

# **Bounds of Advocacy**

## **Goals for Family Lawyers in Florida**

### **Preface**

The idea for the Bounds of Advocacy was originally conceived in November 1987 by then president of the American Academy of Matrimonial Lawyers (AAML), James T. Friedman. The original Bounds of Advocacy was published by the American Academy of Matrimonial Lawyers in 1991. Subsequently, a revision was published in 2000. In 2002, Caroline Black, Chair of the Family Law Section of The Florida Bar, and Chair-Elect Richard West, appointed this committee to review the Bounds of Advocacy of the AAML and to adapt them to Florida practice for the guidance of family lawyers in our state. This committee has reviewed, modified, and adapted the AAML Bounds of Advocacy to conform to Florida law and practice. We submit it to The Florida Bar and the Family Law Section to be used as guidance in this important area of practice.

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Stephen Sessums, Chair, Tampa  
Professor Robert Atkinson, Tallahassee  
Melinda P. Gamot, West Palm Beach  
Ky M. Koch, Clearwater  
Honorable Judith L. Kreeger, Miami  
Honorable John C. Lenderman, St. Petersburg  
Carroll Lee McCauley, Panama City  
Honorable Raymond T. McNeal, Ocala  
James Fox Miller, Hollywood  
Honorable Stevan Northcutt, Tampa  
Richard D. West, Orlando  
Honorable Kenneth L. Williams, Pensacola



## **Preliminary Statement**

The primary purpose of the Bounds of Advocacy: Goals for Family Lawyers<sup>1</sup> (Goals) is to guide family lawyers confronting professional and ethical dilemmas. Existing codes often do not provide adequate guidance to the family lawyer. The Florida Bar Rules of Professional Conduct (FRPC) are addressed to all lawyers, regardless of the nature of their practices. This generally means that, with rare exceptions, issues relevant only to a specific area of practice cannot be dealt with in detail or addressed at all. Many family lawyers have encountered situations when the FRPC provided insufficient guidance.

Most attorneys are able to distinguish between unethical or illegal conduct and ethical and proper practice. These Goals, therefore, are directed primarily to those areas in between, in which even experienced, knowledgeable family lawyers might have concerns, and are an effort to provide clear, specific guidelines in areas most important to family lawyers.

Conduct permitted by the FRPC cannot form the basis for discipline by The Florida Bar or Florida Supreme Court. Hence, the Goals established here for family lawyers generally use the terms "should" and "should not," rather than "must," "shall," "must not", and "shall not." Because the Goals aspire to a level of practice above the minimum established in the FRPC, it is inappropriate to use them to define the level of conduct required of lawyers for purposes of malpractice liability or discipline.

Some Goals elaborate on FRPC rules or relate those rules to issues confronting family lawyers. Each Goal is followed by a Comment. The Comments are intended to provide further explanation and examples of conduct addressed and in some instances, to suggest limitations of the application of the goal.

Few human problems are as emotional and complicated, or seem so important, as those people bring to family lawyers. The break-up of a family will be felt not only by the couple but also by other family members and often by friends and others with personal or business relationships with the parties. The problems and expense of the family law system can be daunting.<sup>2</sup>

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<sup>1</sup> "Family lawyer" is defined to mean any lawyer handling a family law matter.

<sup>2</sup> *In re Report of Family Court Steering Comm.e*, 794 So. 2d 518, 527 (Fla. 2001) (approximately 65% of initial filings in domestic relations cases involve self-represented litigants in Dade County and by the time of final judgment, 85% of cases involve at least one self-represented litigant); *See also* Williams and Buckingham, *Family Court Assessment: Dissolution of Marriage in Florida-Preliminary Assessment Findings*, 39 Fam. Ct. Rev. 170 (2001) (A review of cases in six Florida circuits found petitioners were represented by attorneys in 52% of divorce cases at time of filing, but only 19% of respondents were represented in the initial stages of their cases. The income level of represented litigants was significantly higher than of those representing themselves. Judges and attorneys agreed that delays and lack of available court

Family law disputes occur in a volatile and emotional atmosphere. It is difficult for family lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes, in which the parties may harbor substantial animosity without practical effect, the parties in family disputes may interact for years to come. In addition, family lawyers are obligated to consider the best interests of children, regardless of which family member they represent.

The family lawyer serves many functions. The Goals reflect a broad range of skills and methodologies to resolve disputes. When litigation is employed, the family lawyer should conduct it constructively because of the continued relationship of the parties after conclusion of the case. Advocacy skills may also be used to the client's advantage in arbitration or mediation. An effective advocate's stock in trade is the power to persuade.

One traditional view of the family lawyer (a view still held by many practitioners) is that of the "zealous advocate," whose only job is to win.<sup>3</sup> However, the emphasis on zealous representation of individual clients used in criminal and some civil cases is seldom appropriate in family law matters. Public opinion increasingly supports other models of practice and methods of conflict resolution.

A counseling, problem-solving approach for people in need of help in resolving difficult issues and conflicts within the family is another model. This is sometimes referred to as "constructive advocacy." "Constructive advocacy" must be the goal of all family law attorneys. This approach must include a consideration of all available means of settling disputes. Family lawyers should recognize the effect that their words and actions have on their clients' attitudes about the justice system, not just on the "legal outcome" of their cases. As a counselor, the lawyer encourages problem solving by the client.

Effective advocacy for a client means considering with the client what is in the client's best interests and determining the most effective means to achieve that result. The client's best interests include the well being of children, family peace, and economic stability. Clients look to

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time were frustrating to litigants. Attorneys added that the cost of litigation and the emotional nature of the issues were most frustrating to litigants.

<sup>3</sup> Under ABA Code of Professional Responsibility (CPR) DR 7-101 (originally enacted in 1969), an attorney was instructed to represent a client "zealously." Although Canon 7 of the CPR required zealous representation to be "within the bounds of the law," commentators, supported by disciplinary cases, noted that some attorneys appeared to equate "zealousness" with "overzealousness." Also noted was the "lack of fit between 'zealousness' and the proper quality of the representation in non-adversarial situations, such as office counseling or transactional work." Hazard & Hodes, *THE LAW OF LAWYERING* § 6-4 (3<sup>rd</sup> ed. 2001). The ABA Model Rules of Professional Conduct (*RPC*) (1983) eliminated the term "zealously," referring instead to "competence" (*RPC* 1.1) and "reasonable diligence and promptness" (*RPC* 1.3).

attorneys' words and deeds to model how they should behave while involved with the legal system. Even when involved in a highly contested matter, family attorneys should strive to promote civility and good behavior by the client towards the parties, lawyers, and court.

The minimum level of ethical conduct mandated by the FRPC is often insufficient in family law matters. All attorneys should aspire to a higher level of ethical behavior and professionalism. The FRPC themselves do not exhaust the moral and ethical considerations that characterize the practice of law at the highest level to which family lawyers should aspire.<sup>4</sup> Local and state bar associations, along with a number of state and federal courts, have adopted codes of professional conduct attempting to raise the level of practice above the ethical minimum necessary to avoid discipline.

The Goals reaffirm the attorney's obligation to competently represent individual clients. They also promote a problem-solving approach that also considers the client's children and family as well. In addition, they encourage efforts to reduce cost, delay, and emotional trauma and urge interaction between parties and attorneys on a more reasoned, cooperative level.

In drafting the Goals, the committee observed a number of conventions:

(1) Whenever the Goals or Comments refer to “family law,” the Committee considered that this area of practice encompasses all actions that may arise, separately or in combination. They include such actions as dissolution of marriage, paternity, parental responsibility and non-parent custody, child support, domestic violence, adoption, juvenile dependency and delinquency.<sup>5</sup>

(2) The conduct of attorneys, in general, is covered in the FRPC. Therefore, an effort was made to avoid repetition of rules and principles already addressed in the RPC and FRPC. For example, the CPR and FRPC address the basic conflict of interest requirements. The Goals address only those conflicts in which additional guidance was deemed desirable, or when the FRPC do not adequately address the unique requirements of family law practice. For that reason the Goals do not address the family lawyer's obligation of honesty and candor in dealing with the court, because that obligation is adequately covered by existing regulations.

(3) Citation to legal authority has been kept to a minimum. However, to indicate the basis

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<sup>4</sup> *FRPC*, Ch. 4, Preamble (“...A lawyer should use the law’s procedures only for legitimate purposes and not to harass or intimidate others.... A lawyer is also guided by personal conscience and the approbation of professional peers.... 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... Furthermore, the purposes of the rules can be subverted when they are invoked by opposing parties as procedural weapons.”)

<sup>5</sup> This is consistent with the Florida Supreme Court’s direction to state trial courts to create a fully integrated comprehensive approach to handling cases involving families and children. See *In Re Report of Family Court Steering committee*, 794 So. 2d 518 (Fla. 2001).

and provide some support for the Goals and Comments, some footnotes have been added. When it is appropriate to cite an official code, references are to the Florida Rules of Professional Conduct (FRPC) or the ABA Model Rules of Professional Conduct (RPC).

(4) References to gender have been eliminated when possible. In those instances in which elimination of gender-specific pronouns would be unduly awkward, the masculine and the feminine are used interchangeably.

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## **Attorney as Counselor and Advocate**

A person comes to a family lawyer with human problems that have legal aspects. Problems arising within a family are exceptionally emotional and transform the family. The family lawyer's duties encompass many roles, from counseling to litigation. Methods for resolving conflicts include mediation, arbitration, and other problem-solving methods. The family lawyer's approach to resolving problems is crucial to the future health of the family. The family lawyer has a critical and demanding counseling role in addressing these problems. The family lawyer serves a role similar to a physician who diagnoses the causes of the patient's pain and counsels the patient about a variety of treatments before undertaking treatment.

The Goals reflects a shift toward the role of constructive advocacy, a counseling, problem-solving approach for a client in need of assistance to resolve difficult issues and conflicts within the family.

### **1. Professional Cooperation and the Administration of Justice**

Candor, courtesy, and cooperation are especially important in family matters in which strong emotions can engulf the attorneys, the court, and the parties. Allowing the adverse emotional climate to infect the relations between the attorneys and parties inevitably harms everyone, including the clients, their children, and other family members. Although lawyers cannot ensure that justice is achieved, they can help facilitate the administration of justice.

Combative, discourteous, abrasive, "hard ball" conduct by family lawyers is inconsistent with both their obligation to effectively represent their clients and their role as problem-solvers. Good family lawyers can be cordial and friendly without diminishing effective advocacy on behalf of their clients. In fact, candor, courtesy and cooperation facilitate faster, less costly and mutually-acceptable resolution of disputes, reduce stress for lawyers, staff and clients, reduce waste of judicial resources, and generate respect for the court system, the individual attorney and the profession as a whole.

