

August 26, 2015

Elizabeth Clark Tarbert, Ethics Counsel
Ethics and Advertising Department
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

Re: Florida Trust Account Compliance Certificate

Dear Ms. Tarbert:

On behalf of the Association of Corporate Counsel (“ACC”), North Florida, Central Florida, West Central Florida and South Florida ACC chapters, we are writing to urge a clarification to the Trust Account Compliance Certificate required under Rule 5-1.2(c)(5), Rules Regulating the Florida Bar. Neither the language of the certificate, nor the guidance in the certificate’s instructions provide a clear option for in-house counsel to accurately state that they are in compliance with Florida’s trust accounting rules. We propose that the Florida Bar add clarifying language to the form’s instructions to address the unique circumstances of in-house counsel.

The ACC is a global bar association that promotes the common professional and business interests of in-house counsel. Since its founding in 1982, ACC has grown to become the world’s largest organization serving the professional and business interests of lawyers who practice in private-sector legal departments. ACC has over 40,000 members employed by over 10,000 organizations in more than 85 countries. For years, ACC has worked to remove obstacles that can make it difficult for in-house lawyers to practice law for their employers. The ACC Florida chapters represent more than 1200 in-house counsel in Florida at leading local, national and international companies. The chapters are dedicated to serving the needs and interests of the in-house counsel community in the state of Florida.

Pursuant to Rule 5-1.2(c)(5), each year Florida bar members are required to certify whether they have complied with the trust accounting and safekeeping property requirements of Rules 5-1.1 and 5-1.2 during the previous fiscal year. The current Trust Account Compliance Certificate includes three options:

- (1) the attorney is required to maintain a trust account and is in compliance with the trust account and property safekeeping rules;

(2) the attorney is not required to maintain a trust account because he or she does not receive or hold funds or properties from clients or third parties in connection with legal representation; and

(3) the attorney is not in compliance with the trust account and property safekeeping rules (and the attorney must include a written explanation for the non-compliance).

According to the instructions to the certificate, bar members such as judges and government lawyers are supposed to use the second option to indicate that they are not required to maintain a trust account. The instructions do not contain specific guidance with respect to in-house counsel.¹

Unfortunately, none of these options reflect the unique context in which in-house counsel operate. Many in-house counsel will at some time briefly have in their possession checks from a third party made payable directly to the client, or “property” in connection with legal representation. Examples of this could be a settlement check mailed to the in-house attorney and made payable to the employer-client, which the in-house counsel turns over for deposit; or a settlement check from the employer-client that is handed to the in-house counsel to be mailed out to opposing counsel. In regard to property, this could potentially include a hard drive with emails that the in-house counsel is turning over to outside litigation counsel in connection with a lawsuit.

Thus, the options on the Trust Account Compliance Certificate do not clearly provide a method by which in-house counsel may complete the form truthfully if they are in this position, because option 2 contains the statement that the attorney does not receive client funds or properties. We urge the Florida Bar to revise the instructions to the form to make clear that in-house attorneys are not required to maintain a trust account or follow property safekeeping rules as part of their legal representation of their employer-client.

Having a clear opt-out for in-house counsel has worked in other jurisdictions. Many states, including Maryland, Arizona, Delaware, South Dakota and Utah to name just a few, explicitly exclude in-house attorneys from the trust account compliance requirements on their trust account compliance forms or the instructions to the form. In Florida, there is already an exception for government attorneys present in the instructions to the form, directing them to choose option 2 on the form.

We would propose adding a similar exception for in-house attorneys to the form instructions. To make it clear that in-house counsel who receive funds or property from

¹ The instructions to the certificate direct bar members to mark option 2 if “you have no trust account because neither you nor anyone within the organization in which you work received funds or property from clients or third parties in connection with the representation of a client and are not required to maintain a trust account.” To the extent this guidance is intended to apply in-house counsel, it suffers from the same defect as the language on the form. Namely, that many in-house counsel do receive funds or property from or on behalf of their employer-client in connection with their representation of their employer-client.

their employer-clients are exempt from the trust account rules, we would suggest adding the following as a bullet point in the option 2 guidance on certificate's instructions:

You are a lawyer employed by a business or non-profit entity during the entire fiscal year and have not accepted nor have funds or property in a lawyer-client relationship, other than funds or property received in connection with your employment duties and disposed of in accordance with the practices of your employer.

Adding this or similar language to the instructions to the certificate will make it clear that in-house counsel may mark option 2 on the certificate even if they have occasion to hold funds or property on behalf of their employer-client.

On behalf of the Association of Corporate Counsel and its Florida Chapters, we urge the Florida Bar Association to make this clarification so that the Trust Account Compliance Certificate better represents modern in-house practice.

Thank you for your consideration. We look forward to working with you. If you have questions about the issues raised in this letter, please contact Simonne Lawrence, the Advocacy Liaison for the ACC South Florida Chapter at (954) 767-2646 or SLawrence@envisionrx.com.

Sincerely yours,



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