

County Attorney
1769 E. Moody Blvd Bldg 2
Bunnell, FL 32110



www.flaglercounty.org
Phone: (386)313-4005
Fax: (386)313-4105

February 9, 2015

(Via Fedex)
Annemarie Craft, Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399

Re: Amended Response to Complaint by Kimberle B. Weeks against
Albert J. Hadeed
Florida Bar File Number 2015-30,587 (7B)

Dear Ms. Craft:

Enclosed is my response to the complaint filed by Kimberle Weeks. By way of introduction, the complaint is an across the board attack on my actions as Canvassing Board Attorney and as the County Attorney of Flagler County. The allegations accuse me of dishonesty, bias, incompetence, conflicts of interest, conspiracy, and criminal wrongdoing. Ms. Weeks has filed this same complaint with the Florida Ethics Commission. These are extreme allegations and they are numerous. Rather than rebut by generalizations, I have looked for matters of record that refute the allegations unequivocally.

I had discussed with you that transcripts, meeting minutes and other official records demonstrate that the alleged facts are misstated and mischaracterized and that material facts are omitted. However, assembling these records generated a sizable volume of materials. There is no way that appending them to the response would even be close to the page limits desired by The Florida Bar. I noted in the procedures that The Bar is permitted to request records. Accordingly, I have footnoted the response identifying records and citations quite specifically to the points made. Should you wish to review any of the materials that are cited in order to corroborate the statements within the response, or for other purposes, please advise accordingly.

As for the order of addressing the allegations, I have sequenced them so that the reader is able to learn in successive steps the dynamics of how the Canvassing Board works both in law and by practice.

Charles Ericksen, Jr.
District 1

Frank Meeker
District 2

Barbara Revels
District 3

Nate McLaughlin
District 4

George Hanns
District 5

Also please note as an administrative matter that Ms. Weeks resigned her position on January 5, 2015. The Supervisor of Elections Office provided us with her home mailing address (indicated below) and that is where we have sent a copy of this submission.

Sincerely,



Albert J. Hadeed

ALJ/jgc

Enclosures

cc: Kimberle B. Weeks (w/enc.)
3056 CR 305
Bunnell, FL 32110

Canvassing Board Attorney Allegedly Violated Sunshine Law In Speaking with Alternate Member of Canvassing Board About Election-Related Business

The Complainant alleges that the Respondent, in his capacity as the Canvassing Board Attorney, violated the Sunshine Law, Section 286.011, Fla. Stat., by discussing actions of a prior commissioner with the alternate member of the Canvassing Board, Commissioner Charles Ericksen. Similarly, the Complainant alleges the Respondent violated the Sunshine Law by privately counseling a prior County Commissioner on the Election Code.

The Sunshine Law applies to public meetings of two or more members of the same board when discussing some matter which will foreseeably come before the board.¹ The Canvassing Board's membership is established by Section 102.141(1), Fla. Stat., and consists of the supervisor of elections, a county court judge, and the chairman of the board of county commissioners. The Canvassing Board Attorney serves as the legal counsel to this statutory board, but is not a member of the Canvassing Board. That position is without any authority to vote or act for the Board, just as with any typical relationship an attorney has with a public, collegial agency. Further, the alternate Canvassing Board member is only authorized by law to act in the absence of a board member and otherwise has no independent decision-making authority.² Therefore, since neither an alternate member, before being called into active service, nor the Canvassing Board Attorney are members of the Canvassing Board, a discussion between them does not fall within the scope of the Sunshine Law.

Likewise, providing legal advice and counseling with a single county commissioner does not implicate the Sunshine Law unless that single commissioner is expressly delegated decision-making authority by the body corporate. In the context of the Canvassing Board, that was not the case, either past or present.

Alleged Conflict of Interest to Represent Both the Board of County Commissioners and the County Canvassing Board

The Complainant alleges the Respondent violated Rule 4-1.7, Rules of Professional Conduct, by representing both the Board of County Commissioners and the County Canvassing Board. The rule prohibits the legal representation of a client if that representation will be directly adverse to another client or if there is a substantial risk that the responsibilities owed to one client will materially limit the representation to the other client.³ Neither of these situations exists in the present case. The Canvassing Board is a three member body established by statute whose duties

¹ See, "2014 Government-In-The-Sunshine Manual," p. 18.

² Section 102.141(1)(e)4., Fla. Stat., provides: "If not serving as one of the three members of the county canvassing board, an alternate member may be present, observe, and communicate with the three members constituting the county canvassing board, but may not vote in the board's decisions or determinations." See also, AGO 88-45.

³ Florida Bar Rules of Professional Conduct, Rule 4-1.7(a).

are ministerial in nature.⁴ Its goal is to fairly and accurately tabulate the votes in elections and certify the results thereof in accordance with the election laws. The Board of County Commissioners has no interest adverse to the Canvassing Board or its duties.

