CLE SEMINAR EVALUATION FORM

Name (Optional): _____ Date: October 21, 2011

Name of Course: Annual Ethics Update 2011(RDL 1298R)

City: Tampa Facility: Tampa Airport Marriott – Tampa International Airport

Please evaluate the speaker presentation for this Florida Bar CLE program based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you rate a presentation 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

Speaker	Speaker Rating	Course material	Comments
Bill Loucks	___	___	_____
Eugene Shuey	___	___	_____
Bill Costello	___	___	_____
Debra Davis	___	___	_____

General Speaker Comments: _____

_____

_____

General Seminar Comments: _____

_____

_____

_____

Course material Comments: _____

_____

☐ Did you attend this course via **Webcast or Telephone**? If so, please send this completed form to FAX 850-561-9427.

Please evaluate the facility based on the following scale: **5=excellent; 4=good; 3=fair/average; 2=poor; 1=unacceptable**. If you use a rate of 2 or 1, please explain why, in the comment section, so that we may further improve our programs.

___ Convenience
___ Aesthetics (comfort, cleanliness, etc.)
___ Amenities (restaurants, restrooms, parking, etc.)

Facility Comments: _____

_____

Where did you learn of this seminar?

☐ Bar *News* Ad ☐ Brochure ☐ FLABAR Website ☐ Section Website ☐ Other

Please identify any topic that you wish to see as the subject of future or expanded Florida Bar seminars:

_____

_____

Common Questions About CLER

1. **What is CLER?**
   CLER, or Continuing Legal Education Requirement, was adopted by the Supreme Court of Florida in 1988 and requires all members of The Florida Bar to continue their legal education.

2. **What is the requirement?**
   Over a 3 year period, each member must complete 30 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness.

3. **Where may I find information on CLER?**
   Rule 6-10 of the Rules Regulating The Florida Bar sets out the requirement. All the rules may be found at www.floridabar.org to Rules Updates to Rules Regulating The Florida Bar.

4. **Who administers the CLER program?**
   Day-to-day administration is the responsibility of the Legal Specialization and Education Department of The Florida Bar. The program is directly supervised by the Board of Legal Specialization and Education (BLSE) and all policy decisions must ultimately be approved by the Board of Governors.

5. **How often and by when do I need to report compliance?**
   Members are required to report CLE hours earned every three years. Each member is assigned a three year reporting cycle. You may find your reporting date either by going to www.floridabar.org to Member Profile to CLE Status Inquiry or the mailing label of The Florida Bar News.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Three months prior to the end of your reporting cycle, you will receive either:
   1) a CLER Reporting Affidavit, if you still lack hours; or,
   2) a CLER Notice of Compliance, if you have completed your hours.

7. **What do I do with the Affidavit?**
   You are to update and correct the form, complete any hours you lack, and sign and return the affidavit by your reporting date. Complete instructions appear on the reverse side of the form.

8. **What do I do with the Notice of Compliance?**
   If the information is correct, you need not respond. This document is your confirmation that you have completed the requirement for your current reporting cycle.

9. **What happens if I am late returning my Affidavit or do not complete the required hours?**
   You run the risk of being deemed a delinquent member which prohibits you from engaging in the practice of Florida law.

10. **Will I receive any other information about my reporting cycle?**
    Approximately 45 days prior to the end of your reporting cycle, if you have not yet completed your hours.

11. Are there any exemptions from CLER?

Rule 6-10.3(c) lists all valid exemptions. They are:

1) Active military service
2) Undue hardship (upon approval by the BLSE)
3) Nonresident membership (see rule for details)
4) Full-time federal judiciary
5) Justices of the Supreme Court of Florida and judges of district, circuit and county courts
6) Inactive members of The Florida Bar

12. Other than attending approved CLE courses, how may I earn credit hours?

Credit may be earned by:

1) Lecturing at an approved CLE program
2) Serving as a workshop leader or panel member
3) Writing and publishing in a professional publication or journal
4) Teaching (graduate law or law school courses)
5) University attendance (graduate law or law school courses)

13. How do I submit various activities for credit evaluation?

Applications for credit may be found either on our website, www.floridabar.org, or in the directory issue of The Florida Bar Journal following the listing of Board Certified Lawyers.

14. How are attendance hours posted on my CLER record?

If you registered for a seminar through The Florida Bar Registrations Department, the credit will be posted to your record automatically. If the course is sponsored by a Florida Bar Section or another organization, you can post your credits online.

15. How long does it take for hours to be posted to my CLER record?

When you post your CLE credit online, your record will be automatically updated and you will be able to see your current CLE hours and reporting period.

16. How may I find information on programs sponsored by The Florida Bar?

You may wish to visit our website, www.floridabar.org, or refer to The Florida Bar News. You may also call CLE Registrations at 850/561-5831.

17. If I accumulate more than 30 hours, may I use the excess for my next reporting cycle?

Excess hours may not be carried forward. The standing policies of the BLSE, as approved by the Supreme Court of Florida specifically state in 6.03(b):

... CLER credit may not be counted for more than one reporting period
and may not be carried forward to subsequent reporting periods.

18. Will out-of-state CLE hours count toward CLER?

Courses approved by other state bars are generally acceptable for use toward satisfying CLER.

19. If I have questions, whom do I call?

You may call the Legal Specialization and Education Department of The Florida Bar at 850/561-5842.

While online checking your CLER, don't forget to check your Basic Skills Course Requirement status.

The Florida Bar Continuing Legal Education Committee,
the General Practice, Solo & Small Firm Section

Annual Ethics Update 2011

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

October 21, 2011

Live Presentation and Webcast:

Tampa Airport Marriott
4200 George J. Bean Parkway
Tampa International Airport
Tampa, FL 33607

Course No. 1298R

THE FLORIDA BAR

PREFACE

The course materials in this booklet were prepared for use by the registrants attending our Continuing Legal Education course during the lectures and later in their offices.

The Florida Bar is indebted to the members of the Steering Committee, the lecturers and authors for their donations of time and talent, but does not have an official view of their work products.

CLER CREDIT

(Maximum 5.0 hours)

General ..... 5.0 hours Ethics ..... 5.0 hours

Seminar credit may be applied to satisfy both CLER and Board Certification requirements in the amounts specified above, not to exceed the maximum credit. Refer to Chapter 6, Rules Regulating The Florida Bar, see the CLE link at www.floridabar.org for more information about the CLER and Certification Requirements.

Prior to your CLER reporting date (located on the mailing label of your Florida Bar *News*) you will be sent a Reporting Affidavit (must be returned by your CLER reporting date) or a Notice of Compliance which confirms your completion of the requirement according to Bar records (does not need to be returned). You are encouraged to maintain records of your CLE hours.

CLE CREDIT IS NOT AWARDED FOR THE PURCHASE OF THE COURSE BOOK ONLY.

CLE COMMITTEE MISSION STATEMENT

The mission of the Continuing Legal Education Committee is to assist the members of The Florida Bar in their continuing legal education and to facilitate the production and delivery of quality CLE programs and publications for the benefit of Bar members in coordination with the Sections, Committees and Staff of The Florida Bar and others who participate in the CLE process.

COURSE CLASSIFICATION

The Steering Committee for this course has determined its content to be INTERMEDIATE.

GENERAL PRACTICE, SOLO & SMALL FIRM SECTION

Frank Maloney, Macclenny — Chair
Linda Calvert Hanson, Gainesville — Chair-elect
Teresa Byrd Morgan, Lake City — CLE Chair

FACULTY & STEERING COMMITTEE

Eugene Shuey, Gainesville — Program Chair
Bill Costello, Tampa
Debra Davis, Tampa
Bill Loucks, Orlando
Eugene Shuey, Gainesville

CLE COMMITTEE

Candace S. Preston, Wauchula — Chair
Terry L. Hill — Director, Programs Division

For a complete list of Member Services visit our web site at www.floridabar.org.

LECTURE PROGRAM

8:00 a.m. – 8:30 a.m.	**Late Registration**
8:30 a.m. – 8:40 a.m.	**Opening Remarks** *Eugene Shuey, Program Chair, Gainesville*
8:40 a.m. – 9:30 a.m.	**Relationship Between Ethics: Professional Responsibility and Professional Liability** *Bill Loucks, Florida Lawyers Mutual Insurance Company, Orlando*
9:30 a.m. – 10:20 a.m.	**Ethical Practice in the Real World** *Eugene Shuey, Gainesville*
10:20 a.m. – 10:30 a.m.	**Break**
10:30 a.m. – 11:20 a.m.	**Ethical Practice in the Real World – continued** *Eugene Shuey, Gainesville*
10:20 a.m. – 12:10 p.m.	**Ethics and the Technology in Your Law Office** *Bill Costello, Rumberger, Kirk & Caldwell, P.A., Tampa*
12:10 p.m. – 1:00 p.m.	**Ethical Advertising** *Debra Davis, Smith, Tozian & Hinkle, P.A., Tampa*

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AUTHORS/LECTURERS

BILL COSTELLO is currently Director of Information Technology; Rumberger, Kirk and Caldwell PA; prior to that held similar positions at Arnstein & Lehr, Arnold & Porter; Banner & Witcoff LTD and Dombroff, Gilmore, Jaques & French P.C. over the past 14 years.

DEBRA J. DAVIS ("Debbie") joined Smith, Tozian & Hinkle, P.A. in 2005. She received her B.S. in accounting, with honors, from the University of Tampa and then studied at the Australian Graduate School of Management in Sydney, Australia. In 1996, Debbie earned her law degree, with honors, from the University of Florida Levin College of Law. Debbie's work experience prior to and during her educational accomplishments involved public and private accounting. She received her Certified Public Accountant license in 1992. From 1997, through 2005, Debbie was Bar Counsel in the Tampa Office of The Florida Bar's Lawyer Regulation Department. Before accepting the Bar Counsel position, she was one of five branch staff auditors employed by The Florida Bar to conduct compliance examinations of attorney trust accounts. Debbie has taught Ethics School and Practicing with Professionalism programs for The Florida Bar and lectured on a variety of ethics topics.

