THE 1997 SURVEY OF FLORIDA LAW

Admiralty Law ................................................................. Brendan P. O'Sullivan
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I. INTRODUCTION

This article surveys opinions in maritime cases decided by the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and state and federal courts in Florida. This survey covers the period from July 1996 through July 1997.

II. UNITED STATES SUPREME COURT DECISIONS

A. Seaman Status

A frequently asked question, one that is not often addressed consistently by the lower courts, is whether a maritime employee, who is a Jones Act seaman, is entitled to an action against his or her employer/shipowners. In Harbor Tug & Barge Co. v. Papai, the Supreme Court granted certiorari to provide clarification and to resolve the conflict existing in the courts of appeal with regard to the application of the test to determine seamen status which was set forth in Chandris, Inc. v. Latsis to determine seamen status.

In Harbor Tug, a maritime worker was injured while painting the housing structure of a docked tug, a one-day job that he had obtained through a union hiring hall. The worker brought suit against the tug owner claiming negligence under the Jones Act and unseaworthiness based upon general maritime law. The district court denied seaman status in reliance on a test, that has been since superseded, holding that the "[plaintiff] did not have a ‘more or less permanent connection’ with the vessel on which he was injured nor did he

2. 117 S. Ct. 1535 (1997).
5. Id. at 1537.
perform substantial work on the vessel sufficient for seaman status.” The Ninth Circuit Court of Appeals reversed and in reliance on Chandris, held that the relevant inquiry was “not whether plaintiff had a permanent connection with the vessel [but] whether plaintiff’s relationship with a vessel (or a group of vessels) was substantial in terms of duration and nature.” The majority reasoned that if the type of work performed would customarily entitle a maritime worker to seaman status if performed for a single employer, “the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system.”

The Supreme Court reiterated the test set forth in Chandris for determining seaman status under the Jones Act as follows: First, “an employee’s duties must contribute to the function of the vessel or to the accomplishment of its mission,” and second, an employee “must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.” Applying the test to the facts of this case, the Court ruled that although the plaintiff’s performance on board the vessel contributed to its function or purpose, the plaintiff failed to establish a substantial connection to the vessel or to an identifiable group of vessels. The Court held that the fact that the plaintiff had done similar maritime work on other vessels not owned by the defendant, did not satisfy the substantial connection test. Rather, the vessels must be “subject to common ownership or control.” Further, the Court ruled that the focus of the substantial connection requirement is “whether the employee’s duties take him to sea,” which the plaintiff’s job did not. In this case, the Supreme Court sufficiently narrowed the instances in which a worker can establish seaman status under the Jones Act. This is an important decision for employers/shipowners.

6. Id. at 1539 (quoting App. to Pet. for Cert. 27a).
7. Id. (quoting Papai v. Harbor Tug & Barge Co., 67 F.3d 203, 206 (9th Cir. 1995)).
8. Id.
12. Id.
13. Id. at 1542.
14. Id. at 1541.
15. Id. at 1540.
B. Products Liability

According to United States Supreme Court precedent, an admiralty tort plaintiff cannot recover for the physical damage a defective product causes to the ‘product itself,’ but can recover for physical damage the product causes to ‘other property.’ In Saratoga Fishing Co. v. J.M. Martinac & Co., the Court was asked to determine whether equipment added to a product by the initial owner/user prior to the sale of the product to a subsequent owner/user is considered part of the “product itself” or “other property.” The Ninth Circuit Court of Appeals ruled that the added equipment was part of the “product itself” since when sold to the subsequent owner/user “the added equipment was part of the defective product.” Thus, the court held that the subsequent owner/user was not entitled to recover in tort for damage to the added equipment, but rather was limited to principles of warranty and contract law.

The Supreme Court reversed the Ninth Circuit Court of Appeals, holding that items added to a product by the initial user are not part of the “product itself” but are “other property,” and the character of the product as sold to the initial user is not changed by the initial user’s sale of the product. The Court reasoned that had the product “remained in the hands of the [i]nitial [u]ser,” the loss of the added equipment could have been recovered in tort. To allow a different rule with the subsequent sale of the product would compromise the incentive of the law of products liability, which is to encourage the manufacture of safer products.

19. Id. at 1783.
20. Id.
21. Id.
22. Id.
24. Id. at 1789.
25. Id. at 1788.
III. OPINIONS OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

A. Limitation of Liability Act

The Limitation of Vessel Owner’s Liability Act, 26 (“The Limitation Act”), allows a vessel owner to bring suit in a court of admiralty to limit its “liability for any damages arising from a maritime accident to the value of the vessel and its freight, provided that the accident occurred without the owner’s ‘privity or knowledge.’” 27

In Suzuki of Orange Park, Inc. v. Schubert, 28 the plaintiff brought suit against a corporate vessel owner for personal injury sustained when he was thrown from a recreational watercraft operated by the vessel owner’s employee. 29 The vessel owner filed an action under The Limitation Act to limit its liability. Plaintiff argued that since the operator of the vessel was the corporation’s president, his actions were attributable to the corporation; therefore, the vessel owner could not prove absence of privity or knowledge. Plaintiff argued that under the circumstances, his actions should not be limited to the admiralty court, which sits without a jury, but should be allowed to proceed in state court. The district court agreed and denied the vessel owner’s limitation petition. 30 The vessel owner appealed. 31

On appeal, the Eleventh Circuit agreed with the district court that it would be impossible for the corporate vessel owner to prove lack of privity or knowledge based on its president’s actions. 32 However, based upon the facts of the case, the court found that it was possible that the corporate owner could also be vicariously liable for the acts of others even though it lacked privity or knowledge. 33 Thus, the Eleventh Circuit held that the vessel owner should not be denied his limitation action. 34 Accordingly, the district court’s decision was reversed, and the case was remanded for fashioning of the proper relief. 35

28. Id. at 1060.
29. Id. at 1062.
30. Id. at 1061.
31. Id.
33. Id. at 1066.
34. Id.
35. Id. at 1066–67.
B. Jurisdiction

In *Ambassador Factors v. Rhein-, Maas-, Und See- Schiffahrtskontor GMBH (VORMALS SANARA REEDEREIKONTOR GMBH)*, the Eleventh Circuit had little difficulty determining that a maritime contract assigned to another may be enforced by an assignee in admiralty. The court, relying on Supreme Court and Eleventh Circuit precedent, reasoned that "the nature of the disputed contract, not the status or alignment of parties, is the crucial inquiry in determining whether a contract is in admiralty." Thus, the Eleventh Circuit held that as long as the assignment is valid, the assigned contract pertains directly to it, and is "necessary for commerce or navigation upon navigable waters," the assignee may enforce the assigned contract. This rule applies even if the assignment contract itself is not within the federal court's admiralty jurisdiction.

In *Hutchins v. Tennessee Valley Authority*, the plaintiff brought a wrongful death action under the Jones Act against the Tennessee Valley Authority ("TVA") for the drowning death of her husband, a deckhand at a TVA plant in Alabama. The district court dismissed the action, holding that it was barred by the exclusivity provision of the Federal Employees Compensation Act ("FECA"), which provides that the exclusive remedy is against the United States with respect to the injury or death of an employee. The plaintiff appealed the district court's dismissal order and urged the court to find, contrary to existing precedent, that a plain reading of FECA and the Jones Act mandates that federally employed seamen are not bound by FECA and may bring suit against the TVA under the Jones Act. The Eleventh Circuit affirmed the district court's dismissal of the plaintiff's claim, holding that it was compelled to follow prior case law which limits a federally employed seaman to the exclusive remedy of FECA. Although the Eleventh Circuit was apparently not persuaded by the plaintiff's argument that

36. 105 F.3d 1397 (11th Cir. 1997).
37. Id. at 1400.
38. Id. at 1398.
39. Id. at 1399 (quoting Nehring v. Steamship M/V Point Vail, 901 F.2d 1044, 1048 (11th Cir. 1990)).
40. Id. at 1400.
41. Ambassador Factors, 105 F.3d at 1400.
42. 98 F.3d 602 (11th Cir. 1996).
43. Id. at 602–03.
45. Hutchins, 98 F.3d at 603 (citing 5 U.S.C. § 8116(c) (1994)).
46. Id.
47. Id. at 603–04.
the court should overturn existing precedent, the court contended that even if it were so inclined, such a decision would require an en banc decision. 48

In Alderman v. Pacific Northern Victor, Inc., 49 the plaintiff slipped and fell on an oil drilling vessel that was being converted into a fish processing vessel. 50 At the time of the accident, the vessel was docked on navigable waters in Florida. More than three years after the accident, the plaintiff filed suit for personal injury under Florida law against the vessel's interests in Florida state court. 51 Due to the defending vessel's interests, the case was removed to federal court based on diversity and admiralty jurisdiction. 52 The defendants moved for summary judgment, asserting that the plaintiff's action was within admiralty jurisdiction 53 and was therefore, untimely under the three year limitations period for maritime torts. 54 The District Court for the Northern District of Florida granted the motion, and the plaintiff appealed. 55

On appeal, the parties agreed that if the tort were governed by maritime law, instead of Florida law, the plaintiff's action would have been deemed untimely. 56 In determining the choice of law problem, the United States Court of Appeals for the Eleventh Circuit relied on the Supreme Court's decision in Grubart Inc. v. Great Lakes Dredge & Dock Co. 57 The Eleventh Circuit held that according to Grubart, the test for determining whether a tort action falls within admiralty jurisdiction requires satisfaction of the following requisites: First, the tort must occur on navigable waters, or the injury suffered on land must have been caused by a vessel on navigable waters; and second, the claim needs to have a sufficient connection with traditional maritime activity. 58 In determining the second prong of the test, the court must consider "whether the incident has a 'potentially disruptive impact on maritime commerce,'" and "whether the 'general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" 59

Plaintiff argued that although the incident occurred on navigable waters, the claim did not fall within admiralty jurisdiction because the incident did not

48. Id. at 603.
49. 95 F.3d 1061 (11th Cir. 1996).
50. Id. at 1063.
51. Id.
52. Id.
54. Alderman, 95 F.3d at 1063.
55. Id.
56. Id.
58. Alderman, 95 F.3d at 1063–64.
59. Id. at 1064 (citations omitted).
cause any actual impact on maritime commerce. In addressing the plaintiff's first contention, that his accident caused no actual impact on maritime commerce, the court held that the "focus is not on what actually happened, but upon the potential effects of what could happen." The Eleventh Circuit concluded that "[u]nsafe working conditions aboard a vessel under repairs, maintenance, or conversion...pose a potentially disruptive impact upon maritime commerce.

With respect to the plaintiff's second contention, namely, that the activity giving rise to the incident bears no substantial relationship to traditional maritime activity, the court ruled that the focus is not on the plaintiff's characterization of his job description as a land based "construction worker." Rather, the focus is on the activity of the vessel's interests as putative tortfeasors. Since the vessel's interests of converting, repairing, or maintaining a vessel in navigable waters is substantially related to traditional maritime activity, the court held that substantive admiralty law applied. Accordingly, the Eleventh Circuit held that the three year statute of limitation for personal injury actions brought in admiralty barred the plaintiff's claims.

In Isbrandtscen Marine Services, Inc. v. M/V INAGUA TANIA, seamen employed aboard a vessel attempted to intervene as claimants against the vessel on the date of its sale. The United States District Court for the Southern District of Florida rejected the intervening seamen's application on the grounds that it was not in compliance with the local rules governing such requests. After the sale of the vessel, the seamen filed a motion to set aside the sale, "and for emergency interim relief allowing it to file" a claim against the vessel "as priority creditors." The seamen argued that they had not received proper notice of the sale; nonetheless, the court denied their application as untimely, and/or that the remedy requested at such a late date "would not be equitable to the interest of all parties." The seamen appealed.

60. Id.
61. Id.
62. Id.
63. Alderman, 95 F.3d at 1064.
64. Id. at 1065.
65. Id.
66. Id. at 1065–66.
67. Id. at 1066.
68. 93 F.3d 728 (11th Cir. 1996).
69. Id. at 730.
70. Id. at 731.
71. Id. at 732.
72. Id.
On appeal, the plaintiffs argued that the intervening seamens’ claim was invalid since the vessel had already been sold. The Eleventh Circuit agreed with the plaintiff that an “in rem proceeding clears a vessel of all maritime liens and that the purchaser gained good title against the world.” However, the court reasoned that “since the proceeds of the sale remain[ed] in the [c]ourt’s registry in “lieu of the res,” the court retained jurisdiction. Having jumped the initial hurdle of jurisdiction, the court then analyzed whether the seamen were entitled to intervene.

The Eleventh Circuit agreed with the district court that the seamen’s action was untimely, and thus “they had no automatic right to intervene.” However, the Eleventh Circuit recognized that the local rules permit district court discretion in allowing a seaman’s late claim “under such conditions and terms as are equitable.” The Eleventh Circuit concluded that since seamen are “wards of admiralty whose rights federal courts are duty-bound to jealously protect,” the district court abused its discretion in failing to aid the crew, by not allowing them to correct deficiencies in their motion to intervene and their complaint. Thus, the Eleventh Circuit vacated and remanded the case to the district court “with instructions that the crew be permitted to amend their complaint and motion to intervene.”

C. Settling Multi-Party Maritime Actions

In 1994, the United States Supreme Court decided McDermott, Inc. v. AmClyde and Boca Grande Club, Inc. v. Florida Power & Light Co., two decisions having a significant impact upon settlements made in multiparty maritime actions. In McDermott, the Court adopted the proportionate share approach for settling multiparty maritime actions, which reduces the award against a nonsettling tortfeasor by the percentage of fault assigned to a settling joint tortfeasor. In Boca Grande, the Court held that the adoption of the proportionate share approach in McDermott extinguished an action for

73. Isbrandtsen, 93 F.3d at 732.
74. Id.
75. Id. at 733.
76. Id.
77. Id.
78. Isbrandtsen, 93 F.3d at 733 (quoting S.D. FLA. ADMIRALTY AND MARITIME R. E(2)(b)).
79. Id. at 733–34.
80. Id. at 735.
82. 511 U.S. 222 (1994).
83. McDermott, 511 U.S. at 204.
Based on the decisions in *McDermott* and *Boca Grande*, the district court in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, dismissed contribution claims brought by a nonsettling party against another settling party. The nonsettling party appealed, arguing that even if its general contribution claims were precluded, its claims for maintenance and cure expenses should survive.

The Eleventh Circuit Court of Appeals agreed with the district court's conclusion that the nonsettling party's general contribution claims were precluded by *McDermott* and *Boca Grande*. However, it disagreed with the district court's conclusion that *McDermott* and *Boca Grande* required the same result with respect to claims based on maintenance and cure. The Eleventh Circuit found that, unlike a nonsettling joint tortfeasor, a shipowner is obligated to provide maintenance and cure regardless of fault; therefore, the proportionate share approach will never benefit the shipowner. The only means by which maintenance and cure expenses can be apportioned among all tortfeasors responsible for harm to seamen is to allow claims for contribution. The Eleventh Circuit concluded that *McDermott* and *Boca Grande* leave binding precedent intact with respect to maintenance and cure expenses, and that the settling party should be allowed to proceed against the nonsettling party for contribution for such expenses.

### D. Immunity

In *Kasprik v. United States*, a case of first impression, the Eleventh Circuit Court of Appeals considered whether the Suits in Admiralty Act ("SAA") bars an injured seaman employed aboard a United States owned vessel from bringing an action against the operator of the vessel, an agent for the United States, for punitive damages for the arbitrary and willful denial of maintenance and cure. On appeal, the Eleventh Circuit agreed with the district court that pursuant to the SAA, a seaman employed aboard a United States

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84. *Boca Grande*, 511 U.S. at 223.
85. 92 F.3d 1102 (11th Cir. 1996).
86. Id. at 1103.
87. Id. at 1105.
88. Id. at 1106.
89. Id.
90. *Great Lakes*, 92 F.3d at 1107.
91. Id.
92. Id.
93. 87 F.3d 462 (11th Cir. 1996).
95. *Kasprik*, 87 F.3d at 464.
States vessel is barred from bringing suit "by reason of the same subject matter against an agent or employee of the United States." Although the Eleventh Circuit believed that precedent allowed an action for punitive damages against the United States, the Eleventh Circuit failed to extend the seaman's entitlement against an agent of the United States. Instead, the court opined that the exclusivity provision of the SAA effectively abolished such a claim.

IV. DECISIONS BY THE UNITED STATES DISTRICT COURTS IN FLORIDA

A. Maritime Liens

In Villafores v. Royal Venture Cruise Lines, Ltd., the defendant entered into extended negotiations for the purchase of a vessel, at which time the owner of the vessel agreed that the defendant could begin repairs and refurbishing to the vessel prior to its purchase. As security, the defendant had the plaintiff post an irrevocable letter of credit to the owner of the vessel on its behalf, so that any debts incurred due to repairs and other work, would be paid and would not become maritime liens. When the sale transaction did not close, the owner of the vessel had to draw down on the full amount of the letter of credit to pay the debts incurred by the defendant for work performed on the vessel. The plaintiff filed a claim for a maritime lien against the vessel on the grounds that the vessel owner's drawing down of the letter of credit was an advance of funds to pay off "necessaries."

Although it is generally recognized that a person advancing funds for the purpose of acquiring "necessaries" has a maritime lien against the vessel, the court found that under the facts presented that was not the case. Rather, the repairs had already been performed on the vessel when the letter of credit was drawn down. Further, the court recognized that the Federal Maritime Lien Act defines "necessaries" as "the things that a prudent owner would provide to enable a ship to perform well the functions for which she has been engaged." Since the repairs were performed by the defendant, a non-owner,

96. Id. at 465 (citing 46 U.S.C. app. § 745 (1994)).
97. Id. at 466.
98. Id.
100. Id. at D631.
101. Id.
102. Id.
103. Id.
and were not necessary for sale of the vessel, the repairs did not constitute "necessaries." 106

In conclusion, the court held that the letter of credit was not to provide repairs to the vessel, but was to provide security in order to facilitate the sale of the vessel. 107 Contracts for sale of a vessel are not maritime in nature. 108 Therefore, the court did not have jurisdiction. 109

B. Rule B Attachment

Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims "provides a vehicle for serving process and obtaining 'quasi in rem' jurisdiction over a defendant" that cannot be found in the district by attaching the defendant's "goods and chattels, or credits and effects in the hands of garnishees." 110 In the case of Oceanfocus Shipping Ltd. v. Naviera Humboldt, S.A., 111 the plaintiff utilized this rule to attach a secured letter of credit and assets pledged by third parties as security for the letter of credit maintained at a local bank on behalf of the defendant, a party not found within the district. 112 The defendant moved to quash service of process and dismiss the complaint for lack of quasi in rem jurisdiction on the grounds that a line of credit "is not a good, chattel, credit or effect of the [d]efendant within the meaning of the Rule." 113

The court observed that "many [other] courts have recognized that funds available to a defendant under a letter of credit issued by a third party are not subject to attachment as property of the defendant." 114 The court, agreeing with this rationale, determined that the funds available under a "line of credit" did not belong to the defendant, but were "essentially loan proceeds that eventually must be repaid." 115 The court reasoned that a line of credit "is nothing more than a privilege to incur a debt; and . . . cannot be considered a 'good, chattel,

106. Id.
107. Id.
108. Id.
109. Id.
111. Id. at 1481.
112. Id. at 1483.
113. Id.
Further, the court found that the relationship between the defendant and the assets pledged in support of the line of credit were too attenuated and were intended to protect the bank, not the defendant’s creditors. Based on the aforementioned, the court granted defendant’s motion to quash and dismissed the action for lack of jurisdiction.

C. In Rem Claims

In admiralty, it is not uncommon for a plaintiff to sue a vessel in rem, as the offending object, pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims. The suit is brought in the district in which the vessel is located under admiralty jurisdiction. However, in Shaffer v. Tiffany Yachts, Inc., "in a novel attempt to establish in rem jurisdiction," an action was brought on behalf of the vessel against the defendant for breach of contract. The court refused to apply in rem jurisdiction on the grounds that an admiralty proceeding in rem is one brought against a vessel, not by a vessel. The court held that in order for the vessel to establish jurisdiction over the defendant, it must establish in personam jurisdiction.

D. Maritime Contracts

There is a constant battle in cases involving admiralty and maritime matters with respect to what law should apply. Clearly, if there is an established rule in admiralty, it should apply irrespective of a contrary state law. However, often times the query is whether there actually exists a rule in admiralty and whether it is clearly established. The United States District Court for the Southern District of Florida was confronted with this issue in ABB Power T & D Co., Inc. v. Gothaer Versicherungsbank VVAG.

In ABB Power, pursuant to a sales contract, a seller agreed to deliver a transformer to the buyer. The seller then contracted with another for the

116. Id.
117. Id. at 1488.
118. Id.
120. Id.
122. Id. at *1.
123. Id. (emphasis added).
124. Id. at *2.
126. Id. at 1569.
manufacture and delivery of the transformer to the buyer. During transport, the transformer was destroyed. Although the seller obtained marine insurance to cover the transformer during transport, the insurer refused coverage on the grounds that neither the seller nor the manufacturer possessed insurable interests and thus lacked standing to bring suit against the insurer. The court denied the insurer's motion for summary judgment; and the insurer moved to have the court reconsider its decision arguing, among other things, that the court erroneously failed to follow Fifth Circuit precedent.\footnote{127} In support of its motion to reconsider, the insurer made the same arguments, produced the same cases, and raised the same discussions as in its earlier motion for summary judgment.\footnote{128}

The court, as a preliminary matter, admonished the insurer for improper use of the rules of procedure.\footnote{129} The court held that a motion to reconsider "should not be used as a vehicle to present authorities available at the time of the first decision or to reiterate arguments previously made" \footnote{130} or to ask the Court to rethink what [it] \ldots already thought through." Rather, its purpose is to share newly discovered evidence or to clarify an issue that the court may have misunderstood.\footnote{131} Obviously offended by the insurer's suggestion that it did not know its place in the judicial system with respect to following precedent, the court explained that contrary to the insurer's belief, it had not ignored or disregarded otherwise binding and valid precedent.\footnote{132} Further, the court found that there was binding precedent more directly on point than that cited by the insurer, which required the court to reject the insurer's position.\footnote{133}

The court determined that United States Supreme Court precedent requires that firmly entrenched rules of admiralty law, governing the interpretation of marine insurance contracts, "reign[] supreme over contrary state law provisions."\footnote{134} Applying the most recent and binding panel's test for determining whether admiralty or state law applies, the court found that the issue of whether certain parties are insurable interests under a marine contract is a firmly entrenched principle of federal admiralty law.\footnote{135} Finding that entrenched federal admiralty law defines an "insurable interest" as "any

\footnotesize{127. Id. at 1571.}
\footnotesize{128. Id. at 1572.}
\footnotesize{129. Id. (citing Z.K. Marine, Inc. v. M/V Archigetis, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992)).}
\footnotesize{130. ABB Power, 939 F. Supp. at 1572 (citations omitted).}
\footnotesize{131. Id.}
\footnotesize{132. Id. at 1574.}
\footnotesize{133. Id. at 1575.}
\footnotesize{134. Id. (citing Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 312 (1955)).}

\footnotesize{135. ABB Power, 939 F. Supp. at 1580.}
pecuniary interest," the court affirmed its earlier decision denying the insurer's motion for summary judgment and held that contrary to the insured's assertion, conflicting state law was effectively preempted. 136

E. Maintenance and Cure

In Aksoy v. Apollo Ship Chandlers, Inc., 137 the United States District Court for the Southern District of Florida, in response to a class action, addressed the issue of whether a crewmember's unearned sick wages should include tips. 138 The issue arose when the plaintiff commenced a class action against the defendants seeking "reasonably anticipated tips or, alternatively, monthly guaranteed tips as part of" the maintenance and cure owed to crew members who became ill or injured. 139 The defendants moved for summary judgment on the basis that the plaintiff had been paid his guaranteed minimum tips as part of his unearned sick wages, and therefore he had no standing. The plaintiff retorted that he was owed his actual anticipated wages, an amount exceeding the guaranteed amount. Relying on Flores v. Carnival Cruise Lines, 140 the plaintiff argued that precedent required the court to calculate tips by determining the amount of tips plaintiff would have earned had he remained on the ship. 141

The court disagreed and held that Flores was distinguishable from the instant case in that in Flores there was no employment contract setting forth the method of calculating tips. 142 In this case, the plaintiff was guaranteed a minimum amount of tips under the crew agreement. Since the defendants had paid the plaintiff the guaranteed minimum amount as set forth in the crew agreement, the court granted the defendants' motion for summary judgment. 143

In Costa Crociere, S.p.A. v. Rose, 144 the United States District Court for the Southern District of Florida was given another interesting issue for determination with respect to maintenance and cure. 145 Specifically, the court was asked to address whether a ship owner was obligated to continue paying

136. Id. at 1581.
138. Id. at *1.
139. Id.
140. 47 F.3d 1120 (11th Cir. 1995).
142. Id.
143. Id. at *3.
145. Id. at 1539.
maintenance and cure to a seaman who had been diagnosed with an incurable
disease.\footnote{146}

The case arose when a seaman on board the M/V American Adventure
fell ill with IgA nephropathy, an incurable kidney disease that progressively
results in the eventual loss of kidney function.\footnote{147} The cause of this disease was
unknown. The seaman was evacuated from the ship, brought to a hospital, and
immediately placed on kidney dialysis, without which, absent a kidney
transplant, he would die. The shipowner, and the corporation which employed
the seaman, filed a complaint seeking a declaration that their obligation to
provide maintenance and cure to the seaman ended when the seaman became
stabilized on dialysis after being transferred from the ship to a hospital on
shore. The plaintiff argued that once the seaman became stabilized, he reached
the point of maximum medical improvement, and therefore, the plaintiff had
no continuing obligation to provide him with maintenance and cure.\footnote{148}

The court appeared to have no easy task in addressing this issue.
However, the court agreed with the plaintiff that a seaman's entitlement to
maintenance and cure continues to the point of maximum medical
improvement.\footnote{149} Additionally, the court recognized that the point at which a
seaman is determined to have reached maximum medical improvement is a
question that is not easily answered.\footnote{150}

After reviewing a number of opinions regarding the termination of
maintenance and cure benefits, the court determined that the main concern is
for the seaman's overall medical condition.\footnote{151} In determining whether a
seaman has reached maximum medical improvement, the pertinent test in the
Second Circuit is whether there is a possibility of a betterment in the seaman's
"condition."\footnote{152} The court held that the term "condition" should be defined
broadly and not be limited to whether a disease has been deemed incurable.\footnote{153}
The court based its decision on the fact that the admiralty courts have always
been liberal in interpreting the doctrine of maintenance and cure for the benefit
and the protection of seamen.\footnote{154} Additionally, the court found that ambiguities
or doubts in the application of the law of maintenance and cure are resolved in
favor of the seamen.\footnote{155}

The court held that the record makes it clear that treatment in the form of dialysis or a transplant will unquestionably result in a betterment of the seaman’s condition. The proposed treatment differs from other treatments that merely treat pain and suffering without enhancing bodily function, in that the proposed treatment represents the difference between life at a reasonable level of functioning for an indefinite period of time and immediate death. Accordingly, the court concluded that the seaman had not yet reached the point of maximum medical improvement.

Having concluded that the duty of maintenance and cure continued as to the subject seaman, a new issue then reared its ugly head; namely, whether the shipowner/employer became obliged under the law of maintenance and cure to provide the seaman with a kidney transplant in lieu of, or in addition to, kidney dialysis. The plaintiff argued that statistically, a kidney transplant is unlikely to be successful, it is costly, and it is unusual treatment beyond the scope of maintenance and cure. Further, the plaintiff argued that even if the transplant was successful, it would do no more than enhance the quality of the seaman’s life.

The court disagreed and held that the record indicated that the seaman has a reasonable probability of survival with a transplant; a successful transplant will better the seaman’s condition to a greater extent than chronic dialysis; and, although not determinative, a successful transplant, with time, ends up considerably less expensive than chronic dialysis for three years. The court ruled that the probability of an improvement in the seaman’s condition was sufficient to bring treatment within the obligation of maintenance and cure.

In conclusion, the court found that the obligation of maintenance and cure is not finite, and there need not be a definite and absolute ending point. The shipowner’s obligation may continue for the life of the seaman. As one can imagine, this case raises significant monetary concerns for the employers of seamen.

F. Admiralty Contract Jurisdiction

156. Id.
157. Id. at 1559.
158. Id. at 1555.
160. Id.
161. Id. at 1556.
162. Id.
163. Id. at 1557.
In *Terra Nova Insurance Co., v. Acer Latin America, Inc.*, the plaintiffs, foreign insurance underwriters, filed a complaint under the Declaratory Judgment Act seeking declaration of no coverage under a marine cargo insurance policy issued to the defendant, a Florida corporation. The defendant counterclaimed against the underwriters and their insurance agent, also a Florida corporation, alleging diversity as the basis for jurisdiction. The underwriters' insurance agent moved to dismiss the counterclaim on the grounds that complete diversity was lacking since both it and the counterclaimant were Florida corporations. The counterclaimant argued that the court had supplemental jurisdiction over its compulsory counterclaim and thus, the court retained subject matter jurisdiction despite the nondiversity of the parties.

In the first instance, the court seemed to battle with whether to entertain the action for declaratory relief. The court recognized that the decision of whether to entertain an action for declaratory relief is within the discretion of the court. However, one of the factors for consideration in determining whether to entertain such an action is whether the action is brought for the purpose of "procedural fencing," a situation in which a party seeks declaratory relief in order to accomplish something it could not do through removal.

In the instant case, the court found that had the defendant/counterclaimant brought suit in the first instance, the presence of the nondiverse underwriters' agent would have precluded removal absent admiralty jurisdiction. Thus, the court held that in order for the declaratory action to be proper, admiralty jurisdiction must exist. The plaintiffs argued that the policy at issue is a maritime insurance contract, and, thus, is within the ambit of the court's admiralty jurisdiction. In response, the defendants argued that although the policy was "captioned a 'marine cargo' policy[,] [i]t cover[ed] conveyances 'per land, water or air.' Since the suit centered around theft of property on

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169. *Id.* at 854–55.
172. *Id.* at 855.
173. *Id.*
174. *Id.*
175. *Id.* at 855–56.
land, the plaintiffs argued that the policy should not be considered a maritime contract. The court considered both parties’ arguments and determined that the policy covered both maritime and nonmaritime obligations. Based on existing law, the court held that in order for the policy to fall within admiralty jurisdiction, the nonmaritime obligations had to be “incidental” in an otherwise maritime contract. The court concluded that in this case, the policy’s nonmaritime elements were not “incidental” to the contract as a whole. The policy applied regardless of where the loss occurred, and in this case, the loss occurred on land. Thus, the court found that there was no admiralty jurisdiction over the subject matter, and it dismissed the case without prejudice to be filed in state court.

H. Duty of Shipper

In Narcissus Shipping Corp. v. Armada Reefers, Ltd., a bareboat charterer brought suit against the time charterer and shipper/consignee to recover damages it suffered as a result of a deviated voyage which resulted from cargo shifting and the vessel taking on a severe list that could not be corrected at sea. The bareboat charterer alleged an action against the time charterer for unpaid charter hire and breach of the duty to “load, trim, and stow” the cargo as required by the charter party. The bareboat charterer alleged an action against the shipper/consignee for negligence in failing to warn interested parties of prior shifting problems with respect to their product. In response, the defendants filed counterclaims against the bareboat charterer and cross-claims against each other.

According to the facts of this case, the shipper/consignee contracted with the time charterer for the shipment of juice products from Florida to the Netherlands. Prior to contracting with the time charterer for the subject

177. Id. at 856.
178. Id. (quoting Atlantic Mutual Ins. Co. v. Balfour Maclaine Int’l, 968 F.2d 196, 199 (2d Cir. 1992)).
179. Id.
180. Id. at 855–56.
181. Terra Nova, 931 F. Supp. at 856.
183. Id. at 1131. The court found that the shipper and consignee were closely related companies that did not act without the consent of the other. Id. at 1132 n.1. Thus, for all practical matters, the court considered them as one and the same. Id.
184. Id. at 1138.
voyage, the shipper/consignee, in an effort to reduce costs, experimented with transporting its product in plastic containers break bulk, rather than in refrigerated containers. The shipper/consignee attempted to utilize this method on thirteen voyages, each resulting in a shifting of cargo and a dangerous resulting list.\textsuperscript{186} Despite the numerous problems encountered by the ship’s transportation of the shipper/consignee’s product in this manner, and recommendations made to the shipper/consignee for resolving these problems, the shipper/consignee failed to advise the time charterer of the risk or to alter its method of transporting its product.\textsuperscript{187}

Before sailing, the shipper/consignee and its stevedore submitted a load plan to the master of the vessel. After reviewing the load plan, the master decided to erect side boards and to screw dunnage to the deck grating of the vessel’s holds to better secure the cargo. The master and his crew supervised as the cargo was loaded.\textsuperscript{188}

Once at sea, the vessel began to roll port-side. Despite efforts to secure the cargo, it shifted, causing the side boards to collapse and the vessel to experience a severe list. As a result of the list, the master deviated from the ship’s intended route and sought refuge at a nearby port. Although the master probably had good intentions, the port was not equipped to handle the discharge, cold storage, and restow of the cargo. Consequently, the ship was forced to return to its port of departure.\textsuperscript{189}

After hearing counsels’ arguments and reviewing all the evidence of record, the court concluded that the shipper/consignee was forty percent at fault for failing to provide adequate securing materials, and for failing to warn other parties of the numerous problematic voyages on which their cargo was carried.\textsuperscript{190} In finding that the remaining sixty percent was attributable to the time charterer, the court focused on the master’s decisions: To erect side boards in order to restrain the drums (which had exacerbated the list when it was destroyed); and to seek refuge in a port ill-equipped to store the cargo during the required restow.\textsuperscript{191}

With respect to actions between the bareboat charterer and the time charterer, the court found that the incident constituted an “‘accident to her cargo.’” Pursuant to the charter party, “‘any detention or expenses related to the accident to cargo are for the account of the charterer,’” unless the accident

\textsuperscript{186. Id. at 1132–33.}
\textsuperscript{187. Id. at 1133.}
\textsuperscript{188. Id. at 1135–36. A stevedore is “[a] person employed in loading and unloading vessels.” BLACK’S LAW DICTIONARY 1414 (6th ed. 1990).}
\textsuperscript{189. Narcissus, 950 F. Supp. at 1136.}
\textsuperscript{190. Id. at 1137.}
\textsuperscript{191. Id.}
\textsuperscript{192. Id. at 1138 (quoting clause 11(B) of the contract).}
is caused or contributed to by the negligence of the bareboat charterer. The court determined that the master’s negligence, which contributed significantly to the subject incident and to the unseaworthiness of the vessel, was attributable to the bareboat charterer. Thus, the court denied the bareboat charterer’s action against the time charterer for unpaid charter hire.

However, the court found in favor of the bareboat charterer with respect to its claim against the time charterer for breach of the charter party for failure to “load, trim, and stow the cargo.” The court determined that the master’s supervision of the loading, stowing, and discharging of the subject cargo did not relieve the time charterer of financial responsibility for such actions. Therefore, the court found the time charterer liable to the owner for breach of contract.

As to the bareboat charterer’s claim against the shipper/consignee for failure to warn the parties of the previous shifting problems, the court concluded that since the propensities of the cargo were dangerous and not open and obvious, the shipper/consignee did indeed owe a duty to inform the other interested parties to the maritime venture. The court concluded that the shipper/consignee breached its duty to warn the other interested parties of its prior problematic voyages, and, as such, the court held it liable to the other parties of the venture.

As to the time charterer’s counterclaim against the bareboat charterer for the master’s failure to adequately supervise the loading, stowing, and discharging of cargo, the court concluded that the clause requiring the master to supervise the loading, stowing, and discharging of cargo merely reiterated what is always implicitly true, i.e., that the master retains the right “to supervise any operations aboard the vessel to ensure that the same do not adversely affect the seaworthiness of the vessel.” Since the time charterer remained under a duty to the charter party with the responsibility to load, stow, and discharge the cargo, the master had no viable counterclaim.

The court addressed the time charterer’s and shipper/consignee’s counterclaims against the bareboat charterer for failure to exercise due

193. Id.
195. Id.
196. Id. 1138–39.
197. Id.
198. Id. at 1139.
200. Id.
201. Id. at 1140.
202. Id.
diligence in providing a seaworthy vessel.\textsuperscript{203} The court concluded that since the duty of providing a seaworthy ship requires an owner to exercise due care, not only in providing a seaworthy vessel, but also in ensuring the adequacy of the ship’s equipment, the bareboat charter breached its duty.\textsuperscript{204} The court determined that the problematic equipment was the ship’s sideboards, which the master installed to retain the cargo.\textsuperscript{205} The vessel was deemed unseaworthy because of its inadequate equipment.\textsuperscript{206} Therefore, the court concluded that the bareboat charterer was liable to both the time charterer and the shipper/consignee for unseaworthiness.\textsuperscript{207}

The time charterer and shipper/consignee cross-claimed against each other for breach of the contract of affreightment.\textsuperscript{208} The shipper/consignee argued that the time charterer was liable for contribution/indemnity pursuant to the contract provision which held that the time charterer was “\textsuperscript{209}responsible for... delay in delivery of the goods only in case the... delay has been caused by the improper or negligent stowage of the goods.”\textsuperscript{209} The court disagreed, and held that the time charterer’s agreement, pursuant to contract, to bring cargo “into the holds, loaded, stowed, and/or trimmed and taken from the holds and discharged... free of any risk, liability, and expense whatsoever to the owners [time charterer],”\textsuperscript{164} insulated time charterer from liability for stowage problems.\textsuperscript{210} As a result, the court discarded the shipper/consignee’s cross-claim against time charterer.\textsuperscript{211}

Further, the court rejected time charterer’s cross-claim against the shipper/consignee for breach of the contract of affreightment for failure to adequately pack the cargo.\textsuperscript{212} The court found no evidence indicating that the cargo was inadequately packaged and held that the lack of damage to cargo supported the conclusion.\textsuperscript{213} However, the district court did find value in the time charterer’s cross-claim against the shipper/consignee for breach of its duty, under the general maritime law, to warn the time charterer of the

\begin{flushleft}
\textsuperscript{203} Id.
\textsuperscript{204} Narcissus, 950 F. Supp. at 1140.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id. at 1140-41.
\textsuperscript{208} Id. at 1141. A contract of affreightment is “a contract with a ship-owner to hire his ship, or part of it, for the carriage of goods... [s]uch a contract generally takes the form either of a charter-party or of a bill of lading.” BLACK’S LAW DICTIONARY 60 (6th ed. 1990) (citation omitted).
\textsuperscript{209} Narcissus, 950 F. Supp. at 1142 (quoting clause 5(b) of the contract).
\textsuperscript{210} Id. at 1142.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\end{flushleft}
potential dangerous nature of the drummed cargo as evidenced by the shipper/consignee’s prior problematic voyages.\textsuperscript{214}

Additionally, the district court determined that “\[u\]nder the general maritime law, cargo owners and shippers each have a duty to warn other interested parties in the maritime venture of any inherent dangers in the cargo of which they know or should know and which the others could not reasonably be expected to know.”\textsuperscript{215} The shipper/consignee knew of the dangers associated with the shipment of the drums which were not patently dangerous and thereby breached its duty by failing to warn other parties.\textsuperscript{216} Therefore, the district court ruled in favor of the time charterer’s claim against the shipper/consignee.\textsuperscript{217}

\textbf{V. FLORIDA DECISIONS}

\textbf{A. Punitive Damages}

In \textit{Langmead v. Admiral Cruises, Inc.},\textsuperscript{218} an entertainer employed by a cruise ship injured herself while exercising in the ship’s gym when an elastic band she was using snapped and hit her in the eye.\textsuperscript{219} The entertainer sued the cruise line for Jones Act negligence, unseaworthiness, maintenance and cure, and punitive damages. The trial court directed a verdict for the cruise line on the issues of maintenance and cure and punitive damages, but submitted the negligence and unseaworthiness claims to a jury for determination.\textsuperscript{220} At trial, the jury denied the entertainer’s claim for unseaworthiness.\textsuperscript{221} However, the jury award for $50,000 on the claim for negligence was reduced to $5000 upon finding that the entertainer was ninety percent comparatively negligent.\textsuperscript{222} The entertainer appealed the judgment.

The Third District Court of Appeal of Florida affirmed the jury’s verdict, holding that the comparative negligence issue was properly submitted to the jury.\textsuperscript{223} However, it reversed and remanded the directed verdict, holding that

\begin{itemize}
  \item \textsuperscript{214} \textit{Narcissus}, 950 F. Supp. at 1142.
  \item \textsuperscript{215} \textit{Id.} at 1143.
  \item \textsuperscript{216} \textit{Id.}
  \item \textsuperscript{217} \textit{Id.}
  \item \textsuperscript{218} 696 So. 2d 1189 (Fla. 3d Dist. Ct. App. 1997).
  \item \textsuperscript{219} \textit{Id.} at 1190.
  \item \textsuperscript{220} \textit{Id.}
  \item \textsuperscript{221} \textit{Id.}
  \item \textsuperscript{222} \textit{Id.}
  \item \textsuperscript{223} \textit{Langmead}, 696 So. 2d at 1190.
  \item \textsuperscript{224} \textit{Id.}
\end{itemize}
the determination as to when the entertainer reached "maximum medical cure" should have been submitted to the jury.\textsuperscript{225}

On remand, the trial court considered the following issues: 1) whether certain visits made by the entertainer to a physician were "cure" and should have been paid for; 2) whether the cruise line owed the entertainer two weeks worth of lost wages; and 3) whether the cruise line's failure to pay the entertainer warranted punitive damages.\textsuperscript{226} The entertainer was denied her maintenance claim on directed verdict, but was awarded cure for medical visits that remained unpaid ($235), two weeks lost wages ($730), and punitive damages ($3.5 million).\textsuperscript{227}

The trial court granted the cruise line's motion for a new trial, holding that the "jury verdict was contrary to the manifest weight of the evidence and was influenced by prejudicial matters."\textsuperscript{228} The entertainer appealed, and the third district appeared to have no difficulty in holding that the trial court abused its discretion in granting the cruise line a new trial on the issue of liability and actual damages because the record fully supported the jury's verdict.\textsuperscript{229} However, the third district recognized that the more difficult issue was the issue of punitive damages.\textsuperscript{230}

The cruise line argued that the punitive damage award was so excessive that it violated the Substantive Due Process Clause of the United States and Florida Constitutions. Citing the United States Supreme Court case, \textit{BMW of North America v. Gore},\textsuperscript{231} the third district set forth three criteria for analysis in determining the excessiveness of a punitive damage award: "1) the degree of reprehensibility of the defendant's conduct; 2) the ratio of the punitive damage award to the actual harm inflicted on the plaintiff; and 3) the comparison between the punitive damage award and the civil or criminal penalties that could be imposed for comparable misconduct."\textsuperscript{232} Applying these three criteria, the third district found no reprehensible conduct on behalf of the cruise line; a ratio of 3626 to one with respect to the amount of punitive damages awarded in comparison to the actual harm inflicted; and that the cruise line was not guilty of any misconduct.\textsuperscript{233}

\textsuperscript{225} \textit{Id.} at 1190-91 (quoting Langmead v. Admiral Cruises, Inc., 610 So. 2d 565 (Fla. 3d Dist. Ct. App. 1997)).
\textsuperscript{226} \textit{Id.} at 1191.
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} Langmead, 696 So. 2d at 1191.
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}
\textsuperscript{231} 116 S. Ct. 1589 (1996).
\textsuperscript{232} Langmead, 696 So. 2d at 1192.
\textsuperscript{233} \textit{Id.} at 1193-94.
In support of its determination that the cruise line was not guilty of reprehensible conduct, the third district noted: 1) the cruise line provided medical attention to the entertainer immediately upon learning of her injury; 2) it referred the employee to a specialist within two days of her injury in order to ensure that she received the best possible treatment; 3) it continued to pay her for three days following her injury when she did not work; 4) it paid for her hotel stay and food expenses for a week while she was treated by a specialist ashore; 5) it flew her from Mexico to California for treatment; and 6) it paid all medical bills submitted by doctors not retained by the entertainer's lawyer. Further, it found that consistent with its finding of no reprehensible conduct on the part of the cruise line, the cruise line was not guilty of "callous," "recalcitrant," "arbitrary," or "capricious" conduct in failing to pay the entertainer for maintenance and cure and thus, was not liable for punitive damages.

Deciding in favor of the cruise line, the third district held that the award of punitive damages was contrary to the manifest weight of the evidence. Additionally, the court held that the award was "so grossly excessive as to shock the judicial conscience;" it bore no relationship to the entertainer's harm and the cruise line's culpability; and it violated the cruise line's rights to substantive due process under the United States and Florida Constitutions. Accordingly, it remanded the case with instructions to grant the cruise line's motion for directed verdict as to punitive damages.

In Kloster Cruise Ltd. v. De Sousa, the trial judge awarded the plaintiff attorneys' fees following a plaintiff's verdict in an admiralty case seeking an award for maintenance and cure, punitive damages, and attorneys' fees and costs. The post-trial judgment was based on the jury's finding that the defendant "willfully and arbitrarily" failed to provide maintenance and cure.

The defendant appealed and the Third District Court of Appeal held that the recovery of attorneys' fees in a suit for willful failure to pay maintenance and cure is nonseverable from the cause of action. Additionally, the third district held that absent waiver of the parties, the jury is to determine not only

234. Id. at 1192–93.
235. Id. at 1194.
236. Id.
237. Langmead, 696 So. 2d at 1194.
238. Id.
239. 677 So. 2d 50 (Fla. 3d Dist. Ct. App. 1996).
240. Id. at 50.
241. Id.
242. Id. at 51.
the plaintiff's entitlement to fees, but also the appropriate amount to award.\textsuperscript{243} The third district found that in the instant case, the trial court, without stipulation of the parties and notwithstanding defendant's objection, severed the issue of the amount of fees to be awarded from the entitlement issue.\textsuperscript{244} The third district reversed the trial court's judgment for attorneys' fees and remanded for further proceedings.\textsuperscript{245} Before concluding, the third district suggested that should the trial court find it impractical to present the issue of fee amount to a jury in the same sitting as other issues, it can have the jury arrive at its verdict, and then receive evidence as to the amount of fees to be awarded.\textsuperscript{246}

In Kloster Cruise Ltd. v. Segui,\textsuperscript{247} the plaintiff, while employed as a cabin steward aboard a cruise line, was diagnosed with a degenerative hip condition requiring him to have his hip replaced.\textsuperscript{248} The plaintiff brought suit against the employer cruise line for "negligence, unseaworthiness, failure to treat, and failure to provide maintenance and cure."\textsuperscript{249} He alleged that the cruise line "failed to respond promptly and properly to [his] complaints of pain" causing his medical condition to become aggravated and requiring hip replacement instead of a "less intrusive" treatment.\textsuperscript{250} Four days before trial, the plaintiff returned to the United States alleging that the surgery was negligently performed in the Phillipines causing his right leg to measure "three-fourths of an inch shorter than the left leg."\textsuperscript{251} The cruise line moved for a continuance of trial on the grounds "that it could not reasonably be expected to defend against the newly discovered claim" of medical malpractice on such short notice.\textsuperscript{252} The trial court denied the cruise line's motion, and the case proceeded to trial.\textsuperscript{253} The plaintiff prevailed, and the cruise line appealed.\textsuperscript{254}

On appeal, the cruise line argued that the judgment should be reversed based on the fact that the trial court wrongfully refused to grant its motion for continuance. It further argued that in light of the recent decision by the United States Court of Appeals for the Fifth Circuit in Guevara v. Maritime Overseas

\begin{flushright}
\textsuperscript{243} Id.  \\
\textsuperscript{244} DeSousa, 677 So. 2d at 51.  \\
\textsuperscript{245} Id.  \\
\textsuperscript{246} Id.  \\
\textsuperscript{247} 679 So. 2d 10 (Fla. 3d Dist. Ct. App. 1996).  \\
\textsuperscript{248} Id. at 11.  \\
\textsuperscript{249} Id.  \\
\textsuperscript{250} Id.  \\
\textsuperscript{251} Id.  \\
\textsuperscript{252} Kloster, 679 So. 2d at 11.  \\
\textsuperscript{253} Id.  \\
\textsuperscript{254} Id.  \\
\end{flushright}
punitive damages are no longer available for willful failure to provide a seaman maintenance and cure.\textsuperscript{256} The third district reversed judgment on the ground that the cruise line's motion to continue should have been granted.\textsuperscript{257} However, the third district ruled that binding precedent prevented the court from ruling that punitive damages are no longer available for willful failure to provide maintenance and cure.\textsuperscript{258}

B. Coverage

In \textit{Florida Marine Towing, Inc. v. United National Insurance Co.},\textsuperscript{259} the seller sold a tugboat to buyer/owner who made a down payment and was obligated to pay the balance in installments over two years.\textsuperscript{260} The seller was considered a lender and was added as an additional assured on the marine hull insurance policy issued by the insurer. Although the policy contained a navigational warranty, which confined the tugboat's use to inland waters in Florida, the tugboat failed to restrict itself to Florida inland waters and sank in the Atlantic Ocean. The insurer denied the seller's claim under the insurance policy on the premise that the tugboat violated the navigational warranty. The seller sued, arguing that "inland waters" includes anything within Florida's three mile limit or, alternatively, that the seller lacked control over the tugboat's navigation, and thus the seller could not be held attributable for the navigational warranty's breach. The trial court granted summary judgment in favor of the insurer, and the seller appealed.\textsuperscript{261}

The Third District Court of Appeal determined that since the contract at issue was for marine insurance, federal maritime law governed the interpretation of the navigational warranty.\textsuperscript{262} Finding that the federal maritime law requires strict construction of a navigational warranty, and that such a warranty can release an insurer even if compliance with the warranty would not have avoided the loss, the third district focused on defining "inland waters."\textsuperscript{263}

Finding a plethora of United States Supreme Court cases defining "inland waters," the third district determined that under the general maritime law, "inland waters" is generally understood to mean waters on the landward side
of the coastline, such as rivers, harbors, and canals. Since the tugboat sank in the Atlantic Ocean, seaward of the coastline, it was not in inland waters. As such, the third district found that the seller breached the policy’s navigational warranty.

Despite the fact that the seller breached its navigational warranty, the third district held that its lack of control over the tugboat’s navigation precluded the insurer from denying it coverage. Additionally, the third district held that since the seller was not merely a loss payee, but was an additional assured, its coverage could not be adversely affected by the mortgagor’s wrongful acts. In conclusion, the third district reversed the summary judgment and remanded the cause for further proceedings.

VI. CONCLUSION

The summary of cases provided run wide in range with respect to issues that may arise in admiralty and should give any novice a general understanding of admiralty law.

264. Florida Marine, 686 So. 2d at 714.
265. Id.
266. Id. at 714–15.
267. Id. at 715.
268. Id.
Appellate Practice: 1997 Survey of Florida Law

Anthony C. Musto*

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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, 1996, and June 30, 1997, it will also deal with certain cases decided shortly before and after that period which are either of particular interest to the appellate practitioner or which 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

will deal with those areas. Additionally, this article will not discuss cases relating to the preservation of issues, nor the question of whether particular errors were harmless.

II. FOUR-YEAR CYCLE AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The most significant development in the field of appellate practice in Florida, during the 1996-97 year, was the four-year cycle revision of the Florida Rules of Appellate Procedure. As is the case with each set of Florida court rules, revisions occur every four years pursuant to the cycle established by rule 2.130(c) of the Florida Rules of Judicial Administration. Proposals are submitted by the Florida Appellate Court Rules Committee to the Supreme Court of Florida, which adopts such portions of the proposals as it deems appropriate. The numerous changes that resulted from this process were initially adopted by the Supreme Court of Florida on November 22, 1996, were corrected on denial of rehearing on December 26, 1996, and took effect on January 1, 1997.

A. Rule 9.010: Effective Date and Scope

This rule was amended to state that the appellate rules, as provided in rule 2.135 of the Florida Rules of Judicial Administration, shall supersede all conflicting rules of procedure. It is likely that the most significant impact of this change will be to require circuit courts, considering requests for extraordinary writs that do not involve the submission of evidence or testimony to follow the procedure set forth by rule 9.100 of the Florida Rules of Appellate Procedure, rather than that contained in rule 1.630 of the Florida Rules of Civil Procedure.

3. Fla. R. Jud. Admin. 2.130(c).
5. Id.
6. Id.
7. As part of its four-year cycle review of the rules of judicial administration, the court adopted new rule 2.135, which states: "The Florida Rules of Appellate Procedure shall control all proceedings in the supreme court and the district courts, and all proceedings in which the circuit courts exercise their appellate jurisdiction, notwithstanding any conflicting rules of procedure." Amendments to the Florida Rules of Judicial Administration, 682 So. 2d 89, 103 (Fla. 1996).
B. **Rule 9.020: Definitions**

The court defined "Family Law Matter" as "[a] matter governed by the Florida Family Law Rules of Procedure," and amended the definition of "Lower Tribunal" to include a "judge of compensation claims...whose order is to be reviewed." The court also added to the list of authorized and timely motions that delay rendition of orders, a motion to withdraw a plea after sentencing pursuant to rule 3.170(l) of the *Florida Rules of Criminal Procedure*. The reference to one of the motions already included in the rule, a motion to correct a sentence or order of probation, was amended to make clear that in order to delay rendition, such motion had to be made pursuant to rule 3.800(b) of the *Florida Rules of Criminal Procedure*. Another amendment to the rule provides that when a notice of appeal is filed during the pendency of a motion to correct a sentence, or order of probation, or a motion to withdraw a plea after sentencing, the notice "shall be treated as prematurely filed and the appeal held in abeyance until the filing of a signed, written order disposing of such motion." A new provision was created to provide:

> An order based upon the recommendation of a hearing officer in accordance with Florida Family Law Rule of Procedure 12.492 shall not be deemed rendered if there has been filed in the lower tribunal an authorized and timely motion to vacate until the filing of a signed, written order disposing of such motion.

C. **Rule 9.100: Original Proceedings**

The references to "common law certiorari" were changed to simply "certiorari" in order to make clear that the thirty-day time limit for instituting a proceeding applies to all petitions for certiorari. Also, past references to "administrative" action were changed to "agency" action.

Added to the list of petitions that must be filed within thirty days of rendition of the order to be reviewed in order to be timely were petitions

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9. Id. 9.020(e).
10. Id. 9.020(h).
11. Id.
12. Id. 9.020(h)(3).
15. FLA. R. APP. P. 9.100(e).
challenging orders of the Department of Corrections in prisoner disciplinary proceedings.  

A new subdivision of the rule sets forth the procedures to be followed with regard to petitions for writs of mandamus and prohibition directed to a judge or lower tribunal. The procedures provide that “[t]he name of the judge or lower tribunal shall be omitted from the caption,” which shall instead “bear the name of the petitioner” and which shall name the “other parties to the proceeding in the lower tribunal” as respondents. The judge or lower tribunal must be named as a formal party in the body of the petition, which must be served on all parties, including the judge, who are formal parties. The rule makes clear that “[t]he responsibility to respond to an order to show cause is that of the litigant opposing the relief requested in the petition. Unless otherwise specifically ordered, the judge or lower tribunal has no obligation to file a response” but retains the discretion to do so. “The absence of a separate response . . . shall not be deemed to admit the allegations of the petition.”

Another new subdivision establishes additional requirements for proceedings invoking the jurisdiction of the circuit court to review judicial or quasi-judicial action. The caption of a petition seeking such review must contain a statement that the petition is being filed pursuant to the subdivision. When such a petition is filed, “the circuit court clerk shall forthwith transmit” it to the appropriate judge or judges “for a determination as to whether an order to show cause should be issued.” The clerk shall not enter a default in a case in which the petition is filed pursuant to the subdivision.


The rule was amended to indicate its applicability to proceedings that “seek review of orders entered in probate and guardianship matters that

16. Id. 9.100(c)(4).
17. Id. 9.100(e).
18. Id. 9.100(e)(2).
19. FLA. R. APP. P. 9.100(e)(3).
20. Id.
21. Id. 9.100(f).
22. Id. 9.100(f)(1).
23. Id. 9.100(f)(2).
25. Id. 9.100(f)(4).
finally determine a right or obligation of an interested person as defined in the Florida Probate Code.\(^\text{26}\)

Another amendment provides that in an appeal of an administrative order:

[T]he appellant shall file the original notice [of appeal] with the clerk of the lower administrative tribunal within 30 days of rendition of the order to be reviewed, and file a copy of the notice, accompanied by the filing fees prescribed by law, with the clerk of the [appellate] court.\(^\text{27}\)

A new subdivision of the rule states that “[j]udgments that determine the existence or nonexistence of insurance coverage in cases in which a claim has been made against an insured and coverage thereof is disputed by the insurer may be reviewed either by the method prescribed in this rule or that in rule 9.130,”\(^\text{28}\) the rule governing proceedings to review non-final orders. This subdivision was a response to the opinion in *Canal Insurance Co. v. Reed*,\(^\text{29}\) which suggested that the Appellate Court Rules Committee consider an appropriate method for providing expedited review in this type of case in order to avoid unnecessary delays in the final resolution of the underlying actions.\(^\text{30}\)

E. Rule 9.130: Proceedings to Review Non-Final Orders

The court adopted an amendment that shifted a phrase used in setting forth one of the rule’s appealable non-final orders. The old version of the rule provided for review of non-final orders that determined “that a party is not entitled to workers’ compensation immunity as a matter of law.”\(^\text{31}\) The new version refers instead to non-final orders which determine “that, as a matter of law, a party is not entitled to workers’ compensation immunity.”\(^\text{32}\) This change was made to resolve the confusion evidenced in *Breakers Palm Beach, Inc. v. Gloger*,\(^\text{33}\) *City of Lake Mary v. Franklin*,\(^\text{34}\) and their progeny.

\(^\text{26}\). *Id.* 9.110(a)(2).
\(^\text{27}\). *Id.* 9.110(c).
\(^\text{28}\). *Id.* 9.110(n).
by clarifying that the rule does not intend "to grant a right of nonfinal review if the lower tribunal denies a motion for summary judgment based on the existence of a material fact dispute."35

Added to the list of reviewable non-final orders were those that determine "that, as a matter of law, a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law."36 This addition was in response to the decision in Tucker v. Resha,37 which asked that the Appellate Court Rules Committee submit a proposed amendment to allow for review of orders of this nature.38

A new subdivision was also added to the rule making it clear that multiple non-final orders within the scope of the rule may be reviewed by a single notice of appeal if the notice is timely filed as to each such order.39

F. Rule 9.140: Appeal Proceedings in Criminal Cases

Several amendments expanded the number of appealable orders. The rule now allows defendants to appeal from: 1) orders granting or modifying community control;40 2) unlawful sentences;41 or 3) sentences, if appeals are permitted by general law42 or "as otherwise provided by general law."43 In addition, it now allows the state to appeal from orders: 1) dismissing affidavits "charging the commission of a criminal offense, the violation of probation, the violation of community control, or the violation of any supervised correctional release;"44 2) granting motions for judgment of acquittal after jury verdicts;45 3) finding a defendant incompetent;46 4) "imposing an unlawful or illegal sentence or imposing a sentence outside the range permitted by the sentencing guidelines;"47 5) "imposing a sentence outside the range recommended by the sentencing guidelines;"48 or 6)
"denying restitution;" or "as otherwise provided by general law for final orders." The amendments also indicate that "[t]he state as provided by general law may appeal to the circuit court non-final orders rendered in the county court." 

A new subdivision was added to the rule to accurately reflect the limited right of direct appeal after a plea of guilty or nolo contendere. It states that "[a] defendant who pleads guilty or nolo contendere may expressly reserve the right to appeal a prior dispositive order of the lower tribunal, identifying with particularity the point of law being reserved." The new subdivision goes on to state:

(B) A defendant who pleads guilty or nolo contendere may otherwise directly appeal only

(i) the lower tribunal’s lack of subject matter jurisdiction;

(ii) a violation of the plea agreement, if preserved by a motion to withdraw plea;

(iii) an involuntary plea, if preserved by a motion to withdraw plea;

(iv) a sentencing error, if preserved; or

(v) as otherwise provided by law.

Except for those appeals in which a defendant expressly reserves the right to appeal a dispositive order, the record for appeals involving a plea of guilty or nolo contendere shall be limited to:

a. all indictments, informations, affidavits of violation of probation or community control and other charging documents;

b. the plea and sentencing hearing transcripts;

c. any written plea agreements;

50. Id. 9.140(c)(1)(M).
51. Id. 9.140(c)(2).
52. Id. 9.140(b)(2).
53. See 1996 Committee Note to FLA. R. APP. P. 9.140.
55. Id. 9.140(b)(2)(B)(i)–(v).
d. any judgments, sentences, scoresheets, motions and orders to correct or modify sentences, orders imposing, modifying, or revoking probation or community control, orders assessing costs, fees, fines, or restitution against the defendant, and any other documents relating to sentencing;

e. any motion to withdraw plea and order thereon;

f. notice of appeal, statement of judicial acts to be reviewed, directions to the clerk, and designation to the court reporter. 56

In addition, "[u]pon good cause shown, the court, or the lower tribunal before the record is transmitted, may expand the record." 57

The rule was also clarified to indicate that a defendant may institute an appeal by filing a notice of appeal "at any time between rendition of a final judgment and 30 days following rendition of a written order imposing sentence." 58

Pursuant to the dictates of Lopez v. State, 59 the rule now also provides that when the state appeals an order, a defendant may cross appeal on related issues involved in the same order by serving a notice within ten days of service of the state’s notice of appeal. 60

Another amendment affects the procedures to be used in death penalty cases. It provides that in such cases "all petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal’s order on the defendant’s application for relief under Florida Rule of Criminal Procedure 3.850." 61 It further indicates that the provision of the rule relating to belated appeals 62 shall not apply to death penalty cases. 63

A new subdivision 64 dealing with sentencing errors provides that claims of such errors "may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal: (1) at the time of

56. Id. 9.140(b)(2)(C)(i)(a)-(f).
57. Id. 9.140(b)(2)(C)(ii).
58. Id. 9.140(b)(3).
59. 638 So. 2d 931 (Fla. 1994).
60. FLA. R. APP. P. 9.140(b)(4).
62. Id. 9.140(j).
63. Id. 9.140(b)(6)(E).
64. Id. 9.140(d).
sentencing; or (2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

The portion of the rule relating to transcripts was amended to allow nonindigent defendants to order just the original transcripts from the court reporters and to make copies for all parties. Parties electing to use the procedure must serve notice of its use on counsel for the state, file the original transcripts and copies for the state and each defendant with the clerk of the lower tribunal for inclusion in the record, and attach a certificate to each copy certifying that it is an accurate and complete copy of the original transcript. When this procedure is used, the clerk of the lower tribunal shall be required to “retain the original transcript[s] for use as needed by the state in any collateral proceedings and shall not destroy the transcripts without the consent” of the Attorney General’s office. The procedures can also be utilized by the state when it appeals.

The adoption of this amendment is intended to supersede the dictates of Brown v. State, and allow the use by nonindigent defendants and the state of a procedure previously available only in civil cases pursuant to rule 9.200(b)(2) of the Florida Rules of Appellate Procedure. In cases in which the defendant is indigent, or in which the party taking the appeal elects not to use the above discussed procedure, “the parties shall designate the court reporter to file with the clerk of the lower tribunal the original transcripts for the court and sufficient copies for the state and all indigent defendants.” The lower tribunal may, however, in publically funded cases, direct its clerk, rather than the court reporter, to prepare the necessary copies of the original transcripts.

Regardless of the method of transcript preparation, the clerk of the lower tribunal shall within fifty days of the filing of the notice of appeal, prepare and serve copies of the record to the court, counsel for the state, and all counsel appointed to represent indigent defendants on appeal. The clerk “shall simultaneously serve copies of the index to all nonindigent defendants

65. Id. 9.140(d)(2).
67. Id.
68. Id.
69. Id. 9.140(e)(2)(E).
71. Brown, 639 So. 2d at 635.
73. Id. 9.140(e)(2)(F).
74. Id. 9.140(e)(1).
75. Id. 9.140(e)(4).
and, upon their request, copies of the record or portions thereof at the cost prescribed by law.76

"Unless otherwise ordered by the court, the clerk of the lower tribunal shall retain all original documents except the original transcripts designated for appeal which shall be included in the record transmitted to the [appellate] court."77 "Except in death penalty cases, the [appellate] court shall return the record to the lower tribunal after final disposition of the appeal."78

The appellant's initial brief "shall be served within 30 days of service of the record or designation of appointed counsel, whichever is later."79

The time period for filing any appellant's brief in appeals from orders denying relief under rules 3.800(a) or 3.850 of the Florida Rules of Criminal Procedure was limited to within fifteen days of the filing of the notice of appeal.80

Another new subdivision of the rule establishes the procedure for petitions seeking belated appeals or alleging ineffective assistance of counsel.81 The procedure calls for both of these types of claims to be presented directly to the appellate courts.82 Previously, the dictates of State v. District Court of Appeal of Florida, First District,83 mandated that a claim that an appeal was frustrated by ineffective assistance of trial counsel (most frequently, the failure to file a notice of appeal) must be raised by a motion in the trial court pursuant to rule 3.850 of the Florida Rules of Criminal Procedure, and that a claim of ineffective appellate counsel was to be raised in a habeas corpus petition filed in the appellate court.84 The second district, in Stephenson v. State,85 had expressed frustration with its inability to grant relief when trial counsel was ineffective for failing to file a notice of appeal.86 On review of the district court's decision in Stephenson, the Supreme Court of Florida continued to require the then-existing procedure,87 but gave some indication of a willingness to eventually change the process, noting that it was adhering to the principle established in District Court of

76. Id.
77. FLA. R. APP. P. 9.140(e)(3).
78. Id. 9.140(e)(5).
79. Id. 9.140(f).
80. Id. 9.140(i).
81. Id. 9.140(j).
82. FLA. R. APP. P. 9.140(j)(1).
83. 569 So. 2d 439 (Fla. 1990).
84. Id. at 441–42.
85. 640 So. 2d 117 (Fla. 2d Dist. Ct. App. 1994).
86. Id. at 119.
87. Stephenson v. State, 655 So. 2d 86, 87 (Fla. 1995). For a discussion of both
Stephenson opinions, see 1995 Survey, supra note 1, at 52–53.
Notice appeal “for now” and that the issue was at that time under review by both the court and the Appellate Court Rules Committee.88

The new subdivision requires both petitions for belated appeals and petitions “alleging ineffective assistance of appellate counsel [to] be filed in the appellate court to which the appeal was or should have been taken.”89

Such petitions are to be in the form prescribed by the rule dealing with original proceedings in the appellate courts and shall recite in the statement of facts:

(A) the date and nature of the lower tribunal’s order sought to be reviewed;
(B) the name of the lower tribunal rendering the order;
(C) the nature, disposition, and dates of all previous proceedings in the lower tribunal and, if any, in the appellate courts;
(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;
(E) the nature of the relief sought; and
(F) the specific facts sworn to by the petitioner or petitioner’s counsel that constitute the alleged ineffective assistance of counsel or basis for entitlement to belated appeal, including in the case of a petition for belated appeal whether the petitioner requested counsel to proceed with the appeal.91

The petitioner is required to serve copies of the petition on both the attorney general and the state attorney.92 "The [appellate] court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition."93 The appellate court may also “dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure."94

88. Stephenson, 655 So. 2d at 87 n.1.
89. FLA. R. APP. P. 9.140(j)(1).
90. Id. 9.100.
91. Id. 9.140(j)(2)(A)-(F).
92. Id. 9.140(j)(4).
93. Id. 9.140(j)(5)(B).
The appellate rule relating to original proceedings shall govern the processing of the petition. "An order granting a petition for belated appeal shall be filed with the lower tribunal and treated as the notice of appeal, if no previous notice of appeal has been filed."

The new subdivision also establishes time limits for the filing of petitions:

(A) A petition for belated appeal shall not be filed more than two years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner

(i) was unaware an appeal had not been timely filed or was not advised of the right to an appeal; and

(ii) should not have ascertained such facts by the exercise of reasonable diligence.

(B) A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

(C) Time periods under this subdivision shall not begin to run prior to the effective date [January 1, 1997] of this rule.


This new rule provides that appeal proceedings in juvenile delinquency cases shall be as in criminal cases, except as modified by this rule. It states:

95. Id. 9.100.
96. Id. 9.140(j)(5)(A).
97. Id. 9.140(j)(5)(D).
98. Id. 9.140(j)(3).
100. FLA. R. APP. P. 9.140(j)(3).
101. Id. 9.145(a).
(b) Appeals by Child. To the extent adversely affected, a child or any parent, legal guardian, or custodian of a child may appeal

(1) an order of adjudication of delinquency or withholding adjudication of delinquency, or any disposition order entered thereon;

(2) orders entered after adjudication or withholding of adjudication of delinquency, including orders revoking or modifying the community control;

(3) an illegal disposition; or

(4) any other final order as provided by law. 102

It further indicates the state may appeal an order:

(A) dismissing a petition for delinquency or any part of it, if the order is entered before the commencement of an adjudicatory hearing;

(B) suppressing confessions, admissions, or evidence obtained by search and/or seizure before the adjudicatory hearing;

(C) granting a new adjudicatory hearing;

(D) arresting judgment;

(E) discharging a child under Florida Rule of Juvenile Procedure 8.090;

(F) ruling on a question of law if a child appeals an order of disposition;

(G) constituting an illegal disposition;

(H) discharging a child on habeas corpus; or

(I) finding a child incompetent pursuant to the Florida Rules of Juvenile Procedure. 103

102. Id. 9.145(b)(1)-(4).
103. Id. 9.145(e)(1)(A)-(I).
Under the rule,

[i]f the state appeals a pre-adjudicatory hearing order of the trial court, the notice of appeal must be filed within 15 days and before commencement of the adjudicatory hearing.

(A) A child in detention whose case is stayed pending state appeal shall be released from detention pending the appeal if the child is charged with an offense that would be bailable if the child were charged as an adult, unless the lower tribunal for good cause stated in an order determines otherwise. The lower tribunal retains discretion to release from detention any child who is not otherwise entitled to release under the provisions of this rule.

(B) If a child has been found incompetent to proceed, any order staying the proceedings on a state appeal shall have no effect on any order entered for the purpose of treatment. 104

Appeals in juvenile delinquency cases “shall be entitled and docketed with the initials, but not the name, of the child and the court case number. All references to the child in briefs, other papers, and the decision of the court shall be by initials.” 105 The rule does not require the deletion of the name of the child from pleadings or other papers transmitted to the court from the lower tribunal. 106

All papers in juvenile delinquency appeals “shall remain sealed in the office of the clerk of court when not in use by the court, and shall not be open to inspection except by the parties and their counsel, or as otherwise ordered.” 107

H. Rule 9.146: Appeal Proceeding in Juvenile Dependency and Termination of Parental Rights Cases and Cases Involving Families and Children in Need of Services

This new rule provides that “[a]ppeal proceedings in juvenile dependency and termination of parental rights cases and cases involving families and children in need of services shall be as in civil cases except as

104. Id. 9.145(g)(2).
modified by this rule.”\textsuperscript{108} It permits “[a]ny child, any parent, guardian ad litem, or legal custodian of any child, any other party to the proceeding affected by an order of the lower tribunal, or the appropriate state agency as provided by law” to appeal to the appropriate court within the time and in the manner prescribed by the appellate rules.\textsuperscript{109}

“The taking of an appeal shall not operate as a stay in any case unless pursuant to an order of the court.”\textsuperscript{110} With two exceptions, a party seeking to stay an “order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief, after considering the welfare and best interest of the child.”\textsuperscript{111} The two exceptions are as provided by general law\textsuperscript{112} and that a termination of parental rights order with placement of the child with a licensed child-placing agency or the Department of Children and Family Services for subsequent adoption shall be suspended while the appeal is pending, but the child shall continue in custody under the order until the appeal is decided.\textsuperscript{113}

Transmittal of the record in cases governed by the rule will not remove the jurisdiction of the lower tribunal to conduct judicial reviews or other proceedings related to the health and welfare of the child pending appeal. . . . When the parent or child is a party to the appeal, the appeal shall be docketed and any papers filed in the court shall be entitled with the initials, but not the name, of the child or parent and the court case number. All references to the child or parent in briefs, other papers, and the decision of the court shall be by initials.\textsuperscript{114}

The rule “does not require deletion of the names of the child and parents from pleadings and other papers transmitted to the court from the lower tribunal.”\textsuperscript{115}

All papers in cases governed by the rule “shall remain sealed in the office of the clerk of the court when not in use by the court, and shall not be open to inspection except by the parties and their counsel, or as otherwise ordered.”\textsuperscript{116}

The appellate court is required to give priority to appeals under this rule.\textsuperscript{117}

\textsuperscript{108} \textit{Id.} 9.146(a).
\textsuperscript{109} \textit{Id.} 9.146(b).
\textsuperscript{110} \textit{Id.} 9.146(c)(2).
\textsuperscript{111} \textit{Id.} 9.146(c)(1).
\textsuperscript{112} FLA. R. APP. P. 9.146(c)(1).
\textsuperscript{113} \textit{Id.} 9.146(c)(2).
\textsuperscript{114} \textit{Id.} 9.146(d)–(e).
\textsuperscript{115} 1996 Committee Note to FLA. R. APP. P. 9.146.
\textsuperscript{116} FLA. R. APP. P. 9.146(f).
\textsuperscript{117} \textit{Id.} 9.146(g).

This new rule consolidates and moves into the appellate rules the procedures previously set forth in *Florida Rules of Workers' Compensation Procedure* 4.160, 4.161, 4.165, 4.166, 4.170, 4.180, 4.190, 4.220, 4.225, 4.230, 4.240, 4.250, 4.260, 4.265, 4.270, and 4.280.118 The change was intended to eliminate duplicative rules and not to change the general nature of workers' compensation appeals.119

J. **Rule 9.200: The Record**

A new subdivision was added to the rule to provide that in family law cases "the clerk of the lower tribunal shall retain the original orders, reports and recommendations of masters or hearing officers, and judgments within the file of the lower tribunal and shall include copies thereof within the record."120 This subdivision "was added because family law cases frequently have continuing activity at the lower tribunal level during the pendency of appellate proceedings and that continued activity may be hampered by the absence of orders being enforced during the pendency of the appeal."121

The wording of the rule was also changed to require that "[t]he transcript of the trial shall be securely bound in consecutively numbered volumes not to exceed 200 pages each, and each page shall be numbered consecutively."122 Prior to the amendment, the rule referred to the "transcript of proceedings."123 The purpose of the change was "to be consistent with and to clarify the requirement in subdivision (d)(1)(B) that it is only the transcript of trial that is not to be renumbered by the clerk."124 Under the amended rule, "it remains the duty of the clerk to consecutively number transcripts other than the transcript of the trial."125 The Appellate Court Rules Committee indicated its view that "if the consecutive pagination requirement is impracticable or becomes a hardship for the court reporting entity, relief may be sought from the court."126

119. *Id.*
120. FLA. R. APP. P. 9.200(a)(2).
121. 1996 Committee Note to FLA. R. APP. P. 9.200.
122. FLA. R. APP. P. 9.200(b)(2).
123. 1996 Committee Note to FLA. R. APP. P. 9.200.
124. *Id.*
125. *Id.*
126. *Id.*
K. Rule 9.210: Briefs

The rule, which had required briefs to be bound in book form and fastened along the left side, was amended to state that briefs “should” be bound and fastened as previously required and added the words “in a manner that will allow them to lie flat when opened.” The amended rule also provides that “[a]lternatively, briefs may be securely stapled in the upper left corner” and that no method of securing the brief other than the two set forth in the rule is acceptable.

The rule was also amended to require references to the appropriate volume, as well as the appropriate page number of the record on appeal, in the statement of the case and of the facts.

Another change to the rule eliminates the requirement that in answer briefs, the statement of the case and of the facts shall be omitted unless there are areas of disagreement, which should be clearly specified. The new version of the rule simply states that “the statement of the case and of the facts may be omitted.” The purpose of the change is “to permit appellees to file their own statements of case and facts.” In amending the rule, the court recognized “that there are some instances in which it is difficult, if not impossible, for the appellee to intelligibly specify the area of disagreement in the statement of the case and facts of the appellants,” but encouraged “appellees not to rewrite the statement . . . except where clearly necessary.”

The portion of the rule dealing with notices of supplemental authority was transferred to the new rule 9.225 of the Florida Rules of Appellate Procedure.

128. Id.
129. Id.
130. Id. 9.210(b)(3).
132. Id.
133. Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1106 (Fla. 1996).
134. Id.
135. Id.
L. **Rule 9.225: Notice of Supplemental Authority**

This new rule is an amended version of the former rule 9.210(g) of the *Florida Rules of Appellate Procedure*. It adds language that requires that supplemental authorities be significant to the issues raised.

M. **Rule 9.300: Motions**

This rule was amended to add "[m]otions relating to expediting the appeal" to the list of motions that do not toll the time schedule of proceedings in appellate courts.

N. **Rule 9.310: Stay Pending Review**

This rule was amended to eliminate former subdivision (b)(3), which provided that the timely filing of a notice of appeal automatically operated as a stay pending review of an award by a judge of compensation claims on a claim for birth related neurological injuries.

O. **Rule 9.315: Summary Disposition**

The references in the rule to "expedited" disposition, affirmance, and reversal were changed to "summary" disposition, affirmance, and reversal.

P. **Rule 9.400: Costs and Attorneys' Fees**

An amendment clarified the fact that only orders rendered "by the lower tribunal" are subject to review by the appellate court under this rule.

Q. **Rule 9.420: Filing; Service of Copies; Computation of Time**

This rule was amended to require that certificates of service must specify the party each attorney being served represents.

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137. *Id.*
139. *Id.* 9.300(d)(9).
141. *Id.* 9.315.
142. *Id.* 9.400(c).
R. Rule 9.430: Proceedings by Indigents

Added to this rule was a new paragraph that provides that "[a]n appellate court may, in its discretion, presume that an incarcerated party who has been declared indigent for purposes of proceedings in the lower tribunal remains indigent, in the absence of evidence to the contrary."\(^\text{144}\)

The language replaced an emergency amendment that the court had adopted in *McFadden v. Fourth District Court of Appeal*\(^\text{145}\) in response to concerns expressed by the fourth district in *McFadden v. West Palm Beach Police Officer*\(^\text{146}\) regarding the need for an amendment to the rules that would allow determination of indigency for appellate purposes to be made at the appellate level.\(^\text{147}\) The emergency amendment, which had called for an indigent incarcerated party to file a motion and affidavit with the appellate court and which allowed the court to either determine the issue or remand to the lower tribunal for determination when an objection is filed,\(^\text{148}\) had been retroactively stayed due to concerns that it could create procedural problems.\(^\text{149}\) The new language submitted by the Appellate Court Rules Committee was agreed upon by representatives of each of the district courts of appeal\(^\text{150}\) and, in the view of the supreme court, appears to give "each court the flexibility necessary to handle these matters."\(^\text{151}\)

S. Rule 9.600: Jurisdiction of Lower Tribunal Pending Review

The portion of this rule relating to family law matters was amended to state that "[t]he receipt, payment, or transfer of funds or property...shall not prejudice the rights of appeal of any party."\(^\text{152}\) Added was a new sentence which provides that "[t]he lower tribunal shall have the jurisdiction to impose, modify, or dissolve conditions upon the receipt or payment of such awards in order to protect the interests of the parties during the appeal."\(^\text{153}\) Additionally, "[r]eview of orders entered pursuant to this

\(^{144}\) *Id.* 9.430.

\(^{145}\) 682 So. 2d 1068 (Fla. 1996).


\(^{147}\) *West Palm Beach Police Officer*, 658 So. 2d at 1048.

\(^{148}\) *Fourth Dist. Court of Appeal*, 682 So. 2d at 1069.

\(^{149}\) Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1106 (Fla. 1996).

\(^{150}\) *Id.*

\(^{151}\) *Id.*

\(^{152}\) FLA. R. APP. P. 9.600(c)(2).

\(^{153}\) *Id.*
subdivision shall be by motion filed in the appellate court within 30 days of rendition."

A new subdivision of the rule recognizes that while an appeal is pending, trial courts have the jurisdiction to rule on motions for posttriaalendar release and motions pursuant to rule 3.800(a) of the Florida Rules of Criminal Procedure. The new subdivision requires that within ten days of any order granting relief under the criminal rule, the movant must file a copy of the order with the appellate court.

T. Rule 9.700: Guide to Times and Acts under Rules

This rule was eliminated.

U. Rule 9.800: Uniform Citation System

Examples of citations were adopted for the Florida Rules for Certified and Court-Appointed Mediators, the Florida Rules for Court-Appointed Arbitrators, and the Florida Family Law Rules of Procedure. They are as follows:

Fla. R. Med. 10.010;

Fla. R. Arb. 11.010;


The court eliminated the requirement that initial references to the United States Supreme Court should cite to the United States Reports, Supreme Court Reporter, and Lawyer's Edition and that subsequent citations, as well as pinpoint citations, shall be to the United States Reports only. Substituted was the following language: "Cite to United States Reports, if published therein; otherwise cite to Supreme Court Reporter, Lawyer's Edition, or United States Law Week, in that order of preference."
III. OTHER AMENDMENTS TO THE FLORIDA RULES OF APPELLATE PROCEDURE

The Supreme Court of Florida adopted, on an emergency basis, changes to the appellate rules necessary to facilitate administrative appeals pursuant to the new Administrative Procedure Act, chapter 120, Florida Statutes, which took effect on October 1, 1996. The court redefined the term "administrative action" to include:

(1) final agency action as defined in the Administrative Procedure Act, chapter 120, Florida Statutes;

(2) non-final action by an agency or administrative law judge reviewable under the Administrative Procedure Act;

(3) quasi-judicial decisions by any administrative body, agency, board or commission not subject to the Administrative Procedure Act; and

(4) administrative action for which judicial review is provided by general law.

The court also adopted a new rule relating to judicial review of administrative action; except as specifically modified by the rule, such review shall be governed by the general rules of appellate procedure. The rule further states that an appeal from a final agency action or other administrative action for which judicial review is provided by law shall be commenced in accordance with rule 9.110(c), the rule governing review of final orders of administrative tribunals. On the other hand, unless judicial review by appeal is provided by general law, review of a non-final action is commenced by the filing of a petition for review in accordance with rules 9.100(b) and (c), which deal with the commencement of original proceedings in appellate courts. Similarly, unless judicial review by appeal is provided by general law, review of a quasi-judicial decision is also

160. Amendment to Florida Rule of Appellate Procedure 9.020(a) & Adoption of Florida Rule of Appellate Procedure 9.190, 681 So. 2d 1132 (Fla. 1996).
162. Id. 9.190.
163. Id. 9.190(a).
164. Id. 9.190(b)(1).
165. Id. 9.190(b)(2).
166. FLA. R. APP. P. 9.190(b)(2).
to be commenced by the filing of a petition for certiorari in accordance with
rule 9.100 (b) and (c).167

The rule also sets forth the materials to be included in the record in
cases in which judicial review of administrative action is sought.168 The
requirements of the rule are quite extensive, specific, and vary significantly
depending on the type of order under review.169 Regardless of the nature of
the order, however, the rule provides that when "hearing testimony is
preserved through the use of videotape rather than through an official
transcript, the testimony from the videotape shall be transcribed and the
transcript shall be made a part of the record before the record is transmitted
to the court."170 The rule also provides that "[t]he contents of the record may
be modified as provided in rule 9.200(a)(2),"171 which at the time of
adoption of Rule 9.190, allowed an appellant to direct the clerk to include or
exclude other documents and required a statement of judicial acts to be
reviewed if the clerk was being directed to transmit less than the entire
record or less than all testimony in a proceeding.172

The rule also addresses attorneys' fees, stating that a motion for such
fees may be served not later than the time for service of the reply brief and
shall state the grounds on which the recovery is sought, citing all pertinent
statutes. The assessment of attorneys' fees may be remanded to the lower
tribunal or the administrative law judge or referred to a special master.173

Review of attorneys' fees orders rendered under rule 9.190(d)(2) shall
be by motion filed in the court within thirty days of the order's
rendition.174 "Review of objections to reports of special masters shall be on
motion filed in the court within 30 days of the report's filing."175

IV. COURT DIVISIONS

In an administrative order,176 the first district, the only Florida district
court that has divided itself into divisions,177 merged its Criminal Division

167. Id. 9.190(b)(3).
168. Id. 9.190(c).
169. Compare id. 9.190(c)(2)(A)–(E), (c)(j) and (c)(4).
170. Id. 9.190(c)(5).
171. FLA. R. APP. P. 9.190(c)(6).
172. Id. 9.200(a)(3). As part of the subsequent four-year cycle amendments to the
appellate rules, rule 9.200(a)(2) was renumbered as (a)(3).
173. Id. 9.190(d)(1).
174. Id. 9.190(d)(2).
175. Id.
into its General Division effective January 1, 1998. After the effective date, the court will sit in two divisions called the General Division and the Administrative Division.

V. JURISDICTION

The fourth district, in Caruso v. Terry's Foods, Inc., transferred to the first district, a case which sought review by certiorari of an order entered by a judge of compensation claims. The court noted that although the first district has exclusive jurisdiction over workers’ compensation appeals, there exists no specific provision relating to jurisdiction over extraordinary writs in such cases. In determining that the case should be transferred, the court relied on cases expressing the principle that extraordinary writs can only be issued by courts with appellate jurisdiction over the tribunal whose order is challenged.

VI. APPEALS TO CIRCUIT COURTS

In Montero v. Oak Casualty Insurance Co., a direct appeal to the circuit court in Dade County was dismissed by an order entered by one judge. Reviewing the order of dismissal on a petition for certiorari, the third district noted that the Supreme Court of Florida rule establishing the appellate division of the Dade County Circuit Court provides for cases to be heard on their merits by three-judge panels. Although the rule also permits “matters preliminary to final determination” to be decided based on subsequent rules, the court noted that it appears no subsequent rules have ever been adopted. The court found in any event that, “[o]rders

177. In In re Court Divisions, the court was split into a “General Division” and an “Administrative Division.” In re Court Divisions, 648 So. 2d 761, 761 (Fla. 1st Dist. Ct. App. 1994). In a subsequent administrative order, the Criminal Division was created. Fla. Admin. Order No. 95-2 (Fla. 1st Dist. Ct. App. Jan. 31, 1996).
178. 683 So. 2d 1136 (Fla. 4th Dist. Ct. App. 1996).
179. Id. at 1136.
180. Id.
182. Caruso, 683 So. 2d at 1136–37 (citing State ex rel. Bettendorf v. Martin County Environmental Control Hearing Bd., 564 So. 2d 1227 (Fla. 4th Dist. Ct. App. 1990)).
183. 693 So. 2d 1024 (Fla. 3d Dist. Ct. App. 1997).
184. Id. at 1024.
185. Id.
186. Id.
VII. ORDERS REVIEWABLE

As usual, a large number of cases dealt with the question of whether certain orders were reviewable, either by appeal or by certiorari. The sheer volume of these cases precludes discussion of the reasoning relied on in each case. Therefore, this article will set forth some of the cases indicating the type of order involved and the conclusion reached.

A. Orders Reviewable by Appeal

Among the orders found to be reviewable by appeal were: 1) an order denying a motion to dismiss and compelling arbitration under a homeowner's insurance policy, in a case in which the appellate court determined that an appraisal provision in the policy constituted an agreement to arbitrate; 2) an order denying a motion to dismiss that rejected a defense of qualified immunity, as a matter of law; 3) an order on a motion for permanent injunction, which allowed an election to proceed with a disputed question on the ballot and that reserved ruling on the legality of the ballot question; 4) an order compelling a law firm to disburse funds partially to the guardian ad litem of a minor with the residue to be paid to a particular attorney; 5) an order denying a motion by a personal representative to strike and dismiss a decedent's brother's petition to revoke

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187. *Id.*
188. *Montero*, 693 So. 2d at 1024.
189. This section of the article will deal only with civil cases. Criminal cases will be discussed in section XXIV(a).
B. Orders Not Reviewable by Appeal

Among the orders found nonreviewable by appeal were: 1) an order setting an evidentiary hearing in a dissolution case on the propriety of a wife's relocation out of state; 2) an order denying a motion seeking relief from an order denying without prejudice a motion for final judgment; 3) an order denying a motion for summary judgment in an action against an insurance company for failure to defend claims and stating that the "duty to defend may well have been triggered" by certain allegations; 4) an order granting a creditor's motion to extend the time for filing a statement of claim in an estate; and 5) an order requiring a plaintiff to have no contact with the defendants, except through counsel, nor to go within a certain distance of a law firm representing the defendant in one case, and that was itself a defendant in a second case brought by the plaintiff.

C. Orders Reviewable by Certiorari

Among the orders found reviewable by certiorari were: 1) an order revoking a clerk of the court's reassignment of the trial court clerks and making assignments of the trial court clerks to a circuit judge; 2) an order disqualifying counsel; 3) an order sustaining an objection to a request for admission, as to the amount in controversy, when the requested admission involved the defendant's right to remove the case to federal court; 4) an order requiring a wife to undergo a psychological evaluation; 5) an order denying an objection to accounting and a motion to extend the time for filing

further objections when an allegation was made that the trial court’s decision was based on improper ex parte communication;\(^{205}\) 6) an order dismissing numerous defendants due to a conclusion that they were improperly joined;\(^ {206}\) 7) an order denying a motion to strike a *lis pendens*;\(^ {207}\) 8) an order denying dismissal of a complaint in a medical malpractice action alleging that the plaintiff failed to comply with the statutory pre-suit screening and corroboration requirements;\(^ {208}\) 9) an order awarding costs and attorneys’ fees after a voluntary dismissal;\(^ {209}\) and 10) an order returning a child to the custody of her mother in a dependency proceeding.\(^ {210}\)

D. *Orders Not Reviewable by Certiorari*

Among the orders found non-reviewable by certiorari were: 1) an order denying a motion for summary judgment based on collateral estoppel;\(^ {211}\) 2) an order denying a motion to compel a defendant to produce a photograph of an accident scene;\(^ {212}\) 3) an order granting a motion to strike from a wife’s witness list, two lawyers in her husband’s law firm;\(^ {213}\) 4) an order denying a motion for summary judgment based on the contention that certain claims were preempted by federal law;\(^ {214}\) and 5) an order imposing the sanction of attorneys’ fees and costs for discovery violations.\(^ {215}\)


\(^{206}\) Intercapital Funding Corp. v. Gisclair, 683 So. 2d 530, 533 (Fla. 4th Dist. Ct. App. 1996).

\(^{207}\) Archer v. Archer, 692 So. 2d 1009, 1009 (Fla. 4th Dist. Ct. App. 1997).

\(^{208}\) Citron v. Shell, 689 So. 2d 1288, 1292–93 (Fla. 4th Dist. Ct. App. 1997).


\(^{213}\) Young v. Young, 682 So. 2d 678, 678 (Fla. 4th Dist. Ct. App. 1996).


VIII. NOTICES OF APPEAL

A. Designation of Order to be Reviewed

In *Duran v. John Stalder, Inc.*, the court reviewed, by certiorari, a decision of a circuit court which, acting in its appellate capacity, decided a case in favor of an appellee because an appellant’s notice of appeal designated the wrong order to be reviewed. The fifth district indicated that the notice of appeal was timely filed with regard to the reviewable order. The district court indicated that it was clear from the initial brief what order was being appealed from, and that the circuit court’s order did not even discuss whether the appellee had been prejudiced by the defective notice. “In the absence of serious prejudice,” and in light of the fact that “the defective notice of appeal did not affect the circuit court’s jurisdiction,” the court concluded that the case “should have been disposed of on the merits” and therefore granted certiorari.

B. Timeliness

In *Broward County v. Bell*, the fourth district granted certiorari to quash a circuit court order that dismissed, as untimely, a petition filed in that court challenging an order of the county’s personnel board. The record reflected that the petition had been filed in the clerk’s office on the last allowable date. However, the clerk’s computer recorded it as having been filed the following day because it was filed between four o’clock, “the time at which filing is clocked in as of the next business day, but before five o’clock, when the office closes for the day.”

In *Tanner v. State*, an appeal was reinstated, after the case’s dismissal, because of an apparently untimely notice of appeal. The appellant’s counsel demonstrated that a timely, authorized motion for rehearing of the order under review was filed, but was returned by the clerk.

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216. 686 So. 2d 627 (Fla. 5th Dist. Ct. App. 1996).
217. *Id.* at 628.
218. *Id.*
219. *Id.* at 629.
220. *Id.* at 628–29.
221. 681 So. 2d 918 (Fla. 4th Dist. Ct. App. 1996).
222. *Id.* at 918.
223. *Id.*
225. *Id.* at D1471.
because it had the wrong case number.\textsuperscript{226} The fourth district concluded that such an error “is no basis for refusing to accept the paper for filing”\textsuperscript{227} nor does it “authorize the clerk to return the paper to the lawyer who filed it.”\textsuperscript{228} Thus, the court held that the motion was deemed filed as of the date it was originally received.\textsuperscript{229} Therefore, the motion served to delay rendition of the order to be reviewed, making the appeal timely.\textsuperscript{230} The court suggested that in such situations, “[a] simple telephone call [from the clerk] to the filing lawyer could sort out any discrepancies in file numbers, or other errors in the caption, that inhibit the clerk’s ability to file the paper in the proper place.”\textsuperscript{231}

\section*{IX. SUPERSEDEAS BOND}

In \textit{Shvarts v. O’Connor},\textsuperscript{232} the appellees instituted an independent appeal from an order determining the amount of a supersedeas bond rather than seeking review, by motion, under rule 9.310(f) of the \textit{Florida Rules of Appellate Procedure}.\textsuperscript{233} The appellate court consolidated the two cases, affirmed the underlying appeal, and therefore, found the appeal challenging the bond to be moot.\textsuperscript{234} The court noted that if review of the order setting the bond had been sought by motion, the matter would have been disposed of months earlier.\textsuperscript{235} By taking a separate appeal, however, the matter “followed the lengthy course of all full appeals.”\textsuperscript{236}

\section*{X. MOTIONS FOR EXTENSIONS OF TIME}

In \textit{Merritt v. Promo Graphics, Inc.},\textsuperscript{237} the appellant’s counsel filed a motion for extension of time which failed to contain a certificate indicating counsel had consulted with opposing counsel, as required by rule 9.300(a) of the \textit{Florida Rules of Appellate Procedure}.\textsuperscript{238} The denial of this motion

\begin{thebibliography}{99}
\bibitem{226} Id.
\bibitem{227} Id. at D1472.
\bibitem{228} Id.
\bibitem{229} \textit{Tanner}, 22 Fla. L. Weekly at D1471.
\bibitem{230} Id.
\bibitem{231} Id. at D1472.
\bibitem{232} 692 So. 2d 960 (Fla. 4th Dist. Ct. App. 1997).
\bibitem{233} Id. at 960.
\bibitem{234} Id.
\bibitem{235} Id.
\bibitem{236} Id.
\bibitem{237} 679 So. 2d 1277 (Fla. 5th Dist. Ct. App. 1996).
\bibitem{238} Id. at 1277.
\end{thebibliography}
because of this failure, triggered a series of pleadings setting forth conflicting versions of the facts relating to what efforts were made to comply with the rule, some of which involved contact between secretaries or other support personnel. Stating that it relies on “representations made to us by lawyers, not their support staff,” the court discussed the rule’s requirement:

An allegation that a lawyer has complied with rule 9.300 by relying on a staff person’s statement that he or she spoke to another lawyer’s secretary is simply not adequate to comply with the personal obligation imposed on lawyers by the rules. Rule 9.300 requires some actual contact with opposing counsel. That was missing here. Apparently, neither the lawyer nor the paralegal spoke with opposing counsel. We realize that, in a rush, it may be difficult to contact opposing counsel, or opposing counsel may not return calls. In such case it would be far better to allege that an attempt to contact was made, but failed after due diligence. Further, to avoid this kind of triple-hearsay buck passing between staff persons, illustrated by this case, some sort of acknowledgement of the contact should be made. The modern era of technology provides creative lawyers with a feast of such opportunities, including e-mail, voice mail, fax machines, and other devices. These can be employed to confirm oral communications and avoid misunderstandings, if written confirmation cannot be timely obtained.

XI. TRANSCRIPTS

In Weise v. Repa Film International, Inc., a plaintiff claiming on appeal that a remark in closing argument by the defendant’s counsel constituted fundamental error did not provide the court with any part of the transcript, other than the defense counsel’s closing argument. Pointing out that appellants must demonstrate that errors are not harmless, the court indicated that when appellants argue that the alleged prejudice from a remark in closing argument resulted in an adverse verdict, the liability portion of the transcript will generally be necessary for the court to determine whether a new trial is warranted.

239. Id. at 1279.
240. Id.
242. Id. at 1129.
243. Id.
The court, in *Estrada v. Unemployment Appeals Commission*, concluded that it was unable to review a claim that a decision was not supported by competent substantial evidence because of the appellant's failure to provide a transcript of the hearing conducted by the appeals referee. The court took this approach despite the fact that after the briefs in the case were submitted, the appellant filed a motion with the court in which he requested permission to supplement the record with the transcript. The court recognized that rule 9.200(f) of the *Florida Rules of Appellate Procedure* states that "[n]o proceeding shall be determined, because of an incomplete record, until an opportunity to supplement the record has been given." The court declined to apply the rule, however, because the day after he filed his notice of appeal, the appellant had been advised by the Unemployment Appeals Commission "that a transcript would be prepared for him at no cost upon his request and that, if he wished to have a transcript prepared, it was his responsibility to make the request within ten days of the appeal." Since the appellant made no such request, the court concluded that he had waived his opportunity to obtain the transcript.

XII. STATEMENTS OF PROCEEDINGS

No record was made in *Warnken v. Warnken* of a trial court hearing and thus, the appellant sought to rely on a "state of proceedings" attached to his brief. The court noted that although under rule 9.200(b)(4) of the *Florida Rules of Appellate Procedure* an appellant can utilize a statement of proceedings, such a statement must be submitted to and approved by the trial court. Since the appellant in the case failed to comply with that requirement, the court concluded that it was unable to fully review the matters about which he complained.

244. 693 So. 2d 1091 (Fla. 5th Dist. Ct. App. 1997).
245. Id. at 1092.
246. Id.
247. Id. (quoting FLA. R. APP. P. 9.200(f)).
248. Id.
249. Estrada, 693 So. 2d at 1092.
250. 689 So. 2d 1123 (Fla. 5th Dist. Ct. App. 1997).
251. Id. at 1123.
252. Id.
253. Id.
A. Page Limitations

In Johnson v. Singletary,254 a criminal defendant sentenced to death sought habeas corpus. The defendant's petition alleged, among many other claims, that he received ineffective assistance of counsel on direct appeal because the Supreme Court of Florida refused to accept his ninety-four page brief, limiting him to seventy pages instead.255 In denying habeas corpus, the court noted that the appeal had "occurred before [the court] had adopted a policy of allowing briefs of up to one hundred pages in capital cases as a matter of course. An 'exception' to the fifty page-limit prescribed by rule was, therefore, still an 'exception' to the rule."256 Finding that the twenty page enlargement that was granted was not inadequate, and pointing to the fact that the full seventy pages allowed were not used, the court found that no prejudice had occurred and that the issue was without merit.257

B. References to Matters Outside the Record

In Ullah v. State,258 the appellant's appointed counsel, pursuant to the dictates of Anders v. California,259 filed a brief indicating that he could "discern no reversible error in proceedings below."260 In response, the State filed an answer brief which included a preliminary statement referring to the case as "another" Anders appeal, listing 112 other pending appeals in which Anders briefs had been filed during the calendar year, and suggesting "that these cases should be submitted to an 'Anders panel' for determination of the common question of whether the appeal is wholly frivolous or requires adversarial briefing" on the merits.261 The court struck the State's brief,262 finding that the other pending cases were matters outside the record and thus, not proper for consideration in the case under review.263 The State's suggestion that "all Anders cases present the common issue of whether the appeal is wholly frivolous," the court said

254. 695 So. 2d 263 (Fla. 1996).
255. Id. at 264.
256. Id. at 266.
257. Id.
259. 386 U.S. 738 (1967).
260. Ullah, 679 So. 2d at 1243.
261. Id. at 1244.
262. Id. at 1245.
263. Id. at 1244.

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"ignores the fact that our review in this appeal is limited to the record of proceedings as they occurred in this case," and "is akin to suggesting that reference to any other pending appeal in a brief before this court is necessarily appropriate because all appeals, at their heart, present the common question of whether reversible error occurred in the proceedings below." 264

XIV. NOTICES OF SUPPLEMENTAL AUTHORITY

On the afternoon prior to oral argument in Brown & Williamson Tobacco Corp. v. Young, 265 the appellee filed a notice of supplemental authority to which was attached copies of five cases, the most recent of which was decided in 1989. 266 The first district struck the notice, 267 and stated in its opinion that "the filing of last-minute notices of supplemental authority is occurring in this court with increasing frequency." 268 The court published its ruling to quote and reiterate the advice it had set forth in Ogden Allied Services v. Panesso. 269 In that case, the court had indicated that rule 9.210(g) of the Florida Rules of Appellate Procedure, 270 which allowed for the filing of notices of supplemental authority, was "not intended to permit a litigant to submit what amounts to an additional brief, under the guise of 'supplemental authorities'; [sic] or to ambush an opponent by deliberately withholding significant case citations until just before oral argument." 271 The quoted portion of Ogden Allied Services indicated that filing such last minute notices "places the opposing party at a disadvantage," forces that party to "divert attention from preparation for the argument," and frequently, requires that party "at oral argument to request an opportunity to respond in writing" to the notice. 272

264. Id.
265. 690 So. 2d 1377 (Fla. 1st Dist. Ct. App. 1997).
266. Id. at 1380.
267. Id.
268. Id.
269. Id. (referencing Ogden Allied Servs. v. Panesso, 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993)). For a discussion of the decision in Ogden Allied Services, see 1993 Survey, supra note 1, at 25.
270. The rule referred to in Ogden Allied Services was subsequently renumbered as rule 9.225 of the Florida Rules of Appellate Procedure. See sections II (K) and (L) of this article.
271. Brown & Williamson Tobacco, Corp., 690 So. 2d at 1380 (quoting Ogden Allied Servs. v. Panesso, 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993)).
272. Id.
In *Leonard v. First Union National Bank of Florida*, the third district reviewed an order of the circuit court, acting in its appellate capacity, that had dismissed an appeal because of the late filing of the initial appellate brief. The appellant filed the brief three days after receipt of the denial of the last of several motions for extension of time. Finding “dismissal to be too harsh a sanction for the minimal time involved,” the district court granted certiorari and quashed the dismissal order.

An appeal was taken in *Robbie v. Robbie* from an order requiring the appellant to pay attorney’s fees and costs to his ex-wife’s attorney. The fourth district entered an order requiring the appellant to pay the amounts due within twenty days and indicated that the failure to do so would result in the dismissal of the appeal. When the appellant did not make payment, the appeal was dismissed.

In *Fletcher v. State*, the appeal was dismissed because of the defendant’s escape from custody. Six months later, the defendant’s public defender filed a motion to reinstate the appeal because the defendant had been returned to custody. The second district published its denial of the motion because of what it termed the “disturbing argument” presented by the public defender, which suggested that the defendant had “not ‘thwarted the orderly effective administration of justice’ because the ‘immense appellate backlog’ render[ed] his escape a harmless footnote in the process.” The court pointed out that “no ‘immense appellate backlog’ existed in the court, but that one ‘exists and has existed for years in the Office of the Public Defender’.”

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273. 685 So. 2d 98 (Fla. 3d Dist. Ct. App. 1997).
274. Id. at 98.
275. Id.
276. Id.
278. Id. at 1132.
279. Id.
280. Id. (citing Gazil v. Gazil, 343 So. 2d 595, 597 (Fla. 1977)).
282. Id. at 795.
283. Id.
284. Id.
Defender of the Tenth Judicial Circuit, which is responsible for handling appeals for indigent defendants throughout the Second District.

The court noted that "[m]any believe that the legislature's chronic underfunding of the public defender's office has contributed significantly to this problem," but indicated that it was "unable to state with certainty, however, that underfunding is the sole cause leading to the backlog in the office of the Public Defender of the Tenth Judicial Circuit because that office appears to be the only appellate public defender in Florida with such a severe problem." The court went on to say that "[r]egardless of the causes, the public defender's office continues to fail to serve many of its clients in a timely fashion" and that when the court "relieves that office of its statutory obligations in many cases," the costs of those appeals are "frequently shifted to taxpayers in counties who have no right to vote for or against the person who holds the Office of Public Defender in the Tenth Judicial Circuit."

Turning to the facts, the court noted that the public defender had spent time and resources on the case long after the appeal would have been dismissed had the court known of the defendant's escape. Those resources, the court said, "should have been employed for the benefit of a prisoner lawfully awaiting the resolution of his or her appeal."

The court concluded by stating: "Admittedly, the public defender's office would cease to have a backlog if many of its clients successfully escaped. This court has been willing to consider a wide array of potential solutions to the public defender's backlog. Suffice it to say, escape is not among them."

**XVII. MOOTNESS**

In *Archer v. State*, an appeal was taken from an order that involuntarily committed the appellant for a period of no more than six months. Although that period had long elapsed and the appellant might have been released, the first district found that the appeal was not moot. Relying on the principle that "an otherwise moot case will not be dismissed"
if collateral legal consequences that affect the rights of a party flow from the issue to be determined,” the court found that because an order of commitment may serve as the predicate for continued involuntary placement orders, it would address the substance of the appeal.294

The third district rejected a mootness claim in Consortion Trading International, Ltd. v. Lowrance,295 in which the defendants in a foreclosure action paid the final judgment and satisfied the mortgage.296 The plaintiff argued that had “the defendants wanted to preserve their right to appeal, they should have obtained a stay of execution by posting a supersedeas bond, instead of paying the final judgment.”297 The court pointed out that “[t]he majority rule is that if a defendant who has suffered the entry of an adverse money judgment against him voluntarily pays the judgment, the case is moot, but if payment is involuntary, it does not result in a waiver of the right to appeal.”298 Because in the case under review the defendants paid the judgment to avoid the public sale of their property, the court considered the payment to be involuntary and therefore, the appeal not to be moot.299

XVIII. LAW OF THE CASE

In State v. Owen,300 a criminal defendant faced a retrial after the Supreme Court of Florida reversed his conviction due to its conclusion that the defendant’s confession was improperly admitted into evidence.301 After the reversal but before the retrial, the United States Supreme Court issued a decision that demonstrated that the confession was admissible as a matter of federal law.302 The trial court refused a request by the state to reconsider the admissibility of the confession in light of the new precedent.303 The fourth district denied the state’s petition for certiorari review of the trial court’s order.304 The district court, however, certified the question of whether the principles announced by the United States Supreme Court applied to the

294. Id. at 297–98 (quoting Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992)).
295. 682 So. 2d 221 (Fla. 3d Dist. Ct. App. 1996).
296. Id. at 222.
297. Id.
298. Id. (quoting Ronette Communications Corp. v. Lopez, 475 So. 2d 1360, 1360 (Fla. 5th Dist. Ct. App. 1985)).
299. Id. at 223.
300. 696 So. 2d 715 (Fla. 1997).
302. Id. (citing Davis v. United States, 512 U.S. 452, 452 (1994)).
303. Owen, 696 So. 2d at 717.
admissibility of confessions in Florida courts. After determining that the Florida Constitution placed no greater restrictions on law enforcement than those mandated under federal law, and that confessions of the sort with which the case was concerned were admissible in Florida, the Supreme Court of Florida faced the question of how the particular confession before the court should be treated.

The court recognized that "generally, under the doctrine of the law of the case, 'all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts.'" The court went on to note, however, that this "doctrine is not an absolute mandate" and that the court "has the power to reconsider and correct erroneous rulings in exceptional circumstances and where reliance on the previous decision would result in manifest injustice, notwithstanding that such rulings have become law of the case." Since "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case" and since, under the facts of the case, reliance on the prior decision "would result in manifest injustice to the people of this state because it would perpetuate a rule which [the court] determined to be an undue restriction of legitimate law enforcement activity," the court quashed the district court's decision and remanded with directions to grant the State's petition for certiorari.

However, the court refused the State's request that it reinstate the convictions on the ground that a retrial is unnecessary in light of the court's decision on the admissibility of the confession. The court stated that its prior decision, which reversed the convictions, was a "final decision that was no longer subject to rehearing." The court also indicated that with respect

305. Owen, 560 So. 2d at 202.
307. Id. at 720.
308. Id. (quoting Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984)).
309. Id. (citing Strazzella v. Hendrick, 177 So. 2d 1, 3 (Fla. 1965)).
310. Owen, 696 So. 2d at 720 (citing Preston v. State, 444 So. 2d 939 (Fla. 1984), vacated, 564 So. 2d 120 (Fla. 1990)).
311. Id. (citing Brunner Enters., Inc. v. Department of Revenue, 452 So. 2d 550, 552 (Fla. 1984); Strazulla v. Hendrick, 177 So. 2d 1, 4 (Fla. 1965)).
312. Id.
313. Id.
314. Id.
to the issue in question, the defendant stood in the same position as any other defendant who had been charged but not yet tried. 315

An approach similar to that taken in Owen was utilized by the third district in Schindler Elevator Corp. v. Viera. 316 There, while the case was pending on remand after a reversal, the court decided another case en banc in a manner that overruled the principle that had formed the basis for the reversal. 317 The court concluded that "this is one of the exceptional cases in which we should reconsider the law of the case because to do otherwise would work a manifest injustice." 318 The court therefore affirmed a trial court order granting a new trial based on the en banc decision. 319

Other cases in which courts found it appropriate to depart from the law of the case included: 1) Trotter v. State, 320 in which the court stated that "[a]n intervening act of the legislature refining a portion of Florida's death penalty statute may be sufficiently exceptional to warrant" such an approach; 321 2) Zolache v. State, 322 in which the court found that reliance on a previous erroneous ruling would require the defendant to serve a sentence in excess of that legally authorized; 323 and 3) Horton v. State, 324 in which a previously argued claim that a county judge was improperly assigned to the circuit court was proven to be meritorious by a subsequent decision of the Supreme Court of Florida. 325

XIX. AFFIRMANCES WITHOUT OPINION

In Lowe Investment Corp. v. Clemente, 326 the court denied a motion for rehearing in a case that had been affirmed without opinion. 327 In doing so, the court discussed some of the reasons why cases are decided in such a manner:

315. Owen, 696 So. 2d at 720.
316. 693 So. 2d 1106 (Fla. 3d Dist. Ct. App. 1997).
317. Id. at 1108.
318. Id.
319. Id. at 1109.
320. 690 So. 2d 1234 (Fla. 1996).
321. Id. at 1237.
322. 687 So. 2d 298 (Fla. 4th Dist. Ct. App. 1997).
323. Id. at 300.
325. Id. at 648.
326. 685 So. 2d 84 (Fla. 2d Dist. Ct. App. 1996).
327. Id. at 84. In doing so, the court expressed some thoughts about the nature of motions for rehearing. Id. at 85. That portion of the opinion is discussed in section XX of this article.
There are many reasons this court decides that a written opinion is unnecessary when affirming a trial court. Usually, the panel of judges considering the appeal agrees that no error occurred. It may be that the claim of error involves the discretion of the trial judge and the panel concludes that such was not abused. Or, the perceived error was harmless. The considerations involved in preparing written opinions were addressed in Whipple: "We write opinions in all reversals and remands and, as noted, in affirmances where we believe an opinion will make a substantial contribution to the law, or where necessary to disclose conflict or certify questions." 431 So. 2d at 1015-16. In addition, this court is frequently presented with claims of error which were not properly preserved at trial. Such a claim of error does not warrant a written opinion because the law in this area is clear. This is the reason why this appeal was affirmed—trial counsel failed to properly preserve the error. 328

XX. REHEARING

In Goter v. Brown, 329 the appellees presented in support of a motion for rehearing a missing second page to an agreement that was at issue in the case. 330 The page had not been previously presented to either the trial or the appellate court. 331 In its opinion on rehearing, the fourth district indicated that had the page been presented to the trial court and accepted as the controlling document, it would have ruled in the appellees' favor. 332 In denying rehearing, the court stated it had "little hesitancy in concluding that this is all too late to change our initial decision." 333 The court expressed the belief that it would be "starkly unfair to allow a party who has fought the battle below and on appeal on one evidentiary basis, to be given leave to fight it on appellate rehearing on quite a different one." 334 The court also stated that even if there was no unfairness present, "it hardly needs belaboring by us that none of this relates to something we overlooked or misapprehended, the standards for rehearing on appeal." 335

328. Lowe Inv. Corp., 685 So. 2d at 85. (quoting Whipple v. State, 431 So. 2d 1011, 1015–16 (Fla. 2d Dist. Ct. App. 1983)).
330. Id. at 157.
331. Id.
332. Id.
333. Id. at 158.
334. Goter, 682 So. 2d at 158.
335. Id.
Noting that much of the motion was in open defiance of the prohibition against argument in such motions, the court also took the opportunity to discuss the proper nature of rehearing requests.\textsuperscript{336} The court stated that "[m]otions for rehearing are strictly limited to calling our attention—\textit{without argument}—to something we have obviously overlooked or misapprehended."\textsuperscript{337} Such a motion, the court continued, "is not a vehicle for counsel or the party to continue its attempts at advocacy\textsuperscript{338} but should be "demonstrative only—i.e. merely point to the overlooked or misunderstood fact or circumstance."\textsuperscript{339} The court concluded: "If we want additional argument, we know how to say so."\textsuperscript{340}

The second district, in \textit{Lowe Investment Corp. v. Clemente}, also discussed rehearing motions.\textsuperscript{341} There, the court affirmed the case without a written opinion, and the appellant filed a motion for rehearing that asked the court to reconsider one of the points previously briefed and argued.\textsuperscript{342}

The court denied the motion, finding that it did not contain a point of law or fact that the court overlooked or misapprehended,\textsuperscript{343} but used its opinion doing so to express some thoughts regarding rehearing:

Motions for rehearing directed to this court are overused, if not abused. \textit{See Whipple v. State}, 431 So. 2d 1011 (Fla. 2d DCA 1983). The motions seem to spring from a belief among some attorneys that this court failed to understand the arguments, ignored those same arguments, or worse, failed to consider the arguments. None of these beliefs are valid, but certain advocates seem to believe one of the above is the only explanation for their loss on appeal. Some losing advocates, as here, apparently believe that a request for rehearing has a better chance for success if demanded in the strongest of terms. \textit{See Patton v. State Dep't. of Health and Rehabilitative Servs.}, 597 So. 2d 302, 303 (Fla. 2d DCA 1991) ("We also understand that human emotions occasionally cause such motions to be written with stronger..."

\textsuperscript{336} Id.
\textsuperscript{337} Id.
\textsuperscript{338} Id.
\textsuperscript{339} \textit{Goter}, 682 So. 2d at 158.
\textsuperscript{340} Id.
\textsuperscript{341} 685 So. 2d 84, 85 (Fla. 2d Dist. Ct. App. 1996).
\textsuperscript{342} \textit{Id.} at 85.
\textsuperscript{343} \textit{Id.} at 86.
rhetoric than is truly necessary or effective.”) This is especially true in cases where the court has not issued a written opinion. 344

XXI. MANDATE

About four and a half months after issuance of the mandate following the affirmance of an order, but within the same term of court as the affirmance, the appellants in Peter v. Seapine Corp. 345 filed a motion to recall mandate. 346 The term of court expired before the appellate court ruled, and the appellees contended that such expiration deprived the court of jurisdiction to grant the motion. 347 The fourth district disagreed, finding that the timely filing of the motion within the same term of court as the challenged judgment and mandate vested the court with jurisdiction. 348

XXII. ATTORNEYS’ FEES

In U.S.B. Acquisition Co., v. Stammi, 349 a trial court on remand after an affirmance on a main appeal and a reversal on a cross appeal 350 entered two separate final orders awarding attorney’s fees, one in favor of an attorney who had handled the appeal and one in favor of the individual appellees for their trial court attorney’s fees. 351 The payor of the fees filed a single notice of appeal directed to both orders 352 and the appellate attorney filed a motion under rule 9.400(c) of the Florida Rules of Appellate Procedure to review the appellate fee award. 353 The fourth district entered an order granting review of the award of appellate fees and, upon such review, affirmed the order. 354 The payor moved for rehearing or clarification of that order, as well as for consolidation with its pending appeal of the trial court fees, arguing that the court’s affirmance of the award had the effect of cutting off the payor’s separate appeal of the appellate fees award. 355

344. Id. at 85. The court went on to discuss some of the reasons why cases might be affirmed without opinion. Id. See section XIX of this article.
346. Id. at 508.
347. Id.
348. Id. at 509.
349. 695 So. 2d 373 (Fla. 4th Dist. Ct. App. 1997).
351. U.S.B. Acquisition Co., 695 So. 2d at 373.
352. Id. at 374.
353. Id.
354. Id.
355. Id.
Relying on *Magner v. Merrill Lynch Realty/MCK Inc.*, 356 and *Starcher v. Starcher*, 357 the payor argued that it properly appealed the appellate fees award, as opposed to seeking review by motion in the appellate court under rule 9.400(c). 358 The court disagreed, stating that the principal holding of *Magner* and *Starcher* "is that review of awards of appellate attorney's fees after remand is strictly under rule 9.400(c), rather than by separate appeal." 359 The court went on to indicate:

Properly read, *Starcher* and *Magner* recognize a very limited exception to the command of rule 9.400(c) that applies only when the same parties are involved in a single judgment after remand that encompasses both an appellate fees issue and another issue, and one party seeks review of both issues at the same time. 360

This exception to the rule, the court continued, "does not apply when there are multiple and discretely different judgments entered, and the appellate fees issue involves a different party than the other issue determined on remand." 361

The court also took the opportunity to discuss the purpose of rule 9.400(c):

There is, after all, an important policy behind rule 9.400(c). Review by simple motion is far more expeditious and less costly than review by plenary appeal. It is obviously the intent of the rule to speed up what may very well be the last court determination in a law suit, especially where it occurs after all trials and appeals have been had, and the issue is the amount of the appellate lawyer's fee. Society has an interest at the point in expediting the closing judicial determination so that at long last finality and the end of litigation are at hand. That is the singular mission of rule 9.400(c). 362

Also recognizing that review of appellate fee orders should be by motion under Rule 9.400(c) was the decision in *Pellar v. Granger Asphalt*

357. 430 So. 2d 991 (Fla. 4th Dist. Ct. App. 1983).
358. *U.S.B. Acquisition Co.*, 695 So. 2d at 374.
359. *Id.* at 375.
360. *Id.*
361. *Id.*
362. *Id.*
Paving, Inc. 363 There, an appeal was taken from such an order. 364 The first district applied the principle set forth in rule 9.040(c) of the Florida Rules of Appellate Procedure, which provides that "[i]f a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought." 365 The court then treated the notice of appeal as a motion for review of the order at issue. 366 The court also discussed the nature of review by motion under rule 9.400(c):

Rule 9.400(c) enables the parties to pursue a one-step method of review that is more practical than an appeal and much less expensive. The procedure does not require the payment of a filing fee or the preparation of a formal record. Testimony and other evidence before the trial court can be presented in an appendix to the motion filed in the appellate court. 367

XXIII. COSTS

In Lone Star Industries, Inc. v. Liberty Mutual Insurance Co., 368 the court reviewed an order granting costs that were incurred by virtue of the fact that a party's claims department was required to pay a nonrefundable sum of money to its surety department as a premium for a supersedeas bond. 369 The third district noted that the term "cost" is not defined by rule 9.400 of the Florida Rules of Appellate Procedure, 370 which deals with appellate costs. The court therefore looked to the term's "plain and ordinary meaning" 371 and pointed out that costs have been defined to mean "'[a]n amount paid or required in payment for a purchase; a price; . . . [t]o cause to lose, suffer or sacrifice . . . ." 372

Given this meaning, the court found that "[t]he term taxable 'costs' as utilized in rule 9.400 then presupposes that the prevailing party on appeal has sustained a loss of funds or incurred an expense by virtue of the appellate process for which it is entitled to reimbursement by the losing

\[\text{363. 687 So. 2d 282 (Fla. 1st Dist. Ct. App. 1997).} \]
\[\text{364. Id. at 283.} \]
\[\text{365. Id. at 284 (quoting FLA. R. APP. P. 9.040(c)).} \]
\[\text{366. Id.} \]
\[\text{367. Id.} \]
\[\text{368. 688 So. 2d 950 (Fla. 3d Dist. Ct. App. 1997).} \]
\[\text{369. Id. at 951.} \]
\[\text{370. Id. at 952.} \]
\[\text{371. Id.} \]
\[\text{372. Id. (quoting AMERICAN HERITAGE DICTIONARY 424 (3d ed. 1992)).} \]
Under the facts of the case, the court concluded that the party had incurred no expenditure for bond premiums.\textsuperscript{374} "The fact that one of its department's budgets had to be debited for the benefit of another\textsuperscript{375} did not alter this conclusion because both of those departments were "part and parcel of one company which is the only prevailing party on appeal."\textsuperscript{376}

In \textit{Vella v. Vella},\textsuperscript{377} the fourth district denied a motion for costs without prejudice to refile the same motion in the trial court.\textsuperscript{378} The court wrote an opinion on the matter because it had seen a large number of similar motions and because of the need to address some inappropriate language in the court's prior opinion in \textit{Anderson v. State}.\textsuperscript{379}

The court noted that rule 9.400(a) of the \textit{Florida Rules of Appellate Procedure} "expressly provides that the authority to tax costs in favor of the prevailing party [on appeal] is vested in the trial court."\textsuperscript{380} In \textit{Anderson}, however, the court had stated that "[w]ithout permission from the appellate court, the trial court cannot award appellate costs."\textsuperscript{381} Clarifying the matter in \textit{Vella}, the court stated that "[w]hat had become a headnote should now be considered a dead note."\textsuperscript{382}

The \textit{Vella} court went on to point out that the decision in \textit{Anderson} also quoted accurately from \textit{Boyer v. Boyer},\textsuperscript{383} a portion of that opinion which indicates that rule 9.400(a) provides for taxation of costs on motions heard within thirty days after issuance of the mandate.\textsuperscript{384} In so doing, the \textit{Vella} court said, "we perpetuated an error. The word 'heard' should have been 'served.'"\textsuperscript{385}

The second district, in \textit{Florida Power & Light Co. v. Polackwich},\textsuperscript{386} addressed the question of which party should pay for transcripts when both

\begin{flushright}
\textsuperscript{373} \textit{Lone Star Industries}, 688 So. 2d at 952.  \\
\textsuperscript{374} \textit{Id.}  \\
\textsuperscript{375} \textit{Id.}  \\
\textsuperscript{376} \textit{Id.}  \\
\textsuperscript{377} 691 So. 2d 612 (Fla. 4th Dist. Ct. App. 1997) (en banc).  \\
\textsuperscript{378} \textit{id.} at 612.  \\
\textsuperscript{379} \textit{Id.} (citing \textit{Anderson v. State}, 632 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1994)).  \\
\textsuperscript{380} \textit{Id.} (emphasis omitted).  \\
\textsuperscript{381} \textit{Id.} (quoting \textit{Anderson v. State}, 632 So. 2d 132, 133 (Fla. 4th Dist. Ct. App. 1994)).  \\
\textsuperscript{382} \textit{Vella}, 691 So. 2d at 612.  \\
\textsuperscript{383} 588 So. 2d 615 (Fla. 5th Dist. Ct. App. 1991).  \\
\textsuperscript{384} \textit{Vella}, 691 So. 2d at 612 (citing \textit{Boyer v. Boyer}, 588 So. 2d 615, 617 (Fla. 5th Dist. Ct. App. 1991)), \textit{superseded by statute as stated in Swartz v. Swartz}, 691 So. 2d 2 (Fla. 3d Dist. Ct. App. 1996).  \\
\textsuperscript{385} \textit{Id.}  \\
\textsuperscript{386} 22 Fla. L. Weekly D626 (2d Dist. Ct. App. March 5, 1997).  \\
\end{flushright}
parties sought review and both prevailed on significant issues. The case reached the court on review of the trial court’s denial of the appellant’s motion to tax costs, including a $37,500 cost for preparation of the record, which included a lengthy trial transcript.

