

PEN Legal Policy Manual

This PEN Legal Policy Manual is to provide information only on PEN's duty to legally defend its members and in no way alters or modifies PEN's insurance coverage of members under PEN's Professional Educators Liability Insurance Policy.

Adopted by PEN Board of Directors as of November 3, 2015

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I. Introduction

- A. PEN's Board of Directors has determined to specifically outline its policies and procedures regarding when the organization will defend a member in a legal proceeding. This document outlines the procedures and policies PEN will follow when making determinations regarding legal representation. Most of the categories of representation outlined below reimburse attorney's fees under PEN's Professional Educators Liability Insurance Policy and PEN has determined to outline when it has a duty to defend and when it will permit representation and coverage, including the procedure of appointment of counsel and payment of attorney's fees. In other areas of representation falling outside PEN's educators liability insurance policy, PEN will follow the procedures as outlined below. It is PEN's intention to specifically outline these legal representation parameters so PEN's legal policy, as regards to whether to defend, is applied equally to every member, rather than on a case by case basis. Every current and future PEN member will be put on notice and affirmatively made aware of these legal policies and procedures when joining PEN and paying membership dues, and have agreed to all policies outlined below.

II. General Provisions

- A. PEN's Legal Department is under the direction and administration of PEN's General Counsel. PEN's Board of Directors shall designate a General Counsel and his/her law firm to serve in this capacity. If the current General Counsel drops PEN as a client or resigns for any reason, PEN's Board of Directors shall appoint a new General Counsel at the next full Board meeting.
- B. PEN's General Counsel will be paid a flat rate monthly fee plus reasonable costs (copying, postage, telephone, etc.) for serving in the capacity of PEN's General Counsel and serving all legal needs of PEN. PEN shall enter into an annual or multi-year engagement agreement with the General Counsel and his/her law firm. PEN's General Counsel serves at the pleasure of the PEN Board of Directors and PEN can terminate the General Counsel and his/her law firm at any time pursuant to the provisions of the legal engagement agreement/contract with the General Counsel and his/her law firm.

- C. PEN's General Counsel shall create, maintain, and coordinate PEN's legal network. On any matter where a member needs legal representation, it shall be under the sole discretion of the General Counsel as to whether to handle the matter in-house with representation by him/her or his/her law firm, or to assign the matter to an attorney in PEN's legal network, or to an attorney outside PEN's legal network. All attorneys under those three categories shall agree to bill the matter under the agreed-upon hourly rate as stated in the engagement agreement or in accordance with the hourly rate and terms set forth in PEN's Professional Educators Liability Insurance Policy. PEN's General Counsel shall enter into the necessary legal engagement agreements with all PEN legal network or other contract attorneys.
- D. PEN's General Counsel represents PEN, but will obtain specific legal instruction and direction in consultation with PEN's Executive or Administrative Director. If PEN's Executive or Administrative Director position is vacant at any time, or if PEN's Executive or Administrative Director's duties have been reassigned to non-legal duties for any period of time, PEN's General Counsel will consult directly with PEN's Chairman of the Board to receive and determine legal instruction and direction. This provision (Section II. D.) will apply to this entire document/manual.

III. Legal Representation for Professional Employment Rights (Coverage B.A.2)

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves the absolute right to determine whether legal representation shall be provided to a member in a Professional Employment Rights matter involving a Florida school district.
- B. Several circumstances shall bar PEN, and PEN's General Counsel, from providing employment rights legal representation and these include:
 - 1. Some or all of the allegations of the alleged misconduct occurred prior to the member joining PEN.
 - 2. The member drops his/her membership during the legal representation.

3. The member has been dishonest with the assigned PEN attorney regarding the facts of the matter.
 4. The member is publicly or privately disparaging of PEN.
 5. The member has become hostile, violent, belligerent, argumentative, or over-aggressive with the PEN office, PEN's staff, or the attorney and his/her staff representing the member.
 6. The member has previously used a union attorney on the same matter and has an existing lawyer/client relationship with the union and the union attorney or any other outside private attorney not assigned by PEN.
- C. Several circumstances may bar PEN from providing employment rights legal representation and these include:
1. The member's employment rights have not been violated in PEN's opinion because after a thorough investigation of the matter, PEN and its General Counsel determine that the allegations are true and therefore no professional employment rights have been violated.
 2. The member is unreasonable in refusing the legal advice of the PEN attorney in the pending matter. For example, the PEN office may negotiate a reasonable and acceptable Settlement Agreement with the school district, but the member refuses to accept the reasonable settlement offered.
 3. The member has received prior discipline regarding the same matter prior to use of PEN's legal representation or prior to joining PEN. Because of this "progressive discipline", the current allegations become more serious and the potential discipline more harsh than it would normally be without the "progressive discipline".
 4. The member did not call PEN or email PEN's Legal Member Liaison with enough time for PEN to adequately prepare for the member's defense and take the appropriate legal action. Upon calling PEN, a member is referred to the PEN Legal Member Liaison email address to put their legal issue in writing for PEN to review. If this email is

sent for example, in the morning and the disciplinary hearing is set for the afternoon, PEN may try to get a continuance of the disciplinary hearing, but cannot be expected to automatically agree to representation. Additionally, PEN is commonly called and an email is sent to PEN's Legal Member Liaison email address after a disciplinary proceeding has occurred and PEN has no chance to represent its member from the beginning of the matter putting PEN at an enormous legal disadvantage to properly represent its member. Given the above, PEN may decide not to offer employment rights legal representation to that member.