**1.1 An attorney should strive to lower the emotional level of family disputes by treating counsel and the parties with respect.**

#### **Comment**

Some clients expect and want the family lawyer to reflect the highly emotional, vengeful relationship between the parties. The attorney must decline to do so and must explain to the client that discourteous or uncivil conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client and that it is unprofessional for the attorney to act otherwise.

Pleadings, motions, and correspondence should contain only necessary facts, allegations, and conclusions. Unnecessary and scurrilous language and allegations are inappropriate.

Ideally, the relationship between counsel is that of colleagues using constructive problem-solving techniques to settle their clients' disputes consistent with the realistic objectives of each client. Examples of appropriate measures of respect include; cooperating with mediation, meeting with opposing counsel to reduce issues and facilitate settlement, promptly answering phone calls and correspondence, advising opposing counsel at the earliest possible

time of any perceived conflict of interest, and refusing to attack, demean, or disparage other counsel, the court, or other parties.

The attorney should ensure that no adversarial relationship with, or personal feeling toward, another attorney interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an overzealous lawyer, an attorney should not react in kind to unprofessional conduct. Pointing out the unprofessional conduct and requesting that it cease is appropriate.

Inflammatory and purely derogatory statements serve no purpose and must be avoided. Family lawyers must recognize the effect that their words and actions have on their client's attitudes about the justice system in general and about the conduct and outcome of the client's case. The client's interests in a family matter may include the well-being of children, future relations with a former spouse and family members, and family financial interests. Family law clients look to attorneys' words and deeds for guidance for their own actions and attitudes. Even when involved in a highly contested matter, family lawyers must demonstrate and promote civility and professional behavior toward the parties, the lawyers, and the court.

### **1.2 An attorney should stipulate to undisputed relevant matters.**

#### **Comment**

By stipulating to undisputed matters, the attorney avoids unnecessary expense and waste of the court's time. The attorney seeking a stipulation should do so in writing, attempting to state the true agreement of the parties. The other attorney should promptly indicate whether the stipulation is acceptable.

### **1.3 An attorney should not deceive or intentionally mislead other counsel.**

#### **Comment**

Attorneys should be able to rely on statements by other counsel. They should be able to assume that the family lawyer will correct any misimpression caused by an inaccurate or misleading prior statement by counsel or a client. Although an attorney must maintain the client's confidences, the duty of confidentiality does not require the attorney to deceive, or permit the client to deceive other counsel. When another party or counsel specifically requests information that: (a) the attorney is not required to provide; (b) the attorney has been instructed to withhold; or (c) may be detrimental to the client's interests, the attorney should refuse to provide the information, rather than mislead other counsel.

#### **Examples**

1. The wife's lawyer is approached by husband's lawyer, who asks, "Although my client realizes there is no hope for reconciliation, he is desperate to know whether his wife is seeing another man. Is she?" The wife's attorney knows that the wife has been having an affair. It would be proper for the attorney to indicate an unwillingness or inability to answer that question, but it would be improper to suggest that the client has not had an affair.

2. The attorney believes that the other party has engaged in activity that the party would not want made public. It is improper to threaten public disclosure of potentially embarrassing matters that would be clearly inadmissible or irrelevant in the case.

**1.4 An attorney should neither overstate the authority to settle nor represent that the attorney has authority that the client has not granted.**

#### **Comment**

In doing so, the attorney has improperly induced reliance by other counsel that could damage the attorney-client relationship. A family lawyer who is uncertain of his authority, or simply does not believe that other counsel is entitled to know such information, should either truthfully disclose his uncertainty, or state that he is unwilling or unable to respond at all.

**1.5 An attorney should not induce or rely on a mistake by other counsel as to agreeing on matters to obtain an unfair benefit for the client.**

#### **Comment**

The need for trust between attorneys, even those representing opposing sides in a dispute, requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should be corrected and not relied on in the hope that they will benefit the client. Therefore, for example, the attorney reducing an oral agreement to writing should not only avoid misstating the understanding, but should correct inadvertent errors by other counsel that are inconsistent with prior understandings or agreements. Whether conduct or statements by counsel that are not necessarily in her client's best interests should be corrected may not always be clear and will depend on the particular facts of a case. The crucial consideration should be whether the attorney induced the misunderstanding or is aware that other counsel's statements do not accurately reflect any prior agreement. It is thus unlikely that tactical, evidentiary or legal errors made by other counsel at trial require correction.<sup>6</sup>

#### **Examples**

1. In an effort to compromise a dispute over alimony, the parties agree that payments are to be deductible by the husband and taxable to the wife. While reviewing the agreement, the attorney for the wife realizes that the language will not create the tax consequences both sides had assumed and will, in fact, benefit his client because the payments will be treated neither as deductible alimony to the husband nor taxable to the wife. The family lawyer should disclose this discovery to opposing counsel.

If, however, counsel's mistake goes to a matter not discussed and agreed on, either explicitly or implicitly, the obligation to the client precludes disclosure of the mistake without the client's permission. Therefore, if alimony was agreed on without any discussion of tax consequences, the wife's lawyer would not be obligated to provide the language necessary to make payments tax deductible by the husband and includable by the wife.

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<sup>6</sup> But see *RPC* 3.3(a)(3) (duty to disclose to the court “legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel”). See also *FRPC* 4-3.3(a)(3).

2. The lawyer for the wife prepares a stipulation erroneously providing for the termination of maintenance on the remarriage of either party. If the husband asks his attorney if it is really true that by remarriage he can terminate his liability to pay any further maintenance, the attorney should correct the mistake in the stipulation or a judgment entered on it. The lawyer should also bring this to the attention of opposing counsel.<sup>7</sup>

**1.6 An attorney who receives materials that appear to be confidential should refrain from reviewing the materials and return them to the sender.**

**Comment**

There are many circumstances in which an attorney receives materials that were inadvertently sent by another attorney or party. Such instances have been increasing because of the use of e-mail, the ability to send simultaneous faxes to multiple persons, and the sheer volume of materials provided through discovery in complex cases. If the materials are not harmful or confidential, no issue is raised. If, however, the materials were not intended to be provided and contain confidential information, the temptation to use them to the client's benefit is great.

This Goal is consistent with Florida Bar Ethics Opinions in providing that once the inadvertence is discovered, the receiving attorney should not further examine the materials and should return them to the sending lawyer.<sup>8</sup> This Goal is also consistent with Goal 7.5, that an attorney should not rely on a mistake by opposing counsel, but should instead correct inadvertent errors. Because the decision whether to rely on inadvertent errors by another counsel is one of "means," the error is "appropriate for correction between the lawyers without client consultation."<sup>9</sup>

**Examples**

1. The wife's lawyer receives a fax with a cover sheet addressed to the husband from the husband's lawyer. In many cases that would be sufficient to indicate that the wife's lawyer was an unintended recipient. If, however, the receiving lawyer has a reasonable basis to believe a copy was intended for him, he may read the message unless and until it becomes evident that the message was unintentionally sent to him.

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<sup>7</sup> See *FRPC* 4.1; 8.4.

<sup>8</sup> Florida Bar Prof'l Ethics Comm., Op. 93-3 (1994).

<sup>9</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 85-1518 (1986). There is no mention of any necessity to notify the client. However, Under *FRPC* 4-1.4 Comments: "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of misrepresentation." As such, if the client's best interests are not compromised by the misdelivered documents, then it could be suggested that the attorney does not need to disclose the inadvertent delivery of the documents.

2. The lawyer for the husband has sought discovery of numerous documents from the wife relating to issues in the case. In response to the document request, the wife's attorney sends over ten large boxes of materials. While reviewing the documents, the husband's lawyer discovers in a seemingly unrelated file, a letter from the wife's attorney to the wife that begins: "As to your question about your use of drugs prior to your marriage to Husband . . . ." Unless the husband's lawyer has a reasonable basis to believe the letter was provided intentionally, was relevant, and was not otherwise confidential, the lawyer should stop reading and return the letter to the wife's attorney.

**1.7 An attorney may use materials intentionally sent from an unknown or unauthorized source unless the materials appear to be privileged, confidential, or improperly obtained.**

#### **Comment**

Attorneys occasionally receive papers from outside of the expected sources. Such materials may have been sent anonymously. The materials should be treated differently depending on both their source (if known) and apparent nature.

Clearly confidential or privileged material, regardless of the sender, should be returned to the other lawyer, preferably unread.<sup>10</sup> Documents not clearly confidential may be used by the receiving attorney. For example, a lawyer receiving an unmarked envelope containing statements of undisclosed accounts in the name of the other party may use the materials. A receiving lawyer who believes the materials were intentionally withheld from a response to a proper discovery request should report the fraud to the court.

**1.8 An attorney should cooperate in the exchange of information and documents. An attorney should not use the discovery process for delay or harassment or engage in obstructionist tactics.**

#### **Comment**

As a basic rule of courtesy and cooperation, attorneys should try to conduct all discovery by agreement, never using the discovery process to harass other attorneys or their clients. This

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<sup>10</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 94-382 (1994) deals with the situation in which the confidential materials were intentionally sent by a person not authorized to send them. For the most part, the Committee applied the same analysis as in Formal Opinion 92-368 (1992) (discussed in the Comment to Goal 7.6). However, the opinion indicates that if the receiving lawyer has a legitimate claim that the documents should have been, but were not, produced by an adverse party in response to pending discovery requests, the receiving lawyer may seek to obtain from a court a definitive resolution of the proper disposition of the materials. See, e.g., *In re Shell Oil Refinery*, 1992 WL 275426 (E.D. La. 1992) (ordering that such documents not be used by receiving party unless they "are publicly available, were previously introduced by Shell, or were the subject of a proper discovery request and were improperly withheld by Shell").

principle applies both to attorneys attempting to obtain discovery and to those from whom discovery is sought. The discovery rules are designed to eliminate or reduce unfair surprise, excessive delay and expense, unnecessary and futile litigation, and the emotional and financial costs of extended and overly adversarial litigation. In addition, pretrial discovery often results in settlements more beneficial than results obtained after protracted litigation.