The court noted that “[w]hen both parties appeal and the cases are consolidated, one party must be selected by the court to be the appellant... [and that the selected party] has the initial responsibility to obtain an adequate record on appeal.” Frequently, the court pointed out, the decision as to which party will be designated as the appellant “is based on nothing more than the fact that one notice of appeal was the first to reach the court.” Thus, the court indicated that “[t]here would be little sense in a rule that forced that party to bear all the costs when both parties wished to challenge the judgment and both parties prevailed on significant issues.”

The court, therefore, reversed the order denying costs and remanded with directions that the trial court “use its discretion to apportion the costs between the parties so that each party pays its fair share.” The court stated that “[f]airness suggests that the cost of that portion of the record needed by both parties should be shared equally... [and that if there were portions] that were necessary for only one of the appeals, the party who lost that appeal should probably bear [those] costs.”

XXIV. APPEALS IN CRIMINAL CASES

A. Orders Reviewable in Criminal Cases

1. Orders Reviewable by Appeal

Among the orders found to be reviewable by appeal were orders: 1) imposing an unauthorized sentence of incarceration suspended in its entirely on the condition that the defendant successfully complete community control; 2) withholding adjudication of guilt, but not placing a defendant...
on probation; 395 3) striking a restitution requirement from a probation order; 396 and 4) denying a petition for a writ of prohibition alleging the denial of a speedy trial in county court. 397

2. Orders Not Reviewable by Appeal

Among the orders found not to be reviewable on appeal were orders: 1) denying a motion for postconviction relief as to seven grounds, when the trial court also granted a belated appeal from the challenged conviction; 398 and 2) denying a motion for case reassignment. 399

3. Orders Reviewable by Certiorari

Among the orders found to be reviewable by certiorari were orders: 1) requiring disclosure of a confidential informant’s identity; 400 2) suppressing evidence of a defendant’s medical treatment records for a sexually transmitted disease; 401 3) dismissing an appeal to a circuit court on the ground that the order in question was not appealable; 402 4) determining the admissibility of hearsay evidence; 403 and 5) excluding similar fact evidence. 404

B. State Appeals after Jeopardy Attaches

In State v. Livingston, 405 the defendant filed pretrial motions to suppress certain evidence and statements. Pursuant to an agreement by all concerned,

405. 681 So. 2d 762 (Fla. 2d Dist. Ct. App. 1996). Although not reflected in the Southern Reporter, the opinion in Livingston was issued upon the appellee’s motion for rehearing. State v. Livingston, 21 Fla. L. Weekly D2041 (Fla. 2d Dist. Ct. App. Sept. 11, 1996). It was substituted for a prior opinion that had been reported at 21 Fla. L. Weekly...
the motions were not heard until after a jury was selected and sworn.406 The trial court granted the motions and subsequently granted a mistrial, despite the fact that the defendant neither moved for nor consented to the mistrial.407 The State appealed from the suppression orders and the second district reversed.408 Rather than remand for further proceedings, however, the court remanded with directions to discharge the defendant.409 The court pointed out that, in most cases, suppression motions can be easily disposed of prior to trial.410 “[W]hen the judge rules at trial to suppress evidence,” however, the court continued, “the state is foreclosed from appealing that decision unless the defendant moves for a mistrial, consents to one, or by his conduct causes one.”411 Since “jeopardy [had] attached when the jury was sworn, and since none of these circumstances [were] present in the record, [the court concluded that] the state lost its right to prosecute the [defendant] any further [once the mistrial was declared].”412

C. Review of Sentences

The Supreme Court of Florida, in Franquiz v. State,413 clarified the remedy that appellate courts should apply when trial courts fail to provide written reasons for downward departures from the sentencing guidelines upon revocation of probation or community control in instances in which the initial placement on probation or community control was a downward departure based on a plea agreement.414 The court concluded that cases in which the sentence was imposed prior to the date of the Franquiz decision (October 10, 1996),415 should be “remanded and the trial court given the option of a downward departure revocation sentence with proper written reasons for the departure.”416 Sentences imposed after the date of the opinion are to be “remand[ed] with direction that the defendant be allowed

D1237 (Fla. 2d Dist. Ct. App. May 22, 1996), and it contains extensive changes from the earlier opinion. For a discussion of the initial opinion that was withdrawn by the court, see 1996 Survey, supra note 1, at 52–53.

406. Livingston, 681 So. 2d at 762.
407. Id. at 764.
408. Id. at 765.
409. Id.
410. Id. at 764–65.
411. Livingston, 681 So. 2d at 765.
412. Id.
413. 682 So. 2d 536 (Fla. 1996).
414. Id. at 537.
415. Id. at 536.
416. Id. at 538.
to withdraw a plea made conditioned upon the departure sentence or be sentenced within the guidelines.\textsuperscript{417}

\section*{D. Death Penalty Cases}

In \textit{State v. Fourth District Court of Appeal},\textsuperscript{418} the Supreme Court of Florida dealt with a petition for mandamus that sought to require the Fourth District Court of Appeal to transfer to the supreme court a prohibition petition filed by a death row inmate.\textsuperscript{419} The inmate had filed a motion for postconviction relief in the trial court and moved to disqualify the judge.\textsuperscript{420} After the motion was denied, the inmate sought prohibition in the fourth district.\textsuperscript{421} In granting the State's mandamus request and ordering the case transferred, the supreme court held that "in addition to our appellate jurisdiction over sentences of death, we have exclusive jurisdiction to review all types of collateral proceedings in death penalty cases."\textsuperscript{422} The court limited its holding, however, by noting that its jurisdiction in this regard "does not include cases in which the death penalty is sought but not yet imposed . . . or cases in which we have vacated both the conviction and sentence of death and remanded for a new trial."\textsuperscript{423}

\section*{XXV. Appeals in Juvenile Cases}

In \textit{I.T. v. State},\textsuperscript{424} the Supreme Court of Florida dealt with the question of how appellate courts should dispose of cases in which they find that the evidence is insufficient with regard to the offense for which the juvenile was adjudicated, but is sufficient with regard to a permissive lesser included offense.\textsuperscript{425} The court found that section 924.34 of the \textit{Florida Statutes}, which requires appellate courts dealing with similar circumstances in criminal cases to direct the trial court to enter judgment for the lesser offense, applies to juvenile delinquency cases.\textsuperscript{426} The court went on to reject a contention that the statutory provision should be read to apply only to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{417} \textit{Id.}
\item \textsuperscript{418} 697 So. 2d 70 (Fla. 1997).
\item \textsuperscript{419} \textit{Id.} at 70.
\item \textsuperscript{420} \textit{Id.}
\item \textsuperscript{421} \textit{Id.}
\item \textsuperscript{422} \textit{Id.} at 71.
\item \textsuperscript{423} \textit{Fourth Dist. Court of Appeal}, 697 So. 2d at 71.
\item \textsuperscript{424} 694 So. 2d 720 (Fla. 1997).
\item \textsuperscript{425} \textit{Id.} at 721.
\item \textsuperscript{426} \textit{Id.} at 722 (citing \textit{Fla. Stat.} § 924.34 (1995)).
\end{itemize}
\end{footnotesize}
necessarily lesser included offenses.\textsuperscript{427} Thus, although the adjudications under review in \textit{I.T.} were ordered vacated due to the wording of the charging document,\textsuperscript{428} the case demonstrates that in the absence of such unique circumstances, appellate courts finding sufficient evidence as to either a necessary or permissive lesser included offense should remand the case for the entry of an adjudication of delinquency for that lesser offense.

The Fifth District Court of Appeal in \textit{Z.F. v. State},\textsuperscript{429} dealt with a situation in which the parents of a juvenile who had been convicted in the court below were not indigent and decided not to proceed with an appeal.\textsuperscript{430} The court noted that section 27.52 (2)(d), \textit{Florida Statutes}, provides:

\begin{quote}
A nonindigent parent or legal guardian of a dependent person under the age of 18 years \textit{shall} furnish such person with the necessary legal services and costs incident to a delinquency proceeding in which the person has a right to legal counsel under the Constitution of the United States or the Constitution of the State of Florida.\textsuperscript{431}
\end{quote}

The court conceded that the statutory provision includes appeals and permits the court to appoint either the Public Defender or a private attorney to appeal and to assess costs of up to $1,250 against the parents.\textsuperscript{432} However, the court focused on the question of whether an appeal constitutes "necessary legal services."\textsuperscript{433} The court asked "Who should determine what is a necessary legal service?"\textsuperscript{434} The court noted that parents may feel, after hearing the testimony, that the child would benefit more by admitting a mistake and getting on with his or her life or that the matter is so unimportant to the child's future that the family would benefit more from using the money it cost to appeal for other purposes.\textsuperscript{435}

The court recognized, however, that a conflict could exist if, for example, the parents are the victims of the child's crime, or that the child could be innocent and that under such circumstances it would seem inappropriate to deny the child an appeal, especially if the youth may have a

\textsuperscript{427} \textit{Id.} at 724.
\textsuperscript{428} \textit{Id.}
\textsuperscript{429} 683 So. 2d 1084 (Fla. 5th Dist. Ct. App. 1996).
\textsuperscript{430} \textit{Id.} at 1084.
\textsuperscript{431} \textit{Id.} at 1084 (citing \textit{FLA. STAT.} § 27.52(2)(d) (1995)).
\textsuperscript{432} \textit{Id.} at 1085.
\textsuperscript{433} \textit{Id.}
\textsuperscript{434} \textit{Z.F.}, 683 So. 2d at 1085.
\textsuperscript{435} \textit{Id.}
\textsuperscript{436} \textit{Id.}
legitimate appeal on an important issue that may dramatically affect his or her future, but have parents who choose not to appeal solely for financial considerations.\footnote{Id.}

Balancing these factors, the court set forth the appropriate procedure for trial courts to follow in such situations:

We submit that when the court announces the defendant's right to appeal (or as soon thereafter as practical so that if a guardian ad litem is appointed, he or she can make a recommendation within the 30-day appeal period), it should determine whether the juvenile is entitled to the appointment of an attorney under the statute. If it appears that the parents are nonindigent, the court should solicit the views of the trial attorney and the parents as to whether an appeal would constitute "necessary legal services." If the court has any doubt, it should remove the parents as the decision maker on this issue and appoint a guardian ad litem in their place. If the court determines that an appeal is a "necessary legal service," then an attorney should be appointed for that purpose. If the court finds that an appeal, under the circumstances of the case, is not necessary, then it should decline to appoint an attorney. In that event, no Notice of Appeal will be automatically filed. If an attorney files an appeal without proper appointment, then a recovery of a fee, if a fee is expected, is the attorney's responsibility.\footnote{Id.}

XXVI. APPEALS IN ADMINISTRATIVE LAW CASES

In \textit{Hill v. Division of Retirement},\footnote{687 So. 2d 1376 (Fla. 1st Dist. Ct. App. 1997).} the first district wrote an opinion "to describe the essential attributes of reviewable final orders entered under the Administrative Procedure Act."\footnote{Id. at 1377.} The court stated:

Under Florida Rule of Appellate Procedure 9.190(b), review of final agency action begins with the filing of a notice of appeal, in accordance with Florida Rule of Appellate Procedure 9.110(c), instead of with the filing of a petition for review of a preliminary,
procedural, or intermediate order, in accordance with Florida Rule of Appellate Procedure 9.100(b) and (c).\textsuperscript{441}

"Review of final agency action taken under the Administrative Procedure Act is, moreover, a matter of right,"\textsuperscript{442} the court continued, while "[o]n the other hand, immediate review of a preliminary, procedural, or intermediate agency action or ruling is available only 'if review of the final agency decision would not provide an adequate remedy.'\textsuperscript{443}

The court went on to note that: 1) final orders in proceedings affecting "substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated'\textsuperscript{444} and 2) that an agency has not rendered a final order until the order is "filed with the agency clerk.'\textsuperscript{445}

The court indicated that "'[f]inal agency action may take the form of an order whether 'affirmative, negative, injunctive, or declaratory' in tenor'\textsuperscript{446} and that "'[a] final agency order may articulate jurisdictional boundaries; require a party to cease or desist; grant, suspend, or revoke a license; impose an administrative penalty; deny an evidentiary hearing; or deny substantive relief of various kinds.'\textsuperscript{447} Additionally, the court recognized that "'[a] final order may or may not dismiss a petition for hearing or some other pleading.'\textsuperscript{448}

The court summed up its discussion by concluding that the finality of an order "depends on whether it has brought the administrative adjudicative process to a close."\textsuperscript{449}

In \textit{W.T. Holding, Inc. v. State},\textsuperscript{450} the fourth district found that the reissuance of a final order by an administrative agency is appropriate when a party does not receive a copy of the order until after the time for appeal has elapsed.\textsuperscript{451}

The first district, in \textit{Libby Investigations v. Department of State},\textsuperscript{452} rejected an argument that an appellate court cannot reverse an agency's decision to increase the penalty suggested in a hearing officer's

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} (quoting FLA. STAT. § 120.68(1) (Supp. 1996)).
\item \textit{Hill}, 687 So. 2d at 1377 (quoting FLA. STAT. § 120.569(2)(j) (Supp. 1996)).
\item \textit{Id.} (quoting FLA. STAT. § 120.52(7) (Supp. 1996)).
\item \textit{Id.} (quoting FLA. STAT. § 120.52(7)(Supp. 1996)).
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Hill}, 687 So. 2d at 1377.
\item 682 So. 2d 1224 (Fla. 4th Dist. Ct. App. 1996).
\item \textit{Id.} at 1225.
\item 685 So. 2d 69 (Fla. 1st Dist. Ct. App. 1996).
\end{enumerate}
\end{footnotesize}
recommended order as long as the penalty is within the limits permitted by the applicable statute.\textsuperscript{453}

XXVII. APPEALS IN WORKERS' COMPENSATION CASES

In \textit{Hastings v. Demming},\textsuperscript{454} the Supreme Court of Florida answered a certified question by indicating that "[n]onfinal orders denying summary judgment on a claim of workers' compensation immunity are not appealable unless the trial court's order specifically states that, as a matter of law, such a defense is not available to a party."\textsuperscript{455} The court stated that "[i]n those limited cases, the party is precluded from having a jury decide whether a plaintiff's remedy is limited to workers' compensation benefits and, therefore, an appeal is proper."\textsuperscript{456} In other than those limited cases, the court noted that "the denial of the summary judgment may be based on a factual dispute and the party is still likely able to present an immunity defense to the jury."\textsuperscript{457} The court also pointed out that prior to its decision, it had amended the appellate rules to address this matter,\textsuperscript{458} and that "the new rule makes clear that the district courts have no jurisdiction to hear an appeal of the nonfinal order."\textsuperscript{459}

The change in the appellate rules discussed in \textit{Hastings} was held in \textit{Stucki v. Hopkins},\textsuperscript{460} to apply retroactively to summary judgments entered prior to its effective date.\textsuperscript{461}

In \textit{Betancourt v. Sears Roebuck & Co.},\textsuperscript{462} the first district set forth the guidelines for determining whether the court has jurisdiction to consider an appeal in cases in which a judge of compensation claims ("JCC") fails to rule on a claim that is ripe for adjudication and that is properly before the JCC.\textsuperscript{463} The court found that "[i]n cases wherein a JCC expressly reserves jurisdiction on a fully tried issue that is ripe for adjudication, such reservation renders the order nonfinal and nonappealable."\textsuperscript{464} Therefore,

\textsuperscript{453} \textit{Id.} at 71.
\textsuperscript{454} 694 So. 2d 718 (Fla. 1997).
\textsuperscript{455} \textit{Id.} at 720.
\textsuperscript{456} \textit{Id.}
\textsuperscript{457} \textit{Id.}
\textsuperscript{458} See section II (E) of this article.
\textsuperscript{459} \textit{Hastings}, 694 So. 2d at 720.
\textsuperscript{460} 691 So. 2d 560 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{461} \textit{Id.} at 562.
\textsuperscript{462} 693 So. 2d 680 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{463} \textit{Id.} at 681.
\textsuperscript{464} \textit{Id.} at 682.
appeals from such orders will be dismissed for lack of jurisdiction.\textsuperscript{465} On the other hand, the court stated:

\begin{quote}
In cases in which the JCC fails to enter a ruling on a fully tried issue that is ripe for adjudication and does not reserve jurisdiction on the issue, this court will consider the absence of a ruling to constitute a denial of the claim only for jurisdictional purposes, and the order will, therefore, be deemed final and appealable.\textsuperscript{466}
\end{quote}

In considering the merits of such cases, the “court will continue to consider the JCC’s failure to rule reversible error based on the JCC’s noncompliance with the duty to adjudicate all issues that are ripe for adjudication.”\textsuperscript{467} The court went on to indicate that “in regard to cases involving claims that are ripe for adjudication at the time of the hearing, for which claimant failed to produce evidence or obtain a ruling, this court will consider the claim abandoned and the issue waived, and will consider the order final and appealable.”\textsuperscript{468} As to such matters, “[a]ny subsequent claim for the same benefits will be barred by the principle of \textit{res judicata}.”\textsuperscript{469}

In reaching its decision, the court “recognize[d] that motions for rehearing in workers’ compensation cases do not toll the time to appeal, unlike those in other classes of cases.”\textsuperscript{470} Noting that it is “of the firm conviction that much of the uncertainty that attends orders which fail to address mature claims could be remedied by the adoption of an amended rehearing rule that would allow the filing of a timely motion to toll the time for appeal,”\textsuperscript{471} the court “therefore commend[ed] to the Workers’ Compensation Rules Committee of The Florida Bar the adoption of an amended rehearing rule for the purpose of achieving the above stated goal.”\textsuperscript{472}

\section*{XXVIII. APPEALS IN FAMILY LAW CASES}

The fifth district in \textit{In re J.A.},\textsuperscript{473} joined the third and fourth districts\textsuperscript{474} in holding that court-appointed counsel in appeals from orders terminating

\begin{thebibliography}
\bibitem{465} \textit{Id.}
\bibitem{466} \textit{Id.}
\bibitem{467} \textit{Betancourt}, 693 So. 2d at 682.
\bibitem{468} \textit{Id.} at 683.
\bibitem{469} \textit{Id.}
\bibitem{470} \textit{Id.}
\bibitem{471} \textit{Id.}
\bibitem{472} \textit{Betancourt}, 693 So. 2d at 683.
\bibitem{473} 693 So. 2d 723 (Fla. 5th Dist. Ct. App. 1997).
\end{thebibliography}
parental rights, who find there to exist no issues of arguable merit, are not required to follow the procedure set forth in Anders v. California for use in similar circumstances by court-appointed counsel involved in criminal cases.

XXIX. EXTRAORDINARY WRITS

A. Prohibition

The fifth district, in Rollins v. Baker, granted a petition for a writ of prohibition that sought the disqualification of a trial judge in a pending case. Although the court found prohibition warranted as to the merits of the petitioner's claim, it also noted the existence of an additional ground for disqualification, the fact the judge had "filed a pro se response to the court's order to show cause" in which he went beyond stating his position as to why the petition was legally insufficient, and commented on facts not alleged in the petition or the underlying motion to disqualify, tried to explain his actions, and attempted to correct or explain allegations in the petition. The court suggested that when judges are "confronted with the dilemma of whether or not to respond to a show cause order in these types of cases, perhaps the best course of action is to request the attorney general's office to file a response on behalf of the judge limited to the legal sufficiency of the facts set forth by the petitioner." In Ellis v. Henning, a trial judge was represented by the attorney general's office in a prohibition proceeding, but the ultimate result was the same as the result in Rollins. In Ellis, the fourth district concluded that it was compelled to grant a writ of prohibition "because the responses, filed on behalf of the trial judge by an assistant attorney general in each of the

475. 386 U.S. 738 (1967).
476. J.A., 693 So. 2d at 724.
477. 683 So. 2d 1138 (Fla. 5th Dist. Ct. App. 1996).
478. Id. at 1139.
479. Id. at 1139–40.
480. Id. at 1140.
481. Id.
482. Rollins, 683 So. 2d at 1140.
483. Id.
484. 678 So. 2d 825 (Fla. 4th Dist. Ct. App. 1996).
485. Id. at 827.
consolidated cases, impermissibly took issue with the accuracy of the allegations in the petition."

The court "recognize[d] that the trial judge may have merely referred this case to the attorney general's office for a response as judges frequently do[.]," and indicated that "[i]t is thus also the responsibility of the office of the attorney general as the judge's representative not to file a response on the judge's behalf, which, as in this case, requires the judge's disqualification." The court reiterated a warning it had expressed in *Fabber v. Wessel,* "that it is the safer practice 'for the judge to remain silent and let the adversarial party supply the response.'"

The *Ellis* court granted the trial judge's motion for clarification to address the concern "that a failure to respond could result in the issuance of a writ of prohibition if a respondent judge follows [the court's] advice and remains silent." The court pointed out that "[i]t arises only in those cases where the adversarial party—for whatever reason—also does not respond[,]" and that "[i]n practical terms, there may be those times that both parties desire that another judge hear the case or where an adversarial party simply fails to respond.")

Also, the court on clarification discussed its caution to the assistant attorney general, indicating that its "concern was that a response, which contests the accuracy of the facts alleged by a petitioner, impermissibly places the trial judge in an adversarial posture." The court noted that, "[o]n the other hand, nothing prevents the assistant attorney general, on behalf of the trial judge, from limiting a response to the legal sufficiency of the facts set forth by the petitioner." The court went on to state that "[t]he respondent simply must avoid the temptation to dispute the facts if a response is filed" and that "[i]n the overwhelming majority of the cases, the office of the attorney general has struck the necessary balance."
B. The Effect on Appeals of Prior Denials of Prohibition

In *Hobbs v. State,* a criminal defendant appealed to the fourth district from his conviction asserting that he was improperly denied discharge on speedy trial grounds. The defendant had raised the speedy trial issue in a pretrial petition for a writ of prohibition which the fourth district had denied without opinion. The State asserted that the denial of prohibition constituted the law of the case and that relitigation of the issue on appeal was therefore barred.

The court noted that in *Petrullo v. Petrullo,* it had stated that a "denial of a writ without opinion cannot be the law of the case." The court recognized that *Petrullo* dealt with a petition for prohibition, but pointed out that the only authority it had cited for its statement was *Bing v. A.G. Edwards & Sons, Inc.*, a case that involved the denial without opinion of a petition for certiorari.

The court then discussed the difference between the two extraordinary writs by noting that the vast majority of petitions for certiorari are dismissed because the petitioner has an adequate remedy on appeal and that no matter how clear the error of a trial judge may be, an appellate court has no jurisdiction so long as an adequate remedy existed on appeal. The court continued, "[t]here is no similar jurisdictional hurdle, separate and apart from the propriety of the action of the trial court, when an appellate court reviews a petition for writ of prohibition."

The court went on to cite the specially concurring opinion of Judge Anstead in *DeGennaro v. Janie Dean Chevrolet, Inc.*, which asserted that unless an order on opinion denying prohibition indicates to the contrary, such a ruling should constitute the law of the case because "[j]udicial
resources, already heavily taxed, are hardly efficiently allocated when they are used to twice review the same issue.”

Opting to follow the approach adopted by the third district in *Obanion v. State*, the *Hobbs* court concluded that “[h]enceforth a denial of a petition for writ of prohibition will be a ruling on the merits, unless we state otherwise.”

The court adopted this approach despite recognizing that the supreme court, in *Barwick v. State*, although approving the procedure which we adopt from *Obanion*, adopted the opposite approach for itself, announcing that if a denial of a petition for writ of prohibition is intended to foreclose further review on direct appeal, the order will state that it is with prejudice.

The court did not, however, discuss its previous decision in *Thomason v. State*, in which Judge Farmer, who joined in the unanimous en banc *Hobbs* decision, wrote a dissenting opinion that expressed disagreement with the *Obanion* approach.

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511. 496 So. 2d 977 (Fla. 3d Dist. Ct. App. 1986).

512. *Hobbs*, 689 So. 2d at 1251.


514. *Hobbs*, 689 So. 2d at 1250, n.2.

515. 594 So. 2d 310 (Fla. 4th Dist. Ct. App. 1992), quashed on other grounds, 620 So. 2d 1234 (Fla. 1993).

516. In *Thomason*, the defendant, who was appealing from an order withholding adjudication and placing him on probation, raised a double jeopardy claim that he had previously asserted in a petition for prohibition that had been denied without opinion. *Id.* The court affirmed without opinion, but Judge Farmer, who wrote primarily to dissent on the merits, discussed the question of whether consideration of the double jeopardy claim was proper in light of the prior petition. *Id.* at 312 (Farmer, J., dissenting). He noted that such consideration was appropriate because prohibition is an extraordinarily prerogative writ that is sometimes denied for “good reasons having nothing to do with the underlying merits of [a petitioner’s] position . . . .” *Id.* at 312 n.2. He recognized that his view was contrary to *Obanion*, but stated that the fourth district had never adopted the *Obanion* approach and that he hoped it never would, “at least as long as prohibition is deemed a matter of mere grace.” *Id.* Although disagreeing with Judge Farmer on the merits of the case, it appears that the other members of the panel agreed with him on the jurisdictional issue because the case was affirmed, rather than dismissed, *Thomason*, 594 So. 2d at 310, because Judge Stone wrote a specially concurring opinion that set forth the reasons why he felt the case should be affirmed on the merits, and because the court, on rehearing, certified a question that dealt only with the merits of the case. *Id.* at 318.
C. Mandamus

In Van Meter v. Singletary, an inmate sought review of a circuit court order dismissing his petition for writ of mandamus, which had challenged a loss of gain time imposed upon a finding that the inmate had committed a disciplinary infraction. The petition had been dismissed because it was filed some six months after his administrative appeal was affirmed and because section 95.11(8), of the Florida Statutes, states that any court action challenging prisoner disciplinary proceedings must be commenced within thirty days after final disposition of the proceeding. Finding the statutory provision to be an unconstitutional violation of the doctrine of separation of powers, the first district reversed the order of dismissal. Relying on a long line of precedent from the Supreme Court of Florida, the first district held that the Florida Constitution vested in the courts the complete power to issue extraordinary writs and "that the legislature was prohibited from interfering with that power in any way." The court recognized that rule 1.630(c) of the Florida Rules of Civil Procedure provides that requests for extraordinary writs "other than common law certiorari must be filed within the time provided by law," but was "unwilling to presume that the supreme court," in enacting the rule "intended so cavalierly to surrender to the legislature a power which it had zealously guarded for so long." The court thus interpreted the rule "to refer to the judicially developed law regarding the time within which such relief must be sought—i.e., the concept of laches."

D. Certiorari

In Stilson v. Allstate Insurance Co., the second district denied a petition for a writ of certiorari that sought review of a circuit court appellate decision, "reluctantly conclud[ing] that [it was] faced with an error that [it]
lack[ed] the discretion to correct. The court found that the county court had improperly granted summary judgment, but declined to disturb the affirmance without written opinion by the circuit court. The district court’s determination was based on the limited standard of review that applies when district courts review decisions of circuit courts acting in their appellate capacity.

The court noted that “certiorari should not be used as a vehicle for a second appeal in a typical case tried in county court.” Rather, the court continued, district courts must be guided by decisions of the supreme court that “[i]n essence . . . cautioned the district courts to be prudent and deliberate when deciding to exercise this extraordinary power, but not so wary as to deprive litigants and the public of essential justice.”

The second district recognized that “the departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error” and that district courts should use their discretion to correct an error “only when there has been a violation of [a] clearly established principle of law resulting in a miscarriage of justice.” The court stated that the error in the case before it was “[a]t worst a misapplication of the correct law and “not sufficient by itself to be a miscarriage of justice.’”

The court noted that there may never be clearly established principles of law governing a wide range of county court issues because “[i]t is difficult for the law to evolve in unreported decisions issued in circuit court appeals.” Therefore, the court admitted to “a great temptation in a case like this one to announce a ‘miscarriage of justice’ simply to provide precedent where precedent is needed.” However, the court resisted the temptation because it did not interpret Heggs as giving it that degree of discretion and

528. Id. at 983.
529. Id. at 980.
530. Id. at 982.
531. Id.
532. Stilson, 692 So. 2d at 982 (citing Haines City Community Dev. v. Heggs, 658 So. 2d 523 (Fla. 1995); Combs v. State, 436 So. 2d 93 (Fla. 1983)). For a discussion of the decision in Heggs, see 1995: Survey, supra note 1, at 31–2.
533. Stilson, 692 So. 2d at 982.
534. Id.
535. Id. (quoting Haines City Community Dev. v. Heggs, 658 So. 2d 523, 528 (Fla. 1995)) (quoting Combs v. State, 436 So. 2d 93, 95–96 (Fla. 1983))).
536. Id.
537. Id.
538. Stilson, 692 So. 2d at 982.
539. Id. at 983.
because "[s]uch an interpretation would invite certiorari review of a large number of appellate decisions issued by circuit courts."\textsuperscript{540}

As a possible solution to the problem, the court pointed to section 34.017(1) of the Florida Statutes,\textsuperscript{541} which permits county court's to certify to district courts of appeal questions that may have statewide application and that either are of "great public importance" or will "affect the uniform administration of justice."\textsuperscript{542} The second district indicated that "[c]ounty court judges should understand that this provision can be used to create precedent needed for the orderly administration of justice in their courts,"\textsuperscript{543} and that the district court "rel[ies] upon them to screen their cases so that the district courts may receive an occasional appeal rather than numerous petitions for certiorari."\textsuperscript{544}

The first district in \textit{Department of Highway Safety & Motor Vehicles v. Smith},\textsuperscript{545} reviewed a circuit court order that had granted certiorari and reversed an order suspending a driver's license.\textsuperscript{546} The appendix to the petition in the circuit court did not include a conformed copy of the order to be reviewed.\textsuperscript{547} The first district found that this fact alone demonstrated that the circuit court could not have applied the correct law, and that it could not have determined whether the findings of the order under review were supported by competent substantial evidence.\textsuperscript{548} Relying both on those conclusions and a finding that the circuit court reweighed the evidence in its ruling on the merits, the district court granted certiorari and quashed the circuit court's order.\textsuperscript{549}

\textbf{E. Habeas Corpus}

The Supreme Court of Florida, in \textit{Alachua Regional Juvenile Detention Center v. T.O.},\textsuperscript{550} dealt with a situation in which a juvenile was detained pursuant to a detention order issued by a circuit court located within the territorial jurisdiction of the fifth district.\textsuperscript{551} The place of detention,
however, was located within the territorial jurisdiction of the first district. 552 After the juvenile’s motion for release was denied by the circuit court, he filed a petition for a writ of habeas corpus in the first district. 553 In granting relief, the first district certified to the supreme court as a question of great public importance the question of whether, in light of the fact that the order detaining the juvenile was entered by a circuit court located in another district, it was the proper court to consider the petition. 554

The court said that “it appears that a district court of appeal does not have the constitutional power to issue a writ directed to a person outside the district court’s territorial jurisdiction.” 555 Further, “the proper respondent in a habeas corpus petition is the party that has actual custody and is in a position to physically produce the petitioner.” 556 The supreme court concluded that “the Fifth District Court could not have issued the writ.” 557

The Supreme Court of Florida went on to consider the question of whether the first district, “not having supervisory or appellate jurisdiction over the . . . court” that issued the detention order, “had the authority to review its detention order.” 558 In concluding that the first district did have such jurisdiction, the supreme court pointed out certain restrictions apply under such circumstances. 559 When a court entertaining a habeas corpus petition does not have supervisory or appellate jurisdiction over the court that entered the order or other process under challenge, the supreme court concluded that “the scope of the reviewing court’s inquiry is limited to whether the court that entered the order was without jurisdiction to do so or whether the order is void or illegal.” 556 The supreme court further found that “[t]he reviewing court may not discharge the detainee if the detention order is merely defective, irregular, or insufficient in form or substance.” 561

XXX. A LOOK TO THE FUTURE

In May of 1997, the Supreme Court of Florida Judicial Management Council (“JMC”) Committee on Appellate Court Workload & Jurisdiction

552. Id.
553. Id.
555. Alachua II, 684 So. 2d at 816.
556. Id.
557. Id.
558. Id.
559. Id.
560. Alachua II, 684 So. 2d at 816.
561. Id.
produced a draft report that may well impact on the future of appellate practice in Florida. "The JMC asked the committee to review the jurisdiction, workload, resources, and case management practices of the district courts of appeal, and make recommendations on alternative approaches that allow the courts to meet anticipated workload levels."\(^{562}\)

The committee summarized its recommendations as follows:

- Adopt a new appellate court workload standard of 225 dispositions after submission on the merits per judge (committee voted 8 in favor, 2 opposed);
- In combination with the above, adopt an additional appellate court workload standard of 385 case filings per judge (committee voted 6 in favor, 2 opposed, 2 abstaining);
- This committee should develop, for court approval, a uniform method of counting cases prior to, or concurrent with, efforts to develop performance-based budgeting (committee voted 9 in favor, 0 opposed, 0 abstaining);
- Redistribute administrative appeals and workers' compensation cases to the district courts of appeal in which the matters arose, with the exception of broad rule-making activities by state agencies (committee voted 8 in favor, 0 opposed, 2 abstaining);
- Move the 8th Judicial Circuit from the 1st District Court of Appeal to the 5th District Court of Appeal and move the 20th Judicial Circuit from the 2nd District Court of Appeal to the 3rd District Court of Appeal (committee voted 7 in favor, 2 opposed, 0 abstaining);
- Balancing district court of appeal workload by combining the recommendations concerning redistributing administrative appeals and workers' compensation jurisdiction with geographic changes (committee voted 9 in favor, 1 opposed, 0 abstaining);
- Do not create an additional district court of appeal at this time but revisit this issue in five years (committee voted 5 in favor, 4 opposed, 0 abstaining);
- Do not create specialized appellate courts (committee voted 7 in favor, 0 opposed, 3 abstaining);

Subject-matter divisions should remain an option available to each district court of appeal to establish as it sees fit (committed voted 7 in favor, 1 opposed, 1 abstaining); Severely limit the availability of appeals from non-final orders (committee voted 6 in favor, 3 opposed, 1 abstaining); The use of senior judges as additional appellate resources, not just as replacements in individual cases, should be encouraged and funded (committee voted 9 in favor, 0 opposed, 0 abstaining); and The use of central staff attorneys should be within the discretion of each district court of appeal, but they are not the alternative to additional judges (committee voted 9 in favor, 0 opposed, 0 abstaining).563

The Florida Courts Technology Commission is presently considering recommending to the supreme court the adoption of a vendor neutral citation system that would include the sequential numbering and paragraph numbering of opinions from the supreme court and the district courts of appeal. Clearly, the adoption of such a system would significantly affect all Florida lawyers, particularly appellate practitioners. Of course, the courts over the coming 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.

Criminal Procedure: 1997 Survey of Florida Law

Jon A. Sale
Marc David Seitles

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I. INTRODUCTION

This article surveys significant developments in the area of criminal procedure between June 1, 1996, and June 1, 1997. The primary focus of this branch of criminal procedure is on the interpretation of the Fourth, Fifth, and Sixth Amendments, more specifically cases involving the substantive areas of search and seizure and confessions. To do so effectively, the authors have selected notable cases from the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the various Florida courts. This article seeks to clarify established principles, indicate continuing trends, and signify a new emphasis or direction without discussing the application of settled or fairly standard fact situations. The author's purpose is to provide the reader with insight into recent changes on the federal and state level, and the case law's general legal impact on criminal practitioners and citizens in the State of Florida.

II. WARRANTLESS SEARCHES

A. Pretextual Police Conduct

Between June 1, 1996, and June 1, 1997, the United States Supreme Court issued a number of significant decisions involving investigatory and
pretexustial traffic stops. Arguably, the most controversial decision of the
survey period was *Whren v. United States*\(^1\) which addressed the Fourth
Amendment's concern of "reasonableness" when law enforcement officials
conduct traffic stops.\(^2\) In *Whren*, the Court held that the temporary detention
of a motorist is reasonable where an officer has probable cause to believe a
motorist has violated a traffic law, even if a reasonable police officer would
not have detained the driver for such a violation.\(^3\) The facts of *Whren*
involve police officers who stopped petitioner Brown's vehicle in a "high
drug area" after Brown was driving at an "unreasonable" speed and failed to
properly signal. Upon approaching the vehicle, the officers observed the
passenger, petitioner Whren, handling plastic bags of what appeared to be
crack cocaine. Petitioners were arrested, and quantities of several types of
illegal drugs were retrieved.\(^4\) Prior to trial on federal drug charges,
petitioners moved to suppress the evidence alleging the stop was pretextual
and was not justified by either a reasonable suspicion or probable cause to
believe the men were engaged in illegal activity. The motion to suppress
was denied and the Maryland Court of Special Appeals affirmed.\(^5\)

Justice Scalia, writing for the majority in *Whren*, dismissed the
petitioner's argument that a subjective "reasonable officer" standard should
have been used based upon the Supreme Court's previous disapproval of
police attempts to use valid bases of action against citizens for other
investigative purposes.\(^6\) Generally, the decision to stop an automobile is
reasonable if probable cause exists that there has been a traffic violation,
reiterating the traditional common law rule justifying search and
seizures.\(^7\) More significantly, the Supreme Court rejected any inquiries into
the subjective state of mind of the individual police officer, stating that
"[s]ubjective intentions play no role in ordinary, probable-cause Fourth
Amendment analysis[,]" foreclosing any argument that the ulterior motives

\(1\) 116 S. Ct. 1769 (1996).
\(2\) Id. at 1772.
\(3\) Id.
\(4\) Id.
\(5\) Id.
\(6\) *Whren*, 116 S. Ct. at 1773 (citing Florida v. Wells, 495 U.S. 1, 4 (1990)). In *Wells*,
the Court stated that "an inventory search must not be a ruse for a general rummaging in order
367, 372 (1987) (approving an inventory search where there had been no evidence of
improper police procedure or bad faith). An inventory search is the search of property
lawfully seized and detained in order to ensure that it is harmless, to secure valuable items
(such as might be kept in a towed car), and to protect against false claims of loss or damage.

\(7\) *Whren*, 116 S. Ct. at 1769.
of individual police officers could invalidate justifiable police conduct.\textsuperscript{8} Furthermore, the Supreme Court refused to apply a detailed balancing analysis\textsuperscript{9} by stating such inquiries are necessary only in cases involving searches or seizures conducted in a manner unusually harmful to the individual.\textsuperscript{10} Accordingly, although a routine traffic stop by plain clothes officers based on probable cause may generate “concern” or “fright,” the existence of probable cause to believe that a law has been broken outweighs the private interest in avoiding police conduct.\textsuperscript{11} Historically, the standard in the Eleventh Circuit Court of Appeals for determining if a traffic stop was “pretextual” has been whether “a reasonable officer would have made the seizure in the absence of illegitimate motivation.”\textsuperscript{12} Nevertheless, the Eleventh Circuit appears to have embraced \textit{Whren}, thereby strengthening pretextual police conduct without reducing the incentive of officers who act upon ulterior motives to investigate into other matters.

In \textit{United States v. Holloman},\textsuperscript{13} the court found that the seizure of Holloman’s vehicle after a traffic stop comported with the Fourth Amendment, notwithstanding the officer’s subjective desire to intercept narocotics.\textsuperscript{14} Holloman refused to have his truck searched after police officers, working with a drug interdiction unit, stopped his vehicle for failing to have an illuminated license tag.\textsuperscript{15} However, using a canine who alerted

\textsuperscript{8} \textit{Id.} at 1774.

\textsuperscript{9} Petitioners argued that a balancing test should be used to weigh the governmental and individual interests implicated in a traffic stop. Petitioners claim such balancing does not permit investigation of traffic violations by plain clothes officers in unmarked cars since it minimally advances the government’s interest in traffic safety and unduly burdens the motorist by creating “substantial anxiety.” \textit{Id.} at 1776. See \textit{Delaware v. Prouse}, 440 U.S. 648, 657 (1979). The Court in \textit{Whren} distinguished itself from \textit{Prouse} and the use of a balancing analysis because the latter was based on a random traffic stop to check a motorist’s license and vehicle registration, a claim that involved police intrusion without the probable cause that is its traditional justification. \textit{Whren}, 116 S. Ct. at 1776.


\textsuperscript{11} \textit{Whren}, 116 S. Ct. at 1777.

\textsuperscript{12} See \textit{United States v. Smith}, 799 F.2d 704, 708 (11th Cir. 1986).

\textsuperscript{13} 113 F.3d 192 (11th Cir. 1997).

\textsuperscript{14} \textit{Id.} at 196. See \textit{Riley v. Alabama}, 104 F.3d 1247, 1250 (11th Cir. 1997) (stopping of vehicle was justified where automobile was traveling over 60 miles an hour in a residential neighborhood, and passenger was throwing paraphernalia out of the window).

\textsuperscript{15} \textit{Holloman}, 113 F.3d at 193. Section 316.221(2) of the \textit{Florida Statutes} “requires a tail lamp or separate lamp to illuminate the rear registration plate and render it clearly legible from a distance of 50 feet to the rear.” \textit{Id.} at 193 n.1 (citing FLA. STAT. § 316.221(2) (1996)).
the presence of narcotics on the passenger side of the vehicle, officers discovered 694 grams of crack cocaine. Neither the nature of the minor traffic infraction nor the use of a canine to establish probable cause were viewed by the Eleventh Circuit as significant differentiating elements. The court in Holloman also concluded that the facts were identically indistinguishable from the Supreme Court’s decision in Whren. In both cases, the police officers had probable cause to believe a traffic violation had occurred, conducted constitutionally valid seizures of the narcotics of each petitioner, and were appropriately decided by their respective courts who did not analyze the officer’s subjective motivation to conduct the traffic stop.

The Whren decision will likely have a significant impact on pretextual stops in the State of Florida. In State v. Holland, the First District Court of Appeal noted that the Whren Court unequivocally rejected the reasonable officer test set forth by the Supreme Court of Florida in State v. Daniel. Consequently, the First District Court of Appeal certified a question to the Supreme Court of Florida to determine the actual scope of Whren. The Holland court, applying the reasonable officer test, held that

16. Holloman, 113 F.3d at 194.
17. Id. See United States v. Griffin, 109 F.3d 706 (11th Cir. 1997). Defendants were pulled over for driving 65 miles an hour on the interstate. Id. at 707. After the stop for the traffic violation, the officers conducted a canine sniff of the vehicle and found marijuana on the front seat. Id. Although the arresting officer testified that the speed defendants were traveling was not unreasonable, the court followed Whren by finding probable cause based upon the traffic violation. Id. at 707–08.
20. Id. at 1042 (rejecting State v. Daniel, 665 So. 2d 1040, 1046 (Fla. 1995)). The Supreme Court of Florida held that “a stop is permissible if effected by specialized officers properly acting within the scope of their usual duties and practices.” Daniel, 665 So. 2d at 1046. The Daniel court expressly rejected both the so-called “subjective test,” which “attempts to inquire into the actual subjective reasons why the officer made the stop,” and the “objective test,” now adopted by the United States Supreme Court in Whren. Holland, 680 So. 2d at 1045 (quoting State v. Daniel, 665 So. 2d 1040, 1041 (Fla. 1995)). Daniel described the objective approach as a “could arrest approach,” dismissing such an examination because the test “would authorize stops for the subject infractions, however unrelated those infractions may be to the true motive for the stop.” Id. (quoting State v. Daniel, 665 So. 2d 1040, 1042 (Fla. 1995)).
21. The question, as originally certified asked:

WHETHER WHREN V. UNITED STATES, --- U.S. ---, 116 S. Ct. 1769, 135
L. Ed. 2d 89 (1996), OVERRULES STATE V. DANIEL, 665 So. 2d 1040,
detaining the appellant driver for questioning on drug charges after being stopped for traveling seventy miles an hour was permissible.\textsuperscript{22} Judge Van Nortwick, in his reluctant concurrence, recognized the flaws with a purely objective test later adopted by \textit{Whren}, specifically its inherent failure to address the problems that sometimes will arise with specialized officers.\textsuperscript{23} For this reason, the trial court found a lack of credible evidence to support a finding that narcotics officers would, under their usual practice, make a traffic stop absent an invalid motive.\textsuperscript{24} In this particular case, they did not even issue a traffic citation after the stop. One judge stated: “Well, I think that’s all a fraud . . . they sit here and testify—they got smirks on their faces when they are testifying. . . . They know what they are doing. You know what they are doing. I know what they are doing . . . .”\textsuperscript{25}

Courts in a number of jurisdictions have attempted to find a solution to the problem of pretextual traffic stops without focusing upon the subjective, ulterior motivations of police officers.\textsuperscript{26} One attempt to limit the authority of officers to order passengers out of a lawfully stopped vehicle was reversed by the United States Supreme Court in \textit{Maryland v. Wilson}.\textsuperscript{27} In \textit{Wilson}, the Supreme Court held that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”\textsuperscript{28} A Maryland state trooper stopped the speeding car in which appellant Wilson was a passenger. Upon noticing his apparent nervousness, the officer ordered Wilson out of the car. When Wilson exited the vehicle, a quantity of cocaine fell to the ground and he was arrested for possession of cocaine.\textsuperscript{29} The Maryland Court of Special Appeals affirmed the lower court’s decision, holding that the rule of \textit{Pennsylvania v. Mimms},\textsuperscript{30} that an officer may order the driver of a lawfully stopped car to exit his vehicle, does not apply for passengers.\textsuperscript{31}

The Supreme Court reversed, holding that a police officer making a traffic stop may require passengers to get out of the car pending a
Chief Justice Rehnquist, who wrote the decision, explained the Court’s decision in *Mimms* which stated that the “touchstone of our analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”\(^\text{33}\) Using the statistical figures of the danger of traffic stops for police officers, particularly when there is more than one occupant,\(^\text{34}\) the additional intrusion on a passenger already in a stopped vehicle is minimal.\(^\text{35}\) The result of the ensuing balancing test, between the public interest in protecting law enforcement officers and an individual’s rights against intrusion, signifies a more expansive role for police officers during traffic stops and sets a precedent that, at the very least as common motorists, may further erode personal civil liberties.

### B. Constitutionality of Roadblocks

The legality of roadblocks once again posed significant dilemmas for law enforcement officials in the State of Florida. The general standard requires a written set of guidelines to be issued before a roadblock can be set up.\(^\text{36}\) Because roadblocks involve seizures without any articulable suspicion of illegal activity, they should be based on the following considerations: “(1) specific evidence of an existing violation; (2) a showing that reasonable legislative or administrative inspection standards are met; or (3) a showing that officers carry out the search pursuant to a plan embodying specific neutral criteria which limit the conduct of the individual officers.”\(^\text{37}\)

In *Campbell v. State*,\(^\text{38}\) a decisive statement was made requiring detailed written guidelines issued to officers that set forth governing procedures for individual roadblocks.\(^\text{39}\) The Supreme Court of Florida noted that “[t]he

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32. *Id.*


34. Justice Stevens points out that “these statistics are not further broken down as to assaults by passengers and assaults by drivers.” *Id.* at 885 n.2 (Stevens, J., dissenting).

35. *Id.* at 886.

36. See *State v. Jones*, 483 So. 2d 433 (Fla. 1986).

37. *Id.* at 438.

38. 679 So. 2d 1168 (Fla. 1996). The undisputed facts are that during the roadblock, petitioner Campbell was stopped and transported to county jail for driving with a suspended license. Officers searched Campbell and found powder cocaine and marijuana in his sock. “Campbell moved to suppress the contraband seized from him and contended that the police roadblock constituted an unlawful seizure in violation of the Fourth and Fourteenth Amendments.” *Id.* at 1169–70.

39. *Id.* at 1172.
requirement of written guidelines is not merely a formality. . . . [but rather a method] to ensure that the police do not act with unbridled discretion in exercising the power to stop and restrain citizens.\textsuperscript{40} In \textit{Campbell}, a roadblock to check motorists for traffic and safety violations was set up by the Jacksonville Sheriff’s Office in response to residents’ complaints about speeding and an accident that had occurred the previous weekend.\textsuperscript{41} Officers prepared a written deployment strategy to stop motorists for a traffic safety check on Mandarin Road and gave oral instructions to the other law enforcement participants regarding procedural issues for the roadblock. Nevertheless, the limited written instructions were deemed insufficient since the operational order failed to contain guidelines restricting the discretion of the officers who took part in the roadblock.\textsuperscript{42} The Supreme Court of Florida has made it emphatically clear that substituting general operating procedure contained in a standard operational order will not replace the requirement of detailed written guidelines for individual roadblocks.\textsuperscript{43}

C. \textit{Consent to Search}

An attempt to limit what police may do after a stop by scrutinizing when an officer has consent to search was rebuffed by the United States Supreme Court.\textsuperscript{44} The Supreme Court categorically rejected the bright line prerequisite for consensual interrogation requiring that an officer clearly state when a citizen validly detained for a traffic offense is “legally free to go.”\textsuperscript{45} Officer Newsome stopped petitioner Robinette for speeding. Neither at the time of the stop nor prior to the search of Robinette’s vehicle did the

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 1169.

\textsuperscript{42} \textit{Id.} at 1171.

\textsuperscript{43} \textit{Campbell}, 679 So. 2d at 1171.

\textsuperscript{44} \textit{Ohio v. Robinette}, 117 S. Ct. 417, 419 (1996).

officer have any basis for believing that there were drugs in the car. After
ordering Robinette out of the car, issuing a warning, and returning his
driver's license, the officer took no further action related to the speeding
violation. He did, however, ask if Robinette had any weapons or illegal
contraband in his car. Thereafter, he obtained petitioner's consent to search
and found a small amount of narcotics.46

Recognizing knowledge of the right to refuse as one factor for effective
consent, the court declined to confine valid consent to the limit of that one
factor.47 The test for a valid consent to search is that the consent be
voluntary, and voluntariness is a question of fact to be determined from "all
the circumstances surrounding the encounter."48 In another decision
authored by Chief Justice Rehnquist, the Supreme Court noted that while it
would be impractical to impose detailed warning requirements for consent
searches, it would be equally unrealistic to require police officers to always
inform detainees that they are free to go in order for a consensual search to
be deemed voluntary.49 Justice Stevens, in his dissent, recognized the severe
limitations upon states to limit the action of its police officers.50 No federal
rule exists precluding a state from requiring its police officers to explain to
individuals detained at valid traffic stops when they may leave.51 Since the
Constitution neither mandates nor prohibits the issuance of such warnings
during traffic stops, such a practice should be decided by lawmakers in each
state.52

*United States v. Butler*53 further limited the defense of involuntary
consent to search, even in the face of a significant police presence.54 The
standard to be applied is "whether the police conduct would have
communicated to a reasonable person that the person was not free to decline

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46. Robinette, 117 S. Ct. at 419.
47. Id. at 421.
(1973).
51. Id. at 427 (Stevens, J., dissenting). Justice Stevens denotes the obvious, that most
motorists have no interest in prolonging the delay occasioned by a valid traffic stop and
maintain an interest in preserving the privacy of their vehicles and possessions from others.
Id. at 425. However, the fact that Robinette's arresting officer successfully used a similar
method of obtaining consent to search roughly 786 times in one year, indicates that motorists
generally respond in a manner that is contrary to their self-interest. Id. "Repeated decisions
by ordinary citizens to surrender that interest cannot satisfactorily be explained on any
hypothesis other than an assumption that they believed they had a legal duty to do so." Id.
52. Robinette, 117 S. Ct. at 428.
54. Id. at 1197.
the officer's request' to search. 55 Even though officers had stationed themselves around the perimeter of the house in order to prevent its occupants from leaving, the Eleventh Circuit Court of Appeals concluded that codefendant Williams consented to the search of her home by opening her door voluntarily. 56 Dismissing the ample assemblage of officers, it was sufficient that Williams was informed that she could refuse the search, signed a consent form, and was cooperative. 57

The Fifth District Court of Appeal followed the same logic when a motorist, properly stopped for speeding, was asked additional questions about his vehicle after his license was returned, including a request for his registration. 58 During the conversation, another officer observed a handgun, and a subsequent search revealed narcotics. Failing to advise a motorist that he is "free to leave" does not show that law enforcement forced the defendant to consent to a search of his vehicle or to talk to the officer. 59 The ensuing observation of a weapon within the appellant's vehicle, as appellant purported to obtain his registration, entitled the officer to arrest appellant and conduct a further search of the vehicle. 60

A warrantless search is constitutional, even if the consenting party does not have the requisite relationship to the premises that are searched. 61 Hence, there is no Fourth Amendment violation if an officer has an objectively "reasonable" though mistaken, good faith belief that he has obtained valid consent to search a particular area. 62 In United States v. Brazel, 63 the search of a tenant's apartment after obtaining the consent of the landlord was upheld based upon the officer's belief the premises were vacant. 64 The landlord, who rented his apartment to petitioner Brazel on a month to month basis, could not remember why he thought the apartment was vacant. Nevertheless, the officer had further evidence to believe Brazel was living with his grandmother, warranting a search of the allegedly

55. Id. (quoting Florida v. Bostick, 501 U.S. 429, 439 (1991)).
56. Id. at 1198.
57. Id. at 1197.
59. Id. at 1091.
62. See United States v. Fernandez, 58 F.3d 593, 598 (11th Cir. 1995) (holding that where a defendant told police that a trailer belonged to his codefendant, it was reasonable for officers to believe that the codefendant had authority to consent to a search).
63. 102 F.3d 1120 (11th Cir. 1997).
64. Id. at 1148–49.
abandoned property. The court concluded that any mistake made by the detective as to whether the premises were vacant was a mistake of fact, not one of law.

Based on a distinct set of facts, the Eleventh Circuit Court of Appeals used comparable logic in United States v. Mathis. In his appeal, petitioner Mathis asserted error in the district court’s admission of evidence alleged to be the product of searches of his residence on two occasions. Mathis’ mother consented to the search of her home and the garage area, which she said she owned. Although the garage area actually belonged to Mathis, it was “objectively reasonable” that the searching officers believed that Mathis’ mother had the authority to consent to a search of the entire premises.

D. Length of an Automobile Stop

Establishing the rule that an officer’s ulterior motives cannot invalidate legally justifiable police conduct has not terminated the debate over the actual time parameters of an automobile stop. In State v. Brown, appellant Brown’s vehicle was stopped for speeding. The officer reported suspicious statements made by the passengers in the vehicle; whereupon minutes later, a backup K-9 unit arrived as Brown’s tag and driver’s license numbers were still being run. Without completing the citation, the officer conducted a license and tag check while the canine searched around the vehicle for approximately ten minutes, eventually discovering marijuana. After the

65. Id. at 1148. See Abel v. United States, 362 U.S. 217, 241 (1960) (concluding that a tenant who abandons property loses any reasonable expectation of privacy he once had).
66. Brazel, 102 F.3d at 1149. See United States v. Elliott, 50 F.3d 180, 187 (2d Cir. 1995) (recognizing that the question of whether a given unit is unleased is one of fact, the officers’ belief that an area was vacant and that the owner could consent to a search was a factual error). But see United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (holding that a warrantless entry of tenant’s apartment was unconstitutional where officer made the mistaken legal conclusion that a landlord’s authority to turn off electrical appliances or lights also validated the officers’ search of the apartment).
67. 96 F.3d 1577 (11th Cir. 1996).
68. “Two warrantless searches of the garage were conducted that day... [T]he [second search] revealed information that aided the officers’ investigation [in obtaining] a search warrant for the garage, where they subsequently found a safe hidden by Mathis containing thousands of dollars.” Id. at 1584 n.5.
69. Id. at 1584.
70. Id.
71. 691 So. 2d 637 (Fla. 5th Dist. Ct. App. 1997).
72. Id. at 637.
marijuana was secured in the trunk of the patrol car, the officer completed the citation. In reversing the trial court's motion to suppress, the court held that a traffic stop should not be considered completed until all information, if it can be obtained within a reasonable time, is returned. Therefore, it is permissible for officers to run a dog sniff until a traffic stop is entirely complete.

E. Automobile Search Warrant Exception

The so-called "automobile exception" to the Fourth Amendment search warrant requirement continued to broaden during this survey period. Generally, an automobile has been one of the last few vestiges of an individual's Fourth Amendment rights. Recent decisions, however, have put such a claim in jeopardy, making it closer to the truth to merely state that "[a citizen does not surrender all the protections of the Fourth Amendment by entering an automobile." In Pennsylvania v. Labron, the United States Supreme Court reaffirmed the proposition that the ready mobility of a car and probable cause that it contains contraband, without more, permits a warrantless search of a vehicle. The case, decided by the Supreme Court, reversed two decisions by the Supreme Court of Pennsylvania, which ruled that warrantless searches of automobiles are limited "where 'unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.'" In Commonwealth v. Labron, the police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car in which the drugs had been stored, and found bags containing cocaine. In Commonwealth v. Kilgore, an undercover informant agreed to buy drugs...
from respondent Randy Lee Kilgore’s accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made, to a farmhouse where she met with Randy Kilgore, and obtained the narcotics. After the drugs were delivered and the Kilgores were arrested, police searched both the farmhouse and Randy Kilgore’s pickup truck, discovering cocaine on the floor of the truck which was parked in the driveway of the farmhouse. In each case, the court upheld the respondent’s motion to suppress, concluding that although probable cause existed, no exigent circumstances justified the failure to obtain a warrant.

The Supreme Court concluded that the state court’s analysis of the automobile exception to the Fourth Amendment’s warrant requirement was flawed, as an automobile’s “ready mobility” is an exigency sufficient to excuse failure to obtain a search warrant once probable cause is clear. Consequently, without acknowledging the residential location of the car in Kilgore or the actual mobility of either vehicle, the Supreme Court noted that probable cause and exigent circumstances existed because both respondents were involved in illegal drug activity. With apparent unbridled acceptance, the Supreme Court acknowledged that there have been recent cases that have continued to reduce the expectation of privacy in an automobile, further justifying their position. In his dissenting opinion, recognized the debilitation of individual citizen’s rights as motorists, and suggested the effect is not only on the individual but on the state, noting the Supreme Court’s “lack of respect” for the Pennsylvania Supreme Court and the “sophistication of its state search and seizure law.” As a result, Justice Stevens suggests that the Supreme Court’s edict will make it harder for states who expressly indicate their intent to extend the protection of their constitution beyond those means available in the Constitution.

The issue of whether probable cause and exigent circumstances existed to justify a warrantless search of an automobile was addressed in United States v. Brazel. In Brazel, prior to the search of the car in question,

85. Id.
86. Id. at 312.
87. Id. at 313. See also Labron, 669 A.2d at 918.
89. Id.
90. Id.
91. Id. at 2492 (Stevens, J., dissenting).
92. Id.
93. 102 F.3d 1120, 1129 (11th Cir. 1997). A federal grand jury indictment handed down drug trafficking indictments against 32 people including petitioner Jefferson. Id. at
detectives were aware that the true purchaser of the vehicle had a minimal income. Petitioner Jefferson had been seen driving the same car in the vicinity where officers were investigating a drug ring. Although cocaine was never observed in the car by detectives, straight single-edged razor blades were seen. The razor blades were similar to those previously found with cocaine residue on them after a search of a garage outside the address which surveillance photos showed Jefferson frequented.94

Taking into account the totality of the circumstances at the time the search was conducted, the court in *Brazel* determined that there was probable cause to believe the car contained some evidence of drug trafficking activities.95 The Eleventh Circuit also found that the potential mobility of the car satisfied the exigency requirement.96 Petitioner Jefferson was in custody at the time of the search, and a second set of car keys was discovered in his girlfriend's possession at the private residence where the car was parked. However, the court in *Brazel* ruled that the inherent potential for mobility created an exigency justifying the warrantless search, especially when other codefendants were not yet in custody, and there was presumably a chance that a person might remove incriminating evidence from the car.97 As a result, Jefferson's motion to suppress evidence from the car was denied. Consequently, Jefferson was convicted of conspiracy to distribute cocaine and sentenced to life in prison.98

An additional noteworthy decision clarified the rule that grants officers the right to search the passenger compartment of an automobile, incident to a lawful custodial arrest of the vehicle's occupants.99 In *State v. Johnson*,100 the record revealed that upon being approached by police officers, the passengers of the vehicle exited and began to walk away.101 After discovering marijuana on one of the men, officers searched the passenger compartment of the petitioner's car. The *Johnson* case establishes that the occupants of an automobile may not avoid the consequences of a vehicle search by stepping outside as officers approach when a subsequent legal arrest is made.102

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1129. Jefferson, along with seven other defendants, was convicted of conspiracy to distribute cocaine with each defendant receiving at least one life sentence. *Id.*
94. *Id.* at 1146–47.
95. *Id.* at 1147.
96. *Brazel*, 102 F.3d at 1147.
97. *Id.*
98. *Id.* at 1129.
100. *Id.* at 880.
101. *Id.* at 881–82.
102. *Id.* at 881.
F. **Warrantless Search of Property**

During this survey period, in a case of first impression, the constitutionality of the Florida Forfeiture Act was challenged. The Florida Contraband Forfeiture Act authorizes law enforcement agencies to seize vehicles of any kind used to "facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article." "Contraband article," includes "[a]ny controlled substance," including cocaine and its derivatives in the statute's list of controlled substances. Thus, the Forfeiture Act clearly authorizes law enforcement officials to seize any type of vehicle used to facilitate the distribution of cocaine. The Forfeiture Act sets forth the procedure to be used in seizing personal property, with the only significant pre-seizure requirement being notice of the right to a subsequent hearing. Furthermore, there is no requirement to obtain a warrant or court order before seizing a vehicle.

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104. **FLA. STAT. § 932.702(3) (1995).**

105. **FLA. STAT. § 932.701(2)(a)(1); see also FLA. STAT. § 893.03(2)(a) (1995).**

106. *White*, 680 So. 2d at 552.

107. The procedure to be followed is set out in the *Florida Statutes*:

- Personal property may be seized at the time of the violation or subsequent to the violation, [provided that] the person entitled to notice is notified at the time of the seizure or by certified mail, return receipt requested, that there is a right to a [sic] adversarial preliminary hearing after the seizure to determine whether probable cause exists to believe that such property has been or is being used in violation of the Florida Contraband Forfeiture Act.

**FLA. STAT. § 932.703(2)(a).**

- A postseizure adversarial preliminary hearing may be requested within 15 days after receipt of this notice and the hearing must be set and noticed by the seizing agency and held by the court within 10 days of receipt of the hearing request or as soon as practicable thereafter. At the hearing, the court must determine whether probable cause existed for the seizure.

*White*, 680 So. 2d at 552 (citation omitted).

108. *Id.*

In *White v. State*, based on eye-witnesses and videotape, police officers seized White’s automobile under the Forfeiture Act because it had been used in the delivery and sale of cocaine. The car was seized without a warrant after a routine inventory search produced two pieces of crack cocaine in the ashtray. The petitioner was charged with possession of a controlled substance and convicted.

At trial, the petitioner argued that the warrantless seizure of a motor vehicle violates constitutional prohibitions against illegal search and seizure. However, “[n]either the Florida nor United States Supreme Court has . . . addressed whether the Fourth Amendment requires law enforcement officers to obtain a warrant prior to seizing a vehicle under the Florida Forfeiture Act or similar statute.” Nevertheless, the Florida Forfeiture Act is substantively similar to the Federal Forfeiture Act and the Uniform Controlled Substances Act.

Although the federal circuits are split in their analysis of this issue, the majority of the circuits that have considered this question have held that a warrantless search of a vehicle under the Federal Forfeiture Act does not violate the Fourth Amendment, and evidence obtained in subsequent inventory searches is admissible in a criminal prosecution. The First District Court of Appeal joined the majority of federal circuits by holding that a warrantless search of a motor vehicle based on probable cause that the

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110. 680 So. 2d 550 (Fla. 1st Dist. Ct. App. 1996), rev. granted, 687 So. 2d 1308 (Fla. 1997).
111. *Id.* at 551.
112. *Id.* at 551–52.
113. *Id.* at 553.
114. *Id.* Because of the significance of this issue and the fact that it is a case of first impression, the court certified the following question:

**WHETHER THE WARRANTLESS SEIZURE OF A MOTOR VEHICLE UNDER THE FLORIDA FORFEITURE ACT (ABSENT OTHER EXIGENT CIRCUMSTANCES) VIOLATES THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION SO AS TO RENDER EVIDENCE SEIZED IN A SUBSEQUENT INVENTORY SEARCH OF THE VEHICLE INADMISSIBLE IN A CRIMINAL PROSECUTION.**

*White,* 680 So. 2d at 555.

116. See United States v. Decker, 19 F.3d 287, 287 (6th Cir. 1994); United States v. Pace, 898 F.2d 1218, 1241 (7th Cir. 1990); United States v. Valdes, 876 F.2d 1554, 1560 (11th Cir. 1989); United States v. One 1978 Mercedes Benz, Four-Door Sedan, 711 F.2d 1297, 1302 (5th Cir. 1983); United States v. Kemp, 690 F.2d 397, 402 (4th Cir. 1982); United States v. Bush, 647 F.2d 357, 368 (3d Cir. 1981). But see United States v. Dixon, 1 F.3d 1080, 1084 (10th Cir. 1993); United States v. Lasanta, 978 F.2d 1300, 1305 (2d Cir. 1992); United States v. Linn, 880 F.2d 209, 214 (9th Cir. 1989).
vehicle was used in violation of the Forfeiture Act does not violate the Fourth Amendment prohibition against unreasonable searches and seizures. The court, affirming the conviction of White, reasoned that if police officers with probable cause can arrest drug traffickers without a warrant, they should be equally able to seize "the vehicle the trafficker has been using to transport his drugs." Since the expectation of privacy with respect to one's automobile has gradually declined under the "automobile exception," a motor vehicle may be seized for the same reasons under the Forfeiture Act without a prior warrant absent exigent circumstances other than the characteristics inherent in a motor vehicle.

It should be noted, however, that Judge Wolf admonished the majority for upholding the search and permitting property to be seized merely upon probable cause. By applying this concept, the warrant requirements for the seizure of a vehicle will be crippled. Moreover, it mistakenly suggests that the forfeiture statute authorizes the seizures of property absent exigent circumstances, trivializing the exigent circumstances exception to the warrant requirement.

G. Use of Informants to Establish Probable Cause

The continued problems with the use of informants to establish probable cause during the past survey year beleaguered the Eleventh Circuit Court of Appeals, which intertwined varied legal standards to find common ground for such elicited information. For example, in Ortega v. Christian, the court concluded that an informant's tip lacked the essential elements to constitute probable cause to believe appellant Ortega participated in a robbery, thereby validating his false arrest claim.

In Ortega, a confidential informant told the Metro-Dade Police Department that an organized group, of which he was a member, committed the robbery. The informant provided the address of the alleged robber's residence and proceeded with officers to that address. The informant identified Ortega who vehemently proclaimed his innocence and requested an opportunity to prove a case of mistaken identity. Officers refused to

117. White, 680 So. 2d at 553.
118. Id. at 554 (quoting United States v. Valdes, 876 F.2d 1554, 1559–60 (11th. Cir. 1989)).
119. Id. at 554–55 (citing California v. Carney, 471 U.S. 386, 390 (1985)).
120. Id. at 559 (Wolf, J., concurring in part and dissenting in part).
121. Id.
122. White, 680 So. 2d at 559.
123. 85 F.3d 1521 (11th Cir. 1996).
124. Id. at 1525.
comply with Ortega’s request and failed to make any inquiries into the claims of innocence, denying the opportunity for Ortega to appear in a line-up or photo spread. Despite the fact that Ortega was never identified by the victim as the perpetrator of the robbery, petitioner was incarcerated for five months without bond. 125

In determining whether an informant’s tip rises to the level of probable cause, the totality of the circumstances must be assessed. 126 Relevant factors include the “informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge.’” 127 “In addition, the corroboration of the details of an informant’s tip through independent police work adds significant value to the probable cause analysis.” 128 In reversing the dismissal of Ortega’s false arrest claim against the officer, the Eleventh Circuit strictly examined additional factors that demonstrated that the informant’s information had not given the arresting officer probable cause to believe Ortega had participated in a robbery. 129 There must be evidence in the complaint that demonstrates a past history between the informant and the arresting officer. 130 Furthermore, “an informant’s tip that is bolstered [through] the fact that it is based on his own personal observation rather than hearsay.” 131 Finally, making statements “against one’s penal interests without more will not raise an informant’s tip to the level of probable cause required under the Fourth Amendment.” 132

In contrast, the Eleventh Circuit in United States v. Talley 133 relied exclusively on whether the information provided by the confidential informant, when combined with the government’s independent corroboration, gave rise to probable cause. 134 Without reference to the relationship between the informant and the officers or the informant’s personal knowledge of the petitioner, the court affirmed Talley’s conviction of aiding and abetting another in possession with the intent to distribute crack cocaine. 135 The accurate information provided by the informant

125. Id. at 1524.
126. Id. at 1525.
128. Ortega, 85 F.3d at 1525 (citing United States v. Gonzalez, 969 F.2d 999, 1003 (11th Cir. 1992)).
129. Id. at 1525.
130. Id.
131. Id. (citing United States v. Reyes, 792 F.2d 536, 539 (5th Cir. 1986)).
132. Id.
133. 108 F.3d 277 (11th Cir. 1997).
134. Id. at 281.
135. Id. at 282.
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included the location and description of petitioner's vehicle and a report that Talley possessed cocaine.\footnote{136}{Id. at 281.} This was corroborated by officers who noticed a visible bulge in Talley's pants, thus providing sufficient probable cause to search the codefendant's car for contraband.\footnote{137}{Id.}

The scope of an informant's information used to establish probable cause to justify a search warrant was enlarged further in United States v. Butler.\footnote{138}{102 F.3d 1191 (11th Cir 1997).} The standard set forth in Butler asks whether there is a "'fair probability that contraband or evidence of a crime will be found.'"\footnote{139}{Id. at 1198 (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).}

One informant stated that appellant Campbell kept cocaine in his garage at his residence for the past two years, yet the affidavit did not state the basis for this information. However, other informants told of purchases they had made from Campbell at his home. Finally, based upon the appellant's employment status, he was found to have a substantial amount of unexplained wealth.\footnote{140}{Id.} Based on these facts, and applying the "fair probability" standard, the issuance of the warrant was deemed appropriate since the affidavit supported allegations that appellant was involved in the drug trade.\footnote{141}{Id.}

H. Warrantless Use of Thermal Image Detectors

The utilization of advanced technology by law enforcement officials to help combat crime continues to raise interesting questions regarding whether the use of a particular technology in a given situation violates a person's expectation of privacy.\footnote{142}{See Thomas M. Melsheimer & Thomas M. Walsh, Criminal Procedure: Confession, Search and Seizure, 49 SMU L. REV. 853 (1996).} One technological advance that has raised frequent debate is the use of thermal or infrared image devices to gather information of possible criminal activity.\footnote{143}{Id. at 866.} Without directly answering the constitutionality of its use, the Fifth District Court of Appeal in State v. Siegel,\footnote{144}{679 So. 2d 1201 (Fla. 5th Dist. Ct. App. 1996).} affirmatively recognized the information from thermal infrared detectors to support the issuance of a search warrant.\footnote{145}{Id. at 1204. No Florida court has expressly ruled on the constitutionality of using such thermal or infrared imaging devices, although the issue has been raised in many other jurisdictions. Id. at 1204 n.3. Generally, the discussion is based upon an individual's
In *Siegel*, investigators received an anonymous tip that Siegel desired to establish an indoor marijuana-growing operation with the use of a trailer. They discovered that Siegel had rented a trailer and was generating inordinately high electric bills for particular months. With the use of infrared detectors, officers from the Aviation Division of the Sheriff’s Office conducted a flight over the rented trailer. The equipment allows its operator to see a depiction of heat escaping into the environment from an area or structure. The results from the flight revealed a large amount of heat escaping from Siegel’s trailer. Since weather conditions did not warrant such heat usage, the large amount of heat may have come from high intensity lights, commonly used in indoor marijuana-growing operations. Another thermal imager, used at ground level to detect differences in temperature, revealed excessively high levels of heat being emitted into the environment from the trailer.

After a warrant was executed and the marijuana-growing operation was discovered, the trial court granted Siegel’s motion to suppress the seized evidence concluding that law enforcement officers were on a “‘fishing expedition’” specifically prohibited by the Fourth Amendment. In reversing the ruling of the lower court and following the lead of the majority of federal district courts of appeals, *Siegel* clearly recognized the use of thermal image devices. The court held that although no single shred of evidence may be conclusive, the various pieces of information created a fair probability that marijuana would be found in the trailer.

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expectation of privacy, requiring a warrant if an individual has evidenced a subjective actual expectation of privacy and if that expectation is one that society is prepared to acknowledge as reasonable. See *Katz v. United States*, 389 U.S. 347, 351–52 (1967). The weight of authority is that the use of thermal or infrared image devices does not require a warrant. *Butler*, 102 F.3d at 1204 n.3. See *United States v. Robinson*, 62 F.3d 1325, 1328–31 (11th Cir. 1995); *United States v. Ishmael*, 48 F.3d 850, 857 (5th Cir. 1995); *United States v. Zimmer*, 14 F.3d 286, 288 (6th Cir. 1994). Only a minority of courts have held that such activities may amount to searches under the Fourth Amendment. *Butler*, 102 F.3d at 1204 n.3. See *United States v. Field*, 855 F. Supp. 1518, 1518–19 (W.D. Wis. 1994); *State v. Young*, 867 P.2d 593, 604 (Wash. 1994).

146. *Siegel*, 679 So. 2d at 1202–03.
147. *Id.* at 1203.
148. *Id.*
149. *Id.* at 1204.
150. *Id.* at 1205.
III. MINIMALLY INTRUSIVE SEARCHES AND SEIZURES

A. Reasonable Suspicion—Grounds for a Terry Stop

The controlling factors surrounding what constitutes reasonable suspicion to warrant a Terry stop continue to be debated in the State of Florida and the Eleventh Circuit Court of Appeals, culminating in several noteworthy decisions during the past year. Generally, however, the issue continues to remain the one area of criminal procedure that the courts in this survey give great scrutiny and analysis, particularly since it is the first stage of infringement upon an individual’s liberty.

By virtue of the fact that reasonable suspicion is a less demanding standard than probable cause, the license to use anonymous tips to establish reasonable suspicion has been abused yet unrebuked by the Eleventh Circuit Court of Appeals. In Riley v. Montgomery, the Eleventh Circuit held that reasonable suspicion existed justifying an automobile stop and subsequent pat-down searches of the vehicle’s passengers. In Riley, an anonymous tipster had indicated that Riley was transporting cocaine. In fact, Riley was seen entering a vehicle matching the informant’s description. Another tip, corroborating this information, gave the license plate number of the vehicle Riley was driving. The court found the anonymous tip, corroborated by the other informant and independent police work, to show a “greater indicia of reliability” for the officers to have “reasonable suspicion” to make a stop. Despite the dismissal of Riley’s earlier indictment for possession of cocaine and an investigation into the Montgomery Police Department Narcotics and Intelligence Unit, the court expressed absolute faith in the reliability of these anonymous tips. The court unabashedly accepted the fact that the investigation uncovered evidence of extensive abuse involving the existence of a fund used to pay confidential informants for tips, including falsifying

151. Terry v. Ohio, 392 U.S. 1 (1968). As a result of Terry, police may conduct a wide array of searches and seizures on a basis of reasonable suspicion, a significantly lesser standard than probable cause, for the purpose of concluding whether a crime has been or is about to be committed and if the suspect is the person who committed or is planning the offense. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 185 (1991).

152. 104 F.3d 1247 (11th Cir. 1997). The plaintiff Riley brought civil rights and malicious prosecution actions against the City of Montgomery and the relevant police officers involved in his arrest. The Eleventh Circuit, dismissing the actions, found that Riley failed to provide sufficient evidence to demonstrate misconduct on behalf of the arresting police officers. Id. at 1251–52.

153. Id. at 1251.

154. Id. at 1252.

155. Id.
the identity of informants and smuggling money by recording transfers of payments to informants who did not exist.\textsuperscript{156}

The skepticism of anonymous tips to establish reasonable suspicion has resulted in more careful and thorough examinations by Florida courts during this survey period. In contrast to the Eleventh Circuit's reasoning in \textit{Riley}, who briefly examined the role of an informant, the Third District Court of Appeal meticulously analyzed both the content of the information possessed by police and its degree of reliability when deciding whether the facts from an anonymous 911 emergency call constituted reasonable suspicion.\textsuperscript{157}

In \textit{State v. Gonzalez},\textsuperscript{158} a citizen made a 911 emergency call to report that two men were removing what appeared to be appliances from a neighborhood house into a white van at approximately 3:00 a.m.\textsuperscript{159} The caller gave the dispatcher the address in an area which had continual problems with theft of air conditioners and other appliances. Furthermore, earlier investigations had also focused on locating a suspicious white van. Officers who received the message encountered the van and discovered numerous air condition units after appellants consented to a vehicle search. The Third District Court of Appeal thoroughly assessed the anonymous tips and how they related to the relevant facts, yet nevertheless recognized that although it was "theoretically possible that this was the owner's 3:00 a.m. moving party, common experience teaches that the probabilities were otherwise and a stop for investigation was reasonable in the circumstances."\textsuperscript{160} In its detailed decision the court acknowledged that the process to determine reasonable suspicion is one of "probability" not "hard certainties."\textsuperscript{161} The court in \textit{Gonzalez} concluded that "[w]hen the 'whole picture' is considered, there was more than enough reasonable suspicion to support the investigatory stop."\textsuperscript{162}

Therefore, in the State of Florida, courts have generally maintained strict standards in what constitutes reasonable, articulable suspicion, an area where an individual's civil liberties have not rapidly eroded:

\begin{quote}
[A]n officer may temporarily detain an individual for investigative questioning if the officer has a reasonable suspicion based on articulable facts that the individual is committing, has committed, or is about to commit a crime. In determining whether an officer
\end{quote}

\begin{itemize}
  \item \textsuperscript{156} \textit{Riley}, 104 F.3d at 1250.
  \item \textsuperscript{157} \textit{State v. Gonzalez}, 682 So. 2d 1168, 1170–71 (Fla. 3d Dist. Ct. App. 1996).
  \item \textsuperscript{158} \textit{Id.} at 1168.
  \item \textsuperscript{159} \textit{Id.} at 1169.
  \item \textsuperscript{160} \textit{Id.} at 1171.
  \item \textsuperscript{161} \textit{Id.} at 1170 (citing United States v. Sokolow, 490 U.S. 1, 7 (1989)).
  \item \textsuperscript{162} \textit{Gonzalez}, 682 So. 2d at 1172.
\end{itemize}
possesses a founded suspicion of criminal activity to justify an investigatory stop, the totality of the circumstances must be taken into account.\textsuperscript{163}

In considering the totality of the circumstances, the court may look at: "'[T]he time of day, the day of the week, the location, the physical appearance and behavior of the suspect, the appearance and manner of operation of any vehicle involved or anything incongruous or unusual in the situation as interpreted in light of the officer's knowledge.'"\textsuperscript{164}

The scrutiny by which the courts of Florida analyze reasonable suspicion is exemplified in \textit{Welch v. State}.\textsuperscript{165} In \textit{Welch}, the Second District Court of Appeal narrowly tailored the meaning of the phrase "anything incongruous or unusual," as perceived by law enforcement.\textsuperscript{166} Welch was sitting on a bicycle with a very small plastic baggie in his hand, when two officers in a patrol car approached him from behind. As soon as Welch saw the officers, he shoved the baggie down his pants motivating one officer to grab the appellant by his trousers and causing rock cocaine to fall to the ground.\textsuperscript{167} The court held that neither the mere sight of Welch sitting on a bicycle with a baggie in a high crime location, nor the subsequent concealment thereof, established a legitimate suspicion to seize or detain Welch.\textsuperscript{168} Although the officers could have properly engaged in a police-citizen encounter with Welch, they acted prematurely in actually seizing him.\textsuperscript{169}

Other cases where officers lack reasonable suspicion involve activities that may be equally attributable to legal activity as to illegal activity.\textsuperscript{170} In \textit{Bowen v. State},\textsuperscript{171} an officer patrolling a parking lot of a motel where prior criminal activity had taken place approached a vehicle with persons who were allegedly acting nervous and attempting "'to tuck something away.'"\textsuperscript{172} The officer ordered the occupants out of the car whereupon petitioner Bowen dropped a straw with white powder, later identified as cocaine. The

\textsuperscript{164.} \textit{Id.} (quoting State v. Stevens, 354 So. 2d 1244, 1247 (Fla. 4th Dist. Ct. App. 1978)).
\textsuperscript{165.} 689 So. 2d 1240 (Fla. 2d Dist. Ct. App. 1997).
\textsuperscript{166.} \textit{Id.} at 1241.
\textsuperscript{167.} \textit{Id.}
\textsuperscript{168.} \textit{Id.}
\textsuperscript{169.} \textit{Id.}
\textsuperscript{170.} \textit{See} Bowen v. State, 685 So. 2d 942, 943 (Fla. 5th Dist. Ct. App. 1996).
\textsuperscript{171.} \textit{Id.} at 942.
\textsuperscript{172.} \textit{Id.} at 943.
fact that the officer could not see clearly into the car or that the occupants could have been engaging in criminal activity is insufficient to establish reasonable suspicion.\text{\textsuperscript{173}} Once again, a Florida court emphasizes that an officer’s fear does not justify ordering an occupant out of a vehicle that is not legally stopped.\text{\textsuperscript{174}} This would open the door for police officers to order persons “out of their automobiles under almost any circumstances.”\text{\textsuperscript{175}}

Several Florida district courts of appeal have decidedly contrasting analyses in applying furtive movements to constitute reasonable suspicion. For example, in \textit{Jenkins v. State},\text{\textsuperscript{176}} the officer’s knowledge of burglaries in the area, coupled with Jenkins’ furtive movements with objects consistent with the type of products recently stolen from a Radio Shack, justified an investigatory stop.\text{\textsuperscript{177}} In stark contrast, in \textit{J.B. v. State},\text{\textsuperscript{178}} the court held that the appellant’s quick movement to conceal something as an officer approached “did not create a founded suspicion of criminal activity justifying an investigative stop.”\text{\textsuperscript{179}} In a high crime area, an officer who observes someone make a furtive movement may have his “suspicions aroused,” but is prohibited from legally detaining the person for further investigation.\text{\textsuperscript{180}}

The distinction between “stop then drop” and “drop then stop” was at issue in \textit{State v. Woods}.\text{\textsuperscript{181}} Woods, who was sitting on a chair, got up and walked away when officers approached. An officer followed him and yelled for him to stop at which time Woods turned and dropped two bags of cocaine and a handgun onto the ground.\text{\textsuperscript{182}} The Fourth District Court of Appeal held that the trial court erred in its finding that the stop preceded the drop and reversed the lower court’s order granting the appellant’s motion to suppress.\text{\textsuperscript{183}} An unlawful seizure does not take place when a person fails to stop when requested to do so.\text{\textsuperscript{184}} An unlawful seizure occurs “only if the person either willingly obeys or is physically forced to obey the police

\textsuperscript{173} \textit{Id.} at 944.  
\textsuperscript{174} \textit{Id.}  
\textsuperscript{175} \textit{Bowen}, 685 So. 2d at 944 (quoting \textit{Popple v. State}, 626 So. 2d 185, 187 n.1 (Fla. 1993)).  
\textsuperscript{176} 685 So. 2d 918 (Fla. 1st Dist. Ct. App. 1996).  
\textsuperscript{177} \textit{Id.} at 921.  
\textsuperscript{178} 679 So. 2d 1296 (Fla. 2d Dist. Ct. App. 1996).  
\textsuperscript{179} \textit{Id.} at 1297.  
\textsuperscript{180} \textit{Id.}  
\textsuperscript{181} 680 So. 2d 630 (Fla. 4th Dist. Ct. App. 1996).  
\textsuperscript{182} \textit{Id.} at 631.  
\textsuperscript{183} \textit{Id.}  
\textsuperscript{184} \textit{Id.}
Therefore, it is not considered an unlawful seizure when the person "drops then stops," even if the drop occurs after an order to stop.\textsuperscript{186} Evidence that justifies "[a] valid stop does not necessarily mean that there can be a valid frisk."\textsuperscript{187} The First District Court of Appeal found it unnecessary to decide whether there was a basis for reasonable suspicion that a person was engaged in criminal activity because probable cause is the essential requirement.\textsuperscript{188} As both Florida Statutes\textsuperscript{189} and case law indicate, an officer must have probable cause to believe a suspect is armed before the officer can conduct a pat-down search or frisk of a suspect to ascertain the presence of a weapon.\textsuperscript{190}

In Stalling v. State,\textsuperscript{191} the appellant was a passenger in an automobile stopped for a traffic infraction.\textsuperscript{192} The vehicle was rented and neither the driver nor appellant were authorized as drivers on the rental agreement. The officer told Stalling that he and the driver would be driven to a telephone where they could arrange for transportation. Prior to permitting Stalling to enter the police car, the officer patted him down discovering three packages of crack cocaine.\textsuperscript{193}

It is undisputed that the officer did not have a warrant to conduct the pat-down search of the appellant. When no warrant has been secured, the rule is that the search or seizure is per se unreasonable.

\begin{footnotes}
\footnote{185}{Id.}
\footnote{186}{Woods, 680 So. 2d at 631.}
\footnote{188}{Id at 845.}
\footnote{189}{Section 901.151(5) of the Florida Statutes states: Whenever any law enforcement officer authorized to detain temporarily any person under the provisions of subsection (2) has probable cause to believe that any person whom he has temporarily detained, or is about to detain temporarily, is armed with a dangerous weapon and therefore offers a threat to the safety of the officer or any other person, he may search such person so temporarily detained only to the extent necessary to disclose, and for the purpose of disclosing, the presence of such weapon. If such a search discloses such a weapon or any evidence of a criminal offense it may be seized. FLA. STAT. § 901.151(5) (1996).}
\footnote{190}{See Shaw v. State, 611 So. 2d 552, 554 (Fla. 1st Dist. Ct. App. 1992).}
\footnote{191}{678 So. 2d 843 (Fla. 1st Dist. Ct. App. 1996).}
\footnote{192}{Id. at 844.}
\footnote{193}{Id.}
\end{footnotes}
unless it falls within one of the well established exceptions to the warrant requirement. 194

Although *Terry* created the right of a law enforcement officer to conduct a pat-down search “to find weapons that he reasonably believes or suspects are then in possession of the person whom he has stopped,” 195 there is still no blanket exception for an officer’s “routine” pat-down of a detainee prior to placing him in a police cruiser. 196 As a result, the First District Court of Appeal concluded that the trial court erred in denying the appellant’s motion to suppress and Stalling’s conviction was reversed for a lack of probable cause. 197

In *Turner v. State*, 198 the Fifth District Court of Appeal reaffirmed that an inchoate and unparticularized suspicion or hunch alone will not warrant an investigatory search. 199 In *Turner*, officers were dispatched to investigate a report that people were arguing over drugs. When they arrived, there was no argument and no drugs were visible. Nevertheless, Turner and his friends were approached by police officers and immediately patted down. At the officer’s request, Turner consented to be searched again and three wrapped pieces of crack cocaine items were removed from his pocket.

The court held that in order to seize Turner’s person and to pat him down for weapons, the officers needed a well-founded suspicion that Turner was involved in criminal activity. 200 The law enforcement officer must be able to articulate the reasons for his suspicion. 201 Prior criminal activity at the same location and an officer’s hunch are insufficient evidence to warrant an investigatory search. 202 The court determined that when the officers initially patted down Turner, they seized his person. 203 After illegal police conduct, a consent to search is presumptively tainted and is deemed involuntary absent clear and convincing evidence sufficient to minimize the taint of prior illegal action by law enforcement officials. 204 Consequently,

194. Id. (citing Jones v. State, 648 So. 2d 669, 674 (Fla. 1994), cert. denied, 575 U.S. 1147 (1995)).
196. Id.
197. Id. at 846.
198. 674 So. 2d 896 (Fla. 5th Dist. Ct. App. 1996).
199. Id. at 897.
200. Id.
201. Id.
202. Id. See also Smith v. State, 637 So. 2d 343, 344 (Fla. 2d Dist. Ct. App. 1994).
203. Turner, 674 So. 2d at 897.
204. Id. at 898.
the court ruled that Turner’s consent to search was tainted, reversing the trial court’s denial of the appellant’s motion to suppress.\footnote{205}

B. **Consensual Encounters v. Investigatory Detentions**

Perhaps the most divisive issue that has surrounded the Florida district courts of appeal during the past survey year involves the point when a consensual encounter becomes an investigatory stop. The underlying theme in these cases involves requests by officers, to those being questioned, to remove their hands from their pockets.

In *State v. Baldwin*,\footnote{206} the Fifth District Court of Appeal applied an objective test\footnote{207} to determine whether a reasonable person would have thought they were free to leave during an interaction with law enforcement officials.\footnote{208}

[The] factors that might indicate a seizure, even where the individual did not attempt to leave, include 'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language of tone of voice indicating that compliance with the officer’s request might be compelled.'\footnote{209}

The subjective intentions of the detainee are immaterial when examining whether a Fourth Amendment violation has occurred.\footnote{210}

\begin{footnotes}
\footnotetext[205]{Id.}
\footnotetext[206]{686 So. 2d 682 (Fla. 1st Dist. Ct. App. 1996). The undisputed facts are that Baldwin was sitting on a front cement stoop with another gentleman when they were approached by police officers. Id. at 683. Baldwin was asked to remove his hands from his pockets and complied, but he returned them back to his pockets after numerous requests not to do so. The last time Baldwin pulled his hands out of his pockets, he threw a paper bag on the ground which contained cocaine. Id. The court remanded the case back to the trial court to apply an objective test, i.e., whether a reasonable person would have thought they were free to leave when the officer asked Baldwin to remove his hands from his pockets. Id. at 687.}
\footnotetext[207]{See United States v. Mendenhall, 446 U.S. 544, 554 (1980); State v. M.J., 685 So. 2d 1350, 1352 (Fla. 2d Dist. Ct. App. 1996) (holding that defendant’s spontaneous and voluntary offer to allow the officer to check him extended from the initial consensual encounter and pat-down to the officer’s later act of reaching into defendant’s pocket and withdrawing a crack pipe).}
\footnotetext[208]{Baldwin, 686 So. 2d at 686.}
\footnotetext[209]{Id. at 685 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).}
\footnotetext[210]{Id. at 686.}
\end{footnotes}
In *State v. Woodard*, two police officers entered an apartment building looking for a person with multiple outstanding warrants. The officers knocked on the door and questioned Woodard and the other occupants about their presence in the building, asked for the names of the men, and checked them for outstanding warrants. At no time was Woodard ordered to remain or otherwise told that he was not free to leave. Prior to the radio response on the warrant checks, Woodard reached into his pockets. When the officer asked him to remove his hands from his pants, Woodard discarded a clear plastic bag from his pocket proving to be cocaine. The court held that the investigating officer’s request to have Woodard remove his hands from his pockets, “when made to ensure an officer’s safety, does not elevate a consensual encounter to a detention.”

The Second District Court of Appeal distinguished *Woodard* from their previous decision in *Mayhue v. State*, where the court had ruled that an investigatory detention resulted when an officer ordered the detainee to open his clenched fist. The court reasoned that, unlike the palm of a hand, “a pocket has the capacity to conceal a lethal weapon.” However, such a distinction may be misguided since a razor blade, knife, or small firearm may be concealed in a closed fist.

Acknowledging there is no litmus test for distinguishing a consensual encounter from a seizure, the Fifth District Court of Appeal did differentiate between “an order” and “a request” from a police officer. In *State v. Johnson*, officers approached the appellants, Johnson and Ryan, who had just exited their vehicle. During the encounter, the law enforcement official requested that Ryan remove his hands from his pocket because the officer felt uncomfortable. Ryan proceeded to empty his pockets revealing a small amount of cannabis. Based on the facts, the court noted that it is difficult to imagine how such an inquiry could intimidate Ryan into emptying his pockets from the unintrusive officer’s statement: “Would you mind removing your hands from your pockets while we talk?” A request

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211. 681 So. 2d 733 (Fla. 2d Dist. Ct. App. 1996).
212. Id. at 734–35.
213. Id.
214. Id. at 735 (citations omitted).
216. *Woodard*, 681 So. 2d at 735 n.1.
217. Id.
218. Id. at 736 (Parker, J., concurring).
220. Id. at 880.
221. Id. at 881.
222. Id. at 882.
to exit a vehicle might cause a reasonable person to conclude that he is not free to leave; however, the same may not be said of a request to remove one’s hands from their pockets.\textsuperscript{223}

The dissent argued that the distinction between “request” and “order” is not determinative.\textsuperscript{224} Whether the officer’s directive is characterized as a request or an order, if a person submits by removing his or her hands from their pocket, the consensual encounter becomes a seizure.\textsuperscript{225} To Judge Thompson, the question is not one of choice: Either follow the directive of the officer or disobey the officer and suffer dire consequences.\textsuperscript{226} Although mindful of the officer’s need to be careful of citizens who may be armed, “an officer’s concern for his safety is not a basis to violate a citizen’s Fourth Amendment rights.”\textsuperscript{227}

In light of the recent United States Supreme Court decision in Maryland v. Wilson,\textsuperscript{228} the concern for officer safety has widened the parameters of consensual encounters.\textsuperscript{229} In King v. State,\textsuperscript{230} decided a few months after the notable decision by the highest court, the Second District Court of Appeal reiterated that the reasonableness of an officer’s request during a consensual encounter “depends on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.”\textsuperscript{231} In King, an officer approached King who was standing in the

\begin{itemize}
  \item \textsuperscript{223.} \textit{Id.}.
  \item \textsuperscript{224.} \textit{Johnson}, 696 So. 2d at 883 (Thompson, J., dissenting).
  \item \textsuperscript{225.} The dissent cites a number of decisions that suggest how divided the courts in Florida are over this issue. \textit{Id.} at 883. \textit{See} Gipson v. State, 667 So. 2d 418, 420 (Fla. 5th Dist. Ct. App. 1996) (ruling that a person stopped by police on the street who is ordered to remove his hands from his pocket evolves from a consensual encounter into a seizure); Doney v. State, 648 So. 2d 799, 801 (Fla. 4th Dist. Ct. App. 1994) (finding that compliance with officer’s request that appellant spit out contents of his mouth was acquiescence to authority rather than consent); Palmer v. State, 625 So. 2d 1303, 1304 (Fla. 1st Dist. Ct. App. 1993) (holding that abandonment of a razor blade was a product of an illegal stop and thus involuntary because seizure occurred when officer told defendant to take his hands out of his pockets); Harrison v. State, 627 So. 2d 583, 584 (Fla. 5th Dist. Ct. App. 1993) (concluding that once an officer orders a person to remove his or her hand from a pocket, the consensual encounter becomes a seizure). \textit{But see} Sander v. State, 595 So. 2d 1099, 1100 (Fla. 2d Dist. Ct. App. 1992) (determining it was not improper for officer to ask defendant to remove hands from his pockets).
  \item \textsuperscript{226.} \textit{Johnson}, 696 So. 2d at 884.
  \item \textsuperscript{227.} \textit{Id.}.
  \item \textsuperscript{228.} 117 S. Ct. 882 (1997).
  \item \textsuperscript{229.} \textit{Id.} at 885. The Court held that an officer making a traffic stop may order passengers to get out of the vehicle pending the completion of the stop. \textit{Id.}
  \item \textsuperscript{230.} 696 So. 2d 860 (Fla. 2d Dist. Ct. App. 1997).
  \item \textsuperscript{231.} \textit{Id.} at 862 (quoting Maryland v. Wilson, 117 S. Ct. 882, 885 (1997)).
\end{itemize}
middle of the road apparently dazed. The officer attempted to speak with King to see if he needed assistance. King did not respond and placed his hands in his pockets. The officer told the appellant to remove his hands, and King complied by placing his hands behind his back. The officer, concerned for his own safety, grabbed King and placed him against the patrol car. As he did, he observed a crack pipe protruding from King’s pants. 232

Accordingly, the court held that when an officer makes a reasonable request to an individual to remove his hands from his pockets and the person refuses to comply, “the individual’s right to personal security free from arbitrary interference is outweighed by the public interest in officer safety.”233 Law enforcement officials should not have to expose themselves to potential dangers each time they have to investigate a situation.234 The Second District Court of Appeal appears to have overstepped the boundaries of what constitutes a consensual encounter by adding that permissible actions by police officers include “physically” taking whatever reasonable actions are necessary to “thwart any threatening actions by the person encountered so as to dispel any reasonable fear of harm.”235 The repercussions of Maryland v. Wilson236 have already demonstrated their impact on Florida courts, not only broadening the standard of what constitutes a consensual encounter, but redefining its boundaries to include officers’ requests made in the interest of safety.

C. Length of an Investigatory Detention

The issue regarding at what point a prolonged detention becomes an arrest was decided by the Third District Court of Appeal.237 The Third District Court of Appeal ruled in Saturnino-Boudet v. State,238 that the detention of appellant Boudet for thirty to forty minutes awaiting the arrival of a canine unit was “nothing more than a Terry stop239 utilized to dispel the police officer’s reasonable suspicion that Boudet was involved in the sale of illegal narcotics.”240 Boudet arrived at the home of William Daniels, where police detectives were conducting a narcotics investigation. The detectives approached Boudet who voluntarily exited his car, leaving the driver’s side

232. Id. at 861.
233. Id. at 862.
234. King, 696 So. 2d at 862.
235. Id.
238. Id. at 188.
240. Saturnino-Boudet, 682 So. 2d at 192.
door open. Boudet produced identification upon request but refused to consent to have his vehicle searched, whereupon detectives visually observed alleged drug paraphernalia located on the front passenger's side in his car. Boudet was detained in the Daniels' residence until the arrival of the narcotics sniff dog who alerted the presence of cocaine. The appellant unsuccessfully moved to suppress the cocaine in the court below and appealed on the grounds that he was effectively arrested without probable cause when police ordered him into the house. 241

Courts continue to acknowledge the difficulty in distinguishing "between an investigative detention and a de facto arrest." 242 The standard set forth in determining reasonableness to make such a detention is whether law enforcement authorities "diligently pursued a means of investigation that was likely to conform or dispel their suspicions quickly." 243 The detention should "last no longer than is necessary to effectuate the purpose of the stop." 244 However, since Boudet was never physically removed from the scene 245 nor detained for an unreasonable time, 246 the court disagreed with the petitioner's argument that he was de facto arrested without probable cause. 247 Under the circumstances, Boudet was not detained longer than necessary for officers to dispel their reasonable suspicion that the petitioner was involved in illegal narcotics activity. 248

241. Id. at 190.
242. Id. at 192.
243. Id. (quoting United States v. Sharpe, 470 U.S. 675, 685 (1985)).
244. Id. (quoting Sharpe, 470 U.S. at 684).
246. See Cresswell v. State, 564 So. 2d 480, 481 (Fla. 1990) (approving detention for 45 minutes while awaiting canine unit is reasonable); State v. Nugent, 504 So. 2d 47, 48 (Fla. 4th Dist. Ct. App. 1987) (holding 30 minute delay did not transform Terry stop into an arrest); Finney v. State, 420 So. 2d 639, 643 (Fla. 3d Dist. Ct. App. 1982) (finding officers justified in detaining defendant for approximately 90 minutes).
247. Saturnino-Boudet, 682 So. 2d at 193.
248. Id.
IV. SEARCH WARRANTS

A. Sufficiency of Description

During this survey period, the Supreme Court of Florida and at least one district court of appeal made it clear that warrants without sufficient description and specificity will result in suppression of evidence. In Green v. State, the Supreme Court of Florida addressed the recurring problem of how specific a search warrant must be in describing the items to be seized under the authority of that warrant. The court adopted the rule that "when the purpose of the search is to find specific property, the warrant should particularly describe this property in order to preclude the possibility of the police seizing any other" items.

Petitioner Green, who was convicted of murder and sentenced to death, challenged the admission of the clothes he was wearing on the night of the murder, which were seized pursuant to a search warrant. Eyewitnesses identified Green as the shooter and described to police that Green was wearing a black pinstriped suit, a white shirt, and a brown trench coat. However, the search warrant authorized the police to search for the clothes that Green was wearing on the evening the weapon was used, and other evidence relating to the murder. Although the police officers who executed the warrant had information not contained in the warrant, the court found it irrelevant in its analysis, and it was not scrutinized. The search must be based on the language of the warrant alone. As a result, it was not possible for an officer to decide with reasonable clarity which articles of clothing the officer was empowered to seize. The court concluded that because of the search warrant's broad description of the items to be seized, the "fruit of [the] search must be suppressed." In considering the use of the good faith exception, Green held that the facial invalidity of the

250. Green, 688 So. 2d at 301.
251. Id. at 306.
252. Id.
253. Id. at 305.
254. Id. at 306.
255. Green, 688 So. 2d at 306.
256. Id.
257. Id.
258. Id.
warrant impedes the application of this exception since no officer could reasonably presume the warrant to be valid. 260

When there are omissions in an affidavit that may actually defeat a warrant, the test is to "consider the affidavit as though it included the omitted information in determining whether the warrant is based on probable cause." 261 In Buggs v. State, 262 the affidavit submitted on behalf of the search warrant described in detail the physical characteristics of Buggs, including his pattern of speech. 263 Yet the petitioner argued that the affidavit lacked sufficient evidence that should have defeated the warrant. 264 The Fifth District Court of Appeal applied the aforementioned test concluding that even if the affidavit had mentioned that no fingerprints were found and that other suspects were in the same area the night of the murder, the affidavit still would have stated probable cause to justify the warrant. 265

B. Detention of Property

Authorizing the seizure of property through civil forfeiture was grounds to address the threshold procedural requirements mandated under the Fifth Amendment Due Process Clause. 266 Applying the policy to the seizure of real property, the Eleventh Circuit Court of Appeals held that the government must provide notice and a hearing prior to executing an arrest warrant issued against real property. 267

In United States v. 408 Peyton Road, 268 the government secured ex parte warrants authorizing the seizure of appellant Richardson’s properties. 269 The warrant maintained that Richardson had financed the acquisition and development of the properties through drug trafficking activities, citing the fact that the appellant’s reported income was insufficient to sustain real estate activities of this kind. Furthermore, Richardson had allegedly engaged in a series of suspect financial transactions. The government executed the warrant to arrest and take into custody Richardson’s properties, whereupon copies of the federal arrest warrants were posted at each of the appellant’s properties. The facts establish that the government neither posted warning

260. Green, 688 So. 2d at 306.
262. Id. at 57.
263. Id. at 58.
264. Id.
265. Id. at 59.
266. United States v. 408 Peyton Rd., 112 F.3d 1106, 1108 (11th Cir. 1997).
267. Id. at 1109.
268. Id. at 1106.
269. Id. at 1108.
Richardson challenged the government's failure to provide a pre-seizure notice and hearing, depriving him of property without due process of law. In 408 Peyton Road, the court analyzed "whether the Fifth Amendment Due Process Clause prohibits the Government in a civil forfeiture case from seizing real property without first affording the owner notice and an opportunity to be heard." To consider whether a hearing was required, the Eleventh Circuit applied a three part inquiry requiring the consideration of: 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, as well as the probable value of additional safeguards; and 3) the Government's interest, including the administrative burden that additional requirements would impose. The Eleventh Circuit Court of Appeals had applied this balancing test in a factually similar setting, holding "that the lack of notice and a hearing prior to issuance of the warrants seizing [a person's] properties rendered the warrants 'invalid and unconstitutional.'" However, unlike the seizure in that case, the government in 408 Peyton Road elected not to evict the residents, post warning signs, or change the locks on the property, concluding that it never "seized" the property because it refrained from exercising physical control.

270. Id.
271. 408 Peyton Rd., 112 F.3d at 1108. See United States v. James Daniel Good Real Property, 510 U.S. 43 (1993). "As a general matter, the government must provide notice and a hearing prior to depriving an individual of property." Id. at 48. The United States Constitution "tolerates exceptions to that general rule only in 'extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.'" Id. at 53.
273. United States v. 2751 Peyton Woods Trail, 66 F.3d 1164, 1167 (11th Cir. 1995) (quoting United States v. One Parcel of Real Property, Located at 9638 Chicago Heights, St. Louis, Mo, 27 F.3d 327, 300 (8th Cir. 1994)).
274. Id. at 1109.
275. 408 Peyton Rd., 112 F.3d at 1109–10. The Supreme Court in Good has never explicitly defined the term "seizure," however, the government suggested that physical control is an essential element of seizure because the facts in Good involved some level of physical intrusion. See Good, 510 U.S. at 49. Contrary to this assertion, the Supreme Court never indicated that the exercise of physical control should be regarded as a constitutionally cognizable seizure. In fact, the term seizure was applied more broadly to refer to governmental action that deprived claimant Good of significant property interests. See United States v. Jacobson, 466 U.S. 109, 113 (1984) (holding that a seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that
asserting physical control over it.\textsuperscript{276} While \textit{408 Peyton Road} did not involve a physically intrusive seizure, the court nevertheless assessed whether the magnitude of the private interests required pre-deprivation notice and a hearing by applying the \textit{Mathews} inquiry.\textsuperscript{277} Applying the first \textit{Mathews} factor, the mere execution of the arrest warrant implicated "private interests" \textsuperscript{278} protected by the Due Process Clause because it bestowed upon the government important rights of ownership.\textsuperscript{279} The fact that the seizures were not physically intrusive was not dispositive, the court holding that "cognizable seizure of real property need not involve physical intrusion."\textsuperscript{280} An analysis of the second factor led the Eleventh Circuit to conclude that "the practice of an ex parte seizure creates an unacceptable risk of error, offer[ing] little or no protection for innocent owners."\textsuperscript{281} A breakdown of the final component of the analysis suggested that no pressing need for prompt governmental action justified ex parte seizure of real property in the civil forfeiture context. The court reasoned that "the Government could secure its legitimate interest without seizing the subject property."\textsuperscript{282} Therefore, the government deprived Richardson of due process when it seized 408 Peyton Road, notwithstanding the decision not to assert physical control over it.\textsuperscript{283}

\section*{C. Knock and Announce Principle}

In the case of \textit{Richards v. Wisconsin},\textsuperscript{284} the Supreme Court revisited their previous decision which ruled that the Fourth Amendment incorporates

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\textsuperscript{276} \textit{408 Peyton Rd.}, 112 F.3d at 1110.

\textsuperscript{277} \textit{Id. See} Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

\textsuperscript{278} \textit{408 Peyton Rd.}, 112 F.3d at 1109 (citing Mathews, 424 U.S. at 335).

\textsuperscript{279} \textit{408 Peyton Rd.}, 112 F.3d at 1110.

\textsuperscript{280} \textit{Id. at} 1111.

\textsuperscript{281} \textit{Id. See} United States v. James Daniel Good Real Property, 510 U.S. 43, 55 (1993). As Justice Frankfurter observed, "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." \textit{Id. See} Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171 (1951) (Frankfurter, J., concurring).

\textsuperscript{282} \textit{408 Peyton Rd.}, 112 F.3d at 1112. The government may prevent the sale of the property by "filling a notice of lis pendens" as authorized by state law when advised of the forfeiture proceedings. \textit{Id.} "If an owner seems likely to destroy his property when advised of the forfeiture action, the government may obtain an ex parte restraining order." \textit{Id.} Finally, the government may prevent further illegal activity with proper search and arrest warrants. \textit{Id.}

\textsuperscript{283} \textit{Id. at} 1114.

\textsuperscript{284} 117 S. Ct. 1416 (1997).
the common law requirement that police knock and announce their identity before attempting forcible entry at a person’s dwelling. Although the Supreme Court explicitly stated in a prior decision that there does not have to be an announcement before every entry, Richards narrowed such an assertion by emphatically holding that there would be no blanket exceptions to the knock and announce requirement for felony drug investigations.

Prior to the Richards decision, “the Supreme Court of Wisconsin concluded that police officers are never required to knock and announce their presence when executing a search warrant in a felony drug investigation.” Exigent circumstances justifying a no-knock entry are always present in felony drug cases because there is an “extremely high risk of serious if not deadly injury to the police” and the potential for destruction of narcotics evidence. In addition, the Supreme Court of Wisconsin reasoned that the violation of privacy that occurs when officers with a search warrant forcibly enter without first announcing their presence is minimal.

Conceding that the requirement to knock and announce may give way under dangerous circumstances or where narcotics evidence is likely to be destroyed, the Supreme Court noted this would not remove each court’s responsibility to make a reasonableness inquiry into a police decision not to knock and announce.

286. Wilson, 514 U.S. at 934.
287. Richards, 117 S. Ct. at 1417.
288. Id. at 1418. Police officers in Madison, Wisconsin obtained a warrant to search Richards’ hotel room for drugs and related paraphernalia. The search warrant was a culmination of an investigation that had uncovered substantial evidence that the appellant was one of several individuals dealing drugs out of hotel rooms in Madison. Police requested a warrant that would have given advance authorization for a “no-knock” entry into the hotel room, but the magistrate deleted this portion from the warrant. Officers knocked on the door, Richards cracked it open and subsequently slammed the door closed, whereupon officers forcibly entered discovering cocaine and money. Id. at 1418–19.
289. The Supreme Court of Wisconsin explained that the circumstances that necessitate this exception are created by the realities of today’s drug culture. State v. Richards, 549 N.W.2d 218, 221 (Wis. 1996), aff’d, 117 S. Ct. 1416 (1997). The blanket exception for felony drug cases is reasonable because of the “violent and dangerous form of commerce and the destruction of drugs.” Richards, 117 S. Ct. at 1420 (quoting Oral Argument of Appellee at 26).
290. Richards, 549 N.W.2d at 219.
291. Id. at 226.
292. Richards, 117 S. Ct. at 1421.
safety while executing search warrants and the individual privacy interests that are invaded by no-knock entries.293

The Supreme Court refused to create exceptions to the knock and announce principle based on the culture surrounding a general category of criminal behavior.294 The first problem with an exception is it tends to overgeneralize, particularly when assuming that all felony drug investigations present an inherent danger to police officers or the evidence sought.295 A second difficulty with permitting any categorical exception to the knock and announce principle is that the reasons for creating the exception can easily be manipulated to apply to other situations.296 If per se exceptions were allowed for each category where potential danger existed, the knock and announce element of the Fourth Amendment would be rendered meaningless.297 The Supreme Court concluded that a no-knock entry may be justified under unique circumstances where law enforcement has a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of criminal activity.298

V. ADMINISTRATIVE SEARCHES

A. Searches of Public School Students

In a highly controversial case surrounding the strip searches of eight-year-old female students, the Eleventh Circuit Court of Appeals addressed the reasonableness of warrantless searches in public schools and the granting of qualified immunity for school officials who conduct them.299 In Jenkins v. Talladega City Board of Education,300 the Eleventh Circuit held that the law

293. Id. at 1420.
294. Id. at 1421.
295. While drug investigations may cause substantial risks, not every felony drug investigation will pose the same degree of uncertainty. For example, a search could be conducted at a time when the only individuals present in a residence have no connection with the drug activity and, thus, will be unlikely to threaten officers or destroy evidence. Alternatively, the police could know that the drugs being searched for were of a type or in a location that made them impossible to destroy. Id.
296. Id.
297. Richards, 117 S. Ct. at 1421.
298. Id.
300. Id. at 821. One of Jenkins' and McKenzie's classmates informed their teacher that seven dollars was missing from her purse. The teacher took the eight-year-old girls and another male student into the hallway and questioned them about the money, at which time
pertaining to applying the Fourth Amendment to the search of students at
school had not been solidly developed to place educators on notice that their
conduct was constitutionally impermissible. Consequently, the three
school faculty members who oversaw or conducted the search were granted
qualified immunity.

In the absence of "detailed guidance" by the United States Supreme
Court, Jenkins found that the specific application of the factors established
to define the parameters of reasonable school searches was notably
deficient. The broadly worded phrases of the United States Supreme
Court failed to address the most essential questions of "whether the search of
a boy or girl is more or less reasonable, and at what age... and what
constitutes an infraction great enough to warrant a constitutionally
reasonable search or, conversely, minor enough such that a search of
property or person would be characterized as unreasonable.

The Eleventh Circuit noted that "school officials cannot be required to construe
general legal formulations that have not once been applied to a specific set
of facts by any binding judicial authority." It is apparent that the Supreme
Court did not intend to clearly establish how the Fourth Amendment right


they mutually accused the other of theft. The teacher instructed the students to remove their
shoes. When these efforts failed to reveal the alleged stolen money, a school counselor
ordered the girls into the bathroom to undress. Having again failed to recover the missing
money, the school principal had the girls escorted back to the restroom and required them to
once again remove their clothes in an effort to locate the seven dollars. Id. at 822–23.

301. Id. at 828.

302. Id. Qualified immunity protects government officials from liability unless they
violate laws or constitutional rights that a "reasonable" person would have been aware of.
Jenkins, 115 F.3d at 823.

303. Id. at 825. See New Jersey v. T.L.O, 469 U.S. 325 (1985). The Supreme Court
held that public school teachers and administrators may search students without a warrant if
two conditions are met. First, they possess reasonable suspicion that the search will result in
evidence that "the student has violated or is violating either the law or the rules of the school;"
and second, once initiated, the search is "not excessively intrusive in light of the age and sex
of the student and the nature of the infraction." T.L.O., 469 U.S. at 342. However, Jenkins
severely criticized the fact that there is no illustration, indication, or hint as to how the
enumerated factors might come into play when other concrete circumstances are faced by
school personnel. Jenkins, 115 F.3d at 825. This issue did not go unnoticed by several
justices who criticized the "reasonableness" test as ambiguous and that it would fail to provide
school officials with a systematic way to predict when their conduct might violate the law. Id.
at 827 n.7. Justice Stevens admonished the majority arguing that this standard would likely
"spawn increased litigation and greater uncertainty among teacher and administrators."
T.L.O., 469 U.S. at 365 (Brennan, J., concurring).

304. Jenkins, 115 F.3d at 825.

305. Id. at 826.

306. Id. at 827.
would apply to the wide variety of school settings, justifying qualified immunity for those school officials who could not have known that their conduct violated the students' constitutional rights.\textsuperscript{307}

The most disturbing commentary from \textit{Jenkins} involves the scope of the search itself, which was not at issue in the decision. With respect to the extent of the search, it is apparent that having the girls remove their clothing was deemed reasonably related to the objective of uncovering the stolen seven dollars.\textsuperscript{308} The stealing of this amount of money should not be trivialized and was considered by school officials to be a matter of serious concern.\textsuperscript{309} Citing the fact that female teachers conducted the strip search on the eight-year-old girls, the court denounced the fact that the searches were excessively intrusive, comparing it to the "common experience" of teachers who assist students of that age in the bathroom after an accidental wetting.\textsuperscript{310} Despite the age of the young girls and the successive encroachment on their physical privacy, \textit{Jenkins} noted that it would not be apparent to a reasonable school official that the challenged searches "were 'excessively intrusive in light of the age and sex of the student[s] and the nature of the infraction.'"\textsuperscript{311}

Undoubtedly, challenges to the intrusiveness of public school searches will surface in upcoming survey periods. However, in light of \textit{Jenkins}, it is unclear what the Eleventh Circuit would find intrusive to a student's rightful expectation of privacy. Considering a significant number of school searches involve much greater dangers than the loss of seven dollars, strip searches may soon become one of "common experience" in our public schools.

Several noteworthy decisions in Florida have followed the lead of the Eleventh Circuit Court of Appeals, though with less widespread dissension, by promoting the legal equivalent of "safety-first" in public schools. The Florida district courts of appeal have tackled the continued debate over random, suspicionless searches in public schools, and who is authorized to administer them. In \textit{State v. J.A.},\textsuperscript{312} the Dade County School Board employed an independent security company to conduct searches with metal detecting wands at randomly chosen secondary schools in response to a growing presence of firearms in public schools.\textsuperscript{313} The court acknowledged that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"\textsuperscript{314} Balancing the students' privacy interest against the

\begin{itemize}
  \item \textit{Id.} at 828.
  \item \textit{Id.} at 827 n.5.
  \item \textit{Jenkins}, 115 F.3d at 827 n.5.
  \item \textit{Id.}
  \item 679 So. 2d 316 (Fla. 3d Dist. Ct. App. 1996).
  \item \textit{Id.} at 318.
  \item \textit{Id.} at 319 (quoting \textit{Vernonia Sch. Dist. v. Acton}, 515 U.S. 646, 652 (1995)).
\end{itemize}
necessity of the search, the Third District Court of Appeal ruled that authorizing random, suspicionless weapons searches of high school students was reasonable and constitutional.\textsuperscript{315} With regard to a reasonable expectation of privacy, "students within the school environment have a lesser expectation of privacy than members of the population generally."\textsuperscript{316} In weighing the character of intrusion, the Third District Court of Appeal found that a metal detector search, and the specific guidelines required to carry it out, provide for a search that involves minimal intrusion.\textsuperscript{317}

Finally, the court cited the rising incidences of violence\textsuperscript{318} in Dade County schools, denoting the nature and immediacy of the governmental concern which is enough to warrant random suspicionless searches.\textsuperscript{319} The unsettled question over who may conduct a school search upon a student alleged to be carrying a weapon was answered by \textit{J.A.R. v. State}.\textsuperscript{320} In \textit{J.A.R.}, a newly appointed assistant principal called upon the assistance of a police officer assigned to the school to investigate a student who was allegedly carrying a gun. The student was questioned and a pat-down search was performed by the officer who discovered a firearm in the boy's waistband.\textsuperscript{321}

Under these circumstances, a school official or a police officer needs only reasonable suspicion to conduct an inquiry in the nature of a \textit{Terry} stop.\textsuperscript{322} In terms of the actual search, "[i]t would be foolhardy and dangerous" for a teacher or administrator, untrained in firearms, to conduct a weapons search without the presence of an officer.\textsuperscript{323} Therefore, the Second District Court of Appeal held that if a school official has a reasonable suspicion that a student is in possession of a dangerous weapon, "that official may request any police officer to perform the pat-down search for weapons without fear that the involvement of the police will somehow violate the student's Fourth Amendment rights or require probable cause for

\begin{thebibliography}{99}
\bibitem{315} \textit{Id.} at 320.
\bibitem{317} \textit{J.A.}, 679 So. 2d at 320.
\bibitem{318} The court acknowledged that in recent years drug use and violent crimes in schools has severely worsened. \textit{Id.} The immediacy of a school board's concern for a student's safety, and the safety of all school personnel is well justified. "The logical way to keep weapons out of school is to let the students know that they may be searched for weapons and that possession of weapons in a public high school is not permissible and will be seriously sanctioned." \textit{Id.} (emphasis omitted).
\bibitem{319} \textit{Id.}
\bibitem{320} 689 So. 2d 1242, 1243 (Fla. 2d Dist. Ct. App. 1997).
\bibitem{321} \textit{Id.} at 1243.
\bibitem{322} \textit{Id.} at 1244. See \textit{Terry v. Ohio}, 392 U.S. 1 (1968).
\bibitem{323} \textit{J.A.R.}, 689 So. 2d at 1244.
\end{thebibliography}
such a search." Without distinguishing between public law enforcement and officers who are employed by the school, the decision undoubtedly raises constitutional concerns by authorizing any police officer to conduct a search on reasonable suspicion alone. However, the Third District Court of Appeal makes clear the distinction between a school police officer and an outside police officer who conducts a search. A search conducted by a school police officer only requires reasonable suspicion in order to legally support the search. On the other hand, a search conducted by an outside police officer, who is employed by a governmental entity unrelated to the school district or its employees, usually requires probable cause.

B. International Border Searches

Persons may be stopped at an international border, where they and their belongings may be searched without a warrant and even without any suspicion of wrongdoing. Although an airport with incoming international flights has long been considered the functional equivalent of a border, neither Florida courts nor the United States Supreme Court has directly answered the question of whether an airport with departing flights also constitutes a border. Several federal circuit courts have held that an airport with departing, as opposed to arriving, international flights meets the border requirement.

324. Id. (emphasis omitted).
325. See People v. Dilworth, 661 N.E.2d 310, 317 (Ill. 1996), cert. denied, 116 S. Ct. 1692 (1996). Where school officials initiate the search, or police involvement is minimal, most courts apply the reasonable suspicion test. The same is true in cases involving school police or liaison officers acting on their own authority. However, where outside police officers initiate a search, or where school officials act at the direction of law enforcement agencies, the probable cause standard is usually applied. Id. See also M.J. v. State, 399 So. 2d 996, 998 (Fla. 1st Dist. Ct. App. 1981) (holding that where a law enforcement officer directs, participates, or acquiesces in a search conducted by school officials, the officer must have probable cause for that search).
327. Id. at 43.
328. Id.
331. See United States v. Oriakhi, 57 F.3d 1290, 1296 n.3 (4th Cir. 1995). The "long-standing right of the sovereign" that underlies the traditional rationale for the border search exception is implicated to a substantial degree where the international borders of the United States are penetrated by large sums of undeclared currency departing this country. Id. at 1296.
In *State v. Codner*, following the logic of the other federal circuit courts, the Second District Court of Appeal held that a person "departing" the country may be the subject of a "border search" for United States currency and monetary instruments without the necessity of probable cause. In *Codner*, the appellant attempted to board a flight to Jamaica at Tampa International Airport, but was detained by customs officials after a search of his bag revealed he was carrying more than $11,000 in United States currency. Personal papers, including a storage lease agreement, were also confiscated from appellant's wallet during a search for additional American currency.

Notwithstanding the fact that an airport with departing flights may constitute a border, the trial court found that the customs officers exceeded the permissive scope of their warrantless search when they retrieved papers from the appellant's wallet, looked them over, photocopied them, and delivered the copies to the Hillsborough County Sheriff's Office. The Second District Court of Appeal dismissed this argument as one "without merit." The court determined the search of the appellant's wallet was a routine border search as opposed to a nonroutine border search. Moreover, there is no more logical location to look for currency other than in someone's wallet. The fact that the wallet contained a storage lease agreement, where the unit was later found to be full of contraband, does not violate any principles of a routine border search.

