IN THE SUPREME COURT OF FLORIDA

STATE ex rel. LAWTON CHILES,
as Governor of Florida, and
ROBERT A. BUTTERWORTH, Attorney
General, and MELANIE ANN HINES,
Statewide Prosecutor,

Petitioners,

vs. CASE NO.

PUBLIC EMPLOYEES
RELATIONS COMMISSION,

Respondent.
_____/

PETITION FOR A WRIT OF PROHIBITION

Lawton Chiles, Governor of Florida, and Robert A. Butterworth, Attorney General of Florida, and Melanie Ann Hines, Statewide Prosecutor, pursuant to article V, section 3(b)(7), Florida Constitution, and Rules 9.030(a)(3) and 9.100, Fla.R.App.P., petition for a writ of prohibition directed to respondent, Florida Public Employees Relations Commission. Petitioners assert that a writ of prohibition is necessary and proper to preserve the complete and exclusive jurisdiction of the Florida Supreme Court to regulate the practice of law and to enforce the Rules Regulating the Florida Bar, including the Rules of Professional Conduct.

I. BASIS FOR INVOKING THIS COURT'S JURISDICTION

On or about March 23, 1993, the State Employees Attorneys Guild (hereafter SEAG) filed a petition with the Florida Public Employees Relation Commission (hereafter "PERC"), pursuant to section 447.307(2), Fla.Stat., seeking certification of a bargaining unit composed of attorneys who are employed by the State of Florida. (App. Ex. A) On March 30, 1993, PERC entered an order finding reasonable cause to believe the petition sufficient and ordering an evidentiary hearing "on questions concerning representation and unit determination." (App. Ex. B) On April 5, 1993, PERC entered an order scheduling a prehearing conference for May 11, 1993, and requiring the parties to file a prehearing statement addressing specified issues. (App. Ex. C)

On April 12, 1993, Governor Chiles, on behalf of the State, filed a response to the petition and a motion to stay. (App. Ex. D) The State contended that the proposed bargaining unit was inappropriate as an unconstitutional attempt to regulate and alter the practice of law in derogation of the exclusive jurisdiction of the Florida Supreme Court. By order of April 29, 1993, PERC denied the stay. (App. Ex. E)

Article V, section 15, Florida Constitution, and the Rules of Professional Conduct adopted and enforced by this Court, preclude PERC from taking any action that would regulate or tend to regulate the attorney-client relationship between the State of Florida, as the client, and its attorneys. Further, PERC may not

regulate the practice of law by mandating collective bargaining over matters regulated by this Court and the Rules of Professional Conduct. As demonstrated herein, the adversarial nature of mandatory collective bargaining is repugnant to the integrity of the attorney-client relationship established by the Rules of Professional Conduct. Collective bargaining over issues such as "at will" employment, case assignments, case loads, and other professional responsibilities, including those owed to the courts, is antithetical to the standards of professional performance dictated by this Court and the Rules of Professional Conduct as well as to the rights of the client and the loyalty owed the client.

Petitioners also contend with respect to the Office of the Attorney General and the Office of Statewide Prosecution that deputies and assistants therein exercise the power of the sovereign inhering in those constitutional offices and therefore, for purposes of Chapter 447, Part II, Fla.Stat., are officers rather than employees. They must not be included in any collective bargaining unit created under Chapter 447.

II. FACTS ON WHICH PETITIONERS RELY

The facts on which petitioners rely to establish this Court's jurisdiction and which warrant the issuance of a writ of prohibition are stated above. Other relevant facts that illustrate the legal issues are discussed in the argument, *infra.* Petitioners do not believe there are any disputed issues of fact.

III. NATURE OF RELIEF SOUGHT

The relief sought is entry of an order prohibiting PERC from proceeding further with certification of a bargaining unit for state employed attorneys under section 447.307, Fla.Stat. In the alternative, or in addition, the petitioners request that this Court rule that assistant attorneys general and assistant statewide prosecutors are not "employees" under Chapter 447 and are not entitled to inclusion in a bargaining unit created under that chapter.

IV. ARGUMENT

A. ARTICLE V, SECTION 15, FLORIDA CONSTITUTION, VESTS THE SUPREME COURT WITH EXCLUSIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.

In 1972 the electorate of this state approved Article V, section 15, Fla.Const., vesting in this Court the "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Well before 1972, however, this Court recognized its inherent power to define and regulate the practice of law. *Petition of Florida State Bar Ass'n*, 40 So.2d 902 (Fla. 1949). *See also, Petition of Florida State Bar Ass'n*, 134 Fla. 851, 186 So. 280 (Fla. 1938).

Even without specific constitutional authority, however, this Court has consistently held that the legislature has no power to regulate the practice of law by members of the Bar. *In re The Florida Bar,* 316 So.2d 45 (Fla. 1975). The

constitutional provisions merely recognize the inherent power of the judicial branch over members of the Bar. *Id.* at 48; *The Florida Bar v. Massfeller*, 170 So.2d 834, 838 (Fla. 1964).

Pursuant to its constitutional and inherent powers, this Court has adopted the Rules of Professional Conduct ("Rules"). Rule 1-10.1 requires adherence to the Rules of Professional Conduct by all members of the Bar. There is no exception for government attorneys.[1] Under the Rules and related case law, attorneys have specific obligations that directly relate to the propriety of collective bargaining under Chapter 447.

Except under limited circumstances, Rule 4-1.7 forbids an attorney to represent a client if the attorney's interests may conflict with the client's. The comment to this rule states in pertinent part:

> Loyalty is an essential element in the lawyer's relationship to a client.
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> * * * *
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> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to ... [a] client's interests without the affected client's consent.
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> * * * *
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> Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the

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[1] In fact, the comment following Rule 4-1.11 expressly recognizes that a lawyer representing a government agency "is subject to the rules of professional conduct...."

> client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.
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> * * * *
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> The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.
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> * * * *
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> The lawyer's own interest should not be permitted to have adverse effect on representation of a client.

