THE FLORIDA BAR

The Government Lawyer Section REPORTER

Volume VIII, No. 3 *"No Higher Calling"* Fall 2001

Message from the Chair

by Stephanie A. Daniel

This is my first article as Section Chair. Since I spent five (5) years writing articles for the newsletter and, of those five (5) years, spent two (2) years as the Editor of the Newsletter, I thought writing these articles would be an easy task. It has been more difficult than I first thought.

My priorities as Section Chair this year are simple. I want to do what I can to continue to improve the lot of government lawyers. Recently, the Standing Committee on Pro Bono Service prepared their 2001 report. That report recommends that Rule 4-6.1, Florida Bar Rules of Professional Conduct,[1] be amended, to remove the exemption for performing pro bono legal services which presently exists for the judiciary, their staffs, or for government lawyers who are prohibited from performing legal services by constitutional, statutory, rule or regulatory prohibitions. I have prepared a letter to the Executive Director for the Standing Committee on Pro Bono Service, advising him that the Section opposes the recommendation to delete the exemption.

In this newsletter, we have included a copy of the report, for your information, as well as the Section's response. If you want to submit a separate response to the Florida Bar, contact me at *Stephanie_Daniel@oag.state.fl.us*, and I will give you the necessary contact information. As you may know, last year, an effort was made to amend the Florida Bar CLE rules to eliminate the deferral for government lawyers to complete the Practicing with Professionalism Course (formerly the Bridge the Gap Course).[2] (Emphasis supplied) The Section led an initiative to oppose the amendment, and the proposed amendment was later withdrawn by the Florida Bar.

The Section anticipates that, by notifying the Florida Bar now of the Section's opposition to the proposal to eliminate the pro bono deferral provision, we will be able to persuade the Florida Bar to forego any request to amend the pro bono deferral rule.

We have also included in this newsletter an article on Caselaw updates. I hope that it is helpful. We've also included an opinion provided by staff counsel at the Ethics Commission. We are working to provide information which is useful to you as Section members. If you would like to see any other types of information in the newsletter, let us know.

In the newsletter, you will also see a revised calendar. The calendar sent out earlier in the year did not consider the impact that the 2002 Legislative Session would have on our activities. Because of the early Session start date, we have had to move courses about. Our Demystifying

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Government Lawyer Section Midyear Meeting

January 11, 2002 • Hyatt Regency Miami

Executive Council Meeting
2:30 p.m. to 4:30 p.m., "Pearson II"

Reception
5:00 p.m. to 7:00 p.m., "Gautier"

INSIDE:

THE GOVERNMENT LAWYER
SECTION REPORTER

Francine M. Ffolkes, Editor

This newsletter is prepared and published by the Government Lawyer Section of The Florida Bar.

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ARTICLES FOR THE WINTER ISSUE ARE DUE January 15, 2002.

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.

Ethically Speaking . . .

Changes in the Ethics Laws Made by the 2000 Legislature

by Phil Claypool, General Counsel, Florida Commission on Ethics

The 2000 Florida Legislature made a number of significant changes to the State's Code of Ethics for Public Officers and Employees [Part III, Chapter 112, Florida Statutes], principally regarding the State's financial disclosure laws, gift law, and Executive Branch Lobbyist Registration law. For the most part, these changes became effective January lst, 2001, but some took effect earlier.

Financial Disclosure Changes:

Effective June 7, 2000, all persons who were required to file either the full financial disclosure (CE Form 6, Full and Public Disclosure of Financial Interests) or the limited-financial disclosure (CE Form 1, Statement of Financial Interests) also were required to file final disclosure statements within 60 days of their leaving their public offices or employment positions, with the statements covering the period between January 1st and their last day of office or employment. The agency head of each person who is required to file a final disclosure statement is required to notify such person(s) and may designate someone to be responsible for the notification requirements. The Commission has promulgated CE Form 6F (Final Full and Public Disclosure of Financial Interests) and CE Form 1F (Final Statement of Financial Interests) for the final disclosure filing; copies are available at the Commission on Ethics' website--*www.ethics.state.fl.us.*

*As of January 1, 2001, per*sons who do not file their annual disclosure forms (either CE Form 6's or CE Form 1's) by the September 1st grace period deadline are subject to automatic fines of $25 for each late day, up to a cap of $1,500. However, the $1,500 limitation on the imposition automatic fines does not limit the civil penalty that may be imposed pursuant to s. 112.317, F.S., if the statement is filed more than 60 days after the deadline and a complaint is filed pursuant to s. 112.324, F.S. Modeled after the automatic fine system in place for campaign finance reports, the Ethics Commission will hear appeals or disputes of the fines based on unusual circumstances surrounding the failure to file on the designated filing due date. It has the power to waive fines under limited circumstances, i.e., good cause shown.

Of major significance to cities and counties, the Legislature revamped the list of which local appointed board members must file. Beginning January l, 2001, only certain types of local boards are covered by the State law. However, local governments have the authority to require other boards to file, as a "local option."

The Legislature also changed the way some assets and liabilities are reported on the Full and Public Disclosure of Financial Interests forms (CE Form 6's), as well as the thresholds for reporting financial interests on the limited disclosure (CE Form 1).

Finally, full financial disclosure forms (CE Form 6's) and the limited disclosure forms (CE Form 1's) of state officers and specified state employees are filed with the Ethics Commission, rather than with the Secretary of State. The Commission on Ethics will be adopting rules and forms to allow officials to amend their disclosure forms.

The deadline for filing the quarterly disclosures of clients represented before agencies at one's level of government (CE Form 2, Quarterly Client Disclosure) has changed to match the quarterly gift reporting dates.

Gift Law Changes:

The State's gift law applicable to persons who must file financial disclosure (either the CE Form 6 or CE Form 1) and to State employees who are involved in procurement was

amended specifically to apply to candidates for elective office, since they are required to file disclosure statements when they qualify as candidates for public office, and to persons who are elected to office, but have not yet assumed their offices. Judges of Compensation Claims also must file their gift disclosures, made pursuant to the judicial cannons, with the Commission on Ethics.

Another change is that payment for a gift must be made within 90 days of receiving the gift in order to avoid the law's prohibitions and disclosure requirements. A promise to pay for a gift will not be sufficient to avoid gift law consequences, unless the promise is in writing and enforceable.

The Technological Research and Development Authority was added to the list of agencies that can give gifts worth over $100, so long as a public purpose is shown for the giving of the gift, with disclosure being required by the donee on CE Form 10 (Annual Disclosure of gifts From Governmental Entities and Direct Support Organizations and Honorarium event Related Expenses).

Finally, disclosure forms [CE Form 30 (Donor's Quarterly Gift Disclosure (Gifts Between $25 and $100)), CE Form 10, and CE Form 9 (Quarterly Gift Disclosure (Gifts over $100))] which previously were filed with the Secretary of State, as of January 1, 2001 are required to be filed with the Ethics Commission.

Executive Branch Lobbyist Registration Law Changes:

Persons who represent local government agencies (as well as private entities) may have to register prior to representing that agency before entities of the Executive Branch of State government.

Previously, each lobbyist had to file an expenditure report after each calendar quarter; now, expenditure reports cover six-month periods and are filed semi-annually, rather than quarterly. The fine for late reports continues to accrue at $50 per day, but now is capped at $5,000 per late report.

Philip C. Claypool *is the General Counsel and Deputy Executive Director of the Florida Commission on Ethics. He graduated from Purdue University and received his law degree from Florida State University. He has lectured on the ethics laws for public officials at national, state, and local conferences and co-authored a Stetson Law Review article on voting conflicts of interest for public officials.*

CHAIR'S MESSAGE
from page 1

Course is in November this year, so that it precedes the Session which will start in January 2002. The Government in the Sunshine course will be in January 2002.

We have planned a retreat on February 8, 2002, to engage in long-range planning for the Section. The retreat will be scheduled in Orlando, Florida. If you are interested in joining us, you would be welcome to attend. Further details about the retreat may be obtained from our Section Coordinator, Arlee J. Colman, at 850/561-5625 or at *acolman@flabar.org*..

One final point, we are interested in increasing our membership. The Florida Bar estimates that between 10 and 15% of the lawyers in Florida are employed by a governmental entity. Despite this statistic, we only have about 1,000 Section members. Accordingly, I'd like to challenge each of you to encourage at least one person you work with to join the Section. There are several benefits. They include this newsletter, a great opportunity to network with other government lawyers (FYI, you can now access a list of all section members from the Florida Bar's website, then go to organization, attorney search, then look to the left and select by section), discounted rates to CLE courses that deal with issues of interest to Government Lawyers, discounted Section rates when you join either the Administrative Law Section and the Government Lawyer Section or the Criminal Law Section and the Government Lawyer Section.

Also, if you'd like to become more involved in Section activities, now would be a great time to do so. It can be as simple as writing an article, or seeking new members in your area. If you want to do more, there's still a need for persons on different committees of the Section. We welcome more help.

I hope that you will feel free to contact me about issues that are important to you this year, and ways that the Section can better serve your needs. I look forward to serving you this year.

Endnote:

[1] Rule 4-6.1(a) provides:

> Each member of The Florida Bar in good standing, as part of the member's professional responsibility, should (1) render pro bono legal services to the poor and (2) participate, to the extent possible, in other pro bono service activities that directly relate to the legal needs of the poor. ***This professional responsibility does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory, rule or regulatory prohibitions. . .*** (Emphasis supplied)

[2] Rule 6-12.4(a), Florida Bar Rules, provides:

> A member of the Florida Bar is eligible to defer compliance with the [Basic Skills Course Requirement] if:
> (1) the member is on active military duty;
> (2) compliance would create an undue hardship;
> (3) the member is a nonresident member whose primary office is outside of the state of Florida;
> ***(4) the member is a full-time governmental employee; or***
> (5) the member elects inactive membership status in the Florida Bar.

STEPHANIE SMITH V. COLONIAL PENN INSURANCE COMPANY
CIVIL ACTION NO. G-96-503

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, GALVESTON DIVISION
943 F. Supp. 782; 1996 U.S. Dist. LEXIS 16599

November 6, 1996, Decided
November 6, 1996, Filed, ENTERED

DISPOSITION: [**1] Defendant's Motion to Transfer DENIED.

OPINION: [*783] ORDER DENYING MOTION TO TRANSFER

This is a breach of contract case based on an insurance contract entered into by Plaintiff and Defendant. Now before the Court is Defendant's October 11, 1996 Motion to Transfer Venue from the Galveston Division to the Houston Division of the United States District Court for the Southern District of Texas pursuant to 28 U.S.C.

º 1404(a). For the reasons set forth below, the Motion is DENIED. <...>

Defendant's request for a transfer of venue is centered around the fact that Galveston does not have a commercial airport into which [**3] Defendant's employees and corporate [*784] representatives may fly and out of which they may be expediently whisked to the federal courthouse in Galveston. Rather, Defendant contends that it will be faced with the huge "inconvenience" of flying into Houston and driving less than forty miles to the Galveston courthouse, an act that will "encumber" it with "unnecessary driving time and expenses." The Court certainly does not wish to encumber any litigant with such an onerous burden.

