

**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR RE  
PETITION TO AMEND RULES  
REGULATING THE FLORIDA BAR

CASE NO. SC

**PETITION TO AMEND THE RULES REGULATING THE FLORIDA BAR**

THE FLORIDA BAR, pursuant to rule 1-12.1, Rules Regulating The Florida Bar, petitions this court for an order amending the Rules Regulating The Florida Bar and states:

**I. Rule Development History**

This petition has been authorized by the Board of Governors of The Florida Bar.

The amendments and action proposed in this petition were specifically approved by the Board of Governors of The Florida Bar (the board) by voice vote at its August 13, 2004 meeting, with two minor exceptions more fully discussed below.

The amendments and action proposed in this petition were specifically approved by the Disciplinary Procedures Committee by voice vote at its April 1, 2004 meeting.

The amendments and action proposed in this petition were specifically approved by the Rules Committee by voice vote at its April 1, 2004 meeting.

The proposed amendments affect Chapters 4 and 5 of the Rules Regulating The Florida Bar. The changes, which were developed by the Special Committee to Review the ABA Model Rules 2002 (the committee), are proposed in response to changes to the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) recommended by the American Bar Association Ethics 2000 Commission (ABA Ethics 2000 Commission). As such, the amendments stand alone and are being filed separately from The Florida Bar's annual rules filing. The final report of the committee, presented to the board at its December 5, 2003 meeting, is attached as Appendix D.

The Florida Bar's Ethics 2000 Review Panel (the panel) was appointed by Florida Bar President Terrence Russell on September 5, 2001. The panel was charged with the following mission:

The Ethics 2000 Review Panel has been created to study the recommendations of the American Bar Association Ethics 2000 Commission. The panel's charge is to analyze the ABA recommendations, and compare them with existing Rules Regulating The Florida Bar. The primary concern in analyzing the ABA Ethics 2000 Commission recommendations should be protecting the public and maintaining the core values of the legal profession.

The ABA Ethics 2000 Commission was appointed in 1997 to perform an exhaustive review and analysis of the ABA Model Rules. The panel understood its primary purpose as reviewing the proposed changes to the ABA Model Rules to make recommendations to the board to assist The Florida Bar's representatives in voting on the proposed changes at the American Bar Association House of

Delegates (ABA House of Delegates) meeting in February 2002. The panel reviewed each model rule, noted substantive changes, compared the model rule with Florida's comparable rule, recommended whether the changes should be adopted, and made suggestions for alternative language to a few of the model rules.

The panel agreed with the majority of the changes proposed by the ABA Ethics 2000 Commission, with notable exceptions. The most notable exception related to rules voted on in August 2001 by the ABA House of Delegates in model rules 1.7, 1.8, 1.9, and 1.10. The changes, also voted down by the ABA House of Delegates, would have allowed "screening" of attorneys within the same law firm to resolve conflicts of interest. The panel disagreed with other changes to model rules 1.7, 1.8, 1.9 and 1.10 besides the screening issue, and with some of the changes in the terminology section.

The panel disagreed with or qualified some of the recommendations to the following model rules voted on by the ABA House of Delegates in February 2002: 1.12 (Conflicts of Former Judge or Arbitrator), 1.18 (Prospective Clients), 3.3 (Candor Toward the Tribunal), 3.7 (Lawyer as Witness), 4.2 (Communication with Represented Persons), 4.3 (Communication with Unrepresented Persons), 5.4 (Professional Independence of a Lawyer), 5.7 (Responsibilities Regarding Nonlegal Services), 6.1 (Voluntary Pro Bono Service), 6.5 (Nonprofit and Court-annexed Limited Legal Services Programs), 7.1 (Communications concerning a Lawyer's Services), 7.2 (Advertising), and 8.4 (General Misconduct).

The panel's final report was presented to the board in October 2001, and President Russell provided copies of the report to all of the Florida delegates.

After the vote by the ABA House of Delegates in February 2002, Florida Bar President Tod Aronovitz appointed a successor committee, the Special Committee to Review the ABA Model Rules 2002 (the committee), charging the committee with the following mission statement:

The Special Committee to Review the ABA Model Rules 2002 has been created to study the changes to the ABA Model Rules of Professional Conduct adopted by the ABA House of Delegates in February 2002 from recommendations of the American Bar Association Ethics 2000 Commission. Building on the work of the Ethics 2000 Review panel, this committee's charge is to analyze the changes to the ABA Model Rules of Professional Conduct, compare them with existing Rules Regulating The Florida Bar, and consider whether The Florida Bar should adopt the recommended changes. The primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct should be protecting the public and maintaining the core values of the legal profession.

The committee reviewed the changes actually adopted by the ABA House of Delegates at its February 2002 meeting. The committee divided into subcommittees to review the actual changes adopted by the ABA House of Delegates and make recommendations to the full committee. Each subcommittee report was reviewed by the full committee and either adopted, modified or rejected. The committee met numerous times in person and by telephone conference. The committee then adopted an interim report for distribution to interested members. The interim report followed the same format as the panel report to the delegates, with a review of each model rule, notation of substantive changes, comparison between the model rule and Florida's comparable rule, recommendation of whether the changes should be adopted, and suggestions for alternative language when appropriate. The committee sent a letter to the chair of each standing committee and section of The Florida Bar (the bar) requesting input

on the interim report and proposed rule changes. The committee also published articles in the *Florida Bar News* inviting Florida Bar members to review and comment on the interim report. The interim report was posted on the bar's website for comment. The committee reviewed the comments received, adopting some changes recommended by those who commented and declining to adopt others.

In considering the ABA Model Rules, the committee reviewed not only the changes recently adopted by the ABA House of Delegates, but also reviewed the existing ABA Model Rules to determine where Florida's rules differ from the ABA Model Rules. The committee agreed that conformity with the ABA Model Rules was desirable as a goal, but not where Florida has diverged from the ABA Model Rules for important policy considerations. As an example, Florida's confidentiality rule, 4-1.6, contains mandatory exceptions requiring disclosure to prevent a client from committing a crime and to prevent death or substantial bodily harm, whereas the ABA model rule's exceptions are merely permissive. The committee recommended retention of the existing Florida rule as providing more protection to the public by removing discretion of the lawyer not to disclose in those circumstances. As another example, Florida as a policy has determined that post-trial contact with jurors is impermissible without notice to the court and opposing side; therefore, a majority of the committee recommended retention of existing rule 4-3.5 with no changes. As a final example, the committee did not recommend adopting any changes to the attorney advertising rules (4-7.1 through 4-7.11), as this area is one in which there is great divergence from the ABA Model Rules based on policy decisions by numerous Florida Bar commissions.

Additionally, the committee recommended against adopting some of the changes made to the ABA Model Rules where the changes involved issues under study by other Florida Bar committees. The ABA House of Delegates adopted changes to the ABA Model Rules in response to a study on multijurisdictional

practice in ABA model rules 5.5 and 8.5. The committee recommended against adopting the changes in Florida's counterpart rules 4-5.5 and 4-8.5, because of the study by The Florida Bar's Special Commission on the Multijurisdictional Practice of Law 2002. The petition requesting changes to rules 4-5.5 and 4-8.5 by that commission is currently pending at the court, as noted below. Similarly, the committee recommended against most changes to Florida's rule 4-4.2 (regarding communication with represented persons), because The Florida Bar's Special Committee to Review Rule 4-4.2 concluded a study of the rule in October 2002, recommending a very minor change to the comment of the rule only. That change was adopted by the court in *Amendments to Rules Regulating The Florida Bar*, 875 So.2d 448 (Fla. 2004). Therefore, the committee recommended adopting relatively minor changes to the comment that do not conflict with the recommendations of the Special Committee to Review Rule 4-4.2, and recommended against adopting the "authorized by law or court order" exception to the rule contained in new ABA model rule 4.2. The model rule already contained the "authorized by law" exception, but added the exception of authorized by court order.

Many of the changes adopted by the ABA House of Delegates and recommended by the committee are minor to reorganize or clarify the rules, with no change in substance intended. Other changes are substantive, and some are pervasive throughout the rules.

