Report of the Special Commission On Insurance Practices II

To:
Terrence Russell
President
The Florida Bar

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II. Preface

In September, 2001 Florida Bar President Terrence Russell selected and the Board of Governors of The Florida Bar approved the appointment of a commission to study the practices of the property and casualty underwriters of the insurance industry as they relate to using insurance company staff attorneys to represent liability insurance policy holders, and identify areas, if any, in which lawyers who represent liability insurance policyholders need guidance as to their ethical responsibilities.

The Commission was composed of twelve members from various parts of the state, and from various legal and insurance-related backgrounds. The Commission held its organizational meeting by conference call on September 28, 2001. Thereafter, in-person meetings were held on October 18, 2001 (Boca Raton), November 16, 2001 (Orlando), December 14, 2001 (Tampa), January 9, 2002 (Miami) and January 31, 2002 (Tampa). The Commission met by conference call on February 8, 2002, February 15, 2002 and February 22, 2002.

This report begins with an executive summary, followed by a review of the process used by the committee to gather pertinent information and the Commission's recommendations. As set forth in the Mission Statement And Charge To The Commission, this Report shall not be the separate basis for any civil action or liability.

III. Executive Summary

The Special Commission on Insurance Practices II was formed in September, 2001, to examine issues raised by members of the bar, bar committees, and the judiciary, with regard to insurance practices. The Commission's mission statement was specifically approved by President Terrence Russell and was reduced to writing so that there would be a clear focus for the Commission's work. The need for The Florida Bar to address the seven issues set forth in the mission statement became particularly important as a result of a series of recent court rulings concerning how insurance defense staff attorneys disclose their affiliations, and related matters. The Commission has received and considered materials related to those court rulings and has familiarized itself with the arguments advanced by the parties in those cases. However, the Commission has focused on the ethical obligations of insurance defense staff attorneys and the protection of the consumers of legal services in the liability insurance context, rather than on the resolution of issues raised in the court proceedings.

The Commission has expended extensive time from September, 2001 - March, 2002 considering the issues outlined in the mission statement. The Commission was assisted by two representatives of the insurance industry, Vince J. Rio III and Katherine E. Giddings, who provided invaluable input. The cooperative relationship between the committee and the industry experienced by the Special Study Committee on Insurance Practices continued during the work of the Commission and was extremely beneficial. The Commission also received extraordinary support from the staff of The Florida Bar. The work of the Commission could not have been concluded so promptly without their diligence. The Commission expresses its special appreciation of the services and insights provided by Mary Ellen Bateman, Elizabeth C. Tarbert, Lori S. Holcomb and John Anthony Boggs.

In order to meet its mission, the Commission studied the organizational structure of insurance defense staff attorneys and found that it has become common for insurance companies to establish groups of staff attorneys employed to handle the defense of claims made against insureds. The forms and formats used to establish these groups of staff attorneys differs from insurance company to insurance

company. Many companies use traditional law firm names to distinguish the insurance defense staff attorneys from the rest of the company. The Commission determines that the current rules do not directly address the organizational structures used by insurance companies for their insurance defense staff counsel, but do provide some guidance.

In considering what constitutes a law firm for purposes of The Rules of Professional Conduct, it appears that some companies have organized themselves, functionally and physically, in a manner that would constitute a firm under the rules. The Commission sets forth in its report the minimum standards necessary to establish a firm for purposes of the rules and to avoid material misrepresentation. These standards include the functional and physical separation of personnel and records, the protection of client privacy and confidentiality interests through the separation of office and administrative systems and procedures, and disclosure by the lawyers of their employment relationship with the insurer.

With regard to firm names, the Commission concludes that existing rules and applicable law permit insurance defense staff attorneys to practice law identifying themselves by a name such as "Law Offices of John Doe" or "John Doe & Associates," so long as there is both adequate disclosure of the employment relationship and compliance with the minimum standards essential to constitute a law firm as set forth in the report. The Commission recommends that Rule 4-7.10 be amended to provide express standards for adoption of specific names by insurance defense staff attorneys. A proposed amendment is included in the report.

The Commission considered the issue of whether existing rules or law allow, or should allow, insurance defense staff attorneys to present testimony by their expert witnesses that payment for the expert's services was made by the defense "law firm or lawyer" when payment was made directly by the liability insurance company or by the salaried lawyer employee. After discussion and review, the Commission determines that it cannot provide a single correct answer to the question. The Commission does conclude that the answer is not necessarily determined by the status of the lawyer (employed or independently retained), but by the ethics rules and substantive law as applied to specific factual

circumstances.

In considering the issue of how insurance defense staff attorneys may sign legal documents and pleadings, the Commission concludes that the use of the firm name on pleadings and documents signed by an insurance defense staff attorney where the firm name has been properly adopted is permissible. However, the Commission also concludes that disclosure should be mandatory at the initial appearance in a case and when an attorney's duty of candor is implicated. The Commission recommends an amendment to Rule 4-7.10 to help clarify the disclosure requirements. A proposed amendment is included in the report.

The issue of whether, absent a disqualifying conflict of interest, an insurance defense attorney may have dual clients (the liability policyholder and the liability insurance company) was considered by the Commission. The Commission concludes that Florida should continue to recognize that the existence of a dual client relationship is a legal and factual question, the answer to which varies according to the circumstances of each case. A majority of the Commission concludes that it would be useful to have an amendment to Rule 4-1.7 to explicitly set forth the duty of a lawyer to assure there is a mutual understanding regarding representation at the inception of the attorney-client relationship. A minority of the Commission views current Florida law as sufficiently clear on this matter. The proposed amendment to Rule 4-1.7 is set forth in the report.

With regard to determining when the exercise of control over the defense of a claim by an insurer infringes on the attorney's independent professional judgment so as to amount to the unlicensed practice of law, the Commission determines that attempting to analyze the matter in the context of the unlicensed practice of law is not practical. Instead, the Commission focused on the attorney's ethical duty to maintain independent professional judgment. The Commission recommends that The Florida Bar concentrate on enhancing the professional consciousness of attorneys confronted with the ethical dilemmas arising in the insurance defense context. The Commission reiterates the recommendations of the Insurance Practices Special Study Committee and urges immediate implementation of an ongoing program of continuing legal education to provide guidance and assistance to insurance defense counsel.

