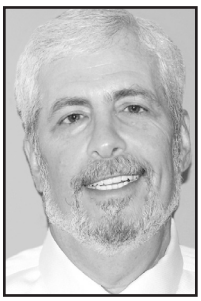
THE FLORIDA BAR
The Government Lawyer Section
REPORTER
Spring 2008
"No Higher Calling"

Message From the Chair

By Bob Krauss



It is not the norm for an attorney to be pleased to have to issue a retraction, but I am delighted to do so with regard to the following remarks I made in the "Message from the Chair" which appeared in the Fall 2007 GLS Newsletter: "...[O]ne of the goals I had wanted to set for this year was to commence the institution of a student loan forgiveness program through the legislative process. We have been advised, however, that the State's financial climate forbids consideration at this time of a program which many believe would help narrow the economic disparity which exists between public and private sector lawyers." Subsequent to the publication of those remarks a series of events occurred which, happily, necessitate this retraction. The Government Lawyer Section is now spearheading the effort to seek loan forgiveness and related matters on behalf of the many lawyers who devote their professional talents on behalf of the public!

First, Attorney General Bill McCollum's Chief of Staff, Deputy Attorney General Joe Jacquot, advised that the Attorney General very much wants to support the effort to establish a loan forgiveness program as part of his Recruitment, Retention and Recognition Initiative. Second, General Counsel for the Department of Children and Families, John Copelan, advised that he and others were already researching this matter and wanted to place the issue on the agenda for the GLS Long-Range Planning session that was to be held in Apalachicola last November; it was placed on the agenda, discussed at some length, and a symposium was planned for the January Midyear Meeting of the Florida Bar in Miami. In addition, the GLS established a Loan Forgiveness Committee which John Copelan graciously agreed to chair. Third, an article appeared, fortuitously on the front page, of the December 15, 2007 Florida Bar News which highlighted our Section's willingness to work on the loan forgiveness issues. That article generated many responses from public sector lawyers throughout the state who advised that this was an issue near and dear to their hearts and that they would offer whatever assistance was needed to try and make loan forgiveness a reality. Finally (for now), the aforementioned sym-

continued, page 2

Student Loan Forgiveness Workgroup Met in Orlando

Upon graduation, law students have the decision of working in public service and government positions or working in private practice. According to the National Association of Student Financial Aid Administrators in their 2003-04 study, 87 percent of public law school graduates have an average debt of $51,230 and 86 percent of private law school graduates have an average debt of $64,854. Facing these numbers, the average law school graduate's decision seems already made: practice in the more lucrative, private sector to be able to pay off those loans!

In an effort to make public service and government positions more attractive and financially viable for new graduates, Department of Children and Families General Counsel John J. Copelan, Jr., a former chair of the Government Lawyers Section, has been appointed Chair of a Florida Bar Government Lawyers Section Loan Forgiveness Committee by Section Chair Bob Krauss. Krauss also appointed Clark Jennings and Tony Musto, former Section chairs, to this committee as Vice Chairs. Mr. Jennings serves as Chief Counsel for the Florida Department of Agriculture. Professor Musto is currently the Legal Writing and Research Director of the Community Outreach and Pro Bono Services program at St. Thomas University School of Law.

As its primary goal, this Committee hopes to both educate and encourage the legislature to create loan repayment assistance plans for public service and governmental lawyers in the State of Florida. Realizing that the State should

continued, page 3

THE GOVERNMENT LAWYER
SECTION REPORTER

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ARTICLES FOR NEXT ISSUE DUE
April 18, 2008

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 *shall@flabar.org.*). Please contact Summer Hall at 850/561-5650.

MESSAGE FROM THE CHAIR

from preceding page

posium was held in Miami where we have begun to coordinate the efforts necessary to achieve establishment of assistance programs for government lawyers. In addition to the valued input from Fifteenth Circuit Assistant State Attorney Timothy Beckwith who was representing the Young Lawyers Division, and from two Assistant Attorneys General who shared their personal stories and hopes for some help in the future, we were especially gratified that Department of Children and Families Secretary Bob Butterworth devoted a significant portion of his valuable time to offer whatever assistance is needed to make loan forgiveness happen. We will assuredly take advantage of Secretary Butterworth's generous offer of assistance as we progress in the process. His is an authoritative voice to which others listen.

Next on the immediate horizon for the Section is an event which occurs but once every two years, the Federal Seminar. I encourage all GLS members to consider attending this valuable program and to bring this Seminar to the attention of all who might be interested. This year there will be two venues: the Supreme Court of the United States on the first day of the Seminar, and the U.S. Capitol on the second. All attendees not yet a member of the Bar of the Supreme Court will have the opportunity to be sworn in by the Chief Justice of the United States immediately prior to the oral arguments on March 24, and we will remain in the Courtroom to hear those arguments. Significantly, attendees will receive 11 CLE credits for this Seminar, and for those who will be seeking certification in State & Federal Government & Administrative Practice these hours may be applied to satisfy Board Certification requirements.

