CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Technology Issues Unique To Local Government Law

by Xavier E. Alban, Assistant City Attorney City of Miami, Office of the City Attorney

I. Definition of (Electronic) Public Records

Chapter 119 defines "public records" as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."[1] The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business, which are used to perpetuate, communicate or formalize knowledge.[2] The courts have further affirmed that the "public records law is not limited to paper documents but applies, as well, to documents that exist only in digital form."[3]

II. Electronic Recordkeeping

Chapter 119's stated policy is to provide access to non-exempt public records.[4] Addressing the rise of electronic records, Chapter 119 provides the following guidelines:

> (a) Automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence

See "Technology Issues," page 13

Message from Out-Going Immediate Past Chair Robert L. Teitler, 2017-2018

It has truly been an honor to serve as the Chair of the City, County and Local Government Law Section of The Florida Bar this past year. I have enjoyed the support and impassioned participation of so many of our Section members during the year on various issues that are important to local government. Thanks to you our Section continues to be a beacon and unparalleled resource to local government practitioners throughout the state.

Our Section enjoys robust financial health and continues to use its resources to provide Bar members and local government practitioners with the very finest CLE and website resources.

I want to express my personal appreciation to the members of our Executive Council for their dedication this past year, with special thanks to our many actively involved past Chairs, including my predecessor Jeannine Williams, our Vice-Chair, Michele Lieberman, and our Secretary Treasurer, Andy Lannon, for their assistance and tireless work on behalf of the Section. I would also like to express my deep gratitude to our Section Administrator, Ricky Libbert, for her assistance to me and all of the work she does for all of us in this Section.

Thank you for the honor of serving as your Chair and please join me by making a commitment to get involved with our Section and support Michele and Andy as they very capably take the helm into the next year. I am certainly looking forward to the incredible future this Section has ahead of it.

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CALENDAR

2018-2019

CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

Executive Council Meetings

October 25, 2018
Rosen Shingle Creek, Orlando

January 17, 2019
Doubletree by Hilton Orlando at Seaworld

May 9, 2019
Loews Sapphire Falls Resort Orlando
(Universal Studios)

June 27, 2019
Boca Raton Resort & Club

CLE Seminars

October 25-26, 2018
44th Annual Public Employment Labor Relations Forum
Rosen Shingle Creek, Orlando

April 5, 2019
Sunshine Law, Public Records & Ethics for Public Officers and Public Employees 2019
Rosen Plaza Hotel, Orlando

May 9, 2019
CCLG Certification Review Course
Loews Sapphire Falls Resort, Orlando (Universal Studios)

Public Finance 2019
Loews Sapphire Falls Resort, Orlando (Universal Studios)

May 10-11, 2019
42nd Annual Local Government Law in Florida
Loews Sapphire Falls Resort, Orlando (Universal Studios)

Ethics Questions? Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

This newsletter is prepared and published by the City, County and Local Government Law Section of The Florida Bar.

A Hard Conversation for the Local Government Attorney:
How to Tell Your Council/Commission They are NOT on the Clock 24/7

by Jill E. Jacobs, Esquire, Deputy City Attorney, City of Palm Bay, Florida

"Workers' compensation is a very important field of the law, if not the most important. It touches more lives than any other field of the law. It involves the payments of huge sums of money. The welfare of human beings, the success of businesses, and the pocketbooks of consumers are affected daily by it."[1] *Singletary v. Mangham Constr. Co.,* 418 So. 2d 1138, 1140 (Fla. Dist. Ct. App. 1982) (Judge E.R. Mills writing in opinion reversing the denial of appellant claimant's temporary total disability benefits for aggravation of a prior work-related injury).

In 2017, in Sunny Isles Beach, Florida, a city commissioner was catastrophically injured while walking through the driveway of his condo toward the parking garage. He was struck by a vehicle driven by a valet-parker, and that accident rendered the commissioner a quadriplegic. Ultimately the commissioner filed a workers' compensation claim against the City. It was initially denied, and after a trial the City was held responsible based on a workers' compensation principle finding the commissioner to have been injured "arising out of and in the course and scope of" his employment.

A review of the court docket, the Final Compensation Order, the trial memoranda and subsequent attorneys' fee award revealed the struggle and potential conflict between this self-insured municipality and their very competent counsel. Legally, the facts as applied to the law should have found that the commissioner was NOT in the course of his employment when he was struck. However, it was certainly (financially) advantageous for the City and the commissioner to argue otherwise.

As a workers' compensation expert and local government attorney myself, the case bothered me. While the Final Order was well written and supported by competent, substantial evidence, it did not cite to a single precedential opinion, no case or statutory authority at all. A case of (possible) first impression, and it was likewise not appealed. It became clear there exists essentially no guidelines and no parameters, on how to handle an elected official alleging a work-related injury.

Introduction

From its inception in 1935 until the 1972 Legislative session, the Florida Workmen's[2] Compensation Act specifically excluded from the definition of employment, *"service performed by or as an officer elected at the polls."*[3]

During the following Legislative session, on April 19, 1972, Governor Reubin Askew approved House Bill No. 3266, "An Act relating to workmen's compensation; amending paragraphs (b) and (c) of subsection (1) of §440.02, Florida Statutes, to include "officers elected at the polls" within the term "employment" for the purposes of workmen's compensation coverage."[4] *Effective November 7, 1972 (Election Day!)*, §440.02 read as follows:

> **(I) "Employment."**
>
> (a) "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him.
>
> (b) The term "employment" shall include:
>
> (i). Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein, **including officers elected at the polls.**

What was going on in Florida at that time, to warrant this change? Some support can be found in the memo from Chairman of the then-Industrial Relations Commission, explaining the third phase of "reformation" of industrial claims judiciary and industrial claims jurisprudence. This may have started out, historically, with the establishment and passage of OSHA in 1970, and the creation the following year of the National Commission on State Workers' Compensation Laws.[5]

This article will cover five main areas:

1. Why it is so important to educate elected officials about the workers' compensation laws, specifically when they are/not covered; definitions of employment, exceptions to rules and exceptions to exceptions;
2. What does a blow-up look like? (And) why a municipality may be inclined to "spin" the facts in favor of the elected representative.
3. What's In Your Wallet? Or policy? Why the City/County Attorney needs to first understand what the municipality's policies cover. (Hint: make your risk manager your BFF).
4. What some other states have done with respect to their elected officials and workers' compensation.
5. Perhaps it's time to revisit the Charter?

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A HARD CONVERSATION
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NEED TO KNOW: Why educate your elected officials? Why do they need to know more?

Workers' Compensation is the single biggest cost of doing business in Florida, with 2016 premiums written totaling $2,769,020,557.00.[6] Just ask any general contractor. The "system," i.e. the premiums, medical benefits, lost time and litigation expense – impact all businesses, large and small, privately held or publicly traded, across every industry. State and local governments are no exception.