## **II. Summary and Discussion of Amendments**

The bar proposes new rules or amendments to existing rules as shown in the listing below. Each entry provides an explanation of each amendment and adverse commentary or dissenting views, if any, regarding the proposals. The source, committee action, and board action are the same for the entire package of amendments and are discussed above; therefore, there is no notation of these items in this section of the petition. Unless noted otherwise, the changes generally

conform the Rules Regulating The Florida Bar more closely to the ABA Model Rules and adopt changes made by the ABA House of Delegates in response to recommendations of the ABA Ethics 2000 Commission. The next two paragraphs discuss two proposed changes that are pervasive throughout the rules. The following paragraphs explain changes to individual rules in numeric order.

### **Informed Consent**

*Explanation/Reasons:* Throughout the rules, the ABA House of Delegates changed “consent after consultation” to “informed consent.” The ABA Ethics 2000 Commission stated that they believed the change clarified and strengthened the requirement of communication with clients regarding consent. “Informed consent” is defined as “agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” The bar agrees that the lawyer’s duty of communication to the client is more clearly delineated by this definition and therefore recommends adoption of this change throughout the Rules Regulating The Florida Bar, appearing in terminology, 4-1.2 (Scope of Representation), 4-1.4 (Communication), 4-1.6 (Confidentiality of Information), 4-1.7 (Conflict of Interest; General Rule), 4-1.8 (Conflict of Interest; Prohibited and Other Transactions), 4-1.9 (Conflict of Interest; Former Client), 4-1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees), 4-1.12 (Former Judge or Arbitrator), and 4-2.3 (Evaluation for Use by Third Persons).

*Dissent:* None.

### **Confirmed in Writing**

*Explanation/Reasons:* The ABA House of Delegates also adopted in many rules a requirement that consent be “confirmed in writing.” A lawyer must either obtain the person’s written consent or obtain oral consent after which the lawyer

gives or sends a written statement that the consent has occurred. The committee initially rejected this approach, then determined that the requirement did not place an unreasonable burden on the lawyer or unreasonably “chill” the lawyer-client relationship, because it does not require that the person actually sign a consent. It merely requires that the lawyer provide a written confirmation of consent to the person. The bar does not recommend adoption of this requirement in every rule that the ABA House of Delegates modified, confining the change to terminology and rules 4-1.7, 4-1.11, and 4-1.12.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee’s interim report, objecting to the new requirement that consent be confirmed in writing everywhere it appears in the proposed rules. For the reasons described above, the bar disagrees with Mr. Trawick’s comments and recommends adoption of the changes.

## **Chapter 4. Rules of Professional Conduct**

### **Preamble: A Lawyer’s Responsibilities**

*Explanation/Reasons:* Changes are recommended to the preamble to conform to the changes in the ABA Model Rules. Some changes are made to conform to amendments in the substantive rules. References to the lawyer as intermediary are deleted, consistent with the bar’s recommendation to delete rule 4-2.2. References to the lawyer serving as third-party neutral are added, consistent with the bar’s proposal to add new references to third-party neutrals in rule 4-1.12, and to add new rule 4-2.4. Changes add that a lawyer should seek improvement in access to the legal system and should further public knowledge of the legal system. Guidance on basic principles to assist lawyers in resolving conflicts is added.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee’s interim report, objecting to the addition of the statement that lawyers should seek improvement and access to the legal system and

that the lawyer should further the public's understanding of the system in the sixth paragraph. The ABA Ethics 2000 Commission reporter's notes indicate that the ABA Model Rules were changed to reflect resolutions adopted by the ABA House of Delegates in February and August 2000. The bar agrees that these are laudable aims, consistent with a lawyer's responsibilities, particularly regarding access to the legal system. Commentary on access to the legal system in particular is consistent with the pro bono obligations expressed in rule 4-6.1. Additionally, the language is not mandatory; it merely indicates that a lawyer should engage in these activities.

### **Scope:**

*Explanation/Reasons:* Changes made to the scope conform to the ABA Model Rules. Some language is clarified. Changes add that comments to rules may be used to warn lawyers they may have obligations under other law. References to proposed new rule 4-1.18 regarding duties to prospective clients are added. Language regarding the relationship between the Rules of Professional Conduct and causes of action against lawyers is modified. Amendments delete information that appears elsewhere in the rules.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, objecting to the deletion of the last paragraph which states that a lawyer's decision not to disclose confidential information should not be re-examined.

The City, County and Local Government Law Section at the May 28, 2004 board meeting raised objections to recommended changes to the Rules Regulating The Florida Bar proposed by the committee. The section requested that the board adopt a paragraph in the scope that was adopted by the American Bar Association (ABA) in 1983 when the ABA adopted the Model Rules of Professional Conduct, replacing the ABA Model Code. The paragraph is as follows:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. ~~They also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so.~~ These Rules do not abrogate any such authority.

The sentence that is struck through above was deleted from the ABA Model Rules by vote of the ABA House of Delegates in 2002. The section recommends adoption of the entire paragraph, including the deleted provision. This paragraph, although adopted in the ABA Model Rules, was not adopted by the bar. The bar's Special Study Committee on the Model Rules of Professional Conduct (special study committee) recommended against adopting this paragraph in the scope section of the Rules Regulating The Florida Bar in 1985. The special study committee's notes do not reflect specifically why the special study committee recommended against adoption of this particular paragraph. The special study

committee only noted that “some portions of the Scope have been modified or eliminated in order to make it clearer and more consistent with other changes proposed by the Committee throughout the Rules and Comments.” A member of this committee who also served on the prior special study committee indicated that the special study committee’s rationale was that the standard for government lawyers and private lawyers should be the same; government clients should receive no lesser protection than private clients. In reviewing the changes to the ABA Model Rules, the committee in general followed policy previously set by prior bar committees, declining to undo the work of prior committees, the board and the Supreme Court of Florida in deviating from the ABA Model Rules. The committee voted 7-0 to retain the committee's original recommendation, which did not adopt any of this paragraph in the scope. The board approved the committee’s recommendation.

### **Terminology:**

*Explanation/Reasons:* Changes conform to the ABA Model Rules, mainly by adding definitions of “confirmed in writing,” “informed consent,” “screened,” “tribunal,” and “writing,” consistent with proposed changes throughout the rules. Amendments also add to definitions of “law firm” and “partner.” Commentary is added to the terminology section, providing further explanation of changes consistent with proposed amendments throughout the rules.

*Dissent:* A member of the bar’s Professional Ethics Committee made comments in response to the interim report, suggesting that the word “consent” in terminology be capitalized to give it more prominence. The bar declines to adopt this suggestion because it is not in keeping with the general format of the Rules Regulating The Florida Bar.

## **4-1. Client-Lawyer Relationship**

### **Rule 4-1.1 Competence**

*Explanation/Reasons:* To conform to the ABA Model Rules, no changes to the substance of the rule are proposed. However, commentary is added that a lawyer must keep current in changes in the law and comply with continuing legal education requirements, as well as changes to some terminology.

*Dissent:* None.

### **Rule 4-1.2 Objectives and Scope of Representation**

*Explanation/Reasons:* Changes are proposed to conform to the ABA Model Rules that add that a lawyer may take action that is impliedly authorized to carry out a client's representation. Amendments also add that a lawyer must "reasonably" consult with a client, which is an amendment that is not contained in the ABA Model Rules. The term "consents after consultation" is changed to "gives informed consent" consistent with changes throughout the rules. Subdivision (c) is deleted, regarding consulting with a client regarding a lawyer's inability to provide assistance prohibited by the Rules of Professional Conduct. The substance of subdivision (c) is moved to rule 4-1.4(a)(5). Commentary is added discussing the appropriate allocation of decision-making authority between lawyer and client. Commentary on limited representation is modified. Commentary to assist lawyers in avoiding assisting a client in a crime or fraud is added. Commentary is added addressing the deletion of subdivision (c) of the rule. Some examples provided in the commentary are clarified.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, objecting to what he characterized as a change limiting the lawyer's right to contract in rule 4-1.2(c). Mr. Trawick's objections appear to be in reference to a change regarding limited representation that was made by the court in *Amendments to the Rules Regulating the Florida Bar*

and the Florida Family Law Rules of Procedure (Unbundled Legal Services), 860 So.2d 394 (Fla. 2003). As such, Mr. Trawick's objections are not properly before the court in this petition.

