

jurisdiction continued only as long as he was in residential treatment or on conditional release, and argues that after the Court released him on 16 June 2006, he was not on any form of conditional release and was not in residential treatment, hence, the Court no longer has jurisdiction.

Defendant cites *Miller v. State*, 2007 WL 121561 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D259c] (court cannot order involuntary commitment absent clear & convincing evidence person meets statutory criteria for same); *DCF v. Gilliland*, 2007 WL 283703 (Fla. 5th DCA 2007) [32 Fla. L. Weekly D367b] (where incompetent defendant no longer meets criteria for involuntary commitment he must be released or state must institute civil commitment proceedings); *Oren v. Judd*, 940 So.2d 1271 (Fla. 2nd DCA 2006) (state must either institute civil proceedings against incompetent defendant absent evidence he would regain competency); and *Mosher v. State*, 876 So.2d 1230 (Fla. 1st DCA 2004) (same). The State and Defendant cite *A.P.D. v. Ramos*, 925 So.2d 455 (Fla. 3rd DCA 2006) (inapposite).

Analysis

Because Defendant is not competent due to mental retardation, this Court is constrained to apply the dictates of §§ 916.302(1)(a-d), 916.3025(1)(2)(3), 916.303(1)(2)(3), and 916.304, Fla. Stat.

A person charged with a felony who is adjudicated incompetent due to retardation may be involuntarily committed for *training* if (a) he is retarded, (b) there is a likelihood he will harm himself or others evidenced by recent behavior, (c) all less restrictive alternatives are not appropriate, and (d) there is a reasonable probability ... he will regain competency. See § 916.302, Fla. Stat.

All experts have opined that Defendant is not competent and not restorable.

A committing court shall retain jurisdiction in the case of a retarded incompetent person ordered into a forensic facility for retarded persons, and shall retain jurisdiction in the case of a defendant placed on conditional release pursuant to § 916.304, Fla. Stat., and, a committing court shall consider a petition to involuntarily admit a person whose charges have been dismissed and may continue secure placement as provided by § 916.303, Fla. Stat. Such court shall retain jurisdiction over such person *so long as he remains in secure placement or conditional release as provided in § 916.303, Fla. Stat.* See § 916.3025, Fla. Stat.

The Court dismissed all charges because Defendant is retarded, not competent, and not restorable, and later in November, 2003 and May, 2005 ordered him civilly committed, with placement at the discretion of A.P.D., and thereafter released him from secure placement in June, 2006 at the suggestion of A.P.D. mental health experts with Sunland Center to allow him to live with his father. He is not under any conditional release order.

This Court concludes that it no longer has jurisdiction over Defendant and must discharge him, without prejudice to the State to reinstitute prosecutions should Defendant's competence be restored in the future, and does accordingly

ORDER that Defendant be DISCHARGED, and does further

ORDER that the Hillsborough County Sheriff's Office release Defendant to any county that has a hold on him for pending criminal charges.

The State of Florida may seek review of this order in the manner provided by law.

* * *

Municipal corporations—Public records—Attorneys—Ex parte contact—Counsel representing plaintiffs in class action against city and police pension board was not required to obtain consent of city attorney prior to filing public records request for names and addresses of officers who might qualify as members of class directly with city clerk—Rule 4-4.2 does not prohibit this public records request and

does not bar attorney from all direct contact with constituents of opposing organization represented by counsel

EDWARD REMIA, JOSHUA RIBA, BENN LOFTON, BRIAN YOUNGBLOOD, CARLOS ROSA, AND KEITH EDWARDS, on behalf of themselves and others similarly situated, Plaintiffs, vs. CITY OF ST. PETERSBURG POLICE PENSION BOARD OF TRUSTEES and THE CITY OF ST. PETERSBURG, Defendants. Circuit Court, 6th Judicial Circuit in and for Pinellas County, Civil Division. Case No. 06-9209-CI-07. UCN 522006CA009209XXCICI. July 17, 2007. Bruce Boyer, Judge. Counsel: Ryan Barack, Kwall, Showers, Coleman & Barack, PA, Clearwater, for Plaintiff. Jane Ellen Wallace, Assistant City Attorney, Office of the City Attorney, St. Petersburg.

