court ruled a business transaction is not limited to those in which the attorney and his client are the primary players in the transaction.[20] Rather, the Court found the attorney is still a party to a business transaction if he helped facilitate the sale. Because the attorney partook in "egregious misconduct," he was subsequently disbarred.[21]

The moral of the story: If you provide legal services to a client and partake in any sort of business transaction that may benefit you, you must disclose this fact to your client, even if the transaction may not be adverse to your client's interests. Otherwise, the Supreme Court might notice what big teeth you have.

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[16] *Id*. at 447.
[17] *See* Rule regulating Fla. B. 4-1.8(a).
[18] *Doherty*, 94 So. 3d at 446.
[19] *Id*. at 447.
[20] *Id*. at 448.
[21] *Id*. at 450, 451.

Florida Supreme Court Restructures Advertising Rules

Ashley Rector

The Florida Bar's advertising rules will be restructured almost entirely according to an order released by the Florida Supreme Court last month.[1] The purpose of these changes is to prevent attorneys from misleading or manipulating the public through improper advertising techniques. These updates also have the positive effect of making these rules easier for attorneys to understand than the old rules and easier for the bar to implement.

These rule changes come after the Florida Bar's extensive research at the request of the Florida Supreme Court. The Bar examined modern lawyer advertising and public opinion concerning current advertisement methods. In analyzing these issues, the Bar took into consideration the decisions of the U.S. Supreme Court and other federal courts as well as input from attorneys and the public.[2] On January 31, 2013, the Florida Supreme Court entered an order selectively granting the Florida Bar's proposed amendments to Subchapter 4-7 to the Rules Regulating the Florida Bar. The order replaced old rules 4-7.1 through 4-7.10 with new rules numbered 4-7.11 through 4-7.23.

The first new rule specifically states that "[u]nless otherwise indicated, this subchapter applies to all forms of communication in any print or electronic forum."[3] This means the advertising rules applies to both print and web advertisements, including social media advertisements. If your firm advertises on Facebook or on the internet, for example, you are directly affected by the new rules. The first section also states the advertising rules apply to all lawyers, whether admitted to practice in Florida or not, who advertise to a Florida audience.[4]

The second new rule tells lawyers what is required for attorney advertisements. In addition to including the name of an attorney from the firm and the firm's

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[1] *In re: Amendments to the Rules Regulating the Florida Bar—Subchapter 4-7, Lawyer Advertising Rules*, No. SC11-1327 (Jan. 31, 2013).

[2] For more on the Court's request to the Florida Bar, see *In re: Amendments to the Rules Regulating the Florida Bar—Advertising*, 971 So. 2d 763 (Fla. 2007).

[3] R. Regulating Fla. B. 4-7.11(a).

[4] *Id.* at 4-7.11(b).

office location, the advertisement must also state whether the matter may be referred to other attorneys.[5] Furthermore, the advertising language must be legible, and all required language must be repeated if the advertisement is written in two languages. [6]

The new section entitled "Deceptive and Inherently Misleading Advertisements" is better organized than the previous rules. This section is broken down into subparts and provides examples of the types of statements that would qualify as misleading, and also suggests ways to cure misleading statements within an advertisement.[7] For example, an attorney advertisement may dramatize an actual or fictitious event, so long as that advertisement states prominently: "DRAMATIZATION. NOT AN ACTUAL EVENT."[8] This section is an extensive change that can have a large impact on your firm's advertising procedures. Thus, you should thoroughly read this new section and its corresponding comments and go over these recent changes with the other attorneys in your firm to ensure compliance.

The new rules also provide new sections for "Potentially Misleading Advertisements," which include advertisements that could be interpreted in multiple ways, and "Unduly Manipulative or Intrusive Advertisements," which include advertisements that appeal to a viewer's emotions rather than common sense and rationality.[9] For example, an advertisement that uses an authority figure, such as a judge, to endorse the lawyer is unduly manipulative.[10] However, even with the new seemingly restrictive rules, the new rules also add a section on "Presumptively Valid Content."[11] This section states that certain information contained in attorney advertisements will be presumed to be valid and to not violate the rules. Types of information presumptively valid include state licenses, military service, foreign language ability, forms of payment accepted, and common salutary languages such as "best wishes."[12]

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[5] *Id.* at 4-7.12(a)–(b).
[6] *Id.* at 4-7.12(c).
[7] *Id.* at 4-7.13.
[8] *Id.* at 4-7.13(b)(6).
[9] *Id.* at 4-7.14; *Id.* at 4-7.15.
[10] *Id.* at 4-7.15(b).
[11] *Id.* at 4-7.16.
[12] *Id.* at 4-7.16(a).

