Fall 2009

The Voice

of The Florida Bar Government Lawyer Section

The Florida Bar Supports Stronger Attorney-Client Privilege for Government

By Marion J. Radson

In a historic act, the Board of Bar Governors voted to support legislation that would strengthen the attorney-client privilege and the related work product doctrine for Florida governments and their attorneys. The Florida Bar now includes in its 2010 official legislative position, amendments to the Public Records Law that expand the exemption for the government attorney's work product. The Bar also supports amendments to the Government-in-the-Sunshine Law that revises the limitations on the attorney-client session, sometimes referred to as a "shade session."

The status of the attorney-client privilege in Florida was initially reviewed by the Bar's Attorney-Client Task Force. The Task Force was originally created to examine policies of some federal agencies that infringed on the attorney-client privilege. Upon careful analysis, the Task Force supported federal legislation to stem the tide against governmental policies that sought to erode the privilege.

The Task Force next studied the status of the privilege for the governments and their attorneys in Florida. In December 2008, the Task Force voted to support legislation that enhances protection for the attorneys' work product when representing governmental entities. The Task Force also supported legislation that would permit more meaningful and useful attorney-client sessions to occur within the ambit of the government-in-the-sunshine law.

The report and recommendations of the Task Force were widely circulated both to sections and committees of the Bar and to outside organizations prior to submission to the Board of Bar Governors. The Government Lawyer Section issued a statement that strongly endorsed the work of the Task Force. The recommendations were also supported by the Trial Lawyers and the City, County, and Local Government Law Sections. The Health Law Section and the Bar's Media and Communications Law Committee opposed the recommendations, as did the First Amendment Foundation, the Florida Homebuilders Association and the Florida Chamber of Commerce. The Governor's Commission on Open Government also opposed the recommendations.

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UPCOMING EVENTS

The Florida Bar 2010 Midyear Meeting
January 20-23, 2010
Hilton Orlando • Orange County Convention Center
Orlando, Florida

Government Lawyer Executive Council Meeting
January 22, 2010 • 12:00 p.m. - 3:00 p.m.

Practicing Before the Legislature CLE
February 12, 2010 • Tallahassee

State/Federal Government Certification Review
April 8-9, 2010 • Tallahassee

Federal Seminar 2010
March 22-23, 2010 • Washington, D.C.

THE GOVERNMENT LAWYER
SECTION REPORTER

KaCee Widener, Editor
Diana Bock, Assistant Editor

This newsletter is prepared and published by the Government Lawyer Section of The Florida Bar.

Keith Rizzardi, Chair
33091 Gun Club Road #MSC-1410
West Palm Beach, FL 33406
Phone: 561/682-6274 Fax: 561/682-6276
Email: krizzar@sfwmd.gov

Mary Ellen Clark, Chair-elect
400 S. Monroe St. #PL-01
Tallahassee, FL 32399
Phone: 850/414-3300 Fax: 850/922-6425
Email: maryellen.clark@myfloridalegal.com

Ward Griffin, Treasurer
1214 Maryland Ave. NE
Washington, DC 20002
Phone: 202/418-5425
Email: ufward@hotmail.com

Carolyn M. Snurkowski, Chair
Immediate Past Chair
4519 Camden Road
Tallahassee, FL 32303-7224
Phone: 850/414-3300 Fax: 850/487-0997
Email: carolyn_snurkowski@myfloridalegal.com

Summer Hall, Program Administrator
651 East Jefferson Street
Tallahassee, FL 32399-2300
Phone: 850/561-5650
Email: shall@flabar.org

ARTICLES FOR NEXT ISSUE DUE
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Articles formatted in Microsoft Word may be submitted on computer disc with hard copy attached (or e-mailed to *shall@flabar.org.*). Please contact Summer Hall at 850/561-5650.

ATTORNEY-CLIENT PRIVILEGE

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In March, 2009, the Bar's Legislation Committee unanimously approved the bill drafted by the Task Force with one exception. The proposed legislation:

- Allows attorney work product of the government attorney, both fact and opinion, that relates to civil, criminal, or adversarial proceedings, to remain confidential.
- Allows for additional persons, such as employees or agents, to participate in the confidential attorney-client sessions between government agencies and their attorneys.
- Expands the permitted topics to include not only pending litigation but also anticipated litigation.

The Committee, however, declined to support a provision recommended by the Task Force that would seal the transcript of the session unless opened by court order. Under current law, the transcript of the session becomes public at the conclusion of the litigation. The Committee was evenly split on this proposal and agreed to further study the issue.

The Board of Bar Governors at its meeting in April 2009, followed the advice of the Legislation Committee and supported the legislative amendments. The complete Report of the Task Force and its recommendations, including the proposed bill, is available on The Florida Bar's website under Special Committees.

As a member of the Task Force who participated in the deliberations before the Legislative Committee and the Board of Bar Governors, it is fair to say that The Florida Bar recognizes the importance of maintaining a strong attorney-client privilege in our system of jurisprudence. The Bar desires to encourage our government clients to consult with their government attorneys. Public officers and employees should be able to candidly consult with their attorneys so that the government attorneys can provide effective legal counsel based upon all the relevant facts. In the final analysis, good decision-making is in the best interest of the government and the people it serves.

The participation of government lawyers in the review and enactment of laws, policies, and the Rules of Professional Conduct of the Florida Bar is essential to our jurisprudence. Each of you are encouraged to take an active role in the Bar's Committees and Sections, as well as any private or public entities that seek to regulate our profession or the practice of law. Our governments and our profession will only be as good as the persons who become involved and are willing to make a difference.

Marion J. Radson served as the Chair of the Public Sector Subcommittee of the Attorney-Client Task Force and is the City Attorney of the City of Gainesville, Florida.

IN THIS ISSUE:

Letter from the Chair

By Keith W. Rizzardi, Chair, Government Lawyer Section


RIZZARDI

In these economically tough times, Florida's government lawyers face a test of our professionalism. We must not allow the ugliness of our government agency's budgets to creep into our psyche, or to otherwise mar the ideals for which we stand.

The financial times are testing our character. Our executives are cutting programs and personnel. Which programs should we trim or abandon? These are brutal decisions. As one longtime government lawyer recently said to me, "now it's about who loses their job."

The financial times are testing our competence. As our colleagues leave, they cannot be replaced. Our workforce ages, and the retiree's shoes cannot be filled. Our younger rising star employees find new employers, as crippling student loans and increased costs of living force them to abandon their public interest desires. And, with every departure, more is demanded of the government servants who remain.

The financial times are testing our commitment. A governor's veto spared state employees from legislatively mandated salary cuts, but raises and promotions are gone, and even the chance to attend a conference is a rare luxury. In some agencies, the paint is peeling from the walls. We ask ourselves, is this why we went to law school?

