IN THE SUPREME COURT OF FLORIDA

The Florida Bar)
Re: Petition to Amend Rules) Case No. SC04-2246
Regulating the Florida Bar)

COMMENTS BY THE CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION OF THE FLORIDA BAR

THE CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION OF THE FLORIDA BAR (the "Section"), in response to the December 1, 2004 filing of The Florida Bar entitled Petition to Amend the Rules Regulating The Florida Bar (Petition), hereby submits the following comments:

1. This filing is made within the 30-day comment period pursuant to Rule 1-12.1(g) of the Rules Regulating The Florida Bar, and is authorized by the Executive Council of the City, County and Local Government Section of the Florida Bar.

2. Revisions to Rule 4-1.11 entitled "Special Conflicts of Interest of Former and Current Government Officers and Employees" are of particular interest to the Section because, as the title suggests, the Rule will apply only to current and former government attorneys.

3. The proposed change to Rule 4-1.11 "incorporates by reference" the provisions of Rule 4-1.7 (respecting concurrent conflicts) and the provisions

of Rule 4-1.9 (respecting obligations to former private clients) into Rule 4-1.11. For the first time, the Florida Bar is choosing to expressly make the concurrent conflict rule and the conflict rule involving former clients fully applicable to all government lawyers and all lawyers who are specially retained by any level of government. The mechanical application of the proposed Rule 4-1.11 will not only interfere with the duties and obligations of a government lawyer to his or her governmental entity, as client, but also alter the relationship between the government lawyer and the government entity.

4. The current Rule 4-1.11 entitled "Successive Government and Private Employment" only applies limitations to a lawyer who served as a former public officer or employee, and to a government lawyer who participated "personally and substantially" in a matter while in private practice or nongovernmental employment. The commentary to this Rule only contains a reference to the application of the adverse interests prohibition of Rule 4-1.7(a) to government lawyers, and the protections afforded former clients as provided in Rule 4-1.9. However, the Scope section of the Rules clearly states that the commentary is intended only as a guide to interpretation and does not add obligations to the rules, as follows:

> The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should", do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.[1]

5. The proposed revisions to the Florida Bar Rules, if approved by this Court, will differ in scope and application from the ABA Model Rules as applied to current government attorneys because the Florida Bar Rules do not include or make reference to Paragraph 18 from the Scope of the ABA Model Rules. Paragraph 18 is of great importance because it recognizes that a government lawyer may be authorized to take certain actions as the legal officer of the governmental entity under prescribed duties, and to represent several government entities in intragovernmental legal controversies not otherwise permitted in the arena of private practice without violating the concurrent conflict rule. Paragraph 18 from the ABA Model Rules states:

[1]Excerpt from the Scope of the Rules of Professional Conduct of the Florida Bar. (No change is proposed by the Florida Bar to this limitation.)

SCOPE

PARAGRAPH 18

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. The Rules do not

abrogate any such authority.[2]

6. Applying Rule 4-1.7, the concurrent conflict rule, into Rule 4-11 without including the substance of Paragraph 18 from the Scope of the ABA Model Rules deprives the right of a government in Florida, as client, from authorizing its government attorney to represent its agencies in intragovernmental legal controversies when the government attorney determines that their interests are adverse under proposed Rule 4-1.7. The literal application of Rule 4-1.7 without the savings clause of Paragraph 18 would also interfere with the lawful duties of government attorneys as prescribed by general statutory law, city or county charters, or special laws.[3] The proposed rule would, on its face, prohibit a state, county, city or other local government attorney from representing his or her respective government as an entity when the interests of sub-organizations within that governmental entity are deemed to be adverse, unless the representation can

[2] The ABA House of Delegates in 2002 deleted the sentence: "(T)hey also may have authority to represent the "public interest" in circumstances where a private lawyer would not be authorized to do so". Although the Section believes that the deleted sentence properly acknowledges a government lawyer's duty as a function of representing a government, the Section does not insist that this deleted sentence must be included, despite the Bar's assertion in the Petition to the contrary under "Scope".

[3] See § 16.01, 16.015 and 60.05, Fla. Stat. (2004); see, e.g., Chapter 90-394, Laws of Florida, Sec. 3.03 "City Attorney", Charter Laws of the City of Gainesville, Fla.

fit within the exceptions of proposed Rule 4-1.7(b).

7. Additionally, an unintended consequence of the application of proposed Rule 4-11, would be the retention of additional attorneys by government entities to avoid concurrent conflicts. This would result in the expenditure of additional tax revenues to fund the retention of more government lawyers.

