

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

Volume VII, No. 1

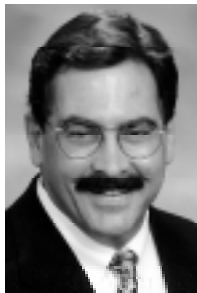
*"No Higher Calling"*

Fall 1999

## *Message from the Chair:*

# An American Citizen's View of Our Legal System

by Joseph P. George, Chair



"Are citizens justified in being suspicious of the law and the legal system?" was the question the Justice put before members of the judiciary, law educators, and practitioners. This was the same question posed by United States Supreme Court Justice William J. Brennan in Miami in 1989. I thought of this while hearing the thoughtful comments of our newest Florida Supreme Court

Justice, the Honorable Peggy Quince, at a recent luncheon given in her honor in Miami by the Dade County Bar Association.

It is said that many citizens' suspicion of the law and legal system takes two forms: (1) the belief that the legal system is unfair to those less fortunate, and (2) the view that law is an obstacle to, rather than an instrument of, the creation of a just and generous society. Justice Brennan stated that the second form of suspicion has an, "even more ominous portent because it brings under a cloud the rule of law itself. To overcome

this distrust society must provide freedom and equality of rights and opportunities in a realistic and not merely a formal sense to all people of this nation." Moreover, it is imperative for *all* lawyers to become involved in this effort.

Continued Brennan in 1989, "Twenty years ago the increase in legal aid, neighborhood legal services, and public defender activities was an encouraging beginning. We were beginning to understand that many current problems will not yield to traditional methods of solution through counseling, negotiation or judicial or administrative proceedings." Now, however, "the rosy beginning has dimmed," according to the United

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## *Letter to the Chair:* *August 12, 1999*

# RE: Public Guardianship — The State Model

Dear Joe:

Sorry we didn't have time at the Florida State Guardianship Association Conference to pursue your questions about the nature of public guardianship and what my role is as a lawyer employed by the State to administer a public guardianship office.

Thirteen years ago I would not have had the hands-on experience to condense this into a few hundred words, but perhaps the doing of the matter has made me more able to explain it.

First, why public guardianship to begin with? Have not our most vulnerable citizens gotten along quite adequately without guardians until now? Without argument because of the lack of space the answer is no. Anyone who lacks the functional ability to exercise one's rights absolutely deserves a

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THE GOVERNMENT LAWYER  
SECTION REPORTER  
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**ARTICLES FOR THE WINTER  
ISSUE ARE DUE October 15, 1999.**

Articles may be submitted on computer disc formatted for Word Perfect 5.0 OR 6.0 with hard copy attached. Please contact Jeanne Clougher at 813/643-4520

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Notice to all "connected" members:

E-mail your information to the web administrator@winsoft.com.

... and visit the Section's WEBSITE at

<http://www.flgovlaw.org>

## ***Tech for the Tech-Impaired:***

# **“NETZERO,” Defenders of the free world— free internet access & e-mail**

by Joseph P. George

The following information is offered to those government luddites who still do not have the benefits of access to: 1) the Internet at work, and 2) free Internet access at work. The benefit of *free* access speaks for itself. NetZero is the first company to provide completely *free internet access and email* ([www.netzero.com](http://www.netzero.com)). The trade off is you must put up with some advertising and allow the company to build a real-time profile of you with their proprietary zCast software. This allows ad campaigns to be tailored to key Uniform Resource Locator's (URL's) and web sites. The profile allows the company to make sure the ads you receive are only for the things that interest you. NetZero says the user profile is kept in strict confidence and your data is always separated from your name and personal information. AOL members already put up with advertising and pay a fee for it, \$264.00 per year. With AOL, before you hear the initial “you've got mail” screen, you must click through advertising anyway. So why pay? If you keep AOL with NetZero as the Internet Service Provider (ISP), AOL is \$9.95 per month.

NetZero offers advertisers “the most sophisticated targeting capabilities available today. NetZero's revenue is generated through advertising and electronic commerce (e-commerce) sponsorships. With

headquarters in Westlake Village, California, NetZero, Inc., is funded by Draper Fisher Jurvetson, Foundation Capital, and Idealab Capital Partners, and maintains strategic alliances with AGIS, NetGravity, and GTE. NetZero is a member of TRUSTe, an independent, nonprofit, privacy initiative that requires participating Web sites to disclose their online information gathering and dissemination practices to consumers.”

NetZero is the leader, so far, in providing free internet access. Families can have multiple accounts at no charge, and keep their AOL screen names.

### **Internet Search Engines**

When you do get on the internet to find information about something you will ask an internet search engine to help you. Search engines enable a computer user to find information by typing in a word or combination of words. A recently published about the internet and internet search engines suggest that as the volume of information on the internet continues to explode, our ability to tap its riches is declining. The search engines most people use to find internet information are indexing only about 16% of the publicly accessible Web, down from 34% in December 1997.

The Web now contains about 800 million pages. It also contains about 180 million images. The internet sites most likely to be indexed and found by ordinary users are those that have many links connecting them to other heavily traveled sites.

The problem of information overload on the Web will eventually be solved by Moore's Law, which predicts that the amount of information that can be processed by a computer doubles every 18 months. Moore's Law says that our machines will multiply in power for at least another decade but that the amount of information that humans might load on the internet is unlikely to grow as quickly.

### **How to change your home page**

If you have Microsoft Internet Explorer and want to change your home page (the page that comes up when you connect) do this:

1. Open the browser (double click your internet icon).
2. Go to the URL (address) you want which we expect to be **[www.flgovlaw.org](http://www.flgovlaw.org)**
3. On the file menu go to view, down to internet options.
4. In the first template you'll see “Current” Click this and that URL becomes your home page.

## ***Introducing a NEW SERIES: “What it's like”***

Please offer to write a short article about your position with the government so that we can help each other develop insight into other positions and responsibilities. Send your article to: [JCPA@libertylawyer.com](mailto:JCPA@libertylawyer.com) or fax to 813/651-0167.

# Government Lawyer Section Gathers at Bar's Annual Meeting in June



Bob Krauss and Justice Peggy Quince share a moment at the Reception



Claude Pepper Award winner, Jim Peters.



