CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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The Collateral Order Doctrine and Florida's Official Immunity from Suit

by Craig E. Leen, City Attorney, City of Coral Gables

It is well-known that the denial by a federal court of a dispositive motion raising qualified immunity can be challenged through an interlocutory appeal under the collateral order doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 524-25 (1985) (*citing Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)).

It is not as well-known, however, that a federal court's order denying a dispositive motion based on an immunity arising under state law can sometimes be immediately appealed under the collateral order doctrine as well. Indeed, the Eleventh Circuit has held that it will allow an interlocutory appeal related to denials of immunities arising under state law, where the immunity is treated as one from suit under the substantive law of the state in question. As stated by the Eleventh Circuit in *Griesel v. B.D. Hamlin*, "[t]he crucial issue in our determination of whether [a] claim of sovereign immunity is immediately appealable is whether the state sovereign immunity . . . is an immunity from suit rather than simply a defense to substantive liability." 963 F.2d 338, 340-41 (11th Cir. 1992).

The three states comprising the Eleventh Circuit – Florida, Georgia, and Alabama – each recognize an immunity for government employees arising under state law that is roughly equivalent to qualified immunity under federal law. . *See, e.g., Griesel*, 963 F.3d at 341 (interpreting

See "Collateral Order" page 36

Chair's Report

by Dana Lynne Crosby-Collier

It is my privilege to serve as Chair of the City, County and Local Government Law Section this year. There are many benefits to being a member of the Section but I find the opportunities for networking among peers, engaging on the list serve, having access to the Desk Book, and sharing information in a publication such as the Agenda, give us all a chance to amass our individual offices and practices into one common strength as local government lawyers.

I am excited about the upcoming year, which holds great promise for our Section. The Executive Council is led by a strong leadership team with Mark CS Moriarity as elected Chair-elect and Jeannine Smith Williams as Secretary/Treasurer. Also, over the next year and for the first time, the City, County and Local Government Law Section will have a non-voting seat on the Board of Governors! This seat was created as a rotating government lawyer seat in 2012 after years

continued, next page

INSIDE:

CHAIR'S REPORT
from page 1

of tireless effort by members of the City, County and Local Government Law Section and the Government Law Section. I anticipate Hans Ottinot, Sr., immediate past-Chair of the City, County and Local Government Law Section, to be appointed to this seat by the incoming Bar President, Greg Coleman. As he did as Chair, I know Hans will do an outstanding job in representing the state's government lawyers in this seat.

Finally, over the next year, the Section will continue our efforts to encourage young lawyers to become more involved with leadership opportunities in the Bar and in the Section and we also hope to foster new opportunities for affiliate Section memberships. Great things are happening and I urge all Section members to get involved with the Section in the coming year! For more information on the Section, you may go to the website at locgov.org. Please feel free to contact me or any member of the Executive Council if you would like to participate on a committee, assist in editing the Desk Book, contribute an article for the Bar Journal or for this publication, or if you would like more information on participating in one of our many outreach, networking, or Section CLEs.

2014-2015 CALENDAR OF EVENTS

February 27, 2015

Sunshine Law, Public Records & Ethics for Public Officers and Public Employees 2015

University Center Club

Tallahassee

May 7, 2015

City, County and Local Government Law Certification Exam Review Course 2015

B Hotel

Walt Disney World Resort

May 7, 2015

Public Finance in Florida 2015

B Hotel

Walt Disney World Resort

May 8-9, 2015

38th Annual Local Government Law in Florida

B Hotel

Walt Disney World Resort

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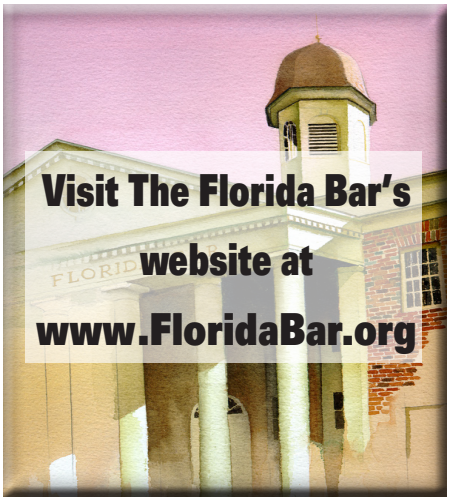

Message from the Former Chair

by Hans Ottinot

It has been a pleasure for me to serve as Chair of the Executive Council of the City, County, and Local Government Section of the Florida Bar. During my tenure as Chair, I have focused on improving members' benefits and providing internship opportunities to law students. Regarding membership benefits, we have created a new user friendly website. The website will now include a "Deskbook" with over 27 chapters of legal topics that members may access at any time. Further, we have improved the Listserve service, which serves as a virtual law library for members to discuss legal topics. It is critical to stay knowledgeable on the legal issues that may impact your clients or practice.

In addition to working to improve members' benefits, we have worked extensively with law school students to provide as many career advancing opportunities as possible. The Section works with law students to provide internships. For example, the Section has been an annual sponsor of Kozyak Minority Mentoring Picnic where members provide speed mentoring to students from Florida's 12 law schools. The Section also offers many scholarships and grant opportunities for student interns to assist them in their incredible journey through law school. A $500 scholarship is given to a law student at each of the Florida's 12 law schools and annual grants up to $20,000 are generously awarded to numerous local governments to hire law students as interns within their legal departments.

Finally, the City, County, and Local Government Law Section invites all members to the 38th Annual Local Government in Florida seminar, which is currently being organized, and is set to feature presentations on numerous local government law topics. I look forward to seeing you at the annual seminar.

Becoming a Florida Bar Board Certified Expert in City, County and Local Government Law

by Cynthia Johnson-Stacks, Miami-Dade Assistant County Attorney; Vice-Chair, The Florida Bar Board of Legal Specialization and Education; Former Member, City, County and Local Government Law Certification Committee

- ✓ Is it important for you to prove to yourself, your client, your employer, potential employer or the public that you are an expert in City, County and Local Government law?
- ✓ Would you like to enhance the stature of your law firm or office by becoming board certified in City, County and Local Government Law?
- ✓ Would it help your law firm's bottom line if you were eligible for a 10% discount on malpractice insurance offered by Florida Lawyers Mutual Insurance to board certified lawyers?

If you answered yes to one or more of these questions, consider applying to The Florida Bar for certification as a specialist possessing expertise in the practice of City, County and Local Government Law.

The purpose of the Florida Bar Board Certification Program is to identify lawyers who have demonstrated special knowledge, skills, and proficiency, as well as a high level of professionalism and ethics in various practice areas. Of the 98,000 lawyers admitted to The Florida Bar, only 4,585 are board certified by The Florida Bar, while fewer still – 231 lawyers – are board certified in City, County and Local Government Law. One only needs to look to respected lawyers with whom we interact on a daily basis to know that there are many lawyers in this practice area who may qualify for and benefit from achieving board certification in City, County and Local Government law.

I invite those of you who are not board certified to explore the possibility of board certification in City, County and Local Government law. The application and other information relevant to certification in this area can be found on the Florida Bar's website.[1] The next application period is from September 1, 2014 through October 31, 2014, followed by the examination on May 14, 2015 in Tampa. Minimum standards for certification in City, County and Local Government Law require an applicant to: have practiced law full-time for five years (receipt of an LL.M. degree in urban affairs or a related field can be substituted for one of the five years); demonstrate substantial involvement (40 percent or more) in the practice of City, County, and Local Government Law during the three years preceding application; receive satisfactory peer review which is provided on a confidential basis; complete 60 hours of continuing legal education approved for certification credit in City, County and Local Government Law; and pass a written examination to demonstrate the requisite knowledge, skills and proficiency in the field. Once achieved, certification status is good for five years, after which you may apply for recertification which does not require another written examination.

Board certification is endorsed at the highest levels of The Florida Bar, as stated by Florida Bar President Eugene Pettis, who is board certified in Education Law:

> "Board certification is becoming a standard of preference for an increasing number of clients. In an ever-crowded field of over 93,000 lawyers, the achievement of board certification – the Bar's highest evaluation of a lawyer's competence and experience in a particular area of practice – is the only way of distinguishing yourself as an expert or a specialist. I highly encourage lawyers to demonstrate their competence and experience through seeking board certification in their professional areas."

If you would like more information regarding board certification in City, County and Local Government Law or in other practice areas, you can visit the Board of Legal Specialization and Education's reception booth at The Florida Bar's Annual Convention June 25-28, 2014 at the Gaylord Palms Resort and Convention Center in Orlando, or contact The Florida Bar's City, County and Local Government Law certification area specialist Zachary M. Shrader at zshrader@flabar.org.

Endnotes

1 http://www.floridabar.org/DIVCOM/PI/CertSect.nsf/9736b6935363096385256fd4005e5cea/03c5360ff7bbfab485256fd4005c0ef3!OpenDocument

In Memoriam

The City, County and Local Government Section lost a great friend and supporter earlier this year. Professor Emeritus James Jay "JJ" Brown passed away at home in Chichester, England on May 26, 2014, after having arrived for the summer with his wife Millie just two days previously.

Professor Brown was the first Attorney's Title Insurance Fund Professor at Stetson University College of Law, where he taught local government law, land use planning law, environmental law and property and real estate law for more than thirty years. He served on the Executive Council of the City, Council and Local Government Section, and also the Executive Councils of the Environmental and Land Use Law Section and the Real Property, Probate and Trust Law Section. Professor Brown was awarded our Section's most prestigious award, the Ralph A. Marsicano Award, in 2006 for his significant contributions to the development of local government law in Florida. He also received the Section's Paul S. Buchman award for outstanding legal contribution to the field at the municipal level.

Professor "JJ," as he was fondly known to many of his former students, also served as faculty coordinator and liaison for Stetson Law Review's annual Local Government Law Symposium, sponsored by the Section, and in addition was a faculty advisor for Stetson Law Review for several years.

Professor "JJ" had a profound influence on the lives and careers of so many of his students, colleagues, and local government lawyers, including mine. I wanted to be a land use lawyer because I took his Land Use Planning Law class, and I have been for fifteen and a half of the seventeen years since I graduated from Stetson. His enthusiasm for the law was infectious and he demanded the best. I was on the Law Review Editorial Board the year he agreed to become one of the faculty advisors, and he dove in with all the passion for excellence he gave to his teaching and legal scholarship.

Alachua County Attorney Michele Lieberman told me that she was fortunate to have had Professor Brown both as a professor and as a mentor in local government law. "His enthusiasm for teaching, dedication to his students and to the practice of law were a positive influence and an inspiration in both my academic and professional career."

Professor Brown made lasting contributions our section and others, as well as to the practice of local government law, land use planning law, environmental law, property law, and real estate law. He also made great contributions to the Stetson University College of Law. But those of us who knew him are truly blessed to have enjoyed his knowledge, his curiosity, his intellect, his passion for the law and life, and his wicked sense of humor.

I, for one, will be forever grateful to Professor "JJ."

Vivien J. Monaco
J.D., Stetson, Class of 1997
Past Chair
City, County and Local Government Section of The Florida Bar (2010-2011)

The Eleventh Circuit's Unique Procedure for Deciding Issues of Exhaustion of Administrative Remedies Under the Prisoner Litigation Reform Act

by Marlon D. Moffett

Local government lawyers are often called upon to defend their clients in lawsuits filed by prisoners under 42 U.S.C. § 1983 alleging excessive force, deliberate indifference to a substantial risk of harm, or various unlawful conditions of confinement. In these cases, prisoners are required under the Prisoner Litigation Reform Act (PLRA) to first exhaust administrative remedies within the facility before filing suit. Generally, those administrative remedies are those set forth in the correctional facility's inmate grievance procedure. As such, the defending governmental entity should always consider raising the inmate's failure to exhaust administrative remedies as a defense where the inmate either failed to file a grievance altogether, failed to submit the grievance to the appropriate person, failed to file the grievance timely, or, in multi-step grievance procedures, failed to appeal a grievance that was denied at the first level.

Although the issue of exhaustion could be resolved at any stage in the litigation, e.g., on a motion to dismiss or motion for summary judgment, the Eleventh Circuit has recently announced in *Myles v. Green*, Case No. 13-12266, 2014 WL 776221 (11th Cir. Feb. 28, 2014) (unpublished opinion), that the summary judgment standard is not appropriate for the exhaustion defense. One might otherwise assume that, if raised on a motion to dismiss, the defendant would likely lose merely if the *allegations* in the complaint, when taken as true, establish that Plaintiff did indeed exhaust administrative remedies. Likewise, if the defense was raised on a motion for summary judgment, one would assume that the issue would proceed to a jury if there were disputed issues of material fact.

However, in at least the Ninth and Eleventh Circuits, the typical motion to dismiss or summary judgment standards do not apply to prisoner exhaustion. Indeed, the Eleventh Circuit has recently announced that exhaustion must be resolved using the analytical framework established in *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008) and *Turner v. Burnside*, 541 F.3d 1077 (2008). Indeed, in *Myles*, the Eleventh Circuit explained the procedure as follows:

> Deciding a motion to dismiss for failure to exhaust administrative remedies is a two-step inquiry. *See Turner*, 541 F.3d at 1082. "First, the court looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's version of the facts as true." *Id.* If, under the plaintiff's version of the facts, the defendant is entitled to have the complaint dismissed, the complaint must be dismissed. *Id.* If not, "the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Id.* In the light of the record, the court then decides, based on its factual findings, whether the inmate has exhausted his administrative remedies. *Id.* at 1083. Defendants bear the burden of proof. *Id.* at 1082.
>
> We review de novo a district court's interpretation and application of the PLRA's exhaustion requirement. *Higginbottom v. Carter*, 223 F.3d 1259, 1260 (11th Cir. 2000). And we review the district court's factual determinations for clear error. *Bryant*, 530 F.3d at 1377.

2014 WL 776221 at *1.

Even if raised on a motion for summary judgment, the same standard applies. In *Myles*, for example, the defendants raised their failure-to-exhaust defense in motions for summary judgment, but the Court treated the issue as if it were raised in a motion to dismiss, and applied the same two-step analysis. *Id.* at *1 n.2 (citing *Bryant*, 530 F.3d at 1374-75).

From a practical and procedural standpoint, *Myles* was surprising in that the Eleventh Circuit first vacated the district court's order granting summary judgment in favor of defendants on the exhaustion issue, and remanded the case to allow the district court to engage in the analysis required by *Bryant* and *Turner* in the first instance. *Myles v. Miami-Dade Cnty. Corr. & Rehab. Dep't*, 476 F. App'x 364, 366 (11th Cir. 2012). Specifically, the Eleventh Circuit rejected the trial court's method of considering whether Myles properly exhausted his administrative remedies using only the summary judgment procedural framework, stating that the district court had "[d]isregard[ed] our precedent in *Bryant* and *Turner* [by] neither treat[ing] Myles's allegations as true, nor [making] specific factual findings on disputed facts." *Id.*

Fortunately, on remand, the Court reached the same conclusion and dismissed Myles's complaint, even using *Bryant's* two-step analysis, determining that Myles indeed failed to exhaust his administrative remedies. Specifically, Myles alleged that no grievance procedure was "available" for him to exhaust because prison staff members refused to provide him with the necessary grievance forms. Accepting Myles's allegations as true, the district court concluded that Defendants had not yet shown that Myles's complaint was subject to dismissal. Following the Eleventh Circuit's guidance in

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Bryant and *Turner*, however, the district court then examined the record and made specific findings about whether Myles was in fact prevented from using the inmate grievance process and determined that he was not.

It is worth noting that, although the Ninth and Eleventh Circuits have held that exhaustion should be resolved on a motion to dismiss rather than a motion for summary judgment, *see Bryant* and *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003), the Fifth and Seventh Circuits have held that it is more appropriate to convert the motion to dismiss into a motion for summary judgment, thus affording the nonmoving party with the protections of Rule 56, *see Dillon v. Rogers*, 596 F.3d 260 (5th Cir. 2010) and *Pavey v. Conley*, 544 F.3d 739, 741-42 (7th Cir. 2008). As demonstrated in *Myles*, however, the Eleventh Circuit continues to stand firm on its required procedure, consistent with the reasons discussed in *Bryant*:

> Because exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense-as in Priester's case-is not ordinarily the proper subject for a summary judgment; instead, it "should be raised in a motion to dismiss, or be treated as such if raised in a motion for summary judgment." *Ritza v. Int'l Longshoremen's & Warehousemen's Union,* 837 F.2d 365, 368-69 (9th Cir.1988); *see also Wyatt,* 315 F.3d at 1119 (explaining "that '[s]ummary judgment is on the merits,' whereas 'dismissal of an action on the ground of failure to exhaust administrative remedies is not on the merits.' " (alteration in original) (citations omitted))

530 F.3d at 1374-75.

Based on the foregoing, the governmental lawyer practicing in the Eleventh Circuit should raise the defendant's exhaustion defense at the earliest possible stage in the litigation, i.e., a motion to dismiss, utilizing the analytical framework in *Bryant* and *Turner*. It can also be raised on a motion for summary judgment, but the district court should treat the defense as if raised in a motion to dismiss and analyze it under the same two-step framework. Either way, the judge will not be limited to the allegations in the complaint, but will be allowed to make factual findings concerning whether the inmate has exhausted administrative remedies. This procedure is beneficial to government defendants who, even on a motion to dismiss, wish to submit affidavits or other documentary evidence which would render Plaintiff's allegations impossible or implausible. The defense lawyer need not fear that the motion will be automatically converted to a motion for summary judgment. Under the Eleventh Circuit's case law, it is clear that the matter of exhaustion is a preliminary question to be resolved by judges, and not by a jury.

