NOVA LAW REVIEW

Induction Address, Fourth District Court of Appeal

THE 1999 SURVEY OF FLORIDA LAW

Appellate Practice
Criminal Law
Employment Law
Environmental Law
Juvenile Law
Professional Responsibility
Property Law

Anthony C. Musto
Candice D. Tobin
John Sanchez
Judith Jackson Chorlog
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Joseph M. Grohman

ARTICLES

Invoking What Rule?
The Scope of Insurance Coverage for Pollution in Florida: Full Indemnification for Indivisible Cleanup Costs Caused by Multiple Releases

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Trial De Novo and Evidentiary Presumptions Under the "Lemon Law": Analysis and Comment

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NOTES AND COMMENTS

Will Opportunity Scholarships Make the Grade?—An Examination of School Vouchers
Changing the Face of Death: Amendments to the Florida Statutes

Kelly Cohen
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I. INTRODUCTION

This article will discuss recent developments in the field of appellate practice in Florida. Although this article will focus primarily on cases decided between July 1, 1998, and June 30, 1999, it will also deal with certain cases decided shortly before and after that period. These cases are either of particular interest to the appellate practitioner or provide the background for, or the culmination of, issues that were addressed by cases decided during that period.

In a broad sense, every appellate decision falls within the scope of appellate practice. Decisions relating to substantive areas of the law, however, are more properly dealt with in articles relating to those substantive areas and therefore, will not be discussed here. Rather, this article will focus on matters relating to practice in the appellate courts and examines those areas. This article will not discuss cases relating to the preservation of particular issues, nor will it discuss the question of whether particular errors were harmless.

II. AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

In light of the enactment of legislation requiring parental notification, or judicial waiver thereof, before an abortion may be performed on a minor, the supreme court adopted, on an emergency basis, amendments to Florida Rule of Appellate Procedure 9.110(1). The amendments replace the reference to

1. In this article, references to “the supreme court” will constitute references to the Supreme Court of Florida. The Florida district courts of appeal will be referred to as “the First District,” “the Second District,” “the Third District,” “the Fourth District,” and “the Fifth District.”

an order denying a petition for "termination of pregnancy" with one to an order denying a petition for "judicial waiver of parental notice of abortion," and add a sentence reading, "[n]o filing fee shall be required for an appeal of the denial of a waiver of parental notice of abortion." In the same opinion, the court also made appropriate amendments to the Florida Rules of Civil Procedure.

III. ADMINISTRATIVE ORDERS

By an administrative order entered by the chief judge and pursuant to the affirmative vote of a majority of the judges of the court, the First District, the only Florida appellate court to ever split into subject matter divisions, dispensed with those divisions. In 1-888-Traffic Schools v. Chief Circuit Judge, the supreme court addressed the issue of which court should review challenges to administrative orders entered by circuit courts. Rejecting the First District's conclusion that only the supreme court can consider such issues, the court found that review by the district courts is appropriate. The court limited its prior holding in Wild v. Dozier, which had concluded that it had sole jurisdiction to review judicial assignments to administrative orders making such assignments.

IV. JURISDICTION OF THE SUPREME COURT OF FLORIDA

The supreme court declined to answer a certified question in State v. Schebel, concluding that the necessary facts for a determination of the issues were not contained in the record. An opinion based on the "speculative facts" alleged by the party who filed the initial motion in the trial court "would necessarily be advisory in nature," the court concluded. The court also declined to answer a certified question in State v. Vazquez.

3. Id. at 300.
4. Id. at 299–300.
6. 734 So. 2d 413 (Fla. 1999).
7. Id. at 413.
8. Id. at 416.
9. 672 So. 2d 16 (Fla. 1996).
10. Traffic Schools, 734 So. 2d at 415.
11. 723 So. 2d 830 (Fla. 1999).
12. Id. at 830.
13. Id.
14. 718 So. 2d 755 (Fla. 1998).
basing its action on the fact that the district court had not ruled on the issue raised by the question.15

In Inquiry Concerning a Judge, No. 97-04, Re: Elizabeth L. Hapner,16 the court determined that it has the authority to tax costs in a proceeding of the Judicial Qualifications Commission ("JQC").17 The court limited the costs in the case to certain charges relating to the court reporter and the transcript,18 concluding that attorneys’ fees may not be awarded as costs.19 The court directed the Florida Rules of Judicial Administration Committee to draft a proposed rule addressing the assessment of costs in a JQC proceeding.20

V. APPEALABLE ORDERS

The Fourth District provided some guidance with regard to the manner of review of orders impacting nonparties to trial court proceedings. In Shook v. Alter,21 a lawyer representing a party in the trial court sought certiorari review of an order holding him in indirect civil contempt.22 The district court concluded that because the order was final as far as the lawyer was concerned, review was proper by appeal, not by certiorari.23 The appellate court noted that this distinction was important because a petitioner seeking certiorari must meet a heavier burden than an appellant taking an appeal and stated that it was publishing its order in the case “so that the Bar will know that, where a final order is entered against a non-party [sic] such as, for example, a lawyer or a witness, the appropriate method for review of that order is by final appeal.”24

Numerous other cases discussed the issue of whether particular orders were reviewable on appeal. These cases included the following: Meyers v. Metropolitan Dade County26 (jury’s verdict as to liability in a bifurcated proceeding was the equivalent of an order determining liability under the interlocutory appeal rule and was therefore appealable under that rule);

15. Id. at 756.
16. 737 So. 2d 1075 (Fla. 1999).
17. Id. at 1075.
18. Id.
19. Id.
20. Id.
22. Id. at 1082–83.
23. Id. at 1083.
24. Id.
25. Id.
Thomas v. Thomas\textsuperscript{27} (denial of a motion to transfer a pending modification of a child custody case to another state was appealable as a determination in the nature of venue); Okeelanta Corp. v. McDonald\textsuperscript{28} (rule providing for appeals from orders granting or denying certification of a class does not extend jurisdiction to orders ruling on motions to decertify a class and an appeal from such an order was therefore dismissed); Key Club Associates v. Mayer\textsuperscript{29} (nonfinal order dismissing counterplaintiffs’ request for certification of their class for purposes of their compulsory counterclaim was appealable); Croteau v. Operator Service of South Florida, Inc.\textsuperscript{30} (order denying a motion to enforce a settlement agreement which constituted the equivalent of a partial final judgment was appealable); Blakeslee v. Morse Operations, Inc.\textsuperscript{31} (conditional order of dismissal, requiring a plaintiff to arbitrate within thirty days or have the case dismissed, was not appealable as an order of dismissal); Red Bird Laundry v. Parks\textsuperscript{32} (appeal from order denying attorneys’ fees was not proper when the final order in the underlying action had not yet been entered); Wanner v. State\textsuperscript{33} (order granting bank’s motion to intervene in a criminal case as a victim for purposes of restitution was not appealable); Crawford v. Dwoskin\textsuperscript{34} (order remanding a matter to an arbitrator to clarify certain portions of an award was not appealable).

VI. INSTITUTION OF APPELLATE PROCEEDINGS

In Holden Avenue Inter-Neighborhood Council, Inc. v. Orange County,\textsuperscript{35} nine days after an action by the Orange County Board of County Commissioners, the petitioner filed a notice of intention to file a petition for writ of certiorari to review the Board’s decision.\textsuperscript{36} This action was taken pursuant to a county code provision which provides that such a notice must be filed in the circuit court within ten days after the decision at issue and that the petition must be filed within sixty days after the Board’s ruling.\textsuperscript{37} The petitioner filed the petition within the time provided by the code, but after the expiration of the thirty-day period allowed for seeking certiorari under

\textsuperscript{27} 724 So. 2d 1246 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{28} 730 So. 2d 1283 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{29} 718 So. 2d 346 (Fla. 2d Dist. Ct. App. 1998).
\textsuperscript{30} 721 So. 2d 386 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{31} 720 So. 2d 1166 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{32} 728 So. 2d 1238 (Fla. 5th Dist. Ct. App. 1999).
\textsuperscript{34} 729 So. 2d 520 (Fla. 3d Dist. Ct. App. 1999).
\textsuperscript{35} 719 So. 2d 1002 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{36} Id. at 1003.
\textsuperscript{37} Id.
Florida Rule of Appellate Procedure 9.100(c)(2). The circuit court then granted the County’s motion to dismiss the proceeding as untimely. Although agreeing that the petitioner could not rely on the code provision because the Florida Constitution provides that only the supreme court has the authority to adopt rules of practice and procedure, the Fifth District granted certiorari. The court concluded that the notice of intention to file the petition, which was clearly filed within the time frame established by the appellate rule, was the functional equivalent of a notice of appeal and that it plainly placed the County on notice that the petitioner intended to seek review. Noting that the petitioner was “understandably misled” by the code, the court “in the interests of justice,” treated the notice of intention to file the petition as the petition itself and the actual petition as an amended petition.

In its opinion in Horst v. Unemployment Appeals Commission, the Second District called for a legislative change with regard to the time for instituting appeals to the Unemployment Appeals Commission. Under section 443.151(4)(b) of the Florida Statutes, such appeals must be taken within twenty days of the order under review. In the case at issue, the appeal was dismissed because it was instituted twenty-five days after the order. The district court accordingly indicated that it was “constrained to affirm the Commission’s ruling.” The court noted, however, that the case was not an isolated one and that it “frequently affirms without written opinion when the Commission dismisses an appeal because it was filed a few days late.” In asking the legislature to establish a thirty day period that would equal the period given in other civil and administrative appeals, the court pointed out that claimants are typically not represented by counsel, are often ill prepared to prosecute a legal appeal, are appealing because they are unemployed and did not receive benefits, and “may be distracted from filing

38. Id.
39. Id.
40. Holden, 719 So. 2d at 1003–04.
41. Id.
42. Id.
43. Id. at 1003–04.
44. Id. at 1004.
45. Holden, 719 So. 2d at 1004.
46. 725 So. 2d 1266 (Fla. 2d Dist. Ct. App. 1999).
47. Id. at 1267.
49. Horst, 725 So. 2d at 1267.
50. Id.
51. Id.
52. Id.
an appeal within the abbreviated period by their need to search for another job.\textsuperscript{55}

In \textit{State v. West},\textsuperscript{54} after the state instituted an appeal from a sentence that constituted a downward departure from the sentencing guidelines, the trial court, which had not previously given any reasons for the departure, \textit{sua sponte} made written findings of its reasons.\textsuperscript{55} The Fifth District reversed the sentence, stating that “the trial court’s belated effort... to supply written reasons after an appeal was taken cannot cure the defect since the trial court had by that time lost jurisdiction.”\textsuperscript{56}

\section*{VII. STAYS}

In \textit{Mann v. Brantley},\textsuperscript{57} an appeal was taken from an order granting a new trial.\textsuperscript{58} The trial court denied a stay and the appellants sought review of the denial in the Fourth District.\textsuperscript{59} That court pointed out that since an order granting a new trial is a nonfinal order, \textit{Florida Rule of Appellate Procedure} 9.130(f) precluded the trial court from entering a final order during the pendency of the appeal.\textsuperscript{60} In light of that fact, and the fact that the holding of a new trial while the appeal was pending would be a waste of money and judicial resources, the district court found the denial of the stay to constitute an abuse of discretion.\textsuperscript{61}

The appellants in \textit{Begonia Corp. v. Nam Financial Corp.}\textsuperscript{62} sought review of an order imposing sanctions in the amount of $100,000 against them for frustrating orders of the court relating to a sale under a final judgment of foreclosure.\textsuperscript{63} They sought a supersedeas bond as to the amount of the sanctions, but the trial court refused to set or allow such a bond and thus any stay pending review.\textsuperscript{64} Reviewing the denial of stay, the Fourth District noted that while the final judgment of foreclosure itself may not have been solely for the payment of money, such as to create an entitlement to bond under \textit{Florida Rule of Appellate Procedure} 9.310(b)(1), the

\begin{flushleft}
\textsuperscript{53.} \textit{Id.}
\textsuperscript{54.} 718 So. 2d 266 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{55.} \textit{Id.} at 267.
\textsuperscript{56.} \textit{Id.}
\textsuperscript{57.} 732 So. 2d 1090 (Fla. 4th Dist. Ct. App. 1998).
\textsuperscript{58.} \textit{Id.} at 1091.
\textsuperscript{59.} \textit{Id.}
\textsuperscript{60.} \textit{Id.}
\textsuperscript{61.} \textit{Id.}
\textsuperscript{62.} 724 So. 2d 714 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{63.} \textit{Id.} at 714.
\textsuperscript{64.} \textit{Id.}
\end{flushleft}
sanctions order was reasonably understood as such a judgment. The court found that an order lacking words allowing for immediate execution did not remove it from the realm of orders essentially requiring the payment of a fixed sum of money and that the appellants were therefore entitled to bond the sanctions order while they pursued their appeal.

The Fifth District, in Garvin v. Jerome, rejected a contention that Florida Rule of Appellate Procedure 9.310(b)(2), which provides for automatic stays pending review when public bodies and officials file notices of appeal, applied to stay an election when the appellant, a public official, appealed from an order denying a request for an injunction to halt the conduct of the election. Aligning itself with decisions of the Second and Fourth Districts, the First District, in Taylor v. Barnett Bank of North Central Florida, N.A., found that the provision of the Federal Bankruptcy Code, providing for an automatic stay of all legal proceedings "against the debtor," applies on appeal when the original proceedings were against the debtor, "regardless of whether the debtor is an appellant or appellee." The court recognized that the Third District had reached a contrary conclusion, but indicated that the Third District's decision was reached at a time when there was a dearth of law on the subject and that since the federal courts began considering the issue, all six courts of appeals that have addressed the question have taken the approach adopted by the Second and Fourth Districts.

65. Id.
66. Id.
67. 721 So. 2d 1224 (Fla. 5th Dist. Ct. App. 1998), review granted, 735 So. 2d 1284 (Fla. 1999).
68. Id. at 1229.
70. 737 So. 2d 1105 (Fla. 1st Dist. Ct. App. 1998).
72. Taylor, 737 So. 2d at 1105.
VIII. RECORD ON APPEAL

The Second District, in *Licea v. Blancher*,75 found notes made by jurors in the record on appeal.76 The court found that the trial court had erred when it preserved the notes and that the notes should have been destroyed as soon as the jury was discharged.77 In affirming the judgment, the court sealed the envelope containing the notes and remanded with instructions to correct the record by unsealing the envelope and destroying the notes.78

IX. TRANSCRIPTS

In *Palomares v. Palomares*,79 the appellant filed a “Motion To Require Court Reporters To Charge A Reasonable Rate For Transcription.”80 The court noted that the court reporter charged $5.95 per page for appellate transcripts, a fee that included an original and two copies, but only $3.50 per page for non-appellate transcripts.81 Noting that *Florida Rule of Appellate Procedure* 9.200(b)(2) allows parties to acquire an original transcript and make additional copies at their own expense, the court concluded that the court reporter should make available an original copy only and that it should do so at a cost not to exceed its charge for a nonappellate transcript.82 The court stated that the purpose of the appellate rule would be defeated if court reporters were permitted to require designating parties to pay for copies as well as the original.83 “Although we recognize that we do not have the authority to fix and determine the reasonableness of a fee,” the court continued, “we can as a matter of law require the court reporter to follow the rules adopted by the Supreme Court of Florida.”84

The Second District, in *Mathis v. State*,85 reversed the denial of a petition for writ of mandamus which sought an order compelling the court reporter to inform the petitioner of the cost for transcripts of certain trial proceedings.86

75. 724 So. 2d 662 (Fla. 2d Dist. Ct. App. 1999).
76. Id. at 663.
77. Id.
78. Id.
79. 730 So. 2d 705 (Fla. 3d Dist. Ct. App. 1999).
80. Id. at 706.
81. Id. at 706–07.
82. Id. at 707.
83. Id. at 708.
84. Palomares, 730 So. 2d at 708.
85. 722 So. 2d 235 (Fla. 2d Dist. Ct. App. 1998).
86. Id. at 236.
Further, in *Manuel v. State*,87 the First District reversed a judgment and remanded a case for a new trial when the trial transcript was not produced in accordance with the procedure mandated by the rules of judicial administration and an order of the chief judge of the trial court.88 In that case, no court reporter was present during trial.89 Instead, the proceedings were tape recorded and transcribed by a deputy clerk.90 The court pointed out a number of problems with the quality of the transcript, but emphasized that its conclusion was not based on these concerns.91 Rather, the court found that the principal problem was the fact "that the transcript was not produced by a licensed court reporter, and, therefore," was "not the official record" of [the] proceedings.92 Thus, the court pointed out that it would have reached the same conclusion "[e]ven if the transcript were otherwise letter perfect."93

X. MOTIONS

After setting forth a series of motions filed by the parties, and denying all but one of them, the Fourth District, in *Slizyk v. Smilack*,94 warned the parties "that motions are not to be used to present arguments which should be addressed in the briefs . . . nor to delay the progress of the appeal."95

XI. AMICUS CURIAE

The Third District endorsed and adopted the principles stated in Chief Judge Posner’s opinion in *Ryan v. CFTC*96 in denying a motion to appear and file a brief as an amicus curiae.97 In *Ryan*, Chief Judge Posner indicated that "[a]fter 16 years of reading amicus curiae briefs the vast majority of which [had] not assisted the judges," he had decided "that it would be good to scrutinize these motions [for leave to file amicus curiae briefs] in a more careful, indeed a ‘fish-eyed,’ fashion."98 The opinion notes that most amicus

87. 737 So. 2d 580 (Fla. 1st Dist. Ct. App. 1999).
88. Id. at 583.
89. Id. at 581.
90. Id.
91. Id. at 582.
92. *Manuel*, 737 So. 2d at 582.
93. Id. at 582–83.
94. 734 So. 2d 1166 (Fla. 4th Dist. Ct. App. 1999).
95. Id. at 1167.
96. 125 F.3d 1062 (7th Cir. 1997).
98. *Ryan*, 125 F.3d at 1063.
curiae briefs are filed by allies of the parties and duplicate the arguments made in the parties' briefs, "in effect merely extending the length of the litigant's brief." It went on to state that an amicus brief should normally be allowed when a party is not represented or is not represented competently, when the amicus has an interest in some other case that may be affected by the case under review, and when the amicus has unique information or a unique perspective that can help the court beyond the help that the parties are able to provide. "Otherwise," Chief Judge Posner concluded, "leave to file an amicus curiae brief should be denied." Noting that "the bane of lawyers is prolixity and duplication," Chief Judge Posner summarized by stating that "we judges should be assiduous to bar the gates to amicus curiae briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal."

XII. DISQUALIFICATION OF CIRCUIT JUDGES IN THEIR APPELLATE CAPACITIES

The First District found that a circuit judge considering a petition for a writ of certiorari erred in denying a motion for disqualification in Smith v. Santa Rosa Island Authority. The court found that the procedures for seeking disqualification that are set forth in Florida Rule of Judicial Administration 2.160 were applicable. The court rejected the argument that the rule applies only to judges sitting in their capacities as trial judges, pointing to the fact that rule 2.160(a), although titled "Disqualification of Trial Judges," provides that the rule applies to "county and circuit judges in all matters in all divisions of court."

XIII. SANCTIONS

After the Third District issued a per curiam affirmance without opinion, counsel for the appellant in Banderas v. Advance Petroleum, Inc., filed a motion for rehearing that the court considered to be "solely... a tool to

99. Id.
100. Id.
101. Id.
102. Id. at 1064.
103. Ryan, 125 F.3d at 1064.
104. 729 So. 2d 944 (Fla. 1st Dist. Ct. App. 1998).
105. Id. at 946.
106. Id.
107. Id. (emphasis in original).
108. 716 So. 2d 876 (Fla. 3d Dist. Ct. App. 1998).
express his personal displeasure with this Court’s conclusion, “a flagrant violation of [Florida] Rule [of Appellate Procedure] 9.330(a).”

The motion included the following language:

4. For this Court to simply ignore all the legal precedents is atrocious. Whatever happened to Justice and Fairness? We come before this Court for rulings which are based on the well-established law. We do not come to hear Nothing, which is precisely what a Per Curiam Affirmed opinion tell us. NOTHING! What a “cop-out.” But I suppose, when you don’t have a good reason for doing something, then you do nothing and don’t even have to explain it.

***

6. From the Opinion rendered in this case, it would appear to be an exercise in futility to even try and get a fair hearing before this tribunal, and I suppose the reality is that people have to suffer, as a result. However, if there is one courageous Jurist out there who would take a moment to look again at this case, perhaps my faith in the system would be restored, even though I realize that my faith ‘is not the issue.”

Because of what the court termed “counsel for the appellant’s flagrant abuse of the Rules of Appellate Procedure” and because the court found the motion “to be both frivolous and insulting,” the court ordered the appellant’s counsel to show cause why sanctions should not be imposed upon him. The Clerk was directed to provide a copy of the court’s opinion to The Florida Bar.

The attorney filed a response to the court’s order and a second opinion, ordering the attorney to pay $2500 as a sanction was filed. The court found that the response attempted “to explain and justify the language used” in the motion and that in some respects, the response made the attorney’s “conduct appear to be even more egregious.” As examples, the court quoted portions of the response which stated, “[m]y intent in writing the

109. Id. at 876.
110. Id.
111. Id. at 877 (emphasis in original).
112. Banderas, 716 So. 2d at 877.
113. Id. at 877–78.
115. Id.
[motion] was based on my belief that my comments and criticism did not exceed the boundaries of truth,” and, “I do not believe that what I wrote could be construed as being false.”

In *Rampart Life Associates, Inc. v. Turkish*, counsel for the appellees moved to supplement the record with a deposition taken after the entry of the order being appealed. After this motion was denied, counsel filed a brief that made reference, in a footnote, to the contents of the deposition and pointed out that the motion to supplement the record had been denied by the court. The Fourth District indicated that “[i]t would have been bad enough if counsel...had included the information in appellees’ brief without moving to supplement the record,” but that “[t]o make matters worse,” counsel did so after the motion was denied. The court stated:

In doing so...[counsel] violated two ethical rules: (1) Rule 4-3(5)(a) of the Florida Bar Rules of Professional Conduct which provides that a lawyer “shall not seek to influence a judge...except as permitted by law or the rules of court;” and (2) Rule 4-3.4(c) which provides that counsel shall not “knowingly disobey an obligation under the rules of a tribunal.”

Accordingly, the court struck the footnote and sanctioned the appellees’ attorney by assessing $500 in attorney’s fees to paid to opposing counsel.

**XIV. EXTRAORDINARY WRITS**

**A. Certiorari**

The supreme court clarified the scope of certiorari review with regard to pretrial discovery matters in *Allstate Insurance Co. v. Boecher*. The court began its discussion by pointing out that in *Martin-Johnson, Inc. v. Savage*, it described certiorari relief as an “extraordinary remedy” that ‘should not be used to circumvent the interlocutory appeal rule which

116. *Id.* (quoting appellant’s response motion).
117. 730 So. 2d 384 (Fla. 4th Dist. Ct. App. 1999).
118. *Id.* at 385.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Rampart*, 730 So. 2d at 385.
123. *Id.*
124. *Id.*
125. 733 So. 2d 993 (Fla. 1999).
126. 509 So. 2d 1097 (Fla. 1987).
authorizes appeal from only a few types of nonfinal orders." In the same opinion, the court indicated that not every erroneous discovery order creates certiorari jurisdiction and focused on the existence of "irreparable harm" as the governing standard.

The court then discussed its opinion in Allstate Insurance Co. v. Langston, which cited to Martin-Johnson with approval and disapproved contrary appellate court decisions to the extent that "they could be interpreted as 'automatically equating irrelevant discovery requests with irreparable harm.'" In Langston, however, the court quashed the district court decision under review "to the extent that it permit[ted] discovery even when it has been affirmatively established that such discovery is neither relevant nor will lead to the discovery of relevant information."

The court went on to note that this language in Langston apparently "caused at least one appellate court to experience 'an increase in the number of petitions for certiorari seeking review of discovery orders.'" Noting that Judge Klein concluded in Eberhardt that the decision in Langston did not expand certiorari review in the discovery context, the court expressed its agreement with Judge Klein's analysis and reiterated that Martin-Johnson properly sets forth the parameters for certiorari relief in pretrial discovery.

Citing Boecher, the Fourth District, in Wal-Mart Stores, Inc. v. Cumming, stated "that certiorari does not lie to review the relevance of discovery, since the disclosure of information that is merely irrelevant is not likely to cause irreparable harm within the meaning of Martin-Johnson." The court noted the petitioner's reliance on its prior decision in Nissan Motors Corp. v. Espinosa, which reversed an order requiring disclosure of irrelevant discovery information without discussion of whether the order posed a threat of irreparable harm. To the extent that Nissan Motors can be read as dispensing with the irreparable harm factor, the court indicated

127. Boecher, 733 So. 2d at 999 (quoting Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1098 (Fla. 1987)).
128. Id.
129. 655 So. 2d 91 (Fla. 1995).
130. Boecher, 733 So. 2d at 999 (quoting Allstate Ins. Co. v. Langston, 655 So. 2d 91, 95 (Fla. 1995)).
131. Id. (quoting Allstate Ins. Co. v. Langston, 655 So. 2d 91, 95 (Fla. 1995)).
132. Id. (quoting Eberhardt v. Eberhardt, 666 So. 2d 1024, 1024 (Fla. 4th Dist. Ct. App. 1996)).
133. Id. at 999–1000.
134. 736 So. 2d 1248 (Fla. 4th Dist. Ct. App. 1999).
135. Id. at 1248.
136. 716 So. 2d 279 (Fla. 4th Dist. Ct. App. 1998).
137. Wal-Mart Stores, 736 So. 2d at 1248 (citing Nissan Motors Corp. v. Espinosa, 716 So. 2d 279 (Fla. 4th Dist. Ct. App. 1998)).
that it conflicts with Boecher and cannot be relied upon as an expansion of the court's certiorari jurisdiction. 138

Clarifying its earlier denial without opinion of a petition for writ of certiorari in Casey-Goldsmith v. Goldsmith, 139 the Fifth District aligned itself with rulings of other district courts, which have held that such a denial is not a ruling on the merits and does not establish law of the case. 140 "Of course," the court continued, "if the court of appeal chooses to do so it can issue a denial on the merits, which would establish law of the case." 141

A number of cases dealt with the question of whether particular orders were reviewable by certiorari. The First and Fifth Districts each considered whether certiorari is appropriate to review comprehensive plan amendments directly related to proposed small-scale development activities. This issue was specifically left open by the supreme court when it ruled in Martin County v. Yusem; 142 that amendments to comprehensive land use plans are legislative, rather than quasi-judicial decisions, and therefore can only be challenged through original proceedings, as opposed to review proceedings such as certiorari, in the circuit courts. 143 Both of the district courts concluded that the same rationale applied to small-scale amendments.

In City of Jacksonville Beach v. Coastal Development of North Florida, Inc., 144 the First District based its determination on its conclusion "that all comprehensive plan amendment requests necessarily involve the formulation of policy, rather than its mere application" and that whatever the size of "proposed development, a comprehensive plan amendment request will require that the governmental entity determine whether it is socially desirable to reformulate the policies previously formulated for the orderly future growth of the community." 145

The Fifth District, in Fleeman v. City of St. Augustine Beach, 146 discussed some of the practical reasons for its conclusion.

We cannot discern any good reason for the courts to treat small-parcel amendments differently than any other amendments or adoption of comprehensive land use plans. To do so would invite

138. Wal-Mart Stores, 736 So. 2d at 1248.
139. 735 So. 2d 610 (Fla. 5th Dist. Ct. App. 1999).
140. Id. at 610 (citing Degrasse v. Wertheim, 566 So. 2d 515, 515 (Fla. 3d Dist. Ct. App. 1990); Johnson v. Florida Farm Bureau Cas. Ins. Co., 542 So. 2d 367, 369 (Fla. 4th Dist. Ct. App. 1988); Bevan v. Wanicka, 505 So. 2d 1116, 1117 (Fla. 2d Dist. Ct. App. 1987)).
141. Id.
142. 690 So. 2d 1288 (Fla. 1997).
143. Id. at 1295.
144. 730 So. 2d 792 (Fla. 1st Dist. Ct. App. 1999).
145. Id. at 794.
146. 728 So. 2d 1178 (Fla. 5th Dist. Ct. App. 1998).
more uncertainty in this still unsettled area of law. How small must the parcel be? How many other people must be affected? 147

Both courts certified to the supreme court that the question at issue is one of great public importance, 148 although the Fifth District did not formulate a specific question. 149 That court did, however, also certify that its decision conflicted with that of the Third District in Debes v. City of Key West. 150

The supreme court in Jaye v. Royal Saxon, Inc., 151 found that certiorari is inappropriate to review trial court orders striking parties' demands for jury trials because such orders do not cause irreparable injury that cannot be remedied on direct appeal. 152 The court’s opinion resolved conflict among the district courts by upholding the Fourth District decision that was under review, 153 and disapproving decisions of the First, 154 Second, 155 and Third 156 Districts on the same issue to the extent that they are inconsistent with the supreme court's opinion. 157

In Schneider v. Schneider, 158 the Fourth District relied on Jaye in concluding that certiorari could not be used to review an order requiring a trustee to retain counsel. 159 The court stated that “if the importance of the right to trial by jury could not displace the requirement of injury that cannot be corrected on appeal,” as concluded in Jaye, “then neither can the right of self-representation.” 160 The court found to be misplaced the petitioner’s reliance on federal cases allowing review of comparable orders under the collateral order doctrine because “Florida has not adopted the doctrine, and certainly under Jaye it could not be used as a basis to avoid the requirement of irreparable injury uncorrectable on final appeal.” 161

147. Id. at 1180.
148. City of Jacksonville Beach, 730 So. 2d at 792; Fleeman, 728 So. 2d at 1178.
149. Fleeman, 728 So. 2d at 1178.
150. Id. (citing Debes v. City of Key West, 690 So. 2d 700 (Fla. 3d Dist. Ct. App. 1997)).
151. 720 So. 2d 214 (Fla. 1998).
152. Id. at 215.
155. Johnson Eng’g, Inc. v. Pate, 563 So. 2d 1122 (Fla. 2d Dist. Ct. App. 1990).
157. Jaye, 720 So. 2d at 216.
158. 732 So. 2d 1147 (Fla. 4th Dist. Ct. App. 1999).
159. Id. at 1148 (citing Jaye v. Royal Saxon, Inc., 720 So. 2d 214 (Fla. 1998)).
160. Id. (citing Jaye v. Royal Saxon, Inc., 720 So. 2d 214 (Fla. 1998)).
161. Id. at 1149 (citing Jaye v. Royal Saxon, Inc., 720 So. 2d 214 (Fla. 1998)).
The petitioner in *Martin v. Doe*\(^{162}\) sought certiorari review of an order entered by a circuit court sitting in its appellate capacity.\(^{163}\) The district court noted that whether it had certiorari jurisdiction under such circumstances was "questionable."\(^{164}\) However, it did not determine the issue in light of its conclusion that the petitioner had not shown irreparable injury.\(^{165}\)

Other cases included the following: *Sheley v. Florida Parole Commission*\(^{166}\) (certiorari rather than direct appeal appropriate method of review of circuit court's denial of petition for writ of mandamus challenging order of the Florida Parole Commission); *Pee v. Aaron*\(^{167}\) (certiorari granted to quash a trial court order requiring plaintiffs' counsel to accept documents from defense counsel by fax); *Williams v. Spears*\(^{168}\) (certiorari review of denial of parents' motion for summary judgment warranted when the motion challenged the constitutionality of a statute authorizing courts to order grandparent visitation if the parents' marriage has been dissolved because the continuation of the trial court proceedings would violate the parents' right to privacy by exploring questions of parental decision-making and considering the best interests of the child); *Florida Commission on Hurricane Loss Projection Methodology v. State*\(^{169}\) (court lacked jurisdiction to entertain a petition for certiorari when the order at issue was fully favorable to the party seeking review and the party only claimed departure from the essential requirements of law was a conclusion in the nature of dicta); *City of Tallahassee v. Kovach*\(^{170}\) (challenges to a municipality's annexation of property must be conducted by certiorari pursuant to section 171.081 of the *Florida Statutes*); and *Panagakos v. Laufer*\(^{171}\) (court lacked jurisdiction to review, by certiorari, an order denying a motion to dismiss, based on a claim that allegedly defamatory statements were privileged from suit because they were made during the course of judicial proceedings and court declined to address whether certiorari jurisdiction would lie to review a claim of judicial proceedings privilege denied after summary judgment).

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162. 731 So. 2d 806 (Fla. 4th Dist. Ct. App. 1999).
163. *Id.* at 806.
164. *Id.*
165. *Id.* at 807.
166. 720 So. 2d 216 (Fla. 1998).
170. 733 So. 2d 576 (Fla. 1st Dist. Ct. App. 1999).
B. Mandamus

Cases involving requests for mandamus included the following: Soto v. Board of County Commissioners\textsuperscript{172} (mandamus appropriate to compel Board of County Commissioners to process a grievance filed by a county employee in situation in which the county had provided that employee disputes would be resolved through a grievance process); Pisarri v. State\textsuperscript{173} (mandamus not available to require Florida Department of Law Enforcement to remove an individual’s name from its list of sexual predators when the individual was included on the list pursuant to a written finding by a court and an appeal from the court’s order would have been the appropriate manner to allege that the individual was erroneously found to be a sexual predator); and Donahue v. Vaughn\textsuperscript{174} (mandamus denied for various reasons when petitioner sought to have the court order his former attorney to furnish him, free of charge, copies of documents in his case; reasons included the fact that mandamus in these circumstances only applies to government officials, not private lawyers).

C. Prohibition

In Anderson v. Glass,\textsuperscript{175} the Fifth District granted a writ of prohibition solely because the trial court delayed too long before ruling on a motion for disqualifcation.\textsuperscript{176} Without discussing the merit or lack of merit of the motion, the district court relied on the fact that the trial court took the matter under advisement for more than thirty days before entering an order denying the motion and the fact that \textit{Florida Rule of Judicial Administration 2.160(f)} requires a trial judge to “immediately” enter either an order granting disqualification or denying the motion.\textsuperscript{177} In Smith v. State,\textsuperscript{178} a criminal defendant’s petition for a writ of prohibition on speedy trial grounds was summarily denied.\textsuperscript{179} After he was convicted, he appealed and raised the same issue that had formed the basis for the petition.\textsuperscript{180} The Fifth District noted that other district courts disagree as to whether a summary denial of a writ of prohibition constitutes an absolute

\textsuperscript{172} 716 So. 2d 863 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{173} 724 So. 2d 635 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{174} 721 So. 2d 356 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{175} 727 So. 2d 1147 (Fla. 5th Dist. Ct. App. 1999).
\textsuperscript{176} \textit{Id.} at 1147.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} 738 So. 2d 410 (Fla. 5th Dist. Ct. App. 1999).
\textsuperscript{179} \textit{Id.} at 411.
\textsuperscript{180} \textit{Id.}
bar against raising the same issue on direct appeal. In this regard, it pointed out that the Third and Fourth Districts have held that denials of petitions will be, unless otherwise indicated, rulings on the merits, and that the Second District has held that a summary denial of a petition does not preclude the raising of the same issue in a subsequent appeal unless it can be affirmatively established that the denial was on the merits or that a merits determination was the only possible basis for denial. The Fifth District stated that although it had not previously articulated its policy, it had followed procedures similar to those practiced by the Second District. Notwithstanding what it termed "the persuasive reasoning set forth by" the Third and Fourth Districts, the court "decline[d] to depart from [its] established practice."

The Second District found, in Panagakos v. Laufer, that prohibition was not available to review a trial court's denial of a defendant's motion to dismiss based on a claim that the complaint was barred by the statute of limitations. The court recognized that in Swartzman v. Harlan, it issued a writ of prohibition because an action was barred by the statute of limitations. To the extent that the decision in Swartzman, which did not specifically address the appropriateness of prohibition, suggested that prohibition is the proper remedy, the court indicated that it believed that the supreme court's decision in Mandico v. Taos Construction, Inc., which held that prohibition may not be used to raise the affirmative defense of workers' compensation immunity, required a contrary conclusion.

181. Id. at 411-12.
184. Smith, 738 So. 2d at 411.
186. Smith, 738 So. 2d at 411-12.
187. Id. at 412.
188. Id.
190. Id. at D801.
191. 535 So. 2d 605 (Fla. 2d Dist. Ct. App., 1988).
193. 605 So. 2d 850 (Fla. 1992).
D.  Habeas Corpus

In *Harvard v. Singletary*, the supreme court declined to exercise its jurisdiction to consider an emergency petition for writ of habeas corpus, instead transferring the matter to the circuit court where the petitioner was incarcerated. In doing so, the court took the opportunity to explain that it will take similar actions with regard to future writ petitions which "raise substantial issues of fact or present individualized issues that do not require immediate resolution by this Court, or are not the type of case in which an opinion from this Court would provide important guiding principles for the other courts of this State."

The court also indicated that it would continue its practice of denying petitions when it is able to determine from the face of the petition that the claim is successive or procedurally barred. Discussing its policy, the court noted that review of petitions that fall in the above categories "requires the expenditure of substantial time that would otherwise be devoted to the performance of our unique duties as the State’s highest court." The court then concluded that "[c]ommon sense dictates that we reserve our exercise of original writ jurisdiction for cases which require this Court’s specific or immediate attention."

In *Basse v. State*, the supreme court considered a challenge to an order of the Second District that struck a 117 page petition for writ of habeas corpus and ordered that an amended petition of no more than fifty pages be filed. In support of its order, the district court had cited *Florida Rule of Appellate Procedure* 9.210(a)(5), which limits appellate briefs to fifty pages. The supreme court agreed with the petitioner that the rule does not apply to writ petitions, but found that the district court had the inherent authority to place reasonable page limitations on filings so long as the rules do not provide otherwise. The court also found that the fifty page limit of the rule provided a reasonable benchmark for the district court to use in exercising its authority, but cautioned that petitioners must be afforded the opportunity to show good cause for filing longer petitions and that when such cause is shown, the court must allow petitioners to exceed the limit to

195. 733 So. 2d 1020 (Fla. 1999).
196.  Id. at 1021.
197.  Id. at 1021–22 (emphasis added).
198.  Id. at 1022.
199.  Id. at 1023.
200.  Harvard, 733 So 2d at 1023.
202.  Id. at S273.
203.  Id.
204.  Id.
the extent necessary for adequate presentation of their claims.\textsuperscript{205} The court also referred to the Florida Appellate Court Rules Committee the issue of whether the rules should contain a provision governing the length of original writ petitions.\textsuperscript{206}

Other cases dealing with requests for habeas corpus included the following: \textit{Minott v. State}\textsuperscript{207} (circuit court order denying habeas corpus vacated when the petitioner was not given the opportunity to serve a reply to the respondent’s response) and \textit{S.C. v. Peterson}\textsuperscript{208} (habeas corpus not available to individual on home detention pursuant to section 985.03(18)(c) of the \textit{Florida Statutes}).

\textbf{E. Coram Nobis}

The supreme court, in \textit{Wood v. State},\textsuperscript{209} determined that the time limitations for filing motions for postconviction relief under \textit{Florida Rule of Criminal Procedure} 3.850 should also apply to petitions for writs of error coram nobis.\textsuperscript{210} The court amended the criminal rule to include such petitions and stated that the time limitations would apply to all defendants adjudicated guilty after the date the decision was filed (May 27, 1999) and that all defendants adjudicated prior to the filing date would have two years from that date to file claims traditionally cognizable under coram nobis.\textsuperscript{211}

In \textit{Gregersen v. State},\textsuperscript{212} the Fourth District found that coram nobis is available to challenge a trial court’s failure to inform a criminal defendant of the deportation consequences of a plea.\textsuperscript{213} The court recognized that the Third District had reached a contrary conclusion in \textit{Peart v. State}.\textsuperscript{214} The supreme court has accepted jurisdiction to review both \textit{Gregersen} and \textit{Peart}. In addition, the Third District, in adhering to its approach in \textit{Van Tuyn v. State},\textsuperscript{215} certified conflict with \textit{Gregersen}.\textsuperscript{216}

\begin{footnotesize}
\begin{enumerate}
\item[205.] Id.
\item[206.] Basse, 24 Fla. L. Weekly at S273 n.1.
\item[207.] 718 So. 2d 381 (Fla. 5th Dist. Ct. App. 1998).
\item[208.] 718 So. 2d 220 (Fla. 4th Dist. Ct. App. 1998).
\item[209.] 24 Fla. L. Weekly S240 (May 27, 1999).
\item[210.] Id. at S241.
\item[211.] Id. at S241–42.
\item[212.] 714 So. 2d 1195 (Fla. 4th Dist. Ct. App. 1998), \textit{review granted}, 728 So. 2d 205 (Fla. 1998).
\item[213.] Id. at 1196.
\item[214.] Id. (citing \textit{Peart v. State}, 705 So. 2d 1059 (Fla. 3d Dist. Ct. App. 1998).
\item[215.] 736 So. 2d 71 (Fla. 3d Dist. Ct. App. 1999).
\item[216.] Id. at 71.
\end{enumerate}
\end{footnotesize}
XV. APPEALS IN CRIMINAL CASES

A. Orders Reviewable

In State v. Schultz, the supreme court concluded that a defendant found guilty may appeal from an order withholding adjudication without placing the defendant on probation. The court resolved a conflict between the districts by approving the Fourth District decision under review and disapproving the Second District's decision in Martin v. State.

The state moved to dismiss a defendant's appeal in Jefferson v. State. The state pointed to the legislature's recent enactment of the Criminal Appeal Reform Act, which states that an appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not, would constitute fundamental error, and asserted that since the alleged sentencing errors in the case under review were neither preserved nor fundamental, the Third District lacked jurisdiction. The court denied the state's motion, concluding that the legislation did not limit its jurisdiction to hear the appeal and that the question of whether errors have been preserved and, if so, whether they have merit are issues to be decided on appeal, not on a motion to dismiss. The court did certify to the supreme court a question of great public importance that asked whether, in light of the legislative enactment, the failure to preserve a sentencing error that is not fundamental is a jurisdictional impediment that should result in the dismissal of an appeal.

Also certifying questions of great public importance on this subject was the decision of the Second District in Bain v. State. Reiterating the conclusion it reached in Denson v. State, the court opined that the Criminal Appeal Reform Act does limit the jurisdiction of Florida's appellate courts to entertain appeals from final orders in criminal cases.

217. 720 So. 2d 247 (Fla. 1998).
218. Id. at 247.
221. 724 So. 2d 105 (Fla. 3d Dist. Ct. App. 1998), review granted, 732 So. 2d 328 (Fla. 1999).
222. FLA. STAT. § 924.051 (1999).
223. Jefferson, 724 So. 2d at 105–06.
224. Id. at 106.
225. Id.
227. 711 So. 2d 1225 (Fla. 2d Dist. Ct. App. 1998).
228. Bain, 730 So. 2d at 302.
In *State v. Gaines*, after the state presented its case, the defense moved for the first time to suppress certain evidence. The trial court granted the motion, and after the state announced that it had no other evidence with which to prove its case, entered an order dismissing the case. The state appealed from the order of dismissal, asserting that the trial court erroneously suppressed the evidence. The Fourth District granted the defendant's motion to dismiss the appeal, which contended that any error in the suppression ruling was moot because retrying the defendant would constitute a double jeopardy violation. The district court indicated that the state should have argued to the trial court to exercise its discretion not to consider the motion to suppress unless the defendant would agree to a mistrial in the event the motion was to be granted. In a motion for rehearing, the State pointed to section 924.07(1)(1) of the *Florida Statutes*, which provides that the state may appeal “[a]n order or ruling suppressing evidence or evidence in limine at trial” was pointed to by the state. The court denied rehearing, finding that the provision violated article V, section 4(b)(1) of the Florida Constitution, which vests exclusive power to authorize non-final appeals in the supreme court.

Other cases dealing with the question of whether particular orders were reviewable included the following: *State v. Gray* (state may not appeal from orders modifying probation or community control) and *State v. Figueroa* (state does not have the right to appeal from a legal sentence entered over the state’s objection after the trial court advised the defendant that if he pled to the crimes charged, it would withhold adjudication and place him on probation).

B. *Bond Pending Appeal*

The trial court in *Coolley v. State* denied bond pending appeal, relying on four factors:

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229. 731 So. 2d 7 (Fla. 4th Dist. Ct. App. 1999).
230. *Id.* at 7.
231. *Id.* at 7–8.
232. *Id.* at 8.
233. *Id.*
234. *Gaines*, 731 So. 2d at 8.
236. *Gaines*, 731 So. 2d at 8–9.
237. *Id.* at 9.
238. 721 So. 2d 370 (Fla. 4th Dist. Ct. App. 1998).
239. 728 So. 2d 787 (Fla. 4th Dist. Ct. App. 1999).
240. 720 So. 2d 598 (Fla. 2d Dist. Ct. App. 1998).
1) Following a finding of guilt by a jury there "remains a high presumption of guilt."
2) As a firearm was used in the offense, the defendant poses a risk to the community.
3) Coolley's conviction involves a mandatory prison term.
4) The trial court feared that the Coolley would not appear for any future court dates if released on bail. 241

The Second District granted the defendant's motion for release and directed the trial court to set a reasonable bond. 242 The court "disagree[d] that there is but a presumption of guilt after a jury returns a guilty verdict."243 The court recognized that there is a presumption of correctness that follows the verdict, but said that "this presumption applies in every criminal case and is not, therefore, an appropriate factor upon which to base the denial of a bond in a specific case."244 The court then stated that it did "not consider the use of a firearm, in and of itself, conclusive evidence that a defendant poses a risk to the community."245 The court went on to indicate that if the legislature had seen fit to deny an appeal bond to any offender who used a firearm or who faced a minimum mandatory sentence, appropriate legislation to that effect would have been enacted.246 Finally, the court found no factual basis for the conclusion that the defendant would not appear for future court dates if released.247

C. Capital Cases

In Arbelaez v. Butterworth,248 a petition was filed by the Capital Collateral Regional Counsel ("CCRC") for the Southern Region of Florida, which asked the court to "exercise its all writs jurisdiction to stay all applicable time limits, court proceedings, and executions until adequate funding was provided to CCRC, or until...the start of the next fiscal year."249 Subsequently, the CCRCs for both the Northern and Southern Regions filed separate all writs petitions asking the court to "impose a general moratorium on the imposition of the death penalty until the CCRCs

241. Id. at 598.
242. Id. at 599.
243. Id.
244. Id.
245. Coolley, 720 So. 2d at 598.
246. Id. at 599.
247. Id.
248. 738 So. 2d 326 (Fla. 1999).
249. Id. at 326.
are adequately funded pursuant to a caseload methodology." Finding that since the actions were filed, "the structure of the CCRC offices has been substantially modified and the funding has significantly changed and increased through two legislative sessions," the court concluded that there was "no present case in controversy" and denied the petitions.

D. Appeals From Denials of Motions for Postconviction Relief

In *Gantt v. State*, the Fourth District made it clear that it is not necessary for court appointed counsel to follow the procedures set forth in *Anders v. California*, which allow attorneys to satisfy their ethical obligations when they can identify no meritorious issues to raise in direct appeals of convictions and sentences, before seeking to withdraw from appeals of orders denying postconviction relief. Pointing out that the *Anders* procedures stem from the Sixth Amendment right to counsel, the court concluded that since the appointment of an attorney to handle an appeal from an order denying a motion for postconviction relief is not a matter of right, but is based on due process considerations, the procedures need not be followed.

The court also took the opportunity to remind the trial court that the Criminal Appeals Reform Act limits the court's power of appointment of appellate attorneys in postconviction matters. Since appointment is not a matter of right, the court continued, trial courts should apply the standards of *Graham v. State*, and when, as in the case under review, "no issues are present, let alone a complex one," counsel should not be appointed.

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250. *Id.*
251. *Id.*
252. *Id.*
253. *Arbelaez*, 738 So. 2d at 327.
254. 714 So. 2d 1116 (Fla. 4th Dist. Ct. App. 1998).
255. 386 U.S. 738 (1967).
256. *Gantt*, 714 So. 2d at 1116.
257. *Id.* at 1116–17.
258. *Id.* at 1117 (citing FLA. STAT. § 924.051 (1997)).
259. 372 So. 2d 1363 (Fla. 1979).
260. *Gantt*, 714 So. 2d at 1117.
E. Belated Appeals

In *State v. Trowell*, the supreme court resolved conflict among the districts by concluding that a defendant who seeks a belated appeal after a guilty plea need not allege that there exists a potentially meritorious issue. The court aligned itself with the approach taken by the First District in the case under review and by the Fourth District in *Gunn v. State*, while rejecting the conclusions to the contrary reached by the Second and Third Districts.

XVI. APPEALS IN TERMINATION OF PARENTAL RIGHTS CASES

In *G.L.S. v. Department of Children & Families*, the supreme court found that an order which initially terminates parental rights in a child dependency case is a partial final judgment, a partial final judgment is reviewable either on appeal from the partial final judgment or on appeal from the final judgment in the case.

The Second District, in *K.W. v. Department of Children & Families*, clarified the question of what steps appointed counsel should take when unable to identify an arguable issue in an appeal from an order terminating parental rights. Aligning itself with the three district courts that had spoken on the subject, the court rejected the necessity to follow the procedures set forth in *Anders v. California*, which allows attorneys

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261. 739 So. 2d 77 (Fla. 1999).
262. *Id.* at 78.
267. 724 So. 2d 1181 (Fla. 1998).
268. *Id.* at 1185–86.
269. *Id.*
271. *Id.* at D87.
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handling criminal appeals to satisfy their ethical obligations under similar circumstances.\textsuperscript{274} Instead, the court concluded that attorneys who cannot identify an arguable issue shall file motions to withdraw, reciting the necessity to do so.\textsuperscript{275} The motion must include:

\begin{enumerate}
  \item the last known address of the parent;
  \item a statement that, if requested, counsel will assist the parent in obtaining the record;
  \item a request that the parent be given forty days to file a pro se brief; and
  \item a certificate of service upon all relevant parties, including the parent.\textsuperscript{276}
\end{enumerate}

The court indicated that upon receipt of a sufficient motion to withdraw, it would enter and forward to the parent's last known address an order allowing the parent to file a pro se brief within forty days.\textsuperscript{277} If no brief is received, the motion to withdraw will be granted and the appeal dismissed.\textsuperscript{278} If a brief is received, it will be examined to determine whether it raises a preliminary basis for reversal.\textsuperscript{279} If so, the motion to withdraw will be denied and counsel ordered to file a supplemental brief.\textsuperscript{280} If not, the appeal will be subject to summary affirmance.\textsuperscript{281}

\section*{XVII. APPEALS IN JUVENILE CASES}

The supreme court, in \textit{A.G. v. Department of Children & Family Services},\textsuperscript{282} held that an order declaring a child dependent may be challenged on appeal from a subsequent final disposition order.\textsuperscript{283} The court found such orders to be analogous to initial orders terminating parental rights that were found in \textit{G.L.S. v. Department of Children & Families},\textsuperscript{284} discussed in the preceding section of this article, and reviewable as a partial final judgment or on appeal from a subsequent final judgment.\textsuperscript{285}

\begin{thebibliography}{99}
\bibitem{274} \textit{K.W.}, 24 Fla. L. Weekly at D87 (citing \textit{Anders v. California}, 386 U.S. 738 (1967)).
\bibitem{275} \textit{Id.}
\bibitem{276} \textit{Id.}
\bibitem{277} \textit{Id.}
\bibitem{278} \textit{Id.}
\bibitem{279} \textit{K.W.}, 24 Fla. L. Weekly at D87.
\bibitem{280} \textit{Id.}
\bibitem{281} \textit{Id.}
\bibitem{282} 731 So. 2d 1260 (Fla. 1999).
\bibitem{283} \textit{Id.} at 1261–63.
\bibitem{284} 724 So. 2d 1181 (Fla. 1998).
\bibitem{285} \textit{Id.} at 1261.
\end{thebibliography}
In Department of Juvenile Justice v. E.R., the Third District found that the Department of Juvenile Justice has standing to appeal orders modifying the commitment of juveniles. The same court concluded in Department of Children & Families v. Morrison, that the Department of Children and Families had standing to challenge a circuit court order directing the department to place a juvenile, who had been found incompetent to stand trial, in a secure facility, in which there was no integration of adult patients with juveniles.

XVIII. ATTORNEY'S FEES

In Bell v. U.S.B. Acquisition Co., the supreme court found that Florida Rule of Appellate Procedure 9.020(h), which provides that “if a party... is required or permitted to do an act within some prescribed time after service of a document, and the document is served by mail, 5 days shall be added to the prescribed period,” does not extend the time for seeking review pursuant to rule 9.400(c) of a trial court’s order on appellate attorney’s fees. The court pointed out that rule 9.400(c) allows for review within thirty days of rendition of the order to be reviewed and that the five-day mailing rule applies only when an act is to be done within a specified number of days from service of a document.

XIX. COSTS

The appellant in Mulato v. Mulato appealed from a circuit court order denying a motion for appellate costs. The motion was untimely under Florida Rule of Appellate Procedure 9.400(a), which requires that such motions be filed within thirty days of the issuance of mandate. The Fourth District affirmed the denial of the motion, finding that the time requirement of the rule is jurisdictional and that compliance with it cannot be waived.

286. 724 So. 2d 129 (Fla. 3d Dist. Ct. App. 1998).
287. Id. at 130.
288. 727 So. 2d 404 (Fla. 3d Dist. Ct. App. 1999).
289. Id. at 405.
290. 734 So. 2d 403 (Fla. 1999).
291. Id. at 412–13.
292. Id. at 412 (citing FLA. R. APP. P. 9.400(c)).
293. 734 So. 2d 477 (Fla. 4th Dist. Ct. App. 1999).
294. Id. at 478.
295. Id.
296. Id.
XX. REHEARING

The Fourth District granted a motion for rehearing in *Teca, Inc. v. WM-TAB, Inc.*,\(^{297}\) withdrawing a per curiam affirmance and substituting an en banc opinion reversing the judgment under review.\(^{298}\) In a specially concurring opinion, Judge Klein noted that the motion for rehearing was less than two pages and was limited to one issue.\(^{299}\) Judge Klein then stated:

I believe there are two things which can be learned from this experience. First, although Florida Rule of Appellate Procedure 9.330 does not limit the length of motions for rehearing, long motions for rehearing are not nearly as effective as short ones. They should almost never exceed three or four pages. Second, although we see far too many motions for rehearing, they can be appropriate, even in cases which are initially affirmed without opinion.\(^{300}\)

In *DeBiasi v. Snaith*,\(^{301}\) the Fourth District considered an appeal in a legal malpractice case from an order granting summary judgment for the defendant lawyer on the basis that alleged negligence was excused under the doctrine of judgmental immunity.\(^{302}\) The attorney had filed a timely motion for certification, rehearing, and rehearing en banc of an appellate decision.\(^{303}\) Within fifteen days of the denial of the motion, but more than fifteen days after the opinion had been issued, the attorney filed a motion for certification of conflict with decisions of other district courts and of a question of great public importance.\(^{304}\) The motion for certification was denied as untimely despite the attorney's argument that Florida Rule of Appellate Procedure 9.330 permits motions for certification to be filed within fifteen days of orders denying rehearing.\(^{305}\) The lawyer's client then brought the malpractice suit, alleging that the untimely filing of the motion for certification deprived the client of the opportunity to have the appellate decision overturned.\(^{306}\)

297. 726 So. 2d 828 (Fla. 4th Dist. Ct. App. 1999) (en banc).
298. *Id.* at 829.
299. *Id.* at 831 (Klein, J., concurring specially).
300. *Id.* (citations omitted).
301. 732 So. 2d 14 (Fla. 4th Dist. Ct. App. 1999).
302. *Id.* at 15.
303. *Id.*
304. *Id.*
305. *Id.*
306. *DeBiasi*, 732 So. 2d at 15.
The district court recognized that a literal reading of the rule presented "a degree of ambiguity," but held that the filing of a motion for rehearing or clarification does not toll the time for the filing of a motion for certification. The court also stated that "mere 'ambiguity of a rule' of procedure, without more, does not equate to the somewhat more amorphous realm of 'fairly debatable' or 'unsettled area of the law' to which the doctrine of judgmental immunity is applied." Accordingly, the court reversed the order granting summary judgment.

The Third District, in Perez v. State, granted the state's motion for rehearing which asserted for the first time that the defendant did not preserve an issue that had formed the basis for an opinion reversing the defendant's conviction and sentence. The court noted that in the past it had been reluctant to consider new arguments made on rehearing that were not raised in the main appeal, but indicated that such a general practice does not deter it from considering such an argument when recent developments in the law or the justice of the cause persuades it to do so. The court then pointed to the enactment of the Criminal Appeal Reform Act of 1996, which mandates that an appeal may not be taken from a trial court judgment or order unless a prejudicial error is alleged and is properly preserved or, if not, would constitute fundamental error.

In Barnes v. State, the state filed a motion for rehearing which, among other things, called the court's attention to an erroneous attribution in the court's opinion. The motion was signed by an assistant attorney general other than the one who had handled the case to that point and by an assistant state attorney. Without reaching any decision on the merits of the motion, the court determined that it would issue a corrected opinion deleting the attribution and accordingly sent a copy of the corrected opinion.

307. Id. at 16.
308. Id.
309. Id.
310. 717 So. 2d 605 (Fla. 3d Dist. Ct. App. 1998).
311. Id. at 605–06.
312. Id. at 606.
313. Id.
314. Id.
315. Perez, 717 So. 2d at 606.
317. Id. at 1250.
318. Id.
to West Publishing ("West"). Shortly afterwards, the court received a copy of a letter from the assistant state attorney to West asking that West "withhold alteration of any portion of the opinion" until the court had finally disposed of the case.

Subsequently, a document styled as "Appellee's Supplemental Motion for Rehearing/Rehearing En Banc," signed only by the assistant state attorney, was filed. The court then issued an order to the attorney general and the assistant state attorney to show cause why the supplemental motion should not be stricken as unauthorized. The order called attention to section 16.01(4) of the Florida Statutes, which provides that the attorney general shall handle all suits in the district courts of appeal, and section 27.02 of the Florida Statutes, which indicates that the state attorney shall appear in the circuit and county courts on behalf of the state.

The assistant attorney general who signed the motion for rehearing filed a response which indicated that the supplemental motion was filed without any prior notice to the attorney general's office. The response did not adopt any part of the supplemental motion. The assistant state attorney also filed a response, recognizing the statutory provisions cited in the court's order, but arguing that a state attorney has a common law right unaffected by those statutes to represent the state in criminal appeals.

The defendant filed a reply to the assistant state attorney's response, bringing to the court's attention that there had never been a motion to substitute counsel for the initial assistant attorney general on the case and the fact that the state attorney's office, "apparently unhappy with the performance of the Attorney General's office," did not become involved with the case until after the issuance of the court's opinion. The defendant also contended that the state attorney's office had a "recent practice" of intervening in cases when a decision of the court was "adverse to that office," and asked that the court strike the supplemental motion.

The court indicated that none of the cases cited by the assistant state attorney had decided that a state attorney has a common law right to represent the state in a higher court. Rather, the court said, they merely

319. Id.
320. Id.
322. Id.
323. Id.
324. Id.
325. Id.
326. Barnes, 24 Fla. L. Weekly at D1250.
327. Id.
328. Id.
329. Id.
showed that a state attorney represented one of the parties.\footnote{Id. at D1250–51.} “We can understand why the Attorney General might prefer to appoint the State Attorney . . . to represent the state” on appeal in particular cases, the court noted.\footnote{Barnes, 24 Fla. L. Weekly at D1251.} The mere fact that the attorney general may have done so in certain situations, the court continued, “does not create any common law right in an assistant state attorney to represent the state in an appellate court without the express authorization of the Attorney General.”\footnote{Id.}

Turning to the facts of the case, the court concluded that the attorney general apparently did approve of the assistant state attorney’s participation in the preparation of the initial motion for rehearing, but that the supplemental motion was not approved by the attorney general.\footnote{Id.} The court therefore deemed the supplemental motion to be unauthorized and granted the defendant’s motion to strike it.\footnote{Id.} In a footnote, the court provided some insight into the manner in which it makes appropriate non-substantive corrections, such as the one arising from the erroneous attribution in the case under review and cautioned attorneys not to take it upon themselves to become involved in the publication process.\footnote{Id.}

Although we have struck the supplemental motion for rehearing, we do wish to stress that our opinions are subject to correction by us at any time before we have decided pending motions for rehearing. We frequently correct an opinion promptly when someone calls our attention to a factual, grammatical, orthographic or other kind of error, inaccuracy or omission not necessarily affecting any substantive decision on our part. The lawyers involved need draw no dire conclusions from our so doing except that we desire to remove such errors from an opinion no matter what else we might do. And, we trust, we need not bother to explain why it is not for attorneys representing the parties in a case in our court to attempt to tamper with the publication of our decisions or to attempt to countermand our directions to West Publishing.\footnote{Barnes, 24 Fla. L. Weekly at D1252 n.4.}
XXI. MANDATE

In *Raulerson v. State*,\(^{337}\) one panel of the Fourth District affirmed a criminal defendant's conviction without opinion.\(^{338}\) Several months later, a different panel, considering the same issue that had been raised by the defendant, reversed the conviction of a codefendant.\(^{339}\) After the defendant filed a motion to recall mandate in his case, the court withdrew the mandate in the codefendant's case in order to resolve the conflict.\(^{340}\) After an en banc conference, the court was persuaded that the opinion in the co-defendant's case was correct and that the defendant's conviction should not have been affirmed.\(^{341}\)

The court indicated that the defendant's motion to recall mandate would have been appropriate had the court still been in the same term of court in which his conviction was affirmed.\(^{342}\) Since the motion was not filed until after the term of court had expired, however, the court concluded that it did not have the authority to recall the mandate.\(^{343}\) The court therefore treated the motion to recall mandate as a petition for habeas corpus, granted the petition, and vacated the defendant's conviction and sentence.\(^{344}\)

XXII. A LOOK TO THE FUTURE

Over the upcoming year, the Florida Appellate Court Rules Committee will submit to the supreme court the committee's four-year cycle report. This report will set forth proposed amendments to the rules. The changes that the court decides to adopt will unquestionably have a significant impact on appellate practice in Florida.

Of course, the courts in the next year will provide answers to many of the questions raised by the cases discussed in this article. These answers, as they frequently do, will likely generate new questions. These questions, and others, will continue to provide the large number of court decisions that shape the field of appellate practice.

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337. 724 So. 2d 641 (Fla. 4th Dist. Ct. App. 1999).
338. *Id.* at 642.
339. *Id.*
340. *Id.*
341. *Id.*
343. *Id.* at 643.
344. *Id.*
Misconduct During Closing Arguments in Civil and Criminal Cases: Florida Case Law

Candice D. Tobin*

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I. INTRODUCTION

Perhaps the most exciting and dramatic aspects of trial are the closing arguments. Passion and emotion can aid in persuading a jury to return a favorable verdict, but a “win at all costs” mind-set can lead to reversal on appeal. Unfortunately, some attorneys continue to ignore the Supreme Court of Florida’s decisions on the use of improper closing arguments.

1. See Gore v. State, 719 So. 2d 1197, 1203 (Fla. 1998) (quoting Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984)) (reversing and commenting that the “prosecutor’s ‘over zealousness in prosecuting the State’s cause worked against justice, rather than for it’”); Hoggins v. State, 718 So. 2d 761, 772 (Fla. 1998) (reversing in part because prosecutor made prohibited comments on defendant’s post-Miranda silence during rebuttal closing argument); D’Ambrosio v. State, 736 So. 2d 44, 48 (Fla. 5th Dist. Ct. App. 1999) (reversing because prosecutor repeatedly referred to the defendant’s defense as innuendo, speculation, and a sea of confusion); Milburn v. State, 24 Fla. L. Weekly D1936, D1937 (2d Dist. Ct. App. Aug. 18, 1999) (reversing because prosecutor improperly shifted the burden of proof regarding insanity defense); Barnes v. State, 743 So. 2d 1105 (Fla. 4th Dist. Ct. App. 1999) (holding that prosecutor’s disparaging statement of defense counsel constituted fundamental error and warranted reversal of the conviction); Izquierdo v. State, 724 So. 2d 124, 125 (Fla. 3d Dist. Ct. App. 1998) (vacating and remanding because the prosecutor “referred to the defense as a ‘pathetic fantasy’” and “improperly appealed to the jurors sympathy”); Freeman v. State, 717 So. 2d 105, 105–06 (Fla. 5th Dist. Ct. App. 1998) (reversing because prosecutor improperly bolstered credibility of police officers); Boyer v. State, 713 So. 2d 1133, 1133–34 n.1 (Fla. 5th Dist. Ct. App. 1998) (reversing because prosecutor “accus[ed] the defendant of suborning the perjury of a defense witness... [;] personally express[ed] his belief that the defendant was guilty;... vouch[ed] for the credibility of a state witness;... appeal[ed] to the jury’s sympathy and emotions; and... call[ed] the defendant and the defendant’s witness liars”); Miller v. State, 712 So. 2d 451, 452–53 (Fla. 2d Dist. Ct. App. 1998) (reversing because prosecutor’s closing argument ridiculed the defendant’s voluntary intoxication defense and misstated the law); Baker v. State, 705 So. 2d 139, 139 (Fla. 3d Dist. Ct. App. 1998) (reversing because prosecutor’s comments implied that “defense counsel was fishing for gullible jurors” was an improper comment and was not “an invited response to defense counsel’s proper closing argument”).

2. See Urbin v. State, 714 So. 2d 411, 422 (Fla. 1998); Campbell v. State, 679 So. 2d 720, 724 (Fla. 1996); Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992); Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989); Garron v. State, 528 So. 2d 353, 356 (Fla. 1988); Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985).
Attorney misconduct may occur during discovery, voir dire, or examination of witnesses. However, this article will focus solely on misconduct that occurs during closing arguments, discuss selected civil and criminal cases decided by Florida courts in 1998 and 1999, and also address earlier cases that are important to the issue.

II. THE LAWYER’S PROFESSIONAL RESPONSIBILITY FOR CONDUCT DURING TRIAL

Come to law as a process, not with the sole purpose of winning every cause, but instead with a strong dedication to the rule of law. Make your client’s case in the best way permitted by our law and ethics, but with the civility and personal restraint that marks the best of our profession. Return to the understanding that our professional role is most concerned with the process and with the belief that if we make the best case within the law and ethics, the probability is that the right result will be reached. Come back to law as a process.

Look upon your role as that of a teacher, who will lead the court through the legal thicket. And then, just as Virgil left Dante, leave all legal proceedings with an air of grace, with an indelible perception of all that is good in legal advocacy. Leave your audience with a lasting impression of your dedication, not to the goal of victory above all else in the trial or hearing, but instead of an abiding deference to the rule of law, to the canons and ethics of professionalism, to the constraints and limits of circumstance and


4. See McArthur v. State, 671 So. 2d 867, 870 (Fla. 4th Dist. Ct. App. 1996) (reversing where the State provided inaccurate and misleading information concerning the test results of the victim’s clothing).

5. See Auto-Owners Ins. Co. v. Dewberry, 383 So. 2d 1109, 1109 (Fla. 4th Dist. Ct. App. 1978) (reversing where insured’s counsel made repeated references to the amount of policy limits during voir dire).

6. See Boatwright v. State, 452 So. 2d 666, 668 (Fla. 4th Dist. Ct. App. 1984) (reversing because the prosecutor asked a witness whether the prior witnesses had lied).
the primary codes of human conduct. Do that and there is a chance that we can erase the current low image of our profession and restore ourselves once again in the minds of farsighted people everywhere that ours is still the profession that gave the world a Thomas Moore, an Abraham Lincoln, a Louis Brandeis, and [a] Thurgood Marshall.7

The Florida Bar has 65,445 members who represent all lawyers licensed to practice in Florida.8 One of the basic purposes of The Florida Bar is to assure high standards of professionalism in the practice of law for the benefit of the public.9 Rule 4-3.4(e) of the Florida Rules of Professional Conduct10 provides that: A lawyer shall not:

[I]n trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.11

Rule 4-3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."12 Additionally, rule 4-3.5(a) states that "[a] lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court."13

All lawyers who are members of The Florida Bar, or otherwise authorized to practice in any court of the State of Florida, must abide by the Rules Regulating The Florida Bar.14 Additionally, the McDade Amendment,15 provides that "[a]n attorney for the Government16 shall be subject to

9. Id.
10. The Rules of Professional Conduct are found in chapter four of the Rules Regulating The Florida Bar.
11. FLA. R. PROF. CONDUCT 4-3.4(e).
12. Id. at R. 4-3.4(c).
13. Id. at R. 4-3.5(a).
14. Id. at preamble.
State laws and rules, and local Federal court rules governing attorneys in each State where such attorney engages in that attorney’s duties, to the same extent and in the same manner as other attorneys in that State.”

Thus, federal prosecutors and public defenders must abide by the Rules Regulating The Florida Bar even if he or she is not a member of The Florida Bar.

III. THE REQUIREMENT TO REPORT ETHICAL VIOLATIONS TO THE FLORIDA BAR

Lawyers have an obligation to report ethical violations to The Florida Bar. Rule 4-8.3(a) states that “[a] lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.”

Judges also have a responsibility to act accordingly when confronted with unethical conduct. The Code of Judicial Conduct states that “[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules Regulating The Florida Bar should take appropriate action.” The Code of Judicial Conduct does not specify what the term “appropriate action” means. The Fifth District Court of Appeal recently stated that a trial judge, “in the case of lawyers who do not heed less severe judicial efforts to correct such conduct . . .”, should refer the matter to The Florida Bar.

A complaint against a Florida lawyer for unethical conduct is a serious matter. When an attorney makes an unethical improper argument during closing argument, The Florida Bar can enforce its rules through its

16. An “‘attorney for the Government’ includes any attorney described in section 77.2(a) of part 77 of Title 28 of the Code of Federal Regulations and also includes any independent counsel, or employee of such a counsel, appointed under chapter 40.” 28 U.S.C.A. § 530B(c).
17. Id. § 530B(a).
18. FLA. R. PROF. CONDUCT 4-8.3(a).
19. Id. at R. 4-8.3(a) (emphasis added).
21. Id.
22. Id.
24. See also Izquierdo v. State, 724 So. 2d 124, 125 n.1 (referring the prosecutor to The Florida Bar where it was the third time the Third District Court of Appeal had been “forced to deal with his indulgence in what is often euphemistically called ‘overzealous advocacy,’ but [was] really just unprofessional and unethical behavior”).
disciplinary process. Negative consequences may arise even if the conduct does not degenerate to the level of unethical conduct because "[c]ourts are often critical of trial conduct even if they do not find that it rises to the level of a violation of the Rules of Professional Conduct." Moreover, attorney misconduct often becomes the focus of adverse media attention.

IV. STANDARD OF REVIEW

Section 924.33 of the Florida Statutes provides that "[n]o judgment shall be reversed unless the appellate court is of the opinion, after an examination of all the appeal papers, that error was committed that injuriously affected the substantial rights of the appellant. It shall not be presumed that error injuriously affected the substantial rights of the appellant." Improper comments during closing arguments are subject to the harmless error rule as provided in section 59.041 of the Florida Statute:

No judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the

25. Id. at 125.
error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.30

In State v. DiGuilio,31 the Supreme Court of Florida stated that the harmless error test "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction."32 The Supreme Court of Florida has cautioned that the "harmless error analysis must not become a device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence."33 In DiGuilio, the Supreme Court of Florida pointed out that:

[o]verwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's case may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result.34

Where the error is not constitutional in nature, section 924.051(7) of the Florida Statutes governs and the burden will be upon the defendant to show prejudice.35

In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error36 occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.37

31. 491 So. 2d 1129 (Fla. 1986).
32. Id. at 1135 (articulating harmless error test established by quoting Chapman v. California, 386 U.S. 18, 24 (1967)).
33. Id. at 1136.
34. Id. (quoting People v. Ross, 429 P.2d 606, 621 (1967) (Traynor, J. dissenting)).
35. FLA. STAT. § 924.051(7) (1999).
36. Prejudicial error is defined as "an error in the trial court that harmfully affected the judgment or sentence." Id. § 924.051(1)(a).
37. Id. § 924.051(7).
V. INVITED RESPONSE DOCTRINE

In *United States v. Young*, the United States Supreme Court explained the Invited Response Doctrine:

[D]efense counsel argues improperly, provoking the prosecutor to respond in kind, and the trial judge takes no corrective action. Clearly two improper arguments—two apparent wrongs—do not make for a right result. Nevertheless, a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by so doing can it be determined whether the prosecutor's conduct affected the fairness of the trial. To help resolve this problem, courts have invoked what is sometimes called the "invited response" or "invited reply" rule.

... [T]he Court must consider the probable effect the prosecutor's response would have on the jury's ability to judge the evidence fairly. In this context, defense counsel's conduct, as well as the nature of the prosecutor's response, is relevant.

... [T]he reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo. Thus the import of the evaluation has been that if the prosecutor's remarks were "invited," and did no more than respond substantially in order to "right the scale," such comments would not warrant reversing a conviction.

Florida courts have refused to reverse convictions where they found the prosecutor was merely making a fair reply to the defendant's own closing argument. It is important to note that a prosecutor must object to improper comments by defense counsel at the time defense counsel makes them in order for the trial judge to impose timely restrictions on defense counsel. The Invited Response Doctrine "does not contemplate that a prosecutor will

39. Id. at 11–13.
sit silently while defense counsel pursues an impermissible line of argument so that he or she can then pursue his or her own impermissible and highly prejudicial response.”

In *Dix v. State*, the defendant was charged and convicted of aggravated battery by shooting the victim in the chest. During opening statement and closing argument, defense counsel argued the shooting was an accident. The defendant did not testify at trial, but an eyewitness testified at trial about the shooting and about his conversation with the defendant while they were both in jail. During closing argument, the prosecutor stated the eyewitness asked the defendant why he shot him, and the defendant replied he had a beef with the victim and did not like him. The prosecutor then argued the shooting was not an accident. Defense counsel moved for a new trial and argued that the prosecutor commented on the burden of proof and on the defendant’s right to remain silent. The circuit court granted the defendant’s motion for new trial and the State appealed.

The Fifth District Court of Appeal said the State had a right and a duty to respond to the explanation of the charges given by the defense because to ignore the defense would give it credence. The court concluded the prosecutor did not refer to the absence of any testimony by the defendant. The court found the prosecutor had merely commented on the defendant’s statement to the eyewitness and compared that statement to the accident defense asserted by defense counsel. The Fifth District reversed the trial court’s order granting a new trial, and directed the trial court to enter a judgment on the jury verdict and sentence.

42. Id.
43. 723 So. 2d 351 (Fla. 5th Dist. Ct. App. 1998).
44. Id. at 352.
45. Id.
46. Id.
47. Id.
48. Dix, 723 So. 2d at 352.
49. Id.
50. Id.
51. Id.
52. Id.
53. Dix, 723 So. 2d at 352.
54. Id.
VI. PRESERVING THE ISSUE FOR APPEAL

The law is clear that absent a contemporaneous objection, improper comments during closing argument are not cognizable on appeal. A timely objection allows the trial court an opportunity to give a curative instruction or admonish counsel. "The only exception to this blanket procedural bar is where the comment constitutes fundamental error." Notably, Florida's district courts of appeal are divided on the concept of fundamental error.

In *Pait v. State*, the Supreme Court of Florida explained that some unobjected-to comments may be so prejudicial that they warrant a new trial:

58. See Wal-Mart Stores v. Gutierrez, 731 So. 2d 151, 151-52 (Fla. 3d Dist. Ct. App. 1999) (finding that unobjected-to comments "were not so prejudicial or inflammatory as to constitute fundamental error"); Gutierrez v. State, 731 So. 2d 94, 95 (Fla. 4th Dist. Ct. App. 1999) (holding that an "improper comment on a defendant's right to remain silent is not fundamental error which may be raised on appeal without an objection at trial"); Henderson v. State, 727 So. 2d 284, 285-86 (Fla. 2d Dist. Ct. App. 1999) (holding that where the prosecutor argued that the defendant "would not know the truth if it hit him up side the head," that an acquittal would mean that the witnesses were "all a pack of liars," and that the defendant had invented a "fairy tale" did not constitute fundamental error and the defendant waived review by failing to object); Ross v. State, 726 So. 2d 317, 319 (Fla. 2d Dist. Ct. App. 1998) (finding that although the defense failed to object when the prosecutor called the defendant and defense witnesses "pathetic," "insulting," "preposterous," "nonsense," and "bologna," the court found the repeated comments constituted fundamental error); Bell v. State, 723 So. 2d 896, 897 (Fla. 2d Dist. Ct. App. 1998) (holding that where the prosecutor vouched for an officer's testimony, told the jury to send a message, argued matters not in evidence, and commented on the defendant's exercise of his right to a jury trial, the court found the comments did not constitute fundamental error); Freeman v. State, 717 So. 2d 105, 105-06 (Fla. 5th Dist. Ct. App. 1998) (finding where the prosecutor's improper bolstering of a police officer's testimony and mention of an officer's funeral in the newspaper together with other improper remarks rose to the level of fundamental error); DeFreitas v. State, 701 So. 2d 593, 600-01 (Fla. 4th Dist. Ct. App. 1997) (holding numerous acts of prosecutorial misconduct were of such a nature and character that the cumulative and collective effect rose to the level of fundamental error); Knight v. State, 672 So. 2d 590, 590-91 (Fla. 4th Dist. Ct. App. 1996) (concluding that prosecutor's verbal attacks on defense counsel, arguing facts not in evidence, and bolstering the credibility of a police officer's testimony constituted fundamental error).
59. 112 So. 2d 380 (Fla. 1959).
When an improper remark to the jury can be said to be so prejudicial to the rights of an accused that neither rebuke nor retraction could eradicate its evil influence, then it may be considered as a ground for reversal despite the absence of an objection below, or even in the presence of a rebuke by the trial judge.  

Once a proper objection has been made, objecting counsel must move for a mistrial to preserve the issue for appeal. The motion for mistrial may be made as late as the end of closing argument, thus avoiding interruption in the continuity of the argument and allowing an opportunity to evaluate the prejudicial nature of the objectionable remarks in the context of the entire argument.  

VII. CLOSING ARGUMENT

Closing argument is the trial attorney's final opportunity "to argue the facts in evidence and/or reasonable inferences to be drawn therefrom." However, this is not a license for an attorney to argue fiction. The Eleventh Circuit Court of Appeals addressed the purpose of closing argument in United States v. Bailey. In Bailey, the court stated that "the sole purpose of closing argument is to assist the jury in analyzing the evidence." The court pointed out that "while a prosecutor may not exceed the evidence in closing argument, he may state conclusions drawn from the evidence." The court continued and said that "although a prosecutor may not make an argument directed to passions or prejudices of the jurors instead of an understanding of the facts and law, there is no prohibition on 'colorful and perhaps flamboyant' remarks if they relate to the evidence adduced at trial."
In *Bertolotti v. State*, the Supreme Court of Florida described the purpose of the closing argument:

The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

A. Civil Cases

1. Expressing Personal Opinion vs. Confining Argument to the Evidence Presented

In *Simmons v. Swinton*, the passenger and driver of a rear-ended motor vehicle sued the driver of the other vehicle. The trial court granted a new trial based on improper statements by the defense counsel during closing argument, that the trial court concluded constituted fundamental error. During closing argument, the defense attorney argued the plaintiff's treating physician had an ulterior motive in blaming her injuries on the accident. The defendant's attorney argued the plaintiff's injuries were actually caused by falls resulting from medication prescribed by the treating physician. On appeal, plaintiff's counsel argued the comments were egregious but "admitted that he did not object to the closing in order to preserve the error for appellate review."

The Fifth District Court of Appeal held that defense counsel's arguments were proper because "the attorney confined closing argument to the evidence presented and reasonable inferences that could be drawn from..."

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70. 476 So. 2d 130 (Fla. 1985).
72. 715 So. 2d 370 (Fla. 4th Dist. Ct. App. 1998), review denied 727 So. 2d 911 (Fla. 1999).
73. *Id.* at 371.
74. *Id.*
75. *Id.* at 373.
76. *Id.*
77. *Simmons*, 715 So. 2d at 373.
the evidence." The appellate court noted that opposing counsel should make an objection at the time the offensive comment is made to "allow the trial court to correct the offending counsel's behavior." The Fifth District reversed and instructed the trial court to reinstate the verdict.

2. Community Conscience Arguments

In Kiwanis Club of Little Havana, Inc. v. Kalafe, Kalafe, a Brazilian-born singer and composer, sued Kiwanis Club and its representative for tortious interference with a contract and defamation. The trial court entered a final judgment in favor of Kalafe, and Kiwanis Club appealed. During closing argument, Kalafe's counsel stated "[w]hat if in the past somebody was a Democrat or Brazilian, where do you draw the line? Use reason. Look at the evidence and realize this type of politics is uncalled for and shouldn't be used." Kalafe's counsel also argued that "Eighth Street belongs to all of us. It is not their home and your verdict should reflect how you feel about this conduct." Kalafe's counsel further argued that "people of Cuba[... haven't been too lucky with politics. The last thing in the world is that we should bring the type of politics here that causes the problems to begin with." The Third District Court of Appeal addressed the impropriety of Kalafe's counsel's remarks and stated "Florida courts have consistently rejected arguments that are nothing more than 'impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation.'" The Third District characterized the comments as an impermissible reference to community conscience and noted the comments in the case "stray[ed] dangerously close to constituting reversible error." The judgment was reversed on other grounds.

78. Id.
79. Id. at 373-74.
80. Id. at 374.
81. 723 So. 2d 838 (Fla. 3d Dist. Ct. App. 1998).
82. Id. at 840.
83. Id.
84. Id. at 842 n.5.
85. Id.
86. Kiwanis Club, 723 So. 2d at 842 n.5.
87. Id. at 842 (quoting Norman v. Gloria Farms, Inc., 668 So. 2d 1016, 1021 (Fla. 4th Dist. Ct. App. 1996)).
88. Id.
3. Expressing Personal Opinion and Bolstering Credibility

*Davis v. South Florida Water Management District*\(^{89}\) was a condemnation proceeding that involved a large tract of land in Palm Beach County taken for Everglades restoration purposes.\(^{90}\) The landowner presented expert testimony that the fair market value of the land was eighteen million dollars.\(^{91}\) The water district expert testified that the fair market value of the land was ten million dollars.\(^{92}\) The landowner appealed the final judgment of the trial court and asserted that the water district’s counsel placed “his own credibility into the argument, offered his personal opinion to the jury, and suggested that the jurors would ultimately pay for the verdict as taxpayers.”\(^{93}\) During closing argument, the landowner’s counsel argued the “full bucket” compensation theory:

Full compensation is your goal, as the constitution requires. It’s kind of like a bucket of water. A bucket of water you fill to the brim, and you know if it spills over and you know when it’s less. And what we want here is for the bucket to be full. And by full I simply mean, please find from the evidence, not from the hypothetical argumentation, but from actual sales in the marketplace, what this property would bring to these owners if it weren’t taken as of February 7, 1996.\(^{94}\)

The water district’s counsel then argued:

Ladies and gentlemen of the jury, it’s easy to make an appeal that the property owner ought to receive a full bucket. And as a lawyer and an officer of the court, and an attorney who is proud to represent South Florida Water Management District and other condemning authorities and private property owners, I will tell you that $18 million overflows that bucket by $8 million because they’re asking you to pay, they’re asking you to consider the value of this property with elements of risk, and elements that aren’t there and may never be there.\(^{95}\)

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89. 715 So. 2d 996 (Fla. 4th Dist. Ct. App. 1998).
90. *Id.* at 997.
91. *Id.*
92. *Id.*
93. *Id.* at 998.
94. *Davis*, 715 So. 2d at 998.
95. *Id.*
Davis’ counsel objected and moved for a mistrial arguing the comment “suggested that the jurors would pay an inflated amount in their role as taxpayers.” The trial court reserved the ruling and allowed the district’s counsel to remedy that suggestion. The water district’s counsel then stated:

Ladies and gentlemen of the jury, it’s very clear that none of you have to pay anything, and when I said you, I meant you in the role of a willing buyer would have to pay. I understand that none of you are the buyers. This hypothetical buyer would have to pay that amount of money, and that would overflow, that would reduce the compensation using Mr. Brigham’s analogy, more than overflow the barrel, the bucket, by almost $8 million or $9 million.

The Fourth District Court of Appeal said it would be patently improper to suggest a jury consider that the jury award would come out of their pockets as taxpayers. However, the Fourth District continued and said that “[a]lthough the ‘asking you to pay’ comment could be construed as reminding the jurors that they are taxpayers, here it does not rise to the level of reversible error.” The district court found the statement was in response to Davis’ prior “characterization that the jurors had to fill the ‘bucket’ of full compensation” and was not prejudicial considering the clarification. The Fourth District noted that using the phrase “award” would have been more prudent than using the phrase “to pay.”

Although the Fourth District affirmed the judgment, it recognized that the water district’s counsel’s statement that as an “officer of the court” and an attorney for a state agency was an improper attempt to bolster his own credibility. The court found those statements “particularly offensive.” However, the Fourth District affirmed because opposing counsel had failed to object at trial and the remarks did not constitute fundamental error.

96. Id.
97. Id.
98. Id.
99. Davis, 715 So. 2d at 999.
100. Id.
101. Id.
102. Id.
103. Id.
104. Davis, 715 So. 2d at 999.
105. Id.
4. Violating an Order in Limine

In *Leyva v. Samess*, Mr. Leyva sustained personal injuries when he was involved in a collision with a vehicle operated by Daniel Samess and owned by his parents, Dr. Ronald Samess and Mrs. Claudette Samess. The trial court granted defense counsel’s motion in limine in part and prohibited Leyva’s counsel from referencing during closing argument that the owner of the vehicle was a doctor. However, the trial court allowed the use of the “doctor” reference during voir dire so that Leyva’s counsel could determine if any of the jurors had been treated by Dr. Samess.

During closing argument, Leyva’s counsel said “I would like to explain to you, Dr. and Mrs. Samess are a party to this lawsuit... owners of a vehicle are responsible for any negligence on the part of their driver if the driver is driving their car with their knowledge and consent.” Plaintiff’s counsel then stated “the Defendants have admitted that Dr. and Mrs. Samess own the vehicle.” Defense counsel objected to the violation of the motion in limine, and the trial court sustained the objection. The defense moved for a new trial, and the trial court reserved ruling on the motion for new trial. The jury returned a verdict in favor of the plaintiffs for $119,400, reduced by the twenty percent for comparative negligence.

The trial court then granted the motion for new trial having determined that “one party’s ‘egregious’ violation of an order in limine entitled the other party to a new trial.” The trial court found that plaintiff’s counsel “had violated the [pretrial] order by referring to Ronald Samess as a doctor.” The trial court incorrectly determined “where an order granting a pretrial motion in limine has been established, a subsequent egregious violation of that order by one party entitles the other party to a new trial.”

The Fourth District Court of Appeal found the trial court abused its discretion when it granted the new trial because it used an incorrect standard of review when it reviewed the comments made in closing argument.
Fourth District Court of Appeal stated that "[n]ot every violation of a pretrial order in limine should automatically result in a new trial."\textsuperscript{119} The Fourth District followed the "principle that in order to grant a new trial for improper comments in closing argument, the trial court must find that the argument was 'highly prejudicial and inflammatory.'"\textsuperscript{120} During voir dire, the jury had already learned that Ronald Samess was a doctor.\textsuperscript{121} Although plaintiff's comments violated the pretrial order, the Fourth District found that the brief references to the fact that the owner of the defendant vehicle was a doctor was not so "highly prejudicial or inflammatory" as to require a new trial.\textsuperscript{122}

5. Invoking Sympathy to Inflate the Recovery of Damages

In \textit{Knoizen v. Bruegger},\textsuperscript{123} Ms. Bruegger suffered severe and debilitating injuries when her motorcycle collided head-on with an automobile.\textsuperscript{124} Ms. Bruegger's injuries included five major pelvic fractures, vaginal lacerations, a broken femur, and an open wrist fracture. Additionally, she lost physical support for her bladder and suffered a prolapsed bladder and uterus.\textsuperscript{125}

During closing argument, Ms. Bruegger's attorney argued that the injuries were the "most devastating injury a woman can suffer"\textsuperscript{126} and the injuries were devastating to her family and children.\textsuperscript{127} He argued that the jury should not leave Ms. Bruegger alone to deal with the injuries she suffered.\textsuperscript{128} Bruegger's attorney said "[d]on't leave her bare and naked, like this accident has already left her, and her children and her family. Don't leave her like that."\textsuperscript{129} Knozien's counsel objected and argued that the remarks were improper attempts to invoke jury sympathy and an attempt to inflame the passions of the jury.\textsuperscript{130} The trial court overruled Knozien's objection.\textsuperscript{131}

\textsuperscript{119} Id. at 1121.
\textsuperscript{120} Id. (quoting Grushoff v. Denny's, Inc., 693 So. 2d 1068, 1069 (Fla. 4th Dist. Ct. App. (1997)).
\textsuperscript{121} Leyva, 732 So. 2d at 1122.
\textsuperscript{122} Id.
\textsuperscript{123} 713 So. 2d 1071 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{124} Id. at 1071.
\textsuperscript{125} Id.
\textsuperscript{126} Id. at 1072.
\textsuperscript{127} Id.
\textsuperscript{128} Knoizen, 713 So. 2d at 1072.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
The Fifth District Court of Appeal found that testimony that the accident had a devastating effect upon Ms. Bruegger and her family supported the closing argument. The court found the closing argument was only "marginally objectionable." The court noted that "[a]ttorneys are given broad latitude during closing, but they must confine their argument to the facts and evidence presented to the jury and all logical deductions from the facts and evidence." The Fifth District also found that the appellant failed to establish the argument was so "pervasive, inflammatory, and prejudicial to preclude the jury's rational consideration of the case."

6. The Fourth District Court of Appeal Explains the Requirement for a Contemporaneous Objection

In Murphy v. International Robotics Systems, Inc., Judge Klein explained why the Fourth District Court of Appeal did not agree with other district courts when they reverse cases because of improper, but unobjected-to, closing argument of counsel. The court stated that its explanation was made "in the hopes that a litigant considering an appeal to this court, whose best hope for reversal is unobjected-to argument of counsel, will carefully consider whether it is worth the cost.

In Murphy, defense counsel accused one of the plaintiffs "of wanting to cash in a lottery ticket in this litigation and suggest[ed] that if the jurors awarded appellant damages based on a phony consultancy agreement they would be accessories, after the fact, to tax fraud." At oral argument, the court asked why plaintiffs' counsel did not object. Plaintiffs' counsel responded that it was "his practice not to object because the jury might hold it against his client."

The court stated "improper, but unobjected-to, closing argument in a civil case is [not] something which is so fundamental that there should be an

132. Id.
133. Knoizen, 713 So. 2d at 1072.
134. Id.
135. Id. (quoting Hagan v. Sun Bank of Mid-Fla., N.A., 666 So. 2d 580 (Fla. 2d Dist. Ct. App. 1996)).
137. Id. at 587 n.1.
138. Id. at 588.
139. Id. (internal quotations omitted).
140. Id.
141. Murphy, 710 So. 2d at 588.
exception to the rule requiring an objection.\textsuperscript{142} The Fourth District relied upon the Supreme Court of Florida's explanation in \textit{Castor v. State}:

The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at early state of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.\textsuperscript{143}

The Fourth District Court of Appeal pointed out that the contemporaneous objection rule requires that an objection be made at the time of the remarks.\textsuperscript{144} "If the [trial] court sustains the objection, there must be a motion for mistrial in order to preserve the issue on appeal."\textsuperscript{145} However, "the motion for mistrial can be made later, at the close of argument, in order to give counsel time to think about whether to seek a mistrial."\textsuperscript{146} The court noted that the last time the Supreme Court of Florida reversed for a new trial based on unobjected-to closing argument was in 1956.\textsuperscript{147} Further, the court noted that the last time the Supreme Court of Florida considered the issue in a civil case was in 1961.\textsuperscript{148}

The Fourth District then stated, "[t]here is an exception to the contemporaneous objection rule, for errors which are deemed fundamental and which can thus be raised for the first time on appeal."\textsuperscript{149} The Supreme Court of Florida has defined fundamental error as "error which goes to the foundation of the case, or goes to the merits of the cause of action,’ which appellate courts should apply ‘very guardedly.’"\textsuperscript{150}

The Fourth District stated that its refusal to allow improper, unobjected-to closing argument of counsel to be raised for the first time on appeal was consistent with the supreme court.\textsuperscript{151} The court noted that improper argument is a nationwide problem: "no other courts in this country allow improper argument to be raised for the first time on appeal in civil cases,"\textsuperscript{152}

\textsuperscript{142} \textit{Id.} at 589.
\textsuperscript{143} \textit{Id.} (quoting \textit{Castor v. State}, 365 So. 2d 701 (Fla. 1978)).
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Murphy}, 710 So. 2d at 589.
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at 590.
\textsuperscript{150} \textit{Id.} (quoting \textit{Sanford v. Rubin}, 237 So. 2d 134, 137 (Fla. 1970)).
\textsuperscript{151} \textit{Murphy}, 710 So. 2d at 591.
\textsuperscript{152} \textit{Id.}
and "few courts have even addressed the issue of whether it could be raised for the first time on appeal."\textsuperscript{153} Following the Fourth District's opinion, the Fifth District Court of Appeal and the Third District Court of Appeal have followed the contemporaneous objection rule.\textsuperscript{154}

B. \textit{Criminal Cases}

1. Foul Blows vs. Hard Blows

In \textit{Berger v. United States},\textsuperscript{155} Justice Sutherland delivered an opinion condemning improper argument:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.\textsuperscript{156}

\textsuperscript{153} Id.

\textsuperscript{154} See Wal-Mart Stores, Inc. v. Gutierrez, 731 So. 2d 151 (Fla. 3d Dist. Ct. App. 1999) (citing Gaines v. Amerisure, Ins. Co., 701 So. 2d 1192, 1193 (Fla. 3d Dist. Ct. App. 1997)) (stating that "a review of the record shows that defense counsel failed to object to the majority of the allegedly improper comments, thereby not preserving them for appellate review"); Fravel v. Haughey, 727 So. 2d 1033, 1037 (Fla. 5th Dist. Ct. App. 1998) (noting "[t]his ruling will remand [sic] lawyers to raise timely objections when confronted with improper argument and create predictability with regard to the future disposition of similar cases by this court"); Kelly v. State Farm Mut. Auto. Ins., 720 So. 2d 1145, 1147 (Fla. 5th Dist. Ct. App. 1998) (stating that although some comments made during State Farm's closing argument "were indeed improper, no contemporaneous objections were made, and we do not find the comments as a whole constitute fundamental error").

\textsuperscript{155} 295 U.S. 78 (1935).

\textsuperscript{156} Id. at 88; \textit{see also} Gore v. State, 719 So. 2d 1197, 1202 (Fla. 1998); Craig v. State, 685 So. 2d 1224, 1229 (Fla. 1996); Miller v. State, 712 So. 2d 451, 453 (Fla. 2d Dist. Ct. App. 1998); Cochran v. State, 711 So. 2d 1159, 1163 (Fla. 4th Dist. Ct. App. 1998); DeFreitas v. State, 701 So. 2d 593, 606 (Fla. 4th Dist. Ct. App. 1997); Hampton v. State, 680 So. 2d 581, 585 (Fla. 3d Dist. Ct. App. 1996); State v. Lozano, 616 So. 2d 73, 76 (Fla. 1st Dist. Ct. App. 1993); Rosso
2. Community Conscience Arguments

In Del Rio v. State, the jury found the defendant guilty of first degree murder, attempted second degree murder with a firearm, attempted first degree murder with a firearm, and burglary of an occupied dwelling with an assault and with a firearm. The Third District Court of Appeal affirmed Del Rio's conviction and sentence because the trial court provided curative instructions, and overwhelming evidence of the defendant's guilt was presented at trial. However, the court wrote its opinion specifically to address the prosecutor's improper comments during closing argument.

During closing argument, the prosecutor referred to the city as a place where "death is cheap." He also commented on the jurors' personal stake in the matter when he said "[t]he law protects all of us or the law protects none of us." The prosecutor further stated that "[i]n the south, we saw it when it happened to blacks. In Germany we saw it when it happened to the Jews." The Third District repeated that "counsel should avoid impassioned and prejudicial arguments which impermissibly appeal to the jury's 'community conscience' or sense of 'civic responsibility.'" The court strongly disapproved of the prosecutor's conduct in the case and sent the opinion to The Florida Bar.

3. Leading the Jury to Believe the Defendant Has the Burden of Proving His Innocence

In Thomas v. State, the jury found the defendant guilty of tampering with evidence. The defendant was a passenger in an automobile driven by


158. Id. at 1100.
159. Id. at 1102.
160. Id. at 1101.
161. Id.
162. Del Rio, 732 So. 2d at 1101.
163. Id.
164. Id.
165. Id. at 1102 n.1.
166. 726 So. 2d 369 (Fla. 4th Dist. Ct. App. 1999).
167. Id. at 369.
his girlfriend.\textsuperscript{168} The police stopped the car in the middle of the road with its lights off and engine running.\textsuperscript{169} The only defense witness at trial was the defendant's girlfriend.\textsuperscript{170} She testified at trial that she and Thomas were in the area to take a busboy with whom she worked home.\textsuperscript{171}

The defendant’s appeal centered upon the prosecutor’s remark during the rebuttal portion of her closing argument when she said “[t]hey told you that she had gone there into this unknown neighborhood to drop off a busboy. Where is this busboy today? I don’t know.”\textsuperscript{172} Defense counsel objected and moved for a mistrial.\textsuperscript{173} The trial court immediately gave a curative instruction and later denied the motion for mistrial.\textsuperscript{174}

Commenting on the defendant’s failure to call a witness may be cause for reversal because such comments may lead a jury to believe the defendant has the burden of proving his innocence.\textsuperscript{175} Although the Fourth District Court of Appeal has frequently taken a strong position against such comments, there are exceptions to the rule.\textsuperscript{176} However, these exceptions are limited to circumstances in which defense counsel “opens the door” and thus, allows the prosecutor to comment in rebuttal.\textsuperscript{177} The Supreme Court of Florida has stated:

\begin{quote}
[T]his Court has applied a narrow exception to allow comment when the defendant voluntarily assumes some burden of proof by asserting the defenses of alibi, self-defense, and defense of others, relying on facts that could be elicited only from a witness who is not equally available to the state. A witness is not equally available when there is a special relationship between the defendant and the witness.\textsuperscript{178}
\end{quote}

The Fourth District Court of Appeal concluded the phantom busboy in \textit{Thomas} did not have a special relationship with the defendant.\textsuperscript{179} Further, the court concluded that “[a]lthough the defense raised the subject of the busboy and placed in issue its explanation for the otherwise suspicious

\textsuperscript{168} \textit{Id.} at 369.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} at 370.
\textsuperscript{171} \textit{Thomas}, 726 So. 2d at 370.
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Thomas}, 726 So. 2d at 370.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} at 371 (quoting \textit{Jackson v. State}, 575 So. 2d 181, 188 (Fla. 1991)).
\textsuperscript{179} \textit{Id.} at 371.
circumstances leading up to the incident,” the prosecutor’s comment was impermissible.\textsuperscript{180} However, the court held that because the trial court immediately gave a curative instruction, the prosecutor’s impermissible comment did not warrant reversal.\textsuperscript{181}

4. Personal Attacks on the Defendant

In \textit{Cupertino v. State},\textsuperscript{182} the defendant was convicted of five counts of manslaughter by culpable negligence and six counts of culpable negligence.\textsuperscript{183} He appealed on numerous grounds, including prosecutorial misconduct.\textsuperscript{184} During closing argument, the prosecutor characterized the defendant as “young Mr. Hitler.”\textsuperscript{185} The court addressed the prosecutor’s remark and stated:

\begin{quote}
We understand the human tendency to identify with the victims of such senseless conduct and their families, as in this case where so many young people died. Prosecutors must nevertheless steel themselves against such emotions and direct their energies to presenting the state’s case within the law. They are not given the right to voice the same emotions understandably expressed by the families of the victims.\textsuperscript{186}
\end{quote}

The court then noted that the prosecutor’s trial conduct suggested a personal interest in winning, rather than detached advocacy for the State.\textsuperscript{187} Although the Fourth District Court of Appeal found the remark was improper, it held that “[t]he state’s evidence in this case is so compelling that the jury returned the only verdict possible.”\textsuperscript{188}

In \textit{Gore v. State},\textsuperscript{189} the defendant had been found guilty of first degree murder and armed robbery and was sentenced to death by the trial court after a unanimous jury recommendation.\textsuperscript{190} During closing argument of the guilt phase, the prosecutor referred to the defendant and said:

\textsuperscript{180.} \textit{Id.} at 371–72.
\textsuperscript{181.} \textit{Thomas}, 726 So. 2d at 372.
\textsuperscript{182.} 726 So. 2d 330 (Fla. 4th Dist. Ct. App. 1999), \textit{review denied}, 735 So. 2d 1284 (Fla. 1999).
\textsuperscript{183.} \textit{Id.} at 332.
\textsuperscript{184.} \textit{Id.}.
\textsuperscript{185.} \textit{Id.} at 334.
\textsuperscript{186.} \textit{Id.}.
\textsuperscript{187.} \textit{Cupertino}, 726 So. 2d at 334 n.2.
\textsuperscript{188.} \textit{Id.} at 334.
\textsuperscript{189.} 719 So. 2d 1197 (Fla. 1998).
\textsuperscript{190.} \textit{Id.} at 1198.
You know, Ladies and Gentlemen, there’s a lot of rules and procedures that I have to follow in court, and there’s a lot of things I can say or can’t say, but there’s one thing the Judge can’t ever make me say and that is he can never make me say that’s a human being.¹⁹¹

The Supreme Court of Florida stated that “engag[ing] in vituperative or pejorative characterizations of a defendant or witness” is clearly improper for the prosecutor.¹⁹² Because of the collective effect of the prosecutor’s improper questioning of the defendant during cross-examination and the improper closing argument, the supreme court reversed the case and remanded it for a new trial.¹⁹³ The supreme court noted that the prosecutor’s “over zealou[ness] in prosecuting the State’s cause worked against justice, rather than for it.”¹⁹⁴

5. Commenting on Defendant’s Right to Remain Silent

In State v. Hoggins,¹⁹⁵ the defendant was convicted of attempted first degree murder with a firearm, armed robbery, aggravated assault with a firearm, and resisting arrest without violence.¹⁹⁶ The defendant based his appeal in part on the prosecutor’s remarks during closing argument.¹⁹⁷ During closing argument, the prosecutor argued the defendant did not tell his version of events to the police on the night he was arrested:

Now, when Mr. Hoggins gives his story—When you remember the story that he gave the other day, remember one thing, that the police arrived at that apartment to conduct a search. It was then that they found him hiding in the upstairs bedroom in the apartment of his girlfriend. Remember, he doesn’t tell them that story at that time.

Now, when they bring him downstairs and have him confronted face to face with the victim, who is so outraged, ... saying “You tried to kill me,” and that victim when confronted with him tries to

¹⁹¹. Id. at 1201.
¹⁹². Id.
¹⁹³. Id. at 1202–03.
¹⁹⁴. Gore, 719 So. 2d at 1203 (quoting Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984)).
¹⁹⁵. 718 So. 2d 761 (Fla. 1998).
¹⁹⁶. Id. at 764.
¹⁹⁷. Id. at 762.
go after this man, he never mentioned his story. [Objection overruled].

Mr. Hoggins did not give them that story. Ronnie Hoggins, never did at that point say anything like, "Man, I didn't try to shoot you. I didn't rob your store. I just found that money and stuff and picked it all up and ran into the apartment."

During rebuttal closing argument, the prosecutor emphasized that the defendant had failed to come forward with an exculpatory explanation prior to trial:

Not once does this Defendant give the police the count [sic] that he came up with when he took the witness stand today. He gave this statement under oath, but never anytime previous to today did he ever say this story to the police about how he came across this money and stuff.... Having been advised of his constitutional right he never mentioned one time this story he has said here today.

No objection was made to the prosecutor's rebuttal closing argument. On appeal, the Fourth District Court of Appeal reversed and held that the prosecutor improperly commented on the defendant's custodial, pre-Miranda silence and violated the due process guarantees of article I, section 9 of the Florida Constitution. The Fourth District recognized a conflict and certified a question to the Supreme Court of Florida. The Supreme Court of Florida rephrased the question:

DOES FLORIDA CONSTITUTION, ARTICLE I, SECTION 9, PREVENT THE IMPEACHMENT OF A TESTIFYING DEFENDANT WITH THE DEFENDANT'S SILENCE MAINTAINED AT THE TIME OF ARREST BUT PRIOR TO THE RECEIPT OF MIRANDA WARNINGS?

The Supreme Court of Florida answered the question in the affirmative and explained how Florida courts differ from the United States Supreme Court on the right to remain silent:

198. Id. at 764.
199. Id.
200. Hoggins, 718 So. 2d at 764 n.3.
201. Id. at 764.
202. Id.
203. Id. at 762 (emphasis in original).
Florida courts reach a different conclusion than does the United States Supreme Court on the issue of postarrest, pre-Miranda silence for two reasons. First, unlike the United States Supreme Court, Florida courts have recognized that the defendant does not waive his or her right to silence at the time of arrest by taking the stand in his or her own defense. Regardless of whether evidence of post arrest silence is introduced in the state’s case-in-chief or for impeachment purposes, the same test applies. If the comment is fairly susceptible of being construed by the jury as a comment on the defendant’s exercise of his or her right to remain silent, it violates the defendant’s right to silence.

The Supreme Court of Florida held “[t]he comments at issue . . . were fairly susceptible of being interpreted as comments on Hoggins’ silence and therefore clearly violated his right to remain silent.”

6. Personal Attacks on Defense Counsel

Florida courts do not condone personal attacks on defense counsel because they are an improper trial tactic that can poison the minds of the jury.

In Del Rio v. State, the defendant was convicted of first degree murder with a firearm, attempted second degree murder with a firearm, attempted first degree murder with a firearm, and burglary of an occupied dwelling with an assault and with a firearm. The Third District Court of Appeal affirmed the convictions and sentence but wrote an opinion specifically to address the improper comments made by the prosecutor.

204. Id. at 769.
205. Hoggins, 718 So. 2d at 769.
207. 732 So. 2d 1100 (Fla. 3d Dist. Ct. App. 1999).
208. Id. at 1101.
209. Id. (the prosecutor denigrated the city as a place where “death is cheap” and commented upon his own and the jurors’ personal stake in the case when he said “the law protects all of us or the law protects none of us and how [i]n the south, we saw it when it happened to blacks. In Germany we saw it when it happened to the Jews.”).
During closing argument, the prosecutor attacked the integrity of defense counsel when he referred to defense counsel and said "[s]ee this man here who claims to be a lawyer in good standing in Miami, Florida and that is the same guy who is going to get up when I sit down and try to tell you what the evidence showed." The Third District Court of Appeal stated that it "will not condone inflammatory and prejudicial remarks attacking the integrity of opposing counsel." The Third District cautioned the prosecution about improper comments and sent a copy of its opinion to The Florida Bar for investigation.

In *Barnes v. State*, defense counsel argued there was a lack of objective evidence linking the defendant to the crime. Defense counsel told the jury a guilty verdict would have to rest on eyewitness identification and the testimony of the defendant's former defense counsel had compromised the identification. In response, the prosecutor characterized the former defense counsel's testimony as "the mercenary actions of... a hired gun, hired by the..." Defense counsel objected and requested the prosecutor's remark be stricken. The trial judge instructed the jury to ignore that last comment. Ignoring the judge, the prosecutor immediately continued his argument and said "—who was hired to go over there and defend this guy." The Fourth District Court of Appeal reversed and held that the prosecutor's argument was highly improper and affected the jury's deliberations "in spite of a sustained objection and the curative instruction."

The Fourth District was troubled by the way the trial judge granted the motion to strike and was concerned about the insufficiency of the curative instruction. The court said the trial judge's statement, "[i]gnore the last
"comment" was ambiguous and vaporous. The court stated "[w]hen a judge grants a motion to strike . . . it is important that the fact of granting the motion be made unmistakably clear to the jury." The court continued by adding that it is "very important that the precise comment to be stricken be identified in a way that will leave no room for doubt about what the jury must ignore." The court explained the proper method for handling this type of objection:

When it is made to appear that a prosecuting officer has overstepped the bounds of that propriety and fairness which should characterize the conduct of a state's counsel in the prosecution of a criminal case, or where a prosecuting attorney's argument to the jury is undignified and intemperate, and contains aspersions, improper insinuations, and assertions of matters not in evidence, or consists of an appeal to prejudice or sympathy calculated to unduly influence a trial jury, the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the gross impropriety of being influenced by improper arguments.

The Fourth District Court of Appeal then directed its attention to attorney professionalism. The court observed that the prosecutor's prior misconduct required a new trial in four other cases. Because the prosecutor had persisted in improper conduct, the court called for sanctions when it referred the matter to The Florida Bar and stated: "[w]ith the fourth rebuke of prosecutor Milian by this court, we hope that the disciplinary organs of The Florida Bar will finally bring their compelling powers to bear on this lawyer who either refuses or is unable to limit his trial tactics to that which are ethical and proper."

222. Id. at 1107.
223. Barnes, 743 So. 2d at 1107.
224. Id.
225. Id. (quoting Deas v. State, 161 So. 729, 731 (Fla. 1935)) (emphasis in original).
226. Id. at 1108.
228. Barnes, 743 So. 2d at 1109.
7. Disclosing the Length of the Sentence

*Florida Rule of Criminal Procedure* 3.390(a) provides that "[t]he presiding judge shall charge the jury only on the law of the case at the conclusion of argument of counsel. Except in capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial." 229 The Supreme Court of Florida has construed this rule literally: "[T]he jury need only be instructed as to the possible penalty when it is faced with the choice of recommending either the death penalty or life imprisonment. As to offenses in which the jury plays no role in sentencing, the jury will not be advised of the possible penalties." 230 Thus, neither the defense nor the prosecutor is permitted to disclose the length of the sentence for the crime charged or for any lesser included offenses.

In *Legette v. State*, 231 the defendant was charged with second degree murder, and the jury found him guilty of manslaughter. 232 The trial court informed counsel it would instruct the jury on the lesser included offenses of manslaughter, battery, and improper exhibition of a weapon. 233 During closing argument, the prosecutor told the jury that battery was a misdemeanor. 234 The defense objected and moved for a mistrial, which was overruled by the trial court. 235

The court stated that allowing a prosecutor to "inject the length of sentence into closing argument [was] contrary to the policy behind the 1984 amendment to rule 3.390(a), that the jury should decide a case in accordance with the law and the evidence and disregard the consequences of its verdict." 236 However, the court found that the reference to the misdemeanor was not prejudicial pursuant to section 924.051(1)(a) of the *Florida Statutes*. 237

The Fourth District Court of Appeal affirmed the conviction but wrote an opinion discussing the prosecutor's closing argument. 238 The Fourth District said "[t]he reference to a misdemeanor suggested to the jury that the sentence for battery was relatively minor when compared to second degree murder and

231. 718 So. 2d 878 (Fla. 4th Dist. Ct. App. 1998).
232. *Id.* at 878.
233. *Id.* at 880.
234. *Id.*
235. *Id.*
236. *Legette*, 718 So. 2d at 881.
237. *Id.*
238. *Id.* at 878–79.
manslaughter." The court discussed the reasons for the 1985 amendment to Florida Rule of Criminal Procedure 3.390(a). Before 1985, the jury was allowed to consider the issue of sentence length. The Fourth District found two reasons for the amendment: "to 'minimize the potential for jury sympathy based on the defendant's possible sentence' [and] to harness the jury's exercise of its pardon power."

8. Bolstering the Credibility of Police Officers

In Freeman v. State, the defendant was convicted of carrying a concealed firearm and sentenced to two years of probation. At trial, the testimony of the State’s witnesses was in direct conflict with the defense witnesses’ testimony concerning whether the firearm discovered in the defendant’s automobile was concealed from the police officers. During closing argument, the prosecutor stated:

... So that's the question. Who do you want to believe here? Do you want to believe the officers or do you want to believe Mr. Freeman? Ladies and gentlemen, I'm here to tell you that you should believe the officers. Why should you believe the officers? Simply because they're police officers, because they're sworn to uphold the law, because they're trained observers, because they have no reason to lie.

The court reasoned that because the credibility of the State’s witnesses was crucial in determining the factual dispute about concealment of the weapon, the prosecutor’s argument was clearly improper and was not harmless error. The prosecutor later referred to facts not in evidence and the defense objected. Although the defense had made no objection to the

239. Id. at 880.
240. Id.
241. Legette, 718 So. 2d at 880.
242. Id. (quoting Limose v. State, 656 So. 2d 947, 949 (Fla. 5th Dist. Ct. App. 1995)).
243. 717 So. 2d 105 (Fla. 5th Dist. Ct. App. 1998).
244. Id. at 105.
245. Id. at 106.
246. Id. at 105.
247. Id. at 105–06.
248. Freeman, 717 So. 2d at 106.
first offending argument, the court found the prosecutor’s collective comments were “so prejudicial as to vitiate the entire trial.”

In *Sinclair v. State*, the defendant was convicted of attempted first-degree murder, robbery, and armed burglary. Although the Fourth District Court of Appeal affirmed the defendant’s conviction and sentence, it wrote an opinion to admonish the prosecutor’s improper comment on the veracity of a detective who testified. The prosecutor stated, “Detective Shotwell, you have to determine if he is the kind of detective you want to believe or not. Do you want to put his career on the line and for whatever motivations as lead—.” The defense objected and the trial court gave a curative instruction. The Fourth District stated that it has “repeatedly condemned comments that the jury should believe a police officer because the officer would not put his or her career on the line by committing perjury.” The court then explained why this type of argument is patently improper:

First, although such comments may not in some instances constitute an affirmative statement of the prosecutor’s personal belief in the veracity of the police officer, they do constitute an inappropriate attempt to persuade the jury that the police officer’s testimony should be believed simply because the witness is a police officer. Second, such comments make reference to matters outside the record and constituted [sic] impermissible bolstering of the police officer’s testimony.

The Fourth District concluded that because the trial court sustained the objection and gave a curative instruction, the trial court did not abuse its discretion when it denied the motion for mistrial based upon the improper comment.

249. *Id.* at 105.
250. *Id.* at 106.
252. *Id.* at 100.
253. *Id.*
254. *Id.*
255. *Id.*
256. *Sinclair*, 77 So. 2d at 100.
257. *Id.* (quoting *Cisneros v. State*, 678 So. 2d 888, 890 (Fla. 4th Dist. Ct. App. 1996)).
258. *Id.* at 101.
9. Bolstering the Credibility of the Victim

In *Lewis v. State*, the defendant was found guilty of armed robbery with a weapon and armed car jacking with a weapon and was sentenced to fifteen years in state prison. He appealed his conviction and sentence and argued "that the trial judge erred in denying his motion for mistrial based on improper arguments made by the prosecutor during closing argument." Although the Third District Court of Appeal affirmed the conviction and sentence, it noted that the prosecutor's closing argument was extremely disturbing. During closing argument, the prosecutor improperly and repeatedly vouched for and bolstered the testimony of the victim:

And, he was honest. He didn't exaggerate. He didn't lie. He didn't go in and say, "[y]eah, that's the guy," because, you know he's a nice kid. That's just the type of person he is. As a matter of fact, even when he was describing the gun, he said, "look, it was used in a manner that I believed it was a gun." But he's not going to come out and say, yeah, man, a hundred percent it's a gun, because that's the type of person he is. Don't let that confuse you. Don't release him into society. Don't let him walk simply because [the victim] is super honest or super accurate.

Don't reward him because Peter [the victim] is a super honest guy and would not come in here and exaggerate and would not come in here and lie. The court said vouching for the credibility of the victim was improper, but the error was harmless considering the overwhelming evidence of guilt.

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259. 711 So. 2d 205 (Fla. 3d Dist. Ct. App. 1998), *review denied*, 725 So. 2d 1109 (Fla. 1998).


261. *Id.* at 207.

262. *Id.*

263. *Id.* (emphasis in original).

264. *Id.* at 208.
10. Ridiculing the Defense Theory

In *Miller v. State*, the defendant was convicted of burglary of a dwelling, petit theft, and attempted burglary. He appealed and claimed *inter alia* that the trial court erred when it denied his motion for a new trial based on improper arguments the prosecutor made during closing argument. During trial, the defendant asserted the defense of voluntary intoxication. The State and the defense presented witness testimony that supported the voluntary intoxication defense. During closing argument, the prosecutor stated:

PROSECUTOR: Voluntary intoxication. Let's talk about this. Their defense is the defense of lack of responsibility. That's simply what it is. He has the nerve to tell you he drank twenty-one beers. No one tied him down, no one forced him to do it—

DEFENSE COUNSEL: Your Honor, I object, this is an instruction on the law.

THE COURT: Overruled. This is argument.

PROSECUTOR: No one forced him to drink those twenty-one beers he claims to have drunk that night, but still is able to at least walk. But yet, because he chose to drink in a reckless manner he's not guilty. Where's the responsibility for your actions? This is not a case about lack of intent, it's a question of lack of responsibility. For when he tells you that he was voluntarily intoxicated, "I'm so drunk I don't know what I'm doing, I don't know what is right from wrong," who did the drinking? And who forced him to drink? 

The Fourth District said the prosecutor's comments improperly expressed personal opinion of the defense theory. The court stated a defendant has a "fundamental right to present a defense... and to have the jury properly instructed on any legal defense supported by the evidence." The court went on to say "[t]hese rights stand for naught if the prosecutor

266. Id. at 452.
267. Id.
268. Id.
269. Id.
270. Miller, 712 So. 2d at 452–53.
271. Id. at 453.
272. Id. (internal citations omitted).
can ridicule a defense so presented, denigrate the accused for his temerity in raising the issue, and misstate the law in contradiction of the judge’s instructions, as the prosecutor in this case did.\textsuperscript{273} The court concluded that the prosecutor’s misconduct was a “foul blow” and deprived the defendant of his fundamental right to a fair trial.\textsuperscript{274}

11. Improper Penalty-Phase Arguments

“[P]rosecutorial misconduct in the penalty phase must be egregious to warrant vacating the sentence and remanding for a new penalty phase proceeding.”\textsuperscript{275} In \textit{Urbin v. State},\textsuperscript{276} the defendant was found guilty of first-degree murder and robbery and was sentenced to death.\textsuperscript{277} The Supreme Court of Florida affirmed the conviction but reversed the death sentence based on proportionality.\textsuperscript{278} Although the defense had failed to object to the prosecutor’s penalty-phase argument and the issue was moot because of the proportionality reversal, the Supreme Court of Florida said it was obligated to acknowledge and disapprove of improprieties in the prosecutor’s closing penalty-phase argument.\textsuperscript{279}

The Supreme Court of Florida was particularly concerned that the prosecutor had invited the jury to disregard the law.\textsuperscript{280} The prosecutor improperly asserted that if the defendant received a life sentence, they might still release him some day.\textsuperscript{281} The prosecutor argued:

\begin{quote}
I anticipate that the defense lawyer is going to argue for you—argue to you to recommend the life sentence. They’re going to argue that life without parole is what you ought to recommend. And I submit to you today now that is the state of the law, life without parole. We all know in the past laws have changed. And \textit{we all know that in the future laws can change}. The law now is life without parole.\textsuperscript{282}
\end{quote}

\begin{itemize}
\item [273.] Id.
\item [274.] Id.
\item [275.] Garron v. State, 528 So. 2d 353, 359 (Fla. 1988).
\item [276.] 714 So. 2d 411 (Fla. 1998).
\item [277.] Id. at 413.
\item [278.] Id. at 418.
\item [279.] Id. at 418–19.
\item [280.] Id. at 420.
\item [281.] \textit{Urbin}, 714 So. 2d at 420.
\item [282.] Id. at 420 n.10 (emphasis added).
\end{itemize}
The court said the prosecutor was "encourag[ing] the jury to reject the only lawful alternative to the death penalty, even if they believed that to be the right recommendation, based on a reflexive fear that, regardless of the law, [the defendant] might someday be eligible for parole." The court found the prosecutor's "ignore the law" argument had absolutely no place in a trial. The prosecutor aggravated the matter more when he argued:

[M]y concern is that some of you may be tempted to take the easy way out, to not weigh the aggravating circumstances and the mitigating circumstances and not want to fully carry out your responsibility and just vote for life.... I'm going to ask you not be swayed by pity or sympathy. I'm going to ask you what pity, what sympathy, what mercy did the defendant show [the victim].... I'm going to ask you to follow the law. I'm going to ask you to do your duty.

The Supreme Court of Florida noted that the prosecutor's argument was similar to a case in which the First District Court of Appeal had condemned the argument as "an impermissible attempt by the prosecution to instruct the jury as to its duties and functions." The prosecutor went beyond the evidence when he stated the "victim was shot while 'pleading for his life.'" The court found that this type of argument was an impermissible emotional appeal and constituted a "subtle 'golden rule' argument." The prosecutor put his own words in the victim's mouth by saying "[d]on't hurt me. Take my money, take my jewelry. Don't hurt me." The court found these imaginary words were an attempt by the prosecutor to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused."

The court then addressed the prosecutor's verbal attack on the defendant's mother. The prosecutor called the defendant's mother a "mistress of excuses" three times and criticized her because she never expressed any concern, remorse, or sorrow to the victim's family.

283. Id. at 420.
284. Id.
285. Id. at 421.
286. Urbin, 714 So. 2d at 421 (citing Redish v. State, 525 So. 2d 928, 930 (Fla. 1st Dist. Ct. App. 1988)).
287. Id. at 421.
288. Id.
289. Id.
290. Id. (quoting Barnes v. State, 58 So. 2d 157, 159 (Fla. 1951)).
291. Urbin, 714 So. 2d at 421.
292. Id. at 421.
court explained that "[t]hese attacks could only serve to prejudice [the defendant] for any animosity that may have been aroused in the jury for [defendant's] mother, hence essentially turning the substantial mitigation of parental neglect against [defendant]." The court also found the prosecutor improperly concluded his argument by stating:

If you are tempted to show this defendant mercy, if you are tempted to show him pity, I'm going to ask you to do this, to show him the same amount of mercy, the same amount of pity that he showed [the victim] on September 1, 1995, and that was none.

Mercy arguments are impermissible because they are "'an unnecessary appeal to the sympathies of the juror calculated to influence their sentence recommendation.'"

VIII. CONCLUSION

Unfortunately, despite warnings, admonitions, and appellate court reversals, misconduct continues, showing that some trial attorneys ignore the requirement for professional and ethical conduct in the courtroom. To halt unethical conduct, appellate courts appear more willing to take serious action against the attorney and forward instances of misconduct to The Florida Bar for disciplinary proceedings.

Judge Altenbernd recently proposed a solution to misconduct during closing argument:

[T]he state attorneys, the public defenders, and the circuit court judges, at a statewide level, need to create a continuing legal education videotape for prosecutors and a separate video tape for defense attorneys, demonstrating improper closing arguments that are against the rules and should never be made. Each new attorney who practices in criminal court should be required to view these tapes before the attorney is allowed to try a case. When an attorney

293. Id.
294. Id.
295. Id. (quoting Rhodes v. State, 547 So. 2d 1201, 1206 (Fla. 1989)).
296. See Urbin, 714 So. 2d at 422.
violates the rules for the first time in closing argument, the trial judge should be encouraged to require the attorney to view the tape again. After two or three viewings, if an attorney still cannot argue within the rules, other more serious sanctions should be imposed either by a supervising attorney or by the trial court. Given the seriousness of these trials and the ramifications of appellate court reversals, the public, the victims of crime, and the defendants deserve no less.\textsuperscript{299}

"If attorneys do not recognize improper argument, they should not be in a courtroom. If trial attorneys recognize improper argument and persist in its use, they should not be members of The Florida Bar."\textsuperscript{300} "\textit{You can win your cases, you can win the tough ones, but you have to do it with dignity and with honor . . . . We are a noble and honorable profession.}"\textsuperscript{301}

\textsuperscript{299} Id. at 897.

\textsuperscript{300} Id. (quoting Luce v. State, 642 So. 2d 4 (Fla. 2d Dist. Ct. App. 1994) (Leblue, J., specially concurring)).

Public Sector Labor and Employment Law
John Sanchez*

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I. HIRING

A. State of Florida as Employment Agency

Who would have guessed that the State of Florida would take out a help
wanted advertisement for exotic dancers? Exhibitionists willing to relocate
to Stuart and dance at a nightclub were urged to send a résumé to the
Department of Labor/Bureau of Workforce Program Support, according to
an article in the Miami Herald.¹ Under federal law, before an employer is
entitled to hire someone from another country, the employer must make a

¹ John Pacenti, Strippers Wanted: State Runs Unusual Employment Ad, MIAMI
HERALD, Apr. 16, 1999, at 5B.
Sanchez finding that no Floridian is suitable for the job. If the efforts of the Florida Department of Labor are unavailing, the strip club's application goes to the United States Department of Labor, which decides whether to approve certification for a work visa. If given the green light, only then, can the club request that the Immigration and Naturalization Service approve a foreign employee.

B. Negligent Hiring

A school in Davie, Florida is being sued for failing to run a criminal background check on a volunteer who turned out to be a convicted pedophile. According to reports the *Miami Herald*, the school was unaware of the volunteer's criminal record. Similar charges had been raised against the same volunteer at a public school program for autistic children. The School Board noted that its own policy only requires those "who work one on one, unsupervised with children to be fingerprinted." Florida law requires public school teachers to be fingerprinted in order to run background checks. If fingerprint tracing reveals that a teacher has been convicted of a crime involving moral turpitude, the teacher must be removed from any position involving direct contact with students.

While many employment checks now include a routine review of criminal records compiled by the National Crime Information Center, an employer's failure to check up on applicants does not invariably reflect gross negligence. As a practical matter, employers are advised to conduct background investigations as a strategy for averting liability stemming from negligent hiring. Liability under Title 42 of the *United States Code* § 1983, The Civil Rights Act, may lie only upon the exercise of some governmental policy. Liability does not rest wholly on a showing of a master-servant relationship, also known as respondeat superior.