As Chair of your Section I would be remiss in my duties if I failed to acknowledge a situation in which we, as government lawyers, find ourselves at present – the unhealthy fiscal condition of our State as it affects government lawyer employment. As of this writing I am unaware of any budget proposals which will afford government employees a much-needed salary increase. Coming on the heels of at least two years in which our salaries were not increased (but for a very great minority who were fortunate enough to receive some sort of a merit increase), the present economic climate is not a friend to the government lawyer. It is during these times that the Government Lawyer Section can be, should be, and will be an advocate for the government lawyer. I am proud to be a career government attorney who has chosen to work on behalf of the citizens of our State. I am proud to serve with similar-minded lawyers on the GLS Executive Council. I am proud to know literally hundreds of government attorneys who truly believe in the motto of our Section, "No Higher Calling." Pride in being a government lawyer is why we will continue to press forward with loan forgiveness and related issues; it is why we will continue to make available reasonably priced CLE opportunities; and it is why we will continue striving to find new ways to benefit the lot of government lawyers.

IN THIS ISSUE:

FORGIVENESS WORKGROUP
from page 1

not loose its law school graduates to private practice due to high student loan debt, the Committee intends to focus on how the State can provide the financial incentives to work in public service.

This past October the federal Cost of College Reduction and Access Act of 2007 was signed into law (20 USC § 1087e). The creation of this new law helps public service lawyers by lowering monthly loan repayments based on income and ultimately cancels remaining loan debt after 10 years of public service. To meet the requirements for loan forgiveness a borrower must: (1) make 120 qualifying monthly payments on an eligible Federal Direct Loan on or after Oct. 1, 2007; (2) be employed in a public service job as defined in the Act during the time he or she makes the qualifying monthly payments; (3) be employed in a public service job as defined in by the Act at the time the Secretary of Education forgives the loan; and (4) make qualifying payments under the repayment options enumerated in the Act. Included in these repayment options is the Income Based Repayment plan, in which a borrower's repayments would be significantly reduced (based on their income) over the 10 year repayment period, after which loan debt is forgiven.

With the implementation of this new federal legislation, one of the Loan Forgiveness Committee's priorities has been to further study the possibility of the State legislature implementing a "gap coverage" program. Under such program a recent law school graduate's payments could be further reduced during the 10 year repayment period. Such a program would not only make public and governmental service attractive, but would let the State stand-out at the forefront of recruiting public service attorneys.

The Loan Forgiveness Committee recently held a committee workgroup on March 14 in Orlando. The committee is now scheduled to hold a symposium at The Florida Bar's 2008 Annual Convention in Boca Raton on Friday, June 20 at 1 p.m. All interested Bar members, law school administrators and student bar leaders are invited. Please contact John Copelan at 850-488-2381 for further information about participating.

An Overview of Indigent Criminal and Indigent Civil Representation

By Joseph P. ("Joe") George, Jr., Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Third District Court of Appeal Region for Miami-Dade and Monroe Counties.

Under the American justice system, persons who cannot afford to hire a lawyer are often entitled to have an attorney appointed to represent them at public expense. In the landmark Florida case in 1963 of Gideon v. Wainwright, 372 U.S. 335 (1963), for instance, the United States Supreme Court held that the Sixth Amendment guarantee of the right to counsel in criminal cases required our state to provide counsel for indigent defendants in criminal cases. This decision was viewed by most as a defining moment for Americans. More recently in Florida, in the Interest of D. B., 385 So.2d 83 (Fla. 1981), the Florida Supreme Court held in 1981 that indigent parents are entitled to have counsel appointed to represent them when the permanent termination of their parental rights over a child is sought by State authorities. In 2002, in State v. Goode, 830 So.2d 817, 829 (Fla. 2002) (per curiam), the Florida Supreme Court held that the appointment of counsel for persons facing commitment as sexually dangerous predators under the Jimmy Ryce Act, Sections 394.910 et seq., Florida Statutes, must occur as soon as the proceedings are initiated, because the appointment of counsel for such persons "represents a significant step in assuring that the proceedings meet constitutional muster." Id., at 829.

Paragraph (2)(d) of Section 393.12, of the Florida Statutes, which Chapter is the Developmental Disability Law, provides for the appointment of an attorney to represent any developmentally disabled person who is the subject of a petition for the appointment of a Guardian Advocate under that section and who cannot afford to hire an attorney. And paragraph (4)(a) of Section 390.01114, of the Florida Statutes, the Parental Notification of Abortion Act, provides that when a pregnant minor files a petition for permission, under that section, to terminate her pregnancy without notice to her parents, the court must advise the minor of her right to court-appointed counsel, and provide the minor with an attorney if she requests one.

Historically, Florida has provided legal counsel to indigent defendants in criminal cases through the Public Defenders' offices, with restricted jurisdiction otherwise. Legal representation for persons deemed entitled to counsel in civil matters has been provided by the appointment – on a case by case basis – of attorneys in private practice, who agree to accept such appointments under a contract and who are paid by the State or by the counties for their work. Also, in criminal cases with more than one indigent defendant, private attorneys have been appointed (and paid by the State or counties) for all but the first indigent defendant, because of the potential conflict of interest between defendants who might have inconsistent defenses and work at cross purposes to each other. The use of private attorneys to meet this need has, however, been expensive. For the fiscal year ending on June 30, 2007, the cost of appointed counsel in criminal cases was estimated to be $ 59 million, and the cost of appointed counsel for civil cases was estimated to be an additional $ 31.2 million.[1]

In 2007 the Florida Legislature moved to address the apparent cost expansion of indigent's legal representation. And on May 24, 2007, Florida Governor Charlie Crist approved and signed into law Chapter 2007-62 of the Laws of the State of Florida, which added and amended various portions of the Florida Statutes, to create a new Office of Criminal

continued, next page

Conflict and Civil Regional Counsel (OCCCRC). Actually, five such offices were created, one for each geographic region for each preexisting District Court of Appeal, to help meet the goal of providing legal representation to persons entitled to such, in both criminal cases the Public Defender's office declined, and civil cases requiring indigent defense counsel, in a fiscally responsible manner.

