[redacted]

Ethics Department
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Re: **REQUEST FOR ETHICS OPINION REGARDING A PUBLIC ADJUSTER'S FEES IN HOMEOWNER INSURANCE LITIGATION MATTERS**

Dear Florida Bar:

I write to ask for an ethics opinion as to the distribution of monies from settlements in litigation cases involving claims by homeowners against their own homeowners insurance companies.

The issue is whether there are any circumstances under which a lawyer may (a) pay to a public adjuster or (b) allow the public adjuster to receive a percentage of the gross monies recovered in a settlement obtained during litigation (or from a judgment at trial) in a case where the public adjuster referred the insured to the lawyer and the lawyer then represents an insured in a claim against the insured's homeowners insurance company.[1]

The question arises because we have declined all potential clients from public adjusters who have conditioned the referral of potential clients to our law firm on the requirement that we allow the public adjuster to receive a percentage of the gross recovery, which would include a percentage of both (1) the indemnification paid by the insurer to the insured and (2) the attorney's fees and costs that are part of the settlement, whether paid separately by the insurer or as part of a contingency fee on the gross settlement amount.

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[1] This request for an ethics opinion is based on the presumption that the referral of the client by the public adjuster to the lawyer was done in a permissible manner. This request also applies equally to situations where the client (*i.e.*, the homeowner) seeks out and retains the lawyer and the client, prior to such retention of the lawyer, had retained a public adjuster that was unable to resolve the claim with the insurance carrier (i.e., where the client hires a public adjuster first, and then the client independently chooses to and hires the lawyer without a referral from the public adjuster).

BACKGROUND

There are several common attorney's fees provisions in Retainer Agreements pursuant to which an insured homeowner retains a lawyer. It is important to consider that in connection with all such lawsuits, Florida Statute Section 627.428 provides that the insurer must pay the homeowner's attorney's fees and costs, even in connection with a settlement. Insurers typically recognize this obligation in settlements, but sometimes attempt to force plaintiff attorneys to participate in global negotiations as to indemnification and attorney's fees. Specifically, an insurer may offer $100,000 as a global settlement, and leave to the insured and the insured's attorney the division of this amount between indemnification and attorney's fees.[2]

In pre-suit settlements, attorneys are typically paid on a contingency fee set forth in a Retainer Agreement because Section 627.428's obligation of the insurer to pay the insured's attorney's fees does not apply to pre-suit settlements.

Further, to explain the common retainer agreement fee provisions, let's assume in a hypothetical settlement of a lawsuit brought by an insured against an insurer where the gross settlement is $100,000, which is comprised of (a) indemnification of $82,500 to the insured, (b) the attorney's lodestar for attorney's fees is $15,000, and (c) the case costs (*i.e.*, filing fee, process server, and deposition transcripts, etc.) are $2,500.

Example Retainer Agreement and Settlement No. 1

First, the Retainer Agreement may provide that the insured's attorney will seek payment of attorney's fees from the defendant insurer, and will not charge the insured a contingency fee. So, using the hypothetical settlement, the attorney will receive $15,000 in attorney's fees and $2,500 in costs, and the insured will receive $82,500 in indemnification.

Example Retainer Agreement and Settlement No. 2

Second, the Retainer Agreement may provide that the insured will pay the attorney an attorney's fee that is a percentage of the gross recovery, plus costs. For example, if the Retainer Agreement provides for a contingency fee of 25%, and the costs are $2,500, the settlement would be distributed as follows: $25,000 in attorney's fees and $2,500 in costs paid to the attorney, and $72,500 in indemnification paid to the insured.

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[2] The undersigned always insists that negotiations for settlement delineate between indemnification and attorney's fees, and that settlement agreements delineate such amounts, so as to avoid a conflict of interest with the law firm's clients. However, insurers do not so insist, and the undersigned understands that other members of the Bar may enter settlement agreements for their insured clients that simply state the gross recovery amount without delineating the amount attributable to indemnification, attorney's fees or costs.

Example Retainer Agreement and Settlement No. 3

Third, the Retainer Agreement may provide that the insured will pay the attorney the greater of the statutory fee or a contingency fee. Using again the hypothetical settlement above, the settlement would be distributed as follows: $25,000 in attorney's fees paid to the attorney (because 25% of $100,000 is greater than the attorney's lodestar of $15,000), $2,500 in costs paid to the attorney, and $72,500 in indemnification paid to the insured.

In all of the above hypothetical settlements, the attorney will receive attorney's fees, whether specifically delineated or as a percentage of the gross recovery.

The Public Adjuster Percentage

If the hypothetical case discussed above is referred to the attorney by a public adjuster (or the client directly sought the attorney's retention and had previously retained a public adjuster), the public adjuster may insist upon receiving a percentage of the gross recovery of $100,000. The public adjuster's position is that the contract between the public adjuster and the insured requires the insured to pay the public adjuster a defined percentage of the insured's gross recovery.

