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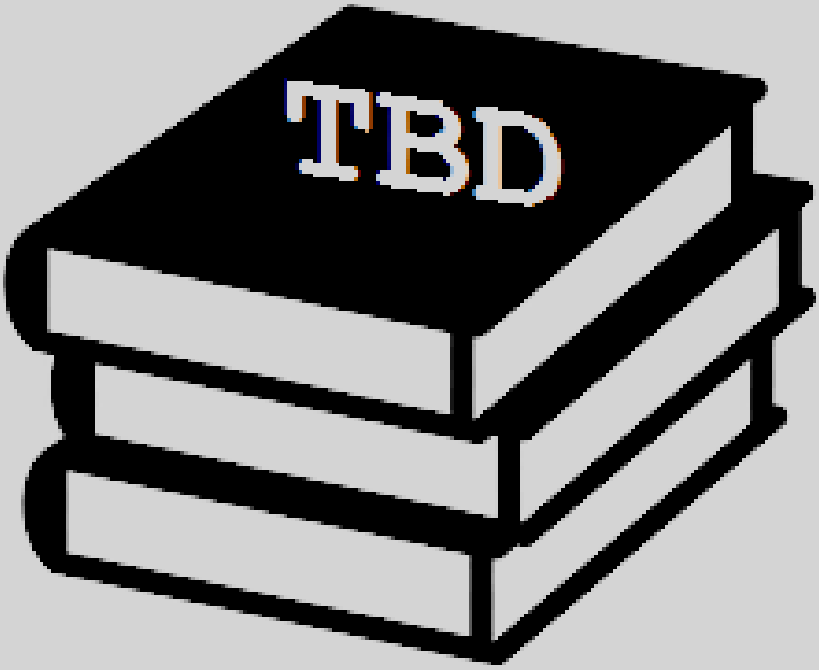

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IN THE THIRD DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

CASE NO. _____
DOAH CASE NO. 13-2254

BERNARD SPINARD AND MARION SPINARD,
Petitioners,

v.

WILLIAM GUERRERO, CHRISTINA BANG GUERRERO,
and
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION
Respondents.

ON APPEAL FROM FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

RESPONDENTS, WILLIAM GUERRERO AND CHRISTINA BANG GUERRERO'S PETITION FOR WRIT OF CERTIORARI AND CONSTITUTIONAL STAY WRIT

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I. PETITION FOR WRIT OF CERTIORARI

Respondents, WILLIAM GUERRERO and CHRISTINA BANG GUERRERO ("Respondents" or "the Guerreros"), pursuant to Rule 9.190(b)(2), FLA. R. APP. P. (2013), file this Petition for Writ of Certiorari seeking review of a non-final order from Administrative Law Judge ("ALJ") Hon. E. Gary Early rendered November 19, 2013, denying Respondents' *ore tenus* Motion to Disqualify the attorneys from The Silver Law Group, P.A., as counsel for Petitioners, BERNARD SPINARD and MARION SPINARD ("Petitioners"), and the ALJ's Amended Order Denying Motion to Disqualify or for Further Discovery denying Respondents' Motion for Reconsideration of *Ore Tenus* Motion to Disqualify the Silver Law Group, P.A., or in the Alternative, Motion for Further Discovery and Evidentiary Hearing Related to Collaboration and Communications with Christopher T. Byrd, Esq. As stated in greater detail below, the ALJ departed from the essential requirements of law that cannot be remedied on appeal when he abused his discretion and denied the motions which sought to disqualify counsel for the Petitioners who had an unfair advantage against Respondents in the administrative proceeding below, which proceeding is *still pending and scheduled to resume on January 6, 2014.*

II. CONSTITUTIONAL STAY WRIT

The Florida Constitution bestows on the district courts the all writs power. Art. V, § 4(b)(3), FLA. CONST. (district courts may issue "other writs necessary to the

complete exercise of [their] jurisdiction."). Encompassed in the district courts' all writs power is the power to issue constitutional stay writs. *Petit v. Adams*, 211 So. 2d 565, 566 (Fla. 1968) (issuing a stay under its all writs powers); *Fraternal Order of Police Lodge 92 v. Freeman*, 372 So. 2d 945, 949 (Fla. 3d DCA 1979) (entering "constitutional stay writ ... [which] stayed [the final judgment] pending the disposition of th[e] appeal."). Constitutional stay "writs are primarily used to preserve the status quo pending complete appellate review of an issue." FLORIDA APPELLATE PRACTICE, § 10.13 (8th ed. 2012).

Respondents request that this Court, pursuant to its all writs power, issue a **stay** of the Final Administrative Hearing scheduled to re-commence on January 6, 2014, to allow for a review of the ALJ's denial of the motions, or in the alternative, a stay to allow discovery from former Florida Department of Environmental Protection ("FDEP") Attorney, Christopher Byrd ("Byrd"), and Attorney for Petitioners, the Silver Law Group, P.A. ("Silver"), including depositions, document production, and non-party production, to discover the full extent of their improper communications and collaboration which gave Silver an unfair informational advantage in the subject administrative proceeding, thereby creating enormous prejudice to the Guerreros.

III. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review a "preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings ... if review of the final agency decision would not provide an adequate remedy." § 120.68(1), Fla. Stat. (2013); FLA. R. APP. P. 9.100(c)(3), and 9.190(b)(2) ("Review of a non-final agency action under the Administrative Procedure Act, including non-final action by an administrative law judge ... shall be commenced by filing a petition for review in accordance with rules 9.100(b) and (c)."). This is the proper District to hear this review because "[j]udicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides." § 120.68(2)(a), Fla. Stat. (2013).

This Court has jurisdiction to issues all writs necessary to the complete exercise of its jurisdiction. ART. V, § 4(b)(3), FLA. CONST. The Court has the power to review an order denying a stay. FLA. R. APP. P. 9.190(e)(3).

