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**The City, County, and Local Government Law Section**

**of the Florida Bar’s**

***LOCAL GOVERNMENT LAWYER’S DESKBOOK***

*Compiled by:*

 The Honorable James R. Wolf  
Judge, First District Court of Appeal of the State of Florida

 Florida League of Cities

 City, County, and Local Government Law Section of The Florida Bar

 Florida Association of County Attorneys

 Florida Municipal Attorneys’ Association

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*March, 2022 NOTE: The CCLGL Section is proud to share the* Local Government Lawyer’s Desk Book *as a historical resource. The Desk Book was written, edited, compiled, and managed over many years by a dedicated team of volunteer local government law attorneys, as a living reference and research tool for the local government lawyer. The Desk Book has now been lovingly “retired” and is not being updated; however, it remains a useful repository of knowledge and historical legal sources on a wide variety of critical local government law topics. Please forgive any formatting irregularities, which are due to the conversion from its original online format and do not reflect the work of the original writers, editors, and compilers.*

**CONTENTS**

[IMPORTANT POINTS (by Mark Moriarty) 4](#_Toc98430912)

[I. Chapter 01: County & Municipal Government in Florida (by Mark Moriarty) 4](#_Toc98430913)

[II. Chapter 02: County–Municipal Relationship / Classification of Local Government Decisions, Procedures for Making Decisions (by Mark Moriarty) 5](#_Toc98430914)

[III. Chapter 03: Local Government & Other Governmental Entities (by Mark Moriarty) 5](#_Toc98430915)

[IV. Chapter 04: None 6](#_Toc98430916)

[V. Chapter 05: Local Government Legislative Functions (by Mark Moriarty) 6](#_Toc98430917)

[VI. Chapter 06: Local Government Quasi-Judicial Capacity (by Herbert W.A. Thiele) 6](#_Toc98430918)

[VII. Chapter 07: Ministerial Actions (by Mark Moriarty) 14](#_Toc98430919)

[VIII. Chapter 08: Local Government as Code Enforcer (by Mark Moriarty) 14](#_Toc98430920)

[IX. Chapter 09: Land Use and Zoning (by Mark Moriarty) 15](#_Toc98430921)

[X. Chapter 10: Local Government as party to a Contract / State Limitations (by Susan H. Churuti) 15](#_Toc98430922)

[XI. Chapter 11: Public Sector Labor & Employment Law Issues (by David C. Miller) 19](#_Toc98430923)

[XII. Chapter 12: Eminent Domain (by Mark Moriarty) 49](#_Toc98430924)

[XIII. Chapter 13: Acquisition of Real Property (by Mark Moriarty) 50](#_Toc98430925)

[XIV. Chapter 14: Local Government as a Landowner (by Mark Moriarty) 50](#_Toc98430926)

[XV. Chapter 15: Local Government as a Service Provider 50](#_Toc98430927)

[XVI. Chapter 16: Liability of a Local Government (by Alan S. Zimmet) 54](#_Toc98430928)

[XVII. Chapter 17: Financing Local Government (by Mark Moriarty) 77](#_Toc98430929)

[XVIII. Chapter 18: Local Government Expenditures (by Mark Moriarty) 80](#_Toc98430930)

[XIX. Chapter 19: Purchasing (by Susan Churuti) 80](#_Toc98430931)

[XX. Chapter 20: Local Government Investments (by Mark Moriarty) 105](#_Toc98430932)

[XXI. Chapter 21: Public Meetings (by Pat Gleason) 105](#_Toc98430933)

[XXII. Chapter 22: Public Records (by Pat Gleason) 130](#_Toc98430934)

[XXIII. Chapter 23: Public Ethics (by Mark Moriarty) 160](#_Toc98430935)

[XXIV. Chapter 24: Local Government as a Litigant 160](#_Toc98430936)

[XXV. Chapter 25: Elections (by Mark Moriarty) 161](#_Toc98430937)

[XXVI. Chapter 26: Local Government as a Creditor (by Mark Moriarty) 162](#_Toc98430938)

[XXVII. Chapter 27: Civil Forfeitures (by Mark Moriarty) 163](#_Toc98430939)

[Appreciation Page (by Mark Moriarty) 164](#_Toc98430940)

IMPORTANT POINTS (by Mark Moriarty)

* 1. A number of important things should be noted about this book:
     1. **This is a work in progress rather than a completed project.** Due to the large numbers of areas of the law that local government attorneys must deal with, it is impossible to have materials in all areas completed at the same time. Certain sections of the book may appear incomplete. Areas of the law which you may feel are pertinent may not be covered. The law in this area is constantly changing. It is, therefore, expected that this book will be continuously updated. Updates may include new or rewritten sections.
     2. **This is the local government attorney’s desk book.** This book is intended to assist the local government lawyer and aid the attorney in job performance. Therefore, if you have any suggestions for revisions which will make this book a more useful tool, or if you feel case law should be added, please feel free to add it.
     3. **This book is not intended as an exhaustive treatise on each subject which is covered.** There are too many areas of the law pertinent to a local government lawyer’s responsibilities for any one book to present an exhaustive and detailed discussion on every area. This book contains general statements and some pertinent case analysis in the areas which are covered.  It is intended to be used as a research tool for the local government lawyer.
     4. **This book is not the work of any one person.** Many of the chapters in this book are based on outlines and work done by local government attorneys over the years. Many of these attorneys were kind enough to assent to revision and use of their materials. Several attorneys wrote new sections specifically for use in the desk book. A number of other attorneys throughout the state helped by editing the manuscript and making suggestions for its improvement.

1. Chapter 01: County & Municipal Government in Florida (by Mark Moriarty)
   1. Historical.
      1. Counties
         1. Under the 1885 Florida Constitution, all municipal powers were dependent on specific delegation of authority by the Legislature in a general law or special act. The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. Art. VIII, § 8, Fla. Const. (1885).
      2. Municipalities
         1. Under the 1885 Florida Constitution, all municipal powers were dependent on a >specific delegation of authority by the Legislature in a general law or special act. The Legislature shall have power to establish, and to abolish, municipalities to provide for their government, to prescribe their jurisdiction and powers, and to alter or amend the same at any time. Art. VIII, § 8, Fla.
         2. This requirement of an express legislative grant was a reflection of the prevailing nineteenth century local government theory known as "Dillon's Rule."\* Under this approach to municipal power, "[t]he authority of local governments in all matters, including those previously local, was limited to that expressly granted by the Legislature, or that which could be necessarily implied from an express grant." Sparkman, The History and Status of Local Government Powers in Florida, 25 U. of Fla.. L.R. 271, 282 (1973).
         3. The power of municipalities varied greatly depending upon the grant of power by special legislation and municipal charters enacted by the Legislature.
2. Chapter 02: County–Municipal Relationship / Classification of Local Government Decisions, Procedures for Making Decisions (by Mark Moriarty)
   1. Noncharter County
      1. A county ordinance adopted by a noncharter county in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict. Art, VIII, § 1(f), Fla. Const.
   2. Charter County
      1. As to charter counties, article VIII, section 1(g), Florida Constitution, provides that the charter will provide which ordinance prevails where there is a conflict between county and municipal ordinances. Additionally, section 166.021, Florida Statutes, the Municipal Home Rule Powers Act, provides that municipal power does not exist for any subject preempted to a county pursuant to a county charter.
         1. In *City of Coconut Creek v. Broward County*, 430 So. 2d 959 (Fla. 4th DCA 1983), the court approved of a county veto of municipally approved plats pursuant to section 1(g).
         2. In *City of Ormond Beach v. County of Volusia*, 383 So. 2d 671 (Fla. 1980), court held that countywide library assessment for a library system did not conflict with city tax for separate municipal library system.
   3. Public Purpose Requirement
      1. Notwithstanding the constitutional provisions concerning conflicts between noncharter county and municipal ordinance, in *City of Ormond Beach v. County of Volusia*, 535 So. 2d 302 (Fla. 5th DCA 1988), the court held that a municipality must have a valid public purpose for opting out of a countywide impact fee ordinance
      2. The county transportation impact fee ordinance stated that its purpose was to regulate county land use and land development and to implement the comprehensive plan by imposing an impact fee for county road expansion attributable to new growth and development. The transportation impact fee was imposed countywide and several municipalities enacted ordinances to opt out of the application of the county impact fee ordinance within their boundaries. The court held the municipal ordinances were invalid because, although municipalities have broad powers under the Florida Constitution to act for municipal purposes, these ordinances had no reasonable relationship to the morals, health, welfare and safety of the people. *Id.*
3. Chapter 03: Local Government & Other Governmental Entities (by Mark Moriarty)
   1. Federal Preemption
      1. *Hernandez v. Coopervision, Inc*., 691 So. 2d 639 (Fla. 2d DCA 1997), the court held that party asserting federal preemption must show either 1) Congress has demonstrated intent to supersede state law, or 2) state law actually conflicts or frustrates purpose of federal law. Therefore, federal preemption would not be presumed.
      2. *DeBuono v. NYSA-ILAM Med. and Clinical Servs. Fund*, 117 S. Ct. 1747 (June 2, 1997), the court held that ERISA didn't preempt state's gross receipt tax. Revenue raising is an area traditionally occupied by state, therefore, preemption would not be presumed.
      3. *In Moran v. City of Lakeland*, 1997 WL 317076 (Ha. 2d DCA June 13, 1997), the court held that section 42 U.S.C. 1988 preempted state offer of judgment statute in determining defendant's entitlement to attorney's fees in civil rights action.
4. Chapter 04: None
5. Chapter 05: Local Government Legislative Functions (by Mark Moriarty)
   1. Definition of Legislative
      1. In *Martin County v. Yusem*, 690 So. 2d 1288 (Fla. 1997), the supreme court determined that comprehensive plan adoption and amendments thereto involved policy making decisions and were therefore legislative in nature. Compare Brevard County v. Snyder, 627 So. 2d 649 (Fla. 1993).
      2. In *Board of County Comm'rs v. Karp*, 662 So. 2d 718 (Fla. 2d DCA 1995), the court held that a "corridor plan" adopted by Sarasota County was legislative in nature since it was the "formation of a general policy rather than the application of a previously determined policy." A substantial number of parcels were involved.
6. Chapter 06: Local Government Quasi-Judicial Capacity (by Herbert W.A. Thiele)
   1. Quasi-Judicial defined
      1. Quasi-judicial is defined as “[t]he action, discretion, etc., of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.” Black’s Law Dictionary 1245 (6th ed., West 1990).
      2. “Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices.”  Art. V, § 1, Fla. Const.
      3. When notice and a hearing are required, and the judgment of the local governing board is contingent on the showing made at the hearing, then the board’s judgment becomes quasi-judicial.  DeGroot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957).
      4. In Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993), the Florida Supreme Court issued a landmark decision which changed how local governments review and process land development applications, particularly those regarding site specific rezonings and site and development plan approvals.  The Court determined that the old rule, i.e., that these decisions were legislative in nature, was inconsistent with the requirements set out in Florida’s Growth Management Act of 1985.  As a result of Snyder, the process for considering site specific rezoning applications and site and development plan approvals requires quasi-judicial proceedings, to be supported by the “competent substantial evidence” standard of review.
   2. Introduction to Local Government Quasi-Judicial Capacity:
      1. When district courts of appeal review by certiorari a circuit court’s decision on a quasi-judicial matter, the district court applies a two-pronged standard: (1) whether procedural due process was accorded; and (2) whether the correct law was applied.  Florida Power & Light Co. v. City of Dania, 761 So. 2d at 1092.  This second tier review by the district court is “extraordinarily limited.” .
      2. “The standard of review in certiorari proceedings in a district court of appeal when it reviews the circuit court’s order under Florida Rule of Appellate Procedure 9.030(b)(2)(B) ... has only two discreet components.  The inquiry is limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law.”  City of Jacksonville Beach v. Marisol Land Dev. Corp., 706 So. 2d 354, 355 (Fla. 1st DCA 1998) (citations omitted).
      3. The district court “may *not* review the record to determine whether the agency decision is supported by competent substantial evidence.”  Florida Power & Light Co. v. City of Dania, 761 So. 2d at 1093 (emphasis in text).
      4. Second-tier certiorari review by the appellate court is not a second appeal.  Miller v. Hernando County, 931 So. 2d 172, 173 (Fla. 5th DCA 2006)
   3. Exhaustion of Administrative Remedies
      1. In *Fehlhaber Corp. v. Village of Tequesta*, 696 So. 2d 880 (Fla. 4th DCA 1997), rehearing denied, the court held that the plaintiff failed to exhaust its administrative remedies before filing suit in circuit court, as the plaintiff failed to follow the procedures set forth in the Village code for challenging the building official’s decision. Thus the merits of the zoning controversy should not have been addressed by the trial court.
      2. In *City of Fernandina Beach v. Myers*, 661 So. 2d 1262 (Fla. 1st DCA 1995), the court held that the circuit court should not have interceded in the city’s administrative process (removal of city manager) by issuing an injunction requiring that certain procedures be followed.
   4. Administrative res Judicata.
      1. In *Holiday Inns, Inc. v. City of Jacksonville*, 678 So. 2d 528 (Fla. 1st DCA 1996), the court held that the city code enforcement board was precluded by administrative res judicata from imposing liability for a code violation on a party which had previously been found not to be liable for the same violation, as there was no substantial change in circumstances
      2. In *Miller v. Booth*, 702 So. 2d 290 (Fla. 3d DCA 1997), the court held that the board of county commissioners acted within its discretion in applying administrative res judicata where it determined that a substantial change of circumstances had not occurred between first and second applications for rezoning.
   5. Review must be by certiorari.
      1. The appropriate method of requesting the review of a quasi-judicial decision is by petition for writ of certiorari filed in the circuit court. *Cherokee Crushed Stone, Inc. v. City of Miramar*, 421 So. 2d 684 (Fla. 4th DCA 1982).
   6. Method of review.
      1. The procedure which is to be utilized in reviewing local government quasi judicial actions is found in Florida Rules of Appellate Procedure 9.100 and 9.190(c)(4). See also rule 2.130, Fla. R. Jud. Admin.
         1. Contents of petition. The caption of the petition shall contain the name of the court and the name and designation of all parties on each side, and contain a statement that the petition is filed pursuant to rule 9.100(f), Florida Rules of Appellate Procedure. See rule 9.100(f)(2) and rule 9.100(g), Fla. R. App. P. Contents of the petition are further proscribed in rule 9.100(g), Fla. R. App. P
         2. Timeliness. Requests for review by circuit court must be filed within 30 days of order being challenged. Broward County Bd. of Adjustment v. Musselman, 568 So. 2d 1349 (Fla. 4th DCA 1990). See also rule 9.100(c). Fla. R. App. P.
   7. The record.
      1. The record consists of an appendix. Rule 9.220 describes appendix and requires that it be indexed and attached to the petition. Rule 9.100(g) states that the petition shall contain references to the appropriate pages of support appendix.
      2. Rule 9.190(c)(4) states that appendices may not contain any matter not made part of the record in the lower tribunal.
      3. In *Metropolitan Dade County v. Sportacres Dev. Group, Inc*., 698 So. 2d 281 (Fla. 3d DCA 1997), rehearing denied, the court said that maps and staff reports in local government file constituted part of the record.
   8. Responsibility to provide record.
      1. Failure to provide a sufficient record for the reviewing court to make an adequate decision will result in denial of the petition. *See Graden v. Graden*, 599 So. 2d 716 (Fla. 1st DCA 1992). *See also* § 286.0105, Fla. Stat. (2013) (advising that a verbatim record of the proceedings will be needed for an appeal). In DSA *Marine Sales & Service, Inc. v. County of Manatee*, 661 So. 2d 907 (Fla. 2d DCA 1995), the court held that the trial court erred in denying the developer’s timely petition for certiorari without ruling on the developer’s motion to supplement the petition with a complete record which was not ready in the 30-day period.
   9. Scope of review.
      1. The Florida Supreme Court has explained that the scope of review for the circuit court, when reviewing the decision of a quasi-judicial body, consists of three elements, or prongs, as follows:
         1. whether procedural due process was accorded;
         2. whether the essential requirements of the law were observed; and
         3. whether the administrative findings and judgment were supported by competent substantial evidence.
            1. *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000), citing City of Deerfield Beach v. Vaillant, 419 So. 2d at 626. See also, *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995).
      2. The circuit court performs a review, but does not sit as a trial court to consider new evidence or make additional findings. *Vichich v. Dept. of Highway Safety and Motor Vehicles*, 799 So. 2d 1069, 1073 (Fla. 2d DCA 2001).
      3. The circuit court should not second-guess the decision of the local government, but only determine compliance with the standards. *Orange County v. Lust*, 602 So. 2d 568 (Fla. 5th DCA 1992). *See also Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1995).
      4. The circuit court should not re-weigh the evidence or substitute its judgment for that of the local governing authority. *Dusseau v. Metro. Dade County Board of County Commissioners*, 794 So. 2d 1270, 1275-76 (Fla. 2001). The circuit court may not re-weigh the “pros and cons” of conflicting evidence. *Id.* at 1276.
      5. The circuit court is limited to a review of the record that was made at the hearing before the local governing authority. *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 943 (Fla. 5th DCA 1988).
   10. Remedies.
       1. There are only two options available to the circuit court: (1) to deny the petition, or (2) to grant the petition and quash the order at which the petition was directed. *City of Atlantic Beach v. Wolfson*, 118 So. 3d 993 (Fla. 1st DCA 2013). *See also, Tamiami Trail Tours, Inc. v. Railroad Com’n*, 174 So. 451, 454 (Fla. 1937) (the reviewing court only determines whether or not the lower tribunal departed from the essential requirements of the law, and upon that determination either quashes the writ of certiorari or quashes the order being reviewed). *See also, National Advertising Co. v. Broward County*, 491 So. 2d 1262 (Fla. 4th DCA 1986) (where the appellate court held that the circuit court exceeded its authority in ordering the removal of a sign, as the appropriate remedy was to quash the variance order).
   11. Quasi-judicial acts as takings.
       1. In *State, Department of Environmental Protection v. Burgess*, 667 So. 2d 267 (Fla. 1st DCA 1995), the court overturned a summary judgment for the property owner which found that the denial of a dredge and fill permit deprived the owner of all viable economic use of his land. The court held that there were still factual issues concerning the reasonable investment-backed expectations at the time the owner purchased the property and whether all viable economic use was denied. Another issue of fact remained with respect to whether the proposed use constituted a nuisance.
       2. In *Reynolds v. County of Volusia*, 659 So. 2d 1186 (Fla. 5th DCA 1995), the court held that the abandonment of a street did not vest the abutting owner with fee title to support an inverse condemnation claim, where the original dedication contemplated additional public uses other than a street.
   12. Competent Substantial Evidence.
       1. Competent substantial evidence is that which is “sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.”  De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).
       2. Surmise, conjecture or speculation have been held not to be substantial evidence.”  Fla. Rate Conference v. Fla. R.R. and Pub. Utils. Comm’n, 108 So. 2d 601, 607 (Fla. 1959).
       3. As a general rule, comments and opinions of professional staff, as well as expert testimony from non-staff professionals, would constitute competent substantial evidence upon which a local governing board may base a decision, provided there are facts in the record to support the comments and opinions.  However, “[g]eneralized statements in opposition to a land use proposal, even those from an expert, should be disregarded.”  City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc., 857 So. 2d 202, 204 (Fla. 3d DCA 2003).  And, “no weight may be accorded an expert opinion which is totally conclusory in nature and is unsupported by any discernible, factually-based chain of underlying reasoning.”  Div. of Admin.,  State Dept. of Transp. v. Samter, 393 So. 2d 1142, 1145 (Fla. 3d DCA 1981), rev. den., 402 So. 2d 612 (1981).
       4. The testimony of neighboring land owners “is perfectly permissible and constitutes substantial competent evidence,” so long as the testimony is fact-based.  Miami-Dade County v. Walberg, 739 So. 2d 115, 117 (Fla. 3d DCA 1999), rev. dismissed, 763 So. 2d 1046 (Fla. 2000), citing Metropolitan Dade County v. Blumenthal, 675 So. 2d 598, 607 (Fla. 3d DCA 1995), rev. dismissed 680 So. 2d 421 (Fla. 1996).  See also Marion County v. Priest, 786 So. 2d 623 (Fla. 5th DCA 2001), rev. den. 807 So. 2d 655 (Fla. 2002) (fact-based testimony of property owners who opposed special use permit was admissible and could be considered substantial competent evidence).
       5. However, generalized statements by neighbors and lay persons that merely support or oppose a project would not constitute substantial competent evidence.  See Walberg, 739 So. 2d at 117.  See also, Colonial Apts., L.P. v. City of Deland, 577 So. 2d 593, 596 (Fla. 5th DCA 1991) (“opinions of neighbors by themselves are insufficient to support denial of a proposed development”).
       6. Where technical expertise is required, lay opinion testimony is not considered to be valid evidence.  Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708, 710 (Fla. 3d DCA 2000).
       7. Lay witnesses may offer their view in land use cases about matters not requiring expert testimony.  For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise.  Lay witnesses’ speculation about potential ‘traffic problems, light and noise pollution,’ and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence.  Similarly, lay witnesses’ opinions that a proposed land use will devalue homes in the area are insufficient to support a finding that such devaluation will occur.  There must be evidence other than the lay witnesses’ opinions to support such claims.”  Katherine’s Bay, LLC v. Fagan, 52 So. 3d 19, 30 (Fla. 1st DCA 2010) (citations omitted).
       8. Arguments of attorneys who represent the parties in a quasi-judicial hearing would not constitute evidence, as “it is black letter law that argument of counsel does not constitute evidence.”  Romeo v. Romeo, 907 So.2d 1279, 1284 (Fla. 2d DCA 2005).  However, it is conceivable that attorneys with other types of professional degrees and employment experiences could provide comments or opinions that would be considered as evidence.
   13. Requirements for a quasi-judicial hearing
       1. A quasi-judicial proceeding should: (1) afford procedural due process; (2) observe the essential requirements of law; and (3) the decision must be based on competent substantial evidence. City of Deerfield Beach v. Valliant, 419 So. 2d 624 (Fla. 1982).
       2. Procedural due process requires reasonable notice of the quasi-judicial hearing and a fair and meaningful opportunity to be heard at same.  Notice is adequate for due process concerns if it is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”  Little v. D’Aloia, 759 So. 2d 17, 19 (Fla. 2d DCA 2000), rehearing denied (citations omitted).
       3. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard.  In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.”  Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992) (citations omitted).
       4. In the Snyder case, the Florida Supreme Court adopted a shifting burden of proof analysis for rezonings. The initial burden is on the petitioner to demonstrate compliance with the comprehensive plan. If the petitioner meets its burden, the burden shifts to the local government to prove that maintaining the existing zoning clarification accomplishes a legitimate public purpose. Snyder, 627 So. 2d at 476.
       5. A ruling constitutes a departure from the essential requirements of law when it amounts to a “violation of a clearly established principle of law resulting in a miscarriage of justice.”  Miami-Dade Cnty. v. Omnipoint Holdings, Inc., 863 So. 2d 195, 199 (Fla. 2003).
       6. Clearly established law can be derived from a variety of legal sources, such as recent controlling case law, rules of court, ordinances, statutes, and constitutional law.  City of Tampa v. City National Bank of Florida, 974 So. 2d 408, 410 (Fla. 2d DCA 2007), rev. den., 973 So. 2d 1120 (Fla. 2007).  In quasi-judicial hearings it typically involves the interpretation and application of local ordinances.  See Colonial Apartments, LP v. City of Deland, 577 So. 2d 593, 598 (Fla. 5th DCA 1991), rev. den. 584 So. 2d 997 (Fla. 1991) (the correct law applicable in the case was to give the zoning ordinance its plain and obvious meaning).
       7. The criteria for a quasi-judicial board to make a decision should be clearly enumerated in the ordinance. Effie, Inc. v. City of Ocala, 438 So. 2d 506 (Fla. 5th DCA 1983); City of Naples v. Central Plaza of Naples, Inc., 303 So. 2d 423 (Fla. 2d DCA 1974) (city council could legally base its decision only on criteria set forth in the applicable ordinance); Rural New Town v. Palm  Beach County, 315 So. 2d 478 (Fla. 4th DCA 1975) (zoning ordinance must prescribe definite standards for guidance and control).
       8. Quasi-judicial proceedings do not require the same quality of due process as would a true court proceeding, although certain minimum standards of due process are required.  A quasi-judicial hearing will meet the basic due process requirements if the parties are provided notice of the hearing, provided an opportunity to be heard, allowed to present evidence, allowed to cross-examine witnesses, and are informed of the facts upon which the commission acts.  Jennings v. Dade County, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991), rev. den. 598 So. 2d 75 (Fla. 1992).
       9. Denying a petitioner the right to challenge a principal witness against it through cross examination would be a denial of due process.  See Seminole Entertainment, Inc. v. City of Casselberry, 811 So. 2d 693 (Fla. 5th DCA 2001).  However, although *parties* to a quasi-judicial hearing must be able to present evidence and cross-examine witnesses, Florida law does not require that *participants* must be allowed to cross-examine witnesses.  See Carillon Community Residential v. Seminole County, 45 So. 3d 7, 10 (Fla. 5th DCA 2010).
       10. It is also necessary for a petitioner to file a proper objection before a quasi-judicial board.  In the case of Clear Channel Communications, Inc. v. City of North Bay Village, 911 So. 2d 188 (Fla. 3d DCA 2005), the District Court of Appeal agreed with the circuit court’s opinion, holding that the petitioners failed to preserve their legal challenges for appellate review by not filing proper objections before the city commission during the quasi-judicial hearing.  The petitioners contended that just questioning a witness during the hearing was sufficient to preserve an issue for appellate review, but the courts disagreed, finding that a sufficiently specific objection would be required.  Id. at 189, 190.
       11. Some earlier case law indicated that written findings of fact were necessary. See, e.g., Albright v. Hensley, 492 So. 2d 852 (Fla. 4th DCA 1986). However, in Snyder, the Florida Supreme Court stated that “[w]hile they may be useful, the board will not be required to make findings of fact.”  Snyder, 627 So. 2d at 476.
       12. A quasi-judicial decision may be upheld “even in the absence of supportive factual findings, so long as the court can locate competent substantial evidence consistent with the decision (and, of course, conclude the local government applied the correct law and did not deprive the petitioner of due process).”  Alachua Land Investors, LLC v. City of Gainesville, 15 So. 3d 782 (Fla. 1st DCA 2009), rehearing denied.
       13. The issue of ex parte citizens’ input (conversations outside the meeting) was called into question in the Jennings v. Dade County case.  The court stated, “[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings.  Quasi-judicial officers should avoid all such contacts where they are identifiable.  However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide.  The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal.”  Jennings, 589 So. 2d at 1341.  See also § 286.0115, Fla. Stat., which states that if the conversations are disclosed and made a part of the record, it is presumed that no prejudice occurred.
       14. The Attorney General has advised that in order to maintain fundamental fairness in administrative hearings, there should be a delegation of duties such that one attorney acts as a prosecutor while another serves as legal advisor to the board.  Fla. Atty. Gen. Op. 72-64.  In Cherry Communications, Inc. v. Deason, 652 So.2d 803, 804 (Fla. 1995), the Florida Supreme Court recognized that, “[i]t is sufficient for us to point out that it would be in closer accord with traditional notions of justice and fair play for a quasi-judicial administrative board to designate one person to act as it legal adviser and a different person to act as its prosecutor.”
       15. Relying on the authority of Cherry Communications, Inc. v. Deason, the court held that a litigant was not afforded procedural due process at a county quasi-judicial proceeding, because the county’s legal counsel acted as both an advocate and proferred legal advice during the hearing.  Brown v. Walton County, 667 So. 2d 376 (Fla. 1st DCA 1995).
       16. However, in City of Sunny Isles Beach v. Publix, 88 So.3d 224, 228 (Fla. 3d DCA, 2011), the court held that the city attorney, who acted as both advocate for the city and legal advisor to the city commission, did not violate the applicant’s due process rights, as “due process does not bar agencies from embracing dual roles in administrative proceedings.”
       17. In McAlpin v. Criminal Justice Standards and Training Commission, 120 So. 3d 1260 (Fla. 1st DCA 2013), the court found that the record indicated that the prosecution was given enhanced access to the decision-making body which undermined the commission’s function as an unbiased, critical reviewer of the facts.  However, the court did say that there “was nothing inherently inappropriate with consolidating the investigative, prosecutorial and adjudicative authority in a single entity or agency.”
   14. Types of Actions Determined to be quasi-judicial
       1. Lot specific rezonings (which have an impact on a limited number of persons or property owners). *Snyder*, 627 So. 2d at 474.
       2. Applicability of zoning codes. *City of Lakeland v. Florida Southern College*, 405 So. 2d 745 (Fla. 2d DCA 1981) (whether a proposed dormitory would be subject to ordinary residential height restrictions).
       3. Variance requests. *Fort Lauderdale Board of Adjustment v. Nash*, 425 So. 2d 578 (Fla. 4th DCA 1983); *Centex Homes Corp. v. Metropolitan Dade County*, 318 So. 2d 149 (Fla. 3d DCA 1975).
       4. Special exceptions. *Irvine v. Duval County Planning Comm'n*, 495 So. 2d 167 (Fla. 1986); *Tomeu v. Palm Beach County*, 430 So. 2d 601 (Fla. 4th DCA 1983).
       5. Preliminary development plans. *BML Investments v. City of Casselberry*, 476 So. 2d 713 (Fla. 5th DCA 1985), rev. den. 486 So. 2d 595 (Fla. 1986).
       6. Review of civil service decisions. *Bowen v. City of Hollywood*, 428 So. 2d 673 (Fla. 4th DCA 1983); *Annoll v. Pomerance*, 363 So. 2d 329 (Fla. 1978); *City of Miramar v. Giordano*, 423 So. 2d 1032 (Fla. 4th DCA 1982).
       7. Plat approvals. *Broward County v. Narco Realty, Inc*., 359 So. 2d 509 (Fla. 4th DCA 1978). *But see, Hernando County v. Leisure Hills, Inc*., 689 So. 2d 1104 (Fla. 5th DCA 1997).
       8. Revocation or failure to renew business licenses. *City of Tampa v. Islands Four, Inc*., 364 So. 2d 738 (Fla. 2d DCA 1978).
       9. Decision to uphold the granting of sign permits. *Sun Ray Homes, Inc. v. County of Dade*, 166 So. 2d 827 (Fla. 3d DCA 1964).
       10. Review of decision of housing board. *Reed v. City of Hollywood*, 483 So. 2d 759 (Fla. 4th DCA 1986).
       11. Site plans, building permits and other development orders. *Park of Commerce Associates v. City of Delray Beach*, 636 So. 2d 12 (Fla. 1994).
       12. Developer's challenge to a development order for being inconsistent with the comprehensive plan. *Parker v. Leon County*, 627 So. 2d 476 (Fla. 1993).
       13. Employment decisions. If a public employee holds the position at will, the decision to remove or suspend the employee is purely executive. If the removal or suspension of the employee is contingent upon the approval of an official or board after notice and hearing, the decision is quasi-judicial. *City of Kissimmee v. Grice*, 669 So. 2d 307 (Fla. 5th DCA 1996).
   15. Judicial versus quasi-judicial.
       1. The term “quasi-judicial” does not imply that a quasi-judicial board possesses judicial power.  Rather, “it is simply a characterization of the action itself – one that imposes certain obligations on the [quasi-judicial board] and that allows judicial review by way of certiorari proceedings in circuit court.”  Verizon Wireless Personal Communications, L.P. v. Sanctuary at Wulfert Point Community Association, Inc., 916 So. 2d 850, 855 (Fla. 2d DCA 2005).
       2. The legislature has the power to create administrative agencies with quasi-judicial powers, but the legislature cannot authorize those agencies to exercise powers that are fundamentally judicial in nature.  Broward County v. La Rosa, 505 So. 2d 422, 423 (Fla. 1987).  Although the boundary between judicial and quasi-judicial functions may often be unclear, a local government cannot empower a local administrative agency to award common law money damages for noneconomic injuries such as humiliation and embarrassment.  Id.
       3. In Metropolitan Dade County Fair Housing and Employment Appeals Bd. v. Sunrise Village Mobile Home Park, Inc., 511 So. 2d 962 (Fla. 1987), the court held that an ordinance authorizing administrative awards of common law damages for non-quantifiable injuries such as humiliation, embarrassment, and mental distress based on discrimination claims was unconstitutional.
       4. Quasi-judicial boards “do not have the power to ignore, invalidate or declare unenforceable the legislated criteria they utilize in making their quasi-judicial determinations.”  Miami-Date County v. Omnipoint Holdings, Inc., 863 So. 2d 375, 377 (Fla. 3d DCA 2003).
       5. A city or county commission may enact, amend, and repeal ordinances in its legislative function, but it is not empowered to rule on the validity of an existing ordinance.  Verizon Wireless, 916 So. 2d at 855.
       6. In Verdi v. Metropolitan Dade County, 684 So. 2d 870 (Fla. 3d DCA 1996), rev. den. 695 So. 2d 703 (Fla. 1996), the court stated that a hearing officer who merely determined whether past violations occurred and assessed civil penalties in the form of predetermined fines was acting in a quasi-judicial capacity. Cites Broward County v. LaRosa, 505 So. 2d 422 (Fla. 1987).
       7. In Michael D. Jones, P.A. v. Seminole County, 670 So. 2d 95 (Fla. 5th DCA 1996), rehearing denied, the court held that a code enforcement board did not have power to impose criminal penalties and thus did not constitute an illegal court, but was an authorized quasi-judicial body.  Court upheld fine against lawyer who failed to pay occupational license fee
   16. Executive versus quasi-judicial
       1. Executive acts characteristically apply to a limited number of persons (and often to only one person); executive acts typically arise from the ministerial or administrative activities of members of the executive branch.”  McKinney v. Pate, 20 F. 3d 1550, 1557, n. 9 (11th Cir. 1994).
       2. When an executive, such as the county manager, has been delegated the sole authority to make a decision, and makes said decision without conducting a hearing, then “there is nothing for the circuit court to review.”  Lee County v. Harsh, 44 So. 3d 239, 242 (Fla. 2d DCA 2010).
       3. A contract award is the exercise of an executive function, rather than a quasi-judicial act.  See MRO Software, Inc. v. Miami-Dade County, 895 So. 2d 1086 (Fla. 3d DCA 2004).
       4. A city official’s issuance of a building permit for the repair of an apartment building was an executive decision, not quasi-judicial.  City of St. Pete Beach v. Sowa, 4 So. 3d 1245 (Fla. 2d DCA 2009).
   17. Legislative versus quasi-judicial
       1. Generally speaking, legislative action results in the formulation of a general rule of policy, whereas judicial action results in the application of a general rule of policy.”  Snyder, 627 So. 2d at 474 (citations omitted; emphasis in text).
       2. Legislative acts “generally apply to larger segments of – if not all of – society; laws and broad-ranging executive regulations are the most common examples.”  McKinney v. Pate, 20 F. 3d 1550, 1557, n. 9 (11th Cir. 1994).
       3. Large scale rezonings are legislative.  Snyder, 627 So. 2d at 474 (“it is evident that comprehensive rezonings affecting a large portion of the public are legislative in nature”).
       4. Comprehensive plan amendments are legislative.  The Florida Supreme Court has “expressly conclude[d] that amendments to comprehensive land use plans are legislative decisions.  This conclusion is not affected by the fact that the amendments to comprehensive plans are being sought as part of a rezoning application in respect to one piece of property.”  Martin County v. Yusem, 690 So. 2d 1288, 1293 (Fla. 1997) (footnote omitted).
       5. Small scale comprehensive plan amendments are also legislative.  The Florida Supreme Court answered a certified question, finding that small scale development amendments to the comprehensive plan were legislative decisions.  Coastal Development of North Florida, Inc. v. City of Jacksonville Beach, 788 So. 2d 204 (Fla. 2001).  The Court concluded that the reasoning set forth in Yusem also applied to small scale development amendments, in part because (1) the original adoption of the comprehensive plan was a legislative act, thus it would follow that a proposed modification to the comprehensive plan was likewise a legislative act, and (2) the integrated review process by several levels of government indicated that the action was a policy decision.  788 So. 2d at 208.
7. Chapter 07: Ministerial Actions (by Mark Moriarty)
   1. Authority to issue writs of mandamus.
      1. The authority to issue writs of mandamus for circuit courts, district courts of appeal, and the supreme court is found in article V, sections 3, 4, and 5, Florida Constitution, respectively.
8. Chapter 08: Local Government as Code Enforcer (by Mark Moriarty)
   1. Types of Local Government Regulations.
      1. Land use and zoning: Described in more detail in section IX [Chapter 09] *infra.*
      2. Occupational Regulation.
         1. In Flores v. City of Miami, 681 So. 2d 803 (Fla. 3d DCA 1996), the court upheld regulatory scheme over street vendors which required the parties to pay fee for license, required the licenses to be issued by lottery, and required purchase of liability insurance. Number of vending carts in crowded public place could validly be limited and therefore, city could determine who received license by lottery
9. Chapter 09: Land Use and Zoning (by Mark Moriarty)
   1. **Comprehensive planning - Chapter 163, Part II, Florida Statutes.**
      1. Local Government Comprehensive Planning and Land Development Regulation Act, Sections 163.3161 to 163.3243, Florida Statutes.
         1. Purpose of Comprehensive Planning.
            1. It is the purpose of this act to utilize and strengthen the existing role, processes, and powers of local governments in the establishment and implemen­tation of comprehensive planning programs to guide and control future develop­ment.
            2. It is the intent of this act that no public or private development shall be permitted except in conformity with comprehensive plans, or elements or portion thereof, prepared and adopted in conformity with this act."
            3. Sections 163.316(2), (3), (5), Florida Statutes
10. Chapter 10: Local Government as party to a Contract / State Limitations (by Susan H. Churuti)
    1. State statutes that require a competitive procurement process by local governments include:
       1. § 101.293, Fla. Stat. (2013), Voting Machines and Equipment Purchases.
       2. §125.012, Fla. Stat. (2013), Transportation and Port Facilities, Concession Franchises – Counties defined in §125.011(1), Fla. Stat. (2013).
       3. §125.031, Fla. Stat. (2013), Lease or lease – Purchases of Property for Public Purpose – County.
       4. §125.3401, Fla. Stat. (2013), Purchase, Sale, or Privatization of Water, Sewer, or Wastewater Reuse Utility – County.
       5. §125.35, Fla. Stat. (2013), Property Sale or Lease -County.
       6. §125.355, Fla. Stat. (2013), Purchases of Real Property – Counties.
       7. §130.01-07, Fla. Stat. (2013), Bonds – County.
       8. §153.10, Fla. Stat. (2013), et seq., Water and Sewer System Construction Contracts – County.
          1. §155.12, Fla. Stat. (2013), Supply Purchased for Hospitals – Trustees.
       9. §157.03-157.07, Fla. Stat. (2013), Drainage Projects – County.
       10. §166.045, Fla. Stat. (2013), Purchases of real property - Cities that want public record exemption; otherwise bound by charter or ordinance.
           1. §180.24, Fla. Stat. (2013), Contracts for Construction – Cities; requires bids on municipal public works projects for construction contracts in excess of $25,000 and on materials or equipment purchases in excess of $10,000.
       11. §180.4221, Fla. Stat. (2013), Purchases from purchasing agreements of special districts, municipalities, or counties – permits procurement by special districts of commodities and contractual services from purchasing agreements of other local governments.
       12. §190.033, Fla. Stat. (2013), Community Development Districts – Bids required.
       13. §217.15-19, Fla. Stat. (2013), Federal Surplus Property Procurement – City and county, school board, city and county officers.
       14. §218.385, Fla. Stat. (2013), Sale of local government bonds.
       15. §218.391, Fla. Stat. (2013), Auditor selection procedures.
       16. §218.415, Fla. Stat. (2013), Bid requirements for local government investments.
       17. §255.20, Fla. Stat. (2013), Local bids and contracts for public construction works – Counties, cities and special districts; projects exceeding $300,000 or $75,000 for electrical work.
       18. §255.103, Fla. Stat. (2013), Authorizes public entities to procure construction management services under the same process outlined in section 287.055, Fla. Stat.
       19. §286.043, Fla. Stat. (2013), Airport Automobile Rental Concession – City, county, and other units of local government.
       20. §287.055, Fla. Stat. (2013), “Consultants Competitive Negotiation Act” – (City, county, or school district), regulates contracting with architects, professional engineers, landscape architects, registered land surveyors and design-builders. Each contract under CCNA with the above professional for professional services must contain a prohibition against contingent fees.
       21. §287.05712 (2013), “Public-Private Partnerships”.
       22. §287.0582, Fla. Stat. (2013), The following statement must be included in state contracts, “The State of Florida’s performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.”
       23. §287.092, Fla. Stat. (2013),  A foreign manufacture with over 200 employees in Florida shall have preference with any other foreign company when the price and other factors are the same.
       24. §287.093, Fla. Stat. (2013), Permits set asides of up to 10% or more of the total funds allocated for procurement of personal property and services for the purpose of entering into contracts with Minority Business Enterprises.
       25. §287.134, Fla. Stat. (2013), companies subject to disqualification from public contracting and purchasing for discrimination are kept on a list by the Florida DMS.
       26. §489.145, Fla. Stat. (2013), Guaranteed Energy, Water, and Wastewater Performance Savings Contracting Act – State, City, or political subdivision
       27. §705.103, Fla. Stat. (2013), Sale of Abandoned property procedure -City or county.
       28. §1013.45, Fla. Stat. (2013), Educational Facilities - contains requirements relating to bidding by local school boards.
    2. Other state statutes that relate to local government competitive procurement include:
       1. §50.011, Fla. Stat. (2013), et seq., Language of legal and official advertisements.
       2. §50.061, Fla. Stat. (2013), Chargeable amounts legal and official advertisements by size of counties.
       3. §119.011, Fla. Stat. (2013), definition of “agency” under public records law includes private corporations acting on behalf of public agencies; *see also*News and Sun Sentinel v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992).
       4. §218.70-218.80, Fla. Stat. (2013), Local Government Prompt Payment Act - purpose is to provide for prompt payments by local governmental entities, their institutions, and agencies.
       5. §218.80, Fla. Stat. (2013), Public Bid Disclosure Act - requires disclosure on bid documents if fees or permitting are required by the governmental entity; subset act of previously referenced act.
       6. §252.38(3), Fla. Stat. (2013), Emergency management powers of political subdivisions.
       7. §255.05, Fla. Stat. (2013), Bond of Contractor Constructing Public Buildings - County, City or other Public Authority.
       8. §283.32; 336.044, Fla. Stat. (2013), Statutes dealing with recycled products.
       9. §286.011, Fla. Stat. (2013), Sunshine Law -applicable to Bid Evaluation Committees, Leach-Wells v. City of Bradenton, 734 So.2d 1168 (Fla. 2d DCA 1999).
       10. §287.042, Fla. Stat. (2013), State Purchasing Contracts.
       11. §287.084, Fla. Stat. (2013), Commodities Purchases, Preference to Florida Businesses when home state or out-of-state vendor has local preference.
       12. §287.087, Fla. Stat. (2013), Preference to businesses with Drug Free Workplace Programs.
       13. §287.133, Fla. Stat. (2013), Public Entity Crimes, prohibits vendors/contractors placed on the state’s convicted vendor list from submitting bids/proposals and/or contracting with public entities.
       14. §336.41; 336.44, Fla. Stat. (2013), describes Invitations to Bid on county roadwork.
       15. §403.70605, Fla. Stat. (2013), Solid Waste collection Services in Competition with Private Companies
       16. Chapter 489, Fla. Stat. (2013) *generally*, Contracting - Construction, Electrical and Alarm Systems, and Septic Tanks.
       17. §627.727; 627.7275, Fla. Stat. (2013), Motor Vehicle Insurance and liability.
    3. State statutes that relate to expenditures of public funds include:
       1. §28.235, Fla. Stat. (2013), authorizes advanced payments by Clerk of Circuit Court pursuant to Chief Financial Officer’s rules or procedures.
       2. §129.07, Fla. Stat. (2013), prohibits county commissioners from expending or contracting for more than the amount budgeted in the fund and provides for personal liability for excess indebtedness.
       3. §129.08, Fla. Stat. (2013), prohibits county commissioners from incurring indebtedness or paying a claim not authorized by law. Mayes Printing Company vs. Flowers, 154 So.2d 859 (Fla. 1st DCA 1963).
       4. §166.241, Fla. Stat. (2013), establishes budget requirements for municipalities.
    4. Statute of Frauds.
       1. The Statute of Frauds operates as a defense to the enforcement of a contract. Specified agreements must be in writing or evidenced by some type of memorandum to be enforceable. See §672.201, Fla. Stat. (2012), (Florida’s version of the UCC); §§725.01-725.08, Fla. Stat. (2012), unenforceable contracts.
       2. The following are required to be evidenced by a writing: promises by executors or administrators to pay estates’ debts out of their own funds; promises to answer for debt/default of another (surety); promises made in consideration of marriage; promises creating an interest in land (however, interests for one year or less are generally not subject to Statute of Frauds); promises that cannot be performed within one year (year runs from date of agreement and not date of performance); agreements for the sale of goods for $500 or more-except for specially manufactured goods, written confirmation of an oral agreement, admissions in a pleading or court that contract existed, or partial payment or delivery was made and accepted; health care guarantees; debt barred by statute of limitations; newspaper subscriptions; home solicitation sales; home improvement contracts; and credit agreements.
          1. Statute of Frauds is satisfied if the writing contains the following: identity of parties sought to be charged, identification of contract’s subject matter, terms and conditions of agreement, recital of consideration, and signature of party to be charged.
          2. The Statute of Frauds is particularly relevant in relation to change orders and/or amendments in contracts. It is important to document any of these changes in writing in order to avoid litigation or disputes
    5. Federal Limitations.
       1. First Amendment.
          1. n O'Hare Truck Servs., Inc. v. City of Northlake, 10 Fla. L. Weekly Fed. S115 (July 5, 1996), the court extended protections enjoyed by governmental employees to service providers contracting with city when it held contractor could not be terminated from contract for failing to support mayor. 42 U.S.C. section 1983 action appropriate to enforce contractor's rights.
          2. In Wabawnsee County Kansas v. Urabehr, 10 Fla. L. Weekly Fed. S124 (July 5, 1996), the court held contractor entitled to First Amendment rights and trash hauling contract should not have been terminated for exercise of First Amend­ment rights for criticizing county.
       2. Antitrust Law.
          1. In Davis v. Washington County, 670 So. 2d 136 (Fla. 1st DCA 1996), the court held that comity's grant of exclusive franchise to collect trash to private entity did not violate either federal or state antitrust laws because (1) there was a clear and affirmatively expressed state policy to allow counties to contract with private entities to provide disposal service, and (2) contract and ordinances provided for active supervision by county.
    6. Franchise Agreements
       1. In Davis v. Washington County 670 So. 2d 136 (Fla. 1st DCA 1996), the court held that county's grant of exclusive franchise to collect trash to private entity did not violate either federal or state antitrust laws because (1) there was a clear and affirmatively expressed state policy to allow counties to contract with private entities to provide disposal service, and (2) contract and ordinances provided for active supervision by county.
       2. In Leonard v. Baylen Street Wharf Co., 59 Fla. 547, 52 So. 718 (1910), the court characterized a franchise as a special privilege conferred upon individuals or corpora­tions by the governmental authority to do something that cannot be done by common right.
       3. In City of Plant City v. Mayo, .337 So. 2d 966 (Fla. 1976), the court characterized a franchise as the relinquishment of a specific property right by a city and franchise fees as charges that are bargained for in exchange for specific property rights relinquished by the city.
    7. Interlocal Agreements
       1. See part I of ch. 163, Florida Statutes, the Florida Interlocal Corporation Act of 1969. Pursuant to this act, a “public agency” may exercise jointly with any other “public agency” of Florida, another state or of the United States, any power, privilege, or authority which such agencies share in common and which each might exercise separately. §163.01(4) Fla. Stat. (2013).
    8. Limitations on Liability; Sovereign Immunity
       1. Contracts – Sovereign Immunity
          1. In City of Miami v. Tarafa Constr., Inc., 696 So. 2d 1275 (Fla. 3d DCA 1997), the court held sovereign immunity pursuant to article X, § 13 of the Florida Constitution – and §768.28, Fla. Stat., barred plaintiff from recovering engineering costs incurred in bidding where there was no written contract for services. Cites to Pan American Tobacco Corp. v. Department of Corrections, 471 So. 2d 4 (Fla. 1984), and Southern Roadbuilders v. Lee County, 495 So. 2d 189 (Fla. 2nd DCA 1986).
          2. In Pan American, supra, the court held that where the state entered into a contract within the power it has been granted, a defense of sovereign immunity will not protect the state from actions arising from its breach of that contract. The holding was limited to express written contracts into which the state had authority to enter.
       2. xx In County of Brevard v. Morelli Engineering, Inc., 703 So. 2d 1049 (Fla. 1997), the court held that claim by contractor against county seeking damages for extra work done beyond items described in written contract barred by doctrine of sovereign immunity where extra work was outside terms of express contract and no written change orders had been issued authorizing extra work.
       3. 3.   The court differentiates Champagne Weber, Inc. v. City of Fort Lauderdale, 519 So. 2d 996 (Fla. 4th DCA 1988), which held governmental entity bound by implied covenant of written contract (e.g., good-faith dealing). Court stated, "Binding the sovereign to the implied covenants of an express contract is quite different from requiring a sovereign to pay for work not contemplated by that contract."
       4. A writ of prohibition is unavailable to seek review of a non-final order relating to the application of a sovereign immunity determination. Citizens Property Ins. Corp. v. San Perdido Ass’n, Inc., 104 So. 3d 344 (Fla. 2012).
    9. Limitations on contracting Authority
       1. Local governments are precluded by article VIII, section 10 of the Florida Constitution from expending public funds for a private purpose.  Jackson Shaw Co. v. Jacksonville Aviation Auth., 8 So. 3d 1076 (Fla. 2008).
       2. Local governments are likewise prohibited from granting a security interest in a governmental property contract because to do so would violate article VII, section 12 of the Florida Constitution. See A.G.O. 80-9, and Nohr v. Brevard County Educational Facilities Auth., 247 So. 2d 304 (Fla. 1971); Betz v. Jacksonville Transportation Authority, 227 So. 2d 769 (Fla. 1973).
       3. Limitations relating to creation of unfunded liabilities.
          1. A local government may not enter into a contract which creates a liability which cannot be quantified. To do so violates article VII. See e.g., §129.07, Fla. Stat. (2013).
       4. Parties entitled to contract.
          1. Only an officer, body or board who has authority to act on behalf of a local government may lawfully enter into a contract. A.G.O. 78-95 (1995) (citing Kirkland v. State, 97 So. 502, 508 (Fla. 1923).
    10. Authority
        1. In Florida, charter counties have authority to contract pursuant to article VIII (1)(g) of the Florida Constitution while non-charter counties look to article VIII (1)(f) and Florida Statute 125.01. Municipalities have such power under article VIII (2)(b) and Florida Statute 166.021.
11. Chapter 11: Public Sector Labor & Employment Law Issues (by David C. Miller)
    1. Introduction
       1. Florida public sector employers are subject to most of the same labor and employment law concerns that affect private sector employers. However, their status as state actors – governments – impose a range of issues and constraints that are all but absent from the private sector. The intent of this chapter is to provide a survey and a starting point for further research for a local government attorney who does not concentrate on labor and employment law but may be confronted with issues in that area. This material may not be construed or relied upon as legal advice for any specific situation. This chapter focuses primarily, but not exclusively, on potential sources of liability and litigation. Issues relating to compliance and human resources policies and practices are, for the most part, not directly addressed. Also not addressed are certain sub-specialty areas of or related to employment law, such as worker’s compensation and employment benefits. Aspects of Florida public sector pension law are included, though not the Florida Retirement System, which is controlled by the State. Labor and employment law is subject to rapid and sometimes unpredictable development, both from judicial interpretation and, especially, from legislative amendment. This chapter was written in early 2014 and any statement of law or interpretation should always be checked for currency.
    2. Employer Unfair Labor Practices
       1. Unfair labor practices is the term for conduct specifically prohibited by the statute and may be committed by either employers or unions.  They are set forth at Florida Statutes Section 501.  Public employers may not:  (a) interfere with, restrain, or coerce employees’ rights under the statute; (b) discriminate against employees based on union activities or association; (c) refuse to bargain or fail to bargain in good faith; (d) retaliate against an employee for filing an unfair labor practice charge or giving testimony; (e) dominate, interfere with, or assist in forming an employee organization; and (f) refuse to discuss grievances pursuant to the terms of a CBA.  Fla. Stat. § 447.501(1)(a)-(f).
       2. The unfair labor practice process, which is a proceeding under the Florida Administrative Procedures Act, commences with the filing of a charge that a violation has occurred.  The charge must be filed within six months of the alleged violation.  If the charge is technically sufficient and the bare allegations state a prima facie case of a violation, PERC will issue a notice of sufficiency.  A hearing officer will be appointed and a hearing scheduled.  At the hearing, the parties may present witnesses and evidence.  The parties may submit post-hearing briefs.  The hearing officer issues a recommended order, exceptions to which may be taken to the full Commission by any party.  PERC may adopt, modify, reverse, or remand the recommended order and issue a final order.  The final order is appealable to the district court of appeal.  Id.; Fla. Stat. § 447.503.
       3. Common employer unfair labor practice charges are those based on refusal to bargain, discrimination, and coercion (technically, all unfair labor practices implicate interference/coercion; however, there can be standalone coercion charges, as well).
       4. In order to establish a pure threat or coercion claim under Section 447.501(1)(a), the charging party must prove that the engagement in activity protected by the statute motivated the employer to make its threatening or coercive decision.  The charging party must show that she engaged in protected activity and that this activity was a substantial or motivating factor in the employer’s decision.  If this is shown, the employer may escape liability by proving that, notwithstanding the protected activity, it would have made the same decision.  Intent is an indispensable element.  *City of Coral Gables v. FOP*, 976 So. 2d 57 (Fla. 3d DCA 2008); *Pasco Sch. Bd. v. PERC*, 353 So. 2d 108 (1977).  The identical analysis applies to charges of violations of Section 447.501(1)(b), that is, discrimination charges.  *FOP v. City of Sanford*, 108 (2010).
       5. Only the union has standing to bring a refusal to bargain charge under Section 447.501(1)(c) because it is to the union that the duty of bargaining flows.  *E.g., Santa Rosa Sch. Dist.*, 18038 (1986).  There are various types of refusal to bargain charges, including unilateral change (changing a term or condition of employment without bargaining), bad faith bargaining, and refusal to provide information.  The analysis of the wide variety of allegations that may establish such a violation is fact-dependent.
       6. Remedies available include reinstatement, rescission, an order to engage in bargaining, posting a notice of violation, backpay, and, in an appropriate case, attorney’s fees.  Fla. Stat. § 503.  Attorney’s fees may be awarded to a prevailing charging party when it is shown that the respondent knew or should have known its conduct was in violation of the statute.  *E.g., Pensacola Junior Coll. Faculty Ass’n v. Bd. of Trustees*, 21268 (1990)
    3. Declaring and Resolving Impasses
       1. The statute sets out a comprehensive scheme for resolving impasses in bargaining.  Fla. Stat. § 447.301.  It is the clear public policy of Florida that bargaining impasses between public employers and labor organizations shall ultimately be resolved by the legislative body of the employer.  Mechanisms such as interest arbitration, in which a neutral third party has binding authority to resolve impasses and set terms and conditions of employment for public employees are unlawful.  *Broward County Board of County Comm’n’rs v. Port Everglades Fire Fighters Ass’n*, 28199 (1997).
       2. Under the statutory scheme, after a reasonable period of good-faith bargaining, one of the parties declares impasse and notifies PERC and the other party.  PERC will send a list of seven qualified special magistrates for the parties to choose from.  Within 20 days, the parties must return to PERC their rejection of up to three of the names and/or their rank-order preference.  PERC will designate one of the nominees from among those names not rejected by either party.  Within 10 days of the designation of the special magistrate, the parties must send the magistrate a list of items at impasse, copying the other party.  Only items that have been a topic of bargaining and on which there is no agreement may be items at impasse.  Only these items may eventually come before the legislative body for imposition.  *Local 173 v. Sarasota County* 29023 (1997).  However, the parties are not obligated to hold to their last negotiated positions, but may change their positions on the items at impasse.  Id.
       3. The special magistrate holds a hearing at which the parties present information and argument.  Usually the parties submit briefs after the hearing.  There are certain factors the magistrate must, by law, consider, and the parties address those in their evidence and argument.  They include comparison of the pay of the employees with that of employees doing similar work for other employers in the local area; comparison of the pay of the employees with that of employees doing similar work for other employers of similar size; the public interest; peculiarities of the jobs; and the availability of funds.  Fla. Stat. § 447.405.
       4. The special magistrate issues a recommendation for resolution of the impasse; it must be issued within fifteen days of the close of the hearing unless agreed otherwise by the parties.  The parties have twenty calendar days from receipt of the recommendation to reject it in whole or in part.  Any portion of a recommendation that is not specifically rejected is deemed accepted.  Rejection is accomplished by submitting a written notice to PERC with a copy served on the other party.  The notice must include a specific rejection and a reason for rejection for each portion that is rejected.  Any portion of the recommendation that is not effectively rejected by a party is accepted and may not come before the legislative body for consideration.  Within ten days of the rejection of any part of the recommendation, the chief executive of the public employer must convey in writing to the legislative body the special magistrate’s recommendation, the rejection, and the chief executive’s recommendation for resolution of the impasse.
       5. (The entire special magistrate process can be waived by agreement of both parties.  In such a case, the impasse goes immediately to the legislative body and the “insulated period,” explained below, begins immediately.)
       6. Immediately upon the rejection by either party of any portion of the magistrate’s recommendation, the “insulated period” begins.  From this time until the end of the imposition hearing(s), the legislative body must act as a neutral and no longer as a party with regard to the items at impasse.  During the insulated period, neither party may communicate ex parte with any member of the legislative body regarding the issues at impasse.  The legislative body’s failure to maintain its neutrality may result in a finding of bad faith bargaining and the setting aside of the body’s resolution of the impasse.  *Volusia County Fire Fighters v. Volusia County*, 211 (2009).
       7. The legislative body may schedule a hearing at any time following the twenty-day rejection period.  The hearing is subject to the Sunshine Law, but may be and usually is conducted according to special procedures declared by the public employer’s attorney.  The union and the chief executive of the employer are given the opportunity to make presentations to the legislative body.  The legislative body deliberates and decides on a resolution in public.  When the legislative body acts, the insulated period ends.  Within a reasonable time, the chief executive must reduce to contract form the legislative body’s action along with any matters that had previously been agreed between the parties.  That “tentative agreement” must be signed by the chief executive and the union bargaining representative and submitted to the bargaining unit and the legislative body for a ratification vote.
       8. If both bodies ratify the tentative agreement, it becomes the new collective bargaining agreement between the parties.  If either party fails to ratify the tentative agreement, then only those items that are a part of the resolution passed by the legislative body at the hearing are put into effect or “imposed,” and matters previously agreed between the parties in bargaining do not take effect.  Imposed items take effect retroactively to the date of the legislative body hearing.  Modifications imposed through this impasse process become the new “status quo” for the terms and conditions of employment for the affected employees and remain in place until they are changed through bargaining.  See, *e.g., CWA v. City of Gainesville*, 25226 (PERC 1994); *Sch. Bd. of Hernando County v. Hernando Classroom Teachers Ass’n*, 13178 (PERC 1982).  In other words, when terms and conditions of employment are changed through impasse and imposition, those changes are permanent until they are modified through later bargaining.
       9. Throughout this entire process, the parties are free to continue bargaining, even on the items at impasse.  In fact, the parties remain obligated to bargain if either party demands it.  If the parties reach preliminary agreement on some item formerly at impasse, even after the special magistrate recommendation has been issued, that item is removed from consideration by the legislative body and may not be imposed
    4. Arbitration of Contractual Grievances
       1. The law requires that the public employer and the union negotiate a grievance process including binding arbitration.  Fla. Stat. § 447.401.  All bargaining unit employees are entitled to access to a fair grievance procedure, which means that individual employees who are not union members may not be barred by the union from the procedure.  *Id.*  However, the union is not required to process grievances for non-members.  *Id.*  The public employer and the union may agree, however, that the union controls access to arbitration.  In such a case, the union may deny an individual employee access to arbitration on grounds the grievance lacks merit and the public employer may legally refuse to arbitrate.  If the grounds are non-membership in the union, the employee is entitled to arbitrate on his own.  *See, e.g., Broward County Sch. Bd.*, 7 FPER 12287 (1981).
       2. Even though the statute requires a grievance procedure ending in binding arbitration, it is permissible for the parties to agree to exclude topics from being grieved.  *Sindermann v. AFSCME*, 17 FPER 22011 (1990).
       3. The Florida Arbitration Act authorizes contractual arbitration agreements.  Fla. Stat. §§ 682.01, et seq.  The finality of arbitration awards is accorded great deference by the courts and may only be vacated on narrow statutory grounds, such as fraud, bias, or exceeding authority.  Fla. Stat. § 682.13.  *AFSCME v. State Dep’t of Corr.*, 23 So. 3d 748 (Fla. 1st DCA 2009).  The arbitrator’s authority is defined and limited by the contract.  *Snchurmacher Holding, Inc. v. Noriega*, 542 So. 2d 1327 (Fla. 1989) (arbitrator exceeds his power under Section 682.13(1)(c) by going beyond authority granted by the parties in their agreement).
       4. The statute prohibits the arbitrator from adding to, subtracting from, modifying, or altering the terms of the CBA.  Fla. Stat. 447.401.  Similarly, in *Detroit Coil Co. v. Int’l Ass’n of Machinists*, 594 F.2d 575 (6th Cir. 1979), the appeals court reversed a trial court’s refusal to vacate an arbitration award in which the arbitrator found the dispute to be arbitrable despite clear language in the contract that compelled the opposite holding.  The award went beyond a mere error of law or construction and effectively modified several provisions of the contract to create exceptions to contractual limitations on access to the arbitration remedy.  Id.  An award that is inconsistent with law exceeds the arbitrator’s authority*.  See AFSCME v. Florida Dep’t of Corrections*, 23 So. 3d 748 (Fla. 1st DCA 2009) (trial court vacated award in part because it was found inconsistent with law; appeals court reversed express finding that no law was violated, suggesting a recognition of inconsistency with law as valid grounds for vacatur).
    5. The Status Quo and the Obligation to Bargain
       1. A fundamental tenet of labor law is the obligation of the employer to bargain with the union over employees’ terms and conditions of employment:
       2. It is well established that an employer breaches its bargaining obligation and commits a per se violation of Section 447.501(1)(a) and (c), Florida Statutes if, in the absence of clear and unmistakable waiver by the bargaining agent, exigent circumstances requiring immediate action, or legislative body action after impasse, it unilaterally alters the status quo with respect to wages, hours, and other terms and conditions of employment.
       3. *IUPA v. Sheriff of Lee County*, 40; 172 (2013) (citing *Florida School for the Deaf and Blind Teachers United v. Florida School for the Deaf and the Blind*, 11; 16080 (1985), , 483 So. 2d 58 (Fla. 1st DCA 1986); *Florida Public Employees Council 79, AFSCME v. State of Florida*, 10; 15208 (1985), , 472 So. 2d 1184 (Fla. 1st DCA 1985); *Central Florida Professional Fire Fighters v. Board of County Commissioners of Orange County*, 14372 (1983), , 467 So. 2d 1023 (Fla. 5th DCA 1985); *Indian River County Education Association v. School Board of Indian River County*, 4262 (1978), , 373 So. 2d 412 (Fla. 4th DCA 1979); *Palowitch v. Orange County School Board*, 280 (1977), , 367 So. 2d 730 (Fla. 4th DCA 1979).  It is immaterial whether the changed term is contained in a CBA or whether it is an established past practice; terms and conditions of employment may not be changed without bargaining, absent an exception.  *Id.*
       4. “Status quo” is a labor law term of art referring to the employer’s duty to maintain unchanged the terms and conditions of employment of bargaining unit employees as defined by existing established practices and the terms of the expired CBA, if one exists.  *See ATU v. Hillsborough Area Regional Transit Auth.*, 175 (2013).  In order for a “past practice” to rise to the level that a change to it must be bargained, it must be (1) unequivocal, (2) accepted by all parties, (3) have existed unchanged for a substantial period of time, (4) be reasonably expected by employees to be continued unchanged.  *Sch. Maintenance Employees v. Duval County Sch. Bd.*, 25 FPER ¶ 30036 (1998); *Manatee Educ. Ass’n v. Manatee County Sch. Bd.*, FPER 12017 (1980); *see also CWA v. City of Gainesville*, 65 So. 3d 1070 (1st DCA 2011) (illustrating difficulty of negating the reasonable expectation of continuation of a practice).
       5. The duty to bargain is a duty of bargaining in good faith.  Good faith bargaining means the “parties are willing to meet at reasonable times and places to discuss issues which are proper subjects of bargaining with the intent of reaching a common accord and that they participate actively with an open mind and a sincere desire to resolve differences.”  Fla. Stat. § 447.203(17).  Whether a party has failed to bargain in good faith will be determined by the total conduct of the parties; good faith is a matter of intent and is inferred from the totality of the circumstances.  *IAFF v. Columbia County*, 331 (2012).  Nonetheless, neither party to bargaining may be compelled to reach a contract, agree to any particular proposal, or make a concession.  Fla. Stat. § 447.203(14); *Local 1998 v. Marion County*, 18000 (1986).
       6. The requirement that the parties agree on a grievance procedure ending in binding arbitration (see discussion of arbitration immediately below) and dues checkoff are exceptions.  Fla. Stat. §§ 447.303, -.401.  The statute entitles the union to have its “dues and uniform assessments” deducted from employee wages by the employer.  However, such deduction must be authorized by the employee and is revocable.  Employers are prohibited from collecting union fines, penalties, or special assessments from employees.  § 447.303.
       7. Meetings for collective bargaining between the parties are open meetings subject to the requirements of the Sunshine Law.  Fla. Stat. § 447.605; *Int’l Union of Painters & Allied Trades v. City of Cape Coral*, 33166 (2002).  However, the statute provides that meetings between the public employer’s chief executive and his representative and the legislative body relating to collective bargaining are closed and exempt from the Sunshine Law.  Moreover, all work product developed by the employer for bargaining is confidential and exempt from the public records laws.  Fla. Stat. § 447.605.  Violations of the confidentiality of information communicated during such an executive session, including documentary information, potentially violates Florida’s ethics laws and may lead to criminal liability.  See Op. Att’y Gen. of Fla. AGO 2003-09 (March 26, 2003).
       8. While the decision to change most terms and conditions of employment must be bargained to agreement or impasse, Florida law does reserve certain decisions to the discretion of the public employer.  Fla. Stat. § 447.209.  These include determining the purpose of its subsidiary agencies, the standard of services, control over its structure and organization, to subcontract work, and to lay off employees.  The parties may agree that management may retain other rights, as well.  However, the exercise of such rights may have an effect or impact on employees’ terms and conditions of employment.  In such a case, the employer is obligated to engage in impact bargaining, if the union requests it and articulates a “bargainable impact.”  Impact bargaining does not put the decision in question; it merely addresses the effects of the decision and how the parties may agree to deal with them.  Moreover, all that is required when a management prerogative is to be exercised is notice to the union and a meaningful opportunity to bargain the impact.  The decision may be implemented before bargaining reaches agreement or impasse.  FOP v. City of Miami, 330 (2012); *Jacksonville Supervisors Ass’n v. City of Jacksonville*, 31140 (2000).
       9. The decision to implement a management prerogative is an example of a subject of permissive bargaining.  Subjects for bargaining may be either mandatory – such as changes to terms and conditions of employment – or permissive – decisions about, for example, whether to have a police department or not or where to locate a new building.  It is a violation to refuse to bargain about a mandatory subject.  It is likewise a violation to condition reaching a CBA upon bargaining over a permissive subject – usually called “insistence to impasse” on such a subject.  E*.g., Dist. 2A, Transp., Tech., Warehouse, Indus., & Serv. Employees Union v. Canaveral Port Auth.*, 31221 (2000).
       10. The duty to bargain includes the duty to provide information relevant to bargaining and to the union’s representative functions, such as processing grievances.  *City of Greenacres v. PBA*, 31093 (2000); *Metropolitan Dade County v. IAFF*, 24024 (1992).
    6. Representation
       1. Labor Organization Registration, Certification
          1. No labor organization (union) may represent public employees in Florida without successfully registering with the Public Employees Relations Commission, which enforces public sector labor law.  Fla. Stat. § 447.305.  Becoming registered is not a heavy burden and primarily involves providing information regarding personnel, activities, and finances.  Registration must be renewed annually.  *Id.*
          2. Certification, in contrast to registration, is the recognition by PERC that a union is the bargaining representative for a particular bargaining unit of public employees (see discussion of “bargaining unit” immediately below).  Fla. Stat. § 447.307.  A union’s attempt to become certified usually, but not always, begins with petition to PERC describing the proposed unit and accompanied a showing of interest by at least 30 percent of the employees holding positions in the proposed bargaining unit.  *Id.*  The employer is given the opportunity to challenge the composition of the proposed bargaining unit in a hearing.  PERC will determine the sufficiency of the petition and an appropriate bargaining unit and order a secret ballot election.  *Id.*; The choices on the ballot will be “union” or “no union.”  If 50 percent plus 1 of those eligible and voting vote to be represented, then the union is certified by PERC as the exclusive bargaining representative.  *Id.*  Alternatively, the public employer may choose to recognize the union voluntarily, whereupon PERC will merely determine the appropriateness of the unit and issue a certification.  *Id.*
          3. A union’s majority status and certification (or right to represent the unit) may not be challenged for twelve months following the certification date.  Id.  It also may not be challenged during the pendency of a CBA, except for a window from 150 to 90 days prior to the expiration of the CBA or any extension of it.  *Id.*  The certification and contract “bars” come into play if unit employees wish to decertify the union or if a rival union wishes to displace the incumbent.  *E.g. Palm Beach County PBA v. SEIU*, 21272 (1990) (contract bar); *Christian v. Professional Fire Fighters of Spring Hill*, 18229 (1987) (certification bar).  The public employer has a duty of neutrality as between the unions during such a competition to represent its employees.  *See, e.g., Broward County Sheriff’s Dep’t*, 13314 (1982).  A petition to decertify a union may not be initiated by the employer and the employer must remain strictly neutral and not be involved with a decertification effort.  *E.g., City of Titusville*, 15132 (1984).
       2. The Distinction Between “Union” and “Bargaining Unit”
          1. A union is a labor organization.  A bargaining unit is one or a group of employment positions that are represented by a labor organization.  Because Florida is a right to work state and the Constitution guarantees employees the right not to join or pay dues to a union, there is a distinct and important difference between the terms “union member” and “unit member.”  A union member belongs to the private labor organization entity and is subject to its bylaws and internal actions.  A unit member need not be a member of the union and merely holds a job which is represented in bargaining by a union.  Regardless of the union membership or not of an employee or employees, a union certified as a bargaining representative must represent all bargaining unit members fairly.  *Seminole County Non-Instructional Personnel*, 21250 (1990).
          2. PERC has the responsibility to determine the appropriateness of proposed bargaining units.  Fla. Stat. § 447.307.  There are several statutorily mandated factors that PERC must consider, including the effect of the unit on the efficiency of government operations, the compatibility of the unit with the responsibility to represent the public, the organization of the employer, and the degree of community of interest among the employees. *Id.*  No unit mixing professional and nonprofessional employees may be approved unless a majority of both groups so votes.  *Id.*  Neither managerial nor “confidential” employees may be placed in a bargaining unit because they are excluded from the definition of “public employee” for this purpose.  Fla. Stat. § 447.203.  Confidential employees are those non-managerial employees who closely assist managers.  *Id.*
    7. The Right to Work, Right of Collective Bargaining, Impairment of Contract; Strikes
       1. Article I Section 6 of the Florida Constitution guarantees the right to work and the right of collective bargaining.  Employees in Florida may choose to join a union, but they cannot be forced to do so.  Fla. Const. art. I § 6; *see, e.g., Hillsborough County Govt’l Employees Ass’n v. Hillsborough Aviation Auth*., 522 So. 2d 358 (Fla. 1988).  The Florida Supreme Court has stated that the collective bargaining rights of public employees are the same as those in the private sector, except for the right to strike and subject to the Legislature’s budgetary powers.  *City of Tallahassee v. PERC*, 410 So. 2d 487 (Fla. 1981).  However, the Court has also extensively explained that there are qualitative differences between the rights of private sector employees and those of employees who choose to serve the public.  “[We have] recognized that the collective bargaining process for public employees involves many special considerations, that it is not the same as the private sector ... .”  *City of Tallahassee, supra.*
       2. The purpose of Florida’s public sector labor laws is equally to promote labor peace and to assure the orderly operation of government.  Fla. Stat. § 447.201.  The end result of collective bargaining usually is a collective bargaining agreement or CBA – a contract between the union and the public employer.  Thus, unions see the constitutional limit on impairment of contract as going hand in hand with the right of collective bargaining.  *See* Fla. Const. art. I § 10.  Nonetheless, governments may abrogate their own contracts in limited circumstances.  A government may alter its own contract if doing so is reasonable and necessary to serve a compelling state interest.  *Pomponio v. Claridge of Pompano*, 378 So. 2d 770, 778-80 (Fla. 1980) (citing U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977)); see also Chiles v. United Faculty of Florida, 615 So. 2d 671 (Fla. 1993) (no abrogation of CBA unless there is no reasonable alternative); *but see City of Miami v. FOP*, 571 So. 2d 1309 (Fla. 3d DCA 1989) (no need to apply strict scrutiny to City’s refusal to bargain over forced drug testing).
       3. Public employee strikes are illegal.  Fla. Stat. § 447.505.  Strikes may be enjoined by the court and violation of such an injunction shall result in immediate contempt proceedings.  Fla. Stat. § 447.507.  The union may be fined up to $5,000.  Union agents may be fined up to $100 a day.  The union may be liable for any damages suffered by the public employer and dues and other union income may be garnished.  Id.  Employees may have their employment terminated by the court and some violations may disbar individuals from future public employment, on certain conditions.  Id.  The matter may be brought before PERC, which may fine the union up to $20,000 per day of the strike or the amount of damage to the public employer per day, regardless of whether that exceeds $20,000 per day.  If the union is determined to have violated Section 447.505, it will be decertified and not permitted to be certified for one year after the date of the final payment required of it.  *Id.*
    8. Judicial Review of Actions by Local Administrative Boards
       1. Local administrative bodies, such as personnel boards and pension boards, are not subject to the Florida Administrative Procedures Act.  Judicial review of these bodies’ decisions is by writ of certiorari to the appellate division of the circuit court, unless otherwise provided by general law.  Fla. Const. Art. V § 5(b); Fla. R. App. P. 9.030(1)(C); *State v. Hanna*, 901 So. 2d 201 (Fla. 5th DCA 2005).  Certiorari review of administrative action is restricted to quasi-judicial actions. *Modlin v. City of Miami Beach*, 201 So. 2d 70 (Fla. 1967) (“[C]ommon law certiorari is appropriate to the review of judicial or quasi-judicial action, but not of legislative or executive (or administrative) action.”).  Whether a decision is quasi-judicial depends on whether notice and a hearing are required and whether the decision of the agency is contingent on the showing made at the hearing. *Hanna*, 901 So. 2d at 209 (citing *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957)).  Executive action, by contrast, is not subject to such judicial review. Board of Public Instruction of *Dade County v. McQuiston*, 233 So. 2d 168 (Fla. 3d DCA 1970).  Even where hearings are afforded to employees who are nonetheless at-will, the simple provision of the hearing does not transform executive action into quasi-judicial action. *Vazquez v. Housing Authority of City of Homestead*, 774 So. 2d 813 (Fla. 3d DCA 2000).
       2. Judicial review of local administrative action in the circuit court is “first tier certiorari review.”  The scope of review is limited to whether procedural due process of law was afforded, whether the essential requirements of law were observed, and whether the findings were supported by competent, substantial evidence.  *City of Deerfield Beach v. Valliant*, 419 So. 2d 624 (Fla. 1982).  Second-tier certiorari review by the district court will encompass only whether procedural due process was accorded and whether the correct law was applied. Id.  Judicial review of administrative decisions in the first instance is “of right,” as opposed to discretionary. *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1998).
       3. As noted above regarding local civil rights boards, administrative boards may not award non-quantifiable damages, such as those based on pain and suffering. LIUNA v. Burroughs, 541 So. 2d 1160 (Fla. 4th DCA 1989); *City of Miami v. Wellman*, 976 So. 2d 22 (Fla. 3d DCA 2008).
    9. Concerns Arising Under the Common Law of Employment / Negligent Hiring, Supervision, and Retention.
       1. Florida recognizes causes of action for negligent hiring, supervision, or retention.  *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002).  These torts are often alleged together with claims of sexual or other hostile environment or in the aftermath of workplace violence.  This is because these torts allow for recovery against the employer for actions of an employee outside the scope and course of the employee’s duties.  Thus, vicarious liability is not in play.  The tort arises from the employer’s own negligence.  *See Garcia v. Duffy*, 492 So. 2d 435 (Fla. 2d DCA 1986).
       2. The prima facie elements are: (1) the employer was required to make an adequate investigation (or to adequately supervise) and did not do so; (2) such an investigation (or supervision) would have revealed the unsuitability of the employee; and (3) it was unreasonable for the employer to have hired or retained the employee in light of the information it knew or should have known.  Id.  In order to impose liability, there must exist some duty on the part of the employer toward the injured party.  The common rule is stated as “a legal duty, arising out of the relationship between the employment in question and the particular plaintiff, owed to a plaintiff who is within the zone of foreseeable risks created by the employment.”  *Id.*  The standard of care required to be breached will vary with the particular circumstances, including the degree of risk and the burdensomeness of the investigation.  *Id.*
    10. Concerns Arising Under the Common Law of Employment / Respondeat Superior
        1. *Respondeat superior*, or vicarious liability, is the common law doctrine whereby an employer may be held liable for the acts of the employee.  *E.g., Iglesia Crsitiana La Casa Del Senor v. L.M.*, 783 So. 2d 353 (Fla. 3d DCA 2001). The employer may not be held liable unless the acts were within the scope and course of duties of the employee and done to further a purpose of the employer. Id. “An employee's conduct is within the scope of his employment, where (1) the conduct is of the kind he was employed to perform, (2) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed, and (3) the conduct is activated at least in part by a purpose to serve the master.” *Id.* Vicarious liability underlies much of the theory of liability of employers for the wrongful acts of their employees in violation of civil rights statutes and others.
    11. Sovereign Immunity in Tort Actions
        1. Florida Statutes Section 768.28 effects a limited waiver of sovereign immunity as to the State and its political subdivisions for suits for money damages for negligent or intentional actions of employees acting within the scope of their duties resulting in property damage or personal injury or death. Damages per claim are limited to $200,000 and per occurrence to a total of $300,000. Generally, notice in writing of a claim must be made within three years of the event giving rise thereto. Notice is a condition precedent to filing suit. Individual liability of public employees is precluded except in cases of actions in bad faith, with malice, or wanton or willful disregard of human rights. The public employer may not be held liable for acts of employees outside the scope of their authority.
    12. At-Will Employment
        1. The doctrine of at-will employment means that an employee may be discharged (or suffer an adverse employment action short of discharge) for any reason besides an illegal reason, such as discrimination. E.g., Davidson v. Iona-McGregor Fire Protection Dist., 674 So. 2d 858 (Fla. 2d 1996). In Florida, there is no independent common law tort cause of action for “wrongful termination” from employment based, for example, on the court’s perception of some non-statutory “public policy.” E.g., Lurton v. Muldon Motor Co., 523 So. 2d 706 (Fla. 1st DCA 1988). Thus, limitations on at-will employment must arise from contract or positive law, such as the Florida Civil Rights Act or the various federal civil rights and other laws. See Patwary v. Evana Petroleum Corp., 18 So. 3d 1237 (Fla. 2d DCA 2009); Walton v. Health Care Dist. of Palm Beach County, 862 So. 2d 852 (Fla. 4th DCA 2003); Otis Elevator v. Scott, 551 So. 2d 489 (Fla. 4th DCA 1989).
    13. Florida Statutes Chapters 175 and 185
        1. Florida Statutes Chapters 175 and 185 establish substantially similar programs in which local governments may voluntarily participate. These programs distribute revenues from certain insurance premium taxes to local governments for the purpose of funding retirement benefits for firefighters or police, respectively. Participating local governments are bound to adhere to certain minimum standards and benefits for fire and police plan members. Failure to meet those minimums can result in the funds being withheld. Both chapters establish a private right of action. These chapters have been a focus of legislative interest and amendments in recent years, particularly in light of widespread difficulties in funding local government pensions in the years following the economic recession beginning in the late 2000s.
    14. Amending Pension Plans
        1. Procedure
           1. Public sector pension plans usually, though not always, are set forth as a part of the local government’s code of ordinances.  Some local government pension plans remain in their charters or in their related special acts, which can create certain Home Rule issues (see next topic).  Changing the plan means passing an amending ordinance and is subject to all the procedural and other requirements attendant on any such action.  Florida Statutes Section 112.63 additionally requires that a proposed amendment be submitted to the State Division of Retirement for review.  The submission must be accompanied by a statement of actuarial impact that indicates whether the amendment maintains the plan in an actuarially sound condition.  If these requirements are not met or if the Division determines that the plan is out of compliance with law, the Division will seek to have the local government come into compliance.  If this is unsuccessful, state funds may be withheld from the local government.  Fla. Stat. § 112.63.
        2. Municipal Home Rule Issues
           1. A conflict between the Municipal Home Rule Act and constitutional collective bargaining rights can arise when a local government pension plan is embodied in a charter or related special act and pension changes are collectively bargained with an employee union.  Florida Statutes Section 166.021(4) provides that no changes may be made to a charter or special act provision affecting “any rights of municipal employees” without approval by the electorate in a referendum.  However, collectively bargained terms and conditions of employment may not constitutionally be subjected to the potential veto of a third party.  *See Hillsborough County Governmental Employees Ass’n v. Hillsborough County Aviation Auth*., 522 So. 2d 358 (Fla. 1988).  Any local referendum requirement would raise the same issue, as would, potentially, the not-infrequent requirement of approval votes by plan participants of plan amendments.  The court *in City of Miami Beach v. Bd. of Trustees of City Pension Fund for Firefighters & Police Officers*, 91 So. 3d 237 (2012), held that Section 166.021(4) was unconstitutional as applied in such a situation.
        3. Vested Rights and Impairment of Contract
           1. A member of a public sector pension plan gains a contractual right to benefits under the plan.  *Florida Sheriff’s Ass’n v. Div. of Retirement*, 408 So. 2d 1033 (Fla. 1981).  That contract right is to the benefits of the plan as they exist at the time the member “reaches retirement status.”  *Id.*  Until that time, the employee’s benefits may be altered prospectively.  *Id.*; *see also City of Jacksonville Beach, State ex rel. Stringer v. Lee*, 147 Fla. 37, 2 So. 2d 127 (1941).  *In Scott v. Williams*, 107 So. 3d 379 (Fla. 2013), the Supreme Court held that the Legislature’s amendment of the Florida Retirement System to prospectively require a 3 percent contribution from current participants did not violate any contract right of those employees.  This holding was reached despite the existence in the FRS of a “preservation of rights” provision that declared members’ rights in the system to be contractual and vested.  The Court reasoned that to hold otherwise would be to forever bind future legislatures from prospectively altering benefits.  The Court did clarify that prospectively altering benefits for current members meant altering them as to service credit to be earned in the future, but preserving them as to service credit already earned.  The Court further held that the change did not constitute an unconstitutional taking and did not facially violate the constitutional right to collective bargaining. *Id.*
        4. Litigation
           1. Pension Boards, although established by the plan sponsor – the public employer – are independent legal entities that can sue and be sued.  Fla. Stat. § 112.66.  In addition to common law causes of action, including breach of fiduciary duty, members and beneficiaries have an express private right of action to enforce rights under the plan or clarify rights to future benefits.  Id.  Members or beneficiaries have at times successfully brought suits for benefits based on estoppel.  Such a suit typically arises when a member is erroneously told his benefit will be a certain amount or accrue at a certain time, he detrimentally relies, and then receives a smaller benefit or is otherwise injured.  E*.g., Branca v. City of Miramar*, 534 So. 2d 604 (Fla. 1994); *Kuge v. State Dep’t of Admin*., 449 So. 2d 389 (Fla. 3d DCA 1984).  While such suits will usually properly be brought against the plan’s board, the plan’s sponsor may successfully intervene on the basis it is a real party in interest or otherwise has a protectable interest by virtue of its responsibility to fund the plan.
    15. Fiduciary Duty
        1. The plan is required to have one or more named fiduciaries.  Fla. Stat. § 112.656.  A fiduciary owes his or her duties solely to the plan participants and beneficiaries and in the interest of defraying the reasonable expenses of administering the plan.  *Id.*  An accountant, actuary, attorney, administrator and any trustee, officer or custodian who is employed full-time by the plan is a fiduciary.  Id.  Plan fiduciaries may be subject to suit in cases where it is alleged their action or omission to act in consonance with their duty and standard of care injured a participant or beneficiary.  *See, e.g., Bd. of Trustees of Jacksonville Police & Fire Pension Fund v. Kicklighter*, 106 So. 3d 8 (Fla. 1st DCA 2013).
        2. Plan sponsors, i.e., the local government employer, generally are not fiduciaries of the plan or its participants.  *See, e.g., Matthews v. Chicago Transit Auth*., 20 N.E. 3d 1255, Case No. 1-12-3348 (Ill. App. Feb. 7, 2014) (not release for publication, subject to withdrawal) (citing *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999)); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright . Schoonejongen*, 514 U.S. 73 (1995); *Walling v. Brady*, 125 F.3d 114 (3d Cir. 1997)); *but see Bennett v. Indiana Life & Health Ins. Guar. Ass’n*, 688 N.E.2d 171 (Ind. App. 1997).  The plan sponsor may assume fiduciary duties, however, if it takes on fiduciary functions, such as administering the plan, or is named as a fiduciary in the plan document.  *Id.*; *see also Cathey v. Metropolitan Life Ins. Co.*, 764 S.W.2d 286 (Tex. App. 1988).
        3. No provision in a plan purporting to relieve a fiduciary of its duties is valid. Fla. Stat. § 112.66.
    16. Actuarial Soundness
        1. The Florida Constitution requires that public sector retirement plans be maintained on an actuarially sound basis such that, generally speaking, benefits earned today are funded by today’s taxpayers. Fla. Const. art. X, § 14; Fla. Stat. § 112.61. If retirement benefits are to be funded by “actuarial experience,” that is, funds resulting from the gains of the retirement system from contributions, investments, and other sources of funds, then the entire net actuarial experience must be used and not merely one aspect. Fla. Stat. § 112.61. Thus, a benefit increase may not be predicated on the occurrence of some level of investment return alone, but must take into account all gains and losses, from whatever source.
    17. Selected Florida Public Sector Pension Law Issues
        1. Florida non-FRS local government pension plans are governed, in part, by the Florida Protection of Public Employee Retirement Benefits Act, found at Florida Statutes Chapter 112, Part VII. Governmental retirement plans are, for the most part, exempt from the provisions of ERISA, a federal law governing private sector retirement and welfare plans.
    18. Florida Statutes Section 112.044
        1. Statutory Sources of Employment Liability
           1. Florida Statutes Section 112.044 prohibits age discrimination in employment by public employers and provides for a private right of action.
    19. Police, Firefighter, Correctional Officer “Bills of Rights”; Garrity Warnings
        1. Statutory Sources of Employment Liability
           1. Police, Firefighter, Correctional Officer “Bills of Rights”; Garrity Warnings
              1. The Police Officers Bill of Rights provides protections for law enforcement officers who are under investigation by their own agencies.  Fla. Stat. §§ 112.531, et seq.  These include prohibiting abusive interrogations, the right to review the charges and evidence, to have a representative present, and the making of a record, among others.  The act provides for complaint review boards to hear complaints that an investigation is or has been conducted in a way inconsistent with the act.  Advance notice to the officer is required for any adverse personnel action, which notice must include the reasons for the action.  Fla. Stat. § 112.532.
              2. All law enforcement agencies are required to have systems for receiving and processing complaints against officers.  Fla. Stat. § 112.533.  An officer under investigation who believes the act is being violated must so advise the investigator.  Fla. Stat. § 112.534.  Within three working days, there must be filed a written notice alleging the violation with sufficient information to identify the particular alleged violation.  A complaint review board is thereupon convened and, after reviewing the facts, determine whether any violation occurred.  The review board may, if it finds a violation, require the removal from the investigation of the offending investigator.  Id.  The act does not provide for any other remedies.  A prior version of the act included the ability to obtain an injunction, but that remedy was legislatively eliminated.
              3. Discipline may not be taken against a law enforcement officer unless the investigation of the allegation against him is completed and notice given to the officer of intent to discipline within 180 days.  The running of the 180 days is tolled by written waiver by the officer, by the pendency of a related criminal investigation or prosecution, by incapacity of the officer, or by other exceptional circumstances.
              4. The Police Officer’s Bill of Rights (and, by analogy, the Firefighter statute) does not create a property interest in continued employment.  Kelly v. Gill, 544 So. 2d 1162 (Fla. 5th DCA 1989).
              5. The Firefighters Bill of Rights provides protections similar to, but not as expansive as, those accorded law enforcement officers.  Fla. Stat. §§ 112.80, et seq.  However, the act retains the ability of the firefighter to obtain an injunction that was stripped from the law enforcement act.  Fla. Stat. § 112.83.
              6. Questions regarding the ability of public employers to force employees to answer questions in internal investigations often arise in the context of police internal affairs investigations.  Police officers giving statements in such investigations are routinely read what are referred to as “Garrity warnings.”  The underlying legal doctrine does not apply only to police, but to all public employees.  A public employee may be required to answer questions in an internal investigation by the employer on pain of adverse employment action without violating the employee’s due process rights or rights against self-incrimination if he is given use immunity for any statement he may make.  That is, if the employee is compelled to speak, his statements and the fruits thereof may not be used in subsequent criminal proceedings.  See Garrity v. State of New Jersey, 385 U.S. 493 (1967).
    20. Statutory Sources of Employment Liability
        * 1. Jury Duty, Direct Deposit, Criminal History
             1. Florida Statutes Section 40.271 prohibits dismissal from employment based on jury duty by the employee.  Dismissal or its threat may be deemed contempt of court.  This section creates a private cause of action with remedies including compensatory damages, punitive damages, and attorney’s fees and costs.  Fla. Stat. § 40.271.  The section does not apply to jury duty in the federal courts (which is covered by 28 U.S.C. § 1875).  *Chase v. Walgreen Co.*, 750 So. 2d 93 (Fla. 5th DCA 1999).  The section also is limited by its terms to discharge.  Id.
             2. Florida Statutes Section 532.04 prohibits the discharge of a public employee because she refuses to authorize payment of wages by direct deposit.
             3. Florida Statutes Section 112.011 prohibits disqualification from public employment solely based on a prior conviction for crime, with some exceptions – in particular if the crime was serious and directly related to the nature of the employment sought
          2. Worker’s Compensation Retaliation
             1. Florida Statutes Section 440.205 prohibits adverse employment action or intimidation against an employee for filing a valid worker’s compensation claim or an attempt to do so. The statute creates a private cause of action. *Smith v. Piezo Tech. & Prof. Administrators*, 427 So. 2d 182 (Fla. 1983). An employee alleging worker’s compensation retaliation must allege and prove that she engaged in the protected activity, that an adverse employment action occurred, and that the two were causally connected*. Ortega v. Eng’g Sys. Tech.*, 30 So. 3d 525 (Fla. 3d DCA 2010). The protected activity need not be the sole cause. *Allan v. SWF Gulf Coast, Inc.*, 535 So. 2d 638 (Fla. 1st DCA 1988). The claim is analyzed under the Title VII analytical model discussed in Part II.A.1., above. *See Ortega, supra.*
             2. The Supreme Court has held that the cause of action constitutes an intentional tort and, therefore, the traditional tort remedies are available, including emotional distress damages. Scott v. Otis Elevator Co., 572 So. 2d 902 (Fla. 1990).
          3. Florida Public Sector Whistleblower’s Act
             1. The Public Sector Whistleblower’s Act prohibits retaliation against an employee who makes certain types of disclosures.  Fla. Stat. § 112.3187.  The disclosure must be made to an appropriate agency and it must concern violations of law, actions that create a substantial and specific danger to the public health, safety, or welfare, or improper use of office, waste of funds, malfeasance, misfeasance, or abuse or gross neglect of public duty.  Id.  An appropriate agency is a government entity with the authority to investigate or remedy the complained-of action.  However, in the case of a local government, the disclosure must be made to the local government’s chief executive officer or other appropriate local official.  *Id.*  The disclosure must be undertaken on the employee’s own initiative in a written and signed complaint.  Id.  Also protected are employees who are requested to participate in an agency investigation, who refuse to participate in adverse action prohibited under the act, and certain others.  *Id.*
             2. The employee may bring a complaint to the State Inspector General, the Governor’ Office, or the Florida Commission on Human Relations within 60 days of the adverse action.  Fla. Stat. § 112. 31895.  The FCHR is charged with investigating all complaints and issuing findings within 90 days.  The FCHR is charged with various reporting obligations and remedial powers depending on the nature of the violation alleged and whether reasonable cause to believe the law was violated is found.  Id.  Upon termination of the FCHR’s investigation, the complainant may, within 180 days, pursue the administrative remedy under Section 112.3189 or file a lawsuit.  Fla. Stat. § 112.3187.  If the local government has established by ordinance an administrative procedure for the purpose of handling complaints under the act, the employee may bring his complaint to that body, within 60 days of the complained-of action and sue within 180 days of that body’s final decision.  *Id.*  Available remedies include reinstatement, back pay and other actual damages, injunction, and attorney’s fees and costs.  *Id.*
             3. An employee who himself participates in the wrongful act of which he complains, and was subject to the adverse action because of that participation, is not protected by the act.  *Martin County v. Edenfield*, 609 So. 2d 27 (Fla. 1992).  The nature of the agency to whom information is disclosed need only be one with authority to investigate or remedy the act and need not be solely one with particular jurisdiction over the narrow nature of the subject matter.  *Hutchison v. Prudential Ins. Co.*, 645 So. 2d 1047 (Fla. 4th DCA 1994).  Thus, in that case, a complaint to the Sheriff’s Office was sufficient, even though the defendant claimed the Department of Insurance had authority over the subject matter.  *Id.* The act does not provide for individual liability of public employees or officials.  *De Armas v. Ross*, 680 So. 2d 1130 (Fla. 3d DCA 1996).  Whether the employee has met the disclosure requirements is a mixed question of law and fact that should be submitted to the jury.  *Guess v. City of Miramar*, 889 So. 2d 840 (Fla. 4th DCA 2004).
          4. Fair Credit Reporting Act
             1. The Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., prohibits employment action, such as hiring, based on “consumer reports” without disclosure and authorization.  A consumer report is a written communication regarding, among other things, a consumer’s personal background from a “consumer reporting agency” intended to be used, again among other things, for employment purposes.  15 U.S.C. § 1681a.  A consumer reporting agency is an entity in the business of providing such reports.  Id.  An “investigative consumer report” is a consumer report that includes information gathered from personal interviews.  *Id.*
             2. A consumer report may be used for employment purposes with certain conditions.  15 U.S.C. § 1681b.  The employer must certify to the agency that it will comply with the provisions of the act and will not use the report for an illegal purpose.  The employer must disclose to the consumer, i.e., the applicant or employee, before obtaining the report that a report may be obtained.  This disclosure must be made in writing and in a document that contains only the disclosure.  The consumer must authorize the employer in writing to obtain the report.  Id.  Adverse employment action may not be taken based on a consumer report until the consumer has been notified in writing by the employer of the proposed action and has provided to the consumer the report and a notice of the consumer’s rights.  *Id.*  An employer may not procure an investigative consumer report without first disclosing to the consumer that it will do so and advising the consumer that the report is to be obtained and may include information on the consumer’s personal life.  15 U.S.C. § 1681d.  The consumer must also be given a written explanation of her rights to additional disclosures.  The consumer must consent in writing, as above.  Upon request, the consumer must be given a complete and accurate disclosure of the nature and scope of the inquiries to be made pursuant to the investigative consumer report.  *Id.*
             3. An entity that violates the act may be sued by the consumer.  15 U.S.C. § 1581n.  Remedies include money damages and attorney’s fees and costs.  *Id.*
          5. Miscellaneous Florida Employment Laws
             1. Florida Statutes Section 218.077 prohibits the State’s political subdivisions from establishing a minimum wage except for their own employees, the employees of their own contractors, or in certain other exceptional circumstances.
             2. Florida Statutes Section 448.01 establishes a ten-hour day unless varied by contract and entitles employees to extra pay for hours worked in excess of ten hours unless varied by contract.
             3. Florida Statutes Section 448.075 prohibits discrimination in employment based on sickle-cell trait and Section 448.076 prohibits mandatory screening for the trait as a condition of employment.
             4. Florida Statutes Section 448.08 enables attorney’s fees and costs to be granted the prevailing party in an action for unpaid wages.  “Wages” for purposes of this statute means compensation paid to employees and not to contractors.  *Goodwin v. Blu Murray Ins. Agy.*, Inc.,939 So. 2d 1098 (Fla. 5th DCA 2006).  The action must be brought to recover back wages and not, for example, merely an administrative appeal for reinstatement.  *Dade County v. Pena*, 664 So. 2d 959 (Fla. 1995); b*ut see Metropolitan Dade County v. Sokolowski*, 439 So. 2d 932 (1983).  All compensation for services rendered are “wages” for purposes of this statute.  *Ocean Club Community Ass’n v. Curtis*, 935 So. 2d 513 (Fla. 3d DCA 2006); *Gulf Solar, Inc. v. Westfall*,447 So. 2d 363 (Fla. 2d DCA  1984).
             5. Florida Statutes Section 450.081 regulates child labor.  It limits the number hours, the time of day, and the number of consecutive days that minors of various ages may work on school days and during vacations and requires meal breaks for minor employees age 17 or younger.  Section 450.021 prohibits employment of any minor age 13 or younger, with certain exceptions.  Violations subject the violator to criminal liability.
             6. Florida Statutes Section 760.50 prohibits employment discrimination based on HIV status or the person’s qualifying health care work relating to HIV.  No employer may require an HIV test as a condition of employment unless the absence of the virus is a bona fide occupational qualification.  This statute also requires that employers maintain the confidentiality of medical information of all kinds of individuals (not merely employees) covered by insurance offered by or through the employer and exempts such information from the public records laws. The law establishes a private cause of action
             7. Florida Statutes Section 768.095 gives qualified immunity to employers who provide job references unless it is proven by clear and convincing evidence that the information given was knowingly false or violated a civil right of the employee
          6. Florida Minimum Wage Act
             1. Florida requires employers to pay a minimum wage set annually by the State. Fla. Stat. § 448.10. Beginning in 2005, the Florida minimum wage was set at $6.15 and has been reviewed and, when necessary, adjusted annually since then according to the indexing formula in the statute. The Florida minimum wage for 2014 was $7.93 per hour; the federal minimum wage in 2014 was $7.25 per hour. The Florida minimum wage may not be lower than the federal rate. An employee who believes she is aggrieved under this statute must give written notice to the employer, which has fifteen days to pay the claim or otherwise resolve the dispute before the employee may bring suit. Remedies include backpay, liquidated damages in the same amount unless the employer proves good faith, equitable relief, and attorney’s fees and costs. The statute of limitations is five years from the date the violation began (as contrasted with two to three years under the FLSA). Fla. Stat. § 95.11. Retaliation is also prohibited by an employer or other “party.”
          7. FLSA (Fair Labor Standards Act)
             1. The Fair Labor Standards Act is the federal law that requires payment of a minimum wage and overtime to non-exempt employees and regulates child labor.  29 U.S.C. §§ 201, et seq.  It does not require vacation, sick leave, breaks, or any other type of time off (but limits hours for some minors).  The FLSA covers employees of all governmental entities, with a few exceptions.  29 U.S.C. § 203.  The FLSA is a sweeping, complex and often counterintuitive law.  It is filled with exceptions and exemptions.  This summary can indicate the provisions of the FLSA in only the broadest fashion.
             2. The FLSA requires the payment of a minimum wage of at least $7.25 per hour (as of 2014) for hours worked up to 40 in a seven-day workweek.  29 U.S.C. §§ 206, 207.  Hours worked in excess of 40 in a workweek are to be compensated at a “premium rate” or overtime of not less than one and one-half times the “regular rate.”  29 U.S.C. § 207.  The regular rate is often, but not necessarily, a rate of pay fixed by the employer as “straight time.”  The regular rate must be, if necessary, calculated on a weekly basis and is typically calculated as the total remuneration paid to the employee for the week divided by 40.  “Remuneration” includes all pay, including the value of in-kind payments and other things of value, but excluding certain narrow categories such as gifts.  Id.  There are multiple alternative methods of calculating the regular rate.  However, an employer should not take a simplistic view that the stated pay per hour for a position will always be the regular rate.
             3. Public employers may use an alternative method of calculating overtime obligation for its employees engaged in fire protection or law enforcement activities – often referred to as “7(k) plans.”  29 U.S.C. § 207(k).  These plans are intended to rationalize pay to this type of employment where employees may regularly work 24- or 48-hour shifts or other irregular workweeks.
             4. Public employers are also authorized to offer “compensatory time” in lieu of overtime pay.  29 U.S.C. § 207(o).  Comp time may be offered only pursuant to a collective or individual agreement with employees.  Comp time must be given at a rate of one and one-half times the number of hours worked in excess of 40 in a workweek (or other amount at which overtime obligation is incurred).  Comp time accumulations are limited to 480 hours for public safety work or 240 hours for non-public safety work.  The employee must be paid for comp time in excess of the caps.  The employee must be permitted to use the comp time within a reasonable time of her request to do so unless the employer’s operation would be unduly disrupted.  An employee paid for accumulated comp time must be paid at her regular rate averaged over the last three years or her final regular rate, whichever is higher.
             5. Certain types of employment are exempt from the overtime provisions of the FLSA.  The most common are the so-called “white collar” exemptions:  the executive, the professional, the administrative, the outside sales, and the computer professional.  29 U.S.C. § 213.  As interpreted as of 2016, the white collar exemptions apply if the employee is paid on a salary basis of at least $913 per week and her primary duty is the exempt duty.  This amount is to be adjusted every three years, starting in 2020. The exact requirements and interpretation of these exemptions is the subject of extensive regulations and thousands of court decisions.  See, e.g., 29 C.F.R. Part 541.
             6. The FLSA prohibits retaliation against individuals who exercise their rights under the law.  29 U.S.C. § 215.  An aggrieved party may file a lawsuit in state or federal court.  29 U.S.C. § 216.  Remedies include reinstatement, backpay, liquidated damages in an amount equal to backpay (for willful violations), equitable relief, and attorney’s fees and costs.  Id.  The law provides for “collective” actions, which are similar to class actions (but do not face as stringent conditions for certification), whereby groups of employees may sue together.  Id.  Any action must be commenced within two (or three, if willful) years of the violation.  29 U.S.C. § 255.  No FLSA claims may be waived without the supervision of the Department of Labor or pursuant to court approval in the context of a lawsuit.  Lynn’s Food Stores, Inc. v. U.S., 679 F.2d 1350 (1982).
          8. Florida Civil Rights Act, Local Civil Rights Ordinances
             1. The FCRA prohibits discrimination in employment based on race, color, religion, sex, national origin, age, handicap, or marital status.  Fla. Stat. § 760.10.  It applies to employers with 15 or more employees.  Fla. Stat. § 760.02.  Federal case law interpreting Title VII and other federal civil rights statutes applies to provisions of the FCRA to the extent that the analogous provisions mirror the federal laws.  *E.g., City of Hollywood v. Hogan*, 986 So. 2d 634 (Fla. 4th DCA 2008).
             2. The enforcement and remedial regime of the FCRA is different from that of Title VII.  Moreover, suits against public employers under the FCRA are subject to the damages limitations in Florida’s waiver of sovereign immunity statute (see discussion of Florida Statutes Section 768.28, below).  An aggrieved individual may bring a lawsuit only after exhausting his administrative remedies.  Fla. Stat. § 760.07.
             3. An employee may initiate enforcement by filing a complaint of discrimination with the Florida Commission on Human Rights within 365 days of the alleged violation, or may dual-file by filing an EEOC charge and alleging the state law violation as well as the federal.  Fla. Stat. 760.11.  The FCHR investigates and, within 180 days, is to issue a determination.  (If no determination is issued within 180 days, the employee may proceed to court.)  If the FCHR determines there is reasonable cause to conclude a violation occurred, the employee may file a lawsuit or, within 35 days, request an administrative hearing under the Florida Administrative Procedures Act, but not both.  Id.  Any lawsuit must be filed within a year of the FCHR’s determination.  Judicial remedies available under the FCRA for employment discrimination include injunctive relief, backpay, compensatory (emotional) damages, punitive damages (not to exceed $100,000), and attorney’s fees and costs.  Fla. Stat. § 760.07.  Punitive damages are not available against the State or its political subdivisions.  Fla. Stat. § 760.11.  Administrative hearings are typically held before an administrative law judge from the Division of Administrative Hearings.  The ALJ’s recommended order is subject to review by the FCHR, which must issue a final order within 90 days.  Administrative remedies include reinstatement, back pay and attorney’s fees and costs.  The final order is subject to judicial review pursuant to the FAPA.  Back pay awards, either judicial or administrative, are limited to two years prior to the filing of the complaint.  Id.
             4. If the FCHR determines there is not reasonable cause to conclude a violation occurred, it must dismiss the complaint.  *Id.*  The employee may, within 35 days, request an administrative hearing, which is heard by an ALJ and is subject to the same procedures and review outlined immediately above.  If, upon review by the FCHR, a violation is found and remedies ordered, the employee may either file a lawsuit or accept the administrative remedies, but not both.  *Id.*
             5. A number of counties and municipalities in Florida have passed local civil rights ordinances.  These ordinances are generally similar to the state and federal civil rights laws, but often cover smaller employers and extend protections to additional categories, such as sexual orientation.  They usually involve a local administrative enforcement process and ultimate resort to judicial review in the circuit courts.  Remedies may include reinstatement, backpay, and attorney’s fees and costs.  Administrative agencies, such as local equal opportunity boards, may not award non-quantifiable damages, such as compensatory damages for pain and suffering.  *LIUNA v. Burroughs*, 541 So. 2d 1160 (Fla. 4th DCA 1989); *City of Miami v. Wellman*, 976 So. 2d 22 (Fla. 3d DCA 2008)
          9. Florida Veteran’s Preference, Benefits
             1. Preference for Veterans in Hiring, Retention, and Promotion