WILLIAM E. LOUCKS is currently the President/CEO of Florida Lawyers Mutual Insurance Company ("FLMIC") and a former partner of Smith, Hood, Perkins, Loucks, Stout, Bigman, Lane and Brock, P.A. of Daytona Beach, Florida. He has been licensed to practice law in the State of Florida since October 1961. During his legal career, Mr. Loucks was a member of the Board of Governors of The Florida Bar and served on its Executive Committee, Disciplinary Review Committee, and Mandatory Continuing Legal Education Committee. He was also a member of the Board of Governors of the Young Lawyers Division. In addition, Mr. Loucks served as a member of the Judicial Council of Florida, Chair of the Statewide Fee Arbitration Committee and a member of the 7th Circuit Judicial Nominating Committee. Prior to becoming President/CEO of FLMIC, Mr. Loucks served on its Board of Directors and as Chairman of its Underwriting Committee and as a member of the Executive and Investment Committees. In private practice, he represented clients in personal injury, insurance, transactional, real estate and commercial matters as well as with wills, trusts, probate and estate administration. A former member of the United States Marine Corps, Mr. Loucks retired with the rank of Captain.

EUGENE E. SHUEY is the shareholder of the Gainesville law firm of Eugene E. Shuey P.A., and practices in the area of real estate and commercial litigation, complex real estate transactions, alternative dispute resolution and Bar grievance defense. He is admitted to practice in Florida, the U.S. Supreme Court, the 5th and 11th U.S. Circuit Courts of Appeal and the U.S. District Court for the Southern District of Florida. He is a graduate of Bowling Green State University with a B.S.B.A. in accounting and received his J.D. degree from the University of Florida College of Law. He has been a Florida Bar board certified real estate lawyer since 1992. Mr. Shuey has lectured extensively for The Florida Bar, the Palm Beach County Bar Association and many other seminar providers on real estate, litigation and legal ethics. He has provided the annual case law and statutory update lecture for the Advanced Real Estate Law and Certification Review Course since 2000. He is often employed as an expert witness in complex real estate litigation and attorney malpractice cases involving real estate issues. Mr. Shuey serves on the Executive Council of the Real Property, Probate & Trust Law Section of The Florida Bar. He is Vice-Chair of the Real Estate Litigation Committee of the Section. He also serves on the Executive Council of the General Practice, Solo and Small Firm Section. Mr. Shuey is a certified circuit civil mediator and a qualified civil arbitrator. He has been listed in the "Leading

Florida Lawyers" and "Super Lawyers" publications regarding real estate law. Since 1984, he has authored and presented numerous articles and over 70 seminar presentations, as well as serving as an adjunct instructor of real estate law at Palm Beach Community College and lecturer on ethics at the University of Florida College of Law. He is most recently the author of Chapter 11, "Notice of Lis Pendens," Florida Real Property Litigation, 5th Edition (2009), published by The Florida Bar.

Relationship Between Ethics: Professional Responsibility and Professional Liability

By

Bill Loucks, Orlando

General Practice Solo & Small Firm Section of The Florida Bar

The Relationship Between Ethics, Professional Responsibility & Professional Liability: Separate or Related?

October 21, 2011

Presented by William Loucks, Esq.
President/CEO
Florida Lawyers Mutual Insurance Company

I. INTRODUCTION:

Violation of an ethical rule per se does not give rise to a cause of action or create a presumption that a legal duty has been breached. See Preamble: A Lawyer's Responsibilities, Florida Rules of Professional Conduct (the "Rules"). In other words, although an attorney may engage in unethical conduct under the Rules, the conduct alone may not constitute an act of legal malpractice. However, it is not surprising to see a legal malpractice claim follow the filing of an ethics complaint, or visa versa. In some situations, the same act or omission may be a basis for an ethics complaint and a legal malpractice claim.

"Separate and distinct, but joined at the hip" is an effective way to describe the relationship between compliance with the Rules and the avoidance of civil liability for legal malpractice. Both the Rules and the American Bar Association ("ABA") Model Rules of Professional Conduct clearly state neither set of Rules are intended to be the basis for civil liability. The Preamble to the ABA Model Rules of Professional Conduct provides:

> Violation of a Rule should not give rise to a cause of action nor should it create any presumption in such a case that a legal duty has been breached . . . The Rules are designed to provide guidance and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

Similar language can be found in the Preamble to the Rules:

> Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached . . . The rules are designed to give guidance to lawyers and to provide a structure for regulating conduct through

> disciplinary agencies. They are not designed to be a basis for civil liability. . . Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

Moreover, the purpose, procedures and decision-makers involved in an ethics complaint and a civil legal malpractice claim differ. However, reviewing courts have taken a variety of approaches regarding how to best use evidence of violation of an ethics rule in a legal malpractice claim. The South Carolina Supreme Court summarized the different approaches taken by various courts in Smith v. Haynsworth, Marion, McKay & Geurard, 472 S.E. 612, 613-614 (1996):

> A majority of courts permit discussion of such a violation at trial as some evidence of the common law duty of care. These courts generally rule that the expert must address his or her testimony to the breach of a legal duty of care and not simply to breach of disciplinary rule. Other courts have held that ethical standards conclusively establish the duty of care and that any violation is negligence per se. A minority finds that violation of an ethical rule establishes a rebuttable presumption of legal malpractice. And, finally, a few courts hold that ethical standards are inadmissible in a legal malpractice action.

Also illustrative of the unique relationship between the Rules and professional liability are the questions typically found in a professional liability insurance application, many of which are based on ethical considerations. For example: 1) Who will be responsible for communications with your clients if you are absent for an extended period of time? (See Rule 4-1.4--Communication) 2) Are there procedures in place for identifying potential or actual conflicts of interest? (See Rule 4-1.7, 4-1.8, 4-1.9, 4-1.10, 4-1.11--Conflict of Interest) 3) Does the applicant use engagement, non-engagement and declination letters (See Rule 4-1.18 (Duties to Prospective Client) 4) How many non-lawyers are with the firm? (Rule 4-5 Law Firms & Associations); 5) Does any lawyer in the firm engage in business ventures with clients? (Rule 4-1.8 Prohibited and Other Transactions), etc.

In summary, compliance with the Rules does not guarantee the avoidance of civil liability for a legal malpractice claim. However, noncompliance can increase the risk.

II. TEN BEST WAYS TO COMMIT MALPRACTICE & VIOLATE THE RULES:

According to the 2004-2007 study by the American Bar Association, the top five most commonly alleged errors were:

1. Failure to know/properly apply the law
2. Failure to file document/no deadline
3. Planning error/procedure choice
4. Inadequate discovery/investigation
5. Failure to calendar properly

A more recent survey by Ames & Gough of senior claim examiners responsible for lawyers' professional liability claims at six of the leading insurance companies found the following 5 additional causes of legal malpractice:

1. Conflict of interest
2. Improper drafting
3. Inadequate discovery
4. Clerical errors
5. Breach of fiduciary duty

Not surprisingly, each of these malpractice errors is related to specific Rules of Professional Conduct.

III. DISCUSSION:

1. Competence. For example, the failure to know or properly apply the law is related to Rule 4-1.1 concerning a lawyer's competence. Rule 4-1.1 provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." As a lawyer, are you aware of recent changes to the law by the Florida Legislature as well as your local government impacting your clients? Are you competent in all areas of law in which you represent clients? What can you do to comply with Rule 4-1.1?

2. Conflict of Interest. Several sections of the Rules require attorneys to avoid conflicts of interest with current, past and prospective clients. These Rules are highlighted and summarized below:

a. Rule 4-1.7 Conflict of Interest: Current Clients.

This Rule specifically forbids representation of a client if that representation will be directly adverse to another current client, or if there is a substantial risk of material limitation of the lawyer's responsibilities to

another current client, a former client, a third person, or by the lawyer's personal interest

The Rule then provides an exception to the prohibition, in which the attorney is required to obtain informed consent in writing from each affected client, after determining that the attorney can provide competent and diligent representation to each, it is not prohibited by law, and it does not involve "the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal."

b. Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions

This Rule prohibits an attorney from entering into a business transaction with a client or from acquiring an interest adverse to a client UNLESS the terms are fair and reasonable and fully disclosed in a readily understood writing; the client is advised in writing of the desirability of getting an outside legal opinion; and the client gives "informed consent" in writing.

c. Rule 4-1.9 Conflict of Interest: Former Client

This Rule states that if an attorney once represented a client in a matter, the attorney shall not represent another person in that same matter if the other person's interests are materially adverse to the former client. An exception to this Rule is available with the client's informed consent.

d. Rule 4-1.10 Imputation of Conflicts of Interest: General Rule

This Rule provides that if one attorney in the firm is disqualified from representing a client, then all attorneys in the firm are also disqualified.

e. Rule 4-1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

This Rule requires informed, written consent in the event of a conflict between clients at the law firm and the former state agency or local government.

Conflict of interest situations not only present challenges to compliance with the Rules but also to a lawyer's obligation to avoid a breach of a fiduciary duty owed to a client. Technology is available to assist in "conflict checks" to avoid conflict of interest situations and the resulting embarrassment, loss of money and time. Technology can assist in checking for deviations in entry of client information.

