THE FLORIDA BAR

The Government Lawyer Section
R E P O R T E R

"No Higher Calling"

Summer 2006

The Chair's Solicitation of Memory

by Pam Cichon

Time flies when you are having fun, I've heard. I find it flies even faster when you are working, making it harder to finish everything or to know exactly how much time has passed. So I am just guessing that it was 16 years ago, or so, that I made the decision to get involved with a new committee of The Florida Bar called the Government Lawyers. With then Attorney General Robert Butterworth chairing this committee, a group of government lawyers from various state and local government agencies throughout Florida got together to discuss simply being government lawyers and then why we needed our own section of the Bar. We all practiced in areas of the law represented by the existing sections, yet the perspective of seminars they presented were rarely from "our" side, the working conditions and restrictions on us were not the same as they were for lawyers in private firms, certain mandatory CLEs had no practical meaning for young attorneys working for the government, and why no matter how crucial our jobs were to "the people," we were made to feel like second class lawyers. Another thing we had in common was that we all wanted to be involved, but wondered if there really was a place for us in the Bar.

We wanted to do something about all these issues, and both the committee and The Florida Bar were trying to encourage and actually help government lawyers, whose agencies could or would not pay for them to attend Bar meetings, to become more involved in leading the Bar. A survey was sent out to thousands of government lawyers to profile who they were and what they were. It solicited their opinions about the work they did, their salaries, their needs, and whether they wanted to have a section of the Bar dedicated to them. At that time, ten percent of The Florida Bar had indicated they worked for the government full-time.

Interestingly, although 18.7 % of Bar members were female, 32.2% of self-identified government lawyers were female. What was also discovered then (which was discussed during the Section's strenuous, and eventually successful, efforts to defer certain mandatory CLE for new lawyers who worked for the government) was that no government lawyers were suspended or disbarred while 1% (553) of total attorneys were suspended or disbarred.

It was at the same time that our committee of government lawyers voted to sponsor an award that would recognize a government lawyer who provides "public and government ser-

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A Message from the Chair-Elect

by Joseph C. Mellichamp, III

It will be a great pleasure to serve as your Chair of the Government Lawyer Section. I plan for us to continue the good work of our outgoing Chair and look forward to an equally productive year. I think that the issue of Certification and Membership growth will continue to be a top priority of your section. I would like for all of the members of the Executive Council to reach out to areas of the Governmental Bar that are still underrepresented in our section. That may be as simple as talking to people in your own office, at local bar meetings or at a CLE seminar you attend.

I look forward to continuing our tradition of excellent CLE seminars. I foresee that there will be a need for new additional CLE seminars as the new certification becomes a reality. We need dedicated volunteers to be program chairs of these CLE seminars. I hope to have these new CLE seminars organized and presented in the major population centers of the state. The necessary ingredient to achieve this goal is your involvement.

Again, I look forward to working with everyone to improve your great section. The section will be what you make it. I call upon everyone to strive to make the section even better. Please feel free to let me and other members of the Executive Council know what ideas and plans you have to serve our members better. Together we can be successful.

THE GOVERNMENT LAWYER SECTION REPORTER

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Statements or expressions of opinion or comments appearing herein are those of the editor and contributors and not of The Florida Bar or the Section.

ARTICLES FOR THE NEXT ISSUE ARE DUE September 15, 2006.

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

CHAIR'S MESSAGE

from preceding page

vice above and beyond their specific legal duties." That award is the well recognized "Claude Pepper Memorial Public Service Award." Although lawyers in general are presented with unique opportunities to do good deeds, I know from working for the State of Florida, the City of St. Petersburg, and the Legal Services Corporation during my 25+ years as a lawyer that government lawyers are handed such challenges daily because of the people with whom we come in contact. And one can choose to rise to the occasion or not. I urge all government lawyers to aspire to the Claude Pepper Award and encourage you to nominate those lawyers who are deserving of recognition.

I digress. There is much to talk about that has happened in the past 16 years. The committee eventually became a Section. The survey yielded a 181 page report with appendices. 2,776 government lawyers responded. Much more interesting than reading statistics was that The Bar published every comment written by those government lawyers on the survey. Those government lawyers expressed their needs, their desires, talked about problems within their own agencies, disparity in salaries, asked for CLEs that were needed, criticized the relevancy of others, complained of the high cost of Bar dues, and even suggested that the Bar disband entirely.

In the past 16 years, the Government Lawyer Section has been working to address the needs that were expressed 16 years ago as well as new things that have come to the Section's attention. It is doubtful that there will ever be a survey like this again giving government lawyers the chance to express themselves. However, that is what this Section of the Bar is for and the only way the GLS is going to know what it needs to tackle next is if government lawyers each make the decision to participate in the Section. You can read about the Section's recent accomplishments elsewhere in this newsletter. Instead of recapping them, I'll simply mention that if you are a government lawyer, you are likely benefitting from them now. If there is something that you think the Bar could do for you, or should do for you, there is a place where you can make it happen. This Section has never been elitist, we have always welcomed the attendance of all government attorneys to our meetings. We hope you will join the section (we need the dues!), but that has never been our criteria. The GLS is like most government lawyer jobs— you are pushed or thrown into the arena from the beginning. Here you have the chance to get involved quickly and fully, and I can guarantee that the contacts you make will be invaluable.

Although there have been many GLS members who have given much of themselves during the years, two of our past chairs deserve special recognition for what they continue to achieve on behalf of government lawyers: Clark Jennings and Keith Rizzardi. They have each worked tirelessly despite demanding government jobs of their own. We now need your ideas and your participation. You must become the memory of this Section during the next 16 years.

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Government Lawyer Section and Friends File Comments on Certification Proposal in the Florida Supreme Court

By Keith Rizzardi

The Government Lawyer Section is on the verge of achieving a major milestone: the creation of the new certification program in State and Federal Government and Administrative Practice. On April 26, 2006, The Florida Bar filed Case No. SC 06-736 in the Florida Supreme Court, including proposed amendments to The Rules Governing The Florida Bar, creating a new Subchapter 6-25.5, entitled "Standards for Certification of a Board Certified State and Federal Government and Administrative Practice Lawyer." The Government Lawyer Section, joined by Friends filed the following comments in support:

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Through this filing, the Government Lawyer Section and friends named below voice our strong support for The Florida Bar's proposed amendments to The Rules Regulating The Florida Bar, Subchapter 6-25.5, Standards for Certification of a Board Certified State and Federal Government and Administrative Practice Lawyer.

For many years, government attorneys were unable to pursue certification because of the diverse or specialized nature of their practices. For example, some government litigators worked as part-time trial lawyers and part-time appellate lawyers, but were unable to qualify for either civil trial practice or appellate practice certification. Other government lawyers, including transactional lawyers and bid protest specialists, and lawyers with very specialized subject matter, found themselves similarly excluded from the various substantive areas of certification.

Most of these government lawyers, however, shared a common range of legal expertise in the State or Federal Administrative Procedure Acts, covering matters such as rulemaking, agency actions, and the administrative hearing process. Government lawyers also possessed common knowledge of ethics, open government and public records laws. Finally, they shared expertise in relevant areas of constitutional law, such as sovereign immunity or the limitations of the commerce clause. This new Certification in State and Federal Government and Administrative Practice is expected to bring together all of these related areas of expertise.