Finally, if you are a member of a Lawyer Directory,[13] you will want to be sure to read the new rule concerning lawyer advertisements in directories.[14] These directories have specific limitations, including that they may not communicate with the public in a way that would violate the rules if the attorney were communicating with the public.[15] It is also important to note that lawyers have the responsibility of checking to make sure their advertisements in directories still comply with the rules of the Florida Bar.[16]

These new rules will take effect on May 1, 2013. To read more about the updated rules, and how they will affect your practice, please visit the Florida Bar Website: http://www.floridabar.org.

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[13] A lawyer directory is defined by the rule as "any person, group of persons, association, organization, or entity that receives any consideration, monetary or otherwise, given in exchange for publishing a listing of lawyers together in one place, such as a common Internet address, a book or pamphlet, in which all the participating lawyers and their advertisements are provided and the viewer is not directed to a particular lawyer or lawyers." R. Regulating Fla. Bar 4-7.23.

[14] *Id.* at 4-7.23.

[15] *Id.* at 4-7.23(b)(1).

[16] *Id.* at 4-7.23(c).

Unwaivable Conflicts of Interest for Prosecutors or Defense Attorneys

DeeAnn Petika

Criminal defense attorneys are barred from advising a client to accept a plea bargain that requires the client to expressly waive ineffective assistance of counsel and prosecutorial misconduct. On June 22, 2012, The Professional Ethics Committee of the Florida Bar stated it is improper for a prosecutor to offer and for a defense attorney to advise a client to accept a plea bargain waiving ineffective assistance of counsel and prosecutorial misconduct.[1] Florida joined the ranks of a majority of states, including Virginia, Missouri, Vermont, and North Carolina, which have examined the issue and have concluded that such plea offers are impermissible for both criminal defense attorneys and prosecutors.

Under Florida Rule 4-1.8(h), The Committee found that an attorney's recommendation that a client waive a claim of ineffective assistance of counsel is analogous to limiting malpractice liability. Under the Florida Rule, a lawyer "shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement."[2] The Committee found that while malpractice liability under specific circumstances can be waived, the personal conflict of interest created by such a plea agreement cannot be waived.[3] The Committee also concluded that this type of waiver is impermissible under Florida Rule 4-1.7(a)(2), which provides that "a lawyer shall not represent a client if . . . there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client, a former client or a third person or by the personal interest of the lawyer."[4] The Committee found that a criminal defense attorney has a personal interest when advising a client to waive the right to later collateral proceedings regarding ineffective assistance of counsel.[5]

The Committee also deemed that a prosecutor who requires a criminal defendant to waive claims of prosecutorial misconduct is engaging in conduct prejudicial to

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[1] Fla. Ethics Op. 12-1 (2012).
[2] R. Regulating Fla. B. 4-1.8(h).
[3] Fla. Ethics Op. 12-1.
[4] R. Regulating Fla. B. 4-1.7(a)(2).
[5] Fla. Ethics Op. 12-1

the administration of justice and in violation of Rules 4-8.4(d) and 4-8.4(a) of the Rules Regulating the Florida Bar.[6] The Committee concluded that it is prejudicial to the administration of justice for a prosecutor to require a criminal defense attorney to waive prosecutorial misconduct claims because the prosecutor is usually in the best position, and sometimes the only person, to be aware of the prosecutorial misconduct that has taken place.[7]

Remember, if you are a criminal defense attorney or a prosecutor, do not offer, assist, or recommend a client to accept a plea offer to waive ineffective assistance of counsel and prosecutorial misconduct. As of June 22, 2012, it is an ethics violation.

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[6] *Id.*
[7] *Id.*

Associate or Not, I Can Represent that Client, Right? Outsourcing and Conflicts of Interest

Meagan Blackshear

Attorneys have been able to make the most out of the recent recession by outsourcing. Outsourcing means that instead of hiring an associate, law firms contract the work to attorneys for specifics needs, such as drafting pleadings or conducting legal research. These contracted attorneys are not afforded the usual employee benefits such as vacation time or health insurance. Instead, they are paid by the hour or for the specific assignment. For firms, outsourcing allows them to avoid employee overhead; for outsourcing attorneys, the relationship allows flexibility and compensation. Outsourcing sounds like a win-win situation at first glance, but can an outsourcing arrangement create unexpected conflicts of interest?