The Court, being somewhat familiar with the Northeast, notes that perceptions about travel are different in that part of the country than they are in Texas. A litigant in that part of the country could cross several states in a few hours and might be shocked at having to travel fifty miles to try a case, but in this vast state of Texas, such a travel distance would not be viewed with any surprise or consternation. n1 Defendant should be assured that it is not embarking on a three-week-long trip via covered wagons when it travels to Galveston.

Rather, Defendant will be pleased to discover that the highway is paved and lighted all the way to Galveston, and thanks to the efforts of this Court's predecessor, Judge Roy [**4] Bean, the trip should be free of rustlers, hooligans, or vicious varmints of unsavory kind. Moreover, the speed limit was recently increased to seventy miles per hour on most of the road leading to Galveston, so Defendant should be able to hurtle to justice at lightning speed.

To assuage Defendant's worries about the inconvenience of the drive, the Court notes that Houston's Hobby Airport is located about equal drivetime from downtown Houston and the Galveston courthouse. Defendant will likely find it an easy, traffic-free ride to Galveston as compared to a congested, construction-riddled drive to downtown Houston. The Court notes that any inconvenience suffered in having to drive to Galveston may likely be offset by the peacefulness of the ride and the scenic beauty of the sunny isle.

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[1] "The sun is 'rize, the sun is set, and we is still in Texas yet!"--

The convenience of the witnesses and the parties is generally a primary concern of this Court when considering transfer motions. However, vague statements about [**5] the convenience of unknown and unnamed witnesses is insufficient to convince this Court that the convenience of the witnesses and the parties would be best served by transferring venue. See *Dupre,* 810 F. Supp. at 823 (to support a transfer of venue, the moving party cannot merely allege that certain key witnesses are not available or are inconveniently located, but must specifically identify the key witnesses and outline the substance of their testimony).

In the Court's view, even if all the witnesses, documents, and evidence relevant to this case were located within walking distance of the Houston Division courthouse, the inconvenience caused by retaining the case in this Court would be minimal at best in this age of convenient travel, communication, discovery, and trial testimony preservation. The Galveston Division courthouse is only about fifty miles from the Houston Division courthouse.

> "It is not as if the key witnesses will be asked to travel to the wilds of Alaska or the furthest reaches on the Continental United States."

Continental Airlines, 805 F. Supp. at 1397.

As to Defendant's argument that Houston might also be a more convenient forum for plaintiff, the Court [**6] notes that Plaintiff picked Galveston as her forum of choice even though she resides in San Antonio.

Defendant argues that flight travel is available between Houston and San Antonio but is not available between Galveston and San Antonio, again because of the absence of a commercial airport. Alas, this Court's kingdom for a commercial airport! n2 The Court is unpersuaded by this argument because it is not this Court's concern how Plaintiff gets here, whether it be by plane, train, automobile, horseback, foot, or on the back of a huge Texas jackrabbit, as long as Plaintiff is here at the proper date and time.

Thus, the Court declines to disturb the forum chosen by the Plaintiff and introduce the likelihood of delay inherent in any transfer simply to [*785] avoid the insignificant inconvenience that Defendant may suffer by litigating this matter in Galveston rather than Houston. See United Sonics, Inc. v. Shock, 661 F. Supp. 681, 683 (W.D. Tex. 1986) (plaintiff's choice of forum is "most influential and should rarely be disturbed unless the balance is strongly in defendant's favor"); Dupre, 810 F. Supp. at 828 (a prompt trial "is not without relevance to the convenience of parties and [**7] witnesses and the interest of justice").

For the reasons stated above, Defendant's Motion to Transfer is hereby DENIED. The parties are ORDERED to bear their own taxable costs and expenses incurred herein to date. The parties are also ORDERED to file nothing further on this issue in this Court, including motions to reconsider and the like. Instead, the parties are instructed to seek any further relief to which they feel themselves entitled in the United States Court of Appeals for the Fifth Circuit, as may be appropriate in due course.

IT IS SO ORDERED.

DONE this 6th day of November, 1996, at Galveston, Texas.

SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

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[2] Defendant will again be pleased to know that regular limousine service is available from Hobby Airport, even to the steps of this humble courthouse, which has got lights, indoor plummin', 'lectric doors, and all sorts of new stuff, almost like them big courthouses back East.

CASE LAW UPDATE

by William A. Stetson

Administrative Appeals

Belvue v. Florida Unemployment Appeals Commission, 26 Fla. L. Weekly D 2042

The Third District Court of Appeal held that when a appeal from a administrative decision is filed in a branch office, and not directly with the agency clerk, the appeal must be accepted as properly filed.

Belvue, a former supermarket worker, filed a notice of appeal from the Commission in the Commission's branch office. Belvue did not file the notice with the Commission's clerk, and filed a copy with the DCA one day after the filing period had expired. The Commission moved to dismiss the appeal arguing that the notice was improperly and untimely filed. The Court concluded that it was immaterial that the notice was filed in the branch office rather than with the commission's clerk because the date of filing the notice of appeal was the date it was forwarded from the branch office, and Belvue's timely filed notice forwarded from the branch office to the commission vested jurisdiction with the court. "The policy of our state is to make appellate review - even of administrative agencies - sensible, and not a minefield. The rules are written to simplify access to review."

ADA

Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356; 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)

A sharply divided U.S. Supreme Court held that state employees cannot sue the state for employment discrimination under the federal American with Disabilities Act because the 11th Amendment precludes such actions.

The 5-4 ruling, another in a string of recent rulings limiting the federal government's power over the states, said Congress exceeded its authority when it gave state workers the right to sue for money damages under the ADA. The 11th Circuit was reversed because Congress had not identified a history and pattern of unconstitutional employment discrimination against disabled the disabled by the states sufficient to abrogate the State's Eleventh Amendment immunity. The general findings and the anecdotal incidents in the ADA's legislative history fell short of suggesting a pattern of unconstitutional discrimination on which 14th Amendment, §5 legislation is required to be based. The Court concluded that states were not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as the state's actions towards such individuals had a rational basis. If special accommodations were to be required, they would have had to come from positive law and not through the Equal Protection Clause.

Chief Justice Rhenquist, writing for the majority stated: "Congressional enactment of the ADA represents its judgment that there should be a 'comprehensive national mandate for the elimination of discrimination against individuals with disabilities.' Congress is the final authority as to desirable public policy, but in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here, and to uphold the Act's application to the States would allow Congress to rewrite the Fourteenth Amendment law laid down by this Court."

Lucas v. W.W. Grainger, Inc., 14 Fla. L. Weekly Fed. C 991

The Eleventh U.S. Circuit Court of Appeals held that an employer is not required to restructure a job by eliminating essential functions that define the position in order to comply with the Americans with Disabilities Act.

The court ruled against a Georgia warehouse worker who was injured on the job and precluded from heavy lifting, bending and squatting. The employer attempted to accommodate his needs by creating a position with more limited physical demands, but the worker instead contended that the position had to be modified to eliminate all the physical demands he could not meet. The 11th Circuit rejected this argument, noting that an accommodation is considered reasonable and necessary under the ADA only if it enables the employee to perform the essential functions of the job. The changes sought in this case would have changed the very nature of the new position and therefore were not required to comply with the ADA.

> "While it is true that the ADA may require an employer to restructure a particular job by altering or eliminating some of its marginal functions, employers are not required to transform the position into another one by eliminating functions that are essential to the nature of the job as it exists," the 11th Circuit said. "The difference between the accommodation that is required and the transformation that is not is the difference between saddling a camel and removing its hump. Restructuring the (new) position by eliminating squatting, bending, lifting, or carrying (certain) items would have changed the nature of the beast, and that is not something the ADA requires."

Shotz and Tacl v. Cates, 14 Fla. L. Weekly Fed. C 954

The Eleventh Circuit Court of Appeals held that a pair of disabled citizens who sued over physical access to the Levy County Courthouse stated a valid cause of action under the ADA, but lacked standing because they have not alleged a threat of future injury.

The court upheld the dismissal of the suit, which sought injunctive relief under the ADA and the Florida Civil Rights Act. The plaintiffs are

disabled men who claimed that architectural barriers impeded their attendance at trials in the courthouse. However, the complaint contained only past incidents of discrimination. Since their one-time visits to the courthouse, the individuals had not attempted to return; nor did they allege an intent to do so in the future. Because the ADA requires the real and immediate threat of future discrimination, the 11th Circuit concluded that the plaintiffs lacked standing because they did not allege that they intend to return to the courthouse in the future. The court rejected the county's assertion that the men did not allege a violation of Title II of the ADA because they were able to attend a trial, even if it was difficult.

The 11th Circuit stated: "A violation of Title II¼does not occur only when a disabled person is completely prevented from enjoying a service, program, or activity. The regulations specifically require that services, programs, and activities be 'readily accessible.' If the Courthouse's wheelchair ramps are so steep that they impede a disabled person or if its bathrooms are unfit for the use of a disabled person, then it cannot be said that the trial is 'readily accessible,' regardless of whether the disabled person manages in some fashion to attend the trial."

Anti-Discrimination Law

Alexander v. Sandoval,121 S.Ct. 1511, 149 L.Ed.2d 517 (2001)

The U.S. Supreme Court held that no private right of action exists allowing citizens to sue state agencies that receive federal assistance under Title VI, the civil rights law that bans discrimination based on race, color or national origin.

By its ruling, the court reversed an 11th U.S. Circuit Court of Appeals ruling against Alabama's policy of offering driver's license exams only in English. Plaintiffs in a class action argued that the English-only policy had the effect of discriminating against non-English speakers based on their national origin, in violation of a U.S. Department of Justice anti-discrimination regulation implementing section 601 of Title VI of the Civil Rights Act of 1964. Both the trial court and the 11th Circuit rejected Alabama's argument that Title VI did not provide a cause of action for the suit. By a 5-4 vote the Supreme Court reversed and held that even assuming that the regulations were statutorily authorized and resulted in discriminatory impact, there was no private right of action to enforce the regulations. Title VI prohibited only intentional discrimination, and the remedies available for violations of Title VI could not be extended by regulation to remedy disparate impact discrimination that did not violate the implementing statute. Further, the express language permitting the implementing regulations included no provision for implementing private enforcement rights, especially in view of the elaborate statutory remedial scheme for termination of funding for regulatory violations.

Justice Scalia, writing for the majority, stated: "Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." Justice Scalia further stated "Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under (law)."

In a dissent Justice Stevens wrote:

> "Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI."

Bond Validation Process

City of Oldsmar v. Dept. of Transportation, 26 Fla. L. Weekly S 507

The Florida Supreme Court ruled

continued, next page

Section Calendar

Midyear Meeting of The Florida Bar
January 9-11, 2002, Miami-Hyatt

~~**Demystifying The Legislative Process**~~
~~November 16, 2001, Tallahassee~~ CANCELLED

Midyear Meeting
January 11, 2002, Miami

Government in the Sunshine
January 18, 2002, Tampa

Retreat/Long Range Planning
February 8, 2002, Orlando

Practicing Before The Supreme Court
June 3, 2002, Tallahassee

Annual Meeting of The Florida Bar
June 19 - 22, 2002, Boca Raton

CASE SUMMARIES
from preceding page

that a city improperly sought to use the Florida Statutes' bond validation procedures, including the Supreme Court's mandatory jurisdiction over bond appeals, to get around its own signed agreement with a state agency.

