IN THE SUPREME COURT OF FLORIDA

LAWTON CHILES, as Governor of the State of Florida,

Appellant,

v.

STATE EMPLOYEES ATTORNEYS GUILD and RAYMOND J. GREENE,

Appellees.

CASE NO. 93,665
DCA NO. 97-2359

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INITIAL BRIEF OF APPELLANT

On Appeal from the Florida First District Court of Appeal

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STATEMENT OF THE CASE AND FACTS

On March 23, 1993, the State Employees Attorneys Guild (SEAG) filed a petition with the Public Employees Relations Commission (PERC) seeking representation-certification of a bargaining unit composed of attorneys who are employed by the State of Florida, pursuant to Section 447.307 (2), Fla. Stat., (1991)(PERC Case No. RC-93-019). The bargaining unit was defined pursuant to Rule 38D-17.023(2)(b), F.A.C., promulgated by PERC in 1987.[1] PERC entered an order finding reasonable cause to believe the petition sufficient and ordered an evidentiary hearing on questions concerning representation and unit determination.

The State's response contended that the proposed bargaining unit was an unconstitutional attempt to regulate and alter the practice of law in derogation of this Court's exclusive jurisdiction under Article V, § 15 of the Florida Constitution. The State then filed a Petition for a Writ of Prohibition in this Court.

In SEAG's response to this Court's Order to Show Cause in that prior case, SEAG contended that the absence of any express legislative exclusion of or reference to government attorneys in Section 447.203, was persuasive proof in support of its position that the State as client had either waived or consented to any

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[1] No attorneys ever unionized under this now-repealed rule. (T 67).

conflict with, or alterations of, the attorney-client relationship. SEAG specifically said:

> Even if this legislation alters or impacts upon the attorney-client relationship in some manner, this Court lacks the power to intercede because the Legislature, not this Court, determines on behalf of the client--the people of the State of Florida--which aspects of the attorney-client relationship are available to governmental entities. By failing to specifically exempt attorneys from the definition of "public employees" in Section 447.203(3), Florida Statutes (1991), the Legislature has preserved collective bargaining rights for state-employed attorneys and has either waived or consented to any conflicts with or alterations of the traditional attorney-client relationship the exercise of these rights might entail.

(R. SEAG Response to Order to Show Cause issued in Supreme Court Case No. 81,835, pp. 5-6).

Ultimately, this Court denied the petition on procedural grounds, finding it had no jurisdiction to issue a writ of prohibition to PERC because PERC was not a court. This Court also denied a writ under its "all writs" authority because collective bargaining did not, *per se*, encroach upon its jurisdiction to admit or discipline attorneys.[2] This Court did recognize the possibility that subsequent rulings by PERC could interfere with its regulation of the practice of law and thereby provide a basis for invoking the Court's jurisdiction. *State ex*

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[2] Specifically, this Court held that "**We find that collective bargaining by state employed attorneys does not encroach upon this Court's jurisdiction over the admission of attorneys to the practice of law or the discipline of attorneys.**" *State ex rel. Chiles v. Public Employees Relations Commission*, 630 So.2d 1093, 1095 (Fla. 1994).

rel. Chiles v. Public Employees Relations Commission, 630 So.2d 1093 (Fla. 1994).

Less than two months later, the Legislature passed Chapter 94-89, Laws of Florida (1994), by almost unanimous vote (with only one dissent) and the Governor signed it into law, codified as section 447.203(3)(j), Florida Statutes(D. Ex. 33, p. 5). This amendment specifically excludes from the definition of "public employee" in section 447.203(3), Fla. Stat., "[t]hose persons who by virtue of their positions of employment are regulated by the Florida Supreme Court pursuant to s. 15, Article V of the State Constitution."

Subsequent to the enactment of Section 447.203(3)(j), PERC dismissed SEAG's petition for lack of jurisdiction. SEAG appealed PERC's order to the First District Court of Appeal which affirmed the dismissal without prejudice to SEAG's right to seek a declaratory judgment challenging Section 447.203(3)(j) on constitutional grounds. *SEAG v. State*, 653 So.2d 487 (Fla.1st DCA 1995.) Because of the lack of a factual record, the District Court declined the parties' joint request to reach the question of the constitutionality of section 447.203(3)(j), Fla. Stat. *Id.*

On July 5, 1995, SEAG and Raymond J. Greene, a state-employed lawyer, filed a one-count complaint seeking a declaration that section 447.203(3)(j), Fla. Stat., violates Art. I, §6 of the Florida Constitution (R 1).

On July 23, 1996, Gov. Chiles moved the trial court for entry of partial summary judgment contending that deputies and assistants of the Attorney General and the Statewide Prosecutor are officers, not "public employees", and thus not entitled to collective bargaining under Chapter 447, Florida Statutes. (R 32) The lower court entered partial summary judgment declaring that "[f]or purposes of determining the Complaint for Declaratory Judgment, Deputy and Assistant Attorneys General and Assistant Statewide Prosecutors will not be considered 'public employees' within the meaning of Chapter 447, F.S." (R 155,158)

Following a bench trial, the lower court entered a final judgment on May 19, 1997, declaring section 447.203(3)(j), Fla. Stat. (1995), to be "an unconstitutional abridgment of Article I, Section 6 which is not justified by a compelling state interest implemented in the least intrusive manner possible." (R 243). An appeal was timely filed on June 11, 1997. (R 244) Plaintiffs filed a notice of cross-appeal regarding the entry of partial summary judgment. (R 268)

On appeal, the First District Court of Appeal affirmed the trial court's determination that Section 447.203(3)(j) was an unconstitutional abridgement of Article I, section 6, of the Florida Constitution. The First District relied in large part in making this determination on this Court's holding in *State ex rel. Chiles v. Public Employees Relations Commission, supra,* stating that:

> . . . In finding "that collective bargaining by state-employed attorneys does not encroach upon this Court's jurisdiction over . . . the discipline of attorneys," *State ex rel. Chiles*, 630 So.2d at 1095, the supreme court has in effect rejected the argument the state makes here that permitting attorneys to bargain collectively would somehow entail a breach of professional ethics. See id.
>
> In short, the state did not demonstrate that a blanket ban on collective bargaining by public employees working as attorneys is the least onerous means of protecting the attorney-client relationships between the lawyers and the public entities which employ them. Evidence of collective bargaining procedures in other jurisdictions showed that collective bargaining procedures can be fashioned to accommodate both public employers' interests in assuring fidelity and competence in their attorneys and the attorneys' constitutional right as public employees to bargain collectively. We hold that the trial court correctly declared section 447.203(3)(j), Florida Statutes (1997), unconstitutional.

Chiles v. State Employees Attorneys Guild and Greene, 23 Fla.L.W. D1348 (June 3, 1998).

