

**THE FLORIDA BAR BUSINESS LAW SECTION
TWO AGENDAS:**

**MEETING OF THE SECTION & SUMMER EXECUTIVE COUNCIL MEETING
Boca Raton Resort, Addison Ballroom East/West**

Thursday, June 25, 2015
3:30 p.m. – 6:00 p.m.

ANNUAL MEETING OF THE SECTION FOR ELECTION OF OFFICERS

AGENDA

- I. Call to Order – Bill Van Nortwick, *Business Law Section Chair*
- II. Report of the Nominating Committee
- III. Election of the 2015-2016 Chair-Elect and Secretary/Treasurer
- IV. Announcement of new Officers effective as of July 1, 2015
- V. Adjournment of the Annual Meeting

SUMMER MEETING OF THE SECTION'S EXECUTIVE COUNCIL

AGENDA

- I. **Call to Order, Introductions by Council Members, and Recognition of Any Guests**
– Bill Van Nortwick, Chair
- II. **Approval of Minutes** – Jon Polenberg, Secretary – Treasurer
 - A. Minutes from January 21, 2015 Executive Council Meeting (Exhibit "A")
 - B. Minutes of Special Executive Council Meeting on March 27, 2015 (Exhibit "B")
- III. **Budget Committee Report** – Jon Polenberg, Secretary – Treasurer (Exhibit "C")
- IV. **Presentation of Awards** – Bill Van Nortwick, Chair
- V. **Matters Requiring Executive Council Vote or Consideration**
 - A. Report of Legislation Committee – Melanie Damian, Chair

- B. Report of Task Force on Proposed Amendments to Rule 4-4.2, Rules Regulating the Florida Bar– Manny Farach, Chair (Exhibit "D")
- C. Report on New Website by Communications Committee – Kacy Donlon, Chair
- D. Report of FICPA Task Force – Don Workman, Chair

VI. Reports of Special Committees and Task Forces

- A. Chapter 607 Sub-Committee – Alan Aronson, Phil Schwartz, and Gary Teblum, Co-Chairs
- B. Employee-Hacker Legis. Task Force – Robert Kain, Chair
- C. Proceedings Supplementary Task Force – Barbara Riesberg, Chair
- D. Strategic Planning Task Force – Steph Nagin, Chair
- E. Marketing and Sponsorships Task Force – Michael Chesal, Chair
- F. By-Law Revisions Task Force – Phil Schwartz, Chair

VII. Committee Reports

- A. Bankruptcy/UCC – Cori Lopez-Castro, Chair/Hon. Cathy McEwen, Jud. Chair
- B. Bankruptcy/Judicial Liaison – Robert P. Charbonneau, Chair/Hon. Paul Hyman, Jud. Chair
- C. Business Litigation – Jude Cooper, Chair/Hon. Ed LaRose, Jud. Chair
- D. Communications – Kacy Donlon, Chair
- E. Social Media Sub-Committee – Paige Greenlee, Chair
- F. Computer & Technology Law – Larry Kunin, Chair
- G. Continuing Legal Education – Mark Nichols, Chair
- H. Corporations, Securities & Financial Services – Stefan Rubin, Chair
- I. eDiscovery Committee – Doug Cherry, Chair; Steve Teppler, Vice-Chair
- J. Inclusion/Mentoring/Fellowships – Leyza Blanco, Chair/Hon. John Olson/Hon. Gill Freeman, Co-Judicial Chairs

- K. Intellectual Property – Dineen Wasyluk, Chair
- L. Legislation – Melanie Damian, Chair/Aimee Diaz Lyon & Greg Black, Legislative Consultants
- M. Long Range Planning – Greg Yadley, Chair/Hon. Michael G. Williamson, Jud. Chair
- N. Membership & Law School Relations – Peter Valori, Chair
- O. Pro Bono – Jennifer Morando, Chair/Hon. Laurel Isicoff, Jud. Chair
- P. Labor Day Weekend Retreat & Sponsorships – Jodi Cooke, Chair
- Q. State/Federal Courts Judicial Liaison – Russell Landy, Chair/Hon. Gill Freeman, Jud. Chair
- R. Third Party Opinion Standards Committee – Robert Barron, Chair

VIII. Other Reports

- A. Historian/Parliamentarian – Phil Schwartz
- B. Council of Sections – Alan Howard
- C. TFB CLE Committee – Ryon McCabe
- D. Board of Governors – Michael Higer
- E. RPPTL Liaison – Jamie Marx/Marsha Rydberg
- F. Tax Liaison – Nick Lioce
- G. Liaison to Out-of-State Practitioners – Donald Workman
- H. Young Lawyers Division Liaison – Andrew Jenkins/Christian George
- I. Chair – Bill Van Nortwick
- J. Chair-Elect – Alan Howard

IX. Future Meeting Dates

- A. Labor Day Retreat – September 4-7, 2015 – Ritz Carlton, Naples, Florida
- B. Winter Mid-Year Meeting – January 27-30, 2016 - Hilton Orlando

X. Motion to Adjourn.

EXHIBIT A

**MINUTES OF THE MEETING
OF THE EXECUTIVE COUNCIL OF THE
BUSINESS LAW SECTION OF THE FLORIDA
BAR**

**JANUARY 22, 2015
THE ROSEN SHINGLE CREEK RESORT,
ORLANDO FLORIDA**

The winter meeting of the Executive Council of the Business Law Section (“BLS” or “Section”) of The Florida Bar was called to order by the Honorable William Van Nortwick, Chair, at 9:00 a.m.

I. QUORUM

As the first order of business, as is the Section’s tradition and regular practice, the Chair requested that everyone present sign the “Attendance List” to confirm that a quorum was present for the transaction of business. (Accompanying these minutes as Exhibit A is the Attendance Sheet.)

II. APPROVAL OF MINUTES

Mr. Polenberg presented the minutes of the September 1, 2014 fall retreat meeting of the Section held at the Ritz Carton Beach Resort, Naples, Florida, which were attached as Exhibit A to the agenda. Upon motion duly made and seconded, the minutes of the September 1, 2014 fall retreat meeting were unanimously approved.

III. TREASURER’S REPORT

Mr. Polenberg presented the Treasurer’s Report for the Section, and reported the Section was on track to exceed its budgeted revenue budget for the Bar year 2014-2015, but the expense reporting lagged so it would be difficult to project actual versus budget on the net results. Ms. Wasylik moved to approve the financial report, and Mr. Gart seconded the motion. The Executive Council unanimously approved the financial report. Next Mr. Polenberg reported on the draft budget for Bar year 2015-2016, as appended to the agenda as Exhibit B, which Melanie Damian moved to approve. Lou Conti seconded the motion. The Executive Council unanimously approved the 2015-2016 budget.

IV. MATTERS REQUIRING EXECUTIVE COUNCIL VOTE OR CONSIDERATION

**A. LEGISLATIVE COMMITTEE REPORT:
Melanie Damian, Chair**

The Chair recognized Melanie Damian, chair of the Legislation Committee. Ms. Damian reported the legislative session for 2015 has started with Committee hearings. The Section is the proponent for CADRA, an LLC Glitch Bill, and a Financial Literacy bill that creates a

requirement for students to complete a course in financial literacy to be eligible for high school graduation.

