Summer 2010

# The Voice

of The Florida Bar Government Lawyer Section

# Ill-Winds Blow for Government Lawyers...

*By Keith W. Rizzardi, Chair, Government Lawyer Section, 2009-2010*


RIZZARDI

As Florida's recession continues, and projections for future years get worse, Florida's government lawyers can expect to continue to feel the effects.

In the 2010 legislative session, public servants, and government lawyers in particular, suffered a series of relatively minor but cumulatively noteworthy reductions in salary and benefits. Pension contributions increased. Life insurance benefits decreased. An appropriations proviso expressly prohibited state agencies from paying attorneys' bar dues. State agencies felt more budget cuts. Public employers cannot afford to pay for required educational conferences, travel, or professional activities. Meanwhile, the Government Lawyer Section's legislative goal of loan forgiveness was never considered, and the proposed minor reforms of public records and sunshine laws, as supported by The Florida Bar Board of Governors, saw no movement in committee.

Unfortunately, based upon some of the ideas discussed in the Capitol in 2010, the next legislative session could affect Florida's government lawyers even more. One proposed bill, directed at salaries, sought to mandate a three percent salary cut for all state workers. Another pension reform bill sought to require 33 years for full retirement benefits, to change the retirement age from 62 to 65, and to revise pension calculations to be based on the public servant's average salary over the course of an entire career.

In fairness to our Legislature, all of these proposals reflect the tough budgetary times. Indeed, reforms may even be necessary to achieve long-

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# Word From the Chair

*By Mary Ellen Clark, Chair, Government Lawyer Section, 2010-2011*


CLARK

I am honored by the opportunity to serve as Chair of the Government Lawyer Section for the 2010-2011 year. I know, as well as each of you, how challenging it is to maintain a positive outlook about the prospect of long-term public service employment right now. While it is currently rare to have a government employer pay travel expenses to a Florida Bar event and we each face difficult choices about our personal priorities, I still encourage you to stay involved and to take every opportunity to come our meetings. With ever increasing technology, there is still no substitute for meeting face-to-face and the energy, ideas, and enthusiasm that result. This year, The Florida Bar has scheduled only two regular meetings, both in Orlando. Our Section will maintain a Friday afternoon meeting slot and will meet on September 24, 2010, and June 24,

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## UPCOMING EVENTS

### CLE

**Tips From Pros from Dover: Section 1983 for Government Lawyers (1182R)**

Tentatively November 5, 2010 - more information to follow

THE GOVERNMENT LAWYER
SECTION REPORTER

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**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.

## ILL-WINDS BLOW FOR GOVERNMENT LAWYERS...

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term fiscal sustainability. But we, the government lawyers, are not fully participating in the dialogue. While we represent the people of Florida with honor and professionalism, we are failing to advocate for ourselves.

Government lawyers do not even have a single full-time agency employee sitting as a member of The Florida Bar Board of Governors. Although The Florida Bar team worked tirelessly on our bar dues issue, as a whole, we government lawyers also lack a meaningful lobbying presence in Tallahassee, or on Capitol Hill. But perhaps most troubling is the fact that we allow ourselves to be silenced. In the past year, lawyer after lawyer, quietly and sheepishly confided to me that he or she was afraid to write down, or speak up, or get involved – in fear of retaliation by some unidentifiable person.

As government lawyers, all of us have already accepted the pay differential of public service, heartened by our belief that "there is no higher calling." But if we remain mute, while witnessing the continued reduction of benefits for the least well off among us, then we should do so fully aware of the inevitable outcome. Young lawyers, burdened by rising student loan debt, will forgo public service. The few who do feel the motivation of public service will leave after short tenures, lured by the market value of their experience, and forced to take the bait due to the economic realities of marriage, home ownership, children, loans, and other debts and obligations. The existing workforce of experienced government lawyers will age, retire, and leave behind a government agency ill-equipped to tackle its increasingly difficult duties. Critics will then further bemoan the ineffectiveness of government, calling for more cuts, or perhaps – as happened to the Department of Community Affairs this year – the proposed dissolution of an entire state agency.

We will get the government we pay for, and the government we advocate for. If you care about public service, then please, speak up. Join the Executive Council of the Government Lawyer Section, and get involved. Our livelihoods, and the effectiveness of our state government, may be at stake.

*Keith Rizzardi, current Chair of the Government Lawyer Section, is a Managing Attorney for the South Florida Water Management District, and a member of NOAA's Marine Fisheries Advisory Committee.*

## IN THIS ISSUE:

**WORD FROM THE CHAIR**
*from page 1*

2011. The GLS Executive Council held a very successful planning meeting for the upcoming year on May 7, 2010, in Tallahassee and set some ambitious goals. At the top of the list is the need to study and address the many changes contemplated by the Florida Legislature this past session that would negatively impact the compensation package of government attorneys. We are honored to have Bobby Downie spearhead this effort. The surprise insertion of language in the budget package prohibiting the payment of Florida Bar dues was a strong reminder of the importance of our relationship with The Florida Bar and its Board of Governors. Other priorities in the coming year will be the creation of a technology committee, headed by Warren Pearson, to address our website and explore new venues used by younger attorneys. Additionally, we will be establishing a committee, headed by Keith Rizzardi, ready to provide positions regarding potential amicus positions for the Section to consider. The need for cooperation by and support of government lawyers is greater than ever and I invite you to join us and get involved!

*Mary Ellen Clark is an Assistant Attorney General, practicing in the Administrative Law Bureau of the Attorney General's office for nearly 7 years, and has represented the Boards of Accountancy, Architecture and Interior Design, Electrical Contractors, Employee Leasing Companies, Pilot Commissioners, Podiatric Medicine, Psychology, and 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 2010-2011 Chair of the Government Lawyer Section, a past Executive Council member of the Administrative Law Section, and was recently appointed to the Professional Ethics Committee. She is also a past president of the Florida Government Bar Association and the Tallahassee Women Lawyers.*

# John Slye Is Claude Pepper Outstanding Government Lawyer


SLYE

The Government Lawyer Section of The Florida Bar announces that this year's recipient of the Claude Pepper Outstanding Government Lawyer Award is John S. Slye, Esquire, Deputy General Counsel with the Department of Children and Families. Mr. Slye was nominated by John J. Copelan, Jr., the 1992 Claude Pepper Award recipient and Bob Butterworth, founding chair of the Government Lawyer Section. The award will be presented to Mr. Slye on June 25, 2010, during The Florida Bar Annual Convention at the Boca Raton Resort and Club.

John Slye has chosen public service as the capstone of his legal career. After graduating from Duke University in 1959 and Stetson University College of Law in 1964, he quickly distinguished himself in both the legal community and the health sector by becoming President of Legal and Public Affairs and Corporate Secretary for Blue Cross and Blue Shield of Florida, Inc., where he practiced for over twenty years. He then joined the law firm of Foley and Lardner in Jacksonville where he practiced health and employee benefit law. However, in 1991 he made a decision that has been the hallmark of many dedicated public servants including Senator Claude Pepper. He decided to enter public service as a government lawyer by accepting appointment as the General Counsel for the Department of Health and Rehabilitative Services. Since then he continued to serve the children and citizens of this state in positions with the Department of Children and Families including his current position. He is a dedicated public servant, a great colleague and provides constant advice and mentoring to all the attorneys at the Department of Children and Families. To quote from his nominating letter from Messrs. Copelan and Butterworth: "[I]t has been said that there is no higher calling for lawyers than public service. For some that is a slogan; for John that is a way of life."

