

**ENVIRONMENTAL AND LAND USE LAW SECTION
EXECUTIVE COUNCIL MEETING**

Thursday, January 15, 2009

1:30-2:30 p.m.

Budget Conference Call

MINUTES

AGENDA

I. Call to Order

- by Chair, Gary Hunter at 1:35 p.m.

In attendance by phone: [Jackie – please check]

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|-----------------------|-----------------|
| Michelle Diffenderfer | Erin Deady |
| Gary Hunter | Keith Rizzardi |
| Paul Chipok | David Bass |
| Joe Richards | Kelly Samek |
| Gary Oldehoff | Kelly Martinson |
| Janet Bowman | Tom Gould |
| Jim Porter | Enola Brown |
| Bud Vielhauer | |

Absent: Marty Collins, Tom Ankersen, Nicole Kibert, Kirk Burns, Vivien Monaco, Carl Eldred

II. Consideration of Draft Budget

Jackie presented overview of budget and the need to make cuts due to investment allocation decline. Bar anticipating investment losses of 10 -15% and therefore only recommending 2 % gain in budget. Dues expected to be down slightly and CLE revenue also will be down. This will require cuts of approximately \$10,000 from proposed numbers.

Paul Chipok moved to adjust Retreat travel allocation as follows: \$750 stipend for agency/public interest sector members and \$500 for private lawyers. Gary Hunter seconded. Motion passed unanimously.

Jackie made following the recommendations on the following line items:

Membership at \$1,000
Committee expenses at \$500
Board and Executive Council travel at \$2,500
Meeting travel at \$8,000 (subject to Jackie's verification)
Retreat at \$2,000

Annual meeting at \$26,000 (based on Diffenderfer recommendation for tickets rather than open bar; section to subsidize a portion of the committee lunch)

Officer's travel at \$2,000 (subject to Jackie's verification)

Recommendations moved by Joe Richards and seconded by Kelly Samek.
Motion passed unanimously.

VII. Other Business –

Discussion re: Rule 4-4.2, Communication with Person Represented by Counsel. Kelly Samek discussed memorandum prepared by Ad Hoc Committee (see attached). Consensus was to publish the memo on the website and in the section reporter for the information of section members. Any decision by the Bar on the issue will also be disseminated to the membership.

Meeting adjourned 2:30 p.m.

To: Executive Council, Environmental and Land Use Law Section

From: Kelly Samek, Michelle Diffenderfer, Larry Sellers, Mary Smallwood, Matt O'Malley, and Vivien Monaco

Date: January 15, 2009

Re: Rule 4-4.2, Communication with Person Represented by Counsel

BACKGROUND

Last year, a matter was referred to the Executive Council for consideration involving a Section member in private practice who had sought assistance from Florida Bar ethics counsel in interpreting a portion of Rule 4-4.2 of the Rules Regulating The Florida Bar, to wit: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.”

The Section member asked if this rule prohibited her from meeting with Governing Board members of a Water Management District (WMD) to discuss and advocate for a Petition to Initiate Rulemaking filed on behalf of her clients absent the WMD counsel’s consent. Bar ethics counsel declined to issue an advisory ethics opinion because the matter involved past conduct and questions of fact; however, counsel did provide extensive information from past Bar opinions indicating that Rule 4-4.2 has been construed to prohibit communications—absent consent of the governmental entity’s counsel—about the subject matter of a representation with governmental employees in managerial capacities or whose acts or omissions in connection with the matter may otherwise be imputed to the agency.

The Section member had the opportunity to appeal the Bar counsel’s denial of the request for an advisory ethics opinion, but ultimately chose not to do so. Still, she was concerned that the response’s indication that “all legislative and quasi-legislative lobbying without approval of the agency attorney” was prohibited by Rule 4-4.2 was erroneous, and forwarded to the matter to other attorneys in environmental and administrative law for consideration. Thus, the matter was brought before the Executive Council of the Administrative Law Section and eventually came to the attention of the ELULS Executive Council as well.

