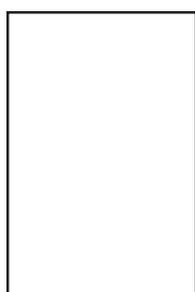


# The Government Lawyer Section R E P O R T E R

*"No Higher Calling"*

Summer 2005

## Chair's Message



The section had its first Executive Council meeting at the Midyear Meeting of The Florida Bar in Miami on February 21, 2005. The September meeting was cancelled due to the hurricanes. I am

happy to report that your section has been moving forward with various

issues. In this column, I will give you an update on three of the section's major initiatives –the Practicing with Professionalism program, certification, and the recruitment fair.

These two initiatives were, in fact, unfinished business from the prior administration. The first one entailed working with the Young Lawyers Division on the Amendments to the Rules Regulating The Florida Bar, Docket Number 04-914, regarding the division's Practicing with Profes-

sionalism program. The second concerned establishing a certification program for Governmental and Administrative Practice. Both of these initiatives have been spearheaded by the Immediate Past Chair of the Section, Keith Rizzardi.

Keith has been negotiating with the YLDs regarding how the new proposed Rules will affect Government Lawyers. The Rules were submitted to the Supreme Court for approval

*continued, next page*

## Attorney General Opinion Updates

By Lagran Saunders, Assistant Attorney General

The following is a summary of recent Attorney General Opinions. The opinions are available on line at <http://myfloridalegal.com/opinions>, in a searchable format.

### AGO 2005-35

Addresses the issue of whether the specialization requirements for speech-language impaired certification set forth in Rule 6A-4.0176, Florida Administrative Code equivalent to the requirements of 42 C.F.R. 440.110(c)(2) and section 468.1185, Florida Statutes.

### 2005-03

Applicability of confidentiality provisions in 42 U.S.C. 5106a to information obtained by state or local child abuse death review committee. Federal law prohibits the release of identifying information received by the State Child Abuse Death Review Committee when carrying out its re-

sponsibilities under the Child Abuse and Neglect Prevention and Treatment Act, but state law requires the disclosure of non-identifying information. It is suggested that problems arising from having to disclose such information be addressed to the Florida Legislature.

### 2005-02

Whether county funds may be used to pay tuition and costs for emergency medical technician certification for volunteer firefighters under no obligation to continue providing services to the county. In light of prohibition against using public funds for private purpose in Article VII, section 10, Florida Constitution, the expenditure must primarily or substantially serve a public purpose. Ultimately, however, the determination of whether the expenditure of county funds fulfills a county purpose is one that the board of county com-

missioners, as the legislative body of the county, must make.

### 2004-63

In considering whether a legislator must obtain an occupational license for his or her district office, this office looked to the long history of court cases recognizing the immunity of the state and its agencies from taxation. It was concluded that a

*continued, page 6*

### INSIDE:

Practicing with Professionalism .....	3
The Privacy Act of 1974 .....	5
Certification for Government Lawyers? ...	7



THE GOVERNMENT LAWYER  
SECTION REPORTER

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Statements or expressions of opinion or  
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**ARTICLES FOR THE FALL  
ISSUE ARE DUE  
September 15, 2004.**

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

## CHAIR'S MESSAGE

*from preceding page*

and oral argument was granted and held on January 11, 2005. Oral argument was divided between the Young Lawyers Division as proponents of the Rule, represented by their Immediate Past-President Mark Romance, the Government Lawyer Section as proponents in general, with some specific reservations regarding the cost of the program and not allowing the use of videotapes, the Florida Prosecutors Association, represented by Arthur I. "Buddy" Jacobs, opposing the program for prosecutors and requesting an exemption, the Florida Public Defenders Association, represented by Nancy Daniels, also a proponent of the program with concerns over the cost of the program, and Tony Musto, representing himself and several other Bar members as an opponent of the program.