Courts in other states have required that this rule be "rigidly followed" and have stated that the client is entitled to the undivided loyalty of his advocate. *See Grievance Com. of Bar of Hartford County v. Rottner*, 152 Conn. 59, 203 A.2d 82, 85 (Conn. 1964).

Second, and no less important, a client has the right to terminate the relationship between himself and the attorney at the client's election with or without cause. *Goodkind v. Wolkowsky*, 132 Fla. 63, 180 So. 538, 540 (Fla. 1938). *See also, Carey v. Town of Gulfport*, 191 So. 45, 46 (Fla. 1939); *Sohn v. Brockington*, 371 So.2d 1089 (Fla. 1st DCA 1979); *Tirone v. Tirone*, 327 So.2d 801 (Fla. 3d DCA 1976); *Nordling v. Northern States Power Co.*, 465 N.W.2d 81 (Minn.App. 1991).[2]

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[2] Under Rule 4-1.16 of the Code, entitled "Declining or Terminating Representation," the "Comment" states with respect to "discharge" that:

The at-will nature of the attorney-client employment relationship is an essential and integral element of the integrity of our judicial system. As noted by this Court in *Rosenberg v. Levin,* 409 So.2d 1016, 1021 (Fla. 1982):

> ... The attorney-client relationship is one of special trust and confidence.
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> * * * *
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> These considerations dictate that clients be given greater freedom to change legal representatives than might be tolerated in other employment relationships. We approve the philosophy that there is an overriding need to allow clients freedom to substitute attorneys without economic penalty as a means of accomplishing the broad objective of fostering public confidence in the legal profession.

(Emphasis added.)

See also, Mazzeo v. City of Sebastian, 550 So.2d 1113 (Fla. 1989).

Third, it is axiomatic that an attorney may not take legal action against a client without first withdrawing from representation. *Grievance Com. of the Bar of Hartford County v. Rottner,* 203 A.2d at 85[3]; *Clark v. State,* 108 Nev. 324, 831 P.2d 1374, 1376 (Nev. 1992).[4]

> A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's service.

[3] The *Rottner* court held that:

> The almost complete absence of authority governing the situation where, as in the present case, the lawyer is still representing the client whom he sues clearly

Moreover, the prohibition against suing a client extends even to attempts to enforce a duly negotiated bargaining agreement. *Santa Clara Cty. Counsel Attys v. Woodside,* 15 Cal.Rptr.2d 898, 904, 905 (Cal.App. 6 Dist. 1993) (attorneys' duty of loyalty is not outweighed by the attorneys' right to enforcement of collective bargaining rights or fundamental First Amendment rights to petition the government for redress of grievances; court prohibited attorneys in labor union from suing county to enforce collective bargaining agreement).[5] Indeed, courts have generally held that in-house counsel do not have a tort claim for retaliatory discharge. *Balla v. Gambro, Inc.,* 584 N.E.2d 104, 108 (Ill. 1991); *Herbster v. North American Co. for Life & Health Insurance,* 150 Ill.App.3d 21, 103 Ill.Dec. 322, 501 N.E.2d 343 (Ill.App. 2 Dist. 1986), *cert. denied,* 484 U.S. 850 (1987).[6]

> indicates to us that the common conscience of the bar is in accord with our holding that such a suit constitutes a reprehensible breach of loyalty and a violation of the preamble to the Canons of Ethics...

[4] In *Clark,* an attorney sued a client for attorneys fees while representing him in a murder trial. Recognizing that the attorney had placed himself in "a situation conducive to divided loyalties," the court concluded that "the appearance of impropriety and potential for adverse consequences were so great here, that the conflict could not be condoned." *Clark v. State,* 831 P.2d at 1376.

[5] The California Supreme Court, which like this Court has exclusive authority to regulate the practice of law, granted review of the *Woodside* decision on May 13, 1993.

[6] In Herbster, the chief legal officer of an insurance company was fired by his employer after refusing to engage in conduct which would have violated his ethical obligations as an attorney. The court held that an attorney cannot be accorded all the rights

Accordingly, the matters subject to bargaining under Chapter 447 and the remedies provided for enforcement by that statute and PERC cannot be reconciled with an attorney's obligations and duties under the Rules of Professional Conduct. If State-employed attorneys have a right to collective bargaining, this Court alone has the authority to implement that right through adoption of an appropriate framework. *Dade Classroom Teachers Ass'n v. Legislature,* 269 So.2d 684 (Fla. 1972).

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against his client-employer that might be enjoyed by other employees because an attorney cannot separate his role as an employee from his profession and its attendant obligation of loyalty.

B. CONTRARY TO THIS COURT'S EXCLUSIVE CONSTITUTIONAL AND INHERENT AUTHORITY, THE COMPREHENSIVE REGULATION OF EMPLOYERS AND EMPLOYEES ESTABLISHED BY CHAPTER 447, PART II, PLACES PERC IN A POSITION OF REGULATING THE PRACTICE OF LAW BY ATTORNEYS WHOSE SOLE CLIENT IS THE STATE OF FLORIDA.

1. Lawyers Are Obligated At All Times To Adhere To the Rules Of Professional Conduct.

In recent years, both the American Bar Association (hereafter ABA) and the Florida Bar have indicated that the Code of Professional Responsibility does not per se forbid lawyers from belonging to unions or associations representing lawyers. ABA Informal Opinion 986 at p. 146 (1967); ABA Informal Opinion 1325 (1975); Florida Bar Amended Advisory Opinion 77-15 (1978). These opinions, however, emphatically state that lawyers must at all times comply with controlling disciplinary rules:

> Lawyers who are union members are required, the same as all other lawyers, to comply with all Disciplinary Rules at all times; and lawyers who are union members should not permit the organization to prescribe, direct or suggest how to fulfill one's professional obligations, but should be vigilant at all times to safeguard one's fidelity to employer free from outside influences.

ABA Informal Opinion 1325, p. 200.