Finances, however, were not the reason we chose this profession. Instead, we must remember the rewards we receive by serving the public and make a lasting mark. So, to further help us through these financial times, we turn to each other. Together, we share our experiences and hard-earned lessons. Collectively, we voice our concerns to the decision-makers and policy makers, and share our insights into the needs of Florida's state and local governmental entities- executive, legislative and judicial alike.

In other words, in these financial times, we have even greater incentive to exceed the already high standards to which we usually hold ourselves. So the next time the economy gets you down, please remember the opportunity you have to demonstrate the extraordinary professionalism of Florida's government lawyers. Our character, our competence, and our commitment are being tested every day. We will pass the test - again.

Keith Rizzardi is Chair of the Government Lawyer Section, an attorney for the South Florida Water Management District, and a member of the federal government's Marine Fisheries Advisory Committee.

Advice to the Gifted (With Apologies to Dickens)

By Virlindia Doss, Deputy Executive Director, Florida Commission on Ethics

Here the holidays are, right around the corner, and you're thinking about all the lovely things you want to give those special people in your life. And more importantly, you're thinking about all the lovely things you hope to *get*! But before you get too carried away in a sugarplum reverie, take a minute to think about whether you can receive those goodies without suffering a lump of coal in the form of an ethics violation.[1]

You know what I'm talking about: those Grinchy laws pertaining to the solicitation, acceptance, and reporting of gifts, "expenditures," and "things of value." Talk about buzz-kill! There's no doubt the gift laws can be confusing, so let's walk through them from the point of view of an employee of the Executive Branch of State government who files financial disclosure. We'll call him Bob Cratchit (not his real name).

The first thing you want to do, Cratchit, is ask yourself whether there is a gift issue. (And I'm going to use the word "gift" sort of generically, because it's a pain to always say, "gifts, 'expenditures,' and 'things of value.'") No matter what the occasion: Thanksgiving dinner at a friend's house? Overnight stay in Vegas, comped for high-rollers? Logo cup because you gave to NPR? All potential gift issues.

The next thing is to ask whether Sections 112.313(2) or (4), Florida Statutes, are implicated. These laws aren't just for Executive Branch reporting individuals, by the way. Sec. 112.313(2) applies to public officers, employees of an agency, local government attorneys, and candidates, and says they cannot "solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service," based upon any understanding that the official action or judgment of the official would be influenced thereby. If that new Infiniti G37 hardtop convertible is premised on an agreement to act or vote in a certain way, you really shouldn't accept it, no matter how much Tiny Tim would enjoy the wind blowing in his hair.

Section 112.313(4) applies to all public officers and employees, local government attorneys and their spouses and minor children and says that none of these folks "shall, at any time, accept any compensation, payment, or thing of value" when the official knows, or, with the exercise of reasonable care, should know, that it was given to influence a vote or other action in which the official was expected to participate. Crachit, ask yourself, "Why is this thing being given to *me*?" I'm sure you have a scintillating personality, but do you think it could be because your benefactor wants something out of you?

Ok, those were the easy ones. If you passed those two tests, you must drop down to a much more complex and restrictive law—the "expenditure" law, found in Section 112.3215. Notice that this law uses different lingo than Sections 112.313(2) and (4), where the prohibition was on "anything of value." But don't worry, we'll be seeing that phrase again.

Section 112.3215 applies to Executive Branch Reporting Individuals, meaning Executive Branch folks who are required to file financial disclosure (that's you Bob!) and says that notwithstanding "any other provision of law to the contrary, no lobbyist or principal shall make, directly or indirectly, and no agency official, member, or employee shall knowingly accept, directly or indirectly, any expenditure."[2] Sounds simple enough.

But hey, what is an "expenditure"? According to Sec. 112.3215(1)(d), it's any "payment, distribution, loan, advance, reimbursement, deposit, or *anything of value* made by a lobbyist or principal for the purpose of lobbying." What is lobbying? It's "seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee." A "lobbyist" is someone who gets compensated for doing this. Sections 112.3215(1)(f) and (h). Executive Branch lobbyists should be pretty easy to identify, because Section 112.3215(3) requires them to register to lobby, and their names are listed on OnLineSunshine[3].

Crachit, your supervisor Mr. Scrooge here is gleefully pointing out that the law doesn't make any exceptions for expenditures with de minimis value, expenditures made by personal friends and clearly unrelated to any official business, or expenditures made by lobbyists who don't even lobby your agency. If you want to look it up for yourself, check out CEO 06-17 (companies who are principals of Executive Branch lobbyists may not give promotional items to Executive Branch agency officials attending benefit fairs held during open enrollment by the Department of Management Services), CEO 06-6 (agency official prohibited from accepting an engagement party or wedding gifts paid for by Executive Branch lobbyists), and CEO 08-19 (expenditures made by a lobbyist or principal to agency officials at any Executive Branch agency are prohibited, even if the lobbyist or principal only lobbies another Executive Branch agency).

Heavens, Mr. Crachit! What is that over there? Why, it's the Ghost of Christmas Presents! And she's saying you can still accept expenditures from relatives. CEO 06-6. And the term "relative," includes a lot of people. It's not just your immediate family, but extends to step great grandchildren, fiancées, and natural persons having the same legal residence. Section 112.312(22). (Be careful though, because the definition does *not* include boy-and-girlfriends!) Also, she says you can accept expenditures from people or entities who aren't "lobbyists or principals." All of these people can shower you with gifts, so don't have a blue Christmas!

Which leads us to the last step in our analysis. Section 112.3148 is the traditional "gift" law, and if you have scrutinized the circumstances under Sections 112.313(2), 112.313(4), and 112.3215 and found something you can still accept, you must still check out this section before you can say, "Thanks! It's just what I wanted!"

Section 112.3148 talks about both

prohibitions on accepting gifts and reporting requirements for the gifts you can accept. It applies to Reporting Individuals (anyone required to file financial disclosure, including candidates) and Procurement Employees (employees of the executive or judicial branch who participate in various ways in the procurement of contractual services or commodities exceeding $1,000 in any year). Section 112.3148(2)(d) and (e). Sorry Bob, but you're a RIPE!

Section 112.3148 uses the term "gift," rather than "expenditure" or "thing of value," and "gift" has its own specific definition in Sec. 112.313(12). The definition is too long to reiterate here, but a supershort version is: a gift is anything you get that you don't pay for within 90 days. Section 112.3148(2)(b) also has a definition of "lobbyist" that's different from the one in Section 112.3215. A lobbyist for purposes of this statute is any natural person who, for compensation, seeks to influence the governmental decisionmaking of a RIPE or his agency or has done so within the past 12 months. In one sense this definition is narrower than that in Section 112.3215; to be a "lobbyist" the person has to lobby *your* agency. But the definition is broader in another sense—people who get paid to influence your agency's decisionmaking might include individuals you wouldn't normally think of as "lobbyists," such as salesmen or attorneys, and they don't necessarily have to register anywhere.

