Administrative Law Section

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(850)425-6654

CHAIR-ELECT:
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Tallahassee, FL 32301-7742
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SECRETARY:
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TREASURER:
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IMMEDIATE PAST CHAIR:
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P.U.L.C. CHAIR:
Michael G. Cooke
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EXECUTIVE COUNCIL:

Terms Expiring 2009:
Paul H. Amundsen
Tallahassee
Donna E. Blanton
Tallahassee
Lisa S. Nelson
Tallahassee
Daniel E. Nordby
Tallahassee
Linda M. Rigot
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W. David Watkins
Tallahassee
William E. Williams
Tallahassee

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Deborah K. Kearney
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Bruce D. Lamb
Tampa
Wellington H. Meffert
Tallahassee
Shaw P. Stiller
Tallahassee
T. Kent Wetherell, II
Tallahassee

SECTION ADMINISTRATOR:
Jackie Werndli
651 E. Jefferson St.
Tallahassee, FL 32399-2300
(850)561-5623

Administrative Law Section Executive Council
September 23, 2008
The Florida Bar Annex

AGENDA

I. CALL TO ORDER – Elizabeth W. McArthur, Chair

II. PRELIMINARY MATTERS
- A. Consideration of Minutes
  - 1. June 20, 2008
- B. Treasurer's Report – Allen R. Grossman
  - 1. 9/17/08 Detail Statement of Operations
- C. Chair's Report – Elizabeth W. McArthur.
  - 1. Revised Proposal Related to the Attorney-Client Privilege
  - 2. BOG Report Presentation

III. COMMITTEE/LIAISON REPORTS
- A. Continuing Legal Education – Bruce D. Lamb
  - 1. Pat Dore Conference – Seann M. Frazier/F. Scott Boyd
- B. Publications – Deborah K. Kearney
  - 1. Newsletter – Donna E. Blanton/Amy W. Schrader
    - a. Agency Snapshots – Wellington H. Meffert
  - 2. TFB *Journal* – Deborah K. Kearney
- C. Legislative – William E. Williams /Linda M. Rigot/Andy Bertron
- D. Public Utilities Law – Michael G. Cooke
  - 1. Practice Before the PSC
- E. Membership – W. David Watkins
- F. Webpage – Daniel E. Nordby
- G. Board of Governors Liaison – Lawrence E. Sellers, Jr.
  - 1. Meeting Summary – July 25, 2008
- H. Law School Liaison – T. Kent Wetherell, II
  - 1. Stetson – First Annual Bar Association Fair
- I. CLE Committee Liaison – Cathy M. Sellers
- J. Council of Sections – Seann M. Frazier
- K. Section/Division Liaison
  - 1. Environmental and Land Use Law – Shaw P. Stiller
  - 2. Health Law – Allen R. Grossman
  - 3. YLD Liaison – Christine R. Davis
- L. DOAH Update – Lisa S. Nelson/Linda M. Rigot/T. Kent Wetherell, II
- M. APD Volunteer Program Ad Hoc Committee – Andy Bertron

IV. OLD BUSINESS

A. Proposed Revisions to Appellate Rules – Linda M. Rigot

V. NEW BUSINESS

A. Ethical Issue – Constraints on contacts by lawyers with government agencies that have a General Counsel

VI. INFORMATIONAL

A. Executive Council List

B. 2008-09 Committee List

C. Legislative Positions

VII. TIME AND PLACE OF NEXT MEETING

Winter 2009 – Tallahassee

VIII. ADJOURNMENT

Unaudited Detail Statement of Operations

	August 2008 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Total Administrative Law				
31431 Section Dues	5,960	27,303	29,190	93.54
31432 Affilliate Dues	0	300	100	300.00
31433 Admin Fee to TFB	(4,340)	(20,068)	(20,555)	97.63
Total Dues Income-Net	1,620	7,535	8,735	86.26
32191 CLE Courses	4	4	9,000	0.04
32293 Section Differential	25	50	1,875	2.67
35700 Member Service Progr	0	0	5,000	0.00
38499 Investment Allocatio	0	0	13,379	0.00
39999 Miscellaneous	0	0	150	0.00
Other Income	29	54	29,404	0.18
Total Revenues	1,649	7,589	38,139	19.90
51101 Employee Travel	0	0	1,341	0.00
84001 Postage	40	40	175	22.86
84002 Printing	112	112	120	93.33
84003 Officers Office Expe	0	0	500	0.00
84006 Newsletter	0	1,383	5,400	25.61
84007 Membership	0	0	500	0.00
84009 Supplies	0	0	50	0.00
84010 Photocopying	1	1	150	0.67
84051 Officers Travel Expe	0	0	2,500	0.00
84052 Meeting Travel Expen	0	0	3,000	0.00
84054 CLE Speaker Expense	0	0	100	0.00
84101 Committee Expenses	0	0	500	0.00
84201 Board Or Council Mee	0	0	600	0.00
84202 Annual Meeting	0	0	2,400	0.00
84205 Section Service Prog	0	0	5,000	0.00
84209 Retreat	0	0	4,500	0.00
84299 Public Utility Comm	0	0	500	0.00
84301 Awards	0	0	600	0.00
84310 Law School Liaison	0	0	4,900	0.00
84422 Website	0	0	3,000	0.00
84501 Legislative Consulta	0	0	5,000	0.00
84701 Council Of Sections	0	0	300	0.00
84998 Operating Reserve	0	0	4,422	0.00
84999 Miscellaneous	34	34	500	6.80
Total Operating Expenses	187	1,570	46,058	3.41
86431 Meetings Administrat	0	0	32	0.00
86543 Graphics & Art	0	0	2,554	0.00
Total TFB Support Services	0	0	2,586	0.00

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	August 2008 Actuals	YTD 08-09 Actuals	Budget	Percent Budget
Total Administrative Law				
Total Expenses	187	1,570	48,644	3.23
Net Operations	1,462	6,019	(10,505)	(57.30)
21001 Fund Balance	0	209,058	191,134	109.38
Total Current Fund Balance	1,462	215,077	180,629	119.07

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September 15, 2008

VIA HAND DELIVERY

Mr. Marcos D. Jimenez, Chair
Attorney-Client Privilege Task Force
c/o Mary Ellen Bateman
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32301-2399

RE: Comment on Revised Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector

Dear Mr. Jiminez:

This letter is submitted in response to your invitation to comment on the referenced revised proposal.

The Administrative Law Section submitted its comments to the Task Force's preliminary proposal, in a March 13, 2008, letter by then-Chair Andy Bertron. That letter expressed strong opposition to two particular provisions, both of which were eliminated in the Revised Proposal (see July 22, 2008, Request for Comment, Changes Made From The Preliminary Proposal To The Revised Proposal, pp. 4 - 5, items 3 and 7). A copy of the Administrative Law Section's March 13, 2008, letter is enclosed for ease of reference.