The Claude Pepper Award is presented to a government lawyer, typically with many years of service, whose character and accomplishments exemplify the highest ideals of government service. Recipients are well-rounded lawyers, whose importance to their agency or employer is irrefutable. The 2010 recipient John Slye exemplifies the highest ideals of dedication, professionalism, and ethics in service to the public. The award is named in honor of the Honorable Claude Pepper, a Florida attorney, United States Senator, and United States Congressman, who was an advocate on behalf of the people, and who represented the highest ideals of government service through twelve presidential administrations. Originated in 1989, there have been twenty recipients of this prestigious award.

**1990 – Navy Lt. Commander Charles Coles Jeffries, Jr.,**

**1991 – Chriss Walker**, Senior Attorney, Department of Health and Rehabilitative Services Office of Child Support, Tallahassee

**1992 – John J. Copelan, Jr.**, Broward County Attorney, Ft. Lauderdale

**1993 – Enoch "Jon" Whitney,** General Counsel for the Department of Highway Safety and Motor Vehicles, Tallahassee

**1994 – Irene M. Quincey,** South Florida Water Management District, West Palm Beach

**1995 – Joseph Lewis, Jr.,** Assistant Attorney General, Department of Legal Affairs, Tallahassee

**1996 – Anthony C. Musto,** Office of the Broward County Attorney, Ft. Lauderdale

**1997 – George B. Barrs,** Office of the Public Defender, West Palm Beach

**1998 – Jorge L. Fernandez,** Office of the County Attorney, Sarasota

**1999 – James A. Peters,** Assistant Attorney General, Department of Legal Affairs, Tallahassee

**2000 – George Lee Wass,** Assistant Attorney General, Department of Legal Affairs, Tallahassee

**2001 – Deborah K. Kearney,** General Counsel, Department of State, Tallahassee.

**2002 – Denise M. Nieman,** Office of the County Attorney, Palm Beach

**2003 – William B. Hammill,** a Civilian Attorney-Advisor with the United States Central Command Stationed at MacDill Air Force Base, St. Petersburg.

**2004 – Sheryl Wood**, General Counsel for the South Florida Water Management District, West Palm Beach.

**2005 – Jack Shreve,** Senior General Counsel for Consumer Affairs in the Office of the Attorney General, Tallahassee

**2006 – W. Anthony Loe**, Broward County State Attorney's Office Homicide Prosecutor

**2007 – Judson M. Chapman**, General Counsel for Dept. of Highway Safety and Motor Vehicles, Tallahassee

**2008 – Patricia R. Gleason**, Cabinet Affairs and Special Counsel for Open Government, Governor's Office, Tallahassee

**2009 – Gerald B. Curington,** Deputy General Counsel, Governor's Office, Tallahassee

*This article was contributed by Francine M. Ffolkes on behalf of the Government Lawyer Section, Keith Rizzardi, chair, and Morgan Rood, chair of the Claude Pepper Outstanding Government Lawyer Award Committee.*

# State Case Summaries

*Compiled by Betsy Stupski*

## United States Supreme Court

Wilkins v. Gaddy 08-10914, 2/22/10

**A finding of excessive force should be based on the nature of the force and not the extent of the injury.**

Wilkins, a state prisoner filed action pursuant to 42 USC §1983, alleging that he had been assaulted without provocation by a corrections officer. The district court dismissed his claim of excessive force when it determined that his injuries were de minimis. The Fourth Circuit affirmed the district court.

The Supreme Court reversed, saying that the finding of excessive force should be based on the nature of the force and not the extent of the injury.

Perdue v. Kenny A. 08-970, 4/21/10

**The Unites States Supreme Court established a very high threshold for awarding enhanced attorney fees over and above an award based on a lodestar calculation in a §1988 case.**

Pursuant to 42 U.S.C. §1998, the District Court awarded an attorney's fee of six million dollars based on a lodestar calculation. In addition the court also awarded an enhancement that amounted to 75% of the lodestar amount. The Eleventh Circuit affirmed the award.

The United States Supreme Court reversed, finding that the District Court had failed to provide proper justification for the enhancement award. In its analysis, the Court established six important rules that determine whether an enhanced fee is appropriate. : 1) A reasonable fee is one that is sufficient to induce a capable attorney to agree to take a particular civil rights case; 2)There is a strong presumption that the lodestar method provides a sufficient fee; 3) The Court has never sustained an enhancement to a lodestar award but has maintained that under extraordinary circumstances an enhancement may be justified; 4) The lodestar calculation includes most, if not all, of the relevant factors constituting a reasonable attorney's fee; 5) The burden of proving that an enhancement is justified falls on the fee applicant; 6) The fee applicant must produce specific evidence supporting the award.

Stop the Beach Renourishment, Inc. v. Florida Dept. of Environment Protection 08-1511, 6/17/10

**There was no judicial taking of Florida beachfront property.**

The City of Destin and Walton County obtained permits to restore a six mile strip of beaches that had been eroded by hurricanes. The restoration changed the high water mark as the boundary for beach front property owners. The property owners brought suit after losing an administrative challenge. The Florida Supreme Court determined that there was no taking.

The question before the Supreme Court was whether the decision of the Florida Supreme Court amounted to a judicial taking without just compensation. While the Supreme Court discussed that a judicial taking is a possibility, the facts of this case did not support it. The Supreme Court affirmed that there was no taking. The Court said, "there is no independent right of contact with the water."

## Eleventh Circuit Court of Appeals

Rine v. Imagitas 08-14880, 12/21/09

**The Department of Highway Safety & Motor Vehicles can use a private vendor to send out renewal notices and accompanying advertisements without violating the Driver's Privacy Protection Act.**

The Florida Department of Highway Safety & Motor Vehicles contracted with Imagitas to send renewal notices to Florida drivers. In addition, Imagitas arranged for advertising brochures to be included in the mail-outs. Some Florida drivers who received the notices sued claiming that the State and Imagitas had violated the Driver's Privacy Protection Act .The District Court granted summary judgment in favor of the Defendants holding that the Driver's Privacy Protection Act had not been violated.

The Eleventh Circuit affirmed stating, "There is nothing in the federal statute that prevents states from including advertisements in such renewal notices and the same statute specifically allows states to operate through private contractors."
08-14880

Oliver v. Fiorino 06-01671, 10/26/09

**Police officers were not entitled to qualified immunity in tasering incident.**

Decedent's representative sued, alleging excessive force after the decedent was tasered several times by a police officer and died. The police officers involved moved for a summary judgment on the basis of qualified immunity. The district court found that the officers were not entitled to qualified immunity.

The Eleventh Circuit affirmed and said, "Tasering the plaintiff at least eight times and as many as eleven or twelve times over a two minute span without attempting to arrest or otherwise subdue the plaintiff – including tasering Oliver while he was writhing in pain on the hot pavement and after he had gone limp and immobilized – was so plainly unnecessary and disproportionate that no reasonable officer could have thought that this amount of force was legal under the circumstances. When measured against these facts, the officers violated a clearly established right."

Coffin v. Brandau 08-14538, 2/24/10

**Deputies were entitled to qualified immunity even though they crossed the threshold into homeowner's garage without a warrant.**

An officer, attempting to serve an Order of Temporary Injunction,

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stepped across the threshold of a garage door as it was closing and caused the door to reopen. Subsequently there was a scuffle between officers and the homeowners. Eventually the homeowners brought an action pursuant to 42 USC §1983 for wrongful entry and arrest. The district court found that the officer had violated the homeowners' right but that the officers were entitled to qualified immunity.

The Eleventh Circuit affirmed. The Court found that the deputies' warrantless entry had violated the homeowners Fourth Amendment rights but that there was no warning to the officers at the time that they were clearly violating an established right by entering the garage without a warrant. The court pointed out that the decision establishing the fact that such a right existed was not issued until later.

