

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE RULES
REGULATING THE FLORIDA BAR -
RULES 4-7.1 AND 4-7.2

CASE NO. SC10-437

THE FLORIDA BAR'S COMMENTS AND RESPONSE TO COMMENTS

The Florida Bar (the bar), through its undersigned counsel, respectfully provides the following comments in response to this Court's sua sponte motion to amend rules 4-7.1 and 4-7.2, of the Rules Regulating the Florida Bar.

This Court, on its own motion, directed that an official notice be published in the bar *News* of this Court's intent to adopt amendments to rules 4-7.1 and 4-7.2, R. Regulating Fla. Bar, addressing the use of the title "judge" by former or retired judges. A copy of the official notice was published in the April 15, 2010 issue of the Florida Bar *News* and is attached as Appendix A. This Court invited the bar and any other interested person to file comments on the proposed amendments with this Court on or before May 17, 2010.

The amendments to rules 4-7.1 and 4-7.2, R. Regulating Fla. Bar, are consistent with the position taken by the Florida Bar's Standing Committee on Advertising in Florida Advertising Opinion A-09-1. The bar's report to this Court is attached as Appendix B. The bar has no further comment or response to comments filed by others.

The bar does not seek oral argument regarding these amendments, unless this Court orders it.

Respectfully submitted,



Elizabeth Clark Tarbert

Ethics Counsel

Florida Bar Number 861294

John F. Harkness, Jr.
Executive Director
Florida Bar Number 123390

Jesse H. Diner
President
Florida Bar Number 161472

Mayanne Downs
President-elect
Florida Bar Number 754900

Scott G. Hawkins
President-elect Designate
Florida Bar Number 460117

Mary Ellen Bateman
Director, Legal Division DEUP
Florida Bar Number 324698

The Florida Bar
661 East Jefferson Street
Tallahassee, Florida 32399-2300
850 / 561-5600

CERTIFICATE OF SERVICE


I certify that a true and correct copy of the foregoing was mailed to the following this 17th day of May, 2010 to:

The Honorable John B. Bowman
Broward County Courthouse
201 S.E. 6th Street
Fort Lauderdale, Florida 33301

Mr. Patrick G. Emmanuel
P.O. Box 1271
Pensacola, Florida 32591


Mr. Arthur J. England, Jr.
Greenberg Traurig, P.A.
1221 Brickell Avenue
Miami, Florida 33131

Mr. Charles T. Wells
Gary Robinson, P.A.
301 E. Pine Street, Suite 1400
Orlando, Florida 32801


Elizabeth Clark Tarbert
Ethics Counsel
Florida Bar Number 861294

CERTIFICATE OF TYPE SIZE AND STYLE

I certify that this petition is typed in 14 point Times New Roman Regular type.


Elizabeth Clark Tarbert
Ethics Counsel
Florida Bar Number 861294

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April 15, 2010

Amendments restricting how former judges now practicing law may use the title 'judge'

The Florida Supreme Court, on its own motion, proposes amendments to Rule 4-7.1(General) and Rule 4-7.2 (Communications Concerning a Lawyer's Services) of the Rules Regulating the Florida Bar. These amendments are intended to preclude former or retired judges, currently engaged in the practice of law, from using the title "Judge" associated with their practice.

The court sent a letter to The Florida Bar requesting that it study whether the Rules Regulating the Florida Bar should be amended to preclude former or retired judges currently practicing law from using the title "Judge" in their letterhead, pleadings, advertising, business cards, and other materials related to their practice.¹ The Bar has recommended no action. Thus, the court proposes its own amendments to the Bar Rules.

As set forth below, the court proposes amendments to rule 4-7.2(c)(1) to add new subdivision (K), which states that a communication will be considered "false, misleading, or deceptive" if it uses the title "Judge," with or without modifiers, in reference to a former or retired judge currently engaged in the practice of law. This prohibition includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards. The court also proposes amendments to rule 4-7.1(g) in order to reflect that the rule prohibiting use of the title "Judge" applies to all communications made by a lawyer, whether or not subchapter 4-7 applies to the communication.

The court invites The Florida Bar, and all other interested persons, to comment on the proposed amendments, which are reproduced in full below, as well as online at www.floridasupremecourt.org/decisions/proposed.shtml. An original and nine paper copies of all comments must be filed with the court on or before May 17, with a certificate of service verifying that a copy has been served on John F. Harkness, Jr., Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee 32399-2300, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Florida Bar has until June 7 to file a response to any comments filed with the court. Electronic copies of all comments also must be filed in accordance with the court's administrative order *In re Mandatory Submission of Electronic Copies of Documents*, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004).

¹The court also separately directed the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy to study the issue as it relates to former judges acting as mediators. In *In re: Amendments to the Florida Rules for Certified and Court-Appointed*

Mediators, No. SC09-1384 (Fla. report filed July 29, 2009), the committee has proposed revisions to the Florida Rules for Certified and Court-Appointed Mediators addressing this practice.

IN THE SUPREME COURT OF FLORIDA

In re: Amendments to the Rules Regulating the Florida Bar – Rules 4-7.1 AND 4-7.2,
CASE NO. SC10-437

4-7.1. General

(a) – (f) [No Change]

(g) Application of General Misconduct Rule and Rule Governing Use of the Title “Judge.” The general rule prohibiting a lawyer from engaging in conduct involving dishonesty, deceit, or misrepresentation, and the rule prohibiting former judges from using the title “Judge” associated with their practice of law, applies to all communications by a lawyer, whether or not subchapter 4-7 applies to that communication.

