CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Are You Complying With the Rules of Professional Conduct?—You' Sure??????

by Marion Radson & Elizabeth M. Hernandez

Can you Poll the City Commission? Can you comply with the Rules in failing to do so? It is a quasi-judicial proceeding-do you share "material facts" with each of the commissioners? If you don't, do you violate the Rules?????? How about: Your Planning and Building and Zoning Directors disagree on which department and Board has jurisdiction on a particular application. Is it an interpretation or is it a deviation from the Code. Who knows? Who decides? Who agrees? More importantly, who is the client? Did you get it writing? Also, have you produced the record in response to Applicant Attorney's public records request? Sit back- Visualize Exhibit "A"-your written consent. Visualize more-you-the City Attorney-adverse government witness.

Scenario: The County Attorney represents the County, its governing board and manager. The County Attorney may also represent the interests of the Constitutional Officers (e.g. Property Appraiser, Sheriff) whose interests may be adverse to each other. For example, under law the Sheriff has the right to appeal his budget to the governor and cabinet whenever the Sheriff believes that the county commission has not adequately funded the Sheriff's department. Additionally, the Property Appraiser may refuse to place on the tax rolls property that he or she believes is tax exempt while the county commission believes the property is taxable. As another example the County Attorney provides legal counsel to the Alachua County Library District, 3 of whose 5 governing board members are county commissioners serving ex officio. The interests of the Library District, an independent district and separate legal entity, may be adverse from time to time with the County. Are you, Madam County Attorney obtaining written consent of all those parties? Are you informing them of the opportunity to retain (at significant expense to the County) their own attorney? Are you hiring attorneys to represent those adverse interests and creating screens throughout the office?

In the City of Gainesville, the City Attorney's Office represents the municipal corporation whose board of directors is the city commission. At times the City Attorney's Office will defend in court, multiple defendants, such as the municipal corporation, the city manager, or a department head or police officer. The legal defenses may be different. As another example, the city created a community redevelopment agency, a public body corporate and politic formed under Chap. 163, F.S., that is a separate legal entity. One of the attorneys in my office represents the agency whose board of directors is the city commissioners serving ex officio. The interests of the Agency and the City, may at times, be adverse.

Are the interests of the government clients better protected in hearing their government attorney advise them that they have the right to obtain other counsel due to possible or actual adverse interests, and then confirm the consent in writing? Remember all of the government business is already conducted in the sunshine, and the public always has an opportunity to hear the differences within their governments.

BE AWARE!!! BE VERY AWARE!!

The American Bar Association (ABA) undertook a comprehensive study of its Model Rules of Professional Conduct starting in 1997. Through the work of the "Ethics 2000 Commission," the ABA adopted final amendments to the Model Rules on

See "Professional Conduct" page 7

INSIDE:

Chair's Report

A•G•E•N•D•A

by Craig H. Coller

As the incoming Chair of the City, County and Local Government Law Section, I want to take this opportunity to thank our immediate past Chair Ken Buchman, who did an outstanding job. I also want to thank the many past chairs of this Section who continue to take leadership positions and are actively involved in Section activities- Mark Barnebey, Susan Churuti, Joni Armstrong Coffey, Michael Grogan, Alexandra MacLennan, Marion Radson, Chip Rice and Herb Thiele. We are indeed fortunate as well to have as our Section Administrator, Carol Kirkland. Thanks to her untiring efforts and the contribution of all the participants, we had an extraordinarily successful Certification Review Seminar and 27th Annual Local Government Law in Florida Seminar, which were held May 6-8, 2004, at the Gaylord Palms Hotel in Kissimmee. Over 100 persons attended the Certification Review Seminar and over 200 persons registered for the Annual Local Government Law Seminar. Past-chair Herb Thiele once again did a great job in handling the responsibilities as program chair for the Certification Seminar.

Congratulations are due to Fredrick Karl, this year's recipient of the Section's Ralph A. Marsciano Award- which recognizes a lawyer who over a period of years has rendered a substantial contribution to the development of city, county and local government law in Florida. Congratulations also go to Mark Barnebey recipient of the Paul S. Buchman Award-, which recognizes outstanding contribution in the area of legal public service. These prestigious awards were presented in May in conjunction with the 27th Annual Local Government Law in Florida seminar. Special thanks to Chip Rice for continuing to chair the Marsicano Selection Committee.

One of the main purposes of the Section is reflected in the first paragraph of our mission statement: "To generally serve as an organization and resource within The Florida Bar for lawyers representing local government interests and also practicing in this field on behalf of private interests." To that end, the Section has a number of programs designed to accomplish this part of our mission.

Under the direction of Grant Alley, the Section's website, provides an excellent resource for the local government practitioner. On our website (www.loc-gov-law.org) you will find the opportunity to sign up for the Section's list serve. Once registered, you will periodically receive summaries of important cases related to local government law. A links page provides access to other databases helpful to the local government practitioner. Another page on our website provides information on employment opportunities. Under development is an on-line local government desk book providing substantive information on the various aspects of local government practice. This project is being coordinated by Elizabeth Hernandez and Marion Radson, with many members of the Section volunteering as contributing authors.

The Section promotes publications and articles relevant to the practice of local government law. In association with *Stetson Law Review* (Pam Dubov, committee chair), you receive as a part of your membership, a complete volume of the *Stetson Law Review* Annual Local Government Law Symposium issue. Our newsletter, *The Agenda*, co-edited by Elizabeth Hernandez and Joe Jarrett, provides updates on Section activities and includes substantive articles relevant to the practice of local government law. The Section, under the direction of Jewell Cole, seeks out and provides editing assistance for local government law articles submitted for publication in *The Florida Bar Journal*.

Of course, one of the main functions of the Section is the sponsorship of continuing legal education programs. The Section sponsors the following seminars: Public Employee Labor Relations (Michael Grogan- program chair), Public Finance (Alexandra MacLennan & Kaye Collie- program chairs), Land Use Law (Karl Sanders and Elizabeth Hernandez- program chairs), Certification Review (Herb Thiele- program chair), and the 28th Annual Local Government Law in Florida Seminar (Kaye Collie-program chair).

Other Section activities include recognition of law students as well as interns who have demonstrated excellence in the field of local government law (Mary Helen Campbell-Committee Chair). Additionally, in an effort to promote civil discourse among citizens who appear before local government boards, the Section encourages these jurisdictions to recognize the month of May as Civility Month. This unique program, which was developed by Mark Barnebey and Marion Radson, is being currently co-chaired by Marion Radson and Ed Dion.

The activities of the Section, only some of which are outlined here, occur as a result of the hard work and dedication of the Section members, many of whom serve on the Executive Council. Our programming can only be improved with your participation. I encourage you to get involved by serving on one of many of the Committees responsible for these programs. Feel free to call me at (305)375-3769, email at chc@miamidade.gov or send me a letter addressed to: Miami-Dade County Attorney's Office, Suite 2810, 111 N.W. 1st. Street, Miami, Florida 33128. I look forward to your participation and a successful year.

Development Exactions and Regulatory Takings – Are Monetary and Legislative Exactions Subject to Less Takings Clause Scrutiny than Real Property and *Ad Hoc* Exactions?

by Nancy Stroud

Introduction

The United States Supreme Court has shown special interest in the area of land dedications as a form of conditional land use regulation. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court established the rule for determining the constitutionality of such exactions as requiring an essential nexus between the nature of the condition and some public need generated by the development proposal. The later case of *Dolan v. City of Tigard,* 512 U.S. 374 (1994), added a second nexus requirement for a "rough proportionality" between the quantum of the exaction and the harms caused by the regulated activity. Both of these cases involved instances where government exercised its regulatory authority to force a landowner to contribute a land interest or easement to the public as a condition of a land use approval. The extent to which the Court will apply these tests to other forms of exactions such as impact fees or facility construction requirements is still uncertain and, over the decade since *Dolan*, that uncertainty has created a significant split in the lower courts. Neither the federal courts nor the state courts in Florida have addressed these issues.