Flanigan's Enterprises, Inc v. Fulton County 08-17035, 2/16/10

**The court upheld an ordinance that restricts the sale and consumption of alcohol in adult entertainment establishments because the City had statistical and anecdotal evidence showing that the ordinance furthered an important governmental goal.**

Fulton County passed an ordinance that prohibited the sale, possession, and consumption of alcohol at adult entertainment establishments. The owner of a number of adult clubs brought suit alleging that the ordinance violated his First Amendment rights. The federal district court struck down the ordinance saying that the ordinance failed to further an important governmental interest.

The Eleventh Circuit reversed the District Court after noting that the circumstances surrounding this ordinance were different than a similar one that the court had struck down in 2001. The Court said, "This case is different. This time around, the County relied on ample statistical, surveillance, and anecdotal evidence, the live testimony of the chief of police and the chief judge of the juvenile court, among others, and dozens of foreign studies, all of which support the County's efforts to curb the negative secondary effects of alcohol and live nude dancing in its communities. We are satisfied that the County's reliance on this factual foundation was reasonable, and because we determine that the ordinance furthers an important governmental interest, we reverse."

Rushing v. Parker 09-12637, 3/16/10

**Officer who arrested wrong individual as a result of misidentification was entitled to qualified immunity.**

Officers arrested the wrong person based on a misidentification. The arrestee sued pursuant to 42 USC §1983. The District Court granted a summary judgment in favor of the defendants based on qualified immunity.

On appeal the plaintiff/appellant argued that the officers did not investigate thoroughly enough. After noting, "In determining whether qualified immunity exists, the issue is not probable cause in fact but arguable probable cause", the court affirmed the finding of qualified immunity. The court said, "Although by no means perfect, Mincey's investigation was not "plainly incompetent."... Nor did the Plaintiff produce evidence that Mincey 'knowingly violated the law.' ...There is no evidence that Mincey had reason to believe the perpetrator was anyone other than the Plaintiff, given the victim's complaint and identification. Most importantly, we believe that a reasonable officer in Mincey's situation could have followed a similar course of action and believed that probable cause existed. In order to 'defeat summary judgment because of a dispute of material fact, a plaintiff facing qualified immunity must produce evidence that would allow a fact-finder to find that no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts.'" 09-12637

Rehberg v. Paulk et al 09-11897, 3/11/10

**Prosecutor was entitled to qualified immunity for decision to issue an investigative subpoena.**

The Plaintiff sent anonymous faxes that were critical of the management to the local hospital. The DA's office opened an investigation and issued subpoenas. Pursuant to 42 USC §1983, the Plaintiff sued the former District Attorney, a specially appointed prosecutor and Chief Investigator for malicious prosecution, retaliatory investigation and prosecution. He alleged that they lacked probable cause to initiate an investigation against him. The district attorneys and investigator moved for summary judgment, arguing immunity. The District Court denied the motion.

The Eleventh Circuit determined that the prosecutors and the investigator were entitled to qualified immunity for issuing subpoenas.

Starling v. Board of County Commissioners, Palm Beach County 09-11168, 4/6/10

**The County was not liable when it demoted a captain in the Fire Department for getting intimately involved with a subordinate fire-fighter.**

A captain at the Fire Department was demoted after he had an extramarital affair with a subordinate (eventually marrying the co-worker). He filed an action, arguing that the County had violated his First Amendment right to an intimate association. The Defendant filed and was granted a motion for summary judgment.

On appeal, the Eleventh Circuit concluded , "[The County] did not violate the Constitution because the County's interest in discouraging extramarital association between supervisors is so critical to the effective functioning of the Fire Department that it outweighs the firefighter's interest in extramarital association with a subordinate..."

Edison v. Douberly 08-15819, 4/30/10

**A private prison management corporation is not a public agency for the purposes of Title II of the ADA.**

An inmate sued employees of Geo Care Group, Inc , a private prison management company, for violations of Title II of the Americans with Disabilities Act. He argued that the defendants qualified as an "instrumentality of the State " pursuant to the Act. Finding that GEO was not a public entity, the District Court granted a summary judgment in favor of the defendants.

The Eleventh Circuit affirmed, finding that the defining characteristic of an instrumentality of a State is that they are either traditional governmental units or created by one. The Court went on to say, " We agree with these courts that a private corporation is not a public entity merely because it contracts with a public entity to provide some service."

## Florida Supreme Court

Sarasota Alliance for Fair Elections, Inc v. Browning SC07-2074, 2/11/10

**The field of election law has not been preempted by the Florida Election Code.**

A political action group was successful in getting a proposed Charter amendment (regarding paper ballots and certification of election results) added to the ballot. The Board of County Commissioners filed a declaratory action to determine whether the area of election law was preempted by state law. The trial court found that the amendment was not preempted by state law and that it was not in conflict with state law. The Second District found that the local election amendment was preempted by state law but certified the following question to the Florida Supreme Court:

> IS THE LEGISLATIVE SCHEME OF THE FLORIDA ELECTION CODE SUFFICIENTLY PERVASIVE, AND ARE THE PUBLIC POLICY REASONS SUFFICIENTLY STRONG, TO FIND THAT THE FIELD OF ELECTIONS LAW HAS BEEN PREEMPTED, PRECLUDING LOCAL LAWS REGARDING THE COUNTING, RECOUNTING, AUDITING, CANVASSING, AND CERTIFICATION OF VOTES?

The Florida Supreme Court concluded that the Florida Election Code does not preempt the field of elections law. However, they did find that some of the provisions of the Sarasota Charter amendment affecting certification of election results did conflict with state law. The court went on to find that other provisions of the amendment did not conflict with state law and were, therefore, severable.

Attorney's Title Insurance Fund, Inc v. Gorka SC08-1899, 4/1/10

**An offer of judgment conditioned on all offerees accepting is not enforceable because parties must be able to independently evaluate the offer.**

Plaintiffs owned property that was insured by Attorney's Title Insurance Fund. When the property owners became involved in a dispute over the ownership of the property, Attorney's Title refused to defend. Plaintiffs then filed a suit for breach of contract. Before the action reached trial, Attorney's Title made an offer of judgment to each Plaintiff but made the offer conditional on both parties accepting it. Neither of the Plaintiffs accepted the offer and later the trial court found in favor of Attorney's Title. Attorney's Title then filed a motion for attorney's fees as a result of the refused offer. The trial court found that the conditional offer was invalid and the Second District affirmed.

On appeal the Florida Supreme Court held "a joint offer of settlement or judgment that is conditioned on the mutual acceptance of all of the joint offerees is not valid or enforceable."

## First District Court of Appeal

Council for Secular Humanism Inc. v. McNeil 1D08-4713, 4/27/10

**The "no-aid" provision of the Florida Constitution is not limited to the school context.**

Plaintiffs challenged faith-based drug rehabilitation programs for inmates. They argued that the programs were a benefit to the religious organizations that operated them in violation of the no-aid provision of Florida Constitution. The plaintiffs also challenged the contracts that were entered into with the faith-based organizations. Lastly, the plaintiffs objected to the participation of chaplains in assisting of the placement of inmates in the programs offered.

The First District found that the no aid provision of the Florida Constitution was not limited to the school context but also applied in this case. The Court, however, went on to find that the plaintiffs did not have taxpayer standing to challenge the contracts. The Court also found that the chaplains' participation in the placement of inmates was not an unlawful delegation of power.

Keesler v. Community Maritime Park Associates 1D09-1659, 3/10/10

**The Florida Sunshine Law gave citizens the right to attend public meeting but did not give them right to speak at the meeting.**

The City of Pensacola hired CMPA, a not-for-profit corporation, to develop a parcel of public waterfront property. As a public contractor, CMPA is subject to the Florida Sunshine law. However, CMPA refused to allow citizens to provide input at a public meeting. CMPA argued that while the Florida Sunshine Law gave citizens the right to attend meetings, it did not insure them the opportunity to speak at the meetings. Citing Florida Supreme Court precedent, the trial court determined that the law did not give the public the right to speak and issued a summary judgment in favor of CMPA.

