

# The Government Lawyer Section REPORTER

## Message from the Chair

# The Road Less Traveled

by Joseph P. George, Chair



*Two roads diverged  
in a wood and I –  
I took the road less  
traveled by,  
And that has made  
all the difference.*

— Robert Frost

It is appropriate in the opening year of this decade which is to witness the dawn of the third millenium to take stock of where we are and where we are likely to go. I am not sure who is the person best suited to attempt this task. I have thought a good deal about our section and consider myself a cheerful philosopher. I have written of history, but I am not a historian. I have taught psychology, but I am not a psychologist, and although I like politics, I cannot be considered a political theorist. But I have had one set of experiences which do partly qualify me for this task: I have run the course, working my way up from section observer, to decided participant, secretary, treasurer, chair-elect and finally, to today.

Dr. Peck's "The Road Less Traveled," said it best when he began his book with, "Life is difficult." It is generally easy to see where we are but quite another to form a vision of the future. Who could imagine the events surrounding the arrival on our shore of a little Cuban boy? Is the Third Millenium the start of a brave and beautiful new world? We all feel it;

we all know it: Everything is changing. What have we learned from our successes? More important, what have we learned from our mistakes? And most important of all, what can each one of us do – as individuals – to make the broader community and our world a better place? The Seven Deadly Sins: Pride, Covetousness, Lust, Anger, Gluttony, Envy and Sloth are well known. We know of what *not* to do. How should we act? Good people can become active. With their deeds and by their example, our section, profession and world can become a better place than we'd ever dreamed. We can look to the *opposite* of the Seven Deadly Sins. Following the lead of my friend Marilyn Vos Savant, I too will call them the Seven Sacred Virtues, guides to living in the future. They are: Humility, Generosity, Restraint, Kindness, Moderation, Charity and Diligence. They are optimistic visions. A vision of having humility instead of pride; of having the humility to know that we are not alone in this world. A vision of generosity instead of covetousness; a magnanimity toward others. A vision of restraint instead of lust: of restraint to control our most passionate impulses. A vision of kindness instead of anger: of having the tolerance to tolerate the mistakes of our fellow man. A vision of moderation instead of gluttony: of having the moderation to being satisfied with the necessities. A vision of discipline and diligence instead of sloth: of having the dili-

gence to make ourselves useful in this modern world and having a vision of charity instead of envy, to help those who are unable to help themselves. These virtues may help guide a bright and balanced vision of public service for government lawyers in the future.

Our group has made remarkable progress in helping others. Beyond the successful Government Lawyer CLE Programs adroitly managed by Keith Rizzardi, Booter Imhof and Joe Mellichamp, the Salary Survey, Mentor, and Pro Bono Ability Projects happily cultivated by Clark Jennings and Mitch Franks, Michelle Jackson and Pam Cichon, the Government Lawyer Guardianship Education Task Force Initiative has completed its task

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

**ARTICLES FOR THE FALL  
ISSUE ARE DUE August 1, 2000.**

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

## CHAIR'S MESSAGE

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in fostering the integrity and vitality of our legal system by promoting public education. Florida District Court of Appeal Judge Charles Wilson recently said, "that community leadership is incumbent on lawyers, because law is the best tool to guarantee equality and justice." He also urged lawyers to be "social architects" rather than "social parasites." In this vein the Task Force presented itself as a volunteer community service offering educational access and opportunity in the form of its work product booklet entitled, "A Short Course on Guardianship Education in Florida." The Task Force may also be considered a guardianship education training program curriculum committee under the new guardianship law for the new Statewide Public Guardian. As Attorney General Bob Butterworth stated in his recent position paper on elder abuse, "The Approaching Storm," "Florida is a 'petri dish' of a Greying America in the next several decades." From my recent involvement and personal experience within my own family I have become acutely aware of the need for this public education initiative. The successfully completed mission of the Task Force sees the Florida judiciary and government lawyers continuing to lead the field in serving and protecting

Florida's most vulnerable residents – the incapacitated – through promoting the education of their caregivers. The ultimate aim of the initiative is the improvement of the public's trust and confidence in our judicial system. Chief Justice Major B. Harding was made clear that, "meaningful access to justice goes hand in hand with public perceptions that our courts are trustworthy and deserving of faith." As an institution government lawyers have taken an active role enhancing the public's perception of the court system, to let people know that we deserve their trust and support. The task force was another step up the road to earning that public trust and support and instilling confidence in the system.

A warm and most appreciative thank you is reserved to the 27 members of the statewide Task Force \* who stood up to be counted in improving access and opportunity to the community education initiative. Special thanks go to Miami's Enrique Zamora, David Mangiero, Maggie Fernandez-Talcott, Barbara Reiser and Evelyn Jordan for their cheerful alacrity and office support. A particularly grateful note of appreciation is conveyed to Ms. Jeanne Clougher, whose active outstanding involvement and editing talent produced not only the Reporter newsletters this past year, but whose continuing administrative oversight of the Section's website for the past four years, including volunteering her time, but also responding to hundreds of e-mail inquiries, maintains our responsiveness

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## Former Section Chair named Supreme Court Clerk!