ORDER DENYING CITY OF ST. PETERSBURG'S SECOND MOTION FOR PROTECTIVE ORDER

THIS MATTER is before the Court on the Second Motion of the City of St. Petersburg for Protective Order. The City claims that the Plaintiffs' attorney, Ryan Barack, violated the Rules Regulating the Florida Bar by sending a public records request directly to the City Clerk without first obtaining the consent of the Office of the City Attorney. The City asks this Court to determine that the direct conduct was improper and to prohibit Barack or his office from any further direct contact with the City regarding this matter without the consent of the City's attorneys. Plaintiffs' counsel maintains that a member of the public is always entitled to file a public records request regardless of whether litigation is pending between that public member and the entity from which the records are sought.

The Court conducted a hearing on this motion on June 26, 2007, at which all parties were represented. Having considered the arguments of counsel, legal authorities, and being otherwise fully advised, this Court denies the motion because the Rules Regulating the Florida Bar do not prohibit either this particular public records request or all ex parte contact between an attorney and employees of an opposing organization.

This matter has been certified as a class action by former police officers of the City who claim entitlement to contributions they made to the Police Pension Fund. In May of 2007, Barack served the City with interrogatories seeking, *inter alia*, the names and addresses of those police officers who might qualify as members of the class.

Approximately two weeks later, without first consulting the City Attorney, Barack directly faxed a public records request to the City Clerk regarding the same information he had requested in the interrogatories. Barack copied the request to the City Attorney, who received it the following day. Although the City Attorney objected to Barack's direct contact with the City Clerk, it responded to the request after Barack indicated he would file suit against the City if the records were not produced immediately.

The City does not argue that the Plaintiffs cannot pursue a public records request once litigation commences. See *Wait v. Florida Power & Light Co.*, 372 So. 2d 420, 424 (Fla. 1979) (entity that engages in litigation does not relinquish its independent statutory right to review public records). However, the City maintains that under the rules governing attorney conduct, it was improper for Barack to make the public records request directly to the City without first seeking the consent of the City Attorney.

Rules Regulating the Florida Bar Rule 4-4.2 governs contacts between an attorney and the opposing party. It provides:

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

Further, where the opposing client is an organization, the Com-

ment to Rule 4-4.2 prohibits communication with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter; has authority to obligate the organization regarding the matter; or whose acts or omissions regarding the matter could be imputed to the organization.

There is no indication that the Public Records Act, Chapter 119, Florida Statutes, requires that service be made directly on the opposing party as opposed to that party's counsel. *Cf. Mintus v. City of West Palm Beach*, 711 So. 2d 1359, 1361 (Fla. 4th DCA 1998) (public records request need not be made upon the statutorily designated custodian or his or her designee, but may instead be made to anyone with "custody" of the public record).

However, contrary to the broad reading the City urges this Court to apply, Rule 4-4.2 does not bar an attorney from all direct contact with constituents of an opposing organization represented by counsel. In *H.B.A. Management, Inc. v. Estate of Schwartz*, 693 So. 2d 541 (Fla. 1997), where the Supreme Court determined that Rule 4-4.2 does not apply to contacts with former employees of an organization, the Court also noted that the Rule does not even apply to every current employee of the organization:

When a corporation or other organization is known to be represented with respect to a particular matter, the bar [against ex parte communications] applies only to communications with those employees who have managerial responsibility, those whose act or omission may be imputed to the organization, and those whose statements may constitute admissions by the organization with respect to the matter in question.

Id. at 545-46 (emphasis in original).

While Rule 4-4.2 has been amended since *H.B.A. Management*, the current Comment is substantially the same regarding the types of employees an attorney is prohibited from contacting directly.¹ In this particular situation, the City Clerk is not one of these types of employees because in her capacity as custodian of the City's records, her official functions are ministerial. *See Smith v. State*, 696 So. 2d 814, 815-16 (Fla. 2d DCA 1997) (mandamus, which is used to compel an official to perform an indisputable ministerial duty, applies to refusal to provide public records because disclosure of public records is mandatory). While the City Clerk might consult with the City Attorney regarding this public records request, there is no indication that, as records custodian, the City Clerk has supervised, directed, or regularly consulted with the City's attorneys concerning the substance of this litigation. Likewise, there is no indication that, as records custodian, she has any authority to obligate the City regarding this litigation or could commit any acts or omissions regarding this litigation that could be imputed to the City.