We write now to express our gratitude to the Task Force for considering and acting upon our comments. We fully support the Revised Proposal's changes that eliminate the two provisions we opposed, for the reasons expressed in the enclosed March 13, 2008, letter. We would urge the Board of Governors to approve the Task Force's Revised Proposal with respect to these two items.

Sincerely,

Elizabeth McArthur, Chair
Administrative Law Section

Enclosure

II C 1 (1)

Administrative Law Section

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March 13, 2008

Mr. Marcos D. Jimenez, Chair
Attorney-Client Privilege Task Force
c/o Mary Ellen Bateman
The Florida Bar
651 E. Jefferson St.
Tallahassee, Florida 32301-2399

RE: Comment on Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector

Dear Mr. Jimenez:

As requested in your January 25, 2008 memorandum, the Executive Council of the Administrative Law Section met to consider the Preliminary Proposal Related to the Attorney-Client Privilege/Work Product Protections in the Public Sector prepared by the Task Force on Attorney-Client Privilege. The Administrative Law Section opposes several proposed statutory changes: (1) as lacking the public necessity justifying the exemption required by the Constitution of the State of Florida, and (2) as being punitive toward the citizens of our State.

The proposals have been reviewed not in the context of civil litigation, for which they appear to have been drafted, but in the context of administrative disputes. It must be remembered that in the administrative arena, a significant number of cases are filed by the government against regulated persons and businesses. These cases involve public policy, which is not involved in civil litigation, and involve, for example, regulation of professions and occupations, the establishment of paternity and child support, the entitlement to services by persons with disabilities, discriminatory employment practices, certificates of need for health care facilities, exceptional student education, the continued involuntary placement of patients in mental facilities, bid protests, and rule challenges. They seldom involve monetary damages.

As to the proposed amendments to Section 119.071, Florida Statutes, the Administrative Law Section strongly opposes proposed (1)(d)3 which provides an exemption from public record production of those documents which would be privileged in the civil discovery context. The concept of "civil discovery context" is without sufficient meaning to satisfy the requirement in s. 24(c), Art. I of the State Constitution, that as to any document exempted from public records disclosure the "law state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law." The

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proposed language offers no specifically- stated public necessity. Further, whether a document is privileged can depend upon the type of civil case being litigated, in other words, it can be case-specific. The general language of the proposal requires that the agency clerk responsible for producing public records make a determination as to how a judge would rule on a disputed question of privilege in a specific-but-non-existent lawsuit. Such responsibility is onerous but under the proposal can be exercised with unbridled discretion. The proposal does not protect the government entity involved in litigation but rather tips the level playing field in favor of the government.

Next, the Administrative Law Section strongly opposes the proposed new Section 119.0710, Florida Statutes. It is highly-inappropriate for The Florida Bar to approve a position which makes a citizen give up one constitutional right in order to exercise another. This proposed statute provides that if someone is involved in a legal proceeding with the government, that person loses his constitutional right to request public records and can only obtain documents through discovery. Again, this proposal fails to state with specificity any public necessity. Further, it is unrestricted and it, therefore, cannot be described as "no broader than necessary to accomplish the stated purpose." This proposal is punitive; it punishes a person for engaging in a civil or administrative dispute with the government by taking away a constitutional right. The Task Force's stated purpose in proposing this new law is to prevent abuses of the public records law, but it is apparent that the only persons affected by this proposed statute and, therefore, the apparent "abusers" are those involved in legal proceedings with the government and that those not involved in legal proceedings with the government are not "abusers." Further, mixing the concepts of public records with discovery is also problematic because those concepts have very different parameters and purposes.

The Administrative Law Section, therefore, urges The Florida Bar to reject the Task Force's proposed new statutes: Subsection 119.071(1)(d)3 and Section 119.0710.

Sincerely,

Andy Bertron
Chair, Administrative Law Section
Executive Council

II C 1(3)

The Florida Bar

John G. White, III
President

John F. Harkness, Jr.
Executive Director

Jesse H. Diner
President-elect

September 12, 2008

Elizabeth Waas McArthur
Radey, Thomas, Yon & Clark
P.O. Box 10967
Tallahassee, FL 32302

Re: January 28-31
Board of Governors Meeting
Tallahassee

Dear Ms. McArthur:

On behalf of President Jay White and the Board of Governors of The Florida Bar, thank you for agreeing to present a report on behalf of the Administrative Law Section to our board when it meets Friday, January 30, 2009, in Tallahassee.

In the very near future, the agenda for this meeting will begin to develop and we will set a tentative time for your appearance.

If I can assist you, please do not hesitate to contact me at (850)561-5759.

Sincerely,

Rosalyn A. Scott
Assistant to the President

cc: John G. White, III, President
Larry Sellers, Section Liaison
Jackie Werndli, Program Administrator ✓

II C 2 (1)

The Florida Bar

John G. White, III
President

John F. Harkness, Jr.
Executive Director

Jesse H. Diner
President-elect

July 1, 2008

Elizabeth Waas McArthur
Radey Thomas Yon & Clark
P.O. Box 10967
Tallahassee, FL 32302-2967

Re: Section Reports to the Board of Governors

Dear Ms. McArthur:

As chair of the Administrative Law Section, I invite you to provide a report to the Board of Governors at one of its meetings during this 2008-2009 Bar year. You may present your report verbally or submit a written version. Included should be information about your section's current activities, goals, and accomplishments during the year.

Personal appearances, should you choose that option, are made on Friday of each Board meeting. We are usually flexible as to the time, and work with you to keep it as convenient as possible. We only ask that you keep your report succinct. The Board has a long agenda and a limited time for each item, so we ask that you limit your presentation to no longer than 7 minutes.

Enclosed is a form for you to indicate whether you would like to submit a written report or make a personal appearance. You may also select the board meeting that is most convenient. Please complete this form and send it to my assistant at Bar Headquarters, Rosalyn Scott, at the address indicated at the bottom. If you decide to submit a written report, please submit it to your program administrator or Rosalyn Scott at least three weeks before the chosen board meeting so that it can be included on our agenda.

I look forward to working with you during this Bar year.