In no area of the law are these benefits more important than in family law, in which the necessity of further dealings between the parties and the interest in protecting the emotional and psychological stability of children necessitate avoiding unnecessary litigation and acrimony. It is in the interest of all parties (including the client) to assist, rather than resist, legitimate discovery. Consistent with this view of discovery in family cases as “information gathering” rather than as an “adversarial weapon,” Florida has imposed mandatory disclosure requirements on all divorcing parties. Furthermore, parties have a continuing duty to supplement documents, including financial affidavits, whenever a material change in their financial status occurs.<sup>11</sup>

By and large the trial courts throughout Florida are aware of the destructive nature of discovery abuses, and are sympathetic to all reasonable efforts to correct the problem. In 1994, the Trial Lawyers Section of the Florida Bar, the Conference of Circuit Court Judges, and the Conference of County Court Judges formed a joint committee to provide a forum for the exchange of ideas on how to improve the day to day practice of law for trial lawyers and trial judges. At the committee’s first meeting, it was the overwhelming consensus that “discovery abuse” should be the top priority. Although sometimes hard to define, “we all know it when we see it.”<sup>12</sup>

It is in the interest of all counsel and the parties to avoid improper tactics. In a misguided effort to advance the interest of their clients, attorneys may be tempted to wear down the opposing party or counsel by means of oppressive “hardball” discovery tactics. These tactics do not advance the *legitimate* interests of clients and are clearly improper.

Improper discovery conduct under this Goal includes:

- (1) avoidance of compliance with discovery through overly narrow construction of interrogatories or requests for production;
- (2) objection to discovery without a good faith basis;
- (3) improper assertion of privilege;
- (4) production of documents in a manner designed to hide or obscure the existence of particular documents;
- (5) directions to parties and witnesses not to respond to deposition questions without adequate justification;

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<sup>11</sup> Fla. Fam. L. R. P. 12.285(e)(i).

<sup>12</sup> Joint Committee of the Trial Lawyers Sec. of the Fla. Bar and Conference of Circuit Judges, 2003 Handbook on Discovery Practice.

- (6) requests for unnecessary information that does not bear on the issues in the case; and
- (7) requests for sanctions before making a good faith effort to resolve legitimate discovery disputes.

An attorney's behavior during depositions is as important as behavior before the court. Because most cases are settled rather than tried, the parties' only direct experience with the legal process may be during depositions. Attorneys, therefore, should conduct themselves at a deposition with the same courtesy and respect for the legal process as is expected in court. For example, they should not conduct an examination or engage in other behavior that is purposely offensive, demeaning, harassing, or intimidating or that unnecessarily invades the privacy of anyone. Attorneys should attempt to minimize arguments during deposition. If sensitive or controversial matters are to be the subject of deposition questioning, when not contrary to the client's interests, the deposing attorneys should consider discussing such matters in advance to reach any appropriate agreements.

With the focus of discovery being the legitimate pursuit of information rather than strategic confrontation, attorneys should not coach deponents by objecting, commenting, or otherwise acting in a manner that suggests a particular answer to a question. Nor should attorneys object for the purpose of disrupting or distracting the questioner or witness. Objections should only be made in the manner and on grounds provided by applicable court rules. Attorneys should not intentionally misstate facts, prior statements, or testimony. Such conduct increases animosity without legitimate purpose.

Obstreperous conduct is now specifically forbidden by the Florida Rules of Civil Procedure. In 1996, the Florida Supreme Court amended *Fla. R. Civ. P.* 1.310(c) in an apparent attempt to curb the practice of "speaking objections" during depositions.<sup>13</sup> *Rule* 1.310(c) now requires that any objection during a deposition shall be stated concisely, and in a non-argumentative and non-suggestive manner. Furthermore, a party may instruct a deponent not to answer only when necessary to preserve a privilege, enforce a limitation on evidence directed by the court, or present a motion to terminate or limit the examination. In Florida, all objections except as to the form of questions, are reserved. Therefore, it is inappropriate to make objections to any evidentiary basis other than the form of a question, or as permitted by *Rule* 1.310.<sup>14</sup>

Trial courts now have great power to enforce appropriate conduct at depositions. *Rule* 1.310(d) gives the court great latitude to order sanctions, limit the scope of discovery, or impose other restrictions on a showing that the deposition is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party or that objections are being made in violation of *Rule* 1.310(c).

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<sup>13</sup> *In re: Amendments to Florida Rules of Civil Procedure*, 682 So. 2d 105 (Fla. 1996).

<sup>14</sup> *Fla. R. Civ. P.* 1.330(d)(3)

**1.9 An attorney should grant to other counsel reasonable extensions of time that will not have a material, adverse effect on the legitimate interest of the client.**

**Comment**

The attorney should attempt to accommodate counsel who, because of schedule, personal considerations, or heavy workload, requests additional time to prepare a response or comply with a legal requirement. Such accommodations save the time and expense of unnecessary motions and hearings. No lawyer should request an extension of time to obtain an unfair advantage.

**1.10 An attorney should clear times with other counsel and cooperate in scheduling hearings and depositions.**

**Comment**

Good faith attempts by attorneys to avoid scheduling conflicts tend to avoid unnecessary delays, expense to clients, and stress to attorneys and their staff. In return, other counsel should confirm the availability of the suggested time within a reasonable period (*i.e.* twenty-four hours) and should indicate conflicts or unavailability only when necessary. Because prior consultation concerning scheduling is a courtesy measure, it is proper to schedule hearings or depositions without agreement if the other counsel fails or refuses to respond promptly to the time offered, raises unreasonable calendar conflicts or objections, or persistently fails to comply with this Goal. The attorney is reminded that attempts to pre-arrange schedules are a focus on availability. It is not a request for “permission” or “consent” to schedule a particular hearing or deposition.

**1.11 An attorney should provide notice of cancellation of depositions and hearings at the earliest possible time.**

**Comment**

Notice of cancellation should be given to the court, all counsel, the client and witnesses. Adherence to this Goal will avoid unnecessary travel, expense, and expenditure of time by other counsel and will also free the court’s time other matters. The same principles apply to all scheduled meetings, conferences, and production sessions with other counsel.

**1.12 An attorney should promptly submit proposed orders to other counsel before submitting them to the court. When received, other counsel should promptly communicate approval or objections.**

**Comment**

Proposed orders following a hearing should generally be submitted at the earliest practicable time. Proposed orders should be limited to and accurately reflect the judge’s ruling. Only after submitting the order to other counsel should the proposed order be submitted to the court.

**1.13 An attorney should not seek an ex parte order without prior notice to other counsel, except in exigent circumstances.**

**Comment**

There are few things more damaging to a client's confidence in his lawyer, or to relationships between lawyers, than for a party to be served with an ex parte order about which his lawyer knows nothing.<sup>15</sup> Even where there are exigent circumstances (substantial physical or financial risk to the client), or where local rules permit ex parte proceedings, notice, or the appearance of notice to other counsel will not usually be able to prevent appropriate relief from issuing.

**1.14 An attorney should not attempt to gain advantage by delay in the service of filed pleadings or correspondence on other counsel.**

**Comment**

When pleadings or correspondence are mailed or delivered to the court, copies should normally be transmitted on the same day and in the same manner to all other counsel of record. An identical method need not be employed, as long as delivery on the same day will be achieved. For example, if the court is one block from counsel's office and opposing counsel's office is 50 miles away, it would be acceptable to hand deliver a document to the court and to fax it to counsel so that it arrives on the same day.

## **2. Competence and Advice**

**2.1 An attorney is responsible for the competent handling of all aspects of a representation, no matter how complex.**

**Comment**

Family law matters almost always involve issues beyond questions of dissolution of marriage, parental responsibility, and support, such as property, tax, business entities, trusts and estates, bankruptcy, and pensions. All family lawyers should possess enough knowledge to recognize the existence of potential issues in the myriad legal areas relevant to the representation. That knowledge is not limited to legal information. Children's issues require knowledge of child development and, at times, understanding of mental and emotional disorders. A family lawyer should also be familiar with the dynamics of domestic violence and alcohol and chemical dependence as well as appropriate intervention for families that experience these issues.

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<sup>15</sup>Even when authorized by law, ex parte proceedings present the potential for unfairness since "there is no balance of presentation by opposing advocates." *RPC* 3.3(d) Comment,. The lawyer for the represented party has a duty to disclose all "material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." *RPC* 3.3(d). Fairness and professional courtesy call for notice to other counsel as well.

Attorneys may properly undertake a matter for which they lack the necessary experience or expertise if the attorney can reach the requisite level of competence by reasonable preparation.<sup>16</sup> Proper preparation might include engaging (with the client's informed consent) persons knowledgeable in other fields to assist in obtaining the knowledge and information necessary to effectively represent the client. An attorney who cannot obtain competence through reasonable study and preparation should seek to withdraw or, with the client's consent, associate with or recommend a more qualified lawyer.

**2.2 An attorney should advise the client of the emotional and economic impact of restructuring family relationships and explore the possibility of reconciliation.**

**Comment**

The divorce process can exact a heavy economic and emotional toll. The decision to dissolve a marriage should never be made casually. An attorney should discuss reconciliation and whether the client has considered counseling or therapy.

A lawyer's role in family matters is to act as a counselor and advisor, as well as an advocate. The Rules of Professional Conduct specifically permit the lawyer to address moral, economic, social, and political factors that may be relevant to the client's situation. When consultation with a professional in another field is appropriate, the attorney should make such a recommendation. However, a discussion of the emotional and monetary repercussions of restructuring family relationships is always appropriate.

If the client wishes to attempt reconciliation, the family lawyer should attempt to mitigate litigation-related activities that might undermine the effectiveness of counseling and marital harmony. However, the attorney should be mindful of the obligation to advise the client to protect the client's legal interest while the reconciliation is attempted.

**2.3 An attorney should refuse to participate in vindictive conduct and should strive to lower the emotional level of a family dispute by treating all other participants with respect.**

**Comment**

Some clients expect and want the family lawyer to reflect the highly emotional and vengeful personal feelings between the parties. The attorney should counsel the client that discourteous and retaliatory conduct is inappropriate, unprofessional and counterproductive. Respect is consistent with competent and ethical representation. It is unprofessional for the attorney to act otherwise.

The client has the right to determine the objectives of representation. After consulting with the client, the attorney may limit the objectives and the means by which the objectives are to be pursued. The family lawyer should make every effort to lower the emotional level of the interaction between parties and counsel. Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of how the attorney handles cases, including what

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<sup>16</sup> *FRPC* 4-1.1, Comment.

the attorney will and will not do regarding vindictive conduct or actions likely to adversely affect the children's interests. For example, the attorney will not respond in kind to unnecessary or unreasonable discovery requests or accusations of irrelevant fault or misconduct. The attorney should never counsel the use of injunctions for protection against domestic violence solely for the purpose of gaining an advantage. If the client is unwilling to accept the attorney's limitations on objectives or means, the attorney should decline the representation.