C. Drug Testing

The controversial issue of drug testing for public employees reached the United States Supreme Court during this survey year. The Supreme Court, in *Chandler v. Miller*, held that the State of Georgia's requirement that

332. 696 So. 2d 806 (Fla. 2d Dist. Ct. App. 1997).
333. *Id.* at 808.
334. 31 U.S.C. § 5316 (1986) states in part that "a person . . . shall file a report under subsection (b) of this section when the person, . . . knowingly-(1) . . . is about to transport, . . . monetary instruments of more than $10,000 at one time-(A) from a place in the United States to or through a place outside the United States . . . ." *Id.*
335. *Codner*, 696 So. 2d at 810.
336. *Id.* at 809.
337. *Id.* at 810.
338. *Id.* At least one court has specifically written that the search of a person's suitcase, purse, wallet, and overcoat at the border is simply not "sufficiently intrusive to be considered nonroutine." *See United States v. Johnson*, 991 F.2d 1287, 1291–92 (7th Cir. 1993).
339. *Codner*, 696 So. 2d at 810.
candidates for state office pass a drug test did not fit within the category of constitutionally permissible suspicionless searches.341

The Georgia statute requires candidates for designated office to certify that they have taken a urinalysis within thirty days prior to qualifying for nomination or election, and that the test result be negative.342 It was uncontested by the petitioners that this prerequisite for office, imposed by Georgia law, effects a search within the meaning of the Fourth Amendment.343 Nevertheless, utilizing a balancing test, the Eleventh Circuit Court of Appeals affirmed the decision of the District Court reasoning that the drug testing program was not inconsistent with the Fourth Amendment inasmuch as the statute served "special needs," interests other than the ordinary needs of law enforcement.344

The Supreme Court declared that to examine "special needs," concerns other than crime detection, a specific inquiry must take place examining "the competing private and public interests."345 The petitioners contended that this standard was faithfully satisfied because drug use is incompatible with holding high state office, since it would systematically undermine the function and purpose of the office, including jeopardizing law enforcement antidrug efforts.346 However, the Court found the petitioners' argument failed to present any indication of a concrete danger demanding departure from the Fourth Amendment's bar against search and seizure absent individualized suspicion.347 Moreover, failing to establish the "special needs" factor, petitioners offered no explanation why ordinary law enforcement methods were not appropriate to apprehend drug-addicted state officials, particularly in light of the public lifestyles of elected officials.348

341. Id. at 1296.
342. Id. at 1298–99.
343. Id. at 1299.
344. Id.
345. Chandler, 117 S. Ct. at 1297. See Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 671 (1995) (upholding a random drug testing program for high school students engaged in interscholastic athletic competitions); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989) (sustaining a United States Customs Service program that made drug tests a condition of promotion of transfer to positions directly involving drug interdiction or requiring the employee to carry a firearm).
347. Id. at 1300–01. In writing for the majority, Justice Ginsburg noted that nothing in the record revealed the hazards of drug abuse affecting state elected officials. Id. at 1303. In fact, the counsel for the respondents directly acknowledged at oral argument that there was no evidence of a drug problem in Georgia with representatives in state office. Id.
348. Id. at 1304.
The Supreme Court clearly enunciated that if the risk to public safety is “substantial and real,” then “blanket suspicionless searches” may be justified as “reasonable.” Nevertheless, a drug testing requirement where public officials do not perform dangerous tasks, nor are immediately involved in drug interdiction efforts, is precluded by the Fourth Amendment which “shields society” from state efforts that “diminishes personal privacy” for symbolic purposes.

VI. CONFESSIONS

A. Equivocal References to Counsel

One of the most significant developments during this survey period involves whether police officers are required to make clarifying statements when a suspect makes an equivocal invocation of his Miranda rights after having validly waived them. Prior to the recent decision by the United States Supreme Court in Davis v. United States, a person undergoing custodial interrogation could indicate in any manner and at any time his wish to remain silent, at which point the interrogation had to cease. However, in light of the decision in Davis, a defendant must articulate his desire for counsel with sufficient clarity so that a reasonable officer under the circumstances would understand the statement to be one requesting an attorney. In United States v. Mikell, the Eleventh Circuit further narrowed the Davis decision by determining that an ambiguous or equivocal statement by a suspect does not obligate an officer to clarify the suspect’s intent, and the interrogation may proceed. The court in Mikell eliminated the significance between a suspect’s equivocal and unequivocal refusal to answer questions, allowing officers to continue questioning until the suspect clearly requests that the questioning cease.

Notwithstanding the Supreme Court decision, the majority of the courts in Florida, until the end of this survey year, repeatedly adhered to the principle that even an equivocal request to invoke the right to counsel asserts

350. Id.
353. Davis, 512 U.S. at 459.
354. 102 F.3d 470 (11th Cir. 1996).
355. Id. at 476. See Coleman v. Singletary, 30 F.3d 1420, 1424 (11th Cir. 1994).
356. Mikell, 102 F.3d at 477.
the constitutional right to counsel. If questioning did continue, it was allowed only to "clarify" any assertion made by a suspect. 

Recently, in State v. Owen, the Supreme Court of Florida held that in light of the decision in Davis, the duty to clarify a suspect's intent upon an equivocal invocation of counsel is no longer good law. This same rule should apply to a suspect's ambiguous or equivocal references to the right to cut off questioning as to the right to counsel. As affirmed by the Eleventh Circuit Court of Appeals this year, "a suspect must articulate his desire to end questioning with sufficient clarity so that a reasonable police officer would understand the statement to be an assertion of the right to remain silent." Consequently, it is indisputable that Florida's Constitution no longer places greater restrictions on law enforcement than those mandated under federal law when a suspect makes an equivocal statement to remain silent.

The decision in Owen was based on the practical dilemma that requires questioning to cease if a suspect makes a statement that might be a request for an attorney. Without mentioning the pragmatic benefits of such a clarifying policy, the court noted the result is a judgment call for law enforcement with the threat of suppression if they guess wrong. Therefore, to force a police officer to clarify whether an equivocal statement is an assertion of a person's Miranda rights "places too great an impediment upon society's interest in thwarting crime."

357. The Supreme Court of Florida remarked that to be admissible, confessions must satisfy both the state and federal constitutions. Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992). If a suspect indicates in any manner that he does not want to be interrogated, questioning must not begin, or, if it has already begun, must immediately stop. Id. at 966. See Weber v. State, 691 So. 2d 55, 55–56 (Fla. 4th Dist. Ct. App. 1997) (holding that response by defendant that "he could not afford an attorney" invoked the defendant's right to counsel requiring officers to clarify his assertion before interrogation could continue); Almeida v. State, 687 So. 2d 37, 39 (Fla. 4th Dist. Ct. App. 1997) (concluding that defendant who asked what was the purpose of having an attorney made an equivocal invocation of his right to counsel). But see State v. Moya, 684 So. 2d 279, 280–81 (Fla. 5th Dist. Ct. App. 1996) (ruling that defendant who proceeded with questioning after stating that he did not know if he wanted to talk did not violate Miranda nor the Florida Constitution).

358. See Weber, 691 So. 2d at 56.
359. 696 So. 2d 715 (Fla. 1997).
360. Id. at 718.
361. Id.
363. Owen, 696 So. 2d at 720.
364. Id. at 719.
365. Id.
A number of justices challenged whether the majority’s decision reflects the best interests of the diverse community for which it speaks. Justice Shaw, in his concurring opinion, emphasized that the new “clearly invoke” standard must take into account the population of Florida, which is home to a large number of immigrants. Many Floridians have little formal schooling or speak minimal English and “have emigrated from societies where the rules governing citizen/police encounters are vastly different . . . .” Justice Shaw found it simply unrealistic to expect every person in the State of Florida to invoke his or her constitutional rights with equal precision; therefore, courts should use a “reasonable person” standard when determining whether a person clearly invoked the right to terminate questioning.

Chief Justice Kogan, in his dissenting opinion, asserted that “the ‘clarification’ approach offers the best balance between effective law enforcement and the rights of the accused.” Chief Justice Kogan agreed with Justice Shaw’s assessment that requiring an officer to determine whether a suspect has “clearly” invoked his or her Miranda rights without compelling further “questioning is not an easy task in light of [Florida’s] unique demographic and geographic makeup.” As a result of the sufficient language and cultural barriers that faces many residents of Florida, “only the ‘clarification’ approach will adequately protect the rights of all suspects . . . while . . . maintaining an effective system of law enforcement.”

B. Invoking Fifth Amendment Right to Counsel Prior to Interrogation

The recent division in the Florida courts over when a person in custody effectively invokes his or her Fifth Amendment right to counsel has

366. Id. at 721 (Shaw, J., concurring).
367. Id. at 722.
368. Owen, 696 So. 2d at 722.
369. Id. at 723 (Kogan, C.J., dissenting).
370. Id.
371. Id. at 724.
372. See Cullen v. State, 687 So. 2d 44, 45 (Fla. 3d Dist. Ct. App. 1997) decision approved, 699 So. 2d 1009 (filing a notice with public defender to invoke right to counsel was ineffective and the incriminating statements defendant made later to the police were admissible). But see Fason v. State, 674 So. 2d 916, 917 (Fla. 2d Dist. Ct. App. 1996) (defendants signing of notification of exercise of rights form prevented the use of defendant’s incriminating statements obtained during police-initiated interrogation while defendant was in custody).
been answered by the Supreme Court of Florida in a 4-3 decision.\textsuperscript{373} In \textit{Sapp v. State},\textsuperscript{374} the court affirmed the decision of the First District Court of Appeal and held that a suspect may not invoke his right to counsel for custodial interrogation before it is imminent.\textsuperscript{375}

Although there are no Supreme Court decisions addressing whether an individual may effectively invoke the Fifth Amendment right to counsel prior to custodial interrogation,\textsuperscript{376} the Supreme Court noted they have never held that a person can invoke his \textit{Miranda} rights "anticipatorily, in a context other than 'custodial interrogation.'\textsuperscript{377} Even though an asserted \textit{Miranda} right to counsel is effective to future custodial interrogation, and may be waived only if the same individual reinitiates conduct with police, it does not necessarily mean that it may be initiated outside the context of custodial interrogation.\textsuperscript{378} The underlying premise of \textit{Miranda} was to protect the Fifth Amendment right against self-incrimination, not when a suspect is taken into custody, but rather where a suspect is subjected to interrogation.\textsuperscript{379} \textit{Sapp} hypothesizes that even if a rule allowed one to invoke the right to counsel

\begin{quote}
\textbf{373.} The question, as originally certified asked:

\textbf{WHETHER AN ACCUSED IN CUSTODY EFFECTIVELY INVOKES HIS [OR HER] FIFTH AMENDMENT RIGHT TO COUNSEL UNDER [MIRANDA v. ARIZONA, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).] WHEN, EVEN THOUGH INTERROGATION IS NOT IMMINENT, HE [OR SHE] SIGNS A CLAIM OF RIGHTS FORM AT OR SHORTLY BEFORE A FIRST APPEARANCE HEARING, SPECIFICALLY CLAIMING A FIFTH AMENDMENT RIGHT TO COUNSEL?}


\textbf{374.} \textit{Id.} at 581.

\textbf{375.} \textit{Id.} at 586. In \textit{Sapp}, the petitioner was arrested for robbery. He was advised of his \textit{Miranda} rights, waived them, and agreed to speak to the police. Subsequently, Sapp was brought to a holding cell where he was advised by an attorney from the public defender's office to sign a copy of a "claim of rights form," with which he complied. \textit{Id.} at 583. A week later, while Sapp remained in jail, an officer initiated an interrogation with him about another robbery and murder. Before being questioned, Sapp was advised of his \textit{Miranda} rights, and he waived them in writing without requesting an attorney. The trial court denied the motion to suppress the statements and Sapp was convicted of attempted armed robbery and first degree felony murder. \textit{Id.}

\textbf{376.} "Clearly, if Sapp had invoked his \textit{Miranda} right to counsel during custodial interrogation on the unrelated robbery charge, police would not have been permitted to approach him later for questioning on that robbery and murder charge." \textit{Sapp}, 690 So. 2d at 584 n.5.


\textbf{378.} \textit{Id.} at 182 n.3.

\textbf{379.} \textit{Sapp}, 690 So. 2d at 585.
\end{quote}
before interrogation was imminent, it would not provide protection against involuntary confessions and would actually hamper the ability of police to obtain voluntary confessions.\textsuperscript{380} In essence, requiring a person to invoke the Fifth Amendment right to counsel either during custodial interrogation or when it is imminent represents a fair “balance between protection... from police coercion... and the State’s need to conduct criminal investigations.”\textsuperscript{381}

Acknowledging the harsh blow to the Fifth and Sixth Amendments, Justice Anstead, along with three other justices in their dissenting opinion, expressed his concern that the constitutional rights an accused is informed of when arrested may not be invoked in writing in an open court.\textsuperscript{382} Under the majority’s perplexing logic, “a written directive executed upon the advice of counsel may be ignored by police even though an uncounseled oral assertion must be scrupulously honored.”\textsuperscript{383} In regard to “imminent” interrogation, the dissent noted that a defendant in jail, who has already been interrogated by police, categorically establishes the “reasonableness” of a defendant’s expectation of further interrogation.\textsuperscript{384} The dissent concluded that in yet another decision related to confessions, the Supreme Court of Florida had once again undermined a fundamental principle set forth in \textit{Miranda}, applying justice fairly among every segment of the population.\textsuperscript{385}

C. \textit{The Functional Equivalent of Interrogation}

The question of whether police conduct is the functional equivalent of interrogation was decided by the Fourth District Court of Appeal. In \textit{Glover v. State},\textsuperscript{386} the court found police conduct toward appellant Glover to be

\begin{itemize}
  \item \textsuperscript{380} \textit{Id.} at 586.
  \item \textsuperscript{381} \textit{Id.}
  \item \textsuperscript{382} \textit{Id.} (Anstead, J., dissenting).
  \item \textsuperscript{383} \textit{Id.} at 587.
  \item \textsuperscript{384} \textit{Sapp}, 690 So. 2d at 589.
  \item \textsuperscript{385} \textit{Id.} at 587. “If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual... cannot afford [an attorney].” \textit{Id.} “The need for counsel in order to protect the privilege [against self incrimination] exists for the indigent as well as the affluent.” \textit{Id.} This clearly takes advantage of those who are unable to retain counsel by discounting their prior Fifth Amendment assertion not to be interrogated without an attorney. \textit{Id.} at 588. \textit{See} \textit{State v. Owen}, 696 So. 2d 715 (Fla. 1997). The “threshold standard of clarity” approach to confessions places a hurdle in front of those individuals who are most likely to have difficulty surmounting that hurdle and successfully invoking their rights. \textit{Sapp}, 690 So. 2d at 588 (Anstead, J., dissenting).
  \item \textsuperscript{386} 677 So. 2d 374 (Fla. 4th Dist. Ct. App. 1996).
\end{itemize}
“tantamount to custodial interrogation.”\textsuperscript{387} Glover was arrested without the benefit of \textit{Miranda} warnings and was placed in an interrogation room for over an hour and a half. Although he repeatedly asked why he had been arrested, the attending police officers refused to respond. Even as appellant became increasingly agitated, law enforcement officials would not inform him of the allegations that led to his arrest. As time progressed, Glover began speaking without any initiation by the officers, ultimately making statements that served to incriminate him.\textsuperscript{388}

Under \textit{Miranda}, “interrogation” refers not only to express questioning, but to those words or actions on the part of the police that the officers should recognize are “reasonably likely to elicit an incriminating response from a suspect.”\textsuperscript{389} The rationale for this broader definition is to keep intact the “safeguards against self-incrimination established by \textit{Miranda} [which logically] apply to interrogation initiated by law enforcement officers after a person has been taken into custody.”\textsuperscript{390} “‘Interrogation’ . . . must reflect a measure of compulsion above and beyond that inherent in custody.”\textsuperscript{391} As a result, the \textit{Glover} court ruled that the conduct of the police officers toward the appellant was “unduly protracted and evocative” such that it became equivalent to a custodial interrogation.\textsuperscript{392}

D. \textit{Use of Pre-Miranda Silence for Impeachment Purposes}

In an important decision likely to be ultimately decided by the Supreme Court of Florida,\textsuperscript{393} \textit{Hoggins v. State}\textsuperscript{394} discussed whether pre-\textit{Miranda}
silence is permissible for impeachment purposes. In direct opposition to the ruling by the Third District Court of Appeal, the Fourth District Court of Appeal held that the use of custodial pre-Miranda silence for impeachment purposes violates the due process protections guaranteed by the Florida Constitution.

On the federal level, the United States Constitution does not prohibit the use, for impeachment purposes, of a defendant's silence even after arrest if no Miranda warnings have been given. However, the Supreme Court has left open the possibility that states could formulate their own evidentiary rules defining when silence is viewed as more probative than prejudicial. As a result, many states have used their own evidentiary analysis to condemn the use of pre-Miranda silence impeachment. Other states have relied on their state constitutional provisions to do so. Still other states have followed the Supreme Court and approved the use of pre-Miranda silence for impeachment purposes.

The Supreme Court of Florida has recognized the right of state constitutions to place more rigorous restraints on governmental conduct than the United States Constitution imposes. In fact, the actual right to remain silent is entitled to more protection under the Florida Constitution than the box whereupon he was handcuffed, identified by one of the victims, and arrested. However, he was not read his Miranda rights until he was placed in the patrol car. Hoggins testified how he retrieved the items, but upon cross-examination was questioned as to why he never told police his story when they came to the apartment the night of the robbery. An objection to this impeachment was overruled. Id. at 384.

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395. Id. at 384 n.2.
396. See Rodriguez v. State, 619 So. 2d 1031, 1032 (Fla. 3d Dist. Ct. App. 1993) (holding that the impeachment of defendant's credibility with his pre-Miranda silence is proper, validating the prosecutor's extensive commentary on the defendant's failure to give an explanation at the scene of the robbery).
397. Hoggins, 689 So. 2d at 386.
399. Id. at 607.
400. Some states make an evidentiary determination on a case by case basis. See People v. DeGeorge, 541 N.E.2d 11 (N.Y. 1989); State v. Antwine, 743 S.W.2d 51 (Mo. 1987). Others have ruled that impeachment as to custodial pre-Miranda silence is inadmissible based on their rules of evidence. See Mallory v. State, 409 S.E.2d 839 (Ga. 1991). In addition, there are states that have precluded impeachment as to pre-Miranda silence on both evidentiary and constitutional grounds. See Coleman v. State, 895 P.2d 653 (Nev. 1995).
United States Constitution. Furthermore, by prohibiting impeachment of a testifying defendant with custodial silence, all defendants are treated the same regardless of when Miranda warnings are administered. The Hoggins court also appropriately expressed its concern that a rule allowing impeachment as to pre-Miranda silence, but not as to post-Miranda silence, may result in police unnecessarily postponing the giving of the warnings, so that silence can be effectively used as impeachment if the defendant testifies.

E. Voluntary Confessions

It is well established that where two defendants are tried together, the admission of the codefendant’s confession without the other defendant taking the stand violates defendant’s rights under the Sixth Amendment Confrontation Clause. In United States v. Chirinos, the Eleventh Circuit Court of Appeals utilized an exception in upholding the admission of a codefendant’s confession against three other appellants in the case. The exception to the Confrontation Clause rule entitles the admission of a nontestifying codefendant’s confession with a proper limiting instruction if the court revises the confession to “eliminate any reference to the defendant.” However, during closing argument in the Chirinos trial, the prosecutor asked the jury to carefully consider the voluntary confessions of two codefendants and the testimony of one of the appellants.

The Eleventh Circuit found the prosecutorial comments highly suggestive and at the very least, implied the involvement of the appellants.

403. See Lee v. State, 422 So. 2d 928, 930 (Fla. 3d Dist. Ct. App. 1982). See also Willinsky v. State, 360 So. 2d 760, 762 (Fla. 1978) (concluding that impeachment by disclosure of the legitimate exercise of the right to silence is a denial of due process regardless at what stage the accused was silent so long as it is protected at that stage); Webb v. State, 347 So. 2d 1054 (Fla. 4th Dist. Ct. App. 1977).
405. Id. at 386.
407. 112 F.3d 1089 (11th Cir. 1997). The Bureau of Alcohol Tobacco and Firearms (“ATF”) conducted a sting operation against five members of the Vargas group who planned to steal 300 kilograms of cocaine from an arriving shipment. Id. at 1093. The men in the group were arrested at the Opa Locka West airstrip where two of the men approached the fictitious bags of cocaine located on the runway. Upon arrest, two of the men waived their Miranda rights and told the ATF of their plan to steal the cocaine. Id. at 1093–94.
408. Id. at 1100.
409. Id.
410. Chirinos, 112 F.3d at 1100.
Nevertheless, the court determined that the prosecutor did not argue to the jury that it could consider the post-arrest statements of two of the members of the Vargas group, since it merely served the purpose of corroborating the appellant's testimony.\footnote{Id.} In an apparent stretch of logic, based on the principle that incriminating evidence such as post-arrest confessions differs in a practical effect from evidence requiring linkage, the codefendant's statements linked with the testimony of the appellant did not constitute improper argument\footnote{Id.}.

Another case in which the appellant challenged the admission of a codefendant's confession in violation of the Confrontation Clause reached a similar conclusion. In \textit{Farina v. State},\footnote{679 So. 2d 1151 (Fla. 1996).} the Supreme Court of Florida held that a codefendant's taped conversations had sufficient "indicia of reliability" and were properly admitted\footnote{Id. at 1157.}.

When a statement against one's own interest also incriminates another criminal defendant and is admitted during their joint trial such statements are "presumptively suspect" and must be subjected to the scrutiny of cross-examination\footnote{See Lee v. Illinois, 476 U.S. 530, 541 (1986).}.\footnote{Id.} Even if such statements are properly admitted against the hearsay exception,\footnote{Section 90.804(2)(c) of the Florida Statutes creates an exception to the hearsay rule for statements against interest if that person is unavailable to testify. The statements must meet the following criteria: A statement which, at the time of its making, was so far contrary to the declarant’s pecuniary or proprietary interest or tended to subject the declarant to liability or to render invalid a claim by the declarant against another, so that a person in the declarant’s position would not have made the statement unless he or she believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. FLA. STAT. § 90.804(2)(c) (1995).} they are likely to raise problems with the Confrontation Clause which does not permit a nontestifying codefendant’s confession to incriminate a defendant\footnote{See Cruz v. New York, 481 U.S. 186, 191–92. (1987).}.

However, this does not mean that such statements are always inadmissible. The presumption of unreliability may be rebuffed where there is a showing of trustworthiness that the statements have an "indicia of reliability."\footnote{Id. at 193–94.} \textit{Farina} determined that since the recorded statements between
the two brothers took place in the back seat of a police car, and each was present to confront the other throughout the conversations detailing the crime, the taped conversations were reliable and had a sufficient "indicia of reliability" to be admissible against petitioner Farina. 419

In Davis v. State, 420 the Supreme Court of Florida confronted the issue of whether successive Miranda warnings are a prerequisite for persons in custody who reinitiate contact with law enforcement officials. 421 While in a holding cell, Davis had requested to be allowed to contact his mother to retain an attorney for him. Subsequent to his request but before his mother was contacted, Davis was approached by an officer who expressed disappointment in him. Davis, who still had not been given Miranda warnings, then voluntarily confessed to murdering an eleven-year-old girl and thereafter gave a taped interview during which he was fully informed of his Miranda rights. One week later, without the advice of counsel or formal Miranda warnings, Davis gave a second taped confession to the police. 422 The Supreme Court of Florida concluded that Davis' untaped confession should have been suppressed. 423 However, each of Davis' taped confessions, including the one given a week later without a fresh set of Miranda warnings, were deemed admissible and admitted without error. 424

Dealing a serious blow to the proponents of Miranda, Davis moved away from its mechanical application and set forth a contemporary test for admissibility of statements made in subsequent or successive custodial interrogations: "Whether the statements were given voluntarily." 425 The court noted that such an inquiry must consider the totality of the circumstances. 426 The Davis court, in upholding the admissibility of both taped confessions, 427 emphatically rejected the notion that a complete readvisement of Miranda warnings is necessary each time an accused undergoes additional custodial interrogation. 428 The Supreme Court of Florida concluded that the fact that Davis initiated the contact that led to his

420. 698 So. 2d 1182 (Fla. 1997).
421. Id. at 1189.
422. Id. at 1186.
423. Id. at 1189.
424. Id.
425. Davis, 698 So. 2d at 1189.
426. Id.
427. The untaped confession to the police officer was inadmissible because no formal Miranda warnings were given. The confession was found to be harmless beyond a reasonable doubt and did not affect the defendants conviction for murder. Id.
428. Id.
second taped confession and that he was apprised of his right to counsel satisfied the underlying concerns of Miranda.  

In the well-publicized case of Rolling v. State, involving the murder of five Florida college students, the court scrutinized the role of law enforcement officers in determining whether a confession was obtained in violation of the defendant's Sixth Amendment right to counsel. The court acknowledged that statements "deliberately elicited" from a defendant after the right to counsel has been invoked and in the absence of a valid waiver are inadmissible. Nevertheless, the court was not willing to exclude incriminatory statements by the defendant merely because the statements were made after judicial proceedings had been initiated. "Rather, law enforcement officials must do something that infringes upon the defendant's Sixth Amendment right."

The Supreme Court of Florida's standard for such a determination rests on whether the confessions were obtained through the active or passive efforts of law enforcement. In essence, if a defendant's statement has not been a product of a strategy "deliberately designed to elicit an incriminating statement" then the person's right to counsel has not been violated.

In Meyers v. State, the Supreme Court of Florida answered questions regarding the admissibility of a voluntary confession where circumstantial evidence is the basis for a conviction. Meyers, who voluntarily made statements to inmates with whom he was incarcerated, established the details of his attempted sexual battery and murder of a fourteen-year-old girl. Although the victim's body was never recovered, Meyers had physical injuries consistent with a violent confrontation and bore marks on his side that resembled the shoes the victim was wearing at the time she disappeared.

429. Id.
430. 695 So. 2d 278 (Fla. 1997).
431. Id. at 289–92.
432. Id. at 290. See Massiah v. United States, 377 U.S. 201, 206 (1964).
433. Rolling, 695 So. 2d at 290.
434. Id.
435. Id. at 291. Rolling made statements to police officials through another inmate. Each contact with the authorities was actively made by either the appellant or his fellow inmate. Therefore, statements to a fellow inmate and to investigators were not the result of Sixth Amendment violations. Id. See Sikes v. State, 313 So. 2d 436, 437 (Fla. 2d Dist. Ct. App. 1975) (holding that voluntary statements to prison authorities by an incarcerated defendant are not subject to the Massiah rule).
436. Rolling, 695 So. 2d at 291.
438. Id. at *1–2.
439. Id. at *1.
In order to prove *corpus delicti* in a homicide case, the state must establish: "(1) the fact of death; (2) the criminal agency of another person as the cause thereof; and (3) the identity of the deceased person." To admit a defendant's confessions, *corpus delicti* may be proved either by direct or circumstantial evidence that tends to show that a crime was committed, however, proof beyond a reasonable doubt is not mandatory.

As a result of these statements, the sufficient circumstantial evidence presented by the State proved the *corpus delicti* of the homicide and permitted the admission of Meyer's confessions to former cellmates. The Supreme Court of Florida ruled that the circumstantial evidence introduced by the State was sufficient to prove *corpus delicti* such that defendant's inculpatory statements were admissible.

XII. CONCLUSION

During the survey period, the United States Supreme Court, the Eleventh Circuit Court of Appeals, and several Florida courts have demonstrated their attempt to fairly balance the competing interests between the interests of law enforcement and an individual's concern for privacy. Without drawing sweeping conclusions, and recognizing the numerous exceptions, these courts have progressed toward providing greater authority to law enforcement officials. The path in this direction does not appear to be shifting and will likely result in future decisions in which the safeguarding of citizens' rights is subordinated to enhance the powers of those who serve to protect us.

440. Id.
441. Id. at *2.
443. Id. at *2. The phrase "*corpus delicti*" refers to proof independent of a confession that the crime charged was in fact committed. See Bassett v. State, 449 So. 2d 803, 807 (Fla. 1984). Since the girl's body was never found, the court relied heavily on the confession Meyers made to a cellmate about the murder. According to the cellmate's testimony, the victim apparently violently resisted the sexual advances of the appellant. Eventually, Meyers killed the girl by cutting her throat and disposed of the body in the woods, piling chunks of concrete on top of her body so she could not be found. Meyers, 1997 WL 109219, at *2.
Immigration Law: 1997 Survey of Florida Law

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I. INTRODUCTION

This article examines immigration cases arising in Florida for which decisions were rendered from June 1996 through June 1997. These cases discuss the recent changes in immigration law under the Illegal Immigration

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Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"),\(^1\) and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").\(^2\) These changes apply to the treatment of legal and undocumented aliens in the United States, some of whom have criminal convictions. Congress and the executive branch, through the Immigration and Naturalization Service ("INS") and the Board of Immigration Appeals ("BIA"), have determined the direction of immigration policy in the United States. This policy is characterized by harsh treatment of illegal and legal immigrants in the United States. New immigration provisions indicate tougher laws on criminal aliens, as well as the withdrawal of meaningful discretionary relief from all aliens. Other immigration laws seek to insulate federal immigration decisions from judicial review. These policies not only target illegal aliens, but also legal immigrants living in the United States who would otherwise qualify for permanent residency or citizenship under previously existing immigration laws. The highly publicized decision,\(^3\) involving the suspension of deportation proceedings initiated by the federal government of approximately 40,000 Nicaraguans living mostly in Florida, exemplifies these changes.\(^4\)

Across the country, states have followed suit and have been interpreting some of these new provisions. With some exceptions in the area of criminal prosecutions, federal and state courts in Florida are outlining hard-line policies against legal and illegal aliens.

II. FEDERAL LEGISLATION ON IMMIGRATION

A. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

During 1996, the executive branch and the 104th Congress turned their attention to immigration and, in some cases, radically altered relief available to lawful residents and others in the United States. The wholesale transformation of immigration law, under the guise of removing undocumented and criminal aliens, became a priority for the Republican-led Congress this past year. It was no surprise that one of the first changes in

\(^4\) Id.
immigration law involved current exclusion and deportation laws. The IIRIRA directly abolished the separate exclusion and deportation hearings and "replaced them with a unitary removal proceeding." The IIRIRA also cut back legal safeguards which historically protected legal residents from deportation. In some cases, long-term lawful permanent residents who have extensive familial and community ties are now subject to deportation without any relief available to them.

One of the most basic changes in relation to exclusion and deportation proceedings was IIRIRA's modification of the "entry" doctrine. Before its passage, "aliens who [had] entered the U.S. whether lawfully or unlawfully, and who remain[ed], ... [were] subject to deportation [proceedings]." Entry had been defined as: 1) a crossing into the territorial limits of the United States, i.e., physical presence; 2) an inspection and admission by an immigration officer; or 3) actual and intentional evasion of inspection at the nearest inspection point; coupled with 4) freedom from restraint. Before the IIRIRA, both illegal and legal aliens who entered the United States enjoyed the right to deportation proceedings before being forcefully expelled from the United States. Under the IIRIRA, aliens who are not inspected and admitted by an immigration officer are deemed to be seeking admission and are subject to exclusion under section 212(a) of the Immigration and Nationality Act ("INA"), regardless of when they effected an entry into the United States under prior law and how long they have actually lived here after entry without inspection.

Another area of change has been in the treatment of criminal aliens. Specifically, the IIRIRA has changed the definition of "conviction." Section 101(a)(48)(A) of the INA now states:

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10. H.R. REP. No. 104-879, at 262 (1997). The definition of "conviction" has been broadened "for immigration law purposes to include all aliens who have admitted to or been found to have committed crimes. This will make it easier to remove criminal aliens, regardless of specific procedures in States for deferred adjudication or suspension of sentences." Id.
The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.\textsuperscript{11}

Additionally, section 101(a)(48)(B) provides that any period imposed by the court will be included as part of a term of imprisonment, regardless of whether the court suspends the sentence or suspends execution.\textsuperscript{12} What is more detrimental to aliens with criminal convictions is that these changes will apply to "convictions and sentences entered before, on, or after the date of the enactment of this Act."\textsuperscript{13} Similarly, Congress has redefined the term "aggravated felony" to include virtually any felony including theft, assault, and small amounts of money or larceny transaction violations.\textsuperscript{14} Since an aggravated felon is barred from citizenship, as well as most forms of relief from removal including political asylum, withhold of deportation, voluntary departure, and cancellation of removal (formerly suspension of deportation), the definitional change has enormous impact.

The statute also substantially restricts relief for persons who have resided in the United States for long periods of time without any criminal problems. Congress abolished the suspension of deportation, which required a person to demonstrate seven years of continuous physical presence, good moral character, and establish hardship to himself or his family, or show that he is a United States citizen or lawful permanent resident.\textsuperscript{15} In its place,

\begin{itemize}
\item \textsuperscript{12} Id. § 1101(a)(48)(B).
\item \textsuperscript{14} 8 U.S.C.A. § 1101(a)(43) (West Supp. 1997).
\item \textsuperscript{15} Id. § 1254(a)(1). The text of section 1254(a) provides:
\end{itemize}
Congress established "cancellation of removal" which requires ten years of continuous physical presence and the establishment of exceptional and extremely unusual hardship but only to a United States citizen or a legal permanent resident spouse, parent, or child. The alien's own hardship is irrelevant.

A crucial part of the new legislation deals with the courts' power to review INS decisions. Among them are the attempts to limit the courts' jurisdiction, as well as the scope of judicial review. Normally, individuals subject to removal by the Attorney General were able to seek relief from deportation by the courts. However, section 242(g) of the INA now provides that:

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Act.

Congress has also sought to eliminate review of discretionary decisions by the Attorney General regarding aliens in proceedings. In addition,
Congress has sought to limit the power of the federal courts to grant injunctive relief.\textsuperscript{21} Congress and the INS have charted the future course of immigration law in this country by limiting the courts’ power to grant relief, and facilitating the deportation of criminal aliens and countless others awaiting permanent residency status. Altogether, the IIRIRA demonstrates a sharp shift from the historical treatment of providing both legal and illegal aliens due process of law.

B. \textit{Antiterrorism and Effective Death Penalty Act of 1996}

Following the Oklahoma City federal building bombing\textsuperscript{22} the country was faced with the growing danger of domestic terrorism.\textsuperscript{23} Although primarily designed to target individuals who commit terrorist attacks in the United States,\textsuperscript{24} the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") broadened the federal government’s power over criminal aliens. Specifically, the AEDPA expanded the definition of an aggravated felony, allowed for the early deportation of nonviolent offenders, and limited the courts’ authority to provide discretionary relief and review final orders of deportation.\textsuperscript{25}

Before the AEDPA was enacted, an “aggravated felony” was defined as murder, drug trafficking, illicit trafficking of firearms, money laundering, crimes of violence for which the term of imprisonment is at least five years, foreign convictions, and any attempt or conspiracy to commit those crimes.\textsuperscript{26} With the advent of the AEDPA, an “aggravated felony” includes: 1) gambling offenses; 2) transportation for the purpose of prostitution; 3) alien smuggling for which the term of imprisonment imposed is at least five years; 4) document counterfeiting or fraud for which the term of imprisonment imposed is at least eighteen months; 5) an offense committed by an alien who was previously deported due to a criminal conviction; 6) commercial

\begin{itemize}
  \item \textsuperscript{21} Id. § 1252(f)(1).
  \item \textsuperscript{23} Senator Gorton stated that “[w]e must not allow the cowards responsibility [sic] for such atrocities as the downing of Pan Am Flight 103, the bombing of the World Trade Center, or the bombing of the Oklahoma City Federal building to gain from their actions.” Id.
  \item \textsuperscript{24} Statement by the President upon Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719 (April 24, 1996).
  \item \textsuperscript{25} Id.
  \item \textsuperscript{26} KURZBAN, supra note 8, at 89–91.
\end{itemize}
bribery; 7) forgery; 8) counterfeiting; 9) trafficking in vehicles with identification numbers of which have been altered; 10) obstruction of justice for which a term of five years or more may be imposed; and 11) failure to appear before a court order to answer to or dispose of a charge of a felony for which a sentence of two years or more may be imposed.\(^7\)

The expanded definition of an aggravated felony clearly permits the deportation of more criminal aliens and substantially increases the likelihood that long-term permanent residents will not be eligible for virtually any form of relief, no matter how minor their criminal convictions. In accordance with other amendments aimed at expeditiously deporting the majority of aliens, the AEDPA facilitates the deportation of nonviolent criminal offenders before completion of their sentences.\(^28\)

The AEDPA, in conjunction with the IIRIRA, seriously curtails the courts' authority to grant relief from deportation, where deportation is based on criminal grounds. Congress amended section 106(a)(10) of the INA with section 440(a) of the AEDPA, which revokes the courts' exercise of judicial

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   (A) Except as provided in section 259(a) of Title 42 and paragraph (2), the Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole supervised release, probation, or the possibility of arrest or further imprisonment is not a reason to defer removal.
   (B) The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—
   (i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that the (I) alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title and (II) the removal of the alien is appropriate and in the best interest of the United States; or
   (ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

Id.
review over final orders of deportation. 29 Equitable relief for deportable aliens has also been drastically cut back. Section 440(d) of the AEDPA amended 8 U.S.C §§ 212(c) and 1882(c), and “provides in relevant part that section 212(c) relief shall not be available to aliens who are deportable by reason of having committed certain specified criminal offenses.” 30 On June 27, 1996, the BIA decided In re Soriano 31 and determined that applications for relief under 212(c) are barred only if filed after IIRIRA’s date of effectiveness. 32 Consequently, section 440(d) should not be applied retroactively to applicants who were awaiting decisions on appeal prior to April 24, 1996. Nonetheless, on February 21, 1997, the Attorney General concluded that it should be applied retroactively. 33 The Attorney General argued that in passing 440(d), Congress withdrew the authority to grant prospective relief, and she stated that when a statute “either alters jurisdiction or affects prospective injunctive relief [it] generally does not raise retroactivity concerns, and, thus, presumptively is to be applied in pending cases.” 34

As a result of the Attorney General’s decision, long-term lawful permanent residents will now be stripped of their ability to remain in the United States irrespective of the age or nature of their conviction. Ancient convictions for relatively minor matters will now result in the deportation of long-term permanent residents without relief. The only bright spot is the

29. Section 440(a)(10) of the AEPDA states: “[A]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered in section [1251(a)(2)(A)(iii), (B), (C), or (D)] of this title for which both predicate offenses are covered by section [1251(a)(2)(A)(i) of this title], . . . shall not be subject to review by any court.” 8 U.S.C. § 1105a(a)(10) (Supp. II 1996).

30. Matter of Soriano, BIA Int. Dec. No. 3289 (1996), 1997 WL 159795, at *1 (Feb. 21, 1997) (Reno, Attorney General) (citing 8 U.S.C. § 1182(c) (1996)). “Section 212(c) grants the Attorney General discretionary authority to admit otherwise excludable permanent resident aliens. Although the statute expressly authorizes only a waiver of exclusion, courts have interpreted it to authorize relief in deportation proceedings as well.” Id. See Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976); De Osorio v. INS, 10 F.3d 1034, 1039 (4th Cir. 1993).


32. Id.


BIA’s recent opinion finding that the statute does not apply to section 212(c) relief or exclusion proceedings.35

III. FEDERAL CASES AND THE UNITED STATES SUPREME COURT

A. Decisions Affecting Immigration Law

The discussion that follows involves two of the most highly contested issues in relation to the recent changes in immigration law: federal jurisdiction and retroactivity. In an effort to further reduce assistance for aliens in the United States, with or without convictions, the AEDPA and the IIRIRA have sought to revoke the district courts’ jurisdiction to review deportation orders issued by the Immigration and Naturalization Service. The elimination of judicial review indicates that aliens may no longer have a forum in which to argue possible violations of substantive rights. Although the removal of judicial review under section 440(a) of the AEDPA has been upheld in several circuit courts,36 constitutional concerns are prevalent. Retroactive application of newly created statutory provisions and jurisdictional changes under the AEDPA and the IIRIRA are of equal constitutional concern for thousands of immigrants who otherwise would not be affected by the new legislation. The cases below will touch on these issues as they affect the legal rights of immigrants in the United States in light of traditional common law principles.

1. Restraints on Judicial Review

There are considerable arguments against the revocation of judicial review under section 440(a) of the AEDPA and the newly created section 242(g) of the INA. In a recent decision by the United States District Court for the Eastern District of New York, Senior Judge Weinstein held that there was “no indication that Congress intended to take the dramatic—and

35. In re Fuentes-Campos, Int. Dec. No. 3318 (B.I.A. May 14, 1997). The BIA held that before the amendment, section 212(c) barred relief for aliens who “had been convicted” of certain crimes and that the language of the statute covered aliens in exclusion and deportation proceedings. Id. at 4. However, section 440(d) eliminated such language and created a “more limited provision making relief unavailable to any alien ‘who is deportable by reason of having committed any criminal offense . . . .’” Id. As a result, the statute cannot bar 212(c) relief to aliens in exclusion proceedings.

arguably unconstitutional—step of repealing the habeas statute [section 2241 of title 28] with roots traceable to our nation’s beginnings. \(^{37}\) The district courts continue to have judicial authority to issue writs of habeas corpus, and to hold otherwise “would call into question the most basic tenets of our tripartite system of government.”\(^{38}\) Furthermore, the court emphasized that “despite the AEDPA’s withdrawal of jurisdiction, ‘some means of seeking judicial relief remain[s] available.’\(^{39}\)

On the other hand, the Eleventh Circuit has concluded that section 440(a) of the AEDPA does eliminate the courts’ jurisdiction to hear appeals from final orders of deportation of persons with criminal convictions.\(^{40}\) In the case of Boston-Bollers v. INS, the defendant entered the United States in 1987 as a lawful permanent resident.\(^{41}\) On June 19, 1992, Boston-Bollers pled guilty to a charge of second degree murder.\(^{42}\) By March of 1993, the INS “issu[ed] an order to show cause charging that Boston-Bollers was subject to deportation on account of his second degree murder conviction.”\(^{43}\) Boston-Bollers filed a petition for review with the Eleventh Circuit Court, after an appeal to the immigration judge and the Board of Immigration Appeals proved unsuccessful.\(^{44}\) The primary issue was whether section 440(a)(10)\(^{45}\) prevented the review of the denial of discretionary relief from deportation of a long-term lawful permanent resident.\(^{46}\)

The court held that, upon the President’s signature on April 24, 1996, courts no longer had jurisdiction over petitions pending review on final orders of deportation of persons with criminal convictions.\(^{47}\) The opinion discussed several propositions in support of the holding. First, “passage of


\(^{38}\) Id. at 157.

\(^{39}\) Id. at 161 (quoting Yesil v. Reno, 958 F. Supp. 828, 837 & n.7 (S.D.N.Y. 1997)).

\(^{40}\) Boston-Bollers v. INS, 106 F.3d 352 (11th Cir. 1997) (per curiam).

\(^{41}\) Id. at 353.

\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Id. at 354.


\(^{46}\) Boston-Bollers v. INS, 106 F.3d 352, 354 (11th Cir. 1997). The United States Constitution states “[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

\(^{47}\) Boston-Bollers, 106 F.3d at 355.
the AEDPA is not [a] retroactive application affecting substantive rights, but [it] is a prospective application of a jurisdiction-eliminating statute.\textsuperscript{48} Second, the court held that restrictions on the federal courts' jurisdiction did not violate the Due Process Clause since "[t]he power to expel aliens, being essentially a power of the political branches of government, the legislative and executive, may be exercised entirely through executive officers, with such opportunity for judicial review of their action as congress may see fit to authorize or permit."\textsuperscript{49} Third, section 440(a)(10) was not invalid under Article III because it is the duty of the political branches of the federal government to regulate "the relationship between the United States and our alien visitors."\textsuperscript{50}

In Ramirez-Centeno v. Wallis,\textsuperscript{51} the United States District Court for the Southern District of Florida held that the court lacked jurisdiction pursuant to section 242(g) to review orders of deportation of cases filed after the Act's date of effectiveness.\textsuperscript{52} Benito Ramirez-Centeno acknowledged deportability on February 1, 1991, based on an illegal entry into the United States in 1990.\textsuperscript{53} Ramirez-Centeno petitioned for political asylum claiming that he had been "a member of the Nicaraguan Social Christian Party" when he resided in Nicaragua and that he had worked with the Contras in 1985.\textsuperscript{54} His claim was dismissed by the immigration judge, and on December 14, 1994, his appeal to the Board of Immigration Appeals was also dismissed.\textsuperscript{55} Consequently, Ramirez-Centeno requested the district court to grant a writ of habeas corpus enjoining deportation.\textsuperscript{56} The court adopted the Seventh Circuit's position that "the general effective date of ... section 309(a) is the first day of the first month beginning more than 180 days after the date of the

\textsuperscript{48} Id. at 354. \textit{See} Landgraf v. USI Film Prods., 511 U.S. 244 (1994). The court also indicated that a majority of the circuits have ruled consistently with this decision. \textit{See} Kolster v. INS, 101 F.3d 785, 791 (1st Cir. 1996); Hincapie-Nieto v. INS, 92 F.3d 27, 29 (2d Cir. 1996); Salazar-Haro v. INS, 95 F.3d 309, 311 (3d Cir. 1996), \textit{cert. denied}, 117 S. Ct. 1842 (1997); Mendez-Rosas v. INS, 87 F.3d 672, 676 (5th Cir. 1996), \textit{cert. denied}, 117 S. Ct. 694 (1997); Qasgurgis v. INS, 91 F.3d 788, 789 (6th Cir. 1996), \textit{cert. denied}, 117 S. Ct. 1080 (1997); Duldulao v. INS, 90 F.3d 396, 400 (9th Cir. 1996).

\textsuperscript{49} \textit{Boston-Bollers}, 106 F.3d at 355 (citing Carlson v. Landon, 342 U.S. 524, 537 (1952)).


\textsuperscript{51} 957 F.Supp. 1267, 1269 (S.D. Fla. 1997).

\textsuperscript{52} Id. at 1269.

\textsuperscript{53} Id. at 1268.

\textsuperscript{54} Id.

\textsuperscript{55} Id. at 1269.

\textsuperscript{56} Ramirez-Centeno, 957 F. Supp. at 1269.
enactment of this Act,’ or April 1, 1997.” 57 Beginning April 1, 1997, the court would no longer have subject matter jurisdiction over pending cases. Since Ramirez-Centeno’s claim was pre-April 1, 1997, the court had jurisdiction to hear the case. Nonetheless, the effect of this provision will mean the withdrawal of judicial review from thousands of aliens who annually receive orders of deportation.

The government also argued that the AEDPA “eliminated all habeas review of final deportation orders.” 58 As a result, the court did not have the power to issue a writ in Ramirez-Centeno’s case. Section 1105(a)(10) of title 8, United States Code, as amended by the AEDPA, states that “[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense [without regard to the date of its commission] shall not be subject to review by any court.” 59 The court concluded that section 440(a) of the AEDPA withdrew the court’s power to grant writs of habeas corpus to aliens who are deportable by reason of their criminal convictions. 60 Specifically, the “amended language of section 1105a(a)(10) refers only to deportations as the result of criminal activity, while the original language referred to all deportations.” 61

The court also favored a strict interpretation of custody in relation to orders of deportation. 62 The court cited Marcello v. District Director of INS, 63 and stated “that 8 U.S.C. § 1105a require[s] that individuals seeking relief from final orders of deportation must be in the actual custody of the Immigration and Naturalization Service and not merely preparing to be deported.” 64 Since Ramirez-Centeno had not pled guilty and was not in the custody of the INS, the court would be unable to issue the writ of habeas corpus. 65 Other jurisdictions, however, have insisted that physical restraint

57. Id. (citing Illegal Immigration Reform and Immigrant Responsibility Act, § 309(a), 110 Stat. 3009 (1996)). The Seventh Circuit decision of Lalani v. Perryman, 105 F.3d 334, 336 (7th Cir. 1997), held that “on April 1, 1997 all cases filed and currently pending that fall within the boundaries of section 242(g) would be dismissed from federal court for lack of jurisdiction.” Id.
58. Id. at 1270.
60. Ramirez-Centeno, 957 F. Supp. at 1270.
61. Id.
62. Id. at 1271.
63. 634 F.2d 964 (5th Cir. 1981).
64. Ramirez-Centeno, 957 F. Supp. at 1271. See Marcello v. District Dir. of INS, 634 F.2d 964, 968 (5th Cir. 1981).
is not necessary for habeas jurisdiction. Although it appeared that the
district court disfavored the attempts at curtailing judicial review, it
ultimately failed to provide relief from deportation.

Another judge in the Southern District of Florida in Tefel v. Reno, disagreed with the analysis that section 242(g) revokes the district court’s jurisdiction over orders of deportation. Petitioners Roberto Tefel and others similarly situated, sought declaratory, injunctive, and mandatory relief against the Immigration and Naturalization Service, the Department of Justice, and the Board of Immigration Appeals for denying them the right to seek suspension of deportation. On May 20, 1997, United States District Judge James Lawrence King rejected the government’s arguments that 242(g) and other statutes barred judicial review, and, in a lengthy order, granted a temporary restraining order. On June 24, 1997, Judge King incorporated the May 20, 1997 opinion regarding jurisdiction and then proceeded to issue a detailed preliminary injunction preventing the INS from deporting class members. On July 11, 1997, upon the heels of much criticism concerning the federal government’s decision to pursue the mass deportations, the Attorney General declared that the deportations would not be effectuated. Instead, the administration would introduce to Congress a legislative proposal that “would enable applicants for suspension of deportation whose cases were pending prior to April 1, 1997, and who meet the standards which applied at that time, to be granted such relief on a case by case basis.”

66. Mojica v. Reno, 970 F. Supp. 130, 164 (E.D.N.Y. 1997) (Weinstein, J.). The court cited to Nakaranurack v. United States, 68 F.3d 290, 293 (9th Cir. 1995), noting that “so long as he is subject to a final order of deportation, an alien is deemed to be ‘in custody.’” Id. at 164.

68. Id. at 608.
70. Tefel, 972 F. Supp at 608.
71. Id. at 620. The court used the traditional four-part test of whether: “(1) there is a substantial likelihood of success on the merits, (2) the TRO is necessary to prevent irreparable injury, (3) the injury to the plaintiff outweighs any harm to the non-movant, and (4) the TRO would serve the public interest.” Id. (citing Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995)).
Judge King’s May 20, 1997, Order Denying Defendant’s Motion to Dismiss for Lack of Jurisdiction addressed section 242(g) in relation to the plaintiff’s case. The court held that there was “a strong presumption that the actions of federal agencies are reviewable in the federal courts unless nonreviewability is explicitly demonstrated in the statutory language.” This conclusion is consistent with a long line of Supreme Court cases cited by the district court. Judge King also argued that this presumption of reviewability is greater in light of constitutional claims that may arise. Based on the statutory language of section 242(g), he also concluded that the statute did not “bar the review of the decisions or actions of lower level government officials.”

Additionally, if the amendments were to deny the power of district courts to exercise judicial review over claims regarding deportation, aliens would be unable to have their constitutional claims heard. The plaintiff’s due process, equal protection, and estoppel claims would not be addressed by an immigration judge or the BIA because they lack jurisdiction over these matters. Furthermore, the district court is the only forum in which a factual record could be developed for the Eleventh Circuit to review. If jurisdiction is eliminated, Congress would be “intrud[ing] upon the judiciary’s essential function by denying any judicial forum to a plaintiff who asserts a violation of constitutional rights.”

In another unrelated area regarding jurisdiction and aliens, the Eleventh Circuit recently decided the case of Foy v. Schantz, Schatzman, & Aaronson, P.A. This decision is important in several aspects as it relates to aliens filing and maintaining suits in federal court based on diversity of jurisdiction. The Eleventh Circuit resolved the question of whether “an alien

74. Tefel, 972 F. Supp. at 612.
75. Order Denying Defendant’s Motion to Dismiss at 2–3, Tefel, (97-0805).
77. Id. at 3. In Tefel, the judge would later hold that the government’s policy inducing the Nicaraguan immigrants led to the emergence of due process and equal protection concerns. See Order Granting Preliminary Injunction at 33–37, Tefel, (97-0805).
78. Order Denying Defendant’s Motion to Dismiss at 4, Tefel, (97-0805). Section 242(g) states in pertinent part, that “no court should have jurisdiction to hear any cause or claim by or on behalf of any client arising from decision or action by the Attorney General.” Immigration and Nationality Act, 8 U.S.C. § 1182 (1994).
79. Order Denying Defendant’s Motion to Dismiss at 8, Tefel, (97-0805).
80. Id. at 10.
81. Id.
82. 108 F.3d 1347 (11th Cir. 1997).
who intends to reside in this country permanently but who has not yet attained official permanent resident immigration status... should be considered an alien admitted for permanent residence" within the meaning of 28 U.S.C. § 1332(a). In this case, Appellant Foy filed a diversity action claiming legal malpractice against a Florida firm. However, at the time he applied, he was not yet a permanent resident; he was waiting for a green card from the INS. The trial court found no diversity between the parties because it interpreted section 1332(a) to include someone who had applied for a “green card” but had not yet received it, and the person satisfied other criteria for residency in Florida. The court dismissed the action for lack of subject matter jurisdiction.

The Eleventh Circuit held that the word “admitted” under section 1332(a) applied only to those persons who had been granted lawful permanent residence by the INS, regardless of what status individual states conferred to aliens residing within their borders. Foy could, therefore, be considered a citizen for purposes of diversity because, even though he had applied for permanent residency, he was not yet a lawful permanent resident at the time of filing the suit.

B. Presumption against Retroactivity

Another issue which has arisen under new immigration laws is the question of their retroactive effect. An overview of the traditional common law principles upon which our legal system has been based will demonstrate the unsoundness of the retroactive application of the criminal alien provisions under AEDPA section 440(d) as expressed in the Attorney General’s decision in Matter of Soriano. The Attorney General’s decision on retroactivity appears to fly in the face of the Supreme Court’s recent

83. Id. at 1348. Section 1332(a) of title 28 states that “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.” Id. (citing 28 U.S.C. § 1332(a) (1995)).

84. Foy, 108 F.3d at 1348.
85. Id.
86. Id.
87. Id.
89. Foy, 108 F.3d at 1349.
decisions of *Lindh v. Murphy*\(^91\) and *Hughes Aircraft Co. v. United States*,\(^92\) which clarify and amplify the Court’s decision in *Landgraf v. USI Film Products*.\(^93\) As the Supreme Court stated in *Landgraf*: “Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.”\(^94\) Consequently, there is a presumption against retroactive legislation, and “the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.”\(^95\) Retroactive application will “create a situation in which people who have lived in the community, have established themselves as valuable members of society, and who are needed to support their families, are summarily deported without regard to the present and future interests of their families or the community at large.”\(^96\) Such is the case of *Tefel*.

On February 20, 1997, the BIA interpreted the IIRIRA in regard to the provisions on suspension of deportation. In the landmark case, *Matter of N-J-B*,\(^87\) the BIA resolved the issue of retroactivity created by the language of the IIRIRA. In a seven to five decision, the court held that, with respect to the respondent’s claim for suspension of deportation, if a person had been

\(^{91}\) 117 S. Ct. 2059 (1997). The Supreme Court held that the amendments of the AEDPA in relation to habeas corpus reform did not apply to pending noncapital cases. *Id.* at 2061. This case is significant in regard to the issue of retroactivity, because it re-enforced the notion that in the absence of an “express command, the court must determine whether the new statute would have a retroactive effect.” *Id.* at 2062. Since section 107 of the AEDPA applies special habeas corpus procedures in capital cases and section 107(c) expressly provides that the amendment “shall apply to cases pending on or after the date of enactment of this Act[,]” the amendments to noncapital cases, which lack such express language, should be applied prospectively. *Id.* at 2063. Furthermore, retroactive application would “have [a] substantive as well as purely procedural effect[.]” *Id.* This is an example of how, without express language, the Supreme Court will uphold the presumption against retroactivity.

In *Mojica v. Reno*, the Eastern District Court of New York held that “[w]ithout manifest congressional design expressed in clear statutory language, the default rule in statutory interpretation requires prospective implementation.” 970 F. Supp. 130, 172 (E.D.N.Y. 1997). The court found that such express language is lacking and that normally Congress has no trouble in expressing retroactive application of the legislation it creates. *Id.*

\(^{92}\) 117 S. Ct. 1871 (1997).
\(^{93}\) 511 U.S. 244 (1994).
\(^{94}\) *Id.* at 265.
\(^{95}\) *Id.* at 269-70; see also *Hughes Aircraft Co.*, 117 S. Ct. at 1876 (citing *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (noting that the “presumption against retroactive legislation is deeply rooted in our jurisprudence.”)).

\(^{96}\) *Mojica*, 970 F. Supp. at 170.
served with an Order to Show Cause before he or she accrued seven years of continuous physical presence in the United States, then he or she was ineligible for suspension even if the case was on appeal after obtaining suspension before an immigration judge.\(^{98}\)

Specifically, the BIA analyzed section 309(c)(1) of the IIRIRA as establishing the Act’s effective date as April 1, 1997, and found that section 309(c)(5)\(^{99}\) created an exception in regard to claims of suspension of deportation of aliens who received notices to appear before, on, or after the Act.\(^{100}\) INA section 240A(d)(1) provides that any period of continuous physical presence will be terminated “when an alien is served a notice to appear under section 239(a).”\(^{101}\) The BIA held that the term used in section 239(a) of the Act was consistent with the formal document titled “Order to Show Cause” (“OSC”), which is mentioned in 8 U.S.C. § 1252b.\(^{102}\) The BIA held that the terms “notice to appear” and OSC were synonymous and that

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For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end when the alien is served a notice to appear under section 1229(a) of this title or when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or (4) of this title, whichever is earliest.


\(^{99}\) Section 309(c)(5) states: “TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.—Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act [section 1229b(d) of this title] (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of enactment of this Act.” Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 309(c)(5), 8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).


\(^{102}\) 8 U.S.C. § 1252b(a) states:

In deportation proceedings under section 242 [8 U.S.C. § 1252], written notice (in this section referred to as an “order to show cause”) shall be given in person to the alien (or, if personal service is not practicable, such notice shall be given by certified mail to the alien or to the alien’s counsel of record, if any) specifying the following: (A) The nature of the proceedings against the alien. (B) The legal authority under which the proceedings are conducted. (C) The acts or conduct alleged to be in violation of law. (D) The charges against the alien and the statutory provisions alleged to have been violated . . . .

receipt of an OSC terminated the seven years of continuous physical presence.103

The petitioner contended that OSCs are not synonymous with the new notice to appear, arguing that a notice to appear was only first used in section 304 of the IIRIRA.104 Furthermore, in INA section 239(a), “Congress provided extensive and detailed requirements for new notices to appear[,]” which never applied to OSCs under prior law.105 In a brief to the Eleventh Circuit, the petitioner argued that retroactive application of section 309(c)(5) “ignores basic rules of statutory construction, is contrary to the statute’s legislative history, violates principles concerning the retroactive application of statutes as established by the Supreme Court, and violates petitioner’s due process and equal protection rights.”106 The petitioner maintained that the majority’s holding violated the rule of statutory construction, which dictates that “[n]o statute may be read as to render any word or phrase surplusage” when it disregards the phrase “under section 239(a).”107 Similarly, by refusing to give the word “under” its ordinary meaning, the BIA ignored the rule that “legislative purpose is expressed by the ordinary meaning of the words used.”108

Concerning the legislative intent behind the amendments, the petitioner argued that when the House first introduced the bill (the Senate receded section 309 to the House), section 309(c)(5) provided that the period of

105. Id. at 16.
Most significantly, § 239(a) requires that all “notices to appear” shall state “[t]he time and place at which the proceedings will be held” and “[t]he consequences under § 1229a(b)(5) [§ 240(b)(5)] . . . of the failure, except under exceptional circumstances, to appear at such proceeding.” Orders to show cause under pre-IIRIRA § 242B(a)(1) were not required to include either of these advisals.
106. Id. at 10.
107. Id. at 22 (citing Kungys v. United States, 485 U.S. 759 (1988); United States v. Menasche, 348 U.S. 528, 538-39 (1955)).
108. Petitioner’s Brief at 22, N-J-B- (No. 97-4400) (citing Ardestani v. INS, 502 U.S. 129 (1991); INS v. Phinpathya, 464 U.S. 183, 188 (1984)). The petitioner also argues that a third rule of statutory construction was violated by the BIA’s decision. Id. Specifically, the rule which dictates that “[d]ifferent words or phrases used in the same statute have different meanings.” Id. According to Petitioner, “[f]or the BIA majority violated this principle when it failed to recognize that only notices to appear served under § 239(a) interrupt physical presence. It also ignored this canon when it failed to note the distinction between notices to appear that are ‘served,’ and notices to appear that are ‘issued.’” Id.
continuous physical presence "shall be deemed to have ended on the date the alien was served an order to show cause." However, the Berman Amendment, adopted in early 1996, established the current language of section 309(c)(5) and "intentionally deleted the operative language that service of an order to show cause ends physical presence." As a result, the final change incorporated as the legislation, which did not reject the Berman Amendment, could not have intended to incorporate language it had previously rejected.

The petitioner finally contended that various sections under the IIRIRA, when read together, provide a correct interpretation of the relevant statutory sections. Particularly, section 309(c)(1) states that the old law continues to be applicable to deportation and exclusion proceedings before April 1, 1997. Section 309(c)(2) states that the Attorney General may choose to apply the new law to pending cases where an evidentiary hearing has not been held. Similarly, section 309(a)(3) provides that the Attorney General may, at any time before there is a final order of deportation or exclusion,

109. Id. at 33 (citing 104 CONG. REC. at H10898 (daily ed. Sept. 24, 1996)). When H.R. 2022 was introduced into the House on August 5, 1995, section 309(c)(5) provided:

Transitional Rule with Regard to Suspension of Deportation.

- In applying section 244(a) of the Immigration and Nationality Act (as in effect before the date of the enactment of this Act) with respect to an application for suspension of deportation which is filed before, on, or after the date of the enactment of this Act and which has not been adjudicated as of 30 days after the date of the enactment of this Act, the period of continuous physical presence under such section shall be deemed to have ended on the date the alien was served an order to show cause pursuant to section 242A of such Act (as in effect before such date of enactment).

Petitioner's Brief at 33, N-J-B- (No. 97-4400) (citing H.R. 2022, 104th Cong. § 309(c)(5) (1995)).

110. Id. at 34 (citing H.R. REP. No. 104-469, pt. 1, at 183–84 (1996)).

111. Id. at 14. Section 309(c)(1) of the IIRIRA states, "GENERAL RULE THAT NEW RULES DO NOT APPLY. - Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III-A effective date . . . ." 8 U.S.C. § 1101 (Supp. II 1996) (Effective Date of 1996 Amendments).

112. Petitioner's Brief at 14, N-J-B- (No. 97-4400). Section 309(c)(2) of the IIRIRA states, in pertinent part:

ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES. - In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III-A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle).

terminate proceedings and initiate a removal proceeding by serving a notice to appear under section 309 of the new law. According to petitioner, when analyzed together, section 240A(d)(1) terminates the period of continuous physical presence necessary for suspension:

“When the alien is served a notice to appear under §239(a)”... INA § 240A(d) “shall apply to notices to appear issued before, on, or after the date of enactment of this Act [September 30, 1997]”... [and] when the Attorney General elects to apply the new law to old cases, old Orders to Show Cause are effectively converted into the new Notice to Appear under 239(a).

In other words, “the prior-issued Order to Show Cause would terminate a suspension applicant’s physical presence only when and if the Attorney General elected to apply the new law to him under § 309(c)(2) or § 309(c)(3), and actually or constructively served him with a notice to appear under § 239.” The Attorney General suggested she agrees with this view by vacating Matter of N-J-B-. In response, on November 14, 1997, Congress passed legislation titled the Nicaraguan and Central American Relief Act, amending section 309(c) of the IIRIRA. The result is a statutory codification of the decision in Matter of N-J-B-, solidifying retroactive application of IIRIRA, with such exceptions that would provide relief to certain aliens. The Act grants adjustment of status to permanent residency to Nicaraguan and Cuban nationals who have not been convicted of an aggravated felony and who

113. Petitioner’s Brief at 14, N-J-B- (No. 97-4400). Section 309(c)(3) states: ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS. – In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II [of] the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.


115. Id.


118. Id. § 203
were residing in the United States prior to December 31, 1995. Furthermore, Guatemalan and Salvadorian nationals who have entered the United States before October 1, 1990 and September 19, 1990, respectively, who have not been convicted of an aggravated felony, and who registered for benefits under the ABC settlement agreement may apply for suspension of deportation under the previously existing laws. In addition, the law grants to persons from the former Soviet Union and the Eastern Bloc countries the right to seek suspension of deportation under pre-IIRIRA rules, if they entered the United States before December 31, 1990, and filed an application for asylum on or before December 31, 1991. However, the law intentionally excluded Haitian nationals who will have to seek cancellation of removal under the strict guidelines of the IIRIRA or seek remedial legislation separately.

C. Other Policies on Criminal Aliens

The United States District Court for the Southern District of Florida, in United States v. Lazo-Ortiz, demonstrated an example of the rigid penalties awaiting criminal aliens. In this case, the defendant unlawfully reentered the United States after being deported. The government requested that he be given a sentence enhancement of not less than twenty years by virtue of section 1326(b)(2) of the Immigration and Nationality Act or under the United States Sentencing Commission Guidelines (“USSG”). However, in 1990, the statutory definition of “aggravated felony” did not include crimes of violence such as manslaughter. At that time, the defendant instead would have been held to a sentence enhancement of not more than ten years under

119. Id. § 202.
120. Id. § 203.
121. Id.
123. Id. at 255.
124. Id.
125. Id.
126. Section 1326(b)(2) of title 8, United States Code, states that any alien whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under title 18, United States Code, imprisoned not more than 20 years, or both. 8 U.S.C. § 1326(b)(2) (Supp. II 1996).
127. The manual for sentencing states that while the base offense level is eight for aliens unlawfully entering or remaining in the United States, “[i]f the defendant previously was deported after a conviction for an aggravated felony, increase [is] by [sixteen] levels.” U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(2) (1995).
section 1326(b)(1). The court carefully avoided this issue and held that USSG section 2L1.2(b)(2) was nonetheless applicable. Based on the sentencing commission’s guidelines, “all defendants sentenced on or after November 1, 1991, who have an aggravated felony conviction [are] eligible for the sixteen-level increase without regard to the date such felony was committed." Defendants who have convictions for crimes of violence which occurred before passage of the new laws will receive longer sentences. The effect of this policy on criminal aliens is indicative of a violation of the ex post facto prohibition under the United States Constitution, since the law enforced did not exist at the time of the offense.

IV. FLORIDA STATE CASES ON IMMIGRATION

The following cases show how Florida state courts are attempting to preserve the protections afforded defendants in criminal prosecutions. As federal sanctions against aliens with criminal convictions increase, and as their opportunities to remain in the United States decrease due to these convictions, the actions of state courts in vacating convictions becomes substantially more important.

A. Prosecution of Criminal Aliens

The following cases concern rule 3.172(c)(8) of the Florida Rules of Criminal Procedure, which requires a trial judge to inform every defendant pleading guilty or nolo contendre that if he is not a citizen of the United States, he may be subject to deportation. In Hen Lin Lu v. State, the

128. 8 U.S.C. § 1326(b)(1) (Supp. II 1996). Under this section, any alien . . . whose [deportation] was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, United States Code, imprisoned not more than [ten] years, or both.

129. Id.

130. Id. Application Note 7 states: “‘Aggravated felony,’ as used in subsection (b)(2), means . . . any crime of violence (as defined in 18 U.S.C. § 16, not including a purely political offense) for which the term of imprisonment imposed (regardless of any suspension of such imprisonment) is at least five years . . . .” Application Note 7 to U.S.S.G. § 2L1.2.


appellant pled guilty to the charge of burglary. In a motion for post-conviction relief, he claimed that the trial court did not inform him of the possibility of deportation as a result of the plea. Hen Lin Lu had signed a preprinted form informing him of the possibility of deportation. The issue to be resolved was whether a “plea form alone is sufficient to demonstrate compliance with rule 3.172(c)(8).”

The Fourth District Court of Appeal held that, although a judge may use preprinted forms, he or she “must orally verify that the defendant has intelligently consumed the written information contained within it.” Furthermore, the court transcripts must affirmatively show that the defendant’s plea was intelligent and voluntary. Upon consideration, the court found that nothing in the record indicated that Hen Lin Lu’s signature on the form communicated “an intelligent and voluntary waiver of his rights.”

Similarly in Perriello v. State, after a conviction and sentence as a consequence of a plea bargain, Defendant Perriello, an Italian citizen,
received notice of deportation proceedings instituted by the INS. In response, Perriello filed a motion for post-conviction relief, asserting that the trial court did not inform him of the possibility of deportation. The defendant appealed upon denial of this motion. The fourth district held that since nothing in the court transcript showed that the trial judge had informed Perriello of the possibility of deportation, as required by rule 3.172(c)(8) of the Florida Rules of Criminal Procedure, the defendant had been prejudiced and must be permitted to withdraw the plea and go to trial. Interestingly, Perriello signed a written plea agreement warning him of possible immigration problems. Nonetheless, the court reasoned that there was no evidence that showed that he understood the consequences of his plea because the deportation warning was one short paragraph in a seven page document and Perriello had minimal English skills and a low education level.

In another case, the State conceded that the trial court did not inform the defendant before he pleaded nolo contendere, as directed in Florida Rule of Criminal Procedure 3.172(c)(8), that he may be subject to deportation. As a result of the conviction, defendant Beckles was taken into INS custody. Evidently, the State’s failure to inform him ultimately prejudiced Beckles.

Consistent with the above summarized cases, the Fourth District Court of Appeal held in Sanders v. State, that a criminal alien should be allowed to withdraw her plea of nolo contendere and proceed to trial. The State failed to inform defendant Sanders of the possibility of deportation before she accepted the plea. The court rejected the argument that, because the defendant made false statements regarding to her citizenship status, she should be impeded from alleging error. Rather, “[c]ompliance with rule 3.172(c)(8) is mandatory, thus the rule contemplates a trial court will not inquire regarding citizenship.”

142. Id.
143. Id.
144. Id.
145. Id. at 259–60.
146. Perriello, 684 So. 2d at 259.
147. Id. at 260.
149. Id.
150. 685 So. 2d 1385 (Fla. 4th Dist. Ct. App. 1997).
151. Id. at 1385.
152. Id.
153. Id.
154. Id.
In sharp contrast, the Third District Court of Appeal has relied on strict, often bizarre interpretations designed to have harsh effects on aliens. In *Chaar v. State*, the third district affirmed the trial court's order denying Bilal Chaar's petition for writ of *coram nobis*. In 1987, Chaar pled *nolo contendere* to possession of cocaine and drug paraphernalia. Chaar voluntarily left the country under threat of deportation and has now been denied reentry because of his state conviction. Even though the trial judge failed to inform the defendant of the possibility of deportation, as is required regardless of the ultimate immigration consequences, the court bizarrely noted that Chaar departed on his own will and that deportation proceedings were not instituted against him as a direct result of the plea.

In *Ross v. State*, defendant Victor William Ross pled guilty to a cannabis possession charge in 1980, and the trial court withheld adjudication. In 1996, the INS notified Ross of ensuing deportation proceedings, which Ross claimed were based on the 1980 plea. Ross argued that the trial judge failed to inform him of the possible consequences of pleading guilty. Ross asserted that the trial court advised him that the withholding of adjudication was not a conviction and it should not cause any immigration problems. There was no transcript of the plea colloquy to verify these assertions. The court avoided the issue of whether such a misstatement was an error of fact or law and, therefore, did not decide whether a writ of *error coram nobis* was appropriate in this case. The court affirmed the trial court holding that without a plea transcript, the

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155. 685 So. 2d 1037 (Fla. 3d Dist. Ct. App. 1997).
156. *Id.* at 1038.
157. *Id.*
158. *Id.* The court relied on *State v. Ginebra*, which held that "the trial court judge is under no duty to inform a defendant of the collateral consequences of his guilty plea." *State v. Ginebra*, 511 So. 2d 960, 960–61 (Fla. 1987). However, in *State v. Sallato*, the court left open the possibility that the defense counsel’s provision of “positive misadvice” may constitute ineffective assistance of counsel resulting in deportation. 519 So. 2d 605, 606 (Fla. 1988).
159. *Chaar*, 685 So. 2d at 1038.
161. *Id.* at D1073.
162. *Id.*
163. *Id.*
164. *Id.*
166. *Id.* The district court noted that in *Malcolm v. State*, “[i]t is well settled in Florida that the function of a writ of error coram nobis is to correct fundamental errors of fact and that the writ is not available to correct errors of law.” *Malcolm v. State*, 605 So. 2d 945, 947 (Fla. 3d Dist. Ct. App. 1992).
defendant could not receive the relief he sought. In effect, the court held that the government could assert estoppel because of the loss of the transcript, notwithstanding Ross' affidavit about the lack of notice. Ross would not only have to assert that "he would not have entered into the plea agreement but in addition, that had he gone to trial, he most probably would have been acquitted." The court then proceeded to entertain Ross' claims that deportation was unreasonable because of his many years of gainful employment, long standing position in the United States, since the 1980 incident, and the fact that his children were citizens of this country. Any analysis of the strength of these arguments went unheard. Rather, the court found that the proper forum for these claims was the Immigration and Naturalization Service or the Florida Pardon Board. Yet, under the new laws of the IIRIRA and the AEDPA, Ross will be unable to receive relief from deportation and a pardon is of no avail. In contrast, had he been properly informed of the consequences in 1980, he could have sought relief

167. Ross, 22 Fla. L. Weekly at D1073. The court agreed with the trial court that "[w]ithout a proper record of what was said during the plea colloquy, it is impossible for the state to defend against the petition, or for the trial court to make an informed evaluation of defendant's claims." Id.
168. Id.
169. Id.
170. Id.
(A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—
   (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

Id. (emphasis added). Since the trial court withheld adjudication, Ross has a conviction pursuant to immigration laws and is, therefore, a deportable alien. Furthermore, 8 U.S.C. § 1251(a)(2)(B)(i), states:
Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.
from INS. The Third District Court of Appeals has granted rehearing en banc in *Ross.*

B. The Right of Criminal Aliens to Bond

In order to guarantee the protected freedoms of all criminal defendants, immigration laws that affect the criminal prosecution of aliens will be strictly applied. The case of *Santos v. Garrison,*172 shows how the Fourth District Court of Appeal has preserved the right of bond to all criminal defendants, regardless of citizenship.173 Petitioner Jose Santos had an initial bond set at his first appearance and was subsequently released on bond.174 At a later hearing it was discovered that Santos was an undocumented alien and the court immediately revoked his bond.175 Although the government insisted that the bond be revoked, the fourth district granted Santos petition for writ of habeus corpus and issued an order vacating the bond revocation.176 The court reiterated that an increase or revocation of bond may only be imposed if there is a “change in circumstances or upon information not disclosed to the court at the time bond was previously established.”177 In addition, it is the state’s burden, and not the defendant’s, to bring any new information to light.178

The court held that to detain undocumented aliens under section 439 of the AEDPA, the accused must have been convicted of a felony and there must be “receipt of an appropriate hold from the Immigration and Naturalization Service for the purpose of taking the individual into federal custody.”179 In this case, it was the State that failed to inquire whether

172. 691 So. 2d 1172 (Fla. 4th Dist. Ct. App. 1997).
173. *Id.* at 1173.
174. *Id.* at 1172.
175. *Id.*
176. *Id.*
177. *Santos,* 691 So. 2d at 1172.
178. *Id.*
179. *Id.* at 1173. Section 1252c(a) states:
Notwithstanding any other provision of law, to the extent permitted by relevant State and local law, State and local law enforcement officials are authorized to arrest and detain an individual who – (1) is an alien illegally present in the United States; and (2) has previously been convicted of a felony in the United States and deported or left the United States after such conviction, but only after the State or local enforcement officials obtain appropriate confirmation from the Immigration and Naturalization Service of the status of such individual and only for such a period of time as may be required for the Service to take the individual into Federal custody for purposes of deporting or removing the alien from the United States.
Santos was an illegal alien and it was the petitioner who acknowledged his status. Furthermore, no showing was made that Santos had been convicted of a felony, and there was no proof of an appropriate hold from INS that Santos was to be taken into federal custody.

C. **Probation Condition on Aliens**

The Fourth District Court of Appeal held in *Madrigal v. State*, that as a special condition on probation, the presence of an undocumented alien within the state is not, in and of itself, criminal. The defendant in this case entered a nolo contendere plea on several counts, ranging from aggravated assault on a law enforcement officer to discharging a firearm in public. He was sentenced accordingly and the order of probation required "appellant, who apparently was an illegal alien, to remain outside the United States and indicated that being in the United States and particularly Saint Lucie County shall be a violation of probation." The court employed the formula found in *Biller v. State*, to determine whether such a condition was valid. Specifically, a condition of probation is invalid "if it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality." The court concluded that the condition was improper because the defendant’s presence in the United States was not criminal.

V. CONCLUSION

The AEDPA and IIRIRA pose new, difficult challenges for lawful permanent residents and others seeking relief from deportation. The recent

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180. Id.
181. *Santos*, 691 So. 2d at 1172–73.
182. 683 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1996).
183. Id. at 1095.
184. Id. at 1094.
185. Id.
186. 618 So. 2d 734 (Fla. 1993).
188. Id. (quoting *Biller v. State*, 618 So. 2d 734, 734–35 (Fla. 1993)).
189. Id. The court stated that "although entering the United States at a time or place other than as designated by immigration officers can constitute a crime, 8 U.S.C. Sec. 1325, the record does not establish that the [defendant's] presence in the United States is in itself criminal." *Madrigal*, 683 So. 2d at 1095 (quoting *Martinez v. State*, 627 So. 2d 542, 543 (Fla. 2d Dist. Ct. App. 1993)).
federal court cases challenging some of these provisions, particularly in regard to their retroactive application, have arisen in Florida and have taken center stage in the interpretation of these laws.
Juvenile Law: 1997 Survey of Florida Law

Michael J. Dale*

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I. INTRODUCTION

After a two-year hiatus, the Florida Legislature resumed its tradition of regularly restructuring the Florida Juvenile Code in response to perceived problems, particularly in Florida's juvenile justice system.1 The legislature’s

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primary focus during the 1996–97 session was on removing the delinquency part II of chapter 39 and rehousing it with its own title in the *Florida Statutes*. The second purpose was to reorganize the structure of the delinquency section of the juvenile code in a way that would be more logical. The result is a new chapter 985, which became effective on October 1, 1997. The new statute does not have its own title, but the format has been changed. The changes are discussed briefly in this survey. In addition, the legislature moved part IV of chapter 39, governing Families in Need of Services and Children in Need of Services, to chapter 984 and made several changes to it as well.

This past year, the appellate courts were particularly active in the delinquency area, both interpreting chapter 39, and holding the trial courts accountable for compliance with the 1993 and 1994 amendments to the *Florida Juvenile Code*. In light of the legislative changes made in the spring of 1997, it can be anticipated that the appellate courts will have to parse the new delinquency law as they have in the past. Interestingly, the courts of appeal were not as active as they have been in the past in the child welfare arena. The appellate caseload of dependency and termination of parental rights cases appears to have been lighter this year, resulting in fewer new interpretations.

II. DELINQUENCY

A. Detention Issues

The Florida Legislature has changed its approach to juvenile detention on a number of occasions over the past twenty years. It has recently added changes to deal with children charged with committing the offense of domestic violence and children alleged to have violated conditions of


community control or aftercare supervision to the list of children who could be securely detained.\(^4\)

The Florida pretrial detention statute provides that the determination of whether a child will be detained securely is based upon the application of a risk assessment instrument ("RAI"), which in turn is premised upon the charge against the juvenile.\(^5\) If the child scores high enough, the child shall be securely detained.\(^6\) The statute also provides the court with limited discretion to detain a child in secure detention when the RAI scoring threshold would not otherwise be met.\(^7\) However, when the court chooses to override the RAI, it must state clear and convincing reasons in writing why it is making such a placement.\(^8\) As noted in previous surveys, the trial courts have not always correctly interpreted the detention requirements.\(^9\) In D.G.H. v. Gnat,\(^10\) the State Attorney sought to have the child detained securely by "aggravating" the RAI score arising from the underlying claim of battery against a school board employee on school grounds in the presence of other students.\(^11\) The First District Court of Appeal carefully analyzed the legislative history and background of the RAI and concluded that the trial court's authority to order a child held in detention during the pendency of a delinquency case is limited to the statutory factors prescribed in the law.\(^12\) In essence, the trial court accepted a bootstrapping argument, which the appellate court rejected. The state claim was that because the battery was committed in the presence of other students on school grounds and there was a resulting disruption of school functions, the RAI computation could be increased.\(^13\) The appellate court held that all of the RAI points assigned to the child were attributable to the delinquent act for which he had been charged and no other reasons compatible with the statutory criteria were given that would justify a departure.\(^14\) Thus, the lower court had no statutory discretion to order a placement more restrictive than that indicated by the points scored in the RAI.\(^15\) The appellate court thus reversed.\(^16\)

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6. Id. § 39.042(2)(b)1 (recodified at § 985.213(2)(b)(1).
7. Id. § 39.042(2)(b)(3) (recodified at § 985.213(2)(b)(3).
11. Id. at 211.
12. Id. at 213.
13. Id. at 211.
14. Id. at 213.
15. D.G.H., 682 So. 2d at 213.
A similar abuse of discretion occurred in *K.C. v. Taylor*, a case in which the child claimed he was illegally detained based upon a risk assessment scoring that justified placement only in nonsecure or home detention. The trial court had ordered him “placed in secure detention with the proviso that he could be released after 120 hours at the ‘counselor’s discretion.’” The Attorney General’s Office candidly admitted that the detention was illegal and further advised that the same procedure was often used by the trial courts in the second district. The Second District Court of Appeal held that use of the RAI is a legislative mandate and the courts must comply with it. The appellate court then added the following:

We sympathize with the trial court’s frustration that, absent clear and convincing reasons to depart from the placement required by the risk assessment instrument, the court had no choice but to release K.C. from secure detention, despite his record of a prior delinquency and his current charge of using a broken table leg to menace a teacher. Until the legislature empowers juvenile court judges with the measure of discretion afforded to criminal court judges to protect society from its dangerous elements, delinquent offenders will be released back into society despite a belief by the juvenile court judge that contrary action is warranted.

The appellate court’s frustration is evident and raises an important question of whether, and if so, to what degree, discretion in handling juvenile matters should be placed in the hands of the courts or the legislature. The appellate court expressed additional frustration, commenting that few petitions involving the legality of juvenile detention raise challenging legal questions. Most petitions are *pro forma* matters in which the trial court fails to comply with the statutory provisions of chapter 39. As this commentator has written in prior survey articles, and as the appellate court held in *K.C.*: “The processing of petitions of obvious merit such as this one consumes public resources of the public defender’s office,
the attorney general’s office and this court—time which could be better spent on disputes that are honestly debatable. 25

In T.B. v. Wright, 26 a juvenile petitioned for a writ of habeas corpus alleging that he could not be held in detention on a charge of burglary beyond twenty-one days without good cause. 27 The trial court detained him, relying on his prior record and the perceived danger to the community. The appellate court found that this rationale did not comply with the Florida statute. 28 The ground for extending detention is a delay resulting from a continuance granted by the court for cause on motion of the child, his or her counsel, or the state. 29 Here, the detention extension was based upon the original grounds for detention which the appellate court rejected. 30

The Florida detention statute also governs post-adjudication and post-Disposition detention. 31 In T.M. v. State, 32 a child appealed from the imposition of a five-day detention period in addition to other penalties permitted by law after he had been adjudicated delinquent for carrying a concealed firearm. 33 Section 790.22(9)(a) of the Florida Statutes provides that a five-day detention period shall be imposed on any juvenile who commits an offense that involves the use or possession of a firearm. 34 The juvenile claimed that the statute violated equal protection because an adult who committed the same offense was not subject to the same mandatory incarceration period. 35 The Third District Court of Appeal rejected the equal protection argument on both state and federal constitutional grounds. 36 It held first that juveniles and adults are not similarly situated because “the state’s interests in juvenile offenders is vastly different from its interests in adult offenders.” 37 The court also declared that the test for treating the two groups differently is whether there is a rational basis to do so. 38 Finally, the court held that the government’s objective bore a reasonable relationship to

25. Id.
27. Id. at 82.
28. Id. at 83.
30. T.B., 679 So. 2d at 83.
32. 689 So. 2d 443 (Fla. 3d Dist. Ct. App. 1997).
33. Id. at 444.
34. FLA. STAT. § 790.22(9)(a) (1995).
35. T.M., 689 So. 2d at 444.
36. Id.
37. Id. at 445.
38. Id.
the legitimate state objective of reducing the alarming and escalating number of firearms in the hands of juveniles.\textsuperscript{39}

B. Adjudicatory Issues

The question of whether charging two fifteen-year-old boys who engaged in consensual sex with two twelve-year-old girls with statutory rape violated the boys’ right to privacy under the Florida Constitution was before the Fifth District Court of Appeal in \textit{State} v. \textit{J.A.S.}\textsuperscript{40} The appellate court upheld the constitutionality of section 800.04, which the State relied upon to charge the youths.\textsuperscript{41} In so doing, the court did not rely upon the seminal opinion by the Supreme Court of Florida in \textit{T.W.} v. \textit{State}\textsuperscript{42} which upheld the right to privacy for a minor seeking an abortion.\textsuperscript{43} Rather, the court relied upon the Supreme Court of Florida’s opinion in \textit{B.B.} v. \textit{State},\textsuperscript{44} and the legislature’s intent in enacting section 800.04.\textsuperscript{45} The court concluded that sexual activity between minors is prohibited whether or not each of the participants believes he or she consented.\textsuperscript{46} Further, the legislature viewed the problem of consensual sex as serious.\textsuperscript{47} Therefore, the statute furthered a compelling state interest through the least intrusive means, the test set forth in \textit{T.W.}\textsuperscript{48} The problem remaining in the \textit{J.A.S.} case was whether the penalty was appropriate. The court held that the trial court had the power to adjudicate a minor a felon if the situation justified it.\textsuperscript{49} As a result, it vacated and remanded.\textsuperscript{50} However, the court also certified the following question to the Supreme Court of Florida as one of great public importance:

\textbf{WHETHER THE POTENTIAL PENALTY FOR VIOLATION OF SECTION 800.04, FLORIDA STATUTES, BY A MINOR UNDER THE AGE OF SIXTEEN FURTHERS A COMPPELLING}
STATE INTEREST THROUGH THE LEAST INTRUSIVE MEANS.\textsuperscript{51}

Juvenile curfew ordinances are a popular political response to the complicated problems of youth crime.\textsuperscript{52} In \textit{Cuva v. State},\textsuperscript{53} an ordinance in effect in Orlando generated an appellate opinion on a search and seizure question.\textsuperscript{54} An Orlando police officer stopped a juvenile because the appellant was in downtown Orlando after midnight and appeared to be under eighteen, thus in violation of the city's curfew ordinance. The appellate court found that the ordinance allowed the police officers to do several things, including issuing a trespass warning or ordering the juvenile to leave downtown Orlando.\textsuperscript{55} According to the ordinance, "the officers could only detain... if there was probable cause to believe [the juvenile] was abandoned, neglected or a threat to himself."\textsuperscript{56} The juvenile in the \textit{Cuva} case met none of these criteria. Further, violation of the ordinance was neither a crime nor a noncriminal violation. There was no provision for the minor to be detained unless it appeared the minor was abandoned, neglected, or in danger.\textsuperscript{57} Thus, the ordinance gave the police no authority to detain the juvenile once he told them his age.\textsuperscript{58} The initial contact was consensual, and after the youngster answered the officer's questions, the officer could not detain him absent an articulable suspicion that the youngster had committed, was committing, or was about to commit a crime.\textsuperscript{59} The appellate court therefore reversed.\textsuperscript{60}

A child who is unable to assist in his or her defense at trial may be committed to the Department of Children and Families ("DCF") for residential treatment in order to restore competency. In \textit{K.D. v. Department of Juvenile Justice},\textsuperscript{61} the child claimed, \textit{inter alia}, that the commitment statute was unconstitutional because it did not require a psychiatrist to recommend commitment as provided under the adult involuntary

\textsuperscript{51} Id. at 1370.
\textsuperscript{52} See 1996 Survey, supra note 1, at 207–08.
\textsuperscript{53} 687 So. 2d 274 (Fla. 5th Dist. Ct. App. 1997).
\textsuperscript{54} Id. at 275.
\textsuperscript{55} Id. at 276.
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Cuva, 687 So. 2d at 275.
\textsuperscript{59} Id. at 277.
\textsuperscript{60} Id. at 274.
\textsuperscript{61} 694 So. 2d 817 (Fla. 4th Dist. Ct. App. 1997).
commitment statute. The appellate court held that the comparable adult rule of criminal procedure dealing with incompetent defendants does not require the appointment of a psychiatrist or the court’s receipt of a psychiatric report in order to commit an adult defendant found to be incompetent to proceed. Thus, the juvenile offender and the adult criminal defendant are treated similarly for purposes of the determination of incompetency, and the court therefore affirmed the commitment.

A First Amendment student’s rights case was recently decided by the Third District Court of Appeal in *M.C. v. State*. A middle school student in Dade County was arrested as a result of disruptive activities, including an intentionally loud tirade and protest in the school’s office resulting from the arrest of her brother on the battery of a police officer. The juvenile was charged in a one count petition of delinquency for violation of the Florida statute governing disruption and interference with the operation of schools. She moved to dismiss the delinquency petition on the grounds that it was facially unconstitutional in violation of free speech, overbreadth, and vagueness. The district court upheld the statute in all respects. The court rejected the free speech claim relying both on state and federal constitutional case law. In *L.A.T. v. State*, the Third District Court of Appeal had reversed a juvenile’s adjudication of delinquency for disorderly conduct based upon the child’s screaming obscenities to police officers who were arresting the juvenile’s friend in a shopping center parking lot. The court distinguished the *M.C.* situation, finding that a school setting is entirely different from an open public setting. Furthermore, the court relied upon *Tinker v. Des Moines Independent Community School District*, which held that the key question was whether the forbidden conduct or expression “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.” The court held that the Florida statute did

62. *Id.* at 818; see also Fla. Stat. § 39.0517 (Supp. 1996) (recodified at § 985.223 (1997)).
64. *K.D.*, 694 So. 2d at 818.
65. 695 So. 2d 477 (Fla. 3d Dist. Ct. App. 1997).
67. *M.C.*, 695 So. 2d at 478.
68. *Id.* at 484.
69. *Id.* at 480–81.
70. 650 So. 2d 214 (Fla. 3d Dist. Ct. App. 1995).
71. *Id.* at 215–17.
72. *Id.* at 217.
74. *Id.* at 513.
not violate the First Amendment under *Tinker* because its intended purpose was to prevent only expression or conduct which materially disrupts or interferes with normal school functions or activities.\(^{75}\)

In *G.R.A. v. State*,\(^{76}\) a child appealed a disposition which, *inter alia*, placed the child on community control for one year after withholding adjudication.\(^{77}\) The appellate court held that the relevant statute specifies the dispositional powers of the trial court when it has jurisdiction over an adjudicated child under which circumstances the commitment may not exceed the maximum term of imprisonment which an adult could serve for the same offense.\(^{78}\) However, nothing in the statute covers a court's dispositional powers when the adjudication is withheld. Despite this fact, the appellate court held that the trial court should not be allowed to impose a penalty harsher than that permitted for an adjudicated delinquent or an adult offender.\(^{79}\) Therefore, the court reduced the commitment to the time established for an adjudicated delinquent or adult.\(^{80}\)

In *P. W.G. v. State*,\(^{81}\) one of the issues on appeal was whether the court could enter an order of disposition placing a child in a high risk level facility specializing in treatment of adolescent sexual offenders based upon a report that included a judgment based upon the child's prior uncharged criminal activity.\(^{82}\) The court of appeal stated that there was no due process violation in making that decision.\(^{83}\) The due process analysis contained in *In re Gault*\(^{84}\) dealt only with procedural due process.\(^{85}\) It did not address substantive due process rights.\(^{86}\) Because the purposes of the juvenile and adult criminal justice processes are different, the court held that it was constitutionally permissible for the trial court to impose whatever treatment plan it concluded was most likely to be effective for the particular child as long as it did "not pose a significant threat to the health or well-being of the child."\(^{87}\)

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\(^{75}\). *M.C.*, 695 So. 2d at 481.

\(^{76}\). 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).

\(^{77}\). *Id.* at 1027.


\(^{79}\). *G.R.A.*, 688 So. 2d at 1028.

\(^{80}\). *Id.* at 1028–29.

\(^{81}\). 682 So. 2d 1203 (Fla. 1st Dist. Ct. App. 1996).

\(^{82}\). *Id.* at 1204.

\(^{83}\). *Id.* at 1206–08.

\(^{84}\). 387 U.S. 1 (1967).

\(^{85}\). *P. W.G.*, 682 So. 2d at 1207.

\(^{86}\). *Id.*

\(^{87}\). *Id.* at 1208.
C. Right to Counsel Issues

The right to counsel is a basic precept of the juvenile court system emanating from In re Gault. Florida provides for counsel by statute and under the Florida Rules of Juvenile Procedure. Rule 8.165 sets forth the obligation of the court to provide counsel and the grounds under which the child may waive counsel. Periodically, the trial courts either fail to appoint counsel or advise juveniles of the right to a lawyer. In N.R.L. v. State, an adjudicatory order was entered following the child's uncontested plea to grand theft. The child was not represented by counsel when he entered his plea, and the appellate court found that no thorough inquiry was made into the juvenile's desire to waive the right to counsel as required by Rule 8.165(b)(2) of the Florida Rules of Juvenile Procedure. The court reversed, finding that the child must be advised of the right to counsel, and, if he chooses to waive counsel, the court must determine whether the waiver was freely and intelligently made.

If a child indicates a desire to waive counsel, the court must ensure by "thorough inquiry" that the waiver is freely and intelligently made. In D.V.L. v. State, the Second District Court of Appeal analyzed the proposition that a plea be knowing and voluntary. In D.V.L., the trial court never determined that the plea was entered "voluntarily and with an understanding of the nature of the allegations," and the possible consequences of such plea, and that there is a factual basis for such plea. The appellate court found that the "plea colloquy was woefully inadequate," and thus reversed and remanded.

The right to a speedy trial, based upon rights secured by the Sixth Amendment in adult cases, also applies in juvenile delinquency cases.

88. Gault, 387 U.S. at 42.
89. FLA. STAT. § 39.041 (1995); FLA. R. JUV. P. 8.165.
90. FLA. R. JUV. P. 8.165.
92. 684 So. 2d 299 (Fla. 5th Dist. Ct. App. 1996).
93. Id. at 299.
94. Id.
95. Id. at 300.
97. 693 So. 2d 693 (Fla. 2d Dist. Ct. App. 1997).
98. Id. at 694.
99. Id.; FLA. R. JUV. P. 8.075.
100. D.V.L., 693 So. 2d at 694.
101. Id.
R.J.A. v. Foster, the Supreme Court of Florida upheld the right. Recently, in State v. T.W., the State appealed from an order granting a motion to dismiss a delinquency petition based upon a speedy trial violation claiming that the State could file outside the ninety-day speedy trial period based upon a fifteen-day “window of recapture period” provided by the Florida Rules of Juvenile Procedure. The court held that the rule does not allow the State to file a delinquency petition after the ninety day period has already expired. In the case at bar, the speedy trial period expired one day before the charges were filed against the child. Because the State was not entitled to file the charges against the child beyond the ninety day period, it could not avail itself of the recapture period.

In 1985, the United States Supreme Court decided a very important case regarding the constitutional rights of children in public schools. In New Jersey v. T.L.O., the Court established the standard for search and seizure by a school official, holding that it is one of reasonable suspicion as opposed to probable cause. In J.A.R. v. State, a child was adjudicated to have committed the offenses of possession of a firearm on school grounds, carrying a concealed weapon, and possession of a firearm by a minor. The child argued, inter alia, that the hand gun seized from his person on the first day of school by a deputy sheriff in the presence of an assistant principal should have been suppressed. When a teacher learned that the juvenile might have the weapon, the official called the school resource officer, who was a deputy sheriff assigned to the school. The deputy performed a pat-down and felt the holstered pistol in the boy’s waist band. The significant issue was the involvement of the deputy sheriff, who as a police officer, generally needs to have probable cause to search, as opposed to the assistant principal, who needed merely reasonable suspicion to interrogate and search under T.L.O. The court held first that because the child was carrying a gun on his person in the classroom during the school day, either a school

103. 603 So. 2d 1167 (Fla. 1992); see also 1992 Survey, supra note 1, at 347.
104. Id. at 1171–72.
105. 679 So. 2d 69 (Fla. 4th Dist. Ct. App. 1996).
106. Id.; see FLA. R. JUV. P. 8.090(j).
107. T.W., 679 So. 2d at 70.
108. Id.
109. Id.
111. Id. at 341.
112. 689 So. 2d 1242 (Fla. 2d Dist. Ct. App. 1997).
113. Id. at 1243.
114. Id.
115. Id.
official or a police officer needed only have reasonable suspicion to conduct
the inquiry because the inquiry was in the nature of a "Terry stop," referring
to the Supreme Court decision in Terry v. Ohio.\textsuperscript{116} The court further held, in
an apparent expansion of T.L.O., that as a general proposition, a school
official who has reasonable suspicion that a student is carrying a dangerous
weapon may request any police officer to perform a pat-down search and
that the involvement of the police officer will not violate the student's
Fourth Amendment right or require probable cause for such a search.\textsuperscript{117}
The court's rationale was:

It would be foolhardy and dangerous to hold that a teacher or
school administrator, who often is untrained in firearms, can search
a child reasonably suspected of carrying a gun or other dangerous
weapon at school only if the teacher or administrator does not
involve the school's trained resource officer or some other police
officer.\textsuperscript{118}

In addition, the court reasoned that courts have held that random
suspicionless administrative searches have been approved because of the
danger of students carrying such weapons.\textsuperscript{119}

In a second case, A.S. v. State,\textsuperscript{120} the Second District Court of Appeal
applied the two-part T.L.O. standard: That the search is grounded in
reasonable suspicion if it is justified at its inception, and that it is reasonably
related in scope to the circumstances which justified the search in the first
place.\textsuperscript{121} In A.S., the assistant principal saw a group of boys huddled
together, one of the students with money in his hand, and the appellant
fiddling in his pocket. The official could see no contraband, and thus the
court held the search was not justified at its inception.\textsuperscript{122} The court also held
that because the student was fiddling with his pockets, the search of his
backpack and wallet was unreasonable as well.\textsuperscript{123}

\begin{flushleft}
\textsuperscript{116} Id. at 1244 (citing Terry v. Ohio, 392 U.S. 1 (1968) and relying upon New York case
law cited in In re Gregory M., 627 N.E.2d 500, 502 (N.Y. 1993)).
\textsuperscript{117} J.A.R., 689 So. 2d at 1244.
\textsuperscript{118} Id.
\textsuperscript{119} Id. (citing State v. J.A., 679 So. 2d 316 (Fla. 3d Dist. Ct. App. 1996)).
\textsuperscript{120} 693 So. 2d 1095 (Fla. 2d Dist. Ct. App. 1997).
\textsuperscript{121} Id. at 1095 (citing New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985)).
\textsuperscript{122} Id. at 1096.
\textsuperscript{123} Id.
\end{flushleft}
D. Dispositional Issues

The dispositional alternatives available in the *Florida Juvenile Code* include restitution, community control, and commitment to various facilities operated either directly or under contract by the Department of Juvenile Justice ("DJJ"). Although the suggestion has been made previously in this survey that the dispositional statute is not particularly complex, the appellate courts continue to rule primarily on rather mundane and repetitious issues of error by the trial courts. For example, section 39.052(4) of the *Florida Statutes* governs the procedures for disposition, and section 39.052(4)(e)1. specifically states:

If the court determines that the child should be adjudicated as having committed a delinquent act and should be committed to the department, such determination shall be in writing or on the record of the hearing. The determination shall include a specific finding of the reasons for the decision to adjudicate and to commit the child to the department.

In *K.Y.L. and N.L. v. State*, the trial court gave no reason for its commitment decision as to one child and, as to the other, the court erred by relying on the child's lack of contrition or remorse to place the child. Lack of contrition or remorse is a constitutionally impermissible consideration in imposing sentence, as at least three earlier appellate court decisions have held. In *J.M. v. State*, the State conceded that the trial court erred in failing to make the requisite findings and the court reversed.

The same problem has arisen regularly with regard to the trial court's obligation to enter a written order when it imposes an adult sentence, as opposed to a juvenile disposition, when the child has been tried as an adult.

127. 685 So. 2d 1380 (Fla. 1st Dist. Ct. App. 1997).
128. Id. at 1381.
130. 692 So. 2d 308 (Fla. 4th Dist. Ct. App. 1997).
131. Id. at 308; *see also 1996 Survey, supra* note 1, at 198–99; K.M.T. v. State, 695 So. 2d 1309, 1310 (Fla. 2d Dist. Ct. App. 1997); J.R.C. v. State, 696 So. 2d 822, 822 (Fla. 2d Dist. Ct. App. 1997) (holding that the court must specify its reasons in writing or on the record of the hearing).
adult. Prior to October 1, 1994, the Florida Legislature required trial courts to make specific, detailed written findings justifying the imposition of the adult sentence. Now, the court need only make a written order of the decision to impose adult sanctions. In four reported decisions, Culliver v. State, McBride v. State, Ledbetter v. State, and Brown v. State, the courts of appeal reversed for failure to enter a written order as provided by the revised statute.

A relatively new form of disposition under Florida law is a fifteen day secure detention placement pending transfer to the Department of Juvenile Justice for commitment. In R.E.D. v. Gnat, the First District Court of Appeal was faced with the question of whether the fifteen day limitation applied to a juvenile who was going to be placed in a high or maximum risk facility operated by DJJ. The State argued that the fifteen day limitation on secure detention pending placement applied only to juveniles awaiting placement in lower to moderate risk residential programs, and that there was no limitation on those awaiting placement in a high risk program. The appellate court agreed and found that the more specific provision of the section controls, and because it placed no time limit on secure detention, the continued confinement was lawful.

In C.H. v. Makemson, a second case that interpreted the post—disposition secure detention statute, the question was how many days a child may be ordered into secure detention for violating the terms of home detention care with electronic monitoring while awaiting a moderate risk placement. The court ordered the child placed in secure detention for ten days. The child argued that the maximum placement was five days.

135. 693 So. 2d 1152, 1152 (Fla. 1st Dist. Ct. App. 1997).
136. 695 So. 2d 405, 405 (Fla. 5th Dist. Ct. App. 1997).
140. See Fla. Stat. § 39.044(10)(a)1 (Supp. 1996) (recodified at § 985.215 (10(a)1 (1997)).
142. Id. at 848.
143. Id. at 849.
144. Id.
145. 692 So. 2d 302 (Fla. 4th Dist. Ct. App. 1997).
146. Id. at 303.
147. Id.
148. Id.
The court agreed with the child’s interpretation of the statute and granted the writ of habeas corpus.\(^\text{149}\)

When a child has been found to have committed a delinquent act and the court considers its disposition of the case, “the court [must] consider a pre—disposition report regarding the suitability of the child for disposition other than by adjudication and commitment to [DJJ].”\(^\text{150}\) The dispositional report results from a multidisciplinary assessment, if needed, and a “classification and placement process” with recommendations.\(^\text{151}\) Trial courts seem to have had difficulty interpreting their responsibilities in reviewing and evaluating the DJJ recommendation. For example, in \textit{R.D. v. State},\(^\text{152}\) the DJJ prepared a predisposition report recommending community control but the court rejected it.\(^\text{153}\) On appeal, the First District Court of Appeal found that the trial court rejected the recommendation and imposed a high risk commitment without first securing another recommendation from DJJ as to the restrictiveness level which the statute required.\(^\text{154}\) The court relied upon earlier opinions in \textit{S.R v. State},\(^\text{155}\) and \textit{K.Y.L. & N.L. v. State},\(^\text{156}\) of which held that the court must receive and consider a recommendation from the DJJ as to restrictiveness level before ordering a commitment.\(^\text{157}\) Apparently, the courts were interpreting the statute to require a second recommendation after the initial rejection.\(^\text{158}\)

In \textit{T.M.B. v. State},\(^\text{159}\) the trial court disregarded DJJ’s pre-disposition report recommendation and gave no reason for its decision.\(^\text{160}\) Because it failed to articulate its rationale, the appellate court reversed.\(^\text{161}\) Thus, the trial court’s departure from a DJJ recommendation is appealable.\(^\text{162}\)

Of course, the trial court does have the power to deviate from the DJJ’s recommended commitment level.\(^\text{163}\) Section 39.052(4)(e)3 of the \textit{Florida

\begin{itemize}
\item\(^\text{149}\) Id.
\item\(^\text{150}\) FLA. STAT. § 39.052(4)(a) (Supp. 1996).
\item\(^\text{151}\) Id.
\item\(^\text{152}\) 22 Fla. L. Weekly D1235 (1st Dist. Ct. App. May 13, 1997).
\item\(^\text{153}\) Id. at D1235.
\item\(^\text{154}\) Id.
\item\(^\text{155}\) 683 So. 2d 576 (Fla. 1st Dist. Ct. App. 1996).
\item\(^\text{156}\) 685 So. 2d 1380 (Fla. 1st Dist. Ct. App. 1997).
\item\(^\text{158}\) See J.P.M. v. State, 688 So. 2d 458, 458 (Fla. 1st Dist. Ct. App. 1997).
\item\(^\text{159}\) 689 So. 2d 1215 (Fla. 1st Dist. Ct. App. 1997).
\item\(^\text{160}\) Id. at 1216.
\item\(^\text{161}\) Id.
\item\(^\text{162}\) J.M. v. State, 677 So. 2d 890, 892 (Fla. 1st Dist. Ct. App. 1996).
\item\(^\text{163}\) See 1996 Survey, supra note 1, at 200.
\end{itemize}
Statutes governs the process whereby the court may disagree with the DJJ placement recommendation. The statute provides:

The court shall commit the child to the department at the restrictiveness level identified or may order placement at a different restrictiveness level. The court shall state for the record the reasons which establish by a preponderance of the evidence why the court is disregarding the assessment of the child and the restrictiveness level recommended by the department. Any party may appeal the court’s findings resulting in a modified level of restrictiveness pursuant to this subparagraph.

The issue in R.L.B. v. State was whether the court could deviate from the recommended commitment level by placing the child at the high risk restrictiveness level when there was no high risk program available. The appellate court held that the trial court acted within its authority when it assigned the juvenile to the specific restrictiveness level. What the court cannot do, according to Florida case law, is choose a particular placement for the child. The First District Court of Appeal noted that the ultimate resolution lay in the legislature to provide an appropriate placement, but nonetheless, the statute gave the appellate court the power to set that level.

Finally, in R.D.S. v. State, a child appealed from a dispositional order disregarding DJJ’s minimum risk placement recommendation based upon the court’s observation of the child. The court found the child’s body language offensive to the court because it was disrespectful and contemptuous. The appellate court held that lack of contrition or remorse is not sufficient to overcome the burden placed upon the trial court when it disregards placement recommendations.

The extent to which a juvenile court can impose “moral” and “spiritual” training was before the First District Court of Appeal in M.C.L. v.
The child challenged the order on both state and federal constitutional grounds. The court held that the imposition of moral training did not violate either the federal or Florida constitutional provisions relating to free exercise of religion, but that the spiritual training portion was unconstitutional. The court concluded that the moral training bore a relationship to the crime for which the juvenile had been adjudicated and reasonably related to future criminality. Finally, the First District Court of Appeal upheld the trial court's order that the mother participate with her child in fulfilling the court ordered sanction. The court held that the order as to the mother was within the dispositional power expressly granted to the court by statute.

Another dispositional alternative is community control, known in other jurisdictions as probation. The contours of this dispositional alternative continue to evade the grasp of the trial courts. Nine reported opinions by the courts of appeal are illustrative of the kinds of problems that arise. In J.S. v. State, the trial court, as a condition of community control, instructed the child to stay away from "negative peers." The Third District Court of Appeal reversed on the grounds that the description was too vague to be enforceable.

Section 39.054 of the Florida Statutes governs the placement on community control. Subpart 4 provides as follows:

Any commitment of a delinquent child to the Department of Juvenile Justice must be for an indeterminant period of time... but the time may not exceed the maximum term of imprisonment that an adult may serve for the same offense... [A] child may not be held under a commitment from a court pursuant to this section after becoming 21 years of age.

Thus, the statute clearly provides that commitment and community control shall be limited to the maximum adult sentence or to the date of the juvenile's nineteenth birthday, whichever happens first.
In *C.P. v. State*, the court committed a child on a third degree felony, punishable by imprisonment not to exceed five years, to community control for an indeterminate period exceeding five years. The appellate court reversed and remanded with instructions to the lower court to clarify the order to place the child on community control for an indeterminate term not to exceed five years. In *M.S. v. State*, the State conceded sentencing error and the court remanded based upon the *C.P.* opinion. In *V.W. v. State*, the trial court placed the child on community control until the child's nineteenth birthday based upon an adjudication of a first degree misdemeanor. The maximum sentence for a first degree misdemeanor for an adult is one year in county jail or community control. In light of the disposition for more than the period an adult would face, the appellate court vacated the sentence and the case was remanded.

However, in *M.B. v. State*, after a child was found to have committed one count of battery, the court withheld adjudication and placed the child on community control under Department of Health and Rehabilitative Services supervision for an indeterminate period. The court of appeal held that because the child was not “adjudicated” for purposes of chapter 39, his case was governed by a separate section of the *Florida Statutes*: Section 39.053. Under this law, the restrictions relating to community control and comparisons to adult sanctions do not apply.

A more technical matter came before the court in *C.L. v. State*. Among the issues the child raised on appeal was the failure of the court to announce seventy-five hours of community service at the sentencing. The Fourth District Court of Appeal affirmed, finding that the conditions of

185. 674 So. 2d 183 (Fla. 2d Dist. Ct. App. 1996).
186. *id.* at 1184.
187. *id.*
188. 695 So. 2d 891 (Fla. 2d Dist. Ct. App. 1997).
189. *id.* at 891 (citing *C.P. v. State*, 674 So. 2d 183 (Fla. 2d Dist. Ct. App. 1996)).
190. 693 So. 2d 722 (Fla. 5th Dist. Ct. App. 1997).
191. *id.* at 723.
192. *id.*
194. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).
195. *id.* at 1066.
197. *M.B.*, 693 So. 2d at 1067.
198. *id.*
199. 693 So. 2d 713 (Fla. 4th Dist. Ct. App. 1997).
200. *id.* at 715.
community control need not be orally pronounced at the sentencing.\textsuperscript{201} In another technical holding, \textit{J.K.N. v. State},\textsuperscript{202} a child appealed a final order of disposition that he violated the community control disposition by failing to attend school.\textsuperscript{203} The appellate court reversed, finding that the evidence at the violation hearing did not establish that anyone had instructed the child to attend school.\textsuperscript{204} Apparently, existence of an order alone did not suffice.

One of the common conditions of community control is regular school attendance with no unexcused absences. In a series of consolidated appeals in \textit{F.A.T. v. State},\textsuperscript{205} the juveniles claimed the affidavits alleging violation of community control were based upon "confidential and inadmissible computer-generated school attendance records impermissibly obtained and [employed] by the state attorney's office in violation of [Florida law]."\textsuperscript{206} Specifically at issue was section 228.093 of the \textit{Florida Statutes} which governs privacy of school records and the state constitutional right to privacy.\textsuperscript{207} The appellate court first found that the attendance records, consisting of records of absences and an absence and warning summary from the school system, were covered by the statute, and thus, not subject to public disclosure.\textsuperscript{208} The court then found that none of the statutory exceptions to nondisclosure applied.\textsuperscript{209} One of the exceptions to the disclosure rule involves using the records to determine the appropriate programs and services for juveniles and their families.\textsuperscript{210} Therefore, the use of such records is admissible in a dispositional hearing but not in any prior proceedings.\textsuperscript{211} The court held that a contempt proceeding is neither a dispositional nor a post-dispositional hearing.\textsuperscript{212} To the contrary, the act of indirect criminal contempt constitutes a delinquent act. The contempt proceeding, therefore, is not a post-dispositional proceeding.\textsuperscript{213} For that reason, the records were held inadmissible.\textsuperscript{214}

\textsuperscript{201} Id. (citing A.B.C. v. State, 682 So. 2d 553 ( Fla. 1996)).
\textsuperscript{202} 691 So. 2d 1169 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{203} Id. at 1169.
\textsuperscript{204} Id.
\textsuperscript{205} 690 So. 2d 1347 (Fla. 1st Dist. Ct. App. 1997).
\textsuperscript{206} Id. at 1348.
\textsuperscript{207} Id. (citing Fla. Stat. § 220.093 (1995)).
\textsuperscript{208} Id. at 1349.
\textsuperscript{209} Id. at 1350.
\textsuperscript{210} F.A.T, 690 So. 2d at 1350.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 1350Es1.
\textsuperscript{214} Id.
The appropriate application of Florida's restitution statute continues to create problems for the trial courts. The Supreme Court of Florida, in J.O.S. v. State, recently resolved one significant issue: Whether, in the absence of a plea agreement, restitution could be ordered in an amount greater than the maximum dollar figure defining the offense for which the child had been adjudicated. The Supreme Court of Florida answered the question in the affirmative. The court first reiterated that damage must be caused by the charged offense before it would be subject to an order of restitution in a juvenile proceeding. Specifically, the damage must bear a significant relationship to the convicted offense. Next, the court compared the juvenile restitution situation to that of an adult criminal defendant and applied the same test it had previously applied to adults in Hebert v. State. In the adult case, the Supreme Court of Florida ruled that a trial court could order restitution that exceeded the amount defined by the maximum dollar value of the offense when a plea agreement expressly left the amount of restitution to the discretion of the trial court. The only difference between the Hebert case and the case at bar was the issue of whether discretion ought to be afforded in the absence of an express agreement leaving the amount of the restitution to the court's discretion. This question had been explicitly left undecided in Hebert. The court concluded in J.O.S. that so long as the amount of damage bore a substantial relationship to what would be the conviction if the child were an adult, the court could order restitution in an amount greater than the maximum dollar value defining the offense for which the child was adjudicated.

In C.M. v. State, the grandmother and legal guardian were ordered to pay restitution to the victim of the child's theft. The appellate court held that the order explicitly violated the Florida statute governing restitution

216. 689 So. 2d 1061 (Fla. 1997).
217. Id. at 1062.
218. Id.
219. Id. at 1063 (citing Fla. Stat. § 775.089(1)(a) (Supp. 1994)).
220. Id. at 1064 (citing J.S.H. v. State, 472 So. 2d 737 (Fla. 1985)).
221. J.O.S., 689 So. 2d at 1064 (citing Herbert v. State, 614 So. 2d 493, 494 (Fla. 1993)).
222. Id.
223. Id.
224. Id.
225. Id. at 1065.
227. Id.
orders. Section 39.054(1)(f) of the Florida Statutes provides that a court imposing restitution at disposition has three alternatives: 1) ordering the child to make restitution in money; 2) ordering the child to make restitution in kind; or 3) ordering the child to make restitution through a promissory note, cosigned by the child’s parent or guardian, providing that the parent or guardian had failed to establish he or she had made a diligent effort to prevent the child from engaging in the delinquent acts. The court found that the trial court did not use any of these alternatives, but instead simply imposed direct liability upon the grandmother. The appellate court reversed.

Under Florida law, the parent can be ordered to pay a fee for the services rendered to the child by the Public Defender. In C.M. v. State, the trial court ordered the child’s guardian to pay $250 to the City of Jacksonville for services rendered to the child by the Public Defender. However, it was undisputed that the guardian, the child’s grandmother, was not afforded either notice of intent to seek such a fee from her or an opportunity to contest its amount. Therefore, the appellate court reversed.

Florida law also provides that when the court enters an order of restitution as part of community control, the amount may not exceed an amount the child could reasonably be expected to earn. In A.J. v. State, a fifteen-year-old pleaded guilty to aggravated battery, which resulted in a restitution order to the victim’s parents and a separate amount to the insurance company. Because there was no record of evidence of what the child could reasonably be expected to earn, and because the trial court made no such finding, there was no basis for the conclusion that the child could pay the amount ordered in restitution. The court of appeal therefore reversed.

228. Id. at 499.
230. C.M., 676 So. 2d at 499.
231. Id.
234. Id. at 499.
235. Id. at 498.
237. 677 So. 2d 935 (Fla. 4th Dist. Ct. App. 1996).
238. Id. at 936.
239. Id. at 938.
240. Id.
A case clearly demonstrating a waste of appellate resources is T.S. v. State. The trial court adjudicated two juveniles delinquent and ordered restitution in the amount of $11,874.75. The problem was that the court failed to clarify each child’s responsibility for the single restitution amount. Apparently, the trial court orally announced that the appellants were each responsible, jointly and severally, with another codefendant for $9,265.50. The two appellants were each also responsible, jointly and severally, for the remaining $2,609.25. The appellate court remanded to the trial court so that it could put the oral pronouncements in writing.

In J.K v. State, a child who had entered a plea of guilty to burglary appealed from the amount of restitution for the loss of a cellular phone. The trial court ordered restitution in the amount of $690.25, constituting twenty-five cents for the cost of the phone and $690 for the victim’s remaining obligation on the contract. The appellate court reversed based upon its determination that the award over compensated the victim. The appellate court did recognize that a restoration award could take into account “consideration that the timing of repayment may cause the victim to suffer additional loss.” However, the facts here were that the award of $690.25 for the contract alone over compensated the victim for his loss. Had the victim been unable to use the telephone, he could have canceled the contract and been obligated to pay only $400. As the court said, “[r]estitution [does] not abandon the concept of mitigation of damages.”

A similar miscalculation of restitution took place in B.D.A. v. State. In that case, the dispositional order resulted from the child’s adjudication for having made false bomb reports to school officials necessitating evacuation of the school building. The restitution order included assessment for the salaries of school staff for each of the days involved. However, the teachers and staff continued to perform services and received their regular

242. Id. at 120.
243. Id.
244. Id.
245. Id.
246. 695 So. 2d 868 (Fla. 4th Dist. Ct. App. 1997).
247. Id. at 869.
248. Id.
249. Id. at 870.
250. Id.
251. J.K., 695 So. 2d at 870.
252. 695 So. 2d 399 (Fla. 1st Dist. Ct. App. 1997).
253. Id. at 399.
254. Id.
salary. Thus, there was no damage or loss caused by the offense. The Florida statute does not provide for compelled restitution under these circumstances.

Finally, restitution orders must be made while the court has jurisdiction. In *M.C.L. v. State*, the trial court held a hearing on restitution after the child’s notice of appeal was filed. Therefore, the order imposing restitution was without effect for lack of jurisdiction despite the fact that the judge attempted to reserve jurisdiction to consider restitution. On the other hand, in *C.A. v. State*, the trial court reserved jurisdiction within sixty days of the sentence, as required by Florida law, having accepted a plea agreement in which the State reserved restitution and the trial court orally stated that it was reserving jurisdiction. While the written order did not conform to the trial court’s oral pronouncement, the appellate court held that the oral pronouncement prevailed over the written form. There had been no loss of jurisdiction similar to that which occurred in *M.C.L.*

### E. Appeals

The issue of a right of appeal for a juvenile who is indigent, although not decided by the United States Supreme Court in *In re Gault*, is provided by statute in Florida. The counsel statute includes the appointment of the public defender for purposes of appeal for an indigent juvenile defendant. An important issue was before the First District Court of Appeal in *Z.F. v. State*. The question before the court was whether a child had a right to a public defender on appeal where the parents were not indigent and did not wish to appeal on the child’s behalf. The appellate court held that under section 27.52(2)(d) of the *Florida Statutes*, the court has the power to

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255. *Id.*
256. *Id.; see also Fla. Stat. § 39.054(1)(f) (Supp. 1996).*
257. 682 So. 2d 1209 (Fla. 1st Dist. Ct. App. 1996).
258. *Id.* at 1214.
260. 685 So. 2d 1036 (Fla. 3d Dist. Ct. App. 1997).
261. *Id.* at 1037. *See Fla. Stat. § 775.089 (1995).*
262. *C.A.*, 685 So. 2d at 1037.
263. *Id.*
264. *M.C.L.*, 682 So. 2d at 1209.
266. *See Fla. Stat. § 27.51 (Supp. 1996).*
267. 683 So. 2d 1084 (Fla. 5th Dist. Ct. App. 1996).
268. *Id.* at 1084.
appoint the Office of the Public Defender or a private attorney to represent a youth on appeal if the nonindigent parent or guardian will not employ counsel. However, in order to do so, the appeal must be necessary. The court established a test for determining necessary legal services. It concluded that when the parents are nonindigent, the court should obtain the opinions of the trial attorney and the parents as to whether an appeal would involve necessary legal services. Should the court have any doubts, it should remove the parents as the decision maker on the issue and appoint a guardian ad litem. Should the court determine that the appeal involves necessary legal services, an attorney should then be appointed. If the court, on the other hand, finds the case does not constitute necessary legal services, it should decline to appoint counsel.

F. Legislative and Rules Changes

For several years, the Juvenile Justice Advisory Board has been pressing the Florida Legislature to make changes in part II of chapter 39 dealing with juvenile delinquency by providing it with its own title and then reorganizing it. This year, the legislature responded by passing chapter 97-238. The resulting chapter did not altogether accomplish the advisory board’s purpose because part II of chapter 39 has been moved, not to a new title, but to a new chapter within title XLVII which governs “criminal procedure and corrections.” The delinquency part of chapter 39 had been in title V which is entitled “Judicial Branch.” When the delinquency provisions were in the judicial branch section they followed

269. Id. at 1085.
270. Id.
271. Id.
272. Z.F., 683 So. 2d at 1085.
273. Id.
274. Id.
275. Id.
277. Telephone Interview with Timothy Center, Esq., Staff Member, Juvenile Justice Advisory Board (Sept. 10, 1997).
278. Chapter 97-238 resulted from House Bill 1369 which originated within the Department of Juvenile Justice and was amended to include SB 2086, the Juvenile Justice Advisory Board’s technical rewrite of chapter 39. See 1997 Fla. Sess. Law Serv. ch. 97-238 (West).
chapters governing the functions of the supreme court, circuit courts, county courts, and district courts of appeal. The delinquency provisions are now found in the criminal procedure and corrections sections after chapters relating to youthful offenders and victim assistance and crime in general. Placement of the delinquency provisions, as they are currently written under either title, makes little structural sense. The simplest approach would have been to take chapter 39 in its entirety and reproduce it as a single juvenile code with its own title.

The second purpose of the legislative move to chapter 985 was to reorganize the statute in a more comprehensible fashion. Whether the new format is more logical remains to be seen. It may be that some unintended substantive changes in the law resulted from the change. But at the very least, practitioners and appellate courts will have to cross-reference case law from the old chapter 39 to the new chapter 985 provisions. Finally, the new law does contain some substantive changes which were attached to the law by the legislature late in the session, although the intent of the Juvenile Justice Advisory Board had been to make no changes in the law except to replace and reorganize it.

