CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

The Agenda

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Unique Issues for City Attorneys Facing Citizen-led Ordinance Initiatives or Charter Amendments

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State law and a city's Charter and/or Code set forth and control the legal requirements which must be satisfied before any proposed amendment, initiative or referendum by citizens may be put to the voters. One fundamental prerequisite concerns the number of signatures that must be gathered. With respect to a Charter amendment, Section 166.031(1), Florida Statutes, provides, in pertinent part, "the electors of a municipality may, by petition signed by 10 percent of the registered electors as of the last preceding municipal general election, submit to the electors of said municipality a proposed amendment to its charter, which amendment may be to any part or to all of said charter except that part describing the boundaries of such municipality."

Following receipt of such a petition, the statute continues, "The governing body of the municipality

See "Unique Issues," page 11

Chair's Report

by Robert L. Teitler

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

Our Section enjoys robust financial health and continues to use its resources to provide Bar members and local government practitioners with the very finest CLE and website resources.I want to express my personal appreciation to the members of our Executive Council for their dedication this past year, with special thanks to our many actively involved past Chairs, including my predecessor Jeannine Williams, our Vice-Chair, Michele Lieberman, and our Secretary Treasurer, Andy Lannon, for their assistance and tireless work on behalf of the Section. I would also like to express my deep gratitude to our Section Administrator, Ricky Libbert, for her assistance to me and all of the work she does for all of us in this Section.

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

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2017-2018 CALENDAR

CITY, COUNTY AND LOCAL GOVERNMENT LAW SECTION

May 10-12, 2018
- **Certification Review Course 2018**
- **Land Use**
- **Executive Council Meeting**

Omni Champions Gate, Orlando

May 11, 2018
- **Annual Meeting**
- **41st Annual Local Government Law in Florida Annual Meeting**

Omni Champions Gate, Orlando

May 12, 2018
- **41st Annual Local Government Law in Florida**

Omni Champions Gate, Orlando

June 15, 2018
- **Executive Council Meeting – The Florida Bar Annual Convention**

Hilton Orlando Bonnet Creek

Moving?

Need to update your address?

The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information.

The online form can be found on the web site under "Member Profile."

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

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Considering the Public Forum Status of Government Internet Sites

I. Benefits of Social Media Use

The past decade has seen the meteoric rise in the use of the internet by the public and in all facets of government.[1] An unofficial survey finds that in Florida: the State, each of its agencies, every county and all cities with populations over 250,000 maintain individual internet sites. Public bodies maintain these sites to:

1. More efficiently provide information and get feedback from the public,[2]
2. Increase transparency in the public body;[3]
3. Monitor public sentiment and concerns;[4]
4. Save time and money;[5] and
5. Provide greater access to government services amongst many other uses.[6]

For example, early in his Presidency, Barack Obama issued a Presidential Memorandum requiring Federal Agencies to take prompt steps to expand access to government information through the internet for the purposes of increasing transparency, participation and collaboration with the public.[7] Consistent with these benefits, effective use of the internet promotes good public administration and serves as an instrument of sustainable development through e-government by enabling the delivery of quality public services and by responding to demands for greater transparency and accountability.[8]

Similarly, our current President Donald Trump is an active and daily user of Twitter. Using this and similar sites such as Facebook, Instagram or blogs, provides elected officials the opportunity to interact directly with the public in order to promote their message. These factors provide an easy explanation for why our clients are enamored with using social media platforms and why there is great value in taking advantage of the benefits of its use.

II. Legal Standards and How They Apply

Public Forum Analysis

This field of jurisprudence is court created and therefore subject to amendment through subsequent interpretations which over time have attempted to further define its application resulting in some hard and fast rules. Unfortunately, certain Court attempts to define the field have broadened the scope of public forum analysis and created confusion as to it proper application.[9] The following examines the nature of the distinct fora and the analysis undertaken by the courts.

Traditional Public Forum

Traditional public fora are areas within a jurisdiction that have historically been held open for political speech and debate.[10] Consider these the public soapbox of the nineteenth century; these are areas that have a historical basis of being open to the public for discussion of the issues of the day. Common designations include public streets[11], sidewalks[12], and parks[13]. Because of this traditional use in these fora any restriction or regulation placed on speech or expression receives the highest level of scrutiny. The Court first looks: 1. to whether the restriction at issue is content based or content neutral; and 2. whether the decision to create the regulation or restriction is based on the words of the speaker or nature of the expression. If either of the above applies the courts will review the law under a strict scrutiny standard; narrowly tailored; 2. To serve a compelling government interest.[14] This is the highest level of scrutiny which is practically impossible to satisfy.

Where the restriction is not based on the content of speech, the courts apply the content neutral standard which provides that any regulation be: 1. narrowly tailored; 2. to address a significant government interest and 3. provide ample alternatives for achieving the desired speech.[15] This is commonly referred to as the time, place and manner test.

Non Public Forum

Non public fora are those areas of public space that are not specifically held aside for First Amendment activity nor are considered to be quintessential public fora. These can be areas of government property which are reserved for the public body's intended purpose.[16] A critical aspect of the public forum analysis explains that the public body must intentionally open a nontraditional forum for public discourse in order to change the character of the forum and hereby make them open to the public.[17] Examples include courthouse lobbies,[18] airports,[19] and entryways to government offices.[20]

In non-public fora government retains a greater ability to regulate and limit First Amendment activity. Specifically, the Court has determined that the lesser reasonable basis standard of review applies requiring only that the government regulation be: 1. reasonable, 2. with no attempt to suppress the speaker based on a disagreement with his views.[21] This standard is relatively easy to satisfy.

Designated and Limited Public Forums

Between the two extremes the Court has carved out two intermediate

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levels of public fora; designated and limited public forums.