Ms. Damian thanked the substantive Committees for reviewing the standing legislative positions, and explained the Corporations, Securities, and Financial Services Committee was concerned with a crowd funding bill filed with the legislature, and will seek to provide technical support; no triple motion was necessary at this time. Thereupon, Ms. Damian made the following **triple motion**:

Supports an amendment to Uniform Commercial Code, Article 4A, section 108, as drafted by the National Conference of Commissioners on uniform State Laws.

Mr. Conti explained the revisions to the UCC 4A-108 as amending 2 sentences to make clear that wire transfers remain governed by federal law. Mr. Conti further explained that the Bankruptcy/UCC Committee approved supporting the amendment. Thereupon, Mr. Conti seconded the motion. The Executive Council unanimously approved supporting the amendment to UCC 4A-108.

B. BYLAWS REVISIONS TASK FORCE

Phil Schwartz, Chair

Phil Schwartz discussed the proposed revisions to the Section's bylaws as proposed by the Task Force. Mr. Schwartz explained that the task force had received several comments to the exposure draft, which caused it to slow down the process. The overall objective for the task force is to address the bylaws so that they reflect the way the Section conducts its business, but also address some changes intended put in place some best practices benchmarked from other sections. But in reflecting on the comments, and the purpose for revising the bylaws, the Task Force determined it need to step back and take a closer look at the changes. Mr. Schwartz closed by stating the fact the bylaws revisions are not complete and should not affect the Section's operations.

C. FLORIDA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS

Non-Agenda Item Brought before the Executive Committee

Chair Van Nortwick

The Chair recognized Jay Brown, who volunteered to address the renewed interest by the FICPA has taken in affiliating with the Business Law Section. Jay Brown presented to the Council on the subject of renewing relations with the Florida Institute of Certified Public Accountants (FICPA). Mr. Brown started that Brad Gould, a lawyer at Dean Mead and on FICPA's board of governors, indicated he spoke to Deborah Curry, the new FICPA Executive Director on a renewed relationship with BLS. Mr. Gould advised Mr. Brown the FICPA has expressed interest in possible joint CLE/CPE programs and social events as well as communicating and cooperating on legislative issues.

Mr. Brown suggested the Executive Council appoint an exploratory Committee consisting

of Don Workman, Joan Bullock, John Hutton, and Felipe Guerrero, each of whom had expressed interest in serving on such a Committee. Additionally, Gary Teblum stated he would try to identify a member of the Corporations, Securities and Financial Services Committee to be included in the exploratory Committee.

Lou Conti explained BLS's experience with its previous efforts to create a FICPA relationship. Phil Schwartz and Rick Gross agreed with Mr. Conti. Brian Gart explained the funds BLS expended for joint events only to have the FICPA not participate. Robert Brighton explained the relationship is worth exploring with an eye toward different goals for each organization.

The general consensus was that Diane Wells, who chaired the Committee charged with developing the FICPA relationship, had an enthusiastic and proactive approach in leading the BLS attempt. The Executive Committee approved cautiously exploring an expanded relationship with the FICPA.

D. MID-YEAR MEETING CONFLICT WITH THE FLORIDA BAR

Non-Agenda Item Brought before the Executive Committee
Chair-elect Howard

Alan Howard presented the issue involving the challenge to finding a location (i.e., hotel and meeting rooms) for BLS members at The Florida Bar Mid-Year meeting. The issue is that the Bar entered into a multi-year contract for lodging and meeting rooms, but it did not include BLS. Therefore, the location for the 2016 mid-year meeting remained undecided at this time.

The Honorable Paul Hyman reported that the Bankruptcy Judicial Liaison Committee discussed regional attendance issues, and the Committee expressed its preference to switch locations based on where BLS conducts its Annual Meeting. Cori Lopez Castro agreed with Judge Hyman regarding the attendance issues associated with the location for the BLS meetings.

Michael Higer asked the Executive Council whether the location was a big issue.

Rick Gross stated that for identifying the location for the BLS mid-year meeting, it should consider Wednesday as the main meeting day because it seemed to be better availability for hotel rooms and meeting space because many attendees would arrive on Tuesday.

Lou Conti reminded the Executive Council members that BLS had eliminated the mid-year meeting during the years The Florida Bar had eliminated its mid-year meeting.

Mr. Howard called a "straw poll" asking the Executive Councilmembers their preference about meeting at the same time and location as The Florida Bar mid-year meeting: 15 members expressed a desire to meet with the Bar; 7 members expressed a desire to meet without the Bar; and 12 members expressed no preference.

E. JOINT RETREAT WITH THE INTERNATIONAL LAW SECTION

Non-Agenda Item Brought before the Executive Committee
Jodi Cooke

Jodi Cooke brought to the attention of the Executive Council that the International Law Section was interested in joining the BLS Retreat. Jon Polenberg discussed his attendance at the fall meeting ILS conducted in Boca Raton to explore a joint retreat. One of the key factors in deciding how to address this issue is the fact many active ILS members are also BLS members, and therefore, they would be able to attend the fall retreat as BLS members. The Executive Council also discussed the fact BLS would not be able to restrict any of the Florida Bar members from attending the fall retreat. But the Executive Council discussion identified three topic that BLS had to resolve in order to protect BLS's signature event: Branding, Planning, and Sponsorship. The key issue underlying each of these issues is funding the fall retreat because BLS invests significant time, effort, and resources to keep the fall retreat as a financially reasonable endeavor as it typically losses money or breaks even.

Jim Murphy moved to proceed with a joint fall retreat with ILS for a one year trial, and Lori Vaughn seconded. The Executive Council unanimously approved the one year trial.

V. REPORTS OF SPECIAL COMMITTEES AND TASK FORCES

A. CHAPTER 607 SUB-COMMITTEE

Alan Aronson, Phil Schwartz, and Gary Teblum, Co-Chairs

Gary Teblum reported the Committee is conducting meetings every 2 weeks. Mr. Teblum stated he is not sure whether there will be draft legislation for the 2016 legislative year. The Committee is starting to work through complicated articles.

B. EMPLOYEE HACKER LEGISLATION TASK FORCE

Robert Kain, Chair

Robert Kain reported CADRA has its sponsors, and they filed the bill in the Florida Legislature.

C. PROCEEDINGS SUPPLEMENTARY TASK FORCE

Barbara Riesberg, Chair

Barbara Riesberg reported there remain several issues with proceeding supplementary. In order to make the 2016 legislative session, the Committee is going to have to narrow the issues it will address. The Committee is working with Senator Simmons. There is a new issue involving third party due process rights. Despite the complications, the goal is to bring to the Executive Council a bill by the June meeting.

D. STRATEGIC PLANNING TASK FORCE

Steph Nagin, Chair

No Report.

E. SPONSORSHIP TASK FORCE
Michael Chesal, Chair

Michael Chesal reported the Committee has met a couple of times, and it is looking for vendors to sponsor at the highest levels.