In my opinion, the argument went very well from the Government Lawyer Section point of view and Keith did an excellent job articulating the Section's views. The oral argument can be viewed on the Supreme Court's website at <http://www.wfsu.org/gavel2gavel/archives/05-01.html#JAN11>. I have appointed Ward Griffin to act as the liaison with the YLD regarding implementation of the program as it affects government lawyers. On May 12, 2005, the Supreme Court issued an opinion adopting the proposed rules, with some changes. The opinion is discussed in another article in this newsletter.

The certification process is also moving forward. The proposal, entitled, "Governmental and Administrative Certification" is available from Arlee Colman at [acolman@flabar.org](mailto:acolman@flabar.org). The Certification Committee, chaired by Keith Rizzardi, consists of Sheryl Wood, Pam Cichon, Clark Jennings, Ward Griffin, Stephanie Daniel, George Waas, Barbara Wingo, Francine Ffolkes, and Joe Mellichamp. After several conference calls among the committee members and a conference call with

a similar committee appointed by the Administrative Law Section Chair, Bobby Downie, the committee submitted a proposed draft to the Executive Council at the Mid-year Meeting. Keith also addressed the Board of Legal Specialization regarding the section's certification proposal. The board voted to pursue the certification proposal. Executive Council members had many questions and much discussion of the program. Members of the Council that do not practice at the Division of Administrative Hearings wanted to be eligible for the certification program too. The council approved the "final" draft and the submittal of the proposal to other affected sections for their comments and suggestions. Keith was authorized to negotiate with the interested sections to attempt to come to an agreement on the certification proposal. I hope the committee can complete their work and a final proposal can be addressed at the Annual Meeting in June.

The section once again attempted to organize a recruitment fair for law students interested in government service. It was originally scheduled for the Fall, but it also fell victim to the aftermath of the hurricanes. Barbara Wingo headed up the section's efforts on the recruitment fair this year and did an outstanding job of getting a great location at Barry University and attempting to recruit employers to attend the job fair. Unfortunately, only one government employer even bothered to respond to the section's invitation to participate – and that employer responded that they were unable to attend! The extraordinary efforts of Barbara Wingo and our section coordinator Arlee Colman were to no avail, the Executive Council was in agreement to cancel the recruitment fair and not reschedule it at this time. If you have any suggestions on how we can get government employers to participate, please contact Barbara or Arlee.

That's all the news that fit to print. If you have any ideas on how the Government Lawyer Section can improve its service to its members or any other ideas for the good of the order, please let me know.

# Practicing with Professionalism

On May 12, 2005, the Florida Supreme Court amended the Rules Regulating The Florida Bar pertaining to what is commonly referred to as the Basic Skills requirement, Rule 6-12.1, Rules Reg. Fla. Bar. The amendments, among other things, change what was formerly known as the "Bridge the Gap" course, now "Practicing with Professionalism, to a one day course. In addition, to comply with the Basic Skills requirement, new lawyers must complete three (3) basic Young Lawyer Division courses.

Also, the Florida Supreme Court modified the "deferral of government employees" from the Practicing with Professionalism requirement. A new

provision was added to the Deferral and Exemption provision of Rule 6-12.4, Rules Regulating The Florida Bar, pertaining to full-time government employees. Pursuant to the amendment, at Rule 6-12.4(a)(1)(E), Rules Reg. Fla. Bar, the deferral previously existing remains in place for all full-time government employees who were deferred from the PWP requirement at the time of the amendment to the rule, so long as the government employees remain in government practice. This is referred to by the Court as a "grandfather provision." Additionally, pursuant to Rule 6-12.4(c)(1), Rules Reg. Fla. Bar, full-time government employees who "were deferred from the

PWP requirement at the time of the amendment to the rule and had already or thereafter served for six years in governmental practice would be granted an exemption from the PWP requirement." In re Amendments to the Rules Regulating the Fla. Bar, 2005 Fla. LEXIS 1102 \* 6 (Fla. 2005). Of course, all government attorneys who do not qualify for deferral or exemption must complete the Basic Skills Requirement.

A copy of the text of the new rules is provided below. Keith Rizzardi represented the Government Lawyer Section in this matter, and was instrumental in obtaining the grandfather and exemption provisions in the rule amendments.