#### **2.4 An attorney should know about different methods of dispute resolution.**

##### **Comment**

Many clients favor a problem-solving model over litigation. It is essential that family lawyers have sufficient knowledge about dispute resolution to understand the advantages and disadvantages for a particular client and to counsel the client appropriately concerning the particular dispute resolution mechanism selected. For example, an attorney who represents a client in mediation should understand the differences between the traditional litigation role and the role of negotiator in mediation. The lawyer should also understand the effects that the dynamics of domestic violence have on the negotiating process.

The ability of the attorney to understand and assess the probable outcome of litigation are essential to the problem-solving process.

#### **2.5 An attorney should attempt to resolve family disputes by agreement and should consider all appropriate means of achieving resolution.**

##### **Comment**

In family law matters, a cooperative resolution of disputes is highly desirable. Family law is not a matter of winning or losing. At its best, family law should result in disputes being resolved fairly for all parties, including children. Major tasks of the family lawyer include helping the client develop realistic objectives and attempting to attain them with the least injury to the family. The vast majority of cases should be resolved by lawyers negotiating settlements on behalf of their clients.

Parties are more likely to abide by their own agreement than by an outcome imposed on them by a court.<sup>17</sup> When resolution requires complex trade-offs, the parties are better able than the court to forge a resolution that addresses their individual values and needs. An agreement that meets the reasonable objectives of the parties maximizes their autonomy and their own priorities. A court imposed resolution may, instead, maximize legal principles that may seem arbitrary or unfair within the context of the parties' family. An agreement may establish a positive tone for

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<sup>17</sup> See Pearson & Thoennes, *The Benefits Outweigh the Costs in Divorce Mediation*, Fam Advoc., Winter 1982, at 26, 32 ("[S]uccessful mediation clients are less likely to report problems with their court orders and more likely to report that their parties are in total compliance"). See also Guffman, *For Better or Worse, Till ADR Do Us Part: Using Antenuptial Agreements to Compel Alternatives to Traditional Adversarial Litigation*, 12 Ohio St. J. on Disp. Resol. 175 (1996).

continuing post-dissolution family relations by avoiding the animosity and pain of court battles.<sup>18</sup> It may also be less costly financially than a litigated outcome. Parents who litigate children's issues are much more likely to believe that the process had a detrimental effect on relations with the other parent than parents whose child or support disputes are settled. These issues should be discussed with the client

A settlement may be achieved by negotiation between the lawyers (with or without the parties presence) or by other means. The family lawyer's task includes informing the client about the availability and nature of mediation or other alternatives to traditional negotiation or litigation.

Although the litigation process is expensive and emotionally draining, compromise may not be appropriate or workable in some cases due to the nature of the dispute (such as cases involving domestic violence) or the animosity of the parties. Litigation may be the best course in those cases.

### **3. Communication and Decision making Responsibility**

In no area of law is the relationship of trust between attorney and client more important than in family law. Clients come to family lawyers when there is a significant problem in the family relationship. The problem may have arisen suddenly or without sufficient time for the client to engage in rational thought. There may have been a move to an emergency shelter or an arrest of the client's minor child. The client may have been the victim of a recent incident of domestic violence. Even in a routine dissolution of marriage, emotions often render rational decision making difficult. Clients seek the advice and judgment of their family law attorneys, even about non-legal matters.

#### **3.1 An attorney should accord clients respect.**

##### **Comment**

To achieve a successful attorney-client relationship, the attorney must treat the client with respect. The attorney's attitude of respect for the client should also be conveyed by the attorney's staff.

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<sup>18</sup> There is substantial evidence of the destructive effect of divorce conflict on the children. See, e.g., Amato, *Life-span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILDREN: CHILDREN AND DIVORCE 143 (1994); Johnston, Kine & Tschann, *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 Amer. J. Orthopsych. 576 (1989); Kurdek & Berg, *Correlates of Children's Adjustment to Their Parents' Divorces*, in CHILDREN AND DIVORCE (Kurdek ed. 1983); Emery, *Interparental conflict and the Children of Discord and Divorce*, 92 Psych. Bull. 310-330 (1982). In addition, divorce litigation has an adverse effect on the parental relationship. See Kelly & Duryee, *Women's and Mien's Views of Mediation in Voluntary and Mandatory Settings*, 30 FAM. AND CONCILIATION CT. Rev. 34 (1992); Kelly et al., *Mediated and Adversarial Divorce: Initial Findings From a Longitudinal Study*, in DIVORCE MEDIATION: THEORY AND PRACTICE (Folberg & Milne eds 1988)

Examples of the respect to be accorded to clients include: appearing on time for all appointments; being prepared for appointments, depositions, and meetings; immediately notifying the client of the results of a hearing, deposition, or a meeting at which the client was not in attendance; listening, understanding and recognizing a client's concern; and training the office staff to treat the client with professional respect and to assist in problem-solving.

The attorney should recognize the client's perception of meetings held between the court and counsel, without the client being present. The client should be advised in advance, if practical, of the possibility of any such meetings and must be advised of the content and outcome of any meeting actually held. Should the court request such a meeting, the attorney may request the court to permit the client's attendance.

### **3.2 An attorney must provide sufficient information to permit the client to make informed decisions.**

#### **Comment**

The lawyer should explain the matter to the extent necessary to permit the client to make informed decisions. The client should have sufficient information to participate intelligently in deciding the objectives of the representation and the means by which they are to be pursued. The client should receive from the attorney a copy of every pleading, motion, and item of correspondence.<sup>19</sup>

An attorney's consideration of the client's interests and timely communication with the client in response to the client's inquiries are a vital and necessary part of the attorney-client relationship. The Florida Supreme Court expects and requires that members of The Florida Bar abide by this imperative and will not hesitate to impose discipline on Florida attorneys who do not fulfill these obligations to their client.<sup>20</sup>

Although relevant information should be conveyed promptly, in rare instances, a lawyer may be justified in delaying transmission of information when the client would be likely to react

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<sup>19</sup> Sometimes cost considerations preclude copying voluminous records, but clients should be afforded an opportunity to review them.

<sup>20</sup> *The Florida Bar v. Roberts*, 770 So. 2d 1207, 1209 (Fla. 2000) (Attorney failed to keep client reasonably informed of status of representation and failed to explain matter to client to extent reasonably necessary to permit client to make an informed decision, when Attorney referred client's marriage dissolution case to another lawyer without client's knowledge that referred lawyer was unaffiliated with attorney's law firm. Attorney then agreed to remain on case when the client expressed dissatisfaction with referred lawyer. Attorney attempted to refer client to third lawyer, and attorney refused or failed to return client's telephone calls.) Compare: *The Florida Bar v. Bryant*, 813 So. 2d 38, 40 (Fla. 2002) Bryant was found guilty of violating FRPC 4-1.3 with regard to the client because he "did not sufficiently attempt to protect [the client's] interest after it was clear that there had been a loss of communication." The finding was upheld by the Florida Supreme Court..

imprudently to an immediate communication.<sup>21</sup> A lawyer is never justified in withholding information solely for the lawyer's own convenience.

A difficult question is whether the family lawyer should provide, either voluntarily or on request, a negative opinion of opposing counsel, the judge, or the law. For example, should the client be told that a case is assigned to a judge who has demonstrated prejudice or bias or who has difficulty with complex tax or financial issues, or that the other lawyer seems incapable of settlement and invariably ends up in difficult trials? Although lawyers must use their best judgment in individual cases, some general guidelines are:

- (1) Do not lie or in any way tell the client less than the whole truth;
- (2) Answer specific questions ("If we go to court, how is the judge likely to rule?" or "What are the risks?") as diplomatically but as completely as possible;
- (3) Do not criticize the court, opposing counsel, or the system unless necessary for the client to make informed decisions or to understand delays or the necessity of responding to conduct of the court or opposing counsel.

Unnecessary criticism of the court, the legal system, or opposing counsel undermines the effectiveness and enforceability of judgments and harms the trust and confidence in the legal system.

It is important for the family lawyer to accurately and thoroughly advise the client and, if necessary, to provide the client with a negative assessment of the case.

### **3.3 An attorney should keep the client informed of developments in the representation and respond promptly to communications from the client.**

#### **Comment**

To keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information,<sup>22</sup> the attorney or a staff member must promptly respond to telephone calls, normally by the end of the next business day.<sup>23</sup> The attorney should also do the following:

- (1) Send the client a copy of all pleadings and correspondence, except in those rare circumstances addressed in the Commentary to FRPC Rule 4-1.4. ("[I]n some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. For example, a lawyer might withhold a psychiatric diagnosis of

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<sup>21</sup> *RPC* 1.4, Comment.

<sup>22</sup> *RPC* 1.3 and 1.4(a).

<sup>23</sup> *The Florida Bar v. Nowacki*, 697 So. 2d 828, 830, 831 (Fla. 1997) (Attorney failed to act with reasonable diligence and promptness in representing marriage dissolution client and failed to uphold client communication obligation. In addition, as to a separate client, the attorney failed to uphold client communication obligations by failing to return the client's repeated phone calls.).

a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience.”).

- (2) Provide notice before incurring any major costs.
- (3) Provide notice of any calendar changes, scheduled court appearances, and discovery proceedings.
- (4) Communicate all settlement offers, no matter how unreasonable.
- (5) Advise of major changes in the law affecting the proceedings.
- (6) Provide reports of major changes in case strategy.
- (7) Communicate all news, good and bad, promptly.

Frequent and prompt communication with the client on important matters empowers the client. It satisfies the client's need for information about the progress of the case and helps build a positive attorney-client relationship. This helps the client understand the amount and nature of the work the attorney is performing, thereby reducing concern that nothing is happening and that the attorney's fees are not being earned.<sup>24</sup> The family lawyer should understand that a pending family law case is usually the most important matter in the life of the client. He or she should also help the client to understand that a successful lawyer has many clients, to each of whom their family law case is usually the most important matter in their life.