F. PROFESSIONAL RULE OF CONDUCT 4-4.2
Manny Farach, Chair

Manny Farach was unable to attend the meeting, but Chair Van Nortwick reported that the new Special Committee is addressing the concerns Florida Bar President Coleman has discussed involving the proposed changes to Rule 4-4.2 that attempts to address attorney contact directly with government employees rather than through counsel. This issue is in the initial phase, and the Executive Council should receive additional information in the future as the Committee completes its work.

VI. STANDING COMMITTEE REPORTS

A. BANKRUPTCY/UCC
Cori Lopez Castro, Chair

Ms. Castro reported the meeting was well attended. The Committee filed 3 amicus briefs, and Ms. Castro thanked Paul Hill who had been very supportive during the process. The Committee formed a task force with the Real Property, Probate, and Trust Law Section regarding proposed changes to Florida's Fraudulent Transfer Act. Ms. Castro also reported the Committee is presenting a program in Tampa on evidence with participation from the Business Litigation Committee.

B. BANKRUPTCY/JUDICIAL LIAISON COMMITTEE
The Honorable Paul Hyman, Chair

Judge Hyman reported of the several topics discussed by the Committee, there were the Committee wanted to underscore: the mortgage modification/mediation process, and the mid-year meeting.

C. BUSINESS LITIGATION COMMITTEE
Jude Cooper, Chair

Mr. Cooper reported the Committee discussed CADRA and Representative Passidomo's Business Identity Theft legislation. The Committee formed a subcommittee to put together CLEs, and a rapid response team for legislative matters. Mr. Cooper reported that Committee discussed the possibility that Broward County could close its Complex Litigation Division.

D. COMMUNICATIONS COMMITTEE
Kacy Donlon, Chair

E. SOCIAL MEDIA
Paige Greenlee, Chair

Ms. Donlon gave the report for the Committee and the Social Media Committee. Ms. Donlon reported the BLS website is approved, and she will attend the build meeting with the design company. There should be a beta website within the next 6-8 weeks. Ms. Donlon stated that she is working with the committee chairs, but if she does not get a response, that committee page will be blank. Ms. Donlon asked that each Committee appoint a liaison to provide content and to inform the Committee about upcoming events to post on BLS social media outlets as well as its website. Ms. Donlon reported she met with the Membership Committee because of the crossover involved with social media and the website. Chair Van Nortwick asked for the CLE Committee and Membership Committee to work closely with the Communications Committee to get content placed on social media and the website.

F. COMPUTER LAW COMMITTEE
Larry Kunin, Chair

Mr. Kunin reported the Florida Legislature has filed more bills involving computer and technology this session that the Committee expected. The Committee is analyzing SB 126 concerning employees' obligation to provide their social media and other internet passwords, HB 271 requiring any publication or transmission of music to include the website and owner's information, and HB 157 concerning business identity theft and cross references to the criminal statutes.

G. CONTINUING LEGAL EDUCATION COMMITTEE
Mark Nichols, Chair

Mr. Nichols reported the Committee is continuing its work to marshal Florida Bar Journal articles, and looking for members to present lunch time CLEs. Mr. Nichols warned the members that he has been asked to become more assertive in asking for the Committees to present CLEs, and work through the Committee.

H. CORPORATIONS, SECURITIES AND FINANCIAL SERVICES COMMITTEE
Stefan Rubin, Chair

Mr. Rubin reported the Committee spent the majority of its time discussing the Crowd Funding Bill, and its overlap with securities law. The Committee take the position that the federal Securities and Exchange Commission must first move on crowd funding before the states. The Committee also discussed the LLC glitch bill.

I. E-DISCOVERY COMMITTEE
Steve Teplar, Chair

Mr. Kunin delivered the report. Twelve people attended the meeting. The Committee is seeking more exposure. The Committee is working on education and preparing a protocol for e-

discovery. The committee is planning a half day CLE for the annual meeting involving the topic, the Internet of things.

J. INCLUSION/MENTORING FELLOWSHIPS COMMITTEE
Leyza Blanco, Chair

Ms. Blanco reported the Committee meeting was well attended and had enthusiastic discussion, but reminded the substantive Committee chairs that it was their responsibility to appoint a member to represent that Committee in the Inclusion/Mentoring Fellowships Committee. The Committee has begun its selection of the new fellows by reviewing 20 applications. The Committee is sponsoring and participating in the Hillsborough County minority mentoring event, and Judge McEwen is this year's chair of that event. The Committee is also involved with a trial skills seminar in Orlando put together by the Honorable Alice Blackwell. Ms. Blanco has asked for NITA certified members to attend the event. Ms. Blanco reported that the Executive Council members needed to devote their time and energy to make these events a success.

K. INTELLECTUAL PROPERTY COMMITTEE
Dineen Wasylik, Chair

Ms. Wasylik reported that the Committee has been addressing many legislative issues, and dittoed what Mr. Kunin reported. Ms. Wasylik reported the Committee is putting on the 6th Annual Symposium in Fort Lauderdale. The keynote speaker will be Ron Firestien the producer of "Kinky Boots." The Committee is starting its campaign to advertise the symposium.

L. LEGISLATIVE COMMITTEE
Melanie Damian, Chair

No additional report.

M. LONG RANGE PLANNING COMMITTEE
Greg Yadley, Chair

No Report.

N. MEMBERSHIP & LAW SCHOOL COMMITTEE
Peter Valori, Chair

Mr. Valori reported the Committee needs members to volunteer as law school liaisons. These liaisons would contact their local law school student bar associations. The Committee is ready to post the testimonials on the website. The next BLS happy hour is set for Brickell Avenue in Miami. The Committee is asking the substantive committees if they need law students to help with projects, as that has proven in the past to be a successful way to get them involved with the section.

O. PRO BONO COMMITTEE

Jennifer Morando, Chair

Mark Stein delivered the report for the Committee. Mr. Stein reported that John Kozak has been recognized for his pro bono participation by receiving the Tobias Simon Pro Bono Service Award. Mr. Stein recommended BLS issue a proclamation recognizing Mr. Kozak's accomplishment. Brian Gart moved that request be adopted by the Executive Council, and Mr. Stein seconded. The Executive Council unanimously approved the motion.

Mr. Stein also reported October 21 through 25 was pro bono week.

Mr. Stein also reported the work the Committee is doing to further pro bono for BLS members. The Florida Bar Foundation is seeking help with its access to justice initiative, which requires technology and computers. There may be a role for BLS to play in that effort. The Committee is also expanding a "tear sheet" program initiated by the Southern District of Florida Bankruptcy Court, which posted pro bono service opportunities outside the courtrooms for people to tear off. The Committee is also continuing its nonprofit workshops.

P. RETREAT COMMITTEE

Jodi Cooke, Chair

Lori Vaughn delivered the report for the Committee. Planning for the 2016 retreat has begun in earnest. The Committee members are working to secure sponsors, and ask the members to consider vendors they use as potential sponsors for the event. The Committee has also set a goal to send out the registrations early this year.