RIPEs are prohibited from soliciting any gift from a political committee or committee of continuous existence, or from a lobbyist who lobbies the RIPE's agency, or from the partner, firm, employer, or principal of such a lobbyist. (For short, I'll refer to these folks as, "prohibited donors.") Aside from it being bad manners to ask for presents, it's a violation of Section 112.3148(3).

RIPEs are also prohibited from accepting any gift worth more than $100 from a prohibited donor. Sec. 112.3148(4).

The Ghost of Christmas Presents reminds us here that again, gifts from persons or entities who are *not* prohibited donors can be accepted. But if they're worth more than $100, they have to be reported. Section 112.3148(8). Also, gifts from relatives can always be accepted and never have to be reported. Section 112.3148(1).

Poor Crachit is hoping by now that he'll wake up soon from this nightmare, and you probably are too, dear reader. So let's look at the situation he's really concerned about: can he accept the boss' offer to come to Christmas dinner? Food meets the definition of a "thing of value," an "expenditure," and a "gift," so all of the statutes we've talked about have to be reckoned with.

Well, is there any understanding between Scrooge and Crachit that Crachit's official actions or judgment will be influenced by turkey and trimmings, or that the meal is being given in an effort to influence? Not likely, so Sections 112.313(2) and (4) are out. Is Mr. Scrooge a lobbyist? No, he's Crachit's supervisor, so the prohibition found in Sections 112.3215 and 112.3148(4) won't apply. Yum, yum, Crachit's mouth is watering as he realizes the dinner is not a prohibited gift. But wait! How much is that turkey in the window? If Bob consumes more than $100 worth of food, he has to report it as a gift. How does he know if the meal is worth more than $100? He looks at the valuation guidelines in Section 112.3147. And that's what you'll have to do too; I have to go Christmas shopping.

Endnotes

[1] This article is intended to be a brief general explanation of the law; of necessity not every nuance is addressed. The statements herein are not intended to be agency statements or rules. Persons with questions about the gifts laws should not rely solely on this article, but should further review the law and/or contact the Commission on Ethics.

[2] Section 11.045, Florida Statutes, contains similar restrictions for members and employees of the Legislature, but the Commission on Ethics does not administer these provisions. Legislative guidelines can be found on a link on the House website: www.myfloridahouse.com.

[3] www.leg.state.fl.us.

Virlindia Doss is a graduate of Florida International University in Miami, and Florida State University College of Law. After graduating law school, she spent two years as Assistant General Counsel to the Florida Sheriffs Association, then joined the Attorney General's Office. Virlindia spent 15 years at the AG's office, 13 of them as Advocate to the Florida Commission on Ethics, prosecuting allegations of violation of the Code of Ethics for Public Officers and Employees. She joined the staff of the Commission itself in November 2003, and was made Deputy Executive Director in January 2007. Virlindia is an AV rated attorney, and in August 2007 received Board Certification in the area of State and Federal Government and Administrative Practice.

Impact of 2009 Legislation on the Clerk of Court of Brevard County, Florida – A View of Events by an Attorney to the Clerk

By Merrily T. Longacre, Esq., Staff Counsel to Scott Ellis, Brevard County Clerk of Court

Seismic changes to the budgets and operations of the Offices of the Clerks of Court occurred during the 2009 legislative session. *See* Chapter 2009-204, Laws of Florida (SB 2108 ER) and Chapter 2009-61, Laws of Florida (SB 1718ER). While I cannot speak for other counties I can provide a look at the effects this legislation is having on my county, Brevard County.

Anyone who pays salaries and fringe benefits knows the difficulty of projecting an annual budget and tracking actual expenses. The legislature rolled back the previously statutorily authorized fiscal year 2008/2009 Clerk budgets in June forcing many clerks all over the state to make up a sudden increased annual deficit in their fourth quarter. The Brevard County Clerk of Court Scott Ellis was operating on an approved budget of approximately $17.4 million dollars to run the office for the fiscal year of October 1, 2008 through September 30, 2009. The legislature rolled the budget back to $14.67 million for that fiscal year and required implementation in the fourth quarter. This roll back created a large year-end shortfall that required Clerk's offices to make up the whole fiscal year deficit in the last quarter.

Mr. Ellis, similar to the Clerks in many other counties, had to take this drastic immediate action just to keep the doors of the Clerk's Office open to the end of the fiscal year. Mr. Ellis in Brevard, was forced to order massive lay-offs, cut hours, reduce pay and services to the Courts and customers [you and your clients], and furlough many valuable employees. Actual expenditures based on the previously approved budget for the fiscal year now were running well above the rolled back reduced budget. At the same time, the statutorily mandated performance standards were not reduced to provide relief from budget reductions. Yet, fewer people were expected to maintain the same standard of performance. We found ourselves in the middle of the proverbial rock and hard place.

The fact never discussed in the rush to change the way the Clerks were funded was that the Constitution of Florida purposely placed the State Attorney, the Judiciary, and the Public Defender on a different footing than the Clerks. Legislative notes from 2004 indicate that the intent of the legislature and the people was in fact to recognize the diversity among the 67 county clerk offices and make each self supporting locally. A challenge has been raised in *Ervin and Dunlap v. Charlie Christ, Governor*, et. al., case number #2009-CA-001386, 2nd Judicial Circuit Court, Leon County. If the constitutional challenge proves correct, a referendum of the people might be called for.

On my last check with our civil processing section, some areas were more than a week behind in docketing, posting, disposing, and defaults. The cause is directly related to the staff cuts made necessary by the legislation and not the dwindling economy. Yet the phone rings constantly with calls from lawyers who want their matter researched and addressed immediately.

The Florida Association of Court Clerks [FACC], the Clerks of Court Operations Corporation [COCC], and all 67 offices of the Clerks of Court are working to implement the statutory amendments provided in SB 1718 and SB 2108 because we have no choice. Worse, the budget cuts in rural areas may mean that a whole area of service required by the Florida Statutes and the Constitution may now be without a clerk because the rural Clerk lost the budget for one of those key persons.

The impact on the litigation bar will be more and more significant as the loss of clerks continues and the increase in filing costs and fees ripples out. The increase in demands in the rules for more paperwork comes at a time when the legislative changes have caused most Clerk Offices to decrease and furlough staff and decrease hours of full time remaining employees.