Most municipalities have numerous types of employees in a variety of departments: full or part-time, administrative, utilities, public works, facilities, law enforcement. Some are sedentary and indoors, others are subjected to the elements outdoors; some drive city cars as a benefit, others operate heavy equipment or big trucks with CDL licenses. Larger, more populated counties may also have airports, shipping ports, hospitals, power plants and unions. What do all of these classes of public employee have in common? Job descriptions, work schedules. In other words, some level of predictability to the job.

But what about your elected officials? A simple Google search of "Work hours of a city of county commissioner" will bring up pages of articles and websites about the job, all making the same point: "For most county commissioners, the position is a part time job; at least that is what they tell you. But the reality is that as an elected official you are on duty and on call for 24 hours a day." So says the National Association of Counties, on their website. But is that really the case?

In Florida, as we will see, elected officials are "employees" for purposes of the workers' compensation laws. The goal of this article to provide a framework for discussion of the Workers' Compensation laws with your clients, the elected officials of the municipalities you represent. They should have a background in the law as far as coverage and how it affects each of them; what the City pays for coverage, benefits and attorneys' fees, how those expenses can be mitigated, and consider whether their City would be protected by having more detailed descriptions in the Charter which better addresses the parameters of these positions. The hope is this will prevent anyone from being caught unaware in the event of a catastrophe.

Some Background: Workers' Comp in Florida. Who's an Employee? An Employer? What's Covered? What's Not? Where?? When???

Briefly, Chapter 440, Florida Statutes, is known as "The Workers' Compensation Act."[7] It sets forth the legislative intent, which is a swift and efficient delivery of medical and indemnity benefits, without any presumption in favor of one party or the other. It is designed and intended to be, a "self-executing" act. Workers' Compensation has been called "a creature of statute." This is clearly true in Florida. Everything from judicial authority to benefits to trial practice and procedure are covered in this section.

Self-insured employers, like municipalities, have regulations and requirements for reporting in addition to the terminology outlined below. The most important definition for our discussion is the SIR, or "self-insured retention." This is a dollar figure, usually upwards of $250,000.00. It describes how much of the "risk" a City will absorb out of pocket, prior to the excess carrier stepping in. Think of it as a deductible, a very large deductible, on a per-claim basis.

As defined by §440.02(15)(a), an **employee:**

> "means any person who receives remuneration from an employer for the performance of any work or service while engaged in any employment under any appointment or contract for hire or apprenticeship, express or implied, oral or written, whether lawfully or unlawfully employed, and includes but is not limited to, aliens and minors."

Just as broadly, §440.02(16)(a) defines **employer** as:

> "the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person." The subsection goes on to address the inclusion of employee leasing agencies and employment agencies as employers.

For our purposes, we also need to look at the definition of **employment**, outlined in §440.02(17), as the relationship between employer and employee can often be called into question. Generally, §440.02(17)(a) states that "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her. Further, pursuant to §440.02(17)(b) Employment also includes:

> **(1) Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein, including officers elected at the polls.** (Emphasis added). (2) All private employments in which four (4) or more employees are employed by the same employer or, with respect to the construction industry, all private employment in which one (1) or more employees are employed by the same employer.

But what makes an injury by accident "compensable" under the Florida Workers' Compensation Act? A compensable claim would be one that is covered by Chapter 440. While "compensability" is not specifically defined, "coverage" is. This is the cornerstone of the Act, and the heart of all litigation therein.

Section 440.09, Florida Statutes, addresses coverage under the Act. Subsection (1) is the primary, threshold definition and will be noted here. But I would encourage everyone to peruse the rest of this section, as it also addresses key exceptions or limits to compensability, like fraud, failure to use a safety device, death by hernia.

> (1) The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental

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> compensable injury or death **arising out of work performed in the course and the scope of employment**. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries. **For purposes of this section, "major contributing cause" means the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought.** In cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence. Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable. For purposes of this section, "objective relevant medical findings" are those objective findings that correlate to the subjective complaints of the injured employee and are confirmed by physical examination findings or diagnostic testing. Establishment of the causal relationship between a compensable accident and injuries for conditions that are not readily observable must be by medical evidence only, as demonstrated by physical examination findings or diagnostic testing. Major contributing cause must be demonstrated by medical evidence only.
>
> (a) This chapter does not require any compensation or benefits for any subsequent injury the employee suffers as a result of an original injury arising out of and in the course of employment unless the original injury is the major contributing cause of the subsequent injury. Major contributing cause must be demonstrated by medical evidence only.
>
> (b) If an injury arising out of and in the course of employment combines with a preexisting disease or condition to cause or prolong disability or need for treatment, the employer must pay compensation or benefits required by this chapter only to the extent that the injury arising out of and in the course of employment is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the major contributing cause of the disability or need for treatment. Major contributing cause must be demonstrated by medical evidence only.

So, simply put, Compensable = Arising out of + Course and Scope.

In §440.02(36) the legislature defines **"arising out of"** as:

> pertaining to occupational causation. An accidental injury or death arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury or death.[8]

Within the umbrella of "arising out of," there are 2 aspects which employers and their claims professionals will consider: the origin of the risk, and medical causation.

The **origin of the risk** deals with how the "potential" for injury came on to the job site. Was it truly a risk of the employment (a dangerous job, a poorly maintained scaffold, a motor vehicle accident?), or was it a personal risk brought on to the site by that employee (did he suffer from an idiopathic or a pre-existing condition?). A true risk of employment would weigh in favor of compensability; while a documentable personal risk would weigh heavily against the employee, with a possible denial of the entire event.

A risk can also be neutral in origin. This usually arises when there is no clear accident or event, or obvious injury, but more often a strain or vague complaint of pain or discomfort that could have come from personal hobbies as easily as from something at work. ("My back has been bothering me for a week, and it's worse when I am here at work."). In this situation, a "Major Contributing Cause" or MCC analysis should be undertaken.

Major Contributing Cause analysis may be done multiple times during the pendency of a claim, but most certainly at the beginning, when the accident first happens, as part of the determination of "arising out of." Let's say the last rung of a ladder broke, causing employee to slip and he had to jump a short distance. He did not fall to the ground and the ladder remained upright. In that case, the origin of the risk is clear, and the accident itself is related to the job. A determination still has to be made IF the mechanics of that accident could have caused the injuries to the body parts the employee is asserting he injured. Could the slip and land from the bottom of the ladder cause pain in the shoulder? The analysis, then, would be to ask the initial medical provider IF the mechanics of that accident could be the "major contributing cause" of the injury. As defined above "major contributing cause," or MCC, is the cause that is at least 50% responsible for the injury. It does not have to be the only cause, just the biggest. Any opinion rendered by the physician must be based on objective medical evidence (no lay testimony).

