The Florida Bar Continuing Legal Education Committee and the Real Property, Probate and Trust Law Section

Advanced Real Property Certification Review Course

– Volume I –

COURSE CLASSIFICATION: ADVANCED LEVEL

February 9 - 10, 2018

Live and Webcast Presentation
Loews Portofino Bay Resort at Universal Studios
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Course No. 2597R

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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 33 hours, 5 of which are in the area of ethics, professionalism, substance abuse, or mental illness awareness, and 3 hours in technology.

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/rules.

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 by logging in to your member portal at member.floridabar.org.

6. **Will I receive notice advising me that my reporting period is upcoming?**
   Four months prior to the end of your reporting cycle, you will receive a CLER Reporting Affidavit, if you still lack hours.

7. **What happens if I am late 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.

8. **Will I receive any other information about my reporting cycle?**
   Yes, you will receive reminders prior to the end of your reporting cycle, if you have not yet completed your hours.

9. **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

10. 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)

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

Applications for credit may be found on our website, www.floridabar.org.

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

You must post your credits online by logging in to your member portal at member.floridabar.org.

13. 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.

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

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

15. 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.

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

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

17. 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.

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 16.5 hours)

General ..... 16.5 hours Ethics ..... 1.0 hour

CERTIFICATION CREDIT

(Maximum 16.5 hours)

Condominium & Planned Development ..... 16.5 hours
Real Estate ..... 16.5 hours
Business Litigation ..... 16.5 hours
Construction Law ..... 16.5 hours
Tax Law ..... 1.0 hour

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 you will be sent a Reporting Affidavit (must be returned by your CLER reporting date). 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 ADVANCED.

REAL PROPERTY, PROBATE AND TRUST LAW SECTION

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Terry L. Hill — Director, Programs Division

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

LECTURE PROGRAM

Friday, February 9, 2018

7:30 a.m. - 8:00 a.m.	**Late Registration**
8:00 a.m. - 8:05 a.m.	**Introductions**
8:05 a.m. - 8:35 a.m.	**Marketable Record Title Act & Curative Statutes** *Melissa Scaletta, Orlando*
8:35 a.m. – 9:00 a.m.	**Title Insurance** *Karla J. Staker, Maitland*
9:00 a.m. – 9:50 a.m.	**Ethics** *Lynwood F. Arnold Jr., Tallahassee* *Frederick W. Jones, Winter Park*
9:50 a.m. – 10:05 a.m.	**Break**
10:05 a.m. – 10:45 a.m.	**Foreclosures** *Alfred A. Lasorte, West Palm Beach*
10:45 a.m. – 11:35 a.m.	**Real Estate Finance and Lending** *David R. Brittain, Tampa*
11:35 a.m. - 12:25 p.m.	**Recording Statute, Priorities and Judgment Liens** *Martin S. Awerbach, Clearwater*
12:25 p.m. – 1:30 p.m.	**Lunch (Included)** *Mary A. Robison, Jacksonville* *Christopher C. Cathcart, Altamonte Springs*
1:30 p.m. – 2:05 p.m.	**Condominiums and Condominium Associations** *William P. Sklar, West Palm Beach*
2:05 p.m. – 2:40 p.m.	**Construction Liens** *Lee A. Weintraub, Fort Lauderdale*
2:40 p.m. – 2:55 p.m.	**Break**
2:55 p.m. – 3:20 p.m.	**Tax Liens and Tax Titles** *Robert G. Stern, Tampa*
3:20 p.m. – 3:45 p.m.	**Surveys and Easements** *Richard W. Taylor, Deland*

3:45 p.m. – 4:30 p.m.	**Homeowner's Associations** *Michael G. Gelfand, West Palm Beach*
4:30 p.m. – 5:00 p.m.	**Environmental Issues** *Roger Schwenke, Tampa*
5:00 p.m. – 6:00 p.m.	**Reception**

Saturday, February 10, 2018

8:25 a.m. - 8:30 a.m.	**Opening Remarks**
8:30 a.m. - 9:10 a.m.	**Doc Stamp Taxes** *E. Burt Bruton, Miami*
9:10 a.m. – 10:00 a.m.	**Far/Bar: Closing Procedures** *Matthew Hoffman, Pensacola* *Brian W. Hoffman, Pensacola*
10:00a.m. – 10:30 a.m.	**Tenancies and Conveyances** *Robert M. Schwartz, Boca Raton*
10:30 a.m. – 10:45 a.m.	**Break**
10:45 a.m. – 11:30 a.m.	**Homestead** *Alan B. Fields, Irvine California*
11:30 a.m. – 12:00 p.m.	**Zoning and Permitting** *Richard Davis, Tampa*
12:00 p.m. – 12:45 p.m.	**Lunch (On your own)**
12:45 p.m. – 1:25 p.m.	**Land Trusts** *Andrew M. O'Malley, Tampa*
1:25 p.m. – 1:55 p.m.	**Bankruptcy** *Marsha G. Rydberg, Tampa*
1:55 p.m. – 2:10 p.m.	**Break**
2:10 p.m. – 2:50 p.m.	**Public Lands and Waterbodies** *Alan B. Fields, Irvine, CA*

2:50 p.m. – 3:20 p.m. **Landlord/Tenant and Mobile Homes**
Jennifer S. Tobin, Orlando

3:20 p.m. – 3:50 p.m. **Case Law and Statutory Update**
Manuel Farach, Fort Lauderdale

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ZONING AND PERMITTING
Richard Davis, Tampa

LAND TRUSTS
Andrew M. O'Malley, Tampa

BANKRUPTCY

Marsha G. Rydberg, Tampa

PUBLIC LANDS AND WATERBODIES

Alan B. Fields, Irvine, CA

LANDLORD/TENANT AND MOBILE HOMES
Jennifer S. Tobin, Orlando

CASE LAW AND STATUTORY UPDATE
Manuel Farach, Fort Lauderdale

AUTHORS/LECTURERS

LYNWOOD F. ARNOLD, JR. received his undergraduate degree from Stetson University and his law degree from Florida State University. He is a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, currently serving as Co-Chair of the Membership and Inclusion Committee and as Lead At Large Member for the Second Judicial Circuit.Mr. Arnold is a past chair of the Real Property, Probate and Trust Law Section of the Hillsborough County Bar Association. He is a member and past president of the Bay Area Real Estate Council. He is a director of the Capital Region Real Estate Council and member of the Tallahassee Bar Association. Mr. Arnold serves on the Professional Ethics Committee of The Florida Bar and on the Board of Directors of the Legal Aid Foundation of the Tallahassee Bar Association. He is a Master in the William H. Stafford Chapter of the American Inns of Court.Mr. Arnold's practice areas include real estate transactions and litigation; estate and trust litigation; wills, trusts and estates; and the mediation of real estate and estate disputes. Mr. Arnold has been certified by the Florida Supreme Court as a Board Certified Real Estate Lawyer and a Circuit Court Mediator. He has an AV rating from Martindale-Hubbell.

MARTIN S. **AWERBACH** is Board Certified as a real estate lawyer by The Florida Bar. He has an extensive background in real property law and is particularly knowledgeable and experienced in real estate title and title insurance law. Unlike most Board Certified real estate lawyers, Mr. Awerbach primarily practices as a litigator in real property and commercial cases. He is often retained as a consultant, and has testified in both the state and federal courts as an expert witness on real estate, real property titles, and title insurance matters. Mr. Awerbach received his baccalaureate degree from Rutgers College and his Juris Doctor from The Rutgers University School of Law - Camden. Prior to entering private practice, Mr. Awerbach was Vice President and Associate Regional Counsel for Safeco Title Insurance Company's southeast region, consisting of Florida and five other southern states. Before that, he was a Florida State Counsel for USLIFE Title Insurance Company. In 1986, he entered private practice and started the firm that expanded to become Awerbach | Cohn. Mr. Awerbach is a Vice Chair of the Real Estate Certification Review Course Committee, of The Florida Bar Real Property, Probate and Trust Law Section, and a member of the Florida Land Title Association Claims Prevention, Avoidance and Education Committee. He is also on the RPPTL Section's Executive Council, and a member of the Real Property Litigation Committee, the Real Property Problem Study Committee, and the Title Insurance and Title Insurance Liaison Committee. He is a past chair of The Florida Bar Real Estate Law Certification Committee, the Real Property Litigation Committee, and the Real Property Law Committee of the Clearwater Bar Association. He is a lecturer at the annual RPPTL Section's Real Estate Certification Review Course, a frequently requested lecturer at continuing education seminars for attorneys and title insurance professionals, and is co-author of several seminar publications.

DAVID R. BRITTAIN is a shareholder in the Tampa office of the firm Trenam Law and the Co-Chair of its Real Estate and Lending Transactions Practice Group. Since 1990, he has been board certified in Real Estate Law by The Florida Bar Board of Legal Designation and Certification, and concentrates his practice in representation of private sector real estate developers, investors, lenders and managers. Mr. Brittain received his B.A. with high honors, from Furman University (1978) and his M.B.A. and J.D., with honors, from the University of Florida (1982), where he was an editorial member of the University of Florida Law Review. Mr. Brittain is a member of the Hillsborough County and Florida Bars and a Fellow of the American College of Real Estate Lawyers. He currently serves as Chair of the Real Property Finance and Lending Committee of the Real Property, Probate and Trust Law Section of The Florida Bar and is a past Chair of the Legal Opinions Committee of the Section.

BURT BRUTON is a shareholder in the real estate department of the law firm of Greenberg, Traurig, P.A. at its office in Miami, Florida. He is an active member of several committees of the Real Property, Probate and Trust Law Section of The Florida Bar, including the Legislative Review Committee, the Real Estate Structures & Taxation Committee, the Real Property Finance & Lending Committee, and the Title Insurance Committee. Mr. Bruton is a fellow of the American College of Real Estate Lawyers and is the author of a chapter on documentary stamp taxes in The Florida Bar Practice Manual on Florida Real Property Complex Transactions.

CHRISTOPHER C. CATHCART is a solo practitioner in Altamonte Springs, Florida. He received a BS degree in Finance from California State University Long Beach in 1981, and a JD, with honors, from the Florida State University College of Law in 1984. Since graduating and passing The Florida Bar Exam in 1984, he has been in private practice with an emphasis on small business and real estate law. His clients include developers, contractors, shopping center owners, office building owners, and homeowners. He handles real estate transactions and closings, lease preparation and evictions, contract preparation and litigation, probate and probate litigation, code enforcement matters, construction lien and construction defect litigation, and simple wills and trusts. He received his Board Certification in Real Estate Law in 2016.

RICHARD E. DAVIS is a senior counsel in Holland & Knight's Tampa office and a member of the Florida Land Use Team. Mr. Davis represents both public and private clients – before administrative bodies and in court – on a wide range of land use matters, including issues pertaining to zoning, developments of regional impact and comprehensive plan amendments. Mr. Davis has nearly 40 years of experience in land use law practice in Florida, having worked in Hillsborough, Pasco, Manatee, Sarasota, Hardee and Hernando counties and many other municipalities throughout the state. He is board certified in city, county and local government law and serves as a mediator in land use matters as well. Mr. Davis is a member of multiple private organizations relating to land development and is a frequent speaker at seminars concerning the regulation of land development and implementation of comprehensive plans and judicial review of local land use decisions. He has previously served on a select committee appointed by the Board of County Commissioners of Hillsborough County to review and recommend changes to the county's capital improvements budget process. Mr. Davis is Florida board certified in city, county and local government law.

MANUEL FARACH, with three decades of both transactional and litigation experience, including as outside general counsel for a savings and loan association, Manny approaches his clients' legal challenges with a perspective that combines legal knowledge with a practical understanding of the financial services industry. Manny focuses on transactional matters (with an

emphasis on real estate), business litigation, debtor-creditor law, creditor representation in bankruptcy, and appellate law. He is board certified by The Florida Bar in both Real Estate Law and Business Litigation. Throughout his career, Manny has counseled businesses in numerous industries and of varying sizes, including lenders and government agencies such as the Federal Deposit Insurance Corporation (FDIC), the Resolution Trust Corporation (RTC), and the Federal Savings and Loan Insurance Corporation (FSLIC), as well as numerous borrowers in complex transactions. Manny has also provided counsel in corporate mergers and acquisitions; financial and debtor-creditor matters to creditors and lenders (including bankruptcy and complex foreclosure litigation); landlord/tenant disputes; Internet law; and construction and real estate development matters. For more than 20 years, Manny has served as an arbitrator for the American Arbitration Association, has significant FINRA (Financial Industry Regulatory Authority, formerly NASDR) arbitration experience, and is certified as a Florida Supreme Court approved mediator. He also previously served as a Foreclosure Commissioner for the United States Department of Housing and Urban Development (HUD). Manny served as a law clerk for the Honorable C. McFerrin Smith of the Ninth Judicial Circuit Court of Florida while in law school and to Judges James T. Downey and Bobbi Gunther of the Florida Fourth District Court of Appeal following law school. Manny has authored numerous legal publications, including *Florida Real Estate Law* (Thomson-West), the real estate component of West's Florida Practice Series, and publishes the (Florida) Real Property and Business Litigation Report, a highly read weekly compilation of Florida real estate and business cases. The Florida Supreme Court appointed Manny the Chair of its committee on business jury instructions, and he is a regular speaker on topics as diverse as real estate law, business litigation, technology law, and professionalism.

ALAN FIELDS is Senior Vice President and Director of Underwriting Services for WFG National Title Insurance. He is a corporate and real estate attorney with experience in complex transactions and turn-arounds. Alan received his B.A. (Economics) in 1983 from Davidson College and his J.D. from Florida State University College of Law in 1986. He is a past Executive Director of the Florida Land Title Association; has been an active member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar for over 20 years, and currently serves as its Title Insurance Committee. Alan is a Fellow of the American College of Real Estate Lawyers and has lectured and written extensively on Real Property and Title issues.

MICHAEL J. GELFAND, a Florida Bar Board Certified Real Estate Lawyer, Certified Circuit and County Civil Court Mediator, Homeowners' Association Mediator, Arbitrator, and Parliamentarian. Mr. Gelfand is the senior partner of Gelfand & Arpe, P.A. Located in West Palm Beach, his firm emphasizes a community association law practice, counseling associations and owners how to set legitimate goals and how to effectively achieve those goals. Mr. Gelfand is also a co-owner of ARC Mediation, Palm Beach County's largest mediation and arbitration firm. Michael Gelfand is a Past Chair of The Florida Bar's Real Property, Probate and Trust Law Section, the Bar's largest substantive law section with over 10,000 members. He has served as the Section's Real Property Division Director and chaired the Section's Legislative Review Committee and the Section's Condominium and Planned Development Committee. He also chaired the Palm Beach County Bar's Community Association Law Continuing Legal Education Committee. He served many terms as Special Master for the City of Boca Raton after chairing the City's Builders Board of Adjustment and Appeals. He received a gubernatorial appointment to the Fifteenth Circuit Judicial Nominating Commission. Michael Gelfand is a sought-after community association law commentator, including presentations for the American Bar Association, American Legal Institute, American College of Real Estate Lawyers, The Florida

Bar, the University of Miami and the Chautauqua Institute, among others. His writings have received acclaim, including AThe Plaza East Trilogy: Not a Nursery Rhyme, but Scary Warfare@, *The Florida Bar Journal*, a critical analysis of the collision between hurricanes and Florida's condominium property insurance legislation. The Florida Bar has published his works including "Alternate Dispute Resolution, Arbitration and Mediation" and "Condominium and Homeowner Association Liens" and many statutory updates. Mr. Gelfand has been recognized nationally, as a member of the College of Community Association Lawyers, and as a Fellow of the renowned American College of Real Estate Lawyers, including serving as Chair of ACREL's Common Interest Ownership Committee. Michael Gelfand believes in personal community involvement and encourages others to become involved in their communities. He is a recipient of the Palm Beach County *Pro Bono* Child Advocate of the Year Award. His public-school volunteer efforts include serving as the real estate/construction appointee on the Palm Beach County School District's Construction Oversight and Review Committee, and as a magistrate for the District's Law Magnet Program. He has also served as chair of the Youth Orchestra of Palm Beach County, Florida. For additional information, please visit: www.gelfandarpe.com and www.arcmediation.com

BRIAN W. HOFFMAN: Brian W. Hoffman is a partner with the law firm of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, and practices in the firm's Pensacola office. Mr. Hoffman is Board Certified by The Florida Bar in Real Estate. He received his Bachelor of Science degree in Business Administration majoring in Finance with high honors from the University of Florida in 2000 and received his Juris Doctor with honors from the University of Mississippi School of Law in 2002, where he was an associate editor of the Mississippi Law Journal. His practice focuses on commercial litigation, real estate litigation, real estate transactions, debt enforcement actions, and general business and corporate law. He was a Fellow with the Real Property, Probate and Trust Law Section of The Florida Bar for 2012-2014, and he currently serves as a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar. Mr. Hoffman serves as Co-Chair of the Title Insurance and Title Insurance Liaison Committee, Vice-Chair of the Real Estate Certification Review Course Committee, and Vice-Chair of the Title Issues and Standards Committee for the Real Property, Probate and Trust Law Section of The Florida Bar.
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MATTHEW C. HOFFMAN is a partner with the firm, of Carver, Darden, Koretzky, Tessier, Finn, Blossman & Areaux, LLC, and practices in the firm's Pensacola office. He received his Bachelor of Science degree in Accounting with highest honors in 2000 from the University of Florida and received his Juris Doctor from the University of Florida College of Law in 2003. In 2013, he received an LL.M. in Taxation from the University of Alabama School of Law. He is admitted to the Florida and Alabama Bars, practices primarily in the areas of residential and commercial real estate transactions, and has significant experience representing lenders in commercial and consumer real estate transactions. Mr. Hoffman is an active member of the Escambia-Santa Rosa Bar Association, serving as President in 2016, and is also a member of the Estate Planning Council of Northwest Florida.

FREDERICK W. JONES is a Florida Bar Board Certified Real Estate lawyer. He has been a member of The Florida Bar for over 40 years, and his legal career includes serving as Staff Counsel for the Florida Real Estate Commission, private practice and Judicial Magistrate positions. In private practice for more than 35 years, most recently as Partner in the Winter Park law firm of Graham, Builder, Jones, Pratt & Marks, LLP, (now Burr & Forman LLP), he has specialized in residential and commercial real estate transactions, mortgage law, agency, title

insurance and lender and broker representation, as well as estate planning and probate. He served as a Special Magistrate for the Orange County ad valorem tax Value Adjust Board and most recently was General Magistrate in Orange County, 9th Judicial Circuit Courts handling residential mortgage foreclosure cases. Mr. Jones received his B.A. from the University of Florida and his J.D. from the University of Florida College of Law. He holds an "AV" rating by Martindale Hubbell and has been recognized as a Florida Super Lawyer from 2007 – 2012. He is a member of The Florida Bar and United States Supreme Court Bar and has been an active member of the American Bar Association and Orange County Bar Association. Mr. Jones is on the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar, has served as Chairman of the Section's Residential Real Estate & Industry Liaison Committee and currently is an At Large Member representing the 9th Judicial Circuit. Mr. Jones was appointed by The Florida Bar as an Attorney member on the Florida Realtor-Attorney Joint Committee and has continuously served on the Joint Committee since 1997, where he is on the FAR/BAR Contract Sub-Committee. He is founding member and past chair of the Central Florida Real Estate Attorneys Council and currently serves as President of the Attorneys' Real Estate Councils of Florida. He is past Chairman of the Real Property Committee of the Orange County Bar Association and was honored with the Attorney Appreciation Award by Orlando Regional Realtors Association in 1996. Mr. Jones is a member of Florida Blue Key, Rotary Club of Winter Park, Winter Park Chamber of Commerce and serves on the boards of various community and charitable organizations.

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MARY ROBINSON was born in St. Paul, Minnesota, and is a graduate of the University of Minnesota at Duluth (B.A., magna cum laude, 1980), and Duke University (J.D., 1983). Mary was admitted to The Florida Bar in 1983. Mary is Board Certified in Real Estate by The Florida Bar Board of Legal Specialization and Education and is currently serving as the Chairman of the Real Estate Certification Committee of The Florida Bar. Mary served as a member of The Florida Bar's steering committee for the fifth edition of *Florida Real Property Complex Transactions*. Mary's younger daughter, Clara, is a graduate student in coastal biology at The Virginia Institute of Marine Science. Her older daughter, Rachel, teaches Latin at Windermere Preparatory School in Windermere, Florida.

MARSHA RYDBERG concentrates her practice in real estate, commercial litigation, land use, and bankruptcy. She is a graduate of Emory University and Stetson College of Law, where she finished first in her class. Marsha is a past member of The Florida Bar Board of Governors, having served twice on its Executive Committee, as well as on numerous other Bar and Board Committees, including Legislation and Budget. She is a past chair of the Bar's Council of Sections and currently is a member of the Executive Councils of the Real Property, Probate and Trust Law and the Business Law Section. Marsha is a past President of the Hillsborough County Bar Association and in 2014 was named that Association's Outstanding Lawyer of the Year. In 2015, Marsha received the Hillsborough Association of Women Lawyers' "Trailblazer" Award and the Hillsborough County Trial Lawyers' Michael J. Fogarty "In the Trenches" Award. She has been a member and chair of the Stetson Law School Board of Overseers and has served as an adjunct professor, teaching Banking Law and Real Property Finance. In 2014, she was named to

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MELISSA SCALETTA, Vice President, Chief Underwriting Counsel. I began working at The Fund in a March of 1998. I wanted to work at a The Fund because I had a desire to increase my knowledge and experience with transactional real estate and title issue while working among the experts in the industry. I am driven to work for The Fund by its Members and the importance of the role Florida real estate lawyers play in real estate transactions. Some of my favorite Member experiences all involve digging into challenging real estate transactions and title problems. Fund Members sometimes encounter pressure to close transactions despite unique title issues. I enjoy working towards creative solutions to resolve these title concerns. Consumers are uniquely protected with involvement of attorney title agents in real estate transactions. The ongoing presence of attorneys in real estate transactions is the essence of The Fund's mission. Working among experienced and talented real estate lawyers, both Fund Members and Fund employees, to continue achieving industry expertise and consumer protection is inspirational and motivating

ROBERT M. SCHWARTZ, B.C.S. has been actively engaged in the practice of law in Florida for more than 45 years, has been certified by The Florida Bars Board of Legal Specialization & Education as a Florida Bar Board Certified Real Estate Lawyer since 1987 when the program began and is a widely recognized expert in the field of Real Property Law. A member of the Executive Council of the Real Property, Probate and Trust Law Section (www.RPPTL.org) of The Florida Bar (www.FlaBar.org) for more than 20 years, he is a past Chair (and current member) of the Condominium & Planned Development Committee of the Section and is currently the Lead At Large Member of the Council for the 15th Judicial Circuit. He also is a member of the Commercial Real Estate, Problem Study, and Landlord Tenant Committees of the Section. He has been a lecturer on real property subjects for more than 30 years and has been a faculty member and speaker for the annual Florida Bar Advanced Real Estate Law and Certification Review Course every year since 1993 and has presented the section of the Course concerning Tenancies and Conveyances every year since 1996. He has also been a speaker at The Florida Bar's annual Condominium Law Seminar, Attorneys Title Insurance Fund's Annual Assembly, and The Institute on Condominium Cluster Development sponsored by the University of Miami Law Center. He has served as an expert witness concerning Real Property matters in lawsuits throughout South Florida and has repeatedly qualified as an expert witness in trials conducted in several Florida counties. Mr. Schwartz's practice today primarily involves real estate transactions. His practice has included the representation of developers, real estate entrepreneurs, lenders, condominium associations, homeowner associations, title insurance companies, other lawyers, and individual buyers or sellers of residential and commercial properties. He has been involved in significant real estate projects such as the acquisition and development of residential communities, office complexes, and shopping centers, involving construction, sales, financing, property management, and leasing. He has also served as local counsel for out-of-state law firms, institutional lenders, and development companies. He has been a member of Attorneys Title Insurance Fund since 1973 and is currently an attorney agent for Old Republic National Title Insurance Company. He has been an approved closing agent for institutional lenders doing business throughout Florida. A past President of the South Palm Beach County Bar Association and a past member of the Board of Directors of the Palm Beach County Bar Association, he has also served as the chairman of the Palm Beach County Realtor/Attorney Joint Committee. He has been an approved instructor by the Florida Real Estate Commission. Mr. Schwartz received his Juris Doctor degree from the University Of Florida College Of Law in 1971. He holds the Martindale Hubbel Directory's highest possible rating AV.

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WILLIAM SKLAR, a member of the real estate and finance practice group, represents developers and lenders. He assists them with planning, drafting, and the development of residential, commercial, and complex mixed-use condominiums and planned developments. Mr. Sklar also serves as regulatory counsel in compliance matters under numerous federal, state, and local statutes; regulations; and ordinances, including the Interstate Land Sales Full Disclosure Act (ILSA), Fair Housing Act, and Florida Condominium and Homeowners Association Acts. Additionally, he represents clients in real estate transactions and financing. Mr. Sklar is an adjunct professor of law at the University of Miami School of Law and a member of the faculty of the LLM graduate law program in real property, teaching courses in condominium and planned development law and a related drafting and litigation workshop since 1980. He is Director of the University of Miami's Boyer Institute on Condominium and Cluster Developments. Mr. Sklar is board certified by The Florida Bar in Real Estate Law and by the Supreme Court of Florida as a Circuit and County Court Mediator.

KARLA J. STAKER is a Senior Vice President and State Underwriting Counsel with Fidelity National Title Group in Maitland, Florida. She received a J.D. and a bachelor's degree in sociology from the University of Florida. Karla later received bachelor degrees in accounting and business administration from Florida Southern College. Except for a brief stint in private practice, Karla has been an underwriter with Fidelity National's group of underwriters since 1986. She is a member of The Florida Bar and is board certified in Real Estate Law. She is also a member of the Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar. She serves as a co-vice chair of the Section's Title Issues and Standards Committee. Additionally, Karla was president of the Florida Land Title Association (FLTA) in 2017 and serves on the FLTA's board of directors. She is past chair of the FLTA's Insurer Section and its Forms Committee.

ROBERT STERN joined the firm in 1990 and is the co-leader of the Real Estate & Lending Transactions Group. Robert represents clients in all aspects of real estate, distressed property, and financing commercial work. His practice focuses on commercial real estate, with an emphasis on transactional and financing matters. His clients include developers, lenders, investors, and retailers. Robert has served as an expert witness, receiver, mediator and adjunct professor of law. He strives to add value to every deal as a trusted advisor for his clients, based on negotiation skills and practical experience honed over twenty years of buying, developing, financing, permitting, leasing and selling commercial real estate.

RICHARD W. TAYLOR is the senior member of the firm Taylor and Nordman, P.A. in DeLand, Florida. He received his BA degree from Florida State University in 1970 and his JD degree, with honors, from Florida State University in 1973. He has been in private practice in his hometown DeLand since 1977, practices primarily in the fields of real property, probate, and trusts. He regularly handles real property, probate and trust litigation and resolution of such

matters. He serves on the Real Property Problems Study Committee of the Real Property, Probate and Trust Law section and co-chairs the Uniform Law and Model Acts Committee. He has fern and citrus interests and is Chairman of the Board of Surety Bank in DeLand. He has been a Florida Board Certified Real Estate Lawyer since 1987.

LEE WEINTRAUB, at age 46, was the youngest recipient ever of the Lifetime Achievement Award from The Florida Bar's Construction Law Committee. Mr. Weintraub is also an adjunct professor of law at Nova Southeastern University Shepard Broad College of Law teaching construction law. In 2009 and 2013, Florida Trend magazine named him one of Florida's Legal Elite, an honor bestowed on only the top 2% of Florida lawyers. He was selected by Florida Super Lawyers every year from 2007 through 2017, which names Florida's top 5% of lawyers as chosen by their peers. Mr. Weintraub has been recognized by Chambers USA – America's Leading Business Lawyers every year since 2003. Chambers USA noted he focuses on licensing and construction defect litigation, but is particularly renowned for his expertise in the Construction Lien Law. He was also selected in the Best Lawyers in America© every year from 2006 through 2018. Mr. Weintraub is Board Certified in Construction Law by The Florida Bar and serves as Vice Chair of the Firm's Construction Law Practice Group. Since passing the construction law board certification exam, he has served as a board certification exam course instructor every year the course has been offered. He is a certified arbitrator for the American Arbitration Association and, as a lawyer, represents owners, developers, contractors, subcontractors, design professionals, bond sureties and other commercial entities in litigation, arbitration and transactions. He is a frequent lecturer statewide, nationally and internationally on construction related topics. The Firm's Public Private Partnership (P3) practice team is led by Mr. Weintraub along with Vice-Chair Jennifer Drake. This multi-disciplinary team of professionals is experienced in development, construction, government, real estate, corporate, finance, procurement, and land use. Mr. Weintraub helped draft, negotiate and advocate for the P3 legislation that became law in Florida in 2013 and all its subsequent amendments. He is a frequent lecturer and author on the nuances of how to structure P3 projects. He is also a founding member and former Chair of the Florida Council for Public/Private Partnerships, a non-profit consortium of public and private sector organizations working together to further P3 opportunities.

MARKETABLE RECORD TITLE ACT & CURATIVE STATUTES

By

Melissa Scaletta, Orlando

Marketable Record Title Act & Curative Statutes

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I. MARKETABLE RECORD TITLE ACT ("MRTA")

A. History and background

1. First proposed by the Real Property, Probate, and Trust Law Section to the Legislature by the MRTA committee of the Florida Bar in 1961.

2. RPPTL sponsored legislation was passed by the Florida Legislature in 1963 and became effective July 1, 1965.

3. Before MRTA was law in Florida, real estate practice relied almost exclusively on examination of abstracts.

4. As early as the 1920's several jurisdictions including Iowa, Michigan, Illinois, Indiana, Minnesota, Nebraska, North Dakota, Oklahoma, Ohio, South Dakota and Wisconsin and Ontario each had laws which basically said that if a title defect was old enough, and nothing had come of it, in spite of old enough intervening transactions, it could be ignored.

B. Goals of the Act

1. Extinguish stale claims and ancient defects against title.

2. Enhance marketability of title since ancient defects rarely give rise to claims. MRTA does not define marketability.

3. MRTA is not a statute of limitations, although it has elements of a statute of limitations. It is a recording act and a significant curative act because it can remove defects and even entire interests.

4. Simplify title examination by removing defects and interests. The Act should be relied upon to eliminate imperfections in title that fall within its scope. Uniform Title Standard 17.1.

C. How does MRTA work?

1. Grossly oversimplified: If the defect or even an entire interest in the land is old enough and subsequent transactions are themselves at least 30 years old and didn't repeat the problem or claim, and no-one has asserted an interest in the public record about it since, you can ignore the defect

because MRTA declares them to be "null and void." Uniform Title Standard 17.2;

2. But that's only after making certain that you fit the technical statutory requirements for the application of MRTA; and

3. Making certain that none of its technical statutory exceptions preserve the defect; and

4. Make sure that a small number of judicially imposed exceptions don't block you.

MRTA should not shorten the period of a title search. MRTA may reduce the number of issues that have to be cured or accepted as a defect or matter impacting title with an exception in a title policy.

D. Do you meet the standards for MRTA? The first step in using MRTA is to locate the **"root of title."** §712.01(2), F.S. To be a **root of title**, an instrument must be:

1. A **title transaction.** This is usually going to be a traditional deed, but the definition of §712.01(3), F.S. allows "any recorded instrument ... which affects title to any estate or interest in land" to qualify as a title transaction.

   a. A court proceeding affecting title may also qualify as a Title Transaction. §712.01(3), F.S. See also *Kittrell v. Clark*, 363 So.2d 373 (Fla. 1st DCA 1978), *cert. den.* 383 So. 2d 909 (Fla. 1980) (probate); *Mayo v. Owens*, 367 So.2d 1054 (Fla. 1st DCA 1979) (judgment determining heirs). Fund TN 10.01.02. But judicial enforcement of deed restrictions is not a Title Transaction for MRTA purposes, so as to protect the deed restrictions from extinguishment under MRTA. *Cunningham v. Haley*, 501 So.2d. 649 (Fla. 5th DCA 1986).

   b. A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.,* 364 So.2d 439 (Fla. 1978), *app. diss.* 99 S.Ct. 2153, 441 U.S. 939. A forgery predating the effective root of title is extinguished by operation of MRTA unless other specific exceptions to MRTA apply. *Marshall v. Hollywood, Inc.* 236 So.2d 114 (Fla. 1970), *cert. den.* 91 S.Ct. 366, 400 U.S. 964; *Wilson v. Kelley*, 226 So.2d 123 (Fla. 2d DCA 1969). In *Lehmann v. Cocoanut Bayou Ass'n*, 157 So.3d 289, (Fla. 2nd DCA 2014), a 1952 wild deed qualified as a root of title for certain beachfront property, but subsequently recorded competing deeds triggered statutory exceptions to MRTA resulting in the Association's inability to quiet title in reliance upon MRTA.

c. Even a conveyance by widow to herself could be the Root of Title and extinguish the vested homestead rights of her children. *ITT Rayonier, Inc. v. Wadsworth*, 556 F.2d 750 (1977).

d. As phrased in the statute, it appears that an instrument dealing with only a portion of the bundle of sticks inherent in fee ownership (mineral rights, an easement, a license) could serve as the Root of Title at least as to that interest.

2. **It must describe the land sufficiently.** Generally a full legal description, either by metes and bounds and properly tied into a section corner, or a recorded plat. Regardless it must describe the land sufficiently to identify its location and boundaries. §712.01(3), F.S.; Fund TN 10.01.02.

3. **The root of title must have been of record for at least 30 years.** Therefore the defect you intend to cure must be older still.

4. **The root of title must describe the interest to be conveyed.** The courts have limited this to provide that an ordinary quit claim deed cannot be the Title Transaction which serves as the Root of Title. *Wilson v. Kelley*, 226 So. 2d 123 (Fla. 2d DCA 1969); Fund TN 10.01.02.

a. This seemingly incongruous conclusion is based on the statutory definition of root of title as "any title transaction purporting to create or transfer the estate claimed by any person ...." §712.01(2), F.S. (emphasis added).

b. In *Wilson v. Kelley*, the court carefully distinguished between an "ordinary" quit claim deed, which does not specify what interest is being conveyed – it simply conveys whatever interest might be there – from the more rare quit claim which exactly describes the interest to be conveyed, which can serve as the Root of Title. This is the fine distinction between a quit claim deed stating "all of my right title and interest in Blackacre" which is not an adequate description to qualify as a root of title and a quit claim deed stating "my undivided one-half interest in Blackacre" which is an adequate description to qualify as a root of title.

E. What interests may not be eliminated by MRTA?

The Statute itself it very broad: It provides "... marketable record title shall be free and clear of all estates, interests, claims, or charges whatsoever, the existence of which depends upon any act, title transaction, event or omission that occurred prior to the effective date of the root of title. All such estates, interests, claims, or charges, however denominated, whether such estates, interests, claims, or charges are or appear to be held or asserted by a person sui juris or under a disability,

whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void ...." § 712.04, F.S. The courts have added a few more exceptions, but generally, MRTA will – subject to its exceptions – eliminate all nature of claims and interest, by all nature of people, including what would otherwise be a superior title.

1. **Matters disclosed by or inherent in the root of title.** §712.03(1), F.S.

A general reference to matters before the root of title or a vague "subject to restrictions and reservations of record" is not sufficient to preserve an interest which would otherwise be eliminated. Referenced matters are only preserved after the root of title if they are expressly described or specifically identified by reference to a book and page of the record or by name or recorded plat. The courts have interpreted this to be matters on the face of the deed, or defects in makeup or constitution of the deed, or in its drafting, not defects of authority of the grantor or the interest in the property which grantor could legitimately convey. *ITT Rayonier, Inc. v. Wadsworth*, 556 F.2d 750 (1977); *Marshall v. Hollywood, Inc.* 236 So.2d 114 (Fla. 1970), *cert. den.* 91 S.Ct. 366, 400 U.S. 964.

In *Sunshine Vistas Homeowners Ass'n v. Caruana,* 623 So.2d 490 (1993) setback restrictions shown on the face of the plat were preserved based on reference to that plat in the legal description and general reference to "covenants and restrictions of record".

In *Barney v. Silver Lakes Acres Property*, 159 So.3d 181(Fla. 5th DCA 2015) a 1982 amendment to restrictive covenants obligating each property owner to pay annual assessments for maintenance was preserved rather than eliminated by MRTA based upon recitations in vesting deeds stating those deeds were subject to obligations of the lot owners at Silver Lakes Acres to the Silver Lakes Property Owners Association. This language did not constitute a general reference. The plain language set forth in the deeds with respect to restrictive covenants was not hidden.

Inherent defects would include:

a. Capacity of the Grantee.

b. Deeds executed in a representative capacity.

c. Quitclaim Deeds. *Wilson v. Kelley*, 226 So. 2d 123 (Fla. 2d DCA 1969).

d. Court Proceedings.

e. Marital Status. MRTA could not cure inherent defect in deed where Husband conveyed homestead property without spousal joinder. *Sigmund v. Elder*, 631 So.2d 329 (Fla. 1st DCA 1994).

f. Homestead. *Reid v. Bradshaw*, 302 So.2d 180 (Fla. 1st DCA 1974); *Sigmund v. Elder*, 631 So.2d 329 (Fla. 1st DCA 1994).

g. A void masters deed was not cured where it was the Root of Title. *Damiano v. Weinstein*, 355 So.2d 819 (Fla. 3d DCA 1978). More troubling is that this case the root of title was a tax foreclosure deed by a special master, which was found to be defective because the owner of record had not been named or served in the underlying foreclosure. It is not made clear in the case whether this "defect" appeared on the face of the masters deed, but suggests the examiner has a duty to inquire into the underlying transactions leading up to the root of title.

h. Faulty legal description. *Muldrow v. Jones*, 36 So. 3d 698 (Fla. 1st DCA 2010). A root of title contained a defect in legal description in that it described the subject land in two ways and one description included additional land. Consequently, only the less inclusive legal description was considered valid.

2. **Matters preserved by the filing of a proper notice under MRTA.** § 712.03(2), F.S.; Uniform Title Standard 17.4.

Sections 712.05 and 712.06 F.S. outline the mechanism for preserving claims from extinguishment, and what must be included in the notice. This procedure allows any person claiming an interest in land or a homeowners association to preserve their claims from extinguishment by filing a written notice in the public records before the expiration of the applicable thirty year period.

In 2010, as an alternative to serving the clerk of the court who then mails notice by certified or registered mail to the purported owner of the property, sec. 712.06 F.S. was amended to include subsection (3)(b) authorizing publication of the notice for 2 consecutive weeks together with the official records book and page of recordation of the notice in a newspaper as defined in Ch. 50, F.S., in the county in which the property is located.

In 2014, sec. 712.05(1) F.S. was amended to clarify the existing law that a homeowners' association or the clerk of the circuit court is not required to provide additional notice when preserving an interest pursuant to sec. 712.06 (3) F.S.

In *Southfields of Palm Beach Polo and Country Club Homeowners Ass'n, Inc. v. McCollough*, 111 So. 3d 283 (Fla. 4th DCA 2013), the trial court's injunction requiring the homeowners' association board of directors to take the action required by sec. 712.05, F.S. to preserve the declaration's restrictions was affirmed. The declaration contained covenants, conditions and restrictions to preserve the equestrian nature of the subdivision and stated a purpose of promoting regulation, maintenance and preservation of the development. McCollough, a homeowner, sought to require the association's board to preserve these covenants, conditions and restrictions in accordance with MRTA. The trial court stated that if parcels were allowed to drop put piecemeal from restrictions of the governing documents, "the Association would begin to resemble a piece of Swiss cheese" with some parcels bound and some parcels not bound to the declaration's restrictions.

If covenants, conditions and restrictions have lapsed, consider the applicability of covenant revitalization through the Department of Economic Opportunity pursuant to §§720.403 - 720.407, F.S. *See Nikorowicz v. Antiquers Aerodrome, Inc.*, 2017 WL 838507, Case Nos. 15-7236 and 15-7237, Division of Administrative Hearings, State of Florida (Feb. 24, 2017) evaluating and disapproving Antiquers Aerodrome's, a homeowners' association, application for preservation of expired restriction covenants.

3. **Persons in possession**, so long as they remain in possession. §712.03(3), F.S. Uniform Title Standard 17.5. Any rights of persons in possession are note eliminated by MRTA. Exception must be made in any title policy for rights ofany party in possession other than the record owner. Fund TN 10.01.02.

4. **Matters recorded subsequent to the root of title.** §712.03(4), F.S.; Uniform Title Standard 17.6. To be preserved under MRTA, the matter must appear in the root or a post root **muniment of title**. A **muniment of title** is documentary evidence upon which title is based, as opposed to a **title transaction**, which is any recorded instrument affecting title. *Cunningham v. Haley*, 501 So. 2d 649 (Fla. 5th DCA 1986).

5. **Recorded or unrecorded easements**, or rights, licenses or servitudes in the nature of easements, rights of way and terminal facilities, so long as any part is used. No notice need be filed to preserve such easements and rights. §712.03(5), F.S. *Water Control Dist. Of South Brevard v. Davidson,* 638 So.2d 521 (Fla. 5th DCA 1994), *rev. den.* 648 So.2d. 722; *White Sands, Inc. v. Sea Club V. Condominium Ass'n, Inc.* , 581 So.2d 589 (Fla. 2nd DCA 1990), *rev. den.* 581 So.2d 166. In *Guttman v. Vanneck*, 15 So. 3d 813 (Fla. 4th DCA 2009), the appellate court held that a setback is a negative easement and was not eliminated by MRTA.

In *Clipper Bay Investments, LLC v. FDOT*, 117 So. 3d 7 (Fla. 1st DCA 2013) the court discussed and reconciled two cases dealing with MRTA as applied to rights of way held in fee rather than as an easement: *FDOT v. Dardashti*, 605 So. 2d 120 (Fla. 4th DCA 1992) and *Water Control District of South Brevard v. Davidson*, 638 So. 2d 521 (Fla. 5th DCA 1994). In *Dardashti*, the court held that the sec. 712.03(5), F.S. easement/right of way in use exception to MRTA does not apply to right of way land held in fee. In *Davidson*, the court applied this same exception to MRTA to land held in fee by a governmental entity.

In *Clipper Bay* the First DCA reasoned that Florida Transportation Code sec. 334.03(22), F.S. provides a right of way can include department, municipal or county land owned in fee, consequently sec. 712.03(5), F.S. can apply to a right of way owned in fee. Ultimately the First DCA held that the Department of Transportation failed to prove that the relevant fee owned land north of interstate 10 was used as a right of way; therefore the Department's interest was eliminated by MRTA.

The Second DCA adopted the position set forth in *Dardashti*, rejecting the application of sec. 712.03(5) to rights of way held in fee and certified the conflict on the issue with *Dardashti* and *Davidson*. *DOT Mid-Peninsula Realty Inv. Group*, LLC, 162 So.3d 218 (Fla. 2nd DCA 2015). Subsequently, the Florida Supreme Court resolved that the sec. 712.03(5) exception is applicable to rights of way held in fee awarding the disputed fee property claimed by Clipper Bay to the FDOT. *FDOT v. Clipper Bay Investments, LLC*, 160 So.3d 858 (2015).

6. **Rights of any person assessed on the county tax rolls**, for so long as assessed and three years after it is last assessed in that person's name. §712.03(6), F.S.; Uniform Title Standard 17.7. This is another area which must be independently researched.

7. **Sovereignty lands**. In 1978, the Legislature added the §712.03(7), F.S. exception for sovereignty lands. The Fifth DCA ruled that any retroactive application of this MRTA exception would be an unconstitutional taking of private property rights previously vested under MRTA. *Trustees of the Internal Improvement Trust Fund v. Paradise Fruit Co. Inc.* 414 So.2d 10 (Fla. 5th DCA 1982), *rev. den.* 432 So.2d 37 (Fla. 1982). In 1986, the Florida Supreme Court ruled that owing to Florida Constitutional and public policy standards (i) there was an implied reservation of sovereignty lands in all State deeds – even those deeds which were absolute on their face; and (ii) MRTA did not serve to quiet sovereignty lands into private ownership because sovereignty lands were never private property. *Coastal Petroleum Co. v. American Cyanimid Co.,* 492 So.2d 339 (Fla. 1986) *cert. den.* 107 S.Ct. 950, 479 U.S. 1065.

8. **State and federal reservations**. Uniform Title Standard 17.8. Any interest reserved by the United States, Florida or any of its officers, boards, commission or other agencies, if reserved in the patent or deed by which they parted with title. §712.04, F.S. This is generally viewed as applying to the initial conveyance into private hands from the sovereign. Such is not necessarily the case. While the matter is subject to debate, this exception would be called into play in any deed, at any time, from the United States, Florida or any of its officers, boards, commission or other agencies parted with title. Consider, for example: Murphy Act deeds (all of which contained mineral and road exceptions), and any situation in which a governmental entity is disposing of surplus lands.

   The 2010 amendment to sec. 712.03, F.S. adding subsection (9) provides "Any right, title or interest held by the Board of Trustees of the Internal Improvement Trust Fund, and water management district created under chapter 373, or the United States" shall not be extinguished by MRTA.

   For the period prior to the 2010 amendment, there is some question as to whether MRTA (or any state legislation) can extinguish property interests of the United States without being in violation of the Constitutional power of Congress to legislate the disposition of federal property. *Chicago Title Ins. Co. v. Florida Inland Nav. Dist.,* 635 So.2d 104 (Fla. 4th DCA 1994), *app. diss., rev. den.* 635 So.2d 451. Prior to the 2010 amendment, the distinction was one of a "reserved interest" as opposed to a "granted interest." An interest reserved by the United States or Florida in any deed conveying property is not affected by MRTA; but an interest acquired and "not conveyed" might have been extinguished by MRTA prior to the 2010 amendment. Subsequent to the 2010 amendment, no federal or state interest could be extinguished by MRTA.

9. **Duty to search.** Any matters which place a duty on the examiner to look outside the record or behind the Root of Title will still be required.

10. **Environmental restrictions or covenants** recorded pursuant to Chapter 376 (dealing with Brownfields, Leaking Petroleum Tanks and other environmental cleanup programs) or Chapter 403, F.S. This provision was added in the 2000 Legislature as §712.03(8), F.S.

11. **Mineral rights.** Whether MRTA will extinguish mineral rights is still uncertain, as the courts have held that mineral rights form a separate estate from the surface rights. These subsurface interests form a separate chain of title so they cannot be extinguished by MRTA. *P & N Investment Corp. v. Florida Ranchettes, Inc.,* 220 So.2d 451 (Fla. 1st DCA 1969). The holding in *Kittrell v. Clark*, 363 So.2d 373 (Fla. 1st DCA 1978), *cert.*

den., 383 So.2d 909 (Fla. 1980), implies that mineral rights would be extinguished. Fund TN 10.01.02.

Section 704.05, F.S. in addition to providing its own limitation periods for a right of entry, expressly provides that the interests which are subject to extinguishment by MRTA include rights of entry or of an easement, given or reserved for mining, drilling, exploring, or developing for oil, gas, minerals, or fissionable materials. Note that a right of entry is an interest in the nature of an easement, and therefore presumably subject to indefinite continuation so long as any part of it is used. Fund TN 27.01.02.

12. **Governmental regulations.**
A restrictive covenant that was required as part of a government imposed condition of land use approval was not extinguishable by MRTA. The court has held that such a restriction constituted a governmental regulation with the force of law and was not an estate, interest, claim or charge to title to real property subject to MRTA. Appeal filed with the Florida Supreme Court. *Save Calusa Trust v. St. Andrews Holdings*, 193 So.3d 910 (Fla. 3rd DCA 2016), *rehearing denied* (Jun. 6, 2016), *appeal docketed*, SC16-1189 (Fla. Jul. 6, 2016), *rehearing denied*, 2016 WL 7474142 (Fla. Dec. 29, 2016).

F. What interests may be eliminated by MRTA?

1. **Fee ownership, breaks in the chain of title prior to the root of title.** *Whaley v. Wotrin*g, 225 So.2d 177 (Fla. 1st DCA 1969). This is the case even when the Root of Title is based on a forgery or a wild deed. *City of Miami v. St. Joe Paper Co.,* 364 So.2d 439 (Fla. 1978), *app. diss.* 99 S.Ct. 2153, 441 U.S. 939; *Marshall v. Hollywood, Inc.* 236 So.2d 114 (Fla. 1970), *cert. den.* 91 S.Ct. 366, 400 U.S. 964; *Wilson v. Kelley*, 226 So.2d 123 (Fla. 2d DCA 1969). Fund TN 10.01.02.

2. **Sec. 16 lands.** On March 3, 1845 "An Act Supplementary to An Act for the Admission of Florida and Iowa to the Union and for Other Purposes" grants the every 16th section throughout the state of Florida for the support of public schools. MRTA will permit the extinguishment of this interest. *Askew v. Sonso*n, 409 So.2d 7 (Fla. 1981).

3. **Interest held by a governmental entity.** "Person" is defined to include the state and any political subdivision or agency thereof. F.S. §712.01(1). *City of Miami v. St. Joe Paper Co*., 347 So.2d 622 (Fla. 3d DCA 1977), *aff'*d, 364 So. 2d 439 (Fla. 1978). As to its applicability against State Interests, *see State Dept. of Natural Resources v. Contemporary Land Sales, Inc.* 400 So.2d 488 (Fla. 5th DCA, 1981); *Trustees of Internal Imp. Trust Fund v. Laney,* 399 So.2d 408 (Fla. 3rd DCA 1981); *Odom v.*

Deltona Corp., 341 So.2d 977 (Fla. 1976); *FDOT v. Dardashti*, 605 So. 2d 120 (Fla. 4th DCA 1992).

The application of MRTA to extinguish governmental interests is limited to interests that were not reserved and to those governmental interests that were eliminated prior to or outside of the application of the 2010 addition of sec. 713.03(10), F.S.

4. **A cotenant**, *Hope v. Hope,* 410 So.2d 212 (Fla. 5th DCA 1982); *Allen v. St. Petersburg Bank & Trust Co*., 383 So.2d 1171 (Fla. 2d DCA 1980); *Travick v. Parke*r, 436 So.2d 957 (Fla. 5th DCA 1983).

5. **Remainderman.** *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940 (M.D. Fla. 1975).

6. **Restrictions and reverters.** If no reference in muniments, beginning with the root of title, to book and page of record where title transaction is recorded which contained the restrictions. Fund TNs 10.01.02, 28.03.01 and 28.03.10; *Cunningham v. Hale*y, 501 So.2d 649 (Fla. 5th DCA 1986); *Matissek v. Waller*, 51 So. 3d 625 (Fla. 2nd DCA 2011). Examples of muniments of title include deeds, wills and orders by which title to land passes and depends. A title transaction is any recorded instrument or court proceeding which affects title. A title transaction may not be a muniment of title. In *Matissek* the appellate court held that a post root of title amendment to restrictions was not a muniment of title and since the amended restrictions could not stand alone, both the pre root restrictions and the post root amendment were extinguished by MRTA.

   Also consider possible covenant revitalization pursuant to secs. 720.402 – 720.407, F.S. and limitations on reverters pursuant to sec. 689.18, F.S. Sec. 689.18 limits reverters to 21 years from a deed, but the application of this limitation period excludes governmental, literary, scientific, religious and certain public interest charitable corporations. Sec. 712.07, F.S., provides that MRTA shall not vitiate any other curative statute. Therefore a shorter period of 21 years may eliminate a right of reverter, if applicable, before MRTA.

7. **Easements.** Can be eliminated if no portion of the easement as originally created is in use. *City of Jacksonville v. Horn*, 496 So.2d 204 (Fla. 1st DCA 1986).

8. **Easements of necessity.** Be aware of the distinction between common law ways of necessity and statutory ways of necessity.

Common law ways of necessity
H & F Land, Inc. v. Panama City-Bay County Airport and Industrial District, 706 So.2d 327 (Fla. 1st DCA 1998); *app'*d, 736 So.2d 1167 (Fla. 1999). In this case, there was never any use of the common law way of necessity; therefore it was capable of being extinguished. Had any portion of the easement been in use, it might have been preserved by the express exceptions in MRTA. The case did include a general statement that ways of necessity may be eliminated by MRTA.

Statutory ways of necessity
In *Blanton v. City of Pinellas Park*, 887 So. 2d 1224 (Fla. 2004), the Florida Supreme Court receded from its broad statement in *H & F Land* that statutory or common law ways of necessity are subject to the provisions of MRTA to the extent those statements can be construed as holding MRTA can act to extinguish a valid claim of statutory way of necessity authorized under sec. 704.01(2), F.S. The court stated that public policy weighs in favor of holding MRTA inapplicable to statutory ways of necessity. The court explained that as land grows more scarce, there is a clear public purpose in providing means of access to such lands. The court further stated that statutory ways of necessity, as in *Blanton*, do not depend upon review of the public record and common ownership as common law ways of necessity do.

Section 704.08, F.S., provides relatives and descendants of those persons buried in cemeteries with an easement for purposes of visitation within reasonable time and manner. In *Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins. Co.*, 128 So.3d 107 (Fla. 3d DCA 2013) , the court considered a claim on a title insurance policy that made no exception for easement rights pursuant to sec.704.08, F.S. An insured developer made a title insurance claim concerning a cemetery that had been created in an instrument recorded over 100 years earlier, prior to the root of title. The court held that no title claim existed because no party asserted a legal right to access the cemetery and stated sec. 704.08, F.S. does not create an interest in real property. The dissent compared the easement rights for visitation to a cemetery to the statutory way of necessity analyzed in the *Blanton* case, urging that like sec. 704.01(2), F.S., a cemetery easement should not be eliminated by MRTA.

9. **Rights of entry to explore for mineral rights.** Sec. 704.05, F.S., provides that the Marketable Record Title Act will extinguish rights of entry of an easement given or reserved for the purpose of mining, drilling, exploring or developing for minerals. Fund TN 27.01.01. In *Noblin v. Harbor Hills Development L.P.*, 896 So. 2d 781 (5th DCA 2005), the court reversed an order of summary judgment in favor of the developer quieting title against mineral interest owners' right to ingress and egress to extract oil and minerals and remanded for further proceedings to determine if the easement in use exception to MRTA or easement disclosed in muniments of title exceptions were applicable. The court stated that an easement to access mineral interests that is not in use may be eliminated by MRTA.

10. **Oil, gas and mineral leases**. Leases, as opposed to reservations or mineral estates, can be eliminated by MRTA. It should be determined that no one claiming under the lease is in possession or has been assessed on the tax rolls for the current and three prior years.

11. **Homestead rights which predate the root of title would seemingly be eliminated,** *Harrell v. Wester,* 853 F.2d 828, *modified* 861 F.2d 1546 (11th Cir. 1988) (surviving spouse purchased tax certificates which formed Root of Title for MRTA to extinguish vested homestead remainder interests of children); *ITT Rayonier, Inc. v. Wadsworth*, 386 F. Supp. 940 (M.D. Fla. 1975) (widow's deed to self formed Root of Title for MRTA to extinguish vested homestead interests of children); but see *Conservatory–City of Refuge v. Kinney,* 514 So.2d 377 (Fla. 2d DCA 1987). Uniform Title Standard 17.10.

12. **Rights of bankrupt's creditors.** Fund TN 10.01.02.

G. How to examine title after MRTA.

1. The most common misconception concerning MRTA is that an examiner only needs to examiner the last 30 years of the record. This is fundamentally wrong. There are simply too many pre-root exceptions to MRTA.

   a. This shortened 30 year examination was the expectation at the time MRTA was passed. Boyer & Shapo, "Florida's Marketable Title Act: Prospects and Problems" 18 U.Miami L.Rev. 103 (1963). ("... the title searcher in Florida should only have to check a chain of title to a recorded title transaction which is thirty years old or more.").

   b. *Wilson v. Kelley*, 226 So.2d 123 (Fla. 2nd DCA 1969), MRTA "obviously intended to make it unnecessary for a person relying upon it to search back to the sovereign, other than to determine that

title had passed from the sovereign; to determine what rights the sovereign may have reserved; to determine the existence and significance of pre-root matters that are apparent from or indicated by his root of title and any subsequent muniments of his title; and to resolve any apparent estates or interests arising out of title transactions recorded subsequent to the root of title. The searchers should also investigate pre-root matters that may support [persons in possession, assessed on tax rolls and existing usage of easements, rights-of-way and terminal facilities]"

2. Gregory M. Cook, Esq. set forth the proper way to examine a title chain after MRTA in his Florida Bar Journal article: *"The Marketable Record Title Act Made Easy"* Florida Bar Journal, (Oct. 1992).

   a. You should still obtain an entire abstract, back to the earliest public records.

   b. Skim backwards in the abstract for 30 years or more until you find an instrument you want to use as your root of title. Divide the abstract at that point.

   c. A MRTA examination involves examining the two parts (pre root and post root) in different ways.

   d. The post root part of every abstract should be examined in detail with every transaction analyzed thoroughly.

   e. The pre root part is examined in a summary manner because you are only seeking the exceptions to MRTA. You do not need to actually trace the chain, or understand all of what might be exceptions but for MRTA. We have reviewed the exceptions in great detail above. The one's you are most likely to find in a pre root review are:

      i. Governmental interests – all properties should have an initial deed from the sovereign into private ownership (sometimes two, when title passed through the State). A huge portion of Florida passed through State ownership again for taxes pursuant to the Murphy Act. Murphy Act deeds routinely included mineral, canal and road reservations.

      ii. Mineral reservations and any fee interests in minerals.

      iii. Easements in use.

f. If you are to rely on MRTA, you must also examine some things which are outside of the normal chain of title/public records search. These are:

i. The tax rolls to determine in whose name the parcel was assessed for at least the last three years.

ii. Determination of parties in possession.

iii. Determination of any possible easements and their use including statutory and common law ways of necessity. Remember MRTA will not operate against a statutory way of necessity regardless of use.

3. Silvia B. Rojas, Fund Sr. Underwriting Counsel, applied MRTA in analyzing and removing title exceptions from a title insurance commitment in "Using MRTA to Eliminate Unnecessary Exceptions" 46 Fund Concept 121 (Nov. 2014).

4. Know your Source of Title. None of us make actual examinations at the Court House. We all purchase our title information somewhere. If we are to rely on MRTA, we must be certain that the title information we are examining was compiled to comply with MRTA. Ask the title company and be sure you understand what is included in the search you are using.

H. Attorney's fees pursuant to sec. 712.08, F.S.

The attorney's fees provision of MRTA "does not require deliberate untruthfulness" but includes "mistaken ideas" and claims that are not "real or genuine claims." The Court upheld its award of attorney's fees against a voluntary homeowners' association that was found to be without authority to file a 2004 MRTA Preservation notice absent a finding of a deliberate untruthful intention. *Sand Hill Homeowners Ass'n v. Busch*, 210, So. 3d 706 (2017).

G. Title insurer's obligation to examine title.

The Court held that as a consequence of MRTA the title insurer's obligation to search title is limited by root of title. The case involved a claim against Old Republic National Title Insurance Company and the rights of the public to access and use the beach. *Kahama VI, LLC v. HJH, LLC*, 2016 WL 7104175, Case No. 8:11-cv-2029-T-30 TBM, M.D. Fla. (Dec. 6, 2016).

II. CHAPTER 712, F.S. MARKETABLE RECORD TITLES TO REAL PROPERTY

712.01 Definitions. -- As used in this law:

(1) The term "person" as used herein denotes singular or plural, natural or corporate, private or governmental, including the state and any political subdivision or agency thereof as the context for the use thereof requires or denotes and including any homeowners' association.

(2) "Root of title" means any title transaction purporting to create or transfer the estate claimed by any person and which is the last title transaction to have been recorded at least 30 years prior to the time when marketability is being determined. The effective date of the root of title is the date on which it was recorded.

(3) "Title transaction" means any recorded instrument or court proceeding which affects title to any estate or interest in land and which describes the land sufficiently to identify its location and boundaries.

(4) The term "homeowners' association" means a homeowners' association as defined in s. 720.301, or an association of parcel owners which is authorized to enforce use restrictions that are imposed on the parcels.

(5) The term "parcel" means real property which is used for residential purposes that is subject to exclusive ownership and which is subject to any covenant or restriction of a homeowners' association.

(6) The term "covenant or restriction" means any agreement or limitation contained in a document recorded in the public records of the county in which a parcel is located which subjects the parcel to any use restriction which may be enforced by a homeowners' association or which authorizes a homeowners' association to impose a charge or assessment against the parcel or the owner of the parcel or which may be enforced by the Florida Department of Environmental Protection pursuant to chapter 376 or chapter 403.

History.—

s. 1, ch. 63-133; s. 11, ch. 65-420; s. 1, ch. 81-242; s. 1, ch. 97-202; s. 56, ch. 2000-258; s. 16, ch. 2000-317.

712.02 Marketable record title; suspension of applicability.

Any person having the legal capacity to own land in this state, who, alone or together with her or his predecessors in title, has been vested with any estate in land of record for 30 years or more, shall have a marketable record title to such estate in said land, which shall be free and clear of all claims except the matters set forth as exceptions to marketability in s. 712.03. A person shall have a marketable record title when the public records disclosed a record title transaction

affecting the title to the land which has been of record for not less than 30 years purporting to create such estate either in:

(1) The person claiming such estate; or

(2) Some other person from whom, by one or more title transactions, such estate has passed to the person claiming such estate, with nothing appearing of record, in either case, purporting to divest such claimant of the estate claimed.

History.—

s. 2, ch. 63-133; s. 1, ch. 85-83; s. 63, ch. 87-226; s. 797, ch. 97-102.

712.03 Exceptions to marketability.—

Such marketable record title shall not affect or extinguish the following rights:

(1) Estates or interests, easements and use restrictions disclosed by and defects inherent in the muniments of title on which said estate is based beginning with the root of title; provided, however, that a general reference in any of such muniments to easements, use restrictions or other interests created prior to the root of title shall not be sufficient to preserve them unless specific identification by reference to book and page of record or by name of recorded plat be made therein to a recorded title transaction which imposed, transferred or continued such easement, use restrictions or other interests; subject, however, to the provisions of subsection (5).

(2) Estates, interests, claims, or charges, or any covenant or restriction, preserved by the filing of a proper notice in accordance with the provisions hereof.

(3) Rights of any person in possession of the lands, so long as such person is in such possession.

(4) Estates, interests, claims, or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.

(5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights-of-way and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof. No notice need be filed in order to preserve the lien of any mortgage or deed of trust or any supplement thereto encumbering any such recorded or unrecorded easements, or rights, interest, or servitude in the nature of easements, rights-of-way, and terminal facilities. However, nothing herein shall be construed as preserving to the mortgagee or grantee of any such mortgage or deed of trust or any supplement thereto any greater rights than the rights of the mortgagor or grantor.

(6) Rights of any person in whose name the land is assessed on the county tax rolls for such period of time as the land is so assessed and which rights are preserved for a period of 3 years

after the land is last assessed in such person's name.

(7) State title to lands beneath navigable waters acquired by virtue of sovereignty.

(8) A restriction or covenant recorded pursuant to chapter 376 or chapter 403.

(9) Any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

History.—

s. 3, ch. 63-133; s. 12, ch. 65-420; s. 1, ch. 73-218; s. 1, ch. 78-288; s. 2, ch. 97-202; s. 17, ch. 2000-317; s. 1, ch. 2010-104.

712.04 Interests extinguished by marketable record title.—

Subject to s. 712.03, a marketable record title is free and clear of all estates, interests, claims, or charges, the existence of which depends upon any act, title transaction, event, or omission that occurred before the effective date of the root of title. Except as provided in s. 712.03, all such estates, interests, claims, or charges, however denominated, whether they are or appear to be held or asserted by a person sui juris or under a disability, whether such person is within or without the state, natural or corporate, or private or governmental, are declared to be null and void. However, this chapter does not affect any right, title, or interest of the United States, Florida, or any of its officers, boards, commissions, or other agencies reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title.

History.—

s. 4, ch. 63-133; s. 1, ch. 65-280; s. 2, ch. 2010-104.

712.05 Effect of filing notice.—

(1) A person claiming an interest in land or a homeowners' association desiring to preserve a covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year period immediately following the effective date of the root of title, a written notice in accordance with this chapter. Such notice preserves such claim of right or such covenant or restriction or portion of such covenant or restriction for up to 30 years after filing the notice unless the notice is filed again as required in this chapter. A person's disability or lack of knowledge of any kind may not delay the commencement of or suspend the running of the 30-year period. Such notice may be filed for record by the claimant or by any other person acting on behalf of a claimant who is:

(a) Under a disability;
(b) Unable to assert a claim on his or her behalf; or

(c) One of a class, but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

Such notice may be filed by a homeowners' association only if the preservation of such covenant or restriction or portion of such covenant or restriction is approved by at least two-thirds of the members of the board of directors of an incorporated homeowners' association at a meeting for which a notice, stating the meeting's time and place and containing the statement of marketable title action described in s. 712.06(1)(b), was mailed or hand delivered to members of the homeowners' association at least 7 days before such meeting. The homeowners' association or clerk of the circuit court is not required to provide additional notice pursuant to s. 712.06(3). The preceding sentence is intended to clarify existing law.

(2) It shall not be necessary for the owner of the marketable record title, as herein defined, to file a notice to protect his or her marketable record title.

History.—s. 5, ch. 63-133; s. 798, ch. 97-102; s. 3, ch. 97-202; s. 1, ch. 2003-79; s. 7, ch. 2014-133.

712.06 Contents of notice; recording and indexing.—

(1) To be effective, the notice referred to in s. 712.05 shall contain:

(a) The name or description of the claimant or the homeowners' association desiring to preserve any covenant or restriction and the name and particular post office address of the person filing the claim or the homeowners' association.
(b) The name and post office address of an owner, or the name and post office address of the person in whose name said property is assessed on the last completed tax assessment roll of the county at the time of filing, who, for purpose of such notice, shall be deemed to be an owner; provided, however, if a homeowners' association is filing the notice, then the requirements of this paragraph may be satisfied by attaching to and recording with the notice an affidavit executed by the appropriate member of the board of directors of the homeowners' association affirming that the board of directors of the homeowners' association caused a statement in substantially the following form to be mailed or hand delivered to the members of that homeowners' association:

STATEMENT OF MARKETABLE TITLE ACTION

The [name of homeowners' association] (the "Association") has taken action to ensure that the [name of declaration, covenant, or restriction], recorded in Official Records Book, Page , of the public records of County, Florida, as may be amended from time to time, currently burdening the property of each and every member of the Association, retains its status as the source of marketable title with regard to the transfer of a member's residence. To this end, the Association shall cause the notice required by chapter 712, Florida Statutes, to be recorded in the public records of County, Florida. Copies of this notice and its attachments are available through the

Association pursuant to the Association's governing documents regarding official records of the Association.

(c) A full and complete description of all land affected by such notice, which description shall be set forth in particular terms and not by general reference, but if said claim is founded upon a recorded instrument or a covenant or a restriction, then the description in such notice may be the same as that contained in such recorded instrument or covenant or restriction, provided the same shall be sufficient to identify the property.

(d) A statement of the claim showing the nature, description, and extent of such claim or, in the case of a covenant or restriction, a copy of the covenant or restriction, except that it shall not be necessary to show the amount of any claim for money or the terms of payment.

(e) If such claim is based upon an instrument of record or a recorded covenant or restriction, such instrument of record or recorded covenant or restriction shall be deemed sufficiently described to identify the same if the notice includes a reference to the book and page in which the same is recorded.

(f) Such notice shall be acknowledged in the same manner as deeds are acknowledged for record.

(2) Such notice shall be filed with the clerk of the circuit court of the county or counties where the land described therein is situated, together with a true copy thereof. The clerk shall enter, record, and index said notice in the same manner that deeds are entered, recorded, and indexed, as though the claimant were the grantee in the deed and the purported owner were the grantor in a deed, and the clerk shall charge the same fees for recording thereof as are charged for recording deeds. In those counties where the circuit court clerk maintains a tract index, such notice shall also be indexed therein.

(3) The person providing the notice referred to in s. 712.05 shall:

(a) Cause the clerk of the circuit court to mail by registered or certified mail to the purported owner of said property, as stated in such notice, a copy thereof and shall enter on the original, before recording the same, a certificate showing such mailing. For preparing the certificate, the claimant shall pay to the clerk the service charge as prescribed in s. 28.24(8) and the necessary costs of mailing, in addition to the recording charges as prescribed in s. 28.24(12). If the notice names purported owners having more than one address, the person filing the same shall furnish a true copy for each of the several addresses stated, and the clerk shall send one such copy to the purported owners named at each respective address. Such certificate shall be sufficient if the same reads substantially as follows:

I hereby certify that I did on this , mail by registered (or certified) mail a copy of the foregoing notice to each of the following at the address stated:

(Clerk of the circuit court)
of County, Florida,
By (Deputy clerk)

The clerk of the circuit court is not required to mail to the purported owner of such property any such notice that pertains solely to the preserving of any covenant or restriction or any portion of a covenant or restriction; or

(b) Publish once a week, for 2 consecutive weeks, the notice referred to in s. 712.05, with the official record book and page number in which such notice was recorded, in a newspaper as defined in chapter 50 in the county in which the property is located.

(4) Failure of any purported owner to receive the mailed notice shall not affect the validity of the notice or vitiate the effect of the filing of such notice.

History.—

s. 6, ch. 63-133; s. 5, ch. 77-354; s. 7, ch. 82-205; s. 57, ch. 95-211; s. 4, ch. 97-202; s. 2, ch. 2003-79; s. 110, ch. 2003-402; s. 3, ch. 2010-104.

712.07 Limitations of actions and recording acts. —

Nothing contained in this law shall be construed to extend the period for the bringing of an action or for the doing of any other act required under any statute of limitations or to affect the operation of any statute governing the effect of the recording or the failure to record any instrument affecting land. This law shall not vitiate any curative statute.

History.—

s. 7, ch. 63-133.

712.08 Filing false claim. —

No person shall use the privilege of filing notices hereunder for the purpose of asserting false or fictitious claims to land; and in any action relating thereto if the court shall find that any person has filed a false or fictitious claim, the court may award to the prevailing party all costs incurred by her or him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party all damages that she or he may have sustained as a result of the filing of such notice of claim.

History.—

s. 8, ch. 63-133; s. 799, ch. 97-102

712.09 Extension of 30-year period.—

If the 30-year period for filing notice under s. 712.05 shall have expired prior to July 1, 1965, such period shall be extended to July 1, 1965.

History.—

s. 9, ch. 63-133.

712.095 Notice required by July 1, 1983.—

Any person whose interest in land is derived from an instrument or court proceeding recorded subsequent to the root of title, which instrument or proceeding did not contain a description of the land as specified by s. 712.01(3), and whose interest had not been extinguished prior to July 1, 1981, shall have until July 1, 1983, to file a notice in accordance with s. 712.06 to preserve the interest.

History.—

s. 2, ch. 81-242.

712.10 Law to be liberally construed.—

This law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in s. 712.02 subject only to such limitations as appear in s. 712.03.

History.—

s. 10, ch. 63-133.

712.11 Covenant revitalization.—

A homeowners' association not otherwise subject to chapter 720 may use the procedures set forth in ss. 720.403-720.407 to revive covenants that have lapsed under the terms of this chapter.

History.—
s. 1, ch. 2007-173.

III. CURATIVE STATUTES

A. STATUTE OF LIMITATIONS

Statutes of limitations limit the time within which an action can be brought to enforce a substantive right. The statute does not eliminate substantive rights. It does extinguish the remedy of enforcement of the right. The statute operates to prevent the collection of a debt but the debt remains. A statute barring the collection of the debt does not affect the enforcement of the lien securing the debt. The statute can be waived. A defendant in an action to enforce a right must affirmatively plead the statute or it is considered waived. The statute cannot be used as a ground for affirmative relief. 35 Fla. Jur. 2d., *Limitations and Laches,* Sec. *1, et seq.*

B. CURATIVE ACTS

A curative act is a law, retrospective in effect, which is designed to remedy some legal defect in previous transactions. BLACK'S LAW DICTIONARY, (9th Ed. 2009). Curative legislation is enacted to render valid and effective attempted acts which otherwise would be ineffective for the purpose the parties intended, particularly irregularities in conveyancing. BALLENTINE'S LAW DICTIONARY, (3rd Ed. 1969).

C. CURATIVE ACTS WITH LIMITATIONS

Curative acts with limitations require that the right be exercised or an action be brought to enforce it within a certain time or the right is lost. Day, *Curative Acts, 8 U.* FLA. L. REV. 365 (1955) and 9 U. FLA. L. REV. 145 (1956).

D. APPLICATION OF STATUTES OF LIMITATION

Sec. 95.011, F.S. The statutes of limitation apply to civil actions, including actions brought by the state, a municipality, a public corporation or body corporate, or any agency or officer of any of them, or any other governmental authority.

E. COMPUTATION OF TIME

Sec. 95.031, F.S. Any statute of limitations begins to run from the time the cause of action accrues, which is when the last element constituting the cause of action occurs, except when otherwise provided by statute. A statute of limitations does not begin to run until a cause of action exists. As an example, a cause of action against a developer for recovery of the amount by which he was unjustly enriched from a lease of recreational facilities which he executed on behalf of a condominium association and for himself did not exist until *Avila South Condominium Assn, Inc. v. Kappa Corp.,* 347 So.2d 599 (Fla. 1977) decided March 31, 1977.

F. WHEN LIMITATIONS TOLLED

1. Sec. 95.051, F.S.

The running of any statute of limitations, except secs. 95.281, .35 and .36, F.S., is tolled by:

(a) Absence from the state of the person sued.

(b) Use of a false name.

(c) Concealment to avoid service of process.

(d) Adjudication of incompetency, before cause of action accrued, of the person entitled to sue.

(e) Voluntary payments by the alleged father of the child in paternity actions.

(f) Payment of any part of the principal or interest of any obligation founded on a written instrument. This subsection does not apply to part payment of a judgment. *Quaintance v. Fogg,* 392 So.2d 360 (Fla. 2d DCA 1981). This subsection also does not a toll the limitation on an action by a mortgagor. *Brown v. Nationscredit Financial Services Corporation*, 32 So.3d 661 (Fla. 1st DCA 2010).

(g) Pendency of any arbitral proceeding pertaining to a dispute that is the subject of the action.

(h) The period of an intervening bankruptcy tolls the expiration period of a tax certificate under § 197.482, F.S. and any proceeding or process under chapter 197, F.S.

(i) The minority or previously adjudicated incapacity of the person entitled to sue during any period of time in which a parent, guardian, or guardian ad litem does not exist, has an interest adverse to the minor or incapacitated person, or is adjudicated to be incapacitated to sue; except with respect to the statute of limitations for a claim for medical malpractice as provided in sec. 95.11, F.S. In any event, the action must be begun within 7 years after the act, event, or occurrence giving rise to the cause of action.

Paragraphs (a)-(c) shall not apply if service of process or service by publication can be made in a manner sufficient to confer jurisdiction to grant the relief sought. This section shall not be construed to limit the

ability of any person to initiate an action within 30 days after the lifting of an automatic stay issued in a bankruptcy action as is provided in 11 U.S.C. s. 108(c).

No disability or other reason shall toll the running of any statute of limitations except those in subsection (1), a 2-year period for examining a taxpayer's books by a taxing authority, during the administration or judicial proceedings to review tax assessments or collections, the Florida Probate Code or the Florida Guardianship Law.

The running of the statutes of limitation are no longer tolled during the time a person is a minor. Sec. 95.20, F.S., repealed in 1974, allowed a child to bring an action, barred by the statutes of limitations before reaching majority, within 7 years after reaching his majority. In *Putnal v. Walker,* 55 So. 844 (Fla. 1911), the court held that under that statute an infant had 7 years after coming of age to disaffirm a deed executed before reaching his majority. Florida has adopted the majority view that an infant has a reasonable time after reaching his majority to disaffirm a deed made before reaching his majority. The 7-year period in the previous statute was adopted as a reasonable time.

2. **Sec. 733.104, F.S.,** provides that if a person entitled to bring an action dies before expiration of the time limited for the commencement of the action and the cause of action survives, the action may be commenced by his personal representative after the expiration and within 12 months from the date of decedent's death.

3. **Sec. 744.394, F.S.,** provides that if the person entitled to bring an action is declared incompetent before the expiration of the time limited for the commencement of it and the cause of action survives, the action may be commenced by the guardian of the property after such expiration and within 1 year from the date of the order appointing him or the time otherwise limited by law, whichever is longer.

   The tolling of statutes of limitations of the Florida Probate Code and the Florida Guardianship Law should be considered before applying a statute of limitations. See "Tolling of Statutes of Limitations", 12 FUND CONCEPT 21 (Apr., 1980).

4. **Sec. 718.124, F.S. Statute of limitations, actions against condominium association.** The statute of limitations for any action in law or equity which a condominium association may have shall not begin to run until the owners have elected a majority of the members of the board of administration. A similar provision applies to cooperatives, Sec. 719.110, F.S.

G. ACKNOWLEDGMENTS AND WITNESSES

1. **Sec. 95.231 (1), F.S. Limitations where deed, will or power of attorney is on record.** Five years after the recordation of a deed executed by the owner of record, probate of a will or recordation of a power of attorney, the instrument can be accepted as valid even though there were no witnesses and there was a defect in the acknowledgment. The provision concerning powers of attorney was added by a 2013 amendment. The statute operates only in the absence of fraud, adverse possession, or pending litigation.

   The statute applies to deeds executed by the owner and is very beneficial where the problem is a lack of witnesses. See Fund TN 10.07.03. A personal representative does not own the property of a decedent and it is doubtful that the section would cure lack of witnesses on a deed executed by a personal representative.

   See "Lack of Witnesses on Deed by Personal Representative," 11 FUND CONCEPT 6 (Jan. 1979).

   The section cures defects in but not lack of acknowledgments. Fund TN 1.03.01. A notary's failure to sign a certificate of acknowledgment would not be cured by the section. Fund Title Note 1.02.08. Failure to affix the notary's seal is cured by this section. Fund TN 1.02.07. An acknowledgment taken by a grantee in the deed would not be cured. Fund TN 1.05.01. *Summa Investing Corp. v. McClure,* 569 So.2d 500, (Fla. 3d DCA 1990); *Earp & Shriver Inc. v. Earp*, 466 So. 2d 1225 (Fla. 2d DCA 1985).

   Pursuant to 2013 legislative amendment, a person claiming an interest in real property affected by the 2013 amendment to this section must file a claim or defense by October 1, 2014.

2. **Sec. 695.05, F.S. Certain defects cured as to acknowledgments and witnesses.** All deeds and mortgages, made and received bona fide and upon good consideration by any corporation, the execution of which are acknowledged before some officer, stockholder or other person interested in the corporation, grantee, or mortgagee as a notary public are validly acknowledged and entitled to record.

3. **Sec. 694.08, F.S. Certain instruments validated, notwithstanding lack of seals or defects in acknowledgments.** Seven years after the recordation of a power of attorney or a deed executed by the owner or by a person in a representative capacity, it can be accepted as valid, in the absence of fraud, adverse possession, or pending litigation, if one or more subsequent conveyances of the land described in the deed have been recorded by persons claiming under the deed, even though there has been

a defect in the acknowledgment or certificate of acknowledgment, the word "as" does not precede the title of the person conveying in a representative capacity, there was no seal affixed when required, and there were no witnesses.

Before, the 2013 amendment, the difference between the 5-year and 7-year limitation, other than the time period, was the 7-year limitation applied to a power of attorney and to conveyances made in a representative capacity and the 5-year limitation did not. Effective October 1, 2014, the 5- year statute also addresses defects in witnesses and acknowledgments on powers of attorney. Only the 7-year statute (sec. 694.08, F.S.) resolves defects involving the complete absence of a power of attorney.

4. **Sec. 695.06, F.S. Certain irregularities as to venue validated.** A deed or other instrument recorded in the official records of a county is properly acknowledged and of record even though recitals in the acknowledgment or following the signature of the notary or from the seal of the notary indicate that the acknowledgment was not taken or may not have been taken in the place as stated in the caption or venue thereof.

There is no statutory provision that requires the venue of an acknowledgment to be stated in the certificate. However, if the recitals when read together indicate that the acknowledgment was taken outside the jurisdiction of the notary, the statute should not be relied on. Fund TN 1.02.09.

H. ADVERSE POSSESSION

1. **Secs. 95.12, .13, .14, .16 and .18, F.S. Real Property Actions.** Title to real property can be acquired by adverse possession with or without color of title. Before January 1, 1975, color of title was limited to the property described in the public records and color of title did not extend to contiguous lands. Pursuant to sec. 95.16(2)(b) “color of title" only extends to the lands within the property description. Affidavits to prove adverse possession are not sufficient. The statute has some value without a judicial determination of adverse possession when accepting title on other grounds, such as ignoring a wild deed. See Uniform Title Standard 16.5.

1. 2. **Sec. 95.21, F.S. Adverse possession against lands purchased at a sale made by personal representatives or guardian.** Title to real property purchased at a sale made by a personal representative or guardian shall not be questioned, after the purchaser has held possession adversely for 3 years, because of any irregularity in the conveyance or any insufficiency or irregularity in the court proceedings authorizing the sale, whether jurisdictional or not, nor shall it be questioned because the sale is made without court approval or confirmation. This section does not bar an action for fraud against a personal representative or guardian for personal

liability to beneficiary or ward.

The purchaser must prove adverse possession. Failure to pay full value and fraud prevent the statute from operating. *Griffin v. Bolen,* 5 So.2d 690 (Fla. 1942).

The statute should apply to irregularities in the court proceedings, but it is doubtful it applies where the court lacked jurisdiction. As an example, Fund TN 16.02.01 discusses a guardian's conveyance of homestead.

This section can be used to cure minor irregularities in the sale without a judicial determination of the adverse possession. However, even then if there is doubt as to the factual questions, the facts determining adverse possession should be judicially determined.

I. CONDOMINIUMS AND COOPERATIVES

1. **Sec. 718.110(10), F.S. Limitations, actions to determine sufficiency of condominium documents.** After 3 years of the recording of the certificate of a surveyor and mapper pursuant to sec. 718.104(4)(e), F.S. or the recording of an instrument that transfers title to a unit in the condominium which is not accompanied by a recorded assignment of developer rights in favor of the grantee of such unit, whichever occurs first, the declaration and other documents shall be effective to create a condominium, whether or not the documents substantially comply with the mandatory requirements of Ch. 718, F.S.

   The statute begins to run when the declaration and other documents have been recorded in the official records of the county where the land is located. The declaration must have been executed and acknowledged with the requirements for a deed. Also, the declaration and documents must contain a description sufficient to locate a unit and must set out the rights and obligations of the unit owners. Other insufficiencies can be ignored after the 3-year limitation period.

2. **Sec. 719.304(2), F.S. Limitations, actions to determine sufficiency of cooperative documents.**
   A similar provision applies to cooperatives.

J. CONTRACTS

1. **Sec. 95.281, F.S. Limitations, instruments encumbering real property.** A contract for deed is considered to be a mortgage under Sec. 697.01, F.S., and is foreclosed in the same manner as a mortgage. Under Sec. 95.281, F.S., the lien of a mortgage terminates 5 years after the date of maturity if the maturity date is ascertainable from the record. If the maturity dates are not ascertainable from the record, the lien terminates 20 years after the date of the contract.

This section is not too much help to the vendee because the legal title is in the vendor and an action must be brought to clear the title. The right of the vendee to specific performance may be barred by laches if the vendee is out of possession. If the vendee is in possession, a mere lapse of time will not prejudice the vendee's remedial rights.

2. **Sec. 95.11(2), F.S. Limitations other than the recovery of real property.** The section bars legal or equitable actions on a contract founded on a written instrument if not commenced within 5 years from the time the cause of action accrues. The section is not very helpful because Sec. 95.051, F.S., tolls the running of the section if the person to be sued is absent from the state and for other reasons stated in that section.

3. **Sec. 95.35, F.S. Termination of contracts to purchase real estate in which there is no maturity date.** The section bars enforcement of a contract made before July 1, 1972, in which the final maturity date of the obligation is not ascertainable from the record of the contract and there is no deed to or judgment in favor of the purchaser of record and the purchaser is not in possession.

   The Fund relies on this section where the contract is a deposit receipt. Fund TN 9.04.01.

4. **Sec. 695.20, F.S. Unperformed contracts of record.** The section is applicable to all recorded contracts prior to January 1, 1930, and which required all payments to be made within 10 years, provided the vendee or assignee did not obtain and record a deed or procure a decree recognizing his rights before October 21, 1941. Rights of persons in actual possession are not affected.

K. CONVEYANCES

1. **Sec. 692.03, F.S. Limitation, validity of conveyances by certain foreign corporations recorded for 7 years.** Conveyances by directors and trustees of a dissolved foreign corporation which have been recorded for at least 7 years can be accepted as having conveyed the fee simple title of the corporation on whose behalf the conveyance has been executed to the land described in the deed.

   This section does not eliminate the necessity of determining that the persons signing as directors and trustees were in fact directors at the time the corporation was dissolved. If the section is not applicable, the proper persons to convey the land of the dissolved corporation must be determined by the laws of the domicile of the corporation. See Fund TN 11.04.05. See TN 11.06.02 for the requirements for alien corporations to

own Florida real property.

2. **Sec. 95.22, F.S. Limitations upon claims by remaining heirs, when deed made by one or more.** The section perfects a title derived from a deed by beneficiaries of a decedent's property which conveys the entire interest of the decedent after 7 years from the recordation of such conveyance as against other possible beneficiaries whose names did not appear of record under the will of the decedent or in proceedings in an administration of the estate.

   The Fund relies on this section provided the instrument of conveyance is not a mere quitclaim deed but one which purports to convey title. See *Egger v. Egger*, 506 So.2d 1168 (Fla. 3d DCA 1987) and Uniform Title Standard 5.15. See Fund TN 10.01.01.

3. **Sec. 95.231(2), F.S. Limitations where deed or will on record.** After 20 years from the recording of a deed or the probate of a will purporting to convey real property, no person shall assert any claim to the property against the claimants under the deed.

   Sec. 95.231(2), F.S. is not applicable to a void deed. *Reed v. Fain,* 145 So.2d 858 (Fla. 1962).

   The section may be applied to a deed from an attorney-in-fact which has been of record for more than 20 years where nothing in the record suggests the death of the principal prior to the deed. Fund TN 4.02.08.

   The section may be applied to a deed subsequent to a deed conveying the property to a mortgagee when the deed does not state that the deed is in satisfaction of the mortgage, if both deeds have been of record more than 20 years. Fund TN 22.05.10.

   This section does not eliminate restrictions or reservations if not mentioned in deeds subsequent to the deed which has been of record for 20 years. Fund TN 27.01.03.

   Sec. 95.231(2), F.S. can be applied to cure technical defects in an otherwise valid deed, but may not be applied to eliminate breaks in the chain of title. *Davis v. Hinson,* 67 So.3d 1107 (Fla. 1st DCA 2011). In *Davis v. Hinson*, there was a break in the chain of title because the heir of a former cotenant never conveyed his interest in the property. Sec. 95.231(2), F.S. cannot be applied to create title where none existed before. In *Hardy v. Shell*, 144 So.3d 668 (Fla. 2nd DCA 2014), the Shells were unsuccessful in applying sec. 95.231, F.S. in barring the Hardy's claims to a waterfront strip of land because the Shells failed to establish that they clearly obtained title to that strip of land due to purported legal description

defects in a 1971 deed.

L. JUDGMENTS

1. **Sec. 55.081, F.S. Statute of limitations, lien of judgment.** Prior to July 1, 1987, no judgment of any court is a lien on real property after the expiration of 20 years from the date of entry of the judgment. In *Park Finance of Broward, Inc. v. Jones*, the Fourth DCA held Florida Rule of Civil Procedure 1.420(e) (dismissal for failure to prosecute) inapplicable after the entry of a final money judgment because that rule would have the effect of nullifying an otherwise valid judgment with a duration of 20 years pursuant to section 55.081, F.S. *Park Finance of Broward, Inc. v. Jones,* 94 So.3d 617 (Fla. 4th DCA 2011).

2. **Sec. 55.10, F.S.,** was amended effective July 1, 1987 to provide that the duration of the lien of a judgment, order or decree entered after the effective date is for an initial period of 7 years from the date of recording and can be extended for one additional 7-year period and a second 6-year period, by re-recording a certified copy of the judgment, order or decree within the 90-day period preceding the expiration of the lien. In no event will the lien of the judgment exceed 20 years. Effective July 1, 1994, sec. 55.10, F.S., was amended again to provide that the duration of a lien of a judgment, order or decree entered after this effective date is for an initial period of 10 years from the date of the recording and can be extended for an additional 10 year period.

   Re recording or re perfecting a lien after the expiration of a perfected lien will not extend the lien relating back in priority to the first lien but give rise to a new lien. *Sun Glow Constr., Inc. v. Cypress Recovery Corp.*, 47 So. 3d 371 (Fla. 5th DCA 2010); *Franklin Financial, Inc. v. White*, 932 So. 2d 434 (Fla. 4th DCA 2006).

M. MINERALS, OIL AND GAS

1. **Sec. 712.04 and .05, F.S. Interests extinguished by Marketable Record Title Act.** Act. Sec. 712.05 (2), F.S., provides that it shall not be necessary for the owner of the marketable record title to file a notice to protect his title.

   Mineral reservations sever the mineral estate from the surface estate. The Fund does not rely on Sec. 712.04, F.S., to eliminate a mineral reservation prior to the root of title. See Fund TN 27.01.01.

2. **Sec. 270.11, F.S.** Statute may be relied upon to release right of entry, held by state of Florida, in relation to parcels of less than 20 acres. Applies to interest held by Trustees of the Internal Improvement Fund or the State Board of Education.

3. **Sec. 704.05, F.S. Easements and rights of entry.** This section provided that rights and interest in land which are subject to being extinguished by the Marketable Record Title Act shall include rights of entry or an easement given or reserve for the purpose of mining, drilling, exploring or developing oil, gas, minerals or fissionable material. This section does not apply to interests reserved or otherwise held by the state or by any of its agencies, boards or departments. Fund TN 27.01.02.

N. MORTGAGES

1. **Sec. 95.281, F.S. Limitations, instruments encumbering real property.** The lien of a mortgage terminates 5 years after the date of maturity if the final maturity date is ascertainable from the record. If the final maturity date is not ascertainable from the record, the lien terminates 20 years after the date of the mortgage. The 5-year and 20-year provisions apply to recorded extensions of the maturity date. The section does not apply to mortgages by any railroad or other public utility corporation or to mechanics' liens under Ch. 713, F.S.

   The Fund relies on this section if there is no extension of record or if the 5-year or 20-year limitation has run from the recordation of the extension. Known unrecorded loan agreements, advances and mortgage modifications must also be considered. Fund TNs 22.05.05 and 22.05.10.

   A note and a loan agreement were secured by a single mortgage. The maturity date of the note was ascertainable from the record. Because the maturity date of the loan agreement was unique from the note and not ascertainable from the record, the Florida Second DCA applied the 20 year statute of repose to the mortgage. *CCM Pathfinder Palm Harbor Management, LLC v. Unknown Heirs of Gendron*, Case No. 2D13-5286, 2015 WL 248796 (Fla. 2nd DCA 2015).

   A mortgage with a future advance clause terminates 5 years after the maturity date ascertainable from the record only if a future advance is not made. *Razak v. Marina Club of Tampa Homeowners Ass'n*, *Inc*., 968 So.2d 616 (Fla. 2d DCA 2007).

   A cause of action on a demand note accrues at the time a written demand for payment is made. Therefore, the maturity date of a demand not cannot be determined from the record and the 20-year limitation period is applicable. *Smith v. Branch,* 391 So.2d 797 (Fla. 2d DCA 1980).

   A mortgagor can bring an action to remove the cloud on the title caused by a mortgage barred by Sec. 95.281, F.S. *Hubbard v. Tebbetts,* 76 So.2d 280 (Fla. 1954).

Taking title subject to a mortgage more than 5 years after its original due date can be an acknowledgment of a continued lien. *Ronald L. Irwin, Trustee v. Ann Groggan-Cole, et al.,* 590 So.2d 1102 (Fla. 5th DCA 1991).

O. RESTRICTIONS AND REVERTERS

1. **Sec. 689.18, F.S. Reverter limitations, cancellations of reverters.** The retroactive provisions of Sec. 689.18, F.S., which became effective July 1, 1951, were declared unconstitutional *Biltmore Village v. Royal,* 71 So.2d 727 (Fla. 1954). Subsection 4 provides that no reverter shall be valid more than 21 years from the date of the deed. This prospective provision was upheld in *J. C. Vereen & Sons, Inc. v. City of Miami,* 397 So.2d 979 at 983 (Fla. 3d DCA 1981). Under subsection 5 all conveyances to any governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or nonprofit corporation or association are excluded from the provisions of the section. Subsection 5 was not considered in *Vereen & Sons, Inc. v. City of Miami,* and it should not be ignored. The section does not affect the enforcement of restrictions which were coupled with the reverter. Twenty-one years after the date of a deed executed after July 1, 1951, containing restrictions coupled with a reverter, the reverter can be ignored but the restrictions cannot. However, reasonable inquiry should be made to determine that a violation of the restrictions did not occur during the 21-year period which would have divested the title of the owner. Fund TN 28.03.08.

P. TAX TITLES

1. **Sec. 95.091, F.S. Limitations on actions to collect taxes.** The section provides that any tax lien, except tax certificate liens, estate tax liens, and corporate income tax liens, shall expire 5 years after the tax is assessed (January 1) or becomes delinquent (July 1), whichever is later. The limitation applies to tax liens in favor of the state or any of its political subdivisions, to municipalities, or any other entity having authority to levy and collect taxes. No action may be brought to collect any tax after the expiration of the lien securing the payment of the tax. Omitted taxes can be back assessed for 3 years.

2. **Sec. 193.092, F.S. Assessment of property for back taxes.** The section applies to municipal, special taxing district or special assessment against the property. Omitted taxes can be back assessed for 3 years.

3. **Sec. 197.482, F.S. Limitations upon lien of tax certificates.** After the expiration of 7 years from the date of issuance, which is the date of the first day of the tax certificate sale as advertised under sec. 197.432, F.S. of a tax certificate, if a tax deed has not been applied for on the property covered by the certificate, and no other administrative or legal proceeding has existed of record, the tax certificate is null and void, and the tax

collector shall cancel the tax certificate, noting the date of the cancellation of the tax certificate upon all appropriate records in his or her office.

4. **Sec. 95.192, F.S. Limitation upon actions against tax deed.** The section limits an action by the former owner to 4 years after the issuance of a tax deed whether or not the tax deed grantee is in possession of the property described in the tax deed. However, the section does not apply if the former owner remained in possession for 1 year after issuance of the tax deed.

5. **Sec. 95.191, F.S. Limitations when tax deed holder in possession.** No action to recover possession of property described in a tax deed shall be maintained by a former owner unless the action is commenced within 4 years after the holder of the tax deed has gone into actual possession. The tax deed holder has 4 years from the date of the deed to bring an action against any person who is in adverse possession of the property. See Fund TN 30.01.02.

6. **Sec. 198.22 and .33, F.S. Lien for unpaid Florida estate taxes.** The two sections when read together are the basis for confusion, Sec. 198.22, F.S., limits the time for enforcement of estate taxes to 12 years and makes no distinction between resident and nonresident decedents. Transfer of property of the estate of a resident decedent for full and adequate consideration divests the lien against the property and the lien is then transferred to the proceeds from the sale. Sec. 198.33, F.S., fixes the duration of the lien to 10 years from the death of a resident decedent and to 10 years from the date of filing with the Department of Revenue a notice of death or a tax return whichever date is earlier for a nonresident decedent. The duration of the lien is extended for a 5-year period in addition to the 10-year period, if a notice of lien is filed.

   It is The Fund's position that the lien for Florida estate taxes for a resident decedent should not be ignored where the decedent has been dead less than 12 years, unless the lien has otherwise been cleared. For a non resident decedent, the lien for estate taxes should not be ignored until 12 years have elapsed from the death of the decedent even though 10 years have elapsed after the date of filing a notice of death or a tax return. The lien for estate taxes can be ignored in any case after 20 years from the death of a resident or nonresident decedent. See Fund TN 2.10.07.

Note: Pursuant to the Economic Growth and Tax Relief Reconciliation Act of 2001and Sec. 198.13(4), F.S., effective July 1, 2007, as amended retroactive to January 1, 2011, resident and nonresident decedents dying on and after Jan. 1, 2005 are not subject to the Florida estate tax. Fund TN 2.10.07.

IV. UNIFORM TITLE STANDARDS OF THE FLORIDA BAR, CHAPTER 17 MARKETABLE RECORD TITLE ACT

Chapter 17

MARKETABLE RECORD TITLE ACT

Standard 17.1

PURPOSE OF THE MARKETABLE RECORD TITLE ACT

STANDARD: THE ACT SHOULD BE RELIED UPON TO ELIMINATE IMPERFECTIONS OF TITLE THAT FALL WITHIN ITS SCOPE.

Authorities & References: *F.S.* 712.01, et seq. (2009); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1010 (Fla. 1977) (mother's life estate holder's deed served as root of title to eliminate the remainder interests of her children); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 120 (Fla. 1970), *cert. denied*, 400 U.S. 964 (1970) (the Act operates to make title based on wild deed marketable); *Sawyer v. Modrall*, 286 So. 2d 610, 613 (Fla. 4th DCA 1973); *cert. denied*, 297 So. 2d 562 (Fla. 1974) (the Act operates to eliminate interest created by deed from the Trustees of the Internal Improvement Trust Fund); *Wilson v. Kelley*, 226 So. 2d 123, 128 (Fla. 2d DCA 1969) (quit claim deed may serve as root of title only if it evidences an intent to convey an identifiable interest); *Whaley v. Wotring*, 225 So. 2d 177 (Fla. 1st DCA 1969); I BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§14.20 to 14.22 (2007).

Comment: For a discussion of the constitutionality of the Act, see FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.5 (CLE 5th ed. 2006). *See also*, *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 449 (Fla. 1978) (holding that the Act is constitutional); *Wichelman v. Messner*, 250 Minn. 88, 83 N.W. 2d 800 (1957); *Annot.*, 71 A.L.R.2d 816 (1960); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 MIAMI L. REV. 103 (1963).

STANDARD 17.2

MARKETABLE RECORD TITLE

STANDARD: MARKETABLE RECORD TITLE EXISTS, SUBJECT TO THE EXCEPTIONS OF THE ACT, WHEN RECORD TITLE HAS BEEN VESTED IN A PERSON, ALONE, OR TOGETHER WITH PREDECESSORS IN INTEREST FOR THIRTY YEARS OR MORE AND NOTHING OF RECORD PURPORTS TO DIVEST THE PERSON OF THE ESTATE.

Problem 1: The following chain of title appears of record. In 1955 John Doe conveyed Blackacre to "Richard Roe and his heirs for so long as the premises are used for residential purposes." In 1965 Richard Roe conveyed Blackacre to "Simon Grant and his heirs." In 1985 Simon Grant conveyed Blackacre to "Thomas Frank and his heirs." In 2005 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: Yes. The 1965 conveyance to Simon Grant purports to transfer the fee simple absolute interest which Thomas Frank claims and was recorded at least thirty years prior to the time marketability is being determined in 2005. Hence the 1965 conveyance is the root of title and all interests not evidenced by it or subsequently created or transferred and not excepted under the Act are extinguished.

Problem 2: Same facts as Problem 1 except that in 1965 Richard Roe delivered the deed of Blackacre to Simon Grant, but the deed was not recorded until 1980. In 2005 did Thomas Frank have marketable record title to Blackacre in fee simple absolute?

Answer: No. The root of title is the last title transaction to have been recorded at least thirty years prior to the time marketability is being determined. The 1955 conveyance is the root of title and it contains the restriction with the possibility of reverter, hence that interest is not extinguished.

Problem 3: John Doe is the grantee in a deed to Blackacre in fee simple absolute recorded in 1975. Nothing affecting Blackacre has been recorded since then. In 2006 did John Doe have marketable record title to Blackacre?

Answer: Yes. The deed qualifies as a root of title and all interests arising prior to the recording of the deed in 1975 are extinguished, unless specifically excepted under the Act.

Problem 4: In 1970, John Doe conveyed Blackacre to Richard Roe. In 1975, Simon Grant, although he never owned Blackacre, purports to convey a portion of Blackacre to Thomas Frank. Does Richard Roe have marketable title?

Answer: No. Although the 1970 deed is the root of title and the 1975 deed was a wild deed, the latter nevertheless created an estate, interest, claim or charge arising out of a title transaction which has been recorded subsequent to the effective date of the root of title, so is an exception to marketability under *F.S.* 712.03(4).

Problem 5: John Doe is the last grantee in the regular chain of title to Blackacre by a deed recorded in 1960. John Doe died in 1969. Court proceedings recorded in 1970 involving his estate establish that his sole heir, Ralph Doe, acquired ownership of Blackacre. In 2001 did Ralph Doe have marketable record title to Blackacre?

Answer: Yes. The court proceedings affect title to land and were recorded thirty years prior to the time marketability is being determined, hence they qualify as the root of title.

Authorities & References: *F.S.* 712.01, et seq. (2009); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §§ 2.5-.12 (CLE 5th ed. 2006); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §§ 14.22 (2007); Fund Title Note 10.01.02.

Comment: A wild or interloping deed may constitute a root of title. *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978). Exceptions to the operation of the Act are contained in F.S. 712.03–.04 (2009) and are dealt with specifically in other Standards in this Chapter.

The Act does not eliminate an interest or claim arising out of a title transaction recorded after the root of title, even if the subsequent interest or claim is outside the chain of title, such as a wild deed. *See, Holland v. Hattaway*, 438 So. 2d 456, 468-470 (Fla. 5th DCA 1983) (the Act did not extinguish an easement purportedly created by a wild deed recorded several years after the root of title, although the court held that the easement was extinguished on other grounds).

STANDARD 17.3

EXTINGUISHMENT OF INTERESTS

STANDARD: SUBJECT TO THE EXCEPTIONS IN MRTA, ALL ESTATES, INTERESTS, CLAIMS OR CHARGES THAT EXIST BY VIRTUE OF ANY ACT, TITLE TRANSACTION, EVENT OR OMISSION THAT OCCURRED PRIOR TO THE EFFECTIVE DATE OF THE ROOT OF TITLE ARE EXTINGUISHED BY THE ACT.

Problem 1: A deed to Blackacre executed by John Doe and recorded in 1965 contained: (1) a condition subsequent that the grantor or his heirs could re-enter in the event of a breach of certain specified conditions and (2) a special limitation that the land was conveyed "so long as" it was used for a specified purpose. A deed to Blackacre recorded in 1975 does not mention any conditions or limitations. No notice of a claim based on them has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Were the right of entry for condition broken and the possibility of reverter barred as clouds upon title?

Answer: Yes. The claims would be based on a title transaction occurring prior to 1975, the effective date of the root of title and no exception is applicable.

Problem 2: Same facts as Problem 1 except that the 1975 deed, or a subsequent deed, contained a provision that the conveyance was "subject to conditions and limitations of record." Were the rights thereby preserved?

Answer: No. Interests disclosed by the muniments of title, beginning with the root of title, are preserved but *F.S.* 712.03(1) requires that a general reference to such interests include specific identification by reference to book and page of record or by name of recorded plat.

Problem 3: The plat for Blackacre Subdivision, filed in 1925, contained a setback restriction. A deed to Lot 1 in Blackacre Subdivision recorded in 1953 contained a reference to the name of the recorded plat, as did subsequent deeds, but none specifically referenced the setback restriction. Is the setback restriction still valid as to Lot 1?

Answer: Yes. A restriction is preserved if the root or subsequent muniment of title by name refers to the recorded plat that imposed the restriction. *F.S.* 712.03(1).

Problem 4: A deed to Blackacre executed by John Doe and recorded in 1965 reserved an easement. A deed to Blackacre in 1975 does not mention the easement. John Doe and his successors in interest have used the easement, or a part thereof, since 1965. No notice of a claim based on the easement has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the easement constitute a cloud upon the title?

Answer: Yes. Easements or rights, interests, or servitudes in the nature of easements, rights of way and terminal facilities and encumbrances thereon are preserved by *F.S.* 712.03(5) so long as they, or any part thereof, are used.

Problem 5: In 1975, ABC Corp. purports to convey Blackacre to John Doe. The deed is signed by "Richard Roe as Secretary of ABC Corp." No corporate resolution was recorded authorizing Richard Roe to execute deeds on behalf of ABC Corp. Nothing affecting Blackacre has been recorded since then. Does John Doe have marketable title?

Answer: No. Although the deed is the root of title, it contains an inherent defect. Hence, the potential ownership claim of ABC Corp. is not extinguished.

Problem 6: A deed to Blackacre executed by John Doe and recorded in 1965 reserved the right of entry to explore and extract mineral rights. A deed to Blackacre in 1975 does not mention the mineral rights reservation. No notice of a claim based on the reservation has been filed. Marketability of title to Blackacre was sought to be determined in 2007. Did the right of entry to explore and extract mineral rights constitute a cloud upon the title?

Answer: No. *See* Comment, below.

Authorities & References: *F.S.* 712.03-.04 (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.22 (2007).

Comment: The "root of title" is any title transaction that describes the land sufficiently, and has been of record for more than 30 years. *F.S.* 712.01; *Marshall v. Hollywood, Inc*., 224 So. 2d 743, 750 (Fla. 4th DCA 1969), aff'd 236 So. 2d 114 (Fla. 1970) (a void deed may be a root of title); *Miami V. St. Joe Paper Co.*, 364 So. 2d 439, 446 (Fla. 1978) (wild deed); *Kittrell v. Clark*, 363 So. 2d 373, 374 (Fla. 1st DCA 1978) (probate); *Mayo v. Owens*, 367 So. 2d 1054, 1057 (Fla. 1st DCA 1979) (judgment determining heirs).

The title examiner should be vigilant for inherent defects in the root of title. *See, e.g., Marshall v. Hollywood, Inc*., *supra*, at 751 ("'defects in the muniments of title' do not refer to defects or failures in the transmission of title . . . but refer to defects in the make up or constitution of the deed or other muniments of title on which such transmission depends").

A restriction older than 30 years is preserved if the root of title or a subsequent muniment of title contains a reference to the name of the recorded plat that imposed the restriction. *Sunshine Vistas Homeowners Association v. Caruana*, 623 So. 2d 490, 492 (Fla. 1993).

The Act may operate to extinguish a county's claim of ownership. *Florida DOT v. Dardashti Properties*, 605 So. 2d 120, 122 (Fla. 4th DCA 1992) (County's interest in a strip of land held for right of way was extinguished by MRTA).

The Act operates to extinguish an otherwise valid claim of common law way of necessity when such claim was not asserted within 30 years. *H & F Land , Inc. v. Panama City-Bay County Airport and Development District*, 736 So. 2d 1167 (Fla. 1999). The Act does not, however, operate to extinguish statutory ways of necessity. *Blanton v. City of Pinellas Park,* 887 So. 2d 1224, 1233 (Fla. 2004) (receding from *H & F Land , Inc.* to the extent its dicta indicated that the Act applies to statutory ways of necessity).

Whether the Act extinguishes mineral rights is undecided and questionable since the courts have held that mineral rights constitute a separate estate from the surface rights. *See, e.g., P & N Investment Corp. v. Florida Ranchettes, Inc.*, 220 So. 2d 451, 453 (Fla. 1st DCA 1969). However, the Act, subject to its exceptions, does serve to eliminate rights of entry to explore and extract mineral rights, whether expressly reserved or implied. *Noblin v. Harbor Hills Development, L.P.*, 896 So. 2d 781, 785 (Fla. 5th DCA 1981) (the Act serves to extinguish rights of entry for exploring or mining oil, gas, minerals, or fissionable materials, unless those rights of entry or easements are excepted); *but see*, *F.S.* 704.05 (excluding the rights of entry held by the state or any of its agencies, boards or departments from operation of the Act).

See, F.S. 712.03 for a list of exceptions for rights not extinguished by the Act. *F.S.* 712.03(9), effective July 1, 2010 added another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

STANDARD 17.4

RECORDING A NOTICE TO PROTECT INTERESTS

STANDARD: RECORDING A PROPER NOTICE PROTECTS ESTATES, INTERESTS, CLAIMS, OR CHARGES FROM THE OPERATION OF THE ACT.

Problem 1: John Doe, the record owner of Blackacre, gave a mortgage to Richard Roe encumbering Blackacre, which was recorded in January, 1975. The last payment was not due until 2010. On June 15, 1975 a deed to Blackacre, which qualified as a root of title, was recorded but it contained no mention of the mortgage. Must Richard Roe file proper notice to preserve the lien of his mortgage by June 15, 2005?

Answer: Yes.

Problem 2: John Doe gave a 99-year lease to Richard Roe on July 1, 1975, at which time the lease was recorded and Roe went into possession of the land. Did John Doe need to file proper notice of his ownership prior to July 1, 2005 to preserve his interest?

Answer: No. The 1975 transaction created a leasehold interest only. John Doe's fee simple interest would not be extinguished. Filing of notice is necessary only when there is a subsequent title transaction that purports to divest the interest claimed.

Problem 3: The owner of Blackacre Subdivision as developer, joined by Blackacre Homeowners' Association, Inc., filed a Declaration of Covenants and Restrictions for Blackacre Subdivision in 1975. John Doe conveyed Lot 1 in Blackacre Subdivision to Richard Roe in 1978. That deed did not mention the covenants or restrictions, and there is no subsequent specific reference to the recording information of the covenants or restrictions in the public record. In 2009, marketability was sought to be determined as to Lot 1. Are the covenants and restrictions still valid as to Lot 1?

Answer: No, unless the Blackacre Homeowners' Association timely complied with the notice requirements under *F.S.* 712.06 or used the procedures in *F.S.* 720.403 – 720.407 to revive the expired covenants.

Authorities & References: *F.S.* 712.03(2), 712.05-.06 (2009), 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[3] (2007).

Comment: The requirements of the notice filed pursuant to the Act are set forth at *F.S.* 712.06 (2009).

The notice merely protects claims as they otherwise exist and does not validate a claim or create a new claim.

F.S. Chapter 712 was amended effective October 1, 1997, to allow homeowner associations to file a notice under MRTA to preserve covenants and restrictions. *F.S.* 712.05 (1) (2009).

If a false or fictitious claim is asserted by the filing of notice pursuant to the Act, the prevailing party may be entitled to costs and attorneys' fees arising out of any action related thereto and damages sustained as a result of the filing of such notice. *F.S.* 712.08 (2009).

STANDARD 17.5

RIGHTS OF PERSONS IN POSSESSION

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF PERSONS IN POSSESSION OF LAND.

Problem:	John Doe was grantee in a deed to Blackacre recorded in 1970, which constitutes the root of title. Nothing further appears of record, but investigation in 2002 disclosed that Richard Roe was in actual open possession of Blackacre. In 2002 did John Doe have a marketable record title to Blackacre free of the claims of Roe?
Answer:	No. The possession of Roe was inconsistent with the record title in John Doe and was therefore prima facie hostile. Upon satisfactory proof that Roe's possession was in fact held in subordination to the title of John Doe (as, for example, that he was a tenant, licensee, or an employee of Doe), Doe would have had marketable record title under the Act.
Authorities & References:	*F.S.* 712.03(03) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[4] (2007).
Comment:	No person can have a marketable record title within the meaning of the Act if the land is in the hostile possession of another person. However, the exception to the Act prevents destruction of existing rights and does not create any new rights.

STANDARD 17.6

SUBSEQUENT RECORDED INSTRUMENTS

STANDARD: THE ACT DOES NOT ELIMINATE ESTATES, INTERESTS, CLAIMS, OR CHARGES ARISING OUT OF A TITLE TRANSACTION RECORDED SUBSEQUENT TO THE RECORDING OF THE ROOT OF TITLE.

Problem 1: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1970. A deed to Blackacre recorded in 1980 recites that John Doe died intestate and the grantor therein named, Richard Roe, was the sole heir at law. In 2007, was the 1980 deed a title transaction not affected or extinguished by the Act?

Answer: Yes. Even if the facts recited are not correct, the 1980 deed is a recorded instrument that affects title to an estate or interest in land, and, hence, a title transaction. Any recorded instrument or court proceeding that affects any estate or interest in land qualifies as a title transaction.

Problem 2: John Doe is the last grantee of record in a regular chain of title to Blackacre by a deed recorded in 1970. In 1980 a stranger to the title executed a deed to Blackacre, at which time the deed was recorded. In determining marketability in 2001, did the 1980 deed constitute a title transaction subsequent to the root of title and therefore not eliminated by the Act?

Answer: Yes. With respect to wild deeds, see Title Standard 16.5 (Wild Instruments — Stranger to Stranger).

Authorities & References: *F.S.* 712.01, 712.03(4) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[5] (2007).

Comment: The fact that the Act does not eliminate an estate, interest, claim, or charge arising out of a title transaction does not bear, either favorably or unfavorably, on the validity of such estate, interest, claim, or charge. That is, the Act protects existing rights but does not create new rights.

A wild deed may constitute a root of title. *City of Miami v. St. Joe Paper Co*., 364 So.2d 439, 446 (Fla. 1978).

STANDARD 17.7

RIGHTS OF PERSONS TO WHOM
TAXES ARE ASSESSED

STANDARD: THE ACT DOES NOT ELIMINATE THE RIGHTS OF A PERSON IN WHOSE NAME THE LAND IS ASSESSED FOR THE PERIOD OF TIME THE LAND IS SO ASSESSED AND THREE YEARS THEREAFTER.

Problem 1: John Doe was grantee in a deed to Blackacre in 1970 which constitutes the root of title. Nothing further appears of record, but investigation in 2002 disclosed that Blackacre had been assessed on the county tax rolls in the name of Richard Roe since 2000. In 2002, did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: No. The rights of Roe would need to be ascertained. However, this exception to the Act only prevents destruction of existing rights and does not create any new rights so Roe would have to prove up his purported interest based on something more than the mere payment of property taxes.

Problem 2: Same facts as Problem 1 except that 2002 is the last year that Blackacre is assessed in the name of Richard Roe. In 2003 through 2005 Blackacre was assessed in the name of John Doe. In 2006 did John Doe have a marketable record title to Blackacre free of the claims of Roe?

Answer: Yes. Any rights of Roe would be preserved for only three years after Blackacre was last assessed in his name. This assumes that no other exception is applicable to preserve any rights of Roe.

Authorities & References: *F.S.* 712.03(6) (2009); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[6] (2007).

Comment: This exception necessitates examination of the county tax rolls for the three years prior to the year in which marketability is being determined.

STANDARD 17.8

RIGHTS OF THE UNITED STATES AND FLORIDA

STANDARD: THE ACT DOES NOT ELIMINATE ANY RIGHT, TITLE, OR INTEREST OF THE UNITED STATES OR FLORIDA RESERVED IN THE PATENT OR DEED BY WHICH THE UNITED STATES OR FLORIDA PARTED WITH TITLE.

Problem: John Doe executed a deed to Blackacre and it was recorded in 1960. No mention of any other interest was contained in the deed. Nothing affecting Blackacre has been recorded since. The title to Blackacre was being examined in 2005. The seller agreed to furnish an abstract of title. The buyer demanded that the seller provide an abstract which included the conveyance by which the United States or Florida parted with title. Was the demand justified?

Answer: Yes. The statutory exception includes the interests of any officers, boards, commissions or other agencies of the United States or Florida.

Authorities & References: *F.S.* 712.04 (2009).

Comment: With respect to submerged sovereignty land, see *F.S.* 712.03(7) (2009) (effective June 15, 1978); *Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 167 (Fla. 1986), cert. den. 479 U.S. 1065 (1987) (holding that the Marketable Record Title Act as originally enacted and as subsequently amended did not operate to divest the state of title to sovereignty lands, even though conveyances of state lands to private interests encompassed sovereignty lands within the lands being conveyed); 1 BOYER, FLORIDA REAL ESTATE TRANSACTIONS §14.23[7] (2007); FLORIDA REAL PROPERTY TITLE EXAMINATION AND INSURANCE §2.7 (CLE 5th ed. 2006).

Effective July 1, 2010, *F.S.* 712.03(9), created another exception for any right, title or interest held by the Trustees of the Internal Improvement Trust Fund, any water management district created under chapter 373, or the United States.

STANDARD 17.9

Reserved for future title standard

STANDARD 17.10

ELIMINATION OF HOMESTEAD

STANDARD: THE ACT CAN BE RELIED UPON TO DEFEAT A CLAIM OF HOMESTEAD AGAINST A CONVEYANCE RECORDED PRIOR TO THE ROOT OF TITLE, UNLESS CLAIMANT FILES A NOTICE WITHIN THE 30 YEAR PERIOD AFTER THE EFFECTIVE DATE OF THE ROOT OF TITLE.

Problem 1: John Doe owned and resided on Blackacre as his homestead, with his wife and two children. In 1960 John Doe conveyed Blackacre to Richard Roe for valuable consideration, but without the joinder of his wife. John Doe died in 1967, survived by his wife and children. Blackacre was conveyed by Roe in 1972. In 2005, Buyer's attorney examined the abstract and objected to the title. No notice of the homestead claim had ever been filed. Was the attorney's objection valid?

Answer: No. The 1972 deed was the root of title, and all claims prior to it are extinguished unless specifically exempted by the Act.

Problem 2: Same facts as Problem 1 except that there were no conveyances of Blackacre after the 1960 conveyance by John Doe. Was the attorney's objection valid?

Answer: Yes. The homestead claim renders the 1960 deed void and this is a defect inherent in the root of title.

Authorities & References: *F.S.* 712.01-.04 (2009); *ITT Rayonier, Inc. v. Wadsworth*, 386 F.Supp. 940, 942-43 (M.D. Fla. 1975), *accord*, *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1009 (Fla. 1977); *see also, Reid v. Bradshaw*, 302 So. 2d 180, 181 (Fla. 1st DCA 1974) (homestead rights are not eliminated by the mere passage of time).

Comment: The answer to Problem 1 would probably be the same without regard to whether the homestead owner died before or after the effective date of the root of title. *See, F.S.* 712.04. However, the *Reid v. Bradshaw* opinion casts some doubt in the latter instance, and caution should be exercised in such a situation. *See, also*, *Conservatory-City of Refuge, Inc. v. Kinney*, 514 So. 2d 377, 378 (Fla. 2d DCA 1987) (holding that the Act did not apply to eliminate homestead claims where the children's remainder interests did not vest until the homestead owner died, which was after the asserted root of title).

Florida's Marketable Record Title Act "MRTA"

Presented by Melissa S. Scaletta

Attorneys' Title Fund Services, L.L.C

The Fund ALWAYS DRIVEN

History and Background

- Passed by Legislature in 1963, effective July 1, 1965
- Sponsored by RPPTL
- Several states and jurisdictions had similar laws

Goals of the Act

- Extinguish stale claims and ancient defects
- Enhance marketability of title
- A curative act and a recording act
- Simplification of title examinations

Recent Cases – New MRTA exception?

Save Calusa Trust v. St. Andrews Holdings, 193 So.3d 910 (Fla. 3rd DCA 2016), rehearing denied (Jun. 6, 2016), appeal docketed, SC16-1189 (Fla. Jul. 6, 2016), rehearing denied, 2016 WL 7474142 (Fla. Dec. 29, 2016).

- A restrictive covenant recorded in compliance with a government imposed condition of land use approval was not extinguished by MRTA.

Recent Cases

Nikorowicz v. Antiquers Aerodrome, Inc., 2017 WL 838507, Case Nos. 15-7236 and 15-7237, Division of Administrative Hearings, State of Florida (Feb. 24, 2017)

- Evaluating and disapproving Antiquers Aerodrome's, a homeowners' association, application for preservation of expired restriction covenants

Recent Cases

Sand Hill Homeowners Ass'n v. Busch, 210, So. 3d 706 (2017).

- The attorney's fees provision of MRTA "does not require deliberate untruthfulness" but includes "mistaken ideas" and claims that are not "real or genuine claims"

Recent Cases

Kahama VI, LLC v. HJH, LLC, 2016 WL 7104175, Case No. 8:11-cv-2029-T-30 TBM, M.D. Fla. (Dec. 6, 2016).

The Court held that as a consequence of MRTA the title insurer's obligation to search title is limited by root of title. The case involved a claim against Old Republic National Title Insurance Company and the rights of the public to access and use the beach.

How MRTA Works

- **A defect or interest must be recorded prior to**
- **A transaction that is at least 30 years old**
- **There must be no repetition of the problem or claim on the record in or subsequent to the transaction**
- **But beware of the technical requirements MRTA, technical statutory exceptions and judicially imposed exceptions**

Root of Title

- **A title transaction**
- **Must describe the land sufficiently**
- **Must have been of record for at least 30 years**
- **Must describe the interest to be conveyed**

Wild Deed as Root of Title

Lehmann v. Cocoanut Bayou Ass'n,157 So.3d 289 (Fla. 2nd DCA 2014)

- A 1952 wild deed qualified as a root of title
- Subsequently recorded competing deeds triggered statutory exceptions to MRTA
- Result - the Association was unable to quiet title in reliance upon MRTA

Matters not eliminated by MRTA

MRTA will not eliminate

Matters disclosed by or inherent in the root of title §712.03(1) F.S.

Barney v. Silver Lakes Acres Property, 159 So.3d 181 (Fla. 5th DCA 2015)

Recitation in vesting deeds providing deeds were subject to obligations of the lot owners at Silver Lakes Acres to the Silver Lakes Property Owners Association preserved amendment to restrictions including assessments.

MRTA will not eliminate

Matters preserved by the filing of a proper notice under MRTA § 712.03(2), F.S.

Procedures and notices §§ 712.05 and 712.06, F.S.

- 2010 revision to § 712.06(3)(b), F.S. authorizes publication notice
- 2014 revision to § 712.05(1) clarifies that HOAs and clerk of circuit court need not comply with § 712.06(3) notice requirements

Southfields of Palm Beach Polo and Country Club Homeowners Ass'n, Inc. v. McCollough, 111 So. 3d 283 (Fla. 4th DCA 2013).

Trial court's injunction requiring the board of directors of the HOA to preserve its declaration pursuant to sec. 712.05, F.S. was affirmed.

MRTA will not eliminate

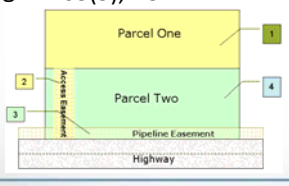
Persons in possession
§712.03(3), F.S.

MRTA will not eliminate

Matters arising out of title transactions recorded subsequent to the root of title
§712.03(4), F.S.

MRTA will not eliminate

Recorded or unrecorded easements, or rights, licenses or servitudes in the nature of easements, rights of way and terminal facilities, so long as any part is used.
§712.03(5), F.S.



Clipper Bay Investments, LLC v. FDOT, 117 So. 3d 7 (Fla. 1st DCA 2013)

The First DCA considered *FDOT v Dardashti, 605 So. 2d 120* (Fla. 4th DCA 1992) and *Water Control District of South Brevard v. Davidson*, 638 So. 2d 521 (Fla. 5th DCA 1994) and held that the easement/right of way in use exception to MRTA set forth in sec. 712.03(5), F.S. can be applied to land held in fee.

DOT Mid-Peninsula Realty Inv. Group, LLC, 162 So.3d 218 (Fla. 2nd DCA 2015)

The Second DCA adopted the position set forth in *Dardashti*, rejecting the application of sec. 712.03(5), F.S. to rights of way held in fee and certified the conflict on the issue with *Dardashti* and *Davidson*.

FDOT v. Clipper Bay Investments, LLC, 160 So.3d 858 (2015)

Subsequently, the Florida Supreme Court resolved that the sec. 712.03(5), F.S. exception is applicable to rights of way held in fee awarding the disputed fee property claimed by Clipper Bay to the FDOT.

MRTA will not eliminate

Rights of any person assessed on the county tax rolls, for so long as assessed and three years after it is last assessed in that person's name

§712.03(6), F.S.

MRTA will not eliminate

Sovereignty lands

§712.03(7), F.S.

MRTA will not eliminate

State and Federal Reservations

§712.04., F.S.

MRTA will not eliminate

Reserved State and Federal Interests, AND

New exception in 2010 sec. 712.03(9)
MRTA will not extinguish any interest of:

TIFF,
Water Management Districts, OR
The United States

MRTA will not eliminate

Duty to Search

MRTA will not eliminate

Environmental Restrictions or Covenants
§712.03(8), F.S.

MRTA will not eliminate

Mineral rights held in fee

MRTA will not eliminate

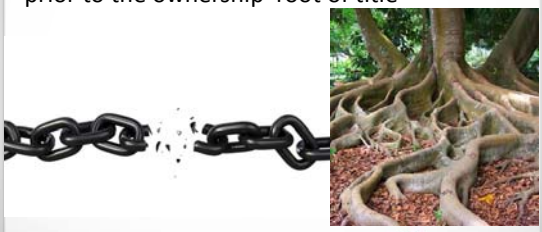
Watch for:

- **Potential future legislative amendments to MRTA?**
- **Save Calusa Trust** – restrictive covenant as a condition of land use approval – rehearing denied.

Matters that may be eliminated by MRTA

MRTA will eliminate

Fee interests and breaks in the chain of title prior to the ownership root of title



MRTA will eliminate

Section 16 lands

MRTA will eliminate

Interest held by a governmental entity

*<u>only non reserved interests before 2010</u>

New exception in 2010 sec. 712.03(9)

MRTA will not extinguish any interest of :

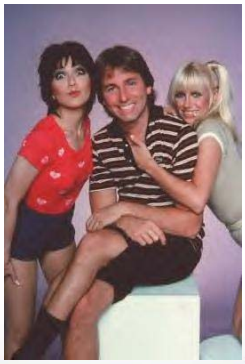
TIFF,

Water Management Districts, OR

The United States

MRTA will eliminate

Cotenants



MRTA will eliminate

Remaindermen

MRTA will eliminate

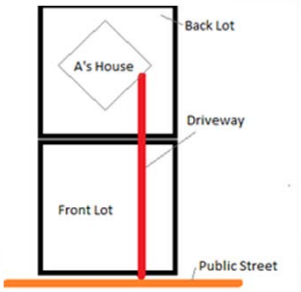
Restrictions and reverters

MRTA will eliminate

Easements - if not in use

MRTA will eliminate

Easements of necessity



Village Carver Phase I, LLC v. Fidelity Nat'l Title Ins., Co., 128 So.3d 107 (Fla. 3d DCA 2013).

The court held that easements permitting the relatives and descendants of a person buried in a cemetery, pursuant to sec. 704.08, F.S., egress for visitation do not create an interest in real property and may be eliminated by MRTA.

MRTA will eliminate

Rights of entry to explore for mineral rights

MRTA will eliminate

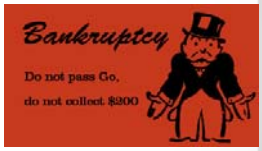
Oil, gas and mineral leases

MRTA will eliminate

Homestead rights which predate the root of title

MRTA will eliminate

Rights of bankrupt's creditors



Examining Title After MRTA

COMMON MISCONCEPTION:

Examiner only needs to examine the last 30 years of the record

This is wrong!

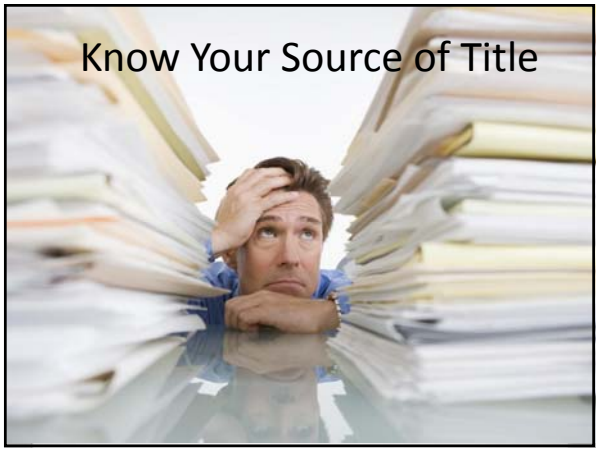
Applying MRTA to Examining Title

- Obtain an entire abstract, EPR
- Skim backwards to root of title
- Divide the abstract
- Post root - examine in detail
- Pre root - see exceptions to MRTA

Examination of matters outside of public records

- Tax rolls for the past 3 years
- Parties in possession
- Easements in use

Know Your Source of Title



Curative Acts and Statutes of Limitations

Acknowledgments and Witnesses
- Secs. 95.231(1) and 694.08, F.S.

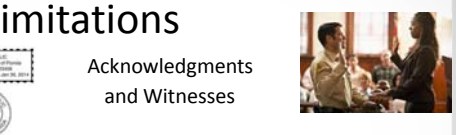
Limitation to Enforcement of Mortgage
- Sec. 95.281(1)(b),F.S.

Minerals, Oil and Gas –Right of Entry
- Sec. 270.11, F.S.

Restrictions and Reverters
- Sec. 689.18, F.S.

Tax Titles
- Secs. 95.191 and 95.192, F.S.

Curative Acts and Statutes of Limitations



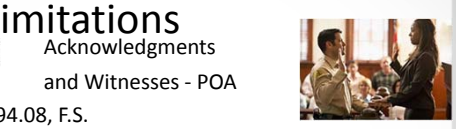
Acknowledgments and Witnesses

- Sec. 95.231(1), F.S.
- Five years after recordation of a deed, will or POA*
- Absent fraud, adverse possession or pending litigation
- Cures lack of witnesses and defects in acknowledgments
- 2013 amendment adds recorded powers of attorney

Curative Acts and Statutes of Limitations

Holder's of interests in real property affected by the 2013 amendment to sec. 95.231(1), F.S. must file a notice of their interest by October 1, 2014.

Curative Acts and Statutes of Limitations



Acknowledgments and Witnesses - POA

- Sec. 694.08, F.S.
- Seven years after recordation of POA or deed and one subsequent conveyance
- Cures lack of witnesses, seal, failure to convey "as" correct capacity, defects in acknowledgments and complete lack of power of attorney
- Absent fraud, adverse possession or pending litigation

Sec. 95.231(2), F.S.

Can cure technical defects in an otherwise valid deed, but may not be applied to eliminate breaks in the chain of title.

Davis v. Hinson, 67 So.3d 1107 (Fla. 1st DCA 2011).

Hardy v. Shell, 144 So.3d 668 (Fla. 2nd DCA 2014).

Curative Acts and Statutes of Limitations

Minerals, Oil and Gas

- Sec. 270.11, F.S.
- Releases right of entry on parcels of less than 20 acres
- Mineral interests must be held by the state of Florida Trustees of the Internal Improvement Trust Fund (TIFF) or the State Board of Education

Curative Acts and Statutes of Limitations

Limitation on Enforcement of Mortgage

- Sec. 95.281, F.S. – a statute of repose
- 5 years from final maturity date if ascertainable from the record
- If maturity date is not ascertainable from the record, 20 years from recordation, unless
- the holder of the mortgage records evidence of the maturity date sec. 95.281(1)(b),F.S.

Curative Acts and Statutes of Limitations

Restrictions and Reverters

- Sec. 689.18, F.S.
- Reverter is not valid for more than 21 years from the date of deed
- Sec. 689.18(5), F.S. excludes conveyances to governmental, educational, literary, scientific, religious, public utility, public transportation, charitable or non profit associations

Curative Acts and Statutes of Limitations

Restrictions and Reverters

Sec. 712.07, F.S., this law (MRTA) shall not vitiate any curative statute

Curative Acts and Statutes of Limitations

Tax Titles

- Sec. 95.192, F.S., no action by former owner 4 years after issuance of tax deed if the former owner has not been in possession for 1 year after tax deed
- Sec. 95.191, F.S., no action my former owner 4 years after the tax deed holder has gone into actual possession

TITLE INSURANCE

By

Karla J. Staker, Maitland

TITLE INSURANCE POLICIES, A SYNOPSIS

I. TITLE POLICY BASICS

The American Land Title Association (ALTA) develops the standard title insurance policy and endorsement forms used in the United States. From time to time, ALTA creates new policy and endorsement forms and revises existing forms.

In Florida, title insurance forms must be approved by the Florida Office of Insurance Regulation (OIR). Frequently, the OIR requires minor modifications to the ALTA forms, to tailor them to Florida law and practices or to make them more consumer friendly.

The two main title policy forms currently used in Florida, which were approved by the OIR in 2011, are:

ALTA 2006 Owner's Policy 6-17-06 (with Florida modifications), which will be referred to in the materials as the "Owner's Policy."

ALTA 2006 Loan Policy 6-17-06 (with Florida modifications), which will be referred to as the "Loan Policy."

The footer at the bottom of each page of a title insurance policy shows the type or version of the policy. Additionally, the footer shows that the policy form is copyrighted by ALTA and that use of the form is restricted to ALTA licensees and ALTA members.

Owner's Policies and Loan Policies are comprised of five sections.

Sections of Policy
Schedule A
Schedule B
Covered Risks
Exclusions from Coverage
Conditions

II. SCHEDULE A

Schedule A contains the following numbered (and unnumbered) items:

OWNER'S POLICY	LOAN POLICY
Name & Address of Title Insurance Company **File no.** **Address Reference (for informational purposes only)** **Policy no.** **Amount of Insurance** **Premium** **Date of Policy**	**Name & Address of Title Insurance Company** **File no.** **Address Reference (for informational purposes only)** **Policy no.** **Amount of Insurance** **Premium** **Date of Policy**
1. Name of Insured	**1. Name of Insured**
2. Estate or interest in Land being insured	**2. Estate or interest in Land being insured**
3. In Whom Title is vested	**3. In Whom Title is vested**
4. Description of Land	**4. Description of Insured Mortgage**
	5. Description of Land
	6. List of ALTA endorsements to incorporate by reference

III. SCHEDULE B

Schedule B of the Owner's Policy and Schedule B-I of Loan Policy list all of the exceptions to coverage under the policy. The standard (or general) exceptions are boilerplate language included in every commitment to issue a title insurance policy. Typically, these standard exceptions do not appear on the final policy because they will be removed by disbursement of funds, a satisfactory seller's/borrower's affidavit and a survey that meets the required Florida technical standards. The remaining exceptions will be specific to the Land.[1]

The Loan Policy has an additional schedule, Schedule B-II. This schedule lists the items that are subordinate to the Insured Mortgage. For example, when the Insured Mortgage is a purchase money mortgage, a judgment lien against the purchaser will typically be listed as a subordinate matter on Schedule B-II of the Loan Policy, although it will be shown as an exception on Schedule B of the Owner's Policy.

IV. COVERED RISKS

The Covered Risks are the coverages provided by the Owner's and Loan Policies. The Owner's Policy has 10 Covered Risks, while the Loan Policy has 14. Numbers 1-8 of the Covered Risks are identical in the Owner's and Loan Policies.

Both the Owner's and Loan Policies are considered indemnity policies, which means that the Insured must suffer a loss from a title defect before the title insurer is obligated to pay. Further, the policies insure as of the Date of Policy and, therefore, do not insure against matters occurring after the Date of Policy. Therefore, the policies insure, as of Date of Policy, against loss or damage sustained by reason of the following covered risks.

	OWNER'S POLICY COVERED RISKS	LOAN POLICY COVERED RISKS
1.	Title being vested other than stated in Schedule A.	Title being vested other than stated in Schedule A.
2.	Any defect in or lien or encumbrance on the Title, including encroachments and other survey matters.	Any defect in or lien or encumbrance on the Title, including encroachments and other survey matters.
3.	Unmarketable Title (defined in Condition 1(k) of Owner's Policy).	Unmarketable Title (defined in Condition 1(m) of Loan Policy).

[1] Terms which are defined in the Conditions section of the Owner's Policy and Loan Policy are capitalized in these materials.

4.	No right of access to and from the Land (insures legal, not physical access).	No right of access to and from the Land (insures legal, not physical access).
5.	Violation or enforcement of land use regulations if notice of violation or enforcement is recorded.	Violation or enforcement of land use regulations if notice of violation or enforcement is recorded.
6.	Exercise of police powers if notice of enforcement is recorded.	Exercise of police powers if notice of enforcement is recorded.
7.	Exercise of eminent domain powers if notice describing Land is recorded.	Exercise of eminent domain powers if notice describing Land is recorded.
8.	Governmental taking occurred and is binding on bona fide purchaser without Knowledge.	Governmental taking occurred and is binding on bona fide purchaser without Knowledge.
9.	Limited creditors' rights coverage for (a) the avoidance of a transfer of the Title prior to the transaction vesting title in the Insured because the prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency or similar creditors' right laws; or (b) the conveyance into the Insured constituting a preferential transfer.	Invalidity or unenforceability of the Insured Mortgage.
10.	Gap coverage as to matters covered by 1 – 9 above occurring after Date of Policy and prior to recording of vesting deed.	Lack of priority of the Insured Mortgage over any other lien or encumbrance.
11.		Lack of priority of the Insured Mortgage over construction liens for work performed or contracted for before the Date of Policy or after the Date of Policy where construction is financed by the insured loan.

12.		Invalidity or enforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A.
13.		Limited creditors' rights coverage.
14.		Gap coverage as to matters covered by 1 – 13 above occurring after Date of Policy and prior to recording of Insured Mortgage.

V. EXCLUSIONS FROM COVERAGE ("EXCLUSIONS")

The Exclusions modify and limit the coverages afforded by the Covered Risks. In other words, the Exclusions are matters that are not covered by the Owner's and Loan Policies. The Owner's Policy has 5 Exclusions and the Loan Policy has 7 exclusions.

	OWNER'S POLICY EXCLUSIONS	LOAN POLICY EXCLUSIONS
1.	Police power and any law, ordinance, permit, governmental regulation (including building and zoning) relating to occupancy, use or enjoyment of Land; improvements on the Land, subdivision of the Land or environmental protection. *This exclusion does not apply under Covered Risks 5 and 6, if notice of the violation or enforcement is recorded in the Public Records.*	Police power and any law, ordinance, permit, governmental regulation (including building and zoning) relating to occupancy, use or enjoyment of Land; improvements on the Land, subdivision of the Land or environmental protection. *This exclusion does not apply under Covered Risks 5 and 6 if notice of the violation or enforcement is recorded in the Public Records.*
2.	Rights of eminent domain. *This exclusion does not apply under Covered Risks 7 and 8 if notice of the exercise of right of eminent domain is recorded or a governmental taking occurred and is binding on bona fide purchaser without Knowledge.*	Rights of eminent domain. *This exclusion does not apply under Covered Risks 7 and 8 if notice of the exercise of right of eminent domain is recorded or a governmental taking occurred and is binding on bona fide purchaser without Knowledge.*

3.	Defects, liens, encumbrances, adverse claims or other matters: (a) Created, suffered, assumed or agreed to by the Insured; (b) Not Known to the Company, not recorded in the Public Records, but Known to the Insured; (c) Resulting in no loss or damage to the Insured; (d) Attaching or created subsequent to the Date of Policy; or (e) Resulting in loss or damage that would not have been sustained if the Insured paid value for the Title.	Defects, liens, encumbrances, adverse claims or other matters: (a) Created, suffered, assumed or agreed to by the Insured; (b) Not Known to the Company, not recorded in the Public Records, but Known to the Insured; (c) Resulting in no loss or damage to the Insured; (d) Attaching or created subsequent to the Date of Policy; or (e) Resulting in loss or damage that would not have been sustained if the Insured paid value for the mortgage.
4.	Any claim under federal bankruptcy, state insolvency or similar creditors' rights laws that the insured transaction is a fraudulent conveyance or preferential transfer, except as provided for in Covered Risk 9.	Unenforceability of a lien resulting from the failure of the Insured to follow local business laws.
5.	Any lien for real estate taxes or assessments recorded between Date of Policy and date of recording of the insured instrument.	Invalidity or unenforceability of the mortgage based upon usury, consumer credit protection or truth-in-lending laws.
6.		Any claim under federal bankruptcy, state insolvency or similar creditors' rights laws that the insured transaction is a fraudulent conveyance or preferential transfer, except as provided for in Covered Risk 13(b).
7.		Any lien for real estate taxes or assessments recorded between Date of Policy and date of recording of the insured instrument.

VI. CONDITIONS

The Conditions provide a roadmap for how the Owner's Policy and Loan Policy work. The Owner's Policy has 18 Conditions and the Loan Policy has 17 Conditions.

A. Definition of Terms (Condition 1 of Owner's Policy and Loan Policy)

Condition 1 of Owner's Policy and Loan Policy contains the definitions set forth in the table below.

TERMS	OWNER'S POLICY	LOAN POLICY
Amount of Insurance	1(a) Amount shown in Schedule A, which may be: • Modified by Endorsement. • Increased by 10% if insurer fails to cure a defect (Condition 8(b) – Determination and Extent of Liability). • Decreased by Conditions 10 (Reduction of Insurance; Reduction or Termination of Liability) and 11 (Liability Noncumulative).	1(a) Amount shown in Schedule A, which may be: • Modified by Endorsement. • Increased by 10% if insurer fails to cure a defect (Condition 8(b) – Determination and Extent of Liability). • Decreased by Condition 10 – Reduction of Insurance; Reduction or Termination of Liability).
Date of Policy	1(b) Date shown in Schedule A.	1(b) Date shown in Schedule A.
Entity	1(c) Entity Includes corporation, partnership, trust, LLC, etc.	1(c) Entity includes corporation, partnership, trust, LLC, etc.
Indebted-ness	N/A	1(d) Obligation secured by the Mortgage. May include principal, interest, some construction loan advances, prepayment premiums, foreclosure expenses, taxes, insurance and costs of preventing waste of improvements.
Insured	1(d) Includes the Insured and • Successors to title by operation of law, as opposed to by purchase.	1(e) Includes the Insured and • Owner and successor owners of Indebtedness (exception for obligor in Condition 12(c)).

	• Successors by dissolution, merger, consolidation, reorganization, etc. • Successors by conversion to another Entity. • Grantee under a deed without payment of actual consideration if the Insured wholly owns the grantee entity; the grantee wholly owns the named Insured; or the grantee is a trustee or beneficiary of the trust created by the named Insured for estate planning.	• Person having control over electronic record (i.e., MERS). • Successors by dissolution, merger, etc. • Successors by conversion to another Entity. • Grantee under deed without payment of actual consideration if the Insured wholly owns grantee, the grantee wholly owns the named Insured, or the grantee is wholly owned by an affiliated Entity of the named Insured and both are wholly owned by the same person/Entity. • Any government agency that is an insurer/guarantor under an insurance contract/guaranty insuring/guaranteeing the Indebtedness secured by the Insured Mortgage.
Insured Claimant	1(e) Insured claiming a loss or damage.	1(f) Insured claiming a loss or damage.
Insured Mortgage	N/A	1(g) Mortgage described in Schedule A.
Knowledge/ Known	1(f) Actual knowledge (not constructive knowledge via public records).	1(h) Actual knowledge (not constructive knowledge via public records).
Land	1(g) Real property described in Schedule A.	1(i) Real property described in Schedule A.
Mortgage	1(h) Mortgage or other security instrument.	1(j) Mortgage or other security instrument.
Public Records	1(i) Records that provide constructive notice to a bona fide purchaser without Knowledge.	1(k) Records that provide constructive notice to a bona fide purchaser without knowledge.
Title	1(j) Estate/interest shown in Schedule A.	1(l) Estate/interest shown in Schedule A.

Unmarket-able Title	1(k) An alleged defect in title that would allow a proposed purchaser or lessee to be released from the obligation to purchase/lease (if the contract requires marketable title).	1(m) An alleged defect in title that would allow a proposed purchaser or lessee to be released from the obligation to purchase/lease (if the contract requires marketable title).

B. Continuation of Insurance (Condition 2 of Owner's Policy and Loan Policy)

Coverage under the Owner's Policy and Loan Policy continues if the Insured:

- Retains an estate or interest in the Land;
- Holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured; OR
- Has liability by reason of warranties in any transfer or conveyance of the Title.

It is a common misconception that a Loan Policy "converts" to an Owner's Policy if the lender acquires title to the property by foreclosure or deed in lieu. The Loan Policy, by its terms, continues to provide certain important coverages to the Insured lender who takes title through a foreclosure action or deed-in-lieu. However, it does not convert to an Owner's Policy.

C. Notice of Claim to be Given by Insured Claimant (Condition 3 of Owner's and Loan Policies)

The Insured (under both the Owner's Policy and Loan Policy) is required to promptly notify the title insurer in writing of a claim. The Insurer's liability is reduced to the extent of the prejudice the title insurer suffers from the Insured's failure to promptly notify it of a claim.

D. Proof of Loss (Condition 4 of Owner's and Loan Policies)

For proof of loss under both the Owner's and Loan Policies, the Company may require the Insured Claimant to furnish a signed proof of loss describing the defect, the loss and the basis for calculating the loss.

E. Defense and Prosecution of Actions (Condition 5 of Owner's and Loan Policies)

• Upon written request by the Insured, and subject to Condition 7 (Options to Pay or Otherwise Settle Claims; Termination of Liability), the Company at its expense and without unreasonable delay shall provide for the defense of an Insured in litigation in which any third party asserts a

claim. The Company also has the right to select counsel to represent the Insured (subject to the Insured's right to object for reasonable cause). The Company is not responsible for fees and costs borne by counsel hired directly by the Insured.

• The Company may institute or prosecute any action or proceeding to establish title or prevent/reduce loss or damage to the Insured. The exercise of these rights is not an admission of liability or waiver of any of the Company's rights under the policy.

• The Company has the right to pursue any litigation to a final determination, including bringing prosecution of an appeal.

F. Duty of Insured Claimant to Cooperate (Condition 6 of Owner's and Loan Policies)

The Insured must cooperate with the Company whenever the Company is prosecuting or defending an action, including an appeal.

G. Options to Pay or Otherwise Settle Claims; Termination of Liability (Condition 7 of Owner's and Loan Policies)

The wording differs in the Owner's and Loan Policies in this section. Under the Owner's Policy, the Company has the following options:

- Pay the Amount of Insurance (together with attorneys' fees and expenses). Liability under the policy terminates once this payment is made.

- Pay or settle the claim with the Insured owner or with parties other than the Insured. For example, rather than paying the Insured, the Company could satisfy a judgment lien by directly paying the judgment creditor.

Under the Loan Policy, the Company has the following options:

- Pay the Amount of Insurance (together with attorneys' fees and expenses) or purchase the Indebtedness (together with the attorneys' fees and expenses). When the Company purchases the Indebtedness, the Insured shall transfer to the Company the Indebtedness and the Insured Mortgage.

- Pay or settle with parties other than the Insured lender or with the Insured. For example, rather than paying the Insured, the Company could satisfy a prior mortgage recorded before the Insured Mortgage by directly paying the prior lender.

For both the Owner's Policy and Loan Policy, if the title insurer is unsuccessful in establishing the Title or lien of the Insured Mortgage, through litigation or otherwise, the Amount of Insurance will be increased by 10% AND the Insured Claimant has the right to have the loss/damage determined at the time the claim was made OR as of the date it is settled and paid.

H. Determination and Extent of Liability (Condition 8 of Owner's and Loan Policies)

Owner's Policy Liability: Lesser of Amount in Schedule A or diminution in value.
Loan Policy Liability: Lesser of Amount in Schedule A; Amount of Indebtedness; diminution in value; or, if government agency is Insured Claimant, the amount it paid to acquire Title or the Insured Mortgage to satisfy its insurance contract/guaranty.

I. Limitation of Liability (Condition 9 of Owner's and Loan Policies)

If the Company establishes Title or removes the defect in a reasonably diligent manner, it will have performed its obligations under the policy and is not liable for any loss or damage caused to the Insured. If the Insured voluntarily settles a claim or suit without the Company's prior written consent, the Company is not liable.

J. Reduction of Insurance; Reduction or Termination of Liability (Condition 10 of Owner's and Loan Policies)

Payments made under the owner's policy (excluding costs, attorneys' fees and expenses) reduce the Amount of Insurance of the Owner's Policy. Payments made under the loan policy (excluding costs, attorneys' fees and expenses) reduce the Amount of Insurance of the Loan Policy. However, payments made prior to the acquisition of title do not reduce the Amount of Insurance except to the extent that the payments reduce the Indebtedness. The voluntary satisfaction or release of the Insured Mortgage terminates the Company's liability, except as provided in Condition 2 (Continuation of Insurance after acquisition of Title by an Insured).

K. Liability Noncumulative (Condition 11 of Owner's Policy)

The Amount of Insurance is reduced by any amount the Company pays to satisfy a mortgage encumbering the subject property (certain conditions must be met).

L. Payment of Loss (Condition 12 of Owner's Policy and Condition 11 of Loan Policy)

Once liability and amount of loss is establishment, payment is to be made within 30 days.

M. Rights of Recovery Upon Payment or Settlement (Condition 13 of Owner's Policy and Condition 12 of Loan Policy)

Upon payment of a claim, the Insurer is subrogated to the rights of the Insured against any person or property. In other words, the Insurer steps into the shoes of the Insured and can sue or otherwise recover against third parties.

N. Arbitration (Condition 14 of Owner's Policy and Condition 13 of Loan Policy)

This Condition addresses the availability of arbitration in the event of a dispute between the title insurer and the Insured regarding the scope of coverage and all matters covered by the title policy. Significantly, in Florida, the standard arbitration clause of the ALTA policy forms has been modified to provide that arbitration is may be demanded upon mutual agreement of both the title insurer and the Insured.

O. Liability Limited To This Policy; Policy Entire Contract (Condition 15 of Owner's Policy and Condition 14 of Loan Policy)

The policy together with endorsements constitutes the entire contract. Any claim, whether or not based upon negligence, is restricted to the policy.

P. Severability (Condition 16 of Owner's Policy and Condition 15 of Loan Policy)

If any provision of the policy is held invalid or unenforceable, the remaining provisions of the policy continue to be in full force and effect.

Q. Choice of Law; Forum (Condition 17 of Owner's Policy and Condition 16 of Loan Policy)

The laws of the jurisdiction where the Land is located are applicable. The Insured must bring any litigation or proceeding in a state or federal court in the United States or its territories having appropriate jurisdiction.

R. Notices, Where Sent (Condition 18 of Owner's Policy and Condition 17 of Loan Policy

Any notice of claim and any other notice must be given in writing to the Company at the address listed.

Title Insurance Policies, a Synopsis

Karla Staker, Esq.

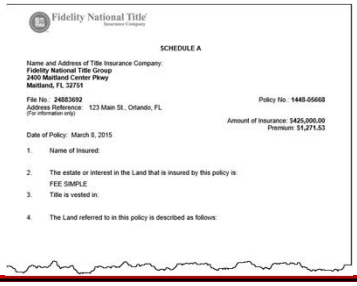
Primary Policies Issued in Florida

- ALTA 2006 Owners Policy (6-17-06) (with FL modifications)
- ALTA 2006 Loan Policy (6-17-06) (with FL modifications)

5 Parts of Policy

- Schedule A
- Schedule B
- Covered Risks
- Exclusions from Coverage
- Conditions

Schedule A



Fidelity National Title
Insurance Company

SCHEDULE A

Name and Address of Title Insurance Company:
Fidelity National Title Group
2400 Maitland Center Pkwy
Maitland, FL 32751

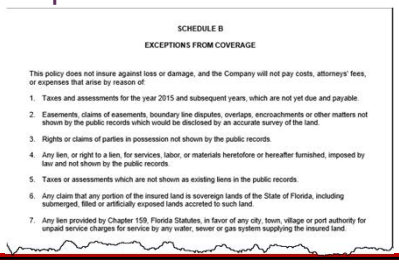
File No.: **24883692** Policy No.: **1448-05668**
Address Reference: 123 Main St., Orlando, FL
(For information only)

Amount of Insurance: **$425,000.00**
Premium: **$1,271.53**

Date of Policy: March 8, 2015

1. Name of Insured:
2. The estate or interest in the Land that is insured by this policy is:
   FEE SIMPLE
3. Title is vested in:
4. The Land referred to in this policy is described as follows:

Schedule B
Exceptions from Coverage



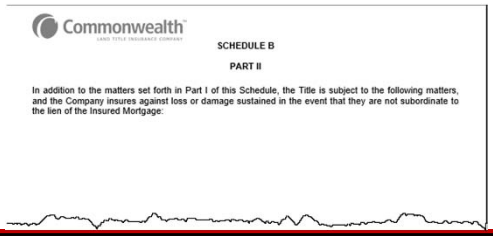
SCHEDULE B

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage, and the Company will not pay costs, attorneys' fees, or expenses that arise by reason of:

1. Taxes and assessments for the year 2015 and subsequent years, which are not yet due and payable.
2. Easements, claims of easements, boundary line disputes, overlaps, encroachments or other matters not shown by the public records which would be disclosed by an accurate survey of the land.
3. Rights or claims of parties in possession not shown by the public records.
4. Any lien, or right to a lien, for services, labor, or materials heretofore or hereafter furnished, imposed by law and not shown by the public records.
5. Taxes or assessments which are not shown as existing liens in the public records.
6. Any claim that any portion of the insured land is sovereign lands of the State of Florida, including submerged, filled or artificially exposed lands accreted to such land.
7. Any lien provided by Chapter 159, Florida Statutes, in favor of any city, town, village or port authority for unpaid service charges for service by any water, sewer or gas system supplying the insured land.

Schedule B-II of Loan Policy
Subordinate Matters



Commonwealth
LAND TITLE INSURANCE COMPANY

SCHEDULE B

PART II

In addition to the matters set forth in Part I of this Schedule, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage:

Covered Risks
Owners & Loan Policies

1. Title being vested other than stated in Schedule A.
2. Any defect in or lien or encumbrance on the title. (Including encroachments and other survey matters.)
3. Unmarketable Title.
4. No right of access.

Covered Risks
Owners & Loan Policies

5. Violation or enforcement of land use regulations <u>if notice is recorded.</u>
6. Exercise of police powers <u>if notice is recorded</u>.
7. Exercise of eminent domain powers <u>if notice is recorded.</u>
8. Government taking occurred and is binding on bona fide purchaser without knowledge.

Covered Risk 9 Owners Policy & 13 Loan Policy

9./13. Limited creditors' rights coverage:

(a) Fraudulent or preferential transfer in chain of title.
(Ex: Party A ➞ Party B ➞ Party C (Insured))

(b) Deed or mortgage to Insured is a preferential transfer b/c of failure of its recording in Official Records
(i) to be timely; or
(ii) to impart notice.

Covered Risk 10 Owners Policy & 14 Loan Policy

10./14. Gap coverage as to matters occurring after Date of Policy and prior to recordation of insured instrument.

(Typically, DOP is the recording date & time of recording. But, DOP could be the date of the closing, in which case Covered Risk 10 would apply.)

Additional Covered Risks Loan Policy

As to the Insured Mortgage:

9. Invalidity or unenforceability.
10. Lack of priority over other liens.
11. Lack of priority over construction liens for work performed or contracted for before DOP or after DOP where construction is financed by the insured loan.
12. Invalidity or unenforceability of any assignment shown in Schedule A.

Covered Risk Comparison

Owners Policy	Loan Policy
1.– 4. Title vested; defects, liens & encumbrances; unmarketable title; access	1.– 4. Same as owners policy
5.– 8. Limited coverage for government regulations/actions	5.– 8. Same as owners policy
9. Limited creditors' rights coverage	9.– 12. Mortgage coverage
10. Gap coverage	13. Limited creditors' rights coverage
	14. Gap coverage

Exclusions From Coverage

3. Defects, liens, encumbrances, adverse claims or other matters

(a) Created, suffered, assumed, or agreed to by Insured
(b) Not Known to the Company, not recorded in the Public Records, but Known to the Insured Claimant
(c) Resulting in no loss or damage
(d) Attaching or created subsequent to Date of Policy
(e) Resulting in loss that would not have been sustained if the Insured Claimant had paid value

Exclusions From Coverage

Owners Policy

1.– 2. Government regulations, police power, eminent domain (Except as stated in Covered Risks)

4. Creditors' rights coverage (Except as stated in Covered Risks)

5. Taxes/assessments between Date of Policy and date of recording

Loan Policy

1.– 2. Same as owners policy

4. Doing business laws

5. Usury, truth-in-lending

6. Creditors' rights coverage (Except as stated in Covered Risks)

7. Taxes/assessments between DOP and date of recording

Conditions Section Highlights

Definition of Insured

Test Your Knowledge

Val Valentine was issued a 2006 Owner's Policies insuring her title to Redacre. Later, she conveyed Redacre without consideration to the trustee of a trust she created for estate planning purposes. Is the trustee an "Insured" under the policy?

More Conditions Highlights

- Continuation of coverage
- Defense and prosecution of actions
- Arbitration clause modified in Florida – Only available if Insured and Company agree

Now, Go Ace the Exam!

ETHICS

By

Lynwood F. Arnold Jr., Tallahassee

Frederick W. Jones, Winter Park

Ethical Considerations for Real Estate Attorneys

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Other Resources

1. FinCEN GTO NOTICE (FR/BAR residential contracts, Rev. 4/17, Standard I.(iii))
2. F.A.C. 69B-186.010 Unlawful Inducements Related to Title Insurance Transactions, interpretation of 626.9541(1)(h)3., F.S.
3. "The Engagement Letter and the Residential Real Estate Attorney" by Scott A. Marcus, Esq., *ActionLine*, Summer 2016
4. Answer Sheet

Ethical Considerations for Real Estate Attorneys

Lynwood Arnold, Jr. , *Tallahassee/Tampa*

Frederick W. Jones, *Winter Park*

Presentation Outline

1) Overview of Ethics and Professionalism
2) Who is your client in a real estate transaction?
3) What duties are there to a non-client?
4) Non-lawyers handling closing.
5) Fees and costs for legal services.
6) Requisite knowledge by attorney before representing a client.
7) Confidentiality of information.
8) Unlawful inducement.
9) Ethical issues when dealing with real estate brokers, lenders and referral sources.
10) Importance of an Engagement Letter in ALL Transactions.

Section1: Overview

Ethics Rules and Resources

- Rules Regulating The Florida Bar: Chapter 4, Rules of Professional Conduct
- Rule 4 Preamble – A Lawyer's Responsibilities – *overview and terminology*
- Ethics Opinions issued by the Professional Ethics Committee
- Written Ethics Opinion – Florida Bar Ethics Department staff opinions
- Oral Advisory Opinion – Ethics Hotline (800-235-8619)
- Informational Packets
- Frequently Asked Ethics Questions

Professionalism

Professionalism "standards of behavior" adopted by the Florida Supreme Court in *In re Code for Resolving Professionalism Complaints*, 116 So.3d 280 (2013), which are:

- The Oath of Admission to The Florida Bar
- The Florida Bar Creed of Professionalism
- The Florida Bar Ideals and Goals of Professionalism (now Professionalism Expectations)
- The Rules Regulating The Florida Bar
- The decisions of the Florida Supreme Court

- Code for Resolving Professionalism Complaints – *Exhibit A to above Supreme Court Case*
- The Henry Latimer Center for Professionalism

Excerpt – Professionalism Expectations

1.4 A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.

1.8 A lawyer must maintain and preserve the confidence and private information of clients. (See R. Regulating Fla. Bar 4-1.6)

1.11 A lawyer must routinely keep clients informed and attempt to resolve client concerns (See R. Regulating Fla. Bar 4-1.4). In the case of irreconcilable disagreements with a client, the lawyer must provide diligent representation until the lawyer-client relationship is formally dissolved in compliance with the law and the client's best interests. (See R. Regulating Fla. Bar 4-1.16)

Excerpt – Professionalism Expectations

2.1 A lawyer should inform every client what the lawyer expects from the client and what the client can expect from the lawyer during the term of the legal representation.

2.2 Candor and civility must be used in all oral and written communications. (See R. Regulating Fla. Bar 4-8.4(c))

2.6 A lawyer should use formal letters or emails for legal correspondence and should not use text messages to correspond with the client or opposing counsel unless mutually agreed.

Excerpt – Professionalism Expectations

2.8 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

2.11 A lawyer must not inappropriately communicate with a party represented by a lawyer (See R. Regulating Fla. Bar 4-2), including not responding "reply all" to emails.

4.3 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.4 A lawyer should counsel the client to consider settlement in good faith.

Excerpt – Professionalism Expectations

6.1 A lawyer should not impose arbitrary or unreasonable deadlines on others.

7.3 In advising a client, a lawyer should not understate or overstate achievable results or otherwise create unrealistic expectations.

7.6 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

Section 2:
Who is Your Client?

Who is your client?

Sally Broker, a friend and long-time client of yours, is the listing and selling agent of a $3M residence, using a 2016 FR/BAR Residential Contract for Sale and Purchase, between T. Turner, as Seller and A. Storm, as Buyer.

Sally has delivered the fully executed Contract to you and she has advised that the parties are requesting you conduct the Closing and issue the Owner's Title Insurance Policy. At this point, neither Seller nor Buyer have retained you nor do either of them have independent counsel in this transaction. Seller is paying for the Owner's Title Insurance Policy pursuant to the terms of the Contract.

QUESTION 2.1:

If you handle the closing on this basis, without more information, who is your client?

A. Seller

B. Buyer

C. Both

D. Sally Broker

E. The Title Insurance Underwriter

F. The "Deal" or the closing

G. No one

The Answer is…

??

[Rule 4 Preamble - A Lawyer's Responsibilities; Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-4.3 (Dealing with Unrepresented Persons); Rule 4-1.13 (Organization as Client); Ethics Opinion 89-5; Ethics Opinion 97-2]

QUESTION 2.1a:

Assume similar fact pattern, but the property being purchased is a commercial building, and Sally Broker has assisted parties in preparing the contract for this deal. Will your answer(s) change?

Ethics Opinion 89-5:

When a law firm's involvement in a real estate transaction is limited to issuing title insurance as an agent for a title insurance company, and does not involve representation of either party to the transaction…the law firm should take care that the parties understand that the firm does not represent their interests.

Ethics Opinion 97-2:

Under for the foregoing circumstances, it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction…. [S]uch representation presents a non-waivable conflict under Rule 4-1.7(a) and (b) and is ethically prohibited.

***The Florida Bar v. Teitelman*, 261 So.2d 140 (Fla. 1972)**

There is evidence in this record that petitioner prepared legal documents to be executed by the seller in furtherance of her contract to sell land, which documents were in fact employed by the seller for that purpose and petitioner charged the seller a fee therefor. This is unmistakably representing the seller.

QUESTION 2.2:

Can you ethically represent both Seller and Buyer (dual representation)?

A. No. You must represent one party or the other in a real estate transaction.

B. Yes, if you give notice to both parties.

C. Yes, with informed consent from both Seller and Buyer.

D. None of the above.

[Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4 Preamble – A Lawyer's Responsibilities; see Ethics Opinion 97-2]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a **lawyer must not represent a** client if:

the representation of 1 client will be **directly adverse to another client**; or

(2) there is a **substantial risk** that the representation of 1 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.

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), **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.

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, **the consultation must include an explanation of the implications of the common representation and the advantages and risks involved**.

Rule 4 PREAMBLE – A Lawyer's Responsibilities

"**Informed consent**" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision.

Comments to Rule 4-1.7

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors…include the duration and intimacy of the lawyer's relationship with the client or clients…functions being performed by the lawyer… likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other [as in Ethics Opinion 97-2], but **common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.**

Comments to Rule 4-1.7

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document **executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.** See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. **The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client**, to explain the **risks and advantages**, if any, of representation burdened with a conflict of interest, as well as **reasonably available alternatives**, and to afford the client **a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns**. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

QUESTION 2.3:

You were the closing agent and represented T. Turner, as Buyer, when Turner purchased this property in 2003. The current Buyer, A. Storm, has requested you represent her in this matter. Can you do it?

QUESTION 2.3: *Answer Choices*

A. No. Since Seller was your previous client you can only represent Seller.

B. Yes, with informed consent from Seller.

C. Yes, and you do not need to consent from either party, because it was totally different matter.

D. Yes, but you cannot use any information you learned from the previous representation to the disadvantage of the now Seller, nor can you reveal information relating to the previous representation.

E. B and D are correct

F. C and D are correct

[Rule 4-1.6 (Confidentiality of Information); Rule 4-1.9 (Conflict of Interest; Former Client); Rule 4 Preamble – A Lawyer's Responsibilities]

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has **formerly represented a client** in a matter must not afterwards:

(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**;

(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;

And see Comments to Rule 4-1.9

Lawyers owe confidentiality obligations to former clients, and thus information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

QUESTION 2.4:

You represent the Buyer who is getting a purchase money mortgage from First Galaxy Bank, which you regularly represent in loan transactions. The loan officer has requested that you prepare the loan documents for the Buyer's $2M purchase money mortgage. In order to comply with this request, do you need Buyer's informed consent to proceed?

QUESTION 2.4: *Answer Choices*

A. No. You don't need anyone's consent to prepare loan documents to facilitate this closing.

B. No. You cannot do it.

C. Yes, only Buyer's informed consent is required.

D. Yes, but informed consent is required from both Buyer and Lender and then only if you believe you can provide competent representation to both.

[Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-1.8 (b), (f) (Conflict of Interest; Prohibited and Other Transactions)]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a **lawyer must not represent a** client if:

the representation of 1 client will be **directly adverse to another client**; or

(2) there is a **substantial risk** that the representation of 1 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.

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(b) Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), **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.

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, **the consultation must include an explanation of the implications of the common representation and the advantages and risks involved**.

Section 3:
What Duties Are There to a Non-Client?

QUESTION 3.1:

If Sally Broker advises you that Seller has requested that you represent him, do you need anything in writing from Seller or Buyer in order to proceed?

A. No. The Contract delivered to you and the Broker's notice of Seller's request is sufficient.

B. Yes. You must have Seller's informed consent.

C. Yes. You must have a separate Engagement Letter signed by the Seller and informed consent from the Buyer, in writing.

D. None of the above.

[Rule 4-1.7 (Conflict of Interest; Current Client); Rule 4-7.18 (Direct Contact with Prospective Clients)]

RULE 4-7.18 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) Solicitation. Except as provided in subdivision (b) of this rule, **a lawyer may not**:

(1) solicit, **or permit… agents of the lawyer to solicit on the lawyer's behalf,** professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain….

(2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.

QUESTION 3.2:

Now that you represent the Seller in this transaction, what duties, if any, do you owe the Buyer?

QUESTION 3.2: *Answer Choices*

A. Advise the Buyer that you represent the Seller.

B. Be truthful regarding material facts or law relating to the transaction, while acting in your client's behalf.

C. Conduct the closing and handle all matters and disbursements in a fair and ethical manner.

D. Decline to answer any question about the Buyer's legal rights (e.g. how title should be taken, tax questions, etc.), other than to advise the Buyer to secure independent counsel

E. All of the above.

[Rule 4-4.1 (Truthfulness in Statements to Others); Rule 4-4.3 (Dealing with Unrepresented Persons); Rule 4-1.18 (Duties to Prospective Client)]

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a **lawyer shall not state or imply that the lawyer is disinterested**. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer **shall make reasonable efforts to correct the misunderstanding.** The lawyer shall **not give legal advice to an unrepresented person**, **other than the advice to secure counsel.**

Section 4:

Non-Lawyers Handling Closings

Non-Lawyers Handling Closings

You are a board certified real estate lawyer and you have a paralegal, Pam, who has been with you for 25 years and she knows more than most real estate lawyers. She has handled thousands of closings and you're comfortable with her handling this closing without your being present. You have reviewed the contract and all closing documents, and you take full responsibility for everything that Pam does.

QUESTION 4.1:

May Pam conduct the closing without your being physically present?

A. Yes.

B. Yes, so long as both Seller and Buyer consent to Pam handling the closing.

C. No. Since Pam is not an attorney, this constitutes the unauthorized practice of law.

D. Yes, but only if certain conditions are met.

[Rule 4-5.3(b) (Responsibilities Regarding Non-lawyer Assistants); *Cooperman v. West Coast Title Company,* 75 So.2d 818 (Fla. 1954); Ethics Opinions 73-43, 89-5, & 97-2]

Cooperman v. West Coast Title Company, 75 So. 2d 818 (Fla. 1954)

"…[W]hat [title companies] do to accomplish a transfer of a title or interest of such kind that a policy of title insurance is warranted are not services the performance of which amount to unauthorized practice of law."

Ethics Opinion 89-5

"…[A] law firm may permit a nonlawyer employee to conduct or attend a closing **if the following conditions are met**:

1. **A lawyer supervises and reviews all work done up to the closing**;

2. The **supervising lawyer determines** that handling or attending **the closing will be no more than a ministerial act**. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that **the client understands the closing documents in advance of the closing**;

Ethics Opinion 89-5

3. **The clients consent** to the closing being handled by a nonlawyer employee of the firm. This requires that **written disclosure** be made **to the clients that the person** who will handle or attend the closing **is a nonlawyer and will not be able to give legal advice** at the closing;

4. **The supervising lawyer is readily available**, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

5. The **nonlawyer employee will not give legal advice** at the closing **or make impromptu decisions** that should be made by the supervising lawyer."

Section 5: Fees and Costs for Legal Services

Fees and Costs for Legal Services

You represent the Seller and you charge Seller a $1200 attorney's fee. As part of the transaction you also charge the Buyer a $500 "closing fee". Both fees are shown on the settlement or closing statements signed by the Seller and Buyer, but there is no other documentation signed by the parties regarding fees.

QUESTION 5.1:

Are there any problems, ethically or otherwise?

A. No, since both parties clearly indicated their consent to the fees by signing the settlement statements.

B. No, but it would have been a problem had you charged the Buyer a $500 "attorney's" fee instead of a "closing fee".

C. Yes. You cannot charge a fee to a non-client.

D. Yes, unless both parties give their written consent to the arrangement, after full disclosure of potential conflicts of interest, but even then there is the possibility that the Buyer has now become your client.

[Rule 4-1.5 (Fees and Costs for Legal Services); Rule 4-1.7 (Conflict of Interest; Current Client); *The Florida Bar v. Teitelman*, 261 So. 2d 140 (Fla. 1972); *The Florida Bar v. Belleville*, 591 So. 2d 170 (Fla. 1991); *The Florida Bar v. Reed,* 644 So. 2d 1355 (Fla. 1994)]

The Florida Bar v. Teitelman, supra

[W]here the seller is NOT… represented, he **can be charged NO fee** by the buyer's or lender's attorney **absent** 1) a **client-attorney relationship** between such attorney and the seller, 2) together with a **full disclosure** that the attorney also represents **adverse interests** in the closing, of which full disclosure must be made to the seller of all circumstances, relationships and interests involved and 3) **after** such full **disclosure** the **attorney obtains the consent** of the seller **for** an agreed **representation** by the attorney **and** only then 4) a **fee which must be agreed upon** between them **prior to undertaking any services**. This is so basic to the practice of law and ethical considerations of the profession that the present emphatic renunciation of it should place the matter at rest for all time.

Special Note

Rule 4-1.5(e) provides that where there is not a regular representation of the client, the basis or rate of the fee and costs must be communicated at **the commencement** of the representation, preferably **in writing**. Fees can be defined as:

(1) a **Retainer** (payment to guarantee lawyer's future availability, is not a payment for past or future services); a **Non-Refundable Retainer must be deposited to operating account**, not trust account;

(2) a **Flat Fee** (payment for all legal services, may be called "nonrefundable"); a **Flat Fee must be deposited to operating account**, not trust account; or

(3) an **Advance Fee** (money paid an advance against which the lawyer will bill the client); an **Advance Fee must be deposited to trust account**, not operating account.

[see also Comment to Rule 4-1.5 under "Terms of payment"]

In a typical residential real estate closing, fees will usually be "flat fees", seldom "advance fees" and never "retainers".

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.

(1) *Duty to Communicate.* When the lawyer has not regularly represented the client, the **basis or rate of the fee and costs shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation**. A fee for legal services that is **nonrefundable** in any part **shall be confirmed in writing** and shall explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.

The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

RULE 4-1.5 FEES AND COSTS FOR LEGAL SERVICES

(2) *Definitions.*

(A) Retainer. A retainer is a sum of money paid to a lawyer to guarantee the lawyer's future availability. A retainer is not payment for past legal services and is not payment for future services.

(B) Flat Fee. A flat fee is a sum of money paid to a lawyer for all legal services to be provided in the representation. A flat fee may be termed "non-refundable."

(C) Advance Fee. An advanced fee is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.

Comments…

Terms of payment

A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. A **nonrefundable retainer or nonrefundable flat fee** is the property of the lawyer and **should not be held in trust**. If a client gives the lawyer a negotiable instrument that represents both an advance on costs plus either a nonrefundable retainer or a nonrefundable flat fee, the entire amount **should be deposited into the lawyer's trust account,** then the portion representing the earned nonrefundable retainer or nonrefundable flat fee should be withdrawn within a reasonable time. An advance fee must be held in trust until it is earned. Nonrefundable fees are, as all fees, subject to the prohibition against excessive fees.

Section 6:
Competence

Competence – Requisite Knowledge By Attorney Before Representing a Client

After the successful closing between T. Turner and A. Storm, Buyer contacts you for assistance with a hearing regarding a land use matter involving the same property which she purchased. The hearing is scheduled in 3 days. You have never handled a land use case and you're unaware of the procedural issues or evidence required, but you need the business and would like to add land use to your practice areas.

QUESTION 6.1:

Can you ethically handle this land use case for A. Storm?

A. Yes. You are familiar with the real estate principles in general and, really, how hard could it be?

B. No. Neither you nor anyone else in your firm has ever handled a land use hearing.

C. Yes you can handle the land use matter, but only if you can "get up to speed" through necessary study.

D. Yes, you can handle the land use matter, but only by associating another lawyer with established competence in the field of land use hearings.

E. Both C and D are correct

[Rule 4-1.1 (Competence)]

RULE 4-1.1 COMPETENCE

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

and see…

Professionalism Expectations

1.4 A lawyer should not enter into a lawyer-client relationship when the lawyer cannot provide competent and diligent service to the client throughout the course of the representation.

Section 7:
Confidentiality of Information

Confidentiality of Information

You represent the Seller. Buyer delivers to you an Assignment of Contract, assigning all of her right, title and interest in the Contract to "ADELE, LLC". The property is in Palm Beach County and the purchase price is $3M.

QUESTION 7.1:

You are advised by the Buyer that this will be a "cash" purchase and the Buyer will be delivering all or a portion of the closing proceeds to you at closing in the form of a cashier's check. As a result you may be required to comply with the January 13, 2016 FinCEN GTO, as extended. Do you need Buyer's informed consent to disclose her personal and confidential information to the title underwriter and the IRS in the Form 8300?

A. No

B. Yes

FR/BAR RESIDENTIAL CONTRACTS FOR SALE AND PURCHASE – Standard -5, and AS/IS-5 - Rev. 4/17

STANDARD I. CLOSING LOCATION; DOCUMENTS; AND PROCEDURE:

(iii) **FinCEN GTO NOTICE**. **If Closing Agent is required to comply with the U.S. Treasury Department's**

Financial Crimes Enforcement Network ("FinCEN") Geographic Targeting Orders ("GTOs"), then Buyer shall provide Closing Agent with the information related to Buyer and the transaction contemplated by this Contract that is required to complete IRS Form 8300, and Buyer consents to Closing Agent's collection and report of said information to IRS.

And see - **Florida Ethics Opinion 92-5**, specifically addressing an Attorney's ethical duties when an IRS Form 8300 is to be completed and filed by the Attorney.

QUESTION 7.2:

Alternatively, Buyer advises you that she is getting a $2M purchase money mortgage from an institutional lender. Do you need her informed consent to disclose her personal and confidential information to the title underwriter and the IRS in the Form 8300 pursuant to the FinCEN GTO?

A. No

B. Yes

[Rule 4-1.6 (Confidentiality of Information); Financial Crimes Enforcement Geographic Targeting Orders (FinCEN GTO); see ALTA Fact Sheet for FinCEN on thefund.com website; Ethics Opinion 92-5]

QUESTION 7.3:

As a result of the information you obtain through the closing and the Assignment of Contract, you learn that A. Storm is actually "Super Star" vocalist Adele. You are the chair of your local Chamber of Commerce Economic Development Committee and you feel the news that Adele is buying in and moving into your community might be just the boost needed for the sagging economy. You can't wait to share this information which you have learned from your closing.

Can you ethically share this information with your committee and Chamber executives?

QUESTION 7.3: *Answer Choices*

A. No, this is confidential information and cannot be disclosed no matter whom you represent

B. Yes, if you have the informed consent of your client, the Seller.

C. Yes, if you have the informed consent of the Buyer.

D. No, unless both Seller and Buyer give informed consent.

[Rule 4-1.6 (Confidentiality of Information)]

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

Section 8:
Unlawful Inducement

Unlawful Inducement

Sally Broker refers you a lot of transactions, most of which are high value. In gratitude and as an accommodation to her, you routinely order and pay for certain services or requirements related to the property, like surveys, permits, municipal lien searches, inspections, reports, Condo/HOA estoppel letters, etc.

QUESTION 8.1:

Is this a violation of Florida's Unlawful Inducement Rule and unethical?

A. Yes.

B. No.

C. No, provided you had a reasonable expectation that you would be reimbursed at closing.

[F.A.C. 69B-186.010 Unlawful Inducements Related to Title Insurance Transactions, interpretation of 626.9541(1)(h)3., F.S.; Rule 4 Preamble – A Lawyer's Responsibility; Rule 4-7.17(b) (Payment for Advertising and Promotion)]

Rule 4 PREAMBLE – A Lawyer's Responsibilities

"A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs."

RULE 4-7.17 PAYMENT FOR ADVERTISING AND PROMOTION

(b) Payment for Referrals. A lawyer may not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by these rules… the usual charges of a lawyer referral service, lawyer directory or other legal service organization….

Section 9:
Dealing with Non-Clients

Dealing with Non-Clients

(Ethical Issues When Dealing with Real Estate Brokers, Lenders and Other Referral Sources)

Sally Broker has been a great referral source for you for many years, not only sending you real estate closings, but also referring many of her clients to you to handle their other legal matters.

Sally has asked you to prepare specific contract addendum language for a deal she is brokering and has told you exactly what terms are to be included. She has not, however, given you any other details regarding the parties or the negotiations because the deal hasn't been finalized. She also wants you to put in language that the Buyer will forfeit the $100,000 deposit if Buyer fails to close for any reason.

QUESTION 9.1:

Can you ethically prepare this Addendum without getting additional information?

A. Yes, Sally has never done anything wrong so you can trust her.

B. Yes, because Sally is your client for purposes of preparing this addendum and nothing further is needed.

C. Yes, because you haven't been retained by either party in the transaction, so there is no conflict of interest.

D. No, because you don't have informed consent of Sellers and Buyer.

E. No, because you must have all the parties' names so you can determine if you have a conflict of interest.

[Rule 4-1.2(c) (Objectives and Scope of Representation); Rule 4-1.7 (Conflict of Interest; Current Clients); Rule 4-1.9 (Conflict of Interest; Former Client); Rule 4-7.17(b) (Payment for Advertising and Promotion)]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

RULE 4-7.17 PAYMENT FOR ADVERTISING AND PROMOTION

(b) Payment for Referrals. A lawyer **may not give anything of value** to a person **for recommending the lawyer's services**, except that a lawyer may pay the reasonable cost of advertising permitted by these rules… the usual charges of a lawyer referral service, lawyer directory or other legal service organization….

Section 10:
Engagement Letters

Top 10 Reasons to Use an Engagement Letter in All Transactions

1. Clearly establish the basis or rate of your fees and comply with Rule 4-1.5(e), including providing written confirmation of (a) a **flat** or nonrefundable **fee,** which **must not be** deposited into trust account, or (b) an **advance fee** which **must be** deposited into trust account. "Retainer fee" should be not used unless you are referring to a representation where the client is paying for your availability, not past or future fees.
2. Establish the scope of your representation.
3. Exclude areas for which you will not be providing representation (e.g. land use, community association issues, estate planning, asset protection, etc.).
4. Provide any required disclosures and obtain informed consents.

Top 10 Reasons to Use an Engagement Letter

5. Provide for reimbursement of any costs advance to avoid violating unlawful inducement rules of Florida Department of Financial Services.
6. Provide consent to title underwriter's audit of firm's trust account.
7. Provide consent to electronic communications.
8. Provide dispute resolution procedures, such as The Florida Bar's Fee Arbitration Program, in the event of a dispute over fees or otherwise.
9. Address client's expectations of attorney's conduct consistent with Professionalism Expectations.
10. Use the engagement letter as an opportunity to differentiate your services as an attorney (providing legal representation) from lay title company (merely confirming that the title is insurable).