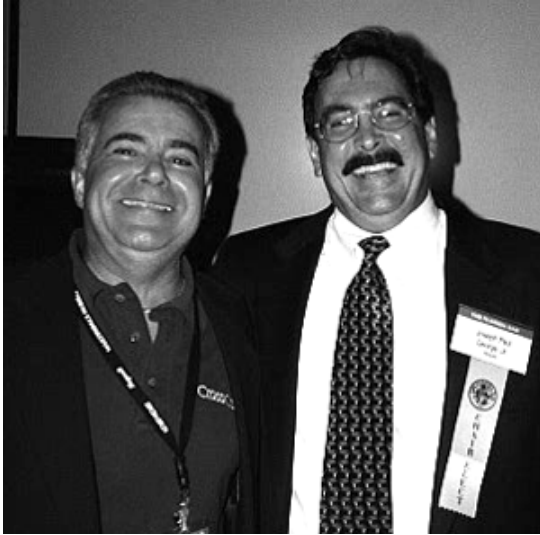
See? If you clean your plate like this, you get a bigger dessert!



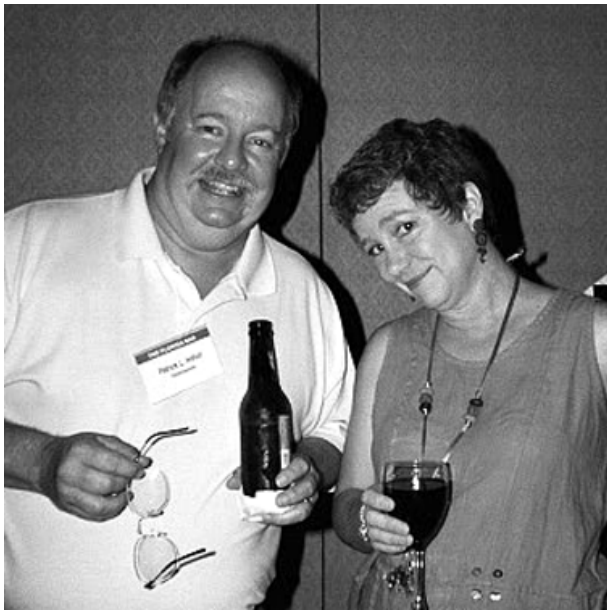
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Phil Maniatty and Chair-elect, Howard Pohl.



Florida Bar Programs  
Division Director, Mike  
Tartaglia and new GLS Chair,  
Joseph George



Booter Imhof, "Party Animal," and friend



Past Chair, Tom Hall (center) enjoys some time with Chair Joe George and a  
Government Lawyer Section member.



Immediate Past Chair,  
Tony Musto.



Jeanne Clougher,  
GLS newsletter editor.

## *Ethically Speaking...*

# Public Officials, or Their Firms, Representing Clients Before the Governmental Bodies on Which They Serve

by Phil Claypool, General Counsel, Florida Commission on Ethics

Attorneys and other professionals who volunteer to serve in a public capacity as members of a collegial board or other body eventually will find themselves in a situation where they must vote on a matter that affects the interests of one of their clients. Generally, these sorts of conflicts are resolved through disclosure and/or abstention from voting in accordance with the requirements of Section 112.3143, Florida Statutes. In some instances, however, the question arises whether the official, or someone from his or her firm, may represent that client in the matter pending before the board or other body on which the official is serving. It is both unfortunate, and too common, an understanding that the official may step down from sitting as a member of the board to represent the client, or that a member of the official's firm may engage in the representation before that board, so long as the official recuses himself or herself.

In a series of decisions dating back to 1977, the Ethics Commission has concluded that Section 112.313(7)(a), Florida Statutes, prohibits a member of a governmental board, as well as the member's firm, from representing a client before that same board, regardless of whether the member abstains from voting on the client's matter. Section 112.313(7)(a) prohibits a public officer from having or holding "any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties."

The first opinion rendered by the Commission in this area was CEO 77-126,<sup>1</sup> involving a member of a city

planning board privately representing as architect clients before the board. There, the Commission found that a prohibited conflict of interest was created where a member of a municipal planning board privately represented clients before that board. The opinion states:

Where a public officer represents clients before his own agency, his independence and impartiality are jeopardized. In our view he is unable to perform his public duties efficiently and faithfully, and the appearance of public office being used for private gain undermines the confidence of people in their government. Moreover, it is our opinion that the subject situation falls squarely within the definition of 'conflict of interest' contained within the Code of Ethics:

'Conflict' or 'conflict of interest' means a situation in which regard for a private interest tends to lead to a disregard of a public duty or interest. [Section 112.312(6), F. S. (1976 Supp.).]

Next, in CEO 78-86 the Commission considered a situation where a board of adjustment member occasionally was representing clients before the board of adjustment and found:

In other words, any representation of a client for compensation before a board of which one is a member impedes the full and faithful discharge of one's public duties, in violation of s. 112.313(7)(a). When one is employed to make several such representations, a frequently recurring conflict of interest arises, in further violation of that section.

We previously have advised that the Code of Ethics does not prohibit

a public officer's appearing in his own behalf before any agency of government, including his own agency. See CEO 77-119. However, a different situation is presented when, as a part of his profession or occupation, an individual undertakes to represent another person's interests before his own board. When that occurs, the board member has the advantage of knowing intimately board procedures as well as the particular interests, views, and voting records of its members, and he can tailor his representation accordingly. In addition, the public officer's independence and impartiality are jeopardized. Finally, the appearance of public office being used for private gain undermines the confidence of people in their government. Such a situation would be similar to a member of the Commission on Ethics being retained to represent one who is charged with a violation of the Code of Ethics, or to a legislator acting as a paid lobbyist before the Legislature. See s. 112.311, F. S., in this regard.

We do not feel that this conflict of interest could be mitigated or avoided by having another member or an employee of the public officer's professional firm represent the client before his board. The same conflict of interest and appearance of conflict of interest would be involved in this type of representation, as well as the same direct private gain to the public officer.

This line of authority was followed in subsequent opinions CEO 79-7 (City planning board member representing clients before planning department and other city departments); CEO 81-84 (Town planning commission member privately serving as president of construction and land development

corporation); CEO 82-14 (Airport authority board member leasing property from authority and engaging in business with tenant of authority); CEO 85-52 (County commissioner's spouse attorney with law firm representing client before county commission); CEO 86-41 (City council member engineer retained by utility company purchasing water from city); and CEO 87-78 (County commissioner retained as attorney by public hospital in county).

In CEO 88-40 the question was whether a city council member or partners of his law firm would be prohibited from representing clients before the city council, and the Commission reiterated its conclusion:

In a previous opinion, CEO 77-126, we advised that representing a client before a public board of which one is a member would violate this provision. Subsequently, in CEO 78-86 we advised that such a conflict of interest could not be mitigated or avoided by having another member or employee of the public officer's professional firm represent the client before his board.