IV. PRELIMINARY STATEMENT

It is unquestionable that fairness, but also, the public perception of fairness in the justice system, are of utmost importance. The integrity of the judicial process demands that attorneys follow ethical standards and not utilize ethical breaches to their benefit to gain a competitive advantage. Here, Silver ---counsel for the Petitioners in the administrative proceeding below (petitioners are neighbors of the Guerreros and are challenging the settlement between the FDEP and the Guerreros over a certain dock, jetties and improvements), took advantage of unauthorized and surreptitious collaboration and disclosures by a contentious FDEP counsel whose employment was terminated by FDEP after the settlement was consummated. During the last several months of employment at the FDEP, Byrd disagreed that his employer/client, FDEP, should enter into the settlement with the Guerreros. The settlement involved the issuance of a new, modified permit, after the initial permit previously issued to the Guerreros had been revoked by the FDEP. So much so, that without authorization from his employer, Byrd began to transmit a privileged draft of the settlement agreement to Silver, discuss FDEP's strategy, and collaborate in order to pave the way for Silver to undermine the settlement with other FDEP counsel and/or later attack it in the very proceeding for which we now seek the relief sought in this Petition. As discussed below, Byrd was using his private, personal email to conceal and implement this unauthorized and clearly unethical collaboration and

disclosure. Byrd's opposition to the Guerreros' settlement apparently was part of larger discontent by Byrd since after his termination by FDEP, Byrd publicly accused the FDEP in the press of allegedly not enforcing environmental laws.

Mr. Byrd is now a solo practitioner in Orlando, FL whose new firm curiously enough is named the "Byrd Law Group," similar to the Silver "Law Group." Based on the closeness of the collaboration and the use of a personal email address, Mr. Byrd's loss of his employment and possible need for new matters, it is highly likely that the collaboration between Byrd and Silver in this case continued, if not intensified, giving Silver unique insights into the strategy of the FDEP and the details of how the settlement and its resulting modified permit came into being. This is precious and most helpful information in the proceeding below where Petitioners are attacking the very settlement which Byrd, since before even being terminated as an employee counsel, began leaking, attacking and undermining through and with Silver.

The Guerreros are facing a tainted and unfair proceeding given this surreptitious, unauthorized and unethical disclosures and collaboration. The ALJ abused his discretion by not disqualifying Silver and by summarily depriving the Guerreros from an opportunity to seek evidence and hold an evidentiary hearing on the post-termination collaboration, disclosures, etc. from both Byrd and Silver (including their email providers).

The Florida Rules of Professional Conduct demand that an attorney who receives privileged information has a solemn duty to return such information. Further, the receiving attorney must not make use of the information prior to returning it. However, in this case, counsel for Petitioners' counsel did just that. Byrd was in frequent communication, both while with the FDEP and likely after his termination, with Petitioners' counsel, Silver, concerning the ongoing settlement discussions and general case strategy and status. Such documented communication and collaboration through a personal email address---clearly used to conceal this from the FDEP---- was only fully disclosed at the end of the first day of the Final Administrative Hearing, November 18, 2013. These egregious actions on the part of Byrd and Silver were clear violations of the Florida Rules of Professional Conduct that resulted in prejudice to the Guerreros.

Upon learning of the occurrence and potential magnitude of the disclosure of privileged information, and the apparent coordination and collaboration between Bryd and Silver through the use of a personal email address, Guerreros' counsel immediately sought disqualification of Silver. For example, it was discovered by Guerreros' counsel that a draft version of the settlement agreement stamped "DRAFT", "CONFIDENTIAL AND PRIVILEDGE [sic]" between the FDEP and the Guerreros, which was being discussed and negotiated at the time, was "leaked" and supplied by Byrd to Silver.

On the first day of the proceedings on November 18, 2013, and quite significantly, **counsel for FDEP** first raised the issue of improper communication and disclosure by Byrd to Silver to the ALJ and expressed concerns over such conduct. A copy of the transcript documenting this discussion by FDEP is provided in **Appendix "A"**

Subsequently, the morning of November 19, 2013, Day Two of the Final Administrative Hearing, counsel for Guerreros made an *ore tenus* motion to disqualify Silver, disqualify the ALJ, and stay the proceeding to allow additional discovery into the improper communication and collaboration between Byrd and Silver (the "*Ore Tenus* Motion") (by way of subpoenas *ad testificandum* and *duces tecum*). The current FDEP counsel was supportive, arguing that additional discovery was indeed necessary into these improper communications. [Exhibit ___ - Transcript] Despite this, the ALJ denied the *Ore Tenus* Motion. A copy of the portion of the transcript documenting the argument and the ALJ's ruling is provided in **Appendix "B"**.

On November 27, 2013, Guerreros' counsel filed its now written Motion for Reconsideration of *Ore Tenus* Motion to Disqualify the Silver Law Group, P.A., or in the Alternative, Motion for Further Discovery and Evidentiary Hearing Related to Collaboration and Communications with Christopher T. Byrd, Esq. ("Motion for Reconsideration"). A copy of the Motion for Reconsideration is provided in

Appendix "C". On December 2, 2013, the ALJ issued his Order denying the Motion for Reconsideration (the "Order"). A copy of the Order is provided in **Appendix "D"**. The ALJ issued an Amended Order Denying Motion to Disqualify or for Further Discovery (the "Amended Order") on December 2, 2013. A copy of the Amended Order is provided in **Appendix "E"**. The Petition for Writ of Certiorari and Constitutional Stay Writ to appeal the decision of the ALJ not to disqualify Silver, or stay the administrative proceeding to allow additional discovery into the communications between Silver and Byrd and to conduct an evidentiary hearing following the additional discovery.