Course and Scope

The last piece of the compensability puzzle is "course and scope." Not specifically defined by statute, the general rule is that an injury is said to be in the course and scope of employment when it occurs within a period of employment, at a place where the employee may reasonably be, and while the employee is reasonably fulfilling the duties of employment or engaging in something identical to it.[9] The primary exception here is **the "Going and Coming Rule"**; i.e. injuries sustained while traveling to and from work are generally **not compensable.**

Course and scope, then, would be the time and place of the event + the work activity being undertaken. Time and place analysis would involve looking at the employment relationship (could he be an independent contractor?), the premises doctrine, or if not on premises, some acceptable location such as for personal comfort.

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Time and Place: The Premises, the Smoke Break, and the Side Job.

Like most things Workers' Compensation, it is the exceptions to the rules that are more oft litigated than the rule itself. This is the case with the premises rule. There are situations where an injury by accident will arise when an employee is going to be off campus or away from his workstation, but still covered. These include special hazards, travel between two parts of an employer's premises, personal comfort and public rights-of-way. It is worth taking a few minutes to address those exceptions and be aware of them.

The special hazard exception involves the normal route an employee would take as a means of ingress to or egress from the employer's premises. The hazards of that route may become the hazards of that employment. This is now codified in §440.09, and the Courts have established a two-prong test: (1) the presence of a special hazard at a particular off-site location, and (2) close association of the access route to the work premises.[10] As to the second prong, the First DCA noted that the course of employment should extend to any injury that occurs at a point where the employee is within the range of dangers associated with the employment, and the only essential inquiry is whether the danger is one to which the employee is particularly subjected or to an abnormal degree, by reason of and in conjunction with his employment.[11]

Travel between two parts of an employer's premises includes cases involving parking lots, parking garages, other buildings like storage facilities. Generally, if that location to which the employee is heading, is owned or controlled by the employer, that injury will be held to be compensable. Likewise, if it is not owned or controlled by the employer BUT it has been designated by the employer as a location in which business activity can or must occur, the courts will find a compensable event.[12]

The Florida Supreme Court did address the question of when the route between two locations of the employer's premises involves travel on public streets. The inquiry was whether the employer actually uses those streets for its purposes. *See*, Fernandez v. Consolidated Box, 249 So. 2d 434 (Fla. 1971). But what if the employer IS the City? How far can the premises of the employer be extended?

The personal comfort doctrine developed from employees' needs such as hygiene, cigarettes, or even a quick walk to stretch ones' legs, during the course of the work day. These events have been considered incidental to employment, de minimus in terms of the extent of the deviation.[13]

The last factor under "Time and Place" of employment in determining compensability is the employment relationship itself. Chapter 440 defines employees, as outlined above, and specifically excludes certain types of employees as well. The caselaw surrounding independent contractors, exempt corporate officers, borrowed servants and leased employees could fill a book. Therefore, for our purposes we will review again the relevant definition of employment. §440.02(17)(a) states that "Employment," subject to the other provisions of this chapter, means any service performed by an employee for the person employing him or her. Further, pursuant to §440.02(17)(b) "Employment also includes" (1) Employment by the state and all political subdivisions thereof and all public and quasi-public corporations therein, including officers elected at the polls. Thus work performed by elected officials in the course of their employment as such, would be specifically covered under the workers' compensation laws of Florida. Provided they were where they were expected to be…… absent an exception. And as long as they were not coming or going.

The Work Activity—But Not Going or Coming—and Special Circumstances for Compensability (Or "Exceptions to Exceptions')

Most elected officials would no doubt argue that "the work never stops, we are on call 24/7" and that "the entire City is my job site." These are characterizations, not job descriptions. But no doubt there is an overlap between roles, and it is difficult to determine when such an official is truly acting in furtherance of the business of his employer, the city/county/town. Absent any statutory or case authority, I would anticipate frequent situations involving an elected official injured arising out of and in the course and scope of employment, will involve this last piece, the *work activity*.

Chapter 440, specifically §440.092 has codified certain circumstances outside the traditional workplace accident, which may give rise to a compensable injury. Likewise, these same scenarios can also serve as defenses to such claims.

Recreational and social activities are not compensable unless they are an expressly required incident of employment AND produce a substantial direct benefit to the employer. This benefit must go beyond improvement of employee health and morale that is common with typical "team building" and social activities. Here, the law normally looks for a financial aspect to the event such as the presence of clients. Much of the caselaw evolved from "softball games" or inter-department competitions, company picnics and the like.[14]

The "going or coming" doctrine under §440.092(2) states: "An injury suffered while an employee is going to or coming from work is NOT an injury arising out of and in the course of employment, whether or not the employer provided the transportation, if that transportation was available for the exclusive personal use of the employee; unless the employee was engaged in a **special mission or errand** for the employer."[15]

An exception to this exception applies to law enforcement officers sworn pursuant to §943.10(1). Section 440.092(2) adds this language to the going or coming rule: ". . . during the officer's work period or while going to or coming from work in an official law enforcement vehicle, an injury by accident shall be presumed

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to be an injury arising out of and in the course of employment, unless the injury occurred during a distinct deviation for a nonessential personal errand. If, however, the employer's policy or the collective bargaining agreement that applies to the officer permits such deviations for nonessential errands, the injury shall be presumed to arise out of and in the course of employment."[16]

Both special errand and dual purpose are exceptions to going or coming. A dual purpose can make a deviation or personal errand compensable. Under the dual purpose doctrine, "an injury which occurs as a result of a trip, a concurrent cause of which was a business purpose, is within the course and scope of employment, even if the trip also served a personal purpose, such as going to and coming from work." Stewart v. Lakeland Funeral Home, 86 So. 3d 1205 (Fla. Dist. Ct. App. 2012).

The special mission or errand is different from deviation. An employee who is injured while deviating from the course of employment, including physically leaving the employer's premises, is not eligible for benefits unless the deviation is expressly approved by the employer or unless such deviation or act is in response to an emergency and designed to save life or property.

In Sentry Insurance and Express Script, Inc. v. Hamlin, 69 So. 3d 1065 (Fla. Dist. Ct. App. 2011) Claimant was injured when he was dragged from his car while a repossession tow truck drove away (with his car). The accident occurred during claimant's work hours and in the employer's parking lot. There was no dispute that the accident occurred in the course and scope of employment and the JCC had granted compensability. However, the 1st District Court of Appeal addressed the statutory requirement that the accident and injuries must 'arise out of work performed.' Here, the repossession was completely unrelated to any work activity and claimant's mission to retrieve his personal items from the vehicle before it was taken was purely personal and did not arise out of his employment. The facts that claimant was at work and on the employer's premises when the incident occurred and that the employer did not preclude claimant's actions were insufficient to draw the connection between employment and the activity responsible for the injury. Nor was claimant engaged in any personal comfort activity, or responding to an emergency, as contemplated by those doctrines. Order granting compensability here was reversed.