Assuming, *arguendo*, the existence of a conflict of interest could be shown, Rule 4-1.7(b) allows for the representation regardless of the conflict if the attorney reasonably believes he will be able to provide competent representation to each client, the representation is not prohibited by law, and each client gives informed consent clearly stated on the record at a hearing.⁵ In the present case, there is no reason to believe the County Attorney could not competently represent both the Canvassing Board and the Board of County Commissioners, nor is such representation prohibited by law. (In a number of Florida counties, especially smaller counties like Flagler, the county attorney represents the canvassing board.) In fact, for at least approximately thirty years in Flagler County, the person occupying the Office of the County Attorney, or an attorney under the direction of the County Attorney, has served as the Canvassing Board attorney. From time to time, constitutional officers also call upon the County Attorney to address particular legal issues for their offices, and the Respondent specifically has provided such services at the request of the Complainant since she has been in office.

Importantly, both the Canvassing Board and the Board of County Commissioners in public meetings approved of the Respondent's representation of the Canvassing Board. First, at the Flagler County Board of County Commissioners meeting on September 15, 2014, the Commission discussed and acknowledged the continuation of the County's longstanding tradition of having its County Attorney provide legal services to the Canvassing Board.⁶ Second, at the Flagler County Canvassing Board meeting on October 17, 2014, the Complainant, who was then the Flagler County Supervisor of Elections, raised her concerns over a conflict of interest and made a motion to allow herself to select the Canvassing Board Attorney. The motion died for lack of a second.⁷ Moreover, the other two members of the Canvassing Board, Judge Moore Stens and Commissioner Hanns, found no reason to remove the Respondent from his role as Canvassing Board Attorney.⁸

⁴ See generally, Fla. Stat. § 102.141, and Morse v. Dade County Cnv. Bd., 456 So. 2d 1314, 1316 (Fla. 3rd DCA 1984).

⁵ Florida Bar Rules of Professional Conduct, Rule 4-1.7(b).

⁶ Flagler County Board of County Commissioners, September 15, 2014, Regular Meeting Minutes, page 47-48. See also, Flagler County Board of County Commissioners, September 15, 2014, Transcript Excerpt of Commission Reports & Comments.

⁷ Flagler County Canvassing Board, October 17, 2014, Minutes, page 2.

⁸ *Id.* It should also be pointed out that the Complainant retained her own counsel beginning sometime in early September who frequently attended the Canvassing Board meetings during the balance of the election schedule. Additionally, the Complainant made liberal use of the attorneys who worked for the Division of Elections in this and prior elections.

Canvassing Board Attorney Allegedly Failed to Advise Alternate Canvassing Board Member to Step Down After Allegedly Actively Participating in a Candidate's Campaign And Canvassing Board Attorney Allegedly Withheld Knowledge of Such Active Participation From the Canvassing Board

The Complainant alleges the Respondent failed to inform the Canvassing Board of the degree of involvement of alternate member, Commissioner Ericksen, in the campaign of Commissioner Meeker and also failed to advise Commissioner Ericksen step down as alternate member due to the involvement. The Complainant further alleges the Respondent also did not advise Commissioner Hanns to step down for endorsing incumbent candidate, Commissioner Meeker.

Section 102.141(1), Fla. Stat., requires the replacement of any canvassing board member who is an "active participant" in the campaign of a candidate whose election is being canvassed. The Division of Elections interprets "active participant" to require more than the giving of a campaign contribution and includes one who intentionally demonstrates or seeks to generate public support of a candidate.⁹

At the Friday, October 17, 2014, Canvassing Board meeting, the Complainant stated that alternate member, Commissioner Ericksen, who was then absent from the meeting, made a \$50 contribution to the campaign of Commissioner Meeker.¹⁰ (Commissioner Ericksen was out of town at an all day conference.) The Complainant claimed in her Complaint that Commissioner Ericksen refused to step down from his position as an alternate. Despite her allegation, the Complainant acknowledged at the meeting that she checked with the Division of Elections, which confirmed that the donation alone did not rise to the level of active participation, and this is confirmed in the minutes of the meeting.¹¹ On Monday following, Respondent met with Commissioner Ericksen and discussed his activities with any campaign based on the comments made at the preceding Friday meeting. Commissioner Ericksen informed the Respondent that he had attended a fundraising dinner with his wife for Commissioner Meeker in addition to making the \$50 contribution. At that point, the Respondent advised Commissioner Ericksen to withdraw as alternate member of the Canvassing Board in accordance with the Division of Elections opinions on "active participation." Later that day at the evening meeting of the Board of County Commissioners, on October 20, 2014, Commissioner Ericksen announced he was stepping aside as an alternate.¹² No commissioner objected or asked any questions of Commissioner Ericksen, and the body proceeded to name Commissioner Revels as the new alternate.¹³ There were no intervening meetings of the Canvassing Board between the time the Complainant raised her concerns and the time when Commissioner Ericksen stepped down. At his first available opportunity after obtaining legal guidance from Respondent, Commissioner Ericksen voluntarily stepped down. There was no refusal as alleged, nor was there an absence of proactive legal

⁹ See, DE 08-10 and DE 09-07.

