THE FLORIDA BAR
The Government Lawyer Section
REPORTER
Fall 2007
"No Higher Calling"

Message From the Chair

By Bob Krauss

This year it is my privilege to serve as Chair of the Government Lawyer Section for the 2007-2008 year. I take this responsibility seriously since the lot of the government lawyer can always be improved and this Section should be a leading force for positive change. Many of us have spent most, if not all, of our legal careers in service to the public and have garnered the experience to know what would make the lives of a government lawyer better. In my several years as an Assistant State Attorney and as an Assistant public Defender, and in my nearly twenty-five years as an Assistant Attorney General, I have witnessed progress in the way government lawyers are perceived by other lawyers and, consequently, the recognition of the disparities which exist between the public and private sectors. The advent of payment of Florida Bar dues by the government lawyers' agencies are only one example of an attempt to diminish those disparities.

Unfortunately, improvement in the quality of a public servant's professional and private life is often measured in terms of dollars and cents, and in these fiscally uncertain times it is difficult, at best, to satisfy the

continued, page 2

No Higher Calling

By Pat Gleason, Director of Cabinet Affairs and Special Counsel for Open Government for Governor Charlie Crist

On June 19, 2007, Governor Charlie Crist issued Executive Order 07-107, creating the Commission on Open Government Reform (Commission). The Commission's task is to "review, evaluate, and issue recommendations regarding Florida's public records and public meetings laws."

Following the issuance of the Executive Order, one of the members asked government lawyers to comment on whether the existing statute that permits a public board to meet with its attorney to discuss pending litigation should be addressed by the Commission.

In my opinion, the response has been disheartening. Without exception, government attorneys argued that the current statute is too restrictive and should be broadened to allow more closed meetings. They want the law changed to allow them to meet privately with the boards they represent if litigation is "threatened" rather than actually ongoing. They would like to allow more personnel in the closed session than is permitted under the existing law. They would like to be able to withhold additional litigation records from public inspection.[1]

The current litigation exemption was passed several years after the Florida Supreme Court's decision in *Neu v. Miami Herald.*[2] In *Neu*, the Court said that neither a city council nor its attorney may use the attorney-client privilege to close a meeting to discuss a lawsuit against the city; only the Legislature may pass an exemption from the Sunshine Law. The court pointed out that the attorney-client privilege belongs to the client (public board) not the attorney. Since the Sunshine Law requires that meetings of boards be open to the public, it is up to the Legislature to determine whether any meetings should be closed. According to the Court:

> The legislature has plenary constitutional authority to regulate the activities of political subdivisions and can require, as it has done in section 286.0111 that meetings be open to the public. The attorney's right to invoke the attorney/client

continued, page 3

THE GOVERNMENT LAWYER
SECTION REPORTER

Diana Bock, Editor
Alison Kelly, Assistant Editor
Shauna Morris, Assistant Editor

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

Robert 'Bob' Krauss, Chair
Office of the Attorney General
3507 E. Frontage Road, Suite 200
Tampa, FL 33607-7013
Phone: 813/287-7900 Fax: 813/281-5500
Email: bob_krauss@oag.state.fl.us

Carolyn M. Snurkowski, Chair-elect
4519 Camden Road
Tallahassee, FL 32303-7224
Phone: 850/414-3300 Fax: 850/487-0997
Email: carolyn_snurkowski@oag.state.fl.us

Barbara Wingo, Treasurer
P.O. Box 113125
Gainesville, FL 32611-3125
Phone: 352/392-1358 Fax: 352/392-4387
Email: wingo@ufl.edu

Drew F. Winters, Secretary
Dept. of Business & Professional Regulation
1940 N Monroe St
Tallahassee, FL 323034700
Phone: 850/487-3197 Fax: 850/414-6749
Email: Drew.Winters@dbpr.state.fl.us

Joseph C. Mellichamp, III
Immediate Past Chair
Office of the Attorney General
Revenue Litigation
400 S Monroe St # PL-01
Tallahassee, FL 32399-6536
Phone: 850-414-3781 Fax: 850-222-0398
Email: Joe.Mellichamp@myfloridalegal.com

Arlee J. Colman, Program Administrator
651 East Jefferson Street
Tallahassee, FL 32399-2300
Phone: 850/561-5625
Email: acolman@flarbar.orgl

ARTICLES FOR NEXT ISSUE DUE
Feb. 15, 2008

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

MESSAGE FROM THE CHAIR

from preceding page

reasonable needs of the government lawyer. Indeed, one of the goals I had wanted to set for this year was to commence the institution of a student loan forgiveness program through the legislative process. We have been advised, however, that the State's financial climate forbids consideration at this time of a program which many believe would help narrow the economic disparity which exists between public and private sector lawyers. A considerable percentage of a new lawyers' income is often devoted to repayment of student loans, and it would be a significant benefit if the loan were to be totally or partially forgiven based upon the number of years a lawyer devotes to the representation of the State or one of its subdivisions. I remain hopeful that in the NEAR future the legislature will consider establishing a loan forgiveness program so that the best of the new lawyers will want to consider public service as their career choice unhindered by the daunting task of repaying student loans on salaries materially less than those offered by the private sector.

If financial incentives are not available due to the State's budgetary condition at present, in what other ways can the Government Lawyer Section provide benefits to its members? This Section has the benefit of having talented, creative people among its members, many of whom serve on the GLS Executive Council, who are always seeking ways to enrich the professional lives of government attorneys. For example, this past year has seen the establishment of board certification in State and Federal Government and Administrative Practice largely through the efforts of former GLS Chair **Keith Rizzardi** and other dedicated GLS Executive Council members. We will continue to present the highest quality CLE seminars and search for new ways to disseminate substantive knowledge to our members, perhaps through teleconferencing. One of the finest CLE opportunities offered by any Bar Section is the **Federal Seminar** presented in Washington, D.C. every other year where a highlight is the opportunity for the attendees to take the oath to become members of the Bar of the Supreme Court of the United States and then witness oral arguments. This seminar will be conducted in March, 2008 and will include visits to federal agencies or other places of interest to government lawyers. Also, we are striving to improve the quality of this newsletter to make it more substantively valuable for our members.