A typical public adjuster contract may include language that, for example, obligates the insured to pay the public adjuster 15% of the *entire insurance proceeds* collected for said loss; or 15% of the *entire claim*; or 15% of the *entire recovery*; or 15% of *all payment made by the insurance company related to the loss, including Global Settlements*; or 15% of the *entire amount of the loss and damages recovered from the insurer*. For purposes of the issues raised herein, the public adjuster interprets all examples of such contractual language to mean 15% of all monies collected for and on behalf of the insured, including but not limited to insurance proceeds (*i.e.*, indemnification paid by the insurer pursuant to the insurance policy issued by the insurer to the insured), attorney's fees and costs.

Let's assume for the issues raised herein that this percentage is 15%.

In Example No. 1 above, the public adjuster may receive (a) 15% of the gross recovery of $100,000, which is $15,000, or (b) 15% of the indemnification of $82,500, which is $12,375.

(Assuming *arguendo* that the public adjuster *may* receive a percentage of the gross recovery, this would result in the attorney receiving $15,000 in attorney's fees and $2,500 in costs, the public adjuster receiving $15,000, and the insured receiving $67,500 in indemnification. By comparison, if it is *not* permissible for the public adjuster to receive a percentage of the gross recovery, the result would be as follows: the attorney receives $15,000 in attorney's fees and $2,500 in costs, the public adjuster receives $12,375, and the insured receives $70,125 in indemnification.)

In Example No. 2 above, the public adjuster may receive (a) 15% of the gross recovery of $100,000, which is $15,000, or (b) 15% of the indemnification of $72,500, which is $10,875.

(Assuming *arguendo* that the public adjuster *may* receive a percentage of the gross recovery, this would result in the attorney receiving $25,000 in attorney's fees and $2,500 in costs, the public adjuster receiving $15,000, and the insured receiving $57,000 in indemnification. By comparison, if it is *not* permissible for the public adjuster to receive a percentage of the gross recovery, the result would be as follows: the attorney receives $25,000 in attorney's fees and $2,500 in costs, the public adjuster receives $10,875, and the insured receives $61,625 in indemnification.)

In Example No. 3 above, the public adjuster may receive (a) 15% of the gross recovery of $100,000, which is $15,000, or (b) 15% of the indemnification of $72,500, which is $10,875.

(Assuming *arguendo* that the public adjuster may receive a percentage of the gross recovery, this would result in the attorney receiving $25,000 in attorney's fees and $2,500 in costs, the public adjuster receiving $10,875, and the insured receiving $57,000 in indemnification. By comparison, if it is *not* permissible for the public adjuster to receive a percentage of the gross recovery, the result would be as follows: the attorney receives $25,000 in attorney's fees and $2,500 in costs, the public adjuster receives $10,875, and the insured receives $61,625 in indemnification.)

ALLOWING THE PUBLIC ADJUSTER TO RECEIVE A PERCENTAGE OF THE GROSS RECOVERY IS SHARING ATTORNEY'S FEES WITH A NON-LAWYER

The undersigned has historically interpreted the Florida Rules of Professional Conduct to mean, under any of the three examples detailed above, that allowing the public adjuster to receive 15% of the gross recovery (or any percentage of the gross recovery) results in the sharing of attorney's fees with a non-lawyer. The reason is that under all of the above examples the settlement includes attorney's fees, and allowing the public adjuster to receive a percentage of the attorney's fees is the sharing of attorney's fees with a non-lawyer. Even under Example No. 2, where the settlement agreement does not delineate the specific amount payable for attorney's fees, the attorney's fees are embedded in the gross settlement amount (*i.e.*, as a contingency fee defined as a percentage of the recovery), such that allowing the public adjuster to receive 15% of the gross recovery means that the public adjuster is receiving a percentage of the attorney's fees.

Moreover, the settlement agreement with the insurer always contains a release – even in cases where the insurer pays a gross amount that does not delineate the amount of the settlement monies attributable to attorney's fees and costs - memorializing that the payment is for all claims that could have been brought against the insurer (*i.e.*, not just indemnification, but also attorney's fees), and that the insured is releasing such claims in the settlement.

Section 626.854(10), Fla.Stat., authorizes the public adjuster to receive a percentage of "insurance claim payments" and, while this term is undefined in the statute, it would not seem to authorize a lawyer to give the public adjuster a percentage of any part of the recovery other than the amounts attributable to indemnification payments made pursuant to the policy of insurance. Even if the

claim "insurance claim payments" is ambiguous, the issue becomes whether the Bar or Court would interpret this term to include attorney's fees recovered by the insured, as, again, this would result in sharing fees with a non-lawyer.

In addition, the attorney's fees are procured as a result of the work of the lawyer, and not the public adjuster.

