

**IN THE SUPREME COURT OF FLORIDA**

FIRST MIAMI SECURITIES, INC., a  
Florida corporation,

Petitioner,

v.

Case No.: SC01-1085  
(Lower Tribunal No. 3D00-

2168)

KURT SYLVIA, individually, and  
FIRST UNION BROKERAGES SERVICES,  
INC., a North Carolina corporation, jointly  
and severally,

Respondents.

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## **STATEMENT OF THE CASE AND FACTS**

### **I. Statement of the Case**

#### **A. Nature of the Case**

This appeal raises the question of the appropriate standard to be applied when a nonlawyer employee terminates his or her employment with counsel for one party to pending litigation, and accepts employment with counsel for the opposing party in the course of that same litigation.

All of the District Courts of Appeal have spoken on this issue. The decision below was rendered by the District Court of Appeal, Third District, which carefully reviewed and synthesized the opinions of these District Courts and, in the process, even reconsidered its own prior decision. The Third District considered all the potential concerns addressed by the other District Courts of Appeal, and decided that, if the nonlawyer employee has actual knowledge of the confidences of one party to litigation, counsel for the opposing party who hired that employee should be disqualified from that litigation proceeding. The Third District decided that “screening” or “Chinese Wall” procedures would be insufficient to preserve client confidences in those circumstances.

A conflict exists among the five District Courts of Appeal in Florida. The Third and Fourth Districts have ruled that this “actual knowledge” standard governs the disqualification analysis in Florida. First Miami Securities, Inc. v. Sylvia, 780

So. 2d 250 (Fla. 3d DCA 2001); Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4<sup>th</sup> DCA 1999). The First District has ruled that a law firm may screen nonlawyer employees that have knowledge of the confidences of the opposition away from the litigation at issue. Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196 (Fla. 1<sup>st</sup> DCA 2000). The Second and Fifth District have ruled that disqualification is appropriate when one side has obtained an “unfair advantage” over the other, and have suggested that screening would be appropriate to prevent such an unfair advantage. City of Apopka v. All Corners, Inc., 701 So. 2d 641 (Fla. 5<sup>th</sup> DCA 1997); Esquire Care, Inc. v. Maguire, 532 So. 2d 740 (Fla. 2d DCA 1988).

**B. Course of the Proceedings**

The Respondents to this appeal are Kurt W. Sylvia, an individual, and First Union Brokerage Services, Inc.

<sup>1</sup>, a North Carolina corporation. Petitioner is First Miami Securities, Inc., a Florida corporation. This case commenced in September 1999 when First Miami filed a Statement of Claim in arbitration before the NASD, and a Complaint for Temporary Injunction with the Circuit Court for Miami-Dade County. A copy of the Circuit Court Docket is found at Appendix Tab 5.

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<sup>1</sup> First Union Brokerage Services, Inc. is now a subsidiary of First Union Securities, Inc.

<sup>2</sup> References to the Appendix will hereinafter be abbreviated as “App. Tab \_\_\_\_,” and shall refer to the Appendix to Petitioner’s Initial Brief on the Merits, filed by Petitioner and before this Court.

Respondents filed their Motion to Disqualify Counsel on July 13, 2000, when they became aware that a nonlawyer employee of counsel for Respondents had been hired by and had gone to work for counsel for Petitioner. App. Tab 1.

**C. Disposition in the Lower Tribunals**

Respondents' motion to disqualify was granted by Judge Bernard Shapiro of the Circuit Court for Miami-Dade County on July 26, 2000. App. Tab 4. Petitioner sought review of Judge Shapiro's Order in the District Court of Appeal, Third District. The Third District quashed the Order and remanded with instructions on February 21, 2001. First Miami, Inc. v. Sylvia, 780 So. 2d 250 (Fla. 3d DCA 2001), App. Tab 9. First Miami's Petitions for Rehearing and Rehearing en banc were denied on April 11, 2001. Id. First Miami then filed its Notice to Invoke the Discretionary Jurisdiction of this Court.

**II. Statement of the Facts**

In August 1999, Respondent Kurt W. Sylvia ("Sylvia") left his employment as a securities broker with Petitioner First Miami Securities, Inc. ("First Miami"), as he had become dissatisfied with the limited range of services and financial products offered by First Miami to its customers. See Transcript of 12/29/99 Hearing, App. Tab 6, at 13, 31-32. In order to be able to offer his clients better service and a

wider range of financial products, Sylvia decided to accept a position with Respondent First Union Brokerage Services, Inc. (“FUBS”) (collectively, with Sylvia, referred to as “Respondents”). See Def. Mem. In Supp. of Mot. to Disqualify Counsel, App. Tab 1 at 1; App. Tab 6 at 13. Because First Miami practices almost exclusively in the niche of tax-free bond investments, Sylvia believed that First Miami would have no objection to his employment in the full-service brokerage services field practiced at FUBS. App. Tab 6 at 54.

Shortly after his resignation, however, First Miami brought its assault upon Sylvia in the Circuit Court for Miami-Dade County and before the National Association of Securities Dealers. First Miami accuses Sylvia of leaving its employment without warning. App. Tab 6 at 5-6. First Miami has alleged that Sylvia and FUBS have caused it “irreparable harm” by taking customers lists and related materials, and sought the return of that material as well as damages for their alleged misappropriation. Id. at 157-163. In the injunctive hearing before the Circuit Court, First Miami has asked that Sylvia essentially be barred from engaging in business in the securities industry, and has alleged that First Miami has suffered substantial damages due to Sylvia’s new employment with FUBS. Id.

Sylvia and FUBS hired the Miami, Florida firm of Gallwey Gillman Curtis Vento & Horn, P.A. (“Gallwey Gillman”) as counsel to defend them in this matter.

See Order Granting Defendants’ Motion to Disqualify Richard & Richard, P.A. as Counsel for Plaintiff (the “Order”), App. Tab 4 at 1. First Miami is represented by the Miami, Florida law firms of Richard & Richard, P.A. (“Richard & Richard”) and Podhurst, Orseck, Josefsberg, Eaton, Meadow, Olin & Perwin, P.A. Until June 12, 2000, Stephen B. Gillman (“Gillman”), the shareholder in Gallwey Gillman who was lead counsel at that firm for Respondents in this case, employed as his legal secretary Elsie St. Fleur (“St. Fleur”). Id. St. Fleur typed outgoing correspondence between Gillman, Respondents, and co-counsel, prepared memoranda related to this case, helped coordinate discovery responses, and had full access to all of Sylvia’s confidential attorney-client privileged and work product documents and information. Id.; see also Affidavit of Gillman, App. Tab 1A at 2-3; Sworn Statement of Elsie St. Fleur, App. Tab 2B at 4.

Directly in the midst of this hotly-contested litigation, First Miami’s counsel, Richard & Richard, surreptitiously hired St. Fleur away from Gallwey Gillman to come to work for Richard & Richard. App. Tab 1A at 2-3. Neither St. Fleur nor Richard & Richard ever informed Gallwey Gillman that it was considering hiring St. Fleur. Id.; see also Affidavit of Mary Wassenberg, Gallwey Gillman office administrator, App. Tab 1B at 2-3. Richard & Richard never called Gallwey Gillman for the customary reference check. App. Tab 1B at 3. When asked by

Gallwey Gillman's office administrator, St. Fleur denied that she had any other employment plans upon her departure from Gallwey Gillman. Id. at 2.

Respondents did not even learn that St. Fleur had gone to work for Richard & Richard until June 21, 2000, nine days after her resignation. Id. Thus, as a result of these activities, Richard & Richard, through its surreptitious hiring of St. Fleur, gained essentially unchecked access to highly confidential, attorney-client privileged information belonging to Respondents.