The Florida Bar Board of Governors, relying on Ethical Consideration 5-13[7], has stated:

> If faced with a choice between following the Code of Professional Responsibility or following a union's wishes, it is clear that a government lawyer who is a member of the union must follow the Code and the Disciplinary Rules thereof as promulgated by the Supreme Court.

Amended Advisory Opinion 77-15, p. 1104.[8]

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[7] Ethical Consideration 5-13 provided:

> A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

[8] The Florida Bar issued Opinion 77-15 (October 25, 1977) in response to a question from several members of the Florida Bar who wished to join a union, composed of lawyers and non-lawyers, established under the National Labor Relations Act. Opinion 77-15 was issued stating that "[a] member of The Florida Bar may not ethically join a labor union of lay and attorney employees if the union relates to his federal employer." In issuing this Opinion, the Committee based its holding on "the obvious divided loyalty of the lawyer-employee with respect to the employer and his membership in a union . . ."

In response to a legal challenge, the Board of Governors amended Advisory Opinion 77-15, on May 13, 1978. The Florida Bar has never considered nor rendered an opinion on the issue at bar -- the inherent conflict between collective bargaining under Chapter 447, Part II, and this Court's rules.

Under Chapter 447, collective bargaining and its enforcement scheme is inimical to the attorney-client relationship mandated by the Rules. Current case law interpreting Chapter 447 mandates bargaining over such things as disciplinary rules[9] and grievance procedures[10]; "at-will" employment[11] ; hours[12]; and case loads[13]. Further, bargaining unit employees may sue their employers to enforce the terms of agreements or to compel bargaining. PERC's statutory role in resolving such bargaining disputes and mandating such bargaining would constitute an impermissible encroachment into the exclusive jurisdiction of this Court. It is tantamount to regulating the

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9 *Amalgamated Transit Union, Local 1596 v. Orange-Seminole-Osceola Transportation Authority,* 12 FPER para. 17134 (1986) (bargaining required before an absenteeism control policy was implemented because it could lead to discipline); *Duval Teachers United, FEA-AFT v. Duval County School Board,* 3 FPER 96 (1977) (discharge and discipline procedure was mandatorily negotiable).

10 Section 447.401, Florida Statutes, specifically requires that a grievance procedure be negotiated and included in every contract.

11 *Florida Federation Union of American Physicians and Dentists, FEA/United, AFT, AFL-CIO, Local 4591 (FFUAPD) v. State of Florida,* 16 FPER para. 21115, p. 239 (1990).

12 *See Royal Palm Beach Professional Fire Fighters Ass'n., Local 2886 v. Village of Royal Palm Beach,* 14 FPER para. 19304 (1988); and *IBEW, Local Union 2538 v. Jacksonville Electric Authority,* 14 FPER para. 19196 (1988).

13 *In re: Petition for Declaratory Statement of Levy County School Board,* 5 FPER para. 10213 (1979) (contract provisions concerning transfers and changes in job assignments were terms and conditions of employment and thus are mandatory subjects of bargaining).

practice of law by state-employed attorneys under PERC standards.[14]

The process of collective bargaining established by Chapter 447 would place PERC in a position of interfering, on a constant basis, with the attorney-client relationship of attorneys whose sole client is the State of Florida. Additionally, the failure of Chapter 447 to provide a mechanism for individual attorneys to opt out of a bargaining unit when they feel, in good faith, that the Code would require such action, inappropriately hinders the exercise of professional judgment required by the Code and this Court.

2. If Applied To Attorneys, The Public Employees Relations Act Would Comprehensively Regulate The Practice Of Law And Create An Impermissible Adversarial Relationship Between Client and Lawyer.

Review and analysis of Chapter 447, Part II, together with decisions of PERC and the courts interpreting Chapter 447, clearly disclose a comprehensive legislative scheme to regulate employer/employee relations. The regulatory scheme is premised on the existence of an adversarial relationship between "organized labor" and employers. That relationship cannot be harmonized with the common law attorney/client relationship embodied in the Rules of Professional Conduct.

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[14] Attorneys who are employed full-time by governmental entities comprise approximately ten percent (10%) of the Florida Bar.

Rule 4-1.7(b) states the attorney's obligation of loyalty to the client:

> (b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:
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> (i) The lawyer reasonably believes the representation will not be adversely affected; and
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> (ii) the client consents after consultation. (Emphasis added.)

Rule 4-1.6, entitled "Declining or Terminating Representation" states in its "comment" that:

> A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment of the lawyer's services.

The statutory requirements of Chapter 447 should be considered against the backdrop of these Rules.

(a) The Bargaining Obligation And Its Concomitant Requirements And Restrictions.

The bargaining obligation is, of course, an incident of the employer/employee relationship. For purposes of this analysis, however, we will refer to it in the form proposed by SEAG, the attorney/client relationship. Thus, attorneys would have the right to negotiate, and engage in concerted activities against the interest of their client, the people of Florida.

Sections 447.301(2)(3) and 447.309(1). The client must bargain in good faith pursuant to section 447.501(1)(c). Section 447.203(14) defines collective bargaining to include the obligation to meet at reasonable times, to negotiate in good faith, and to execute a written contract concerning agreements reached. Section 447.203(17) defines "good faith bargaining" and specifically at section 447.203(17)(f) notes, "[n]egotiating directly with [attorneys] rather than their certified bargaining agent" is indicative of bad faith bargaining.

Bargaining is "collective" and therefore implicitly prohibits "direct dealing" between the client and an individual attorney concerning any mandatorily negotiable subject of bargaining. *See Fort Walton Beach Firefighters Ass'n. v. City of Fort Walton Beach,* 11 FPER para. 16240 (1985); *Hillsborough Community College Chapter of the Faculty United Services Ass'n. v. Board of Trustees for Hillsborough Community College*, 15 FPER para. 20161 (1989) (college engaged in unlawful direct dealing by discussing implementation of ten-week summer school program with unit members in an attempt to gain their consent).[15]

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[15] See also Alachua County PBA v. City of Starke Police Dept., 15 FPER para. 20020 (1988) (city unlawfully attempted to negotiate directly with police officers over their entitlement to bullet proof vests); Professional Fire Fighters of Pembroke Pines, Local 2292 v. City of Pembroke Pines, 15 FPER para. 20023 (1988) (city unlawfully bypassed union by discussing starting salary directly with employee whom city had unilaterally transferred to a new position); and Dade County PBA v. Metropolitan Dade County, 8 FPER para. 13153 (1982) (county, by soliciting input concerning promotional procedures for newly created police positions, engaged in unlawful direct dealing).

