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REAL PROPERTY, PROBATE & TRUST LAW SECTION

THE FLORIDA BAR

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November 7, 2014

Via Email and U.S. Mail
Email: eto@flabar.org

Elizabeth C. Tarbert, Esq.
The Florida Bar
651 E. Jefferson Street
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Dear Ms. Tarbert:

Re: Proposed Amendment to Comment on Fla. Bar Rule 4-4.2 Regarding Communications with Governmental Agencies Represented By Counsel

Dear Ms. Tarbert:

The members of the Real Property, Probate & Trust Law Section of the Florida Bar (the "RPPTL Section") represent owners, buyers, sellers, lenders, developers, title agents and others involved in all facets of real property transactions. The RPPTL Section is the largest section of the Florida Bar, having over 10,000 members practicing in the areas of real estate, construction, probate, trust and estate law. Our members are dedicated to serving the public in these fields of practice. The RPPTL Section produces educational materials and seminars, assists the public *pro bono*, drafts legislation and rules of procedure, and occasionally offers advice to the judicial, legislative and executive branches to assist on issues related to our fields of practice.

Thus, the RPPTL Section, with a large number of members integrally involved in the process of seeking entitlements associated with the ownership, and at times, development of real estate across Florida, respectfully submits the following comments with regard to the proposed amendment to the Comment on Florida Bar Rule 4-4.2 regarding

communications with governmental agencies represented by counsel ("Proposed Amendment").[1]

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013) which interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. Without a lengthy discussion of the merits of the opinion rendered in *Tobin*, the decision was perceived by some practitioners as an extension of the independent justification exception to Rule 4-4.2, to a degree that the exception swallowed the rule. In response, however, an amendment is proposed which has the effect of overhauling the current landscape and would significantly limit the ability of a citizen represented by counsel to communicate and interact with elected and appointed officials, local and state agencies and all of their staff, in connection with matters before those governmental bodies or agencies. In addition the Proposed Amendment creates traps for the practitioner, tips the balance of communications in favor of those with greater resources, infringes upon the constitutionally protected right to petition government and proposes drawing lines that are confusing and impractical.

The Section recommends that the Proposed Amendment be rejected. An executive summary of our attached white paper follows.

The Independent Justification Exception

As currently drafted, the Comment to Rule 4-4.2 recognizes the special place in American jurisprudence protecting against and disfavoring barriers to communications between citizens and their government, by providing an independent justification exception from the Rule:

> Also, a lawyer having independent justification for communicating with the other party is permitted to do so. **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.**

(Emphasis added). Thus, a citizen who does not believe that he or she has the ability to communicate effectively with a governmental body or agency is not disadvantaged by retaining counsel as compared to an opposing party who either has confidence in his or her communication skills or has the resources to retain lobbyists and others (land planners, engineers, environmental consultants and the like) to communicate directly with a governmental body or agency.

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[1] The Section's response and recommendation analyzes what we understand to be the most recent version of the proposed changes to the Comment to Rule 4-4.2 submitted after the Board of Governor's July, 2014 meeting. In this regard, representatives of the RPPTL Section communicated our concerns to the City, County and Local Government Section, and while we were not able to reach agreement, the RPPTL Section appreciates the opportunity for professional dialogue with members from our fellow Section.

The Proposed Amendment

The version of the Proposed Amendment which is the basis of the Section's Comments is the following version which seeks to limit the independent justification exception by revising the Comment to provide as follows:

> This rule ~~Nor~~ does not ~~this rule~~ preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so as set forth in subdivision (a). Permitted communications include, for example, the right of a lawyer who is a party to a dispute ~~controversy~~ with a government agency to speak with government officials about the matter. This rule does not preclude routine communications with government officials on strictly procedural matters, or on general policy issues or other administrative matters that are not involving a legal matter, claim or threatened or pending litigation. Also in representing a client who has a dispute in a matter with a government agency, a lawyer may communicate with the elected officials who have authority over such agency and who are represented by a lawyer in the matter only under the following circumstances: 1) in writing, if a copy of the writing is contemporaneously delivered to the government attorney who represents said officials; 2) orally, upon adequate and meaningful prior notice to the government attorney who represents said officials; or 3) as part of a public hearing when an administrative or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9.