Designated Public forums are areas of public property that have been opened up for use by the public body as a place for expressive activity.[22] This is an intentional act by government, inaction or permitting limited use is not sufficient to create this category of public forum; only policy or practice of the public body creates this designation.[23] Examples include, a municipal auditorium,[24] a bulletin board at a state university which is held open to the public,[25] or government public access channels.[26] The limited public forum on the other hand has been defined to be those areas of public space set aside by government for only a limited purpose or use by certain groups or for certain topics of discussion. Examples include public school meeting rooms,[27] council meetings,[28] or publicly funded publications.[29] The distinction between these two forums is critical as designated public forums receive the same standard of review as to the traditional public forum,[30] while limited public forums will be examined under the more relaxed standard of review requiring government regulation to be reasonable and viewpoint neutral.[31]

Government Speech

A final category to consider is the application of the government speech doctrine. Whereas the Free Speech Clause severely restricts the ability of government to limit the ability of the public to speak, there is no such limitation on its control of its own speech.[32] This is a common sense approach, but its impacts are supported by the distinction between government and private speech.

III. Social Media and Internet Policy Considerations

Determining the applicable category of speech is the critical factor in advising your client regarding its options for controlling access to the social media platform. This analysis also has practical effect in non-social meeting settings; particularly regarding the public's right to speak at government functions and activities. Consider these above standards for both scenarios, but refocusing on social media consider applying the following designations for government internet use. For our purposes, internet use by public bodies can be categorized into four distinct groups: 1. Public Facing; 2. E-Government; 3. Social Networking; and 4. Intranet.

Public Facing

For the purposes of this discussion public facing website, (PFW), will be defined as those sites controlled by governmental bodies that are primarily used as the government's introduction to the public. These are the web pages that introduce the public body to the wider audience searching for information about the government generally or specifically.[33]

E-Government

The United Nations commissions a bi-annual study on the development of e-government world-wide and determined that e-government is becoming the standard approach for providing service delivery to the public in the context of citizens being the customer under the public service model.[34] A goal of e-government is to provide service to the public in a more consolidated manner, thereby increasing efficiency and effectiveness in the public sector.

Social Networking

Facebook, Twitter, Instagram and Flckr are but a few of the many social networking sites used by public bodies to interact more efficiently with the public. Governmental use of social networking is primarily for the purpose of engaging local citizens, businesses locally and internationally and, individuals outside of the community. Public bodies use social networking to directly interact with the public through person to person interactive conversations.[35] Local residents are given the opportunity to ask questions of their government regarding issues of the day and debate their fellow citizens on such topics through the public body's blog or social networking site. Public staff can promote their community and programs, and address questions raised by potential clients and business partners also. Elected officials take advantage by polling their constituents and reviewing posts to better understand the public's interests and concerns.

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Intranet

This platform is used for internal communications of public bodies. There is no intent to include outside voices unless specifically allowed by the body. The conversation created is also internal as between staff, elected or appointed officials and others who are members of the public body. The main controls over internal use are the prevalence of state and federal laws requiring that such communications be open to the public.[36]

Applying these filters should help in coordinating the legal and policy analysis of local government internet and social networking use.

PFW

The PFW is intended to only provide information and serve as a portal for the public to obtain more specific information or services. This is a governmental proprietary function and the sites specifically, have not been set aside for public speech. Consistent with such an interpretation a PFW is not a traditional public forum.[37] The purpose of the main page of a PFW is not to open a discussion or provide an outlet for public speech, therefore, considering the limited case law on the subject, two potential interpretations could apply: 1. The PFW could be considered a limited public forum based on the argument that the intent of the site is only to provide discussion of certain subjects specifically provided for on the webpage; or 2. The PFW could be considered government speech in which case the public forum analysis would not apply. For the local government attorney it is critical to examine the individual PFW closely. Some PFW do not provide direct access to comment. These sites simply provide users information only with links that provide more specific information regarding the topics presented on the web page. At this introductory level, the public has no right to speak which suggests that these pages are quintessential examples of government speech.

Government sites that provide more specific information on the topic of interest to members of the public navigating the site, more closely align with a public forum where the intent of these sites is to create a conversation or direct interaction with the public. The nature of the interaction may properly be conscribed by the topic at issue though, for example, when linking to a site regarding roadways within the jurisdiction, the public body may limit discussion to issues regarding roadways and not adult use licensing, so long as the limitation on speech is reasonable and viewpoint neutral policy or rules limiting the scope of discussion will not violate the Free Speech Clause.[38] This interpretation would reasonably apply in all contexts wherein the governmental body opens a forum through the internet for discussion of specific discreet topics to be discussed such as department or Agency sites.

E-Government

E-Government is normally a subset of the PFW that is specifically designated for providing service to the public. It includes the sites that allow the public to apply for permits, file complaints or pay for services, amongst many other government functions. These sites are used for providing ministerial services that previously were provided on site physically at governmental facilities. The creation and expansion of e-government is not intended to create public space for debate and in most cases these sites or web pages do not provide an opportunity for comment outside of the context for which the user is accessing the site. When public bodies are acting in their proprietary capacity, the public receives no right to enforce First Amendment protections.[39] Based on these factors and considering the historical context of the use of these sites, the weight of support suggests that these are non-public fora comparable to the business offices of public bodies.

Intranet

Similar to e-government sites, intranet sites are not intended to be public fora as they are not open to the public.[40] The purpose of these sites is to provide information to the staff and members of the public body. Based on the nature of the intranet, the public forum analysis would not apply where no access to this portal is allowed.

Social Networking

As discussed in the previous section, the intent of government participation in social media is to create a conversation between the government and the public. Social networking sites all have this conversation as a primary goal, government blogs and other forms of open communication between the government and public also retain this flavor. For example, where elected bodies open their meetings to comments, Twitter or blogs the public is tacitly being invited in to speak on matters being discussed. This act of opening a previously more limited forum seems to be decisive. In this latter example, a limited public forum is transformed into a designated public forum based on the changed nature of the forum.[41] Whereas, prior to allowing blog and twitter, live Board meetings could be limited to the subject of the meeting,[42] providing comment, blog or twitter access creates a distinct forum because the nature of tweets and blogs is that they are not controlled and limited by the specific topic being discussed. Both forms of social networking are intended to create free flowing discussions and public bodies will rationally be presumed to understand that nature and therefore agree to the resulting consequences of allowing speech not necessarily specific to the topic of discussion.