5. Specifically with regard to appeal of unsatisfactory evaluations, PEN may deny legal representation in an appeal if the evaluations covered a time period prior to the member joining PEN, or if the educator has not joined PEN by October 31 of the current school year or prior to the first observation/evaluation. Moreover, if two or more previous evaluations have been unsatisfactory, PEN may deny legal representation to a member who joins after the unsatisfactory evaluations to contest school district action such as termination, suspension, etc. pursuant to Coverage B.A.2.

D. At some point in the employment rights legal representation, PEN and PEN's General Counsel may decide that an insurance file should be opened in the matter under Coverage B.A.2 pursuant to PEN's Professional Educators Liability Insurance Policy. PEN's General Counsel may open up this file, or it may be assigned to an attorney in PEN's legal network, or to an attorney outside PEN's legal network.

1. Once this is done, the member shall sign an Assignment Form so that the attorney can collect reasonable attorney's fees for this representation from the insurance company. If an Assignment Form is not filled out, signed, and returned within seven (7) days of when the file was opened with the insurance company (which includes a conflict check, creation of a matter number, opening of a hard file, etc. by the assigned attorney) PEN and PEN's General Counsel may refuse representation of that member.
2. In order for an attorney to be reimbursed for attorney's fees once an insurance file is opened, the member must prevail pursuant to Coverage B.A.2 with regard to a professional employment rights

matter. In order to prevail, the PEN attorney must agree that the allegations are untrue, or if admitted, should not lead to the penalties suggested by the school district. The member cannot prevail if PEN believes the allegations are true and employment rights have not been violated, and this may be the basis to deny representation.

- E. There is no prohibition on PEN's General Counsel, an attorney in PEN's legal network, or an attorney outside PEN's legal network to discontinue representation of a member at any time for any reason for any situation mentioned above or any other reasonable scenario as long as the member is given proper notice of the withdrawal, coverage of impending proceedings is addressed, and PEN attempts to assist that member in finding another attorney.

IV. Legal Representation for Professional Certification Rights (Coverage B.A.3)

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves the absolute right to determine whether legal representation shall be provided to a member in a Professional Certificate Rights matter involving Professional Practices Services (PPS) of the Florida Department of Education (DOE).
- B. See the procedures and policies regarding determination of legal representation under Section III above, all of which shall apply to this Section with the addition of the following.
 - 1. A professional certification rights matter is conducted by PPS under the jurisdiction of DOE. Such a case is divided into two proceedings. In the first proceeding, PPS/DOE conducts an investigation of alleged misconduct which could result in discipline of a professional certificate. PEN may open an insurance file under Coverage B.A.3 to engage in representation of a member to assist the member while PPS/DOE is conducting the investigation. PEN's determination as to representation at this point only applies to the investigatory stage which also includes an informal hearing with the PPS investigator. Legal representation will not extend beyond conclusion of the PPS/DOE investigation. Once the investigation is

concluded, PEN shall make a second determination as to whether to continue the legal representation.

2. After a PPS/DOE investigation is concluded, the DOE will determine whether there is "Probable Cause" or "No Probable Cause" to file an Administrative Complaint against the educator. If "No Probable Cause" is found, the case is dismissed. If "Probable Cause" is found, DOE files an Administrative Complaint and requires the educator to complete an Election of Rights Form to determine whether a Formal Administrative Hearing, an Informal Administrative Hearing, or a Settlement negotiation is requested. Once this is done, PEN will reassess the case de novo and decide whether to once again represent the member. All of the considerations laid out above under Section III will be taken into account de novo to determine if PEN will go forward with the legal representation after the Administrative Complaint is filed and "Probable Cause" is found. Among other things listed in Section III above, PEN will review the material allegations in the Administrative Complaint to determine if the member can prevail, or if the member cannot prevail, whether a settlement negotiation is probable, before making a commitment to represent the PEN member post-Administrative Complaint.

V. Legal Representation for Criminal Action or Proceeding (Coverage B.A.1)

- A. Neither PEN's General Counsel nor attorneys in PEN's legal network have expertise in criminal representation. Therefore, PEN's legal representation policies and procedures under Coverage B.A.1 regarding criminal matters and proceedings will fall under the following procedures.
 1. The PEN member charged in a federal or state criminal matter or proceeding shall find and retain a criminal attorney on their own. PEN will not be involved in any way to assist in hiring or locating a criminal attorney. The legal engagement and relationship between the PEN member and the criminal attorney will not include PEN, but only those two parties, i.e., the member and the criminal attorney. Issues such as payment of a retainer and scope of representation are solely between the PEN member and the criminal attorney.
 2. The criminal attorney retained by the PEN member may file a claim for reimbursement of attorney's fees under PEN's Professional

Educators Liability Insurance Policy pursuant to Coverage B.A.1 on their own without the assistance of PEN or PEN's General Counsel.