This appeal, pursuant to Rule 9.030(a)(1)(A)(ii), Fla.R.App.P., was timely filed.

SUMMARY OF ARGUMENT

In the first round of litigation over SEAG's effort to unionize the State's attorneys, this Court addressed the issue of whether unionization encroached upon the Court's exclusive jurisdiction over the regulation of the practice of law provided in Article V, section 15 of the Florida Constitution. In the case at bar, the question presented is whether Article I, Section 6 of the Florida Constitution deprives the State, as a client, of the right all other clients have to refuse to consent to its attorneys undertaking the adverse interest inherent in collective bargaining.

There are two primary issues before this Court which need to be considered in determining the constitutionality of Section 447.203(3)(j), Florida Statutes. First, did the Florida Legislature, as client, properly determine that it has a compelling state interest in preserving its attorneys' traditional duty of giving complete confidentiality, fidelity and loyalty to the client. And second, whether the exclusion from the definition of "public employee" of individuals serving the State in an attorney-client relationship, contained in Section 447.203(3)(j), is a constitutionally permissible means of achieving the State's compelling interest.

Both the trial court and the District Court properly acknowledged that the State has a compelling interest in the

lawyer-client relationship between the State and the employee-attorneys who represent it. However, the District Court improperly held that the exclusion in Section 447.203(3)(j) was not the "least onerous means of protecting the attorney-client relationships between the lawyers and the public entities which employ them." *Chiles v. SEAG and Greene*, 23 Fla.L.W. at 1350. This holding was in error both in the standard applied as well as the conclusion reached.

The exclusion set forth in Section 447.203(3)(j) achieves the compelling state interest of maintaining government attorneys' traditional duty under the attorney-client relationship to give complete confidentiality, fidelity, and loyalty to their governmental client. The exclusion is narrowly drawn to limit the collective bargaining rights of only those persons who represent the State in an attorney-client capacity -- not all employees who are members of the Florida Bar. There is no other reasonable alternative means of preserving the complete confidentiality, fidelity and loyalty of the attorney-client relationship than having all attorneys abide by that duty.

The Rules Regulating the Florida Bar require the consent of the client before a lawyer can undertake an interest adverse to a client's interest. Collective bargaining represents such an adverse interest, given its inherently adversarial nature. Accordingly, the State, as client, must give its express consent

for the attorneys who represent it to be permitted to engage in such an adversarial relationship.

In every other instance in which attorneys representing a governmental entity as client have been permitted to collectively bargain, they have done so with the express and limited consent of the legislative body authorized to make such determinations on behalf of the client government. In no instance has a governmental client been compelled to submit to the antagonistic relationship inherent in collective bargaining with its attorneys over the client's express refusal to consent to such an assault on the integrity of the traditional attorney-client relationship.

Adoption by the people of Florida of Article I, section 6, in 1968, in no way constituted knowing or informed consent for its attorneys to collectively bargain. There was no private sector precedent in Florida for such bargaining by attorneys when Article I, section 6 was adopted. The Legislature has unambiguously enunciated its refusal to consent to such an affront to its attorney-client relationship now. Common sense would dictate that the very last group to which clients would consent to engage in the adversarial relationship of collective bargain with would be those to whom they look to represent their interests. Indeed, in light of the traditional, uniform and statutory exclusion of managerial and confidential employees from collective bargaining, it is inconceivable that the voters of

this State ever intended their attorneys -- those who have the most confidential of all relationships with their clients -- be allowed to collectively bargain when they voted to ratify Article I, section 6.

Additionally, in resolving the issue of the constitutionality of Section 447.203(3)(j), Florida Statutes, the Court should resolve now the status of Deputies and Assistants to the Attorney General and Statewide Prosecutor. Such resolution is integral to the question of the breadth, or overbreadth, of Section 447.203(3)(j). Further, resolution of this issue now is in the interest of judicial economy and in the public's best interest.

Accordingly, this Court should uphold the constitutionality of Section 447.203(3)(j), Florida Statutes, and reverse the First District Court of Appeal. In addition, the Court should recognize the status of deputies and assistants of both the Attorney General and the Statewide Prosecutor as officers and not "public employees" within the meaning of Section 447.203(3), Florida Statutes.

ARGUMENT

I. THE STANDARD TO APPLY IN DETERMINING THE CONSTITUTIONALITY OF SECTION 447.203(3)(j) IS WHETHER THE EXCLUSION OF ATTORNEYS FROM THE DEFINITION OF "PUBLIC EMPLOYEE" IS SUPPORTED BY A COMPELLING STATE INTEREST -- A STANDARD THE STATE HAS MET. THE LOWER COURTS ERRED IN APPLYING A DIFFERENT STANDARD

In 1968, the people of Florida ratified Art. I, section 6, Florida Constitution, which dealt with the right of employees to collectively bargain.[3] This provision is not self-executing and required legislative action to define and implement the parameters of collective bargaining.[4] *Dade County Classroom Teachers Association, Inc. v. Legislature*, 269 So.2d 684 (Fla. 1972). In 1974, after an admonition by this Court, the Legislature enacted Chapter 447, Part II, Florida Statutes, to codify and implement the parameters of collective bargaining for public employees.

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[3] That constitutional provision provides as follows:

> **SECTION 6. Right to Work.**-- The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

[4] The parties stipulated that Article I, section 6 was not self-executing. (R 1:46, ¶¶5-9).

While this Court has been vigilant in upholding the right of public employees to collectively bargain, the Court has also recognized that public employee bargaining is not the same as private bargaining. *United Teachers of Dade v. Dade County School Board*, 500 So.2d 508, 512 (Fla.1986); *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d 415 (Fla. 1992). "In fact, courts and commentators uniformly agree that public bargaining is inherently different from private bargaining." *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d at 417.

This Court has specifically noted the need to construe public employees' constitutional right to collectively bargain in accordance with all provisions of the constitution.[5] Thus, the collective bargaining rights of public employees are subject to the Legislature's exclusive jurisdiction over appropriations, in accordance with the doctrine of Separation of Powers. *State v.*

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[5] The Court stated specifically that:

> **The constitutional right to bargain must be construed in accordance with all provisions of the constitution. Surely it was not intended to alter fundamental constitutional principles, such as the separation of powers doctrine. Under the Florida Constitution, exclusive control over public funds rest solely with the legislature. Art. VII, Sec. 1(c), Fla. Const. ("No money shall be drawn from the treasury except in pursuance of appropriation made by law."). This fact in and of itself necessitates a realization that public and private bargaining is inherently different.**

***State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d at 417.**

Florida Police Benev. Ass'n, Inc., supra. Likewise, the alleged collective bargaining rights of state-employed attorneys' must be construed in accordance with the Rules Regulating the Florida Bar, particularly those provisions relating to the rights of the State as client. Rules 4-1.7; 4-1.9; 4-1.11 (Comment), Rules Regulating the Florida Bar.