Congratulations, salutations and warmest regards go to 1996-97 mentor and Section Chair, Tom Hall, a former Staff Attorney with the 1st District Court of Appeal, who on April 19, 2000 was named as the Clerk of Court for the Florida Supreme Court. Trust in government is hard to earn. Skill, integrity, resourcefulness, loyalty – these attributes are less tangible than the monetary rewards of private practice, but they speak louder and last longer. Tom's long record of service to the state court system and section exemplifies the highest ideals and professional

standards to those dedicated to maintaining trust and integrity in public service. The Florida State court system, members of the bench and bar, and the common citizen of our state will be honored, respected and well served with Thomas D. Hall succeeding the visionary course of outstanding service and administration established by his predecessor. May providence guide and God bless you, Tom. We are assured in your commitment to ensuring integrity, trust and confidence in the new position, and our extraordinary system. Best Wishes!

## ETHICALLY SPEAKING

# An Introduction to Voting Conflicts for Public Officers

by C. Christopher Anderson, III

Section 112.3143, Florida Statutes, addresses voting<sup>1</sup> conflicts of interest of elected and appointed public officers at State and local levels of government. The triggering factor of the law (special private gain or loss) is applicable to officers at all levels, but the obligations placed on officials when a voting conflict is present differ depending on level of government. At the State level, disclosure of the conflict via filing of a memorandum of voting conflict (Commission on Ethics Form 8A), but not abstention from voting, is required; at the local level, declaration, abstention, and filing (CE Form 8B) are required.<sup>2</sup>

It is apparent from opinions of the Commission on Ethics (CEOs) dealing with the voting conflicts law that the "gain" or "loss" with which the statute is concerned relates to measures before one's public collegial body which can tangibly or economically affect the public officer or others to whom he or she is connected, such as one's principal/employer (other than a government agency) or relative. See, for example, CEO 97-004. In other words, the law does not address measures that merely impact matters of conscience or philosophical concerns of a public officer.

In interpreting the voting conflicts law, the Commission has sought to avoid its application in situations where there is uncertainty as to the effect of a measure at the time it is voted on, but has applied the law in situations where the reality is indicative of a tangible, economic effect on the interest of the public officer or his or her surrogates. Thus, the Commission found in CEO 91-70 that a city commissioner was not presented with a voting conflict regarding a measure to increase hours of parking meter enforcement in an area near a restaurant owned by his mother, reasoning that it would be remote and

speculative to conclude that such increased enforcement would, under the totality of circumstances, cause an increase or decrease in the restaurant's business. Conversely, the Commission found in CEO 91-07 that a school board member was required to abstain from voting on the board's selection of a general contractor for a school construction project because the member's company would be seeking to subcontract on the project.

Similarly, the Commission has sought to focus application of the law on situations somewhat insular to public officers or their surrogates, rather than to bring all measures in which a public officer has a private interest, however relatively small, under the law's proscriptions. Consequently, in CEO 99-12, the Commission, following its precedent, found that an airport authority member was subject to the voting conflicts law regarding measures affecting the quadrant of the airport fronting the commissioner's twenty-home neighborhood, but that he was not subject to the law regarding other measures which affected many more properties than those in his neighborhood. The size of the class of affected properties determined whether the gain or loss was "special" or was of a more general nature.

In addition, it should be noted that commissioners of community development agencies created or designated pursuant to Section 163.356 or Section 163.357, Florida Statutes, and officers of independent special tax districts elected on a one-acre, one-vote basis are not prohibited from voting, but must nevertheless declare and memorialize their private interests. See CEO 86-13. Further, Section 112.313(5), Florida Statutes, provides that no public officer shall be prohibited from voting on a matter affect-

ing his or her salary, expenses, and compensation as a public officer, as provided by law. However, in order for Section 112.313(5) to apply, the items voted upon must be "as provided by law"--that is, authorized by and in amounts in accord with applicable general law, special law, or common law. See CEO 88-046 and CEO 91-62.

Also, while the law generally does not apply to measures that are merely preliminary or procedural (e.g., a measure to postpone consideration of a rezoning request until the next board meeting), very few measures fall within this category. Further, the voting conflicts law applies to all votes on a measure necessary to keep it alive in the governmental process. See *Chavez v. City of Tampa*, 560 So. 2d 1214 (Fla. 2d DCA 1990).

*The following is a summary of the opinions rendered by the Commission on Ethics in December 1999 and January 2000.*

### CEO 99-15

#### **Conflict of Interest: Fire Control and Rescue District Employee Providing Consultations and Teaching Continuing Education Courses and Seminars**

A prohibited conflict of interest in violation of the second part of Section 112.313(7)(a), F.S., would be created were a fire district employee to become secondarily employed providing consultations and/or representation to or for architects, contractors, and/or engineers whose work he and/or his employing district reviews, inspects, and approves, and who, therefore, have interests in matters within the jurisdiction of the district, notwithstanding the fact that the projects that the employee consults on may be outside the jurisdiction of the

*continued, next page*

the District. Furthermore, due to the necessity of maintaining working and cooperative relationships between the various fire control and rescue districts within the County and the requirement that the employee's credibility with the County Board of Adjustments and Appeals on behalf of his employing district also be maintained with respect to his and his employing district's interpretations of the County Uniform Fire Safety Code, which he, in his public capacity, has a duty to interpret and enforce, appearances of the employee supporting the advice that he has provided to his clients and/or his interpretations of the Uniform Fire Safety Code before fire officials of other fire control and rescue districts within the County and before the County Board of Adjustments and Appeals also create continuing or frequently recurring conflicts or impediments to the

full and faithful discharge of his public duties.

As long as the District employee is not serving persons or entities whose work he, in his public capacity, and/or the District are currently reviewing or inspecting, no prohibited conflict of interest would be created were he to become secondarily employed teaching continuing education courses and seminars to architects, engineers, and contractors.