The Court recognizes that there may be situations in which the City Clerk has acted in her managerial capacity relevant to litigation, and in such situations she might fall within the types of employees who could not be contacted directly. However, when Barack directed a public records request specifically to the City Clerk in her ministerial capacity, he did not engage in any ex parte communication prohibited by Rule 4-4.2. Instead, the City Clerk was under a mandatory duty to either provide the requested documents or to cite the specific exemptions under which she was withholding documents. Fla. Stat. § 119.07(1)(c). She could exercise no discretion in this regard. *See Mills v. Doyle*, 407 So. 2d 348, 350 (Fla. 4th DCA 1981) (disclosure of public records is not discretionary).

Consequently, the City is not entitled to a protective order declaring Barack's contact with the City Clerk to be improper. Likewise, since the prohibition set forth in Rule 4-4.2 does not apply to all organizational employees, the City is not entitled to a protective order prohibiting Barack or his office from directly contacting the City on this matter without the consent of the City Attorney's Office.

Therefore, it is

ORDERED that the City of St. Petersburg's Second Motion for

Protective Order is DENIED.

¹The version of the Comment to Rule 4-4.2 before the Court in *H.B.A. Management* prohibited direct communication with "persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization ... or whose statement may constitute an admission on the part of the organization."

* * *

Insurance—Homeowners—Appraisal award—Confirmation—Denial—Where parties opted to use voluntary appraisal process established in insurance policy to resolve dispute as to amount of loss, appraisals were conducted, and amount of loss was set and paid, there is no need or legal basis for court to grant motion to confirm appraisal award

MICHAEL CLEMENS and CINDI CLEMENS, Plaintiffs, vs. STATE FARM FLORIDA INSURANCE COMPANY, Defendant. Circuit Court, 7th Judicial Circuit in and for Volusia County. Case No. 2005-10087-CIDL. June 18, 2007. David A. Monaco, Judge. Counsel: Matthew R. Danahy, for Plaintiffs. Lynn S. Alfano-Vinton, Kingsford & Rock, P.A., Maitland, for Defendant.

**ORDER DENYING MOTION TO CONFIRM
APPRAISAL AWARD FOR DAMAGE TO DWELLING
AND CODE UPGRADES ONLY, AND FOR ENTRY OF
PARTIAL FINAL JUDGMENT FOR PLAINTIFFS ON
THAT PORTION OF APPRAISAL AWARD**

This matter came on for hearing on the motion of the plaintiffs, Michael Clemens and Cindi Clemens, for confirmation of that part of an appraisal award under their homeowner's policy regarding damage to their dwelling as a result of Hurricane Charley and regarding code upgrades. In addition, they seek entry of a partial summary judgment on the part of the appraisal award for which they seek a confirmation. As the court can find support neither in the law, nor in logic for the taking of such actions, the motion is denied.

State Farm issued a policy of homeowner's insurance to Mr. and Mrs. Clemens that contained a provision entitled "Appraisal." That provision begins with the following language:

If you and we fail to agree on the amount of loss, either one can demand that the amount of the loss be set by appraisal.

The provision then outlines the process of each party selecting a competent, independent appraiser and the two appraisers selecting a competent, impartial umpire. The language continues:

If the appraisers submit a written report of an agreement to us (of the amount of loss), the amount agreed upon shall be the amount of the loss. If the appraisers fail to agree within a reasonable time, they shall submit their differences to the umpire. Written agreement signed by any two of the three shall set the amount of loss.

Thus, the parties may choose not to use the appraisal process by simply not demanding it. If they demand appraisal, however, that is the method to be used to set the amount of loss. In the present case, the parties opted to use the appraisal process, an appraisal was conducted, an amount of loss was set, State Farm paid it, and Mr. and Mrs. Clemens accepted it. There is, accordingly, absolutely no logical need for judicial intervention into this already accomplished and completed, purely voluntary process. That is to say, there is no logical point to the "confirmation" of the results of the appraisal because it is both extra-judicial and over. The court did not have to compel the parties to abide by their contract; there was no request for the court to interpret or construe the unambiguous language of the clause; and the court did not have to intervene in any way in the setting of the quantum of the loss or in the payment of it by the insurer. All of it was accomplished voluntarily.

Moreover, the court is convinced that there is no legal basis for the entry of a confirmation of the award. The Florida Supreme Court in *Allstate Insurance Co. v. Suarez*, 833 So. 2d 762, 766 (Fla. 2002), pointedly held that an appraisal process is not an agreement to arbitrate and that the parties need not proceed "under the formal procedures of