8. Government attorneys will also be placed in the difficult and sometimes untenable position of attempting to identify the entities or persons within the organization who are the "clients", such as agencies, departments, divisions and employees for purposes of the application of Rule 4-1.7 in both actual cases and in internal transactional issues. The government attorney must then determine whether the interests of the sub-organization "client" may be adverse to the larger government as client. The Section maintains that conflict issues for government lawyers must ultimately be analyzed differently for government lawyers because of the legal framework within which they must function.

9. Threshold questions about the identity of the public client, and whether particular decisions are entrusted in the government lawyer or to an agency or department head, must be determined by reference to the law establishing the government's legal officer or the government's law department. Resolution of conflict issues in the government context cannot be left

exclusively with reference to the Rules of Professional Conduct. To illustrate by examples, the Florida attorney general must, by law perform the duties prescribed by the Florida Constitution and also perform such other duties "appropriate to his or her office as may from time to time be required by the Attorney General by law or by resolution of the Legislature.[4] Courts in other jurisdictions have permitted their states' attorneys general to represent conflicting interests.[5] The unique nature of this constitutional office would require an acknowledgement that dual representation in the government context is permissible to allow the attorney general to fulfill the duties of the office.[6]

10. As another example, the City of Gainesville has over 2000 full time employees and provides services ranging from electric and other utility

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[4] Section 16.01(2), Fla. Stat. (2004)

[5] State of Hawaii v. Klattenhoff, 71 Haw. 598, 801 P.2d 548 (Haw. 1990); Superintendent of Insurance v. Attorney General, 558 A.2d 1197 (Me.1989); Connecticut Commission on Special Revenue v. Connecticut Freedom of Information Commission, 174 Conn. 308, 387 A.2d 533 (Conn. 1978); Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262 (Mass. 1977); Environmental Protection Agency v. Pollution Control Board, 69 Ill.2d 394, 372 N.E.2d 50, 14 Ill. Dec. 245 (Ill. 1977); Commonwealth ex rel. Hancock v. Paxton, 516 S.W.2d 865 (Ky. 1974); Humphrey ex rel. State v. McLaren, 402 N.W.2d 535 (Minn. 1987); State ex rel. Allain v. Mississippi Public Service Commission, 418 So.2d 779 (Miss. 1982); State ex rel, McLeod v. Snipes, 266 S.C. 415, 223 S.E.2d 853 (S.C. 1976).

[6] See e.g., Attorney General v. Michigan Public Service Commission, 243 Mich. App. 487, 625 N.W. 2d 16 (Mich. 2000).

services, provided by an enterprise of the City, d/b/a "GRU", to mass transportation, police and fire, planning and zoning, community development, parks and recreation, and economic development. Not including GRU, the City's general government has approximately 40 departments with wide and different responsibilities. The city attorney, by Charter, is charged with the duty of being the "legal advisor and attorney for the City"[7]. The "City" comprises all of the departments of the City and the enterprise d/b/a GRU, as well as the governing body, the city commission. The city attorney may advise the city commission during a quasi-judicial planning hearing as counsel to the decision-making body, while an assistant city attorney advises staff who may recommend denial of the planning matter because it violates, for example, the City's comprehensive plan. The City Commission may ultimately approve the matter, finding that it does meet the criteria of the city's comprehensive plan. Under the proposed Rule, can the assistant city attorney later represent the City in an administrative or court case that challenges the city commission's decision filed by a third party? Can the city attorney later advise staff on the same, related or a

[7] The City Charter of Gainesville was adopted by Special Act of the Legislature. Chapter 90-394, Laws of Florida, supra.

different matter? Should the resolution of these conflict issues be left only to the exceptions of subsection (b) of Rule 4-1.7, or is it, in part, a question of substantive law?

11. The unique function of government and the duties of government lawyers require an acknowledgement that government attorneys represent several government agencies in intragovernmental legal controversies as part of their inherent duties. If these controversies become actual cases in administrative or court proceedings, then the government attorney should determine if there is a conflict in the representation so as to warrant the retention of other counsel. Due to the multiple duties imposed upon the government lawyers and those lawyers specially retained by the government, the rules for the private sector bar cannot be strictly applicable, in all cases, to the lawyers who represent government.

12. The omission of paragraph 18 from the ABA Model Rules does not afford any greater protections to the government in Florida as client, and it simply ignores the practical reality of the government as client, as well as the practice of government law.

13. The State of Florida, its political subdivisions, agencies, special districts, and municipal corporations, are subject to the most expansive open meetings and public records laws in the nation. The public can hear and participate in the

decision-making process at almost every stage or level of government. Unlike the private sector, almost all of the government's business is conducted in publicly noticed meetings, and the public has an opportunity to hear any adverse interests that arise within their government. Government lawyers provide legal advice to their clients in public meetings, as required by state statute, and unlike the private sector attorney, abide by the Code of Ethics for public officers and employees as established by the state legislature.[8]

14. Governments in Florida conduct their business substantially different from private persons corporations and entities. Private corporations rarely, if ever, meet in advertised public meetings and never make quasi-judicial decisions based upon the competent substantial evidence of their employees. Similarly, the public sector bar must operate differently from the private sector bar. Government attorneys must be able to represent governmental entities as well as the sub-organizations and employees that comprise the organization. Adequate protection, such as the government-in-the-sunshine law and public records law, serve to protect the public's interest. For example, a government attorney must advise the public governing body in a public meeting, unless it meets the limited statutory requirement of section

[8] Section 286.011, Fla. Stat. (2004), and Chapter 112, Part III, Fla. Stat. (2004).

286.011(8), Fla. Stat. (2004). A lawyer representing a private corporation never advises his or her client in a public meeting. The Rules regulating the Florida Bar should reflect these differences in the public interest.

15. A comparison of the Rules of other State bars indicate that thirty-five states include Paragraph 18 (in pari materia) from the Scope of the ABA Model Rules into their Rules. As of the filing of the Petition, the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, North Carolina, New Hampshire, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming include Paragraph 18 (in pari materia) from the Scope of the ABA Model Rules. Only the State of North Dakota and the District of Columbia resemble the Florida Bar's Rules by excluding the ABA's Paragraph 18 from the scope section of their Rules.[9]

16. Including Paragraph 18 from the Scope of the ABA Model Rules into the

[9] The Rules of the State Bars of Iowa, Maine, Nebraska, New York, Ohio and Oregon are patterned after the Model Code instead of the ABA Model Rules, and thus are not relevant to this discussion. The States of California, Illinois, Washington, South Carolina, Kentucky, Louisiana and New Jersey do not include a scope in their rules; some of these same states do not include a preamble or definitions section, or both.

Scope of the Florida Bar Rules will maintain the status quo, and will not alter the relationship between the government attorney and the government as client. No problems or ills have been identified by the Florida Bar that warrant the literal application of the conflict rule in the government context without any accommodation for the government and its lawyers as provided in Paragraph 18.

17. The Florida Bar previously addressed this issue in 1985 when a Special Study Committee then declined adopting this paragraph in the scope section of the Rules. The notes of the Special Study Committee do not reflect specifically the reason why this particular paragraph was omitted from the Rules. The only rationale offered in the Petition is the personal recollection of one member of the Special Study Committee who indicated that "standard for government lawyers and private lawyers should be the same; government clients should receive no lesser protection than private clients." As previously argued, this rationale ignores the realities of the differences between the government, as an organizational entity, and private persons, private corporations and other entities. This rationale also ignores the realities of the government practice of law. Moreover, the need to include Paragraph 18 of the ABA Model Rules was not as critical in 1985 because

the concurrent conflict provision was not applicable to government lawyers in the same manner as proposed in this Petition.

18. As stated in Section 1 of the Petition, "Rule Development History", the proposed revisions to the Rules emanate from changes made to the ABA Model Rules in 2002 at the recommendation of the ABA Ethics 2000 Commission.

19. As further stated in Section I of the Petition, former President Tod Aronovitz appointed the Special Committee to Review the ABA Model Rules 2002 (the "Special Committee") in February 2002 with the primary purpose, as its name suggests, of analyzing the changes to the ABA Model Rules of Professional Conduct made by the ABA Ethics 2000 Commission comparing them with existing Rules Regulating The Florida Bar, and considering whether The Florida Bar should adopt the recommended changes. Their primary concern in analyzing the changes to the ABA Model Rules of Professional Conduct "should be protecting the public and maintaining the core values of the legal profession."

20. No harm will result with the inclusion of Paragraph 18 from the Scope Section of the ABA Model Rules, and the interests of the public will be protected while maintaining the core values of the legal profession.

WHEREFORE, the City, County and Local Government Law Section respectfully requests this Court to adopt and incorporate Paragraph 18 from the ABA Model Rules into the Scope of the Florida Bar Rules with appropriate reference in Rule 4-1.11, or in the alternative to make no change to Rule 4-1.11.

Respectfully submitted:

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CERTIFICATE OF TYPE AND SIZE AND VIRUS SCAN

I HEREBY CERTIFY that this Comment is typed in 14 point Times New Roman type and that the computer disk that contains this Comment has been

scanned by Norton Anti-Virus Corporate Edition and has been found to be free from viruses.

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Marion J. Radson
City Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been sent by United States Mail this ____ day of December, 2004 to each of the following at The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300: John F. Harkness, Jr., Executive Director, Miles A. McGrane, III, President, Kelly Overstreet Johnson, President-Elect, Alan Bookman, President-Elect Designate, Paul F. Hill, General Counsel, Mary Ellen Bateman, Director, Legal Division, Ethics.

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