THE FLORIDA BAR

The Government Lawyer Section REPORTER

"No Higher Calling"

Fall 2003

Promoting Worthy Causes and Our Common Interest: A Message from the Chair

By Keith Rizzardi

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena... who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly.

– Theodore Roosevelt, April 23, 1910.

Thank you for the opportunity to serve as Chair of our distinguished Florida Bar Section. President Theodore Roosevelt, a leading voice for civil servants throughout his career, would be especially proud of the Government Lawyer Section. Critics often malign our jobs, and our wallets often come short, yet still we serve. We hold positions allowing access to our civic leaders. We *are* the civic leaders. We strive for worthy causes, we achieve public good, and that endeavor keeps us satisfied and engaged. In all these ways, we embody the Rooseveltian spirit. As public servants, we are all in the arena – and there is no higher calling.

I thank the people who have heeded that call since our Section was created. I am especially grateful to two people: Clark Jennings, for his past and continuing leadership as Chair of our Section, and for his future efforts as an officer in the Council of Sections; and Sheryl Wood, who eight years ago encouraged and inspired me to become a leader within the Florida Bar. Now I ask all of you to help our Section, however you can, in fulfilling three important goals for the year ahead.

1. **Membership Growth.** More members mean more voices in the Florida Bar, and more leaders to help with all the undertakings of the Section. Even if you do nothing more than ask a friend to join, you'll help us make a difference.
2. **Membership Benefits.** Of course, a main attraction for all our current and future members is our top-notch programming, including the Practicing Before the Supreme Court, Practicing Before the Legislature, and Government in the Sunshine CLE seminars. But there is always room for more. Our Section's Executive Council is exploring new CLE program ideas and other benefits. I am personally working on a special members-only program scheduled for April, 2004 in Washington, D.C. See page 6.
3. **Membership Advocacy.** Finally, our Section must continue to serve as the advocate for its membership. At the recent Bar Conference, one member said to me – in whispered tones – "some people call your Section a... *guild*." Webster's Dictionary says a guild is "an association for mutual aid and the promotion of common interests." The common interests our Section represents include seeking tuition debt relief for new public sector attorneys, ensuring that Florida Bar rules are not amended to force government lawyers to complete mandatory but inapplicable CLE requirements, obtaining a public records exemption for the personal

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THE GOVERNMENT LAWYER
SECTION REPORTER

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ARTICLES FOR THE SPRING ISSUE ARE DUE December 15, 2003.

Articles formatted for Word Perfect 5.0 OR 6.0 may be submitted on computer disc with hard copy attached (or e-mailed to *acolman@flabar.org.*). Please contact Arlee Colman at 850/561-5625.

CHAIR'S MESSAGE
from preceding page

home information of government lawyers, and participating in the emerging debate over the need for an Administrative Law Certification within the Florida Bar.

Like every other Florida Bar section, the Government Lawyer Section is the voice of its members. We represent the common interests of the government lawyer. If that makes us a guild, then I'm proud to be a guildsman. But I'll be even prouder a year from now when we know the triumph of high achievement on each of these three goals. Thank you again for the opportunity to serve as Chair.

Note from the Editor

By Francine M. Ffolkes

I am very excited about this Fall 2003 issue of the Government Lawyer Section's *Reporter.* First I would like to welcome on board my new assistant editor Jan McLean who has jumped right in by undertaking the Case Law Update. Jan has chosen a variety of appellate opinions to report that are of interest to government lawyers in several practice areas. Second, this issue features articles from a variety of government lawyers. Our Chair for 2003-2004 continues his series on being a "FED," there's a United States Supreme Court case note of interest to local government lawyers, the Ethics Opinions update that is of interest to all government lawyers, and an interesting article by Ed Bayo on sticky issues that discovery presents for the government lawyer. In addition this year's Claude Pepper Award recipient is certainly an outstanding example of not only government service but service to our country.

I must also sadly report that a fellow government lawyer who was a member of the Section for many years and the regular contributor of the Ethic Opinions Update died suddenly this summer. We will miss our friend and colleague Peter D. Ostreich. However, with his usual steadfastness and reliability he handed me this issue's Ethics Opinion Update when I last saw him at the Florida Bar meeting in June just two weeks before his untimely passing.

I hope you find this issue of the Reporter informative and beneficial to your practice as a government lawyer. Please feel free send me any feedback you may have for the "From the Backbenches" feature in the *Reporter* at *Francine.Ffolkes@dep.state.fl.us.*

Judith Hawkins selected to receive Harvey Ford Award

The selection of the recipient of the 2003 Conference of County Court Judges **Harvey Ford Award** was announced during the conference Award and Installation Banquet. Judge Jim Shelfer, who nominated and introduced Judge Hawkins, stated that he nominated her because, "*Her energy and enthusiasm to serve others made her the logical choice from our Circuit. I was very pleased, but not surprised, that the Conference chose Judi for this prestigious award.*"

Judge Hawkins is an active participant in the Conference of County Court Judges and currently serves on two committees, Education and Article V Revision. She has also served as a Circuit Representative, and has been called upon to serve as a presenter at Conference sessions.

Judge Hawkins has extensive involvement with local bar associations and civic organizations. For instance, she serves or has served on the Boards of Directors the Tallahassee Women Lawyers, Legal Aid Foundation, Legal Services of North Florida, Inc., Leadership Tallahassee, and the American Marine Institute. She is a Master in the American Inns of Court, Tallahassee Section and a member of Leadership Tallahassee Class XIX (2001-2002).

For more than 15 years, Hawkins has also been a steadfast and long-standing advocate and volunteer for children of all ages and educational backgrounds. During the 2002-2003 school year, she devoted countless hours mentoring young students at PACE, an alternative school for girls, as well as serving as a volunteer in a second grade class at Oakridge Elementary School. Judge Hawkins even clothed a few when she sewed and donated girls' jumpers and shorts sets to the Guardian Ad Litem Program! Judge Hawkins actively participates with law related student activities at local high schools and at the Florida State University College of Law. She regularly serves as a judge for moot court and oral argument competitions.

Leon County Judge Judith W. Hawkins received the 2003 Harvey Ford Award during the 30th anniversary of the Conference of County Court Judges recently held in Marco Island, Florida. The Award recognizes Hawkins for dedicated service to the community, the legal profession and the conference. The crystal award was signed by the Beth Bloom, first female president of the Conference of County Court Judges. The Conference is the organization that speaks on behalf of the County Judges and represents the County Judges at the Supreme Court and the Legislature.

Judge Hawkins' "giving back" to the community is further demonstrated by the time she devotes to speaking at community, school and church programs. For instance, she was invited to and delivered the Summer 2002 FAMU Commencement Address.

Hawkins' passion for serving others includes those from all over the world. During her trips abroad, she speaks with and encourages young students of the importance of education, and to stay in school and study hard in spite the many adversities and challenges they may face. In February 2003, for instance, Hawkins was the Judicial Law Delegate to South Africa in the People to People Ambassador Program. In 2001, she helped build a school in Costa Rica. In 2002, her mission work took her to Kenya, and to the Dominican Republic in 2003.

Judge Hawkins' 1996 election was historic for Leon County. She was the first African-American in the Second Judicial Circuit to win in a contested election, as well as the first African-American female county judge. Judge Hawkins was resoundingly re-elected in 2000.

As county judge, Judge Hawkins continues to set new precedent. She has made valuable contributions to the court system by increasing the court's efficiency, reducing the court docket, and reducing the amount of time it takes for parties to have their case heard before the court. Some of the ways she accomplishes this has been, for instance, the introduction of "user-friendly" forms for use by pro se litigants in county civil court, and pre-hearing checklists that assist the parties prepare for final hearing in uncontested family law cases. While assigned to misdemeanor court, she increased the use of video appearances by defendants, saving transportation and personnel costs. Judge Hawkins also instituted a program that allows installment payments of traffic fines. Judge Hawkins service, contributions and accomplishments have earned her the well-deserved reputation for being fair, intelligent, consistent, and personable.

Judge Hawkins received her Juris Doctor Degree from the Florida State University College of Law (1984); a Master's Degree from Ohio State University (1977); and a Bachelor's Degree from Andrews University (1972). She is married to Dr. James Hawkins and they are the parents of a grown son, Jason.

Ethics Questions? Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

Chair's Goodbye

By Clark Jennings, Immediate Past Chair

As outgoing chair I would like to take this opportunity to thank the many members of the Executive Council for their hard work and dedication to the improvement of the condition of the government lawyer. I am truly grateful to those new members who joined the Council this last year and contributed so many fresh ideas. To all of you I say thank you for taking time out of your busy schedules to assist me during my term as Chair. I would like to specifically recognize my fellow officers without whose efforts I would have failed miserably in my attempt to guide the Section through the year. I commend their efforts to the Section and am content in the knowledge that they shall continue to serve the Section well. To immediate past Chair Stephanie Daniel my special thanks for clearing the way for my tenure and being there to guide me throughout the year.

When I began my term I had hoped to establish this Section as a more visible advocate for the government lawyer. While we are not where I had desired in that regard we are closer than we were and are in place to promote some of our legislative goals during the upcoming 2004 legislative session. The long range planning session this May produced numerous ideas which, if implemented, should form a productive framework for future growth. I am convinced that Chairman Rizzardi shall see to it that the best of those ideas are set into motion. Keith is a dynamic individual whose energy and vision should produce a year full of excitement and achievement. We as a section should continue to enjoy the production of first class CLE courses under the stewardship of Joe Mellichamp and Booter Imhoff. I can not begin to express the gratitude I feel towards these men for their tireless service to the Section. Through their efforts this Section provides top quality CLE to the members of the Bar. The products they provide are relevant and entertaining and therefore profitable to the Section. Finally I would like to thank Dan Stengle and his committee for their work on the Claude Pepper Award for outstanding government service. This year's recipient Mr. William Hammill was a superb choice. While the pool of nominees was replete with worthy candidates, Mr. Hammill's selection was particularly appropriate given the current world in which we live. As a retired United States Air Force JAG officer and current civilian attorney for the U.S. Central Command, Mr. Hammill, while incredibly deserving in his own right, represents the legions of our brothers and sisters who serve each and every one of us every day in the United States Military.

Keith Rizzardi, Incoming Chair, presents Clark Jennings, Chair, with the Chair's Award for 2002 - 2003 at The Florida Bar's Annual Meeting in Orlando in June.

In sum I would have to say it has been a good year with some accomplishments and many promising things begun. I encourage all of you to get involved in the Section. Participate in Executive Council meetings as they are open to all members and most importantly encourage those who are not members to join. I stand by my belief that the greater the number of members in the Section the greater our strength and influence. This is not because of increased dues collections, although the extra money might help fund needed projects, but because with each body added to our chorus the greater the sound of our voice. If we in government service have learned anything it is that the louder the voice the faster the powers that be will move to turn down the volume.

Thank you for the opportunity to serve.

United States Supreme Court Rules Local Governments Subject to False Claims Act Liability

By Edward J. Hopkins, Esq., Partner
Broad and Cassel, P.A., West Palm Beach, Florida

Cities, counties and all other instrumentalities of government, except states themselves, are now subject to treble damages, potentially huge civil penalties, and private whistleblowers' litigation expenses and attorneys fees under the federal False Claims Act, as a result of a stunning unanimous decision of the United State Supreme Court announced March 10, 2003. The decision, *Cook County, Illinois vs. United States ex rel. Janet Chandler*, No. 01-1572 (U.S. Mar. 10, 2003), affects local government receipts of federal grants, and participation in any government program funded in whole or in part by the federal government, including, but not limited to, health care, roads, environment, transportation, and homeland security.