Oldsmar agreed with DOT to pay an amount to relocate utilities on DOT's right of way, and to indemnify DOT for damages incurred from the department's involvement with the city's utility work. DOT filed a third party complaint against Oldsmar after DOT's contractor filed suit claiming that Oldsmar's erroneous plans caused delays and additional costs. Oldsmar filed a motion for summary judgment alleging that the agreement with DOT violated Article VII, §12 of the Florida Constitution as a long term pledge of the city's ad valorem taxes. The motion was denied. Oldsmar then filed a complaint under Chapter 75.

The court said the City of Oldsmar had no basis for bringing a bond validation complaint under Chapter 75, when its actual objection involved an agreement to have the DOT relocate city utilities as part of a road improvement project. The court ruled that Chapter 75, which provides for the Supreme Court to directly review bond validation decisions, is intended to be used before bonds are issued, not after the construction work has been completed. The procedures available under Chapter 75 were not available to seek to invalidate the city's executed agreement. Rather, Chapter 75 applied only to (1) proposed governmental indebtedness; (2) proceedings to validate proposed agreements closely related to proposed or previously validated bond issues; or (3) non-Chapter 75 proceedings (injunctions, declaratory judgments, etc.) brought by third parties where the issue of the validity of an underlying agreement was litigated.

Justice Pariente, writing for a unanimous court, stated: "Unlike a traditional bond validation proceeding where the governmental entity seeks to have the circuit court validate a proposed bond or certificate of indebtedness, in this case the City is attempting to utilize the unique features of Chapter 75 to invalidate its own agreement with DOT and to avoid paying its incurred debt." Justice Pariente further stated: "The provisions of Chapter 75 are intended to provide a unique statutory mechanism to a governmental entity that seeks to incur bonded debt or to issue certificates of indebtedness. All of the language of the statutory provisions is prospective in nature. There is no indication from the statutory text that Chapter 75 was intended to be available to a governmental entity that seeks to invalidate a pre-existing and fully performed contract that gives rise to an indebtedness Not only is this attempt by the City contrary to the purpose of chapter 75, but it misuses the discrete and narrow grant of this Court's mandatory jurisdiction."

Collective Bargaining and Governmental Reorganization

City of Jacksonville v. Jacksonville Supervisor's Ass'n, Inc., 26 Fla. L. Weekly D 1734

The First DCA held that a municipal employer did commit an unfair labor practice when its reorganization of three departments deleted three positions in a collective bargaining unit and created new positions outside the unit.

The court reversed the Public Employees Relations Commission, which determined that the City of Jacksonville engaged in an unfair labor practice by not participating in "impact bargaining" over the transfer of bargaining unit work to positions outside the bargaining unit. The DCA did affirm Percy's determination that the city committed an unfair labor practice by failing to provide certain information about the change to the union, a conclusion the city did not challenge on appeal. In addressing the main issue before it, the DCA noted that section 447.209 provides that a public employer may unilaterally determine the organization and operations of its agencies and departments without having to collectively bargain.

The First DCA stated "We agree with the City that by granting this discretion to the public employer's organization and operations, unless those changes impact the determination of wages, hours, and terms and conditions of employment of employees within the bargaining unit. There is no dispute, however, that the City's actions had any impact upon the wages, hours, or terms and conditions of employment of any of the employees in the bargaining unit."

Counties to pay for Competency Exams

Miami-Dade County v. Jones, 26 Fla. L. Weekly S 533

The Florida Supreme Court ruled that when a trial court orders a competency evaluation of a criminal defendant by a neutral mental health expert, the county is required to pay for the examination under Fla. Stat. §43.28 and §916.115 (2000).

In this case, defendant's counsel filed a motion for determination of competency. The trial court found that a competency evaluation was necessary. Defendant's counsel and the State were only allowed by the court to each suggest an expert from a court-approved list. The trial court appointed both experts suggested by the State and defendant's counsel, and both of them testified at the hearing. Defendant's counsel they filed a motion for payment of competency expert fees and the court granted the motion.

The Supreme Court determined that competency determinations are an integral part of the operation of Florida courts, and section §43.28 makes counties responsible for costs that inhere in the operation of the courts. The court further referenced §916.12 and Fla.R.Crim.P. 3.851(d) which outlines procedures for competency evaluations. The court stated "It would be difficult to find that the County, which is clearly responsible

for competency evaluations conducted pursuant to §916.12, is not similarly obligated for the expert witness fees incurred during competency evaluations authorized by rule 3.851(d), which are fundamentally designed to protect the identical interests recognized under the statutory provisions...There is nothing more essential to the operation of the court system, and to due process itself, than the mental competency of the defendants that are required to be adjudicated in the proceedings designed to evaluate criminal responsibility."

County Standing to Challenge Canker Program

Department of Agriculture & Consumer Services v. Miami-Dade County, 26 Fla. L. Weekly D 1788

The Third DCA reversed injunctions blocking the canker eradication program holding that a county and city do not have the legal authority to challenge a statute that allows the Department of Agriculture to conduct the program.

Miami-Dade County and the City of North Miami challenged the constitutionality of§581.031(15)(a) and the department's rules and procedures implementing the canker program, claiming that the lack of a search warrant requirement violates state and federal constitutional protections. Without reaching the merits of the argument, the DCA said in two related opinions that the county and the city lack standing to pursue the action. State officers and agencies could not challenge the validity of legislation affecting their duties, and the fact that the county and the city might face liability because the county was required to assist the department in enforcement and might call upon the city for police assistance did not establish standing. Also, neither the county nor the city could assert Fourth Amendment rights of individual property owners.

The DCA stated "Our supreme court has held that the *threat* of suit, without more, does not give public officers or agencies a sufficiently substantial interest or special injury to allow the court to hear the challenge. In fact, the case law is clear that the *only* time that a public officer or agency may raise the constitutionality of a state statute is in a defensive posture."

Equal Protection and Race

Johnson v. Board of Regents of the University of Georgia

The Eleventh Circuit ruled that a University of Georgia's admissions policy, which grants preferential treatment to non-white applicants, is unconstitutional because student body diversity was not a compelling interest sufficient to withstand the strict scrutiny test that courts must apply to government decision-making based on race.

Plaintiffs asserted that the university's intentional use of race in the application process violated the Equal Protection Clause of the Fourteenth Amendment, as well as 42 U.S.C. §1981. The court held that the district court properly entered summary judgment in the applicant's favor on their challenge to the admissions policy, not because student body diversity could never be a compelling interest, but rather because this policy was not narrowly tailored to serve that interest. The court reasoned the university failed to meet its burden of showing that its 1999 freshman admissions policy was narrowly tailored. Moreover, the court reasoned that mechanically and inexorably awarding an arbitrary "diversity" bonus to each and every non-white applicant, and severely limiting the range of other factors that may be considered at that stage, the policy contemplated that non-white applicants would be admitted or advance further in the process at the expense of white applicants with greater potential to contribute to a diverse student body.

Excessive Force and Nominal Damages

Oliver v. Falla, 14 Fla. L. Weekly Fed. C. 1034

Nominal damages are not automatically awarded to a plaintiff who prevails on an Eighth Amendment excessive force claim, and the plaintiff waives any entitlement to such damages if he does not specifically requests them.

The court held that a plaintiff may make an implied waiver of nominal damages by failing to request them in his jury instructions or by failing to object to the absence of a jury instruction on nominal damages. The court ruled against George Oliver, who sued Miami-Dade County and several corrections officers over an alleged attack against him by one of the officers. The trial court and jury found against Oliver on all counts except for an excessive force count against one officer. The jury did not award Oliver any compensatory or punitive damages, and the trial court denied his motion for an award of nominal damages.

The 11th Circuit specifically states "Oliver clearly waived any request for nominal damages. Oliver's counsel made a strategic decision to seek compensatory and punitive damages only, probably thinking that the jury would award nominal damages only if Oliver requested them. Consequently, Oliver and his counsel waived the right to nominal damages at their own peril."

IDEA

School Board of Lee County v. S.W., 26 Fla. L. Weekly D 1673

The 2nd DCA ruled that an administrative law judge improperly ordered a school board to hire a speech and language specialist to teach a profoundly disabled student when evidence showed that the student's regular teacher was achieving significant results.

In a case involving the Individuals with Disabilities in Education Act, the court said the ALJ determined on his own that the student, who suffered severe speech and language problems, was not receiving proper educational opportunities. The student was eligible for services under IDEA. After a due process hearing on her educational placement, the ALJ found that the student's individual education plan and most services satisfied IDEA. However, the ALJ found that

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it was necessary to invite outside agencies that might assist with transition services to attend the next IEP conference. The ALJ's order implicitly directing the school district to compel the attendance of the outside agencies abused his discretion. Further, the ALJ found that the speech and language teacher provided by the school board was not qualified, and therefore the student should be provided therapy by a qualified speech and language pathologist or therapist. The DCA ruled that this was error as the record showed that the student had "significantly improved her quality of communication" using methods employed in the special classroom.

Liability for High Speed Police Pursuit

Knowles v. Henneley, 2001 Fla. App. LEXIS 10834

The Fourth DCA held that a jury is entitled to determine whether a law enforcement agency should be held liable for damages sustained when one of its officers conducts a risky high-speed chase. The court acknowledged the general proposition that police decisions to engage in pursuit should receive a high degree of judicial deference. However, the court said a St. Lucie County deputy's pursuit of a speeder was not immune from liability because it passed through residential areas at speeds approaching 100 mph.

The court reasoned that since the police cruiser pursued a traffic violator through a mixed residential and commercial areas at speeds near 100 mph which made control of the vehicle difficult, and that the deputy failed to immediately engage his lights and siren to warn others of the chase, warranted a jury determination of whether conducting the pursuit was negligent.

Medicaid Funding for Abortions

Renee B., et al., v. Florida Agency for Health Care Administration, 26 Fla. L. Weekly S 487

The Florida Supreme Court held that AHCA's decision to exclude abortions from the list of medical services covered by the state's Medicaid program does not violate the privacy guarantee of the Florida Constitution.

Three Medicaid eligible women and several health clinics and physicians filed a class action suit challenging three rules enacted by AHCA. The women were denied public funding for medically necessary abortions. The rules exclude abortions from Medicaid coverage, except in the cases where the pregnancy endangers the life of the mother or is the result of incest or rape. The plaintiffs claimed the rules violate the privacy clause of the state Constitution, but the Supreme Court disagreed with the privacy argument as well as an equal protection claim that the rules discriminate on the basis of gender. The Supreme Court reasoned that the state was not placing obstacles in the path of the woman's exercise of her freedom of choice; it had simply declined to remove an obstacle – indigency – not of its own making.

Justice Harding wrote for the Court stating: "Although the Florida Legislature has opted to subsidize medically necessary services generally, but not certain medically necessary abortions, the fact remains that Florida's Medicaid program leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if the Legislature had chosen to subsidize no health care costs at all. The right of privacy in the Florida Constitution protects a woman's right to choose an abortion. But contrary to the petitioner's arguments, the right of privacy does not create an entitlement to the financial resources to avail herself of this choice. Poverty may make it difficult for some women to obtain abortions. Nevertheless, the State has imposed no restriction on access to abortions that was not already present. Therefore, we find that the rules in question do not violate the right of privacy in the Florida Constitution."