It would seem that allowing the public adjuster to receive 15% of the gross recovery would be no different than allowing a non-lawyer to receive a percentage of the gross recovery in a personal injury settlement for having referred the client to the lawyer or to an expert who worked on the case, and would violate the rules against fee-sharing with non-lawyers. Further, regardless of whether the public adjuster is entitled to charge the insured a percentage of the recovery, and even if such obligation is contained in a contract between the insured and the public adjuster, the insured's obligation to pay a percentage of the gross recovery cannot include such portion of the recovery that represents attorney's fees, whether measured by a specifically delineated amount of attorney's fees or a contingency fee, because Rule 4-5.4(a)'s prohibition against the sharing of attorney's fees with non-lawyers cannot be circumvented or trumped by the public adjuster's statutory right to charge the insured a percentage of the recovery.

Further, assuming payment to the public adjuster of a percentage of the gross settlement does violate the prohibition against fee sharing, and even if such fee obligation is contained in a contract between the insured and the public adjuster, it appears such provision would be unlawful, the contract (or at least such provision to the extent it purports to give the public adjuster a right to a percentage of the attorneys' fees recovered) would be voidable, and the attorney would have an ethical duty to counsel the client to reject or avoid contracts that are not legally enforceable. Here, it would seem that regardless of whether the public adjuster or another person referred the client to the attorney, the attorney would be duty bound to advise the insured that any provision of the contract between the public adjuster and the insured that obligates the insured to pay the public adjuster a percentage of the gross recovery - to the extent such recovery includes attorney's fees – is unenforceable as a matter of law.

Importantly, it is the insured, the client of the attorney (and the public adjuster), who will be negatively impacted if it is violative of Rule 4-5.4(a) for the public adjuster to receive a percentage of the gross recovery, because this results in decreasing the net settlement amount paid to the insured. Specifically, in Example No. 1 the insured would receive $67,500 rather than $70,125, and in Example Nos. 2 and 3 the insured would receive $57,500 rather than $61,625.

ALLOWING THE PUBLIC ADJUSTER TO RECEIVE A PERCENTAGE OF THE GROSS RECOVERY IS NOT SHARING ATTORNEY'S FEES WITH A NON-LAWYER

The public adjuster would argue that allowing the public adjuster to receive a percentage of the gross recovery is distinguishable from a personal injury settlement where the Florida Bar Rules prohibit a lawyer from paying a percentage of the recovery to a non-lawyer that referred the client to the lawyer. The argument is that the public adjuster is specifically authorized by Florida law to

charge the insured a percentage of the recovery for the public adjuster's services, and that the obligation to pay such attorney's fees is contained in a contract between the public adjuster and the insured. Specifically, the public adjuster relies on Florida Statute Section 626.854(10), which provides as follows:

> (10)(a) If a public adjuster enters into a contract with an insured or claimant to reopen a claim or file a supplemental claim that seeks additional payments for a claim that has been previously paid in part or in full or settled by the insurer, the public adjuster may not charge, agree to, or accept from any source compensation, payment, commission, fee, or any other thing of value based on a previous settlement or previous claim payments by the insurer for the same cause of loss. The charge, compensation, payment, commission, fee, or any other thing of value must be based only on the *claim payments or settlement* obtained through the work of the public adjuster after entering into the contract with the insured or claimant. Compensation for the reopened or supplemental claim may not exceed *20 percent of the reopened or supplemental claim payment.* In no event shall the contracts described in this paragraph exceed the limitations in paragraph (b).
>
> (b) A public adjuster may not charge, agree to, or accept from any source compensation, payment, commission, fee, or any other thing of value in excess of:
>
> 1. Ten percent of the amount of *insurance claim payments* made by the insurer for claims based on events that are the subject of a declaration of a state of emergency by the Governor. This provision applies to claims made during the year after the declaration of emergency. After that year, the limitations in subparagraph 2. apply.
>
> 2. Twenty percent of the amount of *insurance claim payments* made by the insurer for claims that are not based on events that are the subject of a declaration of a state of emergency by the Governor.
>
> (c) Insurance claim payments made by the insurer do not include policy deductibles, and public adjuster compensation may not be based on the deductible portion of a claim.
>
> (d) Any maneuver, shift, or device through which the limits on compensation set forth in this subsection are exceeded is a violation of this chapter punishable as provided under s. 626.8698.

The public adjuster, and lawyer who shares a percentage of the gross recovery with the public adjuster, would argue that attorney's fees, whether explicitly delineated or a percentage of the gross recovery pursuant to a contingency fee agreement with the lawyer, are part of the "insurance claim payments" made by the insurer in the settlement of the case, and that the public adjuster's contract entitles the public adjuster to a percentage of all monies recovered from the insurer.

In all of the three examples above, the public adjuster argues, and the attorney may rationalize, that the public adjuster's contract with the insured entitles the public adjuster to 15% of the gross recovery, which includes both indemnification, attorney's fees and costs and, therefore, the payment of 15% of the gross recovery to the public adjuster does not violate Rule 4-5.4(a)'s prohibition against sharing attorney's fees with non-lawyers. The public adjuster and lawyer may purposefully structure the settlement as in Example No. 2 so that the settlement agreement does not delineate the specific amounts paid for attorney's fees and costs, reasoning that the lawyer is not sharing attorney's fees with the non-lawyer because the settlement agreement does not identify the amount of attorney's fees to be paid and, therefore, does not include the payment of attorney's fees (*i.e.*, because the obligation to pay attorney's fees arises from the Retainer Agreement between the insured and the lawyer, and not from the settlement agreement).