Another type of deviation that occurs on premises, but would not

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normally be compensable, involves horseplay. Whether such behavior is a substantial deviation precluding compensability depends on: (1) the extent and seriousness of the deviation; (2) the completeness of the deviation- and whether it involved an abandonment of employment duties; (3) the extent to which similar activity had either been forbidden or had become an accepted or tolerated practice; and (4) the extent to which such horseplay may have been, may have been expected to or reasonably foreseeable in the employment.[17]

To summarize, a variety of situations and scenarios can be imagined where elected officials can be injured, from traveling to Tallahassee to lobby, to stepping off the dais to greet a citizen, **BUT** to qualify for benefits under the workers' compensation act, a compensable injury suffered by a covered employee, including those "elected at the polls," must arise out of and be in the course and scope of employment. Other than the specific statutory reference to law enforcement officers in an official vehicle, there is no guidance for "on call" employees. And, while serving one's city may feel like a 24/7 job, only sworn law enforcement officers are truly on-call, and even that rule has limitations. Thus, it can be argued that the legislative intent here is to restrict such a definition to the one identified in the law.

So what does a blow-up look like? Why a municipality may be inclined to sway the facts in favor of their representative, and why workers' comp offers a very attractive package, especially after a catastrophe.

A blow-up looks like Sunny Isles Beach.[18] Medical benefits exceeded $1,000,000 after six (6) months, and the City paid huge attorneys' fees and costs to the commissioner's workers' compensation counsel ($475,000 for eight (8) months of litigation). Permanent and total disability benefits for this 67-yearold male with a 14.3 year life expectancy, are $171,600 assuming he is already receiving Social Security retirement and Medicare. This is based on his $12,000 annual salary as a commissioner, and $6,000 annual stipend for which he does not need to account.[19]

The medical expense is the much larger exposure. Initial hospital bills exceeded the $1 Million Dollar threshold (SIR) before the case went to trial. Future medical expenses for a quadriplegic are going to be high even without comorbidities and complications. The attendant care awarded (non-professional nursing care as allowed by §440.13) for 24 hours per day, or 168 hours per week, even at $10 per hour for an attendant or practical nurse, would total over $1.2 million in 14 years.

From a medical-expense standpoint, workers' compensation benefits in Florida present a very attractive "package." Consider this: There is no lifetime maximum, no co-payments, no deductibles. Providers who accept workers' compensation patients must be willing to accept payments within a "fee schedule" which is, again, statutory. There are medical benefits available to catastrophically injured employees that surpass Medicare: professional and non-skilled nursing care, mileage reimbursement or transportation, modifications to housing and vehicles, and all manner of DME – durable medical equipment.

Indemnity is paid at 66 2/3% of an individual's average weekly wage. It is tax-exempt. Temporary benefits are capped at 260 weeks, but permanent total disability benefits are to age 75. It includes supplemental benefits of 3% per annum to age 62. There is an offset if the recipient is also insured for SSD, but that ends at age 62.[20] Thereafter, complete double-dipping.

Clearly, compared to group health insurance, PIP, or Medicare, the part-time elected city official is going to push for coverage under workers' compensation.

From the municipality's standpoint, once the "SIR" is reached, all benefits due are reimbursed by the City's excess carrier, at anywhere from 70% to 100%, usually staggered. (The more paid out, the greater the percentage of reimbursement.)

Without a doubt, though, the greatest advantage to any employer in having an employee's catastrophic claim covered under workers' compensation can be summed up in a single word: **IMMUNITY.**

Quite simply, §440.11, Florida Statutes, states that an employer who obtains workers' compensation coverage for its employees gains statutory immunity from suits filed by injured employees. In other words, employees under the no-fault workers' comp act are limited to the medical and indemnity benefits provided by statute for their work-related injuries. An employer cannot be sued in negligence for this event; hence, no pain and suffering is available.

This does not preclude the employee from filing suit against the actual third-party tortfeasor, such as in the case of a motor vehicle accident caused by a valet parker. In that situation, the employee is free to allege all causes of action and seek recovery from that tortfeasor for all benefits, including pain and suffering. To avoid the double-dipping issue, again, §440.39 permits an employer and carrier to subrogate against such a recovery, to the extent they have paid out in workers' compensation benefits, up to the amount of employee's net recovery in tort (after attorney's fees and costs).

WHAT'S IN YOUR WALLET? OR POLICY? Why the local government attorney should read and understand the municipality's policy of workers' compensation, what it covers, what it does not.....

As stated above, the exceptions sometimes are as crucial to understand as the law itself. It is important to understand a little about workers' comp policy basics. The standard workers' compensation policy consists of two primary parts, I and II. The attorney advising the municipality should read this in its entirety, and be familiar with both parts. Like your auto policy, it will include a declarations page, endorsements and statutory requirements. The inclusions and exclusions will

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be important in making coverage decisions.

Part I of the typical workers' compensation policy covers obligations under Chapter 440 and related provisions.

Part II, also called Employer's Liability, typically states that this policy of employers' liability insurance applies to bodily injury by accident or disease that arises out of and in the course and scope of employment. The injury must occur in a designated coverage area or state, during the policy period. (Note: some companies with traveling employees will list those additional states outside the "home state" where coverage has been extended; this is called "3C" coverage). Part II also contains standard exclusions from coverage for the following situations: contractual obligations, obligations imposed by workers' compensation laws (Part I); an injury intentionally caused or aggravated by the employer; damages arising from demotion, evaluation, harassment, or personnel practices; and bodily injury to an employee while employed in violation of the law with the employer's actual knowledge.

If you do not know the answers to these questions, ask your Risk Manager:

What is your municipality's SIR?

Are you self-insured, or covered from dollar one ($1)?

Do your union contracts provide more or different benefits than the workers' compensation act? Does your city have unions?

Is your city a drug-free workplace?

Do you have traveling employees?

WHAT ARE SOME OTHER STATES DOING?

Florida's workers' compensation act, as we have seen, is purely a creature of statute. No benefits are given or taken away without an act of Congress, and no term of substance is defined without such approval. While every state in the US has a law pertaining to workers' compensation, there are many whose approaches are worth a look.

In Minnesota, workers' compensation coverage for elected and appointed officials is optional. For those cities who are members of the League of Minnesota Cities Insurance Trust (LMCIT) coverage is the default option for mayors, council members, elected clerks and elected treasurers. That is, these elected officials are covered parties for workers' compensation benefits unless the member city specifically chooses otherwise.[21]

The state of Indiana, since 1977, specifically excludes from coverage employment as an elected official, member of a legislative body or judiciary, a member of the state national guard, temporary employees hired for natural disasters, and "an individual in a position which, under the laws of the state, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of which ordinarily does not require more than 8 hours per week."[22] The focus on the part-time nature of the position is interesting, as most local government elected officials do have full time jobs outside of their service.