Also implicit in the collective bargaining obligation is the requirement that the "status quo" of any mandatorily negotiable subject be maintained until bargaining is waived or concluded by agreement, or a change is imposed by the legislature. Current responsibilities of attorneys could not, then, be changed by the client until bargaining is waived or concluded. *See Florida School for the Deaf and Blind Teachers United v. Florida School for the Deaf and Blind*, 11 FPER para. 16080 (1985) (employer may not unilaterally alter the status quo with respect to wages, hours or other terms and conditions of employment of its employees represented by a bargaining agent); *Palowitch v. Orange County School Board*, 3 FPER para. 280 (1977), *aff'd*, 367 So.2d 730 (Fla. 4th DCA 1979) (it is immaterial whether the unilateral change relates to a term or condition of employment which is an established practice rather than expressly incorporated into a collective bargaining agreement; bargaining is still mandatory prior to a change in the status quo).[16]

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[16] *See also Collier Support Personnel, NEA v. School District of Collier County*, 16 FPER para. 21243 (1990) (school district violated its bargaining obligation by unilaterally implementing "safe driver plan" for school bus drivers; plan, which provided for mandatory termination of any driver who accumulated ten points in a year, effectively limited district's discretion under collective agreement to determine appropriate discipline for misconduct or incompetency, and thus, amounted to significant alteration of status quo); and *Lake County Education Ass'n. Local 3783 v. District School Board of Lake County*, 6 FPER para. 11019 (1979) (school board violated bargaining obligation by unilaterally adopting school calendar containing teacher workdays, despite its intent to negotiate teacher workdays at a later time; refusal to bargain prior to unilateral change is per se violation of bargaining obligation regardless of any subjective good faith).

Additionally, the adversarial nature of collective bargaining would pervade every interaction between state-employed attorneys and their client. Under PERC's previous rulings, an employer cannot insist that employees bargain over a clause to waive bargaining over future changes. Thus, a client who wishes to limit the disruption and onerous burden of bargaining with its attorneys to every two or three years is unable to do so. *See, Palm Beach Junior College v. United Faculty*, 475 So.2d 1221 (1985). Accordingly, under 447, Part II, the assault on the attorney-client relationship is persistent, relentless, and omnipresent, under the statutory bargaining scheme created by Chapter 447, Part II, and PERC's interpretations of that statute.

(b) The Scope Of Bargaining.

PERC, with judicial approval, has consistently followed a policy of broadly interpreting the scope of bargaining. Pursuant to Section 447.309(1), Florida Statutes, the scope of bargaining is "wages, hours, and terms and conditions of employment." In *Palm Beach Junior College v. United Faculty,* 425 So.2d 133 (Fla. 1st DCA 1982), the Court reviewed PERC's decisions concerning the scope of bargaining and stated that:

> Upon considering those decisions as well as the applicable language in Chapter 447, PERC has concluded rightly we believe, that the stability to be encouraged in the bargaining relationship between public employer and employee requires the parties to conduct negotiations over a broad range of subjects, and that such stability might well be disrupted if one party were to be allowed to

> implement unilateral management decisions prior to negotiations.

Id. at 140 (Emphasis added).

The range of mandatorily negotiable subjects has been broad indeed. In *In re: Petition for Declaratory Statement of City of Hollywood,* 14 FPER para. 19130 (1988), PERC held that the City must bargain over its decision to upgrade job requirements of future bargaining unit members. The rationale of that PERC decision would certainly apply if the State wanted all of its newly hired attorneys to achieve certain professional recognition within, for example, five years of hiring, or if it decided to require a minimum number of years of practice before the attorney was eligible to be hired.[17]

Personnel rules and regulations, of course, are mandatorily negotiable, and may not be unilaterally changed, added to, or deleted from. *Florida State Lodge, FOP v. City of Lauderhill,* 4 FPER para. 4209 (1978). When work is to be performed, scheduling, and lengths of work days or work periods is a vast area of mandatory bargaining and is often litigated. *See Royal Palm Beach Professional Fire Fighters Ass'n., Local 2886 v. Village of Royal*

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[17] *Central Florida Professional Firefighters, Local 2057 v. Board of County Commissioners of Orange County,* 9 FPER para. 14372 (1983), *aff'd in relevant part,* 467 So.2d 1023 (Fla. 5th DCA 1985), provides a further example. There the matter of employees' store visitation rights while on duty was held to be mandatorily negotiable. *See also City of Boca Raton,* 12 FPER para. 17051 (1986), where PERC held that the subject of firefighters' use of "slack time" while on duty to work on their own lawn mowers and other personal, non-work related equipment was a mandatory subject of bargaining.

Palm Beach, 14 FPER para. 19304 (1988); and *IBEW, Local Union 2358 v. Jacksonville Electric Authority,* 14 FPER para. 19196 (1988).

However, arbitrarily imposed limitations on such matters as the length of the work day cannot be reconciled with an attorneys duty of zealous representation and professional obligations to perform all tasks necessary to meet that obligation within the time frames established by the courts. This Court has made clear that an attorney cannot require a client to waive the right to zealous and timely representation of all matters entrusted to its attorneys. The State of Florida, as client, should not be compelled by PERC, under the rubric of regulating the employer-employee relationship, to bargain away its attorneys' obligations to timely perform their professional responsibilities. Accordingly, PERC cannot be permitted to require bargaining over artificial limits on an attorney's work day or schedule.