**3.4 An attorney should share decision making responsibility with the client, but should not abdicate responsibility for the propriety of the objectives sought or the means employed to achieve them.**

#### Comment

The conduct and resolution of a family law case may require making many decisions, from the most mundane (who gets the toaster in a dissolution of marriage case) to the most significant (whether a parent should surrender parental rights in a dependency case). During the course of the representation, depending on the nature of the decision to be made, decision making authority may reside with the client, the attorney, or both. The lawyer should consult with the client as to the means by which objectives are to be pursued, but the lawyer should assume responsibility for technical and legal tactical issues (*e.g.*, choosing forum, type of pleadings, or judicial remedy). The lawyer should defer to the client regarding expenses to be incurred and concern for third persons who might be adversely affected.<sup>25</sup>

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<sup>24</sup> See, *e.g.*, *In re Nobel*, 699 N.E.2d 1142, 1145 (Ind. 1998) (“We find that the respondent violated Ind. Professional Conduct Rule 1.4(a) by failing to keep his clients informed about the status of their [marital] actions and by failing to respond to their requests for information.”).

<sup>25</sup> *FRPC* 4-1.2, Comment.

It is appropriate, as part of the family lawyer's counseling function, to assist the client in evaluating the client's objectives. A lawyer should counsel a client not only as to the law, but also as to "other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation."<sup>26</sup>

Although the lawyer is entitled to make decisions that do not affect the merits of the cause or substantially prejudice the rights of a client, the attorney and client should jointly make significant decisions, such as whether to file a costly motion or whether to retain certain experts. Even when the client has ultimate decision making authority, as in the decision to surrender parental rights, the attorney should provide counsel and advice.

A family law client may need or request advice on problems beyond the lawyer's expertise. These problems may fall within the disciplines of psychiatry, psychology, social work, accounting, or financial planning. The lawyer should recommend consulting a professional in another field when it is something a reasonably competent lawyer would recommend.<sup>27</sup>

A lawyer should offer advice to a family law client when doing so appears to be in the client's best interest. If a family law client proposes a course of action that is likely to result in substantial adverse consequences to the client or the client's minor child, the lawyer should advise the client on the adverse consequences and any available options. However, duty to the client may require the lawyer to act in accordance with the client's wishes, unless the lawyer finds the objectives or means repugnant or imprudent.<sup>28</sup>

### Examples

1. The client insists that the real problem in the marriage is a third person and asks the family lawyer to bring that issue to the court's attention during the trial. The facts are important to the client. However, the lawyer knows that the facts are legally irrelevant and will be counter-productive at trial. The lawyer is concerned that if the client is unhappy with the ultimate result in the case, the client may claim that the lawyer's failure to use the evidence concerning the third person led to the unsatisfactory result. In such a case, the lawyer must rely on her judgment and explain to the client why it is not appropriate to present the evidence, and why it would not be persuasive. The risk that the client may be unhappy about the lawyer's decision is a risk inherent in the practice of law. The lawyer should also specifically explain how using irrelevant evidence or arguments could result in sanctions against the client or the attorney, or both.<sup>29</sup>

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<sup>26</sup> *FRPC* 4-2.1.

<sup>27</sup> *FRPC* 4-2.1, Comment.

<sup>28</sup> *FRPC* 4-1.16(b)(3) and Comment.

<sup>29</sup> *Moakley v. Smallwood*, 826 So. 2d 221 (Fla. 2002) (court has inherent authority to assess attorneys' fees against an attorney for bad faith conduct); *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998); *Rosen v. Rosen*, 696 So. 2d 697, 701 (Fla. 1997) (court may deny party's request for attorneys' fees because litigation was frivolous or spurious or was brought primarily to harass the adverse party).

2. In a domestic relations case in which the wife has a claim for alimony that the lawyer believes will succeed, the husband offers to give a larger share of the assets to the wife if she will waive the right to alimony. Alimony will terminate at the death of either party or on the wife's remarriage. If the client does not remarry, she will benefit far more from alimony than the additional assets. If she remarries, she will benefit more from the additional assets. The family lawyer's role is to educate the client and allow her to make the choice.

3. The father, in a dependency case, wishes to admit dependency, agree the mother should have sole custody, and agree to have no contact with the children. The mother and the Department of Children and Families are eager to accept this outcome. The mother's attorney should fully inform the mother on the risks of future litigation and the potential adverse consequences to the children. The attorney representing the father should explain the legal options that would allow him to maintain contact with the children and the potential adverse consequences to the children. When a client insists on settlement that the attorney feels is unfair, inadvisable, or harmful, the attorney should consider: 1) putting the advice in writing 2) advising the client to obtain the advice of another lawyer, a counselor, or a responsible friend or family member or 3) withdrawing from the case, subject to approval by the court.

**3.5 When the client's decision making ability appears to be impaired, the attorney should try to protect the client from the harmful effects of the impairment.**

**Comment**

The economic and emotional turmoil caused by family law matters often affects a client's ability to make rational decisions in his own best interest. The client whose ability to make reasonable decisions is impaired poses special problems for the lawyer.

Although not incapacitated as a result of substance abuse or another physical or psychological condition, a client may be impaired in the ability to assist in the preparation of the case. A lawyer with reasonable cause to believe that the client's impairment will interfere with the representation should refer the client for an evaluation to determine the extent of the client's impairment. The attorney may seek to withdraw from the representation of a client who will not undergo an evaluation.<sup>30</sup>

The lawyer is not compelled to follow irrational or potentially harmful directives of a client, particularly one who is distraught or impaired, even if the client is not legally incapacitated and not technically incompetent. The lawyer should oppose any client's illegal or improper decision (*i.e.*, "I don't care what the court says, I won't pay her a cent"). The attorney

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<sup>30</sup> FRPC 4-1.14. See also Fla. Prof'l Ethics Comm. Op. 73-25, (1974) (If the client refuses to consent to a competency determination, a lawyer having good reason to doubt the client's competency should move for leave to withdraw from the cause. The motion for leave to withdraw should not mention incompetency and should be framed so as to cause the least possible prejudice to the client's rights.) and *Schetter v. Schetter*, 239 So. 2d 51 (Fla. 4th DCA 1970) (appointment of a guardian ad litem for a dissolution of marriage client was reversed when the expert testimony given in support of the application for appointment arose from privileged attorney-client communications).

should attempt to dissuade the client before accepting any clearly detrimental decision. The attorney should encourage the client to consult with others who may have a stabilizing influence on the client such as the client's therapist, doctor, or clergy. Under extraordinary circumstances, it may be necessary for an attorney to initiate appointment of a guardian in a situation in which the client appears to be legally incapacitated.<sup>31</sup>

When rejection of the attorney's advice is likely to adversely affect the client's interests, the attorney should document both the advice and the client's refusal to follow it. This documentation emphasizes the risk to the client, formalizes and marks the importance of the client's decision, and protects the attorney from subsequent allegations of complicity in the conduct or failure to properly advise the client of the risks involved. In appropriate cases, the attorney may withdraw from representation.

**3.6 An attorney should not permit a client's relatives, friends, employers, or other third persons to interfere with the representation, affect the attorney's independent professional judgment, or, except with the client's express consent, make decisions affecting the representation.**

#### Comment

Third persons often try to play a part in family law cases. Frequently, the client asks to have one or more of these people present at conferences and to consult them about major decisions. The potential conflicts are exacerbated when the third person is paying litigation expenses or the attorney's fee. Neither payment to the attorney, nor sincere concern about the client's welfare makes those third persons clients. At the outset, the lawyer must inform the client and the person paying for the representation that nothing related by the client to the attorney will be disclosed without the client's consent. The lawyer shall also explain the protection of attorney-client privilege and how it may be waived by disclosures to third persons and by their presence during confidential discussions.<sup>32</sup> Then, if the client consents, the lawyer may discuss the client's options with third parties.

In some situations, the presence of a third person may undermine or impair the decision-making ability of the client. In those situations, the lawyer shall confer with the client in private. While it is important for persons with family law issues to receive advice and support from those they trust, the client must live with the decisions. The client, with the advice of the family lawyer, should make the final decision on important issues.

#### Example

An attorney represents an elderly woman. The client's son, who is paying the attorney's fee, instructs the attorney to establish a trust to manage the client's assets. The attorney should

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<sup>31</sup> RPC 1.14, Comment.

<sup>32</sup> *First Southern Baptist Church of Mandarin, Fla., Inc. v. First National Bank*, 610 So. 2d 452, 454 (Fla. 1st DCA 1992) (communications between attorney and client with or in the presence of third persons are not protected by attorney-client privilege); *Hamilton v. Hamilton Steel Corp.*, 409 So. 2d 1111 (Fla. 4th DCA 1982) (voluntary disclosure of privileged matters to a third party waives the privilege).

explain the attorney's obligation to act only as requested by the client. Additionally, the attorney may not accept payment from the son without consent of the client and unless the attorney can avoid interference with the client-lawyer relationship and preserve the confidentiality of communications with the client.<sup>33</sup> Although the son's instructions may be best for the client, the attorney must assure that the client has exercised her choice independently with the appropriate advice of the attorney.

**3.7 An attorney should not allow personal, moral, or religious beliefs to diminish loyalty to the client or usurp the client's right to make decisions concerning the objectives of representation.**

**Comment**

Attorneys would not be human without personal beliefs about issues affecting family law practice. No lawyer should be expected to ignore strongly held beliefs. But the matrimonial lawyer may only limit the objectives of the representation if the client consents after the consultation.<sup>34</sup> The client even has the right to be consulted about the means by which the objectives are to be pursued, matters normally within the lawyer's discretion.<sup>35</sup> Therefore, the lawyer should withdraw from representation if personal, moral or religious beliefs are likely to cause the attorney to take actions that are not in the client's best interest. If there is any question as to the possible effect of those beliefs on the representation, the client should be consulted and consent obtained. See Goal 2.4 & Comment.

**3.8 An attorney should discourage the client from interfering in the other party's effort to obtain counsel of choice.**

**Comment**

The attorney should discourage a client or prospective client from interviewing other attorneys solely for the purpose of denying the other party access to counsel of choice. The attorney should not assist the client, for example, by responding to the client's request for a list of family lawyers, if improper motives are suspected. When the client has already contacted other lawyers for the purpose of disqualifying them, the attorney should advise the client of the advantages and disadvantages of waiving any conflicts so created.

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<sup>33</sup> *RPC* 4-1.8(f)

<sup>34</sup> *RPC* 1.2(c)

<sup>35</sup> *RPC* 1.2(a). See *RPC* 1.2 Comment: "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."