4-7.2. Communications Concerning a Lawyer’s Services

The following shall apply to any communication conveying information about a lawyer’s or a law firm’s services except as provided in subdivisions (e) and (f) of rule 4-7.1:

(a) – (b) [No Change]

(c) Prohibitions and General Regulations Governing Content of Advertisements and Unsolicited Written Communications.

(1) *Statements About Legal Services.* A lawyer shall not make or permit to be made a false, misleading, or deceptive communication about the lawyer or the lawyer’s services. A communication violates this rule if it:

(A) – (H) [No Change]

(I) compares the lawyer’s services with other lawyers’ services, unless the comparison can be factually substantiated; ~~or~~

(J) contains a testimonial; ~~or~~

(K) uses the title “Judge,” with or without modifiers, in reference to a former or retired judge currently engaged in the practice of law. This includes, but is not limited to, use of the title in advertisements and written communications, computer-accessed communications, letterhead, and business cards. However, an accurate representation of one’s judicial experience is permitted in reference to background and experience in bios and resumes.

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The Florida Bar

JOHN F. HARKNESS, JR.
EXECUTIVE DIRECTOR

651 EAST JEFFERSON STREET
TALLAHASSEE, FLORIDA 32399-2300

850/561-5600
WWW.FLORIDABAR.ORG

July 31, 2009

Mr. Thomas D. Hall
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399-1925

Re: Use of the title “judge” by retired judges practicing law

Dear Mr. Hall:

The Florida Bar (the bar) received your February 10, 2009 request regarding the use of the title “judge” by retired judges practicing law. You requested that the bar either file a request to amend the Rules Regulating The Florida Bar to address this conduct in its next master rules petition or report to the Court the bar’s reasons for not recommending an amendment to the Rules Regulating The Florida Bar by August 3, 2009. The bar does not intend to seek an amendment to the Rules Regulating The Florida Bar regarding this issue at this time. This letter is intended to serve as the report you requested in lieu of a proposed rule amendment. Enclosed for your convenience are 9 copies of this report.

The Florida Bar Board of Governors (the board) referred your request to 2 of the bar’s standing committees: the Professional Ethics Committee and the Standing Committee on Advertising. The board requested that the Professional Ethics Committee review existing ethics opinions to determine if they should be withdrawn. The board simultaneously requested that the Standing Committee on Advertising determine whether that committee should issue a formal advisory opinion on the issue. Each committee was provided with an entire copy of your request, including all backup materials, was informed of the court’s request for either a rule change or a report back to the court, and reviewed the issue at its next regularly scheduled meeting. Official notice of the 2 committee’s intent to consider these issues was published in the April 1, 2009 Florida Bar *News* and is attached in Appendix A.

Mr. Thomas D. Hall

Report on use of the title "judge" by retired judges practicing law

July 31, 2009

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At its May 12, 2009 meeting, the Standing Committee on Advertising discussed the issue extensively. The committee determined that existing rules adequately address the issue, but that a formal opinion of the committee would be appropriate to provide bar members with the committee's guidance regarding use of the title "judge" by former judges actively engaged in the practice of law. The committee therefore directed staff to draft a proposed advisory opinion that determined that use of the term "judge" as a title by a former judge actively engaged in the practice of law is misleading and may state or imply an ability to exert improper influence, in violation of the Rules Regulating The Florida Bar. However, the committee also directed that the opinion indicate that truthful and accurate statements about former judicial service in advertisements as a qualification of a former judge actively engaged in the practice of law is permissible.

The Standing Committee on Advertising received and considered comments filed by three bar members. Mr. Joseph W. Little filed comments that he supports a complete prohibition against former judges or justices referring to themselves as judges, justices or former judges or justices in their advertisements and before a court or jury. Mr. Charles T. Wells commented that former judges should be permitted to communicate the fact of the prior judicial position as information relevant to consumers of legal services, that prohibiting dissemination of information regarding former judicial service is particularly problematic in Florida because of mandatory retirement, and that public policy supports encouraging lawyers to become judges while prohibiting dissemination of information about judicial service deters lawyers from becoming judges. Mr. Arthur England filed comments in support of the comments provided by Mr. Charles T. Wells. Copies of the comments are attached in Appendix B.

At its June 25, 2009 meeting, the Standing Committee on Advertising adopted Proposed Advisory Opinion A-09-1, which is attached as Appendix C. Proposed Advisory Opinion A-09-1 was published in the July 15, 2009 *Florida Bar News* for comment by Florida Bar members in accordance with the Procedure 4(c), Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation. A copy of this official notice is attached in Appendix A. Copies of the opinion were also provided to the Chair of the Conference of Circuit Court Judges and to the President of the Conference of County Court Judges as groups that might have an interest in this issue. If comments are timely filed in response to the July 15, 2009 official notice, the committee must reconsider Proposed Advisory Opinion A-09-1 at its September 10, 2009 meeting. If those bar

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members who file comments disagree with the committee's ultimate action, they can then request Board of Governors review of the proposed advisory opinion. If no comments are filed, the opinion becomes final under the Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation.

Also in response to the Court's request, the Professional Ethics Committee reviewed Florida Ethics Opinions 73-27, 73-31, 75-34 and 87-9 at its June 26, 2009 meeting. These opinions conclude that use of the title "judge" by former judges who are actively practicing law is improper for a number of reasons. After discussion by the committee, which included statements in support of these existing opinions, no motion was made to amend or withdraw the opinions. The opinions therefore remain current opinions to provide guidance to Florida Bar members on this issue. Copies of the opinions are attached as Appendix D.