V. STATEMENT OF THE FACTS

A. History of the Case and Related Cases

Understanding the history of this case, and a series of prior related cases, is critical to comprehend the unfair benefit obtained by Silver through her improper communication and collaboration with Byrd. This case follows a long history of permitting and administrative challenges involving Petitioners, the Guerreros, and the late Burgess Levine, the prior owner of the Guerrero property. On September 19, 2008, the FDEP issued a permit exemption verification letter to Burgess Levine for certain work on his property and privately-owned submerged land. [1] Such work

1. Under FDEP permitting rules, an exemption is granted for certain projects that are below certain size thresholds, and that are generally consider to have little to no environmental impacts.

included repair and/or construction of a boat ramp, dock, channel, jetties, and a bulkhead (collectively referred to as the "Project"). Ms. Levine represented to the FDEP that the Project was necessary to address damage caused by Hurricane Wilma in 2006. The Guerreros purchased the subject property on or about June 2, 2010 believing that all required permits had been duly issued and all government requirements satisfied.

The issuance of the permit exemption verification was administratively challenged by the Petitioners (DOAH Case No. 11-1544). During the administrative proceeding on DOAH Case No. 11-1544, as a result of complaints from Petitioners, advanced by Silver, and after the Guerreros had started construction work on the dock and jetties, FDEP took the position that the Project included work not related to damage from Hurricane Wilma, nor was it on privately owned submerged land. As a result of this discovery, on May 2, 2011, the FDEP issued a Notice of Change of Agency Action, effectively revoking the exemption previously granted to Ms. Levine. Upon information and belief, Byrd, who was assigned to the matter, was instrumental in issuing and effecting the Notice of Change of Agency Action.

The Guerreros, now owners of the subject property, challenged the May 2, 2011 Notice of Change of Agency Action (DOAH Case No. 11-5307). The Petitioners intervened, again, through their counsel, Silver. Byrd was a member of a legal team which included his superiors. The Guerreros and FDEP (through Byrd's

superiors in the legal department) then entered into extensive settlement discussions, which resulted in a two-party Settlement Agreement that included modifications of the Project and the issuance of a new, modified permit. Upon receiving notice of the Settlement Agreement in DOAH Case No. 11-5307, the Petitioners filed an administrative petition that is the subject of the instant case. In each of these cases, Silver represented Petitioners.[2]

B. Silver's Communication with Byrd, and Byrd's Disclosure of Privileged Information

The relationship Byrd and Silver developed was somewhat unusual and intriguing. For example, Byrd emailed Silver for recommendations on hotels to stay at while attending the Final Administrative Hearing. (App. B: Pages 16-18). But the communications were not simply about travel recommendations. Strategic discussions between Byrd and Silver were numerous. Importantly, Silver and Byrd discussed the FDEP possibly filing counterclaims against the Guerreros (App. B: Pages 14-15, 19-20), and also discussed strategy concerning other litigation in which the Petitioners were involved against other parties, but were not aligned with FDEP (App. B: Pages 26-28, 29, 30). Clearly, Byrd wanted to assist Silver, and Silver gladly embraced that assistance.

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2. In addition to the administrative challenges, Petitioners filed a public and private nuisance lawsuit in circuit court related to the Project, and is represented by Silver there. *Spinrad v. Guerrero,* Sixteenth Judicial Circuit Court, Case No. 11-CA-267-M. Silver was recently *personally* sanctioned by the Court in that case for abusive conduct during a deposition. *See* **Appendix "F"**.

These discussions established the baseline for the communication history and collaboration between Byrd and Silver. What crossed the line was when Byrd solicited comments from Silver as to the Draft Settlement Agreement between the Guerreros and the FDEP. (App. B: Pages 21-25). This Settlement Agreement is the very document that is at issue and being challenged by the Petitioners in the case below.

Particularly worrisome is an email that was disclosed by FDEP on November 18, 2013, at the close **of the first day of the administrative proceeding**, and for which *FDEP counsel expressed serious concerns to the ALJ.*

On November 15, 2011, Byrd emailed Silver, stating **"[t]ried sending something from my personal email address, but it bounced back – I'll try again."** (Emphasis Added) (App. C: Pages 34-35).

This was a clear effort on the part of Byrd to circumvent the public records laws of Chapter 119 and the internal rules of conduct and practices of the FDEP's legal department. There is no indication as to the extent of the communication that occurred between Silver and Byrd through his private email. Moreover, FDEP has produced no public records from Byrd's private email account(s). Importantly, DOAH Case No. 11-5307, which resulted in the Settlement Agreement that is being challenged here, was *in the middle of the initial pleading and discovery stage* at the

time of the private emails between Byrd and Silver.[3] *See* DOAH Case No. 11-5307 docket attached as **"Appendix "G"**. Therefore, it is very likely that such private emails included discussions disclosing information subject to attorney-client privilege.

Byrd was terminated from the FDEP at the end of May, 2013. (App. B: Page 13, Line 22); (*see* articles attached as **Appendix "H"**). Despite this, Silver attempted to contact Byrd at his official FDEP email on June 14, 2013, the day she filed an Amended Petition for Administrative Hearing in the lower case. (App. C: Pages 52-53, with attachment to email found at App. C: Page 51). Silver's June 14, 2013 email is titled "reviewing files" and implies that additional emails were to follow with additional attachments.[4]

Importantly, the June 14, 2013, email attaches a February 12, 2013, FDEP memorandum discussing the conduct of Byrd (referred to as "Chris Berg" in the memorandum) at a meeting between FDEP and the Guerreros' representatives. (App. C: Page 51). The memorandum appears to question the intentions of Byrd based on his conduct at the referenced meeting. From Byrd's conduct, and the

---

3. FDEP filed its Motion to Dismiss one day after the November 15, 2011, email. (App. F, Page 2). Silver filed its first set of interrogatories and request for production of documents eight days after the November 15, 2011, email. (App. F: Page 2).