REQUEST FOR ETHICS OPINION

Ultimately, the undersigned seeks an ethics opinion from The Florida Bar as to whether under any scenario, a public adjuster may receive a percentage of the gross recovery in a settlement between an insured homeowner and homeowner insurance company in a manner that does not violate Rule 4-5.4(a)'s prohibition against the sharing attorney's fees with non-lawyers.

[redacted]

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

August 15, 2019

PERSONAL AND CONFIDENTIAL

[redacted]

Re: Ethics Inquiry [redacted]

Dear [redacted]:

I received your request for an advisory ethics opinion on July 29, 2019.

My advisory opinion is enclosed. To maintain confidentiality, the opinion excludes references to your name or other identifying information.

If you disagree with my opinion, you have thirty (30) days to request that the Professional Ethics Committee review the opinion. A request for review must be addressed to Elizabeth Clark Tarbert, Ethics Counsel, at 651 E. Jefferson Street, Tallahassee, Florida 32399. The request must be postmarked no later than thirty (30) days from the date of this letter, not the date of receipt. The request must contain the original staff opinion number and clearly state the issues for review. You may include a written argument explaining why you believe my opinion is incorrect. Procedures governing your request for review and committee procedures may be found in Procedures 3(d), 4 and 6, Florida Bar Procedures for Ruling on Questions of Ethics (available on The Florida Bar's website at www.floridabar.org). The Professional Ethics Committee meets approximately four times per year. You will be notified of the committee's decision promptly.

Sincerely,

LiliJean Quintiliani
Assistant Ethics Counsel

cc: Chair and Vice Chairs, Professional Ethics Committee (opinion only)

FLORIDA BAR STAFF OPINION 39873
August 15, 2019

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. Advisory opinions are authored in response to specific inquiries and may not be applicable to anyone other than the inquiring attorneys referenced in them. 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 and are not binding; 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.

The inquiring lawyer has asked for an opinion regarding the distribution of settlement funds in cases regarding claims by clients against their homeowners insurance company. The inquiry states:

> The issue is whether there are any circumstances under which a lawyer may (a) pay to a public adjuster or (b) allow the public adjuster to receive a percentage of the gross monies recovered in a settlement obtained during litigation (or from a judgment at trial) in a case where the public adjuster referred the insured to the lawyer and the lawyer then represents an insured in a claim against the insured's homeowners insurance company.[1]
>
> The question arises because we have declined all potential clients from public adjusters who have conditioned the referral of potential clients to our law firm on the requirement that we allow the public adjuster to receive a percentage of the gross recovery, which would include a percentage of both (1) the indemnification paid by the insurer to the insured and (2) the attorney's fees and costs that are part of the settlement, whether paid separately by the insurer or as part of a contingency fee on the gross settlement amount.

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[1]This request for an ethics opinion is based on the presumption that the referral of the client by the public adjuster to the lawyer was done in a permissible manner. This request also applies equally to situations where the client (*i.e.*, the homeowner) seeks out and retains the lawyer and the client, prior to such retention of the lawyer, had retained a public adjuster that was unable to resolve the claim with the insurance carrier (i.e., where the client hires a public adjuster first, and then the client independently chooses to and hires the lawyer without a referral from the public adjuster).

In Florida Ethics Opinion 92-3 (copy enclosed) the Professional Ethics Committee of The Florida Bar considered the propriety of a law firm accepting referrals from a public adjusting company and protecting the adjuster's interest in the recovery. In that opinion the committee found that a number of ethical problems existed. Opinion 92-3 holds that such an arrangement constitutes improper fee splitting with a non-lawyer. Rule of Professional Conduct 4-5.4(a). Additionally, the committee found that the referral of clients by the adjusting company to the law firm violated Rules 4-7.4(a) [now renumbered as 4-7.18(a)] and 4-8.4(a), which prohibit an attorney from soliciting business either through direct contact with a potential client, or through the acts of an employee or agent. In addition, the Committee found that the attorney might be aiding the adjuster in the unlicensed practice of law if the adjuster was settling claims with a tortfeasor's insurance company. *See* Rules 4-5.4(a) and 4-5.5(b), Rules Regulating The Florida Bar. The inquirer may not engage in such an improper referral arrangement with a public adjuster.

The inquirer is not, however, prohibited from continuing representation of a client although the inquirer knows that a client will pay a contingent fee to the public adjuster as long as: 1) the client's contingent fee agreement with a public adjuster pre-dated the inquirer's representation of the client, 2) there was no improper solicitation or referral by a public adjuster to the inquirer, 3) the client is paying under the client's original contract with a public adjuster, 4) the inquirer does not have an arrangement with the public adjuster as in Florida Ethics Opinion 92-3, and 5) there is no payment of any incentive to a public adjuster for the public adjuster's testimony. Specifically as to the fifth condition, see Rule 4-3.4(b) which states that a lawyer shall not "offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings...."