#### **Rule 4-1.3 Diligence**

*Explanation/Reasons:* No changes to the substance of the rule are proposed. Some language in the comment is clarified with no change in substance intended and commentary is added supporting bar civility initiatives.

*Dissent:* None.

#### **Rule 4-1.4 Communication**

*Explanation/Reasons:* The ABA House of Delegates adopted, and the bar recommends, changes to rule 4-1.4 (Communication) that strengthen a lawyer's obligation to communicate with clients. The changes to the rule set forth specific requirements of communication, such as the obligation to promptly inform the client of any decision or requirement in the rules, consult with the client about how the goals of the representation will be accomplished, keep the client informed on the progress of the matter, respond to requests for information, and consult with the client when the lawyer understands that the client wants the lawyer to engage in unethical or illegal conduct. Changes to the comment reflect the modifications to the rule.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, objecting to changes dealing with a lawyer's ability to decide tactical issues. The committee voted to retain its original recommendation at its September 4, 2003 meeting.

#### **Rule 4-1.5 Fees and Costs for Legal Services**

*Explanation/Reasons:* Florida's rule on fees substantially differs from the ABA model rule. To conform to previous bar policy, as opposed to conforming to the ABA model rule, no changes to the substance of the rule are proposed.

Commentary conforming to ABA model rule commentary is added regarding contingent fees to obtain post-judgment arrearages for financial support in domestic relations cases. Redundant commentary on the same subject is deleted.

*Dissent:* None.

#### **Rule 4-1.6 Confidentiality of Information**

*Explanation/Reasons:* Florida's confidentiality rule differs substantially from the ABA model rule. To conform to prior policy established in Florida on confidentiality, most changes to the ABA model rule are not recommended for adoption. However, "consents after disclosure" is changed to "gives informed consent" in subdivision (a), consistent with the ABA model rule and with changes throughout the rules. References to rules on prospective clients, former clients, and other conflicts are added to the commentary. Commentary is added that a lawyer may disclose confidential information in order to seek advice on the lawyer's ethical obligations. Terminology and placement of concepts expressed in the commentary are changed, with no change in substance intended.

*Dissent:* Sixth Circuit Public Defender Bob Dillinger made a comment in response to the board's circulation of the committee's final report, recommending deletion of mandatory disclosure of confidential information to prevent "death or substantial bodily harm" as redundant, because lawyers are already required to report a client's intent to commit a crime. The bar disagrees that the requirement is redundant, because the exception requires a lawyer to disclose information that would prevent death or substantial bodily harm even where no client crime is involved. The important policy considerations of preventing death or substantial bodily harm require such disclosure. Additionally, this mandatory disclosure already exists in the rule and is not a change; therefore, Mr. Dillinger's comments are not properly before the court.

### **Rule 4-1.7 Conflict of Interest; General Rule**

*Explanation/Reasons:* The bar recommends changes to rule 4-1.7 (Conflict of Interest) based on changes made to the ABA Model Rules by the ABA House of Delegates. In the main, no change in the substance of the rule is intended. The changes are intended to better organize and clarify the meaning of the rule. The title of the rule is also changed to better reflect the purpose of the rule, which is to address conflicts involving current clients. One change to the rule, already noted, is the requirement that the client give informed consent to waive a conflict, and that informed consent must be confirmed in writing. The ABA House of Delegates adopted numerous changes to the comment to rule 4-1.7; the bar declines to recommend adoption of the vast majority of the changes. The bar believes the existing comment to the rule provides better guidance than the changes adopted by the ABA, and the additions made by the ABA are already covered in existing Florida authority such as caselaw and ethics opinions. The bar does recommend adding an explanation of confirmed in writing to the comment.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, objecting to references to "third person" in rule 4-1.7(a)(2). As those references appear in the existing rule, Mr. Trawick's objections are not properly before the court. Additionally, as discussed more fully above, Mr. Trawick objects to the requirement that a client's consent be confirmed in writing.

Sixth Circuit Public Defender Bob Dillinger, in response to the committee's final report, recommended revision of rule 4-1.7 to allow waiver of conflicts to occur before a court as opposed to confirmed in writing as is addressed in *Forsett v. State*, 790 So.2d 474 (App. 2 Dist. Jun 01, 2001). The committee discussed the issue and determined that electronic recording, such as by a court reporter, might meet the definition of "confirmed in writing." The committee also discussed its

belief that it is unlikely that the bar would prosecute a lawyer who continued to represent a client pursuant to a court order determining that a criminal defendant knowingly consented to a conflict. The bar therefore declines to adopt this recommendation.

#### **Rule 4-1.8 Conflict of Interest; Prohibited and Other Transactions**

*Explanation/Reasons:* The bar recommends adopting requirements that strengthen the protection of clients in rule 4-1.8, consistent with changes to the ABA Model Rules. The changes include clarifying that in a business transaction with a client, the requirement that there be written consent by the client includes that the writing spell out the terms of the transaction and the lawyer's role in the transaction in subdivision (a). The bar also recommends adding to subdivision (c) that a lawyer cannot solicit a substantial gift from a client to the existing prohibition against preparing an instrument by a client giving any substantial gift to the lawyer or the lawyer's family. The bar also recommends adding in subdivision (g) that consent to aggregate settlement of client claims must be in writing, signed by the client. There are also substantial additions to the comment, providing additional explanation to existing rules. Finally, new subdivision (k) imputes all conflicts listed in the rule to lawyers in the same firm; previously, subdivision (c) regarding preparing an instrument in which a client gave a substantial gift to the lawyer or lawyer's family was excepted from the imputation of conflicts. Commentary is added consistent with the proposed changes to the rule and providing explanatory comments on existing provisions of the rule.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, suggesting that the term "familial" be deleted from rule 4-1.8(c). The committee voted against this recommendation at its September 4, 2003 meeting.

The chair of a committee appointed by the Trial Lawyers Section made comments in response to the committee's interim report, suggesting that the committee consider adopting a change to rule 4-1.8(e) to reconcile the rule with the case of *Florida Bar v. Taylor*, 648 So.2d 1190 (Fla. 1994), in which this court declined to discipline an attorney for making a one-time charitable contribution to a client of used clothing and \$200 where there was no agreement for repayment or an expectation that the gift was to maintain the lawyer-client relationship. The bar declines to adopt this change, because it is outside the scope of the committee's charge and because no change is necessary.

After the official notice of October 15, 2004, Florida Bar member Katherine E. Giddings filed a comment, stating that changes to Rule 4-1.8(f), which would require a client's informed consent when accepting compensation for representing a client from a person other than the client, might conflict with Rule 4-1.8(j) regarding the Statement of Insured Client's Rights. She stated her concern that an insurance defense lawyer might believe that the Statement of Insured Client's Rights is insufficient to establish informed consent on behalf of the insured client. She suggested adding to the commentary the following:

In the insurance defense context, informed consent generally can be inferred from the circumstances, because Rule 4-1.8(j) requires that insureds receive the Statement of Insured Client's Rights and any additional information pertinent to a particular case, providing adequate information about the matter.

Although the bar has not taken any position on this comment, having received it on November 29, 2004, immediately prior to filing the petition, the commentary

proposed by Ms. Giddings is consistent with the position taken by the bar in *Amendments to Rules Regulating The Florida, 820 So.2d 210* (Fla. 2002).