Social networking sites should receive a similar analysis, though Twitter and blogs will represent the most open forms of discussion, Facebook, LinkedIn and other interactive open discussion sites[43] created by public bodies are created for the purpose of public discussion and therefore may properly be interpreted as a designated public forum.

Distinctions are available in the social networking context as many sites retain a blocking function that allows the site host to avoid any comments. Utilizing such an option will convert the social networking site into a PFW because the public discussion is now foreclosed. Though this

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option is not preferred by the public information or communications wing of public bodies, it is an option for controlling potential concerns that may arise from creating a designated public forum.

IV. Potential Liabilities and Protections

1983

Breaching an individual's right to free speech provides standing for a section 42 USC 1983, considering the following factors: 1. whether the speech at issue is afforded constitutional protection; 2. the nature of the forum where the speech was made; and 3. whether the government's action in shutting off the speech was legitimate, in light of the applicable standard of review.44 Such liability may be imposed upon the government body if a plaintiff can show that the constitutional harm suffered was a result of the body's custom or policy.45 Based on this standard, implementation of organization-wide policy must be carefully prepared and enforced, because it will provide potential immunity if for your client. Failure to provide such policy protection leaves your government client open to potential liability for the actions of one authorized individual as a plaintiff may demonstrate the existence of a policy, custom, or usage in a variety of ways, including a single unconstitutional act or decision, when taken by an authorized decision-maker.46

Public Records

Access to public records is guaranteed by Article I, section 24 of the Florida Constitution, and Chapter 119, Florida Statutes. Specifically, Article I, section 24 of the Florida Constitution states:

> (a) Every person has the right to inspect or copy **any public record made or received in connection with the official business** of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. [emphasis added.]

The purpose of Florida's Public Records Law is to memorialize that unless a record is exempt, "[p]roviding access to public records is a duty of each agency."[47] Florida's Public Records Law applies to each "agency" of the state including "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."[48]

The obligation to produce public records attaches to the agency and the agency's employees and representatives, all of whom have an obligation under the Florida Public Records Law to produce public records in their possession. More importantly, the term "public record" is broadly defined to include:

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, **or other material, regardless of the physical form,** characteristics, **or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency**. [Emphasis added].

The result of this broad language and subsequent Supreme Court interpretation[49] is that through social media, government agencies are creating public records that must comply with the requirements of section 119 including Section 119.07(1)(a) requiring such records to be made available upon request and Section 119.021 which sets retention requirements for public records regardless of their format.[50]

Failure of agencies to properly retain public records, including those records generated by public officials from their personal computers can result in costly lawsuits for the agency, and potential personal and criminal liability by the violating individual.[51] In the matter of *Lorenzo v. City of Venice,* the City of Venice's Clerk was unable to produce all of the email communications between the City Council members in response to the public records request from Anthony Lorenzo and Citizens for Sunshine, Inc. (a non-profit corporation devoted to promoting awareness and compliance with open government laws) because several of City Council members failed to copy the Clerk on the transmitted the emails from their personal email accounts and the City Council members deleted their emails from their personal computers. After almost a year of litigation and an evidentiary hearing on the amount of the attorneys' fees and costs that would be assessed against the City, Judge Robert Bennett ordered the City to pay $777,114.42 in attorney's fees and costs, one of the highest and most costly judgments entered against a local government for violations of the Public Records and Sunshine Laws.

In addition to civil penalties against the agency, depending on the nature of the violation, a public officer who violate Florida's Public Records Law may be subject to penalties that include a fine of $500 or $1000 (the fine is dependent on whether it is an intentional or unintentional violation); public suspension, removal or impeachment from office; and criminal misdemeanor or felony claims.

Retention of these electronic public records is a matter for the IT departments to handle, but they must be made aware of this responsibility and create processes and controls for compliance. Similarly, individual staff and elected officials are responsible for retaining electronic documents created outside of the government's technology structure; local government counsel should make all parties subject to these responsibilities and the potential liabilities aware of how Section 119 applies to them.

Public Meetings

Florida's Public Meetings law as set forth in Article I, section 24 of the Florida Constitution, and Chapter 286, Florida Statutes, provides the public with a right of access to all local government proceedings

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including any gathering where two or more members of a board or commission discuss a matter upon which foresseable action will be taken by the board or commission. Discussions between two or more board members on an issue that may foreseeably come before the board is subject to the Sunshine Law even if such communications occur via electronic mediums like computer networks, on-line bulletin boards, website blogs, message boards, emails, and most recently, Facebook.[52]

Civil penalties can be raised against local governments and the individual public officials violating the Sunshine law and there is a statutory basis for the recovery of attorneys. Depending on the nature of the violation, a public officer who violates Florida's Sunshine Laws may also be subject to criminal penalties including a fine of $500 and criminal misdemeanor charges.

Decency Statutes

The Federal government provides specific protections for internet service providers to protect the public from viewing inappropriate material on their websites. The "Good Samaritan Law" of the Communications Decency Act, (CDA), 47 U.S.C. §230, provides general liability protection for service providers publishing material to the web.[53] The Good Samaritan provision exempts service providers from liability for information posted on their sites by users or for any action taken in good faith to restrict access to obscene, lewd, or otherwise objectionable postings.[54]

Consistent with this analysis, Florida the courts have upheld the application of our obscenity law prohibiting certain use of the internet. In *Simmons v. State*,[55] the Florida Supreme Court considered a challenge to sections 847.0135 and 847.0138 on First Amendment grounds.[56] Applying a strict scrutiny standard because the nature of the statutes at issue is content based, the Court upheld the obscenity laws because each provision restricts its applicability to e-mails sent knowingly to minors.