During this process, the bar has also remained in communication with the Alternative Dispute Resolution Rules and Policy Committee through its staff, exchanging information on the actions of these committees on this issue. The rule amendments drafted by the Alternative Dispute Resolution Rules and Policy Committee were provided to the Standing Committee on Advertising for its consideration while discussing this issue. Neither Proposed Advisory Opinion A-09-1 nor existing Florida Ethics Opinions 73-27, 73-31, 75-34 and 87-9 appear to conflict with the amendments approved by the Alternative Dispute Resolution Rules and Policy Committee.

The bar believes that existing rules adequately address the use of the title "judge" by a former judge who is actively engaged in the practice of law, and that the guidance provided by Florida Ethics Opinions 73-27, 73-31, 75-34 and 87-9 and Proposed Advisory Opinion A-09-1 sufficiently informs Florida Bar members of the bar's position regarding these issues. The bar therefore does not intend to seek an amendment to the Rules Regulating The Florida Bar.

If the Supreme Court of Florida desires further action on the part of the bar, or would prefer that this report be made in a more formal fashion, please let me know as soon as possible and the bar will respond accordingly.

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Thank you for the opportunity to provide this service to the Court. If you have any questions, please do not hesitate to contact me.

Sincerely,



Elizabeth Clark Tarbert
Ethics Counsel

cc: Mr. Jesse H. Diner, President
Mr. John G. White, III, Immediate Past President
Mr. David R. Heffernan, Chair, Professional Ethics Committee
Mr. Adam P. Schwartz, Chair, Standing Committee on Advertising
Mr. Thomas H. Bateman III, Acting Chair, Alternative Dispute Resolution
Rules and Policy Committee
The Honorable Burton C. Conner, Chair, Public Awareness and Advertising
Subcommittee
Mr. J. Calvin Goodlett, Office of the State Court Administrator
Mr. John F. Harkness, Jr.
Ms. Mary Ellen Bateman, DEUP Division Director

APPENDIX A

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April 1, 2009

Notice on advisory ethics and ad opinions

Advisory Ethics Opinions to be Withdrawn by Professional Ethics Committee

The Professional Ethics Committee will consider withdrawing or modifying Florida Ethics Opinions 73-9, 73-14, 73-27, 73-31, 73-37, 74-10, 75-34, 78-3, and 87-9 at its meeting to be held in conjunction with the bar's Annual Meeting at 2:00 p.m. on June 26, 2009 at the Orlando World Center Marriott. Opinion 73-9 states that a full time assistant state attorney may, in his spare time and with the consent of his superiors, perform legal research and prepare legal memoranda for private law firms, solely in civil matters, even if those firms may on occasion represent clients in criminal matters that involve the state attorney's office. Opinion 73-14 states that a lawyer may ethically sue his client for recovery of a fee only when necessary to prevent "fraud or gross imposition by the client" and that the question of what constitutes "fraud or gross imposition" will be answered only as each fact situation arises. Opinion 73-37 states that it is misleading and, therefore, improper for an attorney to advertise himself as a "notario." Opinion 74-10 states that lawyers may send particular correspondence to other lawyers. Opinions 73-27, 73-31, 75-34, and 87-9 involve the issue of former judges using the title "judge" while practicing law. Opinion 78-3 addresses Rule 4-3.6, the trial publicity rule and was written before substantial changes were made to Rule 4-3.6. Pursuant to Procedures 4(c) and (d) of The Florida Bar Procedures for Ruling on Questions of Ethics, comments from Florida Bar members are solicited on the withdrawal of the opinions.

Advertising Referral from the Board of Governors

The Standing Committee on Advertising will consider adopting a proposed advisory opinion, numbered 09-1, based on a referral from The Florida Bar Board of Governors at a meeting to be held via conference call on May 12, 2009. The proposed advisory opinion will address the use of the title "judge" by former judges engaged in the active practice of law, including its use in advertisements, on letterhead and business cards. There are no drafts for the committee's consideration at this time. Pursuant to Procedures 4(c) and (d) of The Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation, comments from Florida Bar members are solicited on the issue presented. Comments must contain the draft proposed advisory opinion number (09-1), must clearly state the issues for the committee to consider, and may include a proposed conclusion.

Comments on the possible withdrawal of the ethics opinions and on the proposed advisory advertising opinion should be submitted to Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-2300, and must be postmarked no later than 30 days from the date of this publication.

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July 15, 2009

Notice

Advisory Ethics Opinion to be Modified or Withdrawn by Professional Ethics Committee

The Professional Ethics Committee will consider modifying Florida Ethics Opinion 74-10 at its meeting at 9:30 a.m. on Friday, September 11, 2009 at the Tampa Airport Marriott held in conjunction with the bar's General Meeting. The opinion states that there is no impropriety in sending a letter under a firm's letterhead in the following situations: to other attorneys praising a counseling service the firm does not represent and has no interest in; recommending a candidate for public office if the letter is sent only to those having a legitimate interest in the attorney's personal view; soliciting charitable contributions from fellow attorneys; or to fellow attorneys recommending an attorney in a particular specialty, so long as the attorney has a personal relationship with those to whom the letter is sent.