¹⁰ Flagler County Canvassing Board, October 17, 2014, Minutes, page 2.

¹¹ *Id.*

¹² Flagler County Board of County Commissioners, October 20, 2014, Regular Meeting, Minutes, page 20. See also, Flagler County Board of County Commissioners, October 20, 2014, Regular Meeting, Transcript Excerpt of Commission Action. It should be noted that Respondent does not attend campaign events or follow campaign activity. Respondent is dependent upon the information that is provided to him by others.

¹³ *Id.*

advice or action. Respondent also as a matter of practice advises the Commissioners about the qualification requirements of the law and reminds those serving during the election process. This can be corroborated by the audio of Commission meetings when members are appointed or by statements from Commissioners.

Finally, in response to the Complainant's allegation concerning Commissioner Hanns, it is true that the Respondent did not advise Commissioner Hanns to withdraw from the Canvassing Board. This was because he was not in fact an active participant in the campaign of Commissioner Meeker and therefore was not disqualified from serving under the opinions of the Division of Elections. Rather, in a mailer to 1,509 registered Democratic voters, Commissioner Meeker's campaign mistakenly and inadvertently attributed an endorsement to Commissioner Hanns. Commissioner Hanns never endorsed Commissioner Meeker and stated such during the November 4, 2014, Canvassing Board meeting, and no one contended otherwise, including the Complainant.¹⁴ The Respondent clarified to the Canvassing Board and to the Complainant's attorney, Ms. Roberta Walton, at the meeting how the Division of Elections interprets the statute involving disqualification of Canvassing Board members as requiring intentional action and not perceived action, and Ms. Walton so agreed on the record.¹⁵ The vote was taken to disqualify Commissioner Hanns on Complainant's motion and was supported by the Judge despite Ms. Walton's concession which apparently was not heard by the Judge. Respondent communicated in writing with Judge Moore Stens after the meeting about his research conducted prior to the meeting and explained the advice he had provided to Commissioner Hanns.¹⁶

Notably, when Commissioner Meeker discovered his campaign committee's error, he publically retracted the endorsement and mailed a corrective card of the same size to each recipient of the previous mailer containing the erroneous endorsement. Further, upon his discovery of the error, he telephoned the Florida Elections Commission immediately and was connected with attorney Ashley Davis with the Division of Elections. He consulted with her as to corrective action. No agency action was taken by the Elections Commission or the Division of Elections for the incident, and he did in fact implement the steps that had been discussed with Ms. Davis. On this particular issue, following the close out of the General Election, the County Commission requested a formal opinion from the Division of Elections on the application of the "active participant" standard, setting out the foregoing facts, which request remains pending.¹⁷

¹⁴ Flagler County Canvassing Board, November 4, 2014, Minutes, pages 1-2.

¹⁵ Flagler County Canvassing Board, November 4, 2014, Transcript, pages 78 - 81.

¹⁶ Email to Judge Moore Stens of Nov. 6, 2014 including attachment. Respondent was advised by Commissioner Revels after the meeting that she did not think the Judge heard the colloquy with Ms. Walton. She stated that the Judge was going through papers, and the attorneys were not facing her and did not obtain her attention. Regardless, Respondent respected the Judge's vote afterwards and made no effort for reconsideration in order to minimize the number of distractions already upon the Board at the behest of the Complainant. Moreover, the disqualification vote came on the night of the General Election, and Canvassing Board matters following the election results are more routine and do not typically include substantive items for voting. Essentially, then, Respondent passed on any review effort to enable the Board to complete its central mission in the most timely and efficient way possible given the circumstances. See, e.g., October 17, 2014 Canvassing Board meeting transcript excerpt, pages 1 - 11.

¹⁷ Opinion request to Fla. Div. of Elections, dated Dec. 5, 2014. Notably, the conversations between the Respondent and the Department of State's General Counsel leading up to and following the formal opinion request confirm that the Canvassing Board, being a creature of statute, has no explicit or implied authority to remove its (cont'd)

**The Canvassing Board Attorney Allegedly Exerted Undue Influence on
and Acted as a Fourth Member of the Board**

The Complaint alleges that Respondent “weighs in on influencing canvassing board members [sic] decisions and inserts his comments and opinions.” The Complainant voiced the same issue at the September 2, 2014, Canvassing Board meeting when she said to Respondent:

“You shouldn’t even be putting your two cents in it because you’re not the third Canvassing Board member or fourth Canvassing Board member. You’re here for a legal question, not here to create a debate. Okay?”¹⁸