For the last three years, since the United States Supreme Court decided in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that States are not "persons" within the meaning of the federal False Claims Act ("FCA") 31 U.S.C. §§3729-3733, many counties and municipalities have assumed that they, too, enjoy immunity from FCA liability. In *Cook County*, however, the Court slammed the door on local governments aspiring themselves to be "non-persons," subjecting them to FCA treble damages and penalties.

Under the FCA, "[a]ny *person*", who, among other things, "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval," 31 U.S.C. §3729(a)(1), is liable to the government for treble damages, up to $11,000 per false claim in penalties, reasonable expenses, costs and attorneys fees. 31 U.S.C. §3729(a). The Attorney General of the United States may sue under the FCA, but, increasingly, this task has fallen to private whistleblowers (*qui tam* relators, as they are called in FCA litigation), whom the FCA allows to institute private actions on behalf of the United States for a share of the recovery of up to thirty percent, as well as reasonable expenses, costs and attorneys fees. 31 U.S.C. §3730(b), §3730(d).

Alleging that Cook County had submitted false statements and reports in connection with a $5 million federal grant to Cook County Hospital, relator Dr. Janet Chandler brought a *qui tam* action under the FCA. Following the Supreme Court's decision in *Stevens*, the district court in Illinois dismissed Chandler's action, holding that a County, like a State, could not be subjected to treble damages. 118 F. Supp. 2d 902, 903 (2000). The Seventh Circuit reversed, however, 277 F. 3d 969 (CA7 2002), in conflict with the Third and Fifth Circuits, all leading up to the Supreme Court's review of the case.

It should first be said that *Cook County* is a dream decision for FCA geeks. The Court cited case law and commentary back to 1787 in determining that municipalities had been considered "persons" long before the Civil War-era FCA was enacted in 1863, and that Congress had done nothing since to alter their status and potential liability.

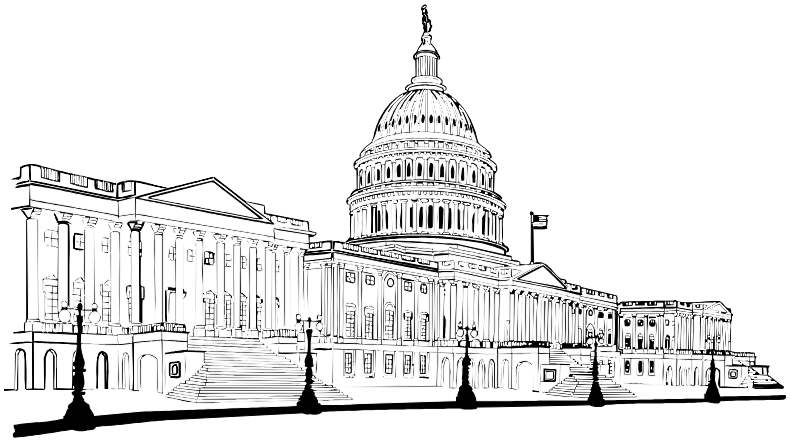
Cook County's main argument, however, and the issue that had really split the Circuits, was that when the FCA was amended in 1986 to subject damages under the FCA to trebling rather than doubling, the nature of the FCA itself changed from a "remedial" to a "punitive" statute. Both *Stevens* and the Solicitor General on oral argument for the United States in *Cook County* conceded this to be true. Thus, argued Cook County, under the common law presumption against punitive damages for municipalities, the 1986 amendments effectively eliminated FCA liability for municipalities.

The Court disposed of this argument decisively, countering with a presumption of its own, the "cardinal rule . . . that repeals by implication are disfavored." *Cook County*, slip opinion at p.9, citing *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The Court stated that the FCA's damages multiplier had both a compensatory and a punitive function, and that, in fact, once a private whistleblower was paid his or her share of the proceeds of potentially up to 30% of the recovery, the government would net roughly double damages in any event, an amount more consistent with the FCA's remedial, as opposed to its punitive, purpose. *Id* at 10.

Finally, the Court pointed out that local governments now often administer or receive substantial federal funds, and so subjecting them to FCA liability would "expose only local taxpayers who have already enjoyed the indirect benefit of the fraud, to the extent that the federal money has already been passed along in lower taxes or expanded services." *Id* at 12. The Court concluded that while it was certainly within Congress' authority to immunize municipalities from FCA liability, "it makes no sense to suggest Congress did so under its breath. It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand in fighting false claims." *Id* at 13.

The *Cook County* decision could not have come at a worse time for counties and municipalities, in the face of a still slumping economy and decreasing revenues. Not only, according to the Solicitor General, are there 140 pending FCA whistleblower cases that have awaiting this decision, who knows how many more actions have not been filed since *Stevens* that *Cook County* now will revive.

Counties and municipalities and similar government instrumentalities will want to intensify their efforts to assure compliance with applicable federal program law and regulations, and to prevent potentially budget-busting liability under the FCA.



Mark your Calendars!

The Government Lawyer Section's 2nd Annual Retreat & Seminar

Washington, D.C., April 16 - 20, 2004

April 16-18: Executive Council Long-range planning

April 19-20: The Federal Seminar including:

Tours of the Justice Department, Supreme Court, Capitol Building and Library of Congress

Watch for the brochure!

Yes, Your Honor, I'd Like to Be a Member of the Supreme Court Bar

By Keith Rizzardi

The Government Lawyer Section is proud to announce a special opportunity for our members. On April 17 and 18, 2004, we will be hosting our Second Annual Retreat in Washington, D.C. In addition, the Section is planning The Federal Seminar for April 19 and 20, 2004 - with an agenda including sessions and tours at the Justice Department, Supreme Court, Capitol Building and Library of Congress. The highlight of the event will be the swearing in of 15 government lawyers as new members of the U.S. Supreme Court Bar at Oral Arguments on Tuesday, April 20. The event is scheduled during cherry blossom season, and your family will surely enjoy visiting the museums and monuments of D.C. If you are interested in joining this limited enrollment seminar, and would like to be one of Supreme Court's new members, please contact *acolman@flabar.org* - priority will be given to members of the Section's executive council and members of the Section, but otherwise will be on a first come, first served basis. See you in Washington!

Section Meets in "The Big Easy"

Government Lawyers at the Executive Council long-range planning meeting at the Hotel Monteleone, New Orleans. Memers are from L to R: Judge Joe Lewis, Keith Rizzardi, Richard Doran, Pam Cichon, Stephanie Daniel, Francine Ffolkes, Clark Jennings, Denise Neiman, and Sheryl Wood.

After working all day, the group prepares for a tour of the French Quarter. From L to R: Keith Rizzardi, Clark Jennings, Francine Ffolkes, Denise Neiman, Sheryl Wook, Pam Cichon, Stephanie Daniel, Judge Joe Lewis, Arlee Colman, and Richard Doran.

For the Feds, BIG is just too small a word

By Keith Rizzardi, Chair

The opportunity to work on issues of national importance contributed to my decision to become a federal litigator. Those bigger opportunities came with a bigger government. Yes, I'm stating the obvious. But from inside the system, I have a new appreciation for just how massive our federal bureaucracy is, and how hard it is to solve problems at the federal level.

Geography is the first hurdle. My clients, their offices, and their problems are national. Site visits are more difficult, and face-to-face meetings are precluded by time, distance, and budgets. The end result is that a federal attorney cannot easily step into a problem, learn the history of an unfamiliar place and disputes, pull the players together, and negotiate mutual solutions.

With geographic diversity comes distance from central command. For Florida government attorneys, access to top agency officials who can craft a compromise is at least an option. When an issue got big in the Everglades, it usually made it to Tallahassee's radar screen – a quick flight from anywhere in the state, and the principal players were assembled. But flights from Washington to California are not so quick, and the President, Attorney General and Secretary of Interior have bigger things to worry about than another pesky Endangered Species Act lawsuit, no matter how precedent-setting it may be. (In fact, I've never met anyone of the three officials, and only once did I meet the Assistant Attorney General responsible for the Environmental & Natural Resources Division where I work.) So many problems, from so many places, and so few people at the top. Even if the issue is big enough to reach the appointees – or "politicals" – in the "adminisphere," it will usually take a while.

Occasionally, even if the politicals do gather together, the problems remain. Disagreements between federal agencies are commonplace: consider the positions of the U.S. Armed Forces and Fish and Wildlife Service on Endangered Species Act exemptions, the views of the Bureau of Reclamation and National Marine Fisheries Service on managing dams for salmon, or the Environmental Protection Agency and Department of Energy about watershed pollution or superfund cleanups. The frequent disagreements between these agencies demonstrate the implausibility of a "federal conspiracy" on just about any subject.

In those instances when statutory language is the problem, and even just a few tweaks would make a huge difference, federal lawyers are stuck. Convincing the 160 Florida legislature to pass a needed "glitch bill" on a water resource law was one thing. This year, Floridians even witnessed substantial changes to the deadlines in the Everglades Forever Act. But getting the ear of a federal official who can convince a majority of 535 members of our U.S. Congress to modify, or even to fully fund, the Endangered Species Act? Forget about it.

Many other obstacles stand in the way: egos, interest group posturing, overwhelmed judges, bad precedent, declining budgets... the list goes on and on. To face these obstacles, federal attorneys must be both patient and creative. "Guidance" documents and interagency agreements help with implementation problems by providing meaningful and reasonable interpretations of problematic federal regulations or statutes. Budgetary wizards find new methods ("voluntary unpaid leave, anyone?") to solve the budgetary crunch. And litigators file declarations from agency personnel to clarify the client agency's reasoning for a decision. But the patience and creativity of a single federal attorney has its limits.

So the next time you find yourself frustrated by how long one of your federal government counterparts is taking to help solve your state agency's issue, remember where they work. Big is just too small a word to describe the obstacles they face.

Keith W. Rizzardi *is a Trial Attorney for the U.S. Department of Justice in Washington, D.C., and a former Senior Attorney for the South Florida Water Management District in West Palm Beach. The opinions in this article are his own, and in no way reflect the views of his employers.*

Ethically Speaking...

Ethics Opinions Update

compiled by Peter D. Ostreich, Staff Attorney

The following is a summary of opinions rendered by the Commission on Ethics from July 2001 through June 2003. A copy of Commission on Ethics opinions may be obtained by contacting the Commission at (850) 488-7864 or SUNCOM 278-7864 or telefax No. (850) 488-3077, or by accessing the Commission's website at www.ethics.state.fl.us.

CEO 01-13 — GIFT ACCEPTANCE AND DISCLOSURE: PUBLIC SERVICE COMMISSION EMPLOYEE OFFERED TRAVEL EXPENSES FOR INTERVIEW WITH PROSPECTIVE EMPLOYER, A UTILITY COMPANY

A reporting individual has not received a "gift" for purposes of Section 112.3148, F. S., when a prospective employer invites him to interview for a position with the company and offers to pay and/or reimburse him for his travel expenses. Interviewing with a prospective employer is consideration for the receipt of travel expenses and does not constitute a "gift." However, the reporting individual bears the responsibility for substantiating the receipt of reasonable expenses.

CEO 01-14 — GIFT ACCEPTANCE AND DISCLOSURE: LEGISLATOR RENTING OFFICE SPACE FROM CITY

Excluded from the definition of "gift" in Section 112.312(12), F.S., is the "use of a public facility or public property, made available by a governmental agency, for a public purpose." Where a legislator leases space for his district office from a municipality at a nominal fee, he has not received a "gift" for purposes of Section 112.3148, F.S.