Private Entity with State Lease

Yachting Promotions, Inc. v. Broward Marine, 26 Fla. L. Weekly D 2104

The Fourth DCA ruled that a private promoter's lease agreements with the state and a city do not make it a state actor whose conduct could violate a company's right of access to the courts.

A promoter had entered into a submerged lands lease with the state and an event agreement with a city. A Company applied to be an exhibitor at the 1999 boat show but its application was denied. The company sued the promoter, but its application for the 2000 boat show was also denied. The company then sought an injunction, claiming the 2000 show was relation for its earlier lawsuit. The company claimed the promoter was violating its rights of access to the courts under the Florida Constitution, and violating the Florida Deceptive and Unfair Trade Practices Act. The trial court granted a preliminary injunction, finding that by virtue of its agreements with the state and city to use public-owned land, the promoter was bound by applicable state and federal laws. The DCA reversed stating that the leases do not make the promoter a state actor, and that right of access to the courts provision of the constitution does not create an independent civil cause of action.

Replacement of highway billboards after wildfires

Chancellor Media Whiteco outdoor Corp. v. Dept. of Transportation, 2001 Fla. App. LEXIS 10908

The First DCA held that nonconforming billboards destroyed in 1998 by Central Florida wildfires cannot be rebuilt because they could jeopardize a portion of Florida's federal highway funding.

The court acknowledges that it's decision was in direct conflict with a March ruling by the Fifth DCA involving the same disputed billboards. State and federal regulations implementing the Highway Beautification Act of 1965 allow pre-existing nonconforming billboards to remain in place and allow them to be rebuilt only if they are destroyed by "vandalism or other criminal or tortious acts." Following the 1998 wildfires, the Florida Legislature enacted a law allowing nonconforming structures to be rebuilt if they were destroyed by the wildfires, regardless of any contract law or regulation, "unless prohibited by Federal law or regulation." A company that owned six grandfathered billboards in Brevard County that were destroyed by the fires contended the federal regulations do not expressly forbid the erection of replacement signs. However, the Department of Transportation argued that allowing replacement signs to be built would violate federal regulations and the Highway Beautification Act, thus jeopardizing some of Florida's federal funding. The DCA agreed, concluding that the grandfathered signs lost their exemption once they were destroyed by noncriminal, nontortious acts.

The DCA states "Florida has exerted considerable effort over the last 30 years in complying with the Highway Beautification Act in order to protect its full share of federal highway funds. The federal-state agreement has been executed, legislation required for compliance has been enacted, and comprehensive state administrative rules have been enacted. The legislature surely did not intend to cast aside these years of effort and imperil the state's share of future federal highway funds to simply allow erection of some nonconforming highway billboards."

Ryce Act – Access to Law Library

Widel v. Venze, 26 Fla. L. Weekly D 2126

The Fifth DCA ruled that a Jimmy Ryce Act sexual offender seeking access to better law books to defend himself must first seek administrative relief from the agency holding him before going to court for relief.

Petitioner inmate sought a writ of mandamus claiming that respondent Department of Children and Family Services failed to provide him with access to a sufficient law library to enable him to defend himself. The inmate alleged that he opted to represent himself in a detainment proceeding and had been incarcerated since that time. He alleged that DCF promulgated no rules regarding access to legal research materials for persons involuntarily held under the Ryce Act, and although he was provided with some materials, they were inadequate. He further alleged he made full use of all available avenues of relief before seeking relief in the appellate courts. The Court reasoned that cases involving involuntary commitment under the Ryce law are analogous to criminal cases, and administrative remedies must be pursued before court intervention will be appropriate. The DCA ruled that it lacked jurisdiction because the inmate did not have a copy of his request or complaint filed with the DCF.

Sovereign Immunity

Lewis v. City of St. Petersburg, 14 Fla. L. Weekly Fed. C 1082

The Eleventh Circuit ruled that a police officer's use of a firearm is not protected by sovereign immunity, but the training provided by a city to its officers is protected by sovereign immunity.

Suing on behalf of herself and as personal representative of her deceased husband's estate, plaintiff widow alleged defendant city was liable for the wrongful death of her husband. Plaintiff asserted that the officers breached a duty of care by using their guns negligently and that the city beached a duty of care by failing to properly train its officers. The trial court dismissed the suit, and plaintiff appealed.

The dismissal of the negligent training was upheld and called the city's actions "clearly an exercise of governmental discretion regarding fundamental questions of policy and planning" and therefore protected by sovereign immunity. The claim for negligent use of a firearm was reversed and remanded. The Court stated "Under Florida Law, when an officer has made an initial discretionary decision to conduct a stop and then proceeds to carry out that decision, the officer is no longer exercising a 'discretionary' function, but is engaged in an 'operational' task."

Standing in Administrative Actions

Sakelson v. Department of Environmental Protection, 26 Fla. L. Weekly D 1889

The Second DCA held that a state agency may not summarily dismiss a request for administrative hearings after concluding that the petitioner lacked standing without first resolving disputed issues of fact critical to resolving the question of standing.

Petitioner requested an administrative hearing after the department denied the leaseholder's request to modify a sovereign submerged land lease. DEP denied the request for hearing and also terminated the lease. The leaseholder also requested an administrative hearing to review the termination decision. While the hearing requests were pending, the leaseholder transferred his lease interest to a corporation. DEP denied the requests for hearing on the grounds that the leaseholder lacked standing because the lease had expired and the leaseholder had transferred his interest in the lease. Petitioner argued that he had standing because his original lease had been renewed before the dispute arose. The DCA held that since standing depended directly on whether the lease had been renewed, DEP could not dismiss the petition without a

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proper determination of whether the lease was still in effect.

The Sword-Wielder Doctrine

Fish and Wildlife Conservation Commission v. Wilkinson, 26 Fla. L. Weekly D2026

The Second DCA held that a state agency's home venue privilege cannot be overcome by a plaintiff's "weak" claim that boating restrictions, which resulted in the plaintiff receiving a speeding ticket, violate his fundamental constitutional right to travel.

Plaintiff received a ticket for violating the speed limit while operating a motor boat within a manatee protection zone. Plaintiff filed suit in Lee County, and the Commission moved to dismiss for improper venue citing Florida's "home venue privilege." Plaintiff then amended his complaint to assert that the rule at issue, which was the speed limit, violated his "fundamental right to travel protected by the state and federal constitutions" and attempted to invoke the sword-wielder doctrine. The sword wielder doctrine permits a agency to be sued outside of Leon County if the primary purpose of the suit is to obtain direct judicial protection from an alleged unlawful invasion of the plaintiff's constitutional rights within the county where the suit is instituted, cannot be defeated. The trial court held that Leon County was the proper venue.

The Second DCA affirmed and held that the "right to travel" is not a property right fixed in Lee County, but is a "transient right" not confined to any particular area. Further, the DCA said that although plaintiff's action appears to seek protection from enforcement of the boating citation he received, the primary focus is a request for declaration that the rule itself is invalid. "This ticket is more analogous to a common pocket knife than a 'sword,' it is marginally sufficient to satisfy the "official action" element of the sword-wielder exception." However, the found that they were unaware of "any specific intrastate 'right to travel' in the Florida Constitution that would create a right to operate a motor boar at an unregulated speed." Therefore, the allegations in the complaint were held to not allege an appropriate constitutional violation necessary for the application of the sword-wielder exception."

Lake County Boys Ranch v. Kearney, 790 So.2d 602 (Fla. 5th DCA 2001)

The sword wielder doctrine cannot be invoked without specifically alleging which provisions of the constitution plaintiff seeks protection from. The Boys Ranch filed suit against the Department of Children and Family Services in a dispute over the care of children at the facility in Lake County. DCF asserted the home venue privilege, and since the Boys Ranch could not allege any proper constitutional violations, the Court ruled that the case must be transferred to Leon County.

Timeliness of Discrimination Complaint

Wells Fargo Guard Services Inc. v. Lehman, 26 Fla. L. Weekly D 1918

The Third DCA ruled that when a discrimination complaint is filed with federal and state agencies, the date of the federal filing should also be considered the date of the state filing even if the state does not receive a hard copy until later.

A employee, who later sued the employer for violating the Florida Civil Rights Act, submitted a form to the U.S. Equal Employment Opportunity Commission. The EEOC operated under a work-sharing agreement with the Florida Commission on Human Relations which provided for dual filing of discrimination claims and that each agency was to act as the agent for the other. The employee did not mark a box on his claim for specifying dual filing. The employee filed suit 180 days after the EEOC filing but less than 180 days after the FCHR received a copy of the claim. The employer claimed the lawsuit was premature because administrative remedies had not been exhausted. The trial court found that the suit was properly filed. The DCA affirmed and ruled that since the claim was dually filed with the agencies, the date of filing with the EEOC was the date of filing with the FCHR. Thus, the complaint was not brought prematurely.

Waiver of Automatic Stay Following Bid Protest

AvMed Inc. v. School Board of Broward County, 2001 Fla. App. LEXIS 10362

The Fourth DCA held that a school board acted properly when it voted to override the mandatory, statutory stay when a bid protest was made because insurance coverage for thousands of public employees was at risk.

The Broward County School Board put a health insurance contract out for bid after it was notified that the incumbent provider would cease coverage some two months later. An unsuccessful bidder, who had recently emerged from insolvency and was unable to provide insurance at the contractually required rates, filed a formal written protest, which under section 120.57(3)(c) would automatically stay the proceedings. However, the school board utilized a provision of the statute to override the stay, citing the lengthy employee enrollment process and the fact that delay would endanger the health, safety and welfare of employees needing to change to the new insurance provider. The DCA determined that this was sufficient grounds for the school board to move forward with the contract award process and upheld the board's decision to override the automatic stay.

William A. Stetson *is employed by the Florida Office of the Attorney General, as an assistant attorney general. He graduated from The Florida State University College of Law with honors in 2000. He practices in the area of general civil litigation. He is also the assistant editor for the Government Lawyer Reporter.*

A Profile of Judge Joseph Lewis, Jr.

by Francine M. Ffolkes

Editor's Note: I wish to thank Judge Joseph Lewis for graciously providing the information for this profile.

Joseph Lewis, Jr. was born in Tallahassee, Leon County. His family lived in a modest home located on the South side of Tallahassee in the Bond community where neighbors gave a helping hand to one another. Joe learned about hard work at an early age picking watermelons in the fields of eastern Leon County and working in construction with his father, Joseph Lewis, Sr. Through his mother, the late Arlene Lawson Lewis, an elementary school teacher, Joe learned the value of good education. After graduation from Rickards High School, he attended the University of Montana where he received his Bachelors Degree in Business Administration. During his enrollment at the University of Montana, Joe participated in a number of extracurricular activities including the Student Member of the Faculty Ad Hoc Committee (One of two students selected to review the Black Studies Program at the University of Montana (1973) and graduated with honors. From there, Joe earned his Juris Doctor degree from the Florida State University College of Law.