I look forward to the challenges which lie ahead this coming year and remain confident that the Government Lawyer Section will grow and become an even stronger entity so that the interests of the government lawyer can be better advanced.

IN THIS ISSUE:

> privilege is derivative of the client's right to that privilege. Under the circumstances, it would truly be a case of the tail wagging the dog to hold that an attorney, or this Court, could require closed meetings of public bodies, contrary to statutory law . . . ."[3].

Eight years after the *Neu* decision, the Legislature passed an exemption to the Sunshine Law allowing public boards to meet in closed session with their attorneys to discuss pending litigation provided that certain conditions were met[4]. Ever since, government lawyers have been arguing that this exemption is too narrow, and the comments submitted to the Commission continue that longstanding tradition.

Essentially the argument is that if the current litigation exemption were expanded, government lawyers could represent "their" boards more effectively because they would have more latitude to discuss litigation options in private. They contend that private attorneys who are suing a public board are able to meet with their clients at will and the public interest is served if we can "level the playing field." But this argument fails to take into account that the government attorney is representing a board that is ultimately responsible to the people for its actions. If a city attorney settles a case against the city council, it is the people's money that pays for a monetary settlement. Shouldn't the people have a right to expect that closed meetings held to discuss how to spend their money are limited and restricted in scope? Why is there an assumption that city residents who are ultimately responsible for these costs would agree that it is in their best interest to expand the current exemption and allow more closed sessions to discuss how to spend their tax dollars?

The effort to secure an exemption from the Sunshine Law that would allow government attorneys to meet privately with public boards to discuss litigation has a long history. In 1977, the Legislature passed a bill that included a provision authorizing closed sessions to discuss litigation[5]. However, Governor Reubin Askew promptly vetoed the entire bill. In his veto message, Governor Askew noted that the bill was originally intended to strengthen the Sunshine Law and contained some positive features[6]. However, he did not approve the bill because one section permitted "public bodies involved in litigation to meet secretly with their attorney to 'decide or discuss future action in the litigation.'" He wrote:

> Many of the decisions which public boards and agencies are called upon to make today are directly related to pending litigation. These decisions include the sale of public lands, environmental disputes, education issues, and the financing of public projects—to name just a few. So what we are talking about is excluding the public from a significant amount of public business.
>
> Furthermore, discussion about litigation almost necessarily wanders far afield. Practically speaking, such discussion cannot be confined to narrow legal issues. Secret discussions could very well result in tentative or even final decisions on matters of great public interest. Indeed, government decisions about whether to start or stop litigation are among the most important decisions that public bodies make.
>
> I am not unappreciative of the fact that there is some merit to permitting public bodies to meet privately with their attorneys, but the potential for abuse outweighs the potential benefit.. . . While [open meetings] may cause some inconveniences in the short run, certainly we have discovered in this state that it is far better in the long run to conduct public business in the 'sunshine.' The public trust and the public confidence that are fostered by free and open government proceedings far outweigh any possible benefits that might be derived from [the proposed exemption][7].

Two years after the *Neu* decision and 10 years after Governor Askew's veto, the Legislature passed another exemption to the Sunshine Law to permit closed sessions between government boards and their attorneys to discuss pending litigation[8]. However, Governor Bob Martinez vetoed the 1987 bill, saying:

> While the purpose of the [proposed exemption] is, in isolation, relatively innocuous, it undeniably weakens the purifying effect of the Sunshine Law. In my view, it would be imprudent to allow the erosion of the Sunshine Law to begin in this manner, and thus risk the loss of the public trust, after Florida government has paid for that trust through years spent acquiring the discipline necessary to adhere to the strictures of the law. In short, I believe that the business of the state should remain the business of its citizens and be subject to their scrutiny as the law now provides[9].

When the Legislature ultimately passed the current exemption to the Sunshine Law for closed meetings, Governor Lawton Chiles allowed it to become law in 1993. Each year however some government attorneys take the position that the current exemption isn't good enough and advocate expanding the litigation exemptions to the Sunshine and Public Records Laws.

The traditional position of government lawyers on this issue seems to be at odds with the trend toward increased transparency and openness that is changing the way state agencies do business.

When former Attorney General Bob Butterworth was appointed to serve as Secretary of the Department of Children and Families he made it clear that the Department was committed to a new policy of open government. Addressing more than 1200 people attending a conference on children in need, he said: "We must put our energy into cooperation, not controversy, competition, or divisiveness. We have nothing to hide, but more importantly, we should hide nothing." [10]

A few weeks earlier, in testimony before the Commission on Open Government Reform, Department of Children and Families Deputy Secretary George Sheldon stated that the new openness policy has enhanced the Department's public image. More importantly, however, Sheldon said that the emphasis on transparency has improved employee morale and performance because the agency is

continued, next page

NO HIGHER CALLING
from previous page

able to explain its actions to the public rather than hiding behind confidentiality laws.[11]

The opportunity that government lawyers have to show the Open Government Commission that they are truly advocates for the people and not simply paid to litigate on behalf of public boards or officials, reminds me of a class I took at the out of state law school I attended prior to graduating from Florida State University Law School. The professor was abrasive and demanding; his questioning of the students was so fierce that some were reduced to tears. One day, the professor was explaining the mechanics of a trial and discussing tactics that could help secure a successful result. At the end of the lecture, he said something like "There you have it; this is the essence of a trial…any questions?" One student slowed raised his hand and softly said: "But… what about justice?" The professor quickly responded dismissively: "Justice has nothing to do with it," he said impatiently. "The key is proper preparation and..." The professor stopped when he realized what he had said and mumbled something to the effect that justice was an important principle, but the strategies involved in securing a winning outcome were what we needed to know. As the years have gone by, it is clear to me that it was the student who knew what being a lawyer was all about and I am sure that many of my classmates would agree.