In studying the issue of the extent to which traditional conflicts of interest rules apply to potential and realized conflicts between the interests of the liability insurance policyholder and the liability insurance company, the Commission determines that all conflict of interest rules apply to all attorneys without regard to the nature of the cases they handle. In determining under what circumstances the exchange of information between the insurance defense staff attorney and other nonlawyer employees of the insurance company breaches confidentiality rules, the Commission finds that Rule 4-1.6 governs, just as it would between the insurance company and non-salaried outside counsel.

The recommendations and findings of the Commission may require some insurance companies to alter their practices. The Commission considers the clarifications suggested to be justified by the public interest in protecting the consumers of legal services. Changes in the delivery of legal services to the public can be accommodated within the profession's long-standing ethics rules and guidelines when those changes serve the public interest by remaining true to the fundamental values of the profession.

IV. Mission Statement and Charge to The Commission

CHARGE

The mission of the commission is to:

Study the practice of the property and casualty underwriters of the insurance industry as it relates to using in-house, salaried attorneys to represent liability insurance policy holders, and identify areas, if any, in which lawyers who represent liability insurance policyholders need guidance as to their ethical responsibilities in such activities.

In carrying out this mission the commission is charged to (if the commission believes that it is necessary to make recommendations concerning other issues in its review of the insurance industry practices, the commission may do so only upon the amendment of its mission and/or charge):

1. Determine whether existing ethics rules and/or applicable law permit, or should permit, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to identify themselves by use of traditional appellations used by independent law firms?

2. Determine whether existing rules and/or applicable law allow, or should allow, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to present testimony by their expert witnesses that payment for their services are by the defense "law firm or lawyer" when payment is made directly by the liability insurance company or by the salaried lawyer employee?

3. Determine whether existing rules and/or applicable law permits, or should permit, a liability insurance company and its salaried lawyer employee to sign legal documents and pleadings by the use of traditional appellations used by independent law firms?

4. Determine whether under existing law, and in the absence of a disqualifying conflict of interest, any lawyer hired by an insurance company pursuant to a contract whereby the insurance company has agreed to defend its liability insurance policyholder has dual clients; those clients being the liability insurance policyholder and the liability insurance company?

5. Determine the point at which, if any, a liability insurance company's exercise of control over the representation of a liability insurance policyholder amounts to the unlicensed practice of law by reason of inappropriate infringement on the exercise of the lawyer's independent professional judgment?

6. Determine the extent to which traditional conflict of interest rules apply to potential and realized conflicts between the interests of the liability insurance policyholder and the liability insurance company?

7. Determine under what circumstances the exchange of information between the lawyer employee who represents liability insurance policyholders and other nonlawyer employees of the liability insurance company breaches confidentiality rules?

ASSUMPTION

Implicit in the charge to the commission is an assumption that the Supreme Court of Florida in 1969 permitted the insurance industry practice of hiring employee lawyers to represent insured clients and that in acknowledging such practice the court arguably concluded that while some analysis may indicate that a corporate entity (not a law firm) may not provide legal services to third parties by its employees, the special nature of the liability insurance contract, and public policy considerations inherent therein, may mandate a narrow exception.

COMMENT

The activity of a liability insurer providing legal representation and legal services to its insured policyholders through lawyers who are salaried employees of the insurer would be, under some analysis, considered the practice of law. In the case of *In Re Proposed Additional Rules Governing the Conduct of Attorneys in Florida*, 220 So. 2d 6 (Fla. 1969) the supreme court did not expressly opine on the UPL question. But it impliedly authorized the use of salaried employees as counsel in liability insurance defense when it declined to approve an ethics rule prohibiting the practice. The court recognized in its opinion that various issues would most likely receive further study by the bar. Accordingly, The Florida Bar has appointed the Special Commission on Insurance Practices II to study the above issues and report recommendations to its board.

REPORT AND RECOMMENDATIONS

Upon conclusion of its study, the commission shall file a report that shall contain recommendations to the board of governors concerning the need, if any, to change existing Rules Regulating The Florida Bar, rules of evidence or procedure, or applicable statutory enactments. The report shall include statements or disclaimers that the report shall not be the separate basis for civil action or liability. Implementation of any recommendations for changes in ethics rules contained in the report shall require action of the Supreme Court of Florida. The report shall be submitted no later than March 1, 2002.

V. Information Gathering Process

The Special Commission on Insurance Practices II held eight meetings in the course of six months. The meetings of the Commission were open to the public and a conscious effort was made by the Commission to include members of the insurance industry in its deliberations and consideration of the issues. E-mails and telephone conferences kept the Commission's work moving forward between meetings.

The Commission determined that public hearings were not necessary as the Commission had at its disposal the transcripts of the two public hearings held by the Insurance Practices Special Study Committee and the testimony and written comment provided to the Standing Committee on the Unlicensed Practice of Law on insurance practices issues.

On October 15, 2001 the Commission solicited input by publishing a request for comment in *The Florida Bar News.*[1] Comments or submissions were solicited from all interested parties, including the Academy of Florida Trial Lawyers, the insurance industry, and insurance defense counsel. All comments received have been reviewed and considered.

The Commission reviewed voluminous materials including case law from Florida and other states, unlicensed practice of law and ethics opinions from Florida and other states, scholarly articles, newspaper articles, legal memoranda and other written materials.

[1] A copy of the request for comment is attached as Appendix A.

VI. Determinations of the Commission

A. INTRODUCTION

The Commission has undertaken the study of each of the seven charges directed to its attention. Its determinations are set forth in this Section of this Report. The Commission emphasizes that throughout its inquiries and deliberations, it has sought to focus on the public interest in protecting consumers of legal services. The Commission is aware that The Florida Bar recognized a need to address these issues as a result of a series of court rulings concerning how insurance defense staff attorneys disclose their affiliations, and certain related matters. Those court rulings, materials from the records in those cases, and appellate submissions to the Supreme Court of Florida concerning those rulings, have been provided to the Commission by several sources. The Commission has familiarized itself with the rulings and arguments advanced by the several parties participating in the pending judicial proceedings. This has been done to assure that the Commission is aware of concerns advanced relevant to the mission of the Commission. However, the Commission has not undertaken to reach conclusions on the legal issues being litigated in the pending proceedings, other than to the extent knowledge of the legal principles involved has been important to performing the mission assigned to it.

The mission of the Commission is focused primarily on the practice of law by attorney employees of insurance companies who represent insureds who have liability policies entitling the insureds to a defense of a claim. The nomenclature used to denote such attorneys varies in the literature, and no single term is commonly used. To avoid confusion, the Commission has chosen for purposes of this report to use the term "insurance defense staff attorney." This term denotes a member of The Florida Bar who is an employee of a liability insurance company, or insurance company group, who

represents the insureds of the company or the group. The term does not include employee attorneys who do not represent insureds in the defense of covered claims.