***Ad Hoc* v. Legislatively Adopted Exactions.**

One distinction drawn by the lower courts is between development exactions that are applied on a case by case basis, in an adjudicatory or quasi-judicial setting, and those that are adopted in a more broadly and uniformly applicable legislative setting. The Supreme Court had the opportunity to discuss this distinction at the same time it decided *Dolan*, in the case of *Ehrlich v. City of Culver City*.[1] Prior to the *Dolan* decision, the California court of appeal in *Ehrlich* upheld the city's requirement that as a condition of development the developer pay a recreational "mitigation" fee and a fee in lieu of participating in the city's art in public places program.[2] The Supreme Court accepted certiorari of the case and, a day after deciding *Dolan,* vacated the opinion and remanded it for further consideration in light of *Dolan.* Upon reconsideration, the California court of appeal applied *Dolan* to once again uphold the recreational mitigation fee, but found that the public art fee was not reviewable under *Dolan* because it was a legislatively enacted program applicable to all large development projects, not one that required individualized assessments on a case by case basis.[3] On appeal, the California Supreme Court agreed that *Dolan* did not apply to the public art fee because the requirement was more akin to landscaping, setback and other land use regulation than a land dedication requirement. It however remanded the case to the trial court to determine if, under *Dolan*, the recreational fee was roughly proportional to the impact caused by the proposed development.[4] The U. S. Supreme Court refused to take certiorari in regard to the later state court decision.[5]

The difference in treatment between legislatively adopted and *ad hoc* exactions is often explained in lower court decisions to be based upon a policy concern that *ad hoc* exactions may tempt local government to illegitimate use of its regulatory powers to extort the maximum revenue or land from the landowner, rather than reasonably to distribute the costs among the public. The courts reason that this potential is at its greatest when the process involves the use of discretionary powers in an adjudicatory process, rather than pursuant to a legislative mandate or formula.[6] Thus, in *Ehrlich*, the fee for public art was not subject to *Dolan* analysis because it was assessed on a broad class of property owners according to a legislative formula with little discretion as to its amount in particular development projects, but the recreational impact fee was subject to heightened scrutiny because it involved the discretionary deployment of the police power on individual development applications.

Most recently, the Texas Supreme Court has very broadly applied *Dolan* to a platting condition requiring that a subdivider pay for the construction of improvements to a road adjacent to the subdivision, while refusing to follow the lower court's initial legislative/adjudicatory distinction. In *Town of Flower Mound v. Stafford Estates Limited Partnership,*[7] the court stated "While we recognize that an ad hoc decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others. Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative."[8] The appellate court had reasoned that although the Town's land development code legislatively created the standards for street improvements, the decision to allow the plat and to apply the particular requirement was the result of an adjudicative decision by the Town.[9]

The Texas decision contrasts with that of the California Supreme Court's recent decision in *San Remo Hotel v. City and County of San Francisco*.[10] There, residential hotel owners challenged a city ordinance requiring that, upon conversion of residential hotels to tourist or shorter term hotel uses, owners replace the longer term housing or pay an in lieu fee for the cost of governmental construction of the housing. The fee was based

continued, next page

on a formula tied to the replacement costs of the residential hotel, which was further based on independent appraisals. The court explained that because "no meaningful governmental discretion enter(ed) into either the imposition or the calculation of the in lieu fee," the developer was not "singled out" for payment of the fee, and that such "generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. *Ad hoc* individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls."[11]

Cash v. Land Dedication

Another way in which *Dolan* has been read narrowly is by distinguishing between land dedication requirements and cash contributions. The Court's reference to *Dolan* in its 1999 decision *City of Monterey v. Del Monte Dunes*[12] unanimously refused to apply *Dolan's* rough proportionality test to the City's denial of proposed coastal development, describing "exactions" as "land-use decisions conditioning approval of development on the dedication of property to public use." This gave general encouragement for a narrow reading of the *Nollan / Dolan* cases, which was further encouraged by other federal cases distinguishing between money and other requirements when deciding the applicability of constitutional takings analysis.

In *United States v. Sperry Corp*.,[13] the Court distinguished money from physical appropriations of property for takings purposes, in the context of monetary deductions from awards made by the Iran-United States Claims Tribunal, because "(u)nlike real and personal property, money is fungible." The court warned that treating an obligation to pay money like a physical appropriation would be an "extravagant extension" of *Loretto v. Teleprompter Manhattan CATV Corp.*[14] More recently, however, the Supreme Court has applied the Takings Clause to a lawyer's obligation under state law to pay into an Interest On Lawyers Trust Accounts (IOLTA) program, although it found that the plaintiffs were not denied just compensation because they could not demonstrate economic harm. *Brown v. Legal Foundation of Washington*.[15]

Several courts have accepted the argument that *Dolan* does not apply to monetary exactions. In *Rogers Machinery Inc. v. Washington County,*[16] the court, in an extensive explanation reviewing existing caselaw, distinguished impact fees from other exactions. Because impact fees are assessed on broad classes of property and calculated pursuant to legislatively set formula, and no significant governmental discretion is involved in their calculation when applied to any particular property, it reasoned that the potential for the abuse of governmental power by "leveraging" to obtain unreasonable concessions from property owners does not come into play. Similarly, the Kansas, Arizona and Colorado supreme courts have held that Dolan does not apply to impact fees.[17]

In contrast, the Ohio Supreme Court in 2000 applied *Dolan* to uphold a roadway impact fee in *Home Builders Association of Dayton et al v. City of Beavercreek,*[18] while noting that "impact fees do not threaten property rights to the same degree as land use exactions or zoning laws. . . ." At the same time, the Washington state appellate court, in *Benchmark Land Co. v. City of Battle Ground,*[19] rejected the city's argument that the Supreme Court in *Del Monte Dunes* clarified that only dedication of land as a condition to approval was subject to the *Dolan* test. While conceding that *Nollan* and *Dolan* "were unique in requiring dedications of real property," the court explained that in each case the government "required the developer to make an affirmative contribution to solve a public problem that existed, at least in part, outside the developed property." It then held that the attempted transfer of a public burden to some people alone, where the burdens should be borne by the public as a whole, requires the application of the *Dolan* "rough proportionality" test.[20] In early 2004, the court reaffirmed the applicability of *Dolan's* roughly proportional test to traffic impact fees in *City of Olympia v. Drebick*.[21]

Conclusion

The cases lead to a conclusion that there is a continuum of exaction types that raise a different level of concern based on the two factors: whether the exaction is a monetary one, and whether it is based on a legislative versus and adjudicatory process. On one end of the continuum is the impact fee, legislatively adopted, pursuant to a set formula, and arguably not subject to the *Dolan* analysis because it falls within the two distinctions: it is not assessed in an *ad hoc* adjudicatory setting, but on the basis of generally applicable legislation; and it is a cash payment, not a land dedication. Other monetary payments that involve negotiation on a case by case basis are more likely to be addressed under the heightened scrutiny of *Dolan*. Non-monetary exactions that are not land dedications but, for example, requirements to construct improvements, are also more likely to be analyzed under *Dolan*, even where they are part of a general legislative mandate, and especially when they require individualized determinations or if they are off-site improvements. Because the process of land development increasingly involves the use of exactions to mitigate development impacts, and because local governments increasingly look to developers to pay for infrastructure needs, the court no doubt will continue to be asked to address these distinctions.