3. To make a successful claim for reimbursement of legal fees the criminal attorney shall agree to bill no more than \$150.00 per hour, exclude costs from their legal invoice, and bill only up to a total of \$20,000.00 for the representation. In order to recover any legal fees under these terms, the PEN member's alleged criminal actions must have arisen out of activities in his/her professional capacity. Moreover, the PEN member shall be adjudicated "Not Guilty" of the criminal charges in order for the criminal attorney to recover any attorney's fees. This excludes any other type of plea or plea bargain or settlement.
4. PEN's General Counsel will not assist the criminal lawyer in filing the reimbursement of attorney's fees claim, other than sending a criminal insurance claim fact sheet to the member to forward to their criminal attorney with the insurance company's address and contact information and the terms the insurance company requires to file a successful claim for reimbursement of criminal attorney's fees.
5. The criminal attorney shall copy PEN's General Counsel on any invoice for criminal attorney's fees sent to PEN's insurance carrier.

VI. Legal Representation for Private Instruction

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves the absolute right to determine whether legal representation shall be provided to a member in a Private Instruction action or proceeding.
- B. See the procedures and policies regarding determination of legal representation under Section III above, all of which shall apply to this Section.

VII. Legal Representation for Civil Liability (Coverage A)

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves

the absolute right to determine whether legal representation shall be provided to a member in a civil liability action.

- B. See the procedures and policies regarding determination of legal representation under Section III above, all of which shall apply to this Section.
- C. Additionally, PEN's insurance carrier shall make a determination if they have a duty to defend under Coverage A. PEN shall comply with the determination of the insurance carrier as to whether the member is covered and legal representation will be provided. The insurance carrier will consider issues which include among other things, primary vs. secondary coverage, whether the member was acting outside the scope of their employment, whether the member is already covered by a school district policy, by a personal civil liability policy, or by a union liability policy, considerations of sovereign immunity, whether the incident occurred during the policy period while the educator was a member of PEN and whether the school district is already providing representation to the PEN member. If PEN's insurance company determines that Coverage A applies and that it is permissible for PEN to represent the member under Coverage A, PEN will then follow the procedures laid out in this Section A and B above.

VIII. Legal Representation for DCF and Other State Agency Investigation/Action

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves the absolute right to determine whether legal representation shall be provided to a member in any action or proceeding by the Department of Children and Families (DCF) or any other action or proceeding involving a state agency.
- B. See the procedures and policies regarding determination of legal representation under Section III above, all of which shall apply to this Section.

IX. Other Legal Representation

- A. PEN's General Counsel, in consultation with his/her client through communication with PEN's Executive or Administrative Director, reserves

the absolute right to determine whether legal representation shall be provided to a member in any other type of legal representation. It shall be within the discretion of PEN and PEN's General Counsel to determine whether a member is entitled to representation in all other legal proceedings not mentioned above or below under Section X.

- B. See the procedures and policies regarding determination of legal representation under Section III above, all of which shall apply to this Section.

X. Prohibited Legal Representation

- A. PEN shall not provide legal representation to members for any type of "offensive" litigation, lawsuit, administrative complaint, complaint, action, petition, or any other type of legal proceeding where the member initiates the proceeding as a plaintiff or petitioner or the like, even if the action or proceeding arises out of the activities of the member in his/her professional capacity.
- B. The following is a list of the types "offensive" litigation, claims, or lawsuits that PEN shall not offer to defend and provide legal representation for its members. This list is not comprehensive.
 - 1. Title VII lawsuit, including discrimination, sexual harassment, hostile work environment, and other violations of civil rights under Title VII.
 - 2. Title IX lawsuit.
 - 3. EEOC (Equal Employment Opportunity Commission) or FCHR (Florida Commission on Human Relations) claim or petition.
 - 4. Civil tort lawsuit including among other causes of action, defamation, battery, assault, false imprisonment, intentional infliction of emotional distress, negligence, etc.
 - 5. Civil tort liability lawsuit alleging damages.
 - 6. Injunction, specific performance, promissory estoppel or any other type of equitable civil remedy sought in a civil lawsuit.

7. ADA (Americans with Disabilities Act) claim or suit.
8. ADEA (Age Discrimination in Employment Act) claim or suit.
9. Any type of legal proceeding filed for violation of civil rights, unequal application of the law or violation of constitutional rights.
10. Any type of legal proceeding filed against the teachers' union in Florida, including among other things, a civil suit, and unfair labor practices suit, or a PERC (Public Employees Relation Committee) action, attempting to decertify the union, challenge the union's right to collectively bargain, challenge the union's jurisdictional authority under Chapter 447, F.S., or the like.
11. Breach of contract suits where a PEN member is initiating the proceeding.
12. **Workers' Compensation Action**