In 1969 the Supreme Court of Florida issued a decision widely viewed as recognizing the legitimacy of insurance companies providing insurance defense staff attorneys to represent insureds due to their unique relationship. In re: Rules Governing the Conduct of Attorneys in Florida, 220 So.2d 6 (Fla. 1969). That decision concerned a petition of The Florida Bar directed at prohibiting attorney employees of insurance companies from providing legal services on behalf of insureds unless "the sole financial interest and risk involved is that of the [insurance company]." The Court made clear that it would not countenance drawing a distinction between salaried attorneys employed by an insurance company and attorneys retained by an insurance company on an independent fee basis. The principles expressed by the Florida Supreme Court were echoed by the Supreme Court of New Jersey in 1988 when it stated:

> These are not second-class lawyers; these are first-class lawyers who are delivering legal services in an evolving format.

In re: Weiss, Healey & Rea, 536 A.2d 266 (N.J. 1988). Recognizing that the development of a new mode of practice would likely receive further study by The Florida Bar, the Florida Supreme Court emphasized in 1969 that in such studies the "primary function of the Bar is to protect the public." 220 So.2d at 8.

The Commission has committed itself to this function.

B. ORGANIZATIONAL STRUCTURES OF INSURANCE DEFENSE STAFF ATTORNEYS

The Commission has encouraged the participation of the insurance industry in the process of gathering information and reaching its conclusions. The Commission reviewed the voluminous materials provided to its predecessor committee, and has engaged in discussion with representatives of the insurance industry to determine how insurance defense staff attorneys are organized and used by the industry.

It has become common for insurance companies to establish groups of staff attorneys employed to handle the defense of claims made against insureds. The manner of organization differs among companies. One major insurer estimates that it employs nearly 700 insurance defense staff attorneys to defend cases nationwide. These attorneys are organized hierarchically. The entire country is divided into local areas focused on a particular city, or a region of a state. A local area office is under the management of an experienced attorney, who has responsibility for the case handling of all attorneys in that office. In some instances, there may be multiple satellite offices also under the supervising attorney's direction. The supervising attorneys of these local area offices report to a regional attorney within the claims handling division of the corporate law department, who in turn reports to others in a chain of administrative responsibility. The organization chart ultimately reaches an assistant general counsel of the insurer, who has nationwide responsibility for the in-house handling of defense cases and reports directly to the general counsel of the insurer. The company seeks in this manner to separate the defense of insureds from all other in-house legal activities and functions. In any actions in which the insured is a client, questions concerning liability insurance coverage are never considered by the insurance defense staff attorneys. The company's legal department also handles real estate matters, securities regulation compliance, insurance regulation compliance, employment law matters and the multiplicity of other work

typical of legal departments of major corporations. However, the handling of claim defense cases on behalf of insureds is discretely separated.

The above described organization of an insurance defense staff attorney office is but one example. The Commission has been informed that a similar structure is used by several major insurance companies, but that variation among companies is considerable. For example, one well-known major insurer performs a conflict check of national scope whenever a new case file is opened. This prevents one local area office from representing an insured who is adverse to another insured being represented in any other office in the country. That is, the claims handling division is treated as a single national law firm for conflict of interest purposes. In comparison, another well-known major insurer performs its conflict checks at the local level. Thus, it treats each local organization as a separate firm for conflict of interest purposes. There is also variation in the extent to which insurance defense staff attorneys may do other work. Some companies' insurance defense staff attorneys do virtually no other type of work. In other companies, the defense of claims may be the primary work, but other legal services for the insurance company also are provided. The Commission does not have the information necessary to draw broad conclusions regarding the variety of organizational formats adopted by insurers who have staff counsel defending claims in Florida or conflicts checking systems adopted by insurers. It is not necessary for the Commission to reach conclusions on these fact specific matters in order to address the issues directed to it.

It has become common for insurance defense staff attorneys to refer to themselves as law firms by using traditional appellations such as "Smith and Doe," "John Doe and Associates," "John Doe, P.A." or "Law Offices of John Doe." Although the Supreme Court of Florida has noted the use of insurance defense staff attorneys to represent insureds, and use of such appellations as these has been called to the

Court's attention, the Court has not spoken to whether lawyers employed in-house by insurance companies can hold themselves out to the public as a law firm or law office. The current rules do not directly address the organizational structure of a law firm as a separate legal department within an insurance company, nor the organizational format used by insurance companies, but they do provide some guidance. When determining whether the Rules Regulating The Florida Bar apply to a particular situation, for example, lawyers employed by an insurance company may be considered a "firm" for purposes of applying the Rules of Professional Conduct.

C. INSURANCE DEFENSE STAFF ATTORNEYS AS "LAW FIRM"

The commentary to Rule 4-1.10 defines a "law firm" for purposes of application of the Rules of Professional Conduct:

> For purposes of the Rules of Professional Conduct, the term "firm" includes lawyers in a private firm and lawyers employed in the legal department of a corporation or other organization or in a legal services organization. Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules.*** With respect to the law department of an organization, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.

It is thus recognized that what constitutes a law firm for purposes of the rules is to be determined by a functional analysis of particular relationships and the purposes of the relevant ethical strictures in protecting the public interest.

Utilizing the functional approach of the Rules of Professional Conduct in determining what constitutes a law firm, it appears likely that a number of insurance companies have organized their claims defense departments with such a degree of physical and functional separation that those departments would constitute a separate firm within the contemplation of the rules. The Commission does not find it necessary to address the range of permissible forms of organization.

The Commission's conclusion is founded, however, on standards being followed to both establish a "firm" within the contemplation of the Rules of Professional Conduct, and to avoid material misrepresentations. These minimum standards include the following:

1. To be treated as a "law firm," the offices, personnel and records of the attorneys representing policyholders must be functionally and physically separate from other operations of the insurance company to the same extent as would be required if the lawyers were private practitioners sharing space with a nonlawyer; to wit, the insurance company. Additionally, it must be recognized that the in-house insurance defense firm is subject to imputed disqualification rules. Thus, the insurance defense staff attorney firm must be separate from insurance company personnel involved in determining the existence of coverage for liability insured clients of the firm, as well as other personnel engaged in activities having potential for conflict with the interests of insured clients. It should be noted that the Commission draws no conclusions regarding the proper scope of conflicts screening utilized by particular companies, nor whether any particular company maintains sufficient separation of functions. The separation must be sufficient to maintain client confidentiality and to prevent conflicts of interest. The adequacy of current practices of a specific company is a topic beyond the scope of the Commission's mission. Every lawyer practicing in a firm has an obligation to assure that no conflict of interest exists.