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The First District affirmed the summary judgment.

Villa Capri Associates v. Florida Housing Finance Corporation 1D08-5235, 11/30/09

**Agencies should index and provide access to all final orders.**

A builder applied for and was denied government funds to build affordable housing. They worked to cure the deficiency in application but were ultimately denied because the cure was inadequate. During the course of their appeal process, the builder discovered a previous decision where the Florida Housing Finance Corporation had interpreted the cure rule differently. Had Villa Capri Associates known of the previous decision they could have used it to support their position and argument.

On appeal, Villa Capri Associates argued that the failure to index the decision and make it available to the public affected the fairness of the administrative process. The First District agreed. The court said, "Parties in an administrative proceeding have a right to locate precedent and have it apply as well as the right to know the factual basis and policy reasons for agency action."

Gadsden Jai Alai, Inc and Washington County Kennel Club, Inc v. Department of Business and Professional Regulation 1D08-5655, 1/15/10

**An economic interest in the outcome of an administrative hearing was not a sufficient basis under the permitting statutes for standing to participate in the hearing**.

The Department of Business and Professional Regulation (DBPR) issued a permit to Gretna Racing, LLC, and a quarter horse racing operation. Subsequently Plaintiffs filed a petition to participate in an administrative hearing to review the permit decision. DBPR dismissed their petition based on a determination that they lacked standing.

On appeal Gadsden Jai Alai argued that they had standing because they were raising constitutional challenges that affected the validity of the permitting process. Affirming the DDBPR's decision, the First District found that the appellants must have an independent basis to have standing. In this case the only basis appellants could submit was their economic interest and that was not contemplated or allowed by the permitting statute. The court concluded by saying, "While appellants' arguments have some initial appeal, we determine the dangers of allowing parties to raise constitutional issues in order to gain standing to address other issues in the permitting process outweigh any arguable consideration of judicial economy. It is preferable under these circumstances to have the constitutional issues addressed in an independent circuit court proceeding. 1D08-5655

Florida Power and Light Company v. Public Service Commission 1D09-5145, 3/3/10

**Court ruled that Florida Power & Light employee salaries could be kept confidential.**

Florida Power and Light (FPL) requested a rate increase. One of the reasons they cited for the requested increase was employee compensation. The Public Service Commission issued interrogatories to FPL regarding employee salaries and other employee compensation. FPL responded but also requested a protective order to keep the information confidential, arguing that it was sensitive business information. The Public Service Commission determined that the information was subject to disclosure pursuant to Florida public records law.

The First District reversed the Commission and determined that the employee information should be kept confidential.

Bruner v. Hartsfield 1D08-5524, 11/17/09

**The "Save our Homes" provision is constitutional.**

The Plaintiff challenged the constitutionality of the "Save Our Homes" provision (SOHA) and Amendment 1, adopted by popular referendum in 2008which concerned the portability of homestead exemptions. The trial court dismissed the second amended complaint with prejudice.

The First District affirmed stating, "This court has already considered and rejected virtually identical constitutional challenges to SOHA… The holdings…that section 4, Article VII is not constitutional for the reasons claimed are not changed by the passage of Amendment 1." 1D08-5524

## Second District Court of Appeal

G.W. v. Rushing 2D09-3986, 11/25/09

**The circuit court clerk has a duty to properly transmit notices of appeal to the court of appeal.**

G.W., a party who had been declared a vexatious litigant by court order, filed a notice of appeal. In response to a court order the circuit clerk removed the Notice of Appeal from the court file. The clerk provided a copy of that order as well as the order declaring him a vexatious litigant to G.W. G.W. then complained that the clerk's failure to submit the Notice of Appeal to the appellate court was error and deprived him of his right to appellate review.

The Second District found that the circuit court clerk should have transmitted the Notice of Appeal to the Court of Appeal. The court said, "Just as this court considers notices to invoke discretionary jurisdiction and notices of appeal it receives to be the property of the supreme court and its clerk, notices of appeal filed with the circuit court clerk to review circuit court orders likewise should be regarded as the property of this court and its clerk… With this opinion, we reiterate that the circuit court clerk has a duty to properly transmit notices of appeal to this court." 2D09-3986

Raven v. Manatee County School Board 2D08-1533, 12/02/09

**Since the School Board had delegated its investigation to the Office of Professional Standards, the teacher under investigation was entitled to an attorney when he was interviewed by the representative from the Office of Professional Standards.**

The appellant was a teacher in Manatee County and was the subject of a joint investigation by Child Protective Services and the Sheriff's Office. Although the investigation did not lead to any criminal charges, the School Board proceeded with its own investigation through its Office of Professional Standards. The appellant was not allowed to have an attorney present at the investigatory interview with the representative from the Office of Professional Standards. As a result he refused to participate in the interview. An ALJ determined that the appellant was entitled to have an attorney present, but the School Board rejected the ALJ's finding and terminated the Appellant's employment.

On appeal the Appellant argued that he was entitled to have an attorney present at the investigatory interview. The Second District reversed the School Board decision saying, "Because Ms. Horne was conducting the agency's investigation the ALJ properly concluded that when Raven was directed to appear before Ms. Horne for an investigative interview he was being compelled to appear before an 'agency in an investigation' as that phrase is used in section 120.62(2)."

Addison v. City of Tampa 2D09-1968, 4/7/10

**The plaintiff was unsuccessful in certifying a defendant class of Florida cities and counties because the cities and counties were entitled to the home venue privilege.**

Plaintiffs sued the City of Tampa in circuit court, arguing that the Florida Constitution does not permit cities and counties to charge an occupational license tax to attorneys. They sought to certify a defendant class of all Florida cities and counties that charge a license tax to attorneys. The trial court found for Defendants.

On appeal, the Second District affirmed because the home venue rule belonging to the cities and counties applied in this case.

Department of Agriculture et al v. Middleton 2D09-2274, 12/2/09

**State agencies did not waive the "home rule privilege" by suggesting they were willing to move the case from Pinellas County to Jackson County instead of Leon County.**

Plaintiffs brought suit in Pinellas County against state agencies and individuals for alleged mistreatment that they received in a Jackson County Facility. The state agencies filed a motion to transfer the case to Leon County pursuant to the "home venue privilege." The state agencies also argued that even though they were entitled to have venue transferred to Leon County, Jackson County would be a proper venue in 'the interests of justice, judicial economy, and taxpayer concerns.' The trial court denied the motion as premature.

On appeal among other things, the Plaintiffs argued that the state agencies had waived the home venue privilege by suggesting Jackson County as an alternative. The Second District found that the home privilege was not waived. The court concluded by saying, "In conclusion the trial court erred in denying the Defendant's motion to transfer venue. On remand, the court should transfer venue to Leon County where the State Agencies have their principal offices.", 2D09-2274

## Third District Court of Appeal

City of Miami v. Reynolds 3D09-3466, 4/21/10

**The City Manager did not have to make findings and conclusions in order to impose a sanction on a police officer that was different from the sanction recommended by the Civil Service Board.**

The Civil Service Board found that a police officer was guilty of only one of several charges. After receiving the Board's decision, the City Manager imposed a stricter penalty than recommended by the Board. The Appellate Division of the Circuit Court quashed the decision by the City Manager because he failed to make findings and conclusion to support his decision to impose a stricter penalty. The Third District quashed the circuit court decision saying , "… while the Civil Service Board determines the truth of the charges and makes findings as to guilt or innocence, it is the prerogative of the City Manager to impose punishment; thus, any recommendations that the Civil Service Board may make regarding punishment may simply be disregarded by the City Manager."