2014 Legislative Update

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Copies of bills from the 2014 Legislative Session may be obtained from Online Sunshine at www.leg.state.fl.us. Click onto either the House or Senate link (we find using the Senate system easier even for retrieving House bills). To obtain a copy of a bill passed by the Legislature, copy only the ENROLLED version of the bill, which is typically identified as the "ER" version. The bill's legislative history will indicate what action the Governor has taken on the bill.

Agricultural and Environmental Issues

Water Utilities
CS/CS/CS/SB 272 (Simpson)
Chapter No. 2014-68, Laws of Florida

The bill creates a process for customers to petition the Florida Public Service Commission (PSC) to require compliance with secondary water quality standards. If a utility fails to comply with PSC orders, the process could result in revocation of the utility's certificate of authority. The bill provides petition criteria and factors the commission must consider in its review of the petition and the action it may take to dispose of the petition. The bill adds secondary water quality standards to the criteria that the PSC must consider when setting rates for water service. The bill provides guidelines for the secondary water quality standards. The bill authorizes

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the PSC to deny all or part of a rate increase for a utility's system or part of a system if it determines that the quality of water service is less than satisfactory. The bill requires a utility to provide an estimate of the costs and benefits of plausible solutions for each concern that the PSC finds, meet with the customers to discuss the costs and solutions, and periodically report on the progress of implementation. The PSC may require the utility to resolve certain problems and require benchmarks and periodic progress reporting. The bill authorizes the PSC to adopt rules to assess and enforce compliance with the secondary water standards and prescribe penalties for a utility's failure to adequately address each concern.

Effective: July 1, 2014.

Brownfields
CS/CS/CS/SB 325 (Stone)
Chapter No. 2014-114, Laws of Florida

The bill revises the process for designating brownfield areas and specifies the criteria that must be met when a brownfield designation is proposed by a local government, or a person other than a governmental entity, such as an individual, corporation, community-based organization, or not-for-profit corporation. The bill clarifies the requirements that apply to all local procedures for brownfield area designations, including the notice and hearing requirements and criteria that must be met for brownfield designation proposals. Local governments that designate brownfield areas pursuant to the procedures within the Brownfields Redevelopment Act are not required to use the term "brownfield area" within the name of the area designated by the local government.

The bill provides relief from liability for claims of property damage caused by contamination for those who successfully implement a brownfield site rehabilitation agreement. The liability protection applies to causes of action accruing on or after July 1, 2014. The bill also provides the circumstances under which liability protection would not apply and provides that liability protection does not limit the right of a third party other than the state to pursue an action for damages to persons for bodily harm.

Effective: July 1, 2014.

Reclaimed Water
CS/CS/SB 536 (Simpson)
Chapter No. 2014-79, Laws of Florida

The bill directs the Florida Department of Environmental Protection (DEP) in coordination with the Florida Department Agriculture and Consumer Services (DACS) and the five water management districts (WMDs) to conduct a study and submit a report on expanding the use of reclaimed water in Florida, including stormwater and excess surface water. The bill specifies the elements the report must include. It directs the DEP and DACS to hold a minimum of two public meetings to gather input on the study design and allow the public to submit written comments on the report. Lastly, the bill requires the report to be submitted to the Governor, President of the Senate, and Speaker of the House of Representatives by December 1, 2015.

Effective: July 1, 2014.

Fish & Wildlife Conservation Commission
CS/CS/HB 955 (Goodson)
Chapter No. 2014-136, Laws of Florida

Anchoring of Vessels

Under current law, local governments are prohibited from regulating the anchoring of vessels (other than live-aboard vessels) outside of legally permitted mooring fields. In 2009, s. 327.4105, F.S., was enacted, creating the Anchoring and Mooring Pilot Program. The program directed the FWC, in consultation with DEP, to establish a pilot program to explore options for regulating the anchoring and mooring of non-live-aboard vessels outside the marked boundaries of public mooring fields in five locations around the state. The program and all ordinances adopted under the program will expire on July 1, 2014, unless reenacted by the Legislature. According to the FWC, the process of developing, approving, and adopting the local government ordinances was a more lengthy process than originally anticipated. FWC met with boating and local government stakeholders in October 2013 to discuss the program findings and challenges that have affected the progress of the program. The bill enacts FWC's recommendation to extend the program for an additional three years to July 2017.

Counties Vessel Registration Fees

The bill amends s. 328.72, F.S., to allow counties to use their portion of vessel registration revenues for the following additional boating-related activities: providing boat piers, docks, and mooring buoys; maintaining or operating recreational channel marking and other uniform waterway markers; public boat ramps, lifts, and hoists; marine railways; boat piers; docks; mooring buoys; and other public launching facilities; and removing derelict vessels and debris that specifically impede boat access (not including the dredging of channels).

Effective: July 1, 2014.

ETHICS AND ELECTIONS

Ethics
CS/CS/CS/SB 846 (Latvala)
Chapter No. 2014-183, Laws of Florida

This bill relates to various aspects of governmental ethics.

- Beginning January 1, 2015, elected municipal officers must obtain four hours of ethics and sunshine law training on an annual basis (this is a current requirement for state- and county-level elected officials). For all elected officials subject to the training requirement, if the elected official assumes office or a new term of office on or before March 31, the official must fulfill the training requirement before the following December 31. Those assuming office after March 31 are not required to complete the training for the calendar year in which the term of office began.
- Beginning January 1, 2015, elected officials required to participate in

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annual ethics and sunshine law training must certify their participation on their full and public disclosure of financial interest forms. Failure to certify completion of the annual ethics and sunshine law training on a disclosure form does not constitute an immaterial, inconsequential, or deminimus error or omission.

- The bill expands the circumstances where a member of a board, commission or agency may abstain from voting if there is, or may be, a conflict of interest under more stringent local standards of conduct and allows for disclosure of the conflict. The bill also allows for abstention when a member is participating in a quasi-judicial proceeding and the abstention is to assure a fair proceeding.
- The Commission on Ethics is authorized to initiate an investigation and hold a public hearing without a complaint if an individual fails to file the disclosure of financial interest for any year and the maximum automatic fine has been imposed upon the individual.
- Citizen support and direct-support organizations are required to adopt a minimum code of ethics, and post the ethics code on the organization's website.
- A person is prohibited from lobbying a water management district until the person registers as a lobbyist. The bill provides various registration and reporting requirements.
- Members of the executive council of the Florida Clerks of Court Operations Corporation are made subject to specified provisions of the code of ethics.
- The president, senior managers and members of the board of directors of Enterprise Florida, Inc. are made subject to specified provisions of the code of ethics.
- Certain officers and board members associated with the divisions of Enterprise Florida, Inc., and the board of directors of the Florida Development Finance Corporation are made subject to specified provisions of the code of ethics.
- For an expressway authority in Miami-Dade County, a lobbyist is prohibited from serving as a member of the expressway authority, lobbying restrictions are applicable to members and the executive director of the authority, the authority's general counsel is made the authority's ethics officer, lobbying restrictions are imposed for authority board members, employees and consultants, and various disclosures and reporting are required. Additionally, the authority must update its code of ethics, and the authority must provide training.
- The executive director of Citizens Property Insurance Corporation is made subject to specified provisions of the code of ethics. The bill also prohibits a former executive director, senior manager, or member of the board of governors of the corporation from entering employment or a contractual relationship with specified insurers for two years after retirement from or termination of service to the corporation.
- The bill does NOT prohibit an elected municipal, county or school board officer from registering as a lobbyist for purposes of lobbying either the legislature or state agencies on behalf of a person or entity other than his or her political subdivision.

Effective: July 1, 2014.

Finance and Taxation

Rental Car Surcharge
CS/CS/HB 343 (Nunez)
Chapter No. 2014-199, Laws of Florida

Provides an alternative surcharge of $1 per usage for use of a motor vehicle pursuant to an agreement with a car-sharing service for less than 24 consecutive hours. A member of a car-sharing service who uses the same motor vehicle for 24 hours or more shall pay the surcharge of $2 per day. The bill defines "car-sharing service."

Effective: January 1, 2015.

Clerks of Court – Delinquent Real Property Taxes
CS/CS/HB 797 (Pilon)
Chapter No. 2014-211, Laws of Florida

Tax Certificates and Sales for Taxes

The bill:

- Provides that tax certificates on homesteads under $250 that are issued to the county may be purchased from the county once they reach $250 in taxes and interest;
- Provides that a tax certificate may be redeemed any time before the tax deed is issued unless full payment for the tax deed has been made, including documentary stamps and recording fees;
- Deletes language specifying that a person may redeem a tax certificate at any time before the property is placed on the list of lands available for public sale;
- Requires the certificateholder to pay the costs of resale within 30 days of notice from the clerk, or the certificate is cancelled by entering the land on the list of "lands available for taxes;"
- Removes a requirement to notify all other persons holding tax certificates against a property in the event:
  - There are no bidders at a tax deed sale,
  - Costs for a subsequent sale are not paid within 30 days of the sale, and
  - The clerk enters the land on the list of "lands available for taxes;"
- Deletes the requirement that legal titleholders of contiguous property be notified when the county does not elect to purchase property on the list of "lands available for taxes."
- Provides that holders of certificates on unsold homestead property must pay one half the value of the homestead within 30 days of the sale or the property is entered on the list of "lands available for taxes;"
- Provides that if the sale is canceled or the buyer fails to make full payment within the time required, the clerk must readvertise the sale within 30 days of the buyer's nonpayment or, if canceled, within 30 days after the clerk receives the

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re-sale costs, with sale to be held within 30 days of readvertising;
- Provides that in a subsequent sale at which there are no bidders, where the certificate holder fails to pay the amount due within 30 days, the property will be placed on list of "lands available for taxes;" and
- Removes the requirement for unlimited recurring sales if the property is not sold.

Surplus Funds from Tax Deed Sales

The bill amends s. 197.582, F.S., to streamline the process by allowing the notice process required by the tax deed statutes to also satisfy the notice requirement for unclaimed funds. It also provides that excess sale proceeds are presumed payable on the date the notice is mailed by the clerk that the funds are on hand under s. 197.582, F.S. This establishes a beginning for the one year reporting date for holders of unclaimed property to the state. The bill further establishes distribution in accordance with lienholders' record priorities and provides for the filing of an interpleader with assessment of fees in the event of a dispute.

Effective: July 1, 2014.

Communications Services Tax
CS/HB 803 (Boyd)
Chapter No. 2014-36, Laws of Florida

For purposes of chapter 202, F.S., the bill revises the definition of the term "information service" to include data processing and other services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a purchaser whose primary purpose for the underlying transaction is the processed data or information. This change in definition is to be applied retroactively.

Effective July 1, 2014.

State Board of Administration/ Foreign Investments
CS/CS/HB 811 (Hager)
Chapter No. 2014-134, Laws of Florida

This bill revises and provides definitions with respect to requirements that the State Board of Administration divest securities in which public monies are invested in certain companies doing specified types of business in or with Sudan or Iran. Further, a domestic insurer must provide to the Office of Insurance Regulation a list of investments that it has in

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companies on the State Board of Administration's list of scrutinized companies with activities in Sudan or in Iran's petroleum energy sector.

Effective July 1, 2014.

Economic Development
HB 5601(Workman)
Chapter No. 2014-38, Laws of Florida

HB 5601 makes the following changes:

- Creates four temporary "tax holiday" periods where sales of certain goods will be exempt from the sales tax – a "back to school" holiday, a hurricane supplies holiday, a physical fitness admissions holiday and an energy efficient products holiday.
- Creates a temporary sales tax exemption for cement mixing drums.
- Creates a permanent sales tax exemption for child restraint systems and booster seats for use in motor vehicles; for bicycle helmets marketed for use by youth; for therapeutic pet foods sold by veterinarians; for prepaid college meal plans purchased by students.
- Expands the amount of credits available under the New Markets Tax Credit program from $178.8 million to $227.55 million.
- Delays the repeal of the Community Contributions Tax Credit program (provides a credit or refund in the amount of 50percent of eligible donations to Florida businesses that make donations toward community development and housing projects for low income persons).
- Amends the statutory definition of "prepaid calling arrangement" to provide that certain prepaid mobile communications services are subject to state and local sales taxes instead of state and local communications services taxes.
- Reduces the sales tax rate for electricity purchases.
- Decreases the sales tax rate on sales of electricity from seven to four percent and increases the gross receipts tax rate on electrical power or energy delivered to a non-exempt retail consumer from two and one-half to five and one-half percent.
- Transfers $100 million in recurring state sales tax revenue, currently deposited in the General Revenue Fund, to the State Transportation Trust Fund.
- Modifies the distribution of Cigarette Tax Revenues to benefit the Moffitt Cancer Center

Effective: Except as otherwise provided, upon becoming a law.

Tax Administration
CS/HB 7081 (Finance & Tax Subcommittee)
Chapter No. 2014-40, Laws of Florida

This bill:

- Revises the procedures local governments may use to authorize ad valorem exemptions for economic development. Real property improvements and tangible personal property could be exempted by a local government if purchased or added after receiving approval by a local motion or resolution but before the ordinance enacting the exemption. An ordinance in existence prior to the effective date of this act will not be invalidated simply because the improvements to real property were made or the tangible personal property was added or increased prior to the day such ordinance was adopted as long as the local governing body acted substantially in accordance with the law as amended by the bill.
- Clarifies that charges for the storage of towed vehicles resulting from a "lawful impoundment" by a law enforcement agency are not taxable.
- Clarifies and reorganizes the statutes pertaining to the application of current criminal penalties regarding any person who willfully fails to collect a tax or fee, who makes a false or fraudulent return with willful intent, or who engages in acts that require a certificate of registration and "fails or refuses" to register or willfully fails to register after the Department provides notice.
- Provides that the Department can require certain individuals and entities seeking to obtain a dealer's certificate of registration to post a cash deposit, bond, or other security if that business will be operated at an identical location of a previous business that would have been required to post such security. This requirement can be waived if absence of tax liability or an arms-length transfer of the business can be demonstrated.
- Clarifies a provision requiring the clerks of the court to transmit all court-related collections electronically by the 10th of the month immediately following the month in which the funds are collected to conform to a similar law changes made by the Legislature in 2010.
- Permits certain local government entities to publish aggregate data on certain tourism taxes.
- Increases the authority of the Executive Director of the Department of Revenue to compromise tax assessed from $250,000 up to $500,000 when there is doubt as to liability or collectability.

Effective: Except as expressly indicated, upon becoming a law.

Professional Sports Facilities
CS/HB 7095 (House Economic Affairs Committee)
Chapter No. 2014-167, Laws of Florida

This bill relates to various provisions on financing professional sports facilities.

- The bill revises the distribution of sales tax monies to certified applicants for a facility used by a spring training franchise for major league baseball, and authorizes a distribution for an applicant that has been approved by the Legislature and certified by the Department of Economic Opportunity under a newly created sports development program.
- The bill provides for municipalities and counties to expend an increased portion of local government half-cent sales tax revenues to reimburse the state as required

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by a contract under the sports development program.

- The bill creates the sports development program and requires the Department of Economic Opportunity to screen applicants for state funding for sports development. The program is designed to provide applicants, defined as a unit of local government, with state funding for the public purpose of constructing, reconstructing, renovating, or improving a facility. Facilities are to be used by beneficiaries, defined to include a professional sports franchise of the National Football League, the National Hockey League, the National Basketball Association, the National League or American League of Major League Baseball, Minor League Baseball, Major League Soccer, and other entities. The bill provides for an application and approval process, for an annual application, and for the DEO to submit recommendations to the Legislature by a certain date. Legislative approval is required for state funding. An applicant (unit of local government) approved by the Legislature and certified by the DEO must enter into a contract with the DEO, which among other things specifies the terms of the state's investment and any required reimbursement to the state.
- The bill provides a process for an applicant to submit an application for state funds for a new facility or a project commenced between March 1, 2013 and July 1, 2014.
- A professional sports facility constructed with financial assistance from the state is to be designated as a shelter site for the homeless during the period of a declared federal, state, or local emergency in accordance with the criteria of locally existing homeless shelter programs unless: the facility is otherwise contractually obligated for a specific event or activity; the facility is designated or used by the county owning the facility as a staging area; or the county owning the facility also owns or operates homeless assistance centers and the county determines there exists sufficient capacity to meet the sheltering needs of homeless persons within the county.

