FLORIDA BAR STAFF OPINION 34289
January 26, 2015

[This opinion was affirmed as amended by the Professional Ethics Committee at its January 23, 2015 meeting.]

Florida Bar ethics counsel are authorized by the Board of Governors of The Florida Bar to issue informal advisory ethics opinions to Florida Bar members who inquire regarding their own contemplated conduct. Advisory opinions necessarily are based on the facts as provided by the inquiring attorney. Opinions are not rendered regarding past conduct, questions of law, hypothetical questions or the conduct of an attorney other than the inquirer. Advisory opinions are intended to provide guidance to the inquiring attorney; the advisory opinion process is not designed to be a substitute for a judge's decision or the decision of a grievance committee. The Florida Bar Procedures for Ruling on Questions of Ethics can be found on the bar's website at www.floridabar.org.

A member of The Florida Bar has requested an advisory ethics opinion. The operative facts as presented in the inquiring attorney's letter are specifically as follows:

> We intend to create a secure, subscription-based, for-profit, lawyers-only, searchable clearinghouse to collect, and make available to other subscribing lawyers, the fee payment histories of business clients who have retained us in connection with business-purpose, non-consumer legal matters, and who have given us their express, informed, prior written consent to do so. We will be the first subscribing members. The clearing house will not be a collection agency, nor will it undertake collection efforts of any kind. Only verified lawyers in good standing will be allowed to subscribe to the system.
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> The clearinghouse will give us access to information that will permit us to make an upfront determination about the likelihood that a given client will pay as agreed, and to make informed judgments about the credit worthiness of prospective and existing clients. Possessing such information will enable us the opportunity to make informed decisions about which business clients to accept and at what risk. Rather than harming the attorney-client relationship, the clearinghouse will enhance it, by promoting clear communications and expectations about payment, by preventing costly and disruptive fee disputes, and by reducing disruptive and burdensome fee litigation. Moreover, the clearinghouse will benefit clients with positive payment histories, who may be able to obtain lower billing rates and lower/no retainers.
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> Key Elements of our Plan:
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> 1. Reporting and Informed Written Consent. Before we accept a new engagement, we will require our clients to review and execute a limited waiver of confidentiality that will allow us to report the client's payment history to the clearinghouse: positive payment histories (i.e., "pays as agreed") may be made during the ongoing course of the representation, but negative payment histories

(i.e., "Last invoice was 30, 60, 90, 120 or 120+ days past due") will only be made after the attorney-client relationship for a particular matter has been terminated, which distinguishes this request from Staff Opinion 31741. Clients who choose to proceed with the representation will do so with a clear understanding of the facts and circumstances under which their payment histories (positive and negative) will be reported, and the material advantages and disadvantages of the Plan. Clients who choose not to sign such a waiver will remain free to engage other counsel, and the subscribing lawyer to the system is still free to accept the engagement on the client's terms.

2. Disputes. Clients will be given a meaningful opportunity to dispute reports of negative payment histories. The subscription agreement to the clearinghouse will require us, as reporting members, to notify clients of their right to dispute any report filed with the clearinghouse, by either contacting the clearinghouse directly, or by informing us that an invoice or fee is disputed, and any such dispute will be noted at the clearinghouse and cross-referenced against any report we file.

3. Lawyers Only; Not a Collection Agency. Membership with the clearinghouse will be limited to lawyers and law firms. The clearinghouse will not be a collection agency, nor will it undertake collection efforts of any kind. Thus, reports we make will be limited to the client's payment history with respect to legal fees only, and will not harm the client's general credit or otherwise impair a client's ability to obtain financing or carry on business operations.

4. Clearinghouse Will Benefit Clients. In addition to promoting clear communications and expectations regarding payment, clients who pay as agreed will derive significant benefits from reports of their positive payment histories (i.e., favorable payment histories often result in reduced or waived fee retainers, and reduced billing rates).

5. Clients Endorse the Clearinghouse. [O]ur business clients fully endorse our proposed future conduct with regard to participation in the clearinghouse.

6. The Clearinghouse involves constitutionally protected free speech. The clearinghouse involves constitutionally protected speech because it involves the voluntary transmission of data communications, and falls squarely within protected speech (see, e.g., Sorrell v. IMS Health Inc., 131 S.Ct. 2653 (2011)).