Effective October 1, 2007, the Office of Criminal Conflict and Civil Regional Counsel has primary responsibility for representing persons entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law in civil proceedings, including, but not limited to, proceedings under Sections 393.12 ("Every person with developmental disabilities who is subject of a petition to appoint a Guardian Advocate shall be represented by counsel.") and Chapters 39 - Proceedings Relating to Children, 390 – Termination of Pregnancies, 392 – The Tuberculosis Control Act, 394 – The Florida Mental Health Law (Baker Act) upon conflict, 397 – The Hal S. Marchman Alcohol & Other Drug Services Act of 1993, 415 – The Adult Protective Services Act, 743 – The Removal of Disability of Nonage, 744 – The Florida Guardianship Law, and 984 – Children and Families in Need of Services. The new office must also handle all circuit court appeals within the state courts system and any authorized appeals to the federal courts which are required in cases in which the office is appointed. The idea behind the new Offices of Regional Counsel is to have – for each region – an office with a staff of government attorneys and support personnel employed by the State, able to provide counsel to indigents at much lower cost (through economies of scale) than the system of appointing private attorneys.

At the time of this article, all of the new Offices of Regional Counsel are not yet fully operational, but they have all begun operations and are successfully working to rapidly achieve complete statewide operational status. In November 2007, the Florida Association of Criminal Defense Lawyers ("FACDL")(a group including private attorneys who used to be appointed as counsel for alleged criminal and civil indigent defendants) filed a lawsuit to challenge the constitutionality of Chapter 2007-62, the law creating the Offices of Regional Counsel, that predominantly preempted private attorneys to be appointed.

The main issue in FACDL's lawsuit is the fact that Chapter 2007-62 provides for the appointment of the head of each Regional Counsel office by the Governor. FACDL's lawsuit argues that this is inconsistent with Section 18 of Article V of the Florida Constitution, which provides that Public Defenders must be elected, and that the new Regional Counsel's are merely Public Defenders by another name.

In December 2007, the Circuit Judge assigned to the FACDL lawsuit entered a judgment as sought by FACDL, holding that the new Offices of Regional Counsel were unconstitutional because the heads of those offices were not elected. The Solicitor General of the Attorney General's office has been defending the new offices and Chapter 2007-62 in the FACDL lawsuit, and the Attorney General's office has filed an appeal from the Circuit Court judgment. The appeal has been certified as one of great public importance and is now pending in the Florida Supreme Court, as that court's case number SC08-02, with oral argument scheduled for February 27, 2008.

Whatever the outcome of the Florida Supreme Court determination, at least two things remain clear. First, indigents in Florida that are accused of criminal and civil offenses (or needs) should be entitled to the constitutional protections of government lawyer representation. Second, Florida's taxpayers footing this expense should be respected in a fiscally responsible way.

Joe George is a former Chair of the Government Lawyer Section (1999-2000). Mark Hanson, an appellate law specialist and Assistant Regional Counsel, assisted with the research and drafting of this article.

(Endnotes)

1 Professional Staff Analysis and Economic Impact Statement for Senate Bill 1088 (the bill enacted as Chapter 2007-62), prepared for Senate Criminal and Civil Justice Appropriations Committee, dated March 19, 2007, page 2

Recent Cases

Florida Supreme Court

Florida's lethal injection procedures are not constitutionally deficient.

Lightbourne v. Bill McCollum, SC06-2391, 11/1/07

Complications arose during the execution of Angel Diaz. As a result other inmates brought an action challenging Florida's lethal injection procedures, arguing that the procedures violated the Eighth Amendment. Executions in Florida were stayed pending the results of a study.

After an exhaustive review of the procedural facts and current law, the Florida Supreme Court ruled that Lightbourne" has failed to show that Florida's current lethal injection procedures, as actually administered through the DOC, are constitutionally defective in violation of the Eighth Amendment of the United States Constitution."

Private property had no duty of care to motorist at intersection with regard to foliage located wholly within the boundaries of her property.

Williams v. Davis, SC05-1817, 11/21/07

Twanda Green was killed in an automobile accident at an intersection. Her personal representative sued several Defendants including a residential property owner whose property abutted the intersection. The claim against the property owner was for negligence in maintaining foliage and that the foliage obstructed the view for drivers entering the intersection. Finding that there was no duty of care, the trial court issued a summary judgment in favor of the Defendant. The Fifth District

continued, page 7

Attorney General Opinions Update

by Jerry Hammond and Lagran Saunders of the Office of the Attorney General, Opinions Division

The following is a synopsis of several recently issued Attorney General Opinions that may be of interest to governmental agency attorneys. To read a complete version of any of these opinions please visit the Florida Attorney General's website: www.myfloridalegal.com. Click on "AG Opinions" to view a searchable database of opinions dating from 1974. Government attorneys may also call the Opinions Division of the Attorney General's Office to discuss any of these opinions or other questions they may have by calling (850) 245-0158.