Engagement Letters

["The Engagement Letter and the Residential Real Estate Attorney", by Scott A. Marcus, Esq., *ActionLine*, Summer. 2016; Rule 4-1.5(e), Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions, (Fees and Costs for Legal Services)]

Thank You!

4 PREAMBLE - A LAWYER'S RESPONSIBILITIES

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has

been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

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. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide 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. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably

sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is

obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time. If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government,

there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms "fraud" or "fraudulent" refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type

involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, these persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above. Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake these procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other information, including information in electronic form, relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other information, including information in electronic form, relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.

In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening.

[Revised: 10/01/2015]

RULE 4-1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Comment

Legal knowledge and skill

In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter, and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also rule 4-6.2.

Thoroughness and preparation

Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. The lawyer should consult with the client about the degree of thoroughness and the level of preparation required as well as the estimated costs involved under the circumstances.

Maintaining competence

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education, and comply with all continuing legal education requirements to which the lawyer is subject.

[Revised: 05/22/2006]

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

EXCERPT: 4-1.2(c)

(c) 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.

RULE 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.

(b) Factors to Be Considered in Determining Reasonable Fees and Costs.

(1) Factors to be considered as guides in determining a reasonable fee include:

(A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(F) the nature and length of the professional relationship with the client;

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;

(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;

(C) the actual amount charged by third party providers of services to the attorney;

(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

(F) the relationship and past course of conduct between the lawyer and the client.

All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable.

(c) Consideration of All Factors. In determining a reasonable fee, the time devoted to the representation and customary rate of fee need not be the sole or controlling factors. All factors set forth in this rule should be considered, and may be applied, in justification of a fee higher or lower than that which would result from application of only the time and rate factors.

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

(e) Duty to Communicate Basis or Rate of Fee or Costs to Client and Definitions.

(1) *Duty to Communicate.* When the lawyer has not regularly represented the client, the basis or rate of the fee and costs shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation. A fee for legal services that is nonrefundable in any part shall be confirmed in writing and shall explain the intent of the parties as to the nature and amount of the nonrefundable fee. The test of reasonableness found in subdivision (b), above, applies to all fees for legal services without regard to their characterization by the parties.

The fact that a contract may not be in accord with these rules is an issue between the attorney and client and a matter of professional ethics, but is not the proper basis for an action or defense by an opposing party when fee-shifting litigation is involved.

(2) *Definitions.*

(A) Retainer. A retainer is a sum of money paid to a lawyer to guarantee the lawyer's future availability. A retainer is not payment for past legal services and is not payment for future services.

(B) Flat Fee. A flat fee is a sum of money paid to a lawyer for all legal services to be provided in the representation. A flat fee may be termed "non-refundable."

(C) Advance Fee. An advanced fee is a sum of money paid to the lawyer against which the lawyer will bill the client as legal services are provided.

(f) Contingent Fees. As to contingent fees:

(1) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by subdivision (f)(3) or by law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(2) Every lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered in any action, claim, or proceeding whereby the lawyer's compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement

thereof shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer for the lawyer or for the law firm representing the client. No lawyer or firm may participate in the fee without the consent of the client in writing. Each participating lawyer or law firm shall sign the contract with the client and shall agree to assume joint legal responsibility to the client for the performance of the services in question as if each were partners of the other lawyer or law firm involved. The client shall be furnished with a copy of the signed contract and any subsequent notices or consents. All provisions of this rule shall apply to such fee contracts.

(3) A lawyer shall not enter into an arrangement for, charge, or collect:

(A) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(B) a contingent fee for representing a defendant in a criminal case.

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

(A) The contract shall contain the following provisions:

(i) "The undersigned client has, before signing this contract, received and read the statement of client's rights and understands each of the rights set forth therein. The undersigned client has signed the statement and received a signed copy to refer to while being represented by the undersigned attorney(s)."

(ii) "This contract may be cancelled by written notification to the attorney at any time within 3 business days of the date the contract was signed, as shown below, and if cancelled the client shall not be obligated to pay any fees to the attorney for the work performed during that time. If the attorney has advanced funds to others in representation of the client, the attorney is entitled to be reimbursed for such amounts as the attorney has reasonably advanced on behalf of the client."

(B) The contract for representation of a client in a matter set forth in subdivision (f)(4) may provide for a contingent fee arrangement as agreed upon by the client and the lawyer, except as limited by the following provisions:

(i) Without prior court approval as specified below, any contingent fee that exceeds the following standards shall be presumed, unless rebutted, to be clearly excessive:

a. Before the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action:

1. 33 1/3% of any recovery up to $1 million; plus
2. 30% of any portion of the recovery between $1 million and $2 million; plus
3. 20% of any portion of the recovery exceeding $2 million.

b. After the filing of an answer or the demand for appointment of arbitrators or, if no answer is filed or no demand for appointment of arbitrators is made, the expiration of the time period provided for such action, through the entry of judgment:

1. 40% of any recovery up to $1 million; plus
2. 30% of any portion of the recovery between $1 million and $2 million; plus
3. 20% of any portion of the recovery exceeding $2 million.

c. If all defendants admit liability at the time of filing their answers and request a trial only on damages:

1. 33 1/3% of any recovery up to $1 million; plus
2. 20% of any portion of the recovery between $1 million and $2 million; plus
3. 15% of any portion of the recovery exceeding $2 million.

d. An additional 5% of any recovery after institution of any appellate proceeding is filed or post-judgment relief or action is required for recovery on the judgment.

(ii) If any client is unable to obtain an attorney of the client's choice because of the limitations set forth in subdivision (f)(4)(B)(i), the client may petition the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for approval of any fee contract between the client and an attorney of the client's choosing. Such authorization shall be given if the court determines the client has a complete understanding of the client's rights and the terms of the proposed contract. The application for authorization of such a

contract can be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service on the defendant and this aspect of the file may be sealed. A petition under this subdivision shall contain a certificate showing service on the client and, if the petition is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive under subdivisions (a) and (b).

(iii) Subject to the provisions of 4-1.5(f)(4)(B)(i) and (ii) a lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for medical liability whereby the compensation is dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall provide the language of article I, section 26 of the Florida Constitution to the client in writing and shall orally inform the client that:

a. Unless waived, in any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000 of all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement, or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants.

b. If a lawyer chooses not to accept the representation of a client under the terms of article I, section 26 of the Florida Constitution, the lawyer shall advise the client, both orally and in writing of alternative terms, if any, under which the lawyer would accept the representation of the client, as well as the client's right to seek representation by another lawyer willing to accept the representation under the terms of article I, section 26 of the Florida Constitution, or a lawyer willing to accept the representation on a fee basis that is not contingent.

c. If any client desires to waive any rights under article I, section 26 of the Florida Constitution in order to obtain a lawyer of the client's choice, a client may do so by waiving such rights in writing, under oath, and in the form provided in this rule. The lawyer shall provide each client a copy of the written waiver and shall afford each client a

full and complete opportunity to understand the rights being waived as set forth in the waiver. A copy of the waiver, signed by each client and lawyer, shall be given to each client to retain, and the lawyer shall keep a copy in the lawyer's file pertaining to the client. The waiver shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements provided in 4-1.5(f)(5).

WAIVER OF THE CONSTITUTIONAL RIGHT PROVIDED IN ARTICLE I, SECTION 26 OF THE FLORIDA CONSTITUTION

On November 2, 2004, voters in the State of Florida approved The Medical Liability Claimant's Compensation Amendment that was identified as Amendment 3 on the ballot. The amendment is set forth below:

The Florida Constitution

Article I, Section 26 is created to read "Claimant's right to fair compensation." In any medical liability claim involving a contingency fee, the claimant is entitled to receive no less than 70% of the first $250,000 in all damages received by the claimant, exclusive of reasonable and customary costs, whether received by judgment, settlement or otherwise, and regardless of the number of defendants. The claimant is entitled to 90% of all damages in excess of $250,000, exclusive of reasonable and customary costs and regardless of the number of defendants. This provision is self-executing and does not require implementing legislation.

The undersigned client understands and acknowledges that (initial each provision):

_____ I have been advised that signing this waiver releases an important constitutional right; and

_____ I have been advised that I may consult with separate counsel before signing this waiver; and that I may request a hearing before a judge to further explain this waiver; and

_____ By signing this waiver I agree to an **increase in the attorney fee** that might otherwise be owed if the constitutional provision listed above is not waived. Without prior court approval, the increased fee that I agree to may be up to the maximum contingency fee percentages set forth in Rule Regulating The Florida Bar 4-1.5(f)(4)(B)(i). Depending on the circumstances of my case, the maximum agreed upon fee may range from 33 1/3% to 40% of any recovery up to $1 million; plus 20% to 30% of any portion of the recovery between $1 million and $2 million; plus 15% to 20% of any recovery exceeding $2 million; and

_____ I have three (3) business days following execution of this waiver in which to cancel this waiver; and

_____ I wish to engage the legal services of the lawyers or law firms listed below in an action or claim for medical liability the fee for which is contingent in whole or in part upon the successful prosecution or settlement thereof, but I am unable to do so because of the provisions of the constitutional limitation set forth above. In consideration of the lawyers' or law firms' agreements to represent me and my desire to employ the lawyers or law firms listed below, I hereby knowingly, willingly, and voluntarily waive any and all rights and privileges that I may have under the constitutional provision set forth above, as apply to the contingency fee agreement only. Specifically, I waive the percentage restrictions that are the subject of the constitutional provision and confirm the fee percentages set forth in the contingency fee agreement; and

____ I have selected the lawyers or law firms listed below as my counsel of choice in this matter and would not be able to engage their services without this waiver; and I expressly state that this waiver is made freely and voluntarily, with full knowledge of its terms, and that all questions have been answered to my satisfaction.

ACKNOWLEDGMENT BY CLIENT FOR PRESENTATION TO THE COURT

The undersigned client hereby acknowledges, under oath, the following:

I have read and understand this entire waiver of my rights under the constitutional provision set forth above.

I am not under the influence of any substance, drug, or condition (physical, mental, or emotional) that interferes with my understanding of this entire waiver in which I am entering and all the consequences thereof.

I have entered into and signed this waiver freely and voluntarily.

I authorize my lawyers or law firms listed below to present this waiver to the appropriate court, if required for purposes of approval of the contingency fee agreement. Unless the court requires my attendance at a hearing for that purpose, my lawyers or law firms are authorized to provide this waiver to the court for its consideration without my presence.

Dated this _____ day of _____, ____.

By: _____
CLIENT

Sworn to and subscribed before me this _____ day of _____, _____ by _____, who is personally known to me, or has produced the following identification: _____.

_____
Notary Public

My Commission Expires:

Dated this _____ day of _____, ____.

By: _____
ATTORNEY

(C) Before a lawyer enters into a contingent fee contract for representation of a client in a matter set forth in this rule, the lawyer shall provide the client with a copy of the statement of client's rights and shall afford the client a full and complete opportunity to understand each of the rights as set forth therein. A copy of the statement, signed by both the client and the lawyer, shall be given to the client to retain and the lawyer shall keep a copy in the client's file. The statement shall be retained by the lawyer with the written fee contract and closing statement under the same conditions and requirements as subdivision (f)(5).

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply to the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract

may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint, or within 10 days of execution of a contract for division of fees when new counsel is engaged. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and, if the application is denied, a copy of the petition and order denying the petition shall be served on The Florida Bar in Tallahassee by the member of the bar who filed the petition. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

(5) In the event there is a recovery, upon the conclusion of the representation, the lawyer shall prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm. A copy of the closing statement shall be executed by all participating lawyers, as well as the client, and each shall receive a copy. Each participating lawyer shall retain a copy of the written fee contract and closing statement for 6 years after execution of the closing statement. Any contingent fee contract and closing statement shall be available for inspection at reasonable times by the client, by any other person upon judicial order, or by the appropriate disciplinary agency.

(6) In cases in which the client is to receive a recovery that will be paid to the client on a future structured or periodic basis, the contingent fee percentage shall be calculated only on the cost of the structured verdict or settlement or, if the cost is unknown, on the present money value of the structured verdict or settlement, whichever is less. If the damages and the fee are to be paid out over the long term future schedule, this limitation does not apply. No attorney may negotiate separately with the defendant for that attorney's fee in a structured verdict or settlement when separate negotiations would place the attorney in a position of conflict.

(g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

(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.

(i) Arbitration Clauses. A lawyer shall not make an agreement with a potential client prospectively providing for mandatory arbitration of fee disputes without first advising that person in writing that the potential client should consider obtaining independent legal advice as to the advisability of entering into an agreement containing such mandatory arbitration provisions. A lawyer shall not make an agreement containing such mandatory arbitration provisions unless the agreement contains the following language in bold print:

NOTICE: This agreement contains provisions requiring arbitration of fee disputes. Before you sign this agreement you should consider consulting with another lawyer about the advisability of making an agreement with mandatory arbitration requirements. Arbitration proceedings are ways to resolve disputes without use of the court system. By entering into agreements that require arbitration as the way to resolve fee disputes, you give up (waive) your right to go to court to resolve those disputes by a judge or jury. These are important rights that should not be given up without careful consideration.

STATEMENT OF CLIENT'S RIGHTS FOR CONTINGENCY FEES

Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:

1. There is no legal requirement that a lawyer charge a client a set fee or a percentage of money recovered in a case. You, the client, have the right to talk with your lawyer about the proposed fee and to bargain about the rate or percentage as in any other contract. If you do not reach an agreement with 1 lawyer you may talk with other lawyers.

2. Any contingent fee contract must be in writing and you have 3 business days to reconsider the contract. You may cancel the contract without any reason if you notify your lawyer in writing within 3 business days of signing the contract. If you withdraw from the contract within the first 3 business days, you do not owe the lawyer a fee although you may be responsible for the lawyer's actual costs during that time. If your lawyer begins to represent you, your lawyer may not withdraw from the case without giving you notice, delivering necessary papers to you, and allowing you time to employ another lawyer. Often, your lawyer must obtain court approval before withdrawing from a case. If you discharge your lawyer without good cause after the 3-day period, you may have to pay a fee for work the lawyer has done.

3. Before hiring a lawyer, you, the client, have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours. If you ask, the lawyer should provide information about special training or knowledge and give you this information in writing if you request it.

4. Before signing a contingent fee contract with you, a lawyer must advise you whether the lawyer intends to handle your case alone or whether other lawyers will be helping with the case. If your lawyer intends to refer the case to other lawyers, the lawyer should tell you what kind of fee sharing arrangement will be made with the other lawyers. If lawyers from different law firms will represent you, at least 1 lawyer from each law firm must sign the contingent fee contract.

5. If your lawyer intends to refer your case to another lawyer or counsel with other lawyers, your lawyer should tell you about that at the beginning. If your lawyer takes the case and later decides to refer it to another lawyer or to associate with other lawyers, you should sign a new contract that includes the new lawyers. You, the client, also have the right to consult with each lawyer working on your case and each lawyer is legally responsible to represent your interests and is legally responsible for the acts of the other lawyers involved in the case.

6. You, the client, have the right to know in advance how you will need to pay the expenses and the legal fees at the end of the case. If you pay a deposit in advance for costs, you may ask reasonable questions about how the money will be or has been spent and how much of it remains unspent. Your lawyer should give a reasonable estimate about future necessary costs. If your lawyer agrees to lend or advance you money to prepare or research the case, you have the right to know periodically how much money your lawyer has spent on your behalf. You also have the right to decide, after consulting with your lawyer, how much money is to be spent to prepare a case. If you pay the expenses, you have the right to decide how much to spend. Your lawyer should also inform you whether the fee will be based on the gross amount recovered

or on the amount recovered minus the costs.

7. You, the client, have the right to be told by your lawyer about possible adverse consequences if you lose the case. Those adverse consequences might include money that you might have to pay to your lawyer for costs and liability you might have for attorney's fees, costs, and expenses to the other side.

8. You, the client, have the right to receive and approve a closing statement at the end of the case before you pay any money. The statement must list all of the financial details of the entire case, including the amount recovered, all expenses, and a precise statement of your lawyer's fee. Until you approve the closing statement your lawyer cannot pay any money to anyone, including you, without an appropriate order of the court. You also have the right to have every lawyer or law firm working on your case sign this closing statement.

9. You, the client, have the right to ask your lawyer at reasonable intervals how the case is progressing and to have these questions answered to the best of your lawyer's ability.

10. You, the client, have the right to make the final decision regarding settlement of a case. Your lawyer must notify you of all offers of settlement before and after the trial. Offers during the trial must be immediately communicated and you should consult with your lawyer regarding whether to accept a settlement. However, you must make the final decision to accept or reject a settlement.

11. If at any time you, the client, believe that your lawyer has charged an excessive or illegal fee, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar, call 850/561-5600, or contact the local bar association. Any disagreement between you and your lawyer about a fee can be taken to court and you may wish to hire another lawyer to help you resolve this disagreement. Usually fee disputes must be handled in a separate lawsuit, unless your fee contract provides for arbitration. You can request, but may not require, that a provision for arbitration (under Chapter 682, Florida Statutes, or under the fee arbitration rule of the Rules Regulating The Florida Bar) be included in your fee contract.

_____

Client Signature

_____

Date

_____

Attorney Signature

_____

Date

Comment

Bases or rate of fees and costs

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. The conduct of the lawyer and client in prior relationships is relevant when analyzing the requirements of this rule. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee but only those that are directly involved in its computation. It is sufficient, for example, to state the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. Although hourly billing or a fixed fee may be the most common bases for computing fees in an area of practice, these may not be the only bases for computing fees. A lawyer should, where appropriate, discuss alternative billing methods with the client. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

General overhead should be accounted for in a lawyer's fee, whether the lawyer charges hourly, flat, or contingent fees. Filing fees, transcription, and the like should be charged to the client at the actual amount paid by the lawyer. A lawyer may agree with the client to charge a reasonable amount for in-house costs or services. In-house costs include items such as copying, faxing, long distance telephone, and computerized research. In-house services include paralegal services, investigative services, accounting services, and courier services. The lawyer should sufficiently communicate with the client regarding the costs charged to the client so that the client understands the amount of costs being charged or the method for calculation of those costs. Costs appearing in sufficient detail on closing statements and approved by the parties to the transaction should meet the requirements of this rule.

Rule 4-1.8(e) should be consulted regarding a lawyer's providing financial assistance to a client in connection with litigation.

Lawyers should also be mindful of any statutory, constitutional, or other requirements or restrictions on attorneys' fees.

In order to avoid misunderstandings concerning the nature of legal fees, written documentation is required when any aspect of the fee is nonrefundable. A written contract provides a method to resolve misunderstandings and to protect the lawyer in the event of continued misunderstanding. Rule 4-1.5(e) does not require the client to sign a written document memorializing the terms of the fee. A letter from the lawyer to the client setting forth the basis or rate of the fee and the intent of the parties in regard to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.

All legal fees and contracts for legal fees are subject to the requirements of the Rules Regulating The Florida Bar. In particular, the test for reasonableness of legal fees found in rule 4-1.5(b) applies to all types of legal fees and contracts related to them.

Terms of payment

A lawyer may require advance payment of a fee but is obliged to return any unearned portion. See rule 4-1.16(d). A lawyer is not, however, required to return retainers that, pursuant to an agreement with a client, are not refundable. A nonrefundable retainer or nonrefundable flat fee is the property of the lawyer and should not be held in trust. If a client gives the lawyer a negotiable instrument that represents both an advance on costs plus either a nonrefundable retainer or a nonrefundable flat fee, the entire amount should be deposited into the lawyer’s trust account, then the portion representing the earned nonrefundable retainer or nonrefundable flat fee should be withdrawn within a reasonable time. An advance fee must be held in trust until it is earned. Nonrefundable fees are, as all fees, subject to the prohibition against excessive fees.

A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to rule 4-1.8(i). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer’s special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client’s interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the

client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Prohibited contingent fees

Subdivision (f)(3)(A) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony, or other financial orders because such contracts do not implicate the same policy concerns.

Contingent fees are prohibited in criminal and certain domestic relations matters. In domestic relations cases, fees that include a bonus provision or additional fee to be determined at a later time and based on results obtained have been held to be impermissible contingency fees and therefore subject to restitution and disciplinary sanction as elsewhere stated in these Rules Regulating The Florida Bar.

Contingent fee regulation

Subdivision (e) is intended to clarify that whether the lawyer's fee contract complies with these rules is a matter between the lawyer and client and an issue for professional disciplinary enforcement. The rules and subdivision (e) are not intended to be used as procedural weapons or defenses by others. Allowing opposing parties to assert noncompliance with these rules as a defense, including whether the fee is fixed or contingent, allows for potential inequity if the opposing party is allowed to escape responsibility for their actions solely through application of these rules.

Rule 4-1.5(f)(4) should not be construed to apply to actions or claims seeking property or other damages arising in the commercial litigation context.

Rule 4-1.5(f)(4)(B) is intended to apply only to contingent aspects of fee agreements. In the situation where a lawyer and client enter a contract for part noncontingent and part contingent attorney's fees, rule 4-1.5(f)(4)(B) should not be construed to apply to and prohibit or limit the noncontingent portion of the fee agreement. An attorney could properly charge and retain the noncontingent portion of the fee even if the matter was not successfully prosecuted or if the noncontingent portion of the fee

exceeded the schedule set forth in rule 4-1.5(f)(4)(B). Rule 4-1.5(f)(4)(B) should, however, be construed to apply to any additional contingent portion of such a contract when considered together with earned noncontingent fees. Thus, under such a contract a lawyer may demand or collect only such additional contingent fees as would not cause the total fees to exceed the schedule set forth in rule 4-1.5(f)(4)(B).

The limitations in rule 4-1.5(f)(4)(B)(i)c are only to be applied in the case where all the defendants admit liability at the time they file their initial answer and the trial is only on the issue of the amount or extent of the loss or the extent of injury suffered by the client. If the trial involves not only the issue of damages but also such questions as proximate cause, affirmative defenses, seat belt defense, or other similar matters, the limitations are not to be applied because of the contingent nature of the case being left for resolution by the trier of fact.

Rule 4-1.5(f)(4)(B)(ii) provides the limitations set forth in subdivision (f)(4)(B)(i) may be waived by the client upon approval by the appropriate judge. This waiver provision may not be used to authorize a lawyer to charge a client a fee that would exceed rule 4-1.5(a) or (b). It is contemplated that this waiver provision will not be necessary except where the client wants to retain a particular lawyer to represent the client or the case involves complex, difficult, or novel questions of law or fact that would justify a contingent fee greater than the schedule but not a contingent fee that would exceed rule 4-1.5(b).

Upon a petition by a client, the trial court reviewing the waiver request must grant that request if the trial court finds the client: (a) understands the right to have the limitations in rule 4-1.5(f)(4)(B) applied in the specific matter; and (b) understands and approves the terms of the proposed contract. The consideration by the trial court of the waiver petition is not to be used as an opportunity for the court to inquire into the merits or details of the particular action or claim that is the subject of the contract.

The proceedings before the trial court and the trial court's decision on a waiver request are to be confidential and not subject to discovery by any of the parties to the action or by any other individual or entity except The Florida Bar. However, terms of the contract approved by the trial court may be subject to discovery if the contract (without court approval) was subject to discovery under applicable case law or rules of evidence.

Rule 4-1.5 (f)(4)(B)(iii) is added to acknowledge the provisions of Article 1, Section 26 of the Florida Constitution, and to create an affirmative obligation on the part of an attorney contemplating a contingency fee contract to notify a potential client with a medical liability claim of the limitations provided in that constitutional provision. This addition to the rule is adopted prior to any judicial interpretation of the meaning or scope of the constitutional provision and this rule is not intended to make any

substantive interpretation of the meaning or scope of that provision. The rule also provides that a client who wishes to waive the rights of the constitutional provision, as those rights may relate to attorney's fees, must do so in the form contained in the rule.

Rule 4-1.5(f)(6) prohibits a lawyer from charging the contingent fee percentage on the total, future value of a recovery being paid on a structured or periodic basis. This prohibition does not apply if the lawyer’s fee is being paid over the same length of time as the schedule of payments to the client.

Fees that provide for a bonus or additional fees and that otherwise are not prohibited under the Rules Regulating The Florida Bar can be effective tools for structuring fees. For example, a fee contract calling for a flat fee and the payment of a bonus based on the amount of property retained or recovered in a general civil action is not prohibited by these rules. However, the bonus or additional fee must be stated clearly in amount or formula for calculation of the fee (basis or rate). Courts have held that unilateral bonus fees are unenforceable. The test of reasonableness and other requirements of this rule apply to permissible bonus fees.

Division of fee

A division of fee is a single billing to a client covering the fee of 2 or more lawyers who are not in the same firm. A division of fee facilitates association of more than 1 lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Subject to the provisions of subdivision (f)(4)(D), subdivision (g) permits the lawyers to divide a fee on either the basis of the proportion of services they render or by agreement between the participating lawyers if all assume responsibility for the representation as a whole and the client is advised and does not object. It does require disclosure to the client of the share that each lawyer is to receive. Joint responsibility for the representation entails the obligations stated in rule 4-5.1 for purposes of the matter involved.

Disputes over fees

Since the fee arbitration rule (chapter 14) has been established by the bar to provide a procedure for resolution of fee disputes, the lawyer should conscientiously consider submitting to it. Where law prescribes a procedure for determining a lawyer’s fee, for example, in representation of an executor or administrator, a class, or a person entitled to a reasonable fee as part of the measure of damages, the lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

Referral fees and practices

A secondary lawyer shall not be entitled to a fee greater than the limitation set forth in rule 4-1.5(f)(4)(D)(ii) merely because the lawyer agrees to do some or all of the following: (a) consults with the client; (b) answers interrogatories; (c) attends depositions; (d) reviews pleadings; (e) attends the trial; or (f) assumes joint legal responsibility to the client. However, the provisions do not contemplate that a secondary lawyer who does more than the above is necessarily entitled to a larger percentage of the fee than that allowed by the limitation.

The provisions of rule 4-1.5(f)(4)(D)(iii) only apply where the participating lawyers have for purposes of the specific case established a co-counsel relationship. The need for court approval of a referral fee arrangement under rule 4-1.5(f)(4)(D)(iii) should only occur in a small percentage of cases arising under rule 4-1.5(f)(4) and usually occurs prior to the commencement of litigation or at the onset of the representation. However, in those cases in which litigation has been commenced or the representation has already begun, approval of the fee division should be sought within a reasonable period of time after the need for court approval of the fee division arises.

In determining if a co-counsel relationship exists, the court should look to see if the lawyers have established a special partnership agreement for the purpose of the specific case or matter. If such an agreement does exist, it must provide for a sharing of services or responsibility and the fee division is based upon a division of the services to be rendered or the responsibility assumed. It is contemplated that a co-counsel situation would exist where a division of responsibility is based upon, but not limited to, the following: (a) based upon geographic considerations, the lawyers agree to divide the legal work, responsibility, and representation in a convenient fashion. Such a situation would occur when different aspects of a case must be handled in different locations; (b) where the lawyers agree to divide the legal work and representation based upon their particular expertise in the substantive areas of law involved in the litigation; or (c) where the lawyers agree to divide the legal work and representation along established lines of division, such as liability and damages, causation and damages, or other similar factors.

The trial court's responsibility when reviewing an application for authorization of a fee division under rule 4-1.5(f)(4)(D)(iii) is to determine if a co-counsel relationship exists in that particular case. If the court determines a co-counsel relationship exists and authorizes the fee division requested, the court does not have any responsibility to review or approve the specific amount of the fee division agreed upon by the lawyers and the client.

Rule 4-1.5(f)(4)(D)(iv) applies to the situation where appellate counsel is retained during the trial of the case to assist with the appeal of the case. The percentages set forth in subdivision (f)(4)(D) are to be applicable after appellate counsel's fee is

established. However, the effect should not be to impose an unreasonable fee on the client.

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.

[Revised: 10/01/2015]

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer must not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer must reveal confidential 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 confidential 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 on conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with the Rules Regulating The Florida Bar; or

(6) to detect and resolve conflicts of interest between lawyers in different firms arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal confidential information, a lawyer may first exhaust all appellate remedies.

(e) Inadvertent Disclosure of Information. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(f) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer must disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(c) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of confidential information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based on experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose confidential information except as authorized or required by the Rules Regulating The Florida Bar or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See

also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In this situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer must reveal information in order to prevent these consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in

present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the lawyer to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure this advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (c)(5) permits this disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct

or representation of a former client. The lawyer's right to respond arises when an assertion of complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges complicity, so that the defense may be established by responding directly to a third party who has made the assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. A charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession.

Detection of Conflicts of Interest

Subdivision (c)(6) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, for example, when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See comment to rule 4-1.17. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. The disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, subdivision (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules.

Any information disclosed under this subdivision may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. This subdivision does not restrict the use of information acquired by means independent of any disclosure under this subdivision. This subdivision also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, for example, when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Acting Competently to Preserve Confidentiality

Paragraph (e) 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 4-1.1, 4-5.1 and 4-5.3. 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 (e) 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, for example state and federal laws that govern data privacy or that impose notification requirements on 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 the comment to rule 4-5.3.

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, for example state and federal laws that govern data privacy, is beyond the scope of these rules.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

[Revised: 10/01/2015]

RULE 4-1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer must not represent a client if:

(1) the representation of 1 client will be directly adverse to another client; or

(2) there is a substantial risk that the representation of 1 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.

(b)Informed Consent. Notwithstanding the existence of a conflict of interest under subdivision (a), 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.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood, Adoption, or Marriage. A lawyer related by blood, adoption, or marriage to another lawyer as parent, child, sibling, or spouse must not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except with the client's informed consent, confirmed in writing or clearly stated on the record at a hearing.

(e)Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the

representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to

accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivisions (b) and (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is

permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

The purpose of Rule 4-1.7(d) is to prohibit representation of adverse interests, unless informed consent is given by the client, by a lawyer related to another lawyer by blood, adoption, or marriage as a parent, child, sibling, or spouse so as to include those with biological or adopted children and within relations by marriage those who

would be considered in-laws and stepchildren and stepparents.

Representation of insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time afterwards. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Revised: 06/01/2014]

RULE 4-1.8 CONFLICT OF INTEREST; PROHIBITED AND OTHER TRANSACTIONS

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Using Information to Disadvantage of Client. A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these rules.

(c) Gifts to Lawyer or Lawyer's Family. A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

(d) Acquiring Literary or Media Rights. Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) Compensation by Third Party. A lawyer shall not accept 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.

(g) Settlement of Claims for Multiple Clients. A lawyer who represents 2 or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee.

(j) Representation of Insureds. When a lawyer undertakes the defense of an insured other than a governmental entity, at the expense of an insurance company, in regard to

an action or claim for personal injury or for property damages, or for death or loss of services resulting from personal injuries based upon tortious conduct, including product liability claims, the Statement of Insured Client's Rights shall be provided to the insured at the commencement of the representation. The lawyer shall sign the statement certifying the date on which the statement was provided to the insured. The lawyer shall keep a copy of the signed statement in the client's file and shall retain a copy of the signed statement for 6 years after the representation is completed. The statement shall be available for inspection at reasonable times by the insured, or by the appropriate disciplinary agency. Nothing in the Statement of Insured Client's Rights shall be deemed to augment or detract from any substantive or ethical duty of a lawyer or affect the extradisciplinary consequences of violating an existing substantive legal or ethical duty; nor shall any matter set forth in the Statement of Insured Client's Rights give rise to an independent cause of action or create any presumption that an existing legal or ethical duty has been breached.

STATEMENT OF INSURED CLIENT'S RIGHTS

An insurance company has selected a lawyer to defend a lawsuit or claim against you. This Statement of Insured Client's Rights is being given to you to assure that you are aware of your rights regarding your legal representation. This disclosure statement highlights many, but not all, of your rights when your legal representation is being provided by the insurance company.

1. *Your Lawyer.* If you have questions concerning the selection of the lawyer by the insurance company, you should discuss the matter with the insurance company and the lawyer. As a client, you have the right to know about the lawyer's education, training, and experience. If you ask, the lawyer should tell you specifically about the lawyer's actual experience dealing with cases similar to yours and give you this information in writing, if you request it. Your lawyer is responsible for keeping you reasonably informed regarding the case and promptly complying with your reasonable requests for information. You are entitled to be informed of the final disposition of your case within a reasonable time.

2. *Fees and Costs.* Usually the insurance company pays all of the fees and costs of defending the claim. If you are responsible for directly paying the lawyer for any fees or costs, your lawyer must promptly inform you of that.

3. *Directing the Lawyer.* If your policy, like most insurance policies, provides for the insurance company to control the defense of the lawsuit, the lawyer will be taking instructions from the insurance company. Under such policies, the lawyer cannot act solely on your instructions, and at the same time, cannot act contrary to your interests. Your preferences should be communicated to the lawyer.

4. *Litigation Guidelines.* Many insurance companies establish guidelines governing

how lawyers are to proceed in defending a claim. Sometimes those guidelines affect the range of actions the lawyer can take and may require authorization of the insurance company before certain actions are undertaken. You are entitled to know the guidelines affecting the extent and level of legal services being provided to you. Upon request, the lawyer or the insurance company should either explain the guidelines to you or provide you with a copy. If the lawyer is denied authorization to provide a service or undertake an action the lawyer believes necessary to your defense, you are entitled to be informed that the insurance company has declined authorization for the service or action.

5. *Confidentiality.* Lawyers have a general duty to keep secret the confidential information a client provides, subject to limited exceptions. However, the lawyer chosen to represent you also may have a duty to share with the insurance company information relating to the defense or settlement of the claim. If the lawyer learns of information indicating that the insurance company is not obligated under the policy to cover the claim or provide a defense, the lawyer's duty is to maintain that information in confidence. If the lawyer cannot do so, the lawyer may be required to withdraw from the representation without disclosing to the insurance company the nature of the conflict of interest which has arisen. Whenever a waiver of the lawyer-client confidentiality privilege is needed, your lawyer has a duty to consult with you and obtain your informed consent. Some insurance companies retain auditing companies to review the billings and files of the lawyers they hire to represent policyholders. If the lawyer believes a bill review or other action releases information in a manner that is contrary to your interests, the lawyer should advise you regarding the matter.

6. *Conflicts of Interest.* Most insurance policies state that the insurance company will provide a lawyer to represent your interests as well as those of the insurance company. The lawyer is responsible for identifying conflicts of interest and advising you of them. If at any time you believe the lawyer provided by the insurance company cannot fairly represent you because of conflicts of interest between you and the company (such as whether there is insurance coverage for the claim against you), you should discuss this with the lawyer and explain why you believe there is a conflict. If an actual conflict of interest arises that cannot be resolved, the insurance company may be required to provide you with another lawyer.

7. *Settlement.* Many policies state that the insurance company alone may make a final decision regarding settlement of a claim, but under some policies your agreement is required. If you want to object to or encourage a settlement within policy limits, you should discuss your concerns with your lawyer to learn your rights and possible consequences. No settlement of the case requiring you to pay money in excess of your policy limits can be reached without your agreement, following full disclosure.

8. *Your Risk.* If you lose the case, there might be a judgment entered against you for more than the amount of your insurance, and you might have to pay it. Your lawyer has a duty to advise you about this risk and other reasonably foreseeable adverse results.

9. *Hiring Your Own Lawyer.* The lawyer provided by the insurance company is representing you only to defend the lawsuit. If you desire to pursue a claim against the other side, or desire legal services not directly related to the defense of the lawsuit against you, you will need to make your own arrangements with this or another lawyer. You also may hire another lawyer, at your own expense, to monitor the defense being provided by the insurance company. If there is a reasonable risk that the claim made against you exceeds the amount of coverage under your policy, you should consider consulting another lawyer.

10. *Reporting Violations.* If at any time you believe that your lawyer has acted in violation of your rights, you have the right to report the matter to The Florida Bar, the agency that oversees the practice and behavior of all lawyers in Florida. For information on how to reach The Florida Bar call (850) 561-5839 or you may access the Bar at www.FlaBar.org.

IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS,
PLEASE ASK FOR AN EXPLANATION.

CERTIFICATE

The undersigned hereby certifies that this Statement of Insured Client's Rights has been provided to.....(name of insured/client(s)).....
by .....(mail/hand delivery)..... at .....(address of insured/client(s) to which mailed or delivered, on .....date).....

_____

[Signature of Attorney]

_____

[Print/Type Name]

Florida Bar No.: _____

(k) Imputation of Conflicts. While lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to any one of them shall apply to all of them.

Comment

Business transactions between client and lawyer

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property, or financial transaction with a client. The requirements of subdivision (a) must be met even when the transaction is not closely related to the subject matter of the representation. The rule applies to lawyers engaged in the sale of goods or services related to the practice of law. See rule 4-5.7. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by rule 4-1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment for all or part of a fee. In addition, the rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities services. In such transactions the lawyer has no advantage in dealing with the client, and the restrictions in subdivision (a) are unnecessary and impracticable. Likewise, subdivision (a) does not prohibit a lawyer from acquiring or asserting a lien granted by law to secure the lawyer’s fee or expenses.

Subdivision (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Subdivision (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Subdivision (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See terminology (definition of informed consent).

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of subdivision (a), but also with the requirements of rule 4-1.7. Under that rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that rule 4-1.7 will preclude the lawyer from seeking the

client's consent to the transaction.

If the client is independently represented in the transaction, subdivision (a)(2) of this rule is inapplicable, and the subdivision (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as subdivision (a)(1) further requires.

Gifts to lawyers

A lawyer may accept a gift from a client, if the transaction meets general standards of fairness and if the lawyer does not prepare the instrument bestowing the gift. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, subdivision (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in subdivision (c). If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide and the lawyer should advise the client to seek advice of independent counsel. Subdivision (c) recognizes an exception where the client is related by blood or marriage to the donee or the gift is not substantial.

This rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as personal representative of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in rule 4-1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of a personal representative or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary rights

An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the

client may detract from the publication value of an account of the representation. Subdivision (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property if the arrangement conforms to rule 4-1.5 and subdivision (a) and (i).

Financial assistance

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.These dangers do not warrant a prohibition on a lawyer advancing a client court costs and litigation expenses, including the expenses of diagnostic medical examination used for litigation purposes and the reasonable costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person paying for lawyer's services

Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company), or a co-client (such as a corporation sued along with one or more of its employees). Because 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, lawyers are prohibited from accepting or continuing such 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. See also rule 4-5.4(d) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

Sometimes, it will 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 fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with rule 4-1.7. The lawyer must also conform to the requirements of rule 4-1.6 concerning confidentiality. Under rule 4-1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party

payer is a co-client). Under rule 4-1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that subdivision. Under rule 4-1.7(b), the informed consent must be confirmed in writing or clearly stated on the record at a hearing.

Aggregate settlements

Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under rule 4-1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, rule 4-1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this subdivision is a corollary of both these rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also terminology (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Acquisition of interest in litigation

Subdivision (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. This general rule, which has its basis in common law champerty and maintenance, is subject to specific exceptions developed in decisional law and continued in these rules, such as the exception for reasonable contingent fees set forth in rule 4-1.5 and the exception for certain advances of the costs of litigation set forth in subdivision (e).

This rule is not intended to apply to customary qualification and limitations in legal opinions and memoranda.

Representation of insureds

As with any representation of a client when another person or client is paying for the representation, the representation of an insured client at the request of the insurer creates a special need for the lawyer to be cognizant of the potential for ethical risks. The nature of the relationship between a lawyer and a client can lead to the insured or the insurer having expectations inconsistent with the duty of the lawyer to maintain confidences, avoid conflicts of interest, and otherwise comply with professional

standards. When a lawyer undertakes the representation of an insured client at the expense of the insurer, the lawyer should ascertain whether the lawyer will be representing both the insured and the insurer, or only the insured. Communication with both the insured and the insurer promotes their mutual understanding of the role of the lawyer in the particular representation. The Statement of Insured Client's Rights has been developed to facilitate the lawyer's performance of ethical responsibilities. The highly variable nature of insurance and the responsiveness of the insurance industry in developing new types of coverages for risks arising in the dynamic American economy render it impractical to establish a statement of rights applicable to all forms of insurance. The Statement of Insured Client's Rights is intended to apply to personal injury and property damage tort cases. It is not intended to apply to workers' compensation cases. Even in that relatively narrow area of insurance coverage, there is variability among policies. For that reason, the statement is necessarily broad. It is the responsibility of the lawyer to explain the statement to the insured. In particular cases, the lawyer may need to provide additional information to the insured.

Because the purpose of the statement is to assist laypersons in understanding their basic rights as clients, it is necessarily abbreviated. Although brevity promotes the purpose for which the statement was developed, it also necessitates incompleteness. For these reasons, it is specifically provided that the statement shall not serve to establish any legal rights or duties, nor create any presumption that an existing legal or ethical duty has been breached. As a result, the statement and its contents should not be invoked by opposing parties as grounds for disqualification of a lawyer or for procedural purposes. The purpose of the statement would be subverted if it could be used in such a manner.

The statement is to be signed by the lawyer to establish that it was timely provided to the insured, but the insured client is not required to sign it. It is in the best interests of the lawyer to have the insured client sign the statement to avoid future questions, but it is considered impractical to require the lawyer to obtain the insured client's signature in all instances.

Establishment of the statement and the duty to provide it to an insured in tort cases involving personal injury or property damage should not be construed as lessening the duty of the lawyer to inform clients of their rights in other circumstances. When other types of insurance are involved, when there are other third-party payors of fees, or when multiple clients are represented, similar needs for fully informing clients exist, as recognized in rules 4-1.7(c) and 4-1.8(f).

Imputation of prohibitions

Under subdivision (k), a prohibition on conduct by an individual lawyer in subdivisions (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, 1 lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with subdivision (a), even if the first lawyer is not personally involved in the representation of the client.

[Revised: 02/01/2010]

RULE 4-1.9 CONFLICT OF INTEREST; FORMER CLIENT

A lawyer who has formerly represented a client in a matter must not afterwards:

(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;

(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.

Comment

After termination of a client-lawyer relationship, a lawyer may not represent another client except in conformity with this rule. The principles in rule 4-1.7 determine whether the interests of the present and former client are adverse. Thus, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction.

The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

Matters are "substantially related" for purposes of this rule if they involve the same

transaction or legal dispute, or if the current matter would involve the lawyer attacking work that the lawyer performed for the former client. For example, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent.

Lawyers owe confidentiality obligations to former clients, and thus information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client without the former client's consent. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client. Information that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonably prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information.

Information acquired in a prior representation may have been rendered obsolete by the passage of time. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

The provisions of this rule are for the protection of clients and can be waived if the former client gives informed consent. See terminology.

With regard to an opposing party’s raising a question of conflict of interest, see comment to rule 4-1.7. With regard to disqualification of a firm with which a lawyer is associated, see rule 4-1.10.

[Revised: 06/01/2014]

The Florida Bar
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RULE 4-1.13 ORGANIZATION AS CLIENT

4 RULES OF PROFESSIONAL CONDUCT
4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.13 ORGANIZATION AS CLIENT

(a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) Violations by Officers or Employees of Organization. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the

organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

(d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The entity as the client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example,

if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to other rules

The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

Government agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it may also be a branch of the government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter

involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

Clarifying the lawyer's role

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Dual representation

Subdivision (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, rule 4-1.7 governs who should represent the directors and the organization.

Representing related organizations

Consistent with the principle expressed in subdivision (a) of this rule, a lawyer or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

[Revised: 05/22/2006]

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RULE 4-1.18 DUTIES TO PROSPECTIVE CLIENT

(a) Prospective Client. A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Confidentiality of Information. Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client may not use or reveal that information, except as rule 4-1.9 would permit with respect to information of a former client.

(c) Subsequent Representation. A lawyer subject to subdivision (b) may not 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 as provided in subdivision (d). If a lawyer is disqualified from representation under this rule, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter, except as provided in subdivision (d).

(d) Permissible Representation. 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

(A) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(B) written notice is promptly given to the prospective client.

Comment

Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and the lawyer sometimes

required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn this information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Subdivision (b) prohibits the lawyer from using or revealing that information, except as permitted by rule 4-1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether to undertake a new matter should limit the initial consultation to only information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under rule 4-1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See terminology for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information

received from the prospective client.

Even in the absence of an agreement, under subdivision (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be used to the disadvantage of the prospective client in the matter.

Under subdivision (c), the prohibition in this rule is imputed to other lawyers as provided in rule 4-1.10, but, under subdivision (d)(1), the prohibition and its imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, the prohibition and its imputation may be avoided if the conditions of subdivision (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See terminology (requirements for screening procedures). Subdivision (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

The duties under this rule presume that the prospective client consults the lawyer in good faith. A person who consults a lawyer simply with the intent of disqualifying the lawyer from the matter, with no intent of possibly hiring the lawyer, has engaged in a sham and should not be able to invoke this rule to create a disqualification.

For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see rule 4-1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see chapter 5, Rules Regulating The Florida Bar.

[Revised: 10/01/2015]

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

RULE 4-4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Comment

Misrepresentation

A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see rule 4-8.4.

Statements of fact

This rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or fraud by client

Under rule 4-1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Subdivision (b) states a

specific application of the principle set forth in rule 4-1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under subdivision (b) the lawyer is required to do so, unless the disclosure is prohibited by rule 4-1.6.

[Revised: 05/22/2006]

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

RULE 4-4.3 DEALING WITH UNREPRESENTED PERSONS

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.

(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 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

An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see rule 4-1.13(d).

This rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

[Revised: 05/22/2006]

RULE 4-5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

(a) Use of Titles by Nonlawyer Assistants. A person who uses the title of paralegal, legal assistant, or other similar term when offering or providing services to the public must work for or under the direction or supervision of a lawyer or law firm.

(b) Supervisory Responsibility. With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity as defined elsewhere in these Rules Regulating The Florida Bar:

(1) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, must make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(2) a lawyer having direct supervisory authority over the nonlawyer must make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(3) a lawyer is responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer:

(A) orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(B) is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(c) Ultimate Responsibility of Lawyer. Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer must review and be responsible for the work product of the paralegals or legal assistants.

Comment

Lawyers generally employ assistants in their practice, including secretaries,

investigators, law student interns, and paraprofessionals such as paralegals and legal assistants. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client. The measures employed in supervising nonlawyers should take account of the level of their legal training and the fact that they are not subject to professional discipline. If an activity requires the independent judgment and participation of the lawyer, it cannot be properly delegated to a nonlawyer employee.

Subdivision (b)(1) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. See comment to rule 1.1 (retaining lawyers outside the firm) and comment to rule 4-5.1 (responsibilities with respect to lawyers within a firm). Subdivision (b)(2) applies to lawyers who have supervisory authority over nonlawyers within or outside the firm. Subdivision (b)(3) specifies the circumstances in which a lawyer is responsible for conduct of nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nothing provided in this rule should be interpreted to mean that a nonlawyer may have any ownership or partnership interest in a law firm, which is prohibited by rule 4-5.4. Additionally, this rule does not permit a lawyer to accept employment by a nonlawyer or group of nonlawyers, the purpose of which is to provide the supervision required under this rule. This conduct is prohibited by rules 4-5.4 and 4-5.5.

Nonlawyers Outside the Firm

A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using these services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend on the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly

with regard to confidentiality. See also rules 4-1.1 (competence), 4-1.2 (allocation of authority), 4-1.4 (communication with client), 4-1.6 (confidentiality), 4-5.4 (professional independence of the lawyer), and 4-5.5 (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making this allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these rules.

[Revised: 10/01/2015]

RULE 4-7.17

(a) Payment by Other Lawyers. No lawyer may, directly or indirectly, pay all or a part of the cost of an advertisement by a lawyer not in the same firm. Rule 4-1.5(f)(4)(D) (regarding the division of contingency fees) is not affected by this provision even though the lawyer covered by subdivision (f)(4)(D)(ii) of rule 4-1.5 advertises.
(b) Payment for Referrals. A lawyer may not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising permitted by these rules, may pay the usual charges of a lawyer referral service, lawyer directory or other legal service organization, and may purchase a law practice in accordance with rule 4-1.17.

(c) Payment by Nonlawyers. A lawyer may not permit a nonlawyer to pay all or a part of the cost of an advertisement by that lawyer.

Comment

Paying for the Advertisements of Another Lawyer
A lawyer is not permitted to pay for the advertisements of another lawyer not in the same firm. This rule is not intended to prohibit more than 1 law firm from advertising jointly, but the advertisement must contain all required information as to each advertising law firm.

Paying Others for Recommendations

A lawyer is allowed to pay for advertising permitted by this rule and for the purchase of a law practice in accordance with the provisions of rule 4-1.17, but otherwise is not permitted to pay or provide other tangible benefits to another person for procuring professional work. However, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in lawyer referral programs or lawyer directories and pay the usual fees charged by such programs, subject, however, to the limitations imposed by rules 4-7.22 and 4-7.23. This rule does not prohibit paying regular compensation to an assistant, such as a secretary or advertising consultant, to prepare communications permitted by this rule.

[Revised: 05/01/2013]

The Florida Bar
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RULE 4-7.18 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

4 RULES OF PROFESSIONAL CONDUCT
4-7 INFORMATION ABOUT LEGAL SERVICES

RULE 4-7.18 DIRECT CONTACT WITH PROSPECTIVE CLIENTS

(a) Solicitation. Except as provided in subdivision (b) of this rule, a lawyer may not:

(1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone, telegraph, or

facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.

(2) enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.

(b) Written Communication.

(1) A lawyer may 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, a written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if:

(A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication;

(B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(C) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence;

(E) the communication violates rules 4-7.11 through 4-7.17 of these rules;

(F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer; or

(G) the communication concerns a request for an injunction for protection against any form of physical violence and is addressed to the respondent in the injunction petition, if the lawyer knows or reasonably should know that the respondent named in the injunction petition has not yet been served with notice of process in the matter.

(2) Written communications to prospective clients for the purpose of obtaining professional employment that are not prohibited by subdivision (b)(1) are subject to the following requirements:

(A) Such communications are subject to the requirements of 4-7.11 through 4-7.17 of these rules.

(B) Each page of such communication and the face of an envelope containing the communication must be reasonably prominently marked "advertisement" in ink that contrasts with both the background it is printed on and other text appearing on the same page. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark must be reasonably prominently marked on the address panel of the brochure or pamphlet and on each panel of the inside of the brochure or pamphlet. If the written communication is sent via electronic mail, the subject line must begin with the word "Advertisement." Brochures solicited by clients or prospective clients need not contain the "advertisement" mark.

(C) Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service must be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.

(D) If a contract for representation is mailed with the written communication, the top of each page of the contract must be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" must appear on the client signature line.

(E) The first sentence of any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member must be: "If you have already retained a lawyer for this matter, please disregard this letter."

(F) Written communications must not be made to resemble legal pleadings or other legal documents.

(G) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, or if the case or matter will be referred to another lawyer or law firm, any written communication concerning a specific matter must include a statement so advising the client.

(H) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member must disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule must be specific enough to enable the recipient to understand the extent of the lawyer's knowledge regarding the recipient's particular situation.

(I) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.

(3) The requirements in subdivision (b)(2) of this rule do not apply to communications between lawyers, between lawyers and their own current and former clients, or between lawyers and their

own family members.

Comment

Prior Professional Relationship

Persons with whom the lawyer has a prior professional relationship are exempted from the general prohibition against direct, in-person solicitation. A prior professional relationship requires that the lawyer personally had a direct and continuing relationship with the person in the lawyer's capacity as a professional. Thus, a lawyer with a continuing relationship as the patient of a doctor, for example, does not have the professional relationship contemplated by the rule because the lawyer is not involved in the relationship in the lawyer's professional capacity. Similarly, a lawyer who is a member of a charitable organization totally unrelated to the practice of law and who has a direct personal relationship with another member of that organization does not fall within the definition.

On the other hand, a lawyer who is the legal advisor to a charitable board and who has direct, continuing relationships with members of that board does have prior professional relationships with those board members as contemplated by the rule. Additionally, a lawyer who has a direct, continuing relationship with another professional where both are members of a trade organization related to both the lawyer's and the nonlawyer's practices would also fall within the definition. A lawyer's relationship with a doctor because of the doctor's role as an expert witness is another example of a prior professional relationship as provided in the rule.

A lawyer who merely shared a membership in an organization in common with another person without any direct, personal contact would not have a prior professional relationship for purposes of this rule. Similarly, a lawyer who speaks at a seminar does not develop a professional relationship within the meaning of the rule with seminar attendees merely by virtue of being a speaker.

Disclosing Where the Lawyer Obtained Information

In addition, the lawyer or law firm should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding the recipient's particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not. The lawyer or law firm must disclose sufficient information or explanation to allow the recipient to locate the information that prompted the communication from the lawyer.

Alternatively, the direct mail advertisement would comply with this rule if the advertisement discloses how much information the lawyer has about the matter.

For example, a direct mail advertisement for criminal defense matters would comply if it stated that the lawyer's only knowledge about the prospective client's matter is the client's name, contact information, date of arrest and charge. In the context of securities arbitration, a direct mail advertisement would comply with this requirement by stating, if true, that the lawyer obtained information from a list of investors, and the only information on that list is the prospective client's name, address, and the fact that

the prospective client invested in a specific company.

Group or Prepaid Legal Services Plans

This rule would not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for its members, insureds, beneficiaries, or other third parties for the purpose of informing such entities of the availability of, and details concerning, the plan or arrangement that the lawyer or the lawyer's law firm is willing to offer. This form of communication is not directed to a specific prospective client known to need legal services related to a particular matter. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become clients of the lawyer. Under these circumstances, the activity that the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under other rules in this subchapter.

[Revised: 05/01/2013]

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PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 65-34
June 15, 1965

A seller's attorney who prepares all of the documents used in a real estate transaction should not present a statement to the buyer for a portion of the attorney's fee for these services when the buyer did not employ the attorney or agree to pay him a fee.

Canons: 6, 12

Chairman Smith stated the opinion of the committee:

A member of The Florida Bar poses the following inquiry for our response. A is selling real estate to B. A portion of the consideration is to be financed by a purchase money mortgage to be given to A by B. A insists that his attorney prepare all legal instruments involved. B has an attorney, however, and this attorney examines the title and represents B at the closing. A's attorney prepares the contract for sale, the deed, the promissory note, the mortgage and the closing statement. There is no dispute as to the type of contract, deed, note and mortgage to be used. Subsequent to the closing, B receives from A's attorney a statement for one-half of the costs of the preparation of the instruments prepared by A's attorney. Prior to that time, neither the parties nor the attorneys involved had discussed payment of fees and/or costs.

The position of this Committee is asked regarding the procedure outlined above. Presumably the inquiry is primarily as to the ethical propriety of A's attorney submitting the statement to B without prior contract or agreement.

A majority of the Committee has construed this inquiry as posing, primarily, a question of law and not of legal ethics. This Committee, of course, is not authorized to answer questions of law.

A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers. Who pays an attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.

The Committee agrees that an attorney should not send a statement for costs and professional services to one who has not become legally obligated to pay that bill. However, since the person receiving the statement may simply refuse to pay it, it is our opinion that no substantial violation of the Canons of Ethics is involved.

[Revised: 08-24-2011]

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 70-62
February 12, 1971

Lay personnel may be used in a law office only to the extent that they are delegated mechanical, clerical or administrative duties. The attorney may not ethically delegate to a lay employee any activity which requires the attorney's personal judgment and participation.

Canon: 3
CPR: EC 3-5, 3-6

Chairman Massey stated the opinion of the committee:

Inquiry is made pertaining to the use of lay personnel within a law office. The opinion will be divided into two parts.

The first portion is quoted from the inquiry as follows:

We anticipate using the lay person in the real estate field to handle the following matters:

1. After the contract between the parties has been executed and a file set up by the attorney's secretary, the file will be delivered to the lay specialist who will obtain all preliminary data. This would include location and ordering of abstracts and survey where appropriate, checking our internal files to determine if a prior opinion or title policy has been issued by our firm on said property, obtaining pay-off or assumption figures on existing mortgages and liens and, in general, gathering all necessary data involving said transaction.

2. We envision that after the contract stage the next time the file would come back to the attorney would be after the abstract continuation, surveys, and all necessary data has been compiled. The lay assistant would then forward the file back to the responsible attorney with all such data included. The responsible attorney would then examine the abstract and dictate either an Opinion of Title or title binder based on his examination. The file would then go back to the lay assistant who would, following the directives of the attorney, prepare closing statements, and notify all parties of the scheduled closing.

3. All work and documents prepared by the lay assistant would be forwarded back to the responsible attorney at some predetermined time prior to the closing for the attorney's review and approval.

4. The attorney closes the real estate transaction.

5. After the closing the attorney forwards a file back to the lay assistant with appropriate directives as to the recording of documents, pay off of any liens, and disbursements of expenses not disbursed during the closing.
The Committee basically approves the proposal as outlined in the inquiry finding that there is no ethical problem. The sole reservation to be expressed by the Committee is that the attorney should at no time leave to the lay employee those matters calling for the expertise of an attorney. For example, if lay personnel prepare all closing documents, such lay personnel should not be allowed to draw complicated escrow agreements or other collateral

contracts. See Canon 3 and ethical considerations thereunder (EC 3-5 and 3-6).

The second part of the inquiry is not quite as easy to answer. It asks of the propriety of:

. . . In the probate field we propose the utilization of lay personnel to prepare estate forms, accountings, tax returns, obtain necessary facts from outside sources for preparation of such estate pleadings, and perform other duties of this nature. In the litigation field we propose utilization of lay personnel to index depositions, prepare interrogatories, prepare schedules of witnesses to be deposed, schedules of witnesses necessary for trial, summarize facts, interview witnesses, and other such related matters. We propose that all work done by a lay person in our office shall be reviewed and approved by a responsible attorney before any item either goes to the files or outside of the office as a completed item of work.

These plans are similar to the proposal as to real estate transactions but not as detailed. Again, the Committee does recognize and approve the use of lay personnel in probate and litigation under the appropriate considerations of Canon 3. Delegation to lay employees of the mechanical, clerical and administrative duties is encouraged. However, the attorney may not ethically delegate an activity in which he personally should give his judgment and participation.

While generally approving the concept stated in this second part of the inquiry, the Committee gives it but a qualified approval as the Committee would prefer to determine such matters on specific factual cases. This is true because the Committee does have reservations as to authorizing lay personnel to prepare interrogatories and to interview all witnesses in every case. What may be permissible in a “run-of-the-mill” case may not be so in complicated, unusual matters.

[Revised: 08-24-2011]

OPINION 73-43
(March 18, 1974)

A graduate of a paralegal institute who is employed by a law firm may, under the supervision and direction of an attorney, prepare real estate documents for which the attorney takes complete professional responsibility.

Note: The portions of this opinion concerning use of the term "Legal Assistant" and business cards have been overruled by Opinion 86-4. The portions of this opinion concerning the nonlawyer employee's attendance at closings have been overruled by Opinion 89-5.

CPR: EC 3-6
Opinions: 73-4; ABA Informal 909, 1185

Vice Chairman Sullivan stated the opinion of the committee:

A Florida firm has hired an employee who is a graduate of the Paralegal Institute of New York. One of the firm's clients is a condominium developer. A member of the firm asks:

1. Whether the employee, working under the supervision and direction of an attorney in the firm, may prepare for that attorney real estate documents which the attorney is preparing for the firm's condominium developer client.

2. Whether the employee may attend closings of sales of condominium units to be held in the firm's office but without any attorneys in the firm being present. She will give no legal advice.

3. Whether the employee may identify herself in telephone conversations and when writing letters on firm stationery as a Legal Assistant below her name.

4. Whether the employee may use business cards with the firm name and with the words Legal Assistant below her name.

We answer the first question in the affirmative. We recognize the increased use of such personnel and that EC 3-6 of the Code of Professional Responsibility not only permits but encourages their use provided the attorney supervises the work so delegated and takes complete professional responsibility for the work product.

We answer the second question in the negative. The question itself recognizes that the employee may not give legal advice or perform any acts that would amount to practicing law. The Committee, one member dissenting in part, is of the opinion that there is no reason for the employee to attend the closings except to give legal advice and that her presence could be construed as answering unasked questions about the propriety or legality of documents. One Committeeman is of the opinion that the employee may properly attend such closings provided she does nothing more than distribute documents for signature.

We answer the third question in the negative, two members of the Committee dissenting in part. The Supreme Court of Florida, which has exclusive jurisdiction to regulate the admission of persons to the practice of law, has not authorized any non-lawyers to do work that would constitute the practice of law. It has not created any category of personnel designated as Legal Assistant or Paralegal. Those terms have no official meaning and no precise definition that is generally applied or accepted.

The majority of the Committee is of the opinion that the use of the term Legal Assistant might mislead clients or others into believing that such a non-lawyer assistant is a licensed lawyer or has expertise or authority he or she does not in fact possess. Two members of the Committee are of the opinion that it is not improper for such an employee to use the designation Legal Assistant as long as it is clear from the conversation or letter that the employee is acting on behalf of a lawyer and not purporting to give legal advice or to express opinions on matters involving professional judgment.

We answer the fourth question in the negative. In Opinion 73-4 [since withdrawn], the Committee, after considering ABA Opinions 909 and 1185 which appeared to allow it, stated that the name of the law firm should not be shown on the business card of a lay employee because of the appearance of professional status and the suggestion of advertising. We adhere to that opinion here.

[Revised: 08-24-2011]

OPINION 89-5
(November 1, 1989)

A law firm may permit a paralegal or other trained employee to handle a real estate closing at which no lawyer in the firm is present if certain conditions are met.

RPC: 4-5.5(b)
Opinion: 73-43
Case: Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954)

In Opinion 73-43, this Committee concluded that it was permissible for a lawyer to have a legal assistant prepare real estate documents under the lawyer's supervision, but that it would be improper for the legal assistant to attend closings at which no attorney in the firm was present. The committee reasoned that there was no purpose for the legal assistant to attend closings except to give legal advice and that the legal assistant's presence could be construed by the clients as answering unasked questions about the propriety or legality of the closing documents.

The Unlicensed Practice of Law Committee has requested that we reconsider the issue of whether a legal assistant or other nonlawyer employee with real estate expertise may be permitted to conduct or otherwise participate in a closing in place of a lawyer in the firm. That committee does not agree with the premise of Opinion 73-43: that conducting a closing necessarily involves the giving of legal advice, in fact or by implication. That committee notes that title companies are permitted by the supreme court to conduct closings. Cooperman v. West Coast Title Company, 75 So.2d 818 (Fla. 1954). The committee also points out that the typical residential real estate transaction is nonadversarial and that allowing a trained paralegal to handle the closing will enable a law firm to assist in real estate transactions at a lower cost to clients.

The majority of this Committee (seven members dissent) now concludes that law firms should be permitted to have trained nonlawyer employees conduct closings at which no lawyer in the firm is present if certain conditions are met. Accordingly, this Committee recedes from Opinion 73-43.

Rule 4-5.5(b), Rules Regulating The Florida Bar, forbids a lawyer to assist a person who is not a member of the Bar in the performance of activity that constitutes the unlicensed practice of law. But, as the comment states, this rule "does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work."

The majority of this Committee concludes that under Rule 4-5.5(b), a law firm may permit a nonlawyer employee to conduct or attend a closing if the following conditions are met:

1. A lawyer supervises and reviews all work done up to the closing;

2. The supervising lawyer determines that handling or attending the closing will be no more than a ministerial act. Handling the closing will constitute a ministerial act only if the supervising lawyer determines that the client understands the closing documents in advance of the closing;

3. The clients consent to the closing being handled by a nonlawyer employee of the firm.

This requires that written disclosure be made to the clients that the person who will handle or attend the closing is a nonlawyer and will not be able to give legal advice at the closing;

4. The supervising lawyer is readily available, in person or by telephone, to provide legal advice or answer legal questions should the need arise;

5. The nonlawyer employee will not give legal advice at the closing or make impromptu decisions that should be made by the supervising lawyer.

When a law firm's involvement in a real estate transaction is limited to issuing title insurance as an agent for a title insurance company, and does not involve representation of either party to the transaction, condition number 3 does not apply. However, the law firm should take care that the parties understand that the firm does not represent their interests.

[Revised: 08-24-2011]

OPINION 97-2
(May 1, 1997)

An attorney may not ethically act as "closing agent" for a transaction where material terms of the contract have not been agreed to or have not been discussed by the parties.

RPC: Rule 4-1.7(a), Rule 4-1.7, Rule 4-1.7(b), Model Rule 1.7(b), Model Rule 2.2,

Cases: *The Florida Bar v. Reed* , 644 So.2d 1355 (Fla. 1994), *The Florida Bar v. Belleville* , 591 So.2d 170 (Fla. 1991), *The Florida Bar v. Teitelman* , 261 So.2d 140 (Fla. 1972), *People v. McDowell* , 718 P.2d 541 (Colo. 1986), *Stark Co. Bar Ass'n v. Ergazos* , 442 N.E.2d 1286 (Ohio 1982), *Baldasarre v. Butler* , 625 A.2d 458 (N.J. Sup. Ct. 1993)

Opinions: 65-34, Maine Ethics Opinion 106, Connecticut Informal Opinion 91-14, New York State Opinion 611, Massachusetts Bar Opinion 1990-3, West Virginia Opinion 89-1, Maryland Bar Opinion 84-85

A member of The Florida Bar has requested an advisory ethics opinion as to whether he can represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. The inquirer had been requested by a licensed business broker to act as a "closing agent" for the sale and transfer of business assets. The member explains that the majority of these sales are a sale of assets only and not of a corporate entity. The business brokers envision a "closing agent" as an attorney who will prepare all closing documents and other instruments that may be required by the terms and conditions of the transaction. The buyer and seller would each agree to pay 50% of the closing agent's fees and expenses. The inquiring attorney asks whether it would be ethically permissible for him to act as a "closing agent" under the circumstances set forth above.

The member has particular concerns regarding the financing of these transactions. He would be required to prepare promissory notes and security agreements which, although somewhat standardized documents, must be negotiated between buyer and seller as to interest rate, payment terms, and especially as to the extent of the security given to the seller for the financing and the terms and conditions imposed upon the purchaser in the event of a default. Under these circumstances, could one attorney handle such negotiations and drafting for both parties as part of acting as "closing agent" for the sale of a business?

Rule 4-1.7(a), Florida Rules of Professional Conduct generally provides that attorneys may not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

(1) the lawyer reasonably believes the representation of that client will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

(2) each client consents after consultation.

As set forth in the Comment to Rule 4-1.7, loyalty to a client prohibits an attorney from undertaking representation directly adverse to that client or another client's interests without the affected client's consent. A client may consent to representation where there is some conflict or potential conflict after full disclosure and consent of the affected clients. However, as stated in the Comment, "when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved

cannot properly ask for such agreement or provide representation on the basis of the client's consent."

The Comment to Rule 4-1.7 specifically addresses common representation of multiple parties to a negotiation, such as the question now before the Committee:

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Court decisions from Florida and other states are useful in determining the types of transactions in which the parties are "fundamentally antagonistic" such that common representation is not possible. In The Florida Bar v. Reed , 644 So.2d 1355 (Fla. 1994) the Court found an attorney's attempt to represent both buyer and seller of the same property and to assume multiple roles in the transaction to be unethical and suspended the attorney for six months. Similarly, in The Florida Bar v. Belleville , 591 So.2d 170 (Fla. 1991), the Court found it improper for the attorney representing the buyer in a real estate transaction to ask the seller to pay all or part of his fees. The attorney was disciplined for improper representation of conflicting interests. See also The Florida Bar v. Teitelman , 261 So.2d 140 (Fla. 1972) (attorney reprimanded for representing mortgage and title companies in real estate closings, but charging unrepresented sellers a portion of his attorney's fee); Florida Ethics Opinion 65-34 (seller's attorney who prepares all documentation in sale of property may not charge buyer for a portion of the attorneys' fees when the buyer did not employ the attorney or agree to pay him a fee; attorney erred in not explaining adverse nature of transaction and attorney's loyalty to seller).

Ethics opinions and caselaw from other states dealing directly with the ethics of an attorney acting as closing agent for the sale of a business have found an irreconcilable conflict between the interests of buyers and sellers of businesses, prohibiting dual representation of both parties by the same lawyer. Maine Bar Ethics Opinion 106, May 25, 1990, ruled that an attorney or law firm may not act as escrow agent or closing agent for both parties involved in sale of a business. A Maine firm had attempted to act as a neutral "closing agent" in the sale of a business, telling both parties it would not 'represent' either of them, but would draft documents to complete the sale. The committee found that the attorneys involved had improperly represented two parties with conflicting interests and that disclosure could not cure the violation. Accord , People v. McDowell , 718 P.2d 541 (Colo. 1986) (held unethical for attorney to represent both buyer and seller in sale of a business; court found attorney would be unable to maintain independent professional judgment required by Model Rule 1.7(b) [Florida Rule 4-1.7(b)]; Stark Co. Bar Ass'n v. Ergazos , 442 N.E.2d 1286 (Ohio 1982)(lawyer could not ethically represent buyer and seller of business where the parties had conflicting interests regarding assumption of existing debts of the business). See also , Baldasarre v. Butler , 625 A.2d 458 (N.J. Sup. Ct. 1993) (attorney cannot represent both buyer and seller in "complex commercial real estate transaction;" consent of clients is immaterial; conflict cannot be waived).

Other state bar ethics opinions have only allowed one attorney to close a sale of business transaction between buyer and seller where there was little or no adversity between the parties and buyer and seller have already agreed to all critical terms of financing and security agreements. Connecticut Bar Informal Opinion 91-14. The Connecticut opinion allowed one attorney to draft the sales contract and handle the closing of the sale of a

business between two longstanding clients, where both parties agreed to the dual representation. However, the opinion deals with the very narrow factual situation where both buyer and seller are long time clients of the same attorney and relies upon Model Rule of Professional Conduct 2.2, allowing an attorney to act as intermediary between two clients under certain specified circumstances.

Other state bar opinions allowing dual representation of buyer and seller at a closing, deal only with sales of real estate, not sales of entire businesses. See , New York State Bar Association Opinion 611(attorney may represent both buyer and seller in same real estate transaction if the parties are in agreement on price, time, manner of payment and security; if the parties' interests diverge, attorney must withdraw); Massachusetts Bar Association Opinion 1990-3 (lawyer may represent both borrower and lender in real estate purchase, provided that there are no apparent disputes or conflicts between the parties and both parties consent in writing after full disclosure); West Virginia State Bar Opinion 89-1(lawyer may represent multiple parties in same real estate transaction if full disclosure to all parties and written consent; lawyer may not represent any of the parties in subsequent litigation relating to the transaction); Maryland State Bar Opinion 84-85 (attorney may represent all parties to a real estate closing, with proper disclosures and waivers as to all parties).

It is an unavoidable fact that the sale of a business, even in the friendliest of circumstances, is by its very nature an adversarial process. The buyer is relying upon sales and profit figures produced by the seller as well as projections of future profits based upon those figures. Security and financing are critical issues in any business purchase and, particularly in the case of smaller businesses, such transactions are often financed by the seller. The closing often includes the transfer of licenses or applications by the new owners for special licenses, zoning changes, and so forth. Such closings often include assumption of existing debts of the selling corporation and representations by the seller as to other actual and potential claims against the seller. Such transactions are fraught with adversity and conflict, even for the most scrupulous attorney in the friendliest of deals.

The facts presented by the inquirer reference the typical situation in which some or all terms of the sale, particularly elements of financing, must be negotiated between buyer and seller. Where there is disagreement or material terms of an agreement have not been addressed between buyer and seller as to financing, security, consulting agreements with the seller, title defects, or any other material matter relating to the sale, conflicts may exist or develop. Under the foregoing circumstances, it would be unethical for a Florida attorney to represent both buyer and seller in the closing of the sale of a business in Florida, acting as "closing agent" for the transaction. A member of The Florida Bar may not be involved in negotiations of the parties to a sale of a business and then attempt to represent both parties to the transaction at closing of the sale. Under the foregoing circumstances, such representation presents a nonwaivable conflict under Rule 4-1.7(a) and (b) and is ethically prohibited.

[Revised: 08-24-2011]

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75 So.2d 818
Loenard W. COOPERMAN et al., Appellants,
v.
WEST COAST TITLE COMPANY et al., Appellees.
Leonard W. COOPERMAN et al., Appellants,
v.
GUARANTEE ABSTRACT COMPANY et al., Appellees.
Florida Association of Realtors, St. Petersburg Board of Realtors, Warren P.Hunnicutt and other individual real estate brokers, and The Florida Bar, Intervenors.
Supreme Court of Florida, En Banc.
Nov. 5, 1954.
Rehearing Denied Dec. 8, 1954.

Leonard W. Cooperman, Walter G. Ramseur, St. Petersburg, Hubert C. Smith, Fort Lauderdale, Unauthorized Practice Committee of The Florida Bar, Darrey Davis, President of The Florida Bar, J. A. McClure, Jr., St. Petersburg, as President of St. Petersburg Bar Ass'n, for appellants.

Harold A. Kooman and William S. Fielding (of Grazier, Fielding, Greene & Coit), St. Petersburg, for West Coast Title Co.

Baynard, Baynard & McLeod and Carroll R. Runyon, St. Petersburg, for Guarantee Abstract Co.

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W. H. Poe of Maguire, Voorhis & Wells, Orlando, for intervenors-appellees.

Wm. H. Rogers, Jacksonville, amicus curiae.

THOMAS, Justice.

The original plaintiffs were members of The Florida Bar practicing law in St. Petersburg and officers of the St. Petersburg Bar Association and the original defendants were Florida corporations engaged in the business of preparing abstracts of title to real property and issuing policies of title insurance as agents of title insurance corporations. In the course of the proceedings in the chancery court, Florida Association of Realtors, St. Petersburg Board of Realtors, Warren P. Hunnicutt and other individual real estate brokers, and The Florida Bar were permitted to intevene.

It was charged in the bills that West Coast Title Company and Guarantee Abstract Company were, in effect, representing that they were qualified to practice law; that they were giving legal advice; and that they were preparing deeds, mortgages, and other instruments incident to conveyancing, and forms necessary to the procurement of guaranty or insurance of loans by the Federal Housing Authority and the Veterans' Administration. It was further asserted that these companies were rendering opinions on the quality of titles of various tracts of real estate based on examinations made by their employees.

The court was asked to determine whether the challenged acts constituted unauthorized practice of law and if so, to enjoin such activities on the part of the corporations.

The corporations denied that they gave legal advice, but admitted that they filled out the forms required by the Federal Housing Authority and the Veteran's Administration for the guaranty or insurance of loans, and admitted also that they examined titles and issued commitments for title insurance. They asserted that all examinations were made simply to determine the insurability of title.

After much pleading and intervening and taking of depositions, the chancellor decreed

that these appellees could with impunity fill out standard forms of conveyancing instruments and alter them to suit the occasion, so long as they were acting as agents for their principals, the title insurance companies. He also held that these appellees could decide from the examination of abstracts and public and other records whether as agents they would grant commitments for policies of insurance eventually to be issued by their principals. He ruled that the companies could complete forms requisite to guaranty or insurance of loans by the Federal Housing Administration and the Veterans' Administration. 'Real estate brokers,' he decided, could complete standard conveyancing forms such as preliminary contracts, deeds, mortgages, notes, assignments and satisfactions where in the instruments, subsequent to the contract, only names, dates, descriptions, amounts and 'latest tax year liability' were to be inserted.

In the appeal from this decree the appellants have brought us three questions for our consideration. The first two deal with the activities of the corporations and the third with the activities of 'realtors.'

The gist of the immediate controversy, so far as it concerns the two corporations, is the extent to which they may go; first, in advising themselves about the condition of the title in a prospective grantor in order to determine whether a commitment to insure it should issue; and second, what they may do in respect of getting the title transferred to the grantee in such way that their principals will assume the risk of insuring an interest or a loan, that is, honor the agents' commitments.

The history of a typical transaction will make the question and, we hope, the solution, simpler. When a customer applies for title insurance, the agent causes an examination to be made of its own records, the public records, and available abstracts of title, for the purpose of ascertaining and reporting to its principal whether the title is insurable. If the condition of title in the

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grantor as it is evaluated from these sources justifies the action, the agent issues in its own name a 'commitment' for title insurance showing defects, and excepting items not to be insured, if any. In the commitment it is stipulated that the policy will issue upon payment of the premium and upon recordation of a proper instrument from grantor to grantee creating the estate or interest to be insured. So the commitment is made before, the policy is issued after, the transfer.

As we understand the procedure, the agents, if the closing takes place in their offices, after the commitment is made, prepare final statements, complete forms of deeds, mortgages, notes, assignments and satisfactions, and supervise their execution, check intangible taxes, compute proration of taxes, interest, and rents, draft assumption clauses, and construct clauses showing that property is taken subject to restrictions and easements.

When all requirements are satisfied and insurability of a particular title or interest in the grantee is reported by the agent to its principal, the policy is issued, and there is no charge for any of the services rendered by the corporation except the premium in which, presumably, it and its principal share. In cases where the corporation acts as disbursing agent of loans secured from the Federal Housing Authority or the Veterans' Administration either connected or unconnected with title insurnce a fee is charged for the service.

We accept appellant's premises that person unauthorized to do so may not practice law, either in a court or an office, and that a corporation may not practice law under any circumstances. Our concern in this phase

of this controversy is whether the appellee-corporations are practicing law in all or part of their functions as representatives of other corporations engaged in issuing title insurance policies. The solution is difficult because of the lack of a definition of 'practice of law.' Clearly the appellee-corporations cannot hold themselves out to all persons advisors on legal matters and as scriveners whose services are available for a fee to all who may seek them. Nor could they appear in court to represent a litigant or defend an indictee.

In our opinion the appellee-corporations may take such steps as necessary to inform themselves of the status of any title to insure which they are asked to issue a commitment. So, from the examination of their own records, abstracts that may be furnished, and the public records accessible to all, they may ascertain the state of title at the time. Up to this point we feel no hesitancy in holding that in the search for intelligence upon which must depend the decision either to issue or decline a commitment, the corporations cannot be said to be engaging in the practice of law, for to practice law one must have a client and in such instances their clients are themselves. Obviously the information to the time of commitment relates to the condition of title or interest of the proposed grantor, not of the prospective grantee to whom the policy will finally issue if the obligation is undertaken by the appellee-corporations' principals.

Having concluded that the appellee-corporations may advise themselves about a present condition of title, we come to the auestion: What then, may they do towards effecting a transfer in such manner that the interest or title of the grantee will be of such quality that the principal will assume the risk and honor the commitment?

In answering this difficult question, we think it should be borne in mind that the prime purpose is to determine the nature of the risk and that the effect of the transfer on the chain of title is consequential. When the corporations supervise the transfer, they are not undertaking to see that a flawless title vests but that a title is passed which they will insure despite any flaws. So long as they are but satisfying themselves and their principals that the premium justifies the risk, we cannot see the logic in requiring that from the time the commitment issues, they must employ counsel, else they will be charged with practicing law.

We do not understand that the appellees undertake to pass primarily upon the marketability

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or validity of the title or interest, but upon its insurability. In other words, the whole effort of the appellee-corporations is to determine the risk that will be taken if the policy issues. Conceivably a title that would not be declared merchantable by a careful attorney might nevertheless be insured by charging a premium that would compensate for the risk that would be run due to a defect of some kind or other.

If the purchaser wishes to engage an attorney to advise him relative to the marketability of the title, as distinguished from its insurability, there is nothing to prevent his doing so.

The fact that the remuneration of the appellee-corporations consists solely of their part of the premium and that their incentive to accomplish an acceptable transfer is to earn that premium but emphasizes the thought that in such activities after commitment they are still representing themselves. We have not overlooked the contention of the appellants that in these transactions the corporations are, in effect, practicing law because they are agents, hence their principals are their clients. But the whole picture and especially that part of it

relating to the manner and source of compensation for their labors repels us from the view adopted by the appellants.

So we decide that what the companies do to inform themselves about the advisability of issuing a commitment and what they do to accomplish a transfer of a title or interest of such kind that a policy of title insurance is warranted are not services the performance of which amount to unauthorized practice of law. But what we have written applies only to the performance of those acts which are indispensable to the determination of insurability and must not be construed as sanctioning a charge of any sort, in addition to the premium for the issuance of title insurance, or approving charges for services rendered in connection with the guaranty or insurance of loans by the Federal Housing Authority or the Veterans' Administration, whether the loans be connected with title insurance transactions or not.

Before passing to the final question we should observe that evidently at one time the appellee-corporations gave advice relative to the effect of taking title as estates by the entirety and completed instruments and acted as escrow agents in transactions where no title insurance was involved, but these actions have now been enjoined by the lower court's decree entered in this cause and as there seems to be no challenge of this part of the decree, there is no need further to discuss this aspect of the case.

Question three, prompted by the admission into the case of real estate brokers, challenges the propriety of brokers' completing conveyancing and other related standard forms when they have nointerest 'except as brokers.'

In the case of Keyes Co. v. Dade County Bar Ass'n, Fla., 46 So.2d 605, we decided the question now presented and we do not find occasion to deviate or recede from that opinion. The chancellor's view of the importance of the preliminary memorandum as expressed in his decree did not coincide with the opinion we expressed in the cited case. As a consequence, his premise sent him in a direction we cannot approve.

In the main the decree is affirmed, but those parts of the decree inharmonious with the views we have expressed or with the case just cited are reversed.

Reversed in part; affirmed in part.

ROBERTS, C. J., and SEBRING, HOBSON, MATHEWS and DREW, JJ., concur.

TERRELL, J., not participating.

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261 So.2d 140
68 A.L.R.3d 959
THE FLORIDA BAR, Complainant,
v.
Harry H. TEITELMAN, Petitioner.
No. 41290.
Supreme Court of Florida.
April 5, 1972.

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Lyle D. Holcomb, Jr., Edward J. Atkins, Miami, Earl Drayton Farr, Jr., Punta Gorda, and Norman A. Faulkner, Tallahassee, for complainant, The Florida Bar.

Leo Greenfield, of Street & Greenfield, Miami, for petitioner, Harry H. Teitelman.

DEKLE, Justice.

Although this is a disciplinary proceeding for a 'private' reprimand pursuant to Integration Rule of The Florida Bar, Art. XI, Rule 11.09(3)(f), 32 F.S.A., it has apparently reached us with an overriding purpose of prevailing upon this Court to render an opinion which will be helpful to the members of The Bar regarding the issues involved. Such goal apparently transcends the disciplinary recommendation by the Referee and The Florida Bar. (It is only for such higher purpose that we render this opinion, for, if affirmed, it would not be published, since any reprimand would otherwise not be 'private'.)

We recognize the conscientious concern which is expressed and therefore proceed with this opinion to crystalize in the affected area, what action constitutes the practice of law and improper professional conduct under the canons involved. We have also given the petition 'precedence over all other civil causes in the Supreme Court' in accordance with Integration Rule 11.09(4).

The situation which arose involves real estate closings for a mortgage company. Petitioner-attorney regularly represents the title insurance company and mortgage company involved, in a large volume of residential closings, set one after the other in his law offices. He is apparently representing the buyer as well (who is getting the loan) in most instances. Many times the seller is not represented; on other occasions,

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as here, he has an attorney. In either instance there are fixed forms which petitioner urges are required of the seller by his lending institution. He prepares and furnishes these in a 'package form' to be executed by sellers. For this he charges an 'attorney's fee of $25.00, for preparation of legal documents.' It is so listed on the closing statement. The attorney (petitioner) estimates that for a period of years now he has closed approximately 300 such loans per year. (At $25.00 per closing--if a seller's attorney's fee were received in each case--this would amount to $7,500 a year.) Petitioner testified that under Federal Housing Authority Rules (most closings) he is 'allowed' to charge the Buyer $25.00 for a 'package' of documents (consisting of mortgage, note, various affidavits, etc.). The charge allowed has since been raised. An expert witness testified that as to the Seller, however, FHA has no control over the charges and fees and that '(I)t is open season on the seller. . . .'

Testimony also reflected that usually there is no notice to the seller prior to closing that he will be responsible for certain documents nor that a fee will be charged him for them; that usually there is no question raised and the matter proceeds without any problem; that where the seller has an attorney the petitioner usually ignores any documents the seller's attorney has prepared and asks him to use instead the 'package' documents; that if there is any objection to the $25.00

charge for the documents then petitioner usually deletes the charge.

That this is what might be termed a 'workship' approach to a transaction which has apparently been treated here as almost a mechanical procedure, with time and money the principal concerns, is reflected by petitioner's testimony that in his opinion it is to a seller's advantage to attend the closing without an attorney because 'no attorney would go to a closing for $25.00 and prepare all those documents.' He rejects the Grievance Committee's position which would require him to advise sellers they may have attorneys at closing, because it would 'make a hardship upon the sellers.' (See Canon 7, 32 F.S.A., footnote 2, infra).

In this particular case the seller had engaged his own attorney, who likewise recognized the limited amount of time that was justified for the fee which he felt he could charge the seller. He prepared certain documents for the closing, to which he sent a law clerk in the office with the documents and closing instructions. A copy of a closing statement had been requested by him but was not furnished. At the closing petitioner informed the law clerk (in line with his usual practice) that he preferred to use his 'package' of forms and the law clerk agreed to this but questioned that there should be any charge (the $25.00) for them. Petitioner said this was his standard charge. The seller also personally questioned this charge being levied in addition to that of her own attorney. The law clerk appeased her by saying that they should go ahead and that the attorney in his office would take care of the problem when he got back. The seller testified that she was angry at the additional charge being made; that she understood the petitioner at the closing to say that the FHA would not accept her attorney's papers and that she signed petitioner's documents 'under protest.' Petitioner denied seller's objection being made in his presence, stating that he would have taken the charge out had she done so, but confirmed that her attorney's documents would have been unacceptable. He was concerned with a gap of 14 days between execution of the no-lien affidavit which had been brought and the date of closing, during which repairs might have been made.

It becomes apparent that all of this, in the seller's presence and under these circumstances, was at the very least most unseemly in the practice of law on the high level which is demanded by the profession. The reaction of the seller as a client is proof of the bad effect which this type of 'closing mill' has upon our public image and the standing of attorneys at law. For

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many members of the public, a real estate transaction is one of the few contacts which they have with the law and with attorneys personally, so that it is the only opportunity they have to form an impression from direct contact. It is therefore important that such transactions be treated on the same high professional standard as litigation in the courts, preparation of contracts and other legal procedures. Despite the pressures and temptations present, and at times the limited remuneration, an attorney must not allow the $ mark to blind or even to dim the guiding light from our profession's polar star--the legal ethic.

Opportunity should be afforded to have an attorney's representation, no matter the amount of the recompense or whether the attorney finds it more expedient to use 'package' instruments in the transaction. Lawyer referral services by Bar groups over the state fulfill this very purpose. The profession's image and standing are more important than the expediency which supposedly demands mass production procedures.

There is no doubt whatever that petitioner's use of the 'package' forms, or any

related forms of a legal nature, clearly constitutes the practice of law. The challenge of that fact by an attorney seems almost a reflection upon an understanding of the law and of professional ethics. The suggestion that it is merely a 'scrivener's' task borders on the presumptuous. In the completion of legal forms it is what may be left out as well as that included which can be a very serious consequence. The advices essential to the completion of such documents almost invariably place their completion in the realm of the practice of law. It requires one skilled in the law for a proper completion of such matters, particularly those dealing with transactions involving real property which are treated by the law upon the highest level as requiring the greatest formalities and safeguards.

As we have said in the early case on the subject, Keyes Co. v. Dade County Bar Ass'n., 46 So.2d 605 at 606 (Fla.1950):

'(T)he preparation and execution of the instruments effectuating the transfer should be under the lawyer's supervision, if the parties decide that they need expert advice and service.'

There is evidence in this record that petitioner prepared legal documents to be executed by the seller in furtherance of her contract to sell land, which documents were in fact employed by the seller for that purpose and petitioner charged the seller a fee therefor. This is unmistakably representing the seller.

Where the seller is represented by other counsel there is no justification for an attorney for the buyer or lender charging any fee to the seller unless it is definitely agreed between the attorneys with the express agreement of the seller. And where the seller is NOT so represented, he can be charged NO fee by the buyer's or lender's attorney absent 1) a client-attorney relationship between such attorney and the seller, 2) together with a full disclosure that the attorney also represents adverse interests in the closing, of which full disclosure must be made to the seller of all circumstances, relationships and interests involved and 3) after such full disclosure the attorney obtains the consent of the seller for an agreed representation by the attorney and only then 4) a fee which must be agreed upon between them prior to undertaking any services. [1] This is so basic to the practice of law and ethical considerations of the profession that the present

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emphatic renunciation of it should place the matter at rest for all time.

Opinion 64--56 (Sept. 29, 1964), Selected Opinions, Professional Ethics Committee, The Florida Bar, 1959--67, pp. 237, 238, holds as follows:

'It is improper for the mortgage company attorney to charge Seller an attorney's fee In the absence of any agreement between the attorney and Seller. It is not improper for the attorney to collect a reasonable fee for his services provided Seller has agreed with Buyer to pay all closing costs and providing the fee is part of the closing costs.

'Further, Seller should be fully advised of the circumstances because the attorney represents the lending institution, not the Seller, and the interest of these parties could well be in conflict. Preferably, Seller should be represented by an attorney of his own choice.' (Emphasis ours.)

Opinion 65--34, p. 298 (June 15, 1965), Professional Ethics Committee of The Florida Bar, points out the same rule applying in the reverse circumstances:

'A seller of real estate may, if he wishes, insist that his attorney draw all papers involved in the transaction. The buyer, in turn, may execute or refuse to execute these papers.

Who pays the attorney is a matter of contract. If the seller employs the attorney he is primarily liable for the fees. Unless the buyer in some way contracts to pay these fees, he is under no obligation to do so.' (Emphasis ours.)

Other states hold likewise. The Standing Committee on Legal Ethics of the Virginia State Bar in its Opinion No. 70 (Feb. 13, 1957) dealt with representation of conflicting interests in holding the following:

'Should there be no apparent conflict of interest between the parties at the time of their joint employment of Mr. X, the Committee is of the opinion that it is proper for him to undertake such employment, Provided a full disclosure of that fact is made to all parties.' (Emphasis ours.)

The State Bar of Michigan's Committee on Professional and Judicial Ethics in Opinion 98 (Nov.1946), involving a lawyer employed full time by a bank to draw deeds and handle transactions for the bank held the following:

'Confusion is apt to be caused over reimbursement of the bank-lawyer's fee when such reimbursement is not made directly to the bank but is, at its direction, paid by the borrower directly to the bank's lawyer. The borrower may easily gain the impression that such lawyer represents him, either individually or jointly with the bank.

