

Board of Governors of The Florida Bar hereby gives notice of filing with the Supreme Court of Florida, on or about July 31, a petition to amend the Rules Regulating The Florida Bar.

The full text of the proposed amendments is printed below. These items will constitute the Bar's filing of rules changes favorably recommended by the Board regarding insurance practices since January 2002. A copy of this submission may be requested by contacting the Office of the General Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee 32399-2300 or calling 850/561-5600, Extension 6802.

Members who desire to comment on these proposed amendments may do so within 30 days of the filing of the Bar's petition. Comments should be filed directly with the clerk of the Supreme Court of Florida, and a copy must be served on the executive director of The Florida Bar.

Rule 1-21.1, Rules Regulating The Florida Bar, governs these proceedings.

### **Rules Regulating The Florida Bar**

## **CHAPTER 4 RULES OF PROFESSIONAL CONDUCT**

### **SUBCHAPTER 4-1 CLIENT-LAWYER RELATIONSHIP**

#### **4-1.7 CONFLICT OF INTEREST; GENERAL RULE**

Summary: Creates new subdivision (c) and commentary, to address the ethical duty of an attorney defending an insured at the expense of an insurer to establish, at the inception of undertaking the representation, a clear mutual understanding as to whether the lawyer will be representing both the insured and insurer as clients, or only the insured — and to inform both as to the scope of the representation; confirms that other conflict rules within Rules Regulating The Florida Bar otherwise apply in such situations.

#### **RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE**

**(a) Representing Adverse Interests.** [no change]

**(b) Duty to Avoid Limitation on Independent Professional Judgment.** [no change]

**(c) Explanation to Clients.** [no change]

**(d) Lawyers Related by Blood or Marriage.** [no change]

**(e) Representation of insureds.** Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

#### **Comment**

**Loyalty to a client**

[no change]

**Consultation and consent**

[no change]

**Lawyer's interests**

[no change]

**Conflicts in litigation**

[no change]

**Interest of person paying for a lawyer's service**

[no change]

**Other conflict situations**

[no change]

**Conflict charged by an opposing party**

[no change]

**Family relationships between lawyers**

[no change]

**Representation of Insureds**

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

**SUBCHAPTER 4-7 INFORMATION ABOUT LEGAL SERVICES****4-7.10 FIRM NAMES AND LETTERHEAD**

Summary: Creates new subdivision (g) and commentary, setting forth terms and conditions under which insurance defense staff attorneys may practice under a firm name other than the name of the insurer without constituting a material misrepresentation; reiterates that attorneys who practice under firm names are additionally required to comply with other applicable requirements of the Rules Regulating The Florida Bar; corrects error within comment, to clarify that law firms using trade names that imply the firm is a public or government agency should use a disclaimer that they are not.

**RULE 4-7.10 FIRM NAMES AND LETTERHEAD**

- (a) **False, Misleading, or Deceptive.** [no change]
- (b) **Trade Names.** [no change]
- (c) **Advertising Under Trade Name.** [no change]
- (d) **Law Firm with Offices in More Than 1 Jurisdiction.** [no change]
- (e) **Name of Public Officer in Firm Name.** [no change]
- (f) **Partnerships and Authorized Business Entities.** [no change]
- (g) **Insurance Staff Attorneys.** Where otherwise consistent with these rules,

lawyers who practice law as employees within a separate unit of a liability insurer representing others pursuant to policies of liability insurance may practice under a name that does not constitute a material misrepresentation. In order for the use of a name other than the name of the insurer not to constitute a material misrepresentation, all lawyers in the unit must comply with all of the following:

(1) the firm name must include the name of a lawyer who has supervisory responsibility for all lawyers in the unit;

(2) the office entry signs, letterhead, business cards, websites, announcements, advertising, and listings or entries in a law list or bar publication bearing the name must disclose that the lawyers in the unit are employees of the insurer;

(3) the name of the insurer and the employment relationship must be disclosed to all insured clients and prospective clients of the lawyers, and must be disclosed in the official file at the lawyers' first appearance in the tribunal in which the lawyers appear under such name;

(4) the offices, personnel, and records of the unit must be functionally and physically separate from other operations of the insurer to the extent that would be required by these rules if the lawyers were private practitioners sharing space with the insurer; and

(5) additional disclosure should occur whenever the lawyer knows or reasonably should know that the lawyer's role is misunderstood by the insured client or prospective clients.

### **Comment**

A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity, or by a trade name such as "Family Legal Clinic." Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is not a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly

speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

Subdivision (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Two examples of such terms are “academy” and “institute.” Subdivision (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. An example of such an improper name is “A. Aaron Able.” Although not prohibited per se, the terms “legal clinic” and “legal services” would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the community for like services.

Subdivision (c) of this rule precludes a lawyer from advertising under a nonsense name designed to obtain an advantageous position for the lawyer in alphabetical directory listings unless the lawyer actually practices under that nonsense name. Advertising under a law firm name that differs from the firm name under which the lawyer actually practices violates both this rule and subdivision (b)(1) of rule 4-7.2.

With regard to subdivision (f), lawyers sharing office facilities, but who are not in fact partners, may not denominate themselves as, for example, “Smith and Jones,” for that title suggests partnership in the practice of law.

All lawyers who practice under trade or firm names are required to observe and comply with the requirements of the Rules Regulating The Florida Bar, including but not limited to, rules regarding conflicts of interest, imputation of conflicts, firm names and letterhead, and candor toward tribunals and third parties.

Some liability insurers employ lawyers on a full-time basis to represent their insured clients in defense of claims covered by the contract of insurance. Use of a name to identify these attorneys is permissible if there is such physical and functional separation as to constitute a separate law firm. In the absence of such separation, it would be a misrepresentation to use a name implying that a firm exists. Practicing under the name of an attorney inherently represents that the identified person has supervisory responsibility. Practicing under a name prohibited by subsection (f) is not permitted. Candor requires disclosure of the employment relationship on letterhead, business cards, and in certain other communications that are not presented to a jury. The legislature of the State of Florida has enacted, as public policy, laws prohibiting the joinder of a liability insurer in most such litigation, and Florida courts have recognized the public policy of not disclosing the existence of insurance coverage to juries. Requiring lawyers who are so employed to disclose to juries the employment relationship would negate Florida public policy. For this reason, the rule does not require the disclosure of the employment relationship on all pleadings and papers filed in court proceedings. The general duty of candor of all lawyers may be implicated in

other circumstances, but does not require disclosure on all pleadings.