

Who's Your Client?

Not Rocket Science, But A Little Like
Quantum Physics

FACA CLE

Patrick F. McCormack,
St. Johns County Attorney

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Overview – Building Blocks

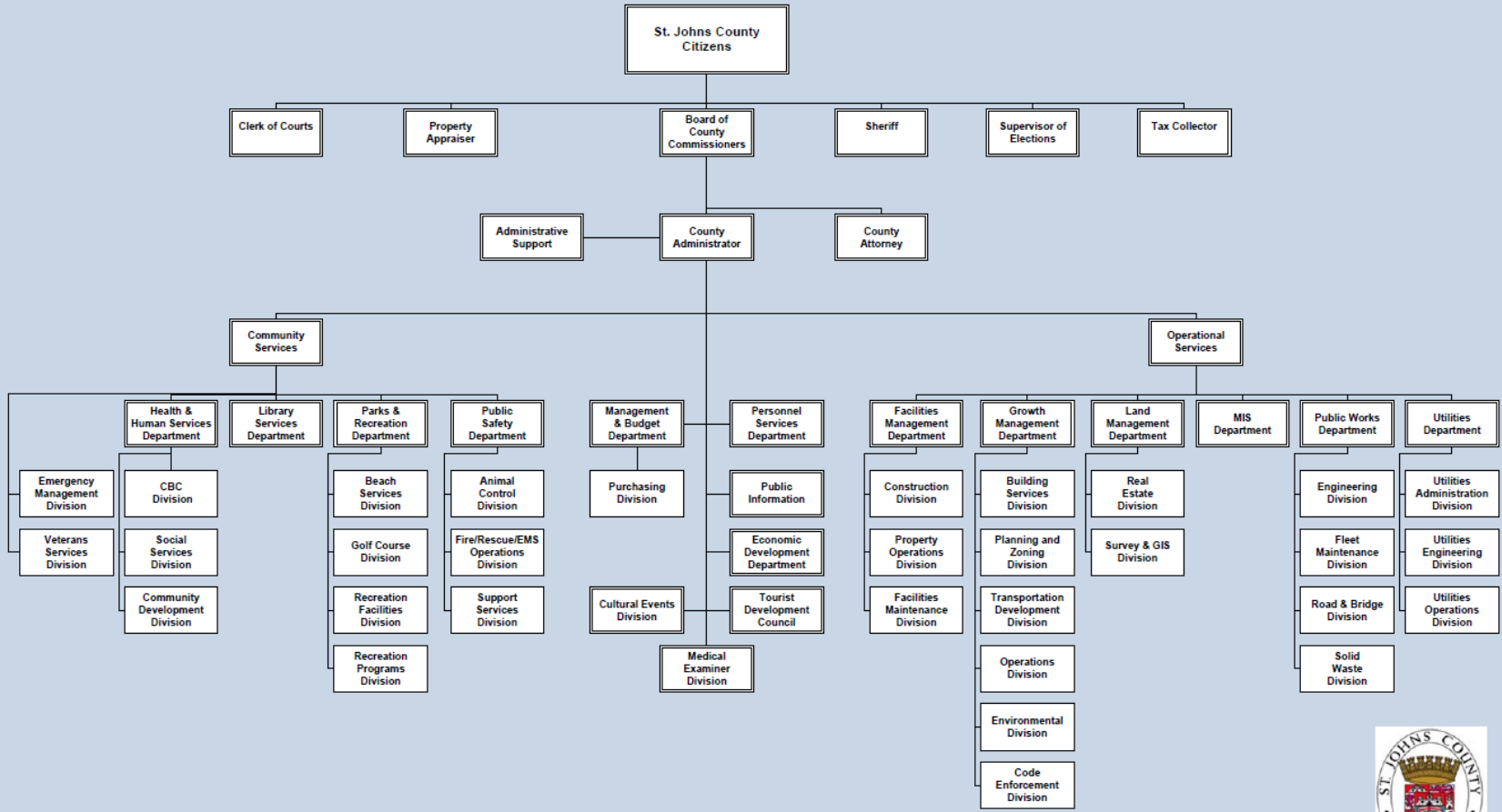
- ❑ Florida Bar Rules/Opinions
- ❑ Florida Statutes/Case Law
- ❑ Charter, Ordinance, Resolution, Rules & Policies
- ❑ Contract/Retainer
- ❑ Local Custom and Practice
- ❑ Web Page
- ❑ The Talk

Uncertainty Principle

The more precisely the position is determined, the less precisely the momentum is known. (I'll explain)

Organization Chart

St. Johns County Board of County Commissioners Organization Chart



Organizational Structure

Governing Body

Ex-officio Boards, Committees, Agencies

Appointed Boards, Committees, Agencies

Staff

Florida Bar Rules

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(c) Limitation of Objectives and Scope of Representation.