4. The June 14, 2013, email from Silver to Byrd stated "[a]s I go through them I will send you copies. If you want a copy of the entire disk, let me know."

private communications, it may be inferred that Byrd was not supportive of the Settlement Agreement and was working with Silver to undermine the efforts of FDEP and the Guerreros efforts in reaching a mutual settlement of the issues.

C. *Ore Tenus* Motion and Motion to Reconsider

FDEP first raised the issue of the communication and collaboration between Byrd and Silver on November 18, 2013. (App. A: Page 1, Lines 9-25; Page 2, Line 1). The morning after FDEP disclosed the November 5, 2011 and June 14, 2013, emails, counsel for Guerreros moved to disqualify Silver, disqualify the ALJ and moved to stay the administrative proceeding to allow additional discovery of the extent of the communication between Silver and Byrd. (App. B: Page 3, Lines 16-25; Page 4, Lines 1-21). The FDEP joined in the Guerreros' concerns. (App. B: Page 4, Lines 22-25; Page 5, Lines 1-12). In fact, Guerreros' counsel noted to the ALJ that it was FDEP that first raised the inappropriate communications between Byrd and Silver. (App. B: Page 3, Lines 7-15).

After hearing argument from all counsel, including FDEP counsel, the ALJ held "there to be no grounds for the disqualification of Ms. Silver based on the evidence I've heard." (App. B: Page 28, Lines 19-21), and "I will find now for the record that, based on what I've heard today, I find absolutely no impropriety on the part of Ms. Silver." (App. B: Page 27, Lines 18-21). As to the stay, he ruled "I just see nothing here that would cause me to suspend or – suspend this proceeding or that

would otherwise affect my role in this proceeding." (App. B: Page 27, Lines 16-25; Page 28, Line 1).

In arguing the propriety of her obtaining the Draft Settlement Agreement from Byrd, Silver stated that she did "not believe there is any issue, and most of the documents that we obtained relative to this case came from a public records request", indicating her belief that the Draft Settlement Agreement was a public record. (App. B: Page 19, Lines 9-12). However, the Draft Settlement Agreement is marked "CONFIDENTIAL AND PRIVILEDGE [sic]" at the top of Page 1, and each page of the Draft Settlement Agreement is marked "CONFIDENTIAL" as a watermark diagonally across each page. (App. C: Pages 25). Therefore, it is clear that the Draft Settlement Agreement is not intended to be seen by anyone other than those that are authorized to possess or view the confidential and privileged document; namely FDEP counsel and staff.[5]

The ALJ then inquired into Silver's communication with Byrd. Specifically, the ALJ asked:

> My immediate question today is were there communications, conversations, e-mails, any type of written or oral communication between you or your firm and Mr. Byrd regarding the substance -- and I understand you may have talked to him about scheduling, and I'm not concerned about that because at the time he was not an employee of the Department and there was nothing improper in your communicating with him with regard to the timing of his deposition -- but in terms of

5. Once the Settlement Agreement was final, it became a public record and was no longer privileged.

> the substance of any issue related to this proceeding, did you or your firm have any communications with Mr. Byrd?

(App. B: Page 6, Lines 18-25; Page 7, Lines 1-4). Silver's response was:

> **Not that I recall, Your Honor.** We had communications while he was with the Department, while we were an intervenor in the proceeding, while the settlement negotiations were going on to our exclusion, which we were being excluded from. Those discussions --...
>
> There were also communications regarding serving on one of the environmental committees with the Florida Bar that Mr. Byrd has chaired.

(Emphasis Added) (App. B: Page 7, Lines 5-10; Page 8, Lines 3-6).

Besides being an equivocal answer on such an important issue, Silver's response as an officer of the Court to the ALJ was contrary to the June 14, 2013, email after Byrd was terminated *wherein Silver sent Byrd a document related to the case, and that additional documents would follow.* (App. C:, Page 31). Silver's response also ignored the disclosure of privileged information and use of such information by Silver. Importantly, the emails from Byrd's private email could have involved discussions of the case without having been disclosed through public records. (App. C:, Pages 34-35).

Without question, there were inconsistencies between Silver's response to the ALJ's question and the evidence submitted. Despite these inconsistencies, the ALJ ignored the evidence on the record, and relied on Silver's vague response, as "an officer of the Court". (App. B: Page 16, Lines 14-20.).

Finally, the ALJ stated that any disclosure of privileged information by Byrd to Silver was an issue between Byrd and the FDEP, applying the apparent authority standard:

> That's an issue between the Department and Mr. Byrd. Mr. Byrd certainly had apparent authority to communicate with any party to the litigation. Whether he had actual authority or not, that's not Ms. Silver's responsibility to determine if his communications were authorized by his client.

(App. B: Page 8, Lines 22-25; Page 9, Lines 1-3). **FDEP agreed, but argued,** as Guerreros' counsel did as well, that it still disqualified Silver:

> No. However, it disqualifies her.
>
> I completely concur with that, however, it would still disqualify Ms. Silver, regardless.

(App. B: Page 9, Lines 4, 8-10).

The ALJ abused his discretion by summarily concluding that this issue of collaboration and disclosures did not involve or impact the Guerreros and by not probing deeper into the ethical and prejudicial consequences and impact of the Byrd-Silver collaboration.

For the reasons stated below, the ALJ departed from the essential requirements of law when he denied the *Ore Tenus* Motion and Motion to Reconsider, as he applied the incorrect legal standard. While this Court is considering the issues so appealed, it should grant a stay of the Final Administrative Hearing so as to prevent prejudice to the Guerreros that could not be remedied on appeal. Alternatively, this

Court should grant a stay and remand to allow additional discovery and for an evidentiary hearing to further discovery the communications between Silver and Byrd, both by way of subpoenas to Silver and Byrd and to their email providers.