The Government Lawyer Section served as one of the leading sources of support for the development of the proposed rules, and the Section's Executive Council unanimously approved their contents; nevertheless, the proposal benefits many private-sector attorneys. Ultimately, the proposed rules reflect years of negotiation and compromise by leading Florida government lawyers, administrative lawyers, and environmental lawyers. Once approved, this proposal will provide new opportunities for a broad array of lawyers – public and private, state and federal, transactional lawyers and litigators, generalists in administrative law and specialists in environmental law – enabling all of them to qualify for certification, and thus, to prove themselves as experts in State and Federal Government and Administrative Practice.

Over the years to come, the Government Lawyer Section intends to offer valuable Continuing Legal Education seminars that will help lawyers seeking certification in this area. For example, the Section's programs in open government and public records, Practicing Before the Florida Supreme Court, and Practicing Before the Florida Legislature are well established. In addition, the Government Lawyer Section expects to continue hosting programs such as The Federal Seminar, a Washington, D.C. event successfully hosted in 2004 and 2006.

In conclusion, the Government Lawyer Section, based on the unanimous support of its Executive Council, believes that this new certification program will be a benefit to all the members of The Florida Bar and the clients we serve, and encourages this Court to approve the proposed amendments to The Rules Regulating The Florida Bar, Subchapter 6-25.

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To track the progress of the Florida Bar's rulemaking initiative, visit the Florida Supreme Court's "Rule Cases" page, Case No. 06-736, available online at http://www.floridasupremecourt .org/clerk/comments/2006/index.shtml

2006-2007 slate of officers

The Nominating Committee of the Government Lawyer Section has presented the slate of officers for 2006-2007. Members will vote on treasurer and secretary at the annual meeting in June.

Chair-Elect	Carolyn Snurkowski, Tallahassee
Treasurer	Robert "Bob" Krauss, Tampa
Secretary	Barbara Wingo, Gainesville

The Florida Supreme Court Library, which is now located in the south wing of the Florida Supreme Court Building, has been in existence since 1845. The library is the oldest state-supported library in Florida, and was originally designed for use by the Supreme Court and the attorneys who practiced before it. It continues to serve this important function.

Until the Constitution of 1885 was amended in 1956, the clerk of the Supreme Court also served as librarian. Since 1956, under Chapter 25.341, Florida Statutes, the Supreme Court has had a librarian whose sole responsibility is administering the library.

Billie J. Blaine is the new Librarian of the Supreme Court, as of Feb. 1, 2006. Ms. Blaine brings with her over ten years of law library experience from the University of Nebraska, the University of Missouri, and Mercer University, in Macon, Georgia. Her educational background includes a Bachelors of Journalism from the University of Nebraska, a Masters of Library Science from the University of Missouri, and a Juris Doctor from the University of Nebraska College of Law. Ms. Blaine has begun her tenure at the Court as the library embarks on a number of changes and improvements, including technological advancement, renovation of the library space, and the preparation and preservation of the Court's archives and rare books for public access.

The Florida Supreme Court Library is open to the public and also serves attorneys and staff at all state agencies. The collection consists of more than 117,000 volumes, including both current and historic resources. The library holdings contain published decisions from all state and federal courts, the United States Code, the Code of Federal Regulations, and an extensive collection of primary Florida materials, both current and historic. The collection also includes legal encyclopedias, the American Law Reports, treatises on a variety of practice areas, and many legal periodicals. The library is a limited federal depository library for government documents. The library's catalog may be searched on its website at http://library.flcourts.org/.

State agency personnel may make limited free copies of library materials. The library collection does not circulate to the general public, but attorneys and staff from state agencies may check out books on a limited basis for 24 hours.

The library provides access to HeinOnline while in the library. HeinOnline is an electronic subscription service which provides access to articles in over 800 legal journals. Articles are image-based and fully-searchable, providing exact page images as they originally appeared in hard copy, including all charts, graphs, and photographs. HeinOnline provides comprehensive coverage from the inception of each publication.

The library provides two terminals with public access to Westlaw, the Internet, and word processing. Printing is free for state agency personnel.

The library's archives and rare book collection includes personal and professional papers, original books, photographs, works of art, and a variety of artifacts related to the Florida Supreme Court and the Florida judicial system. Many of these books and materials are on display in the library and in the Supreme Court rotunda.

The Supreme Court Library is open Monday – Friday, from 8 a.m. – 5 p.m. The library's main number is 488-8919. Billie Blaine may be reached at 922-5520; Teresa Farley, Assistant Librarian, may be reached at 922-5519; and Jeff Spalding, Technical Services Librarian, may be reached at 414-1154.

E-Discovery, the Spoliation Mine Shaft, and Florida Public Records Laws

by Jim Peters

Public records oriented Florida government lawyers may have discerned the proverbial sentry canary's alert when the Florida Supreme Court decided *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla. 2005), and reminded litigants of their obligations to preserve relevant materials and the consequences for failing to do so.

That alert was followed by the United States Supreme Court April 12, 2006, announcement that it was submitting proposed federal civil electronic ("E") discovery rules to the United States Congress that will be effective on December 1, 2006, unless Congress determines otherwise.[1]

These events should be wake-up calls to those of us whose "government lawyer" labors are already permeated with Chapter 119, Florida Statutes, public record obligations because the Florida Bar Civil Rules Committee is to determine what changes, if any, should be made to the Florida Rules of Civil Procedure concerning discovery and production of information that is electronically stored in private and public sector computer vaults.

E-discovery poses document organization, retention, retrieval, and accountability issues which will— if they have not at this time — burden legal counsel for all but the smallest units of Florida government who use e-mail, Blackberries, the internet, word processing, databases, cell phones, and other technologies whose products are subject to discovery.

Martino v. Wal-Mart

In *Martino*, the plaintiff shopper injured her arm when she lifted a bag of salt to a shopping cart seat at a price check-out station and the cart collapsed. During discovery in her negligence suit she requested a videotape of the incident from the store's surveillance camera and the collapsed cart. The store could produce neither.

Plaintiff filed a second amended complaint with a separate claim for spoliation of evidence. The trial court granted the store's directed verdict motion on the spoliation of evidence claim. The appellate court affirmed on the ground that an independent cause of action did not exist for a spoliation claim where the spoliator and the defendant were the same.

On review, the Florida Supreme Court concluded sanctions, rather than an independent cause of action, were the proper remedy against the first-party defendant for a spoliation of evidence claim. The Court concluded there was a presumption when evidence which was intentionally lost, misplaced, or destroyed by one party that the absent materials would have contained indications of negligence.[2]

Justice Well's concurring opinion in *Martino* qualified the use of the presumption to instances in which it is demonstrated that a first-party defendant has a duty by statute, regulation, court order, or discovery rule to maintain and preserve the materials:

"It is fundamental to the entire legal basis for spoliation of evidence that the owner or possessor of property have a legally defined duty to maintain or preserve the property..... Unless there is a legally defined duty, I believe that presumptions or sanctions against owners or possessors of property for spoliation of evidence have serious due process concerns under both the United States and Florida Constitutions. ... Both constitutions expressly protect the freedom to use property, and this necessarily includes the freedom to dispose of property, unless there is a legally defined duty requiring maintenance or preservation of the property."

The Federal E-discovery Rules

The federal E-discovery rules project began in 2000 with the realization that recent electronic information technology had dwarfed the significance of all prior paper information storage concerns and that federal judges, especially those overseeing complex litigation, were having to construe the federal rules to resolve discovery issues which could not have existed when the rules were promulgated.

Discovery orders were being entered based upon, in particular, Rule 26(b), Fed. R.Civ. Pr. considerations of burden, reasonableness, costs, resources, and importance of the issues at stake. For example, see Federal Judicial Center Publication "Annotated Case Law on Electronic Discovery", at http://www.uscourts.gov/rules/. There was discussion of the need to amend the civil rules to accommodate E-discovery by practitioners and judges who felt the existing rules and case law was sufficient.