Members of the Real Estate Bar surely noticed that they now must pay increasingly larger filing fees, some as high as $1,900 for foreclosing on a home valued over $250,000. Increased paperwork and fewer clerks and foreclosures that have increased approximately five times over those filed two years ago have caused delays in processing. The tsunami of paperwork has yet to begin for those cases that did not properly identify

the property value at the outset. Filing fees are particularly onerous in the domestic area. If the paperwork demanded by the Supreme Court rule changes and the rates of foreclosure filings continues to increase exponentially, we will be seeing longer delays in processing.

Lawyers can help by avoiding certain acts and omissions that cause delay. Some examples are (1) failure provide an accurate civil cover sheet, (2) failure to provide the proper payment, (3) failure to provide all the documentation that the Supreme Court and legislature have mandated, (4) failure to include the correct case heading and case number, (5) contacting clerks for procedural information or direction provided by Florida Statutes and Rules, and (6) contacting the clerk for status of their particular case. These acts and omissions cause a clerk to have to stop processing to review or mail out more letters at a cost in time and money. Another large cost to the Clerk's Office in Brevard has been the stress to relationships between the Clerk's Office, the Judiciary and other local governmental agencies. The tragedy of the situation is that the Clerk had no hand in the economic distress of the state, yet a lot of finger pointing as to inability to budget and operate and lack of oversight was made without proper study and factual backup in the rush to this change.

All 67 Clerks and their staffs serve the people of our counties and we will continue to do so with dedication in the belief that our job is essential to the continuation of justice and access to courts so critical to our democratic process. I ask my fellow lawyers to take a look at your local Clerk's Office and try to be part of the solution in the tough times to come.

Member Spotlight

By Mary Ellen Clark

Originally from New York City, George Waas received his J.D. degree from the Florida State University College of Law in 1970 and was admitted to The Florida Bar later that same year. He received a B.S. in journalism from the University of Florida in 1965 and worked as a newspaper reported in south Florida for two years before entering law school.

Since 1987, George has worked for the Florida Attorney General's Office as an Assistant Attorney General, Senior Assistant Attorney General and since 2003 as Special Counsel. From 1986 to 1987, he was counsel to the Division of Elections, Department of State. From 1980 to 1986, he was in private practice. He also served as counsel to the Departments of Transportation, Health and Rehabilitative Services, and Commerce.

George's most interesting case was the suit the State of Florida filed against Sondra London, the "cybergirlfriend" of Danny Rolling, under the "Son of Sam" law that prohibits criminals from profiting from their crimes. Jane Pauley from Dateline NBC came to the Collins Building in Tallahassee to interview him as lead counsel for a television segment. George said that his work with the victims' families to see justice prevail and the money London had wrongfully earned from the sale of her book used to dedicate a park to the students murdered at the University of Florida was his most personally rewarding legal experience.

GEORGE WAAS

Having served in numerous capacities in voluntary bar work, George states his most rewarding bar service has come as a member of the initial State and Federal Government Law and Administrative Practice Certification Committee. He and the other eight members had to create the first examination from scratch covering the most expansive area of law of any Florida Bar certification; his current term will expire in 2010.

George is the recipient of The Florida Bar Claude Pepper Outstanding Government Lawyer Award for 2000, and appears in several Marquis Who's Who publications, including Who's Who in America and Who's Who in American Law. He has been named a top government lawyer in Florida Trend's Legal Elite for 2008 and 2009, is a frequent lecturer for continuing legal education programs, and has written numerous articles for The Florida Bar Journal, as well as the Florida State University and Nova University Law Reviews. He will retire after 32 years with the State on June 30, 2010.

Mary Ellen Clark is an Assistant Attorney General practicing in the Administrative Law Bureau of the Attorney General's office for more than 6 years, and has represented the Boards of Accountancy, Architecture and Interior Design, Electrical Contractors, Employee Leasing Companies, Pilot Commissioners, Podiatric Medicine, and Psychology and was recently assigned to serve the Florida Real Estate Appraisal Board. A native Floridian, Mary Ellen is an A-V rated attorney who graduated with honors from the FSU College of Law and cum laude from Randolph-Macon Woman's College. Prior to joining the AG's office, Mary Ellen was a hearing officer for the Department of Highway Safety and Motor Vehicles and a prosecutor for the Department of Business and Professional Regulation. Mary Ellen is active with the Florida Bar and is Vice-Chair of the Government Law Section as well as a past Executive Council member of the Administrative Law Section. She is also a past president of the Florida Government Bar Association and the Tallahassee Women Lawyers.

State Case Summaries

Compiled by Betsy Stupski

United States Supreme Court

Without sufficient facts, Plaintiff's threadbare recitals of the elements of a cause of action could not survive a motion to dismiss in civil rights action.
Ashcroft v. Iqbal 07-1015, 5/18/09

After the September 11, 2001 terrorist attacks, Iqbal was arrested and detained in maximum security conditions. He sued several defendants including former Attorney General Ashcroft. Iqbal alleged that Ashcroft had violated his constitutional rights by adopting an unconstitutional policy which subjected him to harsh treatment while in federal custody. Ashcroft moved to dismiss on the basis of qualified immunity. The district court denied the motion to dismiss, concluding that Iqbal's complaint was sufficient to state a claim. The circuit court affirmed the decision of the district court.

The Supreme Court reversed after finding that the complaint was insufficient. The court said, "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face…A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." The court went on to say, "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."

Florida Supreme Court

Business that had relocated and continued to operate, after a taking by DOT, was not entitled to damages worth the total value of its operations as if it had ceased to exist.
System Components Corporation v Florida Department of Transportation SC08-1507, 7/9/09

DOT filed a petition to condemn property owned by System Components Corporation in order to expand an existing roadway. Because it could not maintain operations on the remaining property, System Components eventually relocated and continued its operation elsewhere. System Components argued that it was entitled to the total-take of its business as though it had ceased to exist on the date of the taking. The trial court awarded business damages that took into consideration that the business had relocated and continued to operate. Like the trial court, the Fifth District rejected the notion that the business was entitled to damages as if it had ceased to exist.

After noting a conflict between the Fourth and Fifth District, the Florida Supreme Court held, "…that a qualifying business that chooses to relocate must receive a business-damages award based upon it continued existence and the true economic realities of the given case."

Court approves a new rule for complex litigation
In re: Amendments to the Florida Rules of Civil Procedure—Management of Cases Involving Complex Litigation SC08-1141, 5/28/09

These amendments create a new Rule 1.202 which determines which cases are to be designated complex and provides procedures for handling those cases.

First District Court of Appeal

NCAA hearing transcript and NCAA response were subject to Florida Public Records Law.
National Collegiate Athletic Association v. The Associated Press et al 1D09-4385, 10/1/09

The NCAA conducted an investigation of the FSU Athletic Department. Ultimately the NCAA imposed penalties against the University. FSU appealed. During the course of the appeal attorneys for the FSU received the transcript of the NCAA hearing and the Committee's response to the appeal. In order to receive the material, FSU's attorneys were required to sign a confidentiality agreement. Later other parties sued to view the documents pursuant to Florida Public Records law. The trial court found that the hearing transcript and the NCAA's response were public records and subject to disclosure.