For example, as part of its change from chapter 39 to chapter 985, the legislature amended the law regarding detention of children charged with domestic violence by providing that the court shall make written findings that form the basis for holding the child in detention. The law had provided that a child could be held in secure detention for up to forty-eight hours prior to a hearing under certain circumstances. The legislature amended the statute to provide that the child could continue to be held in secure detention if the court made specific written findings that it was

282. At least chapter 39 had been in the same place for several years. Part of the problem is that the Florida Juvenile Code contains both court procedure provisions and agency operational provisions. The sections of the code governing the operation of agencies like DJJ and DCF should be moved to separate sections of the law specifically related to those agencies.
283. According to DJJ, the current structure of chapter 39 is illogically organized, which causes confusion and inconsistency in its application. The Juvenile Justice Advisory Board has recommended that the Florida Legislature remove the current provisions of the statute relating to delinquency and children in need of services ("CINS") and families in need of services ("FINS") matters from chapter 39 and place them in separate chapters of the statute. Fla. H.R. Comm. on Juv. Just., HB 1369, Staff Analysis & Final Research Doc. at 2 (Apr. 4, 1997).
284. According to the Department of Juvenile Justice, there were to be no substantive changes except those explicitly made by the legislature. See Department Of Juvenile Justice, 1997 Legislative Session WrapUp at 3 (1997).
285. See Telephone Interview with Timothy Center, Esq., supra note 206.

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necessary to protect the victim from further injury, but that under no circumstances might the child be held in secure detention beyond the time limits set forth in section 39.044. The second and more significant change in the detention criteria provides that a child who is alleged to have violated the conditions of community control or aftercare supervision may be detained, but that detainment must be in what Florida Statutes refer to as a “consequence unit.”

It can be expected that the Florida Rules of Juvenile Procedure will be amended to reflect the transfer of the delinquency section of chapter 39 to chapter 985 as well as the substantive changes. In the fall of 1996, the Supreme Court of Florida made several changes to the Florida Rules of Juvenile Procedure in two significant respects. First, the discovery rules, both in adult felony cases and in juvenile cases, were changed to limit the use of depositions. There are now three categories of witnesses subject to deposition. In category A, the individual is subject to deposition under the former rules. Category B witnesses are subject to deposition upon leave of court upon a showing of good cause, and, absent a showing that a Category C witness has been improperly designated, such witness cannot be deposed.

Category A witnesses are eye witnesses, alibi and rebuttal witnesses, those present when a recorded or unrecorded statement was made, investigating officers, witnesses known by the prosecutors that have material information to negate guilt, child hearsay witnesses, and experts who have not provided a written report or curriculum vitae but are going to testify. In addition, the limitation on the use of depositions in juvenile cases will now be the same as that in adult cases wherein depositions are restricted in cases in which only a misdemeanor or traffic offense has been alleged.

In separate amendments to the Florida Rules of Juvenile Procedure, also in the fall of 1996, the Supreme Court of Florida authorized substantial redrafting of the procedures when a child is believed to be incompetent or
insane at the time of the adjudicatory hearing. The court also authorized a change in the procedure for post-dispositional hearings on revocation of community control.

III. CHILDREN IN NEED OF SERVICES AND FAMILIES IN NEED OF SERVICES

The legislature also moved part IV of chapter 39 entitled "Children in Need of Services and Families in Need of Services" ("CINS/FINS") to chapter 984, also within the title governing "Criminal Procedure and Corrections." This change was also supported by the Juvenile Justice Advisory Board. Part of the justification appears to be that the CINS/FINS section of the law should be placed within the corrections title because DJJ is responsible for the juvenile justice continuum which includes Children in Need of Services. That public policy justification is contrary to the view of the federal government and other public policy analysts that children in need of services legislation should not be part of a juvenile delinquency continuum.

The legislature also made substantive changes in the CINS/FINS statute. The law now provides that children adjudicated in need of services may be placed for up to ninety days in a staff secure facility. A child found in direct or indirect contempt of court as in need of services who has run away from staff secure facilities on at least two occasions may be

295. Id. at 767B68; see also FLA. R. JUV. P. 8.120.
296. FLA. STAT. § 984.04 (1997).
298. See id. Prior to 1994, the Department of Health and Rehabilitative Services (HRS) had the sole responsibility for implementing the provisions of Chapter 39. However, the 1994 legislature eliminated HRS authority to administer certain juvenile justice programs by creating the Department of Juvenile Justice (DJJ) [Ch. 94B209, Laws of Florida]. As a result of this change, DJJ is now responsible for the juvenile justice continuum which includes delinquent children, CINS, and FINS HRS's successor, the Department of Children and Family Services, continues to be responsible for the child welfare system, including dependency, foster care, and termination of parental rights. Id.
300. See generally FLA. STAT. § 97.280 (1997).
301. FLA. STAT. § 39.4421 (1997) (recodified at § 984.225 (1997)).
placed in a physically secure facility. The child’s parent, guardian, or legal custodian may now file a Child in Need of Services Petition.

Finally, in addition to other sanctions for contempt of court, the court may direct the Department of Highway Safety and Motor Vehicles to withhold issuance of or suspend a child’s driver license or driving privilege for up to one year for a first offense and up to two years for a second offense of contempt of court as a CINS.

IV. DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS

A. Dependency Issues

Evidentiary issues tend to be generic in nature and, as such, are beyond the scope of this survey. However, occasionally an evidentiary issue relates specifically to the child welfare area. Such was the case in *M.B. v. Department of Health & Rehabilitative Services*. In *M.B.*, the trial court concluded that the child was dependent based upon the finding that the father had sexually abused her, and the mother was negligent in failing to protect the child from the abuse.

The basis for the lower court’s finding was prior hearsay statements which the child later recanted at trial. The court examined the *Florida Evidence Code* and determined that once the child recanted the identification at her father’s trial, her earlier unsworn statement became a prior inconsistent statement which was then inadmissible as substantive evidence at the dependency proceeding.

The Supreme Court of Florida reversed. The court held that the admission and subsequent consideration of the child’s statements as substantive evidence by the fact finder did not require that the child’s testimony at trial be consistent with the out of court statements. The court found no consistency requirement in the statute which dealt with the

307. Id.
308. Id. at 1 (citing Williams v. State, 560 So. 2d 1304, 1306 (Fla. 1st Dist. Ct. App. 1990); Jaggers v. State, 536 So. 2d 321, 325 (Fla. 2d Dist. Ct. App. 1988)).
310. Id. at S297.
admission into evidence of out of court statements of a child crime victim.\textsuperscript{311} The court explained that the purpose of the law was to deal with problems inherent in a child victim’s live appearance and testimony at trial and to provide an additional way of presenting a child’s evidence to the trier of fact.\textsuperscript{312} The court added that the trial court must also satisfy the stringent reliability safeguards established in the law.\textsuperscript{313} Also, the court held that its 1995 decision in \textit{State v. Green},\textsuperscript{314} in which it held that a prior statement of a child directly conflicting with the victim’s trial testimony standing alone may not sustain a criminal conviction, is distinguishable.\textsuperscript{315} The court distinguished \textit{Green} both on the facts relating to the particular child’s testimony and because \textit{Green} involved a criminal conviction whereas \textit{M.B.} involved a dependency proceeding in which the child’s welfare and not criminal culpability was at issue.\textsuperscript{316}

\textit{Interest of K.D.},\textsuperscript{317} is a short opinion worthy of comment because it clarifies proper appellate practice in dependency cases.\textsuperscript{318} In \textit{K.D.}, the appellate court explained the appropriate method of review when an order as part of a dependency proceeding requires the return of the child to the custody of the parent.\textsuperscript{319} Further, the court explained that when a child is declared dependent and thereafter returned to the custody of the parent, the trial court retains jurisdiction until the child reaches eighteen years of age unless jurisdiction is otherwise relinquished by the court.\textsuperscript{320} This is then a nonfinal order which may be challenged by writ of certiorari and not by appeal.\textsuperscript{321}

The question of what parties may intervene in dependency proceedings was before the Fourth District Court of Appeal in \textit{J.L. v. G.M.}\textsuperscript{322} A writ of certiorari was brought to review two orders of the trial court which allowed the nonparty maternal grandmother, aunt, and uncle to intervene in an ongoing dependency proceeding.\textsuperscript{323} The court relied upon Rule 8.210(a) of the \textit{Florida Rules of Juvenile Procedure} and the Supreme Court of Florida’s

\begin{itemize}
  \item \textsuperscript{311} See FLA. STAT. § 90.803(23) (1996).
  \item \textsuperscript{312} \textit{M.B.}, 22 Fla. L. Weekly at S295.
  \item \textsuperscript{313} \textit{Id.} at S298.
  \item \textsuperscript{314} 667 So. 2d 756 (Fla. 1995).
  \item \textsuperscript{315} \textit{M.B.}, 22 Fla. L. Weekly at S298.
  \item \textsuperscript{316} \textit{Id.} at S296.
  \item \textsuperscript{317} 679 So. 2d 39 (Fla. 2d Dist. Ct. App. 1996).
  \item \textsuperscript{318} \textit{Id.} at 39.
  \item \textsuperscript{319} \textit{Id.}
  \item \textsuperscript{320} \textit{Id.}
  \item \textsuperscript{321} \textit{Id.}
  \item \textsuperscript{322} 687 So. 2d 977 (Fla. 4th Dist. Ct. App. 1997).
  \item \textsuperscript{323} \textit{Id.} at 977.
\end{itemize}
opinion in Beagle v. Beagle, to remand the case. The Rules of Juvenile Procedure define parties as "the petitioner, the child, the parent(s), the department [of Children and Family Services], and the guardian ad litem, when appointed." The Beagle case establishes Florida's strong public policy against unwarranted interference with the parenting decisions of an intact family. The court in J.L. remanded to determine whether the relatives could be granted nonparty participant status pursuant to Rule 8.210(b) of the Florida Rules of Juvenile Procedure.

An important issue of custody in the context of dependency proceedings arose recently in Roberts v. Florida Department of Children & Families. In that case, the natural father of a six-year-old who had been adjudicated dependent as to the mother sought release of the child from the custody of DCF by writ of habeas corpus. The father had been in prison at the time of the proceeding against the mother and the dependency petition against him had been dismissed. When the father sought return of the children, the DCF denied him custody. Chief Judge Schwartz granted the writ of habeas corpus and ordered transfer of custody to the child. The court found that there was no evidence that the return would endanger the safety or well-being of the child which is required under the Florida statute. The court concluded that the DCF lacked authority to make an

324. 678 So. 2d 1271 (Fla. 1996).
325. J.L., 687 So. 2d at 977-78.
326. Id. at 977.
327. Beagle, 678 So. 2d at 1271. The issue in Beagle was the ability of grandparents to enforce visitation rights against an intact family unit in which the parents rejected the visitation. Id. at 1272.
328. J.L., 687 So. 2d at 978.
329. 687 So. 2d 51 (Fla. 3d Dist. Ct. App. 1997).
330. Id. at 51.
331. Id.
332. Id.
333. Id. at 52.
334. Section 39.41(1) of the Florida Statutes provides:
When any child is adjudicated by a court to be dependent, and the court finds that removal of the child from the custody of a parent is necessary, the court shall first determine whether there is a parent with whom the child was not residing at the time the events or conditions arose that brought the child within the jurisdiction of the court who desires to assume custody of the child and, if such parent requests custody, the court shall place the child with the parent unless it finds that such placement would endanger the safety and well-being of the child.

independent judicial determination of the best interests of the child. 335 The statute, according to the court, represents the legislative policy, and the court is bound by the statute. 336

B. Right to Counsel Issues

Florida’s dependency statute does not provide an absolute right to counsel for indigent parents in dependency proceedings. 337 This legislative failure continues to create problems for the appellate courts. This author has argued in previous surveys in favor of a statute providing free counsel to indigent parents in all dependency proceedings as occurs in other states. 338

The issue came up again in J.S.S. v. Department of Health and Rehabilitative Services. 339 A father who was denied counsel brought an appeal which was treated as a petition for writ of certiorari challenging the failure to appoint counsel. 340 The appellate court found that the procedure utilized by the trial court in determining whether to appoint counsel constituted a departure from the essential requirements of law and thus granted the petition. 341 The appellate court’s findings and application of law are probative of need for outright appointment of counsel. First, the trial court had explained why it had no authority to appoint counsel unless there was going to be a termination of parental rights proceeding or a pending criminal proceeding (a clear misunderstanding of the law). 342 But in denying the request, the trial court also explained that it had been at a judicial conference where it learned that “a couple of judges” had been brought before the judicial qualifications commission because the judges had been appointing counsel in dependency proceedings. 343 The trial court explained that “[judges are] getting a lot of maybe rightful pressure from taxpayers and

335. Roberts, 687 So. 2d at 51.
337. See In re D.–, 385 So. 2d 83, 87 (Fla. 1980); Potvin v. Keller, 313 So. 2d 703, 705 (Fla. 1975).
340. Id. at 548.
341. Id. at 548–49.
342. Id. at 549.
343. Id.

https://nsuworks.nova.edu/nlr/vol22/iss1/1
other powers that be."\textsuperscript{344} The appellate court explained that the appointment of counsel under Florida law takes place when parents are threatened with permanent loss of custody or when criminal charges may arise from the proceedings.\textsuperscript{345} However, in all other proceedings, a case by case determination of factors contained in the \textit{Potvin} decision are to be used to determine the parents' right to appointment of counsel.\textsuperscript{346} The \textit{Potvin} factors are: "(i) the potential length of parent child separation, (ii) the degree of parental restrictions on visitation, (iii) the presence or absence of parental consent, (iv) the presence or absence of disputed facts, and (v) the complexity of the proceeding in terms of witnesses and documents."\textsuperscript{347} The \textit{Potvin} test is fact specific and, arguably, mitigates in favor of the appointment of counsel to indigent parents. However, the statement by the trial court about the "pressure" being applied does not augur well for indigent parents who, once there is no appointment of counsel for unstated political reasons, are usually not in a position to appeal the denial of counsel. The legislature should set an absolute rule providing counsel to all indigent parents in dependency cases.

The issue of taxation of costs in dependency cases recently came before the First District Court of Appeal in \textit{W.S.M. Jr. v. Department of Health & Rehabilitative Services}.\textsuperscript{348} After successfully having a petition for dependency dismissed, a father filed a motion to tax costs against the Department of Health and Rehabilitative Services ("HRS"). The motion was denied, and the father appealed.\textsuperscript{349} Florida law provides in general that in civil cases a party recovering judgment shall recover all the legal costs and charges.\textsuperscript{350} It is irrelevant that the party against whom costs are taxed is a state agency.\textsuperscript{351} Several appellate courts have held that the civil taxation statute applies to juvenile proceedings.\textsuperscript{352} The general rule is that parties are

\begin{itemize}
  \item \textsuperscript{344} \textit{J.S.S.}, 680 So. 2d at 549 The trial court added: I've been told that I better start following the statute because I, by not following the statute, lose my judicial immunity and I become a subject of a taxpayer's suit for the dollars that I am appointing attorneys on that do not meet the requirements of the statute, and I got to send marry one daughter and send put another son through college, and I really don't want to lose my judicial immunity. \textit{Id.}
  \item \textsuperscript{345} \textit{Id.} (citing \textit{In the Interest of D.F.}, 622 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1993)).
  \item \textsuperscript{346} \textit{Id.} (citing \textit{In the Interest of D.-.}, 385 So. 2d 83 (Fla. 1980)).
  \item \textsuperscript{347} \textit{Potvin v. Keller}, 313 So. 2d 703, 706 (Fla. 1975) (citation omitted).
  \item \textsuperscript{348} 692 So. 2d 246 (Fla. 1st Dist. Ct. App. 1997).
  \item \textsuperscript{349} \textit{Id.} at 247.
  \item \textsuperscript{350} \textit{See generally} \textit{FLA. STAT. § 57.041} (1995); \textit{Florida -ar v. Davis}, 419 So. 2d 325, 328 (Fla. 1982).
  \item \textsuperscript{351} \textit{W.S.M. Jr.}, 692 So. 2d at 247 (citations omitted).
  \item \textsuperscript{352} \textit{See Department of Health & Rehabilitative Services v. A.F.}, 528 So. 2d 87, 88 (Fla. 5th Dist. Ct. App. 1988); \textit{Gordon v. Department of Health & Rehabilitative Services}, 674 So. 2d 840, 841 (Fla. 3d Dist. Ct. App. 1996).
\end{itemize}
entitled to collect costs in legal proceedings and in equitable proceedings in the discretion of the court. HRS argued that because the proceedings were in equity, the court should use discretion and depart from the general rule of payment. The court rejected this argument. To deny court costs because of HRS’s statutory mandate to prosecute dependency cases would mean denying the costs across the board in dependency cases. In addition, other courts had already rejected this approach. The costs recoverable do not include court fees or witness fees for certain witness, specifically any party to the petition, any parent or legal custodian, or child named in a summons. On the other hand, other witnesses shall be paid the witness fee fixed by law. With this exception, the court held that the father was entitled to fees.

The court’s determination as to whether a person is indigent is also important because it may obligate the parent to find an attorney. In Beveridge v. Mardis, the trial court, after a cursory examination of the mother’s financial situation, concluded that she was not entitled to appointed counsel. She proceeded pro se and her parental rights were subsequently terminated despite her ongoing request for an attorney, and the fact that she could not afford one. The appellate court held that the lower court should have continued the matter until a more thorough investigation of her claim of indigency and inability to secure counsel could have been conducted. Further, the court failed to obtain a waiver of counsel as provided by the Florida Rules of Juvenile Procedure.

C. Termination of Parental Rights

Issues of mental illness create difficult problems in termination of parental rights cases. This was true in P.A. v. Department of Health &

353. W.S.M., Jr., 692 So. 2d at 247 (citing The Florida –ar v. Davis, 419 So. 2d 325, 328 (Fla. 1982).
354. Id. at 248.
355. Id.
356. Id.
357. Id.
358. W.S.M., Jr., 692 So. 2d at 249 (citing FLA. STAT. § 39.414 (1993)).
360. W.S.M. Jr., 692 So. 2d at 249.
362. Id. at 1143.
363. Id.
364. Id.
365. Id.; see also FLA. R. JUV. P. 8.320(b)(2) (1996).
The trial court had terminated parental rights based upon the mother's chronic bipolar mental disease. However, the unrebutted evidence was that the mother had substantially met the four goals of a performance plan. There was no clear and convincing evidence that she failed to substantially comply with it. Further, no clear and convincing evidence of past abuse, neglect, or abandonment had been presented.

Other courts in Florida have analyzed the issue of chronic mental illness as a basis for the termination of parental rights; they have found that it can be the basis, but only where the parent fails to comply with the performance agreement and where there was prior abuse, neglect, or abandonment. The appellate court in *P.A.* held that the DCF cannot simply rely upon the parents' mental status to terminate parental rights. Where the parent and department enter into a case plan, the DCF must make reasonable efforts to unify the family; this includes assisting the parent to receive the services needed to become a capable parent including mental health services. The appellate court therefore reversed, but added that termination could occur if the parent failed to comply with a new case plan despite reasonable efforts by the DCF, or if reunification would threaten the children's well-being irrespective of the provision of services.

A second case dealing with the difficult issue of mental health services and compliance with case plans is *S.Q. v. Department of Health & Rehabilitative Services.* The Department moved to terminate parental rights based upon the claim that the mother failed to obtain timely psychiatric treatment or counseling for schizophrenia as required by the permanent placement plan. The appellate court rearticulated the Florida test that termination of parental rights is governed by section 39.467(2)(a)-(k) which sets forth eleven factors. The law provides that

366. 685 So. 2d 92 (Fla. 4th Dist. Ct. App. 1997).
367. *Id.* at 92.
368. *Id.*
369. *Id.* at 92–93.
371. *P.A.*, 685 So. 2d at 92.
372. *Id.* at 93 (citing FLA. STAT. § 39.464(1)(e) (1995)).
373. *Id.*
374. 687 So. 2d 319 (Fla. 1st Dist. Ct. App. 1997).
375. *Id.* at 323.
376. *Id.* See T.C. v. Department of Health & Rehabilitative Services, 681 So. 2d 893, 893 (Fla. 4th Dist. Ct. App. 1996) (discussing at note 1 the issue of whether the trial court must address in its order each of the factors enumerated in section 39.4612, since renumbered at section 39.469(3)).
"[w]hen a petition to terminate parental rights is predicated upon allegations of abuse, neglect, or abandonment, a performance agreement or permanent placement plan must be offered [and a parent who fails to] 'substantially comply' with the agreement or plan [may then have parental rights terminated]." Parental rights may be terminated so long as failure to comply with the performance agreement provisions is not the sole basis for permanently terminating the rights. In the S.Q. case, the trial court incorrectly terminated parental rights based upon the claimed failure of the mother to comply with recommendations for mental health treatment and counseling. Indeed, none of the psychological tests and evaluations the mother went through under the performance plan actually recommended mental health treatment and counseling. Thus, she had no obligation to undergo them. In addition, the court found that the order terminating parental rights did not find the factors under the statute proven by clear and convincing evidence. The court therefore reversed.

D. Legislative and Rules Changes

The legislature amended the provisions of chapter 39 dealing with termination when a parent is incarcerated in a state or federal correction institution. The law now provides for the circumstance when the parent is expected to be incarcerated for a substantial portion of the period of time before the child will attain the age of eighteen years.

In the dependency area, the Supreme Court of Florida authorized changes in the Florida Rules of Juvenile Procedure to match case law determinations over the past few years. Specifically, the new rules expand and make precise the procedure for diligent searches and service of pleadings and papers in dependency proceedings and also change the procedures for shelter hearings and orders. Finally, the new rules track case law with regard to final judgments terminating parental rights as well as denying termination of parental rights.

377. S.Q., 687 So. 2d at 323–24 (citation omitted).
378. Id. at 324.
379. Id.
380. Id. at 325.
381. Id.
382. S.Q., 687 So. 2d at 325.
385. Id. at 769–71.
386. Id. at 772–73.
387. Id. at 776.
V. CONCLUSION

The Florida Legislature made extensive structural changes to the Florida Juvenile Code in the Juvenile Delinquency and Families in Need of Services/Child in Need of Services areas this year. The legislative changes not only move the delinquency and status offense provisions to a new location in the Florida Statutes but renumber the provisions. These changes may result in the additional expenditure of time and money. To what extent these structural changes will generate new appellate opinions remains to be seen.

In the meantime, the appellate courts continued a process that has been going on for sometime—routine correction of basic errors by the trial courts. However, on occasion the courts, including the Supreme Court of Florida, have clarified significant issues including evidentiary matters as was the case in M.B. v. Department of Health & Rehabilitative Services. 388

388. 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997).
Professional Responsibility: 1997 Survey of Florida Law

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Elizabeth Clark Tarbert**

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I. INTRODUCTION

Professional responsibility law in Florida continued to expand in 1997.1 Case law, rules,2 and ethics opinions amplified and, in some areas, extended the duties that lawyers assume as officers of the judicial branch of government. This article examines professional responsibility decisions that are likely to affect the relationships that lawyers have with clients, former clients, judges, third parties, and The Florida Bar.3

Part II looks at developments affecting the most important relationship that lawyers establish and operate within: the relationship between lawyer and client. Part III reviews developments of significance to the lawyer’s relationship to the court and the judicial system. Part IV examines decisions that could impact the lawyer’s relationship with third parties,

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1. This article surveys professional responsibility developments in Florida from July 15, 1996, through July 14, 1997.

2. Of primary interest here are changes to the Florida Rules of Professional Conduct (“RPC”), which comprise Chapter 4 of the Rules Regulating The Florida Bar.

3. Cases and ethics opinions are discussed in the section to which they have the most significant connection, rather than in every section to which they might possibly relate.

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such as opposing parties, other attorneys, expert witnesses, potential clients, employers, and creditors. Part V explores the lawyer's relationship with The Florida Bar and other disciplinary authorities and reviews a number of disciplinary actions taken against Florida lawyers for widely varying conduct.  

II. THE LAWYER'S RELATIONSHIP WITH CLIENTS

For most lawyers, the attorney-client relationship is the professional relationship that commands the majority of their attention and effort. Ethical issues can arise at any point in the attorney-client relationship, from the initial consultation through termination of the matter. Recent decisions have addressed questions of establishing an attorney-client relationship, conflicts of interest, confidentiality, communication, fees, fiduciary duties, competent representation, diligence, and withdrawal.

In Goldfarb v. Daitch, the Third District Court of Appeal reaffirmed the basic concepts that the attorney-client relationship is a consensual one, and that an attorney cannot act on behalf of someone unless the attorney has been properly authorized to do so. Daitch was the defendant in a mortgage foreclosure suit. A final judgment of foreclosure was entered, and the property was sold at a clerk's sale. On the day that the certificate of sale was issued, attorney Goldfarb filed a motion seeking disbursement of surplus funds that were held in the court's registry. Pursuant to the court's order, funds were disbursed to various parties, including to "Goldfarb, as attorney for Marilyn Daitch."  

A few weeks later Daitch, through another lawyer, filed an emergency motion to vacate the disbursement order. Daitch alleged that she had never met Goldfarb, and that Goldfarb had no authority to represent her in the foreclosure matter. At the hearing on the motion, Daitch testified that she was unrepresented in the foreclosure case; indeed, a default had been entered against her. After the sale, Daitch was approached at her home by two men who claimed to have purchased the house at the sale and needed to talk to her about the sale. Intimidated, Daitch signed a blank document and the men left. Two nights later the men returned with a check for the "surplus funds less 1/3 fee for collection." Daitch claimed that she first learned of Goldfarb's
involvement when she signed a receipt for the check. The receipt reflected a $2000 legal fee.\(^\text{10}\)

Testimony of Daitch and others showed that the document Daitch had signed was a power of attorney giving two individuals authority to employ an attorney to represent her in the foreclosure and authority to deduct, "as a non-refundable option" one-third of any funds due Daitch.\(^\text{11}\) Goldfarb testified that he had not met Daitch at the time he was allegedly retained, but filed the motion for the surplus funds based on the document alone. Although Goldfarb did not know Daitch, he did know the individuals who held the power of attorney, having represented them on prior occasions.\(^\text{12}\)

The trial judge vacated the disbursement order, finding that Goldfarb had no authority to represent Daitch and that "there existed no valid attorney/client relationship by and between' Goldfarb and Daitch."\(^\text{13}\) The court’s order is not remarkable. It simply reflects that the attorney-client relationship is grounded in agency principles, one of the most fundamental of which is that an agent can act only when properly authorized by the principal. Unfortunately, this basic point of law is sometimes ignored or misunderstood by practicing lawyers.\(^\text{14}\)

Goldfarb is noteworthy for another reason. Both the trial court and the Third District Court of Appeal expressed concern about a conflict of interest on attorney Goldfarb’s part.\(^\text{15}\) The appellate court noted that Goldfarb effectively acknowledged the existence of "a patent conflict of interest" when he replied, after being questioned by the trial judge about a possible conflict of interest, that "I don’t see anything wrong in representing investors in these type of deals."\(^\text{16}\)

Business transactions in which a lawyer is a party often result in conflict of interest problems, especially transactions that involve the lawyer’s client. The obvious potential for conflict is recognized in RPC 4-1.8(a),\(^\text{17}\) which

\(^{10}\). Goldfarb, 696 So. 2d at 1201.

\(^{11}\). Id.

\(^{12}\). Id. at 1202.

\(^{13}\). Id. at 1203.


\(^{15}\). Goldfarb, 696 So. 2d at 1199.

\(^{16}\). Id. at 1205 (emphasis added by appellate court) (quoting the Plaintiff, Goldfarb).

\(^{17}\). Subdivision (a) of RPC 4-1.8, "CONFLICT OF INTEREST; 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
regulates these types of transactions as an ethical matter. In *Florida Bar v. Laing*, the lawyer stepped into a client's business deal that had gone bad and turned it to his own advantage. In imposing a ninety-one day suspension for this and other violations, the Supreme Court of Florida noted that entering into a business transaction with his client required the lawyer to comply with the provisions of RPC 4-1.8(a).

A lawyer who represents multiple parties in business matters also must be alert to conflict of interest concerns. Such representation is not strictly prohibited, but a lawyer who undertakes to represent parties whose interests appear to be aligned at the outset, takes the risk that those interests could diverge at some point during the deal. If that happens, the lawyer usually will

adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses, unless:

- 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;
- the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
- the client consents in writing thereto.

RPC 4-1.8(a).

18. 695 So. 2d 299 (Fla. 1997).
19. *Id.* at 301.
20. *Id.* at 304.
22. Subdivisions (a) and (b) of RPC 4-1.7, "CONFLICT OF INTEREST; GENERAL RULE," provide:

(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:

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

- the lawyer reasonably believes the representation will not be adversely affected; and
- the client consents after consultation.
be ethically obligated to withdraw from the entire matter. A lawyer who failed to recognize the warning signs of a serious conflict ended up with disciplinary problems in *Florida Bar v. Joy.* The lawyer represented three individuals, including a father and son, who were shareholders in a corporation that invested in real estate. When an apartment building owned by the corporation burned, the insurer suspected arson and refused to pay the claim. The corporation retained the lawyer to pursue its claim for insurance proceeds. Sometime during this course of events, however, the lawyer began to distrust the father and son and secretly started providing the third shareholder with blind copies of his correspondence with the father and son. To make matters worse, the lawyer attempted to protect the third shareholder’s interest by obtaining an assignment of his shares in the corporation. This was done without the knowledge of either the father or son. A substantial settlement was reached with the insurer, but the situation deteriorated further when the lawyer removed some of the settlement proceeds from this trust account without authorization and deposited them into an account bearing his wife’s name. The final chapter in this sad saga was a physical altercation between the lawyer and the son. This conflict-ridden conduct netted the lawyer a ninety-one day suspension.

In contrast, a lawyer was held to be not guilty of conflict violations in *Florida Bar v. Norvell.* The lawyer had served a disciplinary suspension and had been readmitted to practice. Prior to his readmission, the lawyer was involved with a builder in the builder’s suit against a construction corporation. The lawyer then attempted to represent the corporation in its bankruptcy proceeding, misrepresenting to the bankruptcy court that he was a ‘‘disinterested person.’’ The bankruptcy judge, however, declined to allow

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RPC 4-1.7(a)-(b).

23. Subdivisions (a) and (b) of RPC 4-1.9, "CONFLICT OF INTEREST; FORMER CLIENT," provide:

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.

RPC 4-1.9.

24. 679 So. 2d 1165 (Fla. 1996).
25. Id. at 1168.
26. 685 So. 2d 1296 (Fla. 1996).
27. Id. at 1297.
the lawyer into the case. The lawyer next entered into an agreement to acquire ownership of the corporation and, after doing so, reapplied to represent the corporation in the bankruptcy case. Unlike the prior application, however, at this time the lawyer did disclose to the court his prospective ownership interest in the debtor corporation. Despite this series of events, the lawyer was found not to have violated the conflict of interest rules, specifically RPC 4-1.7(b). The Supreme Court of Florida noted that most of the conflict-related information was known to all principals.

Sometimes conflicts are apparent at the inception of a representation, as was the case in Goldfarb. Often, however, an actual or potential conflict problem arises during a representation. Decisions concerning both types of conflicts in the criminal defense context were handed down in the past year. Regarding conflict issues to be confronted at the beginning of a matter, The Florida Bar Board of Governors published Florida Ethics Opinion 96-2 to address an issue that had not been reviewed in a formal ethics opinion since 1978: the extent, if any, to which a law firm that represents local law enforcement agencies may engage in criminal defense work in that same county.

Overruling portions of prior opinions, Opinion 96-2 concluded that a law firm that represents local law enforcement agencies on civil and administrative matters is not per se precluded from engaging in criminal defense work within the same county. Instead, whether such dual representation is ethically permissible depends on application of the conflict rules, particularly RPC 4-1.7(b), to the specific facts and circumstances involved. The opinion spoke to several general scenarios. First, it noted that where the firm’s law enforcement clients are completely uninvolved in a criminal matter, no potential conflict of interest exists and the firm may defend the accused without triggering the conflict provisions of the Rules of Professional Conduct. Second, if the firm’s law enforcement clients are in some way involved in a criminal matter, the firm may represent the accused

28. Id.
29. See supra note 22.
30. Norvell, 685 So. 2d at 1298.
31. Goldfarb, 696 So. 2d at 1199; see also supra notes 5-16 and accompanying text.
33. Id.
34. Opinion 96-2 states that Florida Ethics Opinions 74-37, 74-37 (Reconsideration), and 78-8 were “overly broad” and overruled those opinions “to the extent that they conflict with” the conclusions reached in Opinion 96-2. Id.
35. Id.
36. See supra note 22 and accompanying text.
only if it complies with the provisions of RPC 4-1.7(b), including obtaining the informed consent of both clients.\textsuperscript{38} Third, where a law enforcement client of the firm is involved in a criminal matter "in a direct and material way," the firm is ethically precluded from representing the criminal defendant.\textsuperscript{39} Significantly, the opinion recognizes that attacking an employee of a client agency on cross-examination presents an unwaivable conflict of interest in this context.\textsuperscript{40}

Both the Third and Fourth District Courts of Appeal addressed conflicts, or alleged conflicts, that arose or became apparent \textit{after} a representation had commenced. In \textit{Rodriguez v. State},\textsuperscript{41} the defendant’s trial counsel was a former assistant state attorney.\textsuperscript{42} While with the State Attorney’s Office years before, counsel had substituted for the assigned prosecutor at a hearing in a previous and totally unrelated case against the defendant. Counsel did not even remember this prior matter until, just before sentencing in the present case, he was shown certified copies of the defendant’s prior convictions. Under these facts, the court stated curtly that “no conflict exists.”\textsuperscript{43}

Two Fourth District Court of Appeal cases dealt with the not uncommon situation of a criminal defendant who becomes dissatisfied with appointed counsel during the case and then moves to discharge that counsel. In \textit{Cunningham v. State},\textsuperscript{44} defendant Cunningham had pled guilty to certain charges.\textsuperscript{45} After the plea hearing but before sentencing, he filed an unsworn motion to vacate his plea and to have new counsel appointed, citing alleged ineffective assistance of counsel. The trial court denied the motion following a hearing at which the court inquired into the basis of Cunningham’s motion to discharge his current counsel.\textsuperscript{46} Affirming the trial court’s order, the appellate court distinguished another recent decision in this area, \textit{Roberts v. State}.\textsuperscript{47} Unlike the situation in \textit{Roberts}, defendant Cunningham made no

\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id. \textit{See also} ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-367 (1992).
\textsuperscript{41} 684 So. 2d 833 (Fla. 3d Dist. Ct. App. 1996).
\textsuperscript{42} Id. at 833.
\textsuperscript{43} Id. \textit{See also} McCaskill v. State, 638 So. 2d 567, 568 (Fla. 5th Dist. Ct. App. 1994) (claim of ineffective assistance properly denied where the defense attorney had been a state attorney who signed original information against defendant). In the instant case, defendant knowingly sought out and retained an attorney, and defendant was prosecuted based on amended information with which the attorney had no active involvement.
\textsuperscript{44} 677 So. 2d 929 (Fla. 4th Dist. Ct. App. 1996).
\textsuperscript{45} Id. at 930.
\textsuperscript{46} Id.
\textsuperscript{47} Id. (referring to Roberts v. State, 670 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1996)). The \textit{Roberts} court found that an actual conflict of interest was present because the very basis
specific allegations concerning his counsel's performance and counsel did not move to withdraw from the case. In fact, the court stated, "nor would we expect such a motion to be routinely filed under these facts." Recognizing that Roberts turned on its particular facts, the Fourth District Court of Appeal stated that "Roberts should not be read to establish a per se rule requiring a trial court to appoint new counsel to argue a motion to withdraw a plea upon the mere filing of a motion to discharge trial counsel." Cunningham is notable because the court "[p]arenthetically" outlined what it termed a "preferable way" to handle a motion to discharge counsel and vacate plea based on complaints about counsel's performance. Providing advice that should be helpful to trial courts as well as practicing attorneys, the court suggested:

The motion to discharge should be addressed first and if, following a Nelson inquiry, the motion is denied as insufficient, the defendant could then be given the option of either proceeding with current counsel, hiring his or her own lawyer, or representing himself or herself on the motion to vacate the plea.

In a contrasting case, Hope v. State, the Fourth District Court of Appeal relied upon Roberts in holding that a criminal defendant was denied effective assistance of counsel in connection with a motion to withdraw a guilty plea. As the court was about to sentence him, Hope orally made a pro se motion to change his plea to not guilty and to discharge his counsel on the grounds that counsel had not investigated all of the allegations against him and had not interviewed all witnesses. Counsel responded by not only defending his performance but by going much further and offering the trial judge his

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for the defendant's motion to withdraw his guilty plea was the alleged misconduct of defense counsel (coercing the defendant to accept the plea offer). Roberts v. State, 670 So. 2d 1042, 1044 (Fla. 4th Dist. Ct. App. 1996). The trial court's refusal to permit defense counsel to withdraw from the representation placed counsel in the untenable position of attempting to argue the motion to withdraw the plea on the grounds of his own alleged misconduct. Id. at 1045. This conflict between the personal interests of defense counsel and counsel's obligations to his client was a violation of RPC 4-1.7(b), and thus the trial court erred in not permitting counsel to withdraw. See Timothy P. Chinaris, Professional Responsibility: 1996 Survey of Florida Law, 21 NOVA L. REV. 231, 253-54 (Fall 1996) [hereinafter "Chinaris"].

48. Cunningham, 677 So. 2d at 930.
49. Roberts, 670 So. 2d at 1042.
50. Cunningham, 677 So. 2d at 930.
51. Id. at 931 n.1.
52. Id.
53. 682 So. 2d 1173 (Fla. 4th Dist. Ct. App. 1996).
54. Id. at 1174.
opinion that his client would not prevail at trial. This conflict-ridden scenario tainted counsel’s representation of his client. In reversing and remanding for appointment of “conflict-free counsel” to argue Hope’s motion to withdraw his guilty plea, the appellate court stated that “[c]learly, this is the type of adversarial situation contemplated in Roberts.”

Confidentiality remains one of the most critical of the duties that is essential to a proper and effective attorney-client relationship. A lawyer’s ethical obligations concerning confidentiality are set forth in RPC 4-1.6. A significant case concerning both conflict and confidentiality issues was In re Estate of Montanez. The Third District Court of Appeal reversed an order awarding attorneys’ fees to a personal representative, which was a corporation that had served as guardian for the decedent/ward. The circumstances of the decedent’s death in a nursing home while the corporation was acting as guardian indicated the possibility of a negligence action against both the

55. Id.
56. Rule 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.

RPC 4-1.6.
57. 687 So. 2d 943 (Fla. 3d Dist. Ct. App. 1996).
58. Id. at 944.
nursing home and the guardian corporation. Yet, upon being appointed personal representative, the corporation, on behalf of the estate, paid the nursing home’s bill and, incredibly, released the nursing home from any liability for no consideration. The appellate court correctly observed that the corporation’s actions were “fatally tainted by conflicts of interest.”

Regarding the duty of the personal representative’s attorney, who apparently was fully aware of these circumstances, the court stated:

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. When a lawyer knows or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or by the law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer’s conduct. The attorneys should have recognized that [the personal representative] could not act objectively and neutrally in the settlement of the claim, and with their client’s consent advised the court and procured the appointment of an attorney ad litem to make the investigation and file its report. Alternatively, under the facts herein, if the attorneys were unable to persuade their client of the certitude of their advice, then the attorneys should have moved to withdraw on grounds of irreconcilable differences. Of course, in doing so, counsel would not reveal the client’s secrets or breach their confidential relationship.

Sometimes lawyers for a fiduciary, such as a personal representative, are unsure of where their loyalties lie. Florida law holds that a lawyer for a personal representative is exactly that, the lawyer for the personal representative, and not for the estate or the beneficiaries. Montanez emphasizes this point. The court’s statements help clarify the duty of a personal representative’s attorney when the attorney learns of improper activity on the part of the personal representative. A personal representative’s lawyer should treat this type of representation like any other; this means that the lawyer ordinarily should withdraw if the client/personal representative appears reasonably likely to engage in improper conduct.

59. Id. at 946.
60. Id. at 947 (citations omitted) (emphasis added).
62. See In re Estate of Montanez, 687 So. 2d 943, 946 (Fla. 3d Dist. Ct. App. 1996).
63. Gory, 570 So. 2d at 1383.
despite the lawyer's attempts to dissuade the client. Absent a clear duty of disclosure under the RPC, upon withdrawal the lawyer must maintain the confidentiality of all information relating to the representation. Any duties of

64. Subdivision (a) of RPC 4-1.16, "DECLINING OR TERMINATING REPRESENTATION," provides:

(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:

(1) the representation will result in violation of the Rules of Professional Conduct or law.

RPC 4-1.16.

65. When representing a personal representative situation, the two most likely ways in which a mandatory duty to disclose confidences could arise are: (1) the personal representative has made false statements to, or false filings with, the court; or (2) the personal representative intends to commit a crime or cause substantial bodily harm to someone. RPC 4-1.16(a) (1993). Regarding the former situation, subdivisions (a) and (b) of RPC 4-3.3, "CANDOR TOWARD THE TRIBUNAL," provide:

(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.

RPC 4-3.3(a)-(b).

Regarding the latter situation, subdivision (b) of RPC 4-1.6, "CONFIDENTIALITY OF INFORMATION," provides:

(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.

RPC 4-1.6 (b).
disclosure are expressly established by the RPC and are not enlarged by the fact that a lawyer represents a fiduciary.  

As evidenced by the court’s statement in Montanez, the duty of confidentiality is not always easy to understand and apply. In an important matter of first impression for Florida, as well as nationally, The Florida Bar Professional Ethics Committee and Board of Governors addressed the duties of a lawyer who, while representing a married couple in estate planning matters, was given information by the husband that the husband wished to keep hidden from the wife. The information in question, of course, would be of significance to the wife. Florida Ethics Opinion 95-4 carefully analyzed the ethical obligations that govern the lawyer’s conduct. The opinion recognized the tension between the duty that a lawyer ordinarily has under RPC 4-1.4 to transmit relevant information to a client and the duty to keep a client’s confidence under RPC 4-1.6. In the situation presented, the lawyer faced an apparent conflict between the duty to inform the wife of the relevant information and the duty to honor the confidentiality obligation owed to the husband.

66. Gory, 579 So. 2d at 1383.
67. Montanez, 687 So. 2d at 946. The court addressed the distinction between the ethical duty of confidentiality and the evidentiary attorney-client privilege. See, e.g., Kleinfeld v. State, 568 So. 2d 937 (Fla. 4th Dist. Ct. App. 1990), rev. denied, 581 So. 2d 167 (Fla. 1991) (even if exception to ethical confidentiality rule permits or requires attorney to disclose certain confidential information, this does not affect whether the evidentiary attorney-client privilege applies to prevent such information from being admitted into evidence); Buntrock v. Buntrock, 419 So. 2d 402 (Fla. 4th Dist. Ct. App. 1982) (ethical confidentiality rule is broader than evidentiary attorney-client privilege, and applies even though the confidential information in question is discoverable from other sources); Fla. Bar Comm. on Professional Ethics, Op. 92-5 (1993) (ethical rule of confidentiality prevents attorney from voluntarily disclosing any information relating to representation, while evidentiary attorney-client privilege protects certain specified communications from compelled disclosure).
69. Id.
70. Id.
71. Rule 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.

RPC 4-1.4 (a)-(b).
72. RPC 4-1.6(b).
Opinion 95-4 properly resolved the dilemma by concluding that the duty of confidentiality is paramount. The general rule that applies in any client representation is that all information "relating to the representation" is confidential as an ethical matter. There is no basis in the Rules of Professional Conduct for relaxing this rule when a lawyer jointly represents multiple clients (such as the husband and wife in the situation addressed in the opinion). Unless it is otherwise understood and agreed in advance by clients and lawyer, all clients, "including those in a joint representation," have a right to expect that this general rule of confidentiality will be honored by their lawyer. No such "no-confidentiality" agreement was made in the joint representation case that was the subject of the opinion.

The opinion also persuasively rejected the argument that the law of attorney-client privilege should set the ethical standard of attorney-client confidentiality. Although the information in question might not be protected by the evidentiary privilege in a future husband-wife suit, that fact was irrelevant to any consideration of whether the lawyer was permitted or required, as a matter of professional ethics, to transmit the confidential information to the non-confiding spouse. As is the case when a lawyer represents two clients in separate matters and learns in confidence information from one client that would be relevant to the lawyer's representation of the other client, Opinion 95-4 concluded that the duty of confidentiality was controlling and required the lawyer to withdraw without disclosing the confidence to the non-confiding spouse, here the wife.

While well reasoned in most respects, the opinion clearly missed the mark in one important respect. The opinion opened by concluding, with virtually no discussion or analysis, that the lawyer was under no duty to discuss potential conflict of interest and confidentiality issues with the husband and wife at the beginning of the joint representation. This conclusion is both incorrect and illogical. Almost every multiple client representation presents at least a potential for a conflict of interests.

75. Id.
76. Id.
77. Id. (emphasis added).
78. Fla. Bar Comm. on Professional Ethics, Op. 95-4 (1997). The opinion implies that the lawyer could have, and perhaps should have, prevented the dilemma by discussing the confidentiality issues with the clients at the outset of the representation.
79. Id.
82. Id.
83. Id.
Furthermore, should not the clients be afforded an opportunity to decide whether they wish to waive the rule of confidentiality that otherwise applies to their separate disclosures to the lawyer? Without a discussion of the issues at the outset of the case, the clients are denied the chance to make this decision. And, of course, the fact that an advisory opinion on this topic was requested by the Real Property, Probate and Trust Law Section of The Florida Bar and that the Professional Ethics Committee and the Board of Governors of The Florida Bar saw the need to publish the opinion, underscores the fact that ethical problems of this type are not uncommon in this setting.

The significance of Opinion 95-4 was highlighted by a Second District Court of Appeal case, Cone v. Culverhouse. This case concerned the applicability of the attorney-client and accountant-client privileges in two different suits. The scope and extent of the "common interest" exceptions to the privileges were disputed. In language reminiscent of the situation addressed in Opinion 95-4, the court stated:

The exceptions to the professional privileges also require that the matter be one "of common interest." . . . [T]he clients' interests must be sufficiently compatible that a reasonable client would expect his or her communications concerning the matter to be accessible to the other client. For example, a married couple creating an estate plan with interrelated documents probably have no reasonable expectation of confidentiality concerning the matter of the joint estate plan, but might still have such expectations concerning their individual, private discussions with their lawyer about the reasons for including or excluding specific bequests to third persons in their individual wills.

The lawyer-client relationship necessarily involves questions of communication between the parties to that relationship. RPC 4-1.4 requires lawyers to communicate with clients about matters that the lawyer is handling for them. In Florida Bar v. Glick, a lawyer who failed to convey to his clients the opposing party's settlement offer, and then lied about this to

84. This group is the largest section of the Bar, with more than 7000 members. The section pursued this matter over a period of years.
86. 687 So. 2d 888 (Fla. 2d Dist. Ct. App. 1997).
87. Id. at 891.
88. Id. at 893 (emphasis added).
89. See supra note 71 and accompanying text.
90. 693 So. 2d 550 (Fla. 1997).
The Florida Bar, was suspended from practice for ten days. Similarly, a lawyer's failure to keep a client informed about the status of the case, among other violations, resulted in a one month suspension in Florida Bar v. Jordan. Not informing the client that the lawyer has let the statute of limitations lapse is a violation of RPC 4-1.4. A lawyer who committed this violation, among others, was suspended for ninety days in Florida Bar v. Lecznar.

Fees are another important aspect of the attorney-client relationship. As might be expected, fee related issues often are the subject of case law and ethics opinions. Over the past year, the Professional Ethics Committee published three opinions dealing with various fee and cost questions. Florida Ethics Opinion 95-3 responded to the inquiry of a law firm that wished to assign its delinquent accounts receivable to a corporation that would be wholly-owned by the firm’s partners. The corporation would then attempt to collect the receivables. If it became necessary to file suit to collect the accounts, the law firm would then represent the corporation in suing the firm’s former clients for the delinquent fees.

The Professional Ethics Committee initially published a proposed advisory opinion concluding that the conduct in question was unethical because it appeared to be an attempt to hide behind the wholly-owned corporation in order to avoid the publicity that could arise when a law firm sues its former clients over fees. The committee believed that this scheme

91. Id. at 552.
92. 682 So. 2d 547, 548 (Fla. 1996).
93. Although not mentioned in the case, it may be noted that the Supreme Court of Florida has indicated that a lawyer ordinarily is obligated to inform a client when the lawyer commits legal malpractice. Florida Bar v. Morse, 587 So. 2d 1120, 1121 (Fla. 1991).
94. 690 So. 2d 1284, 1288 (Fla. 1997).
96. The accounts receivable represented uncollected legal fees owed by former clients of the law firm. Id.
97. Id.
98. When it determines that a formal advisory opinion is needed on a particular issue or matter, the Professional Ethics Committee publishes a “proposed advisory opinion” in the Florida Bar News along with a notice inviting comments from any interested Bar members. If no comments are received within 30 days, the opinion becomes a final Florida Ethics Opinion. If comments are received, the committee considers those comments and decides whether to stand by its original opinion. If the committee adheres to its original opinion, any dissatisfied commenters may appeal to The Florida Bar Board of Governors. The Board’s determination is final; there is no provision for appeal to the Supreme Court. These procedural rules appear in the Florida Bar Procedures for Ruling on Questions of Ethics, 70 FLA. B.J. 684, 864-85 (Sept. 1996).
constituted a violation of RPC 4-8.4(c),\textsuperscript{100} which prohibits lawyers from engaging in misrepresentation or deceitful conduct.

The committee's proposed conclusion was rejected by the Bar's Board of Governors, which revised Opinion 95-3 to permit the conduct in question.\textsuperscript{101} The Board's opinion traced the trend of ethics opinions issued since the 1970s to liberalize the guidelines governing lawyer conduct in the area of fee collection.\textsuperscript{102} Extending this trend, Opinion 95-3, as revised by the Board, concluded that the proposed assignment of receivables to the firm-owned collection corporation, with the firm representing the corporation in collection actions, violated neither RPC 4-8.4(c) nor RPC 4-1.9(a).\textsuperscript{103} The Board viewed the proposed conduct as a legitimate collection technique for lawyers who were owed fees by former clients.\textsuperscript{104}

Whether RPC 4-8.4(c)\textsuperscript{105} was intended to bar the conduct at issue is a question over which reasonable minds can differ. Thus, the matter boiled down to a policy question, which the Board answered in favor of law firms rather than their delinquent clients.\textsuperscript{106} The opinion is disappointing, however, in the manner in which it evaded the reach of RPC 4-1.9(a). This rule precludes a lawyer\textsuperscript{107} from representing "another person" in a matter that is the same as, or substantially related to, a matter in which the lawyer represented a former client.\textsuperscript{108} As Opinion 95-3 conceded, the literal terms of this rule bar a law firm from representing anyone other than itself in matters substantially related to matters in which it represented its former clients.\textsuperscript{109} Certainly, collection of a fee owed for representing a client in a matter is "substantially related" to the original matter; the opinion conceded this fact.\textsuperscript{110}

Why, then, does RPC 4-1.9(a)\textsuperscript{108} not apply? The opinion essentially stated that the firm and the wholly-owned collection corporation were really the same entity, and therefore declined to apply RPC 4-1.9(a).\textsuperscript{111} As a matter of convenience for fee collecting lawyers, the opinion thus ignored the basis for

\textsuperscript{100} Subdivision (c) of RPC 4-8.4, "MISCONDUCT," provides that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." RPC 4-8.4(c).


\textsuperscript{102} Id.

\textsuperscript{103} Id. See supra note 23 and accompanying text.


\textsuperscript{105} See supra note 100 and accompanying text.


\textsuperscript{107} All lawyers in a law firm are treated as one for purposes of RPC 4-1.9(a). RPC 4-1.10(a).

\textsuperscript{108} RPC 4-1.9(a).


\textsuperscript{110} Id.

\textsuperscript{111} Id.
a large part of the American legal structure—corporations are separate entities under law, distinct and apart from their owners. As a separate legal entity, the collection corporation should have been considered "another person" for purposes of applying RPC 4-1.9(a). It is important to note, however, that Opinion 95-3 expressly did not address two questions that should be of great interest to most law firms facing a fee collection problem: first, whether a law firm ethically may assign its delinquent fee receivables to a collection corporation not owned by the firm; and second, whether it is ethically permissible for a law firm to assign its accounts receivable as security for a loan.\footnote{12}

Two Professional Ethics Committee opinions attempted to clear up some ambiguities in the application of rules governing lawyers advancement, or payment, of costs on behalf of clients. Florida Ethics Opinion 96-1\footnote{13} was issued to a lawyer who was preparing to submit a bid to a state agency that was seeking to hire lawyers for collection work.\footnote{14} The lawyer asked the ethics committee whether it would be permissible for the bid to provide that the lawyer would be responsible for paying all expenses associated with the representation, even if the lawyer was successful in obtaining a recovery for the client agency.\footnote{15} The committee concluded that, while RPC 4-1.8(e)\footnote{16} permitted the lawyer to advance court costs and expenses of litigation, it forbade the lawyer from paying for those items.\footnote{17} The proposed bid was

\footnote{112. Most jurisdictions that have addressed this second issue prohibit the assignment or limit a law firm's ability to assign its receivables for this purpose. See, e.g., Arizona ethics opinion 92-4; Illinois ethics opinion 93-4; Kansas ethics opinion 94-08; Maryland ethics opinion 93-3; New York City ethics opinion 1993-1.}


\footnote{114. Id.}

\footnote{115. Id.}

\footnote{116. Subdivision (e) of RPC 4-1.8, "CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS," provides:}

\footnote{(e) Financial Assistance to Client. A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:}

\footnote{(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and}

\footnote{(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.}

\footnote{RPC 4-1.8(e).}

\footnote{117. Fla. Bar. Comm. on Professional Ethics, Op. 96-1 (1996). The opinion noted that RPC 4-1.8(e) contains an exception that allows lawyers to pay costs for indigent clients, but this exception was inapplicable because a state agency would not be considered indigent. Id.}
declared unethical because it would make the lawyer unconditionally responsible for the costs of expenses of the collection matters.\(^{118}\)

Florida Ethics Opinion 96-3\(^{119}\) arose in connection with the Florida offer of judgment statute.\(^{120}\) A plaintiff's lawyer apparently was unhappy with the defendant's settlement offer and wanted his client to go to trial rather than accept the offer. The lawyer wished to guarantee his client that he, the lawyer, would pay any attorney's fees and costs assessed against the client if the client proceeded to trial and the defendant ultimately prevailed. The ethics committee opined that such a promise would defeat the purpose of the offer of judgment statute, which the committee believed was enacted to penalize litigants who did not accept bona fide settlement offers prior to trial.\(^{121}\) Accordingly, the committee concluded that the proposal was unethical as prejudicial to the administration of justice, in violation of RPC 4-8.4(d).\(^{122}\)

As usual, 1997 saw several cases handed down concerning lawyer-client fee issues. At issue in Smith & Burnetti, P.A. v. Faulk\(^{123}\) was a trial court order denying a law firm a charging lien and an award of attorneys' fees.\(^{124}\) The law firm apparently had withdrawn from the case, rather than being discharged by its client. Referencing RPC 4-1.7(b),\(^{125}\) the Second District Court of Appeal stated that, "[b]ased upon the record disclosing serious conflict between the law firm and [the client], we are persuaded that the law firm had no ethical choice but to terminate its relationship with [the

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120. Id.
121. Id. The committee cited: Goode v. Udhwni, 648 So. 2d 247 (Fla. 4th Dist. Ct. App. 1995), and Florida Bar re: Amendment to Rules of Civil Procedure, 550 So. 2d 442 (Fla. 1989), in support of its view. Id.
122. Id. Subdivision (d) of RPC 4-8.4, "MISCONDUCT," provides that a lawyer may 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, humble, or discriminate against litigants, juries, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.
123. 677 So. 2d 404 (Fla. 2d Dist. Ct. App. 1996).
124. Id. at 404.
125. See supra note 22.
Because the firm’s termination of representation was required by the rules of ethics, the lower court erred in not permitting the firm to recover fees from the client. Relying upon the leading case of *Faro v. Romani*, the appellate court reversed and remanded the matter for determination of amount of fee to be awarded to firm. Citing *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, the opinion noted that the fee was to be based upon *quantum meruit* but without a lodestar.

The Fourth District Court of Appeal addressed the scope of an attorney’s charging lien in *Len-Hal Realty, Inc. v. Wintter & Cummings*. A law firm had represented a plaintiff in obtaining certain real property through a mortgage foreclosure. Part of the firm’s work included having a bankruptcy stay lifted for the plaintiff. Affirming the trial court, the appellate court held that the charging lien filed by the firm in the mortgage foreclosure case could include the fees relating to the work done by the law firm in the bankruptcy matter. The work in the bankruptcy case was “directly related to” obtaining the property on which the charging lien was imposed.

*Noris v. Silver*, was a fee-related case with important implications for any lawyers who share fees from particular matters, whether in a referral context or otherwise. Noris sued attorney Silver for legal malpractice and negligent referral. Noris alleged that he was injured while visiting another state. He then contacted attorney Silver, who referred him to attorney Falk. In the past, Silver had referred clients to Falk and had received one-third of Falk’s fee. Noris then retained Falk to handle his injury claim. The Noris-Falk employment agreement did not make reference to Silver, and Silver and Falk did not execute a written fee-division agreement between themselves. Falk subsequently let the statute of limitations lapse without filing suit. Noris’ action against Silver ensued.

The trial court entered an order of summary judgment for Silver on the legal malpractice claim, and ordered the negligent referral claim dismissed.

126. *Faulk*, 677 So. 2d at 404.
127. Id.
128. 641 So. 2d 69 (Fla. 1994).
129. *Faulk*, 677 So. 2d at 404.
130. 652 So. 2d 366 (Fla. 1995).
131. *Faulk*, 677 So. 2d at 404.
132. 689 So. 2d 1191 (Fla. 4th Dist. Ct. App. 1997).
133. Id. at 1191.
134. Id.
136. Id. at D1859.
137. Id.
138. Id.
The Third District Court of Appeal reversed the summary judgment order on the malpractice claim. \(^{139}\) The court concluded that a genuine issue of material fact existed regarding whether Silver had retained a financial interest in Noris’ case by expressly or impliedly agreeing to divide the legal fee with Falk. \(^{140}\) The legal effect of such an agreement would be the creation of a joint venture, which would mean that Silver could be held legally liable for any malpractice committed by Falk. \(^{141}\)

While the court rested its decision on joint venture principles, it noted that its conclusion was consistent with RPC 4-1.5(g)(2), \(^{142}\) which allows attorneys to split fees on the basis of a written agreement among each participating attorney and the client. \(^{143}\) RPC 4-1.5(g)(2) is the rule that allows a lawyer to receive what is commonly called a “referral fee,” a fee that one attorney receives for referring a client to another attorney. The fee is “earned” primarily as a result of the referral, rather than from any work performed on the case by the referring attorney. \(^{144}\) Noris underscored what the plain language of RPC 4-1.5(g)(2) provides: by agreeing to receive a referral fee in a matter, an attorney becomes responsible for legal malpractice committed by the attorney to whom the matter has been referred. \(^{145}\) Furthermore, it would appear that any attempt by a referring attorney to avoid such liability by means of an exculpatory or indemnification agreement would be unethical in

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139. The order dismissing the negligent referral claim was affirmed. \(Id.\) The court noted that the negligent referral claim “did not allege that Silver had knowledge of any facts that would indicate that Falk would commit malpractice” and that Noris’ counsel conceded this during oral argument. \(Noris, 21 Fla. L. Weekly at D1859.\)

140. \(Id.\)

141. \(Id.\)

142. Subdivision (g)(2) 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.

RPC 4-1.5 (g)(2) (emphasis added).

143. \(Noris, 21 Fla. L. Weekly at D1859.\)

144. \(Id.\)

145. \(Id.\)
view of the clear command of RPC 4-1.5(g)(2)(A) that each attorney assume “joint legal responsibility” for the representation.\textsuperscript{146}

In the statutory fee-shifting context, the Eleventh Circuit Court of Appeals, in \textit{Foodtown, Inc. of Jacksonville v. Argonaut Insurance Co.},\textsuperscript{147} ruled that an oral contingent fee agreement that did not comply with Florida’s ethics rules governing contingent fee contracts could not be considered by the trial court in determining fees to be awarded to the prevailing party under a Florida fee-shifting statute.\textsuperscript{148} Relying on the authority of \textit{Chandris, S.A. v. Yanakakis},\textsuperscript{149} the appellate court stated that, “[b]ecause the oral agreement between [the client] and the law firm violated the rule governing contingent fees, the district court properly refused to recognize it.”\textsuperscript{150} The court went on to warn that a law firm that failed to have its contingent fee agreements in writing would be doing so “at its own risk.”\textsuperscript{151}

A Fifth District Court of Appeal decision recognized that the fee-related aspects of the attorney-client relationship remain a primary factor in the degree of confidence that the public places in the judicial system.\textsuperscript{152} In \textit{Elser v. Law Offices of James M. Russ, P.A.},\textsuperscript{153} a lawyer sued a former client for fees.\textsuperscript{154} The trial court granted summary judgment in favor of the lawyer.\textsuperscript{155} The appeals court reversed, finding that material issues of fact existed.\textsuperscript{156} A

\textsuperscript{146} RPC 4-1.5(g)(2)(A). Additionally, because RPC 4-1.5(g)(2) requires that the client join in any fee-division agreement, any liability-limitation attempts by the referring attorney likely would violate subdivision (h) of RPC 4-1.8, “CONFLICT OF INTEREST; PROHIBITED TRANSACTIONS,” which provides:

\textsuperscript{(h) Limiting Liability for Malpractice. A lawyer shall not make an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. A lawyer shall not settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.}

RPC 4-1.8(h).

\textsuperscript{147} 102 F.3d 483 (11th Cir. 1996).

\textsuperscript{148} Id. at 485.

\textsuperscript{149} 668 So. 2d 180 (Fla. 1995). See Chinaris, supra note 47, at 260-65.

\textsuperscript{150} Foodtown, 102 F.3d at 485.

\textsuperscript{151} Id.


\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id. at 311.

\textsuperscript{156} Id. at 312.
key fact issue concerned whether it was reasonably necessary for the lawyer to perform the amount of work completed on the case. The court noted that "public policy demands" that a lawyer "only charge the client for those hours that are reasonably necessary to perform the legal services under the contract." Additionally, a troubling clause in the lawyer-client fee contract provided that the client would waive objection to the lawyer's bills unless the client contested the bill within ten days from the date of billing. The court voided this provision, declaring it unconscionable and therefore unenforceable. "To permit such an egregious clause to be enforceable in an attorneys' fees contract would undermine the public confidence in the legal system." 

Another unconscionable clause in an attorney-client fee agreement was addressed in Florida Bar v. Spann. Lawyer and client entered into a contingent fee agreement, but the agreement further obligated the client to pay the lawyer based on an hourly rate schedule if the client discharged the lawyer from the case prior to settlement or final judgment. The Supreme Court of Florida held that this provision constituted a prohibited penalty on the client's right to discharge the lawyer and, as such, was a violation of RPC 4-1.5(a). This decision affirmed the special nature of the attorney-client relationship and the client's absolute right to discharge his or her lawyer at any time, with or without cause. The court has consistently refused to permit clauses in fee agreements that would penalize clients for exercising this right.

157. Elser, 679 So. 2d at 312.
158. Id.
159. Id.
160. Id. at 313.
161. 682 So. 2d 1070 (Fla. 1996).
162. Id. at 1072-73. Subdivision (a) of RPC 4-1.5, "FEES FOR LEGAL SERVICES," provides:

(a) Illegal, Prohibited, or Clearly Excessive Fees. An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:

(1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear overreaching or an unconscionable demand by the attorney; or

(2) the fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a nonclient party, or any court, as to either entitlement to, or amount of, the fee.

RPC 4-1.5(a).
Charging a fee in excess of that permitted under RPC 4-1.5\textsuperscript{165} resulted in a lawyer being publicly reprimanded by the Supreme Court of Florida.\textsuperscript{166} In \emph{Florida Bar v. Thomas},\textsuperscript{167} a lawyer who represented a personal injury client on a contingent fee basis in two separate matters paid a medical provider from \$5000 received in “med pay” funds.\textsuperscript{168} The original bill was \$5000, which was reflected on the closing statement. The problem was that the lawyer forwarded only \$3100 of these funds to the doctor, keeping the remainder for himself.\textsuperscript{169}

As one might expect, fee issues can also implicate conflict of interest concerns. One segment of protracted litigation\textsuperscript{170} dealt with an appeal of an order awarding attorneys’ fees to several lawyers involved in a wrongful death matter.\textsuperscript{171} In \emph{Moreno v. Allen},\textsuperscript{172} the Third District Court of Appeal reversed the order, finding the conduct of the attorneys in seeking the fees to be highly questionable.\textsuperscript{173} The court noted that one of the attorneys had a “severe conflict of interest” in pursuing a fee claim over the objection of his client that, if successful, would have substantially reduced the client’s recovery.\textsuperscript{174} Another of the attorneys was denied fees on conflicts grounds as well.\textsuperscript{175}

A lawyer, of course, is in a fiduciary relationship with a client. Annually, the case law reflects that some lawyers breach their fiduciary duties. Misuse of trust funds is perhaps the most egregious example of such a breach. Disbarment was the result of misappropriation of trust money and commingling in \emph{Florida Bar v. Tillman}\textsuperscript{176} and \emph{Florida Bar v. Porter}.\textsuperscript{177} A lesser sanction of six months suspension followed by two years

\textsuperscript{163.} See also, \emph{e.g.}, Rosenberg v. Levin, 409 So. 2d 1016, 1017 (Fla. 1982); Goodkind v. Wolkowsky, 180 So. 538, 542 (Fla. 1938).
\textsuperscript{164.} See \emph{Florida Bar v. Hollander}, 607 So. 2d 412, 415 (Fla. 1992); \emph{Florida Bar v. Doe}, 550 So. 2d 1111, 1113 (Fla. 1989).
\textsuperscript{165.} The schedule setting forth the maximum contingent fee that ethically can be charged without specifically procuring court approval is found in subdivision (f)(4)(D) of RPC 4-1.5, “FEES FOR LEGAL SERVICES.” RPC 4-1.5 (f)(4)(D).
\textsuperscript{166.} \emph{Florida Bar v. Thomas}, 698 So. 2d 530, 532 (Fla. 1997).
\textsuperscript{167.} \emph{Id.} at 530.
\textsuperscript{168.} \emph{Id.}
\textsuperscript{169.} \emph{Id.} at 531.
\textsuperscript{170.} See, \emph{e.g.}, Perez v. George, Hartz, Lundeen, Flagg & Fulmer, 662 So. 2d 361 (Fla. 3d Dist. Ct. App. 1995).
\textsuperscript{171.} \emph{Id.} at 362.
\textsuperscript{172.} 692 So. 2d 957 (Fla. 3d Dist. Ct. App. 1997).
\textsuperscript{173.} \emph{Id.} at 959.
\textsuperscript{174.} \emph{Id.} at 959 n.3.
\textsuperscript{175.} \emph{Id.} at 958-59.
\textsuperscript{176.} 682 So. 2d 542 (Fla. 1996).
\textsuperscript{177.} 684 So. 2d 810 (Fla. 1996).
probation was imposed for trust account irregularities in *Florida Bar v. Barbone*.178

**Competent representation** is perhaps the core of the attorney-client relationship. It is no coincidence that the first RPC is entitled "[c]ompetence."179 Incompetent representation can lead not only to potential legal malpractice liability but to professional responsibility problems as well. In 1997, several lawyers were disciplined by the Supreme Court of Florida for various shades of incompetence. Cases involving sanctions for incompetence included *Florida Bar v. Horowitz*,180 *Florida Bar v. Roberts*,181 and *Florida Bar v. Nunes*.182

The ethical obligation of **diligence**, expressed in RPC 4-1.3,183 follows closely from the duty of competence. In disciplinary parlance, grievance complaints accusing attorneys of lack of diligence are referred to as "neglect" cases.184 More neglect complaints are filed with The Florida Bar than any other type of alleged violation. Inevitably, some of these complaints result in imposition of disciplinary sanctions.

A lawyer's failure to promptly deliver funds held in trust, when coupled with other violations, led to a suspension of ninety-one days in *Florida Bar v. Laing*.185 In *Florida Bar v. Jordan*,186 the lawyer was suspended for ninety-one days for, among other things, a failure to file required documents that resulted in dismissal of a client's appeal.187 In *Florida Bar v. Barcus*,188 the lawyer was publicly reprimanded for several instances of neglect, including failure to appear at a deposition and failure to file necessary motions.189 The disciplinary sanction could have been greater, as the court noted: "[The lawyer] committed isolated acts of negligence, but we do not find a pattern of negligence which would require a suspension. We find this to be a case of an..."

178. 679 So. 2d 1179 (Fla. 1996).
179. Rule 4-1.1 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." RPC 4-1.1.
180. 697 So. 2d 78 (Fla. 1997).
181. 689 So. 2d 1049 (Fla. 1997).
182. 679 So. 2d 744 (Fla. 1996).
183. Rule 4-1.3, "DILIGENCE," provides that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." RPC 4-1.3.
184. RPC 4-1.3.
185. 695 So. 2d 299, 304 (Fla. 1997).
186. 682 So. 2d 548 (Fla. 1996).
187. Id. at 549.
188. 697 So. 2d 71 (Fla. 1997).
189. Id. at 74-75.

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attorney who ineptly handled a difficult situation. And, of course, missing a statute of limitations violates the duty of diligence, as was the case in *Florida Bar v. Lecznar*. 191

A logical, but unfortunate, occasional consequence of a lack of diligence is the lawyer’s failure to follow the ethical rules that govern withdrawal from a representation. Simply walking away from a representation, even one that is not in litigation, is not sufficient. A withdrawing lawyer must comply with RPC 4-1.16, 192 which requires, at a minimum, proper notice to the client and

190. Id. at 75. Two justices, however, would have imposed a thirty day suspension. Id. (Grimes, J., dissenting).

191. 690 So. 2d 1284, 1286 (Fla. 1997). See also supra text accompanying note 183.

192. Rule 4-1.16, “DECLINING OR TERMINATING REPRESENTATION,” provides:

(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:

(1) the representation will result in violation of the Rules of Professional Conduct or law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(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:

(1) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer’s services to perpetrate a crime or fraud;

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(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;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(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.

(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
an attempt by the lawyer to reasonably protect the client's interests upon withdrawal. The failure to properly withdraw can be considered abandonment of the client, as was the case in Florida Bar v. Brakefield. The lawyer's neglect and abandonment of several clients resulted in a six-month suspension, along with probation and other sanctions.

III. THE LAWYER'S RELATIONSHIP TO THE JUDICIAL SYSTEM

Lawyers often are referred to as "officers of the court" and, as such, they have ethical responsibilities to the leading officers of the court, judges, and to the judicial system in general. This position as an integral part of our jurisprudential system has long required that lawyers comply with certain standards of conduct, as set forth in the RPC. Florida case law in 1997 addressed a variety of issues in this area, such as a lawyer's duty of candor to a court, the extent to which a lawyer may communicate with jurors after a trial, grounds for a lawyer's disqualification from participating in litigation, and the permissible scope of argument before a jury.

The past year saw interest in the lawyer's status as an officer of the court and a member of a learned profession carried to a new level. The Supreme Court of Florida created a "Commission on Professionalism" consisting of judges, lawyers, legal educators, and public representatives and charged them with the responsibility of ensuring "that the fundamental ideals and values of the justice system and the legal profession are inculcated in all of those persons serving or seeking to serve in the system." The Florida Bar pitched in, creating and funding a "Center for Professionalism." The Continuing Legal Education ("CLE") Requirement rules were amended to mandate that

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.

RPC 4-1.16.

193. id.

194. 679 So. 2d 766, 769 (Fla. 1996). See also Florida Bar v. King, 664 So. 2d 925 (Fla. 1995); Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987).

195. Brakefield, 679 So. 2d at 769-70.

196. See supra note 65 and accompanying text. Such obligations in the current Florida RPC often are based on ethics rules that existed in prior professional responsibility codes. See, e.g., Code of Professional Responsibility, 59 FLA. B.J. 439, 439 (Sept. 1985) (citing former rule DR 7-102(B) of Florida Code of Professional Responsibility).


198. The Center will have a budget of almost $300,000 annually. See, e.g., Gary Blankenship, BoardOKays 97-98 Budget, FLA. B. NEWS, Apr. 1, 1997, at 1, 6; The Florida Bar Proposed Budget for Fiscal 1997-98, FLA. B. NEWS, Apr. 15, 1997, at 12.
lawyers complete at least five hours every three years of continuing education courses in some combination of ethics, professionalism, or substance abuse.\(^{199}\) Despite the interest in Florida surrounding the issue of "professionalism,"\(^{200}\) it remains to be seen what effect, if any, these initiatives will have on the conduct of lawyers. "Professionalism" means different things to different people, so it will be hard to measure whether the behavior of lawyers becomes more "professional." Although ethics education has been mandatory for years,\(^{201}\) many Florida lawyers seemingly cannot grasp the most elemental notions of fiduciary duty.\(^{202}\) If the threat of disciplinary sanctions for the violation of mandatory professional ethics rules has not transformed the behavior of lawyers, one might question how an aspirational "professionalism" program can be expected to achieve more favorable results.

Several cases addressed a variety of issues relating to a lawyer's relationship with the judicial system, including lawyers' ethical obligation of candor toward a tribunal. Misrepresentation to a court remains one of the most serious offenses that an attorney can commit.\(^{203}\) In Florida Bar v. Kravitz,\(^{204}\) a lawyer who made multiple misrepresentations to a judge was not only held in contempt but ultimately was suspended from the practice of law.

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199. The Florida Bar re: Amendments to Rules Regulating The Florida Bar, 697 So. 2d 115 ( Fla. 1997). Ironically, the new rule actually allows a lawyer to escape entirely any CLE course in the ethics rules (the very rules to which compliance is mandatory) by taking five hours of courses in "professionalism" or substance abuse. Id. at 133. While these two subjects are important, it is unfortunate that the new requirement permits lawyers to evade basic ethics education.


201. In 1987 the Supreme Court of Florida adopted a "Continuing Legal Education Requirement," whereby lawyers must take at least two hours of ethics education every three years. Florida Bar re Amendment to Rules Regulating The Florida Bar Continuing Legal Education, 510 So. 2d 585, 586 (Fla. 1987).


203. See supra notes 65 and 100 and accompanying text.

204. 694 So. 2d 725 (Fla. 1997).
for thirty days. Among other offenses, the lawyer lied to the judge about a matter of which he had personal knowledge, and falsely represented to the judge that opposing counsel did not object to entry of a proposed “agreed” order. This conduct violated RPC 4-3.3(a) and 4-8.4(c).

A lawyer who filed an affidavit in a bankruptcy case falsely stating that he had no connection with the debtor was suspended for ninety-one days in Florida Bar v. Norvell. Disbarment was the sanction imposed in Florida Bar v. Catalano, after the lawyer made both written and oral misrepresentations to the court in a civil matter. In Florida Bar v. Kaufman, disbarment also resulted when a lawyer falsely testified in an attempt to evade discovery of his assets in a civil suit in which he was a party.

In our legal system, a constant source of tension is the conflict between a lawyer’s duty to effectively represent the client and the duty to be honest and forthright with the court. It seems, however, that in an adversarial system any legitimate doubts that a lawyer has should be resolved in favor of the client. A lawyer can have disclosure obligations to a court regarding both the facts and the law. The extent of these obligations may be easier to determine with regard to the law. In addition to general rules that prohibit a lawyer from making false or misleading statements to a court, a special rule, RPC 4-3.3(a)(3), imposes a duty to disclose to a court “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.”

This duty was addressed in Dilallo v. Riding Safely, Inc. A trial court granted summary judgment, relying on a particular statute that apparently immunized the defendant from liability. The problem with the court’s ruling, however, was that the statute had not become effective until after the date of the accident in question. Defense counsel had failed to disclose this

205. Id. at 725.
206. Id. at 726.
207. See supra note 65.
208. See supra note 100.
209. 685 So. 2d 1296 (Fla. 1996). The lawyer was guilty of other violations as well. Id. at 1296-97.
210. 685 So. 2d 1299 (Fla. 1996).
211. Id. at 1300.
212. 684 So. 2d 806 (Fla. 1996).
213. Id. at 807.
214. RPC 4-3.3(a).
215. Id.
216. RPC 4-3.3(a)(3).
217. 687 So. 2d 353 (Fla. 4th Dist. Ct. App. 1997).
218. Id. at 354-55.
fact to the court; on appeal, counsel conceded that he had not checked the effective date before arguing for summary judgment below. The Fourth District Court of Appeal considered RPC 4-3.3(a)(3) in conjunction with RPC 4-1.1, which mandates competent representation, and stated that these rules “imply a duty to know and disclose to the court adverse legal authority.” Trial counsel’s failure to know and disclose the effective date had failed to meet these standards, and the judgment was reversed.

In contrast to the clear requirement to disclose adverse legal authority, there is no corresponding duty to volunteer adverse facts. Schlapper v. Mauer was a medical malpractice case in which a defendant doctor was granted summary judgment dismissing him as a party. Plaintiff’s counsel had not opposed the motion for summary judgment because he was advised by the doctor’s lawyer that the doctor “had nothing to do with the treatment of” the plaintiff. After discovering that this statement was totally false, plaintiff’s counsel moved to vacate the summary judgment. Affirming the trial court’s order vacating the summary judgment, the Fifth District Court of Appeal concluded that defense counsel’s conduct violated the ethical prohibition against misrepresentations of fact that is imposed by RPC 4-4.1. The court explained:

Because of the attorney-client privilege, and the attorney's fiduciary duty owed to a client, an attorney has no affirmative duty to inform an opposing party or attorney as to the existence of relevant facts. But misrepresentations about facts, as well as

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219. See supra note 179 and accompanying text.
220. Dilallo, 687 So. 2d at 355 (emphasis added).
221. Id.
222. Id.
224. Id. at 982.
225. Id. at 983.
226. Id. at 984.
227. Id. at 985. Rule 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.

RPC 4-4.1.
procedures and future conduct likewise is forbidden. An attorney has the option of keeping silent, refusing to answer, changing the subject or referring counsel to the discovery process. But he or she cannot misstate the facts.  

A dissenting opinion in Steinhorst v. State contained interesting comments regarding the ethical obligations of a lawyer who was aware that the trial judge had a conflict of interest that, as a matter of judicial ethics, would require the judge’s recusal from the case. The judge had recused himself in a co-defendant’s case due to a conflict, but failed to recuse himself from this case despite the presence of the same conflict. The majority upheld the conviction, concluding that the judge’s conflict could have been discovered by defense counsel with the exercise of due diligence. Justice Anstead’s dissent expressed the view that the prosecutor, as well as the judge, had the duty to disclose the judge’s conflict to the defense.

The ethical limitations on a lawyer’s post-trial communication with jurors are set forth in RPC 4-3.5(d)(4). In Kriston v. Webster, a lawyer for the defendant interviewed jurors without following the procedure specified

 RPC 4-3.5 (d)(4).

228. Schlapper, 687 So. 2d at 985.
229. 695 So. 2d 1245 (Fla. 1997) (Anstead, J., dissenting).
230. Id. at 1251.
231. Id. at 1247.
232. Id. at 1251.
233. Subdivision (d)(4) of RPC 4-3.5, “IMPARTIALITY AND DECORUM OF THE TRIBUNAL,” provides:

(d) Communication With Jurors. A lawyer shall not:

(4) after dismissal of the jury in a case with which the lawyer is connected, initiate communication with or cause another to initiate communication with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge; provided, a lawyer may not interview jurors for this purpose unless the lawyer has reason to believe that grounds for such challenge may exist; and provided further, before conducting any such interview the lawyer must file in the cause a notice of intention to interview setting forth the name of the juror or jurors to be interviewed. A copy of the notice must be delivered to the trial judge and opposing counsel a reasonable time before such interview. The provisions of this rule do not prohibit a lawyer from communicating with members of the venire or jurors in the course of official proceedings or as authorized by court rule or written order of the court.

234. 688 So. 2d 346 (Fla. 5th Dist. Ct. App. 1997).
by this rule. The trial court ultimately granted the defense's motion for a new trial, but in doing so expressly stated that it was ignoring the improper juror interviews and granting the new trial on other grounds. Regarding counsel's noncompliance with RPC 4-3.5(d)(4), the court stated:

Knowledge and observance of the rules regulating a lawyer's ethical conduct with respect to jury and court contacts is as important in the practice of the profession as knowing the substantive law. Ignorance or non-observance of those rules affects the reputation of the Bar and of the individual lawyer who violates them.

In Kriston, the court referred to the procedures that are required as a matter of attorney ethics by RPC 4-3.4(d)(4), but made no reference to Rule 1.321(h) of the Florida Rules of Civil Procedure, which also outlines required juror-contact procedures. The relationship between the ethics rule and the rule of procedure was addressed, however, in a Third District Court of Appeal case, Seymour v. Soloman. Following the trial in this case, plaintiff's counsel contacted three jurors. At that time counsel was aware of no grounds to challenge the verdict or to support a motion to interview the jurors. From one of these contacts, counsel learned that one of the jurors had known the defendant. Counsel moved for a new trial, and the court responded by setting an evidentiary hearing to interview the juror. The appellate court

235. Id. at 347.
236. Id.
237. Id. at 348.
238. RPC 4-3.4(d)(4).
239. Florida Rule of Civil Procedure 1.431(h) provides:

Interview of a Juror. A party who believes that grounds for legal challenge to a verdict exists may move for an order permitting an interview of a juror or jurors to determine whether the verdict is subject to the challenge. The motion shall be served within 10 days after rendition of the verdict unless good cause is shown for the failure to make the motion within that time. The motion shall state the name and address of each juror to be interviewed and the grounds for challenge that the party believes may exist. After notice and hearing, the trial judge shall enter an order denying the motion or permitting the interview. If the interview is permitted, the court may prescribe the place, manner, conditions, and scope of the interview.

FLA. R. CIV. P. 1.431(h).
240. Kriston, 688 So. 2d at 347.
242. Id. at 168.
quashed the trial court’s order, noting that counsel had violated Florida Rule Civil Procedure 1.431(h) by contacting jurors without filing a motion with the court, without notice and hearing, and without leave of court.\textsuperscript{243} In a footnote, the court recognized that RPC 4-3.5(d) “governs the propriety of attorneys’ actions in relation to juror interviews.”\textsuperscript{244} Citing the preamble to the RPC,\textsuperscript{245} however, the court stated that the ethics rules are “not intended to supplement court procedural rules.”\textsuperscript{246}

A trial judge’s authority to \textbf{disqualify an attorney} from representing a client in a particular case is an important aspect of our court system. This authority allows the judge to prevent one party from being placed at an unfair disadvantage in litigation due to reasons such as improper access to confidential information, an attorney’s failure to honor ethical obligations, or even the “appearance of impropriety.”\textsuperscript{247} Two cases at the appellate level dealt with the issue of disqualification as a result of alleged access to confidential information.

The Third District Court of Appeal addressed the question of how the conflicts rules apply to a lawyer who may have been previously involved in a matter in a nonlawyer capacity. \textit{Royal Caribbean Cruises, Ltd. v. Buenaagua}\textsuperscript{248} concerned a former adjuster for a cruise line’s insurance claims manager who became a lawyer and opposed the cruise line in Jones Act cases.\textsuperscript{249} The cruise line’s motions to disqualify the lawyer in four unrelated cases were denied. The appellate court denied certiorari, concluding that the current matters were not “substantially related” to matters on which the lawyer previously worked as an adjuster.\textsuperscript{250} The court noted the presence of four significant factors: 1) four years had passed since the lawyer left the claims manager; 2) the current matters arose after the lawyer left the claims manager; 3) the claims manager and the cruise line were no longer associated; and 4) the claims manager did not adjust the matters in question.\textsuperscript{251} The

\textsuperscript{243} Id.
\textsuperscript{244} Id. at 168 n.1.
\textsuperscript{245} RPC, “PREAMBLE: A LAWYER’S RESPONSIBILITIES.”
\textsuperscript{246} Seymour, 683 So. 2d at 168 n.1 (citing Preamble to Rules Regulating The Florida Bar).
\textsuperscript{247} State Farm Mut. Auto. Ins. Co. v. K.A.W., 575 So. 2d 630, 633 (Fla. 1991). Unlike the former Code of Professional Responsibility, Florida’s current RPC no longer contains a rule against the “appearance of impropriety.” \textit{Id}. Nevertheless, judges may use an “appearance of impropriety” standard in ruling on motions to disqualify counsel. \textit{Id.} at 634.
\textsuperscript{248} 685 So. 2d 8 (Fla. 3d Dist. Ct. App. 1996).
\textsuperscript{249} Id. at 8.
\textsuperscript{250} Id. at 10.
\textsuperscript{251} Id. at 8-10. In the court’s view, these factors distinguished this case from its prior decision in Tuazon v. Royal Caribbean Cruises, Ltd., 641 So. 2d 417 (Fla. 3d Dist. Ct. App. 1993).
cruise line failed to show that any information to which the lawyer, as adjuster, had access gave him an unfair advantage in the present matters.\textsuperscript{252} The court further noted that information relevant to each case (e.g., "shipboard conditions, cleaning practices, maintenance procedures") could be obtained through discovery.\textsuperscript{253} Citing the comment to RPC 4-1.9,\textsuperscript{254} the court concluded that a "changing of sides in the matter in question" by the lawyer had not occurred.\textsuperscript{255} The court further stated that the fact that all Jones Act cases are all similar to some degree was insufficient to warrant disqualification of the lawyer.\textsuperscript{256}

Unfair access to confidential information as grounds for disqualification in a joint representation situation was at issue in \textit{Double T Corp. v. Jalis Development, Inc.}\textsuperscript{257} Several co-defendants were jointly represented in the defense of a civil matter. Plaintiff's counsel gained access to one co-defendant's corporate files after that co-defendant filed for bankruptcy, and the bankruptcy trustee waived that co-defendant's attorney-client privilege. The remaining co-defendants moved to disqualify plaintiff's counsel, but the trial court denied the motion.\textsuperscript{258} The Fifth District Court of Appeal reversed and ordered disqualification.\textsuperscript{259} "As a result of the bankruptcy trustee's

\textsuperscript{252.} \textit{Royal Caribbean}, 685 So. 2d at 11.
\textsuperscript{253.} \textit{Id.} at 10.
\textsuperscript{254.} \textit{Id.} The comment to RPC 4-1.9, "CONFLICT OF INTEREST; FORMER CLIENT," provides in pertinent part:

The scope of a "matter" for purposes of rule 4-1.9(a) may depend on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a wholly distinct problem of that type even though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdiction. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

RPC 4-1.9 cmt.
\textsuperscript{255.} \textit{Royal Caribbean}, 685 So. 2d at 10 (citing RPC 4-1.9 cmt. (1992)).
\textsuperscript{256.} \textit{Id.} at 11.
\textsuperscript{257.} 682 So. 2d 1160, 1160 (Fla. 5th Dist. Ct. App. 1996).
\textsuperscript{258.} \textit{Id.} at 1161.
\textsuperscript{259.} \textit{Id.}
waiver of the attorney-client privilege, [plaintiff's] counsel has received an informational advantage over the defendants who agreed to joint representation, as [the bankrupt's] corporate files include attorney-client communications regarding the pending civil litigation. 260

Disqualification as a means of preventing a lawyer from acting in the dual roles of advocate and witness at trial was the subject of several cases. With limited exceptions, RPC 4-3.7 ethically precludes a lawyer from representing a client at trial if that lawyer will be a "necessary witness on behalf of the client." 261 Disqualification under this rule is not warranted where the lawyer will not be a material witness. 262 In a domestic relations case, Pascucci v. Pascucci, 263 opposing counsel moved to disqualify the wife's lawyer based on alleged communications with a psychologist who treated the wife and children, claiming those discussions made the lawyer a material witness. 264 The trial court granted the motion, but the Fourth District Court of Appeal reversed the order. 265 The record reflected no evidence that the wife's lawyer would be a material witness.

Even if counsel had gained information, this would not make counsel a material, necessary or essential witness because anything he could conceivably testify to would be inadmissible hearsay.

Any possible argument that counsel could be a witness vanished.

260. Id.
261. Rule 4-3.7, "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.

RPC 4-3.7.
262. Id.
263. 679 So. 2d 1311 (Fla. 4th Dist. Ct. App. 1996).
264. Id. at 1312.
265. Id. at 1313.
when the trial court denied former wife's motion for protective order and permitted the deposition [of the psychologist].

On a related point, the appellate court noted that the conflict of interest rule, RPC 4-1.7(b), "does not require an attorney to withdraw when the opposing party has instituted collateral litigation against the attorney personally." Two other cases concerning applicability of RPC 4-3.7 have helped clear up uncertainty concerning the extent of the disqualification imposed under this rule. The rule on its face states that a disqualified lawyer-witness cannot "act as advocate at a trial." It does not, however, refer to possible pre-trial or post-trial representation. In Fleitman v. McPherson, the First District Court of Appeal ruled that the trial court had erred in not disqualifying a lawyer who was likely to be a "featured witness" at trial. Significantly, the court went on to state that the lawyer "may participate in the representation up until the trial and after the trial, but may not participate as an attorney at trial." The conclusion that RPC 4-3.7(a) does not bar pre-trial representation was also reached in United States v. Abbell, which concerned a criminal defendant’s lawyer who was to be called as a government witness at trial to testify regarding his client’s co-defendant. The court ruled that the lawyer was disqualified under RPC 4-3.7(a) from representing his client at trial, but was not disqualified from pre-trial representation.

As in many areas of lawyering, delay in pursuing a motion to disqualify opposing counsel can be fatal. A federal court in Florida denied a motion for disqualification that was filed five months after suit was instituted and eight months after the filing of a related case. The court in Concerned Parents of Jordan Park held that the untimeliness in the filing of the disqualification motion acted as a waiver of the right to object.

266. Id. at 1312.
267. RPC 4-1.7(b); see supra note 22.
268. Pascucci, 679 So. 2d at 1312.
269. RPC 4-3.7(a) (emphasis added); see supra note 261.
270. 691 So. 2d 37 (Fla. 1st Dist. Ct. App. 1997).
271. Id. at 38.
272. Id. (emphasis added).
274. Id. at 862.
275. RPC 4-3.7(a); see supra note 261.
278. Id. at 406.
279. Id. at 408.
The permissible scope of a lawyer’s argument to a jury, and responses of the court and The Florida Bar when those bounds are exceeded, were addressed in a number of cases. District Courts of Appeal for each district, except the second, published decisions in this area. In Winterberg v. Johnson,280 the First District Court of Appeal expressed its position that argument that is unethical and improper under RPC 4-3.4(e)281 “does not necessarily constitute fundamental or harmful error.”282 Rather, the court will focus on whether the misconduct could have been cured by a jury instruction from the trial court, and whether the argument was so egregious as to preclude the jury from fairly considering the case.283 The court noted that, while interested in the conduct of attorneys, its primary consideration was not attorney discipline, but the fairness of trial proceedings.284 Similar decisions were reached by the First District Court of Appeal in City of Jacksonville v. Tresca285 and Hicks v. Yellow Freight Systems, Inc.286

The Third District Court of Appeal, in Hampton v. State,287 concluded that an improper argument that was not objected to did not require reversal.288 The prosecution had agreed not to mention a certain tape to the jury. Despite this agreement, when the prosecutor began his closing argument, he brought up the tape. Defense counsel did not object, and this failure to object proved costly when the appellate court declined to find fundamental error.289

Also addressed by the Third District Court of Appeal was improper argument that was alleged to be “invited.”290 Repeated expressions of the prosecutor’s personal opinion were condemned by the court in Fryer v.

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281. Rule 4-3.4(e), “FAIRNESS OF OPPOSING PARTY AND COUNSEL,” provides that a lawyer may not
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.
RPC 4-3.4(e).
282. Winterberg, 692 So. 2d at 255.
283. Id.
284. Id.
286. 694 So. 2d 869, 870 (Fla. 1st Dist. Ct. App. 1997).
288. Id. at 585.
289. Id.
as "patently improper and violative of the rules of professional conduct." Defense counsel objected to some of the statements. The court reversed the conviction, ruling that an the prosecutor's responses to defense counsel's "inviting" comments went far beyond merely "righting the scale" and prejudiced the jury. A concurring opinion characterized the actions of both counsel as a "monumental display of attorney misconduct."

The Fourth District Court of Appeal affirmed per curiam the trial court's judgment in *Donahue v. FPA Corp.* The concurring opinion in *Donahue* expressed the view that an unobjected-to closing argument that violated RPC 4-3.4(e) was not necessarily fundamental error. The concurrence distinguished the court's prior holding in *Norman v. Gloria Farms, Inc.* The concurring opinion declared the author's "hope that publishing unethical remarks and the name of the lawyer making them will serve as a deterrent."

In *American Chambers Life Insurance Co. v. Hall,* the Fourth District Court of Appeal concluded that isolated ""send a message"" and ""conscience of the community"" arguments, while clearly improper, are not always per se harmful. Another improper argument case, *Grushoff v. Denny's, Inc.* concerned a "golden rule" argument. The argument in question had been objected to, and the objections were sustained. On the basis of the argument, the trial court granted a new trial. The appellate court reversed, holding that "golden rule" arguments were not per se reversible error but must be evaluated under the same standard as other improper argument: whether the subject argument was "highly prejudicial and inflammatory." Here, the argument fell short of this standard.

The voice of the Fifth District Court of Appeal was heard in the form of a lengthy dissent in *Schlotterlein v. State.* The dissenting opinion

291. *Id.* at 1046.
292. *Id.* at 1047.
293. *Id.* at 1048.
294. *Id.* at 1049 (Sorondo, J., concurring specially).
296. RPC 4-3.4(e); *see supra* note 281.
297. *Donahue,* 677 So. 2d at 883-84 (Klein, J., concurring specially).
298. *Id.* (citing *Norman v. Gloria Farms, Inc.*, 668 So. 2d 1016 (Fla. 4th Dist. Ct. App. 1996)).
299. *Donahue,* 677 So. 2d at 883 (Klein, J., concurring specially).
301. *Id.* at D1381.
302. 693 So. 2d 1068 (Fla. 4th Dist. Ct. App. 1997).
303. *Id.* at 1069.
304. *Id.*
305. *Id.*
characterized the prosecutor's closing argument as containing statements bolstering the credibility of state's witnesses and vouching for their veracity, as well as expressions of personal opinion as to the guilt of the accused. The dissent would have reversed the conviction on the grounds of this improper argument, which the author believed violated RPC 4-3.4(e) "in multiple regards." It is interesting to note, despite the numerous reported cases dealing with various aspects of improper and unprofessional argument, there appear to have been no reported instances of disciplinary sanctions being assessed against the perpetrators.

IV. The Lawyer's Relationship with Third Parties

A lawyer's ethical obligations extend beyond dealings with his or her client. Florida Rules of Professional Conduct impose minimum requirements in a lawyer's dealings with third parties. These duties include whether and how an attorney can communicate with third parties, and honesty and fairness in dealing with third parties and others. This section discusses cases which have impacted these areas.

Perhaps the area of the most court activity has been the propriety of lawyers' communications with others. The Supreme Court of Florida settled the question of communications with the former employees of a defendant corporation in the case of H.B.A. Management, Inc. v. Estate of Schwartz. The court found that under RPC 4-4.2, ex parte contact with former employees of a defendant corporation is permissible. The court upheld the Fourth District Court of Appeal, and disapproved of the position taken by the Second District Court of Appeal in Barfuss v. Diversicare Corp.

307. Id. at 568.
308. Id. at 571.
309. Id.
311. 693 So. 2d 541 (Fla. 1997).
312. H.B.A. Management, 693 So. 2d at 544. Rule 4-4.2 provides in pertinent part: "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." RPC 4-4.2.
Adopting the position taken by Florida Ethics Opinion 88-14, the court stated:

An employee’s departure terminates the agency or respondeat superior connection that had previously permitted that employee to create liability for her employer or to bind or make admissions for that employer. Hence, the underlying concerns and purpose of rule 4-4.2 is simply no longer served by restricting contacts with former employees.

Following the Schwartz case, the Second District Court of Appeal quashed a trial court order which prohibited plaintiff’s counsel from communicating with former employees of a nursing center. Plaintiff’s counsel wished to contact former employees of a nursing home who, while employed there, had cared for the now-deceased patient whose estate was suing the nursing home. The court relied on the Supreme Court of Florida’s decision in Schwartz in quashing the lower court order and permitting such contact.

Regarding communication between a prosecutor and a criminal defendant who was represented by counsel, the Supreme Court of Florida found that the presence of the prosecutor at the jail while police investigators spoke with the inmate was not improper in Rolling v. State of Florida. Danny Rolling was accused of serial killings and incarcerated in the Alachua County jail awaiting trial. During the course of his imprisonment, another inmate, Bobby Lewis, sought to obtain an advantage in his own case by becoming an informant against Rolling. Lewis repeatedly contacted investigators regarding information he claimed to have about the murders, while investigators refused to offer him any benefit for revealing such information. Lewis then enlisted the help of Rolling in his plan to obtain a better deal for himself, in which Rolling, through Lewis, requested to speak with homicide investigators. Upon being told by police investigators that his lawyers would be opposed to such contact, Rolling terminated the interview. Lewis continued to attempt to contact police to make a deal for himself. Ultimately, Rolling requested another interview with the police, at which

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313. Id. at 546 (citing Barfuss v. Diversicare Corp. of Am., 656 So. 2d 486 (Fla. 2d Dist. Ct. App. 1995)).
315. H.B.A. Management, 693 So. 2d at 546.
317. Id.
318. Id.
319. 695 So. 2d 278, 292 (Fla. 1997).
Lewis would also be present to speak for Rolling. The prosecutor in the case came to the jail to be present while investigators spoke with Rolling, so that he would be available to answer questions posed by the investigators interviewing Rolling. Rolling subsequently plead guilty to the murders and was sentenced to death.  

Rolling appealed his sentence on several grounds, including that his statements to investigators should be suppressed based on alleged violations by the prosecutor of RPC 4-4.2 and 4-5.3. Rolling contended that the prosecutor not only participated in the interview by being present, but also directed the course of the interview, thereby violating RPC 4-4.2 and 4-5.3. The trial court made a specific finding that the prosecutor did not violate the rules:

As legal advisor to the law enforcement officers, he [Nilon] made himself available to render such advice as was appropriate under the circumstances. Mr. Nilon was careful to insure that he did not participate in any of the interviews with the Defendant, but was available to advise law enforcement officers should such advice be sought. The fact that Mr. Nilon was in geographic proximity to the site of the interview, rather than merely being available to render

320. *Id.* at 282.

321. *See supra* note 312 and accompanying text.

322. Rule 4-5.3 states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 4-5.3.
advice by telephone, does not rise to the level of violation of the
Code of Professional Responsibility.\textsuperscript{323}

The Supreme Court affirmed the court’s denial of the motion to suppress “[b]ecause the evidence in the record and inferences derived therefrom support the trial court’s finding that the prosecutor’s presence at the prison to render advice if needed did not violate the Rules of Professional Conduct.”\textsuperscript{324}

It is important to note that the conduct complained of appeared in the context of a motion to suppress evidence.\textsuperscript{325} The court upheld the trial court on the motion to suppress by failing to disturb the lower court’s finding.\textsuperscript{326} Since there was evidence to support the lower court’s finding that no violation of the rules occurred, the Supreme Court of Florida refused to overturn the trial court’s ruling on the motion to suppress.\textsuperscript{327} The court also emphasized that the evidence did not support a conclusion that the prosecutor participated in the interview between the police and the accused which was instigated at the request of the accused.\textsuperscript{328} Attorneys should not assume that they can infer from this case that it is permissible to participate in any way in discussions between their clients or others and persons who have counsel.\textsuperscript{329} Additionally, attorneys should not assume that they may be present at discussions between their clients or others and persons represented by counsel, since the court specifically found that the prosecutor’s role in this instance was to “ensure that Rolling’s constitutional rights were not violated by any conduct of Task Force investigators.”\textsuperscript{330}

The case of \textit{Jackson v. Motel 6 Multi-Purposes, Inc.}\textsuperscript{331} determines the permissible extent of communications with actual and potential members of a class prior to class certification.\textsuperscript{332} Plaintiffs’ attorneys had sought leave to depart from rule 4.04(e),\textsuperscript{333} and be permitted to communicate with actual and potential class members, which were potentially numerous. The magistrate allowed such departure in an order which permitted the following: 1) communication through an 800 number for persons to reach the plaintiff’s

\begin{itemize}
  \item\textsuperscript{323} \textit{Rolling}, 695 So. 2d at 292.
  \item\textsuperscript{324} \textit{Id.}
  \item\textsuperscript{325} \textit{Id.}
  \item\textsuperscript{326} \textit{Id.}
  \item\textsuperscript{327} \textit{Id.}
  \item\textsuperscript{328} \textit{Rolling}, 695 So. 2d at 292.
  \item\textsuperscript{329} Participation would include, e.g., drafting questions or documents for presentation to the opposing party, and the like.
  \item\textsuperscript{330} \textit{Rolling}, 695 So. 2d at 292.
  \item\textsuperscript{331} 10 Fla. L. Weekly Fed. D500 (M.D. Feb. 24, 1997).
  \item\textsuperscript{332} \textit{Id.} at D501.
  \item\textsuperscript{333} LOCAL R. M.D. FLA. 4.04.
\end{itemize}
attorneys; 2) publication of notices, response to requests for information by parties or class members, except for management or supervisory employees; and 3) letters through the mail so long as there was no solicitation to become plaintiffs, and the communications identified the attorney, the litigation, and the purpose of the communication. The order was appealed, and the court found that the order was appropriate with certain modifications. The court added the following: 1) mailings could not be directed to persons with managerial or supervisory positions in Motel 6; 2) plaintiffs' counsel could not solicit for payment of fees or expenses; 3) no ex parte communication could be made to persons with managerial and/or supervisory positions in Motel 6; 4) ex parte communication must be preceded by identification of the plaintiff or attorney, identification of the litigation and its status, identification of the purpose of the communication to discuss potential discriminatory practices of Motel 6, a statement that the person could refuse to participate in the communication, and a statement that the allegations had not yet been proven; and 5) the communications must comply with any applicable rules of court, evidence, or The Florida Bar. Most significantly, for the purpose of this article, is the statement that any communication must comply with Florida Bar Rules. Potentially, in addition to the rules regulating communication with persons represented by counsel and persons not represented by counsel, the rules regulating attorney advertising may apply.

Finally, regarding commercial communications by an attorney to potential clients, Babkes v. Satz struck down a statute prohibiting the commercial use of names and addresses of persons who have received traffic tickets. Section 316.650(11) of the Florida Statutes provides that information in traffic citations "shall not be used for commercial solicitation

335. Id. at D503.
336. Id.
337. Id.
338. See supra note 312 and accompanying text.
339. Rule 4-4.3 states the following:
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.
RPC 4-4.3.
340. See RPC 4-7.
342. Id. at 914.
purposes. Florida attorney Babkes challenged the constitutionality of the statute, stating that it restricted his First Amendment right to free speech. The court, in using the *Central Hudson* four-pronged test, found that the speech is commercial speech under the First Amendment and that the State of Florida has a substantial interest in preserving privacy and restricting abuse of solicitation. However, the State of Florida failed to prove that the statute directly advances the government interest under the test. Further, the court found that the State of Florida failed to show that "a more limited speech regulation would be ineffective." The court then granted a permanent injunction against enforcement of the statute.

The court will scrutinize not only whether communications may be made, but also the content of such communications. The court found in *Florida Bar v. Roth* that an attorney may not threaten criminal prosecution to gain an advantage in a civil case. Roth, in negotiating a settlement in a trust case, indicated that he could prosecute the opposing party’s husband in a molestation case based on an alleged incident many years ago as there is no statute of limitations on child molestation cases. The court found that the mere mention of the sexual molestation allegations in the conversation was a threat for the purpose of settling the civil matter, in violation of RPC 4-4.4 and 4-8.4(d), which warranted a public reprimand.

A lawyer has an obligation of fair and honest dealings with third parties. The Supreme Court of Florida in *Florida Bar v. Bosse* reprimanded an attorney for avoiding his obligation to pay an expert witness fee. The attorney had hired the expert for his defense in a prior grievance matter, in

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346. Id.
347. Id. at 913 (quoting Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y., 447 U.S. 557, 571 (1980)).
348. Id. at 914.
349. 693 So. 2d 969 (Fla. 1997).
350. Id. at 972.
351. Rule 4-4.4 provides: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person.” RPC 4-4.4.
352. The rule states that an attorney shall not “engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.” RPC 4-8.4(d).
353. Roth, 693 So. 2d at 971.
354. 689 So. 2d 268 (Fla. 1997).
355. Id. at 268.
which the attorney was awarded costs against the Bar after winning the case. The Bar sent a check for the costs to the attorney, which was deposited in his personal joint checking account by his wife. Bosse neither paid the expert witness with the funds, nor notified the expert that the funds had been received. In defending his actions to the court, Bosse stated that the funds had been deposited and spent, and that he therefore had not willfully failed to pay the expert witness fee. However, the records indicated that Bosse had sufficient funds in the account to pay the amount of the expert’s fee during the time period in which he claimed it was spent. The court found that he violated Rule of Discipline 3-4.3 of the Rules Regulating The Florida Bar and RPC 4-8.4(c) in failing to use the cost award to pay the witness’ fee and in misrepresenting his finances to avoid payment of his debt.

Lawyers also have obligations in dealing with potential creditors as evidenced by Florida Bar v. Cramer. Cramer used the name of a third person, who had a substantial net worth, on his application to a financial institution for credit in purchasing computer equipment. Cramer had previously been turned down for credit when applying in his own name. Ultimately, Cramer stopped making payments on the leases. Cramer raised as a defense that the third party knew that he was using his name and that an officer of the financial institution ratified the use of the third party’s name. The court found that regardless of third party contact or authorization of the fraud, Cramer was guilty of fraud and misrepresentation. The court disbarred Cramer, taking into consideration his past discipline which also included “subterfuge in money matters.”

356. Id. at 269.
357. Rule of Discipline 3-4.3 provides that: “The commission by a lawyer of any act that is unlawful or contrary to honesty and justice . . . may constitute a cause for discipline.” RULES OF DISCIPLINE 3-4.3.
358. Rule 4-8.4(c) provides that: “A lawyer shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” RPC 4-8.4(c).
359. Bosse, 689 So. 2d at 269.
360. 678 So. 2d 1278 (Fla. 1996).
361. The court found that Cramer specifically violated the following rules:
   3-4.3 (committing an act that is unlawful or contrary to honesty and justice);
   4-4.1(a) (making a false statement of material fact or law to a third person in the course of representing a client); 4-8.4(b) (committing a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer); and 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation).
 Id. at 1281.
362. Cramer, 678 So. 2d at 1281.
In addition to fair dealing with an attorney's own witnesses or creditors, an attorney also may owe an obligation of honesty to potential employers. The Supreme Court of Florida reprimanded an attorney for an intentional misrepresentation on an employment application in Florida Bar v. Glant. The case stemmed from an earlier disciplinary case in which Glant, while employed at Central Florida Legal Services, sent a letter to Health and Rehabilitative Services ("HRS") enclosing an unfiled request for modifying custody against the wishes of her client, whose husband Glant thought should be investigated for child abuse. Glant was reprimanded and placed on probation in that case. In the later case, Glant left Central Florida Legal Services and applied for a position with HRS. In her application and resume, Glant failed to disclose her prior employment with Central Florida Legal Services. The application signed by Glant stated that it was "true, correct, and made in good faith." Additionally, at her hearing before the referee "Glant admitted that her failure to disclose her employment with Central Florida Legal Services was intentional." The court upheld the referee's finding that an attorney "may be disciplined for an intentional misrepresentation on an application for a position as a lawyer" in violation of RPC 4-8.4(c) and ordered that she be publicly reprimanded. It should be noted that the court emphasized in its opinion Glant's signature as to the application's veracity, as well as her admission that the omission was intentional.

A lawyer, in matters not involving fraud or misrepresentation, may limit his or her personal liability to third parties. The court found in Porlick, Poliquin, Samara, Inc. v. Compton that firms organized under the Professional Service Corporation Act may limit the personal liability of their members in discharging firm debts. Compton, a member of the firm, signed an agreement as president of the firm with a consulting engineer to investigate and possibly testify as an expert in a case.

363. 684 So. 2d 723, 725 (Fla. 1996).
365. Glant, 645 So. 2d at 964.
366. Glant, 684 So. 2d at 725.
367. Id.
368. Id.
369. Id.
370. 683 So. 2d 545 (Fla. 3d Dist. Ct. App. 1996).
371. Id. at 548.
engineering firm sued Compton in his individual capacity, alleging that Compton and the firm failed to pay the agreed fee for services performed and that Compton was individually liable since he signed the contract. The law firm had been organized under the Professional Service Corporation Act and RPC 4-8.6(a). The Act provides that shareholders acting in their capacity as shareholders have no personal liability outside the provision of legal services. The court concluded that the Act "relieves professional service corporation shareholders of personal liability for the ordinary business debts of the professional service corporation." Compton’s addition of "Pres." after his name indicated that he was acting as a shareholder, thus relieving him of responsibility for the debt.

However, acting as a shareholder has both benefits and detriments. Contingent fee contracts signed by a shareholder, even the sole shareholder of a P.A., inure to the benefit of the P.A. as in the case of In Re Nelson. Nelson, as a member of his P.A., signed a contingent fee contract as a referring lawyer which provided for a division of fees between his P.A. and another law firm. Prior to the referral, Nelson’s P.A. had done

373. Rule 4-8.6(a) provides in part that: “Lawyers may practice law in the form of professional service corporations, professional limited liability companies, or registered limited liability partnerships organized or qualified under applicable law.” RPC 4-8.6(a).
375. Porlick, 683 So. 2d at 548-49.
376. Id. at 546-47.
378. See RPC 4-1.5(f)(4)(D), which states the following:

(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 for circuit court 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 contract shall not bar subsequent inquiry as to whether the fee actually claimed or
significant work on the case. Before the conclusion of the case, Nelson P.A. and Nelson personally filed for bankruptcy under Chapters 11 and 7. Nelson was suspended shortly after the petitions were filed, then resigned in lieu of disciplinary proceedings, and the P.A.'s bankruptcy was converted to a Chapter 7. Subsequently, the contingent fee case was settled, and a district court approved the fee division between Nelson P.A. and the other law firm, which petitioned to determine to whom the fee should be paid. 379

The court rejected Nelson's argument that he had any personal interest in the money, concluding that the contract was signed by him in his role as shareholder in Nelson, P.A. 380 The court also indicated that since Nelson was suspended and then resigned, any fee was based on the value of legal services performed prior to the suspension, rejecting Nelson's argument that he was entitled to fees because he performed work on the case after the bankruptcy was filed and after the suspension. 381 The court therefore concluded that any fee was the property of the Nelson P.A. bankruptcy estate and should properly be paid to the estate. 382

Regarding dealings with the IRS, attorneys may not deposit client refund checks into their trust account. 383 In Ollinger v. Internal Revenue Service, 384

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.

RPC 4-1.5(f)(4)(D). See also RPC 4-1.5(g), which provides that:

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.

RPC 4-1.5(g).

380. Id. at 762.
381. Id.
382. Id. at 764.
an attorney appealed fines assessed against him by the IRS for such conduct.\textsuperscript{385} With the client's consent, the attorney deposited two refund checks into his trust account and disbursed the checks to the client and the attorney. Federal law prohibits negotiation of any refund check to a taxpayer by a preparer of tax documents.\textsuperscript{386}

Finally, an attorney may not assist in the unlicensed practice of law.\textsuperscript{387} The court found in \textit{Florida Bar v. American Senior Citizens Alliance, Inc.},\textsuperscript{388} that a corporation owned and managed by nonattorneys for the purpose of selling legal documents was engaged in the unlicensed practice of law.\textsuperscript{389} Specifically, the court found that nonlawyer employees gave legal advice to buyers regarding the appropriateness of estate planning documents which would be prepared by nonlawyer employees of the corporation then reviewed by an employee who was an attorney.\textsuperscript{390} The nonlawyer determined which type of estate planning the buyer should use and what documents were required to fulfill the estate plan, while other nonlawyer employees drafted the documents. Such conduct went well beyond "gathering [the] necessary information"\textsuperscript{391} required to complete estate documents which the court had previously found to be permissible.\textsuperscript{392} The referee found that "a lawyer participating in these same activities would be subject to sanction by The Florida Bar," citing to RPC 4-5.5.\textsuperscript{393}

\textbf{V. THE LAWYER'S RELATIONSHIP WITH THE FLORIDA BAR}

This section discusses the interaction of attorneys with The Florida Bar, the disciplinary arm of the Supreme Court of Florida. Some notable disciplinary cases not discussed in prior sections will be reviewed here. Additionally, rule changes which are not specific to other sections will be briefly discussed.

\begin{itemize}
\item \textsuperscript{384} \textit{Id.} at 96-6567.
\item \textsuperscript{385} \textit{Id.}
\item \textsuperscript{386} 26 U.S.C. § 6695(f) (1994).
\item \textsuperscript{387} RPC 4-5.5(b) provides that: "A lawyer shall not assist a person who is not a member of the bar in the performance of activity that constitutes the unlicensed practice of law." RPC 4-5.5(b).
\item \textsuperscript{388} 689 So. 2d 255 (Fla. 1997).
\item \textsuperscript{389} \textit{Id.} at 256.
\item \textsuperscript{390} \textit{Id.} at 257.
\item \textsuperscript{391} \textit{Id.} at 258 (quoting Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 427 (Fla. 1992)).
\item \textsuperscript{392} \textit{See generally}, Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992).
\item \textsuperscript{393} \textit{Id.} at 257. \textit{See also} RPC 4-5.5.
\end{itemize}
The area in which the court continues to impose the most severe discipline is that of false statements. The requirement of honesty is particularly important in reinstatement proceedings, as evidenced by Florida Bar v. Orta.\textsuperscript{394} Orta had been suspended for three years after being convicted of income tax evasion. Orta applied for reinstatement, but did not disclose the existence of foreign property when asked to by Florida Bar investigators. The referee found that Orta did not disclose the property until he was exposed by Florida Bar investigators and counsel.\textsuperscript{395} The pattern of dishonesty while on suspension for income tax evasion, another form of dishonesty, warranted disbarment.\textsuperscript{396}

Misrepresentation to a foreign disciplinary authority also warrants disbarment, as demonstrated by Florida Bar v. Budnitz.\textsuperscript{397} Budnitz was disbarred by New Hampshire after he testified to a grand jury that a document had been notarized at his office on a particular date when, in fact, it had been notarized at his home and backdated.\textsuperscript{398} In answering a query from the New Hampshire Bar, he reiterated that the testimony was true, and was later disbarred in New Hampshire.\textsuperscript{399} The Supreme Court of Florida disbarred Budnitz as well noting that, although he raised several procedural defects, he neither denied the conduct or, in the alternative, expressed remorse for it.\textsuperscript{400}

Perhaps because misrepresentation and dishonesty generally warrant the harshest punishment, the court scrutinizes these cases carefully. The court confirmed that “[i]n order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent” in Florida Bar v. Lanford.\textsuperscript{401} Similarly, the court refused to overturn a referee’s finding of rehabilitation in an attorney who had checks returned for insufficient funds in her personal account during the period of her suspension in Florida Bar v. Hernandez-Yanks.\textsuperscript{402} While on suspension for misappropriation of client funds and trust account violations, Hernandez-Yanks had checks returned for insufficient funds in a joint account with her husband. The payees were subsequently paid. The referee found that Hernandez-Yanks lacked knowledge of the balance of her joint account at the time the checks were written and recommended reinstatement.\textsuperscript{403} Although

\textsuperscript{394} 689 So. 2d 270, 273 (Fla. 1997).
\textsuperscript{395}  Id. at 272.
\textsuperscript{396}  Id. at 271-72.
\textsuperscript{397}  690 So. 2d 1239, 1239 (Fla. 1997).
\textsuperscript{398}  Id. at 1240.
\textsuperscript{399}  Id. at 1239-40.
\textsuperscript{400}  Id. at 1241.
\textsuperscript{401}  691 So. 2d 480, 480-81 (Fla. 1997).
\textsuperscript{402}  690 So. 2d 1270, 1272 (Fla. 1997).
\textsuperscript{403}  Id. at 1271.
the Bar disagreed with the referee, the court refused to "second-guess the referee." Perhaps Justice Wells had the better argument in his dissent, in which he stated that the basis of the suspension in conjunction with the bounced checks from her personal account indicated "that respondent, within three months of the referee’s report, was continuing the same conduct for which she was suspended. I cannot excuse the continued writing of overdrafts on the basis that she was unaware of the balance in the account."

While declining to discipline an attorney for conduct during his judicial term, the court publicly reprimanded an attorney for his behavior during the conduct of the Judicial Qualifications Committee hearings. The court found that Graham repeatedly objected to motions, intentionally delayed the proceedings, and disregarded the instructions of the presiding chair, as well as harassed another judge who was called as a witness in deposition. The court indicated that Graham’s actions were mitigated by his prior removal from the bench, his cooperation in the disciplinary process, and his good intentions. Based on the violations of RPC 4-3.4(e), 4-3.5(c), 4-3.6(a), 4-4.4, 4-8.2(a), and 4-8.4(d), the court reprimanded Graham as part of a consent judgment.

404. Id. at 1272.
405. Id. at 1273 (Wells, J., dissenting).
406. See Florida Bar v. Graham, 662 So. 2d 1242 (Fla. 1995) (dismissing several counts against Graham regarding conduct which resulted in Graham’s removal from the bench, but for which the court declined to discipline Graham).
407. Id. at 1245.
408. Id. at 1243 n.2.
409. Id. at 1244.
410. Rule 4-3.4(e), provides:

A lawyer shall not . . . 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.

RPC 4-3.4(e).
411. Rule 4-3.5(c) states that “[a] lawyer shall not engage in conduct intended to disrupt a tribunal.” RPC 4-3.5(c).
412. Rule 4-3.6(a) provides:

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.
The court also reiterated that it is impermissible to continue the practice of law while on suspension in *Florida Bar v. Rood.* Rood, while on suspension for two years "failed to notify all his clients of his suspension and . . . continued to meet with, represent and advise clients, and continued to receive and disburse client funds from his bank accounts." Based on this evidence, the court disbarred Rood.

However, the Supreme Court of Florida's direction of the profession is not limited to discipline; the year saw several amendments to rules of note. In the arena of lawyer advertising, the court raised the filing fee from $50 to $100 for advertisements which are required to be filed with and reviewed by the Standing Committee on Advertising. In the same case, the court expanded the information which may be provided in advertisements that are exempt from the filing requirement to include "the office location and parking arrangements; disability accommodations; electronic mail addresses; a lawyer's years of experience practicing law; official certification logos for the fields of law in which a lawyer practices; and common salutary language such as

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RPC 4-3.6(a).

413. Rule 4-4.4 states 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 or knowingly use methods of obtaining evidence that violate the legal rights of such a person." RPC 4-4.4.

414. Rule 4-8.2(a) provides:

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, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.

RPC 4-8.2(a).

415. Rule 4-8.4(d) prohibits a lawyer from:

[Engag[ing] 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 litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

RPC 4-8.4(d).

416. 678 So. 2d 1277, 1277 (Fla. 1996).

417. *Id.*

418. *Id.* at 1278.

419. Amendments to Rules Regulating The Florida Bar—Rules 4-7.2 & 4-7.5, 690 So. 2d 1256, 1257 (Fla. 1997).
as ‘best wishes,’ ‘good luck,’ ‘happy holidays,’ and ‘pleased to announce.’ The court also amended the Interest on Trust Accounts ("IOTA") Program rules to allow voluntary IOTA sweep accounts, which would allow for greater interest on the IOTA account.

Finally, the court denied a petition by The Florida Bar which would have eliminated the pro bono reporting requirement and substituted a voluntary report. In so doing, the court stated the following:

Lawyers have been granted a special boon by the State of Florida—they in effect have a monopoly on the public justice system. In return, lawyers are ethically bound to help the State’s poor gain access to that system. The mandatory reporting requirement is essential to guaranteeing that lawyers do their part to provide equal justice.

Justices Harding and Wells each dissented in part; although they agreed with the obligation the majority imposes on lawyers’ services to the needy, they noted the difficulty in enforcement for The Florida Bar. Justice Grimes dissented entirely in the opinion; he approved the "aspirational goals" of the rule, but found mandatory reporting to be "coercion" and "counterproductive."

The Supreme Court of Florida also made significant changes to the rules on bar admissions in Amendments to the Rules of the Supreme Court Relating

420. Id. at 1256-57.

421. The court described sweep accounts as follows:

A sweep account is an existing cash management product used to generate higher yields on checking accounts. At the end of each business day after all deposits, checks, and charges have cleared against an account, the financial institution electronically transfers the excess funds out of the account into a higher yield investment. At the start of the next business day, the financial institution electronically returns the excess funds to the account and posts the interest earned.

Amendments to Rules Regulating The Florida Bar—Rule 5-1.1(c)—IOTA, 692 So. 2d 181, 182 n.1 (Fla. 1997).

422. Id. at 182.


424. Id. at 735.

425. Id. at 737 (Harding, J., & Wells, J., dissenting).

426. Id. at 738 (Grimes, J., dissenting).

427. Id.

428. Amendments to Rule 4-6.1, 696 So. 2d at 738.
to Admissions to the Bar. The changes reorganized and clarified the rules, and codified some long standing policies of the Board of Bar Examiners. The court considered comments filed by one Bar member who contested the rules regarding formal hearings and appeals from the Board, indicating that they have inadequate due process protections and provide an incomplete record for the court's review. The court indicated that the Board, in practice, gives such protections, but recommended that the Board review their rules to consider codifying their current practices. The member also contested the requirement of a fee to applicants for whom the Board requires a formal hearing who are ultimately admitted to the Bar. The court adopted the rule change requiring the fee of all applicants who undergo a formal hearing, noting that the hearing was required whether the applicant was admitted or not and that the costs associated with the hearings are fairly placed on those whose applications required a greater expenditure of the Board’s resources.

VI. CONCLUSION

Cases, rules, and ethics opinions continue to define the role of lawyers in dealings with their clients, the justice system, and society as a whole. Interest in the area of professional responsibility has continued to expand in 1997. Lawyers have become more concerned with the image of the profession, and believe that ethics and professionalism must be focussed on to improve it. This article has examined a wide spectrum of topics within ethics and professionalism, of which lawyers should remain aware to practice responsibly and attain the high standards imposed on them.

429. 695 So. 2d 312 (Fla. 1997).
430. Id. at 313.
431. Id.
432. Id. at 314.
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I. INTRODUCTION

This survey covers the decisions of the Florida courts and Florida legislation produced during the period from July 1, 1996, through June 30, 1997, especially selected for this article as being of potential interest to the real estate practitioner.