Civil rules advisory committee panels, including a panel on which Chief Judge Roger Vinson, United States District Court, Northern District of Florida, was a member, concluded there was need to amend the federal rules. Federal E-discovery text is sprinkled throughout the imminent amendments to the Federal rules. The full text is online at http://www.uscourts.gov/rules/ .

Proposed Rule 16 concerns pretrial conferences, scheduling and management, and establishes process for the parties and court to address early issues pertaining to the disclosure and discovery of electronic information. Proposed Rule 26 has general provisions and duties of disclosure and requires parties to discuss during the discovery-planning conference issues relating to the disclosure and discovery of electronically stored information. Its text at Rule 26(b)(5) has express procedures to shield use of inadvertently produced privileged documents until privilege claims are resolved by the court .

Proposed Rule 33 provides that an answer to an interrogatory involving review of business records should involve a search of electronically stored information. Proposed Rule 34 con-

continued, next page

cerning production of documents and things and entry upon land distinguishes between electronically stored information and "documents".

Proposed Rule 37(f) addresses failure to make disclosures or cooperate in discovery and sanctions. It creates a "safe harbor" that protects a party from sanctions for failing to provide electronically stored information if electronically stored information is lost "because of the routine operation of the party's computer system."

The proposed text in the federal rules — and the fundamental question if there is need to revise the Florida rules — is fair game for discussion by the Florida Bar's Civil Rules Committee and by lawyers in Florida as the Committee considers E-discovery provisions for the Florida rules.

Florida government lawyers' clients have presently **"a legally defined duty requiring maintenance or preservation" of records**.

The particulars of records maintenance obligations under Chapter 119, Florida Statutes are beyond the scope of this article. Suffice to say, our state, county and municipal clients are subject to myriad retention schedules and disposal processes. The "legally defined duty requiring maintenance or preservation" of records required by *Martino* exists for Florida government.

"It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." Section 119.01, Fla. Stat.

Unlike the leeway that may be afforded the private business sector Wal-Mart's of the world as to their preservation of their surveillance tapes, retention schedules for "the routine operation" of state agencies' computer systems are determined by sections 119.021(2)(a), (b) and (c), Fla. Stat., and by authority of rules promulgated by the Florida Department of State at Fla.Admin. Code Rule 1B-24.003. Retention can be for months, years, or forever.

Among other requirements, Rule 1B-24.003 provides that a public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division, and each agency shall submit annual signed statements attesting to the agency's compliance with records disposition laws, rules, and procedures.

The relatively minimal monetary sanction at section 119.12, Fla. Stat. authorizing attorney fees and costs in a civil action to enforce the provisions of Chapter 119 pales in comparison with other more painful sanctions upon application of the presumption arising from spoliation of evidence when a party — plaintiff, defendant, Florida state agency or other — has "a duty by reason of statute, regulation…to maintain and preserve" documents and has failed to do so.[3]

Aside from the duties arising from the public records statute and state regulations, spoliation case law does not require a finding of bad faith for discovery sanctions. There is ample case precedent for judgments against defendants when spoliation of evidence prejudices plaintiff's abilities to prove their claims. [4]

Early appreciation of records maintenance requirements and awareness of the specter of E-discovery in litigation [5] that is subject to public records laws, even before pretrial conferences and initial discovery exchanges, will avoid the consequences of embarrassing and potentially disastrous after-the-fact realizations that relevant agency records and materials — potentially hard and soft line e-mails, databases, internal memoranda — have been mislabeled, discarded or cannot be located.

Government lawyer E-discovery rule concerns

The emergence of E-discovery presents the need for a reality check by government lawyers to assess attainable expectations about E-records retention and reasonable internal prophylactic procedures for state agencies to avoid the dark end of the spoliation mine shaft and the inadvertent disclosure of privileged E-documents.

That reality is pre-determined to great extent by Florida public records requirements and by the technical ability of government computers to save essentially everything that government employees key into them. The "balancing standard" Federal Rule 26 (b)(2) by which a federal judge can limit discovery to what is "reasonably obtainable", "the burden or expense of the proposed discovery …taking into account …the parties' resources…." , even if embraced in a Florida discovery rule, affords little safe harbor for government litigants because of Florida's pre-existing public records requirements and public policy requiring their disclosure.

The "routine operation" for preservation of Florida government electronic public records could well afford a treasure trove of "reasonably obtainable" discoverable information — and a heap of internal agency client finger pointing and accusations for failures to preserve and maintain privileged and non-privileged records in an orderly fashion — that is readily foreseeable in light of government resources and obligations.

In light of the ease of commingling privileged and non- privileged electronic communications and of failures to expressly identify privileged electronic communication of privileged documents, the text of proposed Federal Rule 26(B)(5) to safeguard inadvertently produced privileged documents until privilege claims are resolved seems especially worthy of evaluation by government lawyers.

Strict and total compliance with Chapter 119 and identification of persons responsible to oversee public records maintenance and retrieval is a good beginning to deal with E-discovery complications. However, other considerations include records staff coordination with legal staff, format of E-records retention and E-discovery responses, redaction, identification and sorting of privileged documents, and costs allocation if massive databases are subjects of discovery.

Metadata (hidden text and formatting codes embedded in electronically stored documents) was the subject of articles in the January 1, 2006, and April 30, 2006, Florida Bar News (available online at http://www.florida bar.org) and is another topic for E-discovery discussion. However, metadata complications

are beyond the scope of this limited introductory article.

Whether or not the Florida Rules of Civil Procedure are amenable to other E-discovery amendments that would afford safe harbors or particular texts relevant to the needs of state agencies should be topics for government lawyer discussion in 2006 and 2007 as the Florida Bar Civil Rules Committee E-discovery project advances.

Conclusion

There is ample room for mischief, misery, and mastery as attorneys focus their attention and their expectations on the volumes of potentially relevant information that is, could be, or should be sorted, labeled, and stored in the electronic vaults of Florida government. Government lawyers have an immediate opportunity — if not an obligation — to help determine whether the inevitable growth in E-discovery is to be a boon or bust for their clients and their careers.

Endnotes:

1 The US Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. §§2072, 2075. The Court must transmit proposed amendments to Congress by May 1 of the year in which the amendment is to take effect. 28 U.S.C. §§2074, 2075. Congress has a statutory period of at least 7 months to act on rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1, 2006. 28 U.S.C. §§2074, 2075.

2 *See Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 601 (Fla. 1987).

3 *See* examples in Robert Peltz, "The Necessity of Redefining Spoliation of Evidence Remedies," 29 Fla. St.U.L. Rev.1289.

4 *See* e.g. *Bank Atlantic v Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045 (11th Cir. 1994); *Computer Task Group Inc v Brothby,* 364, F.3d 1112 (9th Cir. 2004); and cases presented in the sanctions section of the Federal Judicial Center publication," Annotated Case Law on Electronic Discovery."