#### **Rule 4-1.9 Conflict of Interest; Former Client**

*Explanation/Reasons:* Substantial amendments to ABA model rule 1.9 were adopted by the ABA House of Delegates. The bar recommends against adoption of most of the changes. As noted above, the bar recommends adopting the change from “consent after consultation” to “gives informed consent” for consistency with the other rules. However, the ABA changes require that consent be confirmed in writing. The bar recommends against this change, believing that although conflicts involving current conflicts of interest should be confirmed in writing because of the existing relationship, confirmation in writing should not be required when conflicts involve former clients because the relationship considerations are minimized with former clients. The bar believes that a lawyer should not be disciplined for failing to confirm a waiver of a conflict of interest involving a former client in writing if the former client has made an informed waiver. Although the ABA did not attempt to define “generally known” for purposes of this rule, Florida’s rule 4-1.9 has a definition of “generally known.” In the process of examining the rule regarding the ABA changes, the committee reviewed the definition. The bar believes the definition of “generally known” is best placed in the comment of the rule, being more consistent with the general format of the rule. The bar also recommends the language be clarified to make clear that “generally known” is subject to a “but for” test; that is, “but for” the prior attorney-client relationship, the lawyer would neither know nor discover the information. Finally, the bar appreciates the attempt by the ABA to define “substantially related.” However, the bar finds the ABA’s attempt to define “substantially related” unhelpful because it blurs the distinction between the duties of loyalty and confidentiality owed to former clients. The bar therefore recommends adoption of

some of the explanatory language of the new ABA comment, but separates the two concepts of loyalty and confidentiality for purposes of Florida's comment.

*Dissent:* None.

#### **Rule 4-1.10 Imputed Disqualification; General Rule**

*Explanation/Reasons:* ABA model rule 1.10 was amended so that personal conflicts of interest of one lawyer are not imputed to the lawyer's firm unless there is a significant risk that the representation of the client would be affected. The rationale for the change is that neither loyalty considerations nor protection of confidential information are raised by removing the imputation as long as the remaining firm members who will actually represent the client are not affected by the personal conflict of one firm lawyer. The example provided in the new comment is a lawyer with strong political beliefs in conflict with the representation of the client. As long as the other lawyers in the firm remain unaffected by the individual lawyer's personal conflict, those other lawyers should be able to represent the client. The bar agrees with the rationale offered for the change and therefore recommends the change in Florida rule 4-1.10 and commentary. New subdivision (e) is added, stating that imputation of conflicts for government lawyers is addressed by rule 4-1.11. An addition to the comment to this rule addresses the frequently raised issue of conflicts of nonlawyer employees. The addition notes that conflicts of nonlawyers will not be imputed to the entire law firm, but that the law firm must make adequate provisions to screen the nonlawyer from participation in the matter. Commentary regarding definition of a law firm is deleted as redundant, because the language is now included in terminology. The title is also modified.

*Dissent:* None.

### **Rule 4-1.11 Successive Government and Private Employment**

*Explanation/Reasons:* Changes to conform to the ABA model rule are proposed. The title is changed to more accurately reflect the content of the rule. In subdivision (a), a provision is added that a former government officer or employee is subject to rule 4-1.9(b), and the term “consents after consultation” is changed to “gives its informed consent, confirmed in writing, to the representation.” Screening provisions in subdivision (b) are clarified. The definition of confidential information is moved from subdivision (e) to new subdivision (c). A provision is added in subdivision (d)(1) that a current government officer or employee is subject to other conflict rules. In subdivision (d)(2), the exception to conflicts involving current government employees is changed to “informed consent” from the current exception that allows a lawyer to act on behalf of the government only if no other person is authorized to act on behalf of the government. The ordering of information in the commentary is changed, and some stylistic changes to the commentary are made. Commentary is added explaining the relationship between rules 4-1.9 and 4-1.11, explaining the rationale for treating government lawyers differently than private lawyers, explaining screening, defining “matter” as used in the rule, conforming the commentary to substantive rules changes, and deleting redundant information.

*Dissent:* The City, County and Local Government Law Section (the section) attended the May 28, 2004 board meeting and presented objections to several changes in rule 4-1.11. The section objects to all of the changes in proposed rule 4-1.11(d), the first section of which expressly states that government lawyers are subject to rules 4-1.7 (general conflict of interest rule) and 4-1.9 (conflicts involving former clients). Similarly, the section objects to changes to the second and fourth paragraphs of the commentary that conform to the changes made in subdivision (d)(1).

The committee met with section representatives via telephone conference. Section representatives originally stated that new obligations were being imposed on government lawyers. They then acknowledged that government lawyers are subject to rules 4-1.7 and 4-1.9, but stated that to specifically state that government lawyers are subject to those rules treats government lawyers differently than other lawyers. The bar disagrees with both contentions. Nothing in existing rules 4-1.7 and 4-1.9 makes an exception for government lawyers from the general requirements of the conflicts rules, and the current comment to rule 4-1.11 specifically states that government lawyers are subject to rules 4-1.7 and 4-1.9:

A lawyer representing a government agency, whether employed or specially retained by the government, *is subject to the rules of professional conduct, including the prohibition against representing adverse interests stated in rule 4-1.7 and the protections afforded former clients in rule 4-1.9. In addition*, such a lawyer is subject to rule 4-1.11 and to statutes and government regulations regarding conflict of interest. [Emphasis added.]

Thus, it is clear from the commentary to the rule that conflicts of interest, as prohibited by rules 4-1.7 and 4-1.9, were intended to apply to government lawyers as well as the specific restrictions addressed by rule 4-1.11. The bar believes that clearly stating government lawyers' responsibilities within the rule itself is helpful to government lawyers, rather than requiring government lawyers to read rules 4-1.7, 4-1.9, 4-1.11 and its comment in conjunction with each other to try to understand their obligations.

Rule 4-1.7 requires that a lawyer with a conflict of interest involving a current client obtain consent of that client, confirmed in writing. The section

requested that the bar consider adopting an exception for government lawyers to the requirement that consent be confirmed in writing, stating their concern that such a writing would be subject to the public records law, creating practical problems for government lawyers. The bar declines to recommend such an exception, believing that government lawyers should be treated the same as private lawyers.

In rule 4-1.11, the section also objects to the changes in proposed subdivision (d)(2). The change would prohibit a government lawyer from participation in a matter in which the lawyer participated personally and substantially while in private practice, unless the appropriate government agency gives informed consent confirmed in writing. This is a substantive change; previously, government lawyers were prohibited from participation in a matter in which the lawyer participated personally and substantially while in private practice unless no one else was authorized to act on behalf of the government. Therefore, there are two substantive changes: one that allows government consent to the lawyer's participation and the second of which requires that the government's consent be confirmed in writing.

This change actually represents a loosening of restrictions for government lawyers. The rationale behind the prior rule was that the government lawyer's participation in a matter in which the government lawyer previously represented a private client could give rise to the inference that the former private client received special treatment. That concern exists regardless of whether the representation of the government was adverse to that of the former private client, justifying the expansion of the prohibition to any matter in which the government lawyer had represented a private client personally and substantially. As discussed in the comment, "the risk exists that power or discretion vested in public authority might be used for the special benefit of a private client." With the change, a government

lawyer who had participated personally and substantially in a matter while representing a private client could represent the government in the same matter with the government's consent.

Section representatives told the committee that their greatest concern was the requirement that such consent be confirmed in writing, because such writings would be subject to the public records law. The committee, to address this concern, voted 5-2 to delete the requirement that the government's consent be confirmed in writing, retaining the remainder of the special committee's recommendation as to that rule. The board approved the recommendation of the committee.

#### **Rule 4-1.12 Former Judge or Arbitrator**

*Explanation/Reasons:* ABA model rule 1.12 was amended to extend the rule to include former mediators and other third-party neutrals in the title of the rule, the substance of the rule, and the rule's commentary. The change recognizes that more lawyers are serving in the capacity of third-party neutrals and clarifies their responsibilities under the Rules of Professional Conduct. The bar agrees with and recommends this change. The bar recommends the further addition to the comment that a Florida Bar member who is a certified mediator is subject to applicable law and other rules governing certified mediators.

*Dissent:* None.

#### **Rule 4-1.13 Organization as Client**

*Explanation/Reasons:* The scienter requirement is changed from "it is apparent" to "the lawyer knows or reasonably should know" to conform to terminology throughout the rules. Commentary describing the law regarding the identity of a government client is amended. Not all of the changes to the ABA model rule were adopted, as discussed below.

*Dissent:* None. The City, County, and Local Government Law Section filed commentary in response to the committee's final report about proposed amendments. The bar changed its recommendations based on those comments and therefore assumes that the City, County, and Local Government Law Section has no further objection to the comments.