'It is the active duty of the bank's lawyer under these circumstances to make clear to the borrower that he represents solely the bank in all of the legal incidents of such transaction. . . .'

'(W)e have not overlooked the possibility of conflicting interest which the lawyer may be called upon to represent in case the borrower should attempt to employ the same lawyer to represent him in the transaction. . . . It seems probable that if the borrower were frankly informed that the lawyer was already on the bank's payroll, or in its constant employ, he might reasonably object to paying an additional fee, presumably equal to what would be charged by a disinterested lawyer of his own choice. In short, the 'full disclosure' contemplated by Canon 6 would probably be fatal to such employment in a large number of cases. The lawyer who thus acts for both the bank and the borrower must bear the burden, if the matter is ever questioned, of showing that every relevant fact was disclosed by him to the borrower before he undertook such dual representation.' (Reported in 29 Mich.St.Bar J. No. 5, at pages 124--126.)

Except for the unusual circumstances and apparent misunderstandings involved between the attorneys in this particular case, there would likewise appear to be a breach

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of Canon 7, [2] regarding interference with employment to other counsel.

This has been the clear holding of other states throughout the Union. To cite just a typical example we refer to Pioneer Title Ins. & Trust Co. v. State Bar of Nevada, 74 Nev. 186, 326 P.2d 408 (1958), enjoining company stenographers from preparing deeds, mortgages, notes and like instruments from printed forms previously approved by the company attorney and thereafter checked by him. The court held at p. 411:

'The difficulty with the company's position is that its services did not end with the clerical preparation of the instruments by the escrow officer and stenographer. It was the company itself which judged of the Legal sufficiency of the instruments to accomplish the agreement of the parties. In the drafting of any instrument, simple or complex, This exercise of judgment distinguishes the legal from the clerical service.' (Emphasis ours.)

To like effect are: Indiana ex rel. Indiana State Bar Ass'n v. Indiana Real Estate Ass'n., Inc., 244 Ind. 214, 191 N.E.2d 711 (Ind.1963); State Bar of Michigan v. Kupris, 366 Mich. 688, 116 N.W.2d 341 (Mich.1962); In Re Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (Mass.1935).

In light of the inconclusive and unusual circumstances giving rise to the unfortunate developments here, and in the higher interest of devoting an opinion to higher standards, we conclude that the recommendation for and issuance of private reprimand in these circumstances was not warranted and accordingly the Private Reprimand of the Eleventh Judicial Circuit Grievance Committee 'F' on April 14, 1970, pursuant to Integration Rule of The Florida Bar, Article XI, Rule 11.04 'C', and the confirming Private Reprimand by The Florida Bar on April 27, 1971, are hereby quashed.

It is assumed that the principles herein announced will be fully recognized and followed hereafter by petitioner. Any future deviation therefrom would in any subsequent proceeding be weighed in the light of this clear admonition.

It is so ordered.

ROBERTS, C.J., and ERVIN, CARLTON and McCAIN, JJ., concur.

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1 Canon 6 (representing differing interests; disclosure). Now in Canon 5, DR 5--101(A), 5--105(C); EC 5--14, 5--15, 5--16, 5--19, 32 F.S.A. See Cross Ref. Table of Canons, The Florida Bar Journal, Oct. 1969, pp. 1210--12; 32 F.S.A. Pocket Part.

DR 5--105(C): '(A) lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.'

2 Now encompassed in Canon 2, DR 2--103(A), 2--104(A), 2--107 and EC 2--2, 2--3, 2--4 and 2--8. Excerpts:

'DR 2--103 Recommendation of Professional Employment.

'(A) A lawyer Shall not recommend employment, as a private practitioner, of Himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.' (Emphasis ours.)

'DR 2--104 Suggestion of Need of Legal Services.

'(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: . . .' (not applicable here).

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591 So.2d 170
THE FLORIDA BAR, Complainant,
v.
Walter J. BELLEVILLE, Respondent.
No. 75116.
591 So.2d 170, 16 Fla. L. Week. S770
Supreme Court of Florida.
Dec. 5, 1991.

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John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Jan Wichrowski, Bar Counsel, Orlando, for complainant.

Dennis F. Fountain, Longwood, for respondent.

PER CURIAM.

We have this case on complaint of The Florida Bar for review of a referee's report recommending that Walter J. Belleville, an attorney licensed in Florida, be found not guilty of alleged ethical violations. We have jurisdiction. Art. V, Sec. 15, Fla. Const.

In the summer of 1988, Belleville was retained as counsel for Bradley M. Bloch. Bloch had entered into an agreement with James F. Cowan to purchase property owned by the latter. Cowan was an elderly man, eighty-three years of age, who had a third-grade education. While the evidence showed that Cowan had substantial prior experience in selling real estate when he was younger, neither party to this cause disputes that the various written documents alleged to constitute the agreement overwhelmingly favored the buyer, Mr. Bloch. Cowan, in fact, has subsequently disputed that he ever agreed to some of the terms embodied in these documents. [1]

Although Cowan and Bloch had negotiated only for the sale of an apartment building, the documents stated that Cowan was selling both the apartment building and his residence, which was located across the street from the apartments. The referee specifically found that Cowan had no intention of selling his residence and did not know that it was included in the sale. The record substantially supports this finding, which accordingly must be accepted as fact by this Court. The Fla. Bar v. Bajoczky, 558 So.2d 1022 (Fla.1990).

It is unclear whether Belleville knowingly participated in his client's activities or merely followed the client's instructions without question. Whatever the case, Belleville drafted the relevant documents to include the legal description of Cowan's house in the instruments of sale. Cowan then apparently signed the documents without realizing he was transferring title to his house. No one at the closing explained the significance of the legal description to him. Belleville only sent a paralegal to the closing and did not attend it himself. In fact, he had never met Cowan to this point in time.

In exchange for the apartment and his residence, Cowan received only a promissory note, not a mortgage. The loan thus was unsecured. This note provided for ten percent interest amortized over twenty-five years. However, the first payment was deferred for four months with no apparent provision for interest to accumulate during this time, and the note by its own terms will become unenforceable upon Cowan's death. Finally, the documents called for Cowan to pay the closing costs, which Bloch and Belleville construed as including Belleville's attorney fee of $625.

When Cowan received the promissory note and closing documents, he realized that their terms varied from the agreement he thought he had entered. Cowan contacted an attorney, who wrote a letter to Belleville explaining the points of disagreement. The

next day, Bloch attempted to evict Cowan from his home.

The referee recommended no discipline based on his conclusion that Belleville owed no attorney-client obligation to Cowan. The Board of Governors of The Florida Bar voted to appeal this decision, and the Bar now seeks a thirty-day suspension.

While it is true that the factual findings of a referee may not be disturbed unless clearly and convincingly wrong, Bajoczky, we do not find that the present case turns on a dispute about the facts. The essential facts are not in question; and Belleville himself concedes with some understatement that "Mr. Cowan did not have a particularly good deal as a result of his negotiations with Mr. Bloch." Rather, the disagreement in this case is over Belleville's guilt and the appropriate discipline, if any.

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This is a question entirely of law that we must decide. As former Chief Justice Ehrlich has noted, a referee's recommendation "is a recommendation and nothing more. It does not carry the authority or weight of a finding of fact by the referee." Bajoczky, 558 So.2d at 1025.

Based on the facts, we cannot accept the referee's recommendation about guilt and punishment. The referee's factual findings established that Cowan had negotiated to sell the apartment, that he did not intend to sell anything other than the apartment, and that he did not know that the documents of sale would result in the loss of his residence. It also is clear Belleville should have harbored suspicions about the documents he was preparing, because the documents established on their face a transaction so one-sided as to put Belleville on notice of the likelihood of their unconscionability.

When faced with this factual scenario, we believe an attorney is under an ethical obligation to do two things. First, the attorney must explain to the unrepresented opposing party the fact that the attorney is representing an adverse interest. Second, the attorney must explain the material terms of the documents that the attorney has drafted for the client so that the opposing party fully understands their actual effect. [2] When the transaction is as one-sided as that in the present case, counsel preparing the documents is under an ethical duty to make sure that an unrepresented party understands the possible detrimental effect of the transaction and the fact that the attorney's loyalty lies with the client alone. R. Regulating Fla.Bar 4-1.7.

We recognize that The Florida Bar relies on The Florida Bar v. Teitelman, 261 So.2d 140 (Fla.1972), which is somewhat distinguishable from the present case. Teitelman dealt with those situations in which an attorney, while representing one party, also directly bills the other party a fee for preparing legal documents. In the present case, the parties themselves contractually agreed that one would pay the other's attorney's fee. [3]

We do not believe Teitelman stands for the proposition that an agreement by one party to pay the other party's attorney fee always makes the payor a client of the attorney, provided dual representation has not occurred and provided the payor either is represented by counsel or is given the warnings required in this opinion if the payor is relying on legal statements or documents prepared by the attorney for the client. However, Teitelman does stand for the proposition that an attorney must avoid the appearance of simultaneously representing adverse interests, especially where the opposing party may be unfairly induced to rely on the attorney's advice or skill in preparing legal documents. Here, Belleville breached that duty. R. Regulating Fla.Bar 4-1.7.

For the foregoing reasons, we adopt the referee's findings of fact but reject the recommendations regarding guilt and discipline. The violation Belleville committed is a serious one in light of the fact that he previously has been disciplined for an ethical violation. The Fla. Bar v. Belleville, 529 So.2d 1109 (Fla.1988). Accordingly, we grant the request of The Florida Bar. Walter J. Belleville is hereby suspended from the practice of law for a period of thirty days, commencing on January 6, 1992. Belleville shall take all steps necessary to protect his present clients' interests and shall provide them with notice of his suspension, as required by the Rules Regulating The Florida Bar. He shall accept no new business from the date this opinion is issued. Judgment for costs in the amount of $1,220.30 is entered against Belleville in

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favor of The Florida Bar, for which sum let execution issue.

It is so ordered.

SHAW, C.J., and OVERTON, McDONALD, BARKETT, GRIMES, KOGAN and HARDING, JJ., concur.

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1 The Florida Bar has not charged Belleville with any fraud-related violation, and we accordingly express no opinion as to whether such a violation occurred.

2 We limit this holding to the facts of this case. We have no intent to mandate that an attorney who has prepared documents for a real estate closing always must be present at the closing to explain the documents to the respective parties.

3 We do not imply that such an agreement existed here in an enforceable form. Cowan has disputed many of the terms of the alleged agreement. We assume solely for resolving the ethical issues of this case that Cowan had agreed to pay Bloch's attorney fees.

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644 So.2d 1355
19 Fla. L. Weekly S506
THE FLORIDA BAR, Complainant,
v.
Yvonne E. REED, Respondent.
No. 79766.
Supreme Court of Florida.
Oct. 6, 1994.
Rehearing Denied Nov. 22, 1994.

Page 1356

John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, and Kevin P. Tynan, Bar Counsel, Fort Lauderdale, for complainant.

Louis M. Jepeway, Jr. of Jepeway and Jepeway, P.A., Miami, for respondent.

PER CURIAM.

Yvonne E. Reed, a member of The Florida Bar, petitions this Court for review of a referee's report recommending she be suspended from the practice of law for two years. [1] We have jurisdiction pursuant to article V, section 15 of the Florida Constitution.

Reed's misconduct arose from her involvement in a real estate transaction that went bad. In August of 1990, Michael and Kathie Heller were selling their home in Lighthouse Point, Florida. Dimetrio Garcia and Carol Sullivan wanted to purchase the Hellers' home. Ultimately, Garcia, Sullivan and the Hellers reached an agreement under which Garcia and Sullivan agreed to pay $290,000 in cash for the Hellers' home. Reed acted as both realtor and attorney for Garcia and Sullivan.

On August 30, 1990, the Hellers executed a warranty deed and all other documents necessary to perfect the sale of their home. Reed prepared all closing documents, including a warranty deed executed by the Hellers to conclude the sale of the property. On August 31, 1990, Sullivan and Garcia informed Reed that they were having difficulties in securing the cash necessary to close on the transaction. Sullivan and Garcia communicated to Reed that they had only $90,000 to bring to closing. However, they further represented to Reed that they would have the balance of the cash within a few days.

Notwithstanding Garcia's and Sullivan's failure to secure all $290,000 for the closing, the Hellers demanded to close by August 31, 1990. In response to that demand, Reed restructured the parties' agreement such that Garcia and Sullivan would pay $90,000 at closing and take the property subject to two mortgages which were to be satisfied within thirty days of closing. Pursuant to the restructured agreement, the closing proceeded and Sullivan took title to the property. [2]

On August 31, 1990, Reed instructed Sullivan to execute a quit claim deed in which the space for designating the grantee was left blank. On September 25, 1990, Reed was advised that the cashier's check received from Garcia was in fact a $90.00 cashiers check which had been altered. The relevant bank made a claim for return of the $90,000. Reed immediately began to liquidate assets to assure that the bank's threatened action against her trust account would not affect other clients' monies held in trust. Reed stopped writing checks against the $90,000 until the bank informed her that the problem was resolved and funds were available.

On October 25, 1990, Reed inserted her name as grantee on the quit claim deed and took title to the property without tendering any consideration for the property. On October 31, 1990, Reed had Garcia and Sullivan served with a notice of eviction. Sullivan and Garcia left the property. Shortly thereafter, Reed marketed the property for

resale and leased the property while it was on the market. In November of 1990, with the knowledge that the actual ownership of the $90,000 was in dispute, Reed began to write checks against the $90,000. Reed made mortgage payments from the $90,000 in order to avoid foreclosure on the property. Further, Reed

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expended additional portions of the $90,000 in order to conserve the property. In January of 1991, Reed sold the property to Roseanna Martino for $265,000, and both outstanding mortgages on the property were satisfied.

The Hellers filed a complaint against Reed with The Florida Bar, alleging that Reed had engaged in certain unethical acts during the sale of their home to Garcia and Sullivan. The Bar investigated Reed. Ultimately, the Bar filed a four-count complaint against Reed. In count I, the Bar alleged that Reed violated various enumerated ethical rules based on her handling of the $90,000 cashier's check. [3] In count III, the Bar alleged that Reed violated various enumerated ethical rules based on her dual representation in the Heller to Sullivan and Garcia transaction. Finally, in count IV, the Bar alleged that Reed violated various enumerated ethical rules based on conflict born of Reed's attempt to perform multiple roles--Sullivan's and Garcia's realtor; Sullivan and Garcia's attorney; the Hellers' attorney to a limited extent; closing agent; escrow agent; property owner; and landlord. The referee found Reed guilty on counts I, III, and IV. [4]

The referee recommended as an appropriate discipline that Reed be suspended from the practice of law for a period of two years and that costs be taxed against her. A referee's recommendation for discipline is persuasive. However, it is ultimately our task to determine the appropriate sanction. See The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla.1989). Reed contends that the recommended discipline is too harsh. [5] We agree.

Upon review of the record, we are firmly convinced that Reed is guilty of the conduct alleged in counts I, III, and IV, as well as the exercise of extremely poor judgment. Reed should not have undertaken to serve more than one party to the same transaction. That decision seems to be the genesis

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of many of the problems which emerged as the transaction began to unravel. However, there is nothing in the record to suggest that Reed intentionally violated ethical rules in order to enrich herself. To the contrary, the Bar concedes that after all expenses, Reed made no more than $5,904.58. This amount obviously does not reflect the time Reed devoted to this matter. Moreover, as the referee noted, Reed "took the only rational path that would conserve the property and would reduce the exposure of all parties[,]" and her "actions ensured that the least harm would come to the most people from a situation ... which she was neither responsible for, nor did she promote." While we do not countenance Reed's ethical violations, we cannot say that her conduct warrants a two-year suspension. In The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), we enumerated the three purposes of disciplining unethical conduct by a member of The Florida Bar:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 986. We conclude that the purposes of disciplining Reed would be fulfilled by a six-month suspension.

Accordingly, Yvonne E. Reed is hereby suspended from the practice of law for a period of six months. Reed is suspended effective thirty days from the date of this opinion to allow her time to wind up her practice and attend to the protection of her clients' interests. She shall provide her clients with notice of her suspension, as required by rule 3-5.1(g) of the Rules Regulating The Florida Bar. Further, she shall accept no new business from the date this opinion issues. Judgment for costs of this proceeding is hereby entered against Yvonne E. Reed in the amount of $2,728.18, for which sum let execution issue.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN and HARDING, JJ., concur.

WELLS, J., recused.

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1 Reed challenges the propriety of the referee's recommendation for discipline, not the referee's findings of guilt.

2 Even though Garcia supplied the $90,000, he was not named in the warranty deed.

3 Because Reed was found not guilty on count II, we need not be distracted by the allegations contained in count II.

4 As to count I, the referee concluded that:

By reason of the misuse of trust account monies, the Respondent has technically violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-43 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline; Rules 4-1.15(a) [A lawyer shall hold in trust, funds belonging to clients or third parties.], 4-1.15(c) [When a lawyer is in possession of disputed funds, those funds must be held in trust], 4-1.15(d) [An attorney shall comply with the Rules Regulating Trust Accounts.], 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct and Rule 5-1.1 [Money entrusted for a specific purpose must only be used for that specific purpose.] of the Rules Regulating Trust Accounts. However Respondent took the only rational path that would conserve the property and would reduce the exposure of all parties. Respondent's actions ensured that the least harm would come to the most people from a situation for which she was neither responsible for, nor did she promote.

As to count III, the referee concluded that:

By reason of the conflict of interest caused by the aforesaid dual representation, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for discipline.] and 3-4.3 [The commission of any act contrary to honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(a) [A lawyer shall not represent a client if the representation will be directly adverse to the interests of another client.], 4-1.16(a) [A lawyer shall withdraw from representation if the representation will result in violation of the Rules of Professional Conduct.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct. Although disclosures were made, the prudent lawyer should have mentioned the potential adverse consequences and its implications.

As to count IV, the referee concluded that:

Based upon the conflict of interest, caused by the Respondent's interests being adverse to her clients, the Respondent has violated Rules 3-4.2 [Violation of the Rules of Professional Conduct is cause for Discipline.] and 3-4.3 [The commission of any act contrary to

honesty and justice may be cause for discipline.] of the Rules of Discipline and Rules 4-1.7(b) [A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's own interests.], 4-1.8(a) [A lawyer shall not enter into a business transaction with a client or secure an ownership interest adverse to the client unless certain enumerated steps are taken.] and 4-8.4(a) [A lawyer shall not violate the Rules of Professional Conduct.] of the Rules of Professional Conduct.

5 Reed challenges the two-year suspension, not the costs taxed against her.

73 So.3d 149

In re Oath of Admission to THE FLORIDA BAR.

No. SC11–1702.

Supreme Court of Florida.

Sept. 12, 2011.

PER CURIAM.

Today we revise the Oath of Attorney administered to new members of The Florida

[73 So.3d 150]

Bar to recognize "[t]he necessity for civility in the inherently contentious setting of the adversary process." *In re Snyder,* 472 U.S. 634, 647, 105 S.Ct. 2874, 86 L.Ed.2d 504 (1985).[1]

In recent years, concerns have grown about acts of incivility among members of the legal profession. Among others, the American Board of Trial Advocates (ABOTA) has sought to increase awareness of the importance of civility in the practice of law. The Code of Professionalism of ABOTA contains a pledge to "[b]e respectful in my conduct toward my adversaries." ABOTA Code of Professionalism, http:// www. abota. org/ index. cfm? pg = professionalism. Since 2003, the Lawyer's Oath sworn by admittees of the South Carolina Bar has contained the following pledge: "To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications." S.C.App.Ct. R. 402(k)(3). We have determined that a similar pledge should be added to Florida's oath.

Recognizing the importance of respectful and civil conduct in the practice of law, we therefore revise the Oath of Admission to The Florida Bar as set forth below. New language is indicated by underscoring.

OATH OF ADMISSION

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;

<u>To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications;</u>

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.

This oath shall be effective immediately, and no rehearing will be permitted in this case.

It is so ordered.

CANADY, C.J., and PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

Notes:

1. *See* art. V, § 15, Fla. Const.

116 So.3d 280

In re CODE FOR RESOLVING PROFESSIONALISM COMPLAINTS.

No. SC13–688.

Supreme Court of Florida.

June 6, 2013.

Original Proceedings—Code for Resolving Professionalism Complaints.

LEWIS, J.

The Supreme Court of Florida Commission on Professionalism has requested that the Court adopt a Code for Resolving Professionalism Complaints which would include a structure to provide a process to more critically address professionalism issues in Florida. We have jurisdiction, art. V, § 15, Fla. Const. ("The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted"), and grant the request.

The current professionalism movement in Florida traces its formal beginning to a Florida Bar task force created in 1989 which generated a report to this Court in 1996 that reported lawyers' professionalism to be in a state of "steep decline." In July of 1996, The Florida Bar requested that this Court create the Supreme Court of Florida Commission on Professionalism with the overarching objective of increasing the professionalism aspirations of all lawyers in Florida and ensuring that the practice of law remains a high calling with lawyers invested in not only the service of individual clients but also service to the public good as well.

Recognizing that professionalism involves principles, character, critical and reflective judgment, along with an understanding of ourselves and others working in and under stressful circumstances, Florida has traditionally followed a more passive, academic approach to enhance and improve professionalism. Continuing legal education programs, speeches, contests, meetings and other academic methods of addressing professionalism have been implemented on both state and local levels. During the last two years, the Professionalism Commission has studied and reviewed both our status and progress in advancing professionalism. Although it is impossible to determine with scientific certainty

[116 So.3d 281]

the true or exact status of professionalism today, the passive academic approach to such problems has probably had a positive impact toward improving professionalism or at least maintaining the status quo by preventing a further decline as reported in 1996, the Professionalism Commission has concluded that we continue to experience significant problems that are unacceptable, requiring further and more concrete action. Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today. While we continue our educational approach, the Professionalism Commission concluded that further integrated, affirmative, practical and active measures are now needed. We agree.

Over the years, we have come to understand that professionalism or acceptable professional behavior is not simply a matter of character or principles nor is it simply an issue of rule-following or rule-violating. To the contrary, unacceptable professional conduct and behavior is often a matter of choice or decision-making. Therefore, we accept the proposal of the Professionalism Commission to create a structure for affirmatively addressing unacceptable professional conduct. This first step admittedly contains small initial measures designed to firmly encourage better

behavior. This structure attempts to utilize a wide range of interventions from mere conversations to written communications to more severe sanctions as may be applied under our existing Florida Code of Professional Responsibility, which continues above and beyond the structure we approve today.

As a first step, the Professionalism Commission has concluded and now proposes that we should *not* attempt to create an entirely new code of "professional" or "unprofessional" conduct nor should we, at this time, attempt to codify an entirely new "Code of Professionalism." We agree with this approach. The Professionalism Commission has proposed, and we adopt, the collection and integration of our current and already existing standards of behavior as already codified in: (1) the Oath of Admission to The Florida Bar; (2) The Florida Bar Creed of Professionalism; (3) The Florida Bar Ideals and Goals of Professionalism; (4) The Rules Regulating The Florida Bar; and (5) the decisions of the Florida Supreme Court into and as part of the Code for Resolving Professionalism Complaints we adopt today. This provides an integrated standard based on the standards previously adopted and already in existence for many years. These standards have been previously approved and are in use, but are not expressed and placed in one location as our standards of expected professional behavior.

The Professionalism Commission has also proposed that the mechanism for initiating, processing, and resolving professionalism complaints be the Attorney Consumer Assistance and Intake Program (ACAP) created by The Florida Bar. We agree and adopt this mechanism. ACAP has been previously created and already accepts, screens, mediates and attempts to resolve any complaints concerning professional behavior. This structure exists to receive and resolve any complaints before and in the place of the initiation of formal grievance proceedings.

The Professionalism Commission also recognized that pursuant to the Administrative Order issued by this Court on June 11, 1998, the Chief Judge of each circuit was directed to create and maintain in continuous operation a Circuit Committee on Professionalism. The Professionalism Commission has proposed that a local committee in each circuit be activated to receive, screen and act upon any and all

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complaints of unprofessional conduct and to resolve those complaints informally, if possible, or refer to The Florida Bar if necessary. We agree with this proposal and also adopt the Local Professionalism Panel plan. The Chief Judge of every circuit shall create a Local Professionalism Panel to receive and resolve professionalism complaints informally if possible. In the discretion of the Chief Judge, the Circuit Committee on Professionalism may be designated as the Local Professionalism Panel. The Chief Judge of each circuit is responsible for activating the respective committees.

The Code for Resolving Professionalism Complaints, attached as Exhibit A, was published for comments, comments were received and considered by the Professionalism Commission, and a public hearing was conducted. The Conference of County Court Judges and the Conference of Circuit Court Judges have responded in favor of the proposed Code as an initial step toward improving professional conduct in Florida. We hereby adopt the Code for Resolving Professionalism Complaints attached as Exhibit A, effective immediately. The Court extends its gratitude to the members of the Professionalism Commission, the Standing Committee on Professionalism, The Florida Bar Center for Professionalism, and The Florida Bar for the extensive work expended in connection with this major project.

It is so ordered.

POLSTON, C.J., and PARIENTE, QUINCE, CANADY, LABARGA, and PERRY, JJ., concur.

EXHIBIT A
Code for Resolving Professionalism Complaints

Standards of Professionalism

Members of The Florida Bar shall not engage in unprofessional conduct. "Unprofessional conduct" means substantial or repeated violations of the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar, or the decisions of The Florida Supreme Court.*

Unprofessional conduct, as defined above, in many instances will constitute a violation of one or more of the *Rules of Professional Conduct.* In particular, Rule 4–8.4(d) of *The Rules Regulating The Florida Bar* has been the basis for imposing discipline in such instances. *See generally, The Florida Bar v. Ratiner,* 46 So.3d 35 (Fla.2010); *The Florida Bar v. Abramson,* 3 So.3d 964 (Fla.2009); and *The Florida Bar v. Martocci,* 791 So.2d 1074 (Fla.2001).

Implementation Procedures

1. Terminology

1.1. **Standards of Professionalism:** The Standards of Professionalism are set forth in the *Oath of Admission to The Florida Bar, The Florida Bar Creed of Professionalism, The Florida Bar Ideals and Goals of Professionalism, The Rules Regulating The Florida Bar* and the decisions of The Florida Supreme Court.

1.2. **Complainant:** The person who complains that an attorney's conduct has violated the Standards of Professionalism.

1.3. **Respondent:** The attorney whose behavior is the subject of the complaint.

1.4. **Attorney Consumer Assistance and Intake Program (ACAP):** The program of The Florida Bar which fields and screens complaints against members of The Florida Bar. Depending upon the nature and severity of the professionalism complaint, ACAP can resolve the complaint informally as provided herein or it

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can refer the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further action.

1.5. **Local Professionalism Panel:** An entity independent of The Florida Bar which is established at the local level for the purpose of resolving complaints of alleged unprofessional conduct by attorneys practicing in that circuit.

1.6. **Practice and Professionalism Enhancement Programs:** The various programs of The Florida Bar which exist for use in diversion cases or as a condition of discipline. These programs include Ethics School, Professionalism Workshops, Law Office Management Assistance Service (LOMAS), Stress Management Workshop, Florida Lawyers Assistance, Inc., and the Trust Accounting Workshop.

2. Initiating Professionalism Complaints

2.1. **Commencement of the Process:** Any person may initiate a professionalism complaint against a member of The Florida Bar through a Local Professionalism Panel when available and appropriate, or through ACAP. Complaints received by a Local

Professionalism Panel may be referred to ACAP at any time depending upon the nature and severity of the complaint.

3. Processing Professionalism Complaints Through ACAP

3.1. Complaints initiated through ACAP can be an informal request for assistance either through a telephone call or by a written request. The complaint can also be a formal complaint either under oath as required by Rule 3–7.3(c) of *The Rules Regulating The Florida Bar* or as an unsworn judicial referral as outlined in Standing Board Policy 15.91 of The Florida Bar. The Bar may also lodge a complaint on its own initiative.

3.2. **Initial Screening**

3.2.1. Upon receipt of a complaint, ACAP will create a record of the request by obtaining the contact information for both the Complainant and the Respondent. The information will then be forwarded to an ACAP Attorney for Initial Screening.

3.2.2. If the ACAP Attorney determines that the concerns raised in the complaint could be resolved informally, the ACAP Attorney will contact the Respondent to discuss the professionalism issues and provide remedial guidance as necessary, or refer the complaint to a Local Professionalism Panel. If the matter cannot be resolved informally, the ACAP Attorney will contact the Complainant and explain any further available options.

3.2.3. Upon receipt of a complaint that cannot be resolved informally, the ACAP Attorney will determine whether the allegations, if proven, would constitute a violation of *The Rules of Professional Conduct* relating to professionalism. If the ACAP Attorney determines the facts as alleged would constitute a violation, an inquiry will be opened and the ACAP Attorney will investigate the allegations. If the ACAP Attorney determines the facts as alleged would not constitute a violation, the ACAP Attorney will advise the Complainant and the Respondent of the decision not to pursue an inquiry and will provide the reasons for doing so.

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3.2.4. If the ACAP Attorney determines after investigation that the facts show the Respondent did not violate *The Rules of Professional Conduct,* the ACAP Attorney may dismiss the case after taking informal action if necessary, such as providing remedial guidance. The Complainant and Respondent will be notified of the dismissal and will be provided the reasons for doing so.

3.2.5. If the ACAP Attorney determines after investigation that a complaint warrants further action for a possible violation of one or more of *The Rules of Professional Conduct,* the ACAP Attorney will forward the matter to the appropriate branch office of The Florida Bar's Lawyer Regulation Department for further consideration.

3.3. **Review at the Branch Level:** Upon a referral to the branch office, branch Bar counsel may dismiss the case after further review and/or investigation, recommend Diversion to a Practice and Professionalism Enhancement Program in accordance with Rule 3–5.3(d) of *The Rules Regulating The Florida Bar,* or refer to a Grievance Committee for further investigation.

3.4. **Review by the Grievance Committee:** Upon referral and conclusion of the investigation, the Grievance Committee will make one of the following findings:

A. No probable cause;

B. No probable cause and include a letter of advice to the Respondent;

C. Recommendation of Diversion to one of the Practice and Professionalism Enhancement Programs;

D. Recommendation of Admonishment for Minor Misconduct; or

E. Probable cause. Probable cause under Rule 3–2.1 of *The Rules Regulating The Florida Bar* is a finding by an authorized agency that there is cause to believe that a member of The Florida Bar is guilty of misconduct justifying disciplinary action.

3.5. **Confidentiality:** The confidentiality of disciplinary investigations and proceedings is outlined in Rule 3–7.1 of *The Rules Regulating the Florida Bar*. Any record of informal attempts to resolve a dispute as outlined in paragraph 3.2.2. would also be subject to the provisions of Rule 3–7.1 except that notes of any telephonic communication between the ACAP Attorney and the Complainant, the Respondent, or any third party would be considered the work product of The Florida Bar and would remain confidential and not become part of the public record.

69B-186.010 Unlawful Inducements Related to Title Insurance Transactions.

(1) The purpose of this rule is to interpret subparagraph 626.9541(1)(h)3., F.S., which provides that it is an unfair method of competition and unfair or deceptive act or practice prohibited by Section 626.9521, F.S., to engage in certain activities related to title insurance.

(2) All lists contained within this rule are intended as examples and are not exhaustive. This rule does not prohibit inducements or rebates provided by filed or approved rates or rating manuals, advertising gifts allowed by paragraph 626.9541(1)(m), F.S., or inducements and rebates otherwise expressly allowed by law.

(3) For purposes of this rule, the term "referrer of settlement service business" means any person who is in a position to refer title insurance business incident to or part of a real estate transaction, or an associate of such person. A referrer of settlement service business may be a title insurance agent, title insurance agency, title insurance company, attorney, real estate broker, real estate agent, real estate licensee, broker associate, sales associate, mortgage banker, mortgage broker, lender, real estate developer, builder, property appraiser, surveyor, escrow agent, closing agent, or any other person or entity involved in a real estate transaction for which title insurance could be issued; or any employee, officer, director, or representative of such a person or entity.

(4) As they relate to the transaction of title insurance, the following activities, whether performed directly or indirectly, for or by any referrer of settlement service business, are inducements for the sale, placement or referral of title insurance business in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S.:

(a) Facilitating any discount, reduction, credit, or paying any fee or portion of the cost of an inspection, inspection report, appraisal, or survey, including wind inspection, to a purchaser or prospective purchaser of title insurance.

(b) Providing membership in any organization, society, association, guild, union, alliance or club at a discount, reduced rate, or at no cost to a referrer of settlement service business.

(c) Making or offering to make a charitable or other tax-deductible contribution on behalf of the purchaser or prospective purchaser of title insurance.

(d) Providing or offering stocks, bonds, securities, property, or any dividend or profit accruing or to accrue thereon to a referrer of settlement service business. However, the use of lawful affiliated business arrangements that are permitted under the Federal Real Estate Settlement Procedure Act would not violate this subparagraph and would be allowable under subsection (2) of this rule.

(e) Providing or offering employment to a referrer of settlement service business in exchange for the purchase of title insurance.

(f) Providing or paying for the printing of bulletins, flyers, post cards, labels, etc. that promote the business of a referrer of settlement service business.

(g) Furnishing or paying for the furnishing of office equipment (fax machines, telephones, copy machines, etc.) to a referrer of settlement service business.

(h) Providing or paying for cellular telephone contracts for a referrer of settlement service business.

(i) Providing simulated panoramic home and property tours to real estate brokers or real estate sales associates that they utilize to promote their listings.

(j) Providing or paying for gift cards or gift certificates to or for a referrer of settlement service business or to a purchaser or prospective purchaser of title insurance.

(k) Sponsoring and hosting, or paying for the sponsoring and hosting, of open houses for real estate brokers or real estate sales associates to promote their listings.

(l) Providing or paying for food, beverages, or room rentals at events designed to promote the business of a referrer of settlement service business other than the title insurance agent or agency.

(m) Paying advertising costs to advertise and promote the listings of real estate brokers or real estate sales associates via publications, signs, emails, websites, web pages, banners, or other forms of media.

(n) Providing an endorsement, designation of preferred status, approved status, or featured partner status on publications, signs, emails, websites, web pages, banners or other forms of media promoting the business of real estate brokers or real estate sales associates.

(o) Paying a referrer of settlement service business to fill out processing (order) forms in exchange for title insurance contracts.

(p) Providing "leads" or mailing lists to or on behalf of a referrer of settlement service business at no cost or a reduced cost.

(q) Entering into any arrangement to provide unearned compensation to a referrer of settlement service business.

(r) Providing, or offering to provide, non-title services, without a charge that is commensurate with the actual cost, to a referrer of settlement service business.

(5) Except as prohibited by Section 626.9541, F.S., expenditures for the following are not in violation of Section 626.9521 and subparagraph 626.9541(1)(h)3., F.S., or in violation of this rule:

(a) Promotional items with a company logo of the title insurance agent or agency, with a value not to exceed the amount allowed by paragraph 626.9541(1)(m), F.S., per item. "Promotional item" does not include a gift certificate, gift card, or other item that has a specific monetary value on its face, or that may be exchanged for any other item having a specific monetary value.

(b) Furnishing educational materials, such as fliers, brochures, pamphlets, or Frequently Asked Question sheets, exclusively related to title insurance for a referrer of settlement service business that are not conditioned on the referral of business and that do not involve the defraying of expenses that otherwise would be incurred by a referrer of settlement service business.

(c) Compensation paid to a referrer of settlement service business for goods and services actually performed at amounts not exceeding the reasonable fair market value of the goods and services and that is not intended to induce the referral of title insurance business.

(d) Any advertising or marketing activities that directly promote the title insurance business of the title insurance agent or agency, which may include joint participation in marketing with another party provided that the agent or agency pays the proportionate share or fair market value of the costs, and does not violate paragraph (5)(a) of this rule.

(e) A payment by a title insurance company to its duly appointed agent for services actually performed in the issuance of a title insurance policy.

(f) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed.

Rulemaking Authority 624.308(1), 626.9611 FS. Law Implemented 626.9521, 626.9541(1)(h), (m), 626.9611 FS. History–New 2-9-16.

626.9541 Unfair methods of competition and unfair or deceptive acts or practices defined.—

(1) UNFAIR METHODS OF COMPETITION AND UNFAIR OR DECEPTIVE ACTS.—The following are defined as unfair methods of competition and unfair or deceptive acts or practices:

(a) *Misrepresentations and false advertising of insurance policies.*—Knowingly making, issuing, circulating, or causing to be made, issued, or circulated, any estimate, illustration, circular, statement, sales presentation, omission, comparison, or property and casualty certificate of insurance altered after being issued, which:

1. Misrepresents the benefits, advantages, conditions, or terms of any insurance policy.
2. Misrepresents the dividends or share of the surplus to be received on any insurance policy.
3. Makes any false or misleading statements as to the dividends or share of surplus previously paid on any insurance policy.
4. Is misleading, or is a misrepresentation, as to the financial condition of any person or as to the legal reserve system upon which any life insurer operates.
5. Uses any name or title of any insurance policy or class of insurance policies misrepresenting the true nature thereof.
6. Is a misrepresentation for the purpose of inducing, or tending to induce, the lapse, forfeiture, exchange, conversion, or surrender of any insurance policy.
7. Is a misrepresentation for the purpose of effecting a pledge or assignment of, or effecting a loan against, any insurance policy.
8. Misrepresents any insurance policy as being shares of stock or misrepresents ownership interest in the company.
9. Uses any advertisement that would mislead or otherwise cause a reasonable person to believe mistakenly that the state or the Federal Government is responsible for the insurance sales activities of any person or stands behind any person's credit or that any person, the state, or the Federal Government guarantees any returns on insurance products or is a source of payment of any insurance obligation of or sold by any person.

(b) *False information and advertising generally.*—Knowingly making, publishing, disseminating, circulating, or placing before the public, or causing, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public:

1. In a newspaper, magazine, or other publication,
2. In the form of a notice, circular, pamphlet, letter, or poster,
3. Over any radio or television station, or
4. In any other way,

an advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance, which is untrue, deceptive, or misleading.

(c) *Defamation.*—Knowingly making, publishing, disseminating, or circulating, directly or indirectly, or aiding, abetting, or encouraging the making, publishing, disseminating, or circulating of, any oral or written statement, or any pamphlet, circular, article, or literature, which is false or maliciously critical of, or derogatory to, any person and which is calculated to injure such person.

(d) *Boycott, coercion, and intimidation.*—Entering into any agreement to commit, or by any concerted action committing, any act of boycott, coercion, or intimidation resulting in, or tending to result in, unreasonable restraint of, or monopoly in, the business of insurance.

(e) *False statements and entries.*—

1. Knowingly:

a. Filing with any supervisory or other public official,

b. Making, publishing, disseminating, circulating,

c. Delivering to any person,

d. Placing before the public,

e. Causing, directly or indirectly, to be made, published, disseminated, circulated, delivered to any person, or placed before the public,

any false material statement.

2. Knowingly making any false entry of a material fact in any book, report, or statement of any person, or knowingly omitting to make a true entry of any material fact pertaining to the business of such person in any book, report, or statement of such person.

(f) *Stock operations and advisory board contracts.*—Issuing or delivering, promising to issue or deliver, or permitting agents, officers, or employees to issue or deliver, agency company stock or other capital stock, benefit certificates or shares in any common-law corporation, or securities or any special or advisory board contracts or other contracts of any kind promising returns or profits as an inducement to insurance.

(g) *Unfair discrimination.*—

1. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class and equal expectation of life, in the rates charged for a life insurance or annuity contract, in the dividends or other benefits payable thereon, or in any other term or condition of such contract.

2. Knowingly making or permitting unfair discrimination between individuals of the same actuarially supportable class, as determined at the time of initial issuance of the coverage, and essentially the same hazard, in the amount of premium, policy fees, or rates charged for a policy or contract of accident, disability, or health insurance, in the benefits payable thereunder, in the terms or conditions of such contract, or in any other manner.

3. For a health insurer, life insurer, disability insurer, property and casualty insurer, automobile insurer, or managed care provider to underwrite a policy, or refuse to issue, reissue, or renew a policy, refuse to pay a claim, cancel or otherwise terminate a policy, or increase rates based upon the fact that an insured or applicant who is also the proposed insured has made a claim or sought or should have sought medical or psychological treatment in the past for abuse, protection from abuse, or shelter from abuse, or that a claim was caused in the past by, or might occur as a result of, any future assault, battery, or sexual assault by a family or household member upon another family or household member as defined in s. 741.28. A health insurer, life insurer, disability insurer, or managed care provider may refuse to underwrite, issue, or renew a policy based on the applicant's medical condition, but may not consider whether such condition was caused by an act of abuse. For purposes of this section, the term "abuse" means the occurrence of one or more of the following acts:

a. Attempting or committing assault, battery, sexual assault, or sexual battery;

b. Placing another in fear of imminent serious bodily injury by physical menace;

c. False imprisonment;

d. Physically or sexually abusing a minor child; or

e. An act of domestic violence as defined in s. 741.28.

This subparagraph does not prohibit a property and casualty insurer or an automobile insurer from excluding coverage for intentional acts by the insured if such exclusion is not an act of unfair discrimination as defined in this paragraph.

4. For a personal lines property or personal lines automobile insurer to:

a. Refuse to issue, reissue, or renew a policy; cancel or otherwise terminate a policy; or charge an unfairly discriminatory rate in this state based on the lawful use, possession, or ownership of a firearm or ammunition by the insurance applicant, insured, or a household member of the applicant or insured. This sub-subparagraph does not prevent an insurer from charging a supplemental premium that is not unfairly discriminatory for a separate rider voluntarily requested by the insurance applicant to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

b. Disclose the lawful ownership or possession of firearms of an insurance applicant, insured, or household member of the applicant or insured to a third party or an affiliated entity of the insurer unless the insurer discloses to the applicant or insured the specific need to disclose the information and the applicant or insured expressly consents to the disclosure, or the disclosure is necessary to quote or bind coverage, continue coverage, or adjust a claim. For purposes of underwriting and issuing insurance coverage, this sub-subparagraph does not prevent the sharing of information between an insurance company and its licensed insurance agent if a separate rider has been voluntarily requested by the policyholder or prospective policyholder to insure a firearm or a firearm collection whose value exceeds the standard policy coverage.

(h) *Unlawful rebates.—*

1. Except as otherwise expressly provided by law, or in an applicable filing with the office, knowingly:

a. Permitting, or offering to make, or making, any contract or agreement as to such contract other than as plainly expressed in the insurance contract issued thereon;

b. Paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance contract, any unlawful rebate of premiums payable on the contract, any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract;

c. Giving, selling, or purchasing, or offering to give, sell, or purchase, as inducement to such insurance contract or in connection therewith, any stocks, bonds, or other securities of any insurance company or other corporation, association, or partnership, or any dividends or profits accrued thereon, or anything of value whatsoever not specified in the insurance contract.

2. Nothing in paragraph (g) or subparagraph 1. of this paragraph shall be construed as including within the definition of discrimination or unlawful rebates:

a. In the case of any contract of life insurance or life annuity, paying bonuses to all policyholders or otherwise abating their premiums in whole or in part out of surplus accumulated from nonparticipating insurance; provided that any such bonuses or abatement of premiums is fair and equitable to all policyholders and for the best interests of the company and its policyholders.

b. In the case of life insurance policies issued on the industrial debit plan, making allowance to policyholders who have continuously for a specified period made premium payments directly to an office of the insurer in an amount which fairly represents the saving in collection expenses.

c. Readjustment of the rate of premium for a group insurance policy based on the loss or expense thereunder, at the end of the first or any subsequent policy year of insurance thereunder, which may be made retroactive only for such policy year.

d. Issuance of life insurance policies or annuity contracts at rates less than the usual rates of premiums for such policies or contracts, as group insurance or employee insurance as defined in this code.

e. Issuing life or disability insurance policies on a salary savings, bank draft, preauthorized check, payroll deduction, or other similar plan at a reduced rate reasonably related to the savings made by the use of such plan.

3.a. No title insurer, or any member, employee, attorney, agent, or agency thereof, shall pay, allow, or give, or offer to pay, allow, or give, directly or indirectly, as inducement to title insurance, or after such insurance has been effected, any rebate or abatement of the premium or any other charge or fee, or provide any special favor or advantage, or any monetary consideration or inducement whatever.

b. Nothing in this subparagraph shall be construed as prohibiting the payment of fees to attorneys at law duly licensed to practice law in the courts of this state, for professional services, or as prohibiting the payment of earned portions of the premium to duly appointed agents or agencies who actually perform services for the title insurer. Nothing in this subparagraph shall be construed as prohibiting a rebate or abatement of an attorney fee charged for professional services, or that portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), or any other agent charge or fee to the person responsible for paying the premium, charge, or fee.

c. No insured named in a policy, or any other person directly or indirectly connected with the transaction involving the issuance of such policy, including, but not limited to, any mortgage broker, real estate broker, builder, or attorney, any employee, agent, agency, or representative thereof, or any other person whatsoever, shall knowingly receive or accept, directly or indirectly, any rebate or abatement of any portion of the title insurance premium or of any other charge or fee or any monetary consideration or inducement whatsoever, except as set forth in sub-subparagraph b.; provided, in no event shall any portion of the attorney fee, any portion of the premium that is not required to be retained by the insurer pursuant to s. 627.782(1), any agent charge or fee, or any other monetary consideration or inducement be paid directly or indirectly for the referral of title insurance business.

(i) *Unfair claim settlement practices.—*

1. Attempting to settle claims on the basis of an application, when serving as a binder or intended to become a part of the policy, or any other material document which was altered without notice to, or knowledge or consent of, the insured;

2. A material misrepresentation made to an insured or any other person having an interest in the proceeds payable under such contract or policy, for the purpose and with the intent of effecting settlement of such claims, loss, or damage under such contract or policy on less favorable terms than those provided in, and contemplated by, such contract or policy; or

3. Committing or performing with such frequency as to indicate a general business practice any of the following:

a. Failing to adopt and implement standards for the proper investigation of claims;

b. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;

c. Failing to acknowledge and act promptly upon communications with respect to claims;

d. Denying claims without conducting reasonable investigations based upon available information;

e. Failing to affirm or deny full or partial coverage of claims, and, as to partial coverage, the dollar amount or extent of coverage, or failing to provide a written statement that the claim is being investigated, upon the written request of the insured within 30 days after proof-of-loss statements have been completed;

f. Failing to promptly provide a reasonable explanation in writing to the insured of the basis in the insurance policy, in relation to the facts or applicable law, for denial of a claim or for the offer of a compromise settlement;

g. Failing to promptly notify the insured of any additional information necessary for the processing of a claim; or

h. Failing to clearly explain the nature of the requested information and the reasons why such information is necessary.

i. Failing to pay personal injury protection insurance claims within the time periods required by s. 627.736(4)(b). The office may order the insurer to pay restitution to a policyholder, medical provider, or other claimant, including interest at a rate consistent with the amount set forth in s.55.03(1), for the time period within which an insurer fails to pay claims as required by law. Restitution is in addition to any other penalties allowed by law, including, but not limited to, the suspension of the insurer's certificate of authority.

4. Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.

(j) *Failure to maintain complaint-handling procedures.*—Failure of any person to maintain a complete record of all the complaints received since the date of the last examination. For purposes of this paragraph, "complaint" means any written communication primarily expressing a grievance.

(k) *Misrepresentation in insurance applications.*—

1. Knowingly making a false or fraudulent written or oral statement or representation on, or relative to, an application or negotiation for an insurance policy for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual.

2. Knowingly making a material omission in the comparison of a life, health, or Medicare supplement insurance replacement policy with the policy it replaces for the purpose of obtaining a fee, commission, money, or other benefit from any insurer, agent, broker, or individual. For the purposes of this subparagraph, a material omission includes the failure to advise the insured of the existence and operation of a preexisting condition clause in the replacement policy.

(l) *Twisting.*—Knowingly making any misleading representations or incomplete or fraudulent comparisons or fraudulent material omissions of or with respect to any insurance policies or insurers for the purpose of inducing, or tending to induce, any person to lapse, forfeit, surrender, terminate, retain, pledge, assign, borrow on, or convert any insurance policy or to take out a policy of insurance in another insurer.

(m) *Advertising gifts permitted.*—No provision of paragraph (f), paragraph (g), or paragraph (h) shall be deemed to prohibit a licensed insurer or its agent from giving to insureds, prospective insureds, and others, for the purpose of advertising, any article of merchandise having a value of not more than $25.

(n) *Free insurance prohibited.*—

1. Advertising, offering, or providing free insurance as an inducement to the purchase or sale of real or personal property or of services directly or indirectly connected with such real or personal property.

2. For the purposes of this paragraph, "free" insurance is:

a. Insurance for which no identifiable and additional charge is made to the purchaser of such real property, personal property, or services.

b. Insurance for which an identifiable or additional charge is made in an amount less than the cost of such insurance as to the seller or other person, other than the insurer, providing the same.

3. Subparagraphs 1. and 2. do not apply to:

a. Insurance of, loss of, or damage to the real or personal property involved in any such sale or services, under a policy covering the interests therein of the seller or vendor.

b. Blanket disability insurance as defined in s. 627.659.

c. Credit life insurance or credit disability insurance.

d. Any individual, isolated, nonrecurring unadvertised transaction not in the regular course of business.

e. Title insurance.

f. Any purchase agreement involving the purchase of a cemetery lot or lots in which, under stated conditions, any balance due is forgiven upon the death of the purchaser.

g. Life insurance, trip cancellation insurance, or lost baggage insurance offered by a travel agency as part of a travel package offered by and booked through the agency.

4. Using the word "free" or words which imply the provision of insurance without a cost to describe life or disability insurance, in connection with the advertising or offering for sale of any kind of goods, merchandise, or services.

(o) *Illegal dealings in premiums; excess or reduced charges for insurance.*—

1. Knowingly collecting any sum as a premium or charge for insurance, which is not then provided, or is not in due course to be provided, subject to acceptance of the risk by the insurer, by an insurance policy issued by an insurer as permitted by this code.

2. Knowingly collecting as a premium or charge for insurance any sum in excess of or less than the premium or charge applicable to such insurance, in accordance with the applicable classifications and rates as filed with and approved by the office, and as specified in the policy; or, in cases when classifications, premiums, or rates are not required by this code to be so filed and approved, premiums

and charges collected from a Florida resident in excess of or less than those specified in the policy and as fixed by the insurer. Notwithstanding any other provision of law, this provision shall not be deemed to prohibit the charging and collection, by surplus lines agents licensed under part VIII of this chapter, of the amount of applicable state and federal taxes, or fees as authorized by s. 626.916(4), in addition to the premium required by the insurer or the charging and collection, by licensed agents, of the exact amount of any discount or other such fee charged by a credit card facility in connection with the use of a credit card, as authorized by subparagraph (q)3., in addition to the premium required by the insurer. This subparagraph shall not be construed to prohibit collection of a premium for a universal life or a variable or indeterminate value insurance policy made in accordance with the terms of the contract.

3.a. Imposing or requesting an additional premium for a policy of motor vehicle liability, personal injury protection, medical payment, or collision insurance or any combination thereof or refusing to renew the policy solely because the insured was involved in a motor vehicle accident unless the insurer's file contains information from which the insurer in good faith determines that the insured was substantially at fault in the accident.

b. An insurer which imposes and collects such a surcharge or which refuses to renew such policy shall, in conjunction with the notice of premium due or notice of nonrenewal, notify the named insured that he or she is entitled to reimbursement of such amount or renewal of the policy under the conditions listed below and will subsequently reimburse him or her or renew the policy, if the named insured demonstrates that the operator involved in the accident was:

(I) Lawfully parked;

(II) Reimbursed by, or on behalf of, a person responsible for the accident or has a judgment against such person;

(III) Struck in the rear by another vehicle headed in the same direction and was not convicted of a moving traffic violation in connection with the accident;

(IV) Hit by a "hit-and-run" driver, if the accident was reported to the proper authorities within 24 hours after discovering the accident;

(V) Not convicted of a moving traffic violation in connection with the accident, but the operator of the other automobile involved in such accident was convicted of a moving traffic violation;

(VI) Finally adjudicated not to be liable by a court of competent jurisdiction;

(VII) In receipt of a traffic citation which was dismissed or nolle prossed; or

(VIII) Not at fault as evidenced by a written statement from the insured establishing facts demonstrating lack of fault which are not rebutted by information in the insurer's file from which the insurer in good faith determines that the insured was substantially at fault.

c. In addition to the other provisions of this subparagraph, an insurer may not fail to renew a policy if the insured has had only one accident in which he or she was at fault within the current 3-year period. However, an insurer may nonrenew a policy for reasons other than accidents in accordance

with s. 627.728. This subparagraph does not prohibit nonrenewal of a policy under which the insured has had three or more accidents, regardless of fault, during the most recent 3-year period.

4. Imposing or requesting an additional premium for, or refusing to renew, a policy for motor vehicle insurance solely because the insured committed a noncriminal traffic infraction as described in s. 318.14 unless the infraction is:

a. A second infraction committed within an 18-month period, or a third or subsequent infraction committed within a 36-month period.

b. A violation of s. 316.183, when such violation is a result of exceeding the lawful speed limit by more than 15 miles per hour.

5. Upon the request of the insured, the insurer and licensed agent shall supply to the insured the complete proof of fault or other criteria which justifies the additional charge or cancellation.

6. No insurer shall impose or request an additional premium for motor vehicle insurance, cancel or refuse to issue a policy, or refuse to renew a policy because the insured or the applicant is a handicapped or physically disabled person, so long as such handicap or physical disability does not substantially impair such person's mechanically assisted driving ability.

7. No insurer may cancel or otherwise terminate any insurance contract or coverage, or require execution of a consent to rate endorsement, during the stated policy term for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured with the same exposure at a higher premium rate or continuing an existing contract or coverage with the same exposure at an increased premium.

8. No insurer may issue a nonrenewal notice on any insurance contract or coverage, or require execution of a consent to rate endorsement, for the purpose of offering to issue, or issuing, a similar or identical contract or coverage to the same insured at a higher premium rate or continuing an existing contract or coverage at an increased premium without meeting any applicable notice requirements.

9. No insurer shall, with respect to premiums charged for motor vehicle insurance, unfairly discriminate solely on the basis of age, sex, marital status, or scholastic achievement.

10. Imposing or requesting an additional premium for motor vehicle comprehensive or uninsured motorist coverage solely because the insured was involved in a motor vehicle accident or was convicted of a moving traffic violation.

11. No insurer shall cancel or issue a nonrenewal notice on any insurance policy or contract without complying with any applicable cancellation or nonrenewal provision required under the Florida Insurance Code.

12. No insurer shall impose or request an additional premium, cancel a policy, or issue a nonrenewal notice on any insurance policy or contract because of any traffic infraction when adjudication has been withheld and no points have been assessed pursuant to s. 318.14(9) and (10).

However, this subparagraph does not apply to traffic infractions involving accidents in which the insurer has incurred a loss due to the fault of the insured.

(p) *Insurance cost specified in "price package".—*

1. When the premium or charge for insurance of or involving such property or merchandise is included in the overall purchase price or financing of the purchase of merchandise or property, the vendor or lender shall separately state and identify the amount charged and to be paid for the insurance, and the classifications, if any, upon which based; and the inclusion or exclusion of the cost of insurance in such purchase price or financing shall not increase, reduce, or otherwise affect any other factor involved in the cost of the merchandise, property, or financing as to the purchaser or borrower.

2. This paragraph does not apply to transactions which are subject to the provisions of part I of chapter 520, entitled "The Motor Vehicle Sales Finance Act."

3. This paragraph does not apply to credit life or credit disability insurance which is in compliance with s. 627.681(4).

(q) *Certain insurance transactions through credit card facilities prohibited.—*

1. Except as provided in subparagraph 3., no person shall knowingly solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders. The term "credit card holder" as used in this paragraph means a person who may pay the charge for purchases or other transactions through the credit card facility or organization, whose credit with such facility or organization is evidenced by a credit card identifying such person as being one whose charges the credit card facility or organization will pay, and who is identified as such upon the credit card by name, account number, symbol, insignia, or other method or device of identification. This subparagraph does not apply as to health insurance or to credit life, credit disability, or credit property insurance.

2. If any person does or performs in this state any of the acts in violation of subparagraph 1. for or on behalf of an insurer or credit card facility, such insurer or credit card facility shall be deemed to be doing business in this state and, if an insurer, shall be subject to the same state, county, and municipal taxes as insurers that have been legally qualified and admitted to do business in this state by agents or otherwise are subject, the same to be assessed and collected against such insurers; and such person so doing or performing any of such acts is personally liable for all such taxes.

3. A licensed agent or insurer may solicit or negotiate insurance; seek or accept applications for insurance; issue or deliver any policy; receive, collect, or transmit premiums, to or for an insurer; or otherwise transact insurance in this state, or relative to a subject of insurance resident, located, or to

be performed in this state, through the arrangement or facilities of a credit card facility or organization, for the purpose of insuring credit card holders or prospective credit card holders if:

a. The insurance or policy which is the subject of the transaction is noncancelable by any person other than the named insured, the policyholder, or the insurer;

b. Any refund of unearned premium is made to the credit card holder by mail or electronic transfer; and

c. The credit card transaction is authorized by the signature of the credit card holder or other person authorized to sign on the credit card account.

The conditions enumerated in sub-subparagraphs a.-c. do not apply to health insurance or to credit life, credit disability, or credit property insurance; and sub-subparagraph c. does not apply to property and casualty insurance if the transaction is authorized by the insured.

4. No person may use or disclose information resulting from the use of a credit card in conjunction with the purchase of insurance if such information is to the advantage of the credit card facility or an insurance agent, or is to the detriment of the insured or any other insurance agent; except that this provision does not prohibit a credit card facility from using or disclosing such information in a judicial proceeding or consistent with applicable law on credit reporting.

5. Such insurance may not be sold through a credit card facility in conjunction with membership in any automobile club. The term "automobile club" means a legal entity that, in consideration of dues, assessments, or periodic payments of money, promises its members or subscribers to assist them in matters relating to the ownership, operation, use, or maintenance of a motor vehicle; however, the term does not include persons, associations, or corporations that are organized and operated solely for the purpose of conducting, sponsoring, or sanctioning motor vehicle races, exhibitions, or contests upon racetracks, or upon race courses established and marked as such for the duration of such particular event. The words "motor vehicle" used herein shall be the same as defined in chapter 320.

(r) *Interlocking ownership and management.—*

1. Any domestic insurer may retain, invest in, or acquire the whole or any part of the capital stock of any other insurer or insurers, or have a common management with any other insurer or insurers, unless such retention, investment, acquisition, or common management is inconsistent with any other provision of this code, or unless by reason thereof the business of such insurers with the public is conducted in a manner which substantially lessens competition generally in the insurance business.

2. Any person otherwise qualified may be a director of two or more domestic insurers which are competitors, unless the effect thereof is substantially to lessen competition between insurers generally or materially tend to create a monopoly.

3. Any limitation contained in this paragraph does not apply to any person who is a director of two or more insurers under common control or management.

(s) *Prohibited arrangements as to funerals.—*

1. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured, or organize, promote, or operate any enterprise or plan to enter into any contract with any insured under which the freedom of choice in the open market of the person having the legal right to such choice is restricted as to the purchase, arrangement, and conduct of a funeral service or any part thereof for any individual insured by the insurer. No life insurer shall designate in any life insurance policy the person to conduct the funeral of the insured as the owner of the policy.

2. No insurer shall contract or agree to furnish funeral merchandise or services in connection with the disposition of any person upon the death of any person insured by such insurer.

3. No insurer shall contract or agree with any funeral director or direct disposer to the effect that such funeral director or direct disposer shall conduct the funeral of any person insured by such insurer.

4. No insurer shall provide, in any insurance contract covering the life of any person in this state, for the payment of the proceeds or benefits thereof in other than legal tender of the United States and of this state, or for the withholding of such proceeds or benefits, all for the purpose of either directly or indirectly providing, inducing, or furthering any arrangement or agreement designed to require or induce the employment of a particular person to conduct the funeral of the insured.

(t) *Certain life insurance relations with funeral directors prohibited.—*

1. No life insurer shall permit any funeral director or direct disposer to act as its representative, adjuster, claim agent, special claim agent, or agent for such insurer in soliciting, negotiating, or effecting contracts of life insurance on any plan or of any nature issued by such insurer or in collecting premiums for holders of any such contracts except as prescribed in s.626.785(3).

2. No life insurer shall:

a. Affix, or permit to be affixed, advertising matter of any kind or character of any licensed funeral director or direct disposer to such policies of insurance.

b. Circulate, or permit to be circulated, any such advertising matter with such insurance policies.

c. Attempt in any manner or form to influence policyholders of the insurer to employ the services of any particular licensed funeral director or direct disposer.

3. No such insurer shall maintain, or permit its agent to maintain, an office or place of business in the office, establishment, or place of business of any funeral director or direct disposer in this state.

(u) *False claims; obtaining or retaining money dishonestly.—*

1. Any agent, physician, claimant, or other person who causes to be presented to any insurer a false claim for payment, knowing the same to be false; or

2. Any agent, collector, or other person who represents any insurer or collects or does business without the authority of the insurer, secures cash advances by false statements, or fails to turn over when required, or satisfactorily account for, all collections of such insurer,

shall, in addition to the other penalties provided in this act, be guilty of a misdemeanor of the second degree and, upon conviction thereof, shall be subject to the penalties provided by s. 775.082 or s. 775.083.

(v) *Proposal required.*—If a person simultaneously holds a securities license and a life insurance license, he or she shall prepare and leave with each prospective buyer a written proposal, on or before delivery of any investment plan. "Investment plan" means a mutual funds program, and the proposal shall consist of a prospectus describing the investment feature and a full illustration of any life insurance feature. The proposal shall be prepared in duplicate, dated, and signed by the licensee. The original shall be left with the prospect, the duplicate shall be retained by the licensee for a period of not less than 3 years, and a copy shall be furnished to the department upon its request. In lieu of a duplicate copy, a receipt for standardized proposals filed with the department may be obtained and held by the licensee.

(w) *Soliciting or accepting new or renewal insurance risks by insolvent or impaired insurer prohibited; penalty.—*

1. Whether or not delinquency proceedings as to the insurer have been or are to be initiated, but while such insolvency or impairment exists, no director or officer of an insurer, except with the written permission of the office, shall authorize or permit the insurer to solicit or accept new or renewal insurance risks in this state after such director or officer knew, or reasonably should have known, that the insurer was insolvent or impaired. "Impaired" includes impairment of capital or surplus, as defined in s. 631.011(12) and (13).

2. Any such director or officer, upon conviction of a violation of this paragraph, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(x) *Refusal to insure.*—In addition to other provisions of this code, the refusal to insure, or continue to insure, any individual or risk solely because of:

1. Race, color, creed, marital status, sex, or national origin;

2. The residence, age, or lawful occupation of the individual or the location of the risk, unless there is a reasonable relationship between the residence, age, or lawful occupation of the individual or the location of the risk and the coverage issued or to be issued;

3. The insured's or applicant's failure to agree to place collateral business with any insurer, unless the coverage applied for would provide liability coverage which is excess over that provided in policies maintained on property or motor vehicles;

4. The insured's or applicant's failure to purchase noninsurance services or commodities, including automobile services as defined in s. 624.124;

5. The fact that the insured or applicant is a public official; or

6. The fact that the insured or applicant had been previously refused insurance coverage by any insurer, when such refusal to insure or continue to insure for this reason occurs with such frequency as to indicate a general business practice.

(y) *Powers of attorney.*—Except as provided in s. 627.842(2):

1. Requiring, as a condition to the purchase or continuation of an insurance policy, that an applicant for insurance or an insured execute a power of attorney in favor of an insurance agent or agency or employee thereof; or

2. Presenting to the applicant or the insured, as a routine business practice, a form that authorizes the insurance agent or agency to sign the applicant's or insured's name on any insurance-related document or application for the purchase of motor vehicle services as described in s. 624.124. To be valid, a power of attorney must be an act or practice other than as described in this paragraph, must be a separate writing in a separate document, must be executed with the full knowledge and consent of the applicant or insured who grants the power of attorney, must be in the best interests of the insured or applicant, and a copy of the power of attorney must be provided to the applicant or insured at the time of the transaction.

(z) *Sliding.*—Sliding is the act or practice of:

1. Representing to the applicant that a specific ancillary coverage or product is required by law in conjunction with the purchase of insurance when such coverage or product is not required;

2. Representing to the applicant that a specific ancillary coverage or product is included in the policy applied for without an additional charge when such charge is required; or

3. Charging an applicant for a specific ancillary coverage or product, in addition to the cost of the insurance coverage applied for, without the informed consent of the applicant.

[1](aa) *Churning.*—

1. Churning is the practice whereby policy values in an existing life insurance policy or annuity contract, including, but not limited to, cash, loan values, or dividend values, and in any riders to that policy or contract, are directly or indirectly used to purchase another insurance policy or annuity contract with that same insurer for the purpose of earning additional premiums, fees, commissions, or other compensation:

a. Without an objectively reasonable basis for believing that the replacement or extraction will result in an actual and demonstrable benefit to the policyholder;

b. In a fashion that is fraudulent, deceptive, or otherwise misleading or that involves a deceptive omission;

c. When the applicant is not informed that the policy values including cash values, dividends, and other assets of the existing policy or contract will be reduced, forfeited, or used in the purchase of the replacing or additional policy or contract, if this is the case; or

d. Without informing the applicant that the replacing or additional policy or contract will not be a paid-up policy or that additional premiums will be due, if this is the case.

Churning by an insurer or an agent is an unfair method of competition and an unfair or deceptive act or practice.

2. Each insurer shall comply with sub-subparagraphs 1.c. and 1.d. by disclosing to the applicant at the time of the offer on a form designed and adopted by rule by the commission if, how, and the extent to which the policy or contract values (including cash value, dividends, and other assets) of a previously issued policy or contract will be used to purchase a replacing or additional policy or contract with the same insurer. The form must include disclosure of the premium, the death benefit of the proposed replacing or additional policy, and the date when the policy values of the existing policy or contract will be insufficient to pay the premiums of the replacing or additional policy or contract.

3. Each insurer shall adopt written procedures to reasonably avoid churning of policies or contracts that it has issued, and failure to adopt written procedures sufficient to reasonably avoid churning shall be an unfair method of competition and an unfair or deceptive act or practice.

(bb) *Deceptive use of name.*—Using the name or logo of a financial institution, as defined in s.655.005(1), or its affiliates or subsidiaries when marketing or soliciting existing or prospective customers if such marketing materials are used without the written consent of the financial institution and in a manner that would lead a reasonable person to believe that the material or solicitation originated from, was endorsed by, or is related to or the responsibility of the financial institution or its affiliates or subsidiaries.

(cc) *Unfair rate increases for persons in military service.*—Charging an increased premium for reinstating a motor vehicle insurance policy that was canceled or suspended by the insured solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. It is also an unfair practice for an insurer to charge an increased premium for a new motor vehicle insurance policy if the applicant for coverage or his or her covered dependents were previously insured with a different insurer and canceled that policy solely for the reason that he or she was transferred out of this state while serving in the United States Armed Forces or on active duty in the National Guard or United States Armed Forces Reserve. For purposes of determining premiums, an insurer shall consider such persons as having maintained continuous coverage.

(dd) *Life insurance limitations based on past foreign travel experiences or future foreign travel plans.*—

1. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's past lawful foreign travel experiences.

2. An insurer may not refuse life insurance to; refuse to continue the life insurance of; or limit the amount, extent, or kind of life insurance coverage available to an individual based solely on the individual's future lawful travel plans unless the insurer can demonstrate and the Office of Insurance Regulation determines that:

a. Individuals who travel are a separate actuarially supportable class whose risk of loss is different from those individuals who do not travel; and

b. Such risk classification is based upon sound actuarial principles and actual or reasonably anticipated experience that correlates to the risk of travel to a specific destination.

3. The commission may adopt rules pursuant to ss. 120.536(1) and 120.54 necessary to implement this paragraph and may provide for limited exceptions that are based upon national or international emergency conditions that affect the public health, safety, and welfare and that are consistent with public policy.

4. Each market conduct examination of a life insurer conducted pursuant to s. 624.3161 shall include a review of every application under which such insurer refused to issue life insurance; refused to continue life insurance; or limited the amount, extent, or kind of life insurance issued, based upon future lawful travel plans.

5. The administrative fines provided in s. 624.4211(2) and (3) shall be trebled for violations of this paragraph.

6. The Office of Insurance Regulation shall report to the President of the Senate and the Speaker of the House of Representatives by March 1, 2007, and on the same date annually thereafter, on the implementation of this paragraph. The report shall include, but not be limited to, the number of applications under which life insurance was denied, continuance was refused, or coverage was limited based on future travel plans; the number of insurers taking such action; and the reason for taking each such action.

[1](ee) *Fraudulent signatures on an application or policy-related document.*—Willfully submitting to an insurer on behalf of a consumer an insurance application or policy-related document bearing a false or fraudulent signature.

[1](ff) *Unlawful use of designations; misrepresentation of agent qualifications.*—

1. A licensee may not, in any sales presentation or solicitation for insurance, use a designation or title in such a way as to falsely imply that the licensee:

a. Possesses special financial knowledge or has obtained specialized financial training; or

b. Is certified or qualified to provide specialized financial advice to senior citizens.

2. A licensee may not use terms such as "financial advisor" in such a way as to falsely imply that the licensee is licensed or qualified to discuss, sell, or recommend financial products other than insurance products.

3. A licensee may not, in any sales presentation or solicitation for insurance, falsely imply that he or she is qualified to discuss, recommend, or sell securities or other investment products in addition to insurance products.

4. A licensee who also holds a designation as a certified financial planner (CFP), chartered life underwriter (CLU), chartered financial consultant (ChFC), life underwriter training council fellow (LUTC), or the appropriate license to sell securities from the Financial Industry Regulatory Authority (FINRA) may inform the customer of those licenses or designations and make recommendations in accordance with those licenses or designations, and in so doing does not violate this paragraph.

(gg) *Out-of-network reimbursement.*—Willfully failing to comply with s. 627.64194 with such frequency as to indicate a general business practice.

(2) ALTERNATIVE RATES OF PAYMENT.—Nothing in this section shall be construed to prohibit an insurer or insurers from negotiating or entering into contracts with licensed health care providers for alternative rates of payment, or from limiting payments under policies pursuant to agreements with insureds, as long as the insurer offers the benefit of such alternative rates to insureds who select designated providers.

(3) INPATIENT FACILITY NETWORK.—This section may not be construed to prohibit a Medicare supplement insurer from granting a premium credit to insureds for using an in-network inpatient facility.

(4) PARTICIPATION IN A WELLNESS OR HEALTH IMPROVEMENT PROGRAM.—

(a) *Authorization to offer rewards or incentives for participation.*—An insurer issuing a group or individual health benefit plan may offer a voluntary wellness or health improvement program and may encourage or reward participation in the program by authorizing rewards or incentives, including, but not limited to, merchandise, gift cards, debit cards, premium discounts, contributions to a member's health savings account, or modifications to copayment, deductible, or coinsurance amounts. Any advertisement of the program is not subject to the limitations set forth in paragraph (1)(m).

(b) *Verification of medical condition by nonparticipants due to medical condition.*—An insurer may require a member of a health benefit plan to provide verification, such as an affirming statement from the member's physician, that the member's medical condition makes it unreasonably difficult or inadvisable to participate in the wellness or health improvement program in order for that nonparticipant to receive the reward or incentive.

(c) *Disclosure requirement.*—A reward or incentive offered under this subsection shall be disclosed in the policy or certificate.

(d) *Other incentives.*—This subsection does not prohibit insurers from offering other incentives or rewards for adherence to a wellness or health improvement program if otherwise authorized by state or federal law.

History.—s. 9, ch. 76-260; s. 1, ch. 77-174; s. 19, ch. 77-468; s. 1, ch. 78-377; s. 1, ch. 79-289; s. 1, ch. 80-152; s. 1, ch. 80-373; s. 1, ch. 82-235; s. 807, ch. 82-243; s. 90, ch. 83-216; ss. 1, 2, ch. 83-342; s. 1, ch. 84-157; s. 14, ch. 85-62; s. 3, ch. 85-182; s. 1, ch. 85-233; s. 4, ch. 86-160; s. 27, ch. 87-226; s. 13, ch. 88-370; ss. 60, 65, ch. 89-360; s. 1, ch. 90-85; s. 33, ch. 90-119; ss. 186, 206, 207, ch. 90-363; s. 58, ch. 91-110; s. 256, ch. 91-224; s. 4, ch. 91-429; s. 38, ch. 92-146; s. 6, ch. 95-187; s. 1, ch. 95-219; s. 314, ch. 97-102; s. 24, ch. 99-3; s. 5, ch. 99-286; s. 1, ch. 99-388; s. 2, ch. 2000-192; s. 1, ch. 2001-178; s. 2, ch. 2002-25; s. 7, ch. 2002-55; s. 65, ch. 2002-206; s. 88, ch. 2003-1; s. 2, ch. 2003-139; s. 1028, ch. 2003-261; ss. 4, 65, ch. 2003-267; ss. 58, 80, ch. 2003-281; s. 4, ch. 2004-340; s. 87, ch. 2004-390; s. 1, ch. 2005-41; s. 2, ch. 2006-277; s. 2, ch. 2007-44; s. 8, ch. 2008-66; s. 7, ch. 2008-237; s. 6, ch. 2010-175; s. 1, ch. 2011-167; s. 10, ch. 2012-151; s. 5, ch. 2012-197; s. 7, ch. 2014-103; s. 1, ch. 2014-180; s. 14, ch. 2015-180; s. 11, ch. 2016-222.

[1]**Note.**—Section 12, ch. 2008-237, provides in part that "[e]ffective [June 30, 2008,] the Department of Financial Services may adopt rules to implement this act."

The Engagement Letter and the Residential Real Estate Attorney

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Introduction

In most legal scenarios, the reason an attorney is sought out and eventually hired by a client is to assist that client with a specific legal need. For example, a person charged in a criminal action hires counsel (or has counsel appointed by the State) to defend him or her against criminal prosecution. In a contract dispute, the attorney is retained by a client to seek money damages or an equitable remedy. Those who wish to prepare for death (life's inevitable end), retain counsel to prepare their estate - and consequently attempt to alleviate their loved ones from legal complications which could arise upon their passing. The real estate attorney's practice, however, can be unlike other practices of law. Each real estate transaction could potentially contain a number of non-real estate related legal components - all of which could affect the ownership of the real property, the client, as well as the attorney. So why is it that so many real estate law practitioners fail to obtain even the most simplified form of written engagement letter or fail to adequately define the *scope of their engagement* with their clients? Although the above scenario is not limited to the *residential real estate practitioner* (attorneys handling commercial transactions are certainly not immune to these same issues), this article is tailored for the attorney handling residential real estate transactions on a regular basis. Retainer agreement, engagement letter, whatever you want to call them. Have one.[1]

The General Rule Regarding Written (and Signed) Engagement Letters

With the exception of contingent fee cases,[2] the Rules Regulating the Florida Bar ("Rules" or "Rule") do not require that the attorney-client relationship be reduced to a written contract, signed by both attorney and client. Rather, in circumstances where the attorney has not regularly represented the client, prior to or within a reasonable time after commencing the representation, the Rules establish *a preference* for written communication between the attorney and the client as to the basis or rate of the fee as well as the costs.[3] In addition, where a legal fee is *nonrefundable*, the Rules require that the nature and amount of the nonrefundable fee be *confirmed* in writing.[4] This confirmation does not however require the attorney to obtain a signed acknowledgment from the client memorializing the terms of the fee. A letter from the attorney to the client setting forth the basis or rate of the fee and the intent of the parties in regards to the nonrefundable nature of the fee is sufficient to meet the requirements of this rule.[5]

Contingency Fee Arrangements

The Florida Bar has well established rules by which engagement letters in contingency fee cases are governed. Rule 4-1.5(f)(1) states that:

> [a] contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated.[6]

In addition, Florida Bar Rule 4-1.5(f)(2) states that

> [e]very lawyer who accepts a retainer or enters into an agreement, express or implied, for compensation for services rendered or to be rendered...whereby the lawyer's compensation is to be...contingent in whole or in part upon the successful prosecution or settlement thereof **shall do so only where such fee arrangement is reduced to a written contract, signed by the client, and by a lawyer**....[7] (Emphasis added)

The Rules provide parameters governing the percentage the attorney is entitled to collect for his or her fee in addition to how those fees can be divided between lawyers in different law firms.[8]

The Unique Role of the Residential Real Estate Attorney

As alluded to in the preamble of this article, the residential real estate attorney's practice can be rather ambiguous. When dissected, a standard real estate transaction has potentially many components in addition to contract and title law. There are aspects of community association law, corporate law, tax law (both foreign and domestic), estate planning and asset protection that could all affect any particular transaction. While the attorney need not be versed in all of the above areas of law, it is the duty of the attorney to identify the aspects of the transaction which could potentially impact the client and allow the client to determine how he or she would like to address those areas not serviced by the attorney. The client may choose to retain the services of a Certified Public Accountant to address the tax-related issues or the client may choose to retain separate counsel for the services not covered under the attorney's scope of representation. It is also possible that the client may decide that he or she is not concerned with any of the additional aspects of the transaction and forego that type of representation all together. At a minimum, however, the

client should clearly comprehend the scope of representation offered by the attorney and have the choice to expand that scope either with the assistance of the attorney or through alternate means. Based on the breadth of any one residential real estate transaction, the potential for attorney malpractice can be significant based on the damage potential to the client; yet it is all too common for the residential real estate practitioner to forge head-on into a matter without even the most informal confirmation to the client (written or otherwise) setting forth the aspects of the transaction the attorney *is,* and more importantly, *is not* handling.

Transitioning to the Engagement Letter as a Standard Practice

Why would a real estate attorney willingly assume legal liability on a transaction by failing to properly outline the scope of engagement in writing to the client? I was guilty of this practice during my early years in private practice; however, upon taking refuge in a large firm with strict governance policies and procedures, it became evident that my days of handling a transaction without even so much as a handshake were, by mandate, a thing of the past. This was not an easy transition. Clients whom I had serviced for years were at first confused by the formal nature of the engagement letter process. They attributed the additional layer of "bureaucracy" to the large firm culture and equated this new procedure to increased fees. This was an incorrect assessment made by the client and served to reinforce, for me, that part of a lawyer's role is to educate clients on non-billable procedural matters as well as to abate any fears associated therewith. Clear and effective communication became a cornerstone of each new engagement. After some discussion, clients realized the benefits of the engagement letter for both the attorney and the client and it generally has avoided confusion and misunderstanding as to the role of the attorney in the transaction.

You know it is needed, so what's stopping you?

Timing. If you have practiced in the area of residential real estate law long enough, you have most likely been on the receiving end of the following statement from a potential client: "I purchased a house and I would like to know how much you would charge to represent me." Knowing exactly what was meant by the statement, my response is always the same: "If you've already *purchased* a house, you don't need me." This prompts the potential client to rephrase with what they believe sets them apart from other clients. "No (chuckle) I signed a contract, I just want to know how much you will charge to represent me." My reply is no less cynical: "So you've served as your own counsel for the contractual phase - now you want me to step in and handle the rest?" This primes a discussion which usually starts with the potential client saying "isn't it just a form?" and ending with the client feeling - shall we say - a tad bit humbled. Point being, the nature of our practice is that we often are faced with picking up where our "lawyer-clients" leave off. *What can go wrong, right? It is just a form.* The above scenario could give the attorney a false sense of informality that they are merely needed to make sure title is marketable. Stop. Take a moment and realize this is more (not less) of a reason to require an engagement letter. You want to make it clear to the client that they arrived at your doorstep with an already executed contract. If you did not assist the client with this portion of the service, why would you want to assume responsibility for the client's work?

The Title Company Dilemma. In Florida, a "title insurance agent" is a defined term under § 626.841, F.S. In order to be licensed to act as a title insurance agent, one need not be an attorney; the applicant need only pass a state exam to become licensed.[9] An attorney may issue title insurance without the requirement of licensure due to an exemption contained in the chapter.[10] The implication is that an attorney is not required to take the state licensing exam due to the fact that the attorney passed the Florida Bar exam. The involvement of non-attorney owned or non-attorney managed title agencies in the residential real estate arena has blurred the line between *legal representation* and *title insurance*. While this portion of the article is not intended as an attack on non-attorney owned title agencies, there is a stark difference between comprehensive legal representation and merely confirming title is insurable. Title agencies do not provide legal representation. However, they have become the norm in residential closing circles. The formality involved with the engagement letter process is a necessary break from that norm. The attorney who subscribes to a level of informality on par with title agencies is forgetting that the title agency protects itself with disclosure documents outlining their limited role. If it is important enough for a title agency to disclose to a customer that the agency is not providing legal representation, it is even more critical for the attorney to disclose to the client the scope of the attorney's representation.

Referral Sources. The typical real estate attorney acquires a significant number of his or her matters from licensed real estate agents. This referral source, when correctly educated by the attorney, can be a blessing. Where the real estate agent is not properly briefed by the attorney on both the importance of timing and the difference between legal representation and title insurance, the referral source can actually impede timely and effective representation, potentially damaging the client and the transaction. I have learned that it is critical to educate my referral sources on timing their referrals properly and that the terms of art in the industry of "closing agent" and "settlement agent" do not automatically denote legal representation. The correct timing to refer a buyer or seller of real property to an attorney is in advance of that person making an offer or accepting that offer, whichever is the case. While this may seem like a rather obvious consideration, real estate agents are often under significant pressures from

the buyer and seller as well as other realtors to expedite the process. The suggestion of attorney involvement during the negotiation phase could be perceived by those involved as an additional impediment to a binding contract. To overcome these negatives, the attorney must be responsive, in addition to knowledgeable. In larger law firms, the system for conflicts checks needs to be streamlined to avoid delaying the attorney's ability to converse with a potential client. In smaller firms without the same level of formality, managing a business as well as practicing law can be overwhelming and prevent the attorney from responding in a timely fashion. Whether large firm or small firm practice, the role of the attorney with respect to the referral source is the same. Specifically, the lawyer should educate the referral source on the benefits to the client and the referral source of the involvement of a competent real estate attorney prior to having a binding contract, the difference between legal representation and title insurance as well as your process of engagement. These should all be concepts your referral sources are versed in so the referral is smooth.

Fear of Judgment. Too often, attorneys expand their services to include real estate transactions and title work without much knowledge of the area. This is due in part to survival and, in some cases, greed. To those facing either or both scenarios, "don't take on work for the money [without the appropriate experience]."[11] You are not doing your clients or the practice any favors. Whatever your reason for practicing in this area without significant training, remember, this is not just another real estate transaction. A real estate acquisition (residential or commercial) is often the largest financial investment a client will make. The client's needs must be paramount. Only practice in this arena once you have a firm grasp of contract, real estate and title law. In addition, at a minimum, know enough to know the other aspects of law which impact the prospective transaction and do not fear telling a client "I don't do that work."[12] Use the engagement letter as a tool to define the scope of your involvement and do not allow your moral compass to waiver.

The Template Engagement Letter and Conclusion

The Residential Real Estate and Industry Liaison ("RREIL") Committee of the RPPTL Section of the Florida Bar, through a subcommittee chaired by this author, has drafted a sample form engagement letter which addresses most elements present within a residential real estate transaction. The template is available to all members of the RPPTL Section by accessing the member login at www.rpptl.org and proceeding to the RREIL Committee's web page.

The county in which the property is located will, along with the contract, dictate whether the buyer or the seller is responsible for selecting and paying the Closing Agent[13] for the title insurance premium and as such, the role of the attorney will fluctuate depending on the location of the property, the contract and the services selected by the client. This particular template was drafted with a "buyer-pay" contract in mind, and is intended as a starting point for the residential real estate attorney to tailor to the specific needs of the transaction and the client. At a minimum, the template engagement letter should define the scope of representation as well as detail the services not included in that scope.

A fee and/or cost retainer should become a standard practice, particularly to avoid violating the unlawful inducements rules of the Florida Department of Financial Services.[14] The Template Engagement Letter also addresses that any costs advanced by the attorney on behalf of the client would be reimbursed by the client. These provisions were added to clarify that the attorney is not advancing these costs as part of an unlawful inducement to obtain business and that the intention is for the attorney to be reimbursed for these costs. Provisions pertaining to granting consent to the title underwriter's audit of the firm's trust account and consent to electronic communication were included in response to avoid ethical concerns.

In sum, a retainer agreement/engagement letter can (in addition to all of the reasons discussed in this article) be a marketing opportunity used to differentiate yourself from a title agency and from other attorneys. Use it to show your value to your prospective clients.

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Endnotes

1 Brian Tannebaum, *The Practice* (American Bar Association, 2015).

2 R. Reg. Fla. Bar 4-1.5(f).

3 R. Reg. Fla. Bar 4-1.5(e).

4 R. Reg. Fla. Bar 4-1.5(e), "A fee for legal services that is nonrefundable in any part **shall be** confirmed in writing...." (Emphasis added).

5 R. Reg. Fla. Bar 4-1.5 Editors' Notes.

6 R. Reg. Fla. Bar 4-1.5(f)(1).

7 R. Reg. Fla. Bar 4-1.5(f)(2).

8 R. Reg. Fla. Bar 4-1.5(f)(4) (B) and 4-1.5(g).

9 §626.8417(3)(a) and (b), F.S. contain the full requirements for licensure.

10 §626.8417, F.S., states: "Title insurers or attorneys duly admitted to practice law in [Florida] and in good standing with The Florida Bar are exempt from the provisions of this chapter **related to title insurance licensing and appointment requirements."** (Emphasis Added). Note, the exemption only applies to the licensing and appointment requirements, not the Chapter's entirety.

11 Brian Tannebaum, *The Practice* (American Bar Association 2015).

12 *Id.*

13 Defined term in the FAR/BAR Purchase and Sale Contract.

14 Fla. Admin. Code 69B-186.010, interpretation of §626.9541(1)(h)3, F.S.

Ethical Considerations for the Real Estate Attorney

ANSWERS

2.1 No clear answer

2.1a No clear answer

2.2 D

2.3 E

2.4 D

3.1 D

3.2 E

4.1 D

5.1 D

6.1 E

7.1 A

7.2 A

7.3 B

8.1 C

9.1 E

FORECLOSURES

By

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FUNDAMENTALS OF MORTGAGE FORECLOSURE

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A. Initial Action Upon Receipt of Request by Client.

1. Review note, mortgage, and all related documents to try to determine potential defenses/problems. Be sure mortgage contains correct legal description. *Lucas v. Barnett Bank of Lee County*, 705 So.2d 115 (Fla. 2d DCA 1998), rev. denied, 719 So.2d 287 (Fla. 1998) (Court can correct legal description before foreclosure, but if not corrected by then, court has to set aside original foreclosure judgment.)

2. Obtain complete correct copy of all documents, including notes, mortgages, amendments, assignments and allonges. Must locate original of note, but copy of mortgage is sufficient. *Perry v. Fairbanks Capital Corp.*, 888 So.2d 725 (Fla. 5th DCA 2004). But, see *Deutsche Bank Nat.Trust Co. v. Clarke*, 87 So.3d 58 (Fla. 4th DCA 2012) (copy of note is sufficient where "appropriate explanation" for lack of original is made. Here, original had previously been filed with the court.) See also, *Colson v. State Farm Bank, F.S.B.*, 183 So.3d 1038 (Fla. 2d DCA 2015) (Because promissory note is negotiable instrument, plaintiff seeking to foreclose must produce original note or provide satisfactory explanation of the failure to produce.) The bare assertion by a defendant that the note alleged to be an original is merely a copy, while sufficient to create a fact issue, is insufficient to support a defense summary judgment, because it does not conclusively negate plaintiff's ability to produce an original note. *ALS Maxim, LLC v. Katsenko*, 218 So.3d 472 (Fla. 2nd DCA 2017).

The Fourth DCA recently ruled that originals of any allonges are also required. *U.S. Bank, N.A. v. Kachik*, 222 So.3d 592, Case No. 4D16-1776 (Fla. 4th DCA 2017), since allonges are generally affixed to promissory notes and are therefore considered part of the notes, pursuant to F.S. Section 673.2041(1): "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." (Emphasis added.) But note - this opinion does not discuss F.S. Section 702.015(4), which appears to require only an original note, not original allonges: "The original note and the allonges must be filed with the court before the entry of any judgment of foreclosure or judgment on the note." (Emphasis added.)

Determine the extent of property covered by the mortgage. For example, a mortgage encumbers alluvium which is added after the mortgage is granted. *Accardi v. Regions Bank*, No. 4D15-3213 (Fla. 4th DCA 2016).

Note – if a loan has been modified and a new note prepared, be sure to proceed on the new note. In *Rattigan v. Central Mortgage Company*, 199 So.3d 966 (Fla. 4th DCA 2016), the lender sued on, and entered into evidence, a $747,500 note, yet claimed $760,000 in principal, alleging that the note had been modified. On appeal, the 4th DCA reversed the lender's judgment and ordered entry of involuntary dismissal since there was "no proper evidence in the record which cold support the final judgment."

Often, by the time a loan gets to foreclosure, the note and mortgage have been assigned and re-assigned several times. Errors in assignment documentation are common and notes often go missing. When representing a defendant, all documents in the assignment chain must be carefully scrutinized for such mistakes. (See Sections J and K, below.)

Often, even without any assignments, the history of ownership of the loan can be tricky to determine due to the lender having failed and either been taken over by the FDIC or merged with another lender. The FDIC and Federal Financial Institutions Examination Council (FFIEC) websites have handy lookup pages to determine failed lenders' histories. **research.fdic.gov/bankfind/** and **cdr.ffiec.gov/public/**

E-Notes. In *Rivera v. Wells Fargo Bank, N.A.*, 189 So.3d 323 (Fla. 4th DCA 2016), the Fourth DCA affirmed a mortgage foreclosure concerning an e-note, rejecting the borrowers' argument that the note did not contain their signatures. Although there was no original paper note signed by the borrowers. Pursuant to F.S. 673,3081(1), a plaintiff is not required to prove the validity of note signatures until some evidence that the signatures are forged or unauthorized. Here, the borrowers introduced no such evidence.

Independent admissibility of promissory note. Because a promissory note is not hearsay, it is independently admissible. As such, there is no requirement that a promissory note be shown to be a F.S. 90.803(6) business record for it to be admitted in evidence. *Deutsche Bank Nat. Trust Co. v. Alaqua Property*, 190 So.3d 662 (Fla. 5th DCA 2016).