Finally, the inquirer should refer to Florida Ethics Opinion 02-4 (copy enclosed) in the circumstance in which the inquirer obtains a client, not through any improper referral, and learns that a public adjuster has a pre-existing contract with the inquirer's client.

FLORIDA BAR ETHICS OPINION
OPINION 92-3
October 1, 1992

Advisory ethics opinions are not binding.

It is unethical for an attorney to enter into a working arrangement with a public adjuster. Ethical problems exist regarding solicitation, fee-splitting, and assisting the unlicensed practice of law.

RPC: 4-5.4(a); 4-5.5(b); 4-7.4(a); 4-8.4(a)
Statutes: F.S. § 316.066

The inquiring attorney has been contacted by a public adjusting firm (the "Company") regarding participation in a proposed arrangement involving personal injury claims. The Company would employ a nonlawyer to pick up accident reports each week from local law enforcement agencies. Those persons with significant claims who have been injured by insured vehicles would then be solicited by the Company. The injured persons (the "claimants") would be given the opportunity to contract with the Company, which, for a fee of 20% of the claimant's recovery, would attempt to negotiate settlement of the claimant's personal injury claim within the tortfeasor's policy limits.

The Company has asked if the inquiring attorney would be interested in representing claimants who need the services of an attorney in the event that the Company is unable to effectuate a settlement. The Company would recommend the attorney to the claimant. The attorney would have contact with the client, would contract directly with the claimant, and would have total control over the handling of the case. In exchange for referring the claimant to the attorney, the attorney would agree to recognize the Company's "contract" with the claimant and agree to protect the Company's "lien." The inquiring attorney describes these financial arrangements as follows:

> [I]f the lawyer settled a case for $100,000.00 after suit was filed and was entitled to a 40% contingent fee, i.e., $40,000.00, he would agree to pay the Company 20% of his fee (or a negotiated lesser amount) in order to protect the Company's contract and lien with the client, which they claim would entitle them to 20% of the gross recovery. The Company claims that this is not "fee splitting with a non-lawyer" in that it is no different than a lawyer agreeing to protect the lien of a health care provider such as a physician or hospital by way of a letter of protection. Further, the Company claims that it is to the benefit of the client, since *it is no extra money out of the client's pocket, as the real division is between the lawyer and the Company out of the gross attorneys' fees*. [Emphasis added.]

The attorney has requested an advisory opinion regarding whether it would be unethical for him to participate in this proposed arrangement. Specifically, the attorney has asked whether doing so would violate the rule prohibiting fee-splitting with a nonlawyer.

It would be unethical for the attorney to participate in the proposed arrangement. A number of ethical problems are apparent. For example, the proposed fee division arrangements would violate Rule 4-5.4(a), Rules Regulating The Florida Bar, which prohibits attorneys from sharing legal fees with nonlawyers. The Company's fee would be paid out of the *attorney's* portion of the recovery, which clearly would constitute improper fee-splitting.

Additionally, the proposed arrangement would result in violation of the rules governing advertising and solicitation. Rule 4-7.4(a) provides:

> A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A *lawyer shall not permit* employees or *agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule.* The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule. [Emphasis added.]

See also 4-8.4(a), which provides:

> A lawyer shall not:
>
> (a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]

The solicitation problem is amplified because the Company would use traffic accident reports to solicit claimants. Florida Statutes § 316.066 prohibits the use of accident reports for commercial solicitation purposes.

Furthermore, the Bar's Unlicensed Practice of Law Counsel has taken the position that a public adjuster engages in the unlicensed practice of law if the adjuster acts on behalf of a claimant against a tortfeasor's insurance company; the authorized activities of a public adjuster are limited to adjusting claims with the claimant's insurer. Therefore, an attorney who is involved in a situation in which a public adjuster is acting on behalf of a claimant against a third party's insurer would be in violation of Rule 4-5.5(b), which prohibits attorneys from assisting someone in activity that constitutes the unlicensed practice of law.

[redacted]

August 29, 2019

VIA MAIL

Ethics Department
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Re: **REQUEST FOR ETHICS OPINION REGARDING A PUBLIC ADJUSTER'S FEES IN HOMEOWNER INSURANCE LITIGATION MATTERS**

Dear Florida Bar:

Please accept this letter as a request for clarification and/or supplementation of The Florida Bar's August 15, 2019 Florida Bar Staff Opinion No. 39873 (the "Opinion 39873"). If the Bar is unable to respond to the instant request within the 30-day deadline set forth in the Ms. LiliJean Quintiliani's August 15, 2019 letter, please then consider this letter my request that the Professional Ethics Committee review Opinion 39873. (My request for clarification, supplementation and/or review are referred to herein collectively as the "Review.").