Conclusion:

We believe the clearinghouse will foster open, honest communications with business clients about fees, resulting in fewer fee disputes, fewer Bar complaints,

> and less litigation over nonpayment. The course of action we intend to undertake – establishing the clearinghouse and being the first subscribing members – is not an intrusion upon, but rather an enhancement of the attorney-client relationship. The clearinghouse will help forestall ugly, disruptive litigation against business clients, prevent hostile collection actions, permit timely payers avoid the cash burden of retainers, and keep nonpaying litigants from burdening lawyers and the courts. Our intended course of conduct merely creates a systematic, objective information exchange, protecting all by setting and stating clear expectations. As an added benefit, clients who pay as agreed will avoid indirectly subsidizing the non-fee payers and slow payers.
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> Our intended conduct conforms with, and falls within, existing precedent. If suing a client to collect unpaid fees, assigning the delinquent account of a former client to a collection agency, and/or reporting delinquent clients to a credit reporting service (remedies previously sanctioned by the Ethics Committee), are exceptions to the duty of client confidentiality, then surely reporting payment histories of business clients – *done only with informed written consent at the inception of an engagement* – is permissible.

The client's consent and limited waiver of confidentiality will authorize the lawyer member to file reports with the clearinghouse identifying the client's name, address, state of incorporation/formation, names of principals, officers and directors, dates of service rendered and dates of payments due, and the length of time the invoice has been outstanding, e.g., "Paid as agreed" or "Last invoice was 60, 90, 120+ days past due." The agreement states that no report will be filed that indicates a negative payment history while the representation of the client is ongoing. Only favorable payment history reports will be filed while there is a current representation. The authorization signed by the client states that the client will given the opportunity to indicate whether the client disputes the invoice and any dispute will be noted at the clearinghouse and cross-referenced with any filed report. The authorization also advises the client to seek independent counsel before signing the authorization.

It is important to note that the inquirers had previously asked for an ethics opinion on a similar business proposal. Under the prior proposal, clients would be asked to consent to the reporting of their payment history (positive or negative) to the clearinghouse. Additionally, the attorneys would report the payment history while clients were still current clients of the firm. Because of confidentiality issues, conflict of interest issues, and prior ethics opinion precedent, the prior staff ethics opinion concluded that the conduct would be permissible when reporting non-payment only if the amount owed is not in dispute and the representation of the client has been concluded. The inquirers requested review of the prior staff opinion by the Professional Ethics Committee and the Board Governors, both of which affirmed the staff opinion. The inquirers have now submitted this new proposal with the primary difference that a negative payment history will only be reported once the attorney-client relationship has been terminated.

The inquiring attorneys ask whether they may organize, operate and be members of this business entity. There are ethical concerns raised by the inquirers' proposed business plan under the Rules Regulating The Florida Bar, Rule 4-1.6, the confidentiality rule, and Rule 4-1.7, the conflict of interest rule. The primary concern raised by the proposed business plan is that of confidentiality and whether it is reasonable to ask a client to agree to such a disclosure. Pursuant to Rule 4-1.6, an attorney may not voluntarily reveal information relating to the representation of a client without the client's consent. Rule 4-1.6(a). The confidentiality rule, which is very broad, applies "to all information relating to the representation, whatever its source." Comment, Rule 4-1.6. Additionally, the comment states that the duty of confidentiality "continues after the client-lawyer relationship has terminated."

There are times, however, when an attorney is required or, alternatively, permitted to reveal otherwise confidential information. Section (b) of Rule 4-1.6, for example, requires such disclosure to prevent a client from committing a crime or to prevent a death or substantial bodily harm to another. Section (c) of the rule sets forth certain situations when an attorney, may, but is not required to, reveal information relating to the representation of a client. None of the exceptions appear to apply to the facts presented. As a result, an attorney who is involved with this clearinghouse may not reveal any information regarding a client's payment history without the client's informed consent. The Preamble to the Rules of Professional Conduct defines "informed consent" as follows:

> "Informed consent" denotes the 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.

Whether it is appropriate for an attorney to ask a client for consent and if the consent is informed, are factual questions, beyond the scope of an ethics opinion.