Endnotes:

[1] *Ehrlich v. City of Culver City*, 512 U.S. 1231 (1994).
[2] *Ehrlich v. City of Culver City*, 911 P. 2d 429 (Cal. 1996).
[3] 911 P. 2d at 436.
[4] 911 P. 2d at 433.
[5] *Ehrlich v. City of Culver City*, 519 U.S. 929 (1996).
[6] 911 P. 2d at 438; see also concurring opinion of Justice Mosk, at 459-460.
[7] 2004 WL 1048331, 47 Tex. Sup. Ct. J. 497, May 07, 2004.
[8] *Id.* at *16. See also *Parking Association of Georgia v. City of Atlanta*, 450 S.E. 2d 200 (Ga. 1994), *cert. den*., 515 U.S. 1116 1995), discussing the Georgia court finding that

Dolan did not apply to requirements that landowners install curbs, landscaping and trees in surface parking lots of over 300 spaces, because the ordinance applied to many landowners equally, and "simply limited" the use of the property. Certiorari was denied but Justice Thomas' dissent, joined by Justice O'Connor, states in part that ". . . the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."

[9] For other cases discussing the adjudicatory/legislative distinction, see *Dudek v. Umatilla County*, 69 P. 3d. 751 (Or. App. 2003) (applying *Dolan* to a subdivision condition requiring that the access road meet county construction standards, where the applicant would be required to purchase land from adjoining owners in order to obtain ten foot private easement necessary to widen the existing road); *J.C. Reeves Corp. v. Clackamas County*, 887 P. 2d. 360 (Or. Ct. App. 1994) (upholding the county's platting requirement for frontage street improvements while applying *Dolan* by reasoning that "a condition on the development of particular properties is not converted into something other than that by reason of legislation that requires it to be imposed."); *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1994) (refusing to apply *Dolan* to a transportation impact tax because the tax results from the county's legislative action); *Rogers Machinery Inc. v. Washington County*, 45 P. 3d. 1966 (Or. Ct. App. 2002), *rev. denied*, 52 P. 3d. 1057 (2002), *cert. denied*, 123 S. Ct. 1482 (2003) (traffic impact fee was not subject to *Dolan's* heightened scrutiny test).

[10] 41 P. 3d 87 (Cal.2002)

[11] 41 P. 3d at 104-105.

[12] *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1996).

[13] 493 U.S. 52 (1989).

[14] 493 U.S. at 62 n.9 (1989). *Loretto,* 458 U.S. 419 (1982), held that the required installation of cable boxes and lines on apartment buildings was a physical appropriation that constituted a *per se* taking. See also, *Kitt v. U.S.,* 277 F. 3d. 1330 (Fed. Cir. 2002), *modified on reh'g on other grounds*, 288 F. 3d. 1353 (Fed. Cir. 2002), where claimants sought a refund of taxes paid on withdrawal from a Roth Individual Retirement Account. There, the court explained that "the mere imposition of an obligation to pay money…does not give rise to claim under the Takings Clause of the Fifth Amendment." *Id*. at 1336 (quoting *Commonwealth Edison Company v. U.S.*, 271 F. 3d. 1327, 1340 [Fed. Cir. 2001]).

[15] 123 S. Ct. 1406 (2003); see also, *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998) (holding that interest earned on client funds in an IOLTA account is property of the client for purpose of the taking clause).

[16] 45 P. 3d. 1966 (Or. Ct. App. 2002) (citing cases), *rev. denied*, 52 P. 3d. 1057 (2002), *cert. denied*, 123 S. Ct. 1482 (2003).

[17] *McCarthy v. City of Leawood,* 894 P. 2d 836 (Kan. 1995) (traffic impact fee); *Home Builders Association of Central Arizona v. Scottsdale*, 930 P. 2d 993, 1000 (Ariz. 1997), *cert. denied,* 521 U.S. 1120 (1997) (water resource fee is a "more benign" form of regulation than land dedication); *Krupp v. Breckenridge Sanitation District*, 19 P. 3d 687 (Colo. 2001) (water and wastewater services; "the essence of a Nollan/Dolan violation is the demanding by the governmental authority of a concession, especially a dedication of an interest in real property, for its own benefit and not to offset the impact of the proposed development"; further explaining that because the fees were assessed on the basis of a schedule of fees applicable to every new project, it was distinguishable from the exactions found unconstitutional in *Dolan*).

[18] 729 N.E.2d 349, 355 (Ohio 2000). Similarly, road impact fee legislation has been upheld in Illinois against a takings challenge, but with a simple assumption that *Dolan* applies and no discussion of possible differences between impact fees and other types of exactions. *Northern Illinois Home Builders Association v. County of DuPage,* 649 N.E. 2d 384 (Ill. 1995).

[19] 972 P.2d 944 (Wash. App. 1999), *rev. granted, cause remanded by* 989 P.2d 1140 (Wash. 1999), *on remand* 14 P.3d 172 (Wash. App. 2000).

[20] *Id.* at 174-175.

[21] 83 P.3d 443 (Wash. App 2004), interpreting statutory impact fee legislation in light of *Nollan and Dolan*.

Calendar of Events

Executive Council Schedule 2004-2005

September 10, 2004
11:30 a.m. - 2:30 p.m.
Tampa Airport Marriott • Tampa

October 21, 2004
5:00 p.m. - 6:00 p.m.
Rosen Center • Orlando

May 5, 2005
Gaylord Palms • Kissimee

May 6, 2005
Section Annual Meeting
Gaylord Palms • Kissimmee

June 24, 2005
Bar Annual Meeting
Marriott World Center • Orlando

Seminar Schedule 2004-2005

Public Employment Labor Relations Forum
October 21-22, 2004
Rosen Center
Orlando

Certification Review Course
May 5, 2005
Gaylord Palms
Kissimmee

28th Annual Local
Government Law in Florida
May 6-7, 2005
Gaylord Palms
Kissimmee

"My Word is My Bond?" The implications of *Rollison v. City of Key West* on Citizen Inquires

by Joseph G. Jarret, Esquire, Polk County Attorney

At first blush, the *Rollison* case appears to be your garden variety declaratory action filed by a landowner seeking to assure the highest and best use of her or his land. However, as will be seen, this case is a bit of a unicorn as it smacks of detrimental reliance founded in assertions offered by a local government attorney.

Background:

The Rollisons purchased a piece of property in 1997 and, as planned, used it as a vacation home for part of the year. They obtained a non-transient occupational license and rented the property approximately sixteen weeks per year. In 1998, the City adopted its City of Key West Land Development Regulations (LDRs). The LDRs replaced the existing zoning code and, according to the parties, eliminated the special definition of "transient housing" which had previously applied to the Truman Annex Planned Redevelopment District. In 1998 the City adopted Ordinance 98-31, governing transient living accommodations in residential dwellings. This was intended "to halt the use of residences for transient purposes in order to preserve the residential character of neighborhoods."

After Ordinance 98-31 was adopted, the City took the position that Ms. Rollison could no longer engage in short-term rentals, and threatened to impose fines if she did so. Kathy Rollison (hereinafter Owner), brought a declaratory-judgment action against City of Key West. In so doing, she asserted that her use of her property as short-term rental units constituted a lawful use, prior to changes in City's zoning laws. The City counterclaimed, alleging that short-term rentals were unlawful at the time the Owner purchased the unit.

The Circuit Court:

Following a bench trial, Monroe County Circuit Court Judge Richard G. Payne, Jr., ruled in favor of the City. Subsequently, the Owner appealed.

The Court of Appeals:

The Third District Court of Appeals Reversed and remanded, and in so doing, held that the use of the condominium unit for short-term rentals was a lawful nonconforming use.