2. The common insurance company practice of referring defense cases involving a coverage question to outside counsel is certainly appropriate, but is not necessarily sufficient by itself to protect client confidences from unintentional disclosure. Care should be exercised to maintain the appropriate separation of word processing systems,

computer data retrieval systems, secretarial support staff and other administrative services to the extent required to protect the confidentiality of client information as required by Rule 4-1.6. The duty of a lawyer to maintain the confidentiality of information supplied by a client is not limited to that which would be privileged from disclosure as a matter of the law of evidence. Protecting the privacy and confidentiality interests of clients is as important in a firm composed of insurance defense staff attorneys as in any other firm.

3. The lawyers must disclose the nature of their employment to insureds, the public, and the court to avoid the potential for misrepresentation and misperception. These obligations are discussed in more detail in subsections VI. D. 1. and VI. D. 3. (Charges 1 and 3).

The Commission uses this approach in discussing each of its charges.

D. CHARGES TO THE COMMISSION

1. USE OF FIRM NAMES

Determine whether existing ethics rules and/or applicable law permit, or should permit, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to identify themselves by use of traditional appellations used by independent law firms?

The issue before the Commission is whether insurance defense staff attorneys practicing as a "law firm", as described above, may ethically practice under the name of a member of that firm. The Commission is of the opinion that it is clearly straightforward and not misleading for insurance defense staff attorneys to identify themselves as employees of the insurance company, using the insurance company's letterhead and business cards. However, it is common for insurance defense staff attorney firms to practice under the name of the individual attorney having supervisory responsibility for the particular office or group of offices. Thus, the phrase "Law Office of John Doe" is sometimes selected for the letterhead, office signs, and business cards of the in-house defense attorneys, with John Doe being the supervisory attorney.

It has been suggested that this appellation inherently implies the existence of a traditional independent law firm, at least to those not regularly involved in this area of legal practice. This concern is at the heart of Florida Bar Professional Ethics Committee Opinion 98-3 (June 18, 1998), affirmed Board of Governors of The Florida Bar (February 12, 1999). The opinion states "[t]he ethics rules clearly indicate that attorneys may not hold themselves out as practicing in a law firm unless the firm itself, and the relationships implied by the name, are bona fide." The committee cited to several rules that prohibit attorneys from making false, misleading, or deceptive statements about the lawyer or the lawyer's services, that prohibit attorneys from stating or implying that they practice in a partnership or

other organization unless the relationship is a fact, and from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rules 4-7.2(b)(1), 4-7.10(f) and 4-8.4(c).[2] The opinion concludes that:

> it is impermissible for in-house attorneys who are employed to represent insureds to state or imply that they practice in a separate independent law firm. Furthermore, the relationship between the attorney and the insurer should be fully disclosed to the client and appear on the letterhead and business card of the attorney.

Florida Ethics Opinion 98-3.

There are four primary name variations reported to be used around the country. These are "John Doe, P.A.," "John Doe & Associates," "Law Offices of John Doe," and "Doe & Smith." Based on Florida Ethics Opinion 98-3, use of a name such as "John Doe, P.A." would be misleading because it indicates a separate incorporated professional association. The names "John Doe & Associates" and "Law Offices of John Doe" do not inherently indicate a particular relationship. Some persons may perceive these as indicating a private law firm, but the potential for misperception may be avoided by proper disclosure.

Use of a name such as "Doe & Smith" implicates the specific provisions of Rule 4-7.10(f), which provides:

[2]It should be noted that Rule 4-7.10(b) concerning trade names was written in contemplation of a private law firm adopting a non-traditional trade name. It is not directly applicable to situations where lawyers practice on the staff of corporations, government agencies, or charitable organizations which have adopted fictitious names for the conduct of their business. It establishes the guiding principle of avoiding deception.

> (f) **Partnerships and Authorized Business Entities**. Lawyers may state or imply that they practice in a partnership or authorized business entity only when that is a fact.

In The Florida Bar v. Hastings, 523 So. 2d 571 (Fla. 1988), the Florida Supreme Court approved a consent judgment finding professional misconduct where the firm name of "Hastings and Goldman" had been used during a time when Mr. Goldman had no ownership interest in the law firm of Mr. Hastings, but was associated with him. Florida Ethics Opinion 98-3 suggests usage of "Doe & Smith" is impermissible under Rule 4-7.10(f), but does not expressly state as much.

Some members of the Commission considered Rule 4-7.10(f) to directly prohibit use of a "Doe & Smith" type of name by insurance defense staff attorneys because such attorneys are employees of a corporation and not a partnership. Other members of the Commission view the "Doe & Smith" type of name to be allowable, if accompanied by appropriate disclosure, such as "staff attorneys of xyz insurance company, not a partnership." It is suggested that the disclosure eliminates the implication of a partnership. A further factor cited in support of allowing the "Doe & Smith" type of name is the potential benefit of publicly identifying all the insurance defense staff attorneys having supervisory responsibility. The Commission has not identified authority from other jurisdictions allowing this usage under similar rules. There is authority rejecting it.

The Supreme Court of New Jersey has taken a third approach. After initially ruling in In Re: Weiss, Healey & Rea, 536 A.2d 266 (N.J. 1988), that such names could not be used by insurance defense staff attorneys, the Supreme Court of New Jersey adopted a rule permitting the usage, but only where the named attorneys "share in the responsibility and liability for the firm's performance of legal services." New Jersey Rule of Professional Conduct 7.5. Under this standard, the

named persons must accept joint and several liability for all actions of one another, and for the actions of all attorneys in the firm as would be the case for attorneys who are partners in a private law firm.

The Commission is unable to reach consensus on this issue, which came to the forefront only at the final stages of the Commission's deliberations. The Commission is unanimous in concluding that it has not sufficiently investigated the potentially far-reaching implications of a possible rule amendment, and has not gained a sufficient understanding of the operational impact of the New Jersey approach. The Commission declines to recommend a rule amendment or that the use of a name such as "Doe & Smith" specifically be permitted when accompanied by disclosure. The Commission believes that the issues involved are more complex than may superficially appear, and that the fundamental underlying policy issues may be best addressed in the context of a specific case. Although cognizant of its responsibility to fully perform its assigned mission, the Commission believes the public interest is best served by not making a recommendation on this issue at this time.