As set forth below, the basis of this Request is two-fold. First, Opinion 39873 does not answer the issue presented in my July 24, 2019 request for an advisory opinion, a copy of which is attached hereto as Exhibit A (the "Request"). Second, Opinion 39873 does not explain why the various arguments presented in my Inquiry do or do not support the opinion requested from the Bar.

THE REQUEST FOR AN ADVISORY OPINION

My Request presented the following issues, which were quoted at the start of Opinion 39873:

> The issue is whether there are any circumstances under which a lawyer may (a) pay to a public adjuster or (b) allow the public adjuster to receive a percentage of the gross monies recovered in a settlement obtained during litigation (or from a judgment at trial) in a case where the public adjuster referred the insured to the

lawyer and the lawyer then represents an insured in a claim against the insured's homeowners insurance company.[1]

The question arises because we have declined all potential clients from public adjusters who have conditioned the referral of potential clients to our law firm on the requirement that we allow the public adjuster to receive a percentage of the gross recovery, which would include a percentage of both (1) the **indemnification** paid by the insurer to the insured **and** (2) the **attorney's fees** and costs that are part of the settlement, whether paid separately by the insurer or as part of a contingency fee on the gross settlement amount.

(Emphasis added). In other words, the Request asked whether there are any circumstances under which an attorney may allow a public adjuster to receive any share of the attorney's fees received by the attorney in the attorney's representation of a homeowner in a claim against their homeowner insurance company, and whether or not such event would or would not constitute fee sharing with a non-lawyer in violation of Rule 4-5.4(a). See Inquiry at Pages __.

I used my best efforts to fully explain the background and various arguments that could be made to support an advisory opinion that would answer the inquiry of whether an attorney may share, under any circumstances, attorney's fees with a non-lawyer public adjuster. After presenting the issue, the Request provides as follows:

1. First, the Request provides detailed background on the various ways that attorneys receive attorney's fees in their representation of homeowners, which include by statute or on a contingency fee. See Inquiry at Pages _.

2. Second, the Request than provides three hypothetical examples of settlements that detail the several ways in which an attorney would receive attorney's fees. See Inquiry at Page__.

3. Third, the Request then explains a public adjuster's contractual relationship with the homeowner, and, using the three hypotheticals, explains for each how much money the Public Adjuster would receive if the Adjuster did, **or** did not, receive a percentage of the attorney's fees paid to the attorney. See Inquiry at Page__.

4. Fourth, the Request next presents the argument of why allowing a public adjuster to share in the gross recovery obtained by the lawyer will necessarily always result in sharing fees with a non-lawyer. This section of the Inquiry is entitled "ALLOWING THE PUBLIC ADJUSTER TO RECEIVE A PERCENTAGE OF THE GROSS RECOVERY **IS SHARING** ATTORNEY'S FEES WITH A NON-LAWYER." (Emphasis added).

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[1] Footnote omitted.

5. Finally, the Request presents the argument of why it might be permissible to allow a public adjuster to receive a percentage of the attorney's fees received by the attorney. This section of the Inquiry is entitled "ALLOWING THE PUBLIC ADJUSTER TO RECEIVE A PERCENTAGE OF THE GROSS RECOVERY **IS NOT** SHARING ATTORNEY'S FEES WITH A NON-LAWYER." (Emphasis added).

FLORIDA BAR STAFF OPINION 39873

Opinion 39873 begins with reference to Florida Ethics Opinion 92-3, and explains that there the Bar" considered the issue of the propriety of a law firm accepting referrals from a public adjusting company and protecting the adjuster's interest in the recovery. Opinion 39873 then, again with reference to Opinion 92-3, recounts the findings set forth in Opinion 92-3, and states that "Opinion 92-3 holds that *such an arrangement* constitutes improper fee splitting with a non-lawyer". (Emphasis added). The language "such an arrangement can only be interpreted to mean and refer to the issue in Opinion 92-3, which Opinion 39873 recounted.

The instant Request did not address or seek an opinion on the referral of clients by a public adjuster to a lawyer, or the conduct of a lawyer in "protecting the adjuster's interest in the recovery."[2] The instant Request also made clear that it sought an advisory opinion based on the presumption that the referral of the client by the public adjuster to the lawyer was done in a permissible manner (see Request at page 1, note 1), and did not use the term or otherwise discuss the issue of a lawyer protecting the interest of a public adjuster or other non-lawyer in the recovery. See Request, generally. This prefatory and explanatory language was included in the Request in an effort to make clear that the Request was narrowly focused on the issue of whether there are any circumstances under which a lawyer may allow a non-lawyer public adjuster to receive a portion of the attorney's fees received by the attorney.

The undersigned was aware of and considered Opinion 92-3 before submitting the instant Request. Opinion 92-3 (and its underlying request for an advisory opinion) is materially distinguishable from the instant Request for several reasons:

1. First, Opinion 92-3 concerns personal injury cases, and specifically claims made by the injured party against the at-fault driver's insurance company (i.e., third-party claims). The instant Request concerns public adjusting and lawyers as it relates to claims against the insured property owner's insurance company (i.e., first-party claims).