If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

RULE 4-1.2; Comment

Agreements Limiting Scope of Representation

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client....

Although this rule affords the lawyer and client substantial latitude to limit the representation if not prohibited by law or rule, the limitation must be reasonable under the circumstances....

RULE 4-1.13

ORGANIZATION AS CLIENT

- (a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

- (d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

- (e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

RULE 4-1.13

ORGANIZATION AS CLIENT

Comment Excerpts

Government Agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation.

RULE 4-1.13

ORGANIZATION AS CLIENT

Comment Excerpts

Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it may also be a branch of the government, such as the executive branch, or the government as a whole.

RULE 4-1.13

ORGANIZATION AS CLIENT

Comment Excerpts

For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

RULE 4-1.13

ORGANIZATION AS CLIENT

Comment Excerpts

Clarifying the Lawyer's Role

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation.

RULE 4-1.13

ORGANIZATION AS CLIENT

Comment Excerpts

Clarifying the Lawyer's Role

Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

FLABAR OPINION 77-30 (Reconsideration) Sept. 29, 2006

The Board is of the opinion that there are some conflicts involving the representation of individual county commissioners that may be waived by both the individual commissioner and the county. For example, if a frivolous ethics complaint is filed against an individual commissioner and the county attorney can readily determine that the allegations are unfounded, the county attorney may represent the individual commissioner if both the individual commissioner and the county give informed consent, confirmed in writing, to the dual representation. Someone other than the individual commissioner to be represented must give informed consent on behalf of the county. Rule 4-1.13(e), Rules of Professional Conduct.

Whether a county attorney may represent an individual commissioner in a particular ethics complaint will depend on the circumstances of the individual situation, and such an analysis must occur on a case by case basis.

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, 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.

Rule 4-4.2 Comment; excerpt

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.

Rule 4-4.2

FLABAR Opinion 09-1

A lawyer may not communicate 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 unless the agency's lawyer first consents to the communication. A lawyer may communicate with other agency employees who do not fall within the above categories, and may communicate with employees who are considered represented by State Agency's lawyer on subjects unrelated to those matters in which the agency lawyer is known to be providing representation. The lawyer may be required to identify himself or herself as a lawyer who is representing a party in making those contacts.

Rule 4-4.2

FLABAR v. Tobin (2013)

Focus on Rule 4-4.2 Comment language:

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.

F.S. 111.07

Defense of civil actions against public officers, employees, or agents

Any agency of the state, or any county, municipality, or political subdivision of the state, is authorized to provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property.

F.S. 90.502

Lawyer-client privilege

- (1) For purposes of this section:
 - (a) A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation.
 - (b) A “client” is any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer.
 - (c) A communication between lawyer and client is “confidential” if it is not intended to be disclosed to third persons other than:
 1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
 2. Those reasonably necessary for the transmission of the communication.

F.S. 90.502(6)

(6) A discussion or activity that is not a meeting for purposes of s. 286.011 shall not be construed to waive the attorney-client privilege established in this section. This shall not be construed to constitute an exemption to either s. 119.07 or s. 286.011.

Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992)

The focus, as we have seen from the common law development of the privilege and our own FEC section 90.502 definition of "client," is on the perspective of the person seeking out the lawyer, not on what the lawyer does after the consultation.

Charter Language (Example)

The County Attorney shall provide legal services to the Board of County Commissioners, County departments, County boards and agencies as specified by County ordinance.

Ordinance Language

(Example City)

In regard to all affairs of the City, be the legal advisor to the Mayor, the City Council and committees thereof, and all of the several departments, officers and boards of the City government; and, when required, shall furnish written or oral opinions to them upon any subject in which the City is interested.

(Example County)

The office of the county attorney shall consist of the county attorney, a deputy county attorney, and legal staff as necessary. The attorneys shall be members of The Florida Bar and shall be legal advisers to the commission, other board officers, departments, and such county boards and commissions as necessary.

Resolutions, Rules and Policies

Contracts/Retainers

County Attorney Web Page

Our clients include:

- ❑ Board of County Commissioners
- ❑ Constitutional Officers
- ❑ County Manager
- ❑ County Departments
- ❑ Library District
- ❑ Metropolitan Transportation Planning Organization
- ❑ Canvassing Board
- ❑ Board-appointed committees

Custom and Practice

Special Situations

- ❑ Commission on Ethics Complaints
- ❑ Division of Elections Complaints
- ❑ State Licensing Board, etc.
- ❑ Commissioner Elects

The Talk

Client Conflicts

Commission v. Appointed Board, Committee, or Agency

Commission v. Staff

Commissioner v. Commissioner

Commission v. Past or Future Commission

Commission v. “The County”

Summary

Know the building blocks

Set client expectations early (based on building blocks)

Not one size fits all—counties are different

When someone steps “out of school” react, keep calm and carry on.

Questions?

Thank you!