Advisory Ethics Opinion Withdrawn by the Professional Ethics Committee

The Professional Ethics Committee withdrew Florida Ethics Opinions 73-9, 73-14, and 78-3 at its meeting on Friday, June 26, 2009. Opinion 73-9 stated that a full-time assistant state attorney may, in his spare time and with the consent of his superiors, perform legal research and prepare legal memoranda for private law firms, solely in civil matters, even if those firms may on occasion represent clients in criminal matters that involve the state attorney's office. Opinion 73-14 stated that a lawyer may ethically sue his client for recovery of a fee only when necessary to prevent "fraud or gross imposition by the client" and that the question of what constitutes "fraud or gross imposition" will be answered only as each fact situation arises. Opinion 78-3 addressed Rule 4-3.6, the trial publicity rule and was written before substantial changes were made to Rule 4-3.6 after the case of *Gentle v. State Bar of Nevada*, 501 U.S. 1047 (1991).

Proposed Advisory Advertising Opinion Adopted by the Standing Committee on Advertising

The Standing Committee on Advertising has issued Proposed Advisory Opinion A-09-1 reprinted below. Pursuant to Rule 4(c) and (d) of The Florida Bar Procedures for Issuing Advisory Opinions Relating to Lawyer Advertising or Solicitation, comments from Florida Bar members are solicited on the proposed opinion. The committee will consider any comments received at a meeting to be held at 2 p.m. on Thursday, September 10, 2009, at the Tampa Airport Marriott in conjunction with the bar's General Meeting. Comments must contain the proposed advisory opinion number and clearly state the issues for the committee to consider. A written argument may be included explaining why the Florida Bar member believes the committee's opinion is either correct or incorrect and may contain citations to relevant

authorities. Comments should be submitted to Elizabeth Clark Tarbert, Ethics Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee 32399-2300, and must be postmarked no later than 30 days from the date of this publication.

Professional Ethics Of The Florida Bar Proposed Advisory Advertising Opinion A-09-1 (June 25, 2009)

The Supreme Court of Florida has asked The Florida Bar to review the issue of use of the title "Judge" by retired judges in the practice of law. It has come to the Court's attention that some attorneys who are retired judges and who are engaged in the active practice of law use the term "Judge Jane Doe (Ret.);" or otherwise identify themselves as "Judge (Ret)" on letterhead, business cards, and advertisements.

Although there are Florida ethics opinions written on the issue of use of the term "judge" by a former judge who is actively engaged in the practice of law, those opinions were written before the current lawyer advertising rules and before the creation of the Standing Committee on Advertising. For example, Florida Ethics Opinion 73-27 concludes that a lawyer who is a former municipal judge may not permit the lawyer's telephone answering service to answer "Judge X's office." Similarly, Florida Ethics Opinion 73-31 determined that a former judge who is actively practicing law may not use a nameplate using "Judge X" on the lawyer's door or desk. Florida Ethics Opinion 75-34 states that a former judge who practices law and serves as a corporate officer may not use "Judge X" on corporate stationary or let corporate employees refer to the lawyer as "Judge" when communicating with third persons.

The American Bar Association has taken a similar position, indicating that former judges should not use the titles of either "Judge" or "The Honorable" while engaged in the practice of law, including answering the telephone "Judge X's Office," having "Judge X" on a nameplate, or using "Judge X." See ABA Formal Opinion 95-391 (1995). The ABA opinion cites concerns that such references are misleading, and may "exaggerate the influence the lawyer may be able to wield."

The Standing Committee on Advertising agrees with the Florida and ABA ethics opinions. Florida Bar rules prohibit lawyers from making false, misleading, or deceptive communications about their services, whether they are misleading by omission or commission. Rule 4-7.2(c) (1), Rules Regulating The Florida Bar. Additionally, a lawyer may not "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law." Rule 4-8.4(e), Rules Regulating The Florida Bar. The Committee is of the opinion that lawyers should not use the term "Judge" preceding their names, regardless of whether a modifier such as "former" or "retired" is used, when they are actively engaged in the practice of law after leaving the bench. Such a use is misleading, as the person is no longer a judge, and it may lead the public to believe that the person has an ability to exert improper influence in the judicial system. The Committee therefore finds it improper to use the term as a title, or to use the term in any way that states or implies that the former judge or justice has special influence. On the other hand, the Committee believes that lawyers may properly provide accurate and truthful information to the public about their prior judicial experience. For example, a former judge may include in advertisements an accurate and truthful statement that he or she is a "retired circuit judge,"

“former county judge” or “former general magistrate.”

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[Revised: 07-31-2009]

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APPENDIX B

COMMENTS OF BAR MEMBERS

JOSEPH W. LITTLE
LAWYER
3731 N. W. 13th Place
Gainesville, Fl. 32605

352-372-5955 (Home)
352-273-0660
Littlegnv@gmail.com

April 22, 2009

Rene Gorman, Chair and Members
c/o Elizabeth Tarbert, Esq.
Florida Bar Advertising Committee
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32399-3858

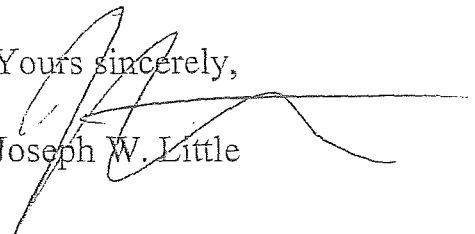
Re: Advertisement by Judges

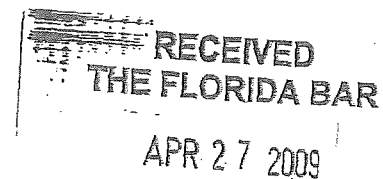
Dear Chair Gorman and Members:

I strongly support the position that former Florida judges or justices of any sort be prohibited from referring to themselves as judges, justices or former judges or justices in their advertisements.