Analysis:

The fact that the Court of Appeals found that the Owner's use of the condominium unit for short-term rentals was a lawful nonconforming use, is not, in and of itself earth shattering. What is most interesting, however, is the manner (in part) in which the Court arrived at its decision. The opinion revealed that the Owners contacted the City Attorney to be sure that the City would allow the unit to be rented. The City Attorney stated that the property could be used for short-term rentals so long as it was not rented for more than twenty-five weeks per year. The Owners were also advised that such rental use required a non-transient occupational license from the City of Key West and that at the time of owner's purchase, the city's zoning code permitted short-term rental of transient housing if the rental occurred less than 50 percent of year. The Court determined that the Owner was well within her rights to rely upon conversations she had with the City Attorney relative to the use of the land.

When faced with the conversations above, the Circuit Court took a contra position, ruling that the city administration's interpretation of the Code could not be viewed as authoritative or binding. Obviously, the Court of Appeals disagreed. In fact, the Court held that such an interpretation ". . . was necessary for licensing, code enforcement, and in order to inform citizens regarding what uses may be made of their property." The Court further ruled that "The interpretation given to the Rollisons by the city attorney was consistent with the position given to realtors and other owners by the responsible members of the city administration."

Granted, according public entities judicial deference when said entities issue administrative interpretations of their respective codes or enactments is nothing new. *See Paloumbis v. City of Miami Beach*, 840 So.2d 297 (Fla. 3d DCA), review denied, 848 So.2d 1153 (2003) wherein the court held that a public entity's administrative interpretations of its own regulations were entitled to judicial deference as long as said interpretations are within the range of possible interpretations. *Id* at 298. However, when you consider *Rollison* in light of the lengths to which the court went to recite conversations between the Owner and the City, you are left with the impression that the court accords a whole new meaning to the deference granted local government entities when tasked with interpreting their own codes or ordinances. In fact, the court seems to issue a not so subtle reminder that a citizen has every expectation and right to rely upon the interpretations or advice, if you will, of local government officials and their attorneys.

Conclusion:

If we take the *Rollins* decision to its logical conclusion, we can surmise that the courts can and may very well accord a level amount of deference to the opinions issued by local government attorneys to citizens. And equally as important, that citizens may rely upon such determination when making decisions as to how to utilize their land. As we are oft called upon to advise the general citizenry on county or municipal policies and procedures (despite our best efforts to resist such "requests"), the realities of public service and the demands of bodies politic often prevail upon us to accommodate our client's constitu-

ency. I guess it's like we've always know, "Our word is our bond."
Finis

Joseph G. Jarret, Esquire
Attorney At Law
Certified Mediator& Arbitrator

Endnote:

[1] *Rollison v. Key West*, 2004 WL 784473 (Fla.App.3 Dist.)

Joseph G. Jarret *is the Polk County Florida, Attorney, a Certified Florida Supreme Court Mediator and Arbitrator, and the former Risk and Insurance Manager of Manatee County during which time he also served as an assistant county attorney. He is the former Chief Counsel for the Hardee County Office of the 10th Judicial State Attorney. He is a former United States Army Combat Arms (Airborne) Officer with service in the Middle East, Africa and Central Europe. Jarret holds the Bachelor of Science Degree in Criminal Justice, from Troy State University (W. Germany Campus) the Masters in Public Administration from Central Michigan University, the Juris Doctor from Stetson Law school, and a post-graduate Certificate in Public Management from the University of South Florida. Jarret has published over 70 articles in various professional journals, seven of which have appeared in the* Florida Bar Journal. *He is a nationally recognized speaker on public entity liability issues.*

PROFESSIONAL CONDUCT
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February 5, 2002. The revised Rules are now effective as ABA policy.

The Florida Bar created the "Special Committee to Review the ABA Model Rules" to review the changes to the ABA Model Rules 2002. The Committee completed its final report in the fall of 2002. The Committee's stated goal was to protect the public and maintain the core values of the profession. The Committee recommended a number of amendments, some of which are substantial, to the Bar Board of Governors, which is scheduled to vote on the proposed revisions on second reading on August 13, 2004. Any revision to the Rules must then be filed and approved by The Florida Supreme Court.

While there are numerous changes to the proposed rules which impact the members of the Section, there are specific provisions which are of particular concern. The proposed revision to the rules address the special status of government lawyers and the principles of confidentiality, screening, and conflict of interest. For a complete copy of the ABA Model Rules and Comments, you are directed to the Center for Professional Responsibility of the American Bar Association. A complete copy of the Special Committee's recommended amendments to the Florida Bar Rules are posted on the Bar website.

Under Florida law, government lawyers (and former government lawyers) already have significant restrictions on their ability to practice law and represent clients. As government lawyers, we must comply with the Public Records Laws, Sunshine Laws, Jennings and Snyder, Prohibitions on Polling of Government officials, countless local ethics laws. Government Lawyers have their own Ethics Commission which reviews, opines, adjudicates on the actions of Government Lawyers among other public officials. For example, in two very recent opinions, the Commission ruled on the conflict of interest provisions of state law as they apply to: 1) a state senator and the senator's law firm in representing a client before the state legislature (see CEO 03-3); and 2) a city council member's law firm doing business with the council member's city (see CEO 03-7).

The existing rules and the proposed amendments create a whole host of new and intricate problems, considerations and limitations on the ability of local government attorneys to effectively perform their jobs in an

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Moving? Need to update your address?

The Florida Bar's website (www.FLABAR.org) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically), but addresses are processed timely. The address form can be found on the website under "Member Services," then "Index."

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

Awards 2003-2004

At the annual meeting luncheon, outgoing Chair Ken Buchman presented several awards. The first award he presented was the Chair's Service Award. This year, there were two recipients, Jewel Cole and Grant Alley.

Jewel Cole is an Assistant County Attorney with the Pinellas County Attorney's office. She serves on the Executive Council and has for the past several years served as the Chair of the Florida Bar Journal Committee and is responsible for articles being printed in the Florida Bar Journal.

Grant Alley is the City Attorney of Ft. Myers. Grant is a member of the Executive Council and serves as Chair of the Section's Website Committee. He also assisted the Section in analyzing eminent domain legislation on behalf of the Section.

The Section's Ethics and Professionalism Award was presented to Marion Radson. Marion is a Past Chair of the Section and is the City Attorney of Gainesville. For the last several years, Marion has been actively representing the Section with respect to proposed changes to the Florida Rules of Professional Conduct.

Pam Dubov was recognized with the Osee R. Fagan Legal Writing Award. Pam serves as the Section's liaison for the Stetson Law Review's Local Government Law Symposium. Ken Buchman noted that this year's Law Symposium was one of the best.

Ken presented this year's Paul S. Buchman Public Service Award to Mark Barnebey. Mark practices law with the law firm of Kirk Pinkerton, P.A., where he concentrates in the area of land use. He is a Past Chair and continues to be active in the Section.

Chip Rice presented the Section's highest honor, the Ralph A. Marsicano Award, to Frederick B. Karl. His long distinguished career includes service as a Justice of the Florida Supreme Court, as State Representative and State Senator, County Administrator for Hillsborough County, County Attorney for Hillsborough County and as City Attorney for the City of Tampa. In October, 2000, the Hillsborough County Board of County Commissioners recognized his lifelong public service by naming the 28 story building that serves as the county's administrative headquarters, the Frederick B. Karl County Center.

Back Row L to R: Craig Coller, Chair, Marion Radson, Mark Barnebey, Grant Alley, Ken Buchman, Immediate Past Chair
Front Row L to R: Jewel White Cole, Karl Frederick, Chip Rice

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ethical and professional manner. For example, Rule 4-1.13 "Organization as Client" recognizes the difficulty in identifying the client in the government context (see Comment, "Government agency"). However, proposed Rule 4-1.11 requires the "appropriate government agency (to) give(s) its informed consent confirmed in writing…(e.s.)" In the government context it can be difficult to determine if this written consent should be granted by the governing body, the chief executive officer, the chief general counsel, or other government official. It can also require a substantial period of time to obtain such consent in writing that may inhibit a former government lawyer from being able to represent a client.