Q. STATE/FEDERAL COURTS LIAISON

Russell Landy, Chair

No further report.

R. THIRD PARTY OPINION STANDARDS COMMITTEE

Robert Barton, Chair

Phil Schwartz delivered the report of the Committee, and reported the Committee is working on a supplement to the report issued in 2011. The changes will include among other items, the changes to trusts and LLCs. The update is important because it serves as a practice guide.

VII. OTHER REPORTS

**A. HISTORIAN/PARLIAMENTARIAN
Phil Schwartz**

No Report

**B. COUNCIL OF SECTIONS REPORT
Alan Howard**

No report

**C. THE FLORIDA BAR CLE COMMITTEE REPORT
Ryon McCabe**

No report

**D. THE FLORIDA BAR BOARD OF GOVERNORS' REPORT
Michael Higer**

No report

**E. RPPTL LIAISON REPORT
Marsha Rydberg, Jamie Marx**

Mr. Marx reported there is a seminar being put on by the RPPTLS regarding the impact Dodd-Frank is having on seller financing for lending institutions. Mr. Marx also stated he would ask the RPPTLS to have 2 members get involved with the Proceedings Supplementary Task Force.

**F. OUT OF STATE DIVISION REPORT
Donald Workman**

No report

**G. TAX LIAISON REPORT
Nick Lioce**

No report

**H. YOUNG LAWYERS DIVISION LIAISON REPORT
Andrew Jenkins**

No report

I. CHAIR'S REPORT

The Honorable William Van Nortwick explained plans for the 2015 Spring Retreat in

Venice Italy are underway, and the registration fee is estimated to be \$600.00. The dates for the Spring Retreat are March 25, 2015 through March 29, 2015. The group events will start on Thursday. Because there are no motor vehicles in Venice, those who will attend should bring good walking shoes. Judge Van Nortwick is in the process of organizing interesting tours through the historic sites in Venice.

J. CHAIR-ELECT'S REPORT

Mr. Howard reported that JoAnn will be out on maternity leave. Mr. Howard also asked for the Committee chairs to provide him with suggestions for successors.

VIII. ADJOURNMENT

Motion to adjourn was duly seconded, and unanimously approved.

/S/ Jon Polenberg
Jon Polenberg
Secretary

EXHIBIT B

**MINUTES OF THE SPECIAL MEETING
OF THE EXECUTIVE COUNCIL OF THE
BUSINESS LAW SECTION OF THE FLORIDA BAR**

**THURSDAY, MARCH 26, 2015
HOTEL MONACO & GRAND CANAL, VENICE, ITALY**

The Special Meeting of the Executive Council ("EC") of the Business Law Section ("BLS") of The Florida Bar was called to order by William A. Van Nortwick, Jr., Chair of the BLS, at 5:30 p.m.

I. QUORUM

As is the BLS's regular practice, the Chair requested that everyone present sign the "Attendance List" to confirm that a quorum was present for the transaction of business.

II. CHAIR'S REPORT

The Chair began the meeting with an overview of the EC's Spring Retreat schedule and upcoming activities in Venice. The Chair also provided a report regarding the potential agenda for the BLS meetings at The Florida Bar's Annual Meeting in June of 2015 in Boca Raton.

III. LEGISLATIVE REPORT

The Chair called on Melanie Damian, Chair of the Legislative Committee, to provide an update of the status of the Florida Legislative Session generally and to lead a discussion concerning the bills of interest to the BLS. Ms. Damian discussed the status of the following legislation:

Court Funding/Budget – The EC members discussed judicial salaries and status of court funding.

CADRA (SB 222 and HB 175) – The EC discussed the status of the BLS's proposed legislation.

Proposed Revisions to LLC Act – The EC discussed at length certain issues concerning SB 554 and ongoing negotiations relating to legislators concerns and comments concerning certain fiduciary duties.

Financial Literacy – The EC discussed working with a coalition of partners on education requirements and a potential pilot project focusing on financial literacy.

Business Identity Theft – The EC discussed the proposed legislation concerning business identity theft and providing technical assistance to legislative staff regarding same.

Crowd Funding – The EC discussed proposed legislation concerning Crowd Funding. No technical advice has been provided regarding the proposed legislation.

Continuing Care Communities – The EC discussed proposed legislation regarding bankruptcy priority of Continuing care communities and members and providing technical advice to legislative staff regarding the proposed legislation.

International Banking Corporations – The EC discussed concerns regarding proposed legislation by the Florida International Banking Association that would allow an international bank to avoid production of its books and records in Florida if such books and records are maintained outside of the United States. The EC discussed potentially taking a formal position against the proposed legislation.

A lengthy discussion ensued among the EC regarding this legislative session, the issues above, and potential BLS initiatives for the next legislative session. No votes were taken.

IV. **ADJOURNMENT**

A motion to adjourn was duly seconded and unanimously approved at 6:25 p.m.

EXHIBIT C



THE FLORIDA BAR

BUSINESS LAW SECTION

MAY 2015 FINANCIAL STATEMENT

YEAR TO DATE OVERVIEW

REVENUE:	\$662,996
EXPENSES:	\$555,701
NET:	\$107,295
BEGINNING FUND BALANCE:	\$437,838
TOTAL CURRENT FUND BALANCE:	\$545,133

TOTAL CURRENT MEMBERSHIP: 5464

	May 2015 Actuals	YTD 14-15 Actuals	Budget	Percent Budget
Total Business Law =====				
31431 Sect Dues	165	257,070	253,000	101.61
31432 Affil Dues	190	2,160	2,500	86.40
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Total Dues Income Net	355	259,230	255,500	101.46
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32010 Legal Span On-line	0	100	0	*
32191 CLE Courses	6,717	117,509	70,000	167.87
32293 Sect Differential	55	18,535	13,750	134.80
35003 Ticket Events	0	44,806	3,000	1,493.53
35201 Sponsorships	-7,500	118,500	115,000	103.04
35601 Bankruptcy Judge Rec	0	0	2,500	0.00
35604 Sect Registration	0	95,783	100,000	95.78
35606 Judl Liaison Dinner	3,736	3,736	30,000	12.45
38499 Investment Alloc	-1,733	4,797	12,679	37.83
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Other Income	1,275	403,766	346,929	116.38
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Total Revenues	1,630	662,996	602,429	110.05
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36998 Credit Card Fees	59	3,061	2,900	105.55
51101 Employee Travel	0	8,021	6,371	125.90
61201 Equip Rental	0	23,113	15,000	154.09
71001 Phone/Direct	0	610	760	80.26
71005 Internet Charges	0	54	700	7.71
81410 Promo Items	0	5,067	0	*
81411 Promo Printing	0	0	500	0.00
84001 Postage	153	577	1,400	41.21
84002 Printing	0	714	1,850	38.59
84007 Membership	0	-672	4,500	-14.93
84009 Supplies	203	256	600	42.67
84010 Photocopying	10	34	450	7.56
84040 Judges Trav Annl Mtg	0	0	8,000	0.00
84041 Judges Trav Napl Ret	0	18,734	40,000	46.84
84042 Judges Trav Sprg Ret	5,453	16,098	15,000	107.32
84043 Judges Trav Fall Mtg	0	5,363	5,000	107.26
84044 Judl Liaison Dinner	0	5,513	30,000	18.38
84052 Mtg Travel Exp	0	1,302	8,000	16.28
84054 CLE Speaker Exp	1,728	3,360	2,000	168.00
84061 Reception	0	22,590	45,000	50.20
84062 Luncheons	0	9,750	8,000	121.88
84063 Family Dinner	0	116,913	100,000	116.91
84101 Committee Exp	24	2,187	10,000	21.87
84107 Diversity Initiative	1,173	8,205	25,000	32.82
84201 Board Or Council Mtg	747	42,104	40,000	105.26
84202 Annual Mtg	0	-9	12,000	-0.08
84204 Midyear Mtg	0	25,338	10,000	253.38
84216 Strategic Planning	0	0	2,000	0.00
84237 Entertainment Exp	0	16,048	20,000	80.24