2. *Id.*
3. *Id.*
4. *Id.*
5. Shari Rudavsky, *Families Sue Man Accused of Sex Abuse Suits: Davie School, Nova Negligent*, *MIAMI HERALD* (Broward), May 7, 1999, at 1A.
6. *Id.*
7. *Id.*
8. *Id.*
10. *Id.*
II. HOURS AND WAGES

A. Fair Labor Standards Act

1. Constitutionality of FLSA Extension to Public Sector

Under the Eleventh Amendment of the United States Constitution, federal courts lack jurisdiction over suits by individuals against states for violating federal law. However, in 1996, in *Seminole Tribe v. Florida*, the Supreme Court ruled that the Eleventh Amendment bars Congress from subjecting states to suits in federal court for violating acts of Congress passed pursuant to its powers under the Commerce Clause of the Constitution. The Fair Labor Standards Act ("FLSA"), enacted under the Commerce Clause, authorizes federal court suits by state employees. Since *Seminole Tribe*, the Eleventh Circuit, among other courts, has ruled that it lacks jurisdiction over state employees' FLSA claims against a state.

In 1999 the Supreme Court ruled that states have sovereign immunity in state courts similar to their Eleventh Amendment immunity in federal courts. In 1992, ninety-six state probation and parole officers sued the State of Maine in federal court for violating the FLSA by not giving them premium pay for overtime. In light of *Seminole Tribe*, the workers' suit was dismissed, and the First Circuit Court of Appeals affirmed the dismissal. The public employees then turned to the Maine courts for relief. The Supreme Judicial Court of Maine affirmed the judgment of the Superior Court of Cumberland County, deciding that the State enjoyed sovereign immunity in its own courts, and likewise dismissed the suit.

15. U.S. CONST. amend. XI. The Eleventh Amendment recites: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." *Id.*
17. *Id.* at 44.
19. *Id.* § 202.
23. *Id.* at 40–41.
25. *Id.* at 175–76.
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Supreme Court of the United States agreed with the lower courts and affirmed.\textsuperscript{26}

Justice Kennedy's opinion for the majority in \textit{Alden v. Maine}\textsuperscript{27} stated that the Eleventh Amendment did not govern the case.\textsuperscript{28} At the same time, he made clear the principle that state immunity "is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design."\textsuperscript{29} In his dissent, Justice Souter warned that 4.7 million state employees were now barred from suing their employer in both state and federal court.\textsuperscript{30} Although the federal government can still sue in state court, the labor department is ill equipped to take up the slack left by \textit{Seminole Tribe} and \textit{Alden}.

2. Minimum Wage Issues

Thousands of Haitian migrants earned less than $100 for up to sixty-hour workweeks, picking beans in the vegetable fields of South Dade County.\textsuperscript{31} According to an article in the \textit{Miami Herald}, many of these farmworkers hope to convince a federal court judge in Miami that they are owed three million dollars in back minimum wages.\textsuperscript{32} Six hundred twelve workers filed a class action suit in 1990, but their case is only now being heard.\textsuperscript{33} The farmers contend that they did provide minimum-wage payments to contractors, who then paid the workers less than minimum wage.\textsuperscript{34} In depositions, the contractors conceded that they never kept any records.\textsuperscript{35} In 1996 the Eleventh Circuit ruled that the growers, not the labor contractors, were the actual employers of the migrant workers.\textsuperscript{36} As a result, the farmers bear the burden of obeying federal wage and hour laws.\textsuperscript{37} The case could take a year to reach a decision.\textsuperscript{38}

\textsuperscript{26.} Alden v. Maine, 119 S. Ct. 2240, 2269 (1999).
\textsuperscript{27.} \textit{Id.} at 2240.
\textsuperscript{28.} \textit{Id.} at 2254.
\textsuperscript{29.} \textit{Id.} at 2243.
\textsuperscript{31.} David Lyons, \textit{Migrant Workers Take Wage Dispute to Court}, \textit{MIAMI HERALD}, Feb. 14, 1999, at 1B.
\textsuperscript{32.} \textit{Id.}
\textsuperscript{33.} \textit{Id.}
\textsuperscript{34.} \textit{Id.}
\textsuperscript{35.} \textit{Id.}
\textsuperscript{36.} Lyons, \textit{supra} note 31, at 1B.
\textsuperscript{37.} \textit{Id.}
\textsuperscript{38.} \textit{Id.}
The Miami-Dade County Commission voted twelve to zero on May 11, 1999 to enact a “living wage” ordinance, requiring Miami-Dade County, and companies that furnish services to the County, to pay employees at least $8.56 per hour with health benefits, according to a report in the Miami Herald. The ordinance will raise the salaries of 1760 full-time and part-time public employees working for the county. The law, to be phased in over several years, becomes fully effective in October, 2002. Miami-Dade joins twenty-six other cities across the nation that have adopted similar laws.

President Clinton has proposed raising the minimum wage by one dollar, to $6.15, by September, 2000. Federal Reserve Chairman, Alan Greenspan, opposes the increase. The pros and cons of such an increase were debated recently in the Miami Herald.

3. Independent Contractors v. Employees

FLSA, the Act governing minimum wage and overtime pay, was amended by Congress in 1974 to cover the vast majority of state and local government employees. In Brouwer v. Metropolitan Dade County, a juror alleged that failure to compensate jurors for jury duty amounted to a FLSA violation. The Eleventh Circuit dismissed the suit, ruling that there is no employment relationship between a juror and the county. The circuit court applied the “economic reality” test to determine whether an employment relationship existed. Moreover, the court made clear that the issue of employment status under the FLSA is a question of law.

39. Don Finefrock, Living Wage is Approved for Dade, MIAMI HERALD, May 12, 1999, at 1B.
40. Id.
41. Id.
42. Id.
44. Id.
45. Id.
47. 139 F.3d 817 (11th Cir. 1998).
48. Id. at 818.
49. Id. at 819.
50. Id. (citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 31–33 (1961); Aimable v. Long & Scott Farms, 20 F.3d 434, 439 (11th Cir. 1994)).
51. Brouwer, 139 F.3d at 818 (citing Villarreal v. Woodham, 113 F.3d 202, 205 (11th Cir.1997)).
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Dade County clearly falls within the FLSA's definition of public employer. The court cited an array of differences between public employees and jurors, including the following: 1) jurors are selected involuntarily from voter registration lists; 2) jurors enjoy no sick or annual leave, nor job security, nor social security or pension benefits; 3) jurors do not voluntarily give their labor to the state, but are forced to serve; 4) jurors are not paid a salary, instead, they are entitled to a statutorily set sum no matter how many hours they serve; and 5) the state lacks the power to fire jurors for poor performance, but must accept their verdict.

4. FLSA Exemption Section 13(a)(1) Exemption for Executive, Administrative, and Professional Workers

Section 13(a)(1) of the FLSA carves out a minimum wage and overtime pay exemption for any employee working "IN A BONA FIDE EXECUTIVE, ADMINISTRATIVE, OR PROFESSIONAL CAPACITY." The basic test for measuring whether an employee is salaried is found at 29 C.F.R. § 541.118(a). Under this Department of Labor regulation,

[a]n employee will be considered to be paid "on a salary basis" ... if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.

There was a split among the circuit courts over whether docking must have actually occurred, or whether mere potential was enough. The Supreme Court settled the issue in Auer v. Robbins in 1997. Auer upheld the Secretary of Labor's regulation in 29 C.F.R. § 541.118, making clear that public employees, to win exemption from overtime pay, must not face salary reductions because of variations in quantity or quality of work performed. However, Auer left several loose ends, but the Supreme Court recently

53. Brouwer, 139 F.3d at 819.
55. 29 C.F.R. § 541.118(a).
56. Id.
58. Id.
59. Id. at 452.
60. Id. at 463–64.
denied certiorari in *Davis v. City of Hollywood*,\(^{61}\) an Eleventh Circuit case arising in Florida.\(^{62}\) *Davis* raised the question whether the "window of correction" spelled out in regulations covering deductions made inadvertently would be lost, even if the employer reimbursed the employee for such deductions and promised to comply in the future.\(^{63}\)

5. **Prohibited Employer Acts Under the FLSA**

FLSA makes it unlawful for any person to deal in any manner with goods which were produced by employees whose pay did not conform with the minimum wage and overtime provisions of the Act,\(^{64}\) or to violate the minimum wage and overtime rules themselves.\(^{65}\) *Tyler v. State*\(^{66}\) raised the question whether this provision of the FLSA is violated when an employee is denied the right to prove his case of fraudulent denial of overtime in court.\(^{67}\)

B. **Equal Pay Act**

The Equal Pay Act of 1963 ("EPA")\(^{68}\) aimed at ensuring that employees doing equal work should be paid equal wages, regardless of sex.\(^{69}\) In 1999, Congress took up a bill, the Paycheck Fairness Act,\(^{70}\) designed to strengthen the FLSA by allowing for compensatory and punitive damages and putting gender based wage bias on an equal footing with race or ethnicity based wage discrimination.\(^{71}\) The proposed bill would also prohibit employers from punishing workers for sharing salary information with their coworkers.\(^{72}\) Moreover, Congress is considering reintroducing the Fair Pay Act\(^{73}\) aimed at barring pay bias on grounds of sex, race, or national origin for work in "equivalent" jobs.\(^{74}\)

62. *Id.* at 1178.
63. *Id.* at 1180.
65. *Id.* § 215(a)(2).
67. *Id.* at 812.
69. *Id.*
71. *Id.*
72. *Id.*
74. *Id.*
III. INVASION OF PRIVACY

A. Public Employee Drug Testing

In *Cox v. McCraley*, Cox worked for the Osceola County School Board as a lead painter. After working there for eleven years, Cox received a letter from his supervisor, Whitman, stating "that he had a 'reasonable suspicion' that Cox had violated School Board policy regarding drug and/or alcohol abuse." Three options were offered to Cox: 1) undergo drug testing; 2) join an employee assistance program; or 3) hand in his resignation. When Cox elected to take the drug screening test, he was told that this option had been mistakenly included, and that it was no longer available. Although Cox completed his annual contract, he was not reappointed.

Cox filed a grievance, and after conducting a full evidentiary hearing, the School Board ruled "that there was no reasonable suspicion of drug use by Cox . . . ." At the same time, the Board made clear that it was powerless to change the decision not to reappoint Cox. Cox appealed the Board’s ruling to Florida’s Fifth District Court of Appeal, which sustained the Board’s decision.

In his lawsuit in federal district court, Cox claimed that the defendants committed an "unwarranted invasion of [his] fundamental right to privacy . . . ." Cox sued under § 1983 of title 42 of the United States Code, claiming violations of the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. Cox also invoked the corresponding sections of the Florida Constitution, and a claim for intentional infliction of emotional distress under Florida common law.

In its opinion, the federal district court agreed that Cox was entitled to rely on § 1983 to raise violations of his Fourth Amendment right to privacy.
and his Fifth Amendment right to procedural due process. However, before a city is liable under § 1983, the plaintiff must allege municipal liability based upon an officially promulgated policy or an unofficially adopted custom. Cox’s claim of a municipal policy, the letter Whitman wrote to Cox raising a suspicion of drug or alcohol abuse, establishes, at most, a claim that such is an unofficially adopted custom of the School Board. Custom will support municipal liability only if it is so entrenched and long standing that it carries the force of law. The federal district court concluded that Cox failed to state a claim against the School Board under § 1983. Assuming arguendo, that Cox had stated a § 1983 claim, his privacy claim under the Fourth Amendment was unavailing. Cox fell short of alleging that anything “implicit in the concept of ordered liberty” was at stake. Cox’s due process claims under the Fifth and Fourteenth Amendments suffer the same fate; absent a property interest in reappointment, no procedural due process violation took place. Even so, the Board offered Cox a full evidentiary hearing.

Turning to Cox’s federal claims against his former supervisors in their individual capacity, the court made clear that Cox failed to prove that the defendants acted under color of state law to deprive Cox of a right conferred by the Constitution or the laws of the United States. The court concluded that “government officials performing discretionary functions are entitled to qualified immunity from civil damages if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” The court ruled that Cox’s supervisors “were acting within the scope of their authority and did not violate any clearly established law of which a reasonable person would have known.” Cox’s complaint was dismissed with prejudice. In addition, the court declined supplemental jurisdiction over Cox’s state law claims.

87. Id.
88. Id. (citing Monell v. Department of Soc. Servs., 436 U.S. 658, 690–91 (1978)).
89. Cox, 993 F. Supp. at 1456.
90. Id. (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)).
91. Cox, 993 F. Supp. at 1456.
92. Id.
93. Id.
94. Id.
95. Id.
96. Cox, 993 F. Supp. at 1457.
97. Id. (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
98. Id.
99. Id. at 1457–58.
100. Id. at 1458.
B. False Light Invasion of Privacy

Apart from constitutional protection of privacy found either in the Fourth Amendment or in the penumbras the Bill of Rights, privacy founded on state constitutions, statutes, and common law has been invoked by public employees as a separate cause of action sounding in tort. To state a claim of tortious invasion of privacy, the intrusion must be unreasonable or offensive and must outweigh the employer’s need to pry. Claims of invasion of privacy committed by public employers are often defeated either by statutory or common law public official immunity.

In Harris v. District Board of Trustees, coordinators of a criminal justice program run by a community college sued for invasion of privacy after they lost their jobs. The court sustained the former public employees’ claim that the community college had presented the workers in a false light. Similarly, the Miami Herald recently reported on a case involving public employment and invasion of privacy. Andrew Greene ran against School Board member Miriam Oliphant in 1992, but Greene’s prospects dimmed amid news reports that he had received counseling for psychological problems. In 1997 a jury awarded Greene $600,000 for invasion of privacy and $250,000 for negligence. The Fourth District Court of Appeal handed down an opinion in June, 1999 affirming the jury’s award of $850,000 to the former School Board candidate. The jury agreed with the former teacher that his employer had no right to release Greene’s confidential psychological records to the news media without his consent. At the same time, state law limits claims against public entities to $100,000

102. See id. at 1329.
103. See id.
104. 9 F. Supp. 2d 1319 (M.D. Fla. 1998).
105. Id. at 1322.
106. Id. at 1329.
107. Daniel de Vise, Judgment Against Schools Upheld Candidate’s Files Leaked to Media, MIAMI HERALD (Broward), June 19, 1999, at 3B.
108. Id.
109. Id.
110. Id. (citing School Bd. of Broward County v. Greene, 24 Fla. L. Weekly D1392 (4th Dist. Ct. App. June 16, 1999) (the opinion cited in the article was later withdrawn and superseded on denial of reh’g by School Bd. of Broward County v. Greene, 739 So. 2d 668 (4th Dist. Ct. App. 1999)).
111. Id.
for negligence. \(^{112}\) It is up to the state legislature to approve any higher sum, which seems unlikely. \(^{113}\)

IV. RIGHT AGAINST SELF-INCrimINATION

Under the Fifth Amendment of the United States Constitution, no person "shall be compelled in any criminal case to be a witness against himself." \(^{114}\) This ban on compelled testimony covers evidence that might be admissible against a public employee in a criminal proceeding. \(^{115}\) A public employee who confesses to self-incriminating evidence of criminal behavior when threatened with dismissal from employment may invoke the privilege in defense. \(^{116}\) The privilege may not be invoked, however, when the compelled testimony will not be relied upon in a criminal proceeding. \(^{117}\)

In *United States v. Veal*, \(^{118}\) Veal, Camacho and other police officers, were members of the Street Narcotics Unit ("SNU") of the Miami Police Department. \(^{119}\) The Chief of Police received a letter in which an anonymous informant warned that unidentified drug dealers had met at Seventh Avenue and N.W. Thirty-Second Street, in Miami and had contracted to kill Camacho. \(^{120}\) The police knew this address was the home of Mercado, a drug dealer. \(^{121}\) On their way to a sting operation, Veal and other SNU members stopped at Mercado's house, approached Mercado, who was outside, and led him into his house. \(^{122}\) Soon, police cars and a fire rescue unit arrived in response to calls for assistance from Camacho. \(^{123}\) Despite emergency medical efforts, Mercado died at the scene. \(^{124}\) Pictures taken of Camacho once he returned to the police station showed a long rip in the front of Camacho's shirt. \(^{125}\) These pictures, plus a butcher knife (allegedly retrieved from the crime scene) and a bag of crack cocaine (allegedly seized from Mercado) were placed in the lieutenant's cabinet. \(^{126}\)

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112. De Vise, *supra* note 107, at 3B (referring to FLA. STAT. § 768.28 (1999)).
113. *Id.*
114. U.S. CONST. amend. V.
115. *See id.*
119. *Id.* at 1236.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Veal*, 153 F.3d at 1236.
124. *Id.*
125. *Id.*
126. *Id.*
A Federal Bureau of Investigation ("FBI") investigation led to federal civil rights charges against Camacho, Veal and other police officers for violating Mercado's civil rights. The district judge found the statements concerning the circumstances of Mercado's death within the scope of Garrity v. New Jersey, and granted the officers' motion to suppress the statements. The officers were acquitted of conspiracy in the civil rights trial, and the jury deadlocked on the other charges. In July of 1993 a federal grand jury in South Florida indicted Camacho, Veal, and two other police officers for conspiring to obstruct justice, for perjury, and for giving false statements. The defendants once again moved to suppress their statements, which had been suppressed under Garrity in the civil rights trial. The judge denied those motions, and both Camacho and Veal were convicted and received prison sentences.

On appeal, Veal challenged the district court's refusal to suppress their statements after Mercado's death, since the same judge had suppressed those statements under Garrity in the civil rights trial. In Garrity, the Supreme Court made clear that the Fifth Amendment applies to police officers facing interrogation by other law enforcement officers and that "incriminating statements made under threat of termination for remaining silent are inadmissible in a subsequent criminal prosecution concerning the matter of inquiry absent a knowing and voluntary waiver." The Eleventh Circuit ultimately ruled that Garrity and the Fifth Amendment do not protect false statements from subsequent prosecutions:

When an accused has been accorded immunity to preserve his right against self-incrimination, he must choose either to relinquish his Fifth Amendment right and testify truthfully, knowing that his statements cannot be used against him in a subsequent criminal prosecution regarding the matter being investigated, or continue to assert the privilege and suffer the consequences. There is no third option for testifying falsely without incurring potential prosecution for perjury or false statements.

127. Id. at 1238.
129. Veal, 153 F.3d at 1238.
130. Id.
131. Id.
132. Id.
133. Id.
134. Veal, 153 F.3d at 1238-39.
135. Id. at 1239 (citing Garrity v. New Jersey, 385 U.S. 493 (1967)).
136. Id. at 1241.
V. FRAUD CASES TIED TO DOWNSIZING

In July of 1999 a supervisory claims examiner for the Department of Veterans Affairs ("VA") in Florida, who stole $615,451 by writing up a false claim in her fiancé’s name, was sentenced to thirty-three months in prison, according to a news report in the Washington Post.\(^\text{137}\) Investigators say Joy Cheri Brown, a supervisory claims examiner for the VA, falsely granted a 100% disability claim to her fiancé, a St. Petersburg police officer, who had served in the military during Desert Storm.\(^\text{138}\) By the time the scheme was detected, Brown had granted her fiancé payments totaling $519,981, and awarded him a $5011 monthly payment for a fake injury.\(^\text{139}\) The inspector general for the VA attributed the fraud to staff reductions that left the VA more vulnerable; the VA’s benefits staff has been cut by twenty percent since 1993.\(^\text{140}\) The VA’s inspector general referred to the case as “the dangers inherent in downsizing.”\(^\text{141}\)

VI. REGULATION OF OFF-DUTY BEHAVIOR

At times, the public employer may fairly stake a claim in the off-duty behavior of its employees to achieve a smoothly running agency or to preserve its image of integrity and honesty.\(^\text{142}\) Arguably, the employer’s stake is greatest when crimes are committed while the public employee is off-duty.\(^\text{143}\) For example, in Castilleja v. City of Jacksonville,\(^\text{144}\) while off-duty and in his own car, Castilleja, a Jacksonville police officer, hit and damaged a fence and sign at a trailer park, and left the scene without reporting the incident to the authorities.\(^\text{145}\) Additionally, he did not leave the statutorily mandated information with the trailer park management or owners.\(^\text{146}\) The next day, an eyewitness reported Castilleja’s tag number to the police.\(^\text{147}\) Although he initially lied, Castilleja eventually came clean and

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137. Bill McAllister, Fraud Cases Worry VA IG; Report on Convictions Cites a Down Side to Downsizing, WASH. POST, July 20, 1999, at A17.
138. Id.
139. Id.
140. Id.
141. Id.
143. See id.
144. 738 So. 2d 335 (Fla. 1st Dist. Ct. App. 1998).
145. Id. at 335.
146. Id.
147. Id.
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admitted his role in the accident. For this, Castilleja received two noncriminal traffic citations: one for leaving the scene without leaving information, and one for careless driving.

As a result of this incident, Castilleja received "notice of immediate suspension with termination to follow." After a plenary evidentiary hearing, the Jacksonville Civil Service Board ruled that the punishment was at odds with the City's charter and that it was manifestly unjust. On appeal, the circuit court reversed the Board's ruling as unsupported by competent substantial evidence. On appeal, Castilleja claimed that the lower court had improperly reweighed the evidence and substituted its judgment for the Board's. The court of appeal agreed. The lower court's scope of review was confined to: 1) whether the Board afforded due process; 2) whether the basic tenets of the law were observed; and 3) whether the Board's findings of fact and conclusions of law were grounded in competent substantial evidence. The First District Court of Appeal concluded that the circuit court failed to determine whether the Board's rulings were supported by competent substantial evidence, and instead reviewed the record to see if the Sheriff's decision was supported by competent substantial evidence. The circuit court erroneously sat as a new Board and reweighed the evidence in the case. As for Castilleja's request for backpay, the court of appeal ruled that his request for postponement should not result in his employer having to pay for time he did not work.

An article in the Miami Herald reported on a moonlighting case involving a Hollywood police officer that was caught working an off-duty security job during his regular patrol shift. As punishment, the officer was suspended for six months from performing twenty dollars an hour moonlighting assignments and his eligibility for promotion or transfer was withdrawn for one year. The officer was cleared of criminal wrongdoing,

148. Id. at 335–36.
149. Castilleja, 738 So. 2d at 336.
150. Id.
151. Id.
152. Id.
153. Id.
154. Castilleja, 738 So. 2d at 336.
155. Id. (citing Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995)).
156. Id.
157. Id. at 337.
158. Id.
160. Id.
The Hollywood Police Department conducted a probe into off-duty jobs after the Miami Herald ran its own investigation into the practice. The newspaper’s probe yielded many examples in which officers were scheduled to be in two places at once. Hollywood’s off-duty policy was run as a “buddy-buddy” or “clique” system often at the cost of offending minorities and female officers. The report recommended that the Department assign off-duty work through a rotation system. Before any changes can occur, however, the City must bargain with the police union over the issue, and the union is known to be hostile to a rotation system.

VII. FAMILY AND MEDICAL LEAVE ACT

Under the Family and Medical Leave Act (“FMLA”), all eligible state and local government employees are entitled to twelve weeks of unpaid leave in a twelve month period: 1) for birth or adoption of a child or placement of a foster child; 2) to care for a spouse, child or parent with a serious health condition; or 3) for the employee’s own serious health condition. Leaves taken in response to a “serious health condition” include time laid up in a hospital, hospice or residential medical care facility.

In Wright v. Department of Children & Families, Wright, a former employee of the Department of Children and Families, was unexpectedly absent from work. His illnesses included an abscessed tooth, gastritis, hepatitis A, bronchitis, and acute arthritis. Wright notified his supervisor of his illnesses and furnished medical certification for these absences. Wright was disciplined for his use of approved leave. Wright argued that

161. Corey Dade, Officer’s Off-Duty Job While On Duty No Crime: Policeman May Still Face Action, MIAMI HERALD (Broward), Jan. 28, 1999, at 1A.
162. Id.
163. Corey Dade, Fix Off-Duty Work Policy, Cops Advised, MIAMI HERALD (Broward), Dec. 11, 1998, at 1B.
164. Id.
165. Id.
166. Id.
168. Id. § 2612.
170. 712 So. 2d 830 (Fla. 3d Dist. Ct. App. 1998).
171. Id. at 831.
172. Id.
173. Id.
174. Id.
the Department’s imposition of discipline for the use of approved sick leave violated the FMLA. 175

Wright worked in a health care facility with a skeleton staff. 176 Among his daily duties, Wright had to bathe, change, dress, and feed special needs patients. 177 Wright’s absences forced the agency to assign scarce staff to fill the gap. 178 For this reason, Wright’s absences undermined the Department’s ability to furnish adequate health care services to patients. 179 The Third District Court of Appeal concluded that the Department had cause to discipline Wright for excessive absenteeism. 180

Under the FMLA, an employee who seeks leave for medical reasons must establish that he suffers from a “serious health condition.” 181 The FMLA defines this term to cover an illness that involves inpatient care at a medical facility or “continuing treatment by a health care provider.” 182 The Third District Court of Appeal concluded that Wright did not establish that he sustained a qualifying “serious health condition” as required by the FMLA. 183 The court ruled that the hearing officer’s findings of fact were grounded upon competent, substantial evidence. 184

The question has been raised whether FMLA suits against state employers may be brought in federal courts. 185 In Driesse v. Florida Board of Regents, 186 the United States District Court for the Middle District of Florida ruled that FMLA suits against state employers in federal court are barred by the Eleventh Amendment of the United States Constitution. 187

VIII. WORKERS’ COMPENSATION

A. Tort Actions and Exclusivity

Employers originally agreed to no-fault liability under workers’ compensation statutes in exchange for immunity from tort liability for injuries or

175. Wright, 712 So. 2d at 831.
176. Id. at 832.
177. Id.
178. Id.
179. Id.
180. Wright, 712 So. 2d at 832.
182. Id. § 2611(11)(a), (b).
183. Wright, 712 So. 2d at 832.
184. Id.
187. Id. at 1331.
diseases that employees suffer in the course of their employment. Like every other jurisdiction, Florida's workers' compensation statute preempts state tort claims covered by workers' compensation.

In *Dade County School Board v. Laing*, Ronald Laing was involved in an incident while he was working as a teacher at Hialeah High School. As he was leaving a classroom, a golf cart driven by the school custodian, Joe Rodriguez, hit him. At Hialeah High, custodians and security guards drive golf carts to cross the school grounds. After his injury, Laing applied for, and was granted, workers' compensation benefits. All the same, Laing also brought a personal injury lawsuit against the School Board. The question for the Fourth District Court of Appeal was whether the exclusivity provision of the workers' compensation statute precluded Laing's state tort claim.

Whether Laing could sue the School Board in tort turned on whether he was involved in "unrelated works" when the accident occurred. If he was, then workers' compensation did not preclude his state tort claim against the School Board. Section 440.11(1) of the *Florida Statutes* carves out an exception to workers' compensation immunity when employees are "operating in the furtherance of the employer's business but they are assigned primarily to unrelated works within private or public employment." Laing claimed that, because his job as a teacher and Rodriguez's role as a custodian were "unrelated," the exception is triggered, thus piercing the School Board's immunity.

Whether an employee is involved in "unrelated works" turns on the following factor as framed by the court: "[W]hether the co-employees are involved in different projects," and "[t]hus, the focus is upon the nature of the project involved, as opposed to the specific work skills of individual employees."

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189. *FLA. STAT.* § 440.11 (1999). However, immunity from suit for governmental employees flows from *FLA. STAT.* § 768.28(9)(1) (1999).
190. 731 So. 2d 19 (Fla. 3d Dist. Ct. App. 1999).
191. *Id.* at 20.
192. *Id.*
193. *Id.*
194. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
The trial court found that the teacher and custodian were engaged in "unrelated works" when the accident occurred and thus, Laing's tort claim against the School Board could proceed.\textsuperscript{202} The Third District Court of Appeal reversed the trial court.\textsuperscript{203} The court reasoned that just because employees perform different duties it does not invariably mean that they are involved in "unrelated works."\textsuperscript{204} The court concluded that the teacher and custodian were co-employees undertaking education related services for students at school when the accident occurred.\textsuperscript{205} Both were part of a team in promoting education at the school.\textsuperscript{206} As a result, the teacher and custodian were not engaged in "unrelated works" and, therefore, the teacher's state tort claim was precluded by the exclusivity provision of the workers' compensation statute.\textsuperscript{207}

B. \textit{Injuries Arising from Employee Misconduct}

An alternate route around the exclusivity provision of workers' compensation is to show that injuries sustained stemmed from the intentional misconduct of a co-employee.\textsuperscript{208} For example, in \textit{Castellano v. Raynor},\textsuperscript{209} Gina Castellano worked as a secretary at Graham Elementary School.\textsuperscript{210} On January 27, 1995, Mark Raynor, a physical education teacher also employed at the school, tossed a football at Castellano, causing injuries.\textsuperscript{211} As employees of the Hillsborough County School Board, both employees were immune from suit unless they acted "'in bad faith or with malicious purpose, or in a manner exhibiting a willful and wanton disregard of human rights, safety, or property.'"\textsuperscript{212}

Here, Castellano and Raynor were friends and coworkers.\textsuperscript{213} On the day in question, Raynor was waiting for his next class to assemble on the football field and absent-mindedly tossed a football to some students who passed by.\textsuperscript{214} Raynor saw Castellano leaving a building, called her name,
and threw the ball “underhanded in a slow arc toward her for her to catch.”\textsuperscript{215} Inadvertently, the ball hit Castellano in the jaw and upper chest.\textsuperscript{216} Raynor immediately apologized, especially when he afterwards noticed that Castellano was carrying student files.\textsuperscript{217} Although Raynor knew Castellano had jaw problems, no evidence shows that Raynor intentionally tossed the ball at her head.\textsuperscript{218} Apparently, Castellano detected no ill will, given that she applied for and was awarded workers’ compensation benefits.\textsuperscript{219}

The trial court ruled that Raynor was immune from suit and the Second District Court of Appeal affirmed.\textsuperscript{220} In support of this conclusion, the district court cited the holding in \textit{Castro v. Allstate Insurance Co.},\textsuperscript{221} wherein a police officer playfully tickled another officer’s ear with the antenna of his hand-held radio, and the second officer abruptly and unexpectedly turned his head, forcing the antenna into his ear canal and rupturing his ear drum.\textsuperscript{222} The Third District Court of Appeal found no evidence of intent to injure the second officer and reversed the lower court’s grant of summary judgment in favor of the first officer’s homeowner’s insurance company, which had tried to characterize the injury as intentional.\textsuperscript{223} Similarly, in this case, Raynor’s culpability, at most, rises to the level of negligence, far below the level of culpability needed to make him liable.\textsuperscript{224}

C. Relation of Injury to Employment

Workers’ compensation benefits are awarded only for injuries or diseases arising out of work performed in the course and the scope of employment.\textsuperscript{225} While workers’ compensation statutes are liberally construed in favor of compensating the injured, some accidents that take place while the public employee is off-duty are too remote for coverage under the law.\textsuperscript{226} For example, in \textit{City of North Bay Village v. Millerick},\textsuperscript{227} an off-duty

\begin{itemize}
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.} at 1199.
\item \textsuperscript{217} \textit{Id.}
\item \textsuperscript{218} \textit{Id.}
\item \textsuperscript{219} \textit{Castellano}, 725 So. 2d at 1199.
\item \textsuperscript{220} \textit{Id.}
\item \textsuperscript{221} 724 So. 2d 133 (Fla. 3d Dist. Ct. App. 1998).
\item \textsuperscript{222} \textit{Id.} at 134.
\item \textsuperscript{223} \textit{Id.} at 135.
\item \textsuperscript{224} \textit{Castellano}, 725 So. 2d at 1199.
\item \textsuperscript{225} FLA. STAT. § 440.091 (1999).
\item \textsuperscript{227} 721 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1998).
\end{itemize}
police sergeant, Millerick, was drinking at the Polo Club, a bar in North Miami Beach, at 5:00 a.m. when he struck up a conversation with Billy Martino, a man suspected to be involved in selling illegal drugs. They ended up fighting, but Millerick left after Martino shouted to other bar patrons that Millerick was a police officer. Later, in the parking lot, two men accosted Millerick, but Millerick was able to escape in his car. While driving toward North Bay Village, Millerick sensed the two men in their car were following him. As he sped away, Millerick lost control of his car, crossed over the median into oncoming traffic and collided with a car traveling in the opposite direction. The driver of the other car died, and Millerick was grievously injured.

While Millerick admitted that he had been drinking throughout the evening of the accident, he denied that he was drunk. Millerick applied for workers' compensation benefits, but the case went unresolved for six years after the initial hearing on the issue of coverage. Finally, on February 17, 1998, the Judge of Compensation Claims awarded Millerick disability benefits. In support of this award, the judge ruled that Millerick had been engaged in his primary duty as a police officer when he was injured. Florida has a special rule governing police officers’ actions when it comes to scope of employment. “A police officer who was discharging a primary law enforcement responsibility ‘shall be deemed to have been acting in the course of employment’ regardless of the officer’s duty status at the time.” However, evidence that a police officer was prepared to discharge a law enforcement duty falls short of justifying an injury as arising in the course of the officer’s employment. Here, the alleged law enforcement nexus comes from the encounter between Millerick and Martino. The First District Court of Appeal found that this encounter did not arise from a desire to execute a legitimate law enforcement function;

228. Id. at 1230.
229. Id.
230. Id. at 1231.
231. Id.
232. Millerick, 721 So. 2d at 1231.
233. Id.
234. Id.
235. Id.
236. Id.
237. Millerick, 721 So. 2d at 1231.
238. Id. (quoting FLA. STAT. § 440.091 (1997)).
239. Id.
240. Id.
241. Id. at 1232.
Millerick's injuries were sustained during a night of social drinking.\textsuperscript{242} This aim was not altered because Millerick started arguing with a man who turned out to be a potential suspect.\textsuperscript{243} In sum, the bar fight did not take place "under circumstances reasonably consistent" with the manner in which an officer's primary responsibility would be performed.\textsuperscript{244} Even more remote was the nexus between the bar incident and the causeway accident.\textsuperscript{245} These two incidents may be wholly unrelated.\textsuperscript{246} The First District Court of Appeal concluded that Millerick was not entitled to recover workers' compensation benefits.\textsuperscript{247}

D. Attorneys' Fees

In \textit{Volusia County Fire Services v. Eaby},\textsuperscript{248} Alan Eaby was working as a paramedic when he was exposed to the hepatitis C virus during the scope and course of employment.\textsuperscript{249} The public employer conceded the condition was a compensable, occupationally contracted disease.\textsuperscript{250} The employer later admitted that Eaby was temporarily and totally disabled.\textsuperscript{251} Eaby sought attorney's fees provided under workers' compensation law.\textsuperscript{252} The Judge of Compensation Claims granted attorney's fees, finding that the employer had denied a requested benefit, namely permanent total disability benefits.\textsuperscript{253} Having denied a claim, the employer was bound to file a notice of denial.\textsuperscript{254} Instead of investigating the claim, the employer built a "wall of willful ignorance."\textsuperscript{255}

On appeal, the First District Court of Appeal reversed the award of attorney's fees.\textsuperscript{256} According to the court, the employer is not bound to file a notice of denial when it pays one of two alternative claims for indemnity benefits made in a single petition.\textsuperscript{257} The employer paid the temporary total

\textsuperscript{242} Millerick, 721 So. 2d at 1232.
\textsuperscript{243} Id.
\textsuperscript{244} Id. (quoting FLA. STAT. § 440.091(2) (1997)).
\textsuperscript{245} Id.
\textsuperscript{246} Id.
\textsuperscript{247} Millerick, 721 So. 2d at 1232.
\textsuperscript{248} 725 So. 2d 415 (Fla. 1st Dist. Ct. App. 1999).
\textsuperscript{249} Id. at 416.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id. (citing FLA. STAT. §§ 440.34(3)(b), .192(8) (1995)).
\textsuperscript{253} Eaby, 725 So. 2d at 417.
\textsuperscript{254} Id. (citing FLA. STAT. § 440.192(8)).
\textsuperscript{255} Id.
\textsuperscript{256} Id. at 416.
\textsuperscript{257} Id. at 417.
Sanchez

disability claim and rejected the claim for permanent total disability. Eaby had not reached maximum medical improvement as of the date of the petition for attorney's fees.

E. Setoffs, Tie-ins with Other Statutes, and Disqualifications

In Heric v. City of Ormond Beach, William Heric worked as a city firefighter. While on vacation, Heric suffered a heart attack. The employer agreed to pay medical and indemnity benefits. The governing collective bargaining agreement addressed the issue of how benefits were to be paid. Under the agreement, claimants were entitled to recover full pay and disability benefits for up to 1008 hours, which comes out to ninety days for firefighters. In the event the cap is exhausted, claimants may seek an extension of “full pay” status. In the face of a petition, the city must convene a panel, which makes a recommendation to the city manager who bears ultimate authority over claimant’s petition. If the petition is turned down, the agreement makes clear that “[t]he employee shall, after utilizing the employee’s annual Personal Leave Time and the employee’s Sick Leave Bank, revert to normal workers’ compensation benefits.”

Heric exhausted his 1008 hours, petitioned the city for a “full pay” status extension, and received full pay through deductions from his sick and personal leave banks until he returned to work on June 2, 1997. At the same time, Heric sought temporary total disability or temporary partial disability benefits. The hearing focused on whether Heric was entitled to benefits for the period after he had exhausted his sick leave and personal leave. The hearing judge denied benefits, citing the collective bargaining agreement, which calls for binding arbitration of such claims as the sole source for a remedy.

258. Eaby, 725 So. 2d at 416.
259. Id.
261. Id. at 1247.
262. Id.
263. Id.
264. Id.
265. Heric, 728 So. 2d at 1248.
266. Id.
267. Id.
268. Id.
269. Id.
270. Heric, 728 So. 2d at 1248.
271. Id.
272. Id.
resolution systems agreed upon by the parties for resolving workers' compensation benefits disputes. As long as the benefits themselves are undiminished, private arbitration conforms to Florida law.

On appeal, the First District Court of Appeal ruled that the judge's finding, that the collective bargaining agreement did not diminish Heric's right to workers' compensation benefits, was in error. According to the court, Florida law leaves no doubt that the agreement is nonbinding if it tries to regulate the method of recovering workers' compensation benefits. Thus, the agreement undermined Heric's right to benefits by forcing him to exhaust his personal and sick leave benefits before recovering workers' compensation benefits. On remand, the judge was instructed to hold a hearing on the merits of Heric's claim for benefits for the period in question. At the same time, the court concluded that the employer may seek to offset against the leave pay awarded to Heric the amount by which the sum of leave pay and workers' compensation benefits exceeds Heric's average weekly wage. Similarly, the judge has discretion to reduce Heric's sick leave and personal leave benefits by a fraction equivalent to the offset accorded the employer.

IX. HEALTH BENEFITS

Some states and many local subdivisions of the state provide dependent health benefits to "spousal equivalents" of its public employees. These so-called "domestic partnership" laws meet with opposition on many fronts. For example, on December 9, 1998 the South Florida Water Management District postponed a vote to grant insurance benefits to unmarried partners of its employees in the face of protest by the Christian Coalition. The District would have been the first Florida agency to offer domestic partnership benefits. Governor Jeb Bush reportedly opposes

274. Id. § 440.211(2).
275. Heric, 728 So. 2d at 1249.
276. Id.
277. Id.
278. Id. at 1249-50.
279. Id. at 1250.
280. Heric, 728 So. 2d at 1250.
282. Id.
granting benefits for unmarried partners.\textsuperscript{283} One board member commented that unelected public officials should not be setting social policy.\textsuperscript{284}

A month after Miami-Dade commissioners narrowly passed a human rights ordinance, Broward County began considering a sweeping domestic partnership law in January, 1999.\textsuperscript{285} Besides offering insurance benefits to domestic partners of county employees, the proposal required independent contractors doing business with the county to do the same.\textsuperscript{286} Heterosexuals living in unmarried partnerships would also qualify under the proposal.\textsuperscript{287} Moreover, unmarried adults could extend their insurance benefits to an elderly parent or other blood relative living in the same household.\textsuperscript{288} A public hearing was set for January 26, 1999.\textsuperscript{289}

An editorial in the \textit{Miami Herald} endorsed the proposed domestic partnership law, but noted that in order to avoid violating Florida's Defense of Marriage Act,\textsuperscript{290} the proposal defined partnerships as two single people who share expenses and consider themselves a family.\textsuperscript{291} As the editorial pointed out, this definition encompasses a person who wants to register his ill aunt in order to cover her under his county health insurance.\textsuperscript{292}

Even before the public hearing, however, the Broward County Commission considered dropping the provision requiring companies doing business with the county to offer domestic partnership benefits to their employees.\textsuperscript{293} Instead, three commissioners were said to be recommending that companies that do offer such benefits be granted bonus points when they bid on county contracts.\textsuperscript{294} It turned out that the county's budget office discovered that most private companies that would be affected by the ordinance would be exempt because they are regulated by the federal

\begin{thebibliography}{9}
\bibitem{283} Id.
\bibitem{284} Id.
\bibitem{285} Lisa Arthur, \textit{Broward Poised to OK Partner Benefits: Not Even Gay Meccas Such as Key West or Miami Beach Have Laws as Sweeping}, \textit{MIAMI HERALD} (Broward), Jan. 17, 1999, at 1A.
\bibitem{286} Under the proposal drawn up by the county attorney's office, "companies that do $50,000 or more in business with the county would have to provide benefits to domestic partners and relatives of gay and unmarried employees." Jacqueline Charles, \textit{Domestic Partners Plan Faces Revisions, County Contractors May Get Exemption}, \textit{MIAMI HERALD} (Broward), Jan. 24, 1999, at 1BR.
\bibitem{287} Arthur, \textit{supra} note 285, at 1A.
\bibitem{288} Id.
\bibitem{289} Charles, \textit{supra} note 286, at 1BR.
\bibitem{290} FLA. STAT. § 741.212 (1999).
\bibitem{291} \textit{Half a Partnership Broward Effort}, \textit{MIAMI HERALD} (Broward), Jan. 17, 1999, at 2L.
\bibitem{292} Id.
\bibitem{293} Charles, \textit{supra} note 286, at 1BR.
\bibitem{294} Id.
\end{thebibliography}
Employee Retirement Insurance Security Act of 1974 ("ERISA").

For this reason, the ordinance would unduly burden the few companies not covered by ERISA. The preference system is already in place for women and minorities who bid on county contracts.

Opposition to the proposed ordinance mobilized immediately. Concerned Citizens for Broward claimed that the proposal undermines the institution of family and sanctions gay marriages. In response, the President of the Broward County AFL-CIO, Dan Reynolds, pointed out that most domestic partners are heterosexual.

Despite opposition, the Broward County Commissioners passed the domestic partnership ordinance on January 26, 1999, by a vote of six to one. Broward’s ordinance was modeled after similar ordinances in Miami Beach, Key West, and San Francisco. The final version of the ordinance included a preference system for awarding bonus points to private companies intent on doing business with the county and who offer domestic partner benefits. About ninety percent of the county’s contractors would be exempted because their health insurance plans are governed by ERISA.

Almost immediately, Wally Lowe, a Broward resident, filed suit challenging the legality of Broward’s ordinance. Before trial, Broward Circuit Court Judge Robert Andrews heard oral arguments on whether Lowe had standing to bring his lawsuit. The county attorneys argued that Lowe lacked standing since he was not affected by the ordinance. At the same hearing, Lowe asked the court to issue a temporary injunction to prevent implementation of any part of the ordinance pending the outcome of his suit. Meanwhile, the County Commissioners considered eliminating biological relatives from the ordinance after the County’s insurer announced that the law would increase rates by thirty percent. In late March, 1999

296. Id.
297. Id.
298. Charles, supra note 286, at 1BR.
299. Id.
300. Id.
301. Jacqueline Charles, County OKs Domestic Partner Law, 6-1, MIAMI HERALD (Broward), Jan. 27, 1999, at 1B.
302. Id.
303. Id.
304. Id.
305. Id.
307. Id.
308. Id.
309. Id.
Broward County’s Director of Human Resources recommended that the ordinance limit the number of partners that can be added during the year (permitting a change in partners only once every six months) and also recommended omitting blood relatives from the ordinance. The blood relative provision had the potential of raising insurance rates dramatically because, hypothetically, employees could bring someone very ill into the pool. By this time, Judge Andrews ruled that Lowe did have standing to challenge the ordinance under state law. Judge Andrews heard oral arguments on April 21, 1999, while a public hearing was pending on an amended version of the ordinance. At the hearing, Lowe’s lawyers argued that the ordinance conflicts with Florida’s Defense of Marriage Act, which bans same-sex marriages, and therefore, the County had exceeded its home-rule authority. On April 27, 1999, a public hearing was held and the Commissioners voted to scale back the ordinance by dropping the blood relatives provision. In May of 1999, Judge Andrews ruled in favor of the county, and Lowe filed an appeal.

Finally, Broward County’s sweeping new domestic partnership law took effect on July 12, 1999. The ordinance, as amended, extended health insurance benefits to the unmarried partners—homosexual or heterosexual—of county employees, provided the employees register their partners with the county.

X. PENSION AND RETIREMENT BENEFITS

The first bill Governor Jeb Bush signed into law was the Police and Firefighters Pension Act of 1999, amending the law governing the

310. Jacqueline Charles, Tighten Domestic Partners Ordinance, County Human Resources Chief Advises, MIAMI HERALD (Broward), Mar. 23, 1999, at 2B.
311. Id.
312. Id.
313. Jacqueline Charles, Hearing Today on Suit vs. Domestic Partner Plan, MIAMI HERALD (Broward), Apr. 21, 1999, at 6B.
314. Jacqueline Charles, Domestic Partner Law Attacked in Court, MIAMI HERALD (Broward), Apr. 22, 1999, at 3B.
315. Jacqueline Charles, Commission Amends Domestic Partner Law, MIAMI HERALD (Broward), Apr. 28, 1999, at 2B.
316. Jacqueline Charles, Broward Judge: Domestic Partnership Law Legal, MIAMI HERALD (Broward), May 1, 1999, at 3B.
317. Jacqueline Charles, Partners in Life, MIAMI HERALD (Broward), July 13, 1999, at 1A.
318. Id.
disbursement of disability benefits and retirement benefits for public employees.  

A panel that governs the Florida Retirement System announced in December, 1998 that for the first time in years, Florida’s primary pension plan is “fully funded on an actuarial basis.” This means the state can meet their pension obligations as thousands of public employees retire over the coming years. According to an editorial in the Miami Herald, the Florida Retirement System’s assets amount to eighty-five billion dollars—sixty-one percent invested in United States stocks, and twenty-six percent invested in bonds. Meanwhile, the state senate is reviewing whether to allow state employees to opt for a “defined contribution plan” akin to the 401(k) plans prevalent in the private sector.

A recurring issue in public pension law is whether retired public employees who return to public employment must surrender their pension benefits while they work. According to an unofficial opinion issued by Attorney General Gerry Hammond in a May 10, 1999 letter to Plantation City Attorney Don Lunny Jr., and reported in the Miami Herald, Plantation City officials can continue to collect retirement benefits when they reenter public employment. According to this unofficial opinion by Assistant Attorney General Hammond, “it would appear that the city may not deny a retired officer simultaneous payment of retirement benefits and a salary for re-employment with the city.” Even so, Plantation is free to adopt an ordinance forcing the surrender of pension benefits if the retiree rejoins the public workforce.

The question of the legal impact of changing public pension law arose in the case of Bean v. State. The case was triggered by a change in the statutory definition of “joint annuitant” in 1995. George Bean worked for the Hillsborough County Aviation Authority for many years. He retired on July 1, 1996 with over thirty-four years of creditable service with the

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322. Id.
323. Id.
324. Id.
325. See generally William T. McGee, Plantation Councilman Can Collect Both Pension and Salary, State Lawyer Says, MIAMI HERALD (Broward), May 26, 1999, at 3B.
326. Id.
327. Id.
328. Id.
331. Bean, 732 So. 2d at 392.
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George and Shirley Bean divorced in 1983. At that time, the State assured George that he could designate both a former wife and a current wife as joint annuitants so long as Shirley was financially dependent on him. In addition, George agreed to pay Shirley alimony equal to forty percent of his gross income. Shirley qualified as a “joint annuitant” until the term was redefined in 1995. Shirley did not, however, qualify as a “joint annuitant” under the new statutory definition. In light of these facts, the court reversed the order of the Division of Retirement and held that George had a vested right to designate Shirley as a “joint annuitant.” In support of this conclusion, the court said the key was that George had reached his normal retirement date before the statutory definition was changed. It was irrelevant that he had not yet retired when the new definition took effect.

XI. DISCIPLINE AND DISCHARGE

A. Just Cause

In order to discipline or discharge most public employees, a public employer must have a business justification known as “just cause.” What constitutes “just cause” under civil service bears a striking resemblance to “just cause” found in collective bargaining agreements negotiated between public employers and unions representing government employees. Discipline and discharge cases are arguably the largest source of employee grievances. In the public sector, who decides whether to discipline an employee is a key question. Usually, the employer decides in the first instance, and the employee is entitled to contest the discipline before a
neutral decision-maker.\textsuperscript{345} Either a civil service commission or an arbitrator holds a hearing and decides whether the employer, indeed, had just cause to support the discipline.\textsuperscript{346} The losing party at that point either appeals to the Public Employees Relations Commission ("PERC") or to a state court to review the civil service commission or arbitrator's decision.\textsuperscript{347}

Many legal questions can be raised upon review, such as: 1) did the commission or the arbitrator apply the proper evidentiary standard (usually a preponderance of the evidence instead of the higher clear and convincing standard); 2) did the punishment fit the crime; 3) were mitigating factors given proper weight; and 4) does the arbitrator's decision violate public policy?

Many of these issues were raised in cases reviewed by Florida circuit courts of appeal in 1998–99. For example, in Mathis v. Florida Department of Corrections,\textsuperscript{348} the Department of Corrections ("DOC") tried to dismiss Earnest Mathis, a career service employee with the DOC.\textsuperscript{349} Mathis challenged the proposed discharge by timely filing a notice of appeal with PERC.\textsuperscript{350} PERC reduced the dismissal to a sixty-day suspension, ordered Mathis reinstated, and ruled that he was entitled to back pay for the time he was out of work without ever spelling out the amount of back pay owed to him.\textsuperscript{351} When negotiations stalled, Mathis filed a petition for issuance of a computation of back pay.\textsuperscript{352} PERC denied the petition as late.\textsuperscript{353} On appeal, the court ruled that PERC had no authority to deny Mathis any back pay merely because he failed to meet PERC's deadline, which was not dictated by statute or rule.\textsuperscript{354} In support of this conclusion, the court noted Mathis's good faith efforts to settle the issue with DOC and lack of any prejudice against DOC.\textsuperscript{355}

Several disciplinary cases involve prison guards, or so-called correctional officers.\textsuperscript{356} The Miami Herald reported the case of a Miami-

\textsuperscript{345.} Id.
\textsuperscript{346.} Id.
\textsuperscript{347.} FLA. STAT. § 110.227(5)(b).
\textsuperscript{348.} 726 So. 2d 389 (Fla. 1st Dist. Ct. App. 1999).
\textsuperscript{349.} Id. at 390.
\textsuperscript{350.} Id.; see FLA. STAT. § 447.207(8) (1995) (stating that PERC "shall hear appeals arising out of any suspension, reduction in pay, transfer, layoff, demotion, or dismissal of any permanent employee in the State Career Service System").
\textsuperscript{351.} Mathis, 726 So. 2d at 390.
\textsuperscript{352.} Id. at 391.
\textsuperscript{353.} Id.
\textsuperscript{354.} Id. at 392–93.
\textsuperscript{355.} Id. at 393.
\textsuperscript{356.} See Ana Acle & Manny Garcia, Inmate Says Guard Forced Her to Have Sex, MIAMI HERALD, July 7, 1999, at 7B.
Sanchez

Dade correctional officer who had been disciplined with pay for reportedly forcing an inmate to perform oral sex on him in a jury room at the county courthouse. Although not criminally charged, the eight-year veteran was relieved of duty. The Miami Herald reported that DNA taken from semen found on the victim's breast tested positive. Police detectives seized the guard's clothing—even the red underwear that the inmate had minutely described. Sources predicted the guard would be dismissed if the story were true, whether or not he was criminally charged. The article pointed out that if the incident had taken place just three weeks later, the guard could have faced an automatic third-degree felony. A new Florida law, effective July 1, 1999, treats sex between a correction officer and a prisoner as a felony even if it is consensual. In earlier cases in 1998–99, one guard was fired after a prisoner became pregnant with the officer's baby. Another female guard was dismissed after reportedly performing oral sex on male inmates.

Disciplining prison guards for beating inmates is a recurring issue. The most recent incident allegedly took place in July, 1999 when nine guards were suspended pending a murder investigation into the suspicious death of a known troublemaker, Frank Valdez, a death row inmate on X Wing, the toughest hold for the toughest inmates at the Florida State Prison in Starke, Florida. Two dozen state investigators and FBI agents were investigating the death. The Florida Department of Law Enforcement ("FDLE") is in charge of the case. The DOC is encouraging the guards to cooperate. Valdez’s death has triggered numerous tips and grievances

357. Id.
358. Id.
359. Id.
360. Id.
361. Acle & Garcia, supra note 356, at 7B.
362. Id.
363. Id. (citing S. Res. 1788, 1999 Reg. Sess. (Fla. 1999) (amending Fla. Stat. § 944.35(3)(b) and creating Fla. Stat. § 951.221)).
364. Acle & Garcia, supra note 356, at 7B.
365. Id.
367. Phil Long & Steve Bousquet, Big Law-Enforcement Team Investigating Death of Inmate, MIAMI HERALD, Aug. 5, 1999, at 9B.
368. Id.
369. Id.
370. Id.
from inmates across the state. The FBI agents, meanwhile, are working on federal civil rights issues.

On August 6, 1999 three correctional officer recruits were dismissed as part of the Valdez investigation. In light of their probationary status, no grounds were given for their dismissal. Moreover, eleven guards were suspended with pay in the wake of the Valdez death. But, one of these correctional officers will return to work at the prison owing to his change of heart to cooperate with the investigation. News reports indicate that one of the guards implicated in the Valdez death has a history of allegations of abuse of inmates. Six complaints by inmates over a five-year period were found in the personnel file of this guard. After one of these grievances was confirmed, the guard was suspended "for 60 days without pay for inappropriate use of force" after putting down an inmate skirmish. Even so, this guard was named Officer of the Month for June 1997.

In *Dalem v. Department of Corrections*, Anthony Dalem was promoted to correctional officer lieutenant. While serving as the shift supervisor, he responded to a radio alert that fighting had broken out in the prison dormitories. Although Dalem arrived after the fight had been broken up, officers Krueger and Arpan testified that Dalem beat inmate Wayne Green, although Green offered no resistance. Among other things, Dalem allegedly kicked Green in the chest several times and once in the neck, and stood on top of a footlocker, and twice jumped onto Green's back. Later, Dalem denied he was even at the scene. The DOC accused Dalem of abuse of an inmate, willful violations of rules and regulations, and giving false testimony. An evidentiary hearing was held before PERC.

371. Id.
372. Long & Bousquet, *supra* note 367, at 9B.
373. Steve Bousquet, *3 Correctional Recruits Fired in Valdez Case*, MIAMI HERALD, Aug. 6, 1999, at 1B.
374. Id.
375. Id.
376. Id.
378. Id.
379. Id.
380. Id.
381. 720 So. 2d 575 (Fla. 4th Dist. Ct. App. 1998).
382. Id. at 575.
383. Id.
384. Id.
385. Id.
386. *Dalem*, 720 So. 2d at 575.
387. Id. at 576.
The hearing officer found that the DOC had reasonable cause to discharge Dalem for his beating of Green and then lying about his role.\textsuperscript{389} Dalem filed an appeal with PERC, which affirmed the hearing officer's ruling.\textsuperscript{390}

On appeal, Dalem argued that the hearing officer applied the preponderance of the evidence standard instead of the clear and convincing standard.\textsuperscript{391} The court concluded that the hearing officer properly applied the right standard for termination hearings.\textsuperscript{392} Dalem also argued that the hearing officer’s decision was not supported by competent substantial evidence and that he failed to consider relevant mitigating factors.\textsuperscript{393} The court rejected both of these arguments.\textsuperscript{394}

The question of what mitigatory criteria PERC may consider in reviewing discipline meted out to a public employee arose in \textit{Nordheim v. Department of Environmental Protection}.\textsuperscript{395} Gregory Nordheim worked as a pilot for the Department of Environmental Protection ("DEP").\textsuperscript{396} In 1991 he sustained injuries in a serious aircraft accident while he was performing several tasks at the same time.\textsuperscript{397} Although the plane was destroyed, Nordheim was not disciplined.\textsuperscript{398} Nordheim caused another accident while flying surveillance in March, 1997.\textsuperscript{399} He failed to lower the landing gear and the plane sustained $5416 worth of damage because he was trying to do too many tasks at once.\textsuperscript{400} DEP at first demoted Nordheim to the rank of boat officer, but changed the demotion to a dismissal when it became apparent that Nordheim was physically unable to perform the duties of boat officer in light of his injuries.\textsuperscript{401}

Nordheim appealed his dismissal to PERC, which held a three-day hearing.\textsuperscript{402} The hearing officer ruled that DEP had cause to fire Nordheim for negligence and that no statutorily prescribed mitigatory criteria applied to

\begin{itemize}
  \item \textsuperscript{388} \textit{Id.}
  \item \textsuperscript{389} \textit{Id.}
  \item \textsuperscript{390} \textit{Id.}
  \item \textsuperscript{391} \textit{Dalem}, 720 So. 2d at 576.
  \item \textsuperscript{392} \textit{Id.}
  \item \textsuperscript{393} \textit{Id.}
  \item \textsuperscript{394} \textit{Id.}
  \item \textsuperscript{395} 719 So. 2d 1212 (Fla. 5th Dist. Ct. App. 1998), \textit{review denied}, 729 So. 2d 393 (Fla. 1999).
  \item \textsuperscript{396} \textit{Id.} at 1213.
  \item \textsuperscript{397} \textit{Id.}
  \item \textsuperscript{398} \textit{Id.}
  \item \textsuperscript{399} \textit{Id.}
  \item \textsuperscript{400} \textit{Nordheim}, 719 So. 2d at 1213.
  \item \textsuperscript{401} \textit{Id.} at 1213–14.
  \item \textsuperscript{402} \textit{Id.} at 1214.
\end{itemize}
reduce his dismissal. Upon review, PERC found there were offsetting factors and reduced the punishment from a dismissal to a ninety-day suspension. As for the mitigation criterion that PERC found relevant, "action taken with respect to similar conduct by other employees," PERC concluded that the hearing officer improperly restricted Nordheim's evidence dealing with earlier incidents of negligence that did not result in discipline. For this reason, PERC ruled that Nordheim's punishment amounted to disparate treatment by his employer.

On appeal, the court reversed PERC's ruling because PERC refused to take into account its own case of Jackson v. Department of Juvenile Justice, which made clear that a new agency is not bound by earlier disciplinary actions taken by its predecessor. The three employees PERC compared to Nordheim all sustained accidents with DEP's predecessor, the Florida Marine Patrol. The court ruled that PERC abused its discretion in refusing to take into account the rule in Jackson and that the decision was "[i]nconsistent with officially stated agency policy or a prior agency practice" not accounted for by PERC. The issue of mitigation grounded on the lack of discipline of former workers for analogous misconduct was raised before the hearing officer. The court remanded the case to PERC to reconsider the hearing officer's findings and to take into account the rule in Jackson.

In Cephas v. Department of Health & Rehabilitative Services, John Cephas worked for the Florida Department of Health and Rehabilitative Services ("HRS") as an interviewing clerk for a program that issued checks for buying food. In this capacity, Cephas issued four checks to Tawanda Baker, a client of the program. Later, Baker applied for an apartment, indicating she was a HRS employee and that Cephas was her supervisor. In verifying Baker's employment, the leasing agent spoke to a male who

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404. Nordheim, 719 So. 2d at 1214.
406. Nordheim, 719 So. 2d at 1214.
407. Id.
409. Nordheim, 719 So. 2d at 1214.
410. Id.
411. Id. (citing Fla. Stat. § 120.68(6)(e)3 (Supp. 1996)).
412. Id.
413. Id. at 1215.
414. 719 So. 2d 7 (Fla. 2d Dist. Ct. App. 1998), review denied, 729 So. 2d 390 (Fla. 1999), and review denied, 729 So. 2d 394 (Fla. 1999).
415. Id. at 8.
416. Id.
417. Id.
Sanchez identified himself as Mr. Cephas and represented that he was Baker’s supervisor and that Baker was an able employee. The next day, unable to reach Baker at home, the agent called the HRS office in Plant City and learned that Baker did not work there. It turns out that Cephas was not Baker’s supervisor, and based on these facts, HRS dismissed Cephas for misconduct. On appeal to PERC, the hearing officer affirmed HRS’s action and PERC ratified the recommendation.

On appeal, the court ruled that the evidence was not adequate to support a finding of misconduct because the leasing agent never nailed down Cephas’s identity as the person whom she talked to about Baker. According to the court, telephone conversations are only reliable evidence if “the identity of the person with whom the conversation was had is established by direct evidence, facts or circumstances.” In short, HRS could not assume the person who answered Cephas’s phone was in fact Cephas without corroborative facts.

When a public employee is disciplined “for cause,” what kinds of defenses may the employee raise to undercut the employer’s case? In Doyle v. Department of Business & Professional Regulation, Elizabeth Doyle worked as a special agent with the Division of Alcoholic Beverages and Tobacco (“ABT”), an arm of the Department of Business and Professional Regulation. Doyle’s coworker accused her of unbecoming conduct and sexual harassment, and Doyle was placed on administrative leave. ABT fired Doyle: 1) “for lying,” 2) for “unbecoming conduct,” and 3) “for using vulgar language.” ABT fired Doyle: 1) “for lying,” 2) for “unbecoming conduct,” and 3) “for using vulgar language.”

418. Id.
419. Cephas, 719 So. 2d at 8.
420. Id.
421. Id.
422. Id.
423. Id. (quoting Zeigler v. State, 402 So. 2d 365, 374 (Fla. 1981)).
424. Cephas, 719 So. 2d at 9 (citing Mack v. Widrowicz, 556 So. 2d 1221 (Fla. 4th Dist. Ct. App. 1990)).
426. Id. at 1041.
427. Id. at 1042.
428. Id.
429. Id. n.2 (citing FLA. ADMIN. CODE ANN. r. 61-2.010 (1990)). The code defines unbecoming conduct as:

Any willful action or conduct by an employee which impedes the Department’s efforts, brings discredit on the Department, impairs the operation or efficiency of the Department or any employee, impairs the employee’s ability to perform his or her job, or results in the reluctance or refusal on the part of others to work with the employee.
vulgar or abusive language." PERC convened a formal hearing, and Doyle raised the defense of condonation, asserting that the agency condoned vulgar and sexually explicit language in the ABT offices. Moreover, Doyle stated that ABT workers regularly posted on their office walls sexually explicit, pornographic and vulgar signs, pictures, and jokes. PERC's hearing officer agreed with Doyle's defense of condonation to the improper language charge. Before Doyle could be disciplined for using vulgar language, the agency owed her notice that future use of such improper language was grounds for discipline. The hearing officer ruled that Doyle met her burden of proving the defense of condonation and that the agency lacked just cause to discipline her for abusive language. Left intact, however, were four other charges of unbecoming conduct, but the hearing officer nevertheless reduced the discipline to a sixty-calendar-day suspension.

PERC remanded the case to the hearing officer to clarify the lying charge. The hearing officer ruled that "when Doyle denied using vulgar or sexually explicit language at the office in front of other employees, during the investigation, she was lying to Harris." PERC affirmed the hearing officer's findings but agreed with the agency that lying during an internal investigation about her job-related conduct warranted Doyle's dismissal.

On appeal, Doyle alleged due process violations which the court rejected in light of the 1998 Supreme Court decision in La Chance v. Erickson which held that due process does not encompass the right of the employee "to 'put the government to its proof' by falsely denying the charged conduct, or 'a right to make false statements with respect to the charged [mis]conduct,' in an agency investigation." In response, Doyle contends that article I, section 9 of the Florida Constitution grants stronger

430. Id. at 1042-43.
432. Id. (accordling to Fla. Stat. § 120.57(1) (1995)).
433. Id.
434. Doyle, 713 So. 2d at 1043.
435. Id.
436. Id.
437. Id. at 1044.
438. Id.
439. Doyle, 713 So. 2d at 1044.
440. Id.
442. Doyle, 713 So. 2d at 1044 (quoting La Chance v. Erickson, 522 U.S. 262, 266 (1998)) (internal citations omitted).
due process protection than the United States Constitution.\textsuperscript{443} Sidestepping Doyle's argument altogether, the court concluded that there was insufficient evidence that Doyle ever lied.\textsuperscript{444} Doyle's later explanation of her denial of ever using vulgar language raised facts implicating her condonation defense.\textsuperscript{445} So, as the court phrased it, Doyle's "denial was merely a legal conclusion or a matter of personal opinion which should not be punishable as a lie."\textsuperscript{446} In reaching this conclusion, the court relied on caselaw interpreting perjury.\textsuperscript{447} In this context, Doyle's "denial was merely an assertion of her legal defense—a legal conclusion or a matter of personal opinion—not a statement of fact."\textsuperscript{448} In sum, "'[c]oncise questioning is imperative as a predicate for the offense of perjury.'"\textsuperscript{449} The court remanded the case to PERC for further proceedings consistent with its opinion.\textsuperscript{450}

In \textit{City of Tallahassee v. Big Bend Police Benevolent Association},\textsuperscript{451} the City fired Thomas Maureau, a lieutenant in the Tallahassee Police Department, for engaging in alleged sex acts while on duty and then lying about it.\textsuperscript{452} Under a collective bargaining agreement, Maureau was entitled to file a grievance and go to arbitration.\textsuperscript{453} At the conclusion of an evidentiary hearing, the arbitrator upheld only one of the City's charges, lying, and reinstated Maureau after a four-month suspension without pay.\textsuperscript{454} The City appealed and urged the trial court to overturn the arbitrator's award.\textsuperscript{455} The trial court was unable, however, to find any statutory grounds for vacating the arbitrator's award.\textsuperscript{456} Florida law provides that:

\begin{enumerate}
\item Upon application of a party, the court shall vacate an [arbitrator's] award when:
  \begin{enumerate}
  \item The award was procured by corruption, fraud or other undue means.
  \item There was evident partiality . . . .
  \end{enumerate}
\end{enumerate}

\begin{itemize}
\item \textsuperscript{443} \textit{Id.} at 1045 (citing \textit{Traylor v. State}, 596 So. 2d 957 (Fla. 1992)).
\item \textsuperscript{444} \textit{Id.}
\item \textsuperscript{445} \textit{Id.}
\item \textsuperscript{446} \textit{Id.}
\item \textsuperscript{447} \textit{Doyle}, 713 So. 2d at 1045.
\item \textsuperscript{448} \textit{Id.} at 1046.
\item \textsuperscript{449} \textit{Id.} (quoting \textit{Bronston v. United States}, 409 U.S. 352, 362 (1973)).
\item \textsuperscript{450} \textit{Id.}
\item \textsuperscript{451} 710 So. 2d 214 (Fla. 1st Dist. Ct. App. 1998).
\item \textsuperscript{452} \textit{Id.} at 214–15.
\item \textsuperscript{453} \textit{Id.} at 215.
\item \textsuperscript{454} \textit{Id.}
\item \textsuperscript{455} \textit{Id.}
\item \textsuperscript{456} \textit{Big Bend}, 710 So. 2d at 215.
\end{itemize}
(c) The arbitrators or the umpire in the course of her or his jurisdiction exceeded their powers.
(d) The arbitrators... refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of s. 682.06, as to prejudice substantially the rights of a party.
(e) There was no agreement or provision for arbitration subject to this law.

On appeal, the City argued that the arbitrator exceeded his authority by erroneously adopting a clear and convincing evidentiary standard instead of the preponderance of the evidence standard. The First District Court of Appeal ruled that even if true, adoption of the stricter standard falls short of legal grounds for vacating the arbitrator's award under section 682.13(1), of the Florida Statutes. The court also rejected the City's claim that reinstating Maureau violated public policy because police officers must possess good moral character. Since the arbitrator found insufficient evidence of a romantic relationship with another police officer, public policy was not violated.

A concurring opinion by Judge Booth made clear that arbitrators are not free to adopt the heightened burden of proof in disciplinary cases, but he did not think the issue had been preserved below.

B. Misconduct by Public Officials

In Hamidullah v. Burke, Governor Lawton Chiles suspended Miami-Dade County District Two Commissioner James C. Burke from his seat on the Miami-Dade County Commission, pursuant to article IV, section 7 of the Florida Constitution. Burke had been indicted on federal public corruption charges. He resigned and a special election was held to fill the vacancy on the commission. Despite his indictment and suspension, Burke declared himself a candidate for his old seat, prompting voters to go to

458. Big Bend, 710 So. 2d at 215.
459. Id.
460. Id.
461. Id.
462. Id. at 216.
464. Id. at D675-76.
465. Id. at D676.
466. Id. at D675.
court to stop him from running. The circuit court for Dade County refused to stop Burke from running.

On appeal, the Third District Court of Appeal affirmed the trial court’s ruling. Nothing in the state constitution or in Florida’s statutes renders Burke ineligible to run for office. Absent constitutional or statutory prohibition, only the legislature is authorized to set eligibility standards for public office. The court refused to encroach on the power of the electorate, of the Governor, and of the legislature. The court rejected the argument that article IV, section 7 of the Florida Constitution dictates that a suspended official may not run for his office until acquitted. At most, that provision empowers the Governor to suspend a public official indicted for a crime until he is acquitted. To be sure, the court noted that the Governor still has the power to suspend Burke again should he win the election.

Defamation of political candidates uttered by anyone during campaigns received attention from the Florida Legislature in 1999. The House Judiciary Committee debated the relative merits of a proposed bill that would hold “all persons accountable for the truthfulness of their statements regarding candidates.” The bill, proposed by Representative Bill Posey, R-Rockledge, would set up an administrative agency to oversee truth and would “put those who falsely claim that a candidate violated this law at peril of criminal felony charges.” In an editorial, the Miami Herald criticized the bill as flawed in two respects: “It is of dubious constitutionality, and it fails to deal with some of the ugliest aspects of campaigns, such as clever distortions and ethnic or racial pandering.” The editorial regarded the bill as weakening the current United States Supreme Court standard for libel by holding someone liable for making statements they should have known were false. Under the federal standard, actual malice, and not mere negligence must be proved.

467. Id. at D675–76.
468. Hamidullah, 23 Fla. L. Weekly at D675.
469. Id. at D676.
470. Id.
471. Id.
472. Id.
473. Hamidullah, 23 Fla. L. Weekly at D676.
474. Id.
475. Id.
477. Id.
478. Id.
479. Id.
480. Id.
In United States v. Starks, community health aides working for HRS and the president of a drug treatment provider were convicted for violating the anti-kickback provision of the Social Security Act. When they started working at HRS, the public employees were warned about accepting any outside employment giving rise to a conflict of interest and were told to report any outside employment to HRS. The public employees agreed to refer patients to the drug treatment business for $250 per patient without reporting their referral arrangement to HRS. At trial, some of the referrals testified that the HRS employees threatened that HRS would take away their babies if they did not go in for treatment for their drug addictions. In sum, the two HRS employees referred eighteen women and were paid $323,023 in Medicaid payments. The United States District Court for the Middle District of Florida sentenced Starks to two concurrent terms of thirty months of home detention.

On appeal, the HRS employees argued that the jury should have been instructed that, because of the Anti-Kickback statute's mens rea component, the employees had to have known that their referral arrangement violated the federal statute before they could be convicted. The Eleventh Circuit's jury instruction for the term "willfully" reads: "The word willfully, as that term is used from time to time in these instructions, means the act was committed voluntarily and purposely, with the specific intent to do something the law forbids, that is with a bad purpose, either to disobey or disregard the law." The Eleventh Circuit also cited the Supreme Court decision in Bryan v. United States, which made clear that a jury may find a defendant guilty of willfully violating a statute if it thinks "that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." In other words, the willfulness requirement does not amount to an exception to the general rule that ignorance of the law is no excuse; knowledge that behavior is unlawful is enough. The giving or taking of kickbacks for medical referrals is clearly illegal, indeed, close to

482. 157 F.3d 833 (11th Cir. 1998).
483. Id. at 835; see 42 U.S.C. § 1320a-7b(b) (1994).
484. Starks, 157 F.3d at 836.
485. Id.
486. Id. at 837.
487. Id.
488. Id.
489. Starks, 157 F.3d at 837.
490. Id. at 837–38.
492. Starks, 157 F.3d at 838 (quoting Bryan v. United States, 524 U.S. 184, 193 (1998)).
493. Id. (citing Bryan v. United States, 524 U.S. 184, 195 (1998)).
malum in se. The court upheld the trial court's jury instruction on the meaning of the word "willful."

As for the vagueness challenge, a criminal statute must define the crime with a degree of clarity to put ordinary people on notice what behavior is banned. The Eleventh Circuit concluded that the Anti-Kickback statute was not vague, citing Supreme Court criteria: "whether the statute (1) involves only economic regulation, (2) provides only civil, rather than criminal, penalties, (3) contains a scienter requirement mitigating vagueness, and (4) threatens any constitutionally protected rights." Applying these factors, the court reasoned that the Anti-Kickback statute regulates only economic behavior and does not violate any constitutional rights. In sum, the HRS employees had adequate notice that their behavior was unlawful.

Another case drawing a distinction among classes of public employees was Service Employees International Union v. Public Employees Relations Commission. Patricia O'Brien worked as a deputy court clerk in Orlando when she was fired, allegedly because she "reported and was paid for more hours than she actually worked on repeated occasions." By contrast, O'Brien contends she was terminated because of her union activities. O'Brien filed an unfair labor practice charge with PERC, which sustained her discharge.

On appeal, the Fifth District Court of Appeal framed "the issue [as] whether a deputy court clerk is in fact a 'public employee'" under article I, section 6 of the Florida Constitution and section 447.203(3) of the Florida Statutes. The Clerk of Court appoints, rather than employs, deputy clerks. Earlier precedent judged deputy court clerks not to be public employees. The court grudgingly agreed, but urged the state supreme court to address the question.

494. Id.
495. Id. at 839.
496. Id.
498. Id. at 840.
499. Id.
500. 720 So. 2d 290 (Fla. 5th Dist. Ct. App. 1998), review granted, 732 So. 2d 328 (Fla. 1999).
501. Id. at 291.
502. Id.
503. Id.
504. Id.
505. Service Employees Int'l Union, 720 So. 2d at 291.
506. Id. (citing Federation of Pub. Employees v. Public Employees Relations Comm'n, 478 So. 2d 117 (Fla. 4th Dist. Ct. App. 1985)).
507. Id.
C. Whistle-blowing and Retaliatory Discharge

Florida has enacted a Whistle-blower’s Act,508 aimed at protecting public employees who report or disclose employment-related wrongdoing, usually by management.509 The law shields employee disclosure of past, present, or potential wrongdoing by supervisors, coworkers, or public employers.510

Several cases raised the question whether the whistle-blower has exhausted administrative channels of relief.511 The Florida Whistle-blower’s Act, provides, in part:

Within 60 days after the action prohibited by this section, any local public employee protected by this section may file a complaint with the appropriate local governmental authority, if that authority has established by ordinance an administrative procedure ... Within 180 days after entry of a final decision by the local governmental authority, the public employee who filed the complaint may bring a civil action in any court of competent jurisdiction. If the local governmental authority has not established an administrative procedure by ordinance or contract, a local public employee may, within 180 days after the action prohibited by this section, bring a civil action in a court of competent jurisdiction.512

In City of Miami v. Del Rio,513 a City of Miami police officer “blew the whistle” on his superiors over the legality of certain orders by disclosing the alleged wrongdoing to other public agencies, including the state attorney.514 In response, Del Rio alleges that his superiors retaliated against him.515 Del Rio went to court, suing the City, the Chief of Police, and three of his superior officers, for violations of the Whistle-blower’s Act.516 Del Rio claimed he had exhausted all administrative remedies.517

On appeal, Del Rio changed his argument, alleging that there was no administrative remedy since the board he went to denied him a hearing by

508. FLA. STAT. § 112.3187 (1999).
509. See id.
510. See id.
511. See City of Miami v. Del Rio, 723 So. 2d 299, 300 (Fla. 3d Dist. Ct. App. 1998), review denied, 733 So. 2d 515 (Fla. 1999).
512. FLA. STAT. § 112.3187(8)(b).
513. 723 So. 2d 299 (Fla. 3d Dist. Ct. App. 1998).
514. Id. at 300.
515. Id.
516. Id.
517. Id.
delay tactics and, therefore, he was free to bypass the administrative route and go directly to court. For its part, the City contends that its code established an administrative board with the power to hear whistle-blower complaints, but that Del Rio abandoned his complaint before the board rendered its decision. In other words, Del Rio failed to exhaust his administrative remedy and forfeits the right to go to court. The Third District Court of Appeal ruled that the Civil Service Board met the requirements of the Whistle-blower’s Act, and therefore, Del Rio must first exhaust his remedy before the Board. The Board delayed its proceedings to secure additional information from Del Rio who, instead of complying with the board’s request, abandoned his petition and filed for judicial relief. Del Rio’s suit was deemed premature.

In Dinehart v. Town of Palm Beach, Mary Dinehart worked in the finance department of the Town of Palm Beach and took part in an investigation of her supervisor, but the town council decided against firing the supervisor. In the aftermath, Dinehart was transferred to another department, which prompted her suit against the town under the public Whistle-blower’s Act. The circuit court for Palm Beach County granted summary judgment in favor of the Town because the Town had set up an administrative procedure for reviewing whistle-blower claims, and Dinehart had failed to go through that board.

On appeal, the Fourth District Court of Appeal framed the issue as whether Dinehart had exhausted her administrative remedies before filing suit. Dinehart argued that the Town’s administrative procedure did not meet the legal requirements set out in section 112.3187(8)(b) of the Florida Statutes. Under the town’s procedures, employees must first discuss their complaint with their immediate supervisor unless the complaint deals with a suspension, demotion, or dismissal. Next, workers should take their

518. Del Rio, 723 So. 2d at 300.
519. Id. at 300. “The City contends its Civil Service Board . . . as set forth in section 36(a), Miami, Fla., Charter, meets the requirements of [the Whistle-blower’s Act].” Id. (citations omitted).
520. Id. at 301.
521. Id.
522. Del Rio, 723 So. 2d at 301.
523. Id.
524. Id.
525. 728 So. 2d 360 (Fla. 4th Dist. Ct. App. 1999).
526. Id. at 360.
527. Id.
528. Id. at 361.
529. Id. at 362.
530. Dinehart, 728 So. 2d at 361 (citing FLA. STAT. § 112.3187(8)(b) (1995)).
531. Id.
grievance to the department head. Third, employees should appeal to a
grievance resolution board. If the complaint deals with a suspension,
demotion, or dismissal, however, workers must "proceed directly to the
grievance resolution board," which then "submits its recommendation to the
town counsel for action." It is clear from the face of the Whistle-blower's Act that the legislature
left the details of the procedure up to the town, so long as complaints are
heard by a panel of impartial decision-makers, and the procedure otherwise
abides by due process. The court concluded that even though the town's
procedure did not guarantee an impartial panel, its procedure duly satisfies
the Act's criteria. Moreover, the town's procedure requires findings by
the grievance committee to be submitted to the town council. In sum,
Dinehart failed to exhaust the administrative remedies.

In Harris v. District Board of Trustees, coordinators of a criminal
justice program run by a community college, who were fired, sued the
college, and its president, among others, claiming that their termination was
in retaliation for their whistle-blowing acts. The alleged wrongdoing
involved irregularities and departures from law and policy going on in the
college's Criminal Justice Training Program. Shattler was the program's
manager. The plaintiffs alleged that he took no action in response to their
complaints, so they took their case to the Florida Department of Law
Enforcement ("FDLE"). During FDLE's investigation of the program,
Buckley, the director of the division of career and special programs fired
Harris, allegedly on financial grounds. Other acts of retaliation include:
unwarranted criticism; verbal abuse; searches through personal papers, such
as a diary; and negative performance evaluations.

The Federal District Court for the Middle District of Florida reached
the following conclusions: 1) the plaintiffs established that the college
president had violated their First Amendment rights; 2) the plaintiffs' speech
touched on matters of public concern; 3) the college president was not acting within the scope of her discretionary authority to trigger qualified immunity; 4) the time for filing a lawsuit under the Florida Whistle-blower's Act began when the plaintiffs read a newspaper interview in which they were blamed for problems in the program; 5) the persons in their individual capacities are not liable under the state whistle-blower law; 6) the plaintiffs satisfied the whistleblower's act when they sent their memo to FDLE, since it supervised the criminal justice instruction; 7) the plaintiffs also established false light invasion of privacy (the newspaper account is arguably highly offensive to a reasonable person and the supervisor made his comments with a reckless disregard for their truth); 8) the plaintiffs did not state a § 1983 claim; and 9) the Eleventh Amendment bars a suit against a community college. 546

However, not all retaliation cases implicate a whistle blower's act. For example, in Barron v. Public Health Trust, 547 Joseph Barron refused to lend his hand in an alleged altering and discarding of patient care plans and other medical records when he worked for the Public Health Trust because he believed such conduct to be illegal. 548 Barron shared his concerns with the Vice President of Satellite Services for the Trust. 549 Retaliation took the form, Barron alleged, of the transferring of one of his subordinates to another department, and of threatening to force Barron to work at night. 550 After Barron returned to work, following an approved medical leave, the director refused to accommodate Barron's impaired condition. 551 Barron regarded this refusal as a constructive discharge that left him no choice but to resign his job with the Trust. 552

Barron sued the Trust in the District Court for the Southern District of Florida alleging free speech violations under § 1983 of title 42 of the United States Code and article I, section 4 of the Florida Constitution. 553 Defendant Reardon claimed qualified immunity from suit given that Barron's speech did not bear on a matter of public concern. 554 He also claimed that Barron's speech rights were outweighed by his employer's interest in running an efficient agency, and that the alleged retaliation did not qualify as an

549. Id. at 1369.
550. Id.
551. Id.
552. Id.
553. Barron, 22 F. Supp. 2d at 1369–70.
554. Id. at 1370.
555. Id.
“adverse employment action under the First Amendment.”\textsuperscript{556} The court only addressed whether the alleged retaliation constituted adverse employment action under the First Amendment.\textsuperscript{557}

The federal district court concluded that the alleged acts of retaliation did not rise to the level of an adverse employment action under the First Amendment.\textsuperscript{558} Transferring one of Barron’s subordinates and threatening to force Barron to work at night are not manifestly illegal retaliation under the First Amendment.\textsuperscript{559} As for the constructive discharge, Barron voluntarily resigned when his supervisor properly refused to accommodate his disability.\textsuperscript{560} Barron’s supervisor never suggested that Barron resign, nor did he threaten to terminate him.\textsuperscript{561} In sum, Barron’s working conditions were not so intolerable that he had no choice but to quit.\textsuperscript{562} For purposes of qualified immunity, Reardon’s actions did not clearly amount to adverse employment.\textsuperscript{563} Reardon’s codefendant, Ward, enjoyed an even stronger claim to qualified immunity because, at worst, Ward failed to end Reardon’s alleged acts of retaliation.\textsuperscript{564} Since Reardon is entitled to qualified immunity, \textit{a fortiori}, so is Ward.\textsuperscript{565}

In \textit{Dade County Police Benevolent Ass'n v. Town of Surfside},\textsuperscript{566} the police union filed an unfair labor practice with PERC, alleging that the Town of Surfside fired Officers Marchese and Casabo for engaging in protected activity, specifically, their support of a union-sponsored survey dealing with the Town’s police department.\textsuperscript{567} At PERC’s hearing, one witness testified that the dismissed officers coerced and intimidated other officers, unlawfully disrupted the investigation, and lied to the investigators.\textsuperscript{568} The police chief made clear that he did not discharge the officers for engaging in protected activity.\textsuperscript{569} The hearing officer concluded, and PERC’s final order affirmed, that the officers were dismissed for cause.\textsuperscript{570}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{556} \textit{Id.}
\item \textsuperscript{557} \textit{Id.}
\item \textsuperscript{558} \textit{Barron}, 22 F. Supp. 2d at 1370.
\item \textsuperscript{559} \textit{Id.}
\item \textsuperscript{560} \textit{Id.} at 1371.
\item \textsuperscript{561} \textit{Id.}
\item \textsuperscript{562} \textit{Id.}
\item \textsuperscript{563} \textit{Barron}, 22 F. Supp. 2d at 1372.
\item \textsuperscript{564} \textit{Id.} at 1373.
\item \textsuperscript{565} \textit{Id.}
\item \textsuperscript{566} 721 So. 2d 746 (Fla. 3d Dist. Ct. App. 1998).
\item \textsuperscript{567} \textit{Id.} at 746.
\item \textsuperscript{568} \textit{Id.}
\item \textsuperscript{569} \textit{Id.} at 746–47.
\item \textsuperscript{570} \textit{Id.} at 747.
\end{enumerate}
\end{footnotesize}
On appeal, the police union claimed that the hearing officer accorded undue weight to hearsay evidence. Rejecting this argument, the Third District Court of Appeal ruled that the documents at issue were not introduced to prove the truth of the matter asserted, but only to prove the employer’s state of mind in firing the officers. The dismissals were upheld.

An article in the *Miami Herald* reported on a couple of retaliation cases involving public employees. In one, Florida’s Department of Environmental Protection ("DEP") reached a settlement with a public employees’ union entitling workers to express professional opinions without fear of retaliation. Moreover, DEP agreed to lobby for legislation aimed at protecting public employees against intimidating lawsuits by developers. Another article in the *Miami Herald* reported on a lawsuit filed by a City of Miramar Police Captain against the City. The police captain alleged that he was demoted after he told the *Miami Herald* that a high profile company, which had made campaign contributions to city commissioners, was awarded a towing contract, even though it overcharged residents. The City denied the charge, claiming that the demotion was wholly a fiscal decision.

D. Procedural Due Process

When is a public agency required to process an employee’s grievance? This issue was addressed in *Soto v. Board of County Commissioners*. Soto was a county employee who sued the county for refusing to process a grievance he had filed. According to the county’s own grievance procedure, any violation of personnel regulations would trigger the grievance procedure. The reviewing court made clear that "[w]here a governmental agency provides that employee disputes shall be resolved through a grievance process, the agency is bound to fully comply with its own rules..."
and policies.\textsuperscript{583} The regulations also contain an anti-retaliation provision, and Soto claims that he was denied a promotion because of an earlier grievance that he had filed.\textsuperscript{584} The Fifth District Court of Appeal issued a writ of mandamus to force the Board of County Commissioners to process Soto’s grievance in accordance with its own procedures.\textsuperscript{585}

Is due process violated if PERC refuses to consider an appeal that is untimely filed? In \textit{Ford v. Public Employees Relations Commission},\textsuperscript{586} PERC affirmed Ford’s dismissal as a probation officer.\textsuperscript{587} Ford’s court appeal of PERC’s decision was dismissed because it was late.\textsuperscript{588} So, Ford asked PERC to allow him to file a belated appeal\textsuperscript{589} PERC turned Ford down, asserting that only an appellate court can authorize a belated appeal.\textsuperscript{590}

On appeal, citing Supreme Court of Florida precedent,\textsuperscript{591} the court recognized egregious circumstances preventing a litigant from filing on time and that either PERC or an appellate court was authorized to permit the belated appeal.\textsuperscript{592} For example, due process is violated if PERC’s order had been entered, but never transmitted to the litigant, and the time to file an appeal expires.\textsuperscript{593} But, the court affirmed PERC’s dismissal of Ford’s untimely appeal, anyway, because Ford never alleged that his counsel did not receive notice.\textsuperscript{594}

E. \textit{First Amendment}

1. \textit{Free Speech: Matters of Public Concern}

Public employees need not check their constitutional rights of free speech at the workplace door.\textsuperscript{595} Whether speech by a public employee is

\begin{itemize}
  \item 583. \textit{Id.} (citing Fredericks v. School Bd. of Monroe County, 307 So. 2d 463 (Fla. 3d Dist. Ct. App. 1975)).
  \item 584. \textit{Id.} at 864.
  \item 585. \textit{Soto}, 716 So. 2d at 865.
  \item 586. 717 So. 2d 149 (Fla. 5th Dist. Ct. App. 1998).
  \item 587. \textit{Id.} at 150.
  \item 588. \textit{Id.}
  \item 589. \textit{Id.}
  \item 590. \textit{Id.}
  \item 591. \textit{Ford}, 717 So. 2d at 150 (citing Millinger v. Broward County Mental Health Div., 672 So. 2d 24, 27 (Fla. 1996)).
  \item 592. \textit{Id.}
  \item 593. \textit{Id.}
  \item 594. \textit{Id.}
\end{itemize}
entitled to First Amendment protection, however, often turns on whether it is speech on a matter of public concern.\textsuperscript{596} An article in the \textit{Miami Herald} reported on a tenured Florida State University ("FSU") psychology professor, who came under fire after it surfaced that he wrote a glowing introduction to \textit{My Awakening}, the autobiography of David Duke, a former Ku Klux Klan grand wizard and state representative in Louisiana.\textsuperscript{597} The right to free speech and academic freedom is pitted against the impulse to censor views repugnant to most people who make up the FSU community.\textsuperscript{598} FSU's president is on record as a defender of free speech in an academic community.\textsuperscript{599} Some have accused the professor of "racial harassment" of African-American students, but a review of the professor's grading record turned up no evidence of bias against minority students.\textsuperscript{600} Although the professor's specialty is genetic research involving mice, his racial views have been dismissed as "junk science."\textsuperscript{601} In an editorial, the \textit{Miami Herald} dismissed the professor's racial views as claptrap and an embarrassment to FSU, but made clear that the First Amendment and academic freedom protect him.\textsuperscript{602}

In \textit{Huerta v. Hillsborough County},\textsuperscript{603} Henry Huerta worked for Hillsborough County for seventeen years as Executive Manager of the Office of Consumer Affairs and Child Care Licensing.\textsuperscript{604} On June 9, 1991, the \textit{Tampa Tribune} quoted Huerta in an article that criticized the County's childcare licensing program.\textsuperscript{605} Two days later, Huerta was dismissed, and he sued the County and Pat Gray Bean, the person who fired him.\textsuperscript{606}

On appeal, the issue turned on whether Bean was entitled to qualified immunity.\textsuperscript{607} Under the law "a government official... is entitled to qualified immunity from civil suit in the performance of discretionary functions when the official's conduct does not violate any clearly established statutory or constitutional right of which a reasonable person should have
known.\textsuperscript{608} The trial court ruled that under this standard, Bean was entitled to qualified immunity.\textsuperscript{609} On appeal, the Second District Court of Appeal reversed the trial court’s grant of qualified immunity to Bean.\textsuperscript{610}

The appellate court’s decision stemmed from its conclusion that Huerta’s speech touched on a matter of public concern.\textsuperscript{611} At that point, the employee’s interest in speaking freely must be weighed against the employer’s interest in running an efficient agency.\textsuperscript{612} Applying the \textit{Pickering v. Board of Education}\textsuperscript{613} balancing test, the court left no doubt that Huerta’s First Amendment right outweighed any employer interest.\textsuperscript{614}

Huerta spoke on the issue of licensing and inspection of day care facilities. Not only was Huerta the executive manager for child care licensing and qualified to make an informed opinion on the issue as it existed in Hillsborough County, but the subject is also one of public importance affecting numerous families in the County. There is nothing in the record to suggest that the statements made by Huerta were false or that they in any way impeded the proper performance of his duties . . . . [T]here is nothing to suggest that the termination was justified in light of any competing social interests.\textsuperscript{615}

In \textit{Martin v. Baugh},\textsuperscript{616} Martin worked for the City of Birmingham as a communications technician who was concerned about the bidding process to upgrade the City’s communications system.\textsuperscript{617} Martin shared his concerns with a member of the City Council, Blake, and the Birmingham chapter of the Fraternal Order of Police (“FOP”).\textsuperscript{618} Later, Martin testified in a suit that arose between two bidders over the city rigged bidding process.\textsuperscript{619} Martin never cleared his whistleblowing with his supervisor, Baugh.\textsuperscript{620} Upon learning of Martin’s disclosures, Baugh accused Martin of insubordination

\begin{thebibliography}{999}
  \bibitem{608} Huerta, 720 So. 2d at 277 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
  \bibitem{609} \textit{Id.}
  \bibitem{610} \textit{Id.} at 278.
  \bibitem{611} \textit{Id.}
  \bibitem{612} \textit{Id.}
  \bibitem{613} 391 U.S. 563 (1968).
  \bibitem{614} Huerta, 720 So. 2d at 278.
  \bibitem{615} \textit{Id.}
  \bibitem{616} 141 F.3d 1417 (11th Cir. 1998), \textit{cert. denied}, 119 S. Ct. 870 (1999).
  \bibitem{617} \textit{Id.} at 1419.
  \bibitem{618} \textit{Id.}
  \bibitem{619} \textit{Id.}
  \bibitem{620} \textit{Id.}
\end{thebibliography}
and urged him to resign. Martin also received a reprimand, and some of his duties were assigned to a coworker. Depressed by this turn of events, Martin took a leave of absence. Martin then sued the City, the Mayor, and Baugh, alleging that his disclosures were protected by the First and Fourteenth Amendments. Among other things, the district court ruled that Baugh was not entitled to qualified immunity.

On appeal, the sole issue concerned Martin’s claim for damages against Baugh in his individual capacity. To receive the protection of qualified immunity, Martin must prove that his First Amendment right Baugh violated was “clearly established” when Baugh disciplined him. The court concluded that Martin fell short of his burden on this issue. The court pointed out that there is a presumption of qualified immunity, and Martin had to prove that: 1) the speech touched on a matter of public concern; and 2) “the value of the speech outweighs its potential for disruption of government workplace efficiency.”

The court made clear that a defendant in a First Amendment suit would “rarely be on notice that his actions are unlawful.” No authority suggests that a person in Baugh’s position would obviously have known that Martin’s speech was constitutionally protected. It is almost impossible for a reasonable person to judge before trial how a court will assess the array of factors that go into whether speech is protected. In sum, it was not plainly manifest when Baugh disciplined Martin that his First Amendment rights were being violated. Baugh is entitled to qualified immunity.

In Badia v. City of Miami, Badia worked for the City of Miami Department of Public Works. Among other claims, Badia alleged that the City and Wally Lee, the former director of the department, violated her First Amendment rights by retaliating against her after she filed a charge of

621. Martin, 141 F.3d at 1419.
622. Id.
623. Id.
624. Id.
625. Id. at 1420.
626. Martin, 141 F.3d at 1418.
627. Id. at 1420.
628. Id.
629. Id. (citing Goffer v. Marbury, 956 F.2d 1045, 1049 (11th Cir. 1992)).
630. Id.
631. Martin, 141 F.3d at 1420–21.
632. Id. at 1420.
633. Id. at 1421.
634. Id.
635. 133 F.3d 1443 (11th Cir. 1998).
636. Id. at 1445.
Lee claimed qualified immunity, but the district court rejected Lee's claim, ruling that a genuine issue existed over whether discrimination motivated Lee's treatment of Badia and the elimination of her job. Lee appealed.

Badia's First Amendment claim came down to whether the "speech" was a matter of public concern. Precedent dictates that the court focus on the "content, form, and context." In the words of the court, "[i]f it is unclear whether Badia's complaints were of the kind held to involve a matter of public concern, then Lee's alleged actions did not violate clearly established First Amendment rights and he is entitled to qualified immunity." Badia cites precedent that treats an employee's federal court testimony in a discrimination suit as speech on a matter of public concern. The court pointed to a split of authority over whether a formal employment discrimination complaint rises to the level of speech on a matter of public concern. In light of this lack of consensus on the issue, the right deemed violated here could not have been clearly established for purposes of qualified immunity. In short, Lee's alleged actions did not violate clearly established First Amendment rights, so he is entitled to qualified immunity.

In Morris v. Crow, the issue also turned on whether a public employee's speech touched on a matter of public concern. Deputy Sheriff Morris was dismissed after an investigation into two incidents of misconduct. Morris claimed that he was terminated due to statements he made in an accident report, and in his deposition testimony involving the investigation of a codeputy's traffic accident, in which a citizen was killed. Morris's accident report mentioned that the officer was driving over 130 miles per hour in a 50 miles per hour zone and that the officer

637. Id.
638. Id.
639. Id.
640. Badia, 133 F.3d at 1445.
641. Id. (citing Connick v. Myers, 461 U.S. 138, 147 (1983)).
642. Id.
643. Id. at 1446.
644. Id.
645. Badia, 133 F.3d at 1446.
646. Id.
647. 142 F.3d 1379 (11th Cir. 1998).
648. Id. at 1381.
649. Id.
650. Id.
failed to switch on "an emergency blue warning light in violation of sheriff's office policy." 651

On appeal, the issue was whether Morris's speech can be "fairly characterized as constituting speech on a matter of public concern." 652 The Eleventh Circuit noted that the Supreme Court has yet to decide whether "speech that occurs in the course of and as part of an employee's ordinary duties is protected." 653 Relying on Eleventh Circuit precedent, the court focused on "whether the speech at issue was made primarily in the employee's role as citizen, or primarily in the role of employee." 654 Forced to choose, the court concluded that Morris's report stemmed primarily from his role as employee: "[t]here is nothing in the record to indicate that Morris's purpose in writing the accident report was to bring to light any wrongdoing or to do any more than accurately report an accident in the course of his employment." 655 As for his deposition testimony, Morris was subpoenaed to testify about the accident: "[t]he mere fact that Morris's statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech." 656 For this reason, the Eleventh Circuit affirmed the district court's ruling that Morris's statements were not protected speech under the First Amendment. 657

Gonzalez v. Lee County Housing Authority 658 dealt with the same issue: Whether public employee speech touched on a matter of public concern. 659 Specifically, whether a letter from an employee of a county housing authority to her supervisor, claiming that she was forced to engage in discriminatory housing practices, constituted speech on a matter of public concern. 660 The Eleventh Circuit ruled that it did not; therefore, the supervisor was entitled to qualified immunity. 661

651. Id.
652. Morris, 142 F.3d at 1381 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)).
653. Id.
654. Id. at 1382 (quoting Morgan v. Ford, 6 F.3d 750, 755 (11th Cir. 1993)) (internal citations omitted).
655. Id.
656. Id. at 1383.
657. Morris, 142 F.3d at 1383.
658. 161 F.3d 1290 (11th Cir. 1998).
659. Id. at 1292.
660. Id. at 1293.
661. Id. at 1298.
2. Freedom of Association

In *Blanco v. City of Clearwater*, Blanco was a police officer with the Clearwater Police Department. Blanco was discharged after an investigation into whether he was involved in a long-term sexual relationship with a seventeen-year-old girl. Blanco was found to be in violation of a department regulation which provides:

[N]o employee shall engage in conduct on or off-duty which adversely affects the morale or efficiency of the department; nor shall any employee engage in conduct on or off-duty which has a tendency to destroy public respect for the employee and/or the department and/or destroy confidence in the operation of the municipal service.

In court, Blanco invoked his constitutional right to intimate association, among other rights. Again, whether some of the defendants were entitled to qualified immunity turned on whether the law was clearly established that an adult has a constitutional right to engage in a sexual relationship with a minor. At most, one earlier case ruled that "'dating is a type of association that must be protected by the First Amendment's freedom of association.' " But, one case does not make for a clearly established law; therefore, the defendants were entitled to qualified immunity.

The *Miami Herald* recently reported on a case that holds out the potential for implicating public employees' freedom of association. In January, 1999 thirty-one people were arrested in a police operation sting at a private club where members took part in consensual sexual activities in front of each other. Among the thirty-one arrested were two public high school teachers who were suspended without pay by the Broward School Board on August 3, 1999, pursuant to a state administrative rule that enables school districts to discharge public employees "convicted of a crime involving

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662. 9 F. Supp. 2d 1316 (M.D. Fla. 1998).
663. Id. at 1318.
664. Id.
665. Id. (quoting CLEARWATER, FLA., POLICE DEP'T reg. 213.15).
666. Id.
668. Id. (quoting Wilson v. Taylor, 733 F.2d 1539, 1543 (11th Cir. 1984)).
669. Id.
671. Id.
Sanchez

moral turpitude."\textsuperscript{672} The article pointed out that the case raises "questions about whether the private lives of teachers should have any bearing on their public roles in the classroom."\textsuperscript{673} While some board members felt that the teachers' dismissal amounted to an invasion of their privacy, another claimed that it was permissible to "hold teachers to a high moral standard."\textsuperscript{674} In the face of public opinion critical of the board's discipline, the board is weighing whether to take another vote.\textsuperscript{675} News accounts cite two earlier cases that frame the strict moral guidelines for teachers.\textsuperscript{676} In 1981 the Eleventh Circuit affirmed the revocation of teaching licenses of two Lee County teachers for growing marijuana in their gardens.\textsuperscript{677} Similarly, in 1975 the Eleventh Circuit sustained the termination of a Miami-Dade teacher who was sexually abusing his stepdaughter.\textsuperscript{678}

XII. UNEMPLOYMENT COMPENSATION

One unemployment compensation case involving a public employee bears mention. In \textit{Philemy v. Florida Department of Health & Rehabilitative Services},\textsuperscript{679} Philemy worked for HRS as a behavioral program associate.\textsuperscript{680} In the course of her duties, Philemy discovered bruises on the back of a resident.\textsuperscript{681} The bruises looked like the imprint of a key.\textsuperscript{682} Although she wrote down her observations, Philemy failed to report the abuse to the abuse registry in accordance with HRS policy.\textsuperscript{683} After she was fired, Philemy appealed her termination to PERC, which sustained the dismissal.\textsuperscript{684} Later, Philemy applied for unemployment compensation.\textsuperscript{685} At first, her claim was approved since the claims examiner deemed that her termination "was for reasons other than misconduct connected with work."\textsuperscript{686} HRS

\begin{itemize}
  \item \textsuperscript{672} Id.
  \item \textsuperscript{673} Id.
  \item \textsuperscript{674} Id.
  \item \textsuperscript{675} Daniel de Vise & Connie Piloto, \textit{Teacher Discipline Sparks Big Outcry Board to Reconsider Sex-Raid Suspensions}, \textit{Miami Herald} (Broward), Aug. 5, 1999, at 1A.
  \item \textsuperscript{676} Beth Reinhard, \textit{Suspension of Two Teachers Prompts Debate}, \textit{Miami Herald}, Aug. 8, 1999, at 1B.
  \item \textsuperscript{677} Id.
  \item \textsuperscript{678} Id.
  \item \textsuperscript{679} 731 So. 2d 64 (Fla. 3d Dist. Ct. App. 1999).
  \item \textsuperscript{680} Id. at 65.
  \item \textsuperscript{681} Id.
  \item \textsuperscript{682} Id.
  \item \textsuperscript{683} Id.
  \item \textsuperscript{684} \textit{Philemy}, 731 So. 2d at 65.
  \item \textsuperscript{685} Id. at 66.
  \item \textsuperscript{686} Id.
\end{itemize}
appealed and the appeals referee concluded that Philemy was terminated for misconduct relating to her job.\(^{687}\)

On appeal, the Third District Court of Appeal reversed and reinstated Philemy's unemployment compensation benefits.\(^{688}\) Under Florida law, "misconduct" that will disqualify a claimant is defined as:

\[
\begin{align*}
& (a) \text{ Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his or her employee;} \text{ or} \\
& (b) \text{ Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.} \quad \text{689}
\end{align*}
\]

All doubts must be resolved in favor of the claimant and the employer bears the burden of proving misconduct.\(^{690}\) A cause sufficient for job termination is not invariably misconduct that will bar unemployment compensation benefits.\(^{691}\) Here, Philemy notified a coworker, recorded her findings in a log, and posted a note on the bulletin board recording her concerns.\(^{692}\) Even though she was negligent in failing to call the abuse registry and to notify her supervisor, her negligence did not amount to misconduct for purposes of unemployment compensation eligibility.\(^{693}\)

XIII. PUBLIC SECTOR COLLECTIVE BARGAINING, UNFAIR LABOR PRACTICES, AND UNION ELECTIONS

On May 20, 1999 the Supreme Court of Florida handed down a landmark decision embracing the fundamental right of government attorneys to bargain collectively over the terms and conditions of their employment.\(^{694}\) Back in 1993, the State Employees Attorneys' Guild ("SEAG") filed a

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\begin{align*}
& 687. \quad \text{Id.} \\
& 688. \quad \text{Id.} \\
& 689. \quad \text{FLA. STAT. § 443.036(29) (1999).} \\
& 690. \quad \text{Philemy, 731 So. 2d at 66 (citing McKnight v. Florida Unemployment Appeals Comm'n, 713 So. 2d 1080, 1081 (Fla. 1st Dist. Ct. App. 1998)).} \\
& 691. \quad \text{Id. at 66 (citing Betancourt v. Sun Bank Miami, N.A., 672 So. 2d 37, 38 (Fla. 3d Dist. Ct. App. 1996)).} \\
& 692. \quad \text{Id.} \\
& 693. \quad \text{Id.} \\
& 694. \quad \text{Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030, 1033 (Fla. 1999) [hereinafter "Chiles II"]).}
\end{align*}
\]
petition with PERC, seeking certification as a bargaining unit of attorneys who work for the State of Florida.\textsuperscript{695} PERC scheduled an evidentiary hearing.\textsuperscript{696} In response, the State asked the Supreme Court of Florida to stop PERC from hearing SEAG's petition, arguing that only the state supreme court could regulate the practice of law.\textsuperscript{697} The court refused to issue a writ of prohibition because PERC is not a "court."\textsuperscript{698} Two months later, Governor Chiles signed into law a bill aimed at barring attorneys working for the state from bargaining collectively.\textsuperscript{699} In light of the new law, PERC dismissed SEAG's petition.\textsuperscript{700} The lawyers' union appealed PERC's dismissal, calling into question the constitutionality of the new law.\textsuperscript{701} The district court sustained PERC's dismissal.\textsuperscript{702} SEAG brought suit in circuit court challenging the law's constitutionality under article I, section 6 of the Florida Constitution.\textsuperscript{703} The circuit court struck down the law, ruling that it encroached upon the right of government lawyers to bargain collectively.\textsuperscript{704} The First District Court of Appeal affirmed.\textsuperscript{705}

On appeal, the Supreme Court of Florida agreed that the new law was unconstitutional.\textsuperscript{706} The court relied on article I, section 6 of the Florida Constitution, which is aimed at protecting the right of public employees to bargain collectively, as evidence that the people of Florida had foreclosed this debate.\textsuperscript{707} In reaching this result, the court applied strict scrutiny analysis under which the state must come forward with a compelling state interest for denying government lawyers the right to bargain collectively.\textsuperscript{708} Moreover, the law must achieve that "compelling state interest in the least intrusive means possible."\textsuperscript{709} The State argued that "government attorneys

\textsuperscript{695} Id. at 1031.
\textsuperscript{696} Id.
\textsuperscript{697} Id.
\textsuperscript{698} Id. (citing Chiles v. Public Employees Relations Comm'n, 630 So. 2d 1093, 1094 (Fla. 1994)).
\textsuperscript{699} "An act relating to public employees." Ch. 94-89, § 1, 1994 Fla. Laws 309, 310 (codified at FLA. STAT. § 447.203(3)(j) (Supp. 1994)).
\textsuperscript{700} Chiles II, 734 So. 2d at 1032 (citing 20 F.P.E.R. ¶ 25151 (1994)).
\textsuperscript{701} Id.
\textsuperscript{702} Id. (citing State Employees Attorneys Guild v. State, 653 So. 2d 487, 489 (Fla. 1st Dist. Ct. App. 1995)).
\textsuperscript{703} Id.
\textsuperscript{704} Id.
\textsuperscript{705} Chiles v. State Employees Attorneys Guild, 714 So. 2d 502, 507-08 (Fla. 1st Dist. Ct. App. 1998) [hereinafter "Chiles I"], aff'd by 734 So. 2d 1030 (Fla. 1999).
\textsuperscript{706} Chiles II, 734 So. 2d at 1036.
\textsuperscript{707} Id.
\textsuperscript{708} Id.
\textsuperscript{709} Id. at 1033 (quoting State Employees Attorneys Guild v. State, 653 So. 2d 487, 488 (Fla. 1st Dist. Ct. App. 1995)).
must give complete confidentiality, fidelity and loyalty to the State and local government while conducting its legal affairs.”

In sum, according to the State the personal nature of the attorney-client relationship would be undermined if the attorney were entitled to continuously sue the state to enforce the terms of a collective bargaining agreement. However, the court found that the State introduced no evidence that the law was needed to protect the asserted state interest. No evidence supported the State’s conclusion that “government employed attorneys would abandon their ethical obligation of confidentiality, fidelity and loyalty” by joining a labor union. Moreover, the experience of other states in which government lawyers are entitled to bargain collectively has produced no “apparent harm to the attorney-client relationship.” Attorneys who work for the federal government also are entitled to bargain collectively with no apparent ill effect.

The State also claimed that collective bargaining would entail compartmentalizing its legal staff to minimize the risk of conflict. The court’s response was that such an administrative burden did not rise to the level of a compelling state interest. Moreover, the court ruled that collective bargaining by state-employed lawyers did not infringe upon the court’s jurisdiction over lawyer discipline. If other states are any guide, collective bargaining can be framed to accommodate both the government’s interests in assuring loyalty and competence in their attorneys, and the attorneys’ constitutional right as public employees to bargain collectively.

In support of this conclusion, the court cited the position of the American Bar Association and of The Florida Bar Board of Governors, which recognizes that attorney collective bargaining is not inherently incompatible with the attorney-client relationship. At the same time, the court warned that the rules regulating The Florida Bar and a lawyer’s duty of loyalty take precedence over a lawyer’s collective bargaining activities, and any breaches will lead to discipline by the court under article V, section 15 of the Florida Constitution.

710. Id.
711. Chiles II, 734 So. 2d at 1034.
712. Id. at 1034.
713. Id.
714. Id.
715. See id. at 1034–35.
716. Chiles II, 734 So. 2d at 1035.
717. Id.
718. Id.
719. Id. at 1036.
720. Id. (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-13 (1980)).
721. Chiles II, 734 So. 2d at 1037.
An article in the *Miami Herald* reported that a public school teachers' union filed a grievance over class sizes, and teachers at Western High School followed the lead.\(^{722}\) The action was noteworthy since it was the first time that the teachers' union filed a grievance over class size.\(^{723}\) School district rules stipulate that, on average, teachers should handle no more than 198 students a day.\(^{724}\) For schools with block scheduling, classes that run twice as long, the number is ninety-nine students.\(^{725}\) With an enrollment of 3675, Western High School was running at double its capacity.\(^{726}\) Although the school added portable classrooms, the union claimed that the school violated health and safety standards by crowding too many students into each portable classroom.\(^{727}\) The issue of overcrowding came to a head at Walter C. Young Middle School, but was settled when teachers agreed on extra pay to teach additional classes.\(^{728}\) As the School Board saw it, however, the issue was not grievable since the collective bargaining agreement was silent on the question of class size, unlike most contracts between school boards and teachers' unions.\(^{729}\)

In *City of Safety Harbor v. Communications Workers of America*,\(^{730}\) PERC had certified the Communications Workers of America ("CWA") as the exclusive bargaining representative for a bargaining unit.\(^{731}\) According to PERC, the bargaining unit, composed wholly of nonprofessional employees, included the classification "Recreation Leaders II," even though the parties regarded that classification as professional.\(^{732}\) On appeal, PERC's ruling was reversed and the court ordered a new election.\(^{733}\) At issue was the proper interpretation of the statute defining the term "professional employee."\(^{734}\) The introductory clause of the statute recites that a professional employee must be engaged in work "in any two or more" of the following four enumerated categories.\(^{735}\) PERC read the fourth

\(^{722}\) Daniel De Vise, *Broward Teachers Score on Crowding But Union Files New Grievance*, *MIAMI HERALD* (Broward), Feb. 4, 1999, at 1A.

\(^{724}\) Id.

\(^{725}\) Id.

\(^{726}\) Id.

\(^{727}\) De Vise, *supra* note 722, at 1A.

\(^{728}\) Id.

\(^{731}\) Id. at 266.

\(^{732}\) Id. (citing *Communications Workers of Am. v. City of Safety Harbor*, 22 F.P.E.R. \(\S\) 27125 (1996)).

\(^{734}\) Id. (citing *FLA. STAT.* \$ 447.203(13) (1999)).

\(^{735}\) *FLA. STAT.* \$ 447.203(13)(a) (1999). The four categories stated in the statute are:
category of the definition, the "specialized intellectual instruction" category, as a threshold requirement.\textsuperscript{736} The court ruled that PERC's treatment of section 447.203(13)(a)4 of the \textit{Florida Statutes} as a threshold was error.\textsuperscript{737} PERC's reliance on the analogous federal statute, the NLRA,\textsuperscript{738} and the analogous statutes of other states was ill advised.\textsuperscript{739} Unlike those statutes, employees in Florida qualify as "professional" based on meeting "any two or more" of the four listed criteria.\textsuperscript{740} The other statutes omit this modifying language.\textsuperscript{741} Since Safety Harbor's Recreation Leaders II met the first two criteria of section 447.203(13)(a), they qualified as "professional employees."\textsuperscript{742}

Once PERC certifies a union as the exclusive bargaining representative of a defined bargaining unit, the public employer and the union must bargain in good faith over the terms and conditions of employment.\textsuperscript{743} In \textit{Hillsborough Area Regional Transit Authority v. Amalgamated Transit Union Local 1593},\textsuperscript{744} the Regional Transit Authority and the Transit Union filed unfair labor practice charges with PERC.\textsuperscript{745} After a hearing, PERC ruled that the Transit Union had not bargained in bad faith.\textsuperscript{746} The Transit

\begin{itemize}
\item Work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work;
\item Work involving the consistent exercise of discretion and judgment in its performance;
\item Work of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and
\item Work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education, an apprenticeship, or training in the performance of routine mental or physical processes.
\end{itemize}

\textit{Id.}

\textsuperscript{736} City of Safety Harbor, 715 So. 2d at 267.
\textsuperscript{737} Id.
\textsuperscript{738} 29 U.S.C. § 152(12) (1994) provides that a professional must be engaged in work calling for knowledge of an advanced type ordinarily secured via higher education.
\textsuperscript{739} City of Safety Harbor, 715 So. 2d at 267.
\textsuperscript{740} Id. at 267 (citing FLA. STAT. § 447.203(13)(a)).
\textsuperscript{741} Id. at 267–68.
\textsuperscript{742} Id. at 268.
\textsuperscript{743} See Hillsborough Area Reg'l Transit Auth. v. Amalgamated Transit Union Local 1593, 720 So. 2d 1160 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{744} 720 So. 2d 1160 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{745} Id. at 1161.
\textsuperscript{746} Id.
Authority appealed. The court sustained PERC's judgment that the Transit Union had not bargained in bad faith. "[W]hether a party bargains in good or bad faith is a factual determination based on the circumstances of the particular case." Even in the face of evidence that may support a contrary view, the court felt compelled to accept PERC's conclusion.

XIV. EMPLOYMENT DISCRIMINATION

A. Section 1981

Section 1981 of title 42 of the United States Code, enacted to police the Thirteenth Amendment, supports only claims alleging racial discrimination. In Jett v. Dallas Independent School District, the Supreme Court ruled that § 1981 would not support a suit against a state employer. In 1991, however, Congress amended section 1981 by adding subsection (c), making clear that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination." A split has emerged among the circuit courts over whether section 1981(c) statutorily overrules Jett and opens up an implied private right of action against municipalities.

In Cason Enterprises, Inc. v. Metropolitan Dade County, Cason Enterprises, Inc. ("CEI") entered into a contract with the Miami-Dade Water and Sewer Department for the purchase of bulk granular potassium permanganate ("GPP") with an option by the County to purchase potassium permanganate ("PP") in liquid form. Later, the County purchased drums of dry PP from another supplier, claiming that CEI refused to sell PP in drums. In 1995 the County ordered GPP in bulk. CEI was unable to

747. Id.
748. id.
749. Hillsborough, 720 So. 2d at 1161 (quoting Duval County Sch. Bd. v. Florida Pub. Employees Relations Comm'n, 353 So. 2d 1244, 1248 (Fla. 1st Dist. Ct. App. 1978)).
750. Id.
753. Id. at 738.
757. Id. at 1335.
758. Id.
759. Id. at 1336.
supply the ordered bulk product. CEI was found to be in default and the contract was canceled in 1996. CEI sued the County for alleged violations of section 1981 of title 42 of the United States, among other claims. The court ruled that "[p]roof of intentional discrimination is required in order to establish liability under § 1981." Moreover, "[l]iability under § 1981 is personal in nature and cannot be imposed vicariously."

B. Title VII and Equal Protection via § 1983

1. Definition of Public Employer under Title VII

The Eleventh Circuit, in Lyes v. Riviera Beach, established a new test to determine whether a public employer has the requisite number of employees to fall within Title VII's coverage. The court focused on "the presumption that governmental subdivisions denominated as separate and distinct under state law should not be aggregated for purposes of Title VII." This presumption, however, is rebuttable "where one entity exerts or shares control over the fundamental aspects of the employment relationships of another entity, to such a substantial extent that it clearly outweighs the presumption that the entities are distinct." Evidence of such control includes: 1) interrelation of operations; 2) centralized control of labor operations; 3) authority to hire, transfer, promote, discipline, or discharge; and 4) the obligation to pay or the duty to train the plaintiff.

2. National Origin Discrimination

National origin discrimination in the public sector can be challenged under the Equal Protection Clause of the Fourteenth Amendment and under Title VII of the Civil Rights Act of 1964. In Buzzi v. Gomez, the plaintiffs were former and current officers of the Metro-Dade Police

760. Id.
762. Id. at 1337.
763. Id.
764. Id.
765. 166 F.3d 1332 (11th Cir. 1999) (en banc).
766. Id. at 1345.
767. Id.
768. Id.
769. Id.
Sanchez

Department ("MDPD"). The plaintiffs claimed that their former supervisor, Lieutenant Gomez, a Cuban-American male, hatched a scheme to systematically transfer them from, or sometimes, bar their transfer into, assignments at the Airport District because they were not Cuban, while employing less qualified Cuban transferees. Gomez was also accused of harassing non-Cuban officers from the Airport District to force their transfers to other districts. The Airport District is a coveted assignment, posing low risk and much overtime. Plaintiffs claimed that they were victims of national origin discrimination by virtue of their non-Cuban heritage, in violation of the Equal Protection Clause of the Fourteenth Amendment. Defendant Carlos Alvarez was also sued because, as the Assistant Director of the MDPD, he did not remedy the situation.

Eventually, Division Chief Paull met with Buzzi, who related evidence of a hostile environment on grounds of national origin. The Professional Compliance Bureau ("PCB") conducted an investigation, which led to Alvarez removing Gomez from his post. PCB’s report sustained several of the allegations, concluding that Gomez had acted unprofessionally and that he failed at times to follow standard procedures for transfers. PCB’s report stopped short of accusing Gomez of national origin discrimination. PCB did not investigate Alvarez. Dissatisfied with PCB’s report, the plaintiffs filed charges of discrimination with the EEOC, which led to a § 1983 suit being filed in federal court, naming Gomez and Alvarez, among other defendants.

The court framed the issue as whether Alvarez was entitled to qualified immunity from plaintiffs’ § 1983 suit. Violations of § 1983 occur when a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects ... any citizen ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

772. Id. at 1355.
773. Id.
774. Id.
775. Id.
777. Id.
778. Id. at 1357.
779. Id.
780. Id.
782. Id.
783. Id.
784. Id. at 1358.
Proof of a violation requires a showing of intent.786 "A defendant may be liable only for an affirmative act or 'deliberate indifference' to a risk where the deprivation of a federal right is a 'plainly obvious consequence' of the defendant's inaction."787 The court concluded that Alvarez was entitled to qualified immunity as a matter of law.788

The Supreme Court framed the test for judging whether a public official is entitled to qualified immunity.789 "[G]overnment officials . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."790 A government official performing discretionary functions is shielded if "a reasonable official could have believed his or her conduct to be lawful in light of clearly established law and the information possessed by the official at the time the conduct occurred."791 Entitlement to immunity is the rule, not the exception.792 The Eleventh Circuit's formulation of the test is two-fold.793 "First, the defendant must prove that he was acting within the scope of his discretionary authority" when the misconduct occurred.794 If the defendant satisfies this prong, then the plaintiff must prove that the defendant "violated clearly established law based upon objective standards," in other words, that the plaintiff's rights were so clear that a reasonable government official would have understood that his acts violated the plaintiff's rights.795

Applying this test, the court concluded that Alvarez acted in his discretionary authority so the burden shifted to the plaintiffs, who failed to meet their burden of demonstrating that Alvarez "violated clearly established constitutional law."796 In short, the plaintiffs failed to show that when Alvarez failed to act, the "law was developed in such a concrete and factually defined context to make it obvious to all reasonable government actors, in Alvarez's place, that what he was doing violated federal law."797

787. Id. (quoting Board of County Comm'rs v. Brown, 520 U.S. 397, 398 (1997)).
788. Id. at 1359.
789. Id.
790. Id. at 1359–60 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).
791. Buzzi, 24 F. Supp. 2d at 1360 (quoting Hardin v. Hayes, 957 F.2d 845, 848 (11th Cir. 1992)).
792. Id.
793. Id.
794. Id. (citing Hartsfield v. Lemacks, 50 F.3d 950, 953 (11th Cir. 1995)).
795. Id. (citing Swint v. City of Wadley, 51 F.3d 988, 995 (11th Cir. 1995)).
796. Buzzi, 24 F. Supp. 2d at 1360 (quoting Sammons v. Taylor, 967 F.2d 1533, 1539 (11th Cir. 1992)).
797. Id. (citing Braddy v. Florida Dep't of Labor & Employment Sec., 133 F.3d 797, 801 (11th Cir. 1998)).
The evidence demonstrated that once Alvarez received concrete information of a hostile environment at the Airport District, he immediately authorized an investigation. When the fruits of the investigation pointed out misconduct, he "summarily relieved Gomez of his command." Without some case precedent holding that an official, akin to Alvarez, had a duty to halt the transfers of personnel, Alvarez enjoyed discretion to decide whether plaintiffs’ grievances required his immediate attention. For Alvarez to lose his immunity, it would have to be demonstrated that his "acts or omissions were the cause—not merely a contributing factor—of the constitutionally infirm condition."  

3. Relationship Between Title VII and § 1983 Claims

In Johnson v. City of Fort Lauderdale, Johnson, an African-American male, worked for the City of Fort Lauderdale Fire Department. In 1994, Johnson sued the City, a former Fire Chief, and four supervisors under Title VII, and §§ 1981 and 1983, alleging an equal protection violation, and claiming racial harassment, discrimination, and retaliation. In response, the defendants argued that the Civil Rights Act of 1991 left Title VII as the sole remedy for public sector employment discrimination.

The Eleventh Circuit surveyed the views of other courts on whether the 1991 Act left Title VII and § 1983 as the exclusive remedies for public sector employment discrimination. The Fourth Circuit and several district courts have rejected defendants’ argument that such exclusivity is implied from 1) "the Act’s inclusion of a savings clause related to § 1981" and conscious exclusion of an analogous savings clause for § 1983; and 2) the Act’s overall remedial scheme. Turning to the Act’s legislative history, the court pointed out that while the language is ambiguous at best, the fairest
conclusion is that Congress did not intend to limit § 1983’s scope.\textsuperscript{809} In short, the omission “sheds little light” on Congress’s aim to preserve or preempt § 1983 remedies for municipal workers.\textsuperscript{810} In support of its ruling the court noted that the legislative history of Title VII evinces congressional intent to preserve, not to preempt, “§ 1983 as a parallel remedy for unconstitutional public sector employment discrimination.”\textsuperscript{811} In light of this conclusion, the court affirmed the district court’s order denying the defendants’ motion to dismiss Johnson’s § 1983 claims.\textsuperscript{812}

4. Relationship Between Title VII and Collective Bargaining

In \textit{United States v. City of Hialeah},\textsuperscript{813} the federal government accused the City of Hialeah of discrimination against African-Americans in hiring firefighters and police officers in violation of Title VII.\textsuperscript{814} The parties entered into a consent decree including a provision granting retroactive competitive seniority to thirty new African-American workers.\textsuperscript{815} The district court refused to approve this part of the consent decree because it would violate contractual seniority rights of the incumbent employees, rights enshrined in the parties’ collective bargaining agreements.\textsuperscript{816} This case can be framed as an effort to adopt affirmative action via a consent decree that is blocked by claims of reverse discrimination.\textsuperscript{817}

On appeal, the Eleventh Circuit concluded that affirmative remedial goals cannot be achieved in a consent decree proceeding if rights of a nonconsenting third party are affected.\textsuperscript{818} Before such affirmative action can be adopted, there must be a trial on the merits or a valid summary judgment.\textsuperscript{819} A prima facie case of discrimination alone will not warrant depriving an objecting party’s right to a full adjudication of its arguments on the merits in a trial.\textsuperscript{820} One party to a collective bargaining agreement cannot rely on a nonconsensual Title VII consent decree to relieve itself of its

\begin{footnotesize}
\textsuperscript{809} \textit{Id.} at 1230.
\textsuperscript{810} \textit{Id.} (quoting Stoner v. Department of Agric., 846 F. Supp. 738, 741 (W.D. Wis. 1994)).
\textsuperscript{811} \textit{Johnson}, 148 F.3d at 1230.
\textsuperscript{812} \textit{Id.} at 1231.
\textsuperscript{813} 140 F.3d 968 (11th Cir. 1998).
\textsuperscript{814} \textit{Id.} at 971.
\textsuperscript{815} \textit{Id.}
\textsuperscript{816} \textit{Id.}
\textsuperscript{817} \textit{Id.}
\textsuperscript{818} \textit{City of Hialeah}, 140 F.3d at 975.
\textsuperscript{819} \textit{Id.} at 977.
\textsuperscript{820} \textit{Id.} at 978.
\end{footnotesize}
obligations, which the other party negotiated and bargained to secure. 821 At the same time, the court made clear that if a Title VII violation is found after trial, collectively bargained seniority rights may have to be modified as part of the remedy. 822

5. Affirmative Action

Court ordered affirmative action in the form of a consent decree was the subject of an article in the Miami Herald. 823 Twenty-two years ago, the City of Miami was ordered by a federal court to improve its record in hiring and promoting minorities in its work force. 824 In response, the city rewrote its hiring and promotion exams to eliminate racial bias. 825 In addition, the City adopted rules that accorded lower ranked minorities opportunities to fill vacancies that would otherwise go to non-Hispanic whites.