5 A general perspective of that specter was presented by Stephen Cohen in "Electronic Data and Discovery, Nightmare or Opportunity," February, 2002, Florida Bar *Journal.*

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Government Lawyer Section Budget for Fiscal Year 2004-2005 Approved Budget for Fiscal Year 2005-2006

Revenues	**2004-2005 Approved Budget**	**Year End June Actuals**	**2005-2006 Approved Budget**
Dues	12,500	10,014	12,500
Section Share Online	0	0	0
CLE Courses	5,695	4,583	5,695
Audio Tape-Section S	2,500	2,202	2,500
Material Sale	0	26	0
Credit Card fees	0	3	0
Investment Allocations	2,195	2,172	4,145
Total Revenues	**22,890**	**19,000**	**24,840**
Expenses			
Employee Travel	209	841	1,643
Postage	700	782	700
Printing	100	20	100
Officer's Office Expenses	100	0	100
Newsletter	2,000	0	2,000
Supplies	50	0	50
Photocopying	120	30	120
Officer's Travel Expenses	2,700	915	2,700
Meeting Travel Expenses	1,500	518	1,500
Out of State Travel	2,500	239	2,500
Committee Expenses	300	33	300
Public Info & Website	0	405	0
Board or Council Meeting	1,000	296	1,000
Bar Annual Meeting	3,000	4,412	3,000
Midyear Meeting	250	401	500
Retreat	1,500	135	1,500
Awards	1,500	1,331	1,500
Scholarships	500	0	500
Council of Sections	300	300	300
Operation Reserve	1,833	0	2,259
Total Expenses	**20,162**	**10,658**	**22,272**
Total Revenue	**22,890**	**19,000**	**24,840**
Net Operations (revenue less expenses)	**-2,728**	**-8,342**	**-2,568**
Beginning Fund Balance (rolled over)	**45,277**	**51,806**	**59,213**
Ending Fund Balance (beginning fund balance + net operations)	**48,005**	**60,148**	**61,781**

Section Reimbursement Policy:

Section 3. Compensation and Expenses. No salary or other compensation shall be paid to any member of the Government Lawyer Section for performance of services to the section, but the chair may authorize the payment of reasonable out-of-pocket expenses resulting from performance of such services.

Recent Attorney General Opinions

by Lagran Saunders and Gerry Hammond

The following brief synopses are provided in an effort to assist governmental attorneys in advising their clients. Please refer to the Attorney General's website for the full text and analysis of any opinion that is of interest: www.myfloridalegal.com:

Attorney General Opinion 2005-28: A custodian of records is authorized to retain a monetary deposit collected in connection with actual costs incurred in making copies to comply with a public records request if the requesting party subsequently advises the city that the copies are no longer needed; the custodian may bill the requester for any shortfall between the deposit and the actual cost of copying the public records in such instance.

Attorney General Opinion 2005-27: A direct-support organization for a community college, as defined in section 1004.70, Florida Statutes, is subject to the Government in the Sunshine Law, section 286.011, Florida Statutes.

Attorney General Opinion 2005-26: While two cities may enter into a mutual aid agreement for the voluntary cooperation and assistance of a routine law enforcement nature across jurisdictional lines or for the rendering of assistance in a law enforcement emergency, the provisions of Part I, Ch. 23, Florida Statutes, may not be used by one city to assume the operation of all law enforcement functions within another city.

Attorney General Opinion 2005-25: Municipality must ensure that its share each moving traffic violation received from the county pursuant to section 318.21(9), Florida Statutes, is used for local law enforcement automation rather than general law enforcement.

Attorney General Opinion 2005-24: Southeast Volusia Hospital District, created by special act as an independent special district to establish, operate and maintain hospitals, clinics, nursing homes or related facilities as its board deems necessary for the health and welfare of the district's people, exercises sufficient control over the Bert Fish Medical Center, Inc., which operates a duly licensed acute care hospital as an instrumentality of the district, such that the medical center is entitled to sovereign immunity of section 768.28, Florida Statutes.

Attorney General Opinion 2005-23: A municipality asked if notes taken by an attorney and used to prepare a form relating to disciplinary action against city employees constitute a public record, and if so, are they exempt from disclosure under section 119.07(6)(l)(1), Florida Statutes, if prepared expressly in anticipation of adversarial proceedings. Notes taken by an attorney to communicate information regarding possible future personnel actions and filed would be public records available for inspection. In order to come within the scope of the exemption in section 119.07(6)(l)1., Florida Statutes, notes must be prepared exclusively for or in anticipation of litigation or adversarial administrative proceedings; records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to subsequent litigation.

Attorney General Opinion 2005-22: Questioned whether a city may monitor the activities of a community development district pursuant to Chapter 189, Florida Statutes, when such district is situated wholly within the city's geographical boundaries. The opinion found that such districts fall within the definition of special districts and that the statute's oversight review process for special districts recognizes that each special district in the state may be reviewed by the local general-purpose government in which the district exists.

Attorney General Opinion 2005-21: The questions posed were whether a county may require annual inspections of fire hydrants and who is responsible for such inspections. Given that a county with fire safety responsibilities may adopt more stringent standards than the Florida Fire Prevention Code and the Life Safety Code (s. 633.025, Fla. Stat.), and the code incorporates the National Fire Prevention Association annual inspection requirements for fire hydrants, it was concluded that the county may enforce annual inspections of fire hydrants. While the code places the responsibility for inspection upon the "owner of the property," there are conflicting views as to whether the term indicates the owner of the real property where the fire hydrant is located or the fire hydrant itself.

Attorney General Opinion 2005-20: Responding to a state representative's request as to whether implementing legislation is required for the constitutional amendment allowing slot machines in Miami-Dade and Broward Counties upon local referendum approval, this office pointed to the specific language in the amendment directing the Legislature, in the next legislative session occurring after voter approval of the amendment, to adopt such legislation, to conclude that the amendment requires implementing legislation.

Attorney General Opinion 2005-19: The opinion considered a county's use of building permit and inspection fees imposed pursuant to section 125.56, Florida Statutes, to either rent or construct a building that would house the county's building department. Distinguishing an earlier opinion (AGO 2001-63) in which it was concluded that fees could not be used to construct a building that would *in part* house the building department, it was found that the use of such fees for a building or part of building *only* for the building department would be authorized as directly related to activities to enforce the county's building and fire prevention codes.

Attorney General Opinion 2005-18: Meetings between a member of a council the council's director who

serves as an ex officio, non-voting member of the council are subject to the provisions of section 286.011, Florida Statutes, the Government in the Sunshine Law. As a statutorily recognized member of the council, the director participates in the decision-making process; such meetings, therefore, should be open to fulfill the broad purpose of the Sunshine Law to protect the public from "closed door" politics and to keep the entire decision-making process open.

Attorney General Opinion 2005-17: A clerk of court asked whether a form created by an individual and offered for recording in the Official Records complies with the statutory requirements for recording under Florida law. While it is the clerk's ministerial duty to record all instruments required or authorized by law to record, the clerk must make the factual determination of whether a particular document may be recorded. In the instant situation, a form for "Declaration of Homestead" appeared to fulfill the statutory requirements for such a declaration, while a "Head of Family Affidavit" was not a form acknowledged in Florida law.

Attorney General Opinion 2005-16: City of North Miami questioned whether section 403.813(2)(s), Florida Statutes, preempts the city's enforcement of land use and other regulations addressing the appropriate zoning for floating vessel platforms and floating boat lifts located within the municipality. Generally, section 403.813(2)(s) provides that a permit is not required for floating vessel platforms or floating boat lifts, under specified conditions, and are not subject to any more stringent regulation by any local government. A review of the legislative history of the statute did not clarify whether the Legislature intended to limit all local regulation of these structures or merely intended to limit local permitting authority. Absent any evidence suggesting a particular result, this office acknowledged its inability to qualify or read into the statute an equitable interpretation and suggested that the city seek legislative clarification.