The Commission is informed that it is the general policy of insurance defense staff attorney firms to make disclosure of their employment relationship to insureds, and that disclosure on letterhead and business cards is commonplace today. It also appears to be the practice of some to file a notice in court proceedings, generally at the beginning stages of a case, as well as on other occasions. Generally, however, disclosure does not occur on all pleadings or other papers filed in court.

The use of names such as "Law Office of John Doe" and "John Doe & Associates" by insurance companies has a lengthy history predating the 1969 In Re: Rules decision. Briefs submitted to the Florida Supreme Court in that proceeding brought this usage to the attention of the Court, although the Court did not reference the practice in its opinion. Usage of such names has become widespread for

many years. During this time, no instance of harm to a member of the public has been identified by the Commission. Disciplinary records of The Florida Bar are not easily searched to identify an instance of complaint involving use of such a name, or an instance where use of such a name contributed to the making of a complaint. However, to the extent it has been possible to make inquiry, only one instance of complaint has been revealed. In that instance, the complaint was filed during the Commission's deliberations and concerns usage of an appellation of the "John Doe, P.A." type, in which a nonlawyer's name is used. The complaint was under investigation and specific information concerning the complaint was not available at the time this report was written.

The Commission concludes that disclosure of the employment relationship has been an adequate means for avoiding potential deceptive effects, given a history of several decades of use of names of the "Law Office of John Doe" and "John Doe & Associates" type, with no identifiable instance of complaint or harm involving those uses.

It is the conclusion of the Commission that existing ethics rules and applicable law permit insurance defense staff attorneys to practice law identifying themselves by a name such as "Law Offices of John Doe" or "John Doe & Associates," so long as accompanied by adequate disclosures to prevent the potential for misperception and so long as meeting the standards to constitute a "law firm" described by the Commission in subsection VI. C. of this report.

Practicing under the name of a person inherently represents that the person named is a member of The Florida Bar who has primary responsibility for the functional unit of attorneys practicing under the name. Therefore, practicing under the name of the person is only permissible if significant management responsibility is vested in that individual. In this respect, the focus of the Commission is particularly

directed to supervision of case handling and the delivery of legal services to liability insurance policyholders. If the unit of attorneys functioning as a firm reports to a higher authority within a corporate legal department chain of command, such as a regional office, the degree of control exercisable is relevant to the appropriateness of the name utilized. The control of availability of administrative support services, for example, may not affect the appropriateness of a name, if not impacting the exercise of independent professional judgment by the attorney having responsibility for the provision of legal services. Control of case handling responsibilities and the delivery of services at a regional level would affect the appropriateness of practicing under the name of a person who is a mere local figurehead. To the extent the named individual lacks supervisory authority, the appropriateness of the name becomes questionable.

Disclosure of the name of the insurance company employer should occur to avoid the potential for misrepresentation and misperception. At a minimum, disclosure should appear on office entry signs, letterhead, business cards, websites, announcements, advertising, and listings or entries in a law list or bar publication bearing the name. Additional disclosure should occur whenever the circumstances are such that a reasonable risk of misperception exists. The signing of pleadings and documents is addressed in regard to Charge 3, in subsection VI. D. 3.

The Commission has considered whether Rule 4-7.10 should be amended to provide specifically for adoption of particular names by insurance defense staff attorneys, and has reviewed possible amendments. It is the conclusion of the Commission that an amendment would provide beneficial standards to protect the public interest, as well as guidance for attorneys as to their ethical responsibilities. A proposed amendment to Rule 4-7.10 and the accompanying commentary appears in the Recommendations section of this report.

2. TESTIMONIAL REFERENCES TO INSURANCE COMPANY STAFF ATTORNEYS

Determine whether existing rules and/or applicable law allow, or should allow, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to present testimony by their expert witnesses that payment for their services are by the defense "law firm or lawyer" when payment is made directly by the liability insurance company or by the salaried lawyer employee?

Considering the information [3] brought to its attention, the Commission determines it is not possible to provide a single correct response as to who has hired or paid for the services of an expert witness. The determination of truthfulness, however, does not depend upon the status of an attorney as an employee of an insurance company, or as independently retained counsel receiving a fee. The ethical responsibilities to the court in the search for truth is the same for all attorneys as governed by the Rules of Professional Conduct and substantive law.

[3] Whether or not defense counsel is a salaried staff attorney or in private practice, it is common for expert witness fees to be directly paid by the insurance company. Few attorneys in private practice advance substantial sums on behalf of insurance companies, especially with the case management guidelines of many insurers placing the attorney at risk of not being reimbursed if company procedures were not followed. Even where defense counsel do advance expert witness fees, the intention is for the insurer to pay. Payment occurs in accordance with a policy contractually obligating the insurer to defend an insured who has submitted a claim. All of the expenses of the defense are provided for the benefit of the insured. In any particular case, it may be no more accurate to state that an expert is hired by an insurance company, or by the attorney or by the insured on whose behalf the attorney acts.

3. SIGNING OF PLEADINGS AND DOCUMENTS

Determine whether existing rules and/or applicable law permits, or should permit, a liability insurance company and its salaried lawyer employee to sign legal documents and pleadings by the use of traditional appellations used by independent law firms?

Having concluded that the use of a firm name which includes a person's name is permissible for a firm composed of insurance defense staff attorneys, the Commission does not hesitate to conclude that use of the firm name on pleadings and documents signed by an attorney in that firm is also permissible.

The question becomes whether disclosure of the firm's relationship with the insurance company is required. The signing of pleadings or documents by an attorney is subject to a variety of rules and legal principles. Unless required by the rules applicable in a particular court, however, there is generally no requirement that an attorney disclose whether the attorney is a member of a firm, or to disclose the name of the firm. Where the attorney elects to state the name of the firm, or is required to do so, the important factor is that the attorney avoid misrepresentation or creating a misperception.

No evidence has been provided to the Commission of any instance of public harm by an insurance defense staff attorney signing a pleading or document bearing the firm name under which the attorney practices. Deep concern has been expressed to the Commission that a witness being interviewed, a recipient of a subpoena, or court personnel might be misled to believe that an insurance defense staff attorney is a private practitioner unless a specific disclosure is made that the firm is a division of an insurance company's legal department. It has been suggested that a person might respond differently if they realized they were "dealing with an insurance company."