CEO 01-15 — CONFLICT OF INTEREST: COUNTY COMMISSIONER EMPLOYED AS OUTSIDE CONSULTANT BY ENGINEERING FIRM SELECTED TO WORK ON COUNTY PROJECTS PURSUANT TO CONSULTANT'S COMPETITIVE NEGOTIATION ACT

A prohibited conflict of interest would be created under Section 112.313(7)(a), F.S., were a county commissioner to work as an outside engineering consultant on non-county projects for an engineering firm which has been selected pursuant to Section 287.055, F.S. (the Consultants' Competitive Negotiation Act ("CCNA")), to work on a County project. Because the county's adherence to the requirements of the CCNA means that it selects qualified engineering firms from both within and without the county, rather than solely from within the county, and because, rather than distributing the county's professional engineering work to qualified firms located in the county in accordance with a rotation list of all qualified engineering firms located in the county (the County selects three of the most qualified firms using a set of selection criteria), the county's selection of a professional engineering firm pursuant to the CCNA is not the equivalent of the county's use of a rotation list of providers/vendors located within the county for its purchase of goods and services (an exemption provided in Section 112.313(12)(a), F.S., from the prohibitions of Section 112.313(3) and 112.313(7)(a), F.S).

CEO 01-16 — CONFLICT OF INTEREST; VOTING CONFLICT: CITY PLANNING BOARD MEMBER'S CORPORATION PURCHASING PROPERTY FROM CITY

No prohibited conflict of interest was created where a corporation of which a member of a city's planning board is president offered to purchase realty from the city; and no prohibited conflict of interest would be created were the corporation to purchase the realty from the city. Section 112.313(3), F.S., addresses purchases by (and sales to) public agencies and political subdivisions, rather than purchases from public agencies and political subdivisions. Furthermore, under Section 112.313(7)(a), F.S., the member's public "agency" (the planning board) would not be the public agency that would be doing business with the member's corporation via the realty sale.

After the member's corporation responded to the city's RFP and after the city commission authorized negotiations with the member's corporation regarding the property, the planning board member correctly abstained from participating in and voting on the zoning ordinance required for development of the property.

CEO 01-17 — VOTING CONFLICT: COUNTY COMMISSIONER MEMBER OF FORUM VOTING ON MEASURES AFFECTING OTHER MEMBERS OF THE FORUM

A county commissioner who also is a member of an educational/networking forum organized as a nonprofit corporation is not subject to the voting conflicts law codified at Section 112.3143(3)(a), F.S., regarding measures inuring to the special private gain or loss of other members of the forum. Members of the educational/networking forum are not "business associates" of the commissioner.

CEO 01-18 — VOTING CONFLICT OF INTEREST: COUNTY COMMISSIONER VOTING ON DRI AMENDMENT WHERE HIS WIFE HAS VARIOUS RELATIONSHIPS WITH PARENT COMPANY AND CORPORATE SIBLING OF COMPANY SEEKING THE AMENDMENT

A county commissioner would not be prohibited by Section 112.3143(3)(a), F.S., from voting on a Development of Regional Impact ("DRI") amendment where the company seeking the amendment is owned by the same company which owns the

continued, next page

bank employing the county commissioner's wife, where the county commissioner's wife is a corporate secretary for the parent company, and where the county commissioner's wife owns stock in the parent company through her employer's retirement plan. The county commissioner's voting on the DRI amendment will not inure either to his special private gain or to that of his wife, as the effect on her stock ownership interest would not be "special" and would be "remote and speculative."

CEO 01-19 — GIFT ACCEPTANCE AND DISCLOSURE: CITY OFFICIALS HOSTING EVENTS AT CITY-OWNED STADIUM

Based upon the specific factual circumstances presented in this opinion, a city official who, pursuant to the city's written policy, serves as a "host" to a group using the city's stadium suite or tickets has not received a reportable "gift." .The definition of "gift" at Section 112.312(12) only includes that "for which equal or greater consideration is not given." A public officer and employee gives equal or greater consideration to his or her own agency when acting in his or her official capacity as an agency representative.

CEO 01-20 — FINANCIAL DISCLOSURE: APPLICABILITY TO LOCAL PENSION BOARDS PARTICIPATING IN FLORIDA MUNICIPAL PENSION TRUST FUND ADMINISTERED BY THE FLORIDA LEAGUE OF CITIES

Because local pension boards retain ultimate authority to invest funds and make binding determinations of entitlement, even when they participate in the Florida Municipal Pension Trust Fund administered by the Florida League of Cities, a member of a local pension board is a "local officer" for purposes of Section 112.3145, F.S.. Consequently, the member is subject to its financial disclosure obligations.

CEO 02-1 — POST-EMPLOYMENT RESTRICTIONS: DEPARTMENT OF TRANSPORTATION EMPLOYEE TRANSFERRED TO SELECTED EXEMPT SERVICE STATUS FROM CAREER SERVICE STATUS APPEARING BEFORE THE DEPARTMENT WITHIN TWO YEARS OF LEAVING EMPLOYMENT

Section 112.313(9)(a)4, F.S., does not prohibit a Selected Exempt Service employee whose position recently was reclassified from a Career Service System position from personally representing another person or entity before his or her agency for two (2) years from the date that he or she vacates his or her position. The lack of a "clear and unequivocally expressed intention" by the Legislature that its *en masse* transfer of Career Service System employees to the Selected Exempt Services would subject them to the two year prohibition of Section 112.313(9)(a)4, F.S., coupled with the impairment of job expectations arrived at by the employees prior to the Legislature's enactment of Chapter 2001-43, Laws of Florida [the Governor's Service First Initiative], requires a finding that the two year prohibition does not apply under these circumstances.

Although the Commission on Ethics urged the Legislature to revisit its transfer of Career Service System employees to the Selected Exempt Services and to expressly determine whether it intended for the two year prohibition of Section 112.313(9)(a)4 to apply to those employees, the Legislature has declined to do so.

CEO 02-2 — CONFLICT OF INTEREST: COUNTY PUBLIC HOSPITAL BOARD MEMBER ENTERING INTO STAFFING AGREEMENT WITH HOSPITAL BOARD

Because an elected member of the board of a county public hospital is not an employee of the board and/or the hospital, and because his relationship to the hospital relative to his being granted hospital and clinical privileges is one authorized by the State laws governing the hospital and the rules and regulations of the board, rather than being contractual, Section 112.313(7)(a), F.S., does not prohibit him from serving on the board solely by reason of his having been granted hospital and clinical privileges by the board.

However, because the Cardiac Surgery Agreement that the elected hospital board member is required to enter into with the board in effect is a contract for the staffing of the hospital's Cardiac Surgery Program, rather than an agreement related solely to the granting of hospital and/or clinical privileges, Section 112.313(7)(a), F.S., would be violated were the board member to sign a new agreement with the board. With respect to the existing agreement, because it was entered into prior to his taking office, Section 112.316, F.S., which requires that the Code of Ethics not be interpreted to preclude private employment which does not interfere with the full and faithful discharge of a public employee's duties, may be applied to act as a "grandfather clause," to negate the conflict created by his agreement with the board.

CEO 02-3 — ANTI-NEPOTISM; CONFLICT OF INTEREST: CITY DEPARTMENT DIRECTOR'S PARAMOUR PROMOTED WITHIN DEPARTMENT; COMPANY'S PURCHASE OF GIFT BASKETS FROM PARAMOUR'S BUSINESS; CONSTRUCTION OF PARAMOUR'S HOME BY CONTRACTOR PARTICIPATING IN CITY HOUSING PROGRAMS; PERMITTING OF HOME; AND HANDLING OF CODE VIOLATION COMPLAINTS

The State's anti-nepotism law (Section 112.3135, F.S.) did not prohibit the promotion within a city department of an employee who was not a "relative" of the department's director, notwithstanding the close, personal relationship between the two. [Despite being urged by the Commission on Ethics to amend the anti-nepotism law to include paramours, the Legislature has not yet done so.]

Due to the unavailability of adjudicatory fact-finding in the context of an advisory opinion, the inquiry's other questions were not answered.

CEO 02-4 — CONFLICT OF INTEREST: SCHOOL DISTRICT'S DIRECTOR OF MINORITY BUSINESS AFFAIRS SERVING AS A MEMBER OF THE CITY COUNCIL

No prohibited conflict of interest

would be created by the election of the Director of Minority Business Affairs for the Duval County Schools to a seat on the Jacksonville City Council. Because the position of City Council member constitutes the holding of an office, rather than an employment or contractual relationship, and inasmuch as intergovernmental agreements and dealings between governmental entities do not constitute "doing business," no prohibited conflict of interest under the first part of Section 112.313(7)(a), F.S. would be created by the Director's election to the City Council. In addition, because her position with the School District does not require her to interact with City officials or staff, no prohibited conflict under the second part of Section 112.313(7)(a) exists either.

Section 112.313(10)(a), F.S., also would not prohibit the Director's continued employment with the School Board while serving as a member of the City Council, because the School Board is separate and distinct from, or independent of, the City Council.

Because the School Board, the Director's principal, is an "agency," the exemption within Section 112.3143(3), F.S., applicable to "agency" principals, applies to permit the Director to vote as a member of the City Council on matters inuring to the special gain of the School Board.

CEO 02-5 — CONFLICT OF INTEREST: SCHOOL BOARD MEMBER'S LAW FIRM REPRESENTING CLIENT BEFORE COUNTY VALUE ADJUSTMENT BOARD

A school board member's "agency" does not include the county value adjustment board where he is not one of the two school board member appointees to the board and where the remaining members of the school board could be asked to substitute for the named appointees but seldom have. Therefore, Section 112.313(7)(a) would not be violated by the school board member's representation of an existing client before the value adjustment board.

CEO 02-6 — CONFLICT OF INTEREST; VOTING CONFLICT: COUNTY COMMISSIONER ATTORNEY REPRESENTING INDIGENT CRIMINAL DEFENDANTS AS COURT-APPOINTED DEFENSE COUNSEL

No prohibited conflict of interest would be created under Sections 112.313(3) or 112.313(7)(a), F.S., were an attorney to continue to be appointed by the court to represent indigent criminal defendants after he becomes a county commissioner. Under the particular facts of the inquiry, because the court, rather than the county commission, has the paramount role regarding attorney appointment and fee payment, Section 112.316, F.S., may be applied to negate the literal language of the prohibitions. However, the attorney/commissioner must comply with the voting conflicts law codified at Section 112.3143(3)(a), F.S., regarding any measure (including any measure affecting court-appointed defense counsel) which would inure to his special private gain or loss.

CEO 02-7 — CONFLICT OF INTEREST; VOTING CONFLICT: ENVIRONMENTAL REGULATION COMMISSION MEMBER WORKING AS ENVIRONMENTAL CONSULTANT ASSOCIATED WITH LAW FIRM

No prohibited conflict of interest under Section 112.313(7)(a), F.S., would be created where a member of the Environmental Regulation Commission who also is a consultant for environmental issues is associated with a law firm specializing in environmental, land use, and administrative matters. The appointee's positions on the boards of directors of several organizations do not constitute contractual relationships as they are not compensated. Her compensated position on the board of directors for a petroleum company also would not create a conflict of interest under Section 112.313(7)(a), as it is not anticipated that the company would appear before the ERC except indirectly through a trade association.

It is not possible to give specific advice about the voting conflicts law applicable to State-level officers—Section 112.3143(2), F.S.—except for matters involving those organizations on whose boards the appointee serves as a non-compensated director. In those situations, the organizations would not be considered principals retaining the appointee.