Sincerely,

John G. White, III

Enclosure

cc: Section Program Administrators

II C 2(2)

BOARD OF GOVERNORS
July 25, 2008

The Board of Governors met on July 24-25 in Clearwater. Here are some of the highlights of our meeting:
:

The Board approved Proposed Advisory Opinion 07-02 on outsourcing of paralegal work to a foreign country. The opinion holds that such work may be sent overseas, although the attorney may need to take extra precautions to protect sensitive information and may need to inform the client. The Board approved adding language suggested by the Board Review Committee on Professional Ethics which says the lawyer must also be sensitive to the possible disclosure of confidential information obtained from others, including an opposing party, and whether such disclosure may be regulated by applicable law, when outsourcing. The Committee also recommended that the issue be referred to the appropriate Board committee/s to comprehensively review use of third parties outside of a law firm to assist in the provision of legal services, whether inside or outside the U.S.

The Board approved a motion directing the Bar's representatives to the ABA's House of Delegates to support a resolution to amend ABA Model Rule 1.10 (Imputation of Conflicts) to allow screening to handle conflicts when a lawyer from one firm is hired by another.

We heard a report from Legislation Committee that Chief Justice Peggy Quince is setting up a special task force in cooperation with the Governors' office to work on funding for the court system, and that Bar President Jay White will be a member. It appears that the courts, public defenders, and state attorneys soon may not have enough money to handle all criminal cases. Among other things, the task force is expected to seek a dedicated funding source to insure adequate funding of the courts and related agencies. Your suggestions are welcome.

The Board also approved two rule changes on providing legal services following a disaster. One would allow out-of-state attorneys to provide *pro bono* services through a legal aid agency to Florida residents after a disaster and would allow out-of-state attorneys to set up a temporary office in Florida to serve their clients when a Katrina-type

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disaster has hit their home state. The other amends the MJP rule to allow the activity.

The Board approved amendments to Florida Supreme Court approved residential lease forms as simplified forms for use by nonlawyers. The amendments include reducing the number of forms from four to two.

The Board endorsed the three-year cycle amendments for the Juvenile Procedure Rules, including a change that provides that children in delinquency proceedings will not be shackled unless there is a reason.

We also endorsed two amendments to the Rules of Criminal Procedure, including one that requires that a defendant be represented and that a prosecutor attend all first appearance hearings. The second allows a successor judge to do the sentencing in a criminal case.

The Board approved several new Members Benefits products, including ADP payroll services, Staples office supplies, BPC Financial for workers' compensation and pet insurance, and TheBillableHouse.com for law-related books, games, and gifts.

As a result of inquiries from Bar members, the Board discussed lawyers' liability for clients' funds held in trust accounts if the bank holding the account collapses. Board members heard that the FDIC will guarantee each client's deposit in a trust account up to the $100,000 maximum, reduced, however, by the amount of any other account a client has independently at that bank. Also, case law indicates lawyers are not liable for losses over the $100,000 maximum. Board members and Bar staff are continuing to review the issue.

Our next meeting is scheduled for October 2-3. In the meantime, please contact us if you have questions or we may be of any service.

Larry Sellers
Dominic Caparello

July 23, 2008

John Harkness
Executive Director
The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399

Dear Mr. Harkness:

We cordially invite the The Florida Bar to participate in the **First Annual Bar Association Fair sponsored by the Career Development Office at Stetson University College of Law**. This event will be held on our campus on **Wednesday, October 15, 2008** in the Great Hall from **12:15 p.m. to 1:30 p.m.**

The Fair has two goals: first, to allow our students to meet representatives from voluntary bar associations and learn about bar-related activities early in their legal careers; and second, to give those associations an opportunity to provide information about the benefits of membership. To that end, we are inviting representatives from over 75 associations throughout Florida and the United States to participate.

We would appreciate your designating members of your organization to join us. Please specify their attendance by returning the registration form in the enclosed envelope by **September 1, 2008**. On the day of the Fair, we suggest **arriving approximately fifteen minutes early** to allow sufficient time to park, meet the other participants, and "get settled." A table will be available for your use to display and distribute information about your association, student membership applications, and scholarship information, if available. An informal luncheon for your representatives will be provided during the event.

If you have any questions about the Fair, please call me at (727) 562-7815. We look forward to meeting you and learning more about your organization.

Sincerely,

Jennifer Horton

Jennifer Horton
Assistant Director

Enclosures

OFFICE OF CAREER DEVELOPMENT
1401 61st Street South • Gulfport, Florida 33707 • (727) 562-7815
Fax: (727) 347-5692 • career@law.stetson.edu • www.law.stetson.edu

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STETSON UNIVERSITY COLLEGE OF LAW

FIRST ANNUAL BAR ASSOCIATION FAIR

October 15, 2008
12:15 p.m. to 1:30 p.m.

REGISTRATION FORM

Name of Bar Association _____

President/Section Chair _____

Address _____

City _____ State _____ Zip _____

Telephone _____ Fax _____ E-Mail _____

θ **Yes**, we are happy to participate. θ **No**, we are unable to participate this year.

If your organization is able to participate, please indicate your representative(s) below.

October 15, 2008: 12:15 p.m. - 1:30 p.m.

Name/Title _____

Firm _____

Address _____

Telephone _____ Fax _____

E-Mail _____

Please return by September 1, 2008 to:
Jennifer Horton
Career Development Office
Stetson University College of Law
1401 61st Street South
Gulfport, FL 33707
Phone: 727-562-7815; Fax: 727-347-5692; E-mail: hortonj@law.stetson.edu

III H 1(2)

JOSEPH M. MASON, JR. *

CAROLE JOY BARICE + # π

RICHARD M. MITZEL #
OF COUNSEL

*ALSO ADMITTED IN THE DISTRICT OF COLUMBIA
+ALSO ADMITTED IN ALASKA
#ALSO ADMITTED IN MICHIGAN
πBOARD CERTIFIED IN LOCAL GOVERNMENT LAW

LAW OFFICES OF
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PLEASE REPLY TO:
BROOKSVILLE

RICHARD E. MCGEE, SR.
(1916 - 2005)

4026 COMMERCIAL WAY
SPRING HILL, FLORIDA 34606-2398
TELEPHONE: (352) 686-1028

1007 WEST CLEVELAND STREET
TAMPA, FLORIDA 33606
TELEPHONE: (813) 769-3677

407-399-1583

August 26, 2008

Ms. Mary Smallwood, Esquire
Ruden McClosky
215 S. Monroe Street, Suite 815
Tallahassee, Florida 32301

Re: Ethics Opinion

Dear Mary:

Enclosed herewith, please find my ethics opinion request to the Florida Bar and the response received from the Bar. I have thirty (30) days from August 18th, until September 17th, to appeal this "denial" letter.

Despite its description as a denial of the request for an opinion, the Bar letter, certainly, appears to answer the question in the negative, and prohibit all legislative and quasi-legislative lobbying without approval of the agency attorney. This would apply to all governmental agencies, including state, regional and local government.