Prior to his appointment to the First District Court of Appeal in January 2001, Judge Lewis served as an Assistant Attorney General for 19 years. At the time of his appointment, he served as a Branch Chief in the General Civil Litigation Section of the Office of the Attorney General. As Branch Chief of the Employment Litigation Branch/Civil Litigation Section of the Attorney General's office, he coordinated civil litigation defense and prosecution for the Branch of Employment Law on behalf of state entities and officials. In addition to the coordination of civil litigation defense and prosecution for the Bureau, he prosecuted and defended civil litigation cases on behalf of state entities and officials in federal and state courts, and before administrative bodies. His practice was before state and federal trial and appellate courts. Prior to his employment with the Attorney General's Office, he served as an Assistant Public Defender for the Second Judicial Circuit in the Juvenile, Misdemeanor and Felony Divisions from 1978-1981. Prior to that he was employed as a Judicial Research Aide for the Industrial Relations Commission. In that capacity he researched issues regarding workers' compensation appeals, prepared legal memorandums for the Commissioners and drafted orders. Judge Lewis also served as legal counsel for the Black Business Investment Board, where he advised the Board on corporate matters.

Judge Lewis has invested most of his life to public service. He believes that the greatest gift that an individual can give is service to their community. He has served on numerous community boards and organizations including the Board of Directors of the Boys and Girls Club of the Big Bend (1993-1995), and as a member of the Rickards High School Foundation Bylaws Committee, the Lincoln High School Quarterback Club, the Tallahassee Urban League, C.K. Steele Memorial Jaycees (Charter Member), Co-Chairman of the University Church of God in Christ Law Day Program, and has served as a parent-volunteer for the PGA Junior Golf Association. Throughout his legal career, Judge Lewis has been committed to equal justice under the law. Judge Lewis is an AV rated attorney who has served in several leadership positions in bar associations and professional societies including president of the Government Bar Association (1995-1996), the Executive Board of the Government Bar Association (1997), Chair of the Second Circuit Fee Arbitration Committee (2000), Vice-Chair of the Second Circuit Fee Arbitration Committee (1999), as a member of the Board of Directors of the Tallahassee Bar Association (4/1999-4/2001), as Vice-Chair of the Florida Bar Federal Court Practice Committee (7/2000-6/2001), and as a member of the Executive Council of the Government Law Section of the Florida Bar (7/1997-6/2001). He is currently serving as Secretary of the Government Law Section of the Florida Bar and as a member of the Appellate Rules Committee of the Florida Bar. Judge Lewis also currently serves as a member of the National Bar Association, the Florida Chapter of the National Bar Association, the Barristers - Local Chapter of the National Bar Association, the Tallahassee Bar Association, and the Labor and Employment Law Section of the Florida Bar. Judge Lewis also contributed time toward the administration of justice by delivering pro bono legal services through the Neighborhood Justice Center. In addition to his involvement in professional associations, he has participated in numerous seminars and lectured on the topics of quasi-judicial immunity of court clerks and prosecutorial immunity of prosecutors.

Judge Lewis has received numerous honor and awards including the following:

- Recipient of the Florida Bar Meritorious Public Service Award in Recognition and Appreciation of Meritorious Service to the Public and the Legal Profession in Florida (June 30, 2000).
- Received the Highest Possible Marks from the *Martindale-Hubbell Law Directory*, the largest, oldest and most comprehensive rating directory of lawyers in the world. Judge Lewis' "AV" rating is based exclusively on confidential recommendations to the publisher from Leon County lawyers and judges.
- Recipient of the Claude Pepper Outstanding Government Lawyer Award of the Florida Bar for Exemplifying the Highest Ideals of Dedication, Professionalism, and Ethics in Serving the Public as a Government Lawyer (June 23, 1995).
- Recipient of the Government Bar Association's Award for Complete Dedication to the Advancement of

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the Organization (1996).

- Recipient of the Community Service Award from the Neighborhood Justice Center and Legal Services of North Florida, Inc. for Outstanding Contributions in the Delivery of Pro Bono Legal Services (February 20, 1997).
- Recipient of the Community Service Award from Legal Services of North Florida, Inc. and the Second Judicial Circuit for Outstanding Contributions in the Delivery of Pro Bono Legal Services (May 1994).
- Recipient of Certificate of Appreciation from the Boys and Girls Club of the Big Bend (August 1995).

Judge Lewis' appointment to the First District Court of Appeal is only the latest chapter in a long history of public service. He is the third African American to serve on the First District Court of Appeal and the first from the Big Bend area. The First District comprises 32 counties ranging from Escambia County in the northwest, to Nassau County in the northeast, to Duval County in the southeast, and to Levy County in the southwest.

Francine M. Ffolkes *is a Senior Assistant General Counsel with the Florida Department of Environmental Protection. She practices Environmental and Administrative Law in the Water Section of the Office of General Counsel. Ms. Ffolkes is the lead water permitting attorney and handles large complex water, wastewater, wetlands and sovereign submerged lands permitting proceedings. Ms. Ffolkes is editor of the Government Lawyer Section Reporter and a member of the Standing Committee on Law Related Education. She is a graduate of the University of Miami (B.S. 1985) and the University of Miami School of Law (J.D. 1989).*

Ethics Opinions Update

compiled by Peter D. Ostreich, Staff Attorney

The following is a summary of the opinions rendered by the Commission on Ethics from January 2000 through June 2001. 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 on the Commission's website, www.ethics.state.fl.us.

CEO 00-01
POST-EMPLOYMENT RESTRICTIONS: APPLICABILITY OF TWO-YEAR "REVOLVING DOOR" RESTRICTION TO EXECUTIVE DIRECTOR OF STATE DEPARTMENT

The former Executive Director of the State Department of Revenue is subject to the two-year "revolving door" prohibition of s. 112.313(9)(a)4, F.S., against representing clients before the Department. Despite the fact that the former executive director was employed in a Senior Management Services System position with the Department of Banking and Finance prior to and after July 1, 1989, he would not be "grandfathered-in" as to representations before the Department of Revenue under s. 112.313(9)(a)6, as his employment with the Department of Revenue began after July 1, 1989.

CEO 00-02
CODE OF ETHICS; FINANCIAL DISCLOSURE: APPLICABILITY OF CODE OF ETHICS AND FINANCIAL DISCLOSURE LAW TO MEMBERS OF SCHOOL ADVISORY COUNCILS

School advisory councils are "advisory bodies" and, as such, are not subject to the financial disclosure requirements of s. 112.3145, F.S. The budget for the middle school advisory council does not exceed one percent of the middle school's total budget or $100,000, and the council's authority does not include the final determination or adjudication of any personal or property right. However, as members of advisory bodies are considered to be "public officers" under ss. 112.313(1) and 112.3143(1)(a), F.S., council members are subject to other provisions of the Code of Ethics.

CEO 00-03
POST-OFFICEHOLDING PROHIBITIONS; CONFLICTS OF INTEREST: FORMER MEMBER OF PUBLIC SERVICE COMMISSION AND CHAIR OF INFORMATION SERVICES TECHNOLOGY DEVELOPMENT TASK FORCE EMPLOYED BY LAW FIRM OR NONPROFIT CORPORATION

Sections 112.313(9)(a)3 and 350.0605(1), F.S., prohibit a former member of the Public Service Commission from representing any person or entity before the Public Service Commission for two years after leaving office. However, this prohibition would not be violated where the former member joins a law firm or is employed by a nonprofit corporation as its national spokesperson, as long as she did not represent any person or entity before the PSC. The post-officeholding ban only restricts the actions of the former PSC member, not partners or associates of a law firm or other persons employed by the same company employing the former member.

CEO 00-04
CONFLICT OF INTEREST; VOTING CONFLICT: FLORIDA INLAND NAVIGATION DISTRICT COMMISSIONER OFFICER/SHAREHOLDER OF COMPANY EXCHANGING REALTY INTERESTS WITH DISTRICT

No prohibited conflict of interest would be created under ss. 112.313(3) or 112.313(7)(a), F.S., were a company of which a member of the Board of Commissioners of the Florida Inland Navigation District is an officer/shareholder to exchange real property interests with the District. Under the

circumstances, the "construction" language of s. 112.316, F.S., applies to negate any conflict. However, the member must refrain from voting and participating regarding the exchange.

CEO 00-05
VOTING CONFLICT: CITY MAYOR SUPERMARKET OWNER VOTING ON AMENDMENT TO TRANSIENT RENTAL ORDINANCE

A city mayor whose supermarket receives grocery sales through a business purchasing for transient tenants in a neighborhood is prohibited from voting by s. 112.3143(3)(a), F.S., on a measure which would exempt the neighborhood from an ordinance banning short-term rentals.

CEO 00-06
POST-EMPLOYMENT RESTRICTIONS: FORMER GOVERNOR'S OFFICE AND DEPARTMENT OF TRANSPORTATION EMPLOYEE REPRESENTING CONSORTIUM OF PUBLIC AND PRIVATE ENTITIES BEFORE GOVERNOR'S OFFICE, LEGISLATURE, AND DEPARTMENT IN CONNECTION WITH STUDY GRANT

Section 112.313(9)(a)4, F.S., which prohibits specified agency "employees" from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions, unless their employment falls within the terms of an exemption, would not apply to prohibit a former Governor's Office employee who was neither in a Senior Management Services ("SMS") nor Selected Exempt Services ("SES") position, nor in a position having the power normally conferred upon such positions while he was employed by the Governor's Office, from representing a coalition of public and private entities formed to apply for funding to study the feasibility of a cross-State rail system through a central Florida transportation corridor before the Governor's Office for a period of two years following his vacating his position. Because the employee was never employed by the Legislature, this provision also would not apply to prohibit him from representing the coalition of public and private entities before the Legislature.

Because the employee's Department of Commerce employment prior to May 1988 in an SES position does not relate to his current employment as an SES employee with the Florida Department of Transportation ("FDOT"), which he accepted after July 1, 1989 and which gives rise to the potential "revolving door" prohibition, he is not exempt from the two-year prohibition after leaving employment with the FDOT.

In addition, because communicating, as the paid Executive Director of the Consortium, with the FDOT on behalf of the Consortium for purposes of negotiating an agreement would involve the employee's attempting to influence the FDOT's decisions relative to the Consortium's implementation of the study grant, such communication falls within the blanket prohibition of s. 112.313(9)(a)4 and is prohibited. Similarly, any communication by the employee within two years of his vacating his FDOT position, as a paid representative of the Consortium, for purposes of either extending the grant or developing a new project would be prohibited by this provision.

However, a distinction can be made between the above types of communications, which are meant to influence the FDOT's decision-making, and the communications that the employee would have with the FDOT while the Consortium is implementing and fulfilling its responsibilities under the Study grant and negotiated agreement. The latter types of communications are not prohibited by § 112.313(9)(a)4, F.S.

Neither §112.3185(3) nor §112.318 (4) prohibits the employee from accepting employment with the Consortium for purposes of implementing the study grant following his vacation of his position with FDOT. Neither §112.3185(3) nor §112.3185(4) have any application to his employment with the Governor's office because his employment was not in connection with a contract in which he participated personally or substantially through decision, approval, disapproval, recommendation, rendering of advice, or investigation, or which was within his responsibilities while he was employed by the Governor's Office. Section 112.3185(4) also will not be applicable to his new employment because, upon terminating his employment with the FDOT and accepting the Executive Director position with the Consortium, the employee's new employment will not be in connection with any contract for "contractual services" which was within his responsibility while he was an FDOT employee inasmuch as the grant was not in existence while he was employed with FDOT. Furthermore, although the employee participated "personally" in the first phase of the Fast Track Grant process while he was employed by the FDOT, his participation was not "substantial." His involvement was not of much significance in the selection committee's recommendation of the Consortium's proposal to the FDOT Secretary or in the recommendation of the FDOT Secretary or the Governor's Office and will not be of much significance in the Legislature's approval of the project. The employee's role in the process appears to have been limited to acting as a facilitator, at most, in the first phase in the process.