In 1999, the United States Justice Department urged a federal judge to end the court order in light of the fact that today, roughly half of Miami’s employees are Hispanic and thirty percent are African-American. 827 As for the police department, the court would continue to oversee exams for the ranks of captain and below for about a year. 828 Departments other than police and fire departments have dropped exams for hiring and promotions altogether, relying on more flexible hiring practices. 829

Ward Connerly, who spearheaded the campaign to end affirmative action in government hiring in California, has turned his attention to Florida. 830 According to a New York Times article, Connerly hopes to amend the Florida Constitution to bar affirmative action that is based on race, sex, or ethnicity, in government hiring and contracts. 831 The article cited a poll showing that eighty-four percent of over 600 voters reached by telephone would vote for a ban on affirmative action. 832 To get his initiative on the

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821. Id. at 983.
822. Id.
823. Tyler Bridges, U.S. Moves to Lift City of Miami Hiring Order, MIAMI HERALD, Apr. 12, 1999, at 1B.
824. Id.
825. Id.
826. Id.
827. Id.
828. Bridges, supra note 823, at 1B.
829. Id.
831. Id.
832. Id.
ballot next year, Connerly must sign up 430,000 registered voters. Next, the Supreme Court of Florida must review the proposed ballot language. Governor Jeb Bush, a critic of the measure, dismissed Connerly’s crusade as divisive. According to the Miami Herald, however, retirees from Homestead and Margate have added their support to building contractors who favor the measure.

Meanwhile, according to an editorial in the Miami Herald, the Miami-Dade County Commission voted in February, 1999 to reaffirm a minority set-aside program for professional contracts. Citing Supreme Court precedent eroding the legal grounds for minority set-asides, the editorial warned that “20-year-old set-aside programs must be adapted to today’s realities.”

An article in the Miami Herald also reported that eleven African-American city employees sued the City of Fort Lauderdale, alleging that they were denied promotions on account of their race. The lawsuit claims that the City promoted three white males in the Public Works Department over senior African-American workers.

6. Sex Discrimination and Sexual Harassment

In May 1999, five female law professors resigned from Florida State University’s law school, alleging sexual harassment. According to the Miami Herald, one of the professors claimed that “harassment is tolerated on several levels at the school” although the women did not single out any particular person.

An editorial in the Miami Herald reviewed claims of sexual harassment among Pembroke Pines city employees. The editorial criticized the city for allowing accused harassers to retire. It also urged cities to create “clear channels for reporting harassment, quick investigations and discipline
of offenders,” otherwise, they would have to continue paying out public
funds to settle harassment suits. 845

While not a public employment case, the Blockbuster hair length case
arose in South Florida and only ended when the Supreme Court refused to
review the case. 846 Four men claimed that Blockbuster singled them out
because of their hair length. 847 Left intact was the Eleventh Circuit’s ruling
that different hair length rules for men and women do not violate Title VII. 848
Blockbuster’s policy required male employees to wear their hair within two
inches of their collar, while women’s hair length went unregulated. 849 In the
past, the Supreme Court has sustained grooming standards for police officers
who were not permitted to wear facial hair or wear their hair long. 850

In Department of Business & Professional Regulation v. Balaguer, 851
Ray Balaguer and a woman were finalists for a promotion to the rank of
sergeant in the Department’s Division of Alcoholic Beverages and
Tobacco. 852 After Balaguer was passed over for the promotion, he filed a
petition with the Commission on Human Relations, claiming gender and age
discrimination. 853 After an administrative hearing, the law judge (“ALJ”)
found that the Department had committed unlawful gender discrimination
and the Commission adopted this judgment as its own, ordering the
Department to stop discriminating and to promote Balaguer to sergeant. 854
On appeal, the court made clear that it would not disturb the ALJ’s findings
unless they were clearly erroneous. 855 After reviewing the record, the court
concluded that there was no evidentiary support for the ALJ’s critical
findings of fact. 856

In Hazel v. School Board of Dade County, 857 Hazel served as Student
Activities Director for Northwestern High School. 858 Clarke became
Principal in 1995. 859 Hazel claimed that Clarke sexually harassed her by

845. Id.
S. Ct. 509 (1998); see also Elaine Walker, Supreme Court Won’t Hear Blockbuster Hair-Length
847. Harper, 139 F.3d at 1386.
848. Id. at 1387.
852. Id. at 537.
853. Id.
854. Id.
855. Id.
856. Balaguer, 729 So. 2d at 538.
858. Id. at 1351.
859. Id.
making comments about her physical appearance, staring at her in a sexual manner, and propositioning her for sex. Hazel also claimed that Clarke threatened that she would regret not having sex with him. After putting him off multiple times, Hazel alleged that Clarke retaliated against her by eliminating her job and reassigning her other duties to other teachers without informing Hazel. Later, Hazel shared her concerns with a former principal of the school, Koonce. As a School Board administrator, Koonce spoke with Clarke about Hazel’s allegations. Clarke was also accused by other female employees of sexual harassment. The School Board never talked to Hazel about her grievance or disciplined Clarke. Hazel claimed that Clarke stepped up his harassment after he learned that she had complained. In 1996, Clarke demoted Hazel (involuntarily transferred her to a classroom teaching position) even though she had received the highest possible performance rating the year before.

Later, the Equal Employment Opportunity Commission allowed Hazel to bring suit against the School Board and Clarke, in his individual capacity. The district court focused on the prima facie case for “quid pro quo sexual harassment,” in which a plaintiff must show that:

1. the employee belongs to a protected class;
2. the employee was subject to unwelcome sexual harassment;
3. the harassment complained of was based on sex;
4. the employee’s reaction to the harassment complained of affected tangible aspects of the employee’s compensation, terms, conditions, or privileges of employment; and
5. respondeat superior.

The court noted that quid pro quo sexual harassment can be explicit or implicit. The closer the connection “between a discussion about job benefits and a request for sexual favors, the more likely that there has been

860. Id.
861. Id.
862. Hazel, 7 F. Supp. 2d at 1351.
863. Id.
864. Id.
865. Id. at 1352.
866. Id.
867. Hazel, 7 F. Supp. 2d at 1352.
868. Id.
869. Id.
870. Id. at 1353 (citing Henson v. City of Dundee, 682 F.2d 897, 909 (11th Cir. 1982)).
871. Id.
an 'implicit' conditioning by the harasser." Also relevant is how often the advances were made, the length of time over which the advances took place, and the strength of the connection between the advances and the discussion of job benefits or detriments. After weighing all of these factors, the court concluded that Hazel made out a prima facie case of quid pro quo sexual harassment under Title VII. On Hazel's Title IX claim, however, the court ruled that Title VII is the exclusive remedy for employment discrimination claims on grounds of sex in federally funded educational institutions. Finally, the court held that Hazel had failed to state a § 1983 claim against the School Board or the principal.

7. Religious Discrimination

Religious discrimination in the workplace may be contested under the Religious Freedom Restoration Act ("RFRA"), under Title VII, and under both prongs of the First Amendment, as free speech and as free exercise of religion. This array of challenges were all cogently analyzed in Gunning v. Runyon, a case involving a federal employee working in Florida. In Gunning, the postal employees voted in favor of playing a Christian radio station over the station loudspeakers, but the post office turned off the station radio altogether and instead allowed employees to wear headsets or have small radios at their workstation.

Gunning went to federal court, challenging the post office's decision to turn off the religious radio station under Title VII, the First Amendment, and the Religious Freedom Restoration Act. Under Title VII, the court analyzed Gunning's claim under both the disparate treatment framework and the reasonable accommodation framework. To establish a prima facie case of disparate treatment discrimination, plaintiff must show that "(1) he is a member of or practices a particular religion; (2) he is qualified to perform the job at issue; (3) he has suffered some adverse employment action; and (4) someone outside the protected class of which he is a member was treated

872. Hazel, 7 F. Supp. 2d at 1353.
873. Id.
874. Id.
875. Id.
876. Id. at 1355.
879. Id.
880. Id. at 1425–26.
881. Id. at 1426.
882. Id.
883. Gunning, 3 F. Supp. 2d at 1427.
differently." Gunning failed to meet the third element because he introduced no evidence as to any adverse employment action under Title VII. "Inconvenience and loss of enjoyment of life . . . are not cognizable under Title VII absent some adverse employment action." Even if Gunning could make out a prima facie case, allowing employees to use walkmans, and other private listening devices, constitutes a legitimate, nondiscriminatory rationale that rebuts the presumption of discrimination.

As for the reasonable accommodation framework under Title VII, a plaintiff's prima facie case entails: "(1) a bona fide religious belief conflicting with an employment requirement; (2) that he informed his employer of the religious belief; and (3) that he was discharged or otherwise penalized for failure to comply with the conflicting requirement." The court found that Gunning established none of these elements because listening to Christian music was not a tenet of his religion, he did not notify his employer of such belief, and he did not suffer any adverse employment action. Moreover, even assuming Gunning made out a prima facie case, allowing employees to wear headphones "constitute[s] a reasonable religious accommodation under Title VII."

The Post Office argued that Gunning's First Amendment freedom of religion claim was precluded by Title VII. The court agreed, citing Brown v. General Services Administration, where the Supreme Court ruled that Title VII is the exclusive remedy for federal employment discrimination. For this reason, Gunning's properly cognizable "constitutional claim of religious employment discrimination . . . [was] cognizable only under Title VII."

Turning to Gunning's free speech claim, the court concluded that it was not precluded by Title VII since it was not an employment discrimination claim. Adopting public forum analysis, the court ruled that the Post Office was a non-public forum, the most restricted, where the employer is free to make distinctions in access on the basis of subject matter and speaker

884. Id. at 1428 (citing Mann v. Frank, 7 F.3d 1365, 1370 (8th Cir. 1993)).
885. Id.
886. Id. at 1429.
887. Id.
888. Gunning, 3 F. Supp. 2d at 1429–30 (citing Beadle v. Hillsborough County Sheriff's Dep't, 29 F.3d 589, 592 (11th Cir. 1994)).
889. Id. at 1430.
890. Id.
891. Id.
894. Gunning, 3 F. Supp. 2d at 1431.
895. Id.
identity, so long as they are “reasonable in light of the purpose served by the forum and are viewpoint neutral.” Applying this framework, the court found that music interferes with an orderly and productive workplace environment and that the decision to deny access to the public address system for recreational music was reasonable in light of the purpose of the postal service. Moreover, the decision was not viewpoint based, that is, it was not based upon the employer's opposition to the message of the music. In effect, the government has the right simply to close the forum altogether.

The RFRA restored the “compelling interest” test as the appropriate method for analysis of free exercise claims. Although the Supreme Court struck down the RFRA as unconstitutional as applied to the states, and even though its constitutionality as applied to the federal government is far from clear, the court assumed, for purposes of analysis, that the Act was valid. To establish a claim under RFRA, the plaintiff must prove that “he possesses a religious belief and... that governmental action or regulation imposes a burden on the free exercise of his religion.” If so, the burden shifts to the government to come up with a compelling state interest for the regulation. Listening to Christian radio is not a tenet of Gunning’s Baptist faith, nor would failure to listen to the radio station burden the practice of his faith. Indeed, Gunning is still free to listen to the radio station of his choice via headphones. But, even if Gunning makes out a prima facie case under the Act, the Post Office’s interest in avoiding a violation of the Establishment Clause constitutes a compelling state interest sufficient to rebut Gunning’s prima facie case.

896. Id. (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (internal quotations omitted)).
897. Id.
898. Id. at 1432.
899. Gunning, 3 F. Supp. 2d at 1432.
900. Id. at 1433 (citing 42 U.S.C. § 2000bb(b)(1) (1994)).
902. Gunning, 3 F. Supp. 2d at 1432–33.
903. Id. at 1433.
904. Id.
905. Id.
906. Id.
907. See Gunning, 3 F. Supp. 2d at 1433.
C. **Age and Disability Discrimination**

1. Eleventh Amendment Immunity and the Age Discrimination in Employment Act and the Americans with Disabilities Act

In *Kimel v. Florida Board of Regents*, the only issue before the Eleventh Circuit Court of Appeals, and now before the Supreme Court which heard oral argument in October, 1999, is whether Congress properly abrogated the states’ sovereign immunity when it passed the Age Discrimination in Employment Act (“ADEA”) and the Americans with Disabilities Act (“ADA”). Two district courts have ruled that Congress properly overrode the states’ Eleventh Amendment immunity for both Acts, but one district court granted the State’s motion to dismiss on Eleventh Amendment grounds.

In *Seminole Tribe v. Florida*, the Supreme Court ruled that Congress’s power to abrogate exists only under section five of the Fourteenth Amendment, not pursuant to the Commerce Clause. In light of this case, the *Kimel* court set out two elements that must be met before Eleventh Amendment immunity may be abrogated: 1) Congress must spell out “a clear legislative statement” of its intent by “making its intention unmistakably clear in the language of the statute,” and 2) Congress must have invoked its enforcement powers granted in section five of the Fourteenth Amendment.

As for the ADEA, the court sidestepped the second element because the Act does not satisfy the first prong: the lack of unmistakably clear legislative intent. Although a weak case of intent can be stitched together

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913. The enforcement provision in section five of the Fourteenth Amendment states: “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” U.S. CONST. amend. XIV, § 5.


916. *Id.* at 1431.
from disparate language in the Act, the court made clear: "For abrogation to be unmistakably clear, it should not first be necessary to fit together various sections of the statute to create an expression from which one might infer an intent to abrogate." 917 The words "the Eleventh Amendment or the States’ sovereign immunity" cannot be found anywhere in the ADEA. 918 Even in the face of Eleventh Amendment immunity, however, the court pointed out that there are forms of relief, other than direct suits by citizens in federal court. 919

By contrast, the ADA contains a clear statement of intent to abrogate Eleventh Amendment immunity: "A State shall not be immune under the eleventh amendment . . . ." 920 Moreover, unlike the ADEA, it is also manifest from the face of the statute itself, that Congress relied upon its Fourteenth Amendment enforcement powers when it enacted the ADA: one purpose of the act was "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment." 921 In sum, the ADA satisfies both elements for abrogation to prevail, while the ADEA cannot even pass muster under the first element. Chief Judge Hatchett wrote in his separate opinion that he believed that Congress abrogated the states’ sovereign immunity in both Acts, 922 while Circuit Judge Cox took the exact opposite position, concluding that Congress lacked constitutional power to abrogate the states’ immunity under either Act. 923

2. The Overlap Between the ADEA and § 1983

In Hornfeld v. City of North Miami Beach, 924 Hornfeld was a sixty-year old woman who had worked for the City for ten years. 925 In 1996, John Asmar, Hornfeld’s supervisor, cut back on Hornfeld’s job duties, driven by an imminent downsizing by the City. 926 Asmar offered plaintiff an early retirement incentive package. 927 Plaintiff claimed that she had no time to weigh her options and accepted the package because she was told that she would be discharged if she turned it down and that a younger, less

917. Id.
918. See id.
919. Kimel, 139 F.3d at 1431.
920. Id. at 1433 (quoting 42 U.S.C. § 12202 (1994)).
922. Kimel, 139 F.3d at 1434 (Hatchett, C.J., concurring in part, dissenting in part).
923. Id. at 1444 (Cox, J., concurring in part, dissenting in part).
925. Id. at 1361.
926. Id.
927. Id.
experienced employee would take over her job. Plaintiff brought both a § 1983 claim, alleging a violation of equal protection, and an ADEA claim. The City contested plaintiff's entitlement to raise the two claims together.

The federal district court framed the issue as whether the ADEA served as plaintiff's exclusive remedy. In ruling that plaintiff was entitled to bring both actions, the court relied on Supreme Court precedent "disfavoring repeals by implication." According to the Supreme Court, "[i]mplicit repeals of statutory rights are recognized only 'when the earlier and later statutes are irreconcilable.'" For example, the weight of authority holds that claims arising under Title VII may complement § 1983 claims. The court pointed out that Title VII is the law that "most closely parallels the ADEA." By contrast, Congress expressly spelled out that the ADEA is the exclusive remedy for federal employees alleging age discrimination.

Even so, plaintiff bears the burden of establishing that her ADEA claim is "not based on the same substantive rights as her concurrent § 1983 claim." In other words, to maintain both claims, plaintiff must aim at protecting independently conferred rights. In this regard, the court pointed to differences between ADEA and equal protection rights: "[u]nlike the ADEA, not all arbitrary treatment is deemed to offend the Fourteenth Amendment. Although the clause protects against age discrimination, the elderly are not a suspect class, and governmental action that disadvantages them is constitutional if it passes the rational basis test." Moreover, under equal protection, "class membership is irrelevant in assessing an ADEA violation." Thus, the court concluded that the ADEA and § 1983 "may be used as com-

928. Id.
929. Hornfeld, 29 F. Supp. 2d at 1360.
930. Id. at 1362–63.
931. See id.
932. Id. at 1363 (citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)).
933. Id. (quoting St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772, 788 (1981)).
934. E.g., Johnson v. City of Fort Lauderdale, 148 F.3d 1228, 1231 (11th Cir. 1998).
935. Hornfeld, 29 F. Supp. 2d at 1365 (quoting EEOC v. Elrod, 674 F.2d 601, 607 (7th Cir. 1982) (internal quotations ommitted)).
936. Id. at 1365 (citing 29 U.S.C. § 633(a)). But Congress implicitly left other remedies open to non-federal employees. Id.
937. Id. (citing Johnson, 114 F.3d at 1091).
938. See id.
940. Id. at 1368 (citing O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)).
Supplementary forms of relief for employment discrimination in the public sector."

3. Adapting Title VII's Burden Shifting Framework to ADEA Cases

In Bogle v. Orange County Board of County Commissioners, a former correction officer sued the county, his former employer, for age discrimination in violation of the ADEA and the Florida Human Rights Act of 1992. Given that plaintiff's case of age bias was wholly circumstantial, the court adopted Title VII's McDonnell Douglas burden shifting framework to weigh plaintiff's ADEA claim. The prima facie case of age discrimination consists of showing:

(1) that he was a member of the protected group of persons between the ages of forty and seventy; (2) that he was subject to an adverse employment action; (3) that a substantially younger person filled the position... from which he was discharged; and (4) that he was qualified to do the job for which he was rejected.

If plaintiff met this burden, the county then had to come up with a legitimate, nondiscriminatory reason for its decision to fire the correction officer. In this regard, the county introduced previous disciplinary sanctions and plaintiff's failure to comply with several policies and procedures. After the county met its burden, the plaintiff had to show that the county's proffered reasons were pretextual. On this score, the court ruled that plaintiff lost because he failed to come up with any evidence that would have entitled a reasonable jury to disbelieve the county's grounds for plaintiff's termination.

In Mize v. School Board, plaintiff worked as a teacher of industrial arts. In 1996, plaintiff was told that he would not be re-appointed for the

942. 162 F.3d 653 (11th Cir. 1998).
943. FLA. STAT. § 760.10 (1999).
944. Bogle, 162 F.3d at 656 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1983)).
945. Id. at 656-67 (quoting Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (1998) (alteration in original), rehe'g denied, 144 F.3d 57 (11th Cir. 1998), and cert. denied, 119 S. Ct. 405 (1998)).
946. Id. at 657.
947. Id.
948. Id. at 658.
949. Bogle, 162 F.3d at 661.
950. 10 F. Supp. 2d 1314 (M.D. Fla. 1998).
1996-1997 school year in light of low student enrollment in the engineering classes in the drafting department.\textsuperscript{952} He was, however, put on a countywide relocation list and indeed was offered a job teaching art to kindergarten classes and elementary students, even though he never taught these levels before.\textsuperscript{953} Mize sued his former employer under the ADEA, under Florida’s Civil Rights Act of 1992,\textsuperscript{954} and under an alleged breach of the collective bargaining agreement.\textsuperscript{955} The court only addressed the ADEA claim.\textsuperscript{956}

The federal district court spelled out the prima facie case for age discrimination when the plaintiff was not replaced. The plaintiff must show:

(1) that he was in a protected age group and was adversely affected by an employment decision, (2) that he was qualified for his current position or to assume another position at the time of the discharge, and (3) evidence by which a fact finder could reasonably conclude that the employer intended to discriminate on the basis of age in reaching that decision.\textsuperscript{957}

Except for this departure from the \textit{McDonnell Douglas} framework, the Title VII burden shifting analysis is the same.\textsuperscript{958} Here, since it was not clear which test to apply,\textsuperscript{959} the court first applied the \textit{McDonnell Douglas} analysis, concluding that plaintiff met his burden on all four elements.\textsuperscript{956} Alternatively, the court applied the \textit{Jamison} framework and found that plaintiff failed to prove the third element, and thus defendant was entitled to judgment as a matter of law.\textsuperscript{961} Under either framework, the employer was able to meet its burden of supplying a legitimate, nondiscriminatory reason for the reassignment,\textsuperscript{962} and plaintiff fell short of his burden of proving that

\textsuperscript{951}. \textit{Id}. at 1316.
\textsuperscript{952}. \textit{Id}.
\textsuperscript{953}. \textit{Id}.
\textsuperscript{954}. FLA. STAT. § 760.10(1) (1999).
\textsuperscript{955}. \textit{Mize}, 10 F. Supp. 2d at 1316.
\textsuperscript{956}. \textit{Id}. at 1318. Since the other claims were matters of state law, the court dismissed them for lack of federal jurisdiction, after dismissing the ADEA claim. \textit{Id}.
\textsuperscript{957}. \textit{Id}. at 1317 (citing Jameson v. Arrow Co., 75 F.3d 1528, 1532 (11th Cir. 1996)).
\textsuperscript{958}. \textit{See id}.
\textsuperscript{959}. \textit{Id}. The confusion arose due to a factual dispute over whether plaintiff’s position was eliminated. \textit{Id}.
\textsuperscript{960}. \textit{Mize}, 10 F. Supp. 2d at 1317. The court assumed that reassignment or demotion counts as a termination under this framework. \textit{Id}.
\textsuperscript{961}. \textit{Id}. at 1318.
\textsuperscript{962}. \textit{Id}. at 1317.
defendant's stated reasons were a pretext. Therefore, the School Board was entitled to summary judgment under either framework.

4. Disability Discrimination

In Bledsoe v. Palm Beach County Soil & Water Conservation District, Bledsoe worked as a resource technician for four years until he was dismissed in 1992. During his tenure with the Palm Beach County Soil & Water Conservation District ("District"), Bledsoe injured his knee and filed a claim for workers' compensation benefits. At the same time, he asked his supervisor to accommodate his inability to walk for long stretches. As an accommodation, the District offered Bledsoe a job as resource conservationist, but he declined the offer, so the District fired him. As part of the settlement of his workers' compensation claim, Bledsoe waived his rights to sue his employer for any other claims, except for future medicals, attorneys' fees, and the like.

Nevertheless, Bledsoe sued the District and Palm Beach County under the ADA, claiming a disability and alleging that his employer's refusal to accommodate his disability (his inability to walk for long distances) was the reason for his termination. In defense, the District raised Bledsoe's release executed as part of his claim for workers' compensation benefits. The district court ruled that the County was not Bledsoe's employer but litigation continued against the District alone. The court ruled that the District fell short of the minimum number of employees required to be covered under Title I of the ADA, so Bledsoe amended his complaint, switching from Title I to Title III liability. The District argued that Title II does not cover employment and again raised the release signed by Bledsoe. The district court entered summary judgment for the District.

963. See id.
964. Id. at 1318.
965. 133 F.3d 816 (11th Cir. 1998), reh'g denied, 140 F.3d 1044 (11th Cir. 1999), and cert. denied, Palm Beach Soil & Water Conservation Dist. v. Bledsoe, 119 S. Ct. 72 (1998).
966. Id. at 818.
967. Id.
968. Id.
969. Id.
970. Bledsoe, 133 F.3d at 818–19.
971. Id.
972. Id.
973. Id.
974. Id.
975. Bledsoe, 133 F.3d at 818–19.
976. Id. at 819.
On appeal, two issues were raised: 1) the validity of the release, and 2) whether Title II covers employment.\footnote{Id.} On both counts, the court reversed the ruling of the district court.\footnote{Id.} Relying on Supreme Court precedent governing Title VII, the court made clear that an employee can waive his "cause of action under Title VII as part of a voluntary settlement agreement," if "the employee's consent to the settlement was voluntary and knowing."\footnote{Bledsoe, 133 F.3d at 819.} In this regard, the court set out from earlier Eleventh Circuit precedent, the factors that weigh on whether a release is knowing and voluntary:

[T]he plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; the clarity of the agreement; the plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver when compared with the benefits to which the employee was already entitled.\footnote{Id.}

Applying these factors, the court ruled that a jury question was raised over whether Bledsoe voluntarily and knowingly released his ADA claim.\footnote{Id.}

As for the second issue, whether Title II of the ADA covers employment, the court relied on earlier Eleventh Circuit decisions implying that Title II does indeed cover employment.\footnote{Id. at 820 (citing Holbrook v. City of Alpharetta, 112 F.3d 1522, 1528–29 (11th Cir. 1997); McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1073 (11th Cir. 1996)).} Moreover, the statutory language of Title II, the Department of Justice's regulations,\footnote{28 C.F.R. § 35.140(b)(1) (1998). "For purposes of [Title II], the requirements of title I of the Act . . . apply to employment in any service, program, or activity conducted by a public entity if that public entity is also subject to the jurisdiction of title I [i.e. employs fifteen or more employees]." Id.} and other courts' position on this issue, weighed in favor of concluding that Title II does cover employment.\footnote{See Bledsoe, 133 F.3d at 820–25.} Title II bars public entities from excluding disabled individuals from "services, programs, or activities."\footnote{42 U.S.C. § 12132 (1994).} The term "public entity" expressly encompasses state and local government.\footnote{Bledsoe, 133 F.3d at 821 (citing 42 U.S.C. § 12131(1)).}
sum, the weight of authority holds that Title II states a cause of action for employment discrimination.\textsuperscript{988}

In \textit{Seaborn v. Florida Department of Corrections},\textsuperscript{989} plaintiffs, all African-Americans employed by the Tallahassee Community Correctional Center, suffered from a skin condition known as \textit{pseudofolliculitis barbae} ("PFB") that made shaving painful.\textsuperscript{990} The Correctional Center made an exception to its "No Beard Policy" for plaintiffs' skin condition.\textsuperscript{991} Even so, plaintiffs alleged that they faced discrimination and were passed over for promotions because they wore beards.\textsuperscript{992} Plaintiffs sued their employer under the ADA.\textsuperscript{993} The district court ruled that plaintiffs' skin disorder did not rise to the level of a disability under the ADA because PFB did not substantially limit their ability to work.\textsuperscript{994}

On appeal, the State of Florida asserted for the first time that it was entitled to Eleventh Amendment immunity from plaintiffs' ADA claims.\textsuperscript{995} Because such a claim is jurisdictional, the court allowed Florida's immunity defense but concluded that it was constrained by Eleventh Circuit precedent that states lack Eleventh Amendment immunity from ADA claims.\textsuperscript{996} Turning to the merits, the court sustained the lower court's ruling dismissing plaintiffs' ADA claims on grounds that PFB did not substantially limit their ability to work.\textsuperscript{997}

\begin{itemize}
\item \textsuperscript{988} \textit{Id.} at 825.
\item \textsuperscript{989} 143 F.3d 1405 (11th Cir. 1998), \textit{cert. denied}, 119 S. Ct. 1038 (1999).
\item \textsuperscript{990} \textit{Id.} at 1406.
\item \textsuperscript{991} \textit{Id.}
\item \textsuperscript{992} \textit{Id.}
\item \textsuperscript{993} \textit{Id.}
\item \textsuperscript{994} \textit{Seaborn}, 143 F.3d at 1406.
\item \textsuperscript{995} \textit{Id.}
\item \textsuperscript{996} \textit{Id.} at 1407 (citing \textit{Kimel v. Florida Bd. of Regents}, 139 F.3d 1426, 1433 (11th Cir. 1998)).
\item \textsuperscript{997} \textit{Id.}
\end{itemize}
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I. INTRODUCTION

In the November 1998 election, Florida voters provided mixed signals with respect to environmental issues. For the first time this century a republican governor, Jeb Bush, was elected along with republican majorities in both the house and senate. Throughout the election campaign, Bush had been criticized by environmentalists because of his ties to oil and real estate development interests. At the same time, voters passed Florida Constitution Revision 5, making it a legislative duty to make adequate provision for conservation and protection of natural resources and allowing for the issuing of bonds for environmental conservation.

However, during the first half of 1999, Governor Bush pleased many of his environmental critics with his appointment of David Struhs to head the Department of Environmental Protection, his water management appointments, and his appointment to lead the Environmental Forever Program. In addition, his opposition to off shore oil drilling, commitment to Everglades restoration, and the passage of the Florida Forever Program have been applauded. With this background in mind, this article will discuss the changes to Florida law and Florida environmental programs due to the Florida Constitutional revisions, Florida case law, and statutory changes during the time period July 1998 through July 1999.

1. Tom Friedler, Floridians Adore Jeb, but Want Buddy's Platform, MIAMI HERALD, Nov. 5, 1998, at 29A.
4. FLA. CONST. art. II, § 7(a); art. VII, § 11(e); art. X, § 18 (amended 1998).
5. Zy Zaneski, Environmental Chief: Change Starts Within, MIAMI HERALD, Feb. 27, 1999, at 1B.
6. Mark Silva, Water Management Appointments Get General Thumbs-Up, MIAMI HERALD, Mar. 6, 1999, at 5B.
7. Cy Zaneski, Bush Chooses Activist for Florida Forever Program, MIAMI HERALD, July 17, 1999, at 1B.
II. FLORIDA CONSTITUTION REVISIONS

There were two proposed Florida constitutional revisions relating to environmental issues on the November 1998 ballot. Only one, Revision 5, passed. Revision 10 was narrowly defeated. Revision 10’s environmental related provisions included an option for local tax districts to exempt property used for conservation purposes and to allow for increased citizen access to local officials on the subject of public hearings.

Revision 5 passed in a landslide with over seventy percent of the voters voting in favor of the revision. Amending Florida Constitution Article II, § 7(a), Article IV § 9, Article VII, § 11 (e)-(f), Article X, § 18, and Article XII, § 22, Revision 5 makes it a duty to pass adequate laws for the conservation and protection of natural resources, requires the creation of the Fish and Wildlife Conservation Commission through the merger of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission, allows for the issuance of bonds to finance conservation and related projects, and restricts the sale of state lands designated for conservation purposes. As discussed below,

10. See id.
11. See id.
12. Id. at 18. The ballot title and summary for Revision 10 was:
LOCAL AND MUNICIPAL PROPERTY TAX EXEMPTIONS AND CITIZEN ACCESS TO LOCAL OFFICIALS
Broadens tax exemption for governmental uses of municipal property; authorizes legislature to exempt certain municipal and special district property used for airport, seaport, or public purposes; permits local option tax exemption for property used for conservation purposes; permits local option tangible personal property tax exemption for attachments to mobile homes and certain residential rental furnishings; removes limitations on citizens’ ability to communicate with local officials about matters which are the subject of public hearings.

Id.

13. See Proposed Constitutional Amendments and Revisions to be Voted on Nov. 3, 1998 (available at <http://elections.dos.state.fl.us/1998elecamendments/intro.htm>). See also, Zaneski, supra note 5 at 1B.
14. Revision 5’s ballot title and summary were:
CONSERVATION OF NATURAL RESOURCES AND CREATION OF FISH AND WILDLIFE CONSERVATION COMMISSION
Requires adequate provision for conservation of natural resources; creates Fish and Wildlife Conservation Commission, granting it the regulatory and executive powers of the Game and Fresh Water Fish Commission and the Marine Fisheries Commission; removes legislature’s exclusive authority to regulate marine life and grants certain powers to new commission; authorizes
Revision 5 resulted in a number of statutory changes during the 1999 Florida Legislative Session.\textsuperscript{15}

III. THE DRYCLEANING SOLVENT CONTAMINATION CLEANUP ACT

A. Overview

In 1995, the Florida Legislature enacted the Drycleaning Solvent Contamination Cleanup Act ("the Act") to address the management and cleanup of current and former drycleaning sites.\textsuperscript{16} The Act limits liability and provides for immunity for owners and operators of eligible sites.\textsuperscript{17} Cleanups are funded through a state-funded cleanup program administered by the Florida Department of Environmental Protection ("FDEP").\textsuperscript{18} Voluntary cleanups are allowed\textsuperscript{19} and encouraged through tax incentives.\textsuperscript{20}

An important legislative modification to the drycleaning program became effective during the past year.\textsuperscript{21} Pursuant to legislation passed by the 1998 Legislature, the FDEP stopped accepting cleanup program applications on December 31, 1998.\textsuperscript{22} Therefore, any previously undiscovered contamination or new releases will no longer be eligible for the limited liability and immunity provisions of the program.\textsuperscript{23}

B. Case Law

In two cases decided this year, Miami-Dade County tested the limits of the Act’s liability and immunity provisions.\textsuperscript{24} In Metropolitan Dade County v. Chase Fed. Hous. Co., 737 So. 2d 494 (Fla. 1999); Metropolitan Dade County v. Department of Envtl. Protection, 714 So. 2d 512 (Fla. 3d Dist. Ct. App. 1998).

\begin{itemize}
\item 15. \textit{See infra} pages 161–62, 164–74.
\item 18. \textit{See id.} § 376.3078(2).
\item 19. \textit{Id.} § 376.3078(11).
\item 20. \textit{Id.} § 199.1055(1)(a)1–2.
\item 21. \textit{See id.} § 376.3078(3)(a)5.
\item 23. \textit{See id.}
\end{itemize}
v. Chase Federal Housing Co.,\textsuperscript{25} Dade County appealed final summary judgments in favor of several shopping center owners where drycleaning solvent contamination was discovered.\textsuperscript{26} Dade County had sued the shopping center owners to enforce a cleanup, to recover costs for the installation of water mains, to impose penalties, and to seek attorneys' fees and administrative costs.\textsuperscript{27}

The suit arose from the 1991 discovery of contamination in private drinking water wells in the Suniland area of Dade County.\textsuperscript{28} Subsequent environmental assessments determined that the contamination was emanating from several shopping centers with drycleaner tenants.\textsuperscript{29} Following the issuance of notices of violation by Dade County, the shopping centers conducted remediation of their property but did not address offsite migration of the contamination.\textsuperscript{30} Over the next two years, Dade County incurred considerable expense in the installation of water mains and conducting environmental investigations.\textsuperscript{31}

On appeal before the Third District Court of Appeal, Dade County argued that the Drycleaning Chemical Cleanup Program was not intended to be retroactive, and thus did "not apply to actions to recover expenditures made by the County prior to the enactment of the immunity provisions."\textsuperscript{32} The court rejected this argument and found the Act's grants of immunity retroactive and, as such, precluded Dade County's actions against the shopping center owners.\textsuperscript{33}

However, the district court certified the following question to the Supreme Court of Florida as a matter of great public importance:

\textbf{ARE SUBSECTIONS 376.3078(3) AND 376.3078(9), FLORIDA STATUTES (1995), WHICH PROVIDE TO ELIGIBLE ENTITIES CONDITIONAL IMMUNITY FROM CERTAIN ADMINISTRATIVE AND JUDICIAL ACTIONS BY STATE AND LOCAL GOVERNMENTS AND AGENCIES, INTENDED BY THE LEGISLATURE TO APPLY RETROACTIVELY, THUS PRECLUDING ACTIONS AGAINST IMMUNIZED ENTITIES FOR THE RECOVERY BY A GOVERNMENT FOR}

\textsuperscript{25}737 So. 2d 494 (Fla. 1999).
\textsuperscript{26}Id. at 498–99.
\textsuperscript{27}Id. at 496–97.
\textsuperscript{28}Id. at 496.
\textsuperscript{29}Id.
\textsuperscript{30}Chase Fed. Hous. Corp., 737 So. 2d at 497.
\textsuperscript{31}Id.
\textsuperscript{32}Metropolitan Dade County v. Chase Fed. Hous. Corp., 705 So. 2d 674, 675 (Fla. 3d Dist Ct. App. 1998).
\textsuperscript{33}Id: at 675.
ENFORCEMENT AND REHABILITATION COSTS EXPENDED PRIOR TO THE ENACTMENT OF THESE SUBSECTIONS? 34

The Supreme Court of Florida answered the certified question in the affirmative. 35 Using a two-prong test the court found that the legislature intended to apply the statute retrospectively and that retroactive application was constitutionally permissible. 36

In Metropolitan Dade County v. Department of Environmental Protection, 37 Dade County appealed an administrative hearing final order approving the eligibility of a property owner, Sekoff Investments, Inc. ("Sekoff"), to participate in the Florida Drycleaning Contamination Cleanup Program. 38 Dade County contended that "Sekoff had committed gross negligence ... because Sekoff was 'in willful violation of local law ... regulating the operation of drycleaning facilities,' for failure to comply with the County's cleanup requests." 39 "The County maintained that this gross negligence disqualified Sekoff from participating in the Cleanup Program and enjoying statutory immunity from County enforcement efforts." 40

The suit arose out of drycleaning chemical contamination discovered on Sekoff's property. 41 Dade County issued a Notice of Violation and Orders for Corrective Action ("NOV") on March 15, 1994 for the presence of drycleaning solvents in the septic tank and storm drain/soakage pit located on the Sekhoff property. 42 In response to the NOV, Sekoff hired an environmental consulting firm and commenced assessment activities. 43 During this same time period, the Florida Drycleaning Solvent Contamination Cleanup Act became effective. 44 Sekoff continued to conduct assessment activities, removed the contents of the septic tank and

34. Id. at 676.
36. Id. at 499. The court made two inquiries. They were: 1) whether there is clear evidence of legislative intent to apply the statute retrospectively; and, if so, 2) whether retroactive application is constitutionally permissible. Id.
37. 714 So. 2d 512 (Fla. 3d Dist Ct. App. 1998).
38. Id. at 513–14.
39. Id. at 514 (citing Fla. Stat. § 376.3078(3)(c) (1997)).
40. Id. (citing Fla. Stat. § 376.3078(3) (1995) (precluding sites found to be grossly negligent from being eligible for the program)). Section 376.3078(3)(c) defines grossly negligent as a willful violation of local law. See Fla. Stat. § 376.3078(3)(c) (1995).
41. See Metropolitan Dade County, 714 So. 2d at 514.
42. Id.
43. Id.
44. Id.
storm drain, and advised Dade County that it would apply for participation in the Drycleaning Solvent Contamination Cleanup Program as soon as the FDEP promulgated the necessary implementation rules.

The site was found eligible for the program on June 11, 1996 and Dade County filed its request for an administrative hearing. Relying on the definition of “willful” in Thunderbird Drive-In Theatre, Inc. v. Reed, the hearing officer concluded that “Sekoff’s actions were not unreasonable and not willful in view of the legislature’s enactment of section 376.3078.” The FDEP adopted the order recommended, and affirmed Sekoff’s eligibility.

The Third District Court of Appeal approved the order noting that an amendment to the Act defined “gross negligence” as the “willful violation of [a] local . . . rule regulating the operation of drycleaning facilities . . . .” The court further found that the property owner’s attempts at compliance demonstrated that it did not willfully violate the county’s code.

IV. THE PETROLEUM CLEANUP PROGRAM

A. Overview

There have been several petroleum cleanup programs enacted by the state including the Early Detection Incentive Program (“EDIP”), the Abandoned Tank Restoration Program (“ATRP”), the Petroleum Cleanup Participation Program (“PCPP”), and the Florida Petroleum Liability and Restoration Insurance Program (“FPLRIP”). These programs are now closed to eligibility for new sites placing the cost for the cleanup of new, or newly discovered discharges on the site owner or other responsible party.

Under these programs, cleanup costs are to be paid for out of the Inland

45. Id. at 515.
46. Metropolitan Dade County, 714 So. 2d at 515.
47. 571 So. 2d 1341, 1344 (Fla. 4th Dist. Ct. App. 1990) (willful “requires intent and purpose that the act or condition take place”).
48. Metropolitan Dade County, 714 So. 2d at 515.
49. Id.
50. Id. at 516 (citing FLA. STAT. § 376.3078(3)(c) (1995)).
51. See id.
53. Id. § 376.305(6).
54. Id. § 376.3071(13). Eligibility ended December 31, 1998. Id.
Protection Trust Fund. Legislative changes in 1995 converted all cleanups under these programs into a preapproval or state administered program based on priority ranking.

Recognizing that "the inability to conduct site rehabilitation in advance of a site's priority ranking . . . may substantially impede or prohibit property transactions or the proper completion of public works projects," the Preapproved Advanced Cleanup Program ("PACP") was established. Under the PACP, responsible parties may apply for cleanup funding in advance of the site's priority ranking if the responsible party is willing to enter into a cost sharing arrangement. Voluntary cleanups, with no state funding obligations, are also allowed.

B. Petroleum Program Cases

*Environmental Trust v. Department of Environmental Protection* is a consolidation of four administrative hearing appeals relating to forty-five reimbursement applications submitted to the FDEP for work performed between July 1994 and February 1995. Environmental Trust and Sarasota Environmental Investors ("the investors") had advanced capital for the remediation projects. FDEP denied part of their applications for reimbursement for cleaning up petroleum contamination and an administrative law judge authorized FDEP's use of "incipient non-rule policies to deny the applications." Also part of this consolidated case is FDEP's appeal of an order by another administrative law judge invalidating a new rule adopting the policies approved in the above case and an award of attorneys' fees.

In each of the forty-five applications, the investors had advanced capital for remediation work at the various sites through a factoring arrangement.

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60. Id. § 376.30713(1)(c)–(d).
61. See id. § 376.3071(11) (1997).
63. Id. at 495.
64. See id.
65. Id.
66. Id.
67. *Environmental Trust*, 714 So. 2d at 495.

The cost of the work was financed in each case by a factoring arrangement. Generally, factoring is the process of purchasing accounts receivable at a discount. In these cases, the factoring company advanced capital at a discounted rate to the subcontractor, the contractor, and an investment company like Environmental Trust or Sarasota Investors, and then applied for
In addition to this financing arrangement, at least thirty of the projects included a fifteen percent markup for a final site inspection performed by a general contractor who did not otherwise participate in the remediation activities. The FDEP stated its position denying the applications in an April 21, 1995 memorandum and an October 20, 1995 internal electronic mail. In the April 21, 1995 memorandum, the FDEP said that the factoring arrangement amounted to the payment of interest, a non-reimbursable expense. The October 20, 1995 electronic mail established the FDEP policy that general contractor markups would only be allowed if they were related to an "integral management function in the rehabilitation of a site."

The investors filed for administrative hearings on the application denials pursuant to sections 120.57(1) and 120.535, of the Florida Statutes. The administrative law judge found in favor of the FDEP allowing the use of the policies as unadopted rules for which the FDEP had initiated rulemaking procedures as soon as "practical or feasible."

Before the dismissal of the investors’ petitions, the FDEP published notices of proposed policies on factoring and contractor markup policies. These rules were challenged in a separate action from the above petitions, by Environmental Trust and other investment companies. The administrative law judge in this second case found the rules invalid and awarded costs and attorney fees to the Environmental Trust and the other investment companies.

The FDEP appealed these orders and the First District Court of Appeal consolidated them with the investors’ appeal for hearing. The court ruled in favor of the FDEP by finding the FDEP’s denial of the factoring charges and contractor markups proper under the existing rules and statute.

As a result, the cost of the discount for providing investment capital to the contractor, subcontractor, and investment company, was passed along to the state as a part of the cost of the rehabilitation.

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68. See id. at 496.
69. Id.
70. Id.
71. Environmental Trust, 714 So. 2d at 496.
73. Environmental Trust, 714 So. 2d at 496.
74. Id.
75. Id. at 496–97.
76. Id. at 497.
77. Id. at 495.
78. Environmental Trust, 714 So. 2d at 497.
addition, the court found that the FDEP's revised rule was valid and that it could be applied retroactively. The court reasoned that "if [a] rule merely clarifies another existing rule and does not establish new requirements" then it falls within an exception to Florida's general prohibition against the promulgation of retroactive administrative rules.

The court's pronouncement of this exception caused significant controversy. In response, the 1999 Florida Legislature amended section 120.54(1)(f) of the *Florida Statutes* to include a prohibition against an agency adopting retroactive rules even if intended to clarify existing law unless expressly authorized by statute. This amendment is discussed more fully below.

In a subsequent decision, *Florida Department of Environmental Protection v. Environmental Corporation of America,* the Second District Court of Appeal dismissed a federal civil rights claim brought against three individual FDEP employees under 42 U.S.C. § 1983. The suit was brought by Environmental Corporation of America, Inc. which alleged that the FDEP's revised reimbursement rules violated "clearly established law against retroactive rule-making" depriving the plaintiff of a vested property right. Citing *Environmental Trust,* the Second District Court of Appeal found the revised rule a mere clarification of existing rules which fell within the exception to the prohibition against retrospective administrative rules. Therefore, the court found the government employees had a qualified immunity as their conduct did not violate a clearly established right.

C. Petroleum Program Statutory Changes

A few legislative changes occurred during the 1999 Legislative Session affecting the petroleum program. First, the Legislature has allowed for the continuation of the Preapproved Advanced Cleanup Program by eliminating

79. See id. at 498.
80. Id. at 500.
81. Id. at 499-500. In its analysis, the court relies on federal, and not state court, cases stating that both Florida and federal courts apply the same principle that "an administrative rule generally has only prospective application." Id. at 499.
83. Ch. 99-379, § 4, 1999 Fla. Laws 3788, 3792–93 (codified at FLA. STAT. § 120.54(1)(f) (1999)).
84. See infra pp. 167–69.
86. Id. at 274.
87. Id.
an October 1, 1999 program deadline. Second, funding has been provided, in advance of a site’s priority ranking, for free product recovery. In addition, the Legislature has established that “[t]he department shall select five sites eligible for state restoration funding assistance . . . each having a low-priority ranking score . . . for an innovative technology pilot program.”

Fourth, the FDEP has been given authority to enter into site rehabilitation agreements for the cleanup of mixed eligibility sites with eligible discharges and non-eligible discharges on a cost-sharing basis. The law also establishes a timeframe for a responsible party to complete negotiations with the FDEP for cost sharing arrangements. If negotiations are not complete within 120 days, the site is to be deemed ineligible. All liability protections afforded by the program would be revoked resulting in the property owner, operator, or other responsible party liable for the complete cost of rehabilitation.

Perhaps the most important statutory modification impacting the transfer of sites currently participating in the Petroleum Cleanup Participation Program, is the elimination of Florida Statutes Section 376.3071(13)(g)(5). This section, in effect, attached program eligibility to the property owner which resulted in the loss of the site’s program eligibility when a property transfer occurred. This potential cause for loss of eligibility has now been removed.

89. Id. § 1, 1999 Fla. Laws at 3734–35 (codified at FLA. STAT. § 376.3071(5)(c) (1999)).
90. Id. § 2, 1999 Fla. Laws at 3736 (codified at FLA. STAT. § 376.30711(8) (1999)).
91. Id. § 4, 1999 Fla. Laws at 3737 (codified at FLA. STAT. §§ 376.30714(1)(d)–(e) (1999)).
92. Id. § 1, 1999 Fla. Laws at 3735 (codified at FLA. STAT. § 376.3071(13)(c) (1999)).
93. Ch. 99-376, § 1, 1999 Fla. Laws 3734, 3735 (codified at FLA. STAT. § 376.3071(13)(c) (1999)).
94. See id.
95. See id. Section 376.30711(13)(g)(5) of the Florida Statutes stated:
Any person who knowingly acquires title to contaminated property shall not be eligible for restoration funding pursuant to this subsection. The provisions of this subsection do not relieve any person who has acquired title subsequent to July 1, 1992, from the duty to establish by a preponderance of the evidence that he or she undertook, at the time of acquisition, all appropriate inquiry into the previous ownership and use of the property consistent with good commercial or customary practice in an effort to minimize liability, as required by s. 376.308(1)(c). The provisions of this subparagraph do not apply to any person who acquires title by succession or devise.
FLA. STAT. § 376.30711(13)(g)(5) (1997).
96. See Ch. 99-376, § 1, 1999 Fla. Laws 3734, 3735 (codified at FLA. STAT. § 376.3071(13) (1999)).
V. OTHER 1999 LEGISLATIVE CHANGES OF INTEREST

A. The Administrative Procedure Act

The Florida Administrative Procedure Act ("APA") governs the rulemaking authority of state agencies. Prior to 1996, the APA was interpreted to allow an agency to adopt a rule if it was "reasonably related to the purpose of the enabling legislation and [was] not arbitrary and capricious." In 1996, however, revisions to the APA's rulemaking provisions specifically rejected the "reasonably related" test.

Subsequent to the 1996 APA Amendments, several appellate decisions were questioned as to whether they met "the spirit and the letter of the law." Two of these cases related to environmental matters and were decided within the past year; Environmental Trust, discussed above, and St. Johns River Water Management District v. Consolidated-Tomoka Land Co. In Consolidated-Tomoka, the St. Johns Water Management District appealed an administrative law judge's invalidation of a series of its proposed rules relating to the designation of two areas as hydrologic basins.

As the proposed rules would result in more restrictive development and permitting requirements, affected property owners challenged the proposed

97. See FLA. STAT. § 120 (1999).
99. See FLA. STAT. §§ 120.52(8), 120.536(1) (1997), which provided:
A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.
Id.
103. Id. at 75.
rules. Discussing the 1996 version of the APA, the administrative judge concluded that the rules "were invalid as a matter of law" in that they were not within the "particular powers and duties granted by the enabling statute," they exceeded "the agency's grant of rulemaking authority," and "they enlarge[d], modif[ied] or contravene[d] the law implemented."

On appeal, the First District upheld the proposed rules finding them "a valid exercise of delegated legislative authority." In reaching this conclusion, the court found the term "particular powers and duties" in section 120.52(8) ambiguous. Looking at two possible interpretations, the court chose the less restrictive alternative and concluded that "particular" meant "that the powers and duties must be identifiable as powers and duties falling within a class."

In part to address the judicial decisions in Environmental Trust and Consolidated-Tomoka Land Co., the 1999 Legislature again amended the APA. This law has been received with mixed reactions due to its potential effect on existing environmental regulations. As indicated in section one of chapter 99-379, Laws of Florida, the language added to sections 120.52(8) and 120.536(1) of the Florida Statutes is "intended to reject the class of

104. Id. at 75-76.
105. Id. at 76.
106. Id. at 81.
107. Consolidated Tomoka Land Co., 717 So. 2d at 79.
108. Id. at 80.
109. Ch. 99-379, § 2, 1999 Fla. Laws 3788, 3790 (codified at Fla. Stat. § 120.52(8) (1999)). This amendment has been criticized by environmentalists and was initially opposed by DEP Secretary David Struhs, however, Mr. Struhs later reversed his position and supported the bill's passage. See Julie Hauserman, DEP Chief Warns Against Rules Bill, St. Petersburg Times, June 17, 1999 at 1B; Julie Hauserman, New Law will Ease State Rules Battles, St. Petersburg Times, June 18, 1999 at 1B; Editorial, A Bad Sign Series, St. Petersburg Times, June 25, 1999 at 16A.
111. Sections 120.52(8) and 120.536(1) of the Florida Statutes, are modified as follows: A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to
powers and duties analysis.\textsuperscript{112} Further, the Law rejects the exception to retroactive rules enounced in \textit{Environmental Trust}\textsuperscript{113} by adding language to section 120.54(f) prohibiting retroactive rules intended to clarify existing law.\textsuperscript{114}

The legislature has included a provision to shield those rules that may exceed rulemaking authority from attack until proper legislation can be passed or they can be repealed.\textsuperscript{115} Each agency is to provide a list of rules that exceed the new standards to the Administrative Procedures Committee by October 1, 1999.\textsuperscript{116} The committee shall provide a cumulative list to the legislature so that the legislature can determine whether legislation authorizing the identified rules should be enacted during the 2000 Regular Session.\textsuperscript{117} Rule challenges are allowed after July 1, 2001.\textsuperscript{118}

In addition to the above, the law modifies the definition of agency to include regional water supply authorities and to remove water control districts from the definition.\textsuperscript{119} The law provides that district school boards

\begin{quote}
implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than \textit{implementing or interpreting the specific powers and duties conferred by the same statute.}
\end{quote}

\textbf{FLA. STAT.} §§ 120.52(8), 120.536(1) (1999) (emphasis added).

\textsuperscript{112} Ch. 99-379, § 2, 1999 Fla. Laws 3788, 3789 (codified at FLA. STAT. § 120.52(8) (1999)). \textit{See also} Florida House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis (June 30, 1999) <http://www.leg.state.fl.us/session/1999/House/bills/analysis/pdfs/HB0107Z.GRR> (staff analysis stating that the amendment rejects the class of powers test in \textit{Consolidated-Tomoka}).

\textsuperscript{113} Florida House of Representatives as Further Revised by the Committee on Governmental Rules and Regulations Final Analysis (June 30, 1999) <http://www.leg.state.fl.us/session/1999/House/bills/analysis/pdfs/HB0107Z.GRR> (staff analysis).

\textsuperscript{114} Ch. 99-379, § 4, 1999 Fla. Laws 3788, 3793 (codified at FLA. STAT. § 120.54(1)(f) (1999)).

An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective until the statute upon which they are based is effective. \textit{An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.}

\textit{Id.} (emphasis added).

\textsuperscript{115} \textit{Id.} § 3, 1999 Fla. Laws at 3792 (codified at FLA. STAT. § 120.536(2)(b) (1999)).

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}

\textsuperscript{118} Ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792 (codified at FLA. STAT. § 120.536(2)(b) (1999)).

\textsuperscript{119} \textit{Id.} § 2, 1999 Fla. Laws at 3789 (codified at FLA. STAT. § 120.52(1) (1999)).
need only adopt rules pursuant to section 230.22(2) of the Florida Statutes. Further, the law clarifies the burden of proof for a rule challenge. Finally, the law requires that when an agency rejects or modifies a conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

B. The Florida Forever Program

Two main laws were passed during the 1999 legislative session relating to the Florida Forever Program. Chapter 99-247 is entitled the Florida Forever Program and contains provisions related to a variety of environmental matters. This includes the creation of a land acquisition program, and the Florida Forever Act, allowing for the continuance of certain submerged land leases, the creation of the Florida Forever Advisory Counsel and the Acquisition and Restoration Council.

120. Id. § 7, 1999 Fla. Laws at 3794 (codified at FLA. STAT. § 120.81(1)(a) (1999)).
121. Id. § 5, 1999 Fla. Laws at 3793 (codified at FLA. STAT. § 120.56(2)(a) (1999)) (stating that “[t]he petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised”).
122. Id. § 6, 1999 Fla. Laws at 3793 (codified at FLA. STAT. § 120.57(1) (1999)).
123. 1999 Fla. Laws chs. 99-246, 247. Several other laws were also enacted which addressed affected statutes relating to agencies other than the DEP. See 1999 Fla. Laws chs. 99-246, 292, 353, 391.
126. Id. § 9, 1999 Fla. Laws at 2458–59 (codified at FLA. STAT. § 253.03 (1999)). This amendment will not effect the seven stilt homes known as Stiltsville located in the Biscayne National Park. However, the House of Representatives did adopt a resolution urging for Stiltsville to be listed in the National Register of Historic Places. 1999 HR 9217.
127. Ch. 99-247, § 14, 1999 Fla. Laws 2446, 2474–77 (codified at FLA. STAT. § 259.0345 (1999)). The seven-member council will report annually on the progress of the program and make recommendations on goals and procedures. Id.
128. Id. § 16, 1999 Fla. Laws at 2477–78 (codified at FLA. STAT. § 259.035 (1999)). The nine-member council, composed of the Secretary of the DEP, representatives from the Department of Community Affairs, the Fish and Wildlife Commission, Division of Historic Resources, the Department of Agriculture and Consumer Services and four members appointed
requiring a two thirds vote by the Board of Trustees of the Internal Improvement Trust Fund prior to the sale of land purchased for conservation purposes, allowing for the issuance of permits for certain coastal armoring, creating the Florida Greenways and Trails Council within the FDEP, and allowing for payment in lieu of taxes to government certain entities where the state’s land acquisitions result in a loss in ad valorem tax revenue.

The Florida Forever Act is a continuation and expansion of the Florida Preservation 2000 Act land acquisition program, scheduled to expire on July 1, 2000. The Florida Forever Program was enacted in accordance with Florida Constitutional Revision 5. As the program was one of Governor Jeb Bush’s campaign issues, it was a priority during the 1999 legislative session. Under the Florida Forever Program, bonds up to $300 million per year, totaling three billion dollars over a ten-year period, may be issued for the acquisition of environmentally significant lands and for water resource development projects.

Unlike its predecessor, the Florida Forever Program allows for alternative uses of acquired land including water resource development projects, water supply development projects, stormwater management projects, linear facilities, and sustainable agriculture and forestry. “[L]inear projects can not include petroleum product pipelines, paved roads,
rail corridors or other facilities for motorized vehicles...” 138 Another major difference between the two programs is that the Florida Forever Program has slated twenty-five percent of its bond proceeds to community-based, urban open spaces, parks, and greenways with an emphasis for projects in low-income or otherwise disadvantaged communities. 139 The Florida Forever Program also provides for a greater emphasis on alternatives to fee simple acquisitions. 140

The second major bill related to the Florida Forever Program creates the Florida Forever Trust Fund. 141 The purpose of the fund is to provide sources of moneys and requirements to support the Florida Forever Act. The fund is administered by the FDEP. 142

C. Creation of the Fish and Wildlife Conservation Commission

In accordance with Florida Constitution Revision 5, the legislature created the Fish and Wildlife Conservation Commission. 143 The commission is formed through a merger of the Game and Freshwater Fish Commission and the Marine Fisheries Commission. 144 In addition, certain FDEP responsibilities were transferred to the new commission including the Bureau of Environmental Law Enforcement, the Bureau of Administrative Support, the Bureau of Operational Support, and the Office of Enforcement Planning and Policy Coordination within the Division of Law Enforcement. 145 The law specifically states that the FDEP will no longer have any responsibilities for boating safety. 146 The Division of Marine Resources within the FDEP is also transferred to the new commission “except for...[t]he Bureau of Coastal and Aquatic Managed Areas which is

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138. Id.; See also Kent Wetherell, 1999 ELULS Legislative Report: A Summary of Environmental and Land Use Legislation Considered in the 1999 Regular Session, THE FLA. B. ENVTL. & LAND USE L. SEC. REP., Vol. XX, No. 3, June 1999 at 1 (linear facilities can include electric transmission lines and pipelines).


141. Id. § 21, 1999 Fla. Laws at 2484 (codified at FLA STAT. § 259.105(1) (1999)).

142. Id.

143. FLA. CONST. art IV, § 9.

144. Ch. 99-245, §§ 2-3, 1999 Fla. Laws 2251, 2257 (codified at FLA. STAT. § 20.06(2) (1999)).

145. Id. § 4, 1999 Fla. Laws at 2257 (codified at FLA. STAT. § 20.06(2) (1999)).

146. Id.
assigned to the Division of State Lands at the Department of Environment Protection.”

47 The FDEP does retain the Office of Environmental Investigations, the Florida Park Patrol, and the Bureau of Emergency Response which are assigned to the FDEP’s Division of Law Enforcement.48

The commission must provide adequate due process to parties “whose substantial interests” are affected by its actions.49 However, the new Commission will have both constitutional and statutory duties and responsibilities. The law “encourages the commission to incorporate the provisions of [s]ection 120.54(3)(c) [of the Florida Statutes] in the exercise] of its constitutional duties.”50 However, it mandates that the performance of the commission’s statutory duties are in accordance with section 120.51

D. Total Maximum Daily Loads

The Florida Watershed Restoration Act52 was passed to comply with the Federal Clean Water Act.53 In addition, this act is intended to address a lawsuit filed on April 22, 1998 on behalf of the Florida Wildlife Federation, Environmental Confederation of Southwest Florida, Inc., and Save our Creeks, Inc. alleging that the “defendants, EPA and its Administrator, Carol Browner, have not enforced Florida’s adherence to the Clean Water Act.”54 Under the act, DEP is assigned as the “lead agency.”55 The act requires the identification of water bodies that are not meeting water quality standards and a process for determining the maximum amount of pollutant that the water body can assimilate or “Total Maximum Daily Load” (“TMDL”).56

147. Id. § 5, 1999 Fla. Laws at 2258 (codified at Fla. Stat. § 20.06(2)(a) (1999)).
148. Id. § 6, 1999 Fla. Laws at 2258.
150. Id. § 1, 1999 Fla. Laws at 2255 (codified at Fla. Stat. § 20.331(6)(b) (1999)).
151. Id. § 1, 1999 Fla. Laws at 2255–56 (codified at Fla. Stat. § 20.331(6)(c) (1999)).
156. 1999 Fla. Laws ch. 99-223. The act defines “Total maximum daily load” as: the sum of the individual wasteload allocations for point sources and the load allocations for nonpoint sources and natural background. Prior to determining individual wasteload allocations and load allocations, the maximum amount of a pollutant that a water body or water segment can
The DEP must submit a list of surface waters or segments for which TMDL assessments will be conducted and establish a priority ranking and schedule.\footnote{157} The act does not require that assessments be conducted on all 709 waters currently listed,\footnote{158} but that assessments conducted are based on their priority ranking.\footnote{159}

E. Everglades Restudy

The Comprehensive Review Study of the Central and Southern Florida Project ("restudy") "is an investigation to determine specific operational and structural changes that can be made to restore South Florida ecosystems, enhance water supply, and maintain flood control within the South Florida region."\footnote{160} The restudy is being conducted by the US Army Corps of Engineers as directed by the Federal Water Resources Development Acts of 1992 and 1996.\footnote{161} In an effort to "support the restudy through a process concurrent with Federal Government review," statutory amendments were enacted.\footnote{162} First, the South Florida Water Management District is established as the local sponsor of the restudy.\footnote{163} The DEP, however, must approve any project component prior to its submission to Congress.\footnote{164} The Executive Office of the Governor must review all proposed expenditures for project components.\footnote{165}

\footnote{assimilate from all sources without exceeding water quality standards must first be calculated.}

\footnote{Id. § 2, 1999 Fla. Laws at 1390 (codified at Fla. Stat. § 403.031(21) (1999)).}
\footnote{157. Id. § 3, 1999 Fla. Laws at 1391 (codified at Fla. Stat. § 403.067(2) (1999)).}


161. Id.}
\footnote{162. 1999 Fla. Laws ch. 99-143.}
\footnote{163. Ch. 99-143, § 1, 1999 Fla. Laws 820, 820-823 (codified at Fla. Stat. § 373.1501(4) (1999)).

164. Id. § 2, 1999 Fla. Laws at 823-24 (codified at Fla. Stat. § 373.026(8)(b) (1999)).

165. Id. § 2, 1999 Fla. Laws at 824 (codified at Fla. Stat. § 373.026(8)(d) (1999)).}
F. One Stop Permitting

In 1996, Florida created an "expedited permitting process intended to facilitate the location and expansion of certain types of economic development projects." Although permits were issued faster under the program, it was under-utilized. In an effort to increase usage of the program, the 1999 amendments create a statewide "one-stop permitting system" with incentives for local governments to integrate their permitting with the state's system. A one-stop permitting internet site is to be established by the Department of Management Services by January 1, 2000.

G. Environmental Compliance Costs of Private Utilities

Since 1996, there have been a number of administrative petitions and rule challenges related to the Florida Public Service Commission's ("PSC") policies and the recovery of environmental compliance costs. In Florida Public Service Commission v. Florida Waterworks Ass'n, the First District reversed an administrative hearing judge's order and found a PSC rule on the treatment of contributions-in-aid-of-construction in relation to margin reserves valid. With respect to the recovery of expenditures made for environmental compliance, the administrative judge had found the rule "invalid for failure 'to provide a mechanism for full-cost recovery of capital improvements required by governmental regulations.'" The district court disagreed, however, and found that the rule did "not purport to include or exclude any particular type or class of expenditure." Amendments to the Water and Wastewater System Regulatory Law clarify the issue by making

168. Ch. 99-244, §§ 5–6, 1999 Fla. Laws 2237, 2243–45 (codified at FLA. STAT. §§ 288.1092–.1093 (1999)).
169. Id. § 4, 1999 Fla. Laws at 2241–43 (codified at FLA. STAT. § 288.109 (1999)).
171. 731 So. 2d 836 (Fla. 1st Dist. Ct. App. 1999).
172. Id. at 836.
173. Id. at 844 (quoting Florida Cities Water Company v. State, 705 So. 2d 620, 623 (Fla. 1st Dist. Ct. App. 1998)).
174. Id.
VI. OTHER SIGNIFICANT CASES

A. Avatar Development Corporation v. State of Florida

Avatar Development Corporation and its vice president, Amikam Tanel, were charged with first-degree misdemeanor violations of section 403.161 of the Florida Statutes, for failure to comply with a dredge and fill permit. Specifically the corporate and individual defendants were charged with a failure to notify the DEP at least forty-eight hours prior to dredging activities and for failure to install and maintain floating turbidity curtains. The trial court dismissed the charges and certified the following question to the district court: "Are Florida Statutes § 403.161(1)(b) or § 403.161(5) unconstitutional as charged in the information?"

The district court reversed the trial court's dismissal of the charges and found the statute constitutional stating that: 1) the statute did not violate the State Constitution in prohibiting administrative agencies from imposing sentences of imprisonment or other penalties except as provided by law; 2) the statute did not violate the State Constitution prohibiting delegation of legislative authority to administrative agencies; and 3) the statute did not violate due process.

The Supreme Court of Florida affirmed the district court holding that the statute was a proper delegation of legislative authority as the DEP's authority to determine permit conditions was "limited to conditions necessary to effectuate the Legislature's [sic] specific policy." Therefore, the court found that "it is the Legislature [sic], and not the administrative body, that has declared such acts unlawful based upon express legislative policy."

175. Ch. 99-319, § 1, 1999 Fla. Laws 3410, 3410–3411 (codified at FLA. STAT. § 367.081(2)(a)2.c. (1999)).

176. Avatar Dev. Corp. v. State, 723 So. 2d 199, 200 (Fla. 1998). Section 403.161(1)(b) of the Florida Statutes establishes any permit violation as a chapter violation. Id. Further, section 403.161(5) provides that "[a]ny person who willfully commits a violation specified . . . is guilty of a misdemeanor of the first degree." Id.


178. Id. at 201 n.3.


180. Avatar Dev Corp., 723 So. 2d at 207.

181. Id.
B. Florida Department of Environmental Protection v. Allied Scrap Processors

Florida Department of Environmental Protection v. Allied Scrap Processors, is an action brought by the DEP to recover cleanup costs from the generators of waste shipped to a former battery processing plant. The DEP appealed a circuit court order granting a summary judgment in favor of the generators finding that the Water Quality Assurance Act of 1983 was not intended to have retroactive application. The district court reversed and remanded the case finding the law was retroactive. In its discussion, the district court found that the state law was modeled after the Federal Comprehensive Environmental Response, Compensation, and Liability Act, and should be given the same retroactive construction.

1. Miccosukee Tribe of Indians v. South Florida Water Management District

The Everglades Forever Act is a comprehensive program to address the preservation of the Everglades. The act grants primary responsibility for the Everglades Construction Project to the South Florida Water Management District ("the District"). It requires that the District apply for certain construction permits for flood control structures. Miccosukee Tribe of Indians v. South Florida Water Management District is an appeal of a DEP order granting the Water Management District a permit for the continued use of thirty-seven such structures. The district court affirmed the granting of the permit finding that the record showed "that the South Florida Water Management District met its burden of demonstrating reasonable assurances that its schedules and strategies will provide compliance with water quality standards" as required under the act.

182. 724 So. 2d 151 (Fla. 1st Dist. Ct. App. 1998).
183. Id. at 151.
185. Allied Scrap Processors, 724 So. 2d at 151.
186. Id. at 152.
189. Id. § 373.4592(4)(a).
190. Id. § 373.4592(9)(k).
193. Miccosukee Tribe of Indians, 721 So. 2d at 390 (citing Fla. Stat. § 373.4592(9)(k), (l) (1997)).
2. Nelo Freijomel v. City of Stuart

*Freijomel v. City of Stuart* is an appeal of a Florida Division of Administrative Hearing order finding that the DEP's arsenic soil cleanup goals were an illegal rule. The Fourth District affirmed, without an opinion, that the hearing officers finding that the DEP's use of certain health based goals for arsenic in the evaluation of a permit application creates a presumption of risk that the applicant must overcome. As such, the hearing officer found the use of the arsenic goals in denying a permit application a violation of section 120.54(1)(a) of the *Florida Statutes*. The officer concluded that the goals should be promulgated as a rule.

3. Miami Sierra Club v. State Administration Commission

In *Miami Sierra Club v. State Administration Commission*, the Miami Sierra Club and the Tropical Audubon Society appealed a final order of the Florida Administration Commission approving a reuse plan for the former Homestead Air Force base in Dade County. The Third District found the plan approval invalid stating: "The final order cannot stand as it was error for the Administration Commission to approve the plan based on the premature action by Miami-Dade County. The County should not have taken any action, or adopted any plan before the Supplemental Environmental Impact Statement ("SEIS") and the requisite management plans were completed."

The court looked at the requirements of sections 288.975 and 288.976 of the *Florida Statutes*, and found that state agencies were compelled to use "information analyses, and recommendations generated by the federal environmental impact statement process." Reasoning that as the federal government had decided that a SEIS was required, the court found that it was improper for the state to approve the plan prior to completion of the SEIS. The court also found the approval improper as the county had not completed.
certain management plans as required by section 163.3177(10)(e) of the Florida Statutes. Finally, the court found the plan approval improper as it did not “consider the nature of the issues in dispute, the compliance of the parties with the statute, the extent of the conflict between the parties, and the comparative hardships and the public interest involved.”
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I. Introduction

The Supreme Court of Florida resolved several issues of statutory construction this past year, which had been festering in the appellate courts, involving appeals in dependency and termination of parental rights cases and dispositions in juvenile delinquency cases. The intermediate appellate courts continued a more than decade long process of holding trial courts accountable to comply with basic statutory provisions within chapters 39 and 985 of the Florida Statutes. While the legislature did not make wholesale changes to the law governing children either in the dependency system or in the juvenile delinquency system, there were several substantial changes which are referenced in this survey. One change involved adding harm from substance abuse explicitly to the grounds for dependency and, ultimately, termination of parental rights.1

1. Ch. 99-186, § 2, 1999 Fla. Laws 1001, 1010-12 (codified at FLA. STAT. 39.01(30)(g) (1999)).
II. JUVENILE DELINQUENCY

A. Detention Issues

Detention issues occur regularly in the appellate case law, and this year was no exception. A significant issue involving use of detention for incompetent juveniles arose in J.W. v. Department of Juvenile Justice. The issue involved the ability of the trial court to order the placement of an incompetent child in secure detention. Without much analysis, the appellate court held that, although the statutes offer little guidance in dealing with a juvenile in J.W.'s circumstances, the trial court's order was consistent with Florida law, met the needs of J.W., and ensured the safety of the public. The court thus ruled that there was an adequate basis for the trial court to conclude that "no less restrictive alternative to secure detention would protect the safety of the public, especially small children." The appellate opinion is silent on what steps, if any, the trial court took pursuant to section 985.223 of the Florida Statutes to engage the Department of Children and Family Services in finding an appropriate placement for the child, nor what steps would be taken to develop a treatment plan for the child's restoration to competency. It is hard to visualize how placement in detention constitutes a remedy consistent with section 985.223 of the Florida Statutes and Rule 8.095(a)(8) of the Florida Rules of Juvenile Procedure, premised as they are on rehabilitation.

In a significant ruling on detention and pretrial practice, the Supreme Court of Florida recently approved an amendment on an interim basis to the Florida Rules of Juvenile Procedure permitting juveniles to attend detention hearings via audio-video devices. The court had initially ruled on the matter in 1996 establishing the practice on an interim basis. The court responded to
the petition of several circuits and relied upon what it described as highly favorable reports to order an amended rule of procedure containing the audio visual approach for a period of ninety days from the date of the opinion after which time the court held that it would determine whether further action was necessary.\(^\text{11}\) It also directed the Juvenile Procedures Committee of the Florida Bar to study the matter and make a recommendation concerning a permanent rule.\(^\text{12}\) The positions of the parties, both favoring and opposing the rule, are set forth in detail in the opinion.\(^\text{13}\) The benefits described included avoiding humiliation of juveniles who are paraded through the courthouse and allowing juveniles more time to attend classes and counseling sessions.\(^\text{14}\) There was great support from the judiciary for continuance of the interim rule.\(^\text{15}\) The shortcoming, according to the court, was a hardship to the public defender in allocating attorneys.\(^\text{16}\) The countervailing considerations also relate to the depersonalization of the initial appearance process.\(^\text{17}\) Children who are seen on television, it may be argued, are less likely to be viewed individually and personally by the court.\(^\text{18}\) The court is thus unable to evaluate the personal characteristics of the child.\(^\text{19}\)

As noted earlier in this survey, the Florida Statutes provide for services to juveniles who have been found incompetent to stand trial.\(^\text{20}\) In Department of Children & Families v. Morrison,\(^\text{21}\) the trial court ordered a child charged with first-degree premeditated murder who was adjudged incompetent to stand trial to be committed to the Department of Children and Family Services for placement in a secure facility where there would be no integration with adult patients and where the child would be rehabilitated.\(^\text{22}\) The Department petitioned for a writ of certiorari on the ground that the circuit court was without authority to order the child to a special mental health facility.\(^\text{23}\) The appellate court agreed, finding that Florida law does not provide the trial court with authority in a commitment order to order a defendant’s placement in a

\begin{footnotes}
\item[11.] Amendment, 24 Fla. L. Weekly at S198.
\item[12.] Id.
\item[13.] See id. at S196–99.
\item[14.] Id. at S197–98.
\item[15.] Id. at S197.
\item[16.] Amendment, 24 Fla. L. Weekly at S198.
\item[17.] Id. at S197.
\item[18.] See id.
\item[19.] See id. at S199.
\item[20.] See supra Part II.A. ¶ 1.
\item[21.] 727 So. 2d 404 (Fla. 3d Dist. Ct. App. 1999), review denied, 741 So. 2d 1136 (Fla. Aug. 19, 1999).
\item[22.] Id. at 405.
\item[23.] Id.
\end{footnotes}
specific facility or to issue instructions on the defendant’s treatment.\textsuperscript{24} The appellate court ruled that the trial court can make a nonbinding recommendation regarding placement.\textsuperscript{25} However, the court did differ with the Department on the issue of housing and treating the indicted child separately from adults.\textsuperscript{26} The court held that section 985.215(4) of the Florida Statutes requires that when a child is prosecuted as an adult, including where indicted as such, the child should be housed in a jail or facility separately from adult inmates.\textsuperscript{27} Finding an apparent contradiction in the provisions of chapter 985 of the Florida Statutes, the court sought to harmonize and reconcile them.\textsuperscript{28} It concluded that it would be anomalous to say that section 985.215 mandated separation of juveniles and adults when an indicted juvenile is held in jail, but that section 985.225 commands that juveniles and adults be lodged together when committed to a mental health facility.\textsuperscript{29} The court did not decide the issue, finding that the Department was not given notice of the proceedings, and that the trial court and the Department did not have an opportunity to address the question of separate confinement for mental health treatment apart from adults.\textsuperscript{30}

Under Florida law, in addition to pretrial detainees, a child committed to the Department of Juvenile Justice awaiting dispositional placement who has already been adjudicated, may be placed in secure detention for a short period of time.\textsuperscript{31} In \textit{L.K. v. State},\textsuperscript{32} the court held that, notwithstanding the child’s acquiescence to a longer period of detention, the plain language of the Florida statute precludes a trial judge ordering detention in excess of fifteen days after commitment.\textsuperscript{33}

\section*{B. Adjudicatory Issues}

The \textit{Florida Rules of Juvenile Procedure} contain detailed discovery provisions,\textsuperscript{34} which have generated appellate decisions in the past.\textsuperscript{35} In a recent case, a mother petitioned the appellate court to quash an order

\begin{itemize}
\item 24. \textit{Id.}
\item 25. \textit{Id.} at 406.
\item 26. \textit{Morrison}, 727 So. 2d at 406–07.
\item 27. \textit{Id.} at 406. See \textit{FLA. STAT.} § 985.215(4) (1999).
\item 28. \textit{Morrison}, 727 So. 2d at 406–07.
\item 29. \textit{Id.} at 407.
\item 30. \textit{Id.}
\item 31. See \textit{FLA. STAT.} § 985.215(10)(a) (1999).
\item 32. 729 So. 2d 1011 (Fla. 4th Dist. Ct. App. 1999).
\item 33. \textit{Id.} at 1011.
\item 34. See \textit{FLA. R. JUV. P.} 8.060.
\end{itemize}
denying her discovery of information in the possession of the medical examiner and a law enforcement agency who were investigating criminal charges against her for the death of her infant child.\textsuperscript{36} The mother sought the information as part of her preparation to defend the petition for dependency of her other two children.\textsuperscript{37} The sheriff’s department moved for a protective order, arguing that the information sought both from the office itself and the medical examiner was exempt from disclosure under Florida law since it was related to a current criminal investigation of the death of the mother’s infant child.\textsuperscript{38} The problem was exacerbated by the fact that the two other children had been removed from the custody of their mother for over seventeen months based upon the death of the infant.\textsuperscript{39} There had never been any report or indication that the mother inflicted any type of injury upon the children although the mother was a suspect because she was one of the many individuals who had access to the infant.\textsuperscript{40} The court recognized that broad discovery is provided under the juvenile rules because of the important interests at stake.\textsuperscript{41} The court concluded that although the child’s welfare and best interest must remain paramount, the court was also obligated to carefully safeguard fundamental liberty interests of the parent in the care, custody, and management of the child.\textsuperscript{42} It then granted the writ of certiorari and quashed the trial court’s order.\textsuperscript{43}

C. Dispositional Issues

Inexplicably, the trial courts have a problem with the proposition that under Florida law, a child may not be sentenced to a juvenile commitment for a period of time longer than the maximum sentence for an adult who commits the same crime.\textsuperscript{44} Two recent cases are illustrative of the issue.\textsuperscript{45} Thus, in \textit{D.S. v. State},\textsuperscript{46} the Fifth District Court of Appeal held that it was reversible error for the trial court to place a child on community control until the youngster’s nineteenth birthday where the maximum penalty for an adult

\begin{itemize}
\item \textsuperscript{36} B.B. v. Department of Children & Family Servs., 731 So. 2d 30, 31 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{37} Id. at 32.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Id. at 33.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} B.B., 781 So. 2d at 34.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} See Fla. Stat. § 985.231(1)(d) (1999).
\item \textsuperscript{45} See D.S. v. State, 730 So. 2d 398 (Fla. 5th Dist. Ct. App. 1999); D.P. v. State, 730 So. 2d 414 (Fla. 5th Dist. Ct. App. 1999).
\item \textsuperscript{46} 730 So. 2d 398 (Fla. 5th Dist. Ct. App. 1999).
\end{itemize}
charged with the same offense was shorter.\textsuperscript{47} Based on the facts of the case, the child could only have been committed or placed on community control for one year.\textsuperscript{48} In \textit{D.P. v. State},\textsuperscript{49} the Fifth District Court of Appeal reversed the trial court's order committing a juvenile to a high risk facility for sex offenders for a period not to extend beyond his nineteenth birthday, followed by community control and aftercare to be planned by the Department of Juvenile Justice and approved by the court because it exceeded the maximum adult penalty.\textsuperscript{50}

In an effort to provide a greater variety of, as well greater severity in, juvenile dispositions, Florida has instituted a serious offender program.\textsuperscript{51} The habitual offender provisions of Florida law create procedures to be followed in order to have a child placed in the serious or habitual juvenile offender program.\textsuperscript{52} Such procedures include a requirement that the state file a petition seeking serious or habitual juvenile offender placement, service of such a petition on the child, the child's attorney, and a representative of the Department of Juvenile Justice, and a reasonable time allowance for the child to prepare a response.\textsuperscript{53} In \textit{D.A.C. v. State},\textsuperscript{54} the issue was whether the court could authorize the prosecution of a child as a serious offender even where the state attorney as prosecutor did not file a petition to do so.\textsuperscript{55} The appellate court held that the statute does not prohibit the trial court from imposing habitual offender sentences unless the prosecutor files the petition the classification.\textsuperscript{56} The rule permits, but does not require, the prosecutor to file the petition and thus allows the court to prosecute habitual or serious offenders in the absence of a filing by the prosecutor.\textsuperscript{57} The statute also requires the court to decide if the child meets serious offender criteria.\textsuperscript{58} In addition, the court held that there is no separation of powers problem

\textsuperscript{47} Id. at 400. \textit{See also} J.D. v. State, 732 So. 2d 1135, 1135 (Fla. 2d Dist. Ct. App. 1999) (finding error where the trial court imposed indefinite term of community control for marijuana and cocaine possession).


\textsuperscript{49} 730 So. 2d 414 (Fla. 5th Dist. Ct. App. 1999).

\textsuperscript{50} Id. at 415.

\textsuperscript{51} \textit{See} FLA. STAT. § 985.31 (1999).

\textsuperscript{52} \textit{See} FLA. R. JUV. P. 8.115(d).

\textsuperscript{53} Id.

\textsuperscript{54} 728 So. 2d 828 (Fla. 5th Dist. Ct. App. 1999), \textit{review denied}, (Fla. Oct. 28, 1999).

\textsuperscript{55} Id. at 829.

\textsuperscript{56} Id. at 830.

\textsuperscript{57} Id. at 829–30.

\textsuperscript{58} Id.
because the purpose of the juvenile proceeding is remedial in nature as opposed to punitive.  

An interesting dispositional issue arises when a child with a pending juvenile delinquency case is the subject of a direct filed information, charging him or her as an adult. In Medina v. State, a child appealed from the imposition of adult sentences on juvenile cases which would be disposed of together with adult cases in the adult court. The appellate court held that once transferred, post-adjudicatory juvenile cases still retain their juvenile status, and thus the felony division judge or adult criminal court judge did not have the authority to impose an adult sentence on a child on these cases as to which the child has been adjudicated in the juvenile division. 

Florida's appellate courts are split on a technical issue of court jurisdiction to extend the dispositional alternative of community control. In N.W. v. State, the Second District Court of Appeal agreed with the Fourth District Court of Appeal opinion in M.B. v. State that the statutory provision that a child adjudicated delinquent for a second-degree misdemeanor is subject to supervision and community control only for six months where the juvenile has been adjudicated delinquent. However, where a child is not adjudicated delinquent, but rather has had the adjudication withheld (a permissible alternative in Florida), the court may impose a penalty that is harsher than the one that would be permitted if the juvenile were adjudicated delinquent. The holdings in N.W. and M.B. are contrary to the ruling of the Fifth District Court of Appeal in G.R.A. v. State; thus, the court in N.W. certified the conflict with the Fifth District.

At both the adjudicative and dispositional stages of delinquency cases, juveniles have an absolute right to counsel. However, juveniles may, on

59. D.A.C., 728 So. 2d at 830.
61. 732 So. 2d 1153 (Fla. 3d Dist. Ct. App. 1999).
62. Id. at 1154.
63. Id. at 1155.
64. N.W. v. State, 736 So. 2d 710, 710 (Fla. 2d Dist. Ct. App. 1999).
65. Id.
66. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).
67. N.W., 736 So. 2d at 711.
69. See id.; M.B., 693 So. 2d at 1067.
70. 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).
71. N.W., 736 So. 2d at 711.

https://nsuworks.nova.edu/nlr/vol24/iss1/1
occasion, be represented by a certified legal intern.73 In A.D. v. State74 the record was silent as to whether the child knowingly and intelligently waived the right to legal representation in return for representation by the intern.75 Nor was there any showing or assertion that a supervising attorney was present at the dispositional hearing.76 Therefore, the court was obligated to quash the dispositional order and remand for further proceedings based on Florida case law establishing that there must be approval by the minor of the intern.77

Periodically, the appellate courts must review appeals on the ground that the child’s waiver of the right to remain silent and have an attorney present during questioning should be suppressed because the waiver was not knowing and intelligent.78 In T.S.D. v. State,79 a twelve-year-old with a history of psychological problems, an IQ of sixty-two, and a third grade reading level moved to suppress his confession.80 The court applied the totality of circumstances approach, evaluating the child’s intelligence, education, experience, and his ability to comprehend the meaning and effect of his statement, in finding that his confession was clearly not admissible.81 Significantly, the court held that contrary to the State’s assertion, the record demonstrated that the child’s prior exposure to the juvenile justice system did not aid in his comprehension of his rights.82

73. See RULES REGULATING THE FLA. BAR 11-1.2(a)–(e) (providing that a law student may directly provide representation to individuals so long as the student is participating in a law school credit-bearing clinical program coordinated by the law school and supervised by a lawyer).
75. Id. at D1494.
76. Id.
77. See id. (citing L.R. v. State, 698 So. 2d 915 (Fla. 4th Dist. Ct. App. 1997); In re J.H., 580 So. 2d 162 (Fla. 4th Dist. Ct. App. 1991)).
80. Id. at D1149.
81. Id.
82. Id.
D. Appellate Issues

The issue of the proper way to take up on appeal a challenge to the adequacy of a plea colloquy arose in *J.M.B. v. State.* 83 The appellate court held that a juvenile may not challenge the voluntariness of his plea on direct appeal without first moving to withdraw the plea. 84 A criminal defendant can contest the voluntariness of the plea after sentencing by filing a motion under the *Florida Rules of Criminal Procedure.* 85 However, because the rule does not apply in juvenile proceedings, the court held that the only remedy for the juvenile under the circumstances of the case was the filing of a writ of habeas corpus in the circuit court. 86 Although the court in *J.M.B.* did not explain whether the failure to appeal was significant, the Supreme Court of Florida has held that the failure of the defendant to raise the issue of the validity of a plea by appeal does not prohibit the individual thereafter from seeking collateral relief if the issue had not been previously addressed and ruled on. 87

III. TERMINATION OF PARENTAL RIGHTS

A. Adjudicatory Issues

Florida law provides that a parent who is served with a petition for termination of parental rights must appear at an advisory hearing or in another manner respond to the notice of the hearing. 88 The failure to respond or appear at an advisory hearing is deemed to constitute consent to the petition to terminate parental rights. 89 In *J.B. v. Department of Children & Family Services,* 90 the appellate court was asked to decide whether the father had been denied due process of law by giving him only twenty-four hours notice of the advisory hearing. 91 The court held that twenty-four hours was sufficient to meet the minimum due process requirements as an advisory hearing in a termination of parental rights case is merely a preliminary step in the process where no rights are finally adjudicated. 92 The court felt that a

84. Id. at D1485 (citing Fla. R. App. P. 9.140(2)(B)(iii)).
86. *J.M.B.*, 24 Fla. L. Weekly at D1485 (citing In re *W.B.*, 428 So. 2d 309, 312 (Fla. 4th Dist. Ct. App. 1983)).
89. Id. § 39.801(3)(d).
90. 734 So. 2d 498 (Fla. 1st Dist. Ct. App. 1999).
91. Id. at 500.
92. Id.
parent was not required to prepare for an advisory hearing and retain counsel in advance and need simply appear and request a postponement.\textsuperscript{93} Where the father did not inform the court that he was not able to attend and did not have an adequate excuse, the court rejected the claim that he was denied due process.\textsuperscript{94} Over a vigorous dissent, the majority held that while there is a great deal at stake for the parents, there is also a great deal at stake for the child, making it unfair to the child to delay the proceedings.\textsuperscript{95} The dissent, describing in detail the constitutionally protected interests in preserving the family unit in raising children, argued that the abruptness of the resolution of such an important matter constituted inadequate notice of the hearing.\textsuperscript{96} Recognizing that the father had no lawyer in the trial court until after the cases had been remanded following an appeal and that the Department only gave the father twenty-four hours notice of the termination proceeding, the dissent concluded that the notice of hearing to terminate the father’s parental rights was constitutionally inadequate.\textsuperscript{97}

The courts have also been faced with the question of whether the appearance by counsel at the advisory hearing is adequate to constitute an appearance so as to avoid a default termination of parental rights.\textsuperscript{98} In \textit{In re E.L.},\textsuperscript{99} the Second District held that appearance by counsel at an advisory hearing avoids a default.\textsuperscript{100} Where the court previously had appointed an attorney for the parent, it was not necessary for the parent to be present, as her attorney could have told the court whether she consented to the termination.\textsuperscript{101}

A third case involving the question of whether the failure to appear may result in a default judgment of termination of parental rights is \textit{In re B.A.}\textsuperscript{102} In this case, the mother failed to appear at the adjudicatory hearing, and the

\begin{tabular}{l}
\textsuperscript{93} \textit{Id.} \\
\textsuperscript{94} \textit{Id.} \\
\textsuperscript{95} \textit{J.B.}, 734 So. 2d at 501–02. \\
\textsuperscript{96} \textit{Id.} at 503–04. \\
\textsuperscript{97} \textit{Id.} at 505. \textit{See also In re S.S.}, 735 So. 2d 576, 577 (Fla. 2d Dist. Ct. App. 1999) (holding that it was error to terminate parental rights because notice was inadequate where a parent failed to appear at an advisory hearing, but attorney did attend, and where notice failed to include the 1998 change which states, “FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF THIS CHILD (OR CHILDREN).” \textit{Fla. Stat.} § 39.801(3)(a) (1999) (emphasis added)). \\
\textsuperscript{98} \textit{See In re M.A.}, 735 So. 2d 578 (Fla. 2d Dist. Ct. App. 1999); \textit{In re S.S.}, 735 So. 2d 576 (Fla. 2d Dist. Ct. App. 1999). \\
\textsuperscript{99} \textit{732 So. 2d 37} (Fla. 2d Dist. Ct. App. 1999). \\
\textsuperscript{100} \textit{Id.} at 39. \\
\textsuperscript{101} \textit{Id.} \textit{See M.A.}, 735 So. 2d at 578–79. \\
\end{tabular}
court entered a default of consent to the termination petition. The appellate court held that despite the mother's failure to appear at a prior advisory hearing, the mother's court appointed lawyer was present at the advisory hearing and suggested that the mother may not have had the ability to understand her duty to appear in court. The trial court did not enter a default and granted counsel's request for a competency evaluation. The case then proceeded and resulted in the adjudicatory hearing. Having found that the case proceeded beyond the advisory stage and onto the adjudicatory stage, the appellate court held that the trial court lacked authority to enter a default.

M.E. v. Department of Children & Family Services is a fourth case involving the issue of failure to appear at an adjudicatory hearing of termination of parental rights. Before the commencement of trial, the mother's counsel advised the court of difficulty reaching the client but informed the court that the client wished to defend against the termination petition. The appellate court rejected the mother's contention that it was required that she be personally served with notice of the termination of parental rights trial date. The Florida Rules of Juvenile Procedure provide that after service of the petition for termination of paternal rights together with notice of an advisory hearing, all other pleadings and papers must be served on each party or the party's attorney. It is thus the parent's obligation to remain in reasonable touch with the attorney regarding the progress of the case.

Matters may have been rendered more complicated as a result of a change in Florida law discussed in a fifth case involving the failure to appear—In re S.S. In S.S., the mother did not appear at the advisory hearing, but an attorney appeared on her behalf and pointed out that the language in the notice did not conform to the amendments to the notice statute which were effective October 1, 1998. Effective October 1, 1998, the Florida law was changed to provide that the notification would include

103. Id. at D1086.
104. Id. at D1087.
105. Id.
106. Id.
108. 728 So. 2d 367 (Fla. 3d Dist. Ct. App. 1999).
109. Id. at 368.
110. Id.
111. Id.
112. Id. (citing FLA. R. JUV. P. 8.225(c)(3)).
113. M.E., 720 So. 2d at 368.
114. 735 So. 2d 576 (Fla. 2d Dist. Ct. App. 1999).
115. Id. at 577.
the following language, "FAILURE TO PERSONALLY APPEAR AT THIS ADVISORY HEARING CONSTITUTES CONSENT TO THE TERMINATION OF PARENTAL RIGHTS OF THIS CHILD (OR CHILDREN)." The issue the court did not have to decide in S.S. was whether the 1998 amendments precluded an appearance by counsel with the result that there would be a waiver and thus termination of parental rights. 117

There is a growing body of case law in Florida dealing with the question of the failure to appoint a guardian ad litem in a dependency or termination of parental rights proceedings. 118 In Vestal v. Vestal, 119 the trial court failed to appoint a guardian ad litem at the outset of a termination of parental rights case. 120 The Vestal court noted that in several earlier cases both the Second and Fifth District Courts of Appeal held that the failure to appoint a guardian in a termination case is not fundamental error. 121 In the preceding cases which are cited in Vestal, the appellate courts found that the trial court had sought a guardian but none was available, and based upon the facts of those cases, there had been no harm to the parent. 122 In E.F., the child had been adequately protected, and the error in not appointing a guardian was not fundamental. 123 In Fisher, where a guardian had resigned and efforts to replace the guardian were unsuccessful, the court held that the child's rights had been adequately protected. 124 In contrast, in Vestal, the trial court made no attempt to appoint a guardian and, as a result, no guardian was appointed, and there was very little involvement by the Department. 125 Thus, there was no testimony from third parties, such as a guardian, with the result that the case was a credibility contest between an ex-wife and ex-husband. 126 Under the circumstances of the case, the court found that the failure to appoint a guardian ad litem was reversible error. 127

Although Vestal upheld the right to a guardian ad litem under the facts of the case, the problem with the opinion and the early cases is that the Florida

117. See S.S., 735 So. 2d at 577.
119. 731 So. 2d 828 (Fla. 5th Dist. Ct. App. 1999).
120. Id. at 828.
121. Id. at 828–29 (citing Fisher v. Department of Health & Rehabilitative Servs., 674 So. 2d 207 (Fla. 5th Dist. Ct. App. 1996); In re E.F., 639 So. 2d 639 (Fla. 2d Dist. Ct. App. 1994)).
122. Fisher, 674 So. 2d at 208; E.F., 639 So. 2d at 643–44.
123. E.F., 639 So. 2d at 644.
124. Fisher, 674 So. 2d at 208.
125. Vestal, 731 So. 2d at 829.
126. Id.
127. Id.
courts are carving out an exception to the child’s right to a guardian ad litem where none exists.128 The Florida statute is absolute on its face.129 Section 39.807(2)(a) of the Florida Statutes provides as follows, “[t]he court shall appoint a guardian ad litem to represent the child in any termination of parental rights proceedings and shall ascertain at each stage of the proceedings whether a guardian ad litem has been appointed.”130 This mandatory language follows from the federal funding statute known as the Child Abuse Prevention and Treatment Act (“CAPTA”), which provides for guardians ad litem in Florida.131 It is unclear why the courts disregard the language of the statute and the applicability of federal law.

Under Florida law, cases involving termination of parental rights are confidential and closed to the public.132 The issue before the Fourth District Court of Appeal in Department of Children & Family Services v. Natural Parents of J.B.133 was whether the statute closing all hearings throughout the case to the public and the media was unconstitutional.134 The appeals court held that the mandatory closure statute was not unconstitutional under either the Sixth or Fourteenth Amendments and that termination of parental rights cases are not indistinguishable from criminal prosecutions.135 The Fourth District Court of Appeals upheld the closure, finding no constitutional violation.136

Florida’s termination of parental rights statute provides that termination may be based upon a child’s adjudication as dependent, the filing of the case plan, and the finding that the child continues to be abused, neglected or abandoned.137 The statute also provides that the failure of the parent to substantially comply with the case plan for a period of twelve months after the child has been adjudicated may constitute evidence of continuing abuse and neglect or abandonment.138 Exceptions to this requirement occur when the failure to substantially comply with the case plan results from either lack of financial resources or when the Department fails to make reasonable efforts to reunify the family.139 In re K.C.C.140 dealt with the factual

129. See id.
130. Id.
133. 736 So. 2d 111 (Fla. 4th Dist. Ct. App. 1999).
134. Id. at 112.
135. Id. at 117–18.
136. Id at 118.
138. Id.
139. Id.
question of what constitutes proper financial resources. At issue was the situation a father whose physical and mental problems precluded his employment. The father admitted to having no income at the time of the dependency adjudication, but said that since the adjudication he had become eligible for social security disability payment and an increase in his veteran administration benefits. He also attributed his failure to attend parenting classes to the family's financial circumstances. Thus, under the facts of the case, the court found that it could not find by clear and convincing evidence that his parental rights should be terminated.

B. Appellate Issues

In W.J.E. v. Department of Children & Family Services, the question was how far must counsel proceed in preserving the appellate rights of a parent in a termination of parental rights case. In W.J.E., as a matter of caution, the father's court appointed lawyer filed an appeal without direction from the client after the client was served with a summons for trial but did not appear. Counsel filed an order to protect the client's rights on appeal. The lawyer was unable to contact the father to confirm his desire to seek review. The appeals court held that by not responding to counsel's efforts, the father had abandoned his appeal. The appellate court ruled that where counsel does not know the client's wishes, he or she should write to the client at the last known address advising of the deadline for appeal and seeking confirmation of the client's wishes. If the client does not respond prior to the expiration of the appeal period, counsel has fulfilled his or her ethical obligations and duties and therefore need not file the appeal.

The Supreme Court of Florida recently cleared up confusion concerning the timing of appeals from dependency and termination of parental rights.

141. Id. at D1027.
142. Id.
143. Id.
144. Id. at D1027–28.
146. 731 So. 2d 850 (Fla. 3d Dist. Ct. App. 1999).
147. Id. at 850.
148. Id.
149. Id.
150. Id.
151. W.J.E., 731 So. 2d at 850.
152. Id.
153. Id.
adjudications. The problem in two cases arose from the ambiguity in the statute as to whether the appeal on the issue of either dependency or termination of parental rights should be raised from the adjudicatory order or from the dispositional order. In G.L.S. v. Department of Children & Families, the supreme court held that an order which initially terminated parental rights in a child dependency case may be challenged upon appeal from a subsequent final disposition order. While it was proper and preferable to appeal from the earlier termination order, because of the ambiguity in the statute, a termination order was subject to review from the final disposition. In A.G. v. Department of Children & Family Services, the court held that the same ambiguity existed in the dependency statute and thus the issue of dependency could be raised on appeal from the later dispositional order in a dependency case.

IV. STATUTORY CHANGES

A. Dependency and Termination of Parental Rights

The legislature continued to make changes to chapter 39 during the 1999 legislative session, focusing on a number of specific areas. For example, the legislature amended the definitional language in section 39.01 of the Florida Statutes governing harm to the child to include exposure to controlled substances and alcohol. In 1998, the legislature provided parents the right to be represented by counsel and, if indigent, to be appointed counsel in dependency cases. This past year, the statute governing shelter hearings was amended to provide that parents who appear at the shelter hearing without counsel may have the shelter hearing continued for up to seventy-two hours to enable them to consult legal counsel.

155. Id.
156. 724 So. 2d 1181 (Fla. 1998).
157. Id. at 1182.
158. Id. at 1185.
160. Id. at 1261–62.
During that time, the child may be continued in shelter care if granted by the court.\textsuperscript{164}

In a further effort to articulate grounds for loss of custody as part of a dependency proceeding, the court amended the statute provision governing arraignment hearings.\textsuperscript{165} When an individual appears for the arraignment hearing and the court orders the individual to personally appear at the adjudicatory hearing for dependency and provides appropriate information about the time, date, and place of that hearing, then the individual's failure to appear at the adjudicatory hearing constitutes consent to a dependency adjudication.\textsuperscript{166} This additional change in the statute leaves undecided the issue of whether counsel's presence without the parent causes the same result as described in several cases reported earlier in this survey.\textsuperscript{167}

A highly significant change in chapter 39 is the passage of a set of goals for dependent children in shelter or foster care.\textsuperscript{168} While the goals do not create rights, they articulate aspirational concepts for these children including the right "to enjoy individual dignity, liberty, pursuit of happiness, and the protection of their civil and legal rights as persons in the custody of the state."\textsuperscript{169}

Finally, the legislature made a significant change in the methodology for carrying out child protective services.\textsuperscript{170} It amended Florida law to provide that the sheriffs of Pasco, Manatee, and Pinellas counties shall provide child protective investigative services and authorized the entry of a contract between the Department of Children and Family Services and the sheriff's departments of each county to carry out this task.\textsuperscript{171}

B. \textit{Juvenile Delinquency}

The legislature recently broadened the crimes for which juveniles may now be charged as adults. With its amendment to section 985.227 of the \textit{Florida Statutes}, the legislature continued to expand the list of crimes for which a fourteen or fifteen-year-old child may be tried as an adult.\textsuperscript{172} The

\begin{itemize}
  \item \textsuperscript{164} Id.
  \item \textsuperscript{165} Id. \textsection 29, 1999 Fla. Laws at 1137 (codified at FLA. STAT. \textsection 39.506(e) (1999)).
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} See discussion supra Part III.A.
  \item \textsuperscript{168} Ch. 99-206, \textsection 5, 1999 Fla. Laws 1245, 1253–55 (codified at FLA. STAT. \textsection 39.4085 (1999)).
  \item \textsuperscript{169} Id.
  \item \textsuperscript{170} Ch. 98-180, \textsection 2, 1998 Fla. Laws 1601, 1605–07 (codified at Fla. Stat. \textsection 39.3065(2) (1999)).
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} Ch. 99-257, \textsection 1, 1999 Fla. Laws 2993, 2993–94 (codified at FLA. STAT. \textsection 985.227 (1999)).
\end{itemize}
statute now provides that a child may be charged as an adult for grand theft of an automobile if the child has previously been adjudicated for grand theft of a motor vehicle. The state attorney may file an information if in his or her discretion he or she believes public interest requires adult sanctions. The criteria for discretionary direct filing of an information has been amended to include the phrase "for the commission of, attempt to commit, or conspiracy to commit" any of the crimes listed in section 985.227 of the Florida Statutes. Burglary with an assault or battery, possessing or discharging any weapon or firearm on school grounds, home invasion robbery, and carjacking have been added to the list of discretionary direct file offenses.

Section 985.225 has been amended to require transfer of certain juvenile felony cases to criminal court for prosecution as an adult in instances where a guilty plea, nolo contendere, or a finding of guilt has not been made. The same penalties will be applied to felony cases that were transferred to adult court if the child is acquitted of all charged or lesser included offenses in the indictment case. A mandatory waiver application has been added requiring the state attorney to request a waiver to prosecute the child as an adult if the child is fourteen years or older and has previously been adjudicated delinquent for a felony.

The legislature has also authorized law enforcement agencies and school districts to establish pre-arrest diversion programs in cooperation with the state attorney. As part of the program, a child who allegedly commits a delinquent act may be required to relinquish his driver's license or refrain from applying for one. The state attorney may notify the Department of Motor Vehicles to suspend the child's driver's license for a maximum of ninety days if the child fails to comply with the program.

Possession or discharge of a weapon or firearm at a school event or on school property is now included as one of the offenses for which a child may...

173. Id.
174. Id.
176. Id. at 3120.
177. Id. § 35, 1999 Fla. Laws at 3131 (codified at Fla. Stat. § 985.225(4)(b) (1999)).
178. Id.
179. Id. § 37, 1999 Fla. Laws at 3131–33 (codified at Fla. Stat. § 985.226(2)(b)1 (1999)).
181. Id.
182. Id.
be fingerprinted. The fingerprints may be given to the Department of Law Enforcement to become part of the state criminal history records and may be used by criminal justice agencies.

A number of changes were also made relating to school children possessing weapons on school property or at school sponsored events. The purpose of the amendments is to prevent children who have been charged with possession of a firearm on school property from returning to the school to cause injury. The law requires placement of a child charged with possessing or discharging a firearm in secure detention and that a probable cause hearing is held within twenty-four hours once the state acquires custody of the minor. At the hearing, the court may order the child to remain in secure detention for up to twenty-one days, during which time the child will receive "medical, psychiatric, psychological, or substance abuse examinations," followed by a written report of examination findings. The state attorney may authorize the release of the minor before the probable cause hearing where the child was wrongfully charged.

Carjacking, home invasion robbery, and burglary with an assault or battery are added to the list of offenses for which a youth, thirteen years of age at the time of the disposition, may be committed to a juvenile correctional facility or juvenile prison. "Juvenile correctional facilit[ies]" or "juvenile prison[s]" replace the term "maximum-risk residential program."

Although a significant portion of recent legislation increases the child's criminal accountability, the legislature created several projects that promote child development while the child is in the custody of the Department of Juvenile Justice. Emphasizing that education is the most significant factor in the rehabilitation of a delinquent child, section 230.23161 of the Florida Statutes now designates the Department of Education as the lead agency for

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183. Ch. 99-284, § 14, 1999 Fla. Laws 3087, 3105–06 (codified at FLA. STAT. § 985.212(1)(b)13 (1999)).
184. Id. at 3106.
185. Id. § 3, 1999 Fla. Laws at 3095–97 (codified at FLA. STAT. § 790.115 (1999)); Id. § 14, 1999 Fla. Laws at 3105–06 (codified at FLA. STAT. § 985.212(1)(b) (1999)).
188. Id.
189. Id.
190. Id. § 40, 1999 Fla. Laws at 3133–35 (codified at FLA. STAT. § 985.313(1) (1999)).
191. Id. at 3133.
educational programs in the juvenile justice system. The new law requires extensive collaboration between the Department of Education and the Department of Juvenile Justice to implement and/or expand effective educational and technical programs for youth in the Department of Juvenile Justice programs. Public schools shall provide instruction for juveniles in the Juvenile Justice programs and model procedures for the transition of youth in and out of juvenile justice programs must be developed.

V. CONCLUSION

The Supreme Court of Florida cleared up several conflicts among Florida’s district courts of appeals involving appeals from dependency and termination cases and dispositional matters in delinquency cases this year. The legislature made several substantial changes in the dependency and termination field, although there were no wholesale changes. One problematic area left unresolved by the legislature is the reduction, without explanation, in the provision of guardians ad litem to children in dependency and termination parental rights cases.

193. Id. See also id. § 43, 1999 Fla. Laws at 3136–37 (codified at FLA. STAT. § 228.081(2) (1999)).
194. Id. § 42, 1999 Fla. Laws at 3135 (codified at FLA. STAT. § 228.051 (1999)).
195. Id. § 43, 1999 Fla. Laws at 3137 (codified at FLA. STAT. § 228.081(3)(b) (1999)).
Florida Professional Responsibility Law in 1999: The Rules of the Game

Timothy P. Chinaris and Elizabeth Clark Tarbert

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I. INTRODUCTION

The year 1999 saw a number of changes and developments in Florida professional responsibility law. This article surveys these developments by reviewing: 1) relevant reported cases; 2) ethics opinions; 3) rules changes; and 4) disciplinary actions affecting lawyers and the practice of law in the Sunshine State. These authorities are examined in the context of the various relationships upon which a lawyer’s professional life is built and within which the lawyer typically operates.

Developments relating to the relationship between lawyer and client are collected in Part II. A lawyer’s relationship with judges and the judicial system is discussed in Part III. Part IV addresses the lawyer’s relationship and interaction with third parties, such as witnesses and other attorneys. Finally, Part V looks at the lawyer’s relationship with the lawyer disciplinary

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1. This article surveys professional responsibility developments in Florida from July 15, 1998 through June 30, 1999.

2. The rules of primary application in the area of professional responsibility are the Florida Rules of Professional Conduct (“RPC”), which are found in Chapter 4 of the Rules Regulating The Florida Bar.
system operated by the Florida Bar\(^3\) under the authorization and control of the Supreme Court of Florida.\(^4\)

II. THE LAWYER’S RELATIONSHIP WITH CLIENTS

Perhaps the lawyer’s most fundamental relationships are created and maintained with the clients that he or she serves. Within this relationship, ethical issues may arise relating to creation of the relationship, decision-making authority of lawyer and client, communication with clients lawyer-client confidentiality, conflicts of interest, fiduciary obligations, competence, legal fees, and termination of the lawyer-client relationship.

In *Keepsake, Inc. v. P.S.I. Industries, Inc.*,\(^5\) the United States District Court for the Middle District of Florida noted that the test in Florida for determining whether a lawyer-client relationship exists “hinges upon the client’s reasonable subjective belief that he is consulting a lawyer in that capacity with the intention of seeking professional legal advice.”\(^6\) Keepsake and P.S.I. entered an exclusive distributorship agreement regarding a disposable camera that used technology developed by Keepsake.\(^7\) While continuing to represent Keepsake in various matters, Keepsake’s law firm assisted P.S.I. in seeking intellectual property protection and also represented P.S.I. in state court litigation relating to this technology.\(^8\) The law firm’s fee agreement with P.S.I. contained a conflict of interest provision providing that circumstances could arise that would require the firm to withdraw from the representation of both clients.\(^9\) The state court litigation ended in late 1997.\(^10\)

Keepsake and P.S.I. subsequently had a falling out, resulting in the law firm filing suit against P.S.I. on Keepsake’s behalf.\(^11\) P.S.I. moved to dis-

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3. The Florida Bar is an official agency of the Supreme Court of Florida. In order to be licensed to practice law in Florida, a lawyer must be a member of The Florida Bar. See RPC Rule 1-3.1; Petition of Florida State Bar Ass’n, 40 So. 2d 902 (Fla. 1949).


5. 33 F. Supp. 2d 1033 (M.D. Fla. 1999).


8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*
qualify the law firm, and Keepsake's response surprisingly admitted that the firm had "performed legal services" for P.S.I. but refused to admit that this performance had resulted in the formation of an attorney-client relationship. The court rejected this unusual position out of hand, ultimately disqualifying the law firm.

Even with an understanding of the legal test for the establishment of a lawyer-client relationship, application of that test is not always easy. The court recognized this in Boca Investors Group, Inc. v. Potash, noting that, at least in the disqualification context, there is a distinction between an initial consultation regarding counsel's availability (characterized by the court as a "job interview"), and a lawyer-client discussion that included disclosure of confidential information. The latter creation of a lawyer-client relationship, would require disqualification, while the former would not.

Once a lawyer-client relationship has been established, communication between the two parties is an essential ingredient for successful teamwork. Failure to communicate effectively, or the failure to document such communications, can create ethical problems for the lawyer. The lawyer in The Florida Bar v. Fredericks suffered disciplinary consequences when a series

13. Id. at 1037 n.3. In a footnote, the court observed that the law firm's "implicit distinction between 'little' and 'big' clients is without any legal or ethical support." Id. Regarding other lawyers or law firms who have encountered legal or disciplinary difficulties as a result of improperly attempting to distinguish between "real" clients and "other" clients, see, e.g., The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993) (lawyer who filed bankruptcy petition for client and client's spouse, whom lawyer never met or advised, disciplined for violating rules requiring communication with and effective representation of spouse/client); Smith v. Perry, 635 So. 2d 1019 (Fla. 1st Dist. Ct. App. 1994) (lawyer who represented husband in personal injury case and filed consortium claim for wife, whom lawyer had not met nor entered into employment agreement with, was sued by wife for malpractice as result of lawyer's role in husband receiving lion's share of settlement proceeds). See also Brennan v. Independence Blue Cross, 949 F. Supp. 305 (E.D. Pa. 1996) (lawyer who represented insured in medical malpractice case and insurer on related subrogation claim disqualified from representing insured against insurer in later dispute over future medical benefits; subrogation representation was more than mere courtesy and established lawyer-client relationship with insured).
15. 728 So. 2d 825 (Fla. 3d Dist. Ct. App. 1999).
16. See infra part III regarding disqualification cases.
17. Boca Investors Group, Inc., 728 So. 2d at 825.
18. Id.
19. Id.
20. 731 So. 2d 1249 (Fla. 1999).
of representations went awry and the client filed a complaint with the Florida Bar. The client’s and the lawyer’s recollections of the operative events were quite discrepant, but neither could back up his version with any written documentation. The lawyer was found guilty of violating RPC 4-1.4, RPC 4-1.3 (requiring diligent representation), and RPC 4-8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit, or misrepresentation). The lawyer was suspended from the practice of law for six months for violating RPC 4-1.4, which requires that a lawyer keep a client informed about the status of the case.

The allocation of decision-making responsibility between a client and a lawyer within their professional relationship is also an ethical matter. RPC 4-1.2 contains a framework for considering this issue. The question was discussed by the Fourth District Court of Appeal in affirming a trial court’s denial of a motion for postconviction relief based on alleged ineffective assistance of counsel in a criminal representation. Demurjian v. State concerned a petitioner who had been charged with first degree murder. He contended that “he killed the victim in self-defense.” At his trial, instructions on lesser included offenses were given to the jury, but during the

21. Id. at 1250.
22. Id.
23. RPC 4-1.4, “COMMUNICATION” provides:
   (a) Informing Client of Status of Representation. A lawyer shall keep a
   client reasonably informed about the status of a matter and promptly comply
   with reasonable requests for information.
   (b) Duty to Explain Matters to Client. A lawyer shall explain a matter to
   the extent reasonably necessary to permit the client to make informed
   decisions regarding the representation.
24. Federicks, 731 So. 2d at 1254.
25. RPC 4-1.4 (1993).
26. Subdivision (a) of Rule 4-1.2 of the RPC, “SCOPE OF REPRESENTATION,”
   provides:
   Lawyer to Abide by Client’s Decisions. A lawyer shall abide by a client’s
   decisions concerning the objectives of representation, subject to subdivisions
   (c), (d), and (e), and shall consult with the client as to the means by which
   they are to be pursued. A lawyer shall abide by a client’s decision whether to
   make or accept an offer of settlement of a matter. In a criminal case, the
   lawyer shall abide by the client’s decision, after consultation with the lawyer,
   as to a plea to be entered, whether to waive jury trial, and whether the client
   will testify.
28. Id.
29. Id. at 325.
30. Id.
closing argument, petitioner’s counsel used what is called an “all or nothing” argument: the lawyer told the jury that his client wanted them to ignore the lesser included offenses and to either convict him of first degree murder or find him not guilty.\textsuperscript{31} He was convicted.\textsuperscript{32} In his post-conviction relief motion, the petitioner alleged that he had never consented to the “all or nothing” closing argument.\textsuperscript{33} The appellate court noted that this form of litigation strategy was not uncommon in criminal defense cases, and stated that “there is no requirement for counsel to obtain a client’s consent for trial strategy decisions.”\textsuperscript{34} Whether the client consented to the “all or nothing” approach was irrelevant, and the court concluded that counsel’s performance was not constitutionally deficient.\textsuperscript{35}

A regularly recurring question facing many practitioners is the extent of the duty to provide clients, or former clients, with copies of file material generated during the lawyer-client relationship.\textsuperscript{36} This is a mixed issue of ethics and law, as indicated in RPC 4-1.16.\textsuperscript{37} This rule requires that, upon the termination of employment, a lawyer turn over to the client “papers and property to which the client is entitled” but permits the lawyer to “retain papers and other property relating to or belonging to the client to the extent permitted by law.”\textsuperscript{38} In \textit{Donahue v. Vaughn},\textsuperscript{39} a former client filed a writ of mandamus to compel his former lawyer to provide to him, free of charge, “all records” in his case.\textsuperscript{40} The court denied the writ for several reasons, first among them being the fact that

\begin{enumerate}
\item \textit{Id.} at 326.
\item \textit{Demurjian}, 727 So. 2d at 325.
\item \textit{Id.} at 326.
\item \textit{Id.} at 327.
\item \textit{Id.}
\item \textit{Id.}
\item Subdivision (d) of RPC 4-1.16, “DECLINING OR TERMINATING REPRESENTATION,” provides:
\begin{enumerate}
\item \textit{Protection of Client’s Interest. Upon} termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.
\end{enumerate}
\item \textit{Id.}
\item 721 So. 2d 356 (Fla. 5th Dist. Ct. App. 1998).
\item \textit{Id.} at 356.
\end{enumerate}
there is no duty upon a private attorney to give any of his files to a client, save documents which are solely those of the client and held by the lawyer. Pleadings, investigative reports, subpoena copies, reports and other case preparation documents are property of the lawyer. He is not required to give that material to the client or make copies free of charge. 41

Confidentiality is an essential part of the lawyer-client relationship. This is recognized in both legal ethics 42 and law. 43 The ethical duty of confidentiality requires that, with certain limited exceptions, a lawyer refrain from voluntarily revealing any “information relating to representation” of a client. 44 This duty continues even after the lawyer-client relationship has ended. 45 In The Florida Bar v. Carricarte, 46 a lawyer was disciplined for

41. Id. at 357.
42. RPC 4-1.6, “CONFIDENTIALITY OF INFORMATION,” provides:
(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.
(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:
   (1) to prevent a client from committing a crime; or
   (2) to prevent a death or substantial bodily harm to another.
(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
   (1) to serve the client’s interest unless it is information the client specifically requires not to be disclosed;
   (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
   (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
   (4) to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or
   (5) to comply with the Rules of Professional Conduct.
(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.
(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Id.

43. In Florida the law of client-lawyer privilege is codified in FLA. STAT. § 90.502 (1999).
44. RPC 4-1.6(a), supra note 42.
45. RPC 4-1.6, comment (1993).
failing to honor this obligation. The lawyer had been house counsel for corporations owned by members of his family. Following his termination as counsel, the lawyer misappropriated trade secrets and disclosed them to third parties. He also threatened to reveal additional confidential information unless his former client authorized him to receive $25,000 “severance pay” from funds being held in the lawyer’s trust account. The Supreme Court of Florida upheld the finding of the referee that the lawyer had violated the basic duty of confidentiality expressed in RPC 4-1.6(a) and had violated RPC 4-1.6(e) by revealing more confidential information than was reasonably necessary at a hearing held as part of a suit that the former client filed against the lawyer for disclosing the trade secrets.

Two legal malpractice cases reflected the respect that courts accord the principle of lawyer-client confidentiality and the cautious approach courts often take when disclosure of confidential information is sought. Coyne v. Schwartz, Gold, Cohen, Zakarin & Kotler, P.A. arose from an erroneous title certification that affected a real estate development project. A law firm’s former clients sued the firm, alleging that they had suffered damages as a result of the firm’s negligence relating to the title certification. The clients had been sued by third parties when they began construction on the project. The clients hired a second law firm to defend them in that suit, which was ultimately settled. The clients, represented by the second law

46. 733 So. 2d 975 (Fla. 1999).
47. Id. at 976.
48. Id.
49. Id. at 977.
50. Id.
51. Carricarte, 733 So. 2d at 977-78. The Supreme Court of Florida appoints a county or circuit judge to preside as “referee” over the trial of disciplinary cases. RULES REGULATING THE FLORIDA BAR 3-7.6(a) (1993).
52. See supra note 42.
53. Id.
54. Carricarte, 733 So. 2d at 978. Even when disclosure of otherwise confidential information is authorized by one of the exceptions contained in RPC 4-1.6, the rule permits such disclosure only “to the extent the lawyer reasonably believes necessary.” RPC 4-1.6(b)–(c). The limited scope of permissible disclosure is emphasized by RPC 4-1.6(e), which specifies that “the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.” RPC 4-1.6(e)(1993). In Carricarte, the lawyer accused the family corporation and their principals of crimes including tax evasion, insurance fraud, and conspiracy. 733 So. 2d at 977.
55. 715 So. 2d 1021 (Fla. 4th Dist. Ct. App. 1998).
56. Id. at 1022.
57. Id.
58. Id.
59. Id.
firm, then brought the malpractice action against the first law firm. The first firm alleged negligence on the part of the second firm and sought production of all correspondence between the clients and the second firm, concerning the property. The trial court ordered production. The Fourth District Court of Appeal reversed the order, concluding that the information was protected by the attorney-client privilege. The fact that the clients had hired a second law firm to represent them in connection with a matter in which they had been represented by the first firm did not constitute a waiver of the privilege as to communications between the clients and the second firm. The possible relevance of the documents sought was not sufficient to override the privilege.

In Volpe v. Conroy, Simberg & Ganon, P.A., insureds were defended under a reservation of rights by a law firm hired by the insurance company. The insureds also hired their personal counsel. The insureds later brought a malpractice suit against the law firm for failing to give certain advice. In defense, the law firm alleged that actions of their former client's personal counsel had contributed to the clients' damages. The law firm sought to depose the personal counsel to ascertain if the advice in question had been given by personal counsel, but the insureds asserted attorney-client privilege. The trial court's order compelling production of this information was reversed on appeal.

The appellate court pointed out that there was no evidence that the insureds had intended to share all communications between them and their personal counsel with the law firm hired by the insurance company. Although the law firm and the personal counsel had represented the same clients,

60. Coyne, 715 So. 2d at 1021.
61. Id. at 1022.
62. Id. at 1021.
63. Id. at 1023.
64. Id. at 1022.
65. Coyne, 715 So. 2d at 1023. See also Shafnaker v. Clayton, 680 So. 2d 1109 (Fla. 1st Dist. Ct. App. 1996). The court in Coyne relied upon Shafnaker, wherein the First District Court of Appeal also applied a narrow construction of the attorney-client privilege in a similar situation. Id. at 1111.
66. 720 So. 2d 537 (Fla. 4th Dist. Ct. App. 1998).
67. Id. at 538.
68. Id.
69. Id.
70. Id.
71. Volpe, 720 So. 2d at 539.
72. Id. at 540.
73. Id. at 539.
it does not follow that the client cannot assert the attorney-client privilege with respect to matters which may have been discussed with one attorney but not with another. Particularly in an insurance representation context, the interest of the insured in further protecting his or her own position may compel the insured to retain and communicate with a personal attorney. The client has every right to assume that the attorney will keep those communications confidential.74

The appellate court narrowly construed the lawyer-client dispute exception to the privilege,75 considering it as not applicable under the facts presented.76 The court also rejected the argument that the "joint defense" exception77 to waiver of the privilege, applied to permit the law firm's access to the communications between the clients and their personal counsel.78 Concluding that the joint defense doctrine was inapplicable, the court stated that it "does not give a coparty the right to obtain disclosure of all communications shared by a coparty with that party's own attorney."79

Various types of conflicts of interest can arise in the lawyer-client relationship. Several cases addressed one of the most common sources of conflict questions, which is a lawyer's representation of a current client in a matter that is adverse to the interest of one of the lawyer's former clients. RPC 4-1.980 is the primary rule governing former client conflicts. It can be difficult to precisely define and apply the operative terms of this rule. For example, the rule prohibits a lawyer from representing a current client whose interests are "materially adverse" to the interests of the lawyer's former client in a "matter" that is the "same" as or "substantially related" to the

74. Id. at 539 (emphasis added).
76. Volpe, 720 So. 2d at 539–40.
78. Volpe, 720 So. 2d at 539.
79. Id.
80. RPC 4-1.9, "CONFLICTS OF INTEREST; FORMER CLIENT," provides:
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

Id.
matter in which the lawyer represented the former client, unless the former client "consents after consultation."81 Similarly, the rule also precludes the lawyer from using "information relating to the representation"82 of the former client to the former client's disadvantage, unless one of the exceptions to the confidentiality rule applies or the information is "generally known."83

Two of these issues, the question of "consent after consultation" to a former client conflict and the question of whether one matter is "substantially related" to another, were addressed in The Florida Bar v. Dunagan.84 In Dunagan, a lawyer represented a husband and wife in buying a business and in litigation relating to that business.85 A year or two later, the lawyer represented the husband against the wife in a divorce proceeding in which ownership of the business was an issue.86 The wife consulted with her new lawyer about the fact that her former lawyer now opposed her.87 Her new lawyer told her that "there were better attorneys to be up against" but never clearly advised her of her rights or that she might be prejudiced by the prior representation.88 The wife subsequently sued her former lawyer for malpractice.89 A Florida Bar disciplinary case was also instituted against the former lawyer.90 Charges against him included violating RPC 4-1.9 by opposing his former client, the wife, in the same or a substantially related matter without her consent after consultation.91

Regarding the issue of "consent after consultation," the lawyer asserted that the wife's failure to object to his representation of the husband was tantamount to the required consent.92 The court rejected this defense.93 The lawyer had never consulted with the wife about the conflict question.94 Furthermore, the court stated that the failure of the wife and her new lawyer "to affirmatively object cannot be construed as 'consent after consultation' as required by the rules."95 The court went on to explain that the burden of raising the conflict issue and securing consent after consultation belonged to

81. RPC 4-1.9(a), supra note 80.
82. See RPC 4-1.6(a), supra note 42 and accompanying text.
83. RPC 4-1.9(b), supra note 80.
84. 731 So. 2d 1237 (Fla. 1999).
85. Id. at 1238.
86. Id. at 1239.
87. Id. at 1241.
88. Id.
89. Dunagan, 731 So. 2d at 1239.
90. Id.
91. Id.
92. Id. at 1240.
93. Id. at 1241.
94. Dunagan, 731 So. 2d at 1241.
95. Id.
the lawyer and was “not the responsibility of the client or the client’s new attorney.”

The court also rejected the lawyer’s contention that the divorce matter in which he opposed the wife was not “substantially related” to the matters in which he previously represented her. Noting that “[w]hether two legal matters are substantially related depends upon the specific facts of each particular situation or transaction[,]” the court concluded that there was a substantial relationship between the matters. The ownership of the business was clearly a material issue in the divorce case.

*Keepsake, Inc. v. P.S.I. Industries, Inc.* also dealt with application of the “substantially related” portion of RPC 4-1.9. Keepsake’s law firm had also represented P.S.I. in connection with securing trademark and international patent protection for a product that was the subject of a distributorship agreement between P.S.I. and Keepsake. The firm also represented P.S.I. in state court litigation concerning the product and its distribution. The law firm referred to its representations of Keepsake and P.S.I. as a “joint representation.” Subsequently the firm represented Keepsake in suing P.S.I. for alleged breach of the distributorship agreement. In granting P.S.I.’s motion to disqualify the law firm from that case, the trial court concluded that the pending suit was substantially related to the law firm’s prior representation of P.S.I. The court noted that P.S.I. had retained the law firm to help it perform obligations that it had under the distributorship agreement, and that these actions were undertaken to protect and advance P.S.I.’s interests. “Having undertaken to protect and advance PSI’s business interest, [the law firm] can not now, without consent, represent an adverse party [Keepsake] in litigation regarding the extent of and limitations on those interests.”

The Eleventh Circuit Court of Appeals, in *Freund v. Butterworth*, held, in a habeas corpus case based on alleged ineffective assistance of counsel, that the issue of whether a lawyer’s prior representation is

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96. *Id.*
97. *Id.* at 1239.
98. *Id.* at 1240.
99. *Dunagan*, 731 So. 2d at 1240.
100. 33 F. Supp. 2d 1033 (M.D. Fla. 1999).
101. *Id.* at 1035.
102. *Id.*
103. *Id.*
104. *Id.*
106. *Id.* at 1036.
107. *Id.* at 1037.
108. *Id.*
109. 165 F.3d 839 (11th Cir. 1999).
substantially related to a later representation "is a mixed question of law
and fact." In this case, the court also addressed the applicability of the
provision in RPC 4-1.9(b) that permits a lawyer to use otherwise
confidential information about a former client to the disadvantage of that
former client in a later, unrelated matter, even without the consent of the
former client. This provision allows such use of information as permitted
by RPC 4-1.6 or when the information has become "generally known."

The Eleventh Circuit appeared to construe this exception broadly under
the facts before it. The petitioner charged that his law firm at trial labored
under a conflict because the law firm had also represented a key potential
adverse witness in numerous prior, unrelated matters. Petitioner
contended that the law firm’s cross-examination of that witness would be
impeded by the ethical obligation in RPC 4-1.9(b), not to use confidential
information to the disadvantage of the witness (the former client). The
court rejected the argument that RPC 4-1.9(b) was implicated, pointing out
that the "only arguably relevant information that the law firm knew" about
the former client was the existence of certain previous arrests and charges
against him. Relying on the "generally known" exception in RPC 4-1.9(b), the
court stated that "[u]nder the Rules Regulating the Florida Bar,

110. Id. at 861.
111. See supra note 80, and accompanying text.
112. Freund, 165 F.3d at 865.
113. See supra note 42, and accompanying text.
114. Freund, 165 F.3d at 865.
115. Id. Other authorities seem to have taken a less expansive view of the "generally
known" exception. See Russakoff v. Department of Ins., 724 So. 2d 582 (Fla. 1st Dist. Ct. App.
1998); King v. Byrd, 716 So. 2d 831 (Fla. 4th Dist. Ct. App. 1998) (declining to equate "public
record" with "generally known" provision of Florida Rules of Professional Conduct 4-1.9(b)). See also Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861-62 (W.Va. 1995) ("ethical
duty of confidentiality is not nullified by the fact that the information is part of a public record"). When applying the "generally known" exception in cases where the information in question is
a matter of public record, the focus of the inquiry should be on whether, but for the lawyer’s
prior representation of that client, the lawyer would have known of the existence and location
of that information. A lawyer who, as in Freund, would be using public record information
that is available and known to any reasonably competent lawyer in that position should fall
within the scope of the "generally known" exception in RPC 4-1.9(b). On the other hand,
some bit of relevant but obscure information buried deep within the "public records" and not
known to anyone except the client’s lawyer (or former lawyer) should not be considered
"generally known" for purposes of RPC 4-1.9(b).

116. Freund, 165 F.3d at 862.
117. Id. at 865.
118. Id. at 864. The court went on to note that the prosecutor’s decision not to call the
law firm’s former client to testify removed the possibility that the firm would cross-examine him
using protected confidential information. Id. at 865.
the law firm's knowledge of those charges cannot be the basis of a conflict of interest."

Conflict of interest problems can also arise when a lawyer's personal interest conflicts or potentially conflicts with the interests of a client. A relatively unusual personal interest conflict was alleged in *Herring v. State.* In a motion for post-conviction relief, a petitioner alleged that he had received ineffective assistance of counsel because one of the assistant public defenders who represented him at trial, Howard Pearl, had a conflict of interest because Pearl was a special deputy sheriff. Attorney Pearl had applied to become a special deputy sheriff in order to be authorized to carry a concealed firearm for protective purposes. The issue before the court was whether the lawyer had an actual conflict of interest that resulted in the rendition of ineffective assistance. The court concluded that "[t]he record

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119. *Id.* at 864.
120. RPC 4-1.7, "CONFLICT OF INTEREST; GENERAL RULE," provides:
(a) Representing Adverse Interests. A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:

1. the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and

2. each client consents after consultation.

(b) Duty to Avoid Limitation on Independent Professional Judgment. A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless:

1. the lawyer reasonably believes the representation will not be adversely affected; and

2. the client consents after consultation.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

*Id.*

121. 730 So. 2d 1264 (Fla. 1998).
122. *Id.* at 1266.
123. *Id.* at 1267.
124. *Id.* at 1265.
reveals no evidence suggesting that [petitioner]'s interests were impaired or compromised as a result of Pearl's special deputy status."  

A more conventional personal interest conflict was presented in The Florida Bar v. Cox. A lawyer co-owned a business with one of his clients, and also was the business's general counsel. The lawyer represented another client in connection with organizing a line of credit for this business. The lawyer did not disclose to the other client his interest in the business, his position as its general counsel, or the fact that his co-owner was also one of his clients. The Supreme Court of Florida affirmed the finding that the lawyer was guilty of violating both RPC 4-1.7(b), which proscribes personal interest conflicts, and RPC 4-1.8(a), governing business transactions with clients. The court observed that the lawyer's independent professional judgment in the other client's representation was limited by his own interests and by the responsibilities that he owed to the client who co-owned the business with him.

125. Id. at 1268. Attorney Pearl's status as a special deputy sheriff has generated a number of conflict claims in post-conviction litigation. See, e.g., Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Stano v. State, 708 So. 2d 271 (Fla. 1998); Robinson v. State, 707 So. 2d 688 (Fla. 1998); Swafford v. State, 636 So. 2d 1309 (Fla. 1994); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Jones v. State, 612 So. 2d 1370 (Fla. 1992); Wright v. State, 581 So. 2d 882 (Fla. 1991); Quince v. State, 732 So. 2d 1059 (Fla. 1990); Harich v. State, 573 So. 2d 303 (Fla. 1990).

126. 718 So. 2d 788 (Fla. 1998).
127. Id. at 790.
128. Id.
129. Id.
130. Supra note 120.
131. Subdivision (a) of Rule 4-1.8, "CONFLICT OF INTERESTS; PROHIBITED TRANSACTIONS," provides:

(a) Business Transactions With or Acquiring Interest Adverse to Client. A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

Id.

132. For these and a number of other violations, the lawyer was disbarred. Cox, 718 So. 2d at 794.
133. Id. at 792.
Another variety of personal interest conflict was seen in *The Florida Bar v. Vining.* The lawyer purported to represent his client in one matter while, at the same time, the lawyer was being sued by, and counterclaiming against, the same client in another matter. The client did not consent to this conflict. The lawyer was disciplined for, among other things, violating RPC 4-1.7(b).

A lawyer's relationship with clients also implicates duties that include, but can extend beyond, the standards set by the ethics rules. These are duties imposed upon lawyers as a matter of law. They include fiduciary responsibilities and duties of competent representation. Typically these legal duties are articulated and enforced in the context of legal malpractice cases. Some of the developments in the area of legal malpractice law are worthy of special notice.

The close, personal, confidential nature of the lawyer-client relationship has long been recognized by Florida courts in the context of actions for legal malpractice. For example, lawyers' liability for malpractice ordinarily runs only to persons who have privity of contract with the lawyer. The only exception to the rule of privity is in a situation where the known intent of the client was for the lawyer's services to benefit a third party. For this reason, malpractice claims are not assignable. In *National Union Fire Insurance Co. v. Salter,* the court relied on these principles in concluding that an insurance company that paid its insured's losses under the insurance policy was not subrogated to the insured's right to recover on an alleged legal malpractice claim against the insured's attorneys, whose negligence allegedly caused the loss.

As noted, a lawyer's duty to competently represent a client is an intensely personal one. Even if multiple lawyers represent a client, each lawyer must take care to see that proper representation is being provided. In

134. 721 So. 2d 1164 (Fla. 1998).
135.  Id. at 1166.
136.  Id. Quite to the contrary; during the course of the representation the client in fact, discharged the lawyer.  Id.
137.  Id. at 1170.
138.  This article does not attempt to undertake a comprehensive survey of developments in the area of legal malpractice. Rather, significant developments most directly relating to lawyers' professional responsibility are reviewed.
139.  See, e.g., Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378 (Fla. 1998); Angel, Cohen & Rogovin v. Oberson Investments, N.V., 512 So. 2d 192 (Fla. 1987).
140.  *Angel,* 512 So. 2d at 194.
141.  See, e.g., Forgione v. Dennis Pirtle Agency, 701 So. 2d 557 (Fla. 1997) (discussed in *Chinaris & Tarbert,* supra note 36, at 164–67).
142.  717 So. 2d 141, 143 (Fla. 5th Dist. Ct. App. 1998).
143.  Id. at 143.
Spaziano v. Price, a person was injured during a scuba diving trip to the Bahamas. Upon returning to his home in New Jersey, this person hired a Philadelphia law firm to represent him in this matter. The Philadelphia law firm determined that the suit should be brought in Florida, and contacted Florida lawyer Price to assist. The Philadelphia law firm was of the opinion that the Florida four year statute of limitation on negligence actions applied. This opinion turned out to be incorrect. In the ensuing legal malpractice action brought by the client against Price, Price defended by asserting that he was entitled to rely on the Philadelphia firm’s opinion concerning the limitations period. Concluding that this contention was “without merit,” the appellate court observed that the Florida lawyer and his firm were “required to bring to that representation the requisite knowledge and skill to determine the appropriate statute of limitations.” The lawyer’s reliance on the Philadelphia firm’s opinion did not relieve him of the duty that he owed to the client.

Another, more conventional, defense raised by lawyers who are accused of malpractice is that of judgmental immunity. The lawyer makes many judgments in the course of the lawyer-client relationship. In making these judgments, the lawyer has a duty to exercise reasonable care and skill. Nevertheless, the law recognizes that a lawyer’s good faith decision, made after diligent inquiry, regarding a fairly debatable or unsettled point of law is not actionable as a breach of this duty, even if the lawyer’s decision later turns out to be incorrect. In DeBiasi v. Snaith, a client’s chance to have an unfavorable decision of an appellate court reviewed was lost when his motion to certify a question was denied as untimely filed. The client then sued his lawyer for alleged malpractice. The lawyer defended on the ground of judgmental immunity, arguing that the language of the procedural rule in question was ambiguous and thus provided him with the protection

144. 24 Fla. L. Weekly D1224 (Fla. 4th Dist. Ct. App. May 19, 1999).
145. Id. at D1224.
146. Id.
147. Id. at D1225.
148. Id.
149. Spaziano, 24 Fla. L. Weekly at D1225.
150. Id.
151. RPC 4-1.1, “COMPETENCE” provides: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Id.
152. See Crosby v. Jones, 705 So. 2d 1356, 1358 (Fla. 1998), and cases cited therein.
154. Id. at 15.
155. Id.
156. At issue was FLA. R. APP. PROC. 9.330.
of the judgment immunity doctrine. Summary judgment was granted in the lawyer’s favor. The appellate court reversed. The lawyer’s contention that the procedural rule was ambiguous was not sufficient to warrant the determination that, as a matter of law, his actions were clothed with judgmental immunity. No showing of diligent inquiry was made on his part, and he apparently cited no law authorizing his interpretation of the rule. Thus, on remand the lawyer would have to prove “the factual issue of his good faith and diligent inquiry.”

A novel but unsuccessful defense to a malpractice claim was raised by the lawyer in *Tarleton v. Arnstein & Lehr*. A law firm was sued by its former client for alleged malpractice arising from the representation of her in a dissolution of marriage action. After trial, the jury entered a verdict finding that the law firm was negligent in its representation and that its negligence was responsible for seventy-five percent of the wife’s claimed damages; however, the jury found the wife to be comparatively negligent for twenty-five percent of her damages. The court granted the firm’s motion for judgment notwithstanding the verdict and denied the former client’s motion for entry of judgment. The former client appealed, urging that the trial court erred in denying her motion. The Fourth District Court of Appeal made it clear that the defense of the former client’s comparative negligence was not available to the law firm. “A client cannot be found to be comparatively negligent for relying on an attorney’s erroneous legal advice or for failing to correct errors of the attorney which involve the exercise of professional expertise.” The relative sophistication of the client “does not impose upon her the burden to second guess her attorney’s advice or hire a second attorney to see if such advice was proper.”

A final consideration for lawyers in this area is the question of when the statute of limitations for an alleged act of malpractice accrues. The Supreme Court of Florida announced what it termed a “bright-line rule” in *Silvestrone*

158. *Id.*
159. *Id.* at 16.
160. *Id.* at 15.
161. *Id.* at 16.
162. *DeBiasi*, 732 So. 2d at 16.
163. 719 So. 2d 325 (Fla. 4th Dist. Ct. App. 1998).
164. *Id.* at 326.
165. *Id.* at 328.
166. *Id.*
167. *Id.*
168. *Tarleton*, 719 So. 2d at 328.
169. *Id.* at 331.
170. *Id.*
The court held that, in cases that proceed to judgment, Florida’s two-year limitations period begins to run when the final judgment becomes final. To illustrate, the court noted that “a judgment becomes final either upon the expiration of the time for filing an appeal or postjudgment motions, or, if an appeal is taken, upon the appeal being affirmed and either the expiration of the time for filing motions for rehearing or a denial of the motions for rehearing.” The newly announced rule was quickly applied by the Third District Court of Appeal in Gaines v. Russo.

The applicable limitation period for claims of malpractice arising from criminal defense representations also was addressed by the Supreme Court of Florida. In Steele v. Kehoe, the court answered the question of whether the defense lawyer’s former client must be exonerated as a prerequisite to bringing a legal malpractice action against the lawyer. After reviewing some policy considerations, the court followed the majority rule and held that “a convicted criminal defendant must obtain appellate or post conviction relief as a precondition to maintaining a legal malpractice action.” Furthermore, the court held that the statute of limitations on the defendant’s malpractice claim did not begin to run until final appellate relief or post conviction relief has been obtained.

Interestingly, the Second District Court of Appeal held that even persons who are not lawyers may be held liable in a legal malpractice action. In Buscemi v. Intachai, a financial planner who held a law degree but was not licensed to practice was sued by a former customer for giving allegedly incorrect and damaging advice concerning the client’s legal affairs. The defendant asserted that, as a non-lawyer, he could not be held liable for

171. 721 So. 2d 1173, 1175–76 (Fla. 1998).
172. Id. at 1175–76.
173. Id. at 1175 n.2.
175. 24 Fla. L. Weekly S237 (May 27, 1999).
176. Id. at S237. There had been some disagreement among the district courts of appeal concerning the correct rule. Compare Rowe v. Schreiber, 725 So. 2d 1245, 1250 (Fla. 4th Dist. Ct. App. 1999) (stating “we agree with those courts that have required criminal defendants to obtain post conviction relief or to set aside their convictions on appeal before pursuing an action for legal malpractice against their defense attorneys”), with Martin v. Pafford, 583 So. 2d 736, 738 (Fla. 1st Dist. Ct. App. 1991) (holding defendant “was not required to have succeeded in obtaining collateral relief from her criminal conviction before she could civilly sue her attorney for malpractice”).
177. Steele, 24 Fla. L. Weekly at S238.
178. Id.
181. Id. at 330.
failing to give the proper legal advice. 182 Disagreeing, the appellate court stated, "[a]ppellant overlooks the fact that whether a lawyer or not, if he undertakes to give legal advice, he is subject to a standard of due care." 183

Fees, of course, are an essential aspect of the lawyer-client relationship. The importance of being aware of and complying with the relevant rules of ethics was highlighted in several cases decided over the past year. The Florida Bar v. Carson 184 concerned a lawyer who complained to the Florida bar about the alleged failure of another lawyer to pay him a referral fee in a personal injury case. 185 Upon investigation, it was determined that the alleged agreement to pay a referral fee had not been reduced to writing and that the lawyer had accepted other referral fees in the absence of written agreements. 186 This conduct was contrary to the relevant ethics rules, which require any division of fee between lawyers not in the same firm to be pursuant to a written agreement, signed by the participating lawyers and the client, disclosing how the fee will be divided and providing that each participating lawyer will accept joint legal responsibility for the case. 187 The

182. Id. 183. Id. 184. 737 So. 2d 1069 (Fla. 1999). 185. Id. at 1069. 186. Id. at 1071. 187. Subdivision (g) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides: (g) Division of Fees Between Lawyers in Different Firms. Subject to the provisions of subdivision (f)(4)(D), a division of fee between lawyers who are not in the same firm may be made only if the total fee is reasonable and:

(1) the division is in proportion to the services performed by each lawyer; or

(2) by written agreement with the client:

(A) each lawyer assumes joint legal responsibility for the representation and agrees to be available for consultation with the client; and

(B) the agreement fully discloses that a division of fees will be made and the basis upon which the division of fees will be made.

Id. Additional rules that apply to fee divisions in contingent fee personal injury-type cases are set forth in subdivision (f)(4)(D) of RPC 4-1.5, which provides:

(f) Contingent Fees. As to contingent fees:

(4) A lawyer who enters into an arrangement for, charges, or collects any fee in an action or claim for personal injury or for property damages or for death or loss of services resulting from personal injuries based upon tortious conduct of another, including products liability claims, whereby the compensation is to be dependent or contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only under the following requirements:

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The lawyer was found guilty and ordered to attend a practice and professionalism enhancement program. 189

In addition to presenting possible disciplinary problems, 190 in 1995 the Supreme Court of Florida clearly stated in Chandris, S.A. v. Yanakakis 191 that a fee agreement that does not comply with applicable ethics rules may

(D) As to lawyers not in the same firm, a division of any fee within subdivision (f)(4) shall be on the following basis:

(i) To the lawyer assuming primary responsibility for the legal services on behalf of the client, a minimum of 75% of the total fee.

(ii) To the lawyer assuming secondary responsibility for the legal services on behalf of the client, a maximum of 25% of the total fee. Any fee in excess of 25% shall be presumed to be clearly excessive.

(iii) The 25% limitation shall not apply to those cases in which 2 or more lawyers or firms accept substantially equal active participation in the providing of legal services. In such circumstances counsel shall apply to the court in which the matter would be filed, if litigation is necessary, or if such court will not accept jurisdiction for the fee division, the circuit court wherein the cause of action arose, for authorization of the fee division in excess of 25%, based upon a sworn petition signed by all counsel that shall disclose in detail those services to be performed. The application for authorization of such a contract may be filed as a separate proceeding before suit or simultaneously with the filing of a complaint. Proceedings thereon may occur before service of process on any party and this aspect of the file may be sealed. Authorization of such a contract shall not bar subsequent inquiry as to whether the fee actually claimed or charged is clearly excessive. An application under this subdivision shall contain a certificate showing service on the client and The Florida Bar. Counsel may proceed with representation of the client pending court approval.

(iv) The percentages required by this subdivision shall be applicable after deduction of any fee payable to separate counsel retained especially for appellate purposes.

Id. 188. Carson, 737 So. 2d at 1070.

189. Id. In 1994 the Supreme Court of Florida approved the creation of the practice and professionalism enhancement program (sometimes known as "ethics school") "as an alternative to existing sanctions," in order to "provide educational opportunities to members of the Bar for enhancing skills and avoiding misconduct allegations." Florida Bar Re Amendments to Rules Regulating The Florida Bar, 644 So. 2d 282, 283 (Fla. 1994).

190. See The Florida Bar v. Rubin, 709 So. 2d 1361 (Fla. 1998) (disciplining lawyer for suing another lawyer on alleged verbal referral fee agreement, which did not comply with ethics rules).

191. 668 So. 2d 180 (Fla. 1995). "[W]e hold that a contingent fee contract entered into by a member of The Florida Bar must comply with the rule governing contingent fees in order to be enforceable." Id. at 185–86.
be unenforceable.\textsuperscript{192} Despite this significant statement from the supreme court, more than one court has seemingly ignored the Chandris decision in circumstances that call for its application. Eakin v. United Technology Corp.\textsuperscript{193} is one such case.\textsuperscript{194} Former counsel for the plaintiff in a personal injury action attempted to enforce their contingent fee agreement through a charging lien.\textsuperscript{195} The plaintiff defended by contending that lawyers were not entitled to a fee because the settlement proceeds from which the fee was to be paid had never been distributed (the defendant had refused to pay the agreed-upon settlement amount until there had been a resolution of various liens asserted against the settlement).\textsuperscript{196} The plaintiff also challenged the underlying validity of the fee agreement.\textsuperscript{197} Plaintiff alleged that the agreement violated The Florida Bar ethics rules thus was unenforceable.\textsuperscript{198} Specifically, Plaintiff claimed that the agreement provided that the two lawyers would divide the fee in a manner that would violate RPC 4-1.5(f)(4)(D) (governing division of contingent fee between counsel in personal injury matters).\textsuperscript{199} Without even mentioning Chandris, the court rejected Plaintiff’s claim.\textsuperscript{200} The court purported to base its decision on language in the RPC’s Preamble, which states that the RPC are “not designed to be a basis for civil liability.”\textsuperscript{201} The court’s rationale failed to

\textsuperscript{192}. Id.
\textsuperscript{194}. Id. at 1422. Another such case is Miller v. Jacobs & Goodman, P.A., 699 So. 2d 729 (Fla. 5th Dist. Ct. App. 1997) (in suit by law firm against its former employee to enforce provision of employment agreement that allegedly violated RPC 4-5.6(a), which prohibits agreements restricting a lawyer’s right to practice after termination of the employment relationship, the court’s decision failed to even mention Chandris in rejecting former employee’s argument that agreement was unenforceable as against public policy because it violated RPC 4-5.6(a)).
\textsuperscript{195}. Eakin, 998 F. Supp. at 1424.
\textsuperscript{196}. Id. at 1425.
\textsuperscript{197}. Id.
\textsuperscript{198}. Id. at 1428.
\textsuperscript{199}. Id. See supra note 187.
\textsuperscript{200}. Eakin, 998 F. Supp. at 1429.
\textsuperscript{201}. Id. (emphasis omitted). The court quoted the following paragraph from the “Scope” section of the Preamble to the RPC:

Violation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has

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recognize that, even though the RPC themselves are not standards governing civil actions, agreements providing for violation of an ethical rule can nevertheless be so contrary to public policy that the agreement is considered void and unenforceable—as the Supreme Court of Florida expressly held in Chandris.202

Several cases of interest dealt with various aspects of contingent fees. The definition of a “contingent fee” was addressed in Worobec v. Morse.203 The lawyer and client entered into a fee agreement in two matters, collection of promissory notes and partition.204 Their agreement provided that the money recovered in the partition action would be used to pay for all hours worked by the lawyer in both cases, but that the lawyer would receive nothing if nothing was recovered in the partition case.205 The appellate court held that arrangement did not create a contingent fee in the promissory note collection matter, because the fee was not contingent on outcome of that (promissory note) case, and thus the contingent fee risk multiplier did not apply.206

The right of a lawyer who withdraws from a contingent fee representation prior to occurrence of the contingency was discussed in Calley v. Thomas M. Woodruff, P.A.207 The lawyer was hired to handle a personal injury claim on a contingent fee basis, but withdrew prior to conclusion of the case.208 The client hired a new lawyer, who settled the case.209 The original lawyer filed a charging lien and ultimately was awarded fees by the trial court.210 The general rule in Florida is that an attorney who withdraws from a contingent fee case before the contingency occurs forfeits all right to compensation, unless the withdrawal was standing to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.

Id.

202. Chandris, 668 So. 2d at 186.
203. 722 So. 2d 227 (Fla. 5th Dist. Ct. App. 1998). Regarding the definition of “contingent fee,” see also Seminole County v. Delco Oil, Inc., 669 So. 2d 1162, 1167 (Fla. 5th Dist. Ct. App. 1996) (defining contingent case as “one where payment depends on winning and collecting”); Quanstrom v. Standard Guar. Ins. Co., 519 So. 2d 1135, 1136 n. 1 (Fla. 5th Dist. Ct. App. 1988), rev’d on other grounds, 555 So. 2d 828 (Fla. 1990) (“controlling substantive character of a contingency fee agreement is the feature that the attorney gets paid in one event and not in another.”).
204. Morse, 722 So. 2d at 227.
205. Id.
206. Id. at 227–28.
208. Id. at D1999.
209. Id.
210. Id.
necessitated by the client's demand for illegal or unethical conduct by the lawyer. The trial court in Calley awarded fees based on its finding that the lawyer had withdrawn as a result of a "well-founded belief" that the client would perjure himself at trial. The Second District Court of Appeal reversed the fee award, concluding that there was insufficient evidence to support the trial court's finding that the unethical conduct exception to the general rule applied. The lawyer had

made no attempt to inquire to confirm his suspicion that [the client] intended to offer false testimony, nor did he take any action to dissuade [the client] from offering false testimony. In the absence of compelling evidence to show that the client's conduct is criminal or fraudulent, a lawyer cannot have a reasonable belief the client will lie without at least inquiring of the client.

Enforcement of a lawyer's claimed right to a fee, whether contingent or non-contingent cases, typically generates litigation. This past year was no exception. One of the most common and efficient means of enforcing a right

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211. Faro v. Romani, 641 So. 2d 69 (Fla. 1994).
213. Id.
214. Id. at D1999-2000. Calley is also instructive regarding a lawyer's duty under RPC 4-3.3 when faced with a client who intends to offer false evidence or engage in a fraud on the court. Subdivisions (a) and (b) of RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL," provides:

(a) False Evidence; Duty to Disclose. A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) permit any witness, including a criminal defendant, to offer testimony or other evidence that the lawyer knows to be false. A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal. If a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) Extent of Lawyer's Duties. The duties stated in subdivision (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6.

Id.
to a fee is through the mechanism of a lawyer’s charging lien. In *Feldman v. New Alliance Insurance Co.*, a lawyer represented a client in a breach of contract action against the client’s insurer. Suit was filed just two weeks after the subject auto accident occurred. Not long thereafter the client discharged the lawyer, who filed a charging lien for fees allegedly due him. The client settled the case with a new lawyer. Neither the client nor the insurer paid the fees claimed by the original lawyer, and the trial court denied his motion for fees on the ground that the suit was filed “prematurely” and did not help the client’s case. The Third District Court of Appeal reversed. The lawyer provided some legal services to the client and established his charging lien for those services. Accordingly, the matter was remanded for determination of the amount due the lawyer.

A high-profile case in which a charging lien was at issue was *State v. American Tobacco Co.* This case centered around a dispute over attorney’s fees arising from the multi-billion dollar settlement in Florida’s litigation against the tobacco industry. A group of private law firms had contracted to represent the State in the litigation. A very favorable settlement was reached with some of the defendants. The lawyers filed a charging lien on the date that the settlement agreement was approved by the

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215. One of two common law liens available to lawyers in Florida, a “charging lien is [an] equitable right to have costs and fees due an attorney for services in [the] suit secured to him in [the] judgment or recovery in that particular suit.” Sinclair, Louis, Siegel, Heath, Nussbaum & Zavertnik, P.A. v. Baucom, 428 So. 2d 1383, 1384 (Fla. 1983). The other equitable lien is called a retaining lien, which is a possessory lien, asserted as security for payment of accrued but unpaid fees or costs, that a lawyer has on papers, funds, and other property of his or her client that comes into the lawyer’s possession in the course of the lawyer’s professional employment. See, e.g., Daniel Mones, P.A. v. Smith, 486 So. 2d 559 (Fla. 1986); Winter v. Fabber, 618 So. 2d 375 (Fla. 4th Dist. Ct. App. 1993); Dowda & Fields, P.A. v. Cobb, 452 So. 2d 1140 (Fla. 5th Dist. Ct. App. 1984). Unlike a charging lien, which is case-specific, a lawyer may assert a retaining lien over property relating to one case that he or she is handling for a client in order to secure the fee owed by that client to the lawyer from another case. Mones, 486 So. 2d at 561.

216. 722 So. 2d 938 (Fla. 3d Dist. Ct. App. 1998).
217. Id. at 939.
218. Id.
219. Id.
220. Id.
221. *Feldman*, 722 So. 2d at 939.
222. Id.
223. Id.
224. Id.
225. 723 So. 2d 263 (Fla. 1998).
226. Id. at 264.
227. Id.
228. Id.
Pursuant to the settlement agreement, millions of dollars were deposited in an escrow account. The trial court, however, quashed the charging lien on the ground that the underlying fee contract was unenforceable. This order was subsequently reversed by the Fourth District Court of Appeal. On remand, the lawyers moved to enforce their charging lien, and the State filed a writ of prohibition in the supreme court to prevent the trial court from ordering disbursement of any funds to the lawyers. The supreme court relied on the fee contract between the parties in reaching its decision. The contract specified that, when the settlement agreement became final, all monies were to be distributed to the State. Accordingly, the court held that no charging lien could be imposed upon the funds because such a lien "would be contrary to the contract for legal services entered into" between the lawyers and the State.

The scope of an attorney's retaining lien was addressed in *Boroff v. Bic Corp.* A lawyer represented the plaintiffs in a personal injury suit, advancing costs and expenses of about $20,000 on his clients' behalf. The defendant prevailed in the suit and obtained a costs judgment against the lawyer's clients. In a separate personal injury suit for the same clients, the lawyer secured a recovery and had $4500 placed in his trust account. When the defendant in the first suit sought to garnish the lawyer's trust account, the lawyer asserted a retaining lien for the costs owed from the first suit and the fees owed from the second suit. The trial court recognized the retaining lien, but permitted it to attach only to the fees owed to the lawyer from the second suit. The appellate court held that the lien should extend to both fees and costs: "an attorney's retaining lien attaches to all property

229. *Id.* at 266.
230. *American Tobacco Co.*, 723 So. 2d at 266.
231. *Id.*
232. *Id.* at 268.
233. *Id.*
234. *Id.*
236. *Id.* at 267–69.
237. *Id.* at 268.
238. 718 So. 2d 348 (Fla. 2d Dist. Ct. App. 1998).
239. *Id.* at 349.
240. *Id.*
241. *Id.*
242. *Id.*
243. *Boroff*, 718 So. 2d at 349.
of the client that comes into the attorney's possession, to secure payment of all debts—including fees and costs—owed by the client to the attorney.\textsuperscript{244} An interesting fee-related issue was raised in \textit{Dadic v. Schneider}.\textsuperscript{245} A couple sued their former lawyer and his law firm for malpractice.\textsuperscript{246} Among the allegations was a count alleging legal malpractice through the charging of excessive fees by the lawyer.\textsuperscript{247} The Fourth District Court of Appeal affirmed a summary judgment for the lawyer, stating that "[n]o authority supports a cause of action on this theory."\textsuperscript{248}

Termination of the lawyer-client relationship can also raise ethical issues. RPC 4-1.16\textsuperscript{249} sets forth the standards governing termination of a

\begin{itemize}
\item \textsuperscript{244} Id.
\item \textsuperscript{245} 722 So. 2d 921 (Fla. 4th Dist. Ct. App. 1998).
\item \textsuperscript{246} Id. at 922.
\item \textsuperscript{247} Id. at 923.
\item \textsuperscript{248} Id.
\item \textsuperscript{249} RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:
\begin{itemize}
\item \textbf{(a) When Lawyer Must Decline or Terminate Representation.} Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:
\begin{itemize}
\item (1) the representation will result in violation of the Rules of Professional Conduct or law;
\item (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
\item (3) the lawyer is discharged.
\end{itemize}
\item \textbf{(b) When Withdrawal Is Allowed.} Except as stated in subdivision (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
\begin{itemize}
\item (1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
\item (2) the client has used the lawyer's services to perpetrate a crime or fraud;
\item (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;
\item (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
\item (5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
\item (6) other good cause for withdrawal exists.
\end{itemize}
\item \textbf{(c) Compliance With Order of Tribunal.} When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
\end{itemize}
One of the most basic principles in this area is that a lawyer must withdraw (or attempt to withdraw) from the representation when discharged by the client. Apparently, however, some lawyers do not always understand or adhere to this basic principle. In Florida Bar v. Vining, a lawyer was disciplined for several rules violations, including the failure to comply with RPC 4-1.16 by withdrawing from representation after his client discharged him. The lawyer was representing the client in connection with a certain building controlled by the client and in which the lawyer happened to be a tenant. The lawyer represented the client in suing another tenant. While an appeal of the trial court's decision in that case was pending, the client discharged the lawyer and, four days later, sued the lawyer's professional association for unpaid rent. Refusing to take no for an answer, the lawyer continued to represent the client in the appeal—and even participated in oral argument. The client complained to the Florida Bar, which ultimately led to the lawyer's suspension from the practice of law for six months. The supreme court noted that "Rule 4-1.16 requires a lawyer to withdraw from representation if the lawyer is discharged."

Application of the termination of representation rules in the criminal context creates special concerns, however, particularly in view of the constitutional obligation of the state to provide legal representation to defendants who cannot afford to hire a lawyer. The Supreme Court of Florida previously ruled that a trial court must grant a public defender's motion to withdraw from a representation when the public defender certifies

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(d) Protection of Client's Interest. Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.

.Id. 250. Id. 251. Id. 252. 721 So. 2d 1164 (Fla. 1998). 253. Id. at 1166. Specifically, the lawyer violated subdivision (a)(3) of RPC 4-1.16. See supra note 249. 254. Vining, 721 So. 2d at 1164. 255. Id. at 1165. 256. Id. 257. Id. at 1167. 258. Id. at 1168. 259. Vining, 721 So. 2d at 1170. 260. Id. at 1168. 261. U.S. CONsT., amend. VI.
to the court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. 262 The trial court has no discretion in this situation; it is not permitted to reweigh the underlying facts and substitute its conclusion for that of the public defender. 263 Despite this clear pronouncement from the supreme court, in at least six reported cases, the Fourth District Court of Appeal reversed trial court orders denying public defenders' motions to withdraw due to certified conflicts. 264 In one of these cases, \textit{Reardon v. State}, 265 the appellate court appeared to invite the legislature to change the result of the supreme court's controlling decision. 266

A trial court's order denying court-appointed criminal defense counsel's motion to withdraw was affirmed on appeal in \textit{Thomas v. State}. 267 Counsel moved to withdraw on eve of trial, stating that his law firm previously employed the mother of one of the witnesses and previously represented members of that witness's family in an unrelated civil case. 268 The trial court denied the lawyer's motion to withdraw. 269 The defendant was convicted, and the conviction was affirmed on appeal. 270 The appellate court distinguished between conflicts of interest involving current or former clients of a criminal defense lawyer and conflicts arising from the lawyer's personal interests: 271

The conflict in this case did not involve representation of clients or former clients with competing interest. Rather the conflict arose from a personal relationship not shown to involve substantial emotional ties. In these circumstances, prejudice is not presumed and the defendant must

262. Guzman v. State, 644 So. 2d 996 (Fla. 1994).
263. \textit{Id.} at 998–99.
265. 715 So. 2d 348 (Fla. 4th Dist. Ct. App. 1998) (noting that it was "bound to follow Guzman," the court stated that "[a]ny change in which a public defender's certification of conflict is treated by the trial courts and reviewed will have to come from the legislature").
266. \textit{Id.} at 348.
267. 725 So. 2d 1171 (Fla. 5th Dist. Ct. App. 1998).
268. \textit{Id.} at 1172–73.
269. \textit{Id.} at 1173.
270. \textit{Id.}
271. \textit{Id.}
demonstrate that he has been prejudiced in some way to establish reversible error.272

A case of interest involving a "nonwithdrawal" was Milane v. State.273 On appeal of his criminal conviction, the defendant asserted that the trial court had erred by not replacing his public defender with private counsel.274 Apparently, the defendant was concerned because another lawyer in the public defender's office was representing, in another case, a person who was a material witness against the defendant in his case.275 The public defender had refused to certify conflict on these facts.276 In affirming the conviction, the appellate court noted that there was no indication that defense counsel's cross-examination of the witness "was anything other than vigorous" and that the defendant had failed to establish the existence of a conflict that adversely affected his lawyer's performance.277 While the court may have correctly affirmed the conviction as a matter of law, it appears that the defense counsel's apparent non-recognition of any conflict may have been an incorrect application of the ethics rules.278 A lawyer's cross-examination of a current client is considered a conflict of interest.279 This conflict ordinarily would extend to all lawyers within the law firm pursuant to RPC 4-1.10(a).280

Finally, lawyers who have the good fortune to be elevated to a position on the bench should take care to close out their practices in an orderly, responsible fashion as contemplated by RPC 4-1.16.281 A lawyer who allegedly "virtually abandoned her law practice and neglected several client matters during the time she ran for office as a county court judge" was found guilty of violating a number of RPC and disciplined by the Supreme Court of Florida.282

272. Thomas, 725 So. 2d at 1173.
273. 716 So. 2d 837 (Fla. 5th Dist. Ct. App. 1998).
274. Id. at 837.
275. Id.
276. Id.
277. Id.
278. Milane, 716 So. 2d at 837.
280. Subdivision (a) of RPC 4-1.10, "IMPUTED DISQUALIFICATION; GENERAL RULE," provides: "(a) Imputed Disqualification of All Lawyers in Firm. While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by rule 4-1.7, 4-1.8(c), 4-1.9, or 4-2.2." Id.

281. See supra note 249.
282. In re Hapner, 718 So. 2d 785, 786 (Fla. 1998). Among the rules violated were RPC 4-1.1 (competence), 4-1.3 (diligence), 4-1.4 (communicating with clients), 4-1.5(e)
III. THE LAWYER'S RELATIONSHIP WITH THE JUDICIAL SYSTEM

A lawyer's relationship with the system of justice is a more abstract, yet critically important one. How does one have a relationship with a "system?" In a practical sense, how are one's responsibilities to and within a "system" determined and measured? For the lawyer, the answers to these questions are probably best arrived at by considering their relationships with and responsibilities to the two principal constituencies of the justice system, judges and the public whom the system is designed to serve. Cases in 1999 addressed relevant issues such as the disqualification of a lawyer or law firm from a litigated matter, the question of a lawyer's dual role as advocate and witness, a lawyer's ability to comment publicly on matters in which he or she is participating, the lawyer's obligation of candor owed to the court, the conduct of lawyers during a trial, a lawyer's professionalism obligations, and the question of proper argument to the jury.

Disqualification of a lawyer based on the fact that he had previously represented the opposing party was addressed in Eplee v. Eplee. The lawyer was representing the husband in a divorce action. Sixteen years earlier, while representing the same client in a criminal matter, the lawyer had given legal advice to the client's girlfriend (who was now the wife in this divorce action) concerning her possible claim of spousal immunity. The trial court granted the wife's motion disqualifying the lawyer based on a finding that the prior advice to her created an attorney-client relationship. On petition for writ of certiorari the First District Court of Appeal quashed the order of disqualification, concluding that there had been no assertion that the lawyer had obtained any confidential information from the wife and no showing that the prior legal advice was substantially related to the current case.

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284. Id. at 277-78.
285. Id. at 278.
286. Id.
287. Id. As a general rule, when a lawyer represents a new client whose interests are materially adverse to those of his or her former client, a conflict of interest exists if either the two matters are the same or substantially related or the lawyer possesses confidential information that could be used to the disadvantage of the former client. RPC 4-1.9, supra note 80. See, e.g., Jenkins v. Harris Ins., Inc., 572 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1991).
The imputed disqualification of lawyers or law firms was addressed in several cases. *Russakoff v. State* concerned an order disqualifying a law firm. The law firm had represented a Health Maintenance Organization ("HMO") that subsequently went into receivership and was taken over by the state's Department of Insurance. The Department sought to recover certain funds from the HMO's former chief executive officer and sole shareholder, who then hired the law firm to defend him. The trial court granted the Department's motion to disqualify the law firm, "finding that the law firm had represented [the HMO] in a related matter, and that, moreover, the Department would certainly call as witnesses the lawyers who had advised [the HMO] regarding this matter." The appellate court quashed the order and remanded the case for further proceedings.

The court discussed the issues of conflicts resulting from the firm's former representation of the HMO and from the possibility that firm lawyers would testify as witnesses. Significantly, the court indicated that screening of certain lawyers might prevent the law firm from being disqualified under the former client conflict rule, RPC 4-1.9, stating that:

[t]he fact that there was an attorney-client relationship between [the HMO] and [the law firm] would automatically disqualify those individual lawyers from working on matters that they handled or were directly related to matters that they handled. Other lawyers in the firm, however, would be disqualified only if any [law firm] lawyer would be called at trial, or if confidences would be exchanged that would disadvantage the [Department].

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288. "Imputed disqualification" is the principle under which the conflict or disqualification of one lawyer is deemed to apply to all lawyers practicing together in the conflicted lawyer's firm. RPC 4-1.10(a) (1993).
289. 724 So. 2d 582 (Fla. 1st Dist. Ct. App. 1998).
290. Id. at 583.
291. Id.
292. Id.
293. Id. at 585.
295. Supra note 80.
296. *Russakoff*, 724 So. 2d at 584 (emphasis added). Regarding the issue of disqualification due to the lawyers' testimony, the opinion correctly recognized that the mere fact that a lawyer in the firm would testify as a witness would not automatically disqualify the entire firm, but that any testimony of a firm lawyer that would involve confidential information would create a disqualifying conflict for entire firm. *Id.* at 583. See RPC 4-3.7(b), infra note 338 and accompanying text.
The opinion's apparent support for the concept of screening to prevent disqualification of a private law firm\textsuperscript{297} is unique in Florida. Decisions of other Florida state and federal courts have declined to permit this practice, which is not recognized in the RPC.\textsuperscript{298}

The principle of imputed disqualification becomes more difficult to apply when lawyers move between law firms. The relatively simple rule of "one lawyer's conflict is every lawyer's conflict" that ordinarily applies to all lawyers practicing together in an organization\textsuperscript{299} is modified somewhat when lawyers move between employers.\textsuperscript{300} School Board of Broward County v. Polera Building Corp.\textsuperscript{301} concerned a lawyer who had worked on some matters relating to his law firm's representation of a school board in various cases.\textsuperscript{302} The lawyer then changed employers; he moved to another law firm that represented a plaintiff in a suit against the school board.\textsuperscript{303} The school board moved to disqualify the lawyer's new firm.\textsuperscript{304} Unfortunately

\begin{itemize}
\item \textsuperscript{297} Screening is effective to avoid disqualifying conflicts of interest when lawyers move from government employment to private practice, or vice versa. RPC 4-1.11 (1993).
\item \textsuperscript{298} See In re Outdoor Products Corp., 183 B.R. 645 (M.D. Fla. 1995); Birdsall v. Crowngap, Ltd., 575 So. 2d 231 (Fla. 4th Dist. Ct. App. 1991); Edward J. DeBartolo Corp. v. Petrin, 516 So. 2d 6 (Fla. 5th Dist. Ct. App. 1987). RPC 4-1.10 contains no provision for screening.
\item \textsuperscript{299} See subdivision (a) of RPC 4-1.10, supra note 280.
\item \textsuperscript{300} Subdivisions (b) and (c) of RPC 4-1.10, "IMPUTED DISQUALIFICATION; GENERAL RULE," provide:
\item \textsuperscript{b} Former Clients of Newly Associated Lawyer. When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.
\item \textsuperscript{c} Representing Interests Adverse to Clients of Formerly Associated Lawyer. When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer unless:
\begin{itemize}
\item (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
\item (2) any lawyer remaining in the firm has information protected by rules 4-1.6 and 4-1.9(b) that is material to the matter.
\end{itemize}
\item \textsuperscript{301} 722 So. 2d 971 (Fla. 4th Dist. Ct. App. 1999).
\item \textsuperscript{302} Id. at 972.
\item \textsuperscript{303} Id.
\item \textsuperscript{304} Id.
\end{itemize}
for the lawyer, the new firm reacted by terminating his employment.\textsuperscript{305} The trial court denied the motion to disqualify the new firm, based on affidavits submitted by the parties.\textsuperscript{306} On petition for \textit{writ of certiorari}, the court quashed the order of disqualification because the trial court erred in basing its decision on affidavits rather than holding an evidentiary hearing.\textsuperscript{307} A hearing is needed because the imposition of imputed disqualification in a situation involving lawyers who change employment in the private firm setting depends in large part on the factual issue of possession of confidential information. The \textit{Polera} court concluded that RPC 4-1.10(c)\textsuperscript{308} applies when a law firm responds to a motion to disqualify by terminating the employment of its lawyer who is alleged to have a conflict.\textsuperscript{309} It then specified that the trial court must make the factual determinations of whether the lawyer with the alleged conflict had any confidential information and whether the new firm gained any confidential information from that lawyer before he was fired from the firm; a hearing is required for these determinations.\textsuperscript{310}

The need for the trial court to hold an evidentiary hearing before ruling on a disqualification motion was also recognized in \textit{Boca Investors Group, Inc. v. Potash}.\textsuperscript{311} The appellate court reversed an order of disqualification, noting that the nature of the lawyer's meeting with the purported former client was unresolved. This case is also noteworthy because, at least for disqualification purposes, the court recognized the distinction between an initial consultation regarding counsel's availability, which would not require

\textsuperscript{305} Id.  
\textsuperscript{306} \textit{Polera Bldg. Corp.}, 722 So. 2d at 972.  
\textsuperscript{307} Id. at 973. The court relied on Nissan Motor Corp. USA v. Orozco, 595 So. 2d 240 (Fla. 4th Dist. Ct. App. 1992).  
\textsuperscript{308} See supra note 300.  
\textsuperscript{309} \textit{Polera Bldg. Corp.}, 722 So. 2d at 973. The court relied on the \textit{Nissan} case in reaching this conclusion. Id. It would appear, however, that \textit{Nissan} reached the wrong result. If, in the type of factual scenario presented in both cases, the new law firm had \textit{not} fired the allegedly conflicted lawyer, the firm would have been governed by the more stringent rule expressed in RPC 4-1.10(a), rather than the relatively lenient standard of RPC 4-1.19(c). It seems inappropriate to allow the law firm to benefit by firing a lawyer that it knew or should have known presented a potential conflict problem when hired. This type of conflict avoidance strategy typically does not work with respect to current client conflicts. A lawyer or law firm usually is not permitted to turn a current client into a "former" client through withdrawal and then claim that it no longer has a conflict problem. See, e.g., Florida Ins. Guaranty Ass'n Inc. v. Carey Canada, Inc., 749 F. Supp. 255 (S.D. Fla. 1990). See also Hilton v. Barnett Banks, Inc., No. 94-1036-CIV-T-24(A), 1994 WL 776971, at *1 (M.D. Fla. Dec. 30, 1994).  
\textsuperscript{310} \textit{Polera Bldg. Corp.}, 722 So. 2d at 973. These two issues track the requirements of RPC 4-1.10(c). Id.  
\textsuperscript{311} 728 So. 2d 825 (Fla. 3d Dist. Ct. App. 1999).  
\textsuperscript{312} Id.
disqualification, and a discussion that included disclosure of confidential information, which would result in the creation of a lawyer-client relationship and thus require disqualification. 313

A conflict arising from a lawyer’s personal interest can also form the basis of a motion to disqualify counsel. Lee v. Gadasa Corp. 314 concerned mortgage foreclosure litigation that began in 1987. 315 In 1997, a motion was filed to disqualify defense counsel from the case. 316 The motion was based on defense counsel’s 1988 action to secure his fee by taking a junior mortgage on the property that was the subject matter of the foreclosure litigation. The movant alleged that the lawyer’s conduct violated RPC 4-1.8(i) 317 and created a disqualifying conflict of interest. The trial court granted the motion, but its order was reversed by the First District Court of Appeal. 318 The appellate court stated that “the trial court may well have been justified in concluding that [the lawyer] had violated” RPC 4-1.8(i). 319 Nevertheless, despite the fact that the lawyer’s “actions may merit investigation by the Florida Bar,” it concluded that disqualification was not appropriate. 320 The lawyer’s client had expressly waived any conflict of interest 321 and, perhaps most significantly, the movant had waited several years after learning of the mortgage before filing the motion to disqualify. 322

313. Id.
315. Id. at 611.
316. Id.
317. Subdivision (i) of RPC 4-1.8, “CONFLICTS OF INTERESTS; PROHIBITED TRANSACTIONS,” provides:

(i) Acquiring Proprietary Interest in Cause of Action. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer’s fee or expenses; and

(2) contract with a client for a reasonable contingent fee.

Id.
318. Lee, 714 So. 2d at 612.
320. Lee, 714 So. 2d at 612.
321. The court’s opinion did not discuss the fact that RPC 4-1.8(i) contains no provision for client waiver or consent. Compare subdivision (a) of RPC 4-1.8, supra note 131.
322. Lee, 714 So. 2d at 612.
This delay led the appellate court to conclude that the movant had "waived any right it might have otherwise had to seek [the lawyer’s] disqualification."\textsuperscript{323}

Lawyers must be aware that the non-lawyers they employ can create disqualification risks. An important case in this area was \textit{Koulisis v. Rivers}.\textsuperscript{324} A secretary working on a case for the defendant’s law firm had access to confidential and privileged information in the firm’s files, attended meetings at which the case was discussed, spoke with the client during pendency of the suit, and so forth.\textsuperscript{325} During the litigation, the secretary left the defense firm and began working for the plaintiff’s firm. The plaintiff’s firm completely screened the secretary from the case.\textsuperscript{326} The trial court denied the defendant’s motion to disqualify the plaintiff’s firm, concluding that the firm had taken sufficient steps “to insure that there [was] no impropriety.”\textsuperscript{327} The Fourth District Court of Appeal reversed, applying the same conflict rule that would apply if a \textit{lawyer} had switched sides—Rule 4-1.10(b).\textsuperscript{328} In refusing to recognize any distinction between lawyers and non-lawyers in this type of situation, the court went further than any of the other Florida authorities that have addressed this issue.\textsuperscript{329}

The court flatly stated that “[the secretary]’s desertion was akin to a lawyer switching to an opposing firm in the middle of a lawsuit.”\textsuperscript{330} The court noted that the secretary had access to confidential information while employed by the defense firm and that she then began to work for the law firm on the other side of same suit. In the court’s opinion, nothing more was required to support the disqualification of the hiring firm.\textsuperscript{331} The screening procedures employed by the hiring firm did not save it from disqualification; screening of lawyers is not recognized by RPC 4-1.10(b) and so was not


\textsuperscript{324.} 730 So. 2d 289 (Fla. 4th Dist. Ct. App. 1999).

\textsuperscript{325.} \textit{Id.} at 291.

\textsuperscript{326.} \textit{Id.}

\textsuperscript{327.} \textit{Id.}

\textsuperscript{328.} \textit{Id.} at 293.


\textsuperscript{330.} \textit{Koulisis}, 730 So. 2d at 291.

\textsuperscript{331.} \textit{Id.} at 292.
available to the non-lawyer employee under the view taken by the court. Furthermore, the court rejected the idea that an evidentiary showing of unfair advantage was necessary because it simply applied RPC 4-1.10(b), unlike other cases that have required such a showing before ordering disqualification as a result of a non-lawyer’s move between law firms.\footnote{See All Corners, 701 So. 2d at 642; Esquire Care, Inc., 532 So. 2d at 740. The Koulias court certified conflict with these cases. 730 So. 2d at 293.}

An interesting aspect of the issue of non-lawyers and disqualification from litigation was brought out in \textit{Caridi v. Inorganic Recycling Corp}.\footnote{Id. at 1072.} A corporation hired a person who used to be a lawyer, who was no longer admitted to the bar of any state, to perform a “legal audit” of the corporation.\footnote{The Florida attorney-client privilege is codified in FLA. STAT. § 90.502 (1997).} At the time, the corporation’s principals believed that the person was licensed to practice law and had given him information that could be considered privileged under Florida law.\footnote{Caridi, 715 So. 2d at 1073.} Later, a dispute arose among the corporation’s principals. One side’s counsel hired the ex-lawyer to assist in the litigation. Consequently, that counsel was disqualified because his client reasonably believed that he was a lawyer, and because of the access to confidential information regarding the opposing side that was enjoyed by the ex-lawyer as a result of his performance of the legal audit.\footnote{Id.}

The RPC\footnote{Regarding the underlying rationale of RPC 4-3.7, see Scott v. State, 717 So. 2d 908 (Fla. 1998); Mansur v. Drage, 484 So. 2d 618 (Fla. 5th Dist. Ct. App. 1986).} recognize that it may be unethical for a lawyer to act as both advocate and witness for a client in a matter.\footnote{RPC 4-3.7, “\textit{LAWYER AS WITNESS},” provides: (a) When Lawyer May Testify. A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness on behalf of the client except where: (1) the testimony relates to an uncontested issue; (2) the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) the testimony relates to the nature and value of legal services rendered in the case; or (4) disqualification of the lawyer would work substantial hardship on the client. (b) Other Members of Law Firm as Witnesses. A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 4-1.7 or 4-1.9 [concerning conflicts of interest]. Id.} Violation of RPC 4-3.7

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can lead to disqualification from litigation for the lawyer and, in some situations, the lawyer's firm. In *Singer Island, Ltd. v. Budget Construction Co.*, the appellate court upheld a trial court's denial of a motion to disqualify. The court emphasized the seriousness of disqualification and its view that motions to disqualify based on allegations that a party's lawyer will also be a witness should be regarded "with some skepticism, because they sometimes are filed for tactical or harassing reasons, rather than the proper reason, [RPC] 4-3.7." Courts have disqualified lawyers and law firms on the ground of improper communications with represented persons. In this case, the trial court correctly denied the motion to disqualify because, at the time the motion was filed, the movant had alleged "only a possibility that disqualification might be necessary," rather than waiting to file the motion after developing more of a record to support the allegations that the subject lawyer would testify as a witness.

Although disqualification motions are often interposed due to alleged conflicts of interest, other ethical transgressions may form the basis of such motions. In *Pinebrook Towne House Associations, v. C.E. O'Dell & Associates, Inc.*, an engineer met with a company's lawyers concerning the company's potential claims against him. When litigation ensued, the engineer retained a lawyer who asserted that disqualification was warranted due to this allegedly improper communication. The trial court granted the engineer's motion to disqualify the lawyers, but on review the Second District Court of Appeal quashed the order. The engineer knew that the


341. 714 So. 2d 651 (Fla. 4th Dist. Ct. App. 1998).

342. Id. at 652.


344. *Singer Island*, 714 So. 2d at 652.

345. 725 So. 2d 431 (Fla. 2d Dist. Ct. App. 1999).

346. The movant apparently urged disqualification based on RPC 4-1.7, the general conflict of interest rule, supra note 120, but the crux of the allegations seemed to concern the communication issue rather than any conflict allegations. Perhaps the movants focused on this language in the Comment to RPC 4-1.7 that states: "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question." RPC 4-1.7 comment (1993).

347. *Pinebrook Towne House Ass'ns*, 725 So. 2d at 433–34.
lawyers represented the opposing party, no documents provided to the attorneys were confidential, and it was "undisputed that [the engineer] was aware that these attorneys represented" the company, meaning that there was no violation of RPC 4-4.3. 348 The appellate court refused the engineer's invitation to "craft a rule, similar to Miranda warnings, which would require putting a potential defendant in a civil case on notice that anything he says will be used against him." 349

A final case of interest in the disqualification arena dealt with the authorization of an out-of-state lawyer to appear in a Florida court pro hac vice. 350 In Srou v. Srou, 351 the out-of-state lawyer was admitted as co-counsel with a Florida law firm. The opposing party moved to disqualify the lawyer on the grounds of alleged failure to comply with section 2.060(b) of the Florida Rules of Judicial Administration. 352 The district court withdrew its grant of pro hac vice admittance not on this ground, however, but because

348. Id. RPC 4-4.3, "DEALING WITH UNREPRESENTED PERSONS," provides:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Id. Courts have disqualified lawyers and law firms on the ground of improper communications with represented persons. See e.g., Rentclub v. Transamerican Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992); see also Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517 (E.D. Pa. 1995); Papanicolaou v. Chase Manhattan Bank, 720 F. Supp. 1080 (S.D.N.Y. 1989); Cronin v. Nevada Dist. Court, 720 P.2d 1150 (Nev. 1989). In the instant case, the allegedly improper communications were with an unrepresented person. Pinebrook Towne House Ass'ns, 725 So. 2d at 433.

349. Pinebrook Towne House Ass'ns., 725 So. 2d at 433.
350. BLACK'S LAW DICTIONARY 1212 (6th ed. 1999) defines "pro hac vice" as: "For this turn; for this one particular occasion. For example, an out-of-state lawyer may be admitted to practice in a local jurisdiction for a particular case only." Id.
351. 733 So. 2d 593 (Fla. 5th Dist. Ct. App. 1999).
352. Subdivision (b) of FLA. R. JUD. ADMIN. 2.060 provides:
(b) Foreign Attorneys. Attorneys of other states shall not engage in a general practice in Florida unless they are members of The Florida Bar in good standing. Upon verified motion filed with a court showing that an attorney is an active member in good standing of the bar of another state, attorneys of other states may be permitted to appear in particular cases in a Florida court. A motion for permission to appear shall be submitted with or before the attorney's initial personal appearance, paper, motion, or pleading. The motion shall state all jurisdictions in which the attorney is an active member in good standing of the bar and shall state the number of cases in which the attorney has filed a motion for permission to appear in Florida in the preceding three years.

Id.
the lawyer was a family member of one of the litigants.\textsuperscript{353} The appellate court ruled that this decision was an abuse of the trial court's discretion. "Although there is considerable discretion of the trial court in reference to admitting lawyers to pro hac vice practice, the decision should not be arbitrary. There is no prohibition against a lawyer representing himself, let alone a family member."\textsuperscript{354}

As officers of the court, lawyers have an obligation not to impair the fairness of proceedings in which they are involved by making prejudicial extra judicial statements.\textsuperscript{355} This duty is embodied in RPC 4-3.6, which precludes a lawyer from making a public, out-of-court statement that the lawyer knows or reasonably should know "will have a substantial likelihood of materially prejudicing an adjudicative proceeding."\textsuperscript{356} Of course, restrictions on a lawyer's right to speak publicly must be carefully scrutinized in light of the First Amendment.\textsuperscript{357} The United States Supreme Court has held that the standard expressed in RPC 4-3.6 permissibly balances the lawyer's free speech rights and the state's interest in providing fair trials.\textsuperscript{358} A trial court that imposes restrictions or "gag orders" on lawyers' rights to publicly comment on pending proceedings should do so only after finding that such action is necessary to ensure a fair trial, and narrowly tailoring the prohibition to bar only those statements that are substantially likely to materially prejudice the trial.\textsuperscript{359} The court in \textit{Rodriguez v. Feinstein}\textsuperscript{360} did not make such findings to support its protective order restricting the extra judicial statements of lawyers in a medical malpractice case, and the order was quashed by the appellate court.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Srour}, 733 So. 2d at 593.
\item \textit{Id}.
\item RPC 4-3.6 (1993).
\item RPC 4-3.6, "TRIAL PUBLICITY," provides:
\begin{enumerate}
\item \textbf{(a) Prejudicial Extrajudicial Statements Prohibited.} A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding due to its creation of an imminent and substantial detrimental effect on that proceeding.
\item \textbf{(b) Statements of Third Parties.} A lawyer shall not counsel or assist another person to make such a statement. Counsel shall exercise reasonable care to prevent investigators, employees, or other persons assisting in or associated with a case from making extrajudicial statements that are prohibited under this rule.
\end{enumerate}
\item \textit{Id}.
\item U.S. CONST. amend. I.
\item Rodriguez v. Feinstein, 734 So. 2d 1162, 1164 (Fla. 3d Dist. Ct. App. 1999).
\item \textit{Id}.
\end{enumerate}
\end{footnotesize}
A lawyer owes strict duties of candor toward the court before which he or she practices, and is also obligated not to engage in misconduct that would affect the outcome of the proceedings. Making false representations to a court is one of the most serious professional offenses that a lawyer can commit. In *Florida Bar v. Klausner*, a lawyer who engaged in such conduct was suspended from the practice of law for three years. In its opinion, the supreme court indicated that, but for the referee's recommendation of a suspension rather than disbarment, the lawyer would have been disbarred.

Lying to a court can also result in civil sanctions. A lawyer, found guilty of such misconduct, was ordered to pay the attorney's fees that the opposing party incurred due to the lawyer's failure to appear at a scheduled deposition in *Lathe v. Florida Select Citrus, Inc.* In trying to excuse his conduct, the lawyer falsely stated to the court that he had been ordered to appear before another judge at the time in question. The lawyer then sought a writ of certiorari to quash the court's prior order requiring him to pay the opposing party's legal fees. Denying the writ, the Fifth District Court of Appeal stated that "[i]t takes chutzpah to admit to lying to a court and yet still seek review of an order imposing sanctions."

The courts condemned other forms of misrepresentation during the past year. In *Leyva v. Samess*, an auto accident case, the plaintiffs' lawyer violated an order in limine by referring to a defendant by his title of "doctor." Plaintiffs' brief on appeal contained what the appellate court characterized as "a gross misrepresentation" of the order in limine. The court went on to issue this admonition to other lawyers who might appear before it: "Attorneys should be aware that in this court's preparation for determining cases on the merits, the record on appeal is thoroughly reviewed. We cannot help but notice attorneys' distortions of the record in their briefs. Such misrepresentations diminish the force and effect of the argument made."

361. See, e.g., The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993); The Florida Bar v. Dodd, 118 So. 2d 17 (Fla. 1960).
362. 721 So. 2d 720, 721 (Fla. 1998).
363. Id. at 722.
364. Id. (Pariente, J., concurring with Wells, J., dissent urging disbarment).
365. 721 So. 2d 1247, 1247 (Fla. 5th Dist. Ct. App. 1998).
366. Id.
367. 732 So. 2d 1118 (Fla. 4th Dist. Ct. App. 1999).
368. Id. at 1120.
369. Id.
370. Id. at 1121.
Another case in which a party's argument on appeal was criticized for a lack of candor was *Builder's Square, Inc. v. Shaw.*\(^{371}\) The appellant's counsel presented a number of contentions, some of which the court described with terms such as "specious" and "disingenuous."\(^{372}\) In an attempt to reinforce the need for professionalism among lawyers, the court sternly warned:

The fact that [appellant] has some legitimate issues to be presented to this court does not give it license to add specious ones. Nor does it give it the right to distort facts and erroneously present a judge's statement. Perhaps the only way to eliminate such issues is to refuse to respond to all issues presented by the party at fault. The Appellant's attorney, who appeared before the trial court, has an otherwise well-respected reputation. We are hesitant to single him out because he is not alone in presenting the problems we have present. We do, however, remind all counsel that they have a duty to the Bar and their profession, as well as to their clients. We must begin to reevaluate how many "bites of an apple" we, as an appellate court, are willing to recognize, and we will not hesitate in the future to sanction those that engage in the conduct this court has faced in this cause.\(^{373}\)

In *Rampart Life Associates, Inc. v. Turkish,*\(^{374}\) the Fourth District Court of Appeal again had the opportunity (or misfortune) to address misconduct on the part of appellate counsel.\(^{375}\) The appellant appealed a non-final order denying a motion to dismiss for lack of personal jurisdiction.\(^{376}\) While the case was on appeal, appellant's lawyer moved to supplement the record with a deposition taken after entry of the order being appealed.\(^{377}\) The appellate court denied the motion.\(^{378}\) Despite this, the lawyer included in her brief information from the subject deposition (the information was placed in a footnote).\(^{379}\) The court struck the offending footnote and imposed a

\(^{372}\) *Id.* at D653.
\(^{373}\) *Id.* at D654.
\(^{374}\) 730 So. 2d 384 (Fla. 4th Dist. Ct. App. 1999).
\(^{375}\) *Id.* at 385.
\(^{376}\) *Id.* at 384.
\(^{377}\) *Id.* at 385.
\(^{378}\) *Id.*
\(^{379}\) *Turkish,* 730 So. 2d at 385.
monetary sanction on the lawyer, stating that her action had violated two ethical rules, 380 RPC 4-3.5(a), 381 and RPC 4-3.4(c). 382

Lawyers are not the only professionals who have ethical obligations in the courtroom. Sparks v. State 383 concerned a judge’s duty to maintain impartiality. 384 During a bench conference in a criminal case, the judge pointed out the fact that the defendant had completed an affidavit of indigence containing information that might have conflicted with his trial testimony. 385 The prosecutor then cross-examined the defendant, using the information the judge alluded. 386 The affidavit was introduced into evidence over a non-specific objection of defense counsel. 387 Thus, the issue of the partiality of the trial judge was raised for the first time on appeal. The appeals court ruled that this issue constituted fundamental error that could not be considered harmless. 388 The conviction was reversed. 389

Tampering with witnesses is considered serious misconduct on the part of a lawyer, and is prohibited by RPC 4-34(b). 390 The United States

380. Id.
381. Subdivision (a) of RPC 4-3.5, “IMPARTIALITY AND DECORUM OF THE TRIBUNAL,” provides: “(a) Influencing Decision Maker. A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court.” Id.
382. Subdivision (c) of RPC 4-3.4, “FAIRNESS TO OPPOSING PARTY AND COUNSEL,” provides: “A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” Id.
384. Id. at D829.
385. Id.
386. Id.
387. Id.
388. Sparks, 24 Fla. L. Weekly at D830.
389. Id. A dissenting opinion agreed with the majority that it is improper for a trial judge to assume the role of advocate, but disagreed that the judge had crossed that line in this case. Rather, the dissenting justice viewed the trial judge’s conduct as a reasonable exercise of judgment in addressing a case of perjury that arose during the trial. Id. at D831 (Padovano, J., dissenting).
390. Subdivision (b) of RPC 4-3.4, “FAIRNESS TO OPPOSING PARTY AND COUNSEL,” provides:
A lawyer shall not:
(b) fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to reimburse a witness for the loss of compensation incurred by reason of preparing for, attending, or testifying at proceedings.
Eleventh Circuit Court of Appeals addressed an interesting application of this rule in *United States v. Lowery*. The defendants in separate criminal cases moved to suppress testimony of their alleged co-conspirators that had been obtained by the prosecution as a result of plea bargains. They argued that the plea agreements violated federal law against bribing witnesses and Florida ethics rule RPC 4-3.4(b), which prohibits a lawyer (in this case, the government prosecutor) from "offer[ing] an inducement to a witness." Based on the reasoning in *United States v. Singleton* concerning the legal issue and on the language of RPC 4-3.4(b) concerning the ethical issue, the trial court granted the motion to suppress.

The Eleventh Circuit reversed and remanded. Regarding the RPC 4-3.4(b) question, the court noted that "[i]t is far from clear that Rule 4-3.4(b) prohibits conduct leading to the type of agreements at issue in this case." The court, however, did not decide the case on that ground. Rather, it ruled that "a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible."

A civil case involving conduct that the appellate court described as "witness tampering" was *Jost v. Ahmad*. A treating physician, who was a testifying witness for the plaintiff in a medical malpractice case, was contacted on the day he testified by the defendant hospital's insurance carrier. Allegations were made that the contact was made with the knowledge of defense counsel. The trial court declined to permit the plaintiff's lawyer to investigate the matter and bring the existence of this contact before the jury. This ruling was error, and the appellate court reversed the jury's verdict for the defense and remanded the case for a new trial.

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*Id.* (emphasis added).

391. 166 F.3d 1119 (11th Cir. 1999).
392. *Id.* at 1119.
394. RPC 4-3.4(b) (1993).
395. *Id.*
396. 144 F.3d 1343 (10th Cir. 1998), reviewed en banc, 165 F.3d 1297 (10th Cir. 1999).
397. *Lowery*, 166 F.3d at 1121.
398. *Id.* at 1125.
399. *Id.* at 1124.
400. *Id.*
401. 730 So. 2d 708, 710 (Fla. 2d Dist. Ct. App. 1998).
402. *Id.* at 709.
403. *Id.*
404. *Id.* at 710.
405. *Id.* at 711.
Other types of trial conduct involving lawyers were criticized in reported decisions. In *Harley v. Lopez*, a lawyer represented personal injury claimants who sued a county and lost at both trial and on appeal. The county’s motion for appellate fees and costs was denied by the trial court for “failure to present expert testimony.” The claimants’ lawyer objected to the county’s expert affidavits for the first time at fees/costs hearing. The county’s motion for a continuance to allow it to produce its expert was denied. Reversing the award, the Third District Court of Appeal stated that “we believe that affirming the trial court’s denial of appellate fees in this instance would reward [the lawyer]’s ‘gotcha’ tactics, tactics long abhorred by this court.”

In *Banderas v. Advance Petroleum, Inc.*, a lawyer who filed a meritless motion for rehearing, which appeared to be filed “solely as a tool to express his personal displeasure” with the court’s per curiam affirmance, was deemed to have violated Rule 9.330(a) of the *Florida Rules of Appellate Procedure*. The court denied rehearing, then referred the lawyer to the Florida Bar by directing the court clerk to provide the Bar with a copy of the court’s opinion. Additionally, the court ordered the lawyer to show cause why sanctions should not be imposed. After considering the lawyer’s response, the court imposed a monetary sanction of $2500.

A lawyer’s motion to disqualify a judge can also create ethical concerns. The Second District Court of Appeal expressed its displeasure about the contents of certain motions in *J & J Industries, Inc. v. Carpet Showcase of Tampa Bay, Inc.* The court served notice that it expects candor and ethical behavior on the part of lawyers who file such motions:

> While it is not our role in reaching a decision—nor has it been in this instance—to pass on the truth of the various allegations counsel for [petitioner] has pleaded, we point out

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407. *id.* at D878.
408. *id.*
409. *id.*
410. *id.*
412. 716 So. 2d 876 (Fla. 3d Dist Ct. App. 1998).
413. *id.* at 876.
414. *id.*
415. The court stated that it was referring the lawyer to the Bar “pursuant to the mandatory language contained in 5-H Corp. v. Padovano.” *Id.* at 877 (internal citation omitted).
416. *id.*
418. 723 So. 2d 281 (Fla. 2d Dist. Ct. App. 1998).
this misleading and ethically suspicious excerpt from its motion in the hope that counsel's reliance on disingenuous accusations during proceedings to disqualify trial judges—themselves largely insulated from inspection of their reliability—will not always be shielded from public scrutiny.\textsuperscript{419}

Similarly, lawyers who behave inappropriately toward each other in the context of litigation may suffer criticism from the bench. In \textit{Baitty v. Weaver},\textsuperscript{420} a lawyer appealed an order directing her to pay fees and costs of more than $76,000 to opposing counsel.\textsuperscript{421} The order was premised on the trial court's finding that the lawyer misrepresented the truth to a Florida court.\textsuperscript{422} The appellate court reversed the order, concluding that the record did not support this finding.\textsuperscript{423} In dissenting, one justice added a "personal observation" to the effect that lawyers should think very carefully before engaging in bitter litigation such as this based on alleged misstatements of other lawyers.\textsuperscript{424} He noted that, while judges should not take lightly a finding that a lawyer has lied to a court, "the image of lawyers calling one another liars raises its own set of problems."\textsuperscript{425}

In the criminal defense arena, a criminal prosecutor's conduct was considered questionable enough to warrant a referral to the Florida Bar for investigation.\textsuperscript{426} In \textit{Lewis v. State},\textsuperscript{427} the prosecution withheld material that should have been turned over to defense counsel pursuant to \textit{Brady v. Maryland}.\textsuperscript{428} Noting that the trial court made no findings concerning whether the failure to turn over the material was intentional or unintentional, the appeals court pointed out that an intentional withholding would violate RPC 4-3.8(c),\textsuperscript{429} which concerns the ethical duties of prosecutors, and turned the matter over to the Florida Bar.\textsuperscript{430}

\textsuperscript{419} \textit{Id.} at 284.
\textsuperscript{420} 734 So. 2d 582 (Fla. 4th Dist. Ct. App. 1999).
\textsuperscript{421} \textit{Id}.
\textsuperscript{422} \textit{Id}.
\textsuperscript{423} \textit{Id.} at 585.
\textsuperscript{424} \textit{Id}. at 586.
\textsuperscript{425} \textit{Baitty}, 734 So. 2d at 586 (Farmer, J., dissenting).
\textsuperscript{426} \textit{Lewis v. State}, 714 So. 2d 1201 (Fla. 2d Dist. Ct. App. 1988).
\textsuperscript{427} \textit{Id}. at 1202.
\textsuperscript{428} 373 U.S. 83, 83 (1963).
\textsuperscript{429} Subdivision (c) of RPC 4-3.8, "SPECIAL RESPONSIBILITIES OF A PROSECUTOR," provides:

The prosecutor in a criminal case shall:

(c) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the
Another prosecutor’s conduct was criticized in *Dunstall v. State.* A
defendant’s conviction of sexual battery was reversed and remanded for a
new trial as a result of prosecutorial misconduct. A certain writing was
referred to by defense counsel, and the state objected. At the ensuing
bench conference, defense counsel stated that he did not intend to try to
introduce the writing itself into evidence. The court ruled the writing
inadmissible. Despite this ruling, the prosecuting attorney asked a witness
to produce the writing and, “incredibly enough, then proceeded to object
when the witness complied.” Based on this objection, the trial court
“erroneously struck the exculpatory testimony of the witness.” A
concurring opinion termed the prosecutor’s actions “unprofessional” and
commented that “she followed neither her oath of office nor the ideals and
goals of professionalism of the Florida Bar.”

Every year numerous cases are decided on improper argument, and this
year presents a dizzying array, which ranges from reversal, despite a failure
to contemporaneously object and preserve the issue for appeal, to a “bright
line” decision, never to reverse without proper preservation of the issue at
trial. Although courts frequently find argument to be improper under the
RPC, courts have been reluctant to reverse a case without preservation of

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defense and to the tribunal all unprivileged mitigating information known to
the prosecutor, except when the prosecutor is relieved of this responsibility by
a protective order of the tribunal.

*Id.*

430. *Lewis,* 714 So. 2d at 1203. The conviction was not reversed because the information
that was withheld “did not have the probability of changing the outcome of [the] trial.” *Id.*
431. 730 So. 2d 819 (Fla. 5th Dist. Ct. App. 1999).
432. *Id.* at 822.
433. *Id.*
434. *Id.*
435. *Id.*
436. *Dunstall,* 730 So. 2d at 822.
437. *Id.*
440. *Dunstall,* 730 So. 2d at 823 (Thompson, J., concurring).
441. Most frequently, courts find a violation of RPC 4-3.4(e), “FAIRNESS TO
OPPOSING PARTY AND COUNSEL,” which provides that:

A lawyer shall not:
(e) in trial, allude to any matter that the lawyer does not reasonably believe is
relevant or that will not be supported by admissible evidence, assert personal
knowledge of facts in issue except when testifying as a witness, or state a
personal opinion as to the justness of a cause, the credibility of a witness, the
culpability of a civil litigant, or the guilt or innocence of an accused.

*Id.*
the record by contemporaneous objection. The courts have, however, continued their recent trend to comment on the inappropriateness of attorneys' comments, apparently in the hope that pointing out these errors will deter attorneys from making them. 442

Thus, the Second District Court of Appeal refused to reverse the conviction of a defendant despite the improper argument of the prosecutor. 443 The court, however, specifically stated that "our affirmance should not be construed as approval of the remarks made by the prosecutor." 444 The court found that the state attorney improperly "vouched for the truthfulness of the officers, told the jury to send [the defendant] a message, argued matters not in evidence, and commented on [the defendant's] exercise of his right to a jury trial." 445 Judge Alterbernd, in a concurring opinion, opined that attorneys who practice criminal law should be required to review continuing legal educations videotapes on improper arguments. 446

The Second District Court of Appeal also affirmed a conviction while finding that the prosecutor made an improper closing in Henderson v. State. 447 The court found that the prosecutor's remarks improperly shifted the burden of proof to the defendant and expressed personal opinions about the defendant's honesty. 448 The prosecutor stated in closing that the defendant "would not know the truth if it hit him up side the head" and stated that the jury should find the defendant not guilty if the jury "believe[d] what [the defendant] said on the witness stand," among other improper remarks.

The Fifth District Court of Appeal took a bright line approach to improper argument, in stating that the court will not reverse cases if the error is not preserved by contemporaneous objection, finding that lawyers have failed to object as a tactical weapon. 450 The court concluded that comments by a plaintiff's attorney were improper because they "request[ed] the jury to act as the conscience of the community and accus[ed] [the defendant], his attorney, and his witnesses of committing perjury." 451 Nevertheless, the

442. E.g., id.
444. Id.
445. Id.
446. Id. This approach to prosecutorial misconduct was reiterated in Dunsizer v. State, 1999 WL 94970, at *1 (Fla. 2d Dist. Ct. App. Feb. 26, 1999), in which the court found that the prosecutor argued facts not in evidence, stating that "[a]lthough it is proper for prosecutors to argue inferences that may reasonably be drawn from the evidence... they have no license to argue fiction." Id.
448. Id. at 285–286.
449. Id.
451. Id. at 1034.
court also suggested that attorneys fail to object as a tactical weapon, hoping to gain a verdict in their favor, while believing that the appellate courts would reverse the case based on improper argument if not. The court further noted that attorneys are subject to discipline by the Florida Bar for misconduct, and that courts and other attorneys have an obligation to report such misconduct. Two judges dissented, stating that the appellate courts had just removed themselves from the fray of curbing attorney excesses in argument, and stating that prior courts were "content to uphold the honor of its court and the integrity of the judicial process by merely denying the unethical lawyer the benefit of his misconduct" in reversing cases for improper comments.

The Supreme Court of Florida, on the other hand, does not share the Fifth District's "bright line" rule and has been willing to reverse cases without contemporaneous objection. In a scathing opinion, the Supreme Court of Florida reversed a conviction for prosecutorial misconduct in a death penalty case, finding that the argument constituted fundamental error in Ruiz v. State. The court blasted a series of improper arguments by the prosecutors in this case, stating that "[i]t is particularly improper, even pernicious, for the prosecutor to seek to invoke his personal status as the government's attorney or the sanction of the government itself as a basis for conviction of a criminal defendant." The court thus found improper the prosecutor's statements, such as "what interest do we [ ] as representatives of the citizens of this county have in convicting somebody other than the person" and "what interest is there to bamboozle anybody about [the defendant's] real role in this case," implying that "[i]f the defendant wasn't guilty, he wouldn't be here." The prosecutors in this case referred to the defendant as "Pinocchio" and then stated that "[t]ruth equals justice." The court found that such argument "invit[es] the jury to convict [the defendant] . . . because he is a liar." If these statements were not bad

452. Id. at 1035. Another case which chided attorneys for failing to object, in the hopes of gaining a tactical advantage, is Simmons v. Swinton, 715 So. 2d 370 (Fla. 5th Dist. Ct. App. 1998).

453. Fravel, 727 So. 2d at 1036.
454. See id. at 1040.
455. Id. at 1042.
456. 24 Fla. L. Weekly S157 (Apr. 1, 1999). Apparently, although the defense objected to some of the prosecutor's remarks, it did not object to all of them. Id. at S157.
457. Id.
458. Id. at S158.
459. Id.
460. Ruiz, 24 Fla. L. Weekly at S158.
461. Id.
462. Id.
463. Id. at S158.
enough, one of the prosecutors also improperly sought to appeal to the juror’s personal sympathies by mentioning her father’s role in the military during Desert Storm. In response to the State’s argument that many of the comments were not the subject of contemporaneous objection, the court stated that “[w]hen the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.” The court then referred the prosecutors to the Florida Bar for possible disciplinary action.

Many of the lower courts have followed the supreme court’s example in reversing cases for improper argument without objection. In Freeman v. State, the Fifth District Court of Appeal, prior to its “bright line” ruling, reversed a conviction after the prosecutor improperly bolstered the credibility of its police witnesses by stating that the police should be believed merely because they are police officers. A prosecutor’s personal attack on the defense attorney was also the basis of a reversal in D’ambrosio v. State. The Third District Court of Appeal appeared particularly incensed with the statements of a prosecutor whose improper remarks were before the court for the third time in Izquierdo v. State. Continuing a trend, the court referred the attorney to the Florida Bar for investigation after finding that “the improprieties committed by [the prosecutor] ... are both breathtaking in their number, variety, and gravity and perhaps unprecedented even in our long and dreary experience with this problem.” The court found that he improperly called the defense a “pathetic fantasy” and

464. Id. at S158. The court stated the following about these remarks:
   This blatant appeal to jurors’ emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with [the prosecutor]’s heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination; and most important, it equated [the prosecutor]’s father’s noble sacrifice for his country with the jury’s moral duty to sentence Ruiz to death.


465. Id. at 5159.
466. Id.
467. 717 So. 2d 105 (Fla. 5th Dist. Ct. App. 1998).
468. Id. at 105.
469. 736 So. 2d 44 (Fla. 5th Dist. Ct. App. 1999); see also, Boyer v. State, 713 So. 2d 1133 (Fla. 5th Dist. Ct. App. 1998).
471. Id. at 125.
472. Id.
improperly appealed to the jury’s sympathy and emotions as, for example, by asking it to consider the effects a crime such as this has on ‘the water we drink, the air we breathe, the ground our children play on.’" 473 The court then invited the trial court to consider dismissing the case for prosecutorial misconduct after the reversal and remand. 474

In Nigro v. Brady, 475 the Fourth District Court of Appeal found that preservation of the error by requesting a mistrial is not required in a motion for new trial, even if the comments do not rise to the level of fundamental error. 476 The court found that the defense attorney badgered the witness by asking questions to obtain inadmissible evidence. 477 The court found that a trial court has “broad discretion to set aside a jury verdict and grant a new trial,” based on the improper comments even sua sponte. 478 The court also remarked on the deterrent effect such a ruling may have on attorneys who act improperly. 479

A trial court can avoid reversal by properly admonishing a jury regarding inappropriate remarks. Thus, the trial court who sustained an objection for improper argument, admonished the prosecutor and gave a curative instruction to the jury to disregard the prosecutor’s remarks was upheld in Sinclair v. State. 480 The prosecutor in closing argument improperly indicated that a police officer should be relied on because “the officer would not put his or her career on the line by committing perjury.” 481 The court wrote specifically to reprimand the prosecutor, stating that “[i]t ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office.” 482 Similarly, the supreme court found no error in a matter in which the trial court gave a curative instruction to the jury when the prosecutor called the defendant an “amoral, vicious, cold-blooded killer.” 483 In concurring, Justice Pariente specifically pointed out several improper remarks of the prosecutor to “send a message to the community” in stating that a jury recommendation for life for a deaf defendant is “an insult to all who have achieved greatness and lived law abiding and productive lives in

473.  Id. at 125–126.
474.  Id. at 126.
475.  731 So. 2d 54 (Fla. 4th Dist. Ct. App. 1999).
476.  Id. at 54.
477.  Id. at 55.
478.  Id. at 56.
479.  Id.
480.  717 So. 2d 99 (Fla. 4th Dist. Ct. App. 1998).
481.  Id. at 100.
482.  Id. at 101.
483.  Hawk v. State, 718 So. 2d 159, 162 (Fla. 1998).
spite of the same handicap." She also stated that the prosecutor's statements, that mitigation evidence is "pathetic excuses," were "clearly improper."

Failure to handle an objection properly, however, will result in reversal, as evidenced by the case of Barnes v. State. The prosecutor referred to defense counsel as a "hired gun," prompting the defense attorney to ask that the remarks be stricken; the trial court responded by telling the jury to "[i]gnore the last comment." The appellate court pointed out that the instruction was "quite ambiguous" because it could be referring to the defense attorney's request that the remarks be stricken. The appellate court also stated that the trial court should specifically reprimand the prosecutor and give a clear curative instruction, stating that "[f]or a curative instruction conceivably to erase the palpable prejudice to the defendant in this situation, the court should have condemned the comment in the clearest and most unmistakable terms." Finally, the court referred the prosecutor to the Florida Bar for investigation of improper conduct, noting that the prosecutor had "persisted in this improper conduct for more than five years in spite of repeated disapproval of it by our court."

Other cases involving reversal include one in which the prosecutor improperly referred to matters not in evidence in Jones v. State. A prosecutor was also reprimanded for bolstering his expert witness by inappropriately asking if the defense attorney had attempted to hire the same expert in Milburn v. State. A reversal was also required where a prosecutor attempted to introduce evidence of other crimes in violation of a pre-trial ruling, and referred to those other crimes in closing argument.

Based on a finding that "truth is a defense," the appellate court found that no improper remarks had been uttered by the plaintiff's counsel who stated that the opening statement of the defendant's attorney was "the most unethical opening statement I have ever heard." The court found that the plaintiff's attorney had stated the truth, in finding that "[b]y calling the

484. Id. at 164.
485. Id. at 165.
487. Id. at D459.
488. Id.
489. Id.
490. Id. at D459.
492. 730 So. 2d 346 (Fla 4th Dist. Ct. App. 1999).
495. Owens-Coming Fiberglass Corp. v. McKenna, 726 So. 2d 361, 363 (Fla. 3d Dist. Ct. App. 1999).
defendant's argument 'unethical,' plaintiff's lawyer was simply defending himself and his client's case against a barrage of blatant improprieties by his opponent. His comment was an accurate description of defense counsel's tirade.⁴⁹⁶

IV. THE LAWYER'S RELATIONSHIP TO THIRD PARTIES

Most of the duties owed by a lawyer are to the client, including duties such as competence,⁴⁹⁷ diligence,⁴⁹⁸ confidentiality,⁴⁹⁹ and loyalty.⁵⁰⁰ Lawyers also owe special fiduciary obligations to clients regarding their property.⁵⁰¹ Under some circumstances, lawyers also owe fiduciary obligations to third parties regarding funds or property.⁵⁰² Thus, the

⁴⁹⁶. Id.
⁴⁹⁷. RPC 4-1.1 (1993).
⁴⁹⁸. Id. at R. 4-1.3.
⁴⁹⁹. Id. at R. 4-1.6.
⁵⁰⁰. Id. at R. 4-1.7–1.12.
⁵⁰¹. RPC 4-1.15, the safekeeping property rule, and Chapter five on trust accounting, set forth the obligations of a lawyer toward client funds.
⁵⁰². RPC 4-1.15 "SAFEKEEPING PROPERTY," states the following:

(a) Clients' and Third Party Funds to be Held in Trust. A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation.

(b) Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
(c) Disputed Ownership of Funds. When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be treated by the lawyer as trust property, but the portion belonging to the lawyer or law firm shall be withdrawn within a reasonable time after it becomes due unless the right of the lawyer or law firm to receive it is disputed, in which event the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) Compliance With Trust Accounting Rules. A lawyer shall comply with The Florida Bar Rules Regulating Trust Accounts.

**Id.** RPC 4-1.15 Comment:

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if money, in 1 or more trust accounts, unless requested otherwise in writing by the client. Separate trust accounts may be warranted when administering estate money or acting in similar fiduciary capacities.

Lawyers often receive funds from third parties from which the lawyer’s fee will be paid. If there is risk that the client may divert the funds without paying the fee, the lawyer is not required to remit the portion from which the fee is to be paid. However, a lawyer may not hold funds to coerce a client into accepting the lawyer’s contention. The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party and where appropriate the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.

The obligations of a lawyer under this rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction.

Subdivision (d) of this rule requires each lawyer to be familiar with and comply with Rules Regulating Trust Accounts as adopted by The Florida Bar.

Money or other property entrusted to a lawyer for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of a lawyer are not subject to counterclaim or setoff for
Supreme Court of Florida disciplined an attorney for engaging in fraud and misrepresentation by signing checks payable to his client and third-party medical providers, depositing the funds into his trust account, failing to advise the third party that he received a settlement check on its behalf, and failing to pay the third party the money owed in settlement in Florida Bar v. Sweeney. The referee found that the lawyer had received settlement checks from an insurance company which were made out to both the client and medical providers. The attorney signed the checks, deposited them into his trust account, and distributed the proceeds to himself, to the client, and all but two of the medical providers. The referee specifically found that the attorney did not intend to defraud the medical providers or Medicaid after the attorney testified that he believed that Medicaid would pay the providers, but found that the attorney had violated RPC 4-1.15(a) and (b), 4-8.4(a) and (c), and 5-1.1. The supreme court agreed with the referee's findings that the attorney violated the safekeeping property and trust accounting rules, but additionally found that the attorney defrauded Medicaid by failing to pay the medical providers from the settlement checks, and suspended the attorney for ninety-one days.

Attorneys may incur obligations, which they do not intend regarding the rights of others, as evidenced by the case of Berger v. Silverstein, Silverstein & Silverstein. In Berger, the attorney represented a client in a personal injury case on a contingent fee basis. The attorney and the client signed a

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attorney's fees, and a refusal to account for and deliver over such property upon demand shall be a conversion. This is not to preclude the retention of money or other property upon which a lawyer has a valid lien for services or to preclude the payment of agreed fees from the proceeds of transactions or collections.

Id.

503. 730 So. 2d 1269 (Fla. 1998).
504. Id. at 1270.
505. Id.
506. Id.
507. RPC 4-1.15(a) provides that “[a] lawyer shall hold in trust, separate from the lawyer’s own property, funds and property of clients or third persons that are in a lawyer’s possession in connection with a representation.” Id.
508. RPC 4-1.15(b) states that “[u]pon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person.” Id.
509. RPC 4-8.4(a) provides that “a lawyer shall not . . . violate or attempt to violates the Rules of Professional Conduct.” Id.
510. RPC 4-8.4(c) prohibits a lawyer from “engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Id.
511. RPC 5-1.1 sets forth specific requirements regarding trust accounts.
512. Sweeney, 730 So. 2d at 1272.
513. 727 So. 2d 312 (Fla. 3d Dist. Ct. App. 1999).
514. Id. at 313.
letter of protection, agreeing to pay the client's physical therapist from the recovery.515 The attorney, after withdrawing his fees and costs from the settlement, had insufficient funds to pay the therapist's bill.516 The physical therapist then filed suit against the client and the attorney to recover his fees.517 The trial court granted the attorney's motion for summary judgment, finding that the attorney's claim for fees had a higher priority than the physical therapist's claim for fees.518 The Fourth District Court of Appeal overturned the trial court decision, finding that the case should not be treated as a priority of lien case.519 The court found that the specific language of the letter of protection520 created a contract between the attorney and the physical therapist, requiring the attorney to pay the full amount owed to the physical therapist from the recovery before paying himself for fees and costs outstanding.521 In a concurring opinion, Judge Nesbitt indicated that, although the attorney had a charging lien for his costs and fees, "the effect of his agreement with the therapist was to partially or wholly divest himself from enforcing that lien."522 In light of this case, the prudent personal injury practitioner who regularly issues letters of protection to medical providers and others, should analyze the letters of protection he or she signs to ensure that the language of the agreements does not create an unintended contractual obligation.

An attorney owes some obligations to the opposing party, such as the duty not to communicate with the opposing party without the consent of the opposing party's lawyer.523 Interpretation of RPC 4-4.2524 is often the subject

515. Id.
516. Id.
517. Id.
518. Berger, 727 So. 2d at 313.
519. Id.
520. Id. The court quoted from the contract the specific language that the attorney would "withhold [the necessary] sums from any settlement, judgment or verdict as [might] be necessary to adequately protect" the physical therapist's fee. Id.
521. Berger, 727 So. 2d at 313.
522. Id. (Nesbitt, J., concurring).
523. RPC 4-4.2, infra note 524.
524. RPC 4-4.2, "COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL," provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to
of cases regarding attorney discipline, disqualification, and admissibility of evidence. The meaning of RPC 4-4.2 as applied to corporate parties was tested this year in the case of *United States ex rel. Mueller v. Eckerd Corp.* The United States government and the State of Florida sued Eckerd Corporation under the Federal False Claims Act and the Florida False Claims Act on the theory that Eckerd's was not properly filling prescriptions. The government sought to communicate *ex parte* with pharmacists, technicians, and clerks employed by Eckerd's, stating that the employees were non-managerial and had expressed interest in speaking with the government. The magistrate judge denied the government's motion for *ex parte* interviews, from which the government appealed as to pharmacy technicians and clerks. The United States District Court for the Middle District of Florida, upheld the magistrate's order denying the request for *ex parte* contact. The court cited the comment to RPC 4-4.2, which states, in part, that in dealing with organizations as parties, an attorney may not communicate with an employee of the organization "whose statement may constitute an admission on the part of the organization." The court stated that the technicians and clerks were involved in contacting health care providers for refill information and in counting and packaging medicine. In so doing, the court held that "[i]t is for the very reason stated in the statutory description of the pharmacy technicians' duties that the statements obtained in an *ex parte* interview would have a 'substantial likelihood' of being used against the organizations in a later proceeding." The court found that information from these employees would be used to establish the government's claims regarding incomplete filling of prescriptions, stating that these employees "would be precisely the employees who could verify Eckerd's practices in regards to filling patients prescriptions."

A lawyer also has responsibilities to the opposing party when the opposing party inadvertently discloses documents. In *Abamar Housing &

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Id. 525. 35 F. Supp. 2d 896 (M.D. Fla. 1999).
527. FLA. STAT. §§ 68.01–092 (1999).
529. *Id.*
530. *Id.*
531. *Id.* at 899.
532. *Id.* at 898 (quoting RPC 4-4.2).
534. *Id.*
535. *Id.*
Chinaris / Tarbert

Development, Inc. v. Lisa Daly Lady Decor, Inc., an attorney was disqualified for his failure to immediately notify opposing counsel and return documents which were inadvertently disclosed by the other side. The court found that disqualification of the attorney was appropriate, stating that the "case demonstrates the effects of the inadvertent disclosure, the plaintiffs' recalcitrance in rectifying the disclosure, and the unfair tactical advantage gained from such disclosure." The court added, however, that disqualification will not always result from an inadvertent disclosure of information. If an attorney immediately notifies the person who disclosed the information and returns the documents, the attorney will not be disqualified, having gained no unfair advantage.

In another disqualification case, the court chose not to disqualify an attorney after the attorney misrepresented the law on work product privilege to opposing counsel's investigator during deposition. The attorney set a deposition of the opposing counsel's investigator, who had been listed as a witness. At the deposition, the investigator asked the attorney if he was inquiring into information protected by the work product privilege. The attorney answered by stating that the privilege "has been waived because [opposing counsel] listed you on his witness list. You are correct that typically what an investigator does is work product." The trial court disqualified the attorney and awarded fees, finding that the attorney had violated RPC 4-4.1, which prohibits making false statements of fact or law.

536. 724 So. 2d 572 (Fla. 3d Dist. Ct. App. 1998).
537. Id. at 573.
538. Id. at 574.
539. Id. at 574 n.2.
540. Id. In reaching this conclusion, the court cited to Florida Ethics Opinion 93-3, stating that the opinion dictated disclosure of the receipt and immediate return of the documents. Interestingly, the opinion merely requires notification of receipt of the inadvertently disclosed documents; the opinion does not require their return. A prudent practitioner, however, will return the documents to avoid the disqualification, which is the result in this case. Fla. Bar Professional Ethics Comm. Op. 93-3 (1994).
541. 5500 North Corp. v. Willis, 729 So. 2d 508, 514 (Fla. 5th Dist. Ct. App. 1999).
542. Id. at 509.
543. Id. at 510.
544. Id.
545. RPC 4-4.1, "TRUTHFULNESS IN STATEMENTS TO OTHERS," provides: In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6.

Id.
to a third party, and that the attorney had obtained privileged information.\(^{546}\) The appellate court overturned the disqualification and the award of attorney's fees, indicating that the attorney did not gain an "unfair advantage" necessitating disqualification, although the attorney misrepresented the law to the witness; the court specifically found that no information protected by the work product privilege had been disclosed.\(^{547}\) The court also overturned the award of attorney's fees, finding that opposing counsel did not obtain a protective order, did not attend the deposition, and did not instruct his own investigator on proper areas of inquiry at the deposition.\(^{548}\) The court admonished both attorneys in this case regarding their lack of professionalism in stating "the circumstances of this case present a textbook example of lack of cooperation between opposing counsel. We would expect more civility from Beavis and Butthead than was displayed here by [the attorneys]."\(^{549}\)

Beyond being admonished for a mere lack of professionalism, lawyers have been disciplined for their conduct toward opposing counsel and judges. In *Florida Bar v. Sayler*,\(^ {550}\) the Supreme Court of Florida publicly reprimanded an attorney who sent a threatening letter to opposing counsel.\(^ {551}\) The letter enclosed copies of articles about the murder of another lawyer who practiced in the same area of law as the recipient, and quoted from the articles.\(^ {552}\) The court found that the sole purpose of the letter was to harass the opposing counsel, violating RPC 4-4.4 and 4-8.4(d).\(^ {553}\) In another case, the supreme court suspended an attorney who, among other violations, accused opposing counsel of stealing the court file.\(^ {554}\) In the same case, the court also found that the attorney had impugned the integrity of a judge by

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547. *Id.* at 513.
548. *Id.*
549. *Id.* at 514.
550. 721 So. 2d 1152 (Fla. 1998).
551. *Id.* at 1155. The Supreme Court of Florida has also disciplined an attorney for sending an insulting letter to the opposing party in *Florida Bar v. Uhrig*, 666 So. 2d 887, 888 (Fla. 1996). The letter was meant to disparage the opposing party, who was a member of a protected class under RPC 4-8.4(d). *Id.*
552. *Sayler*, 721 So. 2d at 1153–54.
553. *Id.* at 1154. RPC 4-4.4 provides that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person." *Id.* RPC 4-8.4(d) states that "[a] lawyer shall not . . . engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against . . . other lawyers on any basis." *Id.*
554. *Florida Bar v. Nunes*, 734 So. 2d 393 (Fla. 1999). The court found that the attorney had violated Rule 4-3.1, regarding filing frivolous proceedings, 4-4.4, *supra* note 553, and 4-8.4(d), *supra* note 553.
filing a motion which included statements indicating that the judge had made a mistake in an order due to lack of experience and by filing a brief indicating that opposing counsel was trying to “get away with” conduct before a female judge that “he could not get away with from the two (2) [sic] male judges.”

The content of an attorney’s communication with others is not the only area of controversy; 1999 saw at least one case in which the method of communication was a bone of contention in Pee v. Arnold H. Aaron, P.A. The Fourth District Court of Appeal overturned a trial court’s order requiring an attorney with a fax machine to accept documents faxed by the opposing counsel. The attorney who was subject to the order filed for writ of certiorari after losing his argument that he should not be required to accept faxes from opposing counsel because “counsel constantly and continually [sent] argumentative letters, non-emergency pleadings, and other materials over the fax, which constantly and continuously interrupted his working day.” The court found that, although Rule 1.080(b)(5) of the Florida Rules of Civil Procedure permits delivery by fax, it does not require an attorney to have a fax machine. Accordingly, an attorney who does not wish to receive documents by fax cannot be required to do so.

Attorneys communicate not only with the court and opposing counsel, attorneys also communicate with the public. Attorneys’ communication with the public, in offering legal services, is the subject of regulation as well. Regulation of attorney advertising was subject to constitutional challenge in the case of Mason v. Florida Bar. Attorney Mason filed a yellow pages advertisement for review with the Florida Bar. The advertisement included the information “‘AV’ rated, the Highest Rating Martindale-Hubbell National Legal Directory.” The Florida Bar opined that the advertisement did not comply with RPC 4-7.2(j), which prohibits “self-laudatory” statements. The Florida Bar further indicated that the advertisement would comply if the attorney included a statement that

555. Nunes, 734 So. 2d at 395. RPC 4-8.2(a) states that “a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.” Id.
556. 719 So. 2d 372 (Fla. 4th Dist. Ct. App. 1998).
557. Id. at 372.
558. Id.
559. Id.
560. Id.
561. The rules regulating attorney advertising are RPC 4-7.1 through 4-7.8.
563. Id. at 1330. Attorneys must file non-exempt advertising for review under RPC 4-7.5.
564. Id.
565. Id. RPC 4-7.2(j) further proscribes “statements describing or characterizing the quality of the lawyer’s services.” Id.
Martindale-Hubbell does not rate all lawyers and that the ratings are based on confidential interviews.566 The attorney challenged the rule on First Amendment grounds and on the basis that the rule is unconstitutionally vague.567 The court found that the advertisement was commercial speech, subject to the Central Hudson568 test, requiring that regulation by the State must be "narrowly drawn" and advance a substantial state interest.569 The court upheld the rule on the basis that The Florida Bar had shown substantial interest in "ensuring (1) that lawyer advertisements are not misleading, (2) that the public has access to relevant information to assist in the comparison and selection of attorneys, and (3) that rating services have a strong incentive to use objective criteria."570 The attorney argued that the public understands the rating system or has access to information which explains the rating process, and therefore it could not be misleading.571 The court found that Martindale-Hubbell is directed at the legal community, and that the public was unlikely to research the ratings system.572 The court also found that requiring a brief disclosure was narrowly tailored to advance the government interest, because it allows the attorney to convey the information.573 The court dismissed the attorney's "void for vagueness" argument, stating that "only an attorney could be confused by that language."574 The court summarized its opinion by stating that "[u]nless the attorney characterizes his Martindale-Hubbell rating with the words 'the Highest Ratings' then he must explain what that means to a public generally unfamiliar with the Martindale-Hubbell rating system."575

Under the RPC, lawyers also have an obligation not to bring frivolous proceedings.576 "A lawyer shall not bring or defend a proceeding, or assert

566. Mason, 29 F. Supp. 2d at 1330.
567. Id.
570. Id. at 1331.
571. Id.
572. Id.
573. Id. at 1332-33.
574. Mason, 29 F. Supp. 2d at 1333.
575. Id.
576. RPC 4-3.1 provides the following:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." 577 Nevertheless, "a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may... so defend the proceeding as to require that every element of the case be established." 578 This obligation can lead not only to discipline by the Florida Bar, but also to sanctions by the trial court. 579 Thus, the Third District Court of Appeal upheld a monetary sanction against a woman and her attorney for filing a frivolous subpoena in Moakley v. Smallwood. 580 During the course of post-dissolution proceedings, the former wife sought to compel production of a note that was awarded to her in the divorce by issuing subpoenas to the former husband and his attorneys. 581 The motion itself stated that one of the attorneys did not possess the note, and that attorney could not quash the subpoena because there was little notice provided prior to the deposition. 582 The appellate court upheld the sanctions imposed, stating that the trial court found that the attorney "was subpoenaed on short notice, for no good reason, to attend an evidentiary hearing fifty miles distant." 583

Similarly, the Third District Court of Appeal ordered an attorney to show cause why sanctions should not be imposed based on his abuse of the appellate process in Banderas v. Advance Petroleum, Inc. 584 In Banderas, the attorney filed a motion for rehearing after the court issued a per curiam opinion indicating that the opinion was "a travesty of justice" and a "cop-out" and scolded the court for not writing an opinion explaining the decision. 585 The appellate court found the motion "frivolous and insulting" 586 and filed "solely as a tool to express his personal displeasure with this Court's conclusion." 587 Attorneys should be careful in statements made to the court, whether oral or written, because in addition to the

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577. Id.
578. Id.
579. Id.
580. 730 So. 2d 286 (Fla. 4th Dist. Ct. App. 1999).
581. Id. at 286.
582. Id.
583. Id. at 287.
584. 716 So. 2d 876 (Fla. 3d Dist. Ct. App. 1998).
585. Id. at 877.
586. Id.
587. Id. at 877.
sanctions the court can impose, the court may also refer the issue to the Florida Bar for potential disciplinary action, as in this case.\textsuperscript{588}

An attorney's responsibilities do not come solely from the RPC. The attorney also has a relationship with the state, which also regulates attorneys' conduct. The State's regulation of attorney conduct was at issue in \textit{State v. Falk}.\textsuperscript{589} Section 817.234(9) of the Florida Statutes, which prohibits attorneys from soliciting car accident victims, was upheld against an equal protection challenge.\textsuperscript{590} The state filed an information charging an attorney with violating the statute, and the attorney filed a motion to dismiss, citing equal protection and free speech grounds; the motion was granted.\textsuperscript{591} The appellate court found a rational basis for the state's distinction between car accident victims and other accident victims, indicating that the statute appeared in a section entitled "[F]alse and fraudulent insurance claims."\textsuperscript{592} The court stated that the legislature "may have concluded that the likelihood of insurance fraud is greater with motor vehicles accidents" because car insurance is required by law in the State of Florida, thereby denying the equal protection claim.\textsuperscript{593} The court also found that, because the information filed by the State did not specify any particular conduct, the trial court erred in finding that the statute violated the First Amendment, because it could not implement the "as applied" test;\textsuperscript{594} the appellate court therefore remanded the case to the trial court to allow the state to amend the information, and the defendant to renew his motion to dismiss.\textsuperscript{595}

Other constitutional law developments were the subject of \textit{Chiles v. State Employees Attorneys Guild}.\textsuperscript{596} The Supreme Court of Florida struck down section 447.203(3)(j) of the Florida Statutes, which prohibited attorneys employed by the state from engaging in collective bargaining because it was constitutionally overbroad.\textsuperscript{597} The court held that "we emphasize that lawyers exercising their constitutional right to bargain collectively may not violate the Rules Regulating The Florida Bar and must give unqualified deference to the traditional duty of loyalty that a lawyer

\textsuperscript{588}. \textit{Id.} at 878. \textit{See also} Timothy P. Chinars & Elizabeth Clark Tarbert, 23 \textit{NOVA L. REV.} 161, 224--25 (1998) (discussing 5-H Corp. v. Padovano, 708 So. 2d 244 (1998)).

\textsuperscript{589}. 724 So. 2d 146 (Fla. 3d Dist. Ct. App. 1998).

\textsuperscript{590}. \textit{Id.} at 149. \textit{See also} FLA. STAT. § 817.234(8) (1999). The chiropractic counterpart to the statute prohibiting attorneys from soliciting car accident victims, was also upheld against First Amendment and equal protection challenge in \textit{Barr v. State}, 731 So. 2d 126 (Fla. 4th Dist. Ct. App. 1999).

\textsuperscript{591}. \textit{Falk}, 724 So. 2d at 147.

\textsuperscript{592}. \textit{Id.} at 148. \textit{See also} FLA. STAT. § 817.234 (1999).

\textsuperscript{593}. \textit{Falk}, 724 So. 2d at 148--49.

\textsuperscript{594}. \textit{Id.} at 148.

\textsuperscript{595}. \textit{Id.} at 149.

\textsuperscript{596}. 734 So. 2d 1030 (Fla. 1999).

\textsuperscript{597}. \textit{Id.} at 1031.
owes to a client." The Supreme Court of Florida, in reaching its decision, cited to Florida Ethics Opinion 77-15, which states that mere membership in a union is not an ethical violation.

V. THE LAWYER'S RELATIONSHIP TO THE FLORIDA BAR AND THE DISCIPLINARY SYSTEM

This section discusses the attorney's relationship to the Florida Bar and the disciplinary system. Included within this section are discipline cases that are not easily categorized within the attorney's relationship to clients, the court and third parties. Also discussed are changes to the RPC.

One of the most egregious violations of the RPC is that of dishonesty. Often violations involving dishonesty invoke the harshest penalties in discipline cases. The Supreme Court of Florida ordered a ninety-one day suspension in the case of Florida Bar v. Cibula for conduct involving dishonesty. The attorney attended a hearing in his own case regarding alimony. While under oath, the attorney testified regarding his income. At the time he testified, he had already earned well over the amount of income he admitted in the court proceeding, and he had overpaid his income taxes, which the bar's expert witness testified can be used to conceal income. The supreme court found that the attorney had committed a fraud on the court and had engaged in dishonest or fraudulent conduct.

The court disbarred an attorney for fraudulent conduct in the case of Florida Bar v. Vernell. The attorney was hired by a client for representation in multiple matters, including an eminent domain case. The attorney received funds from the state both prior to trial and after the verdict in the trial for the client. The client filed a complaint stating that the attorney did not inform the client that he had received funds on the client's

598. Id.
599. Id. at 1036.
601. 725 So. 2d 360 (Fla. 1998).
602. Id. at 365. According to RPC 3-5.1(e), a ninety-one day suspension is particularly severe because an attorney is required to show rehabilitation in order to be reinstated and may be ordered to re-take the Bar exam. RPC 3-5.1(e) (1993).
603. Cibula, 725 So. 2d at 361.
604. Id.
605. Id. at 362.
606. Id. The court found that the attorney had violated RPC 4-3.3(a) and 4-8.4(c), respectively. Id.
607. 721 So. 2d 705 (Fla. 1998).
608. Id. at 706.
609. Id.
behalf, and that the attorney had never discussed the issue of fees with the client regarding any of the matters for which the attorney had been hired.\textsuperscript{610} The attorney claimed that there was no fee agreed upon at the outset of the attorney-client relationship because of the friendship between the two, and that the amount of his fees in the matters exceeded the amount he received on the client’s behalf.\textsuperscript{611} The referee found that, in addition to violating the trust accounting and safekeeping property rules, the attorney had engaged in conduct involving dishonesty and deceit, all relating to the misappropriation of the client’s funds.\textsuperscript{612} The supreme court upheld the referee’s findings of fact and disbarred the attorney, based on his prior disciplinary history and the egregiousness of the offense.\textsuperscript{613}

An attorney remains subject to the jurisdiction of the supreme court even while under suspension. The Supreme Court of Florida undertook a lengthy explanation of the basis of its jurisdiction over disbarred and suspended attorneys in \textit{Florida Bar v. Ross}.\textsuperscript{614} The court explained that Rule 3-5.1(e) of the \textit{Rules Regulating The Florida Bar} specifically states that attorneys are subject to discipline as members of The Florida Bar during the period of the suspension.\textsuperscript{615} Both suspended and disbarred attorneys remain subject to the court’s contempt powers if they violate the court order imposing discipline.\textsuperscript{616} Thus, attorney Ross was disbarred for conduct committed during the time period of his suspension from the practice of law.\textsuperscript{617} Ross became involved in a dispute with his landlord regarding property that was foreclosed on and purchased at a foreclosure sale.\textsuperscript{618} The landlord started proceedings to set aside the foreclosure, and filed an affidavit stating that he did not receive notice of the sale.\textsuperscript{619} Ross offered to sell the purchaser information which he claimed would rebut the affidavit filed by the landlord.\textsuperscript{620} The purchaser’s attorney declined to buy the information, but informed Ross that he would subpoena him for a deposition.\textsuperscript{621} The opposing counsel contacted Ross to tell him the date of

\begin{itemize}
  \item \textsuperscript{610} \textit{Id.}
  \item \textsuperscript{611} \textit{Id.} at 707.
  \item \textsuperscript{612} Vernell, 721 So. 2d at 706.
  \item \textsuperscript{613} \textit{Id.} at 709–10. In another case involving dishonesty, the supreme court denied reinstatement to an attorney who was convicted of writing over 150 worthless checks during her probation, including writing worthless checks after applying for reinstatement. Florida Bar v. Roberts, 721 So. 2d 283 (Fla. 1998).
  \item \textsuperscript{614} 732 So. 2d 1037 (Fla. 1998).
  \item \textsuperscript{615} \textit{Id.} at 1040.
  \item \textsuperscript{616} \textit{Id.} at 1041.
  \item \textsuperscript{617} \textit{Id.} at 1043.
  \item \textsuperscript{618} \textit{Id.} at 1038–39.
  \item \textsuperscript{619} Ross, 732 So. 2d at 1039 (Fla. 1998).
  \item \textsuperscript{620} \textit{Id.}
  \item \textsuperscript{621} \textit{Id.}
\end{itemize}
his scheduled deposition and to determine what information he had. 622 Ross offered to evade service of the subpoena for the deposition, provided the opposing counsel paid Ross several thousand dollars; the opposing counsel declined. 623 Ross eluded service of process by posting a notice at his address, which stated that he was on vacation. 624 In light of this conduct, the supreme court found that Ross had violated RPC 4-8.4(c), which prohibits dishonesty, deceit, and misrepresentation, and disbarred him. 625

An attorney may also be disciplined for violating specific obligations to the court and to the Florida Bar. Attorneys have duties during the discipline process, and this year several cases were decided regarding those responsibilities. 626 The supreme court thus suspended an attorney for not responding to a court order to answer a subpoena duces tecum in Florida Bar v. Kassier. 627 Furthermore, the court suspended an attorney for failing to respond to the Florida Bar regarding a complaint and for failure to appear at her final hearing in Florida Bar v. Summers. 628 Finally, the court suspended an attorney for submitting false documentation in responding to the bar regarding a complaint in Florida Bar v. Arango. 629 A client had complained that the attorney failed to act diligently in a representation, and the attorney submitted a medical authorization from the client, correspondence between the attorney and a medical provider, and notations in a log that indicated work was being performed on the case, all of which the court found to be false. 630

The supreme court also considered the applicability of the RPC in computing a suspension from another state in the case of Florida Bar v. Shinnick. 631 An attorney was suspended from practice in Minnesota for fraudulent conduct in business transactions not related to the practice of law. 632 The suspension was indefinite, but with the ability to apply for

622. Id.
623. Id.
624. Ross, 732 So. 2d at 1039 (Fla. 1998).
625. Id.
626. See Florida Bar v. Summers, 728 So. 2d 739 (Fla. 1999); Florida Bar v. Kassier, 730 So. 2d 1273 (Fla. 1998); Florida Bar v. Arango, 720 So. 2d 248 (Fla. 1998).
627. 730 So. 2d 1273 (Fla. 1998). The attorney was also found to have issued worthless checks. Id.
628. 728 So. 2d 739 (Fla. 1999). The complaint to which Summers did not respond involved a federal case which was dismissed because she did not follow the trial court’s orders in a forfeiture case as an Assistant United States Attorney. Her failure to appear at her final hearing in the disciplinary case resulted in the referee finding her guilty of all charges by The Florida Bar. Id.
629. 720 So. 2d 248 (Fla. 1998).
630. Id. at 250.
631. 731 So. 2d 1265 (Fla. 1999).
632. Id. at 1265.
reinstatement after six months. Because the attorney had begun to practice before the suspension period had expired, the Florida Bar prosecuted the attorney and the referee found that the respondent had violated the RPC based on the Minnesota suspension. The referee recommended a suspension in Florida until the attorney was reinstated in Minnesota nunc pro tunc to the date of suspension in Minnesota, which was July 25, 1996. The Florida Bar argued that the suspension was for longer than ninety days, requiring proof of rehabilitation prior to reinstatement in Florida. The attorney, on the other hand, contended that his suspension in Florida was for under ninety days, because the six months in Minnesota had expired prior to the entry of the referee’s findings and recommendation. The Supreme Court of Florida held that the attorney’s suspension in Minnesota was for longer than ninety days, pointing out that he had not been reinstated in Minnesota at the time of the referee’s hearing, and required proof of rehabilitation.

On a more positive note, the supreme court held that a Florida Bar member who has been found not guilty of violations of the RPC cannot be ordered to bear the bar’s costs of prosecution. At the final hearing, the referee found that the attorney had not violated the Rules, but ordered that she pay half of the costs of the bar for the disciplinary proceeding. The attorney appealed, arguing that the bar was not a “prevailing party” and should therefore bear its own costs in the case. The supreme court agreed, finding that:

[a] referee does not have discretion to recommend that a respondent in a bar disciplinary proceeding pay any portion of the Bar’s costs pursuant to rule 3-7.6(o) when the referee recommends that the respondent be found not guilty of any of the charged offenses and recommends no discipline or

633. Id.
634. Id at 1266. RPC 3-4.6, states that a final disciplinary order in another jurisdiction "shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule." Id.
635. Shinnick, 731 So. 2d at 1266.
636. Id.
637. Id at 1267.
638. Id.
639. Florida Bar v. Williams, 734 So. 2d 417, 421 (Fla. 1999).
640. Id at 418.
641. Id.
other sanctions, and where the Bar is otherwise not successful in whole or in part. 642

The court did note, however, that it was not addressing whether sanctions could be imposed for lack of cooperation in the disciplinary proceeding. 643

As in every year, the supreme court considered changes to the RPC. 644 Many of the changes this year involved RPC 4-1.5, regarding fees. The court amended RPC 4-1.5(f)(4)(B)(ii) and 4-1.5(f)(4)(D)(iii) to allow approval of a contingent fee contract in excess of the contingent fee schedule and approval of a division of fees between attorneys not in accordance with the schedule in "the court in which the matter would be filed" or the circuit court of competent jurisdiction, in the event that the former court will not accept jurisdiction. 645 Instead of requiring that attorneys file a separate action in circuit court, it is now possible for attorneys to have these matters heard in the court in which the underlying litigation takes place. 646 The court also amended the Statement of Client's Rights to indicate that a client may be obligated to pay "costs and expenses" to the opposing party. 647 The court declined to change the percentages stated in the contingent fee schedule at the bar's request, because the bar did not indicate the rationale for the proposed rule change. 648

The supreme court also amended RPC 4-3.4, 649 adding two new subdivisions, (g) and (h), regarding threatening criminal prosecution or disciplinary action as leverage in a civil matter. 650 The supreme court adopted the Code of Professional Responsibility in 1970. 651 Contained within the code was Disciplinary Rule ("DR") 7-105, which stated that "[a] lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." 652 When the supreme court adopted the current RPC, 653 the rules contained no counterpart to DR 7-105. In the interim, the Professional Ethics Committee of the Florida Bar published formal opinion 89-3, which stated that, although

642. Id. at 420.
643. Id. at 420.
644. In re Amendments to the Rules Regulating The Florida Bar, 718 So. 2d 1179 (Fla. 1998).
645. Id. at 1181.
646. Id.
647. Id. at 1181–82.
648. Id. at 1180–81.
650. In re Amendments to the Rules Regulating The Florida Bar, 718 So. 2d at 1182.
651. In re The Integration Rule of The Florida Bar, 235 So. 2d 723 (Fla. 1970).
653. In re Rules Regulating The Florida Bar, 494 So. 2d 977. For the correct opinion, see 507 So. 2d 1366 (Fla. 1986).
the rules contain no express prohibition, attorneys may not "bring, participate in bringing, or threaten to bring criminal charges against someone solely to obtain an advantage in a civil matter or if the primary purpose of such action is harassment." 654 This rule change re-enacts the specific prohibition previously expressed in DR 7-105. Although the Code of Professional Conduct did not contain an express prohibition against bringing a disciplinary action as leverage in a civil matter, the Professional Ethics Committee of the Florida Bar issued formal opinion 94-5, which prohibits lawyers from threatening to file a bar complaint "to obtain advantage in a civil matter." 655 The amendment to RPC 4-3.4 codifies this interpretation of the Rules of Professional Conduct.

VI. CONCLUSION

This past year saw continued development of the law of lawyers' professional responsibility in Florida. It has become increasingly more difficult for lawyers to sort out and prioritize the numerous responsibilities to and relationships with various persons and entities. Fortunately, the courts and the Florida Bar continue to provide guidance for the interested attorney in the form of cases, ethics opinions, and rules changes. In the final analysis, lawyers must not only avail themselves of these resources but must also draw upon themselves to realize that commitment to their clients, dedication to our system of justice, and service to the public are the hallmarks of our honored profession.

654. Fla. Bar Comm. on Professional Ethics, Op. 89-3 (1989). In making its decision, the committee relied on Rule 4-3.1 of the RPC, which prohibits frivolous actions, 4-4.4, which prohibits actions with "no substantial purpose other than to embarrass, delay or burden a third person," 4-8.4(c) which prohibits dishonest or deceitful conduct, and 4-8.4(d) which states that an attorney shall not "engage in conduct that is prejudicial to the administration of justice." Id.

655. Fla. Bar Comm. on Professional Ethics, Op. 94-5 (1995). The committee used the same rationale as in opinion 89-3, supra, note 654. In addition, the committee noted that attorneys have an obligation to report attorneys who have violated the Rules of Professional Conduct "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer" under Rule 4-8.3 of the Florida Rules of Professional Conduct. Id.
Survey of Florida Law: Real Property
Ronald Benton Brown* and Joseph M. Grohman**

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I. INTRODUCTION

This survey covers judicial decisions and Florida legislation that appeared between July 1, 1998 and June 30, 1999. Real estate law continues to develop in interesting ways and the authors have selected the cases and statutes that they think will be of particular interest to real estate practitioners and others involved with Florida real estate law. The authors do not intend this survey to be all inclusive. The general goal is to inform the reader, but on occasion the authors felt compelled to voice disagreement or hopes for the future.

II. ATTORNEYS' FEES

A. Eminent Domain

1. Statutory Changes

1999 Fla. Laws. ch 385 is a huge act relating to the Department of Transportation. Buried deep within this act are some significant changes to provisions relating to attorneys' fees under the eminent domain statutes. The most important changes are: section 73.015(4) of the Florida Statutes will provide for attorneys' fees and costs when the parties reach agreement without litigating; the condemnee will no longer be able to recover

1. Note that this article does not include zoning and land use because those are covered in a different article.
2. When dealing with legislation, the authors strongly recommend reading the entire act.
3. Under article III, section 5 of the Florida Constitution, a legislative act is limited to one subject. If this act satisfies the one subject rule, then the rule is entirely meaningless.
4. For further discussion see the Eminent Domain section infra Part X. See also Paul D. Bain, 1999 Amendments to Florida's Eminent Domain Statutes, THE FLA. B.J., Nov. 1999 at 68, 68–71.
prejudgment interest on attorneys’ fees and costs;\(^6\) the modification of the calculation of the benefit achieved by the attorney, which is the basis for calculating attorneys’ fees, to include nonmonetary benefits; and a schedule to use in the calculating the fees from the benefit.\(^7\)

2. Trial

*Department of Transportation v. Skidmore.*\(^8\) The district court found that the decision the trial court made followed the correct approach for calculating fees.\(^9\) The district court determined the benefits that had been obtained for the clients, calculated the lodestar figure using the factors listed in the statute,\(^10\) and then decided “whether to adjust that figure based on the total benefits obtained.”\(^11\) However, the attorneys’ fees were $900,000, when the benefit obtained was only $1,225,000.\(^12\) The attorneys’ fee were equal to almost seventy-five percent of the benefit, in contrast to the norm which was twenty-five to thirty-five percent.\(^13\) In fact, the client was not entitled to keep all the money that the Department of Transportation had deposited in the registry of the court at the beginning of this quick take proceeding.\(^14\) These factors alone made the district court state, “we would find ourselves hard-pressed to affirm this award.”\(^15\)

In addition, other errors necessitated reversal. First, in calculating the client’s benefit, the court included the value of the Department of Transportation’s rebuilding of a pier, despite the fact that the client, and its

\(^{6}\) *Id.* Paul D. Bain questioned the constitutionality of this provision based on the supreme court’s reasoning in *Boulis v. Florida Dep’t of Trans.*, 733 So. 2d 959 (Fla. 1999). Bain, *supra*, note 4, at 70. *Boulis* is discussed *infra* text accompanying notes 333–43, that prejudgment interest on costs is required by the Florida Constitution.

\(^{7}\) Ch. 49–385, § 60, 1999 Fla. Laws 3820, 3880 (codified at FLA. STAT. § 73.091 (1999)).

\(^{8}\) 720 So. 2d 1125 (Fla. 4th Dist. Ct. App. 1998).

\(^{9}\) *Id.* at 1129.

\(^{10}\) *Id.* at 1128.

\(^{11}\) *Id.* (quoting FLA. STAT. § 73.092(2)(a)–(e) (1991)).

\(^{12}\) *Skidmore,* 720 So. 2d at 1129.

\(^{13}\) *Id.*

\(^{14}\) *Id.* at 1130.

\(^{15}\) *Id.*
attorney, had vigorously opposed the rebuilding. Second, in calculating the number of hours expended by the attorneys, the court included the time that they had spent litigating the question of whether their client improperly filled in sovereignty lands. The district court held that to be a matter that was merely incidental to the eminent domain proceedings and, therefore, not compensable.

Finally, in taxing costs, the trial court was bound by the Statewide Uniform Guidelines for Taxation of Costs. While "[t]he trial court may deviate from the Guidelines depending on the facts of the case as justice may require," the trial court went too far here. It was error to include office expenses such as postage, long distance calls, fax transmissions and delivery services. It was error to award computer research costs that should have been considered as overhead. In addition, it was also error to include travel expenses for experts and witnesses where the record did not reflect that they had to travel from out of state. Furthermore, it was error to award the law firm's surcharge assessed on other expenses.

*Teeter v. Department of Transportation.* The condemnee sought attorneys' fees under section 73.092 of the *Florida Statutes.* The trial court awarded fees based solely upon the monetary benefits achieved for the client under section 73.092(1), which provided, "[e]xcept as otherwise provided in this section, the court, in eminent domain proceedings, shall award attorneys' fees based solely on the benefits achieved for the client." The trial court rejected the condemnee's additional request for fees under section 73.092(2). The district court affirmed. Section 73.092(2) provided for the payment of attorneys' fees where such fees have been "incurred in defeating an order of taking, or for an apportionment, or other supplemental proceedings." This case was settled before it went to trial. Utilizing the plain meaning approach to statutory interpretation, the court concluded that

17. *Id.*
18. *Id.*
19. *Id.* at 1130–31.
20. *Id.* at 1130.
21. *Skidmore,* 720 So. 2d at 1130.
22. *Id.*
23. *Id.*
24. *Id.* at 1130–31.
25. 713 So. 2d 1090 (Fla. 5th Dist. Ct. App. 1998).
26. *Id.* at 1091; FLA. STAT. § 73.092 (Supp. 1994).
27. *Teeter,* 713 So. 2d at 1091; FLA. STAT. § 73.092(1).
28. *Teeter,* 713 So. 2d at 1091.
29. *Id.*
30. *Id. ;* FLA. STAT. § 73.092(2).
31. *Teeter,* 713 So. 2d at 1091–92.
section 73.092(2) simply did not apply to this situation.\footnote{32} Furthermore, the condemnee was not entitled to attorneys' fees for hours spent litigating the attorneys' fees issue because that was not provided for by the statute.\footnote{33}

Judge Sharp concurred specially in order to urge the legislature to reconsider the potential constitutional defects in the statute.\footnote{34} Although acknowledging that no constitutional issues had been raised in this case, she noted that the statute was "fraught with problems and may be constitutionally defective."\footnote{35} Under the Florida Constitution, the condemnee is entitled to attorneys' fees, as part of the mandated compensation.\footnote{36} The limit of the statute on attorneys' fees, based upon the nature of the proceeding, may shortchange some future condemnees.\footnote{37}

3. Appellate

\textit{Department of Transportation v. Skinners Wholesale Nursery, Inc.}\footnote{38} The land in this case was the subject of a "quick take."\footnote{39} The parties agreed on all issues except business damages which went to trial.\footnote{40} The Department of Transportation's ("DOT") position was that business damages were $130,000, but the final judgment awarded to the landowner was $2,950,000.\footnote{41} Of course, the DOT appealed, but the landowner prevailed again and the award was upheld.\footnote{42} In calculating appellate attorneys' fees, the trial court determined a reasonable hourly rate of $250 per hour.\footnote{43} It concluded from the evidence that 100.75 hours had been expended in the case.\footnote{44} The hours expended produced a lodestar fee of $25,187.50.\footnote{45} The court then "applied what it described as a 'results obtained' enhancement in an amount equal to 2.5% of the $2,950,000, the amount of the business damages awarded at trial, or $73,750; and rounded the awarded fee to $98,000."\footnote{46} The DOT appealed the addition of the enhancement and the
district court reluctantly reversed, although it did not find the award to be excessive.\(^47\)

The use of the lodestar approach was the correct way to approach appellate attorneys' fees. Moreover, applying an enhancement for results obtained might be justified in the rare case where the quality of service and the results obtained were exceptional.\(^48\) However, it would be inappropriate to use a risk multiplier because that is designed to compensate the lawyer for the risk of not getting paid in a contingent fee case.\(^49\) In this eminent domain proceeding where the condemning authority had appealed, attorneys' fees were mandated by statute,\(^50\) so there was no risk that this attorney would not get paid.\(^51\) Unfortunately, the trial court's order, and the evidence on which it was based, considered the risk of losing on appeal as a factor in calculating the enhancement.\(^52\) Thus reversal was required\(^53\).