CEO 02-8 — CONFLICT OF INTEREST; VOTING CONFLICT: ENVIRONMENTAL REGULATION COMMISSION APPOINTEE EMPLOYED BY ENGINEERING CONSULTING FIRM SELECTED BYU. S. ARMY CORPS OF ENGINEERS TO WORK ON EVERGLADES RESTORATION PROJECT

No prohibited conflict of interest under Section 112.313(7)(a), F.S., would be created where an appointee to the Environmental Regulation Commission ("ERC") also is employed by an engineering consulting firm which has been selected by the U. S. Army Corps of Engineers to serve as its program manager for the Comprehensive Everglades Restoration Project. The ERC member's employment relationship is with the engineering consulting firm, which is neither doing business with nor regulated by the ERC. As for the firm's clients and whether a prohibited conflict would be created for the appointee solely on that basis, there are no facts which suggest an impermissible overlap between his private employment and his duties on the ERC. The ERC appointee was cautioned against using his public position to market his employer's services.

CEO 02-9 — CONFLICT OF INTEREST: STATE FIRE MARSHAL EMPLOYEES ENGAGING IN OUTSIDE EMPLOYMENT

No prohibited conflict of interest under Section 112.313(7)(a), F.S., would be created were a Fire Protection Specialist Supervisor of the State Fire Marshal's Bureau of Fire Prevention to engage in the practice of architecture as a self-employed architect, preparing design and construction documents for various types of residential and commercial buildings, unless the Bureau of Fire Prevention is called upon to resolve a dispute regarding the application of the fire codes to the client's project or unless the subject employee contracts directly with an architect, engineer, or contractor whose work he or the Bureau is reviewing or inspecting.

No prohibited conflict of interest

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would be created were a Fire Protection Specialist with the State Fire Marshal's Bureau of Fire Prevention to be secondarily employed to do home inspections and to assist contractors in preparing permitting packages for clients that would include Realtors, contractors, and purchasers, unless the Bureau is called upon to resolve a dispute regarding the application of the fire codes to a client's project or unless the subject employee contracts directly with an architect, engineer, or contractor whose work he or the Bureau is reviewing or inspecting.

No prohibited conflict of interest would be created were a Senior Management Analyst of the Bureau of Fire Prevention to engage in outside employment involving contracting to provide services to building owners, attorneys, contractors, architects, and engineers through corporate level contract training or project management not involving fire codes or standards, unless the Bureau is called upon to resolve a dispute regarding the application of the fire codes to a client's project or unless the subject employee contracts directly with an architect, engineer, or contractor whose work he or the Bureau is reviewing or inspecting. Without additional information, no opinion can be rendered about the employee's privately serving as an expert witness or providing architectural plan review, design assistance, requirement analysis, and specific code research.

CEO 02-10 — CONFLICT OF INTEREST: SPOUSE OF CHILDREN'S SERVICES COUNCIL BOARD MEMBER PRESIDENT OF CORPORATION CONTRACTING WITH COUNCIL

A prohibited conflict of interest under Section 112.313(3), F.S., would be created were a county Children's Service Council to enter into future contracts with a private, nonprofit corporation to provide certain services to children, as the spouse of a board member is the president/CEO of the corporation. The board's use of contractors to fulfill its statutory duties constitutes a purchase of services for the board and is prohibited by Section 112.313(3) absent the applicability of a Section 112.313(12) exemption because the Commission on Ethics consistently has held that one is deemed to act in his or her official capacity to purchase services when a body or board of which he or she is a member acts to purchase such services. However, existing contracts would be "grandfathered-in."

CEO 02-11 — ANTI-NEPOTISM: HIGHWAY PATROL DIRECTOR'S BROTHER PROMOTED TO MAJOR (TROOP COMMANDER)

The State's anti-nepotism law (Section 112.3135, F.S.) would not be violated were the brother of the Director of the Florida Highway Patrol, a Division of the Department of Highway Safety and Motor Vehicles, to be promoted to the position of Major (Troop Commander). Under the circumstances, the Department's Executive Director (and not the brother/Director) is the Apublic official@ vested with the authority to make the appointment, and the brother/Director will not advocate the promotion of his brother. CEO 98-7 is receded from.

CEO 02-12 — POST-EMPLOYMENT RESTRICTIONS: FORMER AGENCY FOR HEALTH CARE ADMINISTRATION ATTORNEY REPRESENTING CLIENTS BEFORE AGENCY AND VARIOUS DEPARTMENT OF HEALTH BOARDS

Section 112.313(9)(a)4, F.S., does not prohibit a former Agency for Health Care Administration ("AHCA") Attorney from appearing before Department of Health ("DOH") boards and the Probable Cause Panels of each board that she appeared before as an AHCA employee for two years from the time that she vacated her position with the AHCA, since these boards were not part of the agency with which she was employed for purposes of the application of Section 112.313(9)(a)4.

Section 112.313(9)(a)4 also does not prohibit the former AHCA attorney from appearing before any other health professional boards under the DOH's Division of Medical Quality Assurance or before the Probable Cause Panels of each of these boards for two years, since these boards were not part of the agency by which she was employed, or from representing another person or entity before any other DOH division.

Because of the personal influence and affiliation gained by the former AHCA attorney with AHCA employees in the Medical Section of the Practitioner Regulation Section of the AHCA's General Counsel's Office, the former AHCA attorney is prohibited by Section 112.313(9)(a)4, F.S., from representing clients for compensation for two years from the date that she vacated her position with the AHCA before boards within DOH's Division of Medical Quality Assurance to the extent that such representation entails written and/or oral communications with the AHCA or with its personnel.

Because the former AHCA attorney would have been in a position to gain personal influence and affiliation with attorneys employed in the AHCA General Counsel's Office, many of whom would still be acting for the Department in matters involving her private clients, any contacts that she might have with AHCA's General Counsel's Office attorneys relative to issues other than health care professional regulation, such as facility regulation and/or Medicaid issues, would constitute prohibited "representation" "before [her former] agency," since her former employer would be the agency with jurisdiction to enter the final order in such matters. For the same reasons, she also is prohibited from personally appearing before other AHCA divisions, including, but not limited to, the Division of Medicaid and the Division of Managed Care and Health Quality on behalf of clients for compensation within two years of her vacating her position with the AHCA.

Finally, in view of the Legislature's recent transfer of the powers, duties, functions, and assets of the practitioner regulation component of the AHCA to the DOH, as a result of its adoption of Section 44 of HB 59-E (assuming the Governor does not veto the legislation), Section 112.313(9)(a)4, F.S., would prohibit the former AHCA attorney from representing clients for compensation before any of the personnel who will be transferred from the AHCA to DOH and

who perform any of the consumer complaint, investigative, and prosecutorial services previously performed by the AHCA under contract with the DOH.

This opinion has been appealed to the First District Court of Appeals. Oral argument is scheduled for July 23, 2003.

CEO 02-13 — CONFLICT OF INTEREST: CITY OFFICIALS USING CITY BUSINESS CARDS IN PRIVATE AFFAIRS

Although no definitive answer can be provided via an advisory opinion, a city official's use of a city business card to promote the official's personal profit, gain, or business would create a prohibited conflict of interest under Section 112.313(6), F.S. However, if the card is used for a public purpose and the official incidentally receives a private or business benefit, a prohibited conflict likely is not created.

CEO 02-14 — CONFLICT OF INTEREST; VOTING CONFLICT: SCHOOL BOARD MEMBER EMPLOYEE OF INVESTMENT BANKING FIRM MARKETING SCHOOL DISTRICT BONDS

A prohibited conflict of interest under Section 112.313(7)(a), F.S., does not exist where a school board member is employed by an investment banking firm marketing school district bonds under an agreement entered into before the member took office; and a prohibited conflict of interest would not be created were the agreement to be renewed, as provided in the agreement, for two additional one-year terms, provided the provisions of the renewed agreement remain the same as those of the original. Section 112.316, F.S., acts as a Agrandfather clause@ to negate the literal language of Section 112.313(7)(a), F.S., regarding contracts entered into prior to one's taking public office.

The school board member would be subject to the voting conflicts law (Section 112.3143(3)(a), F.S.) regarding district votes/measures concerning bond issues involving his employer or the district's senior underwriting firm connected to his employer.

CEO 02-15 — PUBLIC OFFICERS; FINANCIAL DISCLOSURE; VOTING CONFLICTS LAW: FLORIDA SPACE INDUSTRY COMMITTEE

The officers and directors of the Florida Space Industry Committee (FSIC) are "public officers" subject to the standards of conduct contained in Section 112.313, F.S. Nevertheless, because they are not listed in the statute and because the FSIC is an "advisory body," the officers/directors thereof are neither "local officers" nor "state officers" subject to filing financial disclosure under Section 112.3145, F.S. However, they are "local public officers" for purposes of the voting conflicts law (Section 112.3143, F.S.).

Members of the FSIC who are neither officers nor director of the FSIC are not public officers, local officers, state officers, or local public officers.

CEO 02-16 — VOTING CONFLICT OF INTEREST: CITY COMMISSIONER ALSO AN EMERGENCY ROOM PHYSICIAN AT HOSPITAL LOCATED WITHIN CITY

No voting conflict of interest under Section 112.3143(3), F.S., is created where a city commissioner who also is an emergency medicine physician and who contracts with a corporation which provides staffing to a local hospital's emergency room votes on matters involving the hospital. The city commissioner is not an employee of the hospital, and the hospital is not a "principal" by whom he is retained. Although the commissioner may abstain from voting under Section 286.012, F.S., this statute is permissive, not mandatory.

CEO 02-17— POSTEMPLOYMENT RESTRICTIONS: FORMER FDOT EMPLOYEE EMPLOYED BY FIRM IN CONNECTION WITH FIRM'S RESEARCH FOR FDOT

A former employee of the Florida Department of Transportation (FDOT) is not prohibited by Section 112.3185(3), F.S., from working with a firm contracting with FDOT. Under the facts submitted, the employee's public-job-capacity participation regarding the contract was not so "substantial" as to preclude him from subsequently becoming employed with the firm upon his termination of his employment with FDOT.

CEO 02-18 — FINANCIAL DISCLOSURE: APPLICABILITY TO SUPPORT ENFORCEMENT HEARING OFFICER

Section 112.3145, F.S., does not apply to require Support Enforcement Hearing Officers appointed pursuant to Rule 12.491(c), Florida Family Law Rules of Procedure, to file financial disclosure. Support Enforcement Hearing Officers are officers of the judicial branch of government and, consistent with the holding of CEO 81-65 and In re The Florida Bar, 316 So.2d 45 (Fla. 1975), the statutory financial disclosure law does not apply to an officer of the judicial branch of government unless he or she is a candidate for elective or retentive office.

CEO 02-19 — CONFLICT OF INTEREST: EMPLOYEE COUNTY ATTORNEY FORMER PARTNER IN LAW FIRM CONTRACTING WITH COUNTY

No prohibited conflict of interest would be created under Section 112.313(7)(a), F.S., were an employed county attorney to receive fees and profit-sharing from his former law firm which does business with the county under contracts entered into before he became county attorney. Section 112.316, F.S., acts as a Agrandfather@ clause insulating him from the literal language of Section 112.313(7)(a).

CEO 03-1 — CONFLICT OF INTEREST: FLORIDA CITRUS COMMISSION MEMBER EMPLOYED BY COMPANY WHERE CORPORATESIBLING OF COMPANY IS SUING THE DEPARTMENT OF CITRUS

No prohibited conflict of interest is created under Section 112.313(7)(a), F.S., where a member of the Florida Citrus Commission is employed by a citrus processing company and where a corporate sibling of his company is one of five plaintiffs suing the Department of Citrus to have an advertising tax declared unconstitutional, since the Citrus Commission member has no employment or contractual relationship with any of the plaintiffs, and the fact that there are overlapping officers and directors between the two subsidiary companies and their corporate parent does not necessarily create a continuing or fre-

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quently recurring conflict or an impediment to the full and faithful discharge of his public duties. The Commission member is cautioned regarding the proscriptions in Sections 112.313(6) and 112.313(8), F.S., which prohibit him from corruptly misusing his position to obtain a special benefit for himself or someone else, and from using information obtained by him through his office and which is not available to the general public for his or someone else's personal benefit.