During approximately the same time frame, a similar matter was ripening that would travel further down the avenues of Bar consideration. In this instance, an attorney with a law firm with extensive business related to the Office of Financial Regulation (OFR) had been told that employees of OFR were represented by counsel in all matters involving the attorney’s law firm and that Rule 4-4.2, then, prohibited direct contact between attorneys of that firm and OFR employees. The attorney sought “clarification” of the rule, and on July 15, 2008, Florida Bar Staff Opinion 28193 was issued with a conclusion substantially similar to the one in the response to the Section member a month later. Dissatisfied with the response, a second request for “clarification” was sent to Bar ethics counsel. This is now being handled as an appeal to the Professional Ethics Committee (PEC), which appointed a subcommittee to examine the issue and present a recommendation for consideration by the PEC at its January 2009 meeting.

As far as the ELULS's action on the issue, it was discussed at the Executive Council meeting in November 2008 and at that time, a small group of Council members and others representing a cross-section of practitioners in the Section was constituted to investigate whether the Section should weigh-in on the discussion in some manner or otherwise involve its membership. This report is the culmination on that group's work to date, subsequent to two phone discussions and other email exchanges.

RECOMMENDATION

The result of the group's deliberations is the recommendation to the Executive Council to inform Section members of the action being contemplated by the Professional Ethics Committee, including avenues for providing comment to the PEC, via the ELULS Reporter.

The reason the group decided not to recommend that the Section take more formal action (such as a comment letter to the PEC on behalf of the section) is that there is great diversity of thought on the issue and the Bar Staff Opinion being appealed, diversity that reflects the membership of the Section. Still, the issue being contemplated for PEC action is of such potential significance to that membership that the Executive Council should make efforts to publicize the opportunity for members to be heard by the PEC at such time it decides to take action on the proposed advisory opinion.

Concerns raised by the group that reflect the complexity of this issue and the values at stake that may be at odds with each other are further detailed below.

DISCUSSION

The group raised by the Executive Council to address the instant issue represented lawyers in private practice (both for-profit and public interest) and government service (both the state and local level) with considerable experience in environmental and land use law in its many forms, including administrative practice.

It became evident that the issues are complicated by the perspective of the particular type of practice involved, and the difference in the prioritization of competing values between those types of practice. For instance, traditional private practitioners may advocate most strongly for the right of private entities to dialogue with public officials and to engage the assistance of attorneys in advancing their position in that dialogue, but governmental practitioners may feel that the greater weight of justice falls on the side of affording their clients protection equal to that afforded private parties. Additionally, addressing the rule from a unified front is difficult because of the sheer range of issues it touches, which, yet again, are difficult to capture on behalf of a wide spectrum of Section members. These problems are illustrated in some of the questions and observations raised in the group's discussion, such as:

How should the application of the rule recognize the client's (and the lawyer's, where she/he is the client) right to petition government and to retain the services of representatives (including lawyers) who are skilled in such matters?

In situations where a client may be commenting on, questioning, or challenging government decisions regarding 3rd party applicants, it is unclear whether those 3rd parties are subject to the same rule enforcement.

What happens if an agency's counsel (or management) has a problem with another agency or law firm and refuses consent?

Are public records requests under Fla. Stat. §119 “independent justifications for communicating with the other party” described in the comments that allow for contact with the public records custodian without going through the attorney first?

Historically, it is notable that, approximately eight years ago, a special committee was convened on the issue of communications with government under Rule 4-4.2. A subcommittee drafted a fairly extensive proposed rule change that would have incorporated two exceptions to the rule: one to allow a lawyer representing a client or who is personally a party to a controversy with the government to communicate directly with a represented government entity at a public meeting held by the government entity to provide citizens with a public forum; and another to allow a lawyer who is personally a party to a controversy with the government to communicate directly with the government as a party as permitted by the first amendment right to petition the government for redress of grievances.

These exceptions were not adopted because, as in the current discussion of the ELULS group, the comments from Florida Bar members came from across the spectrum.

Ultimately, the only change recommended by the committee was to the rule’s comment, which replaced the “Communications authorized by law” with “Permitted communications” in the sentence “Permitted communications include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.” (The change was approved by the Supreme Court of Florida in Case No. SC03-705, 875 So.2d 448 (Fla. 5/20/2004).) It is perhaps heartening to realize that the special committee felt no pressing need to recommend further changes in part because, as it wrote to the Board of Governors, it “was persuaded by the comments made on the draft that lawyers in Florida are aware of their responsibilities under the rule and that few complaints have been made on the issue of attorneys contacting represented government entities without the consent of government counsel.”

STATUS

The PEC subcommittee’s draft proposal received by the Executive Council’s small group reviewing this matter is attached. Its first several paragraphs more or less adopt the original staff language. The text substantially restructures the original after the excerpt of the Comment to the rule, although the conclusion ultimately ratifies the staff analysis.

The proposed advisory opinion clarifies that “[s]everal issues must be considered in responding to the requested advisory opinion,” and sets forth those issues as:

- whether all persons within an organization are deemed to be represented by the organization's counsel for the purposes of this rule;

- what matters trigger the rule’s prohibition on communications with represented parties;

- whether, because a governmental agency has a general counsel, the general counsel is effectively representing the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the agency’s officials and managers on all subjects.

As to the first issue, the subcommittee answers “no,” noting that attorneys are “ethically precluded from communicating with” two groups of individuals: “employees or officers of the agency with decisionmaking authority” *and* those “whose acts or omissions in connection with the controversy could be ascribed to the agency.” However, the

prohibition is not determined to extend to communications with “nonmanagerial employees whose acts or omissions cannot be imputed” to the agency.

As to the second issue, the subcommittee hews closely to the staff opinion in determining that application of the rule is “not limited to matters in litigation and may extend to matters on which litigated has not yet commenced” and, in fact, goes on to explicitly state that this extension includes “specific transactional or non-litigation matters on which the agency’s attorney is providing representation.” The subcommittee acknowledges, though, that the seemingly vast scope of the rule falls short of preventing “direct communications with represented persons, including agency officials and others within an agency who are in managerial positions, on matters other than specific matters for which the agency attorney is providing representation are permissible” and that the scope of the rule is also limited in that “there must be actual knowledge by the non-agency attorney of representation by the agency attorney on the matter being discussed in order for Rule 4-4.2 to apply.”

As to the third and final issue, the subcommittee answers in the negative, finding that the relevant Comment indicates that it is not the intent of the rule to consider an agency represented in all matters just because it has general counsel so that all communications with managerial staff are prohibited. The subcommittee is compelled by the commentary’s recognition of the constitutional (First Amendment) right to petition one’s government and interprets that this right remains intact in the ability to communicate with agency officials and employees “on general matters that do not relate to those for which the State Agency’s general counsel is known to be providing direct representation.”

In sum, it states that:

. . . Rule 4-4.2, as clarified by its Comments, prohibits communications with agency officials and managers who are in a decision making position about the subject matter of a specific controversy or matter on which an attorney knows or has reason to know that a governmental attorney is providing representation unless the agency’s attorney consents to the communication. The rule does not prohibit an attorney from communicating with other agency employees who have no authority to bind the agency and whose actions or statements cannot be legally imputed to the agency, nor does it prohibit an attorney from communicating with agency decision makers on subjects unrelated to those controversies on which the agency attorney is providing representation.

The PEC is meeting in conjunction with the Bar’s midyear meeting this month and is expected to take action on its subcommittee’s proposed advisory opinion at that time. It is expected to publish a proposed advisory opinion and solicit for comment by Bar members for a period thereafter.

February 4 is the deadline for submitting items for publication in the ELULS Reporter, and therefore, the ELULS Executive Council must consider the recommendation to publicize the matter via the Reporter prior to the quarterly Executive Council meeting in February.