Effective: Upon becoming a law.

General Government

Canned or Perishable Food Distributed Free of Charge
HB 23 (Rogers)
Chapter No. 2014-26, Laws of Florida

Includes the phrase "public schools" within the statutory definition of "donor" as it relates to civil and criminal liability for injuries caused by donated food, thus protecting schools from such liability from donated food.

Effective: July 1, 2014.

Public Retirement Plans/Consolidated Governments
HB 117 (Ray)
Chapter No. 2014-28, Laws of Florida

This bill provides that a consolidated government (City of Jacksonville) may enter into an inter-local agreement to provide police protection services to a municipality within its boundaries and become eligible to receive insurance premium taxes to fund a police pension fund under Chapter 185, F.S.

Effective: July 1, 2014.

Flood Insurance
CS/CS/CS/SB 542 (Brandes)
Chapter No. 2014-80, Laws of Florida

The bill authorizes specified insurers to issue insurance coverage providing personal lines residential coverage for floods on any structure or the contents of personal property contained within such structure. This authority does not apply to commercial lines residential or commercial lines non residential coverage for floods. This also does not apply to coverage for floods that is excess coverage over any other insurance covering a flood. An insurer may issue flood insurance policies, contracts, or endorsements on a standard, preferred, customized, or supplemental basis. The bill requires the Florida Commission on Hurricane Loss Projection Methodology to adopt standards and guidelines relating to personal lines residential flood loss by July 1, 2017. The bill requires an insurer to notify the Office of Insurance Regulation before writing flood insurance and to file a plan of operation with the office. "Flood" is defined to include a mud flow or collapse or subsidence of land along the shore of a lake or similar body of water as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels that result in a flood.

Effective: Upon becoming a law.

Licensure to Carry a Concealed Weapon or Firearm
CS/CS/HB 523 (Grant, Steube)
Chapter No. 2014-205, Laws of Florida

Authorizes the Department of Agriculture and Consumer Services (department) to appoint county tax collectors to accept new and renewal concealed weapon or firearm license applications. Under the bill, applicant information will be electronically input and transmitted for processing to the department's Division of Licensing (division) in Tallahassee. Licenses would be issued by the division by mail. The bill requires county tax collectors seeking appointment to submit a written request to the division. Upon approval of the request, the bill authorizes the division to enter into a Memorandum of Understanding (MOU) with the tax collector on behalf of the department. The bill authorizes appointed tax collectors to collect and retain fees for accepting new and renewal concealed weapon or firearm licenses. Revenue received for license applications submitted to the tax collector offices will be deposited into the Division of Licensing Trust Fund within the department.

Effective: July 1, 2014.

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Municipal Governing Body Meetings
CS/CS/SB 730 (Galvano)
Chapter No. 2014-14, Laws of Florida

This bill authorizes the governing body of a municipality to hold joint meetings with the governing body of the county in which the municipality is located or the governing body of another municipality to receive, discuss and act upon matters of mutual interest. The bill authorizes the governing body of a municipality to prescribe the time and place of joint meetings by ordinance or resolution.

Effective: July 1, 2014.

Legal Notices
CS/HB 781 (Powell)
Chapter No. 2014-210, Laws of Florida

Current law provides that a newspaper's website must include the same legal notices that appear in print. A newspaper's legal notice webpage must be clearly titled and free of charge. The Florida Press Association maintains a statewide website for legal notices as a repository for all published notices. The bill:

- Adds that legal notices must be posted on the date that the printed newspaper notice appears in a separate web page entitled, "Legal Notices," "Legal Advertisements," or comparable language;
- Provides that no fee may be charged nor may registration be required for viewing or searching legal notices on the statewide site;
- Requires that a legal notice placed on the statewide website must be searchable by party or case number, be posted for 90 consecutive days, and retained for 18 months; and
- Provides that the newspaper's web pages that contain legal notices must present the legal notices as the dominant and leading subject matter of those pages.

Effective: October 1, 2014.

Financial Institutions
CS/CS/SB 1012 (Richter)
Chapter No. 2014-91, Laws of Florida

This is a comprehensive bill relating to the regulation of financial services and institutions. The bill prohibits a county or municipality from enacting or enforcing an ordinance or rule that regulates financial or lending activities, including an ordinance or rule that disqualifies persons from doing business with a county or municipality based on lending interest rates, or that imposes reporting requirements or other obligations regarding the financial services or lending practices of persons or entities, and subsidiaries or affiliates which: are subject to the jurisdiction of the state office regulating financial institutions; are subject to the jurisdiction of various federal entities; are chartered to engage in secondary market mortgage transactions; or are acting on behalf of the Florida Housing Finance Corporation. A county or municipality is not prevented from engaging in a civil investigation, initiating an administrative proceeding, or commencing a civil proceeding to determine compliance with or to enforce a state law, rule or order or a state agency, or an ordinance or rule of a county or municipality which is not preempted under the bill. A financial institution must notify the state office of any civil investigation or administrative or civil proceeding initiated by a county or municipality. The state office has sole and exclusive jurisdiction to initiate appropriate administrative or civil proceedings to enforce such laws or rules if the office determines that such investigation or proceeding; is based upon a local ordinance or rule that is preempted; or directly and specifically regulates the manner, content, or terms and conditions of a financial transaction or account related thereto that a financial institution is authorized to engage in, or prevents, significantly interferes with, or alters the exercise of powers granted to a financial institution under the financial institutions codes or any applicable federal law or regulation.

Effective: July 1, 2014.

Security of Confidential Personal Information
CS/CS/SB 1524 (Thrasher)
Chapter No. 2014-189, Laws of Florida

This bill relates to protecting and securing data containing personal information in electronic form. Entities covered by the bill include private entities and governmental entities, which is defined to include agencies and other instrumentalities of the state. The bill defines "personal information," which includes financial information, medical information, and personal identifying information. Each covered entity, governmental entity, or third-party agent must take reasonable measures to protect and secure data in electronic form containing personal information. Notice is to be provided to the Department of Legal Affairs of any breach of security affecting 500 or more individuals in the state. A covered entity must give each individual in the state whose personal information was, or the covered entity reasonably believes to have been, accessed as a result of a breach. Under specified circumstances, a covered entity must also provide notice to all consumer reporting agencies. The bill also provides requirements for the disposal of customer records containing personal information. The bill provides for enforcement and penalties, but does not establish a private cause of action.

Effective: July 1, 2014.

Florida Retirement System and Health Insurance Subsidy – Contribution Rates
HB 5005 (House Appropriations Committee)
Chapter No. 2014-54, Laws of Florida

This bill establishes the contribution rates for the various classes of the Florida Retirement System for fiscal year 2014-2015.

Effective: July 1, 2014.

Growth Management

Vacation Rentals
SB 356 (Thrasher)
Chapter No. 2014-71, Laws of Florida

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This bill prohibits local laws, ordinances, or regulations that regulate the duration or frequency of rental of vacation rentals. It repeals the provisions that prohibit local laws, ordinances, or regulations that restrict the use of vacation rentals or that regulate vacation rentals based solely on their classification, use, or occupancy. The bill maintains the current prohibition against local laws, ordinances, or regulations that prohibit vacation rentals.

Effective: July 1, 2014.

Initiative or Referendum Process
SB 374 (Detert)
Chapter No. 2014-178, Laws of Florida

SB 374 removes the prohibition against some local initiative and referendum processes related to comprehensive plan amendments and map amendments. Current law allows local initiatives and referendums if they:

- Were in effect on June 1, 2011;
- Affect more than five parcels of land; and
- Were expressly authorized for comprehensive plan or map amendments in a local government charter.

The bill removes the requirement that the initiative or referendum affect more than five parcels of land.

Effective: upon becoming a law.

Fuel Terminals
CS/CS/SB 1070 (Simpson)
Chapter No. 2014-93, Laws of Florida

The bill prohibits a local government from amending its comprehensive plan, land use map, zoning districts, or land development regulations after July 1, 2014, in a manner that would conflict with a fuel terminal's classification as a permitted and allowable use, including amendments that would make a terminal a nonconforming use, structure, or development.

The bill requires that local governments allow a fuel terminal damaged or destroyed by a natural disaster or other catastrophe to be repaired to its pre-existing capacity. The bill specifies the authority of a local government to adopt, implement, modify, and enforce applicable federal and state requirements for fuel terminals, is not limited by the bill so long as it does not conflict with federal or state safety and security requirements for fuel terminals. This includes safety and building requirements, and local safety and building standards.

Effective: July 1, 2014.

Economic Development
CS/HB 7023 (House Economic Development and Tourism Subcommittee)
Chapter No. 2014-218, Laws of Florida

This bill relates to various aspects of economic development, including grant and loan programs, land development, and unemployment compensation.

- Within one year after submission of its comprehensive plan or revised comprehensive plan for review, each county and municipality must adopt and enforce land development regulations consistent with the plan.
- For the Rural Job Tax Credit Program, a new or existing eligible business that receives a tax credit under the program is eligible for a tax refund of up to 50 percent of the amount of sales tax on purchases of electricity paid by the business during the one-year period before the date the credit is received.
- The bill provides legislative intent stating that various programs are designed to enable local governments to undertake necessary community and economic development programs.
- For the Florida Small Cities Community Development Block Grant Program Fund, applicants for grants must compete against each other in the following grant program categories: housing rehabilitation; economic development; neighborhood revitalization; and commercial revitalization. Except for applications for economic development grants, an eligible local government may submit one application for a grant during each application cycle. An eligible local government may apply up to three times in any one annual funding cycle for an economic development grant, but may not receive more than one such grant per annual funding cycle. The Department of Economic Opportunity is to rank each application received during the application cycle according to criteria established by rule. The ranking system is to include a procedure to eliminate or reduce any population-related bias that places exceptionally small communities at a disadvantage in the competition for funds. In order to provide citizens with information concerning an applicant's proposed project, the applicant must make available to the public information concerning the amounts of funds available for various activities and the range of activities that may be undertaken. In addition, the applicant must hold a minimum of two public hearings in the local jurisdiction within which the project is to be implemented to obtain the views of citizens before submitting the final application to the DEO. The maximum amount of block grant funds that may be spent on administrative costs by an eligible local government for the economic development program category is $120,000. The primary purpose of these various changes is to maintain funding categories with adequate safeguards to ensure grants are properly and evenly distributed.
- For unemployment compensation purposes, the DEO must offer an online assessment that serves to identify an individual's skills, abilities, and career aptitude. The skills assessment must be voluntary, and the DEO must allow a claimant to chose whether to take the skills assessment.
- The bill rebrands what are currently known as "rural areas of critical economic concern" as "rural areas of opportunity."
- The bill revises the administration of all loan programs administered under the DEO to increase

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accountability. The loan programs include the Rural Community Development Revolving Loan Program, Economic Gardening Business Loan Pilot Program, and the Black Business Loan Program.

- Any building permit, and any permit issued by the Department of Environmental Protection or by a water management district, which has an expiration date from January 1, 2014, through January 1, 2016, is extended and renewed for a period of two years after its previously scheduled date of expiration. The extension includes any local government-issued development order or building permit including certificates of levels of service. The extension does not prohibit conversions from the construction phase to the operation phase upon completion of construction. The permit extension is in addition to any existing permit extension granted by similar legislation in 2010, 2011, 2012, and 2013 but may not exceed four years in total. The commencement and completion dates for any required mitigation associated with a phased construction project are extended so that mitigation takes place in the same time frame relative to the phase as originally permitted. The holder of a valid permit or other authorization that is eligible for the two-year extension must notify the authorizing agency in writing by December 31, 2014, identifying the specific authorization for which the holder intends to use the extension and the anticipated time frame for acting on the authorization. The bill provides a list of permits to which the extension does not apply. Extended permits must continue to be governed by the rules in effect at the time the permit was issued unless it is demonstrated that the rules in effect at the time the permit was issued would create an immediate threat to public health or safety. A permit extension does not impair the authority of a county or municipality to require the owner of a property who has notified the county or municipality of the owner's intent to receive the extension of time granted under the bill to maintain and secure the property in a safe and sanitary condition in compliance with applicable laws and ordinances.
- The bill creates the "Florida Microfinance Act," to provide entrepreneurs and small businesses in Florida access to business loans to improve overall health and growth in the state's economy. Two programs are created: a microfinance loan program and microfinance guarantee program. Under the loan program, the DEO is to competitively award funds to up to three eligible loan administrators who will in turn provide a one-to-one match to make short-term, microloans of up to $50,000 to entrepreneurs and small businesses. Under the guarantee program, Enterprise Florida, Inc., is to utilitize state funds to guarantee loans made by private lenders to entrepreneurs and small businesses in Florida.

Effective: July 1, 2014.

Health & Human Services

Homelessness
CS/CS/HB 979 (Peters)
Chapter No. 2014-214, Laws of Florida

The bill requires the Department of Economic Opportunity to provide training and technical assistance to designated lead agencies of homeless assistance continuums of care that receive funding from the Department of Children and Families to provide or secure housing, programs, and other services for homeless persons. Such training and technical assistance, subject to receiving a specified appropriation for that purpose, must be provided by a nonprofit entity that meets the requirements for providing training and technical assistance. The DEO is required to establish award levels for "Challenge Grants" for homeless assistance, and specify the criteria to determine award levels. Grants may be used to fund any of the housing, program, or services needed and included in the local homeless assistance continuum of care plan. A lead agency that receives a grant must submit a report to the DEO.

Effective: July 1, 2014.

Military and Veterans Affairs – Employment Preference
CS/CS/HB 7015 (House Veteran and Military Affairs Subcommittee)
Chapter No. 2014-1, Laws of Florida

This bill is a comprehensive bill relating to various aspects of military and veterans affairs. The bill revises and provides governmental employment preference for specified relatives of a veteran, including the parents or legal guardian of a veteran killed during combat, and also provides preference to members of the reserves. The bill allows private employers to provide a veterans' preference. The bill also provides findings and intent to establish charter schools on military installations. The bill allocates approximately $7.5 million to purchase nonconservation lands around MacDill Air Force Base, Naval Support Activity Panama City, and Naval Station Mayport for the purpose of creating buffers to protect against encroachment.

Effective: July 1, 2014. Chapter No. 2014-1.

Personnel

Workers' Compensation
CS/HB 785 (Albritton)
Chapter No. 2014-131, Laws of Florida

This bill provides that under workers' compensation, reimbursement is not to be made for oral vitamins, nutrient preparations, or dietary supplements. Also, reimbursement is not to be made for medical food, unless the self-insured employer or workers' compensation carrier at its sole discretion authorizes the provision of such food.

Effective: July 1, 2014.

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Public Records and Public Meetings

Prepaid Wireless E911 Fee
CS/HB 177 (Steube)
Chapter No. 2014-197, Laws of Florida

Current law provides a public record exemption for proprietary confidential business information submitted by a prepaid wireless provider to the E911 Board (Board) or Technology Program within the Department of Management Services (DMS). This bill, which is linked to the passage of CS/CS/HB 175, expands the public record exemption for proprietary confidential business information submitted by a prepaid wireless provider to include such information when it is submitted to the Department of Revenue (DOR). It authorizes DOR to provide such information to DMS or the Board in certain circumstances.

Effective: On the same date that HB 175 takes effect.

Education Data Privacy
CS/CS/SB 188 (Hukill)
Chapter No. 2014-41, Laws of Florida

Contains provisions to make students and their parents aware of their educational privacy rights. The bill also prohibits the collection and limits the dissemination of certain types of information and requires the replacement of social security numbers with student identification numbers. The bill applies to K-12 schools and agencies that provide administrative control or direction or perform services for them. The bill:

- Specifies that students and their parents must be notified annually about their rights regarding education records;
- Clarifies existing law to authorize that attorney fees and court costs be awarded upon receipt of injunctive relief, rather than when the parent or student's rights are "vindicated";
- Prohibits certain agencies or institutions from collecting or retaining information regarding the political affiliation, voting history, religious affiliation, or biometric information of a student, parent, or sibling of a student and defines biometric information but permits a school district that used a palm scanner on a certain date to continue to use the scanner for one additional school year;
- Prohibits the disclosure of confidential and exempt education records unless the disclosure is authorized by law;
- Requires governing boards, in a public meeting, to identify which student education records the board intends to include as publicly available student directory information; and
- Requires DOE to establish a process for assigning a non-social security number as a Florida student identification number, and once DOE completes the process, a school district may not use social security numbers as student identification numbers in its management information systems.