I firmly believe staff opinion is wrong, and should be corrected. If you review the opinions the Bar enclosed, you will note that they are all at least 18 years old, and surely outdated.

As we discussed, on the one hand I can let it go, for this does not constitute a formal opinion. On the other hand, it bodes trouble in the future for anyone who runs into this situation again, and who does not desire to, or who cannot, obtain approval from the agency, district or local government attorney to meet with his or her bosses.

I would appreciate hearing from you regarding this matter. If I appeal to the Bar Ethics Committee, it would be critical to solicit support from other affected attorneys. We would not want the Bar to author a bad opinion letter.

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Thank you so much for your assistance and camaraderie! Please give me a call (cell (407)399-1583, or work (352)796-0795), send me an e-mail (carolebarice@mcgeemasonlaw.com), or drop me a line to discuss this further. I am sorry our Amelia ELULS seminar was postponed. However, Fay was a soaker! I look forward to hearing from you soon.

Sincerely,

Carole Joy Barice

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JOSEPH M. MASON, JR. *

CAROLE JOY BARICE + # ||

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August 5, 2008

Ms. Lilly Quintiliani, Esquire
Florida Bar Ethics Department
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300

Re: Ethics Question

Dear Ms. Quintiliani:

Rule 4-4.2, *Rules of Professional Conduct*, provides that:

> In representing a client, a lawyer shall not communicate about the subject of representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

Does Rule 4-4.2 prohibit me from meeting with members of the Governing Board of a water management district, together with my clients, in support of a Petition To Initiate Rulemaking filed with the water management district on behalf of my clients, unless the lawyer for the water management district consents?

By way of background, a Petition To Initiate Rulemaking is a process created by the Florida Legislature, at Section 120.54(7), *Florida Statutes*, for persons to request *legislative action* by an agency to adopt, amend or repeal an agency rule. *Model Rules of Procedure* for state agencies, at Section 28-103.006, *Florida Administrative Code*, require that a person seeking rulemaking state the reasons for the rule or action requested and demonstrate that the person is regulated by the agency or has a substantial interest in the rule or action requested. The "Petition for Rulemaking" process, also, requires that the person or entity requesting rulemaking provide a draft rule proposal to the agency which would adopt the rule.

Chapter 120, *Florida Statutes*, is Florida's "Administrative Procedure Act". The Act covers a number of subjects dealing with state agencies, including rulemaking, challenges to existing rules, declaratory statements by agencies, formal and informal administrative hearings to challenge proposed agency actions and judicial review of agency action. With respect to communications with agency officials, the Florida Legislature prescribed, at Section 120.66, *Florida Statutes*, that:

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> **120.66 Ex parte communications.---**
> (1) In any proceeding under ss. 120.569 and 120.57, no *ex parte* communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the presiding officer by:
> (a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.
> (B) A party to the proceeding, the party's authorized representative or counsel, or any person who, directly or indirectly, would have a substantial interest in the proposed agency action.
>
> *Nothing in this subsection shall apply to* advisory staff members who do not testify on behalf of the agency in the proceeding or to *any rulemaking proceeding under s. 120.54.* (Emphasis added)

Appreciating that members of the Bar are governed by the highest ethical standards, even when not addressed or required by the Florida Legislature, my purpose in providing the above excerpt from the statute for you, is to elaborate upon the nature of rulemaking proceedings under Section 120.54, *Florida Statutes*.

Rulemaking proceedings under Section 120.54, *Florida Statutes*, are not adversarial proceedings. A person's rights are not adjudicated in rulemaking proceedings. There is *no case or controversy* in rulemaking proceedings. The matter is not referred to an Administrative Law Judge, or otherwise decided by a judicial or quasi-judicial tribunal. Rather, rulemaking proceedings are legislative in nature, much the same as asking the Legislature to adopt a law, or a County Commission to pass a new ordinance. It is intended that there be a free dialogue and exchange of information between the legislator and citizens in the promulgation of new laws.

In each of these instances, the "legislative body", in other words, the council, commission, governing board or the Florida Legislature, has legal counsel which is usually a staff member or attorney contracted with the agency.

Respectfully, if the legal staff counsel of these government entities had the ability to deny access by members of the Bar, with or without their clients, to the members of a collegial board, council, commission, governing board or the Legislature, by refusing consent under Rule 4-4.2, staff counsel could effectively block access by attorneys to lobby members of appointed boards (or even the Legislature itself). Moreover, were Rule 4-4.2 to be interpreted in this manner, persons or entities represented by counsel would be discriminatorily disadvantaged; an attorney for a person or entity would be prohibited from discussing a matter related to rulemaking with members of a collegial board, but another person who is not an attorney, or not represented by an attorney, would be free to do so.

On the other hand, Rule 4-4.2, clearly, prevents an attorney from contacting the opposing side without the presence or the consent of counsel regarding the subject matter of litigation, whether it be administrative, state or federal forum. It has been suggested that Rule 4-4.2 extends to all "controversies" (even including matters in which rulemaking is being lobbied as a legislative matter), which portends something undefined, beyond the scope of litigation.

Any legislative matter may *evolve* into litigation. The Legislature may adopt a law which is challenged in court. An agency may adopt a regulation which is challenged in either administrative or judicial legal forum. In the case of a Petition To Initiate Rulemaking under Section 120.54(7), *Florida Statutes*, an agency's refusal to adopt a rule may result in creative legal challenge, but no legal controversy exists unless or until the agency denies the request, and unless and until the client authorizes legal challenge. Any such legal challenge would not arise under Section 120.54, *Florida Statutes*, which is the Legislative process at work.

Assuming that the answer to the inquiry above were negative (that the provisions of Rule 4-4.2 do not apply to lobbying collegial board members in support of a Petition for Rulemaking), a second subsidiary question deserves analysis: Does the existence of a separate, but arguably related, petition for hearing under ss. 120.569 and 120.57, which stands abated, and which has never been presented to the Governing Board of the water management district or forwarded for administrative hearing, change the Petition To Initiate Rulemaking into a "controversy" over which the district legal counsel now has the authority under Rule 4-4.2 to prevent an attorney from accompanying his or her clients and meeting with members of the Governing Board in support of passage of a new rule?

Respectfully, I do not believe the Bar ought extend the breath of Rule 4-4.2 to legislative matters. A Petition To Initiate Rulemaking is, clearly, a legislative matter.

Thank you for your consideration. I shall remain available to answer any questions you may have in rendering your Ethics Opinion.

Sincerely,

Carole Joy Barice, Esquire

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The Florida Bar

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EXECUTIVE DIRECTOR

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August 18, 2008

Ms. Carole Joy Barice
P.O. Box 1900
Brooksville, FL 34606-1900

Re: Ethics Inquiry 28300

Dear Dear Ms. Barice:

I received your August 5, 2008, request for an advisory ethics opinion regarding a matter that we discussed on July 30, 2008 concerning an attorney who has accused you of unethical conduct.