Calculate amount owed, with careful attention to index rates as to variable rate loans. In *Gonzalez v. OneWest Bank, FSB*, 204 So.3d 167 (Fla.4th DCA 2016), foreclosure judgment was reversed and the case remanded for a new trial on the appropriate interest rate. The variable rate note's interest rate was tied to the LIBOR Index, but the lender's failure at trial to present testimony as to the LIBOR rate on the promissory note's interest rate change date.

3. Send notice of default, acceleration and demand for payment (review loan documents for notice requirements). Summary judgment of foreclosure was reversed where the defense of failure to provide the required notice of acceleration was not conclusively rebutted in *Konsulian v. Busey Bank, N.A.,* 61 So.3d 1283(Fla. 2nd DCA 2011). See also, *Patel v. Aurora Loan Services, LLC*, 162 So.3d 23 (Fla. 4th DCA 2014) (summary judgment reversed where affirmative defense of lack of notice not rebutted by evidence of record). See also*, Freiday v. OneWest Bank, FSB*, 162 So.3d 86 (Fla. 4th DCA 2014) (error to enter summary judgment where there was a factual issue as to plaintiff's compliance with mortgage's default notice provision); *Martins v. PNC Bank, N.A.,* 170 So.3d 932 (Fla. 5th DCA 2015) and *Gorel v. The Bank of New York Mellon*, 151 So,.3d 1288 (Fla. 5th DCA 2014) (same).

Until 2016, the Third District had differed with other Florida appellate courts over whether which a lender is required to strictly or merely substantially comply with loan documents' notice requirements. Compare *Ramos v. CitiMortgage, Inc.*, 146 So.3d 126, (Fla. 3d DCA 2014) (strict compliance with notice provisions required, including with regard to addresses) with *Green Tree Servicing, LLC v. Milam*, 177 So.3d 7 (Fla. 2d DCA 2015) and *Indymac Fed. Savings Bank, FSB*, 185 So.3d 664 (Fla. 2d DCA 2016) (lender must show substantial, rather than strict, compliance with notice provision); *Vasilevskiy v. Wachovia Bank, N.A.*, 171 So.3d 192 (Fla. 5th

DCA 2015) (lender's breach by providing only twenty-eight days' notice, rather than the required thirty, held "insignificant" and not material, and therefore not a bar to foreclosure) and *Bank of New York Mellon v. Nunez*, 180 So.3d 160 (Fla. 3d DCA 2015) (parties need only substantially comply with conditions precedent in mortgages). Also, see *Samaroo v. Wells Fargo Bank*, 137 So.3d 1127 (Fla. 5th DCA 2014) (Defective notice found to be a material breach where it omitted an entire element from the list of required contents, and the breach was promptly raised by borrower.) See also, *The Bank of New York Mellon v. Johnson,* 185 So.3d 594 (Fla. 5th DCA 2016), *Lopez v. JP Morgan Chase Bank, N.A.*, 187 So.3d 343 (Fla. 4th DCA 2016) and *Ortiz v. PNC Bank, N.A.*, 188 So.3d 923 (Fla. 4th DCA 2016) (attaching copy of note to complaint, coupled with presenting original note in same condition later at trial, creates inference that plaintiff was in actual possession of note at time complaint was filed). Note – *Ortiz* does not apply where the copy of the note attached to the complaint differs from the note entered in evidence. *Friedle v. The Bank of New York Mellon*, 226 So.3d 976 (Fla. 4th DCA 2017) (bank failed to prove standing where note entered in evidence contained loan number not present on copy attached complaint.)

However, in three recent cases the Third District appears to have come into line on this issue. *See, Suntrust Mtg., Inc. v. Garcia*, 186 So.3d 1036 (Table) (Fla. 3d DCA 2016), *Bank of Am. v. Cadet*, 183 So.3d 477 (Mem) (Fla. 3d DCA 2016) (confirming that default notices are reviewed under "ordinary contract principles" which under Florida law requires only substantial compliance with contractual provisions) and *Federal National Mortgage Association v. Linares*, 202 So.3d 886 (Fla. 3rd DCA 2016).

In *Bayview Loan Servicing, LLC v. Heefner*, 198 So.3d 918 (Fla. 5th DCA 2016) dismissal based on the failure of the acceleration notice letter to inform the borrowers of their right to file affirmative defenses was reversed, since the borrowers did in fact file affirmative defenses and could not demonstrate any prejudice.

Where the appellate court found that the foreclosing plaintiff had failed to send proper notice of acceleration, it reversed for dismissal. *Miller v. The Bank of New York, as Trustee for the Certificate Holders of CWMBS, Inc.*, 189 So.3d 359 (Fla. 4th DCA 2016).

And testimony that the acceleration notice letter was sent is generally insufficient – the letter must be placed in evidence. *Hall v. ALS VII RVC, LLC*, 200 So.3d 1302 (Fla. 5th DCA 2016) (foreclosure judgment reversed with instructions to enter involuntary dismissal, where lender's witness testified that its "business records indicate that the letter was sent predating the complaint," but no such letter was produced or entered into evidence.)

However, where the mortgage provides that an acceleration notice is deemed to have been given to the mortgagors upon it being placed in the mail, the mortgagors' affidavits in support of their motion for summary judgment claiming to have never received notice were insufficient to establish entitlement to judgment in their favor, as the affidavits did not address whether mortgagee mailed the notice. *JPMorgan Chase Bank, N.A. v. Ostrander*, 201 So.3d 1281 (Fla. 2nd DCA 2016).

And "substantial compliance" does not occur when the notice erroneously asserts that acceleration has already occurred, and the notice is sent only eight days before suit is filed. *Dixon v. Wells Fargo Bank, N.A.*, 207 So.3d 899 (Fla. 4th DCA 2017).

Notice of acceleration was found to be a condition precedent, such that a defendant may assert lack of notice in opposition to a lender's summary judgment motion even if not asserted as an affirmative defense, as long as it is denied in the answer, in *Young v. Nationstar Mortgage, LLC*, 205 So.3d 790 (Fla. 2nd DCA 2016).

Summary judgment was reversed where plaintiff did not give written notice of intent to accelerate as required by HUD regulations where the note incorporated these regulations in *Laws v. Wells Fargo Bank, N.A.*, 159 So.3d 918 (Fla. 1st DCA 2015).

Note – where a mortgage incorporates HUD regulations, the foreclosing plaintiff must comply with HUD regulations limiting acceleration and foreclosure. *McIntosh v. Wells Fargo Bank, N.A.*, 226 So.3d 377 (Fla. 5th DCA 2017).

Similarly, when foreclosing a loan that is insured and guaranteed by the Department of Veterans' Affairs, proof of compliance with the VA's notice and opportunity to cure provisions is a condition precedent. *DeLong v. Lakeview Loan Servicing, LLC*, 222 So.3d 662 (Fla. 5th DCA 2017).

A rebuttable presumption of mailing of a notice can be created by evidence of the lender's routine practice pursuant to F.S. 90.406. As such, a notice letter which met the business record admissibility requirements of F.S. 90.803(6), coupled with trial testimony as to the lender's general business practice of preparing such letters and compiling them in the mail room for pickup by the postal carrier was held sufficient to prove that the notice was mailed in *CitiMortgage, Inc. v. Hoskinson*, 200 So.3d 191 (Fla. 5th DCA 2016).

Summary judgment for the lender was reversed where it failed to rebut the borrower's defense of failure to provide the required notice of default in *Mojica v, Bank of America, N.A.*, 188 So.3d 109 (Fla. 5th DCA 2016).

And where mortgage required that notice of breach and opportunity to cure be sent as condition precedent to suit, and the only indication that notice was actually sent came from inadmissible hearsay, final judgment of foreclosure was reversed in *Ensler v. Aurora Loan Services, LLC*, 178 So.3d 95 (Fla. 4th DCA 2015)

A new notice of default is not necessary in a new foreclosure case when the dismissal of a previous case was without prejudice. *Sill v. JP Morgan Chase Bank, N.A.*, 182 So.3d 851 (Fla. 4th DCA 2016).

In *FNMA v. Hawthorne*, 197 So.3d 1237 (Fla 4th DCA 2016) service of the default notice at the borrower's permanent address in New York, as opposed to the property address in Florida, was found to substantially comply with the notice requirement in the absence of a showing of prejudice. And in *Stanley v. Bank of America, N.A.*, 199 So.3d 409 (Fla. 4th DCA 2016) a lender was held to have substantially complied with a mortgage's notice requirement by sending an

acceleration not to the mortgage's premises, but to an alternative address given by the mortgagors at the closing.

If acceleration notice was previously sent, was it proper and adequate? See *Zimmerman v. Olympus Fidelity Trust, LLC*, 936 So.2d 652 (Fla. 4th DCA 2006). Where a note provided that the mortgagor would be in default for failure to make payments on time and allowed acceleration without notice in the event of default, foreclosure was appropriate even though the mortgagee had accepted a late payment before the mortgagee sent its notice of acceleration. *LRB Holding Corp. v. Bank of America*, 944 So.2d 1113 (Fla. 3d DCA 2007).

There is no requirement that a plaintiff specifically plead that all conditions precedent to acceleration have occurred in order to accelerate a note and mortgage. *Branch Banking and Trust Co. v. Taylor*, Case No. 1D15-5291 (1st DCA 2016).

Challenges to the sufficiency of notice must be raised at the trial level and cannot be raised for the first time on appeal. *Loudin v. Bayshore Loan Servicing, LLC*, 208 So. 3d 789 (Fla. 3rd DCA 2017) (bank's failure to specify unit number on notice letter not raised below cannot be raised for the first time on appeal).

4. Order title report or abstract. Do not rely on mortgage title policy. Determine if taxes have been paid (consider paying tax certificates, if certificates become more than 2 years old).

5. Has insurance been paid? (If not, recommend that client consider paying). Note – a borrower's failure to pay taxes and insurance as required by the mortgage was held a material breach in *Liberty Home Equity Solutions, Inc. v. Raulston*, 206 So.3d 58 (Fla. 4th DCA 2016). *See also, PNC Bank, N.A. v. Clark*, 211 So.3d 265 (Mem) (Fla. 3rd DCA 2017)(borrower's failure to pay real estate taxes, requiring lender to pay off tax certificate and subsequent years' taxes constituted material breach by borrower, justifying foreclosure judgment.)

6. Order appraisal of property.

7. Order environmental report.

8. If applicable, send statutory written notice demanding sequestration of rents and profits pursuant to Section 697.07, Florida Statutes.

9. Inspect property to determine occupant, general condition and if waste is being committed.

10. Truth in Lending Act. Check for Reg Z compliance, if applicable.

11. Is it a purchase money mortgage? If so, it will have priority over previously-recorded judgment liens. *Carteret Savings Bank v. Citibank Mortgage Corp*., 632 So.2d 599 (Fla. 1994). *BancFlorida v. Hayward*, 689 So.2d 1052 (Fla. 1997).

12. How is mortgage indexed in public records?

13. Equitable subrogation. If the title search reveals an unsatisfied lien which would be prior to your mortgage per Florida's Recording Act, F.S. 695.01, it can still be foreclosed out, to the extent that your mortgage's proceeds were used to pay off a mortgage or other lien that was prior to it under the doctrine of equitable subrogation. See *Suntrust v. Riverside*, 792 So.2d 1222 (Fla. 4th DCA 2001); rev. den. 821 So.2d 300 (Fla. 2002); *Garal Corp. v. Pociero*, 888 So.2d 681 (Fla. 3d DCA 2004).

But, see also *Velazquez v. Serrano*, 43 So.3d 82 (Fla. 3d DCA 2010) wherein equitable subrogation was rejected because the intervening mortgage had a "due on sale" clause yet had not been paid off by the mortgage for which equitable subrogation was sought. The court found that under these facts equitable subrogation would have improperly prejudiced this lender.

Equitable subrogation may also be used to cure the failure of a recipient of the loan proceeds to sign the mortgage. *Wells Fargo Bank v. Clavero*, 2015 WL 5132447 (Fla. 3d DCA 2015). See also, *Palm Beach Sav. & Loan Ass'n v. Fishbein*, 619 So.2d 267 (Fla.1993) and *Fleet Fin. & Mortg., Inc.*, 707 So.2d 949 (Fla. 4th DCA 1998).

(For a good discussion comparing "notice" recording statutes such as F.S. 695.01 to "race" and "race-notice" recording statutes, see *Argent Mortgage Co, LLC v. Wachovia Bank, N.A.*, 52 So.3d 796 (Fla. 5th DCA 2010).)

Equitable subrogation can be of assistance in a variety of contexts involving errors or defects rendering mortgage liens invalid or inferior. For example, in *Spikes v. OneWest Bank FSB*, 119 So.3d 444 (Fla. 4th DCA 2012), the failure to obtain the signature of the non-owner spouse rendered a purchase money mortgage on homestead property invalid. Nevertheless, since this mortgage paid off the prior owner's two mortgages, the new lender was permitted to foreclose an equitable subrogation lien. The Fourth District also found the purchase money mortgage qualified as an obligation "contracted for the purchase" of the homestead per Fla. Const. Article X Section 4(a) and therefore granted the lender a vendor's lien despite the lack of signature by the spouse.

Note – a claim for this type of relief must be pled. In *HSBC v. Frenkel*, 208 So.3d 156 (Fla. 3rd DCA 2016), when the lender failed to prove its case for mortgage foreclosure, the judge entered judgment enforcing an equitable lien instead. But the judgment was reversed on appeal because the lender has not pled an equitable lien cause of action.

14. Refiling of Foreclosure after Dismissal with Prejudice. Dismissal of a foreclosure action with prejudice does not preclude instituting a new foreclosure action based on a different act or date of default not alleged in dismissed action. *Star Funding Solutions, LLC v. Krondes*, 11 So.3d 403 (Fla. 4th DCA 2012).

15. Confirm that documentary stamps have been paid on the promissory note. Section 201.08(1)(b), Florida Statutes (2007). There is a conflict among the District Courts regarding whether a mortgage note is enforceable where the documentary stamp tax and intangible tax have not been paid, but the court may permit the lender to pay the taxes belatedly. Compare *Nikooie v. JPMorganChase Bank, N.A.*, 183 So.3d 424 (Fla. 3d DCA 2014) (not enforceable) with *Glenn Wright Homes (Delray) LLC v. Lowy*, 18 So. 3d 693 (Fla. 4th DCA 2009)

(enforceable). (Note – deferred interest is not a future advance and therefore does not require payment of documentary stamp tax under F.S. 201.08(1)(a). *Steinberg v. Wells Fargo Bank, N.A.*, 178 So.3d 473 (Fla. 4th DCA 2015).

16. Compliance with Consumer Financial Protection Bureau ("CFPB") Rules. The CFPB was established by the Dodd-Frank Wall Street Reform and Consumer Protection Act of. New CFPB rules, effective as of January 10, 2014, strictly limit mortgage servicers' ability to foreclose while also negotiating a loan modification concerning residential loans. These rules require:

a. A good faith effort to establish phone or in-person contact with the borrower by 36 days delinquency.

b. Written notice to the borrower or borrower's agent encouraging them to contact the servicer, providing the phone number for the personnel assigned to the borrower, and giving the borrower examples of loss mitigation options the servicer offers and information on how to find a housing counselor by 45 days delinquency.

c. No foreclosure suit until at least 120 days delinquency. In addition, if the borrower has submitted a complete application for mortgage assistance the servicer may not begin foreclosure while a borrower is being evaluated for a loss mitigation plan.

For a detailed explanation of these rules' requirements, please see the following CFPB publications:

http://files.consumerfinance.gov/f/201312_cfpb_foreclosure-avoidance-procedures.pdf

http://files.consumerfinance.gov/f/201409_cfpb_readiness-guide_mortgage-implementation.pdf

Compliance with a HUD requirement of face-to-face meeting between lender and borrower under 24 C.F.R. § 203.604 (2013) is a condition precedent to foreclosure action, as opposed to being an affirmative defense. As such, summary judgment of foreclosure requires proof of compliance with this requirement, even if not asserted as a defense. *Palma v. JP Morgan Chase Bank, N.A.*, 208 So.3d 771 (Fla. 5th DCA 2016).

17. Non-resident Cost Bond. Per F.S. 57.011, a non-resident plaintiff is required to post a $100 bond for costs within 30 days of filing suit. If not, a defendant may move to dismiss with 20 days' notice to plaintiff. But in *Dyck-O'Neal, Inc. v. Duffy*, 180 So.3d 1079 (Fla. 2d DCA 2015), although plaintiff failed to file the bond within this 20 days period, the plaintiff had filed it prior to hearing on the dismissal motion.

18. Reverse Mortgage. Where husband and wife executed a reverse mortgage as borrowers, lender was prevented from foreclosing upon husband's death if wife was still living and maintained the property as her principal residence. *Smith v. Reverse Mortgage Solutions, Inc.*, 200 So.3d 221 (Fla. 3rd DCA 2016).

B. Mortgage Foreclosure Complaint - Florida Fair Foreclosure Act and F.R.C.P. 1.115

1. The Florida Fair Foreclosure Act, enacted in 2013 provides as follows:

- Shortened time period for deficiency actions for residential mortgages on 1-4 family dwelling units with new F.S. Section 95.11(5)(h).

- Added F.S. 702.015 - additional pleading requirements for standing on 1-4-four unit residential foreclosures (other than timeshares). Such complaint must:

(a) Allege that plaintiff is holder of original note secured by the mortgage; or

(b) Allege with specificity the factual basis by which the plaintiff is a person entitled to enforce the note under s. 673.3011.

(c) Document plaintiff's authority to file suit if such right has been delegated to it.

(d) Verify plaintiff holds note (if such is the case). Identify person making such verification and note's location. Copies of note and allonges must be attached. But note – the 4th DCA has recently ruled that an allonge does not necessarily have to be attached to a promissory note. "Where an allonge contains evidence of a clear intent that the note and the allonge were to be physically attached to each other, such evidence of intent is sufficient to establish a valid endorsement under the UCC." *Purificato v. Nationstar Mortgage, LLC*, 182 So.3d 821 (Fla. 4th DCA 2016).

(e) If foreclosing lost, destroyed, or stolen instrument, an affidavit executed under penalty of perjury must be attached to complaint. It must:

(1) Detail a clear chain of all endorsements, transfers, or assignments of the promissory note that is the subject of the action.

(2) Set forth facts showing plaintiff is entitled to enforce a lost, destroyed, or stolen instrument pursuant to F.S. 673.3091. Adequate protection as required under F.S. 673.3091(2) must be provided before entry of final judgment.

(3) Include as exhibits to affidavit copies of note and allonges thereto, audit reports showing receipt of original note, or other evidence of the acquisition/ownership.

- Added F.S. 702.036. In action to set aside mortgage foreclosure or re-establish lien "the court shall treat such request solely as a claim for monetary damages and may not grant relief that adversely affects the quality or character of the title to the property, if:

(1) Party seeking relief from final judgment of foreclosure was properly served in the foreclosure lawsuit per Chapter 48 or Chapter 49.

(2) Final judgment of foreclosure was entered as to the property.

(3) All applicable appeals periods have run and any appeals resolved.

(4) Property acquired for value, by person unaffiliated with foreclosing lender or owner, and no lis pendens re a suit to set aside, or challenge the foreclosure."

F.S. 702.036(3): where a mortgage foreclosure is granted based on lost instrument, one who later appears and claims to be true party entitled to enforce such instrument has no claim against the real property, and may only proceed on the note.

- Strengthened rule to show cause provisions of F.S. 702.10 by shifting burden of proof to the defendant, and expanding scope to residential foreclosures. Plaintiff may now obtain order that monthly payments be made during action's pendency and evict occupant if not paid, on residential properties other than primary residences.

- Enacted F.S. 702.11 requiring plaintiffs seeking to enforce lost, destroyed or stolen notes to provide protection to the defendant borrower in the form of a written indemnity agreement, surety bond, cash deposit or other security approved by the court.

- Added a new, beefed up Form 1.924, regarding proof of diligent search and inquiry.

In re Final Report and Recommendations on Residential Mortgage Foreclosure, 2009 WL 5227471 (Fla. Dec. 28, 2009) (not reported in So.3d.)

2. In December, 2014, the Florida Supreme Court amended the Florida Rules of Civil Procedure to add a new Rule 1.115 concerning mortgage foreclosures, plus several new forms. (Fla. Sup. Ct., No. SC13-2384). Slight modifications were made to this rule and forms in January, 2016. (Fla. Sup. Ct. No. SC13-2384):

- FRCP Rule 1.115(a) requires (as did its predecessor, the former F.R.C.P. 10110(b)) that all residential foreclosure complaints, including those dealing with condominiums and cooperatives, be verified, and affirmatively allege either the plaintiff to be the holder of the promissory note, or sufficient factual basis by which the plaintiff is entitled to enforce the note per F.S. 73.3011.

- FRCP Rule 1.115(b) requires a plaintiff suing to foreclose on behalf of someone else to allege with specificity the documents entitling it to enforce the note.

- FRCP Rule 1.115(c) requires the claimant, under penalty of perjury, to certify that it is in possession of the original note, and further disclose the note's location, person certifying same, time and date of verification of same. Copies of the note and all allonges must be filed with the court.

- FRCP Rule 1.115(d) requires specificity and an affidavit of allegations with regard to lost note claim.

The following new or revised forms have been promulgated:

- 1.944(a) Foreclosure (when location of original note is known)

- 1.944(b) Foreclosure Complaint (when location of original note is unknown)

- 1.944(c) Motion for Order to Show Cause (for use in connection with motions under F.S. 702.10 – see Section F "Expedited Foreclosure Procedures. Section 702.10, Florida Statutes," below)
- 1.944(d) Order to Show Cause
- 1.996(a) Final Judgment of Foreclosure (Note – Although utilization of this form is mandatory, verbatim adherence is not required. *Royal Palm Corporate Center Assn, Ltd. v. PNC Bank, NA*, 89 So.3d 923 (Fla. 4th DCA 2012).)
- 1.996(b) Final Judgment of Foreclosure for Re-establishment of Lost Note
- 1.996(c) Motion to Cancel and Reschedule Sale

Case law interpreting verification requirement. In *Trucap Grantor Trust 2010-1v. Pelt*, 84 So.3d 369 (Fla. 2d DCA 2012), the 2nd DCA held that this verification requirement is met even if the language used qualifies the verification as being "to the best of my knowledge and belief."

The verification need not be contained within the complaint, but can be in a separate document. *Becker v. Deutsche Bank, Nat. Trust Co.*, 88 So.3d 361 (Fla. 4th DCA 2012).

The certification requirements of FRCP 1.115(c) and F.S. 702.15(4) as to plaintiff's possession of the original note are not mandatory pre-suit requirements, so dismissal for failure to so certify is not a merely ministerial act. As such, a writ of mandamus to order a trial court to dismiss on this basis is not available. *Campbell v. Wells Fargo Bank, N.A.,* 204 So.3d 476 (Fla. 4th DCA 2016). *See also*, *Bank of America, N.A. v. Leonard*, 212 So.3d 417 (Fla. 1st DCA 2016) (filing of certification not a prerequisite to suit such that any defect in certification would require dismissal of complaint, and certification may be filed by plaintiff's counsel).

A servicing agent may sign the verification on a foreclosure complaint filed in its own name, but must include evidence that the loan's owner authorizes or ratifies this action. *Elston/Leetsdale, LLC v. CW Capital Asset Management LLC*, 87 So.3d 14 (Fla. 4th DCA 2012). However, there is no requirement of a showing of authority for the verification where a servicing agent verifies a complaint filed in the name of the owner of the loan. *Deutsche Bank Nat. Trust Co. v. Plageman*, 133 So.3d 1199 (Fla. 2d DCA 2014). A plaintiff's loan servicing agent is a proper representative to verify a mortgage foreclosure complaint. *Deutsche Bank N.A. Trust Co. v. Huber*, 137 So.3d 562 (Fla. 4th DCA 2014).

In *JP Morgan Chase Bank, N.A. v. Jurney*, 86 So.3d 1182 (Fla. 2d DCA 2012) dismissal of a foreclosure complaint for absence of verification was reversed. Failure to follow amendment requiring foreclosure verification was an honest mistake due to confusion about the effective date of the Supreme Court's amendment.

Also, a verification within a complaint which may be sufficient to meet the requirements of Rule 1.115(d) is not necessarily sufficient, standing alone, to support summary judgment in the presence of an affirmative defense of insufficient notice. *Toyos v. Helm Bank, USA*, 187 So.3d 1287 (Fla. 4th DCA 2016. In *Toyos*, the complaint's verification was conclusory in nature and failed to allege sufficient facts or demonstrate the affiant's personal knowledge of the verified facts.

Failure to verify the complaint is not the kind of error that cannot be corrected by amendment. As such, it was error to dismiss a foreclosure complaint on this basis without giving leave to amend. *Beltway Capital, LLC v. Lucombe*, 211 So.3d 328 (Fla. 2nd DCA 2017).

The Florida Supreme Court's unsuccessful mandatory residential foreclosure mediation program, initiated in 2009, was terminated in late 2011.

1. Preparing Complaint and Suit Papers.

   a. Before you begin to draft the complaint, CHECK LOCAL ADMINISTRATIVE RULES for the court's most up to date requirements. Local rules regarding foreclosure are a moving target, with the various measures being enacted frequently by local courts and by state and federal government to deal with the foreclosure crisis. Each circuit may have its own specific requirements with regard to the form of complaint, judgment, proof of service of process, disclosures as to the availability of foreclosure counselors, mandatory mediation, etc.

      For a comprehensive listing of the foreclosure rules of each circuit court in Florida, go to the RPPTL Section's website, www.rpptl.org, and click on "Circuit by Circuit Foreclosure Procedures."

   b. Must attach copies of note, mortgage, assignment of note and mortgage, and other documents upon which claim is made. Rule 1.130, Florida Rules of Civil Procedure.

      But *Glen Garron, LLC v. Buchwald*, 210 So.3d 229 (Fla. 5th DCA 2017) reversed a trial court dismissal of a foreclosure action for failure to attach a copy of the note, ruling that material provisions of the note that were contained within the mortgage and riders thereto were sufficient to cure any violation of F.R.C.P. 1.130(a). As such, unlike an action on a promissory note, this foreclosure action did not require attachment of the note itself. *See also, Khleif v. Bankers Trust Co. of California*, 215 So.3d 619 (Fla. 2nd DCA 2017). (attachment of "short-form" mortgage sufficient despite failure to attach lengthier "master-form" mortgage referenced therein).

   c. Include separate counts for note foreclosure and guaranty. See *Gregora v. Goldstein*, 500 So.2d 695 (Fla. 3d DCA 1987). Issue of election of remedies arises if judgment entered on promissory note and plaintiff levies execution and acquires property at sheriff's sale. In *Westbury Properties, Inc. v. Cardillo*, 638 So.2d. 519 (Fla. 2d DCA 1994), the court held there was no election of remedies and the mortgagee could still foreclose.

      However, where a lender obtained a judgment of foreclosure and also a money judgment on the promissory note, it was error to issue a writ of garnishment on the money judgment prior to entry of a deficiency

judgment after the real property was sold by the clerk. *Hammond v. Kingsley Asset Management, LLC*, 144 So.3d 673 (Fla. 2d DCA 2014).

Prepayment penalty. If the note specifically states that acceleration and foreclosure will result in payment of a prepayment penalty, the prepayment penalty amount may be included in the judgment amount. *Feinstein v. Ashplant*, 961 So.2d 1074 (Fla. 4th DCA 2007). *Feinstein* distinguished a prior Florida Supreme Court decision, *Fla. Nat. Bank v. Bankatlantic*, 589 So.2d 255 (Fla. 1991) which had disallowed a repayment penalty in a foreclosure judgment, since in *Fla. Nat. Bank* the acceleration and prepayment penalty arose from separate provisions of the loan documents. In *Feinstein*, on the other hand, a single provision specifically authorized inclusion of the penalty in an accelerated foreclosure judgment.

It is not necessary for a foreclosure complaint to allege the inferiority of the interests of the defendants. By definition, a plaintiff suing to foreclose a mortgage asserts a superior interest. As such, a trial court's refusal to dismiss on this basis was affirmed in *Black Point Assets, Inc. v. Federal National Mortgage Association*, 220.So.3d 566 (Fla. 5th DCA 2017).

d. Other Possible Counts.

i. Foreclosure of security agreement.

ii. Assignment of rents.

iii. Appoint receiver.

iv. Damages against guarantors.

v. Re-establishment of original documents, if not found. Sections 90. 953(1), 673.3091, Florida Statutes. *Guttierrez v. Bermudez*, 540 So.2d 888 (Fla. 5th DCA 1989). Pursuant to F.S. 673.3091, a party seeking to enforce a lost note need not prove that the note was in its possession at the time it was lost. Rather, now the party need only prove that it was entitled to enforce the note at the time of the loss. *See, MERS v. Badra*, 991 So.2d 1037 (Fla. 4th DCA 2008).

But in the absence of admissible evidence of the connection between the plaintiff and whoever was in possession when the note was lost, a judgment re-establishing a lost note was reversed in *Robelto v. U.S. Bank Trust, N.A.*, 194 So.3d 429 (Fla. 4th DCA 2016).

NOTE - Do not include a lost instrument count unless the note is really lost! (See discussion of Florida Fair Foreclosure Act, Section B, above.)

NOTE #2: A good-faith assignee of the note and mortgage may sue to enforce them even if they are now lost without first re-establishing them. *Lawyers Title Ins. Co., Inc. v. Novastar Mortgage, Inc.,* 863 So.2d 793 (Fla. 4th DCA, 2003), citing F.S. 673.3091. Then again, an assignee may not pursue foreclosure in the absence of proof that either it or its assignor at one time had possession of the note. *State Street Bank & Trust v. Lord*, 851 So.2d 790 (Fla. 4th DCA 2003), also citing § 673.3091.

In addition, the assignee must demonstrate that the signor of an assignment had authority to sign on behalf of the assignor. In *Bonafide Properties, LLC v. E-Trade Bank*, 208 So.3d 1279 (Fla. 5th DCA 2017), E-Trade Bank filed a foreclosure action as a claimed assignee, under an assignment which E-Trade Bank had signed for the assignor as its attorney-in-fact. But it failed to produce a power of attorney or any other evidence supporting its claim to have been assignor's attorney-in-fact. As such, its foreclosure judgment was reversed, with directions to enter involuntary dismissal.

NOTE #3: There is an apparent conflict among the districts as to whether F.S. §71.011 (Reestablishment of Lost Instruments) or F.S. §673.3091 (Enforcement of Lost Instruments) applies to a lost promissory note in a foreclosure setting. In the Fourth District, per *State Street, supra,* F.S. §673.3091 controls. The Fifth DCA also relied on F.S. 673.3091 in *Delia v. GMAC Mortgage Corp.*, 161 So.3d 554 (Fla. 5th DCA 2014). However, the Third District requires that F.S. §71.011 be followed. *See, O'Donovan v. Citibank, F.S.B.*, 710 So.2d 654 (Fla. 3d DCA 1998). The two statutes have different requirements. F.S. §71.011 requires that the circumstances of the loss of the instrument be pled, whereas F.S. §673.3091 does not. And F.S. §673.3091's application is limited to where the plaintiff was entitled to enforce the instrument when loss of possession occurred or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred.

The newly enacted Florida Fair Foreclosure Act's new F.S.702.015 requires compliance with §673.3091, at least with regard to foreclosure of one-to-four unit residential mortgages.

The plaintiff has the burden of proving the lost instrument count. Summary judgment for the plaintiff was reversed where, although the complaint included a lost instrument count, the plaintiff filed no affidavit or other evidence in support, but merely averred that it "currently held the note but could not find it." *Boumarate v. HSBC Bank US, N.A.*, 109 So.3d 1239 (Fla. 5th DCA 2013).

A final judgment of foreclosure was reversed with instructions to enter an involuntary dismissal where the plaintiff failed to prove the terms of the note under section 673.3091(2) or its right to enforce the note under section 673.3091(1)(b). *Correa v. U.S.Bank, N.A.*, 118 So.3d 952 (Fla. 2d DCA 2013). The court distinguished *Guerrero v. Chase Home Fin., LLC* 83 So.3d 970 (Fla. 3d DCA 2012), in which the case had been remanded to give the plaintiff an opportunity to prove up its lost note count. See also, *Russell v. Aurora Loan Services, LLC*, 163 So.3d 639 (Fla. 2d DCA 2015)(dismissal on remand appropriate where plaintiff assignee failed to prove standing.) See also *Figueroa v. Federal Nat'l Mortg. Assn,* 180 So.3d 1110 (Fla. 5th DCA 2015) (involuntary dismissal required where plaintiff fails to demonstrate all elements of count to re-establish lost instrument.) But where plaintiff locates the original note and thus dismisses its count to re-establish the note, it is not necessary to amend the complaint in order to foreclose the newly-discovered note. *Bank of America, N.A. v. Lukas*, 166 So. 3d 965, 966 (Fla. 4th DCA 2015.

See also, Nationstar Mortgage, LLC v. Wing, 210 So.3d 216 (Fla. 5th DCA 2017) (trial court erred in dismissing action to re-establish lost note where affidavit explained circumstances of note's loss, and affirmed plaintiff's agreement to indemnify and hold borrowers harmless regarding any later appearance of the note.)

Note – under F.S. 673.3091 as amended in 2013, "[t]he court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument." F.S. 673.3091(2). In *Delia v. GMAC Mortgage Corp.*, 161 So.3d 554 (Fla. 5th DCA 2014), a foreclosure judgment was reversed where the lender proved that the note was lost, but failed to present evidence on the issue of adequate protection. F.S. 702.11(1) (2013) specifies the available means of providing such protection, such as indemnification, or cash or surety bond. See also *Blitch v. Freedom Mortgage Corporation*, 185 So.3d 645 (Fla. 2nd DCA 2016) and *Calixte v. Federal National Mortgage Association*, 211 So.3d 1084 (Mem) (Fla. 3rd DCA 2017) (same).

Foreclosure judgment was reversed for failure to reestablish a lost note in *Home Outlet, LLC v. U.S. Bank N.A.*, 194 So.3d 1075 (Fla. 5th DCA 2016) where the lender's witness relied the prior servicer's lost note affidavit that was not entered in evidence, and the witness failed to establish her own personal knowledge of the circumstances of the note's loss. See also, *Wisman v. Nationstar Mortgage, LLC*, Opinion filed October 20, 2017, Case No. 5D16–3236 (Fla. 5th DCA 2017) (Foreclosure judgment reversed where

evidence was insufficient to establish ownership of note with right to enforce it at time of loss of note.)

vi. Foreclosure based on false representations and nondisclosures regarding the loan application process.

vii. Reformation of the promissory note or mortgage, if material terms are missing. This, in turn, allows the mortgage for the reformed note to then be foreclosed. Y*oung v. Kurlansik*, 974 So.2d 623 (Fla. 4th DCA 2008).

In *Losner v. HSBC Bank USA, N.A.*, 190 So.3d 160 (Fla. 4th DCA 2016), that a mortgage stated "see attached legal description" but none was attached was held clear and convincing evidence of a mutual mistake, thus justifying reformation. However, because the lender failed to prove what property the parties intended for the mortgage, reformation was denied, and the lender received only a money judgment for the amount owed, not a foreclosure judgment.

e. Consider including claim for deficiency judgment.

f. Notice of Lis Pendens must be filed which contains legal description. A notice of lis pendens bars subsequent tax lien. (Note – while a notice of lis pendens trumps a subsequently-recorded tax lien, in general tax liens have super=priority over mortgages, regardless if the mortgage was recorded prior to the lien. *Miami-Dade County v. Landsdowne Mortgage, LLC*, Opinion filed October 18, 2017,Case No. 3D16-1046 (Fla. 3rd DCA 2017).

Section 48.23, Florida Statutes. It requires the following information:

i. The names of the parties.

ii. The date of the *institution* of the action, the date of the clerk's electronic receipt, or the case number of the action.

iii. The name of the court in which it is pending.

iv. A description of the property involved or to be affected.

v. Statement of the relief sought as to the property.

The statute was also amended to clarify that where a lis pendens has expired or been withdrawn or discharged, one who subsequently acquires an interest in the property the lis pendens is deemed <u>not</u> to have actual or constructive knowledge of the proceeding, notwithstanding the Recording Act, F.S. 695.01.

In *Ober v. Town of Lauderdale-by-the-Sea*, Case No. No. 4D14–4597, (Fla. 4th DCA, August 24, 2016), the Fourth District initially held that

code enforcement liens entered after final foreclosure judgment but prior to sale were not wiped out, explaining that a notice of lis pendens only extinguishes subordinate interests through the conclusion of the litigation and that foreclosure litigation is concluded upon entry of final judgment. However, on rehearing at 218 So.3d 952, Fla. 4th DCA, January 25, 2017)), the Fourth District withdrew that opinion and replaced it with the exact opposite opinion, holding that a judicial sale discharges all liens, even those arising post-foreclosure judgment, unless the lienor intervenes as provided for in the lis pendens statute, F.S. 48.23.

The Florida Supreme Court has accepted the 4th DCA's certified question on this issue. Stay tuned…

A lis pendens is generally available, and should be sought by plaintiff, in cases seeking to correct as morgtage's legal description or to enforce an equitable lien where the legal in the recorded mortgage is erroneous and fails to describe the intended property. (*See, J.B.J. Investments of South Florida, Inc. v. Maslanka*, 163 So.3d 726 (Fla. 5th DCA 2015) (error to deny motion to extend lis pendens in case seeking to correct mortgage's legal or in the alternative imposition of equitable lien.)

NOTE – Acceleration and foreclosure, where unsuccessful, are not a res judicata bar to later foreclosure action based on a subsequent default. *Singleton v. Greymar Associates*, 822 So.2d 1004 (Fla. 2004). See also *2010-3 SFR Venture, LLC v. Garcia*, 149 So.3d 123 (Fla. 4th DCA 2014) (Despite adjudication on the merits in a prior action to foreclose mortgage, res judicata does not render mortgage unenforceable by precluding enforcement actions on subsequent defaults.)

Acceleration and Limitation of Actions. **[NOTE – also, see the extensive discussion of the statute of limitations defense in Section K(15)]** Where acceleration clause is optional and requires the lender to exercise the option and give notice, the cause of action on accelerated debt accrues, and statute of limitations commences, when lender exercises acceleration option and notifies borrower. *Snow v. Wells Fargo Bank, N.A.*, 156 So.3d 538 (Fla. 3d DCA 2015). See also *Pino v. Deutsche Bank Nat. Trust Co*, 201 So.3d 128 (Mem) (Fla. 3d DCA 2015).

In *Deutsche Bank Trust Co. Americas v. Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), the 3rd District in a long opinion full of analysis and review of other recent opinion on this issue held that 1) dismissal of a foreclosure action accelerating payment on one default does not bar a subsequent foreclosure action on a later default, if the subsequent default occurred within five years of the subsequent action; 2) whether a dismissal is with or without prejudice is irrelevant to a lender's right to file subsequent foreclosure actions on subsequent defaults; 3) a lender was under no obligation to decelerate loan after dismissal of foreclosure action; and 4) the installment nature of loan continues following acceleration, and no more than dismissal of foreclosure action is necessary to decelerate an accelerated loan.

The same day as *Beauvais*, the Third DCA also issued *Collazo v. HSBC Bank U.S.A., N.A.*, 2016 WL 1445419 (Fla. 3d DCA 2016), holding that a suit alleging a default more than five years prior to initiation of the suit can proceed, but that in calculating the judgment amount, payments

due more than five years prior to commencement of the suit must be excluded. However, on rehearing at 213 So.3d 1012), the Third DCA rethought this ruling, withdrew its prior opinion and reversed the foreclosure judgment with instructions to dismiss without prejudice.

In *Dhanasar v. JP Morgan Chase Bank, N.A.*, 201 So.3d 825 (Fla. 3rd DCA 2016) (rehearing of prior opinion at 2016 WL 4035727, Case No. 3D15–10), a foreclosure action was found to have been timely filed in August, 2013 despite the complaint alleging failure to make the payment due on April 1, 2008 since it also alleged the failure to make "all subsequent payments." While more than five years had passed since the April 1 payment was missed, the suit alleged additional missed payments less than five years prior to filing of the suit. *See also, Desylvester v. The Bank of New York Mellon*, 219 So.3d 1016 (Fla. 2nd DCA 2017), which reached the same result, and which distinguishes *Collazo*.

In *Countrywide Home Loans, Inc. v. Burnette*, 177 So.3d 1032 (Fla. 1st DCA 2015) a claim that a promissory note and mortgage became unenforceable five years after debt was accelerated and that, accordingly, mortgage lien was extinguished, was rejected. While the statute of limitations did in fact run five years after acceleration, the court ruled that the lien would remain on the property until five years after maturity, citing *Houck Corp. v. New River, Ltd*., Pasco, 900 So. 2d 601, 603 (Fla. 2d DCA 2005) ("The limitations period provided in section (2)(c) does not affect the life of the lien or extinguish the debt; it merely precludes an action to collect the debt after five years. Section 95.281(1)(b), conversely, establishes an ultimate date when the lien of the mortgage terminates and is no longer enforceable.")

See also, *Hicks v. Wells Fargo*, 178 So.3d 957 (Fla. 5th DCA 2015) (lender's prior acceleration and foreclosure suit based on a default more than five years ago, later dismissed without prejudice, does not bar a new suit more than five years after acceleration, provided it is based on a new event of default that occurs less than five years prior to filing of suit.) In *Bollettieri Resort Villas Condominium Association, Inc. v. The Bank of New York Mellon*, 198 So.3d 1140 (Fla. 2nd DCA 2016), the Second District went a step further, holding that where a prior foreclosure action is dismissed without prejudice, a new complaint filed more than five years after the prior default is timely as long as no further payments had been made, since each missed payment constitutes a new default, citing *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004).

Florida federal courts have weighed in on this issue as well. In *Torres v. Countrywide Home Loans, Inc.*, Case No. No. 14–20759–CIV., 2014 WL 3742141 (S.D. Fla. 2014) the Southern District dismissed a class action filed on behalf of borrowers against whom the lender had failed to file suit within five years of acceleration. The action sought a declaration that the notes and mortgages were no longer valid. The court rejected this argument, holding that default on each payment that was less than five years old constitutes a new basis for acceleration and foreclosure, citing *Koan v. Wells Fargo Bank, N.A.* 981 F. Supp. 2d 1271 (S.D. Fla. 2013) and *Romero v. SunTrust Mortg. Inc.*, 15 F. Supp. 3d 1279 (S.D. Fla. 2014).

In *Deutsche Bank Nat. Trust Co. v. Patino*, 192 So.3d 637 (Fla. 5th DCA 2016), a final judgment against a lender due to lack of standing went further and declared the mortgage lien of no further effect. On appeal, the Fifth District struck this "invalidity" language from the judgment because such relief had not been requested in defendant's pleadings.

Arbitration versus litigation. Where a promissory note had a mandatory arbitration provision, but appeared to contemplate litigation to foreclose the mortgage, the court held that the foreclosure suit could proceed despite defendant's demand for arbitration, but that the counts for damages for breach of the note and guaranty must be arbitrated. *Swan Landing Development, LLC v. Florida Capital Bank, N.A.*, 19 So.3d 1068 (Fla. 2d DCA 2009).

However, where a mortgage incorporated the terms of a promissory note by reference, and the promissory note contained an arbitration clause, foreclosure of the mortgage was covered by the arbitration clause. But this did not apply to an action against the guarantors since the guaranties did not incorporate the note's terms. *Perdido Key Island Resort Development, L.L.P. v. Cattar*, 101 So.3d 1 (Fla. 1st DCA 2012).

Consolidation. Where two or more foreclosure actions concern the same real property and have multiple parties in common, consolidation of the actions can avoid possible inconsistent results and duplicative judicial efforts. While a trial court has discretion, a trial court's refusal to consolidate two such foreclosure cases was reversed in *Browncorp Constr. Contracting, Inc. v. Stonybrook South Community*, 47 So.3d 965 (Fla. 5th DCA 2010).

Balloon Mortgages. F.S. Section 697.05 places certain disclosure requirements on balloon mortgages, defined as any mortgage "in which the final payment or the principal balance due and payable upon maturity is greater than twice the amount of the regular monthly or periodic payment." However, it does not apply to seller-financed mortgages or first mortgages. *Zander v. Cima*, 197 So.3d 1082 (Fla. 2d DCA 2015).

C. Plaintiff's Standing.

(NOTE – See additional discussion of standing in Sections J and K, below.)

Plaintiff must be holder of note and mortgage as of the date of filing suit in order to have standing to bring suit. *Jeff-Ray Corp. v. Jacobson*, 566 So.2d 885 (Fla. 4th DCA 1990). But, see *WM Specialty Mortgage, LLC v. Salomon*, 874 So.2d 680 (Fla. 4th DCA 2004) wherein the court limited *Jeff-Ray*, allowing that a lender whose assignment was dated after the filing of its complaint could still proceed if it could plead and prove that the date of equitable assignment preceded the complaint. See, also *Glynn v. First Union Nat'l Bank*, 912 So.2d 357 (Fla. 4th DCA 2005) and *Taylor v. Bayview Loan Servicing, LLC,* 74 So.3d 1115 (Fla. 2d DCA 2011). (Because ownership of the mortgage follows the note in the absence of a contrary intention and Bayview owned and held the note when it filed its lawsuit, Bayview has standing to maintain the underlying foreclosure action.) See also, *Mazine v. M & I Bank*, 67 So.3d 1129, 1131 (Fla. 1st DCA 2011) ("The party seeking foreclosure must present evidence that it owns and holds the note and mortgage to establish standing to proceed with a foreclosure action.")

A plaintiff has standing to foreclose if, at the time the complaint is filed, it possesses the promissory note and the note bears either a special endorsement in favor of plaintiff or a blank endorsement. Accordingly, where a foreclosing lender possessed a note specially endorsed to it as trustee, it has standing, even if the name of the trust is incorrect, as a trustee plaintiff is not required to prove the trust on whose benefit the plaintiff acts. *Bank of New York Mellon Trust Co. v. Ginsberg*, 221 So.3d 1196 (Fla. 4th DCA 2017).

Assignment of the mortgage is insufficient where there is a question as to the transfer of the note as well. *Bristol v. Wells Fargo Bank,* 137 So.3d 1130 (Fla. 4th DCA 2014). See also, *Geweye v. Ventures Trust 2013-I-H-R*, 189 So.3d 231 (Fla. 2nd DCA 2016) ("An assignment of the mortgage without assignment of the debt creates no right in the assignee," citing *Vance v. Fields*, 172 So.2d 613, 614 (Fla, 1st DCA 1965) and *Johnson v. Bank of New York*, Case No. 2D15-2222 (Fla. 2nd DCA 2017) (same) and a backdated assignment alone cannot confer standing. Since it was created during the litigation, it fails to demonstrate that the plaintiff was a holder on the date of filing suit. *Luiz v. Lynx Asset Services,* LLC, 198 So.3d 1102 (Fla. 4th DCA 2016). See also, *Partridge v. Nationstar Mortgage, LLC*, 224 So.3d 839 (Fla. 2nd DCA 2017) (assignment of mortgage, without assignment of note, held insufficient to demonstrate assignee had standing as holder of note or nonholder in possession at inception of suit.)

"Because a promissory note is a negotiable instrument and because a mortgage provides the security for the repayment of the note, the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder." *Stone v. BankUnited*, 115 So.3d 411 (Fla. 2d 2013).

An argument that because a promissory note referred to a mortgage it was not a negotiable instrument was rejected in *OneWest Bank, FSB v. Nunez*, 193 So.3d 13 (Fla. 4th DCA 2016). Pursuant to F.S. 673.1061(1)(c), a note is not "unconditional," and therefore not "negotiable," where "rights or obligations with respect to the promise or order are stated in another writing." *Nunez* held that merely referring to a mortgage in the note does not meet this test. However, where the note goes further, incorporating the mortgage and providing that the mortgage's terms "are by this reference made a part hereof," F.S. 673.1061(1)(c) is triggered, rendering the note non-negotiable. *Holly Hill Acres, Ltd. V. Charter Bank of Gainesville*, 314 So.2d 209 (Fla. 2d DCA 1975).

Pursuant to F.S. 673.3011, it is not necessary that the foreclosing plaintiff prove that it owns the note as long as it proves that it holds it, or is a non-holder who has the rights of a holder. *Wells Fargo v. Morcom*, 125 So.3d 320 (Fla. 5th DCA 2013): "We have previously held that "[t]he party that holds the note and mortgage in question has standing to bring and maintain a foreclosure action." *Deutsche Bank Nat'l. Trust Co. v. Lippi*, 78 So. 3d 81, 84 (Fla. 5th DCA 2012) (citing *Philogene v. ABN Amro Mortg. Grp. Inc.*, 948 So. 2d 45, 46 (Fla. 4th DCA 2006))... In the present case, the original note Appellant attached was endorsed in blank with Appellant's name stamped in the blank endorsement field, which, paired with section 673.3011(1), established that Appellant was the holder entitled to enforce the instrument." See also, *JP Morgan Chase Bank N.A. v. Jean Pierre*, 215 So.3d 633 (Fla. 4th DCA 2017) (holder of note with blank assignment at time of filing complaint had standing despite "owner" being a different entity.)

Indeed, where the plaintiff proceeds under a theory of holding the note, merely owning the note is insufficient proof. *See, Angelini v. HSBC Bank USA, N.A.*, 189 So.3d 202 (Fla. 4th DCA 2016) adopting the following statement from Judge Conner's concurrence in *Rodriguez v. Wells Fargo Bank, N.A.*, 18 So. 3d 62 (Fla. 4th DCA 2015): "ownership . . . of the note is not the issue, with regards to standing, unless the note is not in bearer form or is payable to someone or some entity other than the plaintiff filing suit." *Angelina* reversed with instructions to enter involuntary dismissal of the foreclosure action since the plaintiff failed to prove it was the holder

of the note on the date suit was filed. (The court also stated in dicta that the plaintiff would likely have fared better, had it proceeded as a non-holder in possession.)

Possession of a bearer note at the time of filing suit establishes a presumption as to the authenticity and authority of endorsements under § 673.3081(1), Fla. Stat. (2014) (a signature on an instrument is generally "presumed to be authentic and authorized"). As such, the dismissal of a foreclosure action due to plaintiff's failure to establish the authenticity and authority of the endorsement from the note's prior owner was reversed in *PennyMac Corp. v. Frost*, 214 So.3d 686 (Fla. 4th DCA 2017).

Involuntary Dismissal versus Remand for Further Evidence. The severe result of remand for entry of involuntary dismissal, rather than for retrial, is a common result where the plaintiff has failed to prove standing. In *Knowles v. The Bank of New York Mellon*, 186 So.3d 1147 (Fla. 4th DCA 2016), despite the plaintiff lender getting some points for candor by conceding error, its request that the remand be for a new trial was rejected, the 4th DCA instead remanding for entry of involuntary dismissal. See also, *Johnson v. U.S. Bank N.A*. 222.So.3d 635 (Fla. 2nd DCA 2017) (same).

Any notion by a trial court of leeway to give the lender a second bite at the apple after such a remand was dashed in *Ensler v. Aurora Loan Service, LLC*, 192 So.3d 616 (Fla. 4th DCA 2016). There, the Fourth District granted a writ of prohibition ordering a trial court to dismiss a foreclosure action. The trial court had ordered a new trial despite the appellate court having previously reversed with instructions to enter an involuntary dismissal in *Ensler v. Aurora Loan Services, LLC*, 178 So. 3d 95 (Fla. 4th DCA 2015).

A trial court's entry of involuntary dismissal was reversed in *Deutsche Bank Nat. Trust Co. v. Baker*, 199 So.3d 967 (Fla. 4th DCA 2016). There, the lender's current servicer testified to the principal amount but because the prior servicer's records were kept out as hearsay, the lender could not prove its damages total. However, since the lender did at least prove the principal amount, it was error to involuntarily dismiss the case. Instead, the 4th DCA remanded for a new trial on damages. If the lender fails again to get the prior servicer's records admitted, it could nevertheless seek judgment just for the principal amount.

The issue of whether to remand for involuntary dismissal or for further taking of evidence as to the correct judgment amount was examined in *Lasala v. Nationstar Mortgage, LLC*, 197 So.3d 1228 (Fla. 4th DCA 2016). There, the Fourth District remanded for the taking of further evidence because, as in *Peuguero v. Bank of America, N.A.*, 169 So.3d 1198 9Fla. 4th DCA 2016), the lender had succeeded in putting on some evidence to support the amount of principal owed. Had it failed to admit any such evidence, presumably reversal with instructions to enter involuntary dismissal would have been more appropriate. See also, *Ottawa Properties 2 LLC v. Central Mortgage Company*, 202 So.3d 102 (Mem) (Fla. 4th DCA 2016) (reversal of judgment due to insufficiency of evidence of amount of indebtedness should be for new trial on damages where plaintiff put on some evidence as to amount of indebtedness.) See also, *Markland v. The Bank of New York Mellon*, 206 So.3d 719 (Fla. 4th DCA 2016?) (remanding for further proceedings where although evidence was insufficient to prove damages, there was some evidence of damages presented.) See also, *Bayview Loan Servicing, LLC v. Luciano Del Lupo*, 208 So.3d 97 (Fla. 4th DCA 2017) (involuntary dismissal due to foreclosing lender's failure to

prove damages reversed for a new trial on damages where loan payment history admitted in evidence was sufficient to establish prima facie case on damages) and *Qualmann v. Deutsche Bank Nat. Trust*, 210 So.3d 705 (Mem) (Fla. 5th DCA 2017) (new hearing on damages required in foreclosure action where evidence supported substantial component of aggregate damage award, but evidentiary foundation for total amount of damages was lacking).

The 4th DCA reversed a foreclosing assignee's summary judgment due to existence of a fact question where the assignment was dated three days after suit was filed, and plaintiff's affidavit asserted that plaintiff "owns and holds the note" but failed to state when possession of the note had actually been obtained. *McLean v.JP Morgan Chase Bank, NA*, 79 So.3d 170 (Fla. 4th DCA 2012). See also, *Vidal v. Liquidation Properties, Inc.*, 104 So.3d 1274 (Fla. 4th DCA 2012) (although mortgage assignment was sworn to one day after complaint was filed with stated effective date prior to the filing, factual dispute existed whether parties to the transfer were attempting to backdate an event to their benefit) and *Schmidt v. Deutsche Bank*, 170 So.3d 938 (Fla. 5th DCA 2015) (plaintiff failed to present substantial competent evidence that it was the holder of note and allonge at time it filed complaint). See also, *Corrigan v. Bank of America, N.A.*, 189 So.3d 187 (Fla. 2nd DCA 2016) (same). *Corrigan* is notable for its concurrence by Judge Lucas, lamenting that "unwavering adherence to this standing-at-inception requirement imposes inequities in foreclosure cases and, in my opinion, has led the rule astray from whatever its underlying purpose may have been."

However, in *U.S. Bank, N.A. v. Knight*, 90 So.3d 824 (Fla. 4th DCA 2012), the 4th DCA reversed a dismissal that had been based on lack of standing where although the assignment documents were dated well after commencement of suit, the foreclosing lender had alleged that it owned and held the note as of that date:

> "U.S. Bank argues that because it is the owner and holder of the note for which the mortgage is the security, it is not necessary that the mortgage, itself, be transferred prior to the initiation of the foreclosure suit. We agree. The person entitled to enforce a negotiable instrument, such as a promissory note, is the "holder of the instrument." § 673.3011(1), Fla. Stat. (2008). A "holder" is someone who is "in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . ." § 671.201(21)(a), Fla. Stat. (2008). The "bearer" is a person "in possession of a negotiable instrument . . . that is payable to bearer or indorsed in blank." § 671.201(5), Fla. Stat. (2008) . . . Thus, to have standing, an owner or holder of a note, indorsed in blank, need only show that he possessed the note at the institution of a foreclosure suit; the mortgage necessarily and equitably follows the note. See *WM Specialty Mortg., LLC v. Salomon*, 874 So.2d 680, 682 (Fla. 4th DCA 2004) (Emphasis added.)

"A plaintiff alleging standing as a holder must prove it is a holder of the note and mortgage both as of the time of trial and also that the (original) plaintiff had standing as of the time the foreclosure complaint was filed." *Dhanik v, HSBC VBank USA, N.A.*, 210 So.3d 113 (Fla. 2nd DCA 2016) (Reversing foreclosure judgment, explaining that copy of blank endorsement introduced at trial did not establish standing at inception of suit where mortgage

and note attached to complaint lacked any endorsement to plaintiff or blank endorsement, and plaintiff offered no evidence as to when blank endorsement was placed on note.)

Attachment to the initial complaint of a copy of a note with a blank indorsement was found sufficient to defeat a motion for involuntary dismissal, so long as the lender later files the original note in the same condition as the copy attached to the complaint, which was held to create a rebuttable presumption of possession of the note. *Ortiz v. PNC Bank, N.A.*, 188 So.3d 923 (Fla. 4th DCA 2016).

In the same month that *Ortiz* was issued, a different 4th DCA panel reversed a foreclosure judgment in *Lewis v. U.S. Bank, N.A.*, 188 So.3d 46 (Fla. 4th DCA 2016) in which the endorsements on an allonge to the note were undated, the lender's witness could not testify when they were placed on the along, and no copy of the note was attached to the complaint. See also, *Mathis v. Nationstar Mortgage, LLC*, 227 So.3d 189 (Fla. 2nd DCA 2017) (foreclosure judgment reversed for entry of involuntary dismissal where lender introduced original note but failed to introduce original allonge with blank indorsement, and servicer's testimony that plaintiff possessed blank indorsement held to violate "Best Evidence Rule," F.S. 90.952 and .953).

The plaintiff in *Lewis* also lost because the pooling and servicing agreement failed to establish the bank's standing. But the Fourth District reached the opposite result, and distinguished the facts justifying that result from those in *Lewis*, in *Bolous v. U.S. Bank, N.A.*, 210 So.3d 691 (Fla. 4th DCA 2016):

> Our review of *Lewis* indicates that the bank in that case could not prove that the pooling and servicing agreement at issue included the note at issue. Here, however, the 2005 pooling and servicing agreement identified the bank as trustee, and the corresponding mortgage loan schedule listed the loans maintained in the trust, including the borrower's loan.

Note – summary judgment for an assignee of the original lender was reversed where the plaintiff did hold the note, but the note neither named the assignee as payee, nor contained a blank assignment, instead naming the original lender as payee. *Lindsey v. Wells Fargo Bank, N.A.*, 139 So.3d 903 (Fla. 1st DCA 2013). See also *Boyd v. Wells Fargo Bank, N.A.*, 143 So.3d 1128 (Fla. 4th DCA 2014) (final judgment of foreclosure reversed where, although plaintiff filed an allonge endorsed in its favor, it was undated, and the only assignment in the record was to an entity other than the plaintiff); and *Creadon v. U.S. Bank, N.A.*, 166 So.3d 952 (Fla. 2d DCA 2015) (bank failed to establish that it was holder of note or nonholder in possession of note with rights of a holder, or any alternate basis for standing, such as an assignment of the mortgage.)

Defendant borrowers may not rely on the terms of plaintiff's trust documents to defeat standing, since they are not parties thereto. *See Castillo v. Deutsche Bank Nat'l Trust Co.,* 89 So. 3d 1069 (Fla. 3d DCA 2012). Florida courts have repeatedly held that borrowers cannot defeat a foreclosure plaintiff's standing by relying upon trust documents to which the borrower is not a party. *Id.*

And the conclusory testimony of a non-lawyer defense expert (a "mortgage foreclosure fraud investigator and securitization auditor") that a trust was not the holder of the subject note was found insufficient basis to involuntarily dismiss a foreclosure action in *Citibank, N.A. v. Olsak*, 208 So.3d 227 (Fla. 3rd DCA 2016).

Constructive Possession of Note. "Possession of a note by a third party agent such as a servicer or law firm, gives the "owner" of the note constructive possession sufficient to establish standing as the note's holder." *U.S. Bank, N.A. v. Angeloni*, 199 So.3d 492 (Fla. 4th DCA 2016), citing *Caraccia v. U.S. Bank, Nat'l Ass'n*, 185 So. 3d 1277, 1279 (Fla. 4th DCA 2016). See also, *Deutsche Bank Nat. Trust Co. v. Mobley*, 212 So.3d 511 (Fla. 3rd DCA 2017) (possession of note by third party agent such as a servicer gives owner of note constructive possession sufficient to establish standing as note's holder.)

"Even where a third party has physical possession of the note, so long as the plaintiff "had the power to exercise control over it, then [the plaintiff] had constructive possession of the note." *Caraccia v. U.S. Bank, N.A.*, 185 So.3d 1277 (Fla. 4th DCA 2016), citing *Deakter v. Menendez*, 830 So. 2d 124, 128 (Fla. 3d DCA 2002). See also, *Phan v. Deutsche Bank Nat'l Trust Co.*, 198 So.3d 744 (Fla. 2d DCA 2016) (confirming that "where an agent holds a mortgage note on behalf of its principal, the principal has constructive possession of the note and standing to file a complaint for foreclosure as a holder under section 673.3011(1)."); *Caraccia v. U.S. Bank, Nat'l Ass'n*, 185 So.3d 1277, D477 (Fla. 4th DCA 2016) (confirming that the element of possession necessary for standing to bring an action on a note may be met "through actual or constructive possession"); and *FNMA v. McFayden*, 194 So.3d 418 (Fla. 3d DCA 2016), which cites to *Phan*.

In *Murray v. HSBC*, 157 So.3d 355 (Fla.4th DCA 2015), a foreclosure judgment in favor of the trustee on a CMBS loan was reversed where the trustee failed to admit the assignments of the loan documents into evidence, leaving a gap. The court explained as follows: "If there are multiple prior transfers, the transferee must prove each prior transfer. Once the transferee establishes a successful transfer from a holder, he or she acquires the enforcement rights of that holder. See Com. Law § 3–203 cmt. 2. A transferee's rights, however, can be no greater than his or her transferor's because those rights are 'purely derivative.'"

Where the original lender was placed in receivership by the FDIC, the entity which purchased the defunct lender's assets pursuant to a purchase assumption agreement was found to have standing to foreclose in *Stone v. BankUnited*, 115 So.3d 411 (Fla. 2d DCA 2013).

See also, *GMAC v. Choengkroy*, 98 So.3d 781 (Fla. 4th DCA 2012) (error to dismiss foreclosure complaint on basis of assignment dated subsequent to commencement of suit, where there was evidence of an earlier equitable assignment of the loan, thus requiring an evidentiary hearing); and *Everhome Mortgage Co. v. Janssen*, 100 So.3d 1239 (Fla. 2d DCA 2012)("We are compelled to point out that possession of the note determines standing to foreclose. *See Taylor v. Bayview Loan Servicing, LLC*, 74 So.3d 1115, 1117 (Fla. 2d DCA 2011). The holder of the original note endorsed in blank has standing. Id.") and *American Home Mortgage Servicing, Inc. v. Bednarek*, 132 So.3d 1222 (Fla. 2d DCA 2013) (Trial court erred in dismissing foreclosure action for lack of standing where plaintiff possessed original

note endorsed in blank and attached to complaint assignment of mortgage from original lender to plaintiff's predecessor).

And a plaintiff not in possession of the note when suit is filed may still be found to have standing where the complaint includes a count to re-establish a lost note and attaches a copy of a note bearing a blank endorsement, and later files the note with the court. *Wilmington Savings Fund Society, FSB v. Louissaint*, 212 So.3d 473 (Fla. 5th DCA 2017). But where a plaintiff did not attach copy of note to initial complaint, but alleged that it was the owner of the note which was lost, and subsequently filed original note with attached allonge containing an undated indorsement from original lender to plaintiff, plaintiff failed to establish standing at inception of case because plaintiff did not demonstrate that the undated indorsement occurred before the complaint was filed. *Kumar v. U.S. Bank, N.A.*, 225 So.3d 888 (Fla. 5th DCA 2017)

But mere possession of the note may not be sufficient to demonstrate standing. The plaintiff is "required to show that it received the instrument from a holder with enforcement rights." *St. Clair v. U.S. Bank, N.A.*, 173 So.3d 1045 (Fla. 2d DCA 2015). In *St. Clair*, the foreclosing assignee failed to demonstrate how it obtained the note and mortgage from the original mortgagee.

Note –A claim of lack of standing is an affirmative defense. It may not be raised for the first time in a Rule 1.540(b) motion for relief from judgment that is not brought until months after entry of judgment. *Pacheco v. IndyMac Federal Bank, F.S.B.*, 92 So.3d 276 (Fla. 4th DCA 2012), and is waived if not asserted as a defense. "Generally, the failure to raise standing as an affirmative defense operates as a waiver." *Beaumont v. Bank of New York Mellon*, 81 So.3d 553, 555 (Fla. 5th DCA 2012) (citing *Kissman v.. Panizzi*, 891 So.2d 1147, 1150 (Fla. 4th DCA 2005)) See also, *Jaffer v. Chase Home Finance, LLC*, 155 So.3d 1199 (Fla. 4th DCA 2015) (Defaulted defendant waived standing defense and could not recast it later as a failure to state a cause of action.) *See also, Rincon v. Bank of America, N.A.*, 206 So.3d 793 (Fla. 3rd DCA 2016) (lack of standing is an affirmative defense that must be raised either by way of responsive pleading or otherwise in the court below, but not for the first time either on appeal or in Rule 1.540(b)(4) motion).

However, in *Benz v. Fed. Home Loan Mortgage Corp.*, 145 So.3d 943 (Fla. 2d DCA 2014) the Second DCA reversed a summary judgment of foreclosure due to fact questions as to standing despite the defendants not asserting standing as an affirmative defense, instead raising it by motion for summary judgment. Citing its holding in *Maynard v. Fla. Bd. of Educ. ex. rel. Univ. of S. Fla.,* 998 So.2d 1201 (Fla. 2d DCA 2009)., the 2nd DCA held that while affirmative defense is the preferred method of raising standing, it may be raised by motion as well. And in *Lovett v. Nat. Collegiate Student Loan Trust,* 149 So.3d 735 (Fla. 5th DCA 2014), summary judgment for the lender was reversed despite the pro se defendant's failure to assert lack of standing as a defense, where it was raised for the first time by his newly-hired attorney on motion for rehearing. Subsequent to *Benz*, the Second District described the defense of lack of standing as "something of a legal oddity," which is waived if not asserted in a pleading in *Winchel v. Pennymac Corp.*, 222 So.3d 639 (Fla. 2nd DCA 2017).

Also, a foreclosure judgment entered into without the mortgagee possessing the note at time suit is filed is voidable, not void. *Everhome Mortg. Co. v. Janssen*, 100 So.3d 1239 (Fla. 2d DCA 2012). And a dismissal for lack of standing to foreclose a mortgage is not an adjudication on the merits for the purpose of res judicata. *Brown v. M&T Bank,* 183 So.3d 1270 (Fla. 5th DCA 2016).

Assignment During Litigation. An assignee during litigation that substitutes in as plaintiff acquires the standing of the original plaintiff. *See, Brandenburg v. Residential Credit Solutions, Inc.*, 137 So. 3d 604, 605-06 (Fla. 4th DCA 2014). Such plaintiff must present proof of the original plaintiff's standing as of the date suit was filed. *Kiefert v. Nationstar Mortgage, LLC*, 153 So.3d 351 (Fla. 1st DCA 2014). (Note – where an assignee substitutes in as plaintiff, a final judgment to be entered must be entered in favor of the substituted plaintiff, not the original plaintiff. *Sainte v. Ventures Trust 2013 1-H-R*, 177 So.3d 316 (Fla. 4th DCA 2015). It was held error to require a substituted plaintiff to demonstrate standing at the time of the substitution in *Ventures Trust 2013-I-H-R v. Asset Acquisitions and Holding Trust,* 202 So.3d 939 (Fla. 2nd DCA 2016).

But the substituted plaintiff must still demonstrate that the initial plaintiff had standing on the date it filed suit. *Seidler v. Wells Fargo Bank, N.A.,* 179 So.3d 416 (Fla. 1st DCA 2015). (Substituted plaintiff failed to prove initial plaintiff's standing where initial plaintiff had sued to re-establish lost instrument and alleged it did not possess the note.) See also *Chery v. Bank of America, N.A.*, 183 So.3d 1253 (Fla. 4th DCA 2016) and *Cartwright v. LJL Mortgage Pool, LLC*, 185 So.3d 614 (Fla. 4th DCA 2016) and *Luiz v, Lynx Asset Services, LLC*, 198 So.3d 1102 (Fla. 4th DCA 2016) (same).

And an order granting substitution, standing alone, is insufficient to prove the standing of the substituted plaintiff, which must still present evidence of a valid assignment from the original plaintiff. *Houk v. PennyMac Corp.*, 210 So.3d 726 (Fla. 2nd DCA 2017).

In *Deutsche Bank Nat. Trust Co. v. Marciano*, 190 So.3d 166 (Fla. 5th DCA 2016), the trustee of a CMBS trust was found to have sufficiently proven standing where the pooling and servicing agreement demonstrated that plaintiff had possession of the blank-endorsed note at time complaint was filed. See also, *FNMA v. Rafaeli*, 225 So.3d 264 (Fla. 4th DCA 2017) (Where note owner was substituted in as plaintiff during case, it was error to dismiss for lack of standing. The complaint filed by note owner's loan servicer had included copy of blank-endorsed note, demonstrating that original plaintiff (loan servicer) had standing at time suit was filed.)

Just having a note with a blank endorsement is not sufficient when confronted with a standing challenge. The plaintiff must also demonstrate that it possessed the note on the date that suit was filed. *Cromarty v. Wells Fargo, NA*, 110 So.3d 988 (Fla. 4th DCA 2013). See also, *Ryan v. Wells Fargo Bank*, 142 So.3d 974 (Fla. 4th DCA 2014) (judgment of foreclosure reversed where although the record contained a copy of a note with a blank endorsement, the note placed in evidence at trial did not, and lender's rep on cross-examination admitted he was "unsure" whether the lender owned the note when suit was filed.) See also, *May v. PHH Mortgage Corp.*, 150 So.3d 247 (Fla. 2d DCA 2014) (final judgment of foreclosure reversed where plaintiff/assignee failed to present prima facie evidence at trial that it was in possession of the

"blank assignment" note at the lawsuit's inception); *Balch v. LaSalle Bank, N.A.,* 171 So.3d 207 (Fla. 4th DCA 2015) (final judgment of foreclosure reversed with instructions to enter involuntary dismissal where plaintiff failed to prove that undated endorsement to note on which it relied was placed there prior to suit being filed) and *Snyder v. JP Morgan Chase Bank, N.A.*, 169 So.3d 320 (4th DCA 2015) (same); *Peoples v. SAM II Trust 2006-AR6, Bank of New York as Successor in Interest to JP Morgan Chase Bank, N.A., Trustee*, 178 So.3d 67 (Fla. 4th DCA 2015) (judgment of foreclosure reversed where, while lender produced original note with undated blank endorsement, it failed to establish when endorsement was placed on note); *Monnot v. U.S. Bank, N.A.*, 188 So.3d 896 (Fla. 4th DCA 2016 (foreclosure judgment reversed where plaintiff failed to prove it possessed the original note on date suit was filed and *Braga v. Fannie Mae*, 187 So.3d 1272 (Fla. 4th DCA 2016) (standing at time complaint was filed held not established where plaintiff failed to prove undated endorsement in blank was placed on allonge prior to filing original complaint) and *Elman v. U.S. Bank, N.A.*, and rehearing opinion, 204 So.3d 452 (Fla, 4th DCA 2016) ("Because the bank was not the original named payee, it had to prove not only a blank or special endorsement in its favor, but also that the endorsement was placed on the note before it filed the original complaint."); *Walton v. Deutsche Bank Nat. Trust Co.*, 201 So.3d 831 (Fla. 1st DCA 2016) (foreclosure judgment reversed with instructions to enter involuntary dismissal where there was insufficient evidence to show that undated indorsement of note occurred prior to filing of complaint) and *Verizzo v. The Bank of New York,* 220 So.3d 1262 (Fla. 2nd DCA 2017) (foreclosure judgment reversed where plaintiff failed to explain its standing in light of note payable to a different lender.

Also, note that a blank endorsement, without more, does not disqualify the possessor of the note from being a holder. A blank endorsement means only that the note is capable of being assigned, not that it has been assigned. *GMAC Mortgage, LLC v. Pisano*, 42 F:W D2155a 9Fla. 4th DCA 2017).

Where the lender presented no evidence that a special endorsement was placed on the note prior to the filing of suit, the Fourth District reversed a lender's judgment after trial and directed that an order of involuntary dismissal be entered in *Balch v. LaSalle Bank*, 171 So.3d 207 (Fla. 4th DCA 2015). See also, *Jarvis v. Deutsche Bank Nat. Trust Co.*, 169 So.3d 194 (Fla. 4th DCA 2015) (Error to enter final judgment of foreclosure where original note listed lender other than plaintiff and contained no blank or special endorsements, and plaintiff did not introduce assignment into evidence) and *Jelic v. BAC Home Loans Servicing, LP,* 178 So.3d 523 (Fla. 4th DCA 2015).

The 4th DCA reversed foreclosure judgment and ordered entry of involuntary dismissal for failure to prove standing where plaintiff possessed a note with blank endorsement but failed to present testimony as to when the endorsement was placed on the note. The plaintiff had also submitted an assignment executed after suit was filed, but with a purported "effective date" prior to filing suit. But there was no evidence, other than the assignment itself, to verify when the assignment actually took place. *Kenney v. HSBC Bank USA, N.A.*, 175 So.3d 377 (Fla. 4th DCA 2015).

However, on appeal the defendant must show that the plaintiff failed to prove standing. Without a trial transcript (or sufficient supplementation of the record per F.R.A.P 9.2000(f)(2)),

the appellate court has no basis to reverse for lack of standing. *Snowden v. Wells Fargo Bank*, 172 So.3d 506 (Fla. 1st DCA 2015).

Introduction into evidence of the original note with a chain of endorsements from the original lender ending with an undated blank endorsement, plus proof that the plaintiff had possession of the original Note with all the endorsements when it filed the foreclosure complaint is sufficient to prove standing. *Green Tree Servicing, LLC v. Sanker*, 204 So.3d 496 (Fla. 4th DCA 2016).

Standing was found to exist in favor of a loan's assignee (although the judgment was reversed for further proceedings on an unrelated basis) where despite the note's along being undated, there was evidence of plaintiff/assignee having paid the taxes on the mortgaged property prior to suit being filed. The court noted that lenders do not generally pay taxes on properties on which they do not already have a mortgage. *Peuguero v. Bank of America*, 169 So.3d 1198 (Fla. 4th DCA 2015).

Standing was also found despite an assignment on the back of the note from the plaintiff to FNMA with "cancelled" stamped on it, where plaintiff offered no explanation of the assignment or how the cancellation thereof occurred. Possession of a note by a "reacquiring" former holder permits that holder to cancel an intervening assignment per F.S. 673.2071. *Wells Fargo Bank, N.A. v. Sheikha*, 221 So.3d 657 (Fla. 4th DCA 2017).

And even an assignment of mortgage which predates filing of suit will be insufficient on its own to prove standing where by its terms it transfers the mortgage but not the note. *Tilus v. AS Michai, LLC*, 161 So.3d 1284 (Fla. 4th DCA 2015).

In *Focht v. Wells Fargo, N.A.*, 124 So.3d 308 (Fla. 2d DCA 2013), the Second District reversed a foreclosure summary judgment where the plaintiff was unable to establish that it possessed the note on the date the action was commenced. Similarly, in *Sorrell v. U.S Bank, N.A.*, 198 So.3d 845 (Fla.2nd DCA 2016) a foreclosure judgment was reversed with instructions to enter dismissal where the lender failed to present any documentary evidence to establish standing as of the date suit was filed. ("To prove standing when in possession of only an undated indorsement or allonge, the plaintiff must introduce other admissible evidence to prove that it had the right to enforce the note on the date the complaint was filed.")

Suit may be filed not just by the note's "holder," but also by the holder's representative, upon adequate showing of authorization to do so. "The proper party with standing to foreclose a note and/or mortgage is the holder of the note and mortgage or the holder's representative." *Elston/Leetsdale, LLC v. CW Capital Asset Mgmt LLC*, 87 So.3d 14, 17 (Fla. 4th DCA 2012), citing *BAC Funding Consortium, Inc. ISAOA/ATIMA v. Jean-Jacques*, 28 So.3d 936, 938 (Fla. 2d DCA 2010) (Holder's servicer may have standing to foreclose, but judgment reversed due to servicer's failure to present evidence of same). See also, *Rodriguez v. Wells Fargo Bank, N.A.* 178 So.3d 62 (Fla. 4th DCA 2015) (Foreclosure judgment reversed where loan servicer plaintiff failed to introduce power of attorney, pooling and servicing agreement, or other evidence to show that real party in interest authorized it to bring the action)

BUT – in *Wright v. JPMorgan Chase Bank, N.A.*, 169 So.3d 251 (Fla. 4th DCA 2015) a plaintiff's claim that it had standing as the servicer for the lender was rejected, and the foreclosure dismissed for lack of standing, where although there was a notice of servicing transfer in the court file, the plaintiff never authenticated this document or entered it into evidence. *See Wolkoff v. Am. Home Mortg. Serv., Inc*., 153 So. 3d 280, 281-82 (Fla. 2d DCA 2014) ("A document that was identified but never admitted into evidence as an exhibit is not competent evidence to support a judgment."); *Beaumont v. Bank of New York Mellon*, 81 So. 3d 553, 555 n.2 (Fla. 5th DCA 2012) (copy of an assignment of a note in the court file was not competent evidence where it was never authenticated and offered into evidence). (Moral of the story – if it's important to your case, authenticate the document and put it in evidence!) *Wright* also held that a corporate parent is a different legal entity than its subsidiary; as such a parent's standing to file suit is not automatically transferred to its subsidiary.

And where the assignment documentation for a bulk assignment of mortgages is equivocal as to whether a particular mortgage is assigned, the lender may be unable to prove standing as to that mortgage. See for example, *Frost v. Christiana Trust*, 198 So.3d 1092 (Fla. 4th DCA 2016) (reversing foreclosure judgment on this basis). See also, *Snyder v. JP Morgan Chase Bank, N.A.*, 169 So.3d 1270 (Fla. 4th DCA 2015).

Standing is determined at the tile of filing suit and an amended complaint does not relate back for standing purposes. *Guzman v. Deutsche Bank Nat. Trust Co.*, 179 So.3d 543 (Fla. 4th DCA 2015).

Absence of Effect of "Anomalous Assignment". An anomalous assignment is an "indorsement made by a person who is not the holder of the instrument." F.S. 673.2051(4). Such an indorsement has not effect, and will be ignored by the court. In *U.S. Bank N.A. v. Becker*, 211 So.3d 142 (Fla. 4th DCA 2017), attached to the note in addition to a complete chain of indorsements ending in the plaintiff, was an undated allonge from one party to another, neither of which appeared to have any connection with the subject loan. After the trial court involuntarily dismissed the action based on this unexplained allonge, the 4th DCA reversed, finding the alonge to be an anomalous assignment per F.S. 673.2051(4).

Similarly, where a copy of a note contained an endorsement to the plaintiff, but at trial the original note contained an unexplained additional blank endorsement that had been placed on it after suit was filed, it was held that the trial court erred in granting involuntary dismissal in *U.S. Bank, N.A. v. Roseman*, 214 So.3d 728 (Fla. 4th DCA 2017). The Fourth DCA held that the unexplained blank endorsement did not constitute an "alteration" under F.S. 673.4071, did not affect the original note's authenticity, and did not affect the note's ability to be self-authenticated under F.S. 90.902(8).

But an endorsement only conveys only those rights held by the endorser. So for the endorsement to be valid, the endorser must be shown to be a holder at time of endorsement. Where this cannot be shown, an endorsement is "anomalous" under F.S. 673.2015, resulting in the endorsee not having standing to foreclose. *PennyMac Corp. v. Frost*, 214 So.3d 686 (Fla. 4th DCA 2017).

Effect of Collateral Assignment. Where a lender has collaterally assigned its note and mortgage, the collateral assignee is the proper party (either alone, or as co-plaintiff with the assignor, where the assignment is silent on the assignor's ability to proceed with foreclosure on its own). *Laing v. Gainey Builders, Inc.*, 184 So.2d 897 (Fla. 1st DCA 1966). Note – In *Laing*, the assignor filed suit without the assignee's knowledge or consent. Assignor may foreclose on its own, however, where it has assignee's knowledge and agreement.

In *Venture Holdings & Acquisitions Group, LLC v. A.I.M. Funding Group, LLC*, 75 So.3d 773 (Fla. 4th DCA 2011), the 4th District held that a lender that had collaterally assigned the note and mortgage to a third party prior to filing suit lacked standing to foreclose, citing *Laing*, *supra*, and *McGrath Cmty. Chiropractic*, 913 So.2d 1281 (Fla. 2d DCA 2005). It should be noted that, unlike *Laing*, *Venture Holdings* does not discuss the exception arising when the assignee has knowledge of, and consents to, assignor bring the foreclosure suit.

Where the collateral assignee has physical possession of the note, but the collateral assignment provides for foreclosure in the name of the assignor, and provides the assignor with access to the note as needed, this should be sufficient basis for the assignor to have standing. (See discussion of constructive possession on page 20, above.) Where possession is an element of a claim, "constructive" forms of possession are generally deemed sufficient, as opposed to requiring "physical" possession. See, *Bush v. Belenke*, 381 So.2d 315 (Fla. 3d DCA 1980) (In replevin action, physical possession is unnecessary, provided party has ability to deliver possession); *Deakter v. Menendez*, 830 So.2d 124 (Fla. 3d DCA 2002) (In lost instrument action, creditor not required to have had physical possession at time of loss; power to exercise control over it is sufficient.)

In *Gee v. U.S. Bank*, 72 So.3d 211 (Fla. 5th DCA 2011), summary judgment in favor of the plaintiff assignee was reversed due to a break in the chain of assignments where the complaint alleged an assignment from "American Home Mortgage as successor in interest of Option One," but failed to prove or explain how American had come to be Option One's successor.

If all assignments are not in order prior to filing suit, lenders sometimes take voluntary dismissals until all required assignments are in place. The Florida Supreme Court held that once a lender has voluntarily dismissed, the defendant may not have the case reinstated for the purpose of imposing sanctions unless the plaintiff has obtained affirmative relief and has dismissed in order to prevent the court from undoing the improperly obtained relief. *Pino v. The Bank of New* York, 121 So.3d 23 (Fla. 2013).

Where a plaintiff lender takes a voluntary dismissal then assigns the note and the assignee files to foreclose, a voluntary dismissal by the assignee, constituting a second voluntary dismissal, triggers an adjudication on the merits under FRCP 1.420(a)(1). *Nolan v. MIA Real Holdings, LLC*, 1855 So.3d 1275 (Fla. 4th DCA 2016).

And where a foreclosure plaintiff takes a voluntary dismissal (thereby entitling the defendants to potential attorney's fees if refiled) and then assigns the mortgage, the assignee will be required to pay those fees in order to file a new foreclosure suit per F.R.C.P. 1.420(d), since an assignee acquires not only the rights, but also the obligations, of the assignor. As such, the

defendant was entitled to a stay of the new foreclosure action pending payment if her attorney's fees and costs from the prior action. *Villalona v. 21st Century Mortgage Corp.*, 1955 So.3d 1195 (Fla. 4th DCA 2016).

Where, as of the date of filing suit, an assignee possessed a note which was endorsed in blank, it had standing to sue regardless whether it also had an assignment. *Deutsche Bank Nat. Trust Co. v. Lippi*, 78 So.3d 81 (Fla. 5th DCA 2012). "The party that holds the note and mortgage in question has standing to bring and maintain a foreclosure action. *Philogene v. ABN Ambro Mortg. Group Inc.*, 948 So.2d 45, 46 (Fla. 4th DCA 2006). Additionally, "the person having standing to foreclose a note secured by a mortgage may be either the holder of the note or a nonholder in possession of the note who has the rights of a holder." *Taylor v. Deutsche Bank Nat'l Trust Co.*, 44 So.3d 618, 622 (Fla. 5th DCA 2010). Therefore, "[t]he party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action." *Lizio v. McCullom*, 36 So.3d 927, 929 (Fla. 4th DCA 2010). Since the lien follows the debt, Florida does not require a plaintiff to attach a written or recorded assignment of the mortgage in order to pursue a foreclosure action. *Chem. Residential Mortg. v. Rector,* 742 So.2d 300, 300-01 (Fla. 1st DCA 1998)."

But where there is a genuine issue of fact as to the affirmative defense of lack of authority by the signor of two allonges to execute them, summary judgment for the lender was reversed. *Bennett v. Deutsche Bank Nat. Trust Co.*, 124 So.3d 320 (Fla. 4th DCA 2013). (This case also held that, unless contested, signatures are presumed valid per F.S. 673.3081(1).)

Special Servicers. A loan servicing entity has standing to bring a foreclosure action on behalf of a trust upon the allegation that it does so as the trust's "agent and special servicer," but failure to back up this allegation with evidence, affidavits or other documentation will result in reversal of summary judgment of foreclosure. *Elston/Leetsdale, LLC v. CW Capital Asset Management*, 87 So.3d 14 (Fla. 4th DCA 2012). See also, *Rivera v. Wells Fargo Bank, N.A.*, 189 So.3d 323 (Fla. 4th DCA 2016) (servicer had standing to foreclose where there was evidence that Fannie Mae owned the e-note and had authorized it to foreclose).

For an excellent discussion of the issues surrounding standing in the mortgage foreclosure context, please see:

"Proving Standing to Foreclose a Florida Mortgage" by Richard H. Martin in the December, 2011 issue of the *Florida Bar Journal* (Volume 85, No. 10).

a. MERS. Mortgage Electronic Registration Systems, Inc. (MERS) Florida was found to have standing to file foreclosure actions in *MERS v. Azize*, 965 So.2d 51 (Fla. 2d DCA 2007) and *MERS v. Revoredo*, 955 So.2d 33 (Fla. 3d DCA 2007).

   NOTE – In 2011 MERS forbade its members from filing foreclosure suits in MERS' name, so the MERS standing issue may become moot. MERS has also now directed that loan servicers obtain and record all necessary mortgage assignments prior to filing foreclosure suits.

Merger. A party seeking to prove standing as the surviving entity after a merger must prove that all of the prior entity's assets were merged into the surviving entity. *Segall v. Wachovia Bank, N.A.*, 192 So.3d 1241 (Fla. 4th DCA 2016).

Name Change. Where a lender's name changes after it makes a mortgage loan, proof of the name change can explain the discrepancy between the name of lender stated in the loan documents and the name of the foreclosing plaintiff, and is therefore sufficient to demonstrate standing. *Wachovia Mortgage, F.S.B. v. Goodwill*, 199 So.3d 346 (Fla. 4th DCA 2016), citing *Brandenburg v. Residential Credit Sols. Inc.*, 137 So. 3d 604, 605-06 (Fla. 4th DCA 2014) (note with special endorsement from original lender to Ohio Savings Bank and certificate showing that Ohio Savings Bank changed its name to Amtrust Bank, the original plaintiff, sufficient to prove Amtrust Bank's standing.) See also, *DiGiovanni v, Deutsche Bank Nat. Trust Co.*, 226 So.3d 984 (Fla. 2nd DCA 2017) reversing foreclosure judgment where plaintiff failed to present evidence of note owner's name change and after close of evidence judge ran a Google search, found the name change information and offered plaintiff the opportunity to re-open its case for judicial notice of the online information. The 2nd DCA found the judge's independent research effort to assist one side had the appearance of partiality, and that the online info was not appropriate for judicial notice anyway.)

Assignee from a party that failed to prove standing in prior case. Where an assignee lender loses a foreclosure action because it fails to demonstrate standing, that does not bar an assignment to a different entity, nor a finding that the new assignee does have standing. In *Kajaine Estates, LLC v. US Bank Nat. Assn,*, 198 So.3d 1010 (Fla. 5th DCA 2016), an assignee plaintiff lost a foreclosure action because it failed to prove that its assignor had standing when it had filed the lawsuit. That assignee then assigned to a second assignee, who was found to have standing. The prior adverse finding against its assignor did not mean it could not validly assign the loan, nor prevent it from obtaining the original note from the court file for that purpose.

D. **Defendants**.

Check title to determine the proper parties. A trial court did not commit error when it allowed a mortgagee to substitute a specific person in place of a "John Doe" defendant. *Penton v. Intercredit Bank, N.A.*, 943 So.2d 863 (Fla. 3d DCA 2006).

1. Indispensable Parties.

   i. Legal title owner is an indispensable party. *English v. Bankers Trust Co. of California*, 895 So.2d 1120 (Fla. 4th DCA 2005). (That may sound obvious, but be careful. Borrowers who are about to be sued in foreclosure often quitclaim the property to third parties before the notice of lis pendens hits the public record. These third parties must therefore be included as defendants). Where the plaintiff seeks no deficiency judgment, a borrower who has conveyed the property is not a proper party to the foreclosure suit. *South Palm Beach Inv., Inc. v. Regatta Trading, Ltd.*, 789 So.2d 396 (Fla. 4th DCA 2001). See also, *MEH Byron 4 LLC v. FNMA*, 187 So.3d 335 (Fla. 3d DCA 2016) (final judgment of foreclosure reversed upon confession of error arising from the property owner having

been dropped as a party, citing *Davanzo v. Resolute Ins. Co.*, 346 So. 2d 1227, 1228 (Fla. 3d DCA 1977) "One who holds legal title to mortgaged property is an indispensable party defendant in a suit to foreclose a mortgage and a court cannot properly adjudicate the matters involved in this suit when it appears indispensable parties are not in some proper way actually or constructively before the court.") And an owner who obtains title through a quitclaim deed from the borrower still has standing to challenge the plaintiff's standing, and to undertake discovery as to witnesses to the loan closing despite not being a party to the loan transaction. *575 Adams, LLC v. Wells Fargo Bank, N.A.*, 197 So.3d 1235 (Fla. 3rd DCA 2016).

Both spouses must be foreclosed when the property is owned by both husband and wife. *Miller v. Washington Mutual Bank*, 184 So.3d 558 (Fla. 4th DCA 2016).