Now is our time to show that the inspirational motto "No Higher Calling" on the masthead of the *Government Lawyer Section Reporter* truly reflects our mission as government lawyers. I plan to contact the Commission and let them know that as a government lawyer I realize that it is not always easy to litigate in the Sunshine but the public's right to know, enshrined in the Constitution and Florida law, does not require us to advocate more closed meetings to discuss litigation affecting the public and public funds. I hope that others will join me.

Pat Gleason is Director of Cabinet Affairs and Special Counsel for Open Government for Governor Charlie Crist. Brandon Schumacher, a Florida State University student and intern in the Governor's Office assisted with research and the bibliography.

Endnotes:

1 *See* Memorandum from Renee Lee. 17 August 2007, enclosing recommendations from government attorneys.
2 462 So. 2d 821 (Fla. 1985)
3 *Neu* at 825
4 Section 286.011(8), F.S.
5 House Bill 1107 (1977 Regular Session)
6 Journal of the House of Representatives 3 (13 Dec. 1977)
7 *Ibid*
8 House Bill 1336 (1987 Regular Session)
9 Journal of the House of Representatives 6 (21 Sept. 1987)
10 Butterworth, Bob. Address. Florida Department of Children and Families'. Statewide Dependency Summit 2007. Orlando. 5 Sept. 2007. <http://www.dcf.state.fl.us>.
11 Sheldon, George. Testimony before Commission on Open Government Reform. Tallahassee. 23 Aug. 2007. Transcript of proceedings, p. 256.

Governor Appoints Past Chair of Government Lawyer Section

FOR IMMEDIATE RELEASE
CONTACT: GOVERNOR'S PRESS OFFICE
TUESDAY, AUGUST 21, 2007

Governor Crist Appoints Five to the Office of Criminal Conflict and Civil Regional Counsel

TALLAHASSEE - Governor Charlie Crist today appointed directors to the five Offices of Criminal Conflict and Civil Regional Counsel.

"The Office of Criminal Conflict and Civil Regional Counsel provides important legal representations to some of Florida's most vulnerable," said Governor Crist. "I am grateful to these dedicated public servants for accepting this call to serve."

The Office of Criminal Conflict and Civil Regional Counsel provides legal services to certain Floridians who are permitted a court-appointed counsel under the Federal and State Constitution.
These appointments are subject to Senate confirmation.

The following appointees to the Office of Criminal Conflict and Civil Regional Counsel are appointed to terms beginning August 21, 2007, and ending July 1, 2011.

Jeffrey Lewis, 52, of Oviedo, will serve the First District Court of Appeal. Lewis most recently worked as a partner with Deen & Laurence P.A.

Jackson Flyte, 45, of Winter Haven, will serve the Second District Court of Appeal. Flyte most recently worked as the sole practitioner in the Law Offices of Jackson S. Flyte.

Joseph George Jr., 52, of Miami, will serve the Third District Court of Appeal. George most recently worked as an attorney with Joseph P. George Jr. P.A.

Philip Massa, 58, of West Palm Beach, will serve the Fourth District Court of Appeal. Massa most recently worked as an Assistant Attorney General.

Jeffrey Deen, 52, of Pensacola, will serve the Fifth District Court of Appeal. Lewis most recently worked as the Assistant Public Defender for the First Judicial Circuit.

Attorney General Opinions Update

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

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

2007-16: ATV REGULATION - county may not partially opt out of section 316.2123, Florida Statutes, allowing the operation of all terrain vehicles during the daytime on an unpaved roadway with a posted speed limit of less than 35 miles per hour by a licensed driver or by a minor under the supervision of a licensed driver.

2007-17: MEMBERSHIP OF SPECIAL DISTRICT - Franklin County Commission has no authority to expand the membership of the Board of Commissioners of the Lanark Village Water and Sewer District and may not act as the ex officio governing board of the district. The district may be dissolved by a freeholder election, pursuant to the requirements of section 189.4042(2), Florida Statutes.

2007-18: HOMESTEAD EXEMPTION - property owned by a limited liability company does not qualify for a homestead exemption.

2007-19: PUBLIC RECORDS - juvenile arrest report for a misdemeanor, where the juvenile has not been found by a court to have committed three or more violations of law which would be misdemeanors, is confidential, such that the sheriff's office may not reveal the names and addresses of the parents of the juvenile offender when asked for in a public records request.

2007-20: AD VALOREM TAX EXEMPTION FOR EDUCATIONAL PROPERTY - educational institution may receive an ad valorem taxation exemption pursuant to section 196.198, Florida Statutes, only on property that is used exclusively for educational purposes; improved real property owned by an educational institution which is partially leased at market rate to non-exempt commercial parties whose use is unrelated to educational purposes would not fall within this exemption.

2007-21: LAW ENFORCEMENT PERSONNEL INFORMATION EXEMPTION - support personnel employed by a police department would not be included within the exemption making photographs of law enforcement personnel exempt from public disclosure.

2007-22: HOMESTEAD TAX EXEMPTION - only upon proper application by the property owner may the property appraiser grant a homestead tax exemption for subsequently acquired property adjacent to homestead property. Whether subsequently acquired property adjacent to homestead property also qualifies as homestead protected from forced sale under section 4, Article X of the Florida Constitution would be dependent upon the intent of the property owner to make such property his or her permanent residence.