## Fourth District Court of Appeal

Karayiannakis v. Nikolits 4D09-8, 12/09/09

**For the purposes of assessing taxes, property appraiser should consider what portion of the property is used for commercial purposes.**

The Plaintiff/Appellant owned an apartment building with five units. She also owned the surrounding land. She lived in one of the units so the property appraiser divided the property for the purposes of determining which portion qualified as homestead and therefore would be entitled to special tax treatment. The property appraiser determined that 37% of the apartment building and 37% of the surrounding property was entitled to special treatment. The property owner argued that the surrounding property should all qualify under the homestead provisions. The trial court entered a summary judgment in favor of the property appraiser.

The Fourth District affirmed stating, "…any portion of a person's

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land, buildings, fixtures, and other improvements that is being used for commercial purposes does not qualify as "real estate used and owned as a homestead."

Francis v. School Board of Palm Beach County 4D08-3953, 3/10/10

**School Board was not liable for tragic accident near bus stop.**

Tragically Francis's daughter was hit and killed by a car while she was going to her bus stop. Francis sued the school board for negligence because they had recommended that she change bus stops to avoid the trouble she had been having with other students. The school board filed a motion to dismiss, arguing sovereign immunity and that they did not proximately cause the student's death. The trial court dismissed the complaint.

Without reaching the issue of sovereign immunity, the Fourth District affirmed stating, "Accordingly, the crux of the issue is that [the student] was not under the school board's control when the accident occurred. Regardless of the circumstances that led her to using the alternate bus stop, she was under the exclusive control of her parents or guardians during the time she was walking to the bus stop. The school board did not have a duty to ensure [the student's] safety in arriving at her bus stop."

## Fifth District Court of Appeal

Calhoun, Dreggors & Associates v. Volusia County 5D09-547, 12/31/09

**It was proper to not award attorney's fees in condemnation case where there was no settlement or condemnation action filed.**

The County planned to widen a road and sent a notice to property owners that some of their property was needed for the project. A few months later the County sent a later making a specific offer for the property. The property owners consulted attorneys but then the County abandoned the project before settling with the property owners or filing a condemnation action against them. However the property owner's attorney moved forward to recover attorney fees and costs. The trial court dismissed the suit to recover fees.

The Fifth District affirmed saying, "We agree with the trial court that the eminent domain statute does not provide for the recovery of attorney's fees and costs associated with a threatened condemnation action where no pre-suit settlement is reached and no condemnation suit is filed.

Seavor v. Department of Financial Services, etc. 5D09-1719, 4/9/10

**Excusable neglect is not a defense for filing an untimely petition for administrative hearing**.

The Department of Financial Services filed an administrative complaint to suspend the license of an insurance agent. The insurance agent filed an untimely petition for a hearing. Since the petition was untimely; the Department proceeded to order an eighteen month suspension.

The agent filed an appeal arguing excusable neglect for her late petition for a hearing and also argued that the eighteen month suspension was inappropriate. The Fifth District agreed that the agent was only subject to a twelve month suspension. The court also concluded that excusable neglect defense is not available where a party has failed to timely file a petition for an administrative hearing.

University of Central Florida Board of Trustees v. Turkiewicz 5D09-1243, 11/6/09

**Plaintiff was required to file a complaint with the Florida Human Relations Commission before bringing suit under the Florida Whistleblower's Act.**

The Plaintiff filed suit against the University pursuant to the Florida Whistleblower Act. The University moved to dismiss, arguing that the Plaintiff failed to comply with the requirements of the whistleblower act. The trial court denied the motion and the University filed for certiorari review.

The Fifth District stated that is was appropriate to review by certiorari whether pre-suit requirements had been met. And in its analysis, the court found that the Florida Statutes required the Plaintiff to file a complaint with the Florida Human Relation Commission and receive a notice from the Commission of termination of investigation before bringing a suit in court. As a result the trial court order was quashed.

*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.*

# Attorney General Candidate Statements

**EDITOR'S NOTE:** *The Government Lawyer Section recently invited each of the candidates for Florida's Attorney General to submit a 500-word statement to The Voice addressing topics of their choice. Our invitation also noted our particular interest in each candidate's views on how our state can retain talented lawyers in the public sector workforce, and maintain our high standards, in the face of the difficult financial times. We received responses from the candidates, including David Aronberg, Holly Benson, Pam Bondi and Jeff Kottkamp, as follows:*

## DAVE ARONBERG:

As a former assistant attorney general myself, I have a professional and personal interest in ensuring that our State attracts and retains talented government lawyers. Lawyers in the public sector could make higher salaries and benefits in private sector jobs, but are driven to public service to fight for justice, attack pollution, give a voice to the voiceless – or to do anything else that makes a difference in the lives of their neighbors. To accomplish this, the government lawyer makes a financial sacrifice; the least we can do is to ensure that they are treated with a measure of respect.

That's why I have repeatedly sponsored bills in the State Senate to provide loan forgiveness for prosecutors, public defenders and assistant attorney generals depending on the number of years of their government service. Since 2002, tuition has continued to rise anywhere from 5 to 15% a year. Many law students graduate today with over $100,000 in debt. This reality, combined with stagnant public sector salaries, has made it harder to recruit quality attorneys – and has lowered morale among existing employees.

As a result of this year's state budget, the Attorney General's Office is now no longer able to pay Florida Bar dues for its attorneys. Moreover, attorneys now have to pay $360 a year per family for health insurance, with co-pays rising by $5 to $20. Unfortunately, tight state budgets have doomed loan forgiveness and other sensible legislation, and public sector lawyers have been without a vocal advocate within the executive branch of our state government. That will change if I'm elected Attorney General in November.

## HOLLY BENSON:

During my time in public service, as the Secretary of the Agency for Health Care Administration, the Secretary of the Department of Business & Professional Regulation, and as a Representative in the Florida House, I worked with outstanding lawyers in all three branches of government to tackle a variety of policy issues. In addition, during the decade I practiced as a municipal bond lawyer, I worked closely with numerous city and county attorneys across the state.

The race for Attorney General has never been more important, not just to Florida but to the entire nation. The next Attorney General will inherit the lawsuit Attorney General Bill McCollum filed in Federal court against the Obama Health Care plan, and the stakes could not be higher. I will carry on General McCollum's fight, and we must win.

Nothing the next Attorney General will do will be of the magnitude of the health care lawsuit, but there are other roles that the Attorney General plays. As your Attorney General, my everyday mission will be simple: to put the bad guys behind bars and to put the good guys to work.

1. I'll make sure we have laws with teeth, so that law enforcement officers can continue to protect our families and our homes.

2. I'll create a regulatory strike force to get rid of unnecessary laws and agency rules, so that businesses can prosper and create jobs, and

3. I'll tackle tort reform because excessive litigation is driving up the cost of everything from health care to the products we buy.

Beyond the policy challenges facing the next Attorney General, there will be continued budgetary challenges. The Florida Legislature will once again be asking the Attorney General's office to make cuts, and we will have to work to ensure that we continue to attract and retain talented lawyers. While I will push for adequate compensation, I will also work to ensure that working in the Attorney General's office is a rewarding calling. We will work to provide meaningful training, to give lawyers the opportunity to try interesting and complex cases, and to ensure a great work environment.

The race for Attorney General has never been more important, and I would be honored to have the support of government lawyers.

## PAM BONDI:

Thank you for the opportunity to explain to your membership why I am a candidate for the office of Attorney General for the State of Florida. Like many of you, I have spent my entire career as a government lawyer, working 18 years as an assistant state attorney for the Hillsborough County States Attorney's Office.

I know first hand the sacrifices, challenges and rewards of being a government lawyer, and I can honestly say that the rewards of this role far outweigh the sacrifices and challenges. As government lawyers, we represent the interests of the public, and work to ensure that our laws and legal system are doing everything possible to prevent and prosecute criminal offenders who victimize the citizens and businesses in our state.