**Post-Employment Restrictions: Applicability of Two-Year "Revolving Door" Restriction to Executive Director of State Department**

The former Executive Director of the State Department of Revenue is subject to the two-year "revolving door" prohibition of Section 112.313(9)(a)4, F.S., against representing clients before the Department.

Despite the fact that he was employed in a Senior Management System position with the Department of Banking and Finance prior to and after July 1, 1989, he would not be "grandfathered-in" as to representations before the Department of Revenue under Section 112.313(9)(a)6, as his employment with the Department of Revenue began after July 1, 1989.

*Chris Anderson has served as Staff Attorney for the Florida Commission on Ethics since 1990. He is a 1979 graduate of Huntingdon College (B.A., History) and a graduate of The Florida State University College of Law (J.D., 1982). Advisory opinions and forms of the Commission on Ethics can be accessed through the Internet--[www.ethics.state.fl.us](http://www.ethics.state.fl.us) The Commission may be contacted at (850) 488-7864, SUNCOM 278-7864.*

## Master Calendar 2000

<b>June 9</b>	<b>Practicing the Supreme Court (GLS)</b>	<b>Tallahassee</b>
<b>June 21-24</b>	<b>Annual Meeting</b> 2:00-4:00 p.m.—Government Lawyer Section Executive Council Meeting 4:30-6:00 p.m.—Government Lawyer Section Reception	<b>Boca Raton</b>
<b>Sept. 13-16</b>	<b>The Florida Bar General Meeting</b>	<b>Tampa</b>
<b>Nov. 16-17</b>	<b>Sunshine or Online (GLS)</b>	<b>Miami-Orlando</b>

## 2001

<b>Jan. 17-20</b>	<b>Mid-Year Meeting</b>	<b>Miami-Hyatt</b>
<b>Feb. 16</b>	<b>Demystifying the Legislative (GLS)</b>	<b>Tallahassee</b>
<b>June 15</b>	<b>Practicing the Supreme Court (GLS)</b>	<b>Tallahassee</b>
<b>June 20-23</b>	<b>Annual Meeting</b>	<b>Orlando</b>

*\*tentative dates & locations*

# Government Lawyer Section Proposed Budget for Fiscal Year 2000-2001

The budget below was approved by the Executive Council on January 14, 2000. The Board of Governors of The Florida Bar at presstime will consider this budget at their April 2000 meeting.

<b>Revenues</b>	<b>Proposed Budget</b>	<b>Expenses</b>	<b>Proposed Budget</b>
Dues Retained by TFB	12,500	Photocopying	250
Net Dues	12,500	Officer's Travel Expenses	2,000
CLE Courses	3,501	Meeting Travel Expenses	1,500
Video Tapes	150	Out of State Travel	3,000
Audio Tapes	1,500	Committee Expenses	250
Book/Material Sales	100	Public Info and Awareness	500
Interest	2,035	Board or Council Meeting	1,000
Out Side Co-Sponsorship	500	Bar Annual Meeting	3,500
<b>Total Revenues</b>	<b>20,366</b>	Midyear Meeting	500
		Section Directory	100
		Awards	600
		Website	500
		Council of Sections	300
		<b>Total Expenses</b>	<b>22,158</b>
		<b>Operating Reserve</b>	<b>2,216</b>
		<b>Beginning Fund Balance</b>	<b>29,070</b>
		<b>Ending Fund Balance</b>	<b>25,062</b>

## Section Reimbursement Policies:

All travel and office expenses payment in accordance with Standing Board Policy 5.61 or more restrictive Section policies identified elsewhere in this budget notice. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5) (a)-(h) 5.61(e) (6) which is available from Bar headquarters upon request.

# Minutes of the Government Lawyer Section

## EXECUTIVE COUNCIL MEETING • JANUARY 14, 2000

### In attendance:

Alina Cataldi, Pamela Cichon, Jeanne Clougher, John Copeland, Stephanie Daniel, Denise Dytrych, Joe George, Chair, Thomas Hall, Elizabeth Hubbard, Michelle Jackson, Clark Jennings, Robert Krauss, Philip Maniatty, Anthony Musto, Howard Pohl, Keith Rizzardi, Joel Silvershein, Sheryl Wood

Guests: None

I. The meeting was called to order by the section chair, Joe George, at 2:00 p.m.

### II. Approval of Minutes

Mr. Musto raised questions as to the notice of the teleconference meetings held September 28 and 30. He spoke in opposition to the resolution supporting a government lawyer for Office of Statewide Public Guardian that was mailed with the minutes and disagreed with the action taken. Mr. Maniatty also voiced concern over the resolution. Mr. George explained the reasoning behind the resolution and indicated that he had contacted all Executive Council members about the meetings and was not aware that some members did not receive their notification. Ms. Clougher moved to approve the minutes of the September 28 and 30 teleconference meetings. Seconded by Ms. Daniel, motion carried unanimously.

### III. Treasurer's Report

Upon review of the Financial Statement and following minor discussion, Ms. Dytrych moved to approve the Treasurer's Report. Seconded by Mr. Maniatty, motion carried unanimously.

### IV. Committee Reports

#### A. CLE Marketing

1. Government in the Sunshine - Mr. Rizzardi reported that the Government in the Sunshine seminar was a success and had excellent attendance.