Florida Statutes, Section 119.07(3)(l) , the Public Records Law, and Section 286.011, F.S., the Government-in-the-Sunshine Law, directly impact the attorney-client and work product privileges. Some of the documents in a government attorney's files are available for public inspection, and meetings with the public client may be required to be open to the public, except as expressly allowed by law. Many states do not impose special statutory restrictions or regulations on lawyers who represent the government. Prior to adopting any changes the Board of Governors should consider the additional restrictions or regulations imposed by Florida's open meetings and public records laws and special standards that apply to government lawyers, found in Chapter 112, Florida Statutes.

It is important to consider whether any revisions are necessary or desirable. While the American Bar Association made revisions to its Rules in February 2002, and there is some desire among some national associations to bring uniformity to the rules regulating lawyers within the 50 states, the Florida Bar should independently consider the necessity or desirability of any Rule revisions in the first instance.

While the representatives of the City, County and Local Government Law Section representatives identified numerous issues with the proposed revisions, in the interests of addressing what the Section considers to be the most egregious, the objections have been limited to two main areas. These are Rule 4-1.11 "~~Successive~~ Special Conflicts of Interest for Former and Current Government Officers and ~~Private Employment~~ Employees" and Rule 4-1.13 "Organization as Client". The test of the provisions of these Rules are found below, as is the proposed text of other provisions which will, if adopted, impact local government attorneys.

The proposed rules and modifications are:

I. THE GOVERNMENT AS "CLIENT" (FLORIDA BAR RULE 4-1.13 "ORGANIZATION AS CLIENT")

A. GENERAL RULE. – A lawyer employed or retained by the government represents the government acting through its duly authorized "constituents." Rule 4-1.13(a).

1. IDENTIFY THE "CONSTITUENT" CLIENT.[1]

a. Governing Body

b. Chief Executive Officer (e.g. Mayor, City or County Manager)

c. Constitutional Officers, (e.g. Clerk of the Court, Property Appraiser, Sheriff)

d. Department Head or Employee

2. CONFIDENTIALITY.

The comments entitled "Government Agency" to Rule 4-1.13 acknowledge the duty of a government lawyer under other substantive law to prevent or rectify wrongful acts. Therefore, a government attorney may have a duty to disclose wrongful acts over maintaining confidentiality "for public business is involved."

3. AUTHORITY TO ACT ON BEHALF OF THE GOVERNMENT.

Government attorneys may have authority to act as the client under general or local substantive law.[2]

B. GOVERNMENT ATTORNEY HAS A DUTY TO ACT IN THE BEST INTEREST OF THE GOVERNMENT AS CLIENT:

CONDITIONS:

1. When a client acts or intends to act in violation of a legal obligation or law, and

2. The act is likely to result in substantial injury to the government.

FACTORS TO CONSIDER (Rule 4-1.13(b)):

1. Seriousness of the violation and its consequences;

2. Scope and nature of the representation;

3. Responsibility and motivation (of the wrongdoer);

4. Policies of the organization, i.e. government and

5. Other relevant considerations.

C. THE GOVERNMENT ATTORNEY'S RESPONSE TO WRONGDOING:

1. Ask for reconsideration;

2. Advise that a separate legal opinion be obtained for presentation to the appropriate authority;

3. Refer the matter to a higher authority in the organization (i.e., government); and

D. DISCLOSURE OF CONFLICT.

If all responses fail, consider disclosing confidential information to proper legal authorities if required by other substantive law or regulation. See Comment (6) "Government Agency[3]".

How Proposed Florida Bar Rule DIFFERS from Existing Florida Bar Rule:

The proposed Fla. Bar Rule clarifies the scienter requirement of subsection (d) by providing that in dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

"Paragraph 6 of the comment was modified to indicate that defining the client in the government context is difficult and outside the scope of these rules." (Purpose of the revision as stated by the Bar's Special Committee.)

The Special Committee recommends revisions to subsection (d) to Rule 4-1.13 and paragraph (6) of the Comment:

RULE 4-1.13 ORGANIZATION AS CLIENT

(d) Identification of Client. In dealing with an organization's direc-

tors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when ~~it is apparent~~ the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Excerpt from proposed Comment to Florida Bar Rules:
Government agency

6. The duty defined in this rule applies to governmental organizations. ~~However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Therefore, defining~~ Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it ~~is generally~~ may also be a branch of the government, such as the executive branch, or the government ~~as a whole~~. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government as a whole may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service maybe defined by statutes and regulation. This rule does not limit that authority. See ~~note on~~ Scope.

The proposed rule makes it more difficult for a government lawyer to reconcile his or her ethical duties under the Rules with the statutory duties imposed on the government lawyer. While the current Comment already suggest that a government lawyer may need to disclose confidential communications made to the attorney under the attorney-client privilege, the revised rule Comment reemphasizes and strengthens the case for disclosure to "assur(e) that the wrongful act is prevented or rectified, for public business is involved." As one commentator has stated "(i)t is worth emphasizing that government lawyers operate under different ethics constraints only to the extent that the law specifically requires it, and not because they have some generalized "higher duty" toward their adversaries, tribunals or the public.

II. CONFLICT OF INTEREST – GOVERNMENT LAWYERS (RULE 4-1.11 "SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES" - *REVISED TO CONSOLIDATE SEVERAL RULES.*)

A. SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES.

1. General Rules for Former Government Lawyers. Rule 4-1.11(a) and (c):

a. A lawyer and the lawyer's firm are disqualified when the former government lawyer participated "personally and substantially" in a "matter." (See definition of "matter" in paragraph 2 below, and Exceptions in Subsection B below.)

b. A lawyer (and firm) cannot use or reveal "confidential government" information to the disadvantage of a former client. "Confidential government information" means information obtained under governmental authority and not available to the public. Rule 4-1.11(c)

2. "Matter" means a judicial or other proceeding, application, request for a ruling, contract, claim, controversy, charge, accusation, arrest, or other matter involving a specific party or parties and any matter covered by the conflict of interest rules of the government agency.[4] Rule 4-1.11(e)

NOTE:

A new comment (10) was added to the Rule to clarify that two "matters" may be considered the same "matter" depending upon the same basic facts, same or related parties, and the time elapsed between the representations.

B. EXCEPTIONS

1. The former government attorney obtains informed consent from the former government client confirmed in writing (by the former government attorney).

2. Other attorneys in the former government lawyer's firm may represent a client, provided:

a. The disqualified former government attorney is timely screened [see paragraph D below) from the matter and receives no fee (Rule 4-1.11(b)(1)];

b. Written notice is promptly given to the former government client to ascertain compliance with this Rule (NOTE: Informed consent is not required.);

C. GENERAL RULE FOR CURRENT GOVERNMENT ATTORNEYS [RULE 4-1.11(A)].

1. Government lawyers must avoid concurrent conflicts of interest (New Reference to Rule 4-1.7):

a. The representation cannot be directly adverse to another client; or

b. There is substantial risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client, a third party, or personal interest of the lawyer.

2. Must respect duties to former clients (confidentiality and conflicts of interest. (New reference to Rule 4-1.9)

3. The government lawyer cannot participate in a "matter" that the lawyer participated personally and substantially while in private practice.

New Exceptions (See reference to Rule 4-1.7):

a. Lawyer believes he or she can provide competent and diligent representation to each affected client;

b. Representation is not prohibited by law;

c. Cannot involve the same claim in the same litigation; and

d. Former client and government each give informed consent confirmed in writing.

4. Transfer from one govern-

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ment agency to a second government agency may create a conflict dependent, in part, if the "client" is different. (e.g., transfer from a federal agency to a city) See Rule 4-1.13, Comment, "Government Agency".

D. "SCREENED". (*A NEW DEFINED TERM*)

Although this Rule makes no specific reference to "screening", a lawyer who is personally disqualified from representing a client due to conflicts must be screened from other attorneys in the same firm or office.