Ethics counsel and assistant ethics counsel are not authorized to provide opinions involving past conduct. Procedure 2(a)(1)(B), Florida Bar Procedures for Ruling on Questions of Ethics (these procedures can be found on The Florida Bar's website at http://www.floridabar.org). Additionally, questions of fact and law are beyond the scope of an ethics opinion. Thus, while I appreciate your concern for the ethical issues involved, I am unable to provide the requested opinion because it involves conduct that has already occurred and questions of fact.

You have inquired whether Rule 4-4.2, Rules Regulating The Florida Bar, regarding communications with a person represented by counsel, prohibits you from meeting with members of the governing board of a water management district in support of a petition to initiate rulemaking filed with the water management district on behalf of your clients.

Although I cannot issue you an opinion, I can direct you to the following authorities.

Rule 4-4.2, Rules Regulating The Florida Bar, states, in pertinent part:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The rule, which uses the term "person," applies whether or not litigation has commenced, and despite the individual's consent to the communication. See Florida Ethics Opinion 78-4 (copy enclosed). The opinion states that :

> In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney. This, of course, presupposes that, as required by DR 7-104(A)(1), the lawyer "knows" of the existence of such representation. In the opinion of four dissenting

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> members of the Committee, where general counsel is involved there would be no bar to communication until the particular matter has been referred to general counsel for handling by the party.

In Opinion 87-2 (copy enclosed), the Professional Ethics Committee applied the rule to government entities and noted that the Comment to Rule 4-4.2, in addition to precluding direct contact with an agency's management, also would preclude unauthorized communications with persons whose acts or omissions in connected with the matter could be imputed to the organization.

In the context of government entities, it is important to note that Florida's Rule 4-4.2, unlike the ABA model rule, does not contain an exception for communications authorized by law. The ABA rule states, with emphasis added:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer *or is authorized by law to do so.* [emphasis added]

In Staff Opinion TEO 91001(copy enclosed), an advisory ethics opinion which was approved by the Committee, it was opined that a request for public records must be directed to counsel for the government entity that is a potential defendant unless a statute requires notice or service of process directly on the entity. The staff opinion discusses the history behind the Committee's interpretation of the rule:

> In June of 1989 the Professional Ethics Committee of The Florida Bar published a proposed ethics opinion incorporating the additional ABA language, "or is authorized by law to do so" into our rule. In response to comments from Florida Bar members, the Committee, at the direction of the Board of Governors of The Florida Bar, narrowed the language of the opinion. The final opinion, Opinion 89-6 (copy enclosed), permits an attorney to comply with a statute requiring notice or service of process directly on the adverse party. The opinion states that the attorney should provide opposing counsel with a copy of any document served upon the adverse party. The Committee intentionally omitted the exception for communications authorized by law. Furthermore, another of the Committee's opinions regarding the communication rule, Opinion 90-4 (copy enclosed), relies upon Florida's omission of the "or is authorized by law" exception.

Rule 4-4.2 was changed subsequent to the issuance of Opinion 89-6 to include the following limited exceptions currently found in the rule:

> Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule,

> statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

In conclusion, Rule 4-4.2 and its comment prohibit communications about the subject matter of a representation with employees of governmental agencies or entities who are in a managerial position or whose act or omission in connection with the matter may be imputed to the agency or entity, unless the agency's attorney consents to the communication. Whether the government entity is represented in particular matters and whether the members of the governing board fall into one of the categories of persons with whom an attorney cannot communicate are factual and legal questions, beyond the scope of an ethics opinion. It is also a factual question, outside the scope of an ethics opinion, as to whether any of the desired communications would fall under the category of "permitted communications," as set forth by the rule.

If you disagree with my denial of your request for an advisory ethics opinion, you have thirty (30) days to request that the Professional Ethics Committee review the denial. 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 inquiry number and clearly state the issues for review. You may include a written argument explaining why you believe you should be issued an advisory ethics opinion. 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.

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

Sincerely,

LiliJean Quintiliani
Assistant Ethics Counsel

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PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 78-4

For purposes of the rule on communicating with a party, representation of a party commences whenever an attorney-client relationship has been established with regard to a particular matter, regardless of whether litigation has commenced. If an individual or corporation has general counsel representing that party in all legal matters, communications must be with the attorney. A corporate party's officers, directors and managing agents are "parties" for purposes of communications, but other employees of the corporation are not unless they have been directly involved in the incident or matter giving rise to the investigation or litigation.

CPR: DR 7-104(A)(1)
Opinions: 68-20, ABA Informal Opinion 1362

Mr. Richman stated the opinion of the committee:

The Committee is asked two questions concerning the application of DR 7-104(A)(1), which states:

> During the course of his representation of a client a lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

The two questions are: (1) When is a party sufficiently "represented by a lawyer" to require application of DR 7-104(A)(1) so as to prohibit communication with the party and, in specific, must litigation have commenced for the DR to apply? (2) Where a potential suit or pending suit involves a corporation, who in the corporate structure is considered to be a "party" within the meaning of the DR?

The Committee's unanimous answer to the first question is that representation of a party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney. This, of course, presupposes that, as required by DR 7-104(A)(1), the lawyer "knows" of the existence of such representation. In the opinion of four dissenting members of the Committee, where general counsel is involved there would be no bar to communication until the particular matter has been referred to general counsel for handling by the party.

The second question presents greater difficulty with regard to where or whether to draw the line as to a corporation. The closest precedent in Florida is Opinion 68-20 [since withdrawn] which found that:

> There is no impropriety in an attorney representing a party in dealings with the State Road Department contacting a member of the State Road Board or its staff in connection with the interest of his client, so long as the matter and issue have not been referred by the Board or its staff to its legal department.

The present Committee is sharply divided on this question. The majority would distinguish this prior opinion or overrule it to the extent of holding that it is too restrictive upon the right to interview certain members of a corporation when balanced against the need to properly prepare and investigate litigation, particularly where litigation has not yet commenced.

By way of example, prior to instituting litigation, plaintiff's attorney has both a need and an obligation to gather sufficient facts to determine whether to commence litigation. In addition, particularly in a large corporation, there may be numerous employees who are sufficiently removed from the management of the company and from the potentiality of themselves being a defendant in the potential or actual litigation so as to not reasonably be considered a "party" to be represented by the corporation's counsel.