I have been greatly moved by the countless stories from victims of every imaginable crime, and it is their faces, their lives and their stories, which drive me to do everything possible to protect the rights of law-abiding citizens and put criminals behind bars. I cannot think of a more important or noble calling in our democracy than serving as prosecutors for the state, provided we maintain the highest standards in our service to the public.

As all of us who have worked in the role of a government lawyer are aware that there are serious challenges of underfunding facing our

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third branch of government. That underfunding creates understaffing challenges as well as difficulty in attracting and retaining our talented attorneys. I think it is unacceptable that most government lawyers haven't even received a cost of living increase in years.

I believe that in order to address those problems, the Attorney General's office should act not only as a strong advocate for more resources, but reform the way our existing appropriations are spent by identifying and removing ineffective expenditures. We need to ensure that the resources we do have are being used in the most efficient and effective way possible so that government lawyers have the tools necessary to be successful in their jobs on behalf of the people.

The people of Florida deserve to have an Attorney General who will be a proactive and aggressive defender of the basic fundamental freedoms provided to them by law; most importantly the rights of law-abiding citizens to be safe from crimes and criminals, and to elevate the rights of victims over the rights of criminals. I understand I cannot be successful in these efforts unless we have the adequate resources to recruit, promote, retain and compensate our talented and dedicated government lawyers, and I am committed to fighting for proper funding to do so.

The Attorney General's Office serves the people of Florida predominantly through the good work of government lawyers. As a political outsider, I bring the unique perspective from my many years of experience, and I will use the power of that office to put the duty of our profession above politics, protect the individual rights of our citizens and protect the sovereign rights of our state.

As the Attorney General for Florida, I will be dedicated to representing the people of Florida. As a career government lawyer, I believe I am most qualified to lead an office of talented and dedicated government lawyers and fight for appropriate funding for all my staff.

## LIEUTENANT GOVERNOR JEFF KOTTKAMP:

Early in my legal career I had the great honor of serving as a law clerk for two legends in the law – U.S. District Court Judge Joe Eaton and U.S. District Court Judge Sidney Aronovitz.

It was an intense and exciting two years. I had the opportunity to work on a wide variety of complex and interesting cases ranging from multi-Defendant cocaine importation cases, bank robbery cases, products liability cases, civil forfeiture cases, and even constitutional challenges to federal law.

Like most government jobs – the pay wasn't great. However, the experience I gained clerking for two federal judges was something I could never have obtained in the private sector. To borrow a phrase from a popular commercial – the experience I gained was "priceless".

I would draw on my personal experience to recruit talented young lawyers to work for the Attorney General's office. You only have to read the headlines to get an idea of the important issues that the Attorney General's office will face in the coming year: the national healthcare legislation challenge in federal court, the aftermath of the oil leak in the Gulf, and a challenge to the EPA's proposed water quality standards to name a few. These are all opportunities for a young lawyer to gain experience in a broad range of cutting edge issues that have profound and lasting implications.

In state government this type of experience is unique to the Attorney General's office.

It is that experience that is THE primary recruiting tool for the Attorney General's office. I would anticipate that most attorneys would do as I did – and take their experience from the public sector to excel in the private sector.

For those that choose to make a career in the public sector we should link years of service with student loan forgiveness programs, first-time home buyer down payment programs and other incentive programs that reward a commitment to public service.

As Attorney General it would be my goal to staff the office with the best trained, most feared attorneys in the state. The people of our great state deserve nothing less.

# GLS Returns to D.C. for The Federal Seminar 2010

## Chief Justice Quince, Congressman Rooney Among Participants

*By Ward P. Griffin, Chair-elect, Government Lawyer Section, 2010-2011*

On March 22 and 23, 2010, the Government Lawyer Section returned to Washington, D.C., for the latest installment of its unique biennial CLE program – The Federal Seminar.

Set at the U.S. Capitol and U.S. Supreme Court, The Federal Seminar 2010 afforded attendees an opportunity to hear from leading practitioners on an array of emerging federal topics, including general regulatory matters, federal contracting, legislative procedures, and litigation before the U.S. Supreme Court, to name a few.

Seminar attendees also enjoyed an inside look at the U.S. Capitol and U.S. Supreme Court, with a guided tour of the Capitol and a cocktail reception in the Capitol Wine Rooms of Union Station among the highlights.

This year's Seminar benefitted from the extensive expertise of the speakers, which included current and former senior-level agency officials, law firm partners, and seasoned Supreme Court litigators. But what truly set this year's Seminar apart from past years' programs was the participation of two special guests.

The Seminar was pleased to host Chief Justice Peggy Ann Quince as the featured guest of the program. In addition to mingling with attendees at the Monday evening reception and at other points during the program, Chief Justice Quince motioned the U.S. Supreme Court for admission of five attendees into the U.S. Supreme Court Bar.

Chief Justice Quince's participation was highly appreciated and helped to make The Federal Seminar 2010 a truly memorable experience.

In addition, Seminar attendees were treated to a keynote address by Congressman Thomas J. Rooney, a Florida Bar member representing Florida's 16th Congressional District. Congressman Rooney offered invaluable insight into the legislative process and discussed, during a question-and-answer session, how his experience as a practicing attorney has aided his approach to the myriad issues that he encounters as a Member of Congress.

Congressman Rooney also secured meeting space and Capitol tour passes for the Seminar. To state it mildly, Congressman Rooney's efforts, both before and during the Seminar, were highly appreciated.

Attendees of The Federal Seminar 2010 represented a broad array of practitioners, representing federal, state and local governments, as well as private law firms. Likewise, attendees traveled to D.C. from throughout Florida, joining out-of-state Florida Bar members from the D.C. area, New York, and elsewhere.

The Government Lawyer Section plans to return to our Nation's Capital for another installment of The Federal Seminar in 2012. We hope to see you there!

*Ward P. Griffin serves as Counsel with the U.S. Commodity Futures Trading Commission, Office of General Counsel, in Washington, D.C. A native of the Tampa area, Ward earned a B.S. in finance and a B.A. in history from the University of Florida, and a J.D. from the William and Mary School of Law, where he was a member of the Law Review and Editor-in-Chief of the William and Mary Bill of Rights Journal. Ward serves as an elected out-of-state member of the Board of Governors for The Florida Bar Young Lawyers Division, as Chair-elect of The Florida Bar Government Lawyer Section, and as Secretary of The Florida Bar Out-of-State Division.*

# Loss of Bar Dues Benefit Catches Attention

*By Keith W. Rizzardi, Chair, Government Lawyer Section, 2009-2010*

In the waning days of the 2010 Session, the Florida Legislature surprised government lawyers working for state agencies by prohibiting employers from paying their Bar dues. But The Florida Bar does allow installment payments, and Chief Financial Officer Alex Sink is encouraging legal leaders to waive dues altogether for one year.

Ending a ten year tradition, and despite efforts by The Florida Bar, state lawmakers did not pass budget proviso language that authorized state agencies to pay dues required by The Florida Bar. Instead, given the state's fiscal situation, the budget expressly prohibited state agencies from paying attorneys' dues. Salary cuts and pension reforms did not pass.

Nevertheless, the "it could have been worse" message offers no comfort to the young lawyers living paycheck to paycheck. For them, The Florida Bar has a rule that can help. According to Rule 1-7.3, governing "Membership Fees," every member of The Florida Bar is required to pay annual membership fees of $265 per annum. Rule 1-7.3(c) further allows for installment payments of annual fees, in 3 equal installments, for members of The Florida Bar who are "employed by a federal, state, or local government in a non-elected position that requires the individual to maintain membership in good standing within The Florida Bar." Importantly, a member's notice of election to pay membership fees in installments, and the first installment payment, must be postmarked no later than August 15. The second and third installment payments must be postmarked no later than November 1 and February 1, respectively.