'Screened" means the isolation of a lawyer from any participation through the timely imposition of procedures. See Rule 1.0 "Terminology", para (l). While screening is only applicable to former government lawyers, a new comment states that it would be prudent for current government lawyers to screen other government lawyers when a conflict arises. See Comment (2) to Rule 4-1.11.

The new term "screened" as set forth in Rule 1.0, reads as follows:

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

Excerpt from the Comment to Rule 1.0:
Screened

(8) This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11 or 4-1.12.

(9) The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

(10) In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

How Proposed Rule 4-1.11 DIFFERS from Existing Florida Bar Rule:

The New Rule consolidates Rules 4-1.7 "Conflict of Interest: Current Clients" and 4-1.9 "Conflict of Interest: Former Client" into this Rule.

The new Rule requires that consent to a conflict be "confirmed in writing". It does not require the lawyer obtain a written confirmation from the client, but merely that the lawyer provide a written confirmation to the person (entity) who consented to the representation.

The Special Committee recommends Revisions to Rule 4-1.11:
RULE 4-1.11 ~~SUCCESSIVE~~ SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND ~~PRIVATE EMPLOYMENT~~ EMPLOYEES

(a) Representation of Private Client by Former Public Officer or Employee. A lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to rule 4-1.9(b); and

(2) shall not otherwise represent a ~~private~~ client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency ~~consents after consultation~~ gives its informed consent, confirmed in writing, to the representation.

(b) ~~No~~ When a lawyer is disqualified from representation under subdivision (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is directly apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

~~(b)~~ (c) Use of Confidential Government Information. A lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

~~(c)~~ (d) Limits on Participation of Public Officer or Employee. A lawyer currently serving as a public officer or employee:

(1) is subject to rules 4-1.7 and 4-1.9; and

(2) shall not:

~~(1)~~ (i) participate in a matter in which the lawyer participated personally and substantially while in pri-

vate practice or nongovernmental employment, unless ~~under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter~~ the appropriate government agency gives its informed consent, confirmed in writing; or

~~(2)~~ (ii) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

~~(d)~~ (e) Matter Defined. As used in this rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties; and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

~~(e) Confidential Government Information Defined.~~ ~~As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and that is not otherwise available to the public.~~

Comment

~~This rule prevents a lawyer from exploiting public office for the advantage of a private client. It is a counterpart of rule 4-1.10(b), which applies to lawyers moving from 1 firm to another.~~

(1) A lawyer ~~representing a government agency, whether employed or specially retained by the government~~, who has served or is currently serving as a public officer or employee is personally subject to the rules of professional conduct, including the prohibition against ~~representing adverse interests~~ concurrent conflicts of interest stated in rule 4-1.7 ~~and the protections afforded former clients in rule 4-1.9.~~ In addition, such a lawyer ~~is~~ may be subject to ~~rule 4-1.11 and to~~ statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this rule. See terminology for definition of informed consent.

(2) Subdivisions (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 4-1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, subdivision (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, subdivision (d) does impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

(3) Subdivisions (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under subdivision (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by subdivision (d). As with subdivisions (a)(1) and (d)(1), rule 4-1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

~~(4)~~ ~~Where~~ This rule represents a balancing of interests. On the one hand, where the successive clients are a ~~public~~ government agency and ~~a private~~ another client, public or private, the risk exists that power or discretion vested in that agency ~~public authority~~ might be used for the special benefit of ~~a private~~ the other client. A lawyer should not be in a position where benefit to ~~a private~~ the other client might affect performance of the lawyer's professional functions on behalf of the government ~~public authority~~. Also, unfair advantage could accrue to the ~~private~~ other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. ~~However~~ On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in subdivision (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to al substantive issues on which the lawyer worked, serves a similar function.

(5) When ~~the client is an agency of~~ the lawyer has been employed by 1 government agency and then moves to a second government agency, it may be appropriate to treat that second, ~~the~~ agency ~~should be treated~~ as ~~a private~~ another client for purposes of this rule ~~if the lawyer thereafter represents an agency of another government,~~ as when a lawyer ~~represents~~ is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by subdivision (d), the latter agency is not required to screen the lawyer as subdivision (b) requires a law firm to do. The question of whether 2 government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these rules. See rule 4-1.13 comment, Government Agency.

(6) Subdivisions ~~(a)(1) and~~ (b) and (c) contemplate a screening arrangement. See terminology (requirements for screening procedures). These subdivisions do not prohibit a lawyer from receiving a salary or partnership share established by prior independent ~~agreement. They prohibit~~, but that the lawyer may not receive compensation directly relating the attorney's compensation to

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the fee in the matter in which the lawyer is disqualified.

(7) Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

~~Subdivision (a)(2) does not require that a lawyer give notice to the government agency at a time when premature disclosure would injure the client; a requirement for premature disclosure might preclude engagement of the lawyer. Such notice is, however, required to be given as soon as practicable in order that the government agency or affected person will have a reasonable opportunity to ascertain that the lawyer is complying with rule 4 1.11 and to take appropriate action if the agency or person believes the lawyer is not complying.~~

(8) Subdivision ~~(b)~~ (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

(9) Subdivisions (a) and ~~(c)~~ (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by rule 4-1.7 and is not otherwise prohibited by law.

~~Subdivision (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated.~~

(10) For purposes of subdivision (e) of this rule, a "matter" may continue in another form. In determining whether 2 particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

The Special Committee recommends the consolidation of several rules that apply only to current and former government lawyers. The revision reflects the ABA's concern with a government lawyer's duties when opposing a former client and with the special obligations of a government lawyer not to abuse the power of public office. There has been no actual showing of the need for this type of revision in Florida. However, the Committee seems to wish to standardize the Florida Bar Rules with the ABA Model Rules.

The revised Rule now states that a lawyer serving as a public officer and employee is subject to Rule 4-1.7 "Conflict of Interest; Current Clients" Rule 4-1.9 "Conflict of Interest: Former client". Rule 4-1.11(d). While the comments of the current Rule refers to these Rules, the Comments "do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules." See, Scope to the Rules. If adopted and approved, government lawyers, present and past, would be fully subject to the Concurrent Conflict Rule 4-1.7. This Rule is also being revised to require that when a conflict exists, a lawyer may undertake the representation provided there is "informed consent" (see —new definition) of each affected client that is "confirmed in writing" (new definition). This Rule revision can be particularly troublesome for government attorneys who often represent different clients within the same government entity with conflicting or potentially conflicting interests, or who represent other government entities with conflicting or potentially conflicting interests.

III. COMMUNICATIONS WITH REPRESENTED PERSONS (RULE 4-4.2: "COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL")

A. GENERAL RULE. A lawyer cannot communicate with a represented person about the subject of the representation.

B. EXCEPTIONS.

1. Permitted with consent of the other lawyer.

2. "Permitted communications"

a. There is no "authorized by law" exception in the Florida Rules as exists in the ABA Model Rules. A revision to comment (4) is pending with the Florida Supreme Court that recognizes "permitted communications" between an attorney representing a party in a controversy to speak with government officials. Amendment to the Rules Regulating The Florida Bar, Case No. SC 03-705.

b. Includes investigative activities of lawyers representing governments or through investigative agents prior to civil or criminal enforcement proceedings. Caveat: Comment (5) also states that a communication is not permissible merely because it does not violate a state or federal constitutional right.

3. Permitted if the matter is outside the representation. See Comment (4).

This issue often arises in the government context when a private lawyer contacts the government for purposes independent of the "matter."