Although I am aware that your committee has limited jurisdiction, I would extend this prohibition to any references to a lawyer, whether as an advocate or as an "expert witness," before a trial judge and especially before a jury, as a former judge or former justice. I have been involved in several cases in which former justices appeared to me to be trading on a perception of prestige from having occupied the judicial office. In my opinion, that perception should not be for sale.

Yours sincerely,


Joseph W. Little



GRAY | ROBINSON
ATTORNEYS AT LAW

SUITE 600
301 SOUTH BRONOUGH ST. (32301)
POST OFFICE BOX 11189
TALLAHASSEE, FL 32302-3189
TEL 850-222-7717
TEL 850-577-9090
FAX 850-222-3494
FAX 850-577-3311
gray-robinson.com

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April 29, 2009

Ms. Rene Gorman, Chair
Standing Committee on Advertising
c/o Ms. Elizabeth Tarbert
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Dear Ms. Gorman:

I would appreciate the comments contained in this letter considered by the Standing Committee on Advertising in the Committee's looking at issuing an advisory opinion on former judges using the title of judge in advertising, letterheads, and business cards. It was reported in the April 15th edition of *The Florida Bar News* that the Committee will meet on May 12, 2009.

Being now a "former judge" who has returned to private practice, I have an obvious interest in this issue and a concern about it. First, I agree with what I conclude is the underlying premise of the Ethic Opinion 87-9 and the ABA Commission on Ethics and Professional Responsibility Opinion 95-391 that a former judge should not communicate the fact of his/her having been a judge in a way that implies that fact gives to the former judge an advantage in a particular case. I agree that there should not be a reference to having been a former judge in pleadings or other papers filed in specific cases.

However, I do not agree with the other restrictions which the *The Florida Bar News* article indicated were in the referenced opinions if the opinions restrict a former judge from making known in communications "related to the practice of law," other than pleadings or papers in specific cases, accurate factual information that he/she has served as a judge. This information is clearly relevant to a potential client's selection of a lawyer in knowing what experience the lawyer has which would be beneficial to the client in the representation of the client. I believe that the dissemination of truthful factual relevant information about a lawyer's judicial service in "advertising, letterheads and business cards," websites or other similar dissemination is constitutionally protected speech as set forth in case law by the United States Supreme Court and respected by the Florida Supreme Court.

APR 30 2009

Rene Gorman, Chair
Standing Committee on Advertising
The Florida Bar
April 29, 2009
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I ask that you consider the following three points. First, the basic fundamental considerations in lawyer dissemination of "Information about Legal Services," Rule 4-7, Rules of Professional Conduct, are whether the information is truthful and accurate, and whether it can reasonably be concluded that the information is relevant to decisions by the consumer of legal services. The case law supporting this point begins with *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), *In re RJM*, 455 U.S. 191 (1982), and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985) and *Peel v. Attorney Registration & Disciplinary Commission of Illinois*, 496 U.S. 91 (1990). In *Peel*, the Court concluded that the attorney could not be prohibited from holding himself out as a civil trial specialist certified by the NBTA. See, *Florida Bar v. Pape*, 918 So. 2d 240, 249 (Fla. 2005).

Indeed, our Rules of Professional Conduct in Rule 4.7.2(c)(6) recognizes that a lawyer who complies with the Florida certification plan may inform the public of that fact. Clearly, a lawyer's service as a judge is similarly informative about the lawyer's background and experience which is relevant to the consumers of legal services. The fact of that service is a true and verifiable fact, which can be valuable in evaluating the lawyer.

Second, a restriction on the dissemination of information that a lawyer has served as a judge has a particular problem in Florida where we have a mandatory age retirement. My circumstance is an example. I have returned to private practice after almost 15 years as a member of the Supreme Court because I reached the mandatory retirement age. I believe it would be unfair to me, and others similarly situated, who have retired because of the State's age requirement to not permit me to disseminate in relation to my new law practice the factual information that I served as a judge for almost 15 years. This is factual information which potential clients are entitled to have.

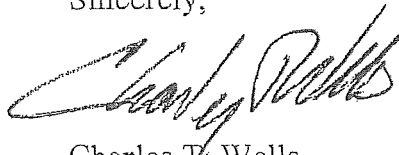
Third, such a restriction would be bad policy for the Bar and the public. Lawyers in mid-career should be encouraged to contribute to their communities and the State through the public service of serving as a judge. It is plain, for many lawyers who would be excellent judges, that judicial service is a substantial financial sacrifice and a sacrifice of valuable privacy. But, when good lawyers in their prime years are willing to make these sacrifices, the Courts, the Bar and the public are greatly benefited by their service. I believe that restrictions on lawyers who are willing to serve as judges from being able to inform the public of their judicial experience when the lawyer returns to private practice

Rene Gorman, Chair
Standing Committee of Advertising
The Florida Bar
April 29, 2009
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will be yet another deterrent to good lawyers being willing to contribute this public service.

Thank you for considering these thoughts.

Sincerely,



Charles T. Wells

CTW:eeh

cc: Halley B. Lewis, Esq.
Mr. Ray Casas
Natalie A. Jackson, Esq.
Gary S. Lesser, Esq.
Adam P. Schwartz, Esq.
Mr. Michael E. Seminario
Charles C. Ebbets, Esq., Board of Governors Liaison

APR 30 2009

Greenberg Traurig

Arthur J. England, Jr.*
Direct Dial: (305) 579-0605
Direct Facsimile: (305) 961-5605
E-Mail: engianda@gtlaw.com

*Board Certified in Appellate Practice

May 6, 2009

VIA OVERNIGHT DELIVERY

Ms. Rene Gorman, Chair
Standing Committee on Advertising
c/o Ms. Elizabeth Tarbert
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Re-consideration of policies regarding the identification of former judges in advertising, letterheads, and business cards

Dear Ms. Gorman:

I understand that your committee will meet by conference call on May 12 to re-examine the issue of whether former judges may use that fact in advertising, letterheads, and business cards. I discussed this issue with Charley Wells after seeing the article in the April 15 issue of *The Florida Bar News*, and he has sent me a copy of his April 30 letter to you on this subject.