In a May 20, 2010 letter to Jesse Diner, President of The Florida Bar, Chief Financial Officer Alex Sink suggested another remedy: "In light of the significant contributions our government attorneys make to the people of Florida, I am writing to request that The Florida Bar consider taking all necessary steps to either waive The Florida Bar annual dues for one year for government attorneys, or to discount the annual dues for one year for government attorneys. Taking either of these steps would send a powerful message by The Florida Bar in support of its members who are pursuing public service on behalf of all Floridians." CFO Sink further requested that her request be considered at the May meeting of The Florida Bar Board of Governors, which took place after this article was submitted for publication, but before The Voice went to print. Nevertheless, her sentiments mirror the views of many other government lawyers, including many leaders and members of the Government Lawyer Section.

Expect the dues dialogue to continue.

# Law School Loans Update

*By John Copelan, Chair, Recruitment and Retention Committee*

As chair of The Florida Bar Government Lawyer Section Recruitment and Retention Committee, I have been asked to write an update on the status of the Loan Assistance efforts. On the state front this year has been a tight budget year for the state of Florida and the Section has put efforts for passing proposed legislation on the back shelf for awhile as the Legislature deals with Dwindling tax resources and major budget cutbacks. The long term vision for this however remains the passage of legislation that would provide "gap payments" for retention in the first ten years while government lawyers are in government service and before the federal law kicks in for loan relief. Additionally this year the Committee disseminated information for participation in a national webinar about Federal Programs, which was very successful: Please visit EJW's website mentioned below for detailed information and to register for their upcoming webinars.

Thanks to Equal Justice Works Senior Program Manager Heather Jarvis for recent news on the CLAPP: By far the most important and time sensitive update about what began as the "Harkin bill," became authorized by the Higher Education Opportunity Act of 2008, and is now entitled the Civil Legal Assistance Attorney Student Loan Repayment Program (CLAAP). Five million dollars is now available for distribution to qualified civil legal assistance attorneys with federal student loan debt. The Department of Education will commit these funds to eligible civil legal assistance attorneys on a first-come, first-served basis. Applications are expected to be due by August 16, 2010. As usual, the program includes some complexity.

I have prepared and posted a comprehensive CLAAP webpage, and have scheduled two webinars to help civil legal assistance attorneys interested in the program.Please help Equal Justice Works get word to civil legal assistance attorneys. Please consider forwarding this announcement to your entire staff, distributing through listservs, and perhaps posting the announcement on your organization's website, blog or lunchroom bulletin board. Please visit EJW's website for detailed information and to register for their upcoming webinars: http://www.equaljusticeworks.org/resources/student-debt-relief/civil-legal-assistance-attorney-student-loan-repayment-program.

*John Copelan is a past Chair of the Government Lawyer Section of The Florida Bar and also of the ABA Government and Public Sector Lawyer Section. He has been a leader in the Government Lawyer Section's efforts on its Recruitment and Retention Committee.*

# Supreme Court Summaries

*Compiled by the NAAG Supreme Court Project*

## I. Opinions

● *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 08-304. The False Claims Act (FCA), 31 U.S.C. §§3729-3733, authorizes the Attorney General and private *qui tam* relators to recover from persons who make false or fraudulent claims for payment to the United States. Courts are without jurisdiction, however, to consider private *qui tam* actions from non-original sources if the actions are based on "public disclosure of allegations or transactions [1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office [sic] report, hearing, audit or investigation, or [3] from the news media." In a 7-2 opinion, the Court held that the use of the term "administrative" in category 2 is not limited to federal administrative agencies, but rather includes state and local administrative reports, hearings, audits, or investigations.

● *United States v. Stevens*, 08-769. By an 8-1 vote, the Court held that the federal statute criminalizing the commercial creation, sale, or possession of the depiction of a live animal being illegally and intentionally wounded, tortured, or killed is overbroad and therefore facially invalid under the First Amendment. Congress enacted 18 U.S.C. §48 in 1999 in response to the production of so-called "crush videos," which showed animals being killed in cruel fashion. The law excluded works with "serious religious, political, scientific, educational, journalistic, historical, or artistic value." Respondent Robert Stevens maintained a business selling video depictions of pit bulls in dogfights, and dogs attacking other animals. He contends that when and where the films of dogfights were made, dogfighting was legal, a fact the United States disputes. The United States charged Stevens with three counts of violating §48, based upon his sale of two dogfight videos and one showing dogs attacking a farm animal. Stevens was convicted of all three counts. On appeal, the Third Circuit, sitting en banc, reversed his conviction. The Third Circuit found that the law was facially invalid under the First Amendment, applying a "strict scrutiny" standard. The statute, it held, was neither narrowly tailored nor the least restrictive means of preventing animal cruelty. In an opinion written by Chief Justice Roberts, the Court affirmed.

● *Graham v. Florida*, 08-7412. By a 5-4 vote, the Court held that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits a sentence of life without parole for juvenile non-homicide offenders. Petitioner Terrance Graham was 16 years old when he and three accomplices attempted to rob a Jacksonville barbecue restaurant. During the crime the restaurant manager was struck in the head by a metal bar. Graham was arrested, charged as an adult, and pled guilty to the charges, including armed burglary with assault or battery, a first-degree felony punishable by life. Following Graham's plea for a second chance, the trial judge withheld adjudication of guilt and sentenced Graham to three years of probation with 12 months to be served in the county jail. Six months after his release, Graham was again arrested. The state alleged that Graham participated in armed home invasion robberies in which two victims were assaulted and confined against their wills. A new trial judge determined that Graham violated his probation by committing home invasion robbery, possessing a firearm, and associating with persons engaged in a crime. The judge then found Graham guilty of, and sentenced him to the maximum allowable punishment for, each of his original crimes: life

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without parole for armed burglary with assault or battery and 15 years for attempted armed robbery. On appeal, the intermediate appellate court concluded that Graham's sentence did not violate the Eighth Amendment because it was not grossly disproportionate to his crimes. The Florida Supreme Court declined review. Through an opinion by Justice Kennedy, the Court reversed.

● *United States v. Comstock*, 08-1224. By a 7-2 vote, the Court held that the Necessary and Proper Clause granted Congress the authority to enact 18 U.S.C. §4248, which authorizes the civil commitment of dangerous sexual predators after they complete their federal prison sentences. A "sexually dangerous" person is someone who has engaged in sexual violence or child molestation, who is sexually dangerous to others, and who suffers from a severe mental illness that would make it difficult for him to refrain from repeating his behavior if released. Upon such a certification from the Attorney General, the district court conducts an evidentiary hearing to determine if the person is, in fact, sexually dangerous. If the court determines, by clear and convincing evidence, that the person meets the definition of sexually dangerous, it must commit the person to federal custody. At that time, the Attorney General is directed to make reasonable efforts to transfer the person to an appropriate state authority or agency. Federal confinement continues until a state assumes responsibility for the person or the person is no longer considered "sexually dangerous." Respondent Graydon Comstock and four other men challenged the constitutionality of the statute when the Attorney General attempted to hold them under it at the conclusion of their prison terms. The men claimed, among other things, that the statute exceeded Congress' power under Article I. Both the district court and the Fourth Circuit agreed, finding that the law was not within the "enumerated powers" of Congress set forth in the Constitution. The Court reversed through an opinion by Justice Breyer.