4. Authorized by court rule[5].

C. PRIVATE LAWYERS COMMUNICATING WITH THE GOVERNMENT AGENTS OR EMPLOYEES. Revised comment (5) prohibits communications with a "constituent" who supervises, directs or regularly consults with the lawyer concerning the represented "matter", or whose act (or omission) may be imputed to the organization (government) for civil or criminal liability.[6]

How Proposed Rule DIFFERS from Existing Florida Bar Rule:

There are no proposed revisions to the text of this Rule. However, there are numerous revisions to the Comment that are made to conform to the ABA Model Rules and are intended to merely clarify the existing Rule. Rule 4-4.2 does not contain the "authorized by law" exception, although there is a reference to "authorized by law" in the comment to Florida's Rule 4-4.2. However, an amendment is pending before the Florida Supreme Court as a result of the study of another Special Committee, to delete this reference and to allow communications authorized by "court rule." The "Special Committee to Review the ABA Model Rules" opposed the "authorized by law" exception, and also opposed the "court rule" exception.

The Special Committee does not recommend any changes to Rule 4-4.2, but recommends revisions to the Comment:

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) 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. 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[7], 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 court Rule (8) statute or contract, and a copy shall be provided to the adverse party's attorney.

(b)An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with the rule on objectives and scope of representation is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.[8]

Comment

(1) This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

(2) This rule applies to communications with any person who is represented by counsel concerning the matter in question.

(3) The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

(4) This rule does not prohibit communication with a ~~party~~ represented person, or an employee or agent of such a ~~party~~ person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. ~~Also, parties~~ Nor does this rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rues of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so. ~~Communications authorized by law~~ Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.[8]

(5) In the case of ~~an~~ a represented organization, this rule prohibits communications ~~by a lawyer for 1 party concerning the matter in representation~~ with persons ~~having a managerial responsibility on behalf~~ a constituent of the organization ~~and with any other person~~ who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with ~~that~~ the 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.~~ Consent of the organization's lawyer is not required for communication with a former constituent. If ~~an agent or employee~~ a constituent of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4. ~~This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.~~

(6) The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

(7) In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

IV. CANDOR TO THE TRIBUNAL (RULE 1.0 "TERMINOLOGY" AND RULE 4-3.3: "CANDOR TOWARD THE TRIBUNAL")

A. GENERAL RULE.

1. A lawyer shall not knowingly make a false statement of fact or law to a "tribunal" or fail to correct a false statement of material fact or law previously made to the "tribunal" by the lawyer.

2. A lawyer shall not knowingly fail to disclose legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing lawyer.

3. A lawyer shall not knowlingly offer evidence the lawyer knows to be false.

B. TRIBUNAL - The Proposed Revisions to the Rules adds a new term "Tribunal" to Rule 1.0:

(n)"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

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C. AUTHOR'S COMMENT.

Lawyers have a clear duty to offer evidence and testimony before a local government body acting in a quasi-judicial capacity with the same standards applicable in a court of law.

How Proposed Fla. Bar Rule DIFFERS from Existing Florida Bar Rule:

The proposed change expressly expands the application of Rule 4-3.3 to "tribunals" as defined above. The proposed change eliminates the requirement that the false statement must be a "material" fact or statement. The revised rule change permits a lawyer to refuse to offer testimony that the lawyer "reasonably" believes is false. Florida's rule also contains commentary addressing the issue of a lawyer's obligation to refuse to offer false evidence and citing to Florida rules and cases addressing this issue.

The Special Committee recommends revisions to Rule 1.0(n) as shown above, and Rule 4-3.3 and the Comment as follows:

RULE 4-3.3 CANDOR TOWARD THE TRIBUNAL

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of ~~material~~ fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) ~~permit any witness, including a criminal defendant, to~~ offer ~~testimony or other~~ evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer ~~thereafter~~ comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(b) Criminal or Fraudulent Conduct. A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

~~**(b) Extent of Lawyer's Duties**. The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.~~

~~**(c) Evidence Believed to Be False.** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.~~

~~**(d)**~~ **(c) Ex Parte Proceedings.** In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

(d) Extent of Lawyer's Duties. The duties stated in this rule continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

Excerpts from the Proposed revisions to the Comment:

Comment

(1) This rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See terminology for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, subdivision (a)(4) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

(2) ~~The advocate's task is~~ This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceedings has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. ~~However~~ Consequently, ~~an advocate does~~ although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause~~;~~ , the lawyer must not allow the tribunal ~~is responsible for assessing its probative value~~ to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a lawyer

(3) An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare rule 4-3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in rule 4-1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with rule 4-1.2(d), see the comment to that rule. See also the comment to rule 4-8.4(b).

Misleading legal argument.

(4) Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in subdivision (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party.

The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False evidence

~~When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.~~

~~When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.~~

(5) Subdivision (a)(4) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

(6) If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

(7) The duties stated in subdivisions (a) and (b) apply to all lawyers, including defense counsel in criminal cases.

(8) Except in the defense of a criminally accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth finding process that the adversary system is designed to implement. See rule 4-1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus, the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a criminal defendant.

(9) (INTENTIONALLY OMITTED)
(10) (INTENTIONALLY OMITTED)
(11) (INTENTIONALLY OMITTED)

Remedial measures.

(12) (INTENTIONALLY OMITTED)

Constitutional requirements.

(13) (INTENTIONALLY OMITTED)

Refusing to offer proof believed to be false

(14) ~~Generally speaking,~~ Although subdivision (a)(4) only prohibits a lawyer has authority from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is ~~untrustworthy~~ false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. ~~In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.~~ Because of the special projections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

(15) A lawyer may not assist the client or any witness in offering false testimony or other false evidence, nor may the lawyer permit the client or any other witness to testify falsely in the narrative form unless ordered to do so by the tribunal. If a lawyer knows that the client intends to commit perjury, the lawyer's first duty is to attempt to persuade the client to testify truthfully. If the client still insists on committing perjury, the lawyer must threaten to disclose the client's intent to commit perjury to the judge. If the threat of disclosure does not successfully persuade the client to testify truthfully, the lawyer must disclose the fact that the client intends to lie to the tribunal and, per 4-1.6, information sufficient to prevent the commission of the crime of perjury.

(16) The lawyer's duty not to assist witnesses, including the lawyer's own client, in offering false evidence stems from the Rules of Professional Conduct, Florida statutes, and case law.

(17) thru (28) (INTENTIONALLY OMITTED)

Ex parte proceedings.

(29) (INTENTIONALLY OMITTED)

V. LAWYER SERVING AS MEDIATOR (*NEW RULE*); PROPOSED RULE 4-2.3: "LAWYER SERVING AS THIRD-PARTY NEUTRAL, AND RULE 4-1.12: "FORMER JUDGE, ARBITRATOR, MEDIATOR OR OTHER THIRD-PARTY NEUTRAL".

A. DEFINITION.

A lawyer serves as a third-party neutral when assisting two or more persons who are not clients to reach a resolution of a dispute or matter. (e.g. arbitrator, mediator, conciliator)[9]

B. DUTY TO INFORM.

A lawyer must inform unrepresented persons that the lawyer does not represent them.

C. CONFLICT OF INTEREST.

1. Rule 4-1.12 originally applied only to former judges or arbitrators. The proposed Rule is now made applicable to third-party neutrals. Thus an arbitrator, mediator or other third-party neutral cannot represent anyone in connection with a matter in which the lawyer participated personally and substantially.

2. Exceptions:

a. Obtain informed consent by all parties confirmed in writing.

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b. Does not apply to other lawyers in the firm provided screening procedures are implemented with notice to parties. (See Comment (4) to proposed Rule 4-2.3.)

How Proposed Florida Bar Rule 4-2.3 DIFFERS From the Existing Florida Bar Rule:

There is no comparable current Florida Bar Rule.

The Special Committee recommends new Rule 4-2.3 and the Comment:

RULE 4-2.3: LAWYER SERVING AS THIRD-PARTY NEUTRAL

(a)A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b)A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Comment

(1) Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the resolution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

(2) The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution. A Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.