I write to echo Charley's sentiments. I have been a "former Justice" and "former Chief Justice" for more than 27 years. I have not used either of those appellations in advertising, letterheads, or business cards, but I can assure you that virtually everyone with whom I have come in contact in my law practice knows of my former service on the Court. When I am contacted by prospective new clients even today, they invariably mention that fact to begin the conversation, and tell me it was important in their decision to contact me. When I have telephone conferences or meetings with clients, I am almost always referred to as "Justice England" even though I ask that they call me "Arthur." In other words, the man may leave the title, but the title does not leave the man.

In my experience and opinion, recognition of the fact that I was the Chief Justice of the Florida Supreme Court when I have been contacted for trial support, or to handle an appeal in a district court, the Florida Supreme Court, or a federal circuit court of appeals, is not attributable to an unjustified expectation of results. Clients tell me that I bring a valuable insight as to how to best present a compelling argument to an appellate tribunal, given my experience on the other side of the bench. While the manner in which an appellate case is processed within the court is often available from a published manual of internal procedures, that generic information is no substitute for insights into the appellate process which come from having been an insider on an appellate court. It is no different, in my opinion, than advertising, or including on letterheads,

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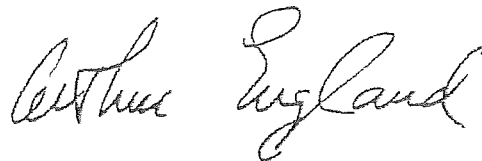
Ms. Rene Gorman
May 6, 2009
Page 2

and business cards, that an associate in a law firm was a former appellate court clerk, or that a litigator clerked for a state of federal trial court judge.

Charley makes the point in his letter that the Rules of Professional Conduct condone informing the public of certification in specialty areas of the law. Since the beginning of the certification in Appellate Law (at the outset of which, incidentally, I served as chairman of the initial committee that prescribed the requirements for appellate law certification), I have stated on my letterhead and business cards that I am "Board Certified in Appellate Law." The qualifications for that certification require significant CLE credits in appellate practice, many hours of which by necessity are spent in the personal company of appellate court judges. Certification, as you know, requires substantial, ongoing practice before the appellate courts of Florida. In fact, I just sent in my application for re-certification, and had to list at least 15 appellate cases in the last five years in which I did the oral argument and/or prepared the brief. The level of continued training and experience required for appellate law certification certainly conveys to the public an ongoing familiarity with Florida's appellate courts, and some personal acquaintance with the appellate judges themselves. If appellate certification does not imply an unjustified expectation of results, then neither does the bare fact of service as a former jurist on an appellate court.

I appreciate this opportunity to share my views with you and the other Committee members, and I urge the Committee to remove any prohibition to the identification of a former judgeship on letterheads and business cards, and in advertisements.

Sincerely,



AJE/ct

cc: Halley B. Lewis, Esq.
Mr. Ray Casas
Natalie A. Jackson, Esq.
Gary S. Lesser, Esq.
Adam P. Schwartz, Esq.
Mr. Michael E. Seminario
Charles C. Ebbetts, Esq., Board of Governors Liaison
Charles T. Wells, Esq.

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APPENDIX C

PROPOSED ADVISORY OPINION A-09-1

1 **PROFESSIONAL ETHICS OF THE FLORIDA BAR**
2 **PROPOSED ADVISORY ADVERTISING OPINION A-09-1**
3 **(June 25, 2009)**
4

5 The Supreme Court of Florida has asked The Florida Bar to review the
6 issue of use of the title “Judge” by retired judges in the practice of law. It has
7 come to the Court’s attention that some attorneys who are retired judges and who
8 are engaged in the active practice of law use the term “Judge Jane Doe (Ret.)” or
9 otherwise identify themselves as “Judge (Ret)” on letterhead, business cards, and
10 advertisements.

11 Although there are Florida ethics opinions written on the issue of use of
12 the term “judge” by a former judge who is actively engaged in the practice of law,
13 those opinions were written before the current lawyer advertising rules and before
14 the creation of the Standing Committee on Advertising. For example, Florida
15 Ethics Opinion 73-27 concludes that a lawyer who is a former municipal judge
16 may not permit the lawyer’s telephone answering service to answer “Judge X’s
17 office.” Similarly, Florida Ethics Opinion 73-31 determined that a former judge
18 who is actively practicing law may not use a nameplate using “Judge X” on the
19 lawyer’s door or desk. Florida Ethics Opinion 75-34 states that a former judge
20 who practices law and serves as a corporate officer may not use “Judge X” on
21 corporate stationary or let corporate employees refer to the lawyer as “Judge”
22 when communicating with third persons.

23 The American Bar Association has taken a similar position, indicating that
24 former judges should not use the titles of either “Judge” or “The Honorable”
25 while engaged in the practice of law, including answering the telephone “Judge
26 X’s Office,” having “Judge X” on a nameplate, or using “Judge X.” See ABA
27 Formal Opinion 95-391 (1995). The ABA opinion cites concerns that such
28 references are misleading, and may “exaggerate the influence the lawyer may be
29 able to wield.”

