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# THE BRECHNER REPORT

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## Judge dismisses suit against UF

GAINESVILLE – A University of Florida instructor has re-filed his lawsuit against UF President Bernie Machen even after Circuit Court Judge Robert Roundtree Jr. dismissed the action without predjudice.

The suit began after Charles Grapski filed a public records request seeking all documents and e-mails related to Florida Blue Key, Homecoming and Gator Growl.

Florida Blue Key receives money from the student government to help sponsor Gator Growl, which is a pep rally during Homecoming.

Grapski said he will continue his legal battle until the University of Florida and Machen “are in full compliance with the Florida law.”

“I received zero documents from the president and an incomplete response from the vice president’s office,” he said. “What the university is not admitting is that Dr. Machen does not like the public records law.”

Grapski did admit that he had received some documents from a separate request.

UF spokesman Steve Orlando said university officials would not comment on ongoing litigation.

**ACCESS  
RECORDS**

## Exclusion of citizen breaks Sunshine Law

NAPLES – Deputy County Manager Leo Ochs determined that the Collier County Productivity Committee violated the state’s Sunshine Law when it asked an attendee to leave the room during a portion of the public meeting.

During the June session, committee chairman Joseph Swaja asked Brad Boaz of Barron

**ACCESS  
MEETINGS**

Collier Partnership to wait outside during discussion about a vacancy for which Boaz was a candidate.

At the close of discussion, the committee recommended Lawrence Baytos, another candidate, for the position.

Members of the Chamber of Commerce complained after the committee’s meeting that Boaz should not have been excluded during the discussion session.

As a result of the violation, Ochs recommended that the County Attorney’s Office provide a refresher course on the Sunshine Law to the members.

## Court demands public dockets

ATLANTA – Maintaining a secret court docket without a written justification for sealing cases is unconstitutional, according to a recent ruling by the 11th U.S. Circuit Court of Appeals.

The court’s decision in *United States v. Ochoa-Vasquez* reaffirms the public’s right of access to court proceedings.

The case arose after the U.S. District Court for the Southern District of Florida sealed court dockets so that certain cases did not appear on the public docket. The federal

trial court has since unsealed the records in the drug-trafficking case.

As a result of the ruling, district courts in Alabama, Florida and Georgia will be required to make written findings, which will be publicly available, before they can seal access to court records.

In its decision, the court noted that docket sheets are an essential part of a criminal proceeding because they provide a method for the public to locate court cases and records.

**ACCESS  
COURTS**

## Time, coach settle libel suit for undisclosed sum

EL PASO, Texas – Time Inc., has settled a defamation lawsuit with former Alabama football coach Mike Price that arose because of a *Sports Illustrated*

article about Price’s night of drinking at a topless bar in the Florida Panhandle.

Price sued the magazine for \$20 million after the article discussed his actions when he visited a Pensacola night spot in

April 2003. Time Inc., did not release the terms of the settlement.

Although the coach admitted he was heavily intoxicated that evening, he denied allegations that anything sexual occurred.

Rick McCabe, a spokesman for Time Inc., said the settlement also resolves Price’s claims against reporter Don Yaeger, who is still on the *SI* staff.

**DEFAMATION**

The lawsuit made its way to the 11th U.S. Circuit Court of Appeals before being settled, as the weekly sports magazine fought for its right to protect confidential sources that were a part of the report.

Although the 11th Circuit did not allow *SI* to rely on Alabama’s state shield law, it did find some protection based on the First Amendment.

Price was fired by Alabama a few days before the article was published.

## Scalia bars journalists from insurance group talk

WASHINGTON – Journalists were turned away from a mid-October speech by U.S. Supreme Court Justice Antonin Scalia.

A Court spokeswoman said reporters should have been able to attend Scalia's speech to insurance executives, where the Justice discussed his experience with reporters who tried to uncover gossip during oral arguments before the

Supreme Court.

Scalia is well-known for his animosity toward cameras and past encounters with reporters.

He frequently bars cameras from his speeches, including an October 2003 event in Ohio where he was honored for his support of free speech.

The trade association for life insurers had made arrangements for reporters to

attend Scalia's speech.

"It was a misunderstanding," said Court spokeswoman Kathy Arberg. "The Justice did not intend for the event to be closed to print reporters."

Last year, Scalia apologized after a deputy federal marshal demanded that two reporters erase tape recordings of remarks the Justice had made at a speaking event in Mississippi.

## Justices reject camera limitations

TALLAHASSEE – The Florida Supreme Court rejected several proposals to limit cameras in the courtroom.

The first proposed rule change would have limited audiovisual coverage of the courts to protect privacy.

The judges also declined to bar television recording or still photography of jurors. This proposal would have allowed the judge to make such a determination without holding a hearing in which the media could object.

The final proposition would have lim-

ited the use of court security cameras to security purposes only.

The justices' unsigned opinion

**ACCESS  
COURTS**

provides no explanation for their rejection of the privacy proposal. However, in turning down the proposal relating to jurors, the justices

cited prior Supreme Court and appellate rulings as support for their decision.