The First District affirmed stating, "…we conclude that the transcript and response are public records. Although these documents were prepared and maintained by a private organization, they were 'received' by agents of a public agency and used in connection with public business."

A state agency may voluntarily waive home rule venue.
Levy County v. Diamond 1D08-3434. 3/3/09

The Diamonds, owners of property in Levy County, filed an action for inverse condemnation against Levy County, the Trustees of the Internal Improvement Fund and the Department of Environmental Protection. After obtaining waivers of the home venue privilege by DEP and the Trust Fund, Levy County moved to transfer venue to Levy County. The trial denied the motion on either the basis that home venue privilege cannot be waived by a state agency or the basis that Levy County's failed to show that a change was proper for the convenience of the witnesses.

The First District could not determine the basis of the trial court decision but determined that the court erred. Finding that a state agency may voluntarily waive home rule venue, the First District said, "Like most other rights, the home venue privilege afforded to a state agency may be waived."

An in camera inspection of assertedly exempt records is generally the only way for a trial court to determine whether or not a claim of exemption applies.
Garrison v. Bailey 1D08-2709, 2/5/09

Garrison made a public records request from the Florida Department of Law Enforcement. FDLE claimed that the records were exempt. Garrison then petitioned for a writ of

mandamus to compel FDLE to turn over the records. The trial court ruled in favor of FDLE without inspecting the records at issue.

The First District reversed and remanded saying, "… an in camera inspection of assertedly exempt records is generally the only way for a trial court to determine whether or not a claim of exemption applies."

Although the School Board had jurisdiction to determine the statutory claim for attorney's fees, the trial court had jurisdiction over the common law claim for attorney's fees.

Webb v. School Board of Escambia County 1D08-0911, 2/5/09

Webb, an elected representative of the Escambia County School District, was charged with criminally violating the Public Records Act. Webb filed a statutory claim pursuant to F. S. 1012.26 as well as a common law claim for attorney's fees spent on her defense. The School Board argued that F.S. 1012.26 eliminated the common law claim leaving only a statutory claim for fees. And as a result the School Board had jurisdiction to determine Webb's attorney's fees. The trial court granted the motion finding that Webb was entitled to seek fees under both claims but that the School Board had jurisdiction to determine her fees.

The First District found that the trial court was correct in determining that Webb was entitled to pursue both the statutory and common law claims for attorney's fees. The First District found, however, that the judge erred in his determination that the trial court did not have jurisdiction to decide on attorney's fees for the common law claim. The court said, "There is a presumption that a statute makes no change in common law unless the statute unequivocally states that it does so or is repugnant to common law that the two cannot co-exist." The court went on to say, "The language of the statute specifically gives the Appellee the authority to consider any school board officer's request for reimbursement of reasonable legal expenses pursuant to the statute. An agency, however, has no common law jurisdiction…The trial court, not the Appellee, has jurisdiction to hear common law claims."

Second District Court of Appeal

County Clerk could make inquiry about county funds that were not in his custody.

Brock v. Board of County Commissioners of Collier County 2D07-4549, 9/23/09

Parties entered into a dispute over a county checking account for a fire district. The Clerk filed a declaratory judgment action seeking to have audit authority over the checking account even though the funds were not actually in his custody. The trial court ruled that the Clerk had no authority to investigate the status of funds which were not in his actual custody and also ruled that the Clerk had no authority to conduct postpayment internal audits concerning county expenditures.

The Second District reversed the trial court rulings, saying "We conclude that the trial court's ruling prohibiting the Clerk from investigating county funds that have not been placed in his custody unduly limits the Clerk's ability to carry out his responsibilities as the custodian of all county funds. A public officer with the right and responsibility to maintain custody of public funds necessarily has the authority both to investigate circumstances in which public have wrongfully been withheld from the officer's custody and to seek to obtain custody of the withheld funds. Restricting the Clerk's authority to do so is inconsistent with the effectual and complete exercise of the Clerk's authority as custodian of all county funds."

County Clerk's office is not a state agency for the purposes of F.S. 287.

Dealer Tag Agency, Inc. v. Hillsborough County Auto Tag Agency 2D08-3536, 7/1/09

Hillsborough County reviewed proposals from two vendors and eventually awarded a contract to one of the vendors. The other vendor brought suit claiming that the County had failed to follow the purchasing procedures set up in F.S. 287. The trial court voided the contract.

The Second District ruled that F.S. 287 did not apply because the County Clerk's office was not a state agency. The court said, "We find, however that the Tax Collector is a constitutional entity created by article VIII, section 1(d) of the Florida Constitution and is not a 'state agency' that is part of the executive branch of the state government. The fact that the Tax Collector is described as an 'authorized agent' of DHSMV for the provisions of section 320.03 does not make it a state agency for the provisions of chapters 287 and 120."

DCF was not liable in tort for negligently issuing a license to counselor who later engaged in misconduct.

Department of Children and Families Services v. Chapman 2D07-4978, 4/15/09

DCF licensed Robert Taylor, who was later discovered to be a convicted felon. In addition, Taylor engaged in misconduct which led to the suicide one of his patients who was a minor. At least one other teenage patient suffered at the hands of Taylor. The parents of the minors who received treatment sued DCF for negligence in giving Taylor a license. At trial the jury found in favor of the families.

The Second District reversed. After a lengthy and thorough discussion of governmental liability law in Florida, the court concluded, "that the role of DCF in this situation in-

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volves a governmental regulatory duty to the general public and does not create a duty of care in tort to individual members of the general public." However the court went on to say, "Because the case law from the Florida Supreme Court is open to legitimate debate about the status of the 'general duty' doctrine, we certify a question of great public importance at the conclusion of this opinion."

City could take land by eminent domain even though the land was located outside of city limits.
Kirkland v. City of Lakeland 2D08-2961, 2/4/09

The City of Lakeland took a portion of land by eminent domain from Kirkland. Kirkland argued that the City did not have the authority because the property was located outside of the city limits and was not even contiguous with the city boundaries. The trial court ruled in favor of the City.

Noting that the City's decision to take the land was based on an interlocal agreement, the Second District affirmed the trial court. The court said that the City demonstrated a public purpose and a reasonable necessity for the taking.