Attorney General Opinion 2005-15: A member of the Board of Trustees of the City of Miami Beach Pension Fund for Firefighters and Police Officers (a Chapter 175 board) asked whether she could serve simultaneously on the city's Fire and Police Pension Board and the Chapter 175 pension board without violating the constitutional dual officeholding prohibition. Attorney General Opinions have, in the past, stated that membership on a board of trustees empowered to administer a pension fund, such as a Chapter 175 board constitutes an "office' for purposes of Article II, section 5(a), Florida Constitution. The opinion concludes that service on both pension fund boards would violate the constitutional dual officeholding provision.

Attorney General Opinion 2005-14: Special Counsel for the City of Winter Park asked whether the city is required to seek approval from the Public Service Commission for the transfer of the city's electric distribution system assets from Progress Energy Florida, an investor-owned utility, to the city. The City of Winter Park was undertaking the purchase of the electric distribution system assets located in the city from PEF pursuant to a purchase option clause in the franchise agreement between the city and PEF. Based on specific statutory language and administrative rules, the Attorney General concluded that the city is not required to seek the approval of the PSC for the transfer of the electric distribution system assets in the city from Progress Energy Florida to the city.

Attorney General Opinion 2005-13: The Coral Gables City Attorney asked whether the city could require persons attending public meetings held in facilities where sensitive documents may be stored to present identification as a condition of attendance. The requirement that members of the public must provide identification prior to their attendance at a public meeting could have a chilling effect on the public's willingness to attend. Thus, while an agency may impose certain security measures on members of the public entering a public building, such as requiring screening by metal detectors or a search of purses or briefcases, the City of Coral Gables may not require persons attending a public meeting to provide identification as a condition of attendance.

Attorney General Opinion 2005-12: The City Attorney for the City of North Port asked whether the Public Records Law precluded the city from requiring the use of a code in order for citizens to view the email correspondence of the city's police department and human resources department. The public was given access to all city email except that from the police department and the human resources department. A code was required to access this correspondence. Citizens were not informed of the code requirement nor were they advised that the email was otherwise not available. The opinion advises that local enactments or policies that purport to dictate additional conditions or restrictions on access to public records are of questionable validity. The Attorney General concludes that the city is precluded from requiring use of a code in order for citizens to view the email correspondence of the city's police department and human resources department.

Attorney General Opinion 2005-11: The Board of County Commissioners for Hernando County asked whether the board, on its own motion, could vacate easements or rights-of-way that are dedicated by plat to the public. The opinion notes that the power of a county or municipality to vacate property dedicated to a public use is controlled by statute. Thus, pursuant to section 177.101(3), Florida Statutes, a county may not vacate easements or rights-of-way that are dedicated by plat for a public purpose, except upon the application of fee simple landowners of the whole or that part of the tract covered by the plat sought to be vacated.

Attorney General Opinion 2005-10: The Chief of Police for the West Melbourne Police Department asked whether a police officer employed by the city who is working off-duty for a private employer is covered by the city's workers' compensation insurance. The opinion concludes that the provisions of section 440.091, Florida Statutes, control this question. Thus, the city would be responsible for injuries sustained by a police officer

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acting "in the line of duty," so long as the officer's actions do not also constitute a service for which he is paid by a private employer, unless the public employer had agreed to provide workers' compensation coverage for the private employment.

Attorney General Opinion 2005-09: The Miami-Dade County School Board Attorney asked whether the school board could condemn property by eminent domain pursuant to section 1013.24, Florida Statutes, and retain less than a fee simple ownership interest when a municipality has agreed to pay the costs of acquiring the property. In addition, the attorney asked whether section 1013.28, Florida Statutes, controls the disposition of such property when fee simple title is conveyed to the municipality and the school board obtains a leasehold interest. The Attorney General concluded that the school board may not use its eminent domain power to obtain fee simple title to property in order to transfer such property to the city. Further, the opinion notes that there is no other mechanism prescribed for disposing of real property by the school board other than section 1013.28(1), Florida Statutes, and any attempt to dispose of a fee simple ownership interest while retaining or contracting for a leasehold interest in the property would not be authorized under state law.

Attorney General Opinion 2005-08: The Commissioner of the Florida Department of Law Enforcement asked whether the prohibition in section 790.23, Florida Statutes, would apply to students in law enforcement training schools. The statutes prohibit a person who has been found to have committed a delinquent act that would be a felony if committed by an adult "and such person is under 24 years of age" from possessing a firearm. An analysis of the legislative history of this statute revealed that the disqualification from firearm possession by a person found to have committed a delinquent act that would be a felony if committed by an adult exists only until the person reaches the age of 24. Thus, the opinion concludes that the prohibition in section 790.23, Florida Statutes, applies to students who are under the age of 24 and are in law enforcement training schools. Once such an individual reaches the age of 24, however, the disqualification no longer applies and such student would be authorized to possess or control firearms.

Attorney General Opinion 2005-07: The Harris Chain of Lakes Restoration Council asked whether they are subject to the Government in the Sunshine Law. The council was created within the St. Johns River Water Management District by Chapter 01-246, Laws of Florida, and the nine member council serves as an advisor to the governing board of the water management district. In light of the absence of any specific exemption, the opinion concludes that the Harris Chain of Lakes Restoration Council is subject to the Government in the Sunshine Law.

Attorney General Opinion 2005-06: On behalf of the North Port Development Review Committee, the city attorney asked whether the committee, composed of several city officials and representatives of various city departments to review and approve development applications, is subject to the Government in the Sunshine Law. The committee is made up of city officials and representatives of numerous city departments and is designated, in the ordinance creating it, as a "committee established administratively." This office was advised that the committee does not serve as an advisory board or make recommendations to the city commission but rather reviews and approves development applications which are then referred to the planning and zoning board for recommendation to the city commission. The opinion concludes that the City of North Port Development Review Committee is subject to the Government in the Sunshine Law.

Attorney General Opinion 2005-05: On behalf of the City of North Port and the Chief of Police, the city attorney asked whether an advisory group created by the chief of police to make recommendations regarding various issues affecting the police department is subject to the Government in the Sunshine Law. The question arose because the group was created by a single public officer and conducts some fact-finding activities. The Attorney General concluded that an advisory group created by the chief of police to make recommendations regarding various issues affecting the police department is subject to the Sunshine Law.

Attorney General Opinion 2005-04: Counsel to the Leon County Property Appraiser requested an Attorney General Opinion addressing whether an application for ad valorem tax exemption, Form DR-501, is exempt from disclosure under Chapter 119, Florida Statutes. In addition, the Property Appraiser asked whether information contained on that form may be made part of other public records of the Property Appraiser's office, such as tax rolls or public information cards, and maintain its exempt status. Information collected on Form DR-501 includes name, address, telephone number, marital status, and proof of residence of the owner of the property. Proof of residence information includes driver's license number, vehicle tag number, voter registration number, and social security number. The opinion concludes that absent a specific statutory exemption for assessment rolls and public information cards, such documents made or received by the property appraiser are public records subject to the Public Records Law, regardless of the confidentiality of a return that may contain information used in their creation.

The full text of the Attorney General's Opinions may be accessed at www.myfloridalegal.com *by clicking the "AG Opinions" icon.*

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Ethics Opinions Update

In **CEO 06-5**, the Commission said that a city commissioner seasonally employed in a company's horsetrack operations was not subject to the voting conflicts law regarding city commission votes/measures affecting a development proposed by the company, where the votes/measures were considered at times outside his seasonal employment. The voting conflicts law addresses present, rather than past or future employment. However, the Commission pointed out that the city commissioner could abstain, and that it was making no finding regarding the laws pertaining to solicitation of gifts, unauthorized compensation, or misuse of position.