2007-23: EMPLOYMENT OF CERTIFIED CORRECTIONAL OFFICERS BY DCF - authority of Department of Children and Families to employ certified correctional officers as institutional security personnel. Legislature failure to clearly express its intent on this issue has resulted in ambiguity as to whether certified correction officers may be employed by DCF without losing their certification. In light of the long history of permitting certified correctional officers to maintain their certification while employed by DCF as institutional security personnel, it would be an unjust result for FDLE to decertify these officers until such time as the Legislature has an opportunity to address this issue.

2007-24: PUBLIC FUNDS USE - water authority not authorized to use funds to host a fishing tournament or to sponsor a soccer league; use of funds for Marine Patrol depends upon the actual duties performed by the patrol on behalf of the authority. Use of authority funds to purchase property for conservation depends upon whether such purchase comports with the actual powers of the authority; such a determination must be made on a case by case basis, dependent upon the specific facts.

2007-25: CREDIT CARD PAYMENTS TO LOCAL GOVERNMENT - section 501.0117, Florida Statutes, does not prohibit municipal utilities from imposing a surcharge for credit card payments; however section 215.322, Florida Statutes, regulates the acceptance of credit cards by municipalities for payment of the financial obligations set forth in the statute.

2007-26: SEVERANCE PAY TO PUBLIC EMPLOYEES - section 215.425, Florida Statutes, would preclude property appraiser from making severance payments in lieu of notice in the absence of a county ordinance authorizing such payments. Absent such an ordinance, the property appraiser may, if otherwise authorized to adopt policies regarding the salary and compensation of the employees of that office, adopt a policy regarding such payments, provided that the policy is prospective in application.

2007-27: GOVERNMENT IN THE SUNSHINE LAW - local health councils are subject to the Government in the Sunshine Law, section 286.011,

continued, next page

Florida Statutes.

2007-28: PUBLIC RECORDS AND GOVERNMENT IN THE SUNSHINE LAW - strategic plan of hospital owned and operated by a hospital authority is exempt from disclosure, provided that such strategic plan meets the definition contained in sections 395.3035(2)(b) and (6), Florida Statutes; to the extent the authority, as the hospital's governing body, is discussing, reporting, modifying, or approving its strategic plan, such meetings of the hospital authority may be closed, provided that the requirements of section 395.3035, Florida Statutes, have been met, and provided that a binding agreement to implement a strategic plan may not be approved at any closed meeting of the board.

2007-29: REGULATION OF SHOPPING CARTS - section 506.5131, Florida Statutes, controls the assessment of fees, fines, and costs against the owners of stolen or abandoned shopping carts; while a local government may not adopt conflicting legislation, legislation treating other aspects of this subject matter may be enacted.

2007-30: CONSTRUCTION CONTRACTS BY SCHOOL BOARD - school board, after selecting a construction management entity, may utilize procedures in section 1013.45(1)(c), Florida Statutes, allowing discretion to local school boards in whether to require an offer to include a guaranteed maximum price or a guaranteed completion date. If a design-build project is undertaken pursuant to section 1013.45(1)(b), Florida Statutes, the school board should be aware of the changes made to section 287.055(9)(c), Florida Statutes, effective July 1, 2007.

2007-31: GOVERNMENT IN THE SUNSHINE - request by the city attorney to meet in private with the city commission to discuss settlement negotiations or strategy sessions related to litigation expenditures pursuant to section 286.011(8), Florida Statutes, may be made during a special meeting provided that such meeting is open to the public, reasonable notice has been given, and minutes are taken.

2007-32: NON-AD VALOREM ASSESSMENTS ON COMMON ELEMENTS - property appraiser may not shift existing non-ad valorem assessment imposed on common elements of subdivision to individual lot owners pursuant to section 193.0235, Florida Statutes, when bond to be repaid by special assessment was issued with common element as collateral prior to enactment of the statute.

2007-33: HOMESTEAD EXEMPTION ON LEASED PROPERTY - lessees who own a bona fide leasehold interest in a residential parcel with a term of 98 years or more qualify for a homestead exemption.

2007-34: AMENDMENT OF CITY CHARTER FOR ELECTION DATE - sections 100.3605(2) and 166.021(4), Florida Statutes, allow city council, by ordinance, to amend city's charter to change the date for the regular municipal election date from the first Tuesday in February of each even numbered year to a date that corresponds with the State of Florida Presidential Primary every four years. Similarly, these statutes provide sufficient authority to amend by ordinance the city charter to provide for a special candidate qualification date in years in which there is a State of Florida Presidential Preference Primary.

2007-35: GOVERNMENT IN THE SUNSHINE - city commissioner may, outside a public meeting, send documents that the commissioner wishes other members of the commission to consider on matters coming before the commission for official action, provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting.

2007-36: STATE'S NEGOTIATION OF INDIAN GAMING COMPACT - Class III gaming activities subject to mandatory negotiations between a state and an Indian tribe do not include those specifically prohibited by state law. While the Indian Gaming Regulatory Act does not define the consideration a state must provide to receive revenue-sharing payments, nothing requires a state to grant prohibited Class III games in return for fees or revenue sharing pursuant to a tribal-state compact.

2007-37: TAX CERTIFICATE REDEMPTION - tax certificates held by a private individual remain valid and enforceable on land that has been obtained by the county subsequent to the issuance of the certificate and Chapter 197, Florida Statutes, provides the means for the tax collector to redeem or cancel such tax certificates.

2007-38: VOLUNTARY ANNEXATION - city may consider whether a proposed voluntary annexation pursuant to section 171.044, Florida Statutes, provides a "net benefit" to the city. The owner of property which is the subject of a voluntary annexation is a party affected by the actions of the municipality and may seek certiorari review of the municipality's denial pursuant to section 171.081, Florida Statutes.