We have advised that a city council member could represent clients as a consulting engineer before boards of the city other than the city council and that such representation should be disclosed as provided in Section 112.3145(4), Florida Statutes. See CEO 86-47. However, we suggest that you contact The Florida Bar for its opinion on these types of situations, as we note that Opinion 74-27 of the Professional Ethics Committee advised that a city board member could represent a client before other city agencies provided that the matter had no relationship to any decision made by the board, the board had no control over any administrative officer before whom the attorney would appear, and the board had no control over any public official who might appear in a proceeding as a witness and whose testimony the attorney might have to attack.

Accordingly, we find that a prohibited conflict of interest would be created were you or another partner of your law firm to represent a

client before the city council in a zoning matter or a request for a variance, if you serve as a member of the city council.

This conclusion also was referenced in CEO 89-29 (City commissioner employed as executive director of city chamber of commerce) and in CEO 89-47 (County commissioner's law firm representing local developer).

Most recently, in an opinion that was upheld on appeal to the First District Court of Appeal, CEO 96-01, *per curiam aff'd., Korman v. State Com'n on Ethics*, 710 So.2d 553 (Fla. 1st DCA 1996), the Commission considered a situation where a city electric authority board member served as "special counsel" to a law firm that had represented bond underwriters on authority bond issues and had represented clients doing business with the authority, concluding:

In past opinions, we have concluded that representing a client before the board of which one is a member violates Section 112.313(7)(a), as it interferes with the full and faithful discharge of one's public duties and, where such representations are frequent, presents a continuing or frequently recurring conflict. See CEO 77-126 and CEO 78-86. We also have concluded that the same conflict exists when another member or employee of the public officer's professional firm undertakes to represent a client before the officer's board. See CEO 78-86 and CEO 88-40. On the other hand, in CEO 94-41 we advised that Section 112.313(7)(a) did not prohibit a city council member's employment as a paralegal with a law firm that infrequently represented clients before the city council. Thus, essentially, we have followed the Bar's imputed disqualification rules in this context.

Therefore, we find that, because of the Board member's close, regular, and continuing relationship with the law firm and duty of loyalty to the clients of the law firm, a prohibited conflict of interest under the second part of Section 112.313(7)(a) would exist when the law firm appears before the JEA on behalf of a client, notwithstanding that the Board member's special coun-

sel position does not entail advising the firm about JEA bond issues, projects, or contracts. An impediment to public duties could exist for the Board member to favor the law firm or the client (his private interests) and to disregard his public duty to act independently and impartially in the best interests of the JEA, when the firm's representation of the client involves the JEA.

The Commission has reached the same conclusion in complaint proceedings where a board member has represented a client before the board on which he or she served. In Complaint No. 94-115, In re William Allan King (Final Order No. 95-26, 10/17/95), the Commission concluded that a member of a County Code Enforcement Board violated Section 112.313(7)(a) by representing a private client before the Code Enforcement Board. In Complaint No. 95-136, In re James Naus (Final Order No. 97-16, 7/22/97), the Commission found that a member of a municipal Planning and Zoning Board violated 112.313(7)(a) by representing a private client before that Board. In that case, the Administrative Law Judge had concluded:

A violation of Section 112.313(7)(a), Florida Statutes (1993), is likewise proven if it is established that Respondent's contractual relationship with Toucans [as a licensed contractor contracting with the bar/restaurant to add an additional story onto its existing building] will impede the full and faithful discharge of his public duties. In this case, Respondent had a contractual relationship with Toucans and represented that client before the Zoning Board for the purpose of seeking a parking variance. By representing a client before the Zoning Board on which he served, Respondent's independence and impartially were jeopardized; Respondent was given an undeniable advantage over other members of his profession or occupation in such matters; and strongly presented the appearance of public office being used for private gain.

The Commission's decisions have followed the rationale and result of a  
*continued, page 8*

line of decisions by the Florida Bar and the Florida Legislature reaching the same conclusion, including Florida Bar Opinion 65-2, and Florida Bar Opinions 67-5 and 67-5 Supplement (both of which were withdrawn by the Board of Governors earlier this year). [As this article was being prepared, the Bar's Professional Ethics Committee was considering Proposed Advisory Opinion 99-1, noticed in the July 15, 1999 issue of *The Florida Bar News*, addressing the question whether a law firm may represent clients before a public board or governing body when one of the firm's partners or associates is a member.] In Opinion 16, the Florida House of Representatives Committee on Standards and Conduct found that in view of the Bar's rulings in Opinions 67-5 and 67-5 Supplement and its own opinion issued during the 1967 legislative session under Rule 5.9, a conflict of interest would be created by a member, his law partner, or his law firm receiving a fee and participating in sharing any fees derived from claimant cases. Opinion 16 concluded that a conflict of interest would exist if the law partner of a legislative member caused to be introduced a claims bill on behalf of a client. See *Journal, House of Representatives*, 1971, February 4, p. 119. In Opinion 27, the House Committee opined that were a member of the Legislature to practice with or be associated with an attorney who is a lobbyist, a "conflict with the best interests of the Legislature and the constituents [he] serve[s]" would exist. *Journal, House of Representatives*, 1974, January 30, page 14.

**Philip C. Claypool** is the General Counsel and Deputy Executive Director of the Florida Commission on Ethics. He graduated from Purdue University and received his law degree from Florida State University. He has lectured on the ethics laws for public officials at national, state, and local conferences and co-authored a *Stetson Law Review* article on voting conflicts of interest for public officials.

<sup>1</sup>The full text of the Commission's opinions is available on the Commission's website, at [www.ethics.state.fl.us](http://www.ethics.state.fl.us).

# The School Board Attorney: Counsel to 200,000 Clients

by Virginia Tanner-Otts, Associate Counsel,  
General Counsel's Office  
The School Board of Palm Beach County, Florida

## Introduction

School districts are in the national news on a daily basis. Frequently the articles deal with incidents of violence, debates on the merits of dress codes, conflicts related to prayer at graduation or on the school premises, and many other subjects. These issues only reflect the tip of the iceberg of legal concerns for attorneys that represent school districts. The complexity of the legal issues affecting school districts reflects the greater systemic problems that exist nationwide and also impact school districts.