Qualifying veterans are entitled to preference in public employment in hiring, retention, and promotion.  The preference remains throughout the veteran’s lifetime, regardless of the number of times or applications for which it is invoked.  Preference is accorded to honorably discharged veterans with wartime service, and veterans with service-connected disabilities and their spouses or unmarried widows/widowers.  Fla. Stat. § 295.07.  Eligible veterans seeking a position for which selection is based on an examination with a numerical score are to be given additional points.  Fla. Stat. § 295.08.  For non-numerical selections, eligible veterans must be given preference at every stage of the process.  Fla. Stat. § 295.085.  Promotional preference is limited to the first application for promotion following his return to employment.  Fla. Stat. § 295.09.  If the eligible veteran leaves public employment for qualifying service, he is entitled to re-employment in the same position he left, provided he applies for the position within a year of separation from the service.  *Id.*

An individual who believes she was eligible for but did not receive veterans preference may make a complaint with the Florida Department of Veterans Affairs.  Fla. Stat. 295.11.   The Department will investigate and issue findings.  The findings may be brought for review by the Public Employees Relations Commission, which will conduct an evidentiary hearing before a Hearing Officer.  The Hearing Officer’s recommendation is reviewable by the Commission, which will issue a final order, which is subject to judicial review.  The procedure is governed by the Florida Administrative Procedures Act.  Fla. Stat. § 295.11.  Remedies include employment or reemployment, backpay, and attorney’s fees and costs (not to exceed $10,000 for a PERC proceeding).  Fla. Stat. § 295.14.

* + - * 1. Pay, Benefits During Military Duty

Florida Statutes Section 250.482 provides USERRA-like protections for members of the Florida National Guard ordered into state active duty.