**Seminole County v. Boyle Investment Co.**\(^54\) In this condemnation case, the county had appealed the trial court's award of attorneys' fees to the landowner.\(^55\) The district court reversed the award of interest on the attorneys' fees and the inclusion of expert witness fees, but affirmed on all other points.\(^56\) The county then opposed the landowner's motion for appellate attorneys' fees, apparently on the theory that it had been the prevailing party on the appeal.\(^57\) However, the district court concluded that the legislature mandated landowners to receive reasonable appellate attorneys' fees in all eminent domain cases, unless the appeal was filed by the landowner and the appeal was unsuccessful.\(^58\) The exception did not apply to this case because the appeal had been filed by the county.\(^59\)

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\(^{47}\) See id. at 8–9.

\(^{48}\) See Skinners Wholesale Nursery, Inc., 736 So. 2d at 9.

\(^{49}\) See id. at 8.

\(^{50}\) Id. at 3; FLA. STAT. § 73.131(2) (1993).

\(^{51}\) See FLA. STAT. § 73.131(2) (1993).

\(^{52}\) Skinners Wholesale Nursery, Inc., 736 So. 2d at 8–9.

\(^{53}\) Id. at 9.

\(^{54}\) 724 So. 2d 645 (Fla. 5th Dist. Ct. App. 1999), review denied, 732 So. 2d 328 (Fla. 1999).

\(^{55}\) Id. at 645.

\(^{56}\) Id.

\(^{57}\) See id. at 645–66.

\(^{58}\) Id. at 646. Section 73.131(2) of the Florida Statutes provides that “[t]he petitioner [condemning authority] shall pay all reasonable costs of the proceedings in the appellate court, including a reasonable attorneys' fee to be assessed by that court, except upon an appeal taken by a defendant [condemnee] in which the judgment of the lower court shall be affirmed.” FLA. STAT. § 73.131(2) (1999).

\(^{59}\) Boyle Inv. Co., 724 So. 2d at 646.
B. Landlord and Tenant

*Florida RS, Inc. v. Nelson.* The tenant brought suit claiming the landlord had breached the lease by, inter alia, failing to pay interest on an annual basis as required by statute. The court rejected the tenant's motion for certification of a class action, but the tenant prevailed on his original claim and was awarded $30.70 interest on his security deposit. The court then awarded the tenant, an attorney who represented himself with the aid of another lawyer, attorneys' fees of $27,654.

The district court reversed. By statute, attorneys' fees could be recovered by the prevailing party in litigation concerning a residential lease. However, the district court concluded that the tenant had not prevailed on the attempt to have the class certified. Therefore, the tenant was not entitled to attorneys' fees involved with that attempt. The tenant was entitled to attorneys' fees for claims on which he prevailed that included only the attorney's time spent on recovering interest on his security deposit.

III. BROKERS

A. Discipline and Licensing

*Starr v. Department of Business & Professional Regulation.* In completing her application for a license, Starr failed to reveal that she had pled no contest to two separate misdemeanor charges, i.e., disorderly intoxication and disorderly conduct. When that was discovered, the Department of Business and Professional Regulation ("DBPR") revoked her license. On appeal, she challenged the Department's right to inquire about criminal conduct not a felony and not related to real estate transactions. The district court summarily rejected that claim and any argument challenging the license revocation as being different from sanctions given to

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61. *Id.* at D57; FLA. STAT. § 83.49(9) (1995).
63. *Id.* at D57.
64. *Id.* at D58.
67. *Id.* at D58–59.
68. *Id.*
69. 729 So. 2d 1006 (Fla. 4th Dist. Ct. App. 1999).
70. *Id.* at 1006.
71. *Id.*
72. *Id.*
others for similar offenses or as being beyond the authority of the Department.\textsuperscript{73}

\textit{White v. Department of Business \& Professional Regulation.}\textsuperscript{74} White was both a broker and a building contractor.\textsuperscript{75} Buyers agreed to buy a lot in Whisper Ridge Subdivision on which the broker would build their house.\textsuperscript{76} The purchase contract provided that the deposit would be held in escrow by Les White Realty/Builders.\textsuperscript{77} However, the deposit was never put in the escrow.\textsuperscript{78} White used the money to buy the lot in his own name.\textsuperscript{79} Then White’s construction financing disappeared, so the house was never built and the lot never sold to the buyers.\textsuperscript{80} White, however, refused to return their deposit.\textsuperscript{81} When the DBPR began disciplinary proceedings, White’s defense was that he acted only as a builder in this transaction, not as a broker, so the DBPR had no basis for disciplining him.\textsuperscript{82}

The Real Estate Commission found otherwise and revoked his broker’s license.\textsuperscript{83} The record revealed that, throughout the transaction, White had represented himself as a licensed real estate broker.\textsuperscript{84} The purchase contract indicated that White was acting as a broker and that the deposit would be held in escrow by his realty company.\textsuperscript{85} “Although the evidence at the hearing disclosed White wore several ‘hats’ in this transaction, it supports the Commission’s conclusion that one of the hats worn was that of a licensed real estate broker.”\textsuperscript{86} In that role, White had breached his statutory duties to properly escrow the deposit money and return the deposit.\textsuperscript{87} In light of the fact that White’s license was already suspended at the time of this transaction, the Commission was justified in revoking his license.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{73} Id. at 1006–07.
\item \textsuperscript{74} 715 So. 2d 1130 (Fla. 5th Dist. Ct. App. 1998).
\item \textsuperscript{75} Id. at 1130.
\item \textsuperscript{76} Id.
\item \textsuperscript{77} Id.
\item \textsuperscript{78} Id.
\item \textsuperscript{79} \textit{White}, 715 So. 2d at 1130.
\item \textsuperscript{80} Id.
\item \textsuperscript{81} Id.
\item \textsuperscript{82} Id. at 1131.
\item \textsuperscript{83} Id. at 1130.
\item \textsuperscript{84} \textit{White}, 715 So. 2d at 1130.
\item \textsuperscript{85} Id. at 1130–31.
\item \textsuperscript{86} Id. at 1131.
\item \textsuperscript{87} Id.; FLA. STAT. § 475.25(1)(d) (1999).
\item \textsuperscript{88} \textit{White}, 715 So. 2d at 1131.
\end{itemize}
B. Brokerage Agreements and Commissions

A.F.S. Services, Inc. v. Venturvest Realty Corp. Under the brokerage agreement, the broker (actually a co-broker in this situation) would earn the first half of its commission within thirty days after execution of the lease and the second half thirty days after the first month’s rent had been collected. A commercial tenant was procured. The tenant signed the lease and paid a deposit covering security and prepaid rent. However, eleven days later, the landlord and tenant signed a “Second Lease Addendum,” increasing the premises by approximately fifty percent. Eventually, the tenant defaulted on its obligations under the amended lease.

The broker claimed that it was entitled to its commission because it had fully performed. The landlord, however, pointed out that the lease also provided that, “[n]o commission shall be earned by Broker in the event of a monetary default by Tenant.” With the terms apparently in conflict, the trial court ruled for the landlord, but the district court reversed the decision in part. It ruled that the broker had earned the first half of the commission based upon the lease signing and the second half based upon the payment of the first month’s rent. The court concluded simply, “default under the Second Lease Addendum does not in any way affect A.F.S.’s entitlement to the commission that it had already earned.”

Earnest & Stewart, Inc. v. Codina. The sellers had an exclusive listing agreement with a broker. Under that listing agreement, the broker could pay a portion of its commission to a cooperating broker. Another broker, Earnest & Stewart, was aware that the house was for sale. One of its sales people informed the Coneses of that fact and offered to show them the house. The Coneses refused that offer because they were already

89. 725 So. 2d 1252 (Fla. 3d Dist. Ct. App. 1999), review denied, (Mar. 10, 1999).
90. Id. at 1253.
91. Id.
92. Id.
93. Id.
94. A.F.S. Servs., Inc., 725 So. 2d at 1253.
95. Id.
96. Id.
97. Id. at 1252.
98. Id. at 1253.
101. Id. at 365.
102. Id.
103. Id.
104. Id.
familiar with the house and knew the sellers. The Coneses dealt directly with the sellers in negotiating the deal which culminated with the sale of the house to the Coneses. Honoring their listing agreement, the sellers paid the real estate commission to their exclusive broker. Earnest & Stewart, however, claimed that they were also entitled to a real estate commission because they had procured the buyer.

Earnest & Stewart's claim was rejected by the trial court which granted summary judgment to the buyers and sellers and the Third District Court of Appeal affirmed. The claim was based on the theory that Earnest & Stewart had become the cooperating brokers and were entitled, as third party beneficiaries of the listing agreement, to share in the commission. The district court concluded they had produced a ready, willing and able buyer and, therefore, had not become cooperating brokers. Thus they had not earned a broker's commission. The court likened it to the situation where a broker merely tells a customer about a “For Sale” sign it has seen on the lawn of a property. That alone is not enough to earn a commission. The court did not, however, address the validity of the plaintiff's third party beneficiary theory. Furthermore, it specifically avoided dealing with the question of whether the broker, even if the theory had been valid, was entitled to sue the sellers and buyers, rather than the listing broker, for its share of the commission.

IV. CONDOMINIUMS

Graves v. Ciega Verde Condominium Ass'n, Inc. Nancy Graves, the personal representative to Fred Graves' estate, appealed the trial court's non-final order vacating an amended final judgment of foreclosure and canceling judicial sale against Ciega Verde Condominium Association, Inc. (“Ciega Verde”) and its unit owners in this foreclosure and construction lien action.

106. Id.
107. Id.
108. Id.
109. Id. at 365–67.
110. Earnest & Stewart, Inc., 732 So. 2d at 365 n.2.
111. Id. at 365–66.
112. Id. at 366.
113. Id.
114. Id.
115. 703 So. 2d 1109 (Fla. 2d Dist. Ct. App. 1997).
116. Id. at 1110.
Decedent, Fred Graves, as a general contractor, performed repair work to the condominiums pursuant to a contract. Ciega Verde later refused to pay Graves for his services and denied Graves access to the property. Graves served a claim of lien and a contractor's affidavit. Subsequently, Graves filed an amended complaint which sought to foreclose the mechanic's lien against the unit owners and sought recovery of damages for breach of contract against Ciega Verde. Graves sued the unit owners as a defendant class with Ciega Verde as class representative. Ciega Verde, in its individual capacity and as representative of the class, answered the amended complaint.

The contract portion of the complaint was set for binding arbitration where Graves was the prevailing party. "Graves served Ciega Verde with a motion to confirm the arbitration award and to set cause for trial on the foreclosure action against the unit owners." [T]he trial court entered final judgment in March 1996, . . . and set [judicial] sale for May 1996.

Counsel for unit owners "filed a motion to set aside the amended final judgment . . . [claiming] the trial court did not have jurisdiction to order foreclosure of the unit owners' property." Ultimately, the trial court granted the unit owners' motion to dismiss and dismissed them from the action. Since Graves failed to serve such unit owners "within 120 days from filing the original complaint as required by Florida Rule of Civil Procedure [Rule] 1.170(I) [sic]," he was precluded from filing the original complaint.

The district court recognized that the trial court erred in vacating the amended final judgment of foreclosure. The trial court had jurisdiction of the unit owners because they constituted a class with a common interest based on membership in Ciega Verde.

Ciega Verde's Declaration of Condominium stated that each unit owner was a member of the condominium association while they owned the unit.
When Ciega Verde authorized work to be performed on the common grounds, it was understood that the unit owners consented to that authorization.\textsuperscript{132} As such, Graves’ lien attached to each condo unit and could be foreclosed.\textsuperscript{133}

Each unit owner was not required to receive individual notice.\textsuperscript{134} It was the condominium’s board of directors’ fiduciary and statutory obligation to give unit owners notice of a lawsuit.\textsuperscript{135} Graves’ service upon Ciega Verde, the class representative, was sufficient.\textsuperscript{136} If the court wanted to require notice to the individual members, it should have provided Graves adequate time to do so.\textsuperscript{137}

\textit{Perlow v. Goldberg.}\textsuperscript{138} This court affirmed the order dismissing owner’s claims because the facts showed the directors could not be held liable in their individual capacity.\textsuperscript{139} Perlow sought personal judgments for breach of fiduciary duty against Goldberg and Leb for “failure to properly administer insurance proceeds.”\textsuperscript{140}

The condominium association directors were immune from individual liability absent fraud, self-dealing, or criminal activity.\textsuperscript{141} The court below relied on \textit{Munder v. Circle One Condominium, Inc.},\textsuperscript{142} which furthered this rule.\textsuperscript{143} This court agreed with that holding and stated the directors here were neither unjustly enriched nor did they commit fraud or a crime.\textsuperscript{144} At most, the directors were negligent by failing to properly administrate insurance proceeds from Hurricane Andrew.\textsuperscript{145} This negligence was not enough to create personal liability for the condominium directors.\textsuperscript{146}

The court also recognized that the owner’s reliance on \textit{B & J Holding Group v. Weiss}\textsuperscript{147} was unwarranted because the directors in that case deliberately engaged in self-dealing.\textsuperscript{148} That was not the situation here.\textsuperscript{149}

\begin{itemize}
  \item \textsuperscript{132} \textit{Id.} at 1112.
  \item \textsuperscript{133} \textit{Id.}
  \item \textsuperscript{134} \textit{Id.}
  \item \textsuperscript{135} \textit{Id.}
  \item \textsuperscript{136} Graves, 703 So. 2d at 1112.
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} 700 So. 2d 148 (Fla. 3d Dist. Ct. App. 1997).
  \item \textsuperscript{139} \textit{Id.} at 149.
  \item \textsuperscript{140} \textit{Id.}
  \item \textsuperscript{141} \textit{Id.; see} \textit{FLA. STAT. §§ 607.0831(1), 617.0834, 718.111(2)} (1995).
  \item \textsuperscript{142} 596 So. 2d 144 (Fla. 4th Dist. Ct. App. 1992).
  \item \textsuperscript{143} \textit{Perlow}, 700 So. 2d at 150.
  \item \textsuperscript{144} \textit{Id.}
  \item \textsuperscript{145} \textit{Id.}
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} 353 So. 2d 141 (Fla. 3d Dist. Ct. App. 1977).
  \item \textsuperscript{148} \textit{Perlow}, 700 So. 2d at 150; \textit{see B & J Holding Corp.}, 353 So. 2d at 142.
  \item \textsuperscript{149} \textit{Perlow}, 700 So. 2d at 150.
\end{itemize}
Kingswood E. Condominium Ass’n, Inc. Kingswood E. Condominium Association ("Kingswood") brought an arbitration proceeding under section 718.1255 of the Florida Statutes, against unit owner Mary Ruffin and her son, appellant Paul Ruffin. The reason for the arbitration was that Kingswood alleged that Mary Ruffin and the appellant were in violation of the condominium declarations. Kingswood requested the Division of Florida Land Sales, Condominium and Mobiles Homes of the Department of Business Regulation to issue an order requiring appellant as tenant to vacate the premises and restrain him from further entry. The appellant informed "the arbitrator that his mother had moved ... and therefore, the matter was moot." However, Kingswood wanted future protection. So, the arbitrator issued an order that "Mr. Ruffin shall remain away and off the condominium property."

The appellant filed a complaint for a trial de novo in circuit court and Kingswood moved for summary judgment on the grounds that the case was moot. The circuit court entered the summary judgment and reserved jurisdiction to assess attorneys' fees.

The appellate court, sua sponte, considered the subject matter jurisdiction of the arbitrator to have heard this action. The court looked at section 718.1255(1) of the Florida Statutes, and found that the arbitrator had no subject matter jurisdiction. The arbitrator may only hear disputes within its statutory authority and disputes that include disagreements involving eviction or other removal are not within the arbitrator's statutory authority. Further, the appellant was not the owner of the unit and, therefore, section 718.1255 did not cover disputes with the appellant.

Since the arbitrator lacked subject matter jurisdiction the trial de novo was not moot. If the appellant had not challenged the matter, the arbitrator's order would have become final. Therefore, this court reversed

150. 719 So. 2d 951 (Fla. 4th Dist. Ct. App. 1998).
151. Id. at 952; See FLA. STAT. § 718.1255 (1995).
152. Ruffin, 719 So. 2d at 952.
153. Id.
154. Id.
155. Id.
156. Id.
157. Ruffin, 719 So. 2d at 952.
158. Id.
160. Ruffin, 719 So. 2d at 953.
161. See id.
162. See id.; See Carlandia Corp. v. Obermauer, 695 So. 2d 408, 410 (Fla. 4th Dist. Ct. App. 1997).
163. Ruffin, 719 So. 2d at 953.
164. Id.
the final judgment and directed the trial court to enter an order vacating the arbitrator’s final order.\textsuperscript{165}

Current legislative changes include, but are not limited to, the following:

Section 718.111(11)(d) of the \textit{Florida Statutes}\textsuperscript{166} now includes subparagraph (d) which provides for the association to “maintain adequate insurance or fidelity bonding of all persons who control or disburse funds of the association.”\textsuperscript{167}

Section 718.112(d)(8) of the \textit{Florida Statutes}\textsuperscript{168} provides that, unless the bylaws provide otherwise, any vacancy on the board of directors of the association prior to the expiration of a term may be filled by a majority vote of the remaining directors even though they may constitute less than a quorum or by the sole remaining director.\textsuperscript{169} Alternatively, however, the board may hold an election to fill the vacancy.\textsuperscript{170}

Section 718.503(2)(a) of the \textit{Florida Statutes}\textsuperscript{171} has been amended to require that a unit owner who is not a developer shall include a copy of the financial information required by section 718.111 in the disclosure information presented to a prospective purchaser.\textsuperscript{172} Likewise, a prospectus or offering circular, per section 718.504\textsuperscript{173} of the \textit{Florida Statutes}, requires the same information to be included.\textsuperscript{174}

\section*{V. CONSTRUCTION}

\textit{Gaston-Thacker General Partners v. School Board.}\textsuperscript{175} The plaintiff was the successful bidder on a school construction project.\textsuperscript{176} The contract required that a certain percentage of the subcontract work be allocated to firms owned by hispanics, blacks, and women.\textsuperscript{177} To make it possible for the plaintiff to satisfy that requirement, the school board agreed to make bi-weekly progress payments to under financed subcontractors.\textsuperscript{178} As the

\begin{footnotesize}
165. \textit{Id.}
167. \textit{Id.}
168. \textit{Id.} § 718.112(d)(8).
169. \textit{Id.}
170. \textit{Id.}
172. \textit{Id.}
173. \textit{Id.} § 718.504.
174. \textit{Id.}
176. \textit{Id.} at D381.
177. \textit{Id.}
178. \textit{Id.} at D382.
\end{footnotesize}
project progressed, "it allegedly became clear to both parties that the drawings, specifications, and addenda were flawed and could not be used for the Project." That resulted in extra work for plaintiff and in delays in the progress payments to the subcontractors. To keep them working, plaintiff was forced to make their progress payments out of its funds. When payment was not forthcoming from the school board, the plaintiff brought this suit in federal district court claiming: 1) breach of contract; 2) rescission and restitution; and 3) quantum meruit. The school board responded with a motion to dismiss based on the clause in the contract that provided that, "[a]ll matters in dispute under this Contract and/or the Contract Documents shall be resolved in the Circuit Court for the 11th Judicial Circuit, In and For Dade County, Florida." There was no doubt that a forum selection clause can preclude removal of a claim to a federal court. Furthermore, there was no allegation that this forum selection clause was unreasonable or unjust, or that it had been procured by fraud or overreaching. Nor was there an allegation that the clause failed to unequivocally state the selected forum. Thus, there was no claim on which the clause could have been held invalid. Plaintiff’s argument was that its claims did not fit within reach of the clause and so it was free to bring these claims in federal court.

That argument was rejected by Chief Judge Davis. Even though the moving party had a heavy burden, the plaintiff could not survive the motion to dismiss merely by arguing that these claims did not arise under the contract. Analysis of the term led to the contrary conclusion. To interpret the contract as plaintiff wanted would allow parallel claims to be litigated simultaneously in state and federal court, and that could not have been what the parties intended by this clause, particularly as the contract was the only basis for the relationship out of which these claims arose.

179. Id.
181. Id.
182. Id.
183. Id.
184. See id.
186. Id.
187. Id.
188. Id. at D382–83.
189. Id.
191. Id. at 383.
192. Id.
Sabal Chase Homeowners’ Ass’n, Inc. v. Walt Disney World Co. 193 The condominium was built between 1973 and 1978. 194 In 1992, Hurricane Andrew severely damaged the common areas. 195 Consequently, in 1994, the Homeowners’ Association brought this action against, inter alia, the builder of the condominium, claiming latent construction defects. 196 The trial court granted the defendants’ motion for summary judgment based on the fifteen year statute of repose provided by section 95.11(3)(c) of the Florida Statutes. 197 The Third District Court of Appeal affirmed. 198

On appeal, the homeowners association unsuccessfully raised two points. 199 The first was that the statute was inapplicable because it was enacted in 1980, after the acts complained of had occurred. 200 The statute had originally been enacted in 1978, before the construction was completed, but the enactment was held invalid because the legislature had failed to make an express finding of overwhelming public necessity as required by the constitution. 201 The legislature cured that defect by reenacting the statute with an express finding, having the effect that “all parts of the original statute which were reenacted are deemed to have been in continuous effect.” 202

The second point was that the fifteen years had not expired because the time did not begin to run until the developer turned over control of the association to the unit owners. 203 This argument was based on section 718.124 of the Florida Statutes which provides that, “[t]he statute of limitations for any actions in law or equity which a condominium association or a cooperative association may have shall not begin to run until the unit owners have elected a majority of the members of the board of administration.” 204 The district court rejected this argument. 205 It noted that courts have clearly delineated the distinction between a statute of limitation and a statute of repose. 206 The fifteen year statute at issue here was clearly a

194. Id. at 797.
195. Id.
196. Id.
197. Id. (citing FLA. STAT. § 95.11(3)(c) (Supp. 1980)).
198. Sabal Chase Homeowners’ Ass’n, 726 So. 2d at 799.
199. Id. at 798.
200. Id. at 797–98.
201. Id. at 799 (citing Overland Constr. Co. v. Sirmons, 369 So. 2d 572 (Fla. 1979)).
202. Id. at 799.
203. Sabal Chase Homeowners’ Ass’n, 726 So. 2d at 798.
204. Id. at 798 n.1 (citing FLA. STAT. § 718.124 (1995)).
205. Id. at 799.
206. Id. at 798.
statute of repose, therefore, section 718.124 was not applicable to delay its application.207

Judge Cope’s dissent focused on the distinction of the statute of limitations and the statute of repose considered in the majority’s opinion.208 Judge Cope disliked the fact that the term statute of limitations is technically distinguishable from a “statute of repose,” but has been used generically to include all statutes that impose time limits for bringing suit.209 The Florida Legislature seems to use the generic definition by including this statute of repose in chapter ninety-five under the general term “statute of limitations.”210 In interpreting a statute, the critical question is what the legislature intended.211 Furthermore, any doubt regarding the limit intended by the legislature, should be resolved in favor of the longer period because limitations defenses are not preferred.212

VI. COOPERATIVES

Current legislative changes include, but are not limited to, the following:

Section 719.103 of the Florida Statutes has added additional definitions including those for “buyers,” “common areas,” and “conspicuous type.”213 A “buyer” is one “who purchases a cooperative,” and the words “purchaser” and “buyer” may be used interchangeably within the act.214 “Common areas” now include, among other things, cooperative property which is not included within the units.215 “Conspicuous type” means typing capital letters not smaller than the largest type on the page on which it appears.216 Also, there are additional definitions for “division,” “limited common areas,” “rental agreement,” and “residential cooperative.”217

Section 719.1035 of the Florida Statutes has been amended to require that, upon creating a cooperative, the developer or association must record the information with the division, on a division form, within thirty working days.218

207. Id. at 799.
208. Sabal Chase Homeowners’ Ass’n, 726 So. 2d at 799–801 (Cope, J., dissenting).
209. Id. at 800.
210. Id. at 801.
211. Id. at 800–01.
212. Id. at 801.
213. FLA. STAT. § 719.103 (1999).
214. Id. § 719.103(4).
215. Id. §§ 719.103(7), (8)(a).
216. Id. § 719.103(11).
217. Id. §§ 719.103(17), (18), (20), (21).
Section 719.104 of the *Florida Statutes* now includes subpart (10), requiring the board to notify the division before any action is taken that would dissolve or merge the cooperative association.\(^{219}\)

Section 719.502(1)(a) of the *Florida Statutes* now includes a provision that states:

\[\text{[a] developer shall not close on any contract for sale or contract for}
\]
\[\text{a lease period of more than 5 years until the developer prepares and}
\]
\[\text{files with the division documents complying with the requirements}
\]
\[\text{of this chapter and the rules promulgated by the division and until}
\]
\[\text{the division notifies the developer that the filing is proper.}\]

Further, any contract for sale or for a lease period of more than five years shall not be closed on by the developer until all documents, as required by section 719.503(1)(b), are prepared and delivered by the developer to the prospective buyer.\(^{221}\)

Section 719.503(1)(b) of the *Florida Statutes* has an added provision requiring that:

\[\text{[t]he developer shall not close for 15 days following the}
\]
\[\text{execution of the agreement and delivery of the documents to the}
\]
\[\text{buyer as evidenced by a receipt for documents signed by the buyer}
\]
\[\text{unless the buyer is informed in the 15-day voidability period and}
\]
\[\text{agrees to close prior to the expiration of the 15 days.}\]

The developer must keep in its records "a separate signed agreement as proof of the buyer's agreement to close prior to the expiration of the voidability period."\(^{222}\)

Section seven of Chapter 99-350 of the *Laws of Florida* adds section 718.105(5) to the 1999 *Florida Statutes*, requiring the filing of a certificate demonstrating all taxes have been fully paid.\(^{224}\)

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219. *Id.* § 719.104(10).
220. *Id.* § 719.502(1)(a).
221. *Id.*
222. *Id.* § 719.503(1)(b).
VII. DEEDS, RESTRICTIONS, AND COVENANTS

Mora v. Karr. 225 The court affirmed the trial court’s denial of the temporary injunction to the Moras, regarding a violation of deed restrictions. 226 Karr wished to purchase a home and rebuild so that it would contain “a three car garage and a twenty five foot setback.” 227 However, deed restrictions only allowed a two car garage and required a thirty-five foot setback. 228 Karr secured a waiver to those restrictions from the developer and from adjacent property owners prior to the purchase. 229 After closing, Mr. Mora, an adjacent property owner and attorney, wrote Karr a letter stating that he would sue over the deed restrictions he waived. 230 Karr continued with construction, and Mora sued. 231

Both the trial court, and this court, denied injunctive relief to Mora. 232 The most compelling evidence was the fact that Mora waived the deed restrictions prior to the construction, and that Karr relied on that waiver in making the purchase. 233

VIII. EASEMENTS

Citgo Petroleum Corp. v. Florida East Coast Railway Co. 234 Final judgment was entered which quieted title to certain property in favor of Florida East Coast Railway Company (“FEC”). 235 The appellate court reversed, finding that “Citgo was granted an express easement to construct and maintain a pipeline on the subject property . . . and that Citgo’s failure to record this easement does not render it ineffectual against FEC since FEC was on inquiry notice of its existence.” 236

The events giving rise to this dispute involved the expansion of the Fort Lauderdale-Hollywood International Airport and the resulting utilities relocation. 237 Citgo’s licensing contract with FEC provided them with the “right and privilege” to operate a pipeline under FEC’s main track, and

225. 697 So. 2d 887 (Fla. 4th Dist. Ct. App. 1997).
226. Id. at 888.
227. Id.
228. Id.
229. Id.
230. Mora, 697 So. 2d at 888.
231. Id.
232. Id.
233. Id.
234. 706 So. 2d 383 (Fla. 4th Dist. Ct. App. 1998).
235. Id. at 384.
236. Id.
237. Id.
across their right-of-way.\textsuperscript{238} FEC's right-of-way and Citgo's pipeline both had to be repositioned when the airport was expanded.\textsuperscript{239} Citgo and Florida's Department of Transportation ("DOT") agreed to reestablish the pipeline.\textsuperscript{240} The stipulated agreement stated that property rights along the original pipeline belonged to Citgo. It also provided that Citgo transfer those property rights to the DOT in exchange for allowing Citgo to reposition and operate the pipeline on other DOT property.\textsuperscript{241}

Citgo informed FEC that the pipeline was to be reestablished across the proposed relocation of FEC's right-of-way.\textsuperscript{242} FEC sent Citgo the appropriate engineering specifications, as well as an application for a new licensing agreement.\textsuperscript{243} FEC remained adamant that, until it reached an agreement with Broward County to reposition its right-of-way, it was unable to consider granting Citgo a utility crossing permit.

FEC and Broward County eventually "reached an agreement with Broward County to relocate the railroad track."\textsuperscript{245} That agreement provided that FEC would transfer its existing right-of-way, and in exchange retrieve a replacement right-of-way to Broward County.\textsuperscript{246} The parcels of land comprising the new right-of-way were transferred to FEC, which promptly recorded the quitclaim deed.\textsuperscript{247} Citgo did not maintain any easements on record regarding this property.\textsuperscript{248}

The new right-of-way was to be transferred to FEC "free and clear of all encumbrances."\textsuperscript{249} However, FEC was required to "grant easements, licenses, and permits to various utility companies ... to allow storm sewers, fuel lines, and other appurtenances to cross the new right-of-way."\textsuperscript{250} No mention was made of the relocated Citgo pipeline.

FEC sent Citgo an additional application for a licensing agreement.\textsuperscript{252} As before, this licensing agreement was never executed.\textsuperscript{253} After FEC's railroad tracks and Citgo's pipeline were fully completed, it was evident that

\begin{itemize}
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} Citgo, 706 So. 2d at 384.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id.
  \item \textsuperscript{242} Id.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Citgo, 706 So. 2d at 384.
  \item \textsuperscript{245} Id.
  \item \textsuperscript{246} Id.
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} Id.
  \item \textsuperscript{249} Citgo, 706 So. 2d at 384.
  \item \textsuperscript{250} Id.
  \item \textsuperscript{251} Id.
  \item \textsuperscript{252} Id.
  \item \textsuperscript{253} Id.
\end{itemize}
the railroad track was built between two of the pipeline’s protruding vents. In response, FEC brought suit to quiet title.

Citgo argued that it had an express easement due to the earlier agreement with the DOT. After the proceedings began, Citgo recorded a Notice of Easement. The court concluded that FEC was not on inquiry notice of any “potential unrecorded easement,” that Citgo was never granted an easement, and that Citgo’s Notice of Easement was null and void. Citgo appealed the court’s final judgment.

Under de novo review, the appellate court was convinced that the 1983 Agreement granted Citgo an express easement to operate and preserve the reestablished pipeline. The court stated that “[a]n easement is the right in one other than the owner of the land to use land for some particular purpose or purposes.” The applicable rule to determine whether the agreement did in fact grant Citgo an easement, is that “no particular form and language are necessary to create an easement; rather, any words clearly showing the intention of the parties to create a servitude on a sufficiently identifiable estate is sufficient.” No provision in the 1983 Agreement affirmatively established that an easement was not intended.

The court also rejected FEC’s argument that the easement was ineffectual against FEC because of Citgo’s failure to record it. In Florida, the recording act subjects FEC to Citgo’s pre-existing, unrecorded easement, unless FEC was “without notice” of it. “If the circumstances known to FEC when it acquired the subject property were ‘such as should reasonably suggest inquiry’ into Citgo’s property rights, then FEC is deemed to be on ‘inquiry notice’ of—and bound by—those encumbrances which would have

254. Citgo, 706 So. 2d at 385.
255. Id.
256. Id.
257. Id.
258. Id.
259. Citgo, 706 So. 2d at 385.
260. Id.
261. Id. (quoting Dean v. MOD Properties, Ltd., 528 So. 2d 432, 433 (Fla. 5th Dist. Ct. App. 1988)).
262. Id. (quoting Hynes v. City of Lakeland, 451 So. 2d 505, 511 (Fla. 2d Dist. Ct. App. 1984)).
263. Id.
264. Citgo, 706 So. 2d at 385.
265. Id.
266. Id.; see Fla. Stat. § 695.01(2) (1995).
been discovered upon a reasonable inquiry."\textsuperscript{267} This court concluded that "Citgo's actual, open, and obvious possession by construction of a conspicuous pipeline placed FEC on inquiry notice of Citgo's easement."\textsuperscript{268}

\textit{H & F Land, Inc. v. Panama City-Bay County Airport & Industrial District.}\textsuperscript{269} The issue before the court was "whether the Marketable Record Title Act (hereinafter MRTA) Chapter 712, of the Florida Statutes, operates to extinguish an otherwise valid claim of an easement of necessity, when such a claim has not been asserted within 30 years, as required by [the Act].\textsuperscript{270}

The appellate court recognized the general rule that a "landowner has a right to access his land."\textsuperscript{271} However, it disagreed with H & F, the owner of a landlocked estate, that its claim deserved different treatment from any other claim of an interest in land which did not fall within an exception to the MRTA, and which had not been asserted in a timely matter.\textsuperscript{272}

The MRTA was devised to streamline conveyances of real property, balance titles, and provide assurance to land ownership.\textsuperscript{273} A party can only blame himself if he fails to provide proper notice.\textsuperscript{274} The legislature intended to afford a means to preserve old claims and interests, and to give a reasonable time period to take steps to accomplish the purpose.\textsuperscript{275}

Since the policies underlying the MRTA conflict with the public policy that "lands should not be rendered unfit for occupancy or cultivation," the court certified a question of great public importance:

\section*{DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, OPERATE TO EXTINGUISH AN OTHERWISE VALID CLAIM OF A COMMON LAW WAY OF NECESSITY WHEN SUCH CLAIM WAS NOT ASSERTED WITHIN 30 YEARS?}\textsuperscript{276}

\begin{itemize}
\item \textsuperscript{267.} \textit{Citgo}, 706 So. 2d at 386 (citing Chatlos v. McPherson, 95 So. 2d 506, 509 (Fla. 1957)).
\item \textsuperscript{268.} \textit{Id.}
\item \textsuperscript{269.} 706 So. 2d 327 (Fla. 1st Dist. Ct. App. 1998).
\item \textsuperscript{270.} \textit{Id. at 327.}
\item \textsuperscript{271.} \textit{id.; see} Roy v. Euro-Holland Vastgoed, 404 So. 2d 410 (Fla. 4th Dist. Ct. App. 1981).
\item \textsuperscript{272.} \textit{H & F Land, Inc.}, 706 So. 2d at 328.
\item \textsuperscript{273.} \textit{Id.} (citing City of Miami v. St. Joe Paper Co., 364 So. 2d 439, 444 (Fla. 1978)).
\item \textsuperscript{274.} \textit{Id.}
\item \textsuperscript{275.} \textit{Id.}
\item \textsuperscript{276.} \textit{Id.}
\end{itemize}
Highland Constuction, Inc. v. Paquette.\textsuperscript{277} This court affirmed final judgment granting Paquette an implied easement over Highland's property.\textsuperscript{278} Paquette sued Highland requesting an implied easement be granted over Vickers Street.\textsuperscript{279} Once Vickers Street was abandoned, ownership reverted to Highland.\textsuperscript{280}

With regard to determining the existence of an implied easement, Florida adopted the "beneficial" or "complete enjoyment rule."\textsuperscript{281} This rule states that the grantee acquires the right to all streets in the plat advantageous to him.\textsuperscript{282} If the grantee can show he will suffer injury, differing in degree and kind from everyone else, he is authorized to acquire an implied easement.\textsuperscript{283} Paquette satisfied the beneficial enjoyment rule.\textsuperscript{284} Since they operate two car businesses on their property, and Vickers Street was the only viable entrance to these establishments, the loss of this access would impair the business.\textsuperscript{285} As such, the implied easement was granted.\textsuperscript{286}

Sears, Roebuck & Co. v. Franchise Finance Corp. of America.\textsuperscript{287} This court reversed a final summary judgment that "declared a condition in a nonexclusive easement unenforceable and void."\textsuperscript{288} Sears owns real property where it operates a retail store, adjacent to a retail shopping center owned by Bradenton Mall Associates ("Developer").\textsuperscript{289} Sears and Developer managed their parcels under a joint Operating Agreement because they had adjacent parcels and parking lots that were connected.\textsuperscript{290} Southern Homes Park, Inc. ("Southern"), a corporate affiliate of Developer, owned an "outparcel" adjacent to the others but only accessible through the Sears parking lot.\textsuperscript{291} In 1987, Southern sold its outparcel to Suncoast Rax, Inc. ("Suncoast"), on the condition that Southern acquired an ingress and egress easement to the "outparcel" over a section of the Sears parking lot.\textsuperscript{292} At the same time, Suncoast, was contracting to sell the "outparcel" and easement, if acquired,

\begin{itemize}
\item \textsuperscript{277} 697 So. 2d 235 (Fla. 5th Dist Ct. App. 1997).
\item \textsuperscript{278} Id. at 236.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Id.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} Paquette, 697 So. 2d at 236.
\item \textsuperscript{283} Id.
\item \textsuperscript{284} Id. at 237.
\item \textsuperscript{285} Id.
\item \textsuperscript{286} Id.
\item \textsuperscript{287} 711 So. 2d 1189 (Fla. 2d Dist. Ct. App. 1998).
\item \textsuperscript{288} Id. at 1190.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Id.
\item \textsuperscript{291} Id.
\item \textsuperscript{292} Sears, 711 So. 2d at 1190.
\end{itemize}
to the appellee, Franchise Finance Corporation of America ("F.F.C.A."). However, F.F.C.A. agreed to lease the property back to Suncoast. Developer and Sears agreed that Sears would grant the easement to Suncoast, and Developer, in return, would sweep both the Developer parking area and the Sears entire parking area. The easement provided:

The rights granted herein shall be perpetual, but shall expire in the event that:

(iii) Developer ... shall fail to sweep that portion of Grantor's parcel devoted to customer parking and which includes the Easement Parcel ("Parking Parcel") as shown in yellow on Exhibit C hereto. Grantor, its employees, agents or contractors shall upon written notice to both Developer and Grantee, have the right, at its cost and expense, to sweep the Parking Parcel. In the event that after notice Developer and/or Grantee fails to or refuses to cure, Grantor shall have the right to terminate the easements granted herein by filing a Notice of Termination of Easement in the Public Records of Manatee County, Florida, thirty (30) days, after written notice to both Grantee and Bradenton.

In 1990, Suncoast went out of business and F.F.C.A. terminated the lease. In November, 1992, Developer sent F.F.C.A. an invoice for the annual cost of sweeping the Sears parking area. Developer notified F.F.C.A. that if the invoice was not paid, the Developer would cease sweeping the Sears parking area. F.F.C.A. refused to pay the invoice, and fearing that Sears may want to terminate the easement, brought its declaratory action to have the "sweeping" condition proclaimed void and unenforceable. The trial court declared the forfeiture provision unenforceable under section 689.18 of the Florida Statutes because it provides that "reverter or forfeiture provisions of unlimited duration in the conveyance of real estate or any interest therein in the state constitute an unreasonable restraint on alienation and are contrary to the public policy of the state."

293. Id.
294. Id.
295. Id.
296. Id.
297. Sears, 711 So. 2d at 1190.
298. Id.
299. Id. at 1191.
300. Id.
301. Id.; FLA. STAT. § 689.18 (1999).
The appellate court rejected this argument, because a grant of easement is not a conveyance of a proprietary interest in real property.\textsuperscript{302} An easement only grants the right to use property for some particular purpose, and does not transfer title to land or disinherit the owner of the land subject to easement.\textsuperscript{303} Therefore, this court concluded that “a specified condition to the continuance of an easement agreed upon by the parties... is not an encumbrance to the marketability of title to real estate” which is meant to be protected by section 689.18 of the \textit{Florida Statutes}.\textsuperscript{304} Basements that cease upon the occurrence of a clearly defined condition have been recognized in the past.\textsuperscript{305}

Furthermore, this court found it was an error of the trial court to apply section 689.18.\textsuperscript{306} Even if it did apply, the forfeiture provision would only become void twenty-one years after the granting of the easement, because section 689.18 (3) and (4) provide that the provisions do not become void until twenty-one years after the conveyance has passed.\textsuperscript{307}

\textit{Shiner v. Baita.}\textsuperscript{308} Shiner sought to terminate a real property right reserved by Baita through a deed given by Baita to Shiner’s predecessor in interest.\textsuperscript{309} A reservation was placed in the deed by Baita, the original grantor of the property which stated:

Grantors reserve to themselves, their heirs and assigns the right to a hook-up to septic tank located on the land herein conveyed, said septic tank being located to the Southeast of the acre being retained by the Grantors herein with the understanding that responsibility of maintaining said septic tank shall remain with the Grantors, their heirs and assigns, and for purposes of maintenance the Grantors, their heirs and assigns, shall have the right to ingress and egress to maintain said septic tank. It is understood this reservation of use of the septic tank is to continue indefinitely but that should Grantee, his successors or assigns determine later that connection to septic tank interferes with use of property herein conveyed, Grantee, his successors or assigns shall have the right to pay expenses necessary to construct a septic tank on the premises which are herein reserved

\textsuperscript{302} \textit{Sears}, 711 So. 2d at 1191.
\textsuperscript{303} \textit{Id.; see Easton v. Appler}, 548 So. 2d 691, 696 (Fla. 3d Dist. Ct. App. 1989); \textit{see also Dean v. MOD Properties, Ltd.}, 528 So. 2d 432, 433 (Fla. 5th Dist. Ct. App. 1988).
\textsuperscript{304} \textit{Sears}, 711 So. 2d at 1191.
\textsuperscript{305} \textit{Id.; see Dotson v. Wolfe}, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980).
\textsuperscript{306} \textit{Sears}, 711 So. 2d at 1192.
\textsuperscript{307} \textit{Id.} (citing \textit{FLA. STAT.} §§ 689.18(3), (4) (1987)).
\textsuperscript{308} 710 So. 2d 711 (Fla. 1st Dist. Ct. App. 1998).
\textsuperscript{309} \textit{Id.} at 711.
by the Grantors, and then in that event, this right of hook-up to septic tank shall cease and be of no further force and effect. 310

Shiner elected to construct a septic tank on the property still held by Baita, because she believed she had the right to do so after acquiring the property. 311 Shiner felt that this action would end the reserved right for Baita's septic tank hook up. 312 Baita, who intended to develop a mobile home park, disputed Shiner's view. 313

The lower court found the restrictive covenant to be ambiguous, and Shiner's septic tank would deprive Baita of using her property. 314 Therefore, the lower court held that Shiner could not take any action regarding the septic tank that would deprive Baita from using and enjoying her property. 315

The appellate court reversed the lower court's decision. 316 First, the court found that a restrictive covenant did not exist. 317 Rather, a reservation existed and that the deed created an easement, not a restrictive covenant. 318 Although an easement is often permanent, it does not have to be, and may in fact end upon the happening of a condition. 319

When there is a grant of easement, "'[t]he intent of the parties . . . is determined by a fair interpretation of the language.'" 320 When the language is unambiguous, the court must look at the plain meaning. 321 This court found that there was no ambiguity in the language of the deed, and it clearly shows that if the grantee determines that the septic tank interferes with their use of the property, they may construct a septic tank on the property and the hook-up septic tank shall cease. 322 Therefore, because "'[t]he easement holder cannot expand the easement beyond what was contemplated at the

310. Id. at 711–12.
311. Id. at 712.
312. Id.
313. Shiner, 710 So. 2d at 712.
314. Id.
315. Id.
316. Id. at 713.
317. Id. at 712.
318. Shiner, 710 So. 2d at 712; see Homer v. Dadeland Shopping Ctr., Inc., 229 So. 2d 834, 836 (Fla. 1969).
319. Shiner, 710 So. 2d at 712; see Dotson v. Wolfe, 391 So. 2d 757, 759 (Fla. 5th Dist. Ct. App. 1980).
320. Shiner, 710 So. 2d at 712 (quoting Walters v. McCall, 450 So. 2d 1139, 1142 (Fla. 1st Dist. Ct. App. 1984)).
322. Shiner, 710 So. 2d at 712.

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time it was granted,""323 the appellate court held that the appellant is permitted to enforce the unambiguous provisions and reversed the lower court's order.324

IX. ELECTIVE SHARE

Chapter 99-343 of the Laws of Florida provides numerous changes to section 732 of the Florida Statutes, including, but not limited to, expanding the elective share right to various assets not included in the probate estate.325

X. EMINENT DOMAIN

A. Condemnation

1. In General

Buried in 1999 Fla. Laws. ch 385, a huge act relating to the DOT,326 are some significant changes to the eminent domain statutes.327 The most important changes are that section 73.015(1) of the Florida Statutes will require every condemner to: 1) provide the landowner with notice by certified mail of the planned taking; 2) make a written offer to buy the land; and 3) negotiate in good faith before filing the condemnation petition.328 The condemner is also required to notify the owners of businesses located on the land.329 The condemner will no longer be allowed to take an entire property when that is not needed for the condemner’s project, but taking the whole would be cheaper because that approach would avoid having to pay business damages.330 Section 73.015(4) of the Florida Statutes will provide for attorneys’ fees and costs when the parties reach

324. Shiner, 710 So. 2d at 713.
325. 1999 Fla. Laws ch. 99-343 (codified at FLA. STAT. § 732 (1999)).
326. Under article III, section 5 of the Florida Constitution, a legislative act is limited to one subject. If this act satisfies the one subject rule, then the rule is entirely meaningless.
327. For further discussion see Bain, supra, note 4, at 68.
328. Ch. 99-385, § 57(1), 1999 Fla. Laws 3820, 3823 (codified at FLA. STAT. § 20.23 (1999)).
329. Id. § 57(2), 1999 Fla. Laws at 3825 (codified at FLA. STAT. § 206.45 (1999)).
330. FLA. STAT. § 337.27(2) (1999) has been eliminated; Ch. 99-385, § 64, 1999 Fla. Laws 3820, 3826–27 (codified at FLA. STAT. § 215.615 (1999)).
agreement without litigating, however, the condemnee will no longer be able to recover prejudgment interest on attorneys' fees and costs. Boulis v. Florida Department of Transportation. At trial, the condemnee succeeded in winning a verdict that valued the land substantially higher than the Department of Transportation had claimed. As costs, the condemnee was awarded expert witness fees, but the trial court denied his claim for prejudgment interest on that amount. The Fifth District Court of Appeal affirmed, but the decision was reversed by a unanimous Supreme Court of Florida.

The holding was narrow. "[P]rejudgment interest is to be awarded on reasonable costs in eminent domain proceedings, but only from the date those costs were actually paid and only after the trial court makes a determination of entitlement to the costs." The decision was based upon the mandate of the Florida Constitution that the state pay "full compensation" for property taken, and the statute that provides for "all reasonable costs incurred." The court clarified that, "Boulis should be awarded prejudgment interest from the date of payment once the trial court determines reasonable entitlement." This is consistent with the supreme court's earlier determination that prejudgment interest could be awarded on attorneys' fees in appropriate cases. However, the legislature reacted quickly and tried to overrule Boulis. It will be interesting to see if that will be successful.

331. Ch. 99-385, § 57(4), 1999 Fla. Laws 3820, 3825 (codified at FLA. STAT. § 73.091 (1999)).
332. Id. § 60, 1999 Fla. Laws at 3880 (codified at FLA. STAT. § 73.091 (1999)).
333. 733 So. 2d 959 (Fla. 1999).
334. Id. at 960–61.
335. Id. at 961.
336. Id. at 961, 963.
337. Boulis, 733 So. 2d at 963.
338. Id.
339. FLA. CONST. art. X, § 6(a).
341. Boulis, 733 So. 2d at 962 (emphasis added).
342. Quality Eng'd Installation, Inc. v. Higley, Inc., 670 So. 2d 929 (Fla. 1996). In contrast, the supreme court held, in Lee v. Wells Fargo Armored Services, 707 So. 2d 700, 702 (Fla. 1998), that prejudgment interest on attorneys' fees was not available in workers compensation cases due to the language of Section 440.34(1) of the Florida Statutes. Lee, 707 So. 2d at 702.
343. Ch. 99-385, § 60, 1999 Fla. Laws 3820, 3880 (codified at FLA. STAT. § 73.091 (1999)).
344. See the statutory changes discussed supra at notes 3–7.
Blockbuster Video, Inc. v. Florida Department of Transportation. The tenant operated a store in a strip mall. When the landlord decided to sell the mall, it kept an outparcel and agreed to relocate the tenant to a new building there. When the new building was ready, the tenant’s inventory was shifted to it, about fifty feet away. The business was shut down for only a few hours during the move. The business reopened with the same address, the same telephone number and the same customers.

Later, the DOT took a section of the store and parking lot in a road widening project. The tenant claimed statutory business damages. The trial court granted the DOT’s motion for summary judgment on the grounds that the store had not operated in that location for five years, as required by the statute. The tenant appealed on the grounds that it met the statutory five-year period, when including its period of occupying the original store in the calculation.

The Second District Court of Appeal reversed, holding the summary judgment as inappropriate. It acknowledged that recovery of business damages was a matter of “legislative largess,” and therefore, should be strictly construed. However, it considered the legislative purpose behind the statute and the plain meaning of “location” more convincing. “Any reasonable definition of ‘location’ creates only one location for [the tenant] under the facts in this case.” Moreover, it rejected application of the “parent tract” as the applicable test, holding that it is a doctrine used in determining whether severance damages could be recovered, and having no application to a business damages determination.

Grandpa’s Park, Inc. v. Florida Department of Transportation. When the DOT took 0.665 acres from Grandpa’s Park, it claimed damages for the diminution in value of its remaining 107 acres due to downzoning.

345. 714 So. 2d 1222 (Fla. 2d Dist. Ct. App. 1998).
346. Id. at 1223.
347. Id.
348. Id.
349. Id.
350. Blockbuster, 714 So. 2d at 1223.
351. Id.
353. Blockbuster, 714 So. 2d at 1223.
354. Id.
355. Id. at 1225.
356. Id at 1223–24.
357. Id. at 1224.
358. Blockbuster, 714 So. 2d at 1224.
359. Id.
360. 726 So. 2d 789 (Fla. 1st Dist. Ct. App. 1998).
and impairment of access resulting from the elimination of its two access routes.\textsuperscript{361} The trial court denied recovery, and the district court affirmed.\textsuperscript{362}

Regarding the downzone claim, the court noted that the general rule is that the value of the condemned property is based on the facts existing at the time of the taking, but there is an exception when the property value at that time is depressed by the market's anticipation of that taking.\textsuperscript{363} However, Grandpa's Park did not fit into that exception because, at the trial court level, the DOT had not influenced the city to downzone the land, nor had the city downzoned it in anticipation of the taking of the 0.665 acres.\textsuperscript{364}

The claim for diminution in value of the land retained was also rejected.\textsuperscript{365} The rule is that a partial taking does not entitle a person to compensation for a decrease in the value of land retained.\textsuperscript{366} The exception to this rule is where the land taken "'constitutes an integral and inseparable part of a single use to which the land taken and other adjoining land is put.'"\textsuperscript{367} The court found this exception inapplicable because the loss of access was not caused by diminishing access from an abutting road.\textsuperscript{368} The court concluded Grandpa's "'theory that, in effect, it has been deprived of all reasonable use of the property, is more appropriate in the context of an inverse condemnation claim.'"\textsuperscript{369}

Judge Booth dissented.\textsuperscript{370} He noted that the effect of the downzoning and condemnation was to leave Grandpa's with a 107-acre tract of land on which he is able to construct two residences, with no permitable access.\textsuperscript{371} Moreover, Judge Booth argued that the majority had misread the law on decreasing land value, due to the threat of condemnation, by focusing on the actual filing of the condemnation rather than the announcement of intent to condemn.\textsuperscript{372} Thus, "'[f]actual issues existing as to these matters were improperly removed from the jury's consideration.'"\textsuperscript{373}

\textsuperscript{361.} Id. at 790.
\textsuperscript{362.} Id.
\textsuperscript{363.} Id.
\textsuperscript{364.} Id.
\textsuperscript{365.} Grandpa's Park, 726 So. 2d at 791.
\textsuperscript{366.} Id.
\textsuperscript{367.} Id. (quoting Lee County v. Exchange Nat'l Bank, 417 So. 2d 268, 269 (Fla. 2d Dist. Ct. App. 1982)).
\textsuperscript{368.} Id.
\textsuperscript{369.} Id.
\textsuperscript{370.} Grandpa's Park, 726 So. 2d at 791. (Booth, J., dissenting).
\textsuperscript{371.} Id.
\textsuperscript{372.} Id. at 793.
\textsuperscript{373.} Id. at 791.
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Seminole County v. Sanford Court Investors, Ltd. The County engaged in a road widening project that required taking part of the parking lot owned by Cumberland Farms. At that time, Cumberland had two tenants, Deis and Hancock. Deis' original written lease had expired and he was then under a month to month lease. Hancock was under an extension of its original lease. More than two years after the filing of the condemnation action, Cumberland Farms notified these tenants that their leases were being terminated so it could build itself a new larger store. In a letter to Deis, Cumberland Farms stated, but for the condemnation, Deis would have continued to be its "tenant for the indefinite future." In the condemnation proceeding, Deis and Hancock sought business damages. Their expert witness was allowed to testify about their business damages, calculated on the theory that their leases would be continually renewed for the indefinite future. He based this on the past history of renewals by Cumberland Farms. The district court found that the admission of this testimony amounted to error.

Business damages are provided by statute, not by constitutional mandate. A statute providing such legislative largess is to be narrowly construed. Consequently, a tenant is entitled to recover business damages based only upon its leasehold interest at the time of the taking. Thus, Deis was entitled to business damages suffered over a one month period, and Hancock was entitled to business damages until the lease was properly terminated by the landlord, prior to the end of its current term. The district court also found the trial court had erred in allowing, as business damages, the losses suffered when the tenants auctioned off their inventory and other personal property in order to vacate the premises. The tenants never presented "any evidence [showing that] they were required to

374. 24 Fla. L. Weekly D1056 (5th Dist. Ct. App. Apr. 30, 1999) (the opinion cited was later withdrawn and superceded on clarification by Seminole County v. Sanford Court Investors, 743 So. 2d 1165 (Fla. 5th Dist. Ct. App. 1999)).
375. Id. at D1056.
376. Id.
377. Id.
378. Id.
379. Sanford, 24 Fla. L. Weekly at D1056.
380. Id.
381. Id.
382. Id.
383. Id.
384. Sanford, 24 Fla. L. Weekly at D1056.
385. Id.; See FLA. STAT. § 73.071(3)(b) (1995).
386. Sanford, 24 Fla. L. Weekly at D1056.
387. Id. at D1057.
388. Id.
move their business property as a result of the County’s taking.”

They were vacating because the landlord had terminated their leases, and apparently, the district court did not consider the “but for” letter sufficient to establish the causal connection between the taking and the landlord’s decision to terminate.

*Florida Department of Transportation v. Powell.* The DOT brought this condemnation action as part of a project funded by the Federal Highway Administration. Naegele owned a billboard and leased space for it on the land that was being taken. This qualified as a nonconforming use because a new ordinance prohibiting off site signs was enacted. Thus, he could not move his sign to another location. Since federal funds were involved, the Federal Uniform Relocation Act applied, and Naegele was entitled to compensation under it. The trial court ruled that the federal statute required separate trials, one for the billboard taking and the other for the taking of the freehold. The district court disagreed, but refused to reverse. The Federal Uniform Relocation Act did abrogate the unity rule under which the value of the property taken must be calculated and then apportioned between the owners of the various interests. However, it only required that the jury consider the value of the leasehold separately, and that could be accomplished without separate trials. In this record, the trial court, in an exercise of its discretion, could have severed the billboard taking, thus holding separate trials did not amount to reversible error.

On appeal, the DOT challenged the admission of expert valuation testimony that utilized the gross rent multiplier approach. The DOT claimed that the method allowed, in effect, the recovery of business damages that were not provided for by the statute, which only allowed recovery of “just compensation.” The district court rejected this argument.

389. *Id.*
390. *Id.* For the same reason, the tenants’ claim for moving expenses was rejected. *Id.*
392. *Id.* at 796.
393. *Id.*
394. *Id.*
395. *Id.*
397. *Powell,* 721 So. 2d at 796–97.
398. *Id.* at 797.
399. *Id.*
400. *Id.*
401. *Id.*
402. *Powell,* 721 So. 2d at 797–98.
403. *Id.* at 798.
404. *Id.*
405. *Id.*
structure has been taken, the statute allows the owner to recover the greater of the fair market value of the structure or the amount the structure contributes to the value of the land. The statute did not provide the method by which these values were to be calculated. Naegle's expert used both an income approach and a market approach, based on the gross rent multiplier, to calculate the fair market value of the structure. The two methods produced approximately the same result. Therefore, it was not error to allow the gross rent multiplier testimony into evidence.

2. Quick Taking

*Florida Department of Transportation v. Barbara's Creative Jewelry.* The DOT began a road widening project. It decided to take appellee's entire parcel, because a study that the DOT performed indicated that it would ultimately cost less than a partial taking, which would include the payment of severance damages. By statute, the legislature has recognized that reducing the costs of a property acquisition is a public purpose that justified taking the additional land. However, the owner objected, and argued that a partial taking would not be more expensive. Logically, determining which would be more expensive involved calculating what the condemnation award would be for both a partial taking and a full taking. The trial judge reasoned that valuation of the property in eminent domain was a jury question, thus determining which was more expensive was also a jury question. Therefore, the judge denied the petition for a quick taking. The Fourth District reversed.

The condemning authority has the burden of showing that there was a reasonable necessity for condemnation. Whether or not the authority has

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406. *Id.*

407. *Powell, 721 So. 2d at 798.*

408. *Id.*

409. *Id.*

410. *728 So. 2d 240 (Fla. 4th Dist. Ct. App. 1998), review granted, Murphy v. Florida Dept. of Trans., 744 So. 2d 455 (Fla. 1999).*

411. *Id. at 241.*

412. *Id.*

413. *Id.; FLA. STAT. § 337.27(2) (1995).*

414. *Barbara's Creative Jewelry, 728 So. 2d at 241.*

415. *Id. at 242.*

416. *Id.*

417. *Id.*

418. *Id. at 243.*

419. *Barbara's Creative Jewelry, 728 So. 2d at 242 (citing Lakeland v. Bunch, 293 So. 2d 66, 69 (Fla. 1974)).*
met that burden is a question for the court. Here, the DOT presented the testimony of the engineers on the road project, who professed the need for some of the land. The DOT then presented the testimony of appraisers and accountants. They testified that taking only the land needed for the road widening project would result in a greater expense to the state than would taking the entire parcel. Consequently, the DOT had met its burden.

The burden then shifted to the objecting landowner to show bad faith or an abuse of discretion by the condemning authority. These were also questions for the court. They did not involve final determinations of what compensation would be paid to the condemnee. Here, the landowner presented a “viable position” that the partial taking would be cheaper, but that did not satisfy their burden which required a showing that the DOT acted in bad faith or abused its discretion. Consequently, the trial judge should not have denied the quick taking.

Judge Polen wrote the dissenting opinion. He observed that the majority opinion was at odds with the plain language of the statute. Furthermore, he was concerned that a due process violation would result if the court allowed the taking, and a jury subsequently determined that a partial taking would have been cheaper. Thus, there would be no public purpose to justify taking more than the condemning authority was going to use. In light of these thoughtful arguments, it is hoped that the supreme court will answer the certified question:

WHERE CONDEMNATION UNDER SECTION 337.27(2), FLORIDA STATUTES, IS REQUESTED, AND THE PROPERTY OWNER DISPUTES THE RELATIVE VALUES OF A WHOLE TAKE OVER A PARTIAL TAKE, MAY A TRIAL COURT DENY A QUICK TAKING UNDER SECTION 74.031,

420. Id.
421. Id.
422. Id.
423. Id.
424. Barbara’s Creative Jewelry, 728 So. 2d at 242.
425. Id.
426. Id.
427. Id.
428. Id.
429. Id.
430. Barbara’s Creative Jewelry, 728 So. 2d at 242.
431. Id. at 243.
432. Id. (Polen, J., dissenting).
433. Powell, 728 So. 2d at 244.
434. Id.

B. Inverse Condemnation

Hernando County v. Anderson. 436 Billboards were located on land that the county acquired. 437 The county destroyed them without giving their owners any notice or opportunity to remove them. 438 The owners brought this suit against the county for compensation. 439 "In Florida, billboards are considered personal property rather than realty." 440 Consequently, acquisition of the land did not include title to the billboards, and the county was held liable for taking this private property. 441

Palm Beach County v. Cove Club Investors. 442 The county condemned a lot in a residential mobile home community and paid compensation to the lot owner. 443 The plaintiff in this case runs the community’s country club. 444 Under the recorded Declaration of Conditions, Covenants, Restrictions and Reservations, each purchaser of a lot in the mobile home community was required to pay a monthly recreational fee to the country club, in exchange for the right to use the club’s recreational facilities. 445 The effect of the condemnation was to give the county title to that lot, free of the burden of paying that monthly fee. 446 The plaintiff characterized this as a taking of its private property for public use, and therefore, demanded compensation in this inverse condemnation action. 447 The circuit court, the Fourth District Court of Appeal, 448 and the Supreme Court of Florida all agreed. 449

435. Id. at 243.
436. 737 So. 2d 569 (Fla. 5th Dist. Ct. App. 1999), review denied, (July 21, 1999).
437. Id. at 569.
438. Id.
439. Id.
440. Id.
441. Anderson, 737 So. 2d at 569.
442. 734 So. 2d 379 (Fla. 1999).
443. Id. at 380.
444. Id.
445. Id. at 380-81.
446. Id.
447. Cove Club Investors, 734 So. 2d at 380.
449. Cove Club Investors, 734 So. 2d at 381.
The court noted that the loss of the benefit of every covenant will not result in a compensable taking.\textsuperscript{450} Thus, if the lot was taken in a development that was the subject of mutual restrictive covenants, the owners of the other lots would not have a claim for compensation due solely to the loss of that one lot from the scheme of restrictions.\textsuperscript{451} Nor would the owner of a franchise, such as the right to supply gas to the homes in the development, have a valid claim for compensation when one of the home lots was taken in an eminent domain action.\textsuperscript{452} The court went to great lengths to point out that this case was different.\textsuperscript{453} Here, each lot owner had a right of access to the club’s property, and the club was still required to provide those facilities to the remaining lot owners, in reliance on its income from those fees.\textsuperscript{454} Moreover, the club had a corresponding right to a lien on any lot whose owner failed to pay the fees.\textsuperscript{455} Consequently, the club had more than mere contract rights. The club had lost property and compensation must be paid for it.\textsuperscript{456} Senior Justice Overton found this distinction unconvincing.\textsuperscript{457} To him, this was just one more provider of services who had lost a customer, and not a situation requiring the payment of compensation.\textsuperscript{458}

\textit{City of Miami v. Keshbro, Inc.}\textsuperscript{459} The Nuisance Abatement Board was faced with the difficult problem of abating prostitution and drug use at a motel.\textsuperscript{460} A series of limited solutions, including partial closures, failed to cure the problem, so the Board issued a six month closure order that was enforced by an injunction issued by the circuit court.\textsuperscript{461} The motel’s owner sought compensation, alleging that it had been deprived of all economic use of its property for the six month period.\textsuperscript{462} “We are faced with a deceptively simple-appearing question: whether the owners are required to be compensated by the City for a valid exercise of the City’s power to abate nuisances because that exercise deprived the owners, at least temporarily, of

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{450} \textit{Id.}\textsuperscript{at 383}.
\item \textsuperscript{451} \textit{Id}.
\item \textsuperscript{452} \textit{See id}.
\item \textsuperscript{453} Justice Anstead wrote the majority opinion. \textit{Id}.
\item \textsuperscript{454} \textit{Cove Club Investors}, 734 So. 2d at 381.
\item \textsuperscript{455} \textit{Id}.
\item \textsuperscript{456} \textit{Id}.
\item \textsuperscript{457} \textit{Id} at 390 (Overton, J., dissenting).
\item \textsuperscript{458} \textit{Id}.
\item \textsuperscript{459} 717 So. 2d 601 (Fla. 3d Dist. Ct. App. 1998), \textit{review granted}, 729 So. 2d 392 (Fla. 1999).
\item \textsuperscript{460} \textit{Id} at 602.
\item \textsuperscript{461} \textit{Id}.
\item \textsuperscript{462} \textit{Id} at 603.
\end{itemize}
\end{footnotesize}
all economic use of their property."\textsuperscript{463} The court concluded that \textit{Lucas} provided the controlling law, but still found that compensation was not required.\textsuperscript{464} \textquotedblleft[T]he record reflects that the motel was, in reality, not a motel, but rather a brothel and drug house which the owners, for whatever reason, failed to stop operating on their property.\textsuperscript{465} These were public nuisances that were not protected by the common law.\textsuperscript{466} The owner had no right to continue them and their continuation could be prohibited by the city.\textsuperscript{467} No compensation would be required if shutting down the motel was the only method to stop these uses.\textsuperscript{468} In fact, these activities had become \textquotedblleft[inextricably intertwined with the motel.\textsuperscript{469}

\textit{Koontz v. St. Johns River Water Management District.}\textsuperscript{470} The landowner wanted to develop a portion of his property.\textsuperscript{471} To do so, he needed a permit to dredge 3.4 acres of wetlands, along with a wetland resource management permit.\textsuperscript{472} The Water Management District indicated it would issue the permits if he would deed part of his land to the district, and also replace culverts over four miles away as offsite mitigation.\textsuperscript{473} He refused to perform the offsite mitigation, so the district denied his permit application. As a result, Koontz filed this suit claiming inverse condemnation.

The Water Management District raised the defense of ripeness.\textsuperscript{475} It claimed that he could have, and should have, attempted to make additional filings, offering different concessions, until an agreement could be reached so he could obtain his permits.\textsuperscript{476} The trial court found this argument convincing, but the district court reversed.\textsuperscript{477} Quite simply,

\begin{quote}
[t]here is no requirement that an owner turned down in his effort to develop his property must continue to submit offers until the
\end{quote}

\begin{itemize}
\item 463. \textit{Id.}
\item 464. \textit{Keshbro}, 717 So. 2d at 604 (citing \textit{Lucas v. South Carolina Coastal Council}, 505 U.S. 1003 (1992)).
\item 465. \textit{Id.}
\item 466. \textit{Id.} at 605.
\item 467. \textit{See id.}
\item 468. \textit{Id.} at 604–05.
\item 469. \textit{Keshbro}, 717 So. 2d at 602.
\item 470. 720 So. 2d 560 (Fla. 5th Dist. Ct. App. 1998), review denied, 729 So. 2d 394 (Fla. 1999).
\item 471. \textit{Id.} at 561.
\item 472. \textit{Id.}
\item 473. \textit{Id.}
\item 474. \textit{Id.}
\item 475. \textit{Koontz}, 720 So. 2d at 561.
\item 476. \textit{Id.} at 562.
\item 477. \textit{Id.}
\end{itemize}
governing body finally approves one before he can go to court. If
the governing body finally turns down an application and the owner
does not desire to make any further concessions in order to
possibly obtain an approval, the issue is ripe.\footnote{478}

In a footnote, the court distinguished this case from \textit{Williamson Co.}
Regional Planning v. Hamilton Bank,\footnote{479} where the landowner could have
applied for a variance but had not done so.\footnote{480}

\textit{South Florida Water Management Distric. v. Basore of Florida, Inc.}\footnote{481}
Basore was growing lettuce on its farm when a big storm hit.\footnote{482} It claimed
that its lettuce crop was damaged by flooding, resulting from the high water
levels in the District's canals thwarting its efforts to pump water off its
fields.\footnote{483} The Fourth District Court of Appeal rejected its claim that a taking
had occurred.\footnote{484} The court recognized that a governmental taking of
personal property would require compensation, but concluded that these
damaged crops were part of the realty.\footnote{485} At best, the flooding might have
amounted to a temporary taking of the land, but that argument had never
been raised by Basore.\footnote{486} Consequently, there was no basis for relief under
the taking clause.\footnote{487} Basore would have to base any claim for relief on a tort
theory, e.g., declaring that the district had been negligent in not reducing the
water levels enough in the canal before the storm.\footnote{488}

\textit{Town of Jupiter v. Alexander.}\footnote{489} The claimant contracted to buy vacant
land in June, 1988.\footnote{490} The land consisted of a parcel on the shore and an
island about 500 yards from the mainland.\footnote{491} Due to problems with the
zoning of the island, she was not able to finalize her plan to build on the
mainland and the island until late 1991.\footnote{492} She sued for a temporary taking

\footnotesize{\begin{itemize}
\item[478.] \textit{Id.}
\item[479.] 473 U.S. 172 (1985).
\item[480.] \textit{Koontz}, 720 So. 2d at 562 n.2 (citing Williamson County Reg'l Planning Comm'n v.
\item[481.] 723 So. 2d 287 (Fla. 4th Dist. Ct. App. 1998), \textit{review denied}, 740 So. 2d 527 (Fla.
1999).
\item[482.] \textit{Id.} at 288.
\item[483.] \textit{Id.}
\item[484.] \textit{Id.}
\item[485.] \textit{Id.} at 289.
\item[486.] \textit{Basore}, 723 So. 2d at 288.
\item[487.] \textit{Id.}
\item[488.] \textit{Id.} at 290.
\item[489.] 23 Fla. L. Weekly D2139 (4th Dist. Ct. App. 1998), \textit{review denied}, 729 So. 2d 389
(Fla. 1999).
\item[490.] \textit{Id.}
\item[491.] \textit{Id.}
\item[492.] \textit{Id.} at D2140.
\end{itemize}}
of her land during that period. The district court concluded that she had not been deprived of all use of her land when considering it as one parcel, and that was appropriate, even though they were not physically contiguous, because: 1) they were to be put to one integrated use; 2) one owner owned both parcels, i.e., there was unity of ownership; and 3) they were to be treated by their owner as one integrated tract. In fact, the highest and best use of the island could only be achieved if the island was developed jointly with the mainland tract. The owner was not prevented from using the mainland tract while the approvals were obtained for the island portion, therefore, so there was no taking. This seems oddly like a Catch-22, because it would have been unreasonable for the owner to proceed with her plans on the mainland without knowing if she would ever get the island portion approved. She could have found herself stuck with structures intended for supporting island use, which may have never occurred, and this would have put her plans for the entire tract on hold.

XI. ENVIRONMENTAL LAW

The City of Jacksonville v. American Environmental Services, Inc. The court addressed the lower court judge's declaratory statement concerning the applicability and validity of the local certificate of need ("CON") application ordinances. This court affirmed the lower court's decision and held American Environmental Services could not be compelled to procure a local CON from the City of Jacksonville.

Jacksonville's CON ordinances, as applied to American Environmental Services proposed hazardous waste transfer station, conflicted with chapter 403 of the Florida Statutes. The Jacksonville ordinance requires a violation of local need, and ordains a condition requiring that the waste only be of the type produced in Duval County.

In comparison, chapter 403 of the Florida Statutes documents a statewide need for hazardous waste facilities, and ponders regional facilities

493. Id.
495. Id. at D2141.
496. Id.
497. See id.
498. See id.
500. Id. at 256.
501. Id.
for the transfer, storage, and treatment of hazardous waste. The City of Jacksonville can not prevent the facility by determining lack of local need, even though statutes refer to local assessments of hazardous waste management. Local assessments have the purpose of collecting information for an evaluation of need within the state.

Local governments cannot enact an ordinance relating to the subject of hazardous waste regulation more stringent than section 403. Pursuant to chapter 403, local governments can control the zoning of such hazardous waste, and ordain requisite conditions to protect the health, safety, and welfare of citizens. However, it may not implement a further obligation to satisfy a test for local need.

The final order of the Department of Environmental Protection ("DEP") denied the association the right to request a permit to build a dock on sovereign land. This court concluded that the association had a "sufficient title interest" in the uplands for the purpose of obtaining authorization to build a dock, and thus, the final order was reversed.

This is the third appeal involving the two parties in dispute here, the association and the Parlatos. This brief pertains solely to the last appeal. The association, through Environmental Services, Inc., filed an application with the DEP for the permits needed to build the dock. This was the issue of the prior appeal. The application solicited a dredge fill permit and authorization from the state, as owner of the submerged lands, to assemble such dock. Almost a year later, the DEP denied the application and stated that the holder of an easement does not have sufficient title

510. 704 So. 2d 702 (Fla. 5th Dist. Ct. App. 1998), review dismissed, 719 So. 2d 288 (Fla. 1998).
511. Id. at 703.
512. Id.
513. Id.
514. See id.
515. Secret Oaks Owner's Ass'n, 704 So. 2d at 704.
516. Id.
517. Id.
interest to make an application for activities pertaining to submerged lands. 518

In return, Secret Oaks requested a formal hearing. 519 The hearing officer determined that there were no material issues of fact, and thus, ordered the case back to the agency for an informal hearing. 520 The director at the informal hearing stated the issue as whether the association, as the holder of an easement, is among the class of persons permitted to file a request to perform activities on state-owned sovereign submerged lands. 521 The director issued a lengthy order regarding such issue. 522

The DEP framed the issue as follows:

[Whether the Association, as the holder of recorded contractual rights to construct, maintain and use all docks on lot 10, and, concomitantly, to limit the rights of any owner or lessee of lot 10, is precluded from applying for a permit to construct a dock because the rule requirement of “sufficient title interest in uplands for the intended purpose” means the appellant must have a possessory interest in the upland property. 523

In this case, the Owners’ Agreement and the recorded easement on lot ten provided that lot owners in the Secret Oaks Subdivision were granted pedestrian access to the St. John’s River and to any dock that is situated or may later be situated thereon. 524 The Association was obligated to improve, repair, or maintain the easement. 525

The DEP relies on the definition of “title interest” as set forth in Black’s Law Dictionary: Title is defined as, “the means whereby the owner of lands has the just possession of his property. The union of all the elements which constitute ownership. Full independent and fee ownership[;] The right to or ownership in land . . . .” 526 Just because title can be the means to receive right of possession, that does not dictate that all possessory interests are title interests. 527 This case clearly shows that the association has recorded contractual rights in lot ten adequate to grant the right to

518. Id.
519. Id. at 705.
520. Secret Oaks Owner’s Ass’n, 704 So. 2d at 705.
521. Id.
522. Id.
523. Id. at 706.
524. Id.
525. Secret Oaks Owner’s Ass’n, 704 So. 2d at 706.
526. Id. at 707; see BLACK’S LAW DICTIONARY 1485 (6th ed. 1990).
527. Secret Oaks Owner’s Ass’n, 704 So. 2d at 707.
construct the dock. If the language “sufficient title interest in the uplands” meant only “right of possession,” the Agency would have specified.

In addition, the DEP offers no reason why a possessory interest is the only possible “title interest,” or why “possessor” interests would be the minimum “sufficient title interest” for dockbuilding permit application. This court viewed the Agency’s interpretation as illogical and unreasonable. To interpret “title interest” as meaning “right of possession” creates irrational distinctions.

XII. HOMEOWNERS’ ASSOCIATIONS

Section 617.303 of the Florida Statutes has a new subsection (8). This subsection provides that “[a]ll association funds held by a developer shall be maintained separately in the association’s name.” There shall be no commingling of reserve and operating funds prior to turnover. However, the association may jointly invest reserve funds, even though the invested funds must be accounted for separately.

Section 617.307 of the Florida Statutes has a new subsection (3). This subsection is designed to provide for the transition of a homeowners’ association control in a community. Under this subsection, such shall occur when the members are entitled to elect at least a majority of the board of directors of the homeowners’ association. The developer shall, at its expense, have no more than ninety days to deliver the prescribed documents to the board.

Section 617.0375 of Florida Statutes was enacted to create a list of prohibitive clauses to be found in homeowners’ association documents. Subsection (1) and its sub parts prohibit provisions to the effect that the developer has the unilateral ability, and right, to make changes in the homeowners’ association documents, after the transition of the association’s

528. Id.
529. Id.
530. Id.
531. Id.
532. Secret Oaks Owner’s Ass’n, 704 So. 2d at 707.
534. Id. § 617.303(8)(a).
535. Id.
536. Id.
537. Id. § 617.307(3).
539. Id.
540. Id.
541. Id. § 617.3075(1).
control in a community to the non-developer members.\textsuperscript{542} Also, the association is restricted from filing a lawsuit against the developer, and the developer is entitled to cast votes in an amount that exceeds one vote per residential lot, after the transition to the association.\textsuperscript{543}

Subparagraph (2) declares the prohibited position, stated above, unenforceable as a matter of public policy, where those clauses were created on or after the effective date of that section, October 1, 1998.\textsuperscript{544}

\textbf{XIII. INSURANCE}

\textit{Fassi v. American Fire & Casualty Co.}\textsuperscript{545} The appellate court affirmed final judgment denying Fassi's claim for fire damages.\textsuperscript{546} Fassi's home was destroyed by fire and he filed a claim for damages under their homeowners' policy.\textsuperscript{547} American Fire and Casualty ("American") was suspicious as to the cause of the fire, and wanted Fassi to submit to examination under oath and provide a sworn claim of loss.\textsuperscript{548} The examination was never conducted since Fassi failed to contact the attorneys involved.\textsuperscript{549} In addition, Fassi still failed to respond after American followed up with a letter.\textsuperscript{550} The law firm scheduled the examination on behalf of American.\textsuperscript{551} In return, Fassi refused to submit to the sworn examination because of the threat of criminal proceedings.\textsuperscript{552}

A claimant cannot recover fire losses under an insurance policy and refuse to comply with policy requirements to submit to sworn examination because criminal charges related to the cause of fire may be pending against him.\textsuperscript{553}

The examination was again rescheduled, and once again, Fassi failed to appear or respond.\textsuperscript{554} Three months later, Fassi wished to have the

\textsuperscript{542} Id.
\textsuperscript{543} FLA. STAT. § 617.3075(1) (1999).
\textsuperscript{544} Id. § 617.3075(2).
\textsuperscript{545} 700 So. 2d 51 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{546} Id. at 52.
\textsuperscript{547} Id.
\textsuperscript{548} Id.
\textsuperscript{549} Id.
\textsuperscript{550} Fassi, 700 So. 2d at 52.
\textsuperscript{551} Id.
\textsuperscript{552} Id.
\textsuperscript{553} Id.
\textsuperscript{554} Id.
examination conducted but American responded that it was too late.\footnote{555}  
Summary judgment was granted after Fassi filed suit on the policy.\footnote{556}  
This court agreed with American’s contentions.\footnote{557}  
Fassi was given one last chance to explain the refusal to cooperate, and failure to respond would lead to denial of the claim.\footnote{558}  
Since Fassi did not explain, no further notice was required on American’s behalf.\footnote{559}  
The final letter to Fassi was only an opportunity to explain, not a chance to participate.\footnote{560}  
The court concluded that five opportunities to participate were enough.\footnote{561}

XIV. LANDLORD AND TENANT

**ARC Foods, Inc. v. MGI Properties.**\footnote{562} The commercial lease provided that: “[d]uring the lease term and any options; the landlord agrees not to rent to any other tenant that sells take-out or delivery pizza.” The landlord rented the neighboring space to an Italian restaurant, so the tenant declared the lease had been breached, moved out, and refused to pay any more rent.\footnote{563}  
The landlord brought this action for damages.\footnote{564}  
The affidavit of the owner of the neighboring restaurant acknowledged that the store did sell take-out pizza, but claimed that its take-out pizza sales amounted to less than one half of one percent of the business of any of its restaurants.\footnote{565}  
Based on that affidavit, the trial court granted summary judgment for the landlord.\footnote{566}  
The district court reversed the trial court’s decision.\footnote{567}  
The district court first addressed the summary judgment issue and held that summary judgment should only be granted when there are no genuine issues of material fact.\footnote{568}  
The lease with the neighboring restaurant did, however, technically violate the terms of this lease.\footnote{569}  
The landlord’s claim that the violation was minimal, and had little effect on the tenant, created an

\footnotesize{\begin{itemize}
\item \footnote{555}{Fassi, 700 So. 2d at 53.}
\item \footnote{556}{Id.}
\item \footnote{557}{Id.}
\item \footnote{558}{Id.}
\item \footnote{559}{Id.}
\item \footnote{560}{Fassi, 700 So. 2d at 53.}
\item \footnote{561}{Id.}
\item \footnote{562}{724 So. 2d 663 (Fla. 2d Dist. Ct. App. 1999).}
\item \footnote{563}{Id. at 664.}
\item \footnote{564}{Id.}
\item \footnote{565}{Id.}
\item \footnote{566}{Id.}
\item \footnote{567}{ARC Foods, 724 So. 2d at 664.}
\item \footnote{568}{Id. at 665.}
\item \footnote{569}{FLA. R. CIV. P. 1.510(e).}
\item \footnote{570}{ARC Foods, 724 So. 2d at 664.}
\end{itemize}}
issue of fact that could be resolved only by a judge weighing the evidence.\textsuperscript{571} Thus, summary judgment was inappropriate.\textsuperscript{572} Furthermore, the claim that the tenant had waived its rights under this clause by failing to object earlier, or to the presence of other competing restaurants, also raised issues of fact that could not be resolved by summary judgment.\textsuperscript{573}

The court also declared that the trial court had erred in its calculation of damages.\textsuperscript{574} The landlord found another tenant for the vacated space, and the court awarded the landlord the real estate broker's commission.\textsuperscript{575} However, the new tenant's lease was at a higher rent, and for a period longer, than was left on the defendant's lease.\textsuperscript{576} The defendant could not be held liable for a commission that was calculated at the higher rent and longer term.\textsuperscript{577} The defendant was liable only for paying the commission involved in finding its replacement, i.e., a commission based on the remaining term and at the rent provided for in the lease.\textsuperscript{578}

\textit{DHSH Corp. v. Affordable Enterprises Exchange.}\textsuperscript{579} When this commercial lease was negotiated, the tenant wanted an option to renew for another seven-year term because of the substantial capital investment involved in setting up an automobile paint and body shop.\textsuperscript{580} The landlord, concerned that the shop might be an eyesore, included in the lease a clause requiring the outside to be cleaned twice daily and cars to be stored inside at night.\textsuperscript{581} It also contained a renewal option which was the source of the problem.\textsuperscript{582}

The lease granted the tenant a five-year option to renew, but it went on to provide that, "[l]andlord—at [l]andlord's sole option to renew—shall notify [t]enant if they desire to honor the option . . . .\textsuperscript{583} Who had the right to exercise, or not exercise, the renewal option? The successor landlord, interpreting the lease as giving that right to the landlord, decided it did not want to renew the lease, and sent the tenant a notice that the lease would not...
be renewed.\textsuperscript{584} Wanting to renew the lease, the tenant brought this action for declaratory judgment.\textsuperscript{585}

The trial court concluded that the renewal option contained an irreconcilable conflict.\textsuperscript{586} The landlord and tenant could not both have a renewal option. Attempting to reconcile all the terms, the landlord asserted that the intent was to give the landlord the right to offer the tenant the renewal option if it wanted to, but that would have rendered the option illusory.\textsuperscript{587} The court solved the problem by invoking the "principles of contract construction," under which an ambiguous term must be interpreted against the one who drafted it.\textsuperscript{588} In this case, the term was drafted by the landlord’s real estate broker, so the term was interpreted in favor of the tenant.\textsuperscript{589} The term was drafted by the agent of the prior landlord, not the successor landlord involved in this litigation, but it did not change the application of the rule or the outcome.\textsuperscript{590}

\textit{Foster v. Matthews}.\textsuperscript{591} The lease included two paragraphs relating to the landlord’s liability if the tenant suffered injury.\textsuperscript{592} The first portion of the lease provided that the landlord would not be liable for damage or injury caused by water.\textsuperscript{593} The second portion provided that the tenant placed its personal property on the premises, at its own risk.\textsuperscript{594} Water leaked into the leased premises, causing one of the co-tenants to slip and fall, and she sued the landlord for negligence.\textsuperscript{595} Relying on the terms in the lease, the trial judge granted summary judgment for the landlord.\textsuperscript{596} The Third District Court of Appeal reversed the trial court’s decision.\textsuperscript{597}

Exculpatory clauses are not favored in the law to absolve the landlord from liability due to its negligence.\textsuperscript{598} The clause must be clear enough to release a party from liability for negligence.\textsuperscript{599} The terms in this lease did not provide such a clear statement of intent, so the court should not have

\begin{itemize}
  \item \textsuperscript{584} DHSH, 734 So. 2d at 568.
  \item \textsuperscript{585} Id.
  \item \textsuperscript{586} Id.
  \item \textsuperscript{587} Id.
  \item \textsuperscript{588} Id. at 569.
  \item \textsuperscript{589} DHSH, 734 So. 2d at 568.
  \item \textsuperscript{590} Id. at 568–69.
  \item \textsuperscript{591} 714 So. 2d 1215 (Fla. 3d Dist. Ct. App. 1998).
  \item \textsuperscript{592} Id. at 1216.
  \item \textsuperscript{593} Id.
  \item \textsuperscript{594} Id.
  \item \textsuperscript{595} Id.
  \item \textsuperscript{596} Foster, 714 So. 2d at 1216.
  \item \textsuperscript{597} Id.
  \item \textsuperscript{598} Id.
  \item \textsuperscript{599} Id.
\end{itemize}
granted summary judgment. However, Judge Cope, in a brief concurrence, observed that in a prior case, a lease similar to this had been read to reveal a clear intent to absolve the landlord of liability for its own negligence when exculpatory clauses similar to these were read in conjunction with an indemnity clause.

Greco v. Corn. Here, the parties had entered into a four-year commercial lease that included a purchase option. However, a dispute quickly arose as to whether the purchase price included rent credit. The landlords notified the tenants that they would not accept any rent payments until the option issue was resolved. When an agreement could not be reached, the landlords brought an unsuccessful action for declaratory judgment to determine whether there had been a "meeting of the minds" to create a binding contract. Following the conclusion of that action, the landlords sent the tenants letters demanding the unpaid rent. When the tenants failed to make payment, the landlords sought and obtained an eviction judgment removing the tenants from the property.

This case began when the tenants brought an action for specific performance of the option. The landlords then counterclaimed for the unpaid rent and the unpaid option fee. The tenants' defense was that the landlords waived their claims by refusing to accept the payments. The trial court denied relief to both. The Second District Court of Appeal held that the landlords had not waived their claims. Unfortunately, the court does not explain why this was not a waiver. The landlords' refusal to accept "rent payments until a determination was made regarding the option to purchase clause . . . ."

600. Id.
601. Foster, 714 So. 2d at 1217 (citing Meyer v. Carribbean Interiors, Inc., 435 So. 2d 936 (Fla. 3d Dist. Ct. App. 1983)).
602. 724 So. 2d 612 (Fla. 2d Dist. Ct. App. 1998), review denied, 735 So. 2d 1284 (Fla. 1999).
603. Id. at 613.
604. Id.
605. Id.
606. Id.
607. Greco, 724 So. 2d at 613.
608. Id.
609. Id. at 612.
610. Id. at 613.
611. Id.
612. Greco, 724 So. 2d at 613.
613. Id.
614. Id.
LaFountain v. Estate of Kelly. 615 This commercial lease had a renewal option that provided "[i]n the event Lessee exercises its option to renew, the lease payment for the renewal period will be negotiated between the parties." 616 The tenant gave notice of her intent to exercise the option, but the parties could not agree on the amount of the rent payments. 617 Subsequently, the tenant died and her estate brought this suit against the landlord for wrongful breach of the renewal option and tortious breach of contract. 618 The trial court dismissed the complaint with prejudice and the district court affirmed. 619

Here, the parties could not agree to the rent and the option did not provide a rent amount or a method to calculate a rent amount. 620 Once the parties had failed to reach an agreement, the court had no method for calculating what the rent should have been. 621 The court could not provide a term that the parties failed to agree on, there had been no meeting of the minds on that point. 622 Therefore, the renewal option was too vague to be enforced. 623 The district court avoided language in an earlier case that such options were valid by pointing out that case was an eminent domain action. In the past, the parties had not even begun to negotiate the extension term when the condemnation proceeding began, so it was still possible that the extension option might be successfully implemented but for the condemnation. 624

Making Ends Meet, Inc. v. Cusick. 625 The landlord sued for unpaid rent, and the tenant counterclaimed for tortious interference with a business relationship. 626 The tortious interference claim was based on the landlord's exercise of his power under the lease to either approve, or not approve, a proposed sale of the lease by the tenant. 627 The landlord's defense was that he could not be held liable for interference with a business relationship of which he was a party. 628 The trial and district courts disagreed with that

616. Id. at 504.
617. Id.
618. Id.
619. Id.
620. LaFountain, 732 So. 2d at 505.
621. Id.
622. Id.
623. Id.
624. Id. (citing State Rd. Dep't v. Tampa Bay Theaters, Inc., 208 So. 2d 485 (Fla. 2d Dist. Ct. App. 1968)).
625. 719 So. 2d 926 (Fla. 3d Dist. Ct. App. 1998), review denied, 732 So. 2d 326 (Fla. 1999).
626. Id. at 926–27.
627. Id. at 927.
628. Id.
interpretation of the law.\textsuperscript{629} Apparently, the landlord created one hurdle after another to prevent the tenant from ever successfully assigning its leasehold.\textsuperscript{630} The landlord had no right to play that game. His approval power could only be exercised for a proper purpose. His wrongful conduct under this set of circumstances cost him $250,000.\textsuperscript{631}

\textit{Margolis v. Andromides.}\textsuperscript{632} The tenant had a twenty-five year lease with an option to renew for an additional twenty-five years.\textsuperscript{633} The tenant sent two letters to the landlords giving notice that he was exercising his renewal option.\textsuperscript{634} In response, the tenant received a letter from a relative of the landlords, authorizing the lease extension.\textsuperscript{635} In 1992, eleven years later, but still during the original term of the lease, the tenant received a surprise.\textsuperscript{636} The landlords claimed that the extension option had never been exercised and that their relative did not have the authority to authorize an extension.\textsuperscript{637} The dispute went to arbitration, where it was concluded that the landlords were correct.\textsuperscript{638} In 1997, the tenant brought this suit against the relative for breach of implied warranty of authority.\textsuperscript{639} The circuit court granted the landlords' motion for summary judgment based on the statute of limitations.\textsuperscript{640} Breach of implied warranty of authority is subject to a four year statute of limitations.\textsuperscript{641} The critical question was when the cause of action accrued so that the time would begin to run.\textsuperscript{642} The tenant claimed it began to run at the arbitration award, but the circuit court had disagreed, and the district court affirmed.\textsuperscript{643} The opinion stated, "[a] cause of action 'accrues' when the last element necessary to constitute the cause of action occurs."\textsuperscript{644} The arbitration award was not a necessary element.\textsuperscript{645} This cause of action is based upon misrepresentation, and the final element of misrepresentation is

\begin{itemize}
  \item \textsuperscript{629} \textit{Id.} at 927–28.
  \item \textsuperscript{630} \textit{Making Ends Meet, Inc.}, 719 So. 2d at 928.
  \item \textsuperscript{631} \textit{Id.} at 927.
  \item \textsuperscript{632} 732 So. 2d 507 (Fla. 4th Dist. Ct. App. 1999).
  \item \textsuperscript{633} \textit{Id.} at 508.
  \item \textsuperscript{634} \textit{Id.}
  \item \textsuperscript{635} \textit{Id.}
  \item \textsuperscript{636} \textit{Id.}
  \item \textsuperscript{637} \textit{Margolis}, 732 So. 2d at 508.
  \item \textsuperscript{638} \textit{Id.} at 508–09.
  \item \textsuperscript{639} \textit{Id.} at 509.
  \item \textsuperscript{640} \textit{Id.}
  \item \textsuperscript{641} \textit{Id.}
  \item \textsuperscript{642} \textit{Margolis}, 732 So. 2d at 509.
  \item \textsuperscript{643} \textit{Id.}
  \item \textsuperscript{644} \textit{Id.}
  \item \textsuperscript{645} \textit{Id.}
\end{itemize}
that harm is caused by it. That happened when the landlords repudiated their relative’s authority to extend the lease. This happened more than four years before the complaint in this case was filed. Nothing had tolled the running of the statute, so the action was barred.

Menendez v. Palms W. Condominium Ass’n. The condominium association acted as the rental manager for the unit in question. The tenant heard a knock at the door, opened it, and at least two people came inside. One of the individuals shot the tenant. This suit charged that the unit owners and the condominium association were liable because they had breached their duty of care by failing to provide adequate security on the premises, in particular, by failing to provide a peephole or door scope by which a person inside the unit could see who was outside the front door. Although the tenant’s expert testified that this was a high crime area, the circuit court granted summary judgment for the defendants.

The general rule is that a landlord has no duty to protect a tenant from criminal acts of third persons. In order for such a duty to arise, “the tenant must allege and prove that the landlord had actual or constructive knowledge of prior similar acts committed on invitees on the premises.” However, the existence of crime in the area “was not sufficient to put the defendants on constructive notice of a particular risk.” Moreover, there was nothing in the record to show that the crime in the area was the type of crime that could have been prevented by installing a peephole or door scope.

The tenant also failed to establish that the lack of a peephole or door scope was a defect or inherently dangerous condition. There was no evidence that the unit would have been made safer by the installation of such devices. In addition, even if this was a defect, it was an obvious defect, and not a latent one. Finally, neither the lease nor the Residential

646. Id.
647. Margolis, 732 So. 2d at 510.
648. Id.
649. Id.
650. 736 So. 2d 58 (Fla. 1st Dist. Ct. App. 1999).
651. Id. at 59.
652. Id. at 59–60.
653. Id. at 60.
654. Id.
655. Menendez, 736 So. 2d at 60.
656. Id.
657. Id. at 61.
658. Id.
659. Id.
660. Menendez, 736 So. 2d at 61.
661. Id.
662. Id. at 61–62.
Landlord and Tenant Act imposed a duty on the landlord to provide a peephole or door scope. Thus, the decision of the circuit court was affirmed.

_Estate of Basile v. Famest, Inc._ Basile guaranteed a commercial lease for a company in which he was a stockholder. The guaranty was limited to defaults during the first two years of the original lease, or the first three years of an approved sublease. The tenant transferred his rights and interests to LM, a local corporation, under a document that stated that the landlord was not releasing the original tenant from liability under the lease. A default occurred more than two years after the original lease was entered, but the landlord sued on the guaranty claiming that the guarantor was still liable. The landlord's theory was that the default had occurred during the first three years of a sublease. The death of the guarantor was not an issue addressed in this decision.

The trial court concluded that the transaction with LM was a sublease, and the landlord expressly reserved the right to hold the original tenant liable. Therefore, the guaranty was still in effect at the time of the breach. However, the district court disagreed. Under the traditional test, a sublease would occur only if the tenant kept a reversionary interest. The tenant here made no attempt to keep any such interest, therefore the landlord's retaining rights had no effect upon the characterization of the transaction. Since the guarantee was not extended by an assignment, the guarantor was not liable.

_Straub Capital Corp. v. Chopin._ In November 1994, a law firm entered into a fifty page lease that contained an integration clause, providing that all negotiations and agreements were in the writing. The lease did contain a time is of the essence clause, but did not contain an express

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663. _Id._ at 62.
664. _Id._
665. 718 So. 2d 892 (Fla. 4th Dist. Ct. App. 1998).
666. _Id._ at 892.
667. _Id._
668. _Id._
669. _Id._
670. _Basile_, 718 So. 2d at 892.
671. _Id._
672. _Id._
673. _Id._ at 893.
674. _Id._ at 892.
675. _Basile_, 718 So. 2d at 893.
676. _Id._
677. 724 So. 2d 577 (Fla. 4th Dist. Ct. App. 1998).
678. _Id._ at 578.
occupancy date. The space was not ready for occupancy until April, 1995. After taking possession, the firm sued for damages, alleging that it had been assured that the space would be ready by the first of January. Based upon the evidence, the trial court rejected the fraud in the inducement claim, but granted substantial damages for lost profits based on negligent misrepresentation. The Fourth District Court of Appeal reversed.

"[A]bsent some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses." Fraud in the inducement would have been an independent tort on which damages could have been rendered, but the court rejected that claim. Consequently, the claim was essentially that the landlord had breached the lease by failing to deliver the premises on time. At best, there was a contractual breach. Since the claim was solely for economic loss, tort damages should not have been awarded.

WPB, Ltd. v. Supran. A commercial lease provided that deposit money would bear interest, but failed to specify a rate. The district court concluded that the rate would be supplied by section 687.01 of the Florida Statutes. That statute provided, "'[i]n all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 12 percent per annum, but the parties may contract for a greater or lesser rate by a contract in writing.'" A special contract is a contract that would have to be express because it could not be implied in law or in fact. The lease was silent as

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679. Id.
680. Id.
681. Id.
682. Straub Capital, 724 So. 2d at 578-79.
683. Id. at 579.
684. Id. (citing HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239 (Fla. 1996)).
685. Id.
686. Id.
687. Straub Capital, 724 So. 2d at 579.
688. Id.
689. 720 So. 2d 1091 (Fla. 4th Dist. Ct. App. 1998).
690. Id. at 1092.
691. Id. (citing Fla. Stat. § 687.01 (1989)). The current version of the statute incorporates, by reference, the rate set according to section 55.03 of the Florida Statutes. See Fla. Stat. § 55.03 (1999).
692. Supran, 720 So. 2d at 1092 (quoting Fla. Stat. § 687.01 (1989)).
693. Id. at 1092–93.
to the interest rate, so there was no special contract to set the rate.694 Thus, the statute filled that gap.695

**XV. LIENS**

*Morse Diesel International, Inc. v. 2000 Island Boulevard, Inc.* The appellate court reversed a peremptory writ of mandamus authorizing release of a cash bond in favor of 2000 Island Boulevard, Inc. ("Williams Island"), owner and developer of a 280 unit condominium project.697 The court remanded, with directions that Williams Island redeposit disbursed proceeds from the cash bond pending further orders.698 Morse Diesel sued Williams Island for money due under a construction contract.699 The parties entered into an agreement which gave Morse Diesel a lien on twenty condo units to secure the claim.700 Morse agreed to release its lien rights as to the other units.701 Williams Island posted a bond on a prorated basis as to five of the units.702 Morse asserted additional claims when another dispute arose between the parties.703 Williams Island later filed an emergency motion for the clerk to transfer the existing liens to its cash bond and to reduce Morse's amended claim of lien when the subcontractors were paid.704

The trial court allowed the lien transfer to a cash bond, but denied Williams Island's request for reduction of the bond.705 Since Williams Island failed to receive the bond reduction, it filed for a writ of mandamus directing the clerk to disburse the cash bond as per section 713.24(4) of the *Florida Statutes*.706 The lower court directed the clerk to release the cash bond.707

The appellate court concluded that the lower court abused its discretion in granting the writ of mandamus where:

694. *Id.* at 1093.
695. *Id.*
696. 698 So. 2d 309 (Fla. 3d Dist. Ct. App. 1997).
697. *Id.* at 310.
698. *Id.* at 313.
699. *Id.* at 310.
700. *Id.* at 311.
701. *Morse Diesel*, 698 So. 2d at 311.
702. *Id.*
703. *Id.*
704. *Id.*
705. *Id.*
706. *Morse Diesel*, 698 So. 2d at 311.
707. *Id.* at 312.
(1) the record did not disclose Williams Island's clear legal right to the same in that a genuine dispute existed as to whether Morse Diesel's claim of lien had expired by operation of law; (2) Williams Island had another adequate legal remedy to procure the release of these funds; and (3) Morse Diesel was an interested party to the mandamus proceeding who had not been brought before the court.\textsuperscript{708}

To receive a writ of mandamus, "petitioner must demonstrate a clear legal right to the performance of a ministerial duty by the respondent and that no other adequate remedy exists."\textsuperscript{709} The court found that Williams Island did not establish a clear legal right to a mandamus where the clerk's answer and defenses created a genuine issue of fact about whether Morse's claim of lien had expired and/or been satisfied.\textsuperscript{710} Williams Island did not allege in its complaint that it had no adequate remedy at law.\textsuperscript{711} Just because Williams Island was unsuccessful in getting the bond reduced, this did not signify that such remedies were inadequate.\textsuperscript{712}

The court also held that the writ should not have been entered when Morse was an interested party, but was given no notice or opportunity to be heard on the issues.\textsuperscript{713} In addition, it was an abuse of discretion to grant the writ releasing the cash bond when the funds were in dispute between the parties in another pending action.\textsuperscript{714} The lower court should have required Williams Island to redeposit disbursed proceeds of the cash bond.

\textit{Robinson v. Sterling Door & Window Co.}\textsuperscript{715} The issue before the court was whether the trial court erred when applying section 55.10(1) of the Florida Statutes to Sterling Door's judgment lien on Robinson's real estate.\textsuperscript{716} The trial court determined that Sterling Door had a valid lien on Robinson's property.\textsuperscript{717} Robinson claimed the lien was defective because Sterling's address was lacking, as required per section 55.10(1).\textsuperscript{718} The trial court held that the statute was satisfied since the names of the attorneys involved were included in the judgment lien.\textsuperscript{719} The court noted that section

\textsuperscript{708} \textit{Id.}
\textsuperscript{709} \textit{Id.; see Pino v. District Court of Appeal, 604 So. 2d 1232, 1233 (Fla. 1992).}
\textsuperscript{710} \textit{Moore Diesel, 698 So. 2d at 312.}
\textsuperscript{711} \textit{Id.}
\textsuperscript{712} \textit{Id.}
\textsuperscript{713} \textit{Id.}
\textsuperscript{714} \textit{Id.}
\textsuperscript{715} 698 So. 2d 570 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{716} \textit{Id. at 571.}
\textsuperscript{717} \textit{Id.}
\textsuperscript{718} \textit{Id.; see FLA. STAT. \S 55.10(1) (1997).}
\textsuperscript{719} \textit{Robinson, 698 So. 2d at 571.}
55.10(1) of the Florida Statutes specifically recognizes that "'[a] judgment, order, or decree does not become a lien on real estate unless the address of the person who has a lien as a result of such judgment . . . is contained in the judgment.'" Since courts must give effect to statutory language, the appellee's address must be on the judgment lien. Without the address, there was no lien on Robinson's real estate.

Wolf v. Spariosu. The appellate court reversed final summary judgment of foreclosure, which declared Wolf Group's lien to be superior to the interests of all appellees, except Maysonet Landscape Company's claim of lien. The court agreed with the Wolf Group that their mortgage gained priority over Maysonet through the doctrine of equitable subrogation or conventional subrogation.

Maysonet and the Spariosus entered into a contract for landscaping materials and services for the property. Maysonet filed and duly recorded a claim of lien. At that time, two existing mortgages were already recorded on the property. A few months later, the Spariosus executed a note and mortgage to City First Mortgage Corporation ("City"). Two prerequisites existed in order for the loan to go to the Spariosus as borrowers. First, the proceeds from City's loan were to be used to satisfy the two previously recorded mortgages. Second, City's first mortgage would be substituted in the place of the two prior mortgages. City's mortgage was later assigned to the Wolf Group.

Maysonet sued the borrowers and recorded its notice of lis pendens. When the borrowers defaulted on the City's loan, Wolf Group sought to foreclose the mortgage, and Maysonet was later named as a defendant in the amended complaint. The lower court entered a final judgment of

720. Id. (quoting Fla. STAT. § 55.10(1) (1997)) (emphasis in original).
721. Id.
722. Id.
723. 706 So. 2d 881 (Fla. 3d Dist. Ct. App. 1998), cause dismissed, Maysonet Landscape Co. v. Wolf (Fla. 1998).
724. Id. at 882.
725. Id.
726. Id.
727. Id.
728. Wolf, 706 So. 2d at 882.
729. Id.
730. Id.
731. Id.
732. Id.
733. Wolf, 706 So. 2d at 882.
734. Id.
735. Id.
mortgage foreclosure finding the Wolf Group's interest superior to the interests of all defendants except Maysonet.\textsuperscript{736}

[S]ubrogation is the "substitution of one person to the position of another with reference to a legal claim or right. The doctrine of subrogation is generally invoked when one person has satisfied the obligations of another and equity compels that the person discharging the debt stand in the shoes of the person whose claim has been discharged, thereby succeeding to the rights and priorities of the original creditor."\textsuperscript{737}

The appellate court found that, under the doctrine of conventional subrogation, the Wolf Group's lien should have been superior to Maysonet's lien.\textsuperscript{738} Evidence showed that the borrowers had an agreement with City for the City mortgage to be substituted in place of the two prior mortgages.\textsuperscript{739}

Conventional subrogation... arises by virtue of an agreement, express or implied, that a third person or one having no previous interest in the matter involved shall, upon discharging an obligation or paying a debt, be substituted in the place of the creditor with respect to such rights, remedies, or securities as [the creditor] may have against the debtor.\textsuperscript{740}

The court concluded "that the Wolf Group's lien was entitled to priority over Maysonet's lien under the doctrine of conventional subrogation."\textsuperscript{741}

\textit{Zalay v. Ace Cabinets of Clearwater, Inc.}\textsuperscript{742} The court affirmed final judgment in a construction lien action filed by subcontractors and materialmen.\textsuperscript{743} Evidence supported the trial court's decision that all but one of the claims were valid and timely, and created liens against the property.\textsuperscript{744}

In 1992, the Zalays contracted with Charles Walker Corporation to build a home for $360,000.\textsuperscript{745} Zalay had to make only one final payment in

\begin{footnotesize}
\begin{enumerate}
\item[736.] \textit{Id.} at 883.
\item[737.] \textit{Id.} at 883 (quoting Eastern Nat'l Bank v. Glendale Fed. Sav. & Loan Ass'n, 508 So. 2d 1323, 1324 (Fla. 3d Dist. Ct. App. 1987)).
\item[738.] \textit{Wolf}, 706 So. 2d at 884.
\item[739.] \textit{Id.}
\item[740.] \textit{Id.} at 883 (citing Foreman v. First Nat'l Bank, 79 So. 742, 744 (1918)).
\item[741.] \textit{Id.} at 884.
\item[742.] \textit{700 So. 2d 15} (Fla. 2d Dist. Ct. App. 1997).
\item[743.] \textit{Id.} at 16.
\item[744.] \textit{Id.}
\item[745.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
the amount of $45,267.07.\textsuperscript{746} Although most of the work was completed on the home, several subcontractors and materialmen remained unpaid.\textsuperscript{747} Three lienors recorded claims totaling about $31,000, and Artistic Surfaces presented an untimely claim for $2600.\textsuperscript{748}

The issue before the court was whether the language of section 713.06 of the \textit{Florida Statutes} allows the attorneys' fees and costs ultimately awarded under section 713.29 to become a lien against the property.\textsuperscript{749} The court concluded "that the limitation in section 713.06(3)(h) is intended to define the extent of the lien for the lienor's materials or services prior to litigation, and is not intended to preclude a lien for costs and attorneys' fees in a lien foreclosure action."\textsuperscript{750}

The court found it important to examine section 713.06(1) of the \textit{Florida Statutes}.\textsuperscript{751} This statute provides:

\begin{quote}
A materialman or laborer, either of whom is not in privity with the owner, or a subcontractor or sub-subcontractor who complies with the provisions of this part and is subject to the limitations thereof, has a lien on the real property improved for any money that is owed to him for labor . . . .\textsuperscript{752}
\end{quote}

Nothing in this statute expressly provides a lien for attorneys' fees and costs.\textsuperscript{753} Construction lien statutes should not be liberally construed in favor of any person.\textsuperscript{754} "[A]ttorneys' fees awarded under section 713.29 are not an element of damages, but are 'taxed as part of . . . costs.'"\textsuperscript{755} The court saw no reason why the costs involved in a construction lien action should not be included within the lien.\textsuperscript{756}

Legislative changes include, but are not limited to, the following: With respect to public lands and property, section 255.05(2)(a) of the \textit{Florida Statutes} now provides that where a claimant is no longer furnishing labor on a project, a contractor, its agent or attorney may elect to shorten the prescribed time within which an action to enforce a claim against the

\begin{flushright}
746. \textit{Id.}
747. \textit{Zalay}, 700 So. 2d at 16.
748. \textit{Id.} at 17.
749. \textit{Id.}
750. \textit{Id.}
751. \textit{Id.}
752. \textit{Zalay}, 700 So. 2d at 17 (quoting \textit{Fla. Stat.} § 713.06(1) (1993)).
753. \textit{Id.}
754. \textit{Id.}
755. \textit{Id.} at 18 (omission in original).
756. \textit{Id.}
\end{flushright}
payment bond may be made. This may be done by filing a Notice of Contest of Claim Against Payment Bond. The form and procedure for such are set out in the above referenced statute.

Section 713.01(12) of the Florida Statutes has been amended to include in the definition of “improve,” a provision for solid waste collection or disposal on the site of the improvement. Likewise, the definitions for “improvement,” “subcontractor,” and “sub-subcontractor” have been amended to reflect the same.

Section 713.23(1)(e) of the Florida Statutes has been amended to provide a shorter time for a contractor to claim against a payment bond. This statute provides a form for filing a “Notice of Contest of Claim Against Payment Bond.” Comparatively, section 713.235(1) of the Florida Statutes provides a form for a “Waiver of Right To Claim Against the Payment Bond.”

XVI. MORTGAGES

Alafaya Square Ass’n v. Great Western Bank. The court granted appellee’s motion for rehearing of the opinion dated February 7, 1997. The opinion was entered in place of the previous one. The court reversed the trial court’s order appointing a receiver because there was no showing that Alafaya wasted or impaired the real property.

Alafaya owned a shopping center encumbered by a mortgage in favor of WHC. If there was a default on the mortgage, Alafaya agreed to have a receiver appointed. After the loan matured, Alafaya did in fact default on payment. In response, WHC sued to foreclose and requested the appointment of a receiver.

757. FLA. STAT. § 255.05(2)(a) (1999).
758. Id.
759. Id.
760. Id. § 713.01(12).
761. Id. § 713.01(14), (26), (27).
762. FLA. STAT. § 713.23(1)(e) (1999).
763. Id. § 713.235(1).
764. 700 So. 2d 38 (Fla. 5th Dist. Ct. App. 1997).
765. Id. at 39.
766. Id.
767. Id.
768. Id.
769. Alafaya, 700 So. 2d at 39.
770. Id.
771. Id.
The trial court granted WHC's motion to sequester the rents received from the shopping center's tenants. All rent collected was placed in escrow and Alafaya could not expend funds from the account without the court's approval. Alafaya requested use of the escrow funds from WHC to do repairs on the property. After Alafaya received no response, it requested permission from the trial court to expend the funds. Alafaya later requested WHC's consent to withdraw escrow funds for payment of real estate taxes. WHC again failed to answer. In response to Alafaya's request for funds to repair, "WHC filed a motion for appointment of receiver alleging an 'apparent waste to the property.'"

The trial court granted WHC's motion for the appointment of a receiver, and Alafaya appealed arguing that evidence failed to show Alafaya wasted or impaired the property. "The appointment of a receiver in a foreclosure action is not a matter of right... it is an extraordinary remedy." The receiver's role "is to preserve the value of the secured property." The trial court can appoint a receiver, but only if evidence suggests that the secured property is being wasted or subject to serious risk of loss.

The appellate court agreed that the evidence did not constitute waste or impairment. The only waste could be the disrepair to the parking lot and the exterior paint. Alafaya took timely action to get WHC to release the funds. As such, there could be no waste since the failure to repair was due to WHC's refusal to release the funds. The appellate court reversed because the facts did not justify the remedy of receivership.

Beach v. Ocwen Federal Bank. Beach, the borrowers, asked the United States Supreme Court to consider whether the three year rescission

772. Id.
773. Id.
774. Alafaya, 700 So. 2d at 39.
775. Id.
776. Id.
777. Id.
778. Id. at 40.
779. Alafaya, 700 So. 2d at 40; see Barnett Bank of Alachua County v. Steinberg, 632 So. 2d 233, 234 (Fla. 1st Dist. Ct. App. 1994).
780. Alafaya, 700 So. 2d at 40.
782. Alafaya, 700 So. 2d at 40.
783. Id.
784. Id.
785. Id.
786. Id. at 41.
period, under the Truth-in-Lending Act, precluded a right of action after a
specified time. If so, the borrowers would not be able to raise their right
to rescind under the act as a recoupment defense in a foreclosure action
brought by the lender more than three years after the loan transaction date.
The Court found the language in 15 U.S.C. § 1635(f) to be clear, and held
that the right of rescission "shall expire" after the three year period.
Therefore, it was not a statute of limitations and could not be raised as a
recoupment defense after the expiration.

Blatchley v. Boatman's National Mortgage, Inc. The court affirmed
an order denying Blatchley's motion to vacate the foreclosure sale of his
home. The summary final judgment in foreclosure stated the sale date was
January 9, 1997. Boatman's moved for an order changing the sale date to
January 7, because January 9 was a "scrivener's error" and the published
"Notice of Foreclosure Sale contained the correct date of January 7." The
court granted the date change.

However, Blatchley failed to receive notice of the new sale date until a
day after the actual sale took place. In addition, Blatchley only received
Boatman's motion to change the date on January 10. Blatchley motioned
to vacate the sale, since he never received proper notice of the correct sale
date. As such, he could not exercise his right of redemption or
reinstatement, nor could he participate in the sale or protect his property
interest. The trial court denied the motion to vacate the sale, but gave
Blatchley fifteen days from the order date to pay the judgment amount.
Instead of taking advantage of the increased redemption period that was
offered, Blatchley filed a notice of appeal.

"Section 45.031 required that the final judgment of foreclosure specify
a day for the sale and that the notice of sale be published for two weeks, the
second of which publication 'shall be at least 5 days before the

788. Id. at 410.
789. Id.
790. Id.
791. See id. at 418.
792. 706 So. 2d 317 (Fla. 5th Dist. Ct. App. 1997).
793. Id. at 317.
794. Id.
795. Id.
796. Id.
797. Blatchley, 706 So. 2d at 317.
798. Id.
799. Id.
800. Id.
801. Id. at 317–18.
802. Blatchley, 706 So. 2d at 318.
The requirements of this statute were not satisfied. However, even though Blatchley did not receive proper notice, the court remedied the error by extending the redemption period. "Foreclosure suits are governed by equitable principles." The trial court "did equity" by extending the redemption period, and nothing would be accomplished by reversing for a new judgment and sale date.

**Clearman v. Dalton.** The Clearmans recovered a judgment for $150,000 against the Daltons. The Daltons filed for bankruptcy and revealed two secured mortgages against their homestead. The first was in favor of their son in the amount of $15,000, and the second was in favor of Monticello Bank for $50,000. The mortgage in favor of their son was never recorded, while the bank's mortgage was recorded but not delivered.

The trustee obtained an order from the Bankruptcy Court avoiding the mortgages, preserving the avoided obligations "for the benefit of the estate." The trustee assigned the mortgages to the Clearmans who recorded the assignment and judgments, avoiding the mortgages and preserving the avoided obligations.

The trial court denied the foreclosure petition filed by Clearman. The appellate court agreed with the trial court that title 544 of the United States Code did not place the trustee in the place of the former mortgagees with the power to foreclose. The appellate court believed the bankruptcy estate had an assignable interest in the mortgage subject to Daltons' claim of homestead. The assignees "can assert their interest and require the Daltons to establish the fact of homestead." Filing of judgments entered by the Bankruptcy Court does not constitute slander of title. Since the Daltons deliberately filed their bankruptcy petition and submitted their property, subject to provable exemptions, they cannot complain if the

803. *Id.* (quoting FLA. STAT. § 45.031 (1997)).
804. *Id.*
805. *Id.*
806. *Id.; see* FLA. STAT. § 702.01 (1995).
807. **Blatchley,** 706 So. 2d at 318.
808. 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).
809. *Id.* at 325.
810. *Id.*
811. *Id.*
812. *Id.*
813. **Clearman,** 708 So. 2d at 325.
814. *Id.*
815. *Id.*
817. **Clearman,** 708 So. 2d at 325.
818. *Id.*
819. *Id.*
assignee of the estate’s interest requires them to prove entitlement to homestead exemption.\footnote{820}

\textit{Crane v. Barnett Bank of Palm Beach County.}\footnote{821} The court affirmed the amended final judgment as to the terms of rescission of the mortgage agreement, except as to the effective date the rate of interest charged to the borrower should run.\footnote{822} The court reversed the denial of the borrower’s motion for partial summary judgment on liability, and vacated the provision for foreclosure of the subject mortgage, if the borrower failed to satisfy the conditions for rescission within forty-five days.\footnote{823}

The bank sought to foreclose when a construction loan matured and the borrower’s wife refused to sign a modification of their mortgage agreement.\footnote{824} The borrower had not defaulted under the construction loan phase of the agreement since the borrower’s payments had been refused, preventing such borrower from performing under the agreement.\footnote{825} “[T]he borrower’s bank did not have a written agreement requiring the wife’s signature on the mortgage.”\footnote{826} Liability against the borrower did not include the wife’s refusal to sign a modification to the mortgage.\footnote{827}

On appeal, the borrower claimed that the trial judge erred in denying his motion for summary judgment because the borrower had offered to make payments but was refused.\footnote{828} “The trial court should have granted the borrower’s motion for partial summary judgment...[T]he bank’s complaint...did not include allegations that the borrower defaulted by failing to have his wife sign the mortgage modification...”\footnote{829} The sole basis for default was due to the borrower’s failure to pay the mortgage.\footnote{830} As such, no material issue of fact existed regarding the question of liability for foreclosure.\footnote{831}

The second issue on appeal was whether the trial court’s order authorizing rescission “ab initio” of the parties’ mortgage agreement properly restored each party to the status quo.\footnote{832} “[T]he trial court erred in assessing two different rates of interest as a condition for rescission of the

\footnote{820}{Id.}
\footnote{821}{698 So. 2d 902 (Fla. 4th Dist. Ct. App. 1997).}
\footnote{822}{Id. at 905.}
\footnote{823}{Id. at 905–06.}
\footnote{824}{Id. at 903.}
\footnote{825}{Id.}
\footnote{826}{Crane, 698 So. 2d at 903.}
\footnote{827}{Id. at 903.}
\footnote{828}{Id. at 904.}
\footnote{829}{Id.}
\footnote{830}{Id.}
\footnote{831}{Id.}
\footnote{832}{Crane, 698 So. 2d at 904.}
parties' agreement 'ab initio.' Since there was only one integrated mortgage agreement and its nullification is ab initio, the borrower should not be penalized with a higher interest rate. This is especially true if it was the bank's own refusal to accept payments that led to rescission, simply because the mortgage agreement provided for two phases of the loan.

This court found no error in the imposition of a "costs of funds" rate of interest and payment required by the borrower as a cost of rescission. No record established the basis for foreclosure within forty-five days if the borrower failed to make rescission as required in the amended final judgment. Since "the trial judge erred in denying the borrower's motion for partial summary judgment on the bank's action for foreclosure, there is no basis for foreclosure under the mortgage agreement of the parties even if the borrower is unable to restore the bank to status quo in 45 days." Acceleration of the balance and foreclosure of the mortgage agreement were declared premature on this record.

Culpepper v. Inland Mortgage Corp. The issue on appeal was "whether a mortgage lender's payment of a 'yield spread premium' to a mortgage broker violates the antikickback provision of the Real Estate Settlement Procedures Act ("RESPA")."

The Culpeppers obtained a federally insured home mortgage loan from the Inland Mortgage Corporation ("Inland"). However, rather than dealing directly with Inland, the Culpeppers dealt only with the mortgage broker, Premiere Mortgage Company ("Premiere"). "On December 7, 1995, Premiere received a rate sheet from Inland and informed the Culpeppers that a 30-year loan was available at a 7.5% interest rate." The Culpeppers approved the given rate. However, the Culpeppers did not know that rate

833. Id.
834. Id.
835. Id.
836. Crane, 698 So. 2d at 904–05.
837. Id. at 905.
838. Id.
839. Id. (quoting Campbell v. Werner, 232 So. 2d 252, 256–57 (Fla. 3d Dist. Ct. App. 1970); Lunn Woods v. Lowery, 577 So. 2d 705 (Fla. 2d Dist. Ct. App. 1991)).
840. Crane, 698 So. 2d at 905.
841. 132 F.3d 692 (11th Cir. 1998).
842. Id. at 694; see 12 U.S.C. § 2601 (1994).
843. Culpepper, 132 F.3d at 694.
844. Id.
845. Id.
846. Id.
was higher than the par rate on Inland’s 30-year loan, and it carried a yield spread premium of 1.675% of the loan amount. Also, they did not know that, as a result of the spread, Inland would be paying Premiere the premium for the higher rate, even though the Culpeppers paid Premiere a loan origination fee for assisting them in obtaining and closing their loan. Once the Culpeppers discovered this, they challenged the legitimacy of Inland’s yield spread premium payment under RESPA.

Noting that no federal circuit court had addressed this issue, and the federal district courts that had addressed it were divided, the Eleventh Circuit Court of Appeals presented its own analysis. In so doing, it determined that the yield spread premium under these facts was a nonexempt referral fee violating RESPA section 2607(a). The court’s analysis began with the statutory prohibitions and exemptions. Section 2607(a) prohibits kickbacks and referral fees pursuant to an agreement regarding federally related mortgages. Section 2607(c) exempts from that prohibition payment for goods or services actually performed.

The first question was whether the payment to Premiere was a referral fee. The court noted that the payment would constitute such “if (1) a payment of a thing of value is (2) made pursuant to an agreement to refer settlement business and (3) a referral actually occurs.” Here, Inland gave Premiere value by paying the spread premium. The payment was made pursuant to an agreement to refer settlement business, because the premium was to be paid for Premiere’s “registered” loans with Inland which funded the loans. There was an actual referral when Premiere registered the loan with Inland.

The next question was whether section 2607(c) exempted the transaction as a payment for goods or services. As to whether there was a payment for goods, the appellate court noted this was not satisfied, since

847. Id.
848. Culpepper, 132 F.3d at 694.
849. Id.
850. Id. at 695.
851. Id. at 695–96.
852. See id. at 695.
854. Culpepper, 132 F.3d at 695; see § 2607(c).
855. See Culpepper, 132 F.3d at 695.
856. Id. at 696.
857. Id.
858. Id.
859. Id.
860. See Culpepper, 132 F.3d at 696.
Inland funded the loan from the beginning.\textsuperscript{861} It was not one owned by Premiere and subsequently sold to Inland, which might be done with loans sold in the permitted secondary mortgage market sales.\textsuperscript{862} The court noted that even if Premiere was selling to Inland its right to direct the loan’s disposition to a number of wholesale lenders, it would not be an exempt sale of goods.\textsuperscript{863} Paying a referral fee for “directing” the business, violates RESPA, and the court concluded that the premium did not fit the sale of goods exemption.\textsuperscript{864}

As to whether the premium was paid for Premiere’s services, the appellate court first looked at the services Premiere provided the Culpeppers, which included both obtaining and closing the loan.\textsuperscript{865} It found the facts clearly showed the Culpeppers already paid Premiere for these services.\textsuperscript{866} It also identified logically that the premium paid to Premiere for generating a higher loan rate was not a service to the Culpeppers.\textsuperscript{867}

Next, the court looked to whether the premium was for a service to Inland.\textsuperscript{868} However, there was no additional service to Inland.\textsuperscript{869} The premium was based solely on the higher interest rate.\textsuperscript{870} Premiere provided no additional service to Inland above what it would have provided them with a loan consisting of a lower interest rate.\textsuperscript{871} Therefore, the payment did not fit the sale of services exemption.\textsuperscript{872}

Having found the transaction violated RESPA’s prohibitions, the court reversed and remanded the case to the district court.\textsuperscript{873} The court noted the market value test utilized by the trial court was inappropriate, since that test applies only to facially permissible transactions.\textsuperscript{874} The appellate court directed the trial court to consider the Culpeppers’ motion for class certification \textit{ab initio}.\textsuperscript{875}

\textit{Dove v. McCormick}.\textsuperscript{876} The court affirmed the trial court’s order granting final summary judgment in favor of McCormick.\textsuperscript{877} Dove executed

\textsuperscript{861.} \textit{Id.} \\
\textsuperscript{862.} \textit{Id.} \\
\textsuperscript{863.} \textit{Id.} \\
\textsuperscript{864.} \textit{Id.} \\
\textsuperscript{865.} \textit{Culpepper}, 132 F.3d at 696. \\
\textsuperscript{866.} \textit{Id.} \\
\textsuperscript{867.} \textit{Id.} at 696–97. \\
\textsuperscript{868.} \textit{Id.} at 697. \\
\textsuperscript{869.} \textit{Id.} \\
\textsuperscript{870.} \textit{Culpepper}, 132 F.3d at 697. \\
\textsuperscript{871.} \textit{Id.} \\
\textsuperscript{872.} \textit{Id.} \\
\textsuperscript{873.} \textit{Id.} \\
\textsuperscript{874.} \textit{Id.} \\
\textsuperscript{875.} \textit{Culpepper}, 132 F.3d at 697. \\
\textsuperscript{876.} 698 So. 2d 585 (Fla. 5th Dist. Ct. App. 1997).
a mortgage in favor of The First, F.A., that encumbered Orange County real property. The transaction was subject to The Truth in Lending Act, ("TILA") requirements. Afterwards, The First was declared "troubled," and the RTC was appointed as a receiver to liquidate The First’s assets. Dove’s mortgage was assigned by RTC to Blazer Financial Services, which later assigned the mortgage to McCormick. Since Dove failed to make monthly payments, McCormick sued to foreclose.

The trial court entered final summary judgment in McCormick’s favor, concluding that Dove posed defenses pertaining to rescission and recoupment which were barred by the statute of limitations. "Dove sought to assert her statutory right to rescission based upon alleged violations of TILA and Regulation Z." Dove also argued for recoupment under section 1640(e). The appellate court affirmed the trial court’s ruling in denying Dove’s claim of rescission because “under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).”

Florida has historically recognized that “when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.” The court reasoned that Dove may not seek the remedy of rescission under the guise of an affirmative defense of recoupment outside the statutory three-year time frame.

_Floyd v. Federal National Mortgage Ass’n._ Floyd appealed a post-judgment final order denying the “Motion to Vacate Final Judgment and Set Aside Foreclosure Sale.” The Federal National Mortgage Company Association ("Federal National"), filed the complaint to foreclose a first mortgage against Pamela Johnson. The mortgage encumbering the home

877. _Id._ at 586.
878. _Id._
879. _Id._
880. _Id._
881. _Dove,_ 698 So. 2d at 586.
882. _Id._
883. _Id._
884. _Id._ at 587.
886. _Dove,_ 698 So. 2d at 588 (quoting Beach v. Great Western Bank, 692 So. 2d 146, 153 (Fla. 1997), aff’d, 523 U.S. 410 (1998)).
887. _Id._ (quoting Bowery v. Babbit, 128 So. 801, 806 (1930)).
888. _Id._ at 588.
889. 704 So. 2d 1110 (Fla. 5th Dist. Ct. App. 1998).
890. _Id._ at 1111.
891. _Id._
was executed by Pamela and her then husband, Vernon Floyd in the original principal amount of $11,000.\textsuperscript{892} After their divorce and Pamela’s subsequent death, Vernon resided in the home with their children.\textsuperscript{893} In the same year, the mortgage went into default with a remaining balance of $3,045.96.\textsuperscript{894}

Personal service of the complaint could not be completed because the sheriff’s process server was unable to locate the property.\textsuperscript{895} The death of Pamela was never confirmed.\textsuperscript{896} Federal National filed an amended complaint naming Pamela Johnson or her heirs as the defendant.\textsuperscript{897} Federal National then filed an Affidavit of Constructive Service alleging that the heirs could not be found even after a diligent search was conducted.\textsuperscript{898}

After a second letter was sent to Vernon, specifying the amount necessary to reinstate the mortgage, the trial court entered final summary judgment in favor of Federal National.\textsuperscript{899} Vernon was notified to vacate the premises after the foreclosure sale.\textsuperscript{900} In response, Vernon filed a motion to set aside the foreclosure sale, which was consequently denied by the trial court.\textsuperscript{901}

The appellate court agreed with Vernon that Federal National failed to conduct a diligent search.\textsuperscript{902} Prior to constructive notice, a plaintiff must first file an affidavit showing that a diligent search was conducted to discover the names and addresses of the defendants.\textsuperscript{903} In this case, Federal National’s affidavit states that a search was conducted of the Social Security Administration database, probate records, and Vital Statistics, all without success.\textsuperscript{904} The Social Security records confirmed that Pamela Johnson was, in fact, deceased.\textsuperscript{905} Federal National failed to locate the property, inquire of those in possession of the property, or talk with neighbors, relatives or friends.\textsuperscript{906}

Federal National’s failure to pursue Vernon after his previous inquiries about reinstating the mortgage showed that Federal National did not

\begin{footnotesize}
\begin{enumerate}
\item[892.] Id.
\item[893.] Id.
\item[894.] Floyd, 704 So. 2d at 1111.
\item[895.] Id.
\item[896.] Id.
\item[897.] Id.
\item[898.] Id.
\item[899.] Id.
\item[900.] Id.
\item[901.] Id.
\item[902.] Id. at 1112.
\item[903.] Id.; see Fla. Stat. §§ 49.031(1), .041(1), .071 (1995).
\item[904.] Floyd, 704 So. 2d at 1112.
\item[905.] Id.
\item[906.] Id.
\end{enumerate}
\end{footnotesize}
"reasonably employ[] the knowledge at [its] command." Federal National failed to conduct a diligent search and inquiry required by the constructive notice statute, by completely ignoring the parties in possession of the premises.

"Strict compliance with constructive service statutes is required." The record showed a diligent effort was not made to acquire the information needed to accomplish personal service on those in possession of the property. The appellate court believed Federal National would have learned the additional facts necessary to accomplish personal service if someone located the property and went there to see who actually had possession.

Kirkland v. Miller. Kirkland appealed final judgment of ejectment awarded in favor of Sportsmen’s Resort Clubs Inc., ("Sportsmen’s"), the original owner of the subject real property. The trial court stated that Kirkland only had a beneficial interest in an Illinois land trust. Thus, ejectment was a proper remedy. The trial court determined there was only a personal property interest and foreclosure was unnecessary. The appellate court reversed.

Miller was a trustee with legal and equitable title to the property identified in the trust. Mary Shearer, the principal, and Sportsmen’s only shareholder, had a beneficial interest. Miller explained the documents for closing to Kirkland, which included a contract showing Sportsmen’s sale of the beneficial interest to Kirkland for $40,000. Kirkland executed a security agreement which assigned the beneficial interest back to Miller as security for the $40,000 debt recognized as a "Purchase Money Mortgage," and included a charge for "State Documentary Stamps on Deed."

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907. Id. (quoting Batchin v. Barnett Bank of S.W. Fla., 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).
908. Id.
909. Floyd, 704 So. 2d at 1112 (citing Tindal v. Varner, 667 So. 2d 890, 890–91 (Fla. 2d Dist. Ct. App. 1996)).
910. Id.
911. Id. at 1113.
912. 702 So. 2d 620 (Fla. 4th Dist. Ct. App. 1997), review denied, 717 So. 2d 535 (Fla. 1998).
913. Id.
914. Id.
915. See id.
916. Id.
917. Kirkland, 702 So. 2d at 620.
918. Id.
919. Id.
920. Id.
921. Id. at 620–21.
was to make monthly payments for twenty years, and if default occurred, there would be an automatic assignment of the entire beneficial interest to Sportsmen's. 922 After default, Miller was to sell the trust property, and after costs and fees were paid out, the balance from the proceeds were to be delivered to Kirkland. 923 Kirkland believed a mortgage was created. 924

Pursuant to section 697.01 of the Florida Statutes, an instrument is said to be a mortgage if, when taken either alone or in conjunction with the surrounding facts, it seems to have been given for the purpose of securing payment of the money. 925 "Whenever property belonging to one person is held by another as security for an indebtedness of the other, the transaction is in effect a mortgage." 925

The transaction in this case was not a valid Illinois land trust, but a mortgage securing an indebtedness. 927 If there was default, Kirkland's interest in the property reverted to Sportsmen's. 928 Accordingly, the transaction was deemed a mortgage, subject to the rules of foreclosure. 929

Najera v. NationsBank Trust Co. 930 Najera appeals from a final summary judgment of foreclosure by NationsBank. 931 The appellate court reversed the trial court's decision because it believed issues of material fact remained on the record which could not be disposed of by summary judgment. 932

Najera's deposition showed that he requested a copy of the property appraisal but never obtained it. 933 General Development Corporation ("GDC") said it would take care of the appraisal because no bank would authorize a loan for more money than the property value. 934 Najera paid a fee for the appraisal, with the understanding that it was being done in order to verify that the property would provide the lending institution with sufficient collateral for the loan. 935

922. Kirkland, 702 So. 2d at 621.
923. Id.
924. Id.
925. Id.; see Fla. Stat. § 697.01 (1985).
926. Kirkland, 702 So. 2d at 621 (quoting Williams v. Roundtree, 478 So. 2d 1171, 1173 (Fla. 1st Dist. Ct. App. 1985)).
927. Id.
928. Id.
929. Id. at 621–22.
931. Id. at 1154.
932. Id.
933. Id.
934. Id.
935. Najera, 707 So. 2d at 1154.
The appellate court believed "the allegations and record create[d] issues of fact concerning whether the Najeras relied upon the existence of a professional appraisal to support the loan values, and whether they would have entered into this transaction had those representations not been made." 336

The record established much more than the assertion of inflated values. 337 GDC and General Development Financial Corporation, ("GDV") collectively misrepresented the value of the lot the Najeras already owned, the value of the condo for which they were induced to swap the lot, the fact that they were to have conventional financing . . . that the rental market in the area was sufficiently strong to cover their mortgage payments, that the resale market for GDC properties was strong at the false sales prices, and that there existed and would be provided a professional appraisal to back up the value of the property provided to them. 338

The appellate court recognized that if the alleged course of fraudulent conduct by GDC and GDV was established at trial, and if it was shown that it was reasonably relied upon by Najeras, they would have a defense to the foreclosure action. 339

Southeast & Associates v. Fox Run Homeowners' Ass'n. 340 The issue before the court was whether the owners may set aside a foreclosure sale where constructive service was "based on affidavits of diligent search and inquiry which were facially sufficient and complied with the statutory requirements." 341

On July 1, 1995, an association assessment for semi-annual maintenance was due. 342 Albert and Rose Love received a notice of delinquency from the association. 343 The notice stated that the association could file a lien against the home and foreclose at a later date. 344 When the Loves failed to pay the assessment, a lien was filed against the property. 345 The Loves paid a partial payment, which the association returned with a

936. Id. at 1155.
937. Id.
938. Id.; see Watson v. Hahn, 664 So. 2d 1083 (Fla. 5th Dist. Ct. App. 1995).
939. Najera, 707 So. 2d at 1155.
940. 704 So. 2d 694 (Fla. 4th Dist. Ct. App. 1997).
941. Id. at 695.
942. Id.
943. Id.
944. Id.
945. Southeast & Assocs., 704 So. 2d at 695.

https://nsuworks.nova.edu/nlr/vol24/iss1/1
notice stating that if full payment was not made, a foreclosure suit would be initiated.\footnote{946}

When the association planned to foreclose, it hired a process server to serve the Loves.\footnote{947} The server failed to recognize that the Loves were at their New York address and made numerous attempts to serve them at their Fox Run address, as well as another Florida address said to be attributed to them.\footnote{948} Since personal service was not able to be performed, the association served by publication after filing an affidavit of diligent search and an affidavit of constructive service.\footnote{949} Final summary judgment of foreclosure was filed against the Loves.\footnote{950} Southeast and Associates, the successful bidder at the foreclosure sale, received a certificate of title.\footnote{951} In response, the Loves moved to set aside the sale due to an insufficient service of process.\footnote{952} The trial court entered an order finding lack of diligent search and inquiry by Fox Run, thereby setting aside the foreclosure sale.\footnote{953}

Section 49.041 of the Florida Statutes "provides that a person may be served by publication upon verified statement showing on its face that 'diligent search and inquiry have been made to discover the name and residence' of the person being served."\footnote{954} If the court finds the verified statement to be defective, or considers the diligent search to be deficient, the court must then decide "whether the trial court's judgment of foreclosure would be void or voidable."\footnote{955} If voidable, a foreclosure sale resulting from constructive service cannot be set aside as against a bona fide purchaser.\footnote{956}

The plaintiff here followed the favored approach.\footnote{957} It filed a detailed affidavit which listed the various attempts to deliver personal service, "the contact with the neighbors, the two skip traces, and the trip to a retail establishment where the process server learned the lessee had moved out in the middle of the night."\footnote{958}

In addition, "where one of two innocent parties must suffer a loss as the result of the default of another, the loss shall fall on the party who is best

\footnote{946} Id.
\footnote{947} Id.
\footnote{948} Id.
\footnote{949} Id.
\footnote{950} Southeast & Assocs., 704 So. 2d at 695.
\footnote{951} Id. at 695–96.
\footnote{952} Id. at 696.
\footnote{953} Id.
\footnote{954} Id.
\footnote{955} Southeast & Assocs., 704 So. 2d at 696 (quoting Batchin v. Barnett Bank of S.W. Fla., 647 So. 2d 211, 213 (Fla. 2d Dist. Ct. App. 1994)).
\footnote{956} Id.
\footnote{957} Id.
\footnote{958} Id.
able to avert the loss and is the least innocent." The Loves did not make the requisite maintenance payment and could have informed the Association of their move to New York. In addition, someone on the Loves' behalf kept signing the certified letters and made partial payments.

**United Companies Lending v. Abercrombie.** The issue presented was whether the "circuit court abused its discretion when it declined to set aside a mortgage foreclosure sale of real property." The appellate court held that the circuit court was mistaken in its view of what its scope of discretion is in such a matter.

The United Companies Lending Corporation ("United") sued to foreclose its mortgage on the residence owned by the appellee. The circuit court entered a final judgment and subsequently scheduled a foreclosure sale to be held at the Sarasota County Courthouse. United's counsel agreed to attend the sale, but due to an illness in the original attorney's family, United sent another attorney to appear in his place. The replacement attorney arrived early for the foreclosure sale, however, he was at the wrong courthouse. He was informed that it was to be held in Sarasota only five minutes before the sale was to take place. The clerk in Sarasota "declined his request to delay the bidding." By the time a substitute Sarasota attorney arrived, the property had already been sold to Darrell Crane for $1000.

United filed an objection to the sale and a motion to have the sale set aside on the grounds of "gross inadequacy of price and the mistaken failure of its agent to attend." Evidence at the hearing proved that the property was worth over $125,000 and that United was going to bid as high as $181,898. The successful bidder, Crane, testified that he would have only bid up to $115,000.

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959. Id. at 697 (quoting Jones v. Lally, 511 So. 2d 1014, 1016 (Fla. 2d Dist. Ct. App. 1987)).
960. Southeast & Assocs., 704 So. 2d at 697.
961. Id.
962. 713 So. 2d 1017 (Fla. 2d Dist. Ct. App. 1998).
963. Id. at 1018.
964. Id.
965. Id.
966. Id.
967. United Cos. Lending, 713 So. 2d at 1018.
968. Id.
969. Id.
970. Id.
971. Id.
972. United Cos. Lending, 713 So. 2d at 1018.
973. Id.
974. Id.
The circuit court found that the price paid for the property at the sale was "grossly disproportionate." However, it denied United's motion, because the court found that the inadequate price resulted from the "unilateral mistake" of United's counsel, "and not from any mistake, misconduct, or irregularity" on the part of anyone else involved in the sale. The circuit court cited Wells Fargo Credit Corp. v. Martin and Sulkowski v. Sulkowski for authority. The appellate court upon reviewing the transcript from the circuit court found that the circuit court mistakenly believed that the Second District, unlike the Third and Fourth Districts, holds that a mistake cannot be a unilateral mistake by the complaining party. However, the law of this appellate district does not differ from the other districts, and follows the holding in Arlt v. Buchanan. In Arlt, the court stated the general rule that:

standing alone mere inadequacy of price is not a ground for setting aside a judicial sale. But where the inadequacy is gross and is shown to result from any mistake, accident, surprise, fraud, misconduct or irregularity upon the part of either the purchaser or other person connected with the sale, with resulting injustice to the complaining party, equity will act to prevent the wrong result.

This court does not construe "person connected with the sale" to mean that it has to be a person who was physically present at the sale. Therefore, the circuit court mistakenly read this court's past opinions to the contrary.

"Whether the complaining party has made the showing necessary to set aside a [foreclosure] sale is a discretionary decision by the trial court, which may be reversed only when the court has grossly abused its discretion." This court found that, in the present case, the circuit court's discretion was restricted by a mistaken understanding of the law in this district, and

975. Id.
976. Id.
977. 605 So. 2d 531 (Fla. 2d Dist. Ct. App. 1992), case dismissed, 613 So. 2d 13 (Fla. 1993).
979. United Cos. Lending, 713 So. 2d at 1018.
980. Id.
981. 190 So. 2d 575 (Fla. 1966).
982. Id. at 577.
983. United Cos. Lending, 713 So. 2d at 1019.
984. Id.
985. Id. at 1018 (citing RSR Invs., Inc. v. Barnett Bank of Pinellas County, 647 So. 2d 874 (Fla. 2d Dist. Ct. App. 1994)).
reversed and remanded for a reconsideration. This court states no “opinion as to the balance of equities in this case.” Rather, the court stated that “[i]n one set of circumstances, the fact that the inadequate sale price was caused by the complaining party’s own mistake might tip the balance of equities in favor of the successful bidder; in another case, it might not.”

XVII. OPTIONS AND RIGHTS OF FIRST REFUSAL

Gonzalez v. Archer. When the tenant tried to exercise the purchase option contained in the commercial lease, the seller claimed that the option had been nullified by the tenant’s default in making late rent payments. The tenant then brought this action for specific performance. The trial court denied relief, but the Third District Court of Appeal reversed because the record revealed that the landlord had accepted the untimely rent payments without protest, and had, therefore, impliedly waived the right to declare the lease in default based on those breaches. The court also invoked estoppel to prevent the landlord from declaring the lease in default under these circumstances.

The court rejected the defense that the tenant had failed to pay the deposits required upon exercising the option. The lease did not specify when the deposits had to be paid, and in the absence of an express term, the tenant had a reasonable time to comply, but the landlord had repudiated the option before a reasonable time had passed. The tenant was not required to make a tender that the landlord already indicated would be refused.

Indian River Colony Club, Inc. v. Bagg. The Indian River Colony Club (“Club”) was a nonprofit organization created to provide benefits to

986. Id.
987. Id.
988. United Cos. Lending, 713 So. 2d at 1018.
989. Rights of first refusal and, for that matter, rights of first sale, are merely options that are subject to conditions precedent. See Ronald Benton Brown, An Examination of Real Estate Purchase Options, 12 NOVAL. REV. 147, 172 (1987).
991. Id. at 890.
992. Id. at 889.
993. Id.
994. Id. at 890.
995. Gonzalez, 718 So. 2d at 890.
996. Id.
997. Id.
998. 727 So. 2d 1143 (Fla. 5th Dist. Ct. App. 1999).
former military officers.\textsuperscript{999} One of the benefits of membership was the ability to buy a residence in the Club’s planned unit development.\textsuperscript{1000} However, under the deed restrictions, nonmembers were unable to purchase a unit.\textsuperscript{1001} Furthermore, if an owner decided to sell, the residence had to be sold at a price agreed to when the unit was first acquired, and to another Club member on the waiting list.\textsuperscript{1002} If a Club member wanted to buy the unit, the Club was required to sell it at the agreed price.\textsuperscript{1003} The Baggs claimed that these restrictions violated the rule against restraints on alienation.\textsuperscript{1004} The trial court agreed, based upon the Supreme Court of Florida’s decision in \textit{Inglehart v. Phillips},\textsuperscript{1005} which invalidated a fixed price repurchase option of unlimited duration.

The Fifth District Court of Appeal disagreed, distinguishing \textit{Inglehart} on the critical facts.\textsuperscript{1006} The rule against restraints on alienation does not prohibit all restrictions that prevent sale of land on the open market.\textsuperscript{1007} The rule prohibits only unreasonable restraints.\textsuperscript{1008} The restriction in \textit{Inglehart} had no stated purpose and the court found it would have a significant negative impact on the likelihood that the property would be improved, and on its general marketability.\textsuperscript{1009} In contrast, the restrictions in this case were shown not to have the same degree of negative impact.\textsuperscript{1010} To the contrary, the restrictions were part of a rational plan to ensure continued success of the organization, and the planned unit development. Declaring the restrictions invalid would undermine the legitimate objectives of the members of the association.\textsuperscript{1011} The dissent considered the case “squarely controlled by \textit{Inglehart}.”\textsuperscript{1012} The critical factor, in the dissent’s opinion, was that there was no provision for an increase in the value of the property between purchase and resale.\textsuperscript{1013} The dissent would, however, have allowed

\textsuperscript{999} \textit{Id.} at 1144.
\textsuperscript{1000} \textit{Id.}
\textsuperscript{1001} \textit{Id.}
\textsuperscript{1002} \textit{Id.}
\textsuperscript{1003} Bagg, 727 So. 2d at 1144.
\textsuperscript{1004} \textit{Id.}
\textsuperscript{1005} 383 So. 2d 610 (Fla. 1980).
\textsuperscript{1006} Bagg, 727 So. 2d at 1145.
\textsuperscript{1007} \textit{Id.}
\textsuperscript{1008} \textit{Id.} at 1145–46.
\textsuperscript{1009} \textit{Id.}
\textsuperscript{1010} \textit{Id.} at 1146.
\textsuperscript{1011} Bagg, 727 So. 2d at 1146.
\textsuperscript{1012} \textit{Id.}
\textsuperscript{1013} \textit{Id.} at 1146 (Thompson, J., dissenting).
\textsuperscript{1014} \textit{Id.} at 1146.
the Club to seek relief based upon equitable principles for the loss of the benefit of its bargain.\textsuperscript{1015}

\textit{Taylor v. Cesery}.\textsuperscript{1016} Defendant was the trustee and executor of the property in dispute.\textsuperscript{1017} As such, he had the power to sell or grant an option on the land.\textsuperscript{1018} Cesery decided to sell the residence, but first offered it to one of the beneficiaries.\textsuperscript{1019} When the beneficiary did not accept the offer, the defendant gave her "a right of first refusal."\textsuperscript{1020} He later received an offer from a third party and notified the beneficiary.\textsuperscript{1021} The beneficiary proposed that she receive the house in lieu of her cash distribution under the will.\textsuperscript{1022} When the defendant rejected that proposal, the beneficiary brought this suit and filed a notice of lis pendens.\textsuperscript{1023}

The trial court denied the motion for a preliminary injunction.\textsuperscript{1024} The First District Court of Appeals affirmed the denial of the preliminary injunction, reasoning that the plaintiff had no likelihood of ultimate success on the merits.\textsuperscript{1025} The claim was based upon having exercised the right of first refusal, but a matching cash offer was never made by the third party.\textsuperscript{1026} Taking the house in lieu of a distribution from the estate was not the equivalent of a cash offer.\textsuperscript{1027}

\textbf{XVIII. RIPARIAN RIGHTS}

\textit{Lee v. Williams}.\textsuperscript{1028} This court resolved the issue of whether the appellant had a right to construct a boat lift, by looking at which neighbor owns the nonnavigable tidelands of Florida.\textsuperscript{1029} In \textit{Lee}, the two neighbors'
lots were contiguous. The western boundary of the Williams’ lot, Lot 13, was defined as the centerline of Butler’s Branch, a small waterway shown on the plat of Butler’s Replat, and the Lees’ northern boundary of their lot, Lot 12, was Julington Creek, a navigable body of water. The waters of Butler’s Branch and Julington Creek joined at the northwest end of the Lees’ property.

In 1960, the owner of Lot 13 excavated a navigable canal to run through and across Lot 13, and through and across the confluence of Butler’s Branch and Julington Creek and into Julington Creek. In 1961, when the Williams purchased Lot 13, the canal had been excavated. If in 1961, the boat lift had been erected where it is today, it would have been over dry land. Over the years, the canal bank eroded toward the common boundary line, and in the 1980’s the owner of Lot 12 constructed a bulkhead along the, then existing, bank of the canal. Surveys show that a great portion of this bulkhead was built on Lot 13.

In 1993, the Lees purchased Lot 12, and without the Williams’ knowledge, constructed a boat lift in the canal adjoining the previously constructed bulkhead sometime in 1994. The boat lift was situated entirely within Lot 13, and the Williams, upon discovering this, protested the construction of the boat lift.

The issue facing this court was whether the canal, which traverses nonnavigable tidelands within the Williams’ lot, was privately owned by the Williams, or was sovereignty land available for public use. The trial court found that Clement v. Watson was dispositive. In Clement, the court found that Watson was able to exclude Clement from fishing privileges in a cove surrounded by property owned by Watson’s wife. The Supreme Court of Florida affirmed the basis of the decision in Clement, when it defined navigable waters and “emphasized that waters are not navigable

1030. Id.
1031. Id. at 57–58.
1032. Id. at 58.
1033. Lee, 711 So. 2d at 58.
1034. Id.
1035. Id.
1036. Id.
1037. Id.
1038. Lee, 711 So. 2d at 58.
1039. Id.
1040. Id.
1041. 58 So. 2d (Fla. 1912).
1042. Lee, 711 So. 2d at 58.
1043. Id.
merely because they are affected by the tides.” The court distinguished between sovereignty and privately owned lands as follows:

“The shore of navigable waters which the sovereign holds for public uses is the land that borders on navigable waters and lies between ordinary high and ordinary low water mark. This does not include lands that do not immediately border on the navigable waters, and that are covered by water not capable of navigation for useful public purposes, such as mud flats, shallow inlets, and lowlands covered more or less by water permanently or at intervals, where the waters thereon are not in their ordinary state useful for public navigation. Lands not covered by navigable waters and not included in the shore space between ordinary high and low water marks immediately bordering on navigable waters are the subjects of private ownership, at least when the public rights of navigation, etc., are not thereby unlawfully impaired.”

The court concluded in Clement that a majority of states, including Florida, base the determination on whether water is navigable and not upon whether water is tidal. The appellants, however, argued that reliance on Clement was an error and that the 1988 decision by the United States Supreme Court in Phillips Petroleum Co. v. Mississippi governed. The appellants concluded that all of Florida’s tidelands are sovereignty lands of the state. In Phillips Petroleum, the United States Supreme Court held that the states, “upon entry into the Union, received ownership of all lands under waters subject to the daily tidal ebb and flow.” However, the Court also held “that the states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit.”

This court looked to see how Florida law defined the limits of the lands held in public trust, and what private rights in tidelands that Florida recognizes. No Supreme Court of Florida case has overruled Clement, nor has any case held a nonnavigable tideland to be sovereignty land.

1044. Id.
1045. Id. at 59 (quoting Clement v. Watson, 58 So. 25, 26 (Fla. 1912)) (emphasis in original).
1046. Id.
1048. Lee, 711 So. 2d at 59.
1049. Id. at 60.
1050. Id.
1051. Id.
1052. Id.
1053. Lee, 711 So. 2d at 62.
Therefore, the appellate court affirmed the trial court's decision that the land is not to be sovereignty land. 1054

XIX. SALES

Anchor Bank, S.S.B. v. Conrardy. 1055 Condominium buyers brought an action for damages for fraud and rescission based on claims that the seller had made fraudulent representations and failed to disclose known construction defects. 1056 The two claims were tried together. The court granted a directed verdict for the defendant on the fraud claim due to "deficiencies in proof as to the tort damages," but then granted rescission based on fraud in the inducement. 1057

Two points on appeal were noteworthy. First, the seller claimed that the buyers had an adequate remedy at law, so they should be denied any equitable relief. 1058 The crux of this argument seems to be based on the fact that the buyers could not simultaneously bring the tort suit without undermining their claim for rescission. 1059 The district court rejected that argument because the Supreme Court of Florida allowed such joinder in Johnson v. Davis. 1060 The seller also seemed to be arguing that losing the tort suit should bar the claim for rescission, but that argument was rejected because the elements for establishing damages for fraud were not the same as those for rescission for fraudulent concealment. 1061

The seller also claimed that rescission should not be granted because the buyers could not restore the property to its condition at the time of the sale, as is ordinarily required. 1062 The exception to the general rule is where restoration is prevented by the very fraud from which the victim seeks relief. 1063 The exception applied in this case because the deterioration was caused by the structural problems that the seller had failed to disclose to the buyers. 1064

1054. Id. at 64.
1056. Id.
1057. Id.
1058. Id.
1059. Id.
1060. Anchor Bank, 23 Fla. L. Weekly at D1764 (citing Johnson v. Davis, 480 So. 2d 625 (Fla. 1985)).
1061. Id.
1062. Id.
1063. Id.
1064. Id.
Beach Higher Power Corp. v. Granados.\textsuperscript{1065} The Buyer signed a contract to purchase a condominium unit "as is."\textsuperscript{1066} The contract called for closing within sixty days but the buyer paid the entire purchase price at the time of signing the contract.\textsuperscript{1067} Over fifteen months later, the buyer still did not have title despite repeated demands, and he thereafter filed this suit for specific performance and breach of contract.\textsuperscript{1068} He alleged that the seller had been using the unit during that period and had damaged it.\textsuperscript{1069}

Before the seller had filed its answer the trial court granted the buyer's motion for partial summary judgment on the breach of contract claim.\textsuperscript{1070} In support of the motion, the buyer had filed an affidavit which incorporated by reference a letter from the seller's attorney claiming the buyer had gotten the unit at a bargain price because he had orally agreed to allow the seller to use the unit as a sales office and model until all the other units had been sold.\textsuperscript{1071} The buyer, in his affidavit, denied any such agreement.\textsuperscript{1072}

The district court concluded that the partial summary judgment should not have been granted.\textsuperscript{1073} Summary judgment should only be granted before an answer has been filed where it appears that no genuine issue or defense could possibly be raised by the answer.\textsuperscript{1074} Here, at least one possible defense existed. The written contract could have been modified by a subsequent oral agreement, or the conduct of the parties, even if that was prohibited by an express term in the contract.\textsuperscript{1075} The buyer's affidavit reveals that there was a dispute about the existence of an agreement under which seller could use the unit.\textsuperscript{1076} If there was such a valid modification, then seller might not have breached the contract. Consequently, the motion should not have been granted at this stage of the proceedings.\textsuperscript{1077} 

Bush v. Ayer.\textsuperscript{1078} The land and the buyer were located in Florida, but the sellers were located in Ohio.\textsuperscript{1079} An agreement in principle was reached

\textsuperscript{1065} 717 So. 2d 563 (Fla. 3d Dist. Ct. App. 1998), review denied, (Sept. 23, 1998).
\textsuperscript{1066} Id. at 564.
\textsuperscript{1067} Id.
\textsuperscript{1068} Id.
\textsuperscript{1069} Id.
\textsuperscript{1070} Granados, 717 So. 2d at 564.
\textsuperscript{1071} Id.
\textsuperscript{1072} Id.
\textsuperscript{1073} Id.
\textsuperscript{1074} Id. at 565.
\textsuperscript{1075} Granados, 717 So. 2d at 565.
\textsuperscript{1076} Id.
\textsuperscript{1077} Id.
\textsuperscript{1078} 728 So. 2d 799 (Fla. 4th Dist. Ct. App. 1999), review denied, Ayer v. Bush, 744 So. 2d 452 (Fla. 1999).
\textsuperscript{1079} Id. at 800.
during a telephone conversation.\textsuperscript{1080} The buyer instructed his attorney to draft the contract and mail it to the sellers.\textsuperscript{1081} After reviewing the contract, the sellers wanted one change.\textsuperscript{1082} They wanted the buyer to pay the closing costs.\textsuperscript{1083} They hand wrote their modifications onto the draft, signed it, and then faxed it to their attorney.\textsuperscript{1084} Their attorney mailed the fax to the buyer with a cover letter that stated:

Please forward these counter-offers to your client, Mr. Bush, and explain the changes. If he is willing to consider the terms proposed by my clients, then please contact me and I will deliver the original signed contracts to your office for [your] review and execution. Once there is a complete bilateral contract . . . then we can discuss making preparations for the closing.\textsuperscript{1085}

That procedure was not followed.\textsuperscript{1086} The original contract that the buyer had sent to the sellers was never delivered back to the buyer’s attorney for review and execution, as the cover letter required for the completing of a bilateral contract.\textsuperscript{1087} The buyer simply went to his attorney’s office and agreed to the changes.\textsuperscript{1088} He then signed the fax copy of the contract that his attorney had received.\textsuperscript{1089} The buyer’s attorney communicated those facts to the sellers and their attorney, and further stated that he was taking the contract to a title company so that the closing documents could be prepared.\textsuperscript{1090} The title company sent the closing documents, including closing statements and proposed deeds, to the sellers.\textsuperscript{1091} The sellers objected to the tax prorations, but that was worked out.\textsuperscript{1092} Anticipating closing, the buyer delivered checks to the title company.\textsuperscript{1093} A further dispute broke out regarding minor discrepancies in the names of the sellers.\textsuperscript{1094} Apparently frustrated over the delays, the sellers attempted to
rescind the contract, offering to return the buyer's deposit. The buyer responded with the threat of a lawsuit. Attempting to resolve the matter, the sellers' attorney stated, "Mr. and Mrs. Ayer are willing to meet their contractual requirements to sell Lot 13; however, there is a problem." When the negotiations again broke down, the sellers claimed, for the first time, that there was no contract because the buyer had never properly accepted the counteroffer.

The trial court agreed with the sellers and found that there was no contract. The Fourth District Court of Appeal disagreed and reversed. While the counteroffer required acceptance in a particular manner, strict compliance with those terms could be waived expressly or impliedly. Reviewing the facts, the district court found:

Prior to the date set for closing, the parties had proceeded in all respects as if a valid contract existed for the sale of Lot 13. [Sellers] did not simply fail to assert to the contrary—they actively conducted themselves in a manner that left no room for a reasonable inference to the contrary. It would be difficult to imagine a much stronger showing of waiver by conduct than that made in this record. We conclude that the only reasonable inference to be drawn from the undisputed evidence... is that they waived strict compliance with the designated manner of acceptance of their counter-offer.

The trial court had concluded otherwise. Because the facts were not in dispute, its findings were in the nature of a legal conclusion. Thus, the district court was not required to defer to the trial court's findings. *Midtown Realty, Inc. v. Hussain.* The buyer sent a signed "Letter of Intent" to the sellers containing a proposal for the purchase of a gas station. It included terms such as the proposed purchase price, financing plans, and an inspection period. It further provided, "[i]f these TERMS and CONDITIONS are acceptable to the Seller, Purchaser shall present to the

1095. Id.
1096. Id.
1097. Id.
1098. *Bush,* 728 So. 2d at 802.
1099. Id.
1100. Id.
1101. Id. at 801.
1102. Id. at 802.
1103. *Bush,* 728 So. 2d at 802.
1104. 712 So. 2d 1249 (Fla. 3d Dist. Ct. App. 1998).
1105. Id. at 1250.
Seller a more detailed and formal Purchase Agreement.\textsuperscript{1106} Before signing the letter of intent, the sellers' representative changed and added terms.\textsuperscript{1107} In response, the buyer sent a signed Purchase and Sale Agreement to the sellers.\textsuperscript{1108} The sellers responded by making several changes, executing it and sending it back to the buyer.\textsuperscript{1109} The buyer notified the sellers that he could not agree to two of the changes the Sellers had made, and that unless an agreement could be reached on these points, the transaction could not be consummated.\textsuperscript{1110} An agreement could not be reached and the sellers withdrew the property from the market.

The buyer then brought this suit for breach of contract.\textsuperscript{1112} The sellers' defense was that there was no contract.\textsuperscript{1113} The trial court dismissed the case and the Third District Court of Appeal affirmed.\textsuperscript{1114} In order to have a contract, there must have been a meeting of the minds on the essential elements of the agreement. Several factors led the court to conclude that no contract existed. First, a letter of intent is customarily used to memorialize a preliminary understanding, rather than a contract.\textsuperscript{1115} Second, this letter of intent included language making it clear that it was merely a proposal intended to further negotiations, rather than an offer.\textsuperscript{1116} The sale of a gas station, necessarily involving many complicated details, such as environmental matters, licensing, permits and financing, would ordinarily be reduced to a detailed contract, rather than a brief document like the letter of intent.\textsuperscript{1117} Furthermore, the buyer himself had stated that the transaction could not be consummated unless agreement could be reached on points not resolved by the letter of intent.\textsuperscript{1118}

\textit{Pressman v. Wolf:}\textsuperscript{1119} The buyer signed a contract that provided the central air conditioning, refrigerator, washer/dryer, hot water heater, stove

\textsuperscript{1106} Id.
\textsuperscript{1107} Id.
\textsuperscript{1108} Id. at 1251.
\textsuperscript{1109} Hussain, 712 So. 2d at 1251.
\textsuperscript{1110} Id.
\textsuperscript{1111} Id.
\textsuperscript{1112} Id.
\textsuperscript{1113} Id.
\textsuperscript{1114} Hussain, 712 So. 2d at 1251. The claim of the broker operating under an open listing contract was also dismissed and that was also affirmed by the district court. \textit{Id.}
\textsuperscript{1115} Id. at 1252.
\textsuperscript{1116} Id.
\textsuperscript{1117} Id.
\textsuperscript{1118} Hussain, 712 So. 2d at 1252.
\textsuperscript{1119} 732 So. 2d 356 (Fla. 3d Dist. Ct. App. 1999), review denied, Wolf v. Pressman, 744 So. 2d 459 (Fla. 1999).
top and existing fixtures were “ALL IN ‘AS IS’ CONDITION.” 1120 The standard term warranting the septic tank, pool, major appliances, plumbing, and machinery to be in working condition was crossed out. 1121 The contract also provided that the buyer waived any defects not reported at least ten days before the closing. 1122 Furthermore, the contract provided the standard integration term that, “[n]o prior or present agreements or representations shall be binding upon [B]uyer or [S]eller unless included in this contract.” 1123 The buyer was clearly aware of these terms, but made a “business decision” to accept against the advice of her attorney. 1124

Before closing, the buyer’s inspectors warned her that the true extent of the problems could not be determined without further testing. 1125 They warned her that there were reasons to be concerned about the home’s structural integrity, whether the air conditioning system worked, and the presence of termites. 1126 Furthermore, there were reasons to suspect that the pool leaked, or worse. 1127 The buyer, however, decided to close anyway. 1128 She later claimed that she went through with the closing because the sellers represented that a city owned building obstructing the view would be torn down and that a person they knew, Mr. Cruz, would be able to renovate the home for only $100,000. 1129

The buyer quickly became dissatisfied with Mr. Cruz’s work, and fired him. 1130 After spending $225,000 on repairs, with the end not in sight, she became dissatisfied with her purchase and brought this suit claiming breach of contract and fraud. 1131 The trial court awarded her compensatory and punitive damages, but the Third District Court of Appeal reversed. 1132

The Third District considered the contract as a whole, rather than relying on isolated terms. 1133 It found that the agreement was to sell the home “as is,” with no warranties because both parties knew it was in bad repair. 1134

1120. Id. at 358 (The capitalization for emphasis reflects the way the term was typed into the contract).
1121. Id.
1122. Id.
1123. Id.
1124. Pressman, 732 So. 2d at 358.
1125. Id.
1126. Id. at 358–59.
1127. Id. at 359.
1128. Id.
1129. Pressman, 732 So. 2d at 359.
1130. Id.
1131. Id.
1132. Id. at 357.
1133. Id. at 360.
1134. Pressman, 732 So. 2d at 360.
Thus, there could be no recovery for breach of contract. Nor could there be recovery for fraudulent misrepresentation based on *Johnson v. Davis* because that only gave relief from the seller's failure to disclose defects that "are not readily observable and are not known to the buyer." Not only were hints of these defects observable, but the buyer was warned by the terms of the contract and by her own inspectors.

The buyer could also not recover based upon claims that she was misled by the sellers' statement that the property could be renovated for $100,000, or that the publicly owned building would be torn down. The buyer could not rely upon an obviously unreliable statement, she still had the duty to take reasonable steps to ascertain the material facts relating to the property. In light of the seller's disclaimers and the warnings of her inspectors, she could not have reasonably relied upon such an unsupported estimate. Furthermore, she should have known that the plans of a government might change, so she could not rely upon its unconfirmed plans to tear the building down.

Finally, any claims that the buyer had been fraudulently induced to enter this contract were barred by the economic loss doctrine. Any representation about the condition of the land was inseparably embodied in the parties' subsequent agreement. Consequently, she could not recover damages for purely economic injury.

*Spitale v. Smith.* The buyer brought an action for, *inter alia,* fraudulent nondisclosure of construction defects. The seller was the first owner of the home, but had never occupied it. As the landlord, he had received a letter from the tenant to the seller specifying some minor problems, including water leaks above the garage door. The tenant later testified that the leak over the garage door was the only one. The seller hired a roofer to repair that leak.

1135. *Id.*
1136. *Id.* (quoting *Johnson v. Davis*, 480 So. 2d 625 (Fla. 1985)).
1137. *See id.*
1138. *Id.* at 361.
1140. *Id.*
1141. *Id.*
1142. *Id.*
1143. *Id.*
1146. *Id.* at 342.
1147. *Id.*
1148. *Id.* at 343.
1149. *Id.*
1150. *Spitale*, 721 So. 2d at 344.
During the four years after the closing, the buyer experienced repeated problems with the roof and had it repaired a number of times. Following a bench trial, judgment was entered for the buyer, but the district court reversed. "Johnson [v. Davis] does not convert a seller of a house into a guarantor of the condition of the house." What it did hold was that "where the seller of a home knows of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to the buyer." In this case, there simply was insufficient evidence that the seller knew of facts that would materially affect the value of the property.

_Tiburon Ltd. v. Minola, Inc._ The buyer contracted to buy fifty acres of an approved development of almost eight hundred acres. The contract of sale included a clause that required the recording of a covenant at closing that would obligate the buyer to pay its pro rata share of the construction, operation, maintenance, and repair of the water management system for the entire development. The parties' engineers were to jointly determine what that pro rata share would be, but if no agreement could be reached, "such issue shall be submitted to binding arbitration." The clause also provided that the buyer's share would not exceed $265,000.

Subsequently, the buyer signed an option to purchase up to an additional twenty-four acres adjacent to the original fifty. The buyer assigned its rights to a related entity, which we will identify as Buyer-2, who went through with the purchase. Buyer-2 exercised the option and the parties proceeded to closing. Because they could not agree on Buyer-2's pro rata share of the costs of the water management system for its combined purchases, they entered into an escrow agreement. It provided that Buyer-2 would deposit $395,000 in escrow as its maximum obligation, and the exact amount would be determined by an arbitrator.

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1151. _Id._
1152. _Id._ at 345.
1153. _Id._ (citing Johnson _v._ Davis, 480 So. 2d 625 (Fla. 1985)).
1154. _Id._ (quoting Johnson _v._ Davis, 480 So. 2d 625, 629 (Fla. 1986)).
1155. _Id._
1156. _Id._
1157. _Id._
1158. _Id._
1159. _Id._
1160. _Id._
1161. _Id._
1162. _Id._ at 755.
1163. _Id._
1164. _Id._
1165. _Id._
represented an increase of its original $265,000 maximum proportional to the greater amount of land it was now purchasing.\textsuperscript{1166}

Buyer and Buyer-2 during arbitration tried to collect from the seller its pro rata share of the cost of the water management system.\textsuperscript{1167} The seller objected on the grounds that imposing liability on the seller was beyond the scope of the arbitration to which they had agreed.\textsuperscript{1168} The trial court agreed, as did the district court.\textsuperscript{1169} The arbitration clause, as interpreted by looking at all the documents, clearly was limited to the question of what share of these costs buyer would have to pay.\textsuperscript{1170} While that necessarily involved calculating the total cost of the system, it did not extend to the question of the seller’s responsibility for costs incurred by the buyer in regard to the system.\textsuperscript{1171} The court acknowledged that the buyer and Buyer-2 might have a cause of action against the seller for contribution to the cost of the water management system, but pointed out that issue was not before the court.\textsuperscript{1172}

\textbf{XX. SLANDER OF TITLE}

\textit{Clearman v. Dalton.}\textsuperscript{1173} This opinion resulted from a motion for rehearing or clarification.\textsuperscript{1174} The Clearmans sought rehearing of the court’s unpublished order that granted the Clearmans attorneys’ fees.\textsuperscript{1175} This court withdrew the previous opinion and the order awarding the Clearmans appellate fees and substituted the following information.\textsuperscript{1176}

The Clearmans recovered a judgment for $150,000 against the Daltons.\textsuperscript{1177} The Daltons filed for bankruptcy and stated there were two secured mortgages against their homestead.\textsuperscript{1178} The first mortgage in favor of the Daltons’ son was never recorded and the second mortgage to Monticello Bank was recorded but never delivered.\textsuperscript{1179} The Daltons never amended their bankruptcy petition to correct the “error.”\textsuperscript{1180}

\textsuperscript{1166.} \textit{Tiburon Ltd.}, 730 So. 2d at 755.
\textsuperscript{1167.} \textit{Id.}
\textsuperscript{1168.} \textit{Id.}
\textsuperscript{1169.} \textit{Id.} at 754.
\textsuperscript{1170.} \textit{Id.} at 755.
\textsuperscript{1171.} \textit{Tiburon Ltd.}, 730 So. 2d at 755–56.
\textsuperscript{1172.} \textit{Id.} at 756.
\textsuperscript{1173.} 708 So. 2d 324 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{1174.} \textit{Id.} at 324.
\textsuperscript{1175.} \textit{Id.}
\textsuperscript{1176.} \textit{Id.} at 325.
\textsuperscript{1177.} \textit{Id.}
\textsuperscript{1178.} \textit{Clearman}, 708 So. 2d at 325.
\textsuperscript{1179.} \textit{Id.}
\textsuperscript{1180.} \textit{Id.}
The trustee in bankruptcy elected to avoid the liens and obtained an order from the bankruptcy court avoiding the mortgages, preserving the avoided obligations "for the benefit of the estate."\textsuperscript{1181} The mortgages were assigned to the Clearmans.\textsuperscript{1182} After they recorded the assignment and the judgments avoiding the mortgages, the Clearmans attempted to foreclose on the interest acquired from the trustee.\textsuperscript{1183} Dalton counterclaimed to quiet title and for slander of title.\textsuperscript{1184} The trial court denied foreclosure and found against the Clearmans on the Daltons' counterclaim for slander of title.\textsuperscript{1185} The court awarded the Daltons attorneys' fees, costs, and prejudgment interest.\textsuperscript{1186}

The appellate court agreed with the trial court holding that "even though the obligations evidenced by avoiding the mortgages were preserved for the estate, 11 U.S.C. § 544 does not place the Trustee ... in the place of the former mortgagees with the power to foreclose and avoid the Daltons' homestead claim."\textsuperscript{1187} It went on to hold "the bankruptcy estate did have an assignable interest in the mortgages subject to the Daltons' claim of homestead."\textsuperscript{1188} The court ruled that the assignees paid a fair price for the assignment, can assert their interest, and thus, can be required to establish the fact of homestead.\textsuperscript{1189}

The appellate court determined that filing of judgments does not constitute slander of title even if the assignment of the estate's interest was in the nature of a quitclaim deed.\textsuperscript{1190} The Daltons willingly filed their bankruptcy petition and submitted their property to bankruptcy.\textsuperscript{1191} Therefore, they cannot subsequently complain if the assignee of the estate's interest requires that they prove their entitlement to the homestead exemption.\textsuperscript{1192}

\textsuperscript{1181} Id.
\textsuperscript{1182} Id.
\textsuperscript{1183} Clearman, 708 So. 2d at 325.
\textsuperscript{1184} Id.
\textsuperscript{1185} Id.
\textsuperscript{1186} Id.
\textsuperscript{1187} Id.
\textsuperscript{1188} Clearman, 708 So. 2d at 325.
\textsuperscript{1189} Id.
\textsuperscript{1190} Id.
\textsuperscript{1191} Id.
\textsuperscript{1192} Id.
XXI. TAXATION

Fuchs v. Robbins. The issue here is whether the trial court properly held section 192.042(1), of the Florida Statutes to be unconstitutional. Section 192.042(1) of the Florida Statutes requires that a zero valuation be placed on buildings under construction and not substantially completed on the taxing date, which is January first of each year.

The appellate court held that the trial court was correct and the statute was unconstitutional. The court determined the statute violated the mandate of article VII, § 4, of the Florida Constitution (1968) that all real property (with some inapplicable exceptions) be assessed and taxed at just valuation. According to the court, just valuation is synonymous with fair market value, and has been determined by the Supreme Court of Florida as "[t]he amount a purchaser willing but not obliged to buy, would pay to one willing but not obliged to sell."

This court held in McNayr v. Claughton that there are three well recognized ways to appraise: 1) the cost approach; 2) the comparable sales approach; and 3) the income or economic approach. Here, the Master's Report states that the property appraiser's expert used the comparable sales approach and arrived at the $3,790,227 tax assessment valuation on the improvements. Therefore, on January 1, 1992 the incomplete hotel structure had an uncontested just valuation of $3,790.227. The court has previously held in Interlachen Lake Estates v. Snyder, ITT Community Development Corp. v. Seay, and Valencia Center, Inc. v. Bystrom that, except where the constitution specifically authorizes it that legislation which singles out classifications or properties for treatment that shows a tax assessment valuation at something other than fair market value violates article VII, section 4, of the Florida Constitution (1968).
Kuro v. Department of Revenue. Kuro, Inc. ("Kuro") appealed a final order which assessed an additional documentary stamp tax, collectively, on conveyances of eight unencumbered condominium units. Stock issued by Kuro in exchange for the condominiums was concluded in the final order to constitute consideration and that, pursuant to the applicable statutes and rules, this consideration was equal to the fair market value of the condominiums. The documentary stamp tax was based on the fair market value. This court reversed and found that levying the additional tax was error.

The condominiums were owned by a father and son team in 1991. In 1994 the father and son incorporated Kuro. They transferred the units' titles to the corporation to avoid the potential personal liability for managing the eight rental units. The father and son transferred each condominium unit to Kuro by warranty deed. Each deed recited nominal consideration of ten dollars and Kuro paid the minimum documentary stamp tax on each transaction.

After conducting an audit, the Department of Revenue ("DOR") determined that additional documentary stamp taxes were due. The administrative law judge recommended the assessment of additional documentary stamp taxes and the DOR entered a final order adopting these recommendations.

The appellate court first looked at section 201.02(1) of the Florida Statutes, which states that "a purchaser of real estate is required to pay a documentary stamp tax of $.70 on each $100 of consideration" for the property. It further states that when consideration given in exchange for real property or any interest therein is other than money, it is presumed that the consideration is an amount that is equal to the fair market value of the real property.

1204. 713 So. 2d 1021 (Fla. 2d Dist. Ct. App. 1998).
1205. Id.
1206. Id. at 1021–22.
1207. Id. at 1022.
1208. Id.
1209. Kuro, 713 So. 2d at 1022.
1210. Id.
1211. Id.
1212. Id.
1213. Id.
1214. Kuro, 713 So. 2d at 1022.
1215. Id.
1216. Id.; FLA. STAT. § 201.02(1) (1999).
1217. Kuro, 713 So. 2d at 1022.
The court found that Kuro was not a purchaser within the meaning of section 210.02(1). Therefore, no additional taxes were due. Section 210.02(1) applies to transfers of real estate for consideration to a purchaser and "purchaser" has been defined by the Supreme Court of Florida as "one who obtains or acquires property by paying an equivalent in money or other exchange in value." The DOR's rule deals with stock as consideration and the statute merely creates a rebuttable presumption. In this situation Kuro successfully rebutted the presumption.

The appellate court found the conveyances were for the benefit of the father and son, who were availing themselves of the advantages of incorporation, and that the father and son still were the beneficial owners although not the legal owners. At the time the deeds were recorded the father and son owned all of the real estate and Kuro's stock. The father and son did not receive anything that they did not already have. Therefore, all that occurred were book transactions and not sales to a purchaser. The court reversed the DOR's final order.

* S & W Air Vac Systems, Inc. v. Department of Revenue. The appellate court affirmed the final administrative decision which held S & W liable to the DOR for use taxes as the licensee of real property pursuant to section 212.031 of the Florida Statutes.

S & W owned coin-operated air vac machines used to vacuum cars and add air to tires. Store owners having these machines received monthly compensation in the form of a percentage of the unit's gross receipts. S & W had the responsibility to collect money from the machines, make repairs, and pay licensing fees and taxes on them.

S & W described this agreement as a "revenue sharing arrangement." The hearing officer found that payment was based on the

1218. *Id.*
1219. *Id.*
1220. *Id.* (quoting Florida Dep't of Revenue v. De Maria, 338 So. 2d 838, 840 (Fla. 1976)).
1221. *Id.*
1222. *Kuro*, 713 So. 2d at 1022.
1223. *Id.*
1224. *Id.* at 1023.
1225. *Id.*
1226. *Id.* at 1022 (citing Palmer-Florida Corp. v. Green, 88 So. 2d 493 (Fla. 1956)).
1227. *Kuro*, 713 So. 2d at 1023.
1228. 697 So. 2d 1313 (Fla. 5th Dist. Ct. App. 1997).
1229. *Id.* at 1314; see FLA. STAT. § 212.031 (1999).
1230. *S & W Air Vac Sys.*, 697 So. 2d at 1314.
1231. *Id.*
1232. *Id.* at 1314–15.
1233. *Id.*
right to place the machine in these stores and store owners should not be

The hearing officer concluded that S & W had been granted licenses for the use of real

Section 212.031 of the Florida Statutes dictated that use taxes were owed to the Department.

First, the facts showed that the air vac machines were not the subject of

A "bailment" is a contractual relationship among parties in

Next, the arrangement with the store owners could not constitute joint

To have a joint venture, five elements must be established in

Although the first element was met, the court recognized that the others were not.

S & W also questioned whether convenience stores and gas stations met

The statute states "it is declared to be

The hearing officer and the Department of Revenue concluded the

That statute defines "business" as "any

In this situation, "the licensors operated a commercial premises
designed to attract customers for revenue generating purposes."

1234. Id.
1235. S & W Air Vac Sys., 697 So. 2d at 1315.
1236. Id.
1237. See id.
1238. See 5 FLA. JUR. 2D Bailments § 1 (1978).
1239. S & W Air Vac Sys., 697 So. 2d at 1315–16.
1240. Id.
1241. Id. (citing to Conklin Shows, Inc. v. Department of Revenue, 684 So. 2d 328, 332
(Fla. 4th Dist. Ct. App. 1996)); See also Kislak v. Kreedian, 95 So. 2d 510, 515 (Fla. 1957).
1242. S & W Air Vac Sys., 697 So. 2d at 1315.
1243. Id. at 1316.
1244. Id. at 1316 (citing FLA. STAT. § 212.031(1)(a) (1993)).
1245. Id.
1246. Id. (citing FLA. STAT. § 212.02(2) (1989)).
1247. S & W Air Vac Sys., 697 So. 2d at 1317.
ventures included income derived from a range of premises activity. Therefore, it was not a clearly erroneous interpretation to determine that store owners were in the business of granting a license under section 212.02 and 212.031 of the Florida Statutes.

Smith v. Welton. The issue this court heard on appeal was whether section 193.155(8)(a) of the Florida Statutes, is facially unconstitutional in light of article VII, section (4)(c) of the Florida Constitution. In Smith, the court stated that article VII, section (4)(c) provides:

Taxation; assessments.—By general law regulations shall be prescribed which shall secure a just valuation of all property for ad valorem taxation, provided:

(c) All persons entitled to a homestead exemption under Section 6 of this Article shall have their homestead assessed at just value as of January 1 [1994]. This assessment shall change only as provided herein.

1. Assessments subject to this provision shall be changed annually on January 1st of each year; but those changes in assessments shall not exceed the lower of the following:
   (A) three percent (3%) of the assessment for the prior year.
   (B) the percent change in the Consumer Price Index for all urban consumers, U.S. City Average, all items 1967=100, or successor reports for the preceding calendar year as initially reported by the United States Department of Labor, Bureau of Labor Statistics.

2. No assessment shall exceed just value.

3. After any change of ownership, as provided by general law, homestead property shall be assessed at just value as of January 1 of the following year. Thereafter, the homestead shall be assessed as provided herein.

4. New homestead property shall be assessed at just value as of January 1st of the year following the establishment of the homestead. That assessment shall only change as provided herein.

5. Changes, additions, reductions or improvements to homestead property shall be assessed as provided for by general law; provided, however, after the adjustment for any change, addition, reduction or improvement, the property shall be assessed as provided herein.

1248. Id.
1249. Id.
1250. 710 So. 2d 135 (Fla. 1st Dist. Ct. App. 1998).
1251. Id. at 136.
6. In the event of a termination of homestead status, the property shall be assessed as provided by general law.1252

However, section 193.155(8)(a) of the Florida Statutes provides:

(8) Erroneous assessments of homestead property assessed under this section may be corrected in the following manner:

(a) If errors are made in arriving at any annual assessment under this section due to material mistake of fact concerning an essential characteristic of the property, the assessment must be recalculated for every such year.1253

The trial court found that section 193.155(8)(a) is unconstitutional because the constitution states clearly that the assessment of just value shall only change as provided by the statute and section 193.155(8)(a) permits changes to the assessment that are not found in the constitution.1254 This court found that section 193.155(8)(a) of the Florida Statutes is facially unconstitutional because the purported exception to the three percent rule contained in section 193.155(8)(a) is not one provided for in the constitution.1255

The Supreme Court of Florida has held that provisions of the Constitution cannot alter, contract or enlarge legislation.1256 The court determined in this case that the statute in question would defeat the purpose of article VII, section (4)(c) by allowing constant reassessments of homesteads when the purpose of section (4)(c) of article VII is to encourage the preservation of homestead property in the face of increasing real estate development and rising property values and assessments.1257

Furthermore, this court found no merit to appellant's argument that without section 193.155(8)(a) there would be inequitable taxation since the constitution expressly mandates the special or inequitable taxation.1258 Only the homestead property receives the three percent cap and, therefore nonhomestead property, commercial, agricultural, and noncommercial recreational land are excluded from the three percent cap.1259 Further, the constitution provides that assessments shall not exceed just value, but does

1252. Id. at 136–37 (quoting Fla. Const. art. VII, § 4(c)).
1254. Smith, 710 So. 2d at 136.
1255. Id. at 137.
1256. Id. at 138; see Osterndorf v. Turner, 426 So. 2d 539, 544 (Fla. 1982).
1257. See Smith, 710 So. 2d at 138.
1258. Id. at 137.
1259. Id.
not say that assessments shall not be below just value.\textsuperscript{1260} Therefore, this court held that the trial court correctly granted summary judgment.\textsuperscript{1261}

Legislative changes include, but are not limited to, the following:

The Florida Legislature enacted chapter 98-185 to be retroactive to January 1, 1998 and to be effective until it expired on July 1, 1999.\textsuperscript{1262} This chapter provides for a partial abatement of ad valorem taxation where property has been destroyed or damaged by tornadoes.\textsuperscript{1263} The application for such abatement must be filed by the owner with the property appraiser before March 1 following the tax year in which the destruction or damage occurred.\textsuperscript{1264} Chapter 6 discusses the detail and criteria to be included in the application and what events will occur if the property appraiser determines the applicant to be entitled to such partial abatement.\textsuperscript{1265}

Section 196.1977 of the \textit{Florida Statutes} provides:

\begin{quote}
[e]ach apartment in a continuing care facility certified under chapter 651, which facility is not qualified for exemption under [section] 196.1975 or other similar exemption, is exempt to the extent of $25,000 of assessed valuation of such property for each apartment which is occupied on January 1 of the year in which exemption from ad valorem property taxation is requested by a person holding a continuing care contract as defined under chapter 651 who resides therein and in good faith makes the same his or her permanent home.\textsuperscript{1266}
\end{quote}

These provisions shall take effect January 1, 1999 and shall apply to the 1999 tax rolls and each subsequent year’s tax rolls.\textsuperscript{1267}

\textbf{XXII. TIMESHARES}

Effective April 30, 1998 amendments to chapter 721 of the \textit{Florida Statutes} became effective.\textsuperscript{1268} Those changes include, but are not limited to, the following:

To section 721.05 the legislature added a definition of “regulated short-term product.”\textsuperscript{1269} That term is defined as

\begin{itemize}
\item \textsuperscript{1260} Id.; see Florida League of Cities v. Smith, 607 So. 2d 397 (Fla. 1992).
\item \textsuperscript{1261} Smith, 710 So. 2d at 138.
\item \textsuperscript{1262} 1998 Fla. Laws ch. 98-185.
\item \textsuperscript{1263} Ch. 98-185, § 1(1), 1999 Fla. Laws 1616, 1616.
\item \textsuperscript{1264} Id. § 1(1)(a), 1999 Fla. Laws at 1616.
\item \textsuperscript{1265} Id.
\item \textsuperscript{1266} F.L.A. STAT. § 196.1977 (1999).
\item \textsuperscript{1267} Id. § 196.1979 n.1.
\item \textsuperscript{1268} F.L.A. STAT. § 721 (1999).
\end{itemize}
a contractual right, offered by the seller, to use accommodations of a timeshare plan, provided that:

(a) The agreement...is executed in this state on the same day that the prospective purchaser receives an offer to acquire an interest in a timeshare plan and does not execute a purchase contract, after attending a sales presentation; and

(b) The acquisition of the right to use includes an agreement that all or a portion of the consideration paid by the prospective purchaser for the right to use will be applied to or credited against the price of a future purchase of a timeshare interest, or that the cost of a future purchase of a timeshare interest will be fixed or locked in at a specified price.1270

An item of consideration that the legislature deleted is section 721.075(4) of the Florida Statutes.1271 That paragraph required the developer to file an irrevocable letter of credit, surety bond, or other assurance acceptable to the director of the division where the aggregate represented value of all incidental benefits offered by a developer to a purchaser exceeded five percent of the purchase price paid by that purchaser.1272 However, that requirement has been deleted and is no longer a part of the statutory scheme.1273

The legislature added subsection (c) to section 721.09(1) of the Florida Statutes.1274 This new provision provides that "the seller must immediately cancel all outstanding reservation agreements, refund all escrowed funds to prospective purchasers, and discontinue accepting reservation deposits or advertising the availability of reservation agreements," where the time share plan subject to the reservation agreement has not been filed with the division as required by Florida law within ninety days after the date the division approves the reservation agreement filing.1275

To that same statute the legislature added subsection (1)(d).1276 This section permits the seller who has filed a reservation agreement and escrow agreement program as required by statute to advertise the reservation agreement providing the material meets the criteria prescribed by the subsections to subparagraph (d).1277

1269. Id. § 721.05(27).
1270. Id.
1271. Id. § 721.075(4).
1272. Id.
1274. Id. § 721.09(1)(c).
1275. Id.
1276. Id. § 721.09(1)(d).
1277. Id.
Section 721.11 of the Florida Statutes added subsection (6) and its subparts. These provisions state that failing to provide cancellation rights or disclosures required in connection with the sale of a regulated short-term product automatically constitutes a misrepresentation in accordance with subsection (4)(a) of this statute. Section 721.11(6)(a) requires the filing within ten days prior to use of a standard form of any agreement relating to the sale of a regulated short-term product. Subsection (b) of that statute establishes the right of a purchaser of a regulated short-term product to cancel the agreement until midnight of the tenth calendar day following the execution date of the agreement. It also provides that the right of cancellation may not be waived by the prospective purchaser or anyone on his or her behalf. Subsection (c) and its subparts with respect to this same statute provide for statements that must be included in an agreement for purchase of a regulated short-term product. Further, subsection (d) of the same statute provides for a series of statements in conspicuous type that must be included in an agreement for the purchase of a regulated short-term product.

Section (e) of the foregoing statute also provides for an exemption from the requirements of subsection (b), (c), and (d). Where the seller provides the purchaser with the right to cancel the purchase of a regulated short-term product for any time up to seven days before the purchasers reserved use of the accommodations, but never less than ten days, and if the seller refunds the total amount of all payments made by the purchaser reduced by the proportion of any benefits the purchaser has actually received prior to the effective date of the cancellation, the specific value of which has been agreed to by the purchaser and seller, the short-term product offer shall be exempt from the requirements of the aforementioned paragraphs.

To section 721.15 the legislature added subparagraph (1)(b). This section provides for allocating total common expenses for a condominium or cooperative timeshare plan and allowing such to vary on a reasonable basis if “the percentage is any interest in the common elements attributable to each

1279. Id.
1280. Id. § 721.11(6)(a).
1281. Id. § 721.11(6)(b).
1282. Id.
1284. Id. § 721.11(6)(d).
1285. Id. § 721.11(6)(e).
1286. Id.
time share condominium parcel or timeshare cooperative parcel equals the share of the total common expenses allocable to that parcel.\textsuperscript{1288}

To chapter 721 the legislature added the Timeshare Lien Foreclosure Act. This act consists of sections 721.80 through 721.86 and should be read in detail to become familiar with the rights and procedures involved.

The legislature also added sections 721.96 through 721.98 to the Florida Statutes. These statutes provide for establishing a commissioner of deeds to take acknowledgments, proofs of execution, and oaths outside the United States in connection with the execution of any instruments relating to or being used in connection with a timeshare estate.\textsuperscript{1289} These sections should be read in detail.

**XXIII. TITLE INSURANCE**

*Security Union Title Insurance Co. v. Citibank, N.A.*\textsuperscript{1290} The First District Court of Appeal was asked to review a jury verdict finding the title insurance underwriter vicariously liable for fraud committed by its agent, an attorney, when he made fraudulent representations to the lender to obtain loans, some of which benefitted him personally and others of which benefitted his clients.\textsuperscript{1291} Noting that the agent was expressly authorized only to sign and issue title insurance commitments and policies and that the losses did not occur from his acting in such a capacity, the appellate court found no vicarious liability under that authority.\textsuperscript{1292}

Next, it considered whether there might be vicarious liability arising from the agent’s acting within his apparent authority.\textsuperscript{1293} In doing so, the appellate court noted that at least one element needed for this liability is that there must have been some representation by the principal.\textsuperscript{1294} Here the facts showed only that the principal who represented the agent had the authority to issue title commitments and policies.\textsuperscript{1295} The fraudulent acts involved the agent’s representations made to obtain loans.\textsuperscript{1296} There were no representations by the underwriter that the agent had any authority to make

\textsuperscript{1288} Id.

\textsuperscript{1289} Id. § 721.96.


\textsuperscript{1291} Id.

\textsuperscript{1292} Id.

\textsuperscript{1293} Id.

\textsuperscript{1294} Id. at 975. Presumably this representation must be one that would lead the claimant to have relied reasonably on the appearance that the agent had the authority to commit the act that caused the harm.

\textsuperscript{1295} Citibank, 715 So. 2d at 975.

\textsuperscript{1296} Id.
statements as a closing agent to obtain loans.\textsuperscript{1297} Also, it was clear that the loans were for both his personal benefit and his clients' benefit.\textsuperscript{1298} Therefore, the appellate court reversed and remanded with instructions to enter a judgment in favor of the underwriter.\textsuperscript{1299}

Legislative changes include, but are not limited to the following: chapter 99-286 of the \textit{Laws of Florida} provides such changes to sections 624 and 627 of the \textit{Florida Statutes} as differentiated ratings and premium splits for real estate transactions exceeding $1,000,000; legislative clarifications for such terms as "premium" and "primary title services;" and a restructuring of reserve requirements.\textsuperscript{1300}

XXIV. CONCLUSION

The foregoing survey presents selected materials of significance to real estate professionals.\textsuperscript{1301} There seems to be no consistent pattern to the case law or legislative developments, but, as always, there is plenty for the reader to ponder. Real estate law continues to evolve in interesting ways.

\begin{flushleft}
1297. \textit{Id.} \\
1298. \textit{Id. at 975.} \\
1299. \textit{Id. at 976.} \\
1300. 1999 Fla. Laws ch. 99-286. \\
1301. Readers are also urged to read the article on zoning and land use controls.
\end{flushleft}
Invoking What Rule?

Michael Flynn*

The sequestration of witnesses has been a part of Florida trial practice since at least 1906. The purpose of the sequestration rule is to “avoid the coloring of a witness’s testimony by that which he has heard from other witnesses.” By “invoking the rule,” the court in a criminal or civil case can insure that the testimony of each witness stands on its own and is not influenced, tainted or purposefully altered because of other witness testimony. The procedure at common law for “invoking the rule” at trial was simple. A lawyer for either side of a case simply asked the judge to “invoke the rule.” Then the court, in its discretion, immediately ruled to grant or deny the request for sequestration of prospective witnesses. Ordinarily, the court granted the request for sequestration absent a showing of extraordinary circumstances. This process for “invoking the rule” was fast, fair, and inexpensive. The Florida courts still use this process for the sequestration of potential witnesses during a trial. But the application of the rule of sequestration to deposition proceedings remains unsettled.

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1. WILLIAM R. ELEAZER & GLEN WEISSENBERGER, FLORIDA EVIDENCE: 1999 COURTROOM MANUAL 425 (1999). See generally Seaboard Air LineRY v. Smith, 43 So. 235 (Fla. 1907) (holding that sequestration was a matter of judicial discretion by trial court, undisturbed unless there was evidence of abuse of that discretion).


3. Dardashti v. Singer, 407 So. 2d 1098, 1099 (Fla. 4th Dist. Ct. App. 1982). The trial court has an additional consideration in sequestration of a witness during a criminal trial: the balancing of the defendant’s Sixth Amendment right of confronting and cross-examination of witnesses. See Wright v. State, 473 So. 2d 1277 (Fla. 1985); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982); Dumas v. State, 350 So. 2d 464 (Fla. 1977).

4. ELEAZER & WEISSENBERGER, supra note 1, at 425. Although no written rule was yet adopted, “invoking the rule” or “the rule” was commonly known among Florida attorneys and judges as the rule of sequestration. Id.


6. Id.

7. Dardashti, 407 So. 2d at 1090. The court in Dardashti quoted Spencer v. State, an often cited case for the common law rule of sequestration: “Ordinarily, when requested by either side, the trial judge will exclude all prospective witnesses from the courtroom” during the trial. Id. at 1099 (quoting Spencer v. State, 133 So. 2d 729, 731 (Fla. 1961)). The court used the language “ordinarily exclude” to mean that not excluding prospective witnesses will only occur
The application of the rule of sequestration to depositions first surfaced in Florida in the Fourth District Court of Appeal case of *Dardashti v. Singer*. In that case, the plaintiff filed a complaint for breach of contract against a defendant. The defendant, in his answer, denied the existence of a contract with the plaintiff. Through interrogatories, the defendant learned that the plaintiff’s wife planned to testify in support of her husband’s claim. The district court noted that the plaintiff’s wife’s testimony was the only corroborating testimony offered by the plaintiff and was therefore, essential to substantiate the husband’s claim. The *Dardashti* court found, unlike the trial court, that permitting the plaintiff’s wife to sit in on the deposition of her husband would clearly prejudice and compromise the plaintiff’s wife’s testimony. Based on this finding, the district court reversed the trial court ruling and granted the defendant’s request to “invoke the rule” and exclude the plaintiff’s wife from attending her husband’s deposition. In so ruling, the Fourth District Court of Appeal held that the same considerations apply to invoking the rule of sequestration at a trial and a deposition.

It is important to note that the district court did not rely on any *Florida Rule of Evidence* in making this decision. Rather, the *Dardashti* court relied on the basic premise used to support the application of the rule of sequestration in any context, namely, the need for untainted testimony. The court, in its critical analysis of *Spencer v. State* which denied witness sequestration in a criminal case, reasoned that the failure to apply the sequestration rule to depositions would not only permit influenced, tainted, and altered deposition testimony, but also threaten the integrity of a trial on

upon a showing of “extra ordinary circumstances.” *Id.* at 1100. In other words, the general rule after *Dardashti* is that either party should grant exclusion of a witness in a deposition upon the request of the other party.

8. 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982).
9. *Id.* at 1099–1100.
10. *Id.*
11. *Id.* at 1100.
12. *Id.*
13. *Dardashti*, 407 So. 2d at 1100. ELEAZER & WEISSENBERGER, *supra* note 1, at 425. Although no written rule was yet adopted, “invoking the rule” or “the rule” was commonly known among Florida attorneys and judges as the rule of sequestration. The court noted: “[t]o have it otherwise would emasculate the rule of exclusion and sequestration of witnesses and subject the trial courts to attack alleging collusion among witnesses.” *Dardashti*, 407 So. 2d at 1100 (quoting Thomas v. State, 372 So. 2d 997, 999 (Fla. 4th Dist. Ct. App. 1979)).
15. *Id.*
16. *Id.*
17. *Id.*
18. 133 So. 2d 729 (Fla. 1961).
the merits. Simply stated, the *Dardashti* court decided that upon the request of either party at the deposition, the rule of sequestration of potential witnesses should apply.

Eight years later, the First District Court of Appeal chose not to apply the rule of sequestration to depositions in a medical malpractice case. In *Smith v. Southern Baptist Hospital*, the plaintiff sought to sequester an eyewitness doctor from attending the deposition of the defendant doctor. The *Smith* court, while never questioning the reason for the plaintiff’s request to “invoke the rule,” stated that the common law rule of sequestration only applies to trial proceedings and not depositions. The court further ruled that Rule 1.280(c) of the *Florida Rules of Civil Procedure*, which sets out the procedure for obtaining protective orders during the discovery stage of a lawsuit, dictates the procedure and legal standard for a lawyer to “invoke the rule” at a deposition. Based on this finding, the district court then ruled that the court in *Dardashti* had no legal authority for its decision. If the *Smith* court is right, the procedure for “invoking the rule” in a deposition just became more time consuming, less immediate, and more costly.

The *Smith* court recognized that its decision was in direct conflict with the decision in *Dardashti* and certified this conflict to the Supreme Court of Florida in 1990.

Meanwhile, the Florida Legislature meandered into the witness sequestration in depositions debate, while waiting for the Supreme Court of Florida’s decision on the subject. For its part, the Florida Legislature enacted section 90.616(1) of the *Florida Statutes* for inclusion as part of the *Florida Rules of Evidence*. Section 90.616(1) of the *Florida Statutes* states in pertinent part that “at the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses . . . .” The good

19. *Dardashti*, 407 So. 2d at 1100 (citing Spencer v. State, 133 So. 2d 729, 731 ( Fla. 1961)).
20. *Id.*
22. *Id.* at 1115.
23. *Id.* at 1115.
24. *Id.* at 1117. The court noted not only that *Dardashti* had no legal authority for its decision but also that the reasoning is not applicable to depositions but only to trials. *Id.*
25. *Id.*
26. *Smith*, 564 So. 2d at 1117.
27. *Id.* at 1118. The court granted the Motion for Certification of Direct Conflict. *Id.*
29. *Id.* The rest of the rule reads:

(2) A witness may not be excluded if the witness is:
(a) A party who is a natural person.
news about this statute is that the legislature explicitly makes the sequestration of potential witnesses mandatory upon the request of a party and implicitly supports the traditional reasons for "invoking the rule." While the statute resolves some questions, it prolongs the debate about whether the sequestration rule applies to depositions. The use by the legislature of the word "proceeding" is too imprecise. The use of the word "proceeding" suggests that the legislature did intend to apply this rule of evidence to proceedings other than trials. Yet the legislature does not define the word proceeding either in the statute or in the legislative history of the statute. Does "proceeding" mean only evidentiary hearings? Is voir dire a "proceeding" within the meaning of the statute? What about summary judgment or preliminary injunction hearings? Is a deposition a proceeding? How is a practitioner to know what to do?

First, if one would apply the statutory construction rule that a court should apply the procedural or evidentiary rule most on point, it would seem

(b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative.
(c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause.
(d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such a person's presence to be prejudicial.

Id.
30. See id.
31. See id.
32. The Senate Staff Analysis and Economic Impact Statement of section 90.616 of the Florida Statutes employs the word "proceeding" in a description of the statute but never defines it. Senate Staff Analysis and Economic Impact Statement for Senate Bill 1350 (1990). In describing sequestration of a law enforcement officer in a criminal proceeding, the Statement quotes Randolph v. State for trial sequestration. Id. (quoting Randolph v. State, 463 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982)). The Statement also cites Dardashti for the proposition that sequestration is a matter of right. Id. (citing Dardashti v. Singer, 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982)). Also note that the Statement does not disclaim the Dardashti application of sequestration rule to depositions. Could this be implicit legislative approval of the result in Dardashti?

33. By using "proceeding," the legislature is tacitly approving a line of cases in criminal law. Sequestration is utilized in voir dire; see Randolph v. State, 562 So. 2d 331 (Fla. 1990); Davis v. State, 461 So. 2d 67 (Fla. 1984); and suppression hearings; see Bryant v. State, 656 So. 2d 426 (Fla. 1995); Bundy v. State, 455 So. 2d 330 (Fla. 1984). Question: if the legislature is putting a stamp of approval on these cases, did the legislature in the process also approve of Dardashti? If not, at least the door is certainly open for its application to depositions.

34. See FLA. STAT. § 90.616 (1999).
35. See id.
that Rule 1.280(c) of the Florida Rules of Civil Procedure should apply to "invoking the rule" at a deposition.\textsuperscript{36} This means that a party will be required to set for hearing a motion for a protective order to sequester potential witnesses from a deposition.\textsuperscript{37} However, since the term "proceeding" is not defined by the legislature, a court might decide that the term is ambiguous and open to interpretation.\textsuperscript{38} If the term "proceeding" is ambiguous, then a court may turn to sources other than the statute’s language for guidance.\textsuperscript{39} In that case, the Florida courts would look to the directly conflicting decisions of the \textit{Dardashti} and \textit{Smith} cases for guidance.\textsuperscript{40} Then, any court would be further confused because the Supreme Court of Florida has never ruled on the certification of these two directly conflicting appellate decisions.\textsuperscript{41}

Acknowledging the good intentions of the legislature in attempting to clarify the rule of sequestration and the Supreme Court of Florida’s benign neglect in ruling on the certification for appeal based on the legislature’s enactment, lawyers must feel a little unsettled about the sequestration rule. Simply stated, a Florida lawyer should take the time and spend the money to use \textit{Florida Rule of Civil Procedure} 1.280(c) concerning protective orders to "invoke the rule" in deposition proceedings. It seems such a shame to add the sequestration of prospective witnesses from a deposition to the list of time consuming, inefficient and costly tasks for judges, lawyers and litigants. Perhaps this is one instance where that curious Florida practice of "invoking the rule" was better off left alone, without judicial or legislative intervention.\textsuperscript{42}

\textsuperscript{36} FLA. R. CIV. P 1.280(c). As a rule of statutory construction, the statute that is on point controls over another statute that merely refers to or speaks more generally to the issue. McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994) (citations omitted). The statute on point is considered an exception to the general principles of the broader statute. \textit{Id.} (citations omitted).

\textsuperscript{37} Rule 26(c) of the \textit{Federal Rules of Civil Procedure}, similar to Rule 1.280 of the \textit{Florida Rules of Civil Procedure}, requires a protective order to exclude witnesses from a deposition. Rule 26(c)(5) provides, in pertinent part: "the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that discovery be conducted with no one present except persons designed by the court." \textit{Id.}

\textsuperscript{38} \textit{Cf.} State v. Egan, 287 So. 2d 1, 4 (Fla. 1973) (citations omitted).

\textsuperscript{39} \textit{Id.} Where a statute utilizes clear language, a court may not interpret any terms and must enforce the statute as it is written. \textit{Id.} However, an ambiguity could be the springboard from which courts may interpret section 90.616 of the \textit{Florida Statutes} to apply to depositions.

\textsuperscript{40} \textit{Dardashti}, 407 So. 2d 1098 (Fla. 4th Dist. Ct. App. 1982); \textit{Smith} v. Southern Baptist Hosp., 564 So. 2d 1115 (Fla. 1st Dist. Ct. App. 1990).

\textsuperscript{41} \textit{See Smith}, 564 So. 2d at 1115.

\textsuperscript{42} \textit{See} Randolph v. State, 463 So. 2d 186 (Fla. 1984); Spencer v. State, 133 So. 2d 729 (Fla. 1961); Seaboard Air Line RY v. Smith, 43 So. 235 (Fla. 1907); \textit{Dardashti} v. Singer, 407 So. 21 1098 (Fla. 4th Dist. Ct. App. 1982).
The Scope of Insurance Coverage for Pollution Claims in Florida: Full Indemnification for Indivisible Cleanup Costs Caused by Multiple Releases

Evan M. Goldenberg *

I. INTRODUCTION

Generally, "occurrence-based" comprehensive general liability ("CGL") insurance policies promise to indemnify the policyholder for "all sums" resulting from an occurrence during the policy period. In the context of pollution cases, however, such policies typically contain a "pollution

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exclusion” clause that either limits or precludes coverage. Because the standard CGL policy, and the language of the “pollution exclusion” clause, have changed over the years, whether coverage is precluded or merely limited generally depends on the date the policy was issued.

Many pollution cases are initiated with the discovery of damages (i.e., contamination), rather than the awareness of a specific pollution release. Often, it is difficult to trace the contamination back to a specific incident. Since the damage from a pollution event may occur over an extended period of time, covered property damage may continue over the course of numerous policy periods during which different insurers were on the risk. Because the terms of the standard “pollution exclusion” have changed over the years, the date of the relevant release or “occurrence” can be the difference between full indemnification and no indemnification.

With the Supreme Court of Florida’s rulings in *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*, and *Deni Associates of Florida, Inc. v. State Farm Fire & Casualty Insurance Co.*, Florida’s insureds seemingly have little chance of recovering insurance proceeds for environmental pollution claims. In *Dimmitt Chevrolet*, the court held that the phrase “sudden and accidental,” found in most pollution exclusion clauses in insurance policies issued between 1970 and 1985, was unambiguous. More specifically, the court stated that “[t]he ordinary and common usage of the term ‘sudden’ includes a temporal aspect with a sense of immediacy or abruptness.” Five years later, in *Deni Associates.*, the court held that the “absolute pollution exclusion,” found in most CGL policies since 1985, was similarly unambiguous, and bars any recovery for damages arising from the release of pollutants or contaminants.

Although the pollution exclusion clauses have been given a restrictive reading under Florida law, no Florida court has defined the scope of coverage in pollution cases in which some, but not all, of the contamination

3.  *Id.*
6.  636 So. 2d 700 (Fla. 1993).
7.  711 So. 2d 1135 (Fla. 1998).
8.  *Dimmitt Chevrolet*, 636 So. 2d at 704.
9.  *Id.* The “word sudden means abrupt and unexpected.” *Id.*
10.  *Deni Assocs.*, 711 So. 2d at 1137.
11.  *Id.* at 1141.
was caused by a covered occurrence. This is a critical issue because when contamination is discovered, it is often possible to identify several “occurrences” that may have caused or contributed to the contamination. Rarely, however, is it easy to distinguish the contamination caused by these various “occurrences.” Some of these releases may be covered under the insurance policy in effect at the time of the release, and others might not. This situation may arise in a number of different contexts:

- A covered “sudden and accidental” release that has caused pollution that is indistinguishable from that caused by other nonsudden or nonaccidental releases;

- A covered, pre-1985 “sudden and accidental” release that has caused pollution that is indivisible from that caused by noncovered, post-1985 releases;

- A pre-1985 release that begins suddenly and accidentally but continues for an extended period of time, beyond the policy period;

- Multiple, pre-1985 “sudden and accidental” releases that each occurred during different policy periods with different insurers;

- A covered pre-1985 “sudden and accidental” release that caused pollution that is indivisible from noncovered post-1985 releases subject to an “absolute pollution exclusion;”

- A covered, pre-1970 release not subject to any pollution exclusion clause that caused pollution that is indivisible or indistinguishable from that caused by noncovered post-1970 releases;

- Multiple covered releases, but only one from which recovery is possible (i.e., other insurers have filed for bankruptcy or the policies cannot be located); and

- A covered release attributable to the insured coupled with other releases caused by previous or subsequent operators at the site.

This article will discuss the scope of insurance coverage for pollution claims when more than one release has caused or contributed to the contamination but not all such releases are covered by the policies then in effect. While the factual scenarios listed above are different, the same
general legal principles apply. As discussed below, notwithstanding the Supreme Court of Florida’s rulings in Dimmitt Chevrolet and Deni Associates, there is still hope for insurers to receive full indemnification for pollution cleanup costs.

II. THE EVOLUTION OF THE "POLLUTION EXCLUSION" CLAUSE

Beginning in 1966, the standard CGL policy provided coverage for an "occurrence," which was defined as "'an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.'"12 This definition expanded the scope of coverage from that of earlier, “accident-based” policies, by including “continuous or repeated exposure to conditions” as a coverage-triggering event.13 At a time when pollution issues were receiving increased attention, this change from “accident-based” to “occurrence-based” policies made it clear that insurers intended the standard CGL policy to apply to pollution claims.14 A few years later, in the early 1970s, insurance companies began including a “pollution exclusion” in their policies because the earlier policies, drafted before public attention focused on large scale pollution events, seemed tailor made to cover most pollution situations. As one commentator noted:

With the increase in litigation concerning environmentally related losses, the liability exposure of insurers, and the uncertainty that courts injected into the policy coverage inquiry, the insurers, in 1970, again changed their policies. The insurers’ primary concern was that the occurrence-based policies, drafted before large scale industrial pollution attracted wide public attention, seemed tailor-made to extend coverage to most pollution situations. Consequently, they tacked onto the occurrence-based policies an

13. See id.

With the lesson of accident-based coverage fresh in their minds, the insurers used new language to remove only the suddenness barrier and to cover pollution liability that arose from gradual losses. The standard policy made it clear that the loss had to be unexpected and unintended from the insured’s standpoint for coverage to apply.

Id. (emphasis in original).
exclusionary clause that applied specifically to pollution related claims.\textsuperscript{15}

This new “pollution exclusion,” which appeared in virtually all CGL policies from roughly 1971 through 1986,\textsuperscript{16} typically stated that:

\begin{quote}
[i]nsurance would not apply... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, \textit{but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.}\textsuperscript{17}
\end{quote}

This limited pollution exclusion remained in effect until 1985, when a new endorsement was added to the CGL form to amend coverage\textsuperscript{18} as follows: It is agreed that the exclusion relating to the “discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants,”\textsuperscript{19} is replaced by the following:

(1) “Bodily injury” or “property damage” arising out of the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants;

(a) At or from premises you own, rent or occupy;

(b) At or from any site or location used by or for [the named insured] or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are at any time transported, handled, stored, treated, disposed of, or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or

(d) At or from any site or location in which the named insured or any contractors or subcontractors working directly or

\textsuperscript{15} E. Joshua Rosenkranz, \textit{The Pollution Exclusion Clause Through the Looking Glass}, 74 GEO. L.J. 1237, 1251 (1986) (citations omitted).


\textsuperscript{17} \textit{Id.} at 1134 (emphasis in original).

\textsuperscript{18} William P. Shelly & Richard C. Mason, \textit{Application of the Absolute Pollution Exclusion to Toxic Tort Claims: Will Courts Choose Policy Construction or Deconstruction?}, 33 TORT & INS. L.J. 749, 752 (1998).

\textsuperscript{19} \textit{Id.} at 752.
indirectly on behalf of the named insured are performing operations;

(i) if the pollutants are brought on or to the site or location in connection with such operations; or

(ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.

"Pollutants" means any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. 20

In Deni Associates, the Supreme Court of Florida held that this "absolute pollution exclusion," as well as the undefined terms "irritant" and "contaminant," were clear and unambiguous. 21 In so holding, the court rejected the argument that the clause excludes only environmental or industrial pollution. 22

As discussed above, the availability of insurance coverage for pollution events has gone through four distinct phases over the past thirty-five years. Prior to 1966, pollution events were generally covered under the standard CGL policy as long as the release could be categorized as an accident. 23 From roughly 1966 through 1973, most CGL policies covered most pollution claims. 24 Between 1973 and 1985, pollution events were covered occurrences only if they were sudden and accidental, 25 and since 1985, the standard CGL policy broadly precludes coverage for releases of pollutants or contaminants. 26 Accordingly, the discovery of contamination may implicate several insurance policies with very different provisions regarding coverage for pollution claims. 27

20. Id. at 752–53.
22. See id. Even before Deni Associates it was clear that the "absolute pollution exclusion" barred coverage for claims arising out of environmental or industrial pollution. See id. at 1137.
24. See id.
25. See Virgina Properties, Inc., 74 F.3d at 1134.
26. Shelly & Mason, supra note 18, at 752.
III. SUDDEN AND ACCIDENTAL RELEASES AFTER DIMMITT CHEVROLET

In *Dimmitt Chevrolet*, the insured car dealership sold used crankcase oil to an oil recycling company known as Peak Oil. As part of its daily operations, Peak Oil illegally dumped thousands of gallons of used oil into unlined pits. As expected, Peak Oil routinely spilled large quantities of used oil onto the ground outside of the pits, and when it rained, runoff from the pits and spills became contaminated. The EPA subsequently named Dimmitt Chevrolet a potentially responsible party ("PRP") liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the costs of cleaning up the Peak Oil site.

In holding that insurance coverage did not exist, the Supreme Court of Florida construed the meaning of "sudden and accidental" within the pollution exclusion clause at issue in that case. As explained in *Dimmitt Chevrolet*, a split in authority existed among the various states as to whether "sudden and accidental" was ambiguous, with many state supreme courts construing that phrase to mean "unexpected and unintended" pollution and others holding that it was limited to "abrupt and unintended" pollution. Siding with the latter interpretation, the court explained that the phrase was not ambiguous and that "[a]s expressed in the pollution exclusion clause, the word sudden means abrupt and unexpected." Applying the policy language to the facts in this case, the court held that Dimmitt Chevrolet's claim was barred because "[t]he pollution took place over a period of many years and most of it occurred gradually."

The nongradual spills of used oil were also excluded from coverage, the court explained, because they occurred on a regular basis, thereby taking

29. *Id.*
30. *Id.*
32. *Dimmitt Chevrolet*, 636 So. 2d at 703–05. The exclusion in *Dimmitt Chevrolet* excluded coverage for:

**BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials... into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.**

*Id.* at 702.
33. *Id.* at 703.
34. *Id.* at 704.
35. *Id.* at 705.
them outside the scope of the "sudden and accidental" exception to the pollution exclusion:

[T]hese spills and leaks appear to be common place events which occurred in the course of daily business, and therefore cannot, as a matter of law, be classified as "sudden and accidental." That is, these "occasional accidental spills" are recurring events that took place in the usual course of recycling the oil.36

In Southern Solvents, Inc. v. New Hampshire Insurance Co.,37 the Eleventh Circuit considered whether, under Florida law, the phrase "sudden and accidental" in the 1972–85 CGL pollution exclusion applies to the initial discharge of pollutants or to the subsequent environmental damage.38 There, the insured operated a tetrachloroethylene (perchloroethylene) distribution facility at which four perchloroethylene releases had occurred.39 While the district court found that the initial discharges of these four releases were "sudden and accidental," it also found that the resulting leaching was continuous after the initial discharge.40 The district court then held that "[t]o rule that such continuous pollution is "sudden and accidental’ thwarts the policy goals behind the exclusion" and granted summary judgment in favor of the insurers.41 The Eleventh Circuit reversed, holding that:

Our reading of Florida law, specifically Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp., 636 So.2d 700 (Fla. 1993), leads us to conclude that the District Court erred in this respect. Under Florida law, the discharge must be sudden and accidental, not the resulting environmental damage. . . . Based on the holding in Dimmitt and the unambiguous terms in the policy issued by Canal it is clear that it is the actual discharge, not the resulting damages or contamination, which must be sudden and accidental in order to fall within the exception to the pollution exclusion clause.42

While Florida courts have not directly addressed the issue, in recent years Massachusetts courts have considered whether "damage due to the release of pollutants on particular occasions would be covered under the

36. Dimmitt Chevrolet, 636 So. 2d at 705 (emphasis added).
37. 91 F.3d 102 (11th Cir. 1996).
38. Id. at 105.
39. Id. at 103–04.
40. Id. at 104.
41. Id.
42. Southern Solvents, Inc., 91 F.3d at 105.
sudden and accidental exception to the pollution exclusion clause if the insured had also engaged in pollution-generating activities not subject to the exception over a longer period."\textsuperscript{43} While these Massachusetts cases obviously are not binding on Florida courts, they are instructive because Massachusetts law is consistent with Florida law in its interpretation of the "sudden and accidental" pollution exclusion.\textsuperscript{44}

In \textit{Nashua Corp. v. First State Insurance Co.},\textsuperscript{45} the court ruled that, notwithstanding a company's history of routinely delivering hazardous waste to a landfill, evidence of a subsequent unexpected and abrupt release of a significant amount of pollutants into the environment may be sufficient to confer insurance coverage despite the pollution exclusion clause.\textsuperscript{46} The test focuses on whether the triggering event is common or uncommon.\textsuperscript{47} Accordingly, the court found that evidence of a burst tank seal, a fire, and a subsequent explosion created genuine issues of material fact as to whether the releases were "sudden and accidental."\textsuperscript{48}

Subsequently, in \textit{Highlands Insurance Co. v. Aerovox, Inc.},\textsuperscript{49} the court made it clear that the exception to the pollution exclusion clause may apply to a "pollution-prone industry."\textsuperscript{50} The court explained that the test is whether the triggering event is "so beyond the pale of reasonable expectability as to be considered 'accidental.'"\textsuperscript{51} In applying this standard to the facts of that case, the court looked to whether a "sudden and accidental" release led to any damages that were more than \textit{de minimis}.\textsuperscript{52} This standard was later applied in \textit{Millipore Corp. v. Travelers Indemnity Co.},\textsuperscript{53} in which the court held that to survive a motion for summary judgment, the insured "must present specific evidence creating a genuine issue as to whether the incidents at the sites were sudden and accidental and caused more than a \textit{de minimis} release of pollutants into the environment."\textsuperscript{54}

While these Massachusetts cases are not binding on Florida courts, they provide some insight into how a Florida court might view "sudden and

\textsuperscript{43.} Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21, 32 (lst Cir. 1997).
\textsuperscript{45.} 648 N.E.2d 1272 (Mass. 1995).
\textsuperscript{46.} See \textit{id.} at 1276.
\textsuperscript{47.} See \textit{id.}
\textsuperscript{48.} \textit{Id.}
\textsuperscript{49.} 676 N.E.2d 801 (Mass. 1997).
\textsuperscript{50.} \textit{Id.} at 806 n.10 (citing Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc., 938 F.2d 1423, 1427 (5th Cir. 1991)).
\textsuperscript{51.} \textit{Id.}
\textsuperscript{52.} \textit{Id.} at 806.
\textsuperscript{53.} 115 F.3d 21 (1st Cir. 1997).
\textsuperscript{54.} \textit{Id.} at 34 (emphasis added).
accidental” releases by a “pollution-prone industry.” However, not all courts have acknowledged the potential for “sudden and accidental” releases to co-exist with intentional or nonsudden releases. These courts have typically avoided the issue by refusing to “microanalyze” the alleged releases, instead looking at the insured’s operations as a whole. This view is contrary to Florida law because it amounts to a determination that insureds in pollution prone industries can never have covered “sudden and accidental” releases. Some of these courts have gone so far as to suggest that a “foreseeable” release for which the insured has taken precautions to prevent or minimize cannot be “sudden and accidental.” Such a position is akin to a determination that a car accident cannot be sudden and accidental because of the presence of brakes, seatbelts, and air bags in the cars. Moreover, this view disregards the policy language and would effectively eliminate the exception to the pollution exclusion for companies whose operations might result in pollution. Thus, it seems likely that Florida courts would recognize the possibility of covered “sudden and accidental” releases coexisting with noncovered expected or intended releases. This raises the question of how much coverage is an insured entitled to when the contamination was caused by both covered and uncovered releases.

56. See, e.g., Smith v. Hughes Aircraft Co., 22 F.3d 1432, 1438 (9th Cir. 1993) (refusing to “break down [the insured’s] long-term waste practices into temporal components in order to find coverage where the evidence unequivocally demonstrates that the pollution was gradual”); Ray Indus., Inc. v. Liberty Mut. Ins. Co., 974 F.2d 754, 768-69 (6th Cir. 1992) (stating “when viewed in isolation ... all releases would be sudden .... Rather than pursuing such metaphysical concepts, we choose to recognize the reality of Sea Ray’s actions in this case.”); Lumbermens, 938 F.2d at 1430 (noting “it is ... the nature of an insured's enterprise and its historical operations that determine the applicability of the [pollution exclusion].”); Hyde Athletic Indus. v. Continental Cas. Co., 969 F. Supp. 289, 301 (E.D. Pa. 1997) (noting the futility of performing a microanalysis of a continuous pattern of pollution); Snyder General Corp. v. Great Amer. Ins. Co., 928 F. Supp. 674, 680 (N.D. Tex. 1996) (stating “[t]he fact that the insured may have also experienced isolated spills or minor accidents over the same period of time is irrelevant.”); American States Ins. Co. v. Sacramento Plating, Inc., 861 F. Supp. 964, 970-71 (E.D. Cal. 1994) (holding three distinct events that contributed to contamination caused by pollution occurring in the regular course of plating operation not covered).
57. See, e.g., Smith, 22 F.3d at 1438; Ray Indus., Inc., 974 F.2d at 768-69; Lumbermens, 938 F.2d at 1430; Hyde Athletic Indus., 969 F. Supp. at 301; Snyder General Corp., 928 F. Supp. at 680; American States Ins. Co., 861 F. Supp. at 970-71.
58. See, e.g., Smith, 22 F.3d at 1439; American States, Inc., 861 F. Supp. at 970-71.
IV. THE EXTENT OF COVERAGE UNDER FLORIDA LAW ONCE A POLICY HAS BEEN TRIGGERED

Under Florida law, if contract language is plain and unambiguous, it is to be given the meaning that it clearly expresses. On the other hand, when the language is ambiguous, an insurance contract prepared by an insurance company shall be construed against the insurer and in favor of the insured. In determining whether policy language is ambiguous, the court must view the terms in the context of the specific policy at issue.

In the standard CGL policy, the insurer agrees to pay “all sums which the INSURED shall become legally obligated to pay as DAMAGES because of [personal injury or property damage] caused by an occurrence during the policy period and within the policy territory.” As discussed above, the word “occurrence” is typically defined as “an accident including continuous or repeated exposure to conditions, which results in BODILY INJURY or PROPERTY DAMAGE neither expected nor intended from the standpoint of the INSURED.” Because the occurrence must take place during the policy period, and occurrence is defined as an “accident,” it would seem that there must be an accident during the policy period in order to trigger coverage. However, this no longer seems to be the case in Florida. In State Farm Fire & Casualty Insurance Co. v. CTC Development Corp., the Supreme Court of Florida held that when the term “accident” is undefined in an insurance policy, the term includes not only “accidental events,” but also damages or injuries that are neither expected nor intended from the standpoint of the insured. Because the typical definition of “property damage” requires that it occur during the policy period, CTC suggests that

61. Dimmitt Chevrolet, 636 So. 2d at 704.
62. Id. at 702.
63. Id.
64. 720 So. 2d 1072 (Fla. 1998).
65. Id. at 1076.
66. Property damage means:

1) the physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES § 7.03(b) (9th ed. 1998).
it is not necessary for an “accidental event” to occur during the policy period in order to trigger coverage. Coverage is triggered whenever unexpected or unintentional damage occurs during the policy period, as long as no other policy exclusion applies. This interpretation is consistent with either the injury-in-fact or continuous trigger theories discussed in section II.B. below.

A. The Nature of Environmental Liability

Environmental statutes, such as CERCLA, impose strict liability for the mere release of hazardous substances.67 Under CERCLA, liability is joint and several unless a PRP can demonstrate that the damages are divisible.68 Accordingly, the mere release of a hazardous substance, regardless of the quantity released, can render a PRP liable for all cleanup costs at the site as long as the damages were not divisible. Implicit in the judicial opinions holding CERCLA liability to be joint and several is the recognition that multiple releases frequently combine to cause indivisible damage.69 In such cases, Congress placed the burden on PRP’s to show that their conduct caused only a discrete portion of the contamination at the site.70

When insurance policies are involved, the corollary question is whether the insured must bear the burden of proving precisely how much of the contaminant is traceable to a covered “occurrence,” or whether the insured must prove that the damage caused by the covered “occurrence” is divisible from the rest of the contamination. This article posits that the language of the standard CGL policy and Florida’s concurrent cause doctrine place the burden of proving divisibility of damages on the insurer.

Under Florida law, CERCLA cleanup costs constitute “damages” as that term is defined in the standard CGL policy.71 Similarly, a majority of courts consider environmental contamination that has already occurred to be “property damage” within the scope of a CGL policy.72 Thus, once coverage


69. See Bell Petroleum Servs., 3 F.3d at 894–95.

70. Id. at 912.


is triggered, the insurer becomes liable for the full cost of cleanup unless it can show that the damages resulting from the covered occurrence are distinct or divisible from the rest of the contamination at the site.

B. Trigger of Coverage

Whether such damage was "caused by an occurrence during the policy period" is often a difficult question because Florida’s courts have not definitively resolved which "trigger of coverage" applies to long tail environmental releases, i.e., releases that may have gone unnoticed for many years only to later be identified as the source of contamination at a site. 73 "Trigger of coverage" refers to the circumstances that "trigger" or activate the insurer’s obligation to indemnify the insured. 74 While this term is not found in CGL policies, it is a term of convenience used to describe what must happen during the policy period in order to create a duty on the part of the insurer to indemnify the insured. 75 As such, it is largely an issue of timing.

The policy language of the insuring clause and the definition of "occurrence," and the "owned property" exclusion may be combined as follows:

The company will pay on behalf of the insured all sums which the Insured shall become legally obligated to pay as damages because of...property damage...caused by...an accident, including continuous or repeated exposure to conditions, which results in...physical injury to or destruction of tangible property [of an entity other than the insured] which occurs during the policy period. 77

Because of the insurance industry’s repeated use of the word “which” instead of “that,” this language should be read in less restrictive manner. 78 Clauses introduced by the word, “that,” on the other hand, are restrictive and essential; removing it materially alters the sentence. 79 Id. Accordingly, the

74. Id. at 880 n.2.
75. See id. at 880–81 n.2.
76. Id.
77. Id. at 881, 889–900 n.21; MORTON S. FREEMAN, THE GRAMMATICAL LAWYER 25 (1979) (clauses introduced by “which” are nonrestrictive and provide only incidental or nonessential information about a previous word).
78. FREEMAN, supra note 77, at 25; see also HENRY WEIHOFEN, LEGAL WRITING STYLE 33 (1961).
79. Freeman, supra note 77; Weihofen, supra note 78.
policy language quoted above can be restated, without changing its meaning, as follows: "[t]he company will pay on behalf of the Insured all sums . . . because of . . . property damage . . . caused by an accident, including continuous or repeated exposure to conditions." This statement is much more conducive to coverage than insurance companies would like, and while technical distinctions between "which" and "that" may seem "nitpicky," the policy language was drafted by the insurance industry. Florida law is clear that when policy language is ambiguous, an insurance contract prepared by an insurance company is to be construed against the insurer and in favor of the insured.

Courts have applied at least four different theories to determine the appropriate trigger of coverage. The "exposure theory," which is often applied in asbestos and other toxic tort cases, holds that the insurance policy is triggered by a third party's exposure to the chemical during the policy period. If there are multiple exposures to the contamination, multiple policies may be triggered. However, this theory is rarely applied to environmental cases involving property damage because, in such cases, "exposure" has little meaning beyond actual injury or contamination.

The "injury-in-fact theory," which is more often applied in environmental pollution cases, posits that the duty to indemnify arises when there has been actual injury to the property of a third party during the policy period. The "exposure theory" and the "injury-in-fact theory" are functionally equivalent when considered in the context of a claim for property damage from environmental contamination because the injury occurs simultaneous with the exposure, i.e., once third party property is exposed to the contamination, property damage has occurred.

The "manifestation theory" considers the duty to indemnify triggered on the date the damage manifests itself. This theory applies the latest of

80. Freeman, supra note 77; Weihofen, supra note 78.
81. Clauses introduced by "which" are nonrestrictive and provide only incidental nonessential information about a previous word. Thus, even if the clause is omitted, the meaning of the sentence will remain intact. See Freeman, supra note 77, at 33.
82. See Pridgen, 498 So. 2d at 1248.
86. See, e.g., Mraz v. Canadian Universal Ins. Co., 804 F.2d 1325 (4th Cir. 1986); Eagle-Picher Indus. v. Liberty Mut. Ins. Co., 682 F.2d 12, 16 (1st Cir. 1982). Some courts have
the four trigger dates and is generally considered the most proinsurer of the four theories. In practice, the “manifestation theory” often converts an “occurrence-based” policy into a “claims-made” policy because policies that expired before discovery of the contamination would not be triggered. Because, the insured has a duty to provide prompt notice of the occurrence, coverage will generally only exist under the policy in effect at the time of such notice.

The fourth trigger theory, the “continuous trigger theory,” is essentially an amalgamation of the aforementioned theories because coverage is triggered: 1) at the time of the initial exposure; 2) at the time of any actual injury or property damage; and 3) at the time of manifestation. The continuous trigger theory is generally considered the most proinsured of the theories because it provides coverage for the entire period from the initial exposure or release through the discovery of the contamination. However, whether this is actually the case depends in large part on the court’s approach to the scope of coverage by each insurer on the risk when multiple policies are triggered. If the court applies the Keene “joint and several liability” approach, discussion Section IV.D. below, then all insurers whose policies have been triggered would be held jointly and severally liable, up to their respective policy limits, for “all sums” that the insured becomes legally obligated to pay. However, if the court applies a “pro-rata” approach to allocation, discussed in Section IV.E.2. below, having more triggered policies can work to the insured’s detriment.

For example, consider a scenario in which the insured becomes liable for one million dollars in cleanup costs and has ten triggered policies that each contain a self-insured retention or deductible of $100,000. In such a scenario, a court applying a continuous trigger and a pro-rata allocation theory would allocate $100,000 to each policy, which would be promptly swallowed by the self-insured retention in each such policy. Accordingly,
the insured would have to pay for the entire one million in cleanup costs, with no assistance from any of its triggered insurance policies.92

While no Florida court has decided the issue in a published decision, the Eleventh Circuit has indicated that the injury-in-fact theory is the approach most likely to be adopted by the Supreme Court of Florida.93 However, based on the supreme court’s recent opinion in CTC, it is not clear how the injury-in-fact trigger would differ from a continuous trigger under Florida law. Some courts distinguish the injury-in-fact trigger from the continuous trigger on the rationale that the injury-in-fact trigger does not provide coverage for continuous injury or property damage that began before the policy period.94 However, when the release involves active, continuous leaching, as opposed to the passive persistence of the contamination, the policy language does not support a trigger theory that provides coverage only upon the initial discharge of the pollution, because no term in the policy imposes a “discrete temporal limitation on ‘injury’” or “property damage.”95 Because continuous contamination that was both unexpected or unintended would cause injury-in-fact in each subsequent policy period, both the injury-in-fact and continuous trigger theories should provide coverage from the date of the initial discharge until the contamination is cleaned up.

92. The scenario discussed above is just one example of the dramatic impact that given trigger and allocation theories can have on the extent of coverage an insured might receive. Whether a court permits an insured to recover on excess policies before exhausting all primary policies (“horizontal exhaustion”), or whether the insured must recover on all primary and excess policies for a given year before recovering on other years’ policies (“vertical exhaustion”), also plays an important role in the coverage equation. Similarly, whether a court permits “stacking” of policies at the same coverage level can be critical to the insured’s recovery. A complete discussion of these issues, and the effect of deductibles and self-insured retentions on an insured’s entitlement to insurance proceeds is beyond the scope of this article. For a thorough discussion of this subject, see Garrett G. Gillespie, The Allocation of Coverage Responsibility Among Multiple Triggered Commercial General Liability Policies in Environmental Cases: Life After Owens-Illinois, 15 VA. ENVT. L.J. 525 (1996). See also Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 978 F. Supp. 589 (D.N.J. 1997), rev’d, 177 F.3d 210 (3d Cir. 1999); Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998).


C. The Concurrent Cause Doctrine

The question presented in each of the scenarios listed at the beginning of this article is, to what extent must the insurer indemnify the insured for damages resulting from a pollution release when some portion of the contamination was caused by noncovered releases? While Florida law has not yet dealt with this issue in the pollution context, case law that has developed in the context of non-environmental claims provides a likely answer to this question.96

The doctrine of concurrent causes applies when an "indivisible" loss is caused simultaneously by two separate events.97 When only one of the events is covered by an insurance policy, Florida courts hold that the insurer becomes jointly and severally liable for the entire loss.98 In Wallach v. Rosenberg,99 a sea wall between the Wallachs' home and their neighbor's collapsed during a storm, precipitating a domino-like crumbling of a portion of the neighbor's sea wall.100 The neighbor then sued Wallach and his insurance carrier.101 The issue was whether the sea wall collapse was caused by Wallach's negligent maintenance of the wall, an event covered under the insurance policy, or the water pressure caused by the storm, an excluded loss.102 On appeal, the court held that "the jury may find coverage where an insured risk constitutes a concurrent cause of the loss even where 'the insured risk [is] not . . . the prime or efficient cause of the accident.'"103 This policy is consistent with the Florida rule that the duty to defend applies to both covered and uncovered claims,104 as well as the rule preventing an insurer who pays a judgment on behalf of a joint tortfeasor from maintaining a contribution action against other insurers.105

97. See id. at 1387.
100. Id. at 1386.
101. Id.
102. Id. at 1387.
103. Id. (quoting 11 GEORGE J. COUCH, COUCH ON INSURANCE 2D § 44:268 (rev. ed. 1982)). See also West American Ins. Co. v. Chateau La Mer II Homeowner's Ass'n, Inc., 622 So. 2d 1105, 1108 (Fla. 1st Dist. Ct. App. 1993).
The concurrent cause doctrine applies "only when the multiple causes are not related and dependent, and involve a separate and distinct risk." In a pollution case involving separate releases, some of which are covered "sudden and accidental" releases and others that are not, this rule is consistent with the rule applied in Massachusetts in Nashua, Aerovox, and Millipore. Thus, under Florida insurance law, if two independent events cause property damage, one of which is covered under an insurance policy and the other is not, coverage exists. As explained in Wallach and West American, this doctrine is based on common sense: if the insured bought insurance coverage for property damage caused by a sudden discharge of pollutant or contaminants, it is entitled to get that coverage.

While separate and independent pollution events rarely occur "concurrently" in the true sense of the word, different releases do often cause indivisible damage. In this regard, the concurrent cause doctrine simply reflects the traditional tort method for dealing with indivisible harm—joint and several liability. The modern trend in CERCLA cases to apportion liability when a site's contamination is divisible reflects the reverse application of the same tort principle. When the harm is not divisible, both the common law and CERCLA impose joint and several liability. In practice, the same is true under Florida law because comparative fault under section 768.81, of the Florida Statutes, does not apply to actions for the recovery of actual economic damages resulting from pollution. Accordingly, under the rationale of the concurrent cause cases, the insurer should be to subject to execution, the carrier must bear the same inequitable burden as is borne by its insured."
liable for the full extent of the damages paid by the insured, absent policy provisions further limiting the insurer’s liability.

D. Allocation Cases—Asbestos

The issue of allocating insurance policy liability for occurrences that span several policy periods has been addressed in a line of cases dealing with asbestos liability. As in the environmental context, asbestos occurrences sometimes span decades and call into question dozens of policies. However, insurers argue that each policy typically limits coverage to losses occurring within the policy period. Courts are split as to which of two general theories should be applied to these allocation decisions.113

The joint and several liability theory was most prominently pronounced in Keene Corp. v. Insurance Co. of North America.114 In Keene, the court noted that “when Keene is held liable for an asbestos related disease, only part of the disease will have developed during any single policy period.”115 Based upon the phrase “all sums” in the policy, the District of Columbia Circuit Court of Appeals concluded that the insurer is liable in full for all damages notwithstanding the fact that some of the disease developed during other policy periods.116 The Keene court stated:

As we interpret the policies, they cover Keene’s entire liability once they are triggered. That interpretation is based on the terms of the policies themselves. We have no authority upon which to pretend that Keene also has a “self-insurance” policy that is triggered for periods in which no other policy was purchased. Even if we had the authority, what would we pretend that the policy provides? What would its limits be? There are no self-insurance policies, and we respectfully submit that the contracts before us do not support judicial creation of such additional insurance policies.117

The court noted that the policies did not “distinguish between injury that is caused by occurrences that continue to transpire over a long period of time and more common types of injury.”118 Accordingly, the insured may collect the full amount of indemnity that is due from any insurer whose coverage is triggered, subject only to the provisions in the policies that govern the

113. Id.; see also O’Neil v. Picillo, 883 F.2d 176 (1st Cir. 1989).
115. Id. at 1047.
116. Id.
117. Id. at 1048–49.
118. Id. at 1049.
allocation of liability when more than one policy covers an injury. Other courts dealing with asbestos trigger issues have followed the approach enunciated in Keene. 119 For example, in ACandS Inc. v. Aetna Casualty & Surety Co., 120 the Third Circuit followed the Keene approach for asbestos claims. The court stated:

The policies require the insurers to pay all sums which ACandS becomes "legally obligated to pay" because of bodily injury during the policy period. It is uncontested that under principles of tort law ACandS may be held fully liable for a personal injury plaintiff's damages caused in part by ACandS' asbestos during a particular period, even though plaintiff's damages may also have been caused, in part, at other times. It follows that if a plaintiff's damages are caused in part during an insured period, it is irrelevant to ACandS' legal obligations and, therefore, to the insurer's liability that they were also caused, in part, during another period. 121

In contrast to the Keene joint and several liability approach stands "the pro-rata time on the risk" theory ("pro-rata theory") of insurer liability. The pro-rata theory was most prominently applied in Insurance Co. of North America v. Forty-Eight Insulations, Inc., 122 and Owens-Illinois, Inc. v. United Insurance Co. 123 In Forty-Eight Insulations, the Sixth Circuit, applying Illinois law, held that defense costs should be prorated over the course of the occurrence. 124 Like the court in Keene, the Forty-Eight Insulations court looked to the terms of the contract to define the scope of coverage. 125 However, in Forty-Eight Insulations, the court concluded that the insurer had not contracted to pay defense costs for occurrences that take place outside the policy period. 126 Accordingly, the different insurance companies that run the risk over the course of the occurrence were required

120. 764 F.2d 968 (3d Cir. 1985).
121. Id. at 974 (internal citation omitted).
122. 633 F.2d 1212 (6th Cir. 1980).
125. Id. at 1215–16.
126. Id. The proration approach applied in Forty-Eight Insulations is inconsistent with the Florida rule that once the duty to defend is triggered, the insured must provide a defense to the entire action. See, e.g., Grissom v. Commercial Union Ins. Co, 610 So. 2d 1299, 1307 (Fla. 1st Dist. Ct. App. 1992).
to prorate defense costs among themselves. The court treated the insured as an insurer for those periods of time that it had no insurance coverage.\textsuperscript{127} Although often cited as authority for the pro-rata approach, \textit{Forty-Eight Insulations} has limited precedential value because the Supreme Court of Illinois rejected this approach in favor of joint and several liability in \textit{Zurich Insurance Co. v. Raymark Industry, Inc.}\textsuperscript{128}

In \textit{Owens-Illinois, Inc. v. United Insurance Co.},\textsuperscript{129} the Supreme Court of New Jersey applied an allocation method that was related to both the time of the risk and the degree of risk assumed.\textsuperscript{130} The court allocated a portion of damages to the insured for uncovered years but \textit{only when no insurance was available}.\textsuperscript{131} Unlike the \textit{Keene} and \textit{Forty-Eight Insulations} courts, the court in \textit{Owens-Illinois} was unable to find the answer to allocation in the policy language.\textsuperscript{132} Instead, the court looked to policy considerations and concluded that the \textit{Keene} joint and several liability rule reduces the property owner's incentive to insure against future risks.\textsuperscript{133} As such, the court was unwilling to allocate costs to the insured for periods in which coverage was not available.\textsuperscript{134}

\textbf{E. \textit{Allocation in the Environmental Context}}

While many of the cases dealing with these scope of coverage issues have arisen in the context of asbestos claims, several courts have considered these issues in the context of environmental pollution claims. Results in these cases have been mixed, with some courts applying a proration formula as in \textit{Forty-Eight Insulations} and \textit{Owens-Illinois}, while other courts have imposed joint and several liability.\textsuperscript{135}

Whether the asbestos cases are truly analogous to hazardous waste cases is questionable. While all asbestos bodily injury cases have essentially the same etiology—ingestion of an asbestos fiber, exposure in residence, and manifestation—environmental pollution cases can differ dramatically. In dealing with groundwater contamination issues, factual considerations such as whether rain flushed the same quantity of contaminants into the ground each year or whether the plume of contaminants advanced in an equal rate.

\begin{itemize}
\item \textsuperscript{127} \textit{Forty-Eight Insulations}, 633 F.2d at 1224–25.
\item \textsuperscript{128} \textit{514 N.E.2d 150 (Ill. 1987)}.
\item \textsuperscript{129} \textit{650 A.2d 974 (N.J. 1994)}.
\item \textsuperscript{130} \textit{Id. at 995}.
\item \textsuperscript{131} \textit{Id}.
\item \textsuperscript{132} \textit{Id. at 990}.
\item \textsuperscript{133} \textit{Id. at 992}.
\item \textsuperscript{134} \textit{Owens-Illinois, Inc.}, 650 A.2d at 995.
\item \textsuperscript{135} \textit{Id}.
\end{itemize}
over successive policies can have a significant impact on whether it is appropriate to apply pro-rata allocation principles.\textsuperscript{136}

1. Early Cases—Joint and Several Liability

The first cases dealing with the allocation issue in the environmental context followed the joint and several liability approach enunciated in \textit{Keene} and \textit{ACandS}. In \textit{New Castle County v. Continental Casualty Co.},\textsuperscript{137} the court faced the allocation issue in the context of landfill leachate that caused groundwater contamination.\textsuperscript{138} Citing \textit{ACandS}, the court held that “there is no proration of losses under a policy once coverage is triggered.”\textsuperscript{139} The court continued by stating “[t]he terms of the contract are not affected by prior or subsequent coverage.”\textsuperscript{140} Further, the court noted that although the insurer makes reference to other policies that may be implicated, it cites no evidence of the terms of those policies.\textsuperscript{141} Thus, there was not enough evidence with which to prorate damages even if the law authorized proration.\textsuperscript{142}

That same year, in \textit{Federal Insurance Co. v. Susquehanna Broadcasting Co.},\textsuperscript{143} the court addressed the allocation issue with regard to CERCLA liability under some policies that had pollution exclusion clauses and others that did not.\textsuperscript{144} The case involved waste generated by Susquehanna Broadcasting Company (“SBC”) from 1975 through 1983 that contaminated soil and well water in adjoining residential areas.\textsuperscript{145} The policies in effect before 1976 or 1977 did not contain a pollution exclusion clause, but subsequent policies did.\textsuperscript{146} The court concluded that coverage under the earlier policies was triggered and that damages could not be apportioned.\textsuperscript{147} Accordingly, the court followed the joint and several approach applied in

\textsuperscript{136} Id.
\textsuperscript{138} Id. at 806.
\textsuperscript{139} Id. at 817 (quoting \textit{ACandS, Inc. v. Aetna Cas. & Sur. Co.}, \textit{764 F.2d 968}, 968 (3d Cir. 1985)).
\textsuperscript{140} Id. (citing Sandoz, Inc. v. Employer’s Liab. Assurance Corp., \textit{554 F. Supp. 257}, 266 (D.N.J. 1983)).
\textsuperscript{141} Id.
\textsuperscript{144} Id. at 169.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 175.
Keene and ACandS, and held the insurers liable for the full extent of the cleanup costs. In so holding, the court noted that "generators of environmental waste can be held jointly liable for all response costs even though others may have contributed to the pollution." Accordingly, the court concluded that the earlier policies covered all of SBC's response cost liability, "regardless of the presence of the pollution exclusion clause in later policies.

Similarly, in Detrex Chemical Industries v. Employers Insurance, the court found that for each policy that is triggered, the policy must cover all damages directly and proximately resulting from the occurrence that caused the injury-in-fact during that policy period. Thus, the court held that without a more complete factual record of the occurrences, the question of allocation was not appropriate for summary judgment because it necessarily requires a determination as to which policies have been triggered. The court recognized that damages can only be allocated to policies that have been triggered. Thus, if the contamination was caused by a single event, or if there is only one policy that has been triggered, that policy assumes liability for all damages directly and proximately resulting from the occurrence.

In Hatco Corp. v. W.R. Grace & Co.-Conn., the court held that although an insured must prove that actual injury occurred during the policy period, coverage is not limited to the injury that occurred during the policy period if the injury is part of a continuous, indivisible process. In Hatco, Grace operated an industrial chemical manufacturing facility in Fords, New Jersey between 1959 and 1978. Effluent containing various organic chemical compound was pumped directly into ditches and streams that drained into the Passaic River. In the mid 1960s, Grace constructed unlined ponds that were supposed to hold the effluent so that the useful product could be recovered. The ponds were also used to dump other chemicals that had been used in the manufacturing process, including heat

149. Id.
150. Id.
152. Id. at 1325.
153. Id.
154. Id.
155. Id.
157. Id. at 1345.
158. Id. at 1343.
159. Id.
160. Id.
transfer fluids containing Polychloronated Bipheynls ("PCB") that were dumped by employees from fifty-five-gallon drums directly into the ponds. In Grace eventually sold the facility to the Hatco Corporation. In 1989, Hatco filed an action against Grace to recover all sums expended to remove hazardous substances disposed of on site. In turn, Grace sued its primary and excess insurers for indemnification because it claimed that all the damages alleged fall within the definition of "occurrence" in the policies.

Applying a continuous trigger theory, the court looked to the language of the insurance contract to determine the scope of coverage. The court noted that the policy language did not expressly restrict coverage to the injury that resulted during the policy period, even though such a provision could have been expressly included in the policies. The court found that "because the Insurers agreed to pay all sums which the insured shall become legally obligated to pay as damages," they essentially stepped "into the shoes of the insured." Under CERCLA, Grace became jointly and severally liable for the full extent of damage sustained by Hatco if the harm sustained was indivisible. Thus, the court would apportion liability only to the extent that the insurers can rebut a showing that the injury was indivisible.

In Ray Industry, Inc. v. Liberty Mutual Insurance Co., the Sixth Circuit addressed the allocation issue with regard to CERCLA liability arising from Sea Ray Boats, Inc.'s disposal of wastes from 1966 to 1979. The district court had held that because the pollution exclusion clause appeared in policies issued on or after July 1, 1971, the policies only covered contamination caused before that date. The Sixth Circuit agreed that the insurer's duty to defend did not extend to matters that would have no relation to the 1966 to 1970 policies, but the court recognized that, considering the nature of CERCLA liability, it was not clear that such matters existed. The court recognized that the insured was subject to full liability for events that occurred during each policy period, and held that the

162. Id. at 1345.
163. Id. at 1346 (emphasis added).
164. Id.
165. Id. at 1345.
167. Id. at 1346 (emphasis added).
168. Id.
169. Id.
170. 974 F.2d 754 (6th Cir. 1992).
171. Id. at 754.
172. Id. at 757.
173. Id. at 771.
insured had coverage up to the full policy limits for each year from 1966 to 1970.\footnote{Id. at 770.} The court specifically refused to further apportion damages via proration to the insured.\footnote{Ray Indus., Inc., 974 F.2d at 770.}

In \emph{Chemical Leaman Tank Lines, Inc. v. Aetna Casulty & Surety Co.},\footnote{817 F. Supp. 1136 (D.N.J. 1993), rev’d, 117 F.3d 210 (1999).} Chemical Leaman operated a tank truck operation specializing in the transport of various chemicals and other liquids.\footnote{Id. at 1140.} From 1960 to 1969, Chemical Leaman placed contaminated rinse water into a wastewater treatment system consisting of unlined ponds and lagoons.\footnote{Id.} This lasted until 1975 when they installed a wastewater treatment system.\footnote{Id.} "By 1977, Chemical Leaman had drained the ponds and lagoons of liquid, dredged the accumulated sludge out of the lagoons, and filled all the ponds and lagoons with brickbat, sand, and concrete."\footnote{Chemical Leaman, 817 F. Supp. at 1140.} In 1984 the Environmental Protection Agency ("EPA") placed the site on the National Priorities List ("NPL") under CERCLA and alleged that Chemical Leaman was strictly liable for the damages and cleanup costs resulting from the contamination.\footnote{Id. at 1153.} Consequently, Chemical Leaman notified its insurer and requested indemnification.\footnote{Id.}

In \emph{Chemical Leaman}, the court found that New Jersey law applies the continuous trigger theory.\footnote{See Diamond Shamrock Chem. v. Aetna Cas. & Sur. Co., 609 A.2d 440, 466 (N.J. Super. Ct. App. Div. 1992).} Basing its decision on the \emph{Hatco} case, the court held that the insurer was jointly and severally liable up to the policy limits for all damages resulting from the occurrence, including damage that occurred before and after the policy period.\footnote{Id. at 11153.} As in \emph{Hatco}, because Chemical Leaman was subject to strict liability under CERCLA, the court held that all policies triggered by a continuous occurrence must bear joint and several liability.\footnote{Id.} The court noted that under New Jersey law, the insured must make two factual showings before imposing joint and several liability under the continuous trigger theory.\footnote{Id.} First, the insured must show that some kind of property damage occurred during each policy period at
issue.\textsuperscript{187} Second, the insured must show that the property damage was part of a continuous and indivisible process of injury.\textsuperscript{188} If the insured could make these showings, then it could recover up to the policy limits of each policy in effect from 1960 until the manifestation of the soil and groundwater damage.\textsuperscript{189}

The continued validity of the \textit{Hatco} and \textit{Chemical Leaman} decisions is questionable in light of the Supreme Court of New Jersey's decision in \textit{Owens-Illinois}.\textsuperscript{190} On appeal in \textit{Chemical Leaman}, the Third Circuit held that because the Supreme Court of New Jersey rejected joint and several liability in favor of a risk-based allocation of liability among applicable insurance policies in \textit{Owens-Illinois}, the case should be remanded to the district court for a reallocation of liability between the insurer and the insured.\textsuperscript{191} Because the district courts in \textit{Chemical Leaman} guessed incorrectly as to the Supreme Court of New Jersey's interpretation of these insurance policies, the district court's opinion has no direct precedential value.

2. Recent Cases—Pro-Rata Allocation

The \textit{Owens-Illinois} case has proven quite influential even outside of New Jersey. Recent cases have departed from the joint and several liability approach in favor of apportionment in certain circumstances. In \textit{Northern States Power Co. v. Fidelity & Casualty Co. of New York},\textsuperscript{192} the Supreme Court of Minnesota held that contamination of groundwater should be analyzed as a continuous process in which the property damage is evenly proportioned throughout the period of time from the first contamination to the end of the last triggered policy.\textsuperscript{193} From 1973 until 1978, power plants were operated on the insured's facility.\textsuperscript{194} The insured, Northern States Power ("NSP"), had an insurance program that included standard comprehensive general liability policies with self-insured retentions of $25,000 per occurrence from 1958 to 1970 and $100,000 per occurrence from 1970 to 1973.\textsuperscript{195} These policies were labeled as excess liability policies, and the record indicated that no other insurer issued any primary liability policies.
between 1958 and 1973. In 1981, the Minnesota Pollution Control Agency discovered that the groundwater at the site was contaminated with coal tars and spent oxide waste and ordered NSP to clean up the contaminated property. NSP settled with some of its carriers, but did not settle with others. Applying an injury-in-fact trigger theory, the court held that the insured bears the burden of proving that the policy was triggered and therefore that coverage is available. The court held that the environmental damage occurred over successive policy periods and concluded that the damages should be presumed to have been continuous from the point of the first damage to the point of discovery or cleanup. Accordingly, the court applied a pro-rata by time on the risk allocation theory similar to that used in Owens-Illinois. Thus, NSP was required to pay one deductible per policy period while being liable for its pro-rata share of any uninsured or self-insured periods.

More recently, the NSP approach was applied by a Minnesota court in Domtar, Inc. v. Niagara Fire Insurance Co. In Domtar, the insured coal-tar processor sued several of its liability insurers for the costs incurred in cleaning up coal-tar contamination that occurred between 1933 and 1991. In the absence of any identifiable release during a specific policy period, the court presumed that the damage was continuous and allocated liability among the insurers on a pro-rata “time-on-the-risk” basis. The court upheld the trial court’s allocation of liability to the insured for uninsured periods and cited Forty-Eight Insulations.

Similarly, in Montrose Chemical Corp. v. Admiral Insurance Co., the court determined that all insurers on the risk should contribute in proportion to their respective policies’ liability limits or the time periods covered under each such policy. “From 1947 to 1982, Montrose manufactured the pesticide, dichloro-diphenyl-trichloro-ethane ("DDT"), at its plant in
Torrance, California. Admiral Insurance Company had issued four CGL policies to Montrose covering the period from 1982 to 1986. The court held that, where successive CGL policy periods are implicated, damages that are continuous over several policy periods are potentially covered by all policies in effect during those periods. The court suggested that courts whose analyses failed to draw these distinctions are actually clouding the issue for the allocation of triggered policies.

In *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, an appellate court in Illinois applied an allocation formula similar to that employed in *Forty-Eight* and *Owens-Illinois*. There, the insured, Outboard Marine Corp., was a large manufacturer of outboard motors that operated a dye casting facility in Waukegan, Illinois. In its dye casting process, Outboard Marine Corp. used a hydraulic fluid, pydraul, that contained Polychlorinated Biphenyl's from 1953 through 1970. Polychlorinated Biphenyl's laden effluent was routed to a ditch on Outboard Marine Corp.'s property and eventually found its way into Waukegan Harbor and Lake Michigan. Residual amounts of PCB laden Pydraul remained in Outboard Marine Corp.'s dye casting machines until approximately 1976. In March of 1978, the federal government sued OMC to compel it to remediate the contaminated areas, and in 1986, Outboard Marine Corp. sued its primary insurance companies alleging a duty to defend and indemnify them in connection with the federal environmental litigation.

In applying the pro-rata theory, the court noted that while the insurers agreed to indemnify Outboard Marine Corp. for "all sums," it had to be for sums incurred as a result of property damage during the policy period. In finding that allocation was appropriate, the court stated that:

> [t]he contamination of the groundwater should be regarded as a continuous process in which the property damage is evenly distributed over the period of time from the first contamination to the end of the last triggered policy (or self-insured) period, and we

209. Id. at 881.
210. Id.
211. Id. at 904.
214. Id. at 746.
215. Id. at 744.
216. Id.
217. Id.
219. Id.
220. Id. at 748.
have also held that the total amount of property damage should be allocated to the various policies in proportion to the period of time each was on the risk. 221

Following the language in Forty-Eight Insulations, the court treated the insured as an insurance company for the years in which it had no insurance coverage, and allocated a portion of liability to the insured. 222 Further, the court summarily dismissed Outboard Marine Corp.'s joint and several liability argument:

OMC cites no authority for its novel proposition that, because its liability under CERCLA is joint and several, the liability of the excess insurers cannot be apportioned on a pro-rata basis. OMC ignores the principal that insurance coverage disputes are governed by contract law. We can find no rationale to support the imposition of joint and several liability upon the insurers simply because OMC's liability arose under CERCLA. 223

Recently, in Missouri Pacific Railroad. v. International Insurance Co., 224 the court followed its previous holding in Outboard Marine Corp. and applied the pro-rata theory. 225 There, the insured railroad company sought indemnification from insurers for noise-induced hearing loss and asbestos exposure claims based on exposures over a seventy-three-year span. 226 The insured alleged that the claims each arose from "one proximate, uninterrupted, and continuing cause" during each of approximately thirty insurance policies. 227 The trial court certified two questions to the court of appeals regarding whether the "all sums" rule of Zurich Insurance Co. 228 or the pro-rata, "time-on-the-risk" approach of Outboard Marine Corp. governs allocation of coverage. 229 The court looked to the policy definition of "occurrence," which by definition must occur during the policy period, to hold that the insurer is only liable for damages that occurred during the policy period. 230 Accordingly, the court followed Outboard Marine Corp.

221. Id. at 749 (quoting Northern States Power Co. v. Fidelity & Cas. Co. of N.Y., 523 N.W.2d 657, 664 (Minn. 1994)).
222. Id.
223. Outboard Marine, 670 N.E.2d at 750.
225. Id. at 804.
226. Id.
227. Id.
228. See id.
230. Id. at 804.
and applied the pro-rata, time-on-the-risk approach because the damage cannot be measured and allocated to particular policy periods.\textsuperscript{231}

3. Limits on the Pro-rata Approach—Single Event Causing Indivisible

As the above-discussed cases indicate, the recent trend is toward pro-rata allocation among insurers that were on the risk during the period of continuous damage. However, the pro-rata allocation cases discussed above involved continuous injury in which there was no single event that was the primary cause of the groundwater contamination. Importantly, although \textit{Forty-Eight Insulations} is one of the principal allocation cases, the court noted that where there is no reasonable means of prorating the cost of defense between the covered and noncovered items, the insurer must bear the entire cost of defense.\textsuperscript{232} In the typical situation, the court noted, suit will be brought as the result of a single accident, but only some of the damages sought will be covered under the insurance policy.\textsuperscript{233} In these cases, the court recognized that prorating costs between the insured claim and the uninsured claim is very difficult, and as a result, courts should impose the full cost of the defense on the insurer.\textsuperscript{234}

Similarly, in \textit{Owens-Illinois}, the court recognized the difference between cases involving the gradual release of contaminants and cases in which the occurrence and the attendant injuries are easily identified as falling within a particular policy period.\textsuperscript{235} Using an explosion as an example, the court noted that "[e]ven though 'all sums' due from the accident might not be known with certainty at the time of the explosion, by the time of trial a claimant would be able to establish, within a reasonable degree of medical probability, what damages would flow from the injury."\textsuperscript{236}

In \textit{SCSC Corp. v. Allied Mutual Insurance Co.},\textsuperscript{237} the Supreme Court of Minnesota declined to apply the \textit{Northern States} pro-rata by time on the risk approach that it had adopted only one year earlier.\textsuperscript{238} From 1976 to the end of 1988, SCSC operated a dry cleaning and laundry supply distribution facility in St. Louis Park, Minnesota, where it stored perchloroethylene in two above-ground storage tanks.\textsuperscript{239} In 1988, perchloroethylene was detected

\textsuperscript{231} \textit{Id.} at 807.
\textsuperscript{232} \textit{Forty-Eight Insulations}, 633 F.2d at 1224.
\textsuperscript{233} \textit{Id.}
\textsuperscript{234} \textit{Id.}
\textsuperscript{235} \textit{Owens-Illinois}, 650 A.2d at 989.
\textsuperscript{236} \textit{Id.}
\textsuperscript{237} 536 N.W.2d 305 (Minn. 1995).
\textsuperscript{238} \textit{Id.} at 318.
\textsuperscript{239} \textit{Id.} at 308.
in the groundwater downgradient of the SCSC facility.\textsuperscript{240} At trial, the jury found that the contamination was caused by a single event in 1977.\textsuperscript{241} The trial court gave the jury the opportunity to divide the damages among the various insurance policies in effect from 1976 through 1988, but the jury found that the damages were not divisible.\textsuperscript{242} There was no evidence in the record to indicate that any post-1977 additions of perchloroethylene to the groundwater increased clean up costs.\textsuperscript{243} In refusing to apportion liability over the policy periods, the court noted that its decision in \textit{Northern States} was an equitable decision based upon the complexity of proving in which policy periods covered property damage arose.\textsuperscript{244} Because in \textit{SCSC} the damage was not divisible and arose from a single sudden and accidental occurrence, the court held that only the 1977 policy applied.\textsuperscript{245} Accordingly, damages in excess of the $1,100,000 aggregate limit were not covered, consistent with the actual injury theory.\textsuperscript{246}

The only court known to have considered the allocation issue under Florida law held that the \textit{Keene} "joint and several liability" theory would be adopted in Florida.\textsuperscript{247} Thus, when covered events combine with noncovered events, such as events outside the policy period, causing damage that is not divisible, the insurer is liable for the full extent of damages. This approach is consistent with Florida's concurrent cause doctrine.

Based upon the "all sums" language in the standard CGL policy and the doctrine of concurrent causes, if the contamination at the insured's facility was caused by multiple events, one of which is a covered loss, then coverage exists. The insurer cannot avoid its contractual duty to pay "all damages which the insured is legally obligated to pay" because of the fortuitous occurrence of a concurrent cause outside of the scope of its policy.\textsuperscript{248}

\begin{footnotes}
\item \textsuperscript{240} \textit{Id.} at 309.
\item \textsuperscript{241} \textit{Id.} at 317.
\item \textsuperscript{242} \textit{SCSC Corp.}, 536 N.W.2d at 317.
\item \textsuperscript{243} \textit{Id.}
\item \textsuperscript{244} \textit{Id.} at 318.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{248} \textit{See Dimmitt Chevrolet,} 636 So. 2d at 700. Interestingly, the concurrent cause argument was briefed before the Supreme Court of Florida in \textit{Dimmitt Chevrolet, Inc.}, but the court did not reach the issue because it held that there were no covered "sudden and accidental" releases to trigger coverage. \textit{Id.}
\end{footnotes}
V. AN INSURER’S LIABILITY IS NOT LIMITED TO DAMAGES CAUSED DURING THE POLICY PERIOD

The cases rejecting the joint and several liability approach on the grounds that the insurer is liable only for damage that occurs during the policy period are missing the point. While the standard CGL policy provides coverage only when there is an occurrence during the policy period, such policies contain no language limiting coverage to damages that occur during the policy period. As the Hatco court recognized, such a provision could easily have been included in the policies, but it was not.

It is true that the definition of “property damage” indicates that there must be some injury during the policy period. However, the standard CGL policy requires the insurer to pay “all sums” the insured becomes legally obligated to pay as damages because of such property damage. When an insured becomes jointly and severally liable for all clean up costs at a site even though not all such costs were caused by its release, the insurer steps into the shoes of the insured and may also be held jointly and severally liable. Thus, while some personal injury or property damage must occur during the policy period, a rule by which the insured would have to prove precisely how much damage occurred during the policy period would place the insured in an impossible situation.

VI. CONCLUSION

The limited authority available on the issue indicates that Florida courts would likely adopt the injury-in-fact trigger theory, which is fundamentally equivalent to the continuing trigger theory under Florida law. Based on the policies enunciated in Wallach v. Rosenberg, it appears equally likely that a Florida court would apply the joint and several approach to the allocation issue as long as the insured can show that some covered property damage occurred during the policy period. Since most courts consider environmental contamination to be “property damage” as soon as it occurs, it generally should not be difficult to establish that the policy was triggered. Accordingly, Florida’s insured’s may be able to obtain full indemnification.

250. See New Castle County v. Continental Cas. Co., 725 F. Supp. 800, 812 (D. Del. 1989) (insured not required to “prove the impossible” in order to establish coverage); see also Northern States Power Co., 523 N.W.2d at 663 (noting “[a]s a public policy matter, this court cannot ignore the difficulty insureds would face if, as is generally the case, they had the burden of proving the amount of damages for each policy at issue”).
251. 527 So. 2d 1386 (Fla. 3d Dist. Ct. App. 1988).
when covered occurrences combine with noncovered occurrences to cause indivisible pollution damage.

Nevertheless, courts in other jurisdictions have become increasingly willing to prorate defense and indemnity costs when it appears that environmental damage was continuous or when the date of the occurrence is uncertain. None of the cases discussed above dealt with the situation in which the insured had coverage from different carriers throughout the course of the contamination but elected to proceed against only one of the insurers. However, adopting the joint and several liability approach would suggest that the insured bears the burden of showing that other insurance policies are implicated if the insurer can show that the damage was divisible and that only a small portion was attributable to the covered release. In such a case, the court may hold the insurer liable for a fraction of the clean up costs while the insured would have to bear the remaining burden. Nonetheless, this scenario seems unlikely in most cases.

First, it will typically be difficult for the insurer to show divisible damages in most cases. Second, the rationale for prorating costs to the insured—that the insured elected to go uncovered and become a self-insurer—is not present in the case where the insured obtained insurance during all relevant time periods, but could only sustain a claim against a single insurer because of more restrictive pollution exclusions in later policies. Considering the “all sums” language in the standard CGL policy, it is unlikely that a Florida court would prorate costs to the insured for damages outside the policy period.

Despite its growing popularity, the pro-rata, “time-on-the-risk” approach seems to be at odds with an “injury in fact” trigger theory. The standard CGL policy only requires an occurrence, i.e., some unexpected, unintended property damage taking place during the policy period, not that all of the damages occur during the policy period. Thus, once an accident has caused damage during the policy period, the insurer should be liable for “all sums” attributable to that occurrence. Allocation among insurers should be governed by the “other insurance” clauses in the triggered policies.

Finally, the “drafting history” of the standard form CGL policies of 1966 and 1973 indicates that the drafters knew that the occurrence-based language would result in coverage under successive policies for long tail claims, that the language would result in the “pyramiding” of successive policy limits, and that the language contained no allocation method for multiple policies, thus leaving the insurers to apportion claims among

252. An insured may elect not to proceed against an insurer that was on the risk during the time the contamination was present for a number of reasons, including inability to locate policies, difficulty in establishing an “occurrence” during risk policy period, and insurer insolvency. See New Castle County, 933 F.2d at 1162; Wallach, 527 So. 2d at 1386; Northern States Power 523 N.W. 2d at 657.
themselves. Nevertheless, the insurers assumed the obligation to indemnify for "all sums" up to the policy limits, regardless of whether periods of non-coverage were also "triggered." Under such circumstances, the insurer should bear joint and several liability just as its insureds do under most modern environmental statutes.

Trial De Novo and Evidentiary Presumptions Under the "Lemon Law": Analysis and Comment

Larry M. Roth**

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Author's Note: This article reflects the personal opinions of the author, developed mostly as a result of particular litigation experiences. The views set forth below are not intended to represent or to reflect the opinions of any other person, or any motor vehicle manufacturer, distributor, dealer, or client.
To consumers, car dealers, wholesale distributors, and manufacturers of motor vehicles, Florida's statutory framework known as the Motor Vehicle Warranty Enforcement Act ("section 681")\(^1\) has become an important factor of economic and commercial life.\(^2\) In common parlance, this statute is known as the Lemon Law.\(^3\) The "Lemon" reference pertains to a motor vehicle. The Lemon Law has also become important to lawyers, as it has spawned a new and different type of litigation and legal counseling. As the number of new motor vehicles sold in Florida increases with population growth, so too does the financial risk exposure arising from Lemon Law claims. This results in an increasing number of consumers who are unhappy with their new vehicles.

To date, the judicial analysis of the Lemon Law has been unsettled, confusing, and even contradictory.\(^4\) In September 1998, the Supreme Court of Florida had the opportunity to establish an understandable and realistic construction of the Lemon Law.\(^5\) Yet, the court in *Chrysler Corp. v. Pitsirelos*\(^6\) missed that opportunity.\(^7\) For example, when confronted with the trial de novo language of section 681,\(^8\) the court followed the Fifth District's decision in *Mason v. Porsche Cars of North America, Inc.*,\(^9\) a case which this article will demonstrate was wrongly decided.\(^10\) As such, in relying on *Mason I*, the Supreme Court of Florida also reached the wrong result.

1. FLA. STAT. §§ 681.10-.118 (1999). This article discusses several cases that have arisen under the 1988–1993 versions of that statute. The present statute has not changed in substance on the issues discussed herein. Only the numbering scheme has been revised. Unless otherwise noted, all references are to the 1999 statutes.

2. Automobile dealers have historically been specifically excluded under the Lemon Law. They are deemed to be the manufacturer's agent under that law. See FLA. STAT. § 681.102 (1991). Only recently has section 681.102(1) of the Florida Statutes been amended to include a "franchised motor vehicle dealer." *Id.* § 681.102 (1999). A dealer's liability under the Lemon Law is precluded, although there are some remedies available to a manufacturer. *Id.* § 681.113 (1999). This is not an issue for discussion in this article.

3. *Id.* § 681.102 (1999).

4. *See, e.g.*, Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).

5. *Id.* at 710.

6. *Id.*

7. *Id.*

8. *Id.* at 713–15.

9. 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993) [hereinafter "*Mason I*"].

10. *Id.*
I. INTRODUCTION

The genesis for this article derived from trial and litigation experiences in a particular Lemon Law case, the Mason I litigation referred to above. The intent here is to analyze the procedural and evidentiary inconsistencies that have been judicially read into the Lemon Law, and to ultimately recommend not only legislative or political changes, but also a different judicial approach from that which the appellate courts have followed to date. This article will therefore critique the current law, both statutory and judicial, as to what a trial de novo is under section 681.1095(12) of the Florida Statutes, and the evidentiary weight to be given a “decision” of a Lemon Law arbitration board in a subsequent judicial proceeding.

Essentially, Lemon Law arbitration is an alternative dispute resolution proceeding. It is informal and intended to be inexpensive and expeditious. The statute does, however, permit a trial de novo in the circuit court subsequent to these informal proceedings. On this issue, precedent was first established by Mason I in 1993, where the court held that a trial de novo under the statute is really an “appeal” to the circuit court after an arbitration award. That decision, interpreting the Lemon Law statute, was arguably a consumer interest driven result, and not a strict judicial interpretation of

11. Id. See also Mason v. Porsche Cars of N. Am., Inc., 688 So. 2d 361 (Fla. 5th Dist. Ct. App. 1997) (setting aside the attorneys’ fee award for Porsche) [hereinafter “Mason II”]. Mason I has already had impact beyond section 681 circumstances. In Kahn v. Villas at Eagle Point Condominium Ass’n, the Second District used Mason I to interpret a different statutory scheme, section 718.1255(4)(c) of the Florida Statutes. 693 So. 2d 1029 (Fla. 2d Dist. Ct. App. 1997). The statute involved did not discuss an appeal from the arbitration, but whether a “'complaint' for trial de novo” could be filed in circuit court. Id. at 1030. Kahn involved a dispute over a deck addition to a condominium unit. Id. The dispute, by statute, was handled in a non-binding arbitration proceeding. Id. Unlike section 681, these arbitration proceedings are presided over by the Department of Professional Regulations which employs “full-time attorneys to act as arbitrators.” Fla. Stat. § 718.1255(4) (1995). In Kahn, there was a two-page opinion requiring the owners to remove their deck. Kahn, 693 So. 2d at 1030. Kahn claimed that the condo owner had the burden of persuasion to “demonstrate some error in the administrative decision.” Id. The court, however, did not determine burden of proof, so that there was no ruling on the presumptive validity of the administrative decision. Id. The property owners lost at the administrative level and then again at the bench trial. Id. The trial judge did not review the administrative order, which the Second District thought inappropriate. Id. Section 718.1255(4), unlike section 681, requires that arbitrators have specialized background in that case, being members of the Florida Bar. § 718.1255(4).

13. § 681.1095(12).
legislative intent. In Chrysler Corp. v. Pitsirelos, the Supreme Court of Florida adopted the Mason I conclusion, without critique or its own analysis. Yet, there are patent errors in the case law analysis of Mason I which should have been discerned by the Supreme Court of Florida, and not otherwise made the law of Florida in Pitsirelos. As the law now stands, a manufacturer who loses at the arbitration level and requests a trial de novo must show up on the courthouse steps as a plaintiff, with the burden of persuasion to disprove that the vehicle is not a "Lemon." As such, this is not a trial de novo and is not what the statute intended.

The second major point of the article discusses whether a written Lemon Law arbitration "decision" should have any evidentiary presumption of correctness in the subsequent de novo judicial proceeding. The Pitsirelos court held that it should not, overturning several lower court decisions, including the Mason II appeal decided by the Fifth District. Yet, this particular result by the Supreme Court of Florida is inconsistent with its conclusion in Pitsirelos regarding what a trial de novo is or is not under the Lemon Law. Regardless of any evidentiary presumption given the formal written arbitration board "decision," particularly since it is prepared by the Florida Attorney General’s lawyers, it is a powerful piece of evidence on its own. The Pitsirelos dissent on this issue recognized that point. This evidentiary presumption issue is inextricably tied to the trial de novo analysis since the statute mandates this written "decision" be admitted into evidence. As this article will demonstrate, the legislature obviously intended to protect a consumer who is forced to litigate in a trial de novo after the arbitration process. This piece of evidence is substantial and persuasive, with or without any presumption, and affords protection to the consumer if litigation ensues.

Thus, the courts’ struggles in Mason I, Mason II, and Pitsirelos, to force a consumer protection friendly result were unnecessary. The statute, section 681, has ample built-in protections so that an individual consumer is not overwhelmed by a manufacturer’s litigational resources. That is the analytical theme of this article. The ultimate and effective resolution of these errors, however, must rest with the legislature.

15. 721 So. 2d 710 (Fla. 1998).
16. Id. at 713.
17. Mason I, 621 So. 2d at 721.
18. Pitsirelos, 721 So. 2d at 711.
19. Id. at 715.
II. LEMON LAW LEGISLATION

A. What is the Lemon Law?21

Simply put, the Lemon Law allows a consumer to obtain a refund or a replacement if their motor vehicle meets the requisite statutory criteria.22 The law defines the meaning of a "Lemon."23 Once statutory prerequisites are met, a presumption that the motor vehicle has deficiencies is established for the consumer.24 This statutory relief is intended to be nonjudicial, expeditious, and inexpensive.25 An attorney is not needed, although any party can appear with counsel.26

In order to qualify for relief under the Lemon Law, a motor vehicle must possess a "nonconformity."27 The statute defines "nonconformity" as a

21. See generally Robert A. Butterworth, Consumer Guide to the Florida Lemon Law (1997), which recites, for the lay public, their rights under the law. This article is not intended to be a practice guide for the Lemon Law. There are no real Continuing Legal Education ("CLE") publications which are designed to be a tool for the attorney practicing in this field. See Duane A. Daiker, Note, Florida's Motor Vehicle Warranty Enforcement Act: Lemon-Aid for the Consumer, 45 FLA. L. REV. 253 (1993) for a good overview of section 681. A general overview of the Lemon Law statutory provisions is contained in Raymond G. Ingalsbe, Florida's New Car Lemon Law: An Effective Tool for the Consumer, 64 FLA. B.J. 61 (Oct. 1990).


23. Id. § 681.104(1).

24. Id. § 681.104(3)(a)–(b).

25. "There is no fee for having your case heard by the Florida New Motor Vehicle Arbitration Board." Butterworth, supra note 21, at 6.

26. "You are not required to have an attorney represent you, although use of an attorney is permitted (at your expense)." Id.

27. § 681.102(16). See also § 681.103(1), which provides: "Nonconformity" means a defect or condition that substantially impairs the use, value, or safety of a motor vehicle, but does not include a defect or condition that results from an accident, abuse, neglect, modification, or alteration of the motor vehicle by persons other than the manufacturer or its authorized service agent.

Id. § 681.102(16).
condition that substantially impairs value, safety, or use. Basically, it establishes a defect, but obviously this statutory conclusion can be quite subjective. A Lemon Law arbitration panel is the one to decide if a non-conformity in the motor vehicle exists.

A motor vehicle is also defined in section 681. Not every vehicle on the highways falls within the statute. While heavy trucks do not, the nonliving portions of recreational vehicles do. For the vast majority, however, the Lemon Law operates to benefit consumers who own passenger cars, sport utility vehicles, and pickup trucks.

The philosophical foundations for the Lemon Law had their origins in the consumer protection movement, which began during the 1970s. From Henry Ford's mass production technology until the advent of this consumerism, automobile manufacturers and dealers clearly had an advantage over a purchaser if a car was a "lemon" or was "defective." The normal relief for a consumer was to file a lawsuit seeking common law remedies, to file a U.C.C. claim, or perhaps an action under the

28. § 681.102(16).
29. See Butterworth, supra note 21, at 2–3.
33. § 681.102(15) ("but does not include vehicles run only upon tracks, off-road vehicles, trucks over 10,000 pounds gross vehicle weight, motorcycles, mopeds, or the living facilities of recreational vehicles.").
34. Id. § 681.102(21). "Recreational vehicle' means a motor vehicle primarily designed to provide temporary living quarters for recreational, camping, or travel use, but does not include a van conversion." Id.
35. See generally, Butterworth, supra note 21, at 2–3.
37. The philosophical basis for these laws was to even the otherwise unfair economic interests favoring the big corporation/manufacturer over the individual consumer. See Harvey M. Sklaw, The New Jersey Lemon Law: A Bad Idea Whose Time Has Come, 9 SETON HALL LEGIS. J. 137, 137 (1985) ("The lemon is the apparently irreparable new automobile; the shiny chrome plated monster which has turned upon its master. Not only has this monster turned upon the buyer, but the seller has washed his hands of the whole affair.").
Magnuson-Moss Act.\textsuperscript{40} Except if brought in small or summary claims court, an attorney and the full legal process applied.\textsuperscript{41} This would then, of course, take time and money.

To eradicate a perceived imbalance which favors the economic power of the manufacturers, the Florida Legislature in 1983 determined, as a matter of public policy, that an automobile purchase is a major event in the financial life of a person, requiring state protection.\textsuperscript{42} Section 681.101 of the Florida Statutes states in part:

The Legislature recognizes that a motor vehicle is a major consumer purchase and that a defective motor vehicle undoubtedly creates a hardship for the consumer \ldots \ It is the intent of the Legislature that a good faith motor vehicle warranty complaint by a consumer be resolved by the manufacturer within a specified period of time; \ldots \ It is further the intent of the Legislature to provide the statutory procedures whereby a consumer may receive a replacement motor vehicle, or a full refund, for a motor vehicle which cannot be brought into conformity with the warranty provided for in this chapter.\textsuperscript{43}

B. The Lemon Law Arbitration Board

The initial decision-maker in a conflict between a consumer and the automobile manufacturer is the New Motor Vehicle Arbitration Board ("Board"). This structure was first created by legislative amendments to the Lemon Law in 1988.\textsuperscript{44} Before the Board existed, there was no enforcement mechanism under section 681 for the consumer, except litigation. The legal rights were created, but the remedy had to be obtained in court.

Arbitration was designed to be an alternative dispute procedure. The Florida Rules of Civil Procedure and Florida Rules of Evidence do not apply.\textsuperscript{45} If a qualified motor vehicle under section 681 is found to be a statutory "Lemon," a repurchase by the manufacturer or a new vehicle

\begin{itemize}
\item \textsuperscript{41} See Senate Staff Analysis and Economic Impact Statement, SB 0462, at 1 (available at Fla. Dep’t of State, Div. of Archives, ser. 18, carton 1281, Tallahassee, Fla.).
\item \textsuperscript{43} § 681.101.
\item \textsuperscript{44} FLA. STAT. § 681.1095 (1988).
\item \textsuperscript{45} See FLA. ADMIN. CODE ANN. r. 2-32.032(10)(a) (1993) ("The formal rules of evidence shall not apply.").
\end{itemize}
replacement is required. In the Mason case, the arbitration panel ordered a refund. Porsche then exercised its statutory right to seek a trial de novo in circuit court.

There is no constitutional basis for the New Motor Vehicle Arbitration Board. Arbitrators, for the most part, have no qualification requirements. They are appointed by the Attorney General’s Office, three per panel. One arbitrator on a panel has to be “a person with expertise in motor vehicle mechanics.”

Lemon Law arbitrators are not professionally trained. They are not required to have special training such as administrative law judges, American Arbitration Association qualified individuals, or any other individuals. The Attorney General’s Office is responsible for determining qualifications and training. Yet, the Attorney General (“AG”) also acts as legal counsel to the Board. Paradoxically, the AG also provides advice to and answers questions from consumers.

The Mason II arbitration involved a 1991 Porsche Carrera 2 high performance sports car, and the alleged defect was the transmission, among other things. The expert on the Mason I panel was a technician from a recreational vehicle (“RV”) facility, with no experience with Porsche Carreras generally, or with the specific tiptronic transmission that was the

46. FLA. STAT. § 681.104(2)(a)-(b) (1999); FLA. ADMIN. CODE ANN. r. 2-32.033(5)(d).
47. Mason I, 621 So. 2d at 720.
48. Id.
49. § 681.1095(1); FLA. ADMIN. CODE ANN. r. 2-32.003 (1993). “Each Board member shall be accountable to the Attorney General for the proper performance of his/her duties as a member of the Board.” Id. at 2-32.005(1). In other contexts, of course, Florida requires specific qualifications for individuals who arbitrate or mediate disputes. See, e.g., FLA. STAT. §§ 44.103, .104, 723.038.
50. § 681.1095(3); FLA. ADMIN. CODE ANN. r. 2-32.004 (1993) (Board Composition; Compensation; Vacancies).
51. § 681.1095(3) (One member “must not be employed by a manufacturer or a franchised motor vehicle dealer or be a staff member, a decisionmaker, or a consultant for a procedure.”); FLA. ADMIN. CODE ANN. r. 2-32.004(2) (1993).
52. See FLA. STAT. § 120.65 (1999).
53. Id. § 681.1095(3); FLA. ADMIN. CODE § 2-32.004 (1993).
54. FLA. ADMIN. CODE ANN. r. 2-32.006(2) (1993).
55. The consumer testified in Mason I to advice and help received from the Attorney General’s Office. Mason I, 621 So. 2d at 719. See Butterworth, supra note 21, printed in inside cover, for a guide that “represents the Attorney General’s interpretation of the [Lemon Law]. . . . If you have a question or are uncertain about a particular aspect of this law, contact the Lemon Law Hotline operated by the Department of Agriculture & Consumer Services, or write the Office of the Attorney General, Lemon Law Arbitration Program.” Id.
56. Mason II, 688 So. 2d at 363 (Fla. 5th Dist. Ct. App. 1997).
mechanical component in dispute.\(^{57}\) Not one member of the \textit{Mason} Board had ever driven such a vehicle, or knew anything about this type of high performance sports car.\(^{58}\)

These arbitration hearings usually last about two hours.\(^{59}\) Test rides are permitted,\(^{60}\) but not required. In \textit{Mason}, only a very brief test ride was used to help determine that the car was a "Lemon."\(^{61}\) The entire process lasted one hour and fifty minutes.\(^{62}\)

C. 	extit{Legislative History of Section 681}

There is little, at best, for guidance. The staff analysis fails to define or explain trial de novo. It simply says: "Appeals to circuit court are to be de novo."\(^{63}\) Further, unlike other statutory provisions, neither section 681 nor its legislative history says anything about who has the burden in the trial de novo.

Before the 1988 amendments, section 681 contained no specific provision about going to circuit court by appeal, trial de novo, or otherwise. Initially, there were no arbitration boards. Some type of judicial proceeding was envisioned, however, since the statute referred to bad faith claims,\(^{65}\) and the court awarding attorneys' fees to a prevailing consumer.\(^{66}\) The 1988

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58. At the deposition, none of the arbitrators remembered anything about the transmission, or its characteristics. This was the central issue since the 1991 Porsche Carrera 2 had a tiptronic transmission. It provided the driver with the unique opportunity to either drive the car like an automatic, or a stick shift. See Deposition of Sidney Mehr, November 14, 1994, Case No. CI 94–1691, at 23–25.


60. FLA. ADMIN. CODE ANN. r. 2-32.032(10)(b) (1993).

61. \textit{Mason II}, 688 So. 2d at 364.

62. The audio hearing tape was turned off at 3:05 P.M. and restarted at 3:30 P.M. on June 16, 1992. In that 25 minute period, two test drives were done. That 25 minutes also included having to go from the 11th floor of the building, to the parking lot, and back to the 11th floor. Estimates on the length of the test rides varied from 5 to 20 minutes. Deposition of William H. Willis, Nov. 14, 1992, at P. 47, L. 6–11; Trial Transcript, Feb. 7, 1995, Vol. VII, P. 670–671. See Mehr, \textit{supra} note 58, at P. 35–37, P. 61, L. 1–11.

63. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, S.B. 556, at 3 (available at Fla. Dep't of State, Div. of Archives, carton 1720, Tallahassee, Fla.).

64. \textit{See} FLA. STAT. § 194.036(3) (1987).

65. FLA. STAT. § 681.106 (1983) ("found by the court").

66. FLA. STAT. § 681.104(5)(b) (1983); HB 883 4/19/83 Report, Committee on Judiciary.
revision was "a clarification that an appeal of a board decision to the circuit court must be trial de novo."\(^{67}\)

What the legislature initially did in 1983 was to create certain statutory rights for a consumer, while placing legal duties upon the manufacturer.\(^{68}\) In essence, a cause of action is created for the consumer whereby, if the statutory requisites are met, a court action could be filed against the manufacturer.\(^{69}\) If a lawsuit was filed, the consumer would be a plaintiff and have to prove his/her case of a statutory violation, consistent with traditional notions of burdens of proof and persuasion.\(^{70}\) The law also allowed manufacturers to set up informal dispute resolution panels.\(^{71}\) These have to be certified by the Division of Consumer Services.\(^{72}\) If all rules are followed, a consumer first has to bring the motor vehicle claim there as a condition precedent to seeking judicial redress under section 681.\(^{73}\) The idea, of course, is that this may avoid litigation and informally resolve a consumer complaint. There are some guarantees of fairness since these manufacturers' informal dispute panels have to conform to federal regulations, and must be certified by a state agency.\(^{74}\) Additionally, the division can appoint "at least one member of the informal dispute settlement panel."\(^{75}\) In 1985, qualifications were put in place to avoid training if a person was a law graduate, qualified arbitrator, mediator, or had already undergone division training.\(^{76}\) No such prequalification is required.

Apparently, there is a legislative view that guarantees of fairness existed in these manufacturer created and state certified informal dispute

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68. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, SB 743, at 1 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1402, Tallahassee, Fla.). Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, SB 0462 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1281, Tallahassee, Fla.). See Maserati Automobiles, Inc. vs. Caplan, 522 So. 2d 993 (Fla. 3d Dist. Ct. App. 1988). This case was decided under the 1983 law, prior to the establishment of the arbitration boards. \(\text{Id.}\)


70. Senate Staff Analysis, supra note 41, at 2.


73. \(\text{Id.}\) § 681.108(1). Some states are similar to Florida in that a consumer must first seek redress in the manufacturer's informal dispute resolution procedures, if the programs are certified. See CONN. GEN. STAT. § 42-179(j) (1999).

74. 16 C.F.R. § 703 (1999).

75. FLA. STAT. § 681.108 (1983).

76. No such training or exempt status prerequisites are required for Lemon Law arbitration members.
procedures. Today, a consumer is still required to initially resort to them,\(^{77}\) and if the consumer prevails this result can be admitted into evidence in a section 681 court proceeding.\(^{78}\) Underlying this is the obvious fact that a manufacturer, after going to all the trouble to get its program certified, will settle the dispute if a loss occurs at its own informal dispute proceedings. If not, the consumer has a favorable piece of evidence to offer a judge or jury.

D. Other States and Other Laws

The Florida statutory program generally tracks those of other states.\(^ {79}\) Florida's 1983 statute was patterned after that of Connecticut's.\(^ {80}\) By 1989, forty-four states and the District of Columbia had lemon laws.\(^ {81}\) When Florida established its state-run arbitration program in 1988, Connecticut, New York, Massachusetts, and Vermont already had similar programs.\(^ {82}\) Different states, of course, run their programs differently.\(^ {83}\)

No specific reported case decision has been found which interpreted the statutory language of trial de novo within the context of a lemon law judicial proceeding after arbitration. A review of other state statutes does not further clarify the issue. Most statutes only refer to a "trial de novo."\(^ {84}\) Interestingly, the terminology "appeal," as used in the Florida Statutes, is not uniform.\(^ {85}\) In this respect, the Georgia statute is particularly interesting.\(^ {86}\) It uses the word "appeal," but a consumer may reject the arbitration decision and "request a trial de novo of the arbitration decision in superior court."\(^ {87}\) The Texas

78. Id. See Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, S.B. 743 (available at Fla. Dept' of State, Div. of Archives, ser. 18, carton 1402, Tallahassee, Fla.).
79. The Senate Staff Analysis and Economic Impact Statement indicated that "[i]n recognition of consumer dissatisfactions, some states have enacted legislation to allow ... a full refund of the purchase price on a new car to replace the defective one." Senate Staff Analysis, note 41, at 1.
80. Id. at 2.
87. Id.
statute is similar. This seems to imply a judicial proceeding that would be a new one from the outset.

The New York statute provides that arbitrations are to be conducted by the American Arbitration Association ("AAA"). The arbitration is final and binding. In New York, there are "professional" arbitrators or arbitrators from firms who are impartial. There is no right to trial by jury or trial de novo. Constitutional attacks on grounds of denial of trial by jury and access to courts have been rejected in New York.

Vermont's statute is interesting in several ways. First, that the Arbitration Board is appointed by the Governor, and at least one member has to be a new car dealer. Members are appointed for three year terms. "[O]ne member and one alternate shall be persons knowledgeable in automobile mechanics." The Vermont Arbitration Board receives "administrative services from the transportation board." It is the Arbitration Board in Vermont which promulgates its own rules, quite unlike Florida where the Attorney General sets the rules. This Board's composition seems more analogous to a commission, which may be appointed in Florida by the Governor, such as the Public Service Commission. Additionally, Vermont's arbitration board decision is truly only reviewable by appeal to the superior court. A specific statutory

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88. See Chrysler Corp. v. Texas Motor Vehicle Comm'n, 755 F.2d 1192 (5th Cir. 1985).
89. See In re Subaru of Am., 532 N.Y.S.2d 617 (Sup. Ct. 1988).
90. Id. at 619. In New York, the scope of judicial review is limited. Id. at 618; 5 N.Y. JUR. 2d Arbitration and Award ¶ 180 (1997).
93. Id. See also Chrysler Motors Corp. v. Schachner, 525 N.Y.S.2d 127, 130 (Sup. Ct. 1988). In his special Pitsirelos opinion, Justice Overton raised this issue, although it was not before the court. He was of the view there was no right to a jury trial since a Lemon Law cause of action did not exist at common law. Chrysler Corp. v. Pitsirelos, 721 So. 2d 710, 716 (Fla. 1998).
95. Id. § 4174(a).
96. Id.
97. Id.
98. Id. § 4174(b).
99. § 4176(a). See Pecor v. General Motors Corp., 547 A.2d 1364, 1365 (Vt. 1988). In In re Villeneuve, the Vermont Supreme Court described well the review scope after a board decision. 709 A.2d 1067 (Vt. 1998). Under Vermont's statute, it is a limited review. Id. at 1069. Villeneuve is helpful in understanding the informality and problems which arise at these arbitration proceedings, referring to a board member's comment about a fist fight. Id. at 1070-71.
burden was established “by clear and convincing evidence.” Further, the grounds for modification or vacation are specified by statute and appear quite rigorous, such as corruption, fraud, and “evident partiality.”

Connecticut’s statute provides for de novo review on “questions of law raised in the application.” This seems more like a certiorari review. The statute provides, “the court shall uphold the award unless it determines that the factual findings of the arbitrators are not supported by substantial evidence in the record and that the substantial rights of the moving party have been prejudiced.” Under the Connecticut statute, arbitrators are appointed by the Commissioner of Consumer Protection, but only one of the three member panel can be from the industry. The Department may also refer the dispute to the AAA.

In Motor Vehicle Manufacturer’s Ass’n v. O’Neill, the Supreme Court of Connecticut held that a manufacturer’s right to a jury trial, with a lemon law claim, had not been unconstitutionally denied. The Connecticut statute allows the consumer, if dissatisfied with the arbitration award, to

101. Id. The specific provisions are as follows:
   (1) the award was procured by corruption, fraud or other undue means;
   (2) there was evident partiality by the board or corruption or misconduct prejudicing the rights of any party by the board;
   (3) the board exceeded its powers;
   (4) the board refused to postpone a hearing after being shown sufficient cause to do so or refused to hear evidence material to the controversy or otherwise conducted the hearing contrary to the rules promulgated by the board so as to prejudice substantially the rights of a party.

103. Id. See Motor Vehicle Mfrs. Ass’n v. O’Neill, 523 A.2d 486 (Conn. 1987) [hereinafter “O’Neill I”]. Florida’s original statute was intended to be modeled after Connecticut’s statute. Staff of Senate Comm. on Natural Resources, Senate Staff Analysis and Economic Impact Statement, S.B. 794, at 3 (available at Fla. Dep’t of State, Div. of Archives, ser. 18, carton 1281, Tallahassee, Fla.).

105. Id.
106. 561 A.2d 917 (Conn. 1989), superseded by statute as stated in General Motors Corp. v. Dohmann, 722 A.2d 1205 (Conn. 1998) [hereinafter “O’Neill II”].
107. Id. at 921–22.
initiate a de novo civil proceeding. For the manufacturer, however, its de novo review is more limited, similar to a judicial review after a formal arbitration proceeding. Although the O'Neill court found it unconstitutional that the consumer has more judicial opportunities available than the manufacturer, its analysis centered around the traditional scope of review depending upon whether the procedure is deemed to be compulsory versus voluntary arbitration. The Connecticut procedures intend an altogether different de novo proceeding than in Florida. Although the Connecticut statute is silent on the point, apparently the burden is upon the party challenging the arbitration award.

In a later decision, *General Motors Corp. v. Dohmann*, the Supreme Court of Connecticut reviewed the factual record to determine if substantial evidence supported the arbitration board's decision. That review is more limited, and by statute the Connecticut Legislature tied judicial review of lemon law arbitration decisions to the same standard as an administrative agency. A Connecticut de novo review is not a trial de novo, as arguably intended in Florida. The court will simply determine whether there is a basis for the factual findings and it will not substitute its judgment for that of the arbitration board. The Connecticut law does provide, however, that questions of law are determined de novo by the court. Since an arbitration board is not a legally trained body, any issue of law must be determined by a court. This statutory procedure in Connecticut makes it quite different from that of Florida.

In Minnesota, the statute allows for a trial de novo as well, but nothing is found to further explain what is meant by that term. This statute does specifically deal with the admissibility of an informal dispute settlement award and any presumptive validity to be given it. The Minnesota statute provides: "A written decision issued by an informal dispute settlement

108. CONN. GEN. STAT. ANN. § 42-181(f) (West Supp. 1999)
112. *Id.*
113. 722 A.2d 1205 (Conn. 1998).
114. *Id.* at 1205.
115. *Id.* at 1210.
116. *Id.*
mechanism, and any written findings upon which the decision is based, are admissible as nonbinding evidence in any subsequent legal action and are not subject to further foundation requirements."  

This type of Minnesota provision in the Florida Statutes would have changed the procedural and evidentiary holdings in Mason I and Mason II and rendered Pitsirelos at least partially unnecessary. The Florida statute does not say anything about the evidentiary effect of the arbitration award, only that it is admissible. It would have been better for the Florida Legislature to have said something on this subject as it has in other contexts, instead of nothing.

In Texas, lemon law disputes are handled by the Texas Motor Commission. The Texas law allows a consumer to reject the Commission's decision and seek a trial de novo. The Commission's decision is not admissible into evidence. The manufacturer, on the other hand, can only seek a limited judicial review, with no similar exclusion of an adverse Commission decision. A legal proceeding by manufacturers challenging the makeup of the Commission, incidentally whose majority number are "automobile dealers," was rejected in Chrysler Corp. v. Texas Motor Vehicle Commission. This case also held that it is constitutional to allow consumers two shots at a manufacturer where in the subsequent lawsuit the Commission's decision does not come into evidence. A trial de novo in Texas for the consumer is truly as if nothing occurred previously.

Finally, a District of Columbia law has some requirements regarding arbitrator qualifications, which are not present in the Florida Statutes. Of seven board members, two shall be attorneys, one from the Department of Consumer and Regulatory Affairs, two shall have training and experience in

122. Alexopoulos, supra note 120, at 172.
123. 755 F.2d 1192 (5th Cir. 1983).
124. Id. at 1202.
125. The court explained: There is nothing procedurally unfair about allowing a car purchaser a second shot at a manufacturer. Its effect is to enhance the claimant's chances of winning, but only because he can first attempt to persuade the Commission of his case. Failing in this concededly more expeditious and limited claim route, where a manufacturer faces much less exposure and a successful purchaser's claims will likely end, the purchaser is back to where he was before the lemon law — free to pursue his suit as long as his purse and his patience endure.
“arbitration and mediation,” one member shall have consumer interests training, and the final to be a person with experience or training in the manufacture, wholesale, or retail sales of consumer goods. This statute seems to present a more balanced and professional arbitration board than in Florida, where the Attorney General basically selects members, without requiring any of the skills or experience imposed by the D.C. law.

III. CASE DECISION ANALYSIS ON TRIAL DE NOVO

A. From Mason I through Pitsirelos

In 1991, section 681.1095(12) of the Florida Statutes, provided as follows:

An appeal of a decision by the board to the circuit court by a consumer or a manufacturer shall be by trial de novo. In a written petition to appeal a decision by the board, the appealing party must state the action requested and the grounds relied upon for appeal. Clearly, it is not the best written provision. The court in Mason I acknowledged this. The court then held that a judicial proceeding subsequent to a lemon law arbitration board is more in the nature of an “appeal,” and therefore “it [was] generally the burden of the appellant to show that the lower tribunal erred.” The lower tribunal being referred to is the AG-selected arbitration board. The result in Mason I requires the aggrieved party, no matter who, to have the burden of proof and in essence be the appellant/plaintiff at the trial de novo. This is really an appeal and not a trial de novo as if nothing had occurred previously. Mason I also holds that the manufacturer shoulders the burden of going forward to disprove that the vehicle is defective, or to prove that it is not presumptively defective.

In the first trial after Mason I, which was an interlocutory appeal, the consumer as the plaintiff went first, but Porsche had the burden to disprove that the vehicle was a “Lemon.” Mason II criticized the trial court for

127. § 40-1303(c).
129. The appellate courts have called this provision “inartfully” worded. Mason I, 621 So. 2d at 722.
130. Id. at 721.
131. Id.
132. Id. at 722–23.
133. Id. at 722.
134. Mason I, 621 So. 2d at 722.
making the consumer be the plaintiff at all\textsuperscript{135} and characterized those proceedings in looking glass terms of Lewis Carroll as "curiouser and curiouser."\textsuperscript{136} Of course, this curious procedure arose only because of the \textit{Mason I} holding that a trial de novo is not really de novo.\textsuperscript{137} \textit{Mason II}, including the reversal of a directed verdict for Porsche, among other things, held that a decision of the arbitration board has a presumption of correctness which goes to the jury like that.\textsuperscript{138} The party who challenges that decision has the burden of proof to demonstrate it is invalid.\textsuperscript{139} Absent such proof, the consumer wins.

In \textit{Sheehan v. Winnebago Industries, Inc.},\textsuperscript{140} the Fifth District Court of Appeal, after \textit{Mason I}, again determined that although a judicial proceeding subsequent to an arbitration board hearing is de novo, it is procedurally more analogous to an appeal.\textsuperscript{141} The party who loses at the arbitration level is the plaintiff, and has the burden of proof de novo.\textsuperscript{142} With no independent analysis, the Third District Court of Appeal, in \textit{Aguiar v. Ford Motor Co.},\textsuperscript{143} followed \textit{Mason I}.\textsuperscript{144} In \textit{General Motors Corp. v. Neu},\textsuperscript{145} the Fourth District Court of Appeal held that an appeal to the circuit court under section 681.1095 of the \textit{Florida Statutes} should be to the trial division, and not the appellate division of the circuit court.\textsuperscript{146} A mandamus was granted directing the circuit court to conduct a trial, as it was wrong to have transferred the case to the appellate division of that court.\textsuperscript{147} \textit{Neu} did not address, as did \textit{Mason I}, issues of the burden of persuasion, who would be a plaintiff or petitioner, or how the de novo proceeding was to be conducted. \textit{Mason I} is not cited in \textit{Neu}, although it may be that the Fourth District did not yet know of the decision.\textsuperscript{148}

\begin{itemize}
  \item \textsuperscript{135} \textit{Mason II}, 688 So. 2d at 364.
  \item \textsuperscript{136} \textit{Id.}
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.} at 369–70.
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} 635 So. 2d 1067 (Fla. 5th Dist. Ct. App. 1994).
  \item \textsuperscript{141} \textit{Id.} at 1067.
  \item \textsuperscript{142} \textit{Id.} at 1068.
  \item \textsuperscript{143} 683 So. 2d 1158 (Fla. 3d Dist. Ct. App. 1996).
  \item \textsuperscript{144} \textit{Id.} at 1158.
  \item \textsuperscript{145} 617 So. 2d 406 (Fla. 4th Dist. Ct. App. 1993).
  \item \textsuperscript{146} \textit{Id.} at 407–08.
  \item \textsuperscript{147} \textit{Id.} at 408.
  \item \textsuperscript{148} Initially, \textit{Mason} was docketed in the appellate division of the circuit court, and given an appellate case number, A1–92–34. When the trial court ordered the consumer to file a new lawsuit, a regular case number was given to the proceedings. \textit{See Mason I}, 621 So. 2d at 721 n.1.
\end{itemize}
Subsequently, in *Chrysler Corp. v. Pitsirelos*, the Fourth District held that Chrysler had the "burden to demonstrate any error or abuse of discretion to the reviewing tribunal." The "tribunal" being referred to is the Arbitration Board. The court said *Neu* is "inapposite," and used the same "appeal" language as *Mason I* to interpret a de novo proceeding. The Fourth District in *Pitsirelos* made this statement:

The legislature has deemed the circuit court action as an "appeal" from an adverse arbitration decision. As in any appeal, it is the appellant's burden to demonstrate any error or abuse of discretion to the reviewing tribunal [circuit court de novo]. No other interpretation of this statutory scheme is reasonable.

*Pitsirelos'* reference to "error" or "abuse of discretion" was unfortunate and only further clouded exactly what type of proceeding is this de novo trial. The lower court's *Pitsirelos* language gave an even different meaning to trial de novo than *Mason I*, although the latter case was cited with approval. Under the Fourth District's *Pitsirelos* decision, the circuit court presumably looks at the record similar to how it might review an administrative proceeding under section 120 of the *Florida Statutes* or an appellate review by certiorari. Chrysler then took the case to Tallahassee, and to the Supreme Court of Florida.

The Supreme Court of Florida, on this trial de novo point, affirmed the Fourth District. Thus, *Mason I* is followed by the Supreme Court of Florida, which states that they "agree with the conclusion" reached by the Fifth District in *Mason*. Any in-depth reasoning by the court never develops on this issue, and *Pitsirelos* does nothing to examine the analytical foundation of the case law precedents *Mason I* found persuasive. Only

149. 689 So. 2d 1132 (Fla. 4th Dist. Ct. App. 1997), review granted, 697 So. 2d 1215 (Fla. 1997).
150. *Id.* at 1134.
151. *Id.* at 1133.
152. The Fourth District Court of Appeal, in *Hargrett v. Toyota Motor Sales U.S.A., Inc.*, denied certiorari as the appropriate way to handle the burden of proof issue. 705 So. 2d. 1009 (Fla. 4th Dist. Ct. App. 1998). The court did not find the presence of irreparable harm. *Id.* at 1009. Petitioner (consumer) had argued that the trial court placed on her the burden of going forward even though she won at arbitration. *Id.*
153. *Pitsirelos*, 689 So. 2d at 1134. The First, Second, and Third Districts did not have any opinions in this area.
154. *Id.*
155. *Id.* at 1133.
156. *Chrysler Corp. v. Pitsirelos*, 721 So. 2d at 710, 711 (Fla. 1998).
157. *Id.* at 713.
Justice Overton, in a partial dissenting opinion, said that a trial de novo should be exactly that—""a new trial... as if no trial whatever had been held in the first instance."" 158 Yet Justice Overton made no attempt to examine the paradox created by the *Pitsirelos* majority of a trial de novo not meaning what it is facially intended to mean.

What seems to be motivating the Supreme Court of Florida in *Pitsirelos* was the fact that the Lemon Law is an alternative dispute resolution ("ADR") procedure. It is intended to benefit the consumer, be quick and economical. *Pitsirelos* adopts, without saying so directly, the "way station" analogy from *Mason I* to reach its result. Thus, according to that analogy, if a prevailing consumer at the arbitration board has to also be the party with the burden in a subsequent circuit court trial, this does "relegate the mandatory arbitration to simply being a procedural impediment to the consumer prior to accessing the circuit court without the counter-balancing benefit to which the prevailing party in the arbitration should be entitled." 159 As an ADR procedure, the Supreme Court of Florida apparently thought that if it is any other way, the arbitration proceeding becomes meaningless. *Pitsirelos* takes a pro consumer approach on the trial de novo, but then undermines the same rationale by holding that the arbitration result carries no evidentiary presumption.

The supreme court in *Pitsirelos* did not examine too deeply section 681. 160 Admittedly, there is sparse legislative analysis for guidance. As noted, nowhere in the legislative history is "trial de novo" defined or explained. Unlike other statutory provisions, neither section 681 nor its legislative history says anything about who has the burden in the trial de novo. *Mason I* and *Pitsirelos* superimposed a specific legislative intent onto the statute. Yet, the Staff Analysis simply said: "Appeals to circuit court are to be de novo." 161 Arguably, if the legislature intended the burden to be on the party wanting a trial de novo, it could have said so as it has in other statutory provisions—for example, section 194.036(3) of the *Florida Statutes*. 162

The ink had not yet dried on *Pitsirelos* before the Fifth District began demonstrating how this strained concept of a trial de novo works in practice. This most recent Fifth District case, *Ford Motor Co. v. Starling* 163 reinforces

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158. *Id.* at 715 (quoting BLACK'S LAW DICTIONARY 1505 (6th ed. 1990)) (emphasis added).

159. *Id.* at 713.

160. *Id.* at 710.

161. Senate Staff Analysis, *supra* note 63, at 3.

162. FLA. STAT. § 194.036(3) (1997).

163. 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998). *Starling* was decided on October 9, 1998. *Id.* at 335. *Pitsirelos* was decided on September 17, 1998. *Pitsirelos*, 721 So. 2d at 710.
that court’s view of the de novo trial as an appellate proceeding.\textsuperscript{164} There, the court affirmed a finding for the consumer after a bench trial.\textsuperscript{165} \textit{Ford} “appealed” the arbitration board’s decision in favor of the consumer, a recreational vehicle purchaser.\textsuperscript{166} Even though \textit{Starling} uses the de novo language, the circuit court proceeding was more analogous to an appeal. This conclusion is supported by the following language from \textit{Starling}:

"Even though this was a de novo review, it was still an appeal. Issues not raised before the arbitrator should not be presented during the de novo review or else the entire statutory arbitration process becomes a nullity."\textsuperscript{167} As such, \textit{Starling} criticizes \textit{Ford} for raising a new issue at trial that they had not argued earlier in the arbitration. A pure trial de novo, however, would not preclude the presentation of new issues and evidence. The Fifth District treats this like a matter that has not first been raised at the lower “tribunal,” which cannot then be asserted on “appeal” for the first time.\textsuperscript{168} The Fifth District’s application of de novo to the \textit{Starling} facts is no different from looking at an appellate record. That is, if \textit{Ford} did not first raise the issue before the lower “tribunal,” or the arbitration panel, then they could not then first assert it on “appeal” to the circuit court. On this issue, the dissent in \textit{Starling} argues that on a trial de novo, new issues can be raised, and even implies a constitutional deprivation if such is not the case.\textsuperscript{169} Although this dissenting opinion is more correct in its “de novo” application, unfortunately the theory being espoused is also contrary to the rationale behind \textit{Pitsirelos} and the Fifth District’s own \textit{Mason I} decision.

B. \textit{Mason I} and \textit{Pitsirelos} Were Wrongly Decided

In \textit{Mason I}, the court attempts to grapple with what it thought, with the help of the Attorney General’s Office,\textsuperscript{170} is a “clear” statute, although inartfully drafted, but one which should not be interpreted to “lead to an inequitable and absurd result.”\textsuperscript{171} Nevertheless, an “absurd result” is reached. The pivotal issue of first impression in \textit{Mason I}, which is subsequently relied on by \textit{Pitsirelos}, became the interpretation of section 681.1095(12) of the Florida Statutes.\textsuperscript{172}

\begin{itemize}
  \item \textsuperscript{164} \textit{Starling}, 721 So. 2d at 335.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Id. at 336.
  \item \textsuperscript{167} Id. at 338. This comment by the court harkens back to the “way station” analogy of \textit{Mason I} and the arbitration process becoming meaningless.
  \item \textsuperscript{168} Id.
  \item \textsuperscript{169} Id. at 340–41.
  \item \textsuperscript{170} Mason I, 621 So. 2d at 722.
  \item \textsuperscript{171} Id. at 723.
  \item \textsuperscript{172} FLA. STAT. § 681.1095(12) (1999).
\end{itemize}
The *Mason I* trial court had ruled in favor of the manufacturer and ordered a traditional trial de novo on the issues of section 681, and the consumer's other claims under Magnuson-Moss and revocation of the sale against the dealership. 173 *Mason I*'s conundrum arises since section 681.1095(12) uses the dual terminology of "appeal of a decision by the board," and that a manufacturer or consumer shall be entitled to a "trial de novo." 174 The Fifth District attached primary significance to this "appeal" language. 175 *Mason I*, however, fails to consider the possibility that this "appeal" reference is only procedural, with no substantive force. 176

Certainly the Attorney General’s amicus argument in *Mason I* that the 1988 revision intended to "balance the economic interests of litigants who otherwise might be unevenly matched" 177 had, arguendo, an unstated social or philosophical impact on the panel. 178 That is, from the societal standpoint, if an economically undermatched consumer wins at arbitration, it is unfair to have that same party file a lawsuit and then to have the burden of proof against a manufacturer who sits in a superior economic position.

During oral argument in *Mason I*, questions were asked that demonstrated a concern for the consumer being worn down by litigation, if all the manufacturer had to do was request a trial de novo every time it lost at arbitration. 179 The panel’s view was that the litigation resources of a motor vehicle manufacturer were greater than an individual’s and potential abuse of the consumer’s rights would occur. 180 This theme permeates *Mason I*. The Fifth District says as much when it speaks of the arbitration board becoming meaningless, if all a manufacturer has to do is ask for a trial de novo, since arbitration would then "amount to nothing more than a way station for a disgruntled party en route to circuit court." 181 In other words, manufacturers would use the de novo proceedings as a strategic weapon to the detriment of a weaker consumer and the litigation flood gates would then be opened.

As noted in the published opinion, the court in *Mason I* thought the manufacturer’s argument that trial de novo means a completely new proceeding was disingenuous. 182 That panel did not think the manufacturer

173. *Mason I*, 621 So. 2d at 721.
174. Id.
175. Id.
176. Id. at 723.
177. Id.
178. *Mason I*, 621 So. 2d at 723.
179. Id.
180. Id.
181. Id. at 722. This “way station” analogy was from *Bystrom v. Equitable Life Assurance Soc’y*, 416 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1982).
182. *Mason I*, 621 So. 2d at 722.
would be making the same interpretation of trial de novo if it had prevailed at the arbitration level. This is wrong. Adopting Porsche's argument on trial de novo would not have resulted in the consumer being treated any differently than a manufacturer in a subsequent lawsuit. The usual burdens of proof and persuasion would apply. Also, the manufacturer, just like a consumer, would then get the statutory benefit of having the arbitration result go into evidence.

Mason I did not attempt to fully analyze section 681, as undertaken in this article. Neither did that court accurately analyze in detail the statutory provisions and case law upon which it relied as precedent to conclude that the trial de novo provisions of section 681.1095(13) of the Florida Statutes were meant to be like an appeal with the burden on the appealing party, the appellant. Section 681, the court in Mason I stated, does not provide for the classical trial de novo.

The statute is clear that once the arbitration board makes its findings, the aggrieved party may appeal to the circuit court. Although most appellate proceedings do not include a trial or evidentiary hearing, the statutory appellate procedure for Florida's lemon law authorizes a trial de novo. Nevertheless, it is generally the burden of the appellant to show that the lower tribunal erred. The issue in this case has arisen because section 681.1095 does not explicitly place the burden of persuasion on either the appellant or appellee.

What the court in Mason I used as precedent for its holding were zoning and ad valorem tax statutes. When analyzed and broken down, these statutes are not support for the construction given to section 681.1095(12) by Mason I. The Lemon Law statute is a totally different statutory scheme, for example, from a property appraiser's valuation of property and the subsequent legal disputes over those taxes.

1. Mason I's Improper Reliance on Zoning Laws

Some of the statutes discussed in Mason I have been repealed. City of Ormond Beach v. Del Marco, relied on in Mason I, also has as its origin

183. Id.
184. Id.
185. Id. at 721.
186. Id. at 722.
188. 426 So. 2d 1029 (Fla. 5th Dist. Ct. App. 1983).
the Fifth District.\textsuperscript{189} There, section 163.250, a zoning statute, allowed for either a review by the circuit court trial de novo or by certiorari.\textsuperscript{190} \textit{Del Marco} involved a Board of Adjustment denying a zoning variance for a windmill.\textsuperscript{191} The case is silent on what happened at the zoning officer level before the property owner went to the Board of Adjustment.\textsuperscript{192} Presumably, the property owner lost, otherwise there would have been no necessity for Board action. This is important because the Board of Adjustment could step into the shoes of the administrative official and provide the same relief.\textsuperscript{193} Thus, unlike \textit{Mason I}, where the arbitration board is the first stop, the \textit{Del Marco} complaining party has already initially been rebuffed by an administrative official at the first level.

When looking at what \textit{Del Marco} says about trial de novo under then section 163.250, it is not a statute that \textit{Mason I} should have analogized to the Lemon Law. This is what the \textit{Del Marco} court states about a trial de novo:

\begin{quote}
A "trial de novo" then must signify the legislative intent that circuit court review involve something more than a mere examination of the record of the board of adjustment. The "trial de novo" signifies to us the legislative intent that the circuit court take new evidence and conduct a new proceeding, not for the purpose of \textit{reviewing} the action of the board of adjustment, but for the purpose of \textit{acting} as the board of adjustment to review the original action of the administrative official, and to grant such relief as the board of adjustment could grant, if a proper showing is made.\textsuperscript{194}
\end{quote}

This language makes the point that in a trial de novo, the circuit court essentially steps into the shoes of the board of adjustment, and can grant the variance. The court does so, however, on a clean slate conducting a "new proceeding" de novo and taking "new evidence."

\textit{Mason I} seemed to miss that point. The property owner in this zoning context had the burden of establishing the basis for a variance, which the circuit court could grant just like the Board of Adjustment.\textsuperscript{195} That property owner also had the burden in court to establish entitlement to the variance, which is no different than his or her burden before the Board of

\begin{flushright}
\textsuperscript{189} \textit{Id.} at 1029. Judge Dauksch, a member of the \textit{Mason I} panel, was also on the \textit{City of Ormond Beach} court.
\textsuperscript{190} \textit{Id.} at 1032.
\textsuperscript{191} \textit{Id.} at 1030.
\textsuperscript{192} \textit{Id.}
\textsuperscript{193} \textit{Del Marco}, 426 So. 2d at 1032.
\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{Id.}
\end{flushright}
The "aggrieved party," or the party seeking relief in *Del Marco*, was the property owner.\(^{197}\) If the Board of Adjustment permitted the variance, there would have been no need for any court proceeding.\(^{198}\) "So, to secure relief in a trial de novo before the circuit court, the aggrieved party must make the showing required by section 163.225, and where, as here, the petition is based on hardship, the aggrieved party has the burden of demonstrating that a hardship exists."\(^{199}\) The underlying "aggrieved party" in *Mason I*, the consumer, is the one making the Lemon Law claim, \(^{200}\) just like the person seeking a zoning variance. Yet, *Mason I* says the manufacturer is the "aggrieved party" because it lost at arbitration.\(^{201}\) However, in a subsequent trial de novo context, who is the aggrieved party at an administrative level should not matter.

Neither the *Del Marco* case nor *Mason I* evaluates what the trial de novo proceeding should have been if someone other than the property owner, as the aggrieved party, files in circuit court under section 163.250 of the *Florida Statutes*. Section 163.250 seems to contemplate this, although its provisions do not define an "officer, department, board, commission, or bureau of the governing body" as an "aggrieved party."\(^{202}\) Thus, it is left open as to who has the burden and who is the plaintiff. An aggrieved party, under this zoning statute, is referring to the property owner since that is the person who has to demonstrate "that a hardship exists."\(^{203}\) If the governmental authority, however, requests a trial de novo, then under the *Del Marco* language cited above, the court stands in the shoes of the Board

\[^{196}\text{Id.}\]
\[^{197}\text{Id.}\]
\[^{198}\text{Id.}\]
\[^{199}\text{Id.}\]
\[^{200}\text{id. at 721-22.}\]
\[^{201}\text{See FLA. STAT. § 163.250 (1981).}\]
\[^{202}\text{Judicial review of decisions of board of adjustment. — Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any officer, department, board, commission, or bureau of the governing body, may apply to the circuit court in the judicial circuit where the board of adjustment is located for judicial relief within 30 days after rendition of the decision by the board of adjustment. Review in the circuit court shall be either by a trial de novo, which shall be governed by the Florida Rules of Civil Procedure, or by petition for writ of certiorari, which shall be governed by the Florida Appellate Rules. The election of remedies shall lie with the appellant.}\]
\[^{203}\text{Id.}\]
of Adjustment. The circuit court would hear and decide whether a zoning variance should be awarded if the property owner proves entitlement, for example, if a "hardship" can be demonstrated.\textsuperscript{204} It should not matter, because it is a new proceeding, de novo. Thus, the person seeking the variance, no matter the forum, still has the burden to prove the "hardship."\textsuperscript{205}

The intent of this zoning statute, arguably, was to have an all new circuit court trial de novo proceeding. The burden on the party trying to obtain the variance is no different from the consumer trying to show a Lemon Law violation under section 681.\textsuperscript{206} In a trial de novo, the consumer, among other things, is trying to prove the motor vehicle was a lemon, and has the benefit of certain statutory presumptions.\textsuperscript{207} To be consistent with how the Fifth District discusses trial de novo in \textit{Del Marco}, their interpretation of that same concept in \textit{Mason I} should have resulted, instead, with the trial court being affirmed and the consumer designated as the plaintiff in the section 681 trial de novo. Yet, the court in \textit{Mason I} says this about \textit{Del Marco}:

\begin{quote}
The case law interpreting this statute [Section 163.250] made clear that the aggrieved party seeking a trial de novo had the burden of proving his claim.... As this court stated in \textit{Del Marco}, in a trial de novo the circuit court can take any action the Board of Adjustment could have taken upon a proper showing by the aggrieved party.\textsuperscript{208}
\end{quote}

Unlike section 681, however, in section 163.250, the aggrieved party had to be the property owner seeking the variance, no matter what the situation.\textsuperscript{209} The Lemon Law has no words about an "aggrieved party."\textsuperscript{210} In \textit{Mason I}, the court implies that the manufacturer is the "aggrieved party."\textsuperscript{211} Whereas section 163.250 talks about any "aggrieved party" going to the circuit court, the only aggrieved party under that zoning law is the property owner, the one seeking a variance.\textsuperscript{212} Therefore, that party has the burden of proving entitlement to a variance. Even if adjoining property owners go to

\begin{itemize}
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} See generally \textit{FLA. STAT. § 163.255 (1981); FLA. STAT. § 681.102 (1991).}
\item \textsuperscript{207} \textit{FLA. STAT. § 681.104 (1991).}
\item \textsuperscript{208} \textit{Mason I, 621 So. 2d at 722.}
\item \textsuperscript{209} \textit{FLA. STAT. § 163.250 (1981).}
\item \textsuperscript{210} \textit{FLA. STAT. § 681.1095(12) (1999).}
\item \textsuperscript{211} \textit{Mason I, 621 So. 2d at 722.}
\item \textsuperscript{212} \textit{FLA. STAT. § 163.250 (1981).}
\end{itemize}
court in a de novo proceeding, the property owner still has the burden to demonstrate the variance entitlement.213

The Lemon Law is also silent on any equivalent point.214 Under the Mason I reading of Del Marco, anyone requesting a trial de novo becomes the "aggrieved party" regardless of which party or who is saying the vehicle was a lemon.215 To the contrary, in Del Marco, the property owner always had to affirmatively prove why the variance should be granted by demonstrating a hardship.216

The underlying statutory basis for this zoning statute and the Lemon Law are different.217 In Del Marco, the de novo proceeding is not an appeal; it is one that starts anew as if nothing occurred previously.218 There the circuit court sits ab initio like the Board of Adjustment, and must decide whether the property owner proves that the variance should be granted.219 Under the Lemon Law, the circuit court has to decide by trial de novo or otherwise whether the consumer proves a statutory violation.220 In these contexts, a trial de novo cannot be anything like an appeal. Thus, on this point, Mason I's analogy to Del Marco was misapplied and misconstrued.

There was another inconsistency between section 681 and Del Marco's zoning statute that Mason I failed to grasp. Under the Lemon Law, the trial court may be faced with having to determine other legal claims between the parties.221 In section 163.250, the circuit court is sitting as the Board of Adjustment, doing just what the Board does.222 In the motor vehicle Lemon Law context, however, a circuit court is deciding, as in Mason, other claims like Magnuson-Moss, which an arbitration board cannot handle.223 Mason I only makes it more convoluted procedurally by requiring everyone to have the burden on their own separate claims, i.e., the manufacturer as aggrieved by the arbitration finding being the plaintiff, and the consumer as the proponent of a Magnuson-Moss claim as some alternative plaintiff, co-plaintiff or counter-claimant.224 It would have been more consistent for Mason I, and practical, to have the trial de novo proceed with the consumer

213. Del Marco, 426 So. 2d at 1032.
215. Mason I, 621 So. 2d at 722.
216. Del Marco, 426 So. 2d at 1032.
217. See id. at 1029.
218. Id. at 1032.
219. Id.
221. Id.
222. § 163.250.
223. Id. § 681.1095.
224. Mason I, 621 So. 2d at 721–22.
who is able to put into evidence the Arbitration "Decision" as plaintiff on all claims just like any typical plaintiff at trial.

One might argue a zoning statute cannot be analogized to the Lemon Law. Yet once that analogy is undertaken it should be correctly compared. Mason I failed in this task. That result, therefore, demonstrates the Fifth District did not thoroughly analyze the case it relied on, and instead may have forced a result more consistent with a particular social philosophy rather than a sound judicial construction. That is to say, a consumer friendly result.

2. Mason I's Inappropriate Reliance on Ad Valorem Tax Statutes

When the other precedent Mason I relied on is scrutinized, an even more serious misapplication of the law occurs. The other statute referred to by Mason I is section 194. Neither upon facial comparison nor by analytical construction does section 194 bear any resemblance to the Lemon Law. Section 194 involves ad valorem taxation and relief from valuations on property. It is a complicated statute which has often been amended over the years. As to what is pertinent on the trial de novo issue, a previous version of section 194 created a Board of Tax Adjustment. That Board was used by Mason I for comparison to a lemon law arbitration panel. They are, however, entirely different entities. The Board of Tax Adjustment is comprised of elected public officials who are from the governing body of the county, i.e. county commissioners and two members of the school board. All of these individuals are elected public officials. This Board has no similarity to members of a lemon law arbitration panel who are selected by an Assistant Attorney General, who are not publicly elected, and who have no qualifying substantive prerequisites for appointment.

This Board of Tax Adjustment hears tax complaints. Section 194.032(6)(c) is more precise than the later enacted Lemon Law. Section 194.036(3) specifically provided: "The circuit court proceeding shall be de

225. See id. at 722.
226. Id.
229. Mason I, 621 So. 2d at 722.
230. See Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981).
232. Id. § 681.1095(1).
233. See Ch. 77-69, § 1, 1977 Fla. Laws 120, 120 (codified at FLA. STAT. § 194.015).
novo, and the burden of proof shall be upon the party initiating the action.\textsuperscript{234} This provision expressly sets forth who has the burden—the initiating party.\textsuperscript{235} Thus, if someone is precipitating the action in circuit court that party is the plaintiff, and has the burden of proof. The Lemon Law is significant by the absence of this type of statutory language. Yet, the Fifth District, in \textit{Mason I}, read these otherwise absent words into the statute.\textsuperscript{236} Did section 194, as relied upon by \textit{Mason I}, support a conclusion that section 681.1095(12) of the Lemon Law should be construed this same way? The answer is "No."

An "appeal" from a tax adjustment board is quite different from a lemon law arbitration panel. First, the adjustment board is made up of publicly elected officials who are constitutional officers.\textsuperscript{237} These officers serve terms at the pleasure of the electorate, and presumably answer to the public. No similarity exists between a lemon law board member who serves at the pleasure of the AG and who is answerable only to that office.\textsuperscript{238} There are basically no checks or balances, unlike an elected official, on the arbitrator selected by the AG.

Second, the \textit{ad valorem} valuation of property and how it's accomplished is a more complicated and a much different process than the Lemon Law.\textsuperscript{239} Special Masters can be appointed by the adjustment board, and outside experts employed to present testimony on just valuation.\textsuperscript{240} The property might be a large, sophisticated commercial complex. Not much needs to be said on how that differs from \textit{Mason}, where the consumer's claim is that the motor vehicle shudders as a result of the transmission.\textsuperscript{241}

Third, under then section 194.032(6), not everyone "aggrieved" can have a trial de novo.\textsuperscript{242} Property appraisers, the taxing authority, cannot "appeal" from the Adjustment Board's decision, except in certain limited circumstances.\textsuperscript{243} Yet, under section 681.1095(12), either a manufacturer or consumer can "appeal" with no restrictions on the circumstances.\textsuperscript{244}

\textsuperscript{234} \textit{FLA. STAT.} § 194.036(3) (1999).
\textsuperscript{235} \textit{Id.}
\textsuperscript{236} \textit{Mason I}, 621 So. 2d at 722.
\textsuperscript{237} \textit{Bath Club, Inc.}, 394 So. 2d at 112. There is, of course, a constitutional basis to the Board whose members are constitutional officers. \textit{Id.} Lemon law arbitration board members are not constitutional officers nor are they publicly elected.
\textsuperscript{238} \textit{FLA. STAT.} § 681.1095 (1999).
\textsuperscript{239} \textit{See FLA. STAT.} § 194.032(1)(a) (1977); \textit{FLA. STAT.} § 194.035 (1999).
\textsuperscript{240} \textit{Id.} § 194.032(9) (1981 & Supp. 1982).
\textsuperscript{241} \textit{Mason v. Porsche Cars of N. Am., Inc.}, 688 So. 2d 361, 363 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{244} \textit{Id.} § 681.1095(12) (1999).
Fourth, *Mason I* views a decision by the Board of Tax Adjustment as carrying the same validity as a lemon law arbitration "decision." In other words, even though under section 194 a taxpayer always has the right to a trial de novo, he or she has the burden to prove the *ad valorem* valuation was in error. Even if the Property Appraiser or Tax Assessor appeals, as the court in *Mason I* stated, "he [the taxpayer] would have the burden of persuasion." This is because, a fact not alluded to by *Mason I*, the board of adjustment for *ad valorem* taxation is a public office, with constitutional officers making the decisions. As the Supreme Court of Florida has stated, "[p]ublic officials are presumed to perform their duties in a proper and lawful manner." That quoted statement is made within the context of a challenge to a Board of Adjustment's tax decision. A board of adjustment, with its publicly elected officials, is presumed to be correct. Nowhere in the Florida Constitution, statutes, regulations, or case law does *Mason I* indicate the authority to elevate a lemon law arbitration board to the status of a board of tax adjustment or property appraisal adjustment board. Such an elevated political body has not a scintilla of comparison to a lemon law panel appointed, without restrictions, by the Attorney General.

3. *Mason I* Misinterpreted Case Law Precedent

The other principal case discussing trial de novo and burden of proof relied on by *Mason I* was *Bystrom v. Equitable Life Assurance Society*. That case, however, did not support the holding of *Mason I*. In fact, when correctly read, *Bystrom* totally undermines the rationale that a lemon law arbitration panel should be presumed correct with the resultant burden on the "appealing" party.

*Bystrom*, for sure, is not an easy case to understand or to read. Simply put, it involved the assessed value of the Omni International Hotel in Miami in 1978. The Omni was described as a "multi-purpose megastructure."

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245. Now known as the Property Appraisal Adjustment Board, under section 194.
246. *Mason I*, 621 So. 2d at 722.
247. *Id*.
248. FLA. STAT. § 194.015.
249. Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113 (Fla. 1981) (citing Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975); Hunter v. Carmichael, 133 So. 2d 584 (Fla. 2d Dist. Ct. App. 1961)).
250. *See Mason I*, 621 So. 2d at 719.
251. 416 So. 2d 1133 (Fla. 3d Dist. Ct. App. 1982).
252. *See id.* at 1133.
253. *Id*.
254. *Id.* at 1136.
255. *Id*.
It was not only the value placed on the Omni that was in dispute, but also how that value was determined.256 The appellant was the Property Appraiser, while the taxpayers were the appellees.257 These taxpayers originally contested the Property Appraiser’s initial valuation of the Omni and went to the Property Appraisal Adjustment Board stating that the valuation was too high.258 The Board agreed, to an extent, and partially reduced the assessment.259 The Property Appraiser filed suit in circuit court since the statutory criteria allowing it to contest the Board’s decision had been met.260 An answer and counterclaim were then filed by the taxpayers since they believed the Board’s reassessment was still too high.261

The first error in Mason I was to cite as controlling authority an issue from Bystrom that did not carry a majority of Third District judges.262 As to what party has the burden of proof and who is the plaintiff, Mason I refers to language in Bystrom which is a minority opinion.263 Yet, Mason I construes that portion of Bystrom as if it is the majority view.264 This mistake by the Fifth District265 is brought to light when Robbins v. Summit Apartments, Ltd.266 is reviewed; a case not mentioned in Mason I.267

Bystrom v. Equitable Life is easily misunderstood. In that case there is a lengthy majority opinion covering a number of legal issues. However, the portion of the main opinion entitled “The Burden of Proof,” id. at 1140-43, represents the view of only one member of the three-member panel. Two judges joined a special concurrence, id. at 1145-47, which took a different view of the burden of proof issue. On the question of burden of proof, the concurring opinion was joined by a majority of the panel and

256. Bystrom, 416 So. 2d at 1137.
257. Id. at 1136.
258. Id. at 1137.
259. Id.
260. Id.
261. Bystrom, 416 So. 2d at 1137.
262. Mason I, 621 So. 2d at 722; Bystrom, 416 So. 2d at 1136.
263. Mason I, 621 So. 2d at 722.
264. Id.
265. Id. (citing Bystrom v. Equitable Life Assurance Soc’y, 416 So. 2d 1133, 1140-43 (Fla. 3d Dist. Ct. App. 1982)). These pages were from Judge Nesbitt’s opinion for the court, but on the burden of proof issues for which it was cited, this was not the majority opinion.
266. 589 So. 2d 460, 461 (Fla. 3d Dist. Ct. App. 1991).
267. Mason I, 621 So. 2d at 719.
therefore represents the decision of the court. The trial court should have followed the concurring opinion on that issue.\textsuperscript{268}

This misreading of \textit{Bystrom} by \textit{Mason I} is without doubt. A proper interpretation of \textit{Bystrom} actually undermines the \textit{Mason} holding.

According to \textit{Mason I}, "[t]he third district [in \textit{Bystrom}] stated that the board's assessment of the property value in question would be accorded presumptive validity."\textsuperscript{269} This statement was then used to equate a lemon law arbitration panel decision in favor of the consumer, as in \textit{Mason}, having the same presumption of correctness as that of a public official.\textsuperscript{270} The effect is that a manufacturer at a trial de novo has to overcome the presumptive validity of the Arbitration "Decision," and it does so as the plaintiff on this issue. That is, the manufacturer has to prove up the negative; to disprove that the motor vehicle is defective. Under this rationale, a trial de novo according to \textit{Mason I} is not what it has always been commonly understood to be—a fresh start, a new proceeding.

The paradox is that a majority of judges in \textit{Bystrom} say the exact opposite from what \textit{Mason I} attributed to them.\textsuperscript{271} The burden in \textit{Bystrom} rests on the party initiating the circuit court action.\textsuperscript{272} But that result was required by express statutory language, words which were conspicuously left out of the Lemon Law.\textsuperscript{273} As the actual \textit{Bystrom} majority states, the presumption of validity is not to be attributed to the Board of Adjustment's decision,\textsuperscript{274} as \textit{Mason I} interprets, but instead to the Property Appraiser's initial tax assessment.\textsuperscript{275} Judge Pearson's majority opinion in \textit{Bystrom} states the following:

Moreover, the presumption in favor of the validity of the property appraiser's assessment is unaffected by the fact that the burden of proof in the Circuit Court is upon the party initiating the action and that an appraiser may, by virtue of a recent change in the law, initiate the action. To accord presumptive correctness to the Board of Adjustment valuation would effectively vitiate the presumptive correctness accorded the property appraiser's assessment.\textsuperscript{276}

\textsuperscript{268} \textit{Robbins}, 589 So. 2d at 461.
\textsuperscript{269} \textit{Mason I}, 621 So. 2d at 722.
\textsuperscript{270} \textit{Id.}
\textsuperscript{271} \textit{Bystrom}, 416 So. 2d at 1145–47.
\textsuperscript{272} \textit{Id.} at 1140–41.
\textsuperscript{274} \textit{Bystrom}, 416 So. 2d at 1147.
\textsuperscript{275} \textit{Id.} at 1143.
\textsuperscript{276} \textit{Id.} at 1146 (Pearson, J., concurring).

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The majority in *Bystrom*, consisting of two judges in Judge Pearson's concurring opinion, in fact concluded the exact opposite from what *Mason I* accredited to that case. Judge Pearson, for the majority on this burden of proof analysis, says that the Board is not to have its decision carry any presumptive validity at the trial de novo. Only the property appraiser's initial tax assessment was to have that presumptive correctness. This is the antithesis to the *Mason I* rationale which makes no reference or citation to Judge Pearson's actual majority opinion. Instead, only Judge Nesbitt's opinion is highlighted, which on the issue cited by *Mason I* is not a majority holding.

To compound this, *Mason I* then ties its analysis of who has the initial burden of proof to whichever party challenges the lemon law arbitration board decision. In *Mason*, it was the manufacturer. Thus, if the manufacturer wants a trial de novo after an adverse lemon law arbitration hearing, since the panel's decision has presumptive correctness, the burden of proof will always be on the party attacking or challenging that decision. In essence, therefore, this proceeding is not truly de novo. As stated by *Mason I*:

>The third district reasoned that if it were otherwise, the proceedings before the board [of tax adjustment, later called property appraisal adjustment board] would amount to nothing more than a way station for a disgruntled party en route to circuit court. Therefore, the party attacking the decision of the value adjustment board

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277. Id.
278. Id. Under section 194, the burden varies depending upon whether the Property Appraiser has followed statutory requirements. If so, the initiating taxpayer has a burden of proof of "clear and convincing evidence." Otherwise, the burden is by the preponderance of the evidence. FLA. STAT. § 194.301 (1999). The Legislature changed the burdens which were discussed in *Bystrom*, and lessened them to favor the taxpayer. Wetherell, *supra* note 228, at 229.
280. *Mason I*, 621 So. 2d at 719.
281. *Bystrom*, 416 So.2d at 1146 n.15. "Judge Pearson's concurring opinion, joined by Judge Hubbart, is actually the majority opinion with respect to the portion of the decision relating to the taxpayer's burden of proof in an 'appeal' of the VAB's decision." Wetherell, *supra* note 228, at 195.
283. Id. at 721.
284. Id.
would have the burden of overcoming of the presumption of correctness. 285

This Bystrom reference is from the minority statements by Judge Nesbitt. 286 Mason I, of course, said nothing about adopting a minority opinion of a Third District panel. This erroneous Bystrom analysis by the Fifth District is the same interpretation argued by the Attorney General in its Mason I amicus curiae brief. 287 It seems, perhaps, the Mason I panel may have blindly relied on what the Attorney General said without digging any deeper.

The “way station” metaphor in Mason I, attributed to Bystrom, is likewise used in error. Mason I thought that if the burden is not placed on the party who challenges the lemon law arbitration decision, the Board becomes meaningless and in that case manufacturers, by filing in circuit court, could force the consumer to start all over with the burden to prove his or her claim. This would seem unfair.

This “way station” analogy is, however, also used by Judge Pearson for the majority in Bystrom, but to make an entirely different point from the Mason I interpretations. 288 While Mason I is concerned about the arbitration board becoming meaningless, 289 the Bystrom majority, in contrast, does not want the Board of Adjustment being used manipulatively by taxpayers to circumvent the presumptive validity of the Property Appraiser’s initial tax assessment. 290 Unlike Mason I, the Bystrom majority is not concerned about the Board of Adjustment becoming meaningless. 291 The Bystrom majority says it can become so. 292 The majority of Bystrom judges were not worried about the Board of Adjustment, but instead about the Property Appraiser’s initial assessment becoming meaningless. 293 Only the Property Appraiser’s assessment should have a presumption of correctness, not the Board’s. The

285. Id. at 722 (quoting Bystrom v. Equitable Life Assurance Soc’y, 416 So. 2d 1133, 1140–43 (Fla. 3d Dist. Ct. App. 1982).
286. Id.
287. See Amicus Brief, at 9–10; Mason I, 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993) (No. 92-3074).
288. Bystrom, 416 So. 2d at 1142. “Consequently, the identical public policy considerations exist to accord the Board’s reevaluation presumptive validity.... If it were otherwise, proceedings before the Board would amount to nothing more than a way station for a disgruntled party en route to circuit court.” Id.
289. Mason I, 621 So. 2d at 721.
290. Bystrom, 416 So. 2d at 1142.
291. Id.
293. Bystrom, 416 So. 2d at 1147.
Mason I court actually concluded just the opposite with regard to the Lemon Law of the Bystrom holding. 294

When properly read, the Bystrom majority opinion states that, in a de novo trial context, the Board of Adjustment decision can indeed be meaningless. 295 “Lastly, because the very nature of the proceeding in the Circuit Court is de novo, there is no presumption of correctness which attaches to the valuation made by the Board of Adjustment.” 296 Law review commentators dealing with section 194 have pointed out that Bystrom does not stand for the proposition that the Adjustment Board’s decision is entitled to any presumptive correctness. 297 Thus, the Board of Adjustment proceeding can indeed appear as if it had never occurred. Mason I misreads and misapplies Bystrom as support for the Fifth District’s conclusion that anyone who challenges a lemon law arbitration decision has the initial burden, ergo, becomes the plaintiff on that issue.

Mason I should have reached a different result, and not held that the party losing at arbitration has to be the plaintiff in the trial de novo on that issue. As a correct analysis of Bystrom demonstrates on this point, Mason I should not have stood for any precedential authority and its rationale behind the trial de novo issue should have been overruled by the Supreme Court of Florida in Pitsirelos. 298 This is particularly true since Pitsirelos implicitly agreed with the Bystrom majority when holding that the lemon law arbitration board decision does not have a presumption of correctness. 299 Thus, Pitsirelos should have repudiated Mason I on this de novo issue instead of adopting it.

The theory upon which a property appraisal for tax purposes operates, like in Bystrom, is totally different from the Lemon Law statute. Mason I either did not understand these differences, or chose to ignore them. According to the Mason I rationale, based on its Bystrom reliance, the prevailing consumer becomes one in the same as the arbitration panel in the circuit court suit. 300 Bystrom, however, held that even if the taxpayer wins at the adjustment board level and the Property Appraiser appeals, the presumption of correctness attaches only to the Appraiser’s initial assessment, and not with the Board of Adjustment’s subsequent decision. 301

294. Mason I, 621 So. 2d at 722.
295. Id.
296. Bystrom, 416 So. 2d at 1147.
297. Wetherell, supra note 228, at 195.
298. Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).
299. Id. at 714.
Thus, the taxpayer cannot simply rest on the Board’s decision. The Property Appraiser, if it appeals, may have to be a plaintiff because it is the person who initiates the circuit court action under that particular statutory language, but its initial tax assessment was still presumptively correct. The assessor only has to demonstrate following its statutory guidelines in making the assessment. The Board of Adjustment decision simply has neither importance nor precedence.

In its reliance on Mason I, and by not discerning the error in that court’s citations of Bystrom, the Supreme Court of Florida, in Pitsirelos, reached an unsupportable result. As noted, one of the reasons Mason I concludes that a party challenging the arbitration panel’s decision has the burden is because a lemon law arbitration board is a public body like the Board of Tax Adjustment in Bystrom. The arbitration panel’s decision, therefore, carries the presumption of correctness. Thus, the party challenging the Board’s ruling de novo has to be the plaintiff on the Lemon Law issue because arbitration panels are presumed to be correct. Otherwise, the Lemon Law arbitration process becomes meaningless. Yet, despite adopting Mason I’s conclusions about trial de novo, Pitsirelos, to the contrary, holds that a lemon law arbitration panel decision does not carry any presumption of correctness. As a matter of logic, therefore, it should have been impossible for the Supreme Court of Florida to reach the same conclusion as Mason I on the trial de novo issue. To have done so can only mean that Pitsirelos is also wrongly decided.

C. What a Trial de Novo Should Be

In legal history de novo trials have been seen differently than the Pitsirelos and Mason I interpretations. Pitsirelos creates an amalgam status for a trial de novo, existing somewhere between the pure concept and a traditional appellate procedure. True, section 681.1095(12) uses the word “appeal.” Pitsirelos, relying on Mason I, seizes upon that terminology to conclude the legislature intended, although without saying so, that the trial de novo in circuit court is like an appeal. Pitsirelos and Mason I together,
hold that the party asking for the trial proceeding has the burden and becomes the plaintiff.\(^{312}\) Thus, the de novo proceeding is not truly a new one. *Pitsirelos* and *Mason I* places a lemon law trial de novo under section 681 into a twilight zone lying somewhere between the polarity of a completely new trial proceeding, and an appellate review for adequacy of a lower tribunal’s record. In his partial dissent, Justice Overton would have found otherwise in *Pitsirelos*, arguing that a trial de novo is exactly what it has always been thought to be—a new proceeding as if nothing had taken place earlier.\(^{313}\)

From a definitional standpoint, a de novo trial has been viewed in the pure sense. It is defined as follows, “[a] new trial; or retrial had in which the whole case is retried as if no trial whatever had been had in the first instance.”\(^{314}\) Read literally this definition itself undermines the rationale upon which *Pitsirelos* is decided. A trial de novo proceeding is an entirely fresh one, without encumbrance of what has already occurred.\(^{315}\) Of course, the legislature can alter this traditional application of de novo in its statutory provisions, as it has done in other instances. For example, section 194.032(6)(c), as now written, qualifies the de novo procedure by stating that “the burden of proof shall be upon the party initiating the action.”\(^{316}\) Inherent in this is the existence of an earlier proceeding which carries some evidentiary weight to the subsequent trial de novo.

Section 681.1095(12) does not have the type of qualifier like section 194.032(6)(c).\(^{317}\) One must assume this omission from the Lemon Law is intentional. Since its inception in 1988, this language in section 681 has remained unchanged: “shall be by trial de novo.”\(^{318}\) One can argue that the legislature does not see a lemon law arbitration panel on the same elevated plane as a public official or public body, such as the constitutionally

\(^{312}\) *Id.* at 714; *Mason I*, 621 So. 2d at 721–22.

\(^{313}\) *Pitsirelos*, 721 So. 2d at 715.

\(^{314}\) *Ballentine’s Law Dictionary* 1505 (6th ed. 1990); “de novo”: “Anew; afresh; a second time.” *Id.* at 435. *Accord*, *Black’s Law Dictionary* 435 (6th ed. 1990). The de novo concept has its roots deep into common law jurisprudence. The concept of trial de novo apparently derives from “venire de novo.” *See* Day, *Common Law Procedure Acts* 290 (1872). The precursor procedure would allow for a second trial on the issue with a new jury, and is different from a new trial concept. 8 *Definitions of Words and Phrases* 7291 (1905). There were different situations where the de novo second trial was grantable. *See* 2 Tidd, *The Practice of the Courts of King’s Bench and Common Pleas* 921–22 (1840). It is clear from this history that this second trial would be as if the first one never occurred. *See* Sewall v. Glidden, 1 Ala. 54, 58 (1840) (“means according to our practice, nothing more, than submitting the case to another jury for trial.”).


\(^{317}\) *Id.* §§ 681.1095(12), 194.036(3).

\(^{318}\) *Id.* § 681.1095(12).
established property appraiser. That official’s public duty of setting property valuations for \textit{ad valorem} taxation is quite different from determining whether a transmission rattles or the brakes squeal on a car. \textit{Pitsirelos}, inconsistent with its holding on the trial de novo issue, impliedly recognizes this by concluding that a lemon law arbitration panel’s decision does not carry with it a presumption of correctness.\footnote{\textit{Pitsirelos}, 721 So. 2d at 711.} Thus, by definition it has to be different from a public official or body. Accordingly, the Supreme Court of Florida should not have interpreted trial de novo to be the same as an appeal. By doing so \textit{Pitsirelos} goes contrary to legislative intent.

The provisions within the Lemon Law address the situation where a trial de novo request is not undertaken for proper reasons.\footnote{FLA. STAT. § 681.106 (1999). That statute deals with bad faith claims by a consumer. \textit{Id}.} This is quite contrary to the underlying decisional themes in \textit{Mason I} and \textit{Pitsirelos} who thought manufacturers might abuse consumers by always seeking a trial de novo. To the contrary, section 681 has built-in protections to keep the consumer from being bludgeoned by the superior economic and litigational weapons of the manufacturer.\footnote{Id. at 711.} There are, quite simply, serious consequences to a manufacturer for bringing a frivolous de novo proceeding.\footnote{Id. at 419.} These statutory protections, which are neither analyzed nor referred to in \textit{Pitsirelos} or \textit{Mason I}, support the conclusion that the legislature has always intended the “trial de novo” to be a new trial, starting from scratch.

Over the years and in other contexts, the Supreme Court of Florida has interpreted trial de novo in a different way from it’s holding in \textit{Pitsirelos}. These historical cases viewed de novo in the pure definitional sense.\footnote{Id. at 418.} For example, in 1909, the Supreme Court of Florida interpreted an old constitutional provision which said “appeals from justices of the peace courts in criminal cases may be tried de novo under such regulations as the legislature may prescribe[.]”\footnote{Id. at 419.} That case, \textit{Nichols v. Bullock},\footnote{Id. at 418.} involved a situation where the circuit court had allowed new charges and proceedings to be filed after the appeal from a county court conviction, but not from the Justice of the Peace (“JP”) Court.\footnote{Id. at 419.} The \textit{Bullock} court held that the circuit court’s jurisdiction under this provision is truly appellate, and it cannot conduct a de novo trial proceeding.\footnote{Id. at 419.} Even though the constitutional
provision there talks in terms of "appeals" from the JP courts, for the trial de novo in circuit court *Bullock* is quite clear that this is a totally new proceeding.

[I]t is provided that appeals from justice of the peace courts in criminal cases may be tried de novo under such regulations as the Legislature may prescribe, but this last provision is there expressly confined to appeals from courts of justices of the peace, and does not authorize a trial de novo in the circuit court in a criminal case arising before the county judge and appealed from his court to the circuit court. [The statute] also expressly confines its provisions for trials de novo in the circuit courts to appeals in criminal cases from courts of justices of the peace. So far, then, as appeals in civil or criminal cases are concerned from county judge’s courts to the circuit courts, the jurisdiction of the latter is appellate only, and in such cases the circuit courts cannot exercise any original jurisdiction, such as permitting new or amended affidavits or charges to be there for the first time filed, or by trying the case anew before the circuit judge or before a jury. 328

Here, the Supreme Court of Florida delineates the contrast between a true appellate proceeding and a trial de novo which starts "anew," even if the procedural avenue to circuit court is by way of "appeals." 329 This "appeal" language used is the same language as in section 681. Yet, *Pitsirelos* and *Mason I* interpret "appeal" in a completely different way from *Bullock*.

In a later case under the same constitutional and statutory provisions, the Supreme Court of Florida, in *Baggs v. Frederick* 330 describes again what a trial de novo should be. 331 The issue in *Baggs* involved whether an accused can have a trial de novo in circuit court after entering a guilty plea before the Justice of the Peace. 332 The Supreme Court of Florida found there could be a trial de novo in circuit court even after a guilty plea below. 333 There are two clear points from the *Baggs* decision which demonstrate why the results reached in *Pitsirelos* and *Mason I* are in conflict.

First, *Baggs* uses the classical definition of trial de novo even in the context of the "appeal" language. 334 The constitutional and statutory provisions in *Baggs* use the trial de novo language within the aegis of an

328. *Bullock*, 50 So. at 419.
329. *id*.
330. 168 So. 252 (Fla. 1936).
331. *id* at 252.
332. *id*.
333. *id* at 252–53.
334. *id*.
"[a]ppeal from the Justices of the Peace Courts."\textsuperscript{335} The court in \textit{Baggs} did not, unlike \textit{Pitsirelos}, construe the de novo concept any differently because the proceeding came to the circuit court as an "appeal."\textsuperscript{336} To that end, \textit{Baggs} contains the following statement: "[T]hat the circuit court 'shall' proceed to try all criminal cases on appeal from justice of the peace courts de novo as though the proceedings had been originally begun in the circuit court."\textsuperscript{337} \textit{Baggs} did not read into the law limitations which do not appear from its language, such as restrictions on the right to trial de novo. This rationale is quite unlike what the same supreme court later did in \textit{Pitsirelos}.\textsuperscript{338}

Second, \textit{Baggs} analytically reveals the true nature of a JP court, and why a trial de novo is so important to proceed later as an original proceeding.\textsuperscript{339} The description of the JP courts from \textit{Baggs} is not much different from how a lemon law arbitration board operates in practice:

Justice of the peace courts in Florida are not courts of record. On the contrary, they proceed with the utmost informality. For the latter reason, no doubt, the Constitution itself recognizes that appellate proceedings from such courts are best made to serve the purpose of justice through, according to the accused, an unconditional trial de novo in the circuit court, under proper forms of accusation and before a judge and jury of the highest degree of capability.\textsuperscript{340}

In the old days, Justices of the Peace did not have to be attorneys. This system was abolished by the major Article V revision in 1973. Lemon Law arbitration panels proceed in similar ways, without rules of evidence or judicial oversight, informally with a verbal free-for-all akin to "Judge Judy" or "The People's Court." This same analysis could have been undertaken first in \textit{Mason I} and then later in \textit{Pitsirelos}. If so, \textit{Baggs} and \textit{Pitsirelos}, decided by the same court, might not have been so divergent in their rationale.

There are other inconsistencies between \textit{Baggs} and the \textit{Pitsirelos} and \textit{Mason I} holdings. As noted supra, \textit{Mason I}, relied on by \textit{Pitsirelos}, misreads a minority opinion in \textit{Bystrom v. Equitable Life Assurance Society}
to be the majority.\textsuperscript{341} Yet, the majority opinion in Bystrom, not the minority opinion relied on by Mason I, cited to both Baggs and Nichols.\textsuperscript{342} This citation from Bystrom further supports the argument that the word “appeal” as used in section 681.1095(12), and contrary to the interpretation in Pitsirelos/Mason I, is only of procedural and not of substantive importance. The “appeal” language is just the procedural vehicle to get to circuit court. Judge Pearson in Bystrom referred to Baggs and Nichols for the following proposition: “Where a statute vests jurisdiction in the Circuit Court to conduct a review or hear an appeal \textit{de novo}, rules of ordinary appellate proceedings do not apply.”\textsuperscript{343}

\textit{Pitsirelos} and \textit{Mason I} interpret trial de novo as a second proceeding, but it is more like an appeal from a lower tribunal (the lemon law arbitration panel) so that the earlier proceeding still has effect and the circuit court de novo action is not truly original. This analysis is \textit{contra} to Nichols/Baggs, and the historical view of trial de novo. Neither Baggs nor Bullock are distinguishable because they are criminal cases. There has never been one definition for trial de novo in a criminal context and a different one in civil proceedings. Interestingly, the Attorney General makes this statement in its public reports on the Lemon Law: Decisions by the state-run board are final and binding upon the parties, unless within thirty days of receipt, a party files a petition in the circuit court for a trial de novo.\textsuperscript{344} The Attorney General, for whatever reason, saw fit to omit the “appeal” language. Yet, in \textit{Mason I} and \textit{Pitsirelos} the AG was arguing that the circuit court proceeding is like an appeal.

Another case supporting a different trial de novo interpretation from Pitsirelos is \textit{Adams v. Dade County}.\textsuperscript{345} Adams involved a statute whereby one could appeal to the circuit court when the election supervisor has stricken an elector’s name from the voting rolls.\textsuperscript{346} On appeal for a de novo proceeding, the circuit court issued a notice to show cause why the voter’s name “should not be removed from the registration books.”\textsuperscript{347} In rejecting that procedure as not being a trial de novo, the Third District stated the following:

\begin{itemize}
  \item \textsuperscript{341} Bystrom, 416 So. 2d at 1133.
  \item \textsuperscript{342} \textit{Id.} at 1147 n.16.
  \item \textsuperscript{343} \textit{Id.}
  \item \textsuperscript{344} \textit{See} FLA. STAT. § 681.1095(12) (1999).
  \item \textsuperscript{345} 202 So. 2d 585 (Fla. 3d Dist. Ct. App. 1967).
  \item \textsuperscript{346} \textit{Id.} at 586 (discussing FLA. STAT. § 98.201 (1965)). “Appeal shall be to the circuit court in and for the county wherein the person was registered. \ldots\! Trial in the circuit court shall be \textit{de novo} and governed by the rules of that court.” \textit{Id.}
  \item \textsuperscript{347} \textit{Adams}, 202 So. 2d at 588.
\end{itemize}
The defect in that procedure which causes us to reject it is that it places the burden of proof on the electors and requires them to disprove the supervisor's charges on which he claims their disqualification. That result should not obtain, because it is the county or the supervisor of elections who is the complaining party and who, therefore, should occupy the position of plaintiff or complainant in the circuit court and have the burden of proof on the issues to be tried.  

*Adams* is consistent with the correct interpretation of *de novo* as set forth in this article. Even though the voter in *Adams* initially loses and appeals, he did not have the burden as plaintiff to overcome removal from the registration list. Fundamentally, the Supervisor of Elections is the complaining party even if he or she prevails below. This is no different from a lemon law claim where the consumer, like the Supervisor, is the underlying complaining party—the one seeking relief under the law.

D. *How Section 681 Intended A Traditional Trial De Novo Proceeding*

*Pitsirelos* and its forerunner, *Mason I*, could have reached results in line with the historical view of trial de novo and yet remained consistent to the legislative intent behind section 681. The Lemon Law statute has a number of provisions which afford adequate protection to a consumer vis-à-vis greater litigational resources available to a manufacturer. This concern over the unequal interests between consumer and manufacturer is a major theme in *Mason I*. Yet, the statutory provisions of section 681 do balance fairness for the consumer in a trial de novo, even if he or she has already prevailed at the arbitration level.

First, in the judicial proceedings at circuit court, under section 681.112(1) of the *Florida Statutes*, attorneys’ fees can be awarded. This is a substantial factor. In *Pitsirelos*, at the trial level, the consumer was awarded attorneys’ fees in the amount of $171,000. The threat of attorneys’ fees being imposed cannot be lightly taken.

Second, if the manufacturer requests a circuit court action after arbitration, but for bad motives or intentions, section 681.1095(13) allows for additional monetary penalties to be imposed. The statute provides in part: "If a court determines that the manufacturer acted in bad faith in

348. *Id.*
bringing the appeal or brought the appeal solely for the purpose of harassment, ... the court shall double, and may triple, the amount of the total award.\textsuperscript{352} There is no similar provision applicable to a consumer. This creates a significant disincentive for a manufacturer to act improperly when bringing a subsequent judicial action under section 681.1095(13). In \textit{Mason}, the consumer had pled "bad faith" in Porsche bringing the "appeal" to the circuit court, and double and treble damages were sought against the manufacturer.\textsuperscript{353} Although the trial judge had determined Porsche did not act in bad faith, the potential risk exposure created could have been well into six figures for an enhanced award.\textsuperscript{354} The punitive imposition on a manufacturer for bringing an appeal in bad faith and the consequences can be seen in \textit{Ford Motor Co. v. Starling}.\textsuperscript{355} In that case, the manufacturer was sanctioned with treble damages on a $59,589 repurchase award.\textsuperscript{356} It is submitted that this type of award can be effective in protecting the consumer from unwarranted litigation after a successful arbitration proceeding. The potential for such an award has a chilling effect, with the trial court then able to protect the consumer to ensure the litigational playing field remains level.

Third, section 681.1095(9) permits the arbitration "decision" to be admitted into evidence.\textsuperscript{357} Justice Overton in his separate \textit{Pitsirelos} opinion recognizes that this "decision" is a significant piece of evidence for the consumer.\textsuperscript{358} This is so even without any presumptions attaching. The manufacturer, just as a practical matter, is put to the daunting task of convincing a judge or jury that all the "Findings of Fact" and "Conclusions of Law" in the "decision" finding the motor vehicle to be a "Lemon" is not persuasive.

Fourth, the manufacturer is subject to a twenty-five dollar per day liquidated damages award computed from forty days after the arbitration decision is received.\textsuperscript{359} The intent behind section 681.1095(13) is to provide monetary relief so the consumer can obtain replacement transportation during the delay on the disposition of the litigational issues. \textit{Pitsirelos} upholds this provision against a constitutional challenge, but also finds that the damages must be proven.\textsuperscript{360} In \textit{Mason}, this potential damages exposure

\textsuperscript{352} \textit{Id.}
\textsuperscript{353} \textit{Mason II}, 688 So. 2d at 363.
\textsuperscript{354} \textit{Id.}
\textsuperscript{355} 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{356} \textit{Id.} at 335.
\textsuperscript{357} \textit{FLA. STAT. § 681.1095(9)} (1999).
\textsuperscript{358} \textit{Chrysler Corp. v. Pitsirelos}, 721 So. 2d 710 (Fla. 1998).
\textsuperscript{359} \textit{§ 681.1095(13)}.
\textsuperscript{360} \textit{Starling}, 721 So. 2d at 335. \textit{Pitsirelos} quashed the District Court of Appeal decision on the issue of presumption of correctness of an arbitration award. \textit{Pitsirelos}, 721 So. 2d at 710. It also upheld the $25.00 per day "penalty" as constitutional, if prove to be a loss. \textit{Id.} A
totaled nearly $50,000. Again, not an insignificant sum and one which is an
incentive against the manufacturer acting unreasonably in asking for a trial
de novo.

Fifth, section 681.1095(12) seems to impose an affirmative duty on the
appellant to make sure the petition is well founded. The requests for trial
de novo must be in a “written petition” and “state the action requested and
the grounds relied upon for appeal.” Mason I finds this provision to be
analogous to filing a notice of appeal, and is contrary to starting a legal
proceeding “anew” or de novo which ignores the benefit of the previous
arbitration hearing. It is just as reasonable, however, that section
681.1095(12) requires the “petition” to appeal as one more guarantee of
protection that litigation abuse, by either side, does not occur. Justice
Overton, again in his minority view in Pitsirelos, believes similarly. The
trial court under the statute essentially screens the “petition” to ensure it is
legally based before letting a “trial de novo” go forward. This provides a
“gatekeeper” role to help prevent litigation abuse.

None of the other statutes analogized in Mason I or Pitsirelos have any
type of protective infrastructure like section 681. These failsafe provisions
distinctively separate the Lemon Law from any other statutory blueprint, and
are essentially directed unilaterally at the manufacturer. Yet, Pitsirelos and
Mason I seem oblivious to these details and differences. With these built-in
disincentives, finding that a trial de novo is a new proceeding altogether does
not contravene the Lemon Law’s legislative intent of protecting the
consumer. Even before Pitsirelos and Mason I manufacturers were not
routinely seeking appeals to the circuit court. During 1990 and 1991, a total
of only nine appeals were brought from hundreds of arbitrations. In 1992,
for example, of the total number of cases arbitrated manufacturers
“appealed” only nine percent. By 1995 only twelve percent of the Board’s
decisions were being appealed. This is hardly an opening of the
floodgates.

Washington state statute imposing a $25.00 a day fine, although a little different from Florida’s
1990). Pitsirelos, 721 So. 2d at 710.

362. Id. § 681.1095(12).
363. Pitsirelos, 721 So. 2d at 715–16.
364. Id.
365. Id.
366. Id. at 713–14. Excessive appeals have not proved to be the case in reality.
Manufacturers, having lost at arbitration, do not routinely file for trial de novo proceedings in
circuit court. According to the most recent annual reports available, in 1995, 12%, or 24 out
of 200 consumer awards were “appealed” by manufacturers. Id. at 713.
From a realistic, legal, economic, and public relations standpoint, a manufacturer does not routinely want to go into court after an arbitration loss. Serious thought and evaluation has to go into any such decision. Even by the AG's own data, there is no empirical evidence to suggest that manufacturers arbitrarily or unreasonably force consumers into a post arbitration judicial proceeding.

IV. THE EVIDENTIARY EFFECT OF A LEMON LAW ARBITRATION BOARD DECISION

It naturally follows from Mason I, where the manufacturer has the burden to overcome the arbitration award, that the issue of what evidentiary effect to give that “decision” would arise. Section 681.1095(9) states that “[i]n any civil action arising under this chapter and relating to a dispute arbitrated before the board, any decision by the board is admissible in evidence.” In this section of the article, various legal interpretations by the courts regarding the evidentiary effect to be given to a lemon law arbitration decision are reviewed and discussed. These analyses have ranged from a presumptive correctness of validity to be given the “decision” with an affirmative duty on the challengers to prove why it is invalid, to the Supreme Court of Florida’s Pitsirelos statement that the “decision” comes in like any other evidence but with no presumption. Despite this straightforward approach in Pitsirelos, there needs to be further clarification due to the logical inconsistency in the Supreme Court of Florida’s trial de novo holding and then its determination that no presumption attaches to an arbitration result.

The Pitsirelos court seemingly has no idea of what form or manner these lemon law arbitration “decisions” are to be written and prepared, or from a practical standpoint the impact such a “decision” has at trial. A “decision” by the Board contains official “Findings of Fact” and “Conclusions of Law.” The lay people on the arbitration panel do not write this document—the Assistant Attorney General who acts as counsel to the Board does. This document, written by the Attorney General, usurps both the judge and jury function in the circuit court’s trial de novo. Obviously, the court in Pitsirelos did not realize this fact or its true impact at trial. Justice Overton, whether or not he understood, makes oblique reference to a favorable “decision” being a strong piece of evidence to present.

367. The statute makes these Decisions of the Board admissible in evidence in any civil action. FLA. STAT. § 681.1095(9) (1999).
368. Id. § 681.1095(9) (1999).
369. Pitsirelos, 721 So. 2d at 713.
370. Id. at 715–16.
As a practical matter this "decision" as evidence is indeed significant, particularly in a jury trial. From a trial lawyer's standpoint these "Findings of Fact" and "Conclusions of Law" are daunting to overcome after the jury sees them, usually in a trial board poster size format. Just looking at the document may be persuasive to the jury—especially with its large print of "Findings of Fact" and "Conclusions of Law." Moreover, this also may potentially confuse a jury since the trial judge tells them, through instructions, that the court decides questions of law and they, the jury, decide the facts. Yet, in the arbitration "decision" both are already recited.

A. Background of Evidentiary Presumptions

In order to have any presumption in Florida, the Lemon Law Arbitration Panel has to be elevated to the status of a public official or body. Several districts, most notably the Fifth District in Mason II, gave the arbitration decision a presumption of validity. To the extent it is inconsistent with Pitsirelos, Mason II is overruled by the Supreme Court of Florida's decision. None of these courts, however, truly analyze why this statutory Board should or should not be elevated to such a lofty plateau. Although Pitsirelos reaches the correct result in denying a presumption, it gives little rationale for the decision on the issue.

The court in Mason II held that the arbitration award was to be given a presumptive validity of correctness. This presumption is like a lower tribunal decision in "the context of an appeal." That court stated: "[T]he 'presumption' terminology we utilized in Mason and Sheehan was intended to refer to the presumption of validity of a lower tribunal's decision in the context of an appeal." The trial judge in Mason entered a ruling that the presumption for the arbitration decision was a "bubble-bursting" type. Once competent evidence is adduced, however, that presumption vanishes. That analysis is rejected in Mason II. The appellate court, for support,

372. Mason II, 688 So. 2d at 370.
373. See Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).
374. Id. at 715.
375. Mason II, 688 So. 2d at 370.
376. Id.
377. Id.
378. Id. A property appraiser's valuation carries a presumption of correctness. Id. It is a "burden" shifting presumption, and not a "bursting bubble." Mason II, 688 So. 2d at 370. Public policy considerations governed the establishment of that burden shifting. Id. Thus, in a circuit court action initiated by a taxpayer they have the burden to produce evidence of the "non-existence of the fact presumed—that is, that the Property Appraiser's assessment is not correct." Wetherell, supra note 228, at 226.
looked to its conclusionary language in Sheehan and Mason I that a "trial court is to grant the Board's decision a presumption of validity." As such, the Fifth District in Mason II holds that it is error for the trial court not to do so in the de novo proceeding.

This Mason-Sheehan presumption of validity means it also affects the burden of proof. In a way, this determination is the tail that wags the dog. Because the arbitration decision carries a presumption which shifts the burden of proof to the party attacking it, at the de novo trial the party opposing that decision is the plaintiff. In effect that presumption alters the nature of the de novo proceeding and makes it something different from what a trial de novo has traditionally been understood to be. This evidentiary presumption forces the de novo proceeding to be more like an appeal. Of course, in all appellate cases as amicus curiae the AG's argument has been for the highest possible evidentiary presumption for an arbitration decision.

Although Mason II came after Mason I and Sheehan, its result can be said to have been driven by the Fifth District's initial view in those earlier cases, that arbitration boards are analogous to a court, a formalized arbitration proceeding, or some public body. Thus, the "decision" comes to the reviewing court de novo with a presumption of correctness. One problem from Mason II on this issue, and not addressed, is what happens if the presumption is rebutted? Does the jury or trier of fact merely decide who wins on a general verdict form, or is there to be a specific verdict finding that evidence sufficient to overcome the presumption has been presented? No appellate case has ever tried to evaluate the basis of this rebuttable presumption as it applies to a lemon law arbitration board decision. That is to say, is it public policy or something else? (The AG's amicus briefs have argued as such.) Does this concept of the arbitration board being a lower tribunal mean that the decision is to be considered a "judgment" which is presumed to be correct? And, what is the burden of proof necessary to overcome this presumption, the greater weight or clear and convincing evidence?

379. Mason II, 688 So. 2d at 369 (emphasis omitted).
380. Id.
381. Sheehan was a bench trial, and one not by jury.
382. See Public Health Trust of Dade County v. Valcin, 507 So. 2d 596 (Fla. 1987).
384. Id. § 304.1 at 90.
385. See generally Palm Beach v. State, 342 So. 2d 56 (Fla. 1976); Boardman v. Esteva, 323 So. 2d 259 (Fla. 1975).
386. See Melbourne State Bank v. Wright, 145 So. 598, 601 (Fla. 1932).
The legislature could have said that arbitration board decisions under section 681 are to be given presumptive validity in a subsequent judicial proceeding. The legislature has done so in other situations. Yet, in section 681 they did not.

The only authority on this point within Mason II is Hollywood Jaycees v. Department of Revenue. Hollywood Jaycees is a constitutional due process case where the Department of Revenue ("DOR") reversed a board of adjustment tax exemption without affording notice or a hearing to the adversely affected taxpayer. It is a case decided under section 120 and has, therefore, no application to section 681 which specifically excludes the Arbitration Board from the administrative procedures of section 120. Of course, an administrative law proceeding is conducted in accordance with the rules of evidence. In Lemon Law arbitration, the rules of evidence do not apply.

B. The Pitsirelos Ruling on Presumptions Did Not Clarify the Issue

In Pitsirelos, the Supreme Court of Florida, as noted, held that there was no evidentiary presumption of correctness to be given a lemon law arbitration decision. Pitsirelos overruled Mason II on that point. The court interpreted section 681 at face value, whose provisions only say that the "decision" is admissible. To give it some evidentiary presumption would raise serious constitutional problems. Despite this correct ruling, the Pitsirelos court did not go far enough in its analysis. Also, Pitsirelos does not grapple with the practical effect such a decision has when introduced into evidence.

It is imperative for the Supreme Court of Florida, and other courts, to recognize the true nature of these arbitration board "decisions." As an example, the Mason "decision" is attached as an Appendix to this article. Perhaps, if judges do understand the true nature of this type of "decision," then some evidentiary restriction of its use might occur. Justice Overton, in his Pitsirelos concurring and dissenting opinion, indicates a better understanding of the nature of these "decisions."
understanding of the nature of the document and its impact if introduced into evidence.\textsuperscript{397} What Pitsirelos should have done is to hold that the “Fact” of the Arbitration Board’s decision is admissible, that is to say, the result only.\textsuperscript{398} Such a holding still is consistent with section 681.1095(9). On the other hand, if the Supreme Court of Florida wants to let the “decision” in its entirety come into evidence, then it should revisit its foundational decision that the trial de novo is not an altogether new proceeding but something closer to an appeal.

Under the analysis of this article, with a trial de novo at circuit court being truly a new proceeding, the plaintiff/consumer already has a substantial piece of evidence to support his or her case. The administrative regulations require that a lot of information be contained in the “decision” including “findings of fact,” “a conclusion with supporting rationale of whether the standards for refund or replacement have been met,” and “a statement of the remedy,” among other things.\textsuperscript{399} It is just as usable to a manufacturer should it win and the consumer requests a judicial proceeding. At trial this document carries persuasive impact even without any evidentiary presumption, particularly on a lay jury. It is an affirmative piece of evidence for a consumer to have, as any trial lawyer can clearly see.\textsuperscript{400}

This written “decision” comes into evidence almost like an expert’s report, yet no foundation or predicate has to be established. There is hearsay and double hearsay in the “decision,” conclusions of law, and findings of fact. This all has formidable evidentiary persuasiveness, even in a real trial de novo. Thus, the arbitration board and its “decision” do not become a meaningless “way station” on the road to the courthouse, as feared by Mason I.\textsuperscript{401}

V. THE ATTORNEY GENERAL’S ROLE IN THE LEMON LAW ADMINISTRATION

Neither the legislature nor any court has examined the role played by the Attorney General in these Lemon Law proceedings. There is a potential

\begin{itemize}
\item \textsuperscript{397} Pitsirelos, 721 So. 2d at 715.
\item \textsuperscript{398} See id.
\item \textsuperscript{399} FLA. ADMIN. CODE § 2-32.033(5)(a)–(f), (6) (1993).
\item \textsuperscript{400} This procedure might also benefit the Attorney General since, with the presumption, it may be less likely anyone will want to depose arbitrators which the Attorney General so vehemently opposes.
\item \textsuperscript{401} See Bystrom v. Equitable Life Assurance Soc’y, 416 So. 2d 1133, 1147 (Fla. 3d Dist. Ct. App. 1982) (Pearson, J., concurring in part). “[T]he Circuit Court litigation will proceed as any other original litigation, unaffected by the results of the administrative resolution. In our view, the Legislature, by providing that the Circuit Court proceeding be de novo, intended it to be no other way.” Id.
\end{itemize}
conflict of interest which is being ignored by the AG. This can be readily seen when the Lemon Law role of the AG is examined.

The true administrative power behind the Lemon Law program is the AG’s Office. The regulations controlling how the arbitration process works are formulated by the AG. An entire division and staff within the Attorney General’s Office has been created to regulate and administer the Lemon Law. Although the Division of Consumer Services is also involved in the program, its role is limited and inconsequential when compared to that of the AG.

The AG’s role here creates a potential conflict of interest which in turn taints the objectivity of the arbitration process, or at a minimum creates an appearance of impropriety. This is because the AG’s Office wears different hats in its roles as Lemon Law administrator and counselor. As noted, the AG’s Office promulgates the regulations which control the process. On a practical basis, it answers questions from consumers. Its consumer manuals provide, in essence, legal advice to those wanting to utilize the Lemon Law. The AG also selects the arbitrators and qualifies those who sit on the panels. Moreover, the AG serves as legal counsel to the arbitration board. According to the sworn testimony of the arbitrators in Mason depositions, their “Findings of Fact” and “Conclusion of Law” to support the “decision” were drafted/written by the staff counsel from the AG’s Office. The Mason Arbitrators did not see the final written “decision” after it was

402. See Fla. Stat. § 681.109 (1999); Fl. Admin. Code §§ 2-30.001(1), 2-32.002(1), (2) (1993). The Executive Director of the Lemon Law Arbitration Program is a member of the Attorney General’s Office. “The Florida New Motor Vehicle Arbitration Board is administered by the Office of the Attorney General.” Butterworth, Consumer Guide to the Florida Lemon Law 5 (1997) (emphasis added). The Division of Consumer Services of the Department of Agriculture and Consumer Services also has a role, more limited than the AG, under Section 681. See id. § 681.102(7). The Division becomes more involved with administration aspects of a consumer filing a request for arbitration. Their role is, however, limited. Id. § 681.109(2)–(6). The Division is also involved in certifying manufacturer’s informal dispute settlement programs. Id. § 681.108.


404. Id. The Lemon Law Arbitration Program is substantial within the Attorney General’s Office. For 1997–98, the total operating budget is $1,675,851. Ofc. of Attorney General Budget, provided by facsimile on 3/17/98 at 11:00 AM. Salaries and benefits were budgeted at $1,086,058. In 1995-1996, salaries and benefits were $890,331. Id.

405. See Fla. Stat. § 681.103(3) (1999); Butterworth, supra note 21 (discussing the contents of the Lemon Law rights booklet provided to consumers).


407. Id.

drafted by the AG, which was based on the AG’s staff attorneys’ notes taken during the proceedings.\footnote{409}

The AG has a vested interest in the Lemon Law operation. The AG certainly obtains political benefits from a program that helps consumers, and this should not be minimized. For example, elaborate compilations of statistical data are prepared by the AG to publicize the effectiveness of the program.\footnote{410} In addition, press releases are issued to trumpet Lemon Law achievements, thanks to the Attorney General.\footnote{411} The Lemon Law provides a political vehicle which allows the AG to champion, rightly or wrongly, a philosophical position of consumerism. In a rhetorical sense, what politician is going to stand up and say that consumers in the electorate are getting too much? Certainly not a popularly elected AG. In its political and administrative roles, the AG wields essentially unrestricted power, unless the judiciary becomes involved. Accordingly, the AG’s Office may not be totally without bias in its Lemon Law involvement.

\footnote{411. Here is a sampling of some News Release(s) from the Office of the Attorney General:

\textit{November 25, 1996} - "Florida's Lemon Law Arbitration Program has crossed the $100 million mark in refunds and replacements for consumers whose new motor vehicles were chronically defective, Attorney General Bob Butterworth and Department of Agriculture & Consumer Services Commissioner Bob Crawford announced today. *** 'To provide this amount of consumer relief in fewer than eight years of operation is remarkable,' Butterworth said. 'It shows that Florida's Lemon Law program is probably the most effective in the nation.'"

\textbf{Florida Lemon Law Program Reaches $100 Million Milestone, NEWS RELEASE (Fla. Atty. Gen.), Nov. 1996.}

\textit{February 19, 1996} - "Walter Dartland has returned to the attorney general's office to oversee the agency's Lemon Law Arbitration Program and develop consumer protection strategies for Attorney General Bob Butterworth."


\textit{August 15, 1997} - "Attorney General Bob Butterworth has announced that his office's Internet home page now contains a list of vehicles bought back by manufacturers in connection with Florida's Lemon Law since 1989. 'Using that list, a shopper can determine whether the vehicle they are interested in buying was repurchased in Florida by a manufacturer because of complaints of chronic problems,' Butterworth said."

Thus, the administrative and legal roles of the AG's Office should be recognized for what they really are. The Lemon Law is big political business.\textsuperscript{412} The AG's Office, for all practical purposes, acts as Ombudsman counsel for the consumer. For example, on every known reported appellate opinion discussed in this article, the AG's Office has argued as \textit{amicus curiae} for a strong consumer position.\textsuperscript{413} It did so again before the Supreme Court of Florida in \textit{Pitsirelos}\.\textsuperscript{414} When the briefs of the AG are read, one has no doubt that they are committed, single-mindedly, to expanding the program and consumer rights and to protecting their political fiefdom, and power base.\textsuperscript{415} There is nothing wrong with this. One should not be, however, naive about it or turn away from this political reality.

As the \textit{Mason} litigation demonstrates, the AG is an aggressive watchdog in protecting the legal and statutory turf it has created for itself.\textsuperscript{416} As with any governmental power, the potential for creeping abuse and expansion is endemic. \textit{Mason} is the first case where arbitrators were actually deposed.\textsuperscript{417} The AG's Office vigorously fought to prevent these depositions, entering appearances in the \textit{Mason} case on several different occasions.\textsuperscript{418}

The absence of something less than an objective interest can be clearly seen in \textit{Mason II}, where the AG once again appeared as \textit{amicus} for the

\textsuperscript{412} The Attorney General's record during an election revealed that work done for consumers in the Lemon Law area obviously proved valuable.

\textsuperscript{413} See, e.g., Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998); BMW of N. Am., Inc. v. Singh, 664 So. 2d 266 (Fla. 5th Dist. Ct. App. 1995); General Motors Corp. v. Neu, 617 So. 2d 406 (Fla. 4th Dist. Ct. App. 1993); Sheehan v. Winnebago Indus., Inc., 635 So. 2d 1067 (Fla. 5th Dist. Ct. App. 1994).

\textsuperscript{414} \textit{Pitsirelos}, 721 So. 2d at 710.

\textsuperscript{415} See \textit{Amicus Brief for the Attorney General of the State of Florida; Mason v. Porsche Cars of N. Am., Inc.}, 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993).

\textsuperscript{416} Mason v. Porsche Cars of N. Am., Inc., 688 So. 2d 361 (Fla. 5th Dist. Ct. App. 1997); Mason v. Porsche Cars of N. Am., Inc., 621 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993). In \textit{Mason}, the Attorney General was involved both at the trial level and the appellate level, and even after the second appeal. Additionally, the Lemon Law Arbitration Program had a staff budget of $1,675,851 in 1997-1998. Between July, 1996 and June, 1997, the Department of Revenue collected $1,877,997 for fees on the $2 per vehicle charge required by section 681.117 of the \textit{Florida Statutes}. Mason I, 621 So. 2d at 719; Mason II, 688 So. 2d at 361.

\textsuperscript{417} Mason II, 688 So. 2d at 370.