The Commission is hesitant to assume that a person would reveal more information, or different information, to an attorney based on whether the attorney is an employee of an insurance company or an independent contractor retained by an insurance company. The Commission doubts such a distinction could justify a different response to a court subpoena under any circumstance. The Commission does not believe court personnel would treat a member of The Florida Bar differently based on the lawyer's mode of employment. The Florida Supreme Court made clear in 1969 that The Florida Bar will not draw a discriminating line between the two classifications. If in reality there would be a difference in how one responds to the attorney, it is highly questionable whether such a difference is socially desirable or legally permissible. If a difference in treatment or response was socially desirable or legally allowed, the question would arise whether outside counsel hired by an insurance company should be required to disclose the company on whose behalf the attorney works on all pleadings and documents. To the extent there is improper bias against insurance defense staff attorneys, the truth finding mission of the judicial process may be advanced by minimizing unnecessary disclosure of such a fact.

The Commission is persuaded by the conclusion reached in West Virginia Lawyer Disciplinary Board Opinion 99-01 where it is stated:

> The purpose of having in-house counsel practice under a firm name in a separate office may be to facilitate or demonstrate the attorney's independence from their employer. But it has the effect of concealing the nature of the lawyers' relationship with the insurance company. The Board advises captive law firms to disclose their affiliation with the insurance company on their letterhead, business cards, phone book identification, phone answering method, office entrances and pleadings and to explain this relationship to each client. One exception to this would be a pleading or other communication that might be submitted to a jury, so that jurors will not be made aware that a party had insurance.

The Commission is aware that many insurance defense staff attorneys disclose the relationship of their firm to the insurance company in a notice filed with the court, generally contemporaneously with their initial appearance in a case. This practice has a salutary effect of minimizing the potential of misperception and should be required as a preventative measure. The proposed amendment to Rule 4-7.10 recommended above would make such disclosure mandatory. Disclosure should also occur whenever an attorney's duty of candor is implicated. For example, if a protective order is entered by a court limiting the circle of persons having access to certain documents, and the insurer is excluded from access, there would be an affirmative duty to assure that the tribunal is aware of the firm's connection to the insurer. However, the Commission does not find there to be a need to require such disclosure on every court filing to fulfill the goal of the Rules of Professional Conduct in protecting the public interest. There is a legitimate interest in avoiding unintentional disclosure of the existence of insurance to jurors and prospective jurors. Once effective disclosure has been made on the court record, repeated disclosures are not required to avoid deception.

The Commission is cognizant of assertions that insurance defense staff attorneys may be subject to greater economic pressures exerted by nonlawyers within their insurance company compared to independent counsel receiving a fee. The Florida Supreme Court in 1969 found this assertion unconvincing when it rejected the proposed rule. In its In re: Rules decision, the Court acknowledged a difference existed; but concluded that the duty of a lawyer to serve the interests of the client remained the same, and ruled that there should not be "a double standard of ethics for salaried and non-salaried lawyers." The Commission is not aware of any need to require defense counsel retained on a fee basis to disclose on pleadings that their fees are being paid by an insurance company, and has not learned a basis for treating salaried staff counsel differently.

4. IDENTIFYING THE CLIENT OF INSURANCE DEFENSE COUNSEL

Determine whether under existing law, and in the absence of a disqualifying conflict of interest, any lawyer hired by an insurance company pursuant to a contract whereby the insurance company has agreed to defend its liability insurance policyholder has dual clients; those clients being the liability insurance policyholder and the liability insurance company?

This issue identifies the fundamental question underlying many of the ethical issues confronting defense counsel retained by an insurance company, whether that counsel is salaried or non-salaried. In 1999 The Florida Bar created the Insurance Practices Special Study Committee to consider a number of ethical issues confronting insurance defense counsel. As reflected in its report issued in June, 2000, that Committee found that the ethical responsibilities of attorneys could vary depending upon whether an insurance company is viewed as a co-client with an insured, or as a non-client third party. The Florida Supreme Court has noted the intertwined economic interests of an insurer and its insured,[4] that these interests are often aligned and that counsel often represents both. The Court, however, has not held that a co-client status per se exists. Some states have recognized that a co-client relationship exists in the absence of a disqualifying conflict of interest, but others have rejected that position. Courts rejecting co-client status nonetheless have recognized that insurers have a special interest different from a mere third party payor of fees. The Report of the Insurance Practices Special Study Committee, at 10, concluded:

> The committee takes no position on the issue of whether the insured and insurer should be considered co-clients of the defense attorney or not. The Committee hopes that the Supreme Court of Florida will address this issue in the near future and resolve it.

[4] See, for example, In Re: Rules Governing the Conduct of Attorneys in Florida, 220 So.2d 6 (Fla. 1969); Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969).

The Commission also concludes that the issue is one that should be addressed, since many of Florida's lawyers are regularly confronted by issues of ethical compliance that can be resolved only by determining who comes within the client relationship.

Florida courts have consistently recognized that the existence of an attorney-client relationship is a question of fact and law. In the insurance context, Florida courts do not appear to have applied any different standards. Unlike jurisdictions that have determined that there is a single correct answer as to who is a client in the tripartite relationship, the Commission believes Florida should continue to recognize that the existence of a dual client relationship is a legal and factual question. The answer varies according to the circumstances and understanding of the parties whether in the context of an insurance defense case or any other multi-party context.[5] A lawyer may represent both an insurer and an insured as clients where there is no conflict of interest and the lawyer complies with Rule 4-1.7 and all other rules relating to multiple party representation.

The ethical complexities arising in this field are generally born of a lack of clarity and mutual understanding at the inception of the attorney-client relationship. An attorney may view the insured as the only client, but difficulties may then arise if the insurer considers itself to be a co-client. Likewise, the attorney who views insured and insurer as co-clients may be ethically compromised if the insured views himself to be the sole client.

A majority of the Commission concludes it would be useful to have an amendment to Rule 4-1.7 to explicitly set forth the duty of a lawyer to assure there is a mutual understanding of who is a client at

[5]For an informative discussion of the inappropriateness of adopting a uniform answer, see Paradigm Ins. Co. v. Langerman Law Office, P.A., 24 P.3d 593 (Ariz. 2001).

the inception of representation. A minority of the Commission views the status of Florida law to be sufficiently clear that adoption of a rule amendment is unnecessary.