The Respondent responded, “I’m your counsel. I’m just in good faith trying to tell you what the bounds of the law are.”¹⁹ Again, at the Canvassing Board meeting on October 17, 2014, the Complainant raised similar concerns to which Judge Moore Stens pointed out:

“...the only time Mr. Hadeed has ever injected himself into our proceedings has been to tell us about any applicable statutes, pulled them up on his computer, so that we could stand around his computer and review whatever applicable law is necessary.”²⁰

In the same discussion, Commissioner Hanns also stated:

“It has been my experience that, being a long time county commissioner, that Mr. Hadeed has been a very good county attorney, and he seems to be unbiased about any subject, and I feel strongly that he would be able to continue representing the canvassing board in a professional manner....”²¹

In sum, the Respondent has provided legal advice in good faith and for which he researched as issues arose during the process, as demonstrated by the record. Respondent did not impose himself on the Board, substitute his judgment for the Board, or overstep his bounds as legal counsel.

members. See, 102.141(1)(c), Fla. Stat., providing that a commission chair who is an active participant in a campaign “shall be replaced” by an appointment from the board of county commissioners and not from a canvassing board. Like other entities whose members are appointed by different agencies, it is the appointing agency which has the authority to substitute or replace its appointees. To illustrate this point in the context of the Canvassing Board, no member of the Board could move, for example, to disqualify the Judge. Such an action would have to be undertaken by the Chief Judge of the Circuit based on whatever one may file or present in support of disqualification.

¹⁸ Flagler County Canvassing Board, September 2, 2014, Minutes page 7 and Transcript Excerpt.

¹⁹ Flagler County Canvassing Board, September 2, 2014, Minutes, page 7.

²⁰ Flagler County Canvassing Board, October 17, 2014, Transcript Excerpt, page 3.

²¹ *Id.* at page 1.

The Canvassing Board Attorney Allegedly Suggested Inclusion of a Voter Registration Complaint in the Conduct of Elections Report Out of Personal Animosity Toward the Candidate Against Whom the Complaint was Leveled

The Complainant alleges that Respondent spoke regarding the inclusion of a voter registration complaint presented by a citizen into the Conduct of Election Report. Complainant alleges this was done out of a likely personal animosity toward the candidate whose voter registration was disputed. A citizen complaint challenging the qualifications of an individual elected to the Flagler County School Board was presented to Respondent and furnished to the Canvassing Board members on the eve of the November 14, 2014, Canvassing Board meeting when the Board would be closing out and certifying the 2014 General Election. These close out activities include a certification of final voting results and separately a report to the Division of Elections addressing a variety of issues concerning the conduct of the election. Prior to this time, Respondent had never received such a complaint and had no experience with them. Respondent determined after research that the only remedy for the complaint was for the individual to pursue a civil action in the circuit court under Section 102.68, Fla. Stat., within 10 days of the certification of the election. After conducting his research, Respondent consulted with the Department of State, General Counsel's office, Deputy General Counsel Jordan Jones, concerning the handling of this complaint when presented to the Canvassing Board by the citizen formally. He advised, and Respondent's research came to the same result, that the Canvassing Board should note the complaint's filing in its close out report but indicate that it took no action on the matter, as it lacked investigatory authority.

The citizen appeared before the Board to request action, and Respondent provided the advice to take no action on the complaint and referenced the concurrence of the Deputy General Counsel. Respondent also noted for the Board that one element of the claim was time barred and not within Section 102.68 in any event. The transcript of that meeting shows that the Complainant agreed with this course of action, noting the filing as recommended by Respondent and as confirmed by the Deputy General Counsel.²² Thus, in contrast to the characterization by the Complainant that Respondent was motivated by bias against the individual being certified for election to the School Board, the Respondent in fact advised the Canvassing Board not to take up the challenge to that candidate's election.

The Canvassing Board Attorney Allegedly Failed to Advise a Board Member Against Refusing to Sign the Conduct of Elections Report, Allegedly Putting the Entire Board at Risk of Non-Compliance with the Election Code

The Complainant alleges that Respondent failed to advise alternate member, Commissioner Barbara Revels, against refusing to sign the Conduct of Election Report at the Canvassing Board Meeting on November 14, 2014. The Complainant then alleges that by failing to give this advice, Respondent somehow put the entire Canvassing Board at risk of violating the Election Code. The Complainant then makes the allegation that Respondent's inaction in this regard

²² Flagler County Canvassing Board, November 14, 2014, Transcript pages 15-22.

meant Respondent was in collusion with the Board of County Commissioners.²³ (Collusion as to what end is unclear in the complaint and therefore cannot be directly addressed.)