#### **Rule 4-1.16 Declining or Terminating Representation**

*Explanation/Reasons:* Changes are proposed to conform to the ABA model rule, with some exceptions. Situations in which the client is using or has used the lawyer's services to commit a crime or fraud are moved from subdivision (b) (permissive withdrawal) to subdivision (a) (mandatory withdrawal), unless the client agrees to disclose and rectify the crime or fraud. Although the above change does not conform to the ABA Model Rules, the bar believes it is consistent with a lawyer's obligation to avoid assisting a client in crime or fraud. Permissible withdrawal is added in subdivision (b)(2) when the client insists on taking action with which the lawyer has a fundamental disagreement. A requirement that a lawyer obtain court permission for withdrawal when applicable is added to subdivision (c). References to refunding unspent cost advances are added in subdivision (d). Commentary is added on when a representation is customarily ended, to conform to changes in the rule, providing references to court approval for withdrawal, and providing references to related rules. Unhelpful commentary is deleted.

*Dissent:* Florida Bar member Henry Trawick filed a comment in response to the interim report suggesting that a provision be added to make a trial court's order on withdrawal subject to appeal. As a Florida Bar rule is not the appropriate vehicle to address whether a court order may be appealed, the bar declines to adopt that recommendation.

Sixth Circuit Public Defender Bob Dillinger filed comments in response to the committee's final report, suggesting that rule 4-1.16(a)(3) be amended to state that "in a noncourt appointed situation, the lawyer is discharged" to recognize that court-appointed attorneys are not necessarily subject to being discharged by the client at any time. The bar declines to adopt the suggestion because the rule provision addressed by Mr. Dillinger is an existing requirement in the Rules Regulating The Florida Bar and is therefore not properly before the court.

#### **Rule 4-1.17 Sale of Law Practice**

*Explanation/Reasons:* The ABA House of Delegates approved changes to its sale of a law practice rule (model rule 1.17) that would allow the sale of part of a practice as opposed to the former requirement that the sale be of the entire practice to one purchaser. The change eliminates the requirement that the sale be to a single purchaser. The rationale for the change is that the prior rule was unduly restrictive for its purpose: to ensure that all cases and clients were disposed of in the event the practice was sold. The bar agrees with the rationale and therefore recommends amendment of Florida rule 4-1.17 to allow the sale of a practice or an area of practice to one or more purchasers. The bar disagrees, however, with the ABA requirement that the seller must discontinue the practice of law in the event of a sale of the entire practice or discontinue the area of practice if an area of practice is sold. The bar believes that requirement is unduly restrictive and does not serve to protect the interests of clients.

*Dissent:* None.

#### **Rule 4-1.18 Duties to Prospective Client**

*Explanation/Reasons:* An entirely new rule, 1.18, was added to the ABA Model Rules regarding duties to prospective clients. The rule mainly addresses the lawyer's responsibility to maintain confidentiality of prospective clients' information, based on the duty of confidentiality owed to former clients. Lawyers

would therefore be precluded from representation adverse to a prospective client who had consulted with the lawyer in the same or a substantially related matter if the information gained from that consultation “could be significantly harmful” to the prospective client. The ABA adopted two exceptions to the prohibited representation: with the informed consent of both the client and prospective client or with timely appropriate screening of the disqualified lawyer. The bar believes the principles set forth in the rule are important and would provide guidance to lawyers on dealing with prospective clients. However, the bar disagrees with the concept of screening to avoid conflicts, which is generally impermissible in Florida except under very limited circumstances that are not present in the prospective client situation. Therefore, the bar recommends adoption of new rule 4-1.18, but without the screening exception employed by the ABA and changing the phrase “could be significantly harmful to” to “could be used to the disadvantage of” the prospective client to more closely conform to existing concepts in Florida.

*Dissent:* Florida Bar member Toni L. Craig made comments in response to the committee’s interim report, recommending that the bar adopt ABA model rule 1.18 as written.

Similarly, the Business Law Section made comments in response to the committee’s final report, opposing changes made by the committee to ABA model rule 1.18. The Business Law Section suggests in the alternative that the board adopt ABA model rule 1.18 in its entirety, with the exception that the Business Law Section supports the change from “significantly harmful to” to “could be used to the disadvantage of” regarding confidential information in the rule.

The proposal by Ms. Craig and the Business Law Section would allow screening to resolve conflicts with prospective clients, and would expand language involving prospective clients’ consent to conflicts. The committee discussed the issue of screening extensively before adopting its final report. Screening is not

acceptable generally under Florida rules to resolve conflicts of interest, with the limited exception of government lawyers and judges. The limited exception is to promote the important public policy of encouraging lawyers to engage in public service. That public policy does not apply to prospective private clients. The proposed rule recommended by the committee allows a lawyer to make an agreement at the outset with the prospective client that nothing said in the initial consultation will prohibit the lawyer from representing another person in the same matter. That option gives more control to the lawyer and eliminates arguments after the fact as to the efficacy of screening. The bar therefore supports adoption of the model rule as amended by the committee.

#### **4-2.1 Counselor**

##### **Rule 4-2.1 Adviser**

*Explanation/Reasons:* No changes in the substance of the rule are proposed. Commentary on consulting with clients regarding alternative dispute resolution is added.

*Dissent:* None.

##### **Rule 4-2.2 Intermediary**

*Explanation/Reasons:* ABA model rule 2.2, on lawyers serving as intermediaries, has been deleted in its entirety. The reporter's explanation for the deletion is that the rule was mainly adopted to address the perception that lawyers believed that common representation of multiple clients was prohibited. However, common representation is much more accepted today, and the concepts of common representation are best set forth in model rule 1.7, the rule dealing with conflicts involving current clients. The bar agrees with the action of the ABA House of Delegates and therefore recommends deletion of rule 4-2.2. However, in order to retain the existing numeric scheme for ease of use and research, the bar

recommends designating the number 4-2.2 as “open” so that the rules need not be renumbered.

*Dissent:* None.

### **Rule 4-2.3 Evaluation for Use by Third Persons**

*Explanation/Reasons:* In subdivision (a), “undertake” is changed to “provide,” and in subdivision (a)(1), “consents after consultation” is changed to “gives informed consent.” Commentary is added, emphasizing that a lawyer cannot make any false statements in performing an evaluation, and providing references to rule 4-4.1. Unhelpful commentary is deleted.

*Dissent:* None.

### **Rule 4-2.4 Lawyer Serving as Third-Party Neutral**

*Explanation/Reasons:* The ABA also adopted an entirely new rule on lawyers serving as third-party neutrals, in recognition that many more lawyers are serving in this capacity. New ABA model rule 2.4 includes a definition of serving as a third-party neutral and a requirement that the lawyer inform the parties involved that the lawyer does not represent them. The new rule imposes a duty on the lawyer to correct any misunderstanding regarding the lawyer’s role when acting as a third-party neutral. The bar agrees with the rationale and rule and recommends adoption of new rule 4-2.4 that is identical to the model rule.

*Dissent:* None.

## **4-3. Advocate**

### **Rule 4-3.1 Meritorious Claims and Contentions**

*Explanation/Reasons:* The rule requires that a lawyer have a valid basis to bring an action; proposed changes add “in law and fact” to this requirement. Commentary is added that lawyers must perform some investigation to determine a good faith basis for client claims, and that constitutional law may take precedence

over the rule in criminal cases. Commentary on the prohibition against actions taken primarily to harass another is deleted.

*Dissent:* None.

### **Rule 4-3.2 Expediting Litigation**

*Explanation/Reasons:* No changes to the substance of the rule are proposed. Overly restrictive commentary is deleted. Commentary that a lawyer should not regularly delay litigation for the lawyer's own convenience is added.

*Dissent:* None.

### **Rule 4-3.3 Candor Toward the Tribunal**

*Explanation/Reasons:* The prohibition against making false statements to a court is expanded by deleting the requirement of materiality in subdivision (a)(1). A provision is added that a lawyer cannot "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer" in subdivision (a)(1). The duty to take remedial measures is expanded. Some subdivisions of the rule are reorganized. Commentary is added explaining what is considered a tribunal, emphasizing the obligation of a lawyer not to undermine the integrity of the judicial system, and applying the rule to criminal defense lawyers.