Commercial Limitations (Central Hudson Test)

Though the courts have yet to specifically rule on the issue, public bodies should retain the authority to limit the posts on their websites by prohibiting commercial activity. The courts have long held that commercial speech receives a separate test as compared to non-commercial speech and in determining the viability of government regulations limiting such speech the *Central Hudson* intermediate scrutiny standard applies.[57] Furthermore, The Florida Constitution prohibits the state, counties, municipalities, or any agency thereof from using, giving, or lending its taxing power or credit to aid any private interest or individual.[58] The purpose of this constitutional provision is "to protect public funds and resources from being exploited by assisting or promoting private ventures when the public would be at most only incidentally benefited."[59] Government internet sites are of course funded by the public body, therefore, allowing commercial entities to self-promote through these publicly funded fora, could violate this constitutional provision. No case law exists directly on point regarding this issue, but incorporating this constitutional limitation into an explanation for prohibiting commercial speech on government websites should be persuasive for a reviewing court.

V. Policy Guidelines

The above mechanisms provide a foundation for the use of policy guidelines to maintain government internet sites and provide a vehicle for properly managing activity on the various sites. As noted previously, consideration of government policy, practice and procedure are critical as they can change the character of a forum.[60]

Policy guidelines will come in two forms; first, regarding government

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social networking sites, the public body can take advantage of rules and limits placed on users by the Facebook, Linked In, or Twitter site which in this context is the internet service provider or "speaker".[61] These terms are stricter than government may impose in the public forum, but because they are required for participation by the provider, the public body is not responsible for the limits placed on speech. For example, Facebook monitors its sites and authorizes itself to remove certain commercial communications, harassing comments and hate speech, amongst other prohibitions subject to terminating the user from the website.[62] Option two, which is nonexclusive, is for the public body to create its own set of participation policies. This option requires government to examine the nature of each individual web application.

As discussed previously, the public forum status of a web page is controlled by the nature and characteristics of its intended use. Specifically, regarding social networking, government blogs or other websites created to provide an open public discussion of issues, a designated public forum is created and as such any policy guidelines must satisfy the time, place and manner doctrine.

Under the circumstance where the public body creates a limited public forum, stricter rules setting standards for participation in the web activity may be applied which must only satisfy the rational relationship test. Limiting discussion to topics or matters being considered as part of the limited forum is consistent with the intent of creating the web access that provides public participation for a specific purpose. This would also be the case where the website or application is considered a nonpublic forum.[63] Similarly, wide discretion will be granted government when setting policy within its own intranet as this is a nonpublic forum and the reasonableness of the policy will control. So long as the policy does not discriminate as between employees or favor one set of outside vendors over another it will be constitutionally valid.

Finally, under a government speech standard, any policy would not be subject to a forum analysis, but such policy cannot discriminate and must comport with the law.[64] Policy guidelines may be set strictly limiting any public participation not consistent with the purpose of the web application. For example, a public body may properly set extensive guidelines through policy for members of the public accessing a closed convention and visitor's bureau website by prohibiting comments that include bad language, promote nonsponsored commercial activity or discuss topics or ask questions unrelated to the purpose of the site.

Policy guidelines should also address the various liability concerns. Specifically, Section 119 and 286 responsibilities should be documented and processes for compliance imposed. Importantly, elected officials must be reminded that the nature of their communications may result in creating public records or meetings even where those activities occur on their personal devices and platforms.

Model Policies and Procedures

There are literally thousands of social networking policies that you can consider in drafting or updating a social networking policy. The options available provide a wide range of options for your consideration, but at minimum include the following:

Scope – explain what you are covering in your policy. Does it include personnel issues; elected officials?

Oversight Authority – define the hierarchy of those members of the government organization who will be responsible for approval participation in specific social networking sites. Include oversight responsibility at each distinct agency level.

Content Provider Responsibility – put standards in place for those persons authorized to input content on networking sites.

Training – Provide requirements for training regarding participation and best use of social networking sites and updating changes to sites being used by the government client.

Use of Copyrighted Material – reference the limits on use of images.

Public Records & Government in the Sunshine – reference public records and public meetings rights and responsibilities

Disclaimer

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Endnotes:

1 Natalie Helbig and Jana Hrdinova, University of Albany, *Exploring Value in Social Media,* Center for Technology in Government, http://www.ctg.albany.edu/publications/issuebriefs/social_media, citing, 2009 Human Capital Institute and Saba, Inc. Survey (suggesting that in 2009, 66% of federal, state and local government workplace were using internet social networking tools).

2 file:///C:/Users/atykb20/Downloads/Benefits-SocialMedia-Gov-MeasuredVoice-Granicus-WhitePaper.pdf (noting that based on its survey, 42% of local government professionals desire to use internet social networking to make civic engagement more productive and useful).

3 Scott Schneider, *Government Without Walls: The Use of the Internet by Government Organizations*, The Policy Tree, August 2011, http://thepolicytree.com/Government_Without_Walls,_August_2011.pdf.

4 See, Adam Jones, *Using Social Media to Enhance Situational Awareness*, Jan. 4, 2013, http://www.govtech.com/e-government/Using-Social-Media-to-Enhance-Situational-Awareness.html (referring to the use of social media in disaster situations).

5 Justin Mosebach, *How Local Governments Benefit from Social Media*, ASPA National Weblog, August 23, 2011; http://aspanational.wordpress.com/2011/08/23/how-local-governments-benefit-from-social-media/

6 See generally, United Nations E-Government Survey 2014. http://unpan3.un.org/egovkb/Portals/egovkb/Documents/un/2014-Survey/E-Gov_Complete_Survey-2014.pdf.

7 Peter R. Orszag, Executive Office of the President, Office of Management and Budget, Memorandum For The Heads Of Executive Departments And Agencies, December 8, 2009.

8 United Nations E-Government Survey 2014 at 2. (The United Nations has created a conceptual framework for the purpose of analyzing the development of e-government by member nations. The results have shown that high income nations score higher on the e-government ranking and the level of national development corresponds with the effective use of e-government.)