Notably, it is undisputed that St. Fleur had access to Respondents' confidential, privileged information which Respondents had entrusted to Gillman and his firm while she was employed by Gillman. Order, App. Tab 4 at 2. Because this highly confidential client information was placed in danger of disclosure due to St. Fleur's new employment with Richard & Richard, once it was discovered, Respondents filed a Motion to Disqualify Counsel with the Circuit Court for Miami-Dade County, Florida. See Tab App. Tab B. Judge Bernard Shapiro ordered that Richard & Richard be disqualified on July 26, 2000. See App. Tab 4.

First Miami sought review of Judge Shapiro's decision to the District Court of Appeal, Third District, which heard oral argument on December 12, 2000. On February 21, 2001, the Third District issued its decision, quashing the Order and

remanding the case to the Circuit Court for Miami-Dade County for a determination consistent with its opinion, discussed more fully infra. First Miami Securities, Inc. v. Sylvia, et al., 780 So. 2d 250 (Fla. 3d DCA 2001), App. Tab 9.

In essence, the Third District Court of Appeals applied an “actual knowledge” standard, and held that Richard & Richard should be disqualified unless First Miami could meet the burden of proving that St. Fleur had no actual knowledge of any confidential client information belonging to Respondents when she joined Richard & Richard. Id. at 256. Recognizing its inability to meet that standard on remand, First Miami filed a Notice to Invoke the Discretionary Jurisdiction of this Court.

First Miami claims that, at all relevant times, Richard & Richard has had in place “screening procedures” designed to protect against the disclosure of any of Respondents’ confidential client information, and that St. Fleur has disclosed no confidential information to Richard & Richard. See Transcript of 7/20/00 Hearing, App. Tab 3 at 32-33. Richard & Richard, however, has never produced any written evidence of such procedures whatsoever, nor any written proof of when the alleged procedures were implemented.

<sup>3</sup> First Miami believes that these alleged procedures – of which there has been no

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<sup>3</sup> Obviously, procedures put in place after St. Fleur’s hiring would be of scant comfort to Respondents.

documented evidence – should be sufficient to preserve the integrity of the judicial process in this case, arguing that Respondents should have no fear that their attorney-client privileged and confidential information is safe with their opponents’ counsel. See Pet. Init. Brief on the Merits (hereinafter “Pet. Brief”). Respondents ask this Court to reject the notion that opposing counsel in a hotly-contested proceeding can, or properly should, serve in the role of sole guardians of their opponents’ confidential information.

### **SUMMARY OF THE ARGUMENT**

In formulating its “actual knowledge” standard, the Third District construed Rule 4-1.10(b) of the Rules of Professional Conduct, regarding imputed disqualification of a law firm hiring a lawyer who has represented the opposition in an ongoing matter, to apply also to nonlawyer employees. First Miami, 780 So. 2d at 253. This interpretation, based in part upon a well-reasoned opinion of the District Court of Appeal, Fourth District, Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4<sup>th</sup> DCA 1999), properly focuses the issue upon actual knowledge of confidential information held by the switching employee; that is, if that employee – lawyer or not – has confidential information belonging to one side in an ongoing litigation matter which is material to that matter, the hiring law firm should be disqualified from representing the opposition in the same matter.

In its brief, First Miami makes an argument, never raised below, inappropriately comparing the legal secretary here to a government attorney. Pet. Brief at 8-11. First Miami argues that, because an entire government attorneys' office would not be disqualified from prosecuting a lawyer's former clients if that attorney is properly "screened" from the matter, Richard & Richard should not be disqualified in the instant case if its legal secretary is screened from the ongoing matter. Id. This standard is unworkable in general and does not take into account the realities of the instant case or the need to assure clients that their highly confidential, privileged information is not shared with their adversary in a hotly-contested case. Courts and commentators have rejected the propriety of screening procedures as ineffective for numerous reasons.

Moreover, even were screening procedures deemed sufficient as a general rule, the conduct of First Miami and its counsel in the instant case would render such procedures ineffective in this case. Because of the potential for abuse or, at best, confusion in these circumstances, the better course is to adopt the decision of the Third District as the standard in Florida, and hold that the imputed disqualification rule of Rule 4-1.10(b) of the Rules of Professional Conduct applies in cases where a law firm hires a nonlawyer employee from counsel for the opposition.



## ARGUMENT

### **I. A LAW FIRM THAT HIRES AWAY A NONLAWYER EMPLOYEE FROM COUNSEL FOR THE OPPOSITION IN A PENDING LITIGATION MATTER SHOULD BE DISQUALIFIED**

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#### **A. Standard of Review**

The standard of review of the decision by the Third District is de novo. The matter considered by the court below is a question of law. See First Miami Securities, Inc. v. Sylvia, 780 So. 2d 250 (Fla. 3d DCA 2001). The standard of review “for a pure question of law is de novo.” Armstrong v. Harris, 773 So. 2d 7, 11( Fla. 2000).

#### **B. The Decision of the Third District is Well-Reasoned, Balanced, and Protects the Interests of All Parties and the Public’s Interest in the Integrity and Fairness of the Judicial System, and Should be Adopted as the Standard in Florida**

In formulating the opinion below, the Third District had before it all the authority cited to this Court by First Miami, including the decisions from the other District Courts of Appeal in Florida, namely, Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196 (Fla. 1<sup>st</sup> DCA 2000); Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4<sup>th</sup> DCA 1999); City of Apopka v. All Corners, Inc., 701 So. 2d 641 (Fla. 5<sup>th</sup> DCA 1997); Esquire Care, Inc. v. Maguire, 532 So. 2d 740 (Fla. 2d DCA 1988); and Lackow v. Walter E. Heller & Co., Inc., 466 So. 2d 1120 (Fla. 3d DCA 1985). After analyzing this authority extensively, the Third District formulated a workable

standard that takes into account the rights of parties, law firms, and nonlawyer employees as well as the need to preserve the public's faith in the integrity of the judicial system.

Under the standard applied by the Third District, actual knowledge by the nonlawyer employee of the attorney-client confidences of the other side is the focus of the inquiry, and prospective employers who would hire a nonlawyer employee away from opposing counsel may not cure the resultant conflict by merely setting up "screening" procedures within the hiring firm. First Miami, 780 So. 2d at 255. The fact that a nonlawyer employee "was exposed to confidential information in the underlying case" while employed by one client's law firm gives rise to "the rebuttable presumption that the secretary had actual knowledge of the confidential information" belonging to that client. Id. at 256. Thereafter, the hiring firm then "bears the burden of demonstrating by the greater weight of the evidence that the secretary has no actual knowledge of any confidential information material to [the underlying] case." Id. If this burden is not met, then counsel for the hiring law firm will be disqualified. Id.

This test is identical to that applied by other District Courts of Appeal when lawyers have switched firms. Gaton v. Health Coalition, Inc., 745 So. 2d 510 (Fla. 3d DCA 1999); see also Koullisis v. Rivers, 730 So. 2d 283 (Fla. 4<sup>th</sup> DCA 1999);

Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6 (Fla. 5<sup>th</sup> DCA 1987). It is designed to, and does, ensure full and reliable compliance with Rule 4-1.10(b) of the Rules of Professional Conduct, which provides:

When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired [confidential] information.

Rule of Professional Conduct 4-1.10(b).

The Third District below saw no reason to distinguish between lawyers and nonlawyers in application of this rule. First Miami, 780 So. 2d at 256. Following the opinion of the Fourth District in Koulisis v. Rivers, 730 So. 2d 289 (Fla. 4<sup>th</sup> DCA 1999), the Third District found “no reason to draw a distinction between lawyers and nonlawyers when it came to protecting the confidences of a client.” First Miami, 780 So. 2d at 253 (quoting Koulisis, 730 So. 2d at 291). In Koulisis, the Fourth District had noted that the secretary “must be viewed the same as if she had been an attorney . . . assigned to handle the . . . case,” and the court should “not look to what tasks the employee performs so much as to his or her access to the same types of privileged materials that lawyers would receive.” Koulisis, 730 So. 2d at 291.