The Commission recommends that The Florida Bar petition the Supreme Court of Florida to amend Rule 4-1.7 to create a new subsection addressing the ethical duty of an attorney representing an insured at the expense of an insurer to establish a clear, mutual understanding as to who is a client at the inception of undertaking representation. In making this recommendation, the Commission does not suggest that the duty of an insurance defense lawyer is different than that of every other lawyer. Rather, by recommending the amendment, the Commission is simply recognizing that in the unique tripartite relationship of insurer, insured and counsel, the relationships can become blurred. Clarity is needed to keep ethical dilemmas from arising. The duty to assure clarity is on the lawyer. The Commission's proposal appears in the Recommendations section of this Report.

5. EXERCISE OF INDEPENDENT PROFESSIONAL JUDGMENT

Determine the point at which, if any, a liability insurance company's exercise of control over the representation of a liability insurance policyholder amounts to the unlicensed practice of law by reason of inappropriate infringement on the exercise of the lawyer's independent professional judgment?

The liability insurance industry regularly asserts that an insurer's contractual right to control the defense of a case, and status as a co-client, effectively eliminates any issue concerning the unlicensed practice of law by an insurer. It is also asserted that any harm to an insured arising from exercise of the contractual right of control is remediable due to the insurer's corollary duty of good faith. As a consequence, liability insurers assert that The Florida Bar need not concern itself with theoretical formulations as to when control of the defense of the case becomes equivalent to the unlicensed practice of law.

The Commission approaches these issues from a somewhat different perspective. The exercise of independent professional judgment by an attorney is at the heart of providing legal services to a client. An attorney must be unhampered in exercising that judgment and must be free to advise one client unimpeded by the influence of other clients or by parties paying clients' fees. If an insurance company's control of the defense of a case overrides the exercise of independent judgment, the attorney has inherently failed to perform the attorney's ethical responsibilities. Some persons view such a failure by the attorney as resulting in nonlawyers using the attorney as a facade for the unlicensed practice of law.

However, the Commission recognizes that attempts to analyze these matters in the context of unlicensed practice of law are not practical. It is not possible to delineate a bright line test capable of being applied by a person outside the client relationship. In most instances, the only person capable of determining whether the attorney's independent professional judgment has been overridden is the

attorney. The attorney alone knows if his or her actions have become mere functions of a lay person's will, rather than reasoned responses to information and factors considered in formulating how to act in the interest of a client. Attorneys are ethically required not to allow their independent judgment to be overridden. Performance of this duty depends on the integrity of the individual lawyer.

The Florida Bar should focus on enhancing the professional consciousness of attorneys confronted by the ethical dilemmas arising in the unique tripartite relationship of insured, insurer and counsel. The June, 2000 Report of the Insurance Practices Special Study Committee made two recommendations. The first was adoption of an amendment to Rule 4-1.8 to include a statement of insured client's rights. That recommendation focused on the need to educate insureds of their basic rights. With such knowledge comes the empowerment to protect those rights. The recommendation was adopted by the Board of Governors of The Florida Bar and a petition is pending before the Florida Supreme Court. The second recommendation was that The Florida Bar develop a continuing education program for insurance defense attorneys to assist them in recognizing and addressing conflicts of interest arising in the unique tripartite relationship in which they practice. This recommendation focused on the benefits of enhancing the ethical consciousness of practitioners, because such awareness empowers compliance. This recommendation also was approved by the Board of Governors of The Florida Bar. The educational program has not been implemented, however, because it was deemed most beneficial for it to follow Florida Supreme Court adoption of the proposed Statement of Insured Client's Rights.

Soon it will be two years since The Florida Bar approved the dual strategy of protecting the public interest by a combined program of informing clients and enhancing the awareness of practitioners. The Commission concludes that to the extent control of the defense of suits against insureds implicates concerns regarding the exercise of independent professional judgment by attorneys, the solution is to be found in action that elevates professional integrity and enhances professional stature.

The Commission reiterates the recommendation of the Insurance Practices Special Study Committee and urges immediate implementation of a permanent program of continuing education crafted to provide guidance and assistance to insurance defense counsel, whether they be salaried or non-salaried practitioners. This recommendation should be implemented even if the Florida Supreme Court declines to adopt the requirement for disclosure to insureds.

6. APPLICABILITY OF CONFLICT OF INTEREST RULES

Determine the extent to which traditional conflict of interest rules apply to potential and realized conflicts between the interests of the liability insurance policyholder and the liability insurance company?

The Florida Supreme Court has addressed the possibility of lawyers being subject to variable ethical rules in these words:

> They should all be held to the highest degree of loyalty and devotion to the causes of the clients whom they agree to serve. Anything short of that is a breach of trust.

In re: Rules, 220 So.2d at 9. Although directed to the question of distinguishing between salaried and non-salaried insurance defense lawyers, these words express the conclusion of the Commission. Conflict of interest rules apply to all attorneys without regard to the nature of the cases they handle. Insurance defense counsel may be representing co-clients in a particular case, or may be representing a single insured at the expense of the insurer. In either event, the ethical standards applicable are the same ones governing every lawyer where there is dual representation of clients or third-party payment of fees.

7. EXCHANGE OF INFORMATION WITH EMPLOYEES OF AN INSURER

Determine under what circumstances the exchange of information between the lawyer employee who represents liability insurance policyholders and other nonlawyer employees of the liability insurance company breaches confidentiality rules?

The exchange of information between an insurance defense staff attorney and nonlawyer employees of the insurer is subject to the same rules that govern the exchange of information between a non-salaried outside counsel and the insurer. Rule 4-1.6 governs. Absent special circumstances set forth in subsections 4-1.6(b) and (c)(2)-(5), the Rule requires an attorney to obtain client consent prior to revealing any information, except where the lawyer reasonably believes information should be revealed "to serve the client's interest unless it is information the client specifically requires not to be disclosed." Any disclosure not within these standards is a breach of confidentiality.

The Commission believes the existing rules adequately address concerns regarding maintenance of client confidences by insurance defense staff attorneys. As noted above in subsection IV.C. of this report, the imputed disqualification rule often will result in the disqualification of insurance defense staff attorneys unless there is physical and functional separation from those in the insurance company who are involved in determining the existence of coverage, or who are otherwise engaged in activities having the potential for conflict with the interest of the insured client. Establishment of such discrete operations does more than create a technical compliance with the Rules of Professional Conduct. It also creates an environment in which the insurance defense staff attorney will be readily cognizant of which nonlawyer staff constitute administrative support in the delivery of legal services for the benefit of insureds, and which employees are outside the attorney-client relationship. In such an environment, the Commission is confident that insurance defense staff attorneys are as capable of complying with their ethical responsibilities as non-salaried outside counsel.