With regard to votes that the Commission member may face, Section 112.3143(2), F.S., would require him to disclose those votes that inure to his special private gain or loss or to the special private gain or loss of either his employer or its parent company.

CEO 03-2 — FINANCIAL DISCLOSURE: APPLICABILITY TO AT-LARGE DIRECTORS OF ENTERPRISE FLORIDA, INC.

At-large members of the board of directors of Enterprise Florida, Inc., are subject to the financial disclosure provisions of Section 112.3145, F.S. Section 288.901(10), F.S., requires each member of the board of directors of Enterprise Florida, Inc., to file disclosure. There is no reason to distinguish between at-large members and the other members of the board listed in Section 288.901 for purposes of financial disclosure.

CEO 03-3 — CONFLICT OF INTEREST; VOTING CONFLICT: STATE SENATOR HAVING RELATIONSHIP WITH LAW FIRM OTHER ATTORNEYS OF WHICH APPEAR BEFORE LEGISLATURE AND SENATOR VOTING ON FIRM-RELATED MATTERS

Notwithstanding that a conflict of interest would be created under Section 112.313(7)(a), F.S., were a State Senator to personally represent a client before the Legislature, a prohibited conflict would not be created were another attorney of a law firm with which a State Senator has an "of counsel" relationship to represent a client before the Legislature, provided certain conditions are adhered to. In addition, attorneys of the firm other than the Senator would not be prohibited from representing clients before State agencies; and the Senator would not be prohibited from representing clients before courts and local government boards. Further, the Senator is not required by Section 112.3143, F.S., to abstain from voting on any measure affecting himself, the firm, or the firm's clients; but he may have to disclose his relationships via the filing of a memorandum of voting conflict.

CEO 03-4 — CONFLICT OF INTEREST: CITY COUNCIL MEMBER EMPLOYEE OF BUSINESS OPERATING PRO SHOP AT CITY GOLF COURSE

Strictly limited to the particular circumstances of this opinion, a prohibited conflict of interest under Section 112.313(7)(a), F.S., does not exist where a city council member is employed by a business running a pro shop at a city-owned golf course under an agreement with the city. Although the city council member holds employment with a business entity doing business with the city; a "grandfathering" is present under Section 112.316, F.S., to negate the conflict. While the city council member served on the city council when the city became a party to the agreement, he did not become employed with the business running the city-owned golf course until many years later, just before the end of a long period in which he did not serve as a member of the city council. Furthermore, a change in the agreement during the member's current term was handled by the city administrator, rather than by the city council.

CEO 03-5 — FINANCIAL DISCLOSURE: APPLICABILITY TO HEALTH FACILITIES AUTHORITY MEMBERS

Members of a health facilities authority created pursuant to Chapter 154, Part III, F.S., are not "local officers" subject to the requirement of filing annual statements of financial interests, as the authority is not a "political subdivision of the state." Rather, it is an agency of the city which created it.

CEO 03-6 – CONFLICT OF INTEREST; VOTING CONFLICT: COUNTY HOUSING FINANCE AUTHORITY MEMBERS REAL ESTATE BROKER AND OFFICER OF FINANCIAL INSTITUTION

Prohibited conflicts of interest under Sections 112.313(3) and 112.313(7)(a), F.S., are not created where a member of a county housing finance authority is a real estate broker representing buyers of bond-based, low-interest home loans, and where another member is employed by a financial institution participating in a mortgage origination agreement between the financial institution and a housing finance authority other than the member's authority.

While the real estate broker member also is not subject to the voting conflicts law (Section 112.3143(3)(a), F.S.) regarding measures authorizing the issuance of bonds for low-interest loans, the employee of the financial institution is.

CEO 03-7 – CONFLICT OF INTEREST; VOTING CONFLICT: CITY COUNCIL MEMBER ATTORNEY IN LAW FIRM CLIENTS OF WHICH INTERACT WITH THE CITY

Because a city councilman would hold a contractual relationship with business entities doing business with his public agency, the city council, contrary to Section 112.313(7)(a), F.S., a prohibited conflict of interest would be created were clients of his law firm to do business with the city in a variety of circumstances. However, a prohibited conflict of interest would not be created were the city councilman's law firm to represent a convenience store chain that owns property being annexed into the city, inasmuch as annexation constitutes neither "regulation" nor "doing business under Section 112.313(7)(a).

The councilman also would be presented with voting conflicts under Section 112.3143(3)(a), F.S., in various situations where his or his law firm's clients are affected by the matters under consideration by the city council. However, were the councilman's status with the firm to be that of "of counsel" (as described in the opinion), rather than that of a shareholder of the law firm, the conflicts of interest and voting conflicts identified herein would not be created or presented.

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CEO 03-8 – POST-EMPLOYMENT RESTRICTIONS: FORMER STATE TECHNOLOGY OFFICE EMPLOYEES EMPLOYED BY VENDORS WHOSE INVITATION TO NEGOTIATE RESPONSES WERE REVIEWED BY THE EMPLOYEES

Section 112.3185(3), F.S. does not prohibit former State Technology Office ("STO") employees, who serve as technical evaluators of one of four categories of responses to prospective vendors' Invitation to Negotiate ("ITN") responses, from accepting subsequent employment with a vendor in connection with a contract awarded as a result of the ITN, inasmuch as their participation in the procurement of the contract would not be "substantial."

Under the circumstances presented, without additional information about the services and/or commodities provided under the specific ITN contract, about when the contract came into existence, and about the duties and responsibilities of the STO technical evaluator relative to the specific contract, no conclusion can be reached regarding the applicability of Section 112.3185(4), F.S.

Peter D. Ostreich *served as Senior Attorney for the Florida Commission on Ethics. He had been employed with the State since 1979, and with the Commission since 1991. He was a 1973 graduate of the Michigan State University (B.A., Political Science) and a 1976 graduate of the Washington College of Law of the American University in Washington, D.C. (J.D.).*

Discovery Issues from a Government Lawyer Perspective

By Edwin Bayo

Government lawyers encounter a number of recurring discovery issues in their practice. This article discusses some of the most common ones. Although this piece is written from the perspective of a former government lawyer, the author hopes that it will prove useful to practitioners who may be called upon to defend clients before government agencies and who may be unfamiliar with some of these issues.

Public Records Request vs. Discovery

Florida's Public Records Law[1] provides an alternative to traditional discovery vehicles under the Rules of Civil Procedure. The use of a public records request may also provide important information prior to the filing of an action. With the showing of a proper predicate, a public record may be admissible under the business record exception to the hearsay rule.[2] The right to inspect and obtain copies of public documents is available to anyone, even parties to an administrative proceeding, and is not limited by the constraints of relevance imposed under the Rules of Civil Procedure.[3]

Although the number of possible issues under the Public Records Law is substantial and beyond the scope of this article, the following items bear mentioning. Sections 119.07(2) and (3), Florida Statutes, provide a number of specific exemptions to the Public Records Law as well as procedures to properly establish some of these exemptions. In addition to the specific exemptions found in the Public Records Law itself, a number of exemptions are interspersed throughout the Florida Statutes.[4] Although the Rules of Civil Procedure and the Public Records Act may overlap in certain areas, they have different procedures and scopes of operation. Including a public records request in a Rule 1.350 request for production of documents has been called a "highly unusual hybrid procedure" that is not contemplated by either the Public Records Act or the Rules of Civil Procedure.[5]

The statutory obligation of a public records custodian is to provide access to, or copies of, public records "at any reasonable time , under reasonable conditions, and under supervision by the custodian.... or the custodian's designee."[6] The Public Records Law does not require the custodian (or any other employee of the agency) to provide information or answer questions regarding the records.[7] Nor is the agency required to create a new record or to reformat its records in a particular form requested. For example, if the county health department keeps a chronological list of dog-bite incidents with rabies implications, a plaintiff bitten by a suspect dog may not require the department to reorder that list and furnish a record of such incidents segregated by geographical area.[8] If the volume or the nature of the materials requested will require the extensive use of information technology resources or extensive clerical or supervisory assistance by the agency, this may trigger the provisions of §119.07(1)(b), F.S., which provide for the assessment of a special service charge.

The Rules of Professional Conduct prohibit a lawyer representing a client from communicating about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, absent the consent of the other lawyer.[9] This rule is applicable to any request for public records during pending litigation, and such request should be directed to the attorney representing the agency and not the records custodian.[10]

Privileges

A frequent challenge faced by government lawyers is the interplay between Florida's Public Records and Government in the Sunshine Law,[11] and the attorney-client and work product privileges. Attorneys who represent public boards and commissions (which pursuant to the Sunshine law can only take official action at duly noticed public meetings) must often confront the daunting task of

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providing advice to their client in front of actual or potential adversaries. The attorney-client privilege provided under §90.502 of the Evidence Code does not create an exemption for attorney-client communications at a public meeting.[12] However, a discussion or activity that is not a meeting for purposes of the Sunshine Law is not to be construed as waiving the attorney-client privilege established under the Evidence Code.[13] This means that discussions between government lawyers and employees or staff of the public board or commission generally are not subject to open meeting requirements. It is also well settled that frequent, unpublicized meetings between a board member and consultants, advisors or staff who assist the member in the discharge of his or her duties are not ordinarily deemed to be meetings within the contemplation of the Sunshine Law.[14] There is also a specific statutory procedure which allows government lawyers to conduct closed door settlement discussions or strategy sessions related to litigation expenditures in pending litigation with their public board or commission, provided that the conditions of the statute are met.[15] Practitioners must further keep in mind that many decisions taken by the attorney to a public board or commission do not have to be made or approved by the public board or commission. For example, the decision to pursue an appeal by counsel to the Florida Parole and Probation Commission, made after discussing the merits of pursuing said appeal with individual members of the Commission, did not violate the Sunshine Law.[16]

Documents created by government attorneys for their public clients are generally subject to disclosure under the Public Records Law, and the Supreme Court has held that only the Legislature, not the Judiciary, can exempt these attorney-client communications from that law.[17] Even if the material being considered by the public board or commission is confidential pursuant to a specific exemption in Chapter 119, this does not result in an implied exemption from the Sunshine law.[18] Government lawyers enjoy a limited work-product exemption from the Public Records Law, which ends at the conclusion of the litigation or adversarial administrative proceeding.[19] However, it must be kept in mind that certain trial preparation materials which are not used to perpetuate, formalize, or communicate knowledge are not considered public records and thus will not be subject to disclosure.[20] A government attorney's personal notes, designed to remind him or herself about certain things such as list of questions to ask a witness, outlines of information on the record, and other similar items do not fall within the definition of public record.[21] Nevertheless, if such notes and trial preparation materials are included in inter-office or intra-office memoranda (and therefore used to communicate knowledge to others), then such materials may constitute public records.[22]

Scope of Discovery under the Administrative Procedure Act

The Administrative Procedure Act [23] provides a number of requirements and procedures that those agencies subject to the Act must abide by in conducting meetings and adjudicatory hearings, as well as in the promulgation of administrative rules. The presiding officer in a proceeding subject to the APA has the power to take sworn testimony of witnesses, issue subpoenas, and "effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure."[24] The Model Rules of Procedure[25] provide that "[a]fter commencement of a proceeding, parties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure. The presiding officer may issue appropriate orders to effectuate the purposes of discovery and to prevent delay, including the imposition of sanctions in accordance with the Florida Rules of Civil Procedure, except contempt."[26]