9 Many commentators have discussed the confusion of applying a consistent standard to the different categories created through the public forum analysis. See, e.g., Lyrissa Lidsky, *Public Forum 2.0,* 91 Boston University Law Review 1975 (2011); Michael J. Friedman, *Dazed and Confused: Explaining*

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Judicial Determinations of Traditional Public Forum Status, 82 Tulane Law Review 929 (2008); Aaron H. Caplan, *Invasion of the Public Forum Doctrine,* 46 Willamette Law Review 647 (2010).

10 *Perry Ed. Assn' v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

11 *Jamison v. Texas*, 318 U.S. 413 (1943), (reversing conviction of Jehovah's Witnesses member cited for violating city ordinance prohibiting a list of expressive activities in Dallas city streets); *Nationalist Movement v. City of Cummings, Ga.*, 92 F.3d 1135, 1139 (11th Cir. 1996) (the court noted that the streets in the city are quintessential public fora), citing, *Perry*, 460 U.S. 37, 34 (1983).

12 *Boos v. Barry*, 485 U.S. 312, 318(1988), (regarding the First Amendment rights of picketers using sidewalks within 500 feet of foreign government embassies); *U.S. v. Grace*, 461 U.S. 171, 177 (1983), (regarding right to distribute leaflets on sidewalk in front of the United States Supreme Court building); *One World v. Miami Beach*, 990 F. supp 1437 (S.D. Fla. 1997), (regarding Miami Beach ordinance restricting hours and location of non-profit vending table from sidewalks in Art Deco neighborhood).

13 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (regarding public forum status of Central Park in New York City).

14 *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

15 See, *Ward*, 491 U.S. 781 (1989).

16 *Perry Ed. Assn,* 460 U.S. 37, 46 (1983).

17 *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, *802 (1985).*

18 *Sefick v. Gardner*, 163 F.3d 370, 373 (7th Cir 1998)(in prohibiting the display of artwork in the lobby of the Dirksen Courthouse, the Court explained that the lobby of a courthouse is not a public forum); *Schmidter v. State*, 103 So.3d 263 (5th DCA 2012) (Upholding court administrative order prohibiting "jury nullification" leafleting at the Orange County, Florida Courthouse).

19 See, *Int. Soc. For Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), (airports are not areas that have been traditionally held open for public discourse).

20 *U.S. v. Kokinda*, 497 U.S. 720 (1990), (public street in leading to post office is not a forum subject to Free Speech activity).

21 See, *Helms v. Zubaty*, 495 F.3d 252, 257 (6th Cir. 2007), (a judges' chambers are nonpublic forum, therefore a person refusing to leave may properly be cited for trespass).

22 *Perry Ed. Assoc*, 460 U.S. 37 (1983).

23 *Bannon v. School District of Palm Beach County*, 387 F.3d 1208, 1213 (11th Cir. 2004).

24 *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975).

25 *Giebel v. Sylvester*, 244 F3d 1182 (9th Cir. 2001).

26 *Denver Area Ed. Telecommunications Consortium v. FCC*, 518 U.S. 727 (1996) Ginsberg concurrence at 791.

27 *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010).

28 *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990), *accord, Steinburg v. Chesterfield County Planning Commission,* 527 F.3d 377, 385 (4th Cir.2008); *Eichenlaub v. Township. of Indiana.,* 385 F.3d 274, 281 (3d Cir. 2004).

29 *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) (the university created a limited public forum by funding the cost of student group publications through a separate fund, therefore it could not deny funding to student organizations whose message they didn't agree with; in this case the message was religious in nature.)

30 *Perry Ed. Assoc.*, 460 U.S. at 46, citing *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981).

31 *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

32 *Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *NEA v. Finley*, 524 U.S. 569, 598 (1998).

33 E.g. www.pinellascounty.org

34 United Nations E-Government Survey 2014 at 2. (The United Nations has created a conceptual framework for the purpose of analyzing the development of e-government by member nations. The results have shown that high income nations score higher on the e-government ranking and the level of national development corresponds with the effective use of e-government.)

35 Graham and Avery, *Government Public Relations and Social Media: An Analysis of the Perceptions and Trends of Social Media Use at the Local Government Level,* Public Relations Journal, Vol. 7, No. 4 (2013).

36 E.g. Section 119 Florida Statutes (2013) (Florida public records law); 5 U.S.C. §552 (the federal Freedom of Information Act).

37 See, *Preminger v. Secretary of Veteran's Affairs*, 517 F.3d 1299 (D.C. Cir. 2008) (Veteran's Affairs Department could properly prohibit partisan political activity in its medical centers because these sites were interpreted as being deemed nonpublic fora based on the purpose of their use).

38 *Good News Club*, 533 U.S. 98 (2001).

39 *Kokinda*, 497 U.S. 720 (1990).

40 Peter F. Jenkins, *Leafleting and Picketing on the "Cydewalk" – Four Models of the Role of the Internet in Labor Disputes*, 2003 U.C.L.A. Journal of Law & Technology 1, 99.

41 See, *Scroggins v. City of Topeka, Kan.,* 2 F. Supp. 1362, 1369-1370 (D. Kan. 1998), citing, *Kindt v. Santa Monica Rent Control Board*, 67 F. 3d 266, 270-71 (9th Cir. 1995).

42 See, infra at 8.

43 The reference to "open discussion sites" distinguishes Facebook and other similar sites from more specialized sites such as Pinterest, Picasa and Technorati that are not created to discuss issues of the day but more focused on craft work, image sharing and to serve as personalized search engines respectively.

44 *Bible Believers v. Wayne County, Mich*., 805 F.3d 228 (6th Cir. 2015), citing, *Cornelius* 473 U.S. 788, 797 (1985).

45 See, *Monell v. Ney York City Dept. of Soc. Svcs*., 436 U.S. 658, 694 (1978).

46 *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480 (1986).

47 *See,* Fla. Stat. § 119.01(1).