Accordingly, in the opinion of the majority of the Committee, DR 7-104(A)(1) will apply to officers, directors, or managing agents of the corporation but will not apply to other employees of the corporation unless they have been directly involved in the incident or matter giving rise to the investigation or litigation. The Committee further suggests that to comply with the spirit of DR 7-104(A)(1) and in drawing the line at this point, the attorney should make no statement which would have the effect of deceiving or misleading the employee, and the attorney or the attorney's agent must specifically identify the capacity in which they are conducting the investigation.

The several dissenting members of the Committee would follow ABA Informal Opinion 1362 and the minority view of a number of ethics opinions relating to this subject as issued by other states to the effect that no employee of a corporation, no matter how remote, can be the subject of communication once litigation has commenced or once the attorney knows, as set forth in Florida Opinion 68-20 [since withdrawn], that the matter in issue is being addressed or considered by an attorney for the corporation.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 87-2
May 1, 1987

When the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the part of the agency, unless consent of the agency's counsel is obtained.

CPR: DR 7-104(A)(1)
RPC: 4-4.2
Opinions: 68-20, 78-4

The inquiring attorney seeks clarification of Florida ethics opinions on the issue of communications with officials and staff of a government entity that is the opposing party in litigation or some other controversy. The opinions in question primarily are staff opinions issued subsequent to the Committee's Opinion 78-4, which addresses communications with corporate parties.

The attorney provides representation for certain individuals committed to a state hospital. This representation includes habeas corpus petitions challenging the legality of a client's continued commitment to the hospital. The hospital administrator is the named defendant. An issue, or the issue, in this litigation is the content or implementation of the hospital's habilitation plan for the client (a habilitation plan is required for any mentally retarded person committed to the hospital). Another issue in the litigation may be the medication prescribed or given to the client.

The attorney's position appears to be that although he should obtain the consent of the hospital's counsel before interviewing hospital administrators or staff who "have authority to speak and to bind the hospital administration by what they say and do," he should not have to obtain counsel's consent to interview hospital staff who provide professional or direct care services to the patients. These employees include psychologists and social workers, who apparently are the staff responsible for developing and implementing the habilitation plans and the staff who administer medication.

DR 7-104(A), which was superseded by Rule of Professional Conduct 4-4.2 on January 1, 1987, provided:

During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in the matter unless he has the prior consent of the lawyer representing such other party or is authorized by

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law to do so.

For corporate parties, the Professional Ethics Committee in Opinion 78-4 applied the disciplinary rule as follows:

> (1) If a corporation has a general counsel representing it in all legal matters, the opposing lawyer must communicate with the general counsel regarding the matter in question unless he has the general counsel's prior consent to communicate with the corporate party.
>
> (2) The restriction on communications applies for officers, directors, managing agents and "*other employees* [who] have been *directly involved in the incident or matter* giving rise to the investigation or litigation." [Emphasis supplied.]
>
> (3) The opposing party's attorney, in communicating with a corporate representative or employee, should make no statement that would mislead or deceive that employee, and he (or his agent) must identify the capacity in which he is conducting the investigation.

In Opinion 78-4 the committee distinguished or overruled its earlier Opinion 68-20 [since withdrawn] as being too restrictive, particularly when litigation has not yet commenced, of opposing counsel's right to interview a party's employees "who are sufficiently removed from the management of the company and from the potentiality of themselves being a defendant . . . so as to not reasonably be considered a 'party' to be represented by the corporation's counsel."

Opinion 68-20 [since withdrawn] found "no impropriety in an attorney representing a party in dealings with the State Road Department contacting any member of the State Road Board, or its staff in connection with the interests of his client, so long as the matter in issue has not been referred [by] the Board or its staff to its legal department." The Committee continued: "Of course, when such matters are referred to the legal department (which of course would be true in the case of all litigation) the attorney should deal *only with the legal division* of the State Road Department." [Emphasis supplied.]

The Committee cautioned that "because of the wide variation in function, composition, and jurisdiction of state and other public agencies," its opinion was limited to the State Road Department. The Committee has never returned to the matter of communications with officials and employees of government agencies to develop any distinctions between types of agencies or entities.

The Comment RPC 4-4.2, which is essentially the same as DR 7-104(A)(1), supports the Committee's interpretation of the disciplinary rule's application to corporate parties. The Comment also indicates that the proposed rule applies to any "organization," including government agencies. The Comment states in pertinent part:

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with *persons having a managerial responsibility* on behalf of the organization, and with any other *person whose act or*

omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or *whose statement may constitute an admission on the part of the organization.* [Emphasis supplied.]

It appears that other states commonly apply the corporate party rule to government agencies. It further appears that the Committee's approach to communications with corporate officials and employees is the mainstream approach. Some ethics committees and courts have stated a more liberal rule, while others are much more restrictive of communications with employees.

Opinion 78-4 is a thoughtful attempt to balance an attorney's need to properly prepare and investigate litigation and a corporate/government/organizational party's interest in avoiding opposing counsel's elicitation of damaging uncounseled statements from officials or employees whose statements would commit, bind or be deemed admissions of the entity. Such entity representatives include not only management, but also those employees whose acts or omissions are at issue in the litigation (in the words of Opinion 78-4, those employees who were "directly involved in the incident or matter"). *Not* included are employees who are mere witnesses, having no responsibility for the matter in question. Opposing counsel is free to interview the latter employees without the prior consent of the entity's counsel.

It appears to be the inquiring attorney's position that at least some government agencies should be treated differently from corporations. Specifically, he appears to be contending that because of the "nature" of his clients' commitment to the hospital and "the lack of alternative resources for information," the hospital's professional and direct care staff should be accessible without the prior consent or presence of the hospital's counsel, and without resort to formal discovery, even if they are the individuals directly responsible for the matter at issue and would be treated as parties under Opinion 78-4.

In terms of the "lack of alternative resources for information," the attorney does not seem to be in a position different from that of most attorneys representing any client against any party, whether an individual or some kind of organizational entity. Further, the attorney does not explain how or why the "nature" of his clients' commitment justifies or warrants a departure from the guidelines provided by Opinion 78-4.

Public policy arguments (based on government agencies' unique responsibility to the public at large and to the particular segments of society served by those agencies) can be made for granting attorneys greater access to employees of government-agency defendants than to employees of corporate defendants. See Note, "DR 7-104 of the Code of Professional Responsibility Applied to the Government 'Party,'"61 Minnesota L. Rev. 1007-1034 (1977). However, that result is not suggested by Rule 4-4.2.

In conclusion, the guidelines set out in Opinion 78-4 for communications with managers and employees of corporate parties apply to government-agency parties as well. Under these guidelines, if the professional and direct care staff in question have been directly involved in the matter underlying the litigation, the inquiring attorney must obtain the consent of the hospital's counsel before the interviews them about the matter.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 89-6
April 15, 1990

A lawyer does not violate the ethical rule against communicating with a represented party when the lawyer strictly complies with a statute requiring notice or service of process directly on the adverse party.

Note: The opinion appearing below was approved by the Board of Governors at its March 1990 meeting. Subsequent to the adoption of this opinion, Rule 4-4.2 was amended to include the following provision: "Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney."

RPC: 4-4.2
Opinion: 85-3

Rule 4-4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The rule must be construed to allow compliance with statutes requiring notice or service of process directly on the adverse party. Were it otherwise, attorneys would be constrained from properly representing their clients. As we said in a different context about the statutorily required notice of worthless check, however, the direct contact must be strictly limited to that required by statute. Opinion 85-3. Further, it would be appropriate to provide opposing counsel with a copy of any document served on the adverse party.

PROFESSIONAL ETHICS OF THE FLORIDA BAR

OPINION 90-4
July 15, 1990

Florida Rule 4-4.2 (communication with person represented by counsel) contains no exception for activities of U.S. Department of Justice attorneys.

RPC: 4-4.2
Opinions: 78-4, 87-2, 88-14; Alabama Opinion 89-108
Cases: *Suarez v. State*, 481 So.2d 1201 (Fla. 1985); *United States v. Hvass*, 355 U.S. 570, 78 S.Ct. 501 (1958); *United States v. Klubock*, 639 F.Supp. 117 (D.Mass. 1986), aff'd 832 F.2d 664 (1987)
Misc: Supremacy Clause, U.S. Constitution; Rule 1-3.2(a), Rules Regulating The Florida Bar; ABA Model Code DR 7-104(A)(1); ABA Model Rule 4.2; Rule 4(K)(1), General Rules of the U.S. District Court for the Northern District of Florida; Rule 2.04(c), Rules of the U.S. District Court for the Middle District of Florida; Rule 4B., Rules of Disciplinary Enforcement for the Southern District of Florida

A member of The Florida Bar has requested the Committee's view regarding the applicability of Rule 4-4.2 to attorneys employed by the United States Department of Justice. The member's inquiry was prompted by a 1989 memorandum issued by the United States Attorney General to all Justice Department litigators. In that memorandum, the Attorney General expressed his belief that DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility and its successor, Rule 4.2 of the ABA Model Rules of Professional Conduct, should not be read in an "expansive" way that would prohibit certain Justice Department communications with suspects or witnesses who are represented by counsel. The memorandum stated that the issue of the applicability of these rules has arisen in primarily two situations: (1) covert contacts (or, less frequently, overt interviews) with a suspect after the suspect has retained counsel; and (2) multiple representation situations (i.e., where a single attorney purports to represent either several individuals or a corporation and all of its employees).

The memorandum advances two primary reasons why a state's version of DR 7-104(A)(1) or Rule 4.2 should not apply to Justice Department attorneys in the above situations. First, the memorandum asserts that such communications are expressly excepted from those rules because they are "authorized by law." Second, the memorandum states that the Supremacy Clause of the United States Constitution prohibits states from interfering with Justice Department attorneys in the performance of their duties.

The relevant Florida Rule of Professional Conduct is Rule 4-4.2, Rules Regulating The Florida Bar, which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

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Florida's Rule 4-4.2 differs in two significant respects from the corresponding ABA Model Rule. The Florida rule governs communication with "a person" represented by counsel, while the ABA rule applies to communication with a represented "party." (The Report of the Florida Bar Special Study Committee on the Model Rules of Professional Conduct indicates that this change was a deliberate one, designed to broaden the scope of the rule.) And, more importantly in the Committee's view, the Florida rule does not contain the "or is authorized by law" exception that is found in the ABA rule.

The Committee is of the opinion that Rule 4-4.2 applies to all members of The Florida Bar (as well as to those nonmembers practicing in Florida pursuant to Rule 1-3.2(a)), including Justice Department attorneys in the situations described in the memorandum. Rule 4-4.2 contains no exceptions for particular categories of attorneys and the Committee declines to read into the rule any such exceptions. Moreover, the Supreme Court of Florida has stated that the rule applies to the conduct of prosecutors in criminal cases. See *Suarez v. State*, 481 So.2d 1201 (Fla. 1985).

The two arguments advanced in the memorandum do not compel the Committee to reach a different conclusion. As noted, Florida Rule 4-4.2 does not contain the exception for communications "authorized by law" that is relied upon so heavily in the memorandum. Furthermore, the Supremacy Clause argument is not persuasive for two reasons. In the federal district courts for all three Florida districts (Northern, Middle, and Southern Districts), the Florida Rules of Professional Conduct govern the conduct of attorneys admitted to those federal bars. See Rule 4(K)(1), General Rules of the U.S. District Court for the Northern District of Florida; Rule 2.04(c), Rules of the U.S. District Court for the Middle District of Florida; Rule 4B., Rules of Disciplinary Enforcement for the Southern District of Florida. Because Florida Rule 4-4.2 has been adopted by those federal courts, it is considered federal law. See *United States v. Hvass*, 355 U.S. 570, 574–75, 78 S.Ct. 501, 504 (1958). Thus there can be no Supremacy Clause problem in applying Rule 4-4.2 to the activities of Justice Department attorneys practicing in Florida.

Additionally, the Committee is of the opinion that the Supremacy Clause argument is unpersuasive for the reason expressed by the federal district court in *United States v. Klubock*, 639 F.Supp. 117, 126 (D.Mass. 1986), aff'd 832 F.2d 664 (1987). In evaluating a claim by federal prosecutors that a state court rule was invalid under the Supremacy Clause, the court stated that regulation of the legal profession is a proper exercise of state power and that a Supremacy Clause problem would arise only if the state's rule regulated the federal attorneys' conduct in a manner that created an actual conflict with some provision of federal law.

The Committee acknowledges the potential problems raised in the memorandum, but believes that Rule 4-4.2 can be applied in a manner that minimizes or eliminates those concerns. In covert investigation situations, for example, applying the rule according to its express terms should not impede most covert investigations. A Justice Department attorney's knowledge that a person is represented in connection with a particular matter is required before the rule is triggered. In the case of an undercover investigation, it seems unlikely that the typical suspect will be represented with respect to that particular matter because at that time he or she usually will not be aware that there is a "matter." The memorandum also raises the concern that career

criminals will retain "house counsel" in an effort to use Rule 4-4.2 to frustrate investigations. The Committee believes that a relatively small number of criminals have "house counsel" on permanent retainer; with respect to those few who do, it can be argued that the rule would not be triggered until the suspect referred the particular matter in question to his or her "house counsel." (In this respect, the committee notes that its Opinion 78-4, concerning communication with someone's general counsel, should be limited to the civil context.)