VI. STANDARD AND SCOPE OF REVIEW

To be entitled to relief from a non-final order pursuant to a petition seeking a common law writ of certiorari, "the petitioner must demonstrate that the trial court departed from the essential requirements of the law, thereby causing irreparable injury which cannot be adequately remedied on appeal following final judgment." *Belair v. Drew*, 770 So. 2d 1164, 1166 (Fla. 2000); *see also Eight Hundred, Inc. v. Fla. Dep't of Revenue*, 837 So. 2d 574, 575 (Fla. 1st DCA 2003). The standard of review for orders entered on motions to disqualify is that of an abuse of discretion. *Applied Digital Solutions, Inc. v. Vasa*, 941 So. 2d 404 (Fla. 4th DCA 2006).

VII. ARGUMENT

A. The ALJ Abused his Discretion and Departed From the Essential Requirements of Law When he Summarily Denied Guerreros' Motion to Disqualify as the Communications Between Silver and Byrd Resulted in an Unfair Informational Advantage Resulting in Prejudice to Guerreros

The ALJ departed from the essential requirements of law, as the ALJ failed to apply the correct legal standard to the actions of Silver communicating and collaborating with Byrd, both during his time at FDEP and apparent collaboration subsequent to Byrd's termination. Contrary to the record before him, the ALJ found that no "impropriety" occurred by Silver with her communications with Silver. However, the ALJ did not provide further detail as to the legal standard he applied when coming to his conclusion or what evidence, other than his broad assumption, he was relying to reach that conclusion.

The correct legal standard when determining whether the receipt of inadvertent disclosure of privileged material warrants disqualification is not "impropriety," but instead, it involves the application of a two-part test. *Moriber v. Dreiling*, 95 So. 2d 449, 454 (Fla. 3d DCA 2012). This two-part test requires the mover to establish: (1) that the inadvertent disclosure is protected, either by privilege or confidentiality; and (2) that there is a possibility that the receiving party has obtained an 'unfair' 'informational advantage' as a result of the inadvertent disclosure. *Id. citing Atlas Air, Inc. v.Greenberg Traurig, P.A.*, 997 So. 2d 1117, 1118 (Fla. 3d DCA 2008) *and*

Abamar Housing & Development, Inc. v. Lisa Daly Lady Décor, Inc., 724 So. 2d 572, 573-574 (Fla. 3d DCA 1997). Based on the record at the hearing below, it is clear that the ALJ did not apply the two-part test to the situation at hand.[6]

1. ***The ALJ Abused his Discretion and Departed from the Essential Requirements of Law When he Failed to Find that the Communications Between Byrd and Silver Were Protected by Privilege or Confidentiality***

The first prong of the two-part test for disqualification of counsel for inadvertent disclosure requires a finding that the disclosure is protected by privilege or confidentiality. The ALJ appeared to hold that the attorney-client privilege had been waived by Silver, or in the alternative that Silver relied on Byrd's apparent authority to disclose the Draft Settlement Agreement to Silver. Neither of these are findings supported by the record, and thus the ALJ's finding constitutes a departure from the essential requirements of law and an abuse of discretion.[7]

The Third District Court of Appeal adopted a five factor relevant circumstances test to determine whether a party waived privilege through inadvertent

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6. Although Byrd's actions appear to be intentional, it is proper to apply the inadvertent disclosure standard as the issue does not involve the Guerreros' counsel, and there does not appear to be an applicable legal standard for intentional disclosure of privileged information.

7. We note that while viscerally, the ALJ was tempted to question what standing the Guerreros had to challenge disclosure of privileged information involving parties other than themselves, the issue here is quite different and unique in that an adversary counsel now has unfairly benefitted from an improper collaboration/ disclosure and is strategically reaping said benefits at the expense of the Guerreros who did not have that kind of advantage.

disclosure. A court determines whether an inadvertent production amounts to a waiver of the attorney client privilege by weighing the following factors: (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error. *Abamar Housing & Development, Inc. v. Lisa Daly Lady Décor, Inc.*, 698 So. 2d 276, 279 (Fla. 3d DCA 1997).

a. *The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production*

The first prong of the *Abamar* test is met, as the Guerreros did not disclose the Draft Settlement Agreement, or any case strategy or case information to Silver, the opposing counsel. The Guerreros cannot be held responsible for the actions of a somewhat defiant FDEP attorney who opposed what his employer/client was doing and who had a personal relationship with Silver motivated by a desire to undermine the settlement, and give ammunition to Silver to attack it, undermine it or later challenge it as she is doing presently. Nor can they anticipate or take any precautions against the unauthorized disclosure of attorney-client privileged information by Byrd. Byrd clearly utilized private emails to contact Silver. Silver clearly attempted to contact Byrd after he was terminated, an attempt that may have been followed by contact to Byrd's private email. Based on the Guerreros' inability to control the

actions of a FDEP attorney, the Guerreros themselves took all necessary precautions to prevent inadvertent disclosure of the privileged information.

In the context of document production, this case is unique from others in that it involves both document production and public records access issues. While it appears that the ALJ may have believed that public records laws found in Chapter 119, Fla. Stat., would allow Byrd to release the documents or information to Silver, such is not the case. Section 119.011(12), Fla. Stat., defines public records as "all documents... made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.071, Fla. Stat., sets forth exemptions from the public records laws. Specifically, Section 119.071(1)(c), Fla. Stat. states:

> A public record that was prepared by an agency attorney... that reflects a mental impression, conclusion, litigation strategy, or legal theory of the... agency, and that was prepared exclusively for civil or criminal litigation or for adversarial administrative proceedings... is exempt from s. 119.07(1) and s. 24(a), Art. 1 of the State Constitution until the conclusion of the litigation or adversarial administrative proceedings.