AGO 2007- 41 – COUNTY REGULATION – CHARTER AMENDMENTS

A county charter can be amended to limit the power of the county and each of the county's incorporated municipalities to increase total residential density. Such a change may be effected through Article VIII, section 1(g), Florida Constitution, and the statutes implementing this constitutional provision as discussed in Seminole County v. City of Winter Springs.

Based on the holdings in the Broward County and Seminole County cases, a proposed charter amendment creating a uniform comprehensive plan for land use and planning does not constitute a transfer of powers pursuant to section 4, Article VIII, Florida Constitution. Therefore, a countywide referendum dealing with the issue is required, but separate referenda in all the affected municipalities and the county pursuant to Article VIII, section 4, are not.

AGO 2007- 42 – SCHOOLS – SCREENING – PUBLIC OFFICERS AND EMPLOYEES

In light of the mandatory language of section 1012.465, Florida Statutes, and inasmuch as noninstructional school district employees do not fall within the exceptions recognized therein, all noninstructional school district employees who are permitted access on school grounds when students are present, who have direct contact with students, or who have access to or control of school funds must meet level 2 screening requirements as described in section 435.04, Florida Statutes.

Local school districts do not constitute licensing departments as contemplated in section 435.07, Florida Statutes, such that they would be authorized to grant exemptions from disqualification under that statute.

AGO 2007- 43 – DUAL OFFICE-HOLDING – MUNICIPALITIES

A city council would be precluded from appointing the city clerk to also serve as city manager. However, the city charter could be amended to provide that the city manager shall also perform the duties of the city clerk. Such an ex officio designation imposing the duties of one office on another office, rather than on the specific individual who was serving in such office, would not violate the provisions of Article II, section 5(a), Florida Constitution.

AGO 2007- 44 – OPEN GOVERNMENT LAWS – PROPERTY OWNERS ASSOCIATION

In light of the agreement between a municipal services taxing unit and a property owners' association delegating the performance of services that would otherwise be performed by the MSTU to the POA, the POA is subject to the Public Records Law and the Government in the Sunshine Law when it is carrying out business related to such roles. Accordingly, to the extent the POA is acting on behalf of the MSTU, the association is subject to Florida laws governing public records and open meetings.

AGO 2007- 45 – SCHOOL BOARDS – VEHICLE MAINTENANCE

A school district is not authorized, pursuant to section 1001.32(2), Florida Statutes, to enter into a contract with a city for construction of a vehicle maintenance facility to provide vehicle maintenance to the city. While the school district possesses a variant of home rule powers which provides it with a broad grant of authority to act for educational purposes, I cannot conclude that the mere receipt of funds as a quid pro quo for services rendered and the deposit of those funds into the school budget would satisfy an educational purpose.

AGO 2007- 46 – MUNICIPALITIES – AIRPORTS – LEASES

A city is authorized to lease property at the city airport for a term of more than 30 years for non-aeronautic purposes.

AGO 2007- 47 – COUNTIES – TORTS – PUBLIC RECORDS

While the notice of claim may become a part of the claim file for a particular incident or accident, there is nothing within section 768.28, Florida Statutes, that expressly includes or excludes the notice as a part of the claims files exempt from public disclosure. Ultimately, the county must make a careful and good faith determination whether the notice of claims would be confidential and exempt from disclosure pursuant to section 768.28(16)(b), Florida Statutes. It should be noted, however, that certain information contained within the notice, such as the social security number of a claimant, would be exempt from disclosure pursuant to other statutory provisions.

continued, next page

Attorney General Opinions Update

AGO 2007- 49 – AIRPORT AUTHORITIES – BIDDING – CONTINUING CONTRACTS

Nothing in section 287.055, Florida Statutes, limits the number of continuing contracts
into which an agency may enter at one time. In fact, the statute appears to recognize that multiple contracts may be in effect simultaneously; otherwise, the statutory language precluding firms from being required to bid against one another would be superfluous. Therefore, an airport authority may enter into multiple continuing contracts for professional services pursuant to section 287.055, Florida Statutes.Section 287.055(2)(g), Florida Statutes, would control any continuing contracts for professional services into which an airport authority may enter and would prohibit the authority from asking firms providing professional services under continuing contracts to bid against one another.

AGO 2007- 50 – MUNICIPALITIES – SOLICITATION

Section 316.2045(3), Florida Statutes, as amended by Chapter 2007-43, Laws of Florida, does not preempt a city ordinance prohibiting the solicitation of donations for charitable, religious, educational, benevolent or any other purposes on publicly-owned streets. Rather, the statute is addressed to local governments that have adopted a permit system for solicitation activities on non-state maintained roadways. I would strongly suggest that the Florida Legislature revisit this statute to consider the First Amendment problems raised by the Bischoff case.

AGO 2007 - 51 – MUNICIPALITIES – TAXATION

Section 212.055(2), Florida Statutes, does not allow a city to use infrastructure surtax proceeds to fund the infrastructure improvements and repairs of a facility owned and operated by a private non-profit corporation.