\textsuperscript{418} The manufacturer subpoenaed for deposition the three arbitrators from the \textit{Mason} panel. The AG filed a motion to quash and for protective order. The trial judge, on October 14, 1994, denied that motion in part and granted a protective order in part. The trial court also denied the AG's motion to quash trial subpoenas. The three arbitrators testified in the first \textit{Mason} trial. In \textit{Mason II}, the AG was an \textit{amicus} again. Mason II, 688 So. 2d at 364. The Fifth District expanded the scope of the discovery. \textit{Id}. The arbitrators testified also in the second trial. \textit{Id}. at 366.
consumer.\textsuperscript{419} In that appeal, while on the one hand arguing for a high threshold rebuttable evidentiary presumption for an arbitration decision,\textsuperscript{420} the AG on the other hand also argued to preclude any depositions or trial testimony from arbitrators.\textsuperscript{421} This latter position would have prevented a manufacturer, or even a consumer, from developing evidence to overcome the strong presumption of correctness the AG Office wanted for arbitration decisions.\textsuperscript{422} The Attorney General in \textit{Mason II}, after arguing that a manufacturer should not be able to depose an arbitrator or subpoena one for trial in order to overcome a presumption of correctness of the “decision,”\textsuperscript{423} attempted to elevate the Board to the status of a constitutional public official. Their Brief stated:

[T]he New Motor Vehicle Arbitration Board was established by the Legislature within the Department of Legal Affairs and consists of members appointed by the Attorney General, a officer. . . . The Arbitration Board acts collectively in the capacity of a public official and the party aggrieved by its decision may seek trial \textit{de novo} in circuit court.\textsuperscript{424}

Their argument is that the Board’s “decision” should have a presumptive validity which shifts the burden of proof to the challenging party, but that party should not then be able to develop testimony to rebut the “decision” or to undermine it.\textsuperscript{425} The AG clearly wants to have its cake and eat it too.\textsuperscript{426}

Even after \textit{Mason II}, when the Fifth District had ruled that arbitrators could testify and be deposed, the AG again entered an appearance in the trial court with new motions for protective orders, arguing that their handpicked

\textsuperscript{419} See \textit{Mason II}, 688 So. 2d at 363.
\textsuperscript{420} Initial Brief of \textit{Amicus Curiae}, at 17–21, Mason v. Porsche Cars of N. Am., Inc., 689 So. 2d 349 (Fla. 5th Dist. Ct. App. 1995).
\textsuperscript{421} Id.
\textsuperscript{422} Let there be no mistake, the AG’s Office views these arbitrators as quasi-judicial, deserving the same protection from discovery as a judge. \textit{See} Motion to Quash and for Protective Order, Case No. CI 94-1691, § 4, at 2–4 (Sept. 23, 1994).
\textsuperscript{423} Initial Brief of \textit{Amicus Curiae}, at 12–17, Mason v. Porsche Cars of N. Am., Inc., 689 So. 2d 349 (Fla. 5th Dist. Ct. App. 1995).
\textsuperscript{424} Id. at 18–19.
\textsuperscript{425} Id.
\textsuperscript{426} This is an example as to why the AG’s Office may not fairly and impartially handle its role, and that either its involvement should be recognized for what it is or a different procedure established. There is, it is submitted, an appearance of impropriety with the way it is involved and the power the Attorney General wields in this area. \textit{Cf.}, Migliore v. City of Lauderhill, 415 So. 2d 62, 64 (Fla. 4th Dist. Ct. App. 1982) (recognizing that a police department complaint review board, composed exclusively of law enforcement personnel, “gives the impression of impropriety” when asked to determine the rights of the public “and one of its own.”).
arbitrators were exempt from testimony. This evidence had been sought in Mason, for litigation strategy purposes even if the arbitrators remembered nothing, in an attempt to diminish the putative importance of the arbitration "decision." To win the Mason case at trial, that "decision" had to be undermined since the Fifth District had given it presumptive validity. Regardless of the case, jurors should have the opportunity to see and hear these arbitrators before deciding whether to defer their own judgment to that of the arbitration "decision." This is particularly necessary if the written "decision" document comes into evidence. This "decision," like any piece of evidence, should be subject to cross-examination and to challenge.

The administrative procedures promulgated by the AG establish a quasi-judicial function for these arbitration boards which creates a separation of powers issue. For example, the Attorney General's public position in court has been that these board members are "public officials." That is because these arbitrators are appointed by the AG, who is a public official and a constitutional officer. Thus, the AG regulates the system, provides legal advice to one of the parties as well as to arbitrators themselves, and then actually writes the "decision" for the board. These are just too many hats for the AG to wear. The supreme court, in Pitsirelos, did not really have this type of evidence presented to it in deciding that case, so that separation of powers was not violated.

As discovered in Mason, arbitrators are not required to be lawyers, or members of professional arbitration organizations like AAA. Many are retired and participate either for the money or as part of community service, or both. All of that is fine. But it does not make them public officials or

427. See Arbitrators Motion for Protective Order, Case No. CI 94-1691, § 3 (Oct. 14, 1997). This motion attacked the trial subpoena for the three arbitrators on the retrial. It was argued the arbitrators, even after Mason II, "be protected from testifying at all in the second trial of this case, as any testimony they may have would be irrelevant to the issue on appeal and at best, such testimony would be merely cumulative of the Board's written decision, which is admissible in evidence." Id.


429. Mason II Brief, at 19 n.5.

430. Id. at 18–19.

431. Pitsirelos, 689 So. 2d at 1134.

432. Section 681.1095(3) of the Florida Statutes only requires arbitrators to "be trained in the application of this chapter ...." FLA. STAT. § 681.1095(3) (1999). However, "at least one member of each board must be a person with expertise in motor vehicle mechanics." Id. No member may be employed by an automobile manufacturer or dealer "or be a staff member, a decisionmaker, or a consultant for a procedure." Id. A "procedure" means "an informal dispute—settlement procedure established by a manufacturer to mediate and arbitrate motor vehicle warranty disputes." Id. § 681.102(17).
constitutional officers, or elevate them to a higher level. They do not seem to fit anywhere within the Article II, section 5 definition of the Florida Constitution, or as defined by other statutory provisions.

The AG's public reliance on section 112 of the Florida Statutes in its briefs to create a legal status for these board members is misplaced. Section 112.061(2)(c) defines a public officer as follows:

An individual who in the performance of his or her official duties is vested by law with sovereign powers of government and who is either elected by the people, or commissioned by the Governor and has a jurisdiction extending throughout the state, or any person lawfully serving instead of either of the foregoing two classes of individuals as initial designee or successor.

Lemon Law arbitrators are not employees or public employees since they are not fulfilling a "regular or full-time authorized position." Despite this argument, surely it would be the AG's position that these "officers" or quasi-judicial officials are not subject to the financial disclosure provisions of section 112.3145.

The issue arises, therefore, about whether it matters that the AG's Office has a purported conflict of interest due to its various roles within the Lemon Law process. It is somewhat analogous to Migliore v. City of Lauderhill, where the court saw a potential conflict of interest, although in a different context, but arguably not unlike the role the AG plays in the Lemon Law. Migliore points out the following:

Further, the fact that the board is required to be composed of law enforcement personnel belies the kind of impartiality and lack of bias that are ordinarily requisites of a panel established to determine substantive rights between the body politic (standing in

434. FLA. STAT. § 163.340(20) (1999). ""Public officer" means any officer who is in charge of any department or branch of the government of the county or municipality relating to health, fire, building regulations, or other activities concerning dwellings in the county or municipality." Id. §§ 843.0855(1)(c), 219.01(1).
435. Id. § 112.061(2)(c) (1999).
436. Id. § 112.061(2)(d).
437. Section 112.3145 of the Florida Statutes requires specified state employees and state officers to file a "statement of financial interests" with the Secretary of State every year, detailing enumerated items of income. Id. § 112.3145.
438. 415 So. 2d 62 (Fla. 4th Dist. Ct. App. 1982).
439. Id. at 64.
the shoes of the taxpayer) and one of its own whose right to continue to represent and therefor to financially benefit from that body politic has been challenged. We do not mean to suggest that a complaint review board so constituted would necessarily act in a biased manner; only that it gives the impression of impropriety, which the legislature would obviously have avoided at all costs.\footnote{440}

This quotation highlights a fundamental flaw in the Lemon Law. It now functions with the pervasive involvement of the AG's Office. This factor should not be overlooked when determining whether or not to overhaul the statute.

VI. FUTURE CONSIDERATIONS AND ACTIONS

Probably on different levels of interest, none of the competing and contesting parties in the Lemon Law debate are happy with its present status. For example, things have not gone far enough for the consumer or the Attorney General. For the manufacturer, the Lemon Law has become a business sensitive process, particularly in a marketing era when "customer satisfaction" totally fuels the quest for selling the product.

To be sure, however, whether it is the courts or the legislature someone needs to examine closely the role the AG's Office plays in the Lemon Law. At present, it basically roams the Lemon Law plains unrestricted and unfettered. The public positions taken by them are legally insupportable. The AG's \textit{amicus curiae} arguments illustrate a lack of objectiveness, while demonstrating a constant interest in protecting it's statutory kingdom.\footnote{441}

One thematic basis of this article has been that the courts should not step into this political fracas, which so clearly highlights the contentious arguments over divergent Lemon Law positions. Whether a judge philosophically believes any of this is good or bad legislation, or despite his or her own personal experiences with buying a motor vehicle—and everyone has had them—none of this should be a factor. But, of course, no one in the real world believes this is very likely.

Nevertheless, any structural modifications to section 681 should be accomplished through the legislative process. That branch of government can best examine the experiential data, what the courts have done, political factors, and the empirical evidence to decide what changes, if any, to make. For example, one law student commentator, in light of appellate court

\footnote{440} \textit{Id.}

\footnote{441} \textit{See} Amicus Brief for the Attorney General of the State of Florida, Mason v. Porsche Cars of N. Am., Inc., 620 So. 2d 719 (Fla. 5th Dist. Ct. App. 1993).
decisions, proposes to have the legislature eliminate the trial de novo provision altogether. 442

The judiciary should not attempt to play a superlegislative role here. Its participation should be more in line with the "nature of the judicial process," and not taking sides on what is in essence a political issue. A judicial role can be best undertaken by a more historically accurate approach to the legal analysis when deciding a dispute under this law. For example, the Supreme Court of Florida, in Pitsirelos, tries to take the approach of Solomon. 443 It adopts the AG's strongly consumeristic position—that the manufacturer who lost at arbitration is the plaintiff and a trial de novo does not retain its traditional meaning with the consumer starting over. 444 Then, it rejects the AG's consumerism position that the "decision" of the Board must have a rebuttable evidentiary presumption. 445 In doing so, the Supreme Court of Florida only creates more inconsistency between legislative intent, strict judicial construction, and the "real" world within which Lemon Law lawyers have to operate.

Listed below are several action plans that are options for these different branches of government to consider.

A. Legislative

To properly balance the competing social and economic interests existing between consumers and manufacturers, the legislature is more ideally suited to take up this task. Through the legislature, the debate and decision-making can, for political considerations, better dictate the future of the Lemon Law. The AG can weigh in on the political side, as he has done in the past, to argue a particular position. After all, the Attorney General is a political post, not an ostensibly neutral or unbiased position, nor should it be. Into this political recipe, motor vehicle dealers, distributors, manufacturers, and trade associations can bring whatever influence their positions can bear to the process. It is better to allow these competing interests, all vested, to battle there between AG/consumer and manufacturer rather than in a judicial forum where the fundamental analysis should be different from what is utilized in the political arena.

First, the legislature should decide what is the proper role for the AG's Office. It is now hard to see an unbiased interest in the AG as the law presently exists and operates. The appearance of impropriety overwhelms the AG's involvement since it is charged with selecting the arbitrators,

442. Daiker, supra note 21, at 270.
443. See Chrysler Corp. v. Pitsirelos, 721 So. 2d 710 (Fla. 1998).
444. See id. at 713.
445. See id. at 714.
giving advice to consumers, running the program, providing legal counsel to the panels, writing the "decisions," making legal interpretations for the board, while at the same time performing the executive branch role of enforcing the law against the manufacturers. This juggles too many different responsibilities.

One solution is to codify for the Attorney General what it already does anyway, which is to act as ombudsman counsel for the consumer and create, in turn, a different arbitration process like some other states have done using professional arbitrators. Hearings can still be held geographically and proceed expeditiously. The integrity of the process, however, might be less suspect. Manufacturers are now routinely appearing with counsel at arbitration proceedings because they are so important and the adverse consequences too great. Let the AG's staff participate for the consumer since it is their position to interpret section 681 to benefit the consumer, as a matter of public policy. It is most essential to elevate the skill and professional level of the arbitration process.

Several years ago, a proposal was circulated to have the arbitration hearings handled as an administrative law procedure under the auspices of the Office of Administrative Law Judges ("ALJ"). Although this would formalize the procedure, it would also serve to more clearly reflect the realities of the Lemon Law process. If an ALJ is involved the evidentiary integrity of the proceedings is maintained. Thus, if the burden of going forward remains on the party appealing to the circuit court, then the underlying process should have more guarantees of trustworthiness to create more reliable results. Also, the AG's Office can act as legal counsel to the consumer and be officially designated as such, which it is anyway at least de facto under the present system.

Finally, increased program costs can be handled by user fees. Already two dollars per motor vehicle is charged to fund the program. Under section 681.117(1) these fees "shall be transferred monthly to the Department of Legal Affairs for deposit into the Motor Vehicle Warranty Trust Fund." This fee is collected when each "new" vehicle is sold. Needless to say, quite a few new motor vehicle registrations occur in Florida each year, and this will only continue to increase. This or a slightly higher

446. FLA. STAT. § 681.117(1) (1999).
447. Id.
448. Id.
449. According to Department of Revenue figures, the remittance fees collected for the $2 per vehicle charge from July, 1996 through June, 1996 was $1,877,977. (Data from D.O.R. Research and Analysis Div., 3/23/98). There are certainly an ample number of new vehicle registrations in Florida from which fees can be generated. The R.L. Polk Company's National Vehicle Population Profile, as of July 1, 1996, indicates for the 1996 model year that 834,669 domestic cars, import cars, and light trucks were registered in Florida.
fee could generate ample funds to support any basic structural changes to section 681.

Second, if fundamental legislative changes are not implemented then ambiguities in the present law should be addressed. If the legislature intends that trial de novo be just that, then the law should be clarified. The "appeal" language can be eliminated, and a clearer statement made as to what a trial de novo is. Still, the "decision" can come into evidence for whichever party benefits, just like any other evidentiary matter, but without foundational hurdles having first to be satisfied. If the legislature intends the "appealing" party to have the initial burden and the proceeding in circuit court be like an appeal, as Pitsirelos and Mason I have held, then it can be specifically stated. The legislature has done this with other statutes, such as section 194. Additionally, if the "initiating" party is not to carry a burden, then the statute can also be amended to state that. Finally, the issue of whether the "Decision of the Board" is to have an evidentiary presumption should be addressed. The legislature can specify whether it should or should not, and if so what type of presumption. For example, section 681.1095(9) might be rewritten to say only that the fact or result of the arbitration decision can be admitted into evidence, but not the physical "decision" document itself. These are basic language changes that can be effectuated easily, and would clear up much legal uncertainty.

B. Judicial

The cases of Mason I and Pitsirelos were wrongly decided on what is a trial de novo under section 681.1095(12). Regardless what the legislature does, or fails to do, these Lemon Law issues will not go away. Thus, here are several suggestions for attorneys and judges to consider and analyze.

First, the Supreme Court of Florida, if the opportunity comes again, should follow more closely the analysis set forth in this article. It should revisit its erroneous trial de novo ruling in Pitsirelos. As argued herein, a different result than the one reached from Mason I and Pitsirelos would still be consistent with the existing legislative intent behind section 681.

Second, constitutional challenges to the statute must be well founded. Any broad-based constitutional attack on section 681, or its individual provisions, will likely fail. Certainly, at the trial courts and the appellate districts. The Supreme Court of Florida’s response to the constitutional challenge in Pitsirelos, signals where that presently constituted court wants

450. See Mason I, 621 So. 2d at 722; Pitsirelos, 721 So. 2d at 713.
451. See FLA. STAT. § 194.036(3) (1999). "The circuit court proceeding shall be de novo, and the burden of proof shall be upon the party initiating the action." Id. § 194.034(6)(c).
the districts to go. Courts from other jurisdictions have also rejected broad-based constitutional challenges to Lemon Laws.\(^\text{452}\) If a constitutional attack is mounted it should be directed, under the present procedures, at how the law operates and its effect on a case specific basis. The court in *Pitsirelos* left this door open. The law may be facially constitutional, but as applied it may be another matter. To make a constitutional argument effective, the challenging party must develop record support for the applicational unfairness and deficiencies in the law. This should include empirical data, experiential support, and attacks on the arbitration process, its selection, implementation, and source. Simply, a "Brandeis Brief" approach is required. Discovery directed to the AG’s Office would be a necessity, although quite naturally the substantial resources of that office would object. A court hearing such a constitutional challenge must be able to see and understand how this arbitration system works. Videotaping hearings, retaining university professors to study the fairness of the lemon law arbitration process to provide expert testimony, and deposing arbitrators all would be necessary tools to mount such a valid constitutional challenge. In short, this would be a substantial and costly effort for both sides, which might be better compromised in a political and not a judicial venue.

Third, if the courts are going to let the entire written "decision" with "Findings of Fact" and "Conclusions of Law" come into evidence, then the proceeding in circuit court should truly be de novo. The consumer can present evidence of the arbitration award, and that may be all that is needed. The initial burden of going forward with proof, however, should still rest with the party claiming the motor vehicle to be a "Lemon." From a practical standpoint, particularly in a jury trial, having the evidence of the arbitration award of "Findings of Fact" and "Conclusions of Law" will obviously be powerful. Subliminally, in and of itself this may carry the day. Alternatively, the Supreme Court of Florida can later read the statute to require only the fact or result of the arbitration "decision" be put into evidence, and not the physical document itself.

Fourth, the Supreme Court of Florida should prepare a new standard Jury Instruction relating to the legal effect of a board’s "decision." This will help clear up confusion on the jury’s part if the full document comes into evidence. It will also ensure that too much influence is not placed on it at trial.

Fifth, the courts should not perform a legislative role in interpreting section 681 to effect a particular philosophical or social result. In light of the way the Lemon Law is set up and the AG’s involvement, a strict judicial interpretation of the statute should be followed. Ample protections are built

\(^{452}\) See, e.g., *Lyeth v. Chrysler Corp.*, 929 F.2d 891 (2d Cir. 1991); *Chrysler Corp. v. Texas Motor Veh. Comm’n*, 755 F.2d 1192 (5th Cir. 1985).
in the statutory scheme to prevent unfairness to the consumer.\textsuperscript{453} The judiciary should not help rewrite the statute.

Finally, it might be argued that the latest Fifth District case of \textit{Ford Motor Co. v. Starling}\textsuperscript{454} highlights the problem of literally applying the trial de novo analysis set forth in this article.\textsuperscript{455} \textit{Starling}, in fact, does just the opposite. What Ford did was to stipulate away its right to argue that the coach builder had created the problem.\textsuperscript{456} It is a stipulation and Ford should have been bound by it whether this circuit court action was a true de novo proceeding or not. That simply was not an issue on the lemon law claim. Certainly Ford could have requested the trial court for leave to bring in Coachmen, the coach builder, on that issue. The trial judge could entertain that, if good cause existed, in a trial de novo or not. The opinion in \textit{Starling} is silent about the record before the arbitration panel.\textsuperscript{457} That is, whether the manufacturer’s written responses, its written declaration of a final repair attempt, or anything in the repair records indicate if Ford had even looked at the “puck” issue before going to circuit court. On the record presented, this seems to be simply a case where the manufacturer stipulated away one of its defenses.\textsuperscript{458} Trying to argue it thereafter was one of the reasons for the trial court’s finding of bad faith in bringing the circuit court action.\textsuperscript{459}

If anything, \textit{Starling} demonstrates the effective reins put on a manufacturer if it brings a subsequent legal action in bad faith. The consumer is afforded the same level of protection under the pure trial de novo theory.\textsuperscript{460} The manufacturer in \textit{Starling} simply did not overcome evidence presented of a nonconformity, and in its effort to do so tried to use a defense that had been stipulated away.\textsuperscript{461} And for that conduct the manufacturer paid an enhanced price, plus attorneys’ fees—which was not highlighted in \textit{Starling}. The legislative intent of section 681, to protect the consumer, is satisfied in \textit{Starling} not because the de novo was in the nature of an “appeal,” but due to the manufacturer bringing an action to circuit court it should not have. This will be a deterrent next time. \textit{Starling}’s result should not have been different had the trial been truly de novo.

\textsuperscript{453} See \textsc{fla. stat.} § 681.
\textsuperscript{454} 721 So. 2d 335 (Fla. 5th Dist. Ct. App. 1998).
\textsuperscript{455} \textit{Id.} at 335.
\textsuperscript{456} \textit{Id.} at 336.
\textsuperscript{457} See \textit{id}.
\textsuperscript{458} See \textit{id}.
\textsuperscript{459} \textit{Starling}, 721 So. 2d at 340.
\textsuperscript{460} \textit{Id}.
\textsuperscript{461} \textit{Id}.

\url{https://nsuworks.nova.edu/nlr/vol24/iss1/1}
VII. CONCLUSION

This article has been intended to provide an analysis of why it is necessary to change the lemon laws from their present existence to a more evolved and comprehensive law. The business of the Lemon Law is only going to grow in the future. Its economic consequences will continue to be profound to all interested parties. As the law presently exists, both from a statutory and judicial standpoint, it is flawed.
I. INTRODUCTION

School vouchers and private school choice have been coined the “civil rights movement of the 1990s,” galvanizing a passionate political debate throughout society.¹ Not since school desegregation has there been a controversy of such great social impact, polarizing so many different

¹ Dominick Cirelli Jr., Utilizing School Voucher Programs to Remedy School Financing Problems, 30 Akron L. Rev. 469, 469 (1997). See also David Wasson, With Vouchers Signed Into Law Options Begin, The Tampa Tribune, June 22, 1999, at 1 (quoting Florida Senator Tom Lee who acknowledged the tense political debate over vouchers and would have preferred that vouchers were introduced as a pilot project: “I called it on the [Senate] floor the abortion issue of education, because everyone has strong feelings about the subject.”).
While twenty states have introduced voucher bills, only a
deficit have been enacted. Additionally, although politicians herald the
importance of vouchers, "when offered the opportunity to vote on voucher-
like programs, the public has consistently rejected them." 2

On June 21, 1999, Florida Governor Jeb Bush sent legal ripples through
the voucher debate by signing into law one of the most disputed educational
reform packages in Florida's history, entitled the Bush/Brogan A+ Plan for
Education. 4 The very next day, outraged civil rights groups, public
education advocates, educators, parents of children attending public schools,
and school board members filed a lawsuit challenging the constitutionality of
the Florida voucher program. 5 The bulk of this controversy originates over
the legislation, which contains an unprecedented statewide school voucher
plan.

Governor Bush's voucher plan is the nation's most far-reaching and
contentious voucher experiment. Florida is the largest state in the nation
thus far to enact a form of voucher legislation. 6 The voucher plan, named
the Opportunity Scholarship Program ("OSP"), grants tuition subsidies for
students in chronically failing public schools. 7 It is the first statewide
voucher program and the most expensive. 8 Additionally, unlike other
programs that base the receipt of vouchers on poverty levels, Florida bases
its voucher plan solely on student performance. 9 This law has received
nationwide attention, placing the voucher debate, once again, into the
limelight. 10 Its enactment has not only electrified the debate throughout the
State of Florida, but has ignited a controversy that continues to reverberate

<http://www.adl.org/vouchers.vouchers_not_uni_popular> [hereinafter School Vouchers].
3. Id. "Voters in 19 states have rejected voucher proposals in referendum ballots." Id.
For example, in the November 1998 election, Colorado voters rejected a proposed amendment to
the Colorado Constitution that approved a tuition tax credit allowing religious schools to receive
public funds. Id. In fact, over the past 30 years, voters have only accepted one of the tuition
voucher proposals. Id.
4. FLA. STAT. § 229.0537 (1999). See also Jeb Bush, Florida Gives Kids an
Alternative to Failing Schools, THE WALL STREET JOURNAL, June 21, 1999, at A26; Frequently
Asked Questions (FAQ's) About School Vouchers, (visited July 30, 1999)
[hereinafter Holmes].
6. FAQ's, supra note 4.
8. FAQ's, supra note 4.
9. Id.
10. FAQ's, supra note 4; See generally Jo Becker, Groups File Suit to Kill Vouchers, ST.
PETERSBERG TIMES, June 23, 1999, at B1 (discussing the impact of the Florida voucher program
along with various other state programs).
throughout the entire nation. As the conflict over the scope and constitutionality of school vouchers continues to percolate throughout the nation, ultimately, the issue will have to be resolved by the Supreme Court of the United States.

The Bush/Brogan A+ Plan for Education allegedly "puts the educational needs of students over the bureaucratic needs of the system," guaranteeing Florida students a better quality education. Proponents of educational vouchers have launched an assault on the fundamental tenets of public education. They believe that vouchers would give parents greater control over their children's education, forcing the public school system to compete for students with nonpublic schools. In return, the competition would beget greater efficiency and quality in the public school system. Hence, school vouchers would become the antidote that would resuscitate American education.

Opponents of school voucher programs argue that it is deceptive to frame school vouchers in the language of free enterprise. They assert that vouchers are not a remedy, but rather a virus that will contaminate the public school system. Voucher opponents contend the OSP is inherently flawed because the problem with public schools is not efficiency in the marketplace, but rather the lack of state financial support. They maintain that school

13. See generally Milton Friedman, Reading, Writing & Vouchers, ST. PETERSBURG TIMES, February 21, 1999, at D5. Friedman is a Nobel Prize winning economist who argues school vouchers will maximize the quality of education by destroying the public schools' monopoly and increasing competition. Friedman maintains that public schools will only progress if forced to compete with private schools:

'O[]portunity scholarships' are so promising. They give parents a choice. The end result will be to strengthen, not weaken, the public school system, just as the competition from Sprint and MCI forced AT&T to serve its customers better and foreign producers of automobiles forced General Motors, Ford and Chrysler to improve the quality and lower the cost of their cars.

Id.
16. As Rabbi A. James Rudin, from the American Jewish Congress expressed: "Financially strong and educationally sound public education is imperative to prevent America from becoming 'balkanized' according to race, ethnicity, religion, creed or culture." A. James Rudin, Florida's School Voucher Plan Doesn't Solve Education Woes, THE STUART NEWS/ PORT ST. LUCIE NEWS (Stuart, FL), July 17, 1999, at D8.
vouchers purport a dangerous proposition; a proposition that will result in the unnecessary expansion of private schools, while simultaneously leading to the decay of the public school as an educational institution. 17 Thus, the voucher program will become a national disgrace, creating the "impoverishment of public schools and the establishment of a two-tiered educational system." 18

There is also great skepticism that private school choice will create enhanced educational opportunities and true empowerment for lower income parents. 19 Voucher students have not shown any discernable academic improvement over their public school peers. 20 In fact, public schools often provide a curriculum as equally competent and challenging as private schools, resulting in the same level of student achievement. 21

Aside from significant public policy concerns, opponents maintain that choice proposals, by their very nature, violate the Establishment Clause. 22 The majority of private elementary and secondary schools in America are undeniably religiously affiliated, with religious schools accounting for more than ninety-five percent of all private school enrollments. 23 Many religious schools have been termed "pervasively sectarian" by the courts, indicating that the educational curriculum includes religious indoctrination, worship, and general education from a religious-centered viewpoint. 24 "Under traditional Establishment Clause jurisprudence, public assistance to sectarian schools is unconstitutional because such aid invariably advances the religious mission of the sponsoring institution, thereby violating the principle of government neutrality toward religion." 25

Additionally, the Bush/Brogan A+ Plan is completely inconsistent with the Florida Constitution. By forcing taxpayers to publicly fund religious education, the OSP explicitly violates Florida's requirement of separation of church and state. 26 The law also directly ignores the voters' demand to make education a fundamental value, by preventing all students from receiving

17. Green, supra note 14, at 39.
18. Id.
19. Id.
20. Id.
22. Green, supra note 14, at 40.
23. Id. at 41.
25. Green, supra note 14, at 41.
26. FLA. CONST. art. I, § 3.
high quality public education. Finally, the OSP will use the state school fund for a purpose other than the “support and maintenance of free public schools” in express violation of the Florida Constitution.

This Comment will explore the conflict over school vouchers, specifically focusing on the statewide voucher plan proposed in the Bush/Brogan A+ Plan for Education. Part II will explain in detail the statutory requirements of the OSP. Parts III and IV will analyze the OSP under the United States and Florida Constitutions. Part V will highlight the consistent failures of voucher programs and compare the OSP to other plans throughout the country, focusing specifically on the lessons learned from the Milwaukee Parental Choice Program. This paper will ultimately conclude that the OSP is unconstitutional as well as detrimental to Florida citizens. While this Comment is concerned primarily with refuting the Florida law, its analysis is applicable to all voucher proposals. Consequently, the issues and solutions presented in this paper are not endemic to the State of Florida, but to any state considering a similar proposal.

II. BUSH/BROGAN A+ PLAN FOR EDUCATION: OPPORTUNITY SCHOLARSHIPS

A. Statutory Requirements

The OSP was enacted as a part of the larger Bush/Brogan A+ Plan for Education. Beginning in the 1999–2000 school year, qualifying Florida residents in Pensacola will have an opportunity to choose from three educational alternatives for their children: public schools, private schools, and parochial schools. The purpose of the voucher program is to provide an enhanced opportunity for students to gain the knowledge and skills necessary for postsecondary education, a technical education, or a vocation. Governor Bush contends that increasing public school accountability will ensure that students are “no longer trapped in chronically failing schools.” However, opponents of the OSP avidly claim that the plan is too simplistic, educationally unsound, fiscally irresponsible, and

27. FLA. CONST. art. IX, § 1.
31. Id.
unconstitutional. Voucher opponents believe the program will subsidize and facilitate impoverishment of Florida's public school system, while establishing a second and third rate educational system.

Under the Bush/Brogan A+ Plan for Education, each public school will receive a grade of A through F, based upon the school's performance on standardized tests. In order to receive a voucher, a child must fall within one of two categories. The first category permits a parent to be eligible for a voucher, when during the previous school year, the child attended a public school that for the second year in a four-year period has been designated a "failing" school, pursuant to the school performance grading system. The second category permits the parent of a child who has been newly assigned to a designated public school, "[to] request and receive from the state an opportunity scholarship for the child to enroll in and attend a private school . . . ."

Students at schools that fall under the first category will have three options if they wish to transfer to another school. First, students may attend a designated higher performing public school within their school district. Second, such students may attend any public school in an adjacent school district that has available space. Third, students may attend any Florida private school, including a sectarian or nonsectarian school, which

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35. Green, supra note 14, at 39.

36. FLA. STAT. § 229.0537 (1999). The public school grade will be based on student performance on the Florida Writes Test and the FCAT or the Florida Comprehensive Assessment Test, which tests students skills in reading, math, writing and, ultimately science. Diane Rado, *Grading Florida's Schools*, ST. PETERSBURG TIMES, June 25, 1999, at A1. This method of determining whether a school is successful raises the question of whether standardized tests are truly indicative of a school's academic performance. There are many factors that determine a school's fitness. This type of grading scale will force schools to focus solely on performing successfully on standardized tests, rather than attempting to provide a well rounded education that will prepare students to be assimilated into society.


38. Id.

39. Id.

40. Id. § 229.0537(1), (4).

41. Id. § 229.0537(3)(a)(2). In order for a student to attend a different public school within the district, that school must be designated as a school performing higher than that in which the student is currently enrolled or to which the student has been assigned, but not less than performance grade category "C". FLA. STAT. § 229.0537(3)(a)(2) (1999).

42. FLA. STAT. § 229.0537(3)(b) (1999). The school in the adjacent school district must also be designated a higher-performing school. Id.
agrees to admit the student and to comply with the requirements set forth in the OSP.\footnote{43} Once a student receives an OSP voucher, the student may continue to attend a private school at public expense, at least until he or she finishes middle school.\footnote{44} The student may remain at the private school, regardless of any change in the "grade" assigned to the student's public school in the interim.\footnote{45} Unless the student has chosen to attend a private school that does not offer a high school education, the student will remain eligible for an OSP voucher throughout high school.\footnote{46} The student can continue to receive an Opportunity Scholarship, even if the school to which he or she would have been assigned has never been designated a failing school.\footnote{47}

OSP vouchers will be in a "calculated amount" determined by a formula, which is roughly equivalent to the public funds that would be spent on the student's education in a public school.\footnote{48} The expenditure could range from $3,000 to $25,000, depending on what extra services the student needs.\footnote{49} As a condition of participation in the OSP, private schools are required to accept the OSP voucher as full payment of the tuition and fees of OSP students.\footnote{50}
The Department of Education is required, for each student receiving an OSP voucher, to transfer the "calculated amount" from each school district to a separate account. The Opportunity Scholarship will then be disbursed in quarterly disbursements to the parents or guardians of participating students. Such disbursements will be in the form of warrants made out in the name of the participating student's parent or guardian. However, the disbursement will be sent only to the chosen private school and must be exclusively endorsed by the parent or guardian.

Under the OSP, private schools must also agree not to "compel" any OSP student "to profess a specific ideological belief, to pray, or to worship." Participating private schools must determine "on an entirely random and religious-neutral basis, without regard to the student's past academic history" whether a student will be admitted into the school. The private school will maintain discretion over who can attend the institution and is not required to accept all students. Additionally, private schools must comply with the prohibitions against discrimination on the basis of race, color, or national origin set forth in Title 42 of the United States Code, Section 2000d.

51. Id. § 229.0537(6)(b)(3). The "calculated amount" is withdrawn from the public school districts account even if it exceeds the amount of tuition actually paid under the OSP. Id.
52. Id.
54. Id. This section provides, however, that the Department is to mail the check directly to the student's private school, rather than to the parent or guardian, and it directs that "the parent or guardian shall restrictively endorse the warrant to the private school." Hence, the effect is that the financial aid is not going to the student as primary beneficiary, rather directly to the religious school.
55. Id. § 229.0537(4)(j). Although the OSP forbids private schools from "compelling" students "to profess a specific ideological belief, to pray, or to worship," the OSP does not bar participating private schools from compelling OSP students to participate in other religious activities, such as, religious training and instructions. Nor are such schools prohibited from requiring the passive attendance of OSP students at worship services and prayers. See Holmes, supra note 5.
56. § 229.0537(4)(e). This section also provides that a private school may give preference in accepting applications to siblings of students who have already been accepted on a random religious-neutral basis. Id. Although the OSP requires that participating private schools admit OSP students on a "religious-neutral basis," it does not prohibit such schools from discriminating on the basis of religion in the admission of other students or in the employment of faculty and staff. See Holmes, supra note 5.
57. FLA. STAT. § 229.0537(4)(c) (1999).
B. Legal Challenges to the Opportunity Scholarship Program

Governor Bush contends that the statewide voucher program is a renaissance in educational reform that will revitalize Florida's public educational system. To the contrary, if the OSP is implemented, "children of the poorest and least empowered [socioeconomic classes] will be abandoned to residue schools that function as mere warehouses." Vouchers will only serve to drain energy and resources from an already struggling public school system.

Florida's first statewide performance grades were rather disconcerting: 185 schools received an A; 317 earned a B; 1215 earned a C; 600 received a D; and 78 received an F. Ironically, one of the schools earning a D was the Liberty City charter school that Bush created before he became Governor. As drafted, the OSP has the potential to increasingly expand, putting an exorbitant burden on taxpayers. Florida's public schools are in a state of emergency and the OSP does not present any real solutions, but only further aggravates the educational crisis.

This unprecedented, broadsweeping legislation is merely a simplistic solution to educational reform that may help a small percentage of students in the short term. However, the long-term ramifications for the students who remain in their local schools will be devastating. Vouchers ignore the

58. Florida's Bad Grades, ST. PETERSBURG TIMES, June 27, 1999, (Editorials) at 2D.
61. Critics argue that the Liberty City Charter School, co-founded by Bush, should illustrate that implementing more school choice and withdrawing governmental control is not the solution to improving the public educational system. David Clark, spokesman for the FTP-NEA, the state's largest teachers union stated:
   It's very ironic that in this world, where everyone is more closely scrutinized and we're all struggling to meet higher standards, that this school that was set up as a model of how it should be done is a failure. It's only evidence of what we've said all along - educating children is a difficult thing to do.
62. See infra note 162.
63. Leon Russell, President of the Florida NAACP, noted:
   It is understood that Florida schools are already under-funded. Overcrowded classrooms and lack of adequate textbooks and the use of portables for classroom space are rampant [in every district in the state] ... A reduction in the overall budget of a school will lead to an overall reduction in the number of teachers and the inability of the school to obtain materials [and
fundamental reasons behind school failure. Opportunity Scholarships will create a mass exodus to private schools, while draining public schools of their funding. The cure lies in reducing class size and increasing school funding, not in profit driven short cuts. The next section of this Comment will address the OSP's legal shortcomings and illustrate how the OSP contradicts the United States Constitution and the Florida Constitution.

III. CONSTITUTIONAL ANALYSIS

A. Establishment Clause Jurisprudence

The First Amendment of the Constitution clearly states: "Congress shall make no law respecting an establishment of religion." Since 1947, the United States Supreme Court and lower courts have closely scrutinized programs that either directly or indirectly involved government aid to religious schools. While recognizing that religious schools make a vital

supplies and purchase equipment]. Students who remain in these schools will be doomed to second and third-class education.

Linda Kleindist, Opponents Challenge New Voucher Law, SUN-SENTINEL (Fort Lauderdale), June 23, 1999, at 6B.

64. FAQ's, supra note 4.

65. Id.

66. University of Wisconsin-Milwaukee Professor Alex Monar reviewed voucher program data throughout the country and concluded that a student’s participation in a voucher program does not necessarily ensure that the student’s performance will improve. However, he did emphasize, "[t]here is no longer any argument about whether or not reducing class size in the primary grades increases student achievement. The research is quite clear: It does." School Vouchers: The Emerging Track Record, (visited Aug. 4, 1999) <http://www.weac.org/resource/1998-99/april99/vouchertrack.htm > [hereinafter “Emerging Track Record”].

The amount of failing schools can be attributed to a lack of public commitment, not to lack of competition. For example, Florida schools also rank 26th out of the 50 states in per-student funding, spending less than the national average. Salaries for teachers lag behind the national average. Children in at least 24 school districts are not supplied with their own textbooks. Additionally, class sizes are extremely large. In 27,433 kindergarten through third grade classrooms in Florida, 22,172 still have more than 20 students. Diane Rado, The High Cost of Vouchers, ST. PETERSBURG TIMES, Feb. 21, 1999, at 1D.

67. U.S. CONST. amend I. The Establishment Clause of the First Amendment to the United States Constitution is made applicable to the states by the Fourteenth Amendment and prohibits any state from enacting a law “respecting an establishment of religion.” U.S. CONST. amend. XIV.

68. See Everson v. Board of Educ., 330 U.S. 1, 2, 17,18 (1947). In holding that the First Amendment did not prohibit a state from reimbursing parents of parochial school children for school bus fares, Justice Black noted that the Founders believed that any form of religious assessment, regardless of size, offended the Establishment Clause, as well as notions of religious
contribution to the overall quality of education, the Supreme Court has consistently limited religious school's role in public education because they exist "primarily as arms of religious ministries." 69

Generally speaking, programs that use public funds to support or aid religious-based education have been deemed unconstitutional. 70 Courts are sensitive towards the relationship between government and religion in the education of our children. 71 In limited circumstances, however, the Supreme Court has validated programs that provide direct aid to religious schools when subsidies are created for nonsectarian uses, such as granting funds for bus transportation to all students. 72 Establishment Clause jurisprudence, especially when dealing with the realm of school aid, lacks a bright line stance, resulting in convoluted, controversial decisions. 73

Due to the ambiguities over the application of the Establishment Clause, conflict over its scope is one of the main disputes in the OSP. Proponents maintain the program is religion neutral in its benefits by allowing Florida students to be liberated from chronically failing public schools. 74 Opponents claim that the Florida voucher program is simply a diversion that actually directly funds religious institutions, expressly violating the separation of church and state. 75 Although the constitutionality of a school voucher program has never been addressed by the United States liberty and freedom of conscious. As Justice Black summarized, the Establishment Clause means, at the very least, that: "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 76

69. Green, supra note 14, at 46. See also Robert F. Drinan, RELIGION, THE COURTS, AND PUBLIC POLICY 39 (1963) (quoting Everson, 330 U.S. at 23–24). In his dissent in Everson, Justice Jackson expounded on the importance of keeping schools and religion separate stating, "Our public school . . . is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." 77

70. Green, supra note 14, at n.27.

71. Id. at 39 (citing Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985). The author further noted that "[t]he government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic." 78


73. The Court has acknowledged the confusion in discerning its opinions. "We have acknowledged before, and we do so again here, that the wall of separation that must be maintained . . . is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Waggoner, supra note 29, at n.109 (citing Wolman v. Walter, 433 U.S. 229, 236 (1977)) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

74. Holmes, supra note 5.

75. Id.
Supreme Court, legal precedent suggests that such programs would violate the United States Constitution.

Any analysis of the Establishment Clause should begin with the legal precedent established in *Lemon v. Kurtzman*.

In *Lemon*, the Court set forth a three-part test for determining when an Establishment Clause violation has occurred. Despite the Court's reliance on the three-pronged test, Chief Justice Warren Burger, author of the majority opinion, warned that the Establishment Clause should still be examined "with consideration of the cumulative criteria developed by the Court over many years." The *Lemon* test has been deemed only a "helpful signpost" in dealing with Establishment Clause challenges. Nevertheless, *Lemon* has not been overturned and continues to be controlling authority when examining Establishment Clause challenges.

Under *Lemon*, all three prongs of the test must be met for a challenged statute to survive constitutional scrutiny. First, the statute must have a secular purpose. Second, the statute must have a principal or primary effect that neither inhibits or advances religion. Finally, the statute must not further excessive government entanglement with religion.

1. Secular Legislative Purpose

The fact that religious or parochial schools participate in voucher programs will not likely violate the first prong of the Lemon test. The Court will typically uphold a statute if any valid secular purpose for it can be


77. *Lemon*, 403 U.S. at 612.

78. *Id.* at 612.


80. The application of the Establishment Clause is one of the most ambiguous and confusing constitutional principles. *See*, e.g., Board of Educ. of Kiryas Joel Sch. Dist. v. Grumet, 512 U.S. 687, 750-51 (1994) (Scalia, J. dissenting) ("[The Court has created a] convenient relationship with *Lemon*, which it cites only when useful . . . . The problem with (and the allure of) *Lemon* has not be that it is 'rigid,' but rather that in many applications it has been utterly meaningless, validating whatever result the court would desire."). *Id.*


82. *Id.* at 612.

83. *Id.*

84. *Id.* at 613.
discerned. Legislation intended to improve Florida’s educational system most likely would be designated a “secular purpose.” The intent to improve student learning and the quality of education received by all children, including those who attend religious schools, would be sufficient to satisfy the first prong. However, the fact that Governor Bush has a legitimate purpose in enacting the OSP does not necessarily mean the legislation will be upheld.

2. OSP’s Primary Effect Advances Religion

The OSP is going to have a more difficult time overcoming the standards set forth in the second prong. Calling for an examination of the effects of the statute, the Court balances certain broad concepts as neutrality and separation of church and state. When evaluating this prong, the Court has outlined several factors that must be taken into consideration when determining if there has been an Establishment Clause violation.

In Committee for Public Education & Religious Liberty v. Nyquist, the Court set forth the standards that should be used as a guideline in determining the constitutionality of school voucher programs. The Court struck down a New York program that permitted parents of students that attended private schools to recover a portion of their private educational expenses from the state. The program was solely limited to parents of

85. The Court is reluctant “to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State’s program may be discerned from the face of the statute.” Mueller, 463 U.S. at 394–95.

86. See generally Douglas A. Edwards, Cleveland and Milwaukee’s Free Market Solution for the “Pedantic Heap[s] of Sophistry and Nonsense” that Plague Public Education: Mistakes on Two Lakes, 30 AKRON L. REV. 687, n.70 (1997) (explaining the trend of the United States Supreme Court to uphold statutes if any secular purpose can be given).


89. Id. at 435.

90. 413 U.S. 756 (1973). In Nyquist, parents were entitled to subtract a designated amount from their adjusted state income tax for each tuition paid to a religious school. Id. at 764. See also Sloan v. Lemon, 413 U.S. 825, 832–35 (1973).

91. Nyquist, 413 U.S. at 773.

92. Id. at 798.
children attending private schools.93 Not surprisingly, an overwhelming majority of eligible children attended sectarian schools.94

In its opinion, the Court reasoned that by allowing parents to recover a portion of their costs for sending their children to a religious school, the state was essentially seeking to relieve the financial burden of religious education.95 Justice Powell concluded that the primary effect was to financially support religious schools, thereby impermissibly advancing religion in violation of the Establishment Clause, stating:

[I]f the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same.96

It was also imperative to the Court’s rationale that the programs bestowed unrestricted benefits toward a religious education.97 The government failed to make any endeavor to maintain the separation between church and state.98 Since parents were given the sole discretion to apply the state aid toward any purpose, including refunding the tuition of sectarian education, there was no attempt to maintain a barrier between secular and religious education.99 The Supreme Court also focused on the fact that the aid was limited specifically to children enrolled in private school, and not available to the general public.100 Consequently, the program in Nyquist was distinguishable from other valid programs, including bus transportation and school textbooks, because the New York programs did not prescribe aid in a purely secular capacity.101

Under a Nyquist analysis, Bush’s Opportunity Scholarships have little chance of success. First, the OSP grants unrestricted aid to parents.102 The OSP places no restrictions on how participating private schools may utilize

93. Green, supra note 14, at 58 (citing Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973)). “In New York, 85% of eligible children attend religious schools.” Id. n.104
94. Id.
95. Nyquist, 413 U.S. at 791.
96. Id. at 786.
97. Id. at 783.
98. Id.
99. Id.
100. Nyquist, 413 U.S. at 783.
102. FAQ’s, supra note 4.
the public funds that are paid to them. The OSP fails to guarantee that the vouchers will fund programs that are identifiably secular. Thus, sectarian schools are free to use these public funds for religious purposes, such as worship, prayer, and religious instruction, regardless of whether participation in such activities is voluntary or compelled.

Second, the OSP creates an incentive for parents to send their child to religious schools, hence removing the government from a position of neutrality towards religious education. In Escambia County, the first county to implement the program, four out of the five private schools that volunteered to participate in the OSP are Catholic schools. In Florida, the OSP vouchers that enable parents to send their children to religious schools would have the same “purpose and inevitable effect” of advancing religion in the same manner as the reimbursements in Nyquist. The OSP fails the second prong of the Lemon test by financially aiding the religious missions of the private schools, therefore, advancing religion.

Finally, the fact that the OSP requires a parent or guardian to endorse a check in order for the private school to receive funds, does not automatically qualify and exempt the aid as indirect. In fact, as currently drafted the parents never directly receive the money. Therefore, the voucher’s financial benefit flows directly from the state to the private school. The Supreme Court has expressed concern with the substantive impact of private school aid. Even if the courts determine that the aid to the schools is merely indirect, the OSP still remains unconstitutional because the economic effect of direct and indirect assistance often is indistinguishable and because the “aid may have [the] effect [of a direct subsidy] even though it takes the form of aid to students or parents.”

103. Id.
104. Id.
105. Public funds provided under the OSP could be used, for example, to pay the salaries of clergy and others who provide religious training and instruction, to purchase Bibles, religious textbooks, textbooks that present other subjects from a religious point of view, and other religious literature, to purchase and display crucifixes and other religious symbols, and to build and maintain chapels and other facilities used for religious worship. Holmes, supra note 5.
106. Green, supra note 14, at 39.
109. FAQ’s, supra note 4.
110. Id.
112. Id.
In *Mueller v. Allen*, the Court began to apply the Lemon test less stringently, as it upheld a statute which involved an income tax deduction for tuition, textbooks, transportation, and other expenses for students attending both public and private schools. The Court reasoned that because the deduction could be applied toward educational expenses incurred by all parents, it would be deemed constitutional. Moreover, Justice Rehnquist noted that, although distributing the aid to the religious schools through the parents minimized Establishment Clause controversy, it still had the basic effect of giving direct aid to the religious schools. The key point under these circumstances for Justice Rehnquist was that the aid only became available “as a result of numerous private choices of individual parents of school-age children.”

Nevertheless, Justice Rehnquist stopped short of overturning *Nyquist* on this point. Even though the private choice aspect was a “material consideration in Establishment Clause analysis,” Rehnquist wrote that it was not the sole determinative factor. However, the Court appears to have erroneously overlooked the fact that the program primarily benefited the parents of students attending private schools, due to the fact that private school tuition was the major tax deduction. Regardless, the OSP will not be upheld just by the very virtue that the money is funneled from the parents to the sectarian schools.

In *Witters v. Washington Department of Services for the Blind*, the Court upheld, in limited circumstances, the use of state-funded scholarships for the disabled to pay bible college tuition. The Court reasoned that the scholarship was not skewed as benefiting religion because it was broad in nature. Additionally, the neutral aid could be applied towards an extensive range of vocational and career programs, where only a small

114. *Id.*
115. The court found because the tax exemption was applied equally to parents of both, public and private schools, it did not impermissibly advance religion. *Id.* at 398.
116. *Id.* at 399.
117. *Id.*
120. *Id.* at 409 (Marshall, J., dissenting). “Of the total number of taxpayers who are eligible for the tuition deduction, approximately 96% send their children to religious schools.” *Id.*
121. “At best, the funneling of aid through private individuals removes only the imprimatur of government approval; it has no effect on the issue of whether the religious institution has been advanced in an impermissible manner.” Green, *supra* note 14, at 70.
123. *Id.* at 481.
124. *Id.*
handful were, in fact, sectarian. In determining if the scholarships met the requirements of the Establishment Clause, the Court focused on the effect of the program "as a whole." When looking at the OSP "as a whole," it primarily benefits the religious schools. Unlike the program in Witters, the OSP creates a "financial incentive for students to undertake sectarian education" because most of the eligible private schools are religion centered. The effect of the OSP is to siphon tax dollars from public schools, while increasing funding for private religious schools.

Moreover, voucher advocates wrongly rely on Witters, because this case would not apply to elementary and secondary schools. Primary and secondary students tend to be more susceptible to religious indoctrination, while college students are not as impressionable. The Supreme Court has consistently noted the vulnerability of elementary and secondary students because "many of the citizens perceiving the governmental message are children in their formative years." Furthermore, Witters dealt solely with a college scholarship that was created for nonreligious purposes. The scholarship had existed for a long period of time and only one individual attempted to extend the scholarship to use public funding for religious schooling. The OSP, however, was designed exclusively for elementary and secondary education. It was designed to impact more than one individual; in fact, Governor Bush plans for it to be applicable to all Florida students. Additionally, the OSP was created as a way to primarily fund and advance religious education and morals, because most participating private schools in Florida are sectarian.

In Zobrest v. Catalina Foothills School District, the Supreme Court held that providing funds to pay for a hearing impaired student attending a

125. Even though the grant recipient clearly would use the money to obtain religious education, the Court observed that the tuition grants were "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." Id. at 487 (quoting Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).
126. Witters, 474 U.S. at 488.
127. Id.
128. Loeb & Kaminer, supra note 108.
129. Green, supra note 14, at 50 (quoting Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373, 390 (1985)).
130. Witters, 474 U.S. at 481.
131. Id. at 488.
132. See Wasson, supra note 107.
133. Id.
134. Id.
sectarian high school was constitutional. In this limited situation, Justice
Rehnquist cited to Mueller and Witters, stating that the Court has
“consistently held that government programs that neutrally provide benefits
to a broad class of citizens defined without reference to religion are not
readily subject to an Establishment Clause challenge just because sectarian
institutions may also receive an attenuated financial benefit.” The Court
stressed that the handicapped child is the primary beneficiary, while the
school receives only an incidental benefit. Accordingly, the OSP should
be deemed unconstitutional because the private schools are the primary
beneficiaries, while the students only receive an incidental benefit.

Finally, in Agostini v. Felton, the United States Supreme Court again
challenged the stability of Lemon v. Kurtzman, allowing a federally
funded program to provide remedial instruction by public school employees
at religious schools. The Court’s rationale was premised on the fact that
no funds ever reached the “coffers of religious schools.” Additionally, the
Court maintained that a public employee, such as a teacher, would not
abandon “assigned duties and instructions and embark on religious
indoctrination” simply because the employee enters a parochial school
classroom. However, it is important to note that, writing for the majority,
Justice O’Connor still failed to create a new test for Establishment Clause
cases; therefore, not overturning Lemon. Under the OSP, not only does
money reach the “coffers of religious schools,” but part of the employees
qualification to work at the religious schools is to be a scholar in religious
indoctrination. Therefore, the OSP is distinguishable from this holding
because it is not neutral toward religion.

After the rulings in cases like Mueller, Zobrest, Witters, and Agostini, choice proponents immediately claimed constitutional victory
for voucher programs. However, a close reading of each case indicates that

136. Id. at 13–14.
137. Id. at 8.
138. Id. at 12.
deeded a publicly funded program permitting school teachers to provide remedial assistance
in parochial schools unconstitutional. Id.
141. Agostini, 521 U.S. at 232.
142. Id. at 228; cf. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S.
646, 657–59 (1980).
143. Agostini, 521 U.S. at 226.
144. Id. at 239.
the circumstances where the state was permitted to aid religious schools, are quite distinguishable from the OSP. Voucher proponents often erroneously cite to the rulings after the Nyquist decision to uphold the constitutionality of the voucher plan. It is true that since Nyquist, the Court has upheld neutral and indirect educational aid programs. However, "the Court has never upheld a program when it has been clearly foreseeable that it would substantially aid religious schools." Voucher proponents misinterpret the type of aid that is permissible under the Establishment Clause. Because Nyquist remains valid legal precedent, the OSP should be found unconstitutional.

3. Excessive Entanglement

Assuming arguendo, that the OSP satisfies the first two prongs of the Lemon test, it would still have to satisfy the requirements set forth in the third prong. This prong requires that the statute in question does not result in excessive government entanglement with religion. To access entanglement, the Court has looked to "'the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" Although the OSP may be able to satisfy the elements of this prong, if the Court emphasizes the statute's effect, the OSP will not be able to survive constitutional scrutiny.

There are two types of entanglement: administrative entanglement and political divisiveness. Administrative entanglement is created when a

149. Recent Case, Establishment Clause School Vouchers Wisconsin Supreme Court Upholds Milwaukee Parental Choice Program Jackson v. Benson, 112 HARV. L. REV. 737, 740-41 (1999) [hereinafter Establishment Clause] (discussing the Wisconsin Supreme Court's erroneous analysis of Establishment Clause jurisprudence when analyzing voucher programs that include a sectarian institution).

150. Id.

151. Stick, supra note 88, at 435.

152. Agostini, 521 U.S. at 232 (quoting Lemon v. Kurtzman, 403 U.S. 602, 615 (1970)).

153. Lemon v. Kurtzman, 403 U.S. 602, 622 (1970). Administrative entanglement refers to state involvement in the administration of a program. Under the form of entanglement referred to as political divisiveness, government action that promotes political fragmentation along religious lines may be held to be unconstitutional. See Stick, supra note 88, at 450-53. For purposes of the OSP, political decisiveness does not apply because it has been confined to cases where direct financial subsidies were paid to parochial schools or to teachers in parochial schools. Id. (citing Mueller v. Allen, 463 U.S. 388, 403 (1980)). Since the OSP creates a financial subsidy to parents, rather than religious schools, this factor is inapplicable. Arguably, the program is not exempt because it funnels the money through the parents, however, the prospect of political divisiveness has never alone warranted the invalidation of a state law. Id. See generally Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 778 (1973).
“comprehensive, discriminating, and continuing state surveillance” is required to guarantee that the government aid does not impermissibly advance religion.154 This type of excessive entanglement between church and state compromises the religious freedom of individuals who are not followers of that particular religious denomination.155 This government entanglement also infringes upon the religious liberty of the adherents to the denomination by imposing government regulations upon the sanctity of the religion.156

In voucher plans that include sectarian institutions, administrative entanglement will be avoided when the program does not require distinctions between sectarian expenses and secular expenses, thereby surveillance and monitoring become unnecessary. Hence, there would not be any excessive administrative entanglement because the government is not forced to monitor whether the money is advancing religious initiatives. This program, however, as previously noted, would violate the effects prong of the Lemon test due to the lack of regulation.157

Furthermore, because the very purpose of many religious schools is to provide an integrated secular and religious education,158 the Court has reasoned that the two functions may be “inextricably intertwined,” such that they become inseparable.159 Religious and parochial schools have been considered “pervasively sectarian,”160 meaning the primary reason for their existence is to function as “arms of religious ministries.” As a general rule, religious schools teach from a limited viewpoint, often expressing conservative views regarding abortion, marriage, homosexuals, and theories of evolution.162 Hence, if Florida provides public support to religious schools, it is condemning OSP students to a one-sided education.163

154. Lemon, 403 U.S. at 619.
156. Id. (citing Aguilar v. Felton, 473 U.S. 402, 410 (1985)).
157. See Nyquist, 413 U.S. at 756.
159. Green, supra note 14, at 48.
160. The Supreme Court has defined “pervasively sectarian” schools as those that: [I]nclude prayer and attendance at religious services as part of their curriculum, are run by churches or other organizations whose members must subscribe to particular religious tenets, have faculties and student bodies composed largely by adherents of the particular denomination, and give preference in attendance to children belonging to the denomination.

Id. at 47 n.48 (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971)).
161. Green, supra note 14, at 46.
162. See id. at 48.
Most of the private schools that participate in the OSP are pervasively sectarian. These pervasively sectarian schools will enroll an even larger proportion of the students who receive OSP vouchers. In Escambia County, twenty out of the twenty-five private schools are sectarian.164 These sectarian schools enroll over ninety-three percent of the private school pupils in Escambia County.165

In fact, most of the Escambia County schools are pervasively sectarian. For example, the "philosophy of education" of Little Flower School explains that:

[T]he school is committed to educating our students in accord with the educational mission of the Church.... We believe that the mission of Catholic education is the Christian formation of students. The young people in Little Flower School must experience the Gospel in order to proclaim it now and throughout their adult lives.166

The Little Flower School illustrates how difficult it is to separate secular education from a religious school's mission.

Since four out of the five schools that have presently volunteered to accept OSP students are Catholic schools, the state is going to have to provide constant surveillance to guarantee that the opportunity scholarships are not advancing religion. Although the OSP does not violate the excessive entanglement prong, by not requiring the schools to be accountable for how they spend the public funds, the OSP violates the Establishment Clause

96/voucher2.htm> [hereinafter WEAC]. Initiated by Horace Mann in the 1830s, public schools were viewed as an essential part of children's development. Id. Only through public schooling, would children from different ethnic, religious, and class backgrounds learn to live as responsible citizens in a democracy. Id. Accordingly, public schools provide children with opportunities and experiences that benefit society as a whole. Id.

A public school in Iowa creates approximately the same social experience for its pupils as a school in Massachusetts. This experience... has in the past been fairly successful in conveying a set of common values to many generations of young children. It is probably the only unifying and democratizing process that young people undergo in a highly diversified society with no compulsory military service.

Id. (quoting Martin Canroy, School Improvement: Is Private the Answer?, in DECENTRALIZATION AND SCHOOL IMPROVEMENT 167 (Jane Hannaway & Martin Canroy eds., 1993)).

164. FAQs, supra note 4.
165. Id.
166. Holmes, supra note 5, at 7.
because it will be unable to ensure that the funds are not being used for sectarian functions.

Additionally, even religious schools are wary of the intrusive nature of the OSP. They fear that by accepting state funds, they are going to, in return, have to accept state regulations. Accordingly, a 1998 United States Department of Education report, performed at the request of Congress, shows that private and religious schools are not likely to participate in voucher programs that would require them to meet accountability standards in key policy areas, "such as admissions, student testing, curriculum, and religious training."168

B. Analysis of the OSP Under the Florida Constitution

The OSP conflicts with several provisions of the Florida Constitution. Because the Florida Constitution is more stringent than the United States Constitution when protecting the separation of church and state, the OSP is not going to be able to withstand constitutional scrutiny. The OSP diminishes the high quality of education that is mandated by the Constitution and facilitates the widening of the educational gap between economic classes. Finally, the OSP puts too heavy a burden on the state school fund, as the Florida Constitution places strict requirements on how the funds can be allocated. In fact, the provisions of the Florida Constitution provide a basis to strike down the OSP, without even delving into federal constitutional questions.

1. Article I, Section 3 of the Florida Constitution

The Florida Constitution is unambiguous when it comes to the state’s independent discretion to spend public funds.169 The state cannot use public funds if it will infringe on an individual’s religious liberty and disturb the delicate balance of separation of church and state. Article I, section 3, clearly makes it unconstitutional to force Florida taxpayers to fund school voucher programs that include religious schools, stating:

167. Donna McCurdy, vice principal of West Florida Baptist Academy stated that "[m]ost Christian schools are worried that when you accept state funds you accept state regulations, and we don’t want to be locked into state regulations and state text books. The state’s saying there are no strings now, but down the road there could be strings." Paul Wilborn, Voucher Program off to a Wary Start, ST. PETERSBURG TIMES, July 2, 1999, at 1A.
168. Emerging Track Record, supra note 66.
There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution. 170

The very premise of the OSP violates this provision because it distributes public funds directly to sectarian institutions, blanketed in the deceptive name of Opportunity Scholarships. The OSP is not revenue neutral because schools earn funds from the state based upon the size of their enrollment. 171 When a child leaves to attend a religious institution, the public school will lose funds, while the private school gains the tuition. 172

Not only does the Florida Constitution explicitly forbid state aid from directly going to religious schools, but examination of legislative history indicates that the provision was intended to ban state aid to parochial schools. According to Jim Redman, a member of the 1968 constitutional revision commission, the topic of state aid to religious schools was fully debated at the time. 173 Members of the commission specifically intended to prohibit vouchers from being used to support any religious schools. 174

It is also important to note that any examination into "the proper interpretation of a constitutional provision must begin with an examination of that provision's explicit language." 175 Unless text suggests that specific words have been used in a technical sense, words and terms of the Florida Constitution should be interpreted in their most usual and obvious meaning. 176 Moreover, less latitude is permitted when interpreting constitutional provisions than when interpreting statutes. 177 This stringent rule of construction is based on the presumption that constitutional

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170. FLA. CONST, art. I, § 3.
172. Id.
173. Jo Becker, Voucher Debate Entwined with a Century-old Fight, ST. PETERSBURG TIMES, July 6, 1999, at 4B.
174. Id.
175. Chiles v. Phelps, 714 So. 2d 453, 457 (Fla. 1998) (quoting Florida Soc'y of Ophthalmology v. Florida Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986)).
176. Advisory Opinion to the Governor—1996 Amendment 5 (Everglades), 706 So. 2d 278, 282 (Fla. 1998) (citing City of Jacksonville v. Continental Can Co., 151 So. 488, 489–90 (Fla. 1933)).
provisions have been more carefully framed. The language of Article I, section 3 expressly forbids public funds from directly or indirectly aiding sectarian institutions. Therefore, the OSP is unable to constitutionally distribute funds to religious schools.

This provision has never been interpreted by Florida courts simply because until now, no legislature has deemed it proper. However, Florida case law dealing with aid to religious schools indicates that the OSP would be deemed unconstitutional. The Supreme Court of Florida has stated that legislation may provide indirect aid to religious interests in specific circumstances. Therefore, while a state cannot pass a law to aid one religion or all religions, state action to promote the general welfare of society, apart from any religious considerations is permissible. The OSP does not promote the general welfare of society because the OSP facilitates the balkanization of public schools, leaving them as the last refuge for students whom private schools deem undesirable. Vouchers harm society as a whole as they create an uneven playing field and institutionalize a two-tiered educational system.

Moreover, Florida courts have expressly stated that neither a public school system nor its property can be employed in permanent promotion of any particular religious sect or denomination. For example, the court held that distributing the Gideon Bibles through the public school system equals the annual promotion and endorsement of a particular religious sect. Because public school students are being given the opportunity to attend private religious schools with state funds, those students should not have to be subjected to religious indoctrination. Under the OSP, using state funds to aid sectarian institutions results in the endorsement of a particular religion.

Finally, the Florida Attorney General determined that a school board could provide instructional materials purchased solely with school district funds to private or sectarian schools for the benefit of the students without

178. Id.
179. FLA. CONST. art. I, § 3.
181. Id. at 307.
185. Id. at 185.
186. FAQ's, supra note 4.
violation of Article I, section 3 of the Florida Constitution. However, the opinion stressed that the pubic school property still could not be used “in a manner which would appear to place a stamp of approval upon a particular religious practice.”

Accordingly, the OSP does place “a stamp of approval” on religion because most private schools are overwhelmingly sectarian. The OSP is clearly entwined with religious worship and instruction, as OSP students will be forced to passively participate in religious ceremonies. The effect of including religious schools in the program is that the State of Florida instills religious ideology in Florida students. In conclusion, looking at the plain meaning of the statute, legislative history, and case law indicate that the OSP would violate this provision.

2. Article IX, Section 1 of the Florida Constitution

In November 1998, Florida passed a referendum that went into effect in January 1999, establishing education as a fundamental value. Recognizing the inherent inequalities in the educational system, Florida voters wanted to bridge the education gap and provide higher quality education for all children. The constitutional amendment evidences the dedication of Florida citizenry to make education the state’s highest priority, declaring:

The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

The OSP completely contradicts the desires of Florida voters. The OSP blatantly ignores the state’s paramount duty to make adequate provisions for the education of all children residing within its borders by providing

188. Id. (citing Brown v. Orange County Bd. of Pub. Instruction, 128 So. 2d 181 (Fla. 2d Dist. Ct. App. 1960)). The opinion also emphasized that the program must promote the general welfare of society, be available to both public and private schools, and not relate to religious worship or instruction. Id.
189. Id.
190. Id.
191. FLA. CONST. art. IX, § 1.
vouchers to only a limited amount of students. While some students reap the benefits, others are abandoned and destined to a low quality education.

For example, there is no guarantee that a student who is eligible for an OSP will in fact receive a voucher. Since only five private schools in Escambia county agreed to honor state vouchers, officials were forced to hold a lottery to determine which kids would be accepted. While 800 elementary students were eligible, only ninety-one expressed interest. Out of the ninety-one students that expressed interest to attend a private school, there were only a mere sixty private school slots available. As Senate Democratic Leader Buddy Dyer notes, "[the voucher bill] will only help a select few while it will leave thousands of students behind."

Moreover, there is no evidence that indicates private school students will necessarily receive a better education. In Milwaukee, an evaluation shows no achievement differences between voucher students and comparable Milwaukee Public School students. In fact, subsequent research has shown that differences in public and private school achievement levels are insignificant and primarily attributable to factors such as differences in student backgrounds.

The OSP is further flawed because private schools will not be subjected to the same grading scale as public schools. Therefore, they are not going to be as accountable as public schools. Parents may be disillusioned that private schools provide a better education. However, there is great danger that an OSP student may attend a private school that would receive a failing grade, resulting in the student receiving an inferior quality education.

Additionally, in contrast to public schools, which must accept and teach all students, private schools may discriminate on many bases, including mental or physical disability, IQ scores, achievement scores, income and sexual orientation. Private schools also may refuse to admit children in need of special services, such as remedial education. Therefore, the OSP does not facilitate uniform education for all students, but instead creates a level of hierarchy that is governed by the religious schools.

193. Id.
194. Id.
195. Id.
196. Kennedy, supra note 34.
197. WEAC, supra note 163.
198. Id.
199. See supra note 36 and accompanying text.
200. Id.
201. Id.
202. Id.
203. Id.
Finally, the OSP is going to drain funds from public schools, the very institutions the plan is intended to improve. Even at a conservative estimate of an annual $3000 per student for up to 156,000 students, for a total of roughly $500 million, the OSP will put a heavy burden on Florida taxpayers. Vouchers would further limit the already tight financing that causes districts to use outdated textbooks, computers, and increase class sizes. As one critic notes, “[f]unds allocated to pay for vouchers inevitably come out of the overall public school budget. In a time of shrinking state revenues and substantial cuts in federal education assistance, it makes little sense to expropriate precious resources from the public schools and give them to private schools.” The OSP will only continue to perpetuate the dehabilitation of impoverished public schools, while continuing to elevate private school education.

Governor Bush should look to the failures of other voucher programs, in order to prevent the same mistakes from occurring in Florida’s public education system. For example, in the 1998–99 school year, about 6000 Milwaukee students received vouchers worth about $5000 each, for a total cost of about twenty-nine million dollars. This created a net loss of twenty-two million dollars to the public schools. As the OSP continues to mushroom, the Florida public school system will be subjected to the same funding epidemic as other more limited voucher programs, forcing schools to function on depleted funds and resources.

3. Article IX, Section 6 of the Florida Constitution

Finally, Article IX, section 6, sets forth the limitations on appropriations of state school funds stating, “[t]he income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.” The OSP unconstitutionally calls for the use of state school funds to be used for more than just the support and maintenance of free public schools. Since the plan does not limit how long a student can participate in the OSP, the state may end up completely financing a student’s entire private school education. Instead of focusing on improving and investing in the public

204. FAQs, supra note 4.
205. Cirelli, supra note 1, at 494.
206. Emerging Track Record, supra note 66.
207. Id.
208. Id.
209. FLA. CONST. art. IX, § 6.
210. Holmes, supra note 5.
211. See id.
school the student was originally assigned to, the OSP focuses more energy and finances into keeping the student enrolled at a private institution.

IV. COMPARING VOUCHER PROGRAMS THROUGHOUT THE COUNTRY TO THE OPPORTUNITY SCHOLARSHIP PROGRAM

When the Supreme Court recently refused to resolve the national debate over the constitutionality of voucher programs, voucher advocates proclaimed victory for voucher legislation. The Court declined to hear a challenge over the Supreme Court of Wisconsin's decision to uphold the MPCP, one of the few publicly funded school voucher programs in the nation to allow participation by religious schools. Voucher supporters' excitement, however, is premature and relatively unfounded since the Court did not validate vouchers. While voucher proponents, including Governor Bush, have galvanized their political efforts to promote school choice, they should instead focus on the consistent failures and disappointments that have resulted from the application of such programs.

A. The Milwaukee Parental Choice Program v. The Opportunity Scholarship Program

While the OSP and the MPCP may have some similarities, there are some inherent differences in their statutory construction. Regardless, the MPCP is indicative of the failure of the voucher concept. The MPCP was initially limited in purpose and scope. The program was created to help prevent city schools from failing its poorest students. To qualify, parents must live below the established poverty level. In the first year, only six schools and 300 former public school students participated. Each student gets about $4900 for use at private and parochial schools. Although the MPCP started as limited in its application, the program's enrollment has mushroomed well beyond initial expectations, causing havoc in the Milwaukee public school system.

212. See generally Establishment Clause, supra note 149.
214. Jackson, 578 N.W.2d at 602.
215. See Cirelli, supra note 1, at 486.
216. Id.
217. Id.
218. Id. at 486.
219. Id.
220. FAQs, supra note 4.
In comparison, the OSP was designed to prevent Florida's students from being trapped in failing schools.\textsuperscript{221} At its creation, the OSP was applicable to 800 students.\textsuperscript{222} Under the OSP, to be eligible for a voucher, parents' income is irrelevant.\textsuperscript{223} Each student gets approximately $3500 for use at private and parochial schools.\textsuperscript{224} However, by the 2000 school year, 169 public schools could potentially be labeled failed schools. Another 1000 could be considered dangerously close to failing.\textsuperscript{225} The lessons learned from the failures of the MPCP foreshadow the imminent collapse of Florida's public school system.

Although some claim that vouchers have revitalized the Milwaukee school system, it has not been the answer for which most educators and politicians have been looking for. Many former supporters are extremely disappointed over the results of the voucher program. Annette Polly Williams, the democratic Wisconsin assemblywoman who sponsored the nation's first publicly funded private school voucher system, is irate over the results of the MPCP.\textsuperscript{226} She is furious over the business community's attempts to exploit the vouchers, by expanding the program to include the wealthiest parents: "We wanted parental choice. They're talking about school choice. And when you're talking about school choice, you're not talking about parents selecting schools, you're talking about schools selecting parents."\textsuperscript{227}

Moreover, as the MPCP has expanded, many participants have suffered greatly. Funding for public schools has deteriorated,\textsuperscript{228} meanwhile, several voucher schools have been forced to shut down and are under investigation for misappropriation of funds.\textsuperscript{229} There is a desperate need for more regulation and accountability of voucher programs, yet, many schools in

\begin{itemize}
  \item \textsuperscript{221} Id.
  \item \textsuperscript{222} Id.
  \item \textsuperscript{223} Id.
  \item \textsuperscript{224} See id.
  \item \textsuperscript{225} FAQ's, supra note 4.
  \item \textsuperscript{227} Id.
  \item \textsuperscript{228} In Milwaukee, statistics indicate that in the 1996–97 school year, voucher school received about $1000 more per student than comparable public schools. Emerging Track Record, supra note 66.
  \item \textsuperscript{229} Five voucher schools have been forced to shut their doors. Two of the voucher schools owe back wages to employees. For example, both Exito Education Center and Milwaukee Preparatory School closed after officials were notified that the schools had been overpaid under the voucher program and owed the state money: Exito $88,008, and Milwaukee Prep $111,843. The Exito closure forced parents of 61 students to find mid year alternatives for their children; Milwaukee Prep's closure stranded another 111 children. Eric Gunn, The Inside Story: Vouchers (visited Aug. 4, 1999) <http://www.weac.org/news/sept96/vouchers.htm>.
\end{itemize}
Milwaukee have campaigned against any legislation ensuring more accountability.\textsuperscript{230}

Florida legislators should not make the same mistakes as the MPCP. The OSP is more expansive than the MPCP, therefore, it has the ability to do more damage to the public school system. Since there is no evidence that the voucher programs will be the remedy Florida's ailing schools need, legislators should explore other options, treating vouchers as their last resort. It defies common sense to set forth the proposition that by draining public funding from demoralized and underfunded public schools, that these schools will in return be more inspired and better equipped to meet the challenges of modern education.

B. Trends in Voucher Legislation Throughout the Country

While the MPCP is still standing, other voucher programs have not been able to withstand constitutional muster. Courts throughout the country have recognized that vouchers make for bad public policy and are detrimental to the evolution of society. The OSP should be condemned to the same fate, as courts should be watchful of the warnings of other jurisdictions. This comment strongly suggests that both state and federal courts should adopt the same legal reasoning as the courts in Maine and Vermont.

On May 27, 1999, the United States Court of Appeals for the First District upheld a Maine law that bars the state from paying students' tuition at religious schools.\textsuperscript{231} The ruling was extremely important to voucher opponents, as it was the highest federal court to rule on the school issue thus far. Under the disputed Maine law, the state would pay grants directly to qualified private educational institutions to subsidize their schooling for families who reside in communities that do not have public secondary schools.\textsuperscript{232} The subsidy was only granted if the institutions were "non-sectarian" in nature.\textsuperscript{233}

The landmark decision stated that there is no binding precedent for the proposition that direct payment of tuition by the state to a private sectarian school is constitutionally permissible.\textsuperscript{234} Moreover, the court warned that history indicates entanglement of church and state is "oppressive to religious freedom."\textsuperscript{235} The court stated in absolute terms that it is impermissible to have

\textsuperscript{230} Id.
\textsuperscript{231} Strout v. Albanese, 178 F.3d 57 (1st Cir. 1999), cert. denied, 120 S. Ct. 329 (1999).
\textsuperscript{232} Id. at 59.
\textsuperscript{233} Id.
\textsuperscript{234} Id. at 61 n.5 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).
\textsuperscript{235} Id. at 61.
broad sponsorship of religious schools. In failing to warrant that state aid be used specifically for "secular, neutral, and nonideological purposes," the statute granted invalid direct aid. The court noted the confusion over distinguishing direct and indirect aid and relied on the reasoning in Nyquist, stating:

This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation. Although not all cases fit neatly within this formula, and this somewhat tenuous distinction has been the subject of considerable criticism by academia, it is the closest thing that we have to a workable bright line rule, or that perhaps is possible.

The court concluded its Establishment Clause argument by stating that government aid should not be extended to parents who send their children to religious institutions because it would create a "breach in the wall separating the State from secular establishments." Moreover, the court called upon the Supreme Court to determine the scope of direct aid to religious institutions. Until the Supreme Court resolves the issue, voucher programs should follow the same reasoning and be deemed unconstitutional. Accordingly, the OSP does not meet the constitutional requirements as it imposes direct benefits to religious schools.

The Supreme Court of Vermont was called upon to consider the constitutional implications of Vermont statutes authorizing school districts "to provide high school education to their students by paying tuition for nonpublic schools selected by their parents." The controversy arose over a parochial high school where the secular and sectarian aspects of its educational program were intertwined. The court held that the tuition scheme transgressed the Vermont Constitution because when it reimbursed...

236. Strout, 178 F.3d at 61.
237. Id. at 62.
238. Id.
239. Id. at 64.
240. Id.
241. Chittenden Town Sch. v. Vermont Dep’t of Educ., 738 A.2d 539, 541 (Vt. 1999). Similar to the OSP, the statute provided that parents could chose sectarian or non-sectarian schools. Id. at 541.
242. Id. at 542. The Mount Saint Joseph Academy statement of philosophy depicted that the curriculum included not only traditional scholastics, but moral and religious education, stating, "[w]e believe that learning occurs in an atmosphere where faith and community are emphasized and overtly practiced." Id.
tuition for sectarian schools, the school district failed to instill adequate safeguards against the use of such funds for religious worship. 243

Additionally, the court left the question of whether "unfettered parental choice between the public funding source and the educational provider will eliminate any First Amendment objection to the flow of public money to sectarian education" to the United States Supreme Court. 244 The court found for the purpose of the Vermont Constitution, parental choice only disguised the fact that the true choice was in the hands of the private schools. 245 Moreover, in dicta, the court noted that it found the reasoning in Jackson v. Benson, the controversial Wisconsin Supreme Court ruling that upheld a voucher program, unpersuasive. 246

Analogously, the OSP fails to put limitations on how sectarian schools can distribute and use public funds and therefore should be deemed unconstitutional. The OSP falsely leads parents to believe that they are empowered to choose what school their children will attend. The reality is that the OSP grants religious schools the discretion to chose what students they deem worthy to attend.

V. CONCLUSION

The Bush/Brogan A+ Plan for Education will not make the grade. Opportunity Scholarships are a cruel hoax that give false hope to the nation's most disenfranchised. It is important that legislatures and the courts are not enticed by the promises of free enterprise. American children have the right to a high quality education that makes them competitive in the marketplace, not victims of it. Public education should not be couched in language like "survival of the fittest." The marketplace has failed before, and this time we have much more to lose—our future. If the OSP is implemented, the grim realities of voucher programs will come to the surface very quickly. This is going to be a turning point in Florida's educational system and the courts should look to the disappointments that have occurred in other states, to protect Florida from the same fate. The future of Florida's public school system is of great public importance. It is imperative that the constitutionality and scope of voucher programs be addressed by the Supreme Court. Florida's unprecedented voucher program would be an ideal test case to put the voucher debate to rest. Until then, Florida students will be condemned to a second-rate education.

243. Id. at 562.
244. Chittenden Town Sch., 738 A.2d at 563.
245. Id.
246. Id. at 559.
VI. ADDENDUM

Five months after Florida enacted the first statewide voucher plan, the OSP is consistently failing to make the grade. In a recent poll, voters emphatically opposed the implementation of a voucher program in Florida public schools.247 As one voter proclaimed, "[o]ur taxes are paying for public school, and if you want something other than public school, then you should pay for it."248 Perhaps more disconcerting is the mass exodus of teachers fleeing the state’s lowest performing schools; paradoxically, the very schools the OSP intended to save.249 One administrator notes, "[t]here appears to be some panic around the A+ Plan, and we’re having a difficult time recruiting teachers, and we’re having a difficult time holding onto teachers."250 The problem arises over the reality that few educators want to teach in a school that has already been labeled a failure?251 The failure of the OSP, should provide the impetus for the Supreme Court to deliver a decisive ruling regarding school choice programs. Only when the Supreme Court rises to the occasion and decides to take a final stand on this explosive issue, will students be freed from the inferior education provided by voucher programs.

Kelly Cohen

247. Analisa Nazareno, Poll: A Public Vote Would Put an End to Tuition Vouchers, MIAMI HERALD (Broward), Nov. 8, 1999, at 6B. The poll, conducted by the Washington, D.C., research firm Schroth & Associates from October 28–31, found that 55 percent of voters oppose vouchers, with a mere 38 percent supporting the concept. Id.
248. Id.
249. Daniel de Vise, A+ Plan Prompts Teacher Exodus, MIAMI HERALD (Broward), Nov. 5, 1999, at 1B.
250. Id.
251. Id. For example, 11 teachers transferred out of one failing school just a week before classes began. At a different school, a group of 22 teaching candidates diminished to two as soon as teachers found out the school had been branded with a D. Id.
Changing the Face of Death: Amendments to the Florida Hospice Statutes

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I. INTRODUCTION

Sarah, a sixty-two-year-old woman suffering from metastasized breast cancer, is having a bedside meeting in the hospital with her oncologist. Dr. Palmer looks at his wristwatch, clears his throat a few times, and begins, "Now Sarah, the last treatment did not have the effect I had hoped." He explains the technical and medical difficulties in treating her cancer, as Sarah hangs on every word. "Doctor," Sarah interrupts, "What should I do?" Dr. Palmer clears his throat again and looks away, "I think it is time to call hospice, like we discussed. There is nothing else I can do for you Sarah. In all likelihood, your body will not last another six months."

1. This story is fictional; however, it demonstrates the practical effects of the new 1999 legislation.

2. In this scenario, Sarah's doctor had taken the time previously to discuss her end-of-life options. Unfortunately, in this era of managed care, these types of physician patient discussions are rare. See generally Kathy Cerminara, Eliciting Patient Preferences in Today's Health Care System, 4 J. PSYCHOL., PUB. POL. & LAW (forthcoming 1998) (discussing some of the time constrains physicians face in today's market).
Time passes, and Sarah is at home receiving hospice care. Her hospice doctor, Dr. Neely, has not returned her phone calls, neither has Dr. Palmer. The morphine that Dr. Palmer prescribed is inadequate for her pain. For the past two days, Sarah has barely been able to breathe, let alone speak, because the pain is so excruciating. Across town, Dr. Palmer receives the message that Sarah called and is in pain. He thinks to himself, “I sent her to hospice, there is nothing else I can do now. Besides, this is just the way it is at the end and I already gave her a prescription for morphine.” In the back of his mind, a nagging fear lurks that if he prescribed additional morphine to Sarah, he could be held liable if she were to die from it, or become addicted to it. Dr. Palmer resolves to himself, “No, the hospice doctor can deal with this now.”

Meanwhile, Dr. Neely is sitting at his desk taking a five minute break. He must see forty-five patients today in his busy general practice. He knows he should call Sarah back, but thinks, “Who has time?” He never wanted to deal with hospice patients, but the biggest health maintenance organization payor in his practice referred her to his practice. He could not bite the hand that feeds him and refuse to take her on as a patient. He looks at the message and places it on the desk. He thinks to himself, “Her primary care physician is still handling the case, I’m sure her care is adequate. If she calls again, I’ll follow up then.” Meanwhile, Sarah writhes in pain.

Tragically, this story may become all too true in the near future. Recent amendments to the Florida Statutes regulating hospice services have allowed for general physician contracting, among other things. Overall, these changes may have a detrimental impact on the quality of care that hospice patients receive because they forever change the dynamics of the patient physician relationship, and run counter to the hospice philosophy of care.

3. DAVID CUNDIFF, EUTHANASIA IS NOT THE ANSWER: A HOSPICE PHYSICIAN’S VIEW 115 (1992). See generally Ann Alpers, CRIMINAL ACT OR PALLIATIVE CARE? PROSECUTIONS INVOLVING THE CARE OF THE DYING, 26 J.L. MED. & ETHICS 308 (1998) (describing some of the obstacles physicians face when administering palliative care). On September 9, 1999 the “Pain Relief Promotion Act” was introduced to the United States House of Representatives. This bill amends the Controlled Substances Act to clarify that doctors may administer pain control drugs for the legitimate purpose of aggressively managing pain even if the use of these drugs has the unintended effect of increasing the risk of death. This bill passed the House on October 27, 1999 and is presently before the Senate for debate. UNITED STATES HOUSE OF REPRESENTATIVES COMM. ON THE JUDICIARY, 106th Cong. News Advisory on H.R. 2260 (Sept. 7, 1999).

4. Instead of having a staff physician as a full time employee of a hospice organization, these amendments allow for the overall provision of hospice physician services through contractual relationships. Audio Tape of the proposal of S.B. 1514, held by the Florida Senate Committee on Long-Term Care and Aging (Mar. 11, 1999) (Tape is on file with Nova Law Review and is also available by order from the Florida Senate).
Hospice is a growing option for end-of-life care in Florida. The services are intended for those who have less than six months to live and who are medically diagnosed as suffering from a terminal illness. Hospice, an approach to treating these terminally ill patients, focuses mainly on relieving the physical symptoms of the disease, or providing palliative care. The approach to care is a holistic one, providing both psychological and emotional support services to the patient and their family, while attempting to make death as meaningful as possible for the patient. In Florida, the legislature has recently changed the regulations governing hospice care and that change may significantly impact the quality of care that Florida hospice patients receive.

In April 1999, the Florida Legislature passed Senate Bill 1514, which amends sections 400.605, 400.6085, and 400.609 of the Florida Statutes. These statutes concern hospice care in Florida and how it is regulated and operated. Senate Bill 1514 empowers the Department of Elderly Affairs to create and to implement any and all regulations pertaining to hospice care in Florida. In addition, the amendment also authorizes hospice organizations, for the first time, to contract out for general physician services. Although hospice sometimes contracted for physician services under certain...
circumstances in Florida, these amendments expand the scope of Florida hospices' general contracting abilities.

Hospice care, with all of its many aspects, is increasingly important to the State of Florida since nineteen percent, or 2.7 million, of its population is elderly, or over the age of sixty-five. In 1992, roughly twenty percent of the total number of elderly deaths in South Florida occurred within hospice programs. Thus, any change in the regulation and operation of hospice care is a matter of concern for a significant portion of Florida's population.

Section II of this article discusses the history and development of hospice care and its regulations. It examines both the national and the Florida hospice movement. Also, section II will explore some of the reasons Florida law initially failed to allow for hospice to contract for physician services.

Section III focuses on the reasons why the Florida Legislature changed the hospice rules with these amendments. This section discusses issues such as financial incentives, cost containment, and efficient administration. It also explores the Florida Legislature's goals for hospice care and evaluates the likelihood that these measures will succeed in achieving those goals.

Section IV examines three types of organizations that hospice could contract with to provide physician services: managed care organizations; physician practice management companies; and independent practitioners. It evaluates which organization is better suited to perform this type of contract by defining the role of each organization, and discussing the inherent philosophical differences and similarities between these organizations and hospice. Also, this section explores the ensuing ethical dilemmas the physicians employed by these organizations encounter when dealing with this type of contractual arrangement.

Section V addresses the many possible effects of this legislation, both detrimental and positive, on the quality of care that hospice patients receive.


17. BETH A. VIRNIG, Managed Care and End-of-Life Care, in END OF LIFE CARE IN THE 21ST CENTURY: INCORPORATING PALLIATIVE CARE INTO MAINSTREAM MEDICINE, 10 (Lifepath Hospice 1998). In 1992, 32,950 deaths occurred among elderly Medicare beneficiaries in South Florida; 6522 of these deaths occurred within a hospice program. Id.
in Florida. In particular, one issue included in this section is the role of the hospice doctor. This section compares and evaluates the type and quality of care received before these amendments, and what is likely to ensue in the future.

Section VI discusses some suggestions for improvement in the future under these types of contractual arrangements. This section will explore such issues as physician training in palliative care, interning abroad in the birthplace of the hospice philosophy, and developing a bona fide medical specialty in palliative care.

II. HOSPICE HISTORY

Hospice care began as one person's attempt to improve and change the type and quality of care that terminally ill patients receive in their last stages of life. Dame Cicely Saunders, of Britain, founded the hospice movement after sharing her views of death with a terminally ill cancer patient in her ward. Hospice does not advocate any particular religion or belief. Indeed, the hospice philosophy of spirituality embraces both agnostics and atheists.

The fundamental hospice belief is that freeing the human spirit from suffering through excellent pain and symptom management enables the patient to redirect his or her energy toward maintaining and cultivating relationships. This fundamental belief has evolved into the hospice philosophy, which is more of a metaphor than a particular plan of treatment or a physical place. Hospice embraces the idea that care and comfort come first, rather than cure, and strives to make the last stage of life as meaningful, if not more so, than the other stages of life. The hospice philosophy

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18. See Wheeler, supra note 7, at 755. Dame Cicely Saunders is the founding pioneer of hospice philosophy in the world. Id. Trained initially as a nurse, she then received a degree in medical social work, and she later received her degree to practice medicine. Id. In 1967, Dr. Saunders opened St. Christopher's, the first modern day, free standing hospice. Id. at 756. She coined the term "total pain" in reference to the emotional, mental, physical, and spiritual pain of the terminally ill. Id.


20. Sendor & O'Connor, supra note 6, at 122.

21. Id.

22. Id. Hospice care is founded upon three basic principles: 1) a person must possess an open mind; 2) a person must have friendship of the heart; and 3) he or she must have freedom of spirit. Wheeler, supra note 7, at 755. They merely help the caregiver affirm to their patients that regardless of sex, race, lifestyle, religion, or disease, the caregiver accepts them and cares about their suffering. Id. at 756.


24. Id.
encompasses the idea that death is not the enemy; it should neither be hastened nor postponed.\textsuperscript{25}

In the United States, hospice began as a grass roots movement, imported from England in 1973.\textsuperscript{26} In twenty-six years, the hospice movement has grown rapidly with over 3100 hospice programs existing nationwide.\textsuperscript{27} Of those approximately 3100 programs, Florida alone has forty programs within its borders.\textsuperscript{28} The first few Florida hospice programs opened their doors in the early 1970s in the Largo, Miami, and Orlando areas.\textsuperscript{29} Since that time, Florida hospices have helped thousands of people and their families face death in a dignified and spiritual manner.\textsuperscript{30} Over the years, hospice has become a valued and utilized option for terminally ill patients in Florida.

Hospice programs are found in a variety of settings. Most hospice programs are home-care oriented;\textsuperscript{31} however, several programs are in nursing homes or in patient "swing" beds in hospitals.\textsuperscript{32} Approximately fourteen hospice programs have free standing facilities in the State of Florida at this time.\textsuperscript{33} However, all of the care hospice patients receive in these alternative settings\textsuperscript{34} is coordinated under the direction of the hospice interdisciplinary


\textsuperscript{26} Wheeler, \textit{supra} note 7, at 756.

\textsuperscript{27} National Hospice Organization, \textit{Hospice Fact Sheet} (last modified Spring 1999) <http://www.nho.org> [hereinafter "Hospice Fact Sheet"].


\textsuperscript{29} Telephone Interview with Lynne Mulder, Executive Director, \textit{Florida Hospices and Palliative Care, Inc.} (Aug. 12, 1999).

\textsuperscript{30} Vrignig, \textit{supra} note 17, at 10 and accompanying text.

\textsuperscript{31} Wheeler, \textit{supra} note 7, at 757. The hospice team makes all efforts to keep the patient home in order to be the most comfortable. \textit{Fla. Stat.} § 400.609 (2) (1999). However, sometimes the family members need a break from caring for the patient or the patient requires a higher intensity of care not available in the home setting. Sendor & O'Conner, \textit{supra} note 6, at 36. Then the patient is transferred to an in patient facility to receive care. \textit{Id}.

\textsuperscript{32} \textit{See id.} Most beds in an in patient facility are given a specific purpose, i.e. intensive care beds, geriatric beds, maternity beds, etc. However, in an in patient setting, when a patient opts to elect hospice care that bed "swings" from its original purpose, i.e. oncology, to a hospice bed.

\textsuperscript{33} Telephone Interview with Robert O'Conner, Vice President of Marketing, Communications, and Membership, \textit{National Hospice Organization} (Aug. 3, 1999).

\textsuperscript{34} Alternative settings refer to any in patient setting that is not the patient's home. It includes nursing homes, skilled nursing facilities, in patient hospital beds, and adult family care homes. See \textit{infra} note 43, and accompanying text.
team, which includes nurses, social workers, clergy, and physicians. The services the hospice interdisciplinary team directly provides are nursing services, pastoral or counseling services, dietary counseling, and bereavement services. The team meets on a regular schedule to review, revise, and update each patient’s care plan. The team may now contract out for physician services, along with other core services, if hospice requires it in general or during peak times. All of these services are available to patients and their family members twenty-four hours per day, seven days per week.

III. TIME FOR CHANGE

Florida Senate Bill 1514 amends sections 400.605, 400.6085, and 400.609 of the Florida Statutes to allow the Department of Elderly Affairs a larger role in regulating hospice standards. This amendment also allows hospice organizations to contract out for physician services rather than employing their own physicians. This section explores the many different reasons Florida changed two major provisions of its hospice rules and the goals the legislature wanted to achieve.

35. Ch. 99-139, § 2, 1999 Fla. Laws 811, 812 (codified at Fla. Stat. § 400.6085 (1999)). Hospice utilizes the services of an interdisciplinary team in order to fulfill all aspects of the patient’s total pain. Id.


37. Sendor & O’Connor, supra note 6, at 141. A patient care plan is a condition of participation if the hospice wants to receive Medicare remuneration for its services. 42 C.F.R. § 418.58 (1998). The plan must consist of an assessment of the patient’s needs and identify the services required, including pain management and symptom relief. It discuss in detail the scope and frequency of services required in order to meet the patient’s and the family’s needs. § 418.58(c).

38. The core services consist of: 1) direct professional nursing services in the home setting; 2) physician services for medical consultation and for the general medical care of the patients to the extent that such needs are not met by the patient’s own primary care physician; 3) medical social services; 4) counseling, including "anticipatory grief"; and 5) bereavement support, nutritional/dietary counseling. Sendor & O’Connor, supra note 6, at 144-45.


40. Id.


42. Id. See also Audio Tape of the proposal of S.B. 1514 held by the Florida Senate Committee on Long Term Care and Aging (Mar. 11, 1999) (tape available by order from the Florida Senate).
A. The Department of Elderly Affairs

Initially, individual nursing homes, skilled nursing facilities, and adult family care centers\(^{43}\) performed and set their own quality assurance standards and disaster preparedness plans that encompassed hospice patients present in these facilities.\(^{44}\) Presently, the Department of Elderly Affairs ("DOEA") has rule-making authority with respect to hospice standards and procedures relating to license requirements, administrative management of a hospice, and components of a patient plan of care.\(^{45}\) It oversees advance directives and do not resuscitate orders, the provision of hospice care in alternate settings, physical plant standards for hospice residential units, disaster preparedness plans, quality assurance and utilization review committees, and the collection of hospice data.\(^{46}\) Earlier, it was the Department of Health and Rehabilitative Services ("HRS")\(^{47}\) that once oversaw the professional licensure requirements of hospice organizations.\(^{48}\) Probably, because hospice deals with health issues and receives most of its remuneration from Medicare,\(^{49}\) a public health benefit, its governance was initially assigned to HRS.\(^{50}\) HRS was probably the best agency at that time to handle the needs and requirements of hospice.

Florida delegated this additional authority for rule-making to the DOEA in order to foster a more efficient administration. Since nineteen percent of hospice deaths take place in nursing homes and skilled nursing facilities,\(^{51}\) it follows to allow the organization that generally regulates and sets the standards for skilled nursing facilities and nursing homes to regulate the

\(^{43}\) The Florida Statutes define an adult family care home as "a full-time, family-type living arrangement, in a private home, under which a person who owns or rents the home provides room, board, and personal care, on a 24-hour basis, for no more than five disabled adults or frail elders who are not relatives." FLA. STAT. § 400.618(2) (1999).

\(^{44}\) See Senate Staff Analysis, supra note 28, at 3.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) In 1996, the same year as the Florida Legislature created the DOEA, it broke apart HRS, creating the Department of Children and Families and reorganizing the rest under the Department of Health. Senator William G. 'Doc' Myers Public Health Act of 1996, ch. 96-403, 1996 Fla. Laws 2642 (1996).

\(^{48}\) Ch. 93-179, § 4, 1993 Fla. Laws 1211, 1215 (codified at FLA. STAT. § 400.605(4) (1995)).


\(^{50}\) Since the Florida Legislature created the Department of Elderly Affairs in 1991, it is likely that HRS was the only administrative agency equipped at the time to deal with regulating hospice when hospice initially entered the State. Ch. 91-115, § 1, 1991 Fla. Laws, 1224, 1224–25 (codified at FLA. STAT. § 20.41 (1993)).

\(^{51}\) Hospice Fact Sheet, supra note 27.
aspect of hospice care present in these alternative settings. Also, since such a large portion of hospice patients are age sixty-five and over in Florida, the DOEA is the best administrative agency to coordinate all the different end-of-life choices available to terminally ill patients. To assign this responsibility elsewhere would result in duplicative administrative services and wasteful utilization of resources. This aspect of the new amendments to the Florida Statutes will probably have a beneficial effect on the care received by Florida hospice patients.

B. Physician Contracting

Until July 1, 1999, hospices in Florida could not contract out for general physician services. Physician services were, and are, part of the core services that make up the interdisciplinary team. Hence, physician services have always been an integral part of hospice care. The issues facing the medical community when hospice began in this country in 1973 are incredibly different from the issues facing it today. Managed care was basically a novelty in 1973; thus, it was more efficient and practical for hospice organizations to employ their own physicians. Most likely, the laws were written in context with the times as the Florida Statutes never expressly prohibited physician contracting, but omitted it, until now.

The supply of doctors able to work solely for a hospice organization may be another reason which contributed to why the hospice statutes omitted contracting out for physician services. With the increase in hospice services in the past twenty years, the need for doctors willing to provide palliative care has grown exponentially. Therefore, it is a reasonable conclusion that

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52. See Virnig, supra note 17, at 10.
53. For example, since the DOEA already regulates the standards for nursing homes and skilled nursing facilities in general, to have another department regulate hospice in these settings would result in two different administrative agencies providing the same services, but in relation to different patients, in one facility. It is much more efficient if only one agency regulated all the care rendered in one setting.
55. Sendor & O'Connor, supra note 6, at 144.
56. Wheeler, supra note 7, at 756.
57. For example, in 1973 health maintenance organizations were just introduced to the public consciousness in an effort to increase efforts to manage and finance care. See Health Maintenance Organization Act of 1973, 42 U.S.C. §§ 300e-e-14a (1994). In contrast, in 1999 the Federal Legislature is struggling with developing a patient's bill of rights as a direct result of the managed care influence in medicine. Patient Bill of Rights, S. 2529, 105th Cong. (1998).
58. Hospice Fact Sheet, supra note 27.
contracting may serve as a solution to the shortage of doctors able to provide full time palliative services in a hospice facility.\footnote{59}

Additionally, the Florida Legislature amended the statutes to comport with federal law.\footnote{60} However, instead of harmonizing the state law with the federal law, Florida expanded the scope of hospices’ contracting abilities.\footnote{61} The federal law permits hospice organizations to contract out for physician services, but only during periods of peak patient loads or under extraordinary circumstances.\footnote{62} Now, however, the amendment broadens the statute to include contracting for physician services in general.\footnote{63} Physician contracting in general will aid in keeping hospice operating costs to a minimum.\footnote{64} Eighty-two percent of managed care plans\footnote{65} offer hospice services.\footnote{66} Since Medicare and managed care plans pay a hospice organization one flat fee for all the services, including physician services,\footnote{67} it is very important to keep costs down. Full time physician services are expensive\footnote{68} and a contract with a physician group or managed care organization is one way a hospice provider can lower its operating costs.

C. The Florida Legislature’s Goals

The legislature’s goals in respect to this bill are twofold.\footnote{69} First, the goal of the legislature in regard to this bill is to expand the DOEA’s rule-

\footnote{59} However, flaws with these types of relationships will be discussed further in sections IV and V, infra.
\footnote{60} Telephone Interview with Cam Fientriss, Florida Legislative Consultant (July 12, 1999).
\footnote{61} 1999 Fla. Laws ch. 99-139 (codified at FLA. STAT. §§ 400.605, .6085, .609 (1999)). See infra note 15, and accompanying text.
\footnote{62} 42 C.F.R. § 418.80 (1998).
\footnote{63} 1999 Fla. Laws ch. 99-139.
\footnote{64} Physicians receive one of the top salaries in the world. MARC A. RODWIN, MEDICINE, MONEY, AND MORALS 5 (1993). For example, a physician’s average annual income in 1990 was $155,800 and $164,300 in 1991, about seven times the average salary. \textit{Id}.
\footnote{65} See infra note 75, and accompanying text for definition of managed care.
\footnote{66} Hospice Fact Sheet, supra note 27.
\footnote{68} See supra note 64 and accompanying text.
\footnote{69} Legislative intent was scarce regarding this bill. The only information regarding this intent was furnished by the DOEA in a short two-paragraph synopsis. Department of Elder Affairs, Explanatory provision of proposed Senate Bill 1514 (Fla.1999) [hereinafter “DOEA”]. Interestingly, the legislature conducted no real debate on the issues and not one mention was made of any of the conflicts presented in this article. In addition, the bill passed unanimously in the Florida Senate and the House of Representatives. Journal for the Florida Senate, Vote Report
making authority for hospice.\textsuperscript{70} As discussed, the amendments definitely accomplish this goal both in theory and in practical application. The DOEA is granted rule-making authority over physical plant standards for hospice residential and in patient facilities and hospice standards in nursing homes, assisted living facilities, and adult family care homes.\textsuperscript{71}

Second, the amendments were to provide statutory clarification in regard to the role of nursing homes, assisted living facilities, and adult family care homes in the provision of hospice services.\textsuperscript{72} The practical application of this bill allows for hospice to provide all the services to a terminally ill patient in a nursing home or other facility that it normally would provide if that patient were in his or her own home.\textsuperscript{73} This translates into confining the nursing home or alternate facility staff to its proper role. Although the hospice assumes full responsibility for the management of the hospice patient’s care that is related to the terminal illness,\textsuperscript{74} the nursing facility still retains the responsibility for providing the custodial, residential, and other types of care required.\textsuperscript{75} Thus, the proper interpretation and impact of this bill is quite narrow and limits itself solely to the provision of palliative and comfort care at the end of life.

IV. WITH WHAT TYPE OF ORGANIZATION WILL HOSPICE CONTRACT TO PROVIDE PHYSICIAN SERVICES?

The type of organization that a hospice contracts with to provide its physician services is extremely important. The type of organization will define the type of relationship between the hospice and the contracting organization, thereby defining the relationship between the hospice patient and the contracted doctor. Managed care\textsuperscript{76} in general, has greatly influenced, and indeed shaped, the way physicians practice medicine today.

\textsuperscript{70} DOEA, \textit{supra} note 69.

\textsuperscript{71} 1999 \textit{Fla. Laws} ch. 99-139 (codified at \textit{FLA. STAT.} §§ 400.605, .6085, .609 (1999)).

\textsuperscript{72} DOEA Letter, \textit{supra} note 69.

\textsuperscript{73} HCFA letter, \textit{supra}, note 5, at 3.

\textsuperscript{74} \textit{Id.}

\textsuperscript{75} Letter from Anna Cam Fentriss, Florida Legislative Consultant, to Jennifer Pender, Nova Southeastern University, Junior Staff Member, \textit{Nova Law Review}, (July 22, 1999) (on file with the author).

\textsuperscript{76} Managed Care is any type of intervention in health care that offers alternate means of delivery and finance with the goal of eliminating inappropriate care and thereby reducing costs. Deven C. McGraw, Note, \textit{Financial Incentives to Limit Services: Should Physicians Be Required to Disclose These to Patients?}, 83 \textit{Geo. L.J.} 1821, 1825 (1995).
For example, managed care curbed the fee-for-service ("FFS") environment previously utilized—where a payor paid a doctor directly for the services rendered—by limiting doctor self-interest by destroying the tendency to order unnecessary tests and referrals. However, the pendulum has swung back, and now financial incentives exist for doctors not to refer or treat patients in order to control costs. The key difference is that in an FFS arrangement, the health insurance is paid individually for every service rendered, while now, in the era of managed care, the physician is paid one fee to care for all of the patient’s health care needs.

Before this section explores the types of organizations from which hospice has to choose, the role of the hospice physician must be examined. A hospice physician has many various time consuming duties. For example, a hospice physician may make house calls, and must coordinate and oversee the palliative care rendered by the primary care physician. Also, the hospice physician evaluates the patient for ongoing and new problems, prescribes medication, monitors symptoms, makes appropriate referrals, and communicates at length with the patient about his or her condition and all the options from which the patient may choose. The landscape of managed care does not make for easy bedfellows with hospice.

In this era of managed care, hospice has many choices of organizations with which to contract, however, three choices predominate and this article

79. McGraw, supra note 76, at 1823.
80. 1999 Fla. Laws ch. 99-139 (codified at FLA. STAT. §§ 400.605, .6085, .609 (1999)).
81. SENDOR & O'Conner, supra note 6, at 120.
82. Id. at 113.
83. For instance, the hospice may contract with an independent physician association (IPA), which is a group of independent physicians that contract with a health maintenance organization at a capitated, or set monthly fee in exchange for providing services. Christensen, supra note 78, at 224. The hospice may also choose to contract with a preferred physician organization (PPO) as another choice. In this type of arrangement, the doctor receives a discounted FFS in exchange for providing services. Id. A group model health maintenance organization (Group HMO) is a physician group that contracts with a managed care organization to provide medical services in exchange for one capitated rate paid to the physician group out of which salaries are paid with various incentives. Id. However, when this article refers to a Managed Care Organization, included within this reference is all of the above mentioned organizations, since all pay physicians financial incentives of one sort or another to control costs.
explores each of the three individually: managed care organizations; physician practice management companies; and independent practitioners.

A. Corporate Based Managed Care Organizations

A managed care organization ("MCO") is an organization "structured to promote quality and access while restraining costs." 84 MCOs provide medical care to subscribers by using a pre-chosen panel of physicians in exchange for a monthly fee. 85 MCOs are part of a system of health care delivery that aims at constraining the physician's management of care in order to attain some stated purpose. 86 Usually, that stated purpose is cost control and profit while still providing quality care. 87 Thus, a hospice could contract with an MCO to provide physician services to its patients by paying a monthly fee.

By contracting with an MCO, a hospice would effectively shift the burden of providing physician services and the risk of losing money on that provision of care to the MCO. 88 The hospice would experience cost savings through this contract as compared to employing a physician because the flat fee paid every month would be at a discounted rate. 89 Additionally, if the hospice organization decides to contract with an MCO for physician services, it could work out that the patient's primary care physician becomes his or her hospice physician. 90 Arrangements like these would be beneficial to hospice patients in that they would not need to change physicians so close to the time of their death. Also, the patient's care could be managed by one physician instead of both the primary care physician and the hospice physician, thereby making the care more efficient. 91 However, this arrangement in practice will be rare. The probability that the hospice will contract with the exact MCO that contracts with the patient's primary care physician is slim at best.

85. RODWIN, supra note 64, at 138.
86. Edmund D. Pellegrino, Managed Care at the Bedside: How Do We Look in the Moral Mirror?, 7 KENNEDY INST. OF ETHICS J. 321, 322 (1997).
87. Id.
88. From this flat fee the MCO must pay the doctor, provide the care, and make a profit. See RODWIN supra note 64, at 136.
89. See id.
90. See id. at 138.
91. Usually, the primary care physician utilizes the hospice physician as a consultant on palliative care issues. However, it is the hospice physician that has complete control over how the patient's symptoms are managed. SENDOR & O'CONNOR, supra note 6, at 120. If the primary care physician is not adequately providing palliative care, it is the duty of the hospice physician to step in and render the appropriate care. 42 C.F.R. § 418.86 (1998).
However, other non-monetary costs are at stake if a hospice contracts with an MCO: ethical dilemmas exist. First, each physician that the MCO assigns to the "hospice rotation" is essentially an employee of that MCO. Financially, the physician depends upon his or her relationship with the MCO, because he or she accepts money in exchange for the service to the MCO, i.e., providing medical care at an appropriate price. Most MCOs, in turn, shift all or part of their financial risk onto the physicians providing the care. The effect of all this shifting is to bias physician judgment and lead doctors to deny needed medical services.

Additionally, this type of arrangement divides loyalties. The hospice patients will not be the only patients for whose care the doctor is responsible. The amount of time and monitoring that the hospice patient requires from the physician will be a difficult need to fulfill in the middle of a busy practice. Also, MCOs use many different financial incentives to decrease the utilization of expensive treatment options. The most infamous and disgraceful are the gag rules. Gag rules prevent enrollees from being made aware that they have been denied a specific service or treatment and do not make them aware of their appeal rights. Some MCOs prohibit their physicians from informing patients about treatments that are not contained in

92. Pellegrino, supra note 86, at 324; Robert I. Field, New Ethical Relationships Under Health Care’s New Structure: The Need For A New Paradigm, 43 VILL. L. REV. 467, 476 (1998). Although many doctors are traditional employees of the Managed Care Organization, many are independent contractors. However, many of the same pressures apply. For further discussion of the dilemmas faced by independent practitioners, see section IV(C).

93. Pellegrino, supra note 86, at 324. The doctor experiences increased financial dependence upon the MCO if a large percentage of the patients in his or her practice belong to that MCO. See id.

94. Rodwin, supra note 64, at 141.


97. See id. at 242. Although not in a hospice setting, 18% of physicians are already concerned about their ability to provide the care they think their patients need and 29% of physicians are concerned about their ability to spend sufficient time with patients. Karen Scott Collins et al., The Commonwealth Fund, The Commonwealth Fund Survey of Physician Experiences with Managed Care, 3 (Mar. 1997).

98. Some common financial incentives include: bonus payments from unspent funds and withholding portions of income which may be paid at the end of the year, depending on the physician’s overall cost containment. Christensen, supra note 78, at 224.

the MCO protocol. Although this practice is prohibited by federal rule, the remnants of the practice, hidden in financial incentives, still exist. For instance, if a patient is not informed of a treatment option because it is too expensive and the financial incentive induces the physician’s self-interest, the end result is the same. The patient is uninformed and any right the patient may have had to appeal the treatment decision is moot. Hence, if hospice organizations in Florida choose to contract with MCOs to provide physician services, they must understand that they may be putting their patients’ comfort at risk because the philosophy and mechanics of hospice are inherently different from those of an MCO.

B. Physician Practice Management Companies or Professionally Based Managed Care Organizations.

Physician practice management companies ("PPMCs") are a subpart of managed care; however, they have one key feature different from the rest: physicians serve as top administrators. This key difference affects the organizational culture and the vision and goals of an organization. A typical PPMC develops, integrates, and manages health care delivery systems. Usually, these groups employ some of the same financial strategies as other corporate based MCOs and they accept remuneration from both MCO’s and traditional fee for service payors.

PPMCs provide doctors within the company many different services. Some of these services include administrative services, claims administration, recruitment, training, and supervision of staff, enrollment, financial record keeping and reporting, information systems, managed care contracting, marketing and public relations, member services, network development, and quality assurance. In effect, all of these services allow doctors to be

100. Id. Since diagnosing and treating pain may lead to expensive tests and specialists, hospice patients may not receive all the care they require. See Diane E. Hoffman, Pain Management and Palliative Care in the Era of Managed Care: Issues for Health Insurers, 26 J.L. MED. & ETHICS 267, 270 (1998).


102. Sage, supra note 101, at 1587.


105. GOREY, supra note 103, at 9.

106. Id.

107. Id. at 6.
doctors, and not worry about the business end of medicine. Also, by centralizing these services, the PPMC lowers the overhead cost in providing medical care, resulting in lower prices charged to patients, i.e., a lower price charged to the hospice for a contract.

If a hospice organization contracts with a PPMC, the same shifting of providing physician services occurs here as it does if it contracted with any other MCO. Another similarity between this type of contract and one with an MCO is that it may work out that the physician management group contracted for employs the patient’s primary care physician and thus, again, the patient will not have to use another, different doctor. Again, it must be stressed that this result is extremely unlikely. Hospice would experience cost savings in contracting for PPMC services, rather than employing physicians. Also, since physicians guide and develop PPMCs from their inception, the integration and implementation of physician oriented ethics are more likely within the organizational culture and vision. Hence, the typical organizational structure and culture of a PPMC has the potential to complement the hospice philosophy.

However, some of the same ills that face MCOs also face PPMCs. The company needs to make a profit in order to please its shareholders and to continue in operation. Since the PPMC would only be paid one flat fee per month for the physician services, the PPMC must find a way to contain the costs related to this care. The PPMC could use financial incentives to conserve health care spending that may result in a general lowering of the quality of care and general under-treatment of hospice patients. However, medical codes of ethics stress that physicians should consider their patients’ welfare and interests as primary, even to their own financial interests. Since PPMCs have been infused with the ethics of the medical profession since its inception, it is more likely that a physician contracted from one of these organizations will continue to be the advocate and champion of the patient.

C. The Independent Practitioner

An independent practitioner ("IP") is a sole doctor in his or her own practice, or a small group of doctors practicing together with no affiliation

108. See Rodwin, supra note 64, at 136. See also Pellegrino, supra note 86, at 322 and text accompanying note 86.
109. See Carlson, supra note 104, at 831.
110. Rodwin, supra note 95, at 1011–12.
112. Rodwin, supra note 96, at 246.
with a larger organization. IPs, in general, accept all types of remuneration for their services. An IP is more like the traditional doctor of yesteryear than any other discussed. A hospice that contracts with an IP will lower operating costs by cutting out the cost of physician salaries. Also, if a hospice contracts with an IP, the hospice could choose someone in the area who has experience providing palliative care, thus continuing the same type and quality of care previously provided by a trained hospice physician.

However, one physician working alone, or a small group of physicians working together to provide the required hospice services could easily become overwhelmed while trying to sustain a private practice that also serves other patients. Additionally, palliative care is expensive. The amount of time that hospice patients require would take an IP away from his or her profit producing patients, often resulting in a financial loss for the physician. An arrangement such as this may result in competing interests that the physician must balance. If a hospice decides to contract with an IP to provide the required physician services, since the physician was the decision-maker in accepting the contract, it is likely that the physician will take an active role in performing and honoring his or her ethical obligations. Hence, if a hospice decides to contract with an IP, the hospice should consider that the philosophies of both complement one another.

V. POSSIBLE EFFECTS OF THIS LEGISLATION ON THE QUALITY OF CARE OF FLORIDA HOSPICE PATIENTS

Currently, no medical specialty in palliative care exists in the United States. However, palliative medicine is a recognized specialty of medicine in countries such as the United Kingdom, Canada, and Australia.

113. An independent contractor is "[o]ne who makes an agreement with another to do a piece of work, retaining in himself control of the means, method, and manner of producing the result to be accomplished, neither party having the right to terminate the contract at will." Heffner v. White, 45 N.E.2d 342, 345 (Ind. Ct. App. 1942).

114. Usually these contracts are entered at a discounted fee that is less than the average physician-employee salary. See Rodwin, supra note 64, at 5 and accompanying text.

115. See Segendor & O'Conner, supra note 6, at 113; See generally Rodwin, supra note 95, at 1012.


117. See id.

118. See United States General Accounting Office, Suicide Prevention: Efforts to Increase Research and Education in Palliative Care, GAO/HEHS-98-128 at 25 (Apr. 1998) [hereinafter “GAO”].

Nonetheless, few continuing education courses exist in the United States to help train physicians in the goals and methods of palliative care. Therefore, the only training many physicians receive in end-of-life care is experience. Indeed, many physicians who worked in hospice settings have opted to become full time hospice doctors in order to provide more hands-on care to terminally ill patients and to learn the finer points of palliative medicine. The lack of this training will likely have significant impact on the quality of care Florida hospice patients receive.

When a hospice contracts with an organization for physician services, whether an MCO or a PPMC, the impact on patient care could be significant. The first issue that surfaces is that since most physicians have little or no palliative care training, the situation will be one of the blind leading the blind. If the hospice physician is under a duty to act as a consultant to the patient's primary care physician on palliative care issues, how can the hospice physician instruct and monitor the primary care physician's palliative treatments if he or she has no palliative care training? Indeed, it will be nearly impossible for the hospice physician to fulfill his or her duty to step in and resume control over the patient's palliative care should the primary care physician's treatments prove inadequate, when the hospice physician can barely define what is adequate palliative care. The lack of palliative care knowledge and skills with which to treat terminal illnesses in the vast majority of physicians is a disgrace. More often than not, inadequate pain relief is caused by the physician's reluctance to use the medications aggressively enough to alleviate the patient's pain. This can affect patient care because it results in substandard care for almost all terminally ill patients and may evoke the desire to hasten death in a few.

120. GAO, supra note 118, at 11.
121. SENDOR & O'CONNER, supra note 6, at 120.
122. Id. See supra note 91 and accompanying text.
123. SENDOR & O'CONNER, supra note 6, at 120.
124. CUNDIFF, supra note 3, at 8. However, national attention has focused on this lack of training in palliative care as a result of the recent debates concerning physician-assisted suicide. Consequently, the availability of literature addressing this subject has increased. For example, whole symposium issues of scholarly journals are dedicated to the subject of palliative care. See Symposium, Legal and Regulatory Issues in Pain Management and More, 24 AM. J. L. & MED. 267 (Winter 1998). Additionally The Pain Relief Promotion Act has recently been introduced to Congress. One of its major provisions concerns funding for education and training in Palliative Care. H.R. 2260, 106th Cong. (199).
126. CUNDIFF, supra note 3, at 9. The relation of hospice as an alternative to physician-assisted suicide, or euthanasia, has been written about extensively. See generally CUNDIFF supra note 3; INSTITUTE OF MEDICINE, APPROACHING DEATH: IMPROVING CARE AT THE END OF LIFE
A second issue resulting from these amendments that could impact the quality of care that the Florida hospice patient receives is physician time constraints. Compared with three years ago, forty-one percent of physicians report a decrease in the amount of time they spend with patients.\textsuperscript{127} Considering this decrease, it may be impossible for a contracted hospice physician to fulfill his or her obligation to treat for pain and symptom control with the same degree of urgency and intensity as the hospice patient deserves and requires.\textsuperscript{128} Thus, the assembly line physician care component in the hospice setting may result from this legislation.

The typical physician reaction to death is another issue resulting from these amendments that could significantly impact the quality of care that patients in Florida hospices receive. All of a general physician's instincts and training focus on reversing the deadly progress of the disease thereby returning the patient to good health. When a physician finally realizes that the patient will die from the disease, he or she tends to withdraw under the assumption that there is nothing else to offer.\textsuperscript{129} In addition, the physician may interpret the death of a patient as a professional and personal failure.\textsuperscript{130} General physicians are not trained to deal with their natural reactions to death. Therefore, with the time pressures facing doctors in these times of managed care, physicians may give in to these instincts to withdraw with relief as a natural reaction to the impending death of the patient.

The competing interests discussed in section IV make up the fourth issue that may impact the quality of care Florida hospice patients receive in these types of contractual arrangements. These competing interests translate into potential for a compromised patient-physician relationship. If a physician is struggling with an ethical dilemma caused by the clash of two philosophies inherently juxtaposed to one another, the impact on the patient physician relationship,\textsuperscript{131} and thus on the quality of care received, is substantial. The physician may decide to cut corners to save time, or view as

\begin{itemize}
  \item \textsuperscript{127} CouNS, supra note 97, at 7.
  \item \textsuperscript{128} See SENDOR & O'CONNER, supra note 6, at 105.
  \item \textsuperscript{129} See CUNDIFF, supra note 3, at 11.
  \item \textsuperscript{130} CHRISTINE K. CASSEL, Overview on Attitudes of Physicians Toward Caring for the Dying Patient, in Caring for the Dying: Identification and Promotion of Physician Competency, 1 (The American Board of Internal Medicine 1996).
  \item \textsuperscript{131} For an insightful analysis of the different components of the physician-patient relationship, see Ezekiel J. Emanuel & Nancy Neveloff Dubler, Preserving the Physician-Patient Relationship in the Era of Managed Care, 273 JAMA 323, 323 (1995). Six C's summarize the ideal physician-patient relationship: choice, competence, communication, compassion, continuity, and (no) conflict of interest. \textit{Id.}
\end{itemize}
elective, expensive tests that he or she once viewed as essential. Even if the patient sustains no physical harm, the physician's financial incentives have the ability to erode patient trust. For example, the patient may second guess every treatment provided by the physician and wonder whether he or she is being denied care as a direct result of the physician's self-interest. Therefore, should a hospice contract with a physician experiencing these difficulties, it effectively destroys two of the three founding principles: an open mind and friendship of the heart.

VI. SUGGESTIONS FOR IMPROVEMENT

The passage of these amendments to the Florida Statutes significantly impacts and decreases the quality of care that Florida hospice patients receive. The goal, now, is researching and developing measures that will lessen or eliminate this detrimental effect. This suggestion proposes initiatives to combat the physician's lack of training in palliative care, time pressures, and conflicts of interest.

Plainly, physician education in palliative care needs improvement. An increasing number of people suffer from chronic and progressively disabling diseases, and the need for doctors trained in the provision of palliative care increases accordingly. However, a specialty for palliative care does not exist in the United States today, and only a few specialties require the inclusion of specific palliative care topics. Additionally, only fifty-six percent of medical schools offer training in palliative care and the median number of instruction hours per medical program is two. "Many medical schools do not specifically test for competency in palliative care issues." Indeed, the state of palliative care medicine in this country is a disgrace.

134. Id.
135. See supra note 22 and accompanying text.
137. GAO, supra note 118, at 3.
138. Id. at 25.
139. Id. at 9.
140. Id. at 2.
141. Id. at 22.
142. GAO, supra note 118, at 3.
One long-term way to improve the state of palliative medicine in this country is by changing the medical school curriculum to include palliative care. However, the time available for instruction and training is fixed, thus providing more time for palliative care training would decrease the amount of time allotted to other areas.\textsuperscript{143} On the other hand, medical schools’ lack of time and resources does not excuse the terrible deficiency in palliative care in this country. Medical schools need to revise the curriculum by cooperative efforts to specify core requirements.\textsuperscript{144} Medical school deans are not without guidance; they can look to the Canadian curriculum and to courses developed by Harvard Medical School in order to develop their own requirements in palliative care.\textsuperscript{145} Ultimately, palliative care must become an integral part of the medical school experience.

More than simply increasing palliative care education, medicine should also recognize it as a specialty. The advantages of gaining specialty status are numerous. This status brings professional stature, visibility, and power in the quest for academic resources such as courses, positions, and residency slots.\textsuperscript{146} However, specialty status is not the only way to increase the number of palliative care experts. Creating journals dedicated to issues in palliative care, establishing professional societies in this area of medicine, and developing varied meetings and seminars are all other ways of expanding and increasing the knowledge base of palliative care in this nation.\textsuperscript{147}

Immediate goals to correct the deficiency in physician knowledge and training in palliative care will help combat the negative effects of this legislation. Some short-term goals include creating an intern program in hospice programs, interning abroad in the birthplace of hospice care, and increasing the availability of continuing education courses.\textsuperscript{148} Additionally, the physician must be trained to resist the typical reaction to death, and the emotional and physical withdrawal from patients.\textsuperscript{149} Medical schools and Continuing Education Courses need to offer training in dealing with the shift from curative efforts to comfort care in order to ensure that the physician’s level of involvement with the patient in no way decreases.\textsuperscript{150} Especially since most of the physicians in the types of organizations with which a hospice will contract possess little or no palliative care training, it is

\begin{itemize}
\item \textsuperscript{143} Id. n.6.
\item \textsuperscript{144} INSTITUTE OF MEDICINE, supra note 126, at 226.
\item \textsuperscript{145} Id. at 407–12.
\item \textsuperscript{146} Id. at 226.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} See CUNDIFF, supra note 3, at 10–11.
\item \textsuperscript{149} Glasson, supra note 125, at 97.
\item \textsuperscript{150} Id.
\end{itemize}
essential that the individual hospices develop physician training programs.\textsuperscript{151} Each program should touch on core competencies requires in efficient and adequate delivery of end-of-life care. For example, each hospice could incorporate training set forth by the American Board of Internal Medicine in their clinical competence in end-of-life care.\textsuperscript{152}

Time constraints and conflicts of interest exist as a system wide problem and not just as a hospice specific problem. Unfortunately, no means exist that would eliminate these problems in this era of managed care. However, ways to mitigate the threat these problems pose to patient quality of care do exist.\textsuperscript{153} For example, the Florida Legislature could combat the possible negative effects of this legislation by requiring complete disclosure of all financial incentives and conflicts of interest to hospice patients.\textsuperscript{154} Indeed, the legislature could prohibit extremely problematic situations altogether.\textsuperscript{155} Also the American Medical Association and other professional societies could encourage intensive training in professionalism and ethics.\textsuperscript{156} These safeguards, working together with a physician's natural fear of malpractice,\textsuperscript{157} could effectively ensure ethical behavior of physicians and safeguard the quality of care that patients receive.

\textbf{VII. CONCLUSION}

Multiple contracting options face hospices now that this legislation has taken effect. The best option that hospice can choose is contracting with an IP who has experience in providing palliative care. This is the best option because it would closely mimic the traditional role of the full time hospice physician. The second choice is to contract with a PPMC. This type of contract would allow the physician to exercise some autonomy while remaining within the framework of a contractual relationship. This relationship would work because of the professional leadership present in these companies. However, contracting with a Business or Corporate MCO

\textsuperscript{151} Most hospices provide in-house training for any staff that will be involved with the provision of hospice care. Sendor & O'Connor, supra note 6, at 37.

\textsuperscript{152} Institute of Medicine, supra note 126, at 405. The components of these core competencies are medical knowledge, interviewing/counseling skills, team approach, symptom assessment and management, professionalism, humanistic qualities, and medical ethics. Id.

\textsuperscript{153} Ezekiel J. Emanuel & Lee Goldman, Protecting Patient Welfare in Managed Care: Six Safeguards, 23 J. Health Pol'y, Pol'y & L. 635, 635 (1998).

\textsuperscript{154} Id. at 640.

\textsuperscript{155} Id. at 641.

\textsuperscript{156} Id. at 642.

to provide the hospice physician services is the least desirable choice for a hospice to make. The MCO doctor is faced with multiple conflicts and the founding philosophy of MCOs is in direct conflict with that of hospice organizations. Thus, the detrimental impact on care would be significant.

In the future, it behooves the Florida Legislature to turn a careful and studious eye on this area of medicine. The need for effective and efficient palliative care in this country will continue to grow. It is left in the legislature’s hands to shape the policy that will impact the lives of so many Florida residents. The Florida Legislature initially intended these amendments to the Florida Statutes to serve as mere housekeeping measures, however, these amendments have changed the face of death for Florida hospice patients.

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