3. Prospective Clients. A seemingly innocuous question, but not always easily answered is "Who is the client?" Uncertainty regarding who the client actually is may

seem more suited to a law school exam than a law practice. Unfortunately, that uncertainty occurs more often than you might think in current practice. With the emergence of chat rooms, blogs and other technology forums that provide interaction between attorneys and the public, the ambiguity regarding who is the client is not fictional.

Rule 4-1.18 contains duties owed by attorneys to a prospective client. Section (a) of the Rule defines a "prospective client" as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter...." Even when the discussion does not result in an attorney-client relationship, the lawyer cannot disclose any information learned in the consultation except, as Rule 4-1.9 would permit regarding a former client. Rule 4-1.9 states:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent; or
>
> (b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or.
>
> (c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Moreover, an attorney cannot under Rule 4-1.18 represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be used to the disadvantage of that person in the matter, except if representation is permissible under subdivision (d) of the Rule. Furthermore, if a lawyer is disqualified from representation under Rule 4-1.18, no lawyer in the firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as otherwise permissible under subdivision (d). Subsection (d) states:

> When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying

> information than was reasonably necessary to determine whether to represent the prospective client; and (3)(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.

Documenting the presence or absence of an attorney-client relationship may seem excessive or unnecessary, yet ethically it is as important as documenting other terms of engagement such as fees. It is difficult to misconstrue an unambiguous declination letter. Moreover, a timely declination letter provides the prospective client the opportunity to seek other counsel in a timely manner without prejudice to the individual's legal rights. A declination letter does not have to be complex. In fact, notification of non-engagement does not always have to be by formal letter. Available computer software can assist in creating the necessary documentation without a loss of valuable time. Good practice suggests declination letters should not include reasons or comments that disparage the declined client or otherwise comment on the merit of the case.

Moreover, an attorney also needs to know who is the client since he or she must avoid conflicts of interest with former and current clients. Rule 4-1.7 provides that a lawyer shall not represent a new client if:

> (1) the representation of one client is directly adverse to another client; or
>
> (2) there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Notwithstanding the existence of a conflict of interest under subdivision (a) of Rule 4-1.7, a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

4. Diligence. Rule 4-1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. Is your practice empowered with the necessary staff resources and computer technology to adequately represent your client(s) in your absence? If work will be delegated to others, is the firm's document management system adequate to provide for easy sharing of documents and collaborative drafting.

Moreover, Rule 4-1.4 provides that "[a] lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; (2) reasonably consult with the client

about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter;(4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules or other law.

In addition, a lawyer is ethically obligated to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Doing so, with follow-up written communication, can avoid future claims that the attorney failed to advise of the risks of certain actions or failed to properly keep the client informed of the progress of the matter. Some matters should always be confirmed in writing. These include: 1) settlement authority; 2) applicable deadlines and scheduled matters which require the client's attendance; 3) advice/strategical decisions regarding key issues; 4) circumstances when a client elects not to follow your advice, particularly when you adamantly believe such advice should be followed.

5. Confidentiality. Several sections of the Rules guide attorneys regarding preservation of confidential information. Rule 4-1.6(a) states: "[a] lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent." Those subdivisions are restated below:

> (b) When Lawyer **Must** Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another.
>
> (c) When Lawyer **May** Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary: (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed; (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client; (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (5) to comply with the Rules of Professional Conduct.

However, subsection (e) provides that when disclosure is mandated or permitted, the lawyer should only disclose that information necessary to meet the requirement or accomplish the purposes of the Rule.

An attorney should discuss with his or her client what information should remain confidential and take adequate steps to keep the information from disclosure due to necessary filings and disclosures under Florida public records law. Filed documents,

which become public records, should contain only essential information to achieve the purpose of filing the document.

Moreover, the use of new technology raises additional issues and challenges concerning the preservation of client confidentiality. Electronic data and communications are subject to risks from viruses, spyware, hackers, etc. Does the technology you currently use in your office adequately protect your client(s)' confidential information?

Caution is advised when using unsecured wifi networks or smart phones in public areas as well as when disposing of electronic equipment, which may contain confidential client information. The Professional Ethics Committee of The Florida Bar has issued Opinion 10-2, which states, "when a lawyer chooses to use Devices that contain Storage Media, the lawyer must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition." The term "Devices" was defined to include computers, printers, copiers, scanners, cellular phones, personal digital assistants, flash drives, memory sticks, fax machines and other electronic or digital devices. Devices and other data storage media were collectively defined as "Hard Drives" or "Storage Media."

The Committee proceeded to identify "reasonable steps" to include: 1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; 2) inventory of the Devices that contain Hard Drives and other Storage Media; 3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and 4) sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.

Also of interest regarding confidentiality of electronic information is Opinion 06-2 issued on September 15, 2006 by the Professional Ethics Committee of The Florida Bar. Metadata is information about the author of a document, changes to a document (additions/deletions), and review comments. Regarding the confidentiality of metadata, Opinion 06-2 provides:

> A lawyer who is sending an electronic document should take care to insure the confidentiality of all information contained in the document, including metadata. A lawyers receiving an electronic document should not try to obtain information from metadata that the lawyer knows or should know is not intended for the receiving lawyer. A lawyer who inadvertently receives information via metadata in an electronic document should notify the sender of the information's receipt."

IV. CONCLUSION:

Knowing, understanding and taking the time to remain familiar and conversant with the Rules Regulating the Florida Bar is more than each attorney's duty. It serves as an excellent guide and risk management tool to prevent negligence and other malpractice claims. A strong ethical foundation is an excellent building block for a successful, rewarding and dispute-free practice.

Ethical Practice in the Real World

By

Eugene Shuey, Gainesville

Ethical Practice in the Real World

Eugene E. Shuey
Gainesville, Florida

1. Introduction

   A. Who am I and why am I here?

   B. The differences between ethics and morality.

   C. What legal ethics really are and why they are important.

   D. The significance of entry into a highly regulated profession with a substantial impact on the public.

2. Practice Makes Perfect

   A. The difference between a J.D. and being admitted to practice in Florida.

   B. Bar card “loneliness.”

   C. Lawyering competence.

3. Participants in the Big Game

   A. The Florida Supreme Court.

   B. The Florida Bar.

   C. You, the attorney.

   D. The public.

   E. Your clients.

4. Rules of the Game

   A. The Florida Supreme Court.

   B. Federal practice.

   C. The Florida Bar.

   D. Local court rules.

5. The Whistle Blows and a Flag is Thrown

   A. The grievance process.

   B. Malpractice avoidance.

   C. Unauthorized practice of law.

6. Post-Game Critique

   A. The Florida Bar “News.”

   B. Read all about it: Southern Reporter.

   C. The Florida Bar public website.

   D. Ethics resources.

   E. Seek advice; get certified; practice “gut” ethics.

Ethical Practice In The Real World

1. Introduction

A. Who am I and why am I here?

Several years ago, after over 40 years of law practice, I was asked to deliver a lecture to a group of senior law students at the University of Florida College of Law just prior to their graduation. That request, and my preparation for that lecture, caused me to reflect on my years as a Florida lawyer and the role that constant ethics awareness played in my practice. Since that first lecture, I have been privileged to give it several more times and have received such a favorable response that I was encouraged to put it in writing. This presentation is the result.

By way of background, my practice has been mainly trials about all aspects of real estate law and a mixture of banking, commercial, personal injury and wills and estates disputes. At the same time, I had to learn the mechanics of negotiating and creating agreements and contracts in a broad range of legal areas. All of this work involved careful observance of the ethical rules of our profession. In mid-career, service on the Florida Bar's state standing committee for unauthorized practice of law and a circuit grievance committee caused further reflection on these issues. My practice then began to include representation of lawyers accused of ethical lapses. All of this is why I am here today, hoping to guide you through some of the many ethics traps safely by a presentation of the structure of the Florida Bar and rules of our profession.

B. **The differences between ethics and morality.**

This presentation is about legal ethics. It is not about moral judgments or morality itself. There are no cultural or religious connotations here. Recently, I purchased a two volume work on the history of ethics. It never defined ethics and only once barely mentioned legal ethics. It was of no help, being impractical, esoteric and purely academic.

C. **What are legal ethics really are and why they are important.**

What, then, are legal ethics other than a set of rules laid down by the Florida Supreme Court? After much thought, an answer finally came to me one day that a good working definition of legal ethics is a set of precepts which tell lawyers how they must conduct themselves and how far they can go in the practice of law. After all, who wrote these rules? Lawyers (now judges) wrote them, for lawyers (not clients), so that lawyers would know in advance what conduct could predictably be expected from other lawyers anywhere in Florida in every kind of legal setting. Said otherwise, legal ethics are rules of lawyer behavior which can be uniformly anticipated by all involved. Thus, ethics are based on predetermined concepts of conduct. Accordingly, ethics are very important because they are the minimum standard of conduct which is expected between lawyers acting for their clients. So, remember, legal ethics are simply rules of predictable conduct. When you deal with another lawyer, you should be able to rely on predictable lawyering and receive no less.

D. **The significance of entry into a highly regulated profession with a substantial impact on the public.**

The practice of law is very highly regulated by the Florida Bar on behalf of its creator, the Florida Supreme Court. These regulations also apply to lawyers from other states practicing here *pro haec vice*. Unethical practice directly and substantially impacts the public, our profession and our clients. We all know from many surveys the degree of respect the public accords us. Our low marks are caused by numerous public perceptions: our franchise to speak for others in business and before the courts; our ability to judicially force people and organizations to act when they wish not to act; our perceived wealth and extended educations; and the false assumption that the Florida Legislature is made up of only lawyers who act only in the interests of their rich clients and themselves. These reasons, among others, create the demand that lawyers be regulated and held accountable for unethical conduct.