## **RULE 6-12.3 REQUIREMENT**

(a) Course Components. Compliance with BSCR shall include in-person attendance at:

- (1) ~~the~~ a 1-day Practicing with Professionalism program sponsored by the YLD; and
- (2) ~~23~~ 2 elective, basic, substantive continuing legal education programs sponsored by the YLD.

(b) Time for Completion. BSCR shall be completed as follows:

- (1) the Practicing with Professionalism program shall be completed no sooner than ~~812~~ 12 months prior to or no later than 12 months following admission to The Florida Bar; and
- (2) the ~~23~~ 2 elective, basic, substantive continuing legal education programs shall be completed during the member's initial 3-year continuing legal education requirement reporting cycle assigned upon admission to The Florida Bar.

## **RULE 6-12.4 DEFERMENT AND EXEMPTION**

(a) Deferment of Practicing with Professionalism Requirement.

(1) Deferment Eligibility. A member of The Florida Bar is eligible to defer compliance with the BSCR requirements of rule 6-12.3(a)(1), if:

- (~~1~~A) the member is on active military duty;
- (~~2~~B) compliance would create an undue hardship;
- (~~3~~C) the member is a nonresident member whose primary office is outside the state of Florida;
- (~~4~~) the member is a full-time governmental employee; or
- (~~5~~D) the member elects inactive membership status in The Florida Bar; or

(E) the member is a full-time government employee who had benefitted from the deferral of the Practicing with Professionalism requirement as of its May 12, 2005, elimination, as long as the member continuously remains in government practice.

(~~b~~2) Deferment Expiration. A deferral of the requirements of rule 6-12.3(a)(1) as provided under this rule shall expire at the time the member is no longer eligible for deferral. Upon expiration, a member must:

- (~~1~~A) promptly notify The Florida Bar in writing of the date deferral expired; and
- (~~2~~B) attend the Practicing with Professionalism program within 12 months of deferral expiration; and

*continued, next page*

~~(3) attend 2 elective, basic, substantive continuing legal education programs sponsored by the YLD within 24 months of deferment expiration.~~

(b) Deferment of Basic Level YLD Courses.

(1) Deferment Eligibility. A member of The Florida Bar is eligible to defer compliance with the requirements of rule 6-12.3(a)(2) if:

- (A) the member is on active military duty;
- (B) compliance would create an undue hardship;
- (C) the member is a nonresident member whose primary office is outside the state of Florida;
- (D) the member is a full-time governmental employee; or
- (E) the member elects inactive membership status in The Florida Bar.

(2) Deferment Expiration. A deferment of the requirements of rule 6-12.3(a)(2) as provided under this rule shall expire at the time the member is no longer eligible for deferment. Upon expiration, a member must:

- (A) promptly notify The Florida Bar in writing of the date deferment expired; and
- (B) attend 3 elective, basic, substantive continuing legal education programs sponsored by the YLD within 24 months of deferment expiration.

~~(c) Exemption. An exemption from rule 6-12.3(a)(2) shall be granted if:~~

(1) Governmental Practice. An exemption from rule 6-12.3(a)(1) shall be granted if a member who had benefitted from the deferment of the Practicing with Professionalism requirement as of its May 12, 2005, elimination has already or thereafter been continuously engaged in the practice of law for a Florida or federal governmental entity as a full-time governmental employee for a period of at least 6 years. An exemption from rule 6-12.3(a)(2) shall be granted if a member has been continuously engaged in the practice of law for a Florida or federal governmental entity as a full-time governmental employee for a period of at least 6 years.