CEO 00-07
SUNSHINE AMENDMENT: FORMER MEMBERS OF LEGISLATURE SERVING AS SECRETARY, DIVISION DIRECTOR, DEPUTY SECRETARY, AND ASSISTANT SECRETARY OF EXECUTIVE BRANCH DEPARTMENTS

Art. II, §. 8(e), Fla. Const., and §. 112.313(9)(a)3, F.S., do not prohibit the Secretary of the Department of Juvenile Justice, the Secretary of the Department of Health, the Director of the Division of Workers' Compensation, the Deputy Secretary of the Department of Elder Affairs, or the Assistant Secretary for Developmental Services, Department of Children and Family Services, who have been members of the Legislature within the last two years, from appearing before the Legislature or legislators in the course of carrying out their official duties. CEO 81-57 and CEO 90-4 are receded from.

CEO 00-08
VOTING CONFLICT OF INTEREST: AIRPORT AUTHORITY COMMISSIONER

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VOTING ON MATTER INVOLVING AIRPORT LESSEE WHOSE SPOUSE WAS FORMERLY EMPLOYED BY ATTORNEY ASSOCIATED WITH COMMISSIONER'S LAW FIRM

Section 112.3143(3), F.S., would not be violated where an airport authority commissioner votes on a matter involving a lessee of the airport authority and where the lessee's wife was formerly employed as a legal secretary for an attorney who was associated with the commissioner's law practice prior to his resignation from the Florida Bar for trust account violations. Voting on the lease would not inure to the special private gain or loss of the commissioner or any relative, principal, or business associate, and the suggestion that the commissioner's vote could affect the testimony the lessee's wife might offer in some future, unanticipated legal proceeding is remote and speculative. Additionally, any bias or prejudice the commissioner may have stemming from the lessee's wife's employment with the former attorney would not constitute a voting conflict under s. 112.3143(3), F.S., which addresses personal, pecuniary benefits. The opinion also examines the applicability of ss. 112.313(6) and 286.012, F.S., which were suggested by the lessee as mandating the commissioner's recusal.

CEO 00-09
POST-EMPLOYMENT RESTRICTIONS: FORMER DEPARTMENT OF ENVIRONMENTAL PROTECTION CAREER SERVICES WORKER ASSISTING APPLICANTS FOR PROPRIETARY AUTHORIZATIONS INVOLVING STATE LANDS

former holder of a DEP Career Services position is not a former "employee" subject to the POST-EMPLOYMENT restrictions of s. 112.313(9)(a)4, F.S., because she was not a member of the Senior Management Services, the Selected Exempt Services, or in a position having the power normally conferred upon the Senior Management Services or the Selected Exempt Services. Because the situation does not involve public entity purchases of contractual services or other items, ss. 112.3185(3) and (4), F.S., would not be violated.

CEO 00-10
CONFLICT OF INTEREST: COMMUNITY REDEVELOPMENT AGENCY ("CRA") EMPLOYEE OWNER OF TELEVISION STATION SELLING ADVERTISING TO CRA

Under the circumstances, a local television station is a "sole source" of supply of advertising for a CRA targeting a county's populace for attendance at a CRA-sponsored event, for purposes of application of the s. 112.313(12)(e), F.S., exemption from the proscriptions of ss. 112.313(3) and 112.313(7)(a), F.S, to an employee of the CRA who is an owner of the station.

CEO 00-11
POST-EMPLOYMENT RESTRICTIONS: FORMER DEPARTMENT OF ENVIRONMENTAL PROTECTION GENERAL COUNSEL REPRESENTING CLIENTS BEFORE THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND

Although the DEP serves as staff to the Board of Trustees for the Internal Improvement Trust Fund pursuant to s. 253.002(1), F.S., the former general counsel for the Department is not prohibited by s. 112.313(9)(a)4, F.S., from representing clients before the Governor and Cabinet sitting in their capacity as the Board of Trustees or from contacting their aides during the two-year period after leaving the Department. The post-employment restriction is directed at restricting activities before the agency with which he was employed and he was employed by the DEP, not by the Governor or any Cabinet officer.

CEO 00-12
CONFLICT OF INTEREST: COUNTY COMMISSIONER OBTAINING S.H.I.P. FUNDING THROUGH COUNTY DEPARTMENT TO REHABILITATE LOW-COST HOUSING

A prohibited conflict of interest would be created under s. 112.313(7)(a), F.S., where a county commissioner obtains funding through a county program to rehabilitate duplexes that will provide affordable housing to low-income individuals. The commissioner would have a contractual relationship with an agency--the community services department--that is overseen by the county commission.

CEO 00-13
CONFLICT OF INTEREST; VOTING CONFLICT: CITY COMMISSIONER RECEIVING PENSION BENEFITS AS A FORMER EMPLOYEE OF CITY FIRE DEPARTMENT AND VOTING ON COLLECTIVELY BARGAINED FOR INCREASE IN BENEFITS

Because pension matters, such as proposed periodic "cost of living" increases, would comprise only a small fraction of the responsibilities of the City Commission, neither a "continuing or frequently recurring" conflict between the City Commissioner's private interests, as a recipient of pension benefits from the City's Firefighter Retirement System, and the performance of his public duties, as a City Commissioner, nor an impediment to the full and faithful discharge of his public duties is created by his service as a member of the City Commission while also receiving benefits as a retiree of the City Fire Department.

A City Commissioner is not prohibited by s. 112.3143(3)(a), F.S., from voting on the City's ratification of the collective bargaining agreement or on any amendments to the City's ordinances required to effectuate any changes to the Retirement System necessitated by the City's ratification of the collective bargaining agreement. The class of members of the Firefighters Retirement System who would be benefited immediately and directly by the proposed periodic cost of living increases is sufficiently large that any gain or loss attendant to the City Commission's ratification of the collective bargaining agreement would not be "special." There also do

not appear to be any circumstances unique to the City Commissioner by which he would stand to gain or lose more than the other members of the class of members of the Firefighter Retirement System who currently receive benefits or who are in DROP. Therefore, there would be no "special" gain or loss inuring to the Commissioner as a result of his voting on an ordinance specifically amending provisions of the Retirement System to provide for periodic cost of living increases to be calculated into the amount of benefits received by retiree members of the System.

CEO 00-14
CONFLICT OF INTEREST: COUNTY COMMISSIONER EMPLOYEE OF PHOSPHATE COMPANY

A county commissioner is not prohibited from being employed by a phosphate mining company with operations in the county. Under s. 112.313(7)(a), F.S., the company is not "subject to the regulation of" the county commission, and no frequently recurring conflict or impediment to the full and faithful discharge of public duty is present. The commissioner must comply with the requirements of the voting conflicts law [Section 112.3143(3)(a), Florida Statutes] regarding measures inuring to the special private gain or loss of the company.

CEO 00-15
POST-EMPLOYMENT RESTRICTIONS: GOVERNOR'S FORMER DEPUTY CHIEF OF STAFF LOBBYING FLORIDA YEAR 2000 TASK FORCE WITHIN TWO YEARS OF VACATING EMPLOYMENT WITH THE GOVERNOR'S OFFICE

The Florida Y2K (Year 2000) Task Force is a "state agency," as that term is defined at s. 112.313(9)(a)2.c, F.S., since it initially was created as an independent "entity" with staff support being provided by the Governor's Office of Planning and Budgeting; it was responsible for making funding recommendations to the Executive Office of the Governor; and plenary budgetary control over the Task Force was exercised by the Legislature through provisos in the general appropriation acts. It also appears to have functioned most like an entity of the executive branch of State government as evidenced by its initial staff support being provided by the Governor's office, its funding recommendations being made to the Governor's office, and its joining together with Team Florida under the supervision and coordination of the Secretary of the Dept. of Management Services ("DMS") at the request of the Governor.

From March 1999, when coordination efforts with respect to the Task Force were taken over by DMS, until the Governor's former Deputy Chief of Staff's departure from the Governor's Office in November 1999, the Task Force clearly was not part of the "agency with which he was employed." Similarly, from January 1999 until March 1999, while the Year 2000 Project Office, which initially provided staff support to the Task Force and coordinated the Y2K readiness activities of the executive and judicial branches of State government and later received Y2K Administered Funds for transfer to various State agencies upon the recommendation of the Task Force through the budget amendment process, was part of the Governor's Office of Planning and Budgeting, the Task Force was not. Consequently, because the Florida Year 2000 Task Force was not the agency with which the Governor's former Deputy Chief of Staff was employed, he was not prohibited by s. 112.313(9)(a)4, F.S., from representing a private company before the Task Force for a period of two years of his vacating his position with the Governor's office.

CEO 00-16
CONFLICT OF INTEREST; POST-EMPLOYMENT RESTRICTION: DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCF") SENIOR ATTORNEY EMPLOYED WITH RURAL LEGAL SERVICES

No prohibited conflict of interest exists under s. 112.313(7)(a), F.S., where a Senior Attorney of the DCF is employed with a rural legal services organization. Under the first part of the statute, the organization (a "business entity") is not subject to the regulation of or doing business with the Department, and the clients of the organization are not "business entities." The second part of the statute is not violated because the Senior Attorney's position, while administratively housed within the Department, is responsible for the interests of clients (residents/patients of a Department hospital) adverse to the Department and not for the interests of the Department.

However, the POST-EMPLOYMENT restriction of s. 112.313(9)(a)4, F.S., prohibits the Senior Attorney's personal representation of legal services clients before the hospital/District of the Department within two years of his leaving public employment.

CEO 00-17
ANTI-NEPOTISM: COUNTY HEALTH DEPARTMENT DIRECTOR'S SPOUSE EMPLOYED BY NEIGHBORING HEALTH DEPARTMENT TO WORK AT DIRECTOR'S HEALTH DEPARTMENT

The anti-nepotism law would not be violated were the husband of the director of a county health department to be employed by another county health department and to provide services at the health department of which his wife is director because his wife is not the "public official" vested with the authority to employ him, because she did not employ him, and because she did not advocate his employment.

CEO 00-18
SUNSHINE AMENDMENT: FORMER SENATOR SERVING AS EXECUTIVE DIRECTOR OF OFFICE OF STATEWIDE PUBLIC GUARDIAN AND COMMUNICATING WITH LEGISLATURE

Art. II, s. 8(e), Fla. Const., and s. 112.313(9)(a)3, F.S., do not prohibit the Executive Director of the Office of Statewide Public Guardian, who formerly served as a member of the Florida Senate, from appearing before or communicating with the Legislature or legislators in the course of carrying out his official duties within two years of leaving the Senate.

CEO 00-19
FINANCIAL DISCLOSURE: ADVISORY COMMITTEES TO

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COMMUNITY REDEVELOPMENT AGENCY

As of January 1, 2001--the effective date of Chapter 2000-243, Laws of Florida--advisory committee members to the Winter Haven Community Redevelopment Agency are no longer subject to the financial disclosure requirements of s. 112.3145, F.S. Chapter 2000-243, Laws of Florida, amended the definition of "local officer" in s. 112.3145, F.S., to remove appointed members of citizen advisory committees, even where advisory committees to community redevelopment agencies make recommendations regarding land-planning and zoning.