Most importantly, the Third District below realized that the same danger of

breach of attorney-client confidences taints the litigation proceedings, regardless of whether it is a lawyer or nonlawyer who was the original holder of such information. Were any other standard adopted, and “information provided by a client in confidence to an attorney for the purpose of obtaining legal advice could be used against the client because a member of the attorney’s non-lawyer support staff left the attorney’s employment” and went to work for opposing counsel, then “[e]very departing secretary, investigator, or paralegal would be free to impart confidential information to the opposition without effective restraint.” Id. at 254 (quoting Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037, 1044 (W.D. Mo. 1984)).

The Third District thus agreed with the reasoning of the Williams court that the “only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these ‘agents’ of lawyers to the same disability lawyers have when they leave legal employment with confidential information.” Id. Rule 4-1.10(b) of the Rules of Professional Conduct requires disqualification of a law firm representing a given client when that firm hires a lawyer who (or whose firm) had represented a person whose interests are materially adverse to that client and about whom the lawyer had acquired confidential information. In keeping with this Rule, the Third District properly

focused the inquiry upon the issue of whether this confidential information was jeopardized by a new employment arrangement.

Recognizing that the position of the “holder” of the information – whether attorney, paralegal, or legal secretary – is essentially irrelevant to the analysis, both the Third District below and the Fourth District in Koulisis have formulated a test to ensure that client confidences are protected irrespective of the holder’s position. This standard prevents an unscrupulous law firm from obtaining the opposition’s valuable client confidences. It is not a particularly onerous burden to require counsel to refrain from hiring employees with actual knowledge of the confidences of their opponents. Respondents submit that this Court should make this standard the rule of general application in Florida, and apply Rule 4-1.10(b) to law firms hiring nonlawyers who have “switched sides.”

**C. First Miami Seeks a Result that Would Call for Lax Conflict Rules, Would be Subject to Manipulation, and Would Erode Public Confidence in Our Judicial System**

**1. State v. Fitzpatrick**

**a. First Miami’s Reliance on Fitzpatrick is Misplaced**

First Miami relies extensively upon this Court’s holding in State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), which, according to First Miami, served as the foundation for the First District’s decision in Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196, 206 (Fla. 1<sup>st</sup> DCA 2000). See Pet. Brief at 8-11. First Miami’s analysis, however, inappropriately equates a nonlawyer employee of a private law

firm with a government attorney. Id.

In Fitzpatrick, this Court recognized the “distinction between private law firms and government prosecutorial offices.” Fitzpatrick, 464 So. 2d at 1187. The Fourth District Court of Appeal has addressed this distinction, and the inherent difference making screening appropriate in one situation but not the other. Birdsall v. Crowngap, Ltd., 575 So. 2d 231 (Fla. 4<sup>th</sup> DCA 1991). In that case, Crowngap alleged that allowing screening for government attorneys and not private attorneys was unconstitutional as violative of equal protection and due process. Id. at 232. The Fourth District explained that there was a “rational basis for the distinction in the rules” that was “based upon a compelling need to treat government attorneys differently.” Id. The government “has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.” Id. (following Comment to Rule of Professional Conduct 4-1.11; quoting Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6, 6 (Fla. 5<sup>th</sup> DCA 1987)).

First Miami has failed to demonstrate that the same kind of compelling need to attract competent lawyers to government service that underlies the Fitzpatrick decision exists here. The rationale of the Fitzpatrick ruling simply has no application. Because First Miami’s counsel is not a government attorneys’ office, it cannot rely on the distinction recognized in Fitzpatrick between a private law firm and a government attorneys’ office.

Indeed, the Fifth District in Petrin, supra, further recognized that screening in the private sector would be ineffective as to lawyers, as “[t]he mere possession of confidential information is too great a threat to public confidence in the attorney-client privilege, and the hardship of recruiting attorneys in the

private sector is not an overriding problem.” Petrin, 516 So. 2d at 7. Given the “12,000-plus” lawyers practicing in Miami-Dade County (as recognized by Judge Shapiro in the Order, App. Tab 4), there are ample employment opportunities for legal support staff.<sup>4</sup>

First Miami further suggests that a “nonlawyer assistant” is the same as a “salaried government employee” under the Fitzpatrick analysis, solely because neither may personally have “a financial interest in the success of departmental representation that is inherent in private practice.” Pet. Brief at 8-10. Fitzpatrick, however, does not speak to nonlawyer assistants at all. This Court found that “the state attorney’s office is not a law firm” within the meaning of Rule 5-105(D) of the Rules of Professional Conduct, basing its reasoning upon the distinction between the prosecutor’s view of “advocacy toward a just result” and the private attorney’s focus on the “vindication of a particular claim.” Fitzpatrick, 464 So. 2d at 1187. This distinction “lessens the temptation to circumvent the disciplinary rules through the actions of associates” on the part of the government lawyer. Id.

To the extent it relies upon Fitzpatrick, the First District in Stewart failed to acknowledge that the primary basis for concerns regarding the breach of their confidences is not whether St. Fleur has a financial stake in the misappropriation of the attorney-client confidences, but whether the law firm that hired the employee away from the opposition in the middle of litigation, which has a potential stake in the outcome, has thereupon obtained access to Respondents’ attorney-client confidences. Unlike the “prosecutor” scenario, the concerns contemplated in Fitzpatrick are manifestly present in the instant

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<sup>4</sup> St. Fleur asserts that if she were conflicted out of every case “in which Gallwey Gillman has conflicts then I will not ever work in a Florida law firm.” App. Tab 2A at 5. Given the large number of other potential employers, and the fact that Gallwey Gillman employed only eight lawyers, this statement is, at best, hyperbole.

situation. St. Fleur's new employer – counsel for Petitioner – is undeniably concerned with “vindication of a particular claim” and not strictly “a just result,” as counsel is ethically obligated to represent zealously its own client, First Miami, in the instant matter. See Fitzpatrick, 464 So. 2d at 1187. If Richard & Richard were so inclined, it could improperly use Respondents' confidences to achieve unfair advantage in the litigation of this matter – and Respondents would, in all likelihood, never know it, nor have any means by which to learn of it. This is not a state of affairs that inspires public confidence in the integrity of the judicial system.

This focus upon the information itself, with less emphasis upon the status of the holder of that information, is entirely consistent with other Florida Rules. Rule 4-5.3 of the Rules of Professional Conduct provides that “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.” Rule of Professional Conduct 4-5.3. The comment thereto provides that such nonlawyer employees “act for the lawyer in rendition of the lawyer's professional services.” Id. Staff members essentially act as agents for the lawyer, and the “lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer” in certain situations (all of which apply here). Id.

To be sure, if St. Fleur became a secretary to a prosecutor, disqualification would not be automatic, just as it would not be if a lawyer had left private practice for a government attorney position, because St. Fleur would be held to the same standard as her government attorney employer. The consequences of her leaving secretarial employment by counsel for one side of a private lawsuit and accepting employment with opposing counsel during the pendency of the litigation should be the

same as if a lawyer had switched from one side to the other. Richard & Richard, as her employer, must bear the consequences of its decision to hire her.