Trial courts possess broad discretion in granting or refusing discovery motions and in protecting parties against possible abuse of discovery procedures, and only an abuse of this discretion will constitute fatal error.[27] The Administrative Law Judge, as the equivalent of a trial court, generally possesses the same broad discretion in the administrative process, with some limitations. Contempt is not an available sanction in an administrative proceeding.[28] Enforcement of a subpoena, an order directing discovery, or an order imposing sanctions must therefore be sought by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides.[29] Further, there is case law which indicates that because a hearing officer is not able to rule on the constitutional validity of an existing agency rule, discovery calculated to establish facts relating to the constitutional questions was not proper.[30]

A number of statutes provide for the confidentiality of certain information that comes into the possession of governmental agencies or third parties.[31] These statutes usually provide that such confidential information may be released by the government agency or third party upon an order "from a court of competent jurisdiction." While Administrative Law Judges are quasi-judicial officers of a quasi-judicial forum, they are not considered judges of a court of competent jurisdiction for purposes of ordering the release of such confidential information.[32]

Hearsay

The rules of evidence are significantly relaxed under the APA, and "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida."[33] Hearsay evidence may be used for the purpose of supplementing or explaining other evidence; however, "it shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action."[34] The implicit conflict between these two statutory provisions may cause some problems when hearsay evidence is introduced without objection during an administrative proceeding. There is case law that supports the position that unobjected hearsay in an administrative proceeding becomes part of

the evidence in the case and is usable as proof just as any other evidence, limited only by its rational persuasive power.[35] However, in an earlier case that year the same court concluded that the agency's decision must be reversed because the only evidence supporting a particular finding of fact was unobjected to hearsay. [36] This little conundrum goes by the name of the "residuum rule" and stands for the proposition that although all evidence may be "admissible" in an administrative hearing (and therefore an objection may not be necessary or even ruled upon), the fact finder's ruling must be grounded in a "residuum" of evidence that would be admissible in a jury trial.[37] This "rule" has been criticized as unfair to a party who offers evidence without objection from the other party, which is then received by the fact finder without limitation, only to discover later that the evidence was secretly rejected.[38] Rule 28-106.213(3) of the Model Rules of Procedure specifically provides that hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

Timing of Discovery

The manner of service of process on the state or any municipal corporation, agency, board, commission, department or subdivision is prescribed by statute.[39] Service of process is not merely a technical exercise. It is an essential element in any lawsuit. Effecting proper service on the government entity should be treated as a prerequisite to serving (or responding) to a discovery request. In the case of a collegial body agency head, service on all members comprising that collegial body should be perfected before discovery is pursued.

It is well settled that after a challenge has been made to the Court's jurisdiction, discovery should be stayed, or limited to jurisdictional issues, until the challenge is resolved.[40] It is similarly established that a stay of discovery is proper when a dispositive motion is pending.[41] Because of the unique defenses available to a state government agency or agent, such as sovereign immunity, Eleventh Amendment immunity, and qualified immunity, motions raising these defenses and requesting a stay of discovery are to be expected in appropriate cases. A defendant entitled to claim qualified immunity is shielded not only from liability, but also from the "burdens of broad reaching discovery."[42]

Depositions

Deposing agency heads and other high-ranking government officials is not an easy feat. Florida courts have followed Federal precedent that department heads and similar high-ranking officials should not ordinarily be compelled to testify unless it has been established that the testimony to be elicited is necessary, relevant, and unavailable from a lesser ranking officer.[43] A party that has not previously pursued other means of discovery such as interrogatories or depositions of lower-ranking personnel will have a difficult time establishing the requisite showing.

Another significant issue confronted by government lawyers is the attempt to depose agency heads or officials acting in a quasi-legislative or quasi-judicial capacity concerning the motives or reasons supporting their action. The general rule of law is that inquiry into the motives of a legislative body are not appropriate when undertaking a judicial review of legislative action, and such review is limited to questions of power and not to matters of expediency, motives, or the reasons which were spread before the legislators to induce them to take legislative action.[44] In Florida, this general rule has been adopted and by analogy applied to determinations of the validity of quasi-legislative activities of municipal councils and Executive Branch collegial bodies.[45] Similar principles are applicable to government officials acting in a quasi-judicial capacity, and they should not be compelled to testify about the mental processes employed in formulating their decision.[46] In the case of collegial bodies, most of the significant quasi-legislative and quasi-judicial activity takes place in public and is recorded electronically, and the minutes as well as the documents considered by the agency are public records. These facts can be cited to in response to an allegation of necessity to depose or unavailability of information.

The long unwritten rule of sequestration of witnesses was finally enacted as a statute in 1990.[47] Caselaw prior to this enactment indicated that the sequestration rule was only applicable at trial, not at a discovery deposition, and that the only means of excluding a witness from a deposition was through a motion for protective order under Fla. R. Civ. P. 1.280(c).[48] Because the statute uses the term "proceeding" instead of "trial," that caselaw may no longer be on point. A party who is a natural person (or in a civil case an officer or employee of a party who is not a natural person) may not be excluded even if they are a witness.[49] This means that the government agency is entitled to have its representative at a deposition or throughout the trial, even if that agency representative will be called to testify.

On occasion, parties attempt to compel the testimony of the agency attorney who assisted in the quasi-legislative or quasi-judicial activity of the agency. While it is not absolutely prohibited, the practice of forcing counsel to testify as a witness "has long been discouraged," and is "recognized as disrupting the adversarial nature of our judicial system."[50] State agency attorneys are entitled to a protective order unless the party seeking to depose them justifies its request by showing that it needs the testimony and cannot obtain it elsewhere.[51]

Subpoenas

A review of the term "subpoena" under the general index to the Florida Statutes discloses the substantial number of state agencies that have the power to issue these and other statutorily authorized investigative devices. The purpose of an administrative investigation is to discover and procure evidence, and not to prove a pending charge or complaint. This function is distinct from adjudication, and accordingly, more latitude is allowed in considering the foundation for a subpoena. The level of proof required of an agency seeking to issue a subpoena has been described as "something more than a

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DISCOVERY ISSUES
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fishing expedition and something less than probable cause."[52] An agency's investigatory subpoenas and other statutorily authorized investigative devices are "presumptively entitled to be given effect judicially if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant."[53] Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.[54]

Interrogatories

The Florida Rules of Civil Procedure provide that when the answer to an interrogatory may be derived or ascertained from the records of the party to whom the interrogatory is directed and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party to whom it is directed, an answer to the interrogatory specifying the records from which the answer may be derived or ascertained, and offering to give the party serving the interrogatory a reasonable opportunity to examine, audit or inspect the records and to make copies is a sufficient answer.[55] Government agencies are entitled to exercise the option of providing access to records in lieu of answering interrogatories in appropriate cases.[56] In such cases, the burden is on the party seeking to compel the answer to present competent substantial evidence that it would be more burdensome for that party than for the agency to ascertain the answer.[57]

Conclusion

Florida's Public Records and Government in the Sunshine Laws create unique challenges for lawyers defending government agencies as well as unique opportunities for those lawyers practicing before these agencies. The particular defenses available to government also affect the timing and availability of certain discovery devices. Practitioners who become familiar with these issues will be able to obtain necessary information more productively and efficiently.

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Endnotes:

[1] Chapter 119, F.S.
[2] *Adams v. State*, 521 So. 2d 337 (4th DCA 1988)
[3] Rule 1.280(b), Fla. R. Civ. P.
[4] See generally, "Government in the Sunshine Manual", 2002 Edition
[5] *State, Dept. of Highway Safety & Motor Vehicles v. Kropff*, 445 So. 2d 1068 (3rd DCA, 1984) (Footnote 1)
[6] Section 119.07(1)(a), F.S.
[7] Attorney General Opinions 80-57; 92-38; See generally "Government in the Sunshine Manual", 2002 Edition
[8] *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla 4th DCA 1982), rev. den. 431 So. 2d 988 (Fla 1983)
[9] Rule 4-4.2, Rules Regulating the Florida Bar
[10] Staff Opinion TE091001, August 23, 1990.
[11] §286.011, F.S.
[12] *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla 1985)
[13] §90.502(6), F.S.
[14] *Occidental Chemical Company v. Mayo*, 351 So. 2d 336 (Fla.1977). *But see Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla 5th DCA 1979) (series of scheduled meetings between school superintendent and individual school board members were subject to the sunshine law where the meetings were held in rapid-fire succession to avoid a public airing of a controversy)
[15] §286.011(8), F.S. *See, e.g. Bruckner v. City of Dania Beach*, 823 So. 2d 167 (Fla 4th DCA 2002)
[16] *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (1st DCA 1978)
[17] *Wait v. Florida Power and Light Company*, 372 So.2d 420 (Fla 1979)
[18] §119.07(5), F.S.
[19] §119.07(3)(l), F.S.
[20] *State v. Kokal*, 562 So. 2d 324 (Fla 1990)
[21] *Johnson v. Butterworth*, 713 So. 2d 985 (Fla 1998); *Patton v. State*, 784 So. 2d 380, 381 (Fla 2001)
[22] *Coleman v. Austin*, 521 So. 2d 247 (1st DCA 1988)
[23] Chapter 120, F.S.
[24] §120.569(2)(f), F.S.
[25] Chapter 28, Florida Administrative Code
[26] Rule 28-106.206, F.A.C.
[27] *Eyster v. Eyster*, 503 So. 2d 340, (1st DCA 1987), rev. den. 513 So. 2d 1061 (Fla 1987)
[28] §120.569(2)(f), F.S.
[29] §120.569(2)(k)2., F.S.
[30] *State, Dept. of Administration, Division of Personnel v. State, Dept of Administration, Division of Administrative Hearings*, 326 So. 2d 187 (1st DCA 1976)
[31] See, e.g., §213.053(2), F.S. (taxpayer information);228.093(3), F.S. (student educational records); §456.057(5), F.S. (patient records).
[32] See *Florida State University v. Hatton*, 672 So. 2d 576 (Fla 1st DCA 1996); *Florida Department of Revenue v. WHI Limited Partnership*, 754 So. 2d 205 (Fla 1st DCA 2000).
[33] §120.569(2)(g), F.S.
[34] §120.57(1)(c), F.S.
[35] *Tri-State Systems v. Department of Transportation*, 500 So. 2d 212 (1st DCA 1986).
[36] *Harris v. Game and Fresh Water Fish Commission*, 495 So. 2d 806 (1st DCA 1986)
[37] *Bellsouth Advertising and Publishing Company v. Unemployment Appeals Commission*, 654 So.2d 292, 295, (Fla 5th DCA 1995), citing to J. Lawrence Johnston, *Admissibility and Use of Evidence in Formal Administrative Proceedings: An Alternative Possibility for Change*, 65 Fla. B.J. 63 (March, 1991)
[38] *Bellsouth*, supra.
[39] §§48.111 and 48.121, F.S.
[40] *Eaton v. Dorchester Development, Inc*, 692 F. 2d 727 (11th Cir. 1982)
[41] *Brennan v. Local U. No. 639 Int. Bros. of Teamsters*, 494 F.2d 1092 (D.C. Cir. 1974), *cert. denied*, 429 U.S. 1123 (1974)
[42] *Harlow v. Fitzgerald*, 457 U.S. 800, 817-818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)
[43] *State, Department of Health and Rehabilitative Services v. Brooke*, 573 So. 2d 363, 371, (1st DCA 1991), quoting from *Halderman v. Pennhurst State School Hospital*, 559 F. Supp. 153 (E.D. Pa. 1982)
[44] See C.J.S. Statutes, §354
[45] *City of Coral Gables v. Coral Gables, Inc.*, 160 So. 476 (Fla 1935); *Board of Commissioners of State Institutions v. Tallahassee Bank and Trust Company*, 108 So. 2d 74 (1st DCA 1958)
[46] *United States v. Morgan*, 313 U.S. 409 (1940)
[47] §90.616, F.S.
[48] *Smith v. Southern Baptist Hospital of Florida*, 564 So. 2d 1115 (1st DCA 1990)
[49] §90.616(2), F.S.
[50] *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), quoting from *Hickman v. Taylor*, 329 U.S. 495 (1947)
[51] *Department of Transportation v. OHM Remediation Services Corp.*, 772 So 2d 572 (1st DCA 2000)
[52] *Check'n Go of Florida v. State*, 790 So. 2d 454 (5th DCA 2001)
[53] *Florida Department of Insurance v. Bankers Insurance Company*, 694 So. 2d 70, 73 (Fla. 1st DCA 1997).
[54] §120.569(2)(k)1., F.S.
[55] Rule 1.340(c), Fla R. Civ. P
[56] *Florida Department of Professional Regulation v. Florida Psychological Practitioners Association*, 483 So. 2d 817 (1st DCA 1986)
[57] *Dept. of Health and Rehabilitative Services v. Cleavinger*, 582 So. 2d 68 (1st DCA 1991)