[strikethrough/underlined language represents the proposed revisions to the Comments.]

The Impact of the Proposed Amendment

The Proposed Amendment creates numerous substantive and procedural concerns, each of which provides a separate and independent justification for its rejection.

- The "independent justification" exception is limited without a full analysis.
- The Proposed Amendment does not acknowledge that in dealing with governmental bodies or agencies it is common to seek administrative, judicial and legislative remedies at the same time and access to other remedies may be limited by the Proposed Amendment.

- The Proposed Amendment does not balance the need to protect the attorney-client relationship with the rights of citizens (through their lawyers) to engage their elected and appointed officials and does not acknowledge Florida's open government system.
- A narrow interpretation of the Proposed Amendment could interfere with a represented party's ability to interact with governmental or agency staff on issues before they rise to the level of contention much less litigation.
- The Proposed Amendment is overkill to address the facts of one problematic case.
- The Proposed Amendment includes terms that are not adequately defined.
- Ultimately, the Proposed Amendment limits access to elected officials.

In addition, the Section believes the Proposed Amendment will have the following significant impacts:

Constitutionality. Modifying the Comments to the Rule will impede the normal interplay between citizens and the government, in which citizens (with and without legal representation) play an integral and fundamental role. Specifically, the Proposed Amendment paves the way for required government lawyer involvement in the daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. The legislative, regulatory and other executive branch/governmental functioning will be heavily "chilled" by inhibiting the free, efficient and normal discussion between a citizen participating in the process of "governing" (e.g., a zoning matter) and the governmental body or agency charged with oversight responsibility. Delay, expense and inefficiency will be unnecessarily introduced into a process that has worked and continues to work. And, most importantly, the Proposed Amendment casts an unduly large net by introducing an overlay of legal formality that substantially inhibits the right of Florida citizens to petition government and redress their grievances.

Fiscal Impact on State and Local Governments. The Proposed Amendment would have an immediate and substantial adverse fiscal impact, requiring governmental bodies and agencies to allocate significant resources to legal departments because seemingly every communication by a citizen's counsel to the governmental body or agency will, if nothing else but in caution, be routed through the governmental legal department. In addition to the direct personnel expenses, handling citizen communications and decision making will take immeasurably longer, further raising the cost. Moreover, it is highly likely that many compromises previously achieved as part of the normal give and take process that one encounters going through governmental proceedings will be thwarted by the Proposed Amendment, thereby increasing the chances of the need for subsequent litigation and the attendant costs for both the public and private sectors.

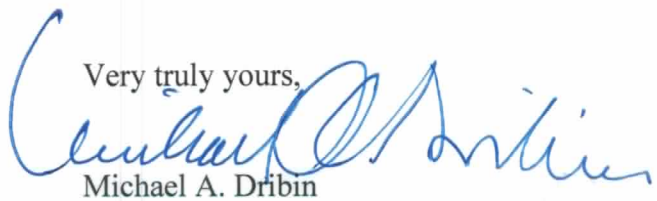
Direct Economic Impact on Private Sector. The Proposed Amendment and subsequent interpretation and application would have an adverse economic impact on the private sector, in that involvement of attorneys for the governmental bodies or agencies could extend the time needed to seek a remedy, thus causing the private sector to spend more money.

RPPTL Section Recommendation

The RPPTL Section recommends that the Proposed Amendment be rejected. While protecting government officials and employees from overreaching attorneys may be an important goal, the decision which is the basis of the Proposed Amendment is insufficient to warrant the proposed substantial and far reaching overhaul of the law in light of the practical, political and constitutional implications it raises. The old adage, "bad facts make bad law" comes to mind in this situation. If the Proposed Amendment is not rejected outright, other possible alternatives should be considered because the Proposed Amendment, as written, puts any client that is represented by legal counsel and does not have resources to retain lobbyists and other communicators at a significant disadvantage. At the very least, instead of approaching amendments to the Comments in a piecemeal fashion, a separate committee should be created to consider whether the Rule itself should be amended and/or whether amending and clarifying the Comments section in a holistic manner is more appropriate.

If you have questions or need additional information regarding these positions, please do not hesitate to contact me.