Circulation of memos by Sheriff's Department did not constitute a meeting for the purposes of Florida Sunshine Law.
McDougall v. Culver 2D07-5490, 1/16/09

The Lee County Sheriff's Office conducted an internal affairs investigation of seven deputies. At the conclusion of the investigation, the investigators prepared memos with their findings and recommendations. The memos were given to the deputies' commanding officers and then sent to senior officials and eventually to Sheriff McDougall who made a final decision regarding discipline. The deputies filed a lawsuit, claiming that the Sheriff's office had violated Florida's Sunshine Law. The trial court found that the circulation of the memo constituted a meeting under the Sunshine Law and that the Sheriff should have made the memos public.

The Second District reversed, finding that the circulation of the memos did not constitute a meeting. In its analysis, the court noted that the senior officials who saw the memos had no decision-making authority. The court said, "…the senior officials provided only a recommendation to the Sheriff but they did not deliberate with him nor did they have decision-making authority."

The circuit court did not have certiorari jurisdiction to review an executive decision by city official.
City of St. Pete Beach v. Sowa 2D08-1674, 2/18/09

Sowa filed a petition for writ of certiorari in circuit court to challenge a building permit issued to his neighbor. The circuit court granted the petition and quashed the permit on finding that the City had violated its Code.

The Second District determined that the circuit court did not have certiorari jurisdiction to review a city official's decision to grant a permit because the nature of the decision was executive. In general, only judicial or quasi-judicial decisions (which require notice and hearing) are reviewable by certiorari. The court went on to say that the appropriate remedy would have been an action in circuit court for declaratory or injunctive relief.

Third District Court of Appeal

Officers charged with battery were required to consult with the City before hiring their own private attorney.
City of Sweetwater v. Alvarez 3D07-1486, 6/24/09

Officers were charged with felony battery. They hired attorneys and successfully defended the charges. Then they submitted their legal bills to the City for payment. When the City refused to pay, the officers filed a motion with the court. The trial court found that the officers were entitled to reimbursement.

On appeal, the Third District reversed the fee award. The court said that a reading of the plain language of F.S. 111.065 required the officers to go to the City before hiring their own private attorneys.

Fourth District Court of Appeal

Absolute immunity barred defamation and tortious interference case against special district.
Palm Beach County Health Care District v. Professional Medical Education, Inc 4D07-4170, 7/8/09

Professional Medical Education (PME) provided continuing education courses to a number of divisions within the District. At some point the relationship broke down and the District trauma director refused to approve invoices from PME. PME sued the District and the trauma director for defamation and tortious interference when the director (by letter) refused to approve expenditures outlined in contract between PME and the Palm Beach Fire Rescue. Courses were postponed indefinitely. The trial court found in favor of the employee because he was acting within the scope of his employment; however, the trial court ruled against the District on both the defamation and tortious interference claims.

The Fourth District reversed on both the defamation and tortious interference claim. Regarding tortious interference, the court said, "In this case, the District had a direct connection to the crucial relationships–it was the ultimate source of funds for the seminars PME intended to give...Because it was not a stranger to the crucial business relationships, the District's acts did not amount to unjustified interference." Regarding

the defamation count the court said, "Davis was acting within the orbit of his duties when he wrote the …letter. Because liability of the District on the defamation count is predicated on its status as Davis's employer, the absolute immunity of Davis 'necessarily requires the exoneration' of the District."

Documents prepared in the ordinary course of business and without an attorney's direct involvement could not be protected as attorney work product.
Neighborhood Health Partnership v. Merkle 4D08-3213, 4/15/09

A health maintenance organization moved to protect certain documents as trial preparation materials. The documents had been generated as a result of informal discussions with AHCA. The trial judge reviewed the documents and determined that they were not trial preparation documents.

The Fourth District affirmed stating, "We agree with the trial judge's reading of them. They lack the essential ingredient necessary to make any brand of work product claim even arguable in this case—namely, a purpose other than ordinary business use and an attorney's direct involvement in their creation or maintenance in connection with reasonably anticipated specific litigation."
4D08-3213

A determination of standing could not be based on the ultimate outcome of the challenge.
Palm Beach County Environmental Coalition v. Florida Department of Environmental Protection 4D08-2015, 6/3/09

DEP issued a notice of intent to grant a permit to Florida Power & Light to install an underground injection well system. An environmental coalition objected to the installation. Both DEP and an ALJ determined that the coalition did not have standing to bring suit Ultimately, the permit was granted.

On appeal the granting of the permit was affirmed; however, the Fourth District found that DEP and the ALJ erred when they determined that the coalition did not have standing. The court said, "The ALJ's standing analysis essentially boils down to a finding that the petitioners lacked standing because the petitioners failed to prevail on the merits…This analysis confuse[s] standing and the merits such that a party would always be required to prevail on the merits to have had standing…Standing is a forward looking concept and cannot disappear based on the ultimate outcome of the proceeding."
4D08-2015

Fifth District Court of Appeal

Memo regarding a disadvantaged business enterprise application from one attorney to another was not exempt from public disclosure.
Greater Orlando Aviation Authority v. Nejame 5D08-2945, 2/13/09

The Greater Orlando Aviation Authority (GOAA) receives federal funds and is required to give contract preferences to disadvantaged business enterprises that qualify after submitting a personal net worth statement. In addition, federal regulations require that the GOAA not release the personal net worth statement or supporting documentation of any one awarded a contract. At some point Carol Hojeij applied for and received a contract as a disadvantaged business enterprise. Later other citizens requested, pursuant to Florida public records law, a copy of a memo by the county attorney as to whether Carol Hojeij was eligible to deduct a certain loan from her personal net worth statement. The GOAA refused to release the document, reasoning that it was documentation supporting a net worth statement protected by federal regulation. The trial court determined that the document did not qualify as "supporting documentation."

The Fifth District affirmed stating, "Like the trial court, we have examined the document and conclude that the legal memo written by one GOAA attorney to another is not 'documentation supporting' Ms. Hojeij's worth as contemplated by the regulation. The document is a general analysis of whether Ms. Hojeij is entitled to deduct a loan request made to a bank from the calculation of her net worth when determining whether she is eligible for the DBE program. Only generally does the memo refer to Ms. Hojeij's net worth as exceeding the $750,000 cutoff for DBE eligibility. Consequently, we conclude that the memo is not exempt from production under 49 C.F.R. § 26.67(a) (2) (iv)."
5D08-2945

Seizing authority was required to show in adversarial preliminary hearing that registered owner of vehicle was not an innocent owner.
Brevard County Sheriff's Office v. Baggett 5D08-2588, 2/20/09

The Brevard County Sheriff's Office seized a truck from the Appellee's father who was engaged in the cultivation of marijuana. Although the vehicle was registered to the Appellee, there was evidence that the vehicle was hers in name only and that the real owner of the vehicle was her father. The trial court determined that it was necessary for the Sheriff's Department to demonstrate in the adversarial preliminary hearing that the Appellate was not an "innocent" owner.