Mr. George informed the Council about a Board of Governors proposal to the Supreme Court to eliminate the deferment for government lawyers from the "Practicing with Professionalism" program. The proposal indicates that law school graduates who go into government service will be required to take this two-day program at a cost of \$190 plus travel expenses. Mr. Musto moved that the Council take a position opposing the elimination of the deferment. Mr. Musto added that as a fallback position, the Council should propose to the Board of Governors that the above-referenced deferment be maintained for those government lawyers who take a one-day professionalism course to be developed by the Section specifically for government lawyers. Seconded by Mr. Pohl, motion carried unanimously.

2. Demystifying the Legislative Process (deferred)

3. Supreme Court Seminar (deferred)

B. Legislative/Long Range Planning (deferred)

#### C. Pro Bono

1. Government Lawyer Pro Bono Ability Project - Ms. Cichon reported that she had conducted an informal telephone poll of government offices throughout the state and learned that nearly every office polled was unaware of their office's policy relating to pro bono and that not much pro bono was being done. She requested the Council's guidance on how to encourage government law offices to establish a pro bono policy. It was suggested that a final report on this issue include the ABA policy, the Attorney General's policy, the policies from Monroe and Broward Counties, and have said final report filed with the Bar. Ms. Daniel suggested contacting Catherine Lannon about developing a newsletter on pro bono programs and considering creative options.

D. Membership (deferred)

E. Publications/Newsletter -

Ms. Clougher noted that articles are needed for the newsletter.

1. Advertising Policy - Ms. Clougher presented a proposed advertising policy based on that of the Real Property Section. After reviewing the advertising policies of other Sections, she noted that the Environmental Law Section's advertising policy most closely matches that of the Government Lawyer Section, and she will investigate the cost of advertising on the Internet.

### V. Additional WOW Projects

A. Government Lawyer Salary Survey Project - Mr. Jennings reported on the status of the Government Lawyer Salary Survey and said that obtaining responses from the agencies surveyed was extremely difficult. After additional mailings, more responses have been received but many are still outstanding.

B. Government Lawyer Mentor Project - Ms. Jackson reported that she has written to the State Attorney and the Public Defender and has received no response. She contacted some administrative attorneys at different offices, and the position for the State Attorney and Public Defender appears to be that the program is unnecessary due to the number of senior attorneys in each office. Mr. George reported that the Supreme Court Professionalism Committee has a Mentor and Professionalism Program, which outlines how the Committee addresses the concept of mentoring. The Section is considering adopting this Program and tailoring it to government lawyers.

### VI. Government Lawyer Guardianship Education Task Force

Mr. George said that this Task Force was established to educate civil division government lawyers, the court system personnel and the

public about the new public guardianship law and to reinforce the fact that government lawyers continue to lead in serving and protecting Florida's most vulnerable residents. The goal of the task force is to expand on the guidelines set forth by the Florida Guardianship Education Coalition, which will then be offered for use as a training tool. The ultimate aim of the Task Force is the improvement of the public's trust and confidence in the judicial system.

#### **VII. Liaison Reports**

*A. ABA Events* - Ms. Wood reported that efforts are underway to lobby the ABA to persuade the next Leadership Institute to come to Florida. No commitment has been made at this time.

The next meeting of the ABA is in February in Dallas.

*B. Council of Sections* (no report)

#### **VIII. Old Business**

*A. Resolution Supporting a Government Lawyer for Executive Director of Office of Statewide Public Guardian* - discussed under Approval of Minutes.

#### **IX. New Business**

*A. Claude Pepper Award* - Ms. Jackson and Mr. Krauss agreed to be on a nominating committee to accept nominations for this award.

*B. Citizenship & Leadership Day* - Mr. George distributed a news article on Leadership Day, which requested government lawyers to participate in this event.

*C. Committee Preferences* - Chairman George reminded the Executive Council to submit committee preference requests for submission to President-Elect Russomanno to the Section.

#### **X. Next Meeting:**

Annual Meeting, Friday, June 23, 2000, Boca Raton Resort & Club.

#### **XI. Adjournment:**

3:55 p.m.

## *An Invitation to the Annual Reception...*

**The Government Lawyer Section of The Florida Bar cordially invites you to join their Section Officers and Representatives at a reception to honor the following chairs and past chairs of the Section:**

*Robert A. Butterworth, Jr., 1991-92*

*Gerald B. Jaski, 1992-93*

*Thomas H. Bateman, 1993-94*

*M. Catherine Lannon, 1994-95*

*John J. Copelan, Jr., 1995-96*

*Thomas D. Hall, 1996-97*

*Sheryl G. Wood, 1997-98*

*Anthony C. Musto, 1998-99*

*Joseph P. George, 1999-2000*

*and Claude Pepper Award Recipients:*

*Charles Cole Jeffries, Jr., 1990*

*Chriss Walker, 1991*

*John J. Copelan, Jr., 1992*

*Enoch J. Whitney, 1993*

*Irene K. Quincey, 1994*

*Joseph Lewis, Jr., 1995*

*Anthony C. Musto, 1996*

*George B. Barrs, 1997*

*Jorge L. Fernandez, 1998*

*James A. Peters, 1999*

*(To Be Announced) 2000*

*Friday, June 23, 2000*

*4:30-6:00 p.m.*

*Boca Raton Resort & Club*

# Government Lawyer Section Commits to New Guardianship Training Incentive

by Jan Pudlow, Associate Editor, *The Florida Bar News*

*Editor's Note: The following article appeared in the March 1st, 2000 Florida Bar News and is reprinted with permission of The Florida Bar.*

Joseph George, Jr., knows guardianship law. His resume is full of guardianship experience: court monitor, general master, director and member of many statewide associations and coalitions, teacher of guardianship courses, author of a book on the subject

So when George became chair of the Government Lawyer Section, it came as no surprise that he would want to do something to help guardians, those important people who watch out for the best interests of the mentally incapacitated, the developmentally disabled, the elderly, and trauma victims.