A. The Proper Test

The District Court erred in failing to consider the State's right as a client to decline to consent to the undertaking of an adverse interest by its attorneys. In so doing, the District Court applied the wrong standard to its consideration of the constitutionality of Section 447.203(3)(j), Florida Statutes.

The right to collectively bargain is, as a part of the State Constitution's Declaration of Rights, a fundamental right. As a consequence, this Court has held that the right to collectively bargain can only be abridged upon a showing of a compelling state interest. *Chiles v. United Faculty of Florida,* 615 So.2d 671 (Fla. 1993); *Hillsborough County Governmental Employees Ass'n, Inc. v. Hillsborough County Aviation Authority,* 522 So.2d 358 (Fla.1988).

However, this Court has also explicitly recognized that, because Article I, section 6 is not self-executing, "considerable deference" should be accorded legislative enactments "regulating" the subject matter embraced by this provision. *Dade County*

Classroom Teachers Ass'n v. Ryan, 225 So.2d 903, 906 (Fla. 1969) (citing, *inter alia*, *Jasper v. Mease Manor, Inc.*, 208 So.2d 821 (Fla. 1968)). With respect to constitutional provisions that are not self-executing the test for measuring legislation against the constitutional requirement "must be that of a reasonable relationship." *Jasper*, supra, 208 So.2d at 825.

Consistent with this principle, the State was previously required to show "a strong rational basis for abridgement which is justified by a compelling state interest," in considering the constitutionality of an exclusion of a class of employees from the definition of "public employee" and, thus, collective bargaining. *United Faculty of Florida, Local 1847 v. Board of Regents*, 417 So.2d 1055, 1057 (Fla. 1st DCA 1982). In *United Faculty*, the First District Court of Appeal applied this standard and determined that the exclusion of graduate assistants from the definition of "public employee" in Section 447.203(3)(i) was unsupported by sufficiently compelling reasons and was, thus, unconstitutional.

This is *not* the standard applied by the First District Court of Appeal in this case, however. Indeed, both the trial court and the District Court concede that the State of Florida has met the burden of demonstrating a compelling state interest in excluding its attorneys from adversarial collective bargaining.

Below, the First District held that:

> The interest public employers have in the relationship between themselves as clients and their employees who represent them as attorneys may fairly be said to be compelling. *See Rosenberg v. Levin*, 409 So.2d 1016, 1021 (Fla. 1982) (stating the relationship is "one of special trust and confidence"); *State ex rel. Florida Bar v. Dawson*, 111 So.2d 427, 432 (Fla. 1959); *see also The Florida Bar v. Doe*, 550 So.2d 1111, 1113 (Fla. 1989); *Sohn v. Brockington*, 371 So.2d 1089, 1093 (Fla. 1st DCA 1979) (citing *Salopek v. Schoemann*, 124 P.2d 21 (Cal. 1942) (Gibson, C.J., concurring)).

Chiles v. State Employees Attorneys Guild, 23 Fla.L.W. at 1349-1350.

Likewise, the trial court found:

> that the state of Florida does have a compelling interest in the lawyer-client relationship, as codified in the Rules Regulating the Florida Bar, between the state and the attorneys it employs. The particular obligations of competence, diligence, confidence, and avoidance of conflicts of interest owed by lawyers to their clients are defining characteristics of the functions of a lawyer. The fact that a lawyer is hired by a state agency rather than by individual clients does not negate a lawyer's basic ethical obligations.

(R. II: 233-34).

However, both the trial court and District Court erred in imposing an additional burden on the State by requiring not only the demonstration of a compelling interest, but also that the means employed for achieving that interest are the "least burdening" to state employees' rights to bargain collectively. Such heightened scrutiny is not appropriate under the circumstances of this case.

Legislative declarations of public purpose are presumed valid and are to be considered correct unless patently erroneous. *State v. Division of Bond Finance*, 495 So.2d 183, 184 (Fla. 1986). What constitutes a public purpose is, in the first instance, a question for the Legislature to determine, and its opinion should be given great weight. *State v. Housing Finance Authority of Polk County*, 376 So.2d 1158 (Fla. 1979). More to the point, this Court has held that legislative enactments regulating collective bargaining of public employees should be accorded considerable deference by the judiciary. *Dade County Classroom Teachers' Association, Inc. v. Ryan*, 225 So.2d at 906; *see also City of Tallahassee v. Public Employees Relations Commission*, 393 So.2d 1147, 1150 (Fla. 1st DCA 1981), aff'd., 410 So.2d 487 (Fla. 1982).

However, rather than giving deference to a legislative determination, in furtherance of a fundamental right of the State as client, which the lower courts have conceded was compelling, these courts applied a heightened level of scrutiny to hold Section 447.203(3)(j), Florida Statutes, unconstitutional. The standard applied by the lower courts is inconsistent with the prior case law of this Court regarding review of legislation implementing provisions of the Constitution which are not self-executing, including Article I, section 6.

This heightened scrutiny was first referenced by the First District, in *dicta*, in an earlier SEAG appeal. *SEAG v. State*, 653 So.2d at 488 (in order to survive a constitutional challenge, it "must serve that compelling state interest in the least intrusive means possible.") In the order on appeal, the First District Court stated that in so holding in the prior *SEAG* case:

> In this way, we refined--or arguably acknowledged implicitly that the decision in *Hillsborough County G.E.A.* had superseded-- the standard of review we had earlier enunciated for such cases. *See United Faculty of Fla. V. Board of Regents*, 417 So.2d 1055, 1056 (Fla. 1st DCA 1982) (holding the state need only a "strong showing of a rational basis for abridgement which is justified by a compelling state interest"); *City of Tallahassee v. Public Employees Relations Comm'n*, 393 So.2d 1147, 1150 (Fla. 1st DCA 1981). . . .

Chiles v. State Employees Attorneys Guild, 23 Fla.L.W. at 1349.

Even if this heightened level of scrutiny is appropriate, <u>*generally*</u>, in determinations concerning the abridgement of public employees' rights to collective bargaining, such a heightened level of scrutiny is <u>*not*</u> appropriate here, where the right to collectively bargain must be balanced against the State-as-client's right to consent, <u>*or refuse to consent*</u>, to the undertaking of an inherently adverse or conflicting interest by its attorneys.

B. Requirements of the Rules Regulating The Florida Bar

The Rules Regulating The Florida Bar impose specific obligations on attorneys, to which all members of The Bar are

required to adhere, regardless of whether they are a "government" lawyer or in private practice.[6] Except under limited circumstances, none of which apply herein, Rule 4-1.7 forbids an attorney from representing a client if the attorney's interests may conflict with the client's. Rule 4-1.7(b) states the attorney's obligations of loyalty to the client, providing:

> (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 own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

(Emphasis supplied).