2007-39: MUNICIPAL CODE OF ETHICS - while county or municipal ethics code may contain provisions apart from those in part III, Chapter 112, Florida Statues, compliance with the local code cannot result in a violation of the state ethics code or make compliance with the state ethics code impossible; municipality may adopt an ethics code more stringent than, or with provisions differing from, the provisions of part III, Chapter 112, Florida Statutes, as long as the municipality's ordinances do not conflict with the state statute.

2007-40: CITY CHARTER AMENDMENT - city charter may be amended by ordinance to change the date of

the yearly organizational meeting at which the vice-mayor is selected; however, any other change to the charter relating to the organizational meeting would require approval by the electorate.
ay also call the Opinions Division of the Attorney General's Office to discuss any of these opinions or other questions they may have by calling (850) 245-0158.

AGO 2006-30 – PUBLIC RECORDS

A municipality may respond to a public records request requiring the production of thousands of documents by composing a static web page where the responsive public documents are posted for viewing if the requesting party agrees to the procedure and agrees to pay the administrative costs, in lieu of copying the documents at a much greater cost.

AGO 2006-36 – SOVEREIGN IMMUNITY

A county health foundation, leasing and operating a hospital owned by the county hospital board, an independent special taxing district, is entitled to sovereign immunity under the provisions of section 768.28, Florida Statutes.

AGO 2006-41 – ATTORNEYS

The Florida Board of Hearing Aid Specialists, is authorized to implement Part II, Chapter 484, Florida Statutes, regulating hearing aid specialists. The board reviews and disposes of complaints filed against licensees pursuant to Chapter 456, Florida Statutes. As an administrative agency, the board does not have the authority to hire private counsel for their prosecutorial services except in the limited circumstances set forth in section 456.073(2) and (4), Florida Statutes.

AGO 2006-42 – REESTABLISHMENT OF MUNICIPALITY

A municipality, in which the government ceased functioning in the 1920's, currently exists even though it has not been active for a number of years. In order to elect town officers who can begin the task of reorganizing the town government, the circuit court must order that an election be held.

AGO 2006-44 – SPECIAL DISTRICTS

The expansion of the general authority of water control districts under Chapter 298, Florida Statutes, to sell or convey real property would now allow a special district to sell or otherwise convey real property.

Special districts, where not otherwise regulated by their enabling legislation, are authorized to exercise their own discretion to determine what terms, conditions, and methods to employ in exercising the power to sell or dispose of surplus real property.

AGO 2006-46 – DUAL OFFICEHOLDING

Members of the Commission for the Transportation Disadvantaged are officers for purposes of Article II, section 5(a), Florida Constitution, and cannot simultaneously hold that office and any other office under the municipal, county and state governments.

AGO 2007-06 – DUAL OFFICEHOLDING

Appointment to the Broward County Planning Council, as a county commissioner's nominee who is an elected municipal official of a municipality within the commissioner's district, would fall within the ex officio exception to the dual officeholding prohibition and would not violate Article II, section 5(a), Florida Constitution.

AGO 2007-14 – PUBLIC RECORDS

E-mails sent by city commissioners in connection with the transaction of official business that are intended to communicate, perpetuate or formalize knowledge of some type are public records even though such e-mails contain undisclosed or blind recipients and their e-mail addresses and are subject to disclosure in the absence of a statutory exemption.

Section 119.021(2), Florida Statutes, provides for the Division of Library and Information Services of the Department of State to adopt rules governing retention schedules and a disposal process for public records. The division has promulgated rules for the retention of electronic records. The procedures within any given agency, however, for responding to a request for public records, consistent with the statutory mandates established in Chapter 119, Florida Statutes, are matters that must be resolved by that agency.

AGO 2007-13 – GOVERNMENT IN THE SUNSHINE LAW

Two county commissioners who are also board members for a regional planning council may take part in council meetings and express their opinions without violating the Government in the Sunshine Law. However, these officials should not discuss or debate these issues with one another outside the Sunshine as either county commissioners or a s regional planning council members.

AGO 2007-15 – PUBLIC RECORDS

A written request for confidentiality under section 288.075(2), Florida Statutes, which requires an economic development agency to keep information concerning plans of a private corporation to locate or expand business activities in this state, may constitute or contain information required to be held confidential under that statute. However, the custodian of these records must determine on a case-by-case basis whether a particular record or portion of a record falls within the scope of the exemption. Further, section 288.075(2), Florida Statutes, may be cited by the records custodian as statutory authority for withholding information from public inspection and copying under the Public Records Law without violating the required confidentiality provisions of the statute.

Eleventh Circuit Court of Appeals

by Betsy Stupski, Office of the Attorney General

Names but not addresses were exempt from disclosure pursuant to the Freedom of Information Act.
News-Press v. U. S. Department of Homeland Security (11th Cir. 05-16771) 6/22/07

After the hurricanes of 2004, FEMA disbursed 1.2 billion in assistance to more than 605,500 Floridians. Plaintiff newspapers requested data regarding the disbursements under the federal Freedom of Information Act. FEMA provided the information but redacted names and addresses because of privacy concerns. The Florida Middle District found that the names and addresses were exempt from disclosure, while the Florida Southern District Court required FEMA to disclose the addresses but not the names.

In a consolidated appeal, the Eleventh Circuit ruled that FEMA failed to show that providing the addresses was an unwarranted invasion of privacy. The court reasoned that disclosure of addresses allowed the public to evaluate whether FEMA was being a good steward with federal funds. The court went on to determine that the names of individuals receiving assistance need not be disclosed.
05-16771

Season ticket holder's rights were not violated because pat-down search was voluntary.
Johnston v. Tampa Sports Authority (11th cir 06-14666) 6/26/2007

In response to recommendations by the NFL, the Tampa Sports Authority initiated a policy that required a pat-down search for all fans attending Buccaneers football games. Johnston, a season ticket holder, objected to the policy. Although he was aware of the policy and objected to it, Johnston allowed himself to be searched when he presented himself and his ticket at the gate. He filed suit after the second game but attended a third. Johnston originally filed suit in state court but eventually the Authority removed to federal court when he added a claim that the searches violated the Fourth Amendment. The Middle District found that the searches violated the Fourth Amendment.