[2] Similarly, the instant Request did not raise the issue of or seek an advisory opinion on whether and under what circumstances a lawyer can represent a client who also is represented by a public adjuster and knows the attorney's client will pay a fee to the public adjuster.

2. Second, the Request raises arguments not addressed in Opinion 92-3, such as a public adjuster's right under Florida Statute Section 626.854 to receive a portion of the insured's recovery.

3. Third, Opinion 92-3 addresses the lawyer's sharing a portion of the lawyer's contingency fee with the public adjuster, while the instant Request also raised the issue of whether a public adjuster can receive a portion of the attorney's fee received by the attorney pursuant to Florida Statute Section 627.428.

4. Fourth, unlike Opinion 92-3, the instant Request sought an advisory opinion on whether there are any circumstances under which a public adjuster can receive a portion of the total monies recovered by the attorney on behalf of the insured, which include (under the several hypotheticals presented) in all circumstances payments for indemnification and attorney's fees.

Thus, while Opinion 39873 states that under the circumstances of facts of Opinion 92-3 that sharing fees with a non-lawyer would violate Rule 4-5.4(a), and in doing so specifically refers to that "arrangement", Opinion 39873 does not address the factual circumstances or arguments presented in the instant Request.

The undersigned recognizes the Bar's right and obligation to include in its advisory opinions issues that the Bar deems important and worthy of consideration, even if not raised by the requesting attorney. The undersigned is not critical of the issues addressed in Opinion 39873 that were not raised in the Request.

Rather, the undersigned simply desires an advisory opinion that addresses and answers (a) the specific issue raised in the Request and (b) explains the reasons why the respective arguments advanced for prohibiting or allowing lawyers to permit public adjusters to receive a percentage of the lawyer's attorney's fees were rejected or accepted by the Bar.

To the extent that my Request did not clearly frame the issue, please accept my apologies. I spent considerable time and effort in researching and drafting the Request, including consultation with several lawyers and public adjusters, legal research, and several review and editing sessions of the Request with several attorneys. If the issue presented was unclear or not properly explained please accept my apologies. To that end, and to further aid in your efforts, I will attempt to rephrase or paraphrase the issue as follows:

> Are there any circumstances, in a case where a lawyer represents an insured property owner in a claim against the insured's property insurance company and the insured is also represented by a public adjuster, where a lawyer may (a) pay to a public adjuster, or (b) allow the public adjuster to receive, in a settlement obtained during litigation (or from a judgment at trial), a percentage of the gross recovery the lawyer obtains for the insured, which includes a percentage of <u>both</u> (1) the **indemnification** paid by the insurer to the insured **and** (2) the **attorney's fees** and costs that are part of the settlement, whether such attorney's fees are:

(i) embedded in a single settlement check paid by the insurer that represents the gross recovery in the case from which the lawyer will be paid a contingency fee against the gross recovery,

(ii) part of a settlement that includes two settlement checks, including one paid by the insurer to the insured for indemnification and one paid by the insurer to the attorney for attorney's fees and costs, or

(iii) any other circumstance in which the public adjuster would receive a percentage of the monies paid in a settlement where attorney's fees are included in the recovery, whether on a contingency fee basis, statutory attorney's fee, otherwise.

Finally, as explained in my August 23, 2019 phone conversation with Ms. Quintiliani, I fully expect the Bar to provide an advisory opinion which states that there are no circumstances that a lawyer may permit a public adjuster to receive a percentage of the gross recovery in which the lawyer's attorney's fees are included, or otherwise embedded, because it would violate Rule 4-5.4(a)'s prohibition against sharing attorney's fees with non-lawyers. I submitted the Request because it is very frustrating for me and the lawyers in my firm to be told by public adjusters that they would happily refer clients to our law firm if we allowed them to receive a percentage of the gross recovery in the settlement, which to me would require us to share a percentage of our legal fees with the public adjuster in violation of Rule 4-5.4(a). This is an issue that the Bar should address, as neither Opinion 92-3 nor any other Ethics Opinion directly or fully addresses the issues raised in my Request.

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

850/561-5600
www.FLORIDABAR.org

Delete

September 27, 2019

[redacted]

Re: Professional Ethics Committee Review of Ethics Inquiry No.39873[redacted]

Dear Mr.[redacted]:

This is to notify you that the chair of the Professional Ethics Committee has cancelled the October 18, 2019 meeting at the Tampa Airport Marriott. The committee's next meeting is scheduled for 9:30 a.m. on Friday, February 7, 2019, at the Hyatt Regency Orlando.

Following the meeting, I will notify you of any action taken by the committee.

If you have any questions, please call me at (850) 561-5780.