(3) Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

(4) A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in rule 4-1.12.

(5) Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct. When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see terminology), the lawyer's duty of candor is governed by rule 4-3.3. Otherwise, the lawyer's duty of candor toward both the third-party neutral and other parties is governed by rule 4-4.1.

VI. VOLUNTARY PRO BONO PUBLIC SERVICE (RULE 4-6.1 "PRO BONO PUBLIC SERVICE").

A. GENERAL RULE. (Rule 4-6.1(a))

Every lawyer has a professional responsibility to provide legal services to the poor, and to participate in other pro bono service activities that directly relate to the legal needs of the poor. A lawyer should aspire to render at least 20 hours of pro bono legal service per year, or make an annual contribution of at lease $350 to a legal aid organization.

B. EXCEPTIONS

1. The Rule does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule, or regulatory prohibitions.[10] Rule 4-6.1(a)

2. The Rule does not apply to members who are retired, inactive or suspended.

C. SPECIAL PRO BONO PROGRAMS FOR GOVERNMENT LAWYERS.

1. Although the Florida Supreme Court recently declined to remove the government lawyer deferral, the Court stated that it is not dissuading government attorneys from engaging in pro bono activities. "We find that the services are invaluable to educating the public about the law and the judicial system, and we applaud all government attorneys who engage in such worthwhile activities". Amendments to Rules Regulating the Florida Bar: Pro Bono Activities by Government Lawyers, 841 So.2d 443 at 446.

2. Examples of pro bono ac-

tivities for participation by government attorneys reported by the circuit committees to the Florida Bar's Standing Committee:

(a) Teen Court

(b) Guardian Ad Litem Program

(c) Attorneys Fighting for Seriously Ill Children

(d) Domestic Violence Permanent Injunctions

(e) Client Intake Programs for Pro Bono Programs.

The Special Committee recommends no revision to this Rule.

VII. CONCLUSION

The Rule Revisions proposed by the Special Committee to Review the ABA Model Rules are extensive and impact government and former government attorneys. The revisions reflect the ABA's dual concerns with a lawyer's duties when opposing a former client, and with the special obligations of a government employee not to abuse the power of public office. Although the Rules may not become effective for many months, it is helpful to become familiar with the revisions that are based upon the ABA Model Rules of Professional Conduct, and will necessitate, at a minimum, some changes in the practice of government and former government attorneys.

Members of the Section have met with the Special Committee to Review the ABA Model Rules. There have been some concessions made. However, as of the time this article went to print, a final recommendation on the Section's request was not made by the Committee. We do not believe that it is the intention of the Bar or the Committee to cause government, as client (federal, state or local) to retain separate legal counsel to represent intertwined governmental agencies, and thereby incur new and additional expenses (or cause the establishment of new attorney-client relationships with multiple attorneys). This is not practical, feasible or how government is accustomed to do their business. Similarly, it would not be practical for government attorneys to seek consent in writing each time an adverse interest arises in the representation of these agencies.

It is suggested that an amendment to the proposed Rule be adopted which would retain the current practices of the governments to retain their government lawyers to represent them using the same government attorney (office) to represent several government agencies even when there are intra-governmental legal controversies. Likewise it shouldn't be necessary for the government attorney to obtain informed consent confirmed in writing only to avoid a new technical violation of the Rules of Professional Conduct.

Government lawyers in Florida already practice under the broadest open meetings and public records law when compared with the other states in the Union. Written documents of government attorneys are subject to the public records law unless an explicit exemption is provided, or unless the document falls under the work product privilege as recognized by case law. The Rules, specifically 4-1.11 (d) and 4-1.13 should remain as they are currently written. Rule 4-1.11(d) currently prohibits a government lawyers from participating in a matter in which the lawyer participated personally and substantially while in private practice. The application of Rules 4-1.7 and 4-1.9 should remain only as a reference in the Comments as currently written. The Board of Governors should jealously protect attorney client communications and not support any further erosion of this time-honored privilege.

While the Rules of Professional Conduct must be followed by attorneys admitted to practice in the State of Florida, professionalism and civility can't be fully legislated. An excerpt from the Preamble to the Rules of Professional Conduct states it best:

(7) Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

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Mr. J. Blair Culpepper (PM-02)

Contact your local representatives on the Board of Governors. Express your views. The meeting of the Board is August 13, 2004.

Footnotes:

[1] The Comment to the Rule expressly recognizes the difficulty of identifying the "client" in the government context. The pending revision to the Rules is an attempt to adopt a functional test for explaining the identity of the client when the interests of the particular government client is adverse to the other constituents of the government.

[2] See Comment (6) to Rule 4-1.13 below.

[3] One commentator states the ABA Model Rules 2002 Comment was amended to make clear that any special duty a government lawyer may have to prevent or rectify wrongful acts is derived from external law and not the rules. 15 Geo J. Legal Ethics 441 at 460. The same argument would apply to this revision.

[4] Rule-making and policy-making matters are not included within this definition. 15 Geo J. Legal Ethics 441 at 457.

[5] Approved by the Florida Supreme Court on November 13, 2003, Amendments to the Rules Regulating the Florida Bar, 2003 WL 22669375.

[6] The ABA Ethics 2000 Commission declined to expressly prohibit communications with members of a governing body; rather the word "constituent" is used instead of agent or employee. 15 Geo J. Legal. Ethics 441 at 468. The Florida Bar 's "Special Committee to Review the ABA Model Rules" in its commentary generally opposes any encouragement to circumvent the rationale behind the Rule.

[7] The "Special Committee to Review Rule 4-4.2" recommended this additional exception that was approved by the Board of Bar Governors in 2002. The revision is pending approval by the Florida Supreme Court, as of the printing of this paper. (add Cite) The "Special Committee to Review the ABA Model Rules" opposed this revision.

[8] The "Special Committee to Review Rule 4-4.2" recommended the following revision to the comment that is pending approval by the Florida Supreme Court: "Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." The "Special Committee to Review the ABA Model Rules" also opposed the "authorized by law" exception, but the text of the Comment fails to delete this sentence.

[9] The ABA Ethics 2000 Commission declined to expressly prohibit a lawyer serving as a third-party neutral from assisting the parties in drafting a settlement document. The Commission preferred that other rules governing arbitrators, mediators, etc. should govern the conduct of the lawyers. 15 Geo J. Legal Ethics 441 at 462. Comment (2) to the proposed Rule states that a Florida Bar member who is a certified mediator is governed by the applicable law and rules relating to certified mediators.

[10] In Amendments to Rules Regulating the Florida Bar Pro Bono Activates by Government Lawyers, 841 So.2d 443 (Feb. 20, 2003), the Supreme Court declined to adopt the Standing Committee's and the Bar Board of Governors proposed amendment to Rule 4-6.1 that would have removed the government lawyer deferral.

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Elizabeth M. Hernandez *has served as Chief Legal Officer for the City of Coral Gables since 1995. Her local government practice is of a general nature, with emphasis on ethics laws governing local government officials, land use and zoning law and Florida constitutional law. She is AV rated by Martindale Hubbell and has been a Florida Bar Board Certified City, County and Local Government Lawyer since 1997, and has served on the Executive Council of the City, County and Local Government Law Section of the Florida Bar since 1998, as well as the executive council of the Florida Municipal Lawyers Association. Mrs. Hernandez currently serves as the Editor of the AGENDA, the newsletter for the City, County and Local Government Section. She has lectured in continuing legal education courses presented by the ABA, Lorman, the South Florida Planning and Zoning Association and other organizations. Mrs. Hernandez has been recognized among top government attorneys in 2004 by both South Florida Legal Guide and Florida Trend. Mrs. Hernandez received her Juris Doctorate at the University of Florida, Holland Law Center, Gainesville, Florida in 1983.*

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