Respondents submit that the First District did not rely upon the “nonlawyer employee – government attorney” comparison as the basis for its decision in Stewart. Contrary to First Miami’s assertion, the First District did not “utilize[ ] the same reasoning used by this Court in State v. Fitzpatrick.” Pet. Brief at 11. First Miami’s quotation in its brief from Stewart, which it alleges was central to the Stewart decision, was in fact a quote from an Arizona appellate court decision, Smart Industries Corp., Mfg. v. Sup. Ct., Cty. of Yuma, 876 P.2d 1176, 1180-81 (Ct. App. Ariz. 1994). It was the Arizona intermediate appellate court that created the “legal assistant – government attorney” parallel in order to adopt a screening standard for nonlawyer employees, as “Arizona law does not recognize screening devices to avoid imputed disqualification” of a new law firm that hires a new lawyer with such an imputed conflict, id. at 1184. To reach this result, the court drew a distinction between lawyers and nonlawyer employees of law firms. Respondents submit that the rule established in Arizona (and not yet ruled upon by the Arizona high court) should not be adopted in Florida. A legal assistant moving from one side to another in the midst of a hotly-contested matter should not be considered the legal equivalent of an attorney leaving private practice to accept a position in a large staff of government prosecutors.

Moreover, First Miami fails to point out that the Smart Industries opinion in Arizona acknowledges that “very few jurisdictions have considered the issue” of disqualification analysis for nonlawyer employees, and that “those that have . . . tend to apply the same standards to nonlawyers as are applied to lawyers under the jurisdiction’s applicable disciplinary rules regarding imputed

disqualification.” Smart Industries, 876 P.2d at 1181. In these cases, a secretary’s new firm can be saved by a “Chinese Wall” or screening procedures only if, under the state’s applicable ethical rules and court decisions, a “Chinese Wall” would be permitted had the firm hired a lawyer from opposing counsel’s firm. Despite the fact that Arizona law forbade screening procedures in the case of lawyers, the Smart Industries court allowed them for nonlawyers. Id. at 1183. By its own admission, then, the Arizona appellate court diverged from the rule followed by the majority of other jurisdictions, allowing different treatment for lawyers and nonlawyers for purposes of assessing the efficacy of a “Chinese Wall.”

In Florida, a “Chinese Wall” cannot save a firm that has hired a lawyer away from the opposition. Id.; see also Gaton v. Health Coalition, Inc., 745 So. 2d 510 (Fla. 3d DCA 1999); Birdsall v. Crowngap, Ltd., 575 So. 2d 231 (Fla. 4<sup>th</sup> DCA 1991); Nissan Motor Corp. v. Orozco, 595 So. 2d 240 (Fla. 4<sup>th</sup> DCA 1992); Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6 (Fla. 5<sup>th</sup> DCA 1987).

Respondents therefore submit that, contrary to the Arizona Court of Appeals decision which departed from the general rule in other jurisdictions, and contrary to First Miami’s misinterpretation of Stewart, the Court’s focus should be directed toward the danger to the integrity of the judicial system, and not upon some strained analogy between a nonlawyer employee and a government lawyer. This focus is mandated by Rule 4-1.10(b) itself, and there it should remain for all employees/agents of lawyers in similar circumstances. As the dissent in Fitzpatrick recognized, one still must be mindful of “public confidence in our justice system.” Fitzpatrick, 464 So. 2d at 1188. Unfortunately, “the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity

of the entire judicial system.” Id. The potential for disclosure still remains when one unscrupulous lawyer may have access to confidences of his or her opponent, no matter the employment status of the provider of that information in the first instance. A rule must be established to prevent such unscrupulous behavior and must address the potential for abuse and betrayal in the “worst case scenario.”

**b. A Nonlawyer Employee Switching Sides Creates Risks**

The law cannot, as First Miami suggests, blindly assume that a nonlawyer employee could never have a financial stake in the outcome of litigation (and therefore none in the disclosure of confidences that may affect that outcome). It is difficult to conceive that a nonlawyer employee would not, in some way, reap some benefits of a major victory for a client and law firm, or that a nonlawyer employee could never be enticed with promises of financial gain by an unscrupulous lawyer who would pay for the opposition’s confidences. Even if that employee did not have such a stake, however, the law cannot assume that his or her employer – counsel for the opposition – will not seek to obtain and profit from those confidences. The rules do not envision the nonlawyer employee as the sole guardian of the opposition’s confidences, and to do so by case law would harm the public’s faith in the integrity of the judicial process.

Respondents submit that, in fact, client confidences possessed by staff are in far greater danger of disclosure in the hands of a nonlawyer than they would be if

possessed by a lawyer. From their first day at law school, lawyers are taught that the confidences of clients are sacrosanct. Even if the most unscrupulous lawyer cares nothing for professional ethics, that lawyer knows that an ethical violation, if discovered, could end his or her career. Because of that deterrent, an unethical lawyer is unlikely to ask a newly-hired attorney colleague to reveal confidences of former clients, given the risk of that new colleague filing an ethics complaint. The greater danger is that the unscrupulous lawyer will cajole or demand such information from a secretary or paralegal subordinate.

Nonlawyer employees seldom have had the same ethical training as attorneys, and essentially rely upon their lawyer employers to follow the ethical rules and assure their compliance therewith.<sup>5</sup> A nonlawyer employee might never know that revealing confidences is inappropriate and, to be sure, the unethical lawyer would never so instruct that employee. Indeed, the Williams court, upon which the Third District below relied, recognized this, finding that “. . . a persuasive argument can be made that a non-lawyer would be more likely to reveal confidential information,” because a nonlawyer “might not be as sensitive to the need to safeguard the

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<sup>5</sup> Rule 4-5.3 of the Rules of Professional Conduct requires attorneys to take responsibility for the action of their staff members. The Comment to this rule acknowledges that assistants “act for the lawyer in rendition of the lawyer’s professional services,” and requires that lawyers “give assistants appropriate instruction concerning the ethical aspects of their employment . . . .”

confidences of his or her previous employer gained while working with an attorney.” Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037, 1043 (W.D. Mo. 1984).

As unfortunate as it may be, the law must recognize that not all lawyers meet their ethical obligations, and rules must be formulated to govern the bad as well as the good. The Third District Court below has created a workable standard that takes this into consideration. It analyzed the prior decisions from the other District Courts, the authority before this Court now and in previous decisions, and relevant decisions from other jurisdictions. This standard, now in place in the Third and Fourth Districts, should be adopted as the rule in Florida.

## 2. **Castro v. State**

Seven years after its decision in Fitzpatrick, *supra*, this Court revisited these issues in Castro v. State, 697 So. 2d 259 (Fla. 1992), warning prosecutors that they were not given *carte blanche* to act at their whim with regard to the confidences of their former clients solely because they had left private practice. This Court reiterated its holding that, where the disqualified attorney in Fitzpatrick had no contact with other state-attorney personnel regarding the underlying case, the entire state attorney's office need not be disqualified. Castro, 597 So. 2d at 260. In contrast, the new prosecutor in Castro had actually consulted with respect to his former client with a prosecutor assigned to the case.

Stressing that it could not “say the same result [as reached in Fitzpatrick] should follow where the defendant or the public at large is given reason to believe the judicial process has been compromised,” *id.*, this Court emphasized that “our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well.” *Id.* Thus, this Court has acknowledged that it remains concerned with apparent, as well as actual, conflicts of interest.

The Castro majority opinion quotes Justice Ehrlich's dissent in Fitzpatrick, (“the appearance of evil . . . in turn calls into question the integrity of the entire

judicial system.”). In cases involving “no contact,” disqualification of the entire state attorneys’ office is not appropriate. Discussions between prosecutors about one prosecutor’s former client, on the other hand, would create the “appearance of evil.” By the same token, hiring away a secretary from opposing counsel’s law firm in the midst of a hotly-contested legal proceeding creates, at a minimum, a similar appearance.<sup>6</sup>

None of the mitigating factors applicable to government lawyers is present here. Rather, this Court should reaffirm its belief that any situation which would cast doubt upon the integrity of the judicial system should be avoided, and use this underlying theme as the basis for the application of Rule 4-1.10(b) to nonlawyer employees. Put simply, allowing a nonlawyer employee to deliver the confidences of a client to an adversary with only a “Chinese Wall”- administered and overseen by that adversary in the midst of ongoing legal proceedings – as protection against divulgence creates significant doubt as to whether those confidences can be effectively safeguarded. Such doubt must be avoided. This can best be accomplished by applying Rule 4-1.10(b) to nonlawyers and adopting the standard

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<sup>6</sup> Any claimed “potential for tactical abuse” decried in First Miami’s brief is nonexistent here. First Miami’s counsel could easily have avoided the dilemma they now face by hiring some other legal assistant, or even by being forthright with Respondents about their decision to hire St. Fleur, at which point it would have learned of Respondents’ objections immediately.

outlined by the Third District below and the Fourth District in Koulisis.