*Dissent:* Sixth Circuit Public Defender Bob Dillinger made comments in response to the committee's final report, recommending that the board return to the prior interpretation of rule 4-3.3, adopting commentary that would allow testimony in the narrative for criminal defendants who intend to commit perjury, which testimony could not be used in argument by the attorney, as opposed to requiring withdrawal and disclosure of the client's intent to testify falsely. The committee discussed that there were a number of committees that have already dealt with this issue many years ago. The committee recommended that the board not revisit the issue, because there is an entire body of law on this issue and the board should not undo what has already been done by the courts. Further, the proposed change is to

an existing requirement in the rule that is outside the scope of the committee's charge. The board approves the committee's recommendation.

#### **Rule 4-3.6 Trial Publicity**

*Explanation/Reasons:* Although the changes made by the ABA House of Delegates to the trial publicity rule (3.6) were relatively minor with no intended change in substance, the previous ABA model rule already substantially differed from the current Florida rule, 4-3.6. After study, the bar recommends adopting changes in Florida's rule to conform Florida's rule to the ABA model rule by adding the safe harbor provisions existing in the ABA model rule and by adding the self defense exception. The safe harbor provisions, which the committee recommends adding in subdivision (c), set forth those things that an attorney may state to the media without fear of violating the trial publicity rule. The self defense exception, which the committee recommends adding in subdivision (d), would allow an attorney to respond with public statements to the media on behalf of a client when there has been adverse publicity not initiated by the lawyer or client. The bar believes that these additions will provide clearer guidance to lawyers regarding their responsibilities under the trial publicity rule.

*Dissent:* None.

#### **Rule 4-3.7 Lawyer as Witness**

*Explanation/Reasons:* Terminology is changed to conform to the ABA Model Rules with no change in substance intended. Commentary is added, explaining the rationale for the rule, explaining that the rule protects the court as well as other parties, and discussing a lawyer's obligation when the lawyer's testimony would be adverse to a client.

*Dissent:* None.

### **Rule 4-3.8 Special Responsibilities of a Prosecutor**

*Explanation/Reasons:* Although only minor changes were made by the ABA House of Delegates to model rule 3.8, Special Responsibilities of Prosecutors, there were already significant differences between it and Florida's counterpart, rule 4-3.8. The bar recommends that Florida's rule be changed to encompass some, but not all, of the concepts addressed in the ABA model rule. The bar agrees that prosecutors should make efforts to ensure that a person accused of a crime has been advised of the right to counsel and has been given a reasonable opportunity to consult with counsel, and therefore recommends addition of new subdivision (b). The bar also agrees with and recommends adoption of new subdivision (e), which prohibits a prosecutor from issuing a subpoena to a lawyer in a proceeding to testify about a client unless the information is not privileged and is necessary to the case. On the other hand, the bar disagrees with and recommends against adding the requirement that prosecutors make efforts to ensure that others, such as police and investigators, follow the trial publicity rule. Prosecutors are already required to make such efforts under the trial publicity rule, so a special requirement here is unnecessary.

*Dissent:* Sixth Judicial Circuit State Attorney Bernie McCabe made comments in response to the committee's final report, opposing the committee's recommended addition of rule 4-3.8(b) and (e)(2). Subdivision (b) would require prosecutors to make reasonable efforts to assure the accused is advised of the right to counsel and has been given reasonable opportunity to obtain counsel. Subdivision (e)(2) would prohibit prosecutors from subpoenaing a lawyer unless the prosecutor believes the information is essential to successful prosecution or investigation of the case. Mr. McCabe believes that subdivision (b), regarding reasonable efforts to assure the accused is advised of right to counsel, should be limited to individuals charged with crimes, because to do otherwise inappropriately

interjects prosecutors into police investigations and imposes duties on prosecutors that are primarily the responsibility of interrogating officers and the courts. Mr. McCabe also states that the prohibition in subdivision (e)(2) assumes that testimony will adversely affect the attorney-client relationship and presupposes that the substance of the testimony will be known in advance to the prosecutor, while the purpose of investigation is to determine if a witness has relevant information. Claims of abuse have been exceedingly rare in Mr. McCabe's 28 years of experience, prosecutors are reluctant to subpoena attorneys anyway, and rules of procedure adequately safeguard against abuse. The bar notes that the requirement imposed by subdivision (b) already exists in the commentary to the rule and is therefore not a new requirement. The bar also interprets subdivision (e)(2) differently than Mr. McCabe, believing that the requirement is not that a prosecutor know the substance of the a lawyer's testimony, but that the evidence sought from the lawyer is essential to successful prosecution. The bar therefore disagrees with Mr. McCabe's contentions, and supports adoption of the changes.

#### **Rule 4-3.9 Advocate in Nonadjudicative Proceedings**

*Explanation/Reasons:* The rule is clarified, and obligations of candor before a legislative body or administrative agency are expanded. The requirement that a lawyer must conform to rule 4-3.5, prohibiting ex parte contacts with the decision maker and prohibiting contacts with jurors, is deleted, because those notions are inconsistent with the legislative and administrative process in government and are unduly burdensome to practicing attorneys. The latter change is a departure from the ABA Model Rules. Commentary on appropriate application of the rule is added.

*Dissent:* None.

## **4-4 Transactions with Persons Other than Clients**

### **Rule 4-4.1 Truthfulness in Statements to Others**

*Explanation/Reasons:* No changes to the substance of the rule are proposed. Commentary is added, providing guidance on the meaning of misrepresentation, providing references to rule 4-8.4, and providing that lawyers must be aware of applicable law.

*Dissent:* None.

### **Rule 4-4.2 Communication with Person Represented by Counsel**

*Explanation/Reasons:* A comma is added in subdivision (a) for consistency with the format of the rules. This proposed change is not in response to changes to the ABA Model Rules changes because this subdivision of Florida's rule 4-4.2 differs substantially from the ABA Model Rules for long-established policy reasons. Commentary is added, explaining the rationale for the rule, explaining application of the rule, discussing considerations when an organization is the client, discussing the scienter requirement, and referencing rule 4-4.3.

*Dissent:* The Real Property, Probate and Trust Law Section, in response to the committee's final report, suggested expanding the commentary of rule 4-4.2 to indicate that a transactional lawyer's "prepping" a client in communications with an opposing client should not be interpreted as improperly getting around the rule. The bar believes that transactional lawyers should not be treated differently than other lawyers, is unaware of any problems that are experienced by transactional lawyers in this area, and therefore recommends against this suggestion.

Sixth Circuit Public Defender Bob Dillinger, in response to the committee's final report, raised the issue of whether contact by an attorney requested by a family member to speak to a criminal defendant represented by the public defender's office regarding possible representation would be considered impermissible under the proposed commentary of rule 4-4.2. The bar believes that

the rule would not be applicable in such a situation because the attorney making the contact is not representing a client in making the contact. The bar therefore believes that no additional clarification is required.

#### **Rule 4-4.3 Dealing with Unrepresented Persons**

*Explanation/Reasons:* A provision that a lawyer shall not give legal advice to an unrepresented person is moved from the commentary to the body of the rule, to conform to changes in the ABA model rule. However, the bar does not recommend adding the new ABA model rule that allows a lawyer to give legal advice to an unrepresented person whose interests are not in conflict with the client, because of the danger that an attorney-client relationship may be created with the unrepresented person pursuant to case law in Florida. Commentary is added referencing rule 4-1.13 on organizational clients. Commentary is also modified to conform to substantive changes in the rule.

*Dissent:* The Real Property, Probate and Trust Law Section commented on the committee's interim report, stating that proposed commentary to rule 4-4.3 may conflict with *The Florida Bar v. Belleville*, 591 So.2d 170 (Fla. 1991), where this court disciplined an attorney who did not explain to the unrepresented opposing party the possible detrimental effects of the transaction and that the attorney represented only the interests of his own client. The bar disagrees that the commentary conflicts with *Belleville*, because the commentary specifically allows an attorney to inform an unrepresented person of the terms of a document and the lawyer's view of the meaning of the document as long as the lawyer has explained to the unrepresented person that the lawyer represents an adverse party, not the unrepresented person.