Florida Statutes Section 115.07 grants an entitlement to leave of absence to public employees in the military reserve without loss of pay or benefits when they are ordered to training or active duty, up to 240 working hours per year and to unpaid leave without limitation.  Florida Statutes Section 115.14 entitles public employees to leave at full pay for the first 30 days of active military duty and permits public employers to supplement the employee’s military pay to bring the employee to his full civilian pay for an unlimited time

* + - 1. USERRA
         1. The Uniformed Services Employment and Re-employment Rights Act is a federal law aimed primarily at preserving the jobs of employees called to active duty in the U.S. armed forces.  38 U.S.C. §§ 4301, et seq.  Certain employment benefits of absent employees are protected; health plans and pension plans receive special attention under the statute.  38 U.S.C. §§ 4316-18.  USERRA also prohibits discrimination in employment or retaliation based on military service.  38 U.S.C. § 4311.  Discrimination/retaliation suits under USERRA are analyzed similarly to Title VII suits.  *See Sims v. MVM, Inc*., 704 F.3d 1274 (11th Cir. 2013); *Bagnall v. City of Sunrise*, 2011 WL 3715123 (S.D. Fla. Aug. 24, 2011).  The employee must initially file a complaint with the Department of Labor.  38 U.S.C. § 4322.  The Department will seek to adjust the complaint and, if unsuccessful, will issue an entitlement to file suit.  38 U.S.C. §§ 4322-23.
         2. To make out a prima facie case of discrimination under USERRA, the plaintiff must show that he was denied a benefit of employment and that his military status was a motivating factor.  Bagnall, supra (citing Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231 (11th Cir. 2005).  This causation standard is the same as that for Title VII and is not the more stringent “but for” standard applied under the ADEA.  Id.
         3. Employees are entitled to be re-employed after a period of military service if the cumulative total of such absences does not exceed five years.  38 U.S.C. § 4312.  The re-employed employee must be placed in the so-called “escalator” position, that is, the position she would have held had she not incurred the qualifying absence.  *Id.*; 38 U.S.C. § 4313; *Fannin v. United Space Alliance, LLC*, 2009 WL 928302 (M.D. Fla. April 3, 2009).  The escalator position “requires that the employee be reemployed in a position that reflects with reasonable certainty the pay, benefits, seniority, and other job perquisites, that he or she would have attained if not for the period of [military] service.”  *Fannin, supra* (quoting 20 C.F.R. § 1002.194).  This requirement means, inter alia, that the re-employed employee is entitled to have her pay adjusted to reflect any non-discretionary increases (or decreases) or promotions that occurred or would have occurred during her absence.  If the employee is not immediately qualified for the escalator position, she must be given a reasonable opportunity, including training, to become qualified.
         4. Defenses to a suit alleging a violation of the reemployment obligations include changed circumstances, undue hardship, or that no re-employment was required because the employee had no reasonable expectation of continuing employment.  These are treated as affirmative defenses with the burden of persuasion on the employer who asserts them.  38 U.S.C. § 4312.
         5. Available remedies include injunctive relief (including reinstatement), backpay, and liquidated damages in the same amount as backpay (if willful).  38 U.S.C. § 4323; *Fannin, supra*.
      2. FMLA (Family Medical Leave Act)
         1. The Family and Medical Leave Act of 1993, 29 U.S.C. 2601 et seq., functions primarily to mandate unpaid leave and job protection for employees to deal with their own or a family member’s serious health condition or with certain circumstances relating to military service of a family member.  29 C.F.R. § 825.100, -.112.  With some exceptions, an employee is entitled to up to twelve weeks of leave per twelve-month period with the guarantee that her job or its equivalent will be available upon her return.  Id.  The FMLA includes detailed notice and certification requirements and procedures.  29 C.F.R. § 825.302, -.305, -.306.  The employer should be careful to designate leave as FMLA leave, along with providing all the attendant notices.
         2. An employee may bring an FMLA suit for conduct by the employer that interferes with FMLA rights or for retaliation based on opposition or participation, as under Title VII.  29 U.S.C. § 2615.  Such lawsuits are analyzed in the same manner as Title VII suits.  E*.g., Brungart v. Bellsouth Telecommunications, Inc.*, 231 F.3d 791 (11th Cir. 2000).  “In order to establish a prima facie case of retaliatory discharge or retaliation using the McDonnell Douglas framework, a plaintiff must show that (1) she engaged in statutorily protected conduct; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected conduct and the adverse employment action.”  Id.
         3. The EEOC previously took the position that FMLA qualifying leave that was undesignated by the employer did not count against the employee’s FMLA leave.  In *Ragsdale v. Wolverine Worldwide, Inc.*, 535 U.S. 81 (2002), the Supreme Court held that the regulation embodying this policy was invalid because it altered the remedial scheme of the FMLA and relieved employees of the burden of proving an impairment of their rights, as required by the statute.  Id.  Current regulations permit retroactive designation of leave as FMLA-qualifying if such action does not harm the employee.  29 C.F.R. § 825.301(d)
      3. GINA (Genetic Information Nondiscrimination Act)
         1. The Genetic Information Nondiscrimination Act of 2008 prohibits employment discrimination based on an individual’s genetic information.  42 U.S.C. §§ 2000ff-1.  It is also illegal for an employer to acquire genetic information, with certain exceptions.  Id.  “ ‘The basic intent of GINA is to prohibit employers from making a predictive assessment concerning an individual's propensity to get an inheritable genetic disease or disorder based on the occurrence of an inheritable disease or disorder in [a] family member.’ *Poore v. Peterbilt of Bristol*, L.L.C., 852 F. Supp. 2d 727, 730 (W.D. Va. 2012) (internal quotations and citation omitted) (alteration in original).”  *Bell v. PSS World Medical, Inc.*, 2012 WL 6761660 (M.D. Fla. Dec. 7, 2012).  GINA offers the same remedies and is governed by the same enforcement scheme as Title VII.  42 U.S.C. § 2000ff-6.  There is no cause of action for disparate impact, but a commission is to begin in May 2014 to examine whether that should be changed.  42 U.S.C. § 2000ff-7.
      4. ADEA (Age Discrimination in Employment Act)
         1. The Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq., prohibits discrimination in employment on the basis of age.  42 U.S.C. § 623.  The ADEA protects only individuals age 40 and older.  42 U.S.C. § 631.  (The Florida Civil Rights Act’s age provision applies to all employees.  Fla. Stat. § 760.10.).  There is no claim for reverse discrimination under the ADEA, i.e., only discrimination against older as compared to younger employees is prohibited.  *Gen. Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004); *City of Hollywood v. Hogan*, 986 So. 2d 634 (Fla. 4th DCA 2008).  It is not necessary that the employee show he was treated disadvantageously compared to employees under age 40; he must compare himself to “substantially younger” employees, who may be over 40.  In the Eleventh Circuit, a difference of as little as three years has been found to be substantial for this purpose.  *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.2d 1354 (11th Cir. 1999).
         2. Analysis of the ADEA, although in the main like Title VII, includes some important differences.  A plaintiff must show:  (1) the employer was actually motivated by age discrimination and (2) the plaintiffs were actually treated less favorably based on age.  *E.g., Ky. Retirement Sys. v. EEOC*, 554 U.S. 135 (2008).  Put another way, the employee must show that age discrimination was the “but for” cause of the disparate treatment.  *Connor v. Bell Microproducts-Future Tech, Inc.*, No. 12-10836, 2012 WL 5258740 at \*1 (11th Cir. 2012).  The ADEA expressly provides that an employer does not violate that act if its conduct was based on a “reasonable factor other than age,” which functions as the legitimate, non-discriminatory reason for analytical purposes.  29 U.S.C. § 623(f)(1); 29 C.F.R. § 1625.7; *see Smith v. City of Jackson*, 544 U.S. 228 (2005); *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588 (11th Cir. 1978).  The test for RFOA is a less stringent showing than the “business necessity” test used in some other discrimination analyses.  *Hunter v. Santa Fe Protective Servs., Inc.*, 822 F. Supp. 2d 1238, 1252 (M.D. Ala. 2011), aff’d, 2012 WL 5503561 (11th Cir. 2012).  The RFOA analysis asks only whether the factor relied upon was reasonable and not whether there were other available factors.  *Meachum v. Knolls Atomic Power Lab.*, 554 U.S. 84, 96 (2008); *City of Jackson*, 554 U.S. at 242-43.  (The EEOC takes a less forgiving view of the RFOA, but there is some doubt as to how much weight the courts will give to the EEOC’s opinion.  See 29 C.F.R. § 1625.7 (2012).)
         3. Pension plans receive special attention under the ADEA.  The maintenance of an employee pension plan that uses age as a condition of eligibility for benefits is expressly permitted under the ADEA.  29 U.S.C. § 623(l)(1)(A)(i).  The mere maintenance of such a plan cannot ordinarily be relied on in establishing a prima facie case of age discrimination.  *Bodnar v. Sympol, Inc.*, 843 F.2d 190, 192 (5th Cir. 1988).
         4. Disparate impact and retaliation claims are analyzed as under Title VII.  *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005)
         5. The ADEA expressly authorizes an affirmative defense of bona fide occupational qualification, which is analyzed the same way as in a gender discrimination case under Title VII.  29 U.S.C. § 623(f).  *City of Jackson, supra*; *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985).
         6. The ADEA’s enforcement and remedial scheme differs from that of Title VII and is based on that of the Fair Labor Standards Act (discussed below), with modifications.  29 U.S.C. § 626.  The employee must file a charge of discrimination with the EEOC not more than 180 (or 300, as in Florida) days after the occurrence of the discriminatory conduct.  However, no less than 60 days thereafter, and regardless of the issuance of a notice of rights by the EEOC, the employee may file a lawsuit.  *Id.*  Relief available includes backpay, liquidated damages (for willful violations) in an amount equal to backpay, reinstatement, injunctive relief, and attorney’s fees and costs.  Neither punitive nor compensatory damages are available under the ADEA (but they are available in an age claim under the FCRA).  29 U.S.C. § 626; *Pettis v. Brown Group Retail, Inc.*, 896 F. Supp. 1163 (N.D. Fla. 1995).
         7. Waivers of ADEA claims, such as in settlement of litigation or in a severance agreement, are invalid unless they are knowing and voluntary and minimally meet specific standards set out in the Older Workers Benefits Protection Act, codified in the ADEA.  29 U.S.C. § 626(f).  Those standards are:  (1) the waiver is written in a manner calculated to be understood by the employee(s); (2) the waiver expressly states that ADEA claims are being waived; (3) no future claims are waived; (4) the individual must receive consideration in addition to any he might otherwise have received; (5) the individual is advised in writing to consult an attorney; (6) if the waiver is for a single individual, he is given at least 21 days to consider whether to enter the agreement (this time period is waiveable) or, if the waiver is part of an exit incentive offered to a group of employees, 45 days; and (7) the agreement must provide for a period of at least seven days in which the individual may revoke entering into the agreement.  *Id.*  If the waiver is requested in connection with an exit incentive offered to a group, detailed other disclosures are required.  *Id.*
      5. ADA, Rehabilitation Act
         1. The Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, et seq., and the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701, et seq., both prohibit employment discrimination on the basis of disability.  The Rehabilitation Act’s employment provision is found at 29 U.S.C. § 794, which is Section 504 of the public law and usually referred to by that number.  The Rehabilitation Act’s coverage is more limited than that of the ADA, but it includes certain entitlements to vocational rehabilitation services and other provisions.  The ADA may be viewed as more expansive in both coverage and scope of protections.  Disability-based discrimination is analyzed essentially the same under both laws.
         2. The ADA prohibits employment discrimination against qualified individuals with disabilities, who have a record of disabilities, or who are regarded as disabled.  42 U.S.C. § 12112.  It requires the provision of reasonable accommodations that will enable disabled employees to perform the essential functions of their jobs.  Id.  It prohibits or limits certain inquiries or medical examinations.  Id.  It imposes confidentiality requirements on medical records.  Id.  “Disability” is defined as an impairment that substantially limits a major life activity, a record of such, or being regarded as disabled.  42 U.S.C. § 12102(1).  The ADA Amendments Act of 2008 substantially broadened aspects of the ADA and legislatively overruled Supreme Court precedent.  In particular, the ADAAA made it much easier for a plaintiff to establish that she is disabled or regarded as disabled.  See, e.g., 42 U.S.C. § 12102(3), (4).  It also added a list of “activities” and conditions to be interpreted as being or affecting major life activities.  42 U.S.C. § 12102(2).
         3. In order to prove a prima facie case under the ADA, an employee must show more than a disability; an employee must show that she is a “qualified individual with a disability” who was discriminated against because of that disability.  42 U.S.C. § 12112(a).  *See also Dockery v. North Shore Medical Ctr.*, 909 F. Supp. 1550 (S.D. Fla. 1995); Fussell v. Georgia Ports Authority, 906 F. Supp. 1561 (S.D. Ga. 1995).  An employee with a disability must be qualified for the job in order to be entitled to the non-discriminatory protections guaranteed by the ADA.  *Salmon v. Dade County School Bd.*, 4 F. Supp. 2d 1157 (S.D. Fla. 1998).  An employee also must show that her employer knew about the disability.  Moreover, the employee must show that she was treated disadvantageously compared with similarly situated employees who are not disabled.  *Wolfe v. Postmaster General*, 488 Fed. Appx. 465 (11th Cir. 2012).  In a misconduct case, the employee must show “that ‘the quantity and quality of the comparator’s misconduct [was] nearly identical.”’  Id. (quoting *McCann v. Tillman*, 526 F.3d 1370 (11th Cir. 2008)).  In order to meet this standard, the employee must identify incidents of misconduct involving the identical conduct in violation of the identical work rule under the same supervisor; failure to do so is “fatal to establishing a prima facie case.”  *Corbin v. Town of Palm Beach*, 996 F. Supp. 2d 1275, 2014 WL 272689 at \*9 (S.D. Fla. 2014).  As in the standard analysis, the employer may articulate a legitimate, non-discriminatory reason that the plaintiff must rebut and show to be pretext for an illegal motive.  *E.g., Corning v. Lodgenet Interactive Group*, 896 F. Supp. 2d 1138 (M.D. Fla. 2012).
         4. The ADA contemplates that the employer and the disabled employee will engage in a process of dialogue to seek a reasonable accommodation to enable the employee to perform the essential functions of her job.  An employee alleging failure to accommodate in accordance with the ADA must establish each of the following elements: that she is a qualified individual with a disability; that the employer is aware of her disability; and that the employer failed to reasonably accommodate the disability.  Davis v. Florida Power & Light Company, 205 F.3d 1301 (11th Cir. 2000).  “In addition to setting forth the prima facie case, Plaintiff must identify a reasonable accommodation that would allow him to perform the job.”  *McCoy v. Geico Gen’l Ins. Co*., 510 F. Supp. 2d 739 (M.D. Fla. 2007) (internal citation omitted).  Thus, it is the employee’s burden to establish not only an accommodation that would enable her to perform the essential job functions but also that the accommodation is reasonable.  *Dickerson v. Sec’y, Dep’t of Veterans Affairs*, 489 Fed. Appx. 358 (11th Cir. 2012).  The employer is not required to grant the employee’s preferred accommodation, whether reasonable or not, but merely to grant some reasonable accommodation, if one exists.  *See id.* “Once the plaintiff has met this burden, the defendant employer may rebut the claim by presenting evidence that the plaintiff's requested accommodation imposes an undue hardship on the employer.”  *Id.*
         5. Both the ADA and the Rehabilitation Act are enforced as and have the same remedies as under Title VII.  42 U.S.C. § 12133; 29 U.S.C. § 794a.  The Eleventh Circuit recognizes hostile environment claims under the ADA.  *E.g., Burgos v. Chertoff*, 274 Fed. Appx. 839 (11th Cir. 2008)
      6. Title VII – Civil Rights Act
         1. Title VII of the U.S. Civil Rights Act of 1964, as amended, prohibits adverse employment action based on race, color, religion, sex, or national origin by employers with 15 or more employees.  42 U.S.C. § 2000e-2.  Title VII prohibits retaliation against an employee or applicant for employment who opposes discrimination or participates in an investigation of discrimination.  42 U.S.C. § 2000e-3.  In the Eleventh Circuit (and under the cognate provisions of the Florida Civil Rights Act), the investigation must be in connection with a filed charge of discrimination.  *EEOC v. Total Systems Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000); *Guess v. City of Miramar*, 889 So. 2d 840 (Fla. 4th DCA 2004).  Thus, an employer’s internal investigation in circumstances in which a charge has been filed is covered, while one regarding a matter in which no complaint has been filed is not.  Id.  In 2013, the Supreme Court ruled that plaintiffs alleging retaliation claims under Title VII must show traditional “but for” causation, which tightened the causation element in that analysis.  *Univ. of Texas Southwestern Med. Ctr. v. Nasser*, 570 U.S. 338, 133 S. Ct. 2517 (2013).
         2. An act is retaliatory if it is based on the employee’s participation in an investigation or his opposition to what he reasonably believed was illegal discrimination and the act is such that it would tend to discourage a reasonable employee in the same circumstances from engaging in protected activity*.  Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).  This is a very broad and sweeping standard that includes non-employment-related circumstances and takes into account the particular and, in some cases, personal situation and characteristics of the employee.  See id.
         3. Religion claims under Title VII may include not only typical discrimination claims but also claims based on failure to accommodate the employee’s beliefs.  Such claims are analyzed similarly to accommodation claims under the ADA, which are discussed immediately below.  *See Telfair v. Fed. Exp. Corp.*, 934 F. Supp. 2d 1368 (S.D. Fla. 2013).  To establish a prima facie case of denial of religious accommodation, the employee must show that she holds a sincere, bona fide religious belief that conflicts with a requirement of the job, that the employer was aware of the conflict, and that the employee suffered an adverse employment action based on their failure to comply with the conflicting job requirement.  *Id.*
         4. Gender, religion, and national origin disparate treatment claims are subject to an affirmative defense of bona fide occupational qualification.  42 U.S.C. § 2000e-2(e).  An employer may intentionally discriminate on one of these bases if the status is “reasonably necessary to the normal operation of that particular business ... .”  Id.  The defense is a very narrow one.  For example, one court held that the BFOQ defense may be maintained “only when the essence of the business operation would be undermined by not hiring members of one [status] exclusively.”  *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971).
         5. Remedies available against public employers under Title VII include compensatory (emotional) damages, backpay, reinstatement, injunctive relief, declaratory relief, and attorney’s fees and costs.  42 U.S.C. § 1981a;  42. U.S.C. § 2000e-5(e)(3)(b), (f), (g), (k).  Compensatory damages are limited based on the number of employees as follows:  up to 100 - $50,000; 101 to 200 - $100,000; 201 to 500 - $200,000; more than 500 - $300,000.  42 U.S.C. § 1981a(b)(3).  However, a defendant who proves that, although it did act on an illegal motive, it would have taken the same action even in the absence of that motive (a so-called “mixed motive” defense), money damages and reinstatement are not available.  42 U.S.C. § 200e-5(g)(2)(B).
      7. Civil Rights Statutes
         1. General Analytical Framework; McDonnell Douglas and Administrative Enforcement

The array of federal, state, and local laws that, generally speaking, prohibit employment decisions based on legally protected characteristics, such as race or sex – so-called civil rights statutes – are often what come to mind first in the area of employment law.  Many of these laws apply the same or a similar general analytical framework to that developed by federal courts considering cases under Title VII (the employment provisions) of the U.S. Civil Rights Act of 1964.  (Employment discrimination claims brought under Section 1983 also are analyzed in this way.)

Under this analysis, illegal discrimination may be shown by direct evidence, statistical evidence, or circumstantial evidence.  “Direct evidence is evidence that establishes the existence of discriminatory intent behind the employment decision without any inference or presumption.”  *Standard v. A.B.E.L. Servs*., 161 F.3d 1318 (11th Cir. 1998).  Statistical evidence will often be presented by an expert witness.  Like all opinion testimony, statistical expert testimony and evidence must meet standards of reliability.  *E.g., Raskin v. Wyatt Co*., 125 F.3d 55 (2d Cir. 1997).

Illegal discrimination may be based on disparate treatment – intentional adverse treatment of an employee based on a protected status – or disparate impact – a discriminatory result of a facially neutral employment policy or practice.  Intent is essential to proving disparate treatment and irrelevant to proving disparate impact.  *Dewey v. City of Albany*, 247 F.3d 1172 (11th Cir. 1998) (disparate treatment); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010) (no intent required to prove disparate impact).

The allocation of burdens and order of presentation of proof in a circumstantial evidence disparate treatment case is well-established and is commonly known as the McDonnell Douglas burden-shifting scheme.  Initially, the employee has the burden of proving, by a preponderance of evidence, a prima facie case of discrimination.  *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).  If the employee establishes a prima facie case, the burden shifts to the employer to produce evidence of and to articulate a legitimate, non-discriminatory reason for its action.  *U.S. v. Crosby*, 59 F.3d 1133 (11th Cir. 1995).  The burden is merely one of production, not persuasion.  *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).  If the employer meets this light burden, the burden shifts back to the employee to prove that the employer’s proffered reason was pretext.  The employee must show both that the reason is false and that discrimination is the true reason.  *Id.*  At all times, the employee retains the ultimate burden of persuasion.  Reeves, supra.

The exact outlines of a prima facie case are malleable and vary according to the particular circumstances, but generally the employee must prove that he (1) is a member of a protected class, (2) was subjected to an adverse employment action, (3) was qualified to do the job in question, and (4) a basis for liability.  *See Burdine*, *supra*; *McDonnell Douglas, supra*; *St. Mary’s Honor Ctr., supra*.  It is essential for the employee to show that he was treated disadvantageously compared to other, similarly situated employees outside his protected class.  *Sheppard v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 1168 (S.D. Fla. 2005).  To be similarly situated, comparators must be nearly identical in all relevant respects except protected status.  *Holifield v. Reno*, 115 F.3d 1555 (11th Cir. 1997).

“Hostile environment” or “harassment” is a form of disparate treatment discrimination that is typified by a continuing pattern of conduct or conditions over a period of time.  *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).  To prove a prima facie case of hostile environment, the employee must show:  (1) he is a member of a protected class, (2) he was subjected to unwelcome harassment, (3) that the harassment was based on the protected status, (4) that the harassment was sufficiently severe or pervasive that it altered the terms and conditions of employment, and (5) a basis for holding the employer liable.  *Mendoza v. Borden*, Inc., 195 F.3d 1328 (11th Cir. 1999).  Not only must the harassment be subjectively unwelcome, it must also be such that a reasonable person would have felt his terms or conditions of employment to have been altered.  *Speedway SuperAmerica v. Dupont*, 933 So. 2d 75 (Fla. 5th DCA 2006).

To state a disparate impact claim, an employee must allege (1) a specific facially neutral policy or practice of the employer; (2) a significant statistical disparity between employees in a protected class versus those not in that class; and (3) a causal relationship between the policy or practice and the adverse impact.  *Connecticut v. Teal*, 457 U.S. 440 (1982).  Statistical evidence must show a significant statistical disparity between members of different protected groups.  *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004), overruled on other grds., *Ash v. Tyson Foods*, 546 U.S. 454 (2006)).  Merely identifying a broad policy or process, such as promotions or layoffs is not sufficient to meet the first leg of the claim.  *Allen v. Highlands Hosp. Corp.*, 545 F.3d 387 (6th Cir. 2009); *Kushmeder v. McHugh*, 2010 WL 1978805 (M.D. Pa. 2010).

There is no individual liability under most civil rights statutes.  Claims against individual supervisors or other decisionmakers are typically brought under Section 1983.

Most civil rights statutes employ an administrative enforcement scheme modeled on that set up under Title VII.  Under Title VII, an employee alleging illegal discrimination must file a charge of discrimination with the U.S. Equal Employment Opportunity Commission within 180 days of the last instance of discrimination.  In a state that has a fair employment agency with a work-sharing agreement with the EEOC, that period is lengthened to 300 days.  Florida is such a state.  The EEOC is charged with investigating the charge and seeking to engage in conciliation between the employee and the employer.  Conciliation usually takes the form of formal mediation or informal facilitation of settlement discussions.  The EEOC may request documents and a statement of position from the employer.  The EEOC may also interview other employees and may enter upon the employer’s premises to conduct interviews and demand and review documents.  The employer is not entitled to attend interviews of non-managerial employees.  The EEOC is charged with making a determination within 180 days of the filing of the charge.  The EEOC may determine that there is cause to believe the law was violated or that it cannot conclude the law was violated.  The determination will be accompanied by a notice of rights.  The notice advises the employee that he has 90 days from his receipt of the notice in which to file a lawsuit based on the charge.  This 90-day period has been held non-jurisdictional, but failure to file will bar a suit unless there is some excuse or reason for tolling.

The Lily Ledbetter Fair Pay Act of 2009 amended Title VII, the ADEA, the ADA, and the Rehabilitation Act to provide that, where there was intentional discrimination in pay, each paycheck is a new act of discrimination.  Moreover, in such a case, backpay may be awarded for up to two years prior to the filing of the charge.  Lily Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009).

* + - 1. Constitutional Dimensions of Public Sector Employment
         1. Speech

Both the U.S. and Florida Constitutions protect freedom of speech from government intrusion. State employers may not condition public employment on abandonment of the employee’s First Amendment rights. *Connick v. Myers*, 461 U.S. 138 (1983); *Perry v. Sinderman*, 408 U.S. 593 (1972). However, the state as an employer has important interests in the orderly provision of public services that must be balanced against the employee’s interest in his constitutional rights in the workplace. *See Pickering v. Board of Educ*., 391 U.S. 563 (1968). Speech cases frequently arise when an employee engages in some form of communication and is disciplined because of it. The *Pickering* test asks whether the employee spoke as a citizen on a matter of public concern, as opposed to as an employee on a merely private interest, such as an individual complaint about work. If the answer is yes, the court must determine whether the public employer had an adequate justification for its actions penalizing or limiting the speech. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). That justification must be directed toward the public employer’s interest in maintaining efficient operations and avoiding disruption to them. Speech by a public employee made pursuant to the employee’s job duties is not protected because the employee is not speaking as a citizen for First Amendment purposes. *Id.*

* + - * 1. Search & Seizure

Because they are state actors, public employers are restrained by the Fourth Amendment in workplace searches and intrusions into privacy. Such intrusions may include not only physical searches of employee’s persons and property, but also reviews of email, telephone messages, and social media communications, whether or not made on work time or using the employer’s equipment. *See O’Connor v. Ortega*, 480 U.S. 709 (1987). Initially, the employee must have a reasonable expectation of privacy in the object of the search. *Id.* This factor is highly sensitive to context and requires a fact-intensive analysis. *See Oliver v. U.S.*, 466 U.S. 170 (1984). To establish a violation, however, the employee must also show that the search itself was unreasonable. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). This is a balancing analysis weighing the employee’s Fourth Amendment interests against the public employer’s need for control and efficient operation. *O’Connor, supra*. The reasonableness of a non-criminal workplace search has two prongs: (1) was the search justified at the outset and (2) was the search as it was conducted reasonably related to the reason for the search. *Id.*

* + - * 1. Property and Liberty Interests, Procedural and Substantive Due Process

The U.S. and Florida Constitutions protect individual interests in property and liberty from government infringement.  U.S. Const. amend. XIV; Fla. Const. art. I § 9; *Moser v. Barron Chase Securities*, 783 So. 2d 231 (Fla. 2001) (Florida Constitution protects property interests); Beagle v. Beagle, 678 So. 2d 1271 (Fla. 1996) (Florida Constitution protects liberty interests).  It is often stated that there is no constitutional right to public employment.  *E.g., Rutan v. Republican Party of Ill*., 497 U.S. 62 (1990); *Speiser v. Randall*, 357 U.S. 513 (1958); *Dep’t. of Transp. v. Morehouse*, 350 So. 2d 529 (Fla. 3d DCA 1977).  Vindication of property and liberty interests through due process analysis is a common method of raising public sector employment issues to the constitutional level.

A property interest in public employment must be conferred by an independent source, such as state law, contract, or some authoritative communication by the public employer.  *Silva v. Bieluch*, 351 F.3d 345 (11th Cir. 2003).  Thus, a law or ordinance or contract may create a protectable property interest in continued public employment if it lists specific grounds for discharge or states discharge may occur only in cases of just cause.  Merely providing minimal procedural steps prior to termination does not alone create a property interest.  *Kelly v. Gill*, 544 So. 2d 1162 (Fla. 5th DCA 1989).

In the context of public employment, a liberty interest most often is asserted when the employee complains of damage to her reputation as the result of some action by the employer.  To successfully establish such a claim, the employee must prove (a) a false statement (b) of a stigmatizing character (c) that attended the infringement of a tangible interest (d) that was publicized by the employer (e) without a meaningful opportunity for the employee to clear her name.  *Herold v. Univ. of S. Fla.*, 806 So. 2d 638 (Fla. 2d DCA 2002); *see also Paul v. Davis*, 424 U.S. 693 (1976); *Buxton v. City of Plant City*, 871 F.2d 1037 (11th Cir. 1989).  This is usually called the “stigma-plus” test, since it requires a stigmatizing communication plus some tangible deprivation.

If a public employee possesses a protectable interest, he is entitled to due process.  If the employee does not possess a protectable interest, of course, no process whatsoever is due.  *Silva, supra*.  The essential requirements of procedural due process are notice and an opportunity to be heard.  *Cleveland Bd. Of Educ. V. Loudermill*, 470 U.S. 532 (1985).  A public employee with a protectable interest is entitled to notice of the charge against him, an explanation of the evidence against him, and an opportunity to present his side of the story.  *Id.*  The degree and level of formality of the process due varies according to a balancing of the private interest affected, the risk of erroneous deprivation under the procedure used, whether additional procedure would be of value, and the governmental interest, including the burden of additional procedure.  *Matthews v. Eldridge*, 424 U.S. 319 (1976).  Such procedures should occur before the deprivation, but must only rise to the level of an initial check against an error; even where there is an initial denial of due process, the state may cure the deprivation by providing a later procedural remedy.  *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1996).

In the case of infringement of a liberty interest, all that is required is a “name-clearing hearing,” which may (and usually will, by its nature) occur post-deprivation.  *See Buxton, supra*.

Florida law still maintains a doctrine of substantive due process.  However, substantive due process protects only fundamental rights.

A substantive due process claim is analyzed differently depending on whether it is legislative or executive action that is challenged.  With regard to legislative action, a court may overturn a duly enacted law only where it is clear that the law is in no way designed to promote the people’s health, safety, or welfare or that the law bears no reasonable relationship to its avowed purpose.  If the action is not alleged to infringe a fundamental right, it is reviewed under the rational basis test.  *City of Lauderhill v. Rhames*, 864 So. 2d 432 (Fla. 4th DCA 2003).  With regard to executive action, a fundamental right may not be infringed if the action is “ ‘arbitrary, irrational, or tainted by improper motive’ or by means of government conduct so egregious that it shocks the conscience.’ ”  *Id.* (internal citations omitted).

An employee’s property interest in public employment is not a fundamental right and, therefore, is not protected by substantive due process.  Id.  A public employee may successfully assert a substantive due process claim against the public employer, but it will not be solely rooted in his property interest in his public employment, but must allege infringement of some fundamental right.

(See discussion of coerced interrogations of public employees and *Garrity v. New Jersey* at Part II. B. 7., below.)

* + - * 1. Right to Work/Right of Collective Bargaining, Impairment of Contract

See discussion of these topics under Part III, Florida Public Sector Pension Law, below.

* + - * 1. Section 1983 and Florida Declaratory Judgment Actions

Constitutional protections from which employment-related lawsuits may arise do not typically create private causes of action.  Instead, such lawsuits are brought pursuant to statutory provisions.  For federal claims against public employers, that is most often 42 U.S.C. § 1983.  Section 1983  authorizes a lawsuit for deprivation of federal constitutional rights by any person acting under color of law.  Thus, there is both institutional and individual liability under a Section 1983 suit.  For the same reason, there is no employer vicarious liability under Section 1983 (see discussion of *respondeat superior* under Part IV, Concerns Under the Common Law of Employment, below).  The employer may only be held liable for a policy or practice of illegal action such that the action came to have the force of law.  *E.g., Monell v. Dep’t of Social Servs*., 436 U.S. 658 (1978).  Such policy or practice may be established by a pattern of repeated action or by a single act by an authorized decisionmaker.  *Connick v. Thompson*, 563 U.S. 51 (2011) (repeated pattern); *Pennbauer v. City of Cincinnati*, 475 U.S. 469 (1986) (single decisionmaker).

An individual sued for violation of constitutional rights may interpose the defense of qualified immunity.  To establish this defense, the individual must show that he was acting within the scope of his official discretionary authority.  *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002).  If so, then he is entitled to qualified immunity unless his actions (1) violated the plaintiff’s constitutional right and (2) the right was “clearly established” at the time of violation.  *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002).  A denial of qualified immunity by the trial court is immediately appealable.  *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

No cause of action exists for money damages based on a violation of a right under the Florida Constitution.  E.*g., Fernez v. Calabrese*, 760 So. 2d 144 (Fla. 5th DCA 2000); *Garcia v. Reyes*, 697 So. 2d 549 (Fla. 4th DCA 1997); *but see Depaola v. Town of Davie*, 872 So. 2d 377 (Fla. 4th DCA 2004).  Alleged violations of Florida constitutional rights often are brought pursuant to Florida Statutes Chapter 86, Declaratory Judgments.  See Fla. Stat. § 86.011.  One seeking a declaratory judgment must show a bona fide need for the declaration based on present, ascertainable facts upon which some right is dependent, and that there is before the court a party with an actual antagonistic interest in the subject matter.  Fla. Stat. § 86.011; *Santa Rosa County v. Admin. Comm’n*, 661 So. 2d 1190 (Fla. 1995).

1. Chapter 12: Eminent Domain (by Mark Moriarty)
   1. Eminent Domain
      1. Authority
         1. Home Rule
            1. In City of Ocala v. Nye, 608 So. 2d 15 (Fla. 1992), the court held that city had home rule power to utilize eminent domain to take the entire tract of land to avoid severance and business damages.
            2. In Alachua County v. Wagner, 581 So. 2d 948 (Fla. 1991), the court said it would uphold local governing body's initial determination to condemn unless there was bad faith, illegality, or gross abuse of discretion.
         2. Public purpose requirement.
            1. In Basic Energy Corp. v. Hamilton County, 652 So. 2d 1237 (Fla. 1st DCA 1995), the court held that city's purpose in exercising its eminent domain power in order to give condemned land to state for construction of a prison was not a valid municipal purpose. The court notes, however, that in this case, no argument was made that power was being exercised for economic development purposes.
2. Chapter 13: Acquisition of Real Property (by Mark Moriarty)
   1. Submerged Land
      1. In City of West Palm Beach v. Board of Trustees of Internal Improvement Fund, 22 Fla. L. Weekly D2028 (Fla. 4th DCA 1996), the court held the trial court erred in determining that dredging did not constitute permanent improvement and therefore, city could not claim title to submerged land under Butler Act where city claimed that it had improved property by dredging and constructing a municipal marina.
3. Chapter 14: Local Government as a Landowner (by Mark Moriarty)
   1. Regulation of Land
      1. In Dade County v. Dunn, 693 So. 2d 1036 (Fla. 3d DCA 1997), the court held county entitled to injunction precluding party from destroying county-owned street and requiring that party make repairs.
      2. In Hernando County v. Franklin, 666 So. 2d 602 (Fla. 5th DCA 1996), the court held that county could provide more stringent notice requirement for abandonment of public street than what was required by section 336.10, Florida Statutes.
      3. In Reynolds v. County of Volusia, 659 So. 2d 1190 (Fla. 5th DCA 1995), the court held vacation of street did not vest abutting owner with fee title to support inverse condemnation claim where original dedication contemplated additional public uses other than street.
      4. In Santa Rosa County v. Gulf Power Co., 635 So. 2d 96 (Fla. 1st DCA 1994), the court held that state statute allowing public service commission to grant territorial juris­dictions to electric companies did not preempt right of counties to charge franchise fees to electric companies for use of rights of way. Franchise fee constituted consideration for contractual grant to use right of way and was not impermissible tax.
4. Chapter 15: Local Government as a Service Provider
   1. Types of service.
      1. Law enforcement.
         1. Jurisdiction.
         2. Potential liability.
      2. Fire protection.
         1. Financing.
         2. Potential liability.
      3. Streets and highways.
         1. Abandonment.
            1. In Reynolds v. County of Volusia, 659 So. 2d 1190 (Fla. 5th DCA 1995), the court held abandonment of street did not vest abutting owner with sufficient title to support an inverse condemnation claim where original dedication contemplated additional public uses other than as a street.
      4. Public transit.
      5. Airports.
         1. Operation of airports is usually a municipal, county, state, or special district authority undertaking, but airports may be operated for the public by the private sector. Airport operations are governed by sections 330, 331 part I, and 332, Florida Statutes. Airport zoning is governed by section 333, Florida Statutes.
         2. Federal Authority for Airport Operations Include:
            1. Title 14, Code of Federal Regulations, Parts 1, 11, 13, 36, 43, 77, 91, 107, 108, 139, 150, 158, 161, 302 are regulations involving topics ranging from zoning issues, including noise compatibility to operating and flight rules, maintenance, airport security, and a host of other topics.
         3. Zoning.
         4. A few cases in Florida have found takings in connection with operation of airports. Most inverse condemnation cases do not sustain takings claims. Sarasota-Manatee Airport Auth. v. Icard, 567 So. 2d 937 (Fla. 2d DCA 1990). See also section 311, Florida Statutes, relative to seaport transportation and economic development programs.
         5. Taxation.
      6. Sanitation.
         1. In St. Lucie County v. City of Fort Pierce, 576 So. 2d 35 (Fla. 4th DCA 1996), the court held that county's use of fees collected pursuant to inter local agreement granting city's right to dispose of garbage in county landfill, for closing of second landfill was valid user fee collected for solid waste purposes.
         2. In Davis v. Washington County, 670 So. 2d 136 (Fla. 1st DCA 1996), the court held county's grant of exclusive franchise to collect trash to private entity did not violate either federal or state antitrust laws because (1) there was clear and affirmatively expressed state policy to allow counties to contract with private entities to provide disposal service, and (2) contract and ordinances provided for active supervision by county.
         3. In City of Riviera Beach v. Martinque 2 Owner's Ass'n, Inc., 596 So. 2d 1164 (Fla. 4th DCA 1992), the court upheld city ordinance which permitted city to charge condominium buildings for waste collection and removal on basis number of units. Rate making for utilities is a legislative function. Judicial deference to the local legislative body will require a review of utility rates only when the rate is so excessive as to be unjustifiable. "The law in this state has long been that if the city has acted unfairly or unwisely in adopting this kind of ordinance the remedy is action by the legislative body of the city, not legislative actions by the court."
         4. In City of New Smyrna Beach v. Fesh, 384 So. 2d 1272 (Fla. 1980), the court upheld different rates for different classes of garbage users and held rate making was a legislative act.
      7. Landfills.
      8. Parks and recreation.
      9. In State v. Baal, 680 So. 2d 608 (Fla. 2d DCA 1996), the court upheld ordinance prohibiting entry in public park between dawn and dusk from vagueness attack. The court distinguished overbreadth challenge which only deals with First Amendment. The court reasoned men of common understanding knew what ordinance meant.
      10. Libraries.
          1. Municipal-county relationship. In City of Ormond Beach v. County of Volusia, 383 So. 2d 671 (Fla. 5th DCA 1980), the court said counties' assessment of city residents for countywide library system did not effect a transfer of powers where both parties still maintained library system.
          2. Pursuant to section 257.17, Florida Statutes, under certain circumstances, operating grants are available for library operation.
          3. Pursuant to section 257.172, Florida Statutes, under certain circumstances multi county library grants are available for the support and extension of library services in the participating counties.
          4. Pursuant to section 257.18, Florida Statutes, counties that qualify for operating grants may be eligible to receive equalization grants.
          5. Pursuant to section 257.19, Florida Statutes, any county or counties and municipalities involved in an inter local agreement, special districts, or special tax districts, which qualify for an operation grant may receive an establishment grant for a one-year period.
          6. Pursuant to section 257.191, Florida Statutes, the Division of Library and Information Services may accept and administer library construction money and to allocate the money to county, municipal and regional libraries.
          7. Sections 27.34 and 27.54, Florida Statutes, require counties to provide library services to state attorneys and public defenders in their judicial circuits.
          8. Counties, municipalities, and political subdivisions are encouraged to enter into agreements to provide library services.
          9. Pursuant to section 23.30, Florida Statutes, school boards may make contracts or agreements with counties for a cooperative program of library establishment, maintenance, and use.
          10. Section 125.0101, Florida Statutes, gives counties the power to contract with municipalities or special districts within the county for library services.
          11. Library agreements for which cities, towns, counties, library systems or districts, or other political subdivisions are parties to or pledge credit for, must comply with local laws. 257.29, Florida Statutes.
      11. Public health.
      12. Correctional Facilities
          1. In Ferguson v. Perry, 593 So. 2d 273 (Fla. 5th DCA 1992), the court held that correction officers owe a duty to inmates to protect them from unreasonable risk of physical harm, and to give them first aid after the officer knows or has reason to know that they are ill or injured. When the symptoms of the inmate are such as to place a reasonable person on notice that the inmate is in need of medical attention, correction officers are bound to take all reasonable steps to obtain medical care for the inmate.
          2. In Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), the court held that the Eighth Amendment to the Constitution prohibits cruel and unusual punishment by way of torture and other barbarous methods of punishment of inmates, which is contrary to the broad and realistic concepts of dignity, civilized standards, humanity and decency, a breach of which may form the basis for a 42 U.S.C. section 1983 civil rights cause of action. In Estelle, the inmate's suit for lack of medical care was dismissed because negligent medical treatment does not rise to the level of a constitutional deprivation.
          3. In Gregg v. Georgia, 428 U.S. 153, 173, 96 S. Ct. at 2925 (1976), the court held that the Eighth Amendment proscribes punishments grossly disproportionate to the severity of the crime and which constitutes the unnecessary and wanton infliction of pain.
      13. Cemeteries/Indigent Burial.
      14. Ports and harbors.
          1. See section 320.20, Florida Statutes for port and harbor financing.
          2. See section 380, Florida Statutes, making ports developments of regional impact.
      15. Cable television.
      16. Homeless.
      17. Sewer and water.
      18. Authority.
          1. Municipalities and counties have general home rule authority to provide for water and sewer services. In addition, municipalities can look to the Municipal Home Rule Power Act, section 166.021, Florida Statutes (1995), and the municipal public works statute, chapter 180, Florida Statutes (1995). Counties can look to section 125.01, Florida Statutes, and the county water system and sanitary sewer financing law, chapter 153, Florida Statutes. This statutory power for both municipalities and counties is generally supplemental and additional to the home rule power granted to municipalities and counties.
      19. Regulation.
          1. In Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So. 2d 1369 (Fla. 1st DCA 1995), the court upheld departmental rule providing liability of wastewater treatment facility for proper disposal of its wastewater residuals unless it can demonstrate that the residual it delivered meets chemical criteria and that the disposer has legally agreed in writing to accept responsibility for proper disposal.
          2. The provision of sewer and water service are highly regulated by the state and federal government. These regulations include both state and federal safe drinking water acts, and numerous laws on disposal of treated sewage, including chapter 403, Florida Statutes, and the Federal Clean Water Act. These environ­mental statutes vary in applicability depending upon the type of facility at issue.
          3. Generally speaking, the level of service and rates of utilities owned by counties and municipalities are exempt from Public Service Commission regulations. See§ 367.022(2), Fla. Stat. (1995).
      20. Rule making.
          1. In City of Pompano Beach v. Oltman, 389 So. 2d 283 (Fla. 4th DCA 1980), rev. denied, 412 So. 2d 469 (Fla. 1982), the city charged out-of-city water users double what was charged to in-city users. The appellate court held rate making was a legislative act, and city could charge higher rates to out-of-city users, trial court erred in interfering with city legislative act. The court observed that inherent in the authority to own and operate a utility is the authority to set reasonable rates. The court also stated at page 286, "While its utility rates must be reasonable and non-discriminatory a municipality is entitled to make a profit from its utility operations and to use the proceeds thus derived for other valid municipal purpose."
   2. Ability of municipality to provide that provision of services be contingent on annexation.
      1. In Allen's Creek Properties, Inc. v. City of Clearwater, 663 So. 2d 628 (Fla. 1995), the court held that a municipality could refuse to provide sewer services or condition the provision of sewer services on annexation as to nonresidents located within its exclusive sewer service territory, which territory had been established pursuant to inter local agreement with neighboring municipality. In this case, agreements did not provide for affirmative duty of city to serve unincorporated area.
      2. A contrary result with respect to water service was reached in City of Clearwater v. Metco Dev. Corp., 519 So. 2d 23 (Fla. 2d DCA 1987), rev. denied, 525 So. 2d 876 (Fla. 1988). In Metco, there was a contract between the county and the city of Clearwater which required Clearwater to service an area outside its municipal limits.
   3. Ability to enforce collection of utility charges through liens.
      1. Municipalities and counties may enforce their utility charges through liens on the property served so long as the utility is used by the owner **of**the property Section 125.495 and section 180.135, Florida Statutes (1995), prohibits counties and municipalities from refusing service or imposing liens to enforce charges incurred by tenants.
   4. Due process and utility shutoffs.
      1. In Memphis Gas, Light and Water Div. v. Craft, 436 U.S. 1, 998 S. Ct, 1554 (1975), the court held a utility customer has a sufficient interest in utility service, that prior to shutoff for nonpayment, the local government there must give notice of the shutoff, and provide an opportunity to dispute potentially incorrect charges.
      2. In DiMassiomo v. City of Clearwater, 805 F.2d 1536 (11th Cir. 1986), the court held a tenant must be given notice prior to utility shutoff. The notice is required so the tenant may have the opportunity to enforce the statutory right to seek an injunction to prevent constructive eviction.
   5. Port authority
      1. Port authorities enjoy recently created ad valorem tax exemption by statute. Section 196.199, Florida Statutes (1997).
5. Chapter 16: Liability of a Local Government (by Alan S. Zimmet)
   1. Pre-suit notice requirements, Section 768.28, Florida Statutes
   2. Counties
   3. Municipalities.
   4. Constitutional officers.
   5. Contents of letter-sufficiency.
      1. In Aitcheson v. Florida Dept. of Highway Safety and Motor Vehicles, 117 So.3d 854 (Fla. 4th DCA 2013), the court held that notice sent by a slip and fall victim which claimed they were INSERT HERE  injured in a car crash, and not a slip and fall, provided enough information to allow the Department to investigate the claim in satisfaction of the statutes purpose.   
          In Smart v. Monge, 667 So. 2d 957 (Fla. 2d DCA 1996), the court held that letter describing incident but not stating claim was insufficient to meet the statutory requirements.  
          In Brower v. Department of Natural Resources, 696 So. 2d 962 (Fla. 2d DCA 1997), the court held that a letter identifying injured party as a "claimant" and advising of injuries suffered as well as stating that there would be a claim met the statutory requirements.
      2. In Vargas v. The City of Fort Myers, the 2nd DCA concluded: While strict compliance with [Florida Statute § 768.28 notice requirement] is required, "the form of the notice is not specified."  Aitcheson, 117 So.3d at 856.  The cases to date yield no talismanic rule as to the specificity of the notice.  Here, the letter sent on March 9, 2007, described the accident, Vargas's injuries, the amount of her medical bills, and that demand was being made.  Fort Myers was placed on adequate notice and was able to investigate the claims based on the information provided in the letter.  As such, Vargas's letter satisfied the notice requirement set for in sections 768.28(6)(a)...Footnote 1: To **the extent that the March 9, 2007, letter does not contain Vargas's date and place of birth and social security number, providing this information in not necessary in the notice.**  See Williams v. Henderson, 687 So. 2d 838,839 (Fla. 2d DCA 1996). ***[Added by Mark Moriarty 05/02/2014]***
   6. Sufficiency of notice.
      1. In Disco v. Navarro, 660 So. 2d 297 (Fla. 4th DCA 1995), the court held that complaint sufficiently alleged presuit notice was given to sheriff where alleged notice given to insurance adjuster who specifically responded that he was adjuster for sheriff and they had investigated claim. Taken in light most favorable to plaintiff, facts were sufficient to get past motion to dismiss.
   7. Who must file.
      1. In Maggio v. Florida Dept. of Labor and Employment Security, 899 So.2d 1074 (Fla. 005), the court held that claims filed pursuant to the Florida Civil Rights Act are not required to follow the pre-suit notice requirements of §768.28, Florida Statutes.
      2. In Bifulco v. Patient Business & Financial Services, Inc., 997 So. 2d 1257 (Fla. 5th DCA 2009), the court held that a workers compensation claim for retaliatory discharge was not required to follow the pre-suit notice requirement since this was not a common law tort.
      3. In Dade County v. Reyes, 688 So. 2d 311 (Fla. 1996), the court held that wife was required to give separate notice pursuant to section 768.28, Florida Statutes, for loss of consortium claim. Claim constituted a separate cause of action.
   8. Failure to file.
      1. In Glisson v. Jacksonville Transp. Auth., 698 So. 2d 869 (Fla. 1st DCA 1997), the court upheld summary judgment on the basis of sovereign immunity as there was no showing Department of Insurance had received notice of claim or had actual knowledge of claim.
   9. Waiver.
      1. In Motor v. Citrus County School Board, 856 So.2d 1054 (Fla. 5th DCA 2003), the court held that a county school board did not waive their right to pre-suit notice by waiting ten months to claim lack of notice as a defense, as the notice is an essential element to the claim, and the defense may be raised at any time prior to trial.
      2. In Calero v. Metropolitan Dade County, 787 So.2d 911 (Fla. 3rd DCA 2001), the court held that the county did not waive its defense to lack of notice when county conducted discovery on the claim after the  issue was raised as an affirmative defense by the county.
      3. In Ronan v. State Dept of Corrections, 701 So. 2d 1211 (Fla. 1st DCA 1997), the court held it was error to dismiss complaint without leave to amend for failure to provide notice to the department and the county pursuant to section 768.28(6), as it appears that there may be facts to support waiver by these agencies. Cites to Hutchins v. Miller, 363 So. 2d 818, 821 (Fla. 1st DCA 1978), cert. denied, 368 So. 2d 1368 (Fla. 1979); and Rabinowitz v. Town of Bay Harbor Island, 178 So. 2d 9-12, 13 (Fla. 1985), for elements which may support waiver, including actual knowledge of claim and investigation which revealed substantially the same information which would be provided by notice.
      4. In Glisson v. Jacksonville Transp. Auth., 698 So. 2d 869 (Fla. 1st DCA 1997), the court upheld summary judgment on the basis of sovereign immunity where there was no showing Department of Insurance had received notice of claim or had actual knowledge of claim
   10. Liability pursuant to other federal statutes
       1. Americans with Disabilities Act (ADA)
          1. In Kornblaw v. Dade County, 10 Fla. L. Weekly Fed. C28 (11th Cir. July 5, 1996), the court held that plaintiff was not entitled as a disabled person to park in private employees' lot where she would not have been able to park if she was not disabled.
          2. In Moresky v. Broward County, 9 Fla. L. Weekly Fed. C992 (11th Cir. April 19, 1996), the court held that county's failure to allow plaintiff to take oral versus written test for custodial job did not constitute an ADA violation where there was no evidence that county knew of plaintiffs disability.
       2. Section 1983
          1. Two requirements for maintaining civil rights action:
             1. Color of Law
             2. Deprivation of Right, Privilege or Immunity.
          2. Section 1983 itself creates no substantive rights. Gonzaga University v. Doe, 536 U.S. 273 (2002); Albright v. Oliver, 114 S. Ct. 807 (1994); City of Oklahoma v. Tuttle, 471 U.S. 808 (1985). Rather, it provides a remedy for the violation of established federal rights. Wilson v. Garcia, 471 U.S. 261 (1985).
          3. In order to maintain a claim under section 1983, a plaintiff must allege two distinct elements (1) that the conduct complained of has resulted in the deprivation of a federally protected right, and (2) the conduct allegedly causing the deprivation was committed under color of law. West v. Atkins, 487 U.S. 42 (1988).
             1. Color of Law

Where a governmental employee acts on behalf of the government pursuant to authority conferred by state law, state action exists and the color of law requirement is satisfied. Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982).  An employee whose conduct is “fairly attributable” to the state may also be considered a state actor under section 1983.  Filarsky v. Delia, 132 S.Ct. 1657 (2012).

When an employee acts in a manner not authorized by law, the color of law requirement may not be satisfied. In Myers v. Bowman, 713 F.3d 1319 (11th Cir. 2013),  the 11th circuit held that the dispositive issue in determining whether an act by an employee is under color of law for purposes of section 1983 is whether the official was acting pursuant to the power possessed by state authority or acting as a private individual. The court applied these principles to find that a magistrate judge who contacted police directly using a government issued communications device, instead of making a 911 call, and reporting an alleged theft of a dog, was not acting under the color of law in his actions.

The harder cases are where a private person or entity acts with some government involvement. While the state action inquiry must be examined on a case-by-case basis, the Supreme Court has offered some guidance. State action exists (1) where the state and the private person or entity maintain a sufficiently interdependent or symbiotic relationship, Buron v. Wilmington Parking Auth., 365 U.S. 715 (1961); (2) where the state requires, encourages, or is otherwise involved in nominally private conduct, Lombard v. Louisiana, 373 U.S. 267 (1963); (3) where the private person or entity exercises a traditional state function, Marsh v. Alabama, 326 U.S. 501 (1946).

See Footnote 1:

* + - 1. Deprivation of Right, Privilege or Immunity
         1. Constitutional Violations— Generally.

Under 42 U.S.C., section 1983, negligence is not actionable. Daniels v.  Williams, 474 U.S. 327 (1986). The Supreme Court noted in Daniels that the Constitution does not supplant traditional tort law. The court reasoned that conduct that is less than intentional is not actionable under section 1983 because that statute was designed to address "deliberate decisions of governmental officials to deprive a person of life, liberty, or property." Daniels, 474 U.S. at 348 (Stevens, J., concurring).

In The Aztec Group v. City of Tampa, 703 So.2d 1133 (Fla. 2d DCA Dec. 3, 1997), the court held that contractor who had bid on city job could not convert damage suit to civil rights suit without alleging any cause of action for violation of federal civil rights.

* + - * 1. Constitutional Violations — Specific Amendments.

**First Amendment.**

Retaliation.

Claims based upon the exercise of constitutionally protected speech are governed by the four-part test announced in Pickering v. Board of Educ., 391 U.S. 563 (1968). Under the first prong, the court determines whether the public employee's speech may be characterized as speech on a matter of "public concern." If the speech involves a matter of "public concern," the court then asks whether the interest of the public employer in promoting the efficiency of its public services outweighs the public employee's First Amendment interests. If the public employee prevails on the balancing test, the court may go on to determine whether the public employee's speech played a "substantial part" in the public employer's decision to discharge the employee. Finally, if the public employee proves by a preponderance of the evidence that the speech played a "substantial part" in his termination, the public employer must prove that it would have done the same thing regardless of the speech. The first two prongs of the Pickering test are matters of law for the court to decide. Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993).

In Norris v. Crow, 117 F.3d 449 (11th Cir. 1997), the 11th circuit upheld the disciplining of a sheriff’s office employee who used profane language to "chew out" one of her superi­ors in front of co-employees. The court reasoned that the sheriff's interest in promoting the efficiency of his adminis­tration outweighed the employees' interest in engaging in First Amendment activity.

In Carter v. City of Melbourne, 731 F.3d 1161 (11th Cir. 2013), the court upheld the termination of a police officer following an internal affairs investigation despite allegations that the investigation was based on political and union activities which are subject to first amendment protection.  While the court found his speech was of the nature which Pickering aims to protect since there were matters of public concern, there was no evidence that these statements were the basis for the investigation.

Political Patronage.

Public employees may be discharged based upon their political affiliation only where some vital government end is furthered and the action taken is the least restrictive of freedom of belief and association in achieving that end and the benefit gained must outweigh the loss of constitutionally protected rights. Elrod v. Burns, 427 J.S. 347 (1976). An exception exists for those government employees who are in policy-making positions. Id. at 367. Whether an employee is in a policy-making position depends upon the nature of the responsibility and whether the employee acts as an adviser or formulates plans for the implementation of broad goals

In Parish v. Nikolites, 86 F.3d 1088 (11th Cir. July 19, 1996), the court held it was error to enter summary judgment against employee claiming he was fired because he supported opponent of boss on grounds that policy makers could be fired based on party affiliation. Party affiliation must be essential to performance of position.

In Branti v. Finkel, 445 U.S. 507 (1980), the court applied these principles to find the termination of two assistant public defenders because they were Republicans to be un­constitutional under the First Amendment.

In McKinley v. Kaplan, 262 F.3d 1146 (11th Cir. 2001), the court found that a county was allowed to remove an employee from an appointed position for speaking out against a county policy which both the county and the commissioner who appointed her fully supported.  The court was mindful to ensure that not all public employees may be terminated for speaking out against the views of their bosses, but when an individual is in an appointed position, acting as a liaison between someone and their employer, and appointed “at will” to a position to act as an agent and on behalf of their appointer, the government may take action based on otherwise protected speech.

In Cutcliffe v. Cochran, 117 F.3d 1353 (11th Cir. 1997), the 11th circuit held that the termination of deputy sheriffs based upon their political alliance with the former sheriff was constitutional under the First Amendment. The court reasoned that loyalty to the sheriff and the policies he seeks to implement is an appropriate job requirement for a deputy sheriff who the court described as the "alter ego" of the sheriff.

In Board of County Comm'rs of Wabaunsee County, Kansas  v. Umbehr, 116 S. Ct. 2342 (1996), the Supreme Court held that the First Amendment protects independent contractors from termination or prevention of automatic renewal of at-will government contracts in retaliation for their exercise of First Amendment rights.

In O'Hare Truck Servs., Inc. v. City of Northlake, 10 Fla. L. Weekly Fed. S115 (July 5, 1996), the court extended protec­tions enjoyed by governmental employees to service provid­ers contracting with city holding that contractor could not be terminated from contract for failing to support mayor. Sec­tion 1983 action appropriate.

Associational Claims.

Two different forms of association are granted protection under the First Amendment—intimate association and ex­pressive association. Cummings v. DeKalb County, 24 F.3d 1349 (11th Cir. 1994). Intimate association encompasses personal relationships attendant to a family. The First Amendment protection afforded to these relationships is not dependent upon the purpose of the relationship being for expressive purposes. Expressive association is the freedom to associate for the purpose of engaging in constitutionally protected conduct.

In Moore v. Tolbert, 490 F. App’x. 200 (11th Cir. 2012), the court determined that a relationship between the owner of a towing company on a city towing list and city residents who filed a recall petition was not an intimate association, despite often socializing and eating dinner together.  The court ultimately determined that intimate association must be one akin to marriage or childbirth, not merely co-workers who socialize.

In Parks v. City of Warner Robins, Georgia, 43 F.3d 609 (11th Cir. 1995), the 11th circuit held that a city's anti-nepotism policy which prohibits relatives from working in the same department did not violate the right of intimate association.

**Fourth Amendment.**

Search and seizure.

 Unlawful seizures under the Fourth Amend­ment occur where there is a governmentally caused and govern­mentally desired termination of an individual's freedom of move­ment through means intentionally applied. Brower v. County of Inyo, 489 U.S. 593 (1989).  Specifically, wrongful arrest and wrongful search claims under the Fourth Amendment are governed by the standard of probable cause. However, because officers acting within their discretionary authority are entitled to qualified immunity, the constitutionality of an arrest or search is determined by the standard of arguable probable cause. See infra.

Excessive force.

In Graham v. Connor, 490 U.S. 386 (1989), the Supreme Court held that excessive force claims are governed by the Fourth Amendment. Under the Fourth Amendment, "objec­tive reasonableness" is the test employed in analyzing an exces­sive force claim. Id. The court must examine (1) the severity of the crime, (2) whether the suspect poses an immediate threat, and (3) whether the suspect was fleeing or resisting arrest.

In Lee v. Ferraro, 284 F.3d 1188 (11th Cir. 2002), the court defined reasonable as “whether a reasonable officer would believe this level of force is necessary in the same situation.”  The test is to balance the necessity of the force with the severity of the crime, using the analysis outlined in Graham.

**Eighth Amendment.**

Deliberate indifference standard.

Generally, the standard of whether a prisoner's right to be free from "cruel and unusual punishment" is deliberate indifference. Estelle v. Gamble, 429 U.S. 97 (1976). This standard applies to both claims of inadequate medical care, challenges to living conditions, attacks by other inmates, condi­tions of confinement, and prison suicides.

In Prison officials can be held liable in damages for their deliber­ate indifference in failing to protect inmates from harm, even if the inmate does not warn them of a particular threat and even if they do not believe that harm would occur to that particular inmate, if the prison officials know of a substantial risk of serious harm. Farmer b. Brennan, 114 S. Ct. 1970 (1994).

Good faith/malice standard.

In the context of a prison security case, the Supreme Court applied the following test for deliberate indifference: whether the force was applied in a good-faith attempt to maintain or restore discipline or "maliciously and sadistically" in order to cause harm. Whitely v. Albers, 475 U.S. 312 (1986). The 11th circuit has applied Whitely broadly. In Ort v. Smith, 813 F.2d 318 (11th Cir. 1987), the court held that a policy of denying a prisoner water for refusing to work did not violate the Eighth Amendment. The court reasoned that under Whitely, there is a difference in actions used as a coercive measure as opposed to punishment in the strict sense.

In Smith v. Vavoulis, 373 F. App’x. 965 (11th Cir. 2010), the court determined that deliberate indifference standard is not intended to punish governments for a *de minimis*injury suffered as a result of a use of force.  At the same time, however, the court recognized that substantial injury is not required to prove a violation of the Eigth Amendment.  The court in Smith found that officers shackling and beating an inmate for discussing a previous incident through vents was not an effort to maintain discipline, but maliciously and sadistically for the purpose of causing harm.

The malicious and sadistic standard set forth in Whitely is applicable to cases involving the alleged use of excessive physical force by prison guards. The use of excessive force in such cases may constitute cruel and unusual punishment when the inmate does not suffer serious injury. Hudson v.  McMillian, 112 S. Ct. 995 (1992).

**Fourteenth Amendment.**

Substantive due process.

In McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), cert. denied, 115 S. Ct. 898 (1995), (en banc), the 11th circuit found that the substantive component of the Due Process Clause protects only those rights which are fundamental. "Fun­damental rights" are those considered "implicit in the ordered concept of liberty." Id.(citing Palko v. Connecticut, 302 U.S. 319 (1937)). The Supreme Court has deemed most, but not all, rights enumerated in the Bill of Rights to be fundamental as well as some unenumerated "penumbral" rights. Id. In general, the protections of substantive due process have been accorded to those unenumerated rights related to marriage, family, procreation, and the right to bodily integrity. Albright v.  Oliver, 114 S. Ct. 807 (1994).

Outside the scope of substantive due process protection are rights created by state law. McKinney 20 F.3d at 1556 (citations omitted). Thus, because "substantive due process rights are created only by the Constitution," rights based upon state law do not enjoy substantive due process protection. Id.(citing Regents of University of Michigan v. Ewing, 474 U.S. 214 (1985) (Powell, J. concurring).

In accordance with these principles, the threshold issue in a substantive due process claim is whether the complaining party has any protected property interest. Restigovche, Inc. v. Town of Jupiter, 59 F.3d 1208, 1211 n.1 (11th Cir. 1995). If the complaining party has no vested property interest, then no federal constitu­tional claim exists. Id.(citing Marine One, Inc. v. Manatee County, 877 F.2d 892 (11th Cir. 1989)).  To determine whether there is a violation, the court looks to the rational basis test to determine if there is any plausible or rational basis for the laws that are challenged.  Bates v. Islamorada, Village of Islands, 243 F. App’x. 494 (11th Cir. 2007).

Procedural due process.

McKinney also forecloses procedural due process claim where state law provides procedural remedies. In McKinney, the 11th circuit held that as long as a state makes available procedures for redress of perceived violation of state created rights, a plaintiff has no claim under federal law for violation of procedural due process rights. Under McKinney, the only narrow circumstances where a section 1983 action is per­missible is where a state fails to make available the procedure for seeking redress. Id. at 1557.