What is clear from the record is that Commissioner Revels objected to including a statement in the Conduct of Election Report sought by Complainant that two Canvassing Board members were removed from the Board.²⁴ She felt, and stated for the record, that such a statement in the report was inappropriate because the report was only a checklist of problems encountered in the election and the use of alternates is a normal practice that had no effect on the election.²⁵ According to Section 102.141(9)(c), Fla. Stat., the purpose of the Conduct of Elections Report is for the Division of Elections to disseminate solutions to election-related problems to the supervisors of elections. The types of problems delineated in Section 102.141(9)(a), Fla. Stat., include equipment malfunctions, ballot printing errors, staffing shortages or errors, etc. Commissioner Revels did not feel the report was the appropriate medium to state the statutorily prescribed replacement of canvassing board members with alternates.

To clearly indicate her objection, Commissioner Revels wrote on the report that she refused to sign the report while putting her signature with the statement. There was no need for Respondent to interject with a legal opinion on this matter, and there is no authority to suggest that her refusal to endorse the report fully would put the Canvassing Board in violation of the Election Code. Commissioner Revels contributed to the Conduct of Election Report and did nothing to prevent the filing of it. She objected to the report containing Complainant's handwritten notes regarding the removal and indicated as much for the record.²⁶ There was no consequence from the State Division of Elections for the manner in which she executed the report (she did sign her name on the report), and there was no sanction to Flagler County or to the Office of the Supervisor of Elections from the State Division of Elections related to the filed report.

A reading of the transcript of this meeting reflects the constant interruptions of the Complainant, particularly when Respondent attempted to address legal issues. Respondent believed that the Supervisor would not let Respondent comment on the signing issue, as she viewed the issue as administrative and within her purview. In any event, if permitted, Respondent would have pointed out that the critical document to which all must subscribe is the certification of the election results such that those elected can take office in a timely way. Respondent also was not given the opportunity to examine the Conduct of Election Report, but from the dialog would have opined that since Commissioner Revels signed and the Division could always follow up as to the circumstances, including asking for an amendment as it apparently has done per the Complainant's remarks at the meeting, there would be no legal prejudice to the degree Complainant was insisting. And finally, the Judge permitted Commissioner Revels to take the action she took. Respondent believed that the Judge was capable of assessing the propriety of

²³ Ironically, in the next sentence of the complaint, the Complainant alleges Respondent interjects himself too much in Canvassing Board meetings.

²⁴ Flagler County Canvassing Board, November 14, 2014, Transcript, page 11-13.

²⁵ County Judge Moore Stens correctly pointed out that only one Canvassing Board member was removed while the other stepped down voluntarily. *See*, Flagler County Canvassing Board, November 14, 2014, Transcript, page 12.

²⁶ Flagler County Canvassing Board, November 14, 2014, Transcript, pages 8-13 and 39-41.

the filing, and she asked questions of the Complainant in that regard to satisfy herself before closing the issue and moving on. There was, thus, no need or advisability for Respondent, based on his judgment and experience, to “interject” himself in this particular discussion about the election conduct report.

The County Attorney Allegedly Failed to Advise the Board of County Commissioners that Its Members Lack Authority To Request State Oversight of the 2014 Election

The Complainant alleges that the Respondent failed to advise the Board of County Commissioners and the County Administrator that they lack authority to ask for election oversight from the Department of State. Section 101.58, Fla. Stat., authorizes “any candidate,” among others, to petition for oversight of election processes. At the October 20, 2014 meeting of the County Commission, County Administrator Craig Coffey asked for permission to request oversight of the election process on its behalf from the Department of State.²⁷ The form of the oversight is the assignment of an observer from the Department. Contrary to the allegation of the Complainant, the Respondent advised the Commission after it first decided to proceed that the authorization needed to be broad enough to meet the Department’s requirements for requesting such an observer.²⁸ The entire Commission, including two incumbent candidates, confirmed their approval according to this advice.²⁹ On October 21, 2014, the County Administrator sent the written request, citing the applicable statute and notifying that the request was on behalf of the Commission including the incumbent candidates.³⁰ In response and without objection the Department did, in fact, send two observers.

The Canvassing Board Attorney Allegedly Had No Reasonable Expectation of Privacy at a Public Meeting and Allegedly Could Be Audio Taped Without Consent

The Complainant alleges that the Respondent is heard on an audio recording speaking to the alternate Canvassing Board member, Commissioner Ericksen, about counseling a prior commissioner against possible sampling of absentee ballots. The Complainant alleges the audio recording was done at a public meeting of the Canvassing Board on August 25, 2014.

However, the recording was not made in the room where the meeting was being held;³¹ the conversation was surreptitiously recorded without the knowledge or consent of either Respondent or Commissioner Ericksen; was contrary to the Complainant’s declaration to the entire Canvassing Board at its public meeting at the commencement of the election process that she would not be recording;³² the Complainant was engaged in recording in a calculated manner so as to conceal it from the Canvassing Board members; the Complainant was recording in a manner that was markedly different than her prior, consistent practice over six separate elections since 2009;³³ and Complainant never disclosed or informed the Canvassing Board members of

²⁷ Flagler County Board of County Commissioners, October 20, 2014, Regular Meeting Minutes, page 19 and corresponding Transcript Excerpt of County Administrator Report.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *See*, Letter of County Administrator on Behalf of County Commission to Secretary of State Ken Detzner, October 21, 2014.