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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> * * *
>
> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to . . . [a] client's interests without the affected client's consent. (Emphasis supplied).
>
> * * *
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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 client because of the lawyer's interests. The conflict in effect forecloses alternatives that would otherwise be available to the client.

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[6] The Comment following Rule 4-1.11 expressly recognizes that a lawyer representing a government agency "is subject to the rules of professional conduct . . . ."

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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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> * * *
>
> 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 or her advocate. *See Grievance Committee of Bar of Hartford County v. Rottner*, 152 Conn. 59, 203 A.2d 82, 85 (Conn.1964);[7] *see also Clark v. State*, 108 Nev. 324, 831 P.2d 1374, 1376 (Nev. 1992).

C. Adversarial Nature of Collective Bargaining

In contrast to an attorney's duty of complete loyalty, a reading of Chapter 447, Part II, Florida Statutes, together with decisions of PERC and the courts, reveals a collective bargaining scheme premised on the existence of an adversarial relationship

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

Rottner, 203 A.2d at 85 (Emphasis supplied).

between organized labor and public employers -- a relationship which allows the employee to sue the employer. Indeed, at trial is this case, virtually all witnesses agreed that the collective bargaining process is adversarial (T 70-74, 92; 125; 296; 635).

William Powers, Appellees' expert on collective bargaining and a former PERC chairman, testified that the process is one in which the employer tries to retain as much authority as possible while, conversely, the union attempts to minimize managerial authority (T 596). Michael Mattimore, the State's expert and also a former PERC Commissioner, testified that collective bargaining agreements by their very nature impede the discretion of management to act (T 101). Mattimore thought it inevitable that conflicts will occur that seriously affect the attorney-client relationship (T 137-138). In fact, Mattimore thought it would not be possible for lawyers to engage in collective bargaining and perform their professional obligations (T 164).

State-employed attorneys covered by a collective bargaining agreement would have the right to representation by the union during disciplinary proceedings or in the course of filing a grievance to resolve a dispute over such matters as pay raises, promotions, case assignments, parking spaces or other benefits, in fact, any term and condition of employment. (Jt. Pretrial Stip. ¶¶B. 14. & B.15.) (R 45) There is no legal requirement that the union representative be an attorney or a member of the

Florida Bar. (Jt. Pretrial Stip., ¶¶B.16. & B.17.) (R 45). If, for example, in the course of investigating an attorney's behavior or competence for possible disciplinary action a client confidence had to be revealed, there is no guarantee the union representative would keep that confidence (Mattimore T 94-95, 126-128; Powers T 640-643). The attorney-client privilege could be violated (Rotunda T 841-342).

Mr. Mattimore thought the collective bargaining process so inherently adversarial that it would have a serious effect on the confidence that he would have using unionized attorneys were he a client (T 118-119). He testified that the State's right to use its most capable attorney in a given situation would be impeded by collective bargaining and believed the State had a compelling state interest for denying collective bargaining to its attorneys because of the limitations placed on the State as client (T 121-122). He stated that collective bargaining would inevitably undercut attorneys' ability to meet their professional obligations (T 163-165).

D. Evidence of the Experience of Attorney Bargaining in other Jurisdictions

In other jurisdictions where government attorneys collectively bargain (California, New York,[8] Wisconsin and the

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[8] Although in New York some government attorneys have the right to collectively bargain pursuant to statute, New York law expressly designates "assistant attorneys general, assistant district attorneys, and law school graduates employed in titles

Federal Government), the collective bargaining process has led to lawyers filing lawsuits against their client/employer. In some instances, the State was represented in that very litigation by members of the collective bargaining unit that brought the action(Mattimore T 120). In each of these jurisdictions, the legislature, on behalf of the state as client, has ***expressly consented*** to collective bargaining by *some, but not all,* publicly employed attorneys.

The union representing employees working for the National Labor Relations Board has sued the federal government "a lot of times." (D. Ex. 37, pp. 45-47). In Wisconsin, state-employed attorneys can and have sued their client-employer over collective bargaining matters or filed unfair labor practices (D. Ex. 38, pp. 18 & 26), including at least two lawsuits (D. Ex. 38, pp. 28-29), and four or five unfair labor practices (D. Ex. 38, p. 31).

The attorneys in the union in New York have used the grievance procedure (D. Ex. 39, p. 30). In New York, the union has sued the state to enforce the collective bargaining agreement (D. Ex. 39, pp. 41-42). There have been hundreds of such suits or grievances (D. Ex. 39, pp. 42). At least one of those suits involves an attorney employed by the state who was suing the

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which promote to assistant district attorney upon admission to the bar of the State of New York" as "managerial employees", excluded from bargaining for purposes of the collective bargaining act. N.Y. Civ. Serv. Law §201(7)(b).

employer while still being employed as an attorney. (D. Ex. 39, p. 54). In one case the union sought to have the attorney retained against the client-employer's will. (D. Ex. 39, p. 66).

In California, unionized lawyers have filed grievances against their clients (D. Ex. 40, pp. 19-20, 27-28). The California lawyers' union has filed at least three lawsuits against the government (D. Ex. 40, pp. 28-30). The unionized lawyers have sued the state for unfair labor practices involving such things as the state's attempt to close a state office, which would require the relocation of its lawyers; distributing a $30 million surplus in premiums paid for dental insurance; and over the contracting out of *legal* work that had previously been done in-house (D. Ex. 40, pp. 40-42). California is routinely represented by attorneys who are members of the union in disciplinary matters against other union members (D. Ex. 40, p. 53).

E. The State of Florida, as Client, Refused to Consent to Imposition of this Adversarial Relationship with its Attorneys

At trial, the evidence presented, *by both sides,* demonstrated that the adversarial nature of collective bargaining cannot be harmonized with the common law attorney-client relationship embodied in the Rules Regulating The Florida Bar, which encompasses complete confidentiality, fidelity and

loyalty.[9] Assumption of such an adversarial relationship by the State's attorneys can only be accomplished with the consent of the client, which the State of Florida has expressly refused to give.

Appellees and both of the lower courts rely heavily upon the existence of collective bargaining in *a few* other State and federal governmental contexts by *some* publicly employed attorneys. However, in ***ALL*** of the instances in which collective bargaining has been permitted by all, or any, of a governmental entity's attorneys, the government has ***consented*** to such bargaining.[10] In contrast, in Florida the Legislature has

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[9] For example, the collective bargaining unit which represents Select Exempt Service physicians sued the State of Florida for its refusal to bargain over the "at-will" employment of its doctors. In response, PERC has interpreted Ch. 447 to require the State to bargain over "at will" employment even for its Select Exempt Service doctors, although in direct conflict with the express terms of §§ 110.601 and 110.604, Florida Statutes (which requires all doctors and lawyers employed by the State to serve "at will"), Florida Federation Union of American Physicians and Dentists, FEA/United, AFT, AFL-CIO, Local 4591 (FFUAPD) v. State of Florida, 16 FPERC para 21115, at 239 (1990). Such a requirement is an anathema to the rights of the State of Florida as client and indicative of the reasons why the Legislature refused to consent to such an affront to their relationship to their attorneys. The State as client should not have to engage in collective bargaining or the grievance process mandated by it in order to discharge its counsel.