AGO 2007 - 52 – CLERKS OF COURT – FINES – FEES – COLLECTIONS

In light of the language of sections 28.246 and 28.35, Florida Statutes, the clerk of court is not authorized to charge a fee to the collection agent or attorney for support services provided by the clerk when an unpaid amount owed to the clerk is referred to an agent for collection. Rather, any administrative support costs incurred by the clerk after referring unpaid fines and fees for collection should most appropriately be paid from "filing fees, service charges, court costs, and fines" as provided in section 28.35(4)(a), Florida Statutes.

AGO 2007- 54 – SUNSHINE LAW – PUBLIC EMPLOYEES

A three member panel established under the city's personnel policy and appointed by the city manager to conduct post-termination hearings of city employees should conduct its hearings in accordance with section 286.011, Florida Statutes.

AGO 2008 - 01 – MUNICIPALITIES – SUNSHINE LAW

Based on constitutional and statutory considerations, as well as previous opinions of this office, a city council may not temporarily relocate the site of public meetings to an adjacent municipality in the absence of state legislative authorization to do so. While the requestor's letter indicates that no commercial space is available for lease to the city for conducting these meetings, it may be possible for the city commission to hold meetings in a school auditorium, church fellowship hall, or the club house of a residential development located within the city on a temporary basis until construction of the new city hall is complete. Any of these venues might be available to the city and would meet the need for a short-term location within the city limits at which to hold official meetings.

AGO 2008 - 02 – COMMUNITY DEVELOPMENT DISTRICT – PUBLIC FUNDS

A community development district is not authorized to expend surplus district funds in support of activities such as holiday social events that are not within the scope of those powers and duties set forth in sections 190.011 and 190.012, Florida Statutes, and county enabling legislation. Further, the interest earned on community development district funds may only be expended for the same purposes that district revenues may be used and may not be used for activities outside the scope of sections 190.011 and 190.012, Florida Statutes, and county enabling legislation. As the district must use these funds for district purposes, the board of supervisors may wish to consider reducing rates for residents of the district using this surplus and interest to accomplish such reductions.

AGO 2008 - 03 – COUNTIES – COURT-RELATED TECHNOLOGY

A board of county commissioners may allocate proceeds of the service charge distributed under section 28.24(12)(e), Florida Statutes, for payment of the cost of installing fiber optic cable throughout the county courthouse, if the cable will be employed to transmit the digitized voice, facsimile, and data signals of a unified telephone and computer network.

AGO 2008 - 04 – SPECIAL DISTRICTS – RESOLUTION – ORDINANCE

A port, waterway and beach commission must exercise its authority pursuant to resolution, not by ordinance.

reversed the trial court.

The Florida Supreme Court reversed the Fifth District finding that private property owners (unlike commercial property owners) do not owe a duty to motorists on abutting roadways as to the maintenance of foliage located wholly within the bounds of the property.

First District Court of Appeal

Agency investigation and report did not amount to unpromulgated rule.
Florida Department of Financial Services v. Capital Collateral Regional Counsel, 1D07-0253, 11/26/07

The Office of Fiscal Integrity within the Department of Financial Services (DFS) issued a report that found improper spending on the part of Capital Collateral Regional Counsel (CCRC). The report determined that the counsel for CCRC used funds for private lobbyists which was prohibited by F.S. 11.062 governing spending for executive agencies. No action was taken against CCRC or its counsels to correct the misuse of funds. However, CCRC and its counsel objected to the report's finding that they were an executive agency. They brought action pursuant to F. S. 120.52 against DFS, arguing that the report amounted to an unpromulgated rule. The ALJ found that DFS had applied an agency rule without proper rulemaking procedures.

The First District found that the ALJ had erred and reversed. Determining that the report did not amount to a rule, the court said, "A recommendation which, standing alone does not require compliance, create certain rights while adversely affecting others, or otherwise have the direct and consistent effect of law, does not constitute a rule." The court also said, "…merely conducting and reporting on an investigation does not amount to promulgating a rule which can be preemptively challenged prior to any attempt by an agency at enforcement."

Evidence of a routine practice should have been allowed. Continuance should have been granted to insure the attendance of witness at centerpiece of case.
Shands Teaching Hospital and Clinics v. Dunn, 1D06-4086, 11/20/07

Plaintiffs' child died while in the care of Defendants. Plaintiffs sued arguing that the nurse on duty, Susan Lim, administered an overdose of a Digoxin, a very powerful medicine designed to regulate the child's heartbeat. During the course of the trial, the judge refused to admit evidence that the hospital had a practice in place which required two nurses to monitor the use of the Digoxin any time it was administered. The trial judge also refused a continuance when it was determined that Nurse Lim would not be available to testify because of advanced stages of pregnancy. Ultimately judgment was entered in favor of the Plaintiffs. Defendants appealed the judgment.

The First District determined that the trial court erred in not admitting the routine practice evidence and on refusing to grant a continuance. The court held that either error would warrant a new trial. The court noted that evidence of a routine practice in place may have affected the outcome of the case. The court said, "The evidence of the hospital's routine practice would have served to forcefully rebut plaintiffs' claim that Nurse Lim administered an overdose of Digoxin…we are not able to say that the error was harmless." The court also noted that Nurse Lim's testimony was at the centerpiece of the case and the reasons for denying the continuance did not outweigh the reasons for granting it.

