TOP FIVE ETHICAL DILEMMAS PLAINTIFF'S EMPLOYER LAWYERS FACE

by

Janet E. Wise, Esquire

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Law Offices of Cynthia N. Sass, P.A.
601 West Dr. Martin Luther King Jr. Boulevard
Tampa, Florida 33603
(813) 251-5599
www.EmploymentLawTampa.com

TOP FIVE ETHICAL DILEMMAS PLAINTIFF'S EMPLOYMENT LAWYERS FACE[1]

I. CLIENT COMMUNICATIONS

FLORIDA BAR RULE 4-1.4 COMMUNICATION

(a) Informing Client of Status of Representation. 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 of Professional Conduct or other law.

(b) Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment
Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

Communicating with client
If these rules require that a particular decision about the representation be made by the client, subdivision (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See rule 4-1.2(a).

Subdivision (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations – depending on both the importance of the action under consideration and the

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feasibility of consulting with the client – this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, subdivision (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, subdivision (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected.

Explaining matters

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in terminology.

Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from mental disability. See rule 4-1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See rule 4-1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding information
In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 4-3.4(c) directs compliance with such rules or orders.

II. ELECTRONIC COMMUNICATIONS WITH CLIENTS

FLORIDA BAR RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. 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.

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ABA MODEL RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph

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(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA COMMENTS:

Acting Competently to Preserve Confidentiality
[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing

additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

AUTHORITIES:

Pensacola Firefighters' Relief Pension Fund Board of Trustees v. Merrill Lynch Pierce Fenner & Smith, Inc., 2011 U.S. Dist. LEXIS 88468 (N.D. Fla. 2011). (Intervenors' motion for protective order was granted where they held a valid individual privilege in email communications, they had a valid joint defense agreement with Merrill, and their disregard of the internal email policy was reasonable because a senior member of Merrill's corporate counsel agreed to and participated in use of the office email system for joint defense discussions.)

Scott v. Beth Israel Medical Center Inc., 847 N.Y.S.2d 436 (2007). (Where employer has a no personal use email policy and has informed employees that it may monitor its email system, employee who communicated with his attorney regarding the litigation over the employer's email system is not entitled to assert attorney-client privilege regarding these communications.)

Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 990 A.2d 650 (2010). ("Under the circumstances, Stengart could reasonably expect that e-mail communications with her lawyer through her personal, password-protected, web-based e-mail account would remain private, and that sending and receiving them using a company laptop did not eliminate the attorney-client privilege that protected them. By reading e-mails that were at least arguably privileged and failing to promptly notify Stengart about them, Loving Care's counsel violated RPC 4.4(b).")

Google Gmail License Agreement, ¶7: "Privacy. As a condition of using the Service, you agree to the terms of the Gmail Privacy Policy as it may be updated from time to time. Google understands that privacy is important to you. You do, however, agree that Google may monitor, edit or disclose your personal information, including the content of your emails, if required to do so in order to comply with any valid legal process or governmental request (such as a search warrant, subpoena, statute, or court order), or as otherwise provided in these Terms of Use and the Gmail Privacy Policy. Personal information collected by Google may be stored and processed in the United States or any other country in which Google Inc. or its agents maintain facilities. By using Gmail, you consent to any such transfer of information outside of your country."

III. CREDIT CARD PAYMENTS

FLORIDA BAR RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

(h) Credit Plans. A lawyer or law firm may accept payment under a credit plan. No higher fee shall be charged and no additional charge shall be imposed by reason of a lawyer's or law firm's participation in a credit plan.

COMMENT

Credit Plans
Credit plans include credit cards. If a lawyer accepts payment from a credit plan for an advance of fees and costs, the amount must be held in trust in accordance with chapter 5, Rules Regulating The Florida Bar, and the lawyer must add the lawyer's own money to the trust account in an amount equal to the amount charged by the credit plan for doing business with the credit plan.

FLORIDA BAR RULE 4-1.15 SAFEKEEPING PROPERTY

Compliance With Trust Accounting Rules. A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts.

FLORIDA BAR RULE 5-1.1 TRUST ACCOUNTS

(j) Disbursement Against Uncollected Funds. A lawyer generally may not use, endanger, or encumber money held in trust for a client for purposes of carrying

out the business of another client without the permission of the owner given after full disclosure of the circumstances. However, certain categories of trust account deposits are considered to carry a limited and acceptable risk of failure so that disbursements of trust account funds may be made in reliance on such deposits without disclosure to and permission of clients owning trust account funds subject to possibly being affected. Except for disbursements based upon any of the 6 categories of limited-risk uncollected deposits enumerated below, a lawyer may not disburse funds held for a client or on behalf of that client unless the funds held for that client are collected funds. For purposes of this provision, "collected funds" means funds deposited, finally settled, and credited to the lawyer's trust account. Notwithstanding that a deposit made to the lawyer's trust account has not been finally settled and credited to the account, the lawyer may disburse funds from the trust account in reliance on such deposit:

(1) when the deposit is made by certified check or cashier's check;
(2) when the deposit is made by a check or draft representing loan proceeds issued by a federally or state-chartered bank, savings bank, savings and loan association, credit union, or other duly licensed or chartered institutional lender;
(3) when the deposit is made by a bank check, official check, treasurer's check, money order, or other such instrument issued by a bank, savings and loan association, or credit union when the lawyer has reasonable and prudent grounds to believe the instrument will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;
(4) when the deposit is made by a check drawn on the trust account of a lawyer licensed to practice in the state of Florida or on the escrow or trust account of a real estate broker licensed under applicable Florida law when the lawyer has a reasonable and prudent belief that the deposit will clear and constitute collected funds in the lawyer's trust account within a reasonable period of time;
(5) when the deposit is made by a check issued by the United States, the State of Florida, or any agency or political subdivision of the State of Florida;
(6) when the deposit is made by a check or draft issued by an insurance company, title insurance company, or a licensed title insurance agency authorized to do business in the state of Florida and the lawyer has a reasonable and prudent belief that the instrument will clear and constitute collected funds in the trust account within a reasonable period of time.

A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than those set forth above, when it results in funds of other clients being used, endangered, or encumbered without authorization, may be grounds for a finding of professional misconduct. In any event, such a disbursement is at the risk of the lawyer making the disbursement. If any of the deposits fail, the lawyer, upon obtaining knowledge of the failure, must immediately act to protect the property of the lawyer's other clients. However, if the lawyer accepting any such check personally pays the

amount of any failed deposit or secures or arranges payment from sources available to the lawyer other than trust account funds of other clients, the lawyer shall not be considered guilty of professional misconduct.

FLORIDA BAR RULE 5-1.2 TRUST ACCOUNTING RECORDS AND PROCEDURES

(d) Electronic Wire Transfers. Authorized electronic transfers from a lawyer or law firm's trust account shall be limited to:

(1) money required to be paid to a client or third party on behalf of a client;
(2) expenses properly incurred on behalf of a client, such as filing fees or payment to third parties for services rendered in connection with the representation;
(3) money transferred to the lawyer for fees which are earned in connection with the representation and which are not in dispute; or
(4) money transferred from one trust account to another trust account.

AUTHORITIES:

Fla. Bar Op. 76-37 (November 16, 1976)

Ohio opinion 2007-3 (April 13, 2007)

D.C. Bar opinion 348 (March 2009)

IV. ADVERTISING AND MARKETING

FLORIDA BAR RULE 4-7.2 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

The following shall apply to any communication conveying information about a lawyer's or a law firm's services except as provided in subdivisions (e) and (f) of rule 4-7.1:

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(b) Permissible Content of Advertisements and Unsolicited Written Communications. If the content of an advertisement in any public media or unsolicited written communication is limited to the following information, the advertisement or unsolicited written communication, if true and not prohibited by law, shall be presumed to be permissible and not to be misleading or deceptive under these rules.

(1) *Lawyers and Law Firms.* 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 subject to the requirements of this rule and rule 4-7.9, 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 membership or positions held in The Florida Bar or its sections or committees, former membership or positions held in The Florida Bar or its sections or committees with dates of membership, former positions of employment held in the legal profession with dates the positions were held, 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, including dates and institutions;

(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.

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(c) Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.

(1) *Statements About Legal Services.* 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.

(2) *Descriptive Statements.* A lawyer shall not make statements describing or characterizing the quality of the lawyer's services in advertisements and unsolicited written communications.

(3) *Prohibited Visual and Verbal Portrayals and Illustrations.* A lawyer shall not include in any advertisement or unsolicited written communication any visual or verbal descriptions, depictions, illustrations, or portrayals of persons, things, or events that are deceptive, misleading, manipulative, or likely to confuse the viewer.

(4) *Advertising Areas of Practice.* A lawyer or law firm shall not advertise for legal employment in an area of practice in which the advertising lawyer or law firm does not currently practice law.

(5) *Stating or Implying Florida Bar Approval.* A lawyer or law firm shall not make any statement that directly or impliedly indicates that the communication has received any kind of approval from The Florida Bar.

(6) *Communication of Fields of Practice.* A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer is "certified," "board certified," a "specialist," or an "expert" except as follows:

(A) Florida Bar Certified Lawyers. A lawyer who complies with the Florida certification plan as set forth in chapter 6, Rules Regulating The Florida Bar, may inform the public and other lawyers of the lawyer's certified areas of legal practice. Such communications should identify The Florida Bar as the certifying organization and may state that the lawyer is "certified," "board certified," a "specialist in (area of certification)," or an "expert in (area of certification)."

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(7) *Disclosure of Liability For Expenses Other Than Fees.* Every advertisement and unsolicited written communication that contains information about the lawyer's fee, including those that indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.