School districts are given the altruistic charge to correct many of the ills of society through the education of its youth, a youth that is bombarded by broken homes, violence in the mass media and peer pressures that include drugs, sex and crime. Children come to a school district with a variety of intellectual and physical talents, or lack thereof, and the school district is charged with the task of doing the impossible, and it often does. But in effecting the metamorphous, the task is overlaid and interlaced with many complex issues that have resulted in extensive legal disputes and often litigation that may involve staff, students and the school district in a wide range of controversies. In this scenario, school board attorneys assist the school district in maneuvering successfully through the dangerous waters of complex legal issues so as to continue with its state mandated mission to take our youth from pre-kindergarten to post-high school and produce educated and successful, fully functioning citizens.

Concomitant with school board attorneys' legal responsibilities is the completion of these responsibilities within the larger context of the school district and community interests and demands. The school board is the largest employer in many counties, and through its governing board, the communities elected school board members,

it reflects the economics and politics of its community. The School Board of Palm Beach County, Florida has over seventeen thousand employees, eight thousand of which are teachers, and has approximately one hundred and fifty thousand students. It may be posited that the school board attorney in this large a district represents more than two hundred thousand clients, if the parents of the students are included.

Given this backdrop, the school board, with its attorneys helping to navigate its legal waters, and the community pressing for fulfillment of its needs, must successfully take its youth down the educational river filled with curves, drop-offs, and falls. The community and the school board concerns and issues set the stage for the school board attorney and present the challenges inherent in the position. For the attorney that seeks unending challenge, constant change, and an overwhelming array of legal issues, there is no greater place to work than for a school district. In the following paragraphs, the demographics, structure, and responsibilities will be considered.

## Demographics

In Florida there are 67 school districts, one for each county. Each school board, the governing body for a school district, provides for legal services. Except for the larger school districts, the school board usually contracts with an outside law firm, or lawyer, to provide legal services. Typically, the contract outlines the lawyer's retainer responsibilities for a flat fee, and per hour costs for additional work. The retainer obligations usually include attending all school board meetings, special meetings, or workshops and serving as legal advisor to the school board at those meetings. Also, the retainer fees usually include a provision for the administration or the school board members to call the attorney to ask various le-



gal questions, when needed. The school board attorneys that are employed full-time by school boards handle all legal work for that district, with the usual exception of insurance covered areas. The legal work for a given school board may include hiring and monitoring of outside counsel when the workload is excessive or when specialized areas of legal work are needed.

## Structures

In most school districts in Florida, the attorney reports directly to the school board with a shared responsibility to the superintendent and administration for the day-to-day legal needs of the district. Whether the school board attorney reports directly to the school board or to the board through the superintendent, the attorney must be responsible for all the legal work for the district. In a limited number of legal areas there may be a conflict of interest between the school board and the superintendent that will necessitate that the school board and the superintendent employ separate counsel.

There are a limited number of areas where conflict will arise. The areas of conflict between the superintendent and school board's statutory responsibilities involve personnel and student discipline and collective bargaining areas regarding impasse. Specifically, school board employees, teachers and non-instructional personnel, have statutorily defined property interests in their positions, whereas the United States and Florida Constitutions, in addition to state statutes, protect students' interests.

These property and constitutional interests are protected further by the substantive and procedural due process rights provided for pursuant to Florida's Administrative Procedure Act. School boards are an agency as defined by the Administrative Procedure Act, and are subject to its provisions, except where specifically exempted. Student discipline is exempted from the Administrative Procedure Act and remains within the discretion of the school board. Student discipline due process rights are delineated in federal case law. The Administrative Procedure Act and the School Code, ensure that each regular employee's property interests in their jobs are pro-

tected.

In student expulsion or employee discipline or termination cases, the superintendent and her/his attorneys are in the role of prosecutor and are required by law to present the case to the school board, and then make recommendations for the disposition of the case. These cases culminate in proceedings before the school board at which time the school board meets in a quasi-judicial capacity and independently and objectively renders a final determination in each case that involves a student or employee. The school board attorney serving as board advisor is prohibited by law from serving as advisor to the school if the attorney has been involved in the prosecution of the case before the board. Therefore, separate attorneys are required, one for the school board as board legal advisor and the other for the superintendent as prosecutor.

## Authorization

A school board's authority to engage legal counsel and to delineate those services is well established in case law. A number of courts have determined that an implied power to hire an attorney exists as a necessary incident to the statutory powers of a school district or board as a separate corporate entity. Florida Statutes are specific and provide a school board with the authority to authorize legal services and to adopt the necessary policies and procedures thereto.

Specifically, Section 230.23005(10), Florida Statutes states that:

the school board may adopt policies and procedures necessary for the daily business operation of the school board, including, but not limited to, the provision of legal services for the school board.

School boards throughout the state of Florida have adopted policies and procedures to implement these services. In Palm Beach County, school board policy provides for the school board to designate a legal advisor to represent the school board at school board meetings and to carry out other responsibilities as provided for by the school board.

Consistent with its policy, the Palm Beach County School Board engages by contract full-time legal counsel to

represent its interests and those of the Superintendent. Provisions for outside counsel, and for representation with respect to conflict of interests areas, are set forth in contractual provisions. The Palm Beach County School Board employs five full-time attorneys, with the following legal specializations: construction, real estate, personnel, employment, procurement, special education, and administrative law.

## Responsibilities

Pursuant to the National School Board Association (NSBA), Council of School Attorneys, the school board attorney should provide the school board and school administration with legal counsel and representation in the daily educational and business affairs of the school district. The school board attorney's responsibilities, like any other corporate attorney, are addressed more fully by the American Bar Association Model Rules of Conduct, that have been modified and adopted in the various states. In Florida, attorney professional responsibilities for representation are defined by The Florida Bar Rules of Professional Conduct.

The position of the NSBA Council of School Attorneys is that an attorney employed by a school district owes the same professional obligation to the school board client that is no different than that owed to any other client that an attorney may represent. These professional responsibilities of the school board attorney include the duty to provide competent legal representation, to abide by the client's decisions concerning the objectives of legal representation, to act with reasonable diligence and promptness, and to keep the client reasonably informed. The responsibilities of school board counsel also include service on legal issues concerning governance, finance, real property, pupils, employees, liability, and other legal concerns of the schooldistrict. Specifically, the major areas include review and interpretation of state and federal constitutions, statutes, and case decisions; tort law (negligent, constitutional, or intentional acts of liability); contract law and bid specifications; assistance in preparation of agendas, notices, and minutes; assistance with employee discipline and dismissals, student placement or discipline matters, intergovernmental

*continued, page 10*

matters, employment law negotiations, copyrights, condemnation, capital improvement, legislation, dispute settlement negotiations, and litigation in the courts or administrative tribunals.