II. ATTORNEYS’ FEES

Brevard County v. Canaveral Properties, Inc.1 The attorneys’ fees awarded in this eminent domain case were calculated to include twenty percent of the benefit to the landowner, which included severance damages.2 However on appeal, the severance damages were stricken.3 When reconsidering the attorneys’ fees, the trial court merely subtracted the benefit and left the rest of the calculation intact.4 The Fifth District Court of Appeal found that to be an unacceptable approach.5 The court pointed out that the statute6 required the court to give the greatest weight to the benefit the attorney achieved for the client, and that the calculation in this case was “based on expert testimony which itself was predicated on the landowners’ very substantial recovery.”7 When the district court reduced the recovery, it reduced the benefit achieved by the attorney.8 Consequently, the trial court was required to completely recalculate the attorneys’ fees based upon the record.9 Furthermore, it ruled, no additional attorneys’ fees should be awarded for relitigating the attorneys’ fee.10

1. 689 So. 2d 1309 (Fla. 5th Dist. Ct. App. 1997).
2. Id. at 1309.
3. Id.
4. Id.
5. Id. at 1309-10.
7. Canaveral Properties, 689 So. 2d at 1309.
8. Id. at 1310.
9. Id.
10. Id. (citing Seminole County v. Butler, 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996)).
This case returned to the district court after the trial court awarded $55,647.00 in appellate attorneys' fees.\(^{11}\) The County claimed the amount was excessive and the district court agreed because it concluded that multiple attorneys had performed duplicate tasks.\(^{12}\) For example, four attorneys had prepared for the oral argument and two had attended the argument even though only one had actually presented the argument. Furthermore, the firm had claimed over 402 hours were spent on the appeal, even though much of the research should have already been performed for the trial. The fact that four property owners were represented by the one law firm was considered, but did not figure into the court's ultimate reasoning. Each owner could have had its own counsel, but declined individual representation. The criterion for measuring attorneys' fees was reasonableness.\(^{13}\) Where the hours were bloated, or a task was performed by more attorneys than were needed, the public should not have to pay the excess.\(^{14}\)

*Broward County v. LaPointe.*\(^{15}\) The County made an offer to buy land for $2,404,000 subject to the condition that if environmental contamination was found, it could cancel the contract or adjust the price based on the cost of the environmental clean up. When the landowners rejected the offer, the County began a condemnation proceeding. In 1991, the County's expert estimated the cost of additional testing and clean up at $1,147,267. The parties entered an agreed order of taking to allow title to pass to the County and proceeded to litigate the landowner's compensation. The case was eventually settled and the settlement terms were incorporated into a stipulated final judgment.\(^{16}\)

In addition to the award of $3,704,480 for the land taken, the settlement provided that the landowner was entitled to: 1) back rent from a billboard tenant; 2) the right to lease back part of the condemned land for billboards; and 3) the agreement that if the County was ever required to perform an environmental clean up of the taken land, it would install a system where it could perform that clean up, not only for the taken land, but also for the adjacent land still owned by the condemnee. The settlement also provided that the court would retain jurisdiction over the agreement for the purpose of

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12. *Id.* at 1244-45.
13. *Id.* at 1245.
14. *Id.*
15. 685 So. 2d 889 (Fla. 4th Dist. Ct. App. 1996).
16. *Id.* at 890-91.
 awarding attorneys’ fees and costs “including all costs of environmental contamination issues.”

In figuring the attorneys’ fees for the landowners’ trial counsel, the circuit court first figured that the firm “had reasonably spent 2,400 hours... at a reasonable blended rate of $250 per hour.” This produced a “lodestar” amount of $600,000. Due to the fact that the contamination issues made the case “novel and complex,” the trial court also awarded a success bonus. The court figured this amount by starting with the initial government offer of $2,404,000 and subtracted its initial clean up estimate of $1,147,267 to produce an adjusted offer of $1,256,753. It subtracted the adjusted offer from the compensation award of $3,704,000 to produce a benefit achieved of $2,447,267. The court added to this the monetary value of the other settlement provisions, which it determined was $1,129,000, to produce a total benefit value of $3,576,267. The success bonus of ten percent of that total benefit, i.e., $357,626, was added to the lodestar amount to produce an attorneys’ fee of $957,626.

The County objected to the method by which the success bonus was calculated. The County claimed that its initial offer should not have been reduced by its initial clean up estimate. Additionally, the County claimed that the benefit should be mechanically calculated by subtracting the initial offer from the final figure. In response, the district court pointed out that the initial offer contained a clean up contingency that could have substantially reduced the amount the landowners received. The landowners’ counsel was successful in eliminating that contingency, in effect shifting the burden of environmental clean up to the County. It was not an abuse of discretion for the trial court to consider that as a benefit achieved for the landowners or to set the value at the County’s own initial estimate. In addition, it was not an abuse of discretion for the trial court to set a monetary figure for the value of the other settlement provisions and to include that in the calculations.

17. Id. at 891.
18. Id.
19. Id. (quoting the trial court).
20. LaPointe, 685 So. 2d at 891.
21. Id.
22. Id.
23. Id.
24. Id.
25. LaPointe, 685 So. 2d at 892.
26. Id.
27. Id.
court’s valuation was within the range of expert testimony in the record. 28 On these issues, the trial court’s decision was affirmed. 29

A more difficult issue was whether the County should pay the attorneys’ fees of two law firms hired to represent the landowners in dealing with the Department of Environmental Regulation. They did obtain a favorable consent order which made possible the eventual settlement of the condemnation case, but the court concluded that whether the County was liable for their fees should be determined by the settlement agreement itself. 30

The agreement provided for payment of the landowners’ “costs and attorney’s fees, including all costs of environmental contamination issues.” 31 The court placed great importance on the fact that the settlement agreement allowed for reimbursement of costs, not all costs and attorneys’ fees of environmental contamination issues. 32 Invoking the plain meaning canon of construction, although negative implication would have been more convincing, the court decided that the agreement did not include paying attorneys who handled related regulatory matters. 33 The court ignored the point that the very statute under which attorneys’ fees and costs were recoverable in condemnation cases included attorneys’ fees within the term “costs.” 34

City of Jacksonville v. Tresca. 35 The City was involved in a redevelopment project. It tried unsuccessfully to obtain an option to purchase the land for $107,000. Later, when condemnation proceedings had begun, the City deposited $50,000 into the registry of the court. The district court said that this was “presumably the good-faith estimate of the property value based on a valid appraisal,” a point never disputed by the City. 36 The jury concluded that the proper amount of compensation for the landowner was $182,000. 37 Attorneys’ fees under section 73.092 of the Florida Statutes are to be based “solely on the benefits achieved for the client.” 38 Thus, “[b]ased
on the $107,000 figure, the trial court awarded a fee in the amount of $24,750 (thirty-three percent of $182,000 minus $107,000). The district court found that to be error. The statute defined benefit as

the difference, exclusive of interest, between the final judgment or settlement and the last written offer made by the condemning authority before the defendant hires an attorney. If no written offer is made by the condemning authority before the defendant hires an attorney, benefits must be measured from the first written offer after the attorney is hired.

The "offer" contemplated by the statute was an offer to buy which, when accepted by the landowner, would obligate the condemnor to buy at that price. But, a purchase option would not even have obligated the City to buy the property. The proper measure of betterment would be to use the $50,000 deposit as urged by the condemnee’s attorneys.

Department of Environmental Protection v. Gibbins. The landowner’s neighbor operated a service station which discharged gasoline from underground storage tanks. In order to define the extent of the resultant contamination, the Department of Environmental Protection notified the landowner that it wanted to drill a number of wells on the landowner’s property. The landowner resisted and demanded compensation, so the Department served him with an administrative order for access. In response to the landowner’s demand for a formal hearing, the Department withdrew its administrative action and filed a complaint in court for injunctive relief against the landowner interfering with the installation of wells on his land. The Department later decided that was unnecessary and moved for voluntary dismissal, but the landowner filed a motion for attorney’s fees on the theory that he had defeated an attempt by the government to take his land. The circuit court agreed and awarded substantial attorney’s fees.

39. Tresca, 692 So. 2d at 992.
40. Id. at 993.
41. Id. (citing Fla. STAT. § 73.092(1)(a)).
42. Tresca, 692 So. 2d at 993.
43. Id. See generally, Ronald Benton Brown, An Examination of Real Estate Purchase Options, 12 NOVA L. REV. 147, 147-54 (1987).
44. Tresca, 692 So. 2d at 993. It is not clear from the case whether the $50,000 was considered the final written offer before the hiring of the attorney or the first written offer after the hiring of the attorney.
45. 696 So. 2d 888 (Fla. 5th Dist. Ct. App. 1997).
46. Id. at 888-89.
The district court reversed. It reasoned that no condemnation proceeding was ever begun so the landowner could not have succeeded in defeating the condemnation attempt. As the statutes relied upon only provide for attorney's fees in condemnation proceedings, there would be no basis for awarding attorney's fees in this case.

Department of Transportation v. Winter Park Golf Club, Inc. The Department of Transportation began a quick taking of an easement for sidewalk construction. After the landowner marshalled evidence that the taking would result in a significant reduction in the market value of its land and significant severance damages, the Department decided to locate the sidewalk elsewhere. The stipulated judgment terminating the taking action provided that the Department would pay the landowner's reasonable costs and attorney's fees. The trial court used a lodestar figure reached by multiplying the number of hours by a reasonable hourly rate ($225 per hour). This amount was adjusted upward to reflect the benefit achieved for the landowner. However, the trial court erred in one respect. It included in the calculation the hours that the landowner's attorney spent litigating the attorney's fee. The district court remanded the case for recalculation of the lodestar amount which did not include fees for time spent litigating the attorney's fee.

Lee County v. Pierpont. The County did a "quick taking" of the property and, accordingly, filed a good faith estimate of the property's value. When the landowners filed an answer to the condemnation complaint through an attorney, the County's attorney sent him a letter making an offer for the property at twenty percent over the good faith estimate. That offer was rejected, but the case was eventually settled. The only issue left was attorney's fees.

In 1994, the legislature amended the attorneys' fees provision in eminent domain proceedings. Previously, the statute had provided that "the court

47. Id. at 890.
48. Id.
49. FLA. STAT. §§ 73.091-.092 (1993).
50. Gibbins, 696 So. 2d at 890.
51. 687 So. 2d 970 (Fla. 5th Dist. Ct. App. 1997).
52. Id. at 971.
53. Id. (citing State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830 (Fla. 1993); Seminole County v. Butler, 676 So. 2d 451 (Fla. 5th Dist. Ct. App. 1996)).
54. Id. at 971.
55. 693 So. 2d 994 (Fla. 2d Dist. Ct. App. 1997).
57. Pierpont, 693 So. 2d at 995-96.
58. Id. at 995.
shall give greatest weight to the benefits resulting to the client from the
services rendered." This was amended to read, "the court, in eminent
domain proceedings, shall award attorney's fees based solely on the benefits
achieved for the client." The statute went on to define benefits as

the difference, exclusive of interest, between the final judgment or
settlement and the last written offer made by the condemning
authority before the defendant hires an attorney. If no written offer
is made by the condemning authority before the defendant hires an
attorney, benefits must be measured from the first written offer
after the attorney is hired.

Here, the trial court determined betterment by subtracting the good faith
estimate from the final settlement. The Second District Court of Appeal
held that the trial court determination was incorrect and reversed.

The court used the plain meaning approach to interpreting the new
statute. The legislature had specified that the benefit was to be calculated
from the first written offer; however, it had not provided that the good faith
estimate could be used as an alternative figure. In addition, the good faith
estimate was not a functional equivalent of a written offer because the
condemnee could not accept that figure creating an enforceable contract, and
the condemnor was in no way bound by that good faith estimate.

Judge Blue dissented on this point. First, he contends there is no clear
precedent that the condemnee cannot simply accept the good faith estimate.
The precedents only hold that the condemnor is not bound at trial by the prior
good faith estimate. He utilized a purpose approach to reach a contrary
conclusion. Figuring attorneys' fees from the good faith estimate would
"encourage condemning authorities to make realistic estimates" since a low
estimate might later result in higher attorneys' fees. The majority's approach
would encourage condemning authorities not to make a written offer, but to

60. Pierpont, 693 So. 2d at 995 (citing FLA. STAT. § 73.092(1) (Supp. 1994)).
61. Id. (quoting FLA. STAT. § 73.092(1)(a) (Supp. 1994)).
62. Id. at 996.
63. Id. at 997.
64. Id. at 996-97.
65. Pierpont, 693 So. 2d at 996.
66. Id.
67. Id. at 997 (Blue, J., dissenting).
68. Id.
69. Id. at 998.
70. Pierpont, 693 So. 2d at 998.
use the estimate as the starting point in negotiations.\(^71\) This would allow the advantage of using a low estimate, the same way the initial offer is used, but without the disadvantage of having attorneys' fees figured from that low number.\(^72\) Since that approach could artificially shrink attorneys' fees in condemnation cases, landowners might have greater difficulty in finding competent counsel to handle these cases, thereby defeating the constitutional right to compensation.\(^73\) This author\(^74\) agrees with Judge Blue’s approach. The burden should be on the condemnor to make a timely written offer. Where the condemnor has not done so, he should not be allowed to penalize the victim of for the victim’s tardiness.

The district court also rejected the landowners’ claim that the county attorney’s letter was not a valid offer because it was made in violation of the State of Florida’s Sunshine Law.\(^75\) Essentially, their argument is that the county attorney was vested with discretion about the amount of money to offer and that before exercising that discretion, he was obliged to hold a public meeting.\(^76\) Even if that was a valid argument, the landowners’ would have no standing to raise it on appeal, as it was not challenged at trial.\(^77\)

*Regency Homes of Dade, Inc. v. McMillen.*\(^78\) The homeowners brought this action based on claims of breach of the construction contract, negligence, and fraud. The contractor counterclaimed on numerous theories and sought foreclosure of its construction lien. The homeowners prevailed on the merits, and they sought attorney’s fees based solely on the statutory provision applicable to actions to enforce construction liens.\(^79\) They could not seek attorney’s fees for the other claims because the construction contract did not provide for attorney’s fees. The contractor appealed the attorney’s fees award because the court did not apportion the attorney’s time and fees between the different claims.\(^80\) The district court affirmed.\(^81\) It reasoned that “the issues involved in defending against the construction lien claim are intertwined with the remaining issues in the case, and that the attorney’s time cannot

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71. Id.
72. Id.
73. Id.
74. Professor Ronald Benton Brown.
75. *Pierpont, 693 So. 2d at 997* (citing FLA. STAT. § 286.011 (1993)).
76. Id.
77. Id.
78. 689 So. 2d 1204 (Fla. 3d Dist. Ct. App. 1997).
79. Id. at 1204-05 (citing FLA. STAT. § 713.29 (1995)).
80. Id. at 1205.
81. Id.
reasonably be apportioned." It distinguished an earlier case in which apportionment was possible because the issues were distinct.

Sanctuary of Boca, Inc. v. Careers USA, Inc. The landlord and tenant got into a dispute over the proper amount of rent due under the lease. The tenant brought and won a declaratory judgment action and sought attorneys' fees under the lease which stated, "[i]n any litigation between the parties hereto to enforce the terms and conditions of this Lease, the prevailing party shall be entitled to recover all costs incurred in such action, including attorneys' fees at all levels from the nonprevailing party." The trial court denied attorneys' fees, reasoning that the action had not been brought "to 'enforce' the terms and conditions" but to interpret them. The district court rejected this logic and reversed. The court determined that the substance of the landlord's defense was the equivalent of trying to enforce its interpretation of the lease. If the landlord had failed to defend this action, it would have been precluded from trying to enforce its claim in a later action. The court also distinguished cases involving attorneys' fees provisions that applied in the event of a breach. Since no breach had occurred in this case, the tenant would not be in a position to claim attorneys' fees under such a provision. However, that was not the provision in this lease. Noting that different results have been reached in other districts, the court certified the conflict to the Supreme Court.

Seminole County v. Coral Gables Federal Savings & Loan Ass'n. In this eminent domain case, attorney's fees were awarded pursuant to section

82. Id.
83. McMillen, 689 So. 2d at 1205 (citing Metro-Centre Assocs. v. Environmental Eng'r's, Inc., 522 So. 2d 967 (Fla. 3d Dist. Ct. App. 1988) (holding apportionment was possible because a counterclaim for goods and services was raised in response to an action to enforce a mechanic's lien)).
84. 691 So. 2d 596 (Fla. 4th Dist. Ct. App. 1997).
85. Id. at 598.
86. Id.
87. Id.
88. Id.
89. Sanctuary of Boca, 691 So. 2d at 598-99 (citing Casarella, Inc. v. Zaremba Coconut Creek Parkway Corp., 595 So. 2d 162 (Fla. 4th Dist. Ct. App. 1992); Fairways Royale Ass'n v. Hasam Realty Corp., 428 So. 2d 288 (Fla. 4th Dist. Ct. App. 1983); Chesterfield Co. v. Rizzenheim, 350 So. 2d 15 (Fla. 4th Dist. Ct. App. 1977)).
91. Sanctuary of Boca, 691 So. 2d at 599.
92. 691 So. 2d 614 (Fla. 5th Dist. Ct. App. 1997).
73.092 of the Florida Statutes.\textsuperscript{93} The County appealed claiming that the statute was "unconstitutional because it deprives trial courts of the ability to determine a reasonable fee to a landowner based upon the criteria listed in Florida Patient's Compensation Fund v. Rowe."\textsuperscript{94} This argument had already been tried unsuccessfully with an earlier version of the statute\textsuperscript{95} and was proved unsuccessful again because the Supreme Court of Florida had already ruled that "the legislature can enact attorney's fees provisions which 'it deems will result in a reasonable award.'"\textsuperscript{96}

The County next tried the novel approach of claiming that the trial court should not have admitted the County's written offer because section 90.408 of the Florida Statutes prohibits introduction into evidence of an offer to settle litigation.\textsuperscript{97} That section directly contradicts the mandate of section 73.092 of the Florida Statutes because it provides that attorneys' fees shall be based on the benefits achieved which are measured by the difference between the last written offer and the final judgment or settlement.\textsuperscript{98} The court utilized two canons of statutory interpretation to reject this argument.\textsuperscript{99} First, a later enactment prevails over an earlier one where there is a direct conflict.\textsuperscript{100} Second, a specific statute prevails over a general one.\textsuperscript{101} Section 73.092 is specific in that it applies only to eminent domain proceedings, while section 90.408 is applicable to litigation in general.\textsuperscript{102}

Seminole County v. Cumberland Farms, Inc.\textsuperscript{103} In this eminent domain case, the trial court apparently based the award of attorneys' fees on the following formula: One-third of the benefit (the amount paid for the property less the County's original offer) times two, plus the lodestar (hourly rate),

\begin{itemize}
  \item \textsuperscript{93} FLA. STAT. § 73.092 (Supp. 1994).
  \item \textsuperscript{94} Coral Gables Fed. Sav., 691 So. 2d at 614 (citing Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)).
  \item \textsuperscript{95} See Seminole County v. Delco Oil, Inc. 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996); Seminole County v. Clayton, 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995) (challenging FLA. STAT. § 73.02 (1993)).
  \item \textsuperscript{96} Coral Gables Fed. Sav., 691 So. 2d at 615 (quoting Shick v. Department of Agric. & Consumer Servs., 599 So. 2d 641, 664 (Fla. 1992)).
  \item \textsuperscript{97} Id.; see FLA. STAT. § 90.408 (1995).
  \item \textsuperscript{98} Coral Gables Fed. Sav., 691 So. 2d at 615; see FLA. STAT § 73.092 (1995).
  \item \textsuperscript{99} Coral Gables Fed. Sav., 691 So. 2d at 615 (citing Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995); People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991)).
  \item \textsuperscript{100} Id. (citing Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995)).
  \item \textsuperscript{101} Id. (citing People Against Tax Revenue Mismanagement, Inc. v. County of Leon, 583 So. 2d 1373, 1377 n.5 (Fla. 1991)).
  \item \textsuperscript{102} See FLA. STAT. §§ 90.408, 73.092 (1995).
  \item \textsuperscript{103} 688 So. 2d 372 (Fla. 5th Dist. Ct. App. 1997).
\end{itemize}
divided by three.\textsuperscript{104} While the trial court’s method was based on a fourth district case,\textsuperscript{105} the Fifth District Court of Appeal reversed.\textsuperscript{106} Two subsequent fifth district cases\textsuperscript{107} had established that the court should have used the lodestar as the basis for the fee and then expressly set forth the number of hours reasonably expended in the litigation and the reasonable hourly rate. The benefit obtained should have then been used to adjust the lodestar up or down by a specific dollar amount as opposed to a multiplier, to reflect the attorney’s unusual success or failure.\textsuperscript{108}

\textit{Department of Transportation v. ABS Properties Partnership.}\textsuperscript{109} The Department of Transportation (“DOT”) began a condemnation proceeding and made an initial written offer. Mediation produced a stipulated settlement that was approved by both parties when DOT decided to indefinitely postpone the project. DOT obtained a voluntary dismissal of the condemnation action. The landowner filed a motion for attorney’s fees. The trial court’s award was based on the difference between DOT’s written offer and the agreed upon price in the stipulation or the benefit achieved under section 73.092(1) of the Florida Statutes.\textsuperscript{109}

DOT’s position on appeal was that the “benefit achieved” subsection should not be used when the benefit was never realized due to the case being withdrawn. That presented a question of first impression.\textsuperscript{111} The district court agreed with DOT and reversed.\textsuperscript{112} The applicable method was in the second subsection which governed attorney’s fees “incurred in defeating an order of taking, or for apportionment, or other supplemental proceedings, when not otherwise provided for.”\textsuperscript{113} To the court, a voluntary dismissal seemed to fit within that definition.\textsuperscript{114} Under subsection two, the court would have to consider a number of factors, such as: 1) novelty; 2) difficulty and

\textsuperscript{104} Id. at 373; see also Solid Waste Auth. v. Parker, 622 So. 2d 1010 (Fla. 4th Dist. Ct. App. 1993).
\textsuperscript{105} Solid Waste Auth., 622 So. 2d at 1010.
\textsuperscript{106} Cumberland Farms, Inc., 688 So. 2d at 373.
\textsuperscript{107} Seminole County v. Delco Oil, Inc., 669 So. 2d 1162 (Fla. 5th Dist. Ct. App. 1996); Seminole County v. Clayton, 665 So. 2d 363 (Fla. 5th Dist. Ct. App. 1995).
\textsuperscript{108} Cumberland Farms Inc., 688 So. 2d at 373 (citations omitted).
\textsuperscript{109} 693 So. 2d 703 (Fla. 2d Dist. Ct. App. 1997).
\textsuperscript{110} Id. at 703-04 (citing FLA. STAT. § 73.092(1) (1995)).
\textsuperscript{111} Id. at 704.
\textsuperscript{112} Id. at 705.
\textsuperscript{113} Id. (quoting FLA. STAT. § 73.092(2) (1995)).
\textsuperscript{114} ABS Properties Partnership, 693 So. 2d at 705.
importance of the questions involved; 3) the skill employed by the attorney; 4) the amount of money involved; 5) the responsibility born by the attorney; 6) the time and labor required of the attorney to adequately represent the client in relation to the benefits; and 7) the customary rate or fee for a comparable case.\textsuperscript{115}

This author\textsuperscript{116} prefers the trial court’s conclusion. The condemnor’s change of heart should not affect the amount of attorney’s fees for work that has already been done, and the calculation in subsection two is needlessly complicated when a simple measure is provided by subsection one, i.e., based upon the benefits achieved. It seems obvious that subsection two should be used when there is no logical way to use subsection one, but that is certainly not the case here where an agreement had already been reached.

III. BROKERS

The Brokerage Relationship Disclosure Act\textsuperscript{117} became effective on October 1, 1997. It is the latest step in Florida’s attempt to solve the problems inherent in the relationships, agency or nonagency, that brokers may have with buyers and sellers.\textsuperscript{118} The legislature has now outlawed brokers acting as dual agents, i.e., simultaneously acting in an agency relationship for both the buyer and the seller.\textsuperscript{119} However, it continues to allow brokers to be transaction brokers who provide “limited representation to a buyer, a seller, or both, in a real estate transaction, but does not represent either in a fiduciary capacity or as a single agent.”\textsuperscript{120} The act further requires that the broker or salesperson disclose to customers upon first contact, that they can only engage that professional as a single agent or transaction broker.\textsuperscript{121} The statute defines those relationships and specifies the duties of each type of broker.\textsuperscript{122} For a

\textsuperscript{115} Id. (citing FLA. STAT. § 73.092(2) (1995)).
\textsuperscript{116} Professor Ronald Benton Brown.
\textsuperscript{119} FLA. STAT. § 475.01(1)(j) (1995), amended by 1997 Fla. Laws ch. 97-42.
\textsuperscript{120} Id. § 475.01(1)(m).
\textsuperscript{121} Id. § 475.272(2).
\textsuperscript{122} Id. § 475.01(l)(m).
residential sale, the disclosure requirements are now more extensive. Section 475.276 of the Florida Statutes now requires potential buyers and sellers to be given a statutory notice of nonrepresentation at the first contact. Additionally, section 475.278 of the Florida Statutes now provides what must be in the disclosure forms describing the transaction or single agency brokerage relationships.

Caserta v. Department of Business & Professional Regulation. The Florida Real Estate Commission ("FREC") issued a final order revoking Caserta's real estate license. Caserta's counsel had filed a request for a subject-matter index of the all agency orders imposing discipline since January 1, 1975. FREC had responded by giving him a subject-matter index starting at January 1, 1992. On appeal, Caserta claimed that reversal of the order was required because the index FREC had provided was not sufficient to satisfy the statutory requirements. The Fifth District Court of Appeal disagreed and affirmed the order.

Section 120.53(2) of the Florida Statutes previously required that each state agency make available to the public a subject-matter index of rules and orders issued or adopted after January 1, 1975. However, the statute was amended, and the 1975 starting date does not appear in the revised statute. The court concluded that the legislature, recognizing the impossible burden that the 1975 starting date had imposed on many agencies, intended the effective date of the amended statute to be the new starting date of the required indices. Consequently, Caserta could not escape discipline on that technicality.

Claycomb v. Combs. Facing foreclosure, landowners listed two properties with a broker. No sale was produced even though the listing agreement was extended. The mortgagee foreclosed, took title, and then sold one property to the broker's father and mother. The landowners (now former landowners) brought an action to have a constructive trust imposed on the

123. Id. § 475.276(2).
125. 686 So. 2d 651 (Fla. 5th Dist. Ct. App. 1996).
126. Id. at 651.
127. Id. at 652-53.
128. Id. at 652 (citing FLA. STAT. § 120.53(2) (1991) (amended 1993)).
129. Id. (referring to FLA. STAT. § 120.53 (amended 1993)).
130. Caserta, 686 So. 2d at 652 (citing FLA. STAT. § 120.53 (amended 1993)).
131. Id. at 653.
property. The trial judge entered judgment on the pleadings for the broker’s parents, but the district court reversed.\\(^{133}\)

Imposition of a constructive trust is an equitable remedy for the breach of a confidential relationship.\\(^{134}\) Consequently, “to survive a motion for judgment on the pleadings,” the landowners’ complaint would have to show that landowners had a confidential relationship with the broker’s parents.\\(^{135}\) The court found that the combination of facts was sufficient to raise the inference that a confidential relationship might have existed.\\(^{136}\)

However, the court held that the landowners had not alleged that the foreclosure was in any way defective.\\(^{137}\) Therefore, their claim was that the property had been purchased, or should have been purchased, on their behalf. Before the landowners could prevail, they would have to tender to the parents the price that they had paid for the land. While the court does not explain further, this is merely an example of the old maxim, he who seeks equity must do equity.

_Cordis Corp. v. Baxter Healthcare Corp._\\(^{138}\) A broker had the commercial lease listing for Cordis Corporation’s property. The broker showed the property to Baxter, but Baxter’s offer to lease a portion of the property was rejected. Cordis later exercised its option to terminate the listing agreement. Nine months later, Baxter approached Cordis through its own broker, and a lease for the entire property was arranged. That lease contained an indemnity clause that provided that each party to the lease promised “to indemnify and hold the other party harmless from and against any claims by any other broker, agent or other persons claiming a commission.”\\(^{139}\)

The broker claimed that Cordis, after terminating the listing agreement, had “orally agreed to pay the broker a commission if it produced a prospect who purchased or leased” its property.\\(^{140}\) As a result, the broker had continued to prospect for buyers and lessees, including maintaining contact with Baxter. Consequently, after learning that Baxter had leased the property, broker sued Cordis for a brokerage commission. Cordis then sought indemnification from Baxter.\\(^{141}\) The trial court entered a judgment on the

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133. _Id._ at 524.
134. _Id._
135. _Id._
136. _Id._
137. _Claycomb_, 676 So. 2d at 525.
139. _Id._ at 848.
140. _Id._ at 847-48.
141. _Id._ at 848. Even though Cordis was ultimately held not liable for the broker's commission, Cordis still sought indemnification for the costs and attorneys' fees. _Id._
pleadings in favor of Baxter and the district court affirmed.\textsuperscript{142} The district court reasoned this was simply a case of interpreting the indemnification clause.\textsuperscript{143} It noted that as a general proposition, an indemnity clause should be construed against the indemnitor if it is an incident of a contract not primarily concerned with indemnification, rather than an indemnification promise by one in the insurance business.\textsuperscript{144} Furthermore, an indemnity clause will not be interpreted to provide a party indemnification for its own wrongful acts unless that intent is clearly and unequivocally expressed. The essence of the broker's claim was that Cordis had committed wrongful acts. Specifically, Cordis represented either expressly or impliedly, that it would pay a commission if the broker produced a tenant and accepted the benefits of that performance.\textsuperscript{145} Both rules of interpretation lead to the conclusion that indemnification was not required. The court offered its opinion that the clause was really intended to provide protection from a surprise demand by a broker that one party did not know had been involved with the other party.\textsuperscript{146} Certainly, that was not the case here.

\textit{ERA Carico Real Estate Co. v. Manfredonia.}\textsuperscript{147} The broker had won an action for a commission in county court, but on appeal to the circuit court that was reversed.\textsuperscript{148} The district court, in turn, reversed and ordered the county court's judgment in favor of the broker reinstated.\textsuperscript{149} The facts are that the broker was the one who first brought the property to the attention of the buyer. However, the buyer and seller negotiated directly. The circuit court held that because the buyer and seller did not "intentionally" exclude the broker from participating in the sale, the broker was precluded from recovering a commission.\textsuperscript{150} According to the district court, the aforementioned holding was based upon a misreading of \textit{Sheldon Green & Associates v. Rosinda Investments, N.V.}\textsuperscript{151} Since the broker was the one who initially brought the parties together, he/she was the "procuring cause" and, as such, was entitled to his/her commission.\textsuperscript{152}

\begin{itemize}
\item \textsuperscript{142} \textit{Cordis Corp.}, 678 So. 2d at 847.
\item \textsuperscript{143} \textit{Id.} at 848.
\item \textsuperscript{144} \textit{Id.} (citations omitted).
\item \textsuperscript{145} \textit{Id.}
\item \textsuperscript{146} \textit{Id.} (citation omitted).
\item \textsuperscript{147} 689 So. 2d 1208 (Fla. 3d Dist. Ct. App. 1997).
\item \textsuperscript{148} \textit{Id.} at 1208.
\item \textsuperscript{149} \textit{Id.}
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 1209 (citing \textit{Sheldon Green & Assocs. v. Rosinda Invs.}, N.V., 475 So. 2d 925 (Fla. 3d Dist. Ct. App. 1985)).
\item \textsuperscript{152} \textit{Manfredonia}, 689 So. 2d at 1209.
\end{itemize}
Gimelstob Realty v. Sechrest Co. One broker sued another on a variety of tort theories because some of his/her associates left to work for the other firm. Both firms were members of the Realtor Association of Greater Fort Lauderdale whose rules required “arbitration of disputes ‘arising out of the real estate business.’” Therefore, the trial court held that this claim was subject to mandatory arbitration. The fourth district, in a per curiam opinion that did not provide a detailed analysis, agreed that “this dispute between these realtors is within the meaning of that provision.”

Waterfront Properties, Inc. v. Coast to Coast Real Estate, Inc. The majority of the panel issued a per curiam affirmance of the trial court's decision, but Judge Gross filed a dissenting opinion. The dissent reveals that the listing broker continued to list the property in the multiple listing service, and one of its employees gave a brochure of the property to the selling broker after the listing had expired. The selling broker showed its buyers the property, but when the buyers later met the seller, they were informed that the property was not then listed with any broker. The buyers then bought the property directly from the seller. Because neither broker had been paid a commission, they both sued.

The trial court held that neither the seller nor the buyers were liable for a commission, but the broker with the expired listing was liable to the selling broker for the equivalent of a three percent commission. The dissent argues that recovery could not be justified by any contract theory, including promissory estoppel. This author must disagree. Although promissory estoppel is often invoked as a consideration substitute, “promissory estoppel is an equitable principle that empowers a court to design a remedy avoiding injustice and achieving corrective justice between the parties in commercial transactions.” By listing the property in the multiple listing service or

153. 676 So. 2d 83 (Fla. 4th Dist. Ct. App. 1996).
154. Id. at 83 (citations omitted).
155. Id.
156. Id.
158. Id. at 48 (Gross, J., dissenting).
159. Id.
160. Id.
161. Id.
162. Waterfront Properties, Inc., 679 So. 2d at 49 (Gross, J., dissenting).
163. Professor Ronald Benton Brown.
handing out the property brochure, a listing broker invites other members of the multiple listing service to earn a share of the sales commission by producing a buyer. A listing broker has, both expressly and by his/her conduct, represented to the other brokers in the multiple listing service that he/she is in the position to fulfill that promise. Once the selling broker has in good faith relied to his/her detriment on that representation, the broker without a listing, e.g., one whose listing has expired, should be estopped from asserting that he/she did not receive the commission upon the sale. The critical elements should be that the “listing” broker knew, or should have known, that he/she did not have the power to perform that promise because he/she did not have a current listing, and that a selling broker who went through the effort of producing a buyer would suffer significant harm if there was no commission to share. Conversely, the selling broker could not reasonably be expected to inspect the listing agreement of each property he/she plans to show because it would be impractical for a broker planning a full day of showings to inspect all those documents, even if he/she were available. The dissent argues that allowing the selling broker to recover “is to base recovery on concepts of relative fault, a tort notion which was not pled.” However, that misses the point that fault is also an important concept in equity and that estoppel is an equitable doctrine.

PK Ventures, Inc. v. Raymond James & Associates, Wassall v. Payne, and Woodson v. Martin. In Woodson, the buyer sued her real estate agent claiming she had misrepresented the house as being in good condition. In a very brief opinion, which did not include a recitation of the facts, the Supreme Court of Florida addressed the following certified question:

IS THE BUYER OF RESIDENTIAL PROPERTY PREVENTED BY THE “ECONOMIC LOSS RULE” FROM RECOVERING DAMAGES FOR FRAUD IN THE INDUCEMENT AGAINST

165. Waterfront Properties, Inc., 679 So. 2d at 48-49.
166. 690 So. 2d 1296 (Fla. 1997).
168. 663 So. 2d 1327 (Fla. 2d Dist. Ct. App. 1995), quashed by 685 So. 2d 1240 (Fla. 1996).
169. Id. at 1327. Note that the facts reported here do not seem to match the certified question in Woodson, which assumes that the broker was the agent of the seller. Woodson v. Martin, 685 So. 2d 1240 (Fla. 1996). However, it does not seem that this will have any impact on use of this case as precedent.
THE REAL ESTATE AGENT AND ITS INDIVIDUAL AGENT REPRESENTING THE SELLERS?170

The unanimous answer was negative, based upon the reasoning provided in \textit{HTP, Ltd. v. Lineas Aereas Costarricenses, S.A.},171 which was decided at the same time. \textit{HTP, Ltd.} dealt with a claim for damages based on the allegation that the party had been fraudulently induced to enter into a settlement agreement.172 The district court denied the damage claim reasoning it was barred by the economic loss rule because it flowed from a contractual breach and was solely for economic losses.173 The Supreme Court of Florida rejected this analysis.174 It held that fraudulent inducement to enter into a contract was an independent tort, separate and distinct from any breach of contract.175 In \textit{HTP, Ltd.}, the supreme court specifically rejected the logic of the \textit{Woodson} court, noting that Judge Altenbernd's dissent therein had been correct.176

These precedents should make brokers and sellers worry that they might be held accountable for the harm they could cause by misrepresenting property. Note that this case does not make either a broker or a seller an insurer of the property. The claimant must still prove the elements of fraud. But, it might have some salutary results. A recent news story on the effects of this case reported an interview with a broker who said that, "he has already alerted his sales people that, 'You don't lie, no matter what.'"177 What a novel concept to introduce into real estate sales.

\textit{HTP, LTD. v. Lineas Aereas Costarricenses, S.A.}178 was also the basis for the decision in \textit{Wassall v. Payne}.179 Wassall had considered buying a particular property. He asked the owner and his broker whether the property was subject to flooding. Allegedly, their response was a misrepresentation. Wassall did not buy the property, but he eventually leased it from the person who did buy it. When flooding occurred, Wassall sued the seller and his broker alleging, \textit{inter alia}, fraudulent and negligent

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170. \textit{Woodson}, 685 So. 2d at 1241.
171. 685 So. 2d 1238 (Fla. 1996).
173. \textit{Woodson}, 663 So. 2d at 1329.
174. \textit{Woodson}, 685 So. 2d at 1241.
175. \textit{HTP, Ltd.}, 685 So. 2d at 1239.
178. 685 So. 2d 1238 (Fla. 1996).
\end{flushleft}
misrepresentation. The trial court granted judgment on the pleadings for the defendants because the plaintiff was not in privity with them, but the First District Court of Appeal reversed.\textsuperscript{180} Wassall’s cause of action was not a breach of contract. His action was in tort, and privity was not an element of the tort. Consequently, if the seller and his broker made a misrepresentation to Wassall that was the proximate cause of his harm, they could be held liable.\textsuperscript{181}

This trilogy was completed by \textit{PK Ventures, Inc. v. Raymond James & Associates}.	extsuperscript{182} That case involved the sale of commercial real estate rather than residential property. The Supreme Court of Florida specifically held that it did not matter whether the property was residential or commercial when damages were sought against a seller’s broker for misrepresentation.\textsuperscript{183} \textit{Woodson} stood for the proposition that the economic loss rule could not be used to bar recovery for the independent tort of misrepresentation by the broker.\textsuperscript{184}

\textbf{IV. CONDOMINIUMS}

\textit{Carlandia Corp. v. Obernauer}.\textsuperscript{185} The question before the court was whether section 718.1255 of the \textit{Florida Statutes} requires nonbinding arbitration before suit can be filed for the stated causes of action.\textsuperscript{186} Carlandia, as a unit owner, filed suit against the condominium association and the board of directors alleging construction defects existed in common areas subject to redress under warranty. The trial court granted the association’s and the board’s motion to dismiss the complaint for failing to conduct nonbinding arbitration prior to filing suit.\textsuperscript{187}

This Fourth District Court of Appeal reversed because the complaint failed to reveal a “dispute” within section 718.1255(4)(a).\textsuperscript{188} The statutory section mandates that the parties to a “dispute” submit to nonbinding

\begin{itemize}
\item 180. \textit{Id.} at 681.
\item 181. \textit{Id.}
\item 183. \textit{PK Ventures, Inc.}, 690 So. 2d at 1296.
\item 184. \textit{Woodson}, 685 So. 2d at 1238.
\item 185. 695 So. 2d 408 (Fla. 4th Dist. Ct. App. 1997).
\item 186. \textit{Id.} at 409.
\item 187. \textit{Id.}
\item 188. \textit{Id.} See FLA. STAT. § 718.1255(4)(a) (1992).
\end{itemize}
arbitration prior to court proceedings. The statute also excludes any disagreement that "primarily involves . . . the interpretation or enforcement of any warranty" from the definition. The statute expands the exclusion "to include those legal theories where application of a warranty is a critical element." The fourth district determined that this case falls within the statutory exclusion because the determination of the association's statutory or fiduciary liability first requires a finding that there were actionable warranty violations on the common areas.

Section 718.1255(3) of the Florida Statutes is designed to protect unit owners from the cost and time constraints involved when litigating with a condominium association. Arbitration was not mandated for all condominium disputes. Statutory nonbinding arbitration is designed to deal with day-to-day condominium disputes. However, construction defect cases do not fit that category because of the factual and legal complexity involved.

Cricket Club Condominium, Inc. v. Stevens. Stevens filed a suit alleging misdeeds of the condominium association. The suit alleged all condominium residents were damaged by misrepresentations made in letters concerning the vote over a cable contract. The trial court certified the class without holding an evidentiary hearing.

The Third District Court of Appeal only concerned itself with the trial court's finding of adequacy of representation. The third district concluded that the adequacy requirement of the rule can not be satisfied if Stevens is involved in other litigation against the Cricket Club. At the time of this action, Stevens was involved in a counterclaim against the Cricket Club and another unit owner for intentional infliction of emotional distress. If Stevens were to represent the class in this dispute, the best interests of that

190. Carlandia Corp., 695 So. 2d at 409 (quoting Fla. Stat. § 718.1255(1) (1992)).
191. Id. at 410.
192. Id.
193. Id.
194. Id.
195. Carlandia Corp., 695 So. 2d at 410.
196. Id.
197. 695 So. 2d 826 (Fla. 3d Dist. Ct. App. 1997).
198. Id. at 827.
199. Id.
200. Id. at 827-28.
201. Id. at 827.
class must be Stevens' sole concern. The third district reversed the trial court's determination of adequacy of representation.

Lambert v. Berkley South Condominium Ass'n. The question before the Fourth District Court of Appeal was whether the Association, or the individual owners of commercial units, should assume ownership and maintenance responsibility for a hallway located on the first floor of the condominium. The Association argued that the hallway could not be considered a common element and was, therefore, not its responsibility because the required approval of all record unit owners to change the hallway's classification was not obtained. In response, Lambert contended that the "governing documents were ambiguous" and that the trial court was correct in considering the parties intent in determining that the hallway was converted to a common element.

The fourth district determined the trial court improperly considered parol evidence in determining that the hallway was a common element. It reasoned that parol evidence should only be addressed when the document is ambiguous on its face. Ambiguity depends upon whether the document is subject to multiple interpretations. However, simply because the document is open to interpretation, does not mean the document is ambiguous. As long as the language is clear, a court cannot begin to interpret the plain meaning of the document.

The condominium documents, taken as a whole, affirmatively state that the hallway was owned by the commercial unit owners as tenants in common. All units were labeled with the letter "C" to signify their unit, and the hallway itself was numbered "C-45" which revealed that the hallway was the last commercial unit. In examining the documents and analyzing their plain meaning, it is obvious that no ambiguity existed. There is nothing in the documents that say the hallway is a common element. Rather, all documentary evidence showed that the hallway "is owned in common by each of the Commercial Condominium Unit Owners." Parol evidence should not have been considered in this case since the document's language is

203. Id.
204. 680 So. 2d 588 (Fla. 4th Dist. Ct. App. 1996).
205. Id. at 590.
206. Id.
207. Id.
208. Id.
209. Lambert, 680 So. 2d at 590.
210. Id.
211. Id. (quoting amendment to governing condominium documents).
facially clear. The trial court discovered ambiguity within the documents only after considering the extrinsic evidence introduced.212 Finally, when a subsequent amendment is made to the document which did not address the hallway, it cannot be assumed that the hallway would be considered a common element.213 Section 718.110(4) of the Florida Statutes requires that all record unit owners must approve an amendment to the documents.214 When the effort to amend is unsuccessful because not all unit owners approved it, the hallway can not be eliminated as a private unit and converted to a common element.215

Leisure Resorts, Inc. v. Frank J. Rooney, Inc.216 In this case the Supreme Court of Florida answered the following question certified by the Fourth District Court of Appeal:

WHETHER THE PROVISIONS OF SECTION 718.203(2), FLORIDA STATUTES (SUPP. 1992), IMPOSE ON A CONTRACTOR AN IMPLIED WARRANTY OF FITNESS FOR THE INTENDED USE AND PURPOSE WHERE THE CONTRACTOR WITHIN THE CONTEMPLATION OF THE CONTRACT DOCUMENTS SUGGESTS AND SUPPLIES A MANUFACTURED ITEM SUCH AS INDIVIDUAL AIR CONDITIONING UNITS TO A DEVELOPER FOR USE IN A BUILDING PROJECT, WHERE SUCH ITEMS LATER PROVE NOT TO BE FIT FOR THE SPECIFIC PURPOSE FOR WHICH THEY WERE SUPPLIED?217

The supreme court held that the warranty of fitness was not applicable, but under the provisions of section 718.203(2) the contractor does not warrant those items for a “specific purpose.”218 Leisure Resorts was the developer of a twenty-two story condominium. Each unit was designed to include its own individual air conditioning unit with a condenser on the balcony; however, the design had a problem. Rooney was the air conditioning subcontractor and suggested the use of Tappan units. Tappan had represented that its units would work properly under the planned design. However, they did not work properly and

212. Id.
213. Id. at 591.
214. Lambert, 680 So. 2d at 591 (citing Fla. Stat. § 718.110(4) (1995)).
215. Id.
216. 654 So. 2d 911 ( Fla. 1995).
217. Id. at 912.
218. Id.
several unit owners brought a class action against Leisure Resorts alleging a
variety of construction defects. Leisure sought indemnity from Rooney, after
settling with the unit owners, alleging breach of warranty among other claims.
The trial court held that pursuant to section 713.203(2), manufactured items
for which there was a manufacturer’s warranty were not within the scope of
the definition of “materials supplied” as set forth in the statute, and that the
subcontractor made no warranty of fitness. 219 The Supreme Court of Florida
held that manufactured items are “materials” within the statute, and thus, a
warranty by the subcontractor attached. 220

However, the supreme court noted a distinction between the scope of the
“developer’s warranty mandated by section 718.203(1) and the contractor’s
warranty mandated under section 718.203(2).” 221 The developer warrants
merchantability and fitness “for the purposes or uses intended.” 222 The
contractor, on the other hand, only warrants fitness “as to the work performed
or material supplied,” with no reference to fitness for intended purpose. 223
The supreme court remanded to the Fourth District Court of Appeal to
decide: 1) whether the units were merely unfit for the specific purpose, in
which case the contractor would not be liable; or 2) whether the units were
unfit for ordinary purposes (unmerchantable), in which case the contractor
would be liable. 224

National Title Insurance Co. v. Lakeshore 1 Condominium
Ass’n. 225 National was the owner of the first mortgage on two of the
condominiums at Lakeshore 1 Condominium. 226 Association was obligated to
purchase insurance “for the benefit of the Association, the Unit Owners and
their respective mortgagees” to cover building and insurable
improvements. 227 The mortgagees had no control over matters of insurance or
reconstruction. 228

As a result of Hurricane Andrew, Lakeshore 1 Condominium sustained
damage which forced unit owners out of their homes. The Condominium
insurer paid Association money for the damages and Association executed a
contract with the construction company to make needed repairs. National’s
mortgagors defaulted, and National foreclosed. Thereafter, National had acquired title to the damaged units and filed suit against Association seeking damages for dissipation of proceeds that National claimed an interest in. The trial court granted Association summary judgment and National appealed. 229

The Third District Court of Appeal recognized that the first issue that had to be addressed was "whether the Association owed National a duty of reasonable care in managing the insurance proceeds." 230 The third district held that Association owed National, a mortgagee, such a duty. 231 Association was managing insurance proceeds on behalf of the owners and mortgagees pursuant to the Declaration of Condominium of Lakeshore. 232

The second issue was whether National was a member of the group to which Association owed a duty. 233 The court believed Association did owe a duty to National. 234 The terms of the Declaration of Condominium reflected that the unit owners’ rights were subject to mortgagee’s interest. 235 The insurance that the Association secured was to protect unit owners’ and mortgagees’ interests in the insured’s property. National did have "an interest in the insurance proceeds," and "invasion of that interest was actionable." 236

RIS Investment Group, Inc. v. Department of Business & Professional Regulation Division of Florida Land Sales Condominiums & Mobile Homes. 237 The Fourth District Court of Appeal reversed an order requiring RIS to remit assessments to Indian Springs due on units owned from the date of recording of declaration through the date of unit sales and imposing civil penalty. 238 RIS was the developer of Briarwood Condominium. The Department issued a notice to show cause to RIS alleging that RIS, while controlling the association, failed to pay assessments due on developer owned units in violation of sections 718.116(1)(a) and 718.116(9)(a) of the Florida

229. Id. at 1106.
230. National Title Ins. Co., 691 So. 2d at 1106.
231. Id.
232. Id. at 1107.
233. Id.
234. Id.
235. National Title Ins. Co., 691 So. 2d at 1107.
236. Id.
238. Id. at 357.
After a hearing, the Department determined that RIS was liable for assessments from the date the declaration was recorded. The fourth district disagreed with the Department’s conclusion. The Department claimed that RIS was required to pay the assessments because of a provision in the RIS Declaration of Condominium. The fourth district recognized that the Department failed to consider the definition of “unit” in the Condominium Act. Section 718.103(24) of the Florida Statutes defines “unit” as “part of condominium property which is subject to exclusive ownership.” “A unit may be in improvements, land, or land and improvements together, as specified in the declaration.” The fourth district’s previous opinion in Welleby Condominium Ass’n One v. William Lyon Co. was controlling. In Welleby, the developer prevailed because the land in question was neither “condominium units” as described in the Declaration of Condominium nor defined by the statute.

The writer of the Declaration of Condominium for RIS could have defined a condominium unit in various ways. Although the definition of “condominium parcel” in Welleby was clearly defined, the definition of “unit” in this case was not. However, it could still be discerned from the definition here that the term “unit” was not meant to encompass raw land. Section 3.2 of the Declaration discusses the boundaries of a unit as “unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan.” This section indicates the intent not to include land within the definition of a unit. Therefore, the court reversed the order requiring RIS to remit assessments.

239. Id. at 357-58.
240. Id. at 358.
241. Id.
242. RIS Inv. Group, 695 So. 2d at 358.
243. Id.
244. FLA. STAT. § 718.03(24) (1995).
245. Id.
246. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987).
247. RIS Inv. Group, 695 So. 2d at 358.
248. Id. at 358-59 (citing Welleby Condominium Ass’n One, Inc. v. William Lyon Co., 522 So. 2d 35, 36 (Fla. 4th Dist. Ct. App. 1987)).
249. Id. at 359.
250. Id.
251. Id.
252. RIS Inv. Group, 695 So. 2d at 359.
253. Id. at 360.
V. CONSTRUCTION

Godwin v. United Southern Bank. Landowners were unhappy with the performance of their home construction contractor. Allegedly, the construction lender released the “final draw,” i.e., the last installment of the construction loan, to the contractor without the landowner’s endorsement. This was after the lender’s construction inspector would not approve the final draw due to construction defects. As a result, the landowners sued their construction lender on a variety of theories. The trial court dismissed the complaint, and the Fifth District Court of Appeal affirmed on all counts except the count claiming a breach of the construction loan.

The loan agreement provided that “construction shall not be deemed complete for purposes of final disbursement unless and until Lender shall have received all of the following: .... Acceptance of the completed improvements by Lender and Borrower.” The fifth district concluded that the factual allegations were sufficient to allege that the final disbursement had been made without acceptance by either. Judge Dauksch dissented, pointing out that an additional provision of the contract appeared to give the lender total control over the decision to make any payments to the contractor. The dissent failed to explain the theory of contract interpretation and apparently chose to ignore the rules of construction that a contract should be interpreted against its drafter, most likely the lender, and that no part of a contract should be interpreted so as to make another part meaningless. The dissent’s interpretation would certainly make the provision on final disbursement, which the majority relied upon, totally meaningless.

Island House Developers, Inc. v. AMAC Construction, Inc. In a dispute over a construction contract, the issue raised was whether the general contractor had a valid license. The trial court granted the contractor’s motion to compel arbitration pursuant to an arbitration clause in the contract. However, under Florida law, the construction contract, including the arbitration clause, could not be enforced by an unlicensed contractor.

254. 688 So. 2d 373 (Fla. 5th Dist. Ct. App. 1997).
255. Id. at 374.
256. Id.
257. Id.
258. Godwin, 688 So. 2d at 374-75 (Dauksch, J., dissenting).
259. Id.
261. Id.
Consequently, the motion should not have been ruled upon until the court had determined that there was a valid and enforceable contract.\textsuperscript{263}

\textit{Mercedes Homes, Inc. v. Osborne.}\textsuperscript{264} The owners and builder entered into a contract for the construction of a home in Hillsborough County. Before the owners were to take possession, the parties entered into a presettlement agreement which provided that the builder would replace certain ceramic tile.

When disagreements arose between the parties, the owners filed suit. The complaint contained three counts based on the following: 1) the builder breached its express one-year warranty by failing to correct the defective ceramic tile; 2) the builder had breached the pre-settlement agreement to replace the tile; and 3) the builder had negligently failed to obtain the extended third party warranty for which the owners had previously paid. The contract provided that venue for any action """"arising herein or related hereto""""\textsuperscript{265} would be in Brevard County, but the complaint was filed in Hillsborough County. The builder’s motion challenging the venue was denied, and the builder appealed.\textsuperscript{266}

The Second District Court of Appeal noted that “parties to an agreement may provide therein where an action must be brought to enforce it."\textsuperscript{267} The trial court accepted the landowner’s argument that the second count arose out of the presettlement agreement, rather than the construction contract containing the venue provision.\textsuperscript{268} Thus, the second count had proper venue in Hillsborough County. Applying section 47.041 of the \textit{Florida Statutes} would allow the other counts to stay in Hillsborough County along with count two.\textsuperscript{269} The second district rejected this logic and reversed.\textsuperscript{270} It concluded that the venue provision had not been eliminated by the subsequent presettlement agreement, i.e., it was not a novation.\textsuperscript{271} Furthermore, the venue provision included an action to enforce the presettlement agreement because that was a modification of the rights and responsibilities of the parties under that contract.\textsuperscript{272} Since all three counts were within the scope of the valid

\textsuperscript{263} \textit{Island House Developers, Inc.}, 686 So. 2d at 1377.
\textsuperscript{264} 687 So. 2d 840 (Fla. 2d Dist. Ct. App. 1996).
\textsuperscript{265} \textit{Id}. at 840 (quoting the contract).
\textsuperscript{266} \textit{Id}. at 841.
\textsuperscript{267} \textit{Id}. (citing Southeastern Office Supply & Furniture Co. v. Barley, 427 So. 2d 1139 (Fla. 5th Dist. Ct. App. 1983)).
\textsuperscript{268} \textit{Id}.
\textsuperscript{269} \textit{Osborne}, 687 So. 2d at 841 (citing FLA. STAT. § 47.041 (1993)).
\textsuperscript{270} \textit{Id}.
\textsuperscript{271} \textit{Id}.
\textsuperscript{272} \textit{Id}.
venue agreement, the second district never reached the question regarding the
effect of section 47.041.273

VI. CONTRACTS

_Holiday Pines Property Owners Ass'n, Inc. v. Rowen._274 The Fourth
District Court of Appeal "reverse[d] the final judgment in favor of the owners
in this action by a homeowners association to enforce restrictive
covenants."275 The fourth district, in reversing final judgment, concluded that
the voluntary homeowners "association lacked standing to bring the
action."276 The association must either be "the assignee of the developer's
right to enforce the restrictive covenants or the direct successor of the
developer's interest" in order to have the requisite standing.277 Neither is true
in this case. In addition, there were no provisions allowing the association to
seek judicial enforcement of the covenants.278

_Oceania Joint Venture v. Trillium, Inc._279 The issue before the court was
"whether, under the mortgage contingency in the purchase contract, Meretsky
was entitled to return of the deposit."280 Meretsky entered into a contract and
placed a deposit to purchase a unit at the Oceania III Condominium. A
separate document executed granted Meretsky the right to take title in the
name of a corporation if he was a principal of the corporation. The seller was
obligated to inform Meretsky when the condominium neared completion
while Meretsky, in turn, was obligated to make a mortgage application. The
agreement to purchase was contingent on Meretsky obtaining a mortgage for
the price of the unit less the deposit amount. If Meretsky could not obtain the
mortgage, the seller had to grant the loan itself or allow Meretsky to rescind
on his purchase agreement and receive back his $55,400 deposit.281

When it was time for Meretsky to obtain the mortgage, he informed the
Great Western Bank that he wanted to take title to the condominium unit. The
unit would be the only asset of Meretsky's corporation. Great Western was
willing to grant Meretsky an individual loan, but not the type of corporate

273. _Id._
274. 679 So. 2d 824 (Fla. 4th Dist. Ct. App. 1996).
275. _Id._ at 825.
276. _Id._
277. _Id._ (citing Palm Point Property Owners' Ass'n v. Pisarski, 626 So. 2d 195 (Fla. 1993)).
278. _Id._ at 824.
279. 681 So. 2d 881 (Fla. 3d Dist. Ct. App. 1996).
280. _Id._ at 882.
281. _Id._
loan he desired. However, Flagler Federal Savings and Loan would grant the loan only if Meretsky gave a personal guarantee. Meretsky failed to secure a loan from any of the institutions he questioned. Needless to say, the seller claimed that Meretsky failed to satisfy his obligations under the mortgage contingency, explaining that Meretsky’s only options were to forfeit the deposit or proceed to closing on the condominium unit.\textsuperscript{282} The seller then proceeded to set a closing date at which Meretsky would not close, thus, the seller kept the $55,400 deposit. Consequently, Meretsky brought suit for the return of the deposit. The trial court found for Meretsky, agreeing that Meretsky complied with the mortgage contingency.\textsuperscript{283} The Third District Court of Appeal reversed the final judgment and remanded for further proceedings.\textsuperscript{284} The court reasoned that once Meretsky failed to supply the personal guarantee which Flagler Federal required to secure the corporate mortgage loan, he failed to comply with the contingency agreement.\textsuperscript{285}

\textit{Rubell v. Finkelstein.}\textsuperscript{286} The question before Third District Court of Appeal was whether the contract agreement for the sale and purchase of real property merged into the deed.\textsuperscript{287} Rubell, “Buyer,” entered into a contract that was for the sale and purchase of real property that was encumbered by existing leases. Finkelstein, “Seller,” was to furnish Buyer with copies of those existing leases. After Buyer received the copies, he then had the option to accept or terminate the contract. The contract also stated that Buyer had to approve any new lease into which Seller wished to enter prior to the closing date. Seller executed a new lease without obtaining Buyer’s approval. After Seller and Buyer closed on the property, Buyer sought a release from the unauthorized lease and filed suit to recover damages.\textsuperscript{288} The third district reversed the final judgment entered in favor of Seller.\textsuperscript{289} As a general rule, “the acceptance of a deed tendered in performance of a contract to convey land merges or extinguishes the preliminary agreements and understandings contained within the contract.”\textsuperscript{290}

\textsuperscript{282. \textit{Id.} at 883.}
\textsuperscript{283. \textit{Id.}}
\textsuperscript{284. \textit{Oceania Joint Venture}, 681 So. 2d at 885.}
\textsuperscript{285. \textit{Id.} at 883.}
\textsuperscript{286. 679 So. 2d 889 (Fla. 3d Dist. Ct. App. 1996).}
\textsuperscript{287. \textit{Id.} at 889.}
\textsuperscript{288. \textit{Id.}}
\textsuperscript{289. \textit{Id.} at 890.}
\textsuperscript{290. \textit{Id.} at 889 (citations omitted).}
However, this accepted rule does not apply to provisions of the sale contract not intended to be extinguished or merged into the deed.  

In this case, the contract between Buyer and Seller contained a provision which stated that Seller must reveal all leases. Those leases revealed must be the only agreements or understandings pertaining to the property. The contract also expressly provided that "representations and warranties made by the Seller ... shall survive closing." Since the new lease breached the contract between Seller and Buyer, the trial court erred in applying the merger rule in this situation.

Whitehurst v. Camp. The First District Court of Appeal affirmed the trial court's finding that the statutory rate computed by the state comptroller should be applied when awarding post-judgment interest. Whitehurst appealed the lower court's final summary judgment which foreclosed upon deeded property. The property at issue was real and personal property over which the Camps and Whitehurts entered into a deed agreement. The agreement provided that the Camps would pay the Whitehurts $450,000 "with interest at the rate of 10 per centum (10%) per annum payable on the whole sum remaining from time to time unpaid." The agreement contained no provision governing the payment of interest on any judgment entered pursuant to the agreement.

Section 55.03(1) of the Florida Statutes allows the parties to set the rate of post-judgment interest by contract. However, the agreement here only set the rate of interest for the debt and did not govern the rate of post-judgment interest. The parties must expressly state in the contract that the decided interest rate is meant to govern post-judgment interest as well. If not expressly stated, upon entry of a judgment, the lender can no longer charge the interest designated by contract but is obligated to charge the amount specified by statute. Since the terms of the agreement here between

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291. Rubell, 679 So. 2d at 889 (citations omitted).
292. Id. at 890.
293. Id. (quoting the contract).
294. Id.
295. 677 So. 2d 1361 (Fla. 1st Dist. Ct. App. 1996), review granted, 687 So. 2d 1308 (Fla.), approved in part, 699 So. 2d 679 (Fla. 1997).
296. Id. at 1362.
297. Id.
298. Id. (quoting the agreement).
299. Id.
300. Whitehurst, 677 So. 2d at 1362.
Whitehurst and Camp were not specific to address post-judgment interest, the eight percent statutory rate should apply.\textsuperscript{302}

VII. COVENANTS, DEEDS, AND RESTRICTIONS

\textit{Mann v. Mann.}\textsuperscript{303} The question before this court was "whether the deed at issue effectively transferred a joint interest in the home to Former Husband and Former Wife.\textsuperscript{304} The First District Court of Appeal reversed and remanded the trial court’s decision that the parties owned the home as tenants in common.\textsuperscript{305}

In 1989, Former Husband and his first wife, who is not the Former Wife in this litigation, deeded property to Former Husband’s mother. The mother never recorded. In 1993, Former Wife altered the deed by “whiting out” the Former Husband’s mother’s name as grantee and replacing it with the parties’ names. The Former Wife alleged that the changes to the deed were made with the consent of Former Husband, his mother, and his sister. On the other hand, Former Husband claimed that the changes to the deed were made without his consent. Former Husband alleged that Former Wife’s intent was to obtain a joint interest in the property.\textsuperscript{306} Under either version of the story, the altered deed did not convey any joint interest in the property to the parties represented in this action.\textsuperscript{307} Presently, the title to the property may belong to Former Husband’s mother, who was not a party of the divorce proceedings; thus, the property does not fall under the court’s jurisdiction.\textsuperscript{308}

\textit{Stev-Mar, Inc. v. Matvejs.}\textsuperscript{309} The Third District Court of Appeal reversed an adverse summary final judgment in favor of Matvejs.\textsuperscript{310} Matvejs divided her piece of property in two, whereby she had her home on one half and listed the vacant half for sale as a homesite. Real estate agents placed an ad to sell the vacant property. Stev-Mar was interested in buying the land for a retirement home. The agent told Stev-Mar that the property was zoned and platted for a single family home. Consequently, Stev-Mar entered into a contract to buy the land. Although Stev-Mar was to take title subject to

\begin{itemize}
\item \textsuperscript{302} \textit{Whitehurst}, 677 So. 2d at 1363.
\item \textsuperscript{303} 677 So. 2d 62 (Fla. 1st Dist. Ct. App. 1996).
\item \textsuperscript{304} \textit{Id.} at 62.
\item \textsuperscript{305} \textit{Id.} at 63.
\item \textsuperscript{306} \textit{Id.} at 62-63.
\item \textsuperscript{307} \textit{Id.} at 63.
\item \textsuperscript{308} \textit{Mann}, 677 So. 2d at 63.
\item \textsuperscript{309} 678 So. 2d 834 (Fla. 3d Dist. Ct. App. 1996), \textit{review denied sub nom.} Carico Real Estate Co. v. Stev-Mar, Inc., 686 So. 2d 576 (Fla. 1996).
\item \textsuperscript{310} \textit{Id.} at 835.
\end{itemize}
certain restrictions, nothing in the contract prevented the "use of [r]eal [p]roperty for residential purposes." In addition, Stev-Mar's attorney verified that the area zoning permitted the building of a single family residence.

When the seller delivered the general warranty deed to Stev-Mar, the deed did not have the required disclosure statement which advises the buyer that "under the Monroe County Land Development Regulations the division of land into parcels of land [which] are not approved as platted lots under the regulations confers no right to develop a parcel of land for any purpose." Later on, Stev-Mar discovered that the property was not properly replatted or subdivided and could not be legally used for its desired purpose. Stev-Mar brought suit against the owner, real estate agent, and real estate agency for intentional fraud and negligent misrepresentation. The trial court held for Matvejs, stating that Stev-Mar hired an attorney to investigate the property and did not rely on the representations of Matvejs.

The third district reversed the trial court's decision. The court relied on the decision in Besett v. Basnett. In Basnett, the Supreme Court of Florida held that a recipient of a fraudulent misrepresentation may rely on the truth of such representation, even though its falsity could have been discovered through investigation, unless he knows, or it is obvious to him, that the representation is false. In this case, the seller misrepresented the land as properly platted for use as a homesite. Stev-Mar entered a contract based on that misrepresentation. In addition, Stev-Mar's attorney was negligent in his investigation of the land because he failed to investigate beyond zoning. The attorney never discovered that the property had not been replatted.

The question is whether Matvejs avoids liability just because Stev-Mar's attorney conducted a negligent investigation. The district court recognized that even though Stev-Mar's attorney was negligent, the seller, real estate agent, and real estate agency cannot avoid the intentional fraud charge.

311. Id. at 835-36 (quoting the contract).
312. Id. at 836.
313. Id. (quoting the contract).
314. Matvejs, 678 So. 2d at 836.
315. Id.
316. Id.
317. Id. at 839.
318. Id. at 837 (citing Besett v. Basnett, 389 So. 2d 995 (Fla. 1980)).
320. Matvejs, 678 So. 2d at 837.
321. Id.
"[T]he law should not permit an inattentive person to suffer loss at the hands of a misrepresenter."

VIII. EASEMENTS

_Nerbonne, N. V. v. Florida Power Corp._ The issue before the Fifth District Court of Appeal was:

Whether Orange County’s grant of a permit to Florida Power Corporation in 1991 to construct a power line over an easement deeded to the County in 1952 and the subsequent erection of the power line exceeded the scope of the grant of easement to the County and, thus, constituted a taking of Nerbonne’s property.

The “Right-of-Way Agreement” in question provided that in exchange for one dollar, the Florida Power Corporation would be given “a right-of-way for public road purposes and full authority to enter upon, . . . TO HAVE AND TO HOLD the said easement.”

Florida has not directly decided this issue, but the majority of courts in other jurisdictions have concluded that the construction of a power line, which did not interfere with highway travel, was a proper use of a highway easement. It “is not regarded as imposing an additional burden or servitude on the underlying estate.” When looking to other cases such as _Fisher v. Golden Valley Electric Ass’n_, the reasoning appeared consistent with Florida cases that have considered the scope of a public road right-of-way. Since the document failed to exclude public utilities from the easement, the court construed the grant of a right-of-way to include such utilities.

_State Department of Transportation v. B & C Foods, Inc._ The Fourth District Court of Appeal affirmed the lower court’s decision ordering the City of Fort Lauderdale to reconvey an easement to McDonald’s Corporation

322. _Id._ at 837-38 (citing Besett v. Basnett, 389 So. 2d 995, 998 (Fla. 1980)).
323. 692 So. 2d 928 (Fla. 5th Dist. Ct. App. 1997).
324. _Id._ at 928.
325. _Id._ (quoting the agreement).
326. _Id._ at 929 (citations omitted).
327. _Id._ (citations omitted).
329. _Nerbonne_, 692 So. 2d at 930 (citing Dickson v. St. Lucie County, 67 So. 2d 662, 665 (Fla. 1953)).
330. _Id._
according to section 255.22 of the Florida Statutes. The language in the 1979 easement stated that the easement was for "right[-]of[-]way purposes." This purpose was for a "specified purpose or use" which was intended to be addressed under subsection (3) of the Florida Statutes. Fort Lauderdale did not use or identify the easement in a comprehensive plan of its own within ten years of the conveyance date. Since subsection (1) required the transferee to identify the property as such in the comprehensive plan, the Department of Transportation could not rely on Broward County's comprehensive plan as a way around subsection (3).

IX. EMINENT DOMAIN

A. Condemnation

_Broward County v. LaPointe._ The Fourth District Court of Appeal ruled that where a researcher had been hired as both an expert witness and as a litigation consultant, it was error to award an expert witness fee for all of the researcher's time. "On remand, the trial court must determine what portion of [his] fee can be allocated to the formation of an expert opinion which related to the valuation of the property." The condemnor can be required to pay only that portion of his bill.

_Department of Transportation v. Springs Land Investments, Ltd._ To effectuate its comprehensive plan, the city was planning on down-zoning an area that included this owner's land. Since that "would have significantly reduced the property's market value," the landowner took the steps necessary to have the commercial zoning vest so it would survive a general re-zoning of the area, primarily by hiring an engineering firm to acquire the city's preliminary site plan approval for a shopping center. Then, the Department of Transportation began this condemnation proceeding which was eventually

332. _Id._ at 5. *See* FLA. STAT. § 255.22(1) (1994).
333. _B & C Foods, Inc._, 687 So. 2d at 5.
334. _Id._
335. _Id._
336. _Id._
337. 685 So. 2d 889 (Fla. 4th Dist. Ct. App. 1996). For more discussion of this case, see also the Attorneys' Fees section of this survey.
338. _Id._ at 893.
339. _Id._
340. 695 So. 2d 414 (Fla. 5th Dist. Ct. App. 1997).
341. _Id._ at 416.
settled. Subsequently, when the condemnee filed a motion to tax costs, it included the engineering firm’s fees.\footnote{342}

The Fifth District Court of Appeal held that those fees should not have been allowed.\footnote{343} Section 73.091 of the \textit{Florida Statutes} provides for “all reasonable costs” of the condemnation proceeding.\footnote{344} Here, however, the fees were incurred to maintain the value of the property by avoiding down-zoning, not to litigate the condemnation. It would seem like double compensation if this landowner was compensated for the land with the commercial zoning in order to pay for both the land with the more valuable zoning and to pay the fees to get that zoning.

\textit{Garber v. State Department of Transportation.}\footnote{345} Following a stipulated judgment, the trial court entered an order on attorneys’ fees and costs pursuant to section 73.091 of the \textit{Florida Statutes}.\footnote{346} However, the trial court denied expert witness fees for the condemnee’s marketing expert who was a real estate broker engaged “to help assess the impact a loss of parking places would have on the property’s continued viability as the location of three physicians’ practices.”\footnote{347} The First District Court of Appeal ruled “that the trial court erred in categorically rejecting” an expert witness fee for the marketing expert.\footnote{348} Neither the plain language of the statute nor the decision in \textit{State Department of Transportation v. Woods}\footnote{349} precluded expert witness fees for a marketing expert.\footnote{350} The latter denied fees for an expert that the fourth district concluded had assisted the condemnee’s lawyer in the litigation rather than act as an expert witness.\footnote{351} However, this trial court had made no similar finding of facts that this expert was not hired “as a witness to render or assist in rendering an opinion on just valuation and to testify, as needed.”\footnote{352} If this person had done what the condemnee claimed, then an expert witness fee would have been appropriate. Furthermore, it must not be duplicative, and it must be necessary to the presentation of the condemnee’s case.

\footnote{342. \textit{Id.}}
\footnote{343. \textit{Id.} at 415.}
\footnote{344. \textsc{Fla. Stat.} \S 73.091 (1993).}
\footnote{345. 687 So. 2d 2 (Fla. 1st Dist. Ct. App. 1996).}
\footnote{346. \textit{Id.} at 3.}
\footnote{347. \textit{Id.} at 4.}
\footnote{348. \textit{Id.}}
\footnote{349. 633 So. 2d 94 (Fla. 4th Dist. Ct. App. 1994).}
\footnote{350. \textit{Garber}, 687 So. 2d at 4.}
\footnote{351. \textit{Id.} (citing Department of Transp. v. Woods, 633 So. 2d 94, 95 (Fla. 4th Dist. Ct. App. 1994)).}
\footnote{352. \textit{Id.}}
Mediation produced a settlement agreement that was incorporated into a stipulated final judgment. One provision was "that the trial court would 'reserve jurisdiction to assess any damage' caused to the landowner's pool by the Department's construction." However, the trial court later denied the landowner's motion to enforce this provision "on the basis that construction damages are not recoverable in an eminent domain proceeding." The second district reversed, noting that "[t]here is no requirement that the terms of a settlement agreement be confined to issues cognizable in the litigation giving rise to the dispute." The court held that the rights and obligations of the parties merged into the settlement agreement. Consequently, the agreement was binding on the parties and the trial court. From the limited facts given, it appears that the Department's conduct was outrageous, but the opinion is a monument of judicial restraint, simply stating the law and the results without casting aspersions on the Department's actions.

The Department of Transportation took sixteen parking spaces from a restaurant parking lot. The restaurateur sought both business and severance damages under the statute in addition to compensation for the land. The issue on appeal centered on proof of the business damages. The trial court admitted the testimony of the restaurateur's expert, which stated:

[He had] calculated a projected loss of sales resulting from the lost parking spaces and deducted from that sales amount the business costs which, in his opinion, would have been attributed to production of those sales had the sales not been lost. The expert then capitalized the recurring shortfall and concluded that the capitalized amount would be the loss to the ongoing business.

The first district reversed, ruling that the expert's testimony was inadmissible as a matter of law because it did not deduct a percentage of all fixed costs

354. Id. at 640.
355. Id.
356. Id.
357. Id.
358. M & C Assocs., 682 So. 2d at 640.
359. 687 So. 2d 825 (Fla. 1997).
360. Id. at 825.
from the sales amount. The first district then certified two questions. The first was whether:

IN AN EMINENT DOMAIN CASE IN WHICH AN ESTABLISHED BUSINESS IS NOT TOTALLY DESTROYED BY A TAKING, DOES SECTION 73.071(3)(B), FLORIDA STATUTES [(1991)], CONTEMPLATE CALCULATION OF BUSINESS DAMAGES BY ANY MEANS OTHER THAN A LOST PROFIT ANALYSIS?

The Supreme Court of Florida declined to answer this question, reasoning that all the experts in this case had used a lost profit analysis. However, the Supreme Court of Florida directed its attention to the second certified question which was:

IN THE INSTANT CASE IS THE EXPERT'S BUSINESS DAMAGE CALCULATION A LOST PROFIT ANALYSIS REQUIRING THE DEDUCTION OF FIXED EXPENSES, SUCH AS SALARIES, INTEREST, DEPRECIATION, AND UTILITIES, OR AN ALTERNATIVE ANALYSIS, COGNIZABLE UNDER SECTION 73.071(3)(b) [FLORIDA STATUTES (1991)], BASED ON DEDUCTION OF CERTAIN VARIABLE EXPENSES AND THE EXCLUSION OF FIXED EXPENSES FROM THE ANALYSIS?

The supreme court answered that "a business-loss calculation based on certain variable expenses and excluding some fixed expenses can be cognizable under section 73.071(3)(b), depending upon the factual circumstances of a particular case." The unanimous opinion written by Justice Wells noted that business damages are related to lost profits, but they are not limited to lost profits. The supreme court rejected a "mechanically applied, one-size-fits-all formula." It would have been error not to deduct managerial salaries in the amount deducted from sales in a case where the business had closed as a

362. Id. at 980.
363. Id.
364. Id. at 825-26.
365. Id. at 826.
366. Id. at 826.
367. Id.
368. Id. at 827.
result of the taking. However, in this case the business did not close. In the case at hand, it was a question of fact as to which fixed expenses should be included in the calculation because it was not certain that managerial expenses would be reduced by the decreased trade that the restaurant would suffer from the loss of parking spaces. Both sides had presented expert testimony on that issue. Therefore, the trial court did not abuse its discretion by admitting this testimony.

Trinity Temple Church of God in Christ, Inc. v. Orange County. Part of the church’s property was taken, and the church sought, inter alia, statutory business damages. The courts did not hesitate to grant severance damages, but the trial court rejected the business damage claim, and the fifth district agreed. First, the court concluded that a tax-exempt church was not a business within the meaning of the statute. The court noted that the statute is to be “strictly construed.” The dictionary definition of a business is one that involved an “activity engaged in for a gain or livelihood,” but, the statute providing the church tax-exempt status requires that the church be used “predominately for a . . . religious . . . purpose.” The court also rejected the church’s equal protection argument by primarily relying on the difficulty in calculating business damages for something that was not a business and already was getting preferential tax treatment.

Trump Enterprises, Inc. v. Publix Supermarkets, Inc. The lease for an unimproved outparcel in a shopping center did not contain a condemnation clause. A restaurant was built on the parcel, and thereafter, almost thirty-five percent of the parcel was taken for road widening. Although the lessee presented unrebutted expert testimony as to the value of the leasehold taken, the trial court held that the lessee was not entitled to a portion of the condemnation award. It reasoned that the lessee had suffered no harm because the land taken was part of the grassy strip running along the road.

369. Murray, 687 So. 2d at 827 (distinguishing Department of Transp. v. Manoli, 645 So. 2d 1093 (Fla. 4th Dist. Ct. App. 1994)).
370. Id.
371. 681 So. 2d 765 (Fla. 5th Dist. Ct. App. 1996).
372. Id. at 766. See also Fla. Stat. § 73.071(3)(b) (1995).
373. Trinity Temple, 681 So. 2d at 766.
374. Id.
375. Id.
376. Id. (quoting BLACK’S LAW DICTIONARY 198 (6th ed. 1990)).
377. Id. (quoting Fla. Stat. § 196.196(1) (1995)).
378. Trinity Temple, 681 So. 2d at 766.
379. 682 So. 2d 168 (Fla. 4th Dist. Ct. App. 1996).
380. Id. at 168.
381. Id. at 170.
Therefore, the restaurant building was not disturbed because it had lost no parking spaces and its business was not affected. The Fourth District Court of Appeal disagreed and reversed.

The right to compensation for a governmental taking is not a matter of damages in the contract or tort sense. A leasehold is an interest in land for purposes of taking jurisprudence. When a fee simple subject to a lease is taken, the lessee is entitled to share in the condemnation award as compensation for the interest lost. The lessee's share should be proportionate to the value of the leasehold in relation to the value of the fee simple taken. Consequently, this lessee's share in the condemnation award should be the decrease in the value of its leasehold, which its expert had figured from the proportionate loss of area minus the value of the landlord's reversion.

The lack of a condemnation clause in the lease did not defeat the lessee's right to compensation. Quite the contrary, when a lease is silent about condemnation, the lessee is entitled to compensation for its lost leasehold interest. The court pointed out in dicta that condemnation clauses limiting a tenant's right to compensation for a governmental taking are disfavored and should, therefore, be construed, whenever possible, not to defeat a tenant's right to compensation.

B. Inverse Condemnation

*Department of Environmental Protection v. Gibbins.* The landowner's neighbor operated a service station which discharged gasoline from underground storage tanks. To define the extent of the contamination, the Department of Environmental Protection notified the landowner that it wanted to drill several wells on the landowner's property. The landowner resisted, demanding compensation; thus, the Department served him with an administrative order for access. After the landowner responded with a demand for a formal hearing, the Department withdrew its administrative action and filed a complaint seeking an injunction against the landowner for interfering with the installation of wells on his land. The Department then decided that was unnecessary and moved for voluntary dismissal; however, the landowner filed a motion for attorney's fees on the theory that he had

382. Id.
383. Id.
384. *Trump*, 682 So. 2d at 170.
385. Id. (relying on *Mullis v. Division of Admin.*, 390 So. 2d 473 (Fla. 5th Dist. Ct. App. 1980)).
386. 696 So. 2d 888 (Fla. 5th Dist. Ct. of App. 1997).
defeated an attempt by the government to take his land. The trial court agreed and awarded substantial attorney’s fees.\footnote{Id. at 888-89.}

The fifth district reversed.\footnote{Id. at 890.} Its analysis does not address whether the Department’s conduct amounted to an “inverse condemnation” or whether attorney’s fees can be awarded in an inverse condemnation case, although the court disagreed with the landowner’s contention that the “DEP’s action, whether deliberate or inadvertent, was highly intrusive behavior, and hence a taking.”\footnote{Id.} Rather, the fifth district reasoned that because no condemnation proceeding had begun, the landowner could not have succeeded in defeating a condemnation attempt.\footnote{Id.} As the statutes relied upon only provide for attorney’s fees in condemnation proceedings,\footnote{See FLA. STAT. §§ 73.091-.092 (1993).} there would be no basis for awarding attorney’s fees in this case.\footnote{Gibbins, 696 So. 2d at 890.}

\textit{Diamond K Corp. v. Leon County.} A creek crossed a corner of Diamond K’s property. The County dredged a channel in the creek for mosquito control. The County approved development and the installation of culverts under the nearby state road to allow for the increased flow of water in the creek. Cumulatively, these culverts caused the creek to widen and, in a heavy rainstorm, the water would back up and not drain properly. The landowner brought suit claiming inverse condemnation, but lost at the trial level.\footnote{677 So. 2d 90 (Fla. 1st Dist. Ct. App. 1996).} The First District Court of Appeal affirmed because the record did not contain evidence of a permanent deprivation of the beneficial use of the land, and suggested that the landowner should have brought an action for damages against any third party responsible for increasing the surface water flow across its land.\footnote{Id. at 91.}

\textit{Jacobi v. City of Miami Beach.} Landowners owned two lots, with the house on one lot overlapping onto the second lot. In order to obtain a building permit for the second lot, the owners sought to reconfigure the two lots to eliminate any overlap. The City’s Department of Planning and Zoning approved the requested reconfiguration and then issued the building permit, which was reversed by the Board of Adjustment.\footnote{678 So. 2d 1365 (Fla. 3d Dist Ct. App. 1996).} The property owners
finally got their approval after a successful appeal to the trial court’s appellate division. They then sued for losses allegedly incurred as a result of the Board of Adjustment’s erroneous reversal on the theories of inverse condemnation and violation of their due process rights. 398 The trial court granted the City’s motion for summary judgment and the landowners appealed. 399

The third district rejected the taking claim because the record reflected that, despite the denial of the permit application, the landowners still occupied and even improved the existing house. 400 Consequently, they were not deprived of “‘substantially all economically beneficial or productive use of land.’” 401 The third district rejected the property owners’ substantive due process claim. 402 The decision of the Board of Adjustment was executive, not legislative in nature. 403 Noting that “‘[t]he notion that the Constitution gives a property owner a substantive right to a correct decision from a government official . . . is novel indeed,’” 404 the court pointed out that an executive act would violate substantive due process only if the right affected was “‘implicit in the concept of ordered liberty.’” 405 But none of the fundamental rights of these property owners had been infringed. Their interest in the reconfiguration approval and building permit issued by the Department of Planning and Zoning was not a fundamental right. Moreover, it was a right that was restored when relief was sought following the appeals process. In sum, the court declined to find that property owners who successfully appeal denials of building permits and the like are, without more, entitled to recover from the government for their resulting losses. 406

_Nerbonne, N.V. v. Florida Power Corp._ 407 A landowner granted the County a right-of-way for public road purposes. Subsequently, the County granted the power company a permit to construct power lines along that right-of-way. The servient landowner claimed that the County had exceeded the

399. _Id._
400. _Id._
401. _Jacobi, 678 So. 2d_ at 1366 (citation omitted).
402. _Id._
403. _Id._ at 1367.
404. _Id._ at 1367-68 (quoting Boatman v. Town of Oakland, 76 F.3d 341, 346 (11th Cir. 1996)).
405. _Id._ at 1367 (quoting C.B. By and Through Breeding v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996)).
406. _Jacobi, 678 So. 2d_ at 1367.
407. 692 So. 2d 928 (Fla. 5th Dist. Ct. App. 1997).
scope of the easement and demanded compensation. This action based upon inverse condemnation followed.\textsuperscript{408}

The fifth district found that this was a case of first impression in Florida.\textsuperscript{409} It reviewed decisions from other states and found decisions in Alaska\textsuperscript{410} and Minnesota\textsuperscript{411} particularly persuasive for the proposition that a right-of-way easement includes compatible uses by which energy or information might be transmitted.\textsuperscript{412} The court stated that "[i]f the grantor had intended in 1952 to exclude public utilities from the easement, it would have been possible to do so. Since the document is silent, we construe the grant of right-of-way for public road purposes to include public utilities."\textsuperscript{413}

\textit{Palm Beach County v. Cove Club Investors Ltd.}\textsuperscript{414} Palm Beach County acquired title to a residential mobile home lot by eminent domain. The mobile home lot was subject to a declaration of covenants that obligated the lot owners to pay a monthly recreation fee and required the Club to operate a golf course and country club for the use of the lot owners. The Club brought this suit claiming that it had suffered the loss of a property right in that the condemnation of the lot had deprived it of the income to which it was entitled. The trial court agreed, holding that a taking of property had occurred and reserved jurisdiction to determine the amount of compensation due.\textsuperscript{415} The County appealed the taking determination, but the Fourth District Court of Appeal affirmed.\textsuperscript{416}

The fourth district distinguished this case from \textit{Board of Public Instruction of Dade County v. Town of Bay Harbor Islands},\textsuperscript{417} \textit{North Dade Water Co. v. Florida State Turnpike Authority},\textsuperscript{418} and \textit{Division of Administration, Department of Transportation v. Ely}.\textsuperscript{419} The critical point seemed to be that the Club was still required to operate the golf course and country club facilities for the other owners, but without the support of the

\begin{thebibliography}{99}
\bibitem{408} \textit{Id.} at 928.
\bibitem{409} \textit{Id.} at 929.
\bibitem{411} \textit{Cater v. Northwestern Tel. Exch. Co.}, 63 N.W. 111 (Minn. 1895).
\bibitem{412} \textit{Nerbonne}, 692 So. 2d at 929 (citation omitted).
\bibitem{413} \textit{Id.} at 930.
\bibitem{414} 692 So. 2d 998 (Fla. 4th Dist. Ct. App. 1997).
\bibitem{415} \textit{Id.}
\bibitem{416} \textit{Id.}
\bibitem{417} 81 So. 2d 637, 643 (Fla. 1955) (holding that mutual restrictions within a subdivision did not create property rights).
\bibitem{418} 114 So. 2d 458, 460 (Fla. 3d Dist. Ct. App. 1959), \textit{dismissed}, 120 So. 2d 621 (Fla. 1960) (holding that an exclusive contract to sell water to subdivision was not a property right).
\bibitem{419} 351 So. 2d 66, 68 (Fla. 3d Dist. Ct. App. 1977) (concluding that a contract to sell gas to mobile home park residents was not a property right).
\end{thebibliography}
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income stream from the condemned lot. The trial court concluded that this amounted to a taking and that "[t]he trial court's determination on liability in an inverse condemnation suit is presumed correct and its findings will not be disturbed on appeal if supported by competent, substantial evidence." The fourth district also rejected the County's claim that public policy would be violated by making the County pay for the Club's lost income because the public policy is to compensate owners whose property is taken. The fourth district subsequently granted the motion to certify the following question to the Supreme Court of Florida as being of great public importance:

WHETHER THE RIGHT OF A PRIVATE COUNTRY CLUB TO RECEIVE A STREAM OF INCOME FROM A MONTHLY RECREATION FEE ASSESSED AGAINST THE OWNER OF A RESIDENTIAL MOBILE HOME LOT CONSTITUTES A PROPERTY RIGHT COMPENSABLE UPON INVERSE CONDEMNATION BY THE COUNTY FOR USE OF THAT LOT IN A PUBLIC ROAD WIDENING PROJECT?

XI. ENVIRONMENTAL LAW

Ober v. Florida Department of Environmental Protection. The fifth district held that Ober was entitled to reimbursement for the clean-up of storage tanks and contaminated soil on Ober's property. Ober owned property that was leased and used as an AAMCO transmission shop. During inspection of the property, the Environmental Control Division determined the site, containing underground storage tanks and an oil/water separator, was contaminated. Ober employed an environmental contractor to remedy the situation, and once this was completed, the contractor filed a closure report. Ober later applied for entry into the Abandoned Tank Restoration Program pursuant to section 376.305(7) of the Florida Statutes, providing for "financial assistance to a clean site contaminated by petroleum or petroleum products." The Department of Environmental Regulation later told Ober

420. Cove Club, 692 So. 2d at 999.
421. Id. at 1000.
422. Id.
423. 688 So. 2d 435 (Fla. 5th Dist. Ct. App. 1997).
424. Id. at 436.
425. Id. (citing Fla. Stat. § 376.305(7) (1995)).
that the contamination at his site was eligible for reimbursement under the statute.\footnote{426}

When Ober filed for reimbursement of the $46,765.24, the Department of Environmental Protection ("DEP") denied the request, concluding that the costs accrued were due to surface spillage of contaminants not covered by the statute. Further, the DEP found that that the source of contamination was "improper disposal and storage methods; and that the underground storage system was not the source of contamination of the facility."\footnote{427} Ober filed a petition for an administrative hearing. The hearing officer found the contamination to be the result of discharge of petroleum products specified under section 376.301 of the \textit{Florida Statutes}.\footnote{428}

The issue before the court was whether the waste oil and transmission fluid (which the hearing officer found to be the source of the contamination) were "petroleum products" as defined by section 376.301 of the \textit{Florida Statutes}.\footnote{429} The court rejected the Department's argument that distinguished between "waste oil" and "used oil" because it overlooked the fact that the intent of the statute was to reimburse property owners for remediating contaminated sites.\footnote{430} The court looked to rule 62-770.200(12) of the \textit{Florida Administrative Code} where it defined used oil.\footnote{431} It recognized the rule had no definition of waste oil even though the hearing officer and Ober's witness at the hearing used the terms "used oil and waste oil interchangeably."\footnote{432} Since there was evidence that lubricants described as waste oil or transmission fluid, which contaminated the soil from underground tanks were used in Florida as fuel, "the conclusion of the hearing officer that these lubricants were liquid fuel commodities made from petroleum and thus 'petroleum products' . . . should have been sustained."\footnote{433} Thus, Ober should have been reimbursed.

\textit{Florida Department of Environmental Protection v. Fleet Credit Corp.}\footnote{434} The fourth district reversed summary judgment granted in favor of Fleet Credit on the grounds that the statute of limitations had expired before Florida's Department of Environmental Protection filed the action.\footnote{435}

\begin{footnotesize}
\begin{footnotes}{10}
426. \textit{Id.}
427. \textit{Id.}
428. \textit{Ober, 688 So. 2d at 436-37.}
429. \textit{Id. at 437.}
430. \textit{Id. at 438.}
431. \textit{Id.}
432. \textit{Id.}
433. \textit{Ober, 688 So. 2d at 438.}
434. \textit{691 So. 2d 512 (Fla. 4th Dist. Ct. App. 1997).}
435. \textit{Id. at 514.}
\end{footnotes}
\end{footnotesize}
court reasoned that summary judgment was inappropriate because “the statute of limitations begins to run when the last element of a cause of action accrues.”

“Florida’s environmental resource and recovery management statutes are remedial in nature” and have the purpose to clean up unused waste disposal sites to protect the public health and safety. It was irrelevant when Fleet abandoned the property because the ongoing contamination constituted continuing disruption. In conclusion, when there is a continuing invasion of rights with regard to environmental concerns, the statute of limitations does not run until the wrongful invasion terminates.

XII. EQUITABLE REMEDIES

Lee County v. Fort Myers Airways, Inc. Arbitrators decided that both the landlord, Lee County, and the tenant, Fort Myers Airways, had breached the lease and both were entitled to damages. The trial court confirmed the decision and also ordered the landlord to maintain the buildings structurally as required by the lease. The maintenance order was reversed by the Second District Court of Appeal, which reasoned that the order was a mandatory injunction. According to the second district, “mandatory injunctions are looked upon with disfavor and should be granted sparingly and cautiously.”

Injunctions should be granted only upon a showing of “(1) a clear legal right, (2) the inadequacy of a remedy at law, and (3) that irreparable injury will occur if such relief is not granted.” Unfortunately, the trial court had not made a finding that the prerequisites were satisfied. Furthermore, an injunction should not be issued where it would produce hardship disproportionate to the one the injunction would prevent; however, the trial court made no finding concerning relative hardship to the parties. These defects in the judgment mandated reversal.

436. Id.
438. Fleet, 691 So. 2d at 514.
439. Id.
440. 688 So. 2d at 389 (Fla. 2d Dist. Ct. App. 1997).
441. Id. at 390.
442. Id.
443. Id.
444. Id.
445. Lee, 688 So. 2d at 390.
446. Id.
447. Id.
448. Id.
Chief Judge Threadgill dissented regarding the injunction. He recharacterized the order as granting specific performance and found ample authority in section 44.104(11) of the *Florida Statutes* for the trial court to grant specific performance based on the arbitrators' award without making further findings. He also urged deference to the opinion of the trial judge, noting that the litigation had been in progress for eight years.

*Licea v. Anllo.* The buyer brought suit for specific performance of a real estate sales contract and filed a notice of lis pendens. In response, the seller filed a motion asking for either discharge of the lis pendens or that the buyer be required to post a bond. Over the buyer’s objection that an evidentiary hearing was necessary, the trial court heard the matter on its motion calendar and set bond for $350,000. The Third District Court of Appeal reversed.

A bond is needed for a notice of lis pendens only if the property owner is likely to suffer and demonstrates loss or damage if the notice later proves unjustified. If a bond is appropriate, its amount must bear a “reasonable relationship” to that potential loss or damage. A court could only make the finding that harm or damage is likely and determine the reasonable amount of the bond after an evidentiary hearing.

*Morton v. Cord Realty, Inc.* As part of the settlement of complex litigation, a development company transferred the development property to its president and then ceased doing business. The broker, seeking to recover sales commissions from the development company, filed supplementary proceedings under section 56.29(6)(a) of the *Florida Statutes* to set aside the transfer. The trial court voided the transfer and the case was appealed. The Fourth District Court of Appeal ruled that the trial court erred in relying entirely upon section 56.29 because that only provided the procedural mechanism for setting aside a fraudulent transfer and not the substantive law. That is now found in chapter 726 of the *Florida Statutes*, Fraudulent

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449. *Id.* at 391 (Threadgill, C.J., dissenting).
450. *Lee*, 688 So. 2d at 391.
451. *Id.*
452. 691 So. 2d 29 (Fla. 3d Dist. Ct. App. 1997).
453. *Id.* at 30.
454. *Id.*
455. *Id.* (citation omitted).
456. *Id.*
459. *Morton*, 677 So. 2d at 1324.
460. *Id.*
Transfers. Consequently, the case had to be reversed and remanded for retrial.\textsuperscript{461}  

\textit{Wal-Mart Stores, Inc. v. AAA Asphalt, Inc.}\textsuperscript{463} Subcontractors sought equitable relief against the landowner under section 713.31 of the \textit{Florida Statutes}, which provided for such relief "‘[w]hen the owner or any lienor shall, by fraud or collusion, deprive or attempt to deprive any [construction] lienor of benefits or rights to which such lienor is entitled. . . .’"\textsuperscript{464} The trial court granted summary judgment to the subcontractors and the landowner appealed.\textsuperscript{465} The question was what the legislature meant by "fraud."\textsuperscript{466} The trial court concluded its meaning encompassed constructive fraud, committed by "negligently failing to determine the invalidity of the [contractor’s] payment bond," but the First District Court of Appeal disagreed.\textsuperscript{468} The district court noted that fraud, for the purposes of this section, had not been defined by statute or by any case.\textsuperscript{469} However, in other construction cases involving the term "fraud," courts had interpreted the term as involving intentional conduct.\textsuperscript{470} Moreover, the term "fraudulent lien" within the same section had been interpreted to mean a lien for an amount that had been willfully exaggerated.\textsuperscript{471} The court reasoned that fraud as used in this chapter should be interpreted consistently.\textsuperscript{472} Consequently, equitable relief was available only if the landowner had the intent to defraud. Therefore, the trial court’s finding that the landowner was negligent did not satisfy that requirement.\textsuperscript{473}

\begin{itemize}
  \item \textsuperscript{461} See \textit{FLA. STAT.} § 56.29(6)(a) (1993).
  \item \textsuperscript{462} \textit{Morton}, 677 So. 2d at 1324.
  \item \textsuperscript{463} 677 So. 2d 93 (Fla. 1st Dist. Ct. App. 1996).
  \item \textsuperscript{464} Id. at 94 (quoting \textit{FLA. STAT.} § 713.31 (1993)).
  \item \textsuperscript{465} Id.
  \item \textsuperscript{466} Id.
  \item \textsuperscript{467} Id.
  \item \textsuperscript{468} \textit{Wal-Mart}, 677 So. 2d at 94.
  \item \textsuperscript{469} Id.
  \item \textsuperscript{470} \textit{Id.} See First Interstate Dev. Corp. v. Ablanedo, 511 So. 2d 536, 539 (Fla. 1987); \textit{Taylor v. Kenco Chemical & Mfg. Corp.}, 465 So. 2d 581, 589 (Fla. 1st Dist. Ct. App. 1985).
  \item \textsuperscript{471} \textit{Wal-Mart}, 677 So. 2d at 94 (citing Vinci Dev. Co. v. Connell, 509 So. 2d 1128, 1132 (Fla. 2d Dist. Ct. App. 1987)).
  \item \textsuperscript{472} Id.
  \item \textsuperscript{473} Id.
\end{itemize}
XIII. FRAUDULENT CONVEYANCES

381651 Alberta, LTD. v. 279298 Alberta, LTD. The issue before this court was "whether 27 Alberta’s action to set aside the conveyances is one at law or equity given the fact that 27 Alberta seeks also that the proceeds from the sale of the property be applied to satisfy the money judgment?" 27 Alberta, a Canadian corporation, received a $2,375,811.17 judgment against Adams, an individual. Adams’ personal property, including two condominiums was held by Eljada Holdings Family Trust Corporation. "After the entry of the judgment, Eljada transferred the mortgages on the condominiums to Adams’ brother’s company, 381651 Alberta, Ltd., ("38 Alberta"), allegedly as security for a loan."

"Therefore, 27 Alberta filed suit against Adams, Eljada, and 38 Alberta seeking an order setting aside the transfers as fraudulent conveyances and mandating the sale of the real property to satisfy the judgment." The trial court denied 38 Alberta’s request for a jury trial and later found that Adams “evaded personal liability by titling . . . personal assets” in Eljada’s name. The trial court determined that the mortgages were fraudulent conveyances and set them aside. The Fourth District Court of Appeal affirmed the final judgment, but wrote an opinion to address the jury trial issue.

The right to a jury trial applies only to legal causes of action and actions seeking monetary judgments are traditionally ones at law. The fourth district distinguished other federal decisions to review this case. However, it noted that in Mission Bay Campland, Inc. v. Sumner, the district court held "[b]ecause the equitable remedy of annulment for a fraudulent transfer of assets was sought, there was no federal constitutional

474. 675 So. 2d 1385 (Fla. 4th Dist. Ct. App. 1996).
475. Id. at 1387.
476. Id. at 1386.
477. Id.
478. Id.
479. 38 Alberta, 675 So. 2d at 1386.
480. Id.
481. Id.
482. Id. at 1387.
483. Id. (citing King Mountain Condominium Ass’n v. Gundlach, 425 So. 2d 569 (Fla. 4th Dist. Ct. App. 1982)).
484. 38 Alberta, 675 So. 2d at 1387 (relying on Hutchens v. Maxicenters, U.S.A., 541 So. 2d 618, 623 (Fla. 5th Dist. Ct. App. 1988)).
right to a jury trial." This case parallels the situation in Alberta. Alberta had an equitable claim against Adams’ assets. “[A]n action to set aside the fraudulent conveyance of Adams’ real property is equitable in nature since it does not result in a general adjudication of title to the property.” Section 56.29 of the Florida Statutes states one cannot give, transfer, convey, or assign anything to hinder or defraud creditors. The fourth district found that Alberta should be handled like the Mission Bay and Allied cases. Therefore, because Alberta’s pursuance of Adams’ property is equitable in nature, there is no right to a jury trial.

**XIV. HOMEOWNERS’ ASSOCIATIONS**

*Sanzare v. Varesi.* The Fourth District Court of Appeal reversed final summary judgment in favor of Varesi and the Coconut Key Homeowners Association ("Association"). The fourth district remanded the case to resolve genuine issues of material fact concerning the Association’s knowledge of the presence and vicious propensities of a tenant’s dog.

While Sanzare walked his dog on a non-dedicated street running through a “common area” owned by the Association, he was bitten by a dog owned by two people leasing a residence within the community. Sanzare filed a negligence action against the Association. In turn, the Association moved for summary judgment arguing it owed no duty to Sanzare. The Association claimed that “liability for the dog-bite incident could be extended only to the owner of the dog or the landlord of the property where the dog was kept.”

The trial court granted summary judgment in favor of the Association. The district court reversed the trial court’s holding, noting that genuine issues of material fact remain to be addressed. A landowner may be liable for injuries resulting from an attack of a tenant’s dog, if the landowner knows of the animal’s vicious propensity and has the ability to
control the animal’s presence.\textsuperscript{497} The district court recognized factual issues remain as to whether the Association had knowledge of the animal’s presence and vicious propensities, as well as the Association’s ability to control the dog’s presence.\textsuperscript{498}

\textit{Westwood Community Two Ass’n v. Lewis.}\textsuperscript{499} In this case the homeowners filed suit to enforce sections 760.20-37 of the \textit{Florida Statutes}, the familial status provisions of the Florida Fair Housing Act.\textsuperscript{500} The homeowners association appealed adverse summary judgment in favor of the appellees, homeowners in Westwood community.\textsuperscript{501} The Fourth District Court of Appeal affirmed the trial court’s holding, reasoning that the association was without the authority to exempt itself from the above statutory provisions.\textsuperscript{502} The association was enjoined from representing the community as “housing for older persons” where one must be fifty-five years of age or older to reside.\textsuperscript{503}

In 1989, the sixteen-year-old age requirement set forth in the Westwood declaration of restrictions was nullified by an amendment to the Fair Housing Act.\textsuperscript{504} This amendment was intended to prevent the Westwood community from discriminating based on familial status. As a result, the Westwood homeowners association amended its bylaws to fit within the “housing for older persons” exemption to familial status.\textsuperscript{505} Paragraph fifteen of the Westwood declaration of restrictions stated that “covenants, restrictions, reservations[,] and servitudes” run with the land and bind those claiming ownership or use of land until March 1, 2022.\textsuperscript{506} The association’s bylaws provided for amendments, but the bylaws stated that “[n]o amendment shall be made which is in conflict with the Declaration of Restrictions.”\textsuperscript{507} However, “Westwood’s declaration of restrictions did not reserve to the association the right to amend the covenants or provide for amendment of the covenants by a vote of lot owners.”\textsuperscript{508} When it amended its bylaws, the

\textsuperscript{497} Sanzare, 681 So. 2d at 786 (citing Vasques v. Lopez, 509 So. 2d 1241 (Fla. 4th Dist. Ct. App. 1987)).
\textsuperscript{498} Id.
\textsuperscript{499} 687 So. 2d 296 (Fla. 4th Dist. Ct. App. 1997).
\textsuperscript{500} Id. at 297.
\textsuperscript{501} Id.
\textsuperscript{502} Id.
\textsuperscript{503} Id.
\textsuperscript{504} Lewis, 687 So. 2d at 297.
\textsuperscript{505} Id.
\textsuperscript{506} Id.
\textsuperscript{507} Id.
\textsuperscript{508} Id.
association exercised authority it did not have. The association could not amend its declaration of restrictions just because the Fair Housing Act voided the sixteen-year-old age restriction.

XV. HOMESTEAD

_Crain v. Putnam._ The Fourth District Court of Appeal concluded that the elderly owner of a home was still entitled to homestead exemption even though she was placed in a nursing home. Crain was placed in a nursing home after suffering extensive brain damage in 1992. In 1994, her son, the appellant, applied for tax exemption for the property pursuant to section 196.101 of the _Florida Statutes_, entitled “[e]xemption for totally and permanently disabled persons.” Even though Crain satisfied the statutory provisions and qualified for the exemption, both the property appraiser and the trial court denied tax exemption because Crain failed to reside on the property. The question before the fourth district was “whether the property was being ‘used’ within the meaning of section 196.101(1) or (2).”

The court found no cases on point with regard to Article VII of the Florida Constitution, which addresses homestead exemption from forced sale and limits on devise. However, the court considered several cases that addressed the homestead exemption in Article X, section 4, which exempts homesteads from forced sale and limits their devise. No cases were found on point with regard to Article VII of the Florida Constitution. Although the two homestead provisions found in the Florida Constitution are separate and distinct, the court articulated no reason why Mrs. Crain could not keep her homestead exemption under Article VII when she would retain it under Article X. The court reversed and remanded for entry in favor of the appellant, concluding that physical presence was not a requirement to receive homestead exemption.

509. _Lewis_, 687 So. 2d at 297.
510. Id. at 298.
511. 687 So. 2d 1325 (Fla. 4th Dist. Ct. App. 1997).
512. Id. at 1325.
514. _Crain_, 687 So. 2d at 1326.
515. Id. at 1325-26.
516. Id. at 1326.
517. Id.
Snyder v. Davis. This case came before the Supreme Court of Florida under the following certified question:

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF A HOMESTEAD BY A DECEDED NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDANT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993).

The Supreme Court answered the certified question in the affirmative and quashed the district court's decision. Betty Snyder died testate in 1995 and was survived by her only son Milo Snyder and his daughter, the appellee, Kelli Snyder. Betty Snyder, in her last will and testament, devised her residual estate, including her homestead to Kelli Snyder.

Kelli Snyder petitioned the probate court seeking a determination that Betty Snyder's homestead passed to her free and clear of claims of creditors because Kelli was recognized as an "heir" under the intestate statute. Alternatively, Kent W. Davis, the personal representative of the decedent's estate, and the appellant in this cause of action, sought to sell the homestead property to satisfy creditor's claims and other expenses. Mr. Davis argued that under section 732.103 of the Florida Statutes, Milo Snyder was the sole heir to the decedent's estate. Therefore, because the estate was devised to the granddaughter and not to the heir, Mr. Davis contended that the property was not exempt from forced sale to satisfy such claims and expenses. The trial court granted Kelli Snyder's petition. The Second District Court of Appeal reversed the trial court's order and remanded for further proceedings.

Article X, section 4(a) of the Florida Constitution states that a homestead is "exempt from forced sale . . . except for the payment of taxes and assessments thereon, obligations contracted for the purchase, improvement or repair thereof, or obligations contracted for house, field or other labor

518. 699 So. 2d 999 (Fla. 1997). Although the Supreme Court of Florida did not render this decision until after June 30, 1997, (the last date that this survey period covers), the authors included it to avoid confusing the reader.
519. Id. at 1000.
520. Id.
521. Id.
522. Id.
performed on the realty.”524 At issue was whether Kelli Snyder “is an heir as contemplated by [A]rticle X, section 4, of the Florida Constitution and as defined in sections 731.201(18) and 732.103.”525

Under 731.201(18), “heirs” are defined as “those persons, including surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.”526 In contrast to the Second District Court of Appeal’s reasoning in the common law understanding of what might constitute an “heir,” the Supreme Court of Florida concurred with the First District Court of Appeal in Walker v. Mickler527 and applied a broader definition to the term “heirs” to include “any of the class of potential heirs under the intestacy statute.”528 The Supreme Court of Florida emphasized that: 1) the homestead provision’s purpose is to protect and maintain the family homestead; and 2) the testator is the one who would be in the best position to know which family member would most likely need the homestead or would most likely be in a position to maintain its position.529

Farrior v. Estate of Farrior.530 The issue before the court was whether the devised homestead was exempt from the apportionment of estate taxes under section 733.817(d) of the Florida Statutes.531 This court looked to the Second District Court of Appeal decision in Davis v. Snyder,532 which held that where a decedent was not survived by a spouse or minor children and the homestead was properly devised, the devisee takes the decedent’s former homestead subject to claims of the decedent’s creditors.533 Here, the decedent was survived by three grandchildren and two adult children.534 Accordingly, this court affirmed the trial court’s order holding Jay Farrior, appellant and grandson of decedent, “liable for apportionment of estate taxes on property devised to him by his grandfather and which property was [his] decedent grandfather’s primary residence and homestead.”535 However, that decision has since been quashed by the Supreme Court of Florida.536

524. Id. (citing FLA. CONST. art. X, § 4(a)).
525. Id. at 1192.
527. 687 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1997).
528. Snyder, 699 So. 2d at 1004.
529. Id. at 1005.
530. 694 So. 2d 804 (Fla. 2d Dist. Ct. App. 1997).
531. Id. at 804. See FLA. STAT. § 733.817(d) (1995).
532. Davis, 681 So. 2d at 1191.
533. Id.
534. Farrior, 694 So. 2d at 804.
535. Id.
536. See Snyder, 699 So. 2d at 1000.
State Agency for Health Care Administration v. Conner. The Second District Court of Appeal reversed the trial court's determination that Madalyn Skiles' interest in a house devised to her by the decedent was entitled to the Florida Constitution homestead exemption from forced sale. Madalyn Hinterleiter, decedent, devised a life estate in her home to Myron Conner, a friend. The remainder of the estate and the home were left to Skiles. The issue here centered on Hinterleiter's being survived by her granddaughter, Skiles, and by also by a daughter.

Article X, section 4 of the Florida Constitution provides a homestead exemption from forced sale which "inure[s] to the surviving spouse or heirs of the owner." The trial court ruled that Skiles was entitled to homestead exemption, but there was no authority on point at the time. Subsequently, the Second District Court of Appeal decided Davis v. Snyder. The Davis court said devised property was not entitled to homestead exemption from forced sale based upon the definition of heirs located in the Probate Code. The Davis case prompted the court to certify the following question of great public importance:

WHETHER ARTICLE X, SECTION 4, OF THE FLORIDA CONSTITUTION EXEMPTS FROM FORCED SALE A DEVISE OF A HOMESTEAD BY A DECEDENT NOT SURVIVED BY A SPOUSE OR MINOR CHILD TO A LINEAL DESCENDENT WHO IS NOT AN HEIR UNDER THE DEFINITION IN SECTION 731.201(18), FLORIDA STATUTES (1993)?

This court recognized that the Davis case governed the case at bar and reversed the trial court's order. In addition, the court also certified the question above as one of great public importance. As noted above, however, the Supreme Court of Florida has since quashed the Second District Court of Appeal's decision in Davis.
Knadle v. Estate of Knadle. The First District Court of Appeal certified the following question as one of public importance:

DOES SECTION 4(b), ARTICLE X OF THE FLORIDA CONSTITUTION PROTECT THE PROCEEDS OF THE SALE OF HOMESTEAD PROPERTY WHERE DECEDENT’S WILL DIRECTS THE PERSONAL REPRESENTATIVE TO SELL THE PROPERTY AND PLACE THE PROCEEDS INTO THE RESIDUE OF THE ESTATE FOR DISTRIBUTION TO DECEDENT’S ADULT CHILDREN?

On November 14, 1994, the decedent, Evangeline Stewart Knadle, died testate and was survived by two adult children. Her “estate included personal assets and real property declared as her homestead.” The decedent’s will contained a provision addressing the homestead property and what should be done with it. Most importantly, the provision expressed the decedent’s wish that her personal representative sell the homestead and add the net proceeds to the rest of the estate. Arbor Health Care filed a claim against the decedent’s estate seeking payment of past bills. Michael Knadle, the son and personal representative of decedent, filed a petition to determine homestead real estate asserting it was entitled to exemption.

The lower court held that homestead property was an asset of the estate, vulnerable to creditors, because decedent devised the property by will making it a gift to her children. Michael Knadle appealed to the First District Court of Appeal. The decedent’s will specifically directed that her homestead be sold and the proceeds placed in the residue for distribution with the other assets. Because the decedent devised her homestead as she did under these circumstances, the court reasoned that the property lost its homestead status and creditors, such as Arbor Health Care, could assert their claims.

Rutherford v. Gascon. The question before the Second District Court of Appeal was whether Mrs. Smith waived her homestead rights by entering into a settlement agreement with Don Gascon wherein she agreed to hold only

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549. Id. at 633.
550. Id. at 632.
551. Id.
552. Id.
553. Knadle, 686 So. 2d at 632.
554. Id.
555. Id.
a life estate in the disputed property. Mr. and Mrs. Robert Smith resided at a condominium, owned by Mr. Smith, which was located in St. Petersburg, Florida. After they were married, Mr. Smith executed a will which gave his wife, Mrs. Smith, the right to live in the condominium as long as she wished. However, in the event she died or chose not to reside there, Mr. Smith gave and devised the condominium to his nephew, Don Gascon.

After a dispute arose between Mrs. Smith and Gascon concerning Mrs. Smith’s rights to probate assets under her deceased husband’s will, a settlement agreement followed where Mrs. Smith signed a document waiving her elective share in the probate estate and accepting a life estate in the property. After Mrs. Smith died, her estate representative filed a petition to have the condominium declared homestead property. The trial court denied this petition, reasoning that Mrs. Smith waived homestead rights when she entered the settlement agreement with Gascon and accepted a life estate.

The second district reversed on the grounds that the settlement agreement neither displayed an intent by Mrs. Smith to waive homestead rights nor showed that Mrs. Smith had knowledge that she relinquished a homestead interest. Evidence offered revealed that Mrs. Smith was in fact unaware that a fee simple interest in the homestead vested in her immediately upon her husband’s death. Therefore, in order to find that Mrs. Smith had waived homestead protection, there must have been evidence showing she intended to do so.

Chief Justice Kogan and Justices Overton, Shaw, Grimes, and Harding concurred in this per curiam opinion. Justice Anstead dissented with an opinion, and Justice Wells concurred with an opinion. The court reviewed the following certified question:

WHETHER ARTICLE X, SECTION 4, FLA. CONST., PROHIBITS CIVIL FORFEITURE OF HOMESTEAD

557. Id. at 330.
558. Id.
559. Id.
560. Id.
562. Id. at 331 (citing FLA. CONST. art. X, § 4(c); FLA. STAT. § 732.4015 (1993); In re Estate of Finch, 401 So. 2d 1308 (Fla. 1981) (“[H]omestead may not be devised by will to pass less than a fee simple interest where testator dies leaving a surviving spouse.” ).
563. Id.
564. 697 So. 2d 821 (Fla. 1997).
565. Id. at 825.
566. Id. (Anstead, J., dissenting).
567. Id. (Wells, J., concurring).
PROPERTY PURSUANT TO SECTIONS 932.701-.702, FLA. STAT., WHEN THE PROCEEDS OF ILLEGAL ACTIVITY ARE INVESTED IN OR USED TO PURCHASE THE PROPERTY? 668

Forfeiture procedures were initiated against Stewart for selling and growing marijuana on the premises of their home. Stewart claimed the real property was homestead property that was not forfeitable. Nevertheless, the trial court entered judgment forfeiting all personal and real property. 669 The First District Court of Appeal reversed the ruling as to the homestead forfeiture and certified the above question to the Supreme Court of Florida. 670

The Supreme Court of Florida looked to Article X, section 4 of the Florida Constitution which construed homestead as exempt from forced sale. 671 The supreme court has previously held that Article X, section 4 prohibited civil or criminal forfeiture of homestead used in the course of racketeering activity in violation of Florida’s Racketeer Influenced and Corrupt Act. 672 The court agreed with the district court’s holding that the state did not have a right to the forfeiture of a homestead on the basis of an equitable lien. 673 Based on the constitution, the court could not find that a forfeiture of homestead could be predicated on the Forfeiture Act. 674

Before the Forfeiture Act could provide a basis for the forfeiture of homestead property, the constitution’s homestead exemption must be liberally construed to permit a forfeiture for a violation of the Forfeiture Act. 675 The court recognized that Article X, section 4 did not provide an exception for the forfeiture of homestead property for a violation of the Forfeiture Act. 676 Although acquiring homestead through felonious activity is wrong, permitting forfeiture on this basis would require a constitutional revision. 677 Therefore, the Supreme Court of Florida answered the certified question in the affirmative and agreed with the district court’s reversal with respect to the forfeiture of homestead property. 678

568. Id.
569. Tramel, 697 So. 2d at 821.
570. Id.
571. Id. See FLA. CONST. art. X, § 4.
572. Tramel, 697 So. 2d at 823. See Butterworth v. Caggiano, 605 So. 2d 56 (Fla. 1992).
573. Tramel, 697 So. 2d at 824.
574. Id.
575. Id.
576. Id.
577. Id.
578. Tramel, 697 So. 2d at 824.
Walker v. Mickler. The First District Court of Appeal affirmed the decision that the decedent's grandson, Bayle, was entitled to protection under Article X, section 4(b) of the Florida Constitution from the estate's creditors when a remainder interest was devised to him. Article X, section 4(b) provides that exemptions and protections established for homestead "shall inure to the surviving spouse or heirs of the owner." Heirs are "those who may under the law of the state inherit from the owner of the homestead." Bayle, as grandson, was a lineal descendant of the decedent and qualified as a person entitled to receive under intestacy and for Article X purposes.

The First District Court of Appeal found the reasoning in Bartelt v. Bartelt persuasive. The Bartelt court found it insignificant that the son and daughter would have taken equally under intestacy, but that the daughter was omitted from the will. The Bartelt court, as the court here, concluded the sequence and share of inheritance as established under the intestacy statutes did not necessarily determine entitlement to homestead exemption.

Although the decision here was contrary to the Second District Court of Appeal's decision in Davis, this court recognized that the opinion was contrary to the goal of homestead exemption against forced sale. This direction was supported by the Supreme Court of Florida in Snyder. The constitution is silent as to the drafters' intent with regard to creditors' rights to homestead, but Article V, section 4(b) as amended in 1984, reflected the intent that homestead exemption inure to whomever gets the property. This court reasoned it is clear that the intent of homestead exemption is to protect the decedent's homestead from his creditors for the benefit of his heirs. It should make no difference if the person chosen to receive property under the

579. 687 So. 2d 1328 (Fla. 1st Dist. Ct. App. 1997), aff'd, 699 So. 2d 687 (Fla. 1997). In Snyder v. Davis, the Supreme Court of Florida recognized that the decision in Walker was in conflict with that given by the Second District Court of Appeal in Davis v. Snyder. Snyder, 699 So. 2d at 1000.

580. Walker, 687 So. 2d at 1328.
581. Id. at 1329 (quoting Fla. Const. art. X, § 4)).
582. Id. (citing State Dep't of Health and Rehabilitative Servs. v. Trammell, 508 So. 2d 422 (Fla. 1st Dist. Ct. App. 1987)).


585. Walker, 687 So. 2d at 1329.
586. Id.
587. Id. at 1330.
588. Snyder v. Davis, 699 So. 2d 999, 1000 (Fla. 1997).
589. Walker, 687 So. 2d at 1330.
590. Id.
will not be the closest consanguine heir.\textsuperscript{591} The person is still one entitled to take by intestate succession.\textsuperscript{592} In addition, the constitution could not intend that creditors gain a windfall by allowing them to take homestead by forced sale because the beneficiary under the decedent’s will was not the closest consanguine heir. To deny Bayle the property would go against constitutional intent.\textsuperscript{593} Therefore, this court affirmed the lower court’s decision and recognized conflict with the \textit{Davis} court.\textsuperscript{594}

XVI. INSURANCE

\textit{Florida Farm Bureau Casualty Insurance Co. v. Sheaffer.}\textsuperscript{595} The Sheaffers sought recovery under their homeowners insurance policy for damages caused by hurricanes Erin and Opal. This court reversed the trial court decision and agreed with the insurance company that the appraisal provision in the policy required arbitration, which was a condition precedent to the Sheaffers maintaining an action on the policy.\textsuperscript{596}

The Sheaffers’ damaged roof was made of unique ceramic tiles that could no longer be matched. The insurance policy covered losses “at replacement cost without deduction for depreciation.”\textsuperscript{597} The Sheaffers wanted the insurance company to pay for replacement of the entire roof to return it to its condition and value before the hurricane. The insurance company refused, and stated that the roof could be repaired by replacing the damaged or missing tiles with other tiles not consistent with the ones already there.\textsuperscript{598} The trial court denied the insurance company’s motion to dismiss concluding that the dispute between the parties involved an issue of coverage under the policy.\textsuperscript{599}

This court concluded that the issue was not coverage but rather the amount of the loss.\textsuperscript{600} The court relied on \textit{J.J.F. of Palm Beach, Inc. v. State Farm Fire and Casualty Co.},\textsuperscript{601} which stated that “[w]here the amount owed on a claim, arguably within the policy coverage, is dependent on the

\begin{itemize}
  \item \textsuperscript{591} \textit{Id.}
  \item \textsuperscript{592} \textit{Id.}
  \item \textsuperscript{593} \textit{Id.} at 1331.
  \item \textsuperscript{594} \textit{Walker}, 687 So. 2d at 1331.
  \item \textsuperscript{595} 687 So. 2d 1331 (Fla. 1st Dist. Ct. App. 1997).
  \item \textsuperscript{596} \textit{Id.} at 1332.
  \item \textsuperscript{597} \textit{Id.}
  \item \textsuperscript{598} \textit{Id.}
  \item \textsuperscript{599} \textit{Id.}
  \item \textsuperscript{600} \textit{Sheaffer}, 687 So.2d at 1332.
  \item \textsuperscript{601} 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994).
\end{itemize}
resolution of disputed issues of fact and the application of policy language to those facts... the extent of the claim does not constitute a "coverage" question. Once it is determined that the claim is covered by the policy, "whether the claimant is actually entitled under the facts of the case to be paid on a claim and, if so, the precise amount to which the claimant is entitled, is a question reserved for the arbitrator." Since the insurance company agreed that damage to Sheaffers' home was a covered claim, the only question was the scope of the required repair and the amount of loss.

New England Mutual Life Insurance Co. v. Podhurst, Orseck, Josefberg, Eaton, Meadow, Olin & Perwin, P.A. This case was originally a suit against the insurer, Affiliated FM Insurance Co., for property damage coverage due to Hurricane Andrew. P.P. Partners, Ltd. and Parkhill Partners, Ltd., the owners of two shopping centers insured by Affiliated, brought suit against the Insurer for payment of damages. The owners later retained the Podhurst law firm which requested it be paid on a contingent fee basis. New England Mutual held mortgages on the two shopping centers and was given the right to direct how the insurance proceeds were to be used. When the law firm obtained the insurance money, the checks were made jointly to the owners and to New England, the lender. Therefore, both the lender and the owners had to agree to disburse the funds.

The lender refused to disperse money to satisfy the law firm's contingent share. The lender stated that its interest in the insurance proceeds had priority over the attorney's fee claims. The law firm filed a motion to impose an attorney's charging lien on the proceeds and to get a disbursement order to release the funds from the escrow account. The trial court ruled in favor of the firm and entered orders for disbursement.

The question the Third District Court of Appeal determined was what rule of priority governs competing claims to first in time insurance proceeds. The lender's lien arose from the mortgage. The firm's claim arose later in time. The general rule of priority is first in time, first in

602. Sheaffer, 687 So. 2d at 1334 (quoting J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co., 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994)).
603. Id. (quoting J.J.F. of Palm Beach, Inc. v. State Farm Fire & Cas. Co., 634 So. 2d 1089, 1090 (Fla. 4th Dist. Ct. App. 1994)).
604. Id.
605. 690 So. 2d 1354 (Fla. 3d Dist. Ct. App. 1997).
606. Id. at 1354-55.
607. Id. at 1355.
608. Id.
609. Id. at 1356.
right. Here, the lender was a loss payee on the insurance policy. So, the firm was chargeable with notice of the lender's earlier in time claim to the proceeds. The owner's agreement to pay the contingent fee was not binding on the lender. If the law firm wanted to receive priority over the lender, the firm would have to secure the lender's consent.