The Eleventh Circuit reversed saying, "Considering the totality of the circumstances, the Court concludes that Johnston voluntarily consented to pat-down searches each time he presented himself at a Stadium entrance to attend a game. The record is replete with evidence of the advance notice Johnston was given of the searches including preseason notice, pre-game notice, and notice at the search point itself. It was clear error for the district court to find that Johnston did not consent to the pat-down searches which were conducted."
06-14666

Glades County election process violated the Voting Rights Act.
*Thompson v. Glade County*_(11th cir 05-10669) 7/24/07

Claiming the system depreciated and diluted their right to vote, voters challenged the at–large method of electing county commissioners and school board members in Glade County. Plaintiffs recommended a plan where Glades County would be divided up into five single districts. The Middle District rejected the plan saying it was impermissible because one of the districts constituted an "influence district."

The Eleventh Circuit reversed stating that the district court erred in finding that District One was an influence district, and it also failed to review the totality of circumstances.
05-10669

Florida Supreme Court

Legal malpractice claim was not assignable.
Law Office of David J. Stern v. Security National Servicing Corporation (SC06-361) 7/05/07

This case involves a legal malpractice action resulting from a blunder in a foreclosure action. A mortgage foreclosure was filed and assigned several times and finally belonged to Security National Servicing Corporation. One of the interim assignees hired Stern to foreclose on the loan. He filed a second foreclosure action which was untimely and ultimately barred by the statute of limitations. He also voluntarily dismissed the original foreclosure action which was timely. He remained as counsel until about a month or two after National Security obtained the note and mortgage. Security National sued Stern for legal malpractice. The trial court issued summary judgment in favor of Stern because no attorney-client existed with Security National when the cause of action accrued.

Security National appealed arguing that it had standing to sue Stern as an assignee of the mortgage and note of the underlying action. The Fourth District found that Security National had standing as an assignee.

The Florida Supreme Court reversed saying that legal malpractice claims are generally not assignable because of the interest in protecting the attorney-client relationship and an interest in avoiding creating a "market" for legal malpractice claims.

The proper test for determining whether an ordinance is substantially and materially changed during the enactment process is whether or not the general purpose of the ordinance has stayed the same.
Neumont v. Monroe County (SC06-1204) 9/27/2007

Monroe County passed an ordinance limiting the use of homes as vacation rentals in a number of residential districts. A group of residents challenged the ordinance arguing that the ordinance was substantially and materially changed during the enactment process. They further argued that because the advertised

draft differed significantly from the version that ultimately passed, the process for consideration must be started from scratch.

On review as a certified question from the Eleventh Circuit, the Supreme Court held that the changes to an ordinance during the enactment process are only 'substantial and material' if they change the ordinance's general purpose. In its analysis the court noted that although which districts were affected changed during the course of consideration, the general purpose of the ordinance stayed the same. The court said, "The general purpose test strikes an effective balance between providing the public with adequate notice and permitting the efficient modification of proposed ordinances in response to public input."
SC06-1204

In order for the Florida Supreme Court to accept review of a certified question, the question must be certified by a majority of judges from the lower court.
Floridians for a Level Playing Field v. Floridians Against Expanded Gambling (SC06-2505) 9/27/2007

Initially the Florida Supreme Court accepted review of a certified question (from the First District Court of Appeal) of great public importance regarding slot machines. Upon further consideration, the court determined that jurisdiction had been granted improvidently and decided to discharge the case. The Court explained in order to accept a certified question; the question must be certified by a majority of judges in the lower court. In this case only six of twelve judges that participated in the en banc decision concurred in the certification. The court concluded by finding that there was also an alternative basis for discharge which was that review for this case was premature.
SC06-2505

County did not have authority to issue bonds without a referendum.
Strand v. Escambia County (SC06-1894) 9/6/07

Escambia County adopted an ordinance that created the Southwest Escambia Improvement District and established the Southwest Escambia Improvement Trust Fund. The ordinance also authorized the use of tax increment financing in order to fund the trust. The County also issued a resolution to issue bonds to finance a four lane road. The Plaintiff sued arguing, that the ordinance and resolution violated the Florida Constitution Art VII §12 which requires that capital projects funded from ad valorem tax must be approved by voters. The County responded that tax increment financing is a constitutional method of servicing debt. The circuit court validated tax-increment-financed bonds.

In receding from earlier decisions, the Florida Supreme Court reversed the circuit court. The Court said, We now hold that the phrase payable from ad valorem taxation in article VII §12 refers not only to a pledge of the taxing power itself but also to a pledge of ad valorem tax revenues. In a revised opinion the court confirmed that their decision did not apply retroactively.
SC06-1894

Law creating an exemption for a CON application was an unconstitutional special law passed in the guise of a general law.
St. Vincent's Medical Center v. Memorial Healthcare Group (SC06-1047) 9/6/07

St Vincent's challenged the constitutionality of Florida Law 2003-274, arguing that it was a special law passed under the guise of general law and without the specific requirements for the enactment of special laws. The act provided a very specific exemption from the CON requirements for a facility seeking to open a heart surgery unit. The trial court and the First District found the law to be an unconstitutional special law because there was no reasonable possibility that any other hospital beside St Vincent that could meet the requirements of the CON exemption.

The Florida Supreme Court affirmed the lower courts stating, "While the courts should never second guess the Legislature about the policy decisions contained within a challenged state, we are nevertheless obligated to give meaningful effect to the notice procedures for special laws mandated by Florida's Constitution. Consistent with this obligation we have emphasized … that whether a law has general application turns on a determination of whether its application to others is reasonable or practical, not theoretical or speculative. The question of general application is not to be guided by irrational speculation that anything is possible. Any determination of possible future applications of a statute must be done by a realistic and reasonable assessment."