Very truly yours,



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REAL PROPERTY, PROBATE & TRUST LAW SECTION

WHITE PAPER
IN OPPOSITION TO
PROPOSED AMENDMENT TO COMMENT ON FLA. BAR RULE 4-4.2

(Regarding Communications With Governmental Agencies Represented By Counsel)

I. SUMMARY

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013) which interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. The stated justification for the Proposed Amendment is:

> ... a lawyer communicated directly with government officials, citing to the comment which states "Also, a lawyer having independent justification for communicating with the other party is permitted to do so. 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."

In summary, the Proposed Amendment would significantly limit the ability of a citizen represented by counsel to communicate and interact with elected and appointed officials local and state agencies and all of their staff, in connection with matters before those elected governmental bodies or agencies. The Proposed Amendment creates traps for the practitioner, tips the balance of communications in favor of those with greater resources, infringes upon the constitutionally protected right to petition government, and proposes drawing lines that are confusing and impractical.

II. CURRENT STATUS OF RULE

A. Rule 4-4.2 of the Florida Bar

Rule 4-4.2(a) of the Rules Regulating the Florida Bar provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by the court rule, statute or contract, and a copy shall be provided to the adverse party's attorney.

Undoubtedly recognizing the special place in American jurisprudence disfavoring barriers to communications between citizens and their government, - - twice encapsulated, at the start of the Bill of Rights (right "...to petition the Government for a redress of grievances." U.S. Const., Amend 1) and the Declaration of Rights (right "... to petition for redress of grievances." Fla. Const, §5), - - the Comment to this Rule which is the subject of the Proposed Amendment currently provides:

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

(Emphasis added). Thus, a citizen who does not believe that he or she has the ability to communicate effectively with an elected body or governmental agency is not disadvantaged by retaining counsel as compared to an opposing party who either has confidence in his or her communication skills or has the resources to retain lobbyists or other professionals (land planners, engineers, environmental consultants, etc.) to communicate directly with a governmental body or agency.

B. Opinions Interpreting/Applying the Rule

Four Florida Bar Ethics Opinions frame this discussion.

1. Florida Bar Ethics Opinion 78-4

Approaching the issue generally, in a corporate rather than governmental context, Opinion 78-4 made findings relative to when representation of a party commences, specifically whether litigation must have commenced, and who in the corporate structure is considered to be a party within the meaning of the Rule, finding:

a. representation of party commences whenever an attorney-client relationship has been established with regard to the matter in question, regardless of whether or not litigation has commenced. In the opinion of

the majority of the Committee, in the case of even an individual or corporation that has general counsel representing the individual or corporation in all legal matters, the DR would require communication on the matter to be with the party's attorney. and

b. in the opinion of the majority of the Committee, the rule will apply to officers, directors, or managing agents of the corporation but will not apply to other employees of the corporation unless they have been directly involved in the incident or matter giving rise to the investigation or litigation.

2. Florida Bar Ethics Opinion 87-2

Narrowing the issue, Opinion 87-2, discussed the Rule as applied to a government agency represented by counsel, finding:

> [w]hen the opposing party is a government agency represented by counsel, an attorney may not communicate concerning the matter with the agency's management or any other employee whose act or omission in connection with the matter may be imputed to the agency or whose statement may constitute an admission on the party of the agency, unless consent of the agency's counsel is obtained.

3. Florida Bar Ethics Opinion, 09-1

Further narrowing, and seeking to address thresholds, Opinion 09-1 interpreted the Rule, providing answers to three specific questions:

a. Are all persons within an organization represented by the organization's counsel for the purposes of the rule?

Consent is required before communicating with State Agency's officers, directors or managers, or employees who are directly involved in the matter, or with public officials or employees whose acts or omissions in connection with the matter can be imputed to State Agency.

b. When does the prohibition arise?

Rule 4-4.2 is not limited to matters in litigation and may extend to matters on which litigation has not yet commenced, as well as to specific transactional or non-litigation matters on which the agency's lawyer is providing representation. Pursuant to the language of the Comment, however, direct communications with represented persons, including protected employees, on matters other than specific matters for which the agency lawyer is providing representation are permissible.

c. Does general counsel effectively represent the agency on all matters, merely by virtue of being in the continuous employ of the agency, thus preventing all communications with the State Agency's public officials and employees on all subjects?