In *Brown v. Florida Department of Highway Safety & Motor Vehicles*,[1] the defendant filed a motion to disqualify the plaintiff's law firm on the grounds that the firm had a relationship with an attorney that previously had worked on the case for the defendant. [2] The plaintiff's firm understood that the attorney herself could not work on or assist the plaintiff's law firm in its prosecution of the case,[3] but plaintiff argued that the firm should be disqualified *only* if the attorney was "associated" with the firm.[4] The attorney in *Brown* went to work for the firm and was to work from home. She prepared documents for review by another attorney, was paid hourly, and received no health or retirement benefits that were available to the attorneys at that firm.[5] The attorney never would have contact with clients and had no expectation of advancement in the firm.[6]

The court held that this outsourcing relationship did not rise to the level or an "association" required for imputing a conflict of interest. In determining whether an attorney is an associate the Court considered the totality of the circumstances,

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[1] *Brown v. Fla. Dept*. of Hwy. Safety & Motor Veh., 2012 WL 4758150, at **1–4 (N.D. Fla. 2012).
[2] *Id.* at 1.
[3] *Id.*
[4] *Id.* (discussing R. Regulating Fla. B. 4-1.10, which imputes conflicts to firms from lawyers who are "associated" with it).
[5] *Id.* at 3.
[6] *Id.*

noting that "[n]o one factor is determinative in every case." [7] Client contact, expectation of advancement, and health and retirement benefits, were factors that can show an attorney is "associated" with the firm.[8] Working from home and doing work on a contract basis such as research or drafting pleadings to be reviewed by another attorney without much more in relation to the firm generally means the outsourced attorney is not an associate of the firm.

So what does this mean for practicing attorneys? This means that keeping organized records of policy and procedure for all outsourced work and the attorneys used for each assignment is imperative. Be sure to avoid direct conflicts; for example, avoid having a prior defense attorney for the case work on related matters of the same case for the plaintiff. Outsourcing has become an increasingly common practice in the legal profession and for that reason lawyers must familiarize themselves with how this practice can work advantageously.

Meagan Blackshear is a third-year law student committed to public service and criminal defense and is passionate to make change.

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[7] *Id.*

[8] *Id*. at 2.

Suspension for Chapter 3 Violation: Are You Aware How You Could Be Disciplined?

Meredith Peck

Often, the focus of a Florida Bar disciplinary proceeding is an attorney's violation of an ethical rule from Chapter 4 of the Rules Regulating the Florida Bar. Chapter 4 of the Rules Regulating the Florida Bar contains the Rules of Professional Conduct. Those rules provide standards of conduct for attorneys and judges in their dealings with each other, clients, and the public.[1] Recently, a Supreme Court opinion made it clear that discipline may *also* be imposed for lawyer conduct violating Chapter 3 of the Rules Regulating the Florida Bar.[2] Chapter 3 prescribes additional standards of conduct and provides the Supreme Court of Florida with jurisdiction to discipline attorneys admitted to the Florida Bar.[3] This recent decision should be alarming to practitioners because the Florida Supreme Court made it clear that conduct resulting in suspension for a Florida attorney does not have to amount to a violation of the Rules of Professional Conduct under Chapter 4 for that attorney to be suspended; a violation of Chapter 3 is enough.[4] Thus, a lawyer is at risk of being suspended for conduct that does not directly violate a rule under Chapter 4 of the Rules Regulating the Florida Bar.

This past summer, Florida attorney Richard Draughon was suspended from practice for one year for misconduct that involved dishonesty in violation of Bar Rule 3-4.3.[5] Bar Rule 3-4.3 provides that "[t]he commission by a lawyer of any act that is unlawful or contrary to honesty and justice. . . may constitute a cause for discipline."[6] While Richard Draughon was also charged with a Chapter 4 violation, his misconduct under Chapter 3 was enough to result in his suspension.[7]

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[1] *State ex rel. Florida Bar v. Calhoon*, 102 So. 2d 604 (Fla. 1958).
[2] *The Florida Bar v. Draughon*, 94 So. 3d 566 (Fla. 2012).
[3] R. Regulating Fla. Bar 3-1.2.
[4] *See The Florida Bar v. Draughon,* 94 So. 3d at 570.
[5] *Id.*
[6] R. Regulating Fla. Bar 3-4.3.
[7] *The Florida Bar v. Draughon,* 94 So. 3d at 571.

In an effort to assist a client with a real estate transaction, Draughon formed an organization, National Lease Management Corporation (NLMC), in which he was sole shareholder, and he used that organization to purchase real property from a Pennsylvania woman.[8] The purchase was financed with a promissory note.[9] After making payments for several years and signing several other promissory notes, Draughon transferred the property from NLMC to himself for no consideration.[10] This left NLMC without sufficient assets to satisfy the remaining balance under the promissory note.[11] As a result of these actions, the Florida Bar initiated a disciplinary proceeding against Draughon for misconduct in violation of Rules Regulating the Florida Bar 3-4.3 and 4-4.3(a).[12] The referee in that proceeding recommended that Draughon be found guilty of professional misconduct under Rule 3-4.3 and receive a public reprimand.[13] The referee recommended that Draughon be found not guilty of the Rule 4-4.3(a) violation.[14] Both sides appealed.[15]