Where a party owning a half interest in property signed a mortgage with the notation "Limited Purpose Execution" this was held to mortgage that owner's interest even though he did not sign the note. *CitiMortgage, Inc. v. Turner*, 172 So.3d 502 (Fla. 1st DCA 2015).

ii. All entities and persons having an inferior interest in property.

iii. Entity or person occupying property.

iv. Guarantors. Guarantors may or may not be indispensable parties, depending on whether the guaranty permits the lender to forego foreclosure and proceed directly against the guarantor. (Holders of second mortgages often do so where the amount owed on the first mortgage leaves no equity.)

A lender may pursue an action at law against the guarantor while simultaneously seeking mortgage foreclosure. While these claims may be brought in separate suits, it is proper to join them in the same suit. *Royal Palm Corporate Center Assn, Ltd. v. PNC Bank, NA*, 89 So.3d 923 (Fla. 4th DCA 2012). In that event, the guarantor is entitled to credit for all amounts paid toward the debt as a result of the foreclosure sale. *Fort Plantation Investments LLC v. Ironstone Bank*, 85 So.3d 1169 (Fla. 5th DCA 2012).

v. Subordinate lienholders. Unless named, interests of subordinate lienholders are not eliminated. *Abdoney v. York*, 903 So.2d 981 (Fla. 2d DCA 2005).

vi. "After-acquired title." Where a mortgagee does not have title to the subject property at time if execution of the mortgage but subsequently acquires it, this validates the mortgage per the doctrine of "after-acquired title" validates the mortgage. As such, where a deed's legal description

contains an error, a subsequent corrective deed corrects that error as to the validity of a mortgage on the property, even if the corrective deed is obtained after execution of the mortgage. *Kebreau v. Bayview Loan Servicing,* LLC, 225 So.3d 255 (Fla. 4th DCA 2017). This doctrine does not apply to purchase money mortgages given to a property's seller, but otherwise causes mortgages that have not attached to a property due to the mortgagee's lack of title to attach and become valid liens thereon. *BCML Holding LLC v. Wilmington Trust, N.S.*, 201 So.3d 109 (Fla. 3d DCA 2015).

2. Other Parties.

i. Borrower/mortgagor who has since conveyed all interest in property is not necessary part, however, unless a deficiency is sought.

ii Entity with superior lien or interest is not a proper party. *Garcia v. Stewart*, 906 So.2d 1117 (Fla. 4th DCA 2005); *Citimortgage, Inc. v. Henry*, 24 So.3d 641 (Fla. 2nd DCA 2009). See also, *Bank of New York Mellon v. Sperling*, 201 So.3d 697 (Fla. 4th DCA 2016) (default judgment in favor of condominium association against superior lender reversed as void since superior mortgage is not a proper party and cannot be foreclosed by inferior interest's foreclosure suit.)

iii. Mortgagor not signing note could still be personally liable where the mortgage includes a covenant to make all note payments. *Ehrlich v. Mangicapra*, 626 So.2d 702 (Fla. 4th DCA 1993).

iv. The failure of the wife to sign a mortgage will not prevent foreclosure on property owned by husband and wife where wife knew of the loan, attended a closing and property was purchased in name of both husband and wife. *Countrywide Home Loans, Inc. v. Kim*, 898 So.2d 250 (Fla. 2005). See also, *Spikes v. OneWest Bank,* FSB, 119 So.3d 444 (Fla. 4th DCA 2012) (purchase money mortgage qualifies as an obligation "contracted for the purchase" of a homestead under Fla. Const. Article X, Section 4(a) and therefore can be valid despite lack of non-owner spouse's signature.) Consider listing "unknown tenants" or "unknown parties in possession."

Where a complaint that originally included the "unnamed spouse" of the principal defendant, an amendment to identify and sue the spouse by name relates back to tie original filing date for limitations purposes. *HSBC Bank USA v. Karzen*, 157 So.3d 1089 (Fla. 1st DCA 2015).

v. Tenants in Possession. The federal "Helping Families Save Their Homes Act of 2009, Pub. L. No. 111-22 [S 896] §§ 701-04, 123 Stat. 1632, which had required that tenants be given 90 days' notice before being evicted due to the property being foreclosed upon **expired 12/31/14**. However, on

June 3, 2015, Section 83.561, Fla. Statutes went into effect, and provides similar relief to Florida tenants as did the "Helping Families Save Their Homes Act of 2009, but only for a shorter, **30 day** protection period. The new statute also provides the form thirty-day notice to tenants.

vi. A party listed as borrower on the mortgage, but not liable on the note is an indispensable party. *Sudhoff v. Federal National Mortgage Association*, 942 So.2d 425 (Fla. 5th DCA 2006).

vii. A "dragnet clause" (i.e., securing all the borrower's pre-existing debt as well as the debt used to purchase the property in question) is enforceable against a purchaser of a part-interest in the subject property, but only if that party has notice that the pre-existing debt was included within the grasp of the clause. *Starlines Int'l Corp. v. Union Planters Bank, N.A.*, 976 So.2d 1172 (Fla. 4th DCA 2008). Such purchaser must be named in order to foreclose their interest.

ix. Two mortgages on the same property. Both mortgages must be foreclosed in the same suit, "only one suit being proper." *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 So. 599 (Fla. 1918).

x. One who makes an unsecured loan to someone so that they have the funds to make their mortgage payments to an unrelated lender is not entitled to an equitable lien over that mortgage where there is no evidence the mortgagee knew of the source of loan payments. *WICHI Management, LLC v. Masters*, 193 So.3d 961 (Fla. 3d DCA 2016).

E. Filing Suit and Obtaining Service.

1. File suit in county where property is located.

a. Location of defendant(s) is not determinative of jurisdiction.

b. If property is in two counties, may file suit in either county. However, notice of sale must be published in both counties. Section 702.04, Florida Statutes. This procedure applies even where there are separate mortgage instruments each encumbering only a single property in the different counties, provided that they both secure the same promissory note. *Frym v. Flagship community Bank*, 96 So.3d 452 (Fla. 2d DCA 2012).

c. Note – Counterclaims which are compulsory must be brought in the same jurisdiction as a pending foreclosure action. Accordingly, a counterclaim brought in a different circuit was dismissed for lack of subject matter jurisdiction in *Floridian Community Bank, Inc. v. Bloom*, 25 So.3d 43 (Fla. 4th DCA 2009).

d. Jurisdiction for filing of small foreclosures. Foreclosures within the jurisdictional amount of the county court may be filed in either county or

circuit court; the monetary limits apply to the amount of the lien, not the value of the securing property. *Nachon Enterprises, Inc. v. Alexdex Corp.*, 615 So.2d 245 (Fla. 3d DCA 1993), aff'd 641 So.2d 858 (Fla. 1994). It is improper for a circuit court to grant a motion to transfer to county court a foreclosure action because the monetary limit is within the jurisdiction of the county court. *Coral Springs Tower Club II Condominium Ass'n, Inc. v. Dizefalo*, 667 So.2d 966 (Fla. 4th DCA 1996).

e. Circuit court was held to have jurisdiction to enter mortgage foreclosure judgment, although a homeowners association had previously filed a county court action to foreclose its lien and a notice of lis pendens, where the mortgage was recorded well before homeowners association commenced its action in *CitiMortgage v. Flowers*, 189 So.3d 1032 (Fla. 4th DCA 2016).

2. Obtain personal service on defendant(s) through sheriff or appointed process server. However, non-residents may be served by registered mail. See Section 48.194, Florida Statutes. If and only if the recipient of registered mail refuses to accept service, then effective service may be completed via first class mail, as set forth in the specific procedures of Section 48.194(3), Florida Statutes.

Where defendant claims not to have been properly served, an evidentiary hearing is required. *Beneficial Fla., Inc. v. Washington*, 965 So.2d 1211 (Fla. 5th DCA 2007). This is so, notwithstanding the fact that a return of service which is regular on its face in general rebuts an allegation of non-service per F.S. 48.031. But challenging validity of service of process isn't easy. The *Beneficial* court held that such a challenge must be proven by clear and convincing evidence. See also, *Mauro v. Wells Fargo Bank, N.A.*, 180 So.3d 1083 (Fla. 4th DCA 2015) (return of service which is regular on its face requires defendant to prove lack of service by clear and convincing evidence.) See also, *Matthews v. U.S. Bank, N.A.*, 197 So.3d 1140 (Fla. 4th DCA 2016) (clear and convincing evidence necessary to rebut a facially regular return of service requires credible, detailed and distinctly remembered testimony rather than a mere denial of receipt).

Service is presumed to be valid where the return of service is regular on its face. The burden is on the party challenging service of process to show its invalidity. *Bank of Am., N.A. v. Bornstein*, 39 So. 3d 500, 503 (Fla. 4th DCA 2010). Uncorroborated affidavits that the person accepting service that the defendant's house did not reside there were found insufficient to defeat service in *Johnson v. Christiana Trust*, 166 So.3d 940 (Fla. 4th DCA 2015). See also, *Davidian v. JP Morgan Chase Bank, N.A.*, 178 So.3d 45 (Fla. 4th DCA 2015) (affirming denial of motion to quash service where returns were regular on their face and defendant failed to present clear and convincing evidence to overcome presumption of proper service). *Davidian* also held that the contents of a properly executed return of service constitute admissible business records under F.S. 90.803(6)(a).

A defendant in mortgage foreclosure case does not waive objection to service or submit himself to court's jurisdiction by filing motions for protective order and sanctions, as those filings are defensive in nature and do not constitute the type of affirmative relief that would

amount to a submission to trial court's jurisdiction. *Bornstein v. The Bank of New York Mellon*, 219 So.3d 832 (Fla. 4th DCA 2017)

Note – strict compliance with the service of process statute is required. For this reason, the Fourth District reversed and remanded for further proceedings a trial court's denial of a defendant's motion to quash service in *Kwong v. Countrywide Home Loan Servicing, L.P.*, 54 So.3d 1033 (Fla. 4th DCA 2/2/11). The reason? While the affidavit of service noted the date of service, it failed to note the time. See also, *Brown v. U.S. Bank, N.A.*, 117 So.3d 823 (Fla. 4th DCA 2013) (Reversible error to deny motion to quash service where process server placed wrong date on summons.)

See also, *Walker v. Fifth Third Mortgage Co.*, 100 So.3d 267 (Fla. 5th DCA 2012) (reversing a trial court's refusal to quash service of process where process server failed to include date and time of service or his identification number on any documents served).

But see also, *Koster v. Sullivan*, 160 So.3d 385 (Fla. 2015), which held that failure to indicate that person served was fifteen years of age or older or that contents of the process were explained to the person served, as required by substitute service statute, F.S. 48.031(1)(a) did not invalidate service. A return of service is "facially valid,' thereby shifting the burden to the defendant to prove otherwise, as long as the four facts required by F.S. 48.21 are noted thereon: 1) date and time the server receives the document; 2) date and time that process is served; 3) manner of service; and 4) name of person served, and, if served in a representative capacity, the position occupied by the person. See also, *Coutts v. Sabadell United Bank, N.A.*, 199 So.3d 1099 (Fla. 3rd DCA 2016) (return of service was not required to contain information showing compliance with substitute service provisions of statute).

Foreclosure was reversed where the returns of service were found to be defective on their face since they indicated a service date earlier than the date the summons were issued. *Romeo v. Sebastian Lakes Condo. Assn, Inc.*, 144 So.3d 585 (Fla. 4th DCA 2014). Because the return was not regular on its face, the plaintiff had the burden of proving through other evidence that service was proper.

3. Substitute service may be effected upon a resident of the defendant's household who is fifteen years of age or older, per F.S. 48.031(1)(a). However, this person must actually "reside" there. A short-term house guest will not suffice. *Baker v. Stearns Bank, N.A.*, 84 So.3d 1122 (Fla. 2d DCA 2012).

"A party seeking to invoke the court's jurisdiction has the burden to prove proper service of process, and a process server's return of service, regular on its face, is presumptive evidence of valid service, absent clear and convincing evidence to the contrary. See *Green v. Jorgensen*, 56 So.3d 794, 798 (Fla. 1st DCA 2011); *Thompson v. State, Dept. of Revenue*, 867 So.2d 603 (Fla. 1st DCA 2004), 807 So.2d 605. If the presumption is overcome, the party asserting valid substitute service then has the burden to prove service was proper. See *Thompson*; see also *Haueter-Herranz v. Romero*, 975 So.2d 511, 518 (Fla. 2d DCA 2008).

In *Vives v. Wells Fargo Bank, N.A.*, 128 So.3d 9 (Fla. 3d DCA 2012) summary judgment for a lender was reversed based on defendant's claim of lack of service of process. A letter from

defendant to the lender was held not to constitute an "answer" to the complaint and therefore not a waiver of her right to challenge service of process. Further, the court held that a verified return of service which failed to state the name of the person served or that the address of service was her residence was not "regular on its face," failed to comply with F.S. 48.031(1)(a) and 48.21, and therefore was not presumed to be valid.

Under F.S.48.031(2), a defendant may be served by serving his or her spouse at a location other than the defendant's usual place of abode, but only if done on the defendant's request. In *Cepero v. The Bank of New York Mellon Trust Company, N.A.*, 189 So.3d 204 (Fla. 4th DCA 2016), this type of service was quashed where there was no evidence that the defendant had requested such service.

Where a motion to quash service was pending, it was nevertheless proper to "re-serve" the defendant with a pluries summons in *Dela Cruz v. CitiMortgage, Inc.*, 197 So.3d 1185 (Fla. 4th DCA 2016).

A defendant who moves for an extension of time to respond to a complaint does not "make an appearance" in the action, and therefore does not waive the right to challenge service of process. *Keeter v. The Bank of New York Mellon*, 192 So.3d 474 (Table) (Fla. 1st DCA 2016).

4. Service on a corporation. Strict compliance with the statute applies to service on corporations, too. In *Empire Beauty Salon, Etc. v. Commercial Loan Solutions IV, LLC*, 159 So.3d 136 (Fla. 5th DCA 2014), judgment for the plaintiff was reversed because the return of service failed to show an attempt to serve the corporation at its designated address during the statutorily prescribed hours (10:00 am to noon on business days, per F.S. Section 48.091) before attempting to serve al alleged "employee."

5. Service by Publication. If personal service is not possible, one must serve by publication. Courts require strict compliance with the procedures set forth for service by publication. *Batchin v. Barnett Bank of Southwest Florida*, 647 So.2d 211 (Fla. 2d DCA 1994). See Section 49.011, Florida Statutes; Sections 49.09 (response due within 30 days after first publication, not 60 days as with other types of cases) and 49.10 (publication to be made once each week for 2 weeks, not 4 weeks as with other types of cases), supra.

As with personal service, strict compliance is required concerning service by publication. In *Martins v. The Oaks Master Prop. Owners' Assn.*, 159 So.3d 142 (Fla. 5th DCA 2014), a HOA lien foreclosure judgment and sale were reversed because the association had a valid address for the defendant but failed to attempt to serve him there, which the 5th DCA found to be "less than diligent."

An evidentiary hearing is required on a motion to quash constructive service where supporting affidavits set forth facts which, if true, would negate plaintiff's diligent search and inquiry. *Lyle v. PennyMac Holdings, LLC*, 186 So.3d 625 (Fla. 5th DCA 2016).

Constructive service on a limited liability company is permitted under F.S. 49.021(2). *1321 Whitfield, LLC v. Silverman*, 67 So.3d 435 (Fla. 2d DCA 2011). But diligent search and inquiry as to an LLC can require more than just attempting to serve an authorized individual at the LLC's stated address. Effort must be made to locate such person to the same extent as if the

person were an individual defendant. See, *Green Emerald Homes, LLC v. The Bank of New York Mellon*, 204 So.3d 512 (Fla. 4th DCA 2016) (foreclosure judgment reversed where affidavit of diligent search and inquiry failed to show any search for the LLC's general manager's residence address, or search of tax assessor records, or any other of the efforts commonly made to locate individuals.)

And in order to serve a limited liability company by substituted service on the Florida Secretary of State pursuant to F.S. 48.181(1), the complaint must be amended to allege that the defendant is avoiding service. *Green Emerald Homes, LLC v. FNMA*, 224 So.3d 799 (Fla. 2nd DCA 2017).

Although F.S. Section 605.0117 authorizes substitute service on a limited liability company via service on the Secretary of State, a plaintiff must still comply with notice requirements in section 48.161(1) for service to be valid. *Green Emerald Homes, LLC v. Nationstar Mortgage, LLC*, 210 So.3d 263 (Fla. 2nd DCA 2017). *See also, Jupiter House, LLC v. Deutsche Bank Nat'l Tr. Co.,* 198 So. 3d 1122, 1123 (Fla. 4th DCA 2016) (citing ch. 2013-180, §§ 3, 29, Laws of Fla.).

a. Examples of areas of investigation for a diligent search for the defendant(s) may include:

   i. Examination of area phone books and directories.

   ii. A search for registered vehicles.

   iii. A trace by a search company.

   iv. Social Security Database.

   v. Vital Statistics.

   vi. Probate Records.

   NOTE: A diligent search may require more than a check of records. A search for the heirs of the original mortgagor that included only records was deemed insufficient. The mortgagee "... omitted the most meaningful search - getting out of the office, finding the property, inquiring of persons in possession of the property, or talking with neighbors, relatives or friends." *Floyd v. Federal National Mortgage Association*, 704 So.2d 1110, (Fla. 5th DCA 1998); also see, *Kroitzsch v. Steele*, 768 So.2d 514 (Fla. 2d DCA 2000). See also, *Godsell v. United Guaranty Residential Insurance*, 923 So 2d 1209 (Fla. 5th DCA 2006) (mortgagee did not make a diligent search and inquiry where its attempted and failed service did inform the mortgagee of the mortgagor's Canadian residence, yet mortgagee failed to attempt service there); *Shepheard v. Deutsche Bank Trust Co. Americas*, 922 So.2d 340 (Fla. 5th DCA 2006) (Statutes governing service of process must

be strictly construed in order to protect Defendant's due process rights).

The requirement to properly effect service is a defense even where the defendant's "interest" in the property is arguably void. In *Hutchison v. Chase Manhattan Bank*, 922 So.2d 311 (Fla. 2d DCA 2006), the 2d DCA invalidated service against a homeowner notwithstanding the apparent invalidity of the homeowner's deed.

b. Affidavit of Diligent Search. The form "diligent search" affidavit has been amended to require more specificity as to the steps taken to attempt to locate the defendant.

See also, *Demars v. Village of Sandalwood Lakes Homeowners Assn*., 625 So.2d 1219 (Fla. 4th DCA 1993); also *Common Title Problems in Real Estate Litigation*, by Joel M. Aresty, Florida Bar Journal, January, 1978, p. 29, and *Affidavits of Diligent Search*, by Elizabeth S. Baker, Florida Bar Journal Feb. 1989**,** p. 63. *Batchin v. Barnett Bank of Southwest Florida*, 647 So.2d 211 (Fla. 2d DCA 1994).

c. The Service Members' Civil Relief Act, 50 U.S.C.A. Section 511 et. seq., enacted in 2003, updated the prior Soldiers and Sailors Civil Relief Act of 1940. Under the new version of the Act, an action cannot proceed against members of the U.S. Armed Force (or commissioned members of National Oceanographic and Atmospheric Association and the Public Health Service) during their commissions. The court has a duty to determine whether an individual defendant is in the military before proceeding.

While some courts over the years had begun to disregard this requirement, this is no longer the case. Florida courts are properly refusing to grant defaults without the required affidavit.

In *Higgins v. Timber Springs Homeowners, Etc.*, 126 So.3d 394 (Fla. 5th DCA 2013, the Fifth DCA ruled that the Service Members' Civil Relief Act must be liberally construed in reversing a HOA's summary judgment. (The defendant had given notice of his active service in the military but failed to technically comply with the statute in that he did not obtain a letter from his commanding officer.)

There is a website where quick military searches can be performed:

www.dmdc.osd.mil/scra.

However, this site requires a social security number for the name being searched. (Without a SSN, a DOB search can be done, but only via U.S. mail and not the website.)

If the court determines that the defendant is in the military, the court must appoint an attorney for him or her in order to proceed.

Note - An excellent primer on the requirements of the Act can be found at:

www.abanet.org/family/military/scrajudgesguidecklist.pdf.

c. Without personal service of process a personal judgment for money damages is not obtainable, however the action to foreclose the mortgage may continue *in rem*, assuming, of course, that substituted service has been properly effected.

d. Foreclosure action against prisoner. When considering a motion to transport a prisoner defendant for a foreclosure hearing, "a trial court must weigh the risks and costs of granting the motion, including "risk of escape, the need for expedited dispositions, costs, inconvenience, security precautions, the nature of the hearing, the impact of court ordered transportation on the state and the correctional agencies involved, and any other relevant factors." *Vaughan v. Vaughan,* 767 So. 2d 614, 614 (Fla. 5th DCA 2000; *Hicks v. Sarping, LLC*, 196 So.3d 1287 (Fla. 5th DCA 2016).

6. Service of Process by Certified Process Servers. In *Abbate v. Provident National Bank*, 631 So.2d 312 (Fla. 5th DCA 1994), the court held that a process server certified in Palm Beach County could not validly serve process there in an Orange County foreclosure action. Section 48.27, Florida Statutes, restricts certified process servers to service in the judicial circuit where they are certified and where the lawsuit is filed.

7. Update Title Report; Priorities; and Amend Complaint to Add Parties. After suit is filed and Notice of Lis Pendens is recorded, the title report must be updated. If any new entities or persons claim lien or cloud on title not discovered on original title report but which interests are recorded prior to date of lis pendens, then the complaint must be amended to add them as parties.

Parties who obtain an interest after recording of Notice of Lis Pendens need not be joined, however; they are bound by foreclosure. Do not rely on a mortgagee policy to determine defendants. *Goldberg, Semet, et. al. v. Chicago Title*, 517 So.2d 43 (Fla. 3d DCA 1987).

8. Service on foreign defendants via the Hague Convention. Service on defendants located in foreign countries may be accomplished by compliance with the provisions of the Hague Convention, per Section 48.194(1), Florida Statutes. Under the Hague Convention, service is appropriate provided it is made in compliance with the internal laws of the country in which the defendant is located. In *Bevilacqua v. U.S. Bank, N.A.*, 194 So.3d 461 (Fla. 3rd DCA 2016), service on a defendant borrower in Italy pursuant to the Hague Convention was affirmed. (*Bevilacqua* contains a good recitation of the Hague Convention process.)

9. Setting Aside a Clerk's Default. *Jacaranda, LLC v. Green Tree Servicing, LLC*, 203 So.3d 964 (Fla, 2nd DCA 2016), held that an ex parte clerk's default should have been set

aside where plaintiff had actual knowledge that the defendant intended to defend the foreclosure lawsuit and was represented by counsel, but failed to notify them before applying for a clerk's default.

F. <u>Expedited Foreclosure Procedures. Section 702.10, Florida Statutes</u>.

After filing the complaint, the mortgagee may request an order to show cause for the entry of final judgment. Upon the request by the mortgagee, the court shall immediately review the complaint.

If the complaint is verified and properly alleges a foreclosure cause of action, the court must promptly issue an order to the defendant to show cause why a final judgment of foreclosure should not be entered. The hearing on the order to show cause must be held within 60 days of service of the order to show cause on the defendant.

The order to the defendant must state several items, including:

i. The date and time for the hearing to show cause;

ii. The time in which service of the order to show cause must be made upon the defendant;

iii. A statement to the effect that the filing of defenses by motion or verified answer at or before the hearing to show cause constitutes cause for the court NOT to enter the attached final judgment;

iv. A statement to the effect that the defendant may file affidavits or other papers at the hearing;

v. A statement that defendant's failure to appear at the hearing and/or to file defenses or a verified answer may be deemed to waive the right to a hearing and that the court may then enter a final judgment of foreclosure; and,

vi. A statement that the court may determine that when an answer does not contest the foreclosure the defendant has waived the right to a hearing and the court may enter final judgment of foreclosure.

NOTE: Courts require strict compliance with these procedures. A "verified" answer must include a statement in which the defendant swears that the facts within are true. Sections 702.10, 92.525(4)(c), Florida Statutes. An answer in which the defendant swears that the facts within are "true to the best of his knowledge and belief' is not a "verified" answer under the statute and constitutes a waiver of the right to a hearing. In such circumstances, the court may enter a judgment of foreclosure. *Muss v. Lennar Florida Partners I, L.P.*, 673 So.2d 84 (Fla. 4th DCA 1996).

The court must also attach to the order to show cause a copy of the final judgment of foreclosure the court will enter if the defendant waives the right to heard at the hearing.

The court is required to promptly enter a final judgment of foreclosure if the right to be heard has been waived.

Section 702.065 provides a process for uncontested mortgage foreclosures. If an answer not contesting the foreclosure is filed or if a default is entered, and the mortgagee waives the right to recoup any deficiency, then the court must enter a final judgment of foreclosure within 90 days of the close of the pleadings.

Order Requiring Defendant Mortgagor to Make Interim Monthly Payments. F.S. Section 702.10(2) permits the plaintiff in non-residential foreclosures to request entry of an order compelling the defendant/mortgagor to make payments during the pendency of the foreclosure suit or vacate the premises. Such an order does not transfer title; it only transfers possession during the suit, and is not binding on the court as to the final outcome of the case. However, it is a powerful tool for a foreclosing lender, as it can cut off the defendant's income stream and therefore its ability to delay or defend the case. *See, Farah Real Estate and Investment, LLC v. The Bank of Miami, N.A*., 59 So.3d 208 (Fla. 3d DCA March 16, 2011).

When the defendant files a motion to dismiss at or prior to the show cause hearing, "cause" exists per F.S. 702.10(1) and the trial court may not enter judgment. *BarrNunn, LLC v. Talmer Bank& Trust*, 106 So.3d 51 (Fla. 2d DCA 2013).

Where a defendant timely files an affidavit and asserts defenses, it is error to enter final judgment under Section 702.10. *MTDR LLC v. Deutsche Bank Nat. Trust Co.*, Case No. 5D15-4506 (Fla. 5th DCA 2017).

Where a defendant violates a F.S. 702.10 order to make mortgage payments while a foreclosure case is pending, the trial court is empowered to enter foreclosure judgment as a sanction. *We Help Community Development Corp. v. Ciras, LLC* 144 So.3d 578 (Fla. 4th DCA 2014).

G. Priority between condo/homeowners' association liens and mortgages.

Unless relation-back is clearly evidenced by specific language in the declaration, a homeowners' association lien's priority is based on the lien's recording date and does not relate back to the date of the declaration's recording. *FNMA v. McKesson*, 639 So.2d 78 (Fla. 4th DCA 1994), aff'd 660 So.2d 266 (Fla. 1995). See also, *U.S. Bank, N.A. v. Grant*, 180 So.3d 1092 (Fla. 4th DCA 2015) (Mortgagee's lien took priority over HOA's unpaid assessment lien in foreclosure action where mortgage was recorded first and declaration recorded prior to mortgage did not state that HOA's lien was superior to other liens or would relate back to date declaration was recorded) and *U.S. Bank, N.A. v. Grant*, 180 So.3d 1092 (Fla. 4th DCA 2015) (same).

Dismissal of a homeowners' association as a superior lienholder was reversed where neither the foreclosing lender nor the association presented any competent evidence as to which one had priority in *Fogarty v. Nationstar Mortgage, LLC,* 224 So.3d 313 (Fla. 5th DCA 2017).

A condo or homeowners association may foreclose a subsequent lien for unpaid assessments despite a foreclosing lender's pending notice of lis pendens if the association's lien right arises from a declaration that pre-existed the lis pendens. The association foreclosure is inferior to the mortgage foreclosure, however. *Jallali v. Knightsbridge Homeowners Association, Inc.*, 211 So.3d 216 (Fla. 4th DCA 2017)

A condo association lien foreclosure judgment that purported to foreclose a superior first mortgage was held void in *Bank of America, N.A. v. Kipps Colony II Condominium Association, Inc.*, 201 So.3d 670 (Fla. 2nd DCA 2016). (Trial court abused its discretion in denying superior lender's motion for relief from judgment, even though default had been entered against lender.) Similarly, where a lender failed to intervene in a condominium association's action to foreclosure its inferior assessment lien, it was held error for to subsequently dismiss the lender's foreclosure action on this basis. As holder of a superior lien, the lis pendens statute, F.S. 48.23, did not require the lender to intervene in the condo foreclosure action or lose its lien. *Ditech Financial LLC v. White*, 222 So.3d 603 (Fla. 4th DCA 2017).

But a condominium declaration which provides that liens relate back to the date of the declaration's recordation will give the lien priority over foreclosure of a mortgage that is recorded after the declaration, even if the association lien is recorded after the lender's notice of lis pendens. *Fountainspring II Homeowners' Association, Inc. v. Veliz*, 212 So.3d 1049 (Fla. 4th DCA 2017).

Section 718.116(5), Florida Statutes controls a mortgagee's obligations regarding assessment liens for all mortgages recorded after 4/1/92. Per a 2010 amendment, a first mortgagee or successor who obtains title via foreclosure or deed in lieu is responsible for the lesser of 12 months back maintenance assessments or 1% of the original mortgage debt. (Prior to the amendment, it had been 6 months.) Once acquiring title, however, the mortgagee/successor is liable for all expenses as they come due. Also, condo association assessment liens recorded after 4/1/92 relate back to the recording of the original declaration of condominium; however, for first mortgages of record, the claim of assessment lien is dated by recording. Claims of lien recorded prior to 4/1/92 are exempted from super priority status.

A nearly identical statute has been enacted regarding Chapter 720 HOA liens. F.S. 720-3085 (which, like F.S. 718.116(5), obligates the lender for the lesser or 12 months or 1% of back maintenance assessments).

Conflicts between condo association or HOA covenants and the relevant statutes – 718.116(1)(b) and 720.3085. Notwithstanding these two statutes, where the controlling covenants grant priority of assessment liens over liens of mortgages, it would be an unconstitutional impairment of contract to hold a lender whose mortgage predates the statute and who obtains title by foreclosure to be liable for assessments prior to the date of the certificate of title; *Coral Lakes Community Association, Inc. v. Busey Bank*, N.A., 30 So.3d 579 (2d DCA 2/19/2010) (re. HOA liens).

A foreclosing lender is only obligated to pay these back assessments after it obtains title, not during the foreclosure litigation. *U.S. Bank, N.A. v. Tadmore*, 23 So.3d 822 (Fla. 3d DCA 2009).

The limitation on a mortgagee's liability to an association per F.S. 720.3085 does not include mounts for interest, late fees, attorney's fees or costs. *Catalina West Homeowners' Association, Inc. v. FNMA*, 188 So.3d 76 (Fla. 3rd DCA 2016).

In addition, a mortgagee may only take advantage of F.S. 720.3085's safe harbor provision if it "initially joins" the association as a defendant in its foreclosure action. In *FNMA v. Mirabella at Mirasol Homeowners' Association. Inc.*, 204 So.3d 164 (Fla. 4th DCA 2016), a mortgagee that obtained title to a residence at clerk's sale was denied the benefit of the statute's limit on its obligation for back assessments because it had waited four years into the foreclosure action before naming the association.

An assignee of the foreclosure judgment (as opposed to an assignee of the mortgage) does not fall within these safe harbor limits as to obligation for prior assessments. *Bay Holdings, Inc. v. 2000 Island Blvd. Condominium Assn*, 895 So.2d 1197 (Fla. 3d DCA 2005). However, see *Villas of Windmill Point II Property Owners' Association, Inc. v. Bank of New York Mellon*, 197 So.3d 1288 (Mem) (Fla. 4th DCA 2016) (affirming entitlement of successor of first mortgagee which acquired title by deed in lieu of foreclosure to the benefit of F.S. 718.116(1)(b)'s safe harbor provision.)

However, a loan servicer, authorized to collect payments under the terms of the loan, is entitled to the benefit of F.S. 720.3085(c). *San Matera the Gardens Condominium Association, Inc. v. Federal Home Loan Mortgage Corp.*, 207 So.3d 1017 (Fla. 4th DCA 2017).

A trial court has jurisdiction to determine the amount of association dues owed a condominium association in a foreclosure action notwithstanding F.S. 7188.303(1), and to determine the amount of attorney's fees to be awarded in the action to determine the does owed. *Ocean Bank v. Caribbean Towers Condo. Assn., Inc.* 121 So.3d 1087 (Fla. 3d DCA 2013).

Priority of the mortgage with regard to subsequent city or county liens depends on the nature of the obligation giving rise to such liens. If the underlying improvement served a valid public purpose, such as payment of municipal services or special assessments, the lien is superior. *Gailey v. Robertson*, 98 Fla. 176, 123 So. 692 (1929). If it concerns a mortgage on the property for private purposes, however, it is inferior. *1st Nationwide Mtg. Corp. v. Brantley*, 851 So.2d 885 (Fla. 4th DCA 2003).

The Florida Supreme Court rejected a municipal ordinance that granted the municipality's code enforcement liens "super priority" ahead of properly recorded mortgages in *City of Palm Bay v. Wells Fargo Bank, N.A.*, 114 So.3d 924 (Fla. 2013), holding that a municipality has no power to enact laws establishing "a priority that is inconsistent with the priority established by the pertinent provisions of chapter 695."

Tax Deed Priority. Tax deeds issued pursuant to F.S. 197.522 and 197.573(2) have priority over homeowners' association liens against a prior owner and permit the tax deed purchaser to quiet title as to such liens. *Lunohah Investments, LLC v. Gaskell*, 158 So.3d 619 (Fla. 5th DCA 2013).

H. **Appointment of Receiver**.

1. The appointment of a receiver is not matter of right. It is an extraordinary remedy, which must be exercised with caution as it is in derogation of the fundamental rights and legal owner to possession of property. *Twinjay Chambers Partnership v. Square*, 556 So.2d 781 (Fla. 2d DCA 1990).

2. To appoint a Receiver, the plaintiff must:

a. Show a convincing reason to believe plaintiff will recover. *Twinjay, supra*.

b. Where rents are part of security and mortgagor refusing to deliver rents, receiver should be appointed unless mortgagor shows that value of property provides adequate security. *BJ Colley v. First Federal Savings & Loan Assn. of Panama City*, 516 So.2d 344 (Fla. 1st DCA 1987). Where mortgagor was insolvent, and holder of mortgage which was in default established that rents and profits were part of security for mortgage and that mortgagor was receiving rents and profits but failing to apply them to mortgage debt, receiver should be appointed. *Smilack v. Slizyk*, 812 So.2d 591 (Fla. 4th DCA 2002).

c. Show waste, or other proper equitable grounds, even if the mortgage expressly provides for receiver upon default. *Boyd v. Banc One Mortgage Corp.*, 509 So.2d 966 (Fla. 3d DCA 1987).

Where rents and profits are expressly made a part of the security, and the mortgagor fails to turn them over, "thus dissipating a part of the security while allowing the debt to increase, a court of equity should appoint a receiver unless the mortgagor makes it clear that the real property covered by the mortgage will sell for enough to pay the debt and charges due the mortgagee." *KeyBank N.A. v. Knuth, Ltd.*, 15 So.3d 939 (Fla. 3d DCA 2009).

d. Present proof (i.e., sworn affidavits and/or evidentiary hearing to support appointment of receiver).

e. Post bond.

f. Comply with Rule 1.620, Florida Rules of Civil Procedure.

g. No existence of equity skimming. Section 697.08, Florida Statutes.

3. *Carolina Portland Cement Co. v. Baumgartner*, 128 So. 241 (Fla. 1930) remains leading receivership case re. HOA's.

4. NOTE – A receiver does <u>not</u> have authority to sell borrower's real property prior to foreclosure judgment and sale, just because a trial court so orders. *Shubh Hotels Boca, LLC, v. FDIC*, 46 So.3d 163 (Fla. 4th DCA 2010). Also, see Fidelity National Title Bulletin No.

01/06/2010.1, which requires either a deed from the record owner or an agreed order approving the sale, executed by the owner with the formalities of a deed, in order to insure title for conveyances from a receiver.

I. Assignment of Rents.

1. If the mortgage contains an assignment of rents, then the assignment becomes effective upon default and written demand. Section 697.07, Florida Statutes. A court may require mortgagor to deposit rents into registry of court or other depository and allow payments needed to protect, preserve and operate the property and to pay taxes, insurance, and mortgage payments. Can have an expedited hearing.

This can be a good choice for lenders where the rents are insufficient to justify the costs associated with appointment of a receiver. The down side is that without a disinterested third party such as a receiver on the scene to ensure the borrower's full compliance there is more opportunity for skimming.

2. Procedure.

a. Send written demand for rents immediately upon default. *Ginsberg v. Lennar Florida Holdings, Inc.*, 645 So.2d 490 (Fla. 3d DCA 1994).

b. If mortgagor fails to deliver rents, promptly seek court order.

Where there are multiple payees on a note, it was error to grant an assignment of rents to less than all of them. *Isra Homes, Inc. v. Appley*, 78 So.3d 724 (Fla. 2d DCA 2012).

J. Motion for Summary Judgment.

1. Rule 1.510, Florida Rules of Civil Procedure, provides for summary judgment where there are no genuine issues as to any material fact and the moving party is entitled to a judgment as a matter of law.

a. May be filed any time after expiration of 20 days from suit commencement.

b. Motion must state with particularity the grounds upon which it is based and law argued. Accordingly, motion should state:

i. Execution of note and mortgage.

ii. Date of default.

iii. Notice of default and acceleration.

iv. Amount now due.

v. Relief sought.

vi. Any points necessary to defeat affirmative defenses.

c. Supporting affidavits by persons with personal knowledge. Generally, will need the following affidavits:

i. Affidavit of Indebtedness setting forth execution of note and mortgage, circumstances of default and amount due. Must attach copies of note and mortgage.

NOTE: If the affidavit includes a credit for unapplied funds, the affidavit should explain the origin of the funds or why the funds were not used to reduce the principal. If there is no explanation of unapplied funds in the affidavit and the mortgagor alleges the defense of an inaccurate accounting and crediting of the mortgage, then the motion for summary judgment may be denied. See *Fatherly v. California Federal Bank*, 703 So.2d 1101, (Fla. 2d DCA 1997). Summary judgment based on an affidavit which fails to include date of last payment, existence of default and notice of acceleration is subject to reversal on appeal. *Kanu v. Pointe Bank*, 861 So.2d 498 (Fla. 4th DCA 2003).

And it is reversible error to include additional amounts in a foreclosure judgment beyond principal and interest (such as property taxes, insurance and escrow balances) unless there is competent testimony to support these items. *Paeth v. U.S. Bank*, 220 So.3d 1273 (Fla. 2nd DCA 2017).

Summary judgment for a lender was reversed where its affidavit of indebtedness was ruled inadmissible hearsay, since the affiant relied on data from a computer system of a prior loan servicer, and lacked knowledge as to how, when or by whom the data entries were made. As such, this information did not constitute a business record under F.S. 90.803(6)(a). *Glarum v. LaSalle Bank N.A.*, 83 So.3d 780 (Fla. 4th DCA 2011).

Mortgagee's employee's testimony as to contents of mortgagee's business records, to prove amount of debt on mortgage note in foreclosure action, was inadmissible hearsay testimony, where business records themselves were not admitted into evidence. *Sas v. Fed. Nat. Mtg. Assn*, 112 So.3d 778 (Fla. 2d 2013). See also *Beauchamp v. Bank of New York Trust Company, N.A.*, 150 So.3d 827 (Fla. 4th DCA 2014) (Summary judgment for lender reversed for a determination of amount owed, where witness had improperly been permitted to testify to the amount by reference to a document not admitted into evidence and not qualified as a business record per F.S. 90.803(6).)

ii. Affidavit of title search showing that interest of all defendants is inferior to mortgage lien.

iii. Affidavit of attorney's time by plaintiffs' attorney.

iv. Affidavit as to reasonable attorney's fees by local attorney.

v. Affidavit as to taxable costs by plaintiffs' attorney (cost of title search, filing fees, service of process fees, publication costs, etc.).

vii. The sworn allegations of a verified complaint are insufficient on their own to support a summary judgment where such allegations are made "upon information and belief." *Lindgren v. Deutsche Bank Nat. Trust Co.*, 115 So.3d 1076 (Fla. 4th DCA 2013).

d. Motion and Affidavits must be served at least 20 days prior to hearing (25 if served by mail).

e. The note and mortgage must also be filed at least 20 days prior to hearing. *Servedio v. U.S. Bank, N.A.*, 46 So.3d 1105 (4th DCA 2010).

f. Motion must conclusively rebut all affirmative defenses. *Frost v. Regions Bank,* 15 So.3d 905 (Fla. 4th DCA 2009) (reversing summary judgment for lender where defense of lack of notice and opportunity to cure default, as required by the loan documents, was not rebutted. See also*, Leal v. Deutsche Bank Nat'l Trust Co*., 21 So.3d 907 (Fla. 3d DCA 2009) (same result, re. defense of failure to give required notice of acceleration and right to reinstate. See also *Laurencio v. Deutsche Bank Nat. Trust Co.*, 65 So.3d 1190 (Fla. 2d DCA 2011); *Judy v. State Trustee Services, LLC*, 100 So.3d 1287 (Fla. 2d DCA 2012) (lender's summary judgment reversed where defense of insufficient notice was not conclusively rebutted, since default notice failed to specify the nature of breach as required by the loan document.) *Seale v. Regions Bank*, 121 So.3d 649 (Fla. 4th DCA 2013) (summary judgment for lender reversed where borrowers defense of lack of notice of default, acceleration and opportunity to cure not conclusively refuted.) See also, *Patel v. Aurora Loan Services, LLC*, 162 So.3d 23 (Fla. 4th DCA 2014) (summary judgment reversed where affirmative defense of lack of notice not rebutted by evidence of record.) See also *Brooks v. Bank of America, N.A.*, 192 So.3d 619 (Fla. 4th DCA 2016) (summary judgment for lender reversed where affirmative defense of failure to comply with notice requirement was not conclusively rebutted.)

g. But – the 5th DCA affirmed summary judgment of foreclosure despite defendant having affirmatively pled a denial that "any of the notices required by the [loan documents]" had been sent. The loan documents provided for thirteen various types of notice, and the 4th DCA held that this "overbroad pleading" failed to place plaintiff on notice that defendant was specifically denying receipt of the notice of acceleration. *Godshalk v.*

Countrywide Home Loans Servicing, L.P., 81 So.3d 626 (Fla. 5th DCA 2011).

A defendant cannot avoid summary judgment merely by asserting general allegations of unclean hands or misconduct by the lender. Specific allegations of a duty and of conduct breaching that duty are required. *Congress Park Office Condos II v. First-Citizens Bank & Trust Co.*, 105 So.3d 602 (Fla. 4th DCA 2013).

The Fourth DCA distinguished *Godshalk* in *Kurian v. Wells Fargo Bank, N.A.*, 114 So.3d 1052 (Fla. 4th DCA 2013). In *Kurian*, the affirmative defense denied compliance with the "acceleration terms" of the note. This was held sufficient to plead the lender's failure to comply with conditions precedent. And in *Galloway v. SunTrust Bank,* 210 So.3d 780 *(*Fla. 5th DCA 2017, summary judgment of foreclosure entered despite an affirmative defense of lack of notice was reversed where the lender failed to enter the acceleration notice into evidence. To support its summary judgment, the plaintiff "needed only to have a competent witness execute a legally sufficient affidavit authenticating the letter, attach the letter to the affidavit, and then timely file the affidavit." Failing to do so, its judgment was reversed.

And in *DiSalvo v. SunTrust Mortgage Inc.*, 115 So.3d 438 (Fla. 2d DCA 2013, the Second District held that where a defendant denies a foreclosure complaint's allegation of proper notice, summary judgment for the lender is error in the absence of conclusive proof of such notice, *even against a defendant whose defenses have been stricken*.

But – Summary judgment for the lender was affirmed despite the borrower's affirmative defense of lack of receipt of notice of default where the loan documents only required that lender <u>mail</u> the notice, not that the borrower <u>receive</u> it. *Roman v. Wells Fargo Bank*, 143 So.3d 489 (Fla. 5th DCA 2014). See also, *U.S. Bank v. Doepker*, 223 So.3d 1083 (Fla. 2nd DCA 2017) (defendant's affidavit of non-receipt of default notice held insufficient to support defense summary judgment because lender substantially met its "Paragraph 22" notice burden by placing notice in the mail, citing *JPMorgan Chase Bank, N.A. v. Ostrander*, 201 So. 3d 1281, 1283 (Fla. 2d DCA 2016))

h. Where the defendant has failed to timely answer the complaint, her affidavit in opposition to summary judgment must still be considered, and summary judgment denied if the plaintiff fails to conclusively rebut it. *Woodrum v. Wells Fargo Mortgage Bank, N.A.*, 73 So.3d 873 (Fla. 4th DCA 2011).

i. Inconsistencies in the lender's documentation can create fact questions negating entitlement to summary judgment. See, for example, *Valencia v.*

Deutsche Bank National Trust Co., 67 So.3d 325 (Fla. 4th DCA 2011) (summary judgment for lender reversed due to conflict between complaint and default notice letters as to date of default.) See also, *Cutler v. U.S. Bank, N.A.*, 109 So.3d 224 (Fla. 2d DCA 2012) (summary judgment for lender reversed where defendant challenged lender's standing as of the date of filing the complaint and, although blank allonge was filed, allonge was undated.)

j. The affidavit must include sufficient information for the court to conclude that the affiant is competent to assert the facts alleged therein from personal knowledge. Summary judgment was reversed in *Feltus v. U.S. Bank, N.A*., 75 So.3d 783 (Fla. 2d DCA 2011) because the lender's affiant, an assistant secretary of lender's servicing agent, failed to reveal any basis for her assertion of personal knowledge that U.S. Bank owned the note, where two notes with conflicting endorsements had been produced. See also, *Floyd v. Bank of America, N.A.*, 194 So.3d 1071 (Fla. 5th DCA 2016) (Lender's summary judgment reversed because although affidavit attested to affiant's familiarity with lender's record-keeping procedures, affiant's deposition of testimony revealed his lack of particular knowledge of these procedures or lender's business practices).

k. Evidence in support of summary judgment motions must meet evidentiary requirements. *Bryson v. Branch Banking & Trust Co.,* 75 So.3d 783 (Fla. 2d DCA 2011) (Lender's summary judgment reversed because while its default notice letters were produced, they "were not attached to an affidavit or authenticated in any way."

l. Must file original note at summary judgment hearing. Filing original note at an unsuccessful summary judgment hearing does not obviate necessity of introducing it at a subsequent trial. *Fair v. Kaufman*, 647 So.2d 167 (Fla. 2d DCA 1994).

m. The original note must be produced and surrendered to the court, and if there is a trial must be admitted into evidence. *Deutsche Bank N.A. Trust Co. v.* Huber, 137 So.3d 562 (Fla. 4th DCA 2014) Showing a trial witness the original note but entering a copy of the note into evidence is not sufficient. *See also, Heller v. Bank of America, N.A.*, 209 So.3d 641 (Fla. 2nd DCA 2017) (error to admit copy of note, rather than original, over objection based on best evidence rule, per F.S. 90.953, because a promissory note is a negotiable instrument, which is an exception to 90.953's permissible use of copies of documents).

n. That counsel for the mortgagors did not receive payoff information was held insufficient to create a genuine issue of material fact precluding summary judgment. *Walker v. Midland Mortgage Co.*, 935 So 2d 519 (Fla. 3d DCA 2006).

o. While it is permissible to file a motion for summary judgment before an answer is filed, doing so isn't particularly smart, as the standard the plaintiff must meet is extremely high. The motion must "conclusively negate every defense that might be presented in the answer." *Greene v. Lifestyle Builders of Orlando, Inc.*, 985 So.2d 588 (Fla. 5th DCA 2008). See also, *Dominko v. Wells Fargo Bank, N.A.*, 102 So.3d 696 (Fla. 4th DCA 2012).

p. Defendant summary judgment motion. Where a defendant borrower moves for summary judgment based on failure of a condition precedent (failure to send default notice letter per par. 22 of the mortgage) the borrower has the burden to conclusively show the absence of any genuine issue of material fact. Accordingly, a borrower's summary judgment was reversed in *Wells Fargo Bank, N.A. v. Bilecki*, 192 So.3d 559 (Fla. 4th DCA 2016) where borrower's affidavit asserted only that affiant had not received the default notice letter, but was silent as to whether his wife had or not.

q. Where defendant's affidavit in opposition to summary judgment challenging the amount owed was technically defective but defendant filed a rehearing motion along with an affidavit that corrected the defect, it was reversible error to deny the rehearing motion. *Cagwin v. Thrifty Rents, Inc.*, 219 So.3d 1003 (Fla. 2nd DCA 2017)

K. Common Defenses.

Note – defenses of course need to be asserted in order to be considered by the court. Often, foreclosure defendants are unrepresented and may not be aware of this, or know how to plead, available defenses. In *Morgan v. The Bank of New York Mellon*, 200 So.3d 792 (Fla. 1st DCA 2016), six years into the case, and a mere thirteen days before trial, the defendants obtained representation. Their new lawyer's motion to file various affirmative defenses was denied as untimely. The First DCA reversed, however, finding that the lender was not prejudiced because it already had the burden to prove the elements challenged in the defenses anyway (standing, proper notice of acceleration, etc.) Defense counsel hired this late in the case should be aware of this holding, and move to assert all available good faith defenses, notwithstanding that trial is right around the corner. Better late than never!

PROBLEM #1: Proof of ownership and possession of the Note, and therefore standing to foreclose. Once considered a routine requirement for foreclosing a mortgage, proof of ownership of the debt has far and away become the most problematic element of foreclosure actions. Closure of lending institutions, sloppy procedures for documenting assignments among successive owners of notes and the sheer volume of foreclosure actions have created havoc in foreclosure courts, with some of the nation's largest lenders even temporarily ceasing prosecution of foreclosure actions last year to allow them to get their houses in order.

In *Riggs v. Aurora Loan Services, LLC*, 36 So.3d 932 (Fla. 4th DCA 2010) the Fourth District initially reversed a foreclosing lender's summary judgment where the plaintiff held a promissory note endorsed in blank. However, on rehearing the Court reversed itself and affirmed the judgment below. The lesson of this close call for the lender assignee is that unless all ducks are completely in a row regarding assignment and ownership of the loan at issue, foreclosure is not a sure thing.

Subsequently, in *Bennett v. Deutsche Bank Nat. Trust Co.*, 124 So.3d 320 (Fla. 4th DCA 2013), the Fourth District reiterated *Riggs*, explaining that the signatures on two challenged allonges to the subject note were presumed authentic under F.S. 673.3081(1): "In this case, the effect of the section 673.3081(1) presumption was to require the Bennetts to make some evidentiary showing to support their claim that [the bank representative] was unauthorized to sign the allonges. Because they failed to offer any such evidence, Deutsche Bank was entitled to rely on the presumption to obtain a summary final judgment."

Possession of the note at the time of filing suit is sufficient to establish standing, even if the assignment to plaintiff takes place at a later date. *Harvey v. Deutsche Bank Nat. Trust Co.*, 69 So.3d 300 (Fla. 4th DCA 2011) (Affirming summary judgment for lender/assignee that possessed note on the date that it filed suit, despite its assignment being dated 20 days later.)

In *Servedio v. U.S. Bank, N.A.*, 46 So.3d 1105 (4th DCA 2010), the Fourth District made it clear that proof of ownership and possession of the note and mortgage is required:

> "The party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action." *Lizio v. McCullom*, 36 So.3d 927, 929 (Fla. 4th DCA 2010). A plaintiff must tender the original promissory note to the trial court or seek to reestablish the lost note under section 673.3091, Florida Statutes. *State St. Bank & Trust Co. v. Lord*, 851 So.2d 790, 791 (Fla. 4th DCA 2003). Moreover, if the note does not name the plaintiff as the payee, the note must bear a special indorsement in favor of the plaintiff or a blank indorsement. *Riggs v. Aurora Loan Servs., LLC*, 36 So.3d 932, 933 (Fla. 4th DCA 2010). Alternatively, the plaintiff may submit evidence of an assignment from the payee to the plaintiff or an affidavit of ownership to prove its status as a holder of the note. *Verizzo v. Bank of N.Y.*, 28 So.3d 976 (Fla. 2d DCA 2010); *Stanley v. Wells Fargo Bank*, 937 So.2d 708 (Fla. 5th DCA 2006)."

See also*, Taylor v. Deutsche Bank National Trust Co*., 44 So.3d 618 (Fla. 5th DCA 2010) ("As a general proposition, evidence of a valid assignment, proof of purchase of the debt, or evidence of an effective transfer, is required to prove that a party validly holds the note and mortgage it seeks to foreclose." Here, the 5th DCA went on to hold an assignment from MERS was valid although MERS had no beneficial interest in the note "because MERS was lawfully acting in the place of the holder and was given explicit and agreed upon authority to make just such an assignment.")

But a defaulted defendant loses the right to challenge standing by a motion to vacate judgment under FRCP 1.540. *Beaulieu v. JP Morgan Chase Bank, N.A*., 80 So.3d 365 (Fla. 4th DCA 2012). ("Because appellant defaulted, she cannot contest, as she tries to do in her post-

judgment motion, the allegations of the complaint that the appellee was the owner and holder of the note and mortgage.)

For an excellent, in-depth discussion of the multitude of issues raised by assignments, please see:

"Cracking the Mortgage Assignment Shell Game" by David E. Peterson in the November, 2011 issue of the *Florida Bar Journal* (Volume 85, No.9), found online at:

www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/8c9f13012b96736985256aa900624829/a81638f11642ffb385257936004a8c29!OpenDocument

While a foreclosing plaintiff was permitted to amend its pleadings at trial to assert a claim to re-establish a lost note, its final judgment was reversed and remanded to consider the lost instrument claim where plaintiff failed to meet its burden of proof re re-establishing the note at trial. (Here, it was undisputed that defendants had not paid on the loan for an extended period, and that the plaintiff owned the note. The only issue was re-establishment.) *Guerrero v. Chase Home Finance, LLC*, 83 So.3d 970 (Fla. 3d DCA 2012).

Where a court involuntarily dismisses a case for failure to present evidence supporting re-establishment during plaintiff's case and the plaintiff fails to object or to proffer additional evidence supporting re-establishment, the plaintiff has waived this right. *Wells Fargo Bank, N.A. v. Ayers*, 42 F:W D730f (Fla. 4th DCA 2017).

PROBLEM #2: Finding an affiant with sufficient knowledge of the loan. Admission in evidence of the lender's loan history record is sufficient basis to establish the amount owed. *Andrasi v. JP Morgan Chase Bank, N.A.*, 224 So.3d 847 (Fla.2nd DCA 2017). But getting this document into evidence can be challenging where the loan has been owned or serviced by multiple entities. Trial testimony regarding amount owed, or affidavit of indebtedness requires a person with knowledge of the subject facts. Not necessarily the person who entered the loan transaction information into the computer, but at least a records custodian per F.S. 90.803(6).

In order to lay a proper foundation for the admission of a business record, an affidavit must show that the record was: (1) made at or near the time of the event recorded; (2) by, or from information transmitted by, a person with knowledge; (3) kept in the course of a regularly conducted business activity; and (4) it was the regular practice of that business to make such a record. *United Auto Ins. Co. v. Affiliated Healthcare Centers, Inc.*, 43 So.3d 127 (Fla. 3d DCA 2010). Employees of the lender's foreclosure law firm, without knowledge of the truth of the facts asserted are obviously not qualified to execute this affidavit, and such affidavits are now being routinely stricken.

In *Glarum v. LaSalle Bank, N.A.*, 83 So.3d 780 (Fla. 4th DCA 2011), the 4th District reversed a lender's summary judgment because its affiant lacked any personal knowledge of a prior loan servicer's computer system and whose affidavit regarding the figures found therein did not meet the "simple basics" of F.S. 90.803(6), the business records exception to the hearsay rule.

The 4th DCA subsequently distinguished *Glarum* in W*eisenberg v. Deutsche Bank National Trust Co.*, 89 So.3d 1111 (Fla. 4th DCA 2012). In *Weisenberg*, unlike *Glarum*, plaintiff's affiant had personal knowledge as to how the computer entries concerning the subject loan were made and kept. As a result, the *Weisenberg* lender's summary judgment was affirmed.

The 4th DCA revisited this issue in *Yang v. Sebastian Lakes Condo. Assn, Inc.*, 123 So.3d 617 (Fla. 4th DCA 2013), denying admissibility under F.S. 90.803(6) of a condo association's previous management company records, holding that the association's current management company's records custodian had insufficient personal knowledge of the prior company's records or procedures to satisfy the business records admissibility requirements.

In *Kelsey v. SunTrust Mortgage Co.*, 131 So.3d 825 (Fla. 3d DCA 2014) a foreclosure judgment was reversed because the lender's representative at trial neither was the records custodian, nor did she have personal knowledge of the loan documents and therefore the foundation for their admission: "To establish its entitlement to foreclosure, SunTrust needed to introduce the subject note and mortgage, an acceleration letter, and some evidence regarding the Kelsey's' outstanding debt on the note. See *Ernest v. Carter*, 368 So. 2d 428, 429 (Fla. 2d DCA 1979) (holding that foreclosure plaintiffs must show: (1) an agreement, (2) a default, (3) an acceleration of debt to maturity, and (4) the amount due). Without the proper foundation, the documents [the witness] relied upon to establish the amount due on the note were indisputably hearsay and were not properly authenticated. § 90.803, Fla. Stat. (2012); *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008)."

Two 2014 foreclosure cases with opposite results as to the admissibility of computerized business records are instructive. In *Hunter v. Aurora Loan Services, LLC*, 137 So.3d 570 (Fla. 1st DCA 2014) final judgment of foreclosure was reversed because the assignee/plaintiff's witness had no personal knowledge of the prior owner of the loan's computerized records such that an insufficient showing was made to enter these records as F.S. 90.803(6) business records. See also, *Evans v. HSBC Bank, USA, N.A.*, Case No. 2D15-433 (Fla. 2nd DCA 2017) (foreclosure judgment reversed for new trial on issue of damages where current loan servicer was had no knowledge of prior service's payment records system.)

But the First District held that a bank assistant vice president's affidavit with a computer printout attached was sufficient to establish the amount due, where the affidavit supported the witness' familiarity with how the bank's computerized loan processing system worked. *Lindsey v. Cadence Bank*, 135 So.3d 1164 (Fla. 1st DCA 2014).

Hunter and *Lindsey* reiterate something we really all learned in law school but may have forgotten, namely, that the key to business record admissibility under F.S. 90.803(6) is proof of the means of the record's creation and maintenance, as shown by a witness with personal knowledge of same.

In 2015, the Fourth District addressed the problem of attempting to prove up loan histories and other business records in foreclosure cases where the loans have been assigned, or the special servicers switched, several times. *Bank of New York as Trustee of the Noteholders CWABS Inc, Asset Backed Notes Series 2006-SD4006-SD4 v. Calloway*, 157 So.3d 1064 (Fla. 4th DCA 2015) held that the trial court had improperly excluded as hearsay a borrower's loan

payment history where the trial witness, an employee of the fifth servicer since suit had been filed, relied on prior servicers' loan records. The Court ruled F.S. 90.803(6)'s requirements can be met, and that one business's records may become the admissible business records of a successor business, provided the successor can demonstrate the trustworthiness of those records by showing that the successor reviewed the records for accuracy before succeeding to them, and that the records were subject to the business' internal practices and procedures to ensure their accuracy:

> "Where a business takes custody of another business's records and integrates them within its own records, the acquired records are treated as having been 'made' by the successor business, such that both records constitute the successor business's singular 'business record.'" (*Calloway*, at 1071.)

The same day, in an insurance case, the Fourth District rejected an insured's attempt to admit as a business record a composite exhibit containing various documents including repair estimates, due to the plaintiff's failure to meet F.S. 90.803(6)'s required showing that each record had been made by or from information transmitted by, a person with knowledge. *Landmark American Ins. Co. v. Pin-Pon Corp.*, 155 So.3d 432 (Fla. 4th DCA 1/7/2015).

The distinction between these two cases seems to be that the loan records in *Bank of New York* were made by prior lenders/servicers that had an interest in maintaining accurate loan records, and were therefore trustworthy, and were relied on by the witness as such, whereas in *Landmark Insurance*, there was no such showing. Further, in *Bank of New York*, the witness testified to the accuracy of the prior servicer's records. In *Holt v. Calchas,* LLC, 155 So.3d 499 (Fla. 4th DCA 2014) the Fourth District had found a prior servicer's records to be hearsay where the witness could not attest to their accuracy. See also *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc.*, 903 So.2d 230 (Fla. 2d DCA 2005) (current noteholder's testimony from previous noteholder's document as to amount owed held admissible where current noteholder had procedures in place to check accuracy of records received from previous noteholder.)

And in *Henderson v. Deutsche Bank Nat. Trust Co.*, 158 So.3d 705 (Fla. 4th DCA 2015) the 4th DCA subsequently reversed a foreclosure judgment where the lender conceded on appeal that its witness's testimony regarding the loan history did not satisfy the business records exception to the hearsay rule." (The opinion does not describe the witnesses' testimony, however.)

In *Colson v. State Farm Bank, F.S.B.*, 183 So.3d 1038 (Fla. 2d DCA 2015) a foreclosure judgment was reversed for further proceedings where, although the lender introduced computer records of the loan history, these records were indecipherable, and no testimony to explain them was introduced. Here, the court also ruled that had the borrower moved below to dismiss or for directed verdict, or for judgment on the pleadings at the close of evidence, the reversal would have been with instructions to enter dismissal of the case. Since they failed to do so, it was remanded for the lender to have a second bite at proving up the amount owed.

And in *Miller v. Bank of America*, 201 So.3d 1286 (Fla. 5th DCA 2016), it was held to be error to admit a screenshot from plaintiff's computer system as a business record concerning

transfer of the loan to plaintiff, despite its witness' attempt to "check off all the boxes' for admissibility under F.S. 90.803(6):

> "Ms. Allen's affirmative answers to the business record foundation questions do not overcome her demonstrated lack of knowledge about the creation, accuracy, or trustworthiness of the LNTH document. *See Yang v. Sebastian Lakes Condo. Ass'n, Inc.,* 123 So. 3d 617, 621 (Fla. 4th DCA 2013) (holding that the witness failed to establish the foundation for the business records exception even though she "employed all of the 'magic words' ").
>
> A loan history printout prepared in anticipation of trial can be admissible as a business record. "Printouts of data prepared for trial may be admitted under the business records exception even if the printouts themselves are not kept in the ordinary course of business so long as a qualified witness testifies as to the manner of preparation, reliability, and trustworthiness." *Deutsche Bank Nat. Trust Co. v. de Brito*, No. 3D16–1466, 2017 WL 5163048 (Fla. 3rd DCA 2017).

A second bite at the apple was given to the lender by the 5th DCA in *Cassell v. Green Planet Servicing, LLC*, 188 So.3d 104 (Fla. 5th DCA 2016). The lender's final judgment of foreclosure was reversed since its witness had no knowledge as to the prior servicer's record-keeping system. Rather than remand with instructions to enter involuntary dismissal, the 5th District remanded instead for a new trial.

Similarly, in *Maslak v. Wells Fargo Bank, N.A.*, the 4th DCA reversed a foreclosure judgment due to the lender's records witness lacking sufficient knowledge of the manner in which loan history information was inputted, but remanded "for further proceedings to establish the amounts due and owing," citing *Channell v. Deutsche bank Nat'l Trust Co*, 173 So.3d 1017, 1020 (Fla. 2d DCA 2015) (citing *Sas v. FNMA*, 112 So.3d 778 (Fla. 2d DCA 2013)).

In *Le v. U.S. Bank*, 165 So.3d 776 (Fla. 5th DCA 2015), a trial court's admission of testimony from the current loan servicer's employee regarding loan history based on a prior servicer's records was affirmed where her testimony met all foundational requirements of Section 90.803(6), Fla. Stat. As did the 4th DCA in *Calloway, supra*, the Fifth DCA recognizes that the real test is whether the witness has sufficient familiarity with the prior servicer's records.

In *Peuguero v. Bank of America, N.A.,* 169 So.3d 1198 (Fla. 4th DCA, 2015) admission of a prior noteholder's loan payment records was held to be properly within the court's discretion where the current lender's witnesses testified as to her familiarity with the prior noteholder's record–keeping practices. See also, *McMillan v. The Bank of New York Mellon,* 180 So.3d 1090 (Fla. 4th DCA 2015), citing *Peugero* as controlling under similar facts. See also *Deutsche Bank Trust Co. v. Frias*, 178 So.3d 505 (Fla. 4th DCA 2015). See also *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So.3d 1272 (Fla. 4th DCA 2016) (lender's representative's testimony met requirements of F.S. 90.803(6) despite his unfamiliarity with the mechanics of posting of payments where he was knowledgeable generally about the borrower's payment history and the accuracy of the prior servicer's records) and *Ocwen Loan Servicing, LLC v. Gunderson*, 204 So.3d 530 (Fla. 4th DCA 2016) (reversing trial court's exclusion of bank's business records including from prior servicer, where bank's witness demonstrated sufficient familiarity with

boarding process and established trustworthiness of prior servicer's records). But to admit a prior servicer's loan history as a business record requires a witness with some familiarity either with the boarding process, or the means of creation and the accuracy of the prior entity's documents. *Evans v. HSBC Bank, N.A.*, 223 So.3d 1059 (Fla. 2nd DCA 2017) (reversing foreclosure judgment for new trial on damages amount where plaintiff's servicer witness had neither knowledge of the boarding process, nor of the accuracy of the prior servicer's record entry process).

See also *JP Morgan Chase Bank, N.A. v. Jean Pierre*, 215 So.3d 633 (Fla. 4th DCA 2017) (acceleration notice letter sent by prior servicer admissible as business record per F.S. 90.803(6) where current servicer's representative testified knowledgeably as to prior servicer's process for preparing and sending such letters, citing *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272 (Fla. 4th DCA 2016).

Familiarity with the prior entity's systems is the key. For example, in *Edmonds v. U.S. Bank, N.A.*, 215 So.3d 628 (Fla. 2nd DCA 2017), a foreclosure judgment was reversed for failure to prove mailing of the "Paragraph 22" default notice. The mortgage's Paragraph 15 specified that notices are deemed given when mailed by first class mail or when actually delivered to the borrowers' notice address. The trial witness testified that the notice was mailed because it was addressed to the borrowers at the correct address. See also, *Bayview Loan Servicing, LLC v. Kay*, 227 So.3d 779 (Fla. 1st DCA 2017) (current servicer's witness held qualified to admit records from prior lender's computer records after demonstrating familiarity with the system and how records therein were maintained.)

And in *CitiBank, N.A. v. Manning*, 221 So.3d 677 (Fla. 4th DCA 2017), the Fourth District reversed a trial court that had found a lender to have failed to prove that the notice letter had been sent. The Fourth District explained that the letter was mailed to borrower via first class mail in accordance with loan servicer's standard procedures for mailing breach letters and in compliance with mortgage's notice requirements raised a presumption of mailing.

But because this witness had no knowledge as to the prior entity's mailing practices and procedures, this was insufficient. But a witne4ss need not have personal knowledge of the default letter being sent as long as the witness testifies from business records which demonstrate the letter was sent. *JP Morgan Chase Bank N.A. v. Jean Pierre*, 215 So.3d 633 (Fla. 4th DCA 2017).

Testimony of a witness regarding business records that are not entered at trial is insufficient to prove standing. *Gonzalez v. BAC Home Loan Servicing, L.P.*, 180 So.3d 1106 (Fla. 5th DCA 2015).

And in *Mia Real Holdings, LLC v. Nolan*, 189 So.3d 858 (Fla. 4th DCA 2015) an estimate prepared in anticipation of trial was held not to constitute a business record since it was not kept in the ordinary course of business.

Two opinions issued on the same day by a single appellate court again highlight how to, and how not to, gain admittance of loan records of a prior holder or servicer of a loan. In *Hidden Ridge Condominium Owners' Association, Inc. v. OneWest Bank, N.A.,* 183 So.3d 1266 (Fla, 5th

DCA 2016) plaintiff's business records affidavit was insufficient to establish each foundational requirement for admitting business records of the prior loan servicer where the affidavit failed to demonstrative affiant's familiarity with the prior servicer's record-keeping system and knowledge of how data was uploaded into system, and further failed to address whether plaintiff certified documents' accuracy and compliance with industry standards.

On the other hand, in *The Bank of New York Mellon v. Johnson*, 185 So.3d 594 (Fla. 5th DCA 2016) a trial court's exclusion of a prior loan servicer's documents was held an abuse of discretion where testimony from the current servicer's agent revealed that it had reviewed the documents transferred from a prior servicer, and could testify regarding the "boarding" process under which the loan documents and history were thoroughly inspected and verified as part of the process of transferring same. Here again, the witness' familiarity with the prior servicer's procedures, plus proof of steps taken to verify the accuracy of the loan documents were key.

The 5th District followed up *Hidden Ridge* and *Johnson* with two cases reversing lenders' final summary judgments: *McNair v. Nationstar Mortgage, LLC*, 187 So.3d 371 (Fla. 5th DCA 2016), (lender's witness failed to lay a proper foundation for admission of the loan payment history as a business record, and failed to present competent, substantial evidence of the amount of interest owed on the loan) and *Grudem v. FNMA*, 189 So.3d 914 (Fla. 5th DCA 2016) (lender failed to introduce note). (Note – where the evidence is sufficient to permit the court to "easily calculate" interest and escrow amounts due, it is error to limit a foreclosure judgment to just principal owed. *Fogarty v. Nationstar Mortgage, LLC*, 224 So.3d 313 (Fla. 5th DCA 2017).

Certification of records custodian as basis for admissibility of loan records. Section 90.902(11), Florida Statutes, allows for self-authentication of business records by means of a "certification or declaration from the custodian of the records":

> "(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed."

Section 90.803(6)(c) requires that this procedure requires "reasonable written notice of that intention upon every other party and shall make the evidence available for inspection sufficiently in advance of its offer in evidence to provide to any other party a fair opportunity to challenge the admissibility of the evidence." A motion opposing admissibility must be served and heard prior to trial or is waived.

In *Wilmington Savings Fund Society, FSB v. Aldape*, 192 So.3d 635 (Fla. 5th DCA 2016), plaintiff filed such a notice seven weeks prior to trial, and filed the certification three weeks prior to trial and defendant filed no motion in opposition, yet the trial court refused to admit the loan documents and entered involuntary dismissal. On appeal, the Fifth District reversed, finding that the lender had complied with the statute and that defendant's objection was waived.

Trustee's standing to bring suit. The foreclosing plaintiff is frequently a loan servicer purporting to bring the action in its capacity as trustee, such as where the loan is part of a package of securitized loans. (In this situation, plaintiff is listed in the style along the lines of "ABC Bank, N.A., as Trustee for CMLTI-2005-WF2".) Defense counsel sometimes challenge plaintiff's ability to bring suit if it is not licensed as a trust company in Florida, citing two old Fla. Supreme Court decisions – *Richardson v. South Florida Mortgage Co.*, 102 Fla. 313, 136 So. 393 (Fla. 1931) (mortgage company not licensed as a trust company not authorized to sue to foreclose a mortgage in that capacity) and *Marion Mortgage Co. v. State*, 107 Fla. 472 (Fla. 1932) (a corporation desiring to "act as trustee" must comply with the licensing statutes.)

A plaintiff filing suit in its capacity as trustee under a pooling and servicing agreement must prove that it was holder of the note at time original complaint was filed, not just at time of trial. *Powers v. HSBC Bank USA, N.A.*, 202 So.3d 121 (Fla. 2nd DCA 2016)

The Fourth DCA has held that national banks need not register as a foreign corporations under F.S.607.1502(1) in order to maintain lawsuits in Florida courts, since that statute was pre-empted as to national banks by the National Bank Act, 12 U.S.C. Section 24. *770 PPR, LLC v. TJCV Land Trust*, 30 So.3d 613 (Fla. 4th DCA 2011) cert. dismissed SC10-974 (Fla. 6/30/2011). Whether this holding extends to trust companies has not yet been decided.

A mortgage is not invalid merely because the lender was not licensed as a lender in the state. While the lack of licensure may subject the lender to fines or other sanctions this "does not affect the validity or enforceability of any mortgage loan." F.S. 494.0022. *Bank of America, N.A. v. Nash*, 200 So.3d 131 (Fla. 5th DCA 2016).

NOTE – challenges to a plaintiff's entitlement to foreclose may be brought by the owner of the subject property, even if the owner is a "stranger" to the suit (i.e., acquired the property after the lis pendens had been filed). *575 Adams, LLC v. Wells Fargo, LLC*, 197 So.3d 1235 (Fla. 3rd DCA 2016).

Additional defenses include:

1. Equitable Estoppel and Waiver based upon:

    a. Express promise to accept late payments. See, *Kimmick v. U.S. Bank*, N.A., 83 So.3d 877 (Fla4th DCA 2012), in which summary judgment for the lender plaintiff was reversed after defendant asserted the lender's acceptance of six reduced monthly payments as a waiver of the mortgage's "no waiver" provision.

    b. Implied promise to accept late payments (past conduct).

c. Breach of express promise to renew loan.

A purported oral modification of a mortgage cannot be enforced as it violates the Statute of Frauds, and the Statute of Frauds cannot be circumvented by claims of promissory estoppel. *Ocwen Loan Servicing, LLC v. Delvar*, 180 So.3d 1190 (Fla. 4th DCA 2015). Modification of a mortgage, like any other contract, requires acceptance of an offer which is 1) absolute and unconditional, 2) identical with the terms of the offer and 3) in the mode and within the time expressly or impliedly stated within the offer. *Nowlin v. Nationstar Mortgage, L.L.C.*, 193 So.3d 1043 (Fla. 2nd DCA 2016).

2. Satisfaction. A mortgage that has been satisfied obviously cannot be foreclosed. But it is not unheard of for lenders to get their loans mixed up and prepare erroneous affidavits attesting to mortgages having been satisfied. In *DFRP Note Purchase Partners I, L.P. v. Bruno*, 196 So.3d 576 (Fla. 4th DCA 2016), the Fourth DCA reversed an involuntary dismissal that had been based on such an affidavit, and reversed for the court to determine whether it had been filed in error.

3. Breach of Contract.

a. Express promise to renew loan.

b. Implied promise to renew loan.

4. Fraudulent Inducement.

a. Loan was obtained with promise of renewal.

b. Credit agreements must be in writing. Section 687.0304(2), Florida Statutes also known as the Banking Statute of Frauds. *Puff-N-Stuff of Winter Park, Inc. v. Bell*, 683 So.2d 1176 (Fla. 5th DCA 1996).

c. A fraud claim alleging that lender orally misrepresented loan to be a fixed rate loan was found legally insufficient where documents defendants signed at closing plainly indicated that note had an adjustable rate. *Vidal v. Liquidation Properties, Inc.*, 104 So.3d 1274 (Fla. 4th DCA 2012).

5. Wrongful refusal to release funds. Summary judgment for a lender was reversed in *Rodriguez v. Ocean Bank*, 208 So.3d 221 (Fla. 3rd DCA 2016) due to the presence of fact questions as to the borrowers' affirmative defenses and counterclaims alleging damages due to the lender's wrongful delay in the release of insurance proceeds, with this comment:

> "Lender liability for the wrongful refusal to disburse funds, imposition of extra-contractual conditions, or delay of construction is now an established feature of Florida law. *See generally Florida Real Property Litigation* §§ 8.32, 8.42, 8.44 (6th ed. 2011); *Lentz v. Community Bank of Fla., Inc.*, 189 So.3d 882 (Fla. 3d DCA Mar. 9, 2016). Although we express no opinion regarding the merits of the Rodriguezes' affirmative defenses and counterclaims, those pleadings are not

insufficient as a matter of law,[7] they were supported by competent affidavits in opposition to the Bank's motion for summary judgment, and they establish genuine issues of material fact for resolution at trial."

In *Alvarez-Mejia v. Bellissimo Properties, LLC*, 208 So.3d 797 (Fla. 3rd DCA 2016), a lender withheld insurance proceeds after a fire destroyed the mortgaged home, on the basis that it was not economically feasible to repair it. But summary judgment for the lender was reversed because material issues of fact existed as to the value of the property and cost of repair.

5. Usury, Chapter 687, Florida Statutes. In general, interest may not exceed 18% per annum on loans up to $500,000 (F.S. Section 687.03) or 25% per annum for principal amounts greater than $500,000 (F.S. Section 687.071). Interest rates above 25% constitutes criminal usury. As an example, a $65,000 thirty-day loan to be repaid in 30 days as $70,000 (an annualized interest rate of 92.3%) was held to be criminally usurious and unenforceable. *Lawyers Title v. Wells*, 881 So.2d 668 (Fla. 5th DCA 2004).

The leading case on methodology for applying the usury statute is *St. Petersburg Bank & Trust Co. v. Hamm*, 414 So.2d 1071 (Fla. 1982). In essence, advances and other loan charges are first determined as a percentage of the loan amount, then spread over the life of the loan. In other words, if there are 6% in up-front charges on a 2-year loan, this increases the interest rate 3 points higher than the stated note amount for purposes of determining whether the loan is usurious. *Hamm* also held that the stated amount of the loan is used for usury calculation purposes, without a reduction for amounts paid as loan costs. For example, on a $300,000 loan where $5,000 in upfront costs are deducted, $300,000 is the denominator in the usury calculation, not $295,000.

In *Velletri v. Dixon*, 44 So.3d 187 (Fla. 2d DCA 2010), the Second District held that where a loan origination fee is paid to a third party, but there is no evidence that this party was an agent of the borrower, the fee is to be counted as interest in the usury calculation. *Velletri* also held that where the lender holds back a portion of the stated loan amount, but charges interest on the holdback, the retained amounts must be considered interest for usury purposes. (A careful reading of *Velletri* and *Hamm* reveals an apparent conflict on this point. But Supreme Court review was not been sought in *Velletri*).

NOTE – F.S. 655.56 provides, in material part:

"No fines, interest, or premiums paid on the following loans made by any financial institution shall be deemed usurious, and the same may be collected as debts of like amount are now collected by law in this state and according to the terms and stipulations of the agreement between the financial institution and the borrower…(1) Loans secured by a first lien on real estate." There are no cases interpreting this statute, but *South Pointe Dev. Co. v. Capital Bank*, 573 So.2d 939 (Fla. 3d DCA 1991) held that under a predecessor statute (the former F.S. 665.077) first mortgages held by banking institutions regulated by F.S. Chapter 658, "Banks and Trust Companies" are indeed exempt from usury statutes, provided certain disclosures are made in the loan documents.

6. Interest Rate Issues and the Truth-in-Lending Act (TILA).

   a. "Prime rate" promise not kept. Understood that prime was lowest rate charged, when in fact other customers received lower rates.

   b. Improper adjustments to interest rates (ARMS).

   c. Mortgagor must be given two copies of the Notice of Rescission Rights. The written acknowledgeable by the mortgagor is only a rebuttable presumption of receipt. *Cintron v. Bankers Trust Company*, 682 So.2d 616 (Fla. 2d DCA 1996).

   d. TILA allows rescission for up to three years after the transaction, if the creditor fails to make material disclosures to the borrower. Rescission under the Act will relieve the mortgagor only from the payment of security interest. Such material disclosures include: the loan's annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. *Truth-in-Lending Act*, 15 U.S.C. Sections 1601-1667 (1994).

   e. A right of rescission pursuant to the Truth in Lending Act may not be revived as a defense in recoupment beyond the three year limit. *Beach v. Great Western*, 692 So.2d 146 (Fla. 1997), affirmed, 523 U.S. 410.

   f. A wife's homestead interest in husband's mortgaged property is nevertheless an "ownership" interest, and she was therefore a "consumer" entitled to all required TILA disclosures. *Gancedo v. Del Carpio*, 17 So.3d 843 (Fla. 4th DCA 2009).

   g. TILA has a three-year statute of limitations on rescission claims and one year on recoupment claims. However, pursuant to 15 U.S.C. § 1640(e), recoupment may be asserted as an affirmative defense to a foreclosure action beyond the one year period. *Vidal v. Liquidation Properties, Inc*., 104 So.3d 1274 (Fla. 4th DCA 212).

7. Excessive Lender Control.

   a. Allegation that the lender was really a partner or joint venturer. Where the lender becomes a "partner" with its borrower in the project, whether as a joint venturer, a member of the borrower's LLC for the project, etc. potential liability exists based on the fiduciary duties that may exist between them. The lender has a right to decide to foreclose if the co-owned venture defaults. But creative counsel for the principal borrower can be expected to cast such decisions in the light of the lender looking after its own interests at the expense of its partner. Little case law yet exists in this area.

But – where a loan agreement provided that any modification or waiver must be in writing, summary judgment in favor of the lender was affirmed, despite borrower's allegation as to an oral commitment to convert the deal into a joint venture. *Coral Reef Drive Land Dev, LLC v. Duke Realty L.P.*, 45 So.3d 897(Fla. 3d DCA, 2010). See also, *Vargas v. Deutsche Bank Nat. Trust Co*, 104 So.3d 1156 (Fla. 3d DCA 2012).

b. Lender caused project failure leading to default.

c. A defense based on the lender's excessive control requires "complete domination and control." The lender having a director on the borrower's board, and having signatory authority on the borrower's account are not sufficient. *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp.*, 483 F. 2d 1098 (5th Cir. 1973) rehrg. den. 490 F 2d 916 (5th Cir. 1974).

8. Fraud. General allegations of fraud in the mortgage industry without specific connection to the subject loan was held insufficient to warrant setting aside of a settlement and release agreement between lender and borrower in *The Bank of New York Mellon v. Simpson*, 227 So.3d 669 (Fla. 3rd DCA 2017).

9. Unclean Hands. A court may not deny a foreclosure action, unless acceptable defenses are raised as to the issues. *G.E. Capital Mortgage Services, Inc. v. Canales*, 691 So.2d 21 (Fla. 3d DCA 1997). However, as a court of equity, the court may use discretion based upon unclean hands to deny foreclosure. *See, Knight Energy Servs., Inc. v. Amoco Oil Co.*, 660 So.2d 786, 789 (Fla. 4th DCA 1995).

In *City First Mortgage Corp. v. Barton*, 988 So.2d 82 (Fla. 4th DCA 2008), the 4th District affirmed a trial court's having denied foreclosure for a period of time due to misrepresentations by the lender as to the amount needed to bring the loan current.

In *Wachovia Mortgage Corp. v. Posti*, 166 So.3d 944 (Fla. 4th DCA 2015) the borrower's unclean hands defense was found not to encompass a claim to enforce an alleged modification agreement. The judgment in favor of the borrower ordering the lender to deliver a loan modification agreement with specific terms was therefore reversed.

A foreclosure judgment was reversed due to unclean hands in *Shahar v. Green Tree Servicing*, 125 So. 3d 251 (Fla. 4th DCA 2013) based on the "unique facts" of that case, which included the lender's deliberate falsification of information on the loan application and actual harm to the borrowers due to substantially increased loan payments imposed by the lender after not allowing the borrowers to review the paperwork at closing.

But where the facts were less egregious, a trial court's dismissal based on unclean hands defense was reversed in *Wells Fargo Bank, N.A. v. Trustee of WAMU Mortgage Pass-Through Certificates Services 2005-PR4,* 199 So. 3d 1031 (Fla. 4th DCA 2016).

In *Wells Fargo Bank, N.A. v. Williamson*, 199 So.3d 1031 (Fla. 4th DCA 2016), dismissal based on the lender's unclean hands was reversed where the plaintiff was the original lender's assignee, and had no knowledge of the alleged unclean hands of its predecessor.

And in *PNC Bank, N.A. v. Smith*, 225 So.3d 294 (Fla. 5th DCA 2017), summary judgment for the defendant borrower based on the lender's unclean hands was reversed where the lender's alleged bad acts concerned a different loan than the one being foreclosed.

10. Florida Deceptive and Unfair Trade Practices Act - F.S. 501.201 et. seq. ("FDUTPA")

In *City First Mortgage, supra,* the 4th DCA also reversed a $312,000 judgment against a lender that was based on an alleged FDUTPA violation because the borrower failed to prove "actual damages sustained as a consequence of violation of the statute." Consequential damages, such as the damages stemming from his inability to refinance due to the lender's misrepresentations, are not recoverable under FDUTPA.

With appropriate disclaimer and waiver language in its loan documents, a lender can avoid FDUTPA liability for allegedly misrepresenting the value of property being financed. *G Barrett, LLC v. The Ginn Co.*, 494 Fed. Appx 944 (11th Cir. 2012).

11. Florida Consumer Collection Practices Act. (F.S. Section 559.715). The FCCPA is inapplicable to assignees of secured notes and mortgages, because they assign the debt itself, as opposed to merely assigning the right to collect a debt. *Deutsche Bank Nat. Trust Co. v. Hagstrom*, 203 So.3d 918 (Fla. 2nd DCA 2016). Similarly, *Dyck O'Neal, Inc. v. Ward*, 216 So.3d 664 (Fla. 2nd DCA 2017), held that the FCCPA does not apply to deficiency actions either, since they are not actions to collect a consumer debt.

Note - *Bank of America v. Siefker*, 201 So.3d 811 (Fla. 4th DCA 2016) created a distinction between straight mortgage foreclosure actions and those which also see entry of deficiency judgments. While a mortgage foreclosure action in and of itself is not an action to collect a consumer debt, a plaintiff/assignee must comply with F.S. 559.715 if it is seeking a deficiency judgment. However, the court also ruled that compliance with the statute is not a condition precedent to filing the foreclosure or deficiency action, and merely leaves the lender/assignee open to an action for statutory damages. *See also, Wells Fargo Bank, N.A. v. Guess*, 213 So.3d 1014 (Fla. 2nd DCA 2017) and *Brindise v. U.S. Bank Nat'l Ass'n*, 183 So. 3d 1215, 1221 (Fla. 2d DCA 2016) (compliance with notice requirement of F.S. 559.715 not a condition precedent to foreclosure). See also, *U.S. Bank, N.A. v. Adams*, 219 So.3d 211 (Fla. 2nd DCA 2017) (F.S. Section 559.715 does not create a condition precedent to foreclosure).

12. Counterclaim based upon lender's actions. Consider requesting jury trial on counterclaim. In *Peterson v. Affordable Homes of Palm Beach*, 65 So.3d 112 (Fla. 4th DCA 2011), summary judgment of foreclosure was reversed as a denial of defendant's right to jury trial on her pending compulsory counterclaim for fraud.

Dismissal of a borrower's counterclaim alleging that lender's attorney fraudulently misled the borrower as to the existence of a restrictive covenant on the property was reversed in *Posner & Sons, Inc. v. Transcapital Bank*, 65 So.3d 1193) (Fla. 4th DCA 2011).

NOTE – It is reversible error to grant foreclosure judgment while a counterclaim remains pending. *Kushner v. Wyndsong Estates HOA, Inc.* 137 So.3d 527 (Fla. 4th DCA 2014). *See Peterson v. Affordable Homes of Palm Beach, Inc.*, 65 So. 3d 112, 113 (Fla. 4th DCA 2011) (holding that summary judgment on a foreclosure claim was premature while the mortgagor's fraud counterclaim was still pending); see also *Woods v. Huntington Fed. Sav. Bank*, 622 So. 2d 1363, 1365 (Fla. 2d DCA 1993) (pending counterclaim precluded summary judgment of foreclosure); *Shahar v. Green Tree Servicing LLC*, 125 So. 3d 251, 253 (Fla. 4th DCA 2013) (summary judgment of foreclosure premature because defense of unclean hands was still pending).

13. Attempts to quiet title to the mortgaged property despite the proper recordation of the subject mortgage. This one is a sure loser. In *Badgley v. Suntrust Mortgage, Inc.* 134 So.3d 559 (Fla. 5th DCA 2014) the Fifth DCA dismissed a borrower's quiet title suit against the lender claiming the mortgage was a cloud on title because the lender had failed to "respond to her absurd demand of them to "prove" that she owed them money." Attorney's fees against the borrower and her counsel were also affirmed. See also *Schwades v. America's Wholesale Lender*, 146 So.3d 150 (Fla. 5th DCA 2014), which reached a similar result.

14. Oral Settlement/Mediation Agreement Unenforceable. An unsigned (oral) mediation agreement affecting a mortgage is unenforceable, as it violates both the Statute of Frauds, F.S. 725.01 and the Banking Statute of Frauds, F.S. 687.0304. *Wells Fargo Bank, N.A. v. Richards*, Case Nos. 4D16-1364 and 4D16-2033 (Fla. 4th DCA 2017).

15. JURY TRIAL – Mortgage foreclosure is an equitable remedy, and does not give rise to a right to a jury trial. But that does not bar the right to a jury on a compulsory counterclaim. In *Peterson v. Affordable Homes of Palm Beach, Inc.*, 65 So.3d 112 (Fla. 4th DCA 2011), summary judgment of foreclosure was reversed where defendant's counterclaim for fraud was still pending. "[W]here the compulsory counterclaim entitles the claimant (upon timely demand) to a jury trial on issues which are sufficiently similar or related to the issues made by the equitable claim that a determination by the first fact finder would necessarily bind the later one, such issues may not be tried nonjury by the court since to do so would deprive the counter-claimant of his constitutional right to trial by jury." *Del Rio v. Brandon*, 696 So.2d 1197 (Fla. 3d DCA 1997), citing *Dykes v. TrustBank Sav., F.S.B.*, 567 So.2d 958, 959 (Fla. 2d DCA 1990).

A borrower who is sued for mortgage foreclosure is not entitled to a jury on a count on the promissory note because that is an extension of the relief to which the lender is entitled in foreclosure, and is to be heard by the court per F.S. Section 702.06. *Kinney v. Countrywide Home Loans Servicing, L.P.*, 165 So.3d 691 (Fla. 4th DCA 2015).

But note –an endorser to the note who is not a party to the mortgage has a right to a jury on a deficiency claim. See *Hobbs v. Fla. First Nat'l Bank of Jacksonville*, 480 So.2d 153, 156 (Fla. 1st DCA 1985).

Also, the right to trial by jury can be waived in a note or mortgage, and such waivers are enforceable. *Kinney v. Countrywide Home Loans Servicing, L.P.*, 165 So.3d 691 (Fla. 4th DCA 2015).

