

## Year in Review

*by Ellen M. Simon, Chair*



ELLEN M. SIMON

It has been an honor and a delight to serve as Chair of the Government Lawyer Section this year; and what a year it's been! I have enjoyed working with the many delightful, thoughtful,

and intelligent members of the Executive Council to accomplish several of the Section's goals. We completed long-overdue projects, furthered long-standing priorities, and leapt forward on the technological front.

One major accomplishment this year was the finalization of the formal process to amend our bylaws. This may seem like a simple task, but it was no small feat. The Section's Immediate Past Chair, Barbara C. Wingo, started the process well over a year ago and—through her tireless efforts—helped to navigate the amendments through the proper channels and, ultimately, to final approval by The Florida Bar Board of Governors. As a result, our bylaws now reflect the current needs and practices of the Section.

We also made significant strides this year toward one of our longstanding goals: increasing membership. I started this year by reminding you of an important statistic: government lawyers make up approximately 20% of The Florida Bar. That means there are about 20,000 government lawyers in this state. So, the Government Lawyer Section should have close to that many members, right? After all, this Section exists specifically to advance the interests of those 20,000 lawyers. Well, one

can only dream. In fact, the Section's membership is closer to 1,000.

That is why we worked hard this year to enhance the Section's visibility and spread the word about the benefits of membership. For example, we forged new partnerships with local voluntary bar associations to create more networking opportunities. We also reached out to law school students in an effort to promote earlier and greater involvement from newly-minted lawyers. Several of our members met with FSU law students to talk about how rewarding bar service can be, to share how beneficial bar service has been for them, and, of course, to extol the virtues of service through the Government Lawyer Section. In the coming years, as we continue to partner with other voluntary bar associations and meet more law students from more schools, our membership numbers are sure to rise.

Increasing membership is always worthwhile—and, frankly, vital to our sustainability—but our primary goal has always been to serve the needs and promote the interests of current members. Accordingly, plans are in the works to fill the upcoming year with CLE

opportunities for our members. Furthermore, the Section made its first foray into the realm of social media this year in an effort to keep pace with current members and to better accommodate their increasingly connected and mobile lives. Our brand-new Facebook® page and LinkedIn® group have already helped us successfully advertise events, and the impact of these media can only improve as our online presence grows.

On a personal note, one of my most moving experiences this year was working on the Claude Pepper Outstanding Government Attorney award committee. It is quite daunting and exhilarating to select the recipient of this award, and I was thrilled to be able to take part in the process. I hope you can join us in Boca Raton on June 26, 2015, at The Florida Bar Annual Convention, as the president of The Florida Bar presents this year's award.

In conclusion, it has been my pleasure and privilege to serve as Chair of the Government Lawyer Section this year. I encourage you all get involved so you, too, can experience working with other outstanding individuals to further the interests of government lawyers.

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THE FLORIDA BAR

THE GOVERNMENT LAWYER SECTION REPORTER

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## Ethics Questions?

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# Revised Bylaws for the Government Lawyer Section

by Barbara C. Wingo, Immediate Past Chair

During the 2013–2014 year the Government Lawyer Section spent much time and effort revising its bylaws. These revised bylaws were approved by The Florida Bar Board of Governors on March 28, 2015.

Changes were made to the bylaws to conform to current Board of Governors stylistic standards, to remove redundancies, to correct out-of-date provisions, and to provide for more streamlined procedures and appropriate committees. The purpose of this article is to describe the principal substantive changes to the bylaws.

**Affiliate Membership:** The affiliate member category is modified. An affiliate member may be anyone “who practices a profession dealing with government lawyers.” Affiliates may include local, state and federal agency personnel, educational personnel, law enforcement personnel, members of administrative boards, persons doing business with local, state and federal agencies, members of the legislature and legislative staff, authorized house counsel, judicial assistants, law faculty and law students. The limit on the number of affiliates has been changed from one-half to one-third of the Section membership.

**Meetings, Quorums and Voting:** Changes clarify and establish the requirements for a quorum at the annual and special meetings of the Government Lawyer Section and the meetings of the executive council. A quorum for the executive council meetings is set at 10 persons. A quorum for the annual meeting as well as special meetings of the membership is set at those who attend.