Judges do have the right to place restrictions on cameras in order to maintain courtroom order and ensure a fair trial.

## ACCESS RECORDS CONTINUED

## County defends lawsuit over \$5

SEBRING – Highlands County has spent more than \$18,000 defending a public records lawsuit by one of its residents.

The lawsuit was filed by Preston Colby after the county claimed he owed about \$5 for a request.

Highlands County sought to obtain the money from Colby even after a judge recently ruled that Colby could not be charged for the benefits paid to an employee who was researching his request.

Colby had requested to see copies of the notes and minutes of the county's

hurricane executive group, a decision-making committee that was involved in storm preparations during 2004.

He paid the county \$65 in advance to cover the estimated costs of locating the documents. That cost covered four hours of staff time that was billed at \$16.28 per hour.

The research actually took two hours, and the county subsequently refunded Colby more than \$30.

The county commission has not yet decided whether it will appeal Circuit Judge David Langford's ruling.

## Federal judge reviews FEMA reports from hurricanes

FORT MYERS – A federal judge has agreed to review communications between President Bush and former FEMA Director Michael Brown to determine whether to open certain FEMA records.

Judge John Steele agreed to review briefs, talking points and correspondence from Brown in response to a lawsuit by *The News-Press, Pensacola News Jour-*

*nal* and *Florida Today* seeking access to the agency's records of its 2004 hurricane response in Florida.

Attorneys for the federal agency argued that such correspondence should remain confidential because it summarizes the issues and offers advice to the executive branch.

However, lawyers for the newspapers

argued that many of the records were created after Bush announced the government aid program, which takes them out of the decision-making process and makes them part of the public record.

Another judge reviewed similar records in a hurricane relief-related lawsuit filed by the *South Florida Sun-Sentinel* on the east coast of Florida.

## COURTS

## Court listens to whistleblower case arguments

WASHINGTON – The U.S. Supreme Court recently heard arguments in a case where attorneys have argued that the First Amendment should protect a whistleblower's job.

The case involves Richard Ceballos, a California whistleblower, who was demoted after he pointed out that co-workers used false statements to obtain search warrants.

Ceballos' attorney argued that his reporting of the fraudulent search warrants was a matter of public concern and should be constitutionally protected.

At issue in the case is whether the Supreme Court should rely on a 1968 test set out by the 9th Circuit in *Pickering v. Board of Education*. Under that standard, an employee's speech is protected so long as it touches on a matter of public concern because it outweighs the employer's interest in a disruption-free workplace.

Attorneys on the other side have argued that routine speech in the course of an employee's duties should not be judged by the *Pickering* test.

The Court is expected to issue a decision in the spring.

## Prosecutor investigates closed council meeting

BARTOW – The State Attorney’s Office is investigating a possible Sunshine Law violation by the Polk County Opportunity Council after it closed a portion of a public meeting.

The board recessed during its meeting, saying it wanted to meet privately with legal counsel. When it returned an hour later, the meeting attendees had departed.

At that time, the board voted unani-

mously to issue a letter of admonishment to Executive Director Carolyn Speed.

The Sunshine Law does allow public meetings to be closed for discussion with legal counsel if the discussion is related to a pending lawsuit or union negotiations.

To close a meeting under a Sunshine Law exemption, the board is required to cite the reason for the closure and have

a court reporter transcribe the closed proceedings.

Warren Dawson, one of the attorneys with whom the group met, said the Polk County Opportunity Council would cite a statutory exemption and divulge the nature of the closed meeting sometime in the future.

No transcript or tape of the meeting exists, he said.

## Governor closes coffee klatch

TALLAHASSEE – Gov. Jeb Bush barred reporters from attending an early morning gathering where he discussed his plans to overhaul the public school system.

The purpose of the meeting was to recruit support from Republican legislators to ensure that Bush’s education policies continue after his term expires, he said.

Bush said the meeting was exempt from the state’s Open Meetings Law because no policy was discussed.

Aides have said this was just the first of many such sessions to discuss the legacy that the governor wishes to leave behind.

The Florida Constitution says that all pre-arranged gatherings of three or more legislators must be open if the purpose is to agree upon formal legislative action that will be taken in the future.

## Cell phone calls between board members raise Sunshine issue

TAMPA – Cell phone conversations between two Pinellas County School Board members have raised concerns that the telephone calls are leaving citizens in the dark.

Board members Mary Russell and Janet Clark have spoken to each other numerous times on cellular telephones provided to them by the school district.

Under Florida’s Sunshine Law, members of a public board are not allowed to privately speak to other members of the board about matters on which the group is likely to take action.

A total of 70 calls were made on

Russell and Clark’s phones between August 2004 and June 2005, according to school district’s records.

While some of the conversations were quite brief, more than 40 of them ranged from 2 minutes to 50 minutes in length.

The Sunshine Law does allow members to speak privately about matters other than board business, so cell phone calls are not automatically a violation of the state’s law.