VII. RECOMMENDATIONS

The Commission recommends the following:

1. The Florida Bar should petition the Florida Supreme Court to amend Rule 4-7.10 of The Rules Regulating The Florida Bar to provide expressly for adoption of specific names by insurance defense staff attorneys, to provide for adequate disclosure of the relationship of the insurance defense staff counsel firm to the insurance company, and to reiterate that attorneys who practice under firm names are required to observe and comply with the requirements of the Rules Regulating The Florida Bar. These rules include but are not limited to, rules regarding conflicts of interest, imputation of conflicts, firm names and letterhead, and candor toward tribunals and third parties. The proposed amendment to Rule 4-7.10 appears at page 42 of this report.

2. The Florida Bar should petition the Florida Supreme Court to amend Rule 4-1.7 to create a new subsection addressing the ethical duty of an attorney defending an insured at the expense of an insurer to establish a clear, mutual understanding as to who is a client at the inception of undertaking representation. The proposed amendment to Rule 4-1.7 appears at page 41 of this report.

3. The Florida Bar should implement an ongoing program of continuing education crafted to provide guidance and assistance to insurance defense counsel.

VIII. PROPOSED RULE 4-1.7(e)

(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

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.

IX. PROPOSED AMENDMENTS TO RULE 4.7.10

RULE 4-7.10 FIRM NAMES AND LETTERHEAD

(a) False, Misleading, or Deceptive. A lawyer shall not use a firm name, letterhead, or other professional designation that violates subdivision (b)(1) of rule 4-7.2.

(b) Trade Names. A lawyer may practice under a trade name if the name is not deceptive and does not imply a connection with a government agency or with a public or charitable legal services organization, does not imply that the firm is something other than a private law firm, and is not otherwise in violation of subdivision (b)(1) of rule 4-7.2. A lawyer in private practice may use the term "legal clinic" or "legal services" in conjunction with the lawyer's own name if the lawyer's practice is devoted to providing routine legal services for fees that are lower than the prevailing rate in the community for those services.

(c) Advertising Under Trade Name. A lawyer shall not advertise under a trade or fictitious name, except that a lawyer who actually practices under a trade name as authorized by subdivision (b) may use that name in advertisements. A lawyer who advertises under a trade or fictitious name shall be in violation of this rule unless the same name is the law firm name that appears on the lawyer's letterhead, business cards, office sign, and fee contracts, and appears with the lawyer's signature on pleadings and other legal documents.

(d) Law Firm with Offices in More Than 1 Jurisdiction. A law firm with offices in more than 1 jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(e) Name of Public Officer in Firm Name. The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(f) Partnerships and Authorized Business Entities. Lawyers may state or imply that they practice in a partnership or authorized business entity only when that is the fact.

(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.

X. CONCLUSION

The Commission has addressed the issues directed to its attention. It is recognized that this report and recommendations may not fully resolve all concerns regarding insurance practices. The

delivery of legal services through insurance defense staff attorneys is no longer novel, but the continuing evolution and expansion of non-traditional legal services delivery systems will give rise to concerns that fundamental ethical standards be safe-guarded. This is true of all changes in the practice of law.

It is in the public interest to promote affordable insurance coverage and efficient delivery of legal services, but the goals of efficiency and affordability can never justify compromising professional ethics. The recommendations and findings of the Commission may require some insurance companies to alter their practices to come into compliance. Some may find the standards for physical and functional separation of insurance defense staff attorney firms costly to implement. Some may object to the inherent consequences of complying with imputed disqualification standards. The Commission is convinced that any burdens imposed are justified by the public interest in protecting the consumers of legal services. Elevation of the professional stature of insurance defense attorneys both within the legal profession and within their corporate structures will assuredly enhance the service received by their clients.

Respectfully submitted,

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Michael P. McMahon
Chair

APPENDIX

1. Appendix A -- Request for Comment, Published in *The Florida Bar News*, Oct. 15, 2001

Appendix A

Request For Comment, *The Florida Bar News*, Oct. 15, 2001

The Florida Bar *News* - October 15, 2001

Insurance Practice Commission seeks comments from lawyers

The Special Commission on Insurance Practices II has been appointed by President Terrence Russell to study issues raised by members of the Bar, Bar committees, and the judiciary, related to the practice of property and casualty underwriters of the insurance industry using in-house, salaried attorneys to represent liability insurance policyholders.

The commission has been directed to identify areas, if any, in which lawyers who represent liability insurance policyholders need guidance as to their ethical responsibilities in such activities. To fulfill its goals, the commission requests comment on the following issues:

•• Whether existing ethics rules and/or applicable law permit, or should permit, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to identify themselves by use of traditional appellations used by independent law firms.

•• Whether existing rules and/or applicable law allow, or should allow, insurance companies and their salaried lawyer employees who represent and defend liability insurance policyholders to present testimony by their expert witnesses that payment for their services are by the defense "law firm or lawyer" when payment is made directly by the liability insurance company or by the salaried lawyer employee.

•• Whether existing rules and/or applicable law permit, or should permit, a liability insurance company and its salaried lawyer employee to sign legal documents and pleadings by the use of traditional appellations used by independent law firms.

•• Whether under existing law, and in the absence of a disqualifying conflict of interest, any lawyer hired by an insurance company pursuant to a contract whereby the insurance company has agreed to defend its liability insurance policyholder has dual clients; those clients being the liability insurance policyholder and the liability insurance company.

•• At which point, if any, a liability insurance company's exercise of control over the representation of a liability insurance policyholder amounts to the unlicensed practice of law by reason of inappropriate infringement on the exercise of the lawyer's independent professional judgment.

•• The extent to which traditional conflict of interest rules apply to potential and realized conflicts between the interests of the liability insurance policyholder and the liability insurance company.

•• Under what circumstances the exchange of information between the lawyer employee who represents liability insurance policyholders and other nonlawyer employees of the liability insurance company breaches confidentiality rules.

If you have comments with regard to any of the matters being examined by the committee, mail, fax, or e-mail your written comments by December 15 to Mary Ellen Bateman, Deputy Director-Legal, The Florida Bar, 650 Apalachee Parkway, Tallahassee 32399-2300; Fax (850)561-56645; e-mail mbateman@flabar.org.