In **CEO 06-6** the Commission again dealt with the new expenditure law. There, the Commission said that an "agency employee" for purposes of Section 112.3215, Florida Statutes, as amended by Chapter 2005-359, Laws of Florida, would be prohibited from accepting an engagement party or wedding gifts paid for by lobbyists registered to lobby the Executive Branch. Although the prohibition would not extend to the agency employee's fiancée, who was employed by a law firm as a lobbyist, the Commission found that expenditures for the personal benefit of the agency employee would be considered to be for the purpose of obtaining his goodwill, and, therefore, prohibited lobbying expenditures.

CEO 06-4, March 8, 2006: An associate that lobbies Executive Branch agencies can host an event for Executive Branch agency officials and employees that includes food, beverages, and entertainment and collect a flat, per-person entrance fee based upon the total cost to plan, produce, stage, and clean up after the event divided by the number of persons reasonably expected to attend. By contemporaneously giving equal or greater consideration, Executive Branch agency officials and employees have not received a lobbying expenditure prohibited by Section 112.3215(6)(a), Florida Statutes, as amended by Chapter 2005-359, L.O.F. This opinion is the first to address the recent enactment of Chapter 2005-359, L.O.F., which amended Section 11.045, F.S., involving lobbyists who lobby the Legislature, and Section 112.3215, F.S., involving lobbyists who lobby Executive Branch agencies. Additionally, in the Frequently Asked Questions portion of the Interim Guidelines, a situation analogous to the Pre-Session AIF party was answered as follows:

Question: Can a lobbyist or principal host an event with food, beverages, entertainment, or other personal benefit for Legislators or Legislative employees and collect from each Legislator or Legislative employee, a flat, per person entrance fee based on the total cost to plan, produce, stage, and clean up after the event, divided by the number of persons reasonably expected to attend. **Answer:** yes.

CEO 06-3, March 8, 2006: Former AHCA employee would not be prohibited by Section 112.3185(3), Florida Statutes, from being employed with an HMO in connection with an AHCA Medicaid HMO contract but would be prohibited by Section 112.3185(4) from being so employed. While the employee was not involved in the procurement function [required for Section 112.3185(3) to be applicable], the contract was "within his responsibility." In order not to violate Section 112.313(9)(a) 4, Florida Statutes, the employee (who would be leaving an SES position) must confine (for two years after leaving public employment) his "representation" before AHCA to contact reasonably necessary to fulfill contracts.

CEO 06-2, March 8, 2006: Under the particular circumstances of this case, no prohibited conflict of interest was found where a resident commissioner of a city Housing Authority continued to work part time, under a federally-funded program administered by a state university, as a manager of a program tutoring sight located at an Authority complex. relevant factors included the fact that: the commissioner held the part-time employment prior to her being appointed as a commissioner; the administration of the program under which she was employed was conducted by the university and not the Authority; the Authority had normal involvement regarding the program; and the employee received modest compensation for part-time services. These factors supported the application of Section 112.316, Florida Statutes, to negate any conflict under Sections 112.313(3), 112.313(7)(a) and 112.313(10), Florida Statutes.

CEO 06-1, March 8, 2006: A selected exempt service attorney employed by the Florida Department of Transportation would be prohibited by Section 112.313(9)(a) 4, Florida Statutes, from personally representing another person or entity for compensation against the Department in eminent domain proceedings, negotiations for same, or in an inverse condemnation lawsuit or negotiations prior to such a lawsuit against the Department for two years following vacation of his position. The attorney was employed as a senior eminent domain attorney with the Florida Department of Transportation, in a selected exempt service position.

CEO 05-19, December 7, 2005: Through the application of Section 112.316, Florida Statutes, prohibited conflict of interest would not be created under Section 112.3185(3), Florida Statutes, were an employee of DCF to leave public employment and work with a foster care provider in connection with the DCF contract in which the employee had participated while a DCF employee. The participation occurred after the vendor was selected and the employee was not involved in the development of the invitation to negotiate for the

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contract and was not involved in the selection of the vendor. This decision was particularly fact specific.

CEO 05-18, December 7, 2005: Under the particular circumstances of this inquiry, no prohibited conflict of interest would be created under Section 112.313(7)(a), Florida Statutes, where an employee of the Enterprise Information Technology Services Office of the Department of Management Services to own stock options in a large, publicly-traded telecommunications company doing business with the department. The relatively small amount of options received by virtue of his prior employment, coupled with the size of the company, negate any conflict via Section 112.316, Florida Statutes.

CEO 05-17, December 7, 2005: An airport authority member would not be presented with a voting conflict regarding a measure to allow a developer to build a road through authority property resulting in an extension of the existing road along side property of a business owned by the member and her husband, where the business has existing road frontage, where its products are sold to the particular described clientele and not to the general public, and where its property is restricted to uses that would not benefit from increased traffic. Under the circumstances, any gain or loss to the business from the new road would be remote and speculative.

CEO 05-16, October 19, 2005: Through the application of Section 112.316, Florida Statutes, a prohibited conflict of interest would not be created under Sections 112.3185(3) and 112.3185(4), Florida Statutes, where as a Director of the Office of Tourism, Trade, and Economic Development within the Executive Office of the Governor to be selected President of Enterprise Florida, Inc. Even though the funding agreements included her signature and were within her ultimate authority as Director, it was clear, given the unique nature of the statutorily-created corporation and the limited discretion the Director had in administering the pass-through funds appropriated to it by the Legislature, that the application of Section 112.316, Florida Statutes, was proper under these particular circumstances.

CEO 05-15, September 7, 2005: A city commissioner whose private legal client is a potential developer of affordable housing within the city is not required to abstain from voting and otherwise comply with the voting conflicts law regarding city commission measures, votes to amend the city's affordable housing ordinance to raise the value/price of affordable housing. "Given the events, in addition to mere passage of the amendments that would have to occur in order for the client-developer to engage a project, any gain or loss to the client-developer (a principal by whom the commissioner is retained) would be 'remote and speculative.' However, the commissioner must comply with the voting conflicts law regarding measures-votes more insular to his client, such as measures/votes on his client's particular projects-permits."

CEO 05-14, September 7, 2005: A prohibited conflict of interest would be created under Section 112.313(3)(7), Florida Statutes, were a member of the Pinellas County Unified Personnel System Board to lease office space to Pinellas County. The Commission pointed out that the second part of Section 112.313(7) prohibits a public officer from having any contractual relationship, which would create a continuing or frequently recurring conflict between his private interests and the performance of his public duties, or would impede the full and faithful discharge of his public duties. The issue is whether the situation "tempts dishonor." The Board upon which the individual in question sat heard, among other things, appeals from negative personnel actions. Although the appeals constituted a small percentage of the Board's work, averaging only two or three a year, because of their nature they consumed 50% of the Board's time. Ultimately, the Commission stated, "There is a potential here that, because of the loose agreement, the member may be tempted to side with the County on issues before the Board. His financial interests in maintaining good relations with the County, while not overwhelming, is certainly substantial, and his opportunity to affect matters in which the County has an interest, particularly in the case of appeals, is significant. Viewing the facts you have described in light of the principles set forth above and the intent of the law, it seems to us that the circumstances would present the member with a 'temptation to dishonor' his public responsibilities."

Contact information for The Florida Commission on Ethics is The Florida Commission on Ethics, P.O. Drawer 15709, Tallahassee, FL 32317-5709, telephone 850-488-7864, facsimile 850-488-3077. All of the Commission's opinions may be found on its website at: www.ethics.state.fl.us.