**D. Screening, as Suggested by First Miami, Would be an Ineffective Remedy**

**1. Arguments Against Screening Procedures**

First Miami suggests that the proper remedy for the danger it has created is the “Chinese Wall,” or screening procedures, that Richard & Richard has allegedly employed.<sup>7</sup> Respondents submit that screening is an ineffective procedure – for attorneys and nonlawyer personnel alike – and should not be adopted as the rule in Florida.

The Third District’s opinion acknowledges the practical difficulties with the proper administration and oversight of screening procedures. The Third, Fourth, and Fifth District Courts of Appeal have already recognized that screening procedures are ineffective as to private sector attorneys. Gaton, 745 So. 2d at 511; Birdsall, 575 So. 2d at 232-33; Petrin, 516 So. 2d at 7 (rejecting screening procedures because “[t]he mere possession of confidential information is too great a threat to public confidence in the attorney-client privilege . . .”). High courts across the nation are in agreement.

For example, the Supreme Court of Nevada has specifically enumerated the

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<sup>7</sup> Respondents will address the questionable circumstances surrounding St. Fleur’s hiring and the deficiencies of the alleged “Chinese Wall,” in this particular case, infra at sections II.D.2 and III.B.

potential pitfalls of a screening process. See Ciaffone v. Eighth Jud. Dist. Ct., 945 P.2d 950 (Nev. 1997). The court recognized “the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosures.” Id. at 953. The Supreme Court of Kansas has also found that screening procedures for lawyers “are not appropriate,” as the rules of ethics “reject . . . any thought that the ‘taint’ of the incoming lawyer can be cured by screening him or her . . . or by erecting a ‘Chinese Wall’ or by imposing a ‘cone of silence.’” Parker v. Volkswagenwerk Aktiengesellschaft, 781 P.2d 1099, 1106 (Kan. 1989) (quoting Hazard and Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct at 191 (1988)).

## **2. First Miami’s Conduct Has Already Rendered any Would-Be Screening Procedures Ineffective**

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First Miami urges this Court to “adopt the well-reasoned opinions of Stewart [v. Bee-Dee Neon & Signs, Inc.], 751 So. 2d 196 (Fla. 1<sup>st</sup> DCA 2000)], the Florida Bar Ethics Committee, and the ABA Ethics Committee, as the uniform standard for the State of Florida.” Pet. Brief at 6. Even assuming for the sake of argument that screening procedures could prevent misappropriation of client confidences and the appearance of impropriety. First Miami cannot claim the benefit of this authority

here. As recognized by the Third District, the circumstances surrounding St. Fleur's departure did not pass the "smell test" in the trial court's view, and they have made compliance with screening procedures impossible. First Miami, 780 So. 2d at 256; see also Order, App. Tab 4 at ¶ 9 (Judge Shapiro was "bothered by a number of factors," including the departure circumstances). First Miami's selective quotations from Stewart, the Florida Bar Ethics Opinion, and the informal opinion of the ABA Committee materials ignore the unique circumstances of this case.

Thus, even if this Court were to allow a "Chinese Wall" or screening procedures in the case of nonlawyer employees who switch sides generally, it should rule that the undocumented procedures allegedly put in place by First Miami's counsel fall far short of acceptable procedures.

**a. The Florida Bar Ethics Opinion**

First Miami cites Opinion 86-5 of the Florida Bar Committee on Professional Ethics ("Op. 86-5")<sup>8</sup> as authority for the proposition that "the hiring firm had a duty not to seek or permit disclosure by the employee of the confidences or secrets of the opposing firm's clients, and 'would not be disqualified' when it fulfilled that duty." Pet. Brief at 22-23. That Opinion equally emphasizes that "the former firm has a duty to admonish the departing employee that the employee has an ethical or

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<sup>8</sup> Advisory ethics opinions are not binding precedent. Krivanek v. The Take Back Tampa Political Cmte., 625 So. 2d 840, 844 (Fla. 1993).

moral obligation not to reveal confidences or secrets of any client to the hiring firm.” Op. 86-5 at 2. The hiring firm has its own duty – together with that of the former firm – not to seek or permit a disclosure of confidences. Id. The Gallwey Gillman firm was denied the opportunity to counsel St. Fleur about her ethical duties because of the surreptitious conduct of Richard & Richard at St. Fleur.

Judge Shapiro, in part, based his ruling upon the appearance of impropriety this conduct created. See Order, App. Tab 4 at ¶ 4 (“attorney Gillman’s law firm denies being told by Elsie St. Fleur prior to her departure that she had accepted employment as legal secretary to Plaintiff’s counsel herein, Dennis Richard, although she alleges to have told people at the firm of her intention”); Id. at ¶ 5 (nearly two weeks following her departure from Gallwey Gillman, “attorney Gillman elicited from Elsie St. Fleur confirmation that she had indeed become employed by Richard & Richard, P.A.”).

Judge Shapiro found that the appearance of impropriety created by First Miami and its counsel outweighed Petitioner’s “right to have its chosen counsel represent it” – because “counsel has himself created a situation where the concerns and appearance to [Respondents] outweigh that right.” Id. at ¶ 12. Judge Shapiro’s findings are supported by the affidavits submitted with Respondents’ motion to disqualify. Gillman Aff., App. Tab 1A at ¶ 2 (“[St. Fleur] did not advise

me that she had previously applied for or had accepted employment as a legal secretary at the law firm of Richard and Richard, P.A.”); Id. at ¶ 3 (“At no time did anyone at Richard and Richard, P.A. inform me that St. Fleur had applied for and was being considered for employment at Richard and Richard, P.A., or that she had accepted employment and started working as a legal secretary at Richard and Richard, P.A.”).

St. Fleur likewise kept the fact of her new employment plans from her direct supervisor, Gallwey Gillman’s legal administrator. See Aff. of Wassenberg, App. Tab 1B at ¶ 4 (“St. Fleur did not inform me that she had previously applied for or accepted employment as a legal secretary with the law firm of Richard and Richard, P.A. . . . until June 21, 2000, and then, only after I pressed her for information on her new employment after having heard a ‘rumor’ that she might have accepted a position at Richard and Richard, P.A.”); Id. at ¶ 5 (“At no time has anyone from Richard and Richard, P.A. contacted me to advise that St. Fleur was being considered for employment or had accepted employment at Richard and Richard, P.A.; not even to check or verify her prior employment or seek any reference”). In fact, as part of the deception, St. Fleur told Wassenberg that she had no immediate plans for employment, and that she was resigning to take care of personal matters. Id. at ¶ 2.

**b. The American Bar Association Informal Opinion**

First Miami next cites Informal Opinion 88-1526 of the American Bar Association Committee on Ethics and Professional Responsibility, a 1988 opinion entitled Imputed Disqualification Arising from Change in Employment by Nonlawyer Employee (hereinafter “ABA Opinion”). First Miami quotes the section of the ABA Opinion dealing with the alleged propriety of screening procedures, Pet. Brief at 24, but ignores the very language that defines the acceptable practices that might offer some assurance of protection of confidential information.

