Florida Association of County Attorneys
2018 Continuing Legal Education Program
June 27-28, 2018 – Orange County
Hyatt Regency Orlando
ORLANDO N
(13 CLE Hours)

Wednesday, June 27, 2018

12:15 p.m. to 12:30 p.m.	**Registrant Sign-In** and **Late Registration**
12:30 p.m. to 12:40 p.m.	**Opening Remarks and Welcome** *Richard Wesch, FACA President* *Lee County Attorney*
12:40 p.m. to 1:30 p.m.	Marijuana and You. We Are Not Token, Everything You Need to Know About Pot in the Workplace *Gregory A. Hearing* *Thompson, Sizemore, Gonzalez & Hearing*
1:30 p.m. to 2:20 p.m.	Florida Whistleblower a/k/a The Law of Unintended Consequences *Sacha Dyson* *Thompson, Sizemore, Gonzalez & Hearing*
2:20 p.m. to 2:30 p.m.	**Refreshment Break**
2:30 p.m. to 3:20 p.m.	Employment Law Update – What's Hot *Robert Sniffen, FAC General Counsel* *Sniffen & Spellman*
3:20 p.m. to 4:10 p.m.	How to Give Meaning to Code Enforcement *Bob Shillinger, County Attorney* *Steve Williams, Assistant County Attorney* *Monroe County*
4:10 p.m. to 5:00 p.m.	Pilot Agreements Have Lift Off *Alan S. Zimmet* *Nicole C. Nate* *Bryant, Miller Olive*
5:00 p.m. to 6:00 p.m.	***Welcome Reception***

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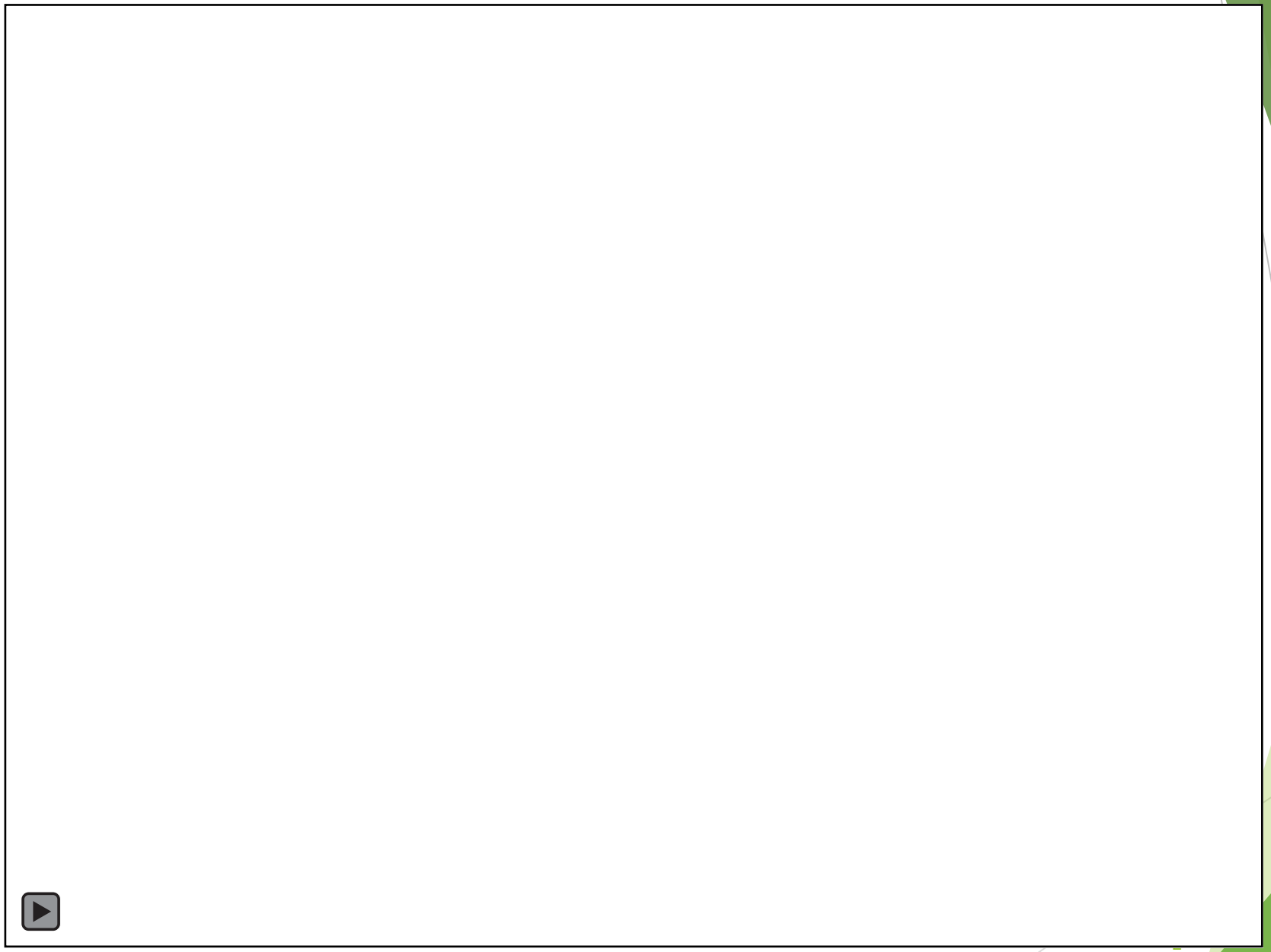
Thursday, June 28, 2018

9:00 a.m. to 9:50 a.m.	Federal Tax, Reform? *Mark Mustian* *Nabors, Giblin & Nickerson*
9:50 a.m. to 10:40 a.m.	Breakfast with Bert (Harris) *Jeff Hinds* *Smolker Bartlett Loeb Hinds & Thompson, P.A.*
10:40 a.m. to 10:50 a.m.	**Refreshment Break**
10:50 a.m. to 11:40 a.m.	Celebrity Wrestling Death Match: Florida Counties vs. FEMA = Epic Battle for Disaster Funding *Heather Encinosa* *Nabors Giblin & Nickerson*
11:40 a.m. to 12:30 p.m.	Emergency Power Plans and Recovery *Diana Johnson, Sr. Assistant County Attorney* *Lake County*
12:30 p.m. to 1:30 p.m.	**Luncheon/Awards Presentation**
1:30 p.m. to 2:20 p.m.	2018 Legislative Update: We Don't Need Any Stinking Counties *Laura Youmans* *FAC Public Policy Advocate*
2:20 p.m. to 3:10 p.m.	Poison Pills: Opioid Crisis from a Local Government Lawyer's View *Erich Eislet, Assistant General Counsel/Editor* *International Municipal Lawyers Association*
3:10 p.m. to 3:20 p.m.	**Ice Cream Refreshment Break**
3:20 p.m. to 4:10 p.m.	A New Battle Tactic for the War on Drugs *Robert Piper, MA, LMHC, Vice President, Residential Services* *First Step of Sarasota, Inc.*
4:10 p.m. to 5:00 p.m.	Trials and Tribulations of Being the County Attorney… *Herbert W.A. Thiele, County Attorney* *Leon County*
5:00 p.m. to 5:10 p.m.	**Closing Remarks**

Reefer Madness: Legalized Marijuana and the Workplace

Gregory A. Hearing
Thompson, Sizemore, Gonzalez & Hearing, P.A.
ghearing@tsghlaw.com
813-273-0050



AGENDA

- Overview of Medical Marijuana in America
- Amendment II
- The Implementation of Amendment II/Florida Statute 381.986
- The Controlled Substances Act
- The Americans with Disabilities Act (“ADA”)
- The Family Medical Leave Act (“FMLA”)
- Drug-Free Workplace Laws/Policies
- Drug Testing
- “Lawful Activities” Laws
- Q&A

But we might as well get this out of the way…

Extract.com's 20 Best Nicknames for Marijuana *(Or, how to know when your client's employee is secretly talking about drugs)*

1) **Dro**
2) **Alice B. Toklas**
3) **Loud**
4) **Ganja**
5) **Wacky tobaccy**
6) **Art Supplies**
7) **Coliflor tostao**
8) **Bubonic chronic**
9) **Kine bud (also 'kind bud')**
10) **Sticky icky**
11) **Square Mackerel**
12) **Juan Valdez**
13) **Left-handed cigarettes**
14) **Giggle smoke**
15) **Chocolope**
16) **Schwag**
17) **Devil's lettuce**
18) **Cabbage Patch**
19) **Skywalker OG**
20) **That yum-yum**

MARIJUANA'S SIDE EFFECTS

- As with most drugs, Marijuana use can have serious side effects, some of which persist beyond the actual "high."
- Several serious side effects include:
  - Memory Loss
  - Addiction
  - Marijuana Use Disorder
  - Psychotic Episodes
  - Threefold Increase In Psychotic Disorder Risk
  - Inability to Organize Information
  - Persistent Vomiting Syndromes (associated with heavy use)

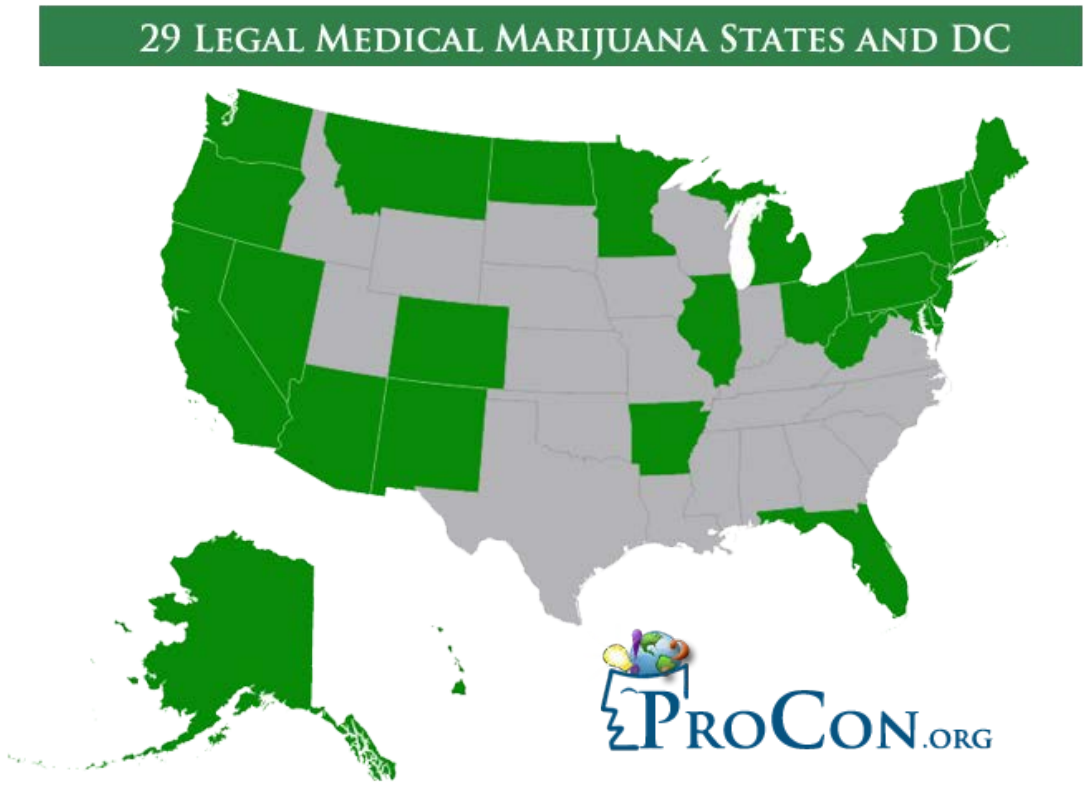
https://nypost.com/2018/05/22/all-the-ways-marijuana-can-hurt-your-health/?utm_source=email_sitebuttons&utm_medium=site%20buttons&utm_campaign=site%20buttons

MARIJUANA'S SOCIETAL IMPACT

- Several studies reveal marijuana's negative impact on our society
  - Using marijuana increases the likelihood of opioid addiction by two and half times the normal rate (2015 study by researchers at Yale University of Medicine)
  - According to the Denver Post, Colorado has experienced a twofold increase in marijuana-related traffic fatalities since the legalization of recreational use in 2014
  - Traffic accidents reported to insurance companies have increased by 2.7% in states with legalized marijuana (Highway Loss Data Institute)
  - Colorado emergency rooms experienced a 400% increase in teenage marijuana-related illnesses from 2005 to 2015 (Journal of Adolescent Health)
- Yet, a comparative study on toxicity published in Scientific Reports by Dirk Lachenmeier and Jürgen Rehm found that marijuana is significantly less toxic compared to alcohol and tobacco. Such studies inevitably provide fuel to the pro-marijuana movement, regardless of marijuana's side effects and societal impact.

https://nypost.com/2018/05/22/all-the-ways-marijuana-can-hurt-your-health/?utm_source=email_sitebuttons&utm_medium=site%20buttons&utm_campaign=site%20buttons
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4311234/

MEDICAL MARIJUANA IN THE UNITED STATES

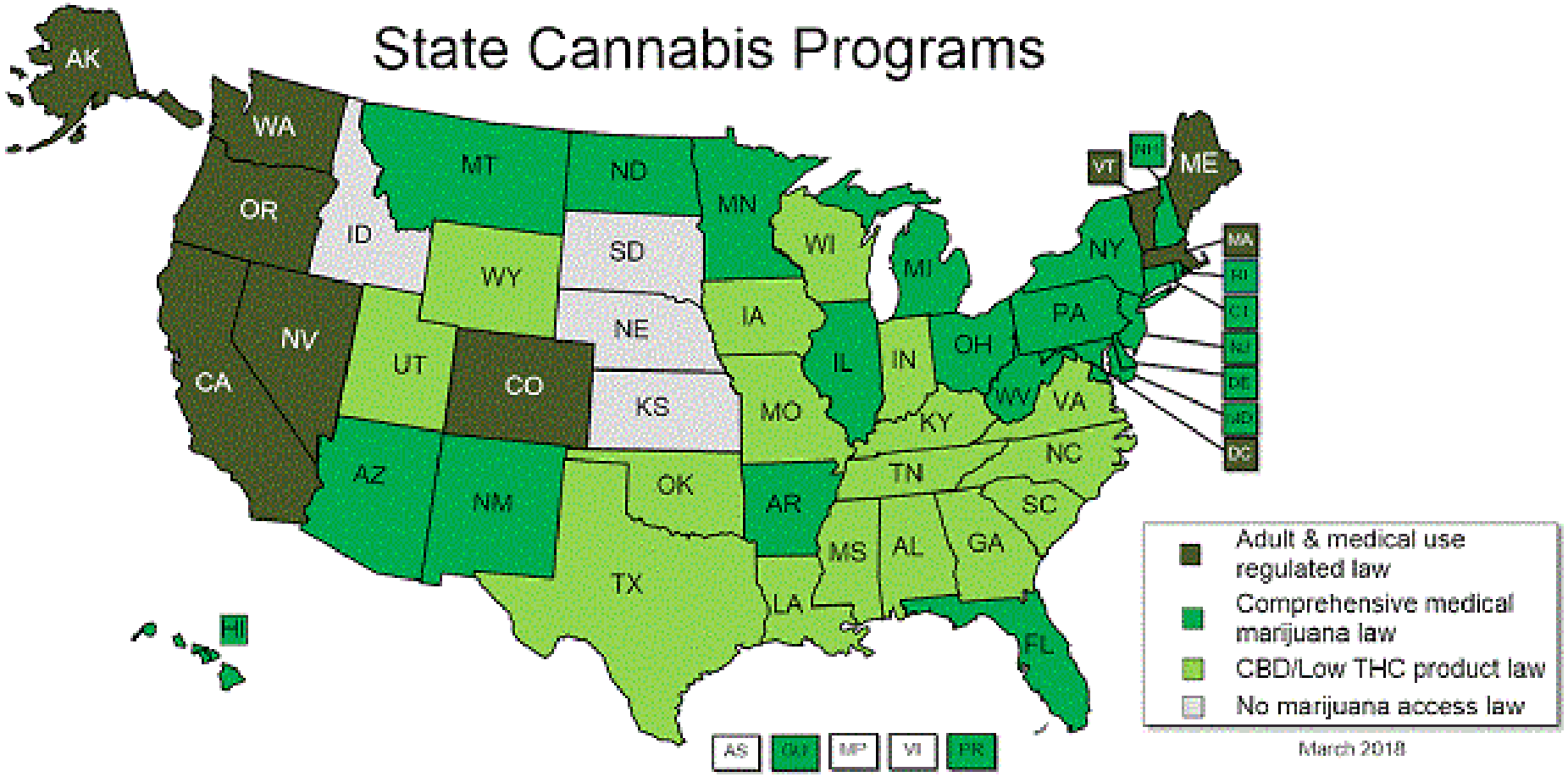


http://medicalmarijuana.procon.org/files/1-medical-marijuana-images/29-medical-marijuana-states-map.png

Since the beginning of 2016, Arkansas, Florida, North Dakota, Ohio, Pennsylvania, and West Virginia have all passed laws or constitutional amendments to legalize marijuana in some form, aligning with what is now a majority of States that have done so.

The trend began with California in 1996, and that state has been somewhat of a training ground for marijuana laws in the 20 years since.

LEGALIZATION OF MARIJUANA AND MARIJUANA PRODUCTS IN THE UNITED STATES



http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx#3

FEDERAL LAW AND MARIJUANA

- Importantly, and as we all know, marijuana is still illegal pursuant to federal law.

- Controlled Substances Act. 21 U.S.C. § 801 et seq.
  - Schedule 1 drugs under the CSA:
    - Opiates
    - Opium derivatives
    - Cannabimimetic agents (synthetic marijuana)
    - Hallucinogens
      - **21 U.S.C. § 812(c)(10): Marijuana**
      - **But, recently introduced legislation would protect state legalized marijuana by amending the CSA**

https://medicalexecutivepost.com/2013/05/02/why-president-nixon-signed-the-controlled-substances-act-in-1970/

THE DEPARTMENT OF JUSTICE AND MEDICAL MARIJUANA

- Under President Obama, the DOJ explicitly chose not to enforce federal law that criminalizes marijuana use against "individuals whose actions are in clear and unambiguous compliance with existing state laws permitting the medical use of marijuana." The prosecution of such individuals was "unlikely to be an efficient use of limited federal resources."

- But…

MARIJUANA & THE TRUMP ADMINISTRATION

- "In terms of marijuana and legalization, I think that should be a state issue, state-by-state. … Marijuana is such a big thing. I think medical should happen — right? Don't we agree? I think so. And then I really believe we should leave it up to the states."
  (to the Washington Post)
- "[I]n favor of medical marijuana 100%."
  (to Bill O'Reilly)

- But on April 7, 2017, Attorney General Jeff Sessions announced a task force within the Justice Department that will "undertake a review of existing policies in the areas of charging, sentencing, and marijuana to ensure consistency with the Department's overall strategy on reducing violent crime and with Administration goals and priorities."

http://www.businessinsider.com/where-donald-trump-stands-on-weed-legalization-2016-11

MARIJUANA & THE TRUMP ADMINISTRATION

- On January 4, 2018, Sessions rescinded the Obama-era Cole memorandum, effectively allowing U.S. attorneys to once again enforce federal drug laws against medical marijuana patients and individuals and entities involved in the medical marijuana industry, regardless of the legality of medical marijuana at the state and/or local level. However, on March 10, 2018, Sessions clarified that the DOJ has never and will not focus on low level marijuana crimes.

- Additionally, the Rohrabacher-Farr Amendment, a budgetary amendment prohibiting the U.S. Department of Justice from using any portion of its budget to pursue individuals and entities acting in accordance with state and local medical marijuana laws, does not expire until September 30, 2018. This Amendment continues to provide an added layer of legal protection to the medical marijuana industry.

http://www.businessinsider.com/where-donald-trump-stands-on-weed-legalization-2016-11

THE ART OF THE MARIJUANA DEAL

- On April 13, 2018, Colorado Republican Senator Cory Gardner announced that he had received "a commitment from the President that the Department of Justice's rescission of the Cole memo will not impact Colorado's legal marijuana industry." In exchange for President Trump's commitment, Gardner agreed to end his blockade against DOJ nominees, a stalemate in effect since Sessions rescinded the Cole memo in January.

- While Senator Gardner did not reveal whether ensuring Mike Pompeo's Senate confirmation for Secretary of State was a key term of his deal with President Trump, Senator Gardner vehemently supported Pompeo throughout the remainder of Pompeo's Senate confirmation hearings.

https://www.washingtonpost.com/politics/trump-gardner-strike-deal-on-legalized-marijuana-ending-standoff-over-justice-nominees/2018/04/13/2ac3b35a-3f3a-11e8-912d-16c9e9b37800_story.html?utm_term=.862e15c0924c

THE ART OF THE MARIJUANA DEAL

- On Thursday, June 7, 2018, Senator Gardner and Massachusetts Democratic Senator Elizabeth Warren, introduced a bi-partisan bill that may finally address the federal illegality of state-legalized marijuana. The proposed legislation amends the Controlled Substances Act so that it no longer applies to those following state laws regarding legalized marijuana.

- On Friday, June 8, 2018, when asked about the newly proposed legislation, President Trump stated that "[w]e're looking at it. But I probably will end up supporting that, yes." At this point it remains quite unclear where this new chapter may lead, but any amendment to the Controlled Substances Act regarding legalized marijuana will significantly change the way employers defend against employee claims based on medical marijuana use.

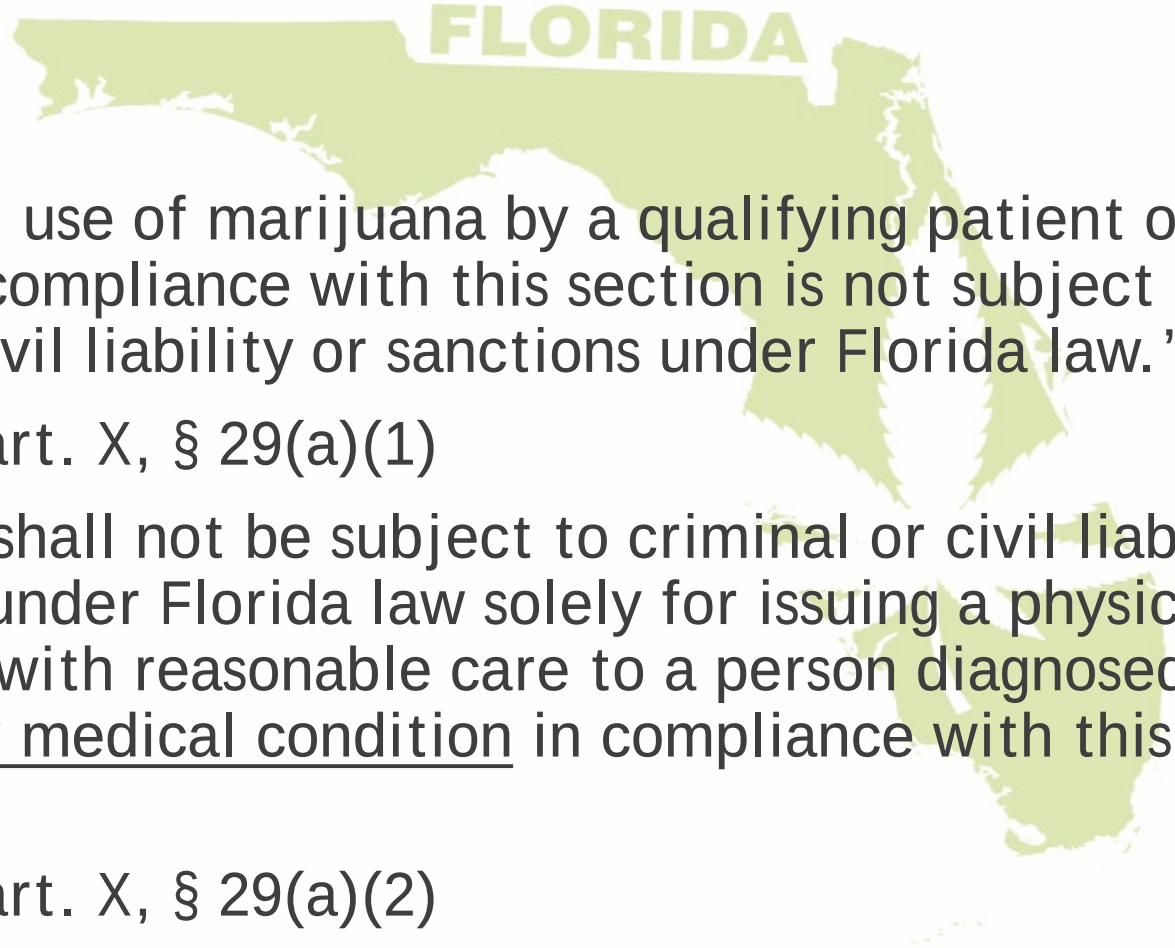
http://thehill.com/homenews/senate/391186-senators-introduce-bill-to-protect-states-from-federal-marijuana
https://www.nytimes.com/2018/06/08/us/politics/trump-marijuana-bill-states.html

AMENDMENT II: How We Got Here

- Florida's Amendment II passed in November 2016 with more than 71% of the vote, allowing medical marijuana use by people with any of the enumerated conditions or other debilitating medical conditions.
- Amendment II is an extension of Florida's "Charlotte's Web" law, which allows physicians to prescribe to people with epilepsy, cancer, and afflictions causing "seizures or severe and persistent muscle spasms" a low-THC strain of marijuana.
  - THC is the chemical that causes the psychoactive effects – the "high" – of marijuana

http://www.healthnutnews.com/breaking-medical-marijuana-sails-victory-florida/

FLA. CONST. ART. X, § 29



- "The medical use of marijuana by a qualifying patient or caregiver in compliance with this section is not subject to criminal or civil liability or sanctions under Florida law."

  Fla. Const. art. X, § 29(a)(1)

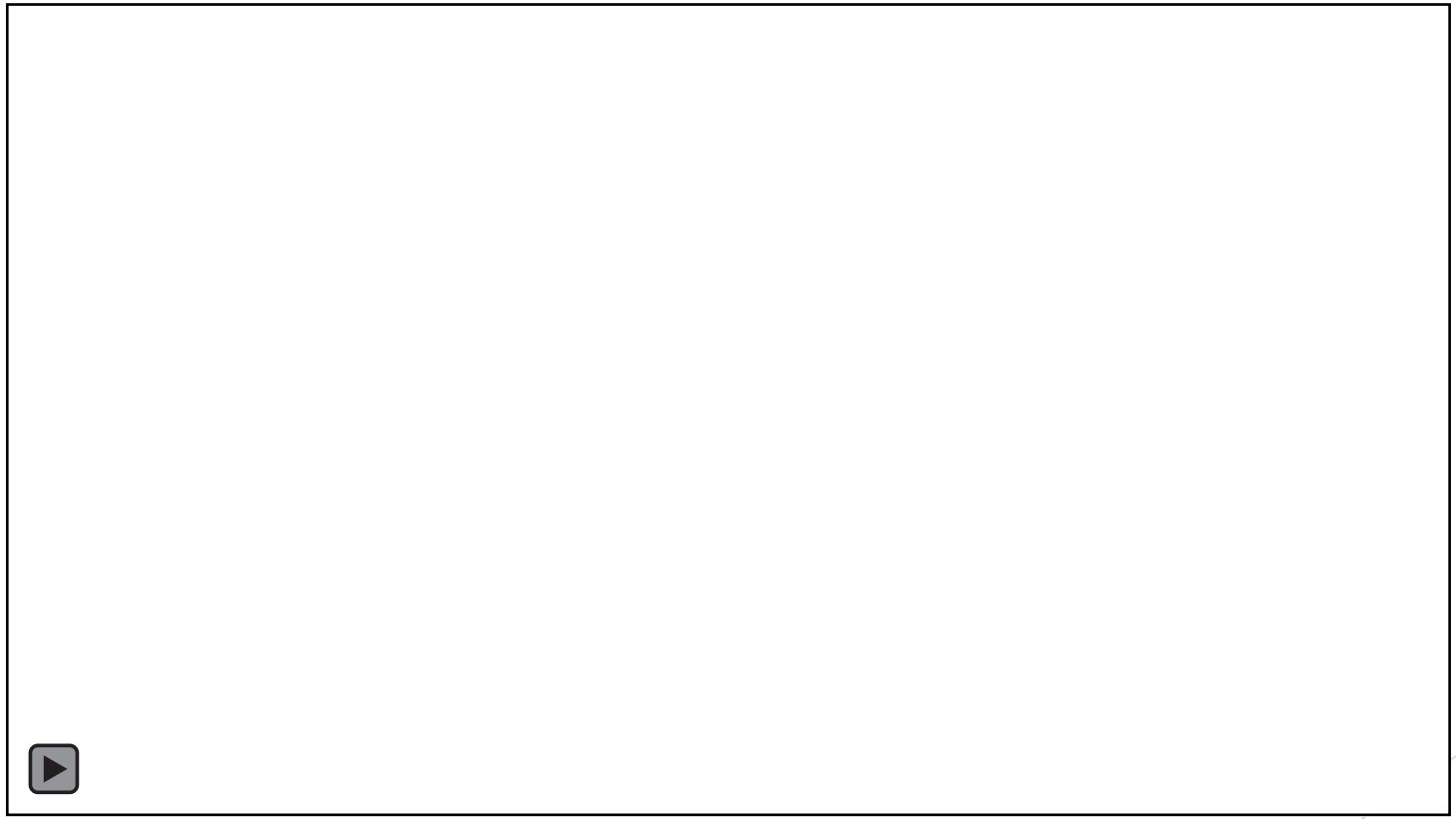
- "A physician shall not be subject to criminal or civil liability or sanctions under Florida law solely for issuing a physician certification with reasonable care to a person diagnosed with a debilitating medical condition in compliance with this section."

  Fla. Const. art. X, § 29(a)(2)

AMENDMENT II: Implementation

- Amendment 2 left many unanswered questions with respect to its implementation
  - Who would qualify to use marijuana medicinally?
  - How much THC would medical marijuana be allowed to contain?
  - How might local ordinances affect marijuana distribution?
  - Would Amendment II conform to the 90-day wait period requirement installed by the state's "Charlotte's Web" law?
  - How would Amendment II affect employers?

“The FDA are having us do a study to determine what, if any, medicinal purposes of marijuana”



CONDITIONS ENUMERATED IN AMENDMENT II

- Cancer
- Epilepsy
- Glaucoma
- HIV
- AIDS
- Post-traumatic stress disorder
- ALS
- Crohn's disease
- Parkinson's disease
- Multiple sclerosis
- "[O]ther debilitating medical conditions of the same kind or class or comparable to those enumerated, and for which a physician believes that the medical use of marijuana would likely outweigh the potential health risks for a patient."

  Fla. Const. art. X, § 29(b)(1)

CRITICAL QUESTIONS REMAINED UNANSWERED

- 1. How would Florida define "debilitating medical condition"?
- 2. Would "debilitating medical condition" be interpreted as a catch-all, which would lead to a very broad basis on which physicians may prescribe medical marijuana?
- Other state medical marijuana laws include similar language.
  - Colorado defines "debilitating medical condition" as any disease or condition that produces conditions such as cachexia; severe pain; severe nausea; seizures, including those that are characteristic of epilepsy; or persistent muscle spasms, including those that are characteristic of multiple sclerosis. Colo. Const. art. XVIII, § 14
  - Washington: "[D]iseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications." Wash. Code § 69.51A.010 (24)(f)

“DEBILITATING MEDICAL CONDITION”

https://www.theweedblog.com/a-15-percent-medical-marijuana-sales-tax-proposed-in-california/

- California uses “serious medical condition,” the interpretation of which has allowed for perhaps the most expansive range of conditions of all medical marijuana laws. Cal. Health & Safety Code § 11362.7 (Includes medical marijuana coverage for people afflicted by migraines, arthritis, muscle spasms, anxiety, alcohol abuse, insomnia, impotence, panic disorders, sleep apnea, herpes, stuttering, etc.)

AMENDMENT II & THE FLA. LEGISLATURE

- On June 9, 2017, both houses of the Florida Legislature passed Senate Bill 8A, implementing medical marijuana.
  - Signed into law by Governor Rick Scott on June 23, 2017, amending Fla. Stat. § 381.986
- Key provisions
  - No smoking – law expressly provides that "[p]ossession, use, or administration of marijuana in a form for smoking" does not constitute "Medical use"
    - On May 25, 2018, a Leon County circuit court judge ruled that the statutory ban on smoking is unconstitutional. People United for Medical Marijuana v. Fla. Dep't of Health, No. 2017-CA-1394 (Fla. Cir. Ct. May 25, 2018).
    - The decision is currently stayed pending review by the 1st District Court of Appeals and the parties expect the case to eventually appear before the Florida Supreme Court.
  - No limit on how much THC medical marijuana may contain
    - "Marijuana" = "all parts of any plant of the genus *Cannabis*", regardless of THC content
    - "Low-THC cannabis" = "a plant of the genus *Cannabis*" containing 0.8% or less of THC
    - Use of "Low-THC cannabis" might be permissible "medical use" in situations where use of "marijuana" would not be (e.g., on public transportation)
- Does not provide a legal method for patients to grow medical marijuana
  - Joe Redner of Tampa challenged the constitutionality of the new law and rules, claiming they interfered with his ability to grow medical marijuana for his own personal use as a patient.
  - On April 11, 2018, a Leon County circuit court judge ruled that Mr. Redner is entitled to grow his own marijuana for personal use. Joe Redner v. Fla. Dep't of Health, No. 2017-CA-002403 (Fla. Cir. Ct. Apr. 11, 2018). However, the ruling is specific to Mr. Redner and does not allow other patients to grow medical marijuana.
  - Although the Court's decision was stayed automatically upon appeal, the Court vacated the automatic stay pending the 1st District Court of Appeal's decision.
    - However, the 1st DCA has since **reinstated the stay** until its ruling on the trial court's decision and the Florida Supreme Court subsequently denied Redner's petition to invoke all writs jurisdiction.

http://www.tampabay.com/florida-politics/buzz/2018/05/25/floridas-smoking-ban-on-medical-marijuana-struck-down-by-judge/

AMENDMENT II & THE FLA. LEGISLATURE (continued)

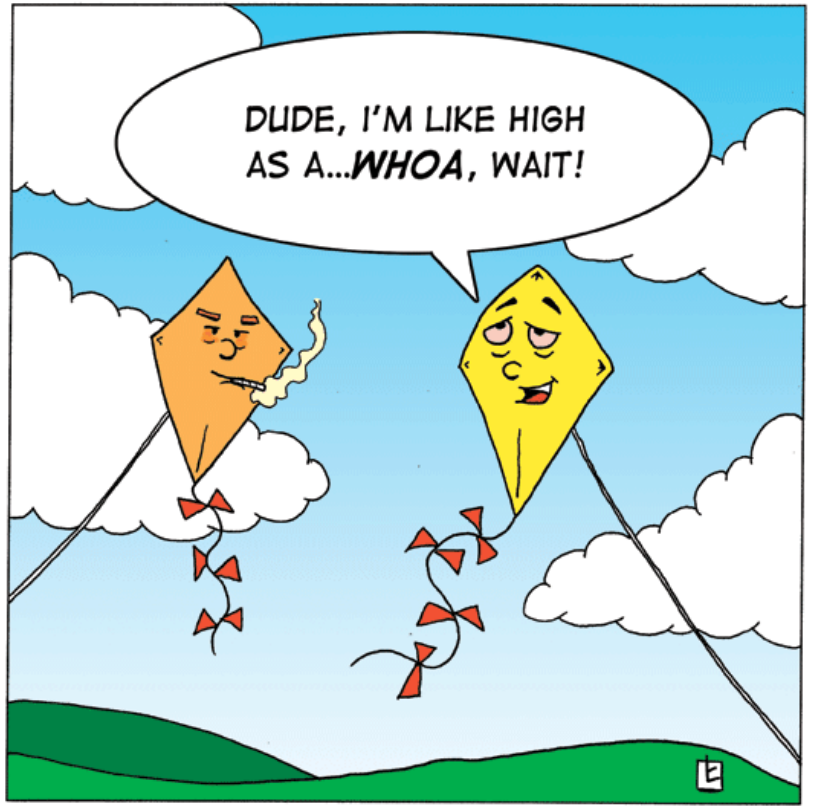
- Qualifying medical conditions under Florida Statute 381.986(2) include those specifically enumerated in Amendment II, as well as: 1) conditions of the "same kind or class" or comparable to those conditions; 2) a terminal condition diagnosed by a physician other than the qualified physician issuing the certification; and 3) chronic nonmalignant pain either caused by a qualifying condition or originating from a qualifying condition and persisting beyond the usual course of that condition
  - No definition of "debilitating medical condition" in Ch. 381.986(1)
- Initial cap of 25 dispensaries per vendor
- No 90-day wait period; patient can obtain a medical marijuana certification during her first visit to a physician
- Identification Cards must be renewed annually at a cost of $75

HOW DO MEDICAL MARIJUANA LAWS AFFECT THE WORKPLACE?

- State laws that provide for the legalization of medical marijuana could have an effect on the application of federal law
  - The Americans With Disabilities Act
  - The Family Medical Leave Act
- The enactment of Amendment II might also affect the application of certain state laws
  - "Lawful Activities" laws that prohibit employers from taking adverse action against employees for participating in lawful activities
    - Florida does not have a "Lawful Activities" law, but some local agencies within the state do
  - Workers Compensation Laws
  - Unemployment compensation
    - No decisions from Florida Reemployment Assistance Appeals Commission . . . yet
    - In 2014, Michigan Court of Appeals held that medical marijuana users are entitled to unemployment benefits so long as there is no evidence that they were impaired on the job. Braska v. Challenge Manufacturing Company, 861 N.W.2d 289, 291 (Mich. Ct. App. 2014)
  - Drug-free Workplace Laws

"ILLEGAL DRUGS" UNDER THE ADA

- The ADA provides that "illegal drugs," for purposes of determining whether the user of which is a qualified individual, is defined not by state law, but rather by the federal Controlled Substances Act. 21 U.S.C. § 801 et seq.
  - As we recall, marijuana is a Schedule I hallucinogen under the CSA.
  - "Illegal drugs" defined with reference to CSA, not to state law.
  - An employee "who is currently engaging in the illegal use of drugs" is not a qualified individual. 42 U.S.C. § 12111(8)



http://spudcomics.com/tag/marijuana/

AMENDMENT II & THE ADA

- With regard to the ADA's reasonable accommodation requirement, state medical marijuana laws generally fit into three categories:

Type of Med. Mar. Law	States with this Type of Med. Mar. Law
States whose laws affirmatively provide that an employer has **no duty to accommodate**	Washington, Oregon, Michigan, Montana, Colorado, and now Florida
States whose laws are **silent on accommodation**	California, Maryland, Massachusetts, New Mexico
States whose laws **expressly require accommodation** (under state employment/human-rights laws)	New York, Arizona, Minnesota, Illinois, Delaware, Maine, Nevada, Connecticut

"NO DUTY TO ACCOMMODATE"

- Example: Oregon's Medical Marijuana Act
  - Or. Stat. § 475B.413: Nothing in ORS 475B.400 to 475B.525 requires:
    - (2) An employer to accommodate the medical use of marijuana in the workplace.
- But even these seemingly clear laws, which expressly state an employer has no duty to accommodate medical marijuana usage, have resulted in litigation regarding their scope.
- Emerald Steel v. Bureau of Labor, 230 P.3d 518 (Or. 2010): Is there a duty to accommodate an employee who uses medical marijuana *outside* the workplace?
  - No duty: Marijuana's legality under state law is irrelevant, because the [federal] CSA preempts Oregon law, and medical marijuana is a Schedule I drug. Marijuana is illegal at the federal level, therefore an employer has no duty to accommodate an employee whose medical marijuana usage is legal at the state level.

Emerald Steel v. Bureau of Labor, 230 P.3d 518 (2010) (continued)

- Facts:
  - Temporary employee used medical marijuana to treat anxiety and panic attacks
  - Told supervisor about his marijuana use in anticipation of potential drug testing as a permanent employee
  - One week later, supervisor discharged employee without discussion of potential alternative treatments for his condition
  - Employee then filed complaint with state Bureau of Labor and Industries, invoking ORS 659A.112 (Oregon's state counterpart to the ADA)
- Holding: no duty to accommodate employee.
  - Even though medical marijuana use permitted under state law, the CSA and ADA's prohibition of illegal drug use preempts state law
  - Therefore, no duty to accommodate or engage in interactive process with employee using medical marijuana in or outside the workplace, regardless of legality at state level

ACCOMMODATION STATES

- States whose medical marijuana laws specifically require an employer to provide medical marijuana accommodations under state human rights/employment laws.
  - Provides a non-ADA avenue for disability discrimination.
- Example: N.Y. Health Law, Title V-A 3369(2). Non-discrimination. Being a certified [medical marijuana] patient shall be deemed to be having a disability… .
- Accommodations may be made by giving the employee medical breaks or modified work schedules.
- These accommodations may be denied through the standard defenses of undue hardship, reasonability or direct threat.

https://www.cartoonstock.com/directory/m/medical_marijuana.asp

Defense to Failure to Accommodate: Direct Threat

- Medical marijuana impairment may be a significant risk to the health or safety of others, but especially so in positions that require transportation or physical activity.
  - Omnibus Transportation Employee Testing Act of 1991 requires drug testing of all employees performing “safety-sensitive transportation”, including those whose duties require having a CDL.
  - DOT Regulations: Provide for who is subject to testing, under what circumstances, and the procedures for conducting testing.

CSA Preemption Defense in Accommodation States

- Many employers and employment law practioners believe the CSA preempts state medical marijuana laws, providing a solid defense in federal court, but this may not be the case.
- Recently in *Noffsinger v. SSC Niantic Operating Co. LLC*, 2017 WL 3401260 (D. Conn. Aug. 8, 2017), the Court found that the CSA does not preempt Connecticut's Palliative Use of Marijuana Act ("PUMA"), which prohibits employers from discriminating based on an employee's medical marijuana use.
  - The Court distinguishes *Noffsinger* from *Emerald Steel* by focusing on the fact that, unlike Oregon's medical marijuana statute, Connecticut's statute expressly prohibits employers from discriminating against an employee's use of medical marijuana.
  - The Court emphasizes that the CSA does not prohibit employers from employing applicants who use illegal drugs, and thus the CSA does not create the conflict required for preemption of PUMA's anti-discrimination provision.
  - This decision turned many heads and means the CSA may not afford the preemption protection many thought it did.
  - Litigation at the trial court level remains ongoing.
  - While the decision is not binding precedent in Florida, other federal trial courts may find *Noffsinger* persuasive and follow suit.

STATES SILENT ON ACCOMMODATION

- Some state medical marijuana laws do not speak to whether an employer has a duty to accommodate.
- Example: California's Compassionate Use Act. No express imposition of the duty; no express rebuke of the duty. Cal. Health & Safety Code § 11362.5
  - A California court held that the CUA's silence on the issue did not imply a duty to accommodate; the only right implied by the law is the right to obtain and use marijuana for medical purposes.
- Nevada: With limited exceptions, requires employers engage in an interactive process with medical marijuana users, but expressly provides that employers are not required to allow medical marijuana use in the workplace. NRS 453A.800
  - Does not provide for private right of action
- Massachusetts Act for the Humanitarian Medical Use of Marijuana: no anti-discrimination provision, job protection or private right of action by employees against employers
  - Cristina Barbuto v. Advantage Sales and Marketing, LLC, Mass. Supreme Judicial Court, July 17, 2017 – Court held that employer had duty to engage in interactive process with medical marijuana user who suffered from Crohn's disease to determine if the user could perform job duties with or without reasonable accommodation under Massachusetts handicap discrimination law.

AMENDMENT II & ACCOMMODATION

- **Fla. Const. art X, § 29(c)(6):** Nothing in this section shall require any accommodation of any on-site medical use of marijuana in any correctional institution or detention facility or place of education **or employment**, or of smoking medical marijuana in any public place.
- **Fla. Stat. § 381.986(15):** This section does not require an employer to accommodate the medical use of marijuana in any workplace or any employee working while under the influence of marijuana.
- But what about *off-site* medical use?
  - Wash. Code § 69.51A.060: "Nothing in this chapter requires any accommodation of any on-site medical use of marijuana in any place of employment … ."
  - 21 R.I. Gen. Laws. Ann. § 21-28.6-7: "Nothing in this chapter shall be construed to require . . . An employer to accommodate the medical use of marijuana in any workplace."
  - While the laws may share similar language, the state courts interpreting them have come to very different conclusions about an employer's obligation to accommodate off-site medical use

*Roe v. TeleTech Customer Care Mgmt.**

- When Washington first passed Medical Use of Marijuana Act in 1998, it provided that nothing in the Act required accommodation of marijuana use in any place of employment; in 2007, amended so that nothing in the Act required accommodation for on-site medical use in any place of employment.

- Facts of Roe:
  - Employee took medical marijuana four times a day to treat migraines
  - Informed employer
  - Terminated after testing positive
  - Sued for wrongful termination in violation of state public policy allowing use of medical marijuana

- Interpreting Washington's "on-site" accommodation provision, the Wash. Supreme Court rejected plaintiff's argument that the inclusion of "on-site" signals the implicit requirement that the law requires "off-site" use of medical marijuana.
  - "This statutory silence supports the conclusion that [the law] does not require employers to accommodate off-site medical marijuana use."

- In coming to this conclusion, the court noted that, if a medical marijuana law truly intended to create a duty to accommodate off-site marijuana use, it would include exceptions for certain occupations or permissible levels of impairment in order to proactively defend against on-the-job impairment.

*257 P.3d 586 (Wash. 2011)

https://www.theweedblog.com/asa-reacts-to-medical-marijuana-employment-discrimination-in-washington-state/

*Callaghan v. Darlington Fabrics Corp.**

- 21 R.I. Gen. Laws. Ann. § 21-28.6-7: "Nothing in this chapter shall be construed to require . . . An employer to accommodate the medical use of marijuana in any workplace."

- Facts of Callaghan:
  - Plaintiff was a medical marijuana user and cardholder
  - Plaintiff informed Defendant of these facts while interviewing for an internship
  - Defendant did not hire Plaintiff because she was currently using marijuana, would continue to use marijuana if Defendant employed her, and would not be able to pass a mandatory pre-employment drug test
  - Plaintiff sued for employment discrimination in violation of state medical marijuana statute

- In finding that state medical marijuana statute created a private right of action, the court found it "crucial" that legislature was silent as to an employer's duty to accommodate use of medical marijuana outside of the workplace.

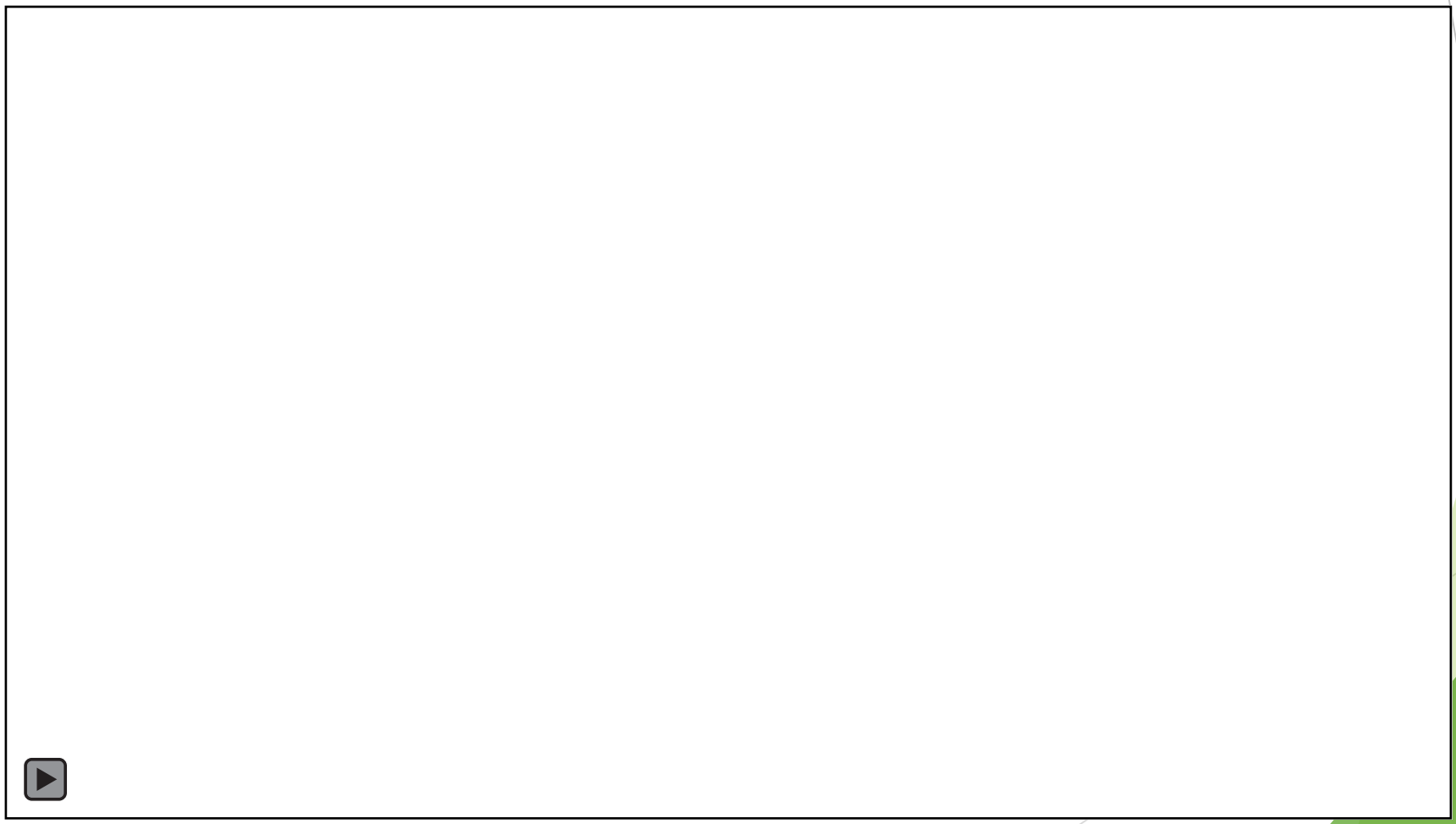
- "The natural conclusion [to be drawn from the statutory silence] is that the General Assembly contemplated that the statute would, in some way, require employers to accommodate the medical use of marijuana outside the workplace."

- Important Florida note: Unlike Rhode Island's medical marijuana law, Fla. Stat. § 381.986(15) expressly provides that it "does not create a cause of action against an employer for wrongful discharge or discrimination."

No. PC-2014-5680 (R.I. Super. Ct., May 23, 2017)

4/20

- An important side note on an important number in marijuana history…



FAMILY MEDICAL LEAVE ACT: THE BASICS

- FMLA allows qualifying employees to take unpaid, protected leave for specified medical reasons, up to 12 weeks. 29 U.S.C. § 2612(a)(1)
  - Medical reasons: Employee is unable to work due to a serious health condition, or time is needed for planned medical treatment of that serious health condition. 29 U.S.C. § 2612(a)(1)(D)

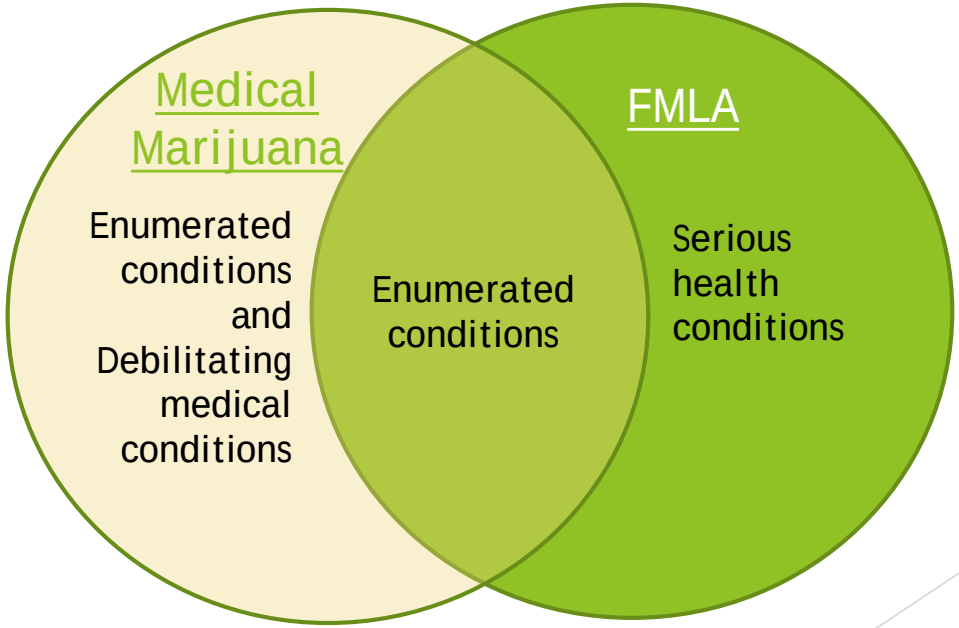
- "Serious health condition": "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider." 29 U.S.C. § 2611(a-b)
- Leave may be taken either through:
  - Reduced leave schedule; or
  - Intermittently. 29 U.S.C. § 2612(b)(1)

FMLA CONCERNS

- Medical marijuana issues in conflict with the FMLA have been sparsely litigated, and courts in states with medical marijuana laws have given us little guidance on the following issues:
  - Must an employer provide FMLA leave for employees who use medical marijuana legally under state law?
  - Is an employer liable for taking an adverse action against an employee who used medical marijuana while out on FMLA leave, in conflict with a workplace policy against drug use?
  - Does an employer need to provide intermittent FMLA leave for medical marijuana use?
  - How may an employer protect against marijuana impairment if a medical marijuana-using FMLA employee consumes as part of his/her treatment?
  - Can/should an employer conduct a fitness-for-duty exam upon an employee's return from FMLA leave in order to determine whether medical marijuana was used, and if so, whether the employee is impaired by the marijuana?

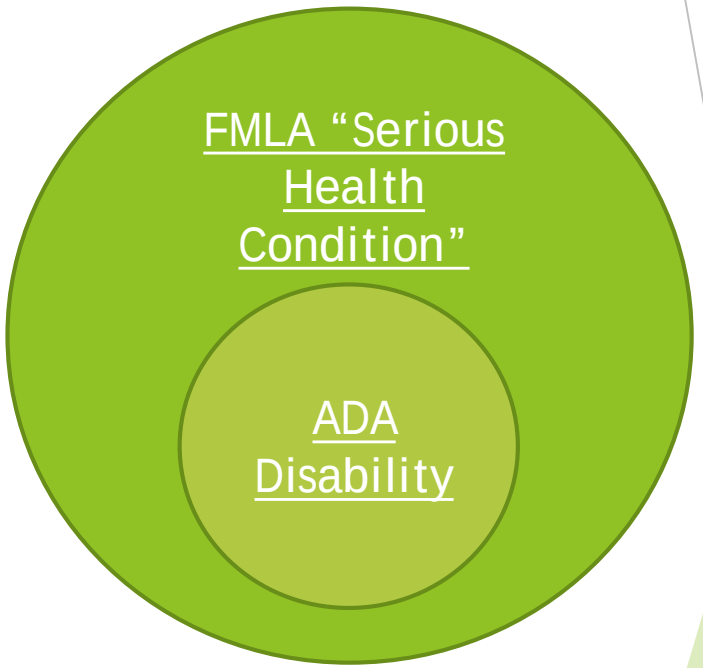
FMLA AND MEDICAL MARIJUANA

- Is there an overlap between conditions which qualify as serious health conditions under the FMLA *and* conditions qualifying for the prescription of medical marijuana under Amendment II and Florida Statute 381.986(2)?
  - The answer depends on Florida's interpretation of "qualifying medical condition."
    - In California, simple stress may qualify someone for medical marijuana; but under the FMLA, simple stress is not a serious health condition.
- It is very likely that all enumerated conditions in Amendment II overlap with the FMLA's definition of serious health condition. But the jury is still out as to whether all "qualifying health conditions" will constitute "serious health conditions."



INTERPLAY BETWEEN THE FMLA AND THE ADA

- Should an employee's eligibility for FMLA indicate to the employer that an accommodation may be contemplated under the ADA (or a state-law equivalent)?
  - Any qualifying ADA disability should also qualify as a serious health condition under the FMLA.
  - However, not all serious health conditions qualify as a disability under the ADA.
- Note that the Florida Civil Rights Act does not expressly require an employer to accommodate an employee who uses medical marijuana.



DRUG-FREE WORKPLACE POLICIES

- The federal Drug-Free Workplace Act requires federal contractors and grantees to keep the workplace free of illegal drugs.
  - "Illegal drugs" is defined by the CSA, which classifies marijuana as a Schedule I substance. 41 U.S.C. § 8101(a)(2)
  - The preemption doctrine, just as it does in ADA reasonable accommodation disputes, likely allows an employer to terminate an employee who lawfully uses medical marijuana under state law, but nonetheless violates the Drug Free Workplace Act via the CSA's definition of "illegal drugs."
  - Interestingly, nothing in the Act provides that employers are required to drug test employees, but there is also nothing in the Act prohibiting testing
- Employer policies may interact with medical marijuana similarly:
  - Washington's *Roe* court: The state marijuana law does not protect an employee who uses medical marijuana from termination for violation of the company drug policy; the law "only provides an affirmative defense to the drug crime."

http://www.riskmanagementmonitor.com/drug-free-workplace-in-the-age-of-marijuana/

FLORIDA DRUG-FREE WORKPLACE ACT

- Florida Statute 381.986(15) provides: "This section does not limit the ability of an employer to establish, continue or enforce a drug-free workplace program or policy."
- "Employer" is not defined in Florida Statute 381.986(1) Definitions.
- The CSA's preemption likely applies to Florida's Drug-Free Workplace Act, but employees may have an out:
  - The Medical Review Officer may render a positive test as negative if the employee provides an explanation that shows that the drug that caused the positive result was taken as a prescription medication.
  - No indication yet as to whether Florida considers medical marijuana a "prescription" under the Act; only that a prescription "includes any order for drugs … written or transmitted … by a licensed practitioner."
- If an employer has a drug-free workplace policy and conducts specified types of drug testing, then a premium credit is applied to the employer's workers' compensation premium. Fla. Stat. § 440.102
- Florida Statute 381.986(15) provides that "Marijuana, as defined in this section, is not reimbursable under Chapter 440."
- But, Drug-Free Workplace Act does account for prescription medication and, if a public employee provides such information, it "shall be taken into account in interpreting any positive confirmed results." Fla. Stat. 112.0455(8)(b)(2).

HOW SHOULD AN EMPLOYER'S DRUG POLICY LOOK?

- First, determine whether allowing medicinal marijuana use is even an option:
  - Not an option if employer receives federal funds
  - Does the employer receive federal funds, or is it subject to the federal Drug-Free Workplace Act? If so, the employer should enforce the policy strictly and follow established medical marijuana jurisprudence in declining to accommodate the use.
- If the employer operates in the private sector, decide whether the employer policy can be nationwide or state-specific:
  - If an employer has locations in Florida and Colorado, does it make sense to draft different policies?
- Finally, the employer should consider the risk vs. reward of strict enforcement:
  - Some medical marijuana patients may use low-THC strains, which means the marijuana is not as psychoactive and, thus, would likely not impair the user.
  - Does off-duty use of medical marijuana affect the employee's performance?
    - If its low-THC, then it likely will not
  - Has the employee used medical marijuana within a short temporal proximity of his or her shift?
  - Would the employee's impairment cause safety concerns? (Drivers, cooks, maintenance workers)

"LAWFUL ACTIVITIES" LAWS

- Laws that prohibit an employer from discriminating or taking adverse employment actions against an employee for engaging in otherwise lawful activities. (See Colo. Rev. Stat. § 24-34-402.5)
  - Coats v. Dish Network, 350 P.3d 849 (Colo. 2015): Lawful medical marijuana (who was a quadriplegic) user sued under the state lawful activities statute for wrongful termination after being fired for positive drug test in violation of company's zero tolerance drug policy.
  - The Colorado Supreme Court again looked to CSA preemption: State "lawful activities" laws are interpreted to refer only to federal law. Held that DISH did not violate the lawful activities law because it had the right to terminate an employee who violates federal law.
    - Wrinkle that has yet to be addressed: "Lawful activities" laws that expressly define the activities as ones that are lawful under state law.
- No Florida "lawful activities" law but some local agencies (e.g. Broward County) have them.
- But, from a practical perspective …

THE MOST IMPORTANT SECTION OF THIS PRESENTATION

(Just Kidding)

http://maryjanesdiary.com/how-to-pass-drug-test/

DRUG TESTING FOR MARIJUANA

- "Note that urine tests do not detect the psychoactive component in marijuana, THC (delta-9-tetrahydrocannabinol), and therefore in no way measure impairment; rather, they detect the non-psychoactive marijuana metabolite THC-COOH, which can linger in the body for days and weeks with no impairing effects." California NORML
  - Put another way, urine tests detect only past use of marijuana
- Single or sporadic use of marijuana may appear in urine for up to a week, but that's no guarantee. Generally, the more frequent the usage, the more likely it will yield a positive test. THC is stored in fat, so frequent exercise may impact how long it stays in the system.
- Hair testing regarded as unreliable, but can potentially detect marijuana use dating back 90 days (using standard 1 ½ long hair)
- Saliva testing: not as accurate as urine testing. Tests only for THC, and designed to detect only very recent use (within past 24-72 hours)
- Blood testing: Rarely administered, but very accurate for first few hours post-consumption (and up to 7 days after for frequent users)

https://www.leafly.com/news/science-tech/the-ultimate-dollar-store-deal-how-accurate-is-a-1-marijuana-drug

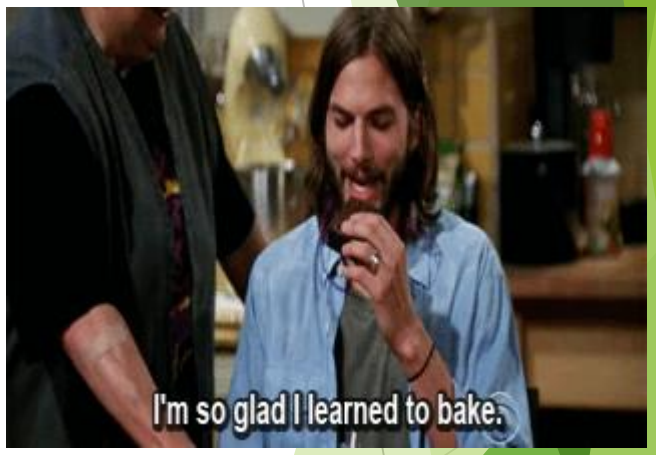
DRUG TESTING FOR MARIJUANA (cont.)

- Remember the Fourth Amendment/Public Employer Responsibilities!
  - Test conducted by governmental entities implicate reasonable search and seizure concerns
  - Suspicion-less random drug testing for all state employees is unconstitutional. AFSCME v. Scott (11th Cir. 2013).
  - Blanket re-employment drug testing for all applicants for city employment without showing of special need or that employment is safety sensitive is unconstitutional. Voss v. City of Key West, (S.D. Fla. 2014).
- Florida's Drug-Free Workplace Act (Fla. Stat. 112.0455) provides for specific types of tests and allows the Agency for Health Care Administration to adopt additional rules.
- The drug-testing procedures under Fla. Stat. 112.0455 do not apply where the specific work performed requires employees or job applicants to be drug tested pursuant to federal regulations, requirements or contracts.

https://www.leafly.com/news/science-tech/the-ultimate-dollar-store-deal-how-accurate-is-a-1-marijuana-drug

CHANGING ATTITUDES TOWARD MARIJUANA

- How many applicants or current employees would be deterred by the strict enforcement of federal law against the use of a drug that is legal at the state level?
  - 64 percent of Americans think marijuana use should be legal
    - 27 percent in 1979
  - 51% of Republican voters now support legalization
  - Half of all users have a household income of $75,000 or higher
    - Over half have completed some college
    - 74% are employed
  - And the kicker… Half of all Americans have *tried* (smoked) marijuana.
    - 18.9 million Americans used marijuana in the prior month, according to a 2012 National Survey on Drug Use and Health.



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http://blog.norml.org/2016/04/25/who-smokes-marijuana-in-america
https://cannabis.net/blog/news/20-of-millennials-smoke-weed-regularly-wait-what
http://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/?utm_source=digg&utm_medium=email
http://www.nbcnews.com/news/us-news/new-poll-finds-majority-americans-have-smoked-pot-n747476

CONCLUSION

What do we know?

- Courts presented with medical marijuana/employment issues have—so far—generally been employer-friendly
- State medical marijuana laws are often construed as affording protection only against criminal liability
- No Florida court has held that an employer must accommodate a medical marijuana user under the ADA
- Marijuana's classification as a Schedule I substance under the CSA preempts state law with regard to employment issues, but remember *Noffsinger* and *Callaghan*
- Employers have been permitted to terminate employees who violate drug-free workplace policies despite medical marijuana's state legality

CONCLUSION

What we don't know

- How broadly/narrowly will Florida courts define medical conditions "of the same kind or class as or comparable to" the specific conditions listed in Amendment II?
- Will Florida allow medical marijuana use as a "prescription" exception for drug-free workplace drug tests?
- Does an employer have to provide intermittent FMLA leave for medical marijuana use?
- Will unions seek to bargain with employers over medical marijuana use?

FLORIDA WHISTLE-BLOWER
a/k/a The Law of Unintended Consequences

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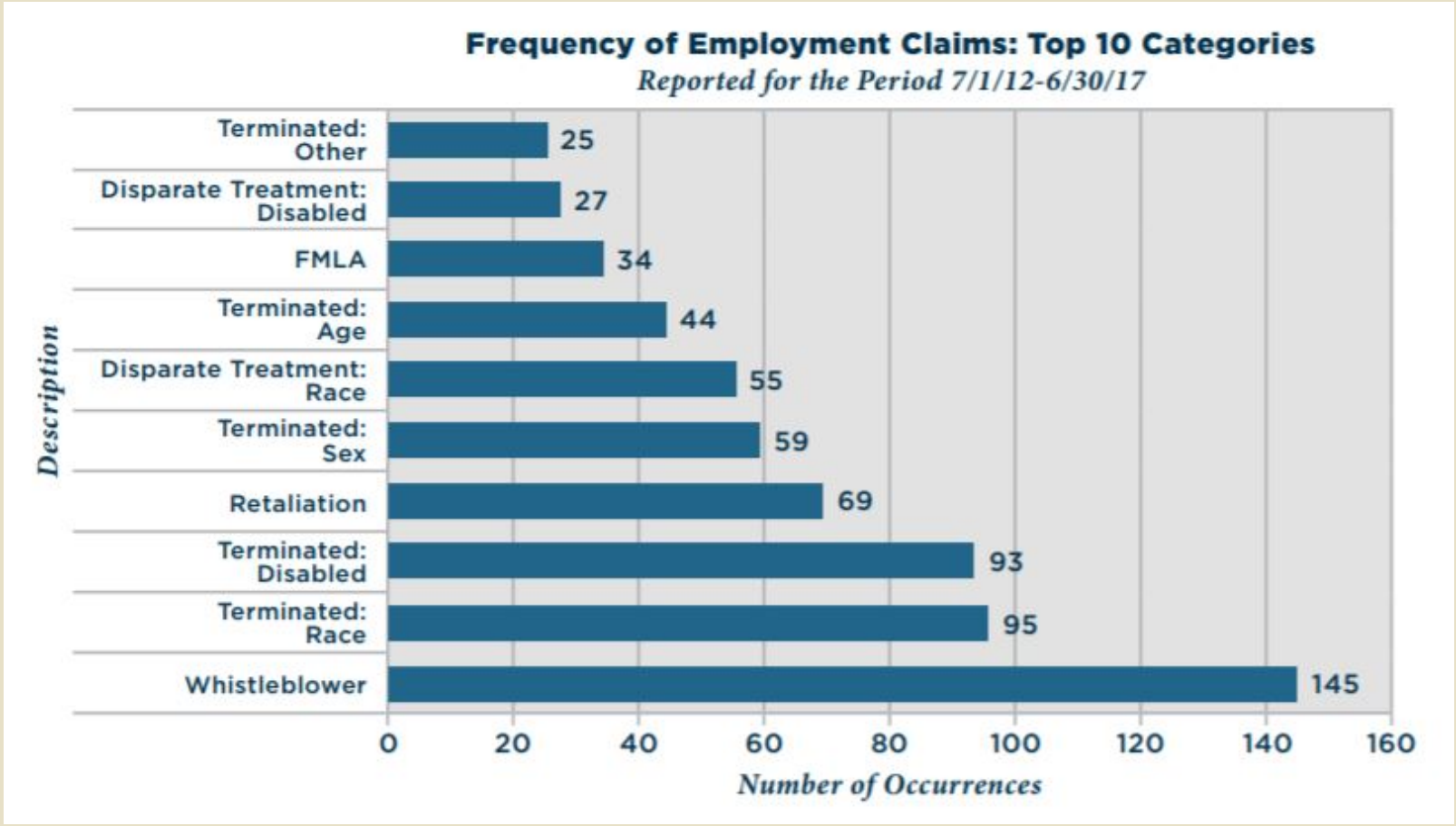
Agenda

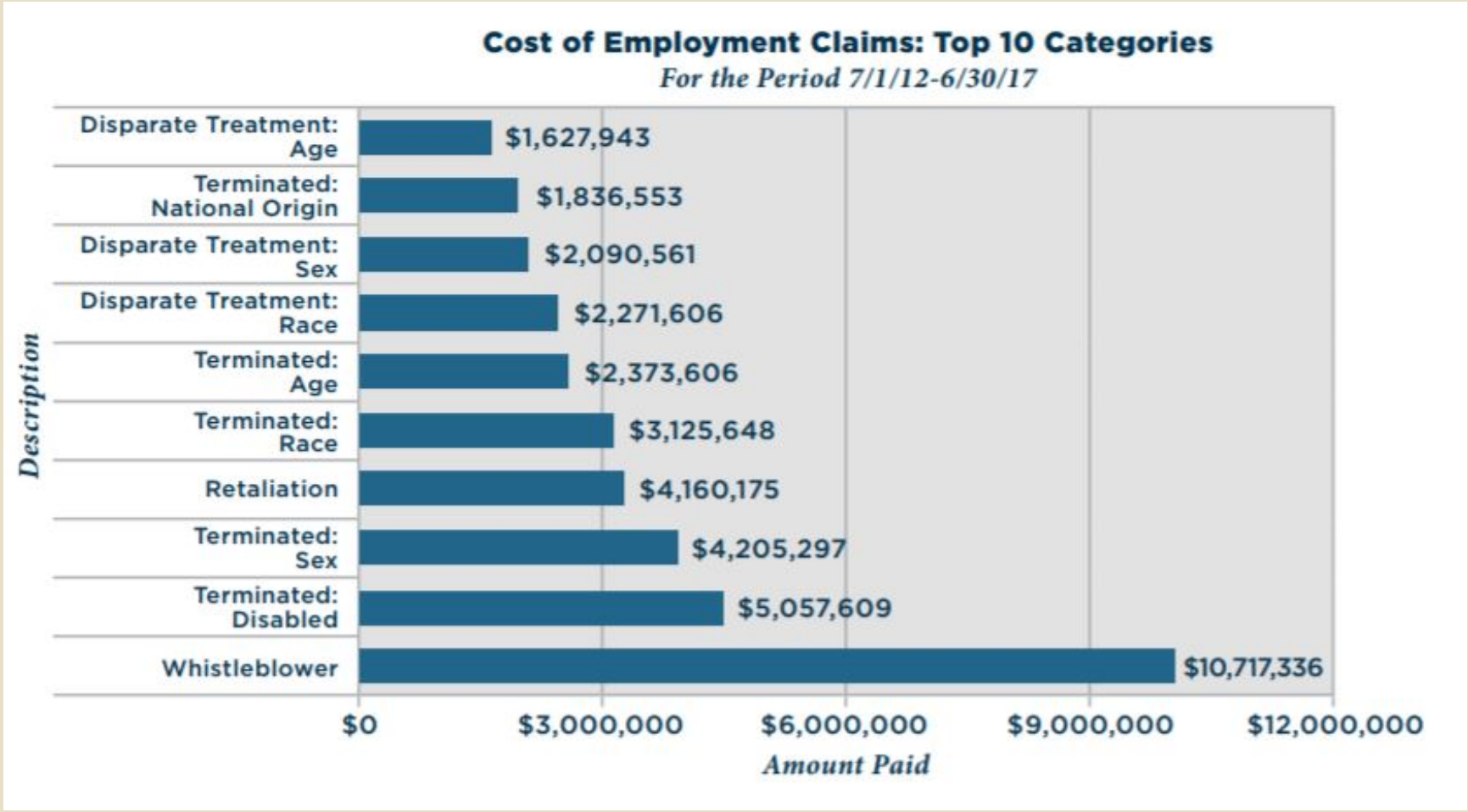
- Florida Whistle-blower Act, Fla. Stat. § 112.3187
  - What the Law Says
  - How the Law Has Been Interpreted
  - How to Avoid the Unintended Consequences

INCREASED FILINGS OF WHISTLE-BLOWER CLAIMS

More Frequent Filings Against State



Increased Costs



FLORIDA'S PUBLIC SECTOR WHISTLE-BLOWER ACT

What the Law Says

- Florida Statutes § 112.3187
  - It was enacted in 1986
  - It only prohibits retaliation
    - An employee is not protected from discharge merely because he or she engages in protected activity

What the Law Says

- No preferential treatment required
- Does not shield employee from meeting performance expectations or following workplace rules
- At-will employment still exists
- Manner of engaging in protected activity may not be protected
  - Disruptive conduct
  - Profanity
  - Abandoning or refusing work
  - Insubordination

What the Law Says

- Enacted to eliminate corruption and protect employees who report such actions in good faith
  - Not to address everyday operational disagreements
  - It was not intended to reach every dispute between a supervisor and subordinate

What the Law Says

- Prohibits retaliation against an employee or person for certain protected conduct
  - Includes applicants, employees, and independent contractors

What the Law Says

- Applies to agencies and contractors
  - Agency is defined to include any county entity
  - No minimum number of employees
  - Contractor includes any private company that contracts with a government agency
- No individual liability

What the Law Says

- Protected activity requires:
  - Disclosure of specific information
  - To a specific person
  - In a specific manner
- Does not require an actual violation
- Does not require violation by the employer
  - Can be a report about a co-worker or contractor

Disclosure of Specific Information

- Violation or suspected violation of law, rule, or regulation
  - Creates a substantial and specific danger to the public's health, safety, or welfare
- Not all violations of law are covered
- But suspected violations can be covered
  - Objectively reasonable, good-faith belief for suspected violation
    - Castro v. Sch. Bd. of Manatee County, Fla., 903 F. Supp. 2d 1290, 1302 (M.D. Fla. 2012)

Disclosure of Specific Information

- Act or suspected act of:
  - Gross mismanagement
    - Defined in the statute
      - Continuous pattern of
      - Managerial abuses, wrongful action, arbitrary action, capricious action, fraudulent conduct, or criminal conduct
      - Which may have a substantial adverse economic impact

Disclosure of Specific Information

- Malfeasance
  - Not defined in the statute
  - "The doing of an act which a person ought not to do at all"
- Misfeasance
  - Not defined in the statute
  - "Improper doing of an act which a person might lawfully do"

Disclosure of Specific Information

- Gross waste of public funds
  - Not defined in the statute
  - Typically must be more than inefficiency or simple neglect
- Medicaid fraud or abuse
  - Not defined in this statute

Disclosure of Specific Information

- Gross Neglect of Duty
  - Also undefined in the statute
  - Modifier of "gross" was added in 1993
  - Typically must be more than simple neglect
  - Florida Supreme Court interpreted "gross neglect of duty" for official misconduct
    - "When such neglect is grave and the frequency of it is such as to endanger or threaten the public welfare it is gross."
    - State ex rel. Hardie v. Coleman, 155 So. 129, 132 (Fla. 1934)

Disclosure to a Specific Person

- For local government entities
  - Chief Executive Officer as defined under PERA
    - § 447.203(9): The person "who is responsible for the legislative body of the public employer for the administration of governmental affairs"
  - Other appropriate local official
    - Not defined in the statute

Disclosure in a Specific Manner

- A written and signed complaint
- "Any written complaint to their supervisory officials"
- The employee or person is requested to participate in an investigation, hearing, or inquiry conduct by an agency
- The employee or person refuses to participate in an adverse action under this statute
- Complaint to the whistle-blower hotline or MFCU hotline

What the Law Says

- Exclusions under the act
  - Any person who committed or participated in committing the violation
    - Includes partial responsibility
  - Any person who knowingly discloses false information

What the Law Says

- Prohibited acts
  - Dismissal
  - Suspension
  - Transfer
  - Demotion
  - Withholding of bonus
  - Reduction in salary or benefit
  - Any other action taken within the terms and conditions of employment
- Adverse personnel action is defined in the statute

What the Law Says

- Prohibited action must be taken "for disclosing information" pursuant to this statute.
  - Decision maker must have knowledge of the protected activity
  - Employee must establish "but for" causation
- Affirmative Defense
  - No relief can be awarded if the employer shows that the adverse action was based on grounds other than the protected activity and would have been taken even in the absence of the protected activity.

What the Law Says

- Exhaustion of administrative remedies
  - Local government employees
    - Exhaustion requirement applies only if the local government has establish a procedure by ordinance or contracted with DOAH to conduct a hearing under this act.

What the Law Says

- Ordinance requirements
  - Enacted by the legislative body
  - To hear whistle-blower complaints
  - By impartial persons
  - Make findings of fact and conclusions of law

What the Law Says

- Employee has 60 days to follow the procedure or request a hearing
- Employee has 180 days after the final decision by the entity to file a lawsuit
- If no administrative procedure or contract with DOAH, employee has 180 days from adverse personnel action to bring a civil action.

What the Law Says

- Lack of subject matter jurisdiction if fail to exhaust administrative remedies
  - Dist. Bd. of Trustees of Broward Cmty. Coll. v. Caldwell, 959 So. 2d 767, 771 (Fla. 4th DCA 2007)
  - Menendez v. City of Hialeah, 143 So. 3d 1136, 1138 (Fla. 3d DCA 2014)
  - Pushkin v. Lombard, 279 So. 2d 79, 81 (Fla. 3d DCA 1973)
- The court is not limited to the four corners of the complaint.
  - Steiner Transocean Ltd. v. Efremova, 109 So. 3d 871, 873 (Fla. 3d DCA 2013)
  - Seminole Tribe of Florida v. McCor, 903 So. 2d 353, 357 (Fla. 2d DCA 2005)

What the Law Says

- Entitled to dismissal with prejudice
  - Husman v. Colchiski, 689 So. 2d 286, 288 (Fla. 2d DCA 1996).
  - Williams v. City of Miami, 87 So. 3d 91, 92 (Fla. 3d DCA 2012)
  - Robinson v. Dep't of Health, 89 So. 3d 1079, 1083 (Fla. 1st DCA 2012)
  - McGregor v. Bd. of Comm'rs of Palm Beach County, 674 F. Supp. 858, 861 (S.D. Fla. 1987).

What the Law Says

- All other employees or persons
  - Must exhaust all available contractual or administrative remedies
  - 180 days to file suit
  - This applies to employees of government contractors or local government applicants

What the Law Says

- No Other Proof or Procedures Specified
  - Statute is silent on application of Title VII burden-shifting
- Right to a Jury Trial

What the Law Says

- Relief Available
  - Reinstatement or front pay
  - Compensation for lost wages, benefits, or other lost remuneration
  - Attorney's fees and costs
    - No fees under the act for the defendant unless the action was frivolous or filed in bad faith
    - The defendant can use the offer of judgment statute

What the Law Says

- Injunction
- Temporary reinstatement
- No catch-all provision for other damages
  - No emotional distress damages or punitive damages
- No sovereign immunity limits
- Election of remedies applies

What the Law Says

- Temporary reinstatement
  - To the former position or an equivalent position
  - Pending the final outcome of the complaint
- Limited to claims based on discharge
  - "An employee complains about being discharged in retaliation for a protected disclosure"

What the Law Says

- No reinstatement if:
  - Disclosure was made in bad faith;
  - Disclosure was made for a wrongful purpose;
  - Disclosure was made after the agency's initiation of personnel action
    - Requires documentation of the performance deficiency or violation of disciplinary standard

What the Law Says

- No other standard provided
- Not available for municipal employees

What the Law Says

- Confidentiality Protected by Florida Statutes § 112.3188
  - Name or identity of the individual may not be disclosed without consent unless necessary to protect public health, safety, or welfare or necessary in the course of the investigation
  - Investigation of protected disclosures is exempt during active investigation
  - Violation is a misdemeanor

HOW THE LAW HAS BEEN INTERPRETED

Did the Legislature Mean What It Said?

- Irven v. Dep't of Health & Rehab. Services, 790 So. 2d 403 (Fla. 2001).
- The Florida Supreme Court held that § 112.3187 must be liberally construed.
- As a result, the language of the statute does not limit the court's interpretation of statute.

Did the Legislature Mean What It Said?

- Irven v. Dep't of Health & Rehab. Services, 790 So. 2d 403 (Fla. 2001).
  - An employee was terminated after she questioned the transfer of a child dependency action.
  - She complained to her supervisor and the agency attorney that the transfer of venue was improper.

Did the Legislature Mean What It Said?

- A court had previously granted an unopposed motion to transfer venue of the dependency proceedings to Polk County.
  - The employee asserted that the motion mistakenly represented that the child's residence was Polk County.
  - The employee asked the agency attorney to correct the mistake and the attorney refused.

Did the Legislature Mean What It Said?

- Her whistle-blower claim was tried and a jury returned a verdict in favor of the employee.
- On appeal, the Second DCA held § 112.3187 waived sovereign immunity and, as a result, that waiver must be limited to the acts or conduct clearly and unequivocally prohibited by the statute.
- The Second DCA noted: "To decide otherwise would turn 'every disagreement by an agency employee with the handling of a matter subject to judicial supervision and control' into a whistleblower action."

Did the Legislature Mean What It Said?

- The Florida Supreme Court rejected this argument, finding that the statute is remedial in nature and must be liberally construed to give effect to the legislation.
- It found that the statute could not be more broadly worded, which supports a liberal construction of the statute.

Did the Legislature Mean What It Said?

- It concluded that the employee had alleged that the employer engaged in misfeasance when it "knowingly misinformed the court relative to facts material to the dependency action" and failed to correct the misinformation.
- It concluded that this conduct falls within the protections of the Whistle-blower Act.
- Numerous cases have cited the Irven decision to support a liberal construction of protected activity under the statute.

Did the Legislature Mean What It Said?

- Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1127-29 (Fla. 4th DCA 2003)
  - Her job duty was to prepare an affirmative action report.
  - She asserted that she was retaliated against when she included her personal opinions in the report, despite her supervisor's instruction to remove those opinions.
  - The Fourth DCA found that there was an issue of fact for trial.

Did the Legislature Mean What It Said?

- Rosa v. Dep't of Children & Families, 915 So. 2d 210, 211–12 (Fla. 1st DCA 2005)
  - The court concluded that a letter, which "could be construed as an employee 'ranting' about personal conflicts with another employee," was sufficient to create a disputed issue of fact as to whether the employee engaged in protected activity.
  - It specifically cited the requirement to use a liberal construction when it found that "'misfeasance' [can include] negligent acts committed by an employee of an agency."

Did the Legislature Mean What It Said?

- Hussey v. City of Marianna, Fla., 5:10-CV-322/RS-CJK, 2011 WL 3294837, at *1 (N.D. Fla. Aug. 1, 2011)
  - The plaintiff reported violations of the City's personnel policy manual.
  - The court concluded:
    - "Straying from those policies may be an indication of managerial abuse and because of the policy in favor of a broad interpretation of the statute, employees are afforded protection for reporting suspected violations of those policies."

Did the Legislature Mean What It Said?

- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *3 (S.D. Fla. Jan. 20, 2017)
  - The court found that the plaintiff engaged in protected activity even when he did not mention any specific policies in two of the complaints.
  - Because the plaintiff mentioned the policy manual in one of the three complaints, the court read the other two complaints as incorporating the same reference under the "principle of liberal construal."

Did the Legislature Mean What It Said?

- Guido v. City of Crystal River, Florida, 5:03-CV-231-OC-10GRJ, 2006 WL 1232815, at *1–2 (M.D. Fla. May 8, 2006)
  - The police chief asked employees to inform local business, while they were off-duty and out of uniform, about how harmful three candidates to city council could be if elected.
  - The plaintiff complained to the city manager about this request and she also reported that the police chief smelled of alcohol.

Did the Legislature Mean What It Said?

- The court expressed "serious doubts as to whether all of the Plaintiff's complaints could constitute protected activity for purposes of the Whistle-blower's Act."
- Yet, it noted:
  - "[T]he Court is mindful that the provisions of the Whistle-blower's Act are to be read liberally."

Did the Legislature Mean What It Said?

- Gardner v. Madison County Sch. Bd., 4:15CV121-MW/CAS, 2016 WL 9506040, at *3 (N.D. Fla. Jan. 22, 2016)
  - "This Court agrees that a supervisor's verbal abuse of an employee could create a good-faith belief that malfeasance or misfeasance occurred if, for example, the supervisor's behavior included derogatory comments, profanity, or the like."

Did the Legislature Mean What It Said?

- However, the court noted that there was a limited on liberal construction:
  - "[Plaintiff] points to no case where a court found that the bare fact that a supervisor raised his voice and yelled at an employee for conduct on the job was enough to support a whistleblower claim. Even when giving it a liberal construction, the whistleblower statute does not reach that far."

Did the Legislature Mean What It Said?

- Other courts have recognized the limits of liberal construction
  - Martinez v. Florida Dep't of Corr., 4:15-CV-00544-MW-CAS, 2017 WL 4422351, at *4 (N.D. Fla. June 27, 2017)
    - "Even when liberally construing the statute, one filing a report that a fellow employee lied about them is not a protected activity under the Florida Whistle-blower's Act. Under that logic, an employee could file a report and achieve whistle-blower status any time they believed an employee lied about them. That is absurd."

Did the Legislature Mean What It Said?

- Turner v. Inzer, 4:11-CV-567-RS-WCS, 2012 WL 4458341, at *3 (N.D. Fla. Sept. 26, 2012), aff'd, 521 Fed. Appx. 762 (11th Cir. 2013)
  - An e-mail sent to a supervisor where the plaintiff requested confirmation of content of meeting minutes was not protected activity even though the plaintiff later asserted that she objected to the removal of the language from the minutes.

Did the Legislature Mean What It Said?

- Jones v. Sch. Bd. of Orange County, Fla., 604CV540ORL31KRS, 2005 WL 1705504, at *10 (M.D. Fla. July 20, 2005)
  - "Under a most liberal construction of the Whistleblower Act, causation remains a necessary factor."
- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *3 (S.D. Fla. Jan. 20, 2017)
  - "I should not be concerned about the protection of my job *if* I bring violations of the Sunshine Laws to your attention."
  - Despite liberal construction, this statement is not protected activity.

Did the Legislature Mean What It Said?

- Jacobs v. City of W. Palm Beach, 914CV80964ROSENBERGB, 2015 WL 4742906, at *2–3 (S.D. Fla. Aug. 10, 2015)
  - Liberal construction did not save the plaintiff's FWA claim based on her complaint that the city had violated the FMLA when it terminated another employee during FMLA leave.
  - The plaintiff only offered her subjective belief that this termination decision endangered the public's health, safety, or welfare.
  - However, it was undisputed that the public was being served as these duties were being performed by others.

Did the Legislature Mean What It Said?

- Other courts have observed that the rule of liberal construction can only be used when the statutory text is ambiguous.
  - Quintini v. Panama City Hous. Auth., 102 So. 3d 688, 690 (Fla. 1st DCA 2012)
    - "The rule cannot be used to defeat the plain meaning of the statute."
    - Report to a federal agency was not protected activity under § 112.3187

Does McDonnell Douglas Framework Apply?

- "To establish a prima facie claim under Florida's Whistleblower statute, the requisite elements set forth under a Title VII retaliation claim are applied."
  - Rice-Lamar v. City of Fort Lauderdale, 853 So. 2d 1125, 1132 (Fla. 4th DCA 2003)

Does McDonnell Douglas Framework Apply?

- Other courts have applied the framework from Title VII retaliation cases.
  - Hopkins v. Am. Sec. Group A-1, Inc., 17-22447-CIV, 2017 WL 4326099, at *3 (S.D. Fla. Sept. 26, 2017)
  - Laird v. Bd. of County Commissioners, 3:15CV394-MCR-CJK, 2017 WL 1147472, at *8 (N.D. Fla. Mar. 26, 2017)
  - Turner v. Inzer, 4:11-CV-567-RS-WCS, 2012 WL 4458341, at *3 (N.D. Fla. Sept. 26, 2012), aff'd, 521 Fed. Appx. 762 (11th Cir. 2013)
  - Guido v. City of Crystal River, Florida, 5:03-CV-231-OC-10GRJ, 2006 WL 1232815, at *5 (M.D. Fla. May 8, 2006)
  - Jones v. Sch. Bd. of Orange County, Fla., 604CV540ORL31KRS, 2005 WL 1705504, at *10 (M.D. Fla. July 20, 2005)
    - Holding that actual retaliatory intent and knowledge are necessary elements of FWA

Does the Employee Have to Complain in Writing?

- A written complaint is not required when the manner of the disclosure was based on the employee's required participation in an investigation, refusal to participate in an adverse action, or contact with the whistle-blower hotline.
- Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 421-22 (Fla. 4th DCA 2015)

Is an E-mail a Signed Writing?

- "An email qualifies as a signed writing."
- King v. Bd. of County Commissioners, 226 F. Supp. 3d 1328, 1336–37 (M.D. Fla. 2016)
  -

Is Participation Alone Protected Conduct?

- Shaw v. Town of Lake Clarke Shores, 174 So. 3d 444, 446 (Fla. 4th DCA 2015)
  - A police officer complained about an employee of a neighboring village in an anonymous letter to that village.
  - The town where the police officer worked conducted an investigation into the author of the letter.
  - The police officer participated in the investigation and admitted to authoring the letter.
  - In this complaint, the plaintiff did not allege that he made any other disclosures during the investigation.

Is Participation Alone Protected Conduct?

- The court affirmed the dismissal of his complaint based on lack of protected activity.
  - Plaintiff's participation in the investigation was not sufficient.
  - He had to make a protected disclosure during his participation.
  - He failed to allege that he made any such disclosure.
- The letter was not a written and signed complaint, even though he later admitted to authoring the letter.

What Is "Other Appropriate Local Official"?

- Rustowicz v. N. Broward Hosp. Dist., 174 So. 3d 414, 424 (Fla. 4th DCA 2015)
  - It is defined as an official or entity, including a member of a board, who "has the authority to investigate, police, manage, or otherwise remedy the violation or act."
  - The individual or entity must be affiliated with the local government.
    - Thus, a federal agency cannot an appropriate local official.
- This was an issue of first impression.

What Is "Other Appropriate Local Official"?

- Laird v. Bd. of County Commissioners, 3:15CV394-MCR-CJK, 2017 WL 1147472, at *9 (N.D. Fla. Mar. 26, 2017)
  - The plaintiff provided a memorandum, drafted by another person, to his supervisor.
  - The court found that the information in the memorandum could have involved a suspected violation of law, gross mismanagement, or misfeasance.

What Is "Other Appropriate Local Official"?

- It noted that "Florida courts construe the term 'other appropriate local official' broadly to include government entities empowered 'to investigate complaints and make reports or recommend corrective action.'"
- However, in this case, the supervisor was a head of a department, not an investigative office.
- Thus, the plaintiff did not make a disclosure to a protected recipient.

What Is "Other Appropriate Local Official"?

- Perez Escalona v. City of Miami Beach, 227 So. 3d 722, 723–24 (Fla. 3d DCA 2017)
  - The plaintiff, a project coordinator, on a water line construction project reported concerns to his three fellow engineers.
  - The court found that it was a disputed issue of fact as to whether the co-workers were appropriate local officials.
  - It reversed the trial court's judgment on the pleadings.

Is It Protected Activity When Employee Has a Duty to Disclose?

- Igwe v. City of Miami, 208 So. 3d 150, 156 (Fla. 3d DCA 2016), reh'g denied (Dec. 20, 2016), review denied, SC17-80, 2017 WL 1056173 (Fla. Mar. 21, 2017)
  - The plaintiff was the Independent Auditor General for a city and he reported to the city commission.
  - He had a duty to report his conclusions and financial analysis to the commission.
  - As part of his job duties, he provided a report disclosing misconduct to the commission.

Is It Protected Activity When Employee Has a Duty to Disclose?

- He also was subpoenaed to provide information to the SEC.
- The court concluded that he engaged in protected activity, even though he made these disclosures in the course of performing his job duties.

Does the Employee Have to Complain About His Employer?

- Kogan v. Israel, 211 So. 3d 101, 107 (Fla. 4th DCA 2017)
  - The act does not require that the disclosure concern the employee's employer as long as the subject is still covered by the act.
  - The plaintiff was employed by a sheriff's office.
  - He complained about misconduct by a city police department.
  - The court found that he engaged in protected conduct because the city was an agency under the act.

Is an Employee Required to File a Grievance Under the CBA?

- Bradshaw v. Bott, 205 So. 3d 815, 819 (Fla. 4th DCA 2016), review denied, SC17-81, 2017 WL 1908398 (Fla. May 10, 2017)
  - The court found that the sheriff was a local government entity.
  - Therefore, to require administrative exhaustion, the sheriff must contract with DOAH to conduct a hearing under the act.
    - It noted that the sheriff could not pass an ordinance to establish an administrative procedure.

Is an Employee Required to File a Grievance Under the CBA?

- The court held that, because the sheriff did not contract with DOAH, there was no administrative exhaustion requirement.
- The section of the act requiring the exhaustion of contractual remedies did not apply to employees of a local government entity.

Can a School Board Adopt an Ordinance for Administrative Exhaustion?

- Julian v. Bay County Dist. Sch. Bd., 189 So. 3d 310, 311–12 (Fla. 1st DCA 2016), review denied, SC16-904, 2016 WL 4440844 (Fla. Aug. 23, 2016)
  - The school district is a local governmental entity for the purpose of determining the administrative exhaustion procedure.
  - Although a school board is not a legislative body, it does enact policies.

Can a School Board Adopt an Ordinance for Administrative Exhaustion?

- A school board's policy establishing an administrative procedure for handling whistleblower claims is an ordinance under the whistle-blower act.
- The court noted that, because the term ordinance is not defined, it applied the common meaning to take official action of a general and permanent nature, such as a public enactment or decree.
- Thus, the court recognized that the school board is empowered to take such action in the enactment of its policies and its policies satisfy the definition of ordinance.

What Is the Standard for Temporary Reinstatement?

- Courts have applied the following standard:
  - The plaintiff made a disclosure protected by the statute;
  - The plaintiff was discharged; and
  - The disclosure was not made in bad faith or for a wrongful purpose, and did not occur after an agency's personnel action against the employee.
- Griffin v. Sun N' Lake of Sebring Improvement Dist., 2:16-CV-14062, 2017 WL 5202683, at *1 (S.D. Fla. Jan. 20, 2017)
- Competelli v. City of Belleair Bluffs, 113 So. 3d 92, 94–95 (Fla. 2d DCA 2013)

What Is the Standard for Temporary Reinstatement?

- Does Rule 1.610 apply to requests for temporary reinstatement?
  - Marchetti v. Sch. Bd. of Broward County, 117 So. 3d 811, 813 (Fla. 4th DCA 2013)
  - Broward County v. Meiklejohn, 936 So. 2d 742, 747 (Fla. 4th DCA 2006)
- Does the plaintiff have to establish an inadequate remedy at law to invoke the court's equitable jurisdiction for an order of temporary reinstatement?
- Does the defense in § 112.3187(10) apply to temporary reinstatement?

What Is the Standard for Temporary Reinstatement?

- Does discharge include constructive discharge?
  - Luster v. W. Palm Beach Hous. Auth., 801 So. 2d 122, 124 (Fla. 4th DCA 2001)
  - "It does not appear that this includes the employee's voluntary choice to refuse continued employment."
  - Employee was transferred and refused to accept new position.

What Is the Standard for Temporary Reinstatement?

- If reinstatement is awarded, does the employee have to be reinstated to his or her previous position?
- Are there any other defenses available such as the employee does not meet the minimum qualifications?
- What if the employee engages in misconduct during temporary reinstatement?
- How do you manage an employee who has been temporarily reinstated?

What Is the Standard for Temporary Reinstatement?

- Can the plaintiff obtain temporary reinstatement without a showing of retaliation?
- Does there have to be a temporal proximity or other evidence of causal connection between the protected activity and the discharge?
- Can the court award back pay as part of the temporary reinstatement?

What Is the Standard for Temporary Reinstatement?

- Does the employer have the right to appeal the temporary reinstatement order?
  - Marchetti v. Sch. Bd. of Broward County, 117 So. 3d 811, 812 (Fla. 4th DCA 2013)
- How long is an employee entitled to temporary reinstatement?
- Is the employer entitled to a stay of the reinstatement order during an appeal?

What Is the Standard for Temporary Reinstatement?

- Is the employer entitled to damages from wrongful temporary reinstatement?
- Why are municipalities but not counties exempt from the remedy?

HOW TO AVOID THE UNINTENDED CONSEQUENCES

Avoiding Unintended Consequences

Avoiding Unintended Consequences

- Consider creating a whistle-blower policy
  - Administrative exhaustion requirement
  - Defining other appropriate local official
- Investigate any complaints made
  - Request specific facts
  - Request identity of witnesses and documents
  - Conduct a thorough investigation

Avoiding Unintended Consequences

- Document performance issues and all disciplinary action, including verbal warnings
  - Including any discussion or debate regarding disciplinary action
  - Complete annual performance evaluations
  - Encourage objective documentation that cannot be disputed

Avoiding Unintended Consequences

- Manage employees even if they make complaints
- Train supervisors
- Consider severance agreements
- Enforce election of remedies

QUESTIONS?

Disclaimer

The information contained in these materials is intended as an informational report on legal developments of general interest. It is not intended to provide a complete analysis or discussion of each subject covered. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of applicable law than can be provided in this format.

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EMPLOYMENT LAW ISSUES – WHAT'S HOT

Florida Association of County Attorneys
2018 Continuing Legal Education Program
June 27-28, 2018 – Orange County

Robert J. Sniffen
FAC General Counsel

"Some like it hot and some sweat when the heat is on.
Some feel the heat and decide that they can't go on.
Some like it hot, but you can't tell how hot 'til you try.
Some like it hot, so let's turn up the heat 'til we fry."

- Robert Palmer

I. State Legislative Issues

A. Passed

HB 105 – substituted with **SB 186** – Signed into Law on April 2, 2018 as the Ch. 2018-126, Laws of Florida, the "Resign to Run Law" - effective upon signing.

Amends §99.012, Fla. Stat., to require that an officer who qualifies for federal public office to resign from their current state office a minimum of 10 days prior to any period of time in which their employment as a federal public officer would run concurrently with their state position.

HB 227 – substituted with **SB 376** – Signed into Law on March 28, 2018 as Ch. 2018-124, Laws of Florida, "Workers' Compensation Benefits for First Responders" – effective October 1, 2018.

Amends §112.1815, Fla. Stat., to require payment of Worker's Compensation Benefits to be paid to first-responders diagnosed with post-traumatic stress disorder when they, in the course of their duties when they see a deceased minor; directly witness the death of a minor; directly witness an injury to a minor who subsequently died before or upon arrival at a hospital emergency department; manually transport an injured minor who subsequently died before or upon arrival at a hospital emergency department; see a decedent whose death involved grievous bodily harm of a nature that shocks the conscience; directly witness a death, including suicide, that involved grievous bodily harm of a nature that shocks the conscience; directly witness a homicide regardless of whether the homicide was criminal or excusable; directly witness an injury, including an attempted suicide, to a person who subsequently died before or upon arrival at a hospital emergency department if the person was injured by grievous bodily harm of a nature that shocks the conscience; participating in the physical treatment of an injury, including an attempted suicide, to a person who

subsequently died before or upon arrival at a hospital emergency department if the person was injured by grievous bodily harm of a nature that shocks the conscience; or manually transport a person who was injured, including by attempted suicide, and subsequently died before or upon arrival at a hospital emergency department if the person was injured by grievous bodily harm of a nature that shocks the conscience. This statute applies to both first responders and volunteer first responders.

SB 648 – substituted with **HB 1437** – signed into law on March 21, 2018 as Ch. 2018-72, Laws of Florida, "Employment Services for Persons with Disabilities" - effective July 1, 2018.

Creates §§413.015 and 413.209, Fla. Stat., to require that a participant in an adult or youth work experience activity administered under either the Blind Services Program or the General Vocational Rehabilitation Programs be covered under Worker's Compensation.

SB 950 – substituted with **HB 651** – signed into law March 22, 2018 as Ch. 2018-57, Laws of Florida, "State Employment" – effective July 1, 2018.

Repeals §110.181, Fla. Stat, and in doing so abolishes the Florida State Employee's Charitable Campaign. Creates §110.182, Fla. Stat., which prohibits the solicitation of state employees for fundraising purposes in work areas, and permits solicitation of fundraising when such communications are approved by the state, non-coercive and voluntary between state employees, or authorized at public events occurring in non-work areas of the state.

HB 495 – signed into law on April 9, 2018 as Ch. 2018-150, Laws of Florida, "K-12 Public Education" – Effective July 1, 2018.

Amends §121.091(13), Fla. Stat., to permit instructional and administrative personnel to extend their period of the Deferred Retirement Option Program (DROP) beyond the 60 months currently permitted by law in order to complete an academic year when the end of their 60 months of DROP would ordinarily require such personnel to terminate their employment prior to the end of the school year. Creates §800.101, Fla. Stat., which makes it a felony for employees, volunteers, or individuals under contract with a school to engage in sexual conduct, a relationship of a romantic nature, or lewd conduct with a student of the school. It is important to note that this felony does not require that the students be under 18 years of age, nor does it

require that any lewd or sexual conduct occur, as it only requires the existence of a relationship of a "romantic" nature. This Bill also establishes various requirements for teaching computer science classes under §1007.2616, Fla. Stat.

B. Failed

Public Employee Union Finances

HB 25 - Would have required all public employee unions to include in annual financial reports the number of employees in the bargaining unit who are eligible for representation and the number of employees who are represented by the organization, specifying the number who pay dues and the number of members who don't. The union's certification would be revoked if it does not submit the information, except for unions that represent police, correctional officers or firefighters.

However, some of the language ended up in the education bill and will apply to teachers' unions (**HB 7055**).

II. Federal Legislative and Regulatory Issues

H.J.Res. 67 - disapproves and nullifies the rule issued by the Department of Labor on August 30, 2016, establishing a "safe harbor" from the Employee Retirement Income Security Act for government-run IRAs managed by states and certain political subdivisions for private sector workers.

Under the final rule, cities and large political subdivisions will not have to comply with the fiduciary oversight and other protections of ERISA that ensure that workers' savings are available to provide a secure retirement. In addition, the rule will result in overlapping and inconsistent requirements for employers operating in multiple jurisdictions, even within a state, disregarding ERISA's statutory preemption of state and local laws affecting employee benefit plans.

Signed by President Trump 4/13/17

Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions

Equal Employment Opportunity Commission

Agency	Agenda Stage of Rulemaking	Title	RIN
EEOC	Proposed Rule Stage	Revision of Federal Sector Regulation on Time Limits for Filing a Civil Action	3046-AA97
EEOC	Proposed Rule Stage	Federal Sector Equal Employment Opportunity Process	3046-AB00
EEOC	Proposed Rule Stage	Procedural Regulations Under Title VII, ADA, and GINA and Procedures--Age Discrimination in Employment Act	3046-AB07
EEOC	Proposed Rule Stage	Enforcement of Nondiscrimination on the Basis of Disability in EEOC Programs/Activities and Accessibility of Electronic and Information Technology	3046-AB08
EEOC	Proposed Rule Stage	Procedures for Previously Exempt State and Local Government Employee Complaints of Employment Discrimination Under Section 304 of the Government Employee Rights Act of 1991	3046-AB09
EEOC	Proposed Rule Stage	Amendments to Regulations Under the Americans With Disabilities Act	3046-AB10
EEOC	Proposed Rule Stage	Amendments to Regulations Under the Genetic Information Nondiscrimination Act of 2008	3046-AB11

Department of Labor

Agency	Agenda Stage of Rulemaking	Title	RIN
DOL/ETA	Proposed Rule Stage	Trade Adjustment Assistance for Workers	1205-AB78
DOL/ETA	Proposed Rule Stage	Drug Testing by States for Purposes of Determining Unemployment Compensation Eligibility	1205-AB81
DOL/ETA	Proposed Rule Stage	Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations	1205-AB85
DOL/ETA	Proposed Rule Stage	Wagner-Peyser Act	1205-AB87
DOL/ETA	Final Rule Stage	Senior Community Service Employment Program (SCSEP); Performance Accountability	1205-AB79
DOL/EBSA	Final Rule Stage	Amendment of Abandoned Plan Program	1210-AB47
DOL/EBSA	Final Rule Stage	Electronic Filing of Apprenticeship & Training Notices, and Top Hat Plan Statements	1210-AB62
DOL/EBSA	Final Rule Stage	Adoption of Amended and Restated Voluntary Fiduciary Correction Program	1210-AB64
DOL/EBSA	Final Rule Stage	Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act	1210-AB83
DOL/EBSA	Final Rule Stage	Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act	1210-AB84
DOL/EBSA	Final Rule Stage	Definition of an 'Employer' Under Section 3(5) of ERISA--Association Health Plans	1210-AB85

DOL/EBSA	Final Rule Stage	Short-Term, Limited Duration Insurance	1210-AB86
DOL/OSHA	Prerule Stage	Communication Tower Safety	1218-AC90
DOL/OSHA	Prerule Stage	Emergency Response and Preparedness	1218-AC91
DOL/OSHA	Prerule Stage	Mechanical Power Presses Update	1218-AC98
DOL/OSHA	Prerule Stage	Powered Industrial Trucks	1218-AC99
DOL/OSHA	Prerule Stage	Lock-Out/Tag-Out Update	1218-AD00
DOL/OSHA	Prerule Stage	Tree Care Standard	1218-AD04
DOL/OSHA	Prerule Stage	Prevention of Workplace Violence in Health Care and Social Assistance	1218-AD08
DOL/OSHA	Prerule Stage	Blood Lead Level for Medical Removal	1218-AD10
DOL/OSHA	Prerule Stage	Occupational Exposure to Crystalline Silica; Revisions to Table 1 in the Standard for Construction	1218-AD18
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	1218-AB76
DOL/OSHA	Proposed Rule Stage	Amendments to the Cranes and Derricks in Construction Standard	1218-AC81
DOL/OSHA	Proposed Rule Stage	Update to the Hazard Communication Standard	1218-AC93
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC96
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD13
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	1218-AD17
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	1218-AC67
DOL/OSHA	Final Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AC94
DOL/OSHA	Final Rule Stage	Rules of Agency Practice and Procedure Concerning OSHA Access to Employee Medical Records	1218-AC95
DOL/OSHA	Final Rule Stage	Technical Corrections to 36 OSHA Standards and Regulations	1218-AD12
DOL/MSHA	Prerule Stage	Exposure of Underground Miners to Diesel Exhaust	1219-AB86
DOL/MSHA	Prerule Stage	Regulatory Reform of Existing Standards and Regulations	1219-AB88
DOL/MSHA	Prerule Stage	Request for Information; Alternatives to Petitions for Modification	1219-AB89
DOL/MSHA	Prerule Stage	Retrospective Study of Respirable Coal Mine Dust Rule	1219-AB90
DOL/MSHA	Prerule Stage	Technologies to Provide Safeguards for Power Haulage Equipment	1219-

		for Surface Mines	AB91
DOL/MSHA	Final Rule Stage	Refuge Alternatives for Underground Coal Mines; Limited Reopening of the Record	1219-AB84
DOL/WHD	Proposed Rule Stage	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees	1235-AA20
DOL/WHD	Proposed Rule Stage	Tip Regulations Under the Fair Labor Standards Act (FLSA)	1235-AA21
DOL/WHD	Proposed Rule Stage	Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA	1235-AA22
DOL/WHD	Proposed Rule Stage	Regular Rate Under the Fair Labor Standards Act	1235-AA24
DOL/OWCP	Final Rule Stage	Claims for Compensation Under the Energy Employees Occupational Illness Compensation Program Act of 2000, as Amended	1240-AA08
DOL/OWCP	Final Rule Stage	Black Lung Benefits Act: Medical Benefit Payments	1240-AA11
DOL/OLMS	Proposed Rule Stage	Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies	1245-AA08
DOL/OLMS	Proposed Rule Stage	Trust Annual Reports	1245-AA09
DOL/OLMS	Final Rule Stage	Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act	1245-AA07
DOL/OFCCP	Proposed Rule Stage	Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE and Certain Other Healthcare Providers	1250-AA08
DOL/OASAM	Proposed Rule Stage	Rescission of Rule Implementing the Nondiscrimination and Equal Opportunity Requirements of the Job Training Partnership Act of 1982	1291-AA39

EEOC Initiatives and Trends in EEO Litigation

1. Harassment
2. EEOC Select Task Force on the Study of Harassment in the Workplace **https://www.eeoc.gov/eeoc/task_force/harassment/**
3. Pattern or practice litigation
4. Continued LGTBQ Litigation
5. ADA and Retaliation Cases
6. Whistleblower Litigation
7. Miscellaneous Litigation

Giving Meaning to Code Enforcement:

a comparative approach

Florida Association of County Attorneys, June 27, 2018
Bob Shillinger, Monroe County Attorney
Steve Williams, Assistant County Attorney

Enforcement Options

- Administrative – Chapter 162, Part I
- Civil Citation – Chapter 162, Part II
- Civil Actions –
  - Injunctive Relief
  - Enforcement Actions
  - Collections
- Quasi-Criminal – F.S. 125.69

Enforcement Options

Code Enforcement Comparison Chart

Forum Choice	Administrative Chapter 162, Part I	Civil Citation Chapter 162, Part II	Civil Enforcement Action Injunctive Relief	Quasi Criminal F.S. 125.69(1)
Forum	Self-designed process	County Court	Circuit Court	County Court
Finder of Fact/Presider	Board or Hearing Officer	County Court Judge	Circuit Judge	Jury & County Judge
Initiating party	Code Enforcement Officer	Code Enforcement Officer	County Attorney & witnesses	Code inspector, LEO, SAO, City Attorney, but not County Attorney
Defendant/Respondent	Property owner and/or violator	Violator	Property owner and/or violator	Violator
Indigent counsel	No	No	No	Yes
Mandatory cure opportunity	Yes unless repeat, serious threat to health, safety, welfare, or irreparable	Yes unless repeat, serious threat to health, safety, welfare, or irreparable	No	No for LEO's Yes for code inspectors, unless repeat, serious threat to health, safety, welfare, or irreparable
Maximum penalty	$250/$1k per day - fine $500/$5k per day - repeat $5k/$15k – Irreversible	$500 – fine	Equitable relief & contempt	60 days jail, $500 fine ($2000 to enforce federal mandated program)
Standard of Proof	Preponderance	Preponderance	Preponderance	Beyond Reasonable Doubt
Discovery	Only if your rules permit	No discovery	Full discovery	Limited discovery
Rules of Evidence	No, but follow due process	Yes	Yes	Yes
Statute of Limitations	None	4 years	4 years	1 year
Enforcement mechanism	Lien foreclosure if eligible Money Judgment for fines	Contempt for non-payment	Contempt – 6 months in jail w/o jury; compliance	Jail
Appellate Forum	Circuit Court App. Div.	Circuit Court App. Div.	District Court of Appeal	Circuit Court App. Div.
Pros	Efficient, expeditious, dictate process	Simplest process Existing process	Presumptions favor govt. Greatest potential penalty	Severe sanction Works for "assetless"
Cons	Limited enforcement vs. homesteaded owners and non-property owners	Limited fines, limited teeth	Full scale civil litigation	7 citizens miss work Don't control process highest burden of proof Pay SAO & PD costs Pay incarceration costs

Venue Shopping

- Administrative – your own process
  - Code Enforcement Board
  - Special Magistrate
- Civil Citation – County Court
- Civil Actions – Circuit Court
- Quasi-Criminal – County Court

Code Enforcement Board

- 7 *Volunteer* residents of jurisdiction
  - 5 or 7 for jurisdictions of 5,000 or less
- Architect, Business, Engineer, General Contractor, Subcontractor, and Realtor (whenever possible)
- Office for Dual Office Holder purposes
- Financial Disclosure Form 1 filers
- Quorum
- Majority vote
- Separate legal adviser and prosecutor

Code Enforcement Special Magistrate

- Same Powers as Board
- Usually lawyer but not required
- Can be paid
- Need not be a resident of the jurisdiction
- Financial Disclosure Filer ???
- Office Holder for Dual Office purposes

Hybrid – Board & Special Magistrate

- Assign cases based upon type or severity of violation
- Violator choses between Board or Special Magistrate
- Board refers certain cases to Special Magistrate
  - Adopt rules clearly setting forth procedures

Consalo, Karen Z., Decision by Judge or Jury Alternatives to Traditional Code Enforcement Boards, 89-NOV Fla. B.J. 64 (November 2015). (In materials)

Administrative: Pros

- Chapter 162 & Due Process provides a framework
- Local government gets to fill in the gaps:
  - Customize its own system
  - Determine how much in staff resources to invest
  - Decide between Board, Special Magistrate, or hybrid
  - Write your own procedural rules (sample in materials)
  - Schedule your own hearings: when, where, how often

Administrative: Pros

- Cost efficient
- Fines escalate
  - Repeat offenders
  - Irreparable or Irreversible
  - Super Fines
- Flexible pleading**
- Formal rule of evidence not required
- Statute of Limitations – none unless jurisdiction adopts one
- Property owner & non-owner violator can be cited

Limits of Enforcement through Administrative Process

- No contempt power to enforce orders or compel attendance
- Can't foreclose liens against homesteaded property
- "Asset-less" have no incentive to comply
- Tenant violators can be a complication
- Bankruptcy can wipe out fines

More Limits of Administrative Option

- Cost & effort to establish system & staff
- Trouble finding Board members
- Cost of Special Magistrate(s) & possible conflicts
- Lack of respect from Article V Appellate Judges
  - Single judge appellate panel in smaller circuits
  - Attempts to re-weigh evidence

Civil Citation Process

Pros

- Courts Established
- Least Expensive
- Power of Contempt
- Limited if any discovery

Cons

- More precise pleading
- Fines capped at $500
- No enhanced penalties for repeat, irreparable, or irreversible violations
- Loss of control over docket and schedule

Civil Litigation

Enforcement

- Injunctive Relief
  - Clear Legal Right
  - Inadequate remedy at law (presumed)
  - Irreparable Injury (presumed)
- Monetary fines

Collections

- Liens foreclosure
- Action for money judgment on code fines

Civil Litigation

Pros

- System Established
- Strong presumptions
- Subpoena Powers
- Attorney's Fees (for collections)
- Contempt Power
- Discovery opportunities

Cons

- Expensive
- Time Consuming
- Discovery costs
- Attorney resources
- Limits on Foreclosures

Candidates for Civil Injunction

- Homesteaded properties with serious threat to health, safety & welfare of community
- Repeat violators to whom enhanced fines are simply the cost of doing business (e.g. vacation rentals)
- Cases too complex to prosecute through other means
- Cases which will be greatly improved via discovery
- Properties that are part of a bankruptcy estate

Quasi-Criminal Prosecution under F.S. 125.69(1)

Violations of county ordinances shall be prosecuted in the same manner as misdemeanors are prosecuted.

Such violations shall be prosecuted in the name of the state in a court having jurisdiction of misdemeanors by the prosecuting attorney thereof and upon conviction shall be punished by a fine not to exceed $500 or by imprisonment in the county jail not to exceed 60 days or by both such fine and imprisonment.

Why Quasi-Criminal Ordinance Violation?

F.S. 775.08 (4) "The term 'crime' shall mean a felony or misdemeanor."

F.S. 775.08(2) . . . "The term 'misdemeanor' shall not mean a conviction for . . . any municipal or county ordinance."

F.S. 775.08(3) . . . "The term 'noncriminal violation' shall not mean any conviction for any violation of any municipal or county ordinance."

So what term describes an ordinance violation with an incarcerative penalty?????

Quasi-Criminal

Pros	Cons
• SAO prosecutes**	• SAO prosecutes**
• System established	• Jury (7 citizens miss work)
• Jail time	• Reasonable doubt
• Limited discovery	• SAO & PD costs
• Attention getter for “asset-less” & “asset-rich”	• Incarceration costs
	• No control
	• Low priority

SAO Prosecutes**

- Counties lack authority to prosecute under F.S. 125.69
- The County Prosecutor we never knew
  - § 80, ch. 2003-402 amended F.S. 125.69 to create
  - § 52, ch. 2004-265 struck language prior to 7/1/04
- For SAO to prosecute, must either have
  - a state charge with local ordinance violation
  - a contract between SAO & County to cover costs

Municipal Prosecutor

Art. V, Section 17

Article V, Section 20(c)(12)

F.S. 34.13(5)

Fla. R.Jud. Admin 2.265

Alternative Method - Public Shaming

this month as a pilot program at Sugarloaf School will be launched in all Monroe County schools this fall, school district officials announced on Tuesday. A news conference to detail the implementation of School Text Tips at all schools will take place 10 a.m. Wednesday in the board room of the school

The news conference will be broadcast online on Channel 78 and via the Monroe County School District's Facebook page. Press participants, parents, students and other stakeholders will be able to submit questions about the program through the district's Facebook Live page to receive responses in real

Verne, whose sons attend Sugarloaf School and Key West High School, started developing School Text Tips six years ago, following the shooting at Sandy Hook Elementary School. The program was ready to launch just before the Valentine's Day shooting in Parkland, Florida.

Verne wanted students to

school officials when they saw or heard students discussing things like suicide, drugs, weapons, bullying or other concerning behaviors.

"The students are our eyes and ears on the ground," Verne said. "They're the ones who know what's happening, and they're the ones we need to be hearing things from."

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A RAPID RESPONSE

ROB O'NEAL/The Citizen

The Rip-Off Rapid Response Team pickets Oro Gold Cosmetics to get a full refund for a man who was charged nearly $10,000 for products from the store, located at 518 Duval St.

Rip-Off team helps man get $10K refund

BY SCOTT UNGER
Key West Citizen

A local consumer advocacy group picketing in front of a Duval Street cosmetic store Monday led to the establishment refunding nearly $10,000 to a Vermont man.

Members of the Rip-Off Rapid Response Team stood in the pouring rain in front of Oro Gold at 518 Duval St. for an hour and a half Monday before negotiating a refund with store owners, according to Rip-Off team member Bruce Mitchell.

A 54-year-old Vermont man diagnosed with bipolar disorder and delusions was sold two packages of cosmetics from the store over a half-hour period totaling $9,752, even though he doesn't use cosmetics, according to friend Jen Bashore.

Although the stores are required to have a 30-day refund policy, the man's receipt stated there were no refunds, only exchanges, within 30 days.

The victim is a frequent visitor to Key West but displayed troubling signs this trip, according to Bashore. "He was totally taken advantage of."

The Rip Off team has been battling the cosmetic stores for several years, working to obtain refunds

See **REFUND**, Page 8A

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BY ALEX V
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Monroe County Experience

- Civil Citations – rarely used
- Injunctive Relief - powerful tool in right circumstances
  - Serious threats to life safety
  - Private right of action in certain ordinances (vacation rentals)
- Quasi-Criminal
  - Certain types of ordinances
    - Open Container
    - Vacation Rental – Repeat violations
  - SAO turnover – incumbent lost 2000, 2008, 2012, 2016
  - Special Assistant State Attorneys

Monroe County Experience
Code Compliance

- DOAH ALJ as Special Magistrate
  - Abandoned board in 1990's due to difficulties
  - Abandoned using local lawyers in 2007 due to conflicts

- Contract rate - $151 / hour
- Alternates in event of recusal (1 since 2007)
- Video conferencing (fee) but no travel costs
- BOCC delegated power for fine mitigations to ALJ

Monroe County Experience
Code Fine Collection

- Pre-2014 approach to collection of code fines led to:
  - Festering violations
    - No follow up by code compliance post imposition of lien
    - Property owners who thought they were compliant
  - Fines accumulating to values in excess of property values

- In 2014, BOCC adopted a resolution setting strict time lines and responsibilities process *after lien imposed*
  - Improved compliance
  - Dramatic increases in collections
  - Took off when Steve Williams took over Code

Code Compliance

High Weeds

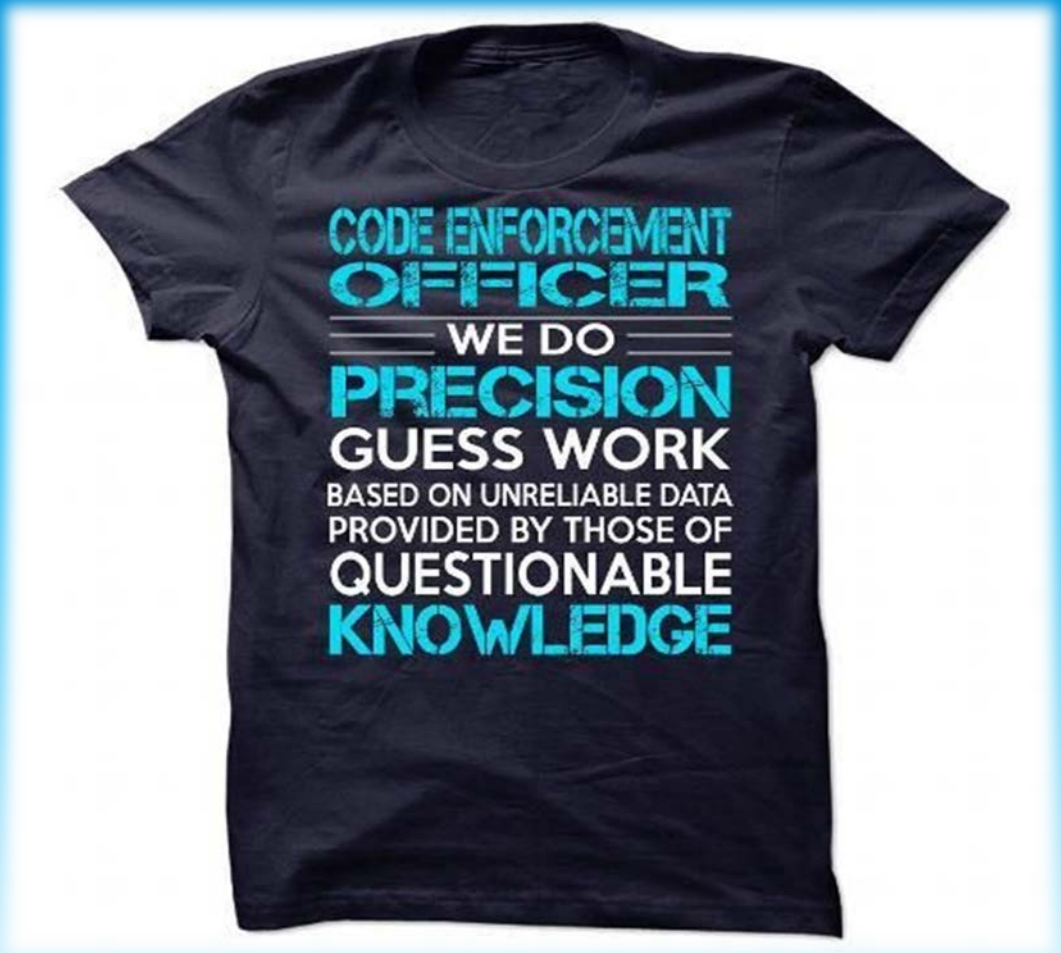
Single Wide

Vacation Rental Home

Code Enforcement House

Code Enforcement Officer needs a gun

Code Enforcement T-Shirt



Handrail Building Code Violation

Uneven Steps Building Code Violation

Electric Hazard next to sidewalk

Sewer Connection

MONROE COUNTY, FLORIDA

RESOLUTION NO.0572014

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY, FLORIDA, ADOPTING THE PROCEDURES TO BE USED AFTER A FINAL ORDER HAS BEEN RENDERED BY THE CODE COMