PRACTICAL TIPS FOR PRACTICING LAW SERIES

DISCUSSION POINTS

SCENE 1 – AMENDED COMPLAINT

- **Competence and Frivolous claims – Bar discipline**. This scene is based on a real case. In the real case, the attorney had additional professional conduct violations.

  - In *Florida Bar v. Bischoff*, 212 So. 3d 312, 316-19 (Fla. 2017), the Court noted:

    First, the referee found that Bischoff lacked the legal knowledge and skill necessary to represent the client. Though Bischoff had practiced in federal court for seven years before the client's case, the referee found his actions demonstrated that he did not understand the basic requirements to litigate cases in a federal court. He did not comply with the Federal Rules of Civil Procedure in amending his complaint, and he made no effort to communicate with opposing counsel in filing motions for extensions of time. The referee further found that Bischoff failed to inform himself on the applicable law. Every version of the complaint that he filed failed to allege whether the client had exhausted her administrative remedies. And, even more significantly, each version of the complaint also failed to allege an essential element of the wrongful wage garnishment claim—that the client had been involuntarily separated from a prior employer, making her exempt from garnishment under the statute. Additionally, the referee found that Bischoff filed a motion to certify class without even minimally investigating whether other class members existed. Finally, he filed frivolous objections or appeals to Judge Scola challenging Magistrate Judge Otazo-Reyes's authority to rule on motions. The referee found that the magistrate judge explained to Bischoff the law and the scope of her authority to make recommendations on dispositive motions; nonetheless, Bischoff's appeals continued to challenge her authority. The referee noted that while Bischoff did have a duty to use the law for the fullest benefit of his client's cause, he also had a duty not to abuse the legal procedure.

    Bischoff failed to act competently on behalf of the client, in violation of Bar Rule 4-1.1 , when he failed to comply with the Federal Rules of Civil Procedure, failed to adequately research his client's causes of action to know what elements were required, and filed objections and appeals challenging Magistrate Judge Otazo-Reyes's authority to hear specific motions, where her authority to hear those motions and enter orders or make recommendations was specifically outlined in federal law. We agree with the referee that these objections and appeals, and other of Bischoff's pleadings, were also frivolous, in violation of Bar Rule 4-3.1.

Authorities: Rule 4-1.1; Rule 4-3.1; Fla. Stat. §57.105; *Florida Bar v. Bischoff*, 212 So. 3d 312, 316 (Fla. 2017).

SCENE 2 – DCA OPINION

- This scene deals with the failure to cite controlling adverse authority.
- What authority is controlling?
  - Hierarchy of Authority: I. Constitution; II. Statutes; III. Administrative Regulations (may carry the same weight as statutes); IV. Case law (court opinions).
- The "controlling jurisdiction" means the forum state in cases pending before state courts and the same judicial district or appellate circuit for federal court cases. If there is no authority on point in the jurisdiction and a lawyer cites authority from outside the controlling jurisdiction, some courts reason that the lawyer then becomes required to also reveal directly adverse authority from outside the controlling jurisdiction. *See, e.g., Mannheim Video, Inc. v. County of Cook*, 884 F.2d 1043, 1047 (7th Cir. 1989); *Plant v. Doe*, 19 F. Supp. 2d 1316, 1318-19 (S.D. Fla. 1998). In *Plant v. Doe*, the Court reminded how the duty of candor outweighs the duty of zealous advocacy:

> Plaintiffs' counsel thus contended that he was not obligated to disclose the adverse authority because he was not personally involved in those adverse cases. This Court's humble understanding of the ethical obligation of attorneys, however, is that they must disclose adverse case authority whether or not they are personally involved in the adverse cases. Otherwise, the majority of attorneys would be exempt from the requirement of citing the relevant Supreme Court case law on a given legal issue. While the Court can certainly understand an attorney's desire to reach a resolution most favorable to his client, higher than the requirements of zealous advocacy are the obligations of truth, honesty, and ethical virtue.

19 F. Supp. 2d at 1319.

- Case law in Florida and the *Pardo* Principle

  The District Courts of Appeal are required to follow Supreme Court decisions. As an adjunct to this rule, it is logical and necessary in order to preserve stability and predictability in the law that, likewise, trial courts be required to follow the holdings of higher courts — District Courts of Appeal. The proper hierarchy of decisional holdings would demand that in the event the only case on point on a district level is from a district other than the one in which the trial court is located, the trial court be required to follow that decision. Alternatively, if the district court of the district in which the trial court is located has decided the issue, the trial court is bound to follow it. Contrarily, as between District Courts of Appeal, a sister district's opinion is merely persuasive.

  Pardo v. State, 596 So. 2d 665, 667 (Fla. 1992).

- On an issue of Florida law, a Florida trial court must follow any decision of first impression by any one of Florida's five District Courts of Appeal. *See Brannon v. State*, 850 So. 2d 452, 458 n.4 (Fla. 2003) ("If there is no controlling decision by this Court or the district court having jurisdiction over the trial court on a point of law, a decision by another district court is binding.").

- Therefore, in some circumstances, a lawyer appearing before a Florida trial court may have to cite decisions from a District Court of Appeal from another appellate district in the state, because Rule 4-3.3(a)(3) provides that "[a] lawyer shall not knowingly:…fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. . . . " The Florida Supreme Court stressed the need for attorney candor and noted that "the rules already require counsel to concede error on appeal when appropriate." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 572 (Fla. 2005).

- What is the prudent approach when dealing with possibly adverse controlling law? Disclose and work to distinguish. Disclose the rulings of any District Court of Appeal on any matter of first impression. Disclose the rulings of the Supreme Court of Florida or of the District Court of Appeal for the district of your case, if they are on point legally and factually. The best approach for close calls is to mention and attempt to distinguish the case, even if the judge or opposing counsel might not have located the authority up to that point. Put yourself in the judge's position – would you want to know about the authority in question? The more the case is on point, the more it appears to be adverse and controlling, the more difficult it may be to deal with, but the more that Rule 4-3.3(a)(3) kicks in and applies. *See e.g., Massey v. Prince George's County*, 918 F. Supp. 905, 908 (D. Md. 1996) (federal district court was not persuaded by the argument that the overlooked case was not "directly adverse" and provided that "in this district whenever a case from the 4th Circuit comes anywhere close to being relevant to a disputed issue, the better part of wisdom is to cite it and attempt to distinguish it.").

- Useful review materials: https://guides.law.ufl.edu/c.php?g=1023436&p=7413300

- Case law in Federal Courts - Useful review handouts:

    - https://www.law.georgetown.edu/wp-content/uploads/2018/07/Which-Court-is-Binding-HandoutFinal.pdf

    - https://www.law.georgetown.edu/wp-content/uploads/2018/07/Matthew-Schafer-FederalLawFederal-CourtsandBindingandPersuasiveAuthority.pdf

Authorities: Rule 4-3.3(a)(3); *Pardo v. State*, 596 So. 2d 665, 667 (Fla. 1992).

Florida Bar Professionalism Expectations 2.2, 2.10, and 4.13.

Examples from other jurisdictions: *Massey v. Prince George's County*, 907 F.Supp. 138 (D. Md. 1995) ("Massey I"); *Massey v. Prince George's County*, 918 F.Supp. 905 (D. Md. 1996) ("Massey II"); Ethics opinion from North Carolina, Order from U.S. District Court for the District of Oregon.

SCENE 3 – REPLY BRIEF

- This scene addresses the duty to cite controlling adverse authority. A recent Eleventh Circuit decision dealt with a similar issue. The court praised counsel for pointing out the new standard:

> In its order granting summary judgment to OSP, the district court referred to the old rule that FLSA exemptions must be "narrowly construed," and OSP repeated the old rule in its brief to this Court. Counsel for Fowler and Swans correctly pointed out in their reply brief that regrettably (for their clients) the Supreme Court has held that the old "narrow reading" standard no longer applies. *Encino Motorcars* decision. *See* 138 S. Ct. at 1142.
> We do appreciate the candor and adherence to high standards of professional responsibility displayed by their counsel, Mitchell D. Benjamin and Matthew W. Herrington.

Fowler v. OSP Prevention Grp., Inc., 38 F.4th 103 n.1 (11th Cir. 2022).

- We heard the partner explain to the associate, after instructing to use the new standard, "I'll explain to the client, whatever the result" which suggests that the lawyers were not going to discuss with the client until *after* proceeding. The appropriate course of action may depend on both the importance of the issue to the briefing and on whether the lawyers determined that ethical obligations required citation to and disclosure of the new standard, or whether doing so was not required but still the best and most prudent course of action. Under Rule 4-1.4, lawyers must, among other things, reasonably consult with the client about the means by which the client's objectives are to be achieved and keep the client reasonably informed of the status of the matter. As explained in the comments, in "some situations – depending on both the importance of the action under consideration and the feasibility of consulting with the client –" the duty of reasonable consultation "will require consultation prior to taking action." Thus, to the extent a particular disclosure is important to the outcome and is discretionary (even if the lawyer believes prudent) the lawyer may need to consult with the client before proceeding. If the client disagrees with or refuses the permit the approach suggested by the lawyer, the lawyer may consider the appropriateness of withdrawal under the circumstances. In any event, to the extent a conferral with or explanation to the client is warranted, doing so before taking action as opposed to after the result is likely better practice.

- In *Gonzalez-Servin v. Ford Motor Co*., 662 F.3d 931, 934 (7th Cir. 2011), a consolidated appeal from two *forum non conveniens* motions, Judge Posner chastised the appellants. The appellants failed to cite a decision called *Abad* in their opening brief or their reply brief, even though the defendants repeatedly and accurately stated that it was nearly identical to the case at bar. In the other consolidated case, the appellants discussed *Abad* "only a little" and failed to discuss another authority directly on point. Judge Posner wrote:

> When there is an apparently dispositive precedent, an appellant may urge its overruling or distinguishing or reserve a challenge to it for a petition for certiorari but may not simply ignore it. … maybe appellants think that if they ignore our precedents their appeals will not be assigned to the same panel as decided the cases that established the precedents. Whatever the reason, such advocacy is unacceptable.
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> The ostrich is a noble animal, but not a proper model for an appellate advocate. (Not that ostriches really bury their heads in the sand when threatened; don't be fooled by the picture below.) The "ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist is as unprofessional as it is pointless.

The opinion also included a photo of an ostrich with its head in the sand and a photo of a man in a suit in a similar pose. https://www.abajournal.com/files/DG0R2WE8.pdf

Authorities: Rule 4-3.3(a)(3); *Fowler v. OSP Prevention Grp., Inc.*, 38 F.4th 103 (11th Cir. 2022); *Gonzalez-Servin v. Ford Motor Co*., 662 F.3d 931, 934 (7th Cir. 2011).

SCENE 4 - INVOICES

- This scene is based on the start of the attorney-client relationship in *Harris v. McMichael*, No. E2020-00817-COA-R3-CV, 2021 BL 434800, at *2 (Tenn. Ct. App. Nov. 12, 2021). The *Harris* case involved a Florida attorney who represented Mr. and Mrs. McMichael in Florida foreclosure litigation. The attorney had a series of three representation agreements with these clients. Our scene involves the first two. The attorney sued the client to recover funds in a Tennessee court. The Tennessee court found that the lawyer failed to bill his clients in accordance with the retainer agreement. In doing so, the lawyer breached his fiduciary duty to his clients under the rules of professional conduct. Specifically, the retainer agreement provided that the lawyer would bill the clients in quarter-hour itemization. Instead, the lawyer "block billed" the clients for "20 hours@$250.00=$5,000" in connection with opposing a motion for summary judgment. At the hearing, the lawyer testified that he did compile detailed billing statements that billed the clients in quarter-hour increments. However, he did not prepare these statements until shortly before the hearing in the trial court in this contested litigation. According to the court, "[t]his belated and ad hoc compliance with the billing provisions of the parties' agreements simply does not reflect the promptness, diligence or appropriate communication required of a Florida attorney, or any other attorney." *Harris,* No. E2020-00817 at 12. The court affirmed that disgorging the lawyer of the remainder of the fees paid by the clients was an appropriate remedy under the circumstances. The court allowed the lawyer to keep $5,000 of the legal fees.

- For hourly fee agreements, detailed records should be kept concerning the time spent on the matter. Further, the lawyer should invoice the client at regular intervals, preferably every month. The client has the right to know the exact amount of the hourly rate and, if possible, an estimate of the hours the lawyer expects are necessary to handle the matter. Finally, after the attorney-client relationship has commenced, the lawyer should inform the client preferably in writing of the status of the case on a periodic, preferably monthly, basis and the work the lawyer performs to earn the fee.

- The scene suggests that the fees may have been paid by the client's sister. Under Rule 4-1.8(f), "a lawyer is prohibited from accepting compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by rule 4-1.6" (the rule governing confidentiality). As explained in the comments, third-party payers "frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing," such that "lawyers are prohibited from accepting or continuing these representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client." Depending on the circumstances, it will sometimes be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the arrangement creates a conflict of interest, then the lawyer must comply with rule 4-1.7. The lawyer must also comply with rule 4-1.6 concerning confidentiality. The fact pattern here does not give complete details, but these are important considerations when fees are paid in whole or in party by a third party.

- Is it okay to have a limited representation agreement?

  Yes, an attorney and client may have a limited representation agreement if (1) the scope of representation is reasonable and (2) the client gives informed consent.

RULE 4-1.2(C) PROVIDES:

Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

There were problems with the limited representation agreement in the *Harris* case. The Tennessee trial court concluded that the attorney breached his fiduciary duty by (1) requiring the clients to sign a vague Initial Limited Appearance fee agreement and not giving them sufficient notice of his intent to terminate his representation, (2) not compiling his billing records pursuant to the terms of the fee agreement, and (3) not sending out billing statements on a regular basis. The trial court also held that the attorney violated his ethical duty in increasing his hourly rate and asking for a substantial retainer for the second agreement. The trial court also concluded that the attorney was only entitled to $5,000 for his work and ordered disgorgement. The appellate court affirmed. *Harris,* No. E2020-00817 at 12.

- What is the problem with the "skinny" bill sent by the attorney?

  The lack of itemized details does not inform the client what work is specifically covered by the bill. This failure to itemize is also referred to as "block billing."

  > Billing should be done promptly after the work for which the bill is sent is completed, and should be detailed. The client is entitled to know what items are covered by the bill and to have current billing so that the cost of the litigation can be overseen as it progresses. When billing a client, the lawyer should detail the legal services performed in the matter and the expenses incurred for each legal service. The "narrative" statements assist the client in understanding the reason for the amount of the bill.

  The Fla. Bar, *Florida Civil Practice Before Trial*, ch.3 (13th ed. 2020).

- Did the attorney act improperly in demanding a new fee agreement when the limited representation agreement was terminating?

- The *Harris* court said that the trial court correctly held "that [Mr. Harris'] failure to comply with the provisions of **his fee agreement** was a breach of his duty under the rules of professional conduct." The fee agreements provided that "Time billed shall be in increments of one quarter of an hour." Mr. Harris argued that he provided billing in quarter hour increments, just not contemporaneous billing. The statements Harris produced were: (1) prepared just prior to the hearing; (2) not submitted when he sent the "skinny bills" to the McMichaels; and (3) only provided to the McMichaels shortly before the hearing. The Tennessee appellate court stated: "This belated and ad hoc compliance with the billing provisions of the parties' agreements simply does not reflect the promptness, diligence or appropriate communication required of a Florida attorney, or any other attorney. We conclude that the trial court did not err in holding that Mr. Harris' failure to comply with the terms of his fee agreement constitute a breach of the fiduciary duty he owed to the McMichaels." *Harris v. McMichael*, No. E2020-00817-COA-R3-CV, 2021 BL 434800, at *12 (Tenn. Ct. App. Nov. 12, 2021).

- What problems are presented by an attorney accepting payment via services like Venmo and PayPal?