(2) Foreign Practice. An exemption from rule 6-12.3(a)(2) shall be granted if a member has been continuously engaged in the practice of law (non-governmental) in a foreign jurisdiction for a period of 5 years; ~~(2) within the immediate 3-year period, the member, can demonstrate completion of 30 hours of approved continuing legal education; within the immediate 3-year period, and~~ ~~(3) the member can attest that the continuing legal education completed has reasonably prepared the member for the anticipated type of practice in Florida.~~

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# The Privacy Act of 1974

You may not be aware that the Privacy Act of 1974, typically regarded as applying only to the federal government, also has a provision which relates to state and local government as well. Section 7 of the act, which is not codified in the United States Code, applies to federal, state and local agencies. *Schwier v. Cox*, 340 F.3d 1284 (11<sup>th</sup> Cir. 2003).

## Section 7 of Public Law 93-579 provides:

(a)(1) It shall be unlawful for any Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security account number.

(2) the provisions of paragraph (1) of this subsection shall not apply with respect to —

(A) any disclosure which is required by Federal statute, or

(B) the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

(b) Any Federal, State, or local government agency which requests an individual to disclose his social security account number shall inform that individual whether that disclosure is mandatory or voluntary, by what statutory or other authority such number is solicited, and what uses will be made of it.

Initially, states believed that, since section 7 was not codified in the United States Code, it was not a law. In describing the reasons why the Section was not codified, the Eleventh Circuit stated:

Within the Privacy Act itself, Congress stated that section 3 was an amendment to Title 5, which governs federal administrative agencies. See 88 Stat. at 2178. Thus,

section 3 added a new section to Title V and was codified as 5 U.S.C. § 552a. Because Congress made no such statement about section 7 of the Privacy Act, the revisor of the U.S. Code placed section 7 in an "Historical and Statutory" note following 5 U.S.C. § 552a. See 5 U.S.C. § 552a (note).

*Schwier v. Cox*, 340 F.3d 1284, 1288 (11<sup>th</sup> Cir. 2003).

The Eleventh Circuit, in *Schwier*, concluded that section 7 was a valid law, notwithstanding the fact that it was not codified in the U.S. Code. *Id.*

Under Section 7 of the Privacy Act of 1974, a general rule is established that a state may not deny an individual a right, benefit, or privilege provided by law, because the individual refuses to provide his or her social security number. Section 7(a)(1) of Public Law 93-579. However, section 7 creates an important exemption to this general rule. The state may deny an individual a right, benefit or privilege provided by law, because the individual refuses to provide his or her social security number, if federal law requires that the social security number be furnished. Section 7(a)(2)(a).<sup>1</sup>

Section 7(b) of the Privacy Act of 1974 requires federal, state and local government to provide disclosures whenever it requests social security numbers. Those disclosures include: (1) whether the requested disclosure is mandatory or voluntary, (2) by what statutory or other authority such number is solicited, and (3) what uses will be made of it.

It is recommended that state and local governments to assess compliance with the Privacy Act of 1974 as follows:

1. Determine in what circumstances, if any, social security numbers are requested.
2. In those circumstances where social security numbers are requested, if any, determine whether the disclosure is required by federal law.
3. If the disclosure is not required by federal law, ensure that appropriate procedures are in place to ensure that an individual is not denied "rights, benefits or privileges provided by law," because of the refusal to provide the social security number.
4. If disclosure is nonetheless requested (whether the disclosure is voluntary or mandatory), then the agency must advise the individual to whom the request is made:
  - a. Whether the requested disclosure is mandatory (i.e., required by federal law) or voluntary;
  - b. The statutory or other authority pursuant to which the number is requested;
  - c. The uses that will be made of the social security number

## Endnotes:

1. Section 7(a)(2)(b) also provides another exemption for "the disclosure of a social security number to any Federal, State, or local agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.

"This provision appears to exempt from the reach of the Privacy Act required disclosure of social security numbers if the disclosure was pursuant to a statute or regulation adopted before January 1, 1975, and the records at issue were in existence before January 1, 1975.

***Ethics Questions?***  
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## ATTORNEY GENERAL OPINIONS

from page 1

legislator's district office, established to assist in carrying out duties as a member of the state Legislature, would be immune from imposition of an occupational license tax.