In Kansas and Kentucky, elected and appointed officials are covered, provided they are injured "while performing official duties."[23]

Vermont has an unusual statute, differentiating coverage between state elected officials and local but attempting to limit or define the "course and scope" question. Chapter 9 of that state's laws governs Employer Liability and Workers' Compensation. Under § 601, "Public employment" means the following: (A) all officers and State employees, as defined in 3 V.S.A. § 1101, of all State agencies, departments, divisions, boards, commissions, and institutions, and the Vermont Historical Society; (B) full-time State's Attorneys and full-time Deputy State's Attorneys; *(C) officers and employees of the General Assembly, provided however, that members of the General Assembly shall be considered as public employees only for the periods that the General Assembly is in session or while engaged in duties for which compensation is provided by law*; ***. . . (O) the term "public employment" shall not include the following: (i) public officials who are elected by popular vote, except those hereinbeforementioned in this subdivision;*** (ii) assistant judges of the Superior Court, high bailiffs, county treasurers, or any of their deputies or subordinates; (iii) prisoners or wards of the State; (iv) any person engaged by the State under retainer or special agreement.[24]

IS IT TIME TO LOOK AT THE CHARTER OR ORDINANCES?

Conclusion and Food for Thought

Perhaps this information about the law, Risk, money, insurance, will lead to a review of Charters and Ordinances. Obviously absent an act of Congress there will not be a change to the definition of employment with respect to coverage for elected officials. However, there is something to be said for clarification of what it means to be "in furtherance of the business of the municipality." Opportunities are present in the areas of hours per week, i.e. when the work day begins, when it ends; overlap with concurrent employment duties; travel and specific events covered. What about city-sponsored events like the Holiday Parade or Independence Day celebration?

I submit it is critical for our elected officials to understand how this statutory scheme impacts them personally, and the City globally, thus enabling more informed decision-making regarding budgetary, risk management and litigation matters. And once they are so informed, a discussion about clarifying their job duties to the municipality they serve may be in order.

Is it realistic to have more detailed job descriptions for our elected officials? Perhaps some clarifying or tweaking would do it. What would the downside be? If a costly disaster can be averted, it would be well worth a little discomfort.

Endnotes:

1 This commentary is an excerpt from Judge Mills' individual opinion denying Employer's Motion for Rehearing on Appeal, and really

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A HARD CONVERSATION

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should be read in its entirety to get the full impact.

2 The Act did not become gender neutral until the 1979 amendments.

3 Laws of Florida, Fourth Division – Title II, Ch. V, Art. 5, "Workmen's Compensation"; §5966(1). Short Title; §5966(2) Definitions. *"When used in this law – (1) The term 'employment' includes employment by the State and all political subdivisions thereof,* ***except officers elected at the polls****"* (emphasis added).

4 Chapter 72-243, Laws of Florida, as amended by chapter 71-80, amending paragraphs (b) and (c) of subsection (1) of §440.02, Florida Statutes.

5 *See* Creston Nelson-Morrill, Workers' Compensation In Florida, 1935-1995: The History, People & Politics (Florida Workers' Compensation Institute Press, HealTrac Books 1995)

6 Florida Office of Insurance Regulation, "2017 Workers' Compensation Annual Report," David Altmaier, Insurance Commissioner, January 15, 2018.

7All references beginning at FN 7 and continuing refer to the current version of Chapter 440, Florida Statutes, unless otherwise specified.

8 Despite the fact that terminology is well-defined in the statute, there is much litigation over what those definitions mean.

9 *See*, e.g., Strother v. Morrison Cafeteria, 383 So. 2d 623 (Fla. 1980); Caputo v. ABC Fine Wine & Spirits, 93 So. 3d 1097 (Fla. Dist. Ct. App. 2012); Lanham v. Department of Environmental Protection, 868 So. 2d 561 (Fla. Dist. Ct. App. 2004); Vigliotti v. K-Mart Corp., 680 So. 2d 466 (Fla. Dist. Ct. App. 1996); Bryant v. David Lawrence Mental Health Center, 672 So. 2d 629 (Fla. Dist. Ct. App. 1996).

10 The 2-prong test for special hazard is set forth in Kramer v. Palm Beach, 978 So. 2d 836 (Fla. Dist. Ct. App. 2008).

11 *See, for more recent application*: Quinn v CP Franchising, 208 So 3d 141 (Fla. 1st DCA 2016); Evans v Holland & Knight, 194 So 3d 551 (Fla. 1st DCA 2016).

12 For cases on travel between two parts of an employer's premises, *see* Silva v. General Labor Staffing Services, 995 So. 2d 1107 (Fla. Dist. Ct. App. 2008); Evans v. Handi-Man Temporary Services, 710 So. 2d 132 (Fla. Dist. Ct. App. 1998); Ryan v. Boehm, Brown et al., 673 So. 2d 494 (Fla. Dist. Ct. App. 1996). These cases essentially extended the premises of the employer such that dropping off time records at a bar would still be considered on premises.

13 *See,* Bayfront Med. Ctr. v. Harding, 653 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1995) ("Claimant's off-premises act in reasonable pursuit of personal comfort needs during employment hours, and at a place condoned by the employer, was not a deviation from his work . . ."); Holly Hill Fruit Prods., Inc. v. Krider, 473 So. 2d 829, 830 (Fla. Dist. Ct. App. 1985) ("An employer-condoned off-premises refreshment break of insubstantial duration is generally not such a deviation as to remove a claimant from the course and scope of the employment.").

14 Brockman v. City of Dania, 428 So. 2d 745 (Fla. Dist. Ct. App. 1983).

15 Swartz v. McDonald's, 788 So. 2d 937 (Fla. 2001).

16 For an example of the extent/completeness of a deviation by a law enforcement officer, see the trial judge's opinion in Ashon Lille v. Florida City Police Department and Gallagher Bassett, OJCC#14-016437, Order date 11/23/2015.

17 See, Sentry Ins. Co. v. Hamlin, 69 So 3d 1065 (Fla. Dist. Ct. App. 2011); Dunleavy v. Seminole County Department of Public Safety, 792 So. 2d 592 (Fla. Dist. Ct. App. 2001); Times Publishing Company, 382 So. 2d 720 (Fla. Dist. Ct. App. 1980).

18 OJCC Case No. 17-004278, October 26, 2017; *Isaac Aelion, Employee vs. City of Sunny Isles Beach / Preferred Government Claims Solutions / PGCS*, Self-Insured Employer/TPA, (2017 WL 5151972 (FL.Off.Judge.Comp.Cl).