One of the most crying needs, George knew from his vast experience, is consistent statewide training for guardians. And he has enlisted help from government lawyers to join a Guardianship Task Force with the first big job of creating a training manual.

While the law requires that professional guardians receive a minimum of 40 hours of training within a year and nonprofessional guardians receive eight hours of training, along with continuing education, it dumped the responsibility on the courts to carry out the training with no guidelines or funding. And that has created inconsistencies in training from circuit to circuit, with some circuits stepping up to the plate and others all but ignoring the mandate to train guardians.

"The state law was so general in its requirement that the court system was to somehow, magically, with no funding, create a program," George said. "And there's never been statewide uniformity. It's been a real struggle."

What will help is the creation of a new Office of the Statewide Public Guardian, to be located in Tampa and headed by John Grant when he finishes

his last term as state senator in May.

But, as Judge Mel Grossman, Broward County circuit administrative probate judge, who co-chairs the Guardianship Subcommittee of the Supreme Court Commission on Fairness, said: "Unfortunately, nothing in government moves quickly."

Grossman ticked off the various entities who have been working on guardianship issues for years, including the Government Lawyer Section, the Elder Law Section, the Real Property Probate and Trust Law Section, as well as the Department of Elder Affairs and his fairness subcommittee, whose first priority is monitoring guardians. Grossman said it would be helpful to gather up the products of the various entities' work to help the new agency.

"I think it would be silly for the agency to reinvent the wheel," Grossman said. "I think there has to be a core basis of understanding and education, and I know that statewide education is very important."

As Grossman said: "We take away people's rights and sometimes we limit their rights to protect them. But if they're not better off after court intervention, then we're not really protecting them, are we?"

That's why training guardians is so essential.

George said he is encouraged by a new law passed last year that will "shift the focus of this education training requirement away from the courts to the new office."

Here's where the Government Lawyer Section steps in: Its Task Force, whose members include many judges, including Grossman, will "work hand-in-glove with the new statewide public guardian which directs the new office to establish a curriculum committee to ensure consistency of training," George said.

The goal is to have the statewide training booklet ready when the statewide guardianship office opens in May.

George sees the booklet's mission as "promoting statewide consistency

while fostering local influence." So a guardian will not only be equally trained in Pensacola and Key West, but will know the local resources in each community, too.

Training isn't just helpful to the professional guardian, but to anyone who needs guidance about their responsibilities in caring for incapacitated persons.

"Some go through training because their mother or loved one is slowly slipping into dementia or Alzheimer's, and they want to be prepared and know what to do, rather than throwing themselves on the system where they wouldn't know where to begin," George said.

Hugh Handley, public guardian in the Second Circuit who is expected to work with the statewide office, applauded the Government Lawyer Section on its efforts.

"There have been several efforts, including Joe's, to get some uniformity. . . It's an effort to get some rhyme or reason to the guardianship issue and a more complicated statute," Handley said.

The need for education is great.

"People come to the guardianship issue completely ignorant of what their duties are," Handley said. "It's a personal thing and a fiduciary endeavor. What we'll have is all these efforts will come together, and we hope to develop a more uniform course the circuit courts can adopt as a requirement for new guardianships."

How many guardians are there?

"Anecdotally and experientially, it may approach 30,000 to 50,000 statewide," Handley said, adding that research from HB 213 should provide better numbers.

And the moral obligation for guardianship cases is huge.

"These folks were once good, viable taxpaying citizens or are so severely disabled to being with that they deserve help," Handley said. "We take the worst criminal and give him a lawyer. Let an elderly person get incapacitated and we abandon him?"

The Government Lawyer Section is dedicated to make sure that doesn't happen.



## CHAIR'S MESSAGE

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and is testament to the type of dedicated service and commitment the Section engenders.

The Section addressed several unpredicted challenges this year with poise and verve. The first was the Board of Governors decision to propose to the Supreme Court a rule change to eliminate Rule 6-12.1(d)(1)(D) which would take away the long standing ability of government lawyers to defer the Basic Skills Course Requirement (BSCR) (a/k/a Bridge The Gap/ Practicing With Professionalism) introductory training course for new lawyers. *In Re The Florida Bar Petition to Amend Rules Regulating The Florida Bar*, Case No. SC00-273. Through the outstanding effort of Tony Musto, Howard Pohl and Tom Hall the Section formally marshaled and filed a penetrating response that every vigilant government lawyer would be well served to read. You will also find concurring responses from the Attorney General's Office, the Florida Prosecuting Attorneys Association, the Florida Public Defenders Association and the Criminal Law Section. Special thanks go to Tony

Musto who crafted a brilliant response on extremely short notice.

The second unpredicted challenge was an eleventh hour request to support House Resolution No. 9143 designating "Florida Citizenship and Leadership Day" to explore Florida's best practices and programs relating to governmental and community issues. Through the tremendous efforts of Stephanie Daniel, Booter Imhof, Alina Cataldi and Mike Tartaglia, we participated in the inaugural defined mission ceremonies "to foster, highlight, express appreciation for, and reward positive contributions and initiatives in a variety of citizenship and leadership endeavors in both the private sector and public sector." We shared support with the Public Interest Law Section, the City, County, and Local Government Law Section, and the Florida Women Lawyers Association at the Capitol in Tallahassee on the designated day, March 10, 2000, the birth date of former Florida Governor Leroy Collins, recognized as "Floridian of the Century" in 1991 by the Florida Legislature.