#### **Rule 4-4.4 Respect for Rights of Third Persons**

*Explanation/Reasons:* Because the issue arises so frequently with modern modes of communication, the ABA House of Delegates chose to address the issue

of the misdelivered document in ABA model rule 4.4, adding a provision setting forth the lawyer's responsibility under that circumstance. The provision states that the lawyer must promptly notify the sender. Additional commentary provides further guidance, but notes that any other responsibility and whether the document is privileged are matters outside the scope of the rules. The bar agrees that the issue arises with such frequency that guidance in the rules is desirable and recommends adoption of the new subdivision (b) and commentary to Florida rule 4-4.4.

*Dissent:* None.

## **4-5. Law Firms and Associations**

### **Rule 4-5.1 Responsibilities of a Partner or Supervisory Lawyer**

*Explanation/Reasons:* The responsibilities of a partner are extended to all lawyers in a firm with comparable managerial authority, and the list of affected lawyers is deleted as redundant, in subdivisions (a) and (c)(2). Commentary is added, addressing the differences between a lawyer with managerial authority comparable to a partner and a lawyer who has direct supervisory authority over another lawyer. Commentary is added on appropriate policies to ensure conformance with the Rules of Professional Conduct. Terminology in the commentary is changed to conform to changes in the substance of the rule. Commentary is added that individual responsibility for compliance with the Rules of Professional Conduct remains unchanged. The title is also changed, to reflect the changes to the rule.

*Dissent:* None.

### **Rule 4-5.3 Responsibilities Regarding Nonlawyer Assistants**

*Explanation/Reasons:* In subdivision (a), the term "authorized business entity" is changed to "law firm," because "law firm" is adequately defined elsewhere in the rules. As subdivision (a) is not contained in the ABA Model

Rules, this change is not made to conform to the ABA Model Rules, but is made to conform to terminology used elsewhere in the rules. In subdivisions (b)(1) and (b)(3)(B), responsibilities to assure nonlawyer compliance with the Rules of Professional Conduct are expanded to include every lawyer with managerial authority comparable to that of a partner. Commentary is amended to more accurately reflect a lawyer's responsibility under the rule. Commentary is added providing that supervisory lawyers must establish appropriate procedures to ensure compliance with the Rules of Professional Conduct.

*Dissent:* None.

#### **Rule 4-5.4 Professional Independence of a Lawyer**

*Explanation/Reasons:* The ABA House of Delegates approved changes to model rule 5.4 to allow fee sharing with nonprofit, pro bono legal services organizations that employ or recommend a lawyer in accordance with ABA Formal Ethics Opinion 93-374, which found such fee-sharing permissible. The reporter's notes indicate that the change to the rule was proposed because many states, although agreeing with the rationale for allowing such fee sharing, felt that it was prohibited by the plain language of the rule. The reporter's notes indicate that Ethics 2000 Commission believed that division of fees with a nonprofit, pro bono legal services organization offered less of a "threat to independent professional judgment" in making the recommendation. The bar agrees with this rationale and recommends the change to Florida's rule 4-5.4. The prohibition against nonlawyer officers in subdivision (e) is broadened to include nonlawyers holding positions similar to corporate officers. Commentary is added, referencing rule 4-1.8(f) regarding payment of legal fees by third parties.

*Dissent:* None.

### **Rule 4-5.6 Restrictions on Right to Practice**

*Explanation/Reasons:* The prohibition in subdivision (a) is expanded to include shareholder and other agreements. The term “partners or associates” is replaced with “lawyers” in the commentary to address the fact that lawyers practice together in ways other than a traditional partnership.

*Dissent:* None.

### **Rule 4-8 Maintaining the Integrity of the Profession**

#### **Rule 4-8.1 Bar Admission and Disciplinary Matters**

*Explanation/Reasons:* No changes to the substance of the rule are proposed. Commentary is added, explaining that the rule requires remedial measures in the event that an applicant or lawyer has made a misstatement in a bar application or bar disciplinary proceeding. References to applicable rules are added to the commentary.

*Dissent:* None.

#### **Rule 4-8.3 Reporting Professional Misconduct**

*Explanation/Reasons:* The ABA House of Delegates approved changes to the scienter requirement in the reporting rule, model rule 8.3, from “having knowledge” to “who knows” to conform to scienter requirements elsewhere in the rules. The bar recommends making those changes. While reviewing the ABA model rule, the committee noted that the model rule contains an exception to the reporting requirement for lawyers participating in a lawyers assistance program to encourage lawyers and judges to take steps to seek assistance. The bar agrees with the rationale and recommends conforming Florida’s rule 4-8.3 to include such an exception, but also recommends provisions that allows disclosure of information about lawyers who are participating in an assistance program as part of a disciplinary sanction.

*Dissent:* None.

## **Rule 4-8.4 Misconduct**

*Explanation/Reasons:* A provision providing that it is improper to achieve results by means that violate the Rules of Professional Conduct or law is added to subdivision (e). Commentary is added providing guidance on when a lawyer will be responsible for the misconduct of another.

*Dissent:* Florida Bar member Henry P. Trawick made comments in response to the committee's interim report, suggesting that the bar delete references to a lawyer violating or attempting to violate the Rules of Professional Conduct in rule 4-8.4(a), because he contends it is for the benefit of aggressive bar staff only. The bar disagrees and, because it is in the existing rules and is not part of any proposed rule change, believes it is not properly before the court as part of this rules package.

## **Chapter 5. Rules Regulating Trust Accounts**

### **5-1. Generally**

#### **Rule 5-1.1 Trust Accounts**

*Explanation/Reasons:* A lawyer's obligations when more than 1 person has an interest in trust funds the lawyer is holding is clarified, expanding a lawyer's responsibility to cover all situations where ownership of trust property is in dispute in subdivision (f). A provision is added to subdivision (f) providing that a lawyer must promptly disburse all undisputed funds. Commentary is clarified to clearly state that certain duties of the lawyer are mandatory. Commentary partially conforms to ABA model rule 1.15 commentary on safekeeping property, clarifying that a lawyer's ethical obligation to third parties depends on whether the lawyer has an independent legal duty to third parties. Commentary on the duty to refuse to surrender property to a client where the lawyer has a duty under law is changed from permissive to mandatory. ABA model rule language was clarified by the bar that it is only where the lawyer has a duty to a third party under applicable law that

the lawyer has an ethical duty to refuse to surrender the property to the client. Commentary is conformed to ABA model rule 1.15 commentary, clarifying that where a lawyer acts only as a fiduciary but not as a lawyer, the lawyer is subject to applicable law and not the rule.

*Dissent:* The Real Property, Probate and Trust Law Section recommended adoption of ABA model rule language in rule 5-1.1 that would allow an attorney's personal funds to be placed in a trust account together with client funds to cover financial institution administrative charges. A proposed rule change addressing that concern was already pending before the court at the time of the committee's study of the ABA Model Rules changes. The court has since adopted the changes to rule 5-1.1(a)(1) that would allow a lawyer to place personal funds in trust sufficient to cover bank charges in *Amendments to Rules Regulating The Florida Bar*, 29 Fla. L. Weekly S265 (No. SC03-705, 5/20/2004). The bar therefore believes that further amendment is unnecessary.

### **III. Comments/Dissent**

As noted above, the committee's interim and final reports were circulated to the bar's standing committees and sections, and both reports were publicized in the bar *News* and were posted on the bar's website. A number of comments were received on both the interim and final reports. The bar carefully considered all comments received, adopted some of the recommendations, and declined to adopt others. Comments of individuals or groups that remain in opposition to specific rules changes are discussed in conjunction with the summary of those rules changes above.

Appendix E includes a copy of the letter sent to the chairs of the bar's committees and sections requesting comments on the final report, summaries and copies of all comments submitted to the bar in reaction to official notices or other

published accounts of the proposed amendments in this petition, as well as the committee's recommendations to the board regarding those comments.

Additionally, the committee's recommendations in its final report regarding rules 4-1.14, 4-6.1, and 4-6.5 generated adverse comments. Those comments will be discussed in this subdivision of the petition, because ultimately the committee and board recommended no changes to these rules.