[10] Although SEAG relied heavily in the lower courts on *Santa Clara Cty. Counsel Attorneys Ass'n v. Woodside,* 869 P.2d 1142 (Cal. 1994), which upheld an attorneys' union's right to sue the attorneys' employer, the decision is easily distinguishable. There, the court found that the California law expressly gave attorneys (as well as all supervisory, managerial and confidential

decided that the burdens of divided loyalties overwhelm any possible benefits of collective bargaining and have determined that its lawyers -- like all managerial and confidential employees -- are excluded from collective bargaining.

In no instance, in any other State or governmental context, has the right of public attorneys to collectively bargain been imposed on a governmental client against the client's will and in direct contravention of their express refusal to consent to imposition of such an assault on the integrity of the traditional attorney-client relationship. Imposition by judicial fiat of such an adversarial relationship, here, in the absence of client consent (indeed, in the face of an unambiguous refusal to give such consent) is contrary to the requirements of the Rules Regulating The Florida Bar.

F. The People Never Consented to Collective Bargaining by their Attorneys When They Ratified Article I, section 6

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employees) the right to collectively bargain and the right to sue the employer. *Id.* at 1147. The court, in rejecting arguments that the attorneys' suit violated their duty of loyalty and constituted a conflict of interest, emphasized both the statutory nature of these rights and the fact the legislature had decided that the benefits of the law outweighed the burdens of divided loyalties. *Id.* at 1148, 1155, 1158. The court also stated that the collective bargaining statute created an exception to the client's ordinarily absolute right to discharge an attorney, further rationalizing that the county could reorganize its office to use non-union attorneys in labor relations matters. *Id.* at 1160-61

The dissenting opinion underscored the extent to which the majority failed to see the issue from the *client's perspective*, refusing to accept the majority's belief that "there can be 'general antagonism between lawyer and client' due to litigation between them without 'actually compromis[ing] client representation.'" *Id.* at 1161.

Further, no evidence was presented or exists to suggest that in ratifying Article I, section 6, that the people intended to consent to collective bargaining by their attorneys. The Court should not now impose such a result thirty years later.

The rules of statutory construction are generally applicable to the construction of the state constitution. *State ex rel. McKay v. Keller*, 191 So.2d 542 (Fla. 1939). This Court has stated, however, that less latitude is permitted when construing constitutional provisions than when construing statutes as it presumed that the constitutional provisions have been more carefully and deliberately framed. *Department of Environmental Protection v. Millender*, 666 So.2d 882 (Fla. 1996).

In *Millender*, this Court held that the intent of the drafters who voted on a state constitutional amendment is traditionally discerned from historical precedent, from present facts, from common sense, for examination of the purpose the provision was intended to accomplish and the evils which were sought to be prevented, and from explanatory materials available to people as the predicate for their decision. In applying these factors to the question of public attorney bargaining, there is no support for the theory that the voters intended to create such a result when they ratified this provision thirty (30) years ago.

There was no private sector precedent in Florida for such bargaining by attorneys when Article I, section 6 was ratified.

Presently, the Legislature -- the elected representatives of the people of this State -- has unambiguously enunciated its refusal to consent to such an affront to its attorney-client relationship.

Common sense would dictate that the very last group to which the voters -- the ultimate client of governmental attorneys -- would consent to engage in the adversarial relationship of collective bargaining with would be those to whom the public looks to represent their interests. Indeed, in light of the traditional, uniform and statutory exclusion of managerial and confidential employees from collective bargaining, it is inconceivable that the voters of this State ever intended their attorneys -- those with whom their clients have the most confidential of all relationships -- to engage in adversarial collective bargaining with the State when they ratified Article I, section 6.

G. Limits on Bargaining by Attorneys Recognized by Bar Opinions

Both the American Bar Association (hereinafter 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[11], stated:

> If faced with a choice between following the Code of Professional Responsibility of 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.

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-

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[11] 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.

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 -- compelled bargaining by public lawyers under the inherently antagonistic position in collective bargaining where the client-employer has refused to consent to imposition of such an adversarial relationship.

H. Application of the Proper Standard in this Case

The State submits that the Rules Regulating The Florida Bar do not permit bargaining by attorneys in the absence of consent by their clients. The trial court and District Court erred in failing to consider the rights of the client-State in determining the constitutionality of Section 447.203(3)(j), Florida Statutes, and erred in imposing a "least intrusive means" standard upon the State in these circumstances.

Even if a heightened level of scrutiny is an appropriate standard to apply, *generally*, in reviewing the constitutionality of limitations on the right to collectively bargain, where, as

here, both the employees and employer are vested with fundamental rights, the rights of each must be ***balanced***. This is consistent with this Court's prior holdings in other constitutional contexts as well as this Court's holdings with respect to collective bargaining rights.

As noted in *Krischer v. McIver*, 697 So.2d 97, 114 (Fla. 1997), judicial analysis can differ according to which interest is at stake. The difference in analysis arises to the extent that one person's constitutionally guaranteed interest is in conflict with other basic rights possessed by separate individuals. When such conflict exists, the Court has used a balancing test to resolve the competing constitutional claims.

As noted previously, this Court has already held that collective bargaining by public employees must be construed in accordance with all provisions of the constitution. *State v. Florida Police Benev. Ass'n, Inc.*, 613 So.2d at 417. The trial court and District Court erred by applying a standard which subordinated the State's fundamental rights as client -- in so doing, the lower courts rendered the State's client rights a nullity.

The appropriate test under these circumstances is that which was enunciated in *United Faculty of Florida v. Board of Regents*, 417 So.2d at 1057: the State must demonstrate a strong rational basis for abridgement which is justified by a compelling state

interest. Both courts have properly conceded that the State has met this standard. Accordingly, Section 447.203(3)(j), Florida Statutes, should be declared constitutional and the lower decisions reversed.

II. EVEN UNDER THE HEIGHTENED SCRUTINY APPLIED BELOW, THE LOWER COURTS ERRED IN DETERMINING THAT SECTION 447.203(3)(j), FLORIDA STATUTES, WAS UNCONSTITUTIONAL

Even assuming arguendo a "least intrusive means" test is appropriate to apply to the facts of this case, the lower courts erred in holding that Section 447.203(3)(j), Florida Statutes, does not meet that standard. The Legislature has narrowly tailored the exclusion of person from the definition of "public employee" in Section 447.203(3)(j) to only those attorneys whose state "positions of employment" are regulated under this Court's Art. V, section 15 jurisdiction. Thus, the exclusion does not apply to all employees who are members of The Florida Bar, but only those who represent the State as attorneys, creating an attorney-client relationship.