CEO 00-20
POST-EMPLOYMENT RESTRICTIONS: FORMER LEGISLATOR REPRESENTING CLIENTS BEFORE THE PUBLIC SERVICE COMMISSION ("PSC") AND ENERGY 2020 STUDY COMMISSION

A former House member is not prohibited by Art. II, s. 8(e), Fla. Const., or s. 112.313(9)(a)3., F.S., from personally representing clients for compensation before the PSC or the Energy 2020 Study Commission within two years of vacation of office, inasmuch as the PSC and the Study Commission are separate government bodies or agencies from the Legislature (the member's former body/agency). However, the member is prohibited from representing clients before the Legislature; nevertheless, the prohibition is not extended via the member's House service to others in his law firm.

CEO 00-21
CONFLICT OF INTEREST: COUNTY MANAGER SELLING LAND TO HEALTH CARE FACILITY WHICH PLANS TO DONATE LAND TO COUNTY FOR WASTEWATER TREATMENT PLANT

The Code of Ethics would not be violated where a county manager sells a parcel of land to a private health care facility which would, in turn, donate the land to the county in order for a wastewater treatment facility to be built on the site to service its present and future needs. The county manager would not be selling realty to the county. Thus, s. 112.313(3), F.S., is not violated, and the relationship between the health care facility and the county would not constitute "doing business" for purposes of s. 112.313(7)(a), F.S.

CEO 00-22
CONFLICT OF INTEREST: DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCF") EMPLOYEE PUBLISHING A CASE MANAGEMENT GUIDE DEVELOPED FROM CONFIDENTIAL CLIENT CASES

The Code of Ethics would not be violated were a DCF employee to publish and receive an advance and/or royalties from a publisher for the publication of a "case management guide" which is based on the employee's years of experience as a State employee and information from confidential Department case files, where the identities of the Department's clients remain confidential. There is no indication that the employee would be acting as a "purchasing agent" to purchase her manuscript for the DCF District, and there is no indication that she would be acting in her private capacity to sell her manuscript to her agency. Furthermore, there is no indication that the employee would be employed by or would be contracting with a business entity doing business with or subject to the regulation of her agency, and her public duties appear to be limited to providing overall management and supervision of District staff involved with the provision of casework services to elderly and disabled adults in need of placement services and in no way involve the writing or publication of, or the selection of, a "case management guide" for her staff, the District, or the Department.

In addition, no violation of s. 112.313(8), F.S., would be created by the employee's use of the information. Section 112.313(8), F.S., was not intended to be applied to situations where the use of information obtained as an outgrowth of an employee's public employment and which is not specifically made confidential or exempt from disclosure by the State Constitution or statute and is intended to be used for academic or professional development purposes. As the development of the employee's manuscript is not part of her official duties and would be written on her own time, she would not be taking unfair advantage of her position to benefit herself or others through the use of the information.

CEO 00-23
CONFLICT OF INTEREST: FIRE DISTRICT COMMISSIONER SERVING AS DISTRICT FIREFIGHTER

A commissioner of a fire district who serves for compensation (however small in amount) as a "volunteer" firefighter of the district's fire department does so in violation of ss. 112.313(10) and 112.313(7)(a), F.S., which prohibit, respectively, an employee of a political subdivision holding office as a member of its governing board, and the member holding employment with an agency which is subject to the regulation of his agency. However, were the district to eliminate the $2 per run payment or substitute a true reimbursement procedure, or if the member were to refuse in writing in advance the payments, the resulting situation would not be conflicting under either of the statutes, inasmuch as the element of "employment" would fail for want of "compensation," notwithstanding the provision of workers' compensation coverage, life insurance, uniforms and bunker gear (firefighting equipment) to the firefighters (including the member).

CEO 01-01
CONFLICT OF INTEREST: SCHOOL BOARD MEMBER'S CORPORATION SELLING BUILDING SUPPLIES TO SCHOOL BOARD

A prohibited conflict of interest would be created under ss. 112.313(3) and 112.313(7)(a), F.S., were building supplies for school board projects to be obtained from a school board member's corporation via "direct purchases."

CEO 01-02
UNAUTHORIZED COMPENSATION: DEPARTMENT OF CHILDREN AND FAMILY SERVICES'

("DCF") EMPLOYEE RECEIVING COMPENSATION FROM COMPANY FOR PARTICIPATING IN SURVEY

Section 112.313(4), F.S., would be violated where an employee of DCF accepted $100 for participating in a brief survey and where the company conducting the survey was doing so on behalf of its client, another company doing business with the Department. Under the circumstances presented, because the agency employee who ostensibly would be paid $100 to participate in the survey was in a position to benefit the contractor, a violation of s. 112.313(4), F.S. would exist.

CEO 01-03
SUNSHINE AMENDMENT: STATE REPRESENTATIVE CONTACTING FLORIDA HOUSING FINANCE CORPORATION STAFF ABOUT ITS PROGRAMS' RULES AND AVAILABILITY OF PROJECT FUNDING

As a result of the Legislature's adoption of s. 420.5061, F.S., which expressly provides that for purposes of the prohibitions of s. 112.313, F.S., the Florida Housing Finance Corporation is a continuation of the Florida Housing Finance Agency, the Corporation's predecessor, and since this Commission previously determined that the Florida Housing Finance Agency was a "state agency" for purposes of Art. II, s. 8(e), Fla. Const., both Art. II, s. 8(e), Fla. Const., and s. 112.313(9)(a)3, F.S., prohibit a State Representative from personally contacting staff of the Florida Housing Finance Corporation on behalf of his development company for information about its programs' rules or for advice on completing funding applications.

CEO 01-04
CONFLICT OF INTEREST: CITY COMMISSIONER EMPLOYED WITH TAX-EXEMPT ORGANIZATION DOING BUSINESS WITH CITY

Under the circumstances, the exemption regarding 501(c) organizations codified at s. 112.313(15), F.S., is inapplicable to negate a conflict under s. 112.313(7)(a), F.S., regarding a city commission member's employment with a community development organization contracting with the city. CEO's 89-29 and 96-10 are distinguished; CEO's 89-58, 97-5, and 98-11 are referenced.

CEO 01-05
POST-EMPLOYMENT; CONTRACTUAL SERVICES: DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION ("DBPR") EMPLOYEE LEAVING STATE EMPLOYMENT TO "OUTSOURCE" WITH DEPARTMENT ON COMPUTER PROJECT

The Code of Ethics would not be violated when a former employee contracts with the State agency where he was formerly employed to serve as project director for a project that he helped initiate when he was employed by the agency. Rather than representing a client for compensation before his former agency, he would be contracting with the agency, so s. 112.313(9)(a)4, F.S., would not be applicable. The limitations in ss. 112.3185(3) and (4), F.S., would not be violated because the statutory language allows contractual relationships with an agency. However, the salary cap imposed by s. 112.3185(5), F.S., would limit the amount of compensation he could receive from the agency for the first year after he leaves State employment unless the agency head waives it after determining that contracting with him will result in significant time or cost savings to the State.

CEO 01-06
POST-EMPLOYMENT RESTRICTIONS: FORMER DCF DISTRICT ADMINISTRATOR EMPLOYED BY PRIVATE PROVIDER WHOSE CONTRACT SHE APPROVED

A former DCF District Administrator who was employed by DHRS, the predecessor of DCF, prior to 1989, is not prohibited from representing a provider of social services, whose contract she ultimately approved in her capacity as District Administrator, before DCF, including her former District, for a period of two (2) years following the termination of her employment with the Department. Section 112.313(9)(a)6a and b applies to exempt her from the prohibition of s. 112.313(9)(a)(4), which prohibits agency employees from representing another person or entity for compensation before the agency with which they were employed for a period of two years following vacation of their positions.

Because the former District Administrator's employment by the provider would not be "in connection with" any existing contract between the provider and the District, or "in connection with" any contract that she was involved in the procurement or development of as District Administrator, neither s. 112.3185(3) nor s. 112.3185(4), F.S., prohibits her from becoming employed as Regional Director of the provider.

CEO 01-07
CONFLICT OF INTEREST: DEPARTMENT OF TRANSPORTATION ("DOT") DISTRICT EMPLOYEES SELLING BORROW MATERIAL TO SUCCESSFUL BIDDER OF A DEPARTMENT BRIDGE PROJECT

Under the circumstances presented, no prohibited conflict of interest would be created were two DOT District employees who are married to each other to sell borrow material to a contractor for use in a Department bridge project. They would not be acting as "purchasing agents" for their District to purchase borrow material from their property for the District, and they are not in the business of selling borrow material. Therefore, the first part of s. 112.313(3), F.S., does not apply to prohibit them from selling borrow material from their property to a company contracting with their District. Similarly, the second part of s. 112.313(3) does not apply to prohibit them from selling the borrow material because they would not be selling the borrow material in their private capacities to the District. Rather they would be selling the borrow material to a company that is contracting with the District.

However, by agreeing to sell borrow material to the company, the employees would have a contractual relationship with a company that would be doing business with their agency in violation of the first part of

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s. 112.313(7)(a). Nevertheless, because the employees were and are not in positions to give advice or recommendations regarding the bridge project to the District, because they had and have no involvement in the planning, prioritizing, or the selection of the company for the bridge project, because they neither had nor have any public responsibilities relative to the bridge project, and because their sale of borrow material to the company would not interfere with the full and faithful discharge of their public duties, s. 112.316, F.S., may be applied to negate the prohibitions of s. 112.313(7)(a), F.S.

CEO 01-08
VOTING CONFLICT: VILLAGE COUNCIL MEMBER VOTING ON MATTERS CONCERNING PROPERTY ADJOINING HIS ON WHICH THE VILLAGE COUNCIL PROPOSES TO BUILD A GOVERNMENTAL CENTER

A Village Council member may be prohibited by s. 112.3143(3)(a), F.S., from voting on the siting of a governmental center on a tract of land adjacent to which the Village Council member owns property. Because of the size of the Council member's adjoining parcel of land and the fact that it remains essentially undeveloped, it appears that any benefit inuring to the Village Council member as a result of the vote of the siting of the governmental center would not be remote or speculative. There are circumstances present here which are unique to the Village Council member and to his adjoining property by which he could stand to gain or lose more than any of the other owners of property in the vicinity of the proposed governmental center by the Council's voting on the siting of the governmental center.

The Village Council member is cautioned that absent the condemnation of his property by the Village Council, he is prohibited by s. 112.313(3), F.S., from selling his property to the Village Council, even at cost.

CEO 01-09
CONFLICT OF INTEREST: CITY MAYOR CONTRACTING TO PROMOTE CHARTER SCHOOLS WITH SUBSIDIARY OF COMPANY DOING BUSINESS WITH CITY

A prohibited conflict of interest would be created under the second part of s. 112.313(7)(a), F.S., were a city mayor to contract with a company to promote charter schools, where the company is a subsidiary of a design-build firm contracting with the city to build its charter schools and other capital projects. The ongoing nature of the relationship between the city and the design-build firm, and the close ties between the design-build firm and its subsidiary, would create a continuing or frequently recurring conflict or an impediment to the full and faithful discharge of the mayor's public duties if he were to contract with the subsidiary to be a paid proponent of charter schools.