2. **Practice Makes Perfect**

A. **The difference between a J.D. and being admitted to practice in Florida.**

As you will recall, your law school gave you a course or two about ethics. When you received your J.D., you faced the final background check by the Florida Board of Bar Examiners and the dreaded bar exam. Dealing with all of that successfully, you were sworn in as a member of the Florida Bar. Remember the oath? I'll remind you just for old times sake.

Oath of Admission to the Florida Bar

> The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of

admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

Adopted by the Supreme Court Jan. 27, 1941 (145 Fla. 797, 798). Revised with amendments received through January 15, 2003.

When the ceremony was over, you soon received a certificate of your admission to the bar and a bar card. Your "shingle" goes on the wall for all to see. Once in the wallet or purse, the bar card is seldom used. It is, however, proof of your lawyerly existence.

B. **Bar card "loneliness."**

Let's think about what I call "bar card loneliness." During your practice, you will surely experience situations where you might be unsure about which ethical

direction you may, or should, go. In this context, always remember that your bar card does not bear any of the following names: your firm, your boss, your partners, your associates, your staff or your clients. Said otherwise, if it all goes bad ethically for you, you will be standing there all alone, especially when that certain letter, marked Personal and Confidential, from the Bar arrives, bearing that middle name you never use. You will truly be lonely at that moment. If what you did was done at the urging of someone else, too bad. A word of advice: don't have a fool for a client - hire a lawyer to deal with the grievance complaint. And, next time, make your decisions solely upon your own ethics evaluation.

C. **Lawyering competence.**

To what standard of professional conduct are you held? As a beginning lawyer, age and lack of experience matter, and you are not likely to be held to the expected conduct of a twenty year practitioner. You are to be sufficiently competent to represent the public in the matter at hand and to do no harm. The longer you lawyer, the better you need to be. Note that these concepts also apply to referrals to other lawyers. The client will always conclude that your referral is to one of the best lawyers. Many lawyers now hold that the safest referral is to a board certified lawyer.

3. **Participants in the Big Game**

A. **The Florida Supreme Court.**

As a beginning, to state the obvious, the Florida Supreme Court is not just the Florida court of last resort. It also has the constitutional authority to admit, regulate and discipline all Florida lawyers; to adopt all rules of court practice and procedure; to manage and operate Florida's court system; to regulate the practice of out of state

lawyers allowed to practice here; and to control the entire lawyer disciplinary system operated by the Florida Bar. Specifically, see Florida Constitution Article V,

> **SECTION 15. Attorneys; admission and discipline.—**The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.

It follows that our Supreme Court and its relationship to us is both significant and worth study. Note the provisions of our state constitution:

Article V, Florida Constitution

> **SECTION 2. Administration; practice and procedure.—**
>
> (a) The supreme court shall adopt rules from the practice and procedure in all courts including the time for seeking appellate review, the administrative supervision of all courts, the transfer to the court having jurisdiction of any proceeding when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought. The supreme court shall adopt rules to allow the court and the district courts of appeal to submit questions relating to military law to the federal Court of Appeals for the Armed Forces for an advisory opinion. Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

B. **The Florida Bar.**

Florida lawyers are each required to be members of the Florida Bar in good standing in order to practice in this state due to the Supreme Court's "integration" order of the 1950's making membership mandatory. As a result, The Florida Bar was created to organize and administer to Florida lawyers according to the constitutional mandate. As the Rules Regulating the Florida Bar state: "The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of and to advance the science of jurisprudence." The Bar is operated by a Board of Governors, whose 52 members are 50 lawyers apportioned

from each judicial circuit and two lay members. One member is not a voting member. Note that if you ever earn a public reprimand, you will meet all of them since the reprimand will be delivered at their meeting. You will be the center of attention and it is up close and personal.

C. **You, the attorney.**

What is your role in the world of law? You are the keeper of your clients' secrets and the facilitator of the exercise of your clients constitutional, statutory and common law rights, both civil and criminal. Although some clients attempt to represent themselves, most will not, or cannot do so, and will seek legal advice from our profession. Attorneys are allowed to pass the physical bar which prevents the general public from entering into the judge's courtroom domain. You are permitted to address the court and the jury as to the facts, the law and your client's positions on motions and procedural matters. If a jury is needed, you will be your client's representative and must ensure the selection of a fair and appropriate jury for the cause and your client's position in the case. The proper submission of evidence by witnesses or by physical things is your obligation. Witnesses are examined and cross examined by counsel. Opening and closing statements are made by lawyers. All of these things must be done in accordance with custom and court rules and, in all matters, in the context of ethics and professionalism. Although judges can discipline you on their own motion, unethical conduct is usually reported by the presiding judge to the Florida Bar. Such reports, like all others, result in inquiry letters from Bar staff. There's that special letter again, with just your name on it. See, *Florida Bar v. Ratiner*, 46 So.3d 35 (Fla. 2010, reh. denied).

As a lawyer, you are also required to look out for the public and the profession. It may get uncomfortable, but read Rule 4-8.3:

> Rule 4-8.3. Reporting Professional Misconduct
>
> (a) Reporting Misconduct of Other Lawyers. A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
>
> (b) Reporting Misconduct of Judges. A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

D. **The public.**

The client base includes individuals and entities. Some just want their rights enforced or defended. Some are honest - some not. Most do not want to pay you to represent them. They all want your best efforts. There are numerous ethical rules to be honored in any representation. An attorney-client relationship is easily created, sometimes in a casual setting. The test of whether there is a professional relationship is not yours to decide; it is the subjective conclusion in the client's mind. Cocktail advice can be expensive and troublesome.

E. **Your clients.**

Florida's ethics rules require full attention and respect for the client's care and protection. Your natural interests (fees, a piece of the action, future business, prestige and such) are all inferior and inimical to your obligations to your client now and far into the future. In the next section, we will discuss the magnitude of these rules.

4. **Rules of the Game**

A. **The Florida Supreme Court.**

The Florida Supreme Court constantly supervises the unending review and amendment of the rules of ethics, regulation of the Bar, and civil and criminal court rules and approved forms. It approves and disapproves a steady stream of proposals for change. The task is huge in scope. An illustration is that the revised 2010 West Publishing Company's Florida Rules of Court handbook is 1863 pages, including Chapter 90, Florida Statutes, the evidence code. The rules for lawyers are 316 pages. The West booklet for 2009 on local court rules was 1440 pages. The West federal rules of court booklet for 2009 for Florida was 1198 pages. All of these rules are subject to change at any time. You are expected to properly apply all of them as needed to provide professional services.

The major elements in the Rules of Professional Conduct and representative decisions include:

1. client-lawyer relationship: *Florida Bar v. Roberts, 689 So.2d 1049 (Fla. 1997); Mansur v. Podhurst Orseck, 994 So.2d 435 (Fla. 3rd DCA 2009); Valliere v. Florida Elections Commission, 989 So.2d 1242 (Fla. 4th DCA 2008).* See Rules section 4-1.

2. attorney competence: *Florida Bar v. Morse, 784 So.2d 414 (Fla. 2001).* See Rule 4-1.1.

3. client decisions: *Florida Bar v. Varner, 992 So.2d 224 (Fla. 2008); Florida Bar v. Scott*, 39 So.3d 309 (Fla. 2010). See Rule 4-1.2.

4. diligence: *Florida Bar v. Arango, 720 So.2d 248 (Fla. 1998). See Rule 4-1.3.*

5. effective communication: *Florida Bar v. Contant, 569 So.2d 442 (Fla. 1990).* See Rule 4-1.4.

6. reasonable fees: *Florida Bar v. Kavanaugh,* 915 So.2d 89 (Fla. 2005); *Robin Roshkind, P.A. v. Machiela*, 45 So.3d 480 (Fla. 4th DCA 2010). See Rule 4-1.5.

7. confidentiality: *Florida Bar v. Lange, 711 So.2d 518 (Fla. 1998).* See Rules 4-1.6 and 4-1.18.

8. client-lawyer business transactions: *Deal v. Migoski, 122 So.2d 415 (Fla. 3rd DCA 1960); Healthnet, Inc., v. Health Net, Inc., 289 F. Supp. 2d 755 (USDC, S.D., Va. 2003).* See Rule 4-1.7.

9. conflicts of interest: *Zarco Supply Co. v. Bonnell, 658 So.2d 151 (Fla. 1st DCA 1995).* See Rules 4-1.7 through 4-1.11.

10. representation of organizations and entities: *Chaiken v. Lewis, 754 So.2d 118 (Fla. 3rd DCA 2000).* See Rule 4-1.13.

11. disabled clients: *See, e.g., Florida Jurisprudence 2d, Attorneys at Law §323. Harold v. State*, 450 So.2d 910 (Fla. 5th DCA 1984). See Rule 4-1.14.

12. safekeeping property: *Florida Bar v. Chickering, 240 So.2d 148 (Fla. 1970).* See Rule 4-1.15.

13. declining or terminating representation: *In re Davis, 258 B.R. 510 (U.S. Bankr. Ct. M.D. Fla. 2001).* See Rule 4-1.16.

14. sale of a law practice: Florida Jurisprudence 2d, Attorneys at Law §17. See Rule 4-1.17.

15. duties to prospective client: Florida Jurisprudence 2d, Attorneys at Law §302; and *Florida Bar v. Barrett*, 897 So.2d 1269 (Fla. 2005); *Florida Bar v. Wolfe*, 759 So.2d 639 (Fla. 2000). See Rules 4-1.1, 4-1.18 and 4-7.4.

16. advice, advocacy and candor: *McNealy v. State, 183 So.2d 738 (Fla. 1st DCA 1966); Florida Bar v. Germain, 957 So.2d 613 (Fla. 2007).* See Rules 4-2.1, 4-3.1 and 4-3.3.

17. dealing with unrepresented persons: *Florida Bar v. Belleville, 591 So.2d 170 (Fla. 1991).* See Rule 4-4.3.

18. law firms and associations: *Florida Bar v. Hollander, 607 So.2d 412 (Fla. 1992, reh. denied 1993).* See Rule 4-5.1 *et seq.*

19. unlicensed practice of law: *Tannenbaum v. State ex rel. Gerstein*, 267 So.2d 824 (Fla. 1972); *Florida Bar v. Howard*, 306 So.2d 515 (Fla. 1975); *Morrison v. West*, 30 So.3d 561 (Fla. 4th DCA 2010, reh. denied). See Rule 4-5.5.

20. restrictions on right to practice: *Florida Bar v. St. Louis, 967 So.2d 108 (Fla. 2007); Florida Jurisprudence 2d, Attorneys at Law §8; Florida Bar v. Rodriguez, 959 So.2d 150 (Fla. 2007).* See Rule 4-5.6.

21. advertising: *Florida Bar v. Lange, 711 So.2d 518 (Fla. 1998). State ex rel. Florida Bar v. Nichols*, 151 So.2d 257 (Fla. 1963). See Rule 4-7.1 *et seq.*

22. reporting misconduct of lawyers and judges: *Snow v. Ruden, McClosky, et al, 896 So.2d 787 (Fla. 2nd DCA 2005).* See Rules 4-8.3 and 4-8.4.

23. trust accounts: *Florida Bar v. Behrman, 658 So.2d 95 (Fla. 1995); Florida Bar v. Valentine-Miller, 974 So.2d 333 (Fla. 2008)*; *Florida Bar v. Hines*, 39 So.3d 1196 (Fla. 2010). See Chapter 5, Rules Regulating Trust Accounts.

Note that most attorneys' fees disputes do not give rise to a grievance, contrary to the views of most clients. The applicable rule is 4-1.5 Fees and Costs for Legal Services:

> Rule 4-1.5 Fees and Costs for Legal Services
>
> (a) Illegal, Prohibited, or Clearly Excessive Fees and Costs. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or cost, or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee or cost is clearly excessive when:
>
> (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee or the cost exceeds a reasonable fee or cost for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or
>
> (2) the fee or cost is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

Attorneys are entitled to enter into enforceable contracts with clients regarding attorneys' fees and to expect civil courts to enforce the contract as long as the fees are not prohibited by the above rule. *Universal Beverages Holdings, Inc., v. Merkin, 902 So.2d 288, 290 (Fla. 3rd DCA 2005)* states that the "matter of a fee agreement between a lawyer and his client is a question of contract." The court is not required to evaluate the ethical issues raised or to afford the client redress for a "private grievance." *Wall v. Buckner, Greene & Manas, 344 So.2d 947, 949 (Fla. 3rd DCA 1977).* See also *Florida*

Bar v. Winn, 208 So.2d 809 (Fla. 1968 reh. denied) and *Franklin & Marbin, P.A., v. Mascola, 711 So.2d 46 (Fla. 4th DCA 1998, decision clarified 1998),* holding that a fee agreement containing a specified period of time within which the client has a reasonable contractual right and duty to object to each billing bars later complaints about the reasonableness of the bill and eliminates the necessity of expert witness testimony as to the nature and amount of the fees. However, see *Robin Roshkind, P.A. v. Machiela*, 45 So.3d 480 (Fla. 4th DCA 2010), which requires expert testimony, *Franklin & Marbin*, supra, notwithstanding.

B. **Federal practice.**

Federal practice, as shown above, requires knowledge and skills in addition to our state practice. You must be admitted to the federal courts before you can practice in trials in federal District Courts and to handle appellate matters in the various federal Circuit Courts of Appeal. Admissions and discipline for the District courts are covered by federal Special Rules Governing the Admission and Practice of Attorneys and the Rules Governing Attorney Discipline. The latter specify that the disciplinary rules which regulate the Florida Bar are applicable for all lawyer conduct in federal courts in Florida, including bankruptcy courts and magistrate judge proceedings. In sum, if you practice in federal courts, review and remember these rules. Discipline in state or federal courts located anywhere in the nation will impact your Florida practice privilege since you are required to promptly report it to the Florida Bar.

C. **The Florida Bar.**

The Florida Bar is operated by the Board of Governors and the staff of the Bar headquarters in Tallahassee.

Members of the Florida Bar are defined by rule to only be: 1) members in good standing; 2) conditionally admitted members; or, 3) inactive members. Additional rules cover such matters as retirement from the Bar, delinquent status and court appearances by petition by non-Florida lawyers (for a particular matter or case; "general" practice is prohibited). A Florida lawyer must also appear for the client. No lawyer may practice (or become a Florida judge) if disbarred or suspended by any jurisdiction.

All members are required to comply with the "terms and intent of the Rules of Professional Conduct" as promulgated and amended. The Bar is composed of sections (currently 23), Divisions (out-of-state and Young Lawyers) and various committees (such as unauthorized practice of law and professional ethics).

Significant rules chapters include: Chapter 3: Rules of Discipline; Chapter 4: Rules of Professional Conduct; Chapter 5: Rules Regulating Trust Accounts; Chapter 6: Legal Specialization and Education; Chapter 7: Client's Security Fund Rules; Chapter 10: Rules Governing the Investigation and Prosecution of the Unlicensed Practice of Law.

As a precaution for the future, be aware that when you annually complete and return your Florida Bar membership renewal form, you must choose one of the following:

> I certify that I have read the rules applicable to lawyer trust accounts and safekeeping property in chapter 5 of the Rules Regulating The Florida Bar [www.floridabar.org/rules/chapter5] and that:
>
> O I am required to maintain a trust account and I am in compliance with the trust account and safekeeping property rules.

O I am not required to maintain a trust account because I do not receive or hold funds or property from clients or third parties in connection with legal representation.

O I am **not** in compliance with the trust account and safekeeping property rules. Attached is an explanation of the way in which I did not comply with the trust account and safekeeping property rules.

Please note that presumably you are representing the facts of compliance for yourself and your entire firm.

D. **Local court rules.**

All Florida county and circuit courts have administrative and practice rules. Some are published as mentioned above; some exist only at the local court. Seek them and be guided accordingly. Inquiry notice puts the burden on you the practitioner.

5. **<u>The Whistle Blows and a Flag is Thrown</u>**

A. **The grievance process.**

The Rules of Discipline tell you where you are as a Florida lawyer in no uncertain terms:

"Rule 3-1.1. Privilege to practice. A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause. Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252)."

What follows from that is the very next rule:

"Rule 3-1.2. Generally. The Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for discipline of lawyers, to discipline for cause attorneys admitted to practice law in Florida, and to revoke the license of every lawyer whose unfitness to practice law has been duly established."

Discipline follows if you violate the rules: Rule 3-4.2. Rules Regulating the Florida Bar.

You shall follow the rules of professional conduct:

> "Rule 1-10.1. Compliance. All members of the Florida Bar shall comply with the terms and the intent of the Rules of Professional Conduct as established and amended by this court. Amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252)."

Grievances and discipline are detailed in Chapter 3 of the Rules of Discipline. These rules begin with Rule 3-1.1 Privilege to practice:

> "A license to practice law confers no vested right to the holder thereof but is a conditional privilege that is revocable for cause."

The rules then establish circuit and special grievance committees and acknowledge concurrent circuit court disciplinary jurisdiction with the Florida Bar.

Types of discipline include admonishments (which may be before the Supreme Court, the board of governors, a grievance committee or a referee); minor misconduct (literally truly minor); probation; public reprimand; suspension; disbarment (by order or consent). Other discipline consists of fees forfeiture and restitution. By the way, what is the most numerous reason for a grievance? It is failure to timely respond to the Bar's preliminary inquiry letter. Then you have two problems to deal with at once. *Florida Bar v. Bloom, 972 So.2d 172 (Fla. 2007).*

What is a grievance? The rules offer no definition. It can be defined from the context of the rules: a written complaint reported to the Florida Bar or to a circuit grievance committee that unprofessional conduct has occurred. As previously noted, the perceived misconduct must be a "substantial" issue of honesty, trustworthiness or fitness to be a lawyer. Complaints are reviewed by Bar staff counsel and transferred to local circuit bar grievance committees for investigation. Staff counsel is kept informed of all steps and participate in the process. The local committee will determine the presence or absence of probable cause to prosecute the lawyer. This determination is

made solely on the lawyer's written response to the initial bar inquiry and the committee's investigation. Lawyers usually cannot attend or participate at this stage. It is basically a secret process. If the complaint is not resolved, it will be assigned to a referee for a hearing trial, usually before a retired judge. The results are subject to Supreme Court review as to findings and recommended punishment. If a grievance is established, the Bar file, the results of the hearing and the Supreme Court ruling are all public. The fact of misconduct and the punishment given are posted on the Bar website for ten years.

B. **Malpractice avoidance.**

Malpractice is bad lawyering which has harmed a client. The elements of malpractice are set out in *Rocco v. Glenn, Rasmussen, Fogarty & Hooker*, 32 So.3d 111 (Fla. 2d DCA 2009) and here as quoted from *Law Office of David Stern, P.A., v. Security Nat'l. Servicing Corp., 969 So.2d 962 (Fla. 2007)*:

> "A legal malpractice action has three elements: 1) the attorney's employment; 2) the attorney's negligence of a reasonable duty; and 3) the attorney's negligence as the proximate cause of loss to the client. *See Kates v. Robinson, 786 So.2d 61, 64* (Fla. 4th DCA 2001). For statute of limitations purposes, a cause of action for legal malpractice does not accrue until the underlying adverse judgment becomes final, including exhaustion of appellate rights. *See Silverstrone v. Edell,* 721 So.2d 1173, 1175 n. 2 (Fla. 1998). That is the first point at which there is a redressable harm. *Id,* at 1175. Until then, a malpractice claim is "hypothetical" and damages are "speculative." *Id.; see also Hold v. Manzini,* 736 So.2d 138, 142 (Fla. 3d DCA 1999) ("mere knowledge of possible malpractice is not dispositive of when a malpractice action accrues")."