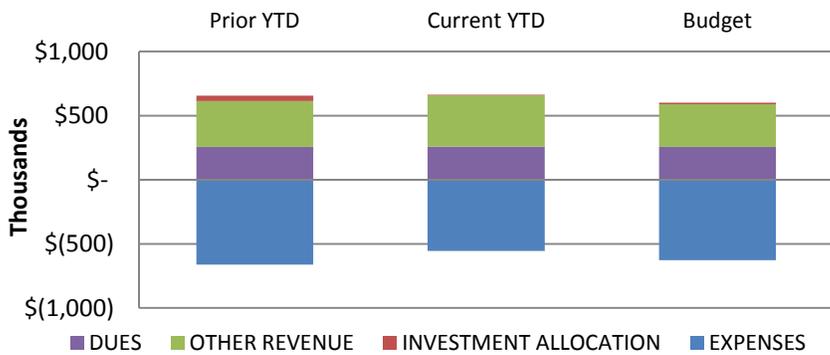
	May 2015 Actuals	YTD 14-15 Actuals	Budget	Percent Budget
Total Business Law				
===== 84264 Social Media & Other	500	5,125	10,000	51.25
84282 Law School Program	0	0	500	0.00
84301 Awards	552	3,036	4,000	75.90
84330 Leadrshp Acad	0	10,000	10,000	100.00
84422 Website	5,830	19,393	15,000	129.29
84501 Legis Consultant	0	60,023	80,000	75.03
84701 Council Of Sections	0	300	300	100.00
84914 Bkrpcy Pro Bono Dona	0	0	10,000	0.00
84991 Special Projects	0	0	2,250	0.00
84998 Operating Reserve	0	0	34,149	0.00
84999 Miscellaneous	0	241	900	26.78
88241 Outline Prt-Inhouse	0	0	100	0.00
88265 Refreshment Breaks	0	3,561	9,000	39.57
88269 Breakfast	0	27,081	25,000	108.32
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Total Operating Expenses	16,432	463,091	616,230	75.15
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31433 Section Mgmt Fee	193	83,041	82,250	100.96
86431 Mtgs Admin	361	6,334	7,532	84.09
86543 Graphics & Art	0	3,235	3,300	98.03
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Total TFB Support Services	554	92,610	93,082	99.49
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Total Expenses	16,986	555,701	709,312	78.34
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	-----	-----	-----	-----
Net Operations	-15,356	107,295	-106,883	-100.39
	-----	-----	-----	-----
21001 Fund Balance	0	437,838	422,645	103.59
	-----	-----	-----	-----
Total Current Fund Balance	-15,356	545,133	315,762	172.64
	-----	-----	-----	-----

* * * * * End of listing * * * * *

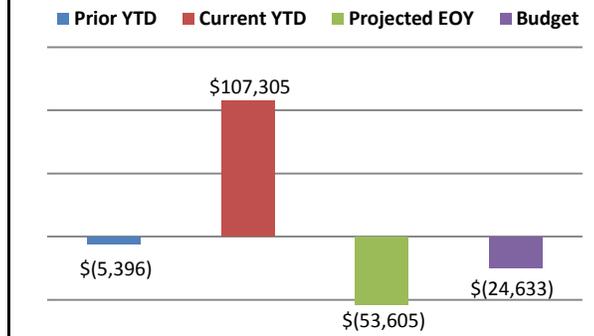
**The Florida Bar
Business Law Section Overview
Eleven Months Ending May 31, 2015**

Statement of Operations	Prior Year to Date	Current Year to Date	Variance	Budget 2014-15	% of Budget
REVENUES					
DUES	\$ 257,185	\$ 259,230	\$ 2,045	\$ 255,500	101.46%
OTHER REVENUE	357,176	398,969	41,793	334,250	119.36%
INVESTMENT ALLOCATION	41,944	4,798	(37,147)	12,679	37.84%
TOTAL REVENUE	656,305	662,996	6,691	602,429	110.05%
EXPENSES					
CURRENT OPERATIONS	(5,396)	107,305	112,701	(24,633)	-435.62%
BEGINNING FUND BALANCE	501,523	437,838		437,838	103.59%
CURRENT FUND BALANCE	\$ 496,127	\$ 545,144		\$ 413,205	136.97%

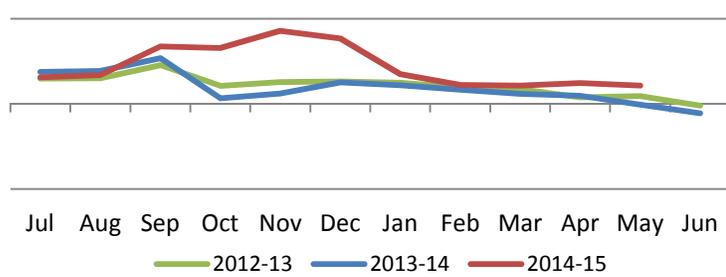
Business Law



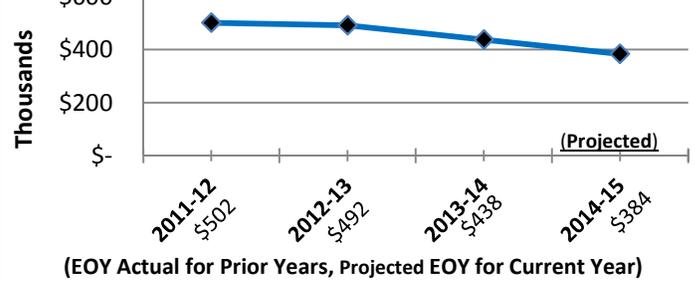
Net Operations Comparison:



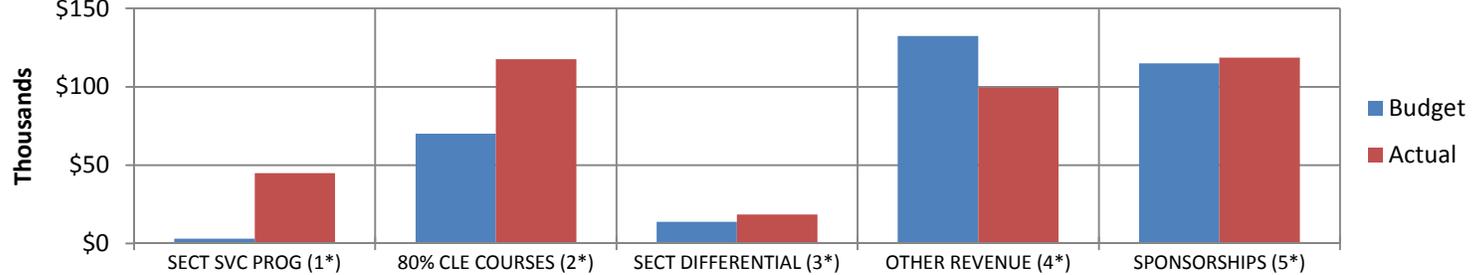
YTD Net Operations by Month



Fund Balance



YTD Non-Dues Revenue Sources by Category



1* Section CLE and Service Programs.