All in all it's been a great year as a result of the time donated, support provided and active, enthusiastic involvement of the officers and you, our members. I have found two gifts common to all of my volunteering. One

is the discovery of skills I didn't know I had. The other is the trust and love people give me. An elder recently reinforced our motto, that there is "No Higher Calling" than public service. As the torch of public service is carried positively and firmly forward I would like to express my sincere gratitude and appreciation to all of you who allowed me the opportunity to serve you on the road less traveled. *Thank You, now onward, into the Millenium!*

*\*Members of the Guardianship Education Task Force are as follows:*

Senator John A. Grant, Jr., Honorable Sandra Taylor, Honorable Harvey Ruvin, Honorable Maria Korvick, Honorable Bruce D. Levy, Honorable Arthur L. Rothenberg, Honorable Sidney Shapiro, Honorable Lester Langer, Honorable Mel Grossman, Honorable John J. Hoy, Honorable Patricia Thomas, Honorable Nick Ficarrota, Honorable Donald R. Moran, Honorable Joseph Tarbuck, Herman Russomanno, Prof. John Petril, Prof. Rebecca Morgan, Howard A. Pohl, Stephanie Daniel, Elizabeth Hubbard, Hugh T. Handley, Elena Herrera, Maria Consuegra, Maggie Fernandez-Talcott, Enrique Zamora, David Mangiero, Joseph P. George, M.D.

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# Making the Right Moves: Transitioning Ethically from the Public to Private Sector

## *Part Two: Post Employment Restrictions*

by L. Joseph Ferrara

The ethical considerations bearing on a lawyer's transition from the public to private sector are challenging because of their variety and stringency. The previous installment in this two-part article (Vol. 8, No. 3) summarized the special ethical considerations applicable to seeking private legal employment while *still* in the public sector. This part addresses the ethical constraints *after* leaving the public sector.

### **Post-Employment Restrictions in 18 U.S.C. § 207**

Unfortunately, the present federal law in this area is complicated. The Ethics Reform Act of 1989 substantially revised 18 U.S.C. § 207, the underlying statute dealing with post-employment conflict of interest. As of early 1999, The Office of Government Ethics, (OGE) had not yet revised its rules to implement this amended code section. The existing rules at 5 C.F.R. Part 2637 apply only to persons terminating government service *prior* to January 1, 1991. This discussion tracks the amended statute. Section 207, as amended, establishes *three* types of "restrictions" on post-public employment activities.

#### *1. Permanent Restriction*

Section 207(a)(1) creates a *permanent, life-time* ban against certain representational and appearance activities. Under this section, no former government employee may knowingly make, with intent to influence, any communication to or appearance before any governmental unit of the United States (except the Congress), on behalf of any person, in connection with a particular matter: (A) in which the United States is a party or has a direct and substantial interest, (B) in which the ex-employee participated personally and substantially

while a government employee, and (C) that involved a specific party or parties at the time of such participation.

The key concept is "personal and substantial participation in particular matters." Participation may take the form of decision, approval or disapproval, recommendation, advice, investigation, and the like. *See* Section 207(i)(2). The "particular matter" in which one participates includes any investigation, application, request for a ruling or determination, rulemaking (to the extent that it involves specific parties), contract, controversy, claim, charge, accusation, arrest or judicial or other proceeding. *See* Section 207(i)(3). To participate "personally" includes both acting directly, and directing a subordinate to participate. To participate "substantially" means significant involvement in the matter regardless of one's job title.

As a practical matter, one should assume that this "permanent" net swings wide. A useful reference tool for the departing public lawyer is a written list of all open, continuing "particular matters" involving a specific party or parties in which he or she had significant participation.

#### *2. Two-year Restriction in Matters of "Official Responsibility"*

A *two-year* restriction applies to particular matters that were under an employee's "official responsibility" even though the employee's participation was not personal and substantial. Section 207(a)(2) prohibits the former employee for a period of *two years after terminating employment* from knowingly making, with intent to influence, any communication to or appearance before the United States in connection with a particular matter: (A) in which the United States is a party or has a direct and substantial interest, (B) that the ex-

employee knows, or reasonably should know, was actually pending under his or her official responsibility within a period of *one year prior to his or her termination*, and (C) that involved a specific party or parties at the time it was so pending.

Official responsibility is a broader concept than personal and substantial participation and is defined as "the direct administrative or operating authority, whether intermediate or final, and either exercised alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action." 18 U.S.C. § 202(b). Official responsibility may be measured in terms of any applicable statute, regulation, job description, or delegation of authority. Covered matters are tracked from *one year* prior to termination of responsibility. An employee's recusal or disqualification from a matter does not operate to remove it from his zone of official responsibility. Again, the transitioning practitioner will find it useful to keep a written list of such matters.

#### *3. Restriction on Certain "Senior" Personnel*

In addition to the preceding two limitations, certain "senior" employees, as defined in Section 207(c)(2), are also subject to a special *one-year* "cooling-off" period in dealings with their former departments or agencies. Section 207(c)(1) prohibits a designated senior employee, within *one year* after termination of service, from knowingly making, with intent to influence, any communication to or appearance before his or her former department or agency on behalf of any other person in connection with any matter in which that person seeks official action. This special restriction is *not* limited to matters in which the employee participated personally and substantially or that were within his or her official responsibility.