48 Fla. Stat. § 119.011(2).

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

50 Op. Att'y Gen. Fla. 01-20 (2001); *see also,* Informal Op. Att'y Gen. Fla. (June 8, 2007); see also, Op. Att'y Gen. Fla. 08-07(2008)(finding that postings by a city council member on a private internet website about official business would be subject to the requirements of the Public Records Law); *National Collegiate Athletic Ass'n v. Associated Press,* 18 So.3d at 1207, (stating that the Public Records Law is not limited to paper documents, it applies to documents that exist only in digital form as well.)

51 *Lorenzo v. City of Venice,* Case No. 2008 CA 8108 SC, (Fla. 12th Cir. Ct. Oct. 7, 2009); *Office of State Attorney for Thirteenth Judicial Circuit of Florida v. Gonzalez,* 953 So. 2d 759 (Fla. 2d DCA 2007).

52 Ops. Att'y Gen. 89-39(1989), 08-65 (2008), 08-07(2008), 01-20(2001), 09-19(2009).

53 In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the U.S. Supreme Court held that portions of the Communications Decency Act (CDA), 47 U.S.C. §§223(a) and (d), violated the First Amendment right to free speech. However, the lesser known 47 U.S.C. §230, which provides general liability protection for service providers, was not challenged, and it remains in effect today.

54 47 U.S.C. §230(c)(2)(A) provides, "[n]o provider…of an interactive computer service shall be held liable [for] any action voluntarily taken in good faith to restrict access to or availability of material that the provider... considers to be obscene, lewd,… whether or not such material is constitutionally protected."

55 *Simmons v. State*, 944 So.2d 317 (Fla. 2006).

56 Id. at 321. (Section 847.0135 makes it a crime for a person to participate in the dissemination of child pornography and Section 847.0138 makes it a crime to transmit harmful material to a minor.)

57 *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557(1980).

58 Fla. Const. art. VII, §10.

59 *See* AGO 84-103, *citing Bannon v. Port of Palm Beach District*, 246 So. 2d 737, 741 (Fla. 1971). Cf., *Markham v. State Department of Revenue*, 298 So. 2d 210 (Fla. 1st D.C.A. 1974); *State v. Town of North Miami,* 59 So. 2d 779 (Fla. 1952); *Bailey v. City of Tampa*, 111 So. 119 (Fla. 1926).

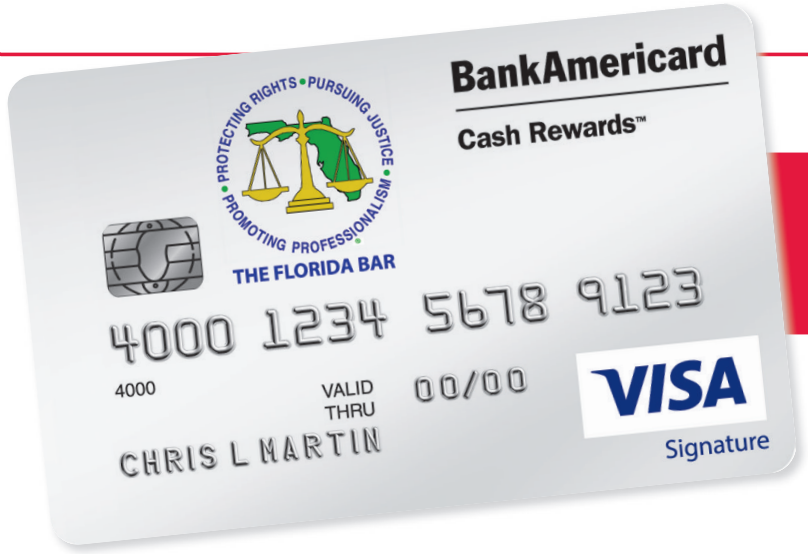
60 See, *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988); *Bannon v. School District of Palm Beach County*, 387 F.3d 1208, 1213 (11th Cir. 2004).

61 See, https://www.facebook.com/legal/terms; http://www.linkedin.com/legal/user-agreement; https://support.twitter.com/articles/18311-the-twitter-rules; respectively.

62 Section 3, https://www.facebook.com/legal/terms.

63 See, *Uptown Pawn & Jewelry. Inc. v. City of Hollywood*, 337 F.3d 1275, 1280 (11th Cir. 2003).

64 See, Pleasant Grove City v. *Summum*, 555 U.S. 460, 468 (2009).



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shall place the proposed amendment contained in the ordinance or petition to a vote of the electors at the next general election held within the municipality or at a special election called for such purpose." For many interested parties, this statutory provision is quite literally interpreted: if there are enough signatures, the measure[1] must be put to the voters.

However, another statutory provision, which appears to require the same skills for counting signatures applies; and, arguably, provides the City Attorney with the authority to ensure the electorate is aware of the changes being voted upon. Specifically, Section 101.161, Florida Statutes, provides, in pertinent part:

> 101.161 Referenda; ballots.—
>
> (1) Whenever a constitutional amendment or other public measure is submitted to the vote of the people, a ballot summary of such amendment or other public measure shall be printed in clear and unambiguous language on the ballot after the list of candidates, followed by the word "yes" and also by the word "no," and shall be styled in such a manner that a "yes" vote will indicate approval of the proposal and a "no" vote will indicate rejection. The ballot summary of the amendment or other public measure and the ballot title to appear on the ballot shall be embodied in the constitutional revision commission proposal, constitutional convention proposal, taxation and budget reform commission proposal, or enabling resolution or ordinance. The ballot summary of the amendment or other public measure shall be an explanatory statement, not exceeding 75 words in length, of the chief purpose of the measure. In addition, for every amendment proposed by initiative, the ballot shall include, following the ballot summary, a separate financial impact statement concerning the measure prepared by the Financial Impact Estimating Conference in accordance with s. 100.371(5). The ballot title shall consist of a caption, not exceeding 15 words in length, by which the measure is commonly referred to or spoken of. This subsection does not apply to constitutional amendments or revisions proposed by joint resolution.

Obviously, the "counting" skills are limited to the number of words used in the ballot title and the ballot summary. Of greater importance, the title and summary must provide the substance of the measure in clear and unambiguous language setting forth the chief purpose of the amendment.