15. Statute of Limitations. Section 95.281, Florida Statutes.

a. If the final maturity date is not ascertainable from the record - 20 years from the date of the mortgage. If the maturity date becomes ascertainable through a re-recording or a copy of the obligation secured by the mortgage is recorded and states the maturity date, then the limitation becomes 5 years from maturity.

b. If final maturity is ascertainable from the record - 5 years from the date of maturity.

c. If the recorded mortgage does not contain a maturity date but the recorded mortgage references an unrecorded promissory note that does include a maturity date, the 20 year statute of limitations still applies. *Layton v. Bay Lake Ltd Partnership*, 818 So.2d 552 (Fla. 2d DCA 2002).

d. Maturity date may only be extended, as to third parties, by recorded writing, signed by all parties. § 95.281, *Zlinkoff v. Von Aldenbruck*, 847 So.2d 1101 (Fla. 4th DCA 2003). However, as between lender and borrower, an oral extension may be enforceable. *Schroeder v. Manceri*, 893 So.2d 603 (Fla. 4th DCA 2005). And it must be founded on valid consideration, not on a promise by the borrower to do something that he or she is already obligated to do. *Davidpur v. Counne*, 972 So.2d 891 (Fla. 3d DCA 2008). See also, *Roach v. TotalBank*, 85 So.3d 574 (Fla. 4th DCA 2012).

e. An SBA mortgage that is assigned to a private third party is not subject to the state limitations period. There is no statute of limitations on federal government foreclosures, even if assigned to a private party. *LLP Mortgage Ltd. v. Cravero*, 851 So.2d 897 (Fla. 4th DCA 2003).

f. The statute of limitations was held not to have begun to run from the first missed monthly payment, such that a foreclosure action filed more than six years later was held timely in *Locke v. State Farm Fire & Cas. Co.*, 509 So.2d 1375 (Fla. 1st DCA 1987). Therein, the court held that because the mortgage provided that the mortgagee could accelerate, at its option, the statute began to run not upon a missed payment, but upon the mortgagee accelerating, which in *Locke* occurred when the complaint was filed.

g. In *Broward County v. 8705 Hampshire Drive Condominium, Inc.*, 127 So.3d 853 (Fla. 4th DCA 2013) it was held that the five-year statute of limitations for breach of certain reporting requirements under the loan documents began to run on the date that demand was made for the reporting information. However, because these were continuing requirements, the dismissal here was without prejudice to a subsequent foreclosure action should future breaches occur.

h. The statute of limitations defense may be waived in mortgage documents. *CCM Pathfinder Palm Harbor Mgmt., LLC v. Unknown Heirs*, 198 So.3d 3 (Fla. 2d DCA 2015) (dismissal of foreclosure complaint based on expiration of limitations period error where mortgage contained a waiver of the statute of limitations.)

i. In *Bartram v. U.S. Bank*, 211 So.3d 1009 (Fla. 2016), the Florida Supreme Court answered a question that district courts had struggled with, holding that where an initial residential foreclosure action is dismissed, the mortgagee is not precluded by statute of limitations from filing a subsequent foreclosure action based on payment defaults occurring subsequent to the dismissal of the initial action, as long as the alleged subsequent default occurred within five years of the subsequent foreclosure action, regardless whether the dismissal is voluntary or involuntary, citing with approval *Singleton v. Greymar Associates*, 882 So.2d 1004 (Fla. 2004). See also, *Desylvester v. The Bank of New York Mellon*, 219 So.3d 1016 (Fla. 2nd DCA 2017) and *The Huntington Nat. Bank v. Watters*, 2017 WL 2821551: Case Nos. 2D16–3347, 2D16–4042, (Fla. 2nd DCA 2017) (same).

See also, *Klebanoff v. Bank of New York Mellon*, 228 So.3d 167 (Fla. 5th DCA 2017), holding that a foreclosure complaint alleging a default more than five years old was not time-barred where it also alleged that the default continued by failure to pay all subsequent payments as well, and distinguishing the Fifth DCA's contrary holding in *Hicks v. Wells Fargo Bank, N.A.*, 178 So.3d 957 (Fla. 5th DCA 2015) because in *Hicks* the parties' stipulation had referenced only the initial, more-than-five-year-old default. See also, *Kebreau v. Bayview Loan Servicing, LLC*, 225 So.3d 255 (Fla. 4th DCA 2017) (same). (Note - *Ventures Trust 2013-1-NH v. Johnson*, 2017 WL 2200226 (Fla. 5th DCA 2017) reached a similar result as *Hicks* where, as in *Hicks*, the complaint alleged a single default, as opposed to alleging a continuing default based on missing all subsequent payments.) And in *The Bank of New York Mellon Corp. v. Anton*, Case No. 3D15-2213 (Fla. 3rd DCA 2017), the Third District held that a foreclosure complaint that alleges the same details as a previously unsuccessful foreclosure but adds the phrase "and all subsequent payments" is not barred by the statute of limitations.

But in such case, the foreclosure judgment may not include monthly payments outside of the limitations period. *U.S. Bank, N.A. v. Diamond*. Case No. 5D16-3609 (Fla. 5th DCA 2017) citing *Bartram*, at 1015.

j. Two-Dismissal Rule. Under F.R.C.P. 1.420(a), a second voluntary dismissal operates as an adjudication on the merits. However, citing the rationale of *Bartram, supra*, the First DCA has held that voluntary dismissal of two successive foreclosure actions on the same note does not bar a third foreclosure action where the third complaint alleges at least

some defaulted payments within 5 years of date it is filed. *Forero v. Green Tree Servicing, LLC*, 223 So.3d 440 (Fla, 1st DCA 2017).

16. Failure of Mortgagee to File Estate Claim. This is not a valid defense. *Denton v. Getson*, 637 So.2d 82 (Fla. 4th DCA 1994).

17. Denial of signature on loan documents. Pursuant to F.S. 673.3081(1), authenticity of, and authority to make, signatures on negotiable instruments, such as promissory notes, are admitted "unless specifically denied in the pleadings." In *Sanabria v. PennyMac Mortgage Investment Trust Holdings I, LLC*, 197 So.3d 94 (Fla. 2nd DCA 2016), an affirmative defense which contained specific allegations challenging such authenticity and authority was found sufficient to meet his standard. As such, foreclosure judgment was reversed.

"There can be no question that basic rules of pleading required Polonsky to place the Bank on notice that she was challenging the authenticity or validity of her signatures on the note and mortgage. *See* § 673.3081(1), Fla. Stat. (2009) (providing that "[i]n an action with respect to an instrument, the authenticity of, and authority to make, each signature on the instrument is admitted unless specifically denied in the pleadings.")" *Polonsky v. HSBC Bank USA, N.A.* 207 So.3d 362 (Fla. 3rd DCA 2016).

Note – where such a defense is asserted, the burden falls on the foreclosing plaintiff to prove the signatures. But the signatures are statutorily presumed to be authentic, per F.S. 673.3081(1). *Polonsky, supra.*

18. A mortgagor's counterclaim is in the nature of recoupment. As such, it generally may be asserted even though its applicable limitations period has expired. *Maynard v. Household Finance Corp. III*, 861 So.2d 1204 (Fla. 2d DCA 2003).

19. Breach of fiduciary duty. Generally, no fiduciary duty exists between a bank and its customers dealing at arm's length. But such a duty can arise when the bank has reason to know that the customer is placing trust and confidence in the bank and relying on it to counsel him or her. *Building Education Corp. v. Ocean Bank*, 982 So.2d 37 (Fla. 3d DCA 2008). This can arise where the lender "takes on extra services for a customer, receives any greater economic benefit than from a typical transaction, or exercises extensive control." *Barnett Bank of W. Fla. v. Hooper*, 498 So.2d 923 (Fla. 1986). See also *1st Nat. Bank and Trust Co. of Treasure Coast v. Pack*, 789 So.2d 411 (Fla. 4th DCA 2001) (bank owed borrowers fiduciary duty where it advised them throughout construction process, assured them that any construction defects would be corrected and that they need not hire an attorney.)

A Florida lender has no duty to renew or restructure a loan, absent a contractual provision requiring it to do so. *Grandin Industries, Inc. v. Fla. Nat. Bank at Orlando*, 267 So. 2d 26 (Fla. 4th DCA 1972) (holding that whether or not a lender issues or modifies a loan is solely a matter within the lender's prerogative).

20. Failure to engage in loss mitigation efforts. Some residential mortgages are governed by regulations of the Department of Housing and Urban Development ("HUD").

Those regulations require loss mitigation efforts prior to filing a foreclosure action. In *Real Estate Mortgage Network, Inc. v. Knight*, 149 So.3d 121 (Fla. 4th DCA 2014) the trial court granted defendant borrowers' motion for summary judgment due to plaintiff's failure to engage in loss mitigation efforts. The 4th DCA held that "non-compliance with HUD regulation may be asserted as an equitable defense in mortgage foreclosure proceedings," citing *Cross v. Fed. Nat'l Mortg.* Ass'n, 359 So.2d 464, 465 (Fla. 4th DCA 1978), but nevertheless reversed due to fact questions in the record as to whether such efforts were made.

But the burden lies with the defendant to prove applicability of the HUD regulations, which do not automatically apply merely because the note and mortgage were created using Fannie Mac/Freddie Mac uniform instruments. *Diaz v. Wells Fargo Bank, N.A.,* 189 So.3d 279 (Fla. 5th DCA 2016).

While compliance with the HUD requirements is a condition precedent to foreclosure, if the lender fails to allege compliance in its complaint, a defendant waives this issue if it isn't raised as an affirmative defense. *Harris v. U.S. Bank N.A.*, 223 So.3d 1030 (Fla. 1st DCA 2017).

The HUD rules require a face-to-face meeting mitigation meeting, but contain an exception for a lender without an office within 200 miles of the mortgaged property. Where a fact issue as to this exception has been properly raised, it is error to grant summary judgment. *ARC/HUD I, LLC v. Ebbert*, 212 So.3d 513 (Fla. 2nd DCA 2017).

21. The court is not permitted to rewrite the loan documents so as to fashion a more equitable remedy. *Taylor v. First Nat'l Bank of Chicago*, 908 So.2d 565 (Fla. 4th DCA 2005). *See, Ponzi v. SunTrust Mortgage, Inc*., 4 So.2d 3 (Fla. 4th DCA 2009) (difficulty that loss of home would cause for family of borrower is not alone a valid grounds to deny foreclosure); *Republic*

Bank N.A. v. Doyle 19 So.3d 1053 (Fla. 3d DCA 2009) (law does not permit compassion or benevolence alone as basis for granting extension of foreclosure sale to allow borrower time to try to sell home.)

Lender's counsel can also be target of claims arising from conduct of foreclosure action. See, *Echeverria, McCalla, Raymer, Barrett & Frappier v. Cole*, 896 So.2d 778 (Fla. 1st DCA 2004) (class action status approved in action against lender's outside counsel for alleged overstatement of reinstatement costs in letters to borrowers.)

NOTE – assertion of frivolous defenses without factual basis can result in imposition of monetary sanctions under F.S. 57.105 against defense counsel. See *Korte v. U.S. Bank, N.A.*,, 64 So.3d 134, (Fla. 4th DCA June 8, 2011), affirming sanctions imposed personally against mortgage foreclosure defense counsel consisting of $20,000 in attorney's fees and $18,600 in delay damages caused by imposition of an unwarranted T.I.L.A. defense.

A pro se party who has repeatedly submitted frivolous pleadings (actually, in this case, the non-party spouse of the defendant borrower) may be prohibited from filing further pleadings unless signed by an attorney. *Balch v. HSBC Bank, USA, N.A.*, 128 So.3d 179 (Fla. 5th DCA 2013).

A trial court's striking defendants' pleadings, including affirmative defense of lack of standing, then, at trial's conclusion, reinstating affirmative defenses and involuntarily dismissing case on grounds plaintiff had failed to establish standing, was held improper in *LNV Corp. v. Gonzalez*, 202 So.3d 890 (Fla. 3rd DCA 2016).

22. Lien Stripping via Bankruptcy Filing. A second mortgage (or third or fourth mortgage, for that matter) may be "stripped off" and eliminated in either a Chapter 7 or Chapter 11 bankruptcy of the mortgagor, upon a determination that there is no equity in the property above the amount of superior liens. It had been common practice to file Chapter 11 petitions for the purpose of eliminating such liens. In the recent case of *McNeal v. GMAC Mortgage LLC*, WL 1649853 (11th Cir. (Ga.) 2012), the 11th Circuit held that such liens are "unsecured" and therefore "voidable under the plain language of 11 U.S.C. 506(d)."

23. RESPA. Violation of the Federal Real Estate Settlement Procedures Act ("RESPA") can give rise to a set off for recoupment against the amount otherwise owed to the lender. However, such defense can only be asserted against the original lender, not an assignee of the loan. *Good v. Deutsche Bank Nat. Trust Co.*, 98 So.3d 1255 (Fla. 4th DCA 2012).

Summary judgment for a lender was reversed where the borrower's motion to file a RESPA counterclaim, based on the lender's failure to notify as to a change in loan servicer, had been denied. The 5th DCA held that the lender failed to conclusively demonstrate that this amendment would be futile. *Green v. JP Morgan ChaseBank, N.A.,* 109 So.3d 1285 (Fla. 5th DCA 2013).

24. Home Affordable Modification Program ("HAMP"). There is no private cause of action under HAMP for a lender's refusal to permanently modify a loan. *Bolch v. Wells Fargo Home Mortgage*, 2014 WL 351688 (11th Cir. 2014).

Note – where at trial a lender fails to present required evidence, whether testimony or documentary, directed verdict is appropriate. However, a number of cases have held that in this circumstance, it is reversible error to deny the lender's rehearing motion which seeks to reopen the case to submit the missing evidence. See *Gulf Eagle, LLC v. Park East Development, Ltd.*, 196 So.3d 476 (Fla. 2nd DCA 2016) (reversing denial of rehearing to permit admission in evidence of guarantees), citing *Hernandez v. Cacciamani Dev. Co.*, 698 So. 2d 927, 928-29 (Fla. 3d DCA 1997) and *National Enterprises, Inc. v. Martin*, 679 So. 2d 331, 332 (Fla. 4th DCA 1996).

25. Purchaser pendent lite's attempt to challenge validity of mortgage. Someone who purchases a property subject to a properly recorded mortgage is not permitted to assert defenses challenging the validity of such mortgage, *Eurovest, Ltd. v. Segall*, 528 So. 2d 482, 483 (Fla. 3d DCA 1988) ("[A] purchaser who takes title to property subject to a mortgage without assuming any personal liability for repayment of the underlying debt is . . . estopped from contesting the validity of the mortgage."); See also, *Pettis v. Chrisentery*, 2017 WL 4781169; CASE NO. 1D17–506 (Fla. 1st DCA 2017), relying on *Eurovest*. But note – a purchaser pendent lite may still challenge the plaintiff's standing to foreclose the mortgage. *3709 N. Flagler Drive Prodigy Land Trust v. Bank of America, N.A.*, Case No. 4D16-3255 (Fla. 4th DCA 2017).

L. Final Judgment Form 1.996, Florida Rules of Civil Procedure.

1. Use sample form 1.996, Florida Rules of Civil Procedure.

2. Sale date must be 20-35 days after date of judgment.

3. Reserve jurisdiction for deficiency judgment.

4. If the plaintiff desires a lien, the plaintiff's address is required. F.S. Section 55.10. The requirement that the judgment contain defendant's social security number was eliminated in 2010. F.S. Section 55.01. However, the Comment to the 2010 amendment nevertheless states that "the address and social security number of the defendant borrower should be included in any deficiency judgment later obtained against the defendant borrower."

5. Post Judgment Interest Rate.

NOTE: The Final Judgment Form extends time to redeem the property. The language contained in a Florida Bar approved Final Judgment Form regarding the length of the redemption period allows the mortgagor to extend the redemptive right until the filing of the Certificate of Title. *Saidi v. Wasko*, 687 So.2d 10 (Fla. 5th DCA 1996). See Section 6, Final Judgment Form 1.996, Florida Rules of Civil Procedure.

F.S. 45.0315 changed the common law, and now a junior lienholder's interest is not extinguished until filing of the certificate of sale (or as otherwise set forth in the judgment) while at common law the junior lienor was extinguished at time of judgment. *AG Group Investments, LLC v. All Realty Alliance Corp.*, 106 So.3d 950 (Fla. 3d DCA 2013).

All elements included in the final judgment, including costs, must be supported by competent, substantial evidence. In *Wagner v. Bank of America, N.A.*, 143 So.3d 447 (Fla. 2d DCA 2014), final judgment of foreclosure was reversed where the lender failed to provide sufficient evidence as to the claimed charges for property inspections and insurance. See also, *Tervil v. U.S. Bank, N.A.*, 204 So.3d 580 (Fla. 4th DCA 2016) (foreclosure judgment reversed for new trial on damages where court included late charges, taxes, etc. without an evidentiary hearing).

NOTE – Form 1.996 contains two separate forms for final judgment where plaintiff possesses the note (Form 1.996(a)) and where the note is lost and is being re-established (Form 1.996(b))

Where there was insufficient evidence to support a final judgment's inclusion of late charges awarded, this was held insufficient to warrant reversal of the entire judgment. Rather, the appellate court remanded for remittitur of the final judgment amount to reduce the late charges awarded. *Newman v. Ocwen Loan Servicing, LLC*, 192 So.3d 498 (Fla. 2nd DCA 2016).

6. Bankruptcy. A foreclosure judgment entered even one day after the defendant filed a petition for bankruptcy violates the automatic stay imposed by 11 U.S.C. Section 362. *Citibank v. James*, 197 So.3d 1214 (Fla. 1st DCA 2016).

7. A state court lacks jurisdiction to enter final judgment where a notice of removal to federal court has been filed and the federal court has not yet remanded the case back to state court. *Cole v. Wells Fargo Bank N.A.*, 201 So.3d 749 (Fla. 5th DCA 2016). *See also*, *Mawhinney v. 998 SW 144th Court Rd, LLC*, 212 So.3d 468 (Fla. 5th DCA 2017).

8. Holding that a "general reservation of jurisdiction in a foreclosure judgment is deemed in case law to be appropriate for deficiency judgments, but little else," in *Garcia v. Christiana Trust*, 208 So.3d 176 (Fla. 3rd DCA 2017) the Third District held that a general reservation of jurisdiction in a foreclosure judgment did not retain support jurisdiction by the trial court to eliminate a foreclosure plaintiff's lien more than three years after judgment of foreclosure became final.

M. <u>Notice of Sale</u>.

1. Notice of Sale must be published once a week for 2 consecutive weeks.

2. Make sure notice has complete and correct legal description. See *J.H Dowling, Inc. v. First Federal Savings & Loan Ass'n*, 502 So.2d 1306 (Fla. 1st DCA 1987).

N. <u>Judicial Sale</u>.

1. Sale must take place 20-35 days from judgment unless plaintiff agrees otherwise. Section 45.031, Florida Statutes. Most counties are moving to online bidding, which is helping meet these time frames despite the current huge foreclosure case load.

2. Timeliness of Publication of Notice of Sale. Section 45.031(2), Florida Statutes (2015), provides: "Notice of sale shall be published once a week for 2 consecutive weeks in a newspaper of general circulation, as defined in chapter 50, published in the county where the sale is to be held. The second publication shall be at least 5 days before the sale." In *Karapetyan v. Deutsche Bank Nat. Trust Co.*, 220 So.3d 542 (Fla. 3rd DCA 2017), it was held that the two weekly notices need only take place sometime during two consecutive weeks. The court rejected appellant's claim that there needs to be fourteen days between the two publication dates.

3. It is error to cancel a sale based upon the mortgagors' having entered into a contract to sell the property and the wife's poor health. *FirstBank of Puerto Rico v. Othon*, 190 So.3d 110 (Fla. 4th DCA 2015) (although continuances are within court's discretion, benevolence is not a valid "ground" for cancellation on the day before the scheduled sale).

4. Mortgagee may bid up to amount of final judgment without paying cash. (But must still pay documentary stamps on the winning bid price.) A senior mortgage does not have the right to credit bid where its mortgage is not being foreclosed. *Branch Banking and Trust Co. v. Tomblin*, 163 So.3d 1229 (Fla. 5th DCA 2015).

6. All others must pay clerk cashier's check, or other such funds. (In most counties $1,000.00 at the time of bid and balance later that day. In Palm Beach County, it's 5% of sale price.)

7. Obtain lender's approval as to bidding instructions. Issues to be considered:

a. At what amount would lender prefer to receive cash as opposed to ownership of the property.

b. Issue of Tax Lien redemption rights.

c. A full judgment bid precludes deficiency judgment against borrower and guarantor.

d. Higher bid requires payment of higher amount of documentary stamps to record Certificate of Title.

e. Intentions to seek deficiency judgment.

8. Must pay sale fees and provide clerk with Certificate of Sale, Certificate of Disbursements and Certificate of Sale.

9. Pre-petition Agreements not to contest mortgagee's motion to lift the automatic stay in bankruptcy in exchange for extension of foreclosure date are not per se binding. *Farm Credit of Central Florida v. Polk*, 160 B.R. 870 (Bnkr. M.D. Fla. 1993).

10. Marshaling of Assets. In *Randall v. Bisbee-Baldwin Corp.*, 995 So.2d 1004 (Fla. 1st DCA 2008), the 1st DCA reversed an order that four properties be sold "all at once" because appraisals indicated the total value of the lots to be higher than the judgment. While trial courts do have discretion in controlling the manner of foreclosure sales, *Coombes v. Wheeler*, 131 Fla. 593, 179 So. 785, 786 (1938), because foreclosure is an equitable remedy this discretion is not unlimited.

But what's good for the goose is good for the gander, too. In *Beach Community Bank v. Spellman*, 206 So.3d 843 (Fla. 1st DCA 2017), an order approving a borrower's request to sell one of multiple mortgaged properties and hold the proceeds in trust pending completion of foreclosure case was reversed. "A mortgage lien is a property right which cannot be extinguished and other security substituted except by agreement of the parties, where the property is sold at judicial sale, or taken under the power of eminent domain." (citing *Mailman Dev. Corp. v. Segall*, 403 So. 2d 1137 (Fla. 4th DCA 1981)).

11. It is error to proceed with the sale while a timely rehearing motion under F.R.C.P. 1.530 is pending. *944 C-WELT-2007 LLC v. Bank of America, N.A.* 194 So.3d 470 (Fla. 3rd DCA 2016).

12. It is also error to proceed with sale while a counterclaim remains unresolved. *DeLong v. Paradise Lakes Condominium Association, Inc.* 210 So.3d 265 (Fla. 2nd DCA 2017)

13. Objections to Sale.

a. Objections to judicial sale must be filed before issuance of the certificate of title, which is supposed to happen 10 days after issuance of the

certificate of sale. F.S. 45.031(5). (The certificate of sale is usually issued the day of the sale.) However, due to the glut of foreclosure cases, in many circuits the certificates of title are delayed for 60 days or more, thus leaving open the time period for filing objections. This problem appears to be lessening as the number of foreclosure cases declines.

b. In *Ryan v. Countrywide Home Loans, Inc*. 743 So.2d 36 (Fla. 2d DCA 1999), the court refused to set aside the judicial sale as requested by the mortgagee because the mortgagee made the request 60 days after the judicial sale. The court upheld the sale of the property, which had a market value of $75,000, but sold for $100.

c. The Florida Supreme Court resolved a dispute among the District Courts over whether "grossly inadequate price" is a requirement to the setting aside of a foreclosure sale in *Arsali v. Chase Home Finance,* LLC, 121 So.3d 511 (Fla. 2013). In *Arsali*, the Supreme Court held that while grossly inadequate price can be a valid equitable basis for setting a sale aside, it is not an essential element and any other equitable basis, such as surprise, fraud, irregularity in the conduct of the sale or admission of irrelevant and incompetent testimony may be sufficient grounds, regardless of price.

The amount bid is conclusively presumed sufficient consideration for the sale. However, a borrower may nevertheless challenge a deficiency based on the amount bid to the extent that he can demonstrate that fair market value exceeds the bid amount. *Lawrence v. Nationstar Mortgage, LLC*, 197 So.3d 150 (Fla. 4th DCA 20160.

d. The losing bidder at a foreclosure sale was held to lack standing to object to the clerk having allowed the winner bidder to submit a personal check, in the absence of an allegation of fraud in the bidding process. *REO Properties Corp. v. Binder*, 946 So.2d 572 (Fla. 2d DCA 2006).

In *Jagodinski v. Washington Mutual Bank*, 63 So.3d 791 (Fla. 1st DCA 2011) the court clarified that a non-party foreclosure sale bidder has standing only for the narrow purpose of challenging the validity of a particular bid regarding whether the bid exceeded his own and whether payment was made in accordance with the bid's terms.

e. A mortgagor's denial of receipt of the notice of sale in the mail does not automatically overcome the presumption of notice, but it does create a question of fact requiring an evidentiary hearing wherein the mortgagor moves to vacate a sale based on the alleged lack of notice. *Richardson v. Chase Manhattan Bank,* 941 So.2d 435 (Fla. 2006); *Regner v. AmTrust Bank*, 71 So.3d 907 (Fla. 4th DCA 2011).

f. A trial court's decision whether to set aside a sale is judged by the gross abuse of discretion standard. *Esque Real Estate Holdings, Inc. v. C.H. Consulting Ltd.*, 940 So.2d 1185 (Fla. 4th DCA 2006); *Long Beach Mortgage Corp. v. Bebble*, 985 So.2d 611 (Fla. 4th DCA 2008).

g. The successful high bidder has a right to notice an opportunity to be heard as to a motion to set aside a sale. *Gianthony Homes, Inc. v. Avondale Diversified, Inc.*, 52 So.3d 838 (Fla. 5th DCA 2011).

h. A tenant not named as a party to a foreclosure action (and therefore whose possessory rights were not foreclosed) was not entitled to intervene post-foreclosure sale to challenge the sale. *Sedra Family, LP v. 4750, LLC*, 123 So.3d 559 (Fla. 4th DCA 2012). *Sedra* also held that tenants can "only redeem the property under or through [the mortgagor's] rights," and have "no independent right to redemption," citing *Burns v. Bankamerica Nat'l Trust Co.*, 719 So. 2d 999, 1001 (Fla. 5th DCA 1998), which in turn had cited *Quinn Plumbing Co. v. New Miami Shores Corp*., 129 So. 690 (Fla. 1930).

i. In *Dawson v. Wachovia Bank, N.A*., 61 So.3d 1218 (Fla. 3d DCA 2011), the 3rd DCA affirmed denial of a defendant's "emergency objection to sale" where the record lacked support for such relief. The appellate court pointed out that the borrowers had delayed the case for more than two years through a series of tactics.

j. Rule 1.540 provides the avenue for relief from a judgment of foreclosure, but is limited to the grounds set out in the rule. *Molinos Del S.A. v. E.I. DuPont de Nemours & Co.*, 947 So.2d 521, 524 (Fla. 4th DCA 2006) ("As an exception to the rule of finality, Rule 1.540(b) gives the trial court jurisdiction to relieve a party from a final judgment in a narrow range of circumstances." And an order vacating a judgment based on a Rule 1.540 motion more than four years later was reversed as untimely in *U.S. Bank, N.A. v. Anthony-Irish*, 204 So.3d 57 (Fla. 5th DCA 2016).

k. An objection to a foreclosure sale under section 45.031(5) must be directed toward conduct that occurred at, or which related to, the foreclosure sale itself. An objection which asserts matters prior to entry of judgment is facially deficient and must be denied. *IndyMac Federal Bank, FSB v. Hagan*, 104 So.3d 1232 (Fla. 3d DCA 2012)

l. A failure to properly publish notice of sale is not a valid basis for vacating a sale where the circuit court's local rules provide that such failure is not a valid reason to cancel a sale. *HSBC Bank USA, N.A. v. Nixon* 117 So.3d 430 (Fla. 4th DCA 2012).

m. An order setting aside a sale in a HOA association lien foreclosure case was reversed in *Chase Financial Services, LLC v. Edelsberg*, 129 So.3d

1139 (Fla. 3d DCA 2013) where an evidentiary hearing revealed that the defendant tendered payment more than one month after the certificate of sale had been issued.

n. In *JRBL Development, Inc. v. Maiello*, 872 So.2d 362 (Fla. 2d DCA 2004), the Second District stated, in dicta, that where a foreclosure sale proceeds despite a settlement agreement complied with by the mortgagor, the Court has "broad discretion" to set the sale aside. (Trial court grossly abused its discretion in failing to set aside sale of $500,000 property for $1,000.) See also *CitiMortgage, Inc. v. Synuria*, 86 So.3d 1237 (Fla. 4th DCA 2012).

o. A foreclosure sale may not be conducted while a timely motion for rehearing of the final judgment of foreclosure remains pending and unresolved. *Hoffman v. BankUnited, N.A.*, 137 So.3d 1039 (Fla. 2d DCA 2014).

p. Even a unilateral mistake such as the inadvertent failure of the lender's representative to attend the foreclosure sale can qualify as excusable neglect which justifies the setting aside of the sale if the sale result is an inequitable one. *Long Beach Mtg. Corp. v. Bebble*, 985 So.2d 611 (Fla. 4th DCA 2008).

q. It was error to deny a motion to vacate a foreclosure sale where the sale occurred while a motion for rehearing of the foreclosure judgment was pending. *Prieto v. FNMA*, 201 So.3d 659 (Fla. 3rd DCA 2016).

r. The successful high bidder has a due process right to notice and to be heard as to an objection to sale. As such, it was reversible error to set aside a sale on mortgagor's motion where the successful bidder received no notice of the motion or hearing. *Skelton v. Voelker*, 157 So.3d 471 (Fla. 2d DCA 2015). But be careful – where a high bidder's rehearing motion as to an order setting aside the sale was denied more than thirty days after said order, the appeal was held untimely as to that order. However, since the appeal was filed within thirty days of denial of the rehearing motion, it was held timely as to that ruling. *New Day Miami, LLC v. Beach Developers, LLC*, 225 So.3d 372 (Fla. 3rd DCA 2017).

s. A non-party who is also not a bidder has no standing to file an objection to the sale. *Whitburn, LLC v. Wells Fargo Bank, N.A.*, 190 So.3d 1087 (Fla. 2nd DCA 2016).

t. An order setting aside a foreclosure judgment and also the certificates of sale and title based on Rule 1.540 was reversed on *Baez v. Perez*, 201 So.3d 692 (Fla. 4th DCA 2016) because while the motion was styled as seeking relief from judgment, it asserted grounds which should have been raised in an appeal, not a Rule 1.540 motion for relief from judgment.

u. An objection to sale alleging inadequate price due to irregularities in the sale process requires an evidentiary hearing before the court may issue a certificate of title. *McKnight v. Chase Home Finance LLC*, 214 So.3d 775 (Mem) (Fla. 4th DCA 2017).

14. Other post-sale matters. The trial court has inherent jurisdiction to adjudicate its post-judgment motion for condominium or homeowners association assessments. *Ross v. Damas*, 31 So.3d 201 (Fla. 3d DCA 2010). However, this jurisdiction ends once the time to alter, modify or vacate the final judgment has elapsed where the judgment contains only a general reservation of jurisdiction. *Central Mortgage Co. v. Calahan*, 155 So.3d 373 (Fla. 3d DCA 2014). See also, *PLCA Condo. Assn. v. Amtrust-NP SFR Venture, LLC*, 182 So.3d 668 (Fla. 4th DCA 2015) (Trial court lacked jurisdiction to rule on mortgagee's post-judgment motion to determine amounts due to condo association following foreclosure judgment where time to alter or amend judgment had passed, and judgment did not address or reserve jurisdiction to determine the issue) and *Montreaux at Deerwood Lake Condo. Assn. v. Citibank, N.A.* 153 So.3d 961 (Fla 1st DCA 2014) (same).

An appeal by a non-party that had not sought to intervene before foreclosure judgment was dismissed for lack of standing in *Yankeetown Management, LLC v. SunTrust Mortgage, Inc.*, 164 So.3d 744 (Fla. 2d DCA 2015).

It was error to award loan servicer the costs of post-foreclosure judgment expenditures where affidavit of additional advances filed by servicer, and not admitted into evidence, was inadequate to prove amounts of expenditures. *Dominguez v. Bayview Loan Servicing LLC*, 221 So.3d 699 (Fla. 4th DCA 2017).

15. An order setting aside dismissal of a foreclosure case for failure to prosecute under F.R.C.P. 1.420(e) was reversed for failure to provide notice of the motion to the borrower defendant and hold an evidentiary hearing in *Arcila v. BAC Hone Loans Servicing, L.P.*, 145 So.3d 897 (Fla. 2d DCA 2014). Also, dismissal of a foreclosure action for failure to prosecute under Rule 1.420(e) cannot be with leave to amend, since the rule "does not authorize the dismissal of a complaint; it requires the dismissal of the action." *Garcia v. BAC Home Loans, Etc,* 145 So.3d 217 (Fla. 5th DCA, 2014). In *U.S. Bank, N.A. v. Proenza*, 157 So.3d 1075 (Fla. 3d DCA 2015) a trial court was found to have abused its discretion when it *sua sponte* dismissed a foreclosure action without providing notice to the parties.

16. A trial court did not abuse its discretion in refusing to permit a party that purchased the subject property during a foreclosure case to intervene post judgment but prior to sale in *DeSousa v. JP Morgan Chase N.A.*, 170 So.3d 928 (Fla. 4th DCA 2015), because the party, having purchased after recording of the lender's notice of lis pendens, therefore had an inferior interest and inferior interests do not support intervention. See also, *Trust No. 602W0 Dated 7/16/15 v. Wells Fargo Bank, N.A.*, 207 So.3d 977 (Fla. 5th DCA 2016) (as purchaser pendent lite, a trust which purchased the mortgaged property post recording of mortgagee's notice of lis pendens held not entitled to intervene.); *Bonafide Properties v. Wells Fargo Bank*, 198 So.3d 694 (Fla. 2nd DCA 2016), *FNMA v. Gallant*, 211 So.3d 1055 (Fla. 4th DCA 2017) and *Investor Trustee Services, LLC v. DLJ Mortgage Capital, Inc.,* 225 So.3d 833 (Fla. 5th DCA

2017), *Carlisle v. U.S. Bank, N.A.*, 225 So.3d 893 (Fla. 3rd DCA 2017) and *Tikhomirov v. The Bank of New York Mellon*, 223 So.3d 1112 (Fla. 3rd DCA 2017) (same).

O. Right of Redemption.

1. Any party can exercise right by paying full judgment amount at any time before filing of Certificate of Sale or the time specified in foreclosure judgment, whichever is later. Section 45.0315, Florida Statutes. The right of redemption can be assigned to a third party. *Indian River Farms v. YBF Partners*, 777 So.2d 1096 (Fla. 4th DCA 2001); *Residential Mortgage Servicing Corp. v. Winterlakes Property Owners Assn.*, 169 So.3d 253 (Fla. 4th DCA 2015). Becoming the owner of the property as a successful bidder at the foreclosure sale is sufficient to create standing to challenge the validity of an assignment of redemption. Additionally, pursuant to Section 45.0315, Florida Statutes, where there is a redemption, the successful bidder at the foreclosure sale should be made whole to the extent reasonably possible. *Martin Properties, Inc. v. Florida Industries Investment Corp.*, 833 So.2d 825 (Fla. 4th DCA 2002).

2. Once the certificate of sale has been entered, the mortgagor's right of redemption terminates. Therefore, a bankruptcy filing by the mortgagor after the certificate of sale but before the certificate of title will not stop the certificate of title from being issued. *Household Finance and Mortgage Corp. v. Osta*, 862 So.2d 885 (Fla. 5th DCA 2003). BUT – note that the new Foreclosure Judgment Form extends the right of redemption until issuance of the Certificate of Title. But a foreclosure complaint filed in violation of the automatic bankruptcy stay is void and without effect and therefore must be dismissed. *Select Portfolio Servicing, Inc. v. Worobec*, 178 So.3d 971 (Fla. 5th DCA 2015).

3. Attorney's Fees. Where a mortgagor or subordinate lienor redeems, and the foreclosing lender dismisses as a result, the redeeming party is not entitled to an attorney's fee aware as the prevailing party. *Washington Mutual Bank, F.A. v. Shelton*, 892 So.2d 547 (Fla. 2d DCA 2005).

4. Once the certificate of title has been entered without objection, the Court lacks jurisdiction to amend the judgment to extend a party's redemption rights. *Y.E.M.C. Construction & Development, Inc. v. INTER SER, U.S.A., Inc.*, 884 So.2d 446 (Fla. 3d DCA 2004).

5. Right of redemption is calculated on the amount of the final judgment plus interest. But if judgment provides that plaintiff has the right to be compensated for costs and expenses incurred subsequent to judgment, such amounts must be included in redemption amount calculation. If redeemer pays this amount, the plaintiff cannot later complain that it was owed additional amounts not included in the judgment. *MERS v. Mahler*, 928 So.2d 470 (Fla. 4th DCA 2005).

6. The right of redemption of a subordinate lienholder is extinguished when the debt giving rise to such lien is paid and satisfied. *Marina Funding Group, Inc. v. Peninsula Property Holdings, Inc.*, 950 So.2d 428 (Fla. 4th DCA 2007).

7. A guarantor who was not given notice of a foreclosure sale cannot challenge the sale on the basis of its adverse impact on the guarantor's right of redemption since a guarantor

possesses no interest in the collateral, and therefore no right of redemption. *Cukierman v. BankAtlantic*, 89 So.3d 250 (Fla. 3d DCA 2012).

8. Where the amount owed is unliquidated, the burden lies with the movant to set an evidentiary hearing and prove up the redemption amount. *Wells Fargo Nat. Bank, N.A. v. Sawh*, 194 So.3d 475 (Fla. 3rd DCA 2016) (reversing dismissal of a foreclosure action following entry of a redemption order where the amount was unliquidated and in dispute.)

9. A bankruptcy filing made one minute after the successful high bid was held to be too late to stop a foreclosure sale in *Coastwide Services, LLC v. Goldberg*, Case No. No. 3D17–1162, 2017 WL 3271882 (Fla. 3rd DCA 2017). However, since the bankruptcy filing (which was later dismissed *nunc pro tunc* as a bad faith filing) did prevent the clerk of court from issuing a certificate of sale, the *Coastwide Services* court remanded for determination of the correct redemption amount, followed by ten days in which the debtor could exercise this right.

P. Certificate of Title.

The Certificate of Title is issued by the clerk no less than 10 days after sale. Once issued, redemption is precluded, even if the party asserting the right was not made a party to the foreclosure proceedings. *Burns v. Bankamerica National Trust Co.*, 719 So.2d 999 (Fla. 5th DCA 1998).

Q. Reforeclosure.

1. If a lien should have been foreclosed but was not, or if jurisdiction was not proper, the certificate of title holder may reforeclose. *White v. Mid-State Savings & Loan Ass'n*, 530 So.2d 959 (Fla. 5th DCA 1988).

2. Where the owner of the property is omitted as a defendant, a foreclosure judgment is void. As such, filing a new action to name the owner is not a reforeclosure, but rather simply a foreclosure. *English v. Bankers Trust Co. of California*, 895 So.2d 1120 (Fla. 4th DCA 2005). See also, *Ballantrae Homeowners Association, Inc. v. FNMA*, 203 So.3d 938 (Fla. 2nd DCA 2016) (lien of homeowners association which lender failed to name as defendant not eliminated; lender's only remedies would be to move to compel redemption by the HOA, or file a separate suit to reforeclose against it, citing *Marina Funding Grp., Inc. v. Peninsula Prop. Holdings, Inc.*, 950 So. 2d 428, 430 (Fla. 4th DCA 2007).

3. In *FNS4, LLC v. Security Bank, N.A.* 88 So.3d 215 (Fla. 3d DCA 2011) a lender had obtained final judgment of foreclosure but failed to name the condo association as a defendant. An order fourteen months later setting aside the judgment and allowing the lender to amend to name the association was reversed by the Third DCA, since the motion to set aside judgment was filed after the one-year limit for relief from judgment under F.R.C.P. 1.540 had run. However, the 3d DCA specifically stated that its ruling was without prejudice to the lender filing a separate suit to reforeclose as against the omitted interest, citing *Quinn Plumbing Co. v. New Miami Shores Corp.*, 129 So. 690 (Fla. 1930) and *Mid-State Inv. Corp. v. Fort Walton Land Dev. Co.*, 145 So.2d 289 (Fla. 1st DCA 1962). See also *Ross v. Wells Fargo Bank*, 114 So.3d

256 (Fla. 3d DCA 2013) (trial court lacks jurisdiction for a supplemental cause of action to re-foreclose after final judgment and expiration of time to amend or vacate same. However, plaintiff entitled to file separate action to re-foreclose.)

Where an error is discovered in a legal description in a final judgment of foreclosure and resulting certificate of title, the judgment and sale must be vacated, the mortgage reformed, and the process begun again. This can be accomplished in the foreclosure action without the need to file a new action. *FNMA v. Sanchez*, 187 So.3d 341 (Fla. 4th DCA 2016), citing *Wells Fargo Bank, N.A. v. Giesel*, 155 So. 3d 411 (Fla. 1st DCA 2014). See also, *Caddy v. Wells Fargo Bank, N.A.*, 198 So.3d 1149 (Fla. 4th DCA 2016) (Where scrivener's error in legal description in deed was discovered after final judgment of foreclosure and sale, court could not simply correct the legal description in consent judgment and certificate of title; rather, reformation required vacating the final judgment, judicial sale, and issuance of title.)

R. Deed in Lieu of Foreclosure Considerations.

1. A deed in lieu of foreclosure does not foreclose out lienors and clouds existing after date of mortgage. In *Morris v. Osteen*, 948 So.2d 821 (Fla. 5th DCA 2007), a lender accepted a deed in lieu of foreclosure after entry of the final judgment, thus resulting in cancellation of the sale. The 5th DCA held that a lease, which was entered into after the mortgagee had filed its lis pendens and complaint remained in effect and was not eliminated by the deed in lieu of foreclosure. The court stated that "had the foreclosure sale proceeded, a different result would likely have been obtained."

2. A deed in lieu also risks a claim in bankruptcy of fraudulent transfer or preference. See *BFP*, *supra.* *BFP* states that Section 548(a)(2) of the United States Bankruptcy Code, continues to apply outside the foreclosure context.

3. *Deprizio* Rule. Overruled by 1994 amendments to Bankruptcy Code. An out of the ordinary course of business payment to an insider which is made within one year before filing bankruptcy may be voidable preference. If a guarantor is released or benefits from the deed in lieu, the insider preference period of one year (instead of 90 days) may be applicable.

S. Surplus Proceeds.

1. Any surplus proceeds are to be paid to subordinate lienors in order of priority, then to the mortgagor. Entitlement does not depend on the party actively defending the suit. Even a defaulted party may participate. *Household Finance Services, Inc. v. Bank of America*, 883 So.2d 346 (Fla. 4th DCA 2004), *Golindano v. Wells Fargo Bank*, 913 So.2d 614 (Fla. 3d DCA 2005). Surplus proceeds may not be paid to the borrower's unsecured creditor, even if the borrower does not object. *Velasquez v. Ettenheim*, 89 So.3d 981 (Fla. 3d DCA 2012).

2. A superior lienor has no right to share in surplus because its lien is not eliminated. *Garcia v. Stewart*, 906 So.2d 1117 (Fla. 4th DCA 2005).

3. In 2006 the legislature substantially modified the procedure for distributing foreclosure sale surplus proceeds with the enactment of F.S. Section 45.031. This statute established a rebuttable legal presumption that it is the owner of record on the date of filing a lis

pendens who is the person entitled to surplus funds after payment of subordinate lienholders who have timely filed claims. It requires that the clerk hold surplus proceeds for sixty (60) days after the sale and sets forth a sworn form by which the owner may claim the proceeds. It is incumbent on subordinate lienholders, as well as any assignees of the owner of record at the time of filing the Notice of Lis Pendens to make a claim during the sixty (60) day period, or the funds will be disbursed to the owner of record. There is a conflict among the district courts as to whether the sixty days runs from the date of foreclosure sale or from issuance of certificate of title, not the earlier date of certificate of sale. *Bank of New York Mellon v. Glenville*, Case No. 2D15-5198 (Fla. 2nd DCA 2017) (foreclosure sale) *Straub v. Wells Fargo Bank, N.A.*, 182 So.3d 878 (Fla. 4th DCA 2015) (issuance of certificate of title). The Second District in *Glenville* certified this conflict to the Supreme Court.

4. A mortgagor defendant was not entitled to assert homestead exemption as to surplus funds where he had entered into a contract with a "surplus recovery" company to share any recovered surplus with it. Since the defendant did not have a good faith intention to reinvest the funds in a new homestead, the funds lost their homestead protection. *Town of Lake Park v. Grimes*, 963 So.2d 940 (Fla. 4th DCA 2007)

5. A judgment creditor that applies for payment from the surplus is entitled to interest for the time that the case is on appeal, but not for the time to rule on objections to the sale. *South Beach Mortgage Inv. Corp. v. Levine*, 109 So.3d 879 (Fla. 3d DCA 2013).

6. Where there are competing claims of entitlement to surplus proceeds, it is error to disburse without first determining priorities and the amounts due junior lienholders." *Wells Fargo Bank v. Aristo Mortgage, LLC*, 110 So.3d 99 (Fla. 3d DCA 2013).

7. It is error to release surplus proceeds to the third party purchaser, rather than the foreclosed property owner. *All Counties Surplus LLC v. Flamingo South Beach I Condominium Association, Inc.*, 211 So.3d 1096 (Fla. 3rd DCA 2017). See also *Rodriguez v. FNMA*, 220 So.3d 577 (Fla. 5th DCA 2017) (error to release surplus funds to buyer to satisfy subordinate lienholders who were not parties to foreclosure action.)

8. A trial court was reversed where it had directed that surplus proceeds from a second mortgage foreclosure sale be paid toward the first mortgage debt. In *Pineda v. Wells Fargo Bank, N.A.*, 143 So.3d 1008 (Fla. 3d DCA 2014), the Third District held that the $99,000 surplus must be paid to the foreclosed property owners, despite those owners' first mortgage debt had been discharged in bankruptcy. The first mortgagee was free to proceed with foreclosure against the property.

9. But be sure to bring a court reporter to a hearing on redemption of surplus funds. Failure to create a record prevented the lender from overturning an order releasing surplus funds to a third party due to the absence of a transcript of the hearing in *GMAC Mortgage, LLC v. Palenzuela*, 208 So.3d 181 (Fla, 3rd DCA 2016).

T. **Settlement Agreements**.

1. Courts favor settlement agreements. Even if a settlement involves dismissal with prejudice, the court retains jurisdictions to enforce its terms after dismissal. *Paulucci v. General Dynamics Corp.*, 842 So.2d 797 (Fla. 2003).

2. However, the extent of the trial court's jurisdiction only allows enforcement of the settlement agreement, not an action for damages for its breach. *Zimmerman v. Olympus Fidelity Trust, LLC*, 847 So.2d 1101 (Fla. 4th DCA 2003). All such agreements should provide for the lender's right to immediate foreclosure judgment in the instant action upon breach. Otherwise, per *Zimmerman*, a new suit will be necessary. See also, *Sarhan v. H&H Investors, Inc*., 88 So.3d 219 (Fla. 3d DCA 2011) (where settlement agreement did not specifically provide for foreclosure in the event of future default, court exceeded its authority in ordering foreclosure.)

3. Where the lender and borrower settled by the borrower reinstating the mortgage after judgment but prior to sale, the trial court's refusal to set aside the judgment, cancel the notice of lis pendens and return the original note from the court file was reversed in *Wells Fargo Bank, N.A. v. Giglio* 123 So.3d 60 (Fla. 4th DCA 2013). Citing the strong policy in favor of settlements, the 4th DCA explained that the trial court's refusal to return the note for this reinstated loan to the lender "left the parties in legal limbo."

U. **Other Restructuring and Work Out Considerations**.

1. Standstill Agreement

   a. In a typical standstill agreement, a foreclosing lender agrees to stop the foreclosure lawsuit, in return for the borrower waives its defenses and agrees to make certain payments to catch up, and to make certain agreed-upon future payments as well. The agreement usually provides that in the event of a future default, the lender may obtain a foreclosure judgment by simply filing an affidavit of default. This allows the borrower to avoid loss of the property, while allowing the lender a smooth, fast path to a foreclosure judgment if the borrower later defaults.

   b. Standstill agreements should provide for the lender's right to immediate foreclosure judgment in the instant action upon breach. Otherwise, per *Zimmerman* (See Section T, above), should the borrower default on the new agreement's terms, a new law suit will be necessary to foreclose the mortgage, greatly delaying this result.

   c. Standstill agreements also need to specify whether relevant terms of the loan documents survive, such as terms regarding notice and opportunity to cure defaults.

2. Bankruptcy

a. Pre-bankruptcy Waivers of Discharge. Bankruptcy courts generally have held that pre-bankruptcy waivers of discharge of particular debts are not enforceable. See *Klingman v. Levinson*, 831 F.2d 1292, 1292-96, 1296 n. 3 (7th Cir.1987) (observing in dictum that public policy reasons preclude a debtor from contracting away a right to obtain a discharge in bankruptcy on a specific debt in the future); *Hayhoe v. Cole (In re Cole*), 226 B.R. 647, 651-54 (BAP 9th Cir. 1998) (concluding that such pre-petition waivers are void as against public policy); *Chilcoat v. Minor (In re Minor*), 115 B.R. 690, 694-96 (D. Colo. 1990) (holding that a pre-petition waiver of discharge of debt in a state court action was unenforceable in a subsequent bankruptcy case because it failed to satisfy the statutory requirements for a waiver of discharge under § 727(a)(10) or for reaffirmation of a dischargeable debt under § 524(c)); *Marra, Gerstein & Richman v. Kroen (In re Kroen)*, 280 B.R. 347, 351 (Bankr. D. N.J. 2002) (observing that "such waivers are void, offending the policy of promoting a fresh start for individual debtors"); *Doug Howle's Paces Ferry Dodge, Inc. v. Ethridge (In re Ethridge)*, 80 B.R. 581, 586 (Bankr. M.D. Ga. 1987) (holding that a pre-petition state-court consent judgment waiving debtor's right to discharge a particular debt violates the spirit of the Bankruptcy Code and is thus void). In *Deutche Bank Trust Co. Americas v. Nash*, 136 So.3d 1267 (Fla. 2d DCA 2014), a trial court order granting relief from foreclosure judgment due to a bankruptcy discharge was reversed, where the parties had entered into a stipulation previously for entry of foreclosure judgment and sale.

b. Agreements to Stay Relief. While agreements not to file bankruptcy or to grant stay relief (or stating that a bankruptcy filing is a default that terminates an agreement), are generally not enforceable, an exception has been recognized by several bankruptcy courts, for stay relief agreements that are reached in the context of a loan workout or a forbearance agreement. Under this limited exception, if the lender, in the context of a workout agreement or foreclosure case--when the loan is already in default--gives up valuable rights or provides new consideration to the borrower, the lender may be able to enforce a stay relief agreement that it negotiates for and obtains in exchange for the new consideration. Note that this exception only applies in the post-default workout/forbearance situation, and that such agreements are not per se enforceable, but depend on the circumstances, and upon the effect on other creditors. *See, Farm Credit of Central Florida v. Polk*, 160 B.R. 870 (Bnkr. M.D. Fla. 1993).

3. Short Sales

a. Once a lender obtains title via foreclosure (whether by foreclosure or by deed-in-lieu) a resale can only bring market value, regardless of the amount the lender had loaned on the property. Hence, the recent

popularity of "short sales" i.e., sales with the lender's consent, prior to foreclosure, with the lender accepting less than the amount owed on the mortgage and waiving deficiency.

b. Documentary Stamps. In 2008, the Florida Department of Revenue issued an advisory ruling that on a short sale where the lender forgives the balance owed by the seller/borrower, documentary stamps are to be calculated only on the amount paid by the purchaser, not the total amount that was owed to the lender by the seller. For example, on a property with a $200,000 mortgage, where the lender agrees to release the mortgage in return for a short payment of $150,000 and release the $50,000 balance owed, the DOR expects that documentary stamps will be paid only on the $150,000 consideration paid by the buyer. Note that this ruling is limited to situations where the lender forgives the balance of the debt. Doc stamps may still be due up to the full amount of the debt less the amount paid from the sale proceeds if the lender takes back a note for the amount not paid in the sale or does not provide a release of the obligation in full. (See DOR Technical Assistance Advisement #08B4-006).

c. Multiple lenders. A first lienholder can be expected to require that neither the owner/borrower nor any subordinate lienholders receive any funds from a short sale. Thus, unless any subordinate lienholders are willing to release their liens for no payment, a short sale prior to foreclosure judgment is not an option.

d. The loan must be at least 30 days in default before most institutional lenders will even consider a short sale.

4. Second Mortgages

a. Frequently, equity has evaporated and second/third position lenders are not even responding when the first lender forecloses. Instead, they are concentrating on enforcing the loan guarantees against the borrower's principals.

b. In order to save its lien, a second mortgagee may have to buy out (redeem) the first mortgage. See, *Marina Funding Group v. Peninsula Property*, 950 So.2d 428 (Fla. 4th DCA 2007).

V. **Attorney's Fees**.

1. On mortgages with "one way" attorney's fees provisions that were entered into prior to the 1988 revision to F.S. 57.105(7) that gave courts discretion to treat such provisions as reciprocal, a mortgagor who prevails is not entitled to an award of fees. *Commercial Service of Perry, Inc. v. Campbell*, 861 So.2d 1258 (Fla. 4th DCA 2003).

However, in *Vives v. Wells Fargo Bank*, 128 So.3d 9 (Fla. 3d DCA 2013) the 3rd DCA affirmed denial of a fee award to a defendant borrower who prevailed below in a foreclosure case

that did not include a count suing on the promissory note. Because only the note contained a prevailing party fee provision, not the mortgage, F.S. 57.105(7)'s reciprocal provision was inapplicable.

"A plaintiff's voluntary dismissal makes the defendant the 'prevailing party' within the meaning of F.S. 57.105(7), even if the plaintiff refiles the case and prevails." *Mihalyi v. LaSalle Bank, N.A.*, 162 So.3d 113 (Fla. 4th DCA 2014) (reversing a denial of attorney's fees to the borrower/defendant and remanding for an evidentiary hearing as to amount.)

Similarly, where a lender plaintiff voluntarily dismissed after remand from reversal of its summary judgment, it was error not to award attorney's fees to the defendant. *Kelly v. BankUnited FBS*, 159 So.3d 403 (Fla. 4th DCA 2015). This is so, even where the plaintiff refiles the case and wins. *Mihalyi v. LaSalle Bank, N.A.*, 162 So.3d 113 (Fla. 4th DCA 2014).

2. A "motion" is not a "pleading". Recovery of attorney's fees requires that this request be pled. As such, a motion for award of fees, without a pleading requesting same, will be denied. *Sardon Foundation v. New Horizons Service Dogs, Inc.,* 852 So.2d 416 (Fla. 5th DCA 2003).

3. A mortgagee is not entitled to fees incurred in connection with asserting a theory of priority which is abandoned in settlement. *North Dade Church of God, Inc. v. J M Statewide, Inc.*, 851 So.2d 194 (Fla. 3d DCA 2003).

4. A second mortgagee who avoided foreclosure by redeeming the first mortgage after suit was filed is not a "prevailing party" for attorney's fees purposes. *Washington Mutual Bank v. Shelton*, 892 So.2d 547 (Fla. 2d DCA 2005).

5. Where a mortgagee failed to pay the required documentary stamps and intangible tax on a mortgage modification and note, and later, during the pendency of the foreclosure lawsuit, paid these fees, it was error to award attorney's fees for the time period prior to payment of such fees. *Bonfiglio v. Banker's Trust Co. of California*, 944 So.2d 1087 (Fla. 4th DCA 2006).

6. It was error to include bankruptcy attorney's fees incurred by the mortgagee in a foreclosure judgment, since such an award was the province of the bankruptcy court. *Martinez v. Giacobbe,* 951 So.2d 902 (Fla. 3d DCA 2007).

7. Where a lender dismissed its foreclosure complaint with prejudice, then filed a new case against the same defendant alleging the same factual and legal issues, the defendant was still entitled to an award of attorney's fees and costs (and a multiplier of 2.5 on the fees) incurred in defending the first case. *Bank of New York v. Williams*, 979 So.2d 347 (Fla. 1st DCA 2008).

8. In *Schniderman v. Fitness Innovations and Technologies, Inc.*, 994 So.2d 508 (Fla. 4th DCA 2008), an award of attorney's fees under F.S. 57.105 against a plaintiff and its lawyer that required the lawyer to pay 60% of the fees was affirmed and judgment entered directly against the lawyer for the portion awarded against him.

9. NOTE – Although per F.S. 687.06 an attorney's fee of no more than 10% of the principal amount of the loan is presumed to be reasonable, the plaintiff must still put on evidence of the amount incurred, even if a default has been entered against the defendant. *Coastal Community Bank v. Jones*, 23 So.3d 757 (Fla. 1st DCA 2009).

10. Where a mortgagor filed a "Notice of Intent to Claim Attorney's Fees" seven days before a deficiency hearing, his fee award was reversed since this notice did satisfy the pleading requirement, and also because it was filed too late to constitute meaningful notice to the plaintiff mortgagee. *BMR Funding, LLC v. SPCC Group, LLC*, 67 So.3d 1137 (Fla. 2nd DCA 2011).

11. But where a mortgagor's answer failed to specifically request prevailing party attorney's fees, she was nevertheless found entitled to fees. The allegation in her answer that she was obligated to pay fees to her attorney was found sufficient to put the plaintiff on notice of her fee claim. *Fanelli v. HSBC Bank USA*, 170 So.3d 72 (Fla. 4th DCA 2015). *See also, Bank United, N.A. v. Ajabshir*, 207 So.3d 354 (Fla. 3rd DCA 2016) (defendants who initially failed to request fees in pro se answer but later, through counsel, advised lender of intent to seek fees, held entitled to prevailing party fees.)

12. Where lender voluntarily dismissed foreclosure action, defendant borrower was "prevailing party" with regard to attorney's fees award. However, fees were properly denied where flat fee of $9,750 was sought and no evidence as to number of hours or reasonableness thereof was produced. *Raza v. Deutsche Bank, Nat Trust Co.*, 100 So.3d 121 (Fla. 2d DCA 2012).

13. A defendant's counsel's fee multiplier of 2.5 was affirmed where the lender's case was dismissed for failure to give proper pre-suit notice, the chance of success for the defendant was unlikely and there was testimony that no other area defense attorneys would take the case without a multiplier. *J.P. Morgan Mtg. Acquisition Corp. v. Golden*, 98 So.3d 220 (Fla. 2d DCA 2012).

14. It was error to include in a fee award to a foreclosing lender 3.5 hours "estimated time to complete" as per the lender's attorney's fee affidavit. *Lindsey v. Cadence Bank*, 135 So.3d 1164 (Fla. 1st DCA 2014) (remanding to enter a reduced judgment and for further proceedings as to any work performed post affidavit.)

15. A foreclosure defendant was found not to have waived his claim for fees by failing to request them in his motion to dismiss. Filing a motion to award fees within 30 days after dismissal was found to be sufficient. *Tunison v. Bank of America, N.A.*, 144 So.3d 588 (Fla. 2d DCA 2014). Also, the unilateral statement in lender's notice of voluntary dismissal that the dismissal was conditioned on each party bearing their own fees was held not binding on the defendant.

16. The court loses jurisdiction to determine a lender's attorney's fees once the lender voluntarily dismisses a foreclosure case. So where a lender received all its litigation fees from the closing of a short sale and then voluntarily dismissed, the court had no jurisdiction to rule on the borrower's claim that the lender took too large an amount in fees from the closing proceeds. *IberiaBank v. RHN Investments, Ltd*., 144 So.3d 583 (Fla. 4th DCA 2014).

17. A defendant's motion for attorney's fees was held timely despite being filed more than thirty days after the lender plaintiff had filed a notice of voluntary dismissal in *Wells Fargo Bank, N.A. v. Mailloux*, 178 So.3d 123 (Fla. 2d DCA 2015). The court found F.R.C.P. 1.525's thirty-day deadline for filing fee motions inapplicable since the lender had made its dismissal "conditional upon Plaintiff and the Defendants agreeing to pay their own attorney's fees and costs." Since the parties never reached such an agreement, the court reasoned that the notice was ineffective to commence the thirty-day period because the notice was conditional.

18. The reciprocity provision of F.S. 57.105(7) does not entitle an entity that is not party to the loan documents to prevailing party attorney fees against an unsuccessful foreclosing lender. *HSBC v. Frenkel*, 208 So.3d 156 (Fla. 3rd DCA 2016). See also, *Nationstar Mortgage LLC v. Glass,* 219 So.3d 896 (Fla. 4th DCA 2017) (where defendant in mortgage foreclosure succeeded in having suit dismissed for lack of standing under the contract sued upon, defendant could not thereafter rely upon reciprocity provision of section 57.105(7) as basis for claiming attorney's fees under that contract.)

19. A party that successfully defends a foreclosure action on the basis of lack of standing is not entitled to an award of attorney's fees because there is no privity between plaintiff and defendant sufficient to implicate F.S. 57.105(7). *The Bank of New York Mellon v. Fitzgerald*, 43D16-981 (Fla. 3rd DCA 2017); *Nationstar Mortgage, LLC v. Glass*, Case No. 4D15-4561 (Fla. 4th DCA 2017).

W. <u>Deficiency Claims</u>.

1. The Florida Fair Foreclosure Act (2013 Fla. Sess. Law Serv. Ch. 2012-137), added F.S. 95.11(5)(h), sets the limitations period for post-foreclosure deficiency claims on one-to-four family dwelling unit properties at one year, which starts running the day after the certificate is issued by the clerk of court or the day after the mortgagee accepts a deed in lieu of foreclosure. However, this one-year limit does not apply to deficiency actions brought after short sales. *Bush v. Whitney Bank*, Case No. 5D16-2344 (Fla. 5th DCA 2017); *Whitney Bank v. Grant*, 223 So.3d 476 (Fla. 1st DCA 2017); *Whitney Bank v. Grant*, Case No. 1S-16-5112 (Fla. 1st DCA 2017).

The trial court in the foreclosure action itself may limit a plaintiff's right to a deficiency judgment, but must state the legal or equitable reasons for doing so. *Shaffer v. Wells Fargo Bank, N.A.*, 190 So.3d 654 (Fla. 5th DCA 2016).

Deficiency judgments are within discretion of the trial court. It is premature to attempt to determine the amount of a deficiency judgment until the sale has occurred and been confirmed. *Shaffer v. Wells Fargo Bank, N.A.*, 190 So.3d 654 (Fla. 5th DCA 2016). The amount bid at foreclosure sale is not conclusive on the issue of the property's market value. *Century Group, Inc. v. Premier Financial Services East*, 724 So.2d 661 (Fla. 2d DCA 1999). The Court also considers the fair market value of the property through the testimony of appraisals experts. The court may be required to examine other issues in determining a deficiency beyond simple testimony of the appraisal. For example, unpaid property taxes reduce the fair market value of the property and should be considered in determining a deficiency judgment. *Chidnese v. McCollem*, 696 So.2d 879 (Fla. 4th DCA 1997). Finding that seller's allocation of value

between real and personal property involved in transaction in order to save documentary stamp fees and real estate commissions was inappropriate is not basis for using unclean hands doctrine to reduce deficiency where evidence did not demonstrate that inappropriate allocation injured adverse party or that adverse party altered his behavior in reliance on that conduct. *McCollem v. Chidnese*, 832 So.2d 194 (Fla. 4th DCA 2002).

2. Pursuant to F.S. Section 702.06 (2015), entry of a deficiency judgment is within the sound discretion of the court, and its amount may not exceed the difference between the judgment (or, in the case of a short sale, the outstanding debt) and the fair market value of the property on the date of sale.

When a mortgagee purchases the foreclosed property by bidding the full amount of the final judgment of foreclosure, the mortgagee's judgment is satisfied in full and a deficiency judgment is not possible. *Warehouses of Florida v. Hensch*, 671 So.2d 885 (Fla. 5th DCA 1996).

3. While deficiency rulings fall within the sound discretion of the court, they are the rule, rather than the exception. *Thomas v. Premier Capital, Inc.*, 906 So.2d 1139 (Fla. 3rd DCA 2005). The amount paid by an assignee of a mortgage is irrelevant to the amount of deficiency judgment to be entered. *Thomas*, *supra*; *Ahmad v. Cobb Corner, Inc.,* 762 So.2d 944 (Fla. 4th DCA 2000).

4. A mortgage foreclosure judgment is not a judgment for a specific monetary award, but merely directs sale of the collateral, with deficiency judgment issues of necessity being deferred until afterward, when the collateral's value can be compared with the amount of the judgment. Accordingly, where a mortgage foreclosure judgment included the words "for let execution issue," that phrase was stricken on appeal as an improper "circumvention of the process required to establish the right to a deficiency judgment." *Farah v. Iberia Bank*, 47 So.3d 850 (Fla. 3d DCA 2010).

5. Generally, a deficiency judgment is calculated based on the difference between the amount owed on the final judgment and the fair market value of the property on the date of the foreclosure sale. *Ahmad v. Cobb Corner, Inc.* 762 So.2d 944 (Fla. 4th DCA 2000). But where the successful high bid at the foreclosure sale actually exceeds fair market value, the defendant is entitled to a set-off for the full amount of the bid. *Gottschamer v. August, Thompson, Sherr, Clark and Shafer, P.C.*, 438 So.2d 408 (Fla. 2d 1983). But the court is not required to accept the opinion of either side's valuation expert. *RAMPHAL V. TD Bank, N.A.*, 206 So.3d 172 (Fla. 5th DCA 2017) (trial court has discretion to find value different than that provided by either expert if it provides articulable, factual basis for doing so supported by competent substantial evidence in the record). *See also*, *Friedman v. Mercantil Commercebank, N.A.*, 211 So.3d 310 (Fla. 3rd DCA 2017) (trial court has broad discretion in determining fair market value based on evidence in the record, including valuation opinions from competing expert witnesses).

6. A deficiency judgment was reversed where the only testimony as to value was from an appraisal five months after the foreclosure sale, with no competent testimony that values as of the date of appraisal would have been the same as on the date of foreclosure sale. *Empire Developers Group, LLC v. Liberty Bank*, 87 So.3d 51 (Fla. 2d DCA 2012). But note – the date

of transfer of the property is the valuation date if there is no foreclosure sale. *Friedman v. Mercantil Commercebank, N.A.*, 211 So.3d 310 (Fla. 3rd DCA 2017).

7. After foreclosure sale, interest runs not on the total amount of the foreclosure judgment, but rather only on the net still owed after deducting the value received as a result of the foreclosure sale, from the sale date forward. *Empire Developers Group, LLC v. Liberty Bank*, 87 So.3d 51 (Fla. 2d DCA 2012).

8. Jury Trial on Deficiency Claims. A borrower is not entitled to a jury on a count on a deficiency claim because that is an extension of the relief to which the lender is entitled in foreclosure, and is to be heard by the court per F.S. Section 702.06. *Kinney v. Countrywide Home Loans Servicing, L.P.*, 165 So.3d 691 (Fla. 4th DCA 2015). (See also, discussion of jury trials on pages 63, above.)

But note –an endorser to the note who is not a party to the mortgage has a right to a jury on a deficiency claim. See *Hobbs v. Fla. First Nat'l Bank of Jacksonville*, 480 So.2d 153, 156 (Fla. 1st DCA 1985).

9. Separate Action for Deficiency. A lender may pursue a deficiency in the same action as foreclosure has been entered, or may pursue a separate deficiency lawsuit. Per amended F.S. Section 95.11(5)(h) (discussed in subsection 1, above) such claims must be filed within one year of issuance of certificate of title or acceptance of deed in lieu.

But a conflict exists among the district courts on whether entry of foreclosure judgment with a reservation of jurisdiction to consider entering a deficiency judgment precludes a separate suit to recover the deficiency where the foreclosure court had not granted or denied a claim for a deficiency judgment. The Second, Third, Fourth and Fifth Districts permit a separate deficiency lawsuit in this situation. See, *Gdovin v. Dyck-O'Neal, Inc.*, 198 So.3d 986 (Fla. 2nd DCA 2016), *Cheng v. Dyck-O'Neal, Inc.*, 199 So.3d 932 (Fla. 4th DCA 2016), *Garcia v. Dyck-O'Neal, Inc*., 178 So. 3d 433 (Fla. 3d DCA 2015), *Dyck-O'Neal, Inc. v. Weinberg*, 190 So. 3d 137 (Fla. 3d DCA 2016), *Dyck-O'Neal, Inc. v. Hendrick*, 200 So.3d 181 (Fla. 5th DCA 2016) and *Dyck-O'Neal, Inc. v. Beckett*, 200 So.3d 179 (Fla. 5th DCA 2016).

The First District reached the opposite result in *Higgins v. Dyck-O'Neal, Inc*., 201 So.3d 157 (Fla. 1st DCA 2016) and *Reid v. Compass Bank*, 164 So. 3d 49 (Fla. 1st DCA 2015), and on rehearing in *Higgins* refused to certify the conflict. (41 FLW D2205b). The Fifth District has certified this conflict in both *Beckett* and *Hendrick*. The Fourth District similarly has certified this question in *Dyck-O'Neal, Inc. v. McKenna*, 198 So.3d 1038 (Fla. 4th DCA 2016).

Where a lender included a request for deficiency in its foreclosure complaint, but then filed a separate action for a money judgment on the promissory note, the trial court was within its discretion to consolidate the two actions, treat the note case as a deficiency claim, and enter a money judgment for the deficiency amount. *Reid v. Compass Bank*, 164 So.3d 49 (Fla. 1st DCA 2015).

A Florida court has jurisdiction to consider a deficiency lawsuit over a non-resident due to the defendant having owned Florida property, even if none is owned as of filing of the deficiency suit. *Dyck-O'Neal, Inc. v. Rojas*, 197 So.3d 1200 (Fla. 5th DCA 2016).

The venue provisions of the federal Fair Debt Collection Practices Act, 15 U.S.C. Sections 1692-1692p (2014) are inapplicable to deficiency actions. As such, a deficiency claim against a Michigan resident concerning a Florida mortgage was permitted to be brought in Florida in *Aluia v. Dyck-O'Neal, Inc.*, 205 So.3d 768 (Fla. 2nd DCA 2016).

10. Introduction of the foreclosure judgment into evidence is not necessary when a deficiency judgment is entered in the same action as the foreclosure judgment. *TD Bank v. Graubard*, 172 So.3d 550 (Fla. 5th DCA 2015).

11. The plaintiff may execute on a deficiency judgment the same as on other types of money judgments, including executing on the judgment defendant's stock in a corporation. See, *Klauber v. First Fed. Bank of Fla.*, 198 So.3d 762 (Fla. 2d DCA 2016).

12. Appeal of denial of a post-judgment deficiency request is by petition for writ of certiorari. *Collins Asset Group, LLC v. Property Asset Management, Inc.*, 197 So.3d 87 (Fla. 1st DCA 2016).

13. Deficiency jurisdiction over non-residents. A Florida court has jurisdiction to enter deficiency awards against non-Florida residents, since "section 48.193(1)(a)(3), Florida Statutes (2013), the Florida long-arm statute, allows a Florida court to exercise jurisdiction over a non-resident who owns … any real property in this state." *Dyck-O'Neal, Inc. v. Moniz,* 198 So.3d 1079 (Fla. 5th DCA 2016).

14. Guarantors, who could have been, but were not, named in the foreclosure action, are not estopped from challenging the amount of the deficiency in a subsequent deficiency action against them. *Romagnoli v. SR Acquisitions Homestead, LLC*, 218 So.3d 955 (Fla. 3rd DCA 2017).

15. Florida Consumer Collection Practices Act (F.S. 559.715) inapplicable to deficiency actions. *Dyck O'Neal, Inc. v. Ward*, 216 So.3d 664 (Fla. 2nd DCA 2017), held that the FCCPA does not apply to deficiency actions either, since they are not actions to collect a consumer debt.

17. Where in a separate action for a deficiency judgment the complaint is personally served on the defendant, a deficiency may be entered even though the underlying foreclosure complaint had been served on this defendant by publication. *Dyck O'Neal, Inc. v. Meikle*, 215 So.3d 604 (Fla. 4th DCA 2017).

18. And a mortgage guaranty insurer which has paid the foreclosing mortgagee under the terms of its policy lacks standing to seek a deficiency because it is not a party to the foreclosure action. *Ibanez v. 21st Mortgage Corp.*, 207 So.3d 901 (Fla. 4th DCA 2017).

19. Conflict of Laws re. Deficiency Actions. Where loan documents stated that note and other loan documents would be governed by Texas law (under which borrowers and guarantors waived right to offset deficiency by fair market value of property), but that foreclosures would be governed by Florida law, lender's claim for deficiency was governed by Florida law because the claim for deficiency was a continuation of the lender's foreclosure action. *Bonita Real Estate Partners, LLC v. SLF IV Lending, L.P.*, 222 So.3d 647 (Fla. 2nd DCA 2017).

20. Appeal of deficiency judgment. A deficiency judgment was affirmed despite it being entered without an evidentiary hearing in *Debas v. Boston Investors Group, Inc.*, Case No. 3D16–2672, 2017 WL 3271833 (Fla. 3rd DCA 2017),where defendant's counsel failed to either object and request an evidentiary hearing, request a continuance, or move for rehearing. As with any other judgment, appeal cannot succeed without the appropriate groundwork at the trial level.

X. Appellate Issues.

FRCP Rule 1.530(e) "allows review of the sufficiency of the evidence despite any deficiencies in the objections made at trial and absence of post-trial motions. Rule 1.530(e) applies to appeals challenging the sufficiency of the evidence in mortgage foreclosure actions after bench trial." *Lacombe v. Deutsche Bank Nat. Trust Co.*, 149 So.3d 152 (Fla. 1st DCA 2014). (Lack of contemporaneous objection at trial held not a bar to appeal based on record's lack of substantial evidence of trustee's standing in the record where pooling and servicing agreement not shown to apply to the loan at issue.)

A third party acquiring title to the subject property during a foreclosure action was found to lack standing to appeal the foreclosure judgment where it had moved for, and been denied, leave to intervene and had failed to appeal that denial. *YHT & Associates, Inc. v. Nationstar Mortgage LLC*, 177 So.3d 641 (Fla. 2d DCA 2015). See also, *Carlisle v. U.S. Bank, N.A*., 225 So.3d 893 (Fla. 3rd DCA 2017).

And a third party purchaser who obtained title to property that was subject to notice of lis pendens has no right to challenge plaintiff's standing to foreclose mortgage. *State Trust Realty, LLC v. Deutsche Bank Nat. Trust Company Americas*, 207 So.3d 923 (Fla. 4th DCA 2016).

A notice of appeal was held to be void where appellant had filed a bankruptcy petition prior to filing of notice of appeal in *Hewett v. Wells Fargo Bank, N.A.,* 197 So.3d 1105 (Fla. 2nd DCA 2016). Filing of the notice was deemed the continuation of a judicial proceeding prohibited by the automatic bankruptcy stay, so the appeal was dismissed for lack of jurisdiction.

Where a foreclosure defendant appeals entry of final judgment and also files bankruptcy, but then enters a settlement in the bankruptcy case in which it surrenders any interest in the property, it is estopped to challenge the foreclosure judgment and the lender is entitled to dismissal of the appeal of the final judgment. *Clay County Land Trust v. HSBC Bank USA, N.A.*, 219 So.3d 1015 (Fla. 1st DCA 2017).

REAL ESTATE FINANCE AND LENDING

By

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ADVANCED REAL ESTATE FINANCE

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I. Mortgage Loan Modifications.

A. Why Modify a Loan? In commercial lending, certain circumstances or events may make it desirable for a borrower and lender to modify the terms of an existing mortgage loan. For example:

1. Delays in completing construction of a building, or in the sale of residential units in a subdivision or condominium project, may hinder a borrower's ability to pay the loan in full by the maturity date. An extension of the maturity date of the loan may be necessary if the parties desire to avoid a borrower default.

2. The value of a tract of land or completed project that is collateral for a loan may decline due to general market conditions, causing the loan to value ratio upon which the loan was underwritten to become unbalanced. The lender may wish to take additional collateral to restore the loan to value ratio, or accept additional borrowers or guarantors of the loan to provide additional security for repayment.

3. General market conditions may result in an increase or decrease in prevailing interest rates, such that borrower and lender desire to negotiate a change in loan terms.

4. A potential purchaser of real property encumbered by an existing mortgage may wish to assume the existing mortgage (and related loan) at the closing of such purchase and sale.

5. A borrower may desire to borrow additional funds from a lender with which such borrower has an existing mortgage loan, and to secure repayment of same with the existing mortgage (note that the existence of a proper future advance clause in the existing mortgage will affect the priority of said mortgage as to the additional money advanced).

B. Common Loan Modifications. Some of the more common mortgage loan modifications are:

1. A simple renewal of an existing loan that is at or past maturity;

2. Changing the interest rate, amount or manner of calculating payments, or the maturity date of an existing loan;

3. Substituting or releasing collateral for an existing loan;

4. Adding additional collateral, borrower(s) and/or guarantor(s);

5. Consolidating or bifurcating existing loan obligations;

6. Cross-collateralizing or cross-defaulting existing loan obligations;

7. An advance of additional funds under an existing loan (commonly referred to as a future advance); and

8. Amending and restating existing loan documents in their entirety (including the note, mortgage, collateral assignments, and any loan agreement), particularly after the assignment of a loan from one lender to another.

C. Potential Issues When Modifying a Loan. A lender must take into consideration potential issues that could arise as a result of modifying an existing mortgage loan. For example:

1. ***Loss of Priority***. The immediate concern of a mortgage-secured lender is whether a modification of a note and other loan documents will cause a loss of priority of the loan security against possible junior lienholders or encumbrancers on the same collateral, if the modification is entered into without the consent of such junior lienholders or encumbrancers.

i. Many courts have held that a material modification of a loan secured by a senior lien on property, including an increase of the interest rate, a shortening of the maturity date or an increase of the amount of the debt, prejudices the holder of a subordinate lien on the same collateral and results in a loss of priority of the senior lien holder. *See, e.g.*, *Gluskin v. Atl. Sav. & Loan Assn.,* 32 Cal. App. 3d 307, 108 Cal. Rptr. 318, 323 (Ct. App. 1973) (lender and borrower could not bilaterally enter a material modification of the loan to which the seller had subordinated, without the consent of the seller to the modification, if the modification materially affected the seller's rights); *Shultis v. Woodstock Land Dev. Assocs.,* 188 A.D.2d 234, 594 N.Y.S.2d 890, 893 (1993) (changing the interest rate on a loan and bringing additional interest charges within lien of the mortgage caused prejudice, since the change increased the total amount of indebtedness with priority over subordinate lien); *but see* Eurovest Ltd. v. 13290 Biscayne Island Terrace Corp., 559 So. 2d 1198 (Fla. 3d DCA 1990).

ii. If the modification of an existing mortgage-secured loan constitutes a "novation" under Florida law, and is done without the consent of junior lienholders/encumbrancers, then the previously subordinate liens of such junior lienholders/encumbrancers will gain priority over the formerly senior mortgage lien. Under Florida law, a "novation" is a particular type of modification, in which a new debt or obligation is substituted for an existing one, extinguishing the old debt or obligation and substituting a new debt or obligation in its place. The four essential elements of a novation under Florida law are:

a. The existence of a prior, valid obligation;

b. The agreement (expressed or implied, written or oral) of all necessary parties to a new obligation;

c. The extinguishment of the old obligation; and

d. The validity of the new contract

See, e.g.: *United Bonding Ins. Co. v. Southeast Reg. Bldrs., Inc.,* 236 So.2d 460 (Fla. 1st DCA 1970); *Pinnacle Holding, Inc. v. Biolagics, Inc.,* 643 So. 2d 642 (Fla. 2d DCA 1994).

iii. There is no easy litmus test for whether a novation has occurred in a given transaction. In general, however, a novation requires the express or implied agreement of all the parties (including the lender, the original debtor, and any new debtor or lender). *See, e.g.*, *Tysen v. Somerville*, 35 Fla. 219; 17 So. 567 (Fla. 1895); *Moses v. Woodward*, 109 Fla. 348, 147 So. 690 (Fla. 1932). Florida courts generally hold that the elements of a novation are proven based upon the intent of the parties at the time of the modification. *See, e.g.*, *Pinnacle Holding v. Biolagics, Inc.,* 643 So. 2d 642 (Fla. 2d DCA 1994); *Evans v. Borkowski,* 139 So. 2d 472 (Fla. 1st DCA 1962), *cert*. *den*., 146 So. 2d 378 (Fla. 1962). Once the facts are established, a novation may be implied as a matter of law by the court. *See, e.g.*, *Evans v. Borowski,* 139 So. 2d 472.

a. Certain modifications tend to show intent to effectuate a novation, for example:

- Satisfying an existing obligation and accepting a new one, absent evidence of intent to continue the former obligation. *See, e.g.*, *Resolution Trust Corporation v. Niagara Asset Corporation*, 598 So.2d 1074 (Fla. 2d DCA, 1992) (question of fact, precluding summary judgment, was presented as to whether mortgage that was subsequently issued and that satisfied first mortgage, was intended to be renewal of first mortgage, so as to give new mortgage priority over intervening second mortgage in foreclosure proceeding).

- Shortening the maturity date of an obligation may constitute a novation (although there is no Florida or national authority on this point).

- Increasing existing obligations (such as increasing the interest rate of a note). *See, e.g.*, *Shane v. Winter Hill Fed. Sav. & Loan Ass'n*, 492 N.E.2d 92, 95-97 (Mass. 1986) (where first mortgage gave mortgagee right to raise interest rate by 1%, but mortgagee raised rate by 1.25% without notice to second mortgagee, increase was prejudicial and unenforceable).

- Replacing *obligors* under an existing obligation (an important factor establishing evidence of intent to extinguish an existing indebtedness and create a new one), except as noted in the following paragraph (in connection with assumption of mortgage obligations). *See, e.g.*, *Moses*, 109 Fla. 348.

- Notwithstanding the previous statement, the assumption of an existing note and mortgage obligation by a new obligor (usually in connection with the sale of real property) does not constitute a novation, unless the lender accepts the assuming obligor as the sole obligor, in effect releasing the existing obligor. *See, e.g.*, *Slotow v. Hull Inv. Co.*, 100 Fla. 244, 129 So 577 (Fla., 1930).

b. Certain other modifications do not tend to show intent to effectuate a novation, for example:

- Extension of the maturity date. *See, e.g.*, *Uniontown Sav. & Loan Assoc. v. Enany*, 15 Pa. D & C.3d 22, (Pa. Ct. of Common Pleas 1980).

- Reduction of interest rate.

- Addition of guarantors of the debt.

- Certain other modifications that the Florida Commissioner of Insurance does not believe constitute a novation are set forth in **Exhibit "B"** to these materials.

iv. There are various means of protecting a senior lender against loss of priority of its mortgage lien based on a modification of the loan documents. For example:

a. Structure the modification to protect the priority of the senior mortgage lien by (A) preserving the continuity of the original debt with the modified debt, (B) disclaiming characterization of the modified debt as a "novation" in the modification agreement, (C) generally avoiding provisions of any kind that might prejudice the rights of subordinate lienholders, and (D) obtaining written consents of subordinate lienholders in connection with a loan modification whenever possible.

b. Include a provision for future advances in the senior mortgage, in compliance with Section 697.04, Florida Statutes. If so stated, the mortgage may secure future advances of principal made within twenty years of the date of the mortgage with equal priority to the original principal advanced. Additionally, under the future advance statute, accrued interest, negative amortization or deferred interest, disbursements made for payment of taxes, levies, or insurance on the property covered by the lien, and any advances or disbursements made under a construction loan agreement referred to in a mortgage to enable completion of the contemplated improvement, with interest on such advances or disbursements, are secured by the mortgage or other instrument *even though* the mortgage or other instrument does not provide for future advances, or the advances or disbursements cause the total indebtedness to exceed the face amount stated in the instrument.

c. Obtain an appropriate title insurance endorsement to the existing lender policy of title insurance to protect against loss of priority of the senior lien. This effectively transfers risk of loss of priority from the senior lender to the title insurance underwriter.

- Rule 69O-186.005(13), Fla. Admin. Code, is the rule applicable to endorsements to existing mortgagee title insurance policies, issued to insure a mortgage modification.

- The rule provides that, in general, if a modification effects any change in the terms of a mortgage, other than as provided for in the exceptions, a premium is due at the same rate provided in Rule 69O-186.003, F.A.C., regarding so-called "substitution loans" (a premium that is anywhere from 30% to 100% of the promulgated minimum mortgage title insurance premium, depending upon the time elapsed since the effective date of the original mortgage). See **Exhibit "A"** to these materials.

- The exceptions to this rule are found in the class of modifications that fall within any of the eight "safe harbors" under the regulations, for which only a nominal endorsement fee is charged. See **Exhibit "B"** to these materials for a list of such exceptions. Why the exceptions? Because Florida title insurance underwriters collectively consider these modifications to be at very low risk of constituting a "novation" or major modification affecting a loss of priority.

2. ***Potential Release of Guarantors***. A material modification of the existing loan obligations evidenced and secured by the loan documents may release existing guarantors of the original obligations, unless the guarantors affirm and renew their guaranties.

i. In Florida, "a continuing guaranty remains in effect until revoked ... [and] covers all transactions, including those arising in the future, which are within the ... contemplation of the agreement." *See, e.g.*, *Causeway Lumber Co. v. King*, 502 So.2d 80, 81 (Fla. 4th DCA 1987).

ii. Under Florida law, a guarantor is released, "where the creditor materially alters the principal debtor's obligation to the detriment of the guarantor without the guarantor's consent." *Miami Nat'l Bank v. Fink*, 174 So.2d 38 (Fla.3d DCA 1965).

iii. However, one Florida court has held that a lender did not waive its right to enforce a guaranty of a promissory note by extending the loan's maturity date, where (a) the lender rejected the request, (b) there was no evidence that the guarantor notified lender that he was revoking his guaranty, and (c) the terms of the guaranty made it unconditional and irrevocable. *See, e.g*., *Branch Banking & Trust Co. v. Hamilton Greens, LLC*, 942 F. Supp. 2d 1290 (S.D. Fla. 2013)

iv. Although the guaranty may (and usually does) provide that the guarantor's liability is not affected by any subsequent amendments, modifications, or changes in the guarantied loan documents, such waivers may or may not be effective.

v. Lender's counsel must ensure that all guarantors, indemnitors and other parties liable for payment of the loan either execute the modification agreement or reaffirm their obligations in a separate written instrument at the time the modification agreement is executed.

3. ***Documentary Stamp Taxes***. A material modification of the existing obligations evidenced and secured by the loan documents may result in payment of Florida documentary stamp tax, which might have been avoided (in whole or in part) had the modification been properly documented. Documentary stamp tax avoidance typically involves documenting any agreement for the modification of a note and mortgage as an "exempt renewal note" under Florida law (see Section II below).

II. **Documentary Stamp Tax and Intangible Tax**.

A. Documentary Stamp Taxes and Intangible Taxes, Generally.

1. Generally speaking (subject to certain exception), a promissory note or other obligation to pay money that is made, executed, delivered, sold, transferred, ***or*** assigned in the state in Florida is subject to documentary stamp tax. Documentary stamp tax is also payable on any mortgage, trust deed, security agreement, or other evidence of indebtedness filed or recorded in this state, and each renewal of the same. The tax rate on

notes and mortgages is $.35 per $100 of consideration (or fraction thereof). *See* Fla. Stat. § 201.08. For a new loan, the consideration used to calculate the documentary stamp tax will be the loan amount.

2. When a promissory note is *not* secured by a mortgage, security agreement or other pledge, documentary stamp tax is capped at $2,450.00, regardless of the amount of the note.

3. When there is both a mortgage (or trust deed, or security agreement) *and* a promissory note executed in connection with the same indebtedness, documentary stamp tax is paid on the mortgage (or trust deed, or security agreement) at the time of recordation, and a notation is made on the note that the tax has been paid on the mortgage (or trust deed or security agreement), so that the tax is not charged twice.

4. In addition to documentary stamp taxes, a one-time nonrecurring intangible tax of two mills is imposed on each dollar of any note or other obligation for payment of money which is secured by a mortgage, deed of trust, or other lien upon real property situated in the state of Florida (*See* Fla. Stat. § 199.133).

B. Documentary Stamp Taxes on Renewal Notes.

1. Pursuant to Section 201.08, Florida Statutes, documentary stamp tax is payable on a promissory note or other written obligation to pay money, and each "renewal of the same." Under Section 201.08, a "renewal" includes only the modification of an original document which (i) changes the terms of the indebtedness by adding one or more obligors, (ii) increases the principal balance, (iii) changes the interest rate, (iv) changes the maturity date, or (v) changes the payment terms. Unless a renewal note is an *exempt* renewal note as described in subsection 2. below, the renewal note will be subject to the full payment of documentary stamp tax.

2. Section 201.08 also provides that modifications to documents which do not modify the terms of the indebtedness are not considered "renewals," for example: modifications to correct errors; modifications of existing loan covenants unrelated to the debt (such as the obligation to provide financial statements); severing a lien into separate liens, or substituting or adding collateral under certain circumstances; consolidating debt or collateral under certain circumstances; adding changing or deleting guarantors; or substituting a new mortgagee or payee if the new mortgagee or payee retains sufficient documentation to show proof that the tax was paid on the original note or mortgage. These minor modifications do not trigger the payment of documentary stamp tax.

3. While renewal notes are generally subject to documentary stamp tax as noted above, *certain* renewal notes may be exempt. Per Section 201.09, Florida Statutes, a renewal promissory note is exempt from payment of documentary stamp taxes (provided that the tax was paid on the original note) if (i) the renewal note renews and extends only an amount equal to or less than the outstanding principal balance of the original note as of the date of execution of the renewal note (or with respect to a revolving obligation, the renewal note renews and extends no more than the original face amount of the original

note), (ii) the original note is attached to and kept with the renewal note, (iii) the renewal note is executed by the original obligors, and (iv) an appropriate legend is placed on the renewal note. If any of these requirements is not met, the note is a non-exempt renewal note and is subject to the full payment of documentary stamp tax, even if no additional principal is being loaned.

4. Notwithstanding the requirement described in subsection 2(i) above: if a renewal note for a term loan increases the unpaid balance of the original note, but otherwise meets the exemption criteria of Florida Statutes Section 201.09, then documentary stamp tax is only payable on the face amount of the *increase*; and if a renewal note for a revolving obligation increases the original face amount of the original note, but otherwise meets the exemption criteria of Section 201.09, then documentary stamp tax is also only payable on the amount of the increase. Note that if a mortgage is modified to change a limitation on recovery set forth therein, or (with respect to a loan secured by property located in Florida and in other states) to change the tax base attributable to the property located in Florida, those changes may trigger the payment of additional documentary stamp tax and/or non-recurring intangible tax.