  Florida Bar Ethics Opinion 21-2, an advisory, non-binding opinion, concluded "that a lawyer ethically may accept payments via a payment-processing service (such as Venmo or PayPal)" if (1) the lawyer takes reasonable steps to keep the transaction confidential; (2) funds that are the property of a client or third person must be directed to an account that is used only to receive such funds and then promptly transferred to the lawyer's trust account; and (3) unless the lawyer and client otherwise agree, the lawyer must ensure that any transaction fee charged to the recipient is paid by the lawyer and not from client trust funds. Likewise, the lawyer must ensure that any chargebacks are not deducted from trust funds and that the service will not freeze the account in the event of a payment dispute.

  In our scene, it is not apparent if the correct privacy settings are enabled to ensure transaction confidentiality. For example, Venmo allows settings for public, "friends" only, or private. Also, the client in our scene mentions a service charge of $275. Florida Bar Ethics Opinion 21-2 says that this fee should be paid by the lawyer and not from client trust funds unless otherwise agreed.

Authority: Rule 4-1.1; *Harris v. McMichael*, No. E2020-00817-COA-R3-CV, 2021 BL 434800, at *2 (Tenn. Ct. App. Nov. 12, 2021), available at https://www.tncourts.gov/sites/default/files/e2020-817_harris_v._mcmichael.pdf; Ethics Opinion 21-2, available at https://www.floridabar.org/etopinions/opinion-21-2/

SCENE 5 – PAGE LIMITS

- Why would an attorney choose to file an extra motion rather than edit the brief?
  - Editing and possibly omitting law and facts the attorney deems crucial take time and may involve some hard choices. A motion for leave may be prepared quickly.
    - Sample motion requesting leave to file motion in excess of 25 pages.
    - Sample motion to exceed 20 page limit.

- Some court rules have word count instead of or in addition to page limits. For example, the Florida Supreme Court converted from page limits to word limits on January 1, 2021. In most cases, "a modicum of informed editorial revision" could easily reduce the brief to the page limit without changing the substance. *See Belli v. Hedden Enters., Inc.*, No. 8:12-cv-1001-T-23MAP, 2012 WL 3255086, at *1 (M.D. Fla. Aug. 7, 2012). *Belli* order.

- Courts will see through and despise any attempt to evade page limitations by manipulating font size, margin size, line spacing or footnotes. In *Abner v. Scott Memorial Hosp.*, 634 F.3d 962 (7th Cir. 2011), the Seventh Circuit struck an appellate brief struck that exceeded page length and word limitation, in part because the attorney falsely certified that the brief complied with local rules. The court ordered Abner to show cause why she should not be sanctioned for filing a brief longer than allowed by the rules without permission of the court. In response, Abner's lawyer conceded his brief was too long but said he inadvertently did not include everything in the word count that he should have. The appellate court ruled that Rule 32 is not ambiguous, "hence [there was] no room for misinterpreting the rule." The lawyer signed a certification that the brief was under the 14,000-word limit. In fact, the brief had more than 18,000 words. After his incorrect affidavit was discovered, Abner's lawyer asked for leave to file a brief in excess of the word limit. The appellate court rejected that request because it "advance[d] no persuasive grounds for allowing an oversized brief to be filed, and so the brief is stricken." *See also Equal Employment Opportunity Com'n v. Darden Restaurant, Inc*., No. 1:15- ev-20561 (S.D. Fla.) (Order of July 25, 2017) (instead of double spacing, motion for summary judgment had line spacing of one and one-half lines, with 89 lines of footnotes), discussed in Debra Casens Weiss, BigLaw Firm Scolded By Federal Judge for Disregarding Line-Spacing Order, A.B.A.J., posted Aug. 1, 2017).

- Florida Bar Professionalism Expectations 2.12, 4.1, and 4.2.

- Rules Regulating the Florida Bar. Rule 4-1.3, Diligence. A Lawyer shall act with reasonable diligence and promptness.

Authorities: *Belli v. Hedden Enterprises, Inc.*, No. 8:12-CV-1001-T-23MAP, 2012 WL 3255086, at *1 (M.D. Fla. Aug. 7, 2012). *See also Abner v. Scott Mem'l Hosp*., 634 F.3d 962, 964 (7th Cir. 2011).