19 Susannah Nesmith, Compensation of Elected Officials, Miami-Dade Ethics Commission (2018); Florida Statutes' §440.14 explains calculation of the average weekly wage for workers' compensation indemnity benefits.

20 §440.15 provides for payment of and limitations on, permanent total disability and supplemental benefits.

21 LMCIT Workers' Compensation Coverage Guide, citing from Minn. Stat. §176, effective 1/1/2018.

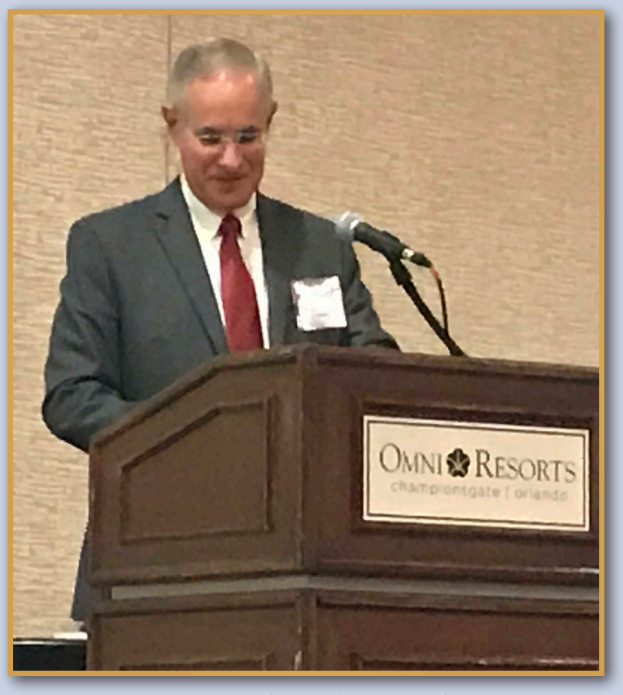
22 Ind. Code Ann.§22-4-8-2.

23 Kan. Stat. Ann.§44-508(b); Ky. Rev. Stat. §342.640(3).

24 Vt. Stat. Ann. Title 21, §601 (emphasis added) (citation omitted)

This submission would not have been possible without the outstanding editing assistance of City of Palm Bay's Debra Hunt, FRP, and legal intern Jaryeneh Travis Tarpeh (MBA / JD, Emory University, May 2019), as well as the support of my City Attorney, Patricia D. Smith.

ANNUAL MEETING



W.2017-18 Chair Robert L. Teitler

Chair-elect Michele L. Lieberman and
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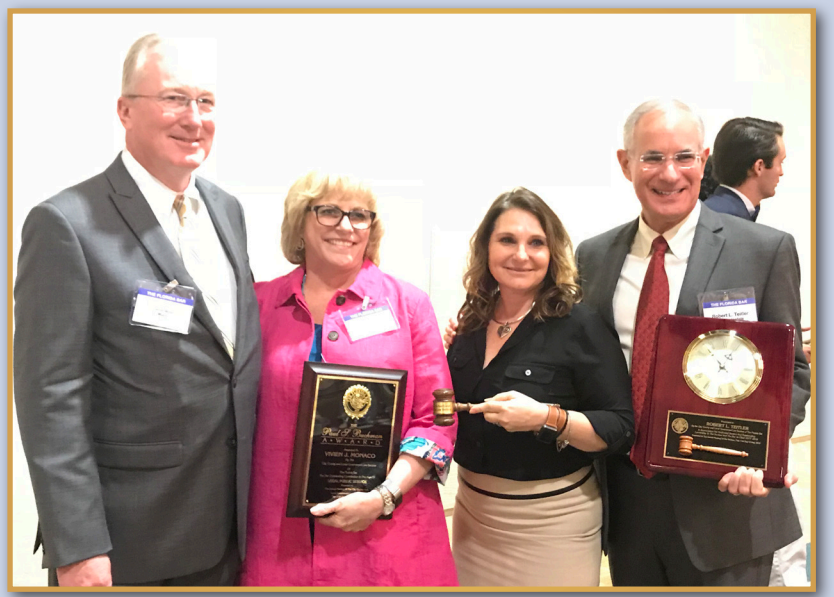

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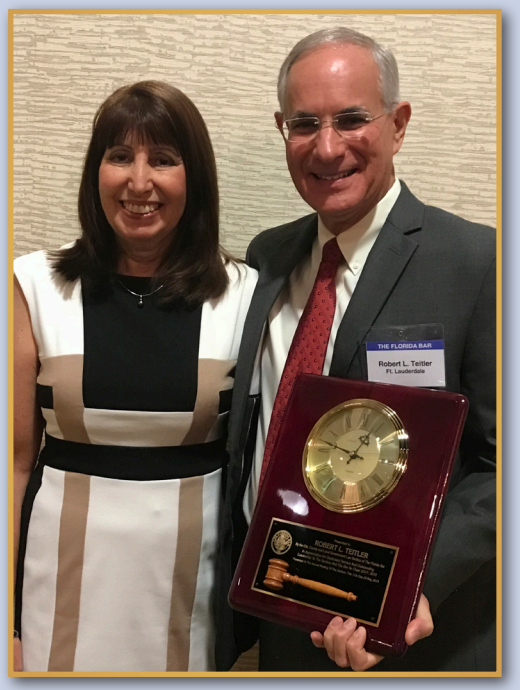

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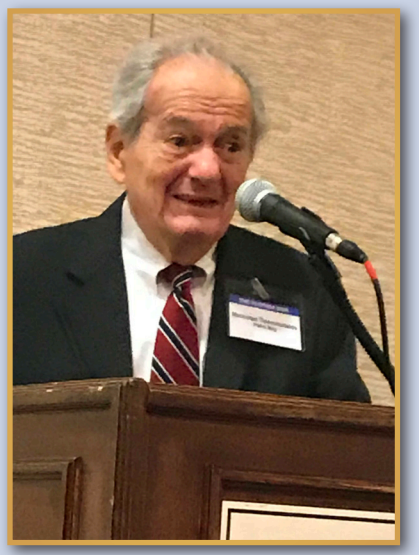
AWARDS