Congratulations, Tony Musto!

The Government Lawyer Section would like to congratulate **Tony Musto** for his recent election to a seat on the Hallandale Beach County Commission (replacing former Mayor Joe Scavo). Mr. Musto is a past chair of the Government Lawyer Section and currently serves on the Executive Council. For details on the election, go to: *www.sun-sentinel.com/news/local/broward/*

CEO 01-10
CONFLICT OF INTEREST: FLORIDA BUILDING COMMISSION MEMBER TEACHING COURSE CAUSED TO BE DEVELOPED AND PROVIDED BY BUILDING COMMISSION AS PART OF CORE CURRICULUM MANDATED BY STATUTE

A teacher or trainer of continuing education courses developed or caused to be developed and provided by the Florida Building Commission as part of a core curriculum mandated by statute to be developed by the Building Commission or certified by an administrator hired by the Building Commission, who also is a member of the Building Commission, would have a contractual or employment relationship with a business entity prohibited by s. 112.313(7)(a), F.S., notwithstanding the development of the core new Florida Building Code curriculum through contracts with outside educational institutions and entities, and the development and certification of module and other courses by an administrator hired by the Building Commission through the Department of Community Affairs ("DCA").

Because the Building Commission ultimately is responsible for the development of the core curriculum and module courses and the certification of all courses developed by other persons or entities and certified by the Training Program Administrator hired by the Building Commission, as well as for the development of the system of administering and enforcing the Florida Building Code, a continuing or frequently recurring conflict between the Building Commission member's private interests and the performance of her public duties, as a Commission member, or an impediment to the full and faithful discharge of her public duties as a Building Commission member also would exist under the second part of s. 112.313(7)(a).

Because no provision of Ch. 553, F.S., requires that a Building Commission member also be a compensated teacher, trainer, or provider of continuing education courses, the exemption of s. 112.313(7)(b) does not apply here to permit the Building Commission member's proposed ac-

tivities as a continuing education teacher or trainer. Her acting as a trainer or teacher is not a facet of air-conditioning contracting.

CEO 01-11
FINANCIAL DISCLOSURE: APPLICABILITY OF FINANCIAL DISCLOSURE LAW TO MEMBERS OF COMMUNITY PLANNING PANELS

Unless specifically made such by local government action, members of community land-use planning panels are not "local officers" required to make disclosures under s. 112.3145, F.S., inasmuch as the panels only have the power to make planning and zoning recommendations.

CEO 01-12
CONFLICT OF INTEREST: DEPARTMENT OF CHILDREN AND FAMILY SERVICES ("DCF") COUNSELOR EMPLOYED WITH CHILD CARE TRAINING PROVIDER

No prohibited conflict of interest exists under s.112.313(7)(a), F.S., where a DCF family services counselor is secondarily employed as a child care trainer with a provider contracting with DCF. The employee played no role in awarding the contract to the provider, her public/private interests are not conflicting under the second part of the statute, and the situation presents a unity of public/private interest in training child care facilities personnel.

Peter D. Ostreich *serves as Staff Attorney for the Florida Commission on Ethics. He has been employed with the State since 1979, and with the Commission since 1991. He is 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.).*

Pro Bono Activities by Judiciary, Judicial Staffs and Government Lawyers

The following is an excerpt of a draft report prepared by the Standing Committee on Pro Bono Legal Service. (You can request the entire report from Arlee J. Colman, The Florida Bar). The report was provided to the Government Lawyer Section, through its Chair, for review and comment. The draft report recommends elimination of the provision in the pro bono rules which exempt from pro bono reporting requirements government attorneys who are precluded by statute, constitutional provision or rule from providing any services to private individuals. Additionally, you will find below the Section's response to the report, opposing the change. If you wish to submit any comments on this issue, you may send them to Natasha Permaul, Chair, C/O Kent Spuhler, Florida Legal Services, Inc., 2119 Delta Way, Tallahassee, FL 32303.

Rule 4-6.1(a), Rules Regulating The Florida Bar, provides that the professional responsibility to render pro bono legal service and participate in other pro bono service activity "does not apply to members of the judiciary or their staffs or to government lawyers who are prohibited from performing legal services by constitutional, statutory rule, or regulatory prohibitions." The comment to this part of the rule states that these members of The Florida Bar are not exempt, but are "deferred from participation" in the Voluntary Pro Bono Plan. In its opinion adopting amended Rule 4-6.1 and Rule 4-6.5, the Florida Supreme Court explained that the judiciary and their staffs and government lawyers were "deferred at this time from participating in the pro bono program," but the Court "strongly encourage[d] the development of [pro bono] programs" to "allow participation ...in pro bono activities" by the judiciary, judicial staff, and government lawyers. Amendments to Rules Regulating The Florida Bar, 630 So. 2d 501, 504 (Fla. 1993).

Since the adoption of The Plan, the Standing Committee has learned that the degree of participation in pro bono activities by the judiciary, judicial staff and government lawyers varies widely from circuit to circuit. Many circuits have developed special pro bono projects for participation by the judiciary, judicial staff and government lawyers. In addition, many government agencies and offices have created pro bono plans and policies. For example, the Office of the Attorney General has adopted a pro bono policy which encourages pro bono legal services to the poor by government lawyers and specifically finds that the primary purpose of pro bono service is overall a public one and the reasonable use of public equipment in providing such service is permissible. The Orange County Attorney's Office has established a pro bono policy that affirms that pro bono legal work serves as an important public need and encourages government lawyers to participate in pro bono projects while allowing reasonable use of county equipment, materials and support staff. See Appendix "F" for a copy of this policy. The Supreme Court of Florida, as early as September 1993, approved law clerks employed by the State Courts System providing pro bono legal services other than direct representation of clients in court. And yet, most of the judiciary, judicial staff and government lawyers still report that they are deferred from the Rule and do not participate in pro bono legal service to the poor. However, many report that they are deferred but also report providing pro bono service and/or making contributions to a legal aid organization. See Appendix "G" for details by circuit and county.

The Standing Committee has reviewed the pro bono activities of the judiciary, judicial staff and government lawyers across the state. The Committee studied the practical and legal barriers to participation by government lawyers and collected information about the various types of pro bono programs adopted by various government offices to provide opportunities for government lawyers to provide pro bono legal services. Listed below are examples of actual pro bono projects being reported by the circuit committees:

• In the 2nd circuit, government attorneys interview, advise, and accept eligible clients at the Night Clinic Project; assist the general public with questions and answers about filing in small claims court; and represent clients at mediation hearings. Judicial clerks of the Florida Supreme Court conduct interviews and provide advice and referrals at the local homeless shelter.

• In the 4th circuit, the State Attorney's Office has developed a slate of ongoing projects for their staff to provide pro bono services to the community: School Conflict Resolution, School Outreach Program, Violence and Gun Safety Education, Program for At-Risk Students, Victim Impact Panels, peer Impact Panels, and Teen Court.

• Government attorneys participate in the Lake County Teen Court in the 5th circuit.

• Six (6) St. Petersburg City Attorneys staff the Consumer Law clinic two times a month in the 6th circuit. Two hundred (200) Pinellas County Government attorneys participate in Teen Court Weekly. Fourteen (14) Pasco Government Attorneys also participate in Teen Court.

• In the 9th circuit, the Orange County Attorney's office has attorneys participating in the Attorneys Fighting for Seriously Ill Children project. The United States Attorney's office participates in Teen Court. Staff attorneys of The Florida Bar are involved with the Citizen Dispute Resolution program and the City of Orlando Attorney's Office provides telephone screening through the local legal aid society.

• In the 11th circuit, twenty-one (21) attorneys from the U.S. Attorneys Office handle domestic violence permanent injunctions. Seventy-six (76) attorneys from the U.S. Attorney's Office and the County Attorneys Of-

fice do guardian ad litem and child advocacy cases and appeals.

• Manatee County attorneys in the 12th circuit, provide pro bono service by conducting hearings at the County Housing Authority.

• In the 13th circuit, attorneys from the Public Defender's Office and the State Attorney's Office do client intake for the Volunteer Lawyers Program. The State Attorney's Office had one hundred (100) of its attorneys participate in their pro bono "School Related Service Plan" which provides law related education and educational activities to over 5,000 students.

• Government attorneys in the 15th circuit provide intake service for pro bono clients bi-weekly.

• Eleven (11) Broward County Attorneys in the 17th circuit handled non-conflict pro bono cases for clients. U.S. Attorney's Office attorneys handle domestic violence Injunctions for Protection cases.

• Thirty-two (32) attorneys from the State Attorney's Office in the 18th circuit participated in Teen Court and legal rights and responsibilities of youths educational programs.

Suggested Changes or Modifications to the Pro Bono Rules

The Standing Committee, after learning of the substantial pro bono legal services being provided by government lawyers and the numerous governmental entities, agencies and departments that have adopted pro bono policies and programs, has concluded that Rule 4-6.1, Rules Regulating The Florida Bar, should be modified to remove the deferral of government lawyers from the rule. This should be accomplished with an acknowledgment that pro bono legal service under the rule is overall a public service and within government lawyers' public service responsibilities. The organized pro bono programs across the state have demonstrated that they can work with government entities, departments and agencies to provide appropriate pro bono legal services opportunities and support services to permit government lawyers to fully participate in the Florida pro bono plan.

Response from the Chair

Kent R. Spuhler
Executive Director
Standing Committee on Pro
Bono Legal Service
2121 Delta Blvd.
Tallahassee, Florida 32303

Re: Pro Bono Deferral for Government Lawyers

Dear Mr. Spuhler:

I have been asked to comment on behalf of the Florida Bar Government Lawyer Section on the draft 2001 report of the Standing Committee on Pro Bono Legal Services, and more particularly the Committee's recommendation that the pro bono deferral for government lawyers be eliminated. In your cover letter, you state that, in prior discussions with the Section, you were informed that the Section might well initiate the petition to actually change the pro bono rule so that government lawyers would no longer be deferred.

I believe that there must be a misunderstanding regarding the Section's position on the rule. As you may know, there are several statutory provisions and rules which prohibit some lawyers in government service from providing legal services to anyone other than their primary client (government). Staff attorneys employed by the Florida Legislature are a case in point.

For the past several years, the Section has adopted as one of its Legislative positions the premise that any statutory provisions which impede government lawyers in providing pro bono services, should be eliminated by the Florida Legislature. The Section supports the voluntary provision of pro bono services, as currently provided for by rule. The Section is working to make it as easy as possible for government attorneys who want to provide pro bono services to do so. This includes not only elimination of statutory and rule impediments, but also exploring different ways to make it possible for government lawyers to provide pro bono services within the constraints of the governmental entities by which they are employed.

At this time, the Section cannot support elimination of the pro bono deferral provision for government lawyers, as the statutes and rules which necessitated the provision still exist. Until the statutes and rules are amended, it would not be appropriate to eliminate the deferral provision since it would put affected government lawyers in an untenable situation. While I appreciate the fact that the Committee anecdotally found some instances where state employees who do have such statutory prohibitions found creative ways to provide services to the community, this does not justify elimination of the pro bono deferral provision.

I hope this clarifies the Section's position on this issue. If you have any other questions about this matter, please contact me at (850) 414-3666.

Sincerely,

Stephanie A. Daniel
Chair, Government Lawyer Section

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