Because revised Section 207 creates other restrictions and contains a number of exceptions to those restrictions, it should be read in its entirety to determine its full applicability in individual circumstances. Lawyers leaving federal service should be particularly careful to seek the most up-to-date ethics advice and counsel on these post-employment restrictions. OGE has developed a helpful interim interpretation of the revised statute in a Memorandum dated November 5, 1992, entitled "Revised Materials Relating to 18 U.S.C. § 207."

### **ABA's Model Rules of Professional Conduct**

The ABA's Model Rules of Professional Conduct (MRPC) take a similar disqualification approach to successive employment in the public and private sectors. Rule 1.11(a) provides that, except as law may otherwise expressly permit, "a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and sub-

stantially as a public officer or employee, unless the appropriate government agency consents after consultation." This restriction is permanent and, moreover, extends to *others* in the lawyer's private firm: "No lawyer in [such a firm] may knowingly undertake to continue representation in such a matter," unless the disqualified lawyer is screened from any participation and written notice is given to the appropriate government agency. Rule 1.11(a)(1) & (2).

The MRPC also establishes a "confidential government information" restriction. Under Rule 1.11(b), except as law may otherwise expressly permit, a lawyer knowingly in possession of "confidential government information" (defined at Rule 1.11(e)) about a person "acquired when the lawyer was a public officer or employee," may not represent a private client whose interests are adverse to that person in a matter in which such information "could be used to the material disadvantage of that person." A screening process must be employed to allow

others in the lawyer's firm to participate in such matters. *Id.*

Of course, the transitioning lawyer will also be subject to other, more general ethical rules in the MRPCF or similar codes that may otherwise affect successive employment, such as keeping the confidences of his or her former public "client." *See, e.g.,* Rule 1.6, MRPC.

### **Conclusion**

As this survey demonstrates, there are a number of serious and special ethical concerns associated with transitioning to the private sector. This is particularly so if the former public lawyer plans on working in the same subject area of practice, within the universe of potential clients who were among the private "stakeholders" of his or her former agency. Being prepared with the appropriate ethical knowledge in *advance* of the job-seeking and transitional process is the best way to assure the integrity of one's practice and to avoid the embarrassment, or worse, of making a misstep in this sensitive area.

## **Annual Section Membership & Executive Council Meeting**

**June 23, 2000 • Boca Raton Resort & Club**

### ***Tentative Agenda:***

- I. Call to Order
- II. Approval of Minutes
- III. Treasurer's Report:
  - a. Recent Financial Statements
- IV. Committee Reports
- V. Project Reports
- VI. Task Force Initiative
- VII. Liaison Reports
- VIII. Special Awards by Section Chair
- IX. Old Business
- X. New Business
- XI. Election of New Officers  
Nominees:
  - Chair — Howard A. Pohl
  - Chair-elect — Stephanie K. Daniel
  - Treasurer — Clark R. Jennings
  - Secretary — Keith W. Rizzardi
- XII. Adjournment

## **Annual Meeting Schedule Government Lawyers Section Meetings**

**Friday, June 23, 2000**

**10:00 a.m. – 12:00 p.m.**

General Assembly — Claude Pepper Award Presentation

**2:00 p.m. 4:00 p.m.**

Annual Section Membership and Executive Council Meeting

**4:30 p.m. – 6:00 p.m.**

Section Reception

To register for the Annual Meeting events, see the special section in your May issue of *The Florida Bar Journal*. Registrations must be postmarked by 6/2/2000. After that date, on-site registrations only. You are not required to register to attend section meetings, or the General Assembly.

To make hotel reservations, use the form in the May issue of *The Florida Bar Journal* or call the Boca Raton Resort & Club at 800/327-0101.

## **Bar Submits, Then Withdraws, Proposal to End Government Lawyer Deferment From Basic Skills Requirement**

In the face of vigorous opposition from the Government Lawyer Section, The Florida Bar has withdrawn for further consideration a proposal it had submitted to the Florida Supreme Court that sought elimination of the rule provision that allows attorneys in public service to defer compliance with the basic skills requirement for new members of the Bar.

"Adoption of the Bar's proposal would be a triumph of style over substance," said the response filed on behalf of the section by immediate past chair Tony Musto. "The Bar will score a public relations coup . . . [but] the reality of the Bar's proposal is that its adoption would achieve a minimal benefit at the cost of an extensive negative impact that would disserve government lawyers, the public, and the Bar." New Bar members must complete a two day program presented by the Young Lawyers Division (YLD) that includes one day devoted to professionalism and one to practical matters. They must also attend two additional substantive courses sponsored by the YLD. Since this requirement has been in place, full-time government employees have been eligible to defer compliance until the time they enter the private sphere. Acting on a proposal by the YLD and the Board of Legal Specialization and Education (BLSE), the Board of Governors in December voted to ask the supreme court to end the deferment. The reasons asserted for the proposal focused exclusively on the desire to have government attorneys receive instruction in professionalism at the outset of their careers. A petition seeking the change was filed in February. The section's response contended that the "minimal amount of instruction in professionalism at the basic skills course that would be relevant to government lawyers would not justify the resulting disruption of public offices, the expenses that would be incurred, and the numerous other negative effects that would result." It pointed out that the bulk of the basic skills course deals with subjects that

do not impact on government lawyers, such as trust accounting, advertising, and law office economics. It further noted that the cost of compliance for each attorney would be at least \$340, not including any travel expenses, that each attorney would miss a minimum of 4 days public service and that the rationale expressed by the Bar does not relate at all to requiring attendance at the second day of the basic skills course or at the two additional courses.