Florida law does not foreclose a claim of liability against Shands for the conduct of a public employee working under its supervision and control.
Andrew v. Shands, 1D06-4995, 12/20/07

After their son died, his parents sued a hospital for failing to identify a cancerous mass. The physician involved was an employee of the University of Florida Board of Trustees but worked at Shands Hospital pursuant to a joint venture agreement. Shands argued that because it did not employ the physician, it was not liable. The trial court agreed and dismissed the complaint against Shands.

The First District reversed saying, "The radiologist would be immune under this statute, and, as between the radiologist and the Board of Trustees, and the plaintiffs' exclusive remedy would be to sue the Board. However, it does not follow to conclude, as the trial court did, that the plaintiffs have no action against a third party who may have been jointly responsible for the radiologist's conduct."

Petitioner or his counsel knew or should have known that their claim was without merit; therefore, they are liable for appellate attorney fees.
Gopman v. Dept of Education, 1D076-1189, 2/25/08

The petitioner in this case challenged a DOE order denying his eligibility for Bright Futures. During the hearing the ALJ had to expel Petitioner's counsel for unruly behavior. The petitioner challenged both the order regarding Bright Futures and the order of expulsion in the First District. The First District denied the petition and on its own motion ordered Petitioner to show cause why the court should not impose appellate attorney's fees.

The First District ultimately rejected Petitioner's arguments and imposed appellate attorney fees.

Second District Court of Appeal

Amendment to county charter was preempted by Florida Election Code.
Browning v. Sarasota Alliance for Fair Elections, 2D06-4339, 10/31/07

Sarasota Alliance for Fair Elec-

continued, next page

tions sponsored an amendment to the Sarasota charter which required paper ballot verification and mandatory audits. The Secretary of State and the Sarasota Supervisor of Elections challenged the amendment arguing that it was preempted by state law, it was in conflict with state law, and it was impermissibly vague. The trial court found that state law did not expressly or impliedly preempt the field of elections.

The Second District reversed and stated that there was implied preemption of election law because of the pervasive nature of the state election code and because there was a need to maintain uniformity across the state. The court went on to find that the amendment was also in conflict with state law. The court concluded by certifying to the Florida Supreme Court the question of whether the Florida Election Code is sufficiently pervasive to find that the field of election law has been preempted.

It is permissible for agency to include salary and benefits as part of labor charge for a public records request.
Board of County Commissioners v. Colby, 2D05-5348, 1/25/08

Highlands County had a policy regarding public records requests where they included both salary and benefits as part of the labor charge. They also requested a deposit for extensive requests. When the policy was challenged, the trial court found that it was inappropriate to include benefits as well as salary.

The Second District reversed, holding that the cost of labor, which is the statutorily prescribed basis for the charge, may include both salary and benefits. The Second District also approved of the County's policy requiring an advance.

Third District Court of Appeal

Trial court had authority to dissolve temporary injunction without a showing of change in circumstance.
Bay N Gulf Inc d/b/a Save on Seafood v. Anchor Seafood, 3D07-1965, 10/24/07

This case arose over a dispute regarding the ownership of frozen seafood. Bay N Gulf (SOS) sued Anchor for injunctive relief. The trial court initially granted the injunction but later dissolved it.

SOS appealed the dissolving of the injunction, arguing that once the trial court enters a temporary injunction, it cannot dissolve it without a change in circumstances which obviate the need for the injunction. The Third District rejected the SOS argument stating that the trial court had discretion to dissolve the injunction based on two well-established legal principles: "1) that injunctions rest in the discretion of the court based on surrounding circumstances 2) that a trial court has inherent authority to reconsider and modify its interlocutory orders."

Trial court erred when it awarded attorney fees on its own initiative.
Davidson v. Ramirez 3D07-79, 11/14/07

Plaintiff-appellant sued Defendant-appellee for abuse of process, fraud, and malicious prosecution. After several amended complaints and motions to dismiss the trial judge issued a final order to dismiss. The Defendant filed a motion for attorney fees. The Plaintiff objected on the basis that the Defendant did not follow the notice requirements. The trial court found that the Defendant's claim had merit but decided to award attorney fees on it own initiative.

The Third District reversed stating that the trial court's award of attorney fees on its own initiative is contrary to the intent of the Florida Statute on attorney fees. The court concluded by saying, "Because the defendant failed to comply with the requirements of subsection 57.105(4), Florida Statutes(2005), the trial court erred in awarding attorney's fees under 57.105.(5)."

Attorney fees were inappropriate because Appellate Rule 9.400 is procedural and cannot alone be the basis for an attorney fee award.
The law of the case doctrine only applies when certiorari is denied based on the merits of the case.
Dept of Highway Safety v. Trauth, 3D07-159, 12/12/07

Two drivers had their driving privileges suspended after they were arrested for DUI and refused to consent to blood alcohol level testing. They challenged their suspension and were successful. They were awarded attorney fees on the basis of Florida Rule of Appellate Procedure 9.400.

The Department requested second-tier certiorari review in the Third District. The Third District denied certiorari. Later the Department appealed. While the appeal was pending the county court awarded fees at the direction of the circuit court.