In the first paragraph of the Informal Opinion, the ABA advises that “the nonlawyer’s former employer must admonish the nonlawyer against revelation of information relating to the representation of clients of the former employer.” ABA Op. at 1. Richard & Richard’s covert hiring of St. Fleur made compliance with this directive impossible. In fact, First Miami has omitted any reference to the entire section in the ABA Opinion devoted to “Responsibilities of Former Employer.” ABA Op. at 2. The ABA admonishes that the former employer “should consider advising the employing firm that the paralegal must be isolated from participating in the matter and from revealing any information relating to the representation of the lawyer’s client.” Id.

Gallwey Gillman could not advise Richard & Richard or St. Fleur to protect

its clients' confidences, because Gallwey Gillman never learned about St. Fleur's new employer until after she had begun employment with counsel for First Miami. The ABA Informal Opinion suggests that, if the former law firm is not satisfied that the new employer has "taken adequate measures to prevent participation and disclosures," the former employer "should consider filing a motion in the lawsuit to disqualify the employing law firm from continuing to represent the opponent." ABA Op. at 3. Respondents did so as soon as they learned of St. Fleur's new employment – again, after she had begun work at Richard & Richard, and after Respondents' confidences were placed in jeopardy. Rather than condoning Petitioner's conduct in this case, the ABA's Informal Opinion fully supports Respondents' position.

**c. The Stewart Opinion**

The First District Court of Appeal construed the above-referenced ethics opinions promulgated by the Florida Bar and the American Bar Association, and held that a per se rule of disqualification for nonlawyers was not appropriate. Stewart, 751 So. 2d at 209. Rather, the Stewart court enumerated certain considerations a trial court should take into account upon ruling on a motion to disqualify counsel.

The precautions enumerated by the Stewart court which could avoid the

necessity for disqualification have been so egregiously flouted in the instant case, however, that, under Stewart, First Miami's counsel's conduct would still require disqualification. The First District also warned, as the ethics opinions do, that "the former firm has a duty to admonish the departing employee that the employee has an ethical or moral obligation not to reveal confidences or secrets of any client to the hiring firm." 751 So. 2d at 203. The departing employee should be cautioned not to disclose any information relating to the representation of the client of the former employer, and that the employee should not work on any matter on which the former employee worked for the former employer. Id. at 204. The employing firm should take reasonable steps to ensure that the employee takes no action and does not perform work related to matters on which the employee worked in the prior employment. Id.

Contrary to these admonitions, both St. Fleur and Richard & Richard took steps to ensure that Gallwey Gillman and the Respondents did not know of St. Fleur's new employer until nine days after she had left Gallwey Gillman. See generally, Aff. of Gillman, App. Tab 1A; Aff. of Wassenberg, App. Tab 1B. Gallwey Gillman, therefore, could not make the admonitions envisioned in Stewart to ensure that St. Fleur would abide by her ethical obligations to the Respondents. Nor could Gallwey Gillman advise Respondents of this conflict of interest. In light

of St. Fleur's and Richard & Richard's less-than-forthright dealing with this issue, Respondents could not be blamed for being skeptical of Richard & Richard's vigilance in safeguarding their confidential information. Having taken no action even to advise Respondents of the potential problem, much less of any concrete steps they intended to take to allay Respondents' well-founded fears, the secretary and her new employer have sown distrust and disbelief in the integrity of the judicial system.

This case illustrates the potential for abuse that would necessarily accompany "Chinese Walls" or screening procedures. If First Miami can keep secret the fact of St. Fleur's interviewing and hiring for weeks, they could similarly hide breaches of "screening procedures," assuming any actually exist. Despite numerous opportunities to do so, counsel for First Miami has never presented any documentary evidence that screening procedures were ever put in place. The better-reasoned view, then, is to make "actual knowledge" of client information the basis for disqualification.

#### **E. Decisions from Other Jurisdictions**

First Miami has omitted several important decisions from other courts across the nation which would show just what the ethical standards are with respect to these issues.

## 1. The Kansas and Nevada Supreme Courts

Just six months ago, the Supreme Court of Kansas held that, because Kansas law did not “allow for the implementation of a screening device or Chinese wall for lawyers, it likewise does not allow for the use of a screening device for nonlawyers.” Zimmerman v. Mahaska Bottling Co., 19 P.3d 784, 793 (Kan. 2001). Therefore, it applied the same standard articulated by the Third District below and the Fourth District – namely, whether the nonlawyer employee had actual knowledge of confidential information. Id. Quoting a Washington federal court opinion, the court acknowledged that it “is no secret that paralegals and other nonattorney staff members are regularly exposed to confidential client information as a part of their everyday work,” and that to “allow such employees to change firms at random and without concern for the information they have acquired would be to undercut the rules applicable to attorneys.” Id. at 790 (quoting Daines v. Alcatel, 194 F.R.D. 678, 682 (E.D. Wash. 2000)). The Kansas Supreme Court recognized further that legal assistants “are privy to a great deal of confidential information” and that they “are also often involved in legal strategy and planning.” Zimmerman, 19 P.3d at 793. As such, “[t]o treat nonlawyers in a different manner than lawyers would seriously erode the foundation of [the applicable Kansas Rules of Professional Conduct] and place at risk the public trust in the legal system.” Id.

The Supreme Court of Nevada was adamant in its criticism of different treatment for lawyers and nonlawyers. The Court held unequivocally that “nonlawyers employees [are] subject to the same rules governing imputed disqualification.” Ciaffone v. Eighth Jud. Dist., 945 P.2d 950, 952 (Nev. 1997). To hold otherwise would result in the nonsensical conclusion of granting “less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer.” Id. Thus, the Court concluded that “the policy of protecting the attorney-client privilege must be preserved through imputed disqualification when a nonlawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests.” Id. The Court went on to acknowledge the “sacrosanct privacy of the attorney-client relationship” necessary to “maintain public confidences in the legal profession and to protect the integrity of the judicial process.” Id. at 953 (quoting Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576 (D.C. Cir. 1984)). As such, the court “decline[d] to carve out an exception allowing screening of nonlawyers in situations where lawyers would be similarly disqualified.” Id.

The Ciaffone court also criticized the approach taken in Smart Industries (relied upon by First Miami in its brief and discussed supra), namely, the concern

about employee mobility and the “quick fix” establishment of a “Chinese Wall” or other screening procedure. Smart Industries and First Miami both place great emphasis upon nonlawyer employee mobility as a reason for treating lawyers and nonlawyers separately for purposes of imputed disqualification analysis. See Smart Industries, 876 P.2d at 1183 (“[i]t is important that nonlawyer employees have as much mobility in employment opportunity as possible . . .”); see also Pet. Brief at 13 (asserting the “devastating effect such a rule would have on her employment mobility”). The Ciaffone court rejected the notion that a “nonlawyer’s employment opportunities or mobility must be weighed against client confidentiality before disqualification occurs,” a belief that “has been roundly criticized for ignoring the realities of effective screening and litigating that issue should it ever arise.” Ciaffone, 945 P.2d at 953. The Court went on to discuss one commentator’s explanation of the general rejection of the screening process due to “the uncertainty regarding the effectiveness of the screen, the monetary incentive involved in breaching the screen, the fear of disclosing privileged information in the course of proving an effective screen, and the possibility of accidental disclosure.” Id. (citing with approval M. Peter Moser, Chinese Walls: a Means of Avoiding Law Firm Disqualification When a Personally Disqualified Lawyer Joins the Firm, 3 Geo. J. Legal Ethics 399, 403, 407 (1990)).

Notably, both Ciaffone and Zimmerman held that nonlawyer employees became subject to the “imputed disqualification” rule when the state rules regarding imputed disqualification were read in tandem with the rule requiring lawyers to ensure that their nonlawyer staff acts in accordance with the same standards. See Zimmerman, 13 P.3d at 790; Ciaffone, 945 P.2d at 953. Florida has in effect versions of these same rules – Rule 4-1.10(b) (Imputed Disqualification) and Rule 4-5.3 (Responsibility Regarding Nonlawyer Assistants) of the Rules of Professional Conduct.