Further, Section 447.401, Fla.Stat., specifically requires that a grievance procedure be negotiated and included in every contract. Moreover, that procedure must conclude with binding arbitration over any dispute "involving the interpretation or application of a collective bargaining agreement." It would be unlawful for the client to seek to exclude any agreed upon provision from the reach of arbitration. *In re Petition for Declaratory Statement of the Orange County Classroom Teachers Ass'n,* 7 FPER para. 12179 (1981). It would also, PERC has held, be unlawful for the client to seek to exclude an otherwise

agreeable provision from the contract in order to keep it from the grasp of an arbitrator. Section 447.203(17)(g) provides that it is indicative of bad faith bargaining to refuse "to reduce a total agreement to writing." *See Duval Teachers United, FEA-AFT v. Duval County School Board*, 3 FPER 96 (1977).

Thus, under this scheme, PERC would be the regulator of the attorney-client relationship aas well as the arbiter, and potentially the initiator, of conflicts between attorneys employed by the State and their client. This constitutes an odious encroachment by PERC into this Court's exclusive jurisdiction to regulate the practice of law and is hostile to the attorney-client relationship mandated by this Court's rules.

Discipline, work rules, rules of conduct, or any other client-initiated basis for affecting the work performance of its attorneys would be mandatorily negotiable. In *Amalgamated Transit Union, Local 1596 v. Orange-Seminole-Osceola Transportation Authority,* 12 FPER para. 17134 (1986) bargaining was required before an absenteeism control policy was implemented because it could lead to discipline. In an even earlier case PERC held that a discharge and discipline procedure was mandatorily negotiable. *Duval Teachers United v. Duval County School Board, supra*. Thus, the client's right to discharge its attorney without cause would have to be negotiated by the State with "an open mind and a sincere intent to reach agreement." *Id.* at 99.

PERC's establishment of "at will" employment as a mandatory subject of bargaining is particularly antagonistic to

the rules of this Court with respect to the attorney-client relationship. Under the rules of this Court, an attorney cannot compel a client to waive the right to discharge its attorney at will. A fundamental aspect of the special trust and duty of loyalty owed by attorneys to their client is the client's right to discharge its attorneys at will. Attorneys cannot require their client - in this case the State - to bargain away the right, as client, to discharge its attorneys. PERC must not be permitted to compel bargaining over this essential client right under the guise that it is a labor relations issue.

Promotion of the attorney to a higher status, or perhaps simply expanding the attorney's level of authority or scope of assignments, would be mandatorily negotiable, as would be the standards for doing so. *See Professional Fire Fighters of Palm Beach County, Local 2928 v. Palm Beach County,* 16 FPER para. 21287 (1990) (employer must negotiate prior to establishing criteria for promotion and salary range for newly created position).[18]

Even something as basic as the number of attorneys employed by the client must be negotiated to the extent a change in that number has an impact on the attorneys' workloads. *Int'l*

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[18] *See also Fort Pierce-St. Lucie County Fire Fighters Ass'n, Local 1377 v. St. Lucie County - Fort Pierce Fire District,* 8 FPER para. 13388 (1982) (employer must bargain over decision to increase number of years of experience required to become eligible for promotion from one position to the next). *And see In Re Petition for Declaratory Statement of Levy County School Board,* 5 FPER para. 10213 (1979) (contract provisions concerning transfers and changes in job assignments were terms and conditions of employment and thus are mandatory subjects of bargaining).

Ass'n of Fire Fighters, Local 2416 v. City of Cocoa, 14 FPER para. 19311 (1988). Impact bargaining, as it is termed, opens up an entire universe of negotiable matters. It is a concept that marries the unilateral management rights set forth in section 447.209 with the employees' rights to bargain in section 447.301. In its simplest form, impact bargaining holds that the employer has the unilateral right to exercise a management right but must bargain over the impact of the change on employees' terms and conditions. The rationale for the principle is succinctly set forth in Commissioner Brooks' decision in *United Faculty of Palm Beach Junior College v. Palm Beach Junior College,* 7 FPER para. 12300 (1981), *aff'd.*, 425 So.2d 133 (Fla. 1st DCA 1982), *approved in relevant part,* 475 So.2d 1221 (1985), wherein he reviewed prior PERC decisions and concluded as follows:

> We have therefore interpreted Section 447.209, Florida Statutes (1979), as granting an employer the right to make unilateral decisions with regard to those matters within the scope of "management rights" but not to implement unilaterally such decisions in a manner which effects the wages, hours, and terms and conditions of employment of bargaining unit employees prior to requested negotiations. To conclude otherwise, as observed by the Fourth District Court of Appeals, "would effectively gut the life of the statute providing for bargaining by public employees."
>
> The statutory right to negotiate over the impact upon bargaining unit employees of management decisions prior to their implementation is therefore an essential element in the legislative scheme of meaningful collective bargaining for public employees."

Id. at 595 (Citations and footnotes omitted).

Examples proliferate of employers who stumbled over the impact bargaining requirement concerning an otherwise unilateral management right. *Hillsborough Community College Chapter of the Faculty United Service Ass'n v. Board of Trustees for Hillsborough Community College*, 15 FPER para. 20161 (1989) (college violated its bargaining obligation by refusing to negotiate with faculty union over impact of managerial decision to change summer school program schedule). *See also Bradford Educ. Ass'n v. Bradford County School Board*, 6 FPER para. 11228 (1980) (school board's unilateral decision to eliminate teachers' planning day was unlawful; board exercised its right in scheduling make-up day necessitated by hurricane, but was required to bargain with respect to impact of management decision on teachers' planning day previously established in school calendar).[19]

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[19] Additional examples abound. *See, e.g. Indian River County Educ. Ass'n. Local 3617 v. School Board of Indian River County*, 4 FPER para. 4262 (1978) (school board was required to bargain over impact of change in the number of class periods in each school day); *Int'l Ass'n of Fire Fighters, Local 1403 v. Metropolitan Dade County*, 11 FPER para. 16285 (1985) (county's decision to close a fire station was within its managerial rights, but county was required to bargain over impact of the decision); *National Ass'n. of Municipal Employees v. City of Casselberry*, 10 FPER para. 15205 (1984) (city was required to bargain over impact of managerial decision to abolish certain job classifications and to upgrade other classifications); *Duval Teachers United, Local 3326 v. School Board of Duval County*, 6 FPER para. 11271 (1980) (school board's adopting change in starting and ending times of student day was managerial prerogative, but board was obligated to bargain over effects of change in teachers' workday).