Effective: Upon becoming a law.

Relating to Public Records/Personal Identifying Information/ Licensure to Carry Concealed Weapon or Firearm
CS/HB 525 (Grant, Steube)
Chapter No. 2014-206, Laws of Florida

Expands the current public record exemption for personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm held by the Division. It is expanded to include such information when it is held by a tax collector appointed by the Department to receive applications for concealed weapon or firearm licenses or renewals and fees. Current law provides a public record exemption for personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm held by the Division of Licensing (Division) of the Department of Agriculture and Consumer Services (Department).

Effective: July 1, 2014.

Motor Vehicle Crash Reports – Sworn Statements Required
CS/HB 863 (Kerner, Campbell)
Chapter No. 2014-212, Laws of Florida

The bill requires a written sworn statement for each individual crash report requested within the 60-day confidential and exempt period. Specifically, the bill amends s. 316.066(d), F.S., requiring that when a person accesses a crash report, within the required 60-day period after the filing of the report, presenting a valid driver license or other photographic identification, proof of status, or identification that demonstrates his or her qualifications to access that information, filing a written sworn statement with the state or local agency in possession of the information, such written sworn statement must be completed and sworn to by the requesting party for each individual crash report that is being requested.

Effective: July 1, 2014.

Motor Vehicle Crash Reports – Personal Identifying Information
CS/SB 865 (Kerner, Campbell)
Chapter No. 2014-213, Laws of Florida

The bill revises the exception to the public record exemption for motor vehicle crash reports, by providing further access restrictions for free newspapers of general circulation, published once a week or more often, available and of interest to the public generally for the dissemination of news. Specifically, the bill only allows these free newspapers to access a crash report within the authorized 60 day period if the free newspaper:

- Distributes a minimum of 7,500 copies by mail or by carrier as verified by a postal statement or by a notarized printer's statement of press run;
- Has the intention of being of general distribution and circulation; and
- Contains news of general interest with a minimum of ten pages per publication.

However, the bill prohibits such

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newspapers from accessing the home, cellular, employment, or other telephone number or the home or employment address of any of the parties involved in the crash, if the newspaper requests ten or more crash reports within a 24 hour period that are exempt because the 60 day period has not elapsed.

Effective: July 1, 2014.

Public Records/Payment of Tolls and Associated Charges
CS/HB 7007 (Transportation and Highway Safety Subcommittee)/ CS/SB 616 (Evers)
Chapter No. 2014-217, Laws of Florida

Current law provides a public record exemption for the personal identifying information provided to, acquired by, or in the possession of the Department of Transportation (DOT), a county, or an expressway authority for the purpose of using a credit card, charge card, or check for the prepayment of electronic toll facilities. This prepayment system is the electronic transponder method of toll payment known as the SunPass system. The bill expands the current public record exemption to include the personal identifying information of customers who use the post-payment method of toll payment known as the Toll-By-Plate system. It also adds municipalities to the current list of public records custodians to whom the exemption applies. The exemption is retroactive, applying to the personal identifying information of Toll-By-Plate customers before, on, or after the effective date.

Effective: Upon becoming a law.

Public Safety & Courts

Threatened Use of Force
CS/CS/HB 89 (Combee)
Chapter No. 2014-195, Laws of Florida

This bill provides criminal and civil immunity to those who threaten to use force if the threat is made in a manner and under circumstances that would have been immune under chapter 776, F.S., had force actually been used. The bill clarifies that those who threaten to use force may claim self-defense if the threat is made in a manner and under circumstances that would have been justifiable under chapter 776, F.S., had force actually been used. Further, the bill ensures that those who threaten to use force in a manner and under circumstances that are justifiable under chapter 776, F.S., are not sentenced to a mandatory minimum term of imprisonment.

Effective: Upon becoming a law.

Emergency Communication System
CS/CS/HB 175 (Steube)
Chapter No. 2014-196, Laws of Florida

The bill amends ss. 365.172 and 365.173, F.S., as follows:

- Provides a mechanism for collection of the E911 fee on prepaid wireless services by retailers at the point of sale and establishes a new category in the E911 Trust Fund for revenues derived from this fee.
- Sets the E911 fee at $0.40 per month per service identifier (for post-paid voice communications services) and applies this fee to prepaid wireless service for each retail transaction.
- Retains the existing E911 fee cap of $0.50 and allows the Board, no sooner than June 1, 2015, to adjust the rate under this cap by a two-thirds vote of the Board membership.
- Expands the list of authorized county expenditures for which E911 system funds may be used.
- Modifies the percentage of funds to be distributed to counties, such that counties will receive 96 percent of the moneys in the wireline category, 76 percent of the moneys in the wireless category (up from 67 percent), and 61 percent of the moneys in the new prepaid wireless category.
- Reduces the percentage of funds available for distribution to wireless providers from 30 percent to 20 percent.
- Provides that 35 percent of the moneys in the new prepaid wireless category will be retained by the Board to provide E911 grants to counties for the purpose of upgrading and replacing E911 systems, developing and maintaining statewide 911 routing and mapping systems, and developing and maintaining next-generation 911 services and equipment.

Effective Date. The bill provides the following dates for commencement of specified activities:

- The prepaid wireless E911 fee (fee) is imposed per retail transaction effective January 1, 2015.
- The monthly fee is applied to wireless, nonwireless, and prepaid wireless categories effective January 1, 2015.
- The fee may not be assessed on or collected from a provider before January 1, 2015.
- The fee is subject to remittance by retailers to the Department of Revenue (DOR) effective March 1, 2015. (Sellers may retain all moneys collected for the first two months to offset setup costs.)
- Each seller may retain 5 percent of the prepaid wireless E911 fees that are collected by the seller as a retailer collection allowance effective March 1, 2015.
- Each seller shall file a return and remit the fees collected the previous month to DOR on or before the 20th day of the month, beginning April 1, 2015.
- The E911 Board may adjust the rate of the fee no sooner than June 1, 2015.
- The effective date of the bill is July 1, 2014.

Nicotine Dispensing Devices
CS/CS/SB 224 (Benacquisto)
Chapter No. 2014-65, Laws of Florida

The bill defines a "nicotine product" as any product that contains nicotine, including liquid nicotine, that is intended for human consumption, whether inhaled, chewed, absorbed, dissolved or ingested by any means. The definition does not include a

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tobacco product under Florida law, a drug or device under federal law, or a product that contains incidental nicotine. The bill redefines "nicotine dispensing devices" as any product that employs an electronic, chemical, or mechanical means to produce vapor from a nicotine product, including, but not limited to, an electronic cigarette, any similar device or product, any replacement cartridge, and any container of nicotine in a solution or other form for such devices or products. The bill provides that the sale or giving of "nicotine products" and "nicotine dispensing devices" to minors under the age of 18 is prohibited and punishable as a second degree misdemeanor. It provides defenses, including a defense based on the appearance of the underage person and whether the underage person falsely misrepresented their age. It provides signage requirements for dealers of "nicotine products" and "nicotine dispensing devices." The bill prohibits the sale or delivery of nicotine products or nicotine dispensing devices by means of self-service merchandising except when such products are under the direct control, or line of sight where effective control may be reasonably maintained, by the retailer or their agent or employee. The bill passed without any local government preemptions.

Effective: July 1, 2014.

Emergency Shelters – Alzheimer's Disease
CS/HB 709 (Hudson)
Chapter No. 2014-163, Laws of Florida

In 2012, the Legislature created the Purple Ribbon Task Force to develop a comprehensive state plan to address the needs of individuals with Alzheimer's disease and their caregivers. The task force submitted its final report and recommendations for an Alzheimer's disease state strategy on August 1, 2013. The bill implements several of the recommendations identified by the task force. Special needs shelters (SNSs) provide shelter and services to persons with special needs, including individuals with Alzheimer's disease, who have no other option for sheltering in an emergency situation. Each local emergency management agency (e.g., counties) in the state must maintain a registry of persons with special needs. Currently, local emergency management agencies are required to register individuals with special needs with SNSs, but they are not required to provide SNS registration online. The bill requires the Division of Emergency Management to develop and implement a SNS registration program. The registration program must include a uniform registration form and a database for uploading and storing registration forms. The bill also requires SNSs to have a staff member who is familiar with the needs of persons with Alzheimer's disease and to establish a designated area in the shelter for individuals with Alzheimer's disease to enable them to maintain their normal habits and routines.

Effective: July 1, 2014.

Controlled Substances
CS/HB 697 (Ingram)
Chapter No. 2014-159, Laws of Florida

The bill adds to the list of Schedule I controlled substances specified materials, compounds, mixtures, or preparations that contain hallucinogenic substances, or any of their salts, isomers, and salts of isomers if the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation. Basically, the bill adds six new substances to the Schedule I list of banned substances.

Effective: Upon becoming a law.

Vessel Safety
CS/CS/HB 1363 (Van Zant)
Chapter No. 2014-143, Laws of Florida

The bill amends the vessel safety statutes to authorize FWC, officers of FWC, and any law enforcement agency or officer to relocate a vessel that unreasonably or unnecessarily constitutes a navigational hazard or interferes with another vessel. The bill exempts FWC or any other law enforcement agency or officer from liability for damages caused by the relocation or removal of a vessel, unless the damage results from gross negligence or willful misconduct. Furthermore, the bill authorizes FWC or another law enforcement agency to recover from the vessel owner all costs, including costs owed to a third party, resulting from the relocation or removal of a vessel that unreasonably or unnecessarily constitutes a navigational hazard or interferes with another vessel. The bill amends the public nuisance and pollutant discharge statutes to specify that, in addition to being authorized to remove a derelict vessel, FWC, an officer of FWC, and certain law enforcement agencies or officers are authorized to relocate or cause to be relocated a derelict vessel from public waters. The bill also exempts FWC or a law enforcement agency from liability for damages caused by the relocation or removal of a derelict vessel authorized by the bill, unless the damage results from gross negligence or willful misconduct. The bill authorizes FWC or other law enforcement agency to recover from the vessel owner all costs, including costs owed to a third party, incurred by FWC or other law enforcement agency for relocating a derelict vessel, and specifies that all third-party costs that are incurred by the FWC or other law enforcement agency in the relocation or removal of the derelict vessel can be recovered from the vessel owner. The bill specifies that contractors who perform the relocation or removal of a vessel at the direction of FWC or a law enforcement agency or officer must meet certain requirements. The state and local governments that perform the removal or relocation of a derelict vessel because under the bill will be able to recover all costs incurred in the removal or relocation of certain vessels.

Effective: July 1, 2014.

Special Districts

Special District Reorganization
CS/CS/SB 1632 (Stargel)
Chapter No. 2014-22, Laws of Florida

continued...

This bill is an omnibus special district bill that reorganizes, renumbers and makes numerous technical and conforming changes to special district provisions in ch. 189, F.S. The bill outlines a process by which the Joint Legislative Auditing Committee (JLAC) and the Department of Economic Opportunity (DEO) may enforce reporting and other requirements when special districts fall out of compliance with their obligations or become inactive. After notifying the DEO, relevant legislators and the local general-purpose government, and after a public hearing, the JLAC may request that the DEO file a petition for enforcement with the Circuit Court of Leon County. Additionally, the bill:

- Requires special districts to maintain a website that offers the public specified information;
- Requires special districts to give the website address to the DEO for publication on its website;
- Amends the definition of agency in the Code of Ethics to specifically include special districts;
- Redefines the term special district in s. 189.403, F.S.;
- Removes provisions concerning a special district's application to amend its charter;
- Amends the circumstances under which the DEO may declare a special district inactive;
- Requires the DEO to notify the chair of the county legislative delegation and the Legislative Auditing Committee;
- Prohibits inactive districts from collecting taxes, fees, and assessments;
- Changes the required education for new special district members;
- Revises the provisions concerning the failure to file certain reports;
- Requires public hearings concerning certain noncompliance.

Effective: July 1, 2014.

TRANSPORTATION

Transportation
CS/CS/CS/SB 218 (Grimsley)
Chapter No. 2014-169, Laws of Florida

This bill relates to various transportation provisions.

- Utility and television lines are required to be removed from county roads and highways at no cost to the county if the county finds the lines to be unreasonably interfering with the widening, repair, or reconstruction of any such road, except under limited conditions.
- The Department of Transportation is authorized to improve and maintain roads that provide access to property within the state park system if they are part of a county road system or city street system. If the Department does not maintain the road, the appropriate county or municipality must maintain the road.
- The DOT is authorized to use appropriated funds for the establishment of a statewide system of interconnected multiuse trails. The bill prioritizes projects for funding, requires funded projects to be included in the Department's work program, and provides that the Department is not responsible for or obligated to provide funds for the operation and maintenance of any such project.
- For a county or municipality, if a

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utility facility was installed in the right-of-way as a means to serve a county or municipal facility on a parcel of property adjacent to the right-of-way and if the intended use of the county or municipal facility is for a use other than transportation purposes, the obligation of the county or municipality to bear the costs of the utility work to relocate the facility shall extend only to the utility work on the parcel of property on which the facility of the county or municipality originally served by the utility facility is located.

- If a municipally owned utility or county owned utility is located in a rural area of critical economic concern, and the DOT determines that the utility is unable, and will not be able within the next ten years, to pay for the cost of utility relocation work necessitated by a Department project on the State Highway System, the Department may pay, in whole or in part, the cost of such utility work performed by the Department or its contractor.
- If the relocation of utility facilities is necessitated by the construction of a commuter rail service project or an intercity passenger rail service project and the cost of the project is eligible and approved for reimbursement by the Federal government, then in that event the utility owning or operating such facilities located by permit on a Department-owned rail corridor shall perform any necessary utility relocation work upon notice from the Department, and the Department shall pay the expense properly attributable to such utility relocation work in the same proportion as federal funds are expended on the commuter rail service project or an intercity passenger rail service project after making specified deductions. In no event is the state required to use state dollars for such utility relocation work. This does not apply to any phase of the Central Florida Commuter Rail project, known as SunRail.
- The bill describes the types of Department property eligible for factoring future revenues received by the Department from leases for communication facilities on Department property, and authorizes the Department to enter into agreements with investors to purchase the revenue streams from Department leases of wireless communication facilities on such property.
- Under the Small County Outreach Program, the bill provides that subject to a specific appropriation in addition to funds annually appropriated for projects under the Program, a municipality within a rural area of critical economic concern or a rural area of critical economic concern community may compete for addition project funding.
- The bill revises the powers of the Tampa-Hillsborough County Expressway Authority.
- The bill authorizes the director of a transportation system or his or her designee to dispose of personal property found on a public transportation system, and provides procedures for the disposal.
- Signs placed on benches, transit shelters, modular news racks, street light poles, public pay telephones, and waste disposal receptacles within the right-of-way, as provided in section 337.408, F.S. are exempt from the outdoor advertising provisions.
- The bill exempts from the permitting requirements of chapter 479, F.S., relating to outdoor advertising, certain signs placed by tourist-oriented businesses, certain farm signs placed during harvest seasons, certain acknowledgement signs on publicly funded school premises, and certain displays of specific sports facilities. However, these exemptions may not be implemented or continued if the Federal government notifies the DOT that implementation or continuation will adversely impact the allocation of federal funds to the DOT.
- The bill clarifies provisions relating to the tourist-oriented directional sign program, limits the placement of such signs to intersections on certain rural roads, and prohibits such signs in urban areas or at interchanges on freeways or expressways.

Effective July 1, 2014.

Speed Zones
SB 392 (Brandes)
Vetoed by Governor

This bill raises the maximum allowable speed limit on limited access highways (interstates) to 75 miles per hour, and raises the maximum allowable speed limit on other roads by an additional five miles per hour. Any speed limit increases would follow the standard process for setting speed limits by the Department of Transportation.

Effective: July 1, 2014.

Department of Transportation / Outdoor Advertising (Billboards)
CS/CS/HB 1161 (Goodson)
Chapter No. 2014-215, Laws of Florida

This bill relates to various transportation provisions.

