



The Florida Bar

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THE FLORIDA BAR PROFESSIONAL ETHICS COMMITTEE

AGENDA

**Friday, June 15, 2018
2:00 p.m. until 5:00 p.m.
Orlando, Florida**

1. Approval of the minutes of the October 13, 2017 meeting.
2. Informational Item. Board of Governors action on Proposed Advisory Opinion 17-1. The opinion became final as the Board of Governors, who requested that the committee write the opinion, took no action when presented with opinion at its December 8, 2017 meeting. The opinion concludes that Florida Bar members may divide legal fees with an out-of-state lawyer whose firm includes nonlawyer ownership where: the out-of-state lawyer is providing only services that the out-of-state lawyer is authorized by law to provide; nonlawyer ownership of the out-of-state firm is permitted in the jurisdiction where that law firm is located; the out-of-state firm is in compliance with that jurisdiction's requirements; and the division of fees complies with Florida Bar rules on fee division. The opinion does not address a Florida Bar member becoming a partner, shareholder, employee, or other formal arrangement with a law firm with nonlawyer ownership. Backup includes Florida Ethics Opinion 17-1.
3. Informational Item. The Florida Bar Board of Governors considered Florida Bar Staff Opinion 37289 at the request of the inquirer. The inquirers are both personal injury lawyers and principals of a company that provides litigation cost protection, that reimburses lawyers for their advanced costs in litigation in the event there is no recovery. The inquirers indicate they plan to use the insurance and ask whether the cost of purchasing the insurance may be charged to clients in cases where there is a recovery if the insurance is specific to the individual client and the inquirers disclose the cost to the clients in the contingent fee agreement. Florida Bar Staff Opinion 37289 concluded that the cost of the insurance to cover the lawyer's loss in advancing costs and making them contingent on the outcome may not be charged to the client because it directly benefits the lawyer and is a business expense of the lawyer that should be accounted for in the lawyer's overhead and is not a cost of litigation that can be charged to the client. The Board of Governors voted 23-17 to reverse the decision of the Professional Ethics Committee and to direct bar staff to issue an advisory ethics opinion in response to a request for an advisory ethics opinion request regarding whether a lawyer who handles personal injury

matters on a contingency fee basis can purchase litigation cost insurance and charge the client for the amount of such insurance in the event there is a recovery, directing that the opinion conclude that the arrangement presents a close question because the circumstance described create potential conflicts of interest between the lawyer and the client throughout the course of litigation, but that the arrangement is permissible only under the following circumstances: (1) the lawyer makes an objectively reasonable determination that the litigation cost protection insurance coverage serves the client's best interests; (2) the amount to be charged to the client is fair and reasonable and is communicated to the client, in writing, in a manner that the client can reasonably understand; (3) the lawyer fully explains to the client what litigation cost protection insurance is, why the lawyer believes a litigation cost protection policy will serve the client's best interests, that the lawyer will be the sole beneficiary under the insurance policy, and that the client will be liable for the insurance premium expense and all other costs and expenses in the event of a recovery; (4) the lawyer fully explains to the client that other lawyers may advance the client's costs without charging the client the cost of the litigation cost protection policy; (5) the lawyer provides the client with the opportunity to review the litigation cost protection policy; (6) the client is advised, in writing, of the desirability of seeking, and is given the opportunity to seek, independent counsel; (7) the lawyer obtains the client's informed consent in writing at the beginning of the representation; and (8) the lawyer does not allow the terms or availability of coverage under the insurance policy to adversely affect their independent professional judgment, the client-lawyer relationship, or the client's best interests; the opinion must also state that it merely addresses the ethics issues involved and does not endorse the concept of the insurance policy. Backup includes Florida Bar Staff Opinion 37289 as approved by the Board of Governors.

4. Review of Florida Bar Staff Opinion 37896 at the request of the inquirer. The opinion concludes that the inquirer may not charge interest on costs in a contingent fee case where the inquirer advances costs and makes them contingent on the outcome because the costs are not liquidated until a recovery is made based on Florida Ethics Opinion 86-2. Backup includes the original inquiry (dated November 7, 2017), Florida Bar Staff Opinion 37896 (dated December 5, 2017), Request for Professional Ethics Committee review (dated January 11, 2018), Rule 4-1.5, a summary of relevant authorities on the issue, and relevant Florida Ethics Opinions.

5. Review of a denial of a staff opinion in Ethics Inquiry 38398. The inquirer, who is a retired Florida Bar member, asks whether the inquirer may refer to himself as "Dr." in conversations and correspondence. The request for an opinion was declined because of a lack of direct authority on which to base an opinion. Backup includes the original inquiry (dated April 9, 2018), Florida Bar staff's response (dated April 13, 2018), the inquirer's requests for Professional Ethics Committee review (dated April 16 and April 19, 2018), a summary of relevant authority, Florida Ethics Opinion 88-2, and relevant ethics opinions.

6. Review of Florida Bar Staff Opinion 37643 at the request of committee vice chair Thomas W. Young. The staff opinion concludes that the inquirer who represents a professional guardian may not disclose to law enforcement or the Department of Children and Families past

improper acts of the client committed as a guardian or power of attorney for elderly persons that might constitute a felony, and that the lawyer should withdraw from representation of the client, citing irreconcilable differences. Backup includes Ethics Hotline Call Record 451599 (dated May 25, 2018), written inquiry (dated August 28, 2017), Florida Bar Staff Opinion 37643 (dated September 1, 2017), Vice Chair Thomas W. Young's request for Professional Ethics Committee review (dated November 29, 2017), Rule 4-1.6, a summary of relevant authorities, and relevant out of state ethics opinions.

7. Request for committee consideration of adopting a formal advisory opinion on responding to negative on-line reviews based on Florida Bar Staff Opinion 38049 at the request of committee vice chair for consideration of a formal opinion on the issue presented. The opinion concludes that a lawyer may not disclose confidential information to respond to a negative on-line review by a client. Backup includes ethics inquiry 38049 (dated January 17, 2018), Florida Bar Staff Opinion 38049 (dated January 24, 2018), request for committee consideration of whether to adopt a formal advisory opinion by Committee Vice Chair Thomas W. Young (dated March 30, 2018), Rule 4-1.6, and a summary of relevant authorities.

8. Request by the Florida Bar Board of Governors for review of the request by the Special Committee on Child and Parent Representation for Board of Governors endorsement of or use of the following in disciplinary cases (recommendation 7 of the final report): the ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases and the Florida Guidelines of Practice for Attorneys who Represent Children in Delinquency Proceedings. Backup includes the 2017-18 final report of the Special Committee on Child and Parent Representation, the ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, and the Florida Guidelines of Practice for Attorneys who Represent Children in Delinquency Proceedings.

9. Presentation of Certificates of Meritorious Service by the chair to the following members who are leaving the committee because of term limits: Lynwood F. Arnold, Andrew S. Berman, Catherine B. Chapman, Brian T. Coughlin, Stewart A. Marshall, Robert E. Vaughn, Jr., and Vice Chair Thomas W. Young. No backup materials.

10. Discussion of other items at the direction of the chair. No backup materials.

11. Discussion of the future meeting schedule. The next meeting of the Professional Ethics Committee is scheduled for **Friday, October 19, 2018, from 9:00 a.m. until 12:00 p.m. at the Tampa Airport Marriott.** No backup materials.