The owners, pursuant to the mortgages, must maintain the property and have the burden to make post hurricane repairs, including steps to pursue insurance proceeds. To shift priorities, the court reasoned, would allow owners' contingent fee agreement to by-pass the lenders first in time lien without securing the lender's consent. In addition, under section 627.428 of the Florida Statutes, "an insured who successfully obtain[ed] judgment against its insurer in an insurance lawsuit is entitled to recover attorney's fees from the insurer." Therefore, the court reversed.

Secured Realty Investment Fund, LTD, III v. Highlands Insurance Co.

The question before the court was "whether the mortgagee may recover insurance proceeds under a policy containing a New York Standard Mortgage clause after the mortgage debt has been fully satisfied by foreclosure or otherwise."

On October 17, 1991, the Garcias entered into a mortgage and security agreement with Century Investment Company. The mortgage encumbered two properties, one in Key Largo, the other in Dade County. Century assigned the interest on the note and mortgage to Secured Realty, who later became the sole mortgagee. The Garcias had an insurance policy issued by Highlands to cover the Key Largo investment. When the Garcias defaulted on payment, Secured Realty initiated foreclosure proceedings. At the foreclosure sale, Secured Realty took title to both the Key Largo and Dade

611. Id.
612. Id. at 1357.
613. Id.
614. Id.
616. Id.
620. Id. at 855 (quoting Nationwide Mut. Fire Ins. Co. v. Wilborn, 279 So. 2d 460, 462 (Ala. 1973)).
621. Id. at 853.
622. Id.
623. Id.
624. Secured Realty Inv. Fund, 678 So. 2d at 853.
properties. When the Key Largo property was later discovered to be damaged, Secured Realty notified Highlands of the damage in order to make a claim under the policy initially secured by the Garcias. In early July, 1993, Secured Realty sold both properties. Later in the month, Highlands offered $45,000 for the damage to Key Largo and Secured rejected the offer and filed a complaint.

The trial court agreed with Highland that Secured did not have an insurable interest in the Key Largo property at the time the damage occurred. When Secured took title of the properties, the fair market value exceeded the redemption amount. Since the debt was satisfied, Secured Realty could no longer be considered the mortgagee.

The Third District Court of Appeal was forced to construe the mortgage loss payable clause contained within the insurance policy issued by Highlands to the Garcias. The court found the clause to be a New York Standard Mortgage clause. This type of clause provides that the loss is payable and the owner/mortgagor's acts or neglect would not invalidate the insurance as long as the lienholder/mortgagee shall pay the premium if the owner/mortgagor fails to do so.

The general rule established by Wilborn recognized that the "loss payee clause affords protection to the mortgagee as his interest may appear before or after foreclosure or other methods of change of ownership or title or other mediums of increased ownership of the mortgage property and the insurance follows the property." The exception to this rule states that "if the mortgage indebtedness is fully satisfied after loss by foreclosure or otherwise, then the insurance company is no longer liable to the mortgagee." The third district held that Secured Realty retained an insurable interest in the Key Largo property after it acquired title to it by foreclosure.

625. Id.
626. Id.
627. Id.
628. Id.
629. Secured Realty Inv. Fund, 678 So. 2d at 853.
630. Id. at 853-54.
631. Id. at 854.
632. Id. at 855.
633. Id. at 854.
635. Id. at 856 (quoting Nationwide Mut. Fire Ins. Co. v. Wilborn, 279 So. 2d 460, 465 (Ala. 1973)).
636. Id.
reversed the lower court holding because Secured Realty had an insurable interest at the time of the loss.\footnote{Id.}

\textit{State Farm Fire and Casualty Co. v. Licea.}\footnote{685 So. 2d 1285 (Fla. 1996).} Justice Harding wrote the court’s opinion with which Justices Overton, Shaw, Grimes, Wells, and Anstead concurred.\footnote{See generally id.} The Supreme Court of Florida held that an insurance appraisal clause was not void for lack of mutuality because of a retained rights clause.\footnote{Id. at 1286.}

Licea’s home was damaged by Hurricane Andrew. When a dispute arose as to the amount of damage, the insurance policy stated that State Farm and Licea were each to select an appraiser and the appraisers chosen would then pick an impartial umpire. If the appointed appraisers could not make the selection, the court would be advised to pick one. This is exactly what happened here. Because the chosen appraisers could not reach an agreement, State Farm petitioned the court to appoint an umpire.\footnote{Id.}

In addition, a clause in the policy stated that an appraisal of damage did not waive any rights of the parties involved.\footnote{Id.} The Liceas argued that because of this clause, State Farm reserved its rights. So, the parties were not equally bound by the appraisal.\footnote{Licea, 685 So. 2d at 1286.} As such, the Liceas contended the appraisal clause should be declared void for lack of mutuality.\footnote{Id.} The trial court denied State Farm’s request for an umpire and the Third District Court of Appeal affirmed.\footnote{Id.}

The Supreme Court of Florida rejected the Third District Court of Appeal’s decision and relied on the rationale set forth in the dissent in American Reliance Insurance Co. v. Village Homes at Country Walk.\footnote{Id. at 1288 (relying on American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d Dist. Ct. App. 1994) (Cope, J., dissenting), overruled by Paradise Plaza Condominium Ass’n v. Reinsurance Corp., 685 So. 2d 937 (Fla. 3d Dist. Ct. App. 1996)).} The \textit{Country Walk} dissent set forth the rule that “by participating in an arbitration proceeding to determine the amount of loss suffered by an insured the insurer

\begin{thebibliography}{9}
\bibitem{637} Id.
\bibitem{638} 685 So. 2d 1285 (Fla. 1996).
\bibitem{639} See generally id.
\bibitem{640} Id. at 1286.
\bibitem{641} Id.
\bibitem{642} Id.
\bibitem{643} Licea, 685 So. 2d at 1286.
\bibitem{644} Id.
\bibitem{645} Id.
\bibitem{646} Id. at 1288 (relying on American Reliance Ins. Co. v. Village Homes at Country Walk, 632 So. 2d 106 (Fla. 3d Dist. Ct. App. 1994) (Cope, J., dissenting), overruled by Paradise Plaza Condominium Ass’n v. Reinsurance Corp., 685 So. 2d 937 (Fla. 3d Dist. Ct. App. 1996)).
\end{thebibliography}
is in no way deprived of the right to later contest the existence of insurance coverage for that loss." 647 If a court decides coverage exists, the dollar value agreed upon under the appraisal process will be binding on the parties. 648 When appraisal is necessary, the insurer can only try to assert there is no coverage under the policy for the loss, or there has been a violation of the usual policy conditions such as fraud, lack of notice, or failure to cooperate. 649 The appraisal clause in this case required an assessment of the amount of loss. As such, the clause would not be void for lack of mutuality. 650

XVII. LANDLORD AND TENANT

_Badaraco v. Suncoast Towers V Associates._ 651 The tenant brought an action for damages against the landlord who was in the process of renovating a rental building so it could be converted into a condominium. The tenant based his cause of action on section 83.67 of the _Florida Statutes_, which prohibited landlords from terminating or interrupting utility services and provided that a violator would be liable for the greater of three months rent or actual and consequential damages. 652 The circuit court dismissed the complaint and the third district affirmed. 653

Judge Gersten started by noting that the critical factor in statutory interpretation is determining the legislative intent. 654 He then invoked the golden rule exception to the plain meaning approach to statutory interpretation, i.e., the statute should not be given a literal reading because that would produce an absurd or unreasonable conclusion. 655 He reasoned that the legislature could not have intended a minimum three month rent penalty for a landlord who was performing necessary maintenance. 656 His review of the legislative history, including the legislative staff analysis and staff summaries, revealed that the legislature's purpose in enacting the statute

647. _Id._ at 1286 (quoting State Farm Casualty Co. v. Licea, 649 So. 2d 910, 911 (Fla. 3d Dist. Ct. App. 1995)); see _Country Walk_, 632 So. 2d at 108-09 (Cope, J., dissenting).
648. _Licea_, 685 So. 2d at 1287-88.
649. _Id._ at 1288.
650. _Id._
651. 676 So. 2d 502 (Fla. 3d Dist. Ct. App. 1996).
652. _Id._ at 503. See _FLA. STAT._ § 83.67 (1995).
653. _Badaraco_, 676 So. 2d at 503.
654. _Id._ (relying on State v. Webb, 398 So. 2d 820 (Fla. 1981)).
655. _Id._ See Weber v. Dobbins, 616 So. 2d 956 (Fla. 1993); State v. Webb, 398 So. 2d 820 (Fla. 1981).
656. _Badaraco_, 676 So. 2d at 503.
was to prevent landlords from using utility shutoffs to coerce tenants to vacate. Here, the tenant admitted that the landlord had no such motive. The outcome troubles this author. The opinion is logical, but the facts suggest that the landlord might have been violating the rights of his tenants to have utility service for the sole purpose of making these units more saleable. Landlords ignoring the rights of tenants for their own gain is the sort of evil that the legislature sought to prohibit, even if it is not the particular landlord misconduct that the legislature had in mind at the moment of enactment. It is suggested that the purpose to the statutory interpretation approach would lead to a better conclusion. The modern residential tenant has a critical need for and right to utility service. Reasonable interruptions for the performance of maintenance are inevitable, and it is unlikely that the legislature intended to penalize such interruptions, but the interruption here does not seem to have occurred as part of maintenance. The brief statement of facts suggests that the interruptions were caused by the landlord changing the property so he could sell it after the lease ended. A tenant would not ordinarily be expected to tolerate the landlord renovating his unit for a prospective sale. Why should the current tenant bear the burden of loss of utility services during the term of the lease because the landlord has plans for the property after the lease expires? Certainly the legislature could not have intended to allow this. To the degree that this landlord was interrupting the tenants’ utility service, not for maintenance but to prepare it for sale, the landlord should be held liable. The complaint should not have been dismissed.

Brandt v. Dade Dental Center, Inc. The commercial lease provided that the tenant would be responsible for paying fifteen percent of any increase over the base year in the real estate taxes and insurance premiums. When the tenant discovered that it occupied only 2.4 percent of the building, the tenant refused to pay. The trial court refused to enforce this clause, holding it to be unconscionable and “monstrously harsh.” The fact that the landlord would have been able to make a profit from a tax or premium increase by similarly overcharging all the tenants was used by the circuit court to confirm its conclusion. The Third District Court of Appeal affirmed based on its finding that there was sufficient evidence in the record to support judgment, noting that the clause required the tenant to pay over six times its pro rata

657. Id. at 503 n.1.
658. Id. at 503.
659. Professor Ronald Benton Brown.
661. Id. at 1064.
662. Id.
share. The third district seemed to place particular importance on the fact that the tenant had thought that it was being charged its share of the increases and was surprised to discover that the clause required it to pay such a disproportionate amount.

This author finds this an odd case to invoke the doctrine of unconscionability. The tenant was a dental office, so the case did not deal with an uneducated or unable tenant. Nor was it a tenant who did not have access to adequate legal representation. The crux of the decision seems to be that the clause implicitly misrepresented the facts to the tenant, i.e., that the share of the increase it would have to bear was proportional to the share of the land that it had leased. The landlord misrepresented the crucial fact, so the court penalized him by denying him the increase. It seems that the better solution would be reformation, i.e., reform the clause to reflect the proper percentage. The trial court may not have felt it had that option because it was not the relief requested, and the district court, faced with the same poor choices, chose to affirm as the lesser of two evils. This illustrates the old adage, "hard cases make bad law."

*Land O'Sun Realty Ltd. v. REWJB Gas Investments.* The parties were involved in twenty-two commercial leases utilizing a common lease document. This case involved the interpretation of two clauses in that lease. Paragraph three provided that the total of the initial term plus all renewal terms would be twenty-seven years. Paragraph four, however, provided: "[n]otwithstanding any conflicting or inconsistent provisions . . . including specifically paragraph 3 hereof, the term of each of the Leases and all renewal terms shall automatically terminate at the date that is eighteen months after the date of this Amendment." The issue was which controlled, the twenty-seven year or the eighteen month maximum. The jury decided in favor of the longer period and the landlord appealed.

The district court found that the terms were in irreconcilable conflict, making it impossible to answer the question without resort to parol evidence. It pointed out that reading paragraph four to control paragraph three would render three meaningless, violating the rule of construction that

663. *Id.*
664. *Id.*
665. Professor Ronald Benton Brown.
666. *See generally Brandt,* 680 So. 2d 1064.
667. 685 So. 2d 870 (Fla. 3d Dist. Ct. App. 1996).
668. *Id.* at 871.
669. *Id.*
670. *Id.*
671. *Id.* at 871-72.
an interpretation should not render any part of the contract superfluous.\(^672\) The court should have also pointed out that the converse was also true, i.e., reading paragraph three to control paragraph four would render four meaningless. That was the irreconcilable conflict. Having established that the trial court properly admitted parol evidence, the only remaining task for the appellate court was to determine that the decision was supported by sufficient evidence, even though the testimony of the parties was "as hopelessly in conflict as the written agreement."\(^673\)

Judge Jorgenson dissented, emphasizing the word "notwithstanding" in paragraph four of the amendment of the lease.\(^674\) He reasoned that paragraph four expressly provided how to deal with the apparent conflict between the paragraphs eliminating any conflict in their application.\(^675\) Consequently, he would have held that the admission of parol evidence was unjustified.\(^676\)

_Mayor’s Jewelers, Inc. v. State of California Public Employees’ Retirement System._\(^677\) The commercial lease for space in this mall provided that the tenant would keep the business open on all business days of the calendar year. The tenant, however, gave notice that it intended to break the lease and vacate. The landlord sued to temporarily enjoin the tenant from breaking the lease and to force the tenant to perform as required by the open-for-business covenant. The circuit court granted a temporary injunction, but the fourth district reversed.\(^678\)

The district court decided that the case was not governed by _Lincoln Tower Corp. v. Richter’s Jewelry Co._\(^679\) because it did not involve a tenant who wanted to vacate.\(^680\) Consequently, the case was one of first impression in Florida.\(^681\) The court noted that injunctions should not be granted when that would involve the court in the business of supervising future performance.\(^682\) In this case, the temporary injunction (and subsequent

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672. _Land O’Sun Realty_, 685 So. 2d at 871.
673. _Id._ at 872 n.3.
674. _Id._ at 873 (Jorgenson, J., dissenting).
675. _Id._
676. _Id._
677. 685 So. 2d 904 (Fla. 4th Dist. Ct. App. 1996).
678. _Id._ at 904.
679. 12 So. 2d 452 (Fla. 1943) (holding that a tenant could be enjoined from breaching the lease by failing to remain open year-round).
680. _Mayor’s Jewelers, Inc._, 685 So. 2d at 905.
681. _Id._
682. _Id._
specific performance order) would, in effect, force the court to supervise the operation of the mall, so the relief should be denied.\textsuperscript{683}

Also, injunctions and specific performance, as forms of equitable relief, should not be granted where there is an adequate remedy at law. In this case, the landlord's harm would be purely economic, making an action for damages for breach of the lease an adequate remedy. However, the court declined to reach any conclusion on this issue because it had already decided the case on the first issue.\textsuperscript{684}

Judge Farmer provided a wonderfully written special concurrence.\textsuperscript{685} In essence, he found that the lease had a liquidated damages clause that provided the landlord with an adequate remedy at law, thereby depriving the landlord of an essential ingredient of a claim for equitable relief.\textsuperscript{686} He explained that the cumulative remedies clause allowed the landlord to seek both eviction and damages rather than allowing it equitable relief to which it would not otherwise be entitled.\textsuperscript{687} Furthermore, he pointed out that mandatory injunctions, i.e., injunctions requiring the party to act in a certain way, are generally disfavored, particularly where the contract involves personal services and stated, "[I]n my opinion, requiring a tenant by specific performance to occupy leased premises for the full term . . . is much akin to requiring an employee to serve out his contractual term of employment."\textsuperscript{688}

Finally, Judge Farmer questioned the intervention of equity on behalf of a party who was ignoring economic reality.\textsuperscript{689} This was an older mall which had passed its prime. Most of the tenants, including the anchors, had moved out. To require an upscale jeweler to remain open in that setting made no sense.\textsuperscript{690} "[W]hat purpose," Judge Farmer asked rhetorically, "is served by the intervention of equity, other than to support the unproductive economic decisions of the landlord?"\textsuperscript{691}

\textsuperscript{683} \textit{Id.}
\textsuperscript{684} \textit{Id.} at 908 (Farmer, J., concurring).
\textsuperscript{685} \textit{Mayor's Jewelers, Inc.,} 685 So. 2d at 906 (Farmer, J., concurring).
\textsuperscript{686} \textit{Id.} at 907.
\textsuperscript{687} \textit{Id.}
\textsuperscript{688} \textit{Id.} at 910.
\textsuperscript{689} \textit{Id.} at 911.
\textsuperscript{690} \textit{Mayor's Jewelers, Inc.,} 685 So. 2d at 910-11.
\textsuperscript{691} \textit{Id.} at 911.
XVIII. LIENS

Grant v. Wester. The issue before the court was whether Mr. Grant was entitled to attorneys’ fees under his claim that he had a right to foreclose a mechanic’s lien. Grant contracted with the Westers to build a home on Westers’ land. When most of the work was completed on May 11, 1992, Westers gave Grant a list of items still needed to be finished or corrected in the home. On May 15, 1992, the Westers moved into the home and a certificate of occupancy was issued. In addition, all items on the Westers’ list had been remedied.

Afterwards, Wester told Grant he would not make full payment until Grant added a hot water recovery unit to the air conditioning system and until he covered the foundation of the house with stucco. Grant complied and charged accordingly for the new requests. When Grant asked to be compensated for his work, Mrs. Wester added two more items to the list of corrections. Grant obliged and once again requested payment. The Westers refused. Grant then delivered an affidavit to the Westers stating that all lienors under the contract had been paid in full. Grant recorded a notice of claim of lien stating the unpaid balance.

Grant filed a complaint seeking enforcement of a mechanic’s lien under section 713.01 of the Florida Statutes and also seeking attorneys’ fees under section 713.29 of the Florida Statutes. In addition, Grant stated a claim for breach of contract. Although Grant prevailed on the breach of contract claim, the court determined that Grant should not get attorneys’ fees because he did not prove count one of the complaint to enforce the lien.

As Grant appealed count one, he filed notice of lis pendens to protect the asserted lien and to collect money from the judgment as to the other count for breach of contract. The sheriff levied Westers’ goods pursuant to court order to collect Grant’s judgment money. Wester filed an emergency motion to set aside the lis pendens and writ of execution. At the emergency

693. Id. at 1306.
694. Id. at 1303.
695. Id.
696. Id.
697. Grant, 679 So. 2d at 1303.
698. Id. (relying on FLA. STAT. § 713.01, -.29 (1991)).
699. Id.
700. Id. at 1304.
701. Id.
702. Grant, 679 So. 2d at 1304.
hearing, the trial court ordered the Westers to pay the balance of the 
judgment. 703 After payment was made pursuant to court order, the trial court 
also ordered that no interest would accrue after the money was deposited. 704

The First District Court of Appeal noted that Grant received some money 
under the judgment. 705 The general rule is that "one cannot ordinarily accept 
a benefit under a judgment or decree and then appeal from it, when the effect 
of his appeal may be to annul the decree as a whole." 706 "Case law reveals 
that there are two exceptions to this stated rule: 1) where the relief denied is 
separate and severable from the relief granted; or 2) where the appellant is 
entitled in any event to at least the amount received." 707 There is also a 
general rule that "where a judgment is appealed on the ground that the 
damages awarded [were] inadequate, acceptance of payment of the amount of 
the unsatisfactory judgment does not, standing alone, amount to an accord and 
satisfaction of the entire claim." 708

The question presented here as to attorneys’ fees falls within one of 
the stated exceptions. Just because Grant collected judgment money, he 
is not precluded from bringing an appeal to recover attorneys’ fees. 709

"Where a contractor complies with all provisions of Chapter 713, Florida 
Statutes, and has substantially performed the contract, he is entitled to a 
mechanic’s lien." 710 Since the trial court awarded money reflecting a 
finding that Grant completed 97.7 percent of his obligation, that 
percentage constituted substantial performance. 711 As such, the Fourth 
District Court of Appeal stated it was error not to allow foreclosure of 
Grant’s mechanic’s lien. 712

When a mechanic’s lien is foreclosed, the prevailing party recovers 
attorneys’ fees. However, "to be a prevailing party entitled to the award of 
attorney’s fees pursuant to section 713.29, a litigant must have recovered an 
amount exceeding that which was earlier offered in settlement of the

703. Id.
704. Id.
705. Id. at 1305.
706. Id. (quoting Capital Fin. Corp. v. Oliver, 156 So. 736, 737 (Fla. 1934)).
707. Grant, 679 So. 2d at 1305 (quoting McMullen v. Fort Pierce Fin. & Constr. Co., 
146 So. 567 (Fla. 1933)).
708. Id. at 1306 (quoting United States v. Hougham, 364 U.S. 310, 312 (1960)).
709. Id.
710. Id. at 1307 (quoting Viking Communities Corp. v. Peeler Constr. Co., 367 So. 2d 
737, 739 (Fla. 4th Dist. Ct. App. 1989) (citations omitted)).
711. Id. at 1308.
712. Grant, 679 So. 2d at 1308.
claim."

Wester argued that Grant tried to settle by offering payment. The offer must have been timely and adequate in amount to preclude an award for attorneys' fees. The court recognized that the issues of adequacy and timeliness were never addressed because the lower court denied foreclosure on the lien. As such, the court reversed the judgment because it denied foreclosure of the lien and remanded for the award of attorneys' fees, if the lower court decided Wester did not make a timely, adequate offer to settle.

Herpel, Inc. v. Straub Capital Corp. The Fourth District Court of Appeal reversed the lower court decision and held that the lien was timely recorded as required by section 713.08(5) of the Florida Statutes. Herpel, by contract, was required to make a mantel for a new residence owned by Blossom Estate. The contract was only for materials. After the mantel was delivered and installed, George Straub, the owner's authorized agent, was not satisfied with its appearance. Herpel's workers removed the mantel for refinishing and later reinstalled it.

Herpel filed a claim of lien 113 days after the original delivery but within ninety days of the date of redelivery. Section 713.08(5) of the Florida Statutes states that "'[t]he claim of lien may be recorded at any time during the progress of the work or thereafter but not later than 90 days after the final furnishing of the labor or services or materials by the lienor.'" The trial court determined that the claim of lien was not timely filed.

This court reversed the trial court decision. The fourth district recognized that the cases the trial court relied on were not sufficient because they did not address the "final furnishing" of purchased materials. The trial court stated:

[T]he majority rule is that, after the installation of fixtures or equipment in a building, later services in the nature of correction or

713. Id. (quoting C.U. Assoc. v. R.B. Grove, 472 So. 2d 1177, 1179 (Fla. 1985)).
714. Id.
715. Id.
716. Id.
717. 682 So. 2d 661 (Fla. 4th Dist. Ct. App. 1996).
718. Id. at 661.
719. Id. at 661-62.
720. Id. at 662.
721. Id.
722. Herpel, 682 So. 2d at 662 (quoting FLA. STAT. § 713.08(5) (1993)).
723. Id.
724. Id. at 663.
725. Id. at 662.
repair are not regarded as a part of the installation so as to make the
time within which to file under a mechanic’s lien based on the
original installation run from the time of performance of such later
services. This rule is followed in Florida. Therefore, this
warranty work was not the final furnishing of labor or materials. 726

In addition, the court applied the test used in *Century Trust Co. of
Baltimore v. Allison Realty Co.* 727 “The test to be applied is whether the work
was done in good faith, within a reasonable time, in pursuance of the terms of
the contract, and whether it was necessary to a ‘finished job.’” 728 “[W]ork
done in fulfillment of the contract is contemplated by the contract and extends
the time for filing, since the contract is not complete until the work is
done.” 729 Corrective or repair work does not extend the time for filing the
claim of lien because the contract is already complete. 730 Here, the contract
was for materials only so the rationale cited from the cases above should be
applied. 731

The fourth district held that the final furnishing of the materials occurred
when the mantel was reinstalled. 732 The additional work after the initial
installation was only to complete the job as set out in the contract. 733 As such,
the lien was properly recorded within the ninety days required by the
statute. 734

*Personal Representative of Estate of Jacobson v. Attorneys’ Title
Insurance Fund, Inc.* 735 The Third District Court of Appeal reversed the
lower court’s decision, since the lien was not valid due to the Monroe County
Code Enforcement Board’s failure to comply with statutory formalities. 736
The property in question was sold three times after the lien was recorded. 737
The last owner, Maggie Kaspersetz, discovered the lien after she purchased
the property and received a warranty deed from Attorneys’ Title Insurance

726. *Id.* (citing *Viking Builders, Inc. v. Felices*, 391 So. 2d 302, 303 (Fla. 5th Dist. Ct.
App. 1980)).

727. *Herpel*, 682 So. 2d at 663 (relying on *Century Trust Co. of Baltimore v. Allison
Realty Co.*, 141 So. 612 (Fla. 1932)).

728. *Id.*

729. *Id.*

730. *Id.*

731. *Id.*

732. *Herpel*, 682 So. 2d at 663.

733. *Id.*

734. *Id.*

735. 685 So. 2d 19 (Fla. 3d Dist. Ct. App. 1996).

736. *Id.* at 20.

737. *Id.*
Fund. Attorneys' Title Insurance paid the lien and then sued Jacobson, as subrogee. The trial court found for Attorneys' Title Insurance who also gained attorneys' fees at a later hearing.

The third district reversed, reasoning that a lien is not acquired unless notice requirements are strictly complied with. Section 162.12(1) of the Florida Statutes "requires that the alleged violator be sent notice by certified mail, by hand delivery, or by leaving the notice at the violator's place of residence." In this case, notice was only sent by regular mail.

"In addition, section 162.09(3), Florida Statutes (1989) states that, if the lien is to be recorded in the public records, a certified copy of the order imposing the fine must be recorded." Since the county failed to give notice of record pursuant to statutory authority, the requirements for obtaining the lien were not met. As such, the court declared the lien invalid.

Kerrigan v. Mosher. The Kerrigans appealed an order denying their motion to set aside the judicial sale of their homestead in connection with foreclosure of a mechanic's lien held by Mosher. Mosher, being the sole bidder at a foreclosure sale, purchased the Kerrigans home for $100. The home had a fair market value between $300,000 and $360,000 and was burdened by an $87,000 mortgage. The Kerrigans believed their attorney would represent their interests at the sale. Unfortunately, the appointed attorney did not attend the sale, nor did he try to redeem the property for the Kerrigans.

The First District Court of Appeal reversed the lower court's holding. The foreclosure sale should have been set aside because of irregularity in the sale process. Price is not enough to set aside the sale; however, the bid was grossly inadequate as a result of the attorney's misrepresentation. As such, the sale should have been set aside and a new sale ordered.

738. Id.
739. Id.
740. Jacobson, 685 So. 2d at 20.
741. Id. (citing FLA. STAT. § 162.12(1) (1989)).
742. Id.
743. Id.
744. Id.
745. Jacobson, 685 So. 2d at 20.
747. Id. at 874-75.
748. Id. at 875.
749. Id.
750. Id.
751. Kerrigan, 679 So. 2d at 875.
XIX. Mechanics' Liens

Craftsman Contractors, Inc. v. Brown. The First District Court of Appeal affirmed the trial court's order finding that Craftsman's lien was unenforceable because it failed to properly list all lienors who had not been paid in full on its final contractor's affidavit. Craftsman's final affidavit stated that "all lienors, subcontractors, and materialmen" were paid in full. However, even though subcontractor McElhany Electric was unpaid and not in the affidavit, Craftsman argued that section 713.06(3)(d)(1) of the Florida Statutes only required the final affidavit to list lienors. In addition, it argued that McElhany Electric could not be a lienor since it failed to file notice to the owner as required by section 713.06(2)(a).

The court recognized that one may be a lienor under chapter 713 of the Florida Statutes without giving notice. Chapter 713 should not be narrowly construed. The court held that McElhany's failure to file notice to the owner did not remove it from the definition of "lienor" under chapter 713.06(3)(d)(1).

Current Control, Inc. v. Bankers Insurance Co. The Fifth District Court of Appeal affirmed the issuance of the writ of prohibition granted by the lower court. Current Control filed a complaint to enforce a claim of lien which was transferred to a bond provided by Bankers Insurance Company. Bankers' motion to dismiss, on the basis that the county court lacked subject matter jurisdiction, was denied. Bankers then sought and obtained a writ of prohibition from the circuit court on the same ground.

The action before the Fifth District Court of Appeal was one brought on a bond issued pursuant to section 713.24 of the Florida Statutes. The essence of subsection three states that "[a]ny party having an interest in such security or the property from which the lien was transferred may at any time, and any number of times, file a complaint in chancery in the circuit court of the county...

752. 695 So. 2d 750 (Fla. 1st Dist. Ct. App. 1997).
753. Id. at 751.
754. Id.
756. Craftsman Contractors, 695 So. 2d at 751. See also Fla. Stat. § 713.06(2)(a) (1993).
757. Craftsman Contractors, 695 So. 2d at 751.
758. Id.
759. 679 So. 2d 78 (Fla. 5th Dist. Ct. App. 1996).
760. Id. at 79.
761. Id. at 78.
762. Id.
where such security is deposited.\textsuperscript{763} The fifth district distinguished this case as being distinct from \textit{Alexdex Corp. v. Nachon Enterprises, Inc.}, which the appellant raised.\textsuperscript{764} In \textit{Alexdex}, the Supreme Court of Florida noted that since a lien foreclosure action is one in equity, the circuit and county courts have concurrent jurisdiction for such matters, within set monetary limits.\textsuperscript{765} In \textit{Current Control, Inc.}, the action involved a mechanic’s lien claim transferred to a surety bond. This action is statutory in nature. The specific statute delineates that actions should be filed in circuit court regardless of the amount involved. As such, the writ of prohibition should be affirmed.\textsuperscript{766}

\textbf{XX. MOBILE HOME PARKS}

\textit{Meadow Groves Management, Inc. v. McKnight.\textsuperscript{767}} The lessee of a space in a mobile home park failed to pay the rent. The park sued, obtained a judgment for possession of the space, got a writ of possession, and had the sheriff remove the tenant and his goods. However, the tenant’s mobile home was left in the space. The park then advertised the mobile home for sale, relying on the statutory summary procedure provided in section 718.78 of the \textit{Florida Statutes}.\textsuperscript{768} The former lessee brought this action to enjoin the sale. The trial court granted the injunction because it concluded that the mobile home was exempt property because it was a homestead under section 222.05 of the \textit{Florida Statutes}.\textsuperscript{769} The Fifth District, sitting en banc, affirmed but for a different reason.\textsuperscript{770}

The majority opinion, written by Chief Judge Peterson, held that the mobile home park had no right to use that statutory summary procedure.\textsuperscript{771} The scope of section 713.78, which is entitled “Liens for recovering, towing or storing vehicles,” is provided by subsection two.\textsuperscript{772} It provides a lien for “a person regularly engaged in the business of transporting

\begin{footnotes}
\footnotetext[763]{Id.}
\footnotetext[764]{\textit{Current Control}, 679 So. 2d at 78. See \textit{Alexdex Corp. v. Nachon Enter., Inc.}, 641 So. 2d 858 (Fla. 1994).}
\footnotetext[765]{\textit{Alexdex Corp.}, 641 So. 2d at 862.}
\footnotetext[766]{\textit{Current Control}, 679 So. 2d at 79.}
\footnotetext[767]{689 So. 2d 315 (Fla. 5th Dist. Ct. App. 1997).}
\footnotetext[768]{Id. at 316. See \textit{FLA. STAT. § 718.78} (1993).}
\footnotetext[769]{\textit{Meadow Groves}, 689 So. 2d at 316 (relying on \textit{FLA. STAT. § 222.05} (1993)).}
\footnotetext[770]{Id.}
\footnotetext[771]{Id.}
\footnotetext[772]{\textit{FLA. STAT. § 713.78} (1993).}
\end{footnotes}
vehicles by wrecker, tow truck, or car carrier. The mobile home park did not fit that definition.

The court then pointed out that the homestead exemption from forced sale was only available to a lessee of a mobile home lot if the mobile home was on land that "he may lawfully possess, by lease or otherwise." Since this tenant had been evicted, he could not lawfully possess the land under his mobile home. Thus, he lost his homestead exemption. The tenant claimed, however, that the park prevented him from removing his mobile home while he still had the right to lawfully possess the land. The district court found nothing in the record to support that claim, but ruled that, on remand, the trial court could consider evidence that the park had interfered with his right to remove his mobile home.

Both Judge Sharp and Judge Thompson expressed dissent from the homestead part of the opinion. The mobile home was homestead before the park obtained its judgment for back rent. Both argued that homestead rights to a mobile home should not be cut off by the eviction. That would conflict with and undermine the purpose of homestead, i.e., protecting the homesteader's home, regardless of its form. Even though the park did not get the homesteader's home this time, it would only be a matter of time before clever claimants used this ruling to circumvent mobile home owners' homestead rights.

XXI. MORTGAGES

*BancFlorida v. Hayward.* Justice Grimes wrote the court's opinion with which Justices Overton, Shaw, Harding, Wells, and Anstead concurred. Before the court was a certified question of great public importance:

WHERE A LENDER REQUIRES A PRE-QUALIFIED CONTRACT PURCHASER BEFORE IT WILL LEND ON THE CONSTRUCTION LOAN WHICH CREATES A PURCHASE MONEY MORTGAGE, DOES THE CONTRACT PURCHASER'S PRIOR EQUITABLE LIEN AGAINST THE

773. *Meadow Groves*, 689 So. 2d at 316 (citing FLA. STAT. § 713.78(2) (1993)).
774. Id. at 317 (citing FLA. STAT. § 222.05 (1993)).
775. Id.
776. Id. (Thompson, Sharp, JJ., dissenting).
777. Id. at 319 (Sharp, J., dissenting).
778. *Meadow Groves*, 689 So. 2d at 319 (Thompson, Sharp, JJ., dissenting).
779. 689 So. 2d 1052 (Fla. 1997).
PURCHASE MONEY MORTGAGOR HAVE PRIORITY OVER THE LENDER'S SUBSEQUENT PURCHASE MONEY MORTGAGE?  

Shores Contractors developed lots and constructed single family homes in subdivisions owned by American Newlands. Shores had an option to acquire individual lots from American. Shores arranged for BancFlorida to provide funds to acquire lots and construct homes on those lots. When the developments failed and the homes were incomplete, Shores filed suit against the bank claiming a breach on the construction loan agreements caused the failure. The bank sought foreclosure of mortgages on the lots. The contract purchasers claimed equitable liens on the lots, and the bank claimed superiority of its mortgages. Final summary judgment of foreclosure was entered, and the bank foreclosed on the lots then purchased them at judicial sale. The bank later sold them to a third party.

"The trial court entered summary judgment in favor of the contract purchasers, holding that they held equitable liens on the lots which were entitled to priority over the bank's mortgages. Although the Third District Court of Appeal held the bank mortgages were purchase money mortgages, it affirmed the judgment in favor of the contract purchasers. The Supreme Court of Florida agreed that the bank's mortgages were purchase money mortgages.

It is well settled that where the proceeds of a third party mortgage loan are used to purchase property, the mortgage of that property is a purchase money mortgage. Most importantly, purchase money mortgages take priority over other claims or liens that attach to property through the mortgagor. As such, "the court below erred in holding that the claims of contract purchasers were superior to the bank's purchase money mortgages."

780. Id. at 1052.
781. Id. at 1052-53.
782. Id. at 1053.
783. Id.
784. BancFlorida, 689 So. 2d at 1053.
785. Id.
786. Id. at 1053 (citing Cheves v. First Nat'l Bank, 83 So. 2d 870 (Fla. 1920); Sarmiento v. Stockton, Whatley, Davin & Co., 399 So. 2d 1057 (Fla. 3d Dist. Ct. App. 1981)).
787. Id. at 1054.
788. Id.
The court pointed out that it could not "answer the certified question as worded because it presupposes that the contract purchasers had a prior equitable lien on the lots." Since the developer only held an option to purchase at the time the agreements were executed, this option created neither an equitable interest nor an equitable remedy under Florida law. The developer had no property interest to which an equitable lien could attach. The court held that "the bank's mortgages on the twenty-two lots have priority over the claims of the contract purchasers but only to the extent that the bank's funds were used to purchase the lots."

Beach v. Great Western Bank. Judges Overton, Grimes, Harding, Wells, and Anstead concurred and Judge Shaw recused in this per curiam opinion. Before the court was the following certified question:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RECISSION SET FORTH IN SECTION 1635(F)?

The Beaches got a bank mortgage for home construction reflecting a thirty year payout. After the Beaches moved into their home, they made two payments and received another loan from Great Western Bank. They used the proceeds from that subsequent loan to pay off the initial bank mortgage. The Beaches defaulted on their mortgage and Great Western Bank sought to foreclose.

The Beaches raised affirmative defenses in response to the foreclosure action based on their right to rescind because of overstatements made by Great Western Bank on disclosure documents and Truth in Lending Act damage claims. The trial court found Great Western Bank overstated the

789. BancFlorida, 689 So. 2d at 1054.
790. Id.
791. Id.
792. Id. at 1055.
794. Id. at 147.
797. Beach, 692 So. 2d at 147.
Beaches monthly mortgage payment and finance charge.\textsuperscript{798} The trial court also found the loan was an exempt transaction not subject to rescission, and held in Great Western Bank's favor on that issue because the Beaches did not assert rescission rights within three years of closing.\textsuperscript{799} The Beaches were awarded damages as per the Truth in Lending Act because of the overstatements.\textsuperscript{800} The damages were then set off against the balance Great Western still needed to receive.\textsuperscript{\textsuperscript{801}}

On appeal, the fourth district found rescission was not a defense for recoupment because recoupment was primarily an equitable remedy to prevent unjust enrichment.\textsuperscript{802} "The district court affirmed the trial court's final judgment, holding that under Florida law the statutory right of rescission in TILA ("the Truth in Lending Act") expires three years after the transaction's closing date and may not be revived as a defense in recoupment in a creditor's foreclosure action."\textsuperscript{803}

The above mentioned certified question was before the Supreme Court of Florida. The purpose of the Truth in Lending Act is to ensure a "‘meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit.’"\textsuperscript{804} The consumer has the absolute right to rescind the secured transaction within three business days following closing and up to three years from the same closing date if the creditor failed to make all material disclosures.\textsuperscript{805} If a borrower rescinds, he is not liable for any finance charges and a security interest given by the borrower becomes void.\textsuperscript{806}

The Truth in Lending Act also allows for damages. Section 1640(e) "‘does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.’"\textsuperscript{807} This savings clause is only recognized in this particular section and is not found in section 1635, expiration of the statutory right of rescission.\textsuperscript{808} The court recognized that an analysis of a Truth in Lending Act issue should include Part 226 of Title 12 of

\textsuperscript{798} Id. at 147-48.  
\textsuperscript{799} Id. at 148.  
\textsuperscript{800} Id.  
\textsuperscript{801} Id.  
\textsuperscript{802} Beach, 692 So. 2d at 148.  
\textsuperscript{803} Id.  
\textsuperscript{804} Id. (quoting 15 U.S.C. § 1601(a) (1994)).  
\textsuperscript{805} Id. (discussing 15 U.S.C. § 1635(f) (1994)).  
\textsuperscript{806} Id.  
\textsuperscript{807} Beach, 692 So. 2d at 149 (quoting 15 U.S.C. § 1640(e) (1994)).  
\textsuperscript{808} Id.
the Code of Federal Regulations," otherwise known as Regulation Z, and the official commentary both address the right to rescission. In Florida courts, ""[i]t is well established that the defense of recoupment may be asserted defensively when the underlying claim is barred by the statute of limitations." The court addressed the cases relied on by the Beaches and deemed them to be inapplicable in the case at bar. None of those cases dealt with the situation where a statute treated a right and its remedy simultaneously.

The Supreme Court of Florida agreed with the Fourth District Court of Appeal that the real danger is that borrowers ""could take advantage of the remedy throughout the entire life of the secured transaction, rendering statutory limitation meaningless." The three-year right of rescission expired in 1989, the Beaches defaulted in 1991, and the foreclosure was sought by Great Western in 1992. The Beaches had control over Great Western's ability to foreclose by making monthly payments. The remedy in the form of damages was extraneous to foreclosure. The savings clause in section 1640 saved the damages remedy beyond the one-year statute of limitations as a "defense by recoupment or setoff." Section 1635(f) provided that the right and the remedy expire three years after the closing date. This clause did not have such a savings clause regarding the right of rescission. As a general rule, when Congress leaves out particular language in a statutory provision, and such language is provided for in another section of the same statute, it is presumed that Congress intended to omit that language from the provision. Section 1635(f) expresses the Congressional intent to omit the statutory right of rescission three years after the transaction.

809. Id. See 12 C.F.R. § 266.23(a)(3) (1996).
811. Id. at 150 (quoting Willoughby v. Dowda & Fields, Chartered, 643 So. 2d 1098, 1099 (Fla. 5th Dist. Ct. App. 1994)).
812. Id.
813. Id.
814. Id. at 152 (quoting Beach v. Great W. Bank, 670 So. 2d 986, 991 (Fla. 4th Dist. Ct. App. 1996)).
815. Beach, 692 So. 2d at 152.
817. Beach, 692 So. 2d at 152.
818. Id.
820. Beach, 692 So. 2d at 152.
The court recognized the controlling case here was *Bowery v. Babbit*[^821] which stated "'when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.'"[^822] As such, the court held that 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)."[^823]

*Bee Bee Medical Center, Inc. v. Strategic Consulting & Managing, Inc.*[^824] The Second District Court of Appeal reversed the trial court's order setting aside the clerk's certificate of redemption after Bee Bee paid the judgment amount before attorneys' fees and costs had been assessed.[^825] A final judgment of foreclosure was issued to Strategic whereby they were entitled to $125,000 plus interest.[^826] However, Bee Bee paid the ordered amount before attorneys' fees and costs were calculated. The court clerk issued a certificate of redemption on Bee Bee's behalf.[^827] Strategic filed an emergency motion asserting that Bee Bee did not pay the full amount owed because attorneys' fees and costs were not assessed. The trial court granted Strategic's motion and set aside the clerk's certificate of redemption.[^828]

The question before the district court of appeal was whether Bee Bee, as mortgagor, properly exercised their right of redemption. The district court held that Bee Bee paid the $125,000 plus interest ordered by the judgment and therefore, properly exercised their right to redemption under section 45.0315 of the *Florida Statutes.*[^829] The statute states that "a mortgagor may exercise redemption rights at any time before the clerk's filing of a certificate of sale 'by paying the amount of moneys specified in the judgment, order, or decree of foreclosure.'"[^830] The second district recognized that Bee Bee should not be prevented from exercising redemption rights just because Strategic failed to enter attorneys' fees and costs in its judgment.[^831]

[^821]: 128 So. 801 (Fla. 1930).
[^822]: *Beach*, 692 So. 2d at 152 (quoting Bowery v. Babbit, 128 So. 801, 806 (Fla. 1930)).
[^823]: *Id.* at 153.
[^824]: 677 So. 2d 84 (Fla. 2d Dist. Ct. App. 1996).
[^825]: *Id.* at 84.
[^826]: *Id.*
[^827]: *Id.*
[^828]: *Id.*
[^829]: *Bee Bee*, 677 So. 2d at 85.
[^830]: *Id.* at 84-85 (quoting FLA. STAT. § 45.0315 (1993)).
[^831]: *Id.* at 85.
Estepa v. Jordan. The Fifth District Court of Appeal of Florida reversed summary judgment granted in favor of Jordan because the record was insufficient to establish the amount of the deficiency following a mortgage foreclosure suit. On March 31, 1995, the trial court entered judgment of foreclosure after Jordan filed a foreclosure suit against Estepa seeking payment of a promissory note, foreclosure and sale of real estate, attorneys’ fees, and deficiency judgment. Jordan bought the property at a foreclosure sale on May 11, 1995, and later filed a motion for deficiency judgment. Estepa’s attorney moved for a continuance on October 20, 1995, because he was unable to reach Estepa about the suit. Estepa filed an objection to the entry of judgment on the ground that they were not personally served with notice. The trial court recognized that Estepa did not need to be served with process personally because service of notice on Estepa’s attorney was adequate. It was also found that a deficiency existed “between the fair market value of the property on the date of the foreclosure sale and the balance of the mortgage debt owed.”

The Fifth District Court of Appeal agreed that new service of process was not needed. The law of mortgage foreclosure in Florida contemplates that a deficiency judgment may be needed in a foreclosure suit and that the deficiency proceeding should be a part of the original foreclosure suit. The party seeking the deficiency judgment has the burden of proving that the fair market value of the property foreclosed upon was less than the total mortgage debt owed.

In addition, the fifth district concluded that the evidence was insufficient to establish the amount of the deficiency. The appraisal value was given twenty-seven days after the foreclosure date when the fair market value must be established on the date of the foreclosure sale. Since the fifth district reversed the deficiency judgment, it was determined that the trial court erred in awarding Jordan interest on the full amount of the judgment through the

832. 678 So. 2d 876 (Fla. 5th Dist. Ct. App. 1996).
833. Id. at 877.
834. Id.
835. Id.
836. Id. at 878.
837. Estepa, 678 So. 2d at 878.
838. Id.
839. Id.
840. Id.
841. Id.
date of the deficiency judgment. The secured party was not entitled to the interest on the entire foreclosure after the foreclosure sale took place.

Goldfarb v. Daitch. Goldfarb appealed the trial court order that granted Daitch’s “Verified Emergency Motion to Vacate Order of Disbursement of Funds” filed pursuant to rule 1.540 of the Florida Rules of Civil Procedure. Federal National Mortgage Association sought to foreclose the mortgage on Daitch’s residence after Daitch defaulted. Final judgment was entered against Daitch, and a foreclosure sale date was arranged. Caro Investments, Inc. (“Caro”) was the highest bidder for the property and Caro requested the court to assign the bid to Claire Blanken. Goldfarb filed a motion on behalf of Daitch seeking disbursement of surplus funds in the court’s registry. Argo Mortgage Corporation (“Argo”) filed its own motion for disbursement. The trial court entered its order granting disbursement and the clerk issued a certificate of disbursement for payment to the Federal National Mortgage Association. The trial court then issued an amended disbursement order providing disbursement to Argo, as the second mortgage holder.

A representative for Daitch filed a “Verified Emergency Motion to Vacate Order of Disbursement of Funds.” The motion alleged Daitch was unaware of Goldfarb’s motion to disburse and that Goldfarb had misrepresented Daitch. The trial court ruled as to the motion and found that Goldfarb “‘had no authority to represent’ Daitch ‘and obtain surplus funds on her behalf.” In addition, the trial court established “‘there existed no valid attorney/client relationship by and between’ Goldfarb and Daitch.” The orders to disburse the funds were vacated.

Goldfarb appealed on the ground that the trial court exceeded its jurisdiction in entering the order to vacate disbursement. The Fifth District Court of Appeal recognized that the law granted the trial court inherent power

842. Estepa, 678 So. 2d at 878.
843. Id.
844. 696 So. 2d 1199 (Fla. 3d Dist. Ct. App. 1997).
845. Id. at 1200.
846. Id.
847. Id.
848. Id.
849. Goldfarb, 696 So. 2d at 1200.
850. Id. at 1203 (quoting the trial judge’s order).
851. Id.
852. Id.
853. Id.
Brown / Grohman

to vacate its own previous orders.\textsuperscript{854} Daitch correctly filed her motion under rule 1.540(b) of the Florida Rules of Civil Procedure to raise the issue of fraud perpetrated in obtaining earlier orders.\textsuperscript{855} The trial court recognized that Daitch’s grant of a limited power of attorney to B.G. Gross and/or Jaime Gross was void, but that did not operate to prevent the court from considering Goldfarb’s authority.\textsuperscript{856} The trial court may vacate orders entered at the attorney’s wishes when the attorney purports to represent a party without the authority to do so.\textsuperscript{857}

\textit{Kasket v. Chase Manhattan Mortgage Corp.}\textsuperscript{858} Resolution Trust Corp. ("RTC") sought foreclosure on Kasket’s home and Kasket filed affirmative defenses and alleged violations of the Truth in Lending Act ("TILA") seeking rescission of the mortgage and damages.\textsuperscript{859} The trial court found Kasket could not bring affirmative defenses and counterclaims.\textsuperscript{860} The Fourth District Court of Appeal affirmed the trial court’s decision regarding the rescission issue, but reversed its decision to bar the affirmative defenses seeking damages.\textsuperscript{861}

Kasket entered a mortgage with Carteret Savings, which was later taken over by RTC. Then, RTC sought to foreclose on the mortgage after Kasket defaulted on his payments. Kasket filed affirmative defenses and counterclaims based on section 1640 of TILA. In the meantime, Chase Manhattan Mortgage Corp. ("Chase") bought the mortgage and note from RTC. Eventually, the trial court concluded that Chase had the right to foreclose.\textsuperscript{862}

The fourth district stayed the proceedings to wait for the Supreme Court of Florida’s ruling in \textit{Beach v. Great Western Bank}.\textsuperscript{863} The supreme court in \textit{Beach} held that rescission as a remedy under section 1635 of TILA could not be brought as an affirmative defense in the nature of recoupment after three years expired from the initial date of the transaction.\textsuperscript{864} Since Kasket allowed the three-year period to run, the fourth district focused its attention only on the

\begin{flushright}
854. \textit{Goldfarb}, 696 So. 2d at 1203.  
855. \textit{Id.} at 1204.  
856. \textit{Id.}  
857. \textit{Id.}  
858. 695 So. 2d 431 (Fla. 4th Dist. Ct. App. 1997).  
859. \textit{Id.} at 432-33.  
860. \textit{Id.} at 433.  
861. \textit{Id.}  
862. \textit{Id.}  
864. \textit{Kasket}, 695 So. 2d at 433. \textit{See Beach}, 692 So. 2d at 146.
\end{flushright}
claim for damages under TILA section 1640. \cite{Kasket_695_So.2d_433}

Section 1640 provides that a creditor who fails to comply with the statutory disclosure requirements is liable to his/her debtor for actual damages as well as penalty damages. \cite{Id. at 434}

Section 1640(e) sets forth a one-year statute of limitations, but permits borrowers to claim recoupment for section 1640 damages as an affirmative defense to a creditor's action to collect the debt. \cite{Id.}

In addition, recovery by recoupment is allowable in Florida even though the limitations period has run if the "party pleads it in defense of an action brought by the opposing party in connection with the same transaction." \cite{Id. at 434}

Although Kasket could not assert his damage claim, he could still assert his recoupment claim. However, section 1640 constitutes a civil penalty. \cite{Id. at 435}

Under section 1612(b), government agencies are exempt from any civil or criminal penalty under TILA. \cite{Kasket_695_So.2d_at_435}

As such, section 1640 damages could not be imposed on RTC. \cite{Id.}

The question before the fourth district was whether that exemption can also be asserted by Chase as an assignee of RTC. \cite{Id. at 435}

The fourth district recognized that the rationale of In re Pinder would control. \cite{Id. at 435}

That rationale suggested that a non-governmental assignee of a mortgage given to a debtor by a federal agency was liable for a recoupment penalty under TILA. \cite{Id.}

Section 1641 of TILA defines the liability of assignees and provides no exception from liability for voluntary assignees of governmental agencies. \cite{Id.}

However, no exemption was asserted here because the assignment from Carteret Savings to RTC was involuntary. \cite{Id. at 435}

Chase argued it had the right to assert all of RTC's defenses based upon the doctrine that prevents asserting of side agreements to defeat the interest of the RTC where those agreements are not in the records of the institution. \cite{Id. at 435}

However, the fourth district court recognized that RTC or its assignees

\begin{quote}

865. Kasket, 695 So.2d 433.
866. Id. at 434.
867. Id.
868. Id.
869. Id. at 435. See Beach v. Great W. Bank, 670 So. 2d 986 (Fla. 4th Dist. Ct. App. 1996).
870. Kasket, 695 So. 2d at 435.
871. Id.
872. Id.
874. Kasket, 695 So. 2d at 435.
875. Id. at 435.
876. Id.
\end{quote}
“needed only to review the truth in lending documents in the records of Carteret to determine whether they complied with TILA.” Mistakes in the TILA statements come from the face of the institution documents themselves. If Congress intended for RTC and its assignees to be exempt from liability for any error in financial documents, it could have provided such an exemption in the Financial Institutions Reform Recovery and Enforcement Act. RTC was only exempted from agreements not found in the records of the institution.

In conclusion, the court held that Chase could be liable for section 1640 damages if Kasket proves Truth in Lending Act violations apparent on the face of the loan documents. The fourth district reversed and remanded because it determined there were several issues which required findings of fact based on the evidence by the trial court.

Lee v. Gadasa Corp. The First District Court of Appeal reversed the trial court’s decision because the trial court erroneously applied the doctrine of collateral estoppel. The trial court took judicial notice of a ruling in another mortgage foreclosure case against Brock with a different plaintiff. The trial court in that matter had applied collateral estoppel to resolve the validity of a power of attorney used by Brock’s wife to secure mortgages. According to the trial court, the doctrine of collateral estoppel could apply without identifying the parties. The first district disagreed. In Zeidwig v. Ward, the use of defensive collateral estoppel was approved to prevent a criminal defendant, as the plaintiff, from relitigating the same issue which had already been addressed in court. The first district distinguished Zeidwig from the case at bar and held there was not a comparable relationship among parties in the two suits. As such, the narrow exception in Zeidwig did not apply. In Florida, the rule has been that unless both parties were bound by

878. Kasket, 695 So. 2d at 435.
879. Id.
880. Id.
881. Id. at 436.
883. Id. at 1108.
884. Id. Lee was the personal representative of the estate of H. Julian Brock which was the estate in question. Id. at 1107.
885. Id.
886. Lee, 680 So. 2d at 1108.
887. Id. at 1109.
888. 548 So. 2d 209 (Fla. 1989).
889. Lee, 680 So. 2d at 1108 (citing Zeidwig v. Ward, 548 So. 2d 209, 209 (Fla. 1989)).
890. Id. at 1108-09.
891. Id.
the prior judgment, neither can use the judgment as an estoppel against the other in a later proceeding.\textsuperscript{892}

\textit{National Enterprises, Inc. v. Martin}.\textsuperscript{893} The Fourth District Court of Appeal reversed and remanded the cause to the trial court.\textsuperscript{894}

The Federal Deposit Insurance Corporation ("FDIC") filed an amended motion for deficiency judgment. Subsequently, National Enterprises, Inc. ("National") moved to substitute itself as the party in the case on the basis that National purchased FDIC's interest in that matter. National wanted to be able to introduce evidence concerning the transfer of the asset from FDIC to National. National's asset manager testified that he had no recollection of any assignment of an ownership interest in the note and mortgage and that he inventoried FDIC's documents evidencing indebtedness.\textsuperscript{895}

The trial court granted appellee's motion for an involuntary dismissal because National had failed to prove it owned the asset by producing a written assignment of the transfer or sale of the asset from the FDIC.\textsuperscript{896} National filed a motion for rehearing attaching as an exhibit an assignment from the FDIC of its interest in the final summary judgment of foreclosure. The trial court failed to grant the motion.\textsuperscript{897}

National did not address \textit{Boulevard National Bank of Miami v. Air Metals Industries, Inc.} at trial which stated that "'[f]ormal requisites of such an assignment are not prescribed by statute and it may be accomplished by parol, by instrument in writing, or other mode, such as delivery of evidences of the debt, as may demonstrate an intent to transfer and an acceptance of it.'"\textsuperscript{898} The fourth district held the trial court did not err in granting involuntary dismissal but it abused its discretion in denying National's motion for rehearing.\textsuperscript{899} According to rule 1.530(a) of the Florida Rules of Civil Procedure, "[o]n a motion for a rehearing of matters heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment."\textsuperscript{900} The

\textsuperscript{892} Id.
\textsuperscript{893} 679 So. 2d 331 (Fla. 4th Dist. Ct. App. 1996).
\textsuperscript{894} Id. at 332.
\textsuperscript{895} Id.
\textsuperscript{896} Id.
\textsuperscript{897} Id.
\textsuperscript{898} National Enters., Inc., 679 So. 2d at 332 (quoting Boulevard Nat'l Bank of Miami v. Air Metals Indus., Inc., 176 So. 2d 94, 97-98 (Fla. 1965)).
\textsuperscript{899} Id. at 333.
\textsuperscript{900} Id. See FLA. R. CIV. P. 1.530(a).
written assignment attached as an exhibit at trial established National’s ownership by assignment of final summary judgment of foreclosure.  

Nerbonne, N.V. v. Lake Bryan International Properties. Nerbonne appealed the dismissal of an entry of a final judgment of foreclosure in a mortgage foreclosure brought by Lake Bryan International Properties. Nerbonne also appealed the dismissal of its counterclaim and the striking of its affirmative defenses. Nerbonne claimed that Robert Figueredo formed Nerbonne to purchase a tract of land as an investment, and induced individuals to purchase capital stock of that corporation. The stock-offering memorandum listed the purchase price of the land but failed to disclose that Figueredo, K. Dwight Waters, and their corporation, Euro American Investment Corp., had conspired to purchase the land for a lesser amount and agreed to split the undisclosed profits when the land was resold.

Nerbonne paid a portion of the purchase price by a $2,550,000 mortgage to Lake Bryan which was, allegedly, a Waters entity incorporated to assist in the conspiracy. Lake Bryan was to assist in the resale of the land by getting the purchase money mortgage, collecting payments, and assigning individual interests in the mortgage to third parties. In 1986, Lake Bryan and Nerbonne were involved in a foreclosure of the same mortgage. The judgment in that foreclosure was vacated and was followed by a judgment that reinstated and modified the mortgage. At the time the modified mortgage was reinstated, Figueredo and his corporation were in control of Nerbonne and Waters was in control of Lake Bryan. The trial court granted summary judgment for Lake Bryan on the grounds that Nerbonne’s action was barred by the statute of limitations and by res judicata because of the 1986 judgment.

The fifth district agreed with Lake Bryan’s contention that it had no duty to disclose to Nerbonne if it made a substantial profit upon the purchase of real estate by Nerbonne. However, in the case at bar, Nerbonne alleged that Figueredo conspired with Waters against Nerbonne, that Figueredo provided funds for Waters to facilitate the purchase of land at a cheaper price, and then

901. National Enters., Inc., 679 So. 2d at 333.
902. 689 So. 2d 322 (Fla. 5th Dist. Ct. App. 1997).
903. Id. at 324.
904. Id.
905. Id.
906. Id.
907. Nerbonne, 689 So. 2d at 324.
908. Id.
909. Id. at 325.
afterwards the same land was sold to Nerbonne at a higher price.\textsuperscript{910} In addition, Waters and Nerbonne calculated how the fraudulent profit would be distributed between them. It was Figueredo’s duty to act in good faith and purchase the land for Nerbonne’s benefit.\textsuperscript{911} Parties involved with Figueredo’s plan to defraud the corporation, Nerbonne, are liable to the principal Nerbonne for the loss.\textsuperscript{912}

The fifth district disagreed with Lake Bryan’s contention that Nerbonne was estopped from disavowing the acts of Figueredo and the indebtedness of the mortgage because Nerbonne wanted to keep the remainder of the land and recover the difference between the price paid by Waters, and the price paid by Nerbonne.\textsuperscript{913} If Lake Bryan was involved with Figueredo’s conspiracy, Nerbonne should only have paid $2.4 million, the price at which Figueredo, as promoter, purchased the land for Nerbonne’s benefit.\textsuperscript{914}

Nerbonne raised an affirmative defense to the mortgage foreclosure and counterclaim against Lake Bryan based on fraud, but it was countered by a defense of res judicata on Lake Bryan’s behalf.\textsuperscript{915} The res judicata defense was grounded upon the 1987 mortgage foreclosure by Lake Bryan. The trial judge’s order stated that the previously entered final judgment be set aside as null and void, that some of the terms of the manner of repayment be modified, and that otherwise, the mortgage would remain as is and fully enforceable.\textsuperscript{916}

The district court recognized that the order contained no language waiving any defenses that may have been available to Nerbonne, the mortgagor.\textsuperscript{917} The mortgage foreclosure proceeding leading to final judgment had no effect on defenses because the later order canceled the final judgment.\textsuperscript{918} In conclusion, this court vacated the final judgment of foreclosure, the summary judgment on Nerbonne’s counterclaim to Lake Bryan, and the order striking the raised affirmative defenses.\textsuperscript{919}

\textit{Saidi v. Wasko.}\textsuperscript{920} The court reversed the order dismissing Saidi’s objections to a judicial sale of foreclosed property because Saidi timely sought to exercise his right of redemption and was unable to do so because of the trial

\begin{itemize}
\item \textsuperscript{910} Id.
\item \textsuperscript{911} Id.
\item \textsuperscript{912} \textit{Nerbonne}, 689 So. 2d at 325.
\item \textsuperscript{913} Id.
\item \textsuperscript{914} Id.
\item \textsuperscript{915} Id. at 326.
\item \textsuperscript{916} Id.
\item \textsuperscript{917} \textit{Nerbonne}, 689 So. 2d at 326.
\item \textsuperscript{918} Id.
\item \textsuperscript{919} Id. at 327.
\item \textsuperscript{920} 687 So. 2d 10 (Fla. 5th Dist. Ct. App. 1996).
\end{itemize}
On October 31, 1995, final judgment in favor of the Waskos provided that if $97,166.60 was not paid, the property would be sold at a judicial sale. Saidi was unsuccessful in his attempt to have the judicial sale postponed. As such, the property was sold to the Waskos and Saidi filed an objection to the sale and a motion to exercise right of redemption. This motion was denied.

The fifth district recognized the right of redemption as an equitable right that the mortgagor has to reclaim his estate by paying the amount owed plus interest and costs. Additionally, the fifth district felt that the law governing the right of redemption should be strictly construed. Section 45.0315 of the Florida Statutes provides that a mortgagor could exercise redemption rights any time before certificate of title was issued.

In this case, the final judgment of foreclosure contained a provision addressing redemption rights. The provision stated: "[o]n filing the certificate of title Defendants and all persons claiming under or against Defendants since the filing of the notice of lis pendens shall be foreclosed of all estate or claim in the property and the purchaser at the sale shall be let into possession of the property." According to this provision, the mortgagor's estate is terminated upon filing of the certificate of title.

The fifth district concluded that the provision in the final judgment of foreclosure had the effect of postponing the termination of Saidi's right of redemption until the certificate of title was filed. Since a mortgagor did not need the trial court's permission to exercise the right of redemption, the fifth district decided that on remand, the trial court should order that Saidi have a period of time to exercise the right.

XXII. OPTIONS AND RIGHTS OF FIRST REFUSAL

Fallschase Development Corp. v. Blakey. A 1975 contract of sale included the following terms: "4. Should the Seller later determine to sell all
Paragraph four created a right of first refusal. In 1995, the buyer's successor brought an action to declare that the right of first refusal was void. Buyer's successor had two theories: 1) the right of first refusal violated the rule against perpetuities; and 2) the right of first refusal was personal to the original buyer and, consequently, ended with her death in 1983. The trial court rejected the latter, concluding, that paragraph six would give the right an unlimited duration. The First District Court of Appeal summarily agreed, so the decision focused on the rule against perpetuities question.

Under traditional analysis, the rule against perpetuities was applied to void rights of first refusal, although there are problems with that analysis. However, Florida's rule against perpetuities was amended in 1976 and 1988. Under the 1976 amendment, the rule would not apply to rights of first refusal. In 1988, Florida adopted the Uniform Statutory Rule Against Perpetuities which included, inter alia, a provision allowing the court to "reform the disposition in the manner that the most closely approximates the transferor's manifested plan of distribution," even if the nonvested interest had been created before adoption of the uniform act.

932. Id. at 835.
933. Id. at 834.
934. Id. at 834-35.
935. See Ronald Benton Brown, An Examination of Real Estate Purchase Options, 12 NOVA L. REV. 147, 172-80 (1987) (explaining that a right of first refusal is a purchase option that is subject to a condition precedent). See also id. at 192-96 (explaining the application of the rule against perpetuities and the rule against restraints on alienation to options, including rights of first refusal).
936. Id. at 193 (pointing out that the rule against perpetuities did not traditionally apply to future interests retained by a grantor, such as the seller here, and the propensity for courts to avoid applying the rule to options). See also id. at 195-96 (pointing out that the policy behind the rule does favor its application to options and that options should properly be tested by the rule against restraints on alienation as occurred in Inglehart v. Phillips, 383 So. 2d 610 (Fla. 1980)).
939. The Uniform Statutory Rule Against Perpetuities also provided an alternative 90 year wait-and-see provision and limited the application of the rule to gratuitous transfers. Fla. Stat. § 689.225(1)(a)(2) (amended 1990). If the Uniform version of the rule had applied, under either of these provisions, the right of first refusal could not have been adjudged void ab initio as occurred here. Id.
940. Id. § 689.225(6)(c).
941. Id.
The first district found that the right of first refusal had become void immediately in 1975 under the traditional rule. Consequently, the title, unencumbered by the right of first refusal, had vested in the buyer at that time. The later amendments, if applied retroactively, would disturb the buyer's vested rights, and the Supreme Court of Florida recently held that "'[e]ven when the Legislature does expressly state that a statute is to have retroactive application, this Court has refused to apply a statute retroactively if the statute impairs vested rights, creates new obligations, or imposes new penalties.'" Judge Wolf, however, dissented on this point noting, "I am . . . unaware of a vested right to have a court strike down an obligation voluntarily undertaken as part of an enforceable written legal agreement."

The court decided to certify the question presented as being of great public importance and formulated it as follows:

WHETHER SECTION 689.225(6)(C), FLORIDA STATUTES, IS A REMEDIAL PROVISION WHICH MAY BE APPLIED RETROSPECTIVELY TO REFORM A FIRST REFUSAL RIGHT TO PURCHASE REAL PROPERTY, SO AS TO BRING EXERCISE OF THE RIGHT WITHIN THE LIMITS OF THE COMMON LAW RULE AGAINST PERPETUITIES.

XXIII. PUBLIC LAND USE CONTROLS

Martin County v. Yusem.

CAN A REZONING DECISION WHICH HAS LIMITED IMPACT UNDER SNYDER, BUT DOES REQUIRE AN AMENDMENT OF THE COMPREHENSIVE LAND USE PLAN, STILL BE A QUASI-JUDICIAL DECISION SUBJECT TO STRICT SCRUTINY REVIEW?

943. Id. at 836 (quoting State Farm v. Laforet, 658 So. 2d 55, 61 (Fla. 1995)).
944. Id. at 838.
945. Id. at 837.
946. 690 So. 2d 1288 (Fla. 1997).
No! The Supreme Court of Florida responded to calls for clarification by directly answering the certified question in the negative. Both the method of judicial review and standard to be applied by the reviewing court depend on whether the governmental decision was classified as judicial or legislative in nature. Following Snyder and Puma, courts, including the Fourth District Court of Appeal in this case, had applied a functional test to determine whether a decision to amend a comprehensive plan was judicial or legislative. However, the supreme court has now clearly stated that "amendments to a comprehensive land use plan which was adopted pursuant to chapter 163, Florida Statutes, are legislative decisions subject to the 'fairly debatable' standard of review." Furthermore, "[t]his conclusion is not affected by the fact that the amendments to comprehensive land use plans are being sought as part of a rezoning application in respect to only one piece of property." The holding was based upon the type of information that should be considered in a decision to amend the comprehensive plan and the statutory process mandated. Henceforth, the method of obtaining review of an amendment to the comprehensive plan and the standard to be applied by the reviewing court will no longer be in doubt. It will no longer be necessary to do a functional analysis to determine if a particular amendment was legislative or judicial in nature, even though that method of analysis remains in effect for determining the method and standard of review for rezoning decisions. In the future, parties aggrieved by amendments to a comprehensive plan "will know to file such challenges as original actions in the circuit court."

Beach v. Village of North Palm Beach City Council. Hoping to construct a large store, the developer sought a certificate of appropriateness from the village’s planning commission. It issued the preliminary approval on February 14, 1995, and the final certificate of appropriateness was issued on May 10, 1995. To comply with the requirements of section 163.3215(4) of

949. Martin County, 690 So. 2d at 1289.
950. Board of County Comm’rs v. Snyder, 627 So. 2d 469 (Fla. 1993).
951. City of Melbourne v. Puma, 630 So. 2d 1097 (Fla. 1994).
953. Martin County, 690 So. 2d at 1289.
954. Id. at 1293.
955. Id. at 1295.
956. 682 So. 2d 164 (Fla. 4th Dist. Ct. App. 1996).
the Florida Statutes, opponents of the development filed a verified complaint challenging the decision to issue the certificate with the village. When relief was denied, the opponents began this court challenge, but the trial court dismissed the complaint on the theory that the verified complaint had been filed with the village too late.

The statute required that, "[t]he verified complaint shall be filed no later than 30 days after the alleged inconsistent action has been taken." It had been filed with the village on June 9, 1995. This was within thirty days of the issuance of the final certificate of appropriateness, but far more than thirty days after the preliminary approval. The Fourth District Court of Appeal decided that the "alleged inconsistent action" was the issuance of the final certificate. The procedure set out in the North Palm Beach Code required two steps: a preliminary approval and a final approval. The fifth district reasoned that the approval was the development order which had the effect of allowing the development to proceed and a development permit to be issued. The fourth district distinguished an earlier rezoning case in which a two step process was not involved. Judge Stone wrote a dissenting opinion. The North Palm Beach Code provided: "[s]uch [preliminary] approval will be irrevocable and makes the issuance of the certificate of appropriateness mandatory upon application, unless the final presentation does not comply in all respects with the preliminary presentation upon which the preliminary approval was based."

Thus, the process was not really a two stage decision-making process, and the "inconsistent action" taken was the issuance of the preliminary approval. For this reason, the instant case is indistinguishable from the earlier rezoning decision. In addition, Judge Stone disagreed with the conclusion that the issuance of the certificate of appropriateness constituted a development order.

958. Beach, 682 So. 2d at 165.
959. Id. (citing FLA. STAT. § 163.3215(4) (1993)).
960. Id.
961. Id. (citing Board of Trustees v. Seminole County Bd. of County Comm’rs, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993)).
962. Id.
963. Beach, 682 So. 2d at 165 (Stone, J., dissenting).
964. Id. at 164 n.1 (quoting NORTH PALM BEACH, FLA. CODE § 6-56 (1996)).
965. Board of Trustees v. Seminole County Bd. of County Comm’rs, 623 So. 2d 593 (Fla. 5th Dist. Ct. App. 1993).
966. Beach, 682 So. 2d at 166 (Stone, J., dissenting).
Chung v. Sarasota County. When the county rejected the landowner’s rezoning petition, he filed suit. The parties reached a settlement under which the county was required to rezone the property subject to certain stipulations and conditions. A neighboring property owner and a homeowners’ association intervened and objected to the settlement. After rehearing, the circuit court vacated the settlement. The Second District of Appeal affirmed the decision based on its conclusion that the settlement constituted contract zoning.

Contract zoning is zoning by agreement rather than by legislative process which complies with statutory and constitutional requirements. Because the government has no power to dispense with these requirements, contract zoning is ultra vires, i.e., beyond the legitimate powers of the government. The second district reasoned that the settlement in this case did not comply with the notice and hearing requirements of rezoning. Any subsequent hearing would have been a sham because the city was already required to rezone the property. Consequently, the settlement was invalid. The second district noted that this conclusion was supported by analogy to suits commenced under section 163.3215(1) because local governments must have a public hearing on any proposed settlement.

The second district, however, noted that the fourth district’s decision in Molina v. Tradewinds Development Corp. and the third district’s decision in Zoning Board of Monroe County v. Hood upheld similar settlements, although neither discussed contract zoning. Furthermore, it expressed concern about “impairing a local government’s ability to settle litigation.” Therefore, it certified the following question as being of great public importance:

**WHETHER A COUNTY OR LOCAL GOVERNMENT CAN ENTER INTO A SETTLEMENT AGREEMENT IN ZONING**
LITIGATION WITHOUT FIRST ADHERING TO THE DUE PROCESS AND STATUTORY/ORDINANCE REQUIREMENTS FOR ENACTING THE ZONING CHANGES CONTEMPLATED BY THE AGREEMENT? 977

City Environmental Services Landfill, Inc. v. Holmes County. 978 The landowner acquired property on which was the site of the former county landfill. By contract, the landowner assumed responsibility for closing the old landfill in return for the right to operate a landfill at that site if the environmental approvals could be obtained. The county's comprehensive plan did not have a category for landfills. When the landowner applied for a development permit to operate a regional landfill, it was informed that it would need to obtain an amendment to the comprehensive plan to create a landfill category. The proposed amendments were rejected by the planning commission and the board of county commissioners who expressly treated the decision making as legislative in nature. The landowner filed this petition for a writ of certiorari, brought suit in circuit court for a declaration that it did not need to amend the plan, and also filed suit in federal court on a claim that an ordinance that prohibited solid waste being brought in from outside the county would be unconstitutional. 979 Although the landowner won the federal suit, it lost the certiorari action and brought a petition for a writ of certiorari in the district court for review. 980

The First District Court of Appeal denied the petition for a writ of certiorari, leaving in effect the circuit court's denial of certiorari. The court noted that in dealing with a certiorari petition "[a]t the district court level, the inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law." 981 As to the correct law,

[the resolution of this case hinges on whether the board of county commissioners' denial of petitioner's proposed amendments to the comprehensive land use plan was a legislative action (reviewable in a de novo hearing in a suit for injunctive or declaratory relief under the very broad "fairly debatable" standard) or a quasi-judicial

977. Id. at 1361.
979. Id. at 1328-31.
980. Id. at 1331.
981. Id. at 1332.
action (reviewable by certiorari under the "competent substantial evidence" standard). The first district simply stated that "[t]he case law indicates that the board’s action in this case was legislative, and that the circuit court therefore properly denied the petition." The decision seems based on the circuit court’s conclusion that, the proposed amendment to the comprehensive plan is drafted in such a way that, if adopted, it is conceivable that landfills could be situated at any location permitted by state environmental agencies. Such an amendment clearly contemplates a legislative policy-making function of Holmes County because, if approved, it would not only transfer much of the county’s authority to determine the location of landfill sites to state regulatory agencies, but would also impact the general population of Holmes County by potentially allowing numerous landfill sites to be placed through the environmental landscape of Holmes County.

Das v. Osceola County. The landowners were the defendants in a condemnation proceeding brought by Central Florida Petroleum Corporation ("CFP") to acquire a permanent easement for a liquefied petroleum pipeline. The landowners filed a cross claim against the county seeking a writ of mandamus to enforce its comprehensive plan. The Fifth District Court of Appeal determined that "the gravamen of [the landowners'] claim is that Osceola County has not carried out its duty to conduct a public consistency review of the pipeline project and issue a valid development order granting or denying CFP permission to construct the pipeline.

The circuit court had dismissed the mandamus action with prejudice on the theory that the court lacked jurisdiction. It reasoned that the sole method of challenging the pipeline project as being inconsistent with the comprehensive plan was under section 163.3215 of the Florida Statutes, and that the landowners had failed to pursue that remedy within the specified time period. The fifth district reversed because that section was predicated upon affected landowners getting notice of possible governmental action that would affect their land. In this case, the county gave neither notice to affected landowners that it was going to consider whether the pipeline was consistent

982. Id. at 1332-33.
983. Holmes County, 677 So. 2d at 1333.
984. Id.
985. 685 So. 2d 990 (Fla. 5th Dist. Ct. App. 1997).
986. Id. at 993.
987. Id. at 992.
988. Id.
989. Id. at 994.
with the comprehensive plan, nor notice of the decision once it had been made. The landowners first learned of it in the condemnation proceeding. In essence, the fifth district declared that they should not be barred from challenging a decision affecting their land when they had no reasonable opportunity to learn that the decision had been made.\textsuperscript{990} The fifth district concluded that "[a] county should, at the least, issue an order or permit of public record before the rights of the public to file a consistency challenge are foreclosed by the expiration of time."\textsuperscript{991}

\textit{Debes v. City of Key West.}\textsuperscript{992} The landowner sought the redesignation of her land from Medium Density Residential to Commercial General on the Future Land Use Map so that she could build a shopping center. The land was located in the center of an area designated commercial on the map and both the city planner and the planning board approved of the change. However, the city commission repeatedly refused. The commission relied upon concern for an increase in traffic and the desire to generate affordable housing. The Third District Court of Appeal, finding the commission's refusal arbitrary, discriminatory, and unreasonable as a matter of law, reversed.\textsuperscript{993}

It concluded that the increase in traffic would not justify denying a commercial use because every commercial use necessarily generates an increase in traffic.\textsuperscript{994} Thus, being able to rely upon that would, in effect, give the commission free reign to deny any commercial designation. Furthermore, limiting the use of the property to affordable housing would be to ignore proper land use concepts in the decision-making process. The third district concluded that this was the inverse of spot zoning, with all of spot zoning ills.\textsuperscript{995}

\textit{Hernando County v. Leisure Hills, Inc.}\textsuperscript{996} Having obtained conditional plat approval from the county's planning and zoning commission, the developer spent more than $500,000 to develop the subdivision. But when it sought final plat approval, the county commission decided that supplying positive drainage for the house on each two and one-half acre lot would no longer be enough. It was now requiring positive drainage for the entire lot.

\textsuperscript{990} Das, 685 So. 2d at 994.
\textsuperscript{991} Id.
\textsuperscript{992} 690 So. 2d 700 (Fla. 3d Dist. Ct. App. 1997).
\textsuperscript{993} Id. at 701.
\textsuperscript{994} Id.
\textsuperscript{995} Id. at 702.
\textsuperscript{996} 689 So. 2d 1103 (Fla. 5th Dist. Ct. App. 1997).
Consequently, the developer's plat was rejected. The developer sought equitable relief based on the theory of estoppel. 997

Noting, "[i]t is clear from the record that the [c]ommission was looking for a way to deny the plat . . . [,,]"998 the Fifth District Court of Appeal "agree[d] with the trial court that equitable estoppel was proved."999 It then dealt with the county's effort to invoke Board of County Commissioners of Brevard County v. Snyder 1000 as a basis for finding that the court had no jurisdiction to hear claims for equitable relief.1001 The fifth district seemed to avoid applying Snyder by pointing out that Snyder was decided years after this action was filed and the county had not raised their jurisdictional argument at that time.1002 However, in the decision denying the motion for rehearing, the court stated that this was merely its "observation" and not the basis for its decision.1003

The fifth district also concluded that the commission's action was, in essence, a legislative act adopting a new policy on drainage because it would apply to all plats which would come before the commission, not just this developer's plat.1004 Since Snyder stands for the proposition that review of a quasi-judicial decision must be by certiorari,1005 it follows that Snyder would not bar equitable relief from this quasi-legislative decision.

The district court also found that there was also no logical reason to limit review to a certiorari petition.1006 The case for estoppel might include testimony about assurances that the developer had relied upon. Such testimony would not necessarily be reflected by the commission record. Consequently, "[a]n independent, de novo hearing was required."1007

Kahana v. City of Tampa.1008 The property in question was zoned YC-1, indicating that it was "in the central commercial core of the district."1009 In order to sell alcoholic beverages, the owner had to petition to rezone the specific lot for that purpose. However, that rezoning would simply add that

997. Id. at 1104.
998. Id.
999. Id.
1000. 627 So. 2d 469 (Fla. 1993).
1001. Leisure Hills, 689 So. 2d at 1104.
1002. Id.
1003. Id. at 1105.
1004. Id. at 1104.
1006. Leisure Hills, 689 So. 2d at 1104.
1007. Id. at 1105.
1008. 683 So. 2d 618 (Fla. 2d Dist. Ct. App. 1996).
1009. Id. at 619.
use to the land's YC-1 designation. At the hearing on rezoning, the parishioners of a nearby church displayed their opposition and the rezoning was denied. The landowners filed a petition for a writ of certiorari in the circuit court. The trial court concluded that the council's action was legislative and not reviewable by certiorari, so it dismissed the petition. The Second District Court of Appeal reversed.

The second district held that the circuit court had misconstrued the test for determining whether zoning activity was legislative or quasi-judicial. Legislative action is the formulation of a general rule of policy. Such a policy would, naturally, affect many people. In contrast, quasi-judicial activity "merely applies an existing general rule of policy to a specific parcel." Because "[t]here was nothing in [the] sparse record establishing the City Council formulated any general rule of policy when it voted to deny [the rezoning] petition . . . [",] the trial court's decision was quashed and the case was remanded. The fifth district had not decided that the rezoning was legislative or quasi-judicial, but only that the trial court had no basis for deciding that it was legislative.

Mandelstam v. City of South Miami. Landowners filed suit against the city and its vice mayor alleging that the delays they had endured in finally getting approval for their gymnastics school, following protracted litigation and administrative proceedings, constituted inverse condemnation and the denial of due process. The Third District Court of Appeal quoted from a recent third district decision, stated "there is no guarantee that regulatory bodies will not become embroiled in disputed [sic] with property owners in which the owners ultimately will prevail." Furthermore, the court stated "there is no concomitant guarantee that property owners may recover for harm caused by these disputes." Due process requires that the city employ fair procedures, not that it must always make the correct decision. The fact that the final approval took so long was not enough to justify a finding of
liability. Moreover, the vice mayor was entitled to qualified immunity because there was no allegation that she had acted with malice or contrary to clearly established law.

Monroe County v. Whispering Pines Associates. A mobile home park covered three lots. Mobile homes were permitted on two of the lots, but prohibited by the zoning on the third lot. The owner obtained permits to place three mobile homes on lots where they were allowed by the zoning, but the mobile homes were actually placed on the lot where they were prohibited. This was an unpleasant surprise for the subsequent purchaser of the park because when the building officials discovered it, they revoked the building permits and gave the park owner ninety days to remove the homes. It did not comply, so this code enforcement proceeding was initiated.

The Monroe County Code Enforcement Board gave the park owner seven months to remove the mobile homes or obtain a variance, and set the fine for noncompliance at $100 per day. The owner appealed to the circuit court which remanded the case with the direction to join the mobile home owner. The Third District Court of Appeal, however, reinstated the Monroe County Code Enforcement Board’s order. The third district found that the current owner can be cited for code violations even though the improper use was actually begun by the prior owner. The current owner is the only one to have the power to bring the property into compliance. Thus, it concluded, “code violations ‘run with the land’” and the current owner could be fined for failing to bring the property into compliance where it had been given time to comply or get a variance.

Sunshine Key Associates Ltd. Partnership v. Monroe County. The Monroe County Code specified land use districts that were designated for recreational vehicles. The county’s director of planning decided that the county code did not allow “park models,” i.e., expandable recreational vehicles over eight feet wide that were designed and built to be permanent

1020. Id. at 869-70.
1021. Mandelstam, 685 So. 2d at 870.
1022. 697 So. 2d 873 (Fla. 3d Dist. Ct. App. 1997).
1023. Id. at 874-75.
1024. Id. at 875.
1025. Id.
1026. Id.
1027. Whispering Pines, 697 So. 2d at 875.
1028. Id.
1030. Id. at 877.
residences.\textsuperscript{1031} When the county tried to enforce that interpretation, this recreational vehicle park filed an unsuccessful administrative appeal to the County Planning Commission. Subsequently, the park unsuccessfully sought declaratory and injunctive relief, as well as damages, in the circuit court.\textsuperscript{1032} Finally, in the Third District Court of Appeal, they succeeded.\textsuperscript{1033}

The third district noted that the essence of the park's argument was that the eight-foot maximum width was arbitrary.\textsuperscript{1034} As a constitutional claim, apparently a due process violation, it was not barred by administrative res judicata.\textsuperscript{1035} The next step in the analysis was that recreational vehicles, unlike mobile homes, were designed for tenancies of less than six months and were "highway ready."\textsuperscript{1036} Both parties conceded at oral argument that "the [RV] industry is moving towards wider vehicles."\textsuperscript{1037} Furthermore, in all other attributes, these trailers met the criteria for recreational vehicles. Therefore, the third district concluded the eight-foot maximum width was arbitrary and unenforceable.\textsuperscript{1038}

**XXIV. Remedies**

*Nystrom v. Cabada.*\textsuperscript{1039} Nystrom, who was not a licensed contractor, built his own house in Naples. After living in the house for about one year, he sold it to Cabada for $126,000. Cabada then sued after she experienced problems with walls cracking and doors sticking. Engineers inspected the property and reported it to be hazardous. Cabaca alleged "breach of implied warranty, fraud, rescission of contract, breach of contract, negligence, and intentional violation of the Collier County Building Code."\textsuperscript{1040} The trial court gave her the option to rescind the purchase and obtain her payment of $126,000, or to take $126,000 in damages and keep the property.\textsuperscript{1041} Of course, she kept the property, chose the judgment, and continued to live in the house. The Second District Court of Appeal affirmed on the issue of liability.

\begin{itemize}
  \item \textsuperscript{1031} See Monroe County Fla. Code § 9.5-4. See also Sunshine Key, 684 So. 2d at 877 n.1.
  \item \textsuperscript{1032} Sunshine Key, 684 So. 2d at 877.
  \item \textsuperscript{1033} Id. at 878.
  \item \textsuperscript{1034} Id.
  \item \textsuperscript{1035} Id.
  \item \textsuperscript{1036} Id. at 877 n.1. See also Monroe County Fla. Code § 9.5-4.
  \item \textsuperscript{1037} Sunshine Key, 684 So. 2d at 878.
  \item \textsuperscript{1038} Id.
  \item \textsuperscript{1039} 652 So. 2d 1266 (Fla. 2d Dist. Ct. App. 1995).
  \item \textsuperscript{1040} Id. at 1267.
  \item \textsuperscript{1041} Id. at 1268.
\end{itemize}
holding that the Nystroms had a duty to disclose both the defects and the fact that the house was built by an unlicensed contractor.\textsuperscript{1042} The second district reversed on the issue of damages holding that Cabada should not have been given the option of obtaining a money judgment for the full purchase price of the property and keeping the property.\textsuperscript{1043} The second district remanded for a new trial on the issue of damages.\textsuperscript{1044}

XXV. Sales

\textit{Gilchrist Timber Co. v. ITT Rayonier, Inc.}\textsuperscript{1045} The seller of a 22,000 acre tract provided the buyer with a year-old appraisal. Unfortunately, the zoning shown on the appraisal was inaccurate. After “unsuccessfully” trying to get the zoning changed, the buyer filed suit in federal district court.\textsuperscript{1046} When the case reached the United States Court of Appeals for the Eleventh Circuit, it certified the following question to the Supreme Court of Florida:

\begin{quote}
WHETHER A PARTY TO A TRANSACTION WHO TRANSMITS FALSE INFORMATION WHICH THAT PARTY DID NOT KNOW WAS FALSE, MAY BE HELD LIABLE FOR NEGLIGENT MISREPRESENTATION WHEN THE RECIPIENT OF THE INFORMATION RELIED ON THE INFORMATION’S TRUTHFULNESS, DESPITE THE FACT THAT AN INVESTIGATION BY THE RECIPIENT WOULD HAVE REVEALED THE FALSITY OF THE INFORMATION.\textsuperscript{1047}
\end{quote}

To simplify matters, this question could be broken into two parts. First, could this seller be held liable for the misinformation in the appraisal which it gave the buyer when there was no evidence of fraudulent intent? Yes, was the court’s answer.\textsuperscript{1048} It relied upon section 552 of the Restatement (Second) of Torts for the proposition that a person “in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in

\textsuperscript{1042} \textit{Id.}
\textsuperscript{1043} \textit{Id.}
\textsuperscript{1044} \textit{Nystrom}, 652 So. 2d at 1268.
\textsuperscript{1045} 696 So. 2d 334 (Fla. 1997).
\textsuperscript{1046} \textit{Id.} at 336.
\textsuperscript{1047} \textit{Id.} at 335.
\textsuperscript{1048} \textit{Id.} at 337.
their business transactions, is subject to liability... if he fails to exercise reasonable care. However, the question has a second part: Does the buyer have a right to rely upon that information when a reasonable person would have sought independent verification? Where the misrepresentation was negligent rather than intentional, the answer was in the negative. The Restatement (Second) of Torts provides that liability only extends to a person who justifiably relies on that information, and the court expressly adopted the position as expressed in section 552 of the Restatement (Second) of Torts. Consequently, this seller should be held liable only if the seller failed to exercise reasonable care in giving the appraisal to the buyer and if the buyer was justified in relying on that appraisal without further checking.

The court further noted that Florida uses comparative fault to apportion damages in negligence cases. Since the seller in this case was accused of negligently supplying incorrect information to the buyer, comparative fault should be applied. In this case, the buyer might have been negligent in failing to communicate the purpose for which it was acquiring the property or in failing to verify the zoning. Thus, the negligent seller may ultimately be liable for little or nothing if the buyer was also negligent.

Decker v. Strom & Strom Realtors, Inc. The buyers apparently had a bad credit history so the only loan the broker could locate was at an interest rate above the current market. When the buyers realized how high the payments would be, they refused to close. The sale was subject to financing under the standard Sarasota County Board of Realtors and the Sarasota County Bar Association purchase contract that had been used; however, that clause was silent as to interest rates. The Second District Court of Appeal reluctantly held that the buyers had breached the contract. It is unclear whether this court was saying that the clause should be interpreted to allow buyers to cancel if unable to find reasonable financing, or that buyers could not cancel unless they were unable to find any financing. The Second District Court of Appeal only stated that this financing was reasonable in light of the buyers' credit history. However, the court noted that the buyers would

1049. Id.
1050. Gilchrist, 696 So. 2d at 339.
1051. See id. (distinguishing Lynch v. Fanning, 440 So. 2d 79 (Fla. 1st Dist. Ct. App. 1983)).
1052. Id.
1053. Id. at 338 (citing FLA. STAT. § 768.81 (1995)).
1054. 695 So. 2d 803 (Fla. 2d Dist. Ct. App. 1997).
1055. Id. at 803.
1056. Id.
have been better off using the standard Florida Bar contract because it has a space for the buyer to specify a maximum acceptable interest rate.\(^{1057}\)

*Miami Child’s World, Inc. v. City of Miami Beach.*\(^{1058}\) The purchase and sale contract had a clause providing that time was of the essence, but it also provided for a three-month extension if the buyer paid an extension fee. The buyer paid the fee and got the extension. At the end of the three months, the buyer was still not ready to close and asked for an eighteen-month extension. The seller agreed only to a four-month extension. As the deadline neared, the buyer asked the seller to extend for another year. The seller responded by giving a three-week extension. When the buyer again could not meet the deadline, the seller gave notice of termination, but the buyer then claimed that the seller had waived the “time is of the essence” clause.\(^{1059}\)

The trial court rejected that claim and the district court of appeal affirmed.\(^{1060}\) Noting that the only basis for the buyer’s waiver argument was the seller’s “patience and forbearance evidenced by its repeated granting of extensions,”\(^{1061}\) the court held that, “[a]s a matter of law, the [seller’s] repeated extensions of the closing date did not amount to a waiver of the ‘time is of the essence’ clause.”\(^{1062}\) Clearly, the court was correct. Waiver is an intentional or voluntary act. The seller’s conduct here did not evidence an intent to relinquish tight control over the time for performance.

*Licea v. Anllo.*\(^{1063}\) The buyer brought this suit for specific performance of a real estate sales contract and filed a notice of lis pendens. In response, the seller filed a motion to discharge the lis pendens or, in the alternative, require the buyer to post a bond. Over the buyer’s objection, the court set the hearing on its motion calendar and then set the bond without an evidentiary hearing.\(^{1064}\) The district court of appeal held that to be reversible error.

The court reasoned that the property owner could prevail in its motion for the setting of a bond only if it could show: “(1) that the notice of lis pendens, if unjustified, will likely result in loss or damage, and (2) the amount of the damages which will likely result.”\(^{1065}\) The first element would be to determine if a bond was required. The second element would be to determine the proper amount of the bond. The property owner could not make the

\(^{1057}\) Id.

\(^{1058}\) 688 So. 2d 942 (Fla. 3d Dist. Ct. App. 1997).

\(^{1059}\) Id. at 943.

\(^{1060}\) Id.

\(^{1061}\) Id.

\(^{1062}\) Id.

\(^{1063}\) 691 So. 2d 29 (Fla. 3d Dist. Ct. App. 1997).

\(^{1064}\) Id. at 30.

\(^{1065}\) Id.
required showing without evidence; therefore, the trial court should not have set the bond without an evidentiary hearing.\textsuperscript{1066}

XXVI. Taxes

\textit{Alachua County v. Adams.}\textsuperscript{1067} At issue was the “validity of a special act permitting Alachua County to use tax revenues raised under a general law for a purpose not enumerated in . . . that general law.”\textsuperscript{1068} Section 212.055(2) of the \textit{Florida Statutes}, a general law, “authorizes Florida counties to levy an infrastructure surtax and use the proceeds” for enumerated purposes.\textsuperscript{1069} The “proceeds . . . nor any interest accrued thereto shall be used for operational expenses of any infrastructure.”\textsuperscript{1070} In addition, chapter 94-487, \textit{Laws of Florida}, expanded section 212.055(2) “to allow Alachua County and its municipalities to use the surtax revenues ‘for operation and maintenance of parks and recreation programs and facilities established with proceeds of the surtax.’”\textsuperscript{1071}

Alachua County and its municipalities entered an agreement under the two statutes “provide for the dedication of the use of Surtax proceeds by the County and all municipalities within the County . . . provision and operation of recreation programs in the implementation of a countywide recreation partnership.”\textsuperscript{1072} Adams, as a taxpayer, sought an injunction and claimed chapter 94-487 was unconstitutional.\textsuperscript{1073} The lower court agreed and Alachua County appealed.\textsuperscript{1074}

Alachua County relied upon \textit{Rowe v. Pinellas Sports Authority.}\textsuperscript{1075} In \textit{Rowe}, the county was pursuing the purpose of building a stadium specifically authorized by general law.\textsuperscript{1076} The court recognized that the same situation was not occurring here.\textsuperscript{1077} Alachua County was attempting, under chapter

\begin{itemize}
  \item 1066. \textit{Id.}
  \item 1067. 677 So. 2d 396 (Fla. 1st Dist. Ct. App. 1996).
  \item 1068. \textit{Id.} at 397.
  \item 1069. \textit{Id.}
  \item 1070. \textit{Id.}
  \item 1071. \textit{Id.}
  \item 1072. \textit{Adams}, 677 So. 2d at 397.
  \item 1073. \textit{Id.}
  \item 1074. \textit{Id.}
  \item 1075. 461 So. 2d 72 (Fla. 1984).
  \item 1076. \textit{Adams}, 677 So. 2d at 397. \textit{See also} \textit{Rowe v. Pinellas Sports Auth.}, 461 So. 2d 72, 74 (Fla. 1984).
  \item 1077. \textit{Adams}, 677 So. 2d at 398.
\end{itemize}
94-487, to use tax revenues for the specific objective of maintaining an infrastructure which was not authorized by general law.\textsuperscript{1078} When a taxing statute specifically sets out the ultimate use for revenues collected pursuant to the statute, a change in the use must be considered a change in the tax.\textsuperscript{1079} Appellants also contend there was a distinction between the power to tax and the power to spend and that only the power to tax must be authorized by general law.\textsuperscript{1080} The court held this distinction to be unpersuasive.\textsuperscript{1081} The First District Court of Appeal affirmed the lower court and held chapter 94-487 to be an unconstitutional special act.\textsuperscript{1082} 

\textit{Appleby v. Nolte.}\textsuperscript{1083} The Fourth District Court of Appeal reversed a final judgment entered in favor of the Indian River County Property Appraiser.\textsuperscript{1084} The appellants contested the assessed value of their homes for ad valorem tax purposes.\textsuperscript{1085} They were residents and equity members entitled to full golf privileges of John’s Island Club, a Florida corporation.\textsuperscript{1086} Full golf members, as with the other equity members with lesser privileges, would receive a proportionate share of property and assets at the club’s dissolution after outstanding debts were satisfied. When the property was appraised, the appraiser considered the type of membership when determining appraisal value.\textsuperscript{1087} Individuals owning homes with full golf memberships were assessed forty percent higher than all other residents having lesser club privileges. At trial, appellants argued that increasing the value assessment of their homes based on the full golf membership was an inappropriate ad valorem tax on intangible property.\textsuperscript{1088} The trial court disagreed and held that the ability to obtain the full golf membership added value to the property which was “reflected in the sales price.”\textsuperscript{1089} Appellants brought the same issue before the Fourth District Court of Appeal. The Florida Constitution prohibited “counties from levying ad valorem taxes on intangible personal property.”\textsuperscript{1090} Section 192.001(11)(b) of

\begin{itemize}
\item \textsuperscript{1078} Id. at 398.
\item \textsuperscript{1079} Id.
\item \textsuperscript{1080} Id.
\item \textsuperscript{1081} Id.
\item \textsuperscript{1082} \textit{Adams}, 677 So. 2d at 398.
\item \textsuperscript{1083} 682 So. 2d 1140 (Fla. 4th Dist. Ct. App. 1996).
\item \textsuperscript{1084} Id. at 1140.
\item \textsuperscript{1085} Id.
\item \textsuperscript{1086} Id.
\item \textsuperscript{1087} Id. at 1141.
\item \textsuperscript{1088} \textit{Appleby}, 682 So. 2d at 1141.
\item \textsuperscript{1089} Id.
\item \textsuperscript{1090} Id. \textit{See also} FLA. CONST. art VII, § 9(a) (1968).
\end{itemize}
the *Florida Statutes* defined intangible personal property as ""‘money, all evidences of debt owed to the taxpayer, all evidences of ownership in a corporation or other business organization having multiple owners.’"’

Likewise ""‘[m]embership [c]ertificates’ fit the above definition."’ The appraiser had based his assessment "‘partially on the value of the real property, and partially on evidence of ownership in a corporation’ which violated article VII, section 9 of the Florida Constitution.

An ad valorem tax can not be based on the fact that appellants possessed scarce full golf memberships.

In addition, the appraiser based the assessments on who owned the property. If the golf member owned a residential unit, the assessment would be one amount. However, a member who does not golf, owning the same unit, would be assessed a lower amount. The Supreme Court of Florida has previously held this was not a valid criterion for valuing property.

*Canaveral Port Authority v. Department of Revenue.*

Justice Wells wrote the court’s opinion with Chief Justice Kogan, and Justices Grimes and Harding concurring, and with Justice Overton dissenting with an opinion with which Justices Shaw and Anstead concurred.

The case at bar conflicted with the opinion in *Sarasota-Manatee Airport Authority v. Mikos.*

*Canaveral* challenged Brevard County’s authority to assess ad valorem taxes pursuant to section 196.199(4) of the *Florida Statutes* “on the fee interest of real property owned by Canaveral and leased to private entities engaged in nongovernmental activities.” Canaveral contended it was not subject to taxation “because it was a political subdivision” or otherwise, “exempt from taxation pursuant to” section 315.11 of the *Florida Statutes*.

The trial court found, in accord with the *Sarasota-Manatee* court, that *Canaveral* was a political subdivision and was immune from ad valorem taxation.

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1091. *Appleby,* 677 So. 2d at 1142 (quoting FLA. STAT. § 192.001(11) (1993)).
1092. *Id.* at 1142.
1093. *Id.*
1094. *Id.*
1095. *Id.*
1096. *Appleby,* 677 So. 2d at 1142. See also *Interlachen Lake Estates, Inc. v. Snyder,* 304 So. 2d 433 (Fla. 1973).
1097. 690 So. 2d 1226 (Fla. 1996).
1098. *Id.* at 1230.
1099. *Id.* at 1227. See also *Sarasota-Manatee Airport Auth. v. Mikos,* 605 So. 2d 132 (Fla. 2d Dist. Ct. App. 1992).
1100. *Canaveral,* 690 So. 2d at 1227. See also *FLA. STAT. § 196.199(4) (1991).*
1101. *Canaveral,* 690 So. 2d at 1227. See also *FLA. STAT. § 315.11 (1991).*
1102. *Canaveral,* 690 So. 2d at 1227.
Court of Florida agreed that Canaveral’s fee simple interest in property was not immune from taxation.\textsuperscript{1103} Immunity from taxation must be kept within limited bounds.\textsuperscript{1104} As such, only the state and those entities expressly recognized in the Florida Constitution as performing a function of the state comprised “the state” for purposes of tax immunity.\textsuperscript{1105} Since Canaveral did not meet the level as to be declared “the state,” Canaveral must be taxed.\textsuperscript{1106}

The court in Sarasota-Manatee held that immunity from taxes was based upon whether an entity was more like a county than a municipality.\textsuperscript{1107} This court rejected that view.\textsuperscript{1108} Immunity does not flow from a judicial determination that the entity is like a county.\textsuperscript{1109} This court also rejected the Sarasota decision that the Sarasota-Manatee Airport Authority was a “political subdivision” as declared by the legislature.\textsuperscript{1110} The Sarasota-Manatee court recognized that the Florida Constitution did not allow the legislature to decide which entities were immune from ad valorem taxation.\textsuperscript{1111}

Since Canaveral was not immune from taxation, Canaveral also argued in the alternative that it was exempt from ad valorem taxation under section 315.11 of the Florida Statutes.\textsuperscript{1112} Section 315.11 provided a statutory exemption from taxes for port authorities and their properties.\textsuperscript{1113} Canaveral contended that sections 196.001 and 196.199 of the Florida Statutes superseded section 315.11 and made Canaveral’s leased property taxable to the extent the property was not subject to governmental use.\textsuperscript{1114} Section 196.001 of the Florida Statutes states that all property is subject to taxation unless expressly exempted.\textsuperscript{1115} Section 196.001 establishes exemptions that apply to Canaveral property leased to non-governmental agencies.\textsuperscript{1116}

\textsuperscript{1103} Id.
\textsuperscript{1104} Id.
\textsuperscript{1105} Id. at 1228.
\textsuperscript{1106} Id.
\textsuperscript{1107} Canaveral, 690 So. 2d at 1228. See also Sarasota-Manatee, 605 So. 2d 132, 133 (Fla. 2d Dist. Ct. App. 1992).
\textsuperscript{1108} Canaveral, 690 So. 2d at 1228.
\textsuperscript{1109} Id.
\textsuperscript{1110} Id. See also Sarasota-Manatee, 605 So. 2d at 133.
\textsuperscript{1111} Canaveral, 690 So. 2d at 1228.
\textsuperscript{1112} Id.
\textsuperscript{1113} Id. See also FLA. STAT. § 315.11 (1991).
\textsuperscript{1114} Canaveral, 690 So. 2d at 1229.
\textsuperscript{1115} Id. See also FLA. STAT. § 196.001 (1991).
\textsuperscript{1116} Canaveral, 690 So. 2d at 1229. See also FLA. STAT. § 196.199 (1991).
The Supreme Court of Florida recognized that by the term "authorities" used in sections 196.001 and 196.199(a)(4), "the legislature intended to provide only a limited exemption for fee interests in port authority property."\(^{1117}\) This court construed section 315.11 of the Florida Statutes with sections 196.001 and 196.199 and held that "section 315.11 provide[d] an exemption only when port authority property [was] being used for a purpose which [was] specifically set forth in section 196.199(2) and (4)."\(^{1118}\) As long as the property was being used for some other purpose not set out in the statute, the fee interest would be taxable.\(^{1119}\)

In conclusion, "the fee interest in the property at issue [was] not exempt from . . . taxation because the property [was] leased to a nongovernmental entity for a nongovernmental [purpose]."\(^{1120}\) In addition, property could only be taxed on its total appraised value.\(^{1121}\) The leased property was not to be taxed twice by assessing both the leasehold and the fee in a way that the value of the leasehold included the fee, or that the value of the fee, included the leasehold. The two must be taxed separately.

Subsequently, Chief Justice Kogan and Justices Grimes, Harding, and Wells concurred as to the petitioner's motion for rehearing and Justices Overton, Shaw, and Anstead dissented.\(^{1122}\) Chief Justice Kogan and Justices Overton, Shaw, Grimes, Harding, Wells, and Anstead concurred as to the respondent's motion for clarification.\(^{1123}\) Motions for rehearing and clarification filed on behalf of both parties were considered and denied.\(^{1124}\)

**Florida Department of Revenue v. Pirtle Construction Co.**\(^{1125}\) This court reversed the trial court's decision and construed section 199.185(1)(d) of the Florida Statutes to mean Pirtle's receivables were not exempt from intangible tax.\(^{1126}\) Pirtle, a general contractor, established construction contracts with the school board for the 1988 and 1991 tax periods. Pirtle claimed exempt intangibles as accounts receivable on his books and records. Later, Pirtle applied to the Department of Revenue for a refund of the intangible taxes

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1117. Canaveral, 690 So. 2d at 1229.
1118. Id.
1119. Id.
1120. Id. at 1229-30.
1121. Id. at 1230.
1122. Canaveral, 690 So. 2d at 1230.
1123. Id.
1124. Id.
1125. 690 So. 2d 709 (Fla. 4th Dist. Ct. App. 1997).
1126. Id. at 710. See also FLA. STAT. § 199.185(1)(d) (1991).
paid, and the Department declined. The Circuit Court ruled in Pirtle’s favor.1127

Pirtle relied on section 199.185(1)(d) of the Florida Statutes which stated, “(1) The following intangible personal property shall be exempt from the annual and nonrecurring taxes imposed by this chapter: . . . (d) Notes, bonds, and other obligations issued by the State of Florida . . . ”1128 Pirtle contended the accounts receivables are “other obligations” that are exempt. The court recognized that the construction of the words “other obligations issued” was warranted.1129 The court looked to legislative intent and turned to “the doctrine of ejusdem generis,” a “tenet of statutory construction that helps discern legislative intent.”1130 In addition, the court stated that “where the enumeration of specific things is followed by a more general word or phrase, the general phrase is construed to refer to a thing of the same nature as the preceding specific things.”1131

Therefore, “because the general language ‘and other obligations’ follow[ed] the specific enumeration of the words ‘note’ and ‘bond,’ the principle of ejusdem generis” allowed the court to properly interpret the statute.1132 Also, “[t]he Legislature could not have intended ‘other obligations issued’ . . . to include accounts receivable arising from a government contract because those accounts receivable are not of the same nature of notes and bonds.”1133 Once the government issues notes or bonds, full faith and credit is pledged for later payment.1134 This is not the case when a construction contract is entered.1135

The court compared the language here to the statutory language appearing in Smith v. Davis.1136 In Smith, “‘all stocks, bonds, Treasury notes, and other obligations of the United States’” were exempt.1137 The Smith court applied ejusdem generis and held “other obligations” referred only to obligations or securities of the same type as those specifically enumerated

1127. Pirtle, 690 So. 2d at 710.
1128. Id. at 711 (quoting Fla. Stat. § 199.195(1)(d) (1991)).
1129. Id.
1130. Id.
1131. Id. (citing Hanna v. Sunrise Recreation, Inc., 94 So. 2d 597, 599-600 (Fla. 1957)).
1132. Pirtle, 690 So. 2d at 711.
1133. Id. at 712.
1134. Id.
1135. Id.
1136. Id. See also Smith v. Davis, 323 U.S. 111, 116 (1944).
1137. Pirtle, 690 So. 2d at 712 (quoting Smith v. Davis, 323 U.S. 111, 116 (1944)).
such as stocks, bonds, and Treasury notes.\textsuperscript{1138} Legislative intent was to limit exemptions only to government obligations needed to secure credit to carry on necessary government functions.\textsuperscript{1139} Since the language was nearly identical to that in the \textit{Smith} case, the result should be the same here.\textsuperscript{1140} The court reversed and remanded.\textsuperscript{1141}

\textit{Leon County Educational Facilities Authority v. Bert Hartsfield.}\textsuperscript{1142} Justice Grimes wrote the court’s opinion and Chief Justice Kogan and Justices Overton, Shaw, Harding, Wells, and Anstead concurred.\textsuperscript{1143} Leon County Educational Facilities Authority was organized to own, lease, and finance higher educational facilities.\textsuperscript{1144} Authority entered into a lease with SRH, Inc. where SRH would acquire, construct, and equip the dormitory and food service project and then lease it to Authority in exchange for rent. Authority was responsible for maintenance, insurance, and any taxes assessed against the property.\textsuperscript{1145} Although the project received a tax exemption in 1992, it was denied exemption in 1993.\textsuperscript{1146} Authority and SRH sued the appraiser for declaratory relief and the trial court found in favor of the property appraiser.\textsuperscript{1147}

The First District Court of Appeal affirmed based on sections 196.192 and 196.199 of the \textit{Florida Statutes}.\textsuperscript{1148} Authority was not entitled to a tax exemption because SRH held legal title to the project.\textsuperscript{1149} This court recognized the concept of equitable ownership in ad valorem taxation and pointed out cases illustrating such.\textsuperscript{1150} The court stated that “the doctrine... should be applied evenhandedly regardless of whether a tax is being imposed or an exemption being claimed.”\textsuperscript{1151} The court pointed out the issue as turning on whether the Authority has equitable ownership of the project.\textsuperscript{1152} The court believed “the project [was] exempt from taxation because the

\begin{itemize}
\item[1138.] \textit{Smith}, 323 U.S. at 117.
\item[1139.] \textit{Pirtle}, 690 So. 2d at 712.
\item[1140.] \textit{Id.}
\item[1141.] \textit{Id.}
\item[1142.] 698 So. 2d 526 (Fla. 1997).
\item[1143.] \textit{Id.} at 530.
\item[1144.] \textit{Id.} at 527.
\item[1145.] \textit{Id.}
\item[1146.] \textit{Id.}
\item[1147.] \textit{Leon}, 698 So. 2d at 527.
\item[1148.] \textit{Id.}
\item[1149.] \textit{Id.} at 528.
\item[1150.] \textit{Id.} at 528-29. \textit{See Bancroft Inv. Corp. v. City of Jacksonville, 27 So. 2d 162 (Fla. 1946); Hialeah, Inc. v. Dade County, 490 So. 2d 998 (Fla. 3d Dist. Ct. App. 1986).}
\item[1151.] \textit{Leon}, 698 So. 2d at 529.
\item[1152.] \textit{Id.}
\end{itemize}
Authority [was] the equitable owner."\textsuperscript{1153} Section 243.33 of the \textit{Florida Statutes} was written with the intent to exempt a project operated and maintained by an authority under taxation provisions.\textsuperscript{1154} The legislature would not intend property being used by the Authority to be denied a tax exemption because it did not hold legal title.\textsuperscript{1155} SRH held legal title to facilitate financing for the project, not to make profit. It was insignificant that the Authority did not automatically gain legal title at the leasehold's end.\textsuperscript{1156}

The amendment to section 196.192(1) of the \textit{Florida Statutes} which added the words ""owned by an exempt entity"" did not prevent the Authority, as equitable owner, from obtaining a tax exemption.\textsuperscript{1157} Section 196.011(1) also did not prevent a tax exemption for the project.\textsuperscript{1158} This section supports a conclusion that the owner of property for the purpose of obtaining a tax exemption could be one who has been determined to be an equitable owner.\textsuperscript{1159} The facts of this case forced the court to hold that the project was not subject to ad valorem taxation because the Authority held all the benefits and burdens of ownership.\textsuperscript{1160}

\textit{Palmer Trinity Private School v. Robbins.}\textsuperscript{1161} Palmer Trinity appealed an order granting final summary judgment in favor of Robbins, the property appraiser of Dade County.\textsuperscript{1162} In 1988, Palmer Trinity applied for an educational tax exemption from ad valorem taxes for the private school.\textsuperscript{1163} After the application was denied, Palmer petitioned the Property Appraisal Adjustment Board who approved the exemption at the special master's recommendation.\textsuperscript{1164} On August 25, 1989, the property appraiser filed suit challenging the exemption, but the circuit court later said no exemption would apply.\textsuperscript{1165} The Third District Court of Appeal reversed the circuit court's decision and found that the private school was qualified to receive the educational exemption.\textsuperscript{1166}

\begin{footnotesize}
\begin{enumerate}
\item[1153.] \textit{Id.}
\item[1154.] \textit{Id.}
\item[1155.] \textit{Id.}
\item[1156.] \textit{Leon, 698 So. 2d at 529.}
\item[1157.] \textit{Id. at 530 (quoting FLA. STAT. §196.192(1) (1988)).}
\item[1158.] \textit{Id.}
\item[1159.] \textit{Id.}
\item[1160.] \textit{Id.}
\item[1161.] 681 So. 2d 809 (Fla. 3d Dist. Ct. App. 1996).
\item[1162.] \textit{Id. at 809.}
\item[1163.] \textit{Id.}
\item[1164.] \textit{Id.}
\item[1165.] \textit{Id.}
\item[1166.] \textit{Palmer, 681 So. 2d at 809.}
\end{enumerate}
\end{footnotesize}
Section 196.011 of the Florida Statutes required the property appraiser to mail a renewal application for exemption on or before February 1 "once an original application for tax exemption had been granted." The appraiser failed to send a renewal application to Palmer for 1989 because the appraiser believed the renewal application was only for those granted a tax exemption in the previous year and not to those whose exemption was still in litigation at the appeal level. The appraiser did mail notice of the proposed tax assessment to Palmer and later mailed the actual bill.

While litigating, Palmer sold the property to the Board of Trustees of the State of Florida. Palmer agreed to pay the 1989 ad valorem taxes to release the tax lien. Palmer, not receiving a refund for the 1989 taxes, brought suit challenging the assessment of ad valorem taxes for the 1989 year. The circuit court held it did not have jurisdiction because Palmer had not filed the action contesting assessment within sixty days from the date the assessment was certified for collection. Section 194.171(2) of the Florida Statutes provided that:

No action shall be brought to contest a tax assessment after 60 days from the date the assessment being contested is certified for collection under section 193.122(2), or after 60 days from the date a decision is rendered concerning such assessment by the property adjustment board if a petition contesting the assessment had not received final action by the property appraisal adjustment board prior to extension of the roll under section 197.323.

Palmer wanted the court to follow Chihocky v. Crapo and hold that the failure to send an exemption renewal application was equal to the failure of the property appraiser to publish notice of the certification of the tax roll as required by statute. Therefore, the sixty-day period should be tolled. The Third District Court of Appeal disagreed.

1167. Id. at 810 (quoting Fla. Stat. § 196.011(6) (1995)).
1168. Palmer, 681 So. 2d at 810.
1169. Id.
1170. Id.
1171. Id.
1172. Id.
1173. Palmer, 681 So. 2d at 810.
1174. Id. (quoting Fla. Stat. § 194.171(2) (1988)).
1176. Palmer, 681 So. 2d at 810.
1177. Id. See also Chihocky v. Crapo, 632 So. 2d 230 (Fla. 1st Dist. Ct. App. 1994).
1178. Palmer, 681 So. 2d at 810.
failed to comply with statutory notice. Chihocky was never extended to cases where the taxpayer received actual notice of the date of the certification of the tax roll. Here, the failure to send the renewal application did not affect Palmer’s ability to challenge the denial of the exemption because it had actual notice of the date of the certification of the tax roll. The action to challenge the tax assessment took place two and a half years later. The Property Appraisal Adjustment Board’s final decision in the 1988 litigation was in July, 1989, and the property appraiser appealed on August 25, 1989. When the sixty-day period expired on December 18, 1989, Palmer must have known it was not certain the exemption would be approved. The statute of nonclaim was strictly enforced, and as such, no exception would be made in this case.

Tamar 7600, Inc. v. Orange County. The Fifth District Court of Appeal reversed the dismissal of the entire case and directed the lower court to permit Tamar to amend the complaint to allege claims such as those set forth in Counts II-VI, and X. This case involved Orange County’s assignment of a one percent tourist tax pursuant to Florida’s Local Option Tourist Development Act. The statute authorized the county to impose taxes on short term rentals of living quarters within the county for certain purposes unless an exemption applied. The tourist tax was enacted to get funds for the construction of a baseball stadium. The letter of intent executed obligated Orange County and the City to work with baseball owners in an attempt to bring major league baseball to the Orlando area. If the attempt was successful, Orange County and the City were to enter a baseball stadium lease within the parameters of a “Summary of Expected Lease Terms.”

1179. Id.
1180. Id.
1181. Id.
1182. Id.
1183. Palmer, 681 So. 2d at 811.
1184. Id.
1185. Id.
1186. 686 So. 2d 790 (Fla. 5th Dist. Ct. App. 1997).
1187. Id. at 793.
1188. Id. at 790. See also Fla. Stat. § 125.0104(3)(l) (1993).
1189. Tamar, 686 So. 2d at 790 (citing Fla. Stat. § 125.0104(3)(1) (1993)).
1190. Id.
1191. Id.
1192. Id. at 791.
The "Summary of Expected Lease Terms" required Orange County to construct the stadium while baseball owners would retain revenues from the ballpark.\footnote{Id.} However, the owners were to assume all responsibility for facility operations. In addition, when the lease was up, the baseball owners had a first option to purchase the ballpark. The County's Board of Commissioners approved a "Revised Summary of Expected Lease Terms" which kept the earlier terms and amended them.\footnote{Tamar, 686 So. 2d at 791.} The Board adopted the resolution imposing the tourist tax and adopted a Budget Resolution which stated how tax revenue would be spent. Tamar filed suit challenging the legality of the tourist tax. The lower court granted Orange County's motion to dismiss.\footnote{Id.} Hotel Group filed a motion to amend the amended complaint.\footnote{Id. at 792.}

This court recognized the lower court's refusal to allow any amendment and the dismissal of the entire suit was erroneous in light of Tamar's raising the issue concerning the county's power to assess tax and then accrue the money to fund a project not permitted under section 125.0104(3)(I) of the Florida Statutes.\footnote{Id. at 793.} The court concluded that the county could not assess and accrue tax money for the purpose of spending it on a ballpark under a specific agreement and then dictate that the taxpayer had no right to challenge the matter.\footnote{Id.} If the county embarked on the enterprise, there must be a present right to challenge its legality since the legality would affect the existence of the tax.\footnote{Id.}

\textit{TEDC/Shel City, Inc. v. Robbins.} The Third District Court of Appeal affirmed final summary judgment denying the taxpayers ad valorem tax exemption.\footnote{690 So. 2d 1323 (Fla. 3d Dist. Ct. App. 1997).} Tacolcy acquired property from Dade County and accepted a restrictive deed obligating it to build low income housing controlled by rental regulatory agreements. The agreements mandated that Tacolcy would operate the buildings as low income housing for thirty years. If the deed restriction was violated, the property reverted to Dade County.\footnote{Id. at 1323.}

The taxpayers filed an application for a 1991 ad valorem tax charitable exemption. The application was denied and taxpayers appealed to the Dade County Value Adjustment Board ("VAB") which granted the

\begin{itemize}
  \item 1193. Id.
  \item 1194. Tamar, 686 So. 2d at 791.
  \item 1195. Id.
  \item 1196. Id. at 792.
  \item 1197. Id. at 793.
  \item 1198. Id.
  \item 1199. Tamar, 686 So. 2d at 793.
  \item 1200. 690 So. 2d 1323 (Fla. 3d Dist. Ct. App. 1997).
  \item 1201. Id. at 1323.
  \item 1202. Id.
\end{itemize}
petition. The property appraiser appealed. The next year, taxpayers again sought a charitable exemption for ad valorem tax, and it was again denied by the property appraiser. However, the VAB granted a seventy-five percent exemption for the 1992 tax year. The property appraiser appealed and the two appeals from the 1991 and 1992 actions were consolidated.

The issue before this court was "[w]hether a federal income tax credit inuring to a taxpayer is a benefit that disqualifies a taxpayer from exempt entity status under section 196.195(3), Florida Statutes (1991), and therefore disqualifies the taxpayer from receiving an ad valorem tax charitable exemption." This court held the entity receiving such a credit did not qualify for exempt entity status. In addition, to receive ad valorem tax exemption, the property must be "owned by an exempt entity and used exclusively for exempt purposes." Section 196.195 of the Florida Statutes gives criteria to determine whether an entity is a nonprofit venture eligible for exemption. Here, the question centered on the requirement that taxpayers "affirmatively show that no part of the subject property, or the proceeds of the sale, lease, or other disposition thereof, will inure to the benefit of its members, directors, or officers or any person or firm operating for profit or for a nonexempt purpose."

"The plain language of section 196.195(3) require[d] an exemption applicant to demonstrate that the entity . . . was not receiving any benefits from the property." Even though the taxpayers did not realize profits from the property, the receipt of a federal income tax credit on behalf of the partners was a benefit as based on its plain and ordinary meaning. Since the taxpayers were receiving a benefit in the form of an income tax credit, they were not exempt entities allowed to qualify for the exemption from ad valorem taxation.