- The bill describes the types of Department of Transportation property eligible for factoring future revenues received by the Department from leases for communication facilities on Department property, and authorizes the Department to enter into agreements with investors to purchase the revenue streams from Department leases of wireless communication facilities on such property.
- The bill makes a number of changes to chapter 479, F.S., relating to the regulation of outdoor advertising (billboards). Signs shall be permitted by the Department only in commercial or industrial zones, as determined by the local government, in compliance with chapter 163, F.S., unless otherwise provided in chapter 479, F.S. Commercial and industrial zones are those areas appropriate for commerce, industry, or trade, regardless of how those areas are labeled. The bill defines "parcel" and "utilities," and requires a local government to use specified criteria to determine zoning for commercial or industrial

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parcels relative to sign permitting.
- If a local government has not designated zoning through land development regulations in compliance with chapter 163, F.S., but has designated the parcel under the future land use map of the comprehensive plan for uses that include commercial or industrial uses, the parcel is to be considered an un-zoned commercial or industrial area. The bill provides further criteria for the issuance of a permit. The bill prohibits specified uses and activities from being independently recognized as commercial or industrial.
- If a local government has indicated that the proposed sign location is on a parcel that is in a commercial or industrial zone but the Department finds that it is not, the Department is to notify the sign applicant in writing of its determination. An appeal process is provided.
- If the Federal Highway Administration reduces funds that would otherwise be apportioned to the Department due to a local government's failure to comply with the sign permitting requirements, the Department must reduce transportation funding appropriated to the local government by an equivalent amount.
- If a sign is visible to more than one highway subject to the jurisdiction on the Department and within the controlled area of the highways, the sign must meet the permitting requirements of all highways and be permitted to the highway having the more stringent permitting requirements.
- The distance between permitted signs on the same side of an interstate highway may be reduced to 1,000 feet if all other requirements of chapter 479, F.S., are met and if the local government has adopted a program encouraging the voluntary removal of signs in various areas that also provides for a new or replacement sign to be erected on an interstate highway within that jurisdiction, and an agreement is reached between the sign owner and the local government.
- The bill revises provisions relating to the removal, cutting, or trimming of trees or vegetation to increase sign face visibility.
- The bill exempts from the permitting requirements of chapter 479, F.S., relating to outdoor advertising, certain signs placed by tourist-oriented businesses, certain farm signs placed during harvest seasons, certain acknowledgement signs on publicly funded school premises, and certain displays of specific sports facilities. However, these exemptions may not be implemented or continued if the Federal government notifies the DOT that implementation or continuation will adversely impact the allocation of federal funds to the DOT.
- The bill revises provisions relating to local government action with respect to the erection of noise-attenuation barriers that block views of lawfully erected signs. The bill removes a requirement that the Department conduct a survey prior to holding a public hearing relating to erection of a noise-attenuation barrier that may block the visibility of an existing outdoor advertising sign. After the public hearing, the Department may erect the noise-attenuation barrier and the local government must either allow an increase in the height of the sign through a waiver or variance to a local ordinance or land development regulation, allow the sign to be relocated or reconstructed at another location if the sign owner agrees, or pay the fair market value of the sign and its associated interest in the real property (current law).
- The bill clarifies provisions relating to the tourist-oriented directional sign program, limits the placement of such signs to intersections on certain rural roads, and prohibits such signs in urban areas or at interchanges on freeways or expressways.
- The bill establishes a pilot program for the School District of Palm Beach County authorizing signage on certain school district property to recognize the names of the school district's business partners, and provides for the expiration of the program on June 30, 2015.
- The Department is authorized to enter into a concession agreement for commercial sponsorship displays on multiuse trails and related facilities and use any revenues from the agreement for the maintenance of the multiuse trails and related facilities. Any signage is subject to applicable federal laws, and must meet certain requirements.

Effective: July 1, 2014.

Bicycle and Pedestrian Ways
SB 2514 (Senate Appropriations Committee)
Chapter No. 2014-50, Laws of Florida

The bill authorizes the Department of Transportation to use appropriated funds for the establishment of a statewide system of interconnected multiuse trails. The bill prioritizes projects for funding, requires funded projects to be included in the Department's work program, and provides that the Department is not responsible for or obligated to provide funds for the operation and maintenance of any such project.

Effective: July 1, 2014.

Highway Safety and Motor Vehicles
CS/CS/HB 7005 (House Transportation and Highway Safety Subcommittee)
Chapter No. 2014-216, Laws of Florida

This bill combines provisions relating to the Department of Highway Safety and Motor Vehicles and the Department of Transportation.
- A bus may not stop to load or unload passengers in a manner that impedes, blocks, or otherwise restricts the progression of traffic on the main-traveled portion of a roadway if there is another reasonable means for the bus to stop parallel to the travel lane and safely load and unload passengers. "Reasonable means" means sufficient unobstructed pavement or a designated turn lane that is sufficient in length to allow the safe loading and unloading of passengers parallel to the travel lane. This does not apply to a school bus.

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- When inspecting a self-service gasoline station, the Department of Agriculture and Consumer Services must confirm that a decal is affixed to each pump relating to fueling assistance to persons. The decal must be a specified color and size and clearly display the telephone number of the station and the words "Call for Assistance." A county or municipality is not barred from adopting an ordinance, or enforcing an existing ordinance, that expands the accessibility, safety, or availability of fueling assistance to a motor vehicle operator.
- The bill provides a definition of the term "automated license plate recognition system," and requires the Department of State to consult with the Department of Law Enforcement in establishing a retention schedule for records generated by the use of an automated license plate recognition system.
- The bill provides definitions for the terms "sanitation vehicle" and "utility service vehicle," and requires a driver to change lanes when approaching a sanitation or utility service vehicle performing a service-related task on the roadside.
- The time frame for the authorized use of golf carts, low-speed vehicles, and utility vehicles related to seasonal delivery personnel is revised to be from October 15 to January 31 (rather than December 31).
- Provisions relating to the operation of vehicles equipped with autonomous technology on state roads for testing purposes are revised to authorize specified research organizations to operate such vehicles.
- A clerk of court may designate a local governmental entity for the disposition of certain parking citations and the local governmental entity may retain the processing fee.
- For a county or municipal wrecker operator system, an unauthorized wrecker operator's wrecker, tow truck, or other motor vehicle used during certain offenses may be immediately removed and impounded. A law enforcement officer from a local governmental agency or state law enforcement agency is authorized to cause to be removed and impounded from the scene of a wrecked or disabled vehicle an unauthorized wrecker, tow truck, or other motor vehicle. The unauthorized wrecker operator is to be assessed a cost recovery fine.
- A retail outlet is not required to provide air or vacuum supply without a charge. A political subdivision may not adopt any ordinance regarding the pricing of such commodities. All such ordinances are preempted and superseded by general law.
- A county or municipality must respond to a request by a county or municipality to which it provides, by agreement, traffic signal or traffic control device services within 60 days after receiving such a request regarding the evaluation, installation, operation, or maintenance of such traffic signals or other traffic control devices.
- The governing body of a county may create a yellow dot critical motorist medical information program to facilitate the provision of emergency medical care to program participants by emergency medical responders by making critical medical information readily available to responders in the event of a motor vehicle accident or a medical emergency involving a participant's vehicle. The bill authorizes a county to solicit sponsorships from business entities and not-for-profit organizations to cover the cost of the program.

Effective: July 1, 2014.

Department of Transportation
HB 7175 (House Economic Affairs Committee)
Chapter No. 2014-223, Laws of Florida

This bill relates to various transportation provisions.

- The bill repeals provisions relating to the Florida Statewide Passenger Rail Commission.
- The Department of Transportation is authorized to fund strategic airport investment projects up to 100 percent of the project's cost under specified conditions.
- The Department is authorized to improve and maintain roads that provide access to property within the state park system if they are part of a county road system or a city street system. If the Department does not maintain the road, the appropriate county or municipality must maintain the road.
- The Department is authorized to enter into a concession agreement for commercial sponsorship displays on multiuse trails and related facilities and use any revenues from the agreement for the maintenance of the multiuse trails and related facilities. Any signage is subject to applicable federal laws, and must meet certain requirements.
- The bill removes from current law a provision that grants the first right of refusal to a local government regarding the sale of Department owned real property within the jurisdiction of the local government. The bill provides that the Department may afford a right of first refusal to the local government or other political subdivision at which a parcel of property is located. Also, if the property is to be used for public purpose, the property may be conveyed without consideration to a governmental entity. Additionally, if property is to be used for public purpose, the property may be leased by the Department without consideration to a governmental entity.
- The bill revises the uses of fees generated from Alligator Alley tolls to include the cost of design and construction of a fire station that may be used by a county or another local governmental entity to provide fire, rescue, and emergency management services to the public on Alligator Alley. An interlocal agreement may be entered into to reimburse a county or another local governmental entity for the direct actual cost of operating such fire station.
- The bill describes the types of Department of Transportation property eligible for factoring future revenues received by the Department from leases for communication facilities on Department property, and authorizes the Department to enter into agreements

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with investors to purchase the revenue streams from Department leases of wireless communication facilities on such property.

- The voting membership of a metropolitan planning organization is to consist of at least five but not more than 25 (increased from 19) apportioned members, with the exact number determined on an equitable geographic-population ratio basis, based on an agreement among the affected units of general-purpose local government and the Governor. Each MPO is to review the composition of its membership in conjunction with the decennial census.
- The bill revises the requirements for economic development transportation project contracts between the Department of Transportation and a governmental entity. A grant award is to be terminated if construction of the transportation project does not begin within four years after the date of the initial grant award.
- The bill revises mitigation provisions to offset environmental impacts of Department projects. Environmental impact inventories for transportation projects proposed by the Department or a transportation authority are revised, and the Department is required to include funding for environmental mitigation for projects in its work program. The bill also revises the process and criteria for the payment by the Department or a participating transportation authority of mitigation implemented by water management districts or the Department of Environmental Protection.
- The bill contains all of the Outdoor Advertising (billboards) provisions described in CS/CS/HB 1161.
- The bill revises provisions relating to local government action with respect to the erection of noise-attenuation barriers that block views of lawfully erected signs. The bill removes a requirement that the Department conduct a survey prior to holding a public hearing relating to erection of a noise-attenuation barrier that may block the visibility of an existing outdoor advertising sign. After the public hearing, the Department may erect the noise-attenuation barrier and the local government must either allow an increase in the height of the sign through a waiver or variance to a local ordinance or land development regulation, allow the sign to be relocated or reconstructed at another location if the sign owner agrees, or pay the fair market value of the sign and its associated interest in the real property (current law).
- The bill clarifies provisions relating to the tourist-oriented directional sign program, limits the placement of such signs to intersections on certain rural roads, and prohibits such signs in urban areas or at interchanges on freeways or expressways.
- The bill establishes a pilot program for the School District of Palm Beach County authorizing signage on certain school district property to recognize the names of the school district's business partners, and provides for the expiration of the program on June 30, 2015.
- The Florida Transportation Commission is to conduct a study of the potential for the state to obtain revenue from any parking meters or other parking time-limit devises that regulate designated parking spaces located within or along the right-of-way limits of a state road. On or before August 31, 2014, each municipality and county that receives revenue from any parking meters or other parking time-limit devices that regulate designated parking spaces located within or along the right-of-way limits of a state road must provide the Commission a written inventory of the location of each such meter or devise and the total revenue collected from such locations during the last three fiscal years. Each municipality or county must also inform the Commission of any pledge or commitment by the municipality or county of such revenues to the payment of debt service on any bonds or other debt. The Commission is to consider this information, and develop policy recommendations regarding the manner and extent that revenue generated by regulating parking within the right-of-way limits of a state road may be allocated between the Department and municipalities and counties. If by August 31, 2014, a municipality or county has not provided the information requested by the Commission, the Department is authorized to remove the parking meters or parking time-limit devices, and all costs incurred in connection with the removal shall be assessed against and collected from the municipality or county. From July 1, 2014 through July 1, 2015, a county or municipality shall not install any parking meters or other parking time-limit devices that regulate designated parking spaces located within or along the right-of-way limits of a state road. However, a municipality or county may replace meters or similar devices installed before July 1, 2014, with new devices that regulate the same designated parking spaces.

Effective: Except as otherwise expressly provided, July 1, 2014.

Reminder:

Publicly Funded Defined Benefit Retirement Plans: Reporting
CS/CS/CS/SB 534 (Brandes), Chapter Number 2013-100
Passed During 2013 Legislative Session

The bill creates new reporting requirements for publicly funded defined benefit retirement plans, found at section 112.664, F.S. It is important to note that the bill does not require pension plans to be funded under the conditions listed below; rather, the bill only requires plans to produce a report to be submitted to the Department of Management Services ("DMS").

Under the bill, each defined benefit retirement plan, not to include the Florida Retirement System, must submit an additional report to the DMS. The bill makes the first or initial report due within 60 days after receipt of the certified actuarial

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report submitted after the close of the plan year that ends on or after June 30, 2014. Therefore, under this timeframe a report would be required for a plan year that ends on, for example, September 30, 2014. After the initial report, subsequent reporting will recur on a plan's schedule for actuarial reporting (typically every 1 to 3 years). The report is to be electronically submitted to the DMS in a format prescribed by the DMS.

The report must include the following information. Annual financial statements that are in compliance with the requirements of GASB Statements 67 and 68, using specified mortality tables. Annual financial statements using an assumed rate of return on investments and an assumed discount rate that are equal to 200 basis points less than the plan's assumed rate of return. Information indicating the number of months or years for which the current market value of assets are adequate to sustain the payment of expected retirement benefits as determined in the plan's latest actuarial valuation and under the new required financial statements. Information indicating the recommended contributions to the plan based on the plan's latest actuarial valuation, and the contributions necessary to fund the plan based on the new required financial statements, stated as an annual dollar value and a percentage of valuation payroll.

The information required under the bill must be provided by a local government plan sponsor, which is typically the city, in the municipal budget disclosure required by section 166.241, Florida Statutes, and on any websites that contain budget information, or actuarial or plan performance information. Each plan sponsor and plan that has a publicly available website must also post: the plan's most recent financial statement and actuarial valuation; and a side-by-side comparison of the previous 5 years, beginning with 2013, of the plan's assumed rate of return compared to the actual rate of return, as well as the percentages of cash, equity, bond and alternative investments in the plan portfolio. The website must also include any charts and graphs of the data, presented in a standardized, user-friendly and easily interpretable format prescribed by the DMS.

Plans that fail to submit timely the required information within 60 days after receipt of the plan's actuarial report will be deemed to be in noncompliance. DMS may notify the Department of Revenue (DOR) and Department of Financial Services (DFS) of the noncompliance, and DOR and DFS must withhold funds payable to the plan sponsor, which are not pledged towards bond debt service. The bill gives plan sponsors administrative rights if these actions are taken.

The bill specifically provides that the state is not liable for any obligation relating to any current or future shortfall in any local government retirement system or plan. Provisions similar to the above already exist in current law for firefighter or police officer pensions operated under chapters 175 or 185, Florida Statutes, respectively.

July 3, 2014: Updated with Governor's actions.

FMAA 33rd Annual Seminar

Elections and the City: A review of unique elections issues often faced by municipalities, including candidate qualifications, residency requirements, canvassing boards, and campaign contributions.

by Keith W. Davis, Esq.

TEN THINGS THE LOCAL GOVERNMENT ATTORNEY SHOULD KNOW ABOUT MUNICIPAL ELECTIONS LAW

or

THE TOP 10 REASONS LOCAL GOVERNMENT ELECTION LAW IS FUN FOR THE MUNICIPAL ATTORNEY

NUMBER 10 – You can pretty much make up your own rules to the extent that you feel the need.

The Florida Election Code, Chapters 97-106, *Florida Statutes*, governs municipal elections in the absence of a municipal charter or code provision, or a special act. Sec. 100.3605, *Florida Statutes*.

Certain provisions of the Florida Election Code; however, are expressly applicable to municipal elections. These must be followed, and a local charter provision or ordinance may not conflict with any of these (so you can't make up your own rules for the following):

- Resign to Run Law. Sec. 99.012, *Florida Statutes*.
- Form of Candidate Oath. Sec. 99.021(1)(a)1., *Florida Statutes*.
- Election Assessment. Sec. 99.093, *Florida Statutes*.
- Bond Referendums. Secs. 100.201 – 100.351, *Florida Statutes*.
- Municipal Recall. Sec. 100.361, *Florida Statutes*.
- Secret Voting. Sec. 101.041, *Florida Statutes*.
- Ch. 104 F.S. Election Code: Violations, Penalties. *See* State v. Brown, 298 So.2d 487 (Fla. 4th DCA 1974).
- Ch. 106 F.S. Campaign Financing. Sec. 106.011, *Florida Statutes*.

NUMBER 9 – You have an opportunity to embrace the diversity of culture in Florida.