### 2004-67

Consideration of whether the Florida School Code (pertinent language in section 1002.33, Florida Statutes) requires that charter schools be funded "the same as" other schools in the public school system. Section 1002.33(17), Florida Statutes, provides that "students enrolled in a charter school . . . shall be funded as if they are in a basic program or a special program, the same as students enrolled in other public schools in the school district." Section 1002.33(6)(h), Florida Statutes, provides an administrative process to resolve issues of disparate treatment of charter schools. It was suggested that the parties work with the Department of Education to mediate any dispute regarding disparate funding of charter schools.

### 2004-61

The City of St. Petersburg asked whether it may enter into multi-year contracts that extend beyond the term of the present city commission without violating the State Constitution or Florida Statutes. Previously in this state, the governing body of a municipality could not enter into a contract that extended beyond the terms of office of the members if the subject matter of the contract was governmental. With passage of the Municipal Home Rule Powers Act, however, the governing body of a municipality, in the absence of a charter or ordinance limitation, may enter into contracts, either proprietary or governmental in nature, for a period in excess of its term.

### 2004-60

Question posed whether operation of a golf cart on the public streets of a golf course community is subject to the child restraint requirements in section 316.613, Florida Statutes, and the safety belt requirements in

section 316.614, Florida Statutes, when the governing body of the community has authorized the operation of golf carts on such streets. Where the Legislature has prescribed the safety equipment that must be on a golf cart and specifically exempted the operation of golf carts under certain conditions from the licensing requirements of Chapter 322, a city may enforce the age restriction prescribed by section 316.212, but may not impose additional age restrictions, nor require additional safety equipment such as the restraint requirements in sections 316.613 and 316.614, Florida Statutes. It was advised, however, to seek legislative clarification on this matter, given the great concern for the safety of motor vehicle operators and passengers.

### 2004-59

Municipality's authority to monitor and charge a fee for monitoring a community development district under Chapter 190, Florida Statutes. Chapter 190, Florida Statutes, provides the exclusive and uniform method for the creation and operation of community development districts and recognizes in subsection 190.003(6) that the accountability for such districts is prescribed by general law. Nothing in Chapter 190, Florida Statutes, authorizes a municipality to monitor a community development district.

### 2004-58

A county questions whether it must renew a declaration of a state of local emergency pursuant to section 252.38(3)(a)5., Florida Statutes, every seven days and if the notice provisions of the Government in the Sunshine Law are suspended during such a state of emergency. Section 252.38, Florida Statutes, sets forth the emergency management powers of political subdivisions and limits a state of emergency declared locally to seven days, but recognizes that such a state of emergency may be extended in seven-day increments. Section 252.38(3)(a)5., Florida Statutes, provides a political subdivision the power and authority to waive the procedures and formalities otherwise required of the political subdivision by law in specific instances, but does authorize the waiver of the notice

requirements required under the Sunshine Law.

### 2004-57

The obligation of citizens, specifically municipal employees, to report child abuse, abandonment or neglect was questioned. Section 39.201(1)(a), Florida Statutes, imposes a responsibility on any person who knows of or has reasonable cause to suspect child abuse, abandonment or neglect to report such abuse, abandonment or neglect. Only those persons specified in subsection 39.201(1)(b), Florida Statutes, however, must provide their names, which are entered into the record of the report but are confidential and exempt as provided in section 39.202, Florida Statutes.

### 2004-54

In light of 2004 amendment to section 119.07(6)(aa), Florida Statutes, exempting from public disclosure personal information contained in a motor vehicle record that identifies the subject of that record, a sheriff asks whether driver identification numbers and other identifying information contained in sheriff's department records are exempt. Given the statutory definition of "motor vehicle record," as one pertaining to a motor vehicle operator's permit, the vehicle title or registration, or an identification card issued by the Department of Highway Safety and Motor Vehicles, it was concluded that the exemption did not extend to sheriff's department records.

### 2004-42

Hernando County School District asked whether a school district must comply with the county's land development ordinances relating to such matters as zoning and landscaping that implement the county's comprehensive plan. While school boards must comply with the Florida Building Code and the Florida Fire Prevention Code, they are expressly exempted from any county amendments to such codes. No provision, however, exempts school boards from the provisions of the Local Government Comprehensive Planning and Land Development Regulation Act, sections 163.3161-163.3217, Florida Statutes.