Terra Mar Capital, Inc. v. Auxier. The Fourth District Court of Appeal affirmed the trial court's setting aside of a tax deed because proper

1203. Id. at 1324.
1204. Id.
1205. Robbins, 690 So. 2d at 1324.
1206. Id.
1207. Id. (quoting Fla. Stat. § 196.192(1) (1991)).
1209. Robbins, 690 So. 2d at 1324 (quoting Fla. Stat. § 196.195(3) (1991)).
1210. Id. at 1325.
1211. Id.
1212. Id.
1213. 694 So. 2d 779 (Fla. 4th Dist. Ct. App. 1997).
notice was not received.\textsuperscript{1214} An executors deed was recorded showing
ownership of property by Janice Fay Underdown Auxier, Patricia Ann
Underdown Smith, and Charlotte Underdown (deceased). The property was
subject to a lease term of ninety-nine years and was used as a parking lot.\textsuperscript{1215}

Section 197.522(1)(a) of the \textit{Florida Statutes} requires notice be given to
an owner.\textsuperscript{1216} In turn, section 197.502(4)(a) of the \textit{Florida Statutes} states
notice must be sent to "[a]ny legal title holder of record if the address of the
owner appears on the record of conveyance of the lands to the owner."\textsuperscript{1217} Here, appellees were not given proper notice because the recorded deed gave
the full names of the three owners individually with their mailing addresses,
while the notice was mailed to a Fort Lauderdale address to the name
"Underdown Smith & Auxier."\textsuperscript{1218} Since it was likely that all owners did not
reside at the same address, notice must be given to each owner. No notice
was given in this case.\textsuperscript{1219}

\textit{Washington Square Corp. v. Wright}.\textsuperscript{1220} The First District Court of
Appeal affirmed the circuit court's final order of dismissal because the failure
to pay ad valorem taxes in succeeding years extinguished the right to maintain
a contest, unless the taxpayer sought timely review of every assessment as to
which taxes were not paid in full.\textsuperscript{1221} Washington Square Corporation
("Corporation") owned real property in Washington County. The Corporation
petitioned Washington's Property Appraisal Adjustment Board seeking
review and adjustment of the ad valorem tax assessment received for the 1993
year. After the Board denied review, the Corporation paid the amount owed
and filed a complaint seeking an adjustment of the appraisal attaching the
receipt of the paid tax amount to the complaint. The Corporation also paid
the assessments for the years 1994 and 1995 which were less than the 1993
year that was petitioned.\textsuperscript{1222}

The issue before the court was "what the statute require[d] to prevent
dismissal of a judicial challenge to an assessment, when duly initiated court
proceedings have not concluded by the time taxes fall due in subsequent
year(s)."\textsuperscript{1223} Section 194.171 of the \textit{Florida Statutes} provides that no tax
assessment can be contested unless all the taxes due in the subsequent years after the action is brought are timely paid.\textsuperscript{1224}

The circuit court concluded that the Corporation’s failure to pay ad valorem taxes in full for the 1994 and 1995 taxable years required dismissal of its complaint challenging the 1993 Board’s assessment.\textsuperscript{1225} This court recognized that the Corporation, after it paid in good faith estimates of the 1994 and 1995 tax assessments, could obtain judicial review of them by filing suits within the time period allowed.\textsuperscript{1226} However, the time expired. Thus, “‘[n]o action shall be brought to contest a tax assessment after [sixty] days from the date the assessment being contested is certified for collection’” unless the petition is pending before the Board when the assessment is certified for collection.\textsuperscript{1227}

Once the time to bring the contest had passed, the tax assessments for the 1994 and 1995 years were no longer subject to adjustment.\textsuperscript{1228} The full amount was owed. Since judicial review for the 1994 and 1995 years were not timely sought and the full amount was not paid, the Corporation’s complaint challenging the 1993 assessment must be dismissed.\textsuperscript{1229}

\textit{Westring v. Florida}.\textsuperscript{1230} The Third District Court of Appeal affirmed the lower court’s dismissal of the action on the ground that Westring did not file for a refund of a documentary stamp tax paid at the time a quitclaim deed conveying title to the home was executed.\textsuperscript{1231} In 1994, Westring and his wife at the time executed a quitclaim deed conveying title to their home from the entireties back to Westring individually (provided by marital settlement agreement).\textsuperscript{1232} Westring paid a documentary stamp tax even though no money changed hands and the outstanding mortgage was not affected. Westring sued individually and as the representative of a class of similar taxpayers. Westring sought declaratory and injunctive relief and a refund of the tax. contending that it was invalidly imposed.\textsuperscript{1233} The certified question is whether a plaintiff challenging the validity of a specific tax must first request a refund before a court can exercise jurisdiction over the action.\textsuperscript{1234}

\begin{itemize}
  \item \textsuperscript{1224} \textit{Id. See also} \textit{Fla. Stat.} § 194.171 (1995).
  \item \textsuperscript{1225} \textit{Wright}, 687 So. 2d at 1375.
  \item \textsuperscript{1226} \textit{Id.}
  \item \textsuperscript{1227} \textit{Id.} (citing \textit{Fla. Stat.} § 194.171(2) (1993)).
  \item \textsuperscript{1228} \textit{Id.}
  \item \textsuperscript{1229} \textit{Id.}
  \item \textsuperscript{1230} 682 So. 2d 171 (Fla. 3d Dist. Ct. App. 1996).
  \item \textsuperscript{1231} \textit{Id.} at 171-72.
  \item \textsuperscript{1232} \textit{Id.} at 171.
  \item \textsuperscript{1233} \textit{Id.} at 172.
  \item \textsuperscript{1234} \textit{Id.}
\end{itemize}
Westring is required to file a claim for a refund of the tax pursuant to section 215.26 of the *Florida Statutes* before seeking jurisdiction of the circuit court. The nature of nonclaim statutes is to preclude a right of action unless and until the claim is filed within the time period designated by statute. Since Westring was still within the three-year-statutory nonclaim period specified by section 215.26 of the *Florida Statutes*, the district court dismissed Westring's complaint without prejudice so that Westring could apply for a refund in accordance with the statute.

**XXVII. CONCLUSION**

The foregoing survey of cases and legislation presents selected materials of significance to real estate professionals. Although there seems to be no consistent pattern to the case law and legislative development, the survey is useful in maintaining contact with the progression of real property law.

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1236. *Westring*, 682 So. 2d at 172.
1237. *Id.*
First Principles for Constitution Revision
The Honorable Daniel Webster*
Donald L. Bell**

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I. INTRODUCTION

Alexis de Tocqueville, the great social observer and political scientist, arrived in the United States in 1831,1 only three years after Andrew Jackson, the populist, former military Governor of Florida, was elected President of

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1. I ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Phillips Bradley ed., Alfred A. Knopf 1945) at epilogue (1835).
the United States. Tocqueville found a nation of people "seeking with almost equal eagerness material wealth and moral satisfaction; heaven in the world beyond, and well-being and liberty in this one." This was the nature of the people who only a few years later adopted Florida's first constitution.

Floridians today still seek those things our predecessors pursued with such vigor: freedom of conscience, financial security, and liberty.

In an effort to assure the continued protection of these values, the framers of the 1838 Florida Constitution included a strong entreaty to those who read it a century and a half later. They noted that "frequent recurrence to fundamental principles, is absolutely necessary, to preserve the blessings of liberty." Like the framers of other state constitutions, the framers of Florida's original constitution understood that over time all human institutions, including constitutions, are subject to potentially harmful changes, misunderstandings, and misinterpretations. They believed that it was necessary to periodically revisit the reasons for creating a constitution in order to assure its continued vitality. As Florida pursues the task of

2. See ALLEN MORRIS, THE FLORIDA HANDBOOK 1995-1996, at 323 (1994). After he became President of the United States, Jackson continued to directly influence the philosophy of government in Florida through, among other things, the placement of his friends as state officers. Id. at 324-27. For example, Jackson played a prominent role in advancing the political careers of all five of the men who served as Territorial Governors of Florida. Id. William Pope DuVal, the first territorial Governor of Florida, was reappointed to that office by Jackson, and Florida's second Territorial Governor, John Henry Eaton, was a prominent member of Jackson's Cabinet. Id. at 324. Territorial Governor Richard Keith Call was a soldier under Jackson and was a close enough friend to have been married in Jackson's home. Id. at 325-26. Florida's fourth Territorial Governor, Robert Raymond Reid, who was serving as Territorial Governor when the Florida Constitution of 1838 was created, got his start in Florida politics when President Jackson appointed him United States Judge of East Florida. MORRIS, supra at 326. Even Florida's sixth Territorial Governor, John Branch, who did not take office until 1844, had previously served as Jackson's Secretary of the Navy. Id. at 327.

3. I TOCQUEVILLE, supra note 1, at 45.

4. Tocqueville's arrival in this country in 1831 preceded the drafting of Florida's first constitution by only seven years. Id. at epilogue. See generally FLA. CONST. of 1838.


6. With regard to a similar "frequent recurrence" provision in the North Carolina Constitution, Bilionis quotes William Hooper, a North Carolina delegate to the Continental
considering revisions to its constitution, this article is intended to discuss the fundamental principles that led to the creation of the Florida Constitution. It also discusses some of the major features of the Florida Constitution and suggests that its provisions should be examined from a functional perspective to determine whether they adequately serve appropriate constitutional purposes.

II. LESSONS FROM PREVIOUS REVISION COMMISSIONS

The only previous Constitution Revision Commission that has met pursuant to article XI of the Florida Constitution convened in 1978. While the 1978 Commission did not produce amendments acceptable to the public, its review of the constitution was still of some value. The 1978 Commission raised public consciousness with regard to the role of our constitution and its contents. By proposing certain amendments, it also brought particular issues to the forefront of the state's public policy agenda.

Congress in Philadelphia, as having said: "'[i]t is necessary that recurrence should often be had to original principles to prevent those evils which in a course of years must creep in and vitiate every human institution and by insensible gradations at length steal upon the Understanding as part of the original system.'" Bilionis, supra note 5, at 1811 n. 27 (quoting 10 COLONIAL RECORDS OF NORTH CAROLINA 862, 867 (William L. Saunders ed., Raleigh, N.C., J. Daniels, 1890)). Mr. Hooper seems to have believed that returning to fundamental principles would involve some weeding out of inappropriate provisions that had crept into the constitution over the years. Id. In a similar vein, shortly after the 1838 Florida Constitution was adopted, President William Henry Harrison said:

The spirit of liberty is the sovereign balm for every injury which our institutions may receive. On the contrary, no care that can be used in the construction of our Government, no division of powers, no distribution of checks in its several departments, will prove effectual to keep us a free people if this spirit is suffered to decay; and decay it will without constant nurture.


8. While the public rejected the 1978 Commission's proposals, it later rejected a proposed amendment that would have abolished the Constitution Revision Commission. Id. See also HJR 50 (1979) (amending article XI, section 2 of the Florida Constitution, to eliminate the Constitution Revision Commission).

9. See D'ALEMBERTE, supra note 7, at 15-16.

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where they would remain for many years to come.\textsuperscript{10} If the current revision process produces similar results, it will have served a useful purpose.

The 1965 Constitution Revision Commission, which created our current constitution, the Constitution of 1968, was formed through a different process than either the 1978 Commission or the current 1997-98 Commission.\textsuperscript{11} The 1965 Commission also differed from the 1978 Commission in that it did not pursue changes in public policy as a primary objective. Perhaps for that reason, the 1965 Commission was the more successful of the two.\textsuperscript{12}

Those involved in the revision process of the mid-1960s had a general understanding that "the rightful place of the states in the federal system had been overwhelmed by central federal power."\textsuperscript{13} The Commission that produced the Florida Constitution of 1968 sought to address that concern. It also focused on eliminating extraneous provisions thereby returning the constitution to its fundamental purposes.\textsuperscript{14} The Commission succeeded in substantially reducing the size of the Florida Constitution\textsuperscript{15} and in eliminating "much of the obsolete and redundant language."\textsuperscript{16}

10. See \textit{id.} (discussing a number of amendments originally proposed by the 1978 Commission that were rejected by the public, only to later be approved upon submission to the voters by the Legislature). Even so, the 1978 Commission might have been more successful if it had focused more on fundamentals and less on discussing sweeping changes in public policy.

11. See \textit{id.} at 11-15. The 1965 Commission was created by the Legislature; the 1978 and 1997-98 Revision Commissions resulted from a recommendation made by the 1965 Commission that was adopted into the Florida Constitution of 1968. \textit{See id.} at 15-16. While the proposed amendments produced by the 1978 Commission were submitted directly to the voters, the proposed amendments produced by the Commission of 1965 were submitted to the Legislature. The Legislature then substantially revised the proposals during four special sessions. The end product of those efforts was our current constitution, the Florida Constitution of 1968. \textit{Morriss, supra} note 2, at 680.

12. See \textit{generally} \textit{D'Alemberte, supra} note 7, at 14 (discussing the results achieved by the 1965 and 1978 revision commissions). During the late 1960s and early 1970s, many other factors contributed to a favorable climate for changes in public policy and in the state constitution. The public was grappling with the civil rights movement, political issues involving elections and voting rights, military matters relating to the Vietnam War, and criminal law issues such as search and seizure and the death penalty. Many of these issues rose to a level of federal constitutional significance and the public interest in constitutional law was considerably heightened. By 1978, public concern over many of these issues was less intense.

13. See \textit{id.} at 11.


15. See \textit{id.} at 12. Frequent statements to the effect that the 1968 revision reduced the size of the Florida Constitution by half are somewhat misleading. \textit{See D'Alemberte, supra}
Perhaps the current Constitution Revision Commission would be wise to pursue these same objectives on a more modest scale. The Florida Constitution continues to serve as a vehicle for some "largely meaningless but politically popular verbiage." Accordingly, there are still opportunities for positive improvements to the constitution by pursuing the reductionist course that began with the creation of the 1968 Constitution.

Because the Florida Constitution has a strong foundation and generally serves the people well, wholesale revision is probably not advisable. Nonetheless, the revision process offers us, as a society, an opportunity to review the reasons why we have a constitution and to consider whether specific provisions of our constitution are serving their intended purposes. That review may, after all, reveal ways in which the constitution can be improved. To the extent that revision is necessary at all, the objective in revising or amending the constitution should be to adjust the constitution's contents back to its basic purposes, thereby restoring its power to inspire the people and the government.

note 7, at 12. In fact, substantial portions of the Florida Constitution of 1885 were kept in force by including them in history notes and incorporating them by reference into the 1968 Constitution. See, e.g., FLA. CONST. art. VIII, § 6(e) (incorporating by reference the Dade County Home Rule provisions of the Constitution of 1885). The 1997-98 Revision Commission should consider advancing the reductionist intent of the 1968 Commission by proposing amendments that would eliminate the need for these extensive and unwieldy historical notes.

17. Id. at 16.
19. The need for stability in the social order and in the law demands that a constitution be changed infrequently and no more than is necessary to accomplish particular purposes. It has been noted that "stability in constitutional law promotes the formation and maintenance of a social consensus on basic values. It does so by encouraging [legislators] and courts to articulate basic values and to provide moral leadership for society." Michael G. Colantuono, The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change, 75 CAL. L. REV. 1473, 1509 (1987). Because it has the "potential to promote a consensus on social values[,]" stability in constitutional law "contributes to social cooperation and peace." Id. at 1510. Tocqueville noted with some dismay that "[a]lmost all the American constitutions have been amended within thirty years." I TOCQUEVILLE, supra note 1, at 267. He found that "the circumstances which contribute most powerfully to democratic instability, and which admit of the free application of caprice to the most important objects, are here in full operation." I TOCQUEVILLE, supra note 1, at 267.
III. Influences, Origins, and Principles Underlying Florida’s Constitution

No revision of the Florida Constitution should be undertaken without first attempting to understand its nature and the purposes it serves. That understanding must come primarily from an examination of the history of constitutional government. Reviewing history will also provide some perspective with regard to the things that a constitution can and cannot accomplish.

In reviewing our history, it is not difficult to see the effects of constitutional law. As Tocqueville said: “America is the only country in which it has been possible to witness the natural and tranquil growth of society, and where the influence exercised on the future condition of states by their origin is clearly distinguishable.” Having achieved a reasonable level of success at self-government, Floridians should not ignore the principles that contributed to that success.

A. Early Constitutional Theory and Practice

The seeds of modern constitutions can be found in documents as old as the Magna Carta. However, it was in the latter part of the eighteenth

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20. See, e.g., Jonathan M. Hoffman, By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions, 74 Or. L. Rev. 1279, 1282 (1995) (noting that “principled debate over a constitutional provision’s application to contemporary circumstances can begin only after grappling with its historical antecedents”). This does not imply that we are forever bound by “original intent” or to the current contents of the constitution. The people are free to amend the constitution at any time. See discussion infra note 78 (discussing the different methods by which the Florida Constitution can be amended).


22. I Tocqueville, supra note 1, at 28. While he admired the system of government and the people of this country, Tocqueville did not always like what he found here. He abhorred the institution of slavery and his thoughts about slavery caused him to express his admiration for our social system with some reservations. For example, he commented: “I am far from supposing that the American laws are pre-eminently good in themselves: I do not hold them to be applicable to all democratic nations; and several of them seem to me to be dangerous, even in the United States.” Id. at 322.

23. Indeed, the origin of at least one provision of the Florida Constitution, the guarantee of “access to courts” contained in article I, § 21, has been traced directly to a similar provision in the Magna Carta. See D’Alemberte, supra note 7, at 32. As Professor Robert Williams
century that Europeans began to fully articulate the key elements of constitutional theory, such that they could be harmonized into a body of law.24 A common understanding developed that when individuals came together to form governments, they had certain inherent rights that must survive the creation of government.25 These rights could be apprehended through an understanding of morality,26 reason, and logic, and they could not be divested.27 Indeed, governmental infringements of fundamental individual liberties were seen as the potential source for a multitude of threatening conditions.28 Government had come to be seen as a consensual creation of those who sought to be governed.29 It was considered that commented to the organizational session of the 1997-98 Constitution Revision Commission: "[T]he roots of this Commission reach deeply into history. . . ." JOURNAL OF THE 1997-1998 CONSTITUTION REVISION COMMISSION 14, 15 (June 17, 1997) (remarks by Robert F Williams). While the United States Constitution has no “access to courts” provision, a provision similar to the one in the Florida Constitution can be found in the constitutions of 39 states. See Hoffman, supra note 20, at 1279 (citing David Schuman, The Right to a Remedy, 65 TEMP. L. REV. 1197, 1201 & n.25 (1992)). 24. See, e.g., Randy J. Holland, State Constitutions: Purpose and Function, 69 TEMP. L. REV. 989, 990 (1996) (discussing the contributions of philosophers Charles Montesquieu, Jean Jacques Rousseau, John Locke, and common law scholars Edward Coke, Henry deBracton, and William Blackstone to the formation of early constitutions). 25. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54 (Thomas P. Pearson ed., 1952) (1690). 26. Tocqueville simultaneously explained the moral foundation of American law and distinguished it from the recently demised French aristocracy: “To the European, a public officer represents a superior force; to an American, he represents a right. In America, then, it may be said that no one renders obedience to man, but to justice and to law.” 1 TOCQUEVILLE, supra note 1, at 98. 27. See id. at 81-82; see also VA. CONST. art. I, § 1 (stating that “all men . . . have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity”). 28. Interference with any one individual’s inherent right to freedom of conscience, for example, poses a threat to the rights of all individuals in the society. This in turn poses a threat to the society itself. Carried to the extreme, deprivation of liberty can threaten a government’s continued existence. See, e.g., DANIEL WEBSTER, The Reply to Hayne, in THE GREAT SPEECHES AND ORATIONS OF DANIEL WEBSTER 227, 256 (Edwin P. Whipple ed., Fred B. Rothman & Co. 1993) (1870) (explaining that “the people may . . . throw off any government when it becomes oppressive and intolerable . . .”). 29. See LOCKE, supra note 25, at 54 (“men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate and subjected to the political power of another without his own consent”). See also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“Governments are instituted among Men, deriving their just [P]owers from the [C]onsent of the [G]overned . . . .”).
people, as the creators of government, held all political power. They could bestow power on political figures, or withhold power and reserve it for individuals in society as the people deemed appropriate.

Notwithstanding the significance of revolutionary thinking, the translation of constitutional theory into practice did not result from the peaceful contemplation of scholars. Government is believed to have arisen from the desire to fully exploit freedom and the necessity of securing self-protection against others. “Constitutional government,” however, arose much more recently to provide people with protection against other forms of government. As we approach the revision process, we must remember that constitutions resulted from governmental oppression. Oppressive government turned the public mind away from obedience to the laws of kings and toward the laws of reason. Our first responsibility is to assure that our constitution continues to protect against tyranny.

B. Constitutional Developments in the States

For practical reasons, constitutional theory could not immediately be put into full practice in Europe. Perhaps because there was a less existing government to supplant, and the tyrannical monarchies were more remote,
the principles of free self-governance found more fertile soil on this continent. As Tocqueville noted:

The general principles which are the groundwork of modern constitutions, principles which, in the seventeenth century, were imperfectly known in Europe, and not completely triumphant even in Great Britain, were all recognized and established by the laws of New England: the intervention of the people in public affairs, the free voting of taxes, the responsibility of the agents of power, personal liberty, and trial by jury were all positively established without discussion. 37

Because of continued oppression, the founders of our national government ultimately declared and sustained independence for the thirteen individual colonies that then existed. 38 However, it was eleven years later, in 1787, before the states joined together under the common bond of a single national constitution. 39 Before the Federal Constitution was adopted, all of government”). Notwithstanding ultimate English oversight, “colonial Legislatures substantially enacted most laws and adopted policies for the colonies.” See id.

37. I TOCQUEVILLE, supra note 1, at 41.

38. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). This document begins:

We hold these [T]ruths to be self-evident, that all [M]en are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these [R]ights, Governments are instituted among Men, deriving their just [P]owers from the [C]onsent of the [G]overned.

Id.

39. See Clinton, supra note 36, at 891. For the first five years of independence, there was no national document to bind the colonies together. Id. In 1781, the original colonies agreed to adopt the Articles of Confederation which, in reality, operated more like a treaty between the states than a constitution. Id. at 891 n.1. However, many of the states specifically conditioned their ratification of the Constitution on the ultimate adoption of a bill of rights by Congress. See id. at 911-12. Because of the inadequacies in the Articles of Confederation, the states reconvened in a second constitutional congress in 1787 which ultimately led to the adoption of the current United States Constitution in 1789. See generally id. at 891. Others feared that enumerating certain rights would lead to the conclusion that others did not exist. To allay those fears, Congress also adopted the Ninth Amendment which provides that “[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” Clinton, supra note 36, at 911-12 (quoting U.S. CONST. amend. IX). Still others feared that an enumeration of rights in a Federal Constitution might somehow be construed to supplant the states as the primary guarantors of individual liberties. See THE FEDERALIST NO. 84 at 510-14 (Alexander Hamilton) (Clinton Rossiter ed., 1961)
the thirteen states had adopted state constitutions. Tocqueville noted that "[t]he form of the Federal government of the United States was the last to be adopted; and it is in fact nothing more than a summary of those republican principles which were current in the whole community before it existed, and independently of its existence." The state constitutions were entirely unique in the history of government. In addition to the fundamental proposition that all political power is derived from the people, the state constitutions recognized, and for the first time resolved, certain problems inherent in the very idea of government—problems that could threaten the continued existence of self-government if left uncontrolled.

First, the states recognized that consolidations of power are dangerous to the public interest. Having escaped one king, the people of the thirteen

(discussing the reasons why the Constitution did not contain a bill of rights). To resolve this concern and others, a Tenth Amendment was adopted which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

40. See Holland, supra note 24, at 990. In response to a resolution passed by the Continental Congress in May of 1776, and the signing of the Declaration of Independence, all of the former colonies established new constitutional governments, and eight had drafted new constitutions before the end of that year. See id. at 989-90.

41. Tocqueville, supra note 1, at 61; see also Holland, supra note 24, at 991-92 (noting that the framers of the United States Constitution had participated in writing and had lived under 18 state constitutions before they began their work on the Federal Constitution); James G. Exum, Jr., Rediscovering State Constitutions, 70 N.C. L. REV. 1741, 1741-42 (1992) (noting that the framers of the Federal Constitution "drew heavily on the experience of delegates to state constitutional conventions"). Indeed, the foundation for the federal Constitution was the so-called "Virginia Plan" presented to the Second Continental Congress on May 29, 1878, as an alternative to amending the Articles of Confederation. See Clinton, supra note 36, at 898. It incorporated a governmental structure that already existed in many of the states, which was based on the writings of Locke, Montesquieu, and others. See id. at 911. See generally THE FEDERALIST No. 39 (James Madison) (comparing provisions of many state constitutions with those of the new Federal Constitution).

42. See Holland, supra note 24, at 992 (noting that dividing sovereign power was a novel idea).

43. Without regard to the form of government (or organization) being discussed, there is a tendency for power to consolidate or centralize over time in the hands of a single individual or just a few individuals. While all of the early state constitutions guarded against consolidation of power in the hands of government officials, it was years later before any steps were taken to curb corporate power. Pennsylvania considered adopting a provision into its first constitution that provided "[t]hat an enormous Proportion of Property vested in a few individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." Robert F. Williams, The State Constitutions of the Founding Decade:
colonies were not anxious to find themselves under the control of another. The consolidation and centralization of power outside the hands of the people to be governed is the essence of tyranny and was the first problem the framers of state constitutions had to overcome. They attacked this problem in three ways: 1) by distributing the key powers of government among three different branches, each having some power to control the other two; 2) by further distributing the powers given to government among numerous offices, thereby limiting any one office's ability to exercise unrestrained power over the people; and 3) by creating constitutions that passed only a

Pennsylvania's Radical 1776 Constitution and its Influences on American Constitutionalism, 62 TEMP. L. REV. 541, 557 (1989) (quoting ERIC Foner, TOM PAINE AND REVOLUTIONARY AMERICA 133 (1976)). However, that proposal was rejected. It was during the Jacksonian era that states began to introduce constitutional restrictions on the powers of corporations and banks like those found in the 1838 Florida Constitution, which provided "that perpetuities and monopolies, are contrary to the genius of a free State, and ought not to be allowed." FLA. CONST. of 1838 art. I, § 24 (1838). Even stronger more detailed restrictions on corporate power and influence were adopted into state constitutions during the late 1800s, immediately prior to and after the adoption of the Sherman Antitrust Act. 15 U.S.C. § 1-7 (1994). See, e.g., Snure, supra note 5, at 672-73, 682 (discussing numerous specific restrictions on monopoly power that were included in the state of Washington's Constitution of 1889). Avoiding concentrations of power continues to be one of the primary purposes of constitutional law, the decisions of which continually assert that "rights protection cannot be entrusted to a monopoly guardian." John Kincaid, Foreward The New Federalism Context of the New Judicial Federalism, 26 RUTGERS L.J. 913, 944 (1995).

44. See, e.g., Holland, supra note 24, at 991 (explaining that the newly independent states were fearful of any "central government, particularly one with substantial powers").

45. It was theoretically possible for people to join together and voluntarily place all political power in the hands of a single individual, or small group of individuals. "[T]he United States Constitution does not require a state to separate the exercise of its own sovereign power horizontally: among an executive, a Legislature, and a judiciary." Id. at 995 (emphasis added). It is possible, for example, for a state to create a democratic monarchy in which the people elect a queen and pass all of their powers over to her. However, the framers of the state constitutions universally chose not to follow that model. To do so would have been inconsistent with their heritage. See LOCKE, supra note 25, at xix-xxii (discussing Locke's thought that absolute monarchy is "inconsistent with civil society").

46. The key powers of government include the power to make laws, the power to execute the laws, and the power to pass judgment on the laws. See generally, LOCKE, supra note 25. Article II of each of the Florida Constitutions since the Constitution of 1838 has explicitly provided for the separation of these powers. See FLA. CONST. of 1838 art. II (1839); FLA. CONST. of 1861 art. II (1861), FLA. CONST. of 1865 art. II (1865); FLA. CONST. of 1868 art. II (1868); FLA. CONST. of 1885 art. II (1885); FLA CONST. art. II, § 3 (1968).

47. For example, the powers of judges are limited in numerous ways. They have no power to take action at all until some party properly invokes their jurisdiction, which is limited by the constitution and by general law. See FLA. CONST. art. V (establishing certain courts and the boundaries of their jurisdiction, directing the Legislature to establish still other courts, and
portion of the peoples’ inherent powers to the states, reserving certain powers to individuals in the form of rights. 48 Some, but not all, of these rights were enumerated in the state constitutions. 49 Ultimately, the addition of a national constitution was intended to add another layer of protection against the exercise of tyrannical power. 50

The framers of the state constitutions also recognized that by placing the power to make governmental decisions in the hands of a majority of the people, the remaining “political minorities” might suffer injustices. 51 As a practical matter, it was also unwieldy to expect all individuals to share in every decision by voting. Thus, to protect against “the tyranny of the majority,” 52 and to aid the practical administration of government, the states authorizing the Legislature to take certain actions with regard to the courts and their jurisdiction). The decisions of trial judges are normally subject to appeal by disappointed litigants, and the power of appellate judges is limited to ruling on cases appealed from lower courts. See id. at §§ 3-5. Appellate judges also normally sit in panels and in order to rule they must secure the agreement of a majority of the other judges sitting on a panel with them. See also FLA. CONST. art. V, § 3(a) (mandating that of the seven justices of the supreme court, five constitute a quorum and the concurrence of four justices is necessary for a decision); FLA. CONST. art. V, § 4(a) (providing that in each district court of appeal, three judges consider each case and the concurrence of two is necessary for a decision). See, e.g., FLA. R. JUD. ADMIN. 2.030(a)(1) (establishing panel, quorum, and majority vote requirements for the Supreme Court of Florida). Similarly, no individual can exercise the power to make laws. Lawmakers must secure the agreement of a majority of the other legislators who sit in the Legislature with them before they can exercise any power at all. FLA. CONST. art. III, § 7.

48. The constitutions of all 50 states contain a declaration of rights, bill of rights, or some other enumeration of individual rights.

49. Article I, section 1 of the Florida Constitution contains an “unenumerated rights clause” similar to the one found in the Ninth Amendment to the United States Constitution. Most other state constitutions contain similar provisions. See generally Louis Karl Bonham, Unenumerated Rights Clauses in State Constitutions, 63 TEX. L. REV. 1321, 1321 (1985).

50. As James Madison said: “[A] double security arises to the rights of the people [because] [t]he different governments will control each other . . . .” THE FEDERALIST No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961).

51. The term “political minorities” must be distinguished from the currently popular usage of the word “minorities.” A group of people in disagreement with the majority on any issue is a political minority group. A political minority, or majority, can be widely diverse in all other respects so long as its members share a common view on some political issue. The greatest strength—and weakness—of a properly functioning democracy is that while the composition of the political majority shifts and changes as frequently as the issues being considered, most of the people are in the political majority most of the time. The result is, as Tocqueville observed, that in the United States, all parties are willing to recognize the rights of the majority, because they all hope at some time to be able to exercise them to their own advantage. I TOCQUEVILLE, supra note 1, at 264-80.

52. See I TOCQUEVILLE, supra note 1, at 254-70 (explaining the view that in a democracy the omnipotence of the majority poses the greatest threat to the people).
established systems of representational government. Instead of voting directly on issues, citizens voted to select individuals from amongst themselves who would then be given specific, limited powers, through the constitution, to act on behalf of the whole body of people they represent.53

Our Federal Constitution, like the state constitutions before it,54 was based on the principles of what has come to be known as “republican democracy.”55 As previously noted, the people were very jealous of their independence, and they did not desire to come under the rule of a central government.56 Nonetheless, they saw the necessity of joining the states together for certain limited purposes.57 The theory underlying the nation-state relationship was that state officials derived their authority directly from the people via the state constitutions.58 That authority included the ability to

53. After describing the dangers that result from absolute majority rule, Tocqueville went on to describe the solution:

If, on the other hand, a legislative power could be so constituted as to represent the majority without necessarily being the slave of its passions, an executive so as to retain a proper share of authority [independent of the people], and a judiciary so as to remain independent of the other two powers, a government would be formed which would still be democratic while incurring scarcely any risk of tyranny.

I TOCQUEVILLE, supra note 1, at 272.

54. Many features of the Federal Constitution were modeled after the earlier constitutions of other states. See Holland, supra note 24, at 995; Williams, supra note 43, at 541. See generally THE FEDERALIST NO. 1 (Alexander Hamilton) (drawing comparisons between the United States Constitution and the state constitutions).

55. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”). Today when we refer to “republican democracy,” it is generally understood that we are describing self-government by the people through the election of representatives who are subject to constitutional controls. See In re Apportionment Law Appearing as Senate Joint Resolution 1 E, 1982 Special Apportionment Session; Constitutionality Vel Non., 414 So. 2d 1040 (Fla. 1982) (distinguishing between democracy and republican democracy). However, this understanding has not always been so clear. See generally THE FEDERALIST NO. 39 (James Madison) (discussing the many different forms of government to which the term republic had been applied). It has been said about our nation’s founders that “[o]nly one thing was certain, Americans believed that republicanism meant an absence of an aristocracy and a monarchy. Beyond this, agreement vanished . . . .” Williams, supra note 43, at 550 (quoting Robert Shalhope, Toward a Republican Syntheses: The Emergence of an Understanding of Republicanism in American Historiography, 29 WM. & MARY Q. 49, 72 (1972)).

56. See supra note 46 and accompanying text.

57. See WEBSTER, supra note 28, at 220 (discussing the limits imposed on the federal government by the United States Constitution).

58. See supra notes 53-55 and accompanying text.
join together with other states to form a federation or confederation under the banner of a single constitution. 59

However, the states could grant the federal government no greater power than they received from their own people, and most of that power could not be conveyed. 60 Thus, the power of the federal government was intended to be sharply limited to certain specific functions. 61 A large portion of the Federal Constitution is dedicated to defining and establishing boundaries between the federal and state authorities, thereby limiting the federal government’s authority to act in contradiction of state power. 62

C. The Development of Constitutional Law in Florida

Florida is a comparative newcomer to statehood, 63 and the drafters of our first state constitution in 1838 64 undoubtedly relied heavily on the

59. The question of whether the federal government derived its authority directly from the people or from the states for the benefit of the people has been a point of contention since the early days of our republic. In M’Culloch v. Maryland, 17 U.S. 316, 404-05 (1819), the United States Supreme Court concluded that “[t]he government of the Union... is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.” Id. In response to that decision, a critic writing under the pseudonym “Amphictyon” wrote: “The Constitution is not binding on any state, even the smallest, without its own free and voluntary consent .... The respective states, then in their sovereign capacity, did delegate the Federal Government its powers, and in so doing were parties to the compact.” SOURCES AND DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 309 (Samuel E. Morrison ed., 2d ed 1965).

60. See infra notes 101-08 and accompanying text (discussing the doctrine of nondelegation).

61. “The powers delegated ... to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.” THE FEDERALIST No. 45 at 292 (James Madison) (Clinton Rossiter ed., 1961).

62. See Holland, supra note 24, at 997. Many provisions of the Federal Constitution were included specifically to insure the independence of the states, and of course, the entire Bill of Rights was intended to limit the federal government’s power over the people. Other amendments further define the federal-state relationship. See, e.g., U.S. CONST. amend. II.

63. Florida became a unified entity in 1822 when East Florida and West Florida were combined into a single territory and did not become a state until 1845. See MORRIS, supra note 2, at 325. The federal government had established specific requirements that had to be met before a territory could be admitted to statehood, one of which was a requirement that the territory have a constitution establishing a Republican form of government.

64. The 1838 Florida Constitution was adopted in 1839 by a margin of only 104 votes. See CHARLTON W. TEBEAU, A HISTORY OF FLORIDA 126 (1971).
constitutions of the states that preceded Florida in becoming a part of the federal republic. More importantly, these early drafters relied on the same principles on which those predecessor constitutions were based. They also relied, to a significant extent, on contemporary writings of the times about the nature of constitutions and on the fundamental elements of republicanism and democracy. In addition, they relied to some degree on the Federal Constitution.

Over the years, the Florida Constitution has been revised numerous times. The first major revision occurred in 1861, when Florida seceded from the Union. In 1865, the state created a new post-war constitution that was intended to help Florida gain readmission to the Union. However, owing to

65. See supra note 43 and accompanying text.
66. See TEBEAU, supra note 64, at 126.
67. Some major works produced immediately prior to, or during, the framing of Florida's first constitution included Tocqueville's *Democracy in America*, first published in the United States in 1835. I TOCQUEVILLE, supra note 1. Justice Story's *Commentaries on the Constitution* was widely read and relied on by legal scholars, as was Blackstone's Commentaries on the Law of England. The framers of the 1838 constitution were also undoubtedly influenced by Jacksonian Democracy. This is evident both in the history of the 1838 convention and in the constitution itself. For example, the populists who swept Andrew Jackson into the White House feared the banking industry and its influence on government. See Andrew Jackson, *Veto Message* (July 10, 1832), in II MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (Richardson ed., 1897) (explaining that in his opinion “the existing [Bank of the United States] [was] unauthorized by the constitution, subversive of the rights of the states, and dangerous to the liberties of the people”). After taking office, Jackson abolished the central bank. See id. Historical accounts of Florida's 1838 constitutional convention relate that the convention continued for three times as long as originally planned because the delegates were deadlocked over banking provisions. See TEBEAU, supra note 64, at 128. While its other provisions speak forcefully about freedom and liberty, the delegates gave the Legislature extensive power to regulate banks and corporations and even went so far as to forbid bankers from holding statewide office or serving in the Legislature. See Holland, supra note 24, at 1000.

The state constitutions that were written during the presidency of Andrew Jackson . . . were often interested in popular sovereignty. Thus, the state constitutions of that time were often rights-conscious documents. Nearly all Jacksonian era state constitutions added or expanded Declarations of Rights and . . . placed them at the beginning of the document [as was the case with Florida's constitution of 1838].


68. The best evidence we have of direct reliance on the federal document is in the constitutions themselves. Sections 12, 13, and 14 of the Florida Constitution of 1838, for example, are virtually identical to similar provisions in the Federal Constitution.

the enactment of the Federal Reconstruction Acts and continued military occupation, the 1865 constitution was never fully effective.

In 1867, the federal government compelled a state constitutional convention. Because of its compulsory nature and other circumstances surrounding its enactment, the constitution produced by that convention— the 1868 constitution—was never treated by the people of Florida as a source of real authority. After the end of Reconstruction, the 1868 constitution was ultimately abandoned, and the 1885 constitution was adopted to take its place.

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70. See Reconstruction Acts, ch. 152, 14 Stat. 428 (1867); ch. 6, 15 Stat. 2 (1867); ch. 30, 15 Stat. 14 (1867); ch. 25, 15 Stat. 41 (1868); ch. 3, 16 Stat. 59 (1868).

71. See TEBEAU, supra note 64, at 247 (noting that the federal military presence continued in Florida after 1865).

72. The first Reconstruction Act divided the South into five military districts and placed Florida, as well as the other secessionist states, under formal military rule. See Act of Mar. 2, 1867, ch. 152, 14 Stat. 428 (1867). Military rule did not cause dramatic changes in Florida, since the state had been under military occupation since the end of the war anyway. The second, or supplemental, Reconstruction Act established procedures for conducting state conventions to establish new state constitutions that would satisfy certain requirements established by the federal government in the Act. See WILLIAM WATSON DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 446-47 (1964).

73. The 1867 convention was in itself highly controversial. See Richard L. Hume, Membership of the Florida Constitutional Convention of 1868: A Case Study of Republican Factionalism in the Reconstruction South, 51 Fla. Hist. Q. (1972). There were serious doubts about the credentials and authority of its participants. See DAVIS, supra note 72, at 491-516. In addition to the fact that the state was still under military rule, the voting districts were heavily gerrymandered to favor Republican candidates, and the referendum on the new constitution appears to have been further marred by widespread voter fraud. See R.L. Peek, Lawlessness and the Restoration of Order in Florida, 1868-1871, at 53-60 (1964) (unpublished Ph.D. dissertation, University of Florida) (on file with the University of Florida). One of the more extreme examples of the confusion that reigned in Florida during the years after the adoption of the Constitution of 1867 culminated in Governor Reed being forced to seek an advisory opinion from the Supreme Court of Florida to determine whether the Legislature had been successful in impeaching and removing him from office. See DAVIS, supra note 72, at 544-56. The court determined that Reed had not been removed from office, in part, because four members of Legislature that were necessary to achieve a quorum had accepted appointments to state office from Reed prior to the vote on his impeachment. Id. Reed had declared their legislative seats vacant prior to the impeachment vote; thus, the impeachment vote failed for lack of a quorum. Id. Before these issues were resolved, however, Lieutenant Governor Gleason, with the cooperation of Secretary of State Alden, had declared himself to be Governor. Id. Ultimately, Gleason was removed from office as the result of an action in quo warranto filed by Reed; Secretary of State Alden was impeached. Id.

74. See D'ALEMBERTE, supra note 7, at 8-9.
Although frequently amended,\textsuperscript{75} the 1885 constitution continued in force until it was replaced by the 1968 constitution. Florida's government continues to operate under the authority of the 1968 constitution. As previously noted, the 1968 constitution removed much extraneous political material from the 1885 constitution, with the intent to improve the constitution's ability to serve its basic purposes.\textsuperscript{76}

As was the case with the constitution of 1838,\textsuperscript{77} the 1968 constitution is a distinctly populist document that now includes five different methods of amendment,\textsuperscript{78} and an explicit statement that all political power originates with the people.\textsuperscript{79} It also contains an explicit separation of powers clause,\textsuperscript{80} sharp limits on the creation of laws by the legislative branch,\textsuperscript{81} some unique local government provisions,\textsuperscript{82} and a strong system of checks and balances.\textsuperscript{83} Finally, it contains the written embodiment of certain rights its authors

\textsuperscript{75} For a general discussion of the amendments to the 1885 and 1968 constitutions, see \textit{id.} at 9-11. The complete text of each of the amendments to Florida's constitution, including the Constitution of 1885, can be found at the World Wide Web cite of the Constitution Revision Commission. \textit{See Revision Commission} (visited July 7, 1997) <http://www.law.fsu.edu/crc/>.

\textsuperscript{76} \textit{See} D'ALEMBERTE, supra note 7, at 13.

\textsuperscript{77} \textit{See supra} note 43 and accompanying text (discussing populist influences on the Florida Constitution of 1838).

\textsuperscript{78} \textit{See FlA CONST.} art. XI. California has recently established a Constitution Revision Commission by statute. \textit{See CAL. GOV'T CODE} § 8275 (West 1992 & Supp. 1997). Florida, meanwhile, is the only state that has an independent, constitutionally-established Constitution Revision Commission. Florida also has a constitutionally established Taxation and Budget Reform Commission, which has the power to make proposals relating to tax and budget issues. In addition to these two commissions, Florida also allows amendment through citizen initiative, legislative proposal, and constitutional convention. \textit{See FlA CONST.} art. XI.

\textsuperscript{79} \textit{See FlA CONST.} art. I, § 1.

\textsuperscript{80} \textit{See FlA CONST.} art. II, § 3.

\textsuperscript{81} Besides the usual majority vote and quorum requirements, the Florida Constitution contains limitations on "special" and "local" legislation, \textit{id.} at art. III, § 11, as well as on "appropriations bills." \textit{Id.} at art. III, §§ 12, 19. It also requires that bills be read three times, \textit{FlA CONST.} art. II, § 7, that the title of a bill describe its contents, \textit{id.} at § 6, and that every bill be limited to one subject. \textit{Id.} These types of provisions were commonly included in state constitutions to limit the distribution of special privileges by the Legislature and to prevent surreptitious legislative action. \textit{See Holland, supra} note 24, at 1001.

\textsuperscript{82} \textit{See FlA CONST.} art. VIII.

\textsuperscript{83} \textit{See id.} at art. II, § 3; art. III, §§ 3(c)(1), 8, 16(c), (e), (f), 17. D'Alemberte attributes our strong system of checks and balances to a conscious effort on the part of those who created the 1885 constitution—from which many of the current constitution's checks and balances are derived—to cure the governmental abuses that occurred during the Reconstruction era. \textit{See} D'ALEMBERTE, supra note 7, at 8-9.
considered inalienable. As will be discussed, it also contains other significant provisions that limit governmental power over the people.

IV. FUNCTIONAL ANALYSIS OF THE FLORIDA CONSTITUTION

Over the years, scholars and courts have employed a wide range of methods for analyzing constitutions. Some principal methods include: deriving the meaning of the constitution from the pure and literal meaning of its text ("textualist"), finding meaning in the intent of the framers ("originalist"), and treating the constitution as a living document that must be interpreted to conform to the immediate needs of modern society ("interpretivist"). However, for the purposes of this article the constitution

84. See Fla. Const. art. I, § 2.

85. The text of any constitution must, of course, be given great weight. Any analysis should begin with the literal meaning of the constitution’s text, and, where the text is completely unambiguous, we should adhere to its plain language in determining what its creators intended. See, e.g., In re Advisory Opinion to the Governor, 374 So. 2d 959 (Fla. 1979) (construing the Florida Constitution by applying the plain ordinary meaning of the language it contains).

86. Where ambiguity exists, or where it has been injected by those who execute the laws or by judicial decision, we should look for clarification in the origins of our constitution and the reasoning of those who created it. See, e.g., Powell v. McCormack, 395 U.S. 486, 547 (1969) (relying heavily on the constitutional debates at the 1787 Philadelphia convention); Bailey v. Ponce de Leon Port Auth., 398 So. 2d 812, 814 (Fla. 1981) (noting that in construing state constitution courts must ascertain and give effect to the intent of the framers); Williams v. Smith, 360 So. 2d 417, 419 (Fla. 1978) (court must interpret state constitution in a way that will best fulfill the intent of the framers).

87. An early example of the interpretivist philosophy can be seen in the United States Supreme Court’s decision in M’Culloch v. Maryland, in which John Marshall wrote that “a constitution [is] intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.” M’Culloch v. Maryland, 17 U.S. 316, 415 (1819) (emphasis omitted). Thomas Jefferson responded to the decision in M’Culloch with the comment that “the judiciary of the United States is the subtle core of sappers and miners constantly working underground to undermine the foundations of our federal constitution.” The Portable Jefferson 994-95 (Peterson ed. 1975). Yet, allowing room for some interpretation may reduce the extent to which we feel compelled to include large bodies of otherwise unnecessary material in our constitutions. As Governor Coke of Texas once said: “It will be found universally true that those State constitutions which contain the smallest number of provisions, [and] which adhere most closely to fundamental declarations . . . have been the wisest and most enduring.” John Walker Mauer, State Constitutions in a Time of Crisis: The Case of the Texas Constitution of 1876, 68 Tex. L. Rev 1615, 1634 (1990) (quoting S.J. 555, 14th Leg., 1st Sess. (Tex. 1874)). However, not every problem has an answer in the constitution, and it should not be interpreted to provide answers to problems that are not constitutional in nature.
is not being applied to a specific set of facts. Rather, under consideration is whether the constitution’s provisions are serving the purposes for which they were intended.88

A constitution may properly be regarded as a document in which the people set forth the structure of the government, including any powers they wish to convey to the government from themselves, and including any instructions they wish to include about how those powers are to be distributed, retained, altered, or removed.89 It may also include an enumeration of rights, but that is not strictly necessary because individual rights are considered inherent in the individuals for whom the government was created.90 Given these factors, and the purpose of this article which is to

The answers to most legal problems—and to social problems that can be addressed by law—can be found in the common and statutory law. See Holland, supra note 24, at 1000-01 (discussing that most of what we conceive to be rights can be found in the “common law”). See also Akhil Reed Amar, Forward: Lord Camden Meets Federalism—using State Constitutions to Counter Federal Abuses, 27 RUTGERS L.J. 845, 849-58 (1996) (explaining by hypothetical that violations of the Fourth Amendment right to be free of unreasonable searches could often be more successfully redressed under the state trespass laws). But see Hans A. Linde, Are State Constitutions Common Law?, 34 ARIZ. L. REV 215, 216-29 (1992) (discussing the unfortunate extent to which state courts merely parrot federal judicial opinions in applying state constitutions). Linde notes that “[o]nce the United States Supreme Court used the label ‘privacy’ for claims of personal relationships and autonomy, any mention of ‘privacy’ in a state constitution became talismanic, regardless of its origins, context, or evident purposes . . . .” Id. at 224 n.58. Where no answers can be found in the common or statutory law, solutions can be created through the democratic processes authorized under the constitution.

88. A constitution serves as the bedrock upon which the remainder of the positive law of a particular jurisdiction (in this case Florida) is built. If restricted to appropriate constitutional purposes, it should serve as one of the great forces for stability in the law and in society. To the extent that a constitution strays from those purposes, the government and the people are less well-served and their respective interests may be endangered. Of course, the difficulty lies in agreeing upon the things that are “constitutional” in nature. For example, the Chief Justice of the Supreme Court of Florida, Gerald Kogan, a member of the 1997-98 Constitution Revision Commission, suggested that a ban on certain kinds of fishing nets does not belong in the Florida Constitution. JOURNAL OF THE 1997-1998 CONSTITUTION REVISION COMMISSION, No. 2 (June 17, 1997). However, those who disagree with Justice Kogan correctly noted that the citizens’ initiative to ban fishing nets resulted from the Legislature’s failure to pass a bill directed to the issue. See, e.g., David Cox, Constitution panel hears net-ban debate, TAMPA TRIBUNE, July 23, 1997, at A19; Citizens Should Be Able To Petition For Change. How?, TALLAHASSEE DEMOCRAT, July 27, 1997, at B19.

89. See James M. Carson, The Constitution and the New Deal, Address Before the Birmingham Forum (Dec. 16, 1935), for an excellent description of constitutions as charters or contracts between citizens and government.

90. See supra notes 24-25 and accompanying text.
consider first "principles," the authors rely primarily on what can be fairly described as a “functional analysis” of Florida’s Constitution.

A. Protecting Against Tyranny: The Separation of Powers

“In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place oblige it to control itself.”91 Tyranny arises most easily when all power is concentrated in the hands of a single person or in the hands of just a few. A constitution that divides power in numerous ways and in numerous directions will best serve the constitutional function of protecting against tyranny.92 Accordingly, the Florida Constitution, the United States Constitution,93 and the constitutions of the remaining forty-nine states divide government into three branches: the legislative, the executive, and the judiciary.

Dividing government powers on paper, however, does no good, if the divisions are not respected in practice. The federal government and the states vary in the extent to which they allow one branch of government to engage in the essential functions of another. About his vision for the federal system, Madison commented:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights

92. Tyranny can arise in other ways as well, such as from bureaucracy. Indeed, once a bureaucratic tyranny has arisen it may be more difficult to eliminate than a tyranny of any other kind.
93. Morley stated:

It may be said that the federal form was historically ordained, by the fact that the original thirteen colonies were separately established and had by the time of the Revolution developed widely differing political and social customs. Only a system which protected those diversities could combine these varying units in a general unity. But behind the determination to keep the rights of the several States inviolate was the even deeper determination to protect the citizens of these states from centralized governmental oppression.

Morley, supra note 93, at 10.
of the people. The different governments will control each other, at the same time that each will be controlled by itself.94

Thus, the framers of the Federal Constitution intended to create a system incorporating strong divisions of power. However, through judicial acquiescence and the constant pressure the branches of government exert on each other95 those divisions have largely given way.96

The Florida Constitution, unlike its federal counterpart, contains an explicit separation of powers requirement.97 The purpose of this provision was to limit the extent to which any branch of government may perform functions assigned by the constitution to another branch.98 Florida courts have indicated that Florida's separation of powers requirement is stronger than the federal requirement because it is explicit.99

Under Florida's doctrine against encroachment, no branch of government may encroach on the powers delegated to another branch by the

94. The Federalist No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961). Madison, in using the term "departments" was referring here to the three branches of government that exist in both the state and national governments. See id.; Morley, supra note 91, at 232 n.1.
95. Constitutional republics are deliberately structured in a manner that results in some friction between the branches. As James Madison noted: "Ambition must be made to counteract ambition . . . . It may be a reflection on human nature that such devices [checks and balances] should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?" The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). However, just as competitors in the private sector sometimes enter into tacit agreements not to compete, the branches of government may each sometimes quietly acquiese to encroachments on authority by the other two branches. With regard to the federal-state relationship it has been noted that "vigorous state constitutionalism is imperative because it perpetuates the scheme of dispersal of powers envisioned by the framers." Randall T. Shepard, The Maturing Nature of State Constitutional Jurisprudence, 30 Val. U. L. Rev. 421, 433 (1996). For the same reasons, it is equally important to maintain the checks and balances that exist within a state's government. See infra note 134 and accompanying text (discussing the valuable competitive elements of constitutional government).
97. See Fla. Const. art. II, § 3.
98. See, e.g., Pepper v. Pepper, 66 So. 2d 280, 284 (Fla. 1953).
99. See, e.g., Askew v. Cross Key Waterways, 372 So. 2d 913, 924 (Fla. 1978).
constitution. For example, the Legislature cannot reserve to itself the right to execute the laws it creates because the power to execute the laws is reserved to the executive branch. Similarly, an officer of the executive branch cannot engage in lawmaking—a function that, because of its supreme nature, is reserved exclusively to the legislative branch—adjudicate the rights or claims of an individual, a function reserved to the judicial branch.

A concordant policy, the doctrine of non-delegation, was intended to prevent the Legislature from delegating its lawmaking power to either of the other two branches of government. While it could, and should, be given stronger effect, the courts have at least found that the doctrine forbids the Legislature from delegating its core functions without any guidance or limits as to how those functions are to be exercised. The doctrine against encroachment and the doctrine of non-delegation are valuable policies derived from hundreds of years of wisdom. While these doctrines can provide the people with a high level of protection against tyranny, the division of powers is not as strong as it once was. We have not been careful in guarding against a merger of the functions of government in the hands of a single branch. Accordingly, the Revision Commission should consider

100. FLA. CONST. art. II, § 3.
101. See LOCKE, supra note 25, at 82 ("[B]ecause it may be too great a temptation to human frailty ... for the same persons who have the power of making laws to have also in their hands the power to execute them ... ").
102. See FLA. CONST. art. III, §§ 1, 7.
103. See id at art. V, § 1.
105. See LOCKE, supra note 25, at 82 (asserting that "the legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have").
106. For example, Chapter 120, Florida Statutes (The Administrative Procedures Act), allows agencies of the executive branch to engage in lawmaking by establishing rules that govern the behavior of businesses and individuals. FLA. STAT. § 120.54 (Supp. 1996). After creating their own rules, agencies execute the rules and even conduct adjudicatory proceedings with regard to those who claim to be adversely affected by the agencies' actions. Id. Thus, it is not atypical for a single individual—an agency head—to make laws, enforce the same laws, and adjudicate rights under those laws. Id. Florida appellate courts have allowed this melding of constitutional functions because the agencies rules and actions are subject to review in the courts. However, when an aggrieved individual proceeds in the courts against an agency's actions undertaken pursuant to Chapter 120, the agency's interpretations of both rules and statutes, and its findings of fact are generally presumed to be correct. See, e.g., Ameristeel Corp. v. Clark, et. al., 691 So. 2d 473 (Fla. 1997) (finding that a party challenging an order of the Public Service Commission must overcome presumptions as to the Commission's jurisdiction, reasonableness of the order, and deference owed to the agency's interpretation of the statute it is charged with enforcing); Krivanek v. Take Back Tampa
whether the separation of powers under the Florida Constitution, and its related doctrines, can be strengthened.

B. *The Legislative Branch*

John Locke saw the establishment of legislative power as the first and foremost of all positive laws. He called the law-making function the "supreme power of the commonwealth"\(^{107}\) because it is the responsibility of the legislative branch to make laws that will govern all, including the executive and the judiciary.\(^{108}\) Accordingly, he believed that some sharp controls on the legislative power were necessary.\(^{109}\) The first of these controls is, of course, the people themselves, who protect against the rise of tyranny through their ability to remove legislators from office by the power of their votes.\(^{110}\) A second control on the Legislature is the fact that the lawmaking power is never concentrated in the hands of a single person or of a small group of people. In Florida, the constitution divides the Legislature between two separate houses—the House of Representatives, with one-hundred and twenty members, and the Senate, with forty members.\(^{111}\) Both houses must agree, by a majority vote of its respective members, before a law can be created, amended, or repealed.\(^{112}\) Still a third control on the Legislature, suggested by Locke and applied successfully in Florida, is the

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\(^{107}\) See *LOCKE*, supra note 25, at 75. However, he also noted that in areas governed by a legislative power that is not constantly in session, and in which the executive power is vested in a single individual who also has a share of the legislative power, that person might also be called "supreme." *Id.* at 85. Thus, under Locke's analysis, Florida retains supreme power in its elected representatives only by preventing its Governor from exercising any legislative power. This is perhaps why the framers of the Florida Constitution included an explicit prohibition against delegation of legislative power to the executive branch. *See supra* notes 101-08.

\(^{108}\) *LOCKE*, supra note 25, at 85-86.

\(^{109}\) *See* *id.* at 84-91.

\(^{110}\) *See* *id.* at 84; *see also* FLA. CONST. art. III, §§ 1, 13.

\(^{111}\) The constitution requires that there be between 30 and 40 senatorial districts and 80 and 120 representative districts. *See* FLA. CONST. art. III, §§ 1, 16. The exact number of districts is established by the Legislature, and as previously noted, there are currently 40 Senate Districts and 120 House Districts.

\(^{112}\) *Id.* at art. III, § 7. A two-thirds vote is required to override a law vetoed by the Governor. *Id.* at § 8.
part-time Legislature.

Locke correctly noted that there is not a constant need for new laws. Accordingly, it is best that legislators meet on a part-time basis and then return home to live under the laws they have created. Finally, the Legislature is controlled by the executive veto power. Any law created by the Florida Legislature is subject to veto by the Governor.

Florida’s Constitution also has a significant set of rules that the Legislature must follow in creating laws, including restrictions on the kinds of laws it can make. The Florida Constitution may be considered superior to some others, in part, because of these rules. For example, the “single subject rules” found in the Florida Constitution have caused our state to develop a body of statutory law and an appropriations process that are far more clear and well-reasoned than those produced under the Federal Constitution. The great significance of these seemingly modest provisions lies in the fact that they are the only constraints, outside the Federal Constitution, on the Legislature’s ability to make any laws it chooses. The people can only be secure in granting the Legislature such broad power to

113. Id. at art. III, § 3.
114. See LOCKE, supra note 25, at 86.
115. "Constant, frequent meetings of the legislative, and long continuations of their assemblies without necessary occasion, could not but be burdensome to the people and must necessarily in time produce more dangerous inconveniences . . ." Id. at 88.
117. The ability to override the Governor’s veto with a two-thirds vote of each house of the Legislature establishes a constitutional control over the executive’s veto power that prevents the Governor from gaining control over the Legislature through its use. See id. at § 8(c).
118. Id. at art. III, § 11 (prohibiting certain special and local laws.).
119. Id. at art. III, § 6 (governing general acts of the Legislature and appropriations bills, respectively).
120. The absence of similar rules in the United States Constitution leaves Congress free to engage in “logrolling,” a practice that involves combining unpopular legislation with popular legislation to assure that the unpopular legislation will become law.
121. U.S. CONST. art. VI (supremacy clause).
make laws, so long as there is a guiding foundation of moral law contained in the constitution, to which all other law is subservient. One would also hope that in making legislative decisions, the Legislature would avoid creating laws that are sharply opposed to natural human interests or behaviors. Anticipating Lyndon Johnson’s selection of the term “Great Society” to describe his unfortunate social agenda, Adam Smith once said:

[Man] seems to imagine that he can arrange the different members of the great society with as much ease as the hand arranges the pieces upon a chessboard; he does not consider that the pieces upon the chessboard have no other principle of motion than that which the hand impresses upon them; but that, in the great chessboard of human society, every single piece has a principle of motion of its own, altogether different from that which the Legislature may wish to impress upon it. If those two principles coincide and act in the same direction, the game of human society will go on easily and harmoniously, and is very likely to be happy and successful. If they are opposite or different, the game will go

122. As Justice Douglas said about rights, “the law must have a broad base in morality, to protect man, his individuality and his conscience, against direct and indirect interference by government.” WILLIAM O. DOUGLAS, THE RIGHT OF THE PEOPLE (Alma Reese Candi ed., 1958). Without moral foundation the law would be arbitrary, and over time it would not be respected by those who are subjected to its power. Hence, without a moral basis for law, the government would ultimately lose its ability to motivate the people except through coercive means.

123. Murder, for example, is not wrong because it is illegal; it is illegal because it is wrong. The law against murder has a moral foundation in the constitution which is established for the benefit and protection of the lives, liberty, and property of those who live under it. Tocqueville’s discussion of this country’s laws in 1831 reflects an understanding that a society’s laws can do little more than reflect the values of the people in that society. See generally, I TOCQUEVILLE, supra note 1, at 321-22. That linkage between the law and morality persists in the public consciousness and is frequently reflected in public commentary. See, e.g., CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT 227 (1985). The authors quote the speech given by President Lyndon Johnson upon signing of the Civil Rights Act of 1964 in which he stated with regard to racial injustice: “Our Constitution, the foundation of our Republic, forbids it. Morality forbids it. And the law I will sign . . . forbids it.” Commenting on the Civil Rights Act, Johnson said: “Its purpose is to promote a more abiding commitment to freedom, a more constant pursuit of justice, and a deeper respect for human dignity. We will achieve these goals because most Americans are law-abiding citizens who want to do what is right.” Id. at 227-28.
on miserably, and the society must be at all times in the highest degree of disorder. \(^{124}\)

Where the law allows them to do so, bureaucrats and other authorities will impose unreasonable expectations on an unwilling populace. \(^{125}\) This is one of the principle reasons why our foundational legal document should be applied to limit the exercise of legislative power by executive branch officials. \(^{126}\)

C. The Executive Branch

The executive branch is responsible for executing the laws the legislative branch creates. \(^{127}\) While there is, as Locke suggested, an area of executive “prerogative” that arises from the Legislature’s inability to foresee all circumstances in which immediate action might be required, \(^{128}\) the executive risks being discredited whenever it acts without explicit legislative authorization. Consequently, it is constrained to act only in those ways unlikely to create public controversy. \(^{129}\)

In establishing the executive branch of government, the Florida Constitution goes further than most other constitutions to protect the public from tyranny by assigning certain duties and responsibilities to particular officers and agencies of the government. \(^{130}\) Unlike the constitutions of some
other states, the Florida Constitution does not vest all executive power in the state's Governor. It establishes the Governor as the state's chief executive officer, but then proceeds to divide the executive power among a wide range of other executive officers and agencies.

Florida's Constitution is particularly unique in that it has an elected Cabinet consisting of six officers. Not unexpectedly, it has been a source of vexation to many governors, including the current one, that the Office of Governor must share its power with members of the cabinet who may be political opponents. However, establishing some competition at the


131. FLA. CONST. art. IV, § 1.

132. Id. at §§ 4, 6, 9.

133. FLA. CONST. art. IV, § 4(a). The offices of Secretary of State and Treasurer/Comptroller were originally established in the Florida Constitution of 1838. FLA. CONST. of 1838, art. III, §§ 14, 23. Like all of the state's justices and judges, these executive branch officials were elected by a majority vote of both houses of the Legislature. See id. at art. V, § 11 (providing for justices and judges to be elected by the state Legislature). Id. at art. III, § 14 (establishing office of Secretary of State and providing for election by the Legislature); id. at art. III, § 23 (creating and providing for election by the Legislature of a "Treasurer and Comptroller of Public Accounts"). This first constitutionally authorized Legislature was quite powerful in relation to the other two branches of government. In addition to its power to make all judicial appointments, and the power to appoint key executive branch officers, the Florida Constitution of 1838 vested sole authority to amend or revise the constitution in the hands of the Legislature. Id. at art. XIV, §§ 1, 2. While the Governor was given veto power over legislation, the veto could be overridden by a simple majority confirming the Legislature's will. FLA. CONST. of 1838, art. III, § 16.

The Constitution of 1868 provided for the Governor to appoint and be "assisted" by a nine-member Cabinet of "administrative officers" consisting of a Secretary of State, Attorney General, Comptroller, Treasurer, Surveyor General, Superintendent of Public Instruction, Adjutant General, and Commissioner of Immigration. FLA. CONST. of 1868, art. V, § 17. However, this expansion of the Governor's powers lasted only briefly. The Legislature amended the constitution in 1870 to once again provide for the popular election of Cabinet officers. See Amendments to the Constitution of 1868, General Assembly of 1870 (Article III, Cabinet Elections) (adopted February 12, 1870). Under the Constitution of 1868, the Governor and Cabinet served on a "Board of Commissioners of State Institutions," which, much like the modern Florida Cabinet, was assigned particular responsibilities by the Legislature. FLA. CONST. of 1868, art. V, § 20. The Constitution of 1885 reduced the number of executive branch officers to seven, including the Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Superintendent of Public Instruction, and Commissioner of Agriculture, and continued to provide for them to be elected rather than appointed. FLA. CONST. of 1885, art. IV, § 20.

134. In the economic arena, it is commonly understood that competition drives down prices and produces higher levels of value for consumers. The early framers of constitutional government understood that in a divided government there would be competition among the
highest levels of executive decision making sometimes causes an extraordinary level of inquiry and public debate to surround those decisions.\textsuperscript{135}

In those areas of policy that require them to work with the cabinet, Florida's governors are undoubtedly more restrained and less capricious in making decisions.\textsuperscript{136} This provides some worthwhile protection for the people. While some Cabinet reform may be appropriately considered by the Revision Commission,\textsuperscript{137} the elimination of the elected Cabinet would not

different divisions, and their comments reflect that understanding. \textit{See, e.g.}, \textit{THE FEDERALIST} No. 73 at 441 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining that in a divided government, no branch of government "[must] be left to the mercy of the other."). \textit{Id.} at 442. Each branch "ought to possess a constitutional and effectual power of self-defense." \textit{Id.} Madison described the purpose of presidential veto power in similar competitive language stating that "[t]he primary inducement to conferring the power in question upon the executive is to enable him to defend himself." \textit{THE FEDERALIST} No. 73, at 443 (Alexander Hamilton) (Clinton Rossiter ed., 1961).


\textsuperscript{136} A common complaint about Florida's elected Cabinet is that the agencies placed under Cabinet supervision lack accountability because they do not answer to a single individual. However, the vast majority of the Cabinet's responsibilities were established by the Legislature—not the constitution. \textit{See, e.g.}, \textit{Fla. Stat.} \textsection 20.24(1) (1995) (placing the Department of Highway Safety and Motor Vehicles under the control of the Cabinet); \textit{id.} at \textsection 20.21(1) (1995) (placing the Florida Department of Revenue under the control of the Cabinet); \textit{id.} at \textsection 20.201(1) (1995) (placing the Florida Department of Law Enforcement under the control of the Cabinet). The Legislature is free to reassign the Cabinet's current duties to the Governor, or to individual Cabinet officers, or to the extent that the Legislature believes the agencies under the Cabinet lack accountability it can impose additional controls. Thus, it does not appear that constitutional amendments are necessary to resolve this issue.

\textsuperscript{137} The Legislature has not always considered whether the functions it assigned to the Cabinet were of an executive, legislative, or judicial nature. While it is within the executive branch, the Cabinet now exercises some power associated with each of the three branches of government. The Commission should consider alleviating this condition.
serve any useful purpose. It would limit public debate and increase the Governor's power at the expense of the people.\textsuperscript{138}

The division of executive and legislative branch power does not stop with the cabinet. The Florida Constitution creates a multitude of constitutional agencies, offices, and commissions. These offices and agencies vary in the extent to which they are subject to the Governor's power\textsuperscript{139} and some agencies even have a measure of independence from legislative oversight.\textsuperscript{140} These additional distributions of power were

\textsuperscript{138} The strength of the Office of Florida's Governor is commonly underestimated. The office, as it is currently comprised, is really quite strong, both in comparison to the office as it was comprised under earlier Florida constitutions, see supra note 133, and in comparison to the Office of Governor as it is comprised in other states. With the adoption of legislative and Cabinet term limits, see FLA. CONST. art. III, §§ 1, 2, 4, the Governor's position vis-a-vis the Legislature and the Cabinet has been strengthened. The Governor is the state's chief budget officer and shares that power with no other state official. Morris, supra note 2, at 13. The Governor's budget powers, and the ability to control programs, have been further expanded through an amendment to the constitution that gives the executive line item veto power. FLA. CONST. art. III § 8. And, while the Governor does not appoint Cabinet officers he or she does appoint the member of over 438 state boards, and makes more than 4000 appointments during his or her term of office. Morris, supra note 2 at 18-19. Moreover, history shows that a Governor's greatest power is the opportunity as the state's chief executive officer to lead by establishing values and standards—leading by moral suasion and example rather than by edict. See id.

\textsuperscript{139} See, e.g., FLA. CONST. art. XI, § 2(a)(2) (15 of the 37 members of the Constitution Revision Commission are appointed by the Governor. The Governor also designates the chairman); id. at art. II, § 8(f) (providing for an independent Commission on Ethics); FLA. STAT. § 112.321(1) (1995) (five of the nine members of the Commission on Ethics are appointed by the Governor, subject to confirmation by the Senate); FLA. CONST. art. IV, § 9 (all five members of the Game and Freshwater Fish Commission are appointed by the Governor, subject to confirmation by the Senate); id. at art. V, § 12(a)(3) (five of the 15 members of the Judicial Qualifications Commission are appointed by the Governor); id. at art. V, § 11(d) (providing for a judicial nominating commission to be established by general law); FLA. STAT. § 43.29(1)(b) (1995) (three of the nine members of the judicial nominating commission are appointed by the Governor); FLA. CONST. art. IV, § 12 (providing that the Legislature may establish a Department of Elderly Affairs); FLA. STAT. § 20.41(1) (1995) (the head of the Department of Elderly Affairs is appointed by the Governor, subject to confirmation by the Senate); FLA. CONST. art. IV, § 11 (providing that the Legislature may establish a Department of Veteran Affairs); FLA. STAT. § 20.37(1) (1995) (the head of the Department of Veteran Affairs is the Governor and the Cabinet. The executive director of the department is appointed by the Governor with the approval of three members of the Cabinet and subject to confirmation by the Senate).

\textsuperscript{140} Constitutional commissions and agencies include the following: the Constitution Revision Commission itself, FLA. CONST. art. XI, § 2, the Taxation and Budget Reform Commission, id. at art. XI, § 6; the Florida Game and Freshwater Fish Commission, id. at art.
intended to protect the people from tyranny. However, where any of these offices is not subject to an adequate system of checks and balances, they can become tyrannies within their area of authority.\textsuperscript{141} It may also be true that some agencies and offices have outlived their usefulness. It would behoove the Revision Commission to examine each of these agencies and offices carefully to consider whether they are subject to adequate controls in the form of checks and balances, whether they have continuing vitality, and whether they serve a constitutional purpose.\textsuperscript{142}

D. \textit{The Judicial Branch}

Even when ruled by a king, "[b]etwixt subject and subject . . . there must be measures, laws, and judges . . . ."\textsuperscript{143} The third branch of government, the judiciary, which has been called the least dangerous branch,\textsuperscript{144} was developed in society to substitute for two powers that people had in nature.\textsuperscript{145} The first is the power to do whatever one sees fit to assure self preservation.\textsuperscript{146} The second is the power to punish those who attempt to

\textsuperscript{141} To employ a simple example, if property appraisers were given unlimited power to appraise property without constitutional or statutory guidance, and without any controls by other agencies, officers, or courts, they would have tyrannical power within the area of authority given to them by the constitution. Even this modest power could be expanded to great lengths if not subject to adequate checks and balances. While the authors use the Office of Property Appraiser in this example, the authors do not intend to disparage property appraisers, or suggest that this particular office should be abolished or altered. The authors' purpose is to suggest that the Revision Commission examine constitutional offices to assure that they are subject to adequate checks and balances.

\textsuperscript{142} Some agencies and officers could, perhaps, be as effective if they were created by statute.

\textsuperscript{143} \textsc{Locke}, supra note 25, at 52.

\textsuperscript{144} \textit{See} The \textsc{Federalist} No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

\textsuperscript{145} \textit{See} \textsc{Locke}, supra note 25, at 72.

\textsuperscript{146} \textit{Id.}
infringe the right of self preservation.\textsuperscript{147} Upon joining society, a person gives up both of these rights, but in exchange receives the support of the civil authorities to accomplish these matters on his behalf.\textsuperscript{148}

In western society, these objectives are accomplished through the law of torts, the criminal law, and the laws of free economy that allow parties to apportion rights, duties, and privileges amongst themselves with the support of the government.\textsuperscript{149} If these remedies ceased to be available the people would resort to self-help, as if in nature. Furthermore, since as Locke noted, "[t]he great end of men's entering into society being the enjoyment of their properties in peace and safety..."\textsuperscript{150} there would be no reason for people to continue under the laws of a society if these interests were not protected.\textsuperscript{151}

Article V of the Florida Constitution establishes a system of courts and judges consistent with the fundamental purpose of the judiciary by establishing that all judicial officers of the state shall be "conservators of the peace."\textsuperscript{152} As Tocqueville explained:

\begin{quote}
The great end of justice is to substitute the notion of right or that of violence . . . . The moral force which courts of justice possess renders the use of physical force very rare and is frequently substituted for it; but if force proves to be indispensable, its power is doubled by its association with the idea of law.\textsuperscript{153}
\end{quote}

Thus, the principal function of the judiciary is public and private dispute resolution.\textsuperscript{154} The courts have the power under article V to review the constitutionality of legislative acts.\textsuperscript{155} But, like the other branches of government, the courts are confined to the exercise of those powers assigned to them under the constitution. The courts must take care that, in rendering their opinions, they do not go beyond the Legislature's intent, thereby

\textsuperscript{147} Id. Having given up the authority to protect their own interests through force, individuals may now rely on the government to act on their behalf. Id.
\textsuperscript{148} See id.
\textsuperscript{149} See LOCKE, supra note 25, at 72-73.
\textsuperscript{150} Id. at 75.
\textsuperscript{151} See id.
\textsuperscript{152} FLA. CONST. art. V, § 19.
\textsuperscript{153} I TOCQUEVILLE, supra note 1, at 145.
\textsuperscript{154} See generally id. (noting that the judiciary is an alternative to violent dispute resolution).
\textsuperscript{155} See FLA. CONST. art. V (explicitly providing for the supreme court to review decisions of the district and circuit courts affecting the constitutionality of statutes, thereby implicitly establishing the power of "judicial review" in the lower courts). Id. at art. V, § 3(b)(3).
creating new laws of their own.\textsuperscript{156} Similarly, it is beyond the power of the courts to execute the laws.\textsuperscript{157}

Florida's judicial officers have enormous independence. Appellate judges, including the Justices of the Supreme Court of Florida, do not stand for popular election as do the officers of the executive and legislative branches.\textsuperscript{158} Instead, they are initially appointed and must stand for a merit retention election every six years thereafter.\textsuperscript{159} If a majority of the electors casting ballots do not vote for retention, the Governor must appoint a replacement.\textsuperscript{160} The practical effect of merit retention elections has been to give judges permanent tenure, subject only to the requirement that they retire at age seventy.\textsuperscript{161} Because this is the case, some have expressed concern that Florida's judges are too far removed from the public will.\textsuperscript{162}

Judges, like all other public officers, derive their power from the people.\textsuperscript{163} If the judiciary is not subject to adequate checks and balances, judges, like other public officers, can exert tyrannical power over the people.\textsuperscript{164} Unlike officers of the executive and legislative branches who are directly responsible to a majority of the voters, judges should be free from day-to-day political pressures. One of the principal functions of the courts is to protect political minorities from "the tyranny of the majority."\textsuperscript{165}

\begin{itemize}
  \item \textsuperscript{156} See generally \textit{The Federalist} No. 78 (Alexander Hamilton).
  \item \textsuperscript{157} See generally id. (noting that the judiciary is the least dangerous branch because they have neither the power of the sword nor the purse).
  \item \textsuperscript{158} See Fla. Const. art. V, \S\ 10(a).
  \item \textsuperscript{159} See id.
  \item \textsuperscript{160} See id. at art. V, \S\ 11(a).
  \item \textsuperscript{161} See id. at art. V, \S\ 8. No Florida judge has ever failed to survive a merit retention election.
  \item \textsuperscript{162} The most striking expression of public concern over perceived judicial activism in Florida occurred when voters amended article I, section 12 of the Florida Constitution (search and seizure) to eliminate what they perceived to be an overly-broad judicial interpretation of the "exclusionary rule." See D'Alemberte, \textit{supra} note 7, at 28; see Fla. Const. art. I, \S\ 12 (requiring that interpretations of the Florida Constitution conform to the opinions of the United States Supreme Court). Proponents of the citizen initiative can point to that incident as an example of the need to maintain the right of citizen initiative to insure that state officials do not stray too far from the public will. See also \textit{supra} note 7 and accompanying text (discussing citizen initiatives as a means of overcoming legislative gridlock). Many conservative analysts will find this an inappropriate delegation of state power to federal authorities.
  \item \textsuperscript{163} See Fla. Const. art. I, \S\ 1.
  \item \textsuperscript{164} See generally \textit{The Federalist} Nos. 46, 47, 48 (James Madison) (suggesting that when any branch is not limited by the system of checks and balances tyranny may result).
  \item \textsuperscript{165} See Morley, \textit{supra} note 93, at 27 ("'general government' must be given sufficient power to safeguard 'the rights of the minority,' . . . 'in all cases where a majority are united by
However, the judiciary should not be so far removed from public control that judges can afford to consistently ignore the public will. Because of the concerns that have arisen in this area, the Revision Commission should consider whether the judiciary is subject to adequate checks and balances. The Commission might also wish to consider whether it is appropriate to maintain a mandatory retirement age for judges. If adequate external controls are lacking, then the Revision Commission should recommend changes to the voters. When considering revisions that would affect the judiciary, one point deserves consideration. It is clear that the Florida Constitution contains some provisions that lend themselves to expansive judicial interpretation. Our judiciary would be more restrained if we had a

a common interest or passion”) (quoting I RECORDS OF THE FEDERAL CONVENTION OF 1787, 134-35 (Max Ferland ed., Yale University Press (1937)). Tocqueville, who made many accurate predictions about the future of our country, remarked that “it may be foreseen that faith in public opinion will become for them a species of religion, and the majority its ministering prophet.” I TOCQUEVILLE, supra note 1, at 11. In making this statement, he foresaw the current era of political correctness, which in modern society is the greatest tyranny that the people impose on themselves. Even in 1831, Tocqueville found that “[i]n the United States the majority undertakes to supply a multitude of ready-made opinions for the use of individuals, who are thus relieved from the necessity of forming opinions of their own.” I TOCQUEVILLE, supra note 1, at 10. Based on his experiences in this country, he concluded:

When an opinion has taken root amongst a democratic people and established itself in the minds of the bulk of the community, it afterwards persists by itself and is maintained without effort, because no one attacks it. Those who at first rejected it as false ultimately receive it as the general impression, and those who still dispute it in their hearts conceal their dissent; they are careful not to engage in a dangerous and useless conflict.

Id. at 261. Tocqueville further explained:

Time, events, or the unaided individual action of the mind will sometimes undermine or destroy an opinion, without any outward sign of the change. It has not been openly assailed, no conspiracy has been formed to make war on it, but its followers one by one noiselessly secede; day by day a few of them abandon it, until at last it is only professed by a minority. In this state it will still continue to prevail. As its enemies remain mute or only interchange their thoughts by stealth, they are themselves unaware for a long period that a great revolution has actually been effected; and in this state of uncertainty they take no steps; they observe one another and are silent. The majority have ceased to believe what they believed before, but they still affect to believe, and this empty phantom of public opinion is strong enough to chill innovators and to keep them silent and at a respectful distance.

Id. at 261-62.

166. FLA. CONST. art. V, § 8.
167. See discussion infra notes 234-238 and accompanying text.
more restrained constitution. Thus, the Revision Commission should consider making changes that move the constitution in a direction more conducive to judicial restraint.

E. Local Government

Just as there are some tasks of government that can best be accomplished at a national or state level, there are also tasks that can most beneficially be performed at the local level. In considering revisions to the Florida Constitution, the Revision Commission should consider whether there are additional functions and responsibilities that can be delegated to local governments.

Only a few thousand people voted on the adoption of Florida’s first constitution in 1838. The state’s population was, of course, much less than today. State government was much closer to the people and it represented much less of an intrusion into citizens’ daily lives. Indeed, in many respects, the state government of 1838 was a local government. The change in the nature of the relationship between individuals and state government that has developed over the intervening years—simply through growth—represents an enormous loss of value to the people. Democracy works best in small units. A democracy composed of only six individuals is far more likely to satisfy its constituents’ concerns than a democracy of six thousand. Thus, it is appropriate that Florida has chosen to authorize the transfer of a significant portion of the people’s political power to counties and municipalities through our state constitution. However, as previously

168. Accordingly, one of the “important thrusts” of the local government article of the 1968 Constitution was to expand local government power by removing the Legislature’s power to make local government decisions and turning that power over to local officials. D’ALEMBERTE, supra note 7, at 123.

169. In 1831, Tocqueville noted:

N[othing] is more striking to a European traveler in the United States than the absence of what we term the government, or the administration. Written laws exist in America, and one sees the daily execution of them; but although everything moves regularly, the mover can nowhere be discovered. The hand that directs the social machine is invisible.

1 TOCQUEVILLE, supra note 1, at 72-73.

170. See 1 TOCQUEVILLE, supra note 1, at 40. Tocqueville noted with some admiration that in America “the township was organized before the county, the county before the state, the state before the union.” Id. at 42.

171. See D’ALEMBERTE, supra note 7, at 121-33 (discussing the prominent role of local governments under the Florida Constitution). See also, MORLEY, supra note 91, at 5. It was Morley’s belief that “[t]he essence of federalism is reservation of control over local affairs to
noted, the state has grown tremendously, and there has been a significant consolidation of power at the state level. Many people have lost faith in government simply because it seems so remote. Because of their relatively smaller size and the smaller number of people they must serve, the units of local government are better equipped to serve their constituents, in most respects, than the state.\footnote{172}

In examining the provisions of our constitution, the constitution revision commission should generally avoid imposing any new limits on the authority of our local institutions and should consider ways in which those institutions can be strengthened. Where appropriate, the commission should consider transferring power from the state to local authorities where it is more easily controlled by the people themselves. This would help to restore both the perception and the reality of the people's control over the government they have created.

F. The Boundary Between State and National Government

Upon joining the Union, the State of Florida became a part of a federalist system of government established more than 200 years ago.\footnote{173} Our state constitution, together with its national counterpart, establishes a separate sphere of influence for our state's laws as opposed to the laws of the federal government.\footnote{174} Together, these two documents establish what is properly understood as the "Federal Government."

When Tocqueville visited the United States in 1831, he found "twenty-four small sovereign nations, whose agglomeration constitutes the body of the Union."\footnote{175} He described the relationship between the federal government

\footnote{172. See I TOCQUEVILLE, supra note 1, at 100. ("I [have] heard a thousand different causes assigned for the evils of the state, but the local system was never mentioned among them. I heard citizens attribute the power and prosperity of their country to a multitude of reasons, but they all placed the advantages of local institutions in the foremost rank.").}

\footnote{173. See generally THE FEDERALIST No. 39 (James Madison) (discussing the differences between a national and a federal government). Federal governments consist of a joining between the national government and the state governments. Id.}

\footnote{174. See generally Ann Althouse, How to Build a Separate Sphere: Federal Courts and State Power, 100 HARV. L. REV. 1485, 1495 (1987). The courts have long ago concluded that federal and state constitutions leave some areas in which both the federal and state governments can act. However, this reasoning is contrary to the Ninth and Tenth Amendments to the Federal Constitution, which leaves no aspect of the power given by the people to the government undistributed. U.S. CONST. amends. IX-X.}

\footnote{175. I TOCQUEVILLE, supra note 1, at 61.}
and the states as "completely separate and almost independent." The federal government being "circumscribed within certain limits and only exercising an exceptional authority over the general interests of the country." Conversely, "fulfilling the ordinary duties and responding to the daily and indefinite calls of a community" fell to the states.

The level of state independence Tocqueville saw in this country soon disappeared in the aftermath of the Civil War. The constitutional relationship between the branches of government was formally altered by the adoption of the post-Civil War amendments to the Federal Constitution. However, the courts have subsequently agreed that in adopting those amendments, the states did not intend to completely eliminate their separate and independent nature. While the dividing lines between state and national government have been blurred, we still have a strong federalist system of government that continues to grow stronger. That system forms an important part of the division of power that was intended to exist under the original state and national constitutions. The Federal Constitution was created not just to authorize the creation of a federal government, but for the benefit and protection of the states as independent legal entities. It contains numerous provisions protecting the states from federal encroachment. There are also several constitutional doctrines that have developed over the years to protect a separate sphere of influence for the

176. Id.
177. Id.
178. Id. ("The Federal government . . . is the exception; the government of the states is the rule.").
179. U.S. CONST. amends. XIII-XV.
181. See generally THE FEDERALIST NO. 37 (James Madison) (explaining that federalism fosters stability for the federal government as well as the states).
182.

Power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other as the instrument of redress.

states, including the "Erie doctrine," the "adequate state grounds doctrine," and the doctrine that allows the states to grant citizens greater rights under state law than exist under federal law. There is, and should be, a constant tension over the proper boundary line between federal and state authority. As with economic competition in the private sector, this competitive aspect of our system of government is beneficial to the people and, wherever it appears to be endangered, the Revision Commission should consider whether steps can be taken to assure its preservation.

V. THE NATURE OF RIGHTS

In addition to providing an organizational framework that protects the citizenry from governmental abuses, the Florida Constitution, like other constitutions, establishes the relationship between government and the people by enumerating certain rights. These rights, as well as others, are

183. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (establishing that "[i]here is no federal general common law" and thereby limiting the ability of federal courts to "create" new law without a specific basis of authority such as state law, the United States Constitution, or federal statutes).

184. The original formulation of the adequate state grounds doctrine provided that where a state court entered a decision based on an "adequate state ground," such as a state constitution or state statute, federal courts would not intervene to disturb the decision. Herb v. Pitcairn, 324 U.S. 117, 125 (1945). While its use has slowed the past few years, in the early 1980s the United States Supreme Court turned this doctrine on its head and used it as a device to assume jurisdiction over state court decisions based on state law. See, e.g., Michigan v. Long, 463 U.S. 1032, 1042 (1983). Until the Court returns to its early formulation of the doctrine it will be of no use in defining the boundary between federal and state governments.


186. See D'Alemberte, supra note 7, at 15 (discussing the 1968 Commission's concern over federal intrusion on state authority).

187. See discussion supra note 25 and accompanying text. These rights are inherent in the individual. Constitutions do not create rights in any classic sense. Explicit identification of specific rights in constitutions is intended to assure that those rights will not be infringed. Governments have provided for the enumeration of rights in their constitutions because assurance of those rights is important to the continuation of democratic governments. As Tocqueville noted, "[i]f ever the free institutions of America are destroyed, that event may be attributed to the omnipotence of the majority, which may at some future time urge the minorities to desperation and oblige them to have recourse to physical force." I Tocqueville, supra note 1, at 279. The minorities referred to here are, of course, political minorities. See supra note 51.
said to be retained by the people, and are required to be kept free from state interference.\textsuperscript{188}

The scope of this article does not allow for a complete exploration of every "right" that one might envision. As previously discussed, there are certain fundamental rights that are inherent in all people.\textsuperscript{189} However, the term "right" has not been limited to its constitutional usage. It has often been used interchangeably with the word "entitlement" to describe both tangible and intangible goods and services to which individuals or groups believe they have some legal claim.\textsuperscript{190} Accordingly, it is perhaps more useful when considering revisions to the constitution to engage in a discussion of the nature of rights and the significance of rights in our society.

John Locke asked the rhetorical question: "I[f man] in the state of nature be so free . . . [in] his own person and possessions . . . why will he . . . subject himself to the dominion and control of any other power?"\textsuperscript{191} Not surprisingly, Locke also supplied the answer to his question and in that answer we can perceive the boundaries of rights:

\begin{quote}
[I]n the state of nature he has such a right, yet the enjoyment of it is very uncertain and constantly exposed to the invasion of others. . . The enjoyment of the property he has in this state is very unsafe, very insecure. This makes him willing to quit a condition which, however free, is full of fears and continual dangers; and it is not without reason that he seeks out and is willing to join in society with others who are already united, or have a mind to unite for the mutual preservation of their lives, liberties, and estates, which I call by the general name 'property.'\textsuperscript{192}
\end{quote}

As seen in Locke's statement, the concept of rights in society involves something of a trade-off. While the members of a society continue to possess all rights, they agree to accept limits on the exercise of certain rights,

\begin{itemize}
\item \textsuperscript{188} See FLA. CONST. art. I, § 1.
\item \textsuperscript{189} See discussion supra note 25 and accompanying text.
\item \textsuperscript{190} A useful way of examining rights to determine if they are inherent is to consider whether they can be lost. Truly inherent rights can never be lost. For example, the right of free speech can be dishonored or ignored, but it still exists within the individual. An expansive right to health care, at public expense, or public education would be a right that is dependent upon the cooperation of others for its implementation. It is not inherent in the individual and, unless enforced by the society, it ceases to exist. By interpreting the constitution to include disguised wealth transfers, we impair its moral basis thereby weakening the authority with which it speaks to other issues of a truly constitutional nature.
\item \textsuperscript{191} LOCKE, supra note 25, at 70.
\item \textsuperscript{192} Id. at 70-71.
\end{itemize}
in exchange for the right to partake of and enhance certain others. As one commentator has noted:

[S]ociety must have rules, and . . . those rules inevitably encroach on personality. If the warden permits me to play solitaire in my prison cell I am at liberty to cheat all I want; nobody else is affected thereby. But if my freedom is somewhat enlarged, to permit me to play bridge with three fellow-prisoners, I must observe the rules of the game, arbitrary though they may seem to me. For the freedom of a social game I have surrendered the liberty I had at solitaire. 193

Outside of society, people have absolute freedom to do as they please. Upon joining society they give up some portion of their freedom in exchange for the ability to exercise particular rights to a greater extent than would be possible outside society. 194 Tocqueville correctly noted that "[t]he Revolution of the United States was the result of a mature and reflecting preference for freedom, and not of a vague or ill-defined craving for independence." 195 It resulted from a "love of order and law." 196 If we seek to understand the nature of rights we must first understand that the concept of rights within society developed to facilitate the security of those who sought to be governed. 197 While rights are individual in nature and society’s recognition of inherent rights will protect political minorities, a society will not tolerate the exploitation of these rights for the purpose of avoiding justice or engaging in extensive wealth transfers at the majority’s expense. 198

193. MORLEY, supra note 91, at 37-38. The rights that individuals forego are not extinguished but are transferred to the society in the form of powers to be exercised on the individual’s behalf. For example, the power to punish those who infringe our property rights.

194. See generally LOCKE, supra note 25.

195. I TOCQUEVILLE, supra note 1, at 73. See also MORLEY, supra note 90, at 34 . Morley was of the opinion that "[w]hat we really mean by individualism is the latitude of a person to choose for himself among the many fruits of a civilization in which he actually participates. It is not merely unfair but also impossible to cut oneself off from the disagreeable results of collective action, while continuing to benefit substantially from those regarded as pleasurable." Id.

196. I TOCQUEVILLE, supra note 1, at 73.


198. See MARY ANN GLENDON, RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991) (explaining that insistence on translating every interest into a right “promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground”).
It is also commonly understood that:

Since people, in a competitive or any other society, are by no means always just to each other, some regulation by the state... is unavoidable. [But] the greatest injustice of all is done when the umpire forgets that he too is bound by the rules, and begins to make them as between contestants in behalf of his own prejudices.199

In addressing this concern, Locke described four restrictions on governmental power that, in his view, arose from the proposition that all governmental power was derived from the individuals who composed society.200 The first restriction was that “[government] is not, nor can possibly be, absolutely arbitrary over the lives and fortunes of the people.”201 Elsewhere, he described this restriction to mean that governments “are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.”202 This restriction on government has been embodied in constitutional law under the broad heading of “equal protection of the laws.”203

Next, Locke said that “these laws also ought to be designed for no other end ultimately but the good of the people.”204 Locke was referring to the necessity that laws be for the ultimate good of all people and not just for the benefit of a select few. This restriction on governmental power is related to the concept of equal protection of the laws and is also reflected in the so-called “public purpose doctrine.”205


200. See Locke, supra note 25, at 76-82. Under Locke’s approach, government can receive no greater power than it is given by the people, and there are moral limits on the exercise of those powers. Accordingly, government power is subject to the same moral restrictions that existed in individuals before they joined in a society. See id.

201. Id. at 76.

202. Id. at 81.

203. See, e.g., U.S. Const. amend. XIV, § 1; Fla. Const. art. I, § 2.

204. Locke, supra note 25, at 81. Elsewhere Locke noted that “a rational creature cannot be supposed, when free, to put himself into subjection to another of his own harm...” Id. at 93. Thus, it must be assumed that all laws should be created for the benefit of those to be governed.

205. See Fla. Const. art. VII, § 10(c); Linscott v. Orange County Indus. Dev. Auth., 443 So. 2d 97, 100 (Fla. 1983).
Locke went on to explain that "the supreme power [the Legislature] cannot take from any man part of his property without his own consent." This restriction is embodied in the Due Process Clause of the Florida Constitution. Locke further explained that this includes efforts by a government to "raise taxes on the property of the people without the consent of the people..."

Finally, Locke said "the Legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have." As discussed above, this restriction is embodied in the separation of powers requirement under the Florida Constitution.

A. The Right to Equal Protection of the Laws

Because it is so significant to the exercise of all rights in society, the right to equal protection of the laws deserves some special attention. Every Floridian has an inherent right to equal protection of the laws of this state. As noted above, this right arises from the fact that the individual relinquishes a certain amount of freedom in order to secure the rights society has to offer. However, there is no right of equality of outcomes. Anatole France once mockingly said that "[t]he law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread." While this comment is both harsh and humorous, it is also true. The Florida Constitution does not attempt to cure all of the injustices

206. LOCKE, supra note 25, at 79.
207. See FLA. CONST. art. I, § 9; U.S. CONST. amend. XIV, § 1.
208. LOCKE, supra note 25, at 81.
209. Id. at 82.
210. See discussion supra Part IV.A.
211. See FLA. CONST. art. I, § 2 (enumerating the inherent right to equal protection of the laws). The question of when a right is fundamental, such that it falls within the scope of the theory of inherent rights, can normally be determined by ascertaining the answer to one simple question: Can the right be exercised without the aid of the government or others? Sometimes the answer to this question can be ascertained by determining whether some wealth transfer is necessary to enforce the supposed right. If a right can only be secured through the government's coercion of others, then it is not an inherent right and is not, in any classic sense, a fundamental right.

212. Many rights are either not naturally available to isolated individuals, or would have no meaning to an isolated individual. See, e.g., Harold Demsetz, Toward a Theory of Property Rights, AM. ECON. REV. 347-57 (1967). It was that author's view that "in the world of Robinson Crusoe property rights play no role. Property rights are an instrument of society and derive their significance from the fact that they help a man form those expectations that he can reasonably hold in his dealings with others." Id. at 347
and hardships of life, to do so would be beyond the power of any constitution.\textsuperscript{214}

The right of equal protection of the laws forbids the government from treating those things that are similarly situated as though they are different, but it does not require the government to treat those things which are in fact different as though they are the same.\textsuperscript{215}

As Locke said:

\begin{quote}
Though . . . all men by nature are equal, . . . [a]ge or virtue may give men a just precedence; excellence of parts and merit may place others above the common level; birth may subject some, and alliance or benefits others, to pay an observance to those whom nature, gratitude, or other respects may have made it due; and yet all this consists with the equality which all men are in, in respect of jurisdiction or dominion one over another, which was the equality I there spoke of as proper to the business in hand, being that equal right that every man has to his natural freedom, without being subjected to the will or authority of any other man.\textsuperscript{216}
\end{quote}

Recently, there has been a strong trend in our society to extend the constitutional\textsuperscript{217} theory of equal protection of the laws to require equality of outcomes for particular groups or arbitrary classifications of people.\textsuperscript{218} All

\begin{footnotes}
\textsuperscript{214} See Lindsey v. Normet, 405 U.S. 56, 74 (1972) (explaining that even the United States Constitution cannot “provide judicial remedies for every social and economic ill”).
\textsuperscript{216} LOCKE, supra note 25, at 31.
\textsuperscript{217} It is important at this point to note the difference between constitutional rights and legislatively created rights. Subject to the limits imposed by the constitution, the Legislature is free to create statutory economic rights. \textit{See, e.g.}, FLA. STAT. § 440.01-.60 (creating the right to receive workers’ compensation under certain statutorily prescribed circumstances).
\textsuperscript{218} Often these efforts are accompanied by demands for government spending or increases in taxation for the purpose of making various kinds of economic opportunities available to groups of people who are believed to be disadvantaged. \textit{See, e.g.}, Allen W. Hubsch, \textit{The Emerging Right to Education Under State Constitutional Law}, 65 TEMP. L. REV. 1325 (1992); Mary Ellen Cusack, \textit{Judicial Interpretation of State Constitutional Rights to a Healthful Environment}, 20 B.C. ENVTL. AFF. L. REV. 173 (1993); Bert B. Lockwood Jr. et. al., \textit{Litigating State Constitutional Rights to Happiness and Safety: A Strategy for Ensuring the Provision of Basic Needs to the Poor}, 2 WM. & MARY BILL RTS. J. 1 (1993). These efforts are misplaced. As Locke noted, “[t]he great and chief end, therefore, of men’s uniting into commonwealths and putting themselves under government is the preservation of their property.” \textit{LOCKE, supra note 25, at 71.} Government does not normally produce wealth; it obtains wealth through the taxation of its citizens. Establishing economic rights in certain
\end{footnotes}
rights of a constitutional nature are vested in individuals, not in groups. When we attempt to confer preferences upon groups as opposed to individuals, we move in direct violation of the principle of equal protection.\textsuperscript{219}

A simple demonstration of this idea is that all citizens have an inherent right to petition the government for redress of grievances. This right arises based upon the individual’s relationship with the government;\textsuperscript{220} it does not arise by virtue of membership in any particular group.\textsuperscript{221} Confining the right to redress grievances to members of particular groups, or granting some groups a more expansive right, would deprive all others of the equal benefit of that right. Thus, it is not only contrary to the notion of “individual” liberties to find that rights arise from groups, but doing so directly violates the principle of equal protection of the laws.

We may not all agree on which rights are constitutional in nature. But, we can all agree on a core of rights that belong in the constitution, and we must recognize that grossly expanding these rights into controversial areas can cause even core rights to be called into question.\textsuperscript{222} This is not to suggest that Legislatures are forbidden from conferring benefits,\textsuperscript{223} it simply means that government is not compelled to do so as a matter of constitutional law.

\vspace{1cm}

individuals necessarily implies a need to take money from some other individuals to meet the demand imposed by the new economic right. In doing so, government risks impairing its relationship with those from whom it removes wealth for the benefit of others.


\textsuperscript{220} U.S. CONST. art. I; FLA. CONST. art. I, § 5.

\textsuperscript{221} See MARY ANN GLENDON, RIGHTS TALK, THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (explaining that “[a]n intemperate rhetoric of personal liberty in this way corrodes the social foundations on which individual freedom and security ultimately rest”).

\textsuperscript{222} Others have noted that interpreting rights too expansively can cause them to be so disrespected that they are destroyed. See, e.g., Gerald B. Cope Jr., Toward a Right of Privacy as a Matter of State Constitutional Law, 5 FLA. ST. U. L. REV. 633, 664 n.182 (1977) (citing Kurland, The Private I, U. CHI. MAG., Autumn 1976, at 11).

\textsuperscript{223} See discussion \textit{supra} pp. 29-33. Equal protection of the laws requires that persons who are similarly situated be treated as though they are the same. Thus, if government chooses to confer benefits on individuals for arbitrary reasons it would run afoul of the equal protection requirement. Government can confer benefits, but it must comply with the law in doing so.
B. Rights in Property

From the foregoing discussion, it can be seen that property should not normally be acquired by individuals from government. Additionally, the rights properly considered constitutional are those that caused us to join into society, and without which we would not have willingly joined the society at all. These rights can be summarized as those necessary to enjoy life, liberty, and property within the bounds of a civilized society. Locke considered all such rights under the notion of property, and described the circumstances under which primitive property rights evolved from common ownership. He believed “acquisition and improvement” created a right of individual ownership. One of the incidents of ownership is, of course, the power to convey an ownership interest to others, so property rights could be continued. Natural limits to property rights existed in the form of limits on the amount of property a person could put to a useful purpose, without waste.

The obvious limit to Locke’s theory, the one he left unexplored, is the lack of sufficient property available for “acquisition and improvement.” This may cause market-based societies to appear unfair. However, free markets are constantly devising new forms of property, new ways of executing transactions in property, and new ways of taking ownership in property. Thus, the problem Locke left unexplored, the potentially limited supply of property, seems to be constantly in the process of being overcome.

224. Government was not intended to be, and is normally not a wealth producer. Accordingly, the wealth it transfers to one must usually be obtained from others.

225. See U.S. CONST. amend. XIV, § 1.


227. Id. at 18-19.

228. Id. at 28.

229. Id. at 19.

230. Id. at 16-30.

231. For example, we now recognize a wide range of intellectual property.

232. Much like their peasant forebears who gleaned fallen grain from the fields of land owners, arbitrageurs now sit at computer terminals and “glean” small fractional profits by exploiting the differences in the price of stocks between the stock exchanges. Some have grown quite wealthy through this modern day gleaning process.

233. In modern times, we have developed stock markets in which anyone can buy an interest in a publicly traded company. The right to purchase or sell stocks at a future date is also a valuable property interest (“futures”) that can be freely traded, and one can even purchase futures in the currency used to purchase stocks or other commodities (“currency futures”).
VI. OTHER PROVISIONS OF THE FLORIDA CONSTITUTION

The Florida Constitution contains a body of non-fundamental legal material. Much of this material was incorporated at various times for political reasons. While most of these provisions taken individually are quite harmless, the overall importance of the constitution is diminished in the minds of the public and lawmakers when legal material of lesser significance is included in its pages. To the extent that these provisions are innocuous, there is no real reason to remove them from the constitution other than as a kind of housekeeping exercise. However, some provisions that are purely gratuitous have the potential to be misinterpreted and should be considered for removal.

For example, article IX, section 1, establishes the requirement that "[a]dequate provision shall be made . . . for the establishment, maintenance and operation of institutions of higher learning and other public education programs . . . ." This provision is particularly troubling because as Tocqueville said:

> It cannot be doubted that in the United States the instruction of the people powerfully contributes to the support of the democratic republic; and such must always be the case, I believe, where the instruction which enlightens the understanding is not separated from the moral education which amends the heart.

However, some interpret article IX, section 1 to require a particular level of school funding and would use it as a basis for allowing individuals to sue the state for additional educational funding. If the judiciary were to expand on this simple statement, it could be used as a basis for requiring

234. D'ALEMBERTE, supra note 7, at 16 (describing some constitutional language as "meaningless" but "politically popular").

235. Id. at 17 (noting that some provisions of the Constitution of 1968 were merely "statements of aspirations"or were "precatory" in nature).

236. FLA. CONST. art. IX, § 1.

237. TOCQUEVILLE, supra note 1, at 329.

238. One attempt to secure an expansive interpretation of this language was a partial failure. See Coalition For Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400 (Fla. 1996). However, because the court left the door open to future challenges, the suit secured a measure of success for those who wish to compel a higher level of school funding. See also Barbara J. Staros, School Finance Litigation in Florida: A Historical Analysis, 23 STETSON L. REV. 497 (1994); Peter Enrich, Leaving Equality Behind: New Directions in School Finance Reform, 48 VAND. L. REV. 101 (1995); John Powell, Segregation and Educational Inadequacy in Twin Cities Public Schools, 17 HAMLINE J. PUB. L. & POL'Y 337 (1996).
wealth transfers for the benefit of particular individuals or groups. Therefore, its continued inclusion in the Florida Constitution offers little value in exchange for the associated risk.

VII. CONCLUSION

For the most part, the Florida Constitution has served us well and should not be changed. In considering whether specific constitutional revisions should be adopted, we should ask ourselves the following questions: What is the appropriate relationship between government and the people, and is that relationship properly reflected in the social order that has developed under the constitution? If not, can the problems we find in the social order be addressed through the constitution? Are they fundamental in nature, or should they be addressed through some other means?

With regard to each of the three branches of government, as well as each officer and agency, we should ask if the system of checks and balances in the constitution is well-ordered, and whether the divisions of power are being respected. As a practical matter, we should ask whether the government is functioning well, or whether the people would benefit from some reorganization that must be accomplished through constitutional means.

In answering these questions, the text of the document as well as the purpose and ideas of the people who created the constitution should be honored. It was once said that "[t]he people reign in the American political world as the Deity does in the universe." This statement was intended to mean that, collectively, the people exercise complete control over their government. If the Revision Commission accomplishes nothing else, we hope that it will take some small steps towards restoring the truth of that statement for the people of Florida.

239. I TOCQUEVILLE, supra note 1, at 60. Tocqueville further comments that, "[i]n America, the people form a master who must be obeyed to the utmost limits of possibility." Id. at 64.
**RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes: Condominium Associations Cheated: The Fourth District Denies Assessments Imposed upon Developer-Owned Unconstructed Condominium Units**

Mark F. Grant*  
Brooke D. Davis**

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I. INTRODUCTION

Prior to the January 29, 1997, decision handed down by the Fourth District Court of Appeal in *RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes,* there were a handful of cases that addressed the creation of condominium units. The most important of these cases were decided in the second and fourth districts and were at odds with one another, despite that various sections of the *Florida Statutes* adequately address and control precisely when a condominium unit is considered created. While the second district was consistent in two of its most important cases on this topic, the fourth district has made decisions at odds with cases within its own district, as well as decisions at odds with those of the second district. When faced with an opportunity to address the split in the districts last January, rather than rectify the problem it helped to create, the fourth district opted to further confuse an already unnecessarily disconcerting area of law.

In Section II, this comment will survey, in addition to the *RIS* decision, four of the most important decisions in this area, two of which came from the second district, and two of which came from the fourth. Section III will address the statutes that were controlling in each case, and Section IV will address the question of whether the fourth district sought to create a third type of condominium property not contemplated by the legislature.

II. THE CASES PRECEDING RIS

Although the fourth district previously decided at least two cases concerning the point in time a condominium unit is created for purposes of imposing assessment fees, in *RIS,* the court addressed only one of those cases, apparently choosing to ignore the other. While the *RIS* decision is based solely upon the fourth district’s decision in *Welleby Condominium Ass’n One, Inc. v. William Lyon Co.,* omitted from consideration—or at least discussion—are the fourth district’s decision in *Winkelman v. Toll* and the second district’s decisions in *Hyde Park Condominium Ass’n v. Estero*

1. 695 So. 2d 357 (Fla. 4th Dist. Ct. App. 1997).
2. 522 So. 2d 35 (Fla. 4th Dist. Ct. App. 1987).
3. 661 So. 2d 102 (Fla. 4th Dist. Ct. App. 1995).
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Island Real Estate, Inc.⁴ and Estancia Condominium Ass’n v. Sunfield Homes, Inc.⁵ Not surprisingly, Welleby is the single decision among the aforementioned cases that is in concert with the fourth district’s RIS decision. A brief synopsis of each pre-RIS decision, as well as the RIS decision, follows.

A. Hyde Park Condominium Ass’n v. Estero Island Real Estate, Inc.

In Hyde Park Condominium Ass’n v. Estero Island Estate, Inc.,⁶ Hyde Park appealed a summary judgment entered in favor of Estero Island Real Estate. Pursuant to the summary judgment, the lower court declined to hold Estero Island liable for assessments Hyde Park claimed were past due on certain unimproved land owned by Estero Island. Estero Island acquired title in November of 1981 to the subject unimproved real property located in Hyde Park I Condominium, which was operated by the appellant. Estero Island acquired title from Philip Werner, Jr., who was also an appellee in this case. Werner acquired title in February of 1976.⁷

In 1983, Hyde Park sought to recover from Estero Island past due assessment fees from 1970 to 1983. Estero Island filed a notice of contest in response to Hyde Park’s Claim of Lien, and, in September of 1983, Hyde Park issued a partial release of claim for assessments owed for the period of 1970 to February of 1976, when Werner acquired title. At that time, Hyde Park filed a claim against the appellees for the assessments due from February 1976 to 1983 and sought to foreclose upon the seven units owned by Estero Island that remained unimproved.⁸

The basis for Estero Island’s refusal to pay was that, because the property remained unimproved, the property constituted “lots” rather than “units;” thus, according to Estero Island, because it owned “lots,” it could not be held liable for assessment fees to which only “units” were subject. Upon the appellees’ joint motion for summary judgment, the court agreed that “the issue of law was whether the declaration of condominium provided for assessments to come due against unimproved lots for proposed apartments, or, whether the declaration only contemplated that assessments were to be paid by ‘completed apartments.’”⁹ Summary judgment was entered in favor of the appellees.¹⁰

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4. 486 So. 2d 1 (Fla. 2d Dist. Ct. App. 1986).
6. Hyde Park, 486 So. 2d at 1.
7. Id. at 2.
8. Id.
9. Id.
10. Id.
Upon appeal to the second district, however, the lower court’s decision, which was premised upon section 711.03(7) of the Florida Statutes, was reversed. The lower court had determined that the unimproved property owned by Estero Island did not fall within the statutory definition of condominium property, which is defined as “units of improvements.” The second district disagreed and found that, under the 1969 Condominium Act which controlled in this case, condominium property includes land, all improvements, all improvements on the land, and all easements and rights with the condominium. A “unit” is that part of the condominium property “which is to be subject to private ownership.” Therefore, under the 1969 Act, the only type of private ownership available within a condominium is a “unit.” For this court to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration. Therefore, the second district determined that the unimproved lots owned by Estero Island were indeed “units” within the meaning of the applicable statute, and Hyde Park was indeed entitled to those past due assessment fees it claimed.

B. Welleby Condominium Ass’n One, Inc. v. William Lyon Co.

The next of the cases, Welleby Condominium Ass’n One, Inc. v. William Lyon Co., was decided in 1987 by the Fourth District Court of Appeal. Welleby, the case upon which RIS was decided, involved a dispute between the plaintiff condominium association, Welleby Condominium Association, and the defendant land owner, the William Lyon Company. The dispute concerned assessment fees the Welleby Condominium Association levied upon the unimproved lots owned by the William Lyon Company, all of

11. Hyde Park, 486 So. 2d at 2.
13. Hyde Park, 486 So. 2d at 2. (citations omitted) (second emphasis added) (citing Fla. Stat. § 711.03(9), (13) (1969)).
14. Id.
15. Id.
16. Welleby, 522 So. 2d at 35.
17. Id.
which were described in the declaration of condominium that was filed in October of 1974.\textsuperscript{18}

In March of 1986, Welleby filed Claims of Lien upon the subject land for unpaid maintenance assessments, which it subsequently sought to foreclose. Welleby alleged that the unimproved land owned by the defendant was subject to such assessments pursuant to both section 718.116 of the \textit{Florida Statutes} and the declaration of condominium. The defendant, however, claimed that the unimproved land owned by it did not constitute "condominium parcels' or 'units" as defined by either the declaration of condominium or the \textit{Florida Statutes} and, therefore, could not be subject to the claimed assessments.\textsuperscript{19}

The fourth district determined that the issue before it was "whether the land['] owned by the [d]efendant [was] subject to assessments levied by the [p]laintiff under the [d]eclaration of [c]ondominium and the Laws of Florida."\textsuperscript{20} In determining that the defendant land owner was not liable for the claimed assessments, the court considered section 711.15(1) which read: "A unit owner . . . shall be liable for all assessments coming due while he is the owner of a unit."\textsuperscript{21} The court next considered section 711.03(15),\textsuperscript{22} which stated that a "['u]nit' means a part of the condominium property which is to be subject to private ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."\textsuperscript{23}

The court next turned to the declaration for its definition of a "unit;" however, the declaration, despite that section 711.15(1) holds "unit owner[s] . . . liable for all assessments coming due . . . .\textsuperscript{24} failed to define or mention "unit" or "unit owner." The court did recognize, however, that the declaration, while "not us[ing] the word 'unit' as the object of assessments[,] . . . utilized the term 'condominium parcel' as the object of assessments by the Condominium Association."\textsuperscript{25} This was determined by the fourth district to be an intentional decision made by the scrivener of the declaration as evidenced by the consistent and repeated use of the term, as well as by the statement in the declaration that "'[t]he owner of each

\textsuperscript{18} Id. at 35–36.
\textsuperscript{19} Id. at 36.
\textsuperscript{20} Id.
\textsuperscript{21} \textit{Welleby}, 522 So. 2d at 36 (citing \textit{FLA. STAT. § 711.15(1)} (Supp. 1974)).
\textsuperscript{22} This section, in effect at the time the declaration of condominium was recorded, is presently codified at section 718.103(24) and has retained the exact language. \textit{FLA. STAT. § 718.103(24)} (1995).
\textsuperscript{23} \textit{Welleby}, 522 So. 2d at 38 (citing \textit{FLA. STAT. § 711.03(15)} (Supp. 1974)).
\textsuperscript{24} Id. at 36 (citing \textit{FLA. STAT. § 711.15(1)} (Supp. 1974)).
\textsuperscript{25} \textit{Welleby}, 522 So. 2d at 37.
condominium parcel shall be liable to the condominium association for the share of common expenses set forth."\textsuperscript{26}

The declaration proceeded to define the term “condominium parcel” as “[a]n apartment together with the undivided share in the common elements and all its easements, rights and interest which are pertinent to the apartment.”\textsuperscript{27} The declaration further defined “apartment” as an “[i]ndividual dwelling” and, as the fourth district stated, “not raw, unimproved lands.”\textsuperscript{28} Accordingly, the court stated that the scrivener, pursuant to section 711.03(15),\textsuperscript{29} chose to describe a “unit” in terms of a “condominium parcel”, which is an individual private dwelling. As permitted by [s]tatute, this [d]eclaration specifically describes the object of assessments as land and improvements, namely, an individual private dwelling, and the use of the term “condominium parcel” is so specifically used throughout this [d]eclaration of [c]ondominium, as to preclude any other interpretation as to what the object of assessments was to be against. Assessments, according to this [d]eclaration, could not be assessed and levied against anything other than an individual private dwelling, and the [d]eclaration would not permit any interpretation allowing an assessment against raw, unimproved lands upon which there is no private dwelling.\textsuperscript{30}

The fourth district did, however, recognize the very different decision in \textit{Hyde Park}, the most recent case at the time of the \textit{Welleby} decision. The \textit{Welleby} court distinguished its decision from \textit{Hyde Park} by relying upon the statutory language contained in the sections that were in effect at the time of each decision. In \textit{Hyde Park}, the 1969 Condominium Act controlled, under which section 711.03(13) defined “units” as including “any part of the condominium property which was subject to private ownership.”\textsuperscript{31} This, according to the fourth district, was a very broad definition that would include unimproved property such as that at issue in \textit{Welleby} and that, therefore, the second district was correct in assessing the owner of unimproved lands in \textit{Hyde Park}.\textsuperscript{32}

\textsuperscript{26} \textit{Id.}
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} FLA. STAT. § 711.03(15) (Supp. 1974) (stating that a unit is as defined by the declaration of condominium).
\textsuperscript{30} \textit{Welleby}, 522 So. 2d at 37.
\textsuperscript{31} \textit{Id.} at 37–38.
\textsuperscript{32} \textit{Id.} at 38.
However, in *Welleby*, section 711.03(15), as opposed to section 711.03(13), was in effect, and the newer section defined “unit” differently. The critical amendment, according to the fourth district, was the addition of the phrase that “permitted a ‘unit’ to be described in any number of different ways.”\(^{33}\) The court subsequently concluded that the declaration defined a “‘unit’ as a private dwelling, thus exempting from an assessment, raw, unimproved property”\(^{34}\) and found that the Welleby Condominium Association did not “have legal authority to levy assessment against the [d]efendant’s land.”\(^{35}\)

C. *Estancia Condominium Ass’n, v. Sunfield Homes, Inc.*

In 1993, *Estancia Condominium Ass’n v. Sunfield Homes, Inc.* was decided.\(^{36}\) The second district rendered a decision consistent with its decision in *Hyde Park* seven years earlier. In *Estancia*, the second district reversed and remanded the case in which the appellee, Sunfield Homes, despite failing to prove that “it was not the legal owner of twenty units [of condominium property] under the applicable *Florida Statutes* and the definition of ‘unit’ within the declaration[,]”\(^{37}\) was declared exempt from paying the assessment fees levied against it.\(^{38}\)

The declaration of condominium for Estancia Condominium was recorded in 1981 and proposed a twelve-phase condominium. In 1983, an amendment to the declaration was recorded that submitted to the condominium the land for Buildings 200 and 600. Subsequently, in 1990, Sunfield Homes purchased the land that had been dedicated to Building 600, but upon which Building 600 had never been constructed. Accordingly, the unimproved land remained subject to the declaration of condominium.\(^{39}\)

Upon acquiring title to the land, Estancia Condominium Association began assessing Sunfield Homes for units 610–629. Sunfield Homes subsequently refused to pay these assessments, and Estancia filed an action to foreclose its lien upon such units for unpaid assessments. The trial court entered judgment in favor of Sunfield Homes based primarily upon the fourth district’s holding in *Welleby*, which declared unimproved land inconsistent with the definition of “unit” and, thus, immune to assessments.\(^{40}\)

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33. *Id.*
34. *Id.*
35. *Welleby*, 522 So. 2d at 38.
36. *Estancia*, 619 So. 2d at 1008.
37. *Id.* at 1009 (emphasis added).
38. *Id.*
39. *Id.*
40. *Id.*
The second district recognized that *Welleby* was controlled by an earlier version of the statutory definition of "unit" and that the case before them concerned the 1981 version, codified at section 718.103(16) of the *Florida Statutes*. This section defined "unit" as "a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration." Further, the declaration in *Estancia* defined a "unit" as "the part of the condominium property which is to be subject to exclusive ownership"—a definition which is indistinguishable from the definition in *Hyde Park*. Thus, the second district declined "to decide in this case whether [it] agree[d] with the Fourth District's decision in *Welleby*" and held, in accordance with its decision in *Hyde Park*, that Sunfield Homes was liable for the assessments levied upon its unimproved land by *Estancia*.

D. *Winkelman v. Toll*

The most recent of the cases preceding *RIS* was decided in 1995 by the fourth district. *Winkelman* is a case that was surprisingly consistent with previous second district decisions and inconsistent with the fourth district's own decision in *Welleby*. Perhaps even more surprisingly, the *Winkelman* court's only mention of *Welleby* is found in its sole footnote in which the court summarily dismisses the *Welleby* decision with respect to its present contrasting decision.

In *Winkelman*, the trial court held that the unimproved land owned by the appellees was not subject to assessment fees because the contemplated units were never constructed. However, the fourth district reversed "[b]ecause...the property was subjected to condominium ownership upon the recording of the amendment to the declaration adding it to the condominium." Therefore, although the units described in the declaration and added to the condominium through an amendment were never

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41. *Estancia*, 619 So. 2d at 1010 (citing Fla. Stat. § 718.103(16) (1981)). It is interesting to note that the words that were critical to the *Welleby* decision denying the assessments are identical to the words in the newer version: "...as specified in the declaration."

42. 619 So. 2d at 1010.

43. *Id.*

44. 661 So. 2d at 102.

45. *Id.* at 107 fn.1.

46. *Id.* at 103.

47. *Id.*
constructed, they were subject to assessments, and the owner of the unimproved land was liable.\textsuperscript{48}

The declaration of condominium for Mission Lakes Condominium was recorded in 1980. The declaration contemplated nine phases, which were to be submitted by amendment pursuant to section 718.403.\textsuperscript{49} This section permits the developer of a condominium to describe in the declaration the proposed number of phases, but permits the contemplated units to escape assessments until the developer adds the phases by amending the declaration; hence, this section of the statute is titled "Phase condominiums."\textsuperscript{50} Accordingly, the developer recorded the declaration, and thereby submitted phase II to condominium ownership. Just over one week later, the developer recorded an amendment adding phases I and III through VIII to the condominium.\textsuperscript{51} In compliance with the applicable statute, the developer attached land surveyor certificates upon substantial completion of phases I and II;\textsuperscript{52} however, the remaining phases were never constructed.\textsuperscript{53}

In 1985, the Winkelmans purchased all the units in phase I of the condominium and purchased all the units in phase II the following year. In 1987, ICON Development Corporation, an appellee in this case, acquired all the units in phases I through VII. According to the fourth district, "[t]he deed to these phases described the property by their description as contained in the amendment to the declaration of condominium, and the deed was specifically subject to the declaration[] of condominium and amendments thereto."\textsuperscript{54}

In 1989, the Winkelmans filed suit to recover from ICON the assessment fees for the percentage of the common expenses of the condominium owned by ICON but for which the Winkelmans had been paying. Several years after instituting this action, ICON filed a counterclaim to quiet title claiming that it had acquired title in fee simple and not subject to the condominium form of ownership. In finding for ICON, the trial court determined that, according to the declaration of condominium, only upon substantial completion of the units could a phase in which the units were to

\begin{itemize}
\item \textsuperscript{48} \textit{Id.}
\item \textsuperscript{49} FLA. STAT. § 718.403 (1979).
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Winkelman}, 661 So. 2d at 104.
\item \textsuperscript{52} Section 718.104(4)(e) of the Florida Statutes requires that, upon substantial completion of each phase submitted to condominium ownership, a certificate of a registered land surveyor be recorded as an amendment to the declaration of condominium. The phase may, however, be added to the declaration prior to substantial completion. FLA. STAT. § 718.104(4)(e) (1979).
\item \textsuperscript{53} \textit{Winkelman}, 661 So. 2d at 104.
\item \textsuperscript{54} \textit{Id.} at 105.
\end{itemize}
be contained be submitted to condominium ownership.\textsuperscript{55} Furthermore, the court relied upon sections 718.403(1) and (4) of the \textit{Florida Statutes} for the proposition that, because the subject property never became subject to the condominium, the phases that were built acquired the entire interest in the common elements for which they were assessed.\textsuperscript{56} Thus, the court reasoned that the units, by virtue of the declaration of condominium, could become subject to the condominium only upon substantial completion and that, because construction of the units never commenced, the units were never substantially completed, the property in question was never subject to condominium ownership, and ICON was not subject to the assessments that the Winkelmans were attempting to recover.\textsuperscript{57}

However, upon appeal by the Winkelmans, the fourth district reversed the lower court. Although section 718.103(16) permits the scrivener to define a “unit” as “improvements, land, or land and improvements together, . . .”\textsuperscript{58} it is crystal clear that “[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership.”\textsuperscript{59} Further, because “[a] condominium is \textit{strictly a creature of statute},”\textsuperscript{60} it is with the statute that the declaration must comply, and should the declaration fail to do so, it is the statute that shall prevail.\textsuperscript{61} Accordingly, contrary to the findings of the lower court, the fourth district found that, because section 718.104(2) of the \textit{Florida Statutes} “mandates that the condominium is created upon the recording of the declaration, the
certificate of substantial completion cannot be a condition precedent to the creation of the condominium if it can be submitted at a later date."\textsuperscript{62}

Additionally, section 718.110(3) similarly mandates that an amendment to a declaration becomes effective upon recordation of the amendment adding the subject property to the condominium, thereby subjecting it to the declaration, as well.\textsuperscript{63} Therefore, as with section 718.104(2), failure to improve the property already added to the condominium by amendment prior to recordation of the amendment "does not prevent the inclusion of the land in the condominium, because the amendment is effective when recorded."\textsuperscript{64} To find otherwise would be to contradict the clear language of the statute.\textsuperscript{65}

The fourth district found that the unconstructed phases owned by ICON became subject to the declaration upon the recordation of the amendments adding the phases and remanded the case for further proceedings consistent with that finding.\textsuperscript{66} The court cited to Estancia for support for its finding and briefly addressed, in a single footnote, its own decision in Welleby, which the appellee ICON argued was inconsistent with both Estancia and Hyde Park. While the court's decision in Welleby is contrary to its decision in Winkleman, the court dismissed the contradiction by viewing Welleby as having not addressed the issue of "whether the property dedicated to the unconstructed units was part of the condominium. In fact, from a reading of the opinion the court assumed that the property was part of the condominium but not subject to assessments."\textsuperscript{67} Thus, the fourth district, in a brief breath, both contradicted and dismissed its perhaps iniquitous decision in Welleby rather than seeking to rectify this past discrepancy.