Sincerely,

Elizabeth Clark Tarbert
Ethics Counsel

cc: Mr. Randolph Braccialarghe, Chair, Professional Ethics Committee
Ms. LiliJean Quintiliani, Assistant Ethics Counsel

The Florida Bar

651 East Jefferson Street
Tallahassee, FL 32399-2300

Joshua E. Doyle
Executive Director

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February 11, 2020

[redacted]

Re: Professional Ethics Committee Review of Florida Bar Staff Opinion 39873

Dear Mr. [redacted]:

At its meeting on February 7, 2020, the Professional Ethics Committee considered your request for review of Florida Bar Staff Opinion 39873.

The committee voted 30-0, with 2 abstentions, to affirm the staff opinion, but delete the final paragraph and add an explicit statement that you may not accept referrals from a public adjuster that are conditioned on you protecting the public adjuster's interests in the settlement. Attached is a copy of the staff opinion as revised by the committee.

If you disagree with the committee's decision, you have thirty (30) days to request review by The Florida Bar Board of Governors. A request for review must be postmarked no later than thirty (30) days from the date of this letter, not the date of receipt. The request must contain the original inquiry number and clearly state the issues for review. You may include a written argument explaining why you believe the committee's decision is incorrect. Procedures governing your request for review and board procedures may be found in Procedures 4(h), 5 and 6, Florida Bar Procedures for Ruling on Questions of Ethics (available on The Florida Bar's website at www.flabar.org). You will be notified of the board's decision promptly.

If you have any questions, please call me at (850) 561-5780.

Sincerely,

Elizabeth Clark Tarbert
Ethics Counsel

cc: Professor Randolph Braccialarghe, Chair, Professional Ethics Committee
Ms. LiliJean Quintiliani, Assistant Ethics Counsel

FLORIDA BAR STAFF OPINION 39873
February 7, 2020

[Note: this opinion was affirmed as modified by the Professional Ethics Committee at its February 7, 2020 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. Advisory opinions are authored in response to specific inquiries and may not be applicable to anyone other than the inquiring attorneys referenced in them. 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 and are not binding; 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.

The inquiring lawyer has asked for an opinion regarding the distribution of settlement funds in cases regarding claims by clients against their homeowners insurance company. The inquiry states:

> The issue is whether there are any circumstances under which a lawyer may (a) pay to a public adjuster or (b) allow the public adjuster to receive a percentage of the gross monies recovered in a settlement obtained during litigation (or from a judgment at trial) in a case where the public adjuster referred the insured to the lawyer and the lawyer then represents an insured in a claim against the insured's homeowners insurance company.[1]
>
> The question arises because we have declined all potential clients from public adjusters who have conditioned the referral of potential clients to our law firm on the requirement that we allow the public adjuster to receive a percentage of the gross recovery, which would include a percentage of both (1) the indemnification paid by the insurer to the insured and (2) the attorney's fees and costs that are part of the settlement, whether paid separately by the insurer or as part of a contingency fee on the gross settlement amount.

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[1]This request for an ethics opinion is based on the presumption that the referral of the client by the public adjuster to the lawyer was done in a permissible manner. This request also applies equally to situations where the client (*i.e.*, the homeowner) seeks out and retains the lawyer and the client, prior to such retention of the lawyer, had retained a public adjuster that was unable to resolve

> the claim with the insurance carrier (i.e., where the client hires a public adjuster first, and then the client independently chooses to and hires the lawyer without a referral from the public adjuster).

In Florida Ethics Opinion 92-3 (copy enclosed) the Professional Ethics Committee of The Florida Bar considered the propriety of a law firm accepting referrals from a public adjusting company and protecting the adjuster's interest in the recovery. In that opinion the committee found that a number of ethical problems existed. Opinion 92-3 holds that such an arrangement constitutes improper fee splitting with a non-lawyer. Rule of Professional Conduct 4-5.4(a). Additionally, the committee found that the referral of clients by the adjusting company to the law firm violated Rules 4-7.4(a) [now renumbered as 4-7.18(a)] and 4-8.4(a), which prohibit an attorney from soliciting business either through direct contact with a potential client, or through the acts of an employee or agent. In addition, the Committee found that the attorney might be aiding the adjuster in the unlicensed practice of law if the adjuster was settling claims with a tortfeasor's insurance company. *See* Rules 4-5.4(a) and 4-5.5(b), Rules Regulating The Florida Bar. The inquirer may not engage in such an improper referral arrangement with a public adjuster.

The inquirer may not accept referrals from a public adjuster that are conditioned on the inquirer's protecting the public adjuster's interest in the recovery. See Florida Ethics Opinion 92-3.

The inquirer is not, however, prohibited from continuing representation of a client although the inquirer knows that a client will pay a contingent fee to the public adjuster as long as: 1) the client's contingent fee agreement with a public adjuster pre-dated the inquirer's representation of the client, 2) there was no improper solicitation or referral by a public adjuster to the inquirer, 3) the client is paying under the client's original contract with a public adjuster, 4) the inquirer does not have an arrangement with the public adjuster as in Florida Ethics Opinion 92-3, and 5) there is no payment of any incentive to a public adjuster for the public adjuster's testimony. Specifically as to the fifth condition, see Rule 4-3.4(b) which states that a lawyer shall not "offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings...."