This holds true even, as here, where the plaintiff claims that the available process was not fair. The McKinney court unequiv­ocally stated that section 1983 is not the appropriate vehicle for addressing claims of "unfair procedures." Rather, the McKinney court directed that any alleged procedural defects should be challenged by a writ of certiorari. Id. at 1561. The court concluded that even if a procedural defect causes an employee to suffer: "a procedural deprivation..., he has not suffered a procedural violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation."  *Id.* (emphasis in original).

Equal protection.

The thrust of an equal protection claim is that the plaintiff has been treated differently than other persons similarly situated. City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412 (1920). Further, where a plaintiff claims unequal application of a facially neutral law, he must prove intentional discrimination to establish an equal protection claim. Washington v. Davis, 426 U.S. 229 (1976); E&T Realty v. Strickland, 830 F.2d 1107, 1114 (11th Cir. 1987). Neither mere error, a mistake in judgment, nor the arbitrary administration or application of facially neutral law violates the Equal Protection Clause absent "purposeful discrim­ination." *Id.*

In Engquist v. Oregon Dept. of Agr., 553 U.S. 591 (2008), the court determined that the “class-of-one” theory of equal protection is not applicable in the public employment context.  The court reasoned that this type of complaint regarding employment actions is what the employee grievance process is for, and if allowed, would allow every decision by an employer to become a federal case.

"Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker ... selected ... a particular course of action at least in part "because of ... its adverse effects upon an identifiable group.  Id. at 1114 (quoting Personnel Administrator of Massachusetts  v. Feeney, 442 U.S. 256, 279 (1979).

Liberty interest.

To state a claim for violation of a Fourteenth Amendment liberty interest, a plaintiff must allege six distinct elements; (1) false statement; (2) of a stigmatizing nature; (3) attending a government employees discharged; (4) made public; (5) by the government employer; and (6) without an opportunity for employee name clearing. Buxton v. City of Plant City, Florida, 871 F.2d 1037, 1043 (11th Cir. 1989). In determining whether a false statement is of a stigmatizing nature, the second element of a liberty interest claim, the Supreme Court found "where the state attaches a badge of infamy to the citizen, due process comes into play. Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin  v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510, 27 L. Ed. 2d 515 (1971).

Creation of Danger/Government Employees

A government employee has no claim under the substantive Due Process Clause of the Fourteenth Amendment for the failure of the municipality to train or warn its employees about known hazards in the workplace. Collins v. Harker Heights, 112 S. Ct. 1061 (1992).

Creation of Danger/Citizens

Nothing in the Constitution requires the state to protect the life, liberty or property of its citizens from invasions by private actors. DeShaney v. Winnebago  County Dep't of Social Servs., 489 U.S. 189 (1989).

Family interest —In Garcia v. Reyes, 695 So.2d 257 (Fla. 1997), the court held that a child did not have **41**constitutionally protected family interest in Florida to support a section 1983 action for false arrest of the father.

* + - * 1. Statutory violations.

Not every federal statutory violation is actionable under section 1983. To determine whether a section 1983 claim may exist, the courts will look to a number of factors (1) whether the statute creates an administrative scheme of enforcement which precludes a section 1983 act; (2) whether the statute provides for a private judicial remedy, such that Congress intended to supplant a section 1983 remedy; and (3) whether the statute creates rights enforceable by section 1983. Livadar  v. Bradshaw, 114 S. Ct. 2068 (1994); Suter v. Artist M., 112 S. Ct. 1360 (1992); Wright v. City of Roanoke Redevelopment & Housing Auth., 479 U.S. 418 (1987); Golden State Transit Corp. v. City of Los Angeles, 110 S. Ct. 444 (1989); Wilder v. Virginia Hosp. Assoc., 110 S. Ct. 2510 (1990).

In conjunction with other statutory violations, in Johnson v. City of Fort Lauderdale, 126 F.3d 1372 (11th Cir. 1997), the court held that employee claiming dismissal based on racial harassment, discrimination, and retaliation may bring action under title VII and 42 U.S.C. 1983.

* + - 1. Parties, claims and defenses.
         1. Governmental entities.

Governmental entities cannot be vicariously liable under section 1983 for the allegedly unconstitutional acts of employees. Rather, governmental entities only may be held liable under section 1983, where the execution of a government policy or custom inflicts the injury Thus, there is no respondeat superior liability under section 1983. Monell v. Department of Social Servs., 436 U.S. 658 (1978).

A municipality only may be held liable for the "execution of a government's policy or custom, whether made by its lawmakers, or by those whose edicts or acts may fairly be said to represent official policy" and which inflict the injury. Id.

Formal Acts

This is the easiest method for subjecting a municipality to liability. Ordinances, written policies, etc. which are unconstitutional in them­selves, or which give rise to a constitutional deprivation, satisfy Monell's policy or custom requirement.

One Act By Municipal Official

A single action by a government employee is insufficient (subject to the caveat below) to trigger liability. City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

Act of High-Ranking Officials

Even a single act by a high-ranking official may be sufficient to trigger municipal liability. Pembaur v. City of Cincinnati, 106 S. Ct. 1291 (1986). The key is whether the official is a final decision maker. Praprotonik v. City of St. Louis, 485 U.S. 112 (1988) (plurality opinion). Federal courts look to state law to determine whether an official is a final decision maker. Id.

Custom

Either the municipality itself for its high-ranking officials may repeatedly act in such a way as to establish a custom. Similarly, customary conduct by lower-ranking employees may be so pervasive that the municipality or higher ranking officials know or should know of its existence.

Failure to Train

Deliberate indifference" may only be inferred in two limited instances. City of Canton v. Harris, 489 U.S. 378 (1989). One, in light of the particular employee's duties, the need for training may be obvious. Id. at 390. Two, past experience may demonstrate the need for training. Id. In evaluating allegations of failure to train, the unsatisfactory training of one officer is not sufficient to establish insufficient training. Id. at 391. Moreover, for liability to attach, the identified deficiency in training must be closely related to the ultimate injury. Id.

The United States Supreme Court again refined *the*contours of a "failure to train" claim. Board of County Comm'rs of Bryan County, Ok. v. Brown, 117 S. Ct. 1382 (1997). In Brown, the court emphasized that "in enacting section 1983, Congress did not intend to impose liability on a municipality unless deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiffs deprivation of federal rights." Id. at 1386. Moreover, one act, even by a final decision maker, may be insufficient to impose municipal liability. Id. at 1388. It is not enough for a section 1983 plaintiff merely to identify conduct properly attributable to the municipality. Id. Rather, a plaintiff also must demonstrate that the municipal action was taken with the " requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." Board of County Comm'rs of Bryan  County Ok., supra(emphasis added).  The Court has further gone on to recognize that when a government acts with actual or constructive notice that there is an omission in its training program, the government is acting with deliberate indifference.  Connick v. Thompson, 131 S.Ct. 1350 (2011).  A policy of inaction is the fundamental equivalent of a blatant violation of constitutional rights.

Id.  The 11th circuit has stressed that the deliberate indifference standard requires a conscious choice by municipal policy makers among alternative courses of action. Young v. City of Augusta, Georgia, 50 F.3d 1160, 1172 (11th Cir. 1995). These policy makers must have actual or constructive notice that the particular omission is substantially certain to result in the violation of the constitutional rights of citizens. Id.(citations omitted). More recently, the 11th circuit noted that "[i]t is not enough to show a situation will rise and that taking the wrong course in that situation will result in injury to citizens ... City of Canton also requires a likelihood that the failure to train or supervise will result in the officer making the wrong decision. Where the proper response ... is obvious to all without training or supervision, then the failure to train or supervise is generally not "so likely" to produce a wrong decision by city policy makers as to the need to train or supervise." Sewell v. Town of Lake Hamilton, 117 F.3d 488 (11th Cir. 1997) (citations omitted).  The 11th Circuit has determined that a deliberate indifference exists when a government official “(1)had a subjective knowledge of risk of serious harm, (2) disregarded that risk, (3) by conduct that is more than mere negligence.”Powell v. Sheriff, Fulton County Georgia, 511 F.App’x. 957 (11th Cir. 2013).

A municipality may not be held liable for an unconstitutional policy or custom or for failure to train in the absence of a constitutional deprivation by one of its employees. City of Los Angeles v. Heller, 475 U.S. 796 (1986) (per curiam); Rooney v. Watson, 101 F.2d 1378 (11th Cir. 1996). Thus, if a municipal employee is entitled to the defense of qualified immunity, see infra, then the municipality itself cannot be held liable.

* + - * 1. Individuals.

Government employees may be sued in their official and individual (personal) capacity. An official capacity lawsuit is the functional equivalent of an action against the municipality itself. Hafer v. Melo, 12 S. Ct. 358 (1991); Kentucky v.  Graham, 473 U.S. 159 (1985). Thus, if both the municipality and employee sued in an official capacity are named, then the court should dismiss the official capacity claim as redundant and confusing. Busby v. City of Orlando, 931 F.2d 764 (1991).

Supervisory liability.

Supervisory liability under section 1983 must be based on something more than a theory of respondeat superior. It occurs when either the supervisor personally participated in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation. Dolihite v. Maughon by and through Videon, 74 F.3d 1027 (11th Cir. 1996); Adams v. Poaq, 61 F.3d 1537 (11th Cir. 1995).

* + - 1. Qualified immunity defense.
         1. Under the doctrine of qualified immunity, government official performing discretionary functions generally are shielded from liability insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see also Anderson, 483 U.S. 630 (1986).
         2. Under the doctrine of qualified immunity, once a public official demonstrates that he was acting within his discretionary authority; the burden shifts to the plaintiff to demonstrate that the official violated clearly established law. Foy v.  Holston, 94 F.3d 1528, 1532 (11th Cir. 1996) (citations omitted); Presley v. City of Blackshear, 340 F. App’x. 567 (11th Cir. 2009); Suissa v. Fulton County, Georgia, 74 F.3d 266, 269 (11th Cir. 1996) (citation omitted). The plaintiff may not satisfy this burden by relying on broad legal aphorisms. See Suissa, supra; see also Hamilton v. Carmen, 80 F.3d 1525 (11th Cir. 1996).  The plaintiff bears the burden of showing that a right was clearly established, and that all reasonable, similarly situated officials would know that the actions in question violated this right.  Presley.
         3. To constitute a "clearly established statutory or constitutional right," the allegedly violated right must be specifically defined:
         4. The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.
         5. *Id.* at 640. As the 11th circuit has explained, for qualified immunity to be surrendered, preexisting law must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like situated, reasonable government agent that what defendant is doing violates federal law in the circumstances. Presley v. City of Blackshear, 340 F. App’x. 567 (11th Cir. 2009); Lassiter v. Alabama A&M University, 28 F.3d 1145, 1150 (11th Cir. 1994). In the absence of clearly settled law at the time of the incident in question„ "public officials are not obligated to be creative or imagi­native in drawing analogies from previously decided cases." Adams v. St. Lucie County Sheriffs Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992), (Edmondson, J., dissenting), approved en banc, 998 F.2d 923 (11th Cir. 1993). Qualified immunity is lost **only**if the controlling case, when compared with the precise actions and  the precise knowledge of the defendant, holds that the actions of the defendant were violative  under the circumstances. See Cottrell v. Caldwell, 85 F.3d 1480, 1488 (11th Cir. 1986); see also Dolihite v. Maughon by and through Videon, 74 F.3d 1027, 1032 n.3 (11th Cir. 1996).
         6. The standard for qualified immunity is objective. Harlow, 457 U.S. at 818. Thus, an inquiry into the officer's subjective belief is unnecessary. Anderson, 483 U.S. at 639. Under this standard, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see also Mitchell v. Forsythe, 472 U.S. 511, 528 (1985).
         7. In the context of an arrest, when determining whether qualified immunity exists, the issue is "not probable cause in fact but 'arguable' probable cause." Von Stein, 904 F.2d at 579 (quoting Gorra v. Hanson, 880 F.2d 95 (8th Cir. 1989)) (additional citation omitted). The standard for "arguable" probable cause is not whether a reasonable officer in the circumstances and with the same knowledge should have or would have reasonably believed that probable cause existed, but whether such an officer could have found probable cause. Eubanks v. Gerwin, 40 F.3d 1157, 1169 (11th Cir. 1994) (citing Von Stein, supra at 579) (emphasis in original); Grider v. City of Auburn, Ala., 618 F.3d 1240 (11th Cir. 2010). Based upon this standard, an officer retains qualified immunity unless, "on an objective basis, it is obvious that no reasonably competent officer would  have concluded" that probable cause existed. Malley , 475 U.S. at 341. There should be no inquiry into the individual actor’s beliefs, but rather the inquiry is what the reasonable officer would believe in the same or similar circumstances.  Grider v. City of Auburn, Ala., 618 F.3d 1240 (11th Cir. 2010).  Therefore, if reasonably competent officers could disagree as to the existence of probable cause for an arrest, then qualified immunity exists*. Id.*
      2. Individual Cases In Qualified Immunity.
         1. In Brown ex rel. Brown v. Jenne, 122 So.3d 881 (Fla. 4th DCA 2012), the court found that Fire Rescue personnel are entitled to qualified immunity for treatment rendered to motor vehicle accident victims who are unable to communicate treatment wishes. The court further pointed out that deliberate indifference has not been applied to paramedics treating crash victims, and has only been reserved for medical treatment, or lack thereof, given to prison inmates.
         2. In Furtado v. Yun Chung Law, 51 So.3d 1269 (Fla. 4th DCA 2011), the court determined that a sheriff and deputy were entitled to qualified immunity where a suspect was fatally shot during a baker act arrest when looking to the totality of the circumstances that the victim posed a threat to himself, the officers, and others involved.
         3. In Town of Southwest Ranches v. Kalam, 980 So.2d 1121 (Fla. 4th DCA 2008), the court found town officials were entitled to qualified immunity from a claim that they denied a property owner’s use of his property without just compensation. The court determined that the town officials were acting in their discretion in applying the local land use plan, and no clearly established constitutional right was violated.
         4. In Fernander v. Bonis, 947 So.2d 584 (Fla. 4th DCA 2007), the court recognized that qualified immunity is the rule, and liability and trials on liability are the exception. The court here addressed whether an officer is immune from liability for malicious prosecution when the plaintiff was arrested, and their charges were subsequently *nolle prossed*. The court ultimately found the officers to be immune, holding that officers act in the realm of possibilities when conducting investigations and serving of warrants.
         5. In Bolanos v. Bain, 696 So.2d 478 (Fla. 3d DCA 1997), the court discussed applicability of qualified immunity of police officer dog handler during arrest of juvenile for alleged burglary. Also discusses liability of other officer on scene for failing to intercede. No *respondeat superior* liability as to policy chief where no showing that his actions or inaction contributed to liability.
         6. In Junior v. Reed, 693 So. 2d 586 (Fla. 1st DCA 1997), the court held county commissioner ordering cemetery cleanup not entitled to total legislative immunity but qualified immunity if shows acting within discretionary powers. Once that is shown, burden shifts to claimant to show conduct does not rise to level of violation of clearly established constitutional or statutory right. In this case, court held claimant did not meet burden.
         7. In Bowden v. Gentile, 22 Fla. L. Weekly D1368 (Fla. 3d DCA 1997), the court reversed a summary judgment for police officer recognizing that while police officer generally immune from suit when applying for a search warrant, where affidavit is totally devoid of facts to support probable cause, immunity may not lie.
         8. In Parish v. Nikolites, 10 Fla. L. Weekly Fed. C85 (11th Cir. July 19, 1996), the court upheld summary judgment against property appraiser individually on qualified immunity grounds where the law was not clearly established that dismissing plaintiffs for political reasons violated their First Amendment rights.
         9. In Cooper v. Smith, 10 Fla. L. Weekly Fed. C186 (11th Cir. Aug. 2, 1996), the court held sheriff not entitled to qualified immunity on deputy sheriff's claim that sheriff refused to renew commission because cooperated with corruption investi¬gation. Violation of clearly established First Amendment rights.
         10. In Mandelstam v. City of South Miami, 685 So. 2d 868 (Fla. 3d DCA 1996), vice mayor had qualified immunity for role played in discretionary decision regarding issuance of special use permit even actions of talking to city planner immunity applied to persuade planner to oppose project.
      3. Right to appeal denial of qualified immunity —Under Mitchell v. Forsythe, 472 U.S. 511 (1985), a party may appeal to the circuit court on an interlocutory basis an order denying a motion based upon qualified immunity. An exception exists if there arc disputed issues of fact or a question of the sufficiency of the evidence, then a party may not take an interlocutory appeal. Johnson v. Jones, 115 S. Ct. 2151 (1995); Johnson v. Clifton, 74 F.3d 1087 (11th Cir. 1996). See also Junior v. Reed, 22 Fla. L. Weekly D494 (Fla. 1st DCA 1996). In Junior v. Reed, 22 Fla. L. Weekly D494 (Fla. 1st DCA 1997), the court allowed appeal from order denying motion to dismiss based on qualified immunity even though order did not state motion was denied based on lack of defense as a matter of law. Case relied on Tucker v. Resha, 648 So. 2d 11887 (Fla. 1984). There may be some question of validity of this procedure in light of Florida Supreme Court's holding in Hastings v. Denning as to workers' compensation immunity.
    1. Damages and Fees
       1. Damages.
          1. Damages under section 1983 may be nominal, compensatory, or punitive (with the caveat below on punitive damages).
          2. Under Carey v. Piphus, 435 U.S. 247 (1978), damages under section 1983 are not presumed. A plaintiff must prove special damages (medical expenses, lost income„ etc.) as well as general damages (pain, suffering, humiliation, etc.).
          3. Punitive damages are available against individuals under certain circum­stances. Smith v. Wade, 461 U.S. 30 (1983). Actual malice is not required; reckless or callous indifference may be sufficient. However, punitive damages are not available against municipalities. City of Newport News v. Facts Concerts, 453 U.S. 247 (1981).
       2. Attorney's fees.
          1. Under 42 U.S.C. section 1988, the prevailing party in an action under section 1983 is entitled to attorney's fees, including fees on appeal, regardless of whether the action is a constitutional or statutory case. Hutto v. Finney,473 U.S. 678 (1978).
          2. The "prevailing party" for purposes of section 1988 attorney's fees is different for plaintiffs and defendants. A plaintiff prevails when the actual relief on the merits of his claim materially alters the legal relationship between the parties and by modifying the defendants behavior in a way that directly benefits the plaintiff.  Lefemine v. Wideman, 133 S.Ct. 9 (2012).  Additionally, a prevailing plaintiff is entitled to an award of fees unless special circumstances would render such an award unjust. Newman v. Piggie Park Enters., 390 U.S. 400 (1968). Neither subjective bad faith or intentional conduct is required, although the circumstances where the courts have declined to award fees to a prevailing plaintiff are rare.
          3. A plaintiff can be a prevailing party entitled to attorney's fees even where the litigation is concluded without formal judicial action or by a consent decree. Fields v. City of Tarpon Springs, 721 F.2d 318 (11th Cir. 1983).
          4. In contrast, a prevailing defendant is entitled to an award of attorney's fees only upon a finding that the plaintiffs action as frivolous, unreasonable or without foundation, even though not brought in subjective bad faith. Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978).  The existence of both frivolous and non-frivolous claims does not prevent a defendant from an award of attorney’s fees.  Rather, the court employs a but for test to determine which fees are attributable to the frivolous claims and those which are not.
  1. Liability Under Contracts
     1. In Pan-Am Tobacco Corp. v. Department of Corrections, 471 So.2d 4 (Fla. 1984), the Supreme Court held that the defense of sovereign immunity will not protect a government entity from actions arising out of a breach of an express written contract for which the entity was authorized to enter into under the powers granted to the entity.
     2. In Champagne-Webber, Inc. v. City of Ft. Lauderdale, 519 So.2d 696 (Fla. 4th DCA 1988), the court held that when a suit is brought against a state agency based on an express written contract with the agency, sovereign immunity does not protect the state agency from any action arising out of a breach of either an express or implied covenant or condition of the contract.
     3. In County of Brevard v. Miorelli Engineering, Inc., 703 So.2d 1049 (Fla. 1997), the Supreme Court held that the defense of sovereign immunity applied to defeat a claim for recovery of costs by a contractor for extra work where the extra work was completely outside the terms of the contract, and no written change order was obtained by the contractor.
  2. Florida Statutory Liability
     1. Civil Theft. In Smith v. State, *supra*, the court upheld challenge to exemption from liability in civil theft statute section 772.19, Florida Statutes, for state, subdivisions and municipalities.
  3. Inverse Condemnation
     1. In Strickland v. Dept. of Agriculture and Consumer Services, 922 So.2d 1022 (Fla. 5th DCA 2006), the court recognized that in the exercise of a police power, destruction of property to prevent the spreading of a fire cannot be the basis for a claim for which a property owner may receive compensation.
     2. In Diamond K Corp. v. Leon County, 677 So. 2d 90 (Fla. 1st DCA 1996), the court held that in order to establish inverse condemnation, plaintiff must establish permanent deprivation of beneficial use of property. Construction of culverts that during certain rain storms cause creek to widen and causes runoff on plaintiffs property, insufficient to establish inverse condemnation.
     3. In Associates of Meadow Lakes, Inc. v. City of Edgewater, 23 Fla. L. Weekly D296 (Fla. 5th DCA Jan. 23, 1998), the court held that city could be liable in inverse condemnation where city's construction of park with improperly functioning storm management system caused continuous flooding on property precluding all reasonable use even though city has taken remedial measures to fix problem.
  4. How to raise defense of sovereign immunity.
     1. In Citizens Property Insurance v. San Perdido Association, 104 So.3d 344 (Fla. 2012), the court held that the denial of a motion to dismiss based on sovereign immunity cannot be reviewed through a writ of prohibition.  The expense of continued litigation does not constitute irreparable harm and therefore, DCAs do not have jurisdiction to hear petitions for certiorari based on a public entity’s claim that it is entitled to sovereign immunity.
     2. In Keck v. Einisor, 104 So.3d 359 (Fla. 2012), the court held that an interlocutory appeal may be used to review an employee’s claim of immunity when the issue turned purely on a question of law, while the court emphasized that it did not allow for a writ of certiorari in order to allow for the appeal.
     3. In VonDrasek v. City of St. Petersburg, 281 o.2d 549 (Fla. 2nd DCA 2001), the court recognized that the defense of sovereign immunity is based on jurisdictional principles, and thus may be raised at any time up to and during trial.
     4. In Department of Educ. v. Roe, 679 So. 2d 756 (Fla. 1996), the court held a nonfinal order denying a motion to dismiss asserting sovereign immunity as a defense to a cause of action is not entitled to interlocutory review.
  5. Service of Process
     1. In Public Health Trust of Miami-Dade County v. Acanda, 23 So.3d 1200 (Fla. 3rd DCA 2009), the court held that when notice of claim was served after a motion for directed verdict was filed, but before the court ruled on the motion, service of process was sufficient to provide notice of the claim.  (Affirmed on review, with the court holding that service was sufficient, but noting that the defendant should have plead lack of notice as a defense prior to trial, and should not use the defense as a “gotcha” tactic to dispose of otherwise meritorious claims.  See Public Health Trust of Miami-Dade County v. Acanda, 71 So.3d 782 (Fla. 2011).
     2. In Williams v. Miami-Dade County, 957 So.2d 52 (Fla. 3rd DCA 2007), the court held that the plaintiff’s lack of proof that they served the proper governmental agencies is ground to dismiss the action.
     3. In Lemonik v. Metropolitan Dade County, 672 So. 2d 899 (Fla. 3d DCA 1997), the court held while service on the Department of Insurance was mandatory when suing a county, failure to serve within statutory period would not be fatal to claim where county was served and failed to initially raise issue.
  6. Causes of Action.
     1. In Strickland v. Dept. of Agriculture and Consumer Services, 922 So.2d 1022 (Fla. 5th DCA 2006), the court held that a city cannot be liable for actions of their firefighters in making strategic decisions on how to fight a fire, as doing so would force the court to second guess decisions and violate the separation of powers doctrine.
     2. In Garcia v. Reyes, 698 So. 2d 257 (Fla. 1997), the court held that no cause of action existed for violation of substantive due process in favor of children as a result of illegal imprisonment of father for 30 months. Section 768.28 did not create any new causes of action.
  7. Acts of Employees.
     1. **Willful and malicious acts of employees.**
        1. In Drudge v. City of Kissimmee, 581 F. Supp.2d 1176 (M.D. Fla. 2008), the court recognized that a city cannot be held liable for actions of employees who act in a willful or malicious manner.
        2. In Smith v. State, 1997 WL 345277 (Fla. 1st DCA June 25, 1997), the court reaffirmed governmental entities could not be held liable under section 768.28, Florida Statutes, for willful and malicious acts of employees.
        3. In Stoll v. Noel, 694 So. 2d 701 (Fla. 1997), the court determined that part-time physician consultants hired by HRS were entitled to statutory immunity where HRS maintained control over physicians pursuant to manual and consultants' guide.
  8. Various Governmental Activities
     1. Legislative-type functions.
        1. In City of Freeport v. Beach Community Bank, 108 So.3d 684 (2013), the court held that the decision not to investigate security posted for proposed developments for fraud was a discretionary function and the City would not be liable for damages as a result.
        2. In Kaweblum ex rel. Kaweblue v. Thornhill Estates Homeowners Association, Inc., 801 So.2d 1015 (Fla. 4th DCA 2001), the court held that the decision to improve only one side of a drainage canal was a planning level function, and the drainage district was immune from liability for wrongful death after a drowning occurred on the unimproved side.
        3. In Peredes v. City of North Bay Village, 693 So. 2d 1153 (Fla. 3d DCA 1997), the court held that city could not be liable in nuisance action for decision to expend funds and decision of where to place baseball field.
        4. In Perez v. Metropolitan Dade County, 662 So. 2d 421 (Fla. 3d DCA 1995), the trial court properly entered summary judgment for county when lawsuit for damages was based on county's discretionary decision whether to extend the area which was covered by a school speed zone.
     2. Permitting.
        1. In Department of Children and Family Services v. Chapman, the court held that statutory duties of DCF to license and regulate substance abuse services were general duties to the public, not the individuals, and that no common law duties existed to families who suffered harm caused by misconduct of a substance abuse counselor.
        2. In Brown v. Department of Health and Rehabilitative Servs., 690 So. 2d 641 (Fla. 1st DCA 1997), the court held that HRS owed no individual duty to child molested in day care center to monitor conditions of permit. Analogized permitting function to enforcement of laws.
        3. In Hummel v. Stentson-Strump, 648 So. 2d 1239 (Fla. 5th DCA 1995), the court held that no liability exists for negligent approval for construction plans; however, there may be liability for failure to operate and maintain storm water drainage system.
     3. Law enforcement.
        1. Decision Whether to Enforce Statute or Ordinance
           1. In City of Delray Beach v. St. Juste, 989 So.2d 655 (Fla. 4th DCA 2008), the court held that the decisions of the animal control officer and police not to impound certain  unfenced dogs subject to complaints were discretionary functions of the city entitled to immunity.
           2. In Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997), the court held there can be no liability for discretionary decision not to arrest in domestic violence situation.
           3. In Carter v. City of Stuart, 468 So. 2d 955 (Fla. 1985), the court said city could not be held liable for failure to enforce animal control ordinance.
           4. In Everton v. Willard, 468 So. 2d 936 (Fla. 1985), the court held immunity precluded suit against deputy for failure to make DWI arrest. But see  Bowden, infra.
           5. In Bowden v. Henderson, 700 So. 2d 714 (Fla. 2d DCA 1997), the court held that after deputy arrested driver of vehicle for driving while intoxicated, a special relationship had been created with passengers of the vehicle and sovereign immunity did not preclude suit based on deputy allowing drunk passenger behind wheel to drive, and there was a subsequent accident.
           6. In Simpson v. City of Miami, 700 So. 2d 87 (Fla. 3d DCA 1997), the court held that municipality could be liable if officer arrested party for domestic violence but allowed party go upon promise not to bother victim when party later killed victim. Court focused on language in section 741.30(9)(h) that stated upon arrest, violator "shall be held in custody until brought before the court as expeditiously as possible." Legal duty created by statute.
        2. Police chase.
           1. In Fisher v. Miami-Dade County, 883 So. 2d 335 (Fla. 3d DCA 2004), the court held that police officers in pursuit of a fleeing suspect do not owe a duty to any passengers in the vehicle, as requiring an officer to first, determine whether there is a passenger in a vehicle, and second, whether the passenger was involved in the crime would essentially halt any police pursuit until such a determination can be made.
           2. In Porter v. Department of Agriculture, 689 So. 2d 1152 (Fla. 1997), the court held police officers who initiated chase but withdrew prior to accident had no duty to plaintiffs who were later struck by vehicle being chased. Distin­guishes City of Pinellas Park v. Brown, 604 So. 2d 1222 (Fla. 1992), where police held liable for the manner in which they conducted high speed chase.
           3. In Creamer v. Sampson, 700 So. 2d 711 (Fla. 2d DCA Aug. 27, 1997), the court held allegations that deputy pursued car at 80 miles an hour on crowded city street because of improper tag, and this activity caused the person being pursued to strike vehicle driven by plaintiff, were sufficient to state a cause of action. Fact that deputy sheriff discontinued pursuit 45 seconds prior to crash did not preclude factual issue of foreseeability being determined by jury.
        3. Level of manpower.
           1. In Wallace v. Dean, 3 So.3d 1035 (Fla. 2009), the court held that an officer’s failure to promptly call for ambulance upon arrival to 911 call, ultimately resulting in death, was an operational level function to which no immunity applied.
           2. In White v. City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995), the court held that while city could not be liable for number of officers on street, an officer's decision to chase stray horse in unlit patrol car which caused horse to go on roadway where it collided with a private citizen could subject city to liability.
        4. Failure to protect third party from lawless acts.
           1. In The City of Ocala v. Graham, 864 o.2d 473 (Fla. 5th DCA 2004) the court held that immunity may disappear when a special relationship exists between the government actor and the tort victim.  (Although, court here ultimately find there to be no special relationship).  See Bowden, supra.
           2. In Laskey v. Martin County Sheriff’s Dept, 708 SO.2d 1013 (Fla. 4th DCA 1998), the court held that the duty to respond to reports of a traffic offender is one owed to the public as a whole, and not to a third party who may otherwise be injured by the offender, resulting in immunity for the law enforcement agency.
           3. In State Dept of Corrections v. Vann, supra. the court held Department of Corrections could not be held liable for crimes committed by prisoner who escaped from department's custody. See also Department of Corrections v.  McGhee, 653 So. 2d 1091 (Fla. 1st DCA 1995).
           4. In City of Delray Beach **v.**Brownstein, 699 So. 2d 855 (Fla. 4th DCA 1997), the court held that city had no duty to maintain stop sign placed on mall property by owners of mall.
        5. Method of enforcement.
           1. In Labance v Dawsy, 14 So. 3d 1256 (5th DCA 2009), the court held that occupants of a residence were in a special relationship to which the Sheriff owed a duty to the occupants of the home.  However the court determined that evidence stating that failure to warn the occupants of the dangerous condition of serving a warrant did not lead to a breach of the duty owed.
           2. In Pollock v. Florida Department of Highway Patrol, 882 So.2d 928 (Fla. 2004), the court held that the FHP’s internal operating procedures and policies did not impose a duty on the FHP to respond to reports of stalled vehicles.
           3. In White **v.**City of Waldo, 659 So. 2d 707 (Fla. 1st DCA 1995), the court held that while city could not be liable for number of officers on street, the officer's decision to chase stray horse in unlit patrol car with private citizen on hood which caused horse to go on roadway where it collided with private citizen could subject city to liability.
           4. In Farrey v. Town of Davie, 22 Fla. L. Weekly D2699 (Fla. 4th DCA Dec. 3, 1997), the court said actions of law enforcement officer in assisting in capture of stray bull constituted an operational function for which city could be held liable.
        6. Custodial functions.
           1. In Estate of Smith v. Florida Dept. of Children and Families, 34 So. 3d 181 (Fla. 1st DCA 2008), the court held that DCF was immune from suit for wrongful death of an employee who was killed by an inmate housed at a state hospital.
           2. In Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla, 402 F.3d 1092 (11th Cir. 2005)(Applying Florida Law), the court held that treatment of an inmate in the county’s custody is an operational function for which the State has waived governmental immunity, and county Sheriffs are not immune from liability.
           3. In State Dept. of Health and Rehabilitative Services v. T.R. es rel Shapiro, 847 So.2d 981 (Fla. 3d DCA 2002), the court determined that HRS was immune from negligence actions regarding the placement and rehabilitative services provided to foster children as these are discretionary planning activities.
           4. In Lee v Department of HRS, 698 So. 2d 1194 (Fla. 1997), the court ruled that HRS could not be liable on basis of level of supervision provided mentally retarded person in its care, but could be liable for manner in which supervision was conducted by employee when retarded person was sexually abused.
           5. In Harris v. Monds, 696 So. 2d 446 (Fla. 4th DCA 1997), the court held common law duty existed as to person incarcerated; therefore, prisoner's action for injuries not barred by sovereign immunity.
           6. In Collazo v. City of West Miami, 683 So. 2d 1161 (Fla. 3d DCA 1996), the court overturned directed verdict for city where child hurt with bat during baseball game after city undertook to provide adult supervision for child during after- school park activities. Compare with cases in section on torts committed by others on governmental property
           7. In Grace v. City of Miami, 661 So. 2d 1332 (Fla. 3d DCA 1995), the court held it was error to enter summary judgment for city that operated a school lunch program when child was injured attending program. Sufficient level of supervi­sion and foreseeability of injuries were questions of fact for the jury.
           8. In Kaisner v. Kolb, 543 So. 2d 732 (Fla. 1989), the court held officer who detained motorist had motorist in custody and therefore owed him actionable duty of care.
        7. Injuries on local government property.
           1. Premises Liability.

Premises liability-defect in capital improvement

In Maday's Wholesale Greenhouse v. Indigo Group. Inc., 692 So. 2d 207 (Fla. 5th DCA 1997), the court held city could be liable for damages caused by subdivision roads which were accepted from developer when it was alleged that use by the city caused plaintiff’s property to be invaded by water. Allegations were based on improper maintenance, not failure to upgrade.

In Brown v City of Vero Beach, 64 So.3d 172 (Fla. 4th DCA 2011), the court held that government entities are not liable for injuries or death caused as a result of changing surf along shore areas.

In City of Melbourne v. Dunn, 941 So.2d 504 (Fla. 5th DCA 2003), the court determined that a city did not have to make a large wooden planter safe for walking as this was not the function for which the planter was designed, and thus the City was immune from liability for injuries sustained by individual who fell off planter.

In Leonard v. Wakulla Count-, 688 So. 2d 440 (Fla. 1st DCA 1997), the court held county could not be held liable for discretionary decision not to upgrade wheelchair ramp to courthouse.

In City of Jacksonville v. Mills, 544 So. 2d 190 (Fla. 1989), held city could be liable for failing to maintain courthouse floor.

In LeNoble v. City of Fort Lauderdale, 663 So. 2d 1351 (Fla. 4th DCA 1995), the court held question of whether plaintiff who was hit in eye by batted ball while plaintiff pitching from a softball mound alleged to be placed six feet too close to home plate could collect from city was question of fact for the jury, and it was error to grant summary judgment for the city.

In Department of Trans., v. Wallis, 659 So. 2d 429 (Fla. 5th DCA 1995), the court held sovereign immunity precluded suit by pedestrian hit crossing the street where there was no duty to upgrade street and lack of sidewalk or stop light was readily apparent.

* + - 1. Failure to warn of defect
         1. In Mann v. State Dept. of Transp., 946 So. 2d 1246 (Fla. 1st DCA 2007), the court held that sovereign immunity does not apply when the DOT creates a known hazardous condition with the illusion of safety and fails to warn or correct it, citing Dept. of Transp. V. Neilson, 419 So. 2d 1071 (Fla. 1982).
         2. In Dudley v. City of Tampa, 912 So.2d 322 (Fla. 2d DCA 2005), the court held that the city was not liable for a failure to warn of known soil defects on property sold to housing developments.
         3. In Leonard v. Wakulla County, 688 So. 2d 440 (Fla. 1st DCA 1997), the court held no duty to warn of steep slope on wheelchair ramp where open and obvious.
         4. In Tucker v. Gadsden County, 670 So. 2d 1053 (Fla. 1st DCA), rev, denied, 679 So. 2d 773 (Fla. 1996), the court said while generally there is no duty to warn a person who normally travels road of a defect, may be distracted by condition on road and or potential that party may not see defect, it is factual issue for jury whether failure to warn of defect (loose shoulders on unpaved road) could constitute negligence.
         5. In Department of Transp. v. Nielson, 419 So. 2d 1071 (Fla. 1982), the court held that failure to warn of a known danger is negligent mission at the operation level of government and is not within the immune judgment planning level sphere.
      2. Torts committed by others on governmental property.
         1. In Metropolitan Dade County v. Dubon, 780 So. 2d 328 (Fla. 3d DCA 2001), the court held a governmental entity does not owe a duty to protect individuals’ at shelters owned by the government from torts committed by a third party.  Since the victim and assailant were both free to come and go as they choose, and neither was in the custody or control of the County, there was no special relationship in existence to create  a duty of care.
         2. In Jones v. City of Coral Springs, 694 So. 2d 819 (Fla. 4th DCA 1997), the court held that summary judgment for city was proper where city could not have reasonably anticipated player would be punched during basketball game. But see  LeNoble v. City of Fort Lauderdale, supra.
         3. In Dennis **v.**City of Tampa, 581 So. 2d 1345 (Fla. 2d DCA), cert. denied, 591 So. 2d 181 (Fla. 1991), summary judgment upheld for city when jogger in city park hit by bicycle. City could not have been reasonably expected to prevent injury.
         4. In Barrio v. City of Miami Beach, 698 So. 2d 1241 (Fla. 3d DCA 1997), the court analyzed city's potential liability as the same as any property owner but held city not liable to uninvited licensee for criminal attack occurring on beach where city had posted hours that beach closed and threat of attack was open and obvious.
  1. Statutory or common-law duty
     1. In Trianon Park Condominium Ass'n v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), the court held in order for a plaintiff suing a local government in tort to prevail, they must demonstrate that the local government owed them a statutory or common-law duty. The court divided governmental activities and functions into four categories:
        1. Legislative
        2. Permitting
        3. Licensing
        4. Executive Office Functions
           1. No duty exists; therefore, the local government is immune from liability.
        5. Enforcement of laws, protection of public safety, power to enforce laws
           1. No duty exists; therefore, the local government is immune from liability.
        6. Power to enforce laws
        7. Capital improvement and property control functions.
           1. A duty exists; therefore, liability exists unless the activity involves a planning level function.
        8. Planning level/operational level test.
           1. Planning level decisions are basic policy decisions - hence, generally immu­nity exists for such decisions. Examples include:

Failure to build, expand, modernize.

Design activities.

Decision to place stop light, stop signs, etc.

Location of bus stops.

* + - 1. Exception.
         1. Hidden traps and dangerous conditions.

Under certain circumstances, courts will hold a governmental body liable for its planning level decisions. Collum v. City of St. Petersburg, 419 So. 2d 1082 (Fla. 1982).

The court established a test for applying this exception.

Did government create dangerous condition?

Was condition known to governmental entity?

Was condition not readily apparent?

If all three are answered affirmatively, then the government has the duty to warn or protect against the dangerous condition and can be held liable. The Supreme Court, however, has determined that certain risks are so obvious that they are readily apparent as a matter of law and therefore, no duty to warn exists. Payne v. Broward County, 461 So. 2d 63 (Fla. 1984) (crossing a road midblock).

* + - 1. Operational decisions.
         1. Generally includes maintenance functions. Once a governmental entity builds or takes control of property or an improvement, it has the same common-law duty as a private person to maintain and operate the private property properly. Breach of that duty can give rise to tort liability. Trianon at 921, no immunity.
         2. Example: Failure to maintain storm water drainage system. Slemp v. City of Miami, 545 So. 2d 256 (Fla. 1989).
      2. Supervision.
         1. If a local government is acting in a supervisory capacity, a duty exists, and it can be held liable. For example, Collazo v. City of West Miami, 683 So. 2d 1161 (Fla. 3d DCA 1996).
      3. Tort Liability
         1. The court recognized it was important to set forth certain basic principles in order to clarify the law regarding governmental tort liability.
         2. First, for there to be governmental tort liability, there must be either an underlying common law or statutory duty of care with respect to the alleged negligent conduct.
         3. Second, it is important to recognize that the enactment of the statute waiving sovereign immunity did not establish any new duty of care for governmental entities.
         4. Third, there is not now, nor has there ever been, any common law duty for either a private person or a governmental entity to enforce the law for the benefit of an individual or a specific group of individuals.
         5. Fourth, under the constitutional doctrine of separation of powers, the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government.
         6. Fifth, certain discretionary functions of government are inherent in the act of governing and are immune from suit. Commercial Carrier v. Trianon at 917-918.
  1. Planning versus operational
     1. In Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), the court stated while section 768.28, Florida Statutes, constituted a general waiver of sovereign immunity, based on the principle of separation of powers, there were certain planning or discretionary functions which local government still could not be held liable for.
     2. The four-part test to determine if a matter is discretionary is as follows:
        1. Does the challenged act, omission or decision necessarily involve a basic governmental policy, program, or objective?
        2. Is the questioned act, omission or decision essential to the realization or accomplish­ment of that policy, program or objective as opposed to one which would not change the course or direction of the policy, program or objective?
        3. Does the act, omission or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved?
        4. Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission or decision?
     3. If all four of the above can be answered affirmatively, then the activity is immune.
  2. Two-prong test for determining state tort liability
     1. In State Dep't of Corrections v. Vann, 650 So. 2d 653 (Fla. 1st DCA 1995), approved and adopted by the Supreme Court in Vann v. Department of Corrections, 662 So. 2d 339 (1995), the court enumerated a two-prong test for determining governmental liability 1) whether there is a common-law duty of care which enures to the benefit of the plaintiff, and 2) whether the alleged action is one for which sovereign immunity has been waived. If either question is answered no, there is no liability.

1. Chapter 17: Financing Local Government (by Mark Moriarty)
   1. Ad valorem taxation.
      1. Authority and limitations (constitutional and statutory).
         1. Article VII, section 1(a), Florida Constitution, provides as follows:
            1. No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. All other forms of taxation shall be preempted to the state except as provided by general law.
            2. In Alachua County v. Adams, 22 Fla. L. Weekly S741 (Fla. Dec. 4, 1997), the supreme court found that special act allowing Alachua County to use proceeds of infrastructure surtax for parks and recreation in contravention of general law violates article I, section 1, article V, section 1(a), and article VII, section 9, Florida Constitution. Special law could not deal with form of taxation.
         2. Article VII, section 9(a), Florida Constitution, provides as follows:
            1. Counties, school districts, and municipalities shall, and special districts may, be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes, for their respective purposes, except ad valorem taxes on intangible personal property and taxes prohibited by this constitution.
         3. Article VII, section 4, Florida Constitution, provides for just valuation of all property for ad valorem taxation purpose and a limitation on amount of increase of assessment.
         4. Article VII, section 9(b), Florida Constitution, provides as follows:
            1. Ad valorem taxes, exclusive of taxes levied for period not longer than two years when authorized by vote of the electors who are the owners of freeholds therein not wholly exempt from taxation shall not be levied in excess of the following millages upon the assessed value of real estate and tangible personal property: For all county purposes, 10 mills; for all municipal purposes, 10 mills; for all school purposes, 10 mills; ... and for all other special districts a millage authorized by law approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation. A county furnishing municipal services may, to the extent authorized by law, levy additional taxes within the limits fixed for municipal purposes.
         5. Section 200.071, Florida Statutes, provides statutory millage limitations for counties and special districts:
            1. Except as otherwise provided herein, no ad valorem tax millage shall be levied against real property and tangible personal property by counties in excess of 10 mills, except for voted levies.
            2. The board of county commissioners shall, in the event the sum of the proposed millage for the county and dependent districts therein is more than the maximum allowed hereunder, reduce the millage to be levied for county officers, departments, divisions, commissions, authorities, and dependent special districts so as not to exceed the maximum millage provided under this section or section 200.091.
            3. Any county which, through a municipal service taxing unit, provides services or facilities of the kind of type commonly provided by municipali­ties, may levy, in addition to the millages otherwise provided in this section, against real property and tangible personal property within each such municipal service taxing unit an ad valorem tax millage not in excess of 10 mills to pay for such services or facilities with the funds obtained through such levy within such municipal service taxing unit.

See Board of County Comm'rs, Hernando County v. Florida Dep't of Community Affairs, 626 So. 2d 1330 (Fla. 1993), upholding the constitutionality of the aggregation of dependent district millage with the county purpose millage.

* + - 1. Section 166.211, Florida Statutes, provides authority to levy ad valorem taxes, consistent with the constitutional provision set forth above. Section 200.081, Florida Statutes, provides the statutory millage limitation for municipalities:
         1. No municipality shall levy ad valorem taxes against real property and tangible personal property in excess of 10 mills, except for voted levies.
         2. Ad valorem taxes may also be levied for up to 10 mills for county purpose.
         3. A county may also levy taxes up to 10 mills for municipal purposes in the unincorporated areas without voter approval. Section 125.01(1), Florida Statutes.
         4. Constitution requires assessment at 100 percent of market value, but *see*"Save Our Homes" constitutional amendment which "caps" residential assessments of homestead property until transfer occurs. Walter v. Schuler, 176 So. 2d 81 (Fla. 1965).
         5. Section 193.011, Florida Statutes, prescribes the criteria to be addressed when assessing property Valencia v. Bystrom, 543 So. 2d 214 (Fla. 1989).
    1. Ad valorem tax collection, defined.
       1. Property subject to taxation.
          1. All real and personal property in the state and all personal property belonging to persons residing in the state. Section 196.001(1), Florida Statutes.
          2. All leasehold interests in property of the U.S., state, or local government agencies. Section 196.001(2), Florida Statutes.
       2. Ad valorem taxes defined. A tax based upon the assessed value of property. Section 192.001(1), Florida Statutes. Ad valorem tax roll is prepared by the property appraiser and certified to the tax collector. Section 197.102(7)(a), Florida Statutes. Ad valorem taxes consist of:
          1. Tangible personal property. All goods, chattels and other articles of value capable of manual possession and whose chief value is intrinsic to the article itself. It includes fixtures, machinery; and equipment, but not inventory, household goods or vehicles. Section 192.001(11)(d), Florida Statutes.
          2. Real property. Land, buildings, fixtures, and all other improvements to land. Section 192.001(12), Florida Statutes.
    2. Exemptions.
       1. United States government. The First Nat'l Bank of Homestead, Florida v. Dickinson, 291 F. Supp. 855 (N.E. Fla. 1968), affd, 393 U.S. 409, 89 S. Ct. 685, 21 L. Ed. 2d 634 (1969).
       2. State and county property. Park-N-Shop, Inc. v. Sparkman, 99 So. 2d 571 (Fla. 1957).
       3. Municipalities, if used for a public purpose. Art. VII, section 3(a), Florida Constitution.; Orange State Oil Co. v. Amos, 130 So. 707 (Fla. 1930).
       4. See chapter 196, Florida Statutes.
       5. In Leon County Educational Facilities Authority v. Hartsfield, 22 Fla. L. Weekly S341 (Fla. June 12, 1997), the court held property owned by nonprofit corporation created to facilitate lease purchase was exempt from taxation.
       6. In Schultz v. Crystal River Three Participants, 686 So. 2d 1391 (Fla. 5th DCA 1997), the court held that fee simple interest of municipalities in power plant are exempt from taxation even though private electric corporation owned controlling interest to the extent that cities' interests were being used for the generation of electricity, a public purpose was being served and municipalities entitled to exemption.
       7. In Canaveral Port Authority v. Department of Revenue, 690 So. 2d 1226 (Fla. 1996), the court held port authority was not the state or subdivision for purpose of exemption contained in constitution; therefore, port authority immunity from ad valorem taxation did not extend to property leased to nongovernmental entity for nongovernmental use.
       8. In Park-N-Shop, Inc. v. Sparkman, 99 so. 2d 571 (1958), the court stated pursuant to the constitution and common law, municipalities enjoy exemption for their property as long as it is used for a public purpose while state and its subdivisions enjoy immunity from taxation.
    3. D.   Collection
       1. See section of Local Government as Creditor, supra.

1. Chapter 18: Local Government Expenditures (by Mark Moriarty)
   1. Limited to public purpose.
      1. Bonds - public purpose.
         1. In State v. Division of Bond Finance, 495 So. 2d 183 (Fla. 1986), the court held legislative declarations of public purpose are presumed valid and are to be considered correct unless patently erroneous.
      2. Wide discretion.
         1. In City of Boca Raton v. Gidman, 440 So. 2d 1277 (Fla. 1983), the court stated that absent a clear abuse of discretion, the court would not interfere with the legislative determination of what expenditures were made for a public purpose. In this case, court upheld city expenditure for educational day care center.
         2. In Poe v. Hillsborough County; 695 So. 2d 672 (Fla. 1997), the court upheld use of bonds for building stadium and found that use constituted a public purpose even though certain revenues were guaranteed to private team owner. Not impermissible public private partnership.
      3. Limitations.
         1. In Palm Beach County v. Hudspeth, 540 So. 2d 147 (Fla. 4th DCA 1989), the court held that while county may appropriately expend public funds to educate public on purpose and essential ramifications of referendum, they must do so fairly and impartially. The county could not become an advocate for one position over another. See, however, People Against Revenue Management v. Leon County, 583 So. 2d 1373 (Fla. 1997).
2. Chapter 19: Purchasing (by Susan Churuti)
   1. Practical Pointers.
      1. Solicitation terms and conditions.
         1. Advertisements/instructions to bidders in Bid/RFP documents should reserve the right to reject all bids.
         2. Selection Criteria should be clearly articulated in all documents.
         3. Minimum/mandatory criteria should be strictly observed during the evaluation process.
         4. Bid documents should prominently state that bidders may not rely on verbal information furnished by public employees. All requests for information should be in writing and addressed to the specific individual/address designated on all relevant bid documents. Answers should be furnished to all known bidders.
         5. If bid bonds or bid deposits are required, this requirement should be noted in all relevant documents.
      2. Drafting checklist -RFP’s/bids.
         1. Can I reject all bids?
         2. Can I award in part?
         3. Are selection criteria clear and easy to apply?
         4. Have I created a property right for a low bidder?
         5. Have I indicated all inquiries into meaning of specifications are to be made in writing to one person?
         6. Have I provided that submission of a bid implies full understanding of and agreement with the terms of the RFP and that misunderstanding will not relieve the bidder from performance?
         7. Have I reserved the right to waive informalities or immaterial variations?
         8. Have I provided that offers are irrevocable at least for a certain time period?
         9. Have I provided for clear bid award procedure?
         10. Have I provided for acceptance of late bids?
         11. Have I provided for mandatory or optional prebid conference?
         12. Have I explained that no assurances are binding other than final action?
         13. Are bid bond and bid deposit requirements clear?
         14. Have I advertised appropriately?
      3. Drafting checklist-contracts.
         1. Is there a public purpose to this contract?
         2. Have I identified the appropriate parties?
         3. Are these parties authorized to perform this function?
         4. Are representations or warranties appropriate?
         5. Are any procedural requirements a condition precedent to the parties’ performance (resolutions of city council, corporate resolutions)?
         6. Have I identified the capacity or status of the parties?
         7. Can I obtain service of process after reviewing the contract (name, entity, location of entity creation, principal place of business or registered agent)?
         8. Can I identify the date of execution of the contract?
         9. Can I identify the date that the services are to begin?
         10. Have I provided a term for the contract?
         11. Is the execution of the parties correct?
         12. Can I encumber funds under this contract?
         13. Can I audit this contract?
         14. Have I included a cancellation provision at the end of the fiscal year or a fiscal non-funding provision?
         15. Can I make payments or know when I will be receiving payments?
         16. Are advanced payments required?
         17. Am I creating a debt (mortgage, security interest, or requirement for a special filing with the I.R.S.)?
         18. Are there any restrictions on the funds being utilized to pay for this contract, which require special conditions?
         19. Have I provided for indemnity to the county?
         20. Have I avoided indemnity by the county?
         21. Have I provided for termination for cause, termination for convenience or options for renewal in lieu of termination?
         22. Have I provided for default and remedy for default?
         23. Is there a priority of documents provision?
         24. Does the law of Florida govern the contract?
         25. Is Florida the venue for litigation of the contract?
         26. Is the contract assignable without consent?
         27. Have I provided for patent, trademark and copyright indemnification?
         28. Has bid splitting occurred which could require competitive bidding?
         29. Does the scope of the services defined in the contract duplicate an existing contract between the parties?
         30. Have I required compliance with all applicable laws?
   2. Bid Protest Issues
      1. Amendments to Invitation to Negotiate
         1. Chapter 2010-151, Laws of Florida, substantially amended the procedures related to the Invitation to Negotiate.  The most significant change was to require more specificity in the invitation to negotiate and to include a requirement that "the agency shall award the contract to the responsible and responsive vendor that the agency determines will provide the best value to the state, based on the selection criteria."  See Keystone Peer Review Org., Inc. v. Agency for Health Care Admin., Case No. 10-9969BID (DOAH Jan. 12, 2011).
         2. This amendment appears to overrule the conclusion in Health Management Systems, Inc. v. Agency for Health Care Administration, Case No. 08-2566BID (DOAH August 15, 2008) which provided that "in determining the best value to the state during the negotiation phase, the agency is not limited to the criteria that are used to determine who will participate in the negotiations."  See Keystone Peer Review Org., Inc. v. Agency for Health Care Admin., Case No. 10-9969BID at n.23 (DOAH Dec. 23, 2011) rejected by Keystone Peer Review Org., Inc. v. Agency for Health Care Admin., Case No. 10-9969BID (DOAH Jan. 12, 2011).
         3. The Division of Administrative Hearings did not specifically reach this issue as it was found the amendments did not apply due to the timing of the initial issuance of the invitation to negotiate.
      2. One percent of estimated contract price.
         1. Section 287.042(2)(c), Florida Statutes, requires that any person protesting a decision or intended decision pertaining to contracts pursuant to section 120.57(3)(b), Florida Statutes, shall post at the time of filing the formal written protest a bond in an amount equal to 1% of the estimated contract amount.
         2. The bond is designed to cover the payment of all costs and charges adjudged against the protestor in the administrative hearing and any subsequent appellate court proceedings.  *Id.*  If the agency prevails, it shall recover all costs and charges, excluding attorney's fees from the bond and remainder shall be returned to the protestor.
         3. Depending on the estimated contract amount, 1% of the bond requirement could be quite high.  Since the purpose of the bond is to secure costs and charges (excluding attorney fees) having a bond amount much larger than necessary may violate constitutional arguments such as access to courts and due process.
      3. Jurisdictional requirement.
         1. The failure to post a protest bond at the time of filing a formal written protest under section 287.042(2)(c) is not jurisdictional.  ABI Walton Ins. Co. v. Dep't. of Mgmt. Serv., 641 So. 2d 967 (Fla. 1st DCA 1994); Gen. Elec. v. Dep't of Transp., 869 So. 2d 1273 (Fla. 1st DCA 2004).
         2. Chapter 2006-82, Laws of Florida, amended section 120.57(3)(a), Florida Statutes, to provide that in the notice of a decision concerning a contract award, the notice shall include the following state: "failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."
         3. It can be argued that the amendment in chapter 2006-82 overruled ABI Walton and General Electric, making the protest bond requirement jurisdictional, but the Legislature did not expressly state that was the amendment's purpose and many other secondary sources still cite to *ABI*Walton and General Electric for the proposition that the protest bond requirement is not jurisdictional.  See, e.g., 43 Fla. Jur. 2d Public Works & Contracts § 35 (2011) (“notice and opportunity to cure are required before the bid protest is dismissed solely due to a deficient bond,” citing General Electric); Fla. Constr. Law & Prac. § 7.78 (2010-11) (“[a]gencies must give protestors notice and an opportunity to cure a defective protest bond,” citing General Electric); 8 Fla. Prac., Constr. Law Manual § 5:21 (2010-11) (“[i]n the event of any deficiency in a bid protest bond, the awarding agency must give the protestor written notice of the deficiency in the bond and an opportunity to cure before dismissing the protest,” citing ABI Walton and General Electric).
      4. Local Preference
         1. Generally.
            1. Local preference policies/ordinances have been enacted with the goal of providing employment opportunities for local contractors and to ensure continuous work for local businesses in an effort to provide local economic benefits/incentives.
         2. Application.
            1. Local preferences are generally granted to a contractor/vendor in a specified geographic area or location, as defined in an ordinance or policy. Such preference policies automatically grant a fixed percentage to a “local” contractor/vendor that submits a bid or proposal. The application of such preference type schemes often have a number of requirements, which include minimum dollar threshold amounts at which such preferences are granted, reciprocity to other cities/counties utilizing similar preferences and waiver provisions for certain agreements such as CCNA and professional service type agreements. The percentage of preference tends to be around 5%.
         3. Tie bids.
            1. The most common application of local preferences seems to be with tie bids. In such cases where two bidders/proposers submit bids/proposals tied in price, but otherwise meeting all required conditions, awards are automatically made to the “local” bidder/proposer.
         4. Advantages and disadvantages.
            1. Local preference ordinances or policies have been enacted or adopted with the policy goals of: (1) employing local residents and businesses; (2) reducing local unemployment (i.e., job creation); (3) generating tax revenue in the locality; (4) rewarding local residents and businesses who contribute to the locality through the payment of taxes; and (5) providing continuous, stable work for local residents and businesses.  See Steven R. Schooley & Michael W. Andrew, Jr., The Devil in Devolution: State & Local Preference Programs, Construction Lawyer, Oct. 16, 1996, at 18, 18-19.
            2. However, local preference ordinances or policies may come with a number of disadvantages, including: (1) increasing the costs of goods and services caused by a less competitive market; (2) restraining the efficiency and growth of local businesses; (3) failing to address multi-jurisdictional businesses; (4) adding costs for administering/enforcing local preference ordinances and policies; and (5) causing retaliatory local preferences in other jurisdictions.  *Id.*  Other disadvantages include increased likelihood of bid protests, creation of barriers to regional and statewide cooperative purchases and making purchases lacking in equity, impartiality and open competition.
         5. Types of local preferences.
            1. Pure local preference ordinances or policies automatically award a fixed percentage in favor of a local bidder.  *Id*. at 19.  The application of such preference often have a number of requirements, which include minimum dollar threshold amounts at which such local preferences are granted, reciprocity to other localities utilizing similar preferences and waiver provisions for certain agreements.  The percentage tends to be around 5%.
            2. Tie-bid local preference ordinances or policies automatically award the contract to the local business if it is tied in price, but otherwise meets all required conditions with another bidder.  *Id.*  This is the most common application of local preference ordinances or policies.
            3. Employment-oriented local preference ordinances or policies prefer bidders that guarantee employment of a fixed percentage of local citizens and businesses.  *Id.*
            4. Reciprocal local preference ordinances or policies apply the foreign-locality's local preference standards in favor of local bidders competing against the foreign bidder.  *Id.*
         6. Local preference challenges.
            1. Local preference ordinance and policies have been challenged on federal and state constitutional
            2. interests); Smith Setzer & Sons Inc. v. S.C. Procurement Review Panel, 20 F. 3d 1311 (4th Cir. 1994) (providing state benefits to residents supplying them is a legitimate state interest); Galesburg Constr. Co., Inc. of Wyo. V. Bd. of Tr. of Mem'l Hosp. of Converse County, 641 P. 2d 745 (Wyo. 1982) (encouraging local economy is a legitimate state interest).
            3. *Due Process Challenges*:  Ex parte Gemmill, 119 P. 298 (Id. 1911) (court held statute requiring all county printing be done within the county where practicable did not violate the due process clause because the statute did not confine the purchases to residents or citizens of the state); Collins v. Senatobia Bank Book & Stationery Co., 76 So. 258 (Miss. 1917) (court held statute prohibiting counties from purchasing blank books, stationary and printing services from non-state businesses did not violate the due process clause because no person is entitled as part of his liberty to contract with or perform labor for the state).  But see Kendrick v. City Council of Augusta, Ga., 516 F. Supp. 1134 (S.D. Ga. 1981) (court held that wrongfully rejected bidder is entitled to substantive and procedural due process protections when subjected to arbitrary government action denying a contract.
            4. *Commerce Clause Challenges*:  America Yearbook Co. v. Askew, 339 F. Supp. 719 (M.D. Fla. 1972) (court held statute requiring all public printing be done in the state did not violate the commerce clause because it had a limited and indirect effect on interstate commerce).  See also Smith Setzer & Sons Inc. v. S.C. Procurement Review Panel, 20 F. 3d 1311 (4th Cir. 1994), Big Country Foods, Inc. v. Bd. of Educ*.*, 952 F. 2d 1173 (9th Cir. 1992), Trojan Tech., Inc. v. Penn., 916 F. 2d 903 (3d Cir. 1990) (courts holding local preference statutes did not violate commerce clause because local government was acting as direct market participant); but see W.C.M. Window Co., Inc. v. Bernardi, 730 F. 2d 486 (7th Cir. 1984) (court held that state demanding implementation of local preferences is unconstitutional regulation under the commercial clause if the funding and administration of the project is locally controlled).
            5. For the most part, legal challenges on federal and state constitutional grounds have been unsuccessful.  See Gavin L. Phillips, Validity, Construction, and Effect of State and Local Laws Requiring Governmental Units to Give "Purchase Preference" to Goods Manufactured or Services Performed in State, 84 A.L.R. 4th 419 (1991).
         7. Federal prohibition on geographic preferences.
            1. The Environmental Protection Agency (the "EPA") has promulgated procurement regulations requiring that grantees of EPA grant funds use procurement procedures that provide full and open competition.  40 C.F.R. §31.36(c)(1).
            2. The use of state or local geographical preferences in evaluating bids or proposals is prohibited, except where federal law requires or encourages them.  40 C.F.R. §31.36(c)(2).  However, geographic location may be used as selection criteria when contracting for architectural and engineering services, so long as there remain a sufficient number of qualified firms to compete for the project.  *Id.*
            3. Other federal agencies and programs have also strictly prohibited the use of local preferences in procurement, such as: the Federal Aviation Administration, Urban Development Action Grant and Community Development Block Grant.  However, federal programs such as Farm to School encourages the purchase of unprocessed locally grown and locally raised agricultural products.
            4. Procurement by state and local governments is not covered by the North American Free Trade Agreement ("NAFTA").
         8. Local preference in Florida.
            1. Legal authority.