2* Section's 80% share of net profit of joint CLE.

3* Section Differential. The premium paid by non-section members for CLE.

4* Other Revenue. Includes ticketed events, advertising, licensing, etc.

5* Sponsorships.

EXHIBIT D



BUSINESS LAW SECTION

SECTION COMMITTEES

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December 10, 2014

Via Email and U.S. Mail

Email: eto@flabar.org

Elizabeth C. Tarbert, Esq.
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

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

Dear Ms. Tarbert:

The approximate Five Thousand members of the Business Law Section of The Florida Bar (the "BLS") represent business entities and individuals in all aspects of business law involving transactions, litigation, and administrative proceedings. The BLS produces educational materials and programs, provides *pro bono* legal services, and drafts and advocates for legislation and rules relating to business laws.

In representing their business clients, the members of the BLS frequently must communicate with governmental entities that are represented by counsel. Thus, the BLS submits the comments set forth below with regard to the proposed amendments to the Comment to Rule 4-4.2, Rules Regulating the Florida Bar (the "Proposed Amendment"), relating to communications with government agencies represented by counsel.

THE FLORIDA BAR

The Proposed Amendment seeks to overturn the decision in *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013), which decision interpreted the comments to Florida Bar Rule 4-4.2 regarding communications with persons represented by counsel. Without a lengthy discussion on 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 ethical drawing lines that are confusing and impractical.

The Section recommends that the Proposed Amendment be rejected. Our rationale is set forth in detail in the attached white paper.

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

Very truly yours,



William A. Van Nortwick, Jr.

WAV/lww

Cc: (w/enclosures)
Gregory W. Coleman, Esq. (via email)
Ramon A. Abadin, Esq. (via email)
Michael A. Dribin, Esq. (via email)
Louis T. M. Conti, Esq. (via email)

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BUSINESS LAW SECTION

June ____, 2015

VIA EMAIL AND U.S. MAIL

Elizabeth C. Tarbert, Esq.
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300

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

Dear Ms. Tarbert:

The approximate six thousand members of the Business Law Section of The Florida Bar (the “BLS”) represent business entities and individuals in all aspects of business law involving transactions, litigation, and administrative proceedings. In representing their business clients, the members of the BLS frequently must communicate with governmental entities that are represented by counsel.

The BLS submits the comments below with regard to the proposed amendments to the Comment to Rule 4-4.2, Rules Regulating the Florida Bar (the “Proposed Amendment”), relating to communications with government agencies represented by counsel, and in response to the May 18, 2105 letter of the City, County and Local Government Law Section, the Government Lawyers Section and the Florida Association of County Attorneys (the “Work Group”).

At the outset, we ask you to note that the Work Group is not to be confused with the informal group of several individuals and Florida Bar Section representatives that met in Orlando in February, at President Coleman’s urging, to discuss these issues and seek common ground (the “Orlando Group”). We make this comment because the Orlando Group has been colloquially referred to as the “Working Group.” The Work Group is advocating the changes set forth in its May 18 letter, while not all members of the Orlando Group have endorsed the changes.

Our Section deems the *Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013), opinion to be a fact-specific decision that is not likely to be replicated or to frequently occur. In light of same, we do not believe there is a compelling need for a change to the Rule. We also remain concerned that the Work Group’s proposed changes involve overly complicated

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procedural and practical hurdles to the constitutionally-protected rights of the citizens of the State of Florida to seek redress with their government. The Work Group's suggestion to employ a procedure of "meaningful prior notice of the communication [with a government official]" takes the presently straight-forward rule and creates a roadblock to communication that requires the proposed communication be first "approved" by the government lawyer. Not only will this requested procedure be very expensive for both government and citizens, the requested change has the potential to allow government officials to hide behind counsel and avoid the dialogue that is sometimes unpleasant but always necessary in a democratically-elected government. The Work Group's proposed changes further create a "gray area" where members of The Florida Bar will be uncertain whether they are in or outside of compliance with Bar rules.

In the spirit of compromise and in attempt to reach consensus, the BLS proposed to the Orlando Group that the Proposed Amendment follow the rules found in District Columbia or Utah Bar Rules of Professional Conduct ("D.C" or "Utah Rules"). The D.C. and Utah Rules limit contact to litigation matters and provide clarity for practitioners. For example, the Utah Rule 4-4.2 (d)(3) reads in pertinent part:

This Rule does not apply to communications with government parties, employees or officials unless litigation about the subject of the representation is pending or imminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official.

However, the Work Group expressed reservations that the Utah/D.C. model did not adequately address their concerns with the *Tobin* decision. Likewise, the Work Group was concerned that an "opt-in" provision, wherein the government official would be required to affirmatively direct the attorney member to their counsel, was likewise not sufficient to deal with its *Tobin* concerns. Accordingly, no consensus was reached on possible changes to the Rule.

Finally and as with all well-intentioned changes, adoption of the Proposed Amendment will have unintended consequences with the inevitable result being that the government contact function now being exercised by lawyers subject to rigorous and strict discipline by The Florida Bar will be left to unregulated persons. Thus, the Work Group's proposed changes would ultimately afford less protection for both government officials and members of the public.

While we understand the concerns of the Work Group, our Section believes the present rule adequately protects government officials and the requested drastic change would harm the public and members of The Florida Bar. As a result, the Section recommends that the Proposed Amendment be rejected. Our rationale, as set forth in detail in our previously submitted White Paper, is re-adopted.

Elizabeth C. Tarbert, Esq.

June ____, 2015

Page 3 of 3

Thank you again for the opportunity to comment on this important issue, and please do not hesitate to contact me if you have questions or need additional information regarding these positions.