Under the public records law exemption, the Draft Settlement Agreement would be exempt from disclosure under public records until the conclusion of the DOAH

proceeding, DOAH Case No. 11-5307. Until such time, it was exempt, and therefore qualified as privileged from disclosure.[8]

b. The number of inadvertent disclosures

There were no inadvertent disclosures by the Guerreros. The full extent of Byrd's disclosures cannot be fully ascertained as the ALJ stopped any further inquiry or discovery by way of subpoenas of Byrd, Silver and their personal email providers, and an evidentiary hearing on same. If while employed by and representing the FDEP, Byrd was bold enough to use his personal email address to avoid public records disclosure and his employer knowing about it, there likely were numerous communications between Byrd and Silver that exist and could be discovered. Regardless, the low number of disclosures would favor a finding that the attorney-client privilege had not been waived.

c. The extent of the disclosure

The extent of disclosure of privileged or confidential information was significant. The very Settlement Agreement that is subject to the case below was released to Silver as the Settlement Agreement which was being negotiated between FDEP and the Guerreros. The Settlement Agreement contained numerous statements concerning its status as "Draft", "Privileged" and "Confidential".

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8. It could be further argued that the Draft Settlement Agreement was not a public record as it is not made in connection with official FDEP business. Under such argument, the final Settlement Agreement qualifies as the public record.

Without question, Silver knew, or at a minimum should have known, that such disclosure involved privilege or confidential information that should not have been disclosed. Silver should also know it was improper for Byrd to disclose case strategy or other privileged information to Silver during the pendency of the numerous cases involving Silver and the Guerreros. Also, Silver should know that use of private emails to avoid public records access was improper. The extent of disclosures favor a finding that the privilege had not been waived.

d. Any delay and measures taken to rectify the disclosures

The Guerreros' counsel did not make the inadvertent disclosure, and therefore, could not take any measures to rectify the disclosure. Furthermore, the communication between Byrd and Silver using private emails and the June 14, 2013, email sent from Silver to Byrd after Byrd's termination were not disclosed until the first day of the Final Administrative Hearing. It is these offline, and post-termination, communications that are the most concerning to the Guerreros. There was no opportunity to rectify disclosures that were not realized until the first day of the hearing.

e. Whether the overriding interests of justice would be served by relieving a party of its error

There are overriding interests of justice impacting the Guerreros that favor a finding of privilege and would only be served by disqualifying Silver. For years, the Petitioners have been involved in lawsuits against the Guerreros. The disclosure of

privileged information serves as a direct, tactical advantage to the Petitioners as they continue their war against the Guerreros. Justice would not be served by allowing Silver to continue to represent Petitioners in this matter. Permitting the Petitioners to use such documents may result in prejudice to the Guerreros, which cannot be fully rectified upon appeal from a final judgment. *Abamar Housing & Development, Inc.*, 698 So. 2d 276; *see also Gen. Accident Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505 (Fla. 4th DCA 1986).

Like so many ethical considerations in the practice of law, perceptions are of the utmost importance. *General Accident Insurance Corp.*, 483 So. 2d at 506. The conduct of the attorney receiving the privileged documents must be tested against the standards imposed by the Rules of Professional Conduct. *Moriber*, 95 So. 3d at 454. An attorney who complies with the Florida Rules of Professional Conduct upon receiving an inadvertent disclosure will not be subject to disqualification. *Id.* at 455. The receiving attorney also must not exercise an unfair advantage (such as photocopying the confidential documents prior to returning them). *Id.* The interests of justice require that the Rules of Professional Responsibility be honored. *Nova Southeastern Univ., Inc. v. Jacobson*, 25 So. 3d 82, 88 (Fla. 4th DCA 2009).

Here, there are several Florida Rules of Professional Conduct that are implicated. Most notably, FLA. R. PROF. CONDUCT 4-4.4(b) states that "[a] lawyer who receives a document relating to the representation of the lawyer's client and

knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender." Comments to Rule 4-4.4 state that the Rule includes "unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." Additional rules govern Byrd's conduct, and should be considered when evaluating Silver's communications with Byrd.[9] Silver knew, or should have known, that Byrd's disclosure of privileged information, whether as a Draft Settlement Agreement or case strategy, was not approved by FDEP. Silver should have ceased all such communications immediately and in fact, she may have been under a legal duty to report such conduct at least to the FDEP. Instead, she continued the communications outside of the public records, and after Byrd was terminated by FDEP. Such communication and collaboration was to the disadvantage of FDEP and a violation of Rule 4-1.9(b). But in the process, regardless of FDEP's position, the unethical conduct has caused the Guerreros great prejudice. Accordingly, justice

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9. The following additional Florida Rules of Professional Conduct were potentially violated by Byrd, and thus should be considered by the Court when evaluating Silver's conduct in the administrative proceeding:

> **Rule 4-1.6 Confidentiality of Information.** (a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client... unless the client gives informed consent.

> **Rule 4-1.9 Conflict of Interest; Former Client.** A lawyer who has formerly represented a client in a matter shall not thereafter: (b) use information relating to the representation to the disadvantage of the former client... or when the information has become generally known; or (c) reveal information relating to the representation...

would only be served through the disqualification of Silver, as the attorney-client privilege had not been waived.

As all five factors weigh in favor of finding that the attorney-client relationship had not been waived, the disclosure of privileged information has been established. In addition to the communication that were discovered, many other disclosures of privileged information may have occurred. To the extent this Court deems it necessary, additional, narrow discovery of Byrd and Silver, **as well as their personal email providers**, would allow the Guerreros, and FDEP, to further inquire into the extent of communications between Byrd and Silver.

2. ***The ALJ Departed from the Essential Requirements of Law When he Failed to Find that there was a Possibility that Silver has Obtained an Unfair Informational Advantage***

The ALJ departed from the essential requirements of law, as he abused his discretion and applied the incorrect legal standard to the situation at hand. The ALJ should have analyzed the situation under the standard of whether there was a possibility that Silver obtained an unfair informational advantage. Clearly, there is more than a colorable case that she did. Particularly, Silver may have been privy, for example, to what FDEP saw as the weaknesses and strengths of the settlement, which in reality is the modified permit which Petitioners are attacking. Silver may also be privy and have knowledge of which FDEP witnesses internally opposed the settlement and why (and hence, this explains why Silver deposed a series of FDEP

employees), what settlement proposals and discussions the Guerreros put forth and had with FDEP which could reveal strategic knowledge about the Guerreros' trial strategy, etc. The list is endless of how an adversary counsel can benefit from "inside information" about the genesis of a document and the dynamics underlying regulatory action (the modified permit) when that counsel is in a position to *attack* that document and that action.

Instead, the ALJ only summarily and quite quickly concluded, **even without waiting for Silver to oppose the Motion for Reconsideration,** that there was no "impropriety" by Silver in her communications with Byrd. The ALJ incorrectly focused on Silver's conduct. Rather, the ALJ should have focused on the **prejudice to the Guerreros, the unfair advantage by Silver, and the extreme likelihood given the circumstances that Silver and Byrd communicated and collaborated after Byrd's termination.** The ALJ did not even allow the Guerreros to seek narrow discovery of Byrd, Silver and their email providers in order to have an evidentiary hearing on disqualification. (This is far from any "fishing expedition" as the only issue is email communications, meetings, conversations, and collaboration which two officers of the Court and members of the Bar—Byrd and Silver--- engaged in. Even if emails are claimed to have been deleted or destroyed, they still remain with their email providers, another narrow and limited source.) Thus, when the materiality, impact, significance and prejudice to the Guerreros are weighed against this narrow

discovery, for a specific period of time and focused on one thing alone, fundamental fairness at the very least calls for the granting of that narrow discovery and an evidentiary hearing.

It is error to fail to make findings as to whether there was a possibility that an unfair information advantage was received through the disclosure of privileged information of documents. *Construction Systems of America, Inc. v. Travelers Casualty & Surety Company of America*, 118 So. 3d 942, 944 (Fla. 3d DCA 2013). Upon the determination that the privilege was not waived, this issue should be remanded back to the ALJ for further findings and, if necessary, discovery related to the possibility that Silver obtained an unfair informational advantage. *Id.* (remanded for further findings consistent with the standards set forth in *Moriber*).

Case law holds that the disclosure of privileged information, including violations of attorney-client privileges, require disqualification of counsel. *Double T Corp. v. Jalis Dev.*, 682 So. 2d 1160, 1161 (Fla 5th DCA 1996); *Adelman v. Adelman*, 561 So. 2d 671, 672 (Fla. 3d DCA 1990); *General Accident Ins. Co.*, 483 So.2d 505.

The Court in *General Accident Ins. Co.* held that "how much of an advantage, if any, one party may gain over another we cannot measure. **However, the possibility that such an advantage did accrue warrants resort to this drastic remedy for the sake of the appearance of justice, if not justice itself, and the**

public's interest in the integrity of the judicial process." (Emphasis Added) *Id.* at 506.

Because there is no requirement that prejudice be shown, *Abamar*, 724 So. 2d at 573; *Junger Util. & Paving Co., v. Myers*, 578 So. 2d 1117, 1119 (Fla. 1st DCA 1989), and it is so difficult to measure how much of an advantage, if any, was obtained due to the inadvertent disclosure of privileged documents, the court must look to the actions taken by the receiving lawyer or law firm in determining whether the drastic remedy of disqualification is warranted. *Abamar*, 724 So. 2d at 574.

Here, the ALJ's rulings on the Motions fail to include a finding that there was not a possibility of an unfair informational advantage for the Petitioners based on the information provided by Byrd to Silver. This was error, and not supported by competent, substantial evidence in the record. Moreover, and perhaps this may be a case of first impression, Byrd's *collaboration* with Silver both during and after his FDEP employment is also a significant factor here, as Silver has received advice and counsel from someone who ethically should not have provided that.

What is clear from the record is that Silver obtained privileged information and privileged collaboration and assistance, and then utilized this to create an unfair informational advantage for Petitioners.

The first example came from Silver providing substantive comments on the Draft Settlement Agreement during the pendency of the administrative proceeding.

Petitioners were not a party to the settlement. They were intervenors in the proceeding. Clearly, the intent was to use Byrd as a conduit to inject provisions that the Guerreros would surely reject, thereby scuttling the settlement.

Next, Silver continued to send Byrd documents related to the case subsequent to his termination from FDEP. To the extent that there were continuous communications outside of the public records, there is a real possibility that numerous, and significant, disclosures of privileged information and collaboration occurred between Silver and Byrd throughout the administrative proceeding below. This record establishes more than a probability that Silver obtained an unfair information advantage through her communications and collaboration with Byrd, enough to disqualify her outright (or at the very least requiring narrow discovery and an evidentiary hearing). We respectfully request this Court to reverse the decision of the ALJ and remand this matter with an order to disqualify Silver.

B. The ALJ Departed From the Essential Requirements of Law When he Denied Guerreros' Motion to Extend Discovery and Allow an Evidentiary Hearing on the Unfair Informational Advantage Provided to Petitioners by Byrd Through his Communications with Silver

To the extent that the ALJ should be afforded discretion, any implied findings were not supported by competent, substantial evidence. The record has not been fully developed, as the Guerreros were not permitted further discovery into the extent and magnitude of the communications between Silver and Byrd that may have occurred outside of the public records, and after Byrd's termination. In the interest of

justice and fairness to the Guerreros, such additional, narrow discovery as pointed out above should be permitted. To allow time to conduct such additional discovery, and hold an evidentiary hearing on same, the administrative proceeding below should be placed in abeyance and a stay granted by this Court.

The purpose of the requested evidentiary hearing is not to determine whether there has been a breach of the Florida Rules of Professional Conduct for which the attorney may be disciplined or any "impropriety", but whether, because of such breach, **one party has an unfair advantage over the other which can only be eliminated by removing the attorney**. *Pantori, Inc. v. Stephenson*, 384 So. 2d 1357, 1359 (Fla. 5th DCA 1980); *Dawson v. Bram*, 491 So. 2d 1275, 1276 (Fla. 2d DCA 1986). While the prejudice to the Guerreros is clear, seeking review of a motion to disqualify through an interlocutory appeal prior to final judgment does not require a showing of actual prejudice. *Junger Utility & Paving Co. v. Myers*, 578 So. 2d 1117, 1119 (Fla. 5th DCA 1989). Moreover, a subjective impression of a conflict (Byrd's collaboration with and disclosures to Silver) requires an evidentiary hearing in light of contradictory evidence that such evidence was objectively reasonable. *Yang Enters. v. Georgalis*, 988 So. 2d 1180, 1184 (Fla. 4th DCA 2008); *citing Gen. Elec. Real Estate Corp. v. S. A. Weisburg, Inc.*, 605 So. 2d 955, 956 (Fla. 4th DCA 1992).

The Guerreros were only provided evidence of potential violations of public records laws, and communications between Silver and Byrd after Byrd's termination, on the first day of the Final Administrative Hearing. By law, such newly discovered evidence warrants further investigation. *See Florida Audubon Soc. v. Ratner*, 497 So. 2d 672, 677-78 (Fla. 3d DCA 1986). Just as the discovery of these emails could have provided a basis for a new trial had they been discovered after the trial, they should, likewise, have provided a sufficient basis for the ALJ to grant a motion for additional discovery during the proceeding on this very limited issue. *Id.* ("[N]ewly discovered evidence is a valid basis for a new trial only where the evidence could not have been discovered before trial by the exercise of due diligence, and where the evidence is not cumulative."). There was more than sufficient subjective evidence to justify additional, narrow discovery and an evidentiary hearing as to the full magnitude of the communication and collaboration between Byrd and Silver.

The ALJ should have made specific findings regarding the unfair informational advantage, and the record was not fully developed to support a finding that Silver had not obtained an unfair informational advantage from Silver. As such, the ALJ departed from the essential requirements of law, and this Court should stay the administrative proceeding and remand the issue back to the ALJ with direction to disqualify Silver, or in the alternative, allow additional discovery and conduct an evidentiary hearing as to the private communications between Silver and Byrd. To

the extent that discovery from third party email providers of Byrd and Silver may required, the Guerreros request that discovery be permitted of such non-parties.[10]

VIII. CONCLUSION

For the foregoing reasons, Respondents, Guerreros, respectfully request that this Court stay the administrative proceeding during the appeal, overturn the decision of the ALJ and disqualify Silver, or in the alternative, allow discovery from Silver, Byrd, and their non-party e-mail providers, to determine whether Petitioners obtained an unfair informational advantage through the disclosure of privileged information by Byrd to Silver and improper collaboration between them.

Respectfully submitted, this 13th day of December, 2013.

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10. Although the relief we seek does not include disqualification of the ALJ, it is possible that the proceedings may already have been so irretrievably tainted by the unfair informational advantage, that the ALJ as fact-finder may not be able to isolate the tainted evidence and arguments.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via Electronic Mail this 13th day of December, 2013 to:

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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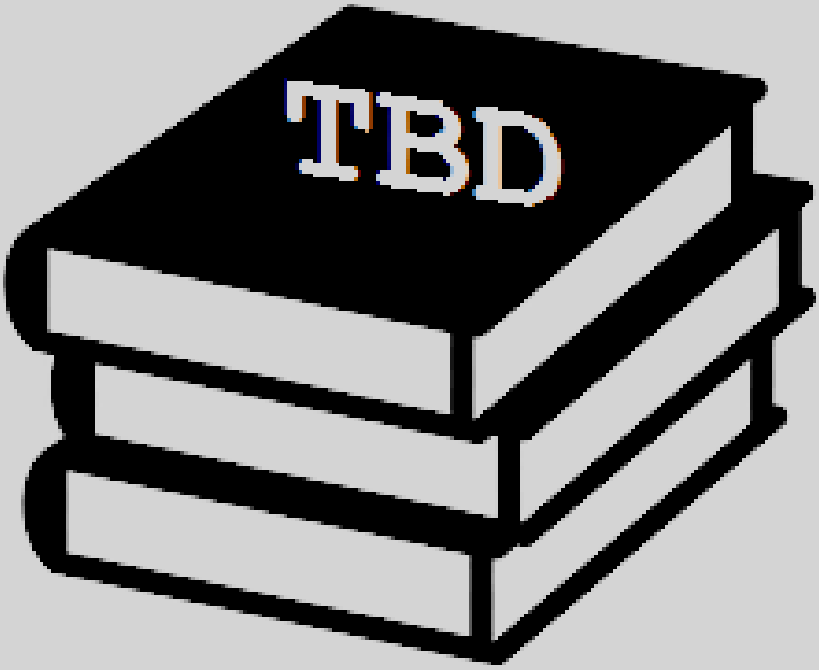

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