The school board attorney has no authority to advise beyond the confines of legal matters. The role of the school board attorney is that of legal advisor not policy-maker. The attorney prepares and renders legal opinions at the request of the superintendent, the staff, the school board, or any member of the board. In rendering advice and in assessing the legality of alternatives, the attorney may help the policy-making process by defining problems. However, the administration recommends and the board adopts policies of the school district.

The school board attorney must be knowledgeable in a number of legal areas to carry out effectively the complex legal tasks required. These tasks include counseling staff and the board, serving as legal advisor at board meetings, handling the litigation of the school district, reviewing and drafting contracts for the district, advising on employment and student personnel issues, and responding rapid fire to the daily array of legal questions posed by staff and the school board. One of the responsibilities of the school board attorney is to provide legal counsel to administrators, teachers, and other employees throughout the school district. Legal questions come to the school board attorney's attention by means of telephone calls, e-mail, and fax. In Palm Beach County, the General Counsel's Office designates an attorney to function as duty attorney each day to respond to questions received from staff throughout the school district. It is not unusual for the office to receive in excess of twenty questions per day. These questions may range from a simple custody issue on release of a child at a school site or examination of student records, to a complex contract issue. The research time necessary to respond to each question will vary depending on the issue and may require several hours of legal research.

Another area of responsibility involves contract drafting and/or review and approval with respect to legal form and sufficiency. The contracts drafted or reviewed include building and construction contracts, leases,

easements, interlocal agreements and various other consulting and technical service contracts as well as grant proposals and awards. All requests for proposals for services (RFP's) or Requests for Information (RFI's) are reviewed for legal form and sufficiency. Issues related to bids or bid protests are handled by the school board attorney.

A major legal area of concern for school boards involves the county's concurrency requirement that ensures that an infrastructure exists for the construction of new buildings, including schools. School boards must work closely with county officials on the fit between school construction and county plans for growth. Likewise the school board has the authority to charge a school impact for new homebuyers. Impact Fees are charged homebuyers for a new residence, provided there is a countywide school impact fee ordinance in place. The school board's authority to require impact fees is dependent on county adoption of a school impact fee ordinance. The legal work necessary for the adoption of a school impact fee ordinance requires extensive knowledge of county and school statutory provisions, and requires a cooperative, close working relationship between county and school legal representatives, staffs, and their elected officials. Also, cooperative legal work is required when the county and school board develop and enter into interlocal agreements to build, share, and/or maintain playgrounds, athletic fields or other facilities. Another major area of responsibility for the school board attorney is as legal advisor the school board at school board meetings, special school board meetings and workshops. These meetings require the attorney to be prepared to respond to legal questions with respect to all agenda items. Also, the attorney may serve as the school board's parliamentarian at these meetings. Guidelines and materials for public hearings are prepared by the attorney and at those hearings the attorney serves as legal counsel to the school board.

A complex area of responsibility for a school board attorney is reviewing and updating all school board policies and procedures. The policies and procedures must be monitored carefully and updated in detail to reflect all

changes in law. Any policy change made must comply with the criteria set forth in Administrative Procedure Act. The Administrative Procedure Act does exempt school boards from many of the rule making requirements set forth in the Act. School boards are still required to provide appropriate notice and to advertise policy changes, and to provide public workshops and hearings on policy changes. In addition, the changes are reviewed and discussed extensively by staff members prior to submission to the school board. The process of making or changing policy can be complex, demanding and time consuming.

School board attorneys in large districts may also be responsible for overseeing and monitoring outside attorney fees. This process can include review of legal bills for services as well as coordination and assistance with discovery and other aspects of litigation. In addition, mediation sessions generally require the presence of the school board attorney.

## **Qualifications**

Qualifications for the school board attorney position may vary depending on the availability of expertise in the areas needed. It is advisable for an attorney that is interested in a position with a school board to have been in practice at least for five years and have extensive litigation experience in state and federal courts as well as before administrative agencies. Specialized legal knowledge in the areas of administrative law, employment law and/or school law is essential. Since the school board attorney advises in the areas of construction and real property, procurement, and special education law the more experience the attorney has the better. Education, training and experience in the education profession can be valuable assets. The school board attorney advises also in the areas of Florida's sunshine and public record laws, the administrative procedure act, the collective bargaining laws, and a host of additional federal laws. In addition to these qualifications, the school board attorney needs to have solid interpersonal skills in handling legal work amidst a background of the complex and changing needs of staff, the superintendent, and the school board. The

attorney will be reporting to several bosses at the same time and should be ready to adjust when those bosses, who comprise the elected school board, change from time to time because of the electoral process.

### Summary

Each school board in Florida employs legal counsel and expects that counsel to be well versed in the broad and varied issues of school law, and the many collateral legal issues that impact the school district. The school board attorney's legal responsibilities are extensive and go from cover to cover in Florida Statutes, while the rewards for the work are substantial. Much of what the school board attorney

does is not on the nightly news. However, the school board attorney's work does enable the school board, superintendent, staff, and teachers to focus their energies on the school district's mission and vision, to prepare children for productive roles in the community.

**Virginia Tanner-Otts (Scigliano)** serves as Associate Counsel in the Office of The General Counsel for the Palm Beach County School Board. She has been a school board attorney for eight years, and has been in Palm Beach County for the past two years. She handles a wide range of legal issues for the school district. She obtained her B.A. and M.R.C. Degrees

from the University of Florida, her Ph.D. in Educational Administration and Management from the University of Texas at Austin, Texas, and her J.D. from Cleveland Marshall College of Law, Cleveland State University, Cleveland, Ohio. Prior to her school board attorney experience she served as a Broward County Assistant State Attorney for five years, was a law clerk to the Honorable Paul Roney, Circuit Judge, U.S. Court of Appeals for the Eleventh District, and law clerk to the Honorable Elizabeth Kovachovich, U.S. District Court, Middle District, Florida. In addition, she has over ten years of teaching and administrative experience in community colleges, the private university system.

### LETTER

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surrogate to preserve and exercise those rights for them. Our legislature has recognized this need.

The public guardianship law 744.701-708 inclusive was enacted in 1986 to provide guardianship for indigents who have no one to act as guardian. Indigent is defined as roughly Medicaid eligible, so the threshold is very low and certainly does not interfere with the private practitioner's need to maintain a viable practice.