Provisions for the use of video or similar electronic communications equipment for the conduct of executive council meetings have been added in order to take advantage of current and future technology. In addition, provisions are made for voting by electronic mail by the executive council. Such voting (with a two-day notice) may be used only to expedite a decision required to be accomplished before the next scheduled executive council meeting.

**Officers:** The method for election and the terms for the Treasurer and the Secretary have been clarified. Their terms begin at the conclusion of the annual meeting of

The Florida Bar. The duties of the Secretary have been clarified and conformed to current practice. They consist of all responsibilities surrounding the taking of minutes. The Section’s administrator is responsible for retaining the minutes in the permanent records of the Section.

**Committees:** The procedures concerning The Florida Bar Claude Pepper Award are clarified and conformed to current practice. The recipient of this award is chosen by the President of The Florida Bar, the Chair of the Government Lawyer Section, and the Chair of the Claude Pepper Award Committee. The Claude Pepper Award Committee is renamed the Claude Pepper Award Nominations Committee, and it continues to be responsible for the recruitment of nominees and the establishment of selection criteria for receipt of the award. A new committee, the Awards and Recognition Committee, is established to be responsible for other awards and recognitions as authorized by the executive council.

In addition, the following committees are recognized: the Technology Committee (to maintain the Section’s website and social media presence) and the Certification Committee (to support the State and Federal Government and Administrative Practice certification). A new committee, the Young Government Lawyer Committee, is established to promote the Government Lawyer Section to the young lawyers of The Florida Bar.

**Government Lawyer Liaison Seat:** A new section has been added that provides for the nomination of a Government Lawyer Section member for The Florida Bar President’s consideration for appointment as a government lawyer liaison to The Florida Bar Board of Governors. The option of providing for some portion of the expenses of this person’s service is also allowed.

The revised bylaws may be consulted on the Government Lawyer Section website.

**Barbara C. Wingo** is Associate Vice President and Deputy General Counsel at the University of Florida. She currently serves as Immediate Past Chair on the Government Lawyer Section’s Executive Council.





# Ethically Speaking . . .

by Francine M. Ffolkes, Treasurer

## CASES

### Qualified Blind Trusts

Apthorp v. Detzner, --- So. 3d ---, 40 Fla. L. Weekly D490 (Fla. 1st DCA 2015). Opinion filed on February 23, 2015.

Apthorp appealed a circuit court declaratory judgment finding that the qualified blind trust statute was constitutional. The statute was enacted in 2013 in response to recommendations from the Florida Commission on Ethics and Florida's Nineteenth Statewide Grand Jury. The statute authorized public officers to create qualified blind trusts. The statute further required the disclosure of only the lump-sum value of the qualified blind trust each year, instead of disclosure of the value of each individual asset within the qualified blind trust. See § 112.31425, Fla. Stat. (2013).

Apthorp filed a petition for writ of mandamus in the Florida Supreme Court seeking to direct Secretary of State Ken Detzner to refuse filing papers from any candidate seeking to qualify for public office that included a qualified blind trust. After the Florida Supreme Court transferred Apthorp's petition to the circuit court, Apthorp amended his petition to include a request for declaratory judgment that section 112.31425(5), Florida Statutes, was unconstitutional. His claim was that the statute allowed public officials to circumvent the full and public financial disclosure requirement found in the Sunshine Amendment – Article II, section 8 of the Florida Constitution. Apthorp voluntarily dismissed the petition for writ of mandamus and only argued the declaratory judgment count.

At the hearing, the trial court was concerned that no true controversy existed. Apthorp argued that the mere

existence of the statute was enough of a controversy. Secretary Detzner argued that Apthorp failed to show any injury because no candidate or public officer used a qualified blind trust as provided for in the statute. The trial court determined a sufficient controversy to maintain the declaratory judgment action and concluded that the statute was constitutional. Apthorp took this appeal to the First District Court of Appeal (DCA).

The First DCA concluded that Apthorp failed to present a justiciable controversy, therefore the trial court lacked jurisdiction to issue the declaratory judgment. Chapter 86, Florida Statutes, authorizes declaratory judgments only when there is an actual controversy before the court. Courts are not authorized to render declaratory judgments that amount to advisory opinions when parties merely show the possibility of legal injury. To invoke the jurisdiction of the court, Apthorp was required to allege a present controversy based on articulated facts which demonstrate a real threat of immediate injury. The First DCA dismissed the appeal, vacated the judgment, and remanded with directions to dismiss Apthorp's complaint with prejudice.