*continued, next page*

**ATTORNEY GENERAL OPINIONS**  
*from preceding page*

**2004-38**

The Auditor General requested

clarification of when a state agency may appropriately allow first class travel. Citing to statutory requirements that an agency head designate the most economical mode of travel and that the most economical class of

transportation be used, except in instances where the use of other modes or classes are fully justified, this office concluded that there may be instances where an agency head may approve travel beyond coach.

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## Certification for Government Lawyers?

By Keith W. Rizzardi

According to Florida Supreme Court Justice Harry Lee Anstead, "certification should be the capstone for a lawyer's professionalism goals." But certification is not an available option for most government lawyers, because our practice areas typically do not fit within the existing certification categories. That unfortunate fact may soon change.

Members of the Government Lawyer Section recently drafted an "Administrative and Governmental Practice" Certification program, and referred the draft rules to the Administrative Law Section for feedback. According to Robert Downie, Chair of the Administrative Law Section, a small subcommittee will provide feedback to the Government Lawyer Section. Thereafter, the Government Lawyer Section, perhaps with the support of the Administrative Law Section, may finalize the rules and refer them to The Florida Bar President and the Board of Governors. Once approved, a new certification committee will be created.

The proposed rules are designed to be inclusive, allowing a diverse group of public and private sector lawyers who practice law on behalf of or before governmental entities to qualify. As Clark Jennings, a former Government Lawyer Section Chair, put it: "becoming certified in administrative and governmental practice should be about more than just how many administrative hearings you worked on. Instead, it should be about understanding administrative law and how

government functions."

The proposed rules reflect that sentiment, allowing lawyers to demonstrate substantial practical experience based on a broad array of "administrative and governmental actions," including: appellate, civil or administrative hearings; rulemaking proceedings; obtaining or issuing permits, licenses or orders; and working on advisory opinions, legislation, or executive orders. Lawyers practicing for the military with substantially equivalent experience may also qualify. Local government matters, however, which are part of a separate certification program, are generally not within the scope of this certification program, although some local government lawyers may still qualify.

Like other certification programs, the proposed rules call for a peer review process, education and CLE requirements, and yes, the dreaded examination. The central topic for the exam will be the Florida and Federal Administrative Procedure(s) Acts. Other likely topics include Florida and Federal law related to open government, constitutional laws, ethics, and sovereign immunity. Lawyers with 20 or more years of experience may be exempt from the exam, and once a lawyer passes the exam and earns certification, they can qualify for re-certification through a streamlined process, without taking another examination. But even the exam has benefits. "Certification is much more than a rubber stamp," Sheryl Wood, a former Government Lawyer Sec-

tion Chair and 2004 recipient of the Claude Pepper Award states. "It also presents an opportunity for lawyers to broaden their horizons beyond their everyday areas of practice."

Ultimately, certification presents an exciting opportunity for public and private lawyers to demonstrate their skills and professionalism. But it has practical benefits too. As the Florida Administrative Procedure Act continues its evolution, increasing in complexity and imposing new standing requirements, a need for private lawyers to demonstrate and market their expertise in administrative law has emerged. Meanwhile, their public servant counterparts, in these tight budgetary times, need new ways to distinguish themselves to earn available promotions and raises. The Government Lawyer Section's certification committee unanimously supported these proposed rules. "I firmly believe that a certification program benefits our Section members, the members of the Administrative Law Section, and their public and private clients," said Government Lawyer Section Chair, Booter Imhof.

The Government Lawyer Section's Executive Council plans to review a final draft of the certification proposal at the Miami Mid-Year Meeting in January 2005. If you have questions or comments, please join us at our next meeting, or contact Keith Rizzardi, Immediate Past Section Chair and Certification Committee Chair at [keith.rizzardi@usdoj.gov](mailto:keith.rizzardi@usdoj.gov)

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