(8) *Period for Which Advertised Fee Must Be Honored.* A lawyer who advertises a specific fee or range of fees for a particular service shall honor the advertised fee or range of fees for at least 90 days unless the advertisement specifies a shorter period; provided that, for advertisements in the yellow pages of telephone directories or other media not published more frequently than annually, the advertised fee or range of fees shall be honored for no less than 1 year following publication.

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Comment

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Communication of fields of practice

This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, such as in a telephone directory or other advertising, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept

matters except in such fields, the lawyer is permitted so to indicate. However, no lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by The Florida Bar may be described to the public as a "specialist" or as "specializing," "certified," "board certified," being an "expert" or having "expertise in," or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.

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V. *EX PARTE* COMMUNICATIONS

FLORIDA BAR RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4.

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 4-4.3.

AUTHORITIES:

H.B.A. Management, Inc., v. Estate of Schwartz, 693 So.2d 541 (Fla. 1997). (No former employee falls within the prohibition against *ex parte* contact regardless of whether the

employee was a manager. An attorney is prohibited from inquiring into any attorney-client communication a former employee may have had.)

Joynes v. NCL America, Inc., 2010 U.S. Dist. LEXIS 4667 (S.D. Fla. 2010). (Slip and fall case resulting in leg amputation against a cruise line. "In order to ensure ethical safeguards, Plaintiff's counsel shall adhere to the following guidelines [when interviewing current and former employees]: 1) Plaintiff's counsel shall identify themselves as attorneys and state the purpose of the contact; 2) Plaintiff's counsel shall inform the employee that the interview is not mandatory and that he or she may choose not to participate, or can opt to participate in the presence of personal counsel or counsel provided by NCL America; 3) Plaintiff's counsel shall immediately terminate the interview at the request of the employee; 4) Plaintiff's counsel shall preserve notes about the contact, including the date, time, length, and any statements or evidence gathered; 5) Plaintiff's counsel shall not interview any employee identified as managerial; 6) Plaintiff's counsel shall advise the employee to avoid disclosure of privileged material; and 7) any information or other evidence obtained during the course of *ex parte* interviews may not later be used by the Plaintiff against Defendants as binding admissions on behalf of the company for the purposes of Rule 801(d)(2) of the Federal Rules of Evidence. See *NAACP, et al. v. Fla. Dept. of Corrections, et al.*, 122 F. Supp. 2d 1335, 1343-44 (M.D. Fla. 2000).")

Lee Memorial Health System v. Jeffrey Smith and Melissa Smith, 56 So.3d 808 (Fla. 2d DCA 2011). (Under Rule 4-4.2, hospital sought an order preventing counsel for parents of disabled child from communicating with child's treating physicians who were hospital employees. Court denied the motion, concluding "that the stated purposes of *rule 4-4.2* would not be served by an interpretation that would prohibit plaintiff's counsel from informal communication with his or her client's treating physicians--absent consent--simply because of the physicians' adventitious employment by a defendant hospital.")

Florida Bar Opinions (at http://www.flabar.org/ - Ethics Opinion tab)

a. Fla. Bar Op. 69-40 (Nov. 10, 1969) (An attorney may not interview the opposing party about the party's anticipated testimony as a witness except with the consent of the opposing party's attorney)

b. Fla. Bar Op. 76-21 (Apr. 19, 1977) (A lawyer who suspects that opposing counsel's client is not receiving settlement offers and other vital information concerning pending litigation may not himself transmit such information to the adverse party)

c. Fla. Bar Op. 78-4 ( ) (If an individual or corporation has general counsel representing that party in all legal matters, communications must be with the attorney. A corporate party's officers, directors and managing agents are "parties" for purposes of communications, but other employees of the corporation are not unless they have been directly involved in the incident or matter giving rise to the investigation or litigation)

d. Fla. Bar Op. 87-2 (May 1, 1987) (When the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the part of the agency, unless consent of the agency's counsel is obtained)

e. Fla. Bar Op. 88-14 (Mar. 7, 1989) (A plaintiff's attorney may communicate with former managers and former employees of a defendant corporation without seeking and obtaining consent of corporation's attorney)

f. Fla. Bar Op. 90-4 (July 15, 1990) (Florida Rule 4-4.2 contains no exception for activities of U.S. Department of Justice attorneys)

g. Fla. Bar Op. 94-4 (Apr. 30, 1995) (Opposing counsel may communicate with an individual who is litigating pro se concerning that litigation even though an attorney is representing the individual in a related matter. Opposing counsel, however, may not communicate with the individual about the subject matter of the attorney's representation without the attorney's consent)

h. Fla. Bar. Op. 02-5 (March 7, 2003) (A lawyer may give a second opinion to a person who is represented by counsel on how the person's current lawyer is handling the case or give information on the services the lawyer may provide)

i. Fla. Bar. Op. 09-1 (December 10, 2010) (Florida Rule 4-4.2 applies to a lawyer's communications with employees, officers, directors, or managers of a State Agency in the same manner it applies to other represented organizations.)

"Ethics Charges for Two Lawyers over Facebook Friending a Litigant," The Employer Handbook Blog by Eric B. Meyer, Esquire.