### Misuse of Public Position

In re Robert Skidmore, III, Case No. 14-1912EC (Fla. DOAH Feb. 27, 2015; Fla. COE April 22, 2015).

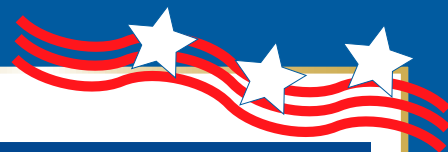
The Commission on Ethics issued a final order adopting an administrative law judge's recommendation that the Respondent twice violated section 112.313(6), Florida Statutes, and that he be fined \$5,000 for each violation, together with public censure and reprimand. Section 112.313(6) provides that no public officer shall corruptly use or attempt to use his official position to

secure a special privilege or benefit for himself, or others.

Mr. Skidmore was a Charlotte County Commissioner who directly called a county code compliance and licensing manager, Ms. Travis, regarding a zoning decision for the Hemmes who are the owners of a business known as the Beach Road Boutique. The Hemmes' zoning application had been denied by Ms. Travis. The judge found that Commissioner Skidmore offered Ms. Travis tickets to a NASCAR race and offered to get her an autographed photograph of a NASCAR driver whose son he had gone to school with. Considering the context Ms. Travis felt that the tickets and photograph were offered in exchange for her approval of the application to the benefit of the Hemmes. The judge found that Charlotte County's Home Rule Charter prohibits county commissioners from interfering with the performance of the duties of any county employee who is under the direct or indirect supervision of the county administration.

Mr. Skidmore also contacted Ms. Jenkins, who reports to Ms. Travis, on a matter involving J.J.'s Restaurant. The judge found that he flagged her down in the parking lot after a meeting and asked her to "do him a favor" and "go shut them down." Mr. Skidmore wanted Ms. Jenkins to find code violations at J.J.'s Restaurant. He also offered to make sure Ms. Jenkins got a pay raise for this. The judge found that either the ex-boyfriend or ex-husband of Mr. Skidmore's wife and father of her children had an interest in J.J.'s Restaurant and there was conflict between the two families. The judge also found that Mr. Skidmore requested another county employee, Mr. Ruggieri, to take code enforcement actions against the restaurant.

*continued, next page*



## FLORIDA COMMISSION ON ETHICS OPINIONS

### Postemployment Restrictions

CEO 14-30, December 17, 2014 – A former employee of the Department of Transportation, District Two, employed there since 1983, would be grandfathered under subparagraph 112.313(9)(a)6 of the Florida Statutes, from the representation restriction. The former employee would not be subject to that two-year, post-public-employment representation restriction.

CEO 14-31, December 17, 2014 – A former administrative law judge (a career service category), employed by the Division of Administrative Hearings, would not be subject to the two-year representation restriction in subparagraph 112.313(9)(a)4 of the Florida

Statutes. The former administrative law judge could represent clients before the Division of Administrative Hearings.

### Conflict of Interest and Voting Conflict

CEO 15-01, March 11, 2015 - The exemption found in Section 112.313(15), Florida Statutes, for elected public officers, operates to negate the conflict of interest under Section 112.313(7)(a), Florida Statutes, for a member of a city council who is also the president of a chamber of commerce, if the chamber receives a grant from the city. No prohibited conflict of interest under Section 112.313(7)(a) is created for the council member if the chamber receives in-kind services or a one-day permit to dispense alcohol from the city. No voting

conflict would be created under Section 112.3143(3)(a), Florida Statutes, if the city council member votes on the city's millage rate. A voting conflict would be created, however, if the council member were to vote on a city budget which includes a line-item appropriation funding a grant for the chamber, on a one-day permit to dispense alcohol, on donation of in-kind services to the chamber, or on a redevelopment plan for a commercial complex where the chamber holds an unexpired lease for its office space.

*Francine M. Ffolkes is the Administrative Law and Ethics counsel for the Florida Department of Environmental Protection. She currently serves as Treasurer on the Government Lawyer Section's Executive Council.*



## Your Government Lawyer Section Website

Remember to visit the Government Lawyer Section's website. The website contains lots of information about the Section.