Respondents respectfully submit that this Court should read these applicable rules together, as have the Supreme Courts of Kansas and Nevada, and find that imputed disqualification results from the hiring of a nonlawyer staff member having actual knowledge of client confidences. Rule 4-1.10 would require disqualification of Richard & Richard were St. Fleur a lawyer. Rule 4-5.3 requires attorneys to take responsibility for the action of their staff members. Indeed, the Comment to this rule acknowledges that assistants “act for the lawyer in rendition of the lawyer’s professional services,” and, most importantly, requires that lawyers “give assistants appropriate instruction concerning the ethical aspects of their employment, **particularly regarding the obligation not to disclose information relating to representation of the client**, and should be responsible for their work

product.” See Rule of Professional Conduct 4-5.3 (emphasis added).

Richard & Richard cannot obtain access, actual or potential, to Respondents’ client confidences yet avoid imputed disqualification simply by hiring a legal assistant instead of a lawyer. The protected information is the same, the danger to the client is the same, and the unseemly breach of public confidence in our legal system is the same. All holders of protected information ought therefore to be treated the same, and subjected to the same standards of accountability and penalties.

## 2. The Williams Decision

Both the Third District below and the Fourth District in Koullisis relied in some part on the decision of a federal court in Missouri, Williams v. Trans World Airlines, Inc., 588 F. Supp. 1037 (W.D. Mo. 1984). See First Miami, 780 So. 2d at 254; Koullisis, 730 So. 2d at 291. These District Courts of Appeal quoted the Williams opinion on the potential dangers of breach of confidentiality if a nonlawyer employee were not held to the same standard as an attorney. Specifically, the courts cited the “devastating effect both on the free flow of information between client and attorney and on the cost and quality of the legal services rendered by an attorney” in such a case, and found that the only “practical way to assure that this will not happen and to preserve public trust in the administration of justice” is to hold nonlawyer employees “to the same disability lawyers have when they leave legal employment with confidential information.” Williams, 588 F. Supp. at 1044.

First Miami accuses the Third and Fourth Districts of relying “on an out-of-context dictum” to reject screening. Pet. Brief at 17. First Miami states that “a closer look at Williams” reveals a factual scenario different than the ones before the First Miami and Koullisis District Courts. Specifically, because the information was actually disclosed to the new law firm, who threatened to use the information against the opposition, id. at 17-18, Williams provides, according to First Miami,

“no foundation for” the First Miami or Koulisis decisions.

This argument misses the forest for the trees. While counsel for Petitioner has not yet threatened to use any of Respondents’ confidences acquired by St. Fleur against them, the Third and Fourth Districts, in quoting Williams, plainly acknowledge the potential “devastating effect” that such disclosures of attorney-client confidences may have. Indeed, it is the potential covert and surreptitious use of such information, without an overt threat to do so, which poses the greater danger. It is precisely because of this catastrophic consequence that screening was rejected:

The only practical way to assure that this will not happen and to preserve public trust in the scrupulous administration of justice is to subject these ‘agents’ of lawyers to the same disability lawyers have when they leave legal employment with confidential information.

First Miami, 780 So. 2d at 253-53 (quoting Williams, 588 F. Supp. at 1044).

## **II. THIS MATTER DOES NOT INVOLVE THE RETROSPECTIVE APPLICATION OF A REVISED ETHICAL STANDARD**

First Miami argues that the Third District “adopt[ed] a new standard for imputed disqualification of a law firm” and that such a “revised ethical standard” should not be applied “retrospectively” to it, even if this Court adopts that standard as the rule in Florida. Pet. Brief at 26.

First Miami would apparently not consider Richard & Richard’s continued

representation of First Miami to be a “retroactive” application of an ethical rule, despite the fact that previously-existing authority in the Third District mandated disqualification under the instant circumstances. Moreover, First Miami fails to explain how, if this Court were to adopt the Stewart standard argued by First Miami (a standard which had been rejected in the Third and Fourth Districts), Respondents themselves would not be injured by such a retroactive application of the Stewart rule.

**A. The Third District’s Decision in Lackow**

Respondents argued before the Circuit Court and the District Court of Appeal that the decision of the Third District in Lackow v. Walter E. Heller & Co. Southeast, Inc., 466 So. 2d 1120 (Fla. 3d DCA 1985) was controlling (see generally, Transcript of 7/20/00 Hearing, App. Tab 3) and that Richard & Richard should be disqualified because, as St. Fleur was hired away from opposing counsel by Richard & Richard, “nothing more was required to be shown to support the disqualification of [the hiring firm’s] counsel in this case.” See First Miami Securities, Inc. v. Sylvia, 780 So. 2d 250, 254 (Fla. 3d DCA 2001). Given this automatic disqualification holding in Lackow, Respondents justifiably believed that their confidences would be protected by the mandatory disqualification of Richard & Richard.

First Miami knew that all the other District Courts of Appeal in Florida had already interpreted Lackow to require automatic disqualification in the circumstances presented here. The Third District below acknowledged that Lackow has been universally read to create “a harsh standard” of automatic disqualification when “the nonlawyer employee has been shown to have been exposed to confidential information on the underlying case while working at the former firm.” Id. at 254. The opinions of the other District Courts bear this out. See Stewart v. Bee-Dee Neon & Signs, Inc., 751 So. 2d 196, 200 (Fla. 1<sup>st</sup> DCA 2000); Koulisis v. Rivers, 730 So. 2d 289, 293 (Fla. 4<sup>th</sup> DCA 1999); City of Apopka v. All Corners, Inc., 701 So. 2d 641, 643 (Fla. 5<sup>th</sup> DCA 1997); Esquire Care, Inc. Maguire, 532 So. 2d 740, 740 (Fla. 2<sup>d</sup> DCA 1988) (all interpreting Lackow as ruling that when a secretary was privy to confidences of the client, disqualification was automatic).

The standard articulated by the Third District below moderates the Lackow rule to First Miami’s advantage, not disadvantage, by allowing at least the possibility of avoiding what would have previously been automatic disqualification. There is no possible unfairness to First Miami in applying the standard articulated by the Third District. If anything, the opinion of the Third District below is an unexpected windfall to First Miami, relaxing somewhat the per se disqualification

rule outlined in Lackow.

**B. First Miami’s Case Authority for its “Retrospective Application” Argument is Inapposite**

First Miami cites Bamac, Inc. v. Grady, 500 So. 2d 274 (Fla. 1<sup>st</sup> DCA 1986), as “applying new standards for disqualification of law firm ‘only prospectively, not retrospectively.’” Pet. Brief at 28. Bamac, a workers’ compensation case, addressed the appearance of impropriety where a worker had received claimed rehabilitation services at a rehabilitation center owned in part by counsel for the worker. Bamac noted at the outset that the decision was controlled by the Code of Professional Responsibility, “soon to be superseded” by the Rules of Professional Conduct (which apply now). 500 So. 2d at 278. Additionally, Bamac stated that “no contention is made that the claimant has been prejudiced in any manner.” Id. at 281. Finally, and most importantly, the Bamac court applied the disqualification rule prospectively solely “to minimize the impact on the claimants” because “reversal of the [orders below denying the motion to disqualify] would mean even more inordinate delay in providing needed services,” and would “have the effect of harming primarily the injured claimants,” none of whom had alleged actual prejudice. Id. at 284.

Such is not the case here. Despite First Miami’s characterization of itself and its law firm as victims, Respondents – the parties whose sacred confidences will be affected by this Court’s decision - will be injured by Richard & Richard’s continued representation of First Miami. Furthermore, Bamac dealt with the application of the admittedly more nebulous (and now superseded) general rule regarding the appearance of impropriety. The instant case involves the direct application of Rule 4-1.10(b).