Both board members deny violating the Sunshine Law.

“One or two times I can think of, I started to say something and said ‘I can’t talk about that,’” Clark said.

# DEFAMATION CONTINUED

## Decision increases protection for news media facing libel lawsuits

JACKSONVILLE – A woman who discussed a legal dispute on the Internet created enough of a public controversy to be considered a limited-purpose public figure, according to a recent ruling by Circuit Judge Karen Cole.

Eliza Thomas sued two Florida television stations operated by *First Coast News* for defamation after they broadcast reports regarding the injuries of her husband.

Thomas’ husband, Scott Thomas, was injured in 2004 and placed on life support.

Afterward, a custody dispute over Scott arose between his wife and his mother after it was discovered that

his wife had discussed the possibility of removing his feeding tube.

In her decision, Judge Cole recognized the increasing role of the Internet in public discussion, noting that numerous articles about Scott Thomas appeared “in the electronic media.”

Under Florida law, Eliza Thomas became a limited-purpose public figure when she played a significant role in the public controversy that arose over her husband.

Because Thomas was considered a limited-purpose public figure, she had a higher burden of proof in showing she was defamed.

She did not meet that burden, and Judge Cole dismissed the case.

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## Florida decision provides greater shield protection

Subpoenas to reporters are back in the news. *New York Times* reporter Judith Miller spent time in jail for failing to testify before a grand jury about her confidential source for a story about a CIA operative. The federal appellate court's decision in the Miller case is so intricate that it not only consumes 40 pages in the Federal Reporter; it also contains four separate opinions when there were only three judges on the panel. This and other cases have led to a resurgence in the debate about whether a federal shield law should be enacted.

Most subpoena cases are not this involved, nor do they deal with such weighty subjects. Yet, even the more mundane can show the challenges that continue to exist. Here is a recent 'war story.'

In September 2002, a reporter for the *Tallahassee Democrat* wrote a very short article about the revelry before a homecoming football game. Among others, the reporter interviewed three guys

### The Back Page

By Michael J. Glazer

who had been partying since the day before. Later, one of these fellows becomes a plaintiff in a personal injury case in federal court because of injuries suffered

while he was a passenger on a bus two years earlier in late 2000.

Fast forward to 2005, and the reporter gets subpoenaed by the defense to bring his notes and testify about the article. Seems the plaintiff alleged that he has lost the capacity to enjoy life and the defense believes this article is evidence to the contrary. We file a motion to quash based on both federal and Florida case law and the Florida shield law. We don't take this lightly, but this doesn't look like the hardest case in the world. The testimony regarding this one brief encounter seems marginally relevant at best on the broader question of the damages this person suffered. The plaintiff isn't even asked about the pre-game party in the only deposition excerpt presented to the Court as evidence by the defense. Also, the two other students identified in the story haven't been deposed.

The defendants don't roll over, but vigorously contest our motion. The federal magistrate issues an order denying the motion to quash. Relying on *Miami Herald Publishing Company v. Morejon* and *CBS, Inc. v. Jackson*, the magistrate finds that the privilege does not apply because the reporter was just being called to testify as an eyewitness to what he saw during the interview. In the alternative, he rules that the defense has presented adequate evidence to over-



Michael J. Glazer

come the privilege. We couldn't believe it.

In federal court, the next step from an order of this kind is to file objections with the federal district judge handling the case. We file a detailed objection explaining more of the history and rationale of this privilege and arguing that it is a slippery slope indeed if a reporter can be deposed about what s/he sees in the normal course of gathering and reporting the news under the guise that this is just an eyewitness observation. This time, the defense presents another deposition excerpt from the plaintiff in which he is actually asked briefly about the party and the story. However, the others identified in the article still have not been deposed.

This story has a happy ending. Judge Stephan Mickle entered an order quashing the subpoena. Significantly, the Court held that, based on the language of the Florida shield law and the Court's interpretation of the *Morejon* decision, the privilege applies unless the eyewitness observation is of a crime. As to the whether the defense proved that the privilege was overcome, the Court held that while the information was relevant, there was no compelling need for the evidence and there were other sources available. As of this writing, an appeal is still possible. However, it is nice to have a decision that limits the *Morejon* case to observations of a crime.

Most stories aren't as sensitive as one involving confidential sources 'outing' CIA agents or other issues of national security. Even one dealing with drunken college kids at a football party can lead to an unexpected subpoena. There are clearly many out there (some of whom are probably judges) that don't understand why a reporter should be treated differently from anyone else in terms of providing evidence about what they see and hear, even if obtained as part of the newsgathering process.

The debate about a possible federal shield law continues. Both the American Bar Association and the Media and Communications Law Committee of The Florida Bar, among others, have spoken in support. However, some knowledgeable and well-respected media lawyers question whether the current proposals are the way to go.

This is just one recent story. Many of you have others. It shows that we must still all be vigilant about subpoenas. It's a subject that is not going away.

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