Regarding multiple representation situations, the Committee's previous opinions clearly indicate that not all corporate employees are considered to be represented by the corporation's counsel for purposes of Rule 4-4.2. See Opinions 78-4; 87-2. See also Comment to Rule 4-4.2; Opinion 88-14. With regard to conflict of interest situations (e.g., where a corporate employee believes that corporate counsel is not representing his or her interests, or where one of several individuals represented by a single attorney believes that the attorney is not representing his or her interests), the Committee agrees with the position expressed by the Alabama State Bar Disciplinary Commission in its Opinion 89-108. In that opinion, the Commission concluded that it was not unethical for a federal prosecutor, despite corporate counsel's objections, to communicate directly with a corporate officer about possible criminal conduct in which the officer and the corporation had engaged after the officer's personal attorney had initiated contact with the prosecutor and had given permission for the communication.

This opinion was adopted by unanimous vote of the Committee.

THIS OPINION WAS APPROVED BY THE PROFESSIONAL ETHICS COMMITTEE OF THE FLORIDA BAR AT ITS JANUARY 10, 1992 MEETING

NOTE: This advisory ethics opinion was authored in response to a specific inquiry and, therefore, might not be applicable to a factual situation other than that presented by the inquiring attorney.

STAFF OPINION TEO91001
August 23, 1990

The inquiring attorney has requested an opinion whether it would be permissible to direct a request for public records to the Records Custodian of a city that is represented by counsel in pending litigation with his client. Presumably the request is in connection with the matter in litigation.

Rule 4-4.2 of The Rules Regulating The Florida Bar states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The Florida rule is based on ABA Model Rule 4.2. The ABA rule, unlike the Florida rule, provides for an exception if the communication is authorized by law. The rule states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so. [Emphasis added.]

In June of 1989 the Professional Ethics Committee published a proposed ethics opinion incorporating the additional ABA language "or is authorized by law to do so" into our rule. In response to comments from Bar members the Committee narrowed the language of the opinion. The final opinion, Opinion 89-6, permits an attorney to strictly comply with a statute requiring notice or service of process directly on the adverse party. The opinion states that the attorney should provide opposing counsel with a copy of any document served upon the adverse party. The Committee intentionally omitted the exception for communications authorized by law. Furthermore, the Committee's most recent opinion regarding the communication rule, Opinion 90-4, relies upon Florida's omission of the "or is authorized by law" exception.

Therefore, under our rules and ethics opinions, any communication concerning the subject matter of representation to a represented person must go through that person's attorney unless (1) the attorney consents or, (2) a statute requires notice or service of process directly on the adverse party. Accordingly, the request for public records must be directed to the attorney for the city unless a statute requires notice or service of process directly on the city. (Whether Chapter 119, F.S. does require such direct contact is a question of law, beyond the scope of an ethics opinion.)

V A (18)

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Administrative Law Section
Committees and Liaisons 2008-2009

CLE Committee	Bruce Lamb, Chair Li Nelson Paul Amundsen Wellington Meffert Scott Boyd
TFB CLE Committee Liaison	Cathy Sellers
Council of Sections Liaison	Seann Frazier Alternate: Clark Jennings
Law School Liaison	Kent Wetherell, Chair Shaw Stiller Bruce Lamb Quinn Henderson
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Environmental & Land Use Law Section Liaison	Shaw Stiller
Health Law Section Liaison	Allen Grossman
Board of Governors Liaison	Larry Sellers

VI B (1)

Young Lawyers Board Liaison	Christine Davis

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APD Volunteer Program Committee: (tentative)	Andy Bertron, Chair Allen Grossman Clark Jennings Julie Waldeman

VI B(2)

The Florida Bar

John G. White, III
President

John F. Harkness, Jr.
Executive Director

Jesse H. Diner
President-elect

July 28, 2008

Elizabeth Waas McArthur, Chair
Administrative Law Section of The Florida Bar
Radey Thomas Yon & Clark
P.O. Box 10967
Tallahassee, Florida 32302-2967

Re: Reactivation of 2006-08 Legislative Positions for 2008-2010 Biennium

Dear Ms. McArthur:

On July 25, 2008 the Board of Governors of The Florida Bar considered your section's request for reactivation of various recognized legislative positions from the 2006-08 legislative biennium following their formal sunset pursuant to Standing Board Policy 9.20(d).

Upon review of that request, the BoG determined that it was consistent with Standing Board Policy 9.50 concerning section legislative activity and opted to not prohibit the Administrative Law Section's continued advocacy of these matters for the 2008-2010 biennium. Per your request, these newly reactivated positions will be officially published within the 2008-2010 Master List of Legislative Positions on The Florida Bar's website as reflected on the attached document.

As you may otherwise know, Bylaw 2-7.5 of the Rules Regulating The Florida Bar specifies that legislative action taken by a section shall be clearly identified as that of the section rather than The Florida Bar.

And, for the benefit of all involved in Bar legislative activities, the Office of Governmental Affairs maintains a listing of individuals who might be directly lobbying legislators on any section position. Our listing includes the names of all "contacts" listed on your original Legislative Position Request Form as well as the section chair and legislative chair. However, if you anticipate legislative visits or appearances by persons other than those cited above regarding any particular matter, please advise us as soon as possible.

If you have any questions or need further assistance, please do not hesitate to contact me.

Sincerely,

Paul F. Hill
General Counsel

Attachment

cc: Honorable Linda M. Rigot, Section Legislation Committee Chair
William Eldred Williams, Section Legislation Committee Chair
Jackie Werndli, Staff Administrator

VI C(1)

2006-08 SECTION LEGISLATIVE POSITIONS REQUESTED FOR REACTIVATION OR "ROLLOVER" IN 2008-10

Administrative Law Section

1. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation, that undermines the rule-making requirements of the Administrative Procedure Act by allowing statements of agency policy without formal rule-making.

2. Opposes any amendment to Chapter 120, *Florida Statutes*, or other legislation to deny, limit or restrict points of entry to administrative proceedings under Chapter 120, *Florida Statutes*, by substantially affected persons.

3. Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, *Florida Statutes*.

4. Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, *Florida Statutes*, and supports confidentiality of discussions in mediation; but opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

5. Supports uniformity of procedures in administrative proceedings under Chapter 120, *Florida Statutes*, and supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

6. Opposes amendments to Chapter 120, Florida Statutes, or other legislation that limit, restrict, or penalize full participation in the administrative process without compelling justification.

7. Supports adequate funding of the Division of Administrative Hearings and other existing state administrative dispute resolution forums in order to ensure efficient resolution of administrative disputes.

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VI C (2)