If the attorneys employed by the State are given the same broad scope of bargaining over issues important to them in the representation of their common client, the extent of that bargaining will be limited only by the ingenuity of some seven hundred attorneys, rather than by this Court. This fact has been demonstrated by previous cases, where the scope of permissible bargaining that emerges from the statutory and decisional analysis is determined largely by the interests and desires of the different types of bargaining units.

Firefighters develop finely-tuned bargaining interests concerning their job requirements, career paths, and what they are required to do during their 24-hour workshifts. Teachers focus on the classroom; police on their performance in the street; and sanitation employees on interests special to them. Attorneys bargaining in a PERC forum could be expected to seek bargaining goals specific to the practice of law. However, it would be PERC, not this Court, regulating these issues which collide with the attorney-client relationship.

Placed in the context of Rule 4-1.7(b), Rules of Professional Conduct, it should be abundantly clear that collective bargaining pits the attorneys'/employees' interests in their terms and conditions of retention/employment in opposition to the client/employer's interest in choosing its attorneys, deciding the bases and standards by which they will be retained, and directing the manner and substance of their work assignments. It is this inherent employer/employee conflict upon which Chapter

447, Part II, has been enacted "to promote harmonious and cooperative relationships between government and its employees" and for which PERC has been created "to assist in resolving disputes between public employees and public employers" (Fla.Stat. § 447.201(3)). This self-interest promotion by attorneys has not been consented to by the client after consultation (as required by Rule 4-1.7(b)(ii)). PERC cannot waive the client's right to consent possessed by the State. In reality, the petition filed with PERC in this case negates Rule 4-1.7(b) for attorney employees of the State. Only the Supreme Court of Florida may constitutionally do that.

(c) PERC Has Decreed That The State Must Bargain Over Proposals That Are In Direct Conflict With Statutorily Mandated At-Will Employment.

In 1986 the legislature created the Select Exempt Service (hereafter "SES") to be composed of professionals, including physicians and attorneys. Chapter 86-149, Laws of Florida. This category was to serve "at-will," i.e., at the pleasure of the agency head. Chapter 86-149 eliminated the Selected Professional Service ("SPS"). Pursuant to section 447.203(2), the Governor was the designated public employer of SPS employees. However, Chapter 86-149 did not amend section 447.203(2) and, hence, there is no designated employer of SES employees. Moreover, Chapter 447 does not expressly include attorneys within the definition of public employees under section 447.203.

Despite the failure of the legislature to designate a public employer for SES employees, in November 1987, PERC amended its rule (38D-17.023, FAC) to establish a statewide bargaining unit of State Selected Exempt Service physicians and attorneys. That rule, 38D-17.023(2), makes no provision for a collective bargaining unit of SES employees who are neither physicians nor attorneys and purports to exclude "all managerial and confidential employees".[20]

Since PERC's adoption of Rule 38D-17.023(2) SES physicians and dentists have organized into a bargaining unit, the Federation of Physicians and Dentists ("FPD"). The fractious history of litigation against the State by that unit of "at-will" SES employees graphically illustrates why collective bargaining by attorneys representing the State of Florida is inherently repugnant to the integrity of the attorney-client relationship.

The State and FPD began negotiations on April 5, 1989, and continued until August 8, 1989. During those negotiations 50 proposed provisions were exchanged; the State and FPD agreed to only two, one relating to gender reference and another relating to the State's recognition of FPD as the exclusive bargaining agent for the unit. As a result, the State declared impasse and

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[20] Rule 38D-17.023(2)(b), FAC, reads as follows:

> (b) ATTORNEYS:
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> Unit 2: All positions which require as a prerequisite membership in The Florida Bar except for any attorney who serves as a hearing officer pursuant to § 120.65 or for hearings conducted pursuant to § 120.57(1)(a).

requested the appointment of a special master. In response, FPD filed two unfair labor practice charges (CA-89-050 and CA-89-053).

FPD alleged that the State refused to bargain in good faith because the State had refused to bargain over an FPD proposal to secure a "just cause" discipline system providing appeal rights under a union grievance system notwithstanding the "at-will" provisions of Chapter 110, Fla.Stat. The State maintained that it was not obligated to bargain over matters contained in Chapter 110, including "at-will" employment, suspensions, dismissals, reductions in pay, demotions and transfers or personnel rules, records, reports, and performance appraisals. The State argued that union approved discipline and grievance procedures are inconsistent with the legislative policy statements in 110.601, Fla.Stat. and 110.604, Fla.Stat., which expressly provide for "at-will" employment for SES employees.

On March 16, 1990, PERC issued its final order on FPD's unfair labor practice charges against the State. PERC held that the State is required to bargain over the union's proposals encompassing "at-will" employment and other subject areas in conflict with Chapter 110. *Florida Federation Union of American Physicians and Dentists, FEA/United, AFT, AFL-CIO, Local 4591 (FFUAPD) v. State of Florida*, 16 FPER para. 21115, at 239 (1990).

Notwithstanding PERC's rule, attorneys are not like physicians and dentists, and PERC has no authority to inject itself into the attorney-client relationship and force the

submission of that relationship to collective bargaining. As heretofore established, attorneys are bound by this Court's rules at all times when employed as attorneys.

Physicians and dentists employed by the State do not have the same client relationship with their employers; their clients/patients are separate and distinct from their employer, the State. The State is, however, both client and employer of governmental attorneys. Moreover, the state constitution does not vest the regulation of the practice of medicine in a separate branch of government as it does with this Court's exclusive jurisdiction over the practice of law.