 When a county is purchasing personal property through competitive solicitation, section 287.084, Florida Statutes (2013), allows the county to award a reciprocal local preference to the lowest responsible and responsive vendor whose principal place of business within Florida, in an amount equal to the preference granted by the foreign state or political subdivision in which the lowest responsible and responsive vendor has its principal place of business.

 In Adolphus v. Baskin, 116 So. 225 (Fla. 1928), the City of Clearwater awarded a contract to construct a public building to the second lowest bidder because "he is a local man, will use local contractors and local labor, and will patronize local supply houses."  *Id.* at 604.  The Florida Supreme Court found that although there was nothing in the City Charter requiring the City Commission to award contracts to the lowest responsible bidder, the City Commission was required to exercise its municipal power in a reasonable manner.  *Id.* at 605.  The Florida Supreme Court held it was unreasonable for the City Commission to award the contract to the second lowest bidder based on the bidder's local ties because it would "unnecessarily deplete the public fund."  *Id.*

 In Marriott Corporation v. Metropolitan Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980), the Dade County Board of County Commissioners awarded a contract to a vendor on the grounds that it was a local firm, even though the bid of a non-local firm returned a higher percentage of revenues to the County.  *Id.* at 663.  The Third District Court of Appeals found that the County adopted by resolution the use of competitive bidding and was required to follow those resolutions.  *Id.* at 665-67.  The Third District Court of Appeals held that the Board of County Commissioners abused its discretion in awarding the contract to the local firm because: (1) nothing in the record confirmed the firm was in fact local and the lowest bidder was not given an opportunity to demonstrate it could qualify as a local firm, *Id.* at 668; and (2) the non-local firm was "the best bidder within the standards set by the Board [of County Commissioners] when it elected to solicit competitive bids."  *Id.*

 In City of Port Orange v. Leechase Corporation, 430 So 2d 534 (Fla. 5th DCA 1983), the City of Port Orange adopted an ordinance granting a pure 3% local preference to firms located in the City and Volusia County.  *Id.* at 535.  Based solely on this ordinance, the City awarded a contract to a local bidder, rather than the lower non-local bidder.  *Id.*  The Fifth District Court of Appeals upheld the ordinance on the grounds that the determination of whether or not to award a local preference is purely a legislative decision and the judicial branch should not overturn such a decision.  *Id.*  The Court distinguishes Adolphus and Marriott because both cases lacked a specific local preference ordinance and, therefore, the courts were reviewing the exercise of power by the executive branch of government as opposed to the legislative branch of government.  *Id.* at 535-36.

 In Attorney General Opinion 2002-03, the School Board of Alachua County asked whether it may give preference to local firms.  The Attorney General opined that the School Board has flexibility in evaluating potential vendors and "knowledge of local conditions" falls within an evaluation of the firms "capabilities" and "experience."  *Id.*  However, the Attorney General cautioned that giving undue weight to the local preference could be contrary to the process of competitive bidding, which could cause the School Board's actions to be arbitrary and capricious.  *Id.*

 In Attorney General Opinion 2001-65, the Lake County School Board asked if it could adopt a policy giving a local preference in awarding purchasing and professional services contracts.  The Attorney General opined that the School Board may adopt such local preference policy as long as such policy does not conflict with statutes or rules on competitive bidding.  *Id.*

* + - * 1. Examples of local preferences.

 Manatee County, Florida (Section 2-26-6).

 Tie bid local preference awarding the contract to the local vendor when the local vendor and non-local vendor have both submitted the lowest responsive bid.

 Defines a local vendor as a business that has maintained for the six months prior to the solicitation a physical place of business with at least one full-time employee in Manatee County and the neighboring counties of Desoto, Hardee, Hillsborough, Pinellas and Sarasota.

 Orange County, Florida (Section 7-310(g)(4)).

 Reciprocal local preference allowing the county to award to the next lowest responsive and responsible bidder having a principal place of business within the county the same preference awarded to local vendors in the county of the lowest responsive and responsible bidder.

 St. Lucie County, Florida (Section 1-2-51).

 For Bids, unique "second chance" local preference allowing the local vendor with the second lowest contract price to match the lowest price submitted by a non-local vendor if the local vendor's original price was within 5% of the non-local vendor's price.

 For RFPs, pure local preference awarding a fixed percentage to the local vendor.

 Also provides a reciprocal local preference allowing the county to enter into interlocal agreements with other local governments to extend local preferences of the county to their local vendors.

 Defines a local vendor as any business having a fixed office location within St. Lucie, Indian River, Martin or Okeechobee County for at least one year prior to the solicitation; holds any business license required by the county; and is the principal offeror and not a subcontractor or a joint venturer.

* 1. State Claims / Substantive Matters
     1. Specificity of technical requirements.
        1. Westinghouse Electric v. Jacksonville Transportation Authority, 491 So. 2d 1238 (Fla. 1st DCA 1986) (Requirement that spiral transitions be included in design for people mover system was not exclusionary where testimony indicated they limit lateral jerk of the vehicles making the ride more comfortable for passengers when negotiating curves, and in light of the fact that the flexibility of the price proposal process encouraged interaction and development of the specifications).
        2. Robinson’s, Inc. v. Short, 146 So. 2d 108 (Fla. 1st DCA 1962) (Specifications were too vague where tax collector specification required forms be “securely fastened” where the tax collector knew he would only accept stapling and not gum, glue or crimping. Court held that the specifications must detail to all bidders the standards anticipated, the test the products must meet, and all factors upon which the product will be judged and the award made).
     2. Requirements contracts.
        1. Tavormina v. Dade County, 475 So. 2d 1304 (Fla. 3d DCA 1985), red. den. 508 So. 2d 1293 (Fla. 3d DCA 1987) (No exclusive contract where Tavormina agreed to provide all the county’s landfill “overburden” on an “as needed” basis where agreement contemplated multiple awards to other contractors from whom the county could utilize the best bid and where fill was received from other sources on a gratuitous basis).
        2. Dade County v. OK Auto Parts of Miami, 360 So. 2d 441 (Fla. 3d DCA 1978) (Guarantee provision of eleven cars per day in a towing contract when read in conjunction with other provisions in the contract indicating that the contractor intended to pay only for what he actually towed in was not absolute, despite the legal requirement that in construing the ambiguous provision most strongly against the drafter, the court was compelled to resolve the question of whether there was *any* viable guarantee against the county. The court looked to both the document itself and the circumstances surrounding the parties at the time of the contract in order to ascertain the intent of the parties).
        3. Boyd v. Bonded Garages, 160 So. 2d 724 (Fla. 3d DCA 1964) (Upon termination of valet parking contract, and award of non-exclusive contract to new bidder, the county retained the authority to prevent previous contractor from conducting business with the county).
        4. Wester v. Belote, 138 So. 721 (Fla. 1931) (Where bids were received for 50,000 cubic yards for oyster shell at price per cubic yard f.o.b. lighters, absent fraud, it was permitted to delete language “from time to time as needed”).
     3. Exceeding statutory requirements.
        1. Reliance Insurance Co. v. Dade County, 230 So. 2d 21 (Fla. 3d DCA 1970) (Where statute required bonds, “of streets, alleys and other such rights of ways shown on such plats” and bid required bond for, “plats, street signs, sidewalks, drainage structures, necessary fill, bridge and guardrails,” company was required to pay and indemnify the county, and the county could recover on a statutory bond when the requirements of the bond exceeded the requirements of statute).
     4. Professional services.
        1. Parker v. Panama City, 151 So. 2d 469 (Fla. 1st DCA 1963) (Revaluation of tangible and real property tax roll in entirety required exercise of special skills and training, therefore charter provision requiring competitive bidding on contracts in excess of $1,000 was not applicable).
        2. City of Pensacola v. Kirby, 47 So. 2d 533 (Fla. 1950) (Maintenance of parking meters was not involving peculiar skill and ability so as to be excluded from charter provision requiring competitive bidding).
     5. Payments.
        1. Jacksonville v. W.R. Fairchild Const., 547 So. 2d 1010 (Fla. 1st DCA 1989) (No ambiguity was found where contract provided different compensation sections for sheeting “driven and pulled” and sheeting driven and left in place).
     6. Sunshine Law.
        1. Section 286.011, Fla. Stat. (2013), generally applies purchasing matters. However, section 286.0113(2)(a), Fla. Stat., provides an exemption from the public meeting requirement for negotiation meetings.  286.0113(2)(b)(1) et. seq.  Florida Statutes, to prevent the public from attending: (1) "[a]ny portion of a meeting at which a negotiation with a vendor is conducted pursuant to a competitive solicitation, at which a vendor makes an oral presentation . . . or at which a vendor answers questions . . .;" and (2) [a]ny portion of a team meeting at which negotiation strategies are discussed."
           1. These meetings are recorded and such recordings and any records presented at these meetings are public records that may be obtained at the earlier of the posting of the notice of intended ward or 30 days after the bids are opened.
           2. In the event an agency rejects all bids and concurrently provides notice of its intent to reissue a competitive bid, the recording and any records presented at the meetings remain exempt until the agency issues a notice of an intended decision concerning the reissued competitive bid or until the agency withdraws the reissued competitive bid; however, the recording and any records presented at the meetings are not exempt for longer than 12 months.
        2. Section 225.0518, Fla. Stat. (2013) relates to public property and publicly owned buildings.
        3. News-Press Publishing Co., Inc. v. Carlson, 410 So. 2d 546 (Fla. 2d DCA 1982) (Where responsibility delegated to staff on budget committee, it had to comply with Sunshine Law).
        4. Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983) (Sunshine Law did not apply to negotiation meetings conducted by city staff members with two competing vendors for award of contract for design, construction and operation of solid waste facility, where ultimate decisions concerning the procedures to be followed and the award of the contract were made by the city council in open meetings).
        5. Public Advertising, Inc. v. Broward County, No. 91-6831 (25) (Fla. 17th Cir. Ct. July 3, 1995) (Sunshine Law not applicable to meetings of a staff committee to evaluate bus shelter proposals).
        6. Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999) (Sunshine Law is applicable to bid evaluation meetings).
        7. Emerald Correctional Management v. Bay County, 955 So. 2d. 647 (Fla. 1st DCA 2007) (No merit to plaintiff's claim of Sunshine Law violation where there is no allegation of improper communication between two members of same public board).
        8. Sarasota Citizens for Responsible Gov't v. City of Sarasota, (Fla. 48 So.3d 755, 2010) (affirming trial court's validation of City and County bonds to finance spring training facilities to bring Oriels to Sarasota on basis that discussions did not violate Sunshine Law: (i) "negotiations team" not a board or commission subject to the Sunshine Law because it performed only information gathering and fact-finding roles and was not delegated any decision-making authority; (ii) private informational briefings for individual County Board of Commissioners members in preparation for public hearing did not violate Sunshine Law; and (iii) any possible Sunshine Law violations resulting from email communications between Board members were cured by the Board's subsequent, independent, and final action taken at duly noticed public hearing).
     7. Public records in public hands.
        1. Section 119.071, Florida Statutes, provides for the public records exemption on sealed bids, proposal, or replies received pursuant to a competitive bid from 10 days after bid or opening to 30 days after opening the bids, proposals, or final replies.
        2. Financial statements of prospective bidder on public works projects are exempt from public records law. §119.071(1)(c), Fla. Stat. (2013).
        3. Data processing software under license is exempt pursuant to §119.071(1)(f), Fla. Stat. (2013).
        4. Appraisals, reports relating to value, offers and counteroffers for purchase of real property are exempt under conditions set forth in §125.355, Fla. Stat. (2013) for counties, and §166.045, Fla. Stat. (2013) for cities.
        5. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 379 So. 2d 633 (Fla. 1980) (Letters, memoranda, resumes and travel vouchers of consultant searching for director of the electric authority are public records).
     8. Public records in private hands.
        1. Article I, section 24, Florida Constitution provides that the public has the right to review the records of any public body "or persons acting on their behalf…"
        2. §119.011(2), Fla. Stat. (2013), defines "agency" to include private entities "acting on behalf of any public entity."
        3. The Supreme Court of Florida adopted the "totality of factors" approach in News and Sun-Sentinel Company v. Schwab, Twitty & Hansen Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992) as follows:
           1. NCAA v. Associated Press, 18 So. 3d 1201 (Fla. 1st DCA 2009) (it was unnecessary to determine whether the NCAA became a public "agency" under the Schwab test because documents at issue became public records when the NCAA provided them to agents of University and the University used them in connection with its business).
           2. §119.011(12), Fla. Stat. (2013) defines "public records" as "all documents…made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency."
           3. Shevin v. Byron, Harless, Schaeffer, Reid and Associates, Inc.  379 So. 2d 633 (Fla. 1980) (Letters, memoranda, resumes and travel vouchers of a private consultant conducting a search for director of the Jacksonville Electric Authority are public records).
           4. B&S Utilities, Inc. v. Baskerville – Donovan, Inc., 988 So. 2d 17 (Fla. 1st DCA 2008), reh. den. August 14, 2008, discussed which documents of a private contractor doing public work are public records in further detail: "to the extent the private entity creates the documents while performing the public function" (*Id.*at 21); "generated in performing engineering services for the City" (*Id.*at 22) "records generated by BDI's performance of its contracts with the City…" (*Id.* at 22-23).
     9. Renewal language.
        1. Florida Department of Highway Safety and Motor Vehicles v. National Safety Commission, Inc., 75 So. 3d 298 (Fla. 1st DCA 2011). Reh. Den. December 8, 2011, discussed a contractual renewal language provision essentially the same as language of section 287.058(1)(f) where parties are authorized to “renew a state procurement contract in subsequent years, but … does not create a right to renewal.”  The Court found mutual agreement of the parties is required for renewal, and a unilateral right to renew for the limited period does not exist for either the private party or the government via the contractual or statutory language.
     10. Development of hybrid procurement model.
         1. Op. Att'y Gen. Fla. 11-21 (2011), the Florida Attorney General discussed that a “hybrid” model for awarding construction and construction management services that is not provided for by statute is not permissible.  A special district (the Southwest Florida Water Management District) is limited to using the competitive award process outlined in section 255.20, Florida Statutes, for construction works.  Therefore the selection of a construction management entity and construction works cannot be awarded via a hybrid method.  The special district, however, could award the construction management in accord with section 255.20 pursuant to section 287.055, Florida Statutes.
     11. Eligible user.
         1. Op. Att’y Gen. Fla.  12-24 (2013), the Florida Attorney General determined that the Sebring Airport Authority is an “eligible user” under section 287.056(1), Florida Statutes, and may purchase commodities and contractual services from state purchasing agreements.  An “eligible user” may join in state procurement contracts and purchasing agreements.  An “eligible user” includes “all governmental agencies, as defined in Section 163.3164, Florida Statutes, which have a physical presence within the State of Florida” pursuant to Rule 60A-1.005, Florida Administrative Code.
     12. Privacy.
         1. NASA v. Nelson, 131 S. Ct. 746 (2011) (United State Supreme Court holding that the Constitution does not prohibit government from conducting standard employment background checks on employees of federal contractors; challenged background checks are reasonable, further the Government’s interests in managing its internal operations, and are protected against public disclosure under the Federal Privacy Act of 1974)
  2. State Claims / Procedural Matters
     1. Type of review.
        1. MRO Software, Inc. v. Miami-Dade County, 895 So. 2d 1086 (Fla. 3d DCA 2004) (Contract award is an executive function, rather than a quasi-judicial act subject to certiorari review).
     2. Notice procedures.
        1. Douglas N. Higgins, Inc. v. Florida Keys Aqueduct Authority, 403 So. 2d 1042 (Fla. 3d DCA 1981) (Second lowest bidder on project entitled to hearing within 21 days as provided by administrative code provision governing point of entry into proceedings; actual notice in excess of 21 days could not cure failure to notify in accordance with rule).
        2. Berry v. Okaloosa County, 334 So. 2d 349 (Fla. 1st DCA 1976) (Where board of county commissioners’ motion to award bid to plaintiff was rescinded by subsequent formal action, no binding contract resulted, because no formal notification of the acceptance of the bid had occurred, and the mere fact of a representative being present at the public meeting was not adequate notice).
        3. Dedmond v. Escambia County, 244 So. 2d 758 (Fla. 1st DCA 1971) (Escambia County had no authority to cancel award once notice had been given that offer was accepted despite fact that lease had not been executed).
     3. Waiving informalities – material vs. non-material deviations.
        1. Robinson Electrical Co., Inc. v. Dade County, 417 So. 2d 1032 (Fla. 3d DCA 1982) (Security in the form of a check rather than a bid bond did not constitute a material variation from the county’s invitation for bids and thus could be waived).
        2. City of Miami Beach v. Klinger, 179 So. 2d 864 (Fla. 3d DCA 1965) (Where city pursuant to its charter published an invitation for sealed bids for the dockage concession of for hire charter fishing boats only for a five-year period and where additional supplemental offer was contained in alternative bid based upon the city granting an additional five-year term by way of an option, the result was the invalidation of the entire agreement absent rebidding).
        3. Central Florida Equipment Rentals of Dade County, Inc. v. Lowell Dunn Company, 586 So. 2d 1171 (Fla. 3d DCA 1991) (No preliminary injunction would lie to prohibit Dade County from awarding bid to next low bidder where lowest bidder had a material irregularity based on its failure to designate single manufacturer and installer of landfill liner and no bidders submitted quality control manuals, which the low bidder claimed was also a material irregularity of the next low bidder).
        4. Tropabest Foods, Inc. v. State Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986) (Irregularity as to beverage mix that did not affect price did not constitute grounds for awarding to another bidder).
        5. Glatstein v. City of Miami, 399 So. 2d 1005 (Fla. 3d DCA 1981) (Material variance between detailed plans upon which competitive bidding was proposed, and the plans submitted and later adopted by city rendered contract void).
        6. Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190 (Fla. 2d DCA 1978). (City did not have authority to accept bid for water treatment plant which was facially nonconforming in regard to the brand of pumps to be installed, but was amended to conform to specifications prior to award).
        7. Overstreet Paving Company v. State Department of Transportation, 608 So. 2d 851 (Fla. 2d DCA 1992) (Bid should not have been declared nonresponsive for missing Disadvantaged Business Enterprise form).
        8. Morse Communications, Inv. v. Brevard Business Telephone Systems, Inc., No. 08-5079BID, 2009 WL 352317 \*10 (DOAH Feb. 10, 2009) (When Invitation to Bid required bidders submit a letter from the manufacturing stating that they were authorized service providers, bidder's submission of contact information of a manufacturer employee who could provide the requested information, instead of providing a letter, was a minor informality which could be waived).
     4. Bid splitting to avoid legal requirements.
        1. Mayes Printing Company v. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963) (Where three sections of a single counter were separately bid in excess of statutory requirement for competitive purchase pursuant to §125.08, Fla. Stat., an illegal warrant resulted).
        2. Armco Drainage & Metal Products, Inc. v. County of Pinellas, 137 So. 2d 234 (Fla. 2d DCA 1962) (County was not estopped to deny claim of bidder where three separate orders for metal resulted in purchase in excess of statutory amount requiring competition).
     5. Bid mistake.
        1. Department of Transportation v. Ronlee, Inc., 518 So. 2d 1326 (Fla. 3d DCA 1988) (Bid may not be reformed to correct an error. If a concrete subcontractor made a $50,000 error and correcting the error still leaves the bidder low the reformation is still not allowed. However, the bidder may be permitted to withdraw the bid).
        2. Intercontinental Properties, Inc., v. State Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (Protesting bidder must be prepared to show that low bid to lease space to agency is deficient and that its own bid does not suffer from the same deficiency).
        3. Hotel China & Glassware Company v. Board of Public Instruction of Alachua County, 130 So. 2d 78 (Fla. 1st DCA 1961) (Generally, equity will relieve a unilateral mistake if the public body is informed promptly upon discovery when the mistake is material, goes to substance, was not occasioned by the lack of due care or diligence, or is the result of neglect).
        4. Lassiter Construction Company v. School Board for Palm Beach County, 395 So. 2d 567 (Fla. 4th DCA 1981) (No upward adjustment to compensation made where error in transposing figure for concrete work from bid worksheet to final bid summary sheet was negligently made by the president himself; error was less than 4% of intended bid, and he would still receive some profit).
        5. State Board of Control v. Clutter Construction Corporation, 139 So. 2d 153 (Fla. 1st DCA 1962) (Contractor permitted to withdraw bid where complying in the face of honest mistake of $100,000.00 would work severe hardship upon the bidder, error was not the result of gross negligence or willful inattention, and the error was discovered and communicated before acceptance).
        6. Department of Transportation v. Ronlee, Inc., 518 So. 2d 1326 (Fla. 1987) (Reformation of contract not appropriate remedy; rescission or withdrawal are appropriate remedies).
     6. Award.
        1. State Department of Lottery v. Gtech Corp., 816 So. 2d 648 (Fla. 1st DCA 2001) (Court invalidated action by the Department of Lottery, which requested proposals and subsequently negotiated a contract, which materially favored the original proposal and qualified appellant as preferred provider).
        2. Valle-Axelberd and Associates, Inc., v. Metropolitan Dade County, 440 So. 2d 606 (Fla. 3d DCA 1983) (Where Dade County reserved the right to consider factors other than price in bid for psychological screening devices for police applicants, county commission exercised its discretion to award to party other than low bidder).
        3. City of Homestead v. Raney Construction, Inc., 357 So. 2d 749 (Fla. 3d DCA 1978) (City council awarded bid to build municipal swimming pool. Contractor was advised by letter of award and both parties had executed contract; it was valid and binding despite new city council resolution rescinding it for technical improprieties).
        4. Wester v. Belote, 138 So. 721 (Fla. 1931) (Leading Florida procurement law case relating to the issue of right to reject or right to award bids).
        5. Culpepper v. Moore, 40 So. 2d 366 (Fla. 1949) (No mandatory obligation is imposed upon school board to consider the lowest dollar and cents bid as being “the lowest responsible bid” to the exclusion of all other pertinent factors).
        6. Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982) (County could award to low bidder on road resurfacing contract, notwithstanding that bidder had submitted bid on only one of two alternate asphalt types for which bids were requested).
        7. Suburban Inv. Co. v. Hyde, 55 So. 76 (Fla. 1911) (Where low bidder refused to submit samples of material on time, Duval county commission had discretion to award to another bidder).
     7. Effect of bidder’s reliance on assurances.
        1. Royal American Development, Inc. v. City of Jacksonville, 508 So. 2d 528 (Fla. 1st DCA 1987) (After housing authority invited construction proposals, submissions were reviewed, and selections or proposals were recommended, city declined to adopt necessary ordinances, and preconstruction expenditures were awarded on theory of promissory estoppel).
        2. Housing Authority of Ft. Pierce v. Foster, 237 So. 2d 569 (Fla. 4th DCA 1970) (Jury question presented whether acceptance of bid was intended to have binding effect until formal contract had been executed).
        3. City of Cape Coral v. Water Services of America, 567 So. 2d 510 (Fla. 2d DCA 1990) (Contractor was entitled to bid preparation costs and prejudgment interest, but not lost profits after reliance on city’s representation that the bid would not be rejected for lack of license).
     8. Rejecting all bids.
        1. Department of Transportation v. Grove-Watkins Constructors, 530 So. 2d 912 (Fla. 1988) (In the absence of fraud, collusion or evidence of means of avoiding competition, no statutory right exists in any bidder to have its bid accepted).
        2. Couch Construction Co. v. Dept. of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978) (Public body should reserve the right to reject all bids, so long as rejection is rational and not arbitrary, when guidelines or specifications are silent on rejection).
        3. Milander v. Department of Water and Sewers of the City of Hialeah, 456 So. 2d 588 (Fla. 3d DCA 1984) (City was free to reject all bids and not sell its property to anyone after request for submission of bids on real property).
     9. Termination.
        1. Rollins Services v. Metropolitan Dade County, 281 So. 2d 520 (Fla. 3d DCA 1973) (Where the contract provided that “the authority may at its option and discretion terminate the contract at any time without any default on the part of the contractor by giving written notice to the contractor and a surety at least ten (10) days prior to the effective date of the termination set forth in notice,” such unilateral termination provision can be enforced because specifically reserved in the contract).
     10. Change orders and amendments.
         1. Process by which parties to a contract agree to change such terms as contract price, contract time or scope of work in a specified time period.
         2. Contract provisions generally provide that such changes be in writing.
         3. Florida law requires written change orders on public projects where the express terms of the governmental entity’s contract contains such a provision. However, recent court decisions have raised the question of whether the doctrine of sovereign immunity is being eroded away in order to hold public entities more accountable for cost increases to contractors.
         4. County of Brevard v. Miorelli Engineering, Inc., 703 So. 2d 1049 (Fla. 1997) (Contractor not entitled to recovery for changes without a written change order).
         5. Ajax Paving Industries, Inc. v. Charlotte County, 752 So. 2d 143 (Fla. 2d DCA 2000) (Distinguished claim in Miorelli as one for damages not covered in the original contract, whereas Ajax claimed damages for work and materials clearly addressed in the original contract between the parties).
         6. Acquisition Corp. of America v. American Cast Iron Pipe Co., 543 So. 2d 878 (Fla. 4th DCA 1989) (Enforceability of written change orders).
         7. Broderick v. Overhead Door Company of Ft. Lauderdale, 117 So. 2d 240 (Fla. 2d DCA 1959) (Court rewarded contractor for work performed without a written change order).
         8. Grove Key Marina, Inc. v. Sakolsky, 383 So. 2d 695 (Fla. 3d DCA 1980) (Where 1973 lease had been executed as the result of competitive bidding process, but there was no competition relating to later amendments in the absence of requirement of expenditure the amendments were not void).
         9. George Hyman Const. Co. v. City of Miami, 545 So. 2d 512 (Fla. 3d DCA 1989) rev. den., 553 So. 2d 1164 (Where change order to contract provided for disbursement of construction funds by checks jointly payable to contractor and subcontractor, latter could allege sufficient facts to support a cause of action for the breach of an express contract).
     11. Damages
         1. Miami-Dade County School Board v. J. Ruiz School Bus Service, Inc., et al., 874 So. 2d 59 (Fla. 3d DCA 2004) (Even when it is undisputed that school board’s failure to award contract is clearly erroneous, contrary to competition, arbitrary and capricious, damages for lost profits and income are not available).
         2. C.A. Davis, Inc. v. City of Miami, 400 So. 2d 536 (Fla. 3d DCA 1981) (Upheld “no damage for delay” clause).
         3. Triple R Paving, Inc. v. Broward County, 774 So. 2d 50 (Fla. 4th DCA 2000) ("No damage for delay" clause not enforceable when the delay results from fraud or bad faith).
         4. City of Cape Coral v. Water Services of America, Inc., 567 So. 2d 510 (Fla. 2d DCA 1990) (Where unsuccessful bidder relied on representations that its bid would not be rejected for lack of license, bidder was entitled to bid preparation costs, prejudgment interest and attorneys fees but not entitled to lost profits).
         5. Wood-Hopkins Contracting Company v. Roger J. Au & Son, Inc., 354 So. 2d 446 (Fla. 1st DCA 1978) (Damages, not injunctive relief, are available after award is made).
     12. Standing.
         1. MHM Correctional Services, Inc. v. Department of Corrections, DOAH No. 09-2577BID, 2009 WL 23332630 \*15 (July 10, 2009) (Plaintiff had standing to administratively protest agency's violation of RFP specifications and requirements regardless of the fact that the agency could have procured the services through an exempt process; once agency elected to use the competitive process, it was bound to follow the specifications of the RFP and failure to do so violates notions of due process and adequate notice).
         2. Accela, Inc. and CRW Systems, Inc. d/b/a CRW Associates v. Sarasota County and CSDC Systems, Inc., 901 So. 2d 237 (2d DCA 2005) (Plaintiffs had standing to complain because they were potential competitors who had a right to seek a determination of whether competitive bidding was required).
         3. City of Lynn Haven v. Bay County Council of Registered Architects, 528 So. 2d 1244 (Fla. 1st DCA 1988) (Non-profit organization of registered architects had standing to challenge alleged circumvention of Consultants Competitive Negotiation Act).
         4. Godheim v. City of Tampa, 426 So. 2d 1084 (Fla. 2d DCA 1983) (Taxpayer failed to show special injury or assert constitutional challenge and thus did not have standing to enjoin city from entering into a contract for the design, construction and operation of a solid waste landfill).
         5. Preston Carroll Company v. Florida Keys Aqueduct Authority, 400 So. 2d 524 (Fla. 2d DCA 1981) (Where another contractor was second lowest bid, unsuccessful bidder failed to establish substantial interest and lacked standing).
         6. Brasfield & Gorrie General Contractor, Inc. v. Ajax Construction Company, Inc. of Tallahassee, 627 So. 2d 1200, rev. den. 639 So. 2d 975 (Fla. 1st DCA 1993) (Contractor’s failure to submit bid for construction of city parking facility precluded standing).
         7. Mid-American Waste Systems of Florida, Inc. v. City of Jacksonville, 596 So. 2d 1187 (Fla. 1st DCA 1992) (Second most responsible bidder had standing to protest award in violation of ordinance of waste-hauling contract to sister corporation of one convicted of price fixing).
         8. TMS Joint Venture v. Commission for the Transportation Disadvantaged, 2010 WL 1217805, DOAH Case No. 10-0030BID, March 2010 (Joint venture which failed to register with MyFloridaMarketPlace prior to RFP response period lacked standing to challenge bid award).
     13. Late bids.
         1. Hewitt Contracting Company, Inc. v. Melbourne Regional Airport Authority, 528 So. 2d 122 (Fla. 5th DCA 1988) (Airport authority had discretion to accept bid for construction work that was ten minutes late).
         2. Air Support Services International, Inc. v. Metropolitan Dade County, 614 So. 2d 583 (Fla. 3d DCA 1993) (Holding that the public purpose is best served by construing bid requirements “in a way that would give all bidders an opportunity to compete,” and that when an advertised submission deadline originally set 1 pm was changed to a new date with no time indicated, according to common practice, it meant that the bid had to be submitted by the end of the workday).
  3. Federal Claims Under 24 U.S.C. § 1983
     1. See generally, Kevin F. Foley and David E. Cannella, Disappointed Bidders on Public Projects and Civil Rights Claims Under 42 U.S.C. §1983, Fla. B.J., Mar. 1993, 18. This article compares the results in Pataula Electric Membership Corporation v. Whitworth, 951 F. 2d 1238 (11th Cir. 1992) and United of Omaha Life Insurance Company v. Solomon, 960 F. 2d 31 (6th Cir. 1992). The cases turn on whether state law recognizes a low bidder’s property interest in a contract and whether it requires that the lowest responsible bidder be awarded the public contract. The article also suggests that a claimant should consider asserting a violation of its procedural due process rights if the agency does not have an adequate procedural mechanism to challenge the agency action. *Id.* at 22.  For a case finding no protected property interest on the part of a bidder, see American Recycling Co., Inc. v. County of Manatee, 963 F. Supp. 1572 (M.D. Fla. 1997).
  4. Consultant’s Competitive Negotiation Act (“CCNA”), §287.055, Fla. Stat. (2013)
     1. The CCNA is applicable to state agencies and most public entities seeking the professional services of an architect, professional engineer, landscape architect, registered entities performing land surveying or mapping, design-builder or contract manager.
        1. Dealer Tag Agency, Inc. v. First Hillsborough County Auto Tag Agency, Inc., 14 So. 3d 1238 (Fla. 2d DCA 2009) (CCNA does not apply to tax collector because tax collector, a constitutional entity, is not an agency as defined under the CCNA).
     2. Sets forth the process and criteria for selecting professional services.
     3. Application of CCNA is also based on whether professional services are needed for a project, which the statute defines as a fixed capital outlay study or planning activity. Additionally, the statute is also limited by minimum threshold dollar amounts.
     4. Requires public entities to utilize written procedures for selection and evaluation of professional services.
        1. Selection process:
           1. Requires uniform and consistent public announcements for all public projects.
           2. Requires competitive selection, by evaluation of all statements of qualification and ranking in order of preference of a minimum of three firms. Criteria is governed by statute but may be added to by the governmental entity.
           3. Provides for negotiation of compensation with the top ranked firm after the three firms are selected.
     5. Minority Business Enterprise (MBE).
        1. Requires public entities to consider whether a firm is a certified Minority Business Enterprise as part of the evaluation process.
        2. MBE certification is governed by §287.0943, Fla. Stat. (2013).
     6. §287.055 Fla. Stat. (2013).
        1. Under the §287.055(g), the maximum amount of construction costs under contract is increased from $1 million to a limitation that the costs of each individual project under the contract cannot exceed $2 million.  For study activity, the maximum fee for studies is increased from $50,000 to a limitation of $200,000 for each individual study under the contract.  The 2009 amendment of §287.055(g) clarifies that the maximum amount applies to each individual project (or each individual study) under contract, rather than the aggregate amount under contract.
        2. Op. Att'y Gen. Fla. 09-49 (2009) (North Broward Hospital District may not contract with an equipment vendor under a sole source contract pursuant to its procurement procedure, such that the vendor contracts with a licensed general contractor to provide design/build construction services to erect a storage facility to house the equipment, without complying with section 287.055, Florida Statutes, for those services covered by the act.)
  5. Procurement vehicles.
     1. Competitive Bids and Requests for Proposals constitute the two major types of procurement vehicles used in competitive bidding.  
        1. Competitive Bids (“Bids”).
           1. The Scope of Work is defined according to detailed specifications, whereby a specific solution is presented. §287.057(1)(a), Fla. Stat. (2013).
           2. Process is usually begun by a notice called an Invitation to Bid (“ITB”).
           3. Variables in competitive bidding are often limited to price and capability.
           4. Selection of the lowest responsible responsive bidder is often governed by controlling legislation (i.e. state statute, ordinance or resolution.)  
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        2. Requests for Proposals (“RFPs”).
           1. Set forth a specific problem and ask proposers to respond with a solution.
           2. In contrast to Bids, RFPs are generally used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. Emerald Correctional Management v. Bay County Bd. of County Comm'rs, 955 So. 2d 647 (Fla. 1st DCA 2007).
           3. Unlike Bids, evaluation of ability and experience carry more weight than cost.
     2. Selection method.
        1. RFPs provide greater flexibility.  
           1. While state agencies are generally required to use ITBs in the procurement of goods and services, unless determined in writing that such a method is impractical, local governmental entities are governed by their own procedures, which may or may not mirror state requirements.
  6. Statutory Issues / Local
     1. Requirement for local legislation.
        1. There is no requirement that counties adopt a home rule ordinance prescribing a general procedure for county purchases, they are free to deal with each contract or purchase on an individual basis with or without competitive bidding as may best serve the public interest. 1971 Op. Att’y Gen. Fla. 071-366 (November 9, 1971); see also Volume Services Div. v. Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979). Numerous municipalities and counties have enacted laws and adopted policies related to the procurement process.
        2. However, Florida has a strong public policy which requires that even in the absence of controlling statutes, expenditures of public funds must be made on competitive bids whenever possible. 1966 Op. Att’y Gen. Fla. 066-9 (February 7, 1966). Ackman v. Dade County, 308 So. 2d 622 (Fla. 3d DCA 1975) (No petition for mandamus would lie where there was no clear legal right to the performance of an administrative act, adherence to competitive bidding procedure).
     2. Standard of review for compliance with local legislation:
        1. Berbusse v. North Broward Hospital District, 117 So. 2d 550 (Fla. 2d DCA 1960) (Standard of review for compliance with hospital district special act is that discretion will not be interfered with by the court unless exercised arbitrarily or capriciously, or unless based upon a misconception of law, or upon ignorance through lack of inquiry, or in violation of law, or was the result of improper influence).
        2. Department of Transportation v. Groves-Watkins Construction, 530 So. 2d 912 (Fla. 1988) (An agency’s decision based upon an exercise of discretion cannot be overturned absent a finding of illegality, fraud, oppression or misconduct).
        3. Emerald Correctional Management v. Bay County, 955 So. 2d 647 (Fla. 1st DCA 2007) (Wide discretion afforded counties in accepting or rejecting Request For Proposals (“RFP”) is subject to review pursuant to arbitrary and capricious standard which is controlled by whether there was compliance with criteria contained in RFP).
        4. Accela, Inc. v. Sarasota County, 993 So. 2d 1035 (Fla. 2ndDCA 2008) (When considering software vendor's challenge in county's award of software contract to competitor, that court was required to determine whether the county acted arbitrarily or capriciously in entering into the agreements with the competitor where contract was awarded using "piggybacking" process, which was a competitive process analogous to bidding or sealed proposals).
     3. County or city charter requirements – where administrative procedures have been adopted they must be followed:
        1. Marriott Corporation v. Dade County, 383 So. 2d 662 (Fla. 3d DCA 1980) (Charter authorized expression of the policy of its authorities by resolution, which required “sealed competitive bids have been received, therefore, in the manner provided by law, and the award of such franchise shall be to that bidder whose bid, when accepted, will result in the greatest financial benefit to the port authority.” The court held that an award made solely because the contractor was a local man who would use local contractors and local labor and would patronize local supply houses was an error, based upon resolutions, charter and public policy arguments).
        2. City of Opa-Locka v. Trustees of Plumbing Ind. Pro. F., 193 So. 2d 29 (Fla. 3d DCA 1966) (The city could not waive county code provision requiring a bidder to hold an appropriate certificate of competency qualifying him to perform the work proposed by the bid).
        3. Miami Marinas Ass’n., Inc. v. City of Miami, 408 So. 2d 615 (Fla. 3d DCA 1981) (City charter of the City of Miami required competitive bidding process and prevented award of waterfront property management contract through competitive negotiation instead).
     4. Special act requirements.
        1. Volume Services Division, etc. v. Canteen Corp., 369 So. 2d 391 (Fla. 2d DCA 1979) (Where special act creating Tampa Sports Authority required bids, and specifications set forth five criteria for consideration, there was no obligation to award a contract to a particular bidder -the lowest, lowest and best, or the lowest responsible bidder -in the absence of a directive to that effect in the controlling legislation).
     5. Judicial review.
        1. Martin County v. Polivka Paving, Inc., 2010 WL 188108 (Fla. 4th DCA May 12, 2010)(A contractor must prove that the government delay caused he or she to indefinitely stand by so that the contractor was suspended and unable to take on additional work).
        2. Blu-Med Response Systems v. Florida Dep’t of Health, 993 So. 2d 150 (Fla. 1st DCA 2008) (A gubernatorial declaration of emergency excused the agency from compliance with the emergency procurement rules of Chapter 287).
        3. Emerald Correctional Management v. Bay County Bd. Of County Comm’rs, 955 So. 2d 150 (Fla. 1st DCA 2007) (A contractor’s allegations of favoritism are sufficient to state a cause of action).
        4. General Electric v. Department of Transportation, 869 So. 2d 1273 (Fla. 1st DCA 2004) (Notice and opportunity to cure are required prerequisites before a bid protest is dismissed for a deficient bond).
        5. Helicopter Applicators, Inc. v. South Florida Water Management District, 892 So. 2d 1114 (Fla. 4th DCA 2004) (A bid protest may be dismissed with filed months after the bid opening).
        6. Miami-Dade County School Board v. J. Ruiz School Bus Service, 874 So. 2d 59 (Fla. 3d DCA 2004) (Lost profits are not permitted for consideration in bid protest, but a government may award future comparable contracts).
        7. Santa Rosa Island Authority v. Pensacola Beach Pier, Inc., 834 So. 2d 261 (Fla. 1st DCA 2002) (A government may rescind negotiations and readvertise proposals and the Court cannot force reinstitution of negotiations with a firm ranked highest following RFP unless illegality, fraud, oppression or misconduct found).
        8. Department of Transportation v. OHM Remediation Services Corp., 772 So. 2d 572 (Fla. 1st DCA 2000) (ALJ denial of protective order for deposition of agency lawyers was remanded for failure to rule whether fact or opinion work product was at issue and whether a the facts could not be obtained elsewhere without undue hardship).
        9. Department of Corrections v. C&W Food Service, Inc., 765 So. 2d 728 (Fla. 1st DCA 2000) (Despite renewal clause for two additional one-year period Chapter 287, Florida Statutes, provides a renewal is not a matter of right).
  7. Statutory Issues / State
     1. State statutes.
        1. State statutes that require a competitive procurement process by local governments include:
           1. §101.293, Fla. Stat. (2013), Voting Machines and Equipment Purchases.
           2. §125.012, Fla. Stat. (2013), Transportation and Port Facilities, Concession Franchises – Counties defined in §125.011(1), Fla. Stat. (2013).
           3. §125.031, Fla. Stat. (2013), Lease or lease -Purchases of Property for Public Purpose – County.
           4. §125.3401, Fla. Stat. (2013), Purchase, Sale, or Privatization of Water, Sewer, or Wastewater Reuse Utility – County.
           5. §125.35, Fla. Stat. (2013), Property Sale or Lease -County.
           6. §125.355, Fla. Stat. (2013), Purchases of Real Property – Counties.
           7. §130.01-07, Fla. Stat. (2013), Bonds – County.
           8. §153.10, Fla. Stat. (2013), et seq., Water and Sewer System Construction Contracts – County.
           9. §155.12, Fla. Stat. (2013), Supply Purchased for Hospitals – Trustees.
           10. §157.03-157.07, Fla. Stat. (2013), Drainage Projects – County.
           11. §166.045, Fla. Stat. (2013), Purchases of real property - Cities that want public record exemption; otherwise bound by charter or ordinance.
           12. §180.24, Fla. Stat. (2013), Contracts for Construction – Cities; requires bids on municipal public works projects for construction contracts in excess of $25,000 and on materials or equipment purchases in excess of $10,000.
           13. §189.4221, Fla. Stat. (2013), Purchases from purchasing agreements of special districts, municipalities, or counties – permits procurement by special districts of commodities and contractual services from purchasing agreements of other local governments.
           14. §190.033, Fla. Stat. (2013), Community Development Districts – Bids required for purchases in excess of $195,000.
           15. §217.15-19, Fla. Stat. (2013), Federal Surplus Property Procurement - City and county, school board, city and county officers.
           16. §218.385, Fla. Stat. (2013), Sale of local government bonds.
           17. §218.391, Fla. Stat. (2013), Auditor selection procedures.
           18. §218.415, Fla. Stat. (2013), Bid requirements for local government investments.
           19. §255.20, Fla. Stat. (2013), Local bids and contracts for public construction works – Counties, cities and special districts; projects exceeding $300,000 or $75,000 for electrical work.
           20. §255.103, Fla. Stat. (2013), Authorizes public entities to procure construction management services under the same process outlined in section 287.055, Fla. Stat.
           21. §286.043, Fla. Stat. (2013), Airport Automobile Rental Concession - City, county, and other units of local government.
           22. §287.055, Fla. Stat. (2013), “Consultants Competitive Negotiation Act” – (City, county, or school district), regulates contracting with architects, professional engineers, landscape architects, registered land surveyors and design-builders. Each contract under the CCNA with the above professionals for professional services must contain a prohibition against contingent fees.
           23. §287.057, Fla. Stat. (2013), Procurement of Commodities or Contractual Services.
           24. §287.05712, Fla. Stat. (2013), Public-Private Partnership Act.
           25. §287.0582, Fla. Stat. (2013), The following statement must be included in state contracts, “The State of Florida’s performance and obligation to pay under this contract is contingent upon an annual appropriation by the Legislature.”
           26. §287.092, Fla. Stat. (2013), A foreign manufacture with over 200 employees in Florida shall have preference with any other foreign company when the price and other factors are the same.
           27. §287.093, Fla. Stat. (2013), Permits set asides of up to 10% or more of the total funds allocated for procurement of personal property and services for the purpose of entering into contracts with Minority Business Enterprises.
           28. §287.134, Fla. Stat. (2013), companies subject to disqualification from public contracting and purchasing for discrimination are kept on a list by the Florida DMS.
           29. §287.135, Fla. Stat. (2013), Prohibition against contracting with scrutinized companies prohibits companies in Cuba and Syria from bidding on projects valued at over $1 million.
           30. §288.075, Fla. Stat. (2013), Confidentiality of records, in conjunction with economic development agencies.
           31. §489.145, Fla. Stat. (2013), Guaranteed Energy, Water, and Wastewater Performance Savings Contracting Act – State, City, or political subdivision.
           32. §705.103, Fla. Stat. (2013), Sale of Abandoned property procedure -City or county.
           33. §1013.45, Fla. Stat. (2013), Educational Facilities - contains requirements relating to bidding by local school boards.
        2. Other state statutes that relate to local government competitive procurement include.
           1. §50.011, Fla. Stat. (2013), et seq., Language of legal and official advertisements.
           2. §50.061, Fla. Stat. (2013), Chargeable amounts legal and official advertisements by size of counties.
           3. §119.011, Fla. Stat. (2013), definition of “agency” under public records law includes private corporations acting on behalf of public agencies; see also News and Sun Sentinel v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So.2d 1029 (Fla. 1992).
           4. §218.70-218.80, Fla. Stat. (2013), Local Government Prompt Payment Act - purpose is to provide for prompt payments by local governmental entities, their institutions, and agencies.
           5. §218.80, Fla. Stat. (2013), Public Bid Disclosure Act - requires disclosure on bid documents if fees or permitting are required by the governmental entity; subset act of previously referenced act.
           6. §252.38(3), Fla. Stat. (2013), Emergency management powers of political subdivisions.
           7. §255.05, Fla. Stat. (2013), Bond of Contractor Constructing Public Buildings - County, City or other Public Authority.
           8. §255.0518, Fla. Stat. (2013), Public Bids; Bid Opening.
           9. §283.32; 336.044, Fla. Stat. (2013), Statutes dealing with recycled products.
           10. §286.011, Fla. Stat. (2013), Sunshine Law-applicable to Bid Evaluation Committees, Leach-Wells v. City of Bradenton, 734 So. 2d 1168 (Fla. 2d DCA 1999); Op. Att’y Gen. Fla. 2013-30 (December 30, 2013).
           11. §287.042, Fla. Stat. (2013), State Purchasing Contracts.
           12. §287.084, Fla. Stat. (2013), Commodities Purchases, Preference to Florida Businesses when home state or out-of-state vendor has local preference.
           13. §287.087, Fla. Stat. (2013), Preference to businesses with Drug Free Workplace Programs.
           14. §287.133, Fla. Stat. (2013), Public Entity Crimes, prohibits vendors/contractors placed on the state’s convicted vendor list from submitting bids/proposals and/or contracting with public entities.
           15. §295.186, Fla. Stat. (2013), Florida Veteran Business Enterprise Opportunity Act.
           16. §336.41; 336.44, Fla. Stat. (2013), describes Invitations to Bid on county roadwork.
           17. §403.70605, Fla. Stat. (2013), Solid Waste collection Services in Competition with Private Companies.
           18. Chapter 489, Fla. Stat. (2013) generally, Contracting - Construction, Electrical and Alarm Systems, and Septic Tanks.
           19. §627.727; 627.7275, Fla. Stat. (2013), Motor Vehicle Insurance and liability.
           20. §768.28, Fla. Stat. (2013), Waiver of Sovereign Immunity in Tort Actions.
        3. State statutes that relate to expenditures of public funds include:
           1. §28.235, Fla. Stat. (2013), authorizes advanced payments by Clerk of Circuit Court pursuant to Chief Financial Officer’s rules or procedures.
           2. §129.07, Fla. Stat. (2013), prohibits county commissioners from expending or contracting for more than the amount budgeted in the fund and provides for personal liability for excess indebtedness.
           3. §129.08, Fla. Stat. (2013), prohibits county commissioners from incurring indebtedness or paying a claim not authorized by law. Mayes Printing Company vs. Flowers, 154 So. 2d 859 (Fla. 1st DCA 1963).
           4. §166.241, Fla. Stat. (2013), establishes budget requirements for municipalities.
        4. Statute of frauds.
           1. The Statute of Frauds operates as a defense to the enforcement of a contract. Specified agreements must be in writing or evidenced by some type of memorandum to be enforceable. See §672.201, Fla. Stat. (2013), (Florida’s version of the UCC); §725.01-725.08, Fla. Stat. (2013), unenforceable contracts.
           2. The following are required to be evidenced by a writing: promises by executors or administrators to pay estates’ debts out of their own funds; promises to answer for debt/default of another (surety); promises made in consideration of marriage; promises creating an interest in land (however, interests for one year or less are generally not subject to Statute of Frauds); promises that cannot be performed within one year (year runs from date of agreement and not date of performance); agreements for the sale of goods for $500 or more-except for specially manufactured goods, written confirmation of an oral agreement, admissions in a pleading or court that contract existed, or partial payment or delivery was made and accepted; health care guarantees; debt barred by statute of limitations; newspaper subscriptions; home solicitation sales; home improvement contracts; and credit agreements.
           3. Statute of Frauds is satisfied if the writing contains the following: identity of parties sought to be charged, identification of contract’s subject matter, terms and conditions of agreement, recital of consideration, and signature of party to be charged.
           4. The Statute of Frauds is particularly relevant in relation to change orders and/or amendments in contracts. It is important to document any of these changes in writing in order to avoid litigation or disputes.
        5. Local Legislation.
  8. Statutory Issues / Federal
     1. When drafting bid documents, it is imperative to know the source of funds being utilized to insure compliance with applicable federal laws. Most federal grants also have significant audit requirements. See, e.g., Fla. Admin. Code Rule 62-503.800, which provides for the audit requirements for the federally-funded State Revolving Fund Loan Program. Common areas where federal grant monies are received are transportation, planning, sewer, community development, aviation, beach renourishment and emergency management. Recently, we have seen several FEMA compliance audits raising these issues.
     2. Examples of federal legal issues.
        1. The Archeological and Historic Preservation Act of 1974, PL 93-921 and the National Historic Preservation Act of 1966, PL 89-665, as amended, regarding identification and protection of historic properties.
        2. The Clean Air Act, 42 USC 7506(c), which requires conformance with State Air Quality Implementation Plans.
        3. The Coastal Barrier Resources Act, 16 USC 3501, et seq., regarding protection and conservation of the coastal barrier resources.
        4. The Coastal Zone Management Act of 1972, PL 92-583, as amended, which requires assurance of project consistency with the approved State management program developed under this Act.
        5. The Endangered Species Act, 16 USC 1531, et. seq., which requires that projects avoid disrupting threatened or endangered species and their habitats.
        6. Executive Order No. 11593, Protection and Enhancement of the Cultural Environment, regarding preservation, restoration, and maintenance of the historic and cultural environment.
        7. Executive Order No. 11988, Floodplain Management, related to avoiding, to the extent possible, adverse impacts associated with floodplain occupancy, modification and development whenever there is a practicable alternative.
        8. Executive Order No. 11990, Protection of Wetlands, related to avoiding, to the extent possible, adverse impacts associated with destruction or modification of wetlands and avoiding support of construction and wetlands.
           1. The Farmland Protection Policy Act, 7 USC 4201, et seq., regarding the protection of agricultural lands from an irreversible loss.
        9. The Fish and Wildlife Coordination Act, PL 85-624, as amended, which requires that actions control natural streams or other water bodies be undertaken to protect fish and wildlife resources and their habitats.
        10. The Safe Water Drinking Act, Section 1424(e), PL 93-523, as amended, regarding protection of the underground sources of drinking water.
        11. The Wild and Scenic Rivers Act, PL 90-542, as amended, relating to protecting components or potential components, of the national wild and scenic rivers systems.
        12. The Uniform Relocation Real Property Acquisition Policies Act of 1970, PL 91-646, which provides for fair and equitable treatment of persons displaced, or whose property is required as a result of federal or federally assisted programs.
        13. The Demonstration Cities and Metropolitan Development Act of 1966, PL 89-754, as amended, which requires that projects be carried out in accord with area-wide planning activities.
        14. Section 306 of the Clean Air Act, Section 508 of the Clean Water Act, and Executive Order No. 11738, which prohibit manufacturers, firms, or other enterprises on the EPA’s list of Violating Facilities, from participating in the project.
        15. The Federal Statutes relating to non-discrimination, including: the Civil Right Act of 1964, PL 88-352, which prohibits discrimination on the basis of race, color, or national origin; the Age Discrimination Act, PL 94-135, which prohibits discrimination on the basis of age, Section 13 of the Federal Water Pollution Control Act, PL 92-500, which prohibits sex discrimination; the Rehabilitation Act of 1973, PL 93-112, which prohibits discrimination on the basis of handicaps.
        16. Executive Order No. 11246, Equal Employment Opportunity, which provides for equal opportunity for all qualified person and Executive Orders 11625 and 12138, Women’s and Minority Business Enterprise, which requires that small minority and women’s businesses and labor surplus areas be used when possible as sources of supplies, equipment, construction and services.
        17. Executive Order No. 12549, Department and Suspension, which prohibits any award to a party which is debarred or suspended, or is otherwise excluded from ineligible for, participation in Federal assistance programs.
        18. The Davis Bacon Act, 40 USC 276, and related requirements of the Copeland Act, and Contract Work Hours and Safety Standards Act, which require compliance with labor standards for construction.
  9. Constitutional Limitations.
     1. Art. VII, §1, Fla. Const., impliedly limits the imposition of taxes and expenditure of tax revenues to public purposes.  See Brown v. Winton, 197 So. 543 (Fla. 1940).
     2. Art. VII, §9, Fla. Const., provides that counties, school districts and municipalities shall and special districts may be authorized by law to levy ad valorem taxes and may be authorized by general law to levy other taxes but such levies are limited to use for their respective purposes.  For example, entertainment or hospitality purposes are not county purposes, absent statutory authority.  1958 Op. Att’y Gen. Fla. 085-305 (November 10, 1958).
        1. Art. VII, §10, Fla. Const., provides that no county, school district, municipality, special district or agency of any of them shall become a joint owner with, or stock holder of, or give, lend, or use its taxing power or credit to aid any corporation, association, partnership or person.
        2. This has been construed to restrict indemnification by a city commission. 1984 Op. Att’y Gen. Fla. 084-103, (December 19, 1984), but see American Home Assurance Company v. National Railroad Passenger Corporation, 908 So. 2d 459 (Fla. 2005) relating to the impact of §768.28, Fla. Stat., on sovereign immunity waiver for municipalities.
        3. A municipality may not lawfully expend public funds to repair privately maintained streets. 1979 Op. Att’y Gen. Fla. 079-14 (February 16, 1979).
        4. Although advanced payments are generally preferred with respect to provided services, a city could, pursuant to its home rule powers, bill in arrears for greens fees payments.  1990 Op. Att’y Gen. Fla. 090-41 (May 15, 1990).
        5. "Joint owner" for constitutional purposes does not necessarily equate with statutory or common law definitions of “partnership” or “joint venture,” and a public agency is not necessarily pledging its credit when a private party obtains arguably below-market or otherwise financially favorable terms in a transaction.  Jackson Shaw Co. v. Jacksonville Aviation Authority, 8 So. 3d 1076 (Fla. 2008).
     3. Art. VII, §12, Fla. Const., restricts the creation of indebtedness. See Betz v. Jacksonville Transportation Authority, 277 So. 2d 769 (Fla. 1973), (contract directly, indirectly, or contingently binding city to pay fees from ad valorem or other municipal revenues would be invalid in the absence of the requisite referendum vote).
     4. Article X, §13, Fla. Const., provides, in relevant part, that “provision shall be made by general law for bringing suit against the state as to all liabilities now existing or hereafter originating.”
        1. Power to waive the state’s sovereign immunity rests with the state legislature.
        2. §768.28, Fla. Stat. (2013), creates a limited waiver of sovereign immunity in tort.
     5. Article X, §13 and the enactment of §768.28, Fla. Stat. (2013), constitute the only manner in which the state’s tort immunity has been waived, thereby prohibiting local governmental entities from agreeing to indemnify another party to a contract or alter the state’s sovereign immunity beyond the limits established in §768.28, Fla. Stat. (2013).  See Pan-Am. Tobacco Corp. v. Dept. of Corrections, 471 So. 2d 4 (Fla. 1984); rehear. den., (1985). (Holding that when contract creates agency versus independent contractor status “[w]e recognize that in so holding we recede from a line of cases holding that the state may not be sued in contract without express consent to the suit…[w]e would also emphasize that our holding here is applicable only to suits on express, written contracts into which the state agency has statutory authority to enter.)  See also 2000 Op. Att’y Gen. Fla. 2000-22, (April 4, 2000); and 2003 Op. Att’y Gen. Fla. 2003-50 (November 3, 2003).  (Responding to question two “If a person or entity is not an officer or employee of a governmental unit, he or it may be protected by governmental immunity only when performing activities within the scope of an agency relationship with the sovereign”), but see American Home Assurance Company v. National Railroad Passenger Corporation, 908 So. 2d 459 (Fla. 2005) relating to the impact of §768.28, Fla. Stat. on sovereign immunity waiver for municipalities.  For a procedural discussion on use of a writ of prohibition on sovereign immunity, see Citizen’s Property Ins. Corp. v. San Perdido Ass’n, Inc., 104 So. 3d 344 (Fla. 2012).
  10. Common Law.
      1. No common law requirement for governmental entities to competitively bid or award to the lowest qualified and responsive bidder.
      2. Absent a specific law or rule requiring competitive bidding for purchase/services, any reasonable method may be used.
         1. Public policy, however, favors competitive procurement whenever possible even in the absence of controlling statutes and/or laws. 1966 Op. Att’y Gen. Fla. 066-9 (February 7, 1966); see also section 287.001, Fla. Stat. (2013) relating to state agency procurements.
      3. Purposes of public bid statutes/laws
         1. Affords the public protection by preventing favoritism toward contractors by public officials.  City of Daytona Beach v. News Journal Corp., 156 So. 887 (Fla. 1934).
         2. Seeks to ensure fair competition by providing equal terms/criteria for award of contracts.  City of Opa-Locka v. Trustees of Plumbing Industry Promotion Fund, 193 So. 2d 29 (Fla. 3d DCA 1966).

1. Chapter 20: Local Government Investments (by Mark Moriarty)
   1. **Investment of surplus public funds.**
      1. Section 166.261, Florida Statutes, and section 125.31, Florida Statutes, provide a list of investments in which municipalities and counties, respectively, are authorized to invest surplus public funds. Section 218.415, Florida Statutes, further restricts the investment activities of local governments by limiting investments to certain specified investments absent a formal written investment policy
2. Chapter 21: Public Meetings (by Pat Gleason)

**NOTE: 2013-2014 ADDITIONS ARE MARKED IN BOLD TEXT**

* 1. WHAT ARE THE NOTICE AND PROCEDURAL REQUIREMENTS OF THE SUNSHINE LAW?
     1. What kind of notice of the meeting must be given?
        1. Reasonable Notice Requirement
           1. A key element of the Sunshine Law is the requirement that boards subject to the law provide "reasonable notice" of all meetings. *See*, section 286.011(1), Florida Statutes.  Although section 286.011 did not contain an express notice requirement until 1995, many court decisions had stated prior to the statutory amendment that in order for a public meeting to be in essence "public," reasonable notice of the meeting must be given.  *Hough v. Stembridge*, 278 So. 2d 288, 291 (Fla. 3d DCA 1973).  *Accord*, *Yarbrough v. Young*, 462 So. 2d 515, 517 (Fla. 1st DCA 1985).  Notice is required even though meetings of the board are "of general knowledge" and are not conducted in a closed door manner.  *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991).  *And see, Baynard v. City of Chiefland,* No. 38-2002-CA-00078 (Fla. 8th Cir. Ct. July 8, 2003)(reasonable notice required even if subject of meeting is "relatively unimportant").
           2. The type of notice that must be given is variable, however, depending on the facts of the situation and the board involved.  In some instances, posting of the notice in an area set aside for that purpose may be sufficient; in others, publication in a local newspaper may be necessary.  In each case, however, an agency must give notice at such time and in such a manner as will enable interested members of the public to attend the meeting.  Ops. Att'y Gen. Fla. 04-44 (2004) and 80-78 (1980).  *Cf.*, *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (where county attorney provided citizen with "personal due notice" of a committee meeting and its function, it would be "unjust to reward" the citizen by concluding that a meeting lacked adequate notice because the newspaper advertisement failed to correctly name the committee); and *Lozman v. City of Riviera Beach*, No. 502008CA027882 (Fla. 15th Cir. Ct. December 8, 2010), *per curiam affirmed,* 79 So. 3d 36 (Fla. 4th DCA 2012) (no violation of Sunshine Law where notice of special meeting held on Monday September 15 was posted at city hall and faxed to the media on Friday September 12,  and members of the public [including the media] attended the meeting).
        2. Notice requirements when quorum not present or when meeting adjourned to a later date
           1. Reasonable public notice is required for all meetings subject to the Sunshine Law. Thus, notice is required for meetings between members of a public board even though a quorum is not present. Ops. Att'y Gen. Fla. 71-346 (1971) and 90-56 (1990). If a meeting is to be adjourned and reconvened later to complete the business from the agenda of the adjourned meeting, the second meeting should also be noticed. Op. Att'y Gen. Fla. 90-56 (1990).
        3. Effect of notice requirements imposed by other statutes, codes or ordinances.
           1. The Sunshine Law only requires that reasonable public notice be given.  As stated above, the type of notice required is variable and will depend upon the circumstances.  A public agency, however, may be subject to additional notice requirements imposed by other statutes, charter or code.  In such cases, the requirements of that statute, charter, or code must be strictly observed.  Inf. Op. to Michael Mattimore, February 6, 1996.
           2. For example, a board or commission subject to Chapter 120, Florida Statutes, the Administrative Procedure Act, must comply with the notice requirements of that act.  *See*, *e.g.*, section 120.525, Florida Statutes.
        4. Notice requirements when board acting as quasi-judicial body or taking action affecting individual rights.
           1. Section 286.0105, Florida Statutes, requires:

“Each board, commission, or agency of this state or of any political subdivision thereof shall include in the notice of any meeting or hearing, if notice of the meeting or hearing is required, of such board, commission, or agency, conspicuously on such notice, the advice that, if a person decides to appeal any decision made by the board, agency, or commission with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.”

* + - * 1. Where a public board or commission acts as a quasi-judicial body or takes official action on matters that affect individual rights of citizens, in contrast with the rights of the public at large, the board or commission is subject to the requirements of section 286.0105, Florida Statutes.  Op. Att'y Gen. Fla. 81-06 (1981).
      1. Does the Sunshine Law require that an agenda be made available prior to board meetings or restrict the board from taking action on matters not on the agenda?
         1. The Sunshine Law does not mandate that an agency provide notice of each item to be discussed via a published agenda.  *Hough v. Stembridge,*278 So. 2d 288 (Fla. 3d DCA 1973).    *And see*,*Yarbrough v. Young*, 462 So. 2d 515 (Fla. 1st DCA 1985) (posted agenda unnecessary);and*Law and Information Services, Inc. v. City of Riviera Beach*, 670 So. 2d 1014, 1016 (Fla. 4th DCA 1996) ("[W]hether to impose a requirement that restricts every relevant commission or board from considering matters not on an agenda is a policy decision to be made by the legislature").  *See,* Inf. Op. to  Mattimore, February 6, 1996 (notice of each item to be discussed at public meeting is not required under section 286.011, Florida Statutes, although other statutes, codes, or rules, such as Chapter 120, Florida Statutes, may impose such a requirement).
         2. Thus, while Florida courts have recognized that notice of public meetings is a mandatory requirement of the Government in the Sunshine Law, the preparation of an agenda that reflects every issue that may come before the governmental entity at a noticed meeting is not.  Op. Att'y Gen. Fla. 03-53 (2003).  Therefore,  the Sunshine Law does not prohibit a city commission from adding additional items to the agenda at a regularly noticed meeting and taking formal action on the added items.  *Id*.  *And see*, *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010) (Sunshine Law does not prohibit use of consent agenda procedure). However, the Attorney General's Office has advised a commission to "postpone formalaction on controversial matters coming before the board at a meeting where the public has not been given notice that such an issue will be discussed."Op. Att’y Gen. Fla. 03-53 (2003).
      2. Does the Sunshine Law limit where meetings of a public board or commission may be held?
         1. Out-of-Town Meetings

The courts have recognized that the mere fact that a meeting is held in a public room does not make it public within the meaning of the Sunshine Law. Bigelow v. Howze, 291 So. 2d 645, 647-648 (Fla. 2d DCA 1974). For a meeting to be "public," the public must be given advance notice and provided with a reasonable opportunity to attend. Id. Accordingly, a school board workshop held outside county limits over 100 miles away from the board's headquarters violated the Sunshine Law where the only advantage to the board resulting from the out-of-town gathering (elimination of travel time and expense due to the fact that the board members were attending a conference at the site) did not outweigh the interests of the public in having a reasonable opportunity to attend. Rhea v. School Board of Alachua County, 636 So. 2d 1383 (Fla. 1st DCA 1994). And see, Ops. Att'y Gen. Fla. 08-01 (2008) and 03-03 (2003) (municipality may not hold commission meetings at facilities outside its boundaries). See now section 166.0213, Florida Statutes (governing body of municipality with 500 or fewer residents may hold meetings within 5 miles of the exterior jurisdictional boundary of the municipality at such time and place as may be prescribed by ordinance or resolution).

* + - * 1. Meetings at facilities that discriminate or unreasonably restrict access prohibited

Section 286.011, Florida Statutes, prohibits boards or commissions subject to its provisions from holding their meetings at any facility which discriminates on the basis of sex, age, race, creed, color, origin, or economic status, or which operates in such a manner as to unreasonably restrict public access to such a facility.  Section 286.011(6), Florida Statutes.  Thus, a police pension board should not hold its meetings in a facility where the public has limited access and where there may be a "chilling" effect on the public's willingness to attend by requiring the public to provide identification, to leave the such identification while attending the meeting and to request permission before entering the room where the meeting is held.  Op. Att'y Gen. Fla. 96-55 (1996).  The Attorney General’s Office has also expressed concerns about holding a public meeting in a private home in light of the possible “chilling effect” on the public’s willingness to attend.  *See*, Inf. Op. to Galloway, August 21, 2008.

 If a huge public turnout is expected for a particular issue and the largest available public meeting room cannot accommodate all of those who are expected to attend, the use of video technology (e.g. a television screen outside the meeting room) may be appropriate.  *See Kennedy v. St. Johns River Water Management District,* No. 2009-0441-CA (Fla. 7th Cir. Ct. September 27, 2010), *per curiam affirmed*, 84 So. 3d 331 (Fla. 5th DCA 2011) (even though not all members of the public were able to enter the meeting room, board did not violate the Sunshine Law when it held a meeting at the board’s usual meeting place and in the largest available room; the court noted, however, that the board set up a computer with external speakers so that those who were not able to enter the meeting room could view and hear the proceedings)

* + - * 1. Inspection or fact-finding trips

The Sunshine Law does not prohibit *advisory* boards from conducting inspection trips provided that the board members do not discuss matters which may come before the board for official action.  *See*,*Bigelow v. Howse*, 291 So. 2d 645 (Fla. 2d DCA 1974).*See also***,** Op. Att'y Gen. Fla. 02-24 (2002) (two or more members of an *advisory*group created by a city code to make recommendations to the city council or planning commission on proposed development may conduct vegetation surveys without subjecting themselves to the notice and minutes requirements of the Sunshine Law, provided that they do not discuss among themselves any recommendations the committee may make to the council or planning commission, or comments on the proposed development that the committee may make to city officials).

 However, the exception to the Sunshine Law for “fact-finding” missions does not apply to boards with the “ultimate decision-making authority.”  *See*, *Finch v. Seminole County School Board,* 995 So. 2d 1068, 1073 (Fla. 5th DCA  2008), in which the court held that a school board violated the Sunshine Law when board members, together with several school officials and two members of the media, took a  bus tour of neighborhoods affected by a proposed rezoning even though there was no open discussion regarding the rezoning; no one either discussed or expressed a preference for any plan; and no decisions were made.  Since the board was the ultimate decision-making body, the bus tour constituted a violation of the Sunshine Law

* + - * 1. Can restrictions be placed on the public's attendance at, or participation in, a public meeting?

Exclusion of certain members of the public

The term "open to the public" as used in the Sunshine Law means open to *all* who choose to attend.  Op. Att'y Gen. Fla. 99-53 (1999).  A board's request that certain members of the public "voluntarily" leave the room during portions of a public meeting is not authorized.  *See* *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169 (Fla. 4th DCA 1995).

 Staff of a public agency clearly are members of the public as well as employees of the agency; they cannot, therefore, be excluded from public meetings. Op. Att'y Gen. Fla. 79-01 (1979).  Section 286.011, Florida Statutes, however, does not preclude the reasonable application of ordinary personnel policies, for example, the requirement that annual leave be used to attend meetings, provided that such policies do not frustrate or subvert the purpose of the Sunshine Law.*Id.*

Cameras and tape recorders

Reasonable rules and policies which ensure the orderly conduct of a public meeting and which require orderly behavior on the part of those persons attending a public meeting may be adopted by the board or commission. However, a board may not ban videotaping of an otherwise public meeting. Pinellas County School Board v. Suncam, Inc., 829 So. 2d 989 (Fla. 2d DCA 2002). Similarly, a rule or policy that prohibits nondisruptive or silent tape recording devices at public meetings is invalid. Op. Att'y Gen. Fla. 77-122 (1977).

Identification

A city may not require persons wishing to attend public meetings to provide identification as a condition of attendance.  Op. Att'y Gen. Fla. 05-13 (2005).  This is not to say that an agency may not impose certain security measures on members of the public entering a public building, such as requiring the public to go through metal detectors.  *Id.*

Public comment

Prior to the adoption of section 286.0114, Florida Statutes (2013), Florida courts had determined that section 286.011, Florida Statutes, establishes a right to *attend* public board meetings, but does not provide a right to be heard.  *See Herrin v. City of Deltona,* 121 So. 3d 1094, 1097 (Fla. 5th DCA 2013) (phrase “open to the public” as used in the Sunshine Law means that “meetings must be “properly noticed and reasonably accessible to the public, not that the public has the right to be heard at such meetings”).  *See also* *Keesler v. Community Maritime Park Associates*, 32 So. 3d 659 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1289 (Fla. 2010); and *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010).

 However, as noted in the *Herrin* case, section  286.0114, Florida Statutes (2013), effective October 1, 2013, now mandates, subject to specified exceptions,  that the public be given "a reasonable opportunity to be heard on a proposition before a board or commission.”  The opportunity to be heard does not have to occur at the same meeting at which the board or commission takes official action if the “opportunity occurs at a meeting that is during the decisionmaking process and is within reasonable proximity in time before the meeting at which the board or commission takes the official action.”  Section 286.0114(2), Florida Statutes.

 Boards are not prohibited from “maintaining orderly conduct or proper decorum in a public meeting.”  In addition, boards are authorized to adopt specified rules or policies governing the opportunity to be heard *i.e.,* time limits for speakers; procedures for designating a representative of a group or faction to address the board rather than all members of the group or faction; forms to indicate a speaker’s position on a matter; and designation of a specified period of time for public comment.   Section 286.0114(4), Florida Statutes.

While section 286.0114(6), Florida Statutes, authorizes a circuit court to issue injunctions for the purpose of enforcing the statute, section 286.0114(8), Florida Statutes, states that an action taken by a board or commission which is found to be in violation of  section 286.0114, Florida Statutes, is not void as a result of that violation.

* + - * 1. Must written minutes be kept of all sunshine meetings?

Section 286.011(2), Florida Statutes, specifically requires that minutes of a meeting of a public board or commission be promptly recorded and open to public inspection.  Thus, a city violated the Sunshine Law when it failed to provide public access to minutes until after they had been approved by the city commission.  *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010).

 The minutes required to be kept for "workshop" meetings are no different than those required for any other meeting of a public board or commission.  Op. Att'y Gen. Fla. 08-65 (2008).*And see*, *Lozman v. City of Riviera Beach*, No. 502007CA007552XXXXMBAN (Fla. 15th Cir. Ct. June 9, 2009), *per curiam affirmed*, 46 So. 3d 573 (Fla. 4th DCA 2010) (minutes required to be kept for city council agenda review meetings).

While tape recorders may be used to record the proceedings before a public body, written minutes of the meeting must also be taken and promptly recorded.   *See*, Op. Att’y Gen. Fla. 75-45 (1975).Similarly, while a board may archive the full text of all workshop discussions conducted on the Internet, written minutes of these workshops must also be prepared and promptly recorded.  Op. Att’y Gen. Fla. 08-65 (2008).

 Draft minutes of a board meeting may be circulated to individual board members for corrections and studying prior to approval by the board, so long as any changes, corrections, or deletions are discussed and adopted during the public meeting when the board adopts the minutes.  Op. Att'y Gen. Fla. 02-51 (2002).

* + - * 1. In addition to minutes, does the Sunshine Law also require that meetings be transcribed or tape recorded?

Minutes of Sunshine Law meetings need not be verbatim transcripts of the meetings; rather the use of the term "minutes" in section 286.011, Florida Statutes, contemplates a brief summary or series of brief notes or memoranda reflecting the events of the meeting.  Op. Att'y Gen. Fla. 82-47 (1982).  However, an agency is not prohibited from using a written transcript of the meeting as the minutes, if it chooses to do so.  Inf. Op. to Fulwider, June 14, 1993.

There is no requirement that tape recordings be made by the public board or commission at each public meeting.  However, once made, such recordings are public records and their retention is governed by the Public Records Act and the schedules established by the Division of Library and Information Services of the Department of State.  Op. Att'y Gen. Fla. 86-21 (1986).

* + - * 1. May members of a public board vote by written or secret ballot?

Board members are not prohibited from using written ballots to cast a vote as long as the votes are made openly at a public meeting, the name of the person who voted and his or her selection are written on the ballot, and the ballots are maintained and made available for public inspection in accordance with the Public Records Act.  Op. Att'y Gen. Fla. 73-344 (1973).

By contrast, a secret ballot violates the Sunshine Law.  *See*, Op. Att'y Gen. Fla. 73-264 (1973) (members of a personnel board may not vote by secret ballot during a hearing concerning a public employee)**.**  *Accord*, Ops. Att'y Gen. Fla. 72-326 (1972) and 71-32 (1971) (board may not use secret ballots to elect the chairman and other officers of the board).

* 1. WHAT ARE THE CONSEQUENCES IF A PUBLIC BOARD OR COMMISSION FAILS TO COMPLY WITH THE SUNSHINE LAW?
     1. Criminal penalties
        1. Any member of a board or commission or of any state agency or authority of a county, municipal corporation, or political subdivision who knowingly violates the Sunshine Law is guilty of a misdemeanor of the second degree. Section 286.011(3)(b), Florida Statutes. Conduct which occurs outside the state which constitutes a knowing violation of the Sunshine Law is a second degree misdemeanor. Section 286.011(3)(c), Florida Statutes. Such violations are prosecuted in the county in which the board or commission normally conducts its official business. Section 910.16, Florida Statutes. The criminal penalties apply to members of advisory councils subject to the Sunshine Law as well as to members of elected or appointed boards. Op. Att'y Gen. Fla. 01-84 (2001) (school advisory council members).
     2. Removal from Office
        1. When a method for removal from office is not otherwise provided by the Constitution or by law, the Governor may suspend an elected or appointed public officer who is indicted or informed against for any misdemeanor arising directly out of his official duties. Section 112.52, Florida Statutes. If convicted, the officer may be removed from office by executive order of the Governor. A person who pleads guilty or nolo contendere or who is found guilty is, for purposes of section 112.52, Florida Statutes, deemed to have been convicted, notwithstanding the suspension of sentence or the withholding of adjudication. Cf., section 112.51, Florida Statutes, and article IV, section 7, Florida Constitution.
     3. Noncriminal infractions
        1. Section 286.011(3)(a), Florida Statutes, imposes noncriminal penalties for violations of the Sunshine Law by providing that any public official violating the provisions of the Sunshine Law is guilty of a noncriminal infraction, punishable by a fine not exceeding $500. The state attorney may pursue actions on behalf of the state against public officials for violations of section 286.011, Florida Statutes, which result in a finding of guilt for a noncriminal infraction. State v. Foster, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005). Accord, Op. Att'y Gen. Fla. 91-38 (1991).
     4. Attorney’s Fees
        1. Reasonable attorney's fees will be assessed against a board or commission found to have violated section 286.011, Florida Statutes.  Such fees may be assessed against the individual members of the board except in those cases where the board sought, and took, the advice of its attorney, such fees may not be assessed against the individual members of the board.  Section 286.011(4), Florida Statutes.
        2. Section 286.011(4) also authorizes an award of appellate fees if a person successfully appeals a trial court order denying access.  *See*, *School Board of Alachua County v. Rhea,*661 So. 2d 331  (Fla. 1st DCA 1995), *review denied*, 670 So. 2d 939 (Fla. 1996).
     5. Civil actions for injunctive or declaratory relief
        1. Section 286.011(2), Florida Statutes, states that the circuit courts have jurisdiction to issue injunctions upon application by any citizen of this state.  The burden of prevailing in such actions has been significantly eased by the judiciary in sunshine cases.  While normally irreparable injury must be proved by the plaintiff before an injunction may be issued, in Sunshine Law cases the *mere showing* that the law has been violated constitutes "irreparable public injury."  *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), *disapproved in part on other grounds, Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985).   *And see, Lozman v. City of Riviera Beach*, No. 502007CA007552XXXXMBAN (Fla. 15th Cir. Ct. June 9, 2009)*per curiam affirmed*, 46 So. 3d 573 (Fla. 4th DCA 2010) (injunctive relief to enjoin city from future violations of the Sunshine Law due to a failure to record minutes of certain meetings is “appropriate” in light of City’s past conduct and consistent refusal to record minutes even after being advised to do so by the City Attorney and also because the City “has continuously taken the legal position that local governments are not required by the Sunshine Law to record minutes.”).
        2. Although a court cannot issue a blanket order enjoining any violation of the Sunshine Law on a showing that it was violated in particular respects, a court may enjoin a future violation that bears some resemblance to the past violation.  *Port Everglades Authority v. International Longshoremen's Association, Local 1922-1*, 652 So. 2d 1169, 1173 (Fla. 4th DCA 1995).  The future conduct must be "specified, with such reasonable definiteness and certainty that the defendant could readily know what it must refrain from doing without speculation and conjecture."  *Id*., quoting from *Board of Public Instruction v. Doran*, 224 So. 2d 693, 699 (Fla. 1969).
     6. Validity of action taken in violation of the Sunshine Law and subsequent corrective action
        1. Section 286.011, Florida Statutes, provides that no resolution, rule, regulation or formal action shall be considered binding except as taken or made at an open meeting.   “Therefore, where officials have violated section 286.011, the official action is void ab initio.”  *Sarasota* *Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 762 (Fla. 2010).  *And see*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473 (Fla. 1974); *Blackford v. School Board of Orange County*, 375 So. 2d 578 (Fla. 5th DCA 1979) (resolutions made during meetings held in violation of section 286.011, Florida Statutes, had to be re-examined and re-discussed in open public meetings); and *TSI Southeast, Inc. v. Royals*, 588 So. 2d 309 (Fla. 1st DCA 1991) (contract for sale and purchase of real property voided because board failed to properly notice the meeting under section 286.011, Florida Statutes).
        2. Where, however, a public board or commission does not merely perfunctorily ratify or ceremoniously accept at a later open meeting those decisions which were made at an earlier secret meeting but rather takes "independent final action in the sunshine," the decision of the board or commission will not be disturbed.  *Tolar v. School Board of Liberty County*, 398 So. 2d 427, 429 (Fla. 1981).  *See*, *Finch v. Seminole County School Board*, 995 So. 2d 1068, 1073  (Fla. 5th DCA 2008) (school board remedied inadvertent violation of the Sunshine Law when it subsequently held full, open and independent public hearings prior to adopting a rezoning plan) and *Sarasota* *Citizens for Responsible Government v. City of Sarasota, supra*(any possible violations that occurred when county commissioners circulated e-mails among each other were cured by subsequent public meetings).    *Cf., Zorc v. City of Vero Beach,*722 So. 2d 891, 903 (Fla. 4th DCA 1998) (meeting did not cure the Sunshine defect because it was not a "full, open public hearing convened for the purpose of enabling the public to express its views and participate in the decision-making process")***;****Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied,*47 So. 3d 1288(Fla. 2010) (city could  have cured Sunshine Law violation by reconsidering the matter, but did not; accordingly, action taken in violation of the law was void)and *Bert Fish Foundation v. Southeast Volusia Hospital District,*No. 2010-20801-CINS (Fla. 7th  Cir. Ct. February 24, 2011) (series of public meetings did not “cure” Sunshine Law violations that resulted from 21 closed door meetings over 16 months; “[t]here was so much darkness for so long, that a giant infusion of sunshine might have been too little or too late”).  *Cf*. Op. Att’y Gen. Fla. 12-31 (2012) (audit committee’s statutorily prescribed function to create a request for proposals may not be delegated to a subordinate entity; the committee may not, therefore, ratify a defective request for proposals which was created and issued by the county’s financial officer contrary to legal requirements).
     7. Damages
        1. “The only remedies available pursuant to the Sunshine Act are a declaration of the wrongful action as void and reasonable attorney’s fees.” *Dascott v. Palm Beach County*, 988 So. 2d 47, 49 (Fla. 4th DCA 2008), review denied, 6 So. 3d 51 (Fla. 2009). Accordingly, an employee who prevailed in a lawsuit alleging that her termination violated the Sunshine Law “may not recover the equitable relief of back pay because money damages are not a remedy provided for by the Act.” *Id.*
  2. DOES THE SUNSHINE LAW APPLY TO?
     1. Members-elect or candidates
        1. Section 286.011, Florida Statutes, applies to meetings of public boards or commissions “including meetings with or attended by any person elected to such board or commission, but who has not yet taken office . . . .”     Thus, members-elect are subject to the Sunshine Law in the same manner as board members who are currently in office.  *See also, Hough v. Stembridge*, 278 So. 2d 288, 289 (Fla. 3d DCA 1973).  The Sunshine Law does not apply to candidates for office, unless the candidate is an incumbent seeking reelection.  Op. Att'y Gen. Fla. 92-05 (1992).
     2. Members of Different Boards
        1. The Sunshine Law does not apply to a meeting between individuals who are members of *different* boards *unless* one or more of the individuals has been delegated the authority to act on behalf of his board.  *Rowe v. Pinellas Sports Authority*, 461 So. 2d 72 (Fla. 1984).  *Accord*, Inf. Op. to McClash, April 29, 1992 (Sunshine Law generally not applicable to county commissioner meeting with individual member of metropolitan planning organization)
     3. A mayor and a member of the city council
        1. If the mayor is a member of the council or has a voice in decision-making through the power to break tie votes, meetings between the mayor and a member of the city council to discuss some matter which will come before the city council are subject to the Sunshine Law.  Ops. Att'y Gen. Fla. 83-70 (1983) and 75-210 (1975).
        2. Where, however, the mayor is *not* a member of the city council and does not possess any power to vote even in the case of a tie vote but only possesses the power to veto legislation, then the mayor may privately meet with an individual member of the city council without violating the Sunshine Law, provided he or she is not acting as a liaison between members and neither the mayor nor the council member has been delegated the authority to act on behalf of the council.  Ops. Att'y Gen. Fla. 90-26 (1990) and 85-36 (1985). *And see*, Inf. Op. to Cassady, April 7, 2005 (meeting between a mayor and a council member to discuss prospective employees).
     4. A board member and his or her alternate
        1. Since the alternate is authorized to act only in the absence of a board or commission member, there is no meeting of two individuals who exercise independent decision-making authority at the meeting. There is, in effect, only one decision-making official present. Therefore, a meeting between a board member and his or her alternate is not subject to the Sunshine Law. Op. Att'y Gen. Fla. 88-45 (1988)
     5. Ex officio board members
        1. An ex officio board member is subject to the Sunshine Law regardless of whether he or she is serving in a voting or non-voting capacity. Op. Att'y Gen. Fla. 05-18 (2005).
     6. Community forums sponsored by private organizations
        1. A "Candidates' Night" sponsored by a private organization at which candidates for public office, including several incumbent city council members, will speak about their political philosophies, trends, and issues facing the city, is not subject to the Sunshine Law unless the council members discuss issues coming before the council among themselves.  Op. Att'y Gen. Fla. 92-5 (1992).
        2. Similarly, in Op. Att'y Gen. Fla. 94-62 (1994), the Attorney General’s Office concluded that the Sunshine Law does not apply to a political forum sponsored by a private civic club during which county commissioners express their position on matters that may foreseeably come before the commission, so long as the commissioners avoid discussions among themselves on these issues.
        3. However, caution should be exercised to avoid situations in which private political or community forums may be used to circumvent the statute's requirements.  *Id*.  *See*, *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974) (Sunshine Law is to be construed "so as to frustrate all evasive devices").  For example, in *State v.  Foster*, 12 F.L.W. Supp. 1194a (Fla. Broward Co. Ct. September 26, 2005), the court rejected the argument that a private breakfast meeting at which the sheriff spoke and city commissioners individually questioned the sheriff but did not direct comments or questions to each other, did not violate the Sunshine Law.  The court denied the commissioners' motion for summary judgment and held that a discussion is subject to the Sunshine Law where there is a common facilitator who is receiving comments from each commissioner in front of other commissioners.  Similarly, a public forum that is hosted by a city council member with other council members invited to attend and discuss matters which may foreseeably come before the city council for action is subject to the Sunshine Law.  Inf. Op. to Jove, January 12, 2009.
     7. Board members attending meetings of another public board
        1. The Attorney General has advised that county commissioners who are also members of a regional planning council may take part in council meetings and express their opinions without violating the Sunshine Law. Op. Att’y Gen. Fla. 07-13 (2007). “However, these officials should not discuss or debate these issues with one another outside the Sunshine as either county commissioners or as regional planning council members.” Id. See also, Op. Att'y Gen. Fla. 00-68 (2000) (Sunshine Law does not prohibit city commissioners from attending other city board meetings and commenting on agenda items that may subsequently come before the commission for final action; however, city commissioners attending such meetings may not discuss those issues among themselves).
     8. Social Events
        1. Members of a public board or commission are not prohibited under the Sunshine Law from meeting together socially, provided that matters which may come before the board or commission are not discussed at such gatherings. Op. Att'y Gen. Fla. 92-79 (1992). Thus, there is no per se violation of the Sunshine Law for a husband and wife to serve on the same public board or commission so long as they do not discuss board business without complying with the requirements of section 286.011, Florida Statutes. Op. Att'y Gen. Fla. 89-6 (1989).
  3. WHAT TYPES OF DISCUSSIONS ARE COVERED BY THE SUNSHINE LAW?
     1. Investigative meetings or meetings to consider confidential material
        1. The Sunshine Law is applicable to investigative inquiries of public boards or commissions. The fact that a meeting concerns alleged violations of laws or regulations does not remove it from the scope of the law. Op. Att'y Gen. Fla. 74-84 (1974); *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973). The Florida Supreme Court has stated that in the absence of a statute exempting a meeting in which privileged material is discussed, section 286.011, Florida Statutes, should be construed as containing no exceptions. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971).
        2. Section 119.07(7), Florida Statutes, provides that an exemption from section 119.07, Florida Statutes, "does not imply an exemption from s. 286.011. The exemption from s. 286.011 must be expressly provided." Thus, exemptions from the Public Records Act, do not by implication allow a public agency to close a meeting in which exempted material is to be discussed in the absence of a specific exemption from the Sunshine Law. See, Ops. Att'y Gen. Fla. 10-04 (2010) (school board discussing confidential student records) and 91-88 (1991) (pension board). Cf. Op. Att’y Gen. Fla. 12-20 (2012) (county board designated as “appropriate local official” authorized by statute to receive and investigate whistle-blower complaints must comply with the Sunshine Law, and must also “protect the confidential information it is considering at a meeting and must not disclose the name of the whistle-blower unless one of the specific circumstances listed in the [whistle-blower law] is present”).
     2. Legal Matters
        1. In the absence of legislative exemption, discussions between a public board and its attorney are subject to section 286.011, Florida Statutes.  *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985) (section 90.502, Florida Statutes, which provides for the confidentiality of attorney-client communications under the Florida Evidence Code, does not create an exemption for attorney-client communications at public meetings).  *Cf.*, section 90.502(6), Florida Statutes, stating that a discussion or activity that is not a meeting for purposes of the Sunshine Law shall not be construed to waive the attorney-client privilege.
        2. There are statutory exemptions, however, which apply to some discussions of pending litigation between a public board and its attorney.
     3. Settlement negotiations or strategy sessions related to litigation expenditures
        1. Section 286.011(8), Florida Statutes, provides:

 Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or administrative agency, provided that the following conditions are met:

 (a)       The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

 (b)       The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

 (c)        The entire session shall be recorded by a certified court reporter.  The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking.  No portion of the session shall be off the record.  The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

 (d)       The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session.  The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending.  At the conclusion of the attorney-client session, the meeting shall be reopened and the person chairing the meeting shall announce the termination of the session.

 (e)       The transcript shall be made part of the public record upon conclusion of the litigation.  (e.s.)

* + - 1. Is section 286.011(8), Florida Statutes, to be liberally or strictly construed?
         1. It has been held that the Legislature intended a strict construction of section 286.011(8), Florida Statutes. City of Dunnellon v. Aran, 662 So. 2d 1026 (Fla. 5th DCA 1995); School Board of Duval County v. Florida Publishing Company, 670 So. 2d 99 (Fla. 1st DCA 1996)
      2. Who may call an attorney-client meeting?
         1. While section 286.011(8), Florida Statutes, does not specify who calls the closed attorney-client meeting, it requires as one of the conditions that must be met that the governmental entity's attorney "shall advise the entity at a public meeting that he or she desires advice concerning the litigation."
         2. The requirement that the board's attorney advise the board at a public meeting that he or she desires advice concerning litigation, is not satisfied by a previously published notice of the closed session.  Op. Att'y Gen. Fla. 04-35 (2004).  Rather, such an announcement must be made at a public meeting of the board.  Id.  Cf., Op. Att’y Gen. Fla. 07-31 (2007) (a board attorney’s request for a section 286.011[8], Florida Statutes, meeting may be made at a special meeting of the board provided that the special meeting at which the request is made is open to the public, reasonable notice has been given, and minutes are taken).
      3. Who may attend?
         1. Only those persons listed in the statutory exemption, i.e., the entity, the entity's attorney, the chief administrative officer of the entity, and the court reporter are authorized to attend a closed attorney-client session.  Other staff members or consultants are not allowed to be present.  School Board of Duval County v. Florida Publishing Company.  *And see,  Zorc v. City of Vero Beach*, 722 So. 2d 891, 898 (Fla. 4th DCA 1998), review denied, 735 So. 2d 1284 (Fla. 1999) (rejecting city's argument that charter provision requiring that city clerk attend all council meetings authorized clerk to attend closed attorney-client meeting); Op. Att’y Gen. Fla. 09-52 (2009) (attorneys representing superintendent of schools in an administrative action where the school board is a named party not authorized to meet privately with school board); and Op. Att'y Gen. Fla. 01-10 (2001) (clerk of court not authorized to attend).
         2. However, because the entity's attorney is permitted to attend the closed session, if the school board hires outside counsel to represent it in pending litigation, both the school board attorney and the litigation attorney may attend a closed session.  Op. Att'y Gen. Fla. 98-06 (1998).  *And see, Zorc v. City of Vero Beach*  (attendance of Special Counsel authorized).   And, a qualified interpreter may attend to interpret for hearing impaired board members without violating the Sunshine Law.   Op. Att’y Gen. Fla. 08-42 (2008).
      4. Is substantial compliance with the conditions established in the statute adequate?
         1. In City of Dunnellon v. Aran, supra, the court said that a city council's failure to announce the names of the lawyers participating in a closed attorney-client session violated the Sunshine Law. The court rejected the city's claim that when the mayor announced that attorneys hired by the city would attend the session [but did not give the names of the individuals], his "substantial compliance" was sufficient to satisfy the statute. Cf., Zorc v. City of Vero Beach, at 901, noting that deviation from the agenda at an attorney-client session is not authorized; while such deviation is permissible if a public meeting has been properly noticed, "there is no case law affording the same latitude to deviations in closed door meetings.”
      5. What kinds of matters may be discussed at the attorney-client session?
         1. Section 286.011(8) states that the subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.  Section 286.011(8)(b), Florida Statutes.
         2. Moreover, section 286.011(8), Florida Statutes, “simply provides a governmental entity’s attorney an opportunity to receive necessary direction and information from the government entity.  No final decisions on litigation matters can be voted on during these private, attorney-client strategy meetings.  The decision to settle a case, for a certain amount of money, under certain conditions is a decision which must be voted upon in a public meeting.”  *School Board of Duval County v. Florida Publishing Company*, 670 So. 2d 99, 100 (Fla. 1st DCA 1996), quoting Staff of Fla.H.R.Comm. on Government Operations, CS/HB 491 (1993) Final Bill Analysis & Economic Impact Statement at 3. If a board goes beyond the "strict parameters of settlement negotiations and strategy sessions related to litigation expenditures" and takes "decisive action," a violation of the Sunshine Law results.  *Zorc v. City of Vero Beach*, at 900.  *And see*, Op. Att'y Gen. Fla.  99-37 (1999).
         3. Thus, "[t]he settlement of a case is exactly that type of final decision contemplated by the drafters of section 286.011(8) which must be voted upon in the sunshine."  *Zorc v. City of Vero Beach*, at 901.  Accord, Op. Att’y Gen. Fla. 08-17 (2008) (“any action to approve a settlement or litigation expenditures must be voted on in a public meeting”).  See also, Freeman v. Times Publishing Company, 696 So. 2d 427 (Fla. 2d DCA 1997) (discussion of methods or options to achieve continuing compliance with a long-standing federal desegregation mandate [such as whether to modify the boundaries of a school zone to achieve racial balance] must be held in the Sunshine).  *Compare, Bruckner v. City of Dania Beach*, 823 So. 2d 167, 172 (Fla. 4th DCA 2002) (closed city commission meeting to discuss various options to settle a lawsuit involving a challenge to a city resolution, including modification of the resolution, authorized because the commission "neither voted, took official action to amend the resolution, nor did it formally decide to settle the litigation"); and *Brown v. City of Lauderhill*, 654 So. 2d 302, 303 (Fla. 4th DCA 1995) (closed-door session between city attorney and board to discuss claims for attorney's fees, authorized).
      6. When is an agency a "party to pending litigation" for purposes of the exemption?
         1. In *Brown v. City of Lauderhill, supra*, the court said it could "discern no rational basis for concluding that a city is not a 'party' to pending litigation in which it is the real party in interest."  *Accord*, Op. Att’y Gen. 09-15 (2009) (where city is a “real party in interest” of a pending lawsuit, it may conduct a closed attorney-client session even though it is not a named party to the litigation at the time of the meeting).  *And see, Zorc v. City of Vero Beach*, at 900  (city was presently a party to ongoing litigation by virtue of its already pending claims in bankruptcy proceedings).
         2. Although the Brown decision established that the exemption could be used by a city that was a real party in interest on a claim involved in pending litigation, that decision does not mean that an agency may meet in executive session with its attorney where there is only the threat of litigation.  *See*, Op. Att'y Gen. Fla. 98-21 (1998) (section 286.011[8] exemption "does not apply when no lawsuit has been filed even though the parties involved believe litigation is inevitable").  *And see*, Ops. Att’y Gen. Fla. 09-25 (2009) (town council that has received a pre-suit notice under the Bert J. Harris Act is not a party to pending litigation and, therefore, may not conduct a closed meeting to discuss settlement negotiations), 06-03 (2006) (closed attorney-client session may not be held to discuss settlement negotiations on an issue that is the subject of mediation conducted pursuant to a partnership agreement between the agency and others) and **13-17 (2013) (exemption may not be used to conduct a closed meeting during a mandatory arbitration proceeding, when there is no pending legal proceeding in a court or before an administrative agency).**
         3. Accordingly, discussions between the city attorney and the city commission relating to settlement of a conflict under the Florida Governmental Conflict Resolution Act would not come within the scope of the exemption because “[n]othing in section 286.011(8), Florida Statutes, extends the coverage of the exemption to discussions of mediated disputes or to issues arising through the conflict resolution procedure whether or not litigation has been filed.” Op. Att’y Gen. Fla. 09-14 (2009).
      7. When is litigation "concluded" for purposes of section 286.011(8)(e)?
         1. **Section 286.011(8)(e), Florida Statutes, provides that transcripts of closed meetings “shall be made part of the public record upon conclusion of the litigation.”  The exemption does not continue for “derivative claims” made in separate, subsequent litigation.  Op. Att’y Gen. Fla. 13-13 (2013).**
         2. However, litigation that is ongoing but temporarily suspended pursuant to a stipulation for settlement has not been concluded for purposes of section 286.011(8), and a transcript of meetings held between the city and its attorney to discuss such litigation may be kept confidential until conclusion of the litigation.  Op. Att'y Gen. Fla. 94-64 (1994).  And see, Op. Att'y Gen. Fla. 94-33 (1994), concluding that to give effect to the purpose of section 286.011(8), a public agency may maintain the confidentiality of a record of a strategy or settlement meeting between a public agency and its attorney until the suit is dismissed with prejudice or the applicable statute of limitations has run.  **And see Inf. Op. to Boutsis, December 13, 2012, noting that the exemption continues through the appeals segment of the litigation.**
         3. **The release by the city council of  attorney-client transcripts from meetings held pursuant to section 286.011(8), Florida Statutes, prior to the “conclusion of litigation” would not constitute a violation of that statutory provision, but would represent a waiver of the limited exemption afforded to government agencies and their attorneys to discuss pending litigation issues.  Op. Att’y Gen. Fla. 13-21 (2013).**
    1. Risk Management
       1. Section 768.28(16)(c), Florida Statutes, states that portions of meetings and proceedings relating solely to the evaluation of claims or to offers of compromise of claims filed with a risk management program of the state, its agencies and subdivisions, are exempt from the Sunshine Law.
       2. This exemption is limited and applies only to tort claims for which the agency may be liable under section 768.28, Florida Statutes.  Op. Att'y Gen. Fla. 04-35 (2004).  The exemption is not applicable to meetings held prior to the filing of a tort claim with the risk management program.  Op. Att'y Gen. Fla. 92-82 (1992).   Moreover, a meeting of a city's risk management committee is exempt from the Sunshine Law only when the meeting relates solely to the evaluation of a tort claim filed with the risk management program or relates solely to an offer of compromise of a tort claim filed with the risk management program.  Op. Att'y Gen. Fla. 04-35 (2004).
       3. Unlike section 286.011(8), Florida Statutes, however, section 768.28(16), Florida Statutes, does not specify the personnel who are authorized to attend the meeting.  See, Op. Att'y Gen. Fla. 00-20 (2000), advising that personnel of the school district who are involved in the risk management aspect of the tort claim being litigated or settled may attend such meetings without jeopardizing the confidentiality provisions of the statute.
    2. Personnel Matters
       1. Meetings of a public board or commission at which personnel matters are discussed are not exempt from the provisions of section 286.011, Florida Statutes, in the absence of a specific statutory exemption. *Times Publishing Company v. Williams*, 222 So. 2d 470 (Fla. 2d DCA 1969), disapproved in part on other grounds, *Neu v. Miami Herald Publishing Company*, 462 So. 2d 821 (Fla. 1985). *And see*, Op. Att’y Gen. Fla. 10-14 (2010) (collegial board created by board of directors of a charter school to oversee personnel decisions of the school is subject to the Sunshine Law).
       2. Collective Bargaining Discussions
          1. A limited exemption from section 286.011, Florida Statutes, exists for discussions between the chief executive officer of the public employer and the legislative body of the public employer relative to collective bargaining.  Section 447.605(1), Florida Statutes.  Cf., Op. Att'y Gen. Fla. 99-27 (1999), noting that a committee (composed of the city manager and various city managerial employees) formed by the city manager to represent the city in labor negotiations qualifies as the "chief executive officer" and thus may participate in closed executive sessions conducted pursuant to this section.
          2. Section 447.605(1), Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure.  Op. Att'y Gen. Fla. 03-09 (2003).
          3. The section 447.605(1) exemption applies only when there are actual and impending collective bargaining negotiations.  *City of Fort Myers v. News-Press Publishing Company, Inc*., 514 So. 2d 408 (Fla. 2d DCA 1987).  It does not apply to other nonexempt topics which may be discussed during the course of the same meeting.  Op. Att'y Gen. Fla. 85-99 (1985).  Moreover, the collective bargaining negotiations between the chief executive officer and a bargaining agent are not exempt and, pursuant to section 447.605(2), Florida Statutes, must be conducted in the Sunshine.
          4. Section 447.605, Florida Statutes, does not directly address the dissemination of information that may be obtained at a closed labor negotiation meeting, but there is clear legislative intent that matters discussed during such meetings are not to be open to public disclosure.  Op. Att'y Gen. Fla. 03-09 (2003)
       3. Disciplinary hearings and grievance committees
          1. A meeting of a municipal housing authority commission to conduct an employee termination hearing is subject to the Sunshine Law.  Op. Att'y Gen. Fla. 92-65 (1992). Similarly, in *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004), the court held that deliberations of pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine.   *And see Citizens for Sunshine Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012) (two members of a civil service board violated the Sunshine Law when they held a private discussion about a pending employment termination appeal during a recess).
          2. However, the Sunshine Law does not apply to a professional standards committee responsible for reviewing charges against a sheriff's deputy and making recommendations to the inspector general as to whether the charges should be sustained, dismissed, or whether the case should be deferred for more information.  *Jordan v. Jenne*, 938 So. 2d 526 (Fla. 4th DCA 2006).  And see, Op. Att’y Gen. Fla. 07-54 (2007), concluding that while post-termination hearings held before the city manager are not required to be open, hearings held before a three member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine.  *Accord*, Op. Att’y Gen. Fla. 10-14 (2010) (while a single officer, accomplishing his or her official duties and responsibilities may not be subject to the Sunshine Law while discharging those duties, the creation of a board or commission to accomplish these duties or the delegation of responsibility to a collegial body may implicate the Sunshine Law).
          3. The Sunshine Law applies to board discussions concerning grievances and other personnel matters.  Op. Att'y Gen. Fla. 76-102 (1976).  A staff grievance committee created to make nonbinding recommendations to a county administrator regarding disposition of employee grievances is also subject to section 286.011, Florida Statutes.  Op. Att'y Gen. Fla. 84-70 (1984).  *And see, Palm Beach County Classroom Teacher's Association v. School Board of Palm Beach County*, 411 So. 2d 1375 (Fla. 4th DCA 1982), in which the court affirmed the lower court's refusal to issue a temporary injunction to exclude a newspaper reporter from a grievance hearing.  A collective bargaining agreement cannot be used "to circumvent the requirements of public meetings" in section 286.011, Florida Statutes.  *Id.* at 1376.
       4. Interviews
          1. The Sunshine Law applies to meetings of a board of county commissioners when interviewing applicants for county positions appointed by the board, when conducting job evaluations of county employees answering to and serving at the pleasure of the board, and when conducting employment termination interviews of county employees who serve at the pleasure of the board. Op. Att'y Gen. Fla. 89-37 (1989).
       5. Screening Advisory Committees
          1. In *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983), a committee composed of staff which was created for the purpose of screening applications for the position of a law school dean and making recommendations to the faculty senate was held to be subject to section 286.011, Florida Statutes, since the committee performed a decision-making function outside of their normal staff activities.  By screening applicants and deciding which applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university.
          2. However, if the sole function of the screening committee is simply to gather information for the decision-maker, rather than to accept or reject applicants, the committee's activities are outside the Sunshine Law.  *See, Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985); *Knox v. District School Board of Brevard*, 821 So. 2d 311 (Fla. 5th DCA 2002)
    3. Quasi-Judicial Proceedings
       1. The Florida Supreme Court has stated that there is no exception to the Sunshine Law which would allow closed-door hearings or deliberations when a board or commission is acting in a "quasi-judicial" capacity. *Canney v. Board of Public Instruction of Alachua County*, 278 So. 2d 260 (Fla. 1973).
    4. Purchasing Committees
       1. A committee appointed by a public college’s purchasing director to consider proposals submitted by contractors was held to be subject to the Sunshine Law because its function was to “weed through the various proposals, to determine which were acceptable and to rank them accordingly.” *Silver Express Company v. District Board of Lower Tribunal Trustees*, 691 So. 2d 1099, 1100 (Fla. 3d DCA 1997). *And see Leach-Wells v. City of Bradenton*, 734 So. 2d 1168, 1171 (Fla. 2d DCA 1999) (selection committee created by city council to evaluate proposals violated the Sunshine Law when the city clerk unilaterally ranked the proposals based on the committee members’ individual written evaluations; the court held that “the short-listing was formal action that was required to be taken at a public meeting”). See now section 286.0113(2)(b)1. and 2., Florida Statutes, providing a limited exception from the Sunshine Law for certain activities conducted pursuant to a competitive solicitation). Cf. section 255.0518, Florida Statutes (sealed bids received pursuant to a competitive solicitation for construction or repairs on a public building or public work must be opened at a public meeting conducted in compliance with section 286.011, Florida Statutes)
    5. Real Property Negotiations
       1. In the absence of a statutory exemption, the negotiations by a public board or commission for the sale or purchase of property must be conducted in the sunshine. See, City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971). In addition, if the authority of the public board or commission to acquire or lease property has been delegated to a single member, that member is subject to section 286.011, Florida Statutes, and is prohibited from negotiating the acquisition or lease of the property in secret. Op. Att'y Gen. Fla. 74-294 (1974).
  1. WHAT IS A MEETING SUBJECT TO THE SUNSHINE LAW?
     1. Number of board members required to be present
        1. The Sunshine Law extends to the discussions and deliberations as well as the formal action taken by a public board or commission.  There is no requirement that a quorum be present for a meeting of members of a public board or commission to be subject to section 286.011, Florida Statutes.  Instead, the law is applicable to *any* gathering, whether formal or casual, of two or more members of the same board or commission to discuss some matter on which *foreseeable action* will be taken by the public board or commission.  *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973).
        2. Thus, two members of a civil service board violated the Sunshine Law when they held a private discussion of a pending employment appeal during a recess of the board meeting.  *Citizens for Sunshine, Inc. v. City of Sarasota*, No. 2010CA4387NC (Fla. 12th Cir. Ct. February 27, 2012).  *Compare*  Op. Att'y Gen. Fla. 04-58 (2004) ("coincidental unscheduled meeting of two or more county commissioners to discuss emergency issues with staff" during a declared state of emergency not subject to s. 286.011 if the issues do not require action by the county commission)
     2. Circumstances in which the Sunshine Law may apply to a single individual or where two board members are not physically present
        1. General
           1. The Sunshine Law applies to public boards and commissions, *i.e.*, collegial bodies.  As discussed *supra*, section 286.011, Florida Statutes, applies to meetings of "two or more members" of the same board or commission when discussing some matter which will foreseeably come before the board or commission.
           2. Therefore, section 286.011, Florida Statutes, would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members.  *See, Deerfield Beach Publishing, Inc. v. Robb*, 530 So. 2d 510 (Fla. 4th DCA 1988) (requisite to application of the sunshine law is a meeting between two or more public officials); *City of Sunrise v. News and Sun-Sentinel Company,* 542 So. 2d 1354 (Fla. 4th DCA 1989);*Mitchell v. School Board of Leon County*, 335 So. 2d 354 (Fla. 1st DCA 1976); and *Sarasota* *Citizens for Responsible Government v. City of Sarasota,* 48 So. 3d 755 (Fla. 2010) (private one-on-one informational briefings between individual county commissioners and staff did not violate the Sunshine Law).
           3. Certain factual situations, however, have arisen where, in order to assure public access to the decision-making processes of public boards or commissions, it has been necessary to conclude that the presence of two individuals of the same board or commission is not necessary to trigger application of section 286.011, Florida Statutes.  As stated by the Supreme Court, the Sunshine Law is to be construed "so as to frustrate all evasive devices."*Town of Palm Beach v. Gradison,* 296 So. 2d 473, 477 (Fla. 1974).
        2. Written correspondence between board members
           1. A city commissioner may, outside a public meeting, send documents that the commissioner wishes other members of the commission to consider on matters coming before the commission for official action, provided that there is no response from, or interaction related to such documents among, the commissioners prior to the public meeting.  Op. Att’y Gen. Fla. 07-35 (2007).  In such cases, the records, which are subject to disclosure under the Public Records Act, are not being used as a substitute for action at a public meeting as there is no interaction among the commissioners prior to the meeting.  Op. Att'y Gen. Fla. 89-23 (1989).
           2. If, however, a report is circulated among board members for comments with such comments being provided to other members, there is interaction among the board members which is subject to section 286.011, Florida Statutes.  Op. Att'y Gen. Fla. 90-3 (1990).  Accordingly, while a school board member may prepare and circulate an informational memorandum or position paper to other board members, the use of a memorandum to solicit comment from other board members or the circulation of
        3. Meetings conducted over the telephone or using electronic media technology
           1. Discussions conducted via telephones, email, text messaging or other electronic means are not exempted from the Sunshine Law

As discussed previously, the Sunshine Law applies to discussions between two or more members of a board or commission on some matter which foreseeably will come before that board or commission for action.  The use of a telephone to conduct such discussions does not remove the conversation from the requirements of section 286.011, Florida Statutes.   *See, State v. Childers*, No. 02-21939-MMC; 02-21940-MMB (Escambia Co. Ct. June 5, 2003), *per curiam affirmed*, 886 So. 2d 229 (Fla. 1st DCA 2004**) (**telephone conversation during which two county commissioners and the supervisor of elections discussed redistricting violated the Sunshine Law).

Similarly, board members may not use computers to conduct private discussions among themselves about board business.  Op. Att'y Gen. Fla. 89-39 (1989). Thus, while a city commissioner is not prohibited from posting comments on the city’s Facebook page, commissioners “must not engage in an exchange or discussion of matters that foreseeably will come before the board or commission for official action.”  Op. Att’y Gen. Fla. 09-19 (2009).  *Cf*., Inf. Op. to Galaydick, October 15, 1995, advising that school board members may share a laptop computer even though the hard drive of the computer contains information reflecting the ideas of an individual member as long as the computer is not being used as a means of communication between members; and Op. Att’y Gen. Fla. 01-20 (2001) (a one-way e-mail communication from one city council member to another,  when it does not result in the exchange of council members’ comments or responses on subjects requiring council action, does not constitute a meeting subject to the Sunshine Law; however, such e-mail communications are public records)

* + - * 1. Authority of boards to conduct public meetings via electronic media technology (e.g. telephone or video conferencing)

A related issue is whether a board is authorized to conduct *public* meetings via electronic media technology (e.g., telephone or video conferencing). The answer to this question depends upon whether the board is a state or local government agency.

In Op. Att'y Gen. Fla. 98-28 (1998), the Attorney General’s Office concluded that section 120.54(5)(b)2., Florida Statutes, authorizes *state* agencies to conduct meetings via electronic means provided that the board complies with uniform rules of procedure adopted by the state Administration Commission.  These rules contain notice requirements and procedures for providing points of access for the public.  *See*, Rule 28-109, Florida Administrative Code.

As to *local* boards, the Attorney General's Office advised that the authorization in section 120.54(5)(b)2., Florida Statutes, to conduct meetings entirely through the use of communications media technology applies only to state agencies. Op. Att'y Gen. Fla. 98-28 (1998). Thus, since section 1001.372(2)(b), Florida Statutes, requires a district school board to hold its meetings at a "public place in the county," a quorum of the board must be physically present at the meeting of the school board.*Id.*

However, if a quorum of a local board is physically present at the public meeting site, "the participation of an absent member by telephone conference or other interactive electronic technology is permissible when such absence is due to extraordinary circumstances such as illness[;] . . . [w]hether the absence of a member due to a scheduling conflict constitutes such a circumstance is a determination that must be made in the good judgment of the board."  Op. Att'y Gen. Fla. 03-41 (2003).

For example, if a quorum of a local board is physically present at the public meeting site, a board may allow a member with health problems to participate and vote in board meetings through the use of such devices as a speaker telephone that allow the absent member to participate in discussions, to be heard by other board members and the public, and to hear discussions taking place during the meeting.  Op. Att’y Gen. Fla. 94-55 (1994).  *See also*, Op. Att'y Gen. Fla. 02-82 (2002) (physically-disabled members of a city advisory committee participating and voting by electronic means).

However, the use of electronic media technology does not satisfy *quorum* requirements necessary for official action to be taken by local boards.  Op. Att’y Gen. Fla. 06-20 (2006**).**“[W]here a quorum is necessary for action to be taken, physical presence of the members making up the quorum is required in the absence of a statute requiring otherwise.”  Op. Att’y Gen. Fla. 09-56 (2009).  Accordingly, a city may not adopt an ordinance allowing members of a city board to appear by electronic means to constitute a quorum.  Op. Att’y Gen. Fla. 10-34 (2010).

The physical presence of a quorum has not been required, however, where electronic media technology (such as video conferencing and digital audio) is used to allow public access and participation at *workshop* meetings where no formal action will be taken.  Thus, the Attorney General’s Office concluded that local boards may use electronic media technology to conduct informal discussions and workshops over the Internet, provided that proper notice is given, and interactive access by members of the public is provided.  Op. Att’y Gen. Fla. 01-66 (2001).   *See also* Op. Att’y Gen. Fla. 06-20 (2006).

 However, the use of an electronic bulletin board to discuss matters over an extended period of days or weeks violates the Sunshine Law by circumventing the notice and access provisions of that law.  Op. Att'y Gen. Fla. 02-32 (2002).  *Compare*, Op. Att’y Gen. Fla. 08-65 (2008) (city advisory boards may conduct workshops lasting no more than two hours using an on-line bulletin board if proper notice is given and interactive access to members of the public is provided and the city ensures that operating-type assistance is available where the computers for the public are located)

* + 1. Delegation of authority to single individual
       1. If a member of a public board is authorized only to explore various contract proposals with the applicant selected for the position of executive director, with such proposals being related back to the governing body for consideration, the discussions between the board member and the applicant are not subject to the Sunshine Law.  Op. Att'y Gen. Fla. 93-78 (1993).  If, however, the board member has been delegated the authority to reject certain options from further consideration by the entire board, the board member is performing a decision-making function that must be conducted in the sunshine.    Ops. Att’y Gen. Fla. 95-06 (1995) and Op. Att’y Gen. Fla. 93-78 (1993).*And see, News-Press Publishing Company, Inc. v. Carlson,* 410 So. 2d 546, 547-548 (Fla. 2d DCA 1982) (when public officials delegate *de facto* authority to act on their behalf in the formulation, preparation, and promulgation of plans upon which foreseeable action will be taken by the public officials, then delegates stand in the shoes of such public officials insofar as the Sunshine Law is concerned).*Compare*, *Lee County v. Pierpont,* 693 So. 2d 994 (Fla. 2d DCA 1997) (authorization to county attorney to make settlement offers to landowners not to exceed appraised value plus 20%, rather than a specific dollar amount, did not violate the Sunshine Law).
       2. Thus, while the Sunshine Law would not ordinarily apply to an individual member of a public board or commission or to public officials who are not board or commission members, the Sunshine law does apply when there has been a delegation of a board’s decision-making authority.  Op. Att’y Gen. Fla. 10-15 (2010).
       3. It must be recognized, however, that the applicability of the Sunshine Law relates to the discussions of a single individual who has been delegated decision-making authority on behalf of a board or commission.  If the individual, rather than the board, is vested by law, charter or ordinance with the authority to take action, such discussions are not subject to section 286.011, Florida Statutes.  *See, City of Sunrise v. News and Sun-Sentinel Company*, 542 So. 2d 1354 (Fla. 4th DCA 1989).   ***Cf.* Op. Att’y Gen. Fla. 13-14 (2013) (where contract terms regarding the police chief’s employment have been discussed and approved at a public city commission meeting, Sunshine Law does not require that the written employment contract drafted by the town attorney as directed by the commission be subsequently presented to, considered and approved by the commission at a Sunshine Law compliant meeting).**
    2. Use of nonmembers as liaisons between board members or to conduct a “de facto” meeting of board members
       1. The Sunshine Law is applicable to meetings between a board member and an individual who is not a member of the board when that individual is being used as a liaison between, or to conduct a de facto meeting of, board members.  For example, in *Blackford v. School Board of Orange County,* 375 So. 2d 578 (Fla. 5th DCA 1979), the court held that a series of scheduled successive meetings between the school superintendent and individual members of the school board were subject to the Sunshine Law.  While normally meetings between the school superintendent and an individual school board member would not be subject to section 286.011, Florida Statutes, these meetings were held in "rapid-fire succession" in order to avoid a public airing of a controversial redistricting problem.  They amounted to a de facto meeting of the school board in violation of section 286.011, Florida Statutes.
       2. Not all decisions taken by staff, however, need to be made or approved by a board.  Thus, the district court concluded in *Florida Parole and Probation Commission v. Thomas*, 364 So. 2d 480 (Fla. 1st DCA 1978), that the decision to appeal made by legal counsel to a public board after discussions between the legal staff and individual members of the commission was not subject to the Sunshine Law.
  1. WHAT AGENCIES ARE COVERED BY THE SUNSHINE LAW?
     1. Are all public agencies subject to the Sunshine Law?
        1. The Government in the Sunshine Law applies to "any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision." The statute thus applies to public collegial bodies within this state, at the local as well as state level. *City of Miami Beach v. Berns*, 245 So. 2d 38 (Fla. 1971). It is equally applicable to elected and appointed boards or commissions. Op. Att'y Gen. Fla. 73-223 (1973).
        2. The judiciary and the Legislature are not subject to the Sunshine Law. *See, Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992); Op. Att'y Gen. Fla. 83-97 (1983).
        3. Federal agencies, *i.e.*, agencies created under federal law, operating within the state do not come within the purview of the state Sunshine Law.  Op. Att'y Gen. Fla. 71-191 (1971).  *Cf.,* Inf. Op. to Markham, September 10, 1996 (technical oversight committee established by *state* agencies as part of settlement agreement in federal lawsuit subject to Sunshine Law).
     2. Are advisory boards which make recommendations or committees established for fact-finding only subject to the Sunshine Law?
        1. Publicly created advisory boards which make recommendations
           1. Advisory boards created pursuant to law or ordinance or otherwise established by public agencies may be subject to the Sunshine Law, even though their recommendations are not binding upon the agencies that create them.*Town of Palm Beach v. Gradison,*296 So. 2d 473 (Fla. 1974).  *See also,* *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983) (Sunshine Law applies to a university's search and screening committee).*And see, Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000) (Sunshine Law applies to site plan review committee created by county commission to serve in an advisory capacity to the county manager)
        2. Fact-Finding Committees
           1. A limited exception to the applicability of the Sunshine Law to advisory committees has been recognized for advisory committees established for fact-finding only.  “[A] committee is not subject to the Sunshine Law if the committee has only been delegated information-gathering or fact-finding authority and only conducts such activities.”  *Sarasota Citizens for Responsible Government v. City of Sarasota,*48 So. 3d 755*,*762 (Fla. 2010).  *And see*, *Cape Publications, Inc. v. City of Palm Bay*, 473 So. 2d 222 (Fla. 5th DCA 1985).
           2. However, when a committee has been delegated a decision-making function (i.e., sorting through options and making recommendations to the governmental body), in addition to fact-finding, the Sunshine Law applies.  Inf. Op. to Randolph, June 10, 2010**.**Moreover, the ‘fact-finding exception’ does not apply to boards, like school boards, that have the “ultimate decision-making authority”; thus the school board could not take a fact-finding tour without compliance with the Sunshine Law.  *Finch v. Seminole County School Board*,  995 So. 2d 1068 (Fla. 5th DCA 2008).  ***See Citizens for Sunshine, Inc. v. School Board of Martin County*,  125 So. 3d 184 (Fla. 4th DCA 2013) (three members of school board violated Sunshine Law when they visited an adult education center without providing reasonable notice).**
     3. Are private organizations providing services to public agencies subject to the Sunshine Law?
        1. “Generally . . . the Government in the Sunshine Law does not apply to private organizations providing services to a state or local government, unless the private entity has been created by a public entity, there has been a delegation of the public entity’s governmental functions, or the private organization plays an integral part in the decision-making process of the public entity.”  Op. Att’y Gen. Fla. 07-27 (2007). Thus, the Sunshine Law would not ordinarily apply to meetings of a homeowners' association.  Inf. Op. to Fasano, June 7, 1996. *Compare*, Op. Att’y Gen. Fla. 07-44 (2007) (property owners association subject to open government laws when it is acting on behalf of a municipal services taxing unit).
        2. A private corporation which performs services for a public agency and receives compensation for such services pursuant to a contract or otherwise, is not by virtue of this relationship alone necessarily subject to the Sunshine Law unless the public agency's governmental or legislative functions have been delegated to it.  *McCoy Restaurants, Inc. v. City of Orlando*, 392 So. 2d 252 (Fla. 1980) (airlines are not by virtue of their lease with the aviation authority public representatives subject to the Sunshine Law).
        3. However, although private organizations are generally not subject to the Sunshine Law, open meetings requirements can apply if the public entity has delegated "the performance of its public purpose" to the private entity.  *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation*, 729 So. 2d 373, 383 (Fla.  1999).  Thus, a not-for-profit corporation that contracted with a city to carry out affordable housing responsibilities and also reviewed and screened applicant files is an agency for purposes of the Sunshine Law.  Op. Att’y Gen. Fla. 08-66 (2008).
        4. Similarly, the Sunshine Law applies to a private economic development council when there has been a delegation of the county commission’s authority to conduct public business such as carrying out the terms of the county’s strategic economic development plan.  Op. Att’y Gen. Fla. 10-30 (2010).  *See also*, Op. Att’y Gen. Fla. 11-01(2011) (Biscayne Park Foundation, a charitable foundation created by the Village of Biscayne Park to serve as ‘the Village’s fundraising arm,’ subject to the Sunshine Law);  and Op. Att’y Gen. Fla. 10-44 (2010) (Sunshine Law applies to nonprofit corporation [Solar and Energy Loan Fund of St. Lucie County, Inc.] delegated authority to carry out the terms of the county’s green economic development plan). *Compare*, Inf. Op. to Gaetz and Coley, December 17, 2009, concluding that the open government laws did not apply to Florida’s Great Northwest, Inc., a private not-for-profit corporation, since no delegation of a public agency’s governmental function was apparent and the corporation did not appear to play an integral part in the decision-making process of a public agency.
     4. Does the Sunshine Law apply to staff?
        1. Meetings of staff of boards or commissions covered by the Sunshine Law are not ordinarily subject to section 286.011, Florida Statutes.  *Occidental Chemical Company v. Mayo,* 351 So. 2d 336 (Fla. 1977), *disapproved in part on other grounds, Citizens v. Beard*, 613 So. 2d 403 (Fla. 1992).  Thus, a state agency did not violate the Sunshine Law when agency employees conducted an investigation into a licensee's alleged failure to follow state law, and an assistant director made the decision to file a complaint.  *Baker v. Florida Department of Agriculture and Consumer Services*, 937 So. 2d 1161 (Fla. 4th DCA 2006).
        2. Similarly, in *Sarasota Citizens for Responsible Government v. City of Sarasota*, 48 So. 3d 755, 766 (Fla. 2010), the Supreme Court ruled that a deputy county administrator delegated authority to negotiate with a baseball team considering a move to the area for spring training, did not violate the Sunshine Law when he consulted with county staff because the administrator’s “so-called negotiations team only served an informational role.”  *And see*, *Lyon v. Lake County*, 765 So. 2d 785 (Fla. 5th DCA 2000), in which  the  court concluded that the Sunshine Law did not apply to  informal meetings of staff where the meetings were "merely informational;" where none of the individuals attending the meetings had any decision-making authority during the meetings; and where no formal action was taken or could have been taken at the meetings; *Knox v. District School Board of Brevard,*821 So. 2d 311, 315 (Fla. 5th DCA 2002) ("A sunshine violation does not occur when a governmental executive uses staff for a fact-finding and advisory function in fulfilling his or her duties").
        3. However, when a staff member ceases to function in a staff capacity and is appointed to a committee which is given **“**a policy-based decision-making function,” the staff member loses his or her identity as staff while working on the committee and the Sunshine Law applies to the committee.  It is the nature of the act performed, not the makeup of the committee or the proximity of the act to the final decision, which determines whether a committee composed of staff is subject to the Sunshine Law.  *Wood v. Marston*, 442 So. 2d 934 (Fla. 1983).  *And see,* *Evergreen the Tree Treasurers of Charlotte County, Inc. v. Charlotte County Board of County Commissioners,* 810 So. 2d 526 (Fla. 2d DCA 2002) (when public officials delegate their fact-finding duties and decision-making authority to a committee of staff members, those individuals no longer function as staff members but "stand in the shoes of such public officials" insofar as the Sunshine Law is concerned).
        4. For example, in *Wood v. Marston*, *supra*, the Court concluded that a committee composed of staff which was created for the purpose of screening applications and making recommendations for the position of a law school dean was subject to section 286.011, Florida Statutes, since the committee members performed a decision-making function outside of their normal staff activities.  By screening applicants and deciding which applicants to reject from further consideration, the committee performed a policy-based, decision-making function delegated to it by the president of the university.
        5. Similarly, in *Silver Express Company v. Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997), the district court determined that a committee (composed of staff and one outside person) that was created by a college purchasing director to assist and advise her in evaluating contract proposals was subject to the Sunshine Law.  According to the court, the committee's job was to weed through the various proposals, to determine which were acceptable and to rank them accordingly.  This function was sufficient to bring the committee within the scope of the Sunshine Law because “[g]overnmental advisory committees which have offered up structured recommendations such as here involved -- at least those recommendations which eliminate opportunities for alternative choices by the final authority, or which rank applications for the final authority -- have been determined to be agencies governed by the Sunshine Law."  691 So. 2d at 1101.  *And see*, Op. Att'y Gen. Fla. 05-06 (2005) (city development review committee composed of several city officials and representatives of various city departments to review and approve development applications, is subject to the Sunshine Law); and  Op. Att’y Gen. Fla. 07-54 (2007), concluding that while post-termination hearings held before the city manager are not subject to the Sunshine Law, hearings held before a three member panel appointed by the city manager pursuant to the city personnel policy should be held in the Sunshine.
        7. In making the determination as to whether a staff committee has “decision-making authority” so as to bring the group within the scope of the Sunshine Law, a key factor may be whether the committee deliberates with the person who makes the final decision.  For example, the Fourth District held that deliberations of a pre-termination panel composed of the department head, personnel director and equal opportunity director should have been held in the Sunshine. *Dascott v. Palm Beach County*, 877 So. 2d 8 (Fla. 4th DCA 2004).   *Compare*, *McDougall v. Culver*,  3 So. 3d 391, 394 (Fla. 2d DCA 2009) (circulation of memoranda by senior officials in sheriff’s office which contained findings and recommendations in connection with an internal affairs investigation did not constitute a “meeting” for purposes of the Sunshine Law because the sheriff alone made the final decision on discipline; “the senior officials provided only a recommendation to the Sheriff but they did not deliberate with him nor did they have decision-making authority.”); *Jordan v. Jenne*, 938 So. 2d 526, 530  (Fla. 4th DCA 2006) (“Because the [group] provided only a recommendation to the inspector general and did  not deliberate with the inspector general, the ultimate authority on termination, we conclude that the [group] does not exercise decision-making authority so as to constitute a ‘board’ or commission within the meaning of section 286.011, and as a result, its meetings are not subject to the Sunshine Act”); and *Sarasota* *Citizens for Responsible Government v. City of Sarasota,*48 So. 3d 755, 763 (Fla. 2010) (county administrator’s consultations with staff did not violate the Sunshine Law because the individuals served “an informational role;” “[t]his is not a situation where the [administrator] and the individuals he consulted made joint decisions”).
     5. Does the Sunshine Law apply to members of public boards who also serve as administrative officers or employees?
        1. Occasionally, members of public boards also serve as administrative officers or employees. The Sunshine Law is not applicable to discussions of those individuals when serving as administrative officers or employees, provided such discussions do not relate to matters which will come before the public board on which they serve.  Thus, a board member who also serves as an employee of an agency may meet with another board member on issues relating to his or her duties as an employee *provided* such discussions do not relate to matters that will come before the board for action.  *See,*Ops. Att'y Gen. Fla. 93-41 (1993) and  11-04 (2011).  ***Cf*. section 286.01141, Florida Statutes (2013), providing an exemption for portions of meetings of local advisory criminal justice commissions.**
  2. WHAT IS THE SCOPE OF THE SUNSHINE LAW?
     1. Florida's Government in the Sunshine Law, commonly referred to as the Sunshine Law, provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels.  The law is equally applicable to elected and appointed boards and has been applied to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action.  There are three basic requirements of section 286.011, Florida Statutes:
        1. meetings of public boards or commissions must be
        2. open to the public;
        3. reasonable notice of such meetings must be given; and
        4. minutes of the meetings must be taken and promptly recorded.
     2. A right of access to meetings of collegial public bodies is also recognized in the Florida Constitution.  Article I, section 24, Florida Constitution, was approved by the voters in the November 1992 general election and became effective July 1, 1993.  Virtually all collegial public bodies are covered by the open meetings mandate of the open government constitutional amendment with the exception of the judiciary and the state Legislature which has its own constitutional provision requiring access.  The only exceptions are those established by law or by the Constitution.

1. Chapter 22: Public Records (by Pat Gleason)
   1. HOW LONG MUST AN AGENCY RETAIN A PUBLIC RECORD?
      1. **Delivery of records to successor**
         1. Section 119.021(4)(a), Florida Statutes, provides that whoever has custody of public records shall deliver such records to his successor at the expiration of his term of office or, if there is no successor, to the records and information management program of the Division of Library and Information Services of the Department of State.  *See*, *Maxwell v. Pine Gas Corporation*, 195 So. 2d 602 (Fla. 4th DCA 1967) (state, county, and municipal records are not the personal property of a public officer).   *And see*, Op. Att’y Gen. Fla. 09-39 (2009) (delivery of public records to records custodian of successor agency).
      2. **Retention and disposal of records**
         1. Pursuant to section 257.36(6), Florida Statutes, "[a] public record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the [Division of Library and Information Services of the Department of State]."  This statutory mandate applies to exempt records as well as those subject to public inspection.  *See,* Ops. Att'y Gen. Fla. 94-75 (1994), 87-48 (1987) and 81-12 (1981).  Questions regarding record destruction schedules should be referred to the Department of State, Bureau of Archives and Records Management at (850) 245-6750.
   2. WHAT ARE THE OPTIONS IF AN AGENCY REFUSES TO PRODUCE PUBLIC RECORDS FOR INSPECTION AND COPYING?
      1. Voluntary mediation program
         1. Section 16.60, Florida Statutes, establishes the open government mediation program as a voluntary alternative for resolution of public access disputes.  For more information about mediation, please contact the Attorney General's Office at the following address and telephone number:  The Capitol, PL-01, Tallahassee, Florida 32399-1050; telephone:  (850) 245-0140.
      2. Civil action
         1. Remedies
            1. Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119, Florida Statutes. *See, Radford v. Brock*, 914 So. 2d 1066 (Fla. 2d DCA 2005) (trial judge dismissal of a writ of mandamus directed to clerk of court and court reporter who were alleged to be records custodians was erroneous because trial judge did not issue a show cause order to the clerk of court and court reporter, and because there was no sworn evidence refuting the petitioner's allegations).
            2. Before filing a lawsuit, the petitioner must have furnished a public records request to the agency. *Villarreal v. State*, 687 So. 2d 256 (Fla. 1st DCA 1996), review denied, 694 So. 2d 741 (Fla. 1997), cert. denied, 118 S.Ct. 316 (1997) (improper to order agency to produce records before it has had an opportunity to comply).
            3. Section 119.11(1), Florida Statutes, mandates that actions brought under Ch. 119 are entitled to an immediate hearing and take priority over other pending cases. *See, Matos v. Office of the State Attorney for the 17th Judicial Circuit*, 80 So. 3d 1149 (Fla. 4th DCA 2012) (“[a]n immediate hearing does not mean one scheduled within a reasonable time, but means what the statute says: immediate”) and *Salvador v. Fennelly*, 593 So. 2d 1091 (Fla. 4th DCA 1992) (the early hearings provision reflects a legislative recognition of the importance of time in public records cases; such hearings must be given priority over more routine matters).
            4. Generally, mandamus is the appropriate remedy to enforce compliance with the Public Records Act. *Staton v. McMillan*, 597 So. 2d 940 (Fla. 1st DCA 1992), review dismissed sub nom., *Staton v. Austin*, 605 So. 2d 1266 (Fla. 1992). *See also, Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). If the requestor's petition presents a prima facie claim for relief, an order to show cause should be issued so that the claim may receive further consideration on the merits. *Staton v. McMillan, supra*. *Accord, Gay v. State*, 697 So. 2d 179 (Fla. 1st DCA 1997).
            5. Mandamus is a "one time order by the court to force public officials to perform their legally designated employment duties." *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996). Thus, a trial court erred when it retained continuing jurisdiction to oversee enforcement of a writ of mandamus granted in a public records case. *Id.* However, it has been recognized that injunctive relief may be available upon an appropriate showing for a violation of Chapter 119, Florida Statutes. *See, Daniels v. Bryson*, 548 So. 2d 679 (Fla. 3d DCA 1989). *And see, Areizaga v. Board of County Commissioners of Hillsborough County*, 935 So. 2d 640 (Fla. 2d DCA 2006) (circuit courts may not refer extraordinary writs to mediation; thus, trial judge should not have ordered mediation of petition for writ of mandamus seeking production of public records).
      3. Procedural issues
         1. In camera inspection
            1. Section 119.07(1)(g), Florida Statutes, provides that in any case in which an exemption to the public inspection requirements in section 119.07(1), Florida Statutes, is alleged to exist pursuant to section 119.071(1)(d) or (f), (2)(d), (e), or (f), or (4)(c), Florida Statutes, the public record or part of the record in question shall be submitted to the trial court for an in camera examination.
            2. While section 119.07(1)(g), Florida Statutes, states that an in camera inspection is “discretionary” in cases where an exemption is alleged under section 119.071(2)(c), Florida Statutes, it has been held that an in camera inspection is necessary in order for the court to determine whether the exemption applies to the records at issue. *See Woolling v. Lamar*, 764 So. 2d 765 (Fla. 5th DCA 2000), review denied, 786 So. 2d 1186 (Fla. 2001).
            3. While the trial court’s failure to conduct an in camera inspection usually constitutes reversible error, where the petitioner objected to an inspection and thereby precluded the trial judge from conducting “an intelligent review of the documents,” the appellate court was “compelled to affirm” the trial court’s denial of a petition seeking documents relating to a pending criminal investigation. *Althouse v. Palm Beach County Sheriff’s Office*, 89 So. 3d 288 (Fla. 4th DCA 2012).
         2. Mootness
            1. In *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996), the court noted that "[p]roduction of the records after the [public records] lawsuit was filed did not moot the issues raised in the complaint."  *See also, Mazer v. Orange County, Florida*, 811 So. 2d 857 (Fla. 5th DCA 2002) ("the fact that the requested documents were produced in the instant case after the action was commenced, but prior to final adjudication of the issue by the trial court, does not render the case moot or preclude consideration of [the petitioner's] entitlement to fees under the statute") and *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), review denied, 47 So. 3d 1288 (Fla. 2010) (city’s refusal to provide canvassing board minutes until they had been approved by city commission “denied any realistic access for the only purpose appellants sought to achieve—review of the Minutes before the Commission meeting[;]” accordingly, “the damage to appellants was not mooted”).
         3. Stay
            1. If the person seeking public records prevails in the trial court, the public agency must comply with the court's judgment within 48 hours unless otherwise provided by the trial court or such determination is stayed within that period by the appellate court. Section 119.11(2), Florida Statutes. An automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. Rule 9.310(b)(2), Florida Rules of Appellate Procedure.
         4. Attorney’s Fes
            1. Section 119.12, Florida Statutes, provides that if a civil action is filed against an agency to enforce the provisions of this chapter and the court determines that the agency unlawfully refused to permit a public record to be inspected or copied, the court shall assess and award against the agency responsible the reasonable costs of enforcement including reasonable attorney's fees.
            2. A successful pro se litigant is entitled to reasonable costs of enforcement. *Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000). *Accord: Weeks v. Golden*, 846 So. 2d 1247 (Fla. 1st DCA 2003) (prevailing pro se inmate entitled to an award of costs including postage, envelopes and copying, in addition to filing and service of process fees). *And see Johnson v. Jarvis*, 107 So. 3d 428 (Fla. 1st DCA 2012) (trial court erred in denying motion for costs based on appellant’s failure to comply with the notice requirement in s. 284.30, F.S.; “[f]or purposes of appellate costs, the appellant was the prevailing party . . . and is entitled to an award of his costs incurred therein”); and *Althouse v. Palm Beach County Sheriff’s Office*, 92 So. 3d 899 (Fla. 4th DCA 2012) (where sheriff “did not provide evidence of a reasonable or good faith belief in the soundness of his refusal of production,” trial court’s summary denial of pro se litigant’s motion for costs including photocopies, word processing copies and use of Westlaw legal research, without an evidentiary hearing to determine the reasonableness of such costs, constituted reversible error).
            3. “[A]ttorney’s fees are awardable for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.” *Office of the State Attorney v. Gonzalez*, 953 So. 2d 759, 764 (Fla. 2d DCA 2007). *And see Hewlings v. Orange County, Florida*, 87 So. 3d 839 (Fla. 5th DCA 2012) (mere fact that county quickly responded to public records request via voicemail and fax is not dispositive of whether the county’s 45-day delay in complying with the request was unjustified; thus trial court erred in ruling that petitioner was not entitled to recover attorney’s fees simply because county had responded to the request in a timely manner
            4. Similarly, an agency that misplaced a public records request and thus failed to produce the documents until a lawsuit was filed, was required to pay fees. *Office of the State Attorney v. Gonzalez, supra*. And see, *Weeks v. Golden*, 798 So. 2d 848 (Fla. 1st DCA 2001)(where prison inmate made public records request and state attorney offered no reason for failing to respond to request, trial judge erred in refusing to award costs to inmate). *Cf., Alston v. City of Riviera Beach*, 882 So. 2d 436 (Fla. 4th DCA 2004) (denial of attorney's fee claim affirmed because "[t]he record supports the trial court's conclusion that the city had a good faith and reasonable belief that Alston's request applied only to documents under the control of the parks and recreation department and that Alston failed to establish that the city unlawfully withheld police department records").
            5. “Although fees are not warranted when the [private] entity in charge of the public records at issue was reasonably and understandably unsure of its status as an agency, *New York Times Co. v. PHH Mental Health Services, Inc*., 616 So. 2d 27 (Fla. 1993), there is no comparable requirement when agency status is not in doubt, nor has there been since the 1984 amendment of section 119.12, when the legislature removed the necessity of showing that an agency ‘unreasonably’ refused inspection of public records.” *Lee v. Board of Trustees, Jacksonville Police & Fire Pension Fund*, 113 So. 3d 1010 (Fla. 1st DCA 2013).
         5. Criminal Penalties
            1. In addition to judicial remedies, section 119.10(1)(b), Florida Statutes, provides that a public officer who knowingly violates the provisions of section 119.07(1), Florida Statutes, is subject to suspension and removal or impeachment and is guilty of a misdemeanor of the first degree, punishable by possible criminal penalties of one year in prison, or $1,000 fine, or both. *See*, *State v. Webb*, 786 So. 2d 602 (Fla. 1st DCA 2001).
            2. Section 119.10(1)(a), Florida Statutes, provides that a violation of any provision of Chapter 119, Florida Statutes, by a public official is a noncriminal infraction, punishable by fine not exceeding $500. A state attorney may prosecute suits charging public officials with violations of the Public Records Act, including those violations which may result in a finding of guilt for a noncriminal infraction. Op. Att'y Gen. Fla. 91-38 (1991).
   3. WHAT FEES MAY LAWFULLY BE IMPOSED FOR INSPECTING AND COPYING PUBLIC RECORDS
      1. ***When may an agency charge a fee for the mere inspection of public records?***
         1. As noted in Op. Att'y Gen. Fla. 85-03 (1985), providing access to public records is a statutory duty imposed by the Legislature upon all record custodians and should not be considered a profit-making or revenue-generating operation.  Thus, public information must be open for inspection without charge unless otherwise expressly provided by law.  *See*, *State ex rel. Davis v. McMillan*, 38 So. 666 (Fla. 1905).
         2. Section 119.07(4)(d), Florida Statutes, authorizes the imposition of a special service charge when the nature or volume of public records to be inspected is such as to require extensive use of information technology resources, or extensive clerical or supervisory assistance, or both.  The charge must be reasonable and based on the labor or computer costs actually incurred by the agency.  Thus, an agency may adopt a policy imposing a reasonable special service charge based on the actual labor cost for personnel who are required, due to the nature or volume of a public records request, to safeguard such records from loss or destruction during their inspection.  Op. Att'y Gen. Fla. 00-11 (2000).  In doing so, however, the county's policy should reflect no more than the actual cost of the personnel's time and be sensitive to accommodating the request in such a way as to ensure unfettered access while safeguarding the records.  *Id.*
      2. ***Is an agency required to provide copies of public records if asked, or may the agency allow inspection only?***
         1. Section 119.07(4), Florida Statutes, provides that the custodian shall furnish a copy or a certified copy of a public record upon payment of the fee prescribed by law.  *See*, *Fuller v. State ex rel. O'Donnell*, 17 So. 2d 607 (Fla. 1944) ("The best-reasoned authority in this country holds that the right to inspect public records carries with it the right to make copies.")
      3. ***What fees may be charged for copies?***
         1. Chapter 119 does not prohibit agencies from providing informational copies of public records without charge.  Op. Att'y Gen. Fla. 90-81 (1990).  An agency may, however, charge a fee for copies provided that the amount of the fee does not exceed that authorized by Chapter 119, Florida Statutes, or established elsewhere in the statutes for a particular record.  *See, Roesch v. State*, 633 So. 2d 1, 3 (Fla. 1993) (indigent inmate not entitled to receive copies of public records free of charge nor to have original state attorney files mailed to him in prison; prisoners are "in the same position as anyone else seeking public records who cannot pay" the required costs); and*City of Miami Beach v. Public Employees Relations Commission*, 937 So. 2d 226 (Fla. 3d DCA 2006) (labor union must pay costs stipulated in Chapter 119, Florida Statutes, for copies of documents it has requested from a public employer for collective bargaining purposes).
         2. If no fee is prescribed elsewhere in the statutes, section 119.07(4)(a)1., Florida Statutes, authorizes  the custodian to charge a fee of up to 15 cents per one-sided copy for copies that are 14 inches by 8 ½ inches or less.  An agency may charge no more than an additional 5 cents for each two-sided duplicated copy.  Section 119.07(4)(a)2., Florida Statutes.  A charge of up to $1.00 per copy may be assessed for a certified copy of a public record.  Section 119.07(4)(c), Florida Statutes.
         3. For other copies, the charge is limited to the actual cost of duplication of the record.  Section 119.07(4)(a)3., Florida Statutes.  The phrase "actual cost of duplication" is defined to mean "the cost of the material and supplies used to duplicate the public record, but does not include the labor cost and overhead cost associated with such duplication."  Section 119.011(1), Florida Statutes.  An exception, however, exists for copies of county maps or aerial photographs supplied by county constitutional officers which may include a reasonable charge for the labor and overhead associated with their duplication.  Section 119.07(4)(b), Florida Statutes.  *And see,* the discussion on the special service charge.
      4. ***May an agency charge for travel costs, search fees, development costs and other incidental costs?***
         1. With the exception of county maps or aerial photographs supplied by county constitutional officers, the Public Records Act does not authorize the addition of overhead costs such as utilities or other office expenses to the charge for public records.  Op. Att'y Gen. Fla. 99-41 (1999).  Thus, an agency may not charge for travel time and retrieval costs for public records stored off-premises.  Op. Att'y Gen. Fla. 90-07 (1990).  *And see,*Op. Att'y Gen. Fla. 02-37 (2002) (although an agency may contract with a private company to provide information also obtainable through the agency, it may not abdicate its duty to provide such records for inspection and copying by requiring those seeking public records to do so only through its designee and then paying whatever fee that company may establish for its services).
         2. Similarly, an agency may not charge fees designed to recoup the original cost of developing or producing the records.  Op. Att'y Gen. Fla. 88-23 (1988) (state attorney not authorized to impose a charge to recover part of costs incurred in production of a training program; the fee to obtain a copy of the videotape of such program is limited to the actual cost of duplication of the tape).  *And see*, *State*, *Department of Health and Rehabilitative Services v. Southpointe Pharmacy*, 636 So. 2d 1377, 1382 (Fla. 1st DCA 1994) (once a transcript of an administrative hearing is filed with the agency, the transcript becomes a public record regardless of who ordered the transcript or paid for the transcription; the agency can charge neither the parties nor the public a fee that exceeds the charges authorized in the Public Records Act).
      5. ***When may an agency charge a special service charge for extensive use of clerical or supervisory labor or extensive information technology resources?***
         1. Section 119.07(4)(d), Florida Statutes, states that if the nature or volume of public records to be inspected or copied requires the extensive use of information technology resources or extensive clerical or supervisory assistance, or both, the agency may charge a special service charge which shall be reasonable and shall be based on the cost incurred for such extensive use of information technology resources or the labor cost of the personnel providing the service that is actually incurred by the agency or attributable to the agency for the clerical and supervisory assistance required, or both.  The special service charge applies to requests for both inspection and copies of public records when extensive clerical assistance is required.  *Board of County Commissioners of Highlands County v. Colby*,   976 So. 2d 31 (Fla. 2d DCA 2008).
         2. The fact that a request involves the use of information technology resources is not sufficient to incur the imposition of the special service charge; rather an extensive use of such resources is required before the special service charge is authorized.  Op. Att’y Gen. Fla. 13-03 (2013).
      6. **Labor costs may include salary and benefits but must be reasonable**
         1. The term “labor cost” for purposes of the special service charge may include both salary and benefits.  *Board of County Commissioners v. Colby*, *supra*. However, the statute requires that the special service charge be “reasonable” and based on actual costs.  *Id*.  *See, Carden v. Chief of Police*, 696 So. 2d 772, 773 (Fla. 2d DCA 1996), stating that an "excessive charge" under section 119.07(4)(d), Florida Statutes, "could well serve to inhibit the pursuit of rights conferred by the Public Records Act."   Moreover, in *State v. Gudinas*, No. CR 94-7132 (Fla. 9th Cir. Ct. June 1, 1999), the court concluded that an agency could charge only a clerical rate for the time spent making copies, even if due to staff shortages, a more highly paid person did the work.
      7. **What is an “extensive” use of labor or information technology resources?**
         1. Section 119.07(4)(d), Florida Statutes, does not contain a definition of the term "extensive."  In 1991, a divided First District Court of Appeal upheld a hearing officer's order rejecting an inmate challenge to a Department of Corrections (DOC) rule that defined "extensive" for purposes of the special service charge.  *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991), *review denied*, 592 So. 2d 680 (Fla. 1991).  The agency rule defined "extensive" to mean that it would take more than 15 minutes to locate, review for confidential information, copy and refile the requested material.
         2. An agency is not ordinarily authorized to charge for the cost to review records for statutorily exempt material.  Op. Att'y Gen. Fla. 84-81 (1984).  However, the special service charge may be imposed for this work if the volume of records and the number of potential exemptions make review and redaction of the records a time-consuming  task.  *See,* *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections,* 579 So. 2d at 269.  *And see,* *Herskovitz v. Leon County*, No. 98-22 (Fla. 2d Cir. Ct. June 9, 1998), noting that "it would not be unreasonable in these types of cases [involving many documents and several different exemptions] to charge a reasonable special fee for the supervisory personnel necessary to properly review the materials for possible application of exemptions."
      8. **May an agency require an advance deposit?**
         1. A county policy to require an advance deposit “seems prudent given the legislature’s determination that taxpayers should not shoulder the entire expense of responding to an extensive request for public records.”*Board of County Commissioners v. Colby,*  976 So. 2d 31, 37 (Fla. 2d DCA  2008)***.***Similarly, an agency may require that a public records requestor pay past due fees for records compiled for a previous request before complying with the requestor’s subsequent request*.  Lozman v. City of Riviera Beach,*   995 So. 2d 1027 (Fla. 4th DCA  2008).
   4. TO WHAT EXTENT DOES FEDERAL LAW PREEMPT STATE LAW REGARDING PUBLIC INSPECTION OF RECORDS?
      1. The general rule is that records which would otherwise be public under state law are unavailable for public inspection only when there is an absolute conflict between federal and state law relating to confidentiality of records.  If a federal statute requires particular records to be closed and the state is clearly subject to the provisions of such statute, then pursuant to the Supremacy Clause of the United States Constitution, Article VI, section 2, United States Constitution, the state must keep the records confidential.  *State ex rel. Cummer v. Pace*, 159 So. 679 (Fla. 1935); Ops. Att'y Gen. Fla. 90-102 (1990), 85-3 (1985), 81-101 (1981), 80-31 (1980), 74-372 (1974), and 73-278 (1973).   *And see, Florida Department of Education v. NYT Management Services, Inc.*, 895 So. 2d 1151 (Fla. 1st DCA 2005) (federal law prohibits public disclosure of social security numbers in state teacher certification database).
      2. Thus, tenant records of a public housing authority are not exempt, by reason of the Federal Privacy Act, from disclosure otherwise required by the Florida Public Records Act.  *Housing Authority of the City of Daytona Beach v. Gomillion*, 639 So. 2d 117 (Fla. 5th DCA 1994).  *And see,* *Wallace v. Guzman,*687 So. 2d 1351 (Fla. 3d DCA 1997) (exemptions from disclosure in Federal Freedom of Information Act apply to documents in the custody of federal agencies; the Act is not applicable to state agencies).
      3. In the absence of statutory authorization, a public official is not empowered to obtain a copyright for material produced by his or her office in connection with the transaction of official business. Ops. Att'y Gen. Fla. 03-42 (2003) and 88-23 (1988).  Thus, a property appraiser is not authorized to assert copyright protection in the Geographic Information Systems maps created by his office.  *Microdecisions, Inc. v. Skinner*, 889 So. 2d 871 (Fla. 2d DCA 2004), *review denied*, 902 So. 2d 791 (Fla. 2005).
      4. The federal copyright law, when read together with Florida's Public Records Act, authorizes and requires the custodian of records of the Department of State to make maintenance manuals *supplied* to that agency pursuant to law available for examination and inspection purposes.  With regard to reproducing, copying, and distributing copies of these maintenance manuals which are protected under the federal copyright law, state law must yield to the federal law on the subject.  Op. Att'y Gen. Fla. 03-26 (2003).  *Cf., State, Department of Health and Rehabilitative  Services v. Southpointe Pharmacy,* 636 So. 2d 1377 (Fla. 1st DCA 1994) (agency copy of administrative hearing transcript is a public record regardless of who ordered the transcription or bore its expense; thus, agency can charge only the fees authorized in Chapter 119, Florida Statutes, regardless of the fact that the court reporter may have copyrighted the transcript).
   5. WHAT IS THE LEGAL EFFECT OF STATUTORY EXEMPTIONS FROM DISCLOSURE?
      1. Creation of exemptions
         1. "Courts cannot judicially create any exceptions, or exclusions to Florida's Public Records Act."  *Board of County Commissioners of Palm Beach County v. D.B.,* 784 So. 2d 585, 591 (Fla. 4th DCA 2001).  *Accord, Wait v. Florida Power & Light Company,* 372 So. 2d 420, 425 (Fla. 1979) (Public Records Act "excludes any judicially created privilege of confidentiality;" only the Legislature may exempt records from public disclosure).
         2. Article I, section 24(c), Florida Constitution, authorizes the *Legislature* to enact general laws creating exemptions provided that such laws "shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."  *See, Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 729 So. 2d 373, 380 (Fla. 1999), in which the Court refused to "imply" an exemption from open records requirements, stating "we believe that an exemption from public records access is available only after the legislature has followed the express procedure provided in Article I, section 24(c) of the Florida Constitution."
      2. Exemptions are strictly construed
         1. The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose.  *Krischer v. D'Amato,*674 So. 2d 909 (Fla. 4th DCA 1996*); Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988).  *And see, Halifax Hospital Medical Center v. News-Journal Corporation,*724 So. 2d 567 (Fla. 1999) (1995 exemption to the Sunshine Law for certain hospital board meetings ruled unconstitutional because it did not meet the constitutional standard for exemptions set forth in article I, section 24[b] and [c], Florida Constitution).  An agency claiming an exemption from disclosure bears the burden of proving the right to an exemption.  *See*, *Florida Freedom Newspapers, Inc. v. Dempsey*, 478 So. 2d 1128 (Fla. 1st DCA 1985).
         2. Access to public records is a substantive right.  *Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation,* 784 So. 2d 438 (Fla. 2001).  Thus, a statute affecting that right is presumptively prospective and there must be a clear legislative intent for the statute to apply retroactively.  *Id.*   *See also, Baker County Press, Inc. v. Baker County Medical Services, Inc.,*870 So. 2d 189, 192-193 (Fla. 1st DCA 2004) (generally, the critical date in determining whether a document is subject to disclosure is the date the public records request is made; the law in effect on that date applies).
         3. However, if the Legislature is "clear in its intent," an exemption may be applied retroactively.  *Campus Communications, Inc. v. Earnhardt,* 821 So. 2d 388, 396 (Fla. 5th DCA 2002), *review denied,* 848 So. 2d 1153 (Fla. 2003) (statute exempting autopsy photographs from disclosure is remedial and may be retroactively applied).  *Accord*Op. Att’y Gen. Fla. 11-16 (2011) (applying exemption to a public records request received before the statute’s effective date because the legislation creating the exemption states that it “applies to information held by an agency, before, on or after the effective date of this exemption”).
      3. Release or transfer of confidential or exempt records
         1. There is a difference between records the Legislature has determined to be exempt from the Public Records Act and those which the Legislature has determined to be exempt from the Act and confidential.  *WFTV, Inc. v. School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004), *review denied*, 892 So. 2d 1015 (Fla. 2004).  If information is made confidential in the statutes, the information is not subject to inspection by the public and may be released only to those persons and entities designated in the statute.  *Id*.  *And see*, Ops. Att'y Gen. Fla. 04-09 (2004) and 86-97 (1986).
         2. On the other hand, if the records are not made confidential but are simply exempt from the mandatory disclosure requirements in section 119.07(1)(a), Florida Statutes, the agency is not prohibited from disclosing the documents in all circumstances.  *See*, *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), *review denied*, 589 So. 2d 289 (Fla. 1991), in which the court observed that pursuant to section 119.07(3)(d), Florida Statutes, [now section 119.071(2)(c), Florida Statutes] "active criminal investigative information" was exempt from the requirement that public records be made available for public inspection.  However, as stated by the court, "the exemption does not *prohibit* the showing of such information."  575 So. 2d at 686.
         3. In *City of Riviera Beach v. Barfield*, 642 So. 2d 1135 (Fla. 4th DCA 1994),*review denied*, 651 So. 2d 1192 (Fla. 1995), the court stated that when a criminal justice agency transfers exempt information to another criminal justice agency, the information retains its exempt status.  *And see*, *Ragsdale v. State*, 720 So. 2d 203, 206 (Fla. 1998) ("the focus in determining whether a document has lost its status as a public record must be on the policy behind the exemption and not on the simple fact that the information has changed agency hands”).
   6. TO WHAT EXTENT MAY AN AGENCY REGULATE OR LIMIT INSPECTION AND COPYING OF PUBLIC RECORDS?
      1. May an agency impose its own restrictions on access to or copying of public records?
         1. Any local enactment or policy which purports to dictate additional conditions or restrictions on access to public records is of dubious validity since the legislative scheme of the Public Records Act has preempted any local regulation of this subject.  *See, Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), appeal dismissed sub nom., *DePerte v. Tribune Company*, 105 S.Ct. 2315, (1985).  *See also, James v. Loxahatchee Groves Water Control District*, 820 So. 2d 988 (Fla. 4th DCA 2002) (trial court should have held a hearing before denying a request to inspect records at the agency's offices rather than at an off-premises location).
      2. What agency employees are responsible for responding to public records requests?
         1. Section 119.011(5), Florida Statutes, defines the term "custodian of public records" to mean "the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee."   A custodian of public records or a person having custody of public records may designate another officer or employee of the agency to permit the inspection and copying of public records, but must disclose the identity of the designee to the person requesting to inspect or copy public records.  Section 119.07(1)(b), Florida Statutes.
         2. However, the statutory reference to the records custodian does not alter the "duty of disclosure" imposed by section 119.07(1), Florida Statutes, upon "[e]very person who has custody of a public record."  *Puls v. City of Port St. Lucie*, 678 So. 2d 514 (Fla. 4th DCA 1996).
         3. Thus, the term "custodian" for purposes of the Public Records Act refers to all agency personnel who have it within their power to release or communicate public records.  *Mintus v. City of West Palm Beach*, 711 So. 2d 1359 (Fla. 4th DCA 1998), citing to, *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991).  But, "the mere fact that an employee of a public agency temporarily possesses a document does not necessarily mean that the person has custody as defined by section 119.07."  *Mintus*, supra, at 1361.
      3. What individuals are authorized to inspect and receive copies of public records?
         1. Section 119.01, Florida Statutes, provides that "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person." (e.s.) *See, Curry v. State*, 811 So. 2d 736 (Fla. 4th DCA 2002) (defendant's conduct in making over 40 public records requests concerning victim constituted a "legitimate purpose" within the meaning of the aggravated stalking law "because the right to obtain the records is established by statute and acknowledged in the state constitution").
      4. Must an individual show a "special interest" or "legitimate interest" in public records before being allowed to inspect or copy same?
         1. No.  Chapter 119, Florida Statutes, requires no showing of purpose or "special interest" as a condition of access to public records.  See, State ex rel. Davis v. McMillan, 38 So. 666 (Fla. 1905) (abstract companies may copy documents from the clerk's office for their own use and sell copies to the public for a profit); Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227, 228 at  n.2 (Fla. 3d DCA 1998), review denied, 729 So. 2d 389 (Fla. 1999) ("Booksmart's reason for wanting to view and copy the documents is irrelevant to the issue of whether the documents are public records").  "[T]he fact that a person seeking access to public records wishes to use them in a commercial enterprise does not alter his or her rights under Florida's public records law."  Microdecisions, Inc. v. Skinner, 889 So. 2d 871,875 (Fla. 2d DCA 2004), review denied, 902 So. 2d 791 (Fla. 2005).
         2. Note, however, that section 817.568, Florida Statutes, provides criminal penalties for unauthorized use of personal identification information for fraudulent or harassment purposes.  And see, section 817.569, Florida Statutes, providing penalties for criminal use of a public record or public records information.
      5. May an agency refuse to allow inspection or copying of public records on the grounds that the request for such records is "overbroad" or lacks particularity?
         1. No. The custodian is not authorized to deny a request to inspect and/or copy public records because of a lack of specifics in the request. *See, Lorei v. Smith*, 464 So. 2d 1330, 1332 (Fla. 2d DCA 1985), review denied, 475 So. 2d 695 (Fla. 1985), recognizing that the "breadth of such right [to inspect] is virtually unfettered, save for the statutory exemptions . . . ." *Cf., Woodard v. State*, 885 So. 2d 444 (Fla. 4th DCA 2004) (records custodian must furnish copies of records when the person requesting them identifies the portions of the record with sufficient specificity to permit the custodian to identify the record and forwards the statutory fee).
      6. When must an agency respond to a public records request?
         1. A custodian of public records and his or her designee must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.  Section 119.07(1)(c), Florida Statutes.  A good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed.  *Id.*
         2. The Public Records Act does not contain a specific time limit (such as 24 hours or 10 days) for compliance with public records requests.  The Florida Supreme Court has stated that the only delay in producing records permitted under Chapter 119, Florida Statutes, is the reasonable time allowed the custodian to retrieve the record and delete those portions of the record the custodian asserts are exempt.  *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), appeal dismissed sub nom., *Deperte v. Tribune Company*, 105 S.Ct. 2315 (1985).
         3. A municipal policy which provides for an automatic delay in the production of public records is impermissible.  *Tribune Company v. Cannella, supra*.  Thus, an agency is not authorized to delay inspection of personnel records in order to allow the employee to be present during the inspection of his records.  *Tribune Company v. Cannella, supra.* Nor may a city delay public access to board meeting minutes until after the city commission has approved them.  *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st  DCA 2010), review denied,  47 So. 3d 1288 (Fla. 2010). And see 96-55 (1996) (board of trustees of a police pension fund may not delay release of its records until such time as the request is submitted to the board for a vote).
         4. An agency's unreasonable and excessive delays in producing public records can constitute an unlawful refusal to provide access to public records.  *Town of Manalapan v. Rechler*, 674 So. 2d 789 (Fla. 4th DCA 1996), review denied, 684 So. 2d 1353 (Fla. 1996).  For example, in  *Johnson v. Jarvis*, 74 So. 3d 168 (Fla. 1st DCA 2011), the appellate court reviewed a state attorney’s policy requiring that certain records requests be directed to the state attorney’s main office rather than produced at a branch office where the records were located.  The court said that the trial judge must hold a hearing to determine whether there was a delay to produce the requested records to the petitioner, and if so, whether the delay was reasonable under the facts of the case.  *See also, State v. Webb*, 786 So. 2d 602, 604 (Fla. 1st DCA 2001), in which the court held that it was error for a lower court judge to vacate a misdemeanor conviction of a records custodian who had been found guilty of willfully violating section 119.07(1)(a), Florida Statutes, based on her "dilatory" response to public records requests filed by a citizen; and *Hewlings v. Orange County*, Florida, 87 So. 3d 839     (Fla. 5th DCA 2012) (mere fact that county quickly responded to public records request by voicemail and fax is not dispositive of whether county unjustifiably delayed in complying with the request).
         5. An agency is not authorized to establish an arbitrary time period during which records may or may not be inspected.  Op. Att'y Gen. Fla. 81-12 (1981).
      7. May an agency require that a request to examine or copy public records be made in writing or require that the requestor furnish background information to the custodian?
         1. No.  Nothing in Chapter 119, Florida Statutes, requires that a requesting party make a demand for public records in person or in writing.  *See, Dade Aviation Consultants v. Knight Ridder, Inc*., 800 So. 2d 302, 305n. 1 (Fla. 3d DCA 2001) ("There is no requirement in the Public Records Act that requests for records must be in writing").  And see Inf. Op. to Cook, May 27, 2011 (agency may not require public records requestor to provide physical address for mailing copies or to be physically present in order to inspect records).
         2. If a public agency believes that it is necessary to provide written documentation of a request for public records, the agency may require that the custodian complete an appropriate form or document; however, the person requesting the records cannot be required to provide such documentation as a precondition to the granting of the request to inspect or copy public records.  *See, Sullivan v. City of New Port Richey*, No. 86-1129CA (Fla. 6th Cir. Ct. May 22, 1987), affirmed, 529 So. 2d 1124 (Fla. 2d DCA 1988), noting that a public records requestor’s  failure to complete a city form required for access to documents did not authorize the custodian to refuse to honor the request to inspect or copy public records.
      8. Is an agency required to give out information from public records or to otherwise produce records in a particular form as demanded by the requestor?
         1. A custodian is not required to give out information from the records of his or her office.  Op. Att'y Gen. Fla. 80-57 (1980).  The Public Records Act does not require a town to produce an employee, such as the financial officer, to answer questions regarding the financial records of the town.  Op. Att'y Gen. Fla. 92-38 (1992).
         2. Similarly, if an agency maintains a list of the names of officers and employees who have requested the exemption of their home addresses and telephone numbers under section 119.071(4)(d), Florida Statutes, the agency must provide the list.  Op. Att’y Gen. Fla. 08-29 (2008).  However, the agency is not required to reformat its records to make such a list in order to comply with a request under Chapter 119.  Id.  Nor is the clerk of court required to provide an inmate with a list of documents from a case file which may be responsive to some forthcoming request.  *Wootton v. Cook*, 590 So. 2d 1039 (Fla. 1st DCA 1991**).**However,  in order to comply with the statutory directive that an agency provide copies of public records upon payment of the statutory fee, an agency must respond to requests by mail for information as to copying costs*.  Id.  And see, Woodard v. State*, 885 So. 2d 444, 445n.1 (Fla. 4th DCA 2004) (case remanded where agency provided only information relating to statutory fee schedule rather than total copying cost of requested records).
         3. An agency is not ordinarily required to reformat its records and provide them in a particular form as demanded by the requestor.  *Seigle v. Barry*, 422 So. 2d 63 (Fla. 2d DCA 1982).  However, an agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium.  Section 119.01(2)(f), Florida Statutes.  See Op. Att’y Gen. Fla. 91-61 (1991) (if asked, custodian must provide copy of computer disk; a typed transcript would not satisfy the requirements of section 119.07[1], Florida Statutes).  *Cf., Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009) (the fact that pertinent information may exist in more than one format is not a basis for exemption or denial of a public records request).
         4. Thus, upon receipt of a public records request, the agency must comply by producing all non-exempt records in the custody of the agency that are responsive to the request, upon payment of the charges authorized in Chapter 119, Florida Statutes.  However, this mandate applies only to those records in the custody of the agency at the time for request; nothing in the Public Records Act appears to require that an agency respond to a so-called “standing” request for production of public records that it may receive in the future.  *See*, Inf. Op. to Worch, June 15, 1995.
      9. May an agency refuse to comply with a request to inspect or copy the agency's public records on the grounds that the records are not in the physical possession of the custodian?
         1. No. An agency is not authorized to refuse to allow inspection of public records on the grounds that the documents have been placed in the actual possession of an agency or official other than the records custodian.  *See, Tober v. Sanchez*, 417 So. 2d 1053 (Fla. 3d DCA 1982), review denied sub nom., *Metropolitan Dade County Transit Agency v. Sanchez*, 426 So. 2d 27 (Fla. 1983) (official charged with maintenance of records may not transfer actual physical custody of records to county attorney and thereby avoid compliance with request for inspection under Chapter 119, Florida Statutes); and ***Chandler v. City of Sanford*, 121 So. 3d 657, 660 (Fla. 5th DCA 2013**) **(City “cannot be relieved of its legal responsibility for the public records by transferring the records to another agency”).**
      10. May an agency refuse to allow access to public records on the grounds that the records are also maintained by another agency?
          1. No. The fact that a particular record is also maintained by another agency does not relieve the custodian of the obligation to permit inspection and copying in the absence of an applicable statutory exemption. Op. Att'y Gen. Fla. 86-69 (1986).
      11. In the absence of express legislative authorization, may an agency refuse to allow public records made or received in the normal course of business to be inspected or copied if requested to do so by the maker or sender of the document?
          1. No.  To allow the maker or sender of documents to dictate the circumstances under which the documents are to be deemed confidential would permit private parties as opposed to the Legislature to determine which public records are subject to disclosure and which are not.  Such a result would contravene the purpose and terms of Chapter 119, Florida Statutes.  *See, Browning v. Walton*, 351 So. 2d 380 (Fla. 4th DCA 1977) (a city cannot refuse to allow inspection of records containing the names and addresses of city employees who have filled out forms requesting that the city maintain the confidentiality of all material in their personnel files).  *Accord, Sepro Corporation v. Florida Department of Environmental Protection*, 839 So. 2d 781 (Fla. 1st DCA 2003), review denied sub nom, *Crist v. Department of Environmental Protection*, 911 So. 2d 792 (Fla. 2005), (private party cannot render public records exempt from disclosure merely by designating information it furnishes a governmental agency confidential).  *Cf., Hill v. Prudential Ins. Co. of America*, 701 So. 2d 1218 (Fla. 1st DCA 1997), review denied, 717 So. 2d 536 (Fla. 1998)  (materials obtained by state agency from anonymous sources during the course of its investigation of an insurance company were public records and subject to disclosure in the absence of statutory exemption, notwithstanding the company's contention that the records were "stolen" or "misappropriated" privileged documents that were delivered to the state without the company's permission).
          2. Similarly, it has been held that an agency "cannot bargain away its Public Records Act duties with promises of confidentiality in settlement agreements."   *Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. Aug. 19, 1991), stating that a confidentiality provision in a settlement agreement which resolved litigation against a public hospital did not remove the document from the Public Records Act.  *Cf*., section 69.081(8), Florida Statutes, part of the "Sunshine in Litigation Act," providing, subject to certain exceptions, that any portion of an agreement which conceals information relating to the settlement or resolution of any claim or action against an agency is void, contrary to public policy, and may not be enforced, and requiring that settlement records be maintained in compliance with Chapter 119, Florida Statutes*.  And see, National Collegiate Athletic Association v. The Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010), holding that a confidentiality agreement entered into by a private law firm on behalf of a state university with the NCAA that allowed access to records contained on the NCAA’s secure custodial website that were used by the university in preparing a response to possible NCAA sanctions, had no impact on whether such records were public records stating that “[a] public record cannot be transformed into a private record merely because an agent of the government has promised that it will be kept private”; and Inf. Op. to Barry, June 24, 1998, stating that “a state agency may not enter into a settlement agreement or other contract which contains a provision authorizing the concealment of information relating to a disciplinary proceeding or other adverse employment decision from the remainder of a personnel file.”
      12. Must an agency state the basis for its refusal to release an exempt record?
          1. Yes. Section 119.07(1)(e), Florida Statutes, states that a custodian of a public record who contends that a record or part of a record is exempt from inspection must state the basis for the exemption, including the statutory citation to the exemption. Additionally, upon request, the custodian must state in writing and with particularity the reasons for the conclusion that the record is exempt from inspection. Section 119.07(1)(f), Florida Statutes. *See, Weeks v. Golden*, 764 So. 2d 633 (Fla. 1st DCA 2000 )(agency's response that it had provided all records "with the exception of certain information relating to the victim" deemed inadequate because the response "failed to identify with specificity either the reasons why the records were believed to be exempt, or the statutory basis for any exemption. *Cf., City of St. Petersburg v. Romine*, 719 So. 2d 19, 21 (Fla. 2d DCA 1998), noting that the Public Records Act "may not be used in such a way as to obtain information that the Legislature has declared must be exempt from disclosure."
      13. May an agency refuse to allow inspection and copying of an entire public record on the grounds that a portion of the record contains information which is exempt from disclosure?
          1. No. Where a public record contains some information which is exempt from disclosure, section 119.07(1)(d), Florida Statutes, requires the custodian of that document to redact only that portion of the record for which a valid exemption is asserted and to provide the remainder of the record for inspection and copying. *See, Ocala Star Banner Corp. v. McGhee*, 643 So. 2d 1196 (Fla. 5th DCA 1994) (city may redact confidential identifying information from police report but must produce the rest for inspection). The fact that an agency believes that it would be impractical or burdensome to redact confidential information from its records does not excuse noncompliance with the mandates of the Public Records Act. Op. Att'y Gen. Fla. 99-52 (1999). *Cf.*, Op. Att'y Gen. Fla. 02-73 (2002) (agency must redact confidential and exempt information and release the remainder of the record; agency is not authorized to release records containing confidential information, albeit anonymously.)
      14. May an agency refuse to allow inspection of public records because the agency believes disclosure could violate privacy rights?
          1. It is well established in Florida that "neither a custodian of records nor a person who is the subject of a record can claim a constitutional right of privacy as a bar to requested inspection of a public record which is in the hands of a government agency." *Williams v. City of Minneola*, 575 So. 2d 683, 687 (Fla. 5th DCA 1991), review denied, 589 So. 2d 289 (Fla. 1991). Thus, to the extent that information on a city’s Facebook page constitutes a public record within the meaning of the Public Records Act, the state constitutional privacy provision in Article I, section 23, Florida Constitution, “is not implicated.” Op. Att’y Gen. Fla. 09-19 (2009).
      15. What is the liability of a custodian for release of public records?
          1. It has been held that there is nothing in Chapter 119, Florida Statutes, indicating an intent to give private citizens a right to recovery for negligently maintaining and providing information from public records.  *Friedberg v. Town of Longboat Key*, 504 So. 2d 52 (Fla. 2d DCA 1987).
          2. However, a custodian is not protected against tort liability resulting from that person intentionally communicating public records or their contents to someone outside the agency which is responsible for the records unless the person inspecting the records has made a bona fide request to inspect the records or the communication is necessary to the agency's transaction of its official business.  *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 5th DCA 1991), review denied, 589 So. 2d 289 (Fla. 1991).
   7. WHAT KINDS OF AGENCY RECORDS ARE SUBJECT TO THE PUBLIC RECORDS ACT?
      1. Computer Records
         1. In general
            1. In 1982, the Fourth District Court of Appeal stated that information stored in a public agency's computer "is as much a public record as a written page in a book or a tabulation in a file stored in a filing cabinet . . . ."  *Seigle v. Barry*, 422 So. 2d 63, 65 (Fla. 4th DCA 1982), *review denied*, 431 So. 2d 988 (Fla. 1983).  Thus, the Public Records Act includes computer records as well as paper documents, tape recordings, and other more tangible materials.  *See, e.g.*, Op. Att'y Gen. Fla. 98-54 (1998) (applications and disciplinary reports maintained in a computer system operated by a national securities dealers association which are received electronically by state agency for use in licensing and regulating securities dealers doing business in Florida are public records subject to Chapter 119); Op. Att'y Gen. Fla. 91-61 (1991) (computer data software disk is a public record); and Op. Att'y Gen. Fla. 89-39 (1989) (information stored in computer utilized by county commissioners to facilitate and conduct their official business is subject to Chapter 119, Florida Statutes). *Cf. Grapski v. Machen*, No. 01-2005-CA-4005 J (Fla. 8th Cir. Ct. May 9, 2006), *affirmed per curiam*, 949 So. 2d 202 (Fla. 1st DCA 2007) (spam or bulk mail received by a public agency does not necessarily constitute a public record).
            2. Thus, computerized public records made or received in the course of official business are governed by the same rule as written documents and other public records -- the records are subject to public inspection unless a statutory exemption exists which removes the records from disclosure. *See*, *National Collegiate Athletic Association v.  Associated Press,* 18 So. 3d 1201 (Fla. 1st DCA 2009), *review denied*, 37 So. 3d 848 (Fla. 2010) (public records law is not limited to paper documents but  applies to documents that exist only in digital form).   *Cf.,* AGO 90-04, stating that a county official is not authorized to assign the county's right to a public record (a computer program developed by a former employee while he was working for the county) as part of a settlement of a lawsuit against the county.
         2. E-Mail, Facebook and text messages
            1. E-mail messages made or received by agency employees in connection with official business are public records and subject to disclosure in the absence of a statutory exemption from public inspection.  ***See, Rhea v. District Board of Trustees of Sana Fe College*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013), noting that “electronic communications, such as e-mail are covered [by the Public Records Act] just like communications on paper.”** *And see*, 07-14  (2007) (e-mails sent by city commissioners in connection with the transaction of official business are public records subject to disclosure even though the e-mails contain undisclosed or “blind” recipients and their e-mail addresses).
            2. Like other public records, e-mail messages are subject to the statutory restrictions on *destruction* of public records, which require agencies to adopt a schedule for the disposal of records no longer needed.  Op. Att’y Gen. Fla. 96-34 (1996).    For example, the e-mail  communication of factual background information and position papers from one official to another is a public record and should be retained in accordance with the retention schedule for other records relating to performance of the agency's functions and formulation of policy.   Op. Att'y Gen. Fla. 01-20 (2001).  *See,* section 257.36(6), Florida Statutes, stating that a public record may be destroyed only in accordance with retention schedules established by the Division of Library and Information Services of the Department of State.  *Id.  Cf.,*section 668.6076, Florida Statutes (e-mail address public record disclosure statement).
            3. The Attorney General’s Office has stated that the placement of material on a city’s Facebook page presumably would be in connection with the transaction of official business and thus subject to Ch. 119, F.S.  Thus, to the extent that the information on a city’s Facebook page constitutes a public record, the city is under an obligation to follow the public records retention schedules established by law. Op. Att’y Gen. Fla. 09-19 (2009).  *And see* Op. Att’y Gen. Fla.  08-07 (2008) (postings relating to city business which are submitted by a city council member to a privately-owned and operated internet website are public records).
            4. In Inf. Op. to Browning, March 17, 2010, the Attorney General’s Office advised the Department of State (which is statutorily charged with development of public records retention schedules) that “the same rules that apply to e-mail should be considered for electronic communications including Blackberry PINS, SMS communications (text messaging), MMS communications (multimedia content) and instant messaging conducted by government agencies.”  In response, the Department of State revised its records retention schedule to note that text messages may be public records and that retention of text messages could be required depending upon the content of those texts
         3. Formatting issues
            1. Each agency that maintains a public record in an electronic recordkeeping system shall provide to any person, pursuant to Chapter 119, a copy of any public record in that system which is not exempted by law from public disclosure.  Section 119.01(2)(f), Florida Statutes.  An agency that maintains a public record in an electronic recordkeeping system must provide a copy of the record in the medium requested by the person making a Chapter 119 demand, if the agency maintains the record in that medium, and the fee charged shall be in accordance with Chapter 119, Florida Statutes.  *Id.*  Thus, a custodian of public records must, if asked for a copy of a computer software disk used by an agency, provide a copy of the disk in its original format; a typed transcript would not satisfy the requirements of section 119.07(1), Florida Statutes.  Op. Att'y Gen. Fla. 91-61 (1991).
            2. However, an agency is not generally required to reformat its records to meet a requestor's particular needs.  As stated in *Seigle v. Barry*, the intent of Ch. 119, Florida Statutes, is "to make available to the public information which is a matter of public record, in some meaningful form, not necessarily that which the applicant prefers."  422 So. 2d at 66.  Thus, the Attorney General’s Office concluded that a school district was not required to furnish electronic public records in electronic format other than the standard format routinely maintained by the district.  Op. Att'y Gen. Fla. 97-39 (1997).***Cf.* Op. Att’y Gen. Fla. 13-07 (2013) (agency not required to allow direct access to its electronic records through a hard drive provided by a requestor, but must allow inspection and copying of the requested records in a manner that protects exempt and confidential information from disclosure).**
            3. Despite the general rule, however, the *Seigle* court recognized that an agency may be required to provide access through a specially designed program prepared by or at the expense of the applicant where:

available programs do not access *all* of the public records stored in the computer's data banks; or

the information in the computer accessible by the use of available programs would include exempt information necessitating a special program to delete such exempt items; or

for any reason the form in which the information is proffered does not fairly and meaningfully represent the records; or

the court determines other exceptional circumstances exist warranting this special remedy.  422 So. 2d at 66, 67.

* + - 1. Remote Access
         1. Section 119.07(2)(a), Florida Statutes, authorizes but does not require agencies to provide remote electronic access to public records. However, unless otherwise required by law, the custodian may charge a fee for remote electronic access, granted under a contractual arrangement with a user, which fee may include the direct and indirect costs of providing such access. Fees for remote electronic access provided to the general public must be in accordance with the provisions of section 119.07(4), Florida Statutes. And see, section 119.07(2)(b), Florida Statutes, which requires the custodian to provide safeguards to protect the records from unauthorized disclosure or alteration.
    1. Financial Records
       1. In general
          1. Many agencies prepare or receive financial records as part of their official duties and responsibilities. As with other public records, these materials are generally open to inspection unless a specific statutory exemption exists. See, Op. Att'y Gen. Fla. 96-96 (1996) (financial information submitted by harbor pilots in support of a rate increase application is not exempt from disclosure requirements).
       2. Bids
          1. Section 119.071(1)(b)2., Florida Statutes, provides an exemption for "sealed bids, proposals, or replies received by an agency pursuant to a competitive solicitation” or until such time as the agency provides notice of an intended decision or until 30 days after opening, whichever is earlier. And see, s. 119.071(1)(b)3., Florida Statutes, providing a temporary exemption if an agency rejects all bids, proposals or replies and concurrently provides notice of an intended decision concerning the reissued competitive solicitation or until the agency withdraws it.
       3. Budgets
          1. Budgets and working papers used to prepare them are normally subject to inspection.  *Bay County School Board v. Public Employees Relations Commission*, 382 So. 2d 747 (Fla. 1st DCA 1980); *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976);*City of Gainesville v. State ex. rel. International Association of Fire Fighters Local No. 2157*, 298 So. 2d 478 (Fla. 1st DCA 1974).
       4. Personal financial Records
          1. In the absence of statutory exemption, financial information prepared or received by an agency is usually subject to Chapter 119, Florida Statutes.  *See, Wallace v. Guzman,*687 So. 2d 1351 (Fla. 3d DCA 1997) (personal income tax returns and financial statements submitted by public officials as part of an application to organize a bank are subject to disclosure); Op. Att'y Gen. Fla. 04-16 (2004) (financial documents contained in licensing file).
          2. Bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from public disclosure.  Section 119.071(5)(b), Florida Statutes.
       5. Trade Secrets
          1. The Legislature has created a number of specific exemptions from Ch. 119, Florida Statutes, for trade secrets.  *See*, *e.g.*, section 1004.22(2), Florida Statutes (trade secrets produced in research conducted within state universities); and section 570.544(8), Florida Statutes (trade secrets contained in records of the Division of Consumer Services of the Department of Agriculture and Consumer Services).
          2. However, even in the absence of a specific statutory exemption for particular trade secrets, section 815.045, Florida Statutes, "should be read to exempt from disclosure as public records *all* trade secrets as defined in [section 812.081(1)c), Florida Statutes]. . . ."*Sepro Corporation v. Florida Department of Environmental Protection,* 839 So. 2d 781, 785 (Fla. 1st DCA 2003),*review denied sub nom., Crist v. Florida Department of Environmental Protection,* 911 So. 2d 792 (Fla. 2005).  (e.s.)
          3. In *Sepro*, the court ruled that while "a conversation with a state employee is not enough to prevent the information from being made available to anyone who makes a public records request," documents submitted by a private party which constituted trade secrets as defined in s. 812.081, and which were stamped as confidential at the time of submission to a state agency, were not subject to public access.  *Sepro*, at 784.  *Compare*, *James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A. v. Rodale, Inc.,*41 So. 3d 386 (Fla. 1st DCA 2010) (customer complaints and company responses are not protected trade secrets)*; Cubic Transportation Systems, Inc. v. Miami-Dade County,*899 So. 2d 453, 454 (Fla. 3d DCA 2005) (company, which supplied documents to an agency and failed to mark them as "confidential" and which continued to supply them without asserting even a legally ineffectual post-delivery claim to confidentiality for some thirty days failed adequately to protect an alleged trade secret claim).  *Cf., Allstate Floridian Ins. Co. v. Office of Ins. Regulation,* 981 So. 2d 617 (Fla. 1st DCA 2008), *review denied*, 987 So. 2d 79 (Fla. 2008) (to the extent Allstate believed any documents sought by the Office of Insurance Regulation were privileged as trade secrets, Allstate was required to timely seek a protective order in circuit court.
    2. Litigation Records
       1. Attorney-client communications subject to Chapter 119, Florida Statutes
          1. The Public Records Act applies to communications between attorneys and governmental agencies; there is no judicially created privilege which exempts these documents from disclosure.  *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979) (only the Legislature and not the judiciary can exempt attorney-client communications from Chapter 119, Florida Statutes).  *See also*, *City of North Miami v. Miami Herald Publishing Company*, 468 So. 2d 218 (Fla. 1985) (although section 90.502, Florida Statutes, of the Evidence Code establishes an attorney-client privilege for public and private entities, this evidentiary statute does not remove communications between an agency and its attorney from the open inspection requirements of Chapter 119, Florida Statutes).
          2. Moreover, public disclosure of these documents does not violate the public agency's constitutional rights of due process, effective assistance of counsel, freedom of speech, or the Supreme Court's exclusive jurisdiction over The Florida Bar.  *City of North Miami v. Miami Herald Publishing Company*, *supra*.  *Accord*, *Brevard County v. Nash*, 468 So. 2d 240 (Fla. 5th DCA 1984); *Edelstein v. Donner*, 450 So. 2d 562 (Fla. 3d DCA 1984), *approved*, 471 So. 2d 26 (Fla. 1985).
       2. Limited statutory work product exemption
          1. Application of the exemption

The Supreme Court has ruled that the Legislature and not the judiciary has exclusive authority to exempt litigation records from the scope of Chapter 119, Florida Statutes.  *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).  With the enactment of section 119.071(1)(d), Florida Statutes, the Legislature has created a narrow exemption for certain litigation work product of agency attorneys. However, this  exemption applies to attorney work product that has reached the status of becoming a public record; as discussed more extensively in the section relating to "attorney notes," certain preliminary trial preparation materials, such as handwritten notes for the personal use of the attorney, are not considered to be within the definitional scope of the term "public records" and, therefore, are outside the scope of Chapter 119, Florida Statutes.  *See, Johnson v. Butterworth*, 713 So. 2d 985 (Fla. 1998.

* + - * 1. Attorney bills and payment

Only those records which reflect a "mental impression, conclusion, litigation strategy, or legal theory" are included within the parameters of the work product exemption.  Accordingly, a contract between a county and a private law firm for legal counsel and documentation for invoices submitted by such firm to the county do not fall within the work product exemption.  Op. Att'y Gen. Fla. 85-89 (1985).  If the bills and invoices contain exempt work product under section 119.071(1)(d) -- *i.e.*, "mental impression[s], conclusion[s], litigation strateg[ies], or legal theor[ies]," -- the exempt material may be deleted and the remainder disclosed.  *Id.*  However, information such as the hours worked or the hourly wage clearly would not fall within the scope of the exemption.  *Id.*

 Thus, an agency which improperly "blocked out" most notations on invoices prepared in connection with services rendered by and fees paid to attorneys representing the agency, "improperly withheld" nonexempt material when it failed to limit its redactions to those items "genuinely reflecting its 'mental impression, conclusion, litigation strategy, or legal theory.'"  *Smith & Williams, P.A. v. West Coast Regional Water Supply Authority*, 640 So. 2d 216 (Fla. 2d DCA 1994).  *And see*, Op. Att'y Gen. Fla. 00-07 (2000) (records of outside attorney fee bills received by the county's risk management office for the defense of the county, as well as its employees who are sued individually, for alleged civil rights violations are public records subject to disclosure).

* + - * 1. Scope of the exemption

Section 119.071(1)(d), Florida Statutes, does not create a blanket exception to the Public Records Act for all attorney work product.  Op. Att'y Gen. Fla. 91-75 (1991).  The exemption is narrower than the work product privilege recognized by the courts for private litigants.  Op. Att'y Gen. Fla. 85-89 (1985).  The records must have been prepared “*exclusively*” for litigation or adversarial administrative proceedings, or prepared in anticipation of imminent litigation or adversarial administrative proceedings; records prepared for other purposes may not be converted into exempt material simply because they are also used in or related to the litigation.   For example, memoranda prepared by a state corrections department attorney regarding lethal injection procedures do not constitute exempt attorney work product because neither memorandum “relates to any pending litigation or appears to have been prepared ‘exclusively for litigation.’”  *Lightbourne v. McCollum*, 969 So. 2d 326, 333 (Fla. 2007).

 Moreover, only those records which are prepared by or at the express direction of the *agency attorney* and reflect "a mental impression, conclusion, litigation strategy, or legal theory *of the attorney or the agency"* are exempt from disclosure until the conclusion of the proceedings.  (e.s.)  *See, City of North Miami v. Miami Herald Publishing Company,*468 So. 2d 218, 219 (Fla. 1985) (noting application of exemption to "government agency, attorney-prepared litigation files during the pendency of litigation"); and *City of Miami Beach v. DeLapp*, 472 So. 2d 543 (Fla. 3d DCA 1985) (opposing counsel not entitled to city's legal memoranda as such material is exempt work product).  *Compar*e, *City of Orlando v. Desjardins*, 493 So. 2d 1027, 1028 (Fla. 1986) (trial court must examine city's litigation file in accident case and prohibit disclosure only of those records reflecting mental impression, conclusion, litigation strategy or legal theory of attorney or city) and *Lightbourne v. McCollum, supra* (memoranda do not constitute exempt work product because they appear to be “final in form” and convey “specific factual information” rather than mental impressions or litigation strategies). *See also,* Op. Att'y Gen. Fla. 91-75 (1991) (work product exemption not applicable to documents generated or received by school district investigators, acting at the direction of the school board to conduct an investigation of certain school district departments).

* + - * 1. Commencement & Termination of exemption

Unlike the open meetings exemption in section 286.011(8), Florida Statutes, for certain attorney-client discussions between a governmental agency and its attorney, section 119.071(1)(d), Florida Statutes, is not limited to records created for pending litigation or proceedings, but applies also to records prepared "in anticipation of imminent civil or criminal litigation or imminent adversarial administrative proceedings."  *See,* Op. Att'y Gen. Fla. 98-21 (1998), discussing the differences between the public records work product exemption in section 119.071(1)(d), and the Sunshine Law exemption in section 286.011.

 But, the exemption from disclosure provided by section 119.071(1)(d), Florida Statutes, is *temporary* and limited in duration.  *City of North Miami v. Miami Herald Publishing Co.*, *supra*.  The exemption exists only until the "conclusion of the litigation or adversarial administrative proceedings" even if other issues remain.  *Seminole County v. Wood*, 512 So. 2d 1000 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988).   *Cf., Lightbourne v. McColllum,* *supra* (even if memoranda might have been exempt work product at one time, the state waived the exemption by producing them as part of a public records response and filing copies in the court file).

 For example, if the state settles a claim against one company accused of conspiracy to fix prices, the state has concluded the litigation against that company.  Thus, the records prepared in anticipation of litigation against that company are no longer exempt from disclosure even though the state has commenced litigation against the alleged co-conspirator.  *State v. Coca-Cola Bottling Company of Miami, Inc.*, 582 So. 2d 1 (Fla. 4th DCA 1990).  *And see*,*Tribune Company v. Hardee Memorial Hospital*, No. CA-91-370 (Fla. 10th Cir. Ct. Aug. 19, 1991) (settlement agreement not exempt as attorney work product even though another related case was pending, and agency attorneys feared disclosure of their assessment of the merits of the case and their litigation strategy).  *Cf., Prison Health Services, Inc. v. Lakeland Ledger Publishing Company,* 718 So. 2d 204  (Fla. 2d DCA 1998), *review denied,*727 So. 2d 909 (Fla. 1999) (private prison company under contract with sheriff to provide medical services for inmates at county jail must release records relating to a settlement agreement with an inmate because all of its records that would normally be subject to the Public Records Act if in the possession of the public agency, are likewise covered by that law, even though in the possession of the private corporation).

The Legislature has, however, established specific exemptions which address disclosure of some risk management files when other related claims remain.  For example, section 768.28(16), Florida Statutes, provides an exemption for claim files maintained by agencies pursuant to a risk management program for tort liability until the termination of the litigation and settlement of all claims arising out of the same incident.  *See,  Wagner v. Orange County*, 960 So. 2d 785 (Fla. 5th DCA 2007) (section 768.28, Florida Statutes,  exemption continues to apply to county’s litigation file when plaintiff pursues a portion of judgment entered against the county through the state legislative claims bill process).

 The exemption afforded by section 768.28(16)(d), Florida Statutes, however, is limited to tort claims for which the agency may be liable under section 768.28, Florida Statutes, and does not apply to federal civil rights actions under 42 U.S.C. section 1983.  Ops. Att'y Gen. Fla. 00-20 (2000) and 00-07 (2000).  *And see*, Op. Att'y Gen. Fla. 92-82 (1992) (open meetings exemption provided by section 768.28, Florida Statutes, applies only to meetings held after a tort claim is filed with the risk management program).  *Cf*., Op. Att’y Gen. Fla. 07-47 (2007) (nothing in section 768.28 expressly includes or excludes the “notice of claim” from the exemption and the Attorney General’s Office may not conclude that all such notices are per se exempt from disclosure; it is the public agency “which must make the determination in good faith whether the notice of claim falls within the public records exemption for claims files”).

Regarding draft settlements received by an agency in litigation, a circuit court has held that draft settlement agreements furnished *to* a state agency by a federal agency were public records despite the department's agreement with the federal agency to keep such documents confidential.  *Florida Sugar Cane League, Inc. v. Department of Environmental Regulation*, No. 91-2108 (Fla. 2d Cir. Ct. Sept. 20, 1991), *affirmed*, 606 So. 2d 1267 (Fla. 1st DCA 1992).

* + - 1. Attorney Notes
         1. Relying on its conclusion in *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), the Florida Supreme Court has recognized that "not all trial preparation materials are public records."  *State v. Kokal*, 562 So. 2d 324, 327 (Fla. 1990).  In *Kokal*, the Court approved the decision of the Fifth District in *Orange County v. Florida Land Co.*, 450 So. 2d 341, 344 (Fla. 5th DCA 1984), *review denied*, 458 So. 2d 273 (Fla. 1984), which described certain documents as not within the term 'public records.'
         2. Similarly, in *Johnson v. Butterworth*, 713 So. 2d 985  (Fla. 1998), the Court ruled that "outlines, time lines, page notations regarding information in the record, and other similar items" in the case file, did not fall within the definition of public record, and thus were not subject to disclosure*.  See also,* *Lopez v. State,* 696 So. 2d 725 (Fla. 1997) (handwritten notes dealing with trial strategy and cross examination of witnesses, not public records); and *Atkins v. State*, 663 So. 2d 624 (Fla. 1995) (notes of state attorney's investigations and annotated photocopies of decisional case law, not public records).
         3. By contrast, documents prepared to communicate, perpetuate, or formalize knowledge constitute public records and are, therefore, subject to disclosure in the absence of statutory exemption.  *See*, *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.,*379 So. 2d 633, 640 (Fla. 1980), in which the Court noted that "[i]nter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of an agency's later, formal public product, would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business."
         4. Thus, in *Orange County v. Florida Land Company*, *supra*, the court concluded that trial preparation materials consisting of interoffice and intraoffice memoranda communicating information from one public employee to another or merely prepared for filing, even though not part of the agency's formal work product, were public records.  As public records, such circulated trial preparation materials might be exempt from disclosure pursuant to section 119.071(1)(d), Florida Statutes, while the litigation is ongoing; however, once the case is over the materials would be open to inspection. *And* *see*, Op. Att'y Gen. Fla. 05-23 (2005).
    1. Personnel Records
       1. The general rule with regard to personnel records is the same as for other public records; unless the Legislature has expressly exempted an agency's personnel records from disclosure or authorized the agency to adopt rules limiting access to such records, personnel records are subject to public inspection and copying under section 119.07(1), Florida Statutes. Michel v. Douglas, 464 So. 2d 545 (Fla. 1985). For more information on the statutory exemptions for information contained in personnel records, please refer to the Government in the Sunshine Manual, available online at myfloridalegal.com.
          1. Privacy Concerns

The courts have rejected claims that constitutional privacy interests operate to shield agency personnel records from disclosure.  *See*, *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), holding that the state constitution "does not provide a right of privacy in public records" and that a state or federal right of disclosural privacy does not exist.  "Absent an applicable statutory exception, pursuant to Florida's Public Records Act . . . public employees (as a general rule) do not have privacy rights in such records."  *Alterra Healthcare Corporation v. Estate of Shelley,* 827 So. 2d 936, 940n.4 (Fla. 2002).

 Additionally, the judiciary has refused to deny access to personnel records based on claims that the release of such information could prove embarrassing or unpleasant for the employee.  *See*, *News-Press Publishing Company, Inc. v. Gadd*, 388 So. 2d 276 (Fla. 2d DCA 1980), stating that a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and damage to an individual or institution resulting from such disclosure.

* + - * 1. Conditions for Inspection of Personnel Records

An agency is not authorized to unilaterally impose special conditions for the inspection of personnel records.  An automatic delay in the production of such records is invalid.  *Tribune Company v. Cannella*, 458 So. 2d 1075 (Fla. 1984), *appeal dismissed sub nom.*, *DePerte v. Tribune Company*, 105 S.Ct. 2315 (1985) (automatic 48 hour delay unauthorized by Chapter 119, Florida Statutes).

 Thus, an agency is not authorized to "seal" disciplinary notices and thereby remove such notices from disclosure under the Public Records Act.  Op. Att'y Gen. Fla. 94-75 (1994).  Nor may an agency agree to remove disciplinary records from an employee’s personnel file and maintain them in separate disciplinary file for the purpose of removing such records from public access.  Op. Att’y Gen. Fla.  94-54 (1994).  *Accord*  Op. Att’y Gen. Fla. 11-19 (2011) (superintendent’s failure to comply with a statutory requirement to discuss a performance evaluation with the employee before filing it in the employee’s personnel file does not change the public records status of the evaluation; the evaluation is a public record and may not be removed from public view or destroyed).  *Cf*., section 69.081(8)(a), Florida Statutes, providing, subject to limited exceptions, that any portion of an agreement or contract which has the purpose or effect of concealing information relating to the settlement or resolution of a claim against the state or its subdivisions is "void, contrary to public policy, and may not be enforced."  *See also* section 215.425(4)(b), Florida Statutes (on or after July 1, 2011, settlements to resolve employment disputes which result in the payment of severance pay authorized by that statute “may not include provisions that limit the ability of any party to the settlement to discuss the dispute or settlement”).

* + - * 1. Social Security Numbers

Section 119.071(5)(a)5., Florida Statutes**,**states that social security numbers held by an agency are confidential and exempt from disclosure requirements.  Disclosure to another governmental agency is authorized if disclosure is necessary to the performance of the receiving agency's duties and responsibilities.  Section 119.071(5)(a)6., Florida Statutes**.**

Upon verified written request which contains the information specified in the statute, a commercial entity engaged in a commercial activity as defined in the exemption may be allowed access to social security numbers, provided that the numbers will be used only in the performance of a commercial activity.  Section 119.071(5)(a)7., Florida Statutes.  The question of whether a particular type of activity constitutes “commercial activity” for purposes of this provision cannot be resolved by the Attorney General’s Office.  Op. Att’y Gen. Fla. 10-06 (2010).

* 1. WHAT AGENCIES ARE SUBJECT TO THE PUBLIC RECORDS ACT?
     1. Section 119.011(2), Florida Statutes, defines "agency" to include:

 “any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.”

* + 1. Article I, section 24, Florida Constitution, establishes a constitutional right of access to 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 those records exempted by law pursuant to Article I, section 24, Florida Constitution, or specifically made confidential by the Constitution.  This right of access to public records applies to the legislative, executive, and judicial branches of government; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or by the Constitution.  However, although a right of access exists under the Constitution to all three branches of government, the Public Records Act, as a legislative enactment, does not apply to the Legislature or the judiciary.  *See, Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992)
       1. Advisory Boards
          1. The definition of "agency" for purposes of Chapter 119, Florida Statutes, is not limited to governmental entities. A "public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency" is also subject to the requirements of the Public Records Act. See also, Article I, section 24, Florida Constitution, providing that the constitutional right of access to public records extends to "any public body, officer, or employee of the state, or persons acting on their behalf...." (e.s.)
       2. Private organizations
          1. A more complex question is presented when a private corporation or entity provides services for a governmental body.  The term "agency" as used in the Public Records Act includes private entities "acting on behalf of any public agency."  Section 119.011(2), Florida Statutes.
          2. The Florida Supreme Court has stated that this broad definition of "agency" ensures that a public agency cannot avoid disclosure by contractually delegating to a private entity that which would otherwise be an agency responsibility.  *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029 (Fla. 1992).  *Cf., Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.*, 718 So. 2d 227, 229 n.4 (Fla. 3d DCA 1998), *review denied,* 729 So. 2d 389 (Fla. 1999) (private company operating college bookstores was an "agency" as defined in section 119.011[2], Florida Statutes, "notwithstanding the language in its contract with the universities that purports to deny any agency relationship").
          3. The fact that an entity is incorporated as a nonprofit corporation is not dispositive as to its status under the Public Records Act, but rather the issue is whether the entity is “acting on behalf of” a public agency.  The Attorney General’s Office has issued numerous opinions advising that if a nonprofit entity is established by law or by a governmental entity, it is subject to Chapter 119 disclosure requirements. *See,* Op. Att'y Gen. Fla. 94-34 (1994) (Pace Property Finance Authority, Inc., created as a Florida nonprofit corporation by Santa Rosa County as an instrumentality of the county to provide assistance in the funding and administration of certain governmental programs).
          4. Receipt of public funds by private entity not dispositive.

A private corporation does not act "on behalf of" a public agency merely by entering into a contract to provide professional services to the agency.  *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, *supra*.  *And see, Weekly Planet, Inc. v. Hillsborough County Aviation Authority,* 829 So. 2d 970 (Fla. 2d DCA 2002) (fact that private development is located on land the developer leased from a governmental agency does not transform the leases between the developer and other private entities into public records).

 Similarly, the receipt of public funds, standing alone, is not dispositive of the organization's status for purposes of Chapter 119, Florida Statutes.  *See*, *Sarasota Herald-Tribune Company v. Community Health Corporation, Inc.*, 582 So. 2d 730 (Fla. 2d DCA 1991), in which the court noted that the mere provision of public funds to the private organization is not an important factor in this analysis, although the provision of a substantial share of the capitalization of the organization is important.  *See also,* *Times Publishing Company v. Acton,* No. 99-8304 (Fla. 13th Cir. Ct. November 5, 1999) (attorneys retained by individual county commissioners in a criminal matter were not "acting on behalf of" a public agency so as to become subject to the Public Records Act, even though the board of county commissioners subsequently voted to pay the legal expenses in accordance with a county policy providing for reimbursement of legal expenses to individual county officers who successfully defend criminal charges filed against them arising out of the performance of their official duties).

* + - * 1. Application of Chapter 119, Florida Statutes, to private entities contracting with public agencies.

The case law has established “two general sets of circumstances” when records belonging to a private entity must be produced as public records. See, Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 829 So. 2d 970, 974 (Fla. 2d DCA 2002) and B & S Utilities, Inc. v. Baskerville-Donovan, Inc., 988 So. 2d 17 (Fla. 1st DCA 2008); County of Volusia v. Emergency Communications Network, Inc., 39 So. 3d 1280 (Fla. 5th DCA 2010). First, when a public entity delegates a statutorily authorized function to a private entity. Second, when a public entity contracts with a private entity to provide goods or services to facilitate the agency’s performance of its duties and the “totality of factors” indicates a significant level of involvement by the public agency. Each of these situations is discussed below.

Delegation of statutorily authorized function to private entity.

“[W]hen a public entity delegates a statutorily authorized function to a private entity, the records generated by the private entity’s performance of that duty become public records.”  *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla.  2d DCA 2002).

 As stated previously, the mere fact that a private entity is under contract with, or receiving funds from, a public agency is not sufficient, standing alone, to bring that agency within the scope of the Public Records Act.  *See, Stanfield v. Salvation Army,*695 So. 2d 501, 503 (Fla. 5th DCA 1997) (contract between Salvation Army and county to provide services does not in and of itself subject the organization to Chapter 119 disclosure requirements).

 However, there is a difference between a party contracting with a public agency to provide services *to* the agency and a contracting party which provides services *in place of* the public body.  *News-Journal Corporation v. Memorial Hospital-West Volusia*, *Inc.,* 695 So. 2d 418 (Fla. 5th DCA 1997), *approved*, 729 So. 2d 373 (Fla. 1999).  Stated another way, business records of entities which merely provide services for an agency to use (such as legal professional services, for example) are probably not subject to the open government laws.  *Id.*  But, if the entity contracts to relieve the public body from the operation of a public obligation (such as operating a jail or providing fire protection) the open government laws do apply.  *Id.*

 Thus, in *Stanfield v. Salvation Army*, 695 So. 2d 501 (Fla. 5th DCA 1997), the court ruled that the Salvation Army was subject to the Public Records Act when it completely assumed  the responsibility to provide misdemeanor probation services pursuant to a contract with Marion County.  *And see,* *Dade Aviation Consultants v. Knight Ridder, Inc.,*800 So. 2d 302 (Fla. 3d DCA 2001) (a consortium of private businesses created to manage a massive renovation of an airport is an "agency" for purposes of the Public Records Act because it was created for and had no purpose other than to work on the airport contract; "when a private entity undertakes to provide a service otherwise provided by the government, the entity is bound by the Act, as the government would be").  Similarly, in *B & S Utilities, Inc. v. Baskerville-Donovan, Inc.*,  988 So. 2d 17 (Fla. 1st DCA 2008*), review denied*, 4 So. 3d 1220 (Fla. 2009), the court held that a private engineering firm which contracted to provide engineering services for a city and acted *de facto* as the city’s engineer, was an “agency” subject to Chapter 119, Florida Statutes.

Contract to provide services and the "totality of factors" test

If a private entity has not undertaken the performance of a public function for an agency but instead has merely contracted with the agency to provide services to facilitate the performance of its duties, the private entity’s records in that regard may be public if the “totality of the factors” indicates a significant level of involvement by the public entity.  *See*, *Weekly Planet, Inc. v. Hillsborough County Aviation Authority*, 829 So. 2d 970, 974 (Fla. 2d DCA 2002).

 Recognizing that "the statute provides no clear criteria for determining when a private entity is 'acting on behalf of' a public agency," the Supreme Court adopted a "totality of factors" approach to use as a guide for evaluating whether a private entity  which is providing services to a public agency is subject to Chapter 119, Florida Statutes.  *News and Sun-Sentinel Company v. Schwab, Twitty & Hanser Architectural Group, Inc.*, *supra*at 1031.  *And see, Wells v. Aramark Food Service Corporation,* 888 So. 2d 134 (Fla. 4th DCA 2004) (trial judge should have applied totality of factors analysis rather than denying petition for writ of mandamus seeking to require Aramark to provide a copy of the food service contract between it and the Department of Corrections).

 The factors listed by the Supreme Court include the following:

the level of public funding;

commingling of funds;

whether the activity was conducted on publicly-owned property;

whether the contracted services are an integral part of  the public agency's chosen decision-making process;

whether the private entity is performing a governmental function or a function which the public agency otherwise would perform;

the extent of the public agency's involvement with, regulation of, or control over the private entity;

whether the private entity was created by the public agency;

whether the public agency has a substantial financial interest in the private entity;

for whose benefit the private entity is functioning.

* + - * 1. Application of Chapter 119 to private entity that has been delegated authority to keep certain records

If a public agency has delegated its responsibility to maintain records necessary to perform its functions, such records will be deemed accessible to the public.  Op. Att'y Gen. Fla. 98-54 (1998) (registration and disciplinary records stored in a computer database maintained by a national securities association which are used by the Department of Banking and Finance in licensing and regulating securities dealers doing business in Florida are public records).  *See also*, *Harold v. Orange County*, 668 So. 2d 1010 (Fla. 5th DCA 1996) (where a county hired a private company to be the construction manager on a renovation project and delegated to the company the responsibility of maintaining records necessary to show compliance with a "fairness in procurement ordinance," the company's records for this purpose were public records).   ***And see*, section 119.0701, Florida Statutes, mandating that public agency contracts for services must include a provision that requires the contractor, as defined in the exemption, to comply with public records laws, including retention and public access requirements.**

* + - 1. Officers-elect
         1. Section 119.035, Florida Statutes, requires an “officer-elect” [defined for purposes of that section to mean the Governor, the Lieutenant Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture] to adopt and implement reasonable measures to ensure compliance with the public records obligations set forth in chapter 119, Florida Statutes.  *Cf.*, section 286.011(1), Florida Statutes, providing that meetings subject to the Sunshine Law include “meetings with or attended by any person elected to such board or commission, but who has not yet taken office. . . .”
  1. WHAT IS A PUBLIC RECORD WHICH IS OPEN TO INSPECTION?
     1. Section 119.011(12), Florida Statutes, defines "public records" 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.”

* + 1. The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge.  *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980).  All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure.  *Wait v. Florida Power & Light Company*, 372 So. 2d 420 (Fla. 1979).  Accordingly, "the form of the record is irrelevant; the material issue is whether the record is made or received by the public agency in connection with the transaction of official business."  Op. Att'y Gen. Fla. 04-33 (2004).
    2. When are notes or nonfinal drafts of agency proposals subject to Chapter 119, Florida Statutes?
       1. There is no "unfinished business" exception to the public inspection and copying requirements of Chapter 119, Florida Statutes.  If the purpose of a document prepared in connection with the official business of a public agency is to perpetuate, communicate, *or* formalize knowledge, then it is a public record regardless of whether it is in final form or the ultimate product of an agency.  *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633 (Fla. 1980).  *See also*, *Warden v. Bennett*, 340 So. 2d 977 (Fla. 2d DCA 1976) (working papers used in preparing a college budget were public records).
       2. Accordingly, any agency document, however prepared, if circulated for review, comment or information, is a public record regardless of whether it is an official expression of policy or marked "preliminary" or "working draft" or similar label.  Examples of such materials would include interoffice memoranda, preliminary drafts of agency rules or proposals which have been submitted for review to anyone within or outside the agency, and working drafts of reports which have been furnished to a supervisor for review or approval.
       3. In each of these cases, the fact that the records are part of a preliminary process does not detract from their essential character as public records.  *See*, *Booksmart Enterprises, Inc. v. Barnes & Noble College Bookstores, Inc.,* 718 So. 2d 227, 229  (Fla. 3d DCA 1998) (book selection forms completed by state university instructors and  furnished to campus bookstore “are made in connection with official business, for memorialization and communication purposes[;] [t]hey are public records”); and  *Grapski v. City of Alachua*, 31 So. 3d 193 (Fla. 1st DCA 2010), *review denied*, 47 So. 3d 1288 (Fla. 2010) (canvassing board minutes constitute final work product of the Board, not a preliminary draft or note; therefore, city violated public records law by refusing to produce minutes until after approval by the city commission).  It follows then that such records are subject to disclosure unless the Legislature has specifically exempted the documents from inspection or has otherwise expressly acted to make the records confidential.  *See*, for example, section 119.071(1)(d), Florida Statutes, providing a limited work product exemption for agency attorneys.
       4. Similarly, so-called “personal notes” can constitute public records if they are intended to communicate, perpetuate or formalize knowledge of some type.  For example, in *Miami Herald Media Company v. Sarnoff*,  971 So. 2d 915 (Fla. 3d DCA 2007), the court held that a memorandum prepared by a city commissioner after a meeting with a former city official, summarizing details of what was said and containing alleged factual information about possible criminal activity, was a public record subject to disclosure.  The court determined that the memorandum was not a draft or a note containing mental impressions that would later form part of a government record, but rather formalized and perpetuated his final knowledge gained at the meeting.  *See also* Op. Att’y Gen. Fla. 05-23 (2005).
       5. However, "under chapter 119 public employees' notes to themselves which are designed for their own personal use in remembering certain things do not fall within the definition of 'public record.'" *Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission*, 823 So. 2d 185, 192 (Fla. 1st DCA 2002).  *Accord, Coleman v. Austin*, 521 So. 2d 247 (Fla. 1st DCA 1988), holding that preliminary handwritten notes prepared by agency attorneys and intended only for the attorneys' own personal use are not public records;
       6. More recently, the Attorney General advised that handwritten personal notes, taken by a city employee in the course of conducting his official duties and made for the purpose of assisting him in remembering matters discussed, are not public records “if the notes have not been transcribed or shown to others and were not intended to perpetuate, communicate, or formalize knowledge.”  Op. Att’y Gen. Fla. 10-55 (2010)
    3. When are records made or received “in connection with the transaction of official business?”
       1. The determination as to whether certain records constitute “public records” can be difficult if the records are produced by a public officer or employee on government equipment but are “personal” in nature.  The Florida Supreme Court has ruled that private e-mail stored in government computers does not automatically become a public record by virtue of that storage.  *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).  "Just as an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records,' . . . private documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer."  *Id*. at 154.   *Accord, Bent v. State*, 46 So. 3d 1047 (Fla. 4th DCA 2010) (sound recordings made by sheriff’s office of inmate personal telephone calls to friends and family which are not investigative material are “clearly not public records”); *Media General Operations, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st  DCA 2003) (cellular phone records of private calls of staff employees do not constitute official business of the Florida House of Representatives). *And see Butler v. City of Hallandale Beach*,  68 So. 3d 278 (Fla. 4th DCA 2011) (e-mail sent by mayor from  her personal account using her personal computer and blind copied to friends and supporters did not constitute a public record because the e-mail was not made pursuant to law or ordinance or in connection with the transaction of official business).
       2. The *Clearwate*r decision does not mean, however, that all records relating to personal matters which are found in agency files are outside the scope of the Public Records Act.  As the *Clearwater* Court noted, the personal e-mails involved in that decision were not e-mails "that may have been isolated by a government employee whose job required him or her to locate employee misuse of government computers."  *State v. City of Clearwater*, at 151n.2.
       3. For example, if a state inspector general is reviewing allegations of misuse of agency equipment for private purposes, the personal emails obtained by the inspector general for his or her investigation are public records and subject to disclosure in the absence of statutory exception.  *And see, Miami-Dade County v. Professional Law Enforcement Association*, 997 So. 2d 1289 (Fla. 3d DCA 2009), concluding that when the county aviation unit’s  written procedures required pilots to maintain a personal flight log, the logs were subject to the Public Records Act.  “The officers are thus paid by the County to make these logbook entries, and the entries are made ‘in connection with the transaction of official business’ of the aviation unit;” therefore, “[t]he entries are readily distinguishable from the purely personal e-mails at issue in *State v. City of Clearwater* [citation omitted].”  *Id*. at 1290-1291.    *See also*,  *Bill of Rights, Inc. v. City of New Smyrna Beach*, No. 2009-20218-CINS (Fla. 7th Cir. Ct. April 8, 2010) (billing documents regarding personal calls made and received by city employees on city-owned or city-leased cellular telephones are public records, when those documents are received and maintained in connection with the transaction of official business; “and, the ‘official business’ of  a city includes paying for telephone service and obtaining reimbursement from employees for personal calls”); and Op. Att’y Gen. Fla. 09-19 (2009) (because the creation of a city Facebook page must be for a municipal, not private purpose, the “placement of material on the city’s page would presumably be in furtherance of such purpose and in connection with the transaction of official business and thus subject to the provisions of Chapter 119, Florida Statutes.”).

1. Chapter 23: Public Ethics (by Mark Moriarty)
   1. Conflict of interest/financial disclosure
      1. Public trust.
         1. In St. Johns Medical Plan, Inc. v. Gutman, 696 So. 2d 1294 (Fla. 3d DCA 1997), the court held that portion of article II, section 8, Florida Constitution, dealing with a public official breaching the public trust was not self-executing and therefore did not create a private cause of action to collect damages against senator for misuse of office.
      2. Conflict of interest.
      3. In Brevard County v. State Comm'n on Ethics, 678 So. 2d 906 (Fla. 1st DCA 1996), the court held where a conflict of interest existed when county paramedics also worked as paramedics for private entities granted franchises by the county. The county could not to enact an ordinance allowing the paramedics to work for the franchises under the ethics statute.
      4. In Commission on Ethics v. Baker, 675 So. 2d 254 (Fla. 1996), the court held that section 112.313(4) acceptance of gift statute was not unconstitutionally vague, but mere proof that something of value was given to a public officials who might be in a position to help the donor one day, without more, would not establish violation of the statute.
      5. In George v. City of Cocoa, 9 Fla. L. Weekly Fed. C931 (11th Cir. March 26, 1996), the court held that city councilperson's possible run for a seat based on redistricting did not require him to abstain from voting. In fact, under Florida law, he was required to vote as potential conflict was too speculative.

3. Administrative process.

* + 1. a. In Goin v. Commission on Ethics, 658 So. 2d 1131 (Fla. 1st DCA 1995), the court held gift law constitutional but overturned commission's order finding violation, had commission erroneously labeled factual findings as conclusion of law and therefore, improperly overturned hearing officer's findings.

1. Chapter 24: Local Government as a Litigant
   1. At the Trial Level
      1. Appropriate party.
         1. In Florida City Police Department v. Carcoran, 661 So. 2d 409 (Fla. 3d DCA 1995), the court held that default entered against city police department must be validated because department did not have capacity to sue and be sued. Proper party was city.
         2. Chapter 164, Florida Statutes.
      2. Settlement of litigation.
         1. In Chung v. Sarasota County, 686 So. 2d 1358 (Fla. 2d DCA 1996), court held county could not rezone property as part of settlement agreement without going through normal rezoning process, including public hearings.
         2. In Broward County v. Conner, 660 So. 2d 288 (Fla. 4th DCA 1995), the court held that attorney for aviation authority could not enter into binding settlement agreement involving land swap absent approval by authority at a public meeting.
         3. In City of Delray Beach v. Brownstein, 699 So. 2d 855 (Fla. 4th DCA 1997), the court held that it was error to enforce settlement agreement against city in negligence action where agreement only signed by city's counsel. Rule 1.730, Florida Rules of Civil Procedure, requires signature of party.
      3. Effect of settlement
         1. In Santa Rosa County v. Administration Comm'n, 661 So. 2d 1190 (Fla. 1995), the court held that county could no longer pursue unconstitutional mandate issue where it had reached settlement and there was no longer bona fide controversy with state.
      4. Chapter 768, Florida Statutes.
         1. In Vargas v. The City of Fort Myers, the 2nd DCA concluded: “While strict compliance with [Florida Statute § 768.28 notice requirement] is required, "the form of the notice is not specified." Aitcheson, 117 So.3d at 856. The cases to date yield no talismanic rule as to the specificity of the notice. Here, the letter sent on March 9, 2007, described the accident, Vargas's injuries, the amount of her medical bills, and that demand was being made. Fort Myers was placed on adequate notice and was able to investigate the claims based on the information provided in the letter. As such, Vargas's letter satisfied the notice requirement set for in sections 768.28(6)(a). FN1 [Footnote 1: **To the extent that the March 9, 2007, letter does not contain Vargas's date and place of birth and social security number, providing this information in not necessary in the notice**. See Williams v. Henderson, 687 So. 2d 838,839 (Fla. 2d DCA 1996)].”
2. Chapter 25: Elections (by Mark Moriarty)
   1. **Initiative/Referendum.**
      1. Scope of Subject Matter.
         1. Citizens were entitled to utilize section 166.031, Florida Statutes, initiative procedures to determine location of city hall where town charter contained no initiative provision. Ennis v. Town of Lady Lake, 660 So. 2d 1174 (Fla. 5th DCA 1995).
         2. Electorate has no power by initiative or referendum to enact a charter amend­ment making all city council actions subject to referendum, and electorate could not by petition usurp the legislature's authority to grant the right of referendum. Holzendorf v. Bell, 606 So. 2d 645 (Fla. 1st DCA 1992).
         3. Where proposed ordinance was within the power of the city, and petition rights were coextensive with the legislative power of the city, initiative petition regarding location and construction of theater and convention center was within the proper scope of subjects that could be considered by the electorate. Scott v.  City of Orlando, 173 So. 2d 501 (Fla. 2d DCA 1965).
         4. Charter properly gave referendum power to approve or reject ordinance passed by City Commission except for appropriation and annual tax levy ordinances which was required to be adopted in certain manner under state law. City of Coral  Gables v. Carmichael, 256 So. 2d 433 (Fla. 3d DCA 1972).
         5. Statutes giving the power of initiative to the electors of a municipality are to be liberally construed by the courts. Barnes v. City of Miami, 47 So. 2d 120 (Fla. 3d DCA 1977).
         6. Initiative and referendum provision of charter held not to apply to appropriations ordinances. State ex rel Keefe v. City of St. Petersburg, 145 So. 2d 175 (1935).
         7. The Florida Supreme Court held that an increase in the rate charged for sewer services was administrative, not legislative, therefore the ordinance was not subject to the initiative provisions of the City Charter. State v. City of St.  Petersburg, 61 So. 2d 416 (Fla. 1952).
         8. Citizens petitioned for writ of mandamus to compel city to take action on their petition to amend the City charter and city code to prevent construction of coal fired electric plant. Court determined that decisions regarding construction and location of an electrical plant were legislative in nature and a proper subject for citizen petition. Those parts of petition that conflict with state law by making repeal subject to submission to the voters would be void however. Gaines v. City of Orlando, 450 So. 2d 1174 (Fla. 5th DCA 1984)
3. Chapter 26: Local Government as a Creditor (by Mark Moriarty)
   1. Ad valorem taxes.
      1. Ad valorem tax liens.
      2. All taxes imposed pursuant to the State Constitution and Florida laws shall be a first lien, superior to all other liens, on any property against which the taxes have been assessed and shall continue from January 1 or the year the taxes were levied until discharged by payment or until barred under chapter 95, 197.122(1), Florida Statutes.
      3. When taxes are due. All taxes shall be due and payable on November 1 of each year or soon thereafter. Taxes become delinquent on April 1 following the year in which they are assessed or immediately after 60 days from the mailing of the original tax notice, whichever is later, 197.333, Florida Statutes.
      4. Not receiving a bill is no excuse for nonpayment. All owners of property shall be held to know that taxes are due and payable annually and are charged with the duty of ascertaining the amount of current and delinquent taxes and paying them before April 1 of the year following the year in which taxes are assessed. Section 197.122, Florida Statutes.
         1. County of Volusia V. Passantino, 364 So. 2d. 730, 732 (Fla. 1st DCA 1978).
      5. Stay of collection pending assessment challenge. Walker v. Palm Beach Commerce Center, 614 So. 2d 1097 (Fla. 1993). The court answered the certified question, "Under what circumstances is a taxpayer entitled to a stay of the collection of taxes pending her challenge to the assessed value of the property?". The plaintiff must first make a good faith payment and must show a substantial likelihood of success in the tax suit.
      6. Personal property tax liens attach to other property of taxpayer. All personal property tax liens, to the extent that the property to which the lien applies cannot be located in the county or to the extent that the sale of the property is insufficient to pay all delinquent taxes, interest, fees and costs, shall be liens against all other personal property of the taxpayer in the county. However such liens against other personal property shall not apply against property which has been sold, and shall be subordinate to any valid prior or subsequent liens against such other property. Section 197.122, Florida Statutes.
         1. Lien travels with the property. Faber, Coe & Gregg of Fla. Inc., v. Wright, 178 So. 2d 51 (Fla. 3rd DCA 1965). Personal property acquired by bulk purchaser was subject to a lien for tangible personal property taxes previously assessed and levied thereon when owned by appellant's predecessor. Although the bulk purchaser took the property subject to the tax lien, there is no personal obligation on the bulk purchaser to pay the taxes nor was the other property of the bulk purchaser subject to seizure and sale.
         2. Although automobiles are exempt from the tangible personal property tax, they are subject to enforcement of the lien on all personal property of the taxpayer. Id.
         3. Walter E. Heller & Co. SE, Inc. v. Williams, 450 So. 2d 521 (Fla. 3rd DCA 1984).
            1. County's lien is not entitled to priority against the claim of a secured creditor whose lien was first in time when the lien is to be enforced on general property of the taxpayer.
            2. Florida follows the rule of strict statutory construction and gives the tax lien priority over senior encumbrances only on the property on which the tax was levied.
4. Chapter 27: Civil Forfeitures (by Mark Moriarty)
   1. **Procedure**
      1. Initial Proceedings
         1. Florida Dept of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991), discusses the two major components of a forfeiture proceedings, the initial restraint on property (accomplished by preliminary adversarial hearing and/or finding of probable cause), and the actual forfeiture of the contraband property (accomplished by estab­lishing a nexus between the property seized and the criminal activity). **It**also sets out the constitutional requirements for forfeiture proceedings. Specifically, it requires (1) that notice of the forfeiture action must be sent to all persons with an interest in the property; (2) that the notice must advise the potential claimants that they have a right to request a preliminary adversarial hearing; and (3) that the statutory term "due proof' requires the seizing agency to prove by no less than clear and convincing evidence that the property is subject to confiscation under the Contraband Forfeiture Act before a final order of forfeiture is entered.
      2. Preliminary Probable Cause Hearing
         1. In Lobo v. Metro Dade Police, 505 So. 2d 621 (Fla. 3d DCA 1987), the court clarified the statutory requirement that the seizing agency establish that there was "probable cause" to seize the property. The court stated that the seizure must be based on a reasonable belief that the property was used or intended to be used in violation of the Contraband Forfeiture Act. "This belief must be more than a mere suspicion, but can be treated by less than prima facie proof."
         2. In FDLE v. Lazzara, 580 So. 2d 855 (Fla. 2d CA 1991), the court held that probable cause for forfeiture was the civil standard and not the criminal standard. It weighs the evidence available at the time of the hearing and not at the time the seizure occurred.
         3. In In Re: Forfeiture of 1983 Welcraft Scarab, 487 So. 2d 306 (Fla. 4th DCA 1986), the court held that hearsay was admissible at a probable cause hearing. However, it could not serve as the basis for final forfeiture.
         4. In State Dep't of Motor Vehicles v. Metiver, 684 So. 2d 204 (Fla. 4th DCA 1996), the court held that the DMV was required to return property where the probable cause hearing was not set until 15 days after the claimant made a request for hearing. The claimant's request was on October 3, 1995, and the DMV waited until October 13, 1995, to file with the court its request for the preliminary probable cause hearing. The court set the hearing on October 18, 1995. The court stated that this was a violation of the statutory requirement that the hearing be set within 10 days or as soon as practicable thereafter. The "as soon as practicable" exception was added as a provision to give the courts some flexibility on scheduling these hearings. It was not intended to allow the seizing agency to wait 10 days after the request to attempt to schedule it. ( See also Cochran v. Harris, 654 So. 2d 969 (Fla. 4th DCA 1995) the court held that a 23-day delay after expiration of the 10-day requirement was a violation of the statutory provisions).

Appreciation Page (by Mark Moriarty)

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