#### **Rule 4-1.14**

The committee originally recommended changes to rule 4-1.14 to conform to amendments to the ABA Model Rules approved by the ABA House of Delegates. The amendments included a change in terminology from "under a disability" to "diminished capacity." The rule allows an attorney to take protective action when the client cannot act in the client's own interest because of the disability, and the committee recommended adding the requirement that the client is at risk of substantial physical, financial, or other harm unless the action is taken. Additionally, changes to the rule would have specifically allowed an attorney to disclose confidential information in order to protect the client's interests, but only to the extent necessary to protect those interests. The committee recommended changes to the comment that reflected the changes to the rule, and addressed factors a lawyer should consider in determining diminished capacity. The comment also would have provided additional guidance on appropriate protective action for an attorney in dealing with a client with diminished capacity.

Several comments were received regarding proposed changes to rule 4-1.14. Some comments offered alternative proposals. The bar's Standing Committee on the Legal Needs of Children opposed some of the changes to rule 4-1.14, stating that they were unduly paternalistic towards clients and conflict with recommendations of the Legal Needs of Children Commission. The Standing Committee on the Legal Needs of Children recommended adoption of substitute

proposed rule changes that would add a provision that lawyers can take protective action only when there is risk of substantial physical, financial, or other harm and shall take the least restrictive action to prevent that harm, would add to the rule and comment a prohibition against disclosing confidential information unless specifically authorized, and would delete language in the commentary that a lawyer should take direction from an appointed legal representative for the client. The Standing Committee on the Legal Needs of Children also recommended additional changes to the commentary. The Public Interest Law Section and University of Miami School of Law's Center for Ethics & Public Service opposed changes to rule 4-1.14 as recommended by the committee and supported the alternative draft changes proposed by the Standing Committee on the Legal Needs of Children with one modification: the addition in the commentary of the language regarding disclosures necessary to take protective action. The Real Property, Probate and Trust Law Section Executive Committee made several specific suggestions for changes in the recommendations.

A number of comments instead recommended that no changes be made to rule 4-1.14 at this time. Florida's Children First! recommended against making specific changes to the rule at this time, particularly regarding taking protective action and disclosure of confidential information, because the changes do not offer clear guidance regarding an attorney's obligations, especially when the clients are children. Florida's Children First! recommended that the bar first develop standards of representation for lawyers representing children before the rule can be changed, which would obviate the need for taking protective action on behalf of children. Circuit Court Judge Raymond T. McNeal opposed changes to rule 4-1.14 without further study and input; Judge McNeal recommended adoption of a specific rule dealing with representation of children.

Sixth Circuit Public Defender Bob Dillinger made the general comment that rule 4-1.14 appears to be more appropriately addressing the civil, not criminal, law context, and the proposed rule had the potential to create unintended consequences resulting in complaints against criminal defense lawyers.

In light of all of the comments received, the committee recommended that the board make no changes to rule 4-1.14 without further study. Thus, no proposed changes to rule 4-1.14 appear in this petition.

#### **Rule 4-6.1**

The Public Interest Law Section, the University of Miami School of Law's Center for Ethics & Public Service, and Florida Bar member Carolyn Salisbury recommended adoption of proposed changes to rule 4-6.1 to conform to the ABA Model Rules that the committee recommended against adopting. They recommend adoption of ABA model rule language that "every lawyer has a professional responsibility to provide legal services to those unable to pay" and "law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this rule." They also recommended increasing the aspirational goal of pro bono hours from 20 to 50 hours per year and raising the suggested financial contribution from \$350 to \$875 per year. The bar recommends against adoption of the language "every lawyer has a professional responsibility to provide legal services to those unable to pay" as unnecessary, because the rule itself points out that lawyers have particular pro bono requirements. Regarding proposed changes to the aspirational goals of hours or financial contributions, the bar recommended against the changes, believing them to be outside the scope of the committee's charge and believing that they have been thoroughly discussed by prior committees of the bar. The bar therefore recommends no changes to this rule.

### **Rule 4-6.5**

The Public Interest Law Section, the University of Miami School of Law's Center for Ethics & Public Service, and Florida Bar member Carolyn Salisbury recommended adoption of ABA model rule 6.5 that would provide a limited exception from the conflict of interest rules for lawyers providing short term legal services to clients sponsored by a non-profit organization or court. The bar believes there should be no special exemption from conflicts rules for pro bono services provided on a short-term basis to indigent clients. No client should receive lesser protection merely because the client received services under a program sponsored by a non-profit organization or court. The board therefore proposes no change to this rule.

No other submissions generated any adverse commentary.

### **IV. Official Notice of Board Action**

Notice of action was published prior to approval by the board of each of these proposed revisions in accordance with rule 1-12.1(d), Rules Regulating The Florida Bar, with the exception of minor matters addressed by the executive committee and discussed further in subdivision V in this petition.

Advance notice of the filing of this petition was published in the October 15, 2004 issue of *The Florida Bar News* to comply with the 30-day preview requirements of rule 1-12.1(g), Rules Regulating The Florida Bar. A photocopy of that official notice is included with this petition, at Appendix A.

### **V. Corrections to the Amendments**

During the final preparation of this petition, 2 errors were detected within proposed changes to rules 4-1.8 and 5-1.1 as finally approved by the board, and as published in the *News* notice. New proposed subdivision (k) was inadvertently omitted from rule 4-1.8, and the word "only" was inadvertently omitted from

paragraph 7 in the comment to rule 5-1.1. The text of rule proposed new subdivision (k) of rule 4-1.8 appears below:

(k) While lawyers are associated in a firm, a prohibition in the foregoing subdivisions (a) through (i) that applies to any one of them shall apply to all of them.

The text of paragraph 7 of the comment to rule 5-1.11 appears as follows. The single error was the omission of the word only, which is recommended for addition in the comment.

The obligations of a lawyer under this chapter are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this rule.

This situation was addressed by the executive committee of The Florida Bar, which conducted a vote via electronic mail that was concluded on October 20, 2004. *See* October 19, 2004 memorandum from Elizabeth Clark Tarbert to Executive Committee (discussing the issue) at Appendix E. The amendments were unanimously endorsed for inclusion in this filing.

A formal corrected notice containing the foregoing was published in the November 1, 2004 issue of *The Florida Bar News*. A photocopy of that publication is included with this petition, at Appendix A. No commentary has been received by the bar in response to this additional notice. No comments were ever made on

these items in response to the original notices that preceded the first board reading or to the committee's interim and final reports, which correctly described the intended changes tendered now.

The Florida Bar submits that these additional revisions to rules 4-1.8 and 5-1.1 are nominal in effect, and that any variance from the procedures specified in rule 1-12.1 during the development of these proposals was minimal and has caused no harm. The bar therefore requests that these revised matters be accepted by the court, and that any necessary waiver pursuant to rule 1-12.1(i) be granted so that these amendments may be considered with the other proposals in this petition.

#### **VI. Other Pending Petitions**

The bar also notes that it has proposed amendments in one other matter presently before this court, seeking separate amendments to the Rules Regulating The Florida Bar regarding multijurisdictional practice: *Amendments to The Rules Regulating The Florida Bar*, Case No. SC04-135. That petition was filed by the bar on February 9, 2004, in response to recommendations of its Special Commission on the Multijurisdictional Practice of Law. The proposals within this petition are unrelated to that pending action, do not address the same rules, and may be considered independent of it.

#### **VII. Full Text of Amendments**

The full text of the proposed amendments in this petition is included in Appendix B to this petition, followed by a separate 2-column presentation within Appendix C, which includes extracted text of affected rules, proposed amendments, and an abbreviated recitation of the reasons for such changes.

#### **VIII. Official Notice of Filing**

The bar has received one comment in response to its official notice of this filing and the amendments published in this petition. One Florida Bar member filed a comment on November 29, 2004, after the official notice of October 15,

2004. That comment, concerning proposed changes to Rule 4-1.8(f), is discussed in greater detail in subdivision II above.

Absent any subsequent comments or objections of significance that might necessitate further pleadings or appearances with respect to the proposed rules changes in this petition, the bar does not presently seek oral argument of the matters within this petition.

WHEREFORE, The Florida Bar requests that this court enter an order amending the Rules Regulating The Florida Bar in the manner sought in this petition.

Respectfully submitted,

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December 1, 2004

**CERTIFICATE OF TYPE SIZE AND STYLE**

THE FLORIDA BAR HEREBY CERTIFIES that this petition is typed in 14 point Times New Roman Regular type.