**3.9 As a general rule, an attorney should not communicate with the media about a family law case.**

**Comment**

A family law attorney should not communicate with the media about a case, a client, or a former client without the client's prior knowledge and consent, except in exigent circumstances when client consent is not obtainable. Statements to the media by an attorney representing a party in a family law matter will generally be inappropriate because family law matters tend to be private and intimate. They are not the business of anyone but the parties and their family. Public discussion of a case is inconsistent with constructive advocacy because it tends to obstruct settlement, cause embarrassment, diminish the opportunity for reconciliation, and harm the family, especially the children. Statements to the media by an attorney representing a party in a family matter are also potentially improper because they tend to prejudice an adjudicative proceeding.<sup>36</sup>

An attorney's desire to obtain publicity conflicts with the duty to the client. If contacted by the media, the attorney should respond by saying: "I cannot give you information on that matter because it deals with the personal life of my client." The attorney, as an officer of the court, has duties to both the courts and the client. The parties, subject to order of the court, have a right to discuss their case if they so desire, despite the advice of their counsel. However, a lawyer's statements may have the effect of influencing an adjudicative body presently sitting or to be convened in the future. An attorney may withdraw if the client disobeys instructions not to speak publicly about the case.

It is no excuse that the opposing party, his counsel or agents, first discussed the matter with the media. However, if necessary to mitigate recent adverse publicity, the attorney may make a statement required to protect the client's legitimate interests. Any such statement should be limited to information essential to mitigate the recent adverse publicity.<sup>37</sup>

A family law attorney should never attempt to gain an advantage for the client by providing information to the media to embarrass or humiliate the opposing party or counsel.

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<sup>36</sup> See *FRPC* 3.6 and Comment.

<sup>37</sup> See *RPC* 3.6(c) (lawyer "may make a statement a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.") See also Cal. St. *RPC* 5-120.

## 4. Conflict of Interest

A conflict of interest is prohibited because it diminishes a lawyer's loyalty to the client.<sup>38</sup> A lawyer's loyalty can be affected by personal interests (financial security, prestige, and self-esteem) and interests of third persons (family, friends, business associates, employer, colleagues, and society as a whole). A conflict exists if the representation of a client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests.<sup>39</sup> The key to preventing unintentional violations of the conflict of interest rules lies in anticipating the possibility that a conflict will develop.

The influences that might diminish a family lawyer's loyalty to a client are unlimited.<sup>40</sup> The interests of children, relatives, friends, lovers, employers, and the opposing party, along with a perceived obligation to the court and the interest of society, may be compelling in a given case. In family law matters, where "winning" and "losing" in the traditional sense often lose their meaning, determination of the appropriate ethical conduct can be extremely difficult.

**4.1 An attorney may not represent both parties in a family law matter, even if the parties do not wish to obtain independent representation.**

### Comment

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the "family lawyer," and previously represented the husband, wife, family corporations, and even the children.<sup>41</sup> However, it is impossible for the attorney to provide impartial advice to both parties. Even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or parental responsibility. A family lawyer should not represent both parties, even with the consent of both.<sup>42</sup>

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<sup>38</sup> *Model Code Professional Responsibility*, Canon EC 5-1 provides: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither the lawyer's personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to his client

<sup>39</sup> *FRPC* 4-1.7(b).

<sup>40</sup> See generally Saylor, *Conflicts of Interest in Family Law*, 28 *Fam.L.Q.* 451 (1994).

<sup>41</sup> *RPC* 1.7 Comments 5 and 27. For example, an attorney representing a husband with respect to his corporation would be precluded from representing his wife against him in an unrelated dissolution of marriage or custody proceeding.

<sup>42</sup> See, e.g., *Walden v. Hoke*, 429 S.E.2d 504, 509 (1993) (unethical for lawyer to represent husband and wife at any stage of separation and divorce proceeding, even if simple or uncontested and with full disclosure and informed consent); *Board of Bar Overseers of the Bar v. Dineen*, 500 A.2d 262 (Me 1985).

The attorney may be asked to represent family members in a non-litigation setting. If separation or divorce is foreseeable, the lawyer may see her role as counselor or negotiator for all concerned. This temptation should be resisted.<sup>43</sup>

Representation of both parties should be distinguished, however, from mediation of a dispute, when the attorney represents neither of the parties.<sup>44</sup> The mediator must remain impartial and advise the participants that the mediator represents neither of them.

#### **4.2 An attorney should not advise an unrepresented party**

##### **Comment**

Once it becomes apparent that another party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the other party in writing as follows:<sup>45</sup>

- (1) I am not your lawyer.
- (2) I do not and will not represent you.
- (3) I will at all times represent my client's interests, not yours.
- (4) Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of my client and not as advice to you as to your best interest.
- (5) I urge you to obtain your own lawyer.

#### **4.3 An attorney should not simultaneously represent both a client and another person with whom the client is sexually involved.**

##### **Comment**

A family lawyer is often asked to represent a client and the client's lover. Joint representation may make it difficult to advise the client of the need to recover from the emotional trauma of divorce, the desirability of a prenuptial agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other at deposition or trial. In addition, the client may want to waive support payments because she believes she is going to marry her lover. The inherent conflicts in attempting to represent both the client and her lover render such representation improper.

Even when the client's new partner is not represented by the attorney, but wishes to participate in consultations and other aspects of the representation, the attorney must be alert to

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<sup>43</sup>This Goal does not apply in adoption proceedings or other matters in which the parties' positions are not adverse.

<sup>44</sup> Cf *FRPC* 4-2.2 (permitting intermediation *between two or more clients* only under extremely narrow circumstances that would not include a dispute between two family members).

<sup>45</sup> See *FRPC* 4-4.3; Fla. Bar Prof'l Ethics Comm. Op. 66-8 (1996); *State ex rel The Florida Bar v. Oxford*, 127 So. 2d 107, 112 (Fla. 1961).

the danger of the client's undermining her own best interests in an effort to accommodate her new partner. The attorney/client privilege is waived by a joint meeting with the client and their lover.

**4.4 An attorney should not have a sexual relationship with a client, opposing counsel, or a judicial officer assigned to the case during the time of the representation.**

**Comment**

Persons in need of a family lawyer are often in a highly vulnerable emotional state. Some degree of social contact (particularly if a social relationship existed prior to the events that occasioned the present representation) may be desirable, but a more intimate relationship may endanger both the client's welfare and the lawyer's objectivity. These risks, present in all lawyer-client sexual relations, are particularly serious in family law matters. Both Florida's rule<sup>46</sup> and the ABA's model rule<sup>47</sup> permit lawyers to continue in non-exploitive preexisting sexual relations with clients.

Intimate relations with others involved in a particular family law matter may also present problems. Attorneys are expected to maintain personal relationships with others, but must be sensitive to the threat to independent judgment and the appearance of impropriety when an intimate relationship exists with opposing counsel or other persons involved in the proceedings.

**5. Fees**

Many family law clients have never hired an attorney and are vulnerable because of fear, insecurity, and the emotional upheaval associated with family problems.<sup>48</sup> Clients may not have an understanding about fees that evolved out of a long-standing business relationship with a lawyer. As a result, clients may misunderstand or forget the terms of a fee agreement unless it is in writing.

It is not unusual for a party to a family law matter to lack sufficient funds to pay an attorney. This lack of resources is aggravated by restrictions against contingent fee contracts and the unwillingness of some courts to redress the economic balance between the parties with fee awards. Also, the tendency of clients to blame their attorneys for undesirable results can make collecting fees extremely difficult.

These factors help to explain why the number of fee disputes arising from family law cases is several times greater than those from any other type of case. Thus, financial arrangements with clients should be clearly explained, agreed upon, and documented.

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<sup>46</sup> *FRCP* 4-8.4(i) provides that "a lawyer shall not engage in sexual conduct with a client that exploits the lawyer-client relationship."

<sup>47</sup> *RPC* 1.8(j) provides that "a lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

<sup>48</sup> See Portnoy, *The Family Lawyer's Guide to Building Successful Client Relationships* (ABA 2000).

## **5.1 Fee agreements should be in writing.**

### **Comment**

The family lawyer should tell the client the basis on which fees will be charged.<sup>49</sup> and when and how the attorney expects to be paid.<sup>50</sup> Written fee agreements should delineate the obligations of the attorney and the client. Agreements should specify the scope of the representation. Fee agreements should be presented in a manner that allows the client an opportunity to consider the terms, consult another attorney before signing, and obtain answers to any questions to fully understand the agreement before entering into it.

### **Examples of Scope Provisions**

(1) Our representation includes advising, counseling, drafting, negotiating, investigating, analyzing and handling this family law matter to a final resolution, whether by negotiated settlement or, if necessary, by trial and adjudication by a court. Depending on the specifics of your case, issues may include parental responsibility, parenting time, and child support; classification of assets as marital or non-marital; the valuation and division of marital property; the determination of maintenance for you or for your spouse; and the determination of whether the attorney's fees and costs incurred may be shifted from you to your spouse, or vice versa.

(2) Our representation as co-counsel is limited to settlement or trial of the following specific issue. We have not agreed to appeal any decisions or court orders.

(3) Our representation is limited to assisting in settlement through negotiation and mediation. If attempts at settlement are unsuccessful and litigation is instituted, our representation will cease. You agree to then retain trial counsel to represent you thereafter.

(4) I understand that this Agreement covers legal representation only through trial and final judgment. It does not include appeals, filing or defending motions for contempt, or post-judgment proceedings to modify or enforce the final judgment. I also understand that the firm's representation does not include other related matters such as temporary or permanent injunctions for protection from domestic violence, bankruptcy proceedings, or real estate transactions, unless these are included in the instant action and bear the same case number. Additionally, I understand you are not responsible for the preparation of a Qualified Domestic Relations Order (QDRO) if one is required in my case. In the event a QDRO is necessary, you will refer me to a specialist in that area of law and I will be solely responsible for the payment of their fees.

## **5.2 An attorney should provide periodic statements of fees and costs.**

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<sup>49</sup> When appropriate, this information might include the fact that total fees and costs cannot be predicted. *RPC* 1.5(b) provides the factors to be used in determining a reasonable fee.

<sup>50</sup> Family lawyers and clients would normally enter into a mutually executed fee agreement. However, some attorney-client relationships would justify the attorney's drafting a letter confirming an oral agreement. Such a confirming letter would be permissible under this Goal, provided that the client indicates approval in writing.

### Comment

When the fee arrangement is based on an hourly rate or similar arrangement, this information is part of the necessary communications concerning the case addressed in Goal 2.3 and Comment. The statement should be sufficiently detailed to apprise the client of the basis of the charges incurred.