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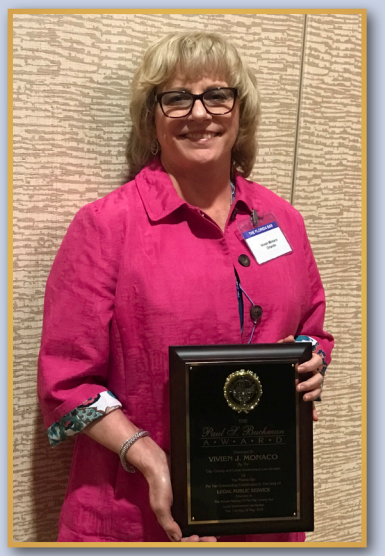
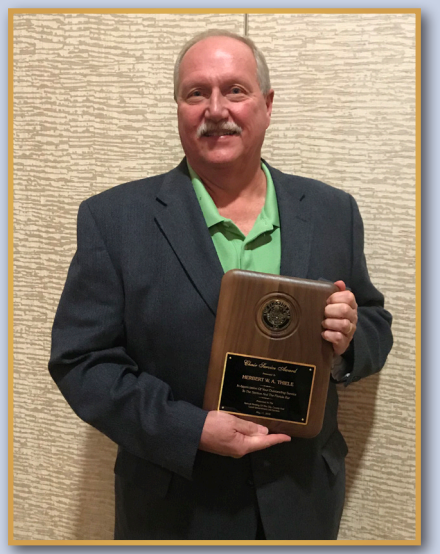
2018 Ralph A. Marsicano Award Winner

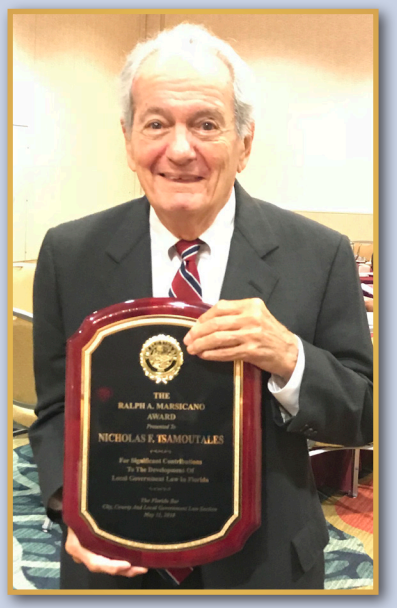


Vivien J. Monaco
Paul S. Buchman Award Winner



Herbert W. A. Thiele
Chair Service Award

Nicholas F. Tsamoutales and Family



Nicholas F. Tsamoutales
2018 Ralph A. Marsicano Award Winner

Law Student Scholarship Award
John Alexander Pilz, Angela Drummond, Jorge E. Torres-Puig and
Donald S. Crowell, Law Student Scholarship Committee Chair

on electronic recordkeeping, each agency must provide reasonable public access to records electronically maintained and must ensure that exempt or confidential records are not disclosed except as otherwise permitted by law.

(b) When designing or acquiring an electronic recordkeeping system, an agency must consider whether such system is capable of providing data in some common format such as, but not limited to, the American Standard Code for Information Interchange.

(c) An agency may not enter into a contract for the creation or maintenance of a public records database if that contract impairs the ability of the public to inspect or copy the public records of the agency, including public records that are online or stored in an electronic recordkeeping system used by the agency.

(d) Subject to the restrictions of copyright and trade secret laws and public records exemptions, agency use of proprietary software must not diminish the right of the public to inspect and copy a public record.[5]

The public agency has a duty to maintain and preserve public records but it is clear that an agency should not establish a system that prohibits a member of the public from being able to inspect and copy these records. It is intended to ensure that a public agency uses technology as a tool and not as a barrier to public records access. "Providing access to public records by remote electronic means is an additional method of access that agencies should strive to provide to the extent feasible."[6]

Many requestors are now requesting that records be provided to them in a "digital format." Section 119.07(1)(a), Florida Statutes, states that "Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervisions by the custodian of the public records." Chapter 119 further requires that while each agency that maintains a public record in an electronic recordkeeping system is required to provide to any person a copy of any non-exempt digital public records, the "agency must provide a copy of the public record in the medium requested *if the agency maintains the record in that medium* . . ." As such, if a requestor requests a record in an electronic format and the public agency maintains that record in the requested electronic format, then the record must be produced to the requestor in the requested electronic format.

However, this does not mean that an agency is required to convert a hardcopy of a record into a digital copy in order to comply with the public records request. Similarly, the agency would not be required to convert an electronic record into the requested electronic format (i.e., PDF to TIFF).[8] But if the agency chooses to satisfy the public records request by "provid[ing] a copy of a public record in a medium not routinely used by the agency, or if it elects to compile information not routinely developed or maintained by the agency or that requires a substantial amount of manipulation or programming" then the agency may charge reasonable fees for satisfying the public records request.[9]

III. Conversion of Hardcopy Records to Digital Records

A master copy of a public record may be reformatted to a digital or electronic format so long as the requirements of Rule 18-26.003, F.A.C. are met. A master copy is defined as a public record "specifically designated by the custodian as the official record."[10] When an electronic reproduction of an original record is created and designated by an agency as the master copy, the original may then be designated as a duplicate.[11] Records retention schedules apply to records regardless of their physical format.[12] Therefore, the standard minimum retention and disposition requirements for master and duplicate copies set forth in the General Records Schedule GS01-SL and in Rule 18-24.003 of the Florida Administrative Code govern.

The retention period for duplicates is always "retain until obsolete, superseded, or administrative value is lost . . . unless otherwise specified."[13] There are no specific standards or definitions governing when ;'administrative value is lost." Therefore, assuming the public agency considers or determines that the hard copies of the record, once scanned, have no administrative value, then the public agency may dispose of the hard copies without documenting the disposition of the records.[14]

However, if the records are being scanned as "part of a retrospective conversion project in accordance with Rules 1B-26.0021 or 1B-26.003, F.A.C., where the microfilm or electronic version will serve as the record (master) copy" then the hardcopy is not considered a duplicate. Rule 1B-24.001(m) defines a "retrospective conversion project" as the "bulk microfilming or digital reformatting of *existing* backfiles" and specifically excludes the "day-to-day scanning of current items conducted as part of daily workflow" from the definition. As such, if a public agency engages in a retrospective conversion project of public records, after scanning the records the public agency must comply with all the requirements, including the appropriate documentation, outlined in Rule 1B-26.003, F.A.C.

Additionally, there are specific requirements when implementing an electronic recordkeeping system and for maintaining electronic records. Pursuant to Rule 1B-26.003(8)(a), F.A.C., electronic recordkeeping systems maintaining master copies of public records must meet the following requirements:

1. A method must be provided for all authorized users of the system to retrieve records;
2. The system must be secure, in accordance with Florida Statute Chapter 282;
3. When necessary, an exchange format must be identified to allow for exchange of records between agency systems;
4. The system must provide for the disposition of records.