The Department appealed, arguing that the trial court made no specific findings regarding attorney fees. The Drivers argued that the fees should be affirmed because of the law of the case doctrine and because the Third District lacked jurisdiction. In rejecting the Drivers' arguments, the Third District said that the law of the case doctrine only applies when certiorari is denied based on the merits of the case. The court also determined that it had jurisdiction. Lastly the court noted that Appellate Rule 9.400 is procedural and cannot alone be the basis for an attorney fee award. The court concluded by saying, "Because the circuit court appellate panel failed to state any basis for awarding attorneys' fees, other than rule 9.400, the attorneys' fee award cannot stand."

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Defendant had good reason to believe it was without liability; therefore, its nominal offer was made in good faith.
Downs v. Coastal Systems International, 3D06-102, 1/2/08

Downs was rendered a quadriplegic when he took a shallow dive at a Miami Beach swimming area. He sued Coastal Systems who was performing a survey study of beach areas for the Miami-Dade Dept. of Environmental Resource Management. Coastal moved to dismiss, arguing that their contract with Miami-Dade in no way created a duty to warn. However, Coastal System offered to settle for $5000 which was turned down. Later after Coastal Systems won a motion for summary judgment, they filed a motion to Tax costs and attorney fees. On the ground that they had proposed a settlement that had not been accepted. The trial court held that Coastal Systems was entitled to its costs from the date of proposal for settlement, but it denied Coastal Systems' entitlement to attorney's fees on the grounds that the offer was not made in good faith.

In concluding that a nominal offer can be made in good faith, The Third District said, "…there is no evidence in the record that Coastal Systems' faced liability for Downs' claim upon which to conclude that its proposal for settlement was necessarily inadequate. Indeed, Coastal Systems moved for summary judgment and prevailed. This fact supports the argument that Coastal Systems had a reasonable basis to have concluded that it had limited exposure and liability."

Three separate promissory notes could not be aggregated to meet the jurisdictional amount of circuit court.
Ben-David v. The Education Resources Institute, Inc., 3D07-317, 2/13/08

The Education Resources Institute, Inc. (TERI) sued Ben-David for three unpaid student loans in circuit court. The balance on each of the loans was $14,539.83, $9,040.18, and $6876.45 respectively. After a jury trial the circuit court entered judgment in favor of TERI for the amount of $40,493.77.

The Third District reversed and remanded for a lack of subject matter jurisdiction. The court said, "Claims may not be aggregated to confer jurisdiction in the circuit court unless the claims are related to one another or arise from the same transaction or circumstance or occurrence."

Fourth District Court of Appeal

Refusal to follow reasonable work orders from superiors is sufficient conduct to warrant discharge.
Determining the credibility of witnesses is within the purview of the hearing officer.
Bernhang v. State of Florida Unemploy. App. Comm. and Fresh Start Produce Sales, 4D06-4579, 11/14/07

The Unemployment Appeals Commission found that Plaintiff-appellant's refusal to follow a reasonable work order from two superiors and inviting the superiors to discharge her in front of other co-workers was sufficient to determine that her behavior was misconduct related to her work.

The Fourth District affirmed saying that credibility of the witnesses falls within in the purview of the hearing officer's discretion.

The Florida Statutes do not require a stay after a motion for arbitration has been denied and that denial is on appeal
Open MRI v. Aldana, 4D07-3532, 12/12/07

After a dispute arose between the parties, Open MRI moved to compel arbitration which was denied by the court. Later they moved to stay the circuit court action pending the appeal. The trial judge also denied that motion.

On appeal, Open MRI argued that pursuant to F.S. 682.03(3) a stay was mandated in this case. The Fourth District rejected their argument stating, "It is clear that the statute mandates a stay while a motion for arbitration is pending. We decline to expand the statutory language to require a stay after a motion for arbitration has been denied and that denial is on appeal."

Defendant's motion for attorney's fee after voluntary dismissal was proper.
Stolper v. Jeffer, 4D05-3230, 1/9/08

Jeffer filed a complaint against Stolper for collection of a promissory note. The complaint was voluntarily dismissed before an answer to the complaint was due. Stolper then filed a motion for attorney's fees and costs within thirty days after dismissal which was denied by the trial court.

The Fourth District reversed the trial court. Quoting the Florida Supreme Court, it said, "Until a rule is approved for cases that are dismissed before the filing of an answer, we require that a defendant's claim for attorney's fees is to be made either in the defendant's motion to dismiss or by a separate motion which must be filed within thirty days following a dismissal of the action. If the claim is not made within this time period, the claim is waived."

Generally, a trial court is within its discretion to dismiss a complaint with three opportunities to amend.
Krilich v. Thomas, 4D07-1260, 1/30/08

The Krilichs' filed suit for specific performance. During the course of the litigation they amended their complaint once and requested leave to amend a second time. The trial court denied their motion with prejudice.

The Fourth District affirmed the order of dismissal but remanded because the trial court abused its discretion when it refused to allow them to amend a second time. The court said that it would not prejudice the opposing party to allow them to amend. The court concluded by saying, "…generally, a trial court is within its discretion to dismiss a complaint with three opportunities to amend."

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Fifth District Court of Appeal

Deputies did not establish special relationship with ill woman, therefore, did not owe her a duty.
Wallace v. Dean, 5D06-4289, 11/30/07

When Plaintiff could not reach her mother by phone, she called her mother's neighbors to check on her mother. When the neighbors were unable to get Plaintiff's mother to come to the door, they called 911. Two deputies responded and entered the house. They found Plaintiff's mother on the couch, snoring but were unable to wake her. Although the neighbors wanted to call an ambulance, the deputies suggested that they just leave the door unlocked and check on her later. The next morning the neighbors found the Plaintiff's mother unresponsive. When they called 911 emergency personnel came and transported Plaintiff's mother to the hospital. She died a few days later without regaining consciousness. Subsequently Plaintiff sued the Sheriff for wrongful death. She claimed that the Sheriff owed a duty of reasonable care under common law. The trial court dismissed for a failure to state a cause of action.