Only those who have an attorney-client relationship with the State owe a special duty of confidentiality, fidelity and loyalty to the State as client. Thus, Section 447.203(3)(j) has been narrowly drawn to have an impact which is minimally restrictive.

There is no other reasonable alternative means of preserving the confidentiality, fidelity and loyalty in the attorney-client relationship than having all government attorneys who have an

attorney-client relationship with the State excluded from collective bargaining. Such an exclusion is consistent with the exclusion of managerial and confidential employees from bargaining.

The trial court erroneously stated that the State had presented "no evidence" that the statute under challenge was necessary to protect the asserted state interest of preserving attorney-client relationships with public employees working as lawyers.[12] The District Court improperly refused to disturb this erroneous determination.

During the week long trial in this cause, both sides presented testimony and volumes of evidence concerning the impact of bargaining in other states and the foreseeable consequences here. The District Court states that:

> Because Florida has not yet permitted attorneys employed as such by public employers to bargain collectively, the trial court considered evidence from other states. It found that other jurisdictions permit state-employed attorneys to

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[12] The trial court stated that:

> The compelling state interest in retaining competent, professional attorneys does not support a finding of a compelling state interest in preventing any collective bargaining by state employed attorneys. The state presented no evidence to support the position that government employed attorneys would abandon their ethical obligation of confidentiality, fidelity and loyalty by becoming members of a labor organization.

(R. II: 234).

> bargain collectively without any apparent harm to the attorney-client relationship. Evidence showed that, in those states, governmental entities that allow their attorneys to bargain collectively have been able to conduct their legal affairs effectively, meet their legal obligations, and otherwise carry out their missions. . . .

Chiles v. State Employees Attorneys Guild, 23 Fla.L.W. at 1350.

Under the standard applied by the lower courts, the State would be unable to sustain any exclusion of attorneys from collective bargaining unless the State could present conclusive and empirical data demonstrating that the lawyers who participated in collective bargaining would violate the ethical standards enunciated in the Rules Regulating the Florida Bar. First, this holding is in error because the law does not require the State to present conclusive evidence or empirical data to sustain legislative regulations issued in furtherance of the public good, even where such regulation impacts fundamental rights. And second, the lower courts failed to acknowledge that -- ***in the absence of client consent*** -- ***ALL*** of the adversarial activities inherent and typical in and permitted by collective bargaining are violative of the standards of conduct required by the Rules Regulating the Florida Bar if engaged in by lawyers against their client.

A. The State Need Not Present Empirical Data

As the U.S. Supreme Court noted in the First Amendment case of *Paris Adult Theatre I v. Slaton*, 413 U.S. 49,61-63, 93 S.Ct. 2628, 2637-2638 (1973):

> From the beginning of civilized societies, legislators and judges have acted on various unprovable assumptions. Such assumptions underlie much lawful state regulation of commercial and business affairs. . . .On the basis of these assumptions both Congress and the state legislatures have, for example, drastically restricted associational rights by adopting antitrust laws, and have strictly regulated public expression by issuers of and dealers in securities, profit sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce.
>
> * * *
>
> The fact that a congressional directive reflects unprovable assumptions about what is good for the people, including imponderable aesthetic assumptions, is not a sufficient reason to find that statute unconstitutional.
>
> * * *
>
> 'Many of these effects may be intangible and indistinct, but they are nonetheless real.' . . . Mr. Justice Cardozo said that all laws in Western civilization are 'guided by a robust common sense . . . .' *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 892, 81 L.Ed.2d 1279 (1937). . . .Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

Similarly, the Eleventh Circuit recently held in a case involving the regulation of commercial speech by attorneys seeking to solicit clients, empirical data need not be presented to sustain a regulation, holding:

> . . . Falanga and Chalker dispute the sufficiency of the State Bar's evidence, contending that it failed to advance any concrete

> proof of the harm that allegedly results from in-person solicitation. We, however, are not convinced. It is true that the State Bar may not rely on "mere speculation or conjecture" to satisfy its burden of justifying Georgia's proscriptions. . . On the other hand, commercial speech jurisprudence does not require it to present "empirical data . . . accompanied by a surfeit of background information." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995) ("[W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether[.]"). Rather, the State Bar's case may rest "solely on history, consensus, and simple common sense[.]" *Went For It*, 515 U.S. at 628 (internal quotation marks and citation omitted).

Falanga and Chalker v. State Bar of Georgia, 11th Cir. C.A., Case Nos. 96-8972, 96-9491, Opinion issued August 19, 1998.

The lower courts in the case at bar erred in holding that the State was required to present empirical data of actual ethical violations by its attorneys in order to satisfy the heightened standard which these courts employed. No such evidence is required in order for Section 447.203(3)(j) to be constitutional.

B. Without the Client's Consent, All of the Activities Permitted by and Inherent in Collective Bargaining are Violative of the Standards of Conduct Required of Attorneys in this State

Furthermore, the State did present ample evidence demonstrating that ethical violations were inevitable and inherent in attorneys' collective bargaining. In virtually every State or governmental context in which collective bargaining has been permitted by attorneys, those attorneys have sued their

client, represented the client in matters in which their own union is a litigant, challenged the clients ability to retain outside counsel, and opposed through judicial means decisions to discharge counsel.

Where the governmental client has ***consented*** to the denigration of its traditional confidential relationship with its advocates, it is true such adversarial activities do not *per se* violate the ethical standards of the attorneys who engage in such conduct. For in those states which have ***consented*** to collective bargaining by their attorneys, the legislatures of those states have simply decided to accept -- through legislative authorization -- diminished client confidence in attorneys' loyalty and lower standards of conduct. See *Santa Clara*, 869 P.2d at 1158.

However, ***in the absence of such client consent***, the classic antagonistic position of collective bargaining situations with the State's own attorneys would defeat the integrity of the attorney-client relationship and fundamentally violate the duty of such attorneys to their client. The State ***did*** present evidence that adversarial conduct is inherent in collective bargaining by attorneys, like all other employees. Where, as here, the State, as client, has refused to consent to its attorneys engaging in activities which so fundamentally violate their obligations of conduct as attorneys, collective bargaining would, in fact, *per*

se violate the ethical obligations of government attorneys. Thus, the State has demonstrated that exclusion of all those who represent the State satisfies even the heightened scrutiny employed by the Courts below.