Petitioner also cites this Court’s opinion in Dosdourian v. Carsten, 624 So. 2d 241 (Fla. 1993), as authority for the proposition that a new ethics standard should be prospective only. Pet. Brief at 28.

In Dosdourian, this Court outlawed “Mary Carter agreements” which were, prior to the decision, “legal in Florida,” and the Court, understandably, was “loath to penalize those who have entered into such agreements” when they were legal. Id. Here, the authority that existed in the Third District at the outset of this case mandated disqualification in the circumstances presented. Under Lackow, as interpreted by all the other District Courts of Appeal, First Miami’s conduct was inappropriate at the outset.

Lastly, it is important to note that in all the cases cited by either side involving disqualification issues – Lackow, Koulisis, Stewart, Esquire Care, and City of Apopka – the respective District Courts applied their pronouncements to the facts of the case before them. In no case did any District Court discuss, or even acknowledge, that its formulation of the applicable ethical standard may have been the “retroactive” application of a rule which should only be applied prospectively.

### **III. FIRST MIAMI MAKES INACCURATE ASSERTIONS IN ITS BRIEF**

#### **A. First Miami's "Proffers"**

First Miami has repeatedly argued that Respondents cannot be heard to refute any of First Miami's allegations regarding the events leading up to St. Fleur's departure, the reasons therefor, and the alleged screening procedures in place at Richard & Richard. For example, First Miami asserts as undisputed fact that St. Fleur "actually had no confidential information material to the case," because Petitioner's counsel stated at the hearing that "he would put on the secretary to establish" this point. Pet. Brief at 2.

First Miami attaches great, almost magical, significance to the word "proffer," stating that "uncontested evidence was presented through the accepted proffer of the testimony of the nonlawyer employee who was present at the disqualification hearing . . ." and that "all of the evidence below was by way of affidavit and proffer." Pet. Brief at 29-31. Because of these "proffers," First Miami argues that this Court should declare the Third District's lack of "actual knowledge" standard met and the matter closed, as "Respondents should not get another opportunity to retry this issue." *Id.* at 30.

This argument is without merit. By their own admission, First Miami "proffered" nothing more than that St. Fleur would say what counsel said she would say, if he were to call her as a witness. The trial court accepted this as what she would say on direct testimony. No one can know, however, what St. Fleur would have said under cross-examination by counsel for Respondents. A proffer merely relieves the proffering party of the necessity for calling the witness. It does not operate as a stipulation to, or finding of, the truth of the testimony proffered. Neither Judge Shapiro nor Respondents are

bound to accept that proffer of her testimony as the final and conclusive word. It is precisely because the fact-finding process was truncated and not fully developed under the standard enunciated by the Third District that the case was remanded for further evidentiary proceedings.

In the Circuit Court proceedings, Judge Shapiro did not consider St. Fleur's actual knowledge of Respondents' confidences to be relevant. He was "bothered by a number of factors" surrounding St. Fleur's hiring, as well as "the appearance of impropriety" created thereby. See Order, App. Tab 4 at ¶¶ 9-10. The parties never needed to try the issue of St. Fleur's actual knowledge in Judge Shapiro's court, as such was irrelevant to his ruling. The Third District's decision, for the first time, required that First Miami make an affirmative showing of "no actual knowledge" if it wished to keep Richard & Richard as its counsel. If the Third District's decision is affirmed, Respondents assume that First Miami will, on remand, attempt to put on evidence of "no actual knowledge" through oral testimony, as counsel for First Miami promised he would in his "proffer." Respondents will refute that evidence. If First Miami's allegations that St. Fleur had no actual knowledge of Respondents' confidences are in fact true, it should have no trouble proving this on remand. If this Court adopts the Third District's standard as the proper one, First Miami will need to do nothing more than prove that which it has "proffered."

#### **B. Allegations of "Tactical" and "Strategic" Abuse**

At numerous points, First Miami accuses Respondents of "tactical" and "strategic" abuse of the disqualification issue, suggesting that Respondents have no actual need for the disqualification of Richard & Richard, but solely bring this action to prejudice First Miami. See Pet. Brief at 14.

Respondents do not consider that their concern for the sanctity of their attorney-client confidences should be so lightly dismissed. In fact, First Miami's callous disregard for these very concerns provides further grounds for Respondents' lack of confidence in First Miami's counsel's commitment to safeguarding Respondents' confidential information. Moreover, First Miami's accusations are all the more troubling given the circumstances surrounding the hiring of St. Fleur. Richard & Richard, by hiring St. Fleur covertly, put themselves in the position of appearing to have sought and gained the unfair advantage – and, as such, occasioned the necessity for the Motion to Disqualify.

If no unfair advantage were sought or gained, why did Richard & Richard hire St. Fleur under a veil of secrecy and eschew even the customary reference check to an applicant's current employer? Why would St. Fleur confide in a paralegal but never speak to her own boss, to the managing partner of Gallwey Gillman, or to the legal administrator about her intention to switch sides in the midst of pending litigation? See Sworn Statement of St. Fleur, App. Tab 2B; Aff. of Gillman, App. Tab 1A; Aff. of Wassenberg, App. Tab 1B. Why would St. Fleur affirmatively misrepresent that she had no other job but was resigning to take care of personal matters? App. Tab 1B at ¶2. At the most basic level, and as Judge Shapiro pointedly wondered both at the hearing and in the Order, why, of all the

“12,000+ attorneys practicing in Miami-Dade County, Florida” did St. Fleur seek and obtain “employment with the one firm which happened to be on the opposite side of [this] hotly contested lawsuit?” Order, App. Tab 4 at ¶ 9; Transcript of 7/20/00 Hearing, App. Tab 3 at 33.

Even giving counsel for First Miami the benefit of the doubt and assuming it did not hire St. Fleur in order to misappropriate Respondents’ confidences, the above questions serve to highlight (1) the appearance of impropriety created by the current situation, and (2) the pitfalls associated with First Miami’s alleged screening procedures, which remain undocumented. Anything less than a full factual inquiry of “actual knowledge” by the trial court leaves a lingering cloud of suspicion and the “smell” of impropriety which the Third District pointedly noted as the underlying rationale for the trial court’s ruling. First Miami, 780 So. 2d at 236.

### **C. Gallwey Gillman’s Involvement**

First Miami accuses Respondents of “strategic abuse” in filing a motion to disqualify where “the secretary did not even work for the principal law firm representing the Respondents.” Pet. Brief at 14. Whether or not Gallwey Gillman was the “principal law firm” involved is wholly irrelevant. Mr. Gillman was and is, undeniably, one of Respondents’ attorneys and, in that capacity, received copies of nearly all attorney-client communications, work product material, and other

attorney-client confidences related to this matter – including material from LeClair Ryan, Respondents’ “principal” law firm. St. Fleur was Gillman’s legal secretary and, as such, she was privy to the confidences of the Respondents. Aff. of Gillman, App. Tab 1A. The fact that Mr. Gillman has not personally argued motions in the case has no bearing on St. Fleur’s possession of the privileged material that regularly crossed her desk during her tenure as Mr. Gillman’s legal secretary.

**CONCLUSION**

The standard articulated by the Third District, in applying Rule 4-1.10(b) of the Rules of Professional Conduct to nonlawyer employees, ensures that each party's confidences will be protected from the opposition, and promotes confidence in the integrity of the judicial proceedings. For all the foregoing reasons, Respondents pray that this Court adopt the decision of the Third District Court of Appeal in First Miami Securities, Inc. v. Sylvia, 780 So. 2d 250 (Fla. 3d DCA 2001).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on the 17th day of September 2001, I caused a true copy of the Respondents' Answer Brief on the Merits to be sent via United States Mail, first-class postage prepaid to Counsel for Petitioner, at the following addresses:

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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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