Look for dates and times of future meetings and minutes of past meetings. Find new CLE courses or CDs and materials on recent CLEs. Get involved with the Florida Bar by contacting members of your executive council through the website.

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## **Interested in attending a Federal Seminar in Washington, D.C. next year? Tell us about it.**

The Government Lawyer Section is seeking input from members interested in attending a Federal Seminar in Washington, D.C., tentatively scheduled for late April to early May 2016. Past Federal Seminars have included lectures and tours at the Department of Justice, the National Archives, the Capitol, the Supreme Court, and the Library of Congress. You may even choose to get sworn in for admission to the Supreme Court.

To effectively plan, we will be sending out a survey in the coming weeks to gauge interest and to get input from potential attendees regarding dates, activities of interest, and general thoughts and comments on how to make this event a success. Stay tuned.



## **UPCOMING MEETING**

### **Executive Council Meeting In conjunction with The Florida Bar Annual Convention**

June 26, 2015  
Boca Raton Resort & Club



# Body-Worn Cameras for Law Enforcement Officers: Many Questions, Few Answers

by Leonard J. Dietzen, III, Esq.

Public outcry for the widespread implementation of body-worn cameras (“BWCs”) by law enforcement officers is growing louder due to recent events. Before an agency even considers the costly implementation of this technology, many questions must be answered on an agency by agency basis. The first and most important question is: What is the agency’s goal in implementing a BWC program? Is it to increase capabilities of the collection of evidence, increase public confidence and transparency, increase police accountability, increase officer safety, or all of the above?

After an agency decides in favor of implementing a BWC system there are many factors to consider: type of camera, video quality, recording limitations, camera placement, policies to cover the program, officer training in the use of the cameras, staff training in the storage and retrieval of recordings, maintenance of hardware, and all the associated costs. Beyond these practical considerations are more thorny legal issues which each agency will have to resolve.

During the 2015 session, the Legislature proposed a bill to make all video captured by a camera worn by a law enforcement officer a public record open for inspection and disclosure with very limited exceptions. Subject to exemptions already in place, the bill made certain recordings confidential and exempt from public disclosure; e.g., recordings taken within

the interior of a private residence; within the interior of a facility that offers health care, mental health care or social services; or in a place that a reasonable person would expect to be private. The bill, now Chapter 2015–41, Laws of Florida, was approved by the Governor on May 21, 2015, and will take effect on July 1, 2015.

The agency is responsible for storing these video records and retrieving them in response to public records requests. Both audio and video data require much computer hard-drive space. The agency might have to create a database specifically for maintaining these records and might also have to hire additional personnel at great expense. Alternatively, the agency could hire a third-party vendor to organize, maintain and retrieve the data. The agency should be careful to draft storage, maintenance, retrieval and destruction policies that comply with the Florida Public Records Law and applicable state law retention schedules.

Before implementing a BWC program, the agency will need to draft specific policies to address each element of the program. Technical issues will need to be addressed. Will the data need to be saved to a database? If so, who decides which data to save? Will it be the officer or her supervisor? Will supervisors review all data recorded by officers, conduct random spot checks or only in response to a complaint? Personnel issues will also need to be

addressed. Would an officer be able to refuse to wear a BWC? When should an officer activate his camera? Does the officer have the ability to review or edit the video before submitting it to the database? These issues affect not only the officers wearing the BWCs, but also the public they serve.

Florida law allows recording of video in public places without consent, but audio recordings generally require consent. Law enforcement officers have certain exemptions to this law when they are conducting criminal investigations or responding to calls. However, not all contact between law enforcement officers and the public takes place within the context of those circumstances. The circumstances under which a citizen has a reasonable expectation of privacy when encountering an officer with a BWC will have to be addressed by policy.

In sum, even though many agencies may be tempted to respond to the public’s demand by quickly implementing a BWC program, each agency should take care to conduct research, weigh all of the options, and carefully consider the ramifications of each before proceeding.