III. THE DISTRICT COURT ERRED IN HOLDING THAT THE TRIAL COURT'S DETERMINATION THAT ASSISTANT AND DEPUTY ATTORNEYS GENERAL AND ASSISTANT AND DEPUTY STATEWIDE PROSECUTORS ARE OFFICERS, NOT "PUBLIC EMPLOYEES" WITHIN THE MEANING OF SECTION 447.203, FLORIDA STATUTES, HAD "NO EFFECT BEYOND THE PRESENT CASE"

The question presented in the case at bar, is whether the exclusion of attorneys for the State of Florida contained in Section 447.203(3)(j) is constitutional. In this context, the Governor moved for partial summary judgment in the trial court to first determine *which* attorneys were impacted by the enactment of this statute. (R. I: 32-42).

The Governor asserted that the Appellees have included attorneys representing the State of Florida in their proposed collective bargaining "unit" who were not public employees under 447.203 -- *prior* to the enactment of Section 447.203(3)(j) -- attorneys who, even in the absence of this statutory enactment, are not eligible to participate in collective bargaining because they are "officers," rather than "public employees". Specifically, deputies and assistants of the Attorney General and the Statewide Prosecutor exercise the constitutional power of those offices and are therefore not "public employees" under Section 447.203(3)(a), Florida Statutes.

In the trial court, the State attempted to determine the scope and definition of the class of attorneys that SEAG is asserting were affected by enactment of Section 447.203(3)(j) and, more particularly, to establish that SEAG was improperly including Deputy and Assistant Attorneys General and Assistant Statewide Prosecutors in this class. SEAG declined, however, to resolve this issue -- objecting *in toto* to the requests for admissions on this question. (R. I: 33).

The trial court agreed with the State that resolution of the question of the scope of Section 447.203(3)(j) was necessary as part of its determination of the constitutionality of that provision and granted the State's motion for partial summary judgment, holding that Assistant and Deputy Attorneys General and Assistant Statewide Prosecutors are officers, not "public employees" within the meaning of Section 447.203, Florida Statutes. SEAG filed a cross appeal challenging the trial court's order granting partial summary judgment.

Citing a phrase from the trial court's order that this ruling was "[f]or purposes of determining the [present case only]," the First District Court of Appeal held that the question of the public employee status of Assistant and Deputy Attorneys General and Assistant Statewide Prosecutors "is now moot." The District Court ruled that "[t]he trial court's ruling on this point has no effect beyond the present case." The District Court contemplated that this issue would have to be litigated at PERC

and declined to express any opinion "as to which state-employed lawyers are public officers and which are public employees for purposes of chapter 447 . . .." *Chiles v. State Employees Attorneys Guild and Greene*, 23 Fla.L.W. at 1350.

The State respectfully submits this legal question must be resolved by this Court prior to any further proceedings in this case, because unless the Court and the parties have a common understanding of which attorneys were impacted by enactment of Section 447.203(3)(j), Florida Statutes, the question of whether the statute is overbroad cannot be properly addressed. SEAG cannot be permitted to have their cake and eat it too -- counting Assistants and Deputies to the Attorney General and Statewide Prosecutor in the class of attorneys allegedly impacted by Section 447.203(3)(j) for purposes of their "overbreadth" argument (and soliciting them for purposes of a certification vote), but refusing to address the fundamental first question of whether these individuals are "public employees" at all.

The Attorney General, one of the elected constitutional officers of the State of Florida, is the chief legal officer of the state. Art. 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.

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 what is in the public interest. *State of Florida ex rel. Shevin v. Exxon Corporation*, 526 F.2d 266, 268-269 (5th Cir. 1976), *cert. denied*, 429 U.S. 829 (1976). Surveying pertinent court 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, Florida Statutes (1995), mandates, in pertinent part, that the Attorney General:

> (4) Shall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state.
>
> (5) Shall appear in and attend to such suits or prosecutions in any other of the

> courts of this state or in any courts of any other state or the United States.
>
> (6) Shall have and perform all powers and duties incident and usual to such office.

Obviously, the Attorney General does not and cannot personally perform every function of his office or aspect of his constitutional, statutory and common law duties and powers. The Attorney General appoints and assigns his respective duties to all deputy and assistant attorneys general. 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, exercise the sovereign power of the State, as discussed infra. He is responsible for their supervision and direction in the fulfillment of his constitutional, statutory and common law powers.

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 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 a lawyer to protect the interest of his client, the people of the State."
>
> * * *

> The Attorney General's responsibility is not limited to serving or representing the particular interests of the State agencies, including opposing State agencies, but embraces serving or representing the broader interests of the State.

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

In the same vein, the Office of Statewide Prosecution is also a constitutional office, created by Art. IV, section 4(c) of the Florida Constitution. The Statewide Prosecutor is appointed by the Attorney General, Art. IV section 4(c), Florida Constitution, and serves a term for four years. Section 16.56 (2), Florida Statutes. The Statewide Prosecutor exercises the sovereign power of the State in the investigation and prosecution of criminal offenders. Section 16.56, Florida Statutes. The Statewide Prosecutor, like the Attorney General, is served by assistants who exercise the sovereign powers conferred on the office by the constitution and statutes.[13]

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[13] Section 16.56 (3), Florida Statutes, provides that:

> (3) The statewide prosecutor may conduct hearings at any place in the state; summon and examine witnessed; require the production of physical evidence; sign information, indictments, and other official documents; confer immunity; move the court to reduce the sentence of a person convicted of drug trafficking who provide substantial assistance; attend to and serve as the legal advisor to the statewide grand jury; and

The right to collectively bargain under Chapter 447, Part II, Florida Statutes, is conferred only upon "public employees". Section 447.301, Florida Statutes. The Legislature has the duty to define who is a public employee. Section 447.203(3), Florida Statutes. The term "public employee" does not include persons appointed to 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), Florida Statutes); *Federation of Public Employees v. Public Employees Relations Commission*, 478 So.2d 117 (Fla. 4th DCA 1985)(Deputy clerks of the circuit court are appointed pursuant to Section 28.06, Florida Statutes, and are not public employees within the meaning of Chapter 447); *Public Emp. Council 79 v. Property Appraiser*, 521 So.2d 243 (Fla. 1st DCA 1988)(Individuals employed by the county property appraisers were appointed deputies of elected constitutional officer and, therefore, were not "public employees" under Section 447.203(3), Florida Statutes. *See*, Section 193.024, Florida Statutes).

> exercise such other powers as by law are granted to state attorneys. **The statewide prosecutor may designate one or more assistants to exercise any such powers.**

(Emphasis Supplied).

In so holding, Florida courts have emphasized the nature of the **source** of the deputies' or assistants' authority as extensions of the Constitutional officer in the exercise of his sovereign powers. Applying this analysis, the Courts have rejected attempts to unionize deputy sheriffs, deputy clerks of the circuit courts, and deputy property appraisers.