The response recognized the fact that attorneys who attend the basic skills course satisfy the Bar requirement of five hours of ethics/professionalism credits in their first three years of practice. Since government lawyers must meet that same three year requirement, the response stated, those who do not attend the basic skills course obtain their professionalism credits in other courses. Because government law offices usually either select or present the other courses, the professionalism credits government lawyers receive are generally better suited to their needs. With budgetary concerns making it unlikely that offices would send their attorneys to both the basic skills course and the courses they are presently attending, the Section maintains that the Bar's proposal "is an ill conceived one that will actually have the effect of decreasing the amount of relevant instruction government attorneys will receive in the field of professionalism and of substituting 'generic' professionalism instruction for professionalism instruction that is tailored to the needs of attorneys in public service."

Our position goes on to argue that the public and the Bar would be better served by having attorneys take the basic skills course at the time they enter private practice, when the subjects it covers become relevant to them, rather than making "the transition to the private arena armed only with the dusty memories of a course, perhaps outdated in many respects due to the passage of time, that addressed subjects that were not of concern to them at the time the course was taken." Further, the Section believes that the proposal is in-

consistent in that it eliminates the government lawyers deferment, but retains similar ones for attorneys in military service and for out-of-state practitioners. The Section declines to speculate as to whether this inconsistency has anything to do with the fact that out-of-state practitioners have four seats on the Board of Governors while the Board's Program Evaluation Committee recently rejected a Council of Sections request to be given one, non-voting, seat on the Board to represent the interests of the Bar's 21 sections. We also touch on several other matters, such as the fact that the proposal's economic impact would be magnified because it applies to all government lawyers admitted to practice since 1988, the negative effect the proposal would have on the recruiting efforts of public offices, and the fact that the cost of compliance is of greater significance to government lawyers than it is to private practitioners because they are generally making less money and because they are not usually in a position to write off the costs as business expenses.

In conclusion, the Section contends that the proposal is based on a simplistic and cursory analysis. The proposal is certainly facially appealing. Who could oppose training in professionalism? But when a more in-depth examination of the proposal is conducted, a very different picture is painted. Adoption of the Bar's proposal will have the opposite effect of its intent. It will decrease the amount of relevant instruction that will be received by new lawyers in the public sector, while taking them away from their duties and creating financial and other problems.

Over the next few months the Section will be meeting with representatives for the YLD, the BLSE and any other interested parties, in an effort to determine whether there is a need for a change to the rules and if so, whether the goal of insuring that government lawyers receive professionalism training at the beginning of their career can be achieved through a method that better suits their needs and that avoids the problems of the Bar's proposal.

The Florida Bar Continuing Legal Education Committee  
and the Government Lawyer Section present

# Practicing Before the Florida Supreme Court

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8:45 a.m. – 9:00 a.m.

**Opening Remarks**

9:00 a.m. – 10:00 a.m.

**Observation of One Argument**

Courtroom Chamber

For Petitioner

For Respondent

10:00 a.m. – 10:30 a.m.

**Discussion With Arguing Attorneys**

Conference Room

Facilitator: Honorable Ben Overton (Ret.), Tallahassee

10:30 a.m. – 11:30 a.m.

**Panel on Oral Argument**

Moderator: Honorable Ben Overton (Ret.), Tallahassee

Bruce S. Rogow, Esq., Ft. Lauderdale

Tom Crapps, Esq., Tallahassee

11:30 a.m. – 12:15 p.m.

**Tour of the Clerk of the Supreme Court's Office and Library**

12:15 p.m. – 1:00 p.m.

**Lunch (included in registration)**

1:00 p.m. – 2:00 p.m.

**Discussion with Panelists**

Justice Gary E. Lonsdale, Tallahassee

2:00 p.m. – 3:00 p.m.

**Panel on Briefs in Support and in Opposition to Requests**

for **Emergency Review**

Moderator: Honorable Parker Lee McDonald (Ret.),

Tallahassee

Honorable Robert T. Benton, Tallahassee

Honorable John Beranek (Ret.), Tallahassee

3:15 p.m. – 3:30 p.m.

**Break**

3:30 p.m. – 4:30 p.m.

**Panel on Merits Briefs**

Moderator: Honorable Stephen H. Grimes (Ret.), Tallahassee

Honorable Philip J. Padovano, Tallahassee

James Rogers, Senior Assistant Attorney General,

Tallahassee

4:30 p.m. – 5:15 p.m.

**Panel on Amicus Briefs**

Moderator: Honorable Joseph W. Hatch, Tallahassee

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Seating is limited to 50. Participants who register on or before May 29th, 2000 will be mailed briefs. These briefs are to prepare you for observing oral arguments. Extra copies of these briefs will not be available on site. Early Registration is highly encouraged. **Business Attire Required.** Breakfast will begin at 7:30 a.m. and check-in will stop promptly at 8:30 a.m. No late arrivals will be allowed. For your convenience Public Parking is available underneath Kleman Plaza at Bronough & Duval Streets.



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**In Memoriam  
Grover Cleveland Freeman  
1946-2000**

Grover C. Freeman was a founding partner of the law firm Freeman, Hunter & Malloy. A Florida native and lifelong resident, his undergraduate degree was from Florida State University in 1967 his law degree from the University of Florida in 1970. Mr. Freeman began his career and practiced law in Tampa for 30 years. An AV rated attorney. Mr. Freeman focused his practice on the defense of physicians in licensure and disciplinary proceedings before professional regulatory boards and hospital credential committees.

He is survived by his wife, Constance King Freeman, and daughter, Westin Kimberly Freeman of Tampa.

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