See also *DBPR v Gulfstream Park Racing Assc.* (SC05-2130) 9/6/07 regarding unconstitutional special laws.

continued, next page

2007 - 2008 Section Calendar

Long Range Planning Meeting
November 16 - 17, 2007
The Gibson Inn, Apalachicola, FL

The Florida Bar Midyear Meeting
[Section Executive Council Meeting]
January 18, 2008
Miami, Downtown Hyatt Regency

Federal Seminar
March 24 - 25, 2008, Washington, D.C.

First District Court of Appeal

Bifurcation of rule challenge and substantial interest challenge would waste public resources.
Community Health Charities et al v. Department of Management (1D07-2067) 7/31/07

Some charities that participated in the 2006 Florida State Employees' Charitable Campaign objected to the way DMS handled "undesignated funds". They initiated proceedings pursuant to Chapter 120, Florida Statutes. After their petition was dismissed by DMS, they filed a request for a formal hearing which was also dismissed by DMS on the basis that the petition included a rule challenge and should be filed with DOAH.

On appeal, the First District determined that DMS improperly denied the petition because it included a rule challenge. The court said, "Although a rule challenge is filed with the Division of Administrative Hearings ("DOAH"), the same result may be accomplished here by requiring the Department to forward the petition to DOAH… Here the clear intent of the statute has been satisfied because the Department has already received notice of the rule challenge as well as of the substantial interest challenge which, of course, must be filed with the agency."
1D07-2067

The statute of limitation on a legal malpractice action did not commence until the time for appeal expired.
Reeves v. Barrett (1D06-4900) 9/21/07

The Plaintiffs filed an action for legal malpractice against Defendants. The trial court determined that the action was barred by the statute of limitations because two years had passed since the entry of a summary judgment in the underlying lawsuits.

The First District reversed stating, "… the limitations time did not commence until the summary judgment became final by expiration of the time for appeal…Because the malpractice action was filed within two years of that date, it was timely and should not have been dismissed."
1D06-4900

Second District Court of Appeal

Constitutional challenge did not prevail because procedural and substantive provisions of statute were intertwined.
Peninsular Properties v. City of Bradenton (2D06-5302) 8/1/07

Peninsular Properties applied for a permit for a planned development project. When the City rejected their application, Peninsular sought alternative dispute resolution under F.S. 70.51. When a resolution appeared unlikely, Peninsular filed an action in circuit court. The City sought to dismiss because the petition was filed beyond the thirty-day time limit. Peninsular argued that F.S. 70.51 had a tolling provision and; therefore, the petition was timely. The City argued that the tolling provision infringed on the supreme court's exclusive rule-making authority. The trial court ruled that the tolling provision was unconstitutional.

The Second District reversed saying that because the procedural provision was so intertwined with the substantive provisions, the statute was not unconstitutional.
2D06-5302

Bilateral class action where attorneys challenged the occupational tax in Tampa is certified as to Plaintiff class and Defendant class.
City of Tampa v. Addison (2D06-3168) 8/8/07

A group of attorneys filed a class action suit challenging the constitutionality of the Tampa occupational tax as applied to attorneys. The trial certified a bilateral class action with selected Tampa attorneys representing the Plaintiff attorneys and the City of Tampa representing the class of City Defendants.

The City of Tampa appealed the order, arguing among other things, that it could not adequately represent the potential 200 defendants in the proposed Defendant class. The Second District rejected the City's arguments and affirmed the trial court order certifying the class.
2D06-3168

County must set forth its method of voluntary annexation in its charter.
Pinellas County v. City of Largo (2D06-4826) 9/19/07

The County attempted to contract the size of selected municipalities pursuant to three county ordinances. The Cities sued, challenging the County's authority to adopt an exclusive method of voluntary municipal annexation. The trial court ruled in favor of the Cities, stating that the Florida Statutes did not allow the County to adopt an exclusive method of voluntary annexation.

The Second District affirmed the trial court's judgment but said that the County did have the authority to adopt an exclusive method of annexation. The court went on to say; however, that the County must set forth its method in its charter not its ordinances.
2D06-4826

Third District Court of Appeal

DHSMV could require ignition interlock device even though driver only drove employer's vehicle.
Department of Highway Safety and Motor Vehicles v. Butler (3D06-2491) 7/05/07

Butler was convicted of DUI for the third time. He was sentenced to ten years license suspension and was allowed to apply for hardship reinstatement after two years. During the application hearing, reinstatement was granted on the condition that he enroll in a special program and as a result of the program, the additional condition of an ignition interlock device was added. However, Butler only drove a vehicle owned by his employer, and the employer did not want the device installed on the company vehicle. Butler requested that this restriction be removed from the issuance of his hardship license. DHSMV denied the request. Butler sought declaratory relief in circuit

court arguing that the required ignition interlock device was not imposed as part of his conviction nor was it required by the officer issuing his hardship reinstatement. The trial court found that DHSMV could not require the device.

On appeal the Third District reversed saying that although the ignition interlock device was not mandatory at the time of his conviction, it was mandatory at the time of his reinstatement.
3D06-2491

Issues appropriate for jury trial should have been tried before equitable issues.
Yer Girl Tera Mia Trust v. Wimberly (3D06-3883) 8/3/07

Plaintiff in this case sued to set aside an agreement for deed. The Defendant responded with affirmative defenses and a counterclaim for breach of contract. The counterclaim also made a request for a jury trial. The trial determined that it was appropriate to try all equity (non-jury) issues first and then allow a jury trial on remaining issues.