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# Florida's Updated Data Breach Law & Government Lawyers

By Russell S. Kent & William E. Foster

## What does the law define as a “breach”?

A breach of security is the “unauthorized access of data in electronic form containing personal information.” § 501.171(1)(a), Fla. Stat. (2014). The law, however, generally does not apply to “good faith access of personal information by an employee or agent of the ... entity.” *Id.*

## Which governmental entities are covered by the law?

“[A]ny department, division, bureau, commission, regional planning agency, board, district, authority, agency, or other instrumentality of this state that acquires, maintains, stores, or uses data in electronic form containing personal information.” § 501.171(1)(f), Fla. Stat.

Essentially, a governmental entity is considered to be a covered entity “[f]or purposes of the notice requirements in subsections (3)–(6)” of the law. § 501.171(1)(b), Fla. Stat.

If a “third-party agent” maintains a system on behalf of a governmental entity, the statute defines the responsibilities of such an agent in the event of a breach. §§ 501.171(1)(h) & (6), Fla. Stat.

## What does the law define as “data in electronic form”?

“Any data stored electronically or digitally on any computer system or other database and includes recordable tapes and other mass storage devices” § 501.171(1)(d), Fla. Stat.

## What does the law define as “personal information”?

Under section 501.171(1)(g), personal information means either of the following:

1. An individual’s first name or first initial and last name in combination with any one or more of the following data elements for that individual:
  - A social security number;
  - A driver license or identification card number, passport number, military identification number, or other similar number issued on a government document used to verify identity;
  - A financial account number or credit or debit card number, in combination with any required security code, access code, or password that is necessary to permit access to an individual’s financial account;
  - Any information regarding an individual’s medical history, mental or physical condition, or medical treatment or diagnosis by a health care professional; or
  - An individual’s health insurance policy number or subscriber identification number and any unique identifier used by a health insurer to identify the individual.
2. A user name or e-mail address, in combination with a password or security question and answer that would permit access to an online account.

## What does the law say about consumer notice?

Once a governmental entity determines there has been a breach of security or there is reason to believe a breach occurred, the law specifies certain consumer notice requirements.

In general, the governmental entity “shall give notice to each individual in this state whose personal information

was, or the ... entity reasonably believes to have been, accessed as a result of the breach.” § 501.171(4)(a), Fla. Stat. Direct notice is generally provided to affected Floridians “no later than 30 days after the determination of the breach or reason to believe a breach occurred.” § 501.171(4)(a), Fla. Stat. The law also specifies the methods for providing notice to affected Floridians. §§ 501.171(4)(d), (e) & (f), Fla. Stat.

The law recognizes exceptions to parts or all of the consumer notice requirements, including where:

- a law enforcement agency makes a written request to delay the notice (§ 4(b)); or
- the governmental entity makes a written determination that notice to affected individuals is not required after consultation with a law enforcement agency (§ 4(c)).

The governmental entity may receive 15 additional days to provide notice to consumers if “good cause for delay is provided” by a timely written communication to the Attorney General. § 501.171(3)(a), Fla. Stat.

## What does the law say about notice to the Attorney General?

For breaches affecting 500 or more Floridians, the governmental entity must also provide notice to the Attorney General “as expeditiously as practicable, but no later than 30 days after the determination of the breach or reason to believe a breach occurred.” *Id.*

Notice to the Attorney General includes the information listed in section 501.171(3)(b). The Attorney General is authorized to request the additional information listed in section 501.171(3)(c).

*continued, next page*



## Data Breach Law, from previous page

The governmental entity may provide “supplemental information regarding a breach at any time.” § 501.171(3)(d). The governmental entity must also provide the Attorney General with a copy of any written determination that consumer notice is not necessary under the circumstances. § 501.171(4)(c), Fla. Stat.

However, “[f]or a ... entity that is the judicial branch, the Executive Office of the Governor, the Department of Financial Services, or the Department of Agriculture and Consumer Services, in lieu of providing the written notice to the department, the ... entity may post the information described in

subparagraphs (b)1.–4. on an agency-managed website.” § 501.171(3)(e), Fla. Stat.