Footnotes 31 – 33 are on the following page.

the recording effort despite opportunities in which it would have been normal and appropriate to do so. Further, the Complainant is subject to an ongoing investigation by the Florida Department of Law Enforcement for the surreptitious recordings in violation of Section 934.03, Fla. Stat., and for associated violations of the Sunshine Law.³⁴ Additionally, FDLE has interviewed Commissioner Ericksen and Respondent and informed them that they are not targets of the investigation.

August 25, 2014 was not the only day that the recordings took place. The recording device, an iPhone, was left in the small conference room where Respondent did his legal work.³⁵ It recorded everything in the room Respondent occupied whether there was a meeting taking place or whether Respondent was alone when the Board adjourned into the tabulating room to conduct its business. Recordings were hours long, and significant parts of the recordings were deleted or erased, presumably by the Complainant or at her direction. On the other hand, Complainant did not record the actual meetings of the Board being conducted in the tabulating room.

Respondent and Commissioner Ericksen had a reasonable expectation of privacy when they were meeting in that conference room, separate and apart from the Canvassing Board meeting being conducted elsewhere.³⁶

**The Canvassing Board Attorney Allegedly Attempted to
Cover Up the Wrongdoing of a Prior County Commissioner**

Against this backdrop of Complainant's recording practices, on August 25, 2014, some unusually extreme and tension filled events prompted the private conversation between Commissioner Ericksen and the Respondent. The first was a confrontation between the Complainant and Pierre Tristam, a newspaper editor/reporter who wanted entry into the meeting taking place in the tabulating room, apparently to take a picture of the Board and others working on the tabulating of the ballots. A large number of people were in the room, including election workers hired specifically for the election, permanent members of the Supervisor's staff and members of the public, along with the Board. The Complainant barred Mr. Tristam's entry at the doorway to the tabulating room. She became physical in her blocking and was noticeably flush with anger. Her wagging index finger instructing him to leave came within a couple of inches of Mr. Tristam's nose. The action was extreme enough that Respondent was pondering some forms of intervention if the situation deteriorated. Mr. Tristam wanted the Complainant to cite the

³¹ Flagler County Canvassing Board, August 25, 2014, 2nd Amended Meeting Minutes, page 7.

³² Canvassing Board meeting of August 8, 2014; minutes do not state this declaration, but the Board members will confirm same and that they concurred with the Complainant not recording.

³³ Complainant would use a black microcassette recorder and would announce when she started and when she paused the recording, and she would also announce when she began recording again after a break or absence.

³⁴ Neither Respondent, nor Commissioner Ericksen, nor any official or employee of the County Commission initiated the investigation by FDLE.

³⁵ Respondent would work on County business that he would bring with him in the small conference room when the Canvassing Board adjourned their meeting to the tabulating room.

³⁶ Complainant also alleges an ADT warning of video and audio surveillance at the entrance to the Elections Office waives the protection of the statute. Complainant does not mention that the system installed does not make audio recordings for the Supervisor's Office. It is just monitoring by video. Moreover, this notice is not within the exemption of the law allowing surreptitious recording.

specific legal exemption that allowed her to bar him from the public meeting. Finally, she yelled into his face, "It's my law." She threatened him with calling security, and she did in fact call the building's security officer, but Mr. Tristam had already left. This was the most tension filled event experienced by the Respondent up to that time in the election process. Respondent noticed that Commissioner Ericksen was observing the confrontation from inside the tabulating room.³⁷

Second, and later, from within the tabulating room, Respondent noticed that Commissioner Ericksen was being escorted by one of the Complainant's female employees down a short hallway and that they returned together. Respondent realized that Commissioner Ericksen was being escorted to the rest room, a single toilet/sink facility. This was unprecedented in Respondent's experience. Respondent believed this would be humiliating for Commissioner Ericksen, a retired, successful business executive about 70 years of age who rides a bicycle some 20 miles or more each morning.

Respondent concluded that the Complainant was probably basing her actions on a risk that either of them would see ballots and that Mr. Tristam might capture the image of a ballot in a photograph. Commissioner Ericksen then did something unprecedented. He came into the room where Respondent was seated, something he had never done before, while the Board was engaged in activity elsewhere. Normally, he dutifully stayed with the Canvassing Board during all its activities and tabulations.

Respondent and Commissioner Ericksen began to discuss these events. Respondent knew that the Commissioner was upset and that his behavior in difficult situations was to mix understatement and humor as his way of relieving the stress. Respondent was attempting to explain the heightened interest of Complainant in not having anyone view ballots who was not supposed to. Respondent recounted a prior episode wherein he believed a county commissioner was eyeing absentee ballots more than was usual during the process of opening absentee ballots and separating them from their mailing envelopes and secrecy sleeves. Respondent honestly was attempting to educate Commissioner Ericksen and also distract him from the tension or emotion Respondent thought he was experiencing. The conversation was not completed when the Canvassing Board concluded its activities in the tabulating room and its members began entering the small conference room.³⁸ Respondent later picked up that conversation again at another time, as Respondent was not certain that Commissioner Ericksen understood what the Respondent was attempting to communicate.

The transcript of the conversation is attached as an exhibit. However, it is not the complete conversation because Complainant altered the recording. (Note that the Complainant deleted the

³⁷ The recording of this confrontation was deleted or erased by Complainant.

³⁸ The Complainant alleges that when Commissioner Hanns entered the conference room, he uttered knowingly his awareness of what was going on. Commissioner Hanns was doing something he actually does out of habit. The Board members were re-entering the conference room to adjourn for the day. Typically Commissioner Hanns who has been chair before of the County Commission, as well as serving on the Canvassing Board previously, announces the next meeting date for the record. It is part of his routine when meetings wind down. Here, however, he realized he did not need to do that just as he started to speak, because in his mind, he recalled there was no recording taking place. His belief was in accordance with the Complainant's initial declaration that there would be no recording.

beginning of the conversation robbing it of important context. Respondent cannot recreate the exact wording that was deleted nor add it to the transcript.)

Respondent's understanding is that he may not disclose confidential client information or attorney-client privileged communications without the consent of the client. As the attached transcript indicates, Respondent did neither. Rather, based on observations, Respondent advised a former member of the Canvassing Board of his observations and as to the requirements of the law. Contemporaneously with that action, Respondent informed the then Supervisor of his observations and stated he would monitor the situation. In recounting these events to Commissioner Ericksen in light of the probable concern of the Complainant about viewing ballots, Respondent was using this prior incident to stress the importance of the secrecy of the ballot.

The Canvassing Board Attorney Allegedly Hesitated and Struggled to Find Words in Responding to the Airing of His Audio Taped Conversation with the Alternate Board Member in an Allegedly Failed Attempt to Dilute the Seriousness of What the Recording Revealed

The Complainant alleges that on September 12, 2014, when she played an audio of the recorded conversation between the Respondent and Commissioner Ericksen, the Respondent, "stumbled around with his response looking for words to dilute the seriousness of the event." On the contrary, the Respondent immediately and directly countered the accusation and explained the conversation as follows:

"That is a mischaracterization of what was stated. The conversation was with Mr. Ericksen and myself when Mr. Tristam was attempting to get photographs, and I was explaining to him that the ballot, how the ballot that is voted, cannot be viewed which we do through the process of separating them, and I had indicated that in a prior, and I couldn't even remember when, I noticed it appeared that a county commissioner was actually looking at the ballots. I didn't know. So I did notice that the commissioner left the room and made a call. I did not know who the call was to or what. But I cautioned the commissioner, you may not, one time, you may not examine those ballots if you were doing so. If you are attempting to contact anybody about those ballots, you may not do so. It is prohibited. And I did not see that activity again. I did what was proper, and you know what? I think as I recall, I don't know that you were actually the supervisor of elections at that time."³⁹

Canvassing Board Attorney Allegedly Violated the Sunshine Law by Acting as a Conduit Between Canvassing Board Members During the 2010 General Election

The Complainant alleges that Respondent violated the Sunshine Law by acting as a conduit between Canvassing Board members in the 2010 election season. At the August 6, 2010

³⁹ Flagler County Canvassing Board, September 12, 2014, Transcript Excerpt, page 1-2.

Canvassing Board meeting, Circuit Judge Kim Hammond and County Commissioner Alan Peterson stood in for County Judge Sharon Atack and County Commission Chairman George Hanns, respectively, both of whom were unavailable for that particular meeting due to out of town travel. They were single meeting substitutes. After the meeting, Judge Hammond discussed with Respondent the draft minutes and discussed changes. Respondent drafted the changes requested by Judge Hammond. Respondent then emailed the changes to the Judge to assure that he had prepared the change correctly. Upon that confirmation, Respondent emailed Commissioner Peterson to ascertain if he was in accord with the changes directed by Judge Hammond. Neither of them at the time of these communications was an active or current member of the Canvassing Board. Their terms had expired. The entire exchange was to ensure they agreed with the contents and that their input could be carried to the regular Board members for their own disposition in finalizing a set of minutes.⁴⁰ The regular members of the Canvassing Board, including Complainant, were copied on the emails and were forwarded the affirmative responses of the judge and commissioner. The entire communication was transparent and in the public record. For reference, the Complainant has attached the emails to her Complaint.

The Sunshine Law applies to meetings of two individuals who exercise independent decision-making authority.⁴¹ Since an alternate is only authorized to act in the absence of a board member, the email communications at issue here between the Canvassing Board attorney and two inactive alternates did not involve the response of any member with authority to vote for the approval of the minutes.

The Complainant also alleges in this regard that the Respondent worked to change the minutes in order to remove her claim of incorrect legal advice regarding who the statute requires the canvassing board chair to be. First, the changes in the minutes were requested by Judge Hammond as clearly indicated in the email included as Exhibit 8 to the Complaint. Second, the changes went beyond what Complainant stated in her complaint.⁴² Finally, Judge Hammond's intent plainly was to have business-like minutes and avoid the minutes becoming a politicized document, as Complainant apparently intended with her rendition of the minutes.⁴³

⁴⁰ The minutes were to be approved by the regular members of the Canvassing Board at its next meeting. Obviously, Judge Hammond and Commissioner Peterson would have no vote in that determination, underscoring the absence of a Sunshine violation.

⁴¹ See, AGO 88-45.

⁴² See emails among Judge Hammond, Commissioner Peterson, and Respondent attached to Complainant's complaint. Respondent also takes issue with Complainant's description as to what transpired at the meeting.

⁴³ The content of the minutes prepared by Complainant continued to be a problem even in 2014 with Judge Moore Stens who finally made a successful motion, over the objection of Complainant, to change the process for the official minutes due to the manner in which the Complainant prepared them. See, Flagler County Canvassing Board, August 26, 2014, Minutes, page 1-2.

August 25, 2014
Transcript Excerpt
Surreptitious Recording Made By Flagler County Supervisor of Elections

Canvassing Board Meeting in a Different Location.

Note: Not known how much of conversation prior to this point was deleted or erased.

Ericksen: She was afraid Pierre was going to focus in on a particular ballot when they were turned over and she would see it in an article in his paper.

Hadeed: Ballots were turned over?

Ericksen: Yeah. Yeah. That is her instructions to the people, you know you open them and you immediately put them in the pile upside down.

Hadeed: Actually, that is a good directive. Even with that...

Ericksen: Well that's why she wouldn't let me walk through and go to the men's room. She said there were ballots out there and you might see them.

Hadeed: The ballots ... are no ballots out there. There are no ballots in the hallway. The ballots are kept in the vault.

Ericksen: What is the background on these elderly people she is hiring?

Hadeed: They are like working under our supervision. They are allowed. It says so in the statute.

Ericksen: I know that.

Hadeed: I understand, I understand, you are saying what is to assure they are going to be credible and honest more so than you who stood for public office?

Ericksen: Of course, they probably don't have the contacts I would have, you know. So when told Joe next door...

Hadeed: the neighbor, yeah, I saw a ballot that said they were voting for so and so

Ericksen. But if I run to Nate or I run to Frank or I ran to Andy, for something..

Hadeed - Well you know, we actually had a problem here. Um, maybe I shouldn't tell you this.

Ericksen - Well, no don't.

Hadeed - No, prior, prior county commissioner, I had to caution him, cause he was reading the frickin ballots. I said you cannot do that.

Ericksen - Right, that's her instructions.

Hadeed - Well, that's the law, that's the frickin law.

Ericksen - Yeah, right.

Hadeed - I think it's like a third degree felony or something like that.

Ericksen - Well yeah she explained that, that if you said anything about what went on in the room, other than the procedures, in other words if you said I saw Al's ballot...

Hadeed - he voted for so and so. No, this commissioner was actually studying the ballots.

Ericksen - Oh wow.

Hadeed - And I said you cannot do that, you cannot do that. And the problem was after that session he ran out and made a call. And so I talked to him later, I said look, you just got, I know, I am sure that call was made was to report to somebody what he'd seen. It was like he was doing like a, a sample, a (inaudible) sample of what he's seen ...he didn't do it again.

Ericksen - Oh, she called security on him.

Hadeed - I know. I saw that. I was in here when she was explaining to him. I mean she was in here telling him.

Ericksen – Before he went, he had told George and I that he had tried to take pictures in here before and she told that to him last year or the year before, and he was trying again.

Hadeed – he ended up taking the pictures by the way.

Ericksen – oh yeah, he did.

Hadeed – No. I'm talking about the last time, because I was....

Ericksen – he took pictures in here

Hadeed – oh okay. Well I didn't know that. Well she, she, actually, the last time, whenever that occurred, I can't remember if it was two years ago, four years ago, I can't remember which election, but she barred him from the room and so he took them through the glass.

Ericksen – through the glass.

[Canvassing Board re-enters room.]

Hanns - Next meeting. Oh, she's not taping it anyway.

[Discussion of the next meeting.]