How pressing is the need for guardians? Anecdotal and experientially it may approach 30,000 to 50,000 statewide. However, a more definitive figure should be forthcoming as a result of HB 213 (1999) research.

You had posed the question, "is being a guardian considered lawyering?" I do act as the named guardian of all of my wards and also function as attorney for each ward in the administration of the guardianship estate as required by Supreme Court rule. I also administer the public guardianship program, make personnel decisions, purchasing and planning decisions, policy development and decisions concerning all wards' affairs and the methodology of medical decision making for wards.

Additionally, I assess the need to address wards' rights through litigation, contracting and housing and I account for and administer all ward spending and accounting.

By utilizing the public guardian as administrator, lawyer, accountant, and manager this kind of system can provide plenary guardianship to 100 to 150 wards at a unit cost of about \$2,200.00 per ward per year. Model expansion has proven to lower unit cost at the 750 ward level to about \$1,650.00 per year. The model utilizes a public guardian lawyer, three court counselors, (case managers) an administrative manager and a secretary.

The 2nd, 11th and 17th Circuits have historically operated on the described model with the 17th Circuit adopting a contractual model with a private university over the last year.



HANDLEY

The several other attempts at public guardianship differ in both the nature of the ward population served; whether elderly, developmentally disabled, mentally incapacitated, or trauma victims and the extent of the function, person or person and property. Funding sources vary from state funding to private grants to local efforts.

We have implemented in the 2nd Circuit an indigency fund supported by filing fees that pay all of the adjudication expenses including attorneys' fees and examining committee costs.

In summary we serve a caseload of 120 to 150 with six people on staff, offering a plenary guardianship of person and property through a paid adjudicatory process. We do so with the most dedicated staff and supportive judiciary in the State of Florida. As a government lawyer I serve the ward and the needs of the Courts.

I also note that while this model is proven, it should not be considered as exclusive. Other models and other funding sources should be examined to arrive at an optimum system which encompasses both good guardianship and economy of operation.

Best of luck, Joe, in the coming year as you chair the Government Lawyer Section. Your past dedication to the Florida State Guardianship Association, The Florida Bar and your recognized pro bono efforts lead me to expect a banner year.

Yours Very Truly,  
Hugh T. Handley

## CHAIR'S MESSAGE

from page 1

States Supreme Court Justice. "All too frequently, older lawyers have viewed the task of remedying the inequities in our law and legal system as that of the young members of the bar. The idea that the public sector should be serviced by young lawyers, while older, more experienced lawyers concern themselves only with more lucrative private practice is a pernicious one, because the public sorely needs the talents and experience of the older practitioner."

Legal education also has a great responsibility. Academia must advance to young lawyers the noble concepts of undertaking the very difficult and weighty responsibilities of American society.

Justice Brennan emphasized that "lawyers must respond not only as professionals, but also as citizens to rectify the shortcomings of the legal system. If the credibility and integrity of our legal system are impugned by the actions and omissions of lawyer-citizens, there will be no general support for the law. Over too many years we as lawyers and as citizens stood idly by while minority citizens were deprived of their most basic legal rights. How can we expect much respect for the law in one who has seen how readily even lawyer-citizens tolerated such legal inequities? Why was it that when legal change finally came it was not initiated by lawyers, but was forced upon the profession by the rebellion of thousands of young students and the zeal of religious leaders like Martin Luther King, Jr.?"

Justice Brennan cited the short-

comings of legislation and court decisions in effecting meaningful change as another cause of disaffected citizens' cynicism of the law. Florida's new Statewide Public Guardian Law (HB 213) is one positive step to answer such cynicism. With the help of Florida's 20 Chief Circuit Judges, the new Secretary of the Florida Department of Elder Affairs, and the Attorney General's new Elder Abuse Unit there will be new hope for those in need of a more unified statewide elder care system. As we head into the 21<sup>st</sup> Century it can only be hoped that all involved work together to disprove the cynicism, in the words of the great Dr. Samuel Johnson, of "the triumph of hope over experience." Justice Brennan believed that, "We must redouble our own efforts by leading the effort for new legislation to achieve real equality. Legislation to date has cost us, the establishment, almost nothing. Real equality will cost us something. Unless we are prepared to pay the price," it was cautioned, "all our good works in legal assistance programs, public defender offices, and the like are meaningless tinkering which do little more than salve our consciences."

However, we must be constantly vigilant of the "Law of Unintended Consequences." As a recent example, consider the Miami case of Ms. Eunice Liberty, the 95 year old former educator who was adjudicated incompetent and for her own protection and needs was placed into the care of the Guardianship Program of Miami-Dade County. Because of the necessary restrictions on her freedom her numerous admirers and friends protested their lack of access to Ms. Liberty with a courthouse demonstration and appeals to the television and newspaper media. These actions re-

sulted in the program being court directed to allow for easier access to the Ward, Ms. Liberty, although she is almost totally incapacitated. As a result, a well-intentioned guardianship program was made to appear uncaring and cruel.

In urging lawyers to constantly work to overcome the inequities in society, Justice Brennan advised, "Moral arguments backed by the hard facts about discrimination and deprivation are still the most potent force in the world, in the courtroom, in the legislatures, and in the cities. The longer the inequities of society remain unaddressed, the more heightened oppressed citizens' protests will be. There are still large segments of our population who would keep the country's problems out of sight. The result is that disaffected groups feel they must escalate their protests in order to be heard. Then some use these very protests as a smoke screen to hide the underlying problems. But we cannot focus public attention on the lawlessness in the streets, and not on its causes – poverty and prejudice."

Justice Brennan concluded that speech in 1989 by imploring lawyers to take the lead in adapting the legal process for a just and equitable society. "That process will not fail us if we try. But we may delay no longer. Let us begin."

Taking up these same issues, Justice Quince reemphasized, in a firm and positive manner, that those issues continue to confront us today and must be met by the legal community with the same determination as recommended by Justice Brennan.

Are citizens justified in being suspicious of the law and legal system today in the United States of America? What is your opinion?



**Visit**  
**THE SECTION'S WEBSITE at**  
**<http://www.flgovlaw.org>**



The Florida Bar Government Lawyer Section  
Continuing Legal Education Committee Presents:

# Public or Private? Sunshine or Online?

## *Perspectives on the Public Records and Government in the Sunshine Laws*

November 18, 1999, Miami  
November 19, 1999, Orlando

9:00 a.m. – 9:05 a.m.