As construed by Florida's Supreme Court and many lower courts for several decades, the purpose of a ballot title and summary is to provide fair notice of the content of the proposed amendment so that the voter will not be misled as to its purpose and can cast an intelligent and informed ballot. A court may invalidate a ballot question only where the record shows that the ballot language is clearly and conclusively defective. In essence, two questions must be asked: 1) does the ballot title and summary fairly inform the voter of the chief purpose of the amendment? 2) does the language of the title and summary, as written, mislead the public?

In answering these questions, the actual measure must be compared to the language contained in the title and summary. The accuracy of a ballot's title and summary is of paramount importance because only the title and summary will be available to the voter in the voting booth; the text of the proposed amendment will not be present. As the Florida Supreme Court stated in the seminal case on this issue, "[t]he burden of informing the public should not fall only on the press and opponents of the measure – the ballot summary must do this."[2]

A ballot summary is not required to explain every detail or ramification of a proposed amendment. However, the problem with a ballot summary may lie not with what the summary says, but, rather, with what it does not say. A summary cannot either "fly under false colors" or "hide the ball" as to the measure's true effect. A ballot summary should be rejected if, although it contains an absolutely true statement, it omits to state a material fact necessary in order to make the statement not misleading. In addition, a ballot summary that does not explain to the reader or sufficiently inform the public of important aspects of the underlying proposed amendment is defective.

Below are some examples of specific ballot summaries and amendments (please note that charter amendments are treated the same as constitutional amendments):

Cases in which a ballot summary was approved:

- Ballot was not misleading and gave voters fair notice of the decision to be made where it "contained a brief description of the tax plan, i.e., the rate, the group on whom it would be imposed, the expected revenues, and the planned expenditure of those revenues."[3]
- Title and summary of proposed amendment legalizing medical use of marijuana was not misleading since the terms "certain" (used in the title) and "debilitating diseases" (used in the summary) were synonymous and consistent with terms used in underlying amendment; title and summary were not affirmatively misleading for omitting language about the issue of physician liability since the amendment would not alter the liability under existing law.[4]
- Ballot summary for Home Rule Charter provided voters with sufficient information even though summary did not state that many of the powers granted by charter were available to non-charter counties, and did not fully explain all powers granted by charter.[5]
- Proposal for casino gaming had sufficient information despite not revealing number of casinos, disclosing location or number or existing para-mutual facilities, and failed to mention that one casino had to be placed in certain redevelopment area in Miami Beach.[6]
- Ballot summary for city charter amendment related to use of marina and adjoining properties, although not artfully phrased, did not mislead the public or "hide the ball" as to its intended purpose and was not clearly or conclusively defective.[7]

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UNIQUE ISSUES
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- Proposed amendment concerning class sizes for public schools, which would raise the constitutionally-permitted maximum class sizes, was not misleading even though summary did not state that passage of the amendment would reduce the funding allocated by the Legislature.[8]
- Proposal amending town charter to require referendum in event commission decided to relocate city hall was not too vague or misleading even though it used the term "feasible" in describing number of locations for proposed new town hall to be presented through referendum process.[9]
- Ballot title and summary were clear, unambiguous and straightforward in stating that proposed amendment would dedicate documentary tax revenue to the Land Acquisition Trust Fund and used to acquire and restore conservation and recreation lands in Florida.[10]
- Wording of straw ballot question was not misleading to voters since measure did not make it appear as vote would have binding effect, but, instead, asked county commissioners to propose a charter change to provide for an elected property appraiser.[11]
- Ballot summary for amendment to city charter setting term limits for mayor and councilmen was not misleading despite failing to set forth exception that mayor could run for council and vice versa to avoid application of term limits.[12]
- Ballot title and summary related to constitutional amendment defining marriage as the union of one man and one woman was clear and unambiguous, and not misleading, and use of the term "substantial equivalent" could be understood by the common voter.[13]
- Ballot summary of amendment aimed at economic development and encouraging job creation did not mislead the public and provided fair notice to public despite opposition which contended that true purpose and effect was to encourage development.[14]
- Summary did not "hide the ball" or mislead voters on measure to build additional permanent structures at Tennis Center since the ballot questions specifically referenced additional required approvals which had to be satisfied to make changes to Park's Master Plan.[15]
- Distinction between language in title and summary and that used in amendment did not render title and summary so misleading as to make them clearly and conclusively defective; summary was not misleading by failing to include judiciary's role in enforcing guidelines for state legislature since it could logically be presumed that if Legislature failed to comply with Constitution, judiciary could compel compliance.[16]
- Ballot summary's use of the term "amendment" without reference to the term "revision" could not mislead voters because the average voter would not be apprised of legal distinction between two terms, and amendment further apprised the electorate of the cut-off date for filing a citizen's initiative.[17]

Cases in which a ballot summary was rejected or struck down:

- Ballot summary which described new two-year prohibition on lobbying by former legislators and statewide elected officers unless they filed a financial disclosure was rejected because summary did not inform the public that there was already in place a total ban on lobbying for two years regardless of financial disclosure.[18]
- Summary of Constitutional Amendment relating to excessive punishment was affirmatively misleading because it failed to disclose that State Constitution, which prohibited cruel **or** unusual punishment, would be changed to cruel **and** unusual punishment, and gave the false impression that the death penalty was in danger of being abolished.[19]
- Ballot summary for nonpartisan commission to apportion legislative and congressional districts, which stated that proposed amendment "establishes non-partisan method of appointment to Commission", was misleading since proposed amendment actually provided that 12 of 15 commission members would be appointed by partisans.[20]
- Ballot summary regarding property tax limits was misleading where it omitted that any property taxes approved by voters could not extend for longer than two years and, further, differed in material ways from the provisions contained in the underlying amendment.[21]
- Ballot summary for proposed amendment which purported to establish standards for establishing legislative and congressional district boundaries was misleading because it failed to inform voters that constitution already contained a mandatory contiguity requirement which, if amendment was adopted, would be subordinated to other considerations.[22]
- Ballot title and summary relating to amendment regarding homestead exemption failed to provide notice to voter of specific criteria within amendment qualifying a person for such exemption and because of such omission, voter was not clearly informed who qualified for the exemption.[23]
- Ballot summary of proposed amendment regarding term limit pledges for candidates was misleading where it did not inform the public that the Secretary of State would be granted constitutional powers concerning elections that the Secretary of State did not previously possess.[24]
- Placement on ballot of proposition to provide that the board of county commissioners shall be the governing board of the Fire and Rescue Service District, but making no mention of the elimination of the existing governing body of that District, was misleading to voters.[25]
- Ballot summary requiring voter approval of projects over a certain monetary level was affirmatively