The Voting Rights Act of 1965, as extended and expanded in 1975, requires "covered jurisdictions" to provide language assistance in specified languages. In Florida, municipalities in the following counties are required to provide bilingual (Spanish) elections materials:

- Broward, Collier, Hardee, Hendry, Hillsborough, Lee, Miami-Dade, Orange, Osceola, Palm Beach, Polk

In addition, five Florida counties are (were) subject to federal "preclearance" of any change to proposed election laws in those jurisdictions in order to protect minority voters:

- Hillsborough, Monroe, Collier, Hardee and Hendry

However, a recent ruling by the U.S. Supreme Court, Shelby County v. Holder, 570 U.S. ___ (2013), held that the preclearance formula provisions of the Voting Rights Act of 1965 were unconstitutional as not being responsive to current needs of voters. The net result is that preclearance will no longer be required unless Congress adopts a new preclearance formula.

In response, the Voting Rights Amendment Act of 2014 has been introduced and is making its way through Congress. The legislation, among other things, revises requirements for determining which states and political subdivisions are covered or not covered by criteria for declaratory judgments that they have not used devices to deny or abridge the right to vote.

NUMBER 8 – You get to see your handiwork and skill at legal writing in print in the newspaper!

There are specific notice requirements for elections, whether codified in state law or local ordinance.

Notice of General Election. Sec. 100.021, *Florida Statutes*. This statute requires, during the 30 days prior to the beginning of qualifying, the publication of a notice announcing the offices up for election. The notice must run twice during the 30 day period. The notice is to be published in a newspaper of general circulation in the jurisdiction.

Sample Ballot. Sec. 101.20, *Florida Statutes*. Upon completion of the list of qualified candidates, a sample ballot shall be published by the Supervisor of Elections in a newspaper of general circulation in the jurisdiction, before the day of the election. There is no minimum or maximum number of days before the election that it must be published.

An example of a local notice requirement: Proclamation of Election. Sec. 22-3. Code of Ordinances, Town of Palm Beach Shores. It shall be the duty of the Mayor to issue his proclamation announcing every election, which proclamation shall be published at least for two consecutive weeks prior to each election in a newspaper of general circulation in the town, and posted during such period of time on the bulletin board in the town hall.

NUMBER 7 - You can tell your elected (and some appointed) officials "you can't have your cake and eat it too."

Sec. 99.012, *Florida Statutes*, is the "resign to run" law. This requires an elected or appointed official with authority to exercise municipal power to resign from the office they currently hold prior to qualifying as a candidate for another office. The law states that "No officer may qualify as a candidate for another state, district, county or municipal public office if the terms of any part thereof run concurrently

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with each other without resigning from the office he or she presently holds."

The resignation must be in writing, and must be filed a minimum of 10 days prior to the first day of qualifying.

The resignation is irrevocable.

The resignation must be effective no later than the earlier of the following dates: (1) the date the officer would take office, if elected; or (2) the date the officer's successor is required to take office.

Elected municipal officials file their written resignation with the officer before whom they qualified (commonly the municipal clerk). Appointed municipal officials file their written resignation with the authority that appointed them (commonly the municipal governing body). In both cases, copies are sent to the Governor and the Department of State.

Note that if the resignation is made effective immediately and is filed prior to qualifying, then the former officer may qualify as a non-officeholder and the resign to run law becomes inapplicable.

Also note that the resign to run law does not apply to persons serving without salary as members of an appointed board.

The resign to run law also prohibits any person from qualifying for more than one federal, state, district, county or municipal office at a time, if any part of the terms of the offices overlap.

NUMBER 6 - You CAN go home.

There are no constitutional or statutory requirements regarding residency for municipal office. Some form of residency requirement is often found in a municipality's charter or code of ordinances. Commonly, local charter or ordinance provisions will require a candidate for municipal office to be a resident of the municipality. For example:

> "No person shall be eligible to hold any elective office of the Village unless said person shall be a registered voter and resident of the Village. Any Village Councilmember who ceases to possess these qualifications shall forthwith forfeit his or her office." Section 2.02, Charter of the Village of Tequesta, Florida.

> "No person shall be eligible to any elective office of the Town of Palm Beach Shores unless he shall be a citizen of the United States and a qualified voter in Palm Beach County, Florida, and a resident of the Town of Palm Beach Shores." Section 3.2, Charter of the Town of Palm Beach Shores, Florida.

Courts have ruled that reasonable durational residency requirements (requiring that a person be a resident of the municipality for a certain period of time prior to being eligible to qualify as a candidate for office) are constitutional, so long as the requirement bears some reasonable relationship to a legitimate government purpose (rational basis test). See Nichols v. State, 177 So.2d 467 (Fla. 1965), and Daves v. City of Longwood, 423 F. Supp. 503 (M.D. Fla. 1976), both upholding a one year residency requirement. But, see also, Board of County Commission of Sarasota County v. Gustafson, 616 So.2d 1165 (Fla. 2nd DCA 1993), and Green v. McKeon, 468 F.2d 883 (6th Cir. 1972), rejecting a two year residency requirement as an infringement upon the fundamental right to travel and a violation of equal protection guarantees. Since the court found that a fundamental right was violated by the two year duration of the residency requirement, the court applied the strict scrutiny test and struck the requirement as excessive.

Another question is "What does it mean to be a resident?" There is no statutory definition. Legislation that failed in the 2014 session (HB 571 and SB 602) would have required that a candidate use his or her domicile address as the address for qualifying for office, and would have provided criteria for making this determination. As it stands, a "totality of the circumstances" approach is a common way to make this determination when it becomes an issue.

NUMBER 5 – You can dabble in high finance.

Chapter 106, F.S. governs campaign finance.

Sec. 106.021, *Florida Statutes*. The first thing that every candidate has to do before accepting or spending any money on their campaign is to appoint a Campaign Treasurer and designate a primary campaign depository. This is done on a form that is filed with the officer before whom the candidate will qualify (commonly the municipal clerk). These designations are to be made prior to qualifying. Once they are made, bank accounts can be opened and funds can be accepted and spent for campaign purposes.

A candidate may appoint him or herself to be the Campaign Treasurer.

Sec. 106.07, *Florida Statutes*. It is the responsibility of the Campaign Treasurer to file regular reports of all contributions received, and all expenditures made, by or on behalf of the candidate. For municipal office candidates, reports must be filed bi-weekly on each Friday up until the 4th day preceding the election. Additional reports must be filed on the 25th, 11th and 4th day preceding the election. Reports are to be filed with the officer before whom the candidate qualifies. There are financial penalties for filing late.

Sec. 106.08, *Florida Statutes*. There are limits on the maximum amount of a campaign contribution that can be made. For municipal elections, no person or political committee may make contributions in excess of $1,000.00 per candidate per election. "Person" is defined broadly to include individuals, corporations, associations, clubs, firms, estates, trusts, or any combination of individuals having collective capacity. This limit does NOT apply to contributions made by the candidate him or herself. The last day that a candidate may accept any contribution is 5 days prior to the election. Violations of these regulations carry criminal penalties.

Pursuant to the Division of Elections, Opinion DE 89-02, anonymous contributions should be reported as such, but not spent on the campaign. Instead, they should be disposed of as surplus, pursuant to Sec. 106.141, *Florida Statutes*, e.g. donate to charity, return to contributor, donate to candidate's political party, donate to the municipality for deposit into the general fund.

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Sec. 106.09, Florida Statutes. The maximum amount of a cash contribution per candidate per election is $50.00.

Sec. 106.113, *Florida Statutes*. It is unlawful for a municipality to expend or authorize the expenditure of public funds for a political advertisement or electioneering communication (TV, radio, newspaper, mail or telephone ad) on an issue that is subject to a vote of the electors. However, this does not apply to the dissemination of purely factual information.

Sec, 106.15, *Florida Statutes*. Neither solicitation nor acceptance of campaign contributions may occur in any building owned by a government entity.

NUMBER 4 – You can learn how to "sign."

Sec. 106.1435, *Florida Statutes*, prohibits the placement of political campaign signs in any state or county road right of way. This section also states that candidates should make a "good faith effort" to remove their signs within 30 days after the election, or their withdrawal from the race. This section also authorizes the municipality to remove the signs after the 30 day period and charge the candidate for the actual cost of the removal. Finally, this section specifically provides for the ability of a municipality to adopt more stringent regulations.

An example of a municipal sign regulation for political campaign signs is as follows:

> Political, religious and personal (free-speech) temporary signs shall be permitted with an exposed area of not more than six square feet. Such signs that refer to a particular election, event or other specific matter shall be removed within seven days after said election, event or other specific matter. Holiday displays shall likewise be removed within seven days from the conclusion of the holiday. No temporary sign shall be placed in any public right-of-way or on any public property. No temporary sign shall be placed in a location, as determined by the village manager or his designee, in such a manner as to constitute a safety hazard, or hindrance to pedestrian or vehicular traffic.

Despite the above regulations, it is not uncommon to see political campaign signs placed in rights of way. If the municipality takes action to cure that violation, enforcement must be consistent and uniform throughout the jurisdiction. In the event that the municipality decides to remove unlawfully placed signs, they should not be destroyed. Storing them until the owner can retrieve them (and billing the owner, as applicable) is a more advisable course of action in this case.

Sec. 106.143, *Florida Statutes*, requires most political advertisements to include specific disclaimer language. The failure of a particular candidate to utilize the required disclaimer language carries civil penalties. This is enforced by the Florida Elections Commission. See. Secs. 106.25, 106.265, *Florida Statutes*.

NUMBER 3 – You can clean house.

Sec. 100.361, *Florida Statutes*, provides a uniform method for conducting a municipal recall. This statute expressly supersedes and repeals any municipal charter or special act provision that provides a different process for recall of an elected official.

A Recall Petition, containing the name of the official to be recalled and a statement of the grounds for recall (200 word maximum) must be signed by the requisite number of registered electors in the municipality. The number of signatures is based on the population (by registered electors) of the municipality. Basically, the number is 10% of the registered electors for municipalities with populations of registered electors less than 25,000. For municipalities with a population that exceeds 25,000 registered electors, the petition need only be signed by 5% of the registered electors. All signatures must be under oath, and must also include the person's printed name, date of birth, address and voter registration number. All signatures must be obtained within a 30 day period.

The elector(s) seeking recall, and all those who sign the petition are deemed the "Recall Committee." The Committee must file the petition and all signatures with the municipal clerk within the same 30 day period.

The Supervisor of Elections then has 30 additional days to verify the signatures on the petition. The Committee is responsible for paying any fees associated with the verification process.

Upon determination that the petition contains the requisite number of signatures, the petition, including grounds for removal, must be served upon the official whose recall is being sought. That official then has 5 days to file a response (200 word maximum) with the municipal clerk. The petition and the response are then returned to the Committee who must then circulate a second petition that includes both the allegations and the defense. This second petition must contain a minimum of 15% of the registered electors in the municipality. These signatures must be obtained within 60 days.

The Supervisor of Elections then has 30 additional days to verify the signatures on this second petition. The Committee is responsible for paying any fees associated with this verification process as well.

Upon determination that the second petition contains the requisite number of signatures, notice of same must be served upon the official whose recall is being sought. A recall election is then scheduled by the circuit court between 30 and 60 days later. Candidates to fill the vacancy created by a successful recall election are to be voted on at the same election.

Grounds for recall: The grounds stated for recall are limited to the following: Malfeasance, Misfeasance, Neglect of duty, Drunkenness, Incompetence, Permanent inability to perform official duties, and Conviction of a felony involving moral turpitude.

No petition for municipal recall may be filed during the first quarter of the official's term of office.

NUMBER 2 – You can vote early, and often.

Sec. 101.657, *Florida Statutes*, provides for early voting "as a

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convenience to the voter." The Supervisor of Elections is charged with designating various early voting locations in the county of their jurisdiction for statewide and federal elections. Approved locations include municipal government buildings, libraries, and government owned civic centers.

Municipalities may offer early voting for municipal elections not held in conjunction with county and statewide elections. The municipality is responsible for determining the sites for early voting. The statute does not specify when early voting provided by a municipality for a municipal election must actually occur.

A municipality is not required to provide early voting. Many municipalities affirmatively opt out of early voting all together, having determined that any convenience to the voter is by far outweighed by the cost in dollars and resources to the municipality:

Sec. 22-8. Early voting exemption. Town of Palm Beach Shores Code of Ordinances:

> The town shall be exempt from the provisions of F.S. § 101.657, regarding early voting for municipal elections, as that section may be amended from time to time.

AND THE NUMBER 1 REASON LOCAL GOVERNMENT ELECTION LAW IS FUN FOR THE MUNICIPAL ATTORNEY – If you play your cards right, you get to be on the 5:00 news! and the 6:00 news, ...and the 11:00 news, ... and the 6:00 a.m. news the next morning.

Municipalities have the home rule power to determine the composition of their canvassing boards for the canvassing of municipal elections. Commonly, the county Supervisor of Elections will be appointed to the canvassing board, along with the municipal clerk. Additionally, some municipalities appoint one elected official who is either not running in that election, or who is unopposed. Finally, some appoint other staff or consultants, including the Town Attorney.

> Sec. 22-6. Canvassing board; method of voting. Town of Palm Beach Shores Code of Ordinances.
>
> The Town Clerk and Town Attorney of the Town of Palm Beach Shores, or their respective designees, along with the Palm Beach County Supervisor of Elections, or designee, shall canvass and certify any municipal election in the Town of Palm Beach Shores, pursuant to the requirements set forth in F.S. § 100.3605, Florida Statutes, and in conformance with any approved and effective agreement between the Town of Palm Beach Shores and the Palm Beach County Supervisor of Elections. Additionally, the town commission by resolution shall provide that one commissioner, which may include the mayor, whose position is either not scheduled to be voted upon or who is unopposed at the election being canvassed, shall also be made a member of the town canvassing board.

The role of the canvassing board is frequently misunderstood. Sec. 102.141, *Florida Statutes*, provides for the duties of county canvassing boards. Short of a municipality adopting its own canvassing procedures, this section applies to the canvassing of municipal elections.

Meetings of the canvassing board are open to the public.

Canvassing absent ballots, and conducting recounts in close races, are the most recognized duties of canvassing boards. As to recounts, if the unofficial results of a race reflect that a candidate or issue was defeated by one half of one percent or less of all votes cast, then a machine recount of all ballots cast is conducted by the board.

Sec. 102.166, *Florida Statutes*, provides that if the result of the machine recount reflects that a candidate or issue was defeated by one quarter of one percent or less, then a manual recount of overvotes and undervotes only shall be conducted by the board.

The manual recount is open to the public.

> "A vote for a candidate or ballot measure shall be counted if there is a clear indication on the ballot that the voter has made a definite choice." The Department of State has promulgated lengthy and detailed rules for determining what constitutes a "clear indication on the ballot that the voter has made a definite choice."

Remember, EVERY VOTE COUNTS! ...and the news media loves to cover a close race.

The Ethical Issues Underlying Internal Investigations

by Michael P. Spellman, Sniffen& Spellman, P.A., mspellman@sniffenlaw.com

I. Introduction

The City Attorney's office is often asked to perform investigations into sensitive or high profile employee issues. Often, there may be an assumption that some privilege will attach as long as the person performing or overseeing the investigation is an attorney. However, the City Attorney's office performs many functions, and it can perform many different functions within fact investigations as well – some of which are privileged and some of which are not.

In most cases, the contours of the applicable attorney-client and work product privileges can be drawn with some level of precision if the goals are outlined clearly and the attorney's role is engineered carefully before the investigation starts. Whether the attorney is acting as a legal counselor, analyzing and weighing risk, or reviewing facts and making policy and business judgments, attorneys within or acting on behalf of the City Attorney's office would do well to remain mindful of which hat they are wearing, and which role they are playing in the investigation. Careful attention to these rules will increase the chances that privileges will apply in the manner in which they were intended, and avoid undesirable surprises.

II. The Increase in Internal Investigations

Unquestionably, over the past two and one-half decades, employment relationships have become more highly regulated, especially from an administrative standpoint. Some of these regulations are triggered by an affirmative act of an employee, such as the filing of a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) and/or the Equal Employment Opportunity Commission (EEOC); others may be self-initiated, as is the case with a Department of Labor audit looking at wage and hour issues or OSHA concerns. Additionally, employment matters can fall into the City Attorney's world from less predictable origins ranging from a simple email from a disgruntled employee to a citizen speaking at a commission meeting to an editorial in a newspaper or a report from the grand jury.

As a result, today attorneys are routinely called upon to conduct various internal investigations for organizational clients, such as corporations and municipalities. The attorney's role in this regard is not novel; see *Upjohn Company Co. v. United States*, 449 U.S. 383, 392 (1981) ("in light of the vast complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, "constantly go to lawyers to find out how to obey the law.""); the change has been in the frequency and variety of claims for which these services are needed. Common examples include:

- Gathering information to respond to an internal EEOC complaint, an EEOC Charge of Discrimination, or a lawsuit alleging discrimination or retaliation;
- Creating the factual basis for a defense, such as an affirmative defense to vicarious liability for a hostile work environment claim;
- Assessing whether a client's hiring, recruitment or promotion processes create any barriers to the employment or advancement of protected groups;
- Investigating accusations of wrongdoing made public through various means, including the media.