Furthermore, all electronic records must be scanned with a density of 300

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dots per inch (DPI), and if intended to be the master copy, be scanned in the TIFF 6.0 format or have the ability for the lossless conversion of the record to the TIFF 6.0 format.[15]

IV. Retention of Electronic Records

Public agencies are required to retain all public records, hardcopy or digital, pursuant to the schedules established by the Division of Library and Information Services of the Department of State ("Division").[16] In an Informal Opinion, the Florida Attorney General's Office suggested that "[t]he same rules that apply to email should be considered for electronic communication including Blackberry PINs, SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies."[17] The updated retention schedules promulgated by the Division states,

> Records retention schedules apply to records regardless of the format in which they reside. Therefore, records created or maintained in electronic format must be retained in accordance with the minimum retention requirements presented in these schedules. Printouts of standard correspondence are acceptable in place of the electronic files. Printouts of electronic communications (email, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device) are acceptable in place of the electronic files, provided that the printed version contains all date/time stamps and routing information. However, in the event that an agency is involved in or can reasonably anticipate, litigation on a particular issue, the agency must maintain in native format any and all related and legally discoverable electronic files.[18]

V. Social Media

Public agencies, including its officers and elected officials, have increasingly moved towards using social media platforms (Twitter, Facebook, Instagram, Linkedln, etc.) to communicate with residents. Social media platforms allow public agencies to, among other things, directly interact with residents and business owners, quickly communicate with the public, and promote agency programs. A forum analysis needs to be conducted for each social media account a public agency has to determine whether the platform is a public forum or a designated public forum. This determination is important because if a social media platform is a public forum or designated public forum, then not only are the public agency's posts to the platform subject to the provisions Chapter 119, Florida Statutes, and the retention schedules, the comments and posts submitted by the public then become public records as swell subject to all the Chapter 119 and retention requirements.

The Florida Attorney General's Office in AGO 09-19 has opined that anything placed on a government agency's Facebook page is considered a public record and is subject to all the provisions Chapter 119, Florida Statutes, and the retention schedules.[19] This same rationale, can be applied to the various social media accounts operated by a government agency such as Twitter, lnstagram, YouTube, Linkedln. Periscope, Snapchat, etc. Public agency's that operate a website and use electronic mail are required to post the following statement in a conspicuous location on its website, "Under Florida law, e-mail addresses are public records. If you do not want your e-mail address released in response to a public records request, do not send electronic mail to this entity. Instead, contact this office by phone or in writing."[20] As such, it is recommended that a public agency also include a similar statement on its social media platforms.

Still unclear are social media accounts operated and managed by a public agency's elected officials, officers, or employees. With regards to Twitter, the Florida Attorney General noted in an Informal Opinion that "[i]f the 'tweets' the public official is sending are public records, then a list of blocked accounts, prepared in connection with those public records 'tweets,' could well be determined by a court to be a public record."[21]

Recently, in *Knight First Amendment Institute. et al. v. Trump, et al.,* a federal district court conducted a forum analysis and held that Twitter's interactive space associated with a tweet from the account of President Donald J. Trump was a designated public forum because various objective factors, including policy and past practices, supported the notion that the "interactive space associated with a tweet" was a place for expressive activity and therefore protected by the First Amendment.[22] While the forum analysis and other issues relating to the First Amendment is outside the scope of this topic, this case has an impact with relation to Chapter 119 and retention requirements. Although this decision is being appealed, if it is affirmed that the interactive space of Twitter is a designated public forum, then Tweet's received by an elected official, agency officer, or public employee receive are received in the transaction of agency business and therefore subject to all the provisions of Chapter 119.

VI. Five (5) Days Notice for Attorney Fees

In 2017, Section 119.12, Florida Statutes, entitled "Attorney Fees" was amended to include a notice requirement before instituting a civil action. The amended statute reads in relevant part,

> (1) If a civil action is filed against an agency to enforce the provisions of this chapter, the court shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:
>
> (a) The agency unlawfully refused to permit a public record to be inspected or copied; and
>
> (b) The complainant provided written notice identifying the public record request to the

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> agency's custodian of public records at least 5 business days before filing the civil action, except as provided under subsection (2). The notice period begins on the day the written notice of the request is received by the custodian of public records, excluding Saturday, Sunday, and legal holidays, and runs until 5 business days have elapsed.[23]

A public agency can only avail itself of this "safe harbor" provision if the agency prominently "post[s] the contact information for the agency's custodian of public records in the agency's primary administrative building in which public records are routinely created, sent, received, maintained, and requested *and on the agency's website, if the agency has a website*."[24]

Endnotes:

1 Section 119.011(12), Fla. Stat.

2 *Shevin v. Byron, Harless, Schaffer, Reid and Associates. Inc.,* 379 So. 2d 633, 640 (Fla. 1980).

3 *National Collegiate Athletic Association v. Associated Press,* 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010).

4 *See* Section 119.01(1), Fla. Stat.

5 Section 119.01(2)(a)-(d), Fla. Stat.

6 Section 119.01(2)(e), Fla. Stat.

7 Section 119.01(2)(f), Fla. Stat.

8 *See* AGO 97-39 ("A school district is not required to furnish its electronic public records in an electronic format other than the standard format routinely maintained by the district."

9 Section 119.01(2)(f), Fla. Stat.; *see also id.* ("[I]f the district elects to provide such records in a different format, the costs of converting the information shall be borne by the requestor . . . .").

10 Rule IB-26.003(5)(h), F.A.C.

11 *See* Rule IB-24.003(9)(a), F.A.C.

12 *See id*

13 *See* General Records Schedule GSO I -SL For State and Local Government Agencies Retention at iv, Fla. Dep't of State Div. of Library and Info. Serv., *available at* http://dos.myflorida.com/media/698312/gsl-sl-2017- final.pdf.

14 *See* Rule 1B-24.003(9)(d), F.A.C.

15 *See* Rule 1B-26.003(10)(d-e), F.A.C.

16 Section 119.021, Fla. Stat.

17 Inf. Op. to Kurt Browning, Dep't of State, Mar. 17, 2010.

18 The following language, or similar language, is found in the GS1-SL, GS2, GS3, GS5, GS7, GS11, GS12, GS13, GS14, and GS15 Retention Schedules. However, the above-quoted language is applicable to all records since all public agencies are eligible to use the GS1 -SL schedule and the GS2 through GS15 schedules arc to be used in conjunction with the GS1-SL schedule.

19 Since the city is authorized to exercise powers for a municipal purpose, the creation of a Facebook page must be for a municipal, not private purpose. The placement of material on the city's page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes. In any given instance, however, the determination would have to be made based upon the definition of "public record" contained in section 119.11, Florida Statutes. AGO 2009-19

20 Section 668.6076, Fla. Stat.

21 Inf. Op. to Nicole Shalley, Gainesville City Attorney, June 1, 2016. This issue is currently being litigated in *Grant Stern v. City of Miami Beach, et al.,* 2016-026031-CA-01.

22 2018 WL 2327290 at *20 (May 23. 2018).

23 Section 119.12(1), Fla. Stat.

24 Section 119.12(2), Fla. Stat. (emphasis added).