The Fifth District agreed with the trial court that the Sheriff was demonstrate that the Appellee was not an "innocent" owner but disagreed with the trial as to the standard. The Fifth District said that the Sheriff's Office was required to show that there was "probable cause to believe that the

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owner knew or should have known, after a reasonable inquiry, the property was employed or was likely to be employed in criminal activity."

The doctrine of promissory estoppel cannot be used to circumvent the statute of frauds. The waiver of sovereign immunity in a contract action can apply only when the "written contract is properly approved.

City of Orlando v. West Orange Country Club 5D08-1887, 4/24/09

West Orange County Country Club sued the City of Orlando to enforce an agreement where the City was supposed to provide reclaimed water to the Club for 20 years. Since the City did provide water to the Country Club for a number of years, the trial court found that even though there was no signed agreement, the City was estopped from claiming statute of frauds as a defense.

The Fifth District reversed, rejecting the argument that partial performance created an exception to the statute of frauds. The court said, "With respect to the trial court's determination that the Defendants can be held liable for performance of the contract under an estoppel theory, the law is well-settled that 'the doctrine of promissory estoppel cannot be used to circumvent the statute of frauds.'" The court also noted that the waiver of sovereign immunity in a contract action could apply only when the "written contract is properly approved by on behalf of the governmental entity sought to be held liable for the performance of the contract."
5D08-1887

Betsy L. Stupski received her J.D. and M.L.S. degrees from the University of Alabama. She is currently the Law Library Resource Manager, Florida Legal Resource Center, Office of the Attorney General, in Tallahassee. Betsy recently authored Guide to Florida Legal Research, a publication of The Florida Bar.

Gerald Curington Wins Government Lawyer Claude Pepper Award

The Government Lawyer Section of The Florida Bar announced at the Annual Meeting that Gerald B. Curington, Esquire, Deputy General Counsel with the Executive Office of the Governor, was the recipient of the Claude Pepper Outstanding Government Lawyer Award for 2009. Mr. Currington was nominated by Richard E. Doran, Esq. and Mitchell Dean Franks, Esq.

A practicing government lawyer for 30 years, Mr. Curington began his legal career with an internship with the State Attorney's Office while in law school. His career has taken him through numerous positions in State government. A long-time lawyer with the Attorney General's Office, he has also worked for the Florida House of Representatives and the Florida Department of State.

Mr. Curington has personally litigated numerous significant cases for the State. As former counsel of the reapportionment litigation for 1982, 1992 and 2002, he is recognized as an expert in State government concerning reapportionment issues. Mr. Curington has acted as a Special Master in Claims Bill hearings brought before the House Judiciary Committee and has been specially assigned as an Administrative law Judge by the Division of Administrative Hearings to cover a formal hearing on an employment discrimination case.

Mr. Curington is an AV rated attorney and is board certified in appellate practice. He is also a certified Circuit Mediator. Mr. Curington has been a presenter at CLE courses concerning sovereign immunity, public records, government in the sunshine and appropriations among other topics.

The purpose of the Claude Pepper Outstanding Government Lawyer Award is to recognize an outstanding lawyer who has made an extraordinary and exemplary contribution as a practicing government lawyer, and one who exemplifies the highest ideals of dedication, professionalism and ethics in service to the public. Claude Pepper Award recipients are not only excellent lawyers, but excellent citizens. The Claude Pepper Award selection committee and Florida Bar President John G. White, III., found Mr. Curington's candidacy to be outstanding in every respect, and congratulate him on earning this statewide recognition and honor.

This article was contributed by Morgan Roger Rood, Esq., Chair, Claude Pepper Outstanding Government Lawyer Award Committee of the Government Lawyer Section, Keith Rizzardi, Esq., Chair.

(L-R) Florida Attorney General Bill McCollum, Chief Justice Peggy A. Quince, Gov't Lawyer Chair Keith Rizzardi, Claude Pepper Award Winner Gerald Currington, Florida Bar Immediate Past Chair Jay White, and Claude Pepper Nominating Committee Chair Morgan Rood

Attorney General Opinions Update

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

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

AGO 2009-45 – COUNTY IMPOSED AIRBOAT CURFEW

A county-imposed curfew on airboats that is based upon eliminating airboat operational noise does not create a boating-restricted area within the scope of section 327.46, Florida Statutes, which would be subject to Florida Fish and Wildlife Conservation Commission approval pursuant to Chapter 327, Florida Statutes, as amended by Chapter 2009-86, Laws of Florida.

Further, section 327.60(2)(e), Florida Statutes, authorizes counties to adopt ordinances governing the operation of vessels which may discriminate against airboats when such ordinances are adopted by a two-thirds vote of the governing body enacting such an ordinance. In enacting any such ordinance, the county must balance its concern for the public health, safety, and welfare with constitutional considerations and a recognition that any such regulation must not be in violation of constitutional protections afforded to the public for the use of, and access to, state sovereignty lands.

AGO 2009-43 – MUNICIPAL CHARTER, AMENDMENT TO TERMS OF OFFICE

Local legislation providing for filling vacancies on appointive municipal boards would not appear to violate the prohibition contained in section 166.021(4), Florida Statutes, precluding charter amendments dealing with "matters prescribed by the charter relating to appointive boards" as the municipal charter in this case contains no provision for filling vacancies on such boards.

AGO 2009-42 – LAW ENFORCEMENT, EMPLOYMENT OF NON-SWORN OFFICERS

The duties of law enforcement personnel, rather than their designated job title, will determine whether public service aides and community service officers are subject to certification by the Criminal Justice Standards and Training Commission as law enforcement officers or auxiliary law enforcement officers as defined in section 943.10(1) and (8), Florida Statutes.

AGO 2009-39 – RECORDS, DISPOSITION OF PUBLIC RECORDS

Public records in the custody of the Spring Hill Fire and Rescue District Municipal Services Benefit Unit should be delivered, pursuant to section 119.021(4), Florida Statutes, to the records custodian of the successor to those duties and responsibilities, that is, to the Spring Hill Fire Rescue and Emergency Medical Services District.

AGO 2009-38 – INTERLOCAL SERVICE BOUNDARY AGREEMENT ACT

The Interlocal Service Boundary Agreement Act, Part II, Chapter 171, Florida Statutes, may not be utilized by a county to retain the authority for issuing development and building permits and providing inspection services within a delineated service area within the boundaries of a municipality.

AGO 2009-37 -- CODE ENFORCEMENT ORDER, ENTRY ON PRIVATE PROPERTY

An order of the city's Unsafe Structures Board authorizes the city to enter premises found to be in violation of the city's code in order to abate or repair the violation without the owner's consent, but does not substitute for the appropriate warrant to arrest the owner.