PERC cannot be empowered by statute to regulate the attorney-client relationship between government attorneys and their client, the State of Florida. This Court's rules mandate that the attorney-client relationship be "at-will;" thus, PERC cannot direct that such matters be bargained over. Nor may attorneys bargain over hours or case assignments because they have a duty of zealous representation and can only accept work if it is within their ability to perform. Neither the legislature nor PERC may force the State to bargain away its rights as employer/client.

(d) Beyond The Collective Bargaining Process, Application Of Chapter 447, Part II, To A Unit Of Attorneys Establishes An Impermissible Adversarial Relationship Between The Client And Its Attorneys.

As is reflected in the foregoing analysis, the parties to a collective bargaining relationship often resort to adjudications by PERC, with judicial review, of bargaining disputes.[21] Even more common than such PERC adjudications, is the utilization of the procedures required for the resolution of bargaining impasses in sections 447.403 and 447.405. When such "disputes" occur, either party may declare an impasse (§ 447.403(i)); cause a special master to be appointed or waive same (§ 447.403(2)); participate in a hearing before the special master, who has the authority to administer oaths and issue subpoenas (§ 447.403(3)); and submit any unresolved issues remaining after the special master's recommended decision to the legislative body for imposition (§ 447.403(4)).

Noteworthy about this impasse resolution procedure is the adversarial and adjudicative nature of the process which is now sought to be applied to the attorney/client relationship. Noteworthy also is that these lawyer/client disputes over terms and conditions of employment may be ultimately resolved by the legislature's imposition on the executive branch. Thus, the executive authority of the State, as the client, may have some of

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[21] Unfair labor practice proceedings are formal adjudications under section 120.57, Fla. Stat.

its prerogatives usurped not only by the bargaining process, but in the end by the legislature.[22]

The adversarial relationship imposed by this statute is manifest further. Section 447.501 catalogues the unfair labor practices of which the client might be accused. Specific in this list is refusing to discuss grievances in good faith (§ 447.501(i)(f)). Section 447.401 requires resolution by arbitration and arbitration, as the Court is aware, is a substitute for other adjudicative processes. No less adversarial than other adjudicatory proceedings, an arbitration hearing consists of advocates presenting witnesses for examination and cross-examination; the use of subpoenas, and the introduction of documentary evidence. This presents the untenable and unauthorized prospect of a State-employed attorney utilizing his own attorney to represent him in an adversarial proceeding over a dispute with his client. This does not comport with the State-employed attorney's singular duty of loyalty to his client and this Court's mandates, as enunciated in the Rules of Professional Conduct.

Even short of the grievance procedure and arbitration, the adversarial nature of the relationship upon which the statute is premised is demonstrated by the bargaining unit member's right of representation in any investigatory or disciplinary meeting. This right is only available to bargaining unit members, *Calvo v.*

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[22] Some of the legislature's impositions would not take effect unless the Governor ratified them. Section 447.403(4)(e).

Dept. of Health and Rehabilitative Services, 16 FPER para. 21244 (General Counsel, 1990); but it has consistently been held by PERC that an employee is entitled to representation, upon request, if the employee reasonably believes that the meeting will result in disciplinary action. *FOP Fort Lauderdale Lodge 31 v. City of Fort Lauderdale*, 16 FPER para. 21258 at 525 (1990). *See also Lewis v. City of Clearwater*, 6 FPER para. 11222 (1980), *aff'd*, 7 FPER para. 12448, 404 So.2d 1156 (Fla. 2d DCA 1981). As applied to the bargaining unit sought in this case, an attorney would have the right to representation in an interview with the client if the attorney thought disciplinary action might result. This is hardly conducive to the special degree of trust and confidence to be reposed in its attorney by the client. It is, rather, a confrontational setting making the client's rights subservient to the employee's/ attorney's rights.

C. THE DEPUTIES AND ASSISTANTS OF THE ATTORNEY GENERAL AND THE STATEWIDE PROSECUTOR EXERCISE THE POWER OF THOSE OFFICES AND ARE THEREFORE NOT EMPLOYEES UNDER CHAPTER 447, FLA.STAT., AND ARE NOT ENTITLED TO INCLUSION IN ANY BARGAINING UNIT.

The Attorney General, one of the elected constitutional officers of the State of Florida, is the chief legal officer of the state. Article IV, section 4(c), Florida Constitution. The duties and authority of the office are derived from the state constitution, statutory enactments, and the common law.

Generally speaking, the Attorney General is responsible for the representation of the State in all legal matters, both civil and criminal, where the State is named as a party or may have an interest in the outcome of the litigation in dispute.

A state attorney general may typically exercise all such authority as the public interest requires and has wide discretion in making the determination as to the public interest. *State ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-269 (5th Cir. 1976), *cert. denied*, 429 U.S. 829 (1976). Surveying pertinent case decisions, the court in *Shevin* concluded that "there is simply no question" but that the Florida Attorney General retains all the common law powers of his office. *Id.* at 270. It is the Attorney General's duty to exercise his constitutional, statutory and common law power and authority whenever the public interest so demands. *State ex rel. Landis v. Kress,* 115 Fla. 189, 155 So. 823 (1934); *State ex rel. Shevin v. Yarborough*, 257 So.2d 891, 894 (Fla. 1972) (Ervin, J., concurring). *See also Thompson v. Wainwright,* 714 F.2d 1495 (11th Cir. 1983), *cert. denied,* 104 S.Ct. 2180 (1984). Section 16.01, Fla.Stat. (1991), authorizes the Attorney General to appear in all suits "in which the state may be a party, or in anywise interested" and recognizes that the Attorney General "shall have and perform all powers and duties incident or usual to such office."

The Office of the Attorney General is therefore unlike any other. It has been described in this manner:

> The attorney general of the state is in a unique position. He is indeed sui generis. As a member of the bar, he is, of course, held to a high standard of professional ethical conduct. As a constitutional executive officer of the state ... he has also been entrusted with broad duties as its chief civil law officer and, as we noted in *Levitt v. Attorney-General*, 111 Conn. 634, 641, 151 A. 171, 174, he must, to the best of his ability, fulfill his "public duty, as Attorney-General, and his duty as a lawyer to protect the interest of his client, the people of the State."
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> * * * *
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> The Attorney General's responsibility is not limited to serving or representing the particular interests of State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State.