Very truly yours,

G. Alan Howard, Chair

GAH:sb

cc: Gregory W. Coleman, Esq. (via email)
Ramon A. Abadin, Esq. (via email)
William Schifino, Esq. (via email)
Michael Gelfand, Esq. (via email)
Louis T. M. Conti, Esq. (via email)

May 18, 2015

Board Review Committee on Professional Ethics
Board of Bar Governors
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300

c/o Elizabeth Clark Tarbert, Ethics Counsel

Re: Proposed Amendment to Rule 4-4.2, Rules of Professional Conduct

Honorable members of the Board Review Committee:

For the past several months, dedicated members of the City, County and Local Government Law Section, the Government Lawyers Section, and the Florida Association of County Attorneys (collectively the "Rule 4-4.2 Work Group") have worked diligently to prepare a comprehensive amendment to Rule 4-4.2 in an effort to address the concerns that were expressed at a February 27, 2015 roundtable meeting of representatives from various sections of the Florida Bar. While we have come to realize through these efforts that it is not possible to fully satisfy all concerns, the Rule 4-4.2 Work Group believe that the attached proposed revisions to Rule 4-4.2 represent best efforts to satisfy the majority of all concerns expressed.

The proposed revisions address or clarify the following:

1. Communication with public officials is permitted under certain circumstances when there are matters in dispute. This revision is intended to address the "constitutional" argument relating to right of access to redress grievances.
2. Communication is not intended to provide direct access to public officials on discovery matters, extensions of time, or scheduling matters in litigation.
3. Meaningful prior notice of the communication must be provided to the government lawyer.
4. Communication with public officials and employees is permitted on general policy and administrative matters, including lobbying matters that have not been referred to the government lawyer.

We appreciate the opportunity to provide you with our comments and the proposed amendments to the rule. Please let us know when the item will come up on agenda so that we may be available to discuss the matter at that time.

Respectfully submitted,

Dana Crosby-Collier

Dana Crosby-Collier
Immediate Past Chair
City, County and Local Government Law Section



Ellen Simon
Chair, Government Lawyers Section

Patrick McCormack

Patrick McCormack
St. Johns County Attorney for the
Florida Association of County Attorneys

Copies via e-mail:

Gregory W. Coleman
President
The Florida Bar

Carl B. Schwait
Chair
Board Review Committee on Professional Ethics

Hans Ottinot
Chair Emeritus
City, County and Local Government Law Section

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL
(draft dated 4-16-15)

(a) In representing a client, a lawyer must 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~~ However, a lawyer may, without ~~such~~ prior consent, communicate with another's client to meet the requirements of any rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute, or contract, and a copy must be contemporaneously provided to the represented person's lawyer.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the lawyer-client relationship, and the uncounseled disclosure of information relating to the representation.

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

The rule applies even though the unrepresented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person, if, after commencing communication, the lawyer learns that the person is the one with whom communication is not permitted by this rule.

This rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matter 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. If a lawyer does not know whether the government agency, private person or organization is represented in a matter, the lawyer should make inquiry, and in all instances, identify himself or herself as a lawyer who is representing a client.

This rule does not prohibit a lawyer from communicating with public officials and employees of a government agency about a matter on the lawyer's own behalf. Nor does this rule prohibit a lawyer in representing a client from communicating with public officials and employees of a government agency on general policy issues, procedural matters relating to the

administration of the government agency, or lobbying for the passage of a law, statute, ordinance or regulation, unless it involves a matter with the government agency that the lawyer knows has been referred to the government lawyer.

In representing a client who has a dispute with a government agency, a lawyer may communicate about the subject of the representation with the public officials who have authority over the government agency even if the lawyer knows that the government agency is represented by another lawyer in the matter, but the communication may only occur under the following circumstances

(1) the sole purpose of the communication is to address a policy issue, including the possibility of resolving a disagreement about a policy position taken by the government agency; and

(2) adequate and meaningful prior notice of the communication must be made to the government lawyer to afford an opportunity for the public official to discuss with the government lawyer the advisability of receiving the communication.

This rule does not permit communications relating to other issues or with any other officials or employees represented by the government lawyer in the matter without the prior consent of the government lawyer. Nor does this Rule permit a lawyer to bypass the government lawyer on every issue that may arise in the course of a dispute with the government agency. It is intended to provide a lawyer with access to decision makers in the government with respect to a genuine dispute, such as to present the view that the government's basic policy position with respect to a dispute is faulty. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar aspects of litigation or adversarial proceedings. The term "public official" includes a public officer of the United States government, or of a state, or of a county, city, political subdivision, or other government agency who has authority to take or recommend action in the matter. The term

"adequate and meaningful prior notice" in communications with a public official means notice that is reasonably provided and that contains sufficient information for the government lawyer to act on it and to be present, if deemed appropriate, to protect the client's interests. The time and place of the intended communication and the identity of the public official should be included. Nor does this

This rule does not 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 section (a). Permitted communications include, for example, the right of a lawyer who is a party to a controversy with a government agency to speak with government officials about the matter, or the right of a lawyer to speak with government officials about a matter on the lawyer's own behalf. Also, in representing a client in a matter with a government agency, a lawyer may communicate with a government officer or board as part of a

public hearing when an administrative matter or quasi-judicial matter is pending before that agency as permitted by rules 4-3.5 and 4-3.9

Code: Underlines and ~~cross-outs~~ are Amendments recommended to the Board of Governors by the B.O.G Rule Committee. Words underlined and ~~crossed-out~~ in *italics* are proposed new Revisions following The Florida Bar Rule 4-4.2 Revision Workshop held on February 27, 2015.

BUSINESS LAW SECTION OF THE FLORIDA BAR

WHITE PAPER IN OPPOSITION TO PROPOSED AMENDMENT TO COMMENT ON RULE GOVERNING THE FLORIDA BAR 4-4.2 (COMMUNICATON WITH PERSON REPRESENTED BY COUNSEL)

I. SUMMARY

Rule Governing The Florida Bar 4-4.2 (“Rule”) prohibits an attorney contacting another person or entity when the attorney knows the other person is represented by counsel and opposing counsel has not given consent to the contact. As the result of the recent *Tobin* decision,¹ the Florida Association of County Attorneys (FACA) has petitioned for a change to the Comment to the Rule which eliminates the Rule’s “independent justification” exception. For the reasons set forth below, the Business Law Section of The Florida Bar (“BLS”) believes the suggested change is unnecessary, eliminates the Constitutional right of citizens (and their lawyers) to directly seek redress from their government, and creates vagueness and uncertainty in the Rule which puts Florida lawyers at risk in the representation of their clients.

II. CURRENT RULE

A. RULE 4-4.2

Rule 4-4.2 reads in its entirety:

(a) In representing a client, a lawyer must 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, a lawyer may, without such prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be provided to the person's lawyer.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

¹ *The Florida Bar v. Tobin*, Florida Bar Case No. 70,451B (October 21, 2013).

Comment [to the Rule]

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

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 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. 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 supplied)

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4.

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 4-4.3.

Various opinions of The Florida Bar have interpreted the Rule, its exceptions, and its application to practicing lawyers. These opinions follow.