AGO 2009-35 – PUBLIC RECORDS, CONFIDENTIALITY OF ASSESSMENT TESTS

Student assessment tests developed by teachers to measure student preparedness for college board advanced placement exams are confidential and exempt from the inspection and copying requirements of Chapter 119, Florida Statutes.

AGO 2009-34 – TAXATION, ASSESSMENT OF LIMITED COMMON ELEMENTS

Assessment for taxation of limited common elements should be prorated to the individual units receiving the benefit of the limited common elements.

AGO 2009-32 – COMMUNITY REDEVELOPMENT AGENCY, RELOCATION EXPENSES

Payment of relocation expenses is limited by the provisions of section 163.370, Florida Statutes, which does not authorize the expenditure of funds for construction of facilities located outside the redevelopment area.

AGO 2009-30 – RECORDS, EMERGENCY MEDICAL RECORDS

The entire record of an emergency call which contains patient examination and treatment information and is maintained as required by section 401.30(1), Florida Statutes, is made confidential and exempt from the provisions of section 119.07(1), Florida Statutes, by subsection (4) of section 401.30, Florida Statutes. Reports containing statistical data, required by the Department of Health to be documented and submitted to the department on forms developed and provided by the department, are public records and must be made available

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for inspection and copying following redaction of any patient-identifying information contained in such reports pursuant to section 401.30(3), Florida Statutes.

AGO 2009-29 – COUNTY ORDINANCE IMPOSING CRIMINAL PENALTY

A county has no authority to adopt an ordinance designating the failure to timely pay the civil penalty imposed pursuant to Part II, Chapter 162, Florida Statutes, as a criminal misdemeanor and is prohibited from doing so by Article I, section 18 of the Florida Constitution. Further, the clear terms of section 828.27, Florida Statutes, and the constitutional provisions discussed herein constitute a prohibition against a county adopting an ordinance imposing a criminal penalty for failure to timely pay the civil penalty imposed pursuant to the county's animal control or cruelty ordinance adopted pursuant to section 828.27(2), Florida Statutes.

AGO 2009-26 – RIGHT TO FARM ACT, RESIDENTIAL DWELLING

The term "residential" in section 604.50, Florida Statutes, does not require that persons reside in the dwelling on a full-time basis in order to remove the building from the exemption for nonresidential farm building under this section.

Further, the county has the authority to enforce its zoning regulations regarding the construction of a building on land classified as agriculture under section 193.461, Florida Statutes, if those regulations do not limit the operational activity of the bona fide farm operation.

AGO 2009-25 – SUNSHINE, PRE-SUIT NOTICE PERIOD NOT PENDING LITIGATION

A town council which has received a pre-suit notice letter under the Bert J. Harris Act is not a party to pending litigation and, therefore, may not conduct a closed meeting pursuant to section 286.011(8), Florida Statutes, to discuss settlement negotiations.

AGO 2009-24 – CITY COUNCIL MEMBER CARRYING FIREARM IN COUNCIL MEETING

A member of a municipal city council may not carry a weapon or firearm during a city council meeting pursuant to the "place of business" exception set forth in section 790.25(3)(n), Florida Statutes. Further, it is irrelevant to resolution of this question that the city council member possesses a concealed weapons license as section 790.06, Florida Statutes, clearly prohibits the carrying of concealed weapons into any meeting of the governing body of a municipality.

AGO 2009-22 – RECORDS, ACCESS TO CRASH REPORTS

A county is not entitled to receive information contained in crash reports from law enforcement agencies prepared pursuant to section 316.066, Florida Statutes, based on authority contained in the County's Motor Vehicle Accident Cost Recovery Fee Ordinance.

Further, a county is not authorized by section 316.008(1)(k), Florida Statutes, to adopt an ordinance requiring that the county be given access to the information contained in crash reports prepared pursuant to section 316.066, Florida Statutes, prior to the expiration of the 60-day confidentiality period.

AGO 2009- 19 – RECORDS, MUNICIPAL FACEBOOK PAGE

Since the city is authorized to exercise powers for a municipal purpose, the creation of a FACE BOOK page must be for a municipal, not private purpose. The placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes. In any given instance, however, the determination would have to be made based upon the definition of "public record" contained in section 119.11, Florida Statutes. Similarly, whether the FACE BOOK page of the friends would also be subject to the Public Records Law, Chapter 119, Florida Statutes, would depend on whether the page and information contained therein was made or received in connection of the transaction of official business by or on behalf of a public agency.

The city is under an obligation to follow the public records retention schedules established by law.

While Article I, section 23, Florida Constitution, may be implicated in determining what information may be collected by the city, the constitutional provision expressly states that "[t]his section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Thus, to the extent that information on the city's FACE BOOK page constitutes a public record within the meaning of Chapter 119, Florida Statutes, Article I, section 23, Florida Constitution, is not implicated.

Communications on the city's FACE BOOK page regarding city business by city commissioners may be subject to Florida's Government in the Sunshine Law, section 286.011, Florida Statutes. Thus, members of a city board or commission must not engage on the city's FACE BOOK page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action.

AGO 2009- 15 – SUNSHINE LAW, LITIGATION STRATEGY SESSION

When a city is a real party in interest of a pending lawsuit, it may conduct a closed attorney-client session under section 286.011(8), Florida Statutes, to discuss the pending litigation, despite not being a named party at the time of the meeting.

AGO 2009- 14 – SUNSHINE LAW/CONFLICT RESOLUTION, CLOSED SESSIONS

Section 286.011(8), Florida Statutes, does not authorize a city council to meet in executive session to consider the terms of settlement negotiations in conflict resolution

proceedings under the "Florida Governmental Conflict Resolution Act."

Gerry Hammond was admitted to the Florida Bar in 1979. She received her B.A. degree from Flagler College in St. Augustine, Florida, in 1975, and her J.D. degree from the University of Florida in 1978.

Following her admission to the Bar, she practiced poverty law with Three Rivers Legal Services in Lake City, Florida. During that period she represented clients in several counties in North Central Florida in all aspects of civil legal practice.

Her employment in the Attorney General's Office began in 1981 in the Opinions Division and she has continued as an Assistant Attorney General in Opinions since that time. In addition to writing opinions she has been involved in drafting briefs in a number of cases in which the Attorney General's Office has appeared as amicus curiae, most significantly in Miami Herald Publishing Company v. Neu, a Sunshine Law case which she had the opportunity to argue before the Third District Court of Appeal. She has also presented a number of citizen initiative petitions to amend the Florida Constitution to the Florida Supreme Court.

Ms. Hammond has been admitted to practice before the Supreme Court of the State of Florida, Federal District Court for the Middle District of Florida, and the United States Court of Appeals for the Eleventh Circuit.

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