Government Lawyer Section Calendar of Events 2003-2004

Executive Council Conference Call
October 16, 2003, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

Executive Council Conference Call
November 20, 2003, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

Executive Council Conference Call
December 18, 2003, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

Executive Council Conference Call
January 15, 2003, 12:30 p.m.
Instructions for joining the call.
1-877-394-0659, then **110497#**

- **Florida Bar Midyear Meeting**
  January 17, 2004, Miami

- **Demystifying The Legislative Process**
  February 7, 2004, Tallahassee

Executive Council Conference Call
February 19, 2004, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

Executive Council Conference Call
March 18, 2004, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

- **Government Lawyer Section Annual Retreat and Seminar**
  April 16-20, 2004, Washington, D.C.

Executive Council Conference Call
May 20, 2004, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

- **Practicing Before The Supreme Court**
  June 6, 2004, Tallahassee

Executive Council Conference Call
June 17, 2003, 12:30 p.m.
Instructions for joining the call
1-877-394-0659, then **110497#**

- **Florida Bar Annual Meeting**
  June 25, 2004, Boca Raton

CASE LAW UPDATE

by Janice M. McLean, Assistant Editor

ATTORNEY GENERAL OPINION: RECORDS-SOCIAL SECURITY NUMBER-MUNICIPALITY
28 Fla. Op. Atty. Gen. 1 No. 25(June 6, 2002).

The question was whether the "legitimate business purpose" exception in section 119.0721, Florida Statutes authorizes a town to release the social security numbers of its water and sewer system customers to a private company that intends to enter the social security numbers into a computer database and sell access to the database to the general public. Normally social security numbers held by an agency are confidential and exempt from public disclosure because they are of such a sensitive personal nature the harm from disclosing such number outweighs any public benefit that can be derived from widespread and unregulated public access to such number. However, the statute does establish an exception that allows access to social security numbers for legitimate business purposes, "Identity verification in the normal course of business; use in civil, criminal, or administrative proceeding; use for insurance purposes; use in law enforcement and investigation of crimes; use in identifying and preventing fraud; use in matching, verifying or retrieving information; and use in research activities. A legitimate business purpose does not include the display or bulk sale of social security numbers to the general public or the distribution of such numbers to any customer that is not identifiable by the distributor. The Attorney General held in his opinion that because the company involved in the complaint operates a website that offers access to utility records, property records, and business license data of cities and counties for a fee. Such use of the social security numbers does not constitute an acceptable business purpose as the term is used in section 119.0721, Florida Statutes.

ATTORNEY GENERAL OPINION: ABSENCE OF DISABLED BOARD MEMBERS AND BOARD VOTING
28 Fla. Op. Atty. Gen. No. 5 (December 11, 2002).

Whether a physically disabled member who is unable to attend a city board meeting may participate and vote on board matters by electronic means. Physically disabled members of the City of Miami Beach Barrier-Free Environment Committee may participate and vote on board matters by electronic means if they are unable to attend a public meeting so long as a quorum of the members of the board is physically present at the meeting site.

ATTORNEY GENERAL OPINION: DUAL OFFICE HOLDING
28 Fla. Op. Atty. Gen. No. 5 (December 17, 2002).

Whether a member of the Board of Commissioners of the Central Broward Water Control District may simultaneously hold the office of city commissioner without violating the dual office holding prohibition in Article II, section 5(a), Florida Constitution. In *Advisory Opinion to the Governor—Dual Office-Holding*, 630 So. 2d 1055, 1058 (Fla. 1994) the Supreme Court of Florida held that special district officers are not included within the dual office holding prohibition. The attorney general concluded that the constitutional dual office holding prohibition does not apply to the officers of an independent special district. Therefore, a member of the Board of Commissioners of the Central Broward Water Control District may simultaneously hold the office of city commissioner without violating the dual office holding prohibition in Article II, section 5(a), Florida Constitution.

ATTORNEY GENERAL OPINION: VOLUSIA SOIL AND WATER CONSERVATION DISTRICT'S AUTHORIZATION TO LEVY TAXES AND POWERS TO CARRY OUT STATUTORY DUTY
28 Fla. Op. Atty. Gen. No. 5 (December 20, 2002).

The question in this case is whether the Volusia Soil and Water Conservation District established pursuant to Chapter 582, Florida Statutes is authorized to levy taxes; and whether Volusia Soil and Water Conservation District is only limited to combating flood damage and soil erosion. The attorney general concluded that a soil and water conservation district established under the procedures prescribed in Chapter 582, Florida Statutes, is not authorized by that chapter to levy taxes, although it may establish a watershed improvement district as provided in Chapter 582, Florida Statutes, as a subdistrict of the soil and water conservation district; such watershed improvement district may levy ad valorem taxes for the purposes of the district or to amortize indebtedness or bonds. Also, a soil and water conservation district established pursuant to Chapter 582, Florida Statutes, is not limited to combating flood damage and soil erosion but has a variety of responsibilities relating to soil and water conservation. As a special district created by law, the district is limited to those powers specified by statute or necessarily implied therefrom in order to carry out a statutorily imposed duty.

ATTORNEY GENERAL OPINION: MAXIMUM PER DIEM AND SUBSISTENCE ALLOWANCE
28 Fla. Op. Atty. Gen. No. 5 (January 3, 2003).

Whether a municipality is autho-

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rized to provide an expense account to its city officials and to citizen volunteers without a limitation on the per diem rates established pursuant to section 112.061(6), Florida Statutes. Section 112.061(6), Florida Statutes, applies to municipalities and controls the maximum rates of per diem and subsistence allowance to be paid to officers, employees or others authorized to act on behalf of the municipality. While a municipality may legislate on the subject of per diem and subsistence allowances for governmental travelers, the rates established by section 112.061(6), Florida Statutes, may not be exceeded.

DISTRICT COURT OF APPEAL: EXHAUSTION OF ADMINISTRATIVE REMEDIES
Florida Fish and Wildlife Conservation Commission v. Pringle, 28 Fla. L. Weekly D 603

Pringle and Crum filed a complaint in circuit court, which they sought declaratory judgment that the net they designed was legal under the Fish and Wildlife Conservation Commission rules. The Commission filed a motion to dismiss on the ground that the plaintiffs had failed to exhaust available administrative remedies and a motion to transfer on the ground that the trial court lacked primary jurisdiction. These motions were denied and the commission then answered the complaint. The circuit court found that the Pringle and Crum net was allowed under Commission rules. However, on appeal the District Court concluded that the plaintiffs had not exhausted available administrative remedies before they sought relief in the courts and they offered no valid reason to be excused from the exhaustion requirement. The issue raised in the complaint involved technical expertise in the area of fishing gear specifications and prohibitions. Such expertise is outside the ordinary experience of judges and juries, but within the special competence of the Commission. Therefore, the Commission, not the circuit court, should have ruled upon the issue first. Therefore the District Court that a constitutional challenge to an agency's rule must first be presented to the agency and the administrative process exhausted before the issue may be raised in the courts.

ADMINISTRATIVE LAW: DISCOVERY-ACCOUNTANT-CLIENT PRIVILEGE WAIVER
Eight hundred, Inc. v. Florida Department of Revenue, 28 Fla. L. Weekly D 491

An administrative law judge held that the accountant-client privilege had been waived when the certified public accountant appeared at deposition as instructed by the judge with documents identified in subpoena duces tecum attached to motions. The District Court of Appeals held that where no evidentiary hearing was held and no evidence was presented to support the claim that privilege had not been waived. Representations by an attorney regarding the facts, and documents attached as exhibits to a motion, do not constitute evidence. To permit a determination of whether petitioner had waived its accountant-client privilege to be made in such a manner notwithstanding the petitioner's repeated objections would amount to a deprivation of procedural due process of law. Because the administrative law judge ruled that the accountant client privilege had been waived without holding an evidentiary hearing, and without receiving any evidence to support respondent's claim, the District Court concluded that the order constituted a departure from the essential requirements of law and must be set aside.

BOND VALIDATION-LEGISLATION-SPECIAL LAWS
Schrader v. Florida Keys Aqueduct Authority, 28 Fla. L. Weekly S 178

The Supreme Court of Florida affirmed the lower court's decision to validate sewage system revenue bonds to be issued by Florida Keys Aqueduct Authority. The Supreme Court of Florida also held that the lower court had properly held that the law providing local governments within the Florida Keys, an area of critical state concern, with the authority to impose more stringent sewage system connection ordinances than elsewhere in the state is a valid general law. Because the law's purpose is rationally related to the Florida Keys as an area critical state concern it is constitutional.

COLLECTIVE BARGAINING AGREEMENT
Dade County School Administrators Association v. School Board of Miami-Dade County, 28 Fla. L. Weekly D 733

The Dade County School Administrators Association, Local 77, AFSA, AFL-CIO appealed an order of the Florida Public Employees Relations Commission (PERC) to dismiss its Representation-Certification to represent a group of assistant principals and vice principals employed by the School Board of Miami-Dade County for the purpose of collective bargaining. Local 77 filed a petition with PERC seeking to represent a group of assistant principals and vice principals for the purpose of collective bargaining. PERC found the petition was sufficient and assigned a hearing officer. After an evidentiary hearing, the hearing officer issued a recommended order, concluding that the assistant principals met the criteria of managerial employees and administrative personnel as defined in section 447.203(4)(a) and section 228.041(10), respectively, and were, therefore, precluded from collective bargaining. PERC adopted the hearing officer's recommended order and issued a final order dismissing the petition. The parties agreed that the hearing officer's recommended order was supported by competent substantial evidence. However, because the statutes at issue were construed in a manner against its interest, Local 77 now sought a constitutional interpretation of sections 447.203(4)(a)6 and 228.041(10). The District Court of Appeal has previously recognized that the right to collectively bargain is guaran-

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teed by the Florida Constitution, that the public employees have the same rights to collectively bargain as the private employees, and that constitutional issues may be considered de novo from an appeal of an administrative proceeding. *State Employees Attorneys Guild v. PERC*, 653 So.2d 487, 488 (Fla 1st DCA 1995). Accordingly, the court affirmed PERC's order dismissing the petition for Representation-Certification without prejudice and declined to reach the question of the constitutionality of section 447.203, Florida Statutes (2001) or section 228.041, Florida Statutes (2001).