### **5.3 All transactions that provide security for payment of attorney's fees should be in writing.**

#### Comment

Security agreements are a source of potential problems. All security agreements should be arms-length transactions and the terms of the agreement should be in writing.<sup>51</sup> When taking mortgages on real property from a client, the lawyer should advise the client to seek independent representation. If an attorney takes personal property as security, it should be appraised, photographed and identified by a qualified appraiser to establish its precise identity and value. The attorney should then secure it in a safe place (usually a safe deposit box) where there is no danger that it can be removed, substituted, or lost.<sup>52</sup> The lawyer must comply with The Florida Bar Rules Regulating Trust Accounts.<sup>53</sup> Also, the lawyer may not acquire a proprietary interest in property that is the subject of the litigation.<sup>54</sup>

### **5.4 An attorney's fee should be reasonable and based on appropriate factors, including those listed in R. Reg. Fla. Bar 4-1.5.**

#### Comment

Lawyers should charge reasonable fees for services performed under a valid fee agreement. Although the starting point in determining a reasonable fee is often the lawyer's hourly rate multiplied by the hours spent on the case, a number of other factors may be relevant in determining an appropriate fee in a particular representation. *FRPC* 4-1.5(b) lists many of those factors.

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<sup>51</sup> As stated in the Comment to *FRPC* 4-1.5: "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 1.8. 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." [WHAT ABOUT FLORIDA?] Some jurisdictions do not permit an attorney to take a security interest in a client's property. In those jurisdictions that do permit such a security interest, the attorney should be sensitive to the need of the client for use of the property involved. In matrimonial law matters where marital property is the subject of litigation, the potential for conflict is increased.

<sup>52</sup> *FRPC* 4-1.15

<sup>53</sup> *FRPC* 4-1.15

<sup>54</sup> *FRPC* 4-1.8(i)

Clients, as consumers, should be able to negotiate fee agreements that best suit their needs and circumstances. In addition to fees based solely on an hourly rate, a fee agreement may provide for a flat fee, or one or more of the factors provided in *FRPC* 4-1.5(b). No single factor is appropriate in all family law cases because clients and the nature of the representations vary greatly. Therefore, it is important at the outset for the attorney to explain the factors to be used in determining the fee and provide the fee agreement in writing (see Goal 5.1).

Florida has prohibited fees in domestic relations cases that are in any way based on the results obtained, holding that such fees constitute contingent fees.<sup>55</sup>

A fee may be based on the attorney's usual hourly rate, but enhanced by any combination of the following circumstances: the complexity of the case; the shortness of the time between the attorney's retention and impending proceedings; the difficult or aggressive nature of the opposing party and counsel; a particular attorney's unique ability to settle a case quickly and avoid lengthy and acrimonious trial proceedings; and a substantial risk that the representation will be unsuccessful due to an unfavorable factual or legal context.

It is illegal for a lawyer to charge or collect a clearly excessive fee.<sup>56</sup> Family lawyers must counsel their clients about needless and vexatious litigation.<sup>57</sup> Although the financial resources of the parties are a primary consideration, the court can consider other factors such as the "scope and history of the litigation; the duration of the litigation; the merits of the respective positions; [and] whether the litigation is brought or maintained primarily to harass..."<sup>58</sup> Thus, the court can deny attorney's fees for improper conduct or award attorney's fees for egregious conduct or bad faith.<sup>59</sup> The court also has inherent authority to award attorney's fees against an attorney who pursues a claim or defense that is not supported by the law and facts.<sup>60</sup>

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<sup>55</sup> *FRPC* 4-1.5(f)(3)(A) prohibits fees in domestic relations matters that are contingent on obtaining a divorce, the amount of alimony or support, or the property settlement. *See King v. Young, Berkman, Berman & Karpf*, 709 So. 2d 572 (Fla. 3rd DCA 1998) (bonus provision in fee agreement was void because it made fees contingent on the results obtained).

<sup>56</sup> *FRPC* 4-1.5(a).

<sup>57</sup> *Donoff v. Donoff*, 691 So. 2d 1091 (Fla. 4th DCA 1997); *Dralus v. Dralus*, 627 So. 2d 505 (Fla. 2d DCA 1993); *Wrona v. Wrona*, 592 So. 2d 694 (Fla. 2d DCA 1991)

<sup>58</sup> *Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997).

<sup>59</sup> *Bitterman v. Bitterman*, 714 So. 2d 356 (Fla. 1998).

<sup>60</sup> *Diaz v. Diaz*, 826 So. 2d 229 (Fla. 2002); *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055 (Fla. 4th DCA 2001).

**5.5 An attorney may move to withdraw from a case when the client fails to honor the fee agreement.**

**Comment**

The fee agreement should set forth the circumstances under which the family lawyer will be permitted to withdraw for nonpayment. Before seeking to withdraw, the attorney must take reasonable steps to avoid foreseeable prejudice to the rights of the client, allowing time for employment of other counsel, and delivering to the client papers and property to which the client is entitled.<sup>61</sup> However, the attorney should not seek to withdraw from a case on the eve of trial unless there was a clear prior understanding that withdrawal would result from nonpayment.<sup>62</sup>

**5.6 An attorney may take all appropriate steps to collect fees, including mediation, arbitration, or suit, from a client who fails to honor the fee agreement.**

**Comment**

Lawyers are entitled to be paid reasonable fees for services performed. Alternatives to litigation should be used to collect a fee unless they are unlikely to be effective. The lawyer should be cautioned that a suit for fees may be followed by a malpractice action. For that reason, some malpractice insurance policies exclude coverage if the lawyer has first filed an action against the client for collection of attorney's fees or costs.

**6. Pre-litigation Advice**

Many clients seek advice in contemplation of future litigation. To obtain advice about "what if" is a frequent reason for the first visit to a lawyer in a family law case. It is very helpful to the client to have a general understanding of the law that will govern the case and the economic and emotional impact on the family before making a final decision to pursue litigation. A family lawyer should advise the client about the repercussions of any family law litigation, including factors that are likely to be considered in deciding parental responsibility and financial issues. The lawyer should also determine if reconciliation is possible and discuss alternatives to adversarial litigation such as mediation.

Lawyers should not assist the client in using the consulting process to design strategies for engaging in fraudulent conduct. Family lawyers should never participate in a client's plan to essentially defraud the other party, such as rendering advice to create a trust that will remove property from the marital estate and defeat a claim by the other party.

**6.1 An attorney should not condone, assist, or encourage a client to transfer, hide, dissipate, or move income or assets to improperly defeat another party's claim.**

**Comment**

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<sup>61</sup> See *FRPC* 4-1.16(d).

<sup>62</sup> *FRPC* 4-1.16(b) provides that a lawyer may withdraw if she can do so "without material adverse effect on the interests of the client, or if: . . . (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."

It is improper for a lawyer to counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. A lawyer should discuss the legal consequences of any proposed course of conduct with a client. Whether the client proposes opening a secret out-of-state bank account, moving assets to an offshore trust, or having a family member hold sums of cash for the purpose of concealment, the advice to the client must be the same: Don't do it. A client's efforts to transfer assets beyond the reach of the court indicates an improper motive.

Hiding assets to defeat a claim is a fraud upon the client's spouse and likely to result in a fraud upon the court. The client must also be advised not to conceal information about property, fail to furnish relevant documents or insist on placing unrealistic values on properties in, or omit assets from, sworn financial statements.

On the other hand, there is a critical distinction between providing advice on the legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity. Sometimes, it may be difficult to determine whether a client's questions are asked to facilitate an improper purpose. Although the attorney should initially give the client the benefit of any doubt, later discovery of improper conduct requires that the attorney immediately take remedial measures and may require withdrawal from representation.<sup>63</sup>

The client should be warned about the potential legal consequences of intercepting and opening mail addressed to another. The client should also understand Florida's prohibition against interception of oral and written wire communications. *Fla. Stat. Ch. 934* has criminal penalties for unlawful interceptions and the interception is not admissible. Federal statutes prohibit unauthorized access of stored electronic communications, which include e-mails.<sup>64</sup> This is an emerging area of the law, but lawyers should not encourage or condone a client obtaining e-mail by accessing the opposing party's e-mail account.

## **6.2 An attorney should advise the client of the potential effect of the client's conduct in disputes involving children.**

### **Comment**

The parties' conduct may affect the children's adjustment, the children's relationship with the parents, and ultimate decisions on parental responsibility and parenting time. The client is entitled to advice when children's issues are involved in the potential litigation. Conduct conforming to such advice will often benefit both the children and both parents, independent of any dispute. Suggesting the client spend more time with the child and consult, from time to time with the child's doctor, teacher, and babysitter, is appropriate. It is also proper to describe the potential harmful consequences to the children (and to the client legally) of prematurely introducing the children to a new romantic partner or engaging in substance abuse, abusive or derogatory behavior toward the other parent, or other inappropriate behavior.

Pre-litigation planning is an ideal opportunity to advise the client on ways to make the transition easier for the children. For example, the lawyer might describe ways for the parents to inform the children together of the separation and to reassure the children that both parents will always be there for them. The lawyer might describe programs available in the client's community to aid both parents and children in adjusting to the change. Most important, pre-

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<sup>63</sup> *FRPC* 4-1.2(d), Comment.

<sup>64</sup> 18 *U.S.C.* §2701(a).

litigation planning is an opportunity to orient the client toward consideration of the children's needs first and the desirability of working out a cooperative parenting plan.

The lawyer should explain that adversarial litigation may be harmful to children because it drives parents further apart when the children need them to work together. The lawyer should explain that family relationships last forever. If parental responsibility is an issue in the litigation, the lawyer should refer the client to the parent stabilization course required by *F.S.* 61.21 at the earliest opportunity. The lawyer should describe how mediation of children's issues might help the parents reach an agreement and in the process conserve emotions and money. When appropriate, the client should be referred to a mental health professional, not only to counsel the client about his or her adjustment to the circumstances, but also to advise in developing a parenting plan that is in the best interests of the re-structured family..

The lawyer should consider whether the client's position on children's issues is asserted in good faith. If not, the lawyer should advise the client of the harmful consequences of a meritless claim to the client, the child, and the client's spouse. If the client persists in demanding advice to build a spurious case or to use a parenting claim as a bargaining chip or a means of inflicting revenge (see Goal 6.2 and Comment), the lawyer should withdraw.

## **7. The Children**

One of the most troubling issues in family law is determining a lawyer's obligation to the parties' children. The lawyer must competently represent the interests of his or her client (a parent), but should not do so at the expense of the children. The parents' fundamental obligations for the well being of children provide a basis for the attorney's consideration of the children's best interests consistent with traditional advocacy and client loyalty principles.