In affirming that deputy property appraisers were not "public employees" pursuant to Section 447.203, Florida Statutes, the First District Court of Appeal noted that:

> '[T]he determinative factor is that [Deputies] may perform any act required of the [Constitutional officer] and not that they actually exercise a plenary range of duties required of him.' . . .[T]he [Constitutional officer's] employees have the authority to perform any ministerial act that the [Constitutional officer] can perform, and in fact have done so, and are aware that they can act for and on behalf of the [Constitutional officer] and that he is ultimately responsible for their actions."

Public Emp. Coun. 79 v. Property Appraiser, 521 So.2d at 244.

This is consistent with the analysis applied by the Florida Supreme Court in generally distinguishing "officers" from "employees". *See, Palmer v. State ex rel. Axelrod*, 6 So.2d 550, 551-552 (Fla. 1942)("The principle difference between an officer and employee is the exercise of the former of a part of the sovereign power."); and *Pace v. King*, 38 So.2d 823 (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.").

A "deputy" is a person appointed to act for another and empowered to act for him in his name and on his 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, all assistants, whether or not called "deputies," are either potentially or, in fact, deputies of the Attorney General and 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 the Attorney General. He or she acts independently in making legal

> decisions or in deciding matters of policy. The nature of the position -- the responsibilities, duties and function -- dictates that we hold that the Assistant Attorney General are deputies of the Attorney General for purposes of the Civil Service Law.

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

Similarly, the Seventh Circuit Court of Appeals held that deputy attorneys general (the term used in Indiana to describe an equivalent level of authority and duties to assistant attorneys general in Florida) are not employees. *Americanos v. Carter*, 74 F.3d 138 (7th Cir. 1996). In so holding, the Seventh Circuit took guidance from federal law, noting that assistant attorneys general were excluded from the definition of "employee" under both the Age Discrimination Employment Act (ADEA), 29 U.S.C. section 630(f), and Title VII, 42 U.S.C. section 2000e(f).

The Seventh Circuit observed that "[t]he ADEA and Title VII exempt certain public officials from their protections:

> The term 'employee' shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the Constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision."

29 U.S.C. Sec. 630(f); 42 U.S.C. sec. 2000e(f).

Based on the foregoing statutory definitions, as well as previous Seventh Circuit holdings in the area of "political firings", the Seventh Circuit determined that a deputy attorney general (having duties analogous to an assistant attorney general in Florida) is not an "employee" within the purview of either Title VII of the Civil Rights Act of 1964 or the ADEA. *See also, Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Heck v. City of Freeport*, 985 F.2d 305, 309 (7th Cir. 1993).

In its consideration of the status of deputy property appraisers, the First District Court of Appeal further noted that:

> . . . [T]he Property Appraiser is empowered to appoint deputies to act on his behalf in carrying out the duties prescribed by law for that office. His employees for that purpose are his alter-ego. It would therefore be incongruous for the Property Appraiser to then assume a classic antagonistic position in collective bargaining situations with these same employees. Such would defeat the power and authority accorded this constitutional officer.

Public Emp. Coun. 79 v. Property Appraiser, 521 So.2d at 244.

The same is true regarding deputies and assistants of the Attorney General and Statewide Prosecutor. The deputies and assistants of the Attorney General and Statewide Prosecutor necessarily exercise sovereign 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 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 and brief that must be filed in the course of representing the public or in exercising the prosecutorial power of the State. The sovereign power conferred on the Constitutional offices of Attorney General and Statewide Prosecution is exercised through the deputies and assistants they appoint.

Because assistants and deputies 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, thus, acting on the policy making level or as an immediate advisor with respect to the exercise of the Constitutional or legal powers of the Attorney General or Statewide Prosecutor, assistant and deputy attorneys general and assistant statewide prosecutors are in this sense "officers" rather than "public employees" under Section 447.203, Florida Statutes. Similarly, assistants and deputies to the Attorney General and Statewide Prosecutor are not "employees" within the meaning of Section 447.203, Florida Statutes.

The Attorney General and Statewide Prosecutor are empowered to appoint deputies to act on their behalf in carrying out the duties prescribed by law for their respective offices. Their

employees for that purpose are their alter-egos. It would therefore be incongruous for the Attorney General or the Statewide Prosecutor to then assume a classic antagonistic position in collective bargaining situations with these same employees. Such would defeat the power and authority accorded these constitutional officers and offices.

Accordingly, even in the absence of the exclusions contained in Section 447.203(3)(j), Florida Statutes, regarding attorneys for the State of Florida, deputies and assistants to the Attorney General and the Statewide Prosecutor are, and were already, excluded from any collective bargaining unit established pursuant to Chapter 447, Part II, because they have never been "public employees" within the meaning of that statute.

The District Court erred in holding that the trial court's determination regarding Deputy and Assistant Attorneys General and Assistant Statewide Prosecutors had no precedential value and erred in holding that this determination should be left for PERC to make when considering a certification petition. *Chiles v. State Employees Attorneys Guild,* 23 Fla.L.W. at 1350.

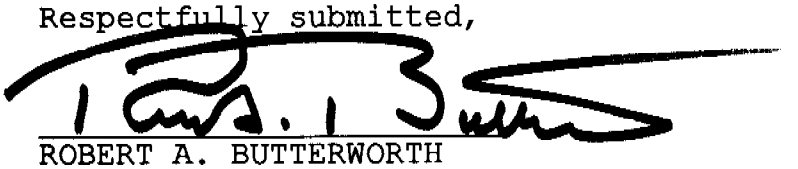
Resolution of this question is necessary now and is an integral element of the determination of the constitutionality of Section 447.203(3)(j). Such a resolution is in the interest of judicial economy and in the public's interest. The alternative advocated by the District Court will only lead to several more

years of protracted litigation over this question, which will inevitably lead right back to this Court to ultimately resolve. Accordingly, the trial court's order declaring that deputies and assistants to the Attorney General and Statewide Prosecutor are not "public employees" within the meaning of Section 447.203, Florida Statutes, should be affirmed.

CONCLUSION

Section 447.203(3)(j), Fla. Stat., is constitutional, and therefore the decision of the district court must be reversed. In addition, the Court should recognize the status of deputies and assistants of both the Attorney General and the Statewide Prosecutor as officers and not "public employees" within the meaning of Section 447.203(3), Florida Statutes.

Respectfully submitted,



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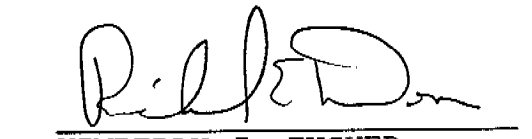

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to THOMAS W. BROOKS, Esquire, Meyer and Brooks, P.A., 2544 Blairstone Pines Drive, Post Office Box 1547, Tallahassee, Florida 32302 this 4TH day of September, 1998.

FOR LOUIS F. HUBENER