Each of these scenarios raises fundamental questions about who should be conducting the investigation (the City Attorney, an outside attorney, a different type of professional, or a combination), what information can be treated as confidential, and what information can reasonably expected to be subject to disclosure in a subsequent lawsuit even if it would otherwise be confidential.

III. The Applicable Rules of Professional Conduct

The Florida Rules of Professional Conduct provide some guidance on the range of ethical issues that may arise when an attorney takes on an internal investigation of an employment matter. How these Rules are applied will be influenced by a variety of factors including the nature and purpose of the investigation and the expected use of the results of that investigation. In fact, several provisions within the Rules specifically target the attorney investigation function.

Florida Rule of Professional Conduct 4-1.6 provides, in pertinent part:

> **Rule 4-1.6. Confidentiality of Information**
>
> **(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 gives informed consent.
>
> * * *
>
> **(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;
>
> * * *
>
> (5) to comply with the Rules of Professional Conduct.

R. Regulating Fla. Bar 4-1.6[1].

Under the section entitled "Authorized Disclosure," the comments to

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the rule note, "A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed." Unfortunately, the comment provides no other guidance on the range of circumstances in which a disclosure of confidential information may be impliedly authorized; yet the question is a recurring one when a lawyer obtains information through conducting an investigation of an employment-based complaint within the city.

Florida Rule of Professional Conduct 4-1.13 is instructive to an attorney's disclosure obligations and limitations in the context of conducting an investigation for an organizational client.

> **Rule 4-1.13 Organization as Client**
>
> **(a) Representation of Organization.** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> **(b) Violations by Officers or Employees of Organization.** If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:
>
> (1) asking reconsideration of the matter;
>
> (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
>
> (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.
>
> **(c) Resignation as Counsel for Organization.** If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.
>
> **(d) Identification of Client.** In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

R. Regulating Fla. Bar 4-1.13[2].

The following comments to the Rule are especially important in the context of this topic:

> When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. . . . This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.
>
> * * *
>
> The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. . . . Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules.

Comments to R. Regulating Fla Bar 4-1.13.

Florida Rule of Professional Conduct 4-2.1 requires an attorney to "exercise independent professional judgment and render candid legal advice." One of the comments to this Rule states that "a lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated as unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest." Comments to R. Regulating Fla Bar 4-2.1.

Against the backdrop of these general ethical rules, there are several

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principles which apply to internal employment investigations conducted by attorneys.

- First, arguably the ethical rules apply only when the attorney is conducting an internal investigation wearing the hat as an attorney or a legal counselor; as opposed to a policy-maker, decision-maker or human resources specialist. As such, one of the first questions an attorney must decide when asked to conduct an internal investigation is what role he would play in the investigation and in the subsequent decision-making process.

- Second, an attorney has an ethical obligation to consider whether conducting an internal investigation is in the client's interest, even if not specifically asked, and to use professional judgment and provide candid legal advice in the conduct of any such investigation.

- Third, the ethical rules apply to interactions with a client's employees, and create special obligations to clarify the attorney's role in dealing with these employees. Although the ethical rule on identifying the client applies only when the client has interests adverse to the client's employee's interests, in the context of an internal investigation, it is often unknown whether a client's employee's interests are or may become adverse to the interests of the client. The safest approach is to assume adversity and counsel should provide a full explanation of his/her role to the client's employees before beginning any interview.

- Fourth, assuming the attorney is acting as a legal advisor, the rules create a presumption that an attorney is ethically obligated to preserve the confidentiality of information obtained in an internal investigation of a client's affairs. Again, identifying the client and knowing what information can and cannot be disclosed is critical.

- Fifth, the rules contemplate situations when counsel may disclose otherwise, confidential information, and provide triggers for such disclosure. Thus, in handling an internal investigation, counsel should consider upfront if their ordinarily privileged communications or documents are likely to be disclosed at some later point and to advise the client of this possibility.

IV. Primer on the Privileges

Before proceeding any further, a quick primer on the doctrinal development of the attorney/client privilege and the work product doctrine is in order.

A. The Attorney/Client Privilege

The attorney-client privilege applies to confidential communications made in the rendition of legal services to the client. *Florida Statutes* § 90.502. Section 90.502(1)(b) defines "client" as "any person, public officer, corporation, association, or other organization or entity, either public or private, who consults a lawyer with the purpose of obtaining legal services or who is rendered legal services by a lawyer." The attorney-client privilege, however, protects only "disclosure of

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communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Slep-Tone Entm't Corp. v. Johnson*, 518 F. App'x 815, 821 (11th Cir. 2013) citing Upjohn, 449 U.S. at 395.

Over the years, court decisions across the country have developed criteria to determine in the corporate context who may be a "client" for purposes of the privilege.

In *City of Philadelphia v. Westinghouse Elec. Corp.,* 210 F.Supp. 483 (E.D.Pa.1962), the court adopted the following "control group test" to determine who may communicate as the "client" for purposes of the attorney-client privilege:

> [I]f the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply.

Id. at 485.

Although some courts and commentators have found the control-group test to be easily applicable,the test fails to recognize the crucial role middle and lower-level employees play in the corporation's activities. Although upper-echelon management may be responsible for making decisions on behalf of the corporation, the noncontrol-group employees are frequently the ones responsible for implementing those decisions. Thus, an attorney representing the corporation is charged with gathering the facts from employees with information relevant to the corporation's legal problem, regardless of their rank.

In *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir.1970), *aff'd per curiam by an equally divided court,* 400 U.S. 348 (1971), the court articulated the subject matter test to determine the scope of the attorney-client privilege:

> [A]n employee of a corporation, though not a member of its control group, is sufficiently identified with the corporation so that his communication to the corporation's attorney is privileged where the employee makes the communication at the direction of his superiors in the corporation and where the subject matter upon which the attorney's advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.

Id. at 491-92.

In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), independent accountants informed Upjohn's general counsel that one of the company's foreign subsidiaries bribed foreign officials in order to secure government business. In response to this information, Upjohn's general counsel conducted an internal investigation of the questionable payments and sent questionnaires to the foreign managers requesting information regarding the payments. Upjohn voluntarily submitted a preliminary report to both the Securities and Exchange Commission (SEC) and the Internal Revenue Service (IRS). The IRS issued a summons demanding production of the questionnaires, memoranda, and notes of the interviews conducted with Upjohn employees. Rejecting the control-group test, the Supreme Court held that the attorney-client privilege protected the employees' communications from disclosure. *Upjohn* applied the attorney-client privilege to corporations, but the Court deliberately refrained from defining the parameters for applying the privilege to corporations.

In *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377 (1994), the Florida Supreme Court reviewed the above-cited precedent, and adopted the subject matter test, finding that it addressed the question whether the communications were made in the course of seeking legal services. *Id* at 1383. There, the Court held:

> Because the nature of the corporation differs significantly from the individual person, the attorney-client privilege will also differ in its application to the corporation and to the natural person. First, a corporation can only act through its agents, whereas a natural person can seek legal advice and then directly act (or not act) upon that advice. Second, a corporation relies on its attorney for business advice more than the natural person. Thus, it is likely that the "zone of silence" will be enlarged by virtue of the corporation's continual contact with its legal counsel. *Radiant Burners, Inc. v. American Gas Ass'n,* 207 F.Supp. 771, 774 (N.D.Ill.1962).

Discovery facilitates the truth-finding process, and although this process constitutes the core of any litigation, it must be tempered by the established interest in the free flow of information between an attorney and client. "Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery." *First Chicago International v. United Exchange Co. Ltd.,* 125 F.R.D. 55, 57 (S.D.N.Y.1989). Thus, to minimize the threat of corporations cloaking information with the attorney-client privilege in order to avoid discovery, claims of the privilege in the corporate context will be subjected to a heightened level of scrutiny.

Id.

The Court then set the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

> (1) the communication would not have been made but for the contemplation of legal services;
>
> (2) the employee making the communication did so at the direction of his or her corporate superior;

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(3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;

(4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;

(5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

B. The Work Product Doctrine

Pursuant to Florida Rule of Civil Procedure 1.280(b)(3), materials prepared in anticipation of litigation by or for a party or its representative are protected from discovery, unless the party seeking discovery has need of the material and is unable to obtain the substantial equivalent without undue hardship. The rationale supporting the work product doctrine is that "one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures." *Dodson v. Persell,* 390 So.2d 704, 708 (Fla.1980).

Fact work product traditionally protects that information which relates to the case and is gathered in anticipation of litigation. *State v. Rabin,* 495 So.2d 257 (Fla. 3d DCA 1986). Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories. *Id.* Whereas fact work product is subject to discovery upon a showing of "need" and "undue hardship," opinion work product generally remains protected from disclosure. *See Upjohn; Rabin.*

Although the attorney-client privilege and the work product doctrine serve separate purposes, the legal issues associated with these concepts overlap in cases involving internal investigations. In *Deason*, *supra,* an issue arose whether statements made by company employees to security personnel, and which were later summarized by personnel managers as a part of disciplinary recommendations were discoverable. Because the statements were not made to attorneys, but rather to security personnel, no attorney-client privilege attached. But, on the issue of the applicability of the work product doctrine, the Court held:

> When a corporation seeks the advice of an attorney, it is difficult to differentiate the role of a legal advisor from the role of a business advisor. In the instant case, the line between law-related communications and business communications is especially blurry.
>
> Although it is evident that the employees' interviews with security personnel were directed by counsel in anticipation of litigation, the purpose of management personnel summarizing the results of the interviews is not as evident. The company's investigation of a legal problem led to the discovery of a potential company business problem. Southern Bell argues that the recommendations contain counsel's mental thoughts and impressions. We find Southern Bell's factual assertion to be inaccurate. The company developed information through an investigation that it memorialized in an alleged work product document. Southern Bell then took this work product, extracted information from it, and created a second set of documents-the panel recommendations. The recommendations contain the thoughts and impressions of the *personnel managers* based on counsel's communications to them. Although Southern Bell has proven that the employee interviews were conducted in anticipation of litigation, it has not proven that the panel recommendations were prepared for anything other than management's decision to consider whether it should discipline company employees. The disciplining of employees is a matter within the ordinary course of business even if it arises out of the PSC's investigation of Southern Bell. The fact that the panel recommendations were based on work product does not convert them into work product. Therefore, Southern Bell is ordered to produce the panel recommendations, but it is authorized to redact any notes, thoughts, or impressions of Southern Bell's counsel that are printed directly on the materials.

Id at 1385-86.

V. The Privileges in the EEO Context

One of the key questions for any city attorney conducting an internal investigation is whether and to what extent the investigated materials will be required to be disclosed. The most likely candidate, outside of the public records arena, is the two-headed agency known as the EEOC/FCHR. For purposes of this discussion, I will refer to these two entities as simply the "EEOC" but the discussion applies to both agencies.

A. EEOC Requests for Information

Once it receives a Charge of Discrimination, the EEOC generally, in its initial packet to the employer, requests certain documents relevant to the complaint of discrimination or retaliation. Among the records requested may be any internal investigation conducted by the employer of a complaint by the employee or class of employees, as the case may be, who filed the Charge of Discrimination. While an assertion of privileged over internal investigative materials may be considered by the EEOC, the agency will resort to the issuance of a subpoena and an enforcement proceeding in Federal Court if it believes that the privilege either is inapplicable or has been waived.

Such was the case in *EEOC v. City of Madison*, 2007 WL 5414902 (W.D. Wisc. 2007). In that case, the City of Madison resisted disclosing its internal sexual harassment investigative

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records to the EEOC investigator who was investigating a Charge of Discrimination. To support its withholding of documents, the City claimed that the City Attorney's office had control over the investigation and that the investigative materials were covered by the attorney work product privilege. The EEOC brought a subpoena enforcement action in Federal District Court, and the court sided with the EEOC. In particular, the court was "persuaded that the EEOC's broad investigatory powers . . . required the work-product doctrine be applied ever so carefully when eyed toward not limiting that broad investigatory power granted the EEOC by Congress." Id. at *2. The Court further noted that "a decision to limit the EEOC's access to relevant evidence should be rare and made with caution." Id.

The court rejected the City's claim that its internal investigation of work place harassment was prepared in anticipation of litigation, based on evidence that the investigation was not only in response to the specific allegations of the charging party but also for the ordinary business purpose of insuring a harassment-free workplace. The court stated that the "remote prospect of future litigation" was not enough to bring the materials under the privilege. Id. In that case, the court also noted that the City Attorney's office did not itself perform the investigation, but merely was the source of advice during the investigation, stating, "attorneys are almost always consulted on a business' in-house investigation and, in fact, it is at the core of an attorney's job to generally advise clients about conducting such investigations. If such involvement by an attorney placed an in-house investigation under the work-product doctrine then every private employer's in-house investigation would fall outside the scope of the EEOC's broad investigatory power." Id. at *3 Other cases have similarly found that investigative materials are not prepared in anticipation of litigation when the investigation is the employer's usual response to EEOC complaints and the investigation takes place before a charge is filed. See *EEOC v. Commonwealth Edison*, 119 F.R.D. 394 (N.D. Ill 1988); *Miller v. Federal Express Corp.*, 186 F.R.D. 376, 388 (W.D. Tenn. 1999).

During litigation of an enforcement action, the EEOC typically requests that the Defendant produce all records relating to the internal investigation of an EEOC charge or internal complaint. Disclosure generally comes down to two questions: one, if an attorney was involved in the conduct of the investigation, was the attorney acting as a legal advisor or merely assisting with business functions? Two, did the client impliedly authorize disclosure in litigation by failing to treat the investigative information confidentially or placing the investigation at issue in litigation?

In *EEOC v. Outback Steakhouse of Florida, Inc.*, 251 F.R.D. 603 (D. Colo. 2008), the court analyzed the assertion of privilege and confidentiality of internal investigative materials in the context of a sexual harassment case while ruling on motion to compel discovery. There, the EEOC alleged sex discrimination in promotions, sexual harassment and retaliation. The EEOC propounded interrogatories asking the defendants to identify all formal and informal complaints of sex discrimination and sexual harassment and all complaints of unfair treatment by female employees during a certain time period. In addition, the interrogatories asked that the defendants provide detailed information regarding each complaint, including the action taken in response to the investigation. The EEOC also requested documents which were parallel and in furtherance of its interrogatories. In response to the claims of privilege, the EEOC argued that the defendant's investigations into complaints of sex discrimination and sexual harassment were non-privileged and that, even if they were, defendants waived this protection by asserting an affirmative defense to vicarious liability. Id. at 609. This second issue, concerning the affirmative defense, was based upon the "*Faragher/Ellerth*" defense, explained in more detail below.

Relying on the Supreme Court's decision in *Upjohn*, the court first noted that neither the work-product doctrine nor the attorney-client privilege protects underlying facts contained within privileged communications or documents. *Outback*, 251 F.R.D. at 610. The court then stated that the defendant's privilege log was too vague for the court to assess whether any privilege applied to any of the materials, and ordered the defendants to submit a more detailed privilege log which would indicate what documents were in fact prepared in anticipation of litigation. The court guided the defendants by defining "in anticipation of litigation" as "in response to a specific threat of litigation, in response to a communication from an attorney, prepared by an attorney, prepared by an agent acting on behalf of an attorney, prepared for the purpose of seeking legal advice, or prepared under the direction of the defendant's officers who have a substantial role in directing actions in response to legal advice." *Id*. a 611.

B. The *Faragher/Ellerth* Defense

The *Faragher/Ellerth* affirmative defense protects employers from liability for discrimination or sexual harassment when no tangible employment action is taken against an employee. *See Faragher v. City of Boca Raton,* 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 765 (1998). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any [discriminatory or] sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher,* 524 U.S. at 807; *Ellerth,* 524 U.S. at 765.

Courts have interpreted an assertion of the *Faragher/ Ellerth* affirmative defense as waiving the protection of the work product doctrine and attorney-client privilege in relation to investigations and remedial efforts in response to employee complaints of discrimination because doing so brings the employer's investigations into issue. The most recent pronouncements in courts within the Eleventh Circuit of this waiver can

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be found in the salacious case involving Paula Deen and the implosion of her empire. *Jackson v. Deen*, 2013 WL 2027398 (S.D. Ga. 2013); *Jackson v. Deen*, 2013 WL 1911445 (S.D. Ga. 2013); *Jackson v. Deen*, 2013 WL 3863889 (S.D. Ga. 2013).