Rule 4-1.7, the conflict of interest rule, states, in pertinent part:

> **(a) Representing Adverse Interests.** Except as provided in subdivision (b), a lawyer shall not represent a client if:
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> (1) the representation of 1 client will be directly adverse to another client; or
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> (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> **(b)** Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
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> (2) the representation is not prohibited by law;
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> (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
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> (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Pursuant to Rule 4-1.7(a)(2), an attorney cannot represent a client if the attorney's independent professional judgment may be limited by the attorney's own interest, unless the attorney reasonably believes that the representation will not be adversely affected and the client gives informed consent, confirmed in writing. Although the rule contemplates waivers of conflicts of interest under subdivision (b) of the rule, the comment to the rule elaborates as to the propriety of waivers:

> A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.

Thus, asking a client to waive a conflict of interest is not always proper, especially if the attorney is acting in the attorney's own interests rather than the clients' best interests.

There is one out of state ethics opinion on this issue. In Texas Opinion 622, the Professional Ethics Committee of the Texas Bar concluded that it is permissible for a Texas attorney to engage in the proposed conduct so long as the "client has agreed to these actions after consultation with the lawyer sufficient to permit the client to make an informed decision on these matters." (Copy enclosed.) While The Florida Bar has not addressed this exact issue, the Professional Ethics Committee has concluded that it is improper for an attorney to take action against a current client to enforce a fee agreement before the representation has ended. *See* Opinion 88-1 (copy enclosed). The committee reasoned that such action would create an impermissible conflict of interest. *See*, *Florida Bar v. Fields*, 482 So.2d 1354 (Fla. 1986). The Professional Ethics Committee has also authorized attorneys to utilize reputable collection agencies to collect past due fees owed by clients. This alternative exists when reasonable efforts to collect delinquent fees have proven unsuccessful. *See* Ethics Opinion 81-3 (copy enclosed). In Ethics Opinion 90-2, which is most analogous to the attorneys' inquiry, the Professional

Ethics Committee authorized attorneys to report delinquent clients to a credit reporting service so long as the attorney-client relationship has been terminated and the debt is not in dispute (copy enclosed). The committee stated:

> The attorney-client relationship is one of special trust and confidence and, therefore, it would be unethical for an attorney to report a current client to a credit reporting service. Only former clients may be reported.
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> Finally, the Committee believes that the reporting of a former client to a credit reporting service is permissible only when the debt is undisputed but has not been paid; if there is a dispute concerning the former client's obligation to pay the fee in question, an attorney's use of a credit reporting service would not be permissible.

Based on the reasoning in Opinion 88-1 (attorney must withdraw before taking adverse action against a client, such as suing client for past due fees), the reporting of a negative payment history can be taken only after termination of representation. Based on the inquiring attorneys' statement of facts, only positive payment history of current clients will be reported to the clearinghouse. So long as negative payment history will only be reported after the representation has been concluded, then the inquirers' proposal is in accordance with the requirement that no adverse action will be taken against a current client.

In Ethics Opinion 90-2, the Professional Ethics Committee concluded that an attorney may report a former client to a credit reporting service only if the debt is not in dispute. With regard to disputes, the inquirers' Authorization, Consent and Limited Waiver of Confidentiality contain the following language:

> 2. Disputes. Clients will be given a meaningful opportunity to dispute reports of negative payment histories. The subscription agreement to the clearinghouse will require us, as reporting members, to notify clients of their right to dispute any report filed with the clearinghouse, by either contacting the clearinghouse directly, or by informing us that an invoice or fee is disputed, and any such dispute will be noted at the clearinghouse and cross-referenced against any report we file.

The inquirers have provided a mechanism for clients to dispute the reports of negative payment history, and the disputes will be noted at the clearinghouse and cross-referenced with any reports filed. By providing a mechanism for the clients to dispute the reports, it appears that there could be situations where the debts are in dispute. However, the inquirers' situation can be distinguished from the conclusion of the Professional Ethics Committee in Opinion 90-2, because the inquirers will obtain clients' informed consent at the outset of representation to the

report of negative payment history once the lawyer-client relationship has concluded.

In conclusion, based on the above discussion of Rules 4-1.6 and 4-1.7 and Opinions 81-3, 88-1 and 90-2, the inquiring attorneys may report a client's negative payment history to the clearinghouse if the clients give informed consent as contemplated by the inquiry and the inquirers no longer represent the clients, regardless of whether the amount owed is in dispute.