30 The Standing Committee on Advertising agrees with the Florida and ABA
31 ethics opinions. Florida Bar rules prohibit lawyers from making false,

32 misleading, or deceptive communications about their services, whether they are
33 misleading by omission or commission. Rule 4-7.2(c)(1), Rules Regulating The
34 Florida Bar. Additionally, a lawyer may not “state or imply an ability to influence
35 improperly a government agency or official or to achieve results by means that
36 violate the Rules of Professional Conduct or other law.” Rule 4-8.4(e), Rules
37 Regulating The Florida Bar. The Committee is of the opinion that lawyers should
38 not use the term “Judge” preceding their names, regardless of whether a modifier
39 such as “former” or “retired” is used, when they are actively engaged in the
40 practice of law after leaving the bench. Such a use is misleading, as the person is
41 no longer a judge, and it may lead the public to believe that the person has an
42 ability to exert improper influence in the judicial system. The Committee
43 therefore finds it improper to use the term as a title, or to use the term in any way
44 that states or implies that the former judge or justice has special influence. On the
45 other hand, the Committee believes that lawyers may properly provide accurate
46 and truthful information to the public about their prior judicial experience. For
47 example, a former judge may include in advertisements an accurate and truthful
48 statement that he or she is a “retired circuit judge,” “former county judge” or
49 “former general magistrate.”

APPENDIX D

FLORIDA ETHICS OPINIONS

PROFESSIONAL ETHICS OF THE FLORIDA BAR

**OPINION 73-27
November 14, 1973**

A former municipal judge may not permit his telephone answering service to answer his phone "Judge X's office."

Note: Judicial conduct is governed by the Code of Judicial Conduct. The Judicial Ethics Committee issues opinions interpreting this Code.

Opinion: 70-63

Vice Chairman Daniels stated the opinion of the committee:

From 1957 through 1965, the inquiring lawyer was a municipal judge and has become widely known as Judge X in the community where he now practices. His telephone answering service answers his phone, "Judge X's office." Inquiry is made as to whether such answering service practice is proper. The question must be answered in the negative. Former Opinion 70-63 [since withdrawn] is squarely in point, where we there said:

A former judicial officer should never personally use the courtesy title "judge" in his law practice. He should instruct his office staff, partners and associates to refrain from affirmatively placing third persons, lawyers or otherwise, in an embarrassing posture of dealing with "Judge

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 73-31

October 22, 1973

A former judge now in active practice as an attorney may not use a nameplate "Judge . . ." on his door or on his desk. However, he may display documents and memorabilia of his former office so long as their display or use does not suggest he is presently a judge or should be addressed by that title. If he is addressed as "Judge . . ." by clients, friends, and acquaintances, he does not have to forbid them to do so.

Note: Judicial conduct is governed by the Code of Judicial Conduct. The Judicial Ethics Committee issues opinions interpreting this Code.

Opinions: 70-63, 73-27; ABA Informal 1006

Vice Chairman Sullivan stated the opinion of the committee:

A member of The Florida Bar now in active practice served as a part-time municipal judge from 1967 to 1971. During that time, he was awarded certificates of merit from various civic organizations and a certificate of appointment from the municipality, all of which identify him as "Judge . . ." He also received a photograph of himself with a nameplate reading "Judge . . .," taken while he was presiding in court. He advises that clients, friends and acquaintances have voluntarily addressed him as "Judge" since he left the bench.

He has inquired whether he may properly:

1. Use a nameplate reading "Judge . . ." on his private, not his outside, office door.
2. Display a nameplate reading "Judge . . ." on his desk.
3. Display on his office walls the various certificates of commendation and appointment and the photograph.

The first and second questions are answered in the negative, the third in the affirmative.

We are governed by Opinions 70-63 [since withdrawn] and 73-27. ABA Informal Opinion 1006 also deals with the first question. In Opinion 70-63 [since withdrawn] this Committee said that a former judicial officer should never personally use the courtesy title "Judge" in his law practice. In other words, he should not do anything to designate himself as "Judge," although he does not have to forbid others from calling him "Judge" if they want to.

A former judge may properly preserve and display documents and memorabilia bearing the title "Judge" which were prepared at the time he was a judge and which indicate that he did hold a judicial office, but he should not display or use them in a way that suggests he is presently a judge or that he should be addressed by that title. The inquiry does not indicate whether the

attorney acquired the door and desk nameplates while he was a judge or afterwards. In either event, the answer is the same.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 75-34

March 10, 1977

A former judge who practices law and also serves as a corporate officer may not use the title "Judge" with his name on the corporation's stationery, nor should the corporation's employees refer to him as "Judge" in communications with third persons.

Note: Judicial conduct is governed by the Code of Judicial Conduct. The Judicial Ethics Committee issues opinions interpreting this Code.

CPR: DR 2-101

Opinions: 70-63, 73-27, 73-31

Vice Chairman Lehan stated the opinion of the committee:

A practicing lawyer had been a judge for a period of four months approximately nine years ago. He advises that he is commonly known in the community as "Judge" He engages in the practice of law and also separately in business as the president and chairman of the board of a company involved in financial matters and having regular dealings with the public. He asks:

(1) Whether his identification on the letterhead of the separate business may properly refer to him as "Judge"

(2) Whether he must forbid the employees of the separate business to use the title "Judge" in referring to him when addressing outside persons.

The Committee answers the first question in the negative and the second question in the affirmative.

Prior opinions of this Committee have established that use of the title "Judge" by a practicing lawyer who was formerly a judge may be improperly self-laudatory under DR 2-101. As to the first question presented by this inquiry, the prohibitions of DR 2-101 against a lawyer participating in the use of any form of public communication containing professionally self-laudatory statements and against a lawyer publicizing himself as a lawyer through any means of commercial publicity are not restricted to statements or publicity directly incident to, or referring directly to, his law practice, such as identification of a lawyer as "Judge" on his law office stationery. Those prohibitions would include participation in any form in such statements or publicity which would be construed as professionally self-laudatory. A lawyer should not do, or permit others over whom he has control to do, indirectly what he cannot do directly under the Code of Professional Responsibility. Accordingly, those prohibitions would preclude identification of a practicing lawyer as "Judge" on the letterhead of a business which deals with the public and of which he is chief executive officer. See Opinions 70-63 [since withdrawn], 73-27, and 73-31.

As to the second question, Opinions 73-27 and 70-63 [since withdrawn] state that a former judge engaged in the practice of law should instruct his office staff to refrain from affirmatively placing third persons in an embarrassing position of dealing with "Judge" Opinion 70-63 [since withdrawn] also states that he should not be required to forbid his staff or others from addressing him as "Judge" if the title has become attached to the particular man, rather than the judicial office.

The Committee adheres to those former opinions and feels that under the circumstances of this inquiry there should be no valid distinction between the employees in question being those employed by a separate business of which the practicing lawyer is chief executive officer (as in this inquiry) or those employed by the lawyer's law office (as in the circumstances surrounding the former opinions; the instant inquiry does not refer to employees of the inquiring attorney's law office). Accordingly, the employees of the separate business referred to in this inquiry should be instructed to avoid using the title "Judge" in referring to the lawyer when communicating with outside persons. But such employees may address the lawyer himself as "Judge" if the title has in general usage become attached to him as part of his commonly understood name.

In any case of doubt, for example, where such employees are addressing both outside persons and the lawyer at the same time in the presence of both, the doubt should be resolved against use of the term "judge" with reference to the lawyer in question.

An additional aspect of this inquiry with regard to question (2) above is that the use of the title "Judge" may reduce confusion with the identity of a relative and business associate of the same name. The Committee does not feel that the possibility of such confusion would justify departing from the foregoing opinion of the Committee as to that question, especially in written correspondence and in answering the telephone. However, in specific cases of such confusion the Committee recognizes that it may be necessary to use "Judge" as a method of correcting the confusion.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 87-9

July 1, 1987

A former justice or judge may indicate his former judicial position under his signature on letters written to attorneys and other professionals regarding matters unrelated to the practice of law.

Note: Judicial conduct is governed by the Code of Judicial Conduct. The Judicial Ethics Committee issues opinions interpreting this Code.

RPC: 4-7.1, 4-7.1(b)

CPR: DR 2-101, DR 2-101(C)(6)

Opinions: 70-63, 73-27, 73-31, 75-34; ABA Informal 1006

The inquiring attorney asks whether it is ethically permissible for a former chief justice of the Florida Supreme Court to indicate his former judicial position below his signature on letters written to attorneys and other professionals regarding a matter unrelated to the practice of law. The letters would be written on stationery of the former justice's law firm.

This Committee has considered it improper for a former judge to identify himself as "Judge X" in his private law practice. Opinions 73-31, 73-27, 70-63 [since withdrawn]. The ABA Committee on Ethics and Professional Responsibility declared that it was improper for a former judge to sign pleadings as "Judge X." This was considered a form of self-laudation in violation of DR 2-101, Code of Professional Responsibility. ABA Informal Opinion 1006. Similarly, this Committee concluded that a former judge's identification of himself as "Judge X" on the letterhead of a nonlegal business he was connected with was self-laudation in violation of DR 2-101. Opinion 75-34.

As mentioned above, DR 2-101(C)(6) prohibited attorneys from using self-laudatory statements in their communications. However, the Rules of Professional Conduct (Chapter 4, Rules Regulating The Florida Bar), which superseded the Code effective January 1, 1987, contain no such express prohibition. Rather, Rule 4-7.1 prohibits an attorney's use of false or misleading communications. Paragraph (b) of this rule provides that a communication is false or misleading if it is likely to create an unjustified expectation about results the attorney can achieve or implies that the attorney can achieve results by unethical or illegal means.

In the situation presented, the statement below the former justice's name indicating the judicial position formerly held by him is not false. Nor could the statement be considered misleading under 4-7.1(b); clearly, the "results" referred to are results obtained in legal matters. The matters addressed in the letter in question would be unrelated to the former justice's law practice.

Accordingly, it would not be ethically improper for the former justice to identify himself as a former chief justice of the Florida Supreme Court below his signature on letters to attorneys and other professionals regarding matters unrelated to the practice of law.

A different issue is presented with respect to a former judge identifying himself as such in letters related to his law practice.

The writer's former judicial office is not relevant to legal matters handled by him in his private law practice, and, therefore, there is no proper reason why his former position should be mentioned in letters connected with such matters. Indeed, it would not be unreasonable to assume that one reason for wishing to include the writer's former judicial position would be to create the kind of undesirable expectations referred to in Rule 4-7.1(b).

Furthermore, in communications with an opposing party there would appear to be no reason for mention of the writer's former judicial position except perhaps to intimidate the recipient. Florida Opinions 70-63 [since withdrawn] and 73-27 indicate that it would be improper for a former judge to use or permit use of his past judicial position or title for such a purpose.

Consequently, it would not be proper for a former judge to identify himself as such below his name on letters related to the practice of law.