The Florida Supreme Court has stated: "The traditional adversarial process is detrimental to children because it drives parents farther apart at the time their children need them to work together to restructure their system of parenting. The legal system should focus on the needs of children who are involved in the litigation, refer families to resources that will make their relationships stronger, coordinate their cases to provide consistent results, and strive to leave families in better condition than when they entered the system."<sup>65</sup> A new and more important problem solving role for lawyers is envisioned as they adapt their practices to these ideals.

**7.1 An attorney representing a parent should consider the welfare of the minor children and seek to minimize the adverse impact of the family law litigation on them.**

### **Comment**

Although the substantive law in Florida concerning parental responsibility, child abuse, and termination of parental rights is premised on "best interests of the child," the ethical codes provide little (or contradictory) guidance for an attorney whose client's expressed wishes, interests, or conduct are in direct conflict with the well-being of children. This Goal emphasizes that the welfare of each family member is interrelated.

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<sup>65</sup> *In re Report of Family Court Steering Committee*, 794 So. 2d 518, 524 (Fla. 2001).

The adversarial process is usually not ideal for solving problems when the parties will have an ongoing relationship. The heightened conflict between the parents creates frustration and stress that detracts from the parents' attention to the children and litigation costs drain resources that could otherwise be used to meet the children's needs. The very process intended to protect the best interests of the children may work to their detriment. Family lawyers should counsel parties to examine their wishes in light of the needs and interests of the children and the relationship to other family members. In so doing, the family lawyer is not only advising the client to adhere to applicable substantive law, but is also reminding the client that the family relationship continues.

Both parents owe a continuing, fundamental duty to their children to serve their children's best interests. In many instances, parents should subordinate their own interests to those of their children. When appropriate, family lawyers and parents should cooperatively seek parenting arrangements that eliminate fractious contact between parents, minimize transition or transportation difficulties, and preserve stability for the children.

Children suffer from involvement in their parents' family law litigation. The attorney should warn the client against leaving papers from the attorney out where children can read them and to avoid talking about the case when children can overhear, or allowing others to do so.

If the parents are in conflict and disagree about parental responsibility and other parenting issues, the attorney should consider, with the cooperation of the other parent's attorney, sending the parties to a neutral mental health professional who is a family therapist. The goal of this referral is to resolve their disputes through counseling with a mental health professional. The referring agreement or court order should include confidentiality for all contacts with the therapist and exclusion of that therapist as a witness in the family law case. The attorney must know what services are effective and available in the particular community to help restructure a dysfunctional family and to preserve the child's relationship with each parent. All professionals involved in family law litigation should become sufficiently educated in the interdisciplinary aspects of their work to function effectively in collaborative problem-solving. Judges and attorneys need basic training in child development to understand and work with other professionals who have more specific training in issues related to child-parent relationships, child development, and risk assessment.

The attorney should discourage the client, and refuse to participate in, conducting multiple psychological evaluations of children for the purpose of finding an expert who will testify in the client's favor. Repeated psychological evaluations of children are contrary to the children's best interest.<sup>66</sup> Delays that have no real positive role in the determination of the best outcome for the family and children are not justifiable. The best thing a lawyer can do for a child is to keep the child out of the case so that the child can get on with important activities in the child's life, such as going to school, playing with friends, and growing up.

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<sup>66</sup> Committee Note to *Fla. Fam. L. R. P.* 12.363, "This rule [evaluation of minor child] should be interpreted to discourage subjecting children to multiple interviews, testing, and evaluations, without good cause shown. The court should consider the best interests of the child in permitting evaluations, testing or interviews of the child."

**7.2 An attorney should not permit a client to contest parental responsibility or contact and access for either financial leverage or vindictiveness.**

**Comment**

Tactics oriented toward asserting parental rights as leverage toward attaining some other, usually financial, goal are destructive. The family lawyer should counsel against, and refuse to assist in such conduct. Proper consideration for the welfare of children requires that they not be used as pawns in the family law process. For example, in Florida child support may be determined partly on the basis of the amount of time a parent spends with the child. However, the lawyers should negotiate parenting issues based solely on considerations related to the child, then negotiate child support based on financial considerations. Similarly, the family lawyer should counsel against, and refuse to assist the client in, using the domestic violence injunction process to deprive the other parent of contact and access to their child unless that parent's conduct justifies the issuance of such an injunction. If, despite the attorney's advice, the client persists, the attorney should seek to withdraw.<sup>67</sup>

Resolving the issues fairly by directly focusing on the best interests of the children, not "winning," should be the goal of the participants.

**7.3 An attorney should not communicate with a minor child of the parties, except with court permission or in the presence of the child's lawyer or guardian ad litem.**

**Comment**

Issues affecting a child's welfare may arise before, during, and after legal proceedings. There is a risk of harm to the child from an attorney's contacts and attempts to involve the child. Advice to or manipulation of the child by a parent's lawyer has no place in the lawyer's efforts on behalf of the parent. Necessary information from a child regarding the parents and the parents' disputes should be obtained under circumstances that protect the child's best interests.

**7.4 An attorney should not seek to bring a child to court without a full discussion with the client and a reasonable belief that it is in the best interests of the child.**

**Comment**

*Fla. Fam. L. R. P. 12.407* prohibits an attorney from bringing a child to court or to a deposition without prior court order, except for good cause shown. Taking sides against either parent in a legal proceeding imposes a large emotional burden on a child. Some children do not want to express a preference in parental responsibility disputes; they want their parents to resolve the issue without involving them. Other children want their views known, and their views may be highly relevant to the outcome of the dispute. All participants in a family law proceeding (for example, attorneys for all parties, any party's therapist, a child custody evaluator, and the judge)

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<sup>67</sup>A parent's communications with an attorney in connection with the making of a false claim are not privileged, because the perpetration of a fraud is outside the scope of the professional duty of an attorney. *Kneale v. Williams*, 30 So. 2d 284, 287 (Fla. 1947).

should strive to permit a child's views and information to be expressed in a manner that minimizes exposure of the child to the rigors of the courtroom.<sup>68</sup> The attorney should weigh carefully the risks and benefits to the child of testifying, and consult with appropriate experts as to the potential for harm. After consideration of all these factors, an attorney who intends to call a child as a witness should ensure that child is prepared for the experience of testifying.

When a child's information is material on an issue other than parental responsibility, counsel should explore whether the same information can be introduced from another source, rendering the child's testimony cumulative and unnecessary.

**7.5 An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes it is necessary to prevent physical or sexual abuse of a child.**

**Comment**

Under FRPC 4-1.6(b), an attorney must reveal information reasonably believed necessary "to prevent a client from committing a crime; or to prevent a death or substantial bodily harm to another."<sup>69</sup> The current Florida rule and statutory "crime-fraud" exception to the Florida evidence code<sup>70</sup> permit the attorney to reveal the intention of the client to commit a crime and the information necessary to prevent it. The rules do not appear to address, however, revelation of conduct that may be severely detrimental to the well being of the child, but is not criminal. While engaged in efforts on the client's behalf, the family lawyer may also become convinced that the client or a person with whom the client has a relationship has abused one of the children. Under traditional analysis in most jurisdictions, the attorney should refuse to assist the client. The attorney may withdraw if the client will not be adversely affected and the court grants any required permission. Disclosure of risk to a child based on past abuse would not be permitted under this analysis, unless the lawyer reasonably believes its disclosure is necessary to prevent the client from committing a crime or to prevent a death or substantial bodily harm.<sup>71</sup>

Notwithstanding the importance of the attorney-client privilege, the obligation of the family lawyer to consider the welfare of children, coupled with the client's lack of any legitimate

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<sup>68</sup>Although Florida law generally requires that domestic relations case files and hearings are public, the Commentary to *Fla. Fam. L. R. P.* 12.400 notes that the rule allowing closure under some circumstances should be applied "to protect the interests of minor children from offensive testimony and to protect children in a divorce proceeding."

<sup>69</sup>The Comment to FRCP 4-1.6 states: "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."

<sup>70</sup> *Fla. Stat.* .§90-502(4)(a) (2002).

<sup>71</sup>FRPC 4-1.6(b)

interest in preventing the attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking primary residence or unsupervised access, even without the attorney's assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child.<sup>72</sup>

As stated in the Comment to the ABA Ethics 2000 Commission's proposed revision of FRPC 1.6(b)(1):<sup>73</sup>

Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representations of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.<sup>74</sup>

It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the child or children. The entire thrust of the family law system is intended to make the child's well-being the highest priority. The vindictiveness of a parent, the ineffective legal representation of the spouse, or the failure of the court to perceive on its own the need to protect the child's interests do not justify an attorney's failure to act. However, even the appointment of a guardian or lawyer for the child is insufficient if the family lawyer is aware of physical abuse or similarly extreme parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer adverse treatment by the client or other parent.

**7.6 An attorney should not make or assist a client in making an allegation of child abuse unless there is a reasonable basis and evidence to believe it is true.**

### Comment

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<sup>72</sup>See Aronson, *What About the Children? Are Family Lawyers the Same (Ethically) as Criminal Lawyers. A Mortality Play*, 1 Inst. For Study of Leg. Ethics 141 (1996); Rosencrantz, *Rejecting 'Hear No Evil Speak No Evil': Expanding the Attorney's Role in Child Abuse Reporting*, 8 Geo. J. Legal Ethics 327 (1995).

<sup>73</sup>The ABA revision of RPC 1.6(b)(1) is embodied in FRPC 4-1.6.

<sup>74</sup>See also *Restatement of the Law (Third), The Law Governing Lawyers* § 117A (Proposed Final Draft No. 2) (1998).

An attorney who is made aware of abuse by a party (or someone closely associated with a party) is permitted, if not obligated, to report that information during family law proceedings.<sup>75</sup> While reporting the existence of child abuse is crucial, a claim that a parent has abused a child leads to the most unpleasant and harmful litigation in the field of family law. Such claims draw the child into testing or some other form of examination, which itself may be traumatic. The harm to the accusing and accused parent and the children will almost always be very great.

Desperate or angry parents sometimes cannot resist the temptation to use such a strong weapon as an abuse charge. Use of such charges to obtain an unfair advantage in the dispute is inexcusable. If a client insists on making a claim that the lawyer believes is unjustified, the lawyer should withdraw from further representation. The lawyer should use all available information and resources, including evaluation by a doctor, therapist, or other health professional, to be sure there is a reasonable basis and substantial supporting evidence for such a charge. Even when the allegation is believed to be justified, it should be made in a manner that is least harmful to the children. Pleadings should be carefully crafted in a way that does not unnecessarily exacerbate the situation.

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<sup>75</sup> *Fla.Stat* §39.201(mandatory reports of child abuse, abandonment, or neglect).