In *EEOC v. Outback Steakhouse of Florida, Inc.*, supra, the Court ruled that, "to the extent that defendants have asserted the *Faragher/Ellerth* affirmative defense, they have waived the protections of the attorney-client privilege and work-product doctrine regarding investigations into complaints made by female employees." 251 F.R.D. at 612. In that case, the court notably held that the waiver applied to all responsive documents and was not restricted to purely factual material. Under that ruling, the notes of any investigating attorney would be discoverable regardless of whether they contained mental impressions in that case. See also *EEOC v. Rose Casual Dining, LP*, 2004 WL 231287 (E.D. Pa. 2007).

Numerous other courts have aligned with this position. *See, e.g., Ivy v. Outback Steakhouse, Inc.*, 2007 WL 1655115 (W.D. Wash. 2007); *Walker v. County of Contra Costa,* 227 F.R.D. 529, 535 (N.D.Cal.2005) ("If [an employer] assert[s] as an affirmative defense the adequacy of [its] pre-litigation investigation into [an employee's] claims of discrimination, then [it] waive[s] the attorney-client privilege and work product doctrine with respect to documents reflecting that investigation."); *Jones v. Rabanco, Ltd.,* No. 2006 WL 2401270, at *4 (W.D. Wash. 2006) (unpublished decision) (raising the *Faragher/Ellerth* defense causes "any investigation and remedial efforts into the discrimination alleged ..., in which [an employer] engaged and in which [its] attorneys were involved, to become discoverable, despite any ... privilege that may have normally attached to such communications"); *Austin v. City & County of Denver ex rel. Bd. of Water Com'rs,* 2006 WL 1409543, at *7 (D.Colo. 2006) (unpublished decision) ("Where a party puts the adequacy of its pre-litigation investigation into issue by asserting the investigation as a defense, the party must turn over documents related to that investigation, even if they would ordinarily be privilege[d].").

One case does hold a minority view, but is easily distinguishable. In *EEOC v. Woodman of the World*, 2007 WL 1544772 (D. Neb. 2007), the court rejected a waiver argued by the EEOC and determined that the defendant's assertion of a Faragher/Ellerth defense did not constitute a waiver of privilege. *Id*. at *6. In so ruling, the court accepted the defendant's argument that there was not a waiver because it had not relied on "the adequacy of the investigation as an affirmative defense" and specifically did "not rely on the fact that its internal investigation found insufficient evidence of sex discrimination . . . Instead, [defendant] asserts that adequate procedures for addressing internal complaints of discrimination existed, that [the charging party] was made fully aware of such procedure, and that during the approximately four years of alleged discrimination, she failed to avail herself of these procedures." *Id*. On balance, the court found that "fundamental fairness does not require disclosure of the subject documents" since the EEOC already had access to the material facts at issue through its possession of the investigative file.

A recent decision which thoroughly explained the application of the doctrine can be found in *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312 (N.D. Ill. 2010). There, the court stated:

> FTD alleges that it "at all times, exercised reasonable care to prevent and correct promptly any alleged sexually harassing behavior, and Plaintiff unreasonably failed to take advantage of available preventive or corrective measures and opportunities provided by Defendant, or to otherwise avoid harm."
>
> Under the Supreme Court's decisions in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) and *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), an employer faced with a hostile environment case may, under certain circumstances, assert an affirmative defense to avoid vicarious liability. The affirmative defense has two necessary elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth,* 524 U.S. at 765, 118 S.Ct. 2257; *Faragher,* 524 U.S. at 807, 118 S.Ct. 2275.

Even assuming, *arguendo,* that the documents are attorney-client privileged or protected work product, any such protection for these particular documents was waived by FTD's assertion of its *Faragher/ Ellerth* defense. The attorney-client "privilege is generally waived when the client asserts claims or defenses that put his attorney's advice at issue in the litigation." *Garcia v. Zenith Electronics Corp.,* 58 F.3d 1171, 1175 n. 1 (7th Cir.1995) (citing with approval *Rhone–Poulenc Rorer Inc. v. Home Indem. Co.,* 32 F.3d 851 (3rd Cir.1994)); *accord Lorenz v. Valley Forge Ins. Co.,* 815 F.2d 1095, 1098 (7th Cir.1987) (the same under Indiana law). This rule "reflects an effort to strike a balance between the principle that waivers of the attorney-client privilege are to be narrowly construed ... and the principle that a party should not be able to selectively disclose privileged information that it believes works to that party's advantage, while concealing the rest." *Remus v. Sheahan,* No. 05 C 1495, 2006 WL 1460006 at *3 (N.D. Ill. May 23, 2006) (finding waiver of attorney-client privilege).

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At issue in the *Faragher/Ellerth* defense is the process of the investigation itself,

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including what the employer knew of the employee's complaints and when. *Brownell,* 185 F.R.D. at 22. "Where, as here, the employer defends itself by relying upon the reasonableness of its response to the victim's allegations, the adequacy of the employer's investigation becomes critical to the issue of liability. The only way that Plaintiff, or the finder of fact, can determine the reasonableness of Defendant's investigation is through full disclosure of the contents thereof." *Brownell,* 185 F.R.D. at 25. It would be unfair to allow an employer to hide its investigations and remedial efforts in the case up to the point of trial when it intends to use related evidence of its remedial efforts to evade liability. *Rabanco,* 2006 WL 2401270 at *4.

In this case, FTD has both denied that Musa–Muaremi was constructively discharged and affirmatively asserted that it is not liable for the acts of which she complains because of its appropriate response to the alleged sexually harassing behavior. Thus, FTD's investigation and allegedly remedial efforts are central to the litigation. The disputed documents were part of that investigation process. Although FTD has stated that the final versions of three of the four withheld documents have been produced, Musa–Muaremi is entitled to compare those versions with the withheld documents to see how the description of the meetings—purportedly authored by Human Resources Director Amy Majka—got revised by others along the way. (*E.g., compare* Pl.'s Mot. to Compel, Ex. 8 *with* PR 4–5.) Moreover, as FTD acknowledges, PR 8 was never produced in any form because according to FTD, it was "never made a part of FTD's investigation file." (Second Supp. Log ¶ 5.)

FTD's argument that it has not claimed privilege as to investigation documents but only as to "communications between FTD and FTD's counsel regarding drafts of documents relating to FTD's investigation" (Def.'s Resp. at 8), raises a false distinction. Here, the attorneys were collaborating in the creation of the investigation record.

FTD also argues that it "does not intend to affirmatively rely" on any of the four withheld documents. (Def.'s Resp. at 4.) That argument, however, misses the point. Musa–Muaremi is entitled to all documents reflecting FTD's investigation of her complaint and its remedial response, not only those that FTD thinks support its cause.

Musa-Muaremi v. Florists' Transworld Delivery, Inc., 270 F.R.D. at 317-19.

VI. Conclusion

The need and frequency of internal investigations related to employment-related issues in municipalities requires City Attorneys to carefully consider their role, and recognize issues in advance. Knowing how or when a recognized privilege may be compromised is part of the critical analysis which must be considered before the first interview takes place. Defining the scope of the investigation, the attorney's role, and what information will be disclosed and to whom early on will go a long way to eliminating surprise or placing the attorney's future relationships in jeopardy.

Endnotes:

1 The text of this Rule differs substantially from the ABA Model Rule which expressly requires an attorney to treat information "relating to the representation of a client" as confidential unless: 1) "the client gives informed consent" to disclose, 2) "the disclosure is impliedly authorized in order to carry out the representation" or 3) the disclosure is necessary "to comply with other law or a court order." *ABA Model Rules of Prof'l Conduct at R. 1.6.*

2 Again, the ABA Model Rule is substantially different. Specifically, under Model Rule 1.13, a lawyer is allowed to disclose the information to anyone (or no one in particular) "to prevent substantial injury to the organization." *ABA Model Rules of Prof'l Conduct at 1.13(c).* The rule, however, has no mention of a lawyer opting to resign as counsel for the organization.

Georgia law and stating: "[t]hus, an officer will not be liable if his actions are within the scope of his authority and done without wilfulness."); *Tinney v. Shores*, 77 F.3d 378, 382 (11th Cir. 1996) (interpreting Alabama law and stating "both sheriffs and deputy sheriffs are considered executive officers of the state, immune from suit under Section 14.") (citation and footnote omitted); Fla. Stat. § 768.28(9)(a) ("No officer, employee, or agent of the state or of any of its subdivisions shall be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."). The immunities are treated differently, however, for the purposes of interlocutory appeal and the collateral order doctrine.

For example, in Georgia and Alabama, if a deputy sheriff is sued under section 1983 and under state law relating to an allegedly unlawful arrest, the officer may file a dispositive motion raising qualified immunity as to the section 1983 claim and then raise official or statutory immunity as to the state law false arrest claim. If that motion is denied as a matter of law, the officer can immediately appeal the denial of qualified immunity

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through a *Forsyth* appeal, and can immediately appeal the denial of the state immunity through an equivalent appeal. *See Tinney v. Shores*, 77 F.3d 378, 382 (11th Cir. 1996) (allowing appeal of the denial of immunity from suit under Alabama law); *Griesel*, 963 F.2d at 340-41 (allowing appeal of an order denying immunity from suit under Georgia law).

In contrast, in Florida, the Eleventh Circuit has previously denied government employees the ability to seek an interlocutory appeal of a state immunity. *See Jones v. Cannon*, 174 F.3d 1271, 1293 (11th Cir. 1999) (*citing CSX Transp., Inc. v. Kissimmee Util. Auth.*, 153 F.3d 1283, 1286 (11th Cir. 1998). These cases are based on a Florida Supreme Court decision, *Dept. of Education v. Roe*, 679 So. 2d 756, 75859 (Fla. 1996), stating that sovereign immunity was simply an immunity from liability, and not from suit.

Official immunity under Florida state law is not exactly the same as sovereign immunity, however. Official immunity, which applies exclusively to individual government employees/agents (similar to federal qualified immunity), generally shields government employees from liability even when the government entity would otherwise be liable (the government employee is only liable to the exclusion of the government entity when the employee acts with malicious purpose, in bad faith, or in wanton and willful disregard to life, safety, or property). Moreover, official immunity is based on section 768.28(9)(a) of the Florida Statutes, and contains words expressly indicating it is an immunity from suit: namely, the statute states that an employee cannot be "named as a party defendant" when the immunity is applicable, and has even been expressly recognized as an immunity from suit by the Florida Supreme Court. *See Stoll v. Noell*, 694 So. 2d 701, 703 (Fla. 1997) (recognizing that section 768.28(9)(a) creates a "***statutory immunity from suit*** and liability.") (emphasis added). Notwithstanding the language in section 768.28(9)(a) and *Stoll*, the Eleventh Circuit has not recognized official immunity arising under Florida law as an immunity from suit that would bring it within the collateral order doctrine.

A recent decision from the Florida Supreme Court, however, will likely result in this issue being looked at again. In *Keck v. Eminisor*, the Florida Supreme Court determined that an interlocutory order denying a motion based on official immunity should be immediately appealable under state law. 104 So. 3d 359, 366 (2012). In reaching this decision, the Court compared official immunity under state law to qualified immunity under federal law, and reasoned that official immunity should be appealable for the same reasons as qualified immunity (e.g. the denial of immunity may chill lawful behavior by government employees who would have to consider individual liability when acting). *Id.* The Court even cited to its prior precedent allowing interlocutory appeals of federal qualified immunity when denied in state court. *Id.* at 364-66 (citing *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994)). The Florida Supreme Court directed the Florida Appellate Court Rules Committee to draft a rule of appellate procedure allowing interlocutory appeals of official immunity, which is presently pending in the Court as Case No. 13-1493. *Id.* at 369.

It is also important to note that the Eleventh Circuit's decisions in *Jones* and *CSX*, and the Florida Supreme Court's decision in *Roe*, pre-date the Florida Supreme Court's 2008 decision in *Wallace v. Dean*, which clarified that sovereign immunity is indeed an immunity from suit:

> As an initial point of departure, ***brief clarification is necessary*** concerning the differences between a lack of liability under established tort law and the presence of sovereign immunity. When addressing the issue of governmental liability under Florida law, we have repeatedly recognized that a duty analysis is *conceptually distinct* from any later inquiry regarding whether the governmental entity remains ***sovereignly immune from suit*** notwithstanding the legislative waiver present in section 768.28, Florida Statutes . . . . Under traditional principles of tort law, the absence of a duty of care between the defendant and the plaintiff results in *a lack of liability, not* application of immunity from suit. ***Conversely, sovereign immunity may shield the government from an action in its courts (i.e., a lack of subject-matter jurisdiction) even when the State may otherwise be liable to an injured party for its tortious conduct.*** *Compare Black's Law Dictionary* 766 (8th ed.2004) ("sovereign immunity. 1. ***A government's immunity from being sued in its own courts*** without its consent."), *with id.* at 545 ("[duty of care]. A legal relationship arising from a standard of care, the violation of which subjects the actor to [tort] liability.").

Wallace, 3 So. 3d at 1044 (bold emphasis added) (footnote and citations omitted).

The *Wallace* decision clarifying that sovereign immunity constitutes immunity from suit is the present state of the law in Florida. In fairness, unlike in *Keck* (where the Court expressly ordered a rule change to allow for immediate review), the Florida Supreme Court recently determined that certiorari review was not available for interlocutory orders denying sovereign immunity to a public entity, and did not order a rule change allowing interlocutory appeals in those instances. *See, e.g., Rodriguez v. Miami-Dade County*, 117 So. 3d 400 (Fla. 2013); *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344 (Fla. 2012). Notably, however, the Court did not foreclose interlocutory review of sovereign immunity through a rule change, and even acknowledged that one was being considered by the Rule Committee in the *Rodriguez* decision. 117 So. 3d at 405.

In fact, in *Keck*, a majority of the Justices joined in a concurrence, authored by Justice Pariente, requesting that the Florida Appellate Court Rules Committee conduct a comprehensive review of immunities to determine when interlocutory appeals should be allowed. *Keck*, 104 So. 3d at 369 ("In light of the number of appellate decisions that have reviewed a variety of legal claims of immunity

continued...

COLLATERAL ORDER
from page 37

by writ of certiorari or writ of prohibition, I believe that the Rules of Appellate Procedure Committee should undertake a comprehensive review of whether the categories of non-final orders in rule 9.130(a)(3) should be expanded to include the denial of any claim of immunity where the question presented is solely a question of law.") (Pariente, J., concurring with an opinion, in which Lewis, Labarga, and Perry, JJ., joined); *see also Rodriguez*, 117 So. 3d at 405 ("Noting the inconsistent use of certiorari to review claims of sovereign immunity, a majority of the Court requested that the Committee undertake a comprehensive review of whether the categories of non-final orders in rule 9.130(a)(3) should be expanded to include the denial of any claim of immunity where the question presented is solely a question of law."). The Rules Committee conducted this review and recommended a rule change that would allow interlocutory appeals relating to all immunities that are recognized as immunities from suit under substantive law when their applicability is denied as a matter of law. This issue is also pending as part of Case No. 13-1493 in the Florida Supreme Court.

Of course, even if the Florida Supreme Court does not extend a state right to interlocutory appeal for sovereign immunity, there is an excellent argument that the Eleventh Circuit should still recognize sovereign immunity from suit as falling under the collateral order doctrine. As the Eleventh Circuit determined in *Griesel*, the issue is whether the state treats the immunity as an immunity from suit as a matter of substantive law, not whether it allows interlocutory appeals related to such immunity under state law. After *Wallace*, it is difficult to claim that sovereign immunity is not an immunity from suit. After all, *Wallace* directly addressed that issue and expressly clarified that it was an immunity from suit. The Eleventh Circuit has held that it will follow changes in state law made by the state's highest court. *See McMahon v. Toto*, 311 F.3d 1077, 1079-81 (11th Cir. 2002) ("Recent events in this case illustrate that when we write to a state law issue, we write in faint and disappearing ink. . . . In a diversity case, however, we are bound to follow any changes in a state's decisional law that occur during the case.") (citations and quotation marks omitted). Accordingly, even denials of sovereign immunity on an interlocutory basis should be appealable under the collateral order doctrine consistent with the Florida Supreme Court's recognition in *Wallace* that sovereign immunity constitutes immunity from suit.

Finally, even if the Eleventh Circuit does not readdress appealability of sovereign immunity on an interlocutory basis under *Wallace*, there is an extremely strong argument that it should readdress the appealability of official immunity under *Keck*, particularly now that the Florida Supreme Court treats official immunity in an identical manner to federal qualified immunity. There is no reason why one would fall under the collateral order doctrine and the other would not. If the Eleventh Circuit follows the Florida Supreme Court's treatment of official immunity as set forth in *Keck*, then government employees in Florida will have the same opportunity as government employees in Georgia and Alabama to have the Eleventh Circuit consider their arguments for state official immunity on an interlocutory basis.