*CEO 06-5 and 06-6 were Submitted by **Virlinda Doss, Senior Attorney.** The remaining opinions were summarized by the editor.*

A Call for Meaningful Tort Reform

by William N. Drake, Jr.

In my opinion, legislative efforts at tort reform over the last few years have consisted of measures designed to counter judicial decisions.

For instance, in F.S.§768.0710 (2002), the legislature overturned the Florida Supreme Court's decision in *Owens v. Publix Supermarket*, 802 So. 2d 315 (Fla. 2001), which had shifted the burden of proof in slip and fall cases from plaintiffs to defendants as to the length of time and reasonableness of a transitory substance existing on the floor. Several years ago, the legislature passed an amendment to F.S.§768.1382 in reaction to the Court's decision in *Clay Electric Cooperative, Inc. v. Johnson, Inc.*, 873 So. 2d 1182 (Fla. 2003), that a power company could be held liable to third parties injured by auto accidents in an area darkened due to inoperable street lights. More recently, amendments were passed to F.S.§380.276 in reaction to the decision in *Breaux v. City of Miami Beach*, 899 So. 2d 1059 (Fla. 2005), that a governmental entity owning a beach could be liable for a drowning due to a transitory natural condition such as a rip tide where the government had not warned of the condition, even though the beach had not been formally designated for swimming.

However, such legislation does nothing to address some fundamental procedural and substantive aspects of Florida personal injury law that beg for reform. After thirty years of civil trial practice in defense of local government, I am convinced that several changes in our tort system would substantially improve that system.

1. Shorten the Negligent Personal Injury Statute of Limitations.

I suspect my experience is similar to many defense attorneys: the alacrity of the plaintiff's attorney in filing a personal injury lawsuit often is directly proportional to the legal and economic viability of the claim. Inversely, less viable claims are frequently filed late— often a day or so before the statute of limitations runs. When such claims become lawsuits, they often languish through a protracted discovery process and are only prosecuted when the judge orders mediation or sets them for trial. In short, such claims are not deemed by the plaintiff's counsel to be worth the effort or expense to pursue diligently, but have "nuisance" value in part because our state personal injury statute of limitations increases the claim's "shelf life" before suit must be filed and money spent in prosecuting the suit.

Florida has a four-year statute of limitations for personal injury actions founded upon negligence. Only six states have statutes this long, and the majority have statutes of two years or less.[1] Florida's generous statute encourages procrastination among personal injury lawyers in filing lawsuits on weak claims and, ultimately, wastes judicial resources if suit is filed. In a time when our judiciary is focusing on technical modernization and efficiency and grousing about a lack of adequate funding, our legislature should assist by amending 95.11, Fla. Stat., shortening the personal injury statute of limitations to bring the state in line with the majority of other jurisdictions.

2. Adopt the Federal Summary Judgment Standard

Florida's standard for summary judgment in negligence cases is, in my opinion, unrealistic and impractical. In my experience, many circuit court judges will not grant summary judgments in negligence cases for fear that they will be reversed on appeal. Consequently, if negligence cases are not settled, the issues likely will be submitted to an overburdened jury system. This frightening reality promotes settlements, but also encourages more personal injury lawsuits and increases the cost of insurance.

In February 2002, two assistant county attorneys for Miami-Dade County, Thomas Logue and Javier Alberto Soto, published a scholarly and persuasive article in the *Florida Bar Journal* entitled "Florida Should Adopt The *Celotex* Standard for Summary Judgments." The article advocated Florida's adoption of the standard for summary judgment applied by the federal courts saying:

> In a series of opinions issued in 1986 known as the *Celotex* trilogy, the U.S. Supreme Court modernized the standard for reviewing motions for summary judgment in federal court. Although not bound by such federal procedural law, over 35 states have followed the Supreme Court's example because, in the words of the Supreme Court of Massachusetts, "we think it makes eminent good sense to do so." In contrast, the Florida Supreme Court has not seriously examined its summary judgment standard since deciding the leading cases of *Holl v. Talcott*, 191 So.2d 40 (1966), and *Visingardi v. Tirone*, 193 So.2d 601 (Fla. 1967), at the beginning of the litigation boom in the late 1960s.[2]

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For reasons so eloquently explained by my colleagues from Miami in their excellent article, it is time for Florida to adopt the modern *Celotex* standard and put an end to the standard that currently prevails. The most direct and appropriate way to accomplish this change would be by amendment to Fla. R. Civ. P. 1.510 , as recommended in the cited article. Legislation would likely be regarded by the Court as in contravention of its rule making authority.

3. Reject the Foreseeable-Zone-of- Risk Test for Duty in Negligence Cases

In my opinion, Florida also has judicially adopted an unusually liberal standard for determining the existence of duty in negligence cases.[3] Since *McCain v. Florida Power Corp.*, 593 So. 2d 500 (Fla. 1992), the law in Florida has been that foreseeability equates to duty, so that conduct creating a "foreseeable-zone-of-risk" produces a legal duty of care. The traditional test for duty in negligence law recognized that foreseeability was only one factor to be considered and that the courts should responsibly weigh a variety of other social and economic factors before determining whether to impose a duty.

The potential liability exposure of whole classes of third party defendants such as landowners, retailers, physicians and other professionals, utilities and local governments has been expanded enormously as a result of the standard for duty in Florida.

Changes in the law will not be easy to accomplish as they will not benefit either private plaintiffs or defense lawyers. However, as public servants, government lawyers are in a unique position to promote such reforms, which will be in the public interest as well as the interest of our judicial system. I hope you will accept the challenge and endeavor to effect the much needed, meaningful tort reforms discussed here.

Editor's Note: *This article expresses the author's opinion and does not necessarily represent the views of the Section or its members.*

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Endnotes:

1. Table of Personal Injury Statutes of Limitations by State:

State	Time Period	Authority
Alabama	2 years	Code of Alabama §6-2-38(1)
Alaska	2 years	Alaska Statutes §09.10.070(a)
Arizona	2 years	Arizona Revised Statutes Ch. 5 Art. 3 §12-453(1)
Arkansas	3 years	Arkansas Code §16-56-105(1)
California	2 years	California Code of Civil Procedure §335.1
Colorado	2 years	Colorado Revised Statutes Art. 80 §13-80-102(1)(a)
Connecticut	2 years	General Statutes of Connecticut Title 52 Ch. 926 §52-584
Delaware	2 years	Delaware Code Title 10 Ch. 81 §8119
Dist. of Columbia	3 years	District of Columbia Code §12-301(8)
Florida	4 years	Florida Statutes §95.11(3)(a)
Georgia	2 years	Georgia Code §9-3-33
Hawaii	2 years	Hawaii Revised Statutes §657-7
Idaho	2 years	Idaho Code §5-219(4)
Illinois	2 years	735 Illinois Compiled Statutes 5/13-202
Indiana	2 years	Indiana Code Title 34 Art. 11 Ch. 2 §4
Iowa	2 years	Iowa Code §614.1(2)
Kansas	2 years	Kansas Statutes §60-513(a)(4)
Kentucky	1 year	Kentucky Statutes §413-140
Louisiana	1 year	Louisiana Civil Code Art. 3492
Maine	6 years	Maine Revised Statutes Title 14 §752
Maryland	3 years	Maryland Statutes §5-101
Massachusetts	3 years	General Laws of Mass. Ch. 260 §2A
Michigan	3 years	Michigan Compiled Law Ch. 600 §5805(10)
Minnesota	2 years	Minnesota Statutes §541.07(1)
Mississippi	3 years	Mississippi Code §15-1-49(1)
Missouri	5 years	Missouri Statutes §516.120(4)
Montana	3 years	Montana Code §27-2-204(1)
Nebraska	4 years	Nebraska Statutes §25-207
Nevada	2 years	Nevada Revised Statutes §11.190(4)(e)
New Hampshire	3 years	Revised Statutes of New Hampshire §508:4I
New Jersey	2 years	New Jersey Statutes §2A:14-2
New Mexico	3 years	New Mexico Statutes §37-1-8
New York	3 years	Laws of New York §214(5)
North Carolina	3 years	North Carolina General Statutes §1-52(5)
North Dakota	6 years	North Dakota Century Code §28-01-16
Ohio	2 years	Ohio Revised Code §2305.10(A)
Oklahoma	2 years	Oklahoma Statutes Title 12 Ch. 3 §95(A)(3)
Oregon	2 years	Oregon Revised Statutes §12.110(1)
Pennsylvania	2 years	Pennsylvania Consolidated Statutes §5524(2)
Rhode Island	3 years	Rhode Island General Laws §9-1-14(b)
South Carolina	3 years	South Carolina Code of Laws §15-3-530(5)
South Dakota	3 years	South Dakota Codified Laws §15-2-14(3)
Tennessee	1 year	Tennessee Code §28-3-104(1)
Texas	2 years	Texas Civil Practice & Remedies Code §16.003(a)
Utah	4 years	Utah Code §78-12-25(1)
Vermont	3 years	12 Vermont Statutes §512(4)
Virginia	2 years	Virginia Code §8.01-243
Washington	3 years	Revised Code of Washington §4.16.080(2)
West Virginia	2 years	West Virginia Code §55-2-12
Wisconsin	3 years	Wisconsin Statutes §893.54
Wyoming	4 years	Wyoming Statutes §1-3-105(a)(iv)©)

Data compiled by David J. Lopez, Local Governmental LawClinical Intern, Stetson University College of Law.

2. Thomas Logue and Javier Alberto Soto, *Florida Should Adopt the Celotex Standard for Summary Judgments*, LXXVII, NO 2, Fla. B. J. 20 (February 2002)

3. William N. Drake, Jr., *Foreseeable Zone of Risk: Confusing Foreseeablity With Duty in Florida Negligence Law*, LXXVII, NO 4, Fla. B. J. 10 (April 2004)

Personnel Issues and the War in the Middle East

by Kenneth R. Harrison, Sr.

The Uniformed Services Employment and Reemployment Act (USERRA) is perhaps the most significant labor legislation enacted in recent history. An effort by congress to provide a semblance of protection for citizen soldiers, while ensuring federal supremacy to raise an armed force in times of need. USERRA was enacted as an update of existing law in 1994, and was revised in 1996 and again 1998. The highlights of the provisions of this act are as follows:

Employee protected from adverse employment practices relating to military service.

A. Initial hiring

B. Employment security on recall to military service

C. Extends to witnesses of discriminating act against an employee by an employer

Employer must excuse employee to attend reserve drills or annual training

A. two days monthly

B. two weeks annually

Cumulative service limit of five (5) years (per employer) of involuntary or voluntary military service

A. Excluding monthly drills and annual training

B. Excludes involuntary recall and additional necessary training

Notice required

A. Verbal or written

B. No set time requirement, but as much time as possible

C. Employer may require written order for leave of more than thirty (30) days

D. Employer may request to reschedule, however the Military command will determine if necessary

Pay during military service

A. USERRA - Employer not required to pay

B. Florida Law – Chapter 115 Florida Statutes (Sections 115.09 & 115.14- Full pay 30 days (governmental employees), and may supplement the difference (regular pay v. military pay) thereafter.

Return to work requirements

A. USERRA

1. 1-30 days of military service – next scheduled shift after 8 hours (drills and annual training).

2. 31 – 180 days of military service – not later than 14 days

3. 181 and more days of military service – not later than 90 days

B. If injured during military service may extend return to work for up to two (2) years.

C. Florida Law – Chapter 175 & 185 Florida Statutes (Sections 175.032(4) (d) 3. & 185.02(5) (d) 3.) – Up to one year to return to employment, Police Officers and Firefighters (not general employees), controls as more liberal than USERRA

Requirements on returning to Job Status

A. Return to job would have had if stayed in employ, includes escalator principle. If entitled and would have received pay increases or promotion will return to those levels

B. Depends on length of military service

1. 1 –90 days of military service – as stated in A. above so long as qualified or can become qualified after reasonable effort by employer

2. 91 or more days of military service – as stated above or a position of like seniority, status and pay so long as qualified or if cannot become qualified, in position employed on the date of commencement of military service or position that nearly approximates that position

3. Must be reemployed promptly, employer may take some time to do, such after lengthy term of military service may take time to give notice to incumbent employee to vacate position

Pension status

A. All contributions cease (employee and employer); however, a question arises where the employer supplements an employee pension;

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an employee's military pay; generally best not to take pension contributions from supplemental pay.

B. Similar to terminated vested status – pension frozen until return

C. On return USERRA requires payment of employee contribution for period of military service and prohibits charging interest.

D. Florida law, Chapters 175 & 185 (Sections 175.032(4) (d) & 185.02(5) (d)), forgives such payment and grants credit service for time in military service (excludes prior military service) for firefighters and police officers.

Health Insurance status

At employee's option

1. May stay in employer plan – treated like COBRA, may be charged premium
2. Drop out of employer plan – use military medical coverage – but must be allowed back in plan on return to employment as if never left; no waiting period

Return to Job Status

A. Return to prior position as if never left, pay increased if would have during absence and promoted if would have during absence.

B. If position had increased qualifications must be given time to qualify.

C. If cannot qualify then must be given job of equal pay, benefits and status.

D. If disabled in some manner must be given reasonable accommodation.

Summary

Once an employee notifies his or her employer that the they have been called up for military service, an employer may request rescheduling from the military for hardship reasons. However, the military is in complete control of whether it will grant the request. Once deployed an employee is treated as if he or she is no longer an employee, insurance premiums may be charged if the employee opts to stay in employer plan. In addition, the employer may cease pension contributions. When the employee returns to civilian work, he or she reenters the insurance plan as if they never left. In other words, they have no waiting period. In addition, once the employee returns he or she is entitled to get their old job back as if they never left. This includes the fact that he or she will be entitled to any promotions they would have got had they not left the job. They must be given opportunity to meet any new requirements of the position that were adopted while they were performing their military service. If they are unable to qualify, they must be given a position of equal pay, benefits and status. Reasonable accommodation must also be given.

Under Florida law police officers and firefighters receive credited service in pension plans without payment of past employee contributions. However, general employees may be required to make employee contributions to the applicable plan for the period of military service but may not be charged interest.

Author's Note: *Many government legal departments and government attorneys have and will continue to face the realities of being effected by the war in the Middle East. Given the military's increasing reliance on our members of the Guard and Reserve, every employer plays an important role in our national defense. But Federal government lawyers and managers should be especially aware of USERRA's purposes provision, which states that "It is the sense of Congress that the Federal Government should be a model employer in catrying out the provision of this chapter." 38 U.S.C. §4301 (b). Finally, readers should note that in December 2005, the Department of Labor enacted new USERRA regulations, codified at 20 CFR Part 1002. For more information about USERRA and its requirements, consult the resources offered by the National Committee for Employer Support of the Guard and Reserve, www.esgr.org.*

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