On appeal, the Florida Supreme Court determined that Draughon intentionally hindered or delayed the Pennsylvania woman's ability to recover from NLMC. [16] Although Draughon was not acting in a formal attorney-client capacity in that transaction, the Court found he was still bound by the Florida Bar's ethical rules and violated Rule 3-4.3 but not 4-4.3(a) by participating in an activity involving dishonesty.[17] Draughon argued that Rule 3-4.3 could not serve as an independent basis for imposing discipline.[18] The Court disagreed, making clear that an individual need not violate a Chapter 4 rule to be subject to discipline for Chapter 3 violations.[19] The Court stated that enumerated categories of misconduct outlined in Chapter 4 are not meant to be an all inclusive list.[20] Any

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[8] *Id.*
[9] *Id.* at 567.
[10] *Id.* at 568.
[11] *Id.*
[12] *Id.* at 567.
[13] *Id.*
[14] *Id.* at FN3. (Rule 4-4.3(a) provides that "[i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.")
[15] *Id.*
[16] *Id*.
[17] *Id.* at 570.
[18] *Id.* at 569-570.
[19] *Id.* at 570.
[20] *Id.*

act "contrary to honesty or justice" the Court said, may subject an attorney to professional discipline.[21] The Court also expressed that attorneys are expected "to conduct their personal business affairs with honesty and in accordance with the law."[22] Because Draughon violated Rule Regulating the Florida Bar 3-4.3, the Court imposed a one year suspension, noting that "basic fundamental dishonesty is a serious flaw" and will not be tolerated in the legal profession.[23]

Florida attorneys should be aware of the standards of conduct outlined in Chapter 3 of the Rules Regulating the Florida Bar and that an attorney may be subject to professional discipline if he or she commits an act contrary to those standards.[24] An attorney should know that he or she may be subject to discipline in Florida if he or she is found guilty of violating the rules of a disciplinary agency of another jurisdiction.[25] Further, Florida attorneys should generally be aware that any misconduct places an attorney at risk of becoming subject to disciplinary proceedings, whether such conduct is minor or of a criminal nature.[26] Therefore, it is recommended that Florida attorneys take a few minutes to review Chapter 3 and become reacquainted with the standards of conduct.

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[21] *Id.*
[22] *Id* at 571.
[23] *Id.*
[24] *See* R. Regulating Fla. Bar 3-4.
[25] R. Regulating Fla. Bar 3-4.6.
[26] R. Regulating Fla. Bar 3-4.3, 3-4.4.

The Supreme Court Declares "Thou Shall Not Steal"

Justin Bennett

On September 6, 2012, The Florida Supreme Court handed down a decision finding two attorneys guilty of professional misconduct and suspended them from practice.[1] The complaints alleged multiple counts of misconduct by the lawyers when they decided to leave their firm in 2001. Prior to leaving, the attorneys made secret plans to open their own firm. In an effort to jump-start the new firm, the pair solicited clients they had represented while working for the old firm to leave and join them, all while misrepresenting their real intentions to the clients.[2] In pursuit of their goal to take clients with them to the new firm, the lawyers made copies of confidential client files.[3]

About this Newsletter

This is a project of the students enrolled in the Spring 2013 Advanced Legal Writing Course taught by Dr. Kirsten K. Davis.

This is a student written newsletter project; this is not legal advice. Stetson University and its College of Law does not endorse any views or guarantee the accuracy of any information contained in this newsletter.

For more information, contact Kirsten K. Davis at kkdavis@law.stetson,edu.

The Florida Bar recommended that both attorneys should be found guilty of criminal theft under Florida Statute Section 812.014 for stealing the client's files. The Florida Supreme Court agreed and found the pair in violation of Rule 4–8.4(d), which punishes criminal acts that reflect adversely on a lawyer's honesty and trustworthiness.[4] Further, the Court found that the lawyers' act of stealing the clients' files from their employer constituted dishonesty, fraud, and deceit in violation of Rule 4–8.4(c).

In its opinion, the Florida Supreme Court expanded Rule 4–8.4(d), which prohibits an attorney's conduct in connection with the "practice of law" that is prejudicial to the administration of justice. Traditionally, this rule only applied to conduct a lawyer engaged in "while employed in a legal capacity."[5] The Court found however, that even though the lawyers stole the client files for private use, the theft was "in connection with the practice of law" and thus was inherently prejudicial to the administration of justice in violation of 4–8.4(d). The Court suspended the lawyers from the practice of law for ninety days, and publicly admonished the guilty duo.[6]

To stay out of this trouble in your own practice, you should refrain from engaging in client stealing, whether it is for professional use in connection with the practice of law or just private use. Honesty is always the best policy.

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[1] *Fla. Bar v. Winters & Yonker*, 104 So. 3d 299, 299 (Fla. 2012).
[2] *Id.* at 301.
[3] *Id.*
[4] *Id.* at 302.
[5] *Id.* at 303.
[6] *Id.* at 304.