5. The documentary stamp tax statute and Florida Department of Revenue regulations interpreting it are very strict in terms of requiring compliance with every aspect of exemption from payment of additional tax.

C. Documentary Stamp Taxes on Multi-State Mortgages. In complex real estate lending transactions involving large sums of money, the loan may be secured by one or more security instruments encumbering real property located in Florida and in another state or states. When that occurs, borrowers and lenders will typically either apportion the amount of the indebtedness to which the Florida documentary stamp tax applies (based on the value of the Florida real property collateral as compared to the value of the out-of-state real property collateral), or (if the lender is willing) limit the lender's recovery against the Florida real property (in order to reduce the amount of tax payable). Rule 12B-4.053(31) and (32), Florida Administrative Code, set forth the rules for calculating documentary stamp tax on loans secured by property in multiple states.

1. Note Secured by a Multi-State Mortgage. When a note is secured by a mortgage/security instrument that describes and pledges the Florida property and the out-of-state property (a "Multi-State Mortgage") recorded in Florida, documentary stamp tax is calculated based upon (i) for notes executed outside the state of Florida, the percentage of indebtedness which the value of the mortgaged property located in Florida bears to the total value of all the mortgaged property, or (ii) for notes executed in the state of Florida, the greater of (a) the amount of the note (with a maximum tax due of $2,450), or (b) the percentage of the indebtedness which the value of the mortgaged property located in Florida bears to the total value of all the mortgaged property. The Multi-State Mortgage is required to state the value of the Florida property, the value of mortgaged property in the other state(s), and the percentage of the Florida property in relation to the total property. Since the Multi-State Mortgage encumbers (in addition to Florida property) property located in another state(s), it will also need to be recorded or filed in such other state(s) as well.

2. Note Secured by a Mortgage Encumbering Only Florida Property, and a Mortgage(s)/Security Agreement(s) Encumbering Out-Of-State Property. When a note is secured in part by a mortgage recorded in Florida which describes and pledges only the Florida property (a "Florida Mortgage"), and in part by a mortgage(s)/security agreement (*not* recorded in Florida) which describes and pledges out of state property, documentary stamp tax is calculated based upon: (i) for notes executed outside the state of Florida, the greater of (a) the percentage of indebtedness which the value of the mortgaged property located in Florida bears to the total value of all the mortgaged property, or (b) the value of the Florida property; or (ii) for notes executed in the state of Florida, the greater of (x) the amount of the note (with a maximum tax due of $2,450), (y) the percentage of the indebtedness which the value of the mortgaged property located in Florida bears to the total value of all the mortgaged property, or (z) the value of the property located in Florida. The Florida Mortgage is required to state the value of the Florida property, the value of mortgaged property in the other state(s), and the percentage of the Florida property in relation to the total property. Note that, unlike a loan secured by a Multi-State Mortgage, when a loan is secured in part by a Florida Mortgage (recorded in Florida) and in part by a mortgag(s)/security instrument(s) encumbering out-of-state property (not recorded in Florida), the taxable portion of the indebtedness for purposes of documentary stamp tax cannot be less than the value of the Florida property.

3. Limitation on Recovery. Rule 12B-4.053(31) and (32) also provide that when a mortgage limits recovery thereunder to less than the amount of the indebtedness secured, then in lieu of calculating documentary stamp tax as described in subsections (1) or (2) above, the tax is calculated based on (i) for notes executed outside the state of Florida, the amount to which the mortgage limits recovery, or (ii) for notes executed in the state of Florida, the greater of the amount of the note (with a maximum tax due of $2,450) or the amount to which the mortgage limits recovery. If documetary stamp tax is calculated based on a limitation on recovery as described above, the mortgage is not required to state the value of any of the property or the percentage the Florida property bears to the total property.

4. Value of the Property. Note that the value of the Florida property, for purposes of calculating documentary stamp taxes under Rules 12B-4.053(31) and (32), is the *unencumbered* value. If the property is already encumbered by senior debt, calculating documentary stamp taxes based on the value or percentage of value of the Florida property may not work out as expected.

III. **Limited Recourse Borrowing and "Carve-Out" Guarantees.**

A. Limited Recourse Borrowing.

1. In general, a borrower is expected to repay the loan in full at maturity or upon default. If the borrower fails to do so, it is liable for damages in the amount of all principal, interest, late charges, and other sums owed under the loan documents. The lender can also exercise its rights under the mortgage, collateral assignments of leases and other rights, and any security agreement to sell the real and personal property collateral to offset the proceeds against the sums owed by the borrower

2. However, the borrow may be able to negotiate provisions in the loan documents that limit the lender's rights in the event of default to the real and personal property collateral (and rents and profits derived therefrom) and not to the other assets of the borrower. This is often referred to as "non-recourse" borrowing, although a more accurate description would be "limited recourse" borrowing, since the lender does have recourse against the borrower, limited, however, to taking borrower's real property and other collateral in the event of a default under the loan documents.

3. Limited recourse borrowing has increased with the growth in use of special purpose entities (SPEs) by borrowers, particularly in securitized transactions. Since an SPE has only limited assets apart from the collateral for the loan, the lender has, in effect, limited recourse by definition. Recourse to any assets other than the property owned by the SPE, and any cash flow from the property, must come from some other source.

4. The "other sources" are typically guarantors of the loan, either living individuals or affiliated or parent companies of the SPE with independent assets evaluated during the underwriting phase of the loan. A solvent guarantor with other assets guarantees payment of damages or loss to the lender resulting from the actions of the borrower.

5. If the loan documents limit the lender's recovery to real and personal property collateral, then the lender must consider the fact that acts of the borrower could potentially reduce the value of such real and personal property, or render recovery by the lender more difficult. One way to address this potential issue, at least in part, is to include language in the loan documents that "carves-out" or removes from the limited recourse provisions thereof certain "bad-boy" actions of the borrower. Such "bad-boy" action carve-outs typically include:

i. *Fraud*: Intentionally deceptive conduct, sometimes including misrepresentation with no actual intent to deceive, as well as some breaches of covenants that may amount to fraud (such as vandalism or theft of personal property).

ii. *Bankruptcy*: The voluntary filing of a bankruptcy or similar proceeding against a borrower, or an involuntary filing of a bankruptcy proceeding against borrower by one of its owners, one of the guarantors, or anyone affiliated with the borrower, or by a creditor that borrower, one of its owners, one of the guarantors, or anyone affiliated with the borrower, conspired or cooperated with in connection with such filing.

iii. *Misapplication of Rents, Profits or Revenues of the Property*: Covers a wide range of wrongful application of security deposits, use of insurance or condemnation proceeds, and failure to pay real estate taxes or maintain insurance.

iv. *Environmental Liability*: Damages for response, clean-up, and remediation costs incurred to clean up hazardous substances or contaminants on the mortgaged real property to the extent quantities are found in excess of permissible

limits under applicable federal or state law. The carve-outs may also extend to claims for damages asserted by third parties, such as adjacent landowners and persons claiming to have been injured or sickened by exposure to hazardous substances or contaminants while on the property.

v. *Violation of SPE Provisions*: Violation of the single-asset entity or single-purpose entity provisions of the loan documents

vi. *Other Carve-outs from the limited recourse provisions*. Carve-outs also may include liability for interference with the lender's exercise of its remedies under the loan documents, non-payment of documentary excise or intangible taxes, damages resulting from failure to comply with federal OFAC/PATRIOT Act requirements, or other acts as determined by the lender.

B. The "Carve-Out" Guaranty. Another way to address potential "bad boy" acts of a borrower in the context of a limited/non-recourse loan is to obtain a so-called "bad boy" or "carve-out" guaranty from the borrower and/or a person or entity with independent assets, pursuant to which the occurrence of "bad boy" acts will trigger the borrower and/or guarantor's liability under the guaranty.

C. Liability Under Carve-Out Provisions of Loan Documents and Carve-Out Guaranty. Liability under the "bad boy" carve-out provisions of the loan documents or under a carve-out guaranty may either be full (also known as "springing") recourse, or limited:

1. Full recourse means that if any of the enumerated "bad-boy" actions occur, the loan is converted from limited to full recourse; that is, the borrower (and concomitantly, the guarantor) becomes liable for all principal, interest, late charges, fees, expenses, and damages suffered by the lender without exception. The lender views such full recourse provisions as a heavy hammer by which to discourage the borrower and guarantors (the latter often being principals of the borrower) from committing "bad boy" acts.

2. Limited recourse means that if any of the enumerated "bad-boy" actions occur, the borrower and guarantor become liable either to the extent of the damages suffered by the lender as a result of the "bad boy" actions, or to a capped amount stated in the loan documents and/or guaranty (which may be a specific dollar amount, or a percentage of the then outstanding principal and accrued interest). Limiting recourse in a carve-out guaranty may be a difficult negotiation, since the lender typically views all "bad boy" actions as intentional and therefore requiring a heavy liability response.

IV. **Specialty Lending: Planning and Drafting Considerations.**

A. Mixed-Use Condominium and Vertical Subdivision Projects

1. Because of the economic and construction risks of condominium development, any condominium construction lender must be sure that it carefully evaluates the property and the project before making the loan, and be sure that the loan documents contain all provisions necessary to permit the lender, after a default, to assume ownership

and control of the project, complete construction (if applicable), and market and sell the units.

2. Pre-loan underwriting measures must include (without limitation) detailed analysis of:

i. The market for absorption of the units under various economic assumptions.

ii. The project size and configuration, including number of floors, the number and configuration of residential units, a description of any commercial units, and the parking, pedestrian and vehicular access points serving each of the types of units. For commercial units, adequacy of parking and access availability for customers is essential to the financial success of the owners.

iii. The proposed project documents, to determine the types of end users and owners contemplated and the relationship between these owners, particularly as expressed in the condominium and non-condominium or master association documents governing the project. This is especially critical in a "vertical subdivision" project, which may consist of multiple condominium (or other projects) stacked upon each other.

3. It is important that the loan documents include certain critical rights of the lender, including:

i. Control over valid and enforceable purchase and sale agreements, the earnest money deposits placed in escrow by the purchasers, and all related cash collateral (e.g. advance payments for construction extras and optional items in units):

a. Lender must require a collateral assignment of all purchase and sale contracts, rights in deposits and related rights, to insure effective control of the seller/purchaser relationship.

b. All purchase and sale agreement must contain strong subordination provisions, subordinating the rights of each contract purchaser to the lender, such that the lender may, if it desires, terminate the purchase contracts in foreclosure. Without such subordination provisions, contract purchasers may try to claim equitable subordination of the loan security instruments to their rights under the purchase contracts.

ii. Control over the prime construction contract. Lender must require a collateral assignment of such prime construction contract, with an appropriate consent and attornment agreement by the contractor, by which the contractor agrees to accept the lender as the "owner" for purpose of the construction contract in the event of a default under the loan documents.

iii. Rights sufficient to refocus the project for other purposes, such as multi-family rental housing (this is especially important in the event of a downward turn in the market during construction).

iv. Control over the usually complex zoning and other land use entitlements that invariably accompany development of large mixed-use condominium projects, including the right to become the owner under any special ordinances conferring rights on the project. In this regard, the lender must determine:

a. Will the consent of the local government authority be necessary to allow the lender to make advance decisions and elections under existing entitlements?

b. Are the land use entitlements consistent with the project declarations and easements, especially on critical issues such as density, parking, and vehicular and pedestrian access to the garage and building lobby?

c. What are the continuing and subsequent obligations of the developer under the land use entitlements, such as special fees, dedications, or exactions? Would these bind the lender in the event it becomes the project owner?

d. If the project must be repurposed, will the existing entitlements support the repurposed use, or will there be a lengthy, expensive, and potentially risky additional public hearing process required for the repurposed use?

i. Control over all special rights of the developer under the condominium declaration(s), declaration(s) of covenants and restrictions, and the governing documents of any related condominium or master association(s). In a mixed-use condominium project, there may be multiple overlapping layers of such documents conferring special rights on the developer to control the association(s), to be free from rights of approval or consent by the association(s), and to assign specific limited common elements of the project, including parking spaces, storage facilities, and marina slips or cabanas

4. Special care must be taken to place lender in a position to take advantage of all of the rights of a "bulk assignee" under the provisions of Sections 718.704 - 718.706, Florida Statutes (part of the "Distressed Condominium Relief Act" enacted during the business recession of 2007-2011).

i. However, keep in mind that the Act includes a "sunset" provision, under which a person acquiring condominium parcels may not be classified as a bulk assignee unless the condominium parcels were acquired on or after July 1, 2010, but before July 1, 2018 (*See* Fla. Stat. § 718.707).

ii. The date of such acquisition is determined by "the date of recording a deed or other instrument of conveyance for such parcels in the public records of the county in which the condominium is located, or by the date of issuing a certificate of title in a foreclosure proceeding with respect to such condominium parcels." (*See* Fla. Stat. § 718.707).

B. Shopping Centers and Office Parks.

1. The underwriting and legal analysis of any loan secured by a shopping center or office park project is the same in many ways as for a mixed-use condominium project. In some ways, the analysis is easier, because shopping centers and office parks are not usually regulated by special statutes in the same manner as condominium projects (unless they are created as commercial condominium units within a mixed use development, in which case many of the same underwriting and documentation features would apply).

2. In the non-condominium context, however, the enduring feature of loans secured by shopping centers and office park projects is the relative complexity and importance of their leases. Because the cash flow from the leases in these projects is the driver of their economic success and value, the underwriting begins with detailed analysis of the project leases. These are usually reviewed and abstracted for the lender either by lender's counsel or by third parties. With regard to the leases, the lender must determine:

i. Is the lender comfortable with the types and mix of tenants, the length of the leases (and renewal options), and the cash flow derived from the leases (including the amount of rent and additional rent payable, and the effect of any free rent or rent credits to which any tenant(s) are entitled), the amount of any unpaid tenant improvement allowances or incentives, and the cost of any tenant improvements required to be performed by the landlord?

ii. Since, under Florida law, the landlord/owner is not required to hold security deposits in a separate account (and is allowed to use them for operating purposes), how will the lender protect itself against liability for security deposits if it becomes the owner?

iii. Do the leases contain adequate mortgagee-protective provisions, such as automatic subordination provisions that make the leases subordinate to the lien of the mortgage? Even if they do, the lender routinely requires the tenants (or at least the major tenants) to execute separate documents known as "Subordination, Non-Disturbance and Attornment Agreements."

iv. Do the leases contain adequate judicial and non-judicial remedies for enforcement of the lease, including eviction of the tenant and collection of rent?

v. Do all of the leases comply with the specific execution requirements of Florida law which affect the validity of leases? Under Section 689.01, Florida Statutes, for example, a lease for a term of greater than one year requires two witnesses to the landlord's signature or the lease may be voidable.

vi. Are the insurance and casualty provisions of the leases consistent with the loan documents? For example certain tenants (e.g., tenants of stand-alone office or retail buildings located within an office park or shopping center) may be required to carry liability and casualty insurance for the premises and to make repairs in the event of a casualty (instead of the landlord/borrower being required to do so, which is typically a borrower obligation under the loan documents), and certain large tenants are sometimes permitted to self-insure. This may be an issue for the lender if lender will be unable to collect insurance proceeds and/or to control/oversee casualty damage repairs.

vii. Are memoranda of any of the leases recorded? Do they contain options to purchase or rights of first offer or refusal that contradict the terms of the loan documents?

C. Mezzanine Lending and Intercreditor Agreements.

1. The financing structure for real estate projects has traditionally consisted of ownership equity capital provided by the owner, joined by mortgage loan proceeds provided by a third party lender, such as a bank or life insurance company. Because tighter regulatory constraints and more conservative underwriting standards have decreased the typical loan-to-value ratio for mortgage loans, borrowers have found it necessary to close an increasingly larger gap between debt and equity in a project. Previously, this gap would be filled by junior mortgage financing (i.e., a separate loan made by a junior lender to the borrower, which junior loan was secured by a second mortgage that was subordinate to the first mortgage). However, the combination of recurring real estate market contractions and the increase in securitized commercial mortgage loans over the past three decades or so, have caused first mortgage lenders to become increasingly reluctant to permit junior mortgage financing.

2. One popular form of commercial real estate financing that evolved to fill the debt-equity gap is the so-called "mezzanine loan." In its most basic structure, a mortgage and mezzanine financing arrangement works like this:

i. A mortgage lender ("Mortgage Lender") makes a loan to a mortgage borrower (typically a special purpose entity whose sole asset is the real estate project) (the "Mortgage Borrower"). Such loan (the "Mortgage Loan") is secured by a first mortgage on the project land and improvements and a collateral assignment of the rents and leases of the project. If the Mortgage Loan is limited recourse (either legally or practically), it will often be secured by a "bad boy" guaranty of the kind discussed above, given by a guarantor or guarantors who are usually principals of the Mortgage Borrower.

ii. A mezzanine lender ("Mezzanine Lender", which may be the same lender that made the Mortgage Loan, or may be a different lender) makes a loan to the owner of the Mortgage Borrower (which is also typically a special purpose entity whose sole asset is 100% of the direct ownership interest in the Mortgage Borrower) (the "Mezzanine Borrower"). Such loan (the "Mezzanine Loan") is

secured by a pledge of 100% of the Mezzanine Borrower's direct ownership interest in the Mortgage Borrower (not a mortgage or any other direct interest in the real property, improvements or leases). Like the Mortgage Lender, the Mezzanine Lender will usually require a "bad boy" guaranty – often from the same guarantor executing the "bad boy" guaranty in favor of the Mortgage Lender. Thus, the loan is secured wholly by non-real estate collateral and not by the property, which results in the effective subordination of the Mezzanine Loan to the Mortgage Loan.

iii. The Mezzanine Loan funds are contributed by the Mezzanine Borrower to the Mortgage Borrower to use as its equity injection for the project.

3. Mezzanine Loan Documentation.

i. The Mezzanine Loan documents are similar to that of the Mortgage Loan, and include a note, loan agreement, guaranty, and pledge of the Mezzanine Borrower's membership or partnership interest in the Mortgage Borrower. If the Mezzanine Loan is being originated by the same lender as the Mortgage Loan, the key Mezzanine Loan documents may simply be duplicates of the Mortgage Loan documents (except there will be a pledge agreement instead of a mortgage), with appropriate business deal changes.

ii. The legal relationship between the Mortgage Lender and the Mezzanine Lender is documented by an intercreditor agreement, which establishes the rights and obligations of the respective creditors and confirms the subordination of the Mezzanine Loan to the Mortgage Loan. The direct contractual relationship between the Mezzanine Lender and Mortgage Lender is actually one of the key features that favors the mezzanine loan as a financing tool. Intercreditor agreements of this kind are very important to the transaction and usually subject to negotiation between the creditors. The key features of an intercreditor agreement are:

a. Subordination of the Mezzanine Loan to the Mezzanine Loan.

b. Conditions precedent to the Mezzanine Lender's foreclosure on the Mezzanine Borrower's interest in the Mortgage Borrower.

c. Notice and cure rights in favor of the Mezzanine Lender in the event of a default by the Mortgage Borrower under the Mortgage Loan documents (in addition to the rights of the Mortgage Borrower under the Mezzanine Loan documents).

d. The right of the Mezzanine Lender to purchase the Mortgage Loan documents (without yield maintenance premium or compliance with defeasance requirements) and to foreclose the pledge of Mezzanine Borrower's membership interests in the Mortgage Borrower in the event the conditions of the intercreditor agreement are satisfied (allowing the Mezzanine Lender to take control of the borrower entity).

e. The right of the Mortgage Lender to sue for injunctive or other relief to stop a Mezzanine Lender foreclosure if the conditions are unsatisfied.

f. Description of the rights of both Mezzanine Lender and Mortgage Lender to pursue rights against any common guarantor. Issue: how to prevent the Mezzanine Lender from obtaining full satisfaction of its Mortgage Loan against the guarantor before the Mortgage Loan is even in default.

g. What protection does the Mortgage Lender have against "bad boy" acts of the Mezzanine Lender if the Mezzanine Lender assumes control of the Mortgage Borrower after default? In such cases, intercreditor agreement may require the Mezzanine Lender to provide a replacement guarantor for the limited recourse carve-outs of the Mortgage Loan. This is particularly true if the Mezzanine Lender for purposes of the transaction is itself a thinly capitalized special purpose entity.

V. **Ethical Concerns – Representation of Multiple Transaction Parties**.

A. Commercial real estate loan transactions present a very fertile field in which serious conflicts of interest may emerge unexpectedly, whether the lawyer represents the lender or borrower in the transaction. In either case, a careful check of the firm's conflicts database at the earliest stage of contact with a prospective client is critical.

1. The Rules of Professional Conduct ("RPC"), Section 4-1.7, prohibits representation of one client whose interest is directly adverse to another client or there is a substantial risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or third person, or the lawyer's personal interest.

2. In particular, lawyers may not represent both the borrower and lender simultaneously in the same loan transaction. The conflicts are unavoidable and not waivable. *Federal Deposit Ins. Corp v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 2013 WL 4402968 (M.D. Fla. Aug. 15, 2013) (attorney who helped the developer purchase the land also represented both the developer and the bank giving the loan).

B. Some borrower-lender conflicts may be waived ethically, however, under certain conditions. If RPC 4-1.7(a) doesn't apply, then under RPC 4-1.7(b), a lawyer may represent a client if he or she reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client and the representation is not prohibited by law. There are other requirements applicable to judicial tribunals not relevant here.

For example, if a lawyer represents a lender in multiple pending loan transactions, and a prospective developer client approaches the lawyer for representation as borrower's counsel in a separate, unrelated transaction involving a loan from such lender for acquisition and development of raw land, the lawyer may accept such representation. However, to confirm that neither the lender nor the borrower regard

the lawyer's representation in such other matters as "directly adverse" to either of their interests, nor that there is a "substantial risk that the representation will be materially limited by the lawyer's responsibilities" to either of them as a client in this or other matters, it is prudent to request a written waiver of conflict from both lender and borrower/developer in such case.

C. An ethical issue may also emerge in connection with a loan transaction that involves multiple parties, either on the lender or borrower side. For example:

1. The lender may be participating or syndicating the loan among multiple lenders, and acting as the "lead" lender in the transaction. If a lawyer is representing a lender in a syndicated loan transaction, the lawyer must determine who the other participating lenders are, and whether their involvement creates a conflict.

2. If the borrower is a business entity, such as a limited liability company or corporation, the business entity will likely have multiple investors, fronted by one particular investor who also acts as the main decision-maker for the entity and thus the entire group. Again, RPC 4-1.7(a) and (b) apply. If a lawyer is representing a borrower in a loan transaction, the lawyer must be sure that he or she represents the person or entity that will be executing the loan documents and accepting the loan proceeds. Therefore, it is important to clarify, early in the transaction, which individual has decision-making authority for a business entity that acts as the borrower.

Be aware of RPC 1-1.7(c), which provides that "when representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved."

D. Written engagement letters signed by the client (and letters waiving conflicts, if they can be ethically waived) are critical in commercial real estate transactions. Why?

1. *To clarify the identity of the client* (either on the lender or borrower side, but especially on the borrower side in most non-participated loan transactions) – does the lawyer represent the individual promoter who forms or manages the entity that the promoter eventually forms, several of the investors, including the manager, or the entity itself? The lines of responsibility, disclosure, and decision-making authority can become blurred easily.

i. RPC 4-1.13 (Organization as Client) is the relevant authority in such matters. It provides that in dealing with an organization's constituents, a lawyer must explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

ii. A lawyer representing an organization may also represent any of its constituents (subject to RPC 4-1.7 regarding conflicts of interest). If the conflict is waivable, the organization's consent to the dual representation is required by RPC 4-1.7, and consent must be given by an appropriate officer of the organization other than the individual who is to be represented, or by the constituents of the organization.

iii. Keep in mind, however, the special ethical problems of the lawyer who represents the borrower in a loan transaction and issues title insurance for the lender's benefit. The lawyer may have special knowledge of facts or circumstances affecting the client (pending litigation, unrecorded judgments, or other adverse matters) that he or she is not obligated to disclose to the lender, but must disclose to the title insurance underwriter in connection with his agency obligations.

2. *To clarify the scope of services* to be rendered by the lawyer and his or her firm in the transaction.

i. On the lender side, is the lawyer retained solely to draft and negotiate loan documents, review the title and survey, and close the loan, or is the lender also looking to the lawyer to perform land use diligence and review, review environmental assessments, and/or perform other due diligence related to the collateral?

ii. On the borrower side, is the lawyer retained solely to review and negotiate loan documents, or to provide a formal third party legal opinion to the lender?

iii. If portions of the work are to be performed by other counsel or consultants, these should be specifically stated in the letter. Engagement letters for commercial real estate transactions should never merely refer to the scope of work performed as "services in connection with the loan" or similar general terms.

EXHIBIT "A"

"Substitution Loan Rate" Premium Generally Applicable to Mortgage Modifications (Rule 69O-186.003(4) F.A.C.)

(4) Substitution Loan Rates. The following risk premium for substitution loans shall apply:

(a) When the same borrower and the same lender make a substitution loan on the same property, the title to which was insured by an insurer in connection with the original loan.

Age of Original Loan	Premium Rates
3 years or under	30% of original rates
From 3 to 4 years	40% of original rates
From 4 to 5 years	50% of original rates
From 5 to 10 years	60% of original rates
Over 10 years	100% of original rates
Minimum premium	$100.00

(b) At the time a substitution loan is made, the unpaid principal balance of the previous loan will be considered the amount of insurance in force on which the foregoing rates shall be calculated. To these rates shall be added the regular rates in the applicable schedules for any new insurance, that is, the difference between the unpaid principal balance of the original loan and the amount of the new loan.

(c) In the case of a substitution loan of $250,000 or more, when the same borrower and any lender make a substitution loan on the same property, the title to which was insured by an insurer in connection with the previous loan, the premium for such substitution loans shall be the rates as set forth in paragraphs (a) and (b).

EXHIBIT “B”

List of Mortgage Modifications Not Requiring Payment of “Substitution Loan Rate” Premium under Rule 69O-186.005(13)(a)

(a) An extension of the time for payment of the secured obligation;

(b) Any decrease in the interest rate of the insured mortgage, provided the “cap” on a variable rate mortgage is not greater than the original “cap” and/or the “cap” is not greater than the original fixed rate;

(c) Any increase in the interest rate of the insured mortgage, provided the endorsement contains an exception for the loss of priority occasioned by the increase;

(d) Changes in an amortization schedule to extend the term of the insured mortgage;

(e) A release of a portion of the secured property;

(f) A correction to either perfect the lien of the insured mortgage or comply with the terms of the lender's original commitment;

(g) Future advances made pursuant to Section 697.04, Florida Statutes; or

(h) Encumbrances of additional parcels under a revolving construction loan agreement contained in the original mortgage and contemplated by subsection 69O-186.003(10), F.A.C.

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TRENAM LAW

Major Topic Overview

I. Loan Modifications

II. Limited Recourse Carve-Out Guaranties

III. Specialty Real Estate Project Financings

IV. Legal Ethics in Complex Multi-Party Financings

Loan Modifications

- Why?
  - Good customer retention
  - Project delays
  - Declines in project value
  - Unavailability of financing at maturity
  - Distressed project work-outs

Loan Mods: Scope

- maturity date and other changes in terms
- addition, substitution or release of collateral
- additional borrowers or guarantors
- consolidation or bifurcation of obligations
- cross-collateralization or cross-default
- amendment and restatement
- simultaneous assumption by new borrower

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Loan Mods: Major Issues

- What's changed in the project since closing (mixed underwriting and legal issues)?
- Loss of lender's lien priority on collateral
- Release of existing guarantors
- Payment of unnecessary Florida document taxes

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Loan Mods: Loss of Priority

- Various material modifications of senior debt may cause loss of priority against junior liens.
- Courts emphasize prejudice to subordinate lender as deciding factor.
- Novation of existing senior debt causes loss of priority.

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Loan Mods: Priority - Novation

- Requirements for Novation (Florida)
  - The existence of a prior, valid obligation; and
  - An express or implied agreement (written or oral) of all necessary parties to a new obligation that extinguishes the old.
- Typical Situations: no easy litmus test
  - Same borrower/lender - new debt for old one;
  - Different borrower, same debt, same lender
  - Different lender, same debt, same borrower.

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Loan Mods: Likely Novation

- Satisfying old debt; replacing with new
- Shortening maturity date of debt
- Increasing interest rate, as to increase
- Changing debtors under existing debt
  - Exception: assumption of existing debt

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Loan Mods: No Novation

- Extension of maturity date of debt
- Reduction of Interest Rate
- Changes in amortized payments to extend maturity
- Addition of guarantors
- Future advances under F.S. 697.04

Others under Rule 69O-186.005(13)(a) F.A.C.

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Loan Mods: Preventing Loss of Priority

- Documentary provisions
- Written consents of subordinate lienors
- Future advance provisions
- Title insurance endorsements
  - Caveat: the "substitution loan rate" under Rule 69O-186.005(13)(a) F.A.C. - Sliding scale premium
  - If a "substitution loan" (i.e., possible novation), conservative underwriting required to insure priority.

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Loan Mods: Guarantors

- Material modification or novation may release existing guarantors of modified debt
- Standard: "…the creditor materially alters the principal debtor's obligation to the detriment of the guarantor without the guarantor's consent." *Miami Nat'l Bank v. Fink, 174 So.2d 38* (Fla.Dist.Ct.App.1965).

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Loan Mods: Document Taxes

- Material modification or novation may result in unnecessary Florida documentary stamp or intangible taxes.
- Doc. Stamps: F.S. 201.08(1), (5); 201.09(1) and F.A.C. Rule 12B-4.052(12)(a)
- Intangible Tax: F.S. 199.133 and F.A.C Rule 12C-2.004
- Strict compliance with technical terms of the statute and regulations required, especially as to doc stamp tax.

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Limited Recourse Guaranties

- "Limited recourse" in that lender does have enforcement rights against the borrower, but limited to the property securing the loan.
- Increasing use of full or partial limited recourse loan features.
- A loan to an SPE is already "limited recourse."
- Recourse to any other assets must come from some additional source.

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The "Carve-Out" Guaranty

- Question: How to recover loss to limited recourse lender if borrower commits "bad acts" as defined in loan documents?
- Answer: The "carve out" or "bad boy" guaranty.
- Document makes the loan "less limited recourse" as to guarantors to extent of "bad acts."
- These are common features of securitized and other limited recourse loans.

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The "Carve-Out" Guaranty

- Typical "bad boy" actions by borrower:
  - Fraud
  - Waste of Security
  - Misapplication of Rents
  - Environmental Liability
  - Interference with Lender's enforcement rts.
  - Non-payment of document taxes
  - Non-compliance with OFAC/PATRIOT Act

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The “Carve-Out” Guaranty

- Extent of recourse for “bad boy” actions
- Wording of guaranty critical
- Does commission of prohibited act render guarantors liable for
  - entire loan principal, interest, costs, and fees, or
  - only damage or loss suffered by the lender, which is
  - capped or uncapped?

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The “Carve-Out” Guaranty

- Wells Fargo Bank, NA v. Cherryland Mall Ltd. Partnership, 812 N.W. 2d 799 (Mich. App. 2011)
- Held: under mortgage covenant that required, mortgagor to remain solvent (for SPE status), loan became fully recourse to mortgagor and guarantor if mortgagor failed to maintain its status as a single purpose entity.
- Result reversed by statute in Michigan, but principle is clear – think through the docs.

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Specialty Lending

- Lender’s counsel for complex project loans must learn to think like the borrower.
- Each development type contains special critical features and developer rights.
- Lender’s counsel must understand and plan for lender to assume control of these rights in event of default.

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Condominium Lending

- Construction Lender underwriting analysis
- **"Project refocus rights"** in event of change in market conditions:
  - Declaration and CCRs
  - Purchase Agreements
- **Unit Purchase Agreements:**
  - Lender control of earnest money deposits
  - Subordination covenants to lender rights
- Use of broader project rights and amenities

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Condominium Lending

- **Control over govt. land use decisions**
  - Must local govt. consent to any change of applicant under existing entitlements?
  - What continuing developer obligations?
  - What changes necessary to "repurpose"?
- **Control over special rights of the developer**
  - Freedom from condo or master association consent or approval rights
  - Right to assign limited common elements
- **Interaction with F.S. 718.704 - 718.706**

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Shopping Center/Office Parks

- Some analysis common to condominium projects
- Complexity begins with lease review:
  - Does client want a "lease abstract" prepared by counsel? Same for "vendor contracts"?
  - Do leases contain strong or weak mortgagee subordination provisions?
  - Adequate notice and cure rights to lender?
  - Adequate judicial remedies against tenant?
  - Execution compliant with F.S. 689.01?

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Shopping Center/Office Parks

- **Estoppel Certificates/SNDAs to resolve issues of lender liability concerning:**
  - Return of "security deposits" or advance rents
  - Tenant offset rights against rent
  - Unfulfilled construction obligations to tenant
  - Claims of breach of lease against landlord
  - Subordination of lease to mortgage
  - Prohibited modifications of lease
  - Plugs other "gaps" in leases from lender perspective

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Mezzanine Lending

- Loan to supply project equity secured only by a security interest in the ownership of the borrower entity
- Why do they exist?
- Inherent tension between mezz lender and first mortgagee
- Both mezz loan and first mortgage loan likely to be secured by carve-out guaranties

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Mezzanine Lending

- Typical mezz lender documents:
  - Note
  - Loan Agreement
  - Security Agreement (includes pledge of member, partner or stock interests in borrower)
  - Guaranties of principals of borrower or third parties (may be full or limited recourse, including carve-outs)
  - Intercreditor Agreement with first mortgagee

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Mezzanine Lending

- **Intercreditor Agreements:**
  - Attempt to create some certainty between mezz lender and first mortgagee
  - Specify conditions to exercise of rights of mezz lender against Borrower
  - Provide notice and cure rights to mezz lender and first mortgagee upon default of respective loans
  - May give mezz lender right to purchase First Mortgage (without yield maintenance or defeasance) under certain conditions

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Mezzanine Lending

- Intercreditor Agreements (cont'd):
  - Describe rights of mezz lender and first mortgagee against common guarantors
  - May provide for limited recourse guarantee by mezz lender of first mortgage "bad boy" carve-outs if mezz lender becomes borrower

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Representation of Multiple Transaction Parties

- Complex loan transactions require special care to avoid multiple transaction party conflicts
- Rules of Professional Conduct (RPC) prohibit:
  - Representation of adverse parties, or
  - Representation of a party where loyalty to the party materially limited by others

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Multiple Transaction Parties

- Rules of Professional Conduct (RPC) 4-1.7: Conflicts of Interest (Current Clients)
- **RPC 4-1.7(a), No representation of current client by the lawyer if:**
  - Representation of one client is directly adverse to another client
  - Substantial risk that representation of one will be materially limited by the lawyer's responsibilities to ---
  - -- another client,
  - -- a former client or a third person, or

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Multiple Transaction Parties

- *Federal Deposit Ins. Corp. v. Icard, Merrill, Cullis, Timm, Furen & Ginsberg, P.A.* 2013 WL 4402968 (M.D. Fla. 2013)
- Attorney represented developer in purchase of land and acquisition loan.
- Held, firm liable to lender based on alleged breach fiduciary duty.
- *Reversed, Federal Deposit Insurance Corp. v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg,* 2014 WL 4923090 (11th Cir., 2014) (insufficient evidence).

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Multiple Transaction Parties

- Possible to proceed with multiple clients under RPC 4-1.7(b) if 4-1.7(a) doesn't apply

RPC 4-1.7(b); Informed Consent

- A lawyer may represent a client if he or she
  - reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client;
  - representation not prohibited by law;
  - Waivers from both clients customary.

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Multiple Transaction Parties

- Representation of multiple borrower parties or lender parties in same transaction
- Permitted if requirements of 4-1.7(a) and (b) apply, and
- Lawyer complies with RPC 4-1.7(c):

  4-1.7(c); Explanation to Clients

  When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved.

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Multiple Transaction Parties

- When representation includes the borrower business entity and one or more members of the organization RPC 4-1.13 applies.
- **RPC 4-1.13 Organization as Client**

  In dealing with an organization's constituents, a lawyer must explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

  A lawyer representing an organization may also represent any of its constituents (subject to rule 4-1.7). If the organization's consent to the dual representation is required by rule 4-1.7, the consent must be given by an appropriate official of the organization other than the individual who is to be represented, or by the constituents.

  Caveat: all requirements of RPC 4-1.7 on conflicts must still be met.

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Multiple Transaction Parties

Conflicts involving the representation of closely held corporations remain a significant source of loss for malpractice insurers and headaches for local Bar grievance committees.

At the outset of the representation, the lawyer must --

-- Make clear in a written engagement letter who the firm does, and does not, represent, and

-- Which constituent of the organization client is authorized to instruct the firm with respect to client decisions and elections.

If the client is only the organization, then the lawyer should advise any constituents who are unclear (or likely to be unclear) that the lawyer does not represent them individually.

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Lack of Competence and Mistakes

Lack of competence and mistakes are a growing share of the malpractice claims experienced by the major attorney malpractice insurance underwriters.

Most common: (1) simple mistakes [frequently proof-reading errors], (2) handling matters not competent to handle, and (3) missed transactional deadlines.

RULE 4-1.1 COMPETENCE

A lawyer must provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

RULE 4-1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

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Lack of Competence and Mistakes

- **RULE 4-1.4 COMMUNICATION**

(a) Informing Client of Status of Representation.

Obtaining informed consent in appropriate cases
Consult with client about means of obtaining client's objectives
Keep client informed about status of the matter
Promptly comply with reasonable requests for information
Inform client about limitations on any unethical conduct requested by client

(a) Duty to Explain Matters to Client.

Provide client with explanation sufficient to permit the client to make an informed decision

TRENAM LAW

35

RECORDING STATUTE, PRIORITIES AND JUDGMENT LIENS

By

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LIEN PRIORITIES

Florida's Recording Statute

Recording acts fall into three general categories: Race, Race/Notice and Notice. Under each type, the analysis focuses on whether the subsequent purchaser meets a certain status. If so, the subsequent purchaser prevails over the prior purchaser. *Argent Mortg. Co., LLC v. Wachovia Bank, N.A.*, 52 So. 3d 796, 798 - 799 (Fla. 5th DCA 2010); *see also* R. Powell and M. Wolf, *Powell on Real Property,* Recording Acts and Priorities, § 82.02.

Under a Race-type statute, the subsequent purchaser must merely record before the prior purchaser records in order to prevail. Under a Race/Notice-type statute, the subsequent purchaser must take without notice of the prior purchaser's interest and record before the prior purchaser in order to prevail. Under a Notice-type statute, the subsequent purchaser must take without notice of the prior purchaser's interest in order to prevail, and the order of recording is irrelevant.

Florida's recording statute, § 695.01, Fla. Stats., provides as follows:

695.01. Conveyances to be recorded

> (1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law; nor shall any such instrument made or executed by virtue of any power of attorney be good or effectual in law or in equity against creditors or subsequent purchasers for a valuable consideration and without notice unless the power of attorney be recorded before the accruing of the right of such creditor or subsequent purchaser.

> (2) Grantees by quitclaim, heretofore or hereafter made, shall be deemed and held to be bona fide purchasers without notice within the meaning of the recording acts.

Pursuant to section 695.01, Florida is a notice type jurisdiction, and notice controls the issue of priority. *Argent Mortg.*, 52 So. 3d at 801. Accordingly, a subsequent purchaser without notice of a prior purchaser's unrecorded interest will prevail, regardless of the order in which the interests are subsequently recorded. *Id.*; *see also* Boyer, Ralph E., *Florida Real Estate Transactions,* Vol. 2, § 26.02.[1]

In *Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 100 Fla. 438, 444, 129 So. 892, 895 (1930), the Florida Supreme Court stated the effect of Florida's Notice type recording statute as follows:

> When one purchases for value and without notice of a prior unrecorded deed, the rights acquired under the junior deed are superior to those held under the senior deed, even though the senior deed be recorded prior to the record of the senior deed.

To illustrate the foregoing, the Court provided the following paradigm:

> Accordingly, it is generally held, in states having recording statutes similar to ours, that if A conveys lands to B, a *bona fide* purchaser for value, who does not go into possession and who failed to record his deed until after A conveys the same land to C, a second *bona fide* purchaser for value without notice of B's interest, and B then records his deed before C records his, the title of C shall nevertheless prevail as between C and B, because it is the fault of B that he did not immediately record his deed, thereby permitting C to deal

[1] The protection provided by Florida's recording statute to purchasers applies equally to mortgagees. *Mfrs. Trust Co. v. Peoples Holdings Co.*, 149 So. 5, 6 (Fla. 1933); *Hull v. Maryland Casualty Co.*, 79 So. 2d 517, 518 (Fla. 1955).

> with the property and part with his consideration without knowledge of B's interest.

Id.

Every type of recording statute is ultimately a bright line test to determine who will suffer a loss as between two potentially innocent purchasers. Although the application of section 695.01 may seem inequitable to a purchaser or lender who records without notice of its grantor's intervening and subsequent transfer to another, the first purchaser is the party in the best position to protect itself. If the first purchaser timely records prior to the grantor's subsequent conveyance, the first purchaser will prevail over the subsequent purchaser, even if, as a practical matter, a title search at the time of the subsequent transfer would be too soon to reveal the recording of the first purchaser's interest. This is because, although a document may not yet have been indexed by the clerk, it is nevertheless "officially recorded" and imparts constructive notice as soon as it is accepted by the clerk and given "official register numbers." *Anderson v. N. Fla. Prod. Credit Ass'n.,* 642 So. 2d 88, 89 (Fla. 1st DCA 1994).

Accordingly, the first purchaser is in the best position to record before the subsequent purchaser closes, in which case the subsequent purchaser will take with constructive notice of the first purchaser's interest, and not be protected by section 695.01.

Types of Notice

Notice is of two kinds, actual and constructive. 'Constructive notice' is sometimes referred to as notice imputed to a person not having actual notice, the most obvious form

of which is record notice. 'Actual notice' is also said to be of two kinds: (1) Express, which includes what might be called direct information; and (2) implied, which is said to include notice inferred from the fact that the person had means of knowledge, which it was his duty to use and which he did not use. Constructive notice is a legal inference, while implied actual notice is an inference of fact, but the same facts may sometimes be such as to prove both constructive and implied actual notice. *Sapp v. Warner*, 105 Fla. 245, 255, 141 So. 124, 127 (1932).

There is a presumption that a subsequent purchaser is without notice of a prior interest that is not recorded, and the first purchaser has the burden of establishing that the subsequent interest was acquired with notice. *McCahill v. Travis Co.*, 45 So. 2d 191, 193 (Fla. 1950); *Lesnoff v. Becker*, 101 Fla. 716, 135 So. 146, 147 (1931); *Rambo v. Dickenson*, 92 Fla. 758, 110 So. 352, 353 (1926).

Implied actual notice, often referred to as "inquiry notice," is based upon the principle that a person has no right to shut his eyes or ears to avoid information, and then claim to have had no notice; that it is not good enough to remain willfully ignorant of readily ascertainable information after learning of facts that should have caused a reasonable person to make further inquiry. *Id.*

Implied actual notice may result from direct information or from information imparted by other recorded documents within the chain of title for a specific property. *In re Chateaux Royal, Ltd.*, 6 B. R. 8 (N.D. Fla. 1980).

Moreover, in order to charge a person with notice of facts discoverable by reasonable inquiry, the circumstances or record information creating the duty to have made further inquiry must be readily apparent and reasonably calculated to lead to discovery of those facts. As stated by the Florida Supreme Court:

> . . . it appears to us that in order to charge a person with notice of facts discoverable by reasonable inquiry, the circumstances should be such, or the record indications should be of a nature, that inquiry outside of the record becomes a duty and the failure to make such inquiry would constitute a negligent omission. In order to charge a person with notice of a fact which he might have learned by inquiry, the circumstances known to him must be such as should reasonably suggest inquiry and lead him to inquiry

Chatlos v. McPherson, 95 So. 2d 506, 509 (Fla. 1957).

Nevertheless, if record title appears consistent with a transferor's misrepresentations, the subsequent purchaser is entitled to rely upon such information, "even if its falsity might have been discovered by relentless and far-reaching further investigation." *Koschler v. Dean*, 642 So. 2d 1119, 1121 (Fla. 2d DCA 1994).

Possession may be the equivalent of constructive notice of unrecorded rights, provided the possession is sufficiently open, visible and exclusive to impart notice. *Carolina Portland Cement Co. v. Roper*, 68 Fla. 99, 67 So. 115 (1914)*; Lee County Bank v. Metropolitan Life Ins. Co.*, 126 So. 2d 589 (Fla. 2d DCA 1961). In such cases, inquiry should be made directly with the party in possession, rather than relying upon the representations of the transferor. *Kroitzsch v. Steele*, 768 So. 2d 514 (Fla. 2d DCA 2000). Possession that is sufficient to impart notice of an unrecorded interest is also

sufficient to avoid attachment of a lien pursuant to a subsequently recorded judgment against the grantor. *Duane v. Staley*, 98 So. 2d 74 (Fla. 1957).

Pursuant to an exception to the rule that possession may impart notice of unrecorded rights, a grantor under a recorded deed will be estopped to assert continued possession as notice of an unrecorded agreement. *Reasoner v. Fisikelli*, 114 Fla. 102, 153 So. 98 (1934); *Roberts v. Bass*, 111 So. 2d 455 (1959); *Am. Metropolitan Mortg., Inc. v. Maricone*, 423 So. 2d 396 (Fla. 2d DCA 1982).

Failure to Record, Notice and Priority

The purpose of section 695.01 is to give notice to subsequent third parties, and recording has no significance as between the parties to the transaction. *Hensel v. Aurilio*, 417 So. 2d 1035 (Fla. 4th DCA 1982); *Sweat v. Yates*; 463 So. 2d 306 (Fla. 1st DCA 1984); *Fong v. Batton*, 214 So. 2d 649 (Fla. 3d DCA 1968). Accordingly, an unrecorded deed or mortgage is binding upon parties to it, and has priority over interests of parties having notice thereof, even if the deed or mortgage is never recorded. *Id.* at 650.

Section 695.01 expressly recognizes that creditors having notice of an unrecorded instrument are not entitled to rely upon its absence from the official records. *Sapp v. Warner*, 105 Fla. 245, 254-255, 141 So. 124, 127 (1932). Therefore, a mortgage, although unrecorded or imperfectly recorded, is valid as against creditors or subsequent purchasers having actual notice of it. 37 Fla. Jur 2d Mortgages § 134, citing *Pierson v. Bill*, 138 Fla. 104, 189 So. 679 (1939); *Sapp v. Warner*, 105 Fla. 245, 141 So. 124 (1932); *Lesnoff v. Becker*, 101 Fla. 716, 135 So. 146 (1931).

Statutory Exceptions to Effect of Actual Notice

There are certain statutory exceptions to the effect of actual notice. For example, Florida's Construction Lien Law adopts a pure race type approach to priority under section 713.07, Florida Statutes, which provides that in the absence of a recorded notice of commencement, construction liens are inferior to prior recorded interests, regardless of actual knowledge. *Page Heating & Cooling, Inc. v. Goldmar Homes, Inc*., 338 So. 2d 265 (Fla. 1st DCA 1976); *Corry Const. Co. v. Hector Const. Co.*, Inc., 363 So. 2d 1125 (Fla. 1st DCA 1978).

Florida's lis pendens statute, section 48.23, Florida Statutes, was amended in 2009 to provide that, in the absence of an effective lis pendens, certain purchasers of property shall take free and clear of claims asserted in pending litigation, which claims are not based upon a duly recorded instrument, notwithstanding notice or knowledge of the pending litigation . Specifically, section 48.23(1) states:

> (1)(a) An action in any of the state or federal courts in this state operates as a lis pendens on any real or personal property involved therein or to be affected thereby only if a notice of lis pendens is recorded in the official records of the county where the property is located and such notice has not expired pursuant to subsection (2) or been withdrawn or discharged.
>
> (b) 1. An action that is filed for specific performance or that is not based on a duly recorded instrument has no effect, except as between the parties to the proceeding, on the title to, or on any lien upon, the real or personal property unless a notice of lis pendens has been recorded and has not expired or been withdrawn or discharged.
>
> 2. Any person acquiring for value an interest in the real or personal property during the pendency of an action described in subparagraph 1., other than a party to the proceeding or the legal successor by operation of

> law, or personal representative, heir, or devisee of a deceased party to the proceeding, shall take such interest exempt from all claims against the property that were filed in such action by the party who failed to record a notice of lis pendens or whose notice expired or was withdrawn or discharged, and from any judgment entered in the proceeding, notwithstanding the provisions of s. 695.01, as if such person had no actual or constructive notice of the proceeding or of the claims made therein or the documents forming the causes of action against the property in the proceeding.

Another example of a statutory exception to the effect of actual notice exists under section 544(a)(3) of the Bankruptcy Code, which provides:

> **544. Trustee as lien creditor and as successor to certain creditors and purchasers**
>
> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by–
>
> * * *
>
> (3) a *bona fide* purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a *bona fide* purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

This statute, appropriately referred to as the trustee's "strong-arm" power, entitles a bankruptcy trustee and, in some cases, a debtor, to avoid an unrecorded interest or lien that would have been unenforceable against a *bona fide* purchaser for value without constructive notice as of the time the bankruptcy was filed, regardless of actual notice or knowledge of the trustee or, under some circumstances, the debtor. Nevertheless, constructive notice of information sufficient to impart implied notice of an unrecorded interest may defeat the strong arm avoidance powers of section 544(a)(3). *In re*

Chateaux Royal, Ltd., 6 B.R. 8 (Bankr. N.D. Fla. 1980); *First Union Nat'l Bk. Fla. v. Diamond*, 196 B.R. 635 (Bankr. S.D. Fla. 1996).

Indexing

Pursuant to section 695.11, Florida Statutes, an instrument is deemed to be "officially recorded" when the instrument is accepted by the court clerk and is given "official register numbers." *Anderson v. N. Fla. Production Credit Ass'n*, 642 So. 2d 88, 89 (Fla. 5th DCA 1992). Section 28.222(2), Florida Statutes, requires clerks of court to keep an official records book, a register of the names of the parties to each recorded instrument and maintain "a general alphabetical index, direct and inverse, of all instruments filed for record." Indexing errors by the clerk, however, generally do not defeat constructive notice imparted by the recording of a document. While indexing is required, priority is not contingent upon it. *Id.*

Purchase Money Mortgages

Purchase money mortgages are entitled to priority over previously recorded judgments or existing matters arising through the purchaser, regardless of notice. *BancFlorida v. Hayward*, 689 So. 2d 1052 (Fla. 1997); *County of Pinellas v. Clearwater Fed. Sav. & Loan Ass'n*, 214 So. 2d 525 (Fla. 2d DCA 1968); *Associates Discount Corp. v. Gomes*, 338 So. 2d 552 (Fla. 3d DCA 1976).

Additionally, a mortgage securing purchase funds loaned by a third party constitutes a purchase money mortgage. *Sarmiento v. Stockton, Whatley, Davin & Co.*, 399 So. 2d 1057 (Fla. 3d DCA 1981).

In *Hayward*, a developer who held an option to purchase land, arranged financing through a bank to exercise the option, purchase the lots, and construct homes. As a condition to funding the loan, the bank required the developer to obtain pre-construction contracts and deposits from purchasers. After the developer provided the bank with copies of the signed contracts, the bank loaned the developer funds secured by a mortgage on the property. A portion of the loan proceeds was used to purchase the property pursuant to the option, with the remainder of the loan proceeds designated for construction.

When the bank subsequently sought to foreclose, the contract purchasers asserted that they were entitled to superior equitable liens for their deposits that the bank had required as a condition to funding the developer's loan. The Florida Supreme Court found that the bank's mortgage was partially a purchase money mortgage, to the extent loan proceeds secured by the bank's mortgage were utilized to fund the developer's acquisition of title to the property. *Hayward* at 1053, *citing Cheves v. First Nat'l Bank*, 83 So. 870 (Fla. 1920) and *Sarmiento*, 399 So. 2d 1057. Accordingly, the Court recognized that the portion of the secured indebtedness that constituted a purchase money mortgage took priority over all prior claims or liens that attach to the property through the mortgagor. *Hayward*, 689 So. 2d at 1054, citing *Van Eepoel Real Estate Co. v. Sarasota Milk Co*., 129 So. 892, 897 (1930). Further, the Court held that this rule applied even though the bank had notice of the purchasers' contracts and deposits. *Hayward*, 689 So. 2d at 1054. However, the purchase money priority only applied to the amount of the loan

proceeds actually used to acquire the property and its existing improvements, and not the amount used to fund subsequent construction. *Id*.; *Carteret Sav. Bank v. Citibank Mortg. Corp.*, 632 So. 2d 599 (Fla. 1994).

The bank's mortgage on four of the lots in *Hayward* constituted a refinance of a prior purchase money mortgage. The Court found that the purchase money mortgage rule nevertheless applied to provide the bank with priority over the contract purchasers' interests, because the bank was entitled to subrogation to the extent loan proceeds from its refinance mortgage were utilized to pay off the prior purchase money mortgage. *Id.* at 1055; citing *Schilling v. Bank of Sulphur Springs*, 109 Fla. 181, 147 So. 218 (1933), and *Fed'l Land Bank of Columbia v. Godwin*, 107 Fla. 537, 145 So. 883 (1933).

Notwithstanding the lack of a spouse's joinder in a purchase money mortgage on homestead real property, the mortgagee may be entitled to imposition and foreclosure of an equitable lien for the full amount invested in the purchase of the property. *Spikes v. Onewest Bank FSB*, 106 So. 3d 475 (Fla. 4th DCA 2012). There is also legal authority that a purchase money mortgage is entitled to priority over a lack of spousal joinder homestead claim. *Porter v. Teate*, 17 Fla. 813 (Fla. 1880); *County of Pinellas v. Clearwater Fed. Sav. and Loan Assoc.*, 214 So. 2d 525 (Fla. 2d DCA 1968) (*dicta*); *Associates Discount Corp. v. Gomez*, 338 So. 2d 552 (Fla. 3d DCA 1976) (*dicta*).

Subrogation

In *Palm Beach Sav. & Loan Assoc., F.S.A. v. Fishbein*, 619 So. 2d 267 (Fla. 1993), a mortgage that was intended to encumber homestead property was void because the wife's signature was forged. Notwithstanding the lender's negligence in allowing the forgery to occur, the Florida Supreme Court upheld the imposition of an equitable lien on the wife's homestead property, equal to the amount of the loan proceeds utilized to pay off prior valid liens against the property. Accordingly, an equitable lien may be imposed upon homestead property to avoid unjust enrichment. *See also Spridgeon v. Spridgeon*, 779 So. 2d 501 (Fla. 2d DCA 2000).

Subrogation may be denied as to a party with "unclean hands." *Epstein v. Epstein*, 915 So. 2d 1272 (Fla. 4th DCA 2005). However, a party asserting unclean hands to defeat a claim for subrogation must prove that it was injured by the alleged conduct in order for the unclean hands doctrine to apply. *Tribeca Lending Corp. v. Real Estate Depot, Inc.*, 42 So. 3d 258, 262 (Fla. 4th DCA 2010).

The doctrine of equitable subrogation has also long been recognized by Florida courts to establish the priority of a subsequent mortgage over other prior recorded liens, to the extent that the lender's proceeds were used to pay off prior, superior liens, as long as the mortgage was intended to constitute a first lien and no prejudice to the prior lienors results. *Fed'l Land Bank of Columbia v. Godwin*, 107 Fla. 537, 145 So. 883 (1933); *Wolf v. Spariosu*, 706 So. 2d 881 (Fla. 3d DCA 1998); *S. Colonial Mortg. Co., Inc. v. Medeiros*, 347 So. 2d 736 (Fla. 4th DCA 1977); *SunTrust Bank v. Riverside Nat'l Bank of*

Fla., 792 So. 2d 1222 (Fla. 4th DCA 2001) (subrogation allowed to grant a refinancing lender priority over a previously recorded second mortgage that was missed due to a negligent title search); *Aurora Loan Serv. LLC v. Senchuck,* 36 So. 3d 716 (Fla. 1st DCA 2010).

There is also a distinction between equitable or legal subrogation and conventional subrogation. Equitable subrogation arises when the person discharging the obligation is under a legal duty to do so or when the person discharges the obligation to protect an interest in, or a right to, the property; whereas conventional subrogation is a right flowing from a contractual agreement that the party paying the debt will be subrogated to the rights and remedies of the original creditor. *Eastern Nat'l Bank v. Glendale Fed. Sav. & Loan Ass'n*, 508 So. 2d 1323, 1324 – 1325 (Fla. 3d DCA 1987).

In *Aurora*, the First District considered the question of what actually constitutes prejudice in the context of subrogation, and concluded that the best guidance is offered by *Godwin*, in which the Florida Supreme Court held that an "injury" to the second lien holder would exist if the lien holder were left in a worse position than if the "prior lien had not been discharged." *Aurora*, 36 So. 3d at 721.

In *Velazquez v. Serrano*, 43 So. 3d 82 (Fla. 3d DCA 2010), property was owned by Serrano subject to three mortgages, the third of which was held by Velazquez. *Id*. at 83. Serrano sold the property, and the purchasers placed a new purchase money mortgage on the property that secured proceeds which had been used to pay off and satisfy the prior two mortgages, but not Velazquez's mortgage, which had been missed in a title search.

Id. Significantly, Velazquez's missed mortgage contained a due-on-sale clause that required Velazquez to be paid off in connection with the sale, and the surplus funds from the sale that were disbursed to the seller, instead of Velazquez, would have been sufficient to satisfy Velazquez's mortgage. *Id*. at 84. Moreover, the title agent who closed the transaction testified that she would have used the surplus funds to pay off the Velazquez mortgage had she been aware of it. *Id*.

The purchase money mortgagee in *Velazquez* filed a foreclosure action, and the trial court entered judgment establishing the priority of the purchase money mortgage over Velazquez's mortgage under the doctrine of equitable subrogation. *Id*. at 83. On appeal, the Third District reversed the judgment based upon its finding that Velazquez would be prejudiced, since the due-on-sale clause in her existing mortgage entitled her to have been paid when the property was sold. *Id*. at 84. More importantly, the Third District found that Velazquez had an expectation funds would be disbursed at closing to pay off her mortgage, stating:

> . . . although Velazquez's mortgage was third in priority . . . there was a surplus of funds after the payment of the [prior two mortgages], and that surplus should have been paid to Velazquez to satisfy her properly recorded mortgage. In addition, the due-on-sale clause in Velazquez's mortgage establishes that Velazquez had an expectation that she would receive any available funds when Serrano sold the property.

Id.

Accordingly, the legal expectation of payment appears to be what distinguishes and reconciles the Third District's holding in *Velazquez* from other Florida case law which

has rejected prejudice on the basis of existing subordinate lien rights and the funds available having instead been disbursed to the owner or seller of the encumbered property. In *Aurora*, for example, the First District reversed the trial court's holding that funds available at closing, which could have been paid to an existing subordinate lien holder instead of the owner of the property, was a sufficient basis to deny equitable subrogation on the basis of prejudice. *Id*. at 721. Accordingly, *Velasquez* appears to be distinguishable from *Aurora*, even though they both involved fact situations in which funds were available to have paid the subordinate lienor, because the subordinate mortgage in *Velazquez* contained a due-on-sale clause, based upon which the holder of that mortgage had both a legal right, as well as the expectation, to have received a payoff in connection with the closing.

The significance of the foregoing distinction between the holdings in *Aurora* and *Velasquez*, that subrogation will prejudice the holder of a formerly subordinate mortgage containing a due-on-sale clause, who was not paid off with funds generated from a sale of the encumbered property, was confirmed in *Nikooie v. JPMorgan Chase Bank, N.A.*, 183 So. 3d 424, 429 (Fla. 3d DCA 2014).

In *SunTrust*, the Fourth District adopted the position of the Restatement (Third) of Property: Mortgages, section 7.6, pursuant to which actual knowledge of an intervening lien is irrelevant to the availability of equitable subrogation. *Suntrust*, 792 So. 2d at 1225. Specifically, the court quoted from section 7.6 of the Restatement:

> [u]nder this Restatement, however, subrogation can be granted even if the

> payor [the refinancing lender] had actual knowledge of the intervening interest; the payor's notice, actual or constructive, is not necessarily relevant. The question in such cases is whether the payor reasonably expected to get security with a priority equal to the mortgage being paid. Ordinarily lenders who provide refinancing desire and expect precisely that even if they are aware of an intervening lien. A refinancing mortgagee should be found to lack such an expectation only where there is affirmative proof that the mortgagee intended to subordinate its mortgage to the intervening interest.

Id.

In *Tribeca*, the Fourth District again rejected the contention that actual knowledge of subordinate claims could bar subrogation, stating:

> Even assuming Tribeca had actual knowledge that Real Estate Depot was claiming the deed was a forgery, the unclean hands defense still fails as a matter of law on this record. By analogy, in *Suntrust*, we explained that a refinancing lender is still entitled to be equitably subrogated to the priority of the mortgage it satisfied even where it had knowledge of the intervening lien. Similarly, Real Estate Depot's interest in the property was subordinate to the mortgage of Colonial. When Tribeca satisfied that lien, it was entitled to step into the shoes, so to speak, of Colonial's priority over Real Estate Depot's interest. Regardless of what Tribeca knew, Tribeca's conduct did not harm Real Estate Depot to that extent.

Tribeca, 42 So. 3d at 263.

The fact that the lender seeking subrogation was also the holder of the prior mortgage that was paid off is not a bar to subrogation. *Nikooie*, 183 So. 3d at 429; *see also Suntrust*, 792 So. 2d at 1222.

Miscellaneous Priority Issues

In the absence of language in a declaration for a homeowner's association or condominium association, that liens shall relate back or otherwise take priority, such liens are subordinate to intervening mortgages. *U.S. Bank Nat'l Ass'n v. Grant*, 180 So. 3d 1092 (Fla. 4th DCA 2015).

A court may not grant a condominium association lien priority over a superior mortgage as a sanction for the mortgagee's failure to pursue foreclosure in a timely manner. *U.S. Bank Nat'l Ass'n v. Farhood*, 153 So. 3d 955 (Fla. 1st DCA 2014).

The lien of a recorded mortgage is not subordinated to subsequent liens due to the failure of an assignee to record an assignment. *Barton v. Metrojax Prop. Holdings, LLC*, 207 So. 3d 304 (Fla. 3d DCA 2016).

As between competing judgment liens, priority is generally determined by order of recording. *Martinez v. Reyes*, 405 So. 2d 468 (Fla. 3d DCA 1981).

A foreclosure judgment pursuant to a default against the holder of a superior lien is void. *Bank of Am., N.A. v. Kipps Colony II Condo. Ass'n, Inc.*, 201 So. 3d 670 (Fla. 2d DCA 2016); *Bank of N.Y. Mellon v. Sperling*, 201 So. 3d 697 (Fla. 4th DCA 2016). Moreover, a lien holder foreclosed pursuant to a default will not be barred by *res judicata* from initiating its own foreclosure to resolve a priority issue. *Cone Bros. Constr. Co. v. Moore*, 141 Fla. 420, 193 So. 288 (1940); *Citimortgage, Inc. v. Henry*, 24 So.3d 641 (Fla. 2d DCA 2009).

JUDGMENT LIENS

Florida State Court Judgments

The requirements for a judgment to constitute a lien against Florida real property, as well as the expiration and renewal of a judgment lien, and for transfer of a judgment lien to other security, are determined pursuant to section 55.10, Florida Statutes, which states:

> **55.10. Judgments, orders, and decrees; lien of all, generally; extension of liens; transfer of liens to other security**
>
> (1) A judgment, order, or decree becomes a lien on real property in any county when a certified copy of it is recorded in the official records or judgment lien record of the county, whichever is maintained at the time of recordation, provided that the judgment, order, or decree contains the address of the person who has a lien as a result of such judgment, order, or decree or a separate affidavit is recorded simultaneously with the judgment, order, or decree stating the address of the person who has a lien as a result of such judgment, order, or decree. A judgment, order, or decree does not become a lien on real property unless the address of the person who has a lien as a result of such judgment, order, or decree is contained in the judgment, order, or decree or an affidavit with such address is simultaneously recorded with the judgment, order, or decree. If the certified copy was first recorded in a county in accordance with this subsection between July 1, 1987, and June 30, 1994, then the judgment, order, or decree shall be a lien in that county for an initial period of 7 years from the date of the recording. If the certified copy is first recorded in accordance with this subsection on or after July 1, 1994, then the judgment, order, or decree shall be a lien in that county for an initial period of 10 years from the date of the recording.
>
> (2) The lien provided for in subsection (1) or an extension of that lien as provided by this subsection may be extended for an additional period of 10 years, subject to the limitation in subsection (3), by rerecording a certified copy of the judgment, order, or decree prior to the expiration of the lien or the expiration of the extended lien and by simultaneously recording an affidavit with the current address of the person who has a lien as a result of

the judgment, order, or decree. The extension shall be effective from the date the certified copy of the judgment, order, or decree is rerecorded. The lien or extended lien will not be extended unless the affidavit with the current address is simultaneously recorded.

(3) In no event shall the lien upon real property created by this section be extended beyond the period provided for in s. 55.081 or beyond the point at which the lien is satisfied, whichever occurs first.

(4) This act shall apply to all judgments, orders, and decrees of record which constitute a lien on real property; except that any judgment, order, or decree recorded prior to July 1, 1987, shall remain a lien on real property until the period provided for in s. 55.081 expires or until the lien is satisfied, whichever occurs first.

(5) Any lien claimed under this section may be transferred, by any person having an interest in the real property upon which the lien is imposed or the contract under which the lien is claimed, from such real property to other security by either depositing in the clerk's office a sum of money or filing in the clerk's office a bond executed as surety by a surety insurer licensed to do business in this state. Such deposit or bond shall be in an amount equal to the amount demanded in such claim of lien plus interest thereon at the legal rate for 3 years plus $500 to apply on any court costs which may be taxed in any proceeding to enforce said lien. Such deposit or bond shall be conditioned to pay any judgment, order, or decree which may be rendered for the satisfaction of the lien for which such claim of lien was recorded and costs plus $500 for court costs. Upon such deposit being made or such bond being filed, the clerk shall make and record a certificate showing the transfer of the lien from the real property to the security and mail a copy thereof by registered or certified mail to the lienor named in the claim of lien so transferred, at the address stated therein. Upon the filing of the certificate of transfer, the real property shall thereupon be released from the lien claimed, and such lien shall be transferred to said security. The clerk shall be entitled to a service charge of up to $15 for making and serving the certificate. If the transaction involves the transfer of multiple liens, an additional service charge of up to $7.50 for each additional lien shall be charged. Any number of liens may be transferred to one such security.

(6) Any excess of the security over the aggregate amount of any judgments, orders, or decrees rendered, plus costs actually taxed, shall be repaid to the party filing the security or his or her successor in interest. Any deposit of

money shall be considered as paid into court and shall be subject to the provisions of law relative to payments of money into court and the disposition of these payments.

(7) Any party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county where such security is deposited for an order:

(a) To require additional security;

(b) To require reduction of security;

(c) To require change or substitution of sureties;

(d) To require payment or discharge thereof; or

(e) Relating to any other matter affecting said security.

Although the creation and duration of judgment liens are determined by section 55.10, the duration of the judgment itself is proscribed by section 55.081, Florida Statutes, which states:

55.081. Statute of limitations, lien of judgment

Subject to the provisions of s. 55.10, no judgment, order, or decree of any court shall be a lien upon real or personal property within the state after the expiration of 20 years from the date of the entry of such judgment, order, or decree.

Significant cases applying these statutes are:

1. *Franklin Financial, Inc. v. White*, 932 So. 2d 434 (Fla. 4th DCA 2006) – An otherwise valid judgment, rerecorded in accordance with section 55.10(2), Florida Statutes, after the expiration of the original recording period, creates a new lien as of the date of rerecording.

2. *Betaco, Inc. v. Countrywide Home Loans, Inc.*, 752 So. 2d 696 (Fla. 2d DCA 2000) - Execution is valid and effective only during statutory time period of judgment, which is not extended by levy.

3. *Robinson v. Sterling Door & Window Co.*, 698 So. 2d 570 (Fla. 1st DCA 1997) – A judgment that did not contain creditor's address did not a become lien on real property.

4. *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla. 4th DCA 1998) – A judgment did not become a lien on real property when it contained the address of the creditor's attorney, rather than the address of the creditor.

5. *Dyer v. Beverly & Tittle, P.A.*, 777 So. 2d 1055 (Fla. 4th DCA 2001) – A judgment which specifically grants lien on real property for amounts awarded must nevertheless comply with creditor's address and other lien perfection requirements of section 55.10, Florida Statutes.

Federal Court Judgments

Pursuant to 28 U.S.C. Sec. 1962, a lien of a judgment entered in a United States district court located in Florida is created in the same manner, to the same extent, and for the same time period, as applicable to Florida state court judgments. If the judgment is in favor of the United States, however, it is not governed by 28 U.S.C. 1962, but by the Federal Debt Collection Procedures Act, 28 U.S.C. 3001, *et seq*.

Foreign State and Federal Court Judgments

Liens and enforcement of judgments of foreign states and out of state federal district courts are governed by Florida Enforcement of Foreign Judgments Act, §§ 55.501 - .509, Fla. Stats. Pursuant to section 55.505, a foreign judgment creditor must record a certified copy of the foreign judgment, along with an affidavit by the creditor providing the name and last known post office address of the judgment debtor and the judgment

creditor. The affidavit is also required to include the judgment debtor's social security number, if known. The clerk of court must then promptly mail notice of the recording of the foreign judgment, by registered mail with return receipt requested, to the judgment debtor at the address given in the affidavit and make a note of the mailing in the docket. The judgment creditor may also mail a notice of the recording of the judgment to the judgment debtor and record proof of mailing with the clerk. The clerk's failure to mail notice of recording will not affect the enforcement proceedings if proof of mailing by the judgment creditor has been recorded.

The judgment will not be enforceable for 30 days after mailing of the notice, however, priority of the judgment will be established as of the date of recording. *Dollar Sav. & Trust Co. v. Soltesiz*, 636 So. 2d 63 (Fla. 2d DCA 1994). Enforcement of the judgment will be further stayed if the judgment debtor files an action contesting the foreign court's jurisdiction or providing another basis to continue the stay of enforcement. § 55.509, Fla. Stats.

The lien of a foreign judgment domesticated pursuant to the Florida Enforcement of Foreign Judgments Act is subject to the 20 year statute of limitations in section 95.11 (1), Florida Statutes, without regard to the effect of any statute of limitations that would apply in the judgment's state of origin. *Patrick v. Hess*, 212 So. 3d 1039 (Fla. 2017).

Foreign Country Judgments

Liens of judgments of foreign countries are perfected pursuant to the Uniform Out-of-Country Foreign Money-Judgment Recognition Act, §§ 55.601 - .607, Fla. Stats.

The Act applies to judgments other than those for taxes, fines or penalties. In order to comply, a foreign creditor must file the judgment with the clerk and record it, along with an affidavit by the creditor providing the name, last known post office address, and social security number, if known, of the judgment debtor and the judgment creditor. The clerk or the creditor must then mail notice of the recording of the foreign judgment, by registered mail with return receipt requested. The debtor then has 30 days to object to the judgment, failing which the clerk must record a certificate stating that no objection was filed. If the debtor objects, but is unsuccessful, an order recognizing the foreign judgment is required to be entered.

Knox's Basic Judgment Lien Paradigm (updated 2008)

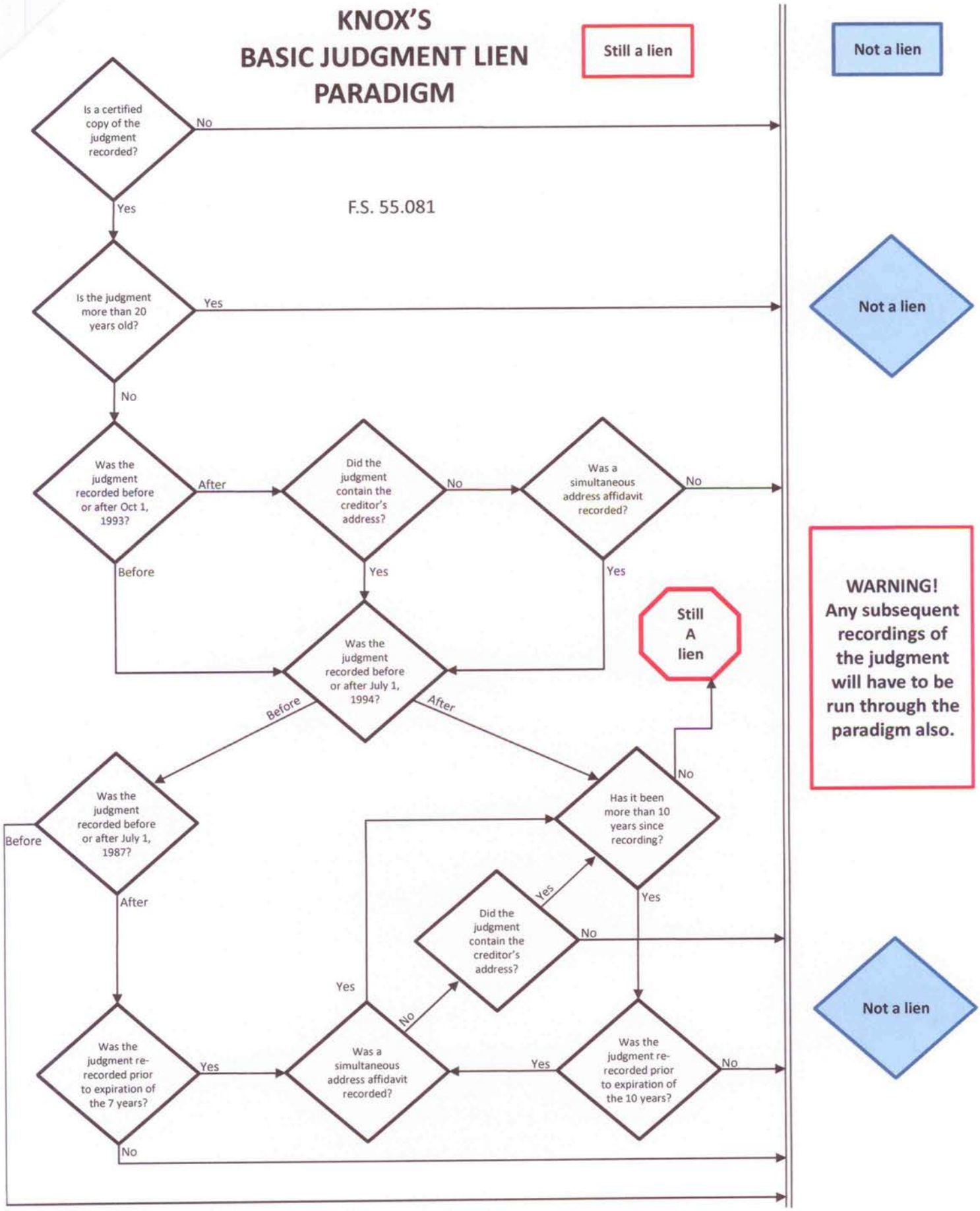
The Basic Judgment Lien Paradigm is an effort to organize the various changes to Florida judgment lien law since 1987. The inspiration was Rohan Kelley's use of a paradigm to organize and simplify Florida homestead law.

Like the homestead paradigm, the sheet is divided into two parts. If the answers to the questions leave you on the left hand side of the page, then the judgment is still a lien. If the answers carry you to the right hand margin at any point, then the judgment is not a lien. However, note **this paradigm does not address title insurance gap issues presented by judgments that are not perfected as liens**, nor any subsequent recordings of judgments that may create a perfected lien which must be run through the paradigm pursuant to the WARNING contained on the right hand side of the paradigm and the WARNING below.

The basic paradigm is based on the following assumptions:

1) It deals only with case law as it exists on January 1, 2008. The user must stay current on statutory and case law changes.
2) It deals solely with Florida judgments. No effort has been made to factor in the various domestication processes for judgments of other jurisdictions.
3) It assumes that the debtor owns non-exempt real property that is subject to levy, i. e. the basic paradigm does not address issues of homestead, entireties, bankruptcy, etc.
4) The word "After" in the paradigm means "on or after". Because the recording of a certified copy is an absolute requirement for a judgment lien, where the words "recorded", "recording", or "re-recorded" are used in connection with a judgment, it means a certified copy.

WARNING: Each recording of a judgment must be reviewed independently to determine if a lien has been created. Just because the initial recording of a judgment contains a defect that prevents it from being a lien does not preclude a later recording that complies with the requirements to create a lien. *Hott Interiors, Inc. v. Fostock*, 721 So. 2d 1236 (Fla 4th DCA 1998) (where a judgment lacks creditor's address, lien is created with recording of a simultaneous address affidavit). In addition, any judgment that has been re-recorded after the initial 7 or 10 year expiration but prior to the expiration of 20 years from the initial recording, should be treated as a new judgment that must be run through the paradigm as of the date of its subsequent recording. *Franklin Financial v. White*, 932 So. 2d 434 (Fla. 4th DCA 2006).



JUDGMENTS, JUDGMENT LIENS, LIEN PRIORITIES

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Florida's Recording Statute Priority

- Betty Borrower closed on a mortgage loan with Bank A, at 10 A.M.
- Three hours later, Betty closed on a mortgage loan with Bank B on the same property.
- Each bank approved its loan subject to receiving a first mortgage, and neither bank knows about the other.
- Bank A records its mortgage the next day.
- Bank B records its mortgage after Bank A's mortgage.

Types of Recording Statutes

- Race
- Race/Notice
- Notice

695.01 - Conveyances to be recorded

(1) No conveyance, transfer, or mortgage of real property, or of any interest therein, nor any lease for a term of 1 year or longer, shall be good and effectual in law or equity **against creditors or subsequent purchasers for a valuable consideration and without notice**, unless the same be recorded according to law . . . .

Parties Protected by § 695.01

- creditors or subsequent purchasers
- for a valuable consideration
- without notice

Valuable Consideration Requirement

- Not full, fair or adequate
- Requires present consideration
- Excludes:
  - Antecedent Debts
  - Gift Donees
  - Heirs

What about C?

- Gary Grantor deeds property to purchaser A.
- Before A records, Gary deeds the same property to purchaser B.
- Neither A nor B know about each other.
- A then deeds the property to purchaser C.

Failure to Record

- Betty Borrower closed on a mortgage loan with Bank A, at 10 A.M.
- Three hours later, Betty closed on a mortgage loan with Bank B on the same property.
- Each bank approved its loan subject to receiving a first mortgage, and neither knows about the other.
- Bank A records its mortgage the next day.
- Bank B records never records its mortgage.

Unrecorded Instruments

- Effective as to:
  - Parties to instrument
  - Parties having notice
  - Prior interests

What Constitutes "Official Records?"

28.222. Clerk to be county recorder

(2) The clerk of the circuit court shall record all instruments in one general series called "Official Records." He or she shall keep a register in which he or she shall enter at the time of filing the filing number of each instrument filed for record, the date and hour of filing, the kind of instrument, and the names of the parties to the instrument. The clerk shall maintain a general alphabetical index, direct and inverse, of all instruments filed for record. The register of Official Records must be available at each office where official records may be filed.

Types of Notice

- Constructive
  - Official Records
  - Possession
- Actual
  - Express
  - Implied Actual (Inquiry)

Parties in Possession

- Open, visible, exclusive
  - Sufficiency of inquiry
- Estoppel exception

Indexing

- Gary Grantor deeds vacant property to Purchaser A.
- The deed is accepted for recording by the Clerk of Court, and assigned official register numbers.
- The Clerk inadvertently fails to index the deed under Gary Grantor's name.
- Gary Grantor subsequently conveys the same vacant property to Purchaser B, who is unaware of the prior conveyance to Purchaser A.
- Prior to B's closing, B's attorney had performed a search of the courthouse official records, but did not discover Gary's prior deed to A, because the deed was not indexed under Gary Grantor's name.

695.11. Instruments deemed to be recorded from time of filing

All instruments which are authorized or required to be recorded in the office of the clerk of the circuit court of any county in the State of Florida, and which are to be recorded in the "Official Records" as provided for under s. 28.222, and which are filed for recording on or after the effective date of this act**, shall be deemed to have been** officially accepted by the said officer, and **officially recorded, at the time she or he affixed thereon the consecutive official register numbers required under s. 28.222, and at such time shall be notice** to all persons. The sequence of such official numbers shall determine the priority of recordation. An instrument bearing the lower number in the then-current series of numbers shall have priority over any instrument bearing a higher number in the same series.

Exceptions to Actual Notice Effect

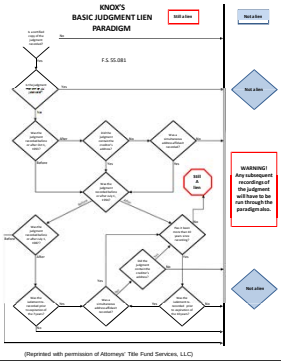
- Construction Liens
  - §713.07, Fla. Stats.
- Lis Pendens
  - §48.23(1), Fla. Stats.
- Bankruptcy Law
  - 11 U.S.C. §544(a)(3)

Exceptions to Effect of Constructive and Actual Notice

- Purchase Money Mortgages
- Subrogation
  - Conventional
  - Equitable / Legal
  - Not applicable to subsequent BFP's

Judgment Liens

- Lien Perfection
  - § 55.10, Fla. Stats.
- Lien Duration
  - § 55.081, Fla. Stats.



- Federal Court Judgments
  - 28 U.S.C. § 1962
- Judgments in favor of U.S.A.
  - Federal Debt Collection Procedures Act, 28 U.S.C. § 3001, *et seq.*

Foreign Judgments

- Foreign State Court Judgments
  - Florida Enforcement of Foreign Judgments Act, §§ 55.501 - .509, Fla. Stats.
- Foreign Countries
  - Uniform Out-of-Country Foreign Money-Judgment Recognition Act, §§ 55.601 - .607, Fla. Stats.

COMMENTS ON THE EXAM

By

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Christopher C. Cathcart, Altamonte Springs

Board Certification – Real Estate Law
2018 Florida Bar Real Estate Certification Review Course
Mary A. Robison

I. Opening Remarks

Purpose is to provide an outline of the real estate certification program, exam format and grading.

II. Certification Statistics – "Evaluated for Professionalism, Tested for Expertise"

A. The Certification program was established in 1982, and expanded to include real estate in 1986.
B. Presently there are 26 certification fields.
C. Approximately 6% of Florida Bar members are board certified.
D. Currently 452 real estate certified attorneys.
E. Real Estate is the second largest certification area. Civil Trial is first, Criminal Trial is third, and Construction Law is fourth.

III. Benefits of Certification

A. Certification denotes competence in the area, and is indicative of professional accomplishment. It can help prospective clients decide to engage your services.
B. Trial lawyers seeking expert witnesses on real property issues often consider only those lawyers who are certified in real estate.
C. Board certified attorneys are entitled to use the designation "Board Certified Specialist," or the letters "B.C.S.," along with the specialty area, to identify themselves.
D. Florida Lawyers Mutual Insurance Company offers a 10% discount on malpractice insurance for Florida board certified attorneys.

IV. Real Estate Certification Committee

A. Normally comprised of 11 board certified real estate attorneys (10 this year due to death of one of the original members).
B. Arlee J. Colman is the BLSE Staff Liaison and Steven D. Rubin of Boca Raton (previously a member of the committee) – is the Liaison from the Board of Legal Specialization and Education.
C. Three-year term, running from July 1 to June 30.
D. Responsible for:
    i. Drafting and grading the examination.
    ii. Determining qualification of applicants for certification and recertification.

E. Typically, seven meetings, five at The Florida Bar offices in the Tampa Airport, including the grading meeting. The other meetings are held by teleconference.

F. Committee members are eligible to receive 15 hours of continuing legal education hours annually, which include real estate certification credits, for the time and work spent drafting questions and researching the law to prepare the examination.

V. Requirements for Initial Certification

A. Practice law on a full-time basis for at least five years.

B. Demonstrate substantial involvement, defined as 40% or more, in real estate law in the three years preceding application.

C. Complete of 45 hours of advanced level continuing legal education in real estate.

D. Satisfactory peer review.

E. Pass a written examination demonstrating knowledge, skills and proficiency in the field of real estate law. The examination is given in May of each year.

F. Submit application postmarked no later than October 31 (November 30 in 2017 due to extension for Hurricane Irma).

VI. Real Estate Certification Examination and Grading

A. Part I (morning – 3 hours in length – 180 minutes/180 points)

i. 45 multiple choice questions worth three points each.
ii. One long essay on Homestead worth 45 points.

B. Part II (afternoon – 3 hours in length – 180 minutes/180 points)

i. One long essay on Transactional Analysis worth 60 points.
ii. Six short essays worth 20 points each for a total of 120 points on the following topics:

a. Ethics;
b. Real Estate Financing;
c. Title Issues/Liens and Priorities;
d. Seller/Buyer/Broker;
e. Real Property Litigation; and
f. Landlord/Tenant.

C. Preparation Resources/Committee's Website

i. Plan to study: Real estate is a broad area and most practitioners specialize in only some aspects of it, however, the examination is written for a broad range of practitioners.
ii. Subject area of the examination – see the "Examination Specifications" and "Exam Format and Scoring" on the Bar website.
iii. Suggested Study Resources – see the "Study Guide" on the Bar Website.
iv. Sample Examination Questions:

a. Sample multiple choice questions;
b. Sample ethics short essay question; and
c. Sample transactional analysis long essay question.

D. Grading

i. Multiple choice questions are machine graded and the committee reviews the results.
ii. Short and long essays are graded holistically on a scale of 1-6, and that score is then converted to analytical points.
iii. Short and long essays are graded by two committee members who assign scores to the questions. If their scores differ, they either discuss and agree upon the final score, or a third member reviews.
iv. Passing Score = 252 (70.0%).
v. All grading is anonymous.

E. Helpful Suggestions

i. Review the point total for each question/section. The total number of points generally corresponds to the time allotted (1 minute = 1 point), so allocate your time accordingly.
ii. If short on time, organize your short and long essays sufficiently to demonstrate identification of the issues and knowledge of the subject area (i.e. issue spotting, recognition and analysis). Graders understand time constraints. The graders look for analytical and technical skill, knowledge and substance, not rhetorical eloquence.
iii. Multiple choice – Credit is awarded only for the correct answer. Read each question carefully before making your selection.
iv. Multiple choice questions are designed to test substantive real estate law and practice knowledge and not pure memory. Basic statutory concepts and timeframes that experienced real estate lawyers should know may be tested.

VII. Peer Review Questionnaires

If you receive a request for peer review, please return it to the Bar. This is important information for evaluating candidates for certification and those seeking recertification. If you know the applicant, please respond to all questions and provide narrative. If you are unfamiliar with the applicant, please check the boxes on the front page, sign the last page and return it to our Bar so they have a record (and will prompt further requests).

VIII. Closing Remarks

A. The Committee will always be in need of quality board certified attorneys for service on the committee when members rotate off due to term limits or due to other circumstances (such as due to an unanticipated early resignation). If interested in serving once you are board certified, submit your committee preference form to the Bar. Note: Only the President of The Florida Bar can appoint individuals to the certification committees and only board certified attorneys (specifically in the area) will be considered for appointment to a certification committee.

B. If you are not board certified in real estate, but practice in that area, I encourage you to seek certification.

PREPARING FOR THE EXAM

I. Set Aside Time to Study

- Start to Study now, the test is upon you before you know it
- Set aside an hour each morning or each evening or both
- Study 8 hours on the weekend
- Weekend and week of test – 4 hours per day
- Night before and morning of test – reviewing notes only

II. Materials to Use for Studying

- This course's book and handouts (read cover to cover)
- Real Estate portions of Florida Statutes (Ch 48 – Lis pendens, Ch 51 – summary proceedings, Ch 64 – partition, Ch 65 – quieting title, Ch 66 – ejectment, Ch 83 – landlord tenant, Ch 95 – statute of limitations and adverse possession, Ch 177 – land boundaries & platting, Ch 222 – homestead and exemptions, Chs 605, 607, 609, 617, 620, 621, - legal entities, Chs – 689 thru 721 – personal and real property, Ch 723 – mobile homes, Ch 725 – statute of frauds, Constitution Art. X Sect. 4 – homestead, Const. Art. X Sect. 11 – sovereignty lands.
- The Fund Seminar Materials
- The Fund's Title Teasers and Quiz on Recent Real Property Cases
- Any other Seminar Materials
- Sign up for Manny's weekly email (summary of recently issued cases)
- Sign up for Florida Law Weekly's Express Email (headnotes from recent cases)

III. How to Study

- Use the study method that worked for you in law school or to pass the bar exam
- Read & write summary in own words
- Write down items you didn't know
- Focus on subjects you are weak in
- Review notes on weak areas on the night before and morning before

IV. Specific Items to Study

- Know recent cases and developments
- Homestead, homestead, homestead (memorize paradigm)
- Know the basic homestead protections (half acre in city, etc) and rules on Wills
- Know the latest homestead cases and hot issues in homestead
- Legal entities – know the pros and cons for each
- Real Estate Ethics
- Memorize the notice rules on priority – not logical so it's tough to remember
- Know the basics of each subject area
- Construction Liens, landlord tenant are likely
- No tax or bankruptcy, but may see FIRPTA or 1099 exchange questions

V. How to Take the Test

- Laptop vs. Handwriting
- Multiple Choice
  - get two or three minutes per question
  - some you will know right away
  - some you will narrow it down between 2 choices
  - some you won't know at all and must make an educated guess
  - try not to take too long on any question
  - on doubtful ones, note the question #, move on to next question and come back later

- Essay Questions
  - morning homestead essay
  - after lunch will have one long essay and 5 or so smaller ones
  - don't provide needless information or law
  - you will be tempted to tell everything you know, but just provide the answers requested
  - afternoon smaller essays – read them all over before starting, focus on those you know
  - watch your time; don't take too long on long essay, leave plenty of time for short ones

VI. Closing Thoughts

- It will be exhausting
- Get a good night's sleep
- Follow the rules the proctor will give you