Connecticut Com'n on Special Revenue v. Connecticut Freedom of Information Com'n, 174 Conn. 308, 387 A.2d 533, 537 (1978).

The Attorney General appoints and assigns to their respective duties all deputy and assistant attorneys general. He is responsible for their supervision and direction in the fulfillment of his constitutional, statutory and common law powers. Together the Attorney General and his deputies and assistants constitute and function as a single professional unit. The Attorney General, and all who exercise his powers and duties on his behalf, are therefore unlike those lawyers who are employed simply to represent various agencies in one capacity or another. The Attorney General and his deputies and assistants

exercise the sovereign power of the state. Agency attorneys do not.

The Office of Statewide Prosecution is also created by article IV, section 4(c), of the state constitution. The Statewide Prosecutor is appointed by the Attorney General, article IV, section 4(c), Florida Constitution, and serves a term of four years. Section 16.56(2), Fla.Stat. The statewide prosecutor exercises the sovereign power of the state in the investigation and prosecution of criminal offenders. Section 16.56, Fla.Stat. The Statewide Prosecutor, like the Attorney General, is served by assistants who exercise the powers conferred on the office.

The right to collective bargaining under Chapter 447, Fla.Stat., is conferred only upon "public employees." Section 447.301, Fla.Stat. A public employee is someone "employed" by a public employer. Section 447.203(3), Fla.Stat. The term "public employee" therefore does not include persons appointed to an office who exercise the sovereign power of that office. *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978) (a deputy sheriff holds office by appointment, exercises the power of the sheriff, and is not a "public employee" within the meaning of section 447.203(3), Fla.Stat.). *See also Palmer v. Axelroad*, 6 So.2d 550, 551-552 (Fla. 1942) ("... the principle difference between an officer and employee is the exercise by the former of a part of the sovereign power"), and *Pace v. King*, 38 So.2d 823, 826 (Fla. 1949) ("An office carries with it the power to exercise authority of a

governmental nature, rather than perform services for an office or officer").

The deputies and assistants necessarily exercise the powers of the Attorney General and the Statewide Prosecutor in performing the functions of those respective offices. They do this whenever, as attorneys and representatives of those offices, they appear on behalf of the public and the State. Although the Attorney General and the Statewide Prosecutor supervise and direct their deputies and assistants, they do not and, in fact, cannot review and approve every decision made and every motion, memorandum or brief that must be filed in the course of representing the public, the State and the State's officers and agencies or in exercising the prosecutorial power of the State. Their power is exercised by and through the deputies and assistants.

A "deputy" is a person appointed to act for another and empowered to act for him in his name and behalf in all matters in which the principal may act. *Blackburn v. Brorein*, 70 So.2d 293 (Fla. 1954). The principal is responsible for the acts of the deputy. *Id.* at 296. Statutory authority is not necessary to enable a public official to appoint sufficient deputies to perform the duties of his office, and the term "officer" is not limited to those elected by the people or appointed by the Governor. *Id.*

In this sense, then, all assistants, whether or not formally called "deputies," are either potentially or in fact

deputies of the Attorney General or the Statewide Prosecutor because they are or may be called upon to exercise the power and authority of those offices in court and elsewhere.

As stated in *Delucia v. Lefkowitz*, 62 A.D.2d 674, 406 N.Y.S.2D 150 (N.Y.A.D. 1978), *aff'd sub nom., Hopkins v. Lefkowitz,* 48 N.Y.2d 901, 400 N.E.2d 1349, 424 N.Y.S.2d 897 (1979):

> [I]t is apparent that every Assistant Attorney General acts as surrogate for the Attorney General when called upon to take a position in court, to appear for any agency of government or to litigate or dispose of any legal matter. The Assistant Attorney General performs his duties in the name of and on behalf of the Attorney General. He or she acts independently when making legal decisions or in deciding matters of policy. The nature of the position -- the responsibilities, duties and functions -- dictates that we hold that Assistant Attorneys General are deputies of the Attorney General for purposes of the Civil Service Law.

406 N.Y.S.2d at 153.

Because assistants in fact exercise or may be called upon to exercise the power and authority of the office of the Attorney General or the Statewide Prosecutor, they are in this sense "officers" rather than public employees under Chapter 447. Accordingly, they are not entitled to inclusion in any collective bargaining unit established pursuant to the provisions of Chapter 447.

CONCLUSION

Chapter 447, Part II, as interpreted and applied by PERC, is in hopeless conflict with the duties imposed upon attorneys pursuant to this Court's exclusive authority to regulate the practice of law. In sum, the rules of this Court governing the practice of law require the utmost loyalty to the client and strictly forbid attorneys from taking any position in conflict with the interests of their clients. Collective bargaining under Chapter 447, Part II, would force attorneys employed by the State to take positions in conflict with their client and, thus, their ethical obligations, and would mandate bargaining over issues which are subject to this Court's exclusive jurisdiction and embodied in this Court's rules.

PERC has no jurisdiction to subject those rules and ethical obligations to collective bargaining. To the extent any attorneys employed by the State have a right to bargain collectively, this Court alone may establish the framework for and limitations upon the exercise of that right. *See Dade Classroom Teachers Ass'n v. Legislature,* 269 So.2d 684 (Fla. 1972). Finally, as a matter of law, Assistant Attorneys General and

Assistant Statewide Prosecutors exercise the sovereign power of constitutional offices and are not, therefore, employees under 447, Part II, Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was provided via hand delivery to Stephen A. Meck, General Counsel, Public Employees Relations Commission, and Thomas W. Brooks, MEYER AND BROOKS, P.A., Attorneys for Petitioner, 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302, this 27th day of May, 1993.

Kimberly J. Tucker