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misleading when compared to language in proposed amendment, and did not give voters fair notice of the actual changes contemplated by proposed measure.[26]

- Ballot summary related to proposed amendment to taxation was misleading because it failed to mention certain details of proposed amendment and gave the false impression that the amendment would only apply to certain taxes, when the language within the proposed amendment was broader.[27]
- Ballot summary rejected where it excluded material elements and did not give fair notice because decision to "establish, implement and enforce" an Urban Growth Boundary would not be self-executing; instead, it would be subject to the political processes of local governments.[28]
- Straw ballot measure which made it appear that vote would have binding effect of voters electing Tax Assessor instead of City Manager appointing Tax Assessor was misleading and failed to adequately inform voters.[29]
- Ballot summary was misleading where summary mentioned "waiting lists" and protection of the "doctor-patient relationship" even though neither issue was addressed in the proposed amendment at all.[30]
- Proposed initiative governing resolution of contract issues between the city and its firefighter employees, which nullified state law governing labor relations, was unconstitutional and invalid.[31]
- Ballot summary for amendment to create Fish and Wildlife Conservation Commission failed to inform voter that effect of amendment would be to strip legislature of its exclusive power to regulate marine life.[32]

Endnotes:

1 As used in this memo, the terms "amendment" and "measure" are interchangeable and refer to actual proposed text for, in this instance, the City's Charter.

2 Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)

3 Miami Dolphins, Ltd. v. Metropolitan Dade County, 394 So. 2d 981, 987 (Fla. 1981)

4 Advisory Opinion to the Attorney General re Use of Marijuana for Certain Medical Conditions, 132 So. 3d 786, 797-808 (Fla. 2014)

5 Maxwell v. Lee County, 714 So. 2d 1043, 1045-46 (Fla. 2d DCA 1998)

6 Advisory Opinion to the Attorney General re Limited Casinos, 544 So. 2d 71, 75 (Fla. 1994)

7 City of Riviera Beach v. Riviera Beach Citizens Task Force, 87 So. 3d 18, 22 (Fla. 4th DCA 2012)

8 Florida Educ. Ass'n v. Florida Dept. of State, 48 So. 3d 694 (Fla. 2010)

9 Ennis v. Town of Lady Lake, 660 So. 2d 1174, 1176 (Fla. 5th DCA 1995)

10 Advisory Opinion to the Attorney General re Water and Land Conservation – Dedicates Funds to Restore Florida Conservation and Recreation Lands, 123 So. 3d 47, 52 (Fla. 2013)

11 City of Hialeah v. Delgado, 963 So. 2d 754, 757 (Fla. 3d DCA 2007)

12 Abramowitz v. Glasser, 656 So. 2d 1332, 1334 (Fla. 4th DCA 1995)

13 Advisory Opinion to the Attorney General re Florida Marriage Protection Amendment, 926 So. 2d 1229, 1237-38 (Fla. 2006)

14 O'Connell v. Martin County, 84 So. 3d 463, 465 (Fla. 4th DCA 2012)

15 Matheson v. Miami-Dade County, 187 So. 3d 221, 226 (Fla. 3d DCA 2015)

16 Advisory Opinion to the Attorney General re Standards for Establishing Legislative District Boundaries, 2 So. 3d 175, 184-87 (Fla. 2009)

17 Florida Hometown Democracy, Inc. v. Cobb, 953 So. 2d 666, 672-73 (Fla. 2007)

18 Askew v. Firestone, 421 So. 2d 151, 156 (Fla. 1982)

19 Armstrong v. Harris, 773 So. 2d 7, 16-18 (Fla. 2000)

20 Advisory Opinion to the Attorney General re Independent Non-Partisan Commission to Apportion Legislative and Congressional Districts Which Replaces Apportionment by Legislature, 926 So. 2d 1218, 1228-29 (Fla. 2006)

21 Advisory Opinion to the Attorney General re 1.35% Property Tax Cap, Unless Voter Approved, 2 So. 3d 968, 974-76 (Fla. 2009)

22 Florida Dep't. of State v. Florida State Conference of NAACP Branches, 43 So. 3d 662, 668-69 (Fla. 2010)

23 Roberts v. Doyle, 43 So. 3d 654, 659-660 (Fla. 2010)

24 Advisory Opinion to the Attorney General re Term Limits Pledge, 718 So. 2d 798, 804 (Fla. 1998)

25 Kobrin v. Leahy, 528 So. 2d 392 (Fla. 3d DCA), rev. denied, 523 So. 2d 577 (Fla. 1988)

26 Falk v. City of Miami, 538 So. 2d 956, 957 (Fla. 3d DCA 1989)

27 Florida Dep't. of State v. Slough, 992 So. 2d 142, 148 (Fla. 2008)

28 Volusia Citizens' Alliance v. Volusia Home Builders' Assn., 887 So. 2d 430, 431-32 (Fla. 5th DCA 2004)

29 City of Miami v. Staats, 919 So. 2d 485, 487 (Fla. 3d DCA 2005)

30 Florida Dep't. of State v. Mangat, 43 So. 3d 642, 648 (Fla. 2010)

31 West Palm Beach Ass'n of Firefighters, Local Union 727 v. Board of City Comm'rs of City of West Palm Beach, 448 So. 2d 1212, 1214 (Fla. 4th DCA 1984)

32 Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission, 705 So. 2d 1351, 1355 (Fla. 1998)

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