B. OPINIONS INTERPRETING RULE 4-4.2

1. Florida Bar Ethics Opinion 78-4

While dealing with the corporate (not governmental context), this Opinion is helpful to the discussion in that it states that an attorney must communicate with a corporation's general counsel for all purposes, and that the corporation's officers, directors and managing agents are "parties" for purposes of prohibited communications. However, the corporation's other employees are not "parties" 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

Opinion 87-2 refined Opinion 78-4, and held that an attorney "may not communicate concerning the matter with the [government] 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 part of the agency, unless consent of the agency's counsel is obtained." Thus, Opinion 87-2 squarely placed Rule 4-4.2 into the government context.

3. Florida Bar Ethics Opinion 09-01

Opinion 09-01 further refined the issue by holding that consent is required before communicating with "officers, directors, or managers of State Agency, or State Agency employees who are directly involved in the matter, and other State Agency employees whose acts or omissions in connection with the matter can be imputed to State Agency about the subject matter of a specific controversy or matter on which a lawyer knows or has reason to know that a governmental lawyer is providing representation." Moreover, Opinion 09-01 clarified the prohibition is not limited to matters in litigation.

4. **The Florida Bar v. Tobin, Florida Bar Case No. 70,451B (October 21, 2013).**

Tobin arose against this backdrop, and involved a land use attorney who was litigating against a county while simultaneously seeking non-litigation redress from the same county. There was no question that Mr. Tobin knew the county was represented by counsel, but he contended he had “independent justification” for contacting the county officials in order to further his client’s administrative goals. The “independent justification” comment was key to Referee [Miami-Dade County Judge Lawrence D.] King’s decision that Mr. Tobin was permitted to meet with county commissioners in order to advance his client’s non-litigation claims:

After an extensive hearing where both parties fully briefed the issues and presented argument and evidence, including the communications at issue, the Referee finds that Respondent's communications were independently justified as contemplated in 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.

Id. at 3.

The Referee further distinguished Opinion 09-01, and held attorneys must participate in administrative proceedings, exhaust administrative remedies, and create administrative records in order to advance a client’s land use goals, and these “parallel proceedings” are precisely what the exception to Rule 4-4.2 contemplated. Accordingly, the Referee found no violation.

III. PROPOSAL

A. PROPOSED CHANGE

The Florida Association of County Attorneys is very concerned with the Tobin decision, and seeks a revision of the Comment to Rule 4-4.2 as follows:

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

(a) In representing a client, a lawyer must 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.~~ However, a lawyer may, without such

prior consent, communicate with another's client to meet the requirements of any court rule, statute or contract requiring notice or service of process directly on a person, in which event the communication is strictly restricted to that required by the court rule, statute or contract, and a copy must be contemporaneously provided to the represented person's lawyer.

(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of the time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

Comment

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

This rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates. The rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this rule.

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. If a lawyer does not know whether the government agency, private person or organization is represented in a matter, the lawyer should make inquiry, and in all instances, identify himself or herself as a lawyer who is representing a client ~~Nor does this~~ This rule does not 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 controversy with a government

agency to speak with government officials about the matter, or the right of a lawyer to speak with government officials about a matter on the lawyer's own behalf. Also, in representing a client in a matter with a government agency, a lawyer may communicate with a government officer or board 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.

In the case of a represented organization, this rule prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). In communication with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See rule 4-4.4.

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See terminology. Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to rule 4-4.3.

B. SUPPORT FOR CHANGE

The Florida Association of County Attorneys, the City, County and Local Government Law Section, and various individuals.

C. OPPOSITION TO CHANGE

The Real Property, Probate and Trust Law Section (“RPPTL”), Dan Gelber, Esq. (Mr. Tobin’s attorney during the disciplinary proceedings brought by The Florida Bar), and various individuals oppose the proposed change.

IV. EFFECT OF PROPOSED CHANGES

The BLS convened a Rule 4-4.2 Task Force (“Task Force”), which group reviewed the controversy and the proposed changes. The concerns of the Task Force can be summarized into four categories.

A. Lack of Need for Proposed Need for Proposed Change

Even when considering the well-argued positions of the FACA and the Local Government Law Section, the members of the Task Force saw very little need for such an extraordinary change. Many government officials are very sophisticated in dealing with law and lawyer, and would neither be intimidated nor “bamboozled” by a lawyer advocating her client’s position. The very basis for Rule 4-4.2, the need to prohibit unscrupulous lawyers from taking advantage of unsophisticated opposing parties, simply does not exist in the governmental context. Moreover, many government agencies are represented by significant number of counsel to which government officials can turn when confronted with a possible question. When combined with the possible disadvantages of implementing such a proposed change, the lack of need for change becomes apparent.

B. Need for Direct Contact with Government Officials

While perhaps not as acute as the fact pattern in *Tobin*, many members of the BLS indicate a need to communicate with lower-level government employees and agents while engaged in litigation or other contact with represented government officials. For example, bankruptcy practitioners must deal with government representatives (e.g., property appraisers, tax collectors, Internal Revenue Service, etc.) while as the same time engaged in litigation with these parties in the bankruptcy court. Moreover, BLS members engaged in corporate activities are required to deal with administrative agencies of the government in order to advance their client’s needs while they may be involved in administrative dispute hearings with the very agencies that regulate or have administrative control over their clients. Imposing the restrictions of the proposed changes to the Rule would unnecessarily impair the ability of counsel to represent their clients, and in extreme cases, would give government agencies the ability to exert subtle yet tremendous pressure on parties to resolve cases on terms favorable to government.

C. Constitutional Implications

The Florida Constitution provides that “[t]he people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances.” Art. I, § 5, Fla. Const. This privilege has been found by the courts to include the rights of citizens to petition their government for redress of what they believe to be grievances. *See Diaz v. Board of County Com’rs of Dade County*, 502 F.Supp. 190 (S.D. Fla. 1980). This right is likewise enshrined in the United States Constitution. *Id.*

Apart from the fact that the proposal might be unconstitutional, the Task Force found the proposal to permit unscrupulous government officials to hide behind their lawyers and avoid public interaction. Moreover, the fact that the proposal removes a bright-line area of protection

for lawyers advocating on behalf of their clients would lead to a “chilling effect” on counsel advocating rights of redress to government.

D. Unintended Consequences

While it appears the proposed revision is well-intentioned, there are two unintended consequences which are deeply troubling. First, it is anticipated that the proposed revision will increase the costs of local government as all communications will need to be reviewed by government’s legal counsel, which increase the cost of government (see Fiscal Impact on Government below). Just as troubling as the financial impact, is the concern that those parties who are seeking redress from their government will turn to non-lawyer parties to advocate on their behalf. These non-lawyer advocates are not regulated by The Florida Bar, and presumably do not have the same level of training, expertise and ethical regulation as do Florida lawyers. The public will be disserved by creating an opportunity for non-lawyers to become a necessary “end around” to redress their concerns with government.

V. RECOMMENDATION

No need for a change having been demonstrated, and the possible negative ramifications outweighing any possible benefits, the BLS recommends **rejection** of the proposed change.

VI. FISCAL IMPACT ON GOVERNMENT

The proposed change has the potential to create financial havoc for government as government itself will now be required to route even the most mundane communications through counsel, thereby increasing the need for staffs of government lawyers and possibly negatively affecting the ability of government to respond to requests for information and govern according to law.