E. \textit{RIS Investment Group, Inc. v. Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes}

In \textit{RIS},\textsuperscript{68} the fourth district relied upon its decision in \textit{Welleby} for support and, at the same time, completely ignored its more recent decision in \textit{Winkelman}. Once again, the controversy involved whether the owner of unimproved condominium property could be assessed for common expenses on that property. RIS was the developer of the condominium at issue and retained ownership of certain units. Although the subject units were

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} at 106.
\item \textsuperscript{63} \textit{Winkelman}, 661 So. 2d at 106 (citing FLA. STAT. § 718.110(3) (1981)).
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 107.
\item \textsuperscript{67} \textit{Winkelman}, 661 So. 2d at 107 fn.1.
\item \textsuperscript{68} 695 So. 2d at 357.
\end{itemize}
eventually constructed, RIS failed to pay assessments on the units from the time of recordation of the declaration of condominium until the time a certificate of occupancy was issued on the units. RIS argued that it was not until the certificate of occupancy was issued that the units were subject to assessment fees, the time from which RIS did pay assessments.\textsuperscript{69}

While the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums, and Mobile Homes (the "Department") determined that RIS was liable for the assessments from the date of recordation of the declaration of condominium, the fourth district disagreed and reversed the Department’s ruling.\textsuperscript{70} In so finding, the court compared \textit{RIS} to its decision in \textit{Welleby} in which it exempted from assessments developer-owned unimproved land because the declaration made reference only to "condominium parcel," as opposed to "unit," which was defined as an apartment or individual dwelling unit, a definition into which the court believed unimproved land did not fall. The court analogized these cases on the premise that the RIS declaration also expounded a definition of "unit" that was inconsistent with unimproved land upon which, therefore, assessments could not be levied.\textsuperscript{71} However, while it is questionable that the declaration in \textit{RIS} even defined the term "unit," what the RIS declaration did provide was a description of what will constitute a unit upon completion:

Each unit consists of the dwelling applicable to the [u]nit, less that portion of the basic Building structure for the dwelling lying within each dwellings[’] maximum dimension as shown on the survey graphic description and plot plan attached hereto.... The boundary lines of each [u]nit are the unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan.\textsuperscript{72}

Together with this description, the court considered two additional clauses found within the declaration:

2.2 The Condominium... is divided into 160 [u]nits which...[.] are shown in the survey of the land on which a graphic description of the improvements in which the [u]nits are located and a plot plan thereof which, together with this [d]eclaration are in sufficient detail to identify the common elements and each [u]nit

\textsuperscript{69} RIS, 695 So. 2d at 358.
\textsuperscript{70} Id.
\textsuperscript{71} Id. at 358–59.
\textsuperscript{72} Id. at 359 (emphasis omitted) (quoting section 3.2 of the RIS declaration).
and the relative location and the approximate dimensions thereof. . . . Each unit shall be a part of the Condominium Parcel which contains the [u]nit.

3.4 . . . The Condominium Parcel, consisting of the [u]nit together with the undivided share of the common elements which are appurtenant to the [u]nit, and the limited common elements which are appurtenant to the [u]nit, constitutes a separate parcel of real property, the ownership of which is in fee simple.73

It is upon these portions of the declaration that the court found a “clear” intent by the scrivener “not to include [raw, unimproved] land . . . within the definition of a unit.”74 Accordingly, the fourth district reversed the Department and held that, because raw land did not constitute a “unit” subject to assessments, RJS owed no assessments.75

III. APPLICABLE STATUTES

In Winkelman, the fourth district recognized that a condominium is strictly a creature of statute and that any declaration in derivation of the statute cannot control.76 However, only sixteen months later, the court, as it did in Welleby, once again applied a misinterpretation of the clear and unambiguous language of the statute it had not too long before confirmed was controlling. While in RJS the fourth district relied upon its decision in Welleby, the court not only clearly ignored its contrary decision in Winkelman only a short time earlier, but ignored the contrary decisions from the second district in both Hyde Park and Estancia. Presented with an opportunity to address the discrepancy within its own district, as well as between the second and fourth districts, the court failed to do so and succeeded only in adding more confusion to what should be a crystalline area of law.

In Hyde Park and Estancia, the second district relied upon the applicable statute in each case. In Hyde Park, the statute in effect at the time the declaration was recorded was section 711.03(9),77 which stated, in pertinent part, that “condominium property includes land, all improvements, all improvements on the land, and all easements and rights with the condominium.”78 Further, “[a] ‘unit’ is that part of the condominium

73. Id.
74. RJS, 695 So. 2d at 359.
75. Id.
76. 661 So. 2d at 105.
77. FLA. STAT. § 711.03(9) (1969).
78. 486 So. 2d at 2 (citing FLA. STAT. § 711.03(9) (1969)).
property "which is to be subject to private ownership." Therefore, based upon this simple statutory language, the court determined that a "unit" is the only type of condominium property subject to private ownership and that "to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration[;]" accordingly, the court held that, because they were subject to private ownership, unimproved lots were indeed "units" and subject to assessments pursuant to section 711.03 of the Florida Statutes.

Likewise, in Estancia, the court again relied upon the clear statutory language in deciding that the unimproved condominium property at issue was subject to assessments. The statute here in effect was section 718.103(16) of the 1981 Florida Statutes, which contained some of the same language to define a "unit" as the 1969 statute that controlled in Hyde Park: "[I]t is a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration." Due to the addition of the phrase "as specified in the declaration[,]" the court considered the definition of the term "unit" that was contained in the declaration. Because the Estancia declaration defined "‘unit’ as ‘the part of the condominium property which is to be subject to exclusive ownership[,]’" and because it is clear that the statute subjects unit owners to assessment fees, the court again found that unimproved condominium property that was subject to private ownership was also subject to assessments.

The Estancia court, while refraining from commenting on whether it agreed with the fourth district's decision in Welleby, expressed concern that Welleby served to create a type of condominium property that was not created or contemplated by the legislature. The court in Welleby determined that, because the Welleby declaration used the term "condominium parcel," defined within the declaration as an individual

79. Id. (quoting Fla. Stat. § 711.03(13) (1969)).
80. Id.
81. Id.
83. Id.
84. Estancia, 619 So. 2d at 1010.
85. Id. at 1010.
86. Id. The Estancia court stated: "It is arguable that the [f]ourth [d]istrict's decision [in Welleby] allowed the declaration of condominium to create a third type of condominium property that was neither a unit nor a portion of the common elements." Id.
private dwelling, rather than "unit" as used in the statute, unimproved property was not subject to assessment fees.\textsuperscript{87}

However, the reasoning espoused by the fourth district in \textit{Winkelman} is much more on target. In \textit{Winkelman}, it appears that the developer wanted to phase the condominium development, but for some reason submitted the phases to condominium ownership prior to the construction of the buildings and units in those phases. Although the declaration stated that substantial completion was a condition precedent to condominium ownership, as the court correctly stated, "[i]t is the recording of the declaration in the public records that subjects the property to condominium ownership."\textsuperscript{88} Thus, despite the contention of the declaration, because "the provisions of the declaration must conform to the statutory requirements[,] and[,] to the extent that they conflict therewith, the statute must prevail[,]" upon recordation of the amendment adding the phases to the condominium, the unimproved property became subject to condominium ownership and, therefore, subject to assessments.\textsuperscript{90}

In \textit{RIS} the effective statute was chapter 718 of the 1987 \textit{Florida Statutes}, which is virtually the same as the 1995 \textit{Florida Statutes}.\textsuperscript{91} While these statutes are quite similar, where the legislature has seen fit to clarify or amend various sections of the statute, courts should give effect to that legislative intent as evidenced by the amendments.\textsuperscript{92} Under this chapter, section 718.103(23), which is identical to section 718.103(24) of the current statute, provides that a "'[u]nit' means a part of the condominium property which is subject to exclusive ownership. A unit may be in improvements, land, or land and improvements together, as specified in the declaration."\textsuperscript{93} This is identical to the statutory provisions effective in \textit{Welleby},\textsuperscript{94} \textit{Estancia},\textsuperscript{95} and \textit{Winkelman}.\textsuperscript{96} While this provision is quoted and relied upon throughout these decisions, what the courts in \textit{Welleby} and \textit{RIS} appear to have

\textsuperscript{87} 522 So. 2d at 37.
\textsuperscript{88} 661 So. 2d at 105.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{92} Memorandum of Law in Support of Proposed Recommended Order at 8, Department of Bus. and Prof'L Regulation, Div. of Florida Land Sales, Condominiums, and Mobile Homes v. Sports Shinko (Florida) Co. Ltd., Case No. 96-001391 (State of Florida Division of Administrative Hearings August 5, 1997) (No. 96-001391) (citing Rowles v. Div. of Florida Land Sales, Condominiums, and Mobile Homes, 585 So. 2d 319 (Fla. 5th Dist. Ct. App. 1991)).
\textsuperscript{93} Id. § 718.103(24) (1995); id. § 718.103(23) (1987).
\textsuperscript{94} \textit{Welleby}, 522 So. 2d at 35 (applying § 711.03(15) (Supp. 1974)).
\textsuperscript{95} \textit{Estancia}, 619 So. 2d at 1008 (applying § 718.103(16) (1981)).
\textsuperscript{96} \textit{Winkelman}, 661 So. 2d at 102 (applying § 718.103(16) (Supp. 1980)).
overlooked are some other important provisions within the same statutory section. For instance, the legislature provides that the assessments at issue in the foregoing cases are to be “assessed against the unit owner.”\(^{97}\) Additionally, a “[c]ondominium” means that form of ownership of real property . . . , which is comprised of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements[.]\(^{98}\) and it is a “declaration of condominium . . . by which a condominium is created.”\(^{99}\) Thus, it is apparent upon the faces of these sections that, upon the recording of the declaration, a condominium is created, which includes the units that are to be assessed. However conspicuous this conclusion may be, to avoid any confusion, the legislature clearly codified it at section 718.104(2):

A condominium is created by recording a declaration . . . . Upon the recording of the declaration, or an amendment adding a phase to the condominium under § 718.403(6), \textit{all units described in the declaration or phase amendment as being located in or on the land then being submitted to condominium ownership shall come into existence, regardless of the state of completion of planned improvements in which the units may be located.}\(^{100}\)

While the portion of this statute that reads “regardless of the state of completion of planned improvements in which the units may be located” was added in 1990\(^{101}\) and was a subsequent amendment to the statute that was in

\(^{97}\) FLA. STAT. § 718.103(1) (1995); \textit{id.} § 718.103(1) (1987) (effective at the time the RIS declaration was recorded); \textit{id.} § 718.103(1) (1981) (effective at the time the Estancia declaration was recorded); \textit{id.} § 718.103(1) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); \textit{id.} § 711.03(1) (Supp. 1974) (effective at the time the Hyde Park declaration was recorded).

\(^{98}\) \textit{Id.} § 718.103(10) (1995); \textit{id.} § 718.103(9) (1987) (effective at the time the RIS declaration was recorded); \textit{id.} § 718.103(9) (1981) (effective at the time the Estancia declaration was recorded); \textit{id.} § 718.103(9) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); \textit{FLA. STAT.} § 711.03(1) (1969) (effective at the time the Hyde Park declaration was recorded).

\(^{99}\) \textit{Id.} § 718.103(14) (1995); \textit{id.} § 718.103(13) (1987) (effective at the time the RIS declaration was recorded); \textit{id.} § 718.103(12) (1981) (effective at the time the Estancia declaration was recorded); \textit{id.} § 718.103(12) (Supp. 1980) (effective at the time the Winkelman declaration was recorded); \textit{FLA. STAT.} § 711.03(11) (Supp. 1974) (effective at the time the Hyde Park declaration was recorded).

\(^{100}\) \textit{FLA. STAT.} § 718.104(2) (1995) (emphasis added).

\(^{101}\) \textit{Id.} § 718.104(2) (Supp. 1990).
effect at the time of recordation of the RIS declaration, as previously mentioned, courts, in determining the correct meaning of prior statute, not only have the right but have the duty to consider such subsequent legislative amendments for purposes of clarification of legislative intent. Thus, in this case the fourth district had not only the right but the duty to consider this clarification when making its decision. This it failed to do. As the Department argues in its current case against Sports Shinko (Florida) Co., a case in which the same statute was in effect at the time of recordation of declaration as was in effect in RIS,

in determining legislative intent, the subsequent clarifying amendments ... should be considered in determining the proper meaning to be given to [this] section as it existed in 1987 and still exists today.

The obvious purpose of these amendments should be given their stated effect especially because the amended provisions reflect not only the Division's unwavering interpretation of the statute but also the intent of the legislature that has been in effect all along.

Accordingly, despite that the court in RIS misconstrued the combined effect of the various definitions contained within the condominium statutes, the legislature proceeded to spell it out. However, it appears that the fourth district chose to ignore this particular statutory section and create its own laws for which there is absolutely no support other than its earlier misguided decision in Welleby.

The RIS court further erred in its reasoning by basing its decision solely upon the few provisions in the RIS declaration that discussed the boundaries of a unit and the description of the condominium. The court cited to section 3.2 of the declaration, which discussed the boundaries of a unit, as its primary support for its decision that, "in reading the declaration[,] ... the term 'unit' was not meant to encompass raw land." The court then, as additional support, cited to two sections that describe the condominium and a condominium parcel. While the fourth district found in these portions of the declaration a "clear" intent "not to include [raw, unimproved] land by

102. Memorandum of Law in Support of Proposed Recommended Order at 8, Department of Bus. and Prof'l Regulation, Div. of Fla. Land Sales, Condominiums, and Mobile Homes v. Sports Shinko (Florida) Co., Case No. 96-001391 (State of Florida Division of Administrative Hearings August 5, 1997) (No. 96-001391) (citing Rowles v. Dep't of Bus. Regulation, 585 So. 2d 319 (Fla. 5th Dist. Ct. App. 1991)).

103. Id. (emphasis added).

104. RIS, 695 So. 2d at 359; see also supra text accompanying note 72.

105. Id.; see also supra text accompanying note 73.
itself within the definition of a unit[,]" its finding is fallacious. As stated by the Department in its pending case, pursuant to sections 718.403(2) and (6) governing phase condominiums, the assertion of the fourth district and of RIS that the existence of plot plans, unit floor plans[,] and unit boundaries in the [d]eclaration and its phase amendments is evidence of intent that the units would come into existence at the time of completion must . . . fail as not supported by the statutory scheme of the Condominium Act and provisions concerning phase condominiums. The declaration or the amendment to the declaration that provides for the phase condominium [] must describe the land which may become part of the condominium and the land on which each phase is to be built; the minimum and maximum numbers and general size of units to be included in each phase; each unit's percentage of ownership in the common elements as each phase is added; the recreational areas and facilities which will be owned as common elements by all unit owners, and the membership vote and ownership in the association attributable to each unit in each phase.107

Thus, it is clear that the section of the RIS declaration that the fourth district itself recognized as "discuss[ing] the boundaries of a unit" cannot be construed as evidencing an intention that a unit must be substantially completed before assessment fees may be levied. Contrariwise, this type of boundary description, as well as the additional descriptions cited by the fourth district in support of its finding, is currently mandated by the Florida Statutes, as it was in 1987 when the RIS declaration was recorded.109 Accordingly, the decision of the Fourth District Court of Appeal, on yet another statutory ground, is erroneous and unsupported.

Additionally, the proffered reasoning in Welleby, upon which RIS was decided, is painfully fallacious. The court refers to section 711.03(15), the same language that was applicable in both Estancia and Winkelman, which permits the scrivener, in the declaration, to define a "unit" as improvements and/or land.110 However, because the scrivener used the term "condominium

106. RIS, 695 So. 2d at 359.
108. RIS, 695 So. 2d at 359.
parcel” throughout the Welleby declaration and never used the term “unit,” the court relied solely upon the definition of “condominium parcel” under the declaration which read: “An apartment together with the undivided share in the common elements and all its easements, rights and interest which are pertinent to the apartment.”111 In turn, an “apartment” was defined as an “[i]ndividual private dwelling.”112 Thus, because the scrivener “chose to describe a ‘unit’ in terms of a ‘condominium parcel’, which is an individual private dwelling[,]”113 it was only an individual private dwelling that could be subject to assessments and not unimproved land.

However, while section 711.103(15), as have its preceding statutes since Winkelman, grants to the scrivener the authority to define a “unit” in a couple of different ways, what the statute does not do is grant to the scrivener the power or authority to determine what property is to be subject to assessments.114 Section 718.103(1) very clearly states, as it always has, that it is units, not condominium parcels or any other property, that shall be subject to assessments.115 Additionally, the statute defines, as it always has, “condominium parcel” as specifically including a “unit;”116 thus, within the term “condominium parcel” is a unit, and a “condominium parcel” by its very definition is subject to assessments. Therefore, regardless of how a “unit” or “condominium parcel” is defined, upon recordation of the declaration, a condominium, and therefore a unit, comes into existence and is subject to assessments. Again, because a court has the right and duty to consider subsequent statutory amendments, while many of the statutory provisions remained the same, if any provisions were subsequently amended, the fourth district was obligated to consider these amended statutory provisions and failed to do so.

IV. IF IT’S NOT A UNIT, WHAT IS IT?

The condominium statutes have always contemplated only two types of property that are subject to condominium ownership: units and common

111. Welleby, 522 So. 2d at 37.
112. Id.
113. Id.
115. Id. § 718.103(1) (1995); id. § 718.103(1) (1987); id. § 718.103(1) (1981); id. § 718.103(1) (Supp. 1980); Fla. Stat. § 711.03(1) (Supp. 1974); id. § 711.03(1) (1969).
116. This section states: “‘Condominium parcel’ means a unit, together with the undivided share in the common elements which is appurtenant to the unit.” Id. § 718.103(11) (1995); id. § 718.103(10) (1987); id. § 718.103(10) (1981); Fla. Stat. § 718.103(10) (Supp. 1980); id. § 711.03(9) (Supp. 1974); id. § 711.03(8) (1969).
elements. Furthermore, while one may own an “undivided share in common elements” which are “the portions of the condominium property which are not included in the units” it is only the units that are “subject to exclusive ownership.” Thus, it logically follows that any portion of condominium property that is exclusively owned must be a unit, the only other type of condominium property being common elements which are not subject to exclusive ownership.

However, the fourth district, in both Welleby and RIS, determined that the condominium property that was subject to exclusive ownership in each case was not units subject to assessments, further, the court failed to

117. This section states: “Condominium’ means that form of ownership of real property which is created pursuant to the provisions of this chapter, which is comprised of units that may be owned by one or more persons, and in which there is, appurtenant to each unit, an undivided share in common elements.” Id. § 718.103(10) (1995); id. § 718.103(9) (1987); FLA. STAT. § 718.103(9) (1981); id. § 718.103(9) (Supp. 1980); id. § 711.03(8) (Supp. 1974); id. § 711.03(7) (1969).

118. Id.

119. FLA. STAT. § 718.103(7) (1995); id. § 718.103(6) (1987); id. § 718.103(6) (1981); id. § 718.103(6) (Supp. 1980); id. § 711.03(5) (Supp. 1974); FLA. STAT. § 711.03(4) (1969).

120. Id. § 718.103(24) (1995).

121. In Welleby, the fourth district interestingly stated that, although the William Lyon Company “was the owner of certain real property . . . described as follows: Units #101, #102, #103, #104, #105, #203, #204, #401, #402, #421, and #422, of Welleby Townhome Condominium One,” 522 So. 2d at 36 (emphasis added), because the land described as the aforementioned units had no construction upon it, and because the “scivner (sic) of this declaration sought to define a ‘unit’ as a private dwelling, [thereby] exempting from an assessment, raw, unimproved property[,]” id. at 38, the units exclusively owned by the William Lyon Company were not the units that were meant to be subject to assessments and were, therefore, exempt. Id.

Similarly, in RIS, the fourth district once again demonstrated its lack of understanding of this area of the law in finding that the developer-owned condominium property, which had been submitted to condominium ownership upon the recording of the declaration, was not subject to assessments because the buildings containing the units had not yet been constructed. 695 So. 2d at 359. This finding was based primarily upon the description of the boundaries of a unit found within the RIS declaration, which discussed that [e]ach unit [would] consist[] of the dwelling applicable to the [u]nit, less that portion of the basic Building structure for the dwelling lying within each dwellings[] maximum dimension as shown on the survey graphic description and plot plan . . . [and that] [t]he boundary lines of each [u]nit [would consist of] the unfinished surface of the ceilings and floors, perimeter walls and any interior walls that are shown within the maximum limits of each unit on the plot plan. Id. Thus, because this description of the boundaries of a unit contemplated a completed unit, the court determined that the scrivener meant only to subject completed units to assessments, apparently completely ignorant of the section that requires the declaration to include such a
indicate what, if not units, the William Lyon Company and RIS owned. In both cases, the declaration had been recorded, which, by statute, served to create the condominium. Additionally, applicable to RIS, it was upon the recording of the declaration that "all units described in the declaration[s] ... as being located in or on the land then being submitted to condominium ownership ... [came] into existence, regardless of the state of completion of planned improvements in which the units may be located." Accordingly, the units described in the RIS declaration, despite having not yet been constructed, were created at the time the declaration was recorded and, since the only condominium property that has ever been subject to exclusive ownership is units, it was only these unconstructed units that the parties in Welleby and RIS could possibly have owned. Therefore, because the William Lyon Company, in Welleby, and RIS, in RIS, could only have owned units, and because the condominium statutes effective in both cases dictated that unit owners are "liable for all assessments which come due while [they are] the unit owner[s]," the decision the fourth district reached in these two cases could not have arrived at logically.

What the fourth district has seemingly done is, as the second district has pointed out, "[allow] the declaration of condominium to create a third type of condominium property that [is] neither a unit nor a portion of the common elements[,]" and for which there is no statutory authority. In fact, it was precisely this result that the second district sought to avoid in its decision in Hyde Park: "[T]he only type of private ownership available within a condominium is a "unit." For this court to hold otherwise would, in effect, create property ownership rights which were not contemplated by either the legislature or the Hyde Park Condominium declaration." It is unfortunate that the fourth district does not share the second district's understanding of the condominium statute.

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122. FLA. STAT. § 718.104(2) (1995); id. § 718.104(2) (1987) (stating that "[a] condominium is created by recording a declaration").

123. Id. (emphasis added).


125. Estancia, 619 So. 2d at 1010 (commenting on the fourth district's decision in Welleby).

126. 486 So. 2d at 2 (citing FLA. STAT. § 711.03(4), (9), (13) (1969)).
V. CONCLUSION

The condominium statute permits a developer to create a condominium with land as a unit, or improvements as a unit, or both land and improvements as a unit. However, the statute does not permit a developer to create a condominium and have units which are not subject to assessments; only common elements are not subject to assessments. Through its RIS decision, the fourth district has once again demonstrated its total lack of understanding of a very basic premise of condominium law—one that every attorney who practices in this area, whether representing developers or associations, understands—unless, of course, the attorney is arguing before a court on behalf of a unit owner who seeks to avoid his or her assessment obligation. Unless and until the fourth district recognizes the error of its ways or the Supreme Court of Florida agrees to tackle the daunting task of clarifying—apparently for the benefit of the misguided fourth district—the clear language of the condominium statute, those unfortunate enough to have to appear before the Fourth District Court of Appeal will be hard-pressed to obtain a logical and legitimate—or even a consistent—ruling regarding condominium assessments.

128. Section 718.116(9)(a) of the Florida Statutes provides an exception to this rule: "No unit owner may be excused from the payment of his share of the common expense of a condominium unless all unit owners are likewise proportionately excused from payment, except as provided [in this section]." Id. § 718.116(9)(a) (1995). The section then provides exceptions for developer-owned units where the developer guarantees the assessments. Id.
129. Id. §§ 718.103(1), (7); 718.104(2); 718.116(1)(a) (1995); id. §§ 718.103(1), (6); 718.104(2); 718.116(1)(a) (1987).
An Equivocal Invocation of One's Right to Remain Silent Will Not Cease Police Interrogation in Florida Anymore in Light of the Florida Supreme Court's Decision in State of Florida v. Owen

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I. INTRODUCTION

Historically, in Florida, interrogating officers were required to cease all questions other than those to clarify the suspect’s wishes pursuant to a suspect’s equivocal invocation of the right to remain silent.1 However, after the Supreme Court of Florida’s recent decision in State v. Owen,2 and in light of the United States Supreme Court decision in United States v. Davis,3 that is no longer the case. Now, a suspect in Florida must clearly and

2. 696 So. 2d 715 (Fla. 1997).
unequivocally invoke his right to remain silent. Following anything less than an unambiguous invocation of one's rights, police officers are no longer required to ask only clarifying questions but rather can proceed with their interrogation.

This comment will discuss both the prior and current state of confession law in Florida. It will also address the impact the Davis decision had on Owen, as well as the impact Owen will have on the handling of equivocal invocations of one's rights in Florida. Part II will give some background on both the constitutional and procedural protections afforded a suspect in Florida. Part III will address the factual situation of Owen. Part IV will deal with the procedural posture of the case. The initial brief of the Appellant State in Owen will be analyzed in Part V. Part VI will focus on the brief that the Appellee, Owen, submitted to the Supreme Court of Florida. The decision of State v. Owen will be discussed in Parts VIIIX; beginning with the Grimes majority's and continuing with Justice Shaw's concurring opinion and Justice Kogan's dissent, respectively. Part X will conclude that the failure to require clarifying questions upon an ambiguous invocation of one's right to remain silent, coupled with the application of a reasonable person test, will best serve the State of Florida as a whole.

II. AN OVERVIEW OF THE RIGHTS OF THE ACCUSED FLORIDIAN WITH RESPECT TO CONFESSION LAW

A. Constitutional Protections

The Fifth and Sixth Amendments of the United States Constitution afford accused individuals due process of the law. The Fifth Amendment provides, inter alia, that in a criminal case no individual be compelled to be a witness against himself. The Sixth Amendment affords the accused with, among other things, the right to the assistance of counsel. Article I, Sections 9 and 16 of the Florida Constitution mirror the United States Constitution's Fifth and Sixth Amendments, respectively. Article I Section 9 provides A[n]o person shall . . . be compelled in any criminal matter to be a witness against himself; much like the Fifth Amendment's right against

4. Owen, 696 So. 2d at 718.
5. Id.
6. U.S. CONST. amend. VI.
7. U.S. CONST. amend. V.
8. Id.
self-incrimination. Likewise, Article I Section 16 of the Florida Constitution reiterates the protection afforded by the Sixth Amendment, providing "[i]n all criminal prosecutions the accused... shall have the right... to be heard in person, by counsel or both."\(^{11}\)

B. Procedural Prophylactic Protections

Federal case law has spawned protections beyond those provided by the Fifth and Sixth Amendments of the United States Constitution. The most noteworthy of these are the *Miranda v. State of Arizona* rule\(^{12}\) and the *Edwards v. State of Arizona* rule.\(^{13}\) In *Miranda*, the United States Supreme Court decided that in order to honor an accused's Fifth Amendment right against self-incrimination, specific guidelines must be followed.\(^{14}\) The court required:

Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.\(^{15}\)

In *Edwards v. State of Arizona*, the Court expanded on the *Miranda* rule. In *Edwards*, the Court held:

[Adding]tional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [A]n accused...having expressed his desire to deal with the police only through counsel, is

10. U.S. CONST. amend. V.
11. *See* FLA. CONST. art. I, § 9 and § 16(a), respectively.
15. *Id.*
not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.\textsuperscript{16}

Much like the adherence to the principles of the Federal Constitution by the drafters of the Florida Constitution, Florida courts have reiterated the procedural rules of both \textit{Miranda} and \textit{Edwards}. In \textit{Traylor v. State},\textsuperscript{17} the Supreme Court of Florida refers to \textit{Miranda} and its progeny, holding:

\begin{quote}
[T]o ensure the voluntariness of confessions, the Self-Incrimination Clause of Article I, Section 9, Florida Constitution, requires that prior to custodial interrogation in Florida suspects must be told that they have a right to remain silent, that anything they say will be used against them in court, that they have a right to a lawyer's help, and that if they cannot pay for a lawyer one will be appointed to help them.
\end{quote}

Under Section 9, if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop. If the suspect indicates in any manner that he or she wants the help of a lawyer, interrogation must not begin until a lawyer has been appointed and is present or, if it has already begun, must immediately stop until a lawyer is present. Once a suspect has requested the help of a lawyer, no state agent can reinitiate interrogation on any offense throughout the period of custody unless the lawyer is present, although the suspect is free to volunteer a statement to police on his or her own initiative at any time on any subject in the absence of counsel.\textsuperscript{18}

\section*{III. The Factual Situation of \textit{Owen v. State}}

In May 1984, Duane Owen was apprehended by the Boca Raton police and identified as a burglary suspect.\textsuperscript{19} Owen was found to have many outstanding warrants and, while in custody, initiated contact with the Boca Raton police to expound upon his role in some of the charges he faced; burglaries, sexual batteries, and murders in both Boca Raton and Delray Beach.\textsuperscript{20}

\setcounter{footnote}{0}
\begin{footnotes}
\item[16] \textit{Edwards}, 451 U.S. at 484-85 (citations omitted).
\item[17] \textit{Traylor}, 596 So. 2d at 957.
\item[18] \textit{Id.} at 965-66 (footnotes omitted).
\item[20] \textit{Id.}
\end{footnotes}
Throughout the questioning, Owen was made aware of his rights under *Miranda* and specifically renounced his desire for an attorney, but he requested the presence of a familiar Delray police officer, Officer Woods. The interrogation of Owen was plagued with his confessions of crimes, followed by a refusal to talk and, ultimately, his initiating contact with the officers to talk again. On about June 18, 1984, Owen contacted police and confessed to committing a burglary, sexual battery, and murder in Boca Raton on May 29, 1984. Owen's confessions revealed that his method of operation in these crimes was to remove his clothing, burglarize, and usually, after subduing his victim into an unconscious state, sexually assault the individual.

On June 21, 1984, Delray Beach police obtained an inked impression of Owen's footprint, in connection with the March 24, 1984 slaying of a fourteen year old babysitter in Delray. The victim, who was last heard from at about ten o'clock that evening, was found to have been sexually assaulted and murdered as a result of multiple stab wounds. Investigators discovered a bloody footprint at the scene of the murder. Delray police presented Owen with both the inked footprint and the bloody footprint from the crime scene. The following is an excerpt of the interrogation between Officer Rick Lincoln of the Boca Raton police force, Officer Mark Woods of the Delray Beach Police Department, and Duane Owen:

OFFICER LINCOLN: Cthat I have to know, Duane. A couple pieces of the puzzle don't fit. How did it come down? Were you looking at that particular house or just going through the neighborhood?

THE DEFENDANT [OWEN]: I'd rather not talk about it.

OFFICER WOODS: Why?

OFFICER LINCOLN: Why? You don't have to tell me about the details if you don't want to if you don't feel comfortable about that. Was it just a random thing? Or did you have this house picked out. That's what I'm most curious about. Things happen, Duane. We can't change them once they're done.

21. Id.
22. Id.
23. Id
25. Id.
26. Id. at 209.
27. Id. at 210.
28. Id.
THE DEFENDANT [OWEN]: No. 29

After further questioning, Owen stated that he had never been at that house before. The officers then went on to ask Owen some other questions regarding a bicycle:

THE DEFENDANT [OWEN]: How do you know I even had a bike? You don't even know that.

OFFICER LINCOLN: You tell me you didn't have a bicycle. See, you won't lie, Duane. I know you won't lie when you are confronted with the truth. Now, are you going to tell me you didn't have a bicycle? I know that much about you now. You play by the rules. Those rules are important. We all need rules. Now did you have a bicycle? Of course, you did. Now, where did you put it?

THE DEFENDANT [OWEN]: I don't want to talk about it.

... 

OFFICER LINCOLN: I won't make you tell me something you're not comfortable in talking about, Duane. But I do want to know some of the things that shouldn't hurt that much to talk about. What you did with the bicycle? How long you were outside the house? Those kinds of things. I know what you're reluctant to talk about and I won't press you on that.

THE DEFENDANT [OWEN]: I don't see what them kind of things got to do with it anyway.

OFFICER LINCOLN: It's all part of the crime, Duane. 31

Owen initially denied involvement in the March 24 murder, but later confessed to the crime. 32

IV. PROCEDURAL POSTURE OF OWEN V. STATE

Duane Eugene Owen was charged, tried, convicted, and sentenced to death in the Circuit Court of Palm Beach County, for burglary, sexual battery, and the first degree murder of a fourteen-year-old Delray Beach babysitter. 33

29. Owen, 560 So. 2d at 215 (Grimes, J., dissenting).
30. Answer Brief of Appellee at 55, Owen (No. 85,781); see also State v. Owen, 696 So. 2d 715 (Fla. 1997).
31. Owen, 560 So. 2d at 215-16 (Grimes, J., dissenting).
32. Id. at 210.
33. Id. at 209.
Owen’s conviction was primarily based on statements of a confession given to police during custodial interrogation. Owen appealed his conviction, contending that the confession was inadmissible due to “(1) improper coercion [by police officers] in violation of his fifth amendment right to remain silent,” and (2) violation of his Miranda rights due to continued questioning after invocation of his right to end the interrogation. The Supreme Court of Florida reversed Owen’s conviction, based on his second contention regarding violation of his Miranda rights, and remanded the case for retrial. The court held that statements made by Owen during interrogation such as “I’d rather not talk about it” and “I don’t want to talk about it,” were “at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement.”

Prior to Owen’s retrial, the United States Supreme Court decided Davis v. United States. In Davis, the Court held that:

After a knowing and voluntary waiver of rights under Miranda v. Arizona, ... law enforcement officers may continue questioning until and unless a suspect clearly requests an attorney .... [I]f a reference is ambiguous or equivocal in that a reasonable officer in the circumstances would have understood only that the suspect might be invoking the right to counsel, Edwards does not require that officers stop questioning the suspect.

In light of Davis’ clarification of Miranda, the State filed a motion in the Circuit Court of Palm Beach County to reconsider the admissibility of Owen’s confession. The circuit court held the confession inadmissible. The State then sought certiorari review by the Fourth District Court of Appeal of Florida. This too, was denied, but the district court certified the following question to the Supreme Court of Florida:

DO THE PRINCIPLES ANNOUNCED BY THE UNITED STATES SUPREME COURT IN DAVIS APPLY TO THE

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34. Id. at 210.
35. Id.
36. Owen, 560 So. 2d at 211-12; see also State v. Owen, 654 So. 2d 200 (Fla. 4th Dist. Ct. App. 1995).
37. Owen, 560 So. 2d at 211.
39. Id. at 452 (citation omitted).
40. Owen, 654 So. 2d at 201.
41. Id.
ADMISSIBILITY OF CONFESSIONS IN FLORIDA, IN LIGHT OF TRAYLOR?\textsuperscript{42}

V. THE APPELLANT STATE URGES THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE AFFIRMATIVE

The State in its initial brief asked the Supreme Court of Florida to answer the certified question in the affirmative.\textsuperscript{43} The State's first contention that the certified question should have been answered in the affirmative was that \textit{Traylor v. State} \textsuperscript{44} should not apply to the instant case.\textsuperscript{45} The State relied on the fact that \textit{Owen} was initially decided based on the Florida Supreme Court's interpretation of the federal \textit{Miranda} rule, and not on either the United States or Florida Constitution.\textsuperscript{46} Therefore, in light of the limitation placed on the \textit{Miranda} rule by the United States Supreme Court's finding in \textit{Davis}, those findings should be applied to Owen's case.\textsuperscript{47}

Here, the State distinguished \textit{Owen} from the two cases relied on by respondent: \textit{Haliburton v. State} \textsuperscript{48} and \textit{Traylor v. State}.\textsuperscript{49} The State contended that both \textit{Haliburton} and \textit{Traylor} dealt with whether the suspects' confessions were voluntary as required by both the Fifth Amendment and the state constitution.\textsuperscript{50} In both the original trial and on remand from the United States Supreme Court, the Supreme Court of Florida in \textit{Haliburton} held the defendant's confession to be involuntary due to a violation of state law.\textsuperscript{51}

The State argued that \textit{Traylor}, too, was distinguishable from \textit{Owen} because it also dealt with whether the defendant's confession was voluntary on constitutional grounds and thereby admissible.\textsuperscript{52} Conversely, Owen's confession was considered voluntary and not in violation of the Fifth Amendment.\textsuperscript{53}

\textsuperscript{42} Id. at 202; \textit{see also} \textit{Owen}, 696 So. 2d at 716.
\textsuperscript{43} Initial Brief of Appellant at 5, \textit{State v. Owen}, 696 So. 2d 715 (Fla. 1997) (No. 85,781).
\textsuperscript{44} 596 So. 2d 957 (Fla. 1992).
\textsuperscript{45} Initial Brief of Appellant at 6, \textit{Owen} (No. 85,781).
\textsuperscript{46} Id. at 4.
\textsuperscript{47} Id.
\textsuperscript{48} 476 So. 2d 194 (Fla. 1985).
\textsuperscript{49} 596 So. 2d 957 (Fla. 1992).
\textsuperscript{50} Initial Brief of Appellant at 7, \textit{Owen} (No. 85,781).
\textsuperscript{51} Id. (citing \textit{Haliburton v. State}, 514 So. 2d 1088 (Fla. 1987) and \textit{Haliburton v. State}, 476 So. 2d 192 (Fla. 1985)) (invoking a defendant who was not informed prior to questioning that his sister had hired an attorney who wanted to see him).
\textsuperscript{52} Id. at 8 (citing \textit{Traylor v. State}, 596 So. 2d 957 (Fla. 1992)). In \textit{Traylor}, the court analyzed the defendant's state rights under Article I, Section 9 of the Florida Constitution and Federal Constitutional Fifth Amendment rights against self incrimination. \textit{Traylor v. State}, 596 So. 2d 957, 960 (Fla. 1992).
Amendment, but the court found the confession violated Owen’s *Miranda* rights. Here, the State differentiated between cases involving constitutional violations, like *Traylor* and *Haliburton*, and those non constitutional rules intended to prevent violation of one’s Fifth Amendment or state constitutional right against self-incrimination, such as *Miranda*. The State emphasized that *Miranda* warnings function to prevent coercion but are not protected by the Constitution. The State reiterated that pursuant to *Davis*, the *Traylor* rationale is inapplicable to the admissability of Owen’s confession which involved a violation of *Miranda* rights. To bolster recognition of the distinction drawn by the State, the appellant referred the court to the similarity between the instant case and other decisions made by or relied on by this same court. Also, the State pointed out instances of where the court refused to intertwine the violation of a constitutional right rationale with cases involving the violation of prophylactic rules such as *Miranda* and *Edwards*.

In *State v. Craig,* the Supreme Court of Florida addressed the issue of whether the defendant was given adequate *Miranda* warnings and whether he had in fact waived his right to counsel. The State noted the similarity of the issue in *Craig* to the issue in Owen’s case—the manner in which a defendant invokes his right to remain silent. The State then proceeded to remind the court of its own rationale in both the instant case and in *Craig*. The court in these cases noted the distinction between issues of voluntariness of confessions and issues of proper *Miranda* warnings and a defendant’s invocation or waiver of his right to remain silent. As willing as the court was to differentiate between such issues, the State emphasized the court’s reluctance to apply *Craig* to *Haliburton*. Here, it seems the State attempted to show that this

53. *Initial Brief of Appellant at 7, Owen* (No. 85,781).
55. *Id*.
56. *Id*.
57. *Initial Brief of Appellant at 9, Owen* (No. 85,781).
58. 237 So. 2d 737 (Fla. 1970).
59. *Id* at 738.
60. *Initial Brief of Appellant at 9, Owen* (No. 85,781).
61. *Id*.
62. *Id*. Appellant cited to *Owen*, where the court stated that “the confession was entirely voluntary under the fifth amendment and that no improper coercion was employed.” *Owen*, 560 So. 2d at 210. Yet, the court went on to add: “Owen next argues that even if the confession was voluntary under the fifth amendment, it was nevertheless obtained in violation of the procedural rules of *Miranda*. On this point, we agree.” *Id*.
63. *Haliburton*, 476 So. 2d at 194.
court’s refusal to extend Craig to Haliburton64 was analogous to their argument that Traylor should not apply to Owen since Traylor and Haliburton function as issues based on constitutional law and Owen and Craig were based on federal rules of procedure.65

The State further noted that the court, in first finding Owen’s confession to be inadmissible, relied Asolely on federal authority66 in determining that only clarifying questions may follow an ambiguous invocation of one’s right to remain silent.67 The State referred to the court’s reliance in Owen on previous interpretations of the Edwards rule.68 The court specifically followed and cited Long v. State69 which interpreted Edwards as requiring all questioning, other than questions to clarify the defendant’s equivocal response, cease even after an equivocal invocation of Miranda rights.70 Noting that the court felt bound to apply Long to find Owen’s confession inadmissible, the State relied on Davis’ interpretation of the Edwards rule to now compel the court to find Owen’s confession admissible.71 Appellant State further reasoned that the court should answer the certified question in the affirmative, stating AUnited States v. Davis should apply in Florida and in the instant case.72

64. Initial Brief of Appellant at 9, Owen (No. 85,781). Appellant quoted Haliburton:

The state argues that we should find appellant’s waiver valid under our decision in State v. Craig. We are unpersuaded... as the issues before us in Craig were the adequacy of the preinterrogation warnings to inform the defendant of his right to consult with an attorney and have the attorney with him during interrogation and the manner in which the defendant expressed his desire to waive counsel.

Id. (quoting Haliburton v. State, 476 So. 2d 192, 194 (Fla. 1985)).

65. Initial Brief of Appellant at 9, Owen (No. 85,781).

66. Id. at 10.

67. Id. Petitioner noted that the court was referencing Long v. State, 517 So. 2d 664 (Fla. 1987).

68. Owen, 560 So. 2d at 210.

69. 517 So. 2d 664 (Fla. 1988).

70. Initial Brief of Appellant at 10, Owen (No. 85,781). Appellant cited to Long, where the court held:

We are bound by the United States Supreme Court decisions in Miranda [and] Edwards... which we conclude mandate suppression of Long’s confession. Without this equivocal request for counsel, we would find this confession voluntary and admissible. Miranda and Edwards, however, establish a bright line test that controls this case and requires suppression of the confession.

Long, 517 So. 2d at 667.

71. Initial Brief of Appellant at 11, Owen (No. 85,781).

72. Id. at 12.
The State correlated the holding and rationale of the *Davis* decision in not expanding the *Edwards* rule to the reasons why the Supreme Court of Florida should not expand on its equivalent interpretation of the *Edwards* rule. In *Davis*, with regard to the equivocal invocation of one's *Miranda* rights, the court held: "we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." The Court in *Davis* acknowledged a lack of uniform standards among the lower courts in applying *Edwards* to equivocal requests and, with its decision in that case, attempted to maintain the bright-line standard for police interrogations. The State emphasized the Supreme Court of Florida's prior announcement of its need for maintaining the bright-line standard as well. The State expounded by illustrating the similarities between Florida courts adopting the *Miranda* and *Edwards* rules almost verbatim pursuant to Article I, Sections 9 and 16 of the Florida Constitution. Summing up, the State noted that "in light of the fact that Florida and federal courts have been guided by identical policy considerations, this Court should adopt the rationale and rule of *Davis*. In other words, this Court should apply its pre-*Edwards* analysis in *Craig*.

A third reason given by the Appellant as to why the certified question should be answered in the affirmative was that "the doctrine of law of the case should not bar application of *Davis* to the instant case." The doctrine of the law of the case means "all questions of law which have been decided by the highest appellate court become the law of the case which, except in extraordinary circumstances, must be followed in subsequent proceedings.

73. *Id.*
74. *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 461-62 (1994)). The *Davis* court went on to reiterate that decision's effect on the longstanding rules in *Miranda* and *Edwards*:

We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if a suspect invokes the right to counsel at anytime, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when a suspect might want a lawyer.


75. Initial Brief of Appellant at 12-13, *Owen* (No. 85,781) (citing *Davis v. United States*, 512 U.S. 452, 462 (1994)).

76. *Id.* at 14-15 (citing *Traylor v. State*, 596 So. 2d 957, 966 (Fla. 1992)).

77. *Id.* at 15-16.

78. *Id.* at 17.

79. *Id.* at 20.
both in the lower and appellate courts." Exceptions to this doctrine can be made when "adherence to the rule would result in 'manifest injustice.'"\(^8\) In urging the court to apply *Davis* in an exception to the law of the case doctrine, the State equated the case history of *Brunner Enterprises, Inc. v. Department of Revenue* with the case history of *Owen.*\(^8\) While *Brunner* was on remand, the United States Supreme Court delivered an opinion that directly contradicted the state court's decision in *Brunner.*\(^3\) In *Brunner,* exceptional circumstances were found, and the law of the case doctrine dispensed with it.\(^4\)

The State, in an attempt to persuade the court to do the same in the instant case, emphasized fairness to the State in their pursuit of justice,\(^5\) a non prejudicial effect on the defendant,\(^6\) and the chance to remedy the erroneous interpretation of the federal rule.\(^7\) The State even went on to give accolades to Justice Grimes’ dissent and Justice Ehrlich’s concurrence in which they reject the notion that questioning must cease upon an equivocal invocation of *Miranda* rights.\(^8\)

**VI. THE APPELLEE OWEN URGES THE COURT TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE**

First, Owen argued that the "law of the case" doctrine should not be used as grounds for altering the previous decision of this court.\(^9\) Owen, like the State, cited to *Brunner* but distinguished his case from that of *Brunner.*\(^0\) Owen relied on the court’s opinion in *Brunner*, stating "no party is entitled as

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81. *Id.* at 552-53 (citing *Strazzulla v. Hendrick*, 177 So. 2d 1, 4 (Fla. 1965)).

82. Initial Brief of Appellant at 21, *Owen* (No. 85,781).

83. *Id.* (citing *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550, 552 (Fla. 1984)). *Brunner* involved a decision that out-of-state stock sold by a foreign corporation could be taxed in Florida.

84. *Id.* (citing *Brunner Enter., Inc. v. Department of Revenue*, 452 So. 2d 550 (Fla. 1984)).

85. *Id.* The State specifically said, "[p]reclusion of critical inculpatory evidence based on an erroneous legal ruling would be a manifest injustice and would result in a total miscarriage of justice." *Id.* at 22.

86. Initial Brief of Appellant at 21, *Owen* (No. 85,781). The State claimed "[t]he defendant is in no different circumstance than he was during pendency of the direct appeal." *Id.*

87. *Id.* at 22. Appellant stated: "[t]he continued adherence to a federal rule that does not even exist does nothing to protect or uphold any state or federal constitutional right. The doctrine of law of the case should not be used to perpetuate this costly error." *Id.*

88. *Id.* (citing *Owen v. State*, 560 So. 2d 207, 216 (Fla. 1990)).

89. Answer Brief of Appellee at 11, *Owen* (No. 85,781). *Id.*

90. *Id.*
a matter of right to have the law of the case reconsidered, and a change in the
down of the case should only be made in those situations where strict adherence
to the rule would result in 'manifest injustice.'" 91

While practically using the same quote as the State did in their brief, 92 Owen urged that the present case is not one of those exceptional situations, as was Brunner. 93 Owen rejected the correlation between Brunner and Owen, in that the intervening decisions by the United States Supreme Court warrant different results. 94 He stated: "[s]pecifically, contrary to the situation in Brunner, Davis does not alter the law in Florida nor is it clearly applicable to the facts of this case." 95

Owen urged that there were three differences that should make Davis inapplicable in the present case. 96 First, Davis concerned the equivocal invocation of one’s right to counsel, whereas Owen involved the defendant’s right to have questioning cease upon his statement "I’d rather not talk about it." 97 Second, the Appellee used dicta from the Davis case 98 to support their notion that when a defendant’s request seems ambiguous, the clarification approach is best. 99 Finally, Owen provided that the established law in Florida is that once a suspect indicates in any manner that he does not want questioning to continue, the questioning must cease at once. 100

The Appellee felt the Davis decision in no way altered the law based on Article I, Section 9, of the Florida Constitution and, therefore, the law of the case should not be reconsidered. 101 Ironically, in light of how the Supreme Court of Florida actually answered the affirmative question posed to them in the instant case, Owen argued that the only way the law of the case should be changed was if the court were to conclude: "(1) Davis applies with equal force

91. Id. at 12 (quoting Brunner Enter., Inc. v. Department of Revenue, 452 So. 2d 550, 552-53 (Fla. 1984) (citations omitted)).
92. See Initial Brief of Appellant at 21, Owen (No. 85,781) where the State said, "[T]he [S]tate asserts that strict adherence to the erroneous ruling would result in 'manifest injustice.'" Id.
93. Answer Brief of Appellee at 12, Owen (No. 85,781).
94. Id. Appellee referred to Asarco Inc. v. Idaho State Tax Comm’n, 458 U.S. 307 (1982). Asarco was the case whose decision directly contradicted the outcome of Brunner, while Davis is the related case decided prior to Owen’s retrial.
95. Answer Brief of Appellee at 12, Owen (No. 85,781).
96. Id. at 13.
97. Id.
98. See Davis v. United States, 512 U.S. 452, 461 (1994). The Court said that often clarifying questions will be good police practice in determining whether a right to counsel is being invoked. Id.
99. Answer Brief of Appellee at 14, Owen (No. 85,781).
100. Id. at 15. Appellee was referring to Traylor v. State, 596 So. 2d 957 (Fla. 1992).
101. Answer Brief of Appellee at 15, Owen (No. 85,781).
to the right to remain silent and to terminate questioning; (2) the statements ‘I’d rather not talk about it.’ and ‘I don’t want to talk about it.’ are equivocal; [and] (3) the Florida Constitution should be interpreted consistent with Davis.”

Owen’s next argument was one the State chose not to dissect: that Owen’s statements “I’d rather not talk about it” and “I don’t want to talk about it” were only equivocal invocations of his right to remain silent. On direct appeal the court held that Owen’s “responses were, at the least, an equivocal indication of the Miranda right to terminate questioning.” Appellee continued on to identify the court’s earlier interpretation of an equivocal response in Long v. State quoting: “[w]hen a person expresses both a desire for counsel and a desire to continue the interview without counsel, further inquiry is limited.”

Appellee defined Owen’s statements as courteous, clear, and unequivocal expressions of his right to remain silent. Appellee blasted the further questioning by Officers Woods and Lincoln as clearly violative of Owen’s Miranda rights, stating they badgered, cajoled, and “pressed him to talk.”

Owen referred to Miranda and its progeny as standing for the essential principle that the defendant has the right to terminate questioning by indicating his right to remain silent in any manner and at any point in the interrogation, and that this right be meticulously upheld by the police. On this point, Appellee concluded Owen’s statements were not ambiguous and, since they dealt with his right to remain silent rather than his right to counsel, Davis

102. Id.
103. Id.
104. Owen, 560 So. 2d at 211.
105. Long v. State, 517 So. 2d 644, 667 (Fla. 1987) (citations omitted); see also Answer Brief of Appellee at 16, Owen (No. 85,781).
106. Answer Brief of Appellee at 17, Owen (No. 85,781). Appellee said “[t]here is no part of ‘I’d rather not talk about it’ that expresses the desire to continue to answer questions” and “‘I don’t want to talk about it’ is unequivocal.” Id.
107. See Miranda v. Arizona, 384 U.S. 436, 479 (1966). In Miranda the Court held the defendant’s right to terminate questioning must be Ascrupulously honored.” Id.
108. Answer Brief of Appellee at 17, Owen (No. 85,781).
109. Id. at 16 (quoting Owen v. State, 560 So. 2d 207, 211 (Fla. 1990)).
111. Id. at 103-04. The Court held that the suspect Acontrol[s] the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” Id. The Court also provided that the interrogation must cease when the suspect indicates in any manner his right to remain silent. Id. at 101-02.
112. See Miranda, 384 U.S. at 479, where the Court found the defendant’s invocation of right to cut off questioning must be Ascrupulously honored.” Id.
should not apply and Owen’s confession should remain inadmissible. Appellee’s last argument importuned the court to uphold their earlier decision in relying solely on the Florida Constitution as the governing law of the case. As stated above, Article I, Section 9 of the Florida Constitution mirrors the Fifth Amendment provision against self-incrimination. Owen relied mainly on the court’s decision in Traylor v. State, in bolstering his position that Florida law serves as an independent basis for the court’s decision: “when called upon to decide matters of fundamental rights, Florida’s state courts are bound under federalist principles to give primacy to our state constitution and to give independent legal import to every phrase and clause contained therein.”

Next, Appellee focused on the similarities between how this court decided Haliburton v. State, on remand in light of the United States Supreme Court’s intervening decision in Moran v. Burbine, and the present case and its relationship to the United States Supreme Court’s Davis’ decision. In Haliburton, the defendant was not told prior to police interrogation that his family had hired an attorney to represent him, in violation of his rights. While pending retrial, the United States Supreme Court decided Moran holding that questioning is to end only upon the defendant specifically requesting an attorney. Just like the instant case, the Supreme Court of Florida had the opportunity to reconsider the Haliburton decision in light of Burbine. In choosing to rely solely on the Florida Constitution the Supreme Court of Florida rejected the United States Supreme Court’s narrower interpretation in Burbine, and again held the confession inadmissible as it violated Article I, Section 9 of the Florida Constitution. Correlating the decision in Haliburton with the instant case, Appellee urged the court to apply Florida law and reject Davis’ narrow interpretation of a defendant’s proper invocation of his right to remain silent.

113. Answer Brief of Appellee at 28, Owen (No. 85,781).
114. Id.
115. Article I, Section 9 of the Florida Constitution provides, “[n]o person shall . . . be compelled in any criminal matter to be a witness against himself.” Id.
116. Answer Brief of Appellee at 29, Owen (No. 85,781).
117. Id. (quoting Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992)).
120. Answer Brief of Appellee at 29, Owen (No. 85,781).
121. Haliburton, 476 So. 2d at 192.
123. Id.
124. Id.
125. Id. at 31.
VII. JUSTICE GRIMES, WRITING FOR THE MAJORITY OPINION, ANSWERS THE CERTIFIED QUESTION IN THE AFFIRMATIVE

Justice Grimes and the majority began with a recapitulation of the facts and procedural posture of Duane Owen's case. The justices emphasized the case against Owen was primarily based on his confession given to Officers Lincoln and Woods. They also reiterated the court's finding on direct appeal, stating that although Owen's confession was voluntary under the Fifth Amendment, it was nonetheless obtained in violation of his Miranda rights.

The major factors of the earlier decision were ambiguous responses given by Owen to questions the Supreme Court of Florida characterized as "relatively insignificant" details of the crime which amounted to "at the least, an equivocal invocation of the Miranda right to terminate questioning." Another point the Grimes group highlighted was that the court's earlier decision was, as the Appellant's brief argued, based solely on a previous interpretation of federal rule: interrogation, other than clarifying questions, must cease upon a suspect's equivocal invocation of his Miranda rights.

This procedure was not followed by Officers Woods and Lincoln in obtaining the inculpatory statements made by Owen, so the confession was ruled inadmissible, and the trial court decision reversed because the court was unable to find admitting the confession to be harmless error. Next, the majority discussed how the supervening decision in Davis, which concerned equivocal invocation of one's right to counsel, related to the instant case, which concerned equivocal invocation of one's right to remain silent. As if in direct response to appellee's brief, the court held that the Davis rule...
applies to a suspect’s right to remain silent and determined Owen’s confession to be admissible.\(^{136}\)

In support of their finding, the court cited to two cases from the Eleventh Circuit Court of Appeals: Coleman v. Singletary\(^{137}\) and Martin v. Wainwright.\(^{138}\) In Coleman, the court was faced with a similar issue as in the present case of whether or not the defendant’s confession, after an equivocal assertion of his right to remain silent, was admissible.\(^{139}\) Grimes and the majority quoted the Coleman court which stated: “[b]ecause we are bound to follow the Supreme Court’s holding in Davis, our decisions creating a duty to clarify a suspect’s intent upon an equivocal invocation of counsel are no longer good law.”\(^{140}\) Next, referring to Martin, the Coleman court expounded: “[f]urthermore, we have already recognized that the same rule should apply to a suspect’s ambiguous or equivocal references to the right to cut off questioning as to the right to counsel.”\(^{141}\)

Grimes and the majority summed up their holding by stating “Davis now makes it clear that, contrary to our belief at the time, federal law did not require us to rule Owen’s confession inadmissible.”\(^{142}\) Additionally, the majority opinion paralleled the Appellant’s brief, in that it acknowledges that its earlier decisions, including Owen, were validated by the courts previous and erroneous interpretation of federal law.\(^{143}\) The opinion, like Appellant’s brief, emphasized the rationale of the court in State v. Craig\(^{144}\) as being a predecessor to the notion that Davis should be followed in Owen.\(^{145}\)

Subsequently, the majority, through Grimes, refuted Appellee’s contention that Traylor v. State dictated a finding that Owen’s confession should be deemed inadmissible, pursuant to Article I, Section 9 of the Florida Constitution.\(^{146}\) Grimes’ group stated that Owen’s reliance on the court’s

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\(^{136}\) Owen, 696 So. 2d at 719.

\(^{137}\) 30 F.3d 1420 (11th Cir. 1994).

\(^{138}\) 770 F.2d 918 (11th Cir. 1985).

\(^{139}\) Coleman, 30 F.3d at 1421.

\(^{140}\) Id. at 1424 (citing Martin v. Wainright, 770 F.2d 918, 924 (11th Cir. 1985)).

\(^{141}\) Id. The court quoted Martin stating “[w]e see no reason to apply a different rule to equivocal invocations of the right to cut off questioning.” Id.

\(^{142}\) Owen, 696 So. 2d at 718.

\(^{143}\) Id. at 718-19; see also Initial Brief of Appellant at 6-10, Owen (No. 85,781).

\(^{144}\) 237 So. 2d 737, 739-40 (Fla. 1970). In Craig, the court found that an ambiguous request for a lawyer does not require police to clarify the suspect’s wishes. Id. at 740.

\(^{145}\) See Owen, 696 So. 2d at 719; see also Appellant’s Brief at 6-10, Owen (No. 85,781).

\(^{146}\) Owen, 696 So. 2d at 719. The court specifically stated, “Traylor does not control our decision in this case.” Id.
words in *Traylor* regarding Section 9 that "if the suspect indicates in any manner that he... does not want to be interrogated, interrogation... must immediately stop" was inapplicable. In what seems to be ambiguous and equivocal in and of itself, the majority claimed Owen "reads a meaning into these words that we never attributed to them." The majority attempted to clarify by illustrating, as did Appellants in their brief, that the words "in any manner" mirror the language of *Miranda* and are therefore not additional safeguards to the federal law.

Additionally, Justice Grimes' majority touched upon the fact that *Traylor* involved voluntariness of a confession, rather than invocation of *Miranda* rights, as appellant's brief also argued. After rejecting Owen's argument in favor of applying *Traylor* to the instant case, the majority went on to acknowledge that though they are authorized to disregard the findings of the United States Supreme Court in *Davis*, they were unwilling to do so. The justices were more persuaded by the policy concern of the Court in *Davis* that the bright line that officers have been afforded, due to decisions like *Miranda* and *Edwards*, would become dim if equivocal statements by suspects allowed for questioning to terminate.

Again, consistent with issues raised by Appellant in the initial brief, the majority felt that "[t]o require the police to clarify whether an equivocal statement is an assertion of one's *Miranda* rights places too great an impediment upon society's interest in thwarting crime." Next, the majority tackled the issue of whether the intervening decision in *Davis* provided an exceptional circumstance to the "doctrine of law of the case." They held that the doctrine serves as a means for judicial economy, and is not an indisputable directive, but rather a self-imposed limitation to achieve that

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147. *Traylor*, 596 So. 2d at 966. The court in *Traylor* referred to the Florida Constitution, Article I, Section 9.
148. *Owen*, 696 So. 2d at 719.
149. *Id.*
150. *Id.* (quoting from the Fla. Const. art. I, § 9).
151. *Id.*
152. *Id.*
154. *Owen*, 696 So. 2d at 719.
155. *Id.* at 718-19.
156. *Id.* at 719.
157. *Id.* at 720. The doctrine of the law of the case provides that "all questions of law which have been decided by the highest appellate court become the law of the case which must be followed in subsequent proceedings, both in the lower and appellate courts." *Brunner*, 452 So. 2d 550, 552 (Fla. 1984). Only in exceptional circumstances in which manifest injustice will result, can the court reconsider and remedy an earlier erroneous ruling which has become the law of the case. *Owen*, 696 So. 2d at 720.
goal. Also, the majority noted that "[a]n intervening decision by a higher court is one of the exceptional situations that this Court will consider when entertaining a request to modify the law of the case."\textsuperscript{159}

The majority concluded that in light of the United States Supreme Court ruling, \textit{Davis} should be applied as the law of the case in Owen's retrial in order to prevent a manifest injustice by forcing the State to adhere to the court's previous erroneous interpretation of the federal law.\textsuperscript{160} However, the majority did not push the envelope as far as the State may have wanted them to. The majority recognized the State's preference to forgo the retrial and simply have both Owen's confession and original convictions reinstated, but refused to overturn its previous decision for a retrial.\textsuperscript{161} By answering the certified question in the affirmative, the majority summarized that "Owen stands in the same position as any other defendant who has been charged with murder but who has not yet been tried."\textsuperscript{162}

\textbf{VIII. SHAW'S CONCURRING OPINION: WHAT IS "CLEARLY?"

Justice Shaw's concurring opinion walked that fine line between concurrence and dissent. While voicing an agreement with the majority's holding that now in Florida, pursuant to \textit{Davis}, a suspect must clearly invoke his \textit{Miranda} rights to terminate questioning after a previous voluntary waiver of that right, Justice Shaw also voiced his dissatisfaction with the majority's own ambiguity as to what "clearly" means.\textsuperscript{163}

The discrepancy Justice Shaw had with the majority was that although he agreed with the \textit{Davis} standard of one's need to "clearly invoke" the right to remain silent, he felt Florida's standard should include an explanation of what will be construed as a clear invocation.\textsuperscript{164} To support his suggested broadening of the \textit{Davis} standard, Justice Shaw used \textit{Traylor}, the same case the majority hesitated to apply. He emphasized the federalist principles which illustrate that a state may exceed the protections afforded to its citizens by the federal

\textsuperscript{158} \textit{Id.} (citing Strazzulla \textit{v. Hendrick}, 177 So. 2d 1, 3 (Fla. 1965)).

\textsuperscript{159} The majority cites both \textit{Brunner and Strazzulla} in support of this reasoning. \textit{Id.} at 720 (citing Brunner Enter., Inc. \textit{v. Department of Revenue}, 452 So. 2d 550, 552 (Fla. 1984), and Strazzulla \textit{v. Hendrick}, 177 So. 2d 1, 4 (Fla. 1965)).

\textsuperscript{160} \textit{Id.}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Owen}, 696 So. 2d at 720.

\textsuperscript{163} \textit{Id.} at 721 (Shaw, J., concurring). Justice Shaw specifically stated: "I concur in the majority opinion, as far as it goes, but write specially to express my view as to what constitutes a 'clear' invocation of the right to cut off questioning in Florida." \textit{Id.}

\textsuperscript{164} \textit{Id.}
government in order to better safeguard those individuals.\textsuperscript{165} He quoted much of the \textit{Traylor} decision, specifically focusing on the concept that often times federal decisions serve as adequate guidelines for state courts, though it is frequently necessary for the state courts, in order to meet local concerns, to elaborate on the federal findings.\textsuperscript{166} Expressly, Justice Shaw noted the court’s statement in \textit{Traylor}:

\begin{quote}
[F]ederal precedent applies equally throughout fifty diverse and independent states.... [T]he Court oftentimes is simply unfamiliar with local problems, conditions and traditions.... [N]o court is... more sensitive or responsive to the needs of the diverse localities within a state, or the state as a whole, than that state’s own high court. In any given state, the federal Constitution thus represents the floor for basic freedoms; the state constitution, the ceiling.\textsuperscript{167}
\end{quote}

In Justice Shaw’s own words, in order to “comport with federalist principles”\textsuperscript{168} Florida needs to adopt a standard of what is a “clear” invocation of one’s rights by looking at the totality of the circumstances when the statement is made by the suspect.\textsuperscript{169} Due to the diverse cultural makeup of the region Justice Shaw expressed the concern of adhering to a strict standard of what is deemed “clear.”\textsuperscript{170} For the less educated migrant worker, or the newly emigrated Floridian, “clearly” invoking one’s right to remain silent may be a far cry from the invocation made by the second year Nova law student who just recently wrote an article on the issue.\textsuperscript{171} In order to combat this potential problem, Justice Shaw suggested that Florida adopt a reasonable person standard in ascertaining whether an invocation of the right to remain silent was done “clearly.”\textsuperscript{172} He stated, “[i]n my view, a suspect ‘clearly’ invokes the right to cut off questioning when a reasonable person would

\begin{thebibliography}{99}
\bibitem{165} Id. at 721-22
\bibitem{166} Owen, 696 So. 2d at 721-22.
\bibitem{167} Id. at 721 (quoting \textit{Traylor v. State}, 596 So. 2d 957, 961-62 (Fla. 1992)).
\bibitem{168} Id.
\bibitem{169} Id.
\bibitem{170} Id. at 721-22. Justice Shaw emphasized that much of Florida’s population consists of non-English speaking immigrants from the surrounding countries and islands, who are often poorly educated. Owen, 696 So. 2d at 721-22.
\bibitem{171} Id. at 722. Shaw offered the example that “to require a migrant worker with a limited education and strong regional dialect to ‘clearly’ invoke his or her constitutional rights with the same precision and forcefulness as a urologist or a nationally-recognized trial lawyer is simply unrealistic.” Id.
\bibitem{172} Id.
\end{thebibliography}
conclude that the suspect has evinced a desire to stop the interview. All the circumstances surrounding the statement— including the suspect's schooling, command of English, and ethnic background—should be considered.

In a somewhat haphazard way, Justice Shaw threw in a brief statement about the equivocal nature of Owen's statements. Citing to the court's conclusion that Owen's "responses were, at the least, an equivocal invocation of the *Miranda* right to terminate questioning," Justice Shaw fashioned his own depiction of equivocal statements. He created a spectrum where statements rank from "no invocation" of rights having been made to "an equivocal invocation" having been made, and finally "a clear invocation" having been made. He categorized Owen's statements as lying between equivocal and clear and used that assessment in his agreement with the majority, stating, "I agree that under these circumstances this case must be remanded for reconsideration under the *Davis* standard." His analysis, stretching the meaning of the word, of Owen's statements ended there. He seemed to just accept the court's previous determination that Owen's statements were equivocal, and therefore deemed *Davis* applicable. Justice Shaw summarized his opinion by reemphasizing his agreement with the majority that *Davis* should be followed, but cautioned the majority that "without further elucidation this standard is in danger of being used as a 'one glove fits all' criterion."

**IX. JUSTICE KOGAN’S DISSENT STATING THAT HE WOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE**

Chief Justice Kogan, in his dissent, forcefully rejected the majority's adoption of *Davis* and what he referred to as the "threshold standard of clarity" approach. Particularly, he supported the retainment of what he called "the clarification" approach, which requires only questions to clarify the suspect's wishes after an ambiguous statement to remain silent or a request for an attorney is made by that individual. Justice Kogan portrayed the benefits of applying the clarification approach, rather than the threshold standard of clarity.

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173. *Id.*

174. *Owen*, 560 So. 2d at 211.

175. *Owen*, 696 So. 2d at 722.

176. *Id.*

177. *Id.*

178. *Id.* (Kogan, J., dissenting). In a footnote, Justice Kogan identifies the "threshold standard of clarity" approach as one used by federal courts in situations involving ambiguous invocations of *Miranda*. The term refers to the notion that one must clearly invoke the *Miranda* rights in order for questioning to cease. *Owen*, 696 So. 2d at 722 n.9.

179. *Id.* at 722-23.
approach, as being threefold. Kogan argued that the clarification approach, rather than the *Davis* threshold standard of clarity approach, provides officers involved in an interrogation setting with a more workable guideline. He refuted the Grimes' majority opinion that the *Davis* rationale preserves the bright line rule.

Justice Kogan, like Justice Shaw, expressed a grave concern over allowing individual officers to determine whether a right has been "clearly" invoked by the suspect. Acknowledging Shaw's concurrence, Kogan referred as well to the difficulties likely to face interrogating officers, due to the diverse educational and cultural background of Florida residents. In addition, Kogan referred to "[o]ther factors such as a suspect's physical condition, level of intimidation, level of fear, or lack of linguistic ability [which will] also make the task of identifying a clear invocation of Miranda rights a difficult one."

Justice Kogan's rationale mirrored and often directly quoted from Justice Souter's concurring opinion in *Davis*. He suggested that in order to eliminate the guesswork associated with determining which invocations are clear and which are not, Florida courts should simply continue to follow the clarification approach. Another advantage Kogan saw in retaining the clarification approach was the consistency it would afford both in situations where the suspect initially invokes his right to remain silent and in situations where the invocation is pursuant to a previous knowing and intelligent waiver of that right. Again citing to Souter's concurring opinion, Kogan said, "applying a single approach is consistent with Miranda's promise of a 'continuous' opportunity to exercise one's Miranda rights."

Besides setting better guidelines for police, Justice Kogan felt the clarification approach served both society's interest in minimizing crime and the interest of the accused individual. In support of his contention that the clarification approach has sufficiently dealt with Florida's fight on crime,

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180. Id.  
181. Id. at 723. Kogan referred to the majority opinion citing to *Davis* creating "a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information." *Davis* v. United States, 512 U.S. 452, 453 (1994).  
182. Owen, 696 So. 2d at 723.  
183. Id. at 724.  
184. Id. at 723.  
185. Id. Kogan, borrowing from the concept announced by Justice Souter in his concurring opinion in *Davis*, specifically said "the 'clarification' approach puts this judgment call into the hands of the party that is most competent to make it—the individual suspect." Id.  
186. Owen, 696 So. 2d at 723.  
187. Id.  
188. Id. at 723-24.
Justice Kogan again cited to Justice Souter's concurrence in *Davis* where he said:

[T]he margin of difference between the clarification approach . . . and the one the Court adopts is defined by the class of cases in which a suspect, if asked, would make it plain that he meant to request counsel . . . . While these lost confessions do extract a real price from society, it is one that *Miranda* itself determined should be borne.\(^{189}\)

Justice Kogan, in agreement with Justice Souter, did not see the clarification approach as an impediment to effective interrogation techniques. Moreover, Justice Kogan denounced the threshold standard of clarity approach as often disregarding the rights of the accused.\(^{190}\) While he specifically criticized the *Davis* majority’s opinion on this issue, Justice Kogan simultaneously rejected the Grimes majority’s adoption of such an analysis.\(^{191}\) He found two particular faults with the *Davis* rationale.

First, from Kogan’s viewpoint, the *Davis* majority, while acknowledging that suspects in a custodial interrogation setting may often be effected by such elements as intimidation, a limited grasp of the language, and linguistic skills, wrongfully dispelled these factors as acceptable risks “in light of the protections already afforded these suspects by the *Miranda* warnings.”\(^{192}\) Justice Kogan began his analysis by claiming that *he* found two faults with that rationale, but he actually went on with criticism quoted from Justice Souter.\(^{193}\)

In essence Justice Kogan, through Justice Souter, expressed his disfavor with employing a heightened level of communication necessary to invoke the rights of the accused when these individuals often struggle with language barriers, lack of education, and fear and intimidation brought on by the sometimes overwhelming setting of a police interrogation.\(^{194}\) On this, Justice Kogan concluded “*Davis* and the majority in the instant case place a hurdle in front of those individuals who are the most likely to have difficulty surmounting that

\(^{189}\) *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 453 (1994) (Souter, J., concurring)).

\(^{190}\) *Id.* at 724. Kogan stated that “[i]n my opinion, the ‘threshold standard of clarity’ approach does not adequately account for [the rights of the accused] and consequently tips the scale in favor of law enforcement interests.” *Owen*, 696 So. 2d at 724.

\(^{191}\) *Id.*

\(^{192}\) *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 460 (1994)).

\(^{193}\) *Id.*

\(^{194}\) *Id.* (quoting *Davis v. United States*, 512 U.S. 452, 469-70 (1994) (Souter, J., concurring)).
hurdle and successfully invoking their rights."¹⁹⁵ In response to this problem, he advocated continuing to require officers to ask clarifying questions after an ambiguous invocation of one's rights.¹⁹⁶

Second, Justice Kogan faulted the *Davis* majority's finding and the majority's following of the notion that simply the reading of one's *Miranda* rights compensated for any hardships bestowed on the accused by applying the threshold standard of clarity approach.¹⁹⁷ He, again using Souter's words from *Davis*, feared that once a suspect's initial, perhaps, ambiguous request is ignored by police, the suspect will be hesitant to assert another request be it equivocal or unequivocal, thinking his next plea will also fall on deaf ears.¹⁹⁸ Kogan reemphasized his feelings that the clarification approach is best suited to address the needs of the police, society, and the accused.¹⁹⁹

Justice Kogan finalized his opinion with disdain for the majority's refusal to apply the clarification approach and reaffirm *Owen* based on the authority bestowed on them by the Florida Constitution.²⁰⁰ Specifically, Kogan disagreed with the majority's opinion that their decisions following *State v. Craig*²⁰¹ were based on federal rulings such as *Mosley* and *Edwards*, and that those federal cases were the primary reasons for the shift from the threshold standard of clarity approach to the clarification approach.²⁰² Justice Kogan said, "any change that might have occurred in the Florida law on this issue subsequent to *Craig* was not solely the result of decisions from the United States Supreme Court. It is my belief that article I, section 9 of our state constitution played a significant part in resolving this issue."²⁰³

In sum, Justice Kogan would have answered the certified question in the negative, since he felt the clarification approach is the best approach to use in Florida and, much like the Appellee in his brief, that the Florida Constitution serves as an independent basis to reaffirm *Owen*.²⁰⁴

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¹⁹⁵. *Owen*, 696 So. 2d at 724.
¹⁹⁶. *Id.*
¹⁹⁷. *Id.*
¹⁹⁸. *Id.* This is a paraphrasing of Justice Souter's argument from *Davis*, where he said "in contravention of the 'rights' just read to him by his interrogator, he may well see further objection as futile." *Davis*, 512 U.S. at 472-73 (1994).
¹⁹⁹. *Owen*, 696 So. 2d at 724.
²⁰⁰. *Id.* at 725.
²⁰¹. 237 So. 2d 737 (Fla. 1970). In *Craig*, the court refused to apply the clarification approach. *Id.*
²⁰². *Owen*, 696 So. 2d at 725.
²⁰³. *Id.*
²⁰⁴. *Id.*
X. CONCLUSION

Pursuant to a suspect’s equivocal invocation of the right to remain silent, interrogating police officers in Florida are no longer required to ask clarifying questions. The key to the majority’s decision in Owen, as well as in Davis, seems to be the word “required.” Both courts acknowledged that clarifying one’s wishes upon an ambiguous statement to possibly assert Miranda rights will often be good police practice. Consequently, in Florida, clarification is not mandatory in such a situation, although it still seems to be preferred. In this day and age where the “get tough on crime” attitude is so prevalent, the majority’s decision to give police more leeway in interrogations seems appropriate.

Justices Shaw and Kogan voiced concerns with the difficulty in applying the clearly invoke standard in such a diverse community that exists throughout Florida. They seem to worry that the uneducated migrant workers cry of, “No quiero hablar,” will be ignored. Justice Shaw, however, fashioned an adequate solution to the problems that may be faced due to language and educational barriers. His suggestion of applying a reasonable person test is a commendable one. In a society as diverse as Florida, it is likely the police force will reflect the surrounding community, at least making the language barrier not such an obstacle with which to contend. On the other hand, asking whether a reasonable person in this situation would find this individual as invoking his right to remain silent provides a test that will help overcome educational and other barriers. The key to Shaw’s approach being effective is that for all surrounding circumstances to be accounted for when assessing whether Miranda rights have been asserted. The adoption of what Kogan referred to as the “threshold standard of clarity” approach coupled with Shaw’s subjective reasonable person test will provide the necessary protections for Florida’s criminal suspects, the police, and society at large.

Beth Connolly

205. Id.
206. Id.; see also Davis, 512 U.S. at 452.
207. “I don’t want to talk” in Spanish.
Prosecutorial Misconduct During Closing Argument: Florida Case Law

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All too often, a criminal defendant is faced with an overzealous prosecutor devoted to winning at all costs. This “win at all costs” mind-set can lead to prosecutorial misconduct during closing argument, and continues to be a basis for reversing numerous convictions in Florida.  

1. See Smith v. State, 699 So. 2d 629, 643-46 (Fla. 1997) (reversing death sentence and remanding for resentencing based on that prosecutor’s continued use of redacted statements of the co-defendant against Smith); DeFreitas v. State, 22 Fla. L. Weekly D2462, D2465-66 (4th Dist. Ct. App. Oct. 22, 1997) (reversing because that prosecutor impermissibly asked the jurors to place themselves in the position of the victims and asked them to think how they would feel if the crime happened to them, and because the prosecutor impermissibly compared the defendant’s case and the O.J. Simpson case); McLellan v. State, 696 So. 2d 928, 930 (Fla. 2d Dist. Ct. App. 1997) (reversing because the prosecutor bolstered witness’ testimony by saying patients give honest histories to their doctor, and thus, commented on facts outside the evidence, because the doctor in question did not testify); Walker v. State, 22 Fla. L. Weekly D1543, D1543 (5th Dist. Ct. App. June 27, 1997) (reversing because the prosecutor’s comment: “The defendant in order to claim entrapment had to say ‘if it wasn’t for the action of the government, I would not have even thought or tried to do what I did,’” was fairly susceptible to being interpreted as a comment on the defendant’s right to remain silent); Fryer v. State, 693 So. 2d 1046, 1048 (Fla. 3d Dist. Ct. App. 1997) (reversing because the prosecutor repeatedly expressed his personal opinion of the veracity of a police officer, and stated that defense counsel ‘knew’ his client was guilty); Jackson v. State, 690 So. 2d 714, 718 (Fla. 4th Dist. Ct. App. 1997) (reversing because the prosecutor argued that the defendant was guilty of a crime greater than the one for which he was tried); Perez v. State, 689 So. 2d 306, 307 (Fla. 3d Dist. Ct. App. 1997) (reversing for interjecting accusations of racism which were not justified by the evidence or relevant to the issues); D’Annunzio v. State, 683 So. 2d 151, 153 (Fla. 5th Dist. Ct. App. 1996) (reversing because the prosecutor argued the defendant failed to produce alibi witness although there was no evidence of the identity of the witness or whether the witness knew material facts); Baldez v. State, 679 So. 2d 825, 826 (Fla. 4th Dist. Ct. App. 1996) (holding “it is improper for a prosecutor to comment on the defendant’s demeanor when the defendant is not on the witness stand”); Raupp v. State, 678 So. 2d 1358, 1361 (Fla. 5th Dist. Ct. App. 1996) (reversing because the prosecutor insinuated that there were missing witnesses who had information, and the defendant had secreted those witnesses); Cisneros v. State, 678 So. 2d 888, 890 (Fla. 4th Dist. Ct. App. 1996) (reversing because the prosecutor argued that the police officer was “not the type of man that would come in here and violate that sacred oath.”) (emphasis omitted); Northard v. State, 675 So. 2d 652, 653 (Fla. 4th Dist. Ct. App. 1996) (finding the prosecutor’s argument improper because it asked the jury to determine who was lying as the test for deciding guilt); Williams v. State, 673 So. 2d 974, 975 (Fla. 1st Dist. Ct. App. 1996) (reversing for the prosecutor’s attempt to bolster the credibility of police officers); Knight v. State, 672 So. 2d 590, 591 (Fla. 4th Dist. Ct. App. 1996) (reversing because the prosecutor attacked the credibility of defense counsel, resorted to personal attacks on defense counsel, argued facts not in evidence, and commented on the defendant’s right to remain silent); Willis v. State, 669 So. 2d 1090, 1094 (Fla. 3d Dist. Ct. App. 1996) (finding that the prosecutor’s attack on the credibility of an alibi witness on the
Although prosecutorial misconduct may occur prior to or during the trial of a criminal case, such as during the discovery period,\(^2\) during examination of witnesses,\(^3\) or during opening statement,\(^4\) this note will be strictly limited to a discussion of prosecutorial misconduct which occurs during closing argument, and will focus on Florida case law.

This note is divided into nine parts. Following the Introduction, Part II will briefly define the purpose of closing argument, and Part III will examine the prosecutor's duty. Part IV will address a variety of improper comments made during closing argument. Part V will review the "Invited Response" or "Fair Reply Rule,"\(^5\) Part VI will discuss the "Harmless Error Doctrine,"\(^6\) and Part VII will discuss preserving the issue for appeal. Part VIII will briefly address a disciplinary action through The Florida Bar, and Part IX will conclude that reversal of convictions has failed to deter prosecutorial misconduct during closing argument, and that the issue is deserving of closer attention by Florida trial courts.

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2. 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 victim's clothing).

3. 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).

4. See Northard v. State, 675 So. 2d 652, 652 (Fla. 4th Dist. Ct. App. 1996)(reversing in part because the prosecutor's comment during opening statement that the jury would return "a verdict that simply reflects the truth; that the defendant in this case was caught red-handed," could have resulted in the jury voting to convict because they believed the defendant had committed the crime, even if the state had not met its burden of proof).

5. See United States v. Young, 470 U.S. 1, 10–14 (1985)(explaining when defense counsel argues improperly and provokes the prosecutor to respond, the court will weigh the impact of the prosecutor's remarks, and take into account defense counsel's opening salvo).

6. Section 59.041 of the Florida Statutes provides in pertinent part:

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 error complained of has resulted in a miscarriage of justice.

This section shall be liberally construed.

II. CLOSING ARGUMENT

Perhaps the most exciting and dramatic part of a criminal trial is closing argument, because it affords the attorneys the final opportunity “to argue the facts in evidence and/or reasonable inferences to be drawn therefrom.” However, it is also at this point in the proceedings that a prosecutor may have become so devoted to winning the case for the victim, or for the citizens of the State of Florida, that his or her emotions intrude and result in a “win at all costs” closing argument not based on the facts brought out during trial. For this reason, it is important to keep in mind the purpose of closing argument.

In Bertolotti v. State, the Supreme Court of Florida stated the purpose of 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.

More recently, in Terry v. State, the Supreme Court of Florida reasoned that “[t]he purpose of closing argument is to help the jury understand the issues by applying the evidence to the law. Thus, the purpose of closing argument is disserved when comment upon irrelevant matters is permitted.”

III. THE PROSECUTOR’S DUTY

The prosecutor’s duty has been addressed in numerous Florida appellate cases. More than sixty years ago in Roach v. State, the Supreme Court of Florida noted that “[a prosecutor] occupies a semijudicial position . . . with no greater duty imposed on him than to preserve intact all the great sanctions and

7. Willis v. State, 669 So. 2d 1090, 1094 (Fla. 3d Dist. Ct. App. 1996)(citing Jones v. State, 612 So. 2d 1370 (Fla. 1992); Robinson v. State, 610 So. 2d 1288 (Fla. 1992); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985)).
8. 476 So. 2d 130 (Fla. 1985).
10. 668 So. 2d 954 (Fla. 1996).
11. Id. at 963.
12. 146 So. 240 (Fla. 1933).
traditions of the law." Thirty-three years later, in Adams v. State, the Supreme Court of Florida added that "attorneys for the State should refrain from inflammatory and abusive argument, since they are officers clothed with quasi-judicial powers.

In Tribue v. State, the Second District Court of Appeal stated a prosecutor has a duty to refrain from making improper comments that may tend to affect the fairness and impartiality of the trial, and as expressed by the Fourth District Court of Appeal, it is the duty of a prosecutor "to be fair, honorable and just." With regard to fairness of opposing party and counsel, the Rules Regulating the Florida Bar provide 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.

The First District Court of Appeal in Cochran v. State, held that "[t]he duty of a prosecuting attorney in a trial to refrain from making improper remarks or committing acts which would or might tend to affect the fairness and impartiality to which the accused is entitled.

13. Id. at 240. See also Young v. State, 195 So. 569 (Fla. 1939).
14. 192 So. 2d 762 (Fla. 1966).
15. Id. at 764–65.
19. FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-3.4. Florida Rules of Professional Conduct are found in chapter 4 of the Rules Regulating The Florida Bar.
20. Id. at 4-3.4(e).
In *Kirk v. State*, the prosecutor read off a list of defense witnesses who did not testify, and asked the jury where those people were. The Fourth District Court of Appeal held the prosecutor’s closing argument was prejudicial and required a new trial. The court noted a prosecutor has a greater responsibility than defense counsel, and explained:

The prosecuting attorney in a criminal case has an even greater responsibility than counsel for an individual client. For the purpose of the individual case he represents the great authority of the State of Florida. His duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for.

IV. FOUL BLOWS

In *Berger v. United States*, Justice Sutherland delivered the opinion of the United States Supreme Court and stated:

The [prosecuting] 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.

24. *Id.* at 42.
25. *Id.* at 43.
27. 295 U.S. 78 (1935).
28. *Id.* at 88 (emphasis added); see also *Craig v. State*, 685 So. 2d 1224, 1229 (Fla. 1996); *Hampton v. State*, 680 So. 2d 581, 585 (Fla. 3d Dist. Ct. App. 1996); *Boatwright v.*
Despite the Court’s condemnation of improper argument, the issue continues to arise in Florida appellate courts. Numerous examples of “foul blows” struck by prosecutors during closing argument are discussed below.

A. Commenting on Defendant’s Right to Remain Silent

All prosecutors are aware they are prohibited from commenting on a defendant’s right to remain silent. In the first half of 1997, Florida courts held that many comments made by prosecutors during closing argument were fairly susceptible of being interpreted by the jury as a comment on the defendant’s failure to testify. Additionally, as noted by the Supreme Court of Florida in *State v. DiGuilio*, comments on a defendant’s failure to testify can be of an “almost unlimited variety.”

During trial in *Davis v. State*, the prosecutor commented on the lack of an identification defense, and stated: “Well, I didn’t hear that from either of these Defendants.” Although the case was reversed on other grounds, the Fourth District Court of Appeal warned that the comment should not be repeated at the new trial because it was “fairly susceptible of being interpreted by the jury as a comment on the defendant’s failure to testify.”

While in *Knight v. State*, the prosecutor made numerous references to “uncontradicted testimony” of the police officers, and stated “God forbid you should believe a police officer whose testimony went uncontradicted by these Defendants who told you specifically what happened in this case.”

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30. See Walker v. State, 22 Fla. L. Weekly D1543, D1544 (5th Dist. Ct. App. June 27, 1997)(reversing because the prosecutor argued that the defendant was not entitled to an entrapment defense because he had remained silent); Dean v. State, 690 So. 2d 720, 724 (Fla. 4th Dist. Ct. App. 1997)(reversing because the prosecutor argued that the defendant had failed to explain why he used an assumed name and failed to produce identification).

31. 491 So. 2d 1129 (Fla. 1986).
32. *Id.* at 1135–36.
33. 683 So. 2d 572 (Fla. 4th Dist. Ct. App. 1996).
34. *Id.* at 575 n.1.
35. *Id.* at 574–75.
36. 672 So. 2d 590 (Fla. 4th Dist. Ct. App. 1996).
37. *Id.* at 591.
38. *Id.*
The Fourth District Court of Appeal noted none of the comments were invited, and held the prosecutor’s remarks were improper and commented on the defendant’s right to remain silent. 39

Recently, in *Dean v. State*, 40 the prosecutor told the jury that they had not heard a reasonable explanation for the defendant using an assumed name and failing to produce identification. 41 The Fourth District Court of Appeal reversed and found the prosecutor’s comments to be “particularly egregious,” because the only person who could have given that testimony was the defendant himself. 42

However, not all similar comments have been held improper. For example, in *Priestly v. State*, 43 the prosecutor remarked during closing argument that the defendants raising an entrapment defense would “have to show or has to be shown through evidence to you—in other words, through the State’s presentation of evidence to you that they were entrapped.” 44 The Fourth District Court of Appeal held the remarks merely called the jury’s attention to the rule that the defense must prove the affirmative defense of entrapment, unless the State’s case itself shows entrapment. 45 Therefore, the comments were proper and not violative of the defendant’s right to remain silent. 46

In *Walker v. State*, 47 the prosecutor stated: “The defendant in order to claim entrapment had to say ‘if it wasn’t for the action of the government, I would not have even thought or tried to do what I did.’” 48 The Fifth District Court of Appeal held the remark to be an improper comment on the defendant’s right to remain silent, 49 and noted, “Florida’s courts have guarded against juries considering even the slightest suggestion that a defendant’s failure to take the stand on his own behalf is evidence of guilt.” 50 The fifth district found the remarks were not harmless error and reversed. 51

Finally, in *Spry v. State*, 52 the defendant did not take the stand. The prosecuting attorney, referring to a scene from the movie “Guide to the

39. *Id.*
40. 690 So. 2d 720 (Fla. 4th Dist. Ct. App. 1997).
41. *Id.* at 724.
42. *Id.*
43. 450 So. 2d 289 (Fla. 4th Dist. Ct. App. 1984).
44. *Id.* at 292.
45. *Id.*
46. *Id.*
48. *Id.* at D1543.
49. *Id.*
50. *Id.*
51. *Id.* at D1544.
52. 664 So. 2d 41 (Fla. 4th Dist. Ct. App. 1995).
Married Man," in which one character advised another that even if he got caught in an act of infidelity “[o]ne of the rules of the game, always deny it—never admit anything... even if you get caught in the act.” The Fourth District Court of Appeal stated: “We would think that the fact that we have been compelled to reverse so many convictions because of improper comments on silence would result in prosecutors getting the message, yet they seem to keep coming up with arguments which can have a double meaning, and thus risk error.” Apparently, many prosecutors have yet to read Spry.

B. Exhorting the Jury to “Do Its Job” and Convict

In United States v. Young, the prosecutor argued:

I don’t know whether you call it honor and integrity, I don’t call it that, [defense counsel] does. If you feel you should acquit him for that it’s your pleasure. I don’t think you’re doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that’s honor and integrity then stand up here in Oklahoma courtroom and say that’s honor and integrity; I don’t believe it.

Chief Justice Burger delivered the opinion of the United States Supreme Court and stated: “The prosecutor was also in error to try to exhort the jury to ‘do its job’; that kind of pressure, whether by the prosecutor or defense counsel, has no place in the administration of criminal justice.” However, the court concluded the jury was not influenced by the improper remarks.

A variety of improper comments were made by the prosecutor in Ryan v. State. The prosecutor asked the jury not to set the defendant free into the community not only because she lied, but because she was rich and would "thumb her nose at small Martin County and say, ‘Well, we really pulled one over those guys.’" The Fourth District Court of Appeal noted “[a]rguments

53. Id. at 41.
54. Id. at 41–42.
56. Id. at 5–6.
57. Id. at 18.
58. Id.
60. Id. at 1088.
which beseech the jury to convict a defendant for any reason except guilt are highly prejudicial and are strongly discouraged."

A similar holding was made by the First District Court of Appeal in *Pacifico v. State.* In *Pacifico,* the prosecutor commented "[i]f the defendant walks out of here a free man today, that's your decision," and, "[n]ow, does he walk out of this courtroom today laughing, or do you make him take responsibility for what he did to [victim] that night?" The first district held the comments were improper and, when considered together, "appears to constitute an implicit instruction to the jurors that it was their duty to society to return a verdict of guilty, a practice deemed to be reversible error."

C. Personal Attacks on Defense Counsel

Without question, the vast majority of criminal prosecutions are competently and ethically tried by the prosecuting attorneys of this state. Too often, however, a prosecuting attorney succumbs to the temptation of putting the defense counsel on trial rather than the issues. "This temptation must be resisted completely in every case." In *Westley v. State,* although the First District Court of Appeal found the prosecutor's remarks were not a personal attack on defense counsel, the court warned "the prosecutor's indulgence in improper argument is a perilous practice."

In *Adams v. State,* the Supreme Court of Florida stated prosecutors are not permitted to make references in closing argument to defense counsel "which are so extreme and of such a nature that they could be prejudicial" to the trial of the accused. In *Briggs v. State,* the prosecutor questioned the personal integrity of defense counsel by suggesting defense counsel had not been truthful and had deliberately mislead the jury. The First District Court of Appeal held "[v]erbal attacks on the personal integrity of opposing counsel, rather than appropriate comments on the credibility of witnesses and

61. *Id.* at 1089.
63. *Id.* at 1182.
64. *Id.* at 1182–83.
66. 416 So. 2d 18 (Fla. 1st Dist. Ct. App. 1982).
67. *Id.* at 20.
68. 192 So. 2d 762 (Fla. 1966).
69. *Id.* at 764 (where the prosecutor said "[l]et me just show you what perverted and distorted things a lawyer can do when he wants to do it").
70. 455 So. 2d 519 (Fla. 1st Dist. Ct. App. 1984).
71. *Id.* at 520.
inferences to be drawn from the evidence before the jury, are wholly inconsistent with the prosecutor's role.\textsuperscript{72}

The Fourth District Court of Appeal has strongly disapproved of these comments. In Landry v. State,\textsuperscript{73} when the prosecutor attempted to denigrate defense counsel by arguing the defense had "conjured up" a witness,\textsuperscript{74} the fourth district held that the comment was highly improper.\textsuperscript{75} Verbal attacks on defense counsel can "poison the minds of the jury,"\textsuperscript{76} and attacks on the personal integrity of defense counsel are "utterly and grossly improper.\textsuperscript{77}

Prosecutors continue to launch personal attacks on defense lawyers and exceed the bounds of proper argument. In many cases, the state's closing argument may cause one to wonder who is on trial, the defendant or the defense counsel.\textsuperscript{78}

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72. \textit{Id.} at 521.
73. 620 So. 2d 1099 (Fla. 4th Dist. Ct. App. 1993).
74. \textit{Id.} at 1101.
75. \textit{Id.}
78. See Knight v. State, 672 So. 2d 590, 590 (Fla. 4th Dist. Ct. App. 1996)(where prosecutor attacked the credibility of defense counsel for objecting to the state's introduction of inadmissible evidence); Landry v. State, 620 So. 2d 1099, 1101 (Fla. 4th Dist. Ct. App. 1993)(where prosecutor suggested the defense conjured up a witness or, in other words, was presenting false testimony); Valdez v. State, 613 So. 2d 916, 918 (Fla. 4th Dist. Ct. App. 1993)(where prosecutor argued the defense failed to give the jury an accurate story); Alvarez v. State, 574 So. 2d 1119, 1120 (Fla. 3d Dist. Ct. App. 1991)(where prosecutor stated: "So, if you are nitpicking and trying to insult somebody's intelligence, as the defense is really doing today")\textsuperscript{(emph. omitted)}; Huff v. State, 544 So. 2d 1143, 1144 (Fla. 4th Dist. Ct. App. 1989)(where prosecutor opined the defense was a fabrication); Waters v. State, 486 So. 2d 614, 616 (Fla. 5th Dist. Ct. App. 1986)(where prosecutor repeatedly characterized defense counsel's argument as a "smoke screen"); Ryan v. State, 457 So. 2d 1084, 1089 (Fla. 4th Dist. Ct. App. 1984)(where prosecutor referred to defense counsel as a fancy lawyer from a big city, and accused him of not being totally honest with the jury); Briggs v. State, 455 So. 2d 519, 520 (Fla. 1st Dist. Ct. App. 1984)(where prosecutor suggested defense counsel "was not being truthful and was deliberately misleading the jury"); Jackson v. State, 421 So. 2d 15, 15-16 n. 1 (Fla. 3d Dist. Ct. App. 1982)(where prosecutor asked, "[w]ould you buy a used car from this guy, ladies and gentlemen of the jury?")(emph. omitted); Peterson v. State, 376 So. 2d 1230, 1233 (Fla. 4th Dist. Ct. App. 1979)(where prosecutor stated "not only do they have to get into these disguises and crawl down there and deal with people like this, but they have to deal with people like his lawyer"); Carter v. State, 356 So. 2d 67, 67 (Fla. 1st Dist. Ct. App. 1978) (where prosecutor argued defense counsel was trying to "distort the evidence" and mislead the jury); Adams v. State, 192 So. 2d 762, 764 (Fla. 1966)(where prosecutor said defense counsel's statements perverted and distorted things, and violated his oath as a lawyer);
\end{flushright}
D. Calling the Defendant a Liar

In *O'Callaghan v. State*, during the defendant’s trial testimony about his presence at the crime scene, the prosecutor stated: “That’s a lie. I would like to go to the bench.” In response, the Supreme Court of Florida stated it is “unquestionably improper” for a prosecutor to assert that the defendant has lied. "Any trial lawyer should know that this type of conduct is completely beyond the limits of propriety." However, the remarks did not warrant a reversal of the conviction.

This year, in *Washington v. State*, the defendant denied the accusations of sexual battery and sexual activity with a minor and the prosecutor, in addressing the defendant’s testimony, stated:

Joseph Goebbels, who was a propaganda minister for Germany back at the time of Adolf Hitler, had a theory. He believed that you should lie to the people but that you shouldn’t lie with small lies because you can get caught in small lies. What you should do is you should lie big, come up with a big lie because that’s something that you might be able to have the people buy is the big lie. Of course, at that time it was that the Jews were responsible for everything that was wrong in the world and they should be exterminated. Well, the defense in this case is nothing but a big lie.

The Second District Court of Appeal in *Washington* stated: “[I]t is difficult for us to perceive a more egregious and prejudicial statement,” and held “[i]t is ‘unquestionably improper’ for a prosecutor to state that the defendant has lied . . . it constitutes an improper statement of opinion by the prosecutor.” The second district concluded it had “no choice but to reverse Washington’s judgment and sentence.”

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Douglass v. State, 184 So. 756, 757 (Fla. 1938)(where, in a prosecution for incest, the prosecutor suggested that defense counsel was also guilty of incest).

79. 429 So. 2d 691 (Fla. 1983).
80. Id. at 696.
81. Id.
82. Id.
83. Id.
84. 687 So. 2d 279 (Fla. 2d Dist. Ct. App. 1997).
85. Id. at 280.
86. Id.
87. Id. (citing O’Callaghan v. State, 429 So.2d 691, 696 (Fla. 1983)).
88. Id.
In Bass v. State, the prosecutor told the jury “[i]f you want to tell Jimmy Wayne Bass he lied, there is only one verdict, guilty. The man is guilty.” The First District Court of Appeal concluded the prosecutor’s remarks “could have been and were likely construed by the jury as directing them to ‘send a message’ about lying in the courtroom rather than focusing their attention on whether the state had proven Bass’ guilt beyond a reasonable doubt.

A similar comment was made by the prosecutor in Jones v. State. The Jones prosecutor did not mince words when he said: “What about Tyrone Jones? I submit, that when Tyrone Jones took the stand, he lied to you....” The First District Court of Appeal reversed because of the “improper comments and argument and the state’s tenuous case against Jones...” However, in Brown v. State, the Fourth District Court of Appeal held “[i]t is clearly not improper for either counsel in closing argument to characterize specific witnesses as liars, so long as counsel relates the argument solely to the testimony of the witnesses and evidence in the record.

E. Commenting on Defendant’s Demeanor

The Fourth District Court of Appeal addressed a comment concerning the defendant’s demeanor in Baldez v. State. In Baldez, the prosecutor said the defendant was “glaring” at the witness while the witness was on the stand. The fourth district stated: “It is improper for a prosecutor to comment on the defendant’s demeanor when he is not on the witness stand.” The court also held the prosecutor used the defendant’s demeanor to bolster the credibility of the witnesses by suggesting they were truthful simply because they testified in the face of intimidation.

89. 547 So. 2d 680 (Fla. 1st Dist. Ct. App. 1989).
90. Id. at 682 (emphasis omitted).
91. Id. at 682–83.
92. 449 So. 2d 313 (Fla. 5th Dist. Ct. App. 1984).
93. Id. at 314.
94. Id. at 315.
95. 678 So. 2d 910 (Fla. 4th Dist. Ct. App. 1996).
96. Id. at 912.
98. Id. at 826.
99. Id. (citing Pope v. Wainwright, 496 So. 2d 798 (Fla. 1986)).
100. Id. at 827.
A similar argument was reviewed by the Supreme Court of Florida. In *Pope v. Wainwright*, the prosecutor stated: "I don’t know if you saw it; but I saw it, [Pope] was grinning from ear-to-ear. This is supposed to be a wrongful accused man, grinning from ear-to-ear? I don’t know why he grins from ear-to-ear." In *Pope*, the court held the prosecutor’s comments were clearly improper, but were not reviewable on appeal because of the defendant’s failure to object and move for a mistrial.

F. Bolstering the Credibility of Police Officers

In *Fryer v. State*, the prosecutor vouched for the credibility of an officer at least six times. The Third District Court of Appeal held the prosecutor’s remarks were "patently improper and violative of the rules of professional conduct," and concluded the "prosecutor’s remarks compromised the jury’s ability to fairly evaluate the evidence and, in turn, Fryer’s right to a fair trial." In *Cisneros v. State*, the Fourth District Court of Appeal explained the reasons why attempting to bolster the credibility of a police officer is 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 impermissible bolstering of the police officer’s testimony.

The fourth district’s explanation was brought about by the prosecutor’s closing argument in *Cisneros*, wherein he made numerous statements about

101. 496 So. 2d 798 (Fla. 1986).
102. Id. at 802.
103. Id.
104. 693 So. 2d 1046 (Fla. 3d Dist. Ct. App. 1997).
105. Id. at 1047.
106. Id. at 1047–48 (citing Cisneros v. State, 678 So. 2d 888 (Fla. 4th Dist. Ct. App. 1996); Davis v. State, 663 So. 2d 1379 (Fla. 4th Dist. Ct. App. 1995); State v. Ramos, 579 So. 2d 360 (Fla. 4th Dist. Ct. App. 1991); Singletary v. State, 483 So. 2d 8, 10 (Fla. 2d Dist. Ct. App. 1985); FlA. Rules of Professional Conduct 4-3.4(e)).
107. Id. at 1048.
108. 678 So. 2d 888 (Fla. 4th Dist. Ct. App. 1996).
109. Id. at 890 (citations omitted).
the police officer’s credibility: “To win a case he jeopardizes his career, to win a case he’s going to put someone in jail? . . . He’s not the man to come in here and violate that oath.”

Similarly, in *Williams v. State*, the prosecutor stated: “I submit to you that it’s not reasonable to consider that sworn police officers, doing their job, could come into court and perjure themselves.” The court found the comment improper and stated: “An attempt by the prosecuting attorney to bolster the credibility of police officers testifying in the case is improper argument entitling the defendant to a new trial.”

This type of improper argument is no stranger to the Fourth District Court of Appeal. In *Davis v. State*, the court condemned the prosecutor’s argument when he remarked:

> The Judge is also going to tell you that you have the right to determine or to evaluate somebody’s testimony by what they have to gain from it . . . . What does Officer Hadden and Officer Kahir have to gain by putting their careers in jeopardy, taking the stand and perjuring themselves?

In *Clark v. State*, the Fourth District Court of Appeal condemned an argument almost identical to the prosecutor’s argument in *Davis*, and concluded “[i]n no uncertain terms, the prosecutor’s argument was that police officers would not testify falsely because they have too much at stake and would not risk their jobs.” Further, in *Landry v. State*, a case replete with improper comments, the Fourth District Court of Appeal reversed the conviction and sentence because of the prosecutor’s improper closing argument. During closing argument, the *Landry* prosecutor referred to the

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110. Id. at 889 (emphasis omitted).
111. 673 So. 2d 974 (Fla. 1st Dist. Ct. App. 1996).
112. Id. at 975.
113. Id. (citing Robinson v. State, 637 So. 2d 998 (Fla. 1st Dist. Ct. App. 1994); Clark v. State, 632 So. 2d 88, 91 (Fla. 4th Dist. Ct. App. 1994)).
114. 663 So. 2d 1379 (Fla. 4th Dist. Ct. App. 1995).
115. Id. at 1380 (emphasis omitted).
117. Id. at 91.
118. 620 So. 2d 1099 (Fla. 4th Dist. Ct. App. 1993). The *Landry* prosecutor was previously chastised in Klepak v. State, 622 So. 2d 19 (Fla. 4th Dist. Ct. App. 1993). In *Klepak*, the prosecutor argued to the court that the jury was “made up of buffoons” and “lobotomized zombies” and suggested that their verdict was returned because they were “eating pizza or salads instead of deliberating.” Id. at 20. Further, the prosecutor said this jury is “a classic reason I don’t believe in the jury system.” Id. Presently pending is another
“unblemished record”\textsuperscript{119} of the police officers several times. The fourth district found the prosecutor’s claim was unsupported by the record and “constituted impermissible bolstering of the officers’ testimony.”\textsuperscript{120}

G. Sending a Message to the Community

The Supreme Court of Florida has stated that urging the jury to consider the message its verdict would send to the community at large is “an obvious appeal to the emotions and fears of the jurors.”\textsuperscript{121} In \textit{Boatwright v. State},\textsuperscript{122} the prosecutor stated: “I’m asking you to do your job today, here in this courtroom and send these folks a message . . . . This is our country, this is our nation, it’s time to send ‘em—send criminals a message we’re not gonna tolerate it any more . . . .”\textsuperscript{123} The Fourth District Court of Appeal held that “[t]he ‘send ‘em a message’ argument may have some cachet in the political arena, but it is grossly improper in a court of law. It diverts the jury’s attention from the task at hand and worse, prompts the jury to consider matters extraneous to the evidence.”\textsuperscript{124}

Last year, in \textit{Campbell v. State},\textsuperscript{125} the Supreme Court of Florida reiterated its holding in \textit{Bertolotti}: “‘Message to the community’ arguments are impermissible—they are ‘an obvious appeal to the emotions and fears of the jurors.’ These considerations are outside the scope of the jury’s deliberation and their injection violates the prosecutor’s duty to seek justice . . . .”\textsuperscript{126} The Supreme Court of Florida reversed \textit{Campbell “due to improper conduct by the prosecutor,”}\textsuperscript{127} and warned:

[W]e are deeply disturbed as a Court by continuing violations of prosecutorial duty, propriety and restraint. We have recently addressed incidents of prosecutorial misconduct in several death penalty cases. As a Court, we are constitutionally charged not only with appellate review but also “to regulate . . . the discipline of

\begin{footnotes}
\footnotetext{119. \textit{Landry}, 620 So. 2d at 1101.}
\footnotetext{120. Id.}
\footnotetext{121. \textit{Bertolotti v. State}, 476 So. 2d 130, 133 (Fla. 1985).}
\footnotetext{122. 452 So. 2d 666 (Fla. 4th Dist. Ct. App. 1984).}
\footnotetext{123. Id. at 667.}
\footnotetext{124. Id. (citations omitted).}
\footnotetext{125. 679 So. 2d 720 (Fla. 1996).}
\footnotetext{126. Id. at 724 (quoting \textit{Bertolotti v. State}, 476 So. 2d 130, 133 (Fla. 1985)).}
\footnotetext{127. Id. at 726.}
\end{footnotes}
persons admitted" to the practice of law. This Court considers this sort of prosecutorial misconduct ... to be grounds for appropriate disciplinary proceedings. It 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.128

H. Appeals to Sympathy, Bias, Passion or Prejudice

The Supreme Court of Florida has addressed a prosecutor's appeal to sympathy, bias, passion, or prejudice on several occasions. In *King v. State*,129 the prosecutor mentioned during opening and closing arguments that the victim was a mother.130 The Supreme Court of Florida concluded the comments did not affect the verdict and were harmless error.131 However, in regards to additional remarks made during closing argument of the penalty phase, the court stated: "if 'comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument.'"132 The court ordered a new sentencing proceeding before a jury.133

In *Rhodes v. State*,134 at the conclusion of the prosecutor's closing argument, he urged the jury to "show Rhodes the same mercy shown to the victim on the day of her death."135 The Supreme Court of Florida reversed and found the "argument was an unnecessary appeal to the sympathies of the jurors, calculated to influence their sentence recommendation."136

The Third District Court of Appeal also addressed the issue in *Edwards v. State*,137 where the prosecutor argued to the jury, "[a]ll I'm going to ask you for is justice. I ask you for justice both on behalf of myself and the people of the State of Florida, also on behalf of [victim's] wife and children."138 The court held "[t]he prosecutor's argument was an improper appeal to the jury for

128. *Id.* at 725 (quoting Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985)). See also Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).
129. 623 So. 2d 486 (Fla. 1993).
130. *Id.* at 488 n.1.
131. *Id.* at 488.
132. *Id.* (quoting Garron v. State, 528 So. 2d 353, 359 (Fla. 1988)).
133. *Id.* at 488–89.
134. 547 So. 2d 1201 (Fla. 1989).
135. *Id.* at 1206.
136. *Id.*
137. 428 So. 2d 357 (Fla. 3d Dist. Ct. App. 1983).
138. *Id.* at 359 (emphasis omitted).
sympathy for the wife and children of the victim, the natural effect of which
would be hostile emotions toward the accused.”

I. Miscellaneous Comments

1. Referring to the Defendant as a Criminal

In Pacifico v. State, the Fourth District Court of Appeal noted “a
prosecutor may use a defendant’s prior conviction as an impeachment tool,
but it is improper to refer to the defendant’s previous convictions for the
purpose of indicating that he or she has a propensity to commit crime.” At
trial, the prosecutor argued to the jury “[t]his defendant is a criminal, and he
needs to be convicted.” Moreover, it is improper to imply that a defendant
has committed other crimes, or that the defendant may commit a future
crime. It is also improper to comment on prior felonies and to state what
they were for when the defendant correctly admitted the number of his felony
convictions.

2. Commenting About When a Defense Witness Was Listed

In Willis v. State, the prosecuting attorney “suggested that one of
Willis’ alibi witnesses was not to be believed because the witness was not
immediately listed on the defense’s pretrial witness list.” The Third
District Court of Appeal held that it was improper to attack the credibility of
an alibi witness merely because that witness was not listed until four months
after the defendant was arrested. The court noted “the decision of whether
or when to list a particular witness on a pretrial witness list is beyond the
control of the witness.”

139. Id.
140. 642 So. 2d 1178, 1183 (Fla. 1st Dist. Ct. App. 1994) (citing Davis v. State, 397
So. 2d 1005, 1008 (Fla. 1st Dist. Ct. App. 1981)).
141. Id.
144. 669 So. 2d 1090 (Fla. 3d Dist. Ct. App. 1996).
145. Id. at 1091.
146. Id. at 1094.
147. Id.
3. Commenting on the Role of the Jury

In Landry v. State the prosecutor argued to the jury: "'[Y]ou took the oath whether you like the law or not. And, you know, when you're asked about your decision here being final, our system is huge. You have appellate courts, you have the supreme court.'"\(^\text{148}\) The Fourth District Court of Appeal agreed those remarks suggested to the jury that their role was only an advisory one, because it would be reviewed by appellate courts.\(^\text{149}\)

4. Currying Favor with the Jury

Additionally, in Landry v. State, the prosecutor made references to his military service in the Persian Gulf.\(^\text{150}\) The Fourth District Court of Appeal held that although such a comment alone was not reversible error, it was an improper attempt to "curry favor with the jury . . . ."\(^\text{151}\) The court noted this is especially true where the comment "is entirely irrelevant to any issue being tried or argued."\(^\text{152}\) The fourth district reversed and remanded for further proceedings.\(^\text{153}\)

5. Personal Belief of the Prosecutor

In Jones v. State, the Fifth District Court of Appeal held that it is improper and inappropriate for a prosecutor to express a personal belief in the guilt of the accused, or in the veracity of the state's witnesses.\(^\text{154}\) The fifth district concluded that the combined effect "of the prosecutor's improper comments and argument and the state's tenuous case against Jones convinces us that on balance Jones did not receive a fair and impartial trial . . . ."\(^\text{155}\) In Jones, "the prosecutor alluded to or stated his personal beliefs in Jones' guilt and the veracity of the state's witnesses . . . ."\(^\text{156}\) Over thirty years ago, the Supreme Court of Florida addressed such comments:

148. 620 So. 2d 1099, 1102 (Fla. 4th Dist. Ct. App. 1993).
149. Id.
150. Id.
151. Id.
152. Id.
153. Landry, 620 So. 2d at 1103.
155. Id. at 315.
156. Id. at 314.
It is unnecessary to enlarge upon the sound rule of practice that the prosecution will not in argument express belief in the guilt of the defendant and will not make inflammatory reference to the victim's family. Competent counsel avoid such breaches of legal propriety and the courts will scrutinize such offensive conduct with great care.

6. Asking the Jury to Determine Who Is Lying

Last year, in Northard v. State, the Fourth District Court of Appeal found the prosecutor's closing argument "impermissible because it improperly asked the jury to determine who was lying as the test for deciding if the appellant was not guilty." The Northard prosecutor told the jury "you're going to have to believe that the defendant was telling the truth and the officer was lying." The fourth district noted these type of remarks "constitute error because they invite the jury 'to convict the defendant for a reason other than his guilt of the crimes charged.'"

7. References to Witnesses Not Called

In Landry v. State, the prosecutor suggested there was other evidence that was not brought to the jury's attention. The Fourth District Court of Appeal found this to be "clear error, made more egregious by the fact" the prosecutor's remarks were made to the jury even after the prosecutor's motion.

157. Grant v. State, 171 So. 2d 361, 365 (Fla. 1965)(citing Tyson v. State, 100 So. 2d 254 (1924)).
158. Id. (citing Barnes v. State, 58 So. 2d 157 (Fla. 1952)).
159. Id.
161. In Northard, the prosecutor argued:
If you believe the defendant's events the police cannot possibly be telling you the truth, and you've got to decide if that's what they did and they got up here and deliberately fabricated evidence and fabricated testimony for you in order to convict this guy. In order to find him not guilty you're going to have to believe that. And that's what your verdict, in order to find him not guilty you're going to have to believe that the defendant was telling the truth and the officer was lying strictly about the twenty-dollar bill because there's really not much else.
162. Id.
163. Id.
164. Id. (quoting Bass v. State, 547 So. 2d 1166 (Fla. 1989)).
165. 620 So. 2d 1099, 1101-1102 (Fla. 4th Dist. Ct. App. 1993).
to allow him to comment on the excluded evidence had been denied. The Fourth District Court of Appeal stated: "There are few errors which could fundamentally affect a jury verdict in a criminal trial more than a prosecutorial argument tantamount to 'trust me, there's more evidence here but I can't get it in because the judge won't let me.'"  

8. Racial Comments

In Perez v. State, the defendants, Perez and Rodriguez, were inmates at the Dade County Jail. They were found guilty of the improper exhibition of a weapon and aggravated assault on a corrections officer. Although there was no evidence of a racial factor contributing to an incident in jail, the prosecutor argued a racial war had divided the inmates, the defendant was part of the war, and that a defense witness thought along racial lines. The Third District Court of Appeal stated:

It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system. It is particularly reprehensible when this is done by a representative of the state in a criminal prosecution.

9. Commenting on Defendant's Failure to Produce a Witness

The defendant in D'Annunzio v. State was convicted of two counts of lewd and lascivious assault on a child. Prior to trial, a notice of alibi was filed by the defense. However, at trial, the defense did not call any alibi witnesses. During closing argument, the prosecutor informed the jury that the defendant had filed a notice of alibi, said they were going to put witnesses on the stand, but did not call one witness to testify about the whereabouts of the defendant at the time of the crime. The Fifth District Court of Appeal

166. Id. at 1102.
167. Id.
168. 689 So. 2d 306 (Fla. 3d Dist. Ct. App. 1997).
169. Id. at 306–07.
170. Id. at 307.
171. 683 So. 2d 151 (Fla. 5th Dist. Ct. App. 1996).
172. Id. at 152.
173. Id.
174. Id.
175. Id. at 152.
held a "prosecutor can only comment on the defendant's failure to produce a witness when the witness knows material facts which are helpful to the defendant's case and the witness is available and competent to testify."\textsuperscript{176} The court found there was no evidence establishing the identity of the alibi witness, and whether he or she was competent, or whether he or she knew material facts.\textsuperscript{177}

V. INVITED RESPONSE DOCTRINE

This year, in Fryer v. State, the Third District Court of Appeal found the comments of the United States Supreme Court in United States v. Young, to be particularly instructive.\textsuperscript{178}

The situation brought before the Court of Appeals was but one example of an all too common occurrence in criminal trials—the defense 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.\textsuperscript{179}

The Fryer court reversed the conviction although the defense initiated the improper comments. As noted in the concurring opinion of Fryer, a prosecutor must object to improper comments by defense counsel at the time

\begin{itemize}
  \item \textsuperscript{176} D'Annunzio, 683 So. 2d at 153 (citation omitted).
  \item \textsuperscript{177} Id.
  \item \textsuperscript{178} 693 So. 2d 1046, 1048.
  \item \textsuperscript{179} Id. (citing United States v. Young, 470 U.S. 1, 9-11 (1985)).
\end{itemize}
they are made in order for the trial judge to impose timely restrictions on defense counsel.180 "The doctrine of invited comment does not contemplate that a prosecutor will 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."181

VI. HARMLESS ERROR RULE

Improper prosecutorial comments during closing argument are subject to the harmless error rule as provided in section 59.041 of the Florida Statutes:

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 error complained of has resulted in a miscarriage of justice. This section shall be liberally construed.182

Additionally, section 924.33 of the Florida Statutes provides "[n]o judgment may 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 appellant."183

The Supreme Court of Florida has held 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."184

In King v. State, the Supreme Court of Florida stated the standard of review is whether the prosecutor’s comment was "so prejudicial as to vitiate the entire trial."185 In State v. Murray,186 the Supreme Court of Florida noted

180. Id. at 1051. (Sorondo, J., concurring specially).
181. Id.
185. 623 So. 2d 486, 488 (Fla. 1993)(citing State v. Murray, 443 So. 2d 955 (Fla. 1984)).
"prosecutorial error alone does not warrant automatic reversal of a conviction unless the errors involved are so basic to a fair trial that they can never be treated as harmless." 187

The Supreme Court of Florida, in *State v. DiGuilio*, advised 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." 188 The *DiGuilio* court went further and stated:

Overwhelming 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. 189

VII. PRESERVING THE ISSUE FOR APPEAL

The law is clear that "improper prosecutorial comment which does not constitute fundamental error must be objected to and a motion for mistrial requested to preserve [the] issue for appeal." 190 When the objection is overruled, "[t]he objection itself calls the court's attention to the error alleged to have prejudiced the party making the objection and to the possibility that a mistrial may be in order." 191 However, in *Pait v. State* 192 the Supreme Court of Florida stated:

[W]hen 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

186. 443 So. 2d 955 (Fla. 1984).
187. *Id.* at 956.
188. 491 So. 2d 1129, 1136 (Fla. 1986).
190. Pope v. Wainwright, 496 So. 2d 798, 802 (Fla. 1986)(citing State v. Cumbie, 380 So. 2d 1031 (Fla. 1980)).
191. Holton v. State, 573 So. 2d 284, 288 (Fla. 1990)(citing Simpson v. State, 418 So. 2d 984, 986 (Fla. 1982)).
192. 112 So. 2d 380 (Fla. 1959).
In Knight v. State, the prosecutor made a variety of improper comments. However, defense counsel failed to object to each of the impermissible remarks. The Fourth District Court of Appeal observed that “[w]e recognize that appellant failed to object to several of the prosecutor’s improper comments and only made one objection at the end of the state’s closing. However, this court has held that ‘if the improper comments rise to the level of fundamental error, then multiple objections are not necessary.” Most recently, in DeFreitas v. State, the Fourth District Court of Appeal reversed although defense counsel failed to object, request a curative instruction, or move for a mistrial. In taking this action, the court stated: “we ‘perceive very few instances where remarks or conduct by an attorney are of such sinister influence as to constitute reversible error absent objection.” The fourth district found a portion of the prosecutor’s closing remarks fell well within this category when the prosecutor asked the jurors to imagine how terrifying it would be if a gun with a laser was pointed at their chest by the defendant. Golden rule arguments are improper, the lines are clear and bright, and they enjoy no safe harbor in the trial of a criminal case. Additionally, the court found the prosecutor compounded the misconduct when he compared the DeFreitas case with the “O.J. Simpson” case. The fourth district reversed, but stressed defense counsel’s duty to object: “[D]efense counsel has the duty to remain alert to such things in fulfilling his responsibility to see that his client receives a fair trial. Except in rare instances where a grievous injustice might result, this court is not inclined to excuse counsel for his failure in this regard.”

193. Id. at 385.
194. 672 So. 2d 590 (Fla. 4th Dist. Ct. App. 1996).
195. Id. at 590–91.
196. Id. at 591 (quoting Ryan v. State, 457 So. 2d 1084, 1091 (Fla. 4th Dist. Ct. App. 1984)) (citing Peterson v. State, 376 So. 2d 1230 (Fla. 4th Dist. Ct. App. 1979)).
198. Id. at D2466.
199. Id. (quoting Norman v. Gloria Farms, Inc. 668 So. 2d 1016, 1023 (Fla. 4th Dist. Ct. App. 1996)).
200. Id. at D2469 n.7.
201. Id. at D2465.
203. Id. at 2466.
Finally, it should be noted that in order for a prosecutor to avail himself of the doctrine of “invited comment,” a prosecutor must object to defense counsel’s improper comments at trial.\(^{204}\)

### VIII. DISCIPLINARY ACTION

In *State v. Murray*, and cases cited therein, the Supreme Court of Florida suggested disciplinary action\(^{205}\) may be appropriate in some cases: “When there is overzealousness or misconduct on the part of either the prosecutor or defense lawyer, it is proper for either trial or appellate courts to exercise their supervisory powers by registering their disapproval, or, in appropriate cases, referring the matter to The Florida Bar for disciplinary investigation.”\(^{206}\)

### IX. CONCLUSION

Despite warnings, admonitions, and reversals of convictions by Florida’s appellate courts, prosecutorial misconduct continues, as evidenced by the Second District Court of Appeal’s remarks this year in *Weiand v. State*:\(^{207}\)

> The law, as a profession, carries with it not only competency requirements but also ethical and professional requirements. As a result, lawyers have an obligation not to present legally correct arguments but also to present them in a professional manner.

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205. Rule 3-7.8(a) provides:
Whenever it shall be made known to any of the judges of the district courts of appeal or any judge of a circuit court or a county court in this state that a member of The Florida Bar practicing in any of the courts of the district or judicial circuit or county has been guilty of any unprofessional act as defined by these rules, such judge may direct the state attorney for the circuit in which the alleged offense occurred to make in writing a motion in the name of the State of Florida to discipline such attorney, setting forth in the motion the particular act or acts of conduct for which the attorney is sought to be disciplined.

**FLA. RULES OF PROFESSIONAL CONDUCT 3-7.8(a)** (1997).

206. Murray, 443 So. 2d at 956 (citing Arango v. State, 437 So. 2d 1099 (Fla. 1983); Jackson v. State, 421 So. 2d 15 (Fla. 3d Dist. Ct. App. 1982), Spenkelink v. Wainwright, 372 So. 2d 927 (Fla. 1979)(Alderman, J., concurring specially)).

Unfortunately, too many lawyers are forgetting their obligation of professionalism.\textsuperscript{208}

It appears prosecutorial misconduct during closing argument will continue in Florida unless the trial courts recognize closing arguments which are designed to be inflammatory, as opposed to dramatic, and either grant mistrials, or proceed with a disciplinary action through The Florida Bar.\textsuperscript{209} Perhaps a proper deterrent would be to require prosecutors and defense counsel to attend oral argument when there are issues of prosecutorial misconduct and invited response.

It is imperative that lawyers be aware of the specific ethical obligation they assume when they step into the role of an advocate.\textsuperscript{210} "If attorneys do not recognize improper argument, they should not be in a courtroom."\textsuperscript{211} All attorneys should govern themselves by the words of Chief Justice Gerald Kogan: "[Y]ou 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 an honorable profession."\textsuperscript{212}

\textit{Candice D. Tobin}

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\item \textsuperscript{208} Id. at D1708.
\item \textsuperscript{209} Fla. Rules of Professional Conduct Rule 3-7.8(a).
\item \textsuperscript{211} Luce v. State, 642 So. 2d 4, 4 (Fla. 2d Dist. Ct. App. 1994).
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