If the aggregated class claims exceed the circuit court threshold, jurisdiction belongs exclusively in the circuit court.
Hernando County v. Morana, 5D06-2243, 2/22/08

A group of citizens filed a class action in county court where the aggregate amount of claims exceeded $15,000; but, individual claims on the average were each below $1000. The County objected arguing that the county court lacked subject matter jurisdiction. The County filed a motion to dismiss which was granted. The county court determined that aggregating the amount of the claims was permissive and not mandatory.

The Fifth District reversed, holding that "If the aggregated class claims exceed the circuit court threshold, jurisdiction belongs exclusively in the circuit court.

The Florida Bar's
Claude Pepper
Outstanding Government Lawyer Award

NOMINATION INFORMATION

NOMINATION INFORMATION:

Purpose: The purpose of The Florida Bar's Claude Pepper Outstanding Government Lawyer Award is to recognize an outstanding lawyer who has made an extraordinary and exemplary contribution as a practicing government lawyer. The award is named in honor of the Honorable Claude Pepper, a Florida attorney, United States Senator, and United States Congressman, who was an advocate on behalf of the people, and who represented the highest ideals of government service through twelve presidential administrations. This prestigious award will be presented at The Florida Bar's Annual Convention. Originated in 1989, there have been fourteen recipients of the award: Charles C. Jeffries, Jr.; Chriss Walker; John J. Copelan, Jr.; Enoch J. Whitney; Irene K. Quincey; Joseph Lewis, Jr.; Anthony C. Musto; George B. Barrs; Jorge Fernandez; James A. Peters; and George Waas, Deborah K. Kearney, Denise Dytrych, William B. Hammill, Sheryl Wood, Jack Shreve, Anthony Loe and Judson Chapman.

NOMINATION CRITERIA:

Nominee must be a member of The Florida Bar in good standing and currently a practicing government lawyer, who has provided legal services at least ten (10) years in full-time government employment. The nominee should exemplify the highest ideals of dedication, professionalism, and ethics in service to the public. The nominee should have made outstanding contributions in providing legal services for the public interest. (Elected officials or judges currently serving in that capacity are not eligible.)

SELECTION PROCEDURE:

Nominations are reviewed by the Claude Pepper Award Nominations Committee, which selects semi-finalists to be submitted to the Claude Pepper Selection Committee. Nominees from the previous year will be included for consideration of the award. The recipient of the award will be chosen by the Selection Committee, which is comprised of the President of The Florida Bar, the Chair of the Government Lawyer Section, and the Chair of the Claude Pepper Award Nominations Committee. Additionally, two other members from the Government Lawyer Section Executive Council will be selected as alternate members of the Nomination or Selection Committee, and who will only vote in the event of a conflict of interest of one or more members of a committee.

A "conflict of interest" is presumed and the committee member must recuse him or herself if one or more of the following factors occurs: 1) member is the employer of the nominee; 2) member is the employee of the nominee; 3) member is a co-worker of the nominee; or 4) member is a relative of the nominee. "Relative" for the purposes of this procedure means any nominee who is the father, mother, son, daughter, husband, wife, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the committee member.

If a question arises as to the applicability of this provision, it shall be referred to the Chair of the Section for resolution. If the question relates to the applicability of this provision to the Chair of the Section, it shall be referred to the Chair-Elect of the Section for resolution.

Each year, selected nominees from the two previous years will be "rolled over" and eligIble to be considered for the current award.

DEADLINE:

Completed nomination forms for each nominee and six copies of materials should be submitted **on or before April 23, 2008**. Questions and inquiries should be directed to: Claude Pepper Government Lawyer Award; Government Lawyer Section, The Florida Bar, 651 E. Jefferson Street; Tallahassee, Florida 32399-2300; (850) 561-5625, FAX: (850) 561-5825.

Please submit this form and attachments by April 23, 2008 to:

Claude Pepper Government Lawyer Award
The Florida Bar – Government Lawyer Section
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
850/561-5625 FAX: (850) 561-5825

The Florida Bar's Claude Pepper Outstanding Government Lawyer Award

Nomination Form

1. Name of nominee: _____

   Title: _____

   Address: _____

   City/State/Zip: _____ Phone _____

   E-mail: _____

2. Government agency where nominee is employed full time: _____

   _____

3. Number of years nominee has practiced law in full-time government employment: _____

4. Attach a current resume of the nominee (if possible).

5. Describe in detail the contributions made by the nominee in the area of providing exemplary legal services as a government lawyer. You may list specific matters handled by the nominee. (Use separate sheet if necessary)

   _____

   _____

   _____

   _____

   _____

6. Name of person/organization submitting this nomination, address and telephone number.

   Name: _____

   Organization: _____

   Address: _____

   City/State/Zip: _____ Phone: _____

   E-mail: _____

7. Name of contact person with additional information, if different from above:

   Name: _____

   Phone: _____

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