The Comments suggest that this is not the intent of the Rule. The Comments expressly recognize that lawyers with an "independent justification" may communicate with a represented party. The Rule does not prohibit a lawyer from communicating with other agency employees who do not fall within the above categories, nor does it prohibit a lawyer from communicating with employees who are considered represented by State Agency's lawyer for purposes of this rule on subjects unrelated to those matters in which the agency lawyer is actually known to be providing representation.

4. The Tobin Case

The Florida Bar v. Tobin, Florida Bar Case No. 70,451B. (October 21, 2013), involved a land use attorney seeking redress from a county government for a client and at the same time representing the client in a circuit court action against the county. Essentially, there were two forums in which Tobin was advocating for his client, both with overlapping subject matter. Tobin was alleged to violate the Rule when Tobin met with the County Commission and, because of the overlapping nature of the issues, some of the conversations that occurred pertained to the pending Circuit Court litigation.

Tobin clarifies the distinction made in Opinion 09-1 seeking to define thresholds for when communication is, or is not, appropriate, by example. Expressly differentiating litigation communications from other circumstances of traditional citizen redress or petitioning government, the Referee found no violation stating:

> Respondent's communications were **independently justified** as contemplated by the above referenced comment. The issues raised in Respondent's communications were squarely part of his efforts to convince county officials to grant his client administrative relief, or to reconsider previous action that was adverse to his client, and were, therefore, permitted communications. Even if some of his communications to county officials were also related to the subject matter of the lawsuit, **the Comment to Rule 4-4.2 permits the communication with a government agency if the communication is independently justified**.

The Florida Bar v. Tobin, Fla. Bar Case No. 70,451B. (Oct. 21, 2013). (Emphasis added).

The Referee continued, discussing Ethics Opinion 09-1 and expressly distinguishing *Tobin* from that Opinion, stating that:

> [t]he Florida Bar's reliance on Ethics Opinion 09-1, does not change the analysis or conclusions herein because the circumstances set forth in that Opinion are different than the matter at hand. In the context of representing a client in a local zoning dispute, as Respondent was doing here, attorneys may be required to participate in the formal or informal administrative arena (to gather information, to make a record and to exhaust administrative remedies), the quasi-judicial arena, and in litigation, all at the same time. **These are precisely the types of parallel proceedings that are squarely addressed in the Comment to Rule 4-4.2 and are not construed in Opinion 09-1.**"

(Emphasis added.) Thus, the Referee recognized the multi-faceted, and historically appropriate role of counsel directly communicating with a governmental agency, even when the agency is represented by counsel.

III. EFFECT OF PROPOSED CHANGES

A. The Proposed Amendment to Rule 4-4.2 Comment

The Proposed Amendment to the Comment in Florida Bar Rule 4-4.2 (regarding communications with persons represented by counsel), came about because of concern over *Tobin*, a disciplinary proceeding, and its interpretation of the **independent justification exception** provided in the Comments to the Rule. The current version of the Proposed Amendment seeks to limit the independent justification exception by separating existing paragraph 4 into two paragraphs and revising it to provide as follows:

> This rule ~~Nor~~ does not ~~this rule~~ preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this rule through the acts of another. See rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make, provided that the client is not used to indirectly violate the Rules of Professional Conduct. Also, a lawyer having independent justification for communicating with the other party is permitted to do so as set forth in subdivision (a). Permitted communications include, for example, the right of a lawyer who is a party to a dispute ~~controversy~~ with a government agency to speak with government officials about the matter. This rule does not preclude routine communications with government officials on strictly procedural matters, or on general policy issues or other administrative matters that are not involving a legal matter, claim or threatened or pending litigation. Also in representing a client who has a dispute in a matter with a government agency, a lawyer may communicate with the elected officials who have authority over such agency and who are represented by a lawyer in the

> matter only under the following circumstances: 1) in writing, if a copy of the writing is contemporaneously delivered to the government attorney who represents said officials; 2) orally, upon adequate and meaningful prior notice to the government attorney who represents said officials; or 3) as part of a public hearing when an administrative or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9.

[strikethrough/underlined language represents the proposed revisions to the Comments.][1]

B. Argument in Support

Proponents of the Proposed Amendment argue that the *Tobin* decision conflicts with certain provisions in Opinion 09-1, that *Tobin* effectively modified Opinion 09-1 and inappropriately extended the independent justification exception in the Rule. Proponents assert that Opinion 09-1 correctly applies Rule 4-4.2. Thus, the Proposed Amendment would codify that interpretation, limiting the independent justification exception as construed by the Referee, so that the exception does not swallow the rule:

> ...if such direct communications [as in Fla. Bar v. Tobin] with represented persons are allowed by the "independent justification" language from the Comment to Rule 4-4.2, there is no meaningful prohibition of direct contact. Within the context of represented government officials and employees, even direct questioning of those officials pertaining to matters in litigation without notice to the government counsel appears to be acceptable.

Florida Association of County Attorneys ("FACA") Letter Re: Rule 4-4.2 (February 20, 2014). FACA argues that the proposed amendment protects government clients from over-reaching attorneys who contact government employees in an attempt to influence ongoing litigation.

C. Argument in Opposition/Potential Issues Created by the Amendment

The Proposed Amendment does not recognize the distinction between an attorney representing a client before an elected body (i.e. city commission), appointed body (i.e. zoning board) or agency in matters such as a comprehensive plan amendment, rezoning request, site plan or other permit application, as opposed to an attorney representing a client in a clearly declared dispute. In fact, the Proposed Amendment muddies the distinction, making it less clear as to when an attorney may interact with governmental staff.

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[1] The Section's response and recommendation analyzes what we understand to be the most recent version of the proposed changes to the Comment to Rule 4-4.2 submitted after the Board of Governor's July, 2014 meeting. In this regard, representatives of the RPPTL Section communicated our concerns to the City, County and Local Government Section, and while we were not able to reach agreement, the RPPTL Section appreciates the opportunity for professional dialogue with members from our fellow Section.

While it is clear that the Rule applies to instances beyond litigation (*See* Ethics Opinion 87-2), when a governmental entity is involved, communications with elected and appointed officials should not be hampered. Moreover, it is in the context of these separate informational meetings with elected officials, which are then disclosed on the record in the public hearing as "ex parte communications" under the rule established in Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), that information is shared so that in the subsequent public meeting the elected officials can make informed decisions. Furthermore, it is these types of information exchanges that frequently allow compromises to be reached in the public hearings, thereby avoiding the need for judicial redress or continued litigation on another front. Finally, the loss of this access to elected officials and agency personnel by citizens represented by counsel would affect both proponents *and* opponents of the particular comprehensive plan, rezoning, site plan or other permit application.

The *Tobin* decision was fact specific, and expressly distinguished Opinion 09-1; therefore the current situation does not require an amendment to the Comments.

D. Constitutional Overtones

Modifying the Rule will impede the normal interplay between citizens and their government in which citizens (with and without representation) play an integral and fundamental role. Specifically, the Proposed Amendment paves the way for required government lawyer involvement in the daily non-judicial dialogue and resolution of administrative, regulatory and related governmental matters. The legislative, regulatory and other executive branch/governmental functioning will be heavily "chilled" by inhibiting the free, efficient and normal discussion between a citizen participating in the process of "governing" (e.g., a zoning matter) and the governmental body or agency charged with oversight responsibility. Delay, expense and inefficiency will be unnecessarily introduced into a process that has worked and continues to work. And, most importantly, the Proposed Amendment casts an unduly large net by introducing an overlay of legal formality that substantially inhibits the right of Florida citizens to petition government and redress their grievances.

1. Florida's Constitutional Framework

a. Article 1, Section 5: Right to Assemble. "The people shall have the right to peaceably assemble, to instruct their representatives and to petition for redress of grievances."

b. Article 1, Section 24: Access to Public Records and Meetings.

"(a.) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of

government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

(b.) All meetings of any collegial public body of the executive branch of state government or of any collegial public body of a county, municipality, school district, or special district, at which official acts are to be taken or at which public business of such body is to be transacted or discussed, shall be open and noticed to the public and meetings of the legislature shall be open and noticed as provided in Article III, Section 4(e), except with respect to meetings exempted pursuant to this section or specifically closed by this Constitution."

2. Federal Constitutional Provisions

a. First Amendment

"Congress shall make no law . . . .prohibiting . . . or inhibiting the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

The provisions of the First Amendment concerning redress of grievances have been applied to the states under the Fourteenth amendment. *DeJonge v. Oregon*, 299 U.S. 242 (1937). From its original parameters, the right to redress grievances and to "petition" has been expanded to include the "approach of citizens or groups of them to administrative agencies. . . and to courts . . . Certainly the right to petition extends to all departments of the Government. . ." *Eastern R.R. Presidents Conference v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). See, *NAACP v. Claiborne Hardware, Co.*, 458 U.S.886, 913-15 (1982). Later cases have seemingly merged the rights to petition government and redress grievances with the rights of assembly, speech and press, thereby heightening their constitutional import even more. By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the Proposed Amendment threatens interference with the most fundamental of citizens' rights, guaranteed by both the Federal and Florida Constitutions and dating back to Magna Carta (1215). See, C. Stephenson & F. Marcham, *Sources of English Constitutional History* 125 (1937). Certainly, less restrictive alternatives abound to address any perceived or actual concerns.

E. Summary of Issues and Concerns

In summary, the Proposed Amendment creates numerous substantive and procedural concerns that militate towards rejection:

- The "independent justification" provision is limited without a full analysis.
- Access to an administrative remedy that does not involve a public hearing may be limited by the Proposed Amendment (for the above-stated reasons).
- The Proposed Amendment does not acknowledge that in dealing with governmental agencies it is common to seek administrative, judicial and legislative remedies all at the same time.
- The Proposed Amendment does not balance the need to protect the attorney-client relationship with the rights of citizens (through their lawyers) to engage their elected and appointed officials and does not acknowledge Florida's open government system.
- A narrow interpretation of the Proposed Amendment could interfere with a represented party's ability to interact with agency staff on issues before they arise to the level of litigation.
- If the Proposed Amendment is adopted, what rules apply when an attorney is acting as a registered lobbyist before the governmental body or agency?
- The Proposed Amendment is overkill to address the facts of one problematic case.
- The Proposed Amendment includes terms that are not adequately defined.
- The Proposed Amendment limits access to elected officials.

IV. RECOMMENDATIONS

- The Proposed Amendment should be rejected. While protecting government officials and employees from overreaching attorneys may be an important goal, the decision which is the basis of the Proposed Amendment is insufficient to warrant the substantial and far reaching overhaul of the law in light of the practical, political and constitutional implications it raises. The old adage "bad facts make bad law" comes to mind in this situation.
- If the Proposed Amendment is not rejected outright, other possible alternatives should be considered because the Proposed Amendment, as written, puts any client that is represented by legal counsel and does not have resources to retain lobbyists and other communicators at a significant disadvantage.
- At the very least, instead of approaching amendments to the Comments in a piecemeal fashion, a separate committee should be created to consider whether the Rule itself should be amended and/or whether amending and clarifying the Comments section in a holistic manner is more appropriate.

V. FISCAL IMPACT ON STATE AND LOCAL GOVERNMENTS

The Proposed Amendment would have an immediate and substantial adverse fiscal impact, requiring governmental bodies and agencies to allocate significant resources to legal departments because seemingly every communication by a citizen's counsel to the governmental body or agency will, if nothing else but in caution, be routed through the agencies legal department. In addition to the direct personnel expenses, handling citizen communications and decision making will take immeasurably longer, further raising the cost. Moreover, it is highly likely that many compromises previously achieved as part of the normal give and take process that one encounters going through governmental proceedings will be thwarted by the Proposed Amendment, thereby increasing the chances of the need for subsequent litigation and the attendant costs for both the public and private sectors.

VI. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR

The Proposed Amendment and subsequent interpretation and application would have an adverse economic impact on the private sector, in that involvement of attorneys for the governmental bodies and agencies could extend the time needed to seek a remedy, thus causing the private sector to spend more money.

VII. CONSTITUTIONAL ISSUES

By chilling or burdening free government access with unnecessary formality in areas of everyday regulation, discussion and resolution, the proposed amendments to Rule 4-4.2 threaten interference with the most fundamental of citizens' rights, guaranteed by both the Federal and Florida Constitutions.

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