● *Abbott v. Abbott*, 08-645. The Hague Convention on Civil Aspects of International Child Abduction provides that a child abducted in violation of "rights of custody" must be returned to the child's country of habitual residence. By a 6-3 vote, the Court held that a parent has such a "right of custody" by reason of that parent's *ne exeat* right, which is the authority to consent before the other parent may take the child out of the country. Timothy and Jacquelyn Abbott were married in the United Kingdom; Timothy is a British citizen, and Jacquelyn is a U.S. citizen. Their child, A.J.A., was born in the United States. After the child was born, the couple moved to Chile. There, the couple separated. Custody of the child was awarded to Jacquelyn, with regular visitation rights to Timothy. The court also entered a *ne exeat* order preventing either parent from removing the child from the country without the other's permission. In 2005, while further divorce proceedings were pending, Jacquelyn took the child back to the United States. She filed for divorce in Texas in 2006, seeking, among other relief, modification of the child custody arrangements to limit Timothy's visitation to the state of Texas and to give her sole authority to determine where the child would reside. Timothy brought a separate action in federal district court seeking to return the child to Chile under the prior court order. The district court and the Fifth Circuit both denied Timothy's request. They reasoned that a *ne exeat* order was not a "right of custody" under the Hague Convention and that Timothy was therefore not entitled to a return order. The Fifth Circuit held that a *ne exeat* order was simply a "veto right" that could not be "actually exercised." In an opinion by Justice Kennedy, the Court reversed.

● *Levin v. Commerce Energy, Inc.*, 09-223. The Court unanimously held that comity principles bar federal jurisdiction over a case in which taxpayers allege that Ohio violates the Equal Protection and dormant Commerce Clauses by providing certain tax exemptions only to their competitors. The Court therefore reversed a Sixth Circuit decision which ruled, based on Hibbs v. Winn, 542 U.S. 88 (2004), that neither comity principles nor the Tax Injunction Act barred the action because the plaintiff/respondent requested only that its competitors lose the tax exemption (which would have the effect of increasing Ohio's tax revenues). The Court emphasized that Ohio state courts – which are not bound by the TIA and are more familiar with state legislative preferences – are better positioned to determine the appropriate remedy for any unequal treatment.

● *Berghuis v. Thompkins*, 08-1470. In this case, police provided Miranda warnings to respondent, who was then largely silent during a three-hour interrogation before answering "yes" when asked if he prayed to God to forgive him for the shooting at issue. By a 5-4 vote, the Court held that (1) respondent did not invoke his right to remain silent through his silence during the interrogation, and (2) respondent waived his right to remain silent when he knowingly and voluntarily made a statement to the police. On the former ruling, the Court held that a suspect must invoke his right to remain silent "unambiguously," just as with the right to counsel under Davis v. United States, 512 U.S. 452 (1994). On the latter holding, the Court reaffirmed that a Miranda waiver can be "implied" through conduct. To establish an implied waiver, the state needs to show that a Miranda warning was given and that it was understood by the accused.

## II. Cases Granted Review

● *City of Ontario v. Quon*, 08-1332. At issue is whether a city police department violated the Fourth Amendment

rights of a police officer when it read the transcripts of text messages the officer sent while on duty on a department-issued text-messaging pager. The City of Ontario, California had a written policy advising employees that use of City-owned computer-related services for personal purposes was forbidden, that the City reserves the right to monitor "all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." When the City Police Department obtained text-messaging pagers for its SWAT team officers, it told the officers that the e-mail policy applied to pager messages. The City, however, had to pay extra when a pager went above its monthly character limit. The officer in charge of the administration of the pagers, Lieutenant Steve Duke, adopted an informal agreement that he would not audit pagers that went above the monthly limit if the officers agreed to pay for any overages. Eventually, Lieutenant Duke became tired of collecting bills. That prompted the Chief of Police to order a review of the pager transcripts for the two officers with the highest overages to determine whether the monthly character limit was insufficient to cover business-related messages. One of those officers was respondent Sergeant Jeff Quon. After initial Department review, the matter was referred to internal affairs to determine whether Sergeant Quon was wasting time with personal matters while on duty. Internal affairs discovered that, during the month under review, Sergeant Quon sent and received 456 personal messages while on duty, some to his wife, some to his mistress, many sexually explicit in nature. Sergeant Quon, his wife, and his mistress (collectively, respondents) filed a §1983 action against the City, the Police Department, and others (the "City"), alleging Fourth Amendment violations. A jury found that the Chief of Police's purpose in ordering review of the transcripts was to determine the character limit's efficacy. The district court ruled that that was reasonable under the circumstances, and therefore constitutional under *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality). The Ninth Circuit reversed, holding that respondents were entitled to summary judgment in their favor. 529 F.3d 892.

● *Schwarzenegger v. Entertainment Merchants Ass'n*, 08-1448. At issue is whether a California statute designed to shield minors from excessively violent video games violates the First Amendment. The statute defines a "violent video game" as one that depicts "killing, maiming, dismembering, or sexually assaulting an image of a human being." The statute prohibits the sale of such a video game to minors under 18 where (1) a reasonable person would find that the violent content appeals to a deviant or morbid interest of minors, (2) it is patently offensive to prevailing community standards as to what is suitable for minors, and (3)

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# Supreme Court Summaries

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it causes the game as a whole to lack serious literary, artistic, political, or scientific value for minors. Cal. Civil Code §§1746-1746.5. Respondents –associations of companies that create, publish, distribute, sell, or rent video games – challenged the statute, claiming, *inter alia*, that it violated the First Amendment because it unconstitutionally restricted freedom of expression. The district court agreed, granting summary judgment for respondents and permanently enjoining enforcement of the statute. The Ninth Circuit affirmed. 556 F.3d 950.

● *Ortiz v. Jordan*, 09-737. The Court will consider whether a party may appeal the denial of its summary judgment motion on the basis of qualified immunity after a trial on the merits has occurred if the party chose not to pursue an available interlocutory appeal. Petitioner Michelle Ortiz was an inmate at the prison where respondents Paula Jordan and Rebecca Bright were officials. Ortiz claimed that she was sexually assaulted by a prison guard and brought a §1983 action against respondents, claiming that they failed to protect her from the assault and retaliated against her for reporting the incident. Respondents sought summary judgment on the basis of qualified immunity, but the district court denied their motion. They did not bring an interlocutory appeal. The case proceeded to trial, and the jury awarded Ortiz compensatory and punitive damages against both respondents. Respondents appealed the verdict and award of damages, claiming they were entitled to qualified immunity. The Sixth Circuit reversed the district court's denial of qualified immunity. Before its analysis on the merits of the qualified immunity claims, the court briefly noted that although summary judgment denials are not ordinarily subject to appeal after a trial on the merits, denial of summary judgment based on qualified immunity is an exception to this rule.

*Compiled from The Supreme Court Report by the NAAG Supreme Court Project.*

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# New LRAP for Prosecutors & Defenders

More exciting loan repayment assistance news from Equal Justice Works: The John R. Justice Student Loan Repayment Program (JRJ) will provide 10 million dollars in loan repayment assistance to state and federal public defenders and state prosecutors who agree to remain employed as public defenders and prosecutors for at least three years. Florida's share of the funding is $524,525. JRJGrant will be administered in Florida by The Office of the Attorney General. More information is available at www.myfloridalegal.com/JRJGrant.

Funds will be available to states based on the total population of each state with a minimum base allocation of $100,000. A JRJ webpage which will be updated as information becomes available and have scheduled two webinars to help prosecutors and defenders interested in the program

# Government Lawyer Section at the 2010 Annual Florida Bar Convention

(L-R) Claude Pepper Committee Chair, Morgan Rood, is honored by 2009-10 Government Lawyer Section Chair, Keith Rizzardi.

Past Claude Pepper Award Winners gather to honor the newest recipient.

(L-R) Morgan Rood; Former Attorney General Robert Butterworth; Claude Pepper Award Winner John Shaffner Slye; Florida Bar Immediate Past President Jessie Diner; George Sheldon, Secretary of the Dept. of Children & Families; and Florida Bar President Mayanne Downs.

**The Florida Bar**
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