**Introduction** — *Stephanie Daniel*

9:30 a.m. – 10:20 a.m.

**What's Hot, What's Not**

An Overview on Public Records and Sunshine Law  
*Patricia R. Gleason, Attorney General's Office,  
Tallahassee*

10:20 a.m. – 10:50 a.m.

**What Happened to Confidentiality?**

Another Look at Attorney-Client Communications  
*Cathy Lannon, Attorney General's Office,  
Tallahassee*

*John Hubbard, Frazer, Hubbard et al, Dunedin*

10:50 a.m. – 11:10 a.m. **Break**

11:10 a.m. – 11:50 a.m.

**Who Needs Discovery?**

**Using Public Records in Litigation**

*Bruce Lamb, Shear, Newman, Hahn, &  
Rosenkrantz, Tampa*

12:00 noon – 1:30 p.m. **Lunch Break**

1:00 p.m. – 1:40 p.m.

**Trying Cases in the Court of Public Opinion**

Public Records in Criminal Proceedings  
*Ken Selvig, Chief Assistant, State Attorney's Office,  
West Palm Beach*

*Martin Reeder, Steel Hector & Davis, West Palm  
Beach*

1:40 p.m. – 3:00 p.m.

**Sunshine — It's Not Just For Government  
Anymore**

How Delegation of Authority Spreads Sunshine  
from Governmental to Non-Governmental  
Organizations

*Frank Bartolone, South Florida Water Management  
District, West Palm Beach*

*Robert Rivas, Rivas & Rivas, Boca Raton*

3:00 p.m. – 3:20 p.m. **Break**

3:20 p.m. – 4:10 p.m.

**Government Online?**

Public Records and Sunshine Law in the Electronic  
Era

*David Bralow, Holland & Knight, Orlando*

*Karen Lloyd, Southwest Florida Water  
Management District, Brooksville*

4:10 p.m. – 4:50 p.m.

**The Color of Money**

Shining the Sunshine Spotlight on Government  
Procurement Procedures

*Earl Black, General Counsel, Department of  
Management Services, Tallahassee*

### Speakers:

Frank Bartalone, Boca Raton  
Earl Black, Jr., Tallahassee  
Mary Helen Campbell, Tampa  
David Bralow, Orlando  
Stephanie A. Daniel, Tallahassee  
Patricia R. Gleason, Tallahassee  
John G. Hubbard, Dunedin

Catherine Lannon, Tallahassee  
Bruce Lamb, Tampa  
Karen Lloyd, Brooksville  
Martin Reeder, West Palm Beach  
Robert Rivas, Boca Raton  
Ken Selvig, West Palm Beach

## Happenings at the August ABA Annual Meeting: Report from Your ABA Liaison

by Sheryl G. Wood

The Council of the American Bar Association's Government & Public Sector Lawyers Division (GPSLD) met in Atlanta on August 7, 1999. As your liaison I attended this business meeting as well as participating in some functions with the Section of



John Copelan, former GLS Chair and GPSLD Immediate Past Chair with Roy Barnes, Governor of Georgia. Pictured at GPSLD Annual Meeting Dinner at the Carter Center on August 6.

State and Local Government Law and the Section of Public Contract Law. At times the ABA meeting programs appear daunting, however, once you get used to the immensity of this bar association that integrates many segments of lawyers on a national basis, you can really appreciate the value.

At the business meeting of the GPSLD future programs are planned and discussed. One of the topics was the 1998 Leadership Institute that was held in San Francisco. Susan Knepel, from the State Bar of Wisconsin's Government Lawyers Division, praised the Leadership Institute concept and reported on subsequent activities of the government lawyers in Wisconsin after participation in the San Francisco event. Programs such as these increase the professionalism and leadership abilities of all government lawyers. The Florida Bar's Government Lawyer Section was a co-sponsor of the San Francisco program and based upon a request from our current leadership, I offered Florida as a possible venue

for the next Leadership Institute which is being proposed for 2000-2001. The Council was very receptive to the idea and will further explore those possibilities with us.

Membership is also a hot topic at the national level. Both increasing and retaining members is a high priority. Some of the membership initiatives within the



Roy Barnes, Governor of Georgia. Pictured at GPSLD Annual Meeting Dinner at the Carter Center on August 6.

GPSLD that have been very effective are the development of the Web-based Public Lawyer Career Center, Law Student Public Lawyer Career Events, CLE programs and a targeted promotional recruitment. These are some items that our Section may want to consider and I will be happy to give more details at our September meeting in Tampa.

The GPSLD next meets in Madison, Wisconsin from October 22 through October 24. We will also meet at the ABA's Midyear Meeting in Dallas, February 11-12, 2000. If you have any items that you would like addressed at these meetings, please feel free to contact me at <mailto:swood@sfwmd.gov> / [swood@sfwmd.gov](mailto:swood@sfwmd.gov).

## Resolution Passes at ABA Meeting

*Susan Kidd, Director of the GPSLD, reported adoption of the GPSLD Division's Resolution by the ABA House of Delegates in support of government lawyers serving in leadership capacities in bar associations as well as using reasonable amounts of official time for participation in such activities. This is a significant resolution, passed by the House of Delegates*

*at the Annual Meeting in Atlanta.*

— Sheryl Wood

I am happy to report that at the ABA annual meeting in Atlanta, the House of Delegates voted to adopt the Division's resolution on government lawyer participation in bar activities. The wording of the final resolution is as follows:

### Recommendation

**Resolved**, that the American Bar Association encourages governmental entities at all levels to permit government lawyers, including those in administrative judicial positions, to serve in leadership capacities within professional associations and societies.

**Further Resolved**, that the American Bar Association encourages governmental entities to adopt standards that would authorize government lawyers, including those in administrative judicial positions, to (i) make reasonable use of government law office and library resources and facilities for professional development, continuing education and justice system improvement activities, including pro bono representation, sponsored or conducted by bar associations and similar legal organizations; and (ii) utilize reasonable amounts of official time for participation in such activities.

**American Bar Association Government and Public Sector  
Lawyers Division Report to the House of Delegates**

# Minutes of the Government Lawyer Section Executive Council Meeting

June 25, 1999 - Boca Raton, Florida

## In attendance:

Anthony Musto	Robert J. Krauss
Stephanie Daniel	Booter Imhoff
Thomas D. Hall	Peggy Quince
M. Catherin Lannon	Pam Cicchone
Joseph George	Michelle Jackson
Philip W. Maniatty	Keith Rizzardi
Howard Pohl	Joel Silvershein
Jeanne Clougher	Sheryl Wood
Denise Dytrych	James Peters
Jim Hendrick	

## Guests:

Irene Kennedy Quincy  
Melissa Tannenbaum

- I.** The meeting was called to order by the section chair, Anthony Musto, at 2:40 p.m.
- II.** The minutes of the May 8, 1999, meeting, having been distributed prior to the meeting, were approved without corrections.