The Fifth Circuit reversed stating that under the Florida Constitution and Statutes, it is appropriate to conduct the jury trial first then dispose of the equitable issues after that.
3D06-3883

Fourth District Court of Appeal

The Florida Administrative Procedure Act applies to the school charter termination process.
Survivors Charter v. School Board of Palm Beach County (4D06-2378) 07/11/2007

An audit report revealed fiscal mismanagement of two Palm Beach County charter schools. After a properly noticed special meeting the School Board voted to terminate the charters and hand delivered notice to each school. The chartered schools appealed to the Charter School Appeals Commission and then to the State Board of Education. The State Board voted to uphold the termination of the school charters.

The charter schools appealed arguing that the School Board failed to follow the Administrative Procedure Act. The Fourth District reversed the State Board of Education, finding that the APA did apply to the charter school termination process.
4D06-2378

Smith v. Fisher (4D06-4922) 9/5/07
Vexatious litigant law was ruled constitutional.

When Smith sued Fisher and Martin Correctional Institution for the sixth time in five years, Fisher moved for an order to provide security pursuant to the vexatious litigant law. Smith then challenged the constitutionality of the law arguing that it interfered with his constitutional access to the courts. The trial court ruled for the Defendants, finding the statute to be constitutional.

The Fourth District affirmed because the statute "does not restrict any claim frivolous or legitimate, filed by a person who does not meet the definition of a vexatious litigant. The statute does not deny access to a court before any judicial determination. The statute does not require the posting of a security regardless of the merits of a lawsuit."
4D06-4922

The language setting up decisional criteria in the challenged Land Development Code provision was mandatory, sufficiently objective, and sufficiently detailed and therefore constitutional.
Friends of the Great Southern, Inc. v. City of Hollywood (4D06-3365) 9/19/07

After the City Commission of Hollywood approved the partial demolition of the Great Southern Hotel pursuant to a provision in the Hollywood Land Development Code, Plaintiffs filed suit challenging the provision as unconstitutionally vague because it did not contain sufficiently objective criteria. Holding that the provision was constitutional, the trial court granted a summary judgment to the City.

On appeal, Friends argued that the Code provision gave the City Commission unbridled discretion to approve or deny the certificate of appropriateness to demolish the hotel. The court rejected Friends argument and found that the provision provided sufficiently objective criteria for the City Commission to carry out its decision-making authority and used mandatory language to prohibit the commissioners from considering factors outside the criteria.
4D06-3365

Fifth District Court of Appeal

Legality of contract should have been addressed, in the first instance, by the arbitrator.
Charles Boyd Construction v. Vacation Beach, Inc (5D06-2168) 6/22/07

The parties had an agreement for Charles Boyd Construction to build condominiums for Vacation Beach, Inc. At some point Vacation Beach, Inc discovered that Charles Boyd Construction was not properly licensed under the Florida Statutes. Later disputes arose between the parties. Boyd recorded a lien and made a demand for arbitration. Vacation responded that since Boyd construction was not licensed, the contract was illegal and actually never came into being. Originally the courts required that the trial court make a determination of validity of the contract before requiring arbitration.

The decision in this case reflects a change in policy based on a United States Supreme Court case. Following the Supreme Court decision, the Fifth District found that the validity of a contract with an arbitration provision, should in the first instance be addressed by the arbitrator. The court said that the trial court's order denying the request to compel arbitration should be reversed. The court said, "In particular, we reverse the finding that the contract between Vacation Beach and Boyd Construction is illegal in the arbitration provision area and is not enforceable. That issue must in the first instance be decided by the arbitrator, not the court."
5D06-2168

Candidate was guilty of an unreported contribution when her husband paid for sign out of a joint personal account.
Candidate's infraction was considered willful because she made no attempt to acquaint herself with Florida election laws.

continued, next page

Beardslee v. Florida Elections Commission (5D06-4314) 8/10/07

The Florida Elections Commission found Beardslee guilty of failing to report an election contribution to her campaign. The contribution in question was her husband's purchase of yard signs funded from a joint personal bank account that the Beardslee shared. Beardslee claimed that the purchase qualified as an independent expenditure instead of a contribution because her husband did not have an agency relationship to the campaign.

On appeal, the Fifth District reviewed the surrounding facts to determine that an agency relation between Beardslee's husband and the campaign did exist. Beardslee saw her husband with the signs before the election and the signs included a campaign disclaimer on them. The Fifth District also found that Beardslee's violation was willful because she made no effort to become acquainted with Florida's election laws.
5D06-4314

Request for discovery was overbroad because it included a request for accident reports that occurred subsequent to Plaintiff's injury and included a request for injuries that were not substantially similar to Plaintiff's injury.
Universal City Development v. Williams (5D07-832) 8/24/07

Plaintiff was injured on a ride at a theme park. When she suffered from dizziness, aphasia and hemiparesis, she sued for negligence. During discovery she sought all medical reports for individuals who had suffered from headache, dizziness, stroke, fainting or heart attack as a result either three years prior or four years after her incident. The Defendant objected to the request, claiming it was overbroad. The trial court overruled the objections and ordered the Defendants to produce the documents.

The Fifth District quashed the court order because it found there was no basis for requiring reports after the Plaintiff's incident and there was not sufficient protection for reporting individual's medical privacy. In addition the court found that reports relating to heart attacks were similar enough to require production.
5D07-832

County ordinance regarding fireworks was not preempted by state law.
Phantom of Brevard v. Brevard County (5D06-3408) 8/31/07

Phantom challenged the constitutionality of a Brevard County ordinance that regulated the supply and sale of fireworks. Phantom argued that state regulation of the firework industry preempted the county ordinance. The trial court entered a summary judgment in favor of the county.

The Fifth District affirmed the lower court noting, "Brevard County enjoys broad constitutional authority to enact ordinances under its home rule charter."The court went on to say that there was neither express nor implied preemption, but found that one section of the ordinance must be severed because it was inconsistent with state law.
5D06-3408

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRSRT - STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43