### What reporting obligations does the law place on the Attorney General?

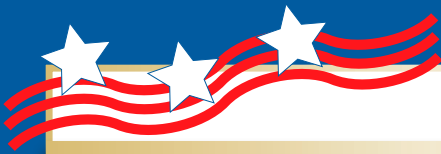
The law directs the Attorney General to submit an annual report “to the President of the Senate and the Speaker of the House of Representatives describing the nature of any reported breaches of security by governmental entities or third-party agents of governmental entities in the preceding calendar year along with recommendations for security improvements. The report shall

identify any governmental entity that has violated any of the applicable requirements in subsections (2)–(6) in the preceding calendar year.” § 501.171(7), Fla. Stat.

*Russell S. Kent is Special Counsel for Litigation at the Florida Office of the Attorney General. William E. Foster is an Assistant Attorney General at the Florida Office of the Attorney General. The overview of certain of the statutory provisions does not represent an official position of the Attorney General, the Government Lawyer Section, or The Florida Bar, and is not meant to offer any guidance to or interpretation of the statute.*



The Government Lawyer Section of The Florida Bar proudly announces that **Clark R. Jennings, Senior Attorney in the Administrative Law Section of the Office of the Attorney General**, has earned the 2015 Claude Pepper Outstanding Government Lawyer Award. Mr. Jennings has an extensive history in serving Floridians, from his work as General Counsel for the Department of Citrus, to his work as Chief Counsel for the Law Enforcement Division of the Department of Agriculture. Additionally, in his fourteen years of working in the Administrative Law Bureau for the Office of the Attorney General, Mr. Jennings’ positions have varied from Senior Attorney to Deputy Chief. Mr. Jennings has also served Floridians in a variety of other capacities. For The Florida Bar, Mr. Jennings was a charter member of the Government Lawyer Section and has been an active member of the Executive Counsel. Mr. Jennings is also an active member of the Administrative Law Section. And, as a well rounded individual, Mr. Jennings has served as Chairman of the Boy Scout District and is very active in scouting operations in South Georgia and North Florida. Mr. Jennings has truly made an extraordinary and exemplary contribution to his profession and the people of Florida. And we are honored that he is the recipient of this award.



# GLS EVENT PHOTOS



Jacek P. Stramski, Gerard T. York, and Linjé E. Rivers conversing during a GLS social networking event at The Brass Tap in Tallahassee on March 31, 2015.

The Executive Council took a break during the GLS Annual Retreat and Long-Range Planning Meeting on May 16, 2015, to show support for "Red Nose Day," an annual campaign dedicated to raising money for children living in poverty waged by Comic Relief, Inc., a non-profit that promotes positive change through entertainment.



Over lunch during the Annual Retreat and Long-Range Planning Meeting, Florida State College of Law professor, Rob Atkinson, presented a CLE lecture on ethics entitled "Virtuous Bureaucrats: The Hope of the Republic & the Helpers of Humankind."



**THE FLORIDA BAR - GOVERNMENT LAWYER SECTION  
APPLICATION FOR MEMBERSHIP**

The law relating to government is constantly changing, and the Government Lawyer Section of The Florida Bar seeks to keep its members abreast of all the recent developments in the area through communication. Membership in the Section provides access to the Section's newsletter, *The Voice*, sponsored continuing legal education programs and section meetings.

**Purpose and Mission Statement**

The Government Lawyer Section is dedicated to promoting the professionalism and competence of its members; improving the delivery of legal services to all governmental entities; improving the administration of the legal system, and enhancing The Florida Bar's and the public's understanding of the unique needs of the government attorney.

**To join the section:** Please complete this application and enclose a check made payable to The Florida Bar. Mail the application to: The Florida Bar, Government Lawyer Section, 651 E. Jefferson St., Tallahassee, FL, 32399.

Member of The Florida Bar: \$30   
(Item number: 8121001)

NAME: \_\_\_\_\_

FIRM OR AGENCY NAME: \_\_\_\_\_

OFFICE ADDRESS: \_\_\_\_\_

CITY/STATE: \_\_\_\_\_

PHONE \_\_\_\_\_ Email: \_\_\_\_\_

PROFESSIONAL SPECIALTY(IES): \_\_\_\_\_

MEMBERSHIP IN PROFESSIONAL ORGANIZATION(S): \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

What legal areas most affect you or your profession?

\_\_\_\_\_  
\_\_\_\_\_

SIGNATURE: \_\_\_\_\_

FLORIDA BAR ATTORNEY #: \_\_\_\_\_

DATE: \_\_\_\_\_