CITRUS CANKER ERADICATION

Florida Department of Agriculture v. Haire, 28 Fla. L. Weekly D 245

Section 581.184, which requires removal of citrus trees within 1900 feet of a tree infested with citrus canker and provides for compensation to homeowners in the amount of $55 or $100 per tree, depending upon time of removal, does not violate substantive or procedural due process and is constitutional. Because protecting citrus industry benefits public welfare, it is within the state's police power to summarily destroy trees to combat citrus canker. This action does not violate due process as long as compensation is given for the destruction of trees having value.

SOVEREIGN IMMUNITY

Dahl v. Eckerd, 28 Fla. L. Weekly D 974

The fact that a private business that operates under a contract with the state is "subject to" the public whistleblower act does not eliminate a wrongly fired worker's right to take advantage of the private whistleblower act, which offers a broader statute of limitations, the 2nd DCA held. The court ruled in favor of Elaine Dahl, who was fired from her job as a psychologist with Eckerd Youth Development Center, a private rehabilitative school for juvenile offenders that operated pursuant to a contract with the Department of Juvenile Justice. Dahl claimed she was fired for reporting various violations by her coworkers and supervisors. Eckerd argued that because it operated under state contract, the provisions of the public whistleblower act applied, leaving Dahl with just 180 days to file her complaint. The DCA, however, said Dahl is also entitled to utilize the private whistleblower act, which allows two years to file. In conclusion, the court held that the fact that Eckerd was "subject to" the public whistleblower act did not diminish Ms. Dahl's right to take advantage of another remedial statute–the private whistleblower act.

SEX DISCRIMINATION

Natase v. Florida Fish and Wildlife Conservation, 28 Fla. L. Weekly D 361

Lee Natase filed a sex discrimination in employment action against Florida Fish and Wildlife Conservation Commission. She alleged that she was a duty officer performing as a dispatcher and that she was written up several times for various rule violations. She further alleged that similarly situated males did not follow these rules, but that the males were never reprimanded or punished. Natase claimed her employer's actions and attempt to terminate her employment constituted a constructive termination forcing her to resign. The trial court entered summary judgment for defendant Commission on ground that Commission was not a proper party because plaintiff was an employee of Department of Environmental Protection and not the Commission. Therefore the Commission could not be subject to liability in the action. Natase acknowledged that a division of the DEP employed her and that the Commission never employed her. However, Natase asserted the entitlement to sue the Commission as a "successor" agency. The court found no merit to the plaintiff's claim that she was employed in the DEP's Division of Law Enforcement, and certain employees of that division became employees of Commission after it was formed, that the Commission is a responsible "successor" agency. Even though some employees were transferred to the Commission the Commission did not succeed or absorb the DEP Law Enforcement Division because the statute provided that the Division of Law Enforcement within the DEP still existed.

STANDING TO CHALLENGE AD VALOREM TAXATION

Todora v. Venice Golf Association, Inc., 28 Fla. L. Weekly D 1428

Venice Golf Association operates a golf course on property owned by the City of Venice under a lease which provides that the lessee assume all tax liabilities related to the property. The question in this case is whether a nongovernmental lessee of government-owned property has standing to challenge the assessment of ad valorem taxes on a property when the property is not assessed in the name of the lessee but the lessee is contractually obligated to pay the taxes. The "Taxpayer" who has standing to challenge assessment on property is the party who has responsibility under the law for payment of taxes, not party who assumes liability for payment of taxes by private contract. The city as the owner of the property was the proper party to challenge assessment. The trial court erred in striking assessments in action brought by lessee of property.

JUDGE DISQUALIFICATION

Carrow v. Florida Bar, 28 Fla. L. Weekly D 1587

A motion to disqualify a trial judge must comply with the requirements of Florida Rule of Judicial Administration 2.160. *Time Warner*, 647 So.2d at 1071. If the motion does not comply with the requirements of the rule, the writ will not be issued. The writ of prohibition to disqualify a trial judge must allege any facts or reasons to disqualify the judge which include any facts specifically describing any prejudice or bias on the part of the judge, or that the judge is related to a party or other attorney in the case. In this case the writ of prohibition did not include any facts "specifically describing" any prejudice or bias of the judge. The motion was legally insufficient pursuant to Rule 2.160 and impermis-

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sibly shifted the burden of identifying prejudice or bias from the litigant to the trial court. Therefore the Writ of Prohibition was denied.

EMINENT DOMAIN GOOD FAITH NEGOTIATION

Simmons v. Department of Environmental Protection, 28 Fla. L. Weekly D 1578

This is an eminent domain case where the appellants challenged an entry of an order of taking. The appellants argued that the trial court erred in entering the order of taking because the Department of Environmental Protection failed to comply with presuit negotiation requirements and failed to present a good faith estimate of value based on a valid appraisal. The Department's duty to negotiate in good faith prior to bringing an eminent domain proceeding is set forth in section 73.015(1), Florida Statutes (2001). That section requires that the Department "attempt to negotiate in good faith with the fee owner of the parcel to be acquired...and must attempt to reach an agreement regarding the amount of compensation to be paid for the parcel." In this case, it is undisputed that the Department sent out, and the appellants received two written offers that complied with section 73.015. The appellants neglected to respond to the offers, and the department filed suit after waiting the requisite thirty days under the statute. The appellant's failure to respond to the offers ended the negotiations.

MUNICIPAL CORPORATIONS AND ORDINANCES

GLA & Associates, Inc. v. City of Boca Raton, 28 Fla. L. Weekly D 1636

A residential developer challenged a trial court order holding constitutional a city ordinance that required a city to permit for activities conducted seaward of the established coastal construction control line. The court held that the developer was collaterally estopped because the developer's predecessor in title previously litigated the same issue, and the court found in favor of the city.

ADMINISTRATIVE LAW – DUE PROCESS, MOTIONS FOR CONTINUANCE

Coleus v. Florida Commission on Human Relations, 28 FLW D981 (5th DCA).

Coleus moved for a continuance of the hearing at the hearing in order to obtain counsel and the motion was denied. Coleus had notice of the hearing, had ample opportunity to obtain counsel and had been represented by counsel in a related workers compensation case. Coleus did not contest the findings of fact made by the ALJ or the legal conclusion that Coleus failed to make a prima facie case, but appealed the agency final order on basis of denial of due process based upon the denial of the motion for continuance. The District Court of Appeal affirmed the agency order finding that there was no abuse of discretion in denying motion for continuance to obtain counsel when motion made at the hearing.

ADMINISTRATIVE LAW – STANDING

Ybor III, Ltd. v. Florida Housing Finance Corp., 28 FLW D1004 (1st DCA).

Through a competitive bidding process, Ybor and another company, Windsong, sought funding from Florida Housing during a funding cycle. Due to an insufficient "funding pool" Windsong was awarded funding but Ybor was not. Ybor alleged that, based upon Florida Housing's rules, policies and practices, Windsong's application was scored incorrectly and if it had been scored correctly Ybor would have been the highest and best applicant. Florida Housing left Windsong's scoring unchanged. Ybor petitioned for a formal administrative hearing. Florida Housing responded that Ybor was attempting to assert an after-the-fact cross-appeal in violation of a "no intervention" rule. Ybor responded that a 120.57 petition is not an intervention, but its own proceeding, and as such Ybor was a substantially affected person entitled to a hearing. Florida Housing entered a final order adopting its position and Ybor appealed. Agency order reversed and remanded for a formal administrative hearing. Ybor met the two-prong *Agrico* test for standing. By granting Windsong's application, Ybor was excluded from the funding cycle.

ADMINISTRATIVE LAW – AGENCY DEFERENCE, PRESERVING ISSUES IN EXCEPTIONS

Colonnade Medical Center, Inc. v. State of Florida, Agency for Healthcare Administration, 28 FLW D1021 (4th DCA).

Agency ordered repayment of overpayments made to Colonnade. Following a formal hearing, the ALJ held the payments at issue were overpayments and construed §409.913 to authorize the Agency to demand repayment of overpayments. The agency adopted the recommended order and ordered Colonnade to remit the overpayments. The agency's final order was affirmed. The Court held that the agency's interpretation of statute is consistent with its plain meaning. Colonnade did not preserve issue of final order not being supported by competent, substantial evidence since Colonnade did not take exception to the recommended order and first raised the issue on appeal.

Janice McLean *is an attorney with the South Florida Water Management District and has practiced for many years in the areas of water resources, water conservation, water permitting, rulemaking and legislation. She is a 1990 graduate of the Stetson University College of Law and a 1978 graduate of the University of South Florida.* *Ms. McLean would like to acknowledge the assistance of Karsten Fontenot, a law clerk at the District, in producing this update.*

William B. Hammill Awarded 2003 Florida Bar Claude Pepper Outstanding Government Lawyer Award

By Francine M. Ffolkes

The Government Lawyer Section was very pleased to award this year's Claude Pepper Outstanding Government Lawyer Award to William B. Hammill, a Civilian Attorney-Advisor with the United States Central Command stationed at MacDill Air Force Base. Mr. Hammill's nomination outlined an impressive legal career in service to the United States. He practices in the unique and critical area of international and operational law. Having the highest security clearances, he has been intimately involved in the planning and conducting of military operations within the 25-country area of responsibility of the U.S. Central Command.

For 26 years Mr. Hammill was an Air Force Judge Advocate, representing the legal interests of this country all over the globe. Before retiring from active duty in December 2000, he was the Staff Judge Advocate General for U.S. Central Command in Tampa Florida. For five years there, he was the key legal advisor to the Commander for Crisis Actions and Current Military Operations, including enforcement of United Nations sanctions against Iraq, air strikes against Iraq during Operation DESERT FOX, and large-scale military exercises in the region. Mr. Hammill returned as a civilian attorney in November 2001, at the height of Operation ENDURING FREEDOM (after September 11, 2001) and has made unparalleled contributions to America's war on terrorism and in upholding the rule of law in the conduct of our military operations.

Mr. Hammill received his Bachelor of Science degree in Business Management, *magna cum laude*, from the University of Southern California in 1971. He then received both his Masters in Business Administration and Juris Doctorate degrees in 1974 from the University of Southern California. Between 1975 and 1987 Mr. Hammill was stationed in various locations around the globe. For example, he was the Director of International Law, Thirteenth Air Force at Clark Air Base in the Philippines; Associate Professor and Course Director of International Law, U.S. Air Force Academy, Colorado Springs, Colorado; and Judge Advocate at Incirlik Combined Defense Installation in Adana, Turkey. In 1984 Mr. Hammill received his Masters of Law (LLM) in International Law from Cornell University. From 1987 to 1991 here was Legal Counsel and Legislative Liaison in the Office of the Secretary of the Air Force at the Pentagon in Washington, D.C. Then in 1991 to 1993 he was Deputy Legal Counsel to the Chairman, Joint Chiefs of Staff, General Colin Powell at the Pentagon. From 1993 to 1995 Mr. Hammill was in the Republic of Korea where he served as Staff Judge Advocate General (General Counsel) at Osan Air Force Base. There he was the principal legal advisor to the Commander of all United States Air Forces in Korea and responsible for interpreting and applying international agreements, criminal justice, and compliance with the Law of Armed Conflict. From 1995 till his retirement in 2000 he served as Principal Legal Advisor to the Commander, U.S. Central Command.

In his current service as Civilian Attorney-Advisor, Mr. Hammill is actively involved in all aspects of military operations in Afghanistan and elsewhere in the U.S. Central Command's area of responsibility and continues to ensure compliance with the Law of Armed Conflict. In his over twenty years of leadership dealing with complex issues in a very high stress environment, Mr. Hammill has emphasized developing creative solutions and providing sound counsel to the most senior decision-makers in our country.

The Government Lawyer Section thanks Captain Shelley Young, Staff Judge Advocate, U.S. Navy, U.S. Central Command, MacDill Air Force Base for her nomination of Mr. Hammill and providing the information used to compile the foregoing biography.

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