## III. Chair's Report

The chair reported on the coordinated meeting schedule concept, discussed by the Council of Sections.

The chair also reported that, with the creation of new committees and sections, it is likely that Saturday meetings will be more significant. A straw vote was taken to determine whether the Executive Council favored Saturday meetings. The vote (8-4) was in favor of continuing with Friday afternoon meetings.

The chair reported that the mentoring project has resulted in receipt of a number of offers to mentor young lawyers. Mr. Musto asked that Section members go back to their offices and encourage young lawyers to participate in the program as "mentorees."

The chair reported that a letter had been received from Howard Coker seeking donations for the Supreme Court Historical Society. The Bar seeks donations of \$250.00 - \$5,000 per year, for a five-year period from the sections. Joe George will circulate the letter at the September 1999 meeting for further action.

The chair reported that the officers of the section had their annual dinner with president-elect, Edith Osman. In attendance were Anthony Musto, Joseph George, Sheryl Wood, and Howard Pohl. Ms. Osman was responsive to requests by the Section officers to appoint government lawyers to committees of the Florida Bar. The Section chair also sug-

gested that the meeting with the chair-elect for the 1999-2000 term, Herman Russomano, be set up to coincide with the September 1999 meeting of the Bar.

## IV. CLE Programs

The Chair reported on the success of the two recent CLE programs offered by the Section—the Professionalism Conference and Practicing Before the Florida Supreme Court. There were approximately 70 registrants and about 100 participants in the Professionalism Conference. The Supreme Court Advocacy program was sold out one month before the course. The chair suggested that the Section pursue the idea of partnering with FSU in presenting the Supreme Court course in the future. Tom Hall is to study the issue and then come back with a proposal. A suggestion was made that the Section consider partnering with one of the other Florida law schools as an alternative. That option can be considered when Mr. Hall returns with a proposal to the Section.

**V.** There was discussion about a move to eliminate the government lawyer "deferment" for the Bridge the Gap CLE program. A motion was made and seconded to recommend that the deferment be retained. The motion passed unanimously. Joe George will draft a letter to the Bar regarding this issue. Keith Rizzardi offered to provide any necessary assistance on the issue.

**VI.** The Chair reported that Attorney General Robert A. Butterworth has proposed a reduction in the costs of certification for government lawyers. Tony Musto has written a letter in support. The Executive Council agreed with this approach.

**VII.** The Treasurer's Report was given. The reported expenses to date (see Detail Statement of Operations, dated 6/9/99) do not reflect all of the expenses for the Professionalism Conference or the Supreme Court Advocacy program.

**VIII.** A report was given on the Professionalism Conclave.

**IX.** A report was given on the All Bar Conference. The big issue was the ancillary business movement, which does not appear to impact government lawyers.

Cathy Lannon did offer to put together a presentation on the issues relating to the ancillary business movement.

**X.** The report from the Long Range Planning Committee has not been issued.

## XI. Committee Reports

Pam Cicchone reported regarding her pro bono survey efforts. She discovered that many offices did not disseminate their pro bono policies, if one existed. She suggested a need to do some education regarding pro bono. Joe George mentioned that he also has materials relating to pro bono surveys.

**XII. Old Business** - none.

## XIII. New Business

Stephanie Daniel raised a recent rule adopted by the North Carolina Supreme Court which provides each attorney with three protected weeks of vacation. Once a notice of vacation is provided, hearings, etc., shall not be scheduled during the vacation period. Mr. Musto suggested that the matter be studied further and considered at the September 1999 meeting.

A suggestion was made by Jim Peters that a letter be sent to the Attorney General, Carlos McDonald, the Legislative Affairs Director within the Attorney General's Office, and relevant state legislators thanking them for their support on the issue of state agency payment of bar dues for government lawyers. Mr. Peters mentioned that the issue was a more difficult one this year. Mr. Peters will work with Mr. George to get him the names of the pertinent people, so that letters can be sent.

## XIV. Election of Officers

The following officers were elected for the 1999-2000 year:

- Joseph George, Chair
- Howard Pohl, Chair-Elect
- Stephanie Daniel, Treasurer
- Clark Jennings, Secretary

Additionally, Appellate District Representatives and At-Large Council Members were elected.

## XV. Awards

The chair recognized the following persons for their work in the past year:

- Booter Imhoff, for his work on "Demystifying the Legislature"

- Tamara Scruders, for her work on the Section Newsletter
- Joe Mellichamp and Tom Hall, for their work on "Practice Before the Florida Supreme Court"
- Susan Cabrera, for her work as the Board Liason

Additionally, a proclamation was presented to Joe George, who will serve as the first Section chair during the next millennium.

#### **XVI. New Chair's Agenda**

Joe George discussed several of the initiatives and projects which he intends to pursue as Section chair. Mention was made of the Pro Bono project, the Government Lawyer salary survey (being conducted by Clark Jennings and Mitch

Franks), the Mentoring project, and the compilation of a new Section directory.

The new chair mentioned the Florida Bar's Communications Plan, and the use of the new logo.

Mr. George also discussed the Supreme Court Historical Society funding request submitted by Howard Coker. Mr. George stated that he plans to recommend in September that the Executive Council approve the expenditure of \$250 per year for five years for this purpose. Ms. Wood suggested the possibility of offering "in-kind" services.

The new chair also asked that all members advise him before the September 1999 meeting with Herman Russomano regarding their committee preferences.

The chair mentioned the July 16,

1999, Leadership conference for Bar and Section Leaders, which will be held in Tallahassee, Florida. Council members were encouraged to attend.

XVII. Ms. Clougher asked that Section members make the Government Lawyer Section Web Page their "home page" so that the section can increase the number of "hits" to the page.

XVIII. Finally, a presentation was made to Anthony Musto, as outgoing chair.

XIX. There being no further business of the council, the meeting was adjourned at 4:07 p.m.

*Respectfully submitted,  
Stephanie A. Daniel*

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**The Florida Bar  
650 Apalachee Parkway  
Tallahassee, FL 32399-2300**

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