Malpractice avoidance requires lawyering within your knowledge and experience. Referrals can also be malpractice. Many suggest that referrals be made to board certified lawyers as the safest course. The legal practice areas with the highest

rates of malpractice are personal injury trial practice and real estate. If you don't understand what to do or what the client needs, quickly get help or refer it away.

C. **Unauthorized practice of law.**

It is not legal to act as an attorney in Florida if you are not licensed to practice law in Florida. Unauthorized law practice is defined as unlicensed practice as prohibited by Florida statute, court rule or case law. Chapter 10 of the Rules Regulating the Florida Bar state:

> "Rule 10-1.1. Jurisdiction
>
> Pursuant to the provisions of article V, section 15, of the Florida Constitution, the Supreme Court of Florida has inherent jurisdiction to prohibit the unlicensed practice of law.
>
> Amended July 9, 1987 (510 So.2d 596); June 20, 1991 (581 So.2d 901); July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252).
>
> Rule 10-1.2. Duty of The Florida Bar
>
> The Florida Bar, as an official arm of the court, is charged with the duty of considering, investigating, and seeking the prohibition of matters pertaining to the unlicensed practice of law and the prosecution of alleged offenders. The court shall establish a standing committee on the unlicensed practice of law and at least 1 circuit committee on unlicensed practice of law in each judicial circuit.
>
> Former Rule 101.1(c). Amended July 7, 1987 (510 So.2d 596). Redesignated as Rule 10-1.2 and amended July 23, 1992, effective Jan. 1, 1993 (605 So.2d 252)."

Exceptions to this prohibition include persons who orally elicit information from persons seeking to complete Supreme Court approved legal forms and paralegals and legal assistants acting under the supervision of a Florida lawyer. The latter is common regarding real estate closings. No legal advice may be given even if requested.

Unlicensed practitioners include those who pretend to be paralegals and legal assistants, and out of state lawyers who advertise that they will provide legal services in Florida. All such matters are handled by the state standing committee on UPL and its circuit committees. Cases are handled in a manner similar to attorney grievance complaints. See *Morrison v. West*, 30 So.3d 561 (Fla. 4th DCA 2010, reh. denied).

6. **Post-Game Critique**

A. **The Florida Bar "News."**

The News regularly publishes all new disciplinary actions in a brief format. All Florida lawyers receive this bi-monthly newspaper. Do you really need this form of advertising?

B. **Read all about it: Southern Reporter.**

The full decision of significant grievance opinions from the Florida Supreme Court are reported in the Southern Reporter. More great publicity about bad practice is the last thing the respondent needs.

C. **The Florida Bar public website.**

On the Florida Bar website, you get long term publicity. The Bar site is available to the public and lists discipline, removing it after ten years.

D. **Ethics resources.**

The Florida Bar offers the following free resources:

1. The ethics rules are found at www.floridabar.org and in West's Rules of Court.

2. Ethics opinions are also on the Bar's website.

3. The Florida Bar Ethics Hotline for oral advisory opinions is at 800-235-8619. (Note: You cannot get an opinion about past personal conduct. This service is designed to help you make a decision about future conduct only.)

4. The Florida Bar UPL office is at 850-561-5840.

5. The Florida Bar also offers:

a) Law office management assistance (LOMAS) at 850-561-6718;

b) The advice of Seek Counsel of Professional Experience (SCOPE) at 850-561-5807; and

c) Aid and assistance for substance abuse and other personal challenges at 800-282-8981. This service is confidential.

E. **Seek advice; get certified; practice "gut" ethics.**

If you do not do these things, what will be your second career choice? If you wish to be, or remain, a Florida lawyer, the basic roadmap is set out above. Follow the old saying that if it doesn't feel right in your gut, do not do it. Never second guess your innate warning system. Now you are better equipped to deal with ethics issues in the real world.

Ethics and the Technology in Your Law Office

By

Bill Costello, Rumberger, Tampa

The Florida Bar and the General Practice, Solo and Small Firm Section

Ethics Seminar – October 21, 2011

OUTLINE

1. Background - Currently Director of Information Technology; Rumberger, Kirk and Caldwell PA; prior to that held similar positions at Arnstein & Lehr, Arnold & Porter; Banner & Witcoff LTD and Dombroff, Gilmore, Jaques & French P.C. over the past 14 years.

2. Where does technology intersect with the practice of law from the perspective of a technology professional (non-lawyer) working for lawyers?

    a. Technology is a tool. Without other elements it is a potentially expensive and likely under-utilized tool. Combined with other elements, technology can be both an enabling tool and a tool that positively differentiates your law firm.

3. How and where do "ethics" intersect with technology?

    a. If the ethical practice of law means that lawyers act in previously agreed upon and therefore predictable ways, then their technology should also support the lawyer in that manner.

    b. Can technology create a climate where the lawyer is subject to malpractice and ethics concerns- It can and it has done so.

    c. Can technology make a positive difference for a lawyer – Yes if accompanied by other elements.

    d. Bottom line- technology by itself will not support the lawyer with consistent and predictable results without other critical elements.

4. What are the critical elements that need to accompany technology to deliver consistent and predictable results?

    a. First, define your business goals, needs and requirements.

    b. Create a multi – year plan. (Business Alignment)

    c. Figure out what you can afford. (Fiscal alignment)

d. Then shop for the right technology and the right integrator.

e. Technology without good process and procedure is a dangerous tool. Create or have others develop technology policies and supporting procedures to ensure that your investment delivers.

f. Remember that you as firm leaders, past, current and future are the reflection of your firm's culture. Your culture is also reflected in your technology choices and how you implement them.

5. Examples of ethics issues encountered:

a. Poor conflict check results in 60K of work being done before it becomes known that firm has a direct conflict. Write off and loss of reputation with client.

b. Outdated technology results in system failures, untimely response to time sensitive email, loss of phone contact during telephone hearing.

c. Lack of training results in breach of confidential information in the form of metadata left in a document.

d. Lost or stolen laptop leads to breach of client sensitive data.

e. Poor/Inadequate systems result in missed filing dates – client's patent rights lost irrevocably.

f. Difficulty entering time and re – creating time.

g. Inadequate response to subpoena resulting in loss of information, potential spoliation charge.

h. Lost smart phone contains emails from clients with credit card information for payment of the firm's charges.

i. Information from prior cases is retained by law firm, and ultimately responsive to a subpoena for a new matter, client had destroyed their copy under an established information retention plan BUT the law firm still had that data. Who knew? Nobody – until it became known. Result – Sanctions. Firm closure.

6. Could technology have prevented all of these issues? – Some but not all!!

    a. Off the shelf or custom built conflicts software examines emails, financial system and other repositories for party "hits". Lawyers or close assistant enter relevant party information. Policy requires complete adverse party information to be entered and checked before matter is considered or any time billed.
    b. Upgraded and well maintained technology reduces risks of outage from dated technology. Good technology policies and procedures provide a safer operation.

    c. Multi – faceted technology training program for attorneys and staff covering metadata cleansing provides consistent results by your staff.

    d. Proven docketing system coupled with good internal process and procedure mitigates risk.

    e. Improved time entry system facilitates both the recovery of billable time that could be lost and contemporaneous time entry.

    f. Creation of a subpoena response team; right technology and/or resources to provide a complete search and production of responsive materials.

    g. Policies and technology can combine to protect firm data from accidental breach through equipment loss or theft.

    h. Comprehensive information backup and retention plans protect firm from not only data loss and disaster, but the more likely risks associated with inadequate discovery.

7. Why does your Firm culture matter?

    a. Your culture is your firm and it touches every aspect of your efforts. It is a top down reflection of who you are!

    b. Your culture will reflect leadership and the financial commitments you make to enable your technology to enable you!

    c. So how does culture influence technology?

        i. Telling clients you have first rate technology is fine, if you do. Do you?

            1. Boasters - 4 $easons technology promises/demands on a Motel 6 Budget.

2. Pioneers – certain to get results but who really benefits?

3. Laggards – also get results, but generally not what was intended.

4. Leaders- plan, process, procedures = consistent results, less time spent struggling with technology - efficiency.

ii. Do it the right way the first time – make smart choices.

1. Define the business goals you want to achieve with technology.

2. Create a multi-year technology plan.

3. Provide adequate funding to meet your technology plan.

4. Establish sound policies and procedures.

5. Maintain your investment with quality training and ongoing support

6. Spend time with your IT Departments – don't let all of the information you get come to you second hand but don't micromanage.

8. Technology is not an alternative for well tailored Policies and Procedures:

a. Policies reflect the law firm's goals and protect the firm's interest. Examples:

1. Information Security Policy

2. Information Retention Policy

3. Social Media Policy

4. Data Backup Policy

5. Litigation Hold Policy

6. Subpoena Response Policy

b. Procedures are the method by which good policies are delivered.

1. Vince Lombardi – Basics of blocking and tackling – anti-virus, tape backup and security patches.

2. Daily, weekly and quarterly system checks – love your logs.

3. Hardware and software refresh cycle.

4. Dual paper and electronic dockets

5. Weekly calendar review – all secretaries

6. Process specific training e.g. metadata; naming conventions, etc.

7. Disaster recovery plan

Top 10 things to avoid:

1. Failing to align business requirements with a multi-year technology plan and appropriate levels of funding.

2. Clinging to outdated technology.

3. Failing to maintain your investment.

4. Moonlighting as a technology consultant.

5. Failing to plan for a disaster properly.

6. Confusing high availability and disaster recovery.

7. Ignoring the fact that 50% of all declared emergencies/disasters are power outages.

8. "The Triumph of Mediocrity" – letting resistance hamper progress.

9. Failing to train.

10. Demanding 4 Seasons technology without an adequate budget.

Questions:

Ethical Advertising

By

Debra Davis, Tampa

The Florida Bar and the General Practice, Solo and Small Firm Section
Annual Ethics Update 2011 – Ethical Lawyer Advertising in Florida

Presented by: Debra J. Davis, Esquire
October 21, 2011

Recent Developments and Pending Cases:

On September 30, 2011, in Harrell v. Florida Bar, Case No. 3:08-cv-15-J-34TEM, the U.S. District Court for the Middle District of Florida, on remand from the Eleventh Circuit in Harrell v. Florida Bar, 608 F. 3d 1241 (11th Cir. 2010), held that some of The Florida Bar Advertising Rules are unconstitutional and permanently enjoined the Bar from enforcing them. Specifically, the Court held that Rule 4-7.2(c)(3) and 4-7.5(b)(1)(A) prohibiting the use of "manipulative" advertisements, as well as the comment to Rule 4-7.1 requiring that advertisements contain only "useful, factual information" are void for vagueness. The Court further held that Rule 4-7.2(c)(2) as applied to "Don't settle for less than you deserve" and Rule 4-7.5(b)(1)(C) prohibiting "any background sound other than instrumental music" as applied to the background sounds in Plaintiff's proposed ad (dogs, gym equipment and other firm activities) violated Plaintiff's First Amendment rights. The Court found that Rule 4-7.2(c)(1)(G) prohibiting communications that promise results and Rule 4-7.2(c)(2) prohibiting statements that describe or characterize the quality of a lawyer's services are not unconstitutionally vague.

On July 5, 2011, The Florida Bar filed its Petition requesting the Florida Supreme Court to amend several of the Advertising Rules. In re: Amendments to the Rules Regulating The Florida Bar – Subchapter 4-7, Lawyer Advertising Rules, Case No. SC11-1327, remains pending at the time of this writing. In September 2011, several of the attorneys who filed Comments regarding the proposed amendments also requested oral argument. The Petition states, in part:

> Current lawyer advertising rules prohibit statements characterizing the quality of legal services. Such a prophylactic bar would be unlikely to meet the *Central Hudson* test. The bar therefore recommends adoption of rule 4-7.3(b)(3), which prohibits characterizations of skills, experience, reputation, or record unless they are objectively verifiable. Although the proposal is significantly less restrictive than the current rule, the bar believes the change is necessary to encourage the free flow of truthful information to the public that is necessary for the selection of a lawyer.

Two other cases proposing changes to the Advertising Rules also remain pending at the Florida Supreme Court. In re: Amendments to Rules Regulating The Florida Bar – Rule 4-7.6, Computer Accessed Communications, 34 Fla. L. Weekly S627 (Fla. Nov. 19, 2009), Case No. SC08-1181, originally effective January 1, 2010, the Court held that websites will be subject to the substantive advertising rules, but will remain exempt from the filing requirement. The case also reinstated requirements for direct email, including

that a statement of qualifications will be required, as will a disclosure if a lawyer other than the one named in the ad would be handling the matter. Unsolicited direct emails will also be required to begin the subject line with "legal advertisement." The Court subsequently approved the Bar's requests to suspend the effective date of the SC08-1181 amendments, which are now to be effective 90 days after the Court rules in Case No. SC10-1014, which remains pending.

The Court opened SC10-1014 on June 1, 2010, when, at the Court's direction, the Bar filed a Motion to Further Amend Rules Regulating The Florida Bar – Rule 4-7.6, Computer Accessed Communications. If adopted, the amendments in SC10-1014 would provide a means by which some of an attorney's website would be considered information provided upon request of a prospective client and thus, not subject to the advertising rules, as long as certain requirements are met. Additional information regarding website regulation can be found in the "History of Website Regulation" available on The Florida Bar's website: www.floridabar.org.

Advertising Regulation Resources:

The Florida Bar has several resources available on its website to assist lawyers in understanding and complying with the Advertising Rules. On the Bar's website, www.floridabar.org, select "Advertising Regulation" under "Lawyer Regulation" to find several links, including to the pending petitions and to the "Handbook on Lawyer Advertising and Solicitation." The 2011 Ninth Edition of the Handbook is 94 pages long, but well worth printing and consulting regularly if you are an attorney who advertises in Florida.

Other useful materials available on the website include: Coversheets, Guidelines, Checklists and additional resources. As examples, appended hereto are the following:

Attorney advertising filing requirements
How to file attorney advertisements
Quick Reference Checklist – Websites
Guidelines for Networking Sites and
Guidelines for Video Sharing Sites

The Florida Bar Standing Committee on Advertising periodically issues Advisory Ethics Opinions that may provide additional guidance. Appended hereto are Advisory Opinion A-00-1 (Revised), April 13, 2010 (attorneys may not solicit prospective clients through Internet chat rooms) and Advisory Opinion A-99-1, June 2, 2000 (the first issue of an attorney's informational newsletter must be filed for review).

Published cases in which attorneys have been disciplined for violating the Advertising Rules are also instructive. Initially, all advertising complaints are reviewed by a single Bar counsel in the Tallahassee Branch of The Florida Bar. Bar counsel then forwards the complaint to the Statewide Advertising Grievance Committee for further consideration and disposition, if deemed appropriate. If the Grievance Committee finds probable cause

that one or more of the advertising rules have been violated, the Bar will file a formal Complaint and proceed to litigate the case until it concludes with a final order from the Supreme Court of Florida. When a case results in discipline, the attorney's membership record on the Bar's website will reflect that fact and also have copies of the complaint, the Supreme Court order and other relevant documents available for public viewing. In recent years, attorneys have been disciplined by Public Reprimand administered before the Board of Governors. Public Reprimands were issued in such manner in SC09-969, TFB File No. 2009-90,019(02S) and SC08-326, TFB File No. 2007-51,308(17B). The printed copies of these reprimands are accessible on the Bar's website under the attorneys' membership record.

Notice of public reprimands, suspensions and disbarments are published in the *Bar News*. To avoid such negative press and the cost of defending a Bar grievance, attorneys should educate themselves about the Bar's advertising regulations and then strive for strict compliance. In addition to CLE courses and the materials available on its website, the Bar periodically presents an Advertising Workshop at various locations throughout the state. Although many attorneys are required to attend as the result of Bar disciplinary proceedings, voluntary attendance is allowed, space permitting, upon payment of the required fee.

Attorneys can avoid discipline for advertising violations by ensuring that all advertisements are factually accurate and timely filed for Bar review. A finding of compliance by The Florida Bar is binding on The Florida Bar in a grievance proceeding, unless the advertisement contains a misrepresentation that is not apparent on the face of the advertisement. Rules 4-7.7(a)(1)(F) and (a)(2)(F). Therefore, attorneys who wish to avoid advertising grievances in Florida should: (1) be certain a proposed advertisement is 100% truthful; and (2) obtain prior Bar approval.

Highlights of the Current Advertising Rules, Florida Rules of Professional Conduct, Chapter 4, Rules Regulating The Florida Bar:

Rule 4-7.1 – General

"[A] lawyer may advertise services through public media, including but not limited to: print media, such as a telephone directory, legal directory, newspaper or other periodical; outdoor advertising, such as billboards and other signs; radio, television, and computer-accessed communications; recorded messages the public may access by dialing a telephone number; and written communication in accordance with rule 4-7.4."

"Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner. Advertisements utilizing slogans or jingles, oversized electrical and neon signs, or sound trucks fail to meet these standards and diminish public confidence in the legal system." Rule 4-7.1, cmt.

The Advertising Rules DO APPLY to Florida lawyers and out-of-state lawyers who advertise the provision of legal services in Florida or target Florida residents. Rule 4-7.1(b) and (c).

The Advertising Rules DO NOT APPLY to advertisements not disseminated in Florida; communications between lawyers; communications between lawyers and their own family members; communications with current and former clients' and communications at a prospective client's request. Rule 4-7.1(d) – (h). Also, per SCA Decision, the Advertising Rules do not apply to advertisements to solicit birth mothers when placed by an attorney on behalf of existing adoption clients.

Caveat re: Lawyer to Lawyer exception: Lawyers may not serve as conduits for other attorneys' advertising. Rule 4-7.1, cmt.

Note: All attorney communications, even those exempt from the Advertising Rules, must be truthful and comply with other Rules Regulating The Florida Bar, including but not limited to Rule 4-4.1 (truthfulness in statements to others) and Rules 4-8.4 (c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). Rule 4-7.1(i).

Regulations governing the content of all forms of advertising are found in Rule 4-7.2.

Rule 4-7.2 – Communications Concerning a Lawyer's Services

All advertisements, except communications had between lawyers, or between lawyers and their own family members, **must include** the name of at least one lawyer and the location of one or more bona fide offices. A bona fide office is defined as "a physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis." Rule 4-7.2(a).

A lawyer or law firm **may include** the following information in advertisements and unsolicited written communications:

> (A) the name of the lawyer or law firm, a listing of lawyers associated with the firm, office locations and parking arrangements, disability accommodations, telephone numbers, website addresses, and electronic mail addresses, office and telephone service hours, and a designation such as "attorney" or "law firm";
>
> (B) date of admission to The Florida Bar and any other bars, current and former membership or positions held in The Florida Bar, former positions of employment held in the legal profession, years of experience practicing law, number of lawyers in the advertising law firm, and a listing of federal courts and jurisdictions other than Florida where the lawyer is licensed to practice;

(C) technical and professional licenses granted by the state or other recognized licensing authorities and educational degrees received;

(D) military service, including branch and dates of service;

(E) foreign language ability;

(F) fields of law in which the lawyer practices, including official certification logos, subject to the requirements of subdivision (c)(6) of this rule regarding use of terms such as certified, specialist, and expert;

(G) prepaid or group legal service plans in which the lawyer participates;

(H) acceptance of credit cards;
(I) fee for initial consultation and fee schedule, subject to the requirements of subdivisions (c)(7) and (c)(8) of this rule regarding cost disclosures and honoring advertised fees;

(J) common salutary language such as “best wishes,” “good luck,” “happy holidays,” or “pleased to announce”;

(K) punctuation marks and common typographical marks;

(L) an illustration of the scales of justice not deceptively similar to official certification logos or The Florida Bar logo, a gavel, traditional renditions of Lady Justice, the Statue of Liberty, the American flag, the American eagle, the State of Florida flag, an unadorned set of law books, the inside or outside of a courthouse, column(s), diploma(s), or a photograph of the lawyer or lawyers who are members of or employed by the firm against a plain background consisting of a single solid color or a plain unadorned set of law books.

Rule 4-7.2(b), R. Reg. Fla. Bar

An advertisement in the public media that does not contain an illustration or any information other than the permissible content listed in Rule 4-7.2(b) is exempt from the filing requirement. Rule 4-7.8(a).

A lawyer **shall not** make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer's services. A communication violates this rule if it:

(A) contains a material misrepresentation of fact or law;

(B) is false or misleading;

(C) fails to disclose material information necessary to prevent the information supplied from being false or misleading;

(D) is unsubstantiated in fact;

(E) is deceptive;

(F) contains any reference to past successes or results obtained;

(G) promises results;

(H) states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;

(I) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(J) contains a testimonial.

Rule 4-7.2(c)(1)

One of the most common advertising violations is Rule 4-7.2(c)(2), which prohibits statements "describing or characterizing the quality of the lawyer's services." Other noteworthy restrictions include:

Lawyers may not advertise legal services in a practice area in which they do not currently practice. Rule 4-7.2(c)(4).

Lawyers may not use the words "specialist" or "expert" or derivatives, unless the lawyer is Board Certified. Rule 4-7.2(c)(6).

Any advertisement that references fees must also disclose whether the client will be liable for expenses. Rule 4-7.2(c)(7).

An advertised fee or range of fees must be honored for at least 90 days after the advertisement, unless a shorter period is expressly stated, except for advertisements published annually, in which case the fee must be honored for one year. Rule 4-7.2(c)(8).

Advertised firm names must comply with the requirements of Rule 4-7.9. Rule 4-7.2(c)(9).

No lawyer may pay any portion of the cost of an advertisement by a lawyer in another firm. Rule 4-7.2(c)(12).

If a case will be referred to another lawyer, the advertisement must include that fact. Rule 4-7.2(c)(13).

Apart from permitted advertising costs and Lawyer Referral Service fees, lawyers may not give anything of value to another person for recommending the lawyers' services. Rule 4-7.2(c)(14).

Celebrity voices and images recognizable to the public are prohibited. Rule 4-7.2(c)(15).

Rule 4-7.4 – Direct Contact with Prospective Clients

This rule prohibits solicitation in subsection (a) and sets forth the requirements for written communications sent on an unsolicited basis in subsection (b). All direct mail communications must be filed for review. Carefully review the requirements of Rule 4-7.4(b) before sending any direct mail advertisement. An often overlooked requirement is that the advertisement be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. Rule 4-7.4(b)(2)(D). Guidelines for an "Attorney's Statement of Qualifications and Experience" are available on the Bar's website. Note that additional requirements are imposed for "targeted direct mail," which is when that the communication is prompted by a specific occurrence.

Rule 4-7.5 – Advertisements in the Electronic Media Other Than Computer-Accessed Communications

(a) Generally. With the exception of computer-based advertisements, which are subject to Rule 4-7.6, all advertisements in the electronic media, including but not limited to television and radio, are subject to the requirements of rule 4-7.2. (Remember, the Supreme Court held in SC08-1181 that websites <u>will</u> also be subject to 4-7.2, as soon as the present stay of enforcement is lifted).

(b) Appearance on Television or Radio. Advertisements on the electronic media such as television and radio shall conform to the requirements of this rule.

(1) *Prohibited Content*. Television and radio advertisement shall not contain:

(A) any feature that is deceptive, misleading, manipulative, or that is likely to confuse the viewer; (As discussed above, the U.S. District Court in <u>Harrell v. Florida Bar</u> has held that this rule is unconstitutionally vague).

(B) any spokesperson's voice or image that is recognizable to the public; or

(C) any background sound other than instrumental music.

(2) *Permissible Content.* Television and radio advertisements may contain:

(A) images that otherwise conform to the requirements of these rules; or

(B) a non-attorney spokesperson speaking on behalf of the lawyer or law firm, as long as the spokesperson is not a celebrity recognizable to the public. If a spokesperson is used, the spokesperson shall provide a spoken disclosure identifying the spokesperson as a spokesperson and disclosing that the spokesperson is not a lawyer.

Rule 4-7.6 – Computer-Accessed Communications

As discussed above, the Supreme Court of Florida amended this rule in SC08-1181, but has stayed the effective date of the amendments until 90 days after it rules in SC10-1014. The following is the current version of Rule 4-7.6.

(a) Definition. For purposes of this subchapter, "computer-accessed communications" are defined as information regarding a lawyer's or law firm's services that is read, viewed, or heard directly through the use of a computer. Computer-accessed communications include, but are not limited to, Internet presences such as home pages or World Wide Web sites, unsolicited electronic mail communications, and information concerning a lawyer's or law firm's services that appears on World Wide Web search engine screens and elsewhere.

(b) Internet Presence. All World Wide Web sites accessed via the Internet that are controlled or sponsored by a lawyer or law firm and that contain information concerning the lawyer's or law firm's services:

(1) shall disclose all jurisdictions in which the lawyer or members of the law firm are licensed to practice law;

(2) shall disclose 1 or more bona fide office locations of the lawyer or law firm, in accordance with subdivision (a)(2) of rule 4-7.2; and

(3) **are considered to be information provided upon request**.

(c) Electronic Mail Communications. A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited electronic mail communication directly or indirectly to a prospective client for the purpose of obtaining professional employment unless:

(1) the requirements of Rule 4-7.4 are met;

(2) the communication discloses 1 or more bona fide office locations of the lawyer or lawyers who will actually perform the services advertised, in accordance with subdivision (a)(2) of rule 4-7.2; and

(3) the subject line of the communication states "legal advertisement."

(d) Advertisements. All computer-accessed communications concerning a lawyer's or law firm's services, other than those subject to subdivisions (b) and (c) of the rule are subject to the requirements of rule 4-7.2.

Rule 4-7.7 – Evaluation of Advertisements

This rule governs the filing requirements and requires attorneys to retain for 3 years a copy or recording of the advertisement along with a list of the names and addresses of persons to whom a written communication was sent

Rule 4-7.8 – Exemptions from the Filing and Review Requirement

Advertisements containing no illustrations and only information listed in 4-7.2(b);
Brief public service announcements;
Listing or entry in a law list or bar publication;
Communications mailed only to existing clients, former clients or other lawyers;
Professional announcements;
Computer-accessed communications as described in Rule 4-7.6(d).

Note: Websites may <u>not</u> be filed with the Bar for review.

Rule 4-7.9 – Firm Names and Letterhead

This rule prohibits the use of a firm name or letterhead that is false, misleading or deceptive. Sole practitioners may not, for example, use terms such as "group" or "and associates" in the law firm name if there is only one licensed attorney in the firm. This rule also specifies the requirements for an attorney's use of a trade name.

Rule 4-7.10 – Lawyer Referral Services

Lawyers may not accept referrals from a lawyer referral service that is not compliant with the requirements of this rule. A list of compliant lawyer referral services is available, on request, from The Florida Bar.

Filing Requirement:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/EF976296E8C7B820852572FE006CB667/$FILE/Ad%20Reg.%20Filing%20Requirement.pdf?OpenElement

How to File:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/F25050D0FEC73934852572FE006C8E9A/$FILE/Ad%20Reg.%20How%20to%20File.pdf?OpenElement

Quick Reference Checklist – Websites:
http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/4CA9D716DD67F5448525769D005574A3/$FILE/QUICK%20REFERENCE%20CHECKLIST-Websites%202011.doc?OpenElement

Guidelines for Networking Sites:
http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/a502e8b302def7a5852576e3004fc685!OpenDocument

Guidelines for Video Sharing Sites:
http://www.floridabar.org/tfb/TFBLawReg.nsf/9dad7bbda218afe885257002004833c5/23f90f97361bc5e9852576e30050ca2c!OpenDocument

Advisory Opinion A-00-1:
http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%20A-00-1%20Revised

Advisory Opinion A-99-1:
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UPS **800-325-7000**
www.savewithups.com/floridabar

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ref. #93718

AVIS ***www.avis.com*** **• 800-331-1212**

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ref. #A421600

BUDGET ***www.budget.com*** **• 800-527-0700**

Year round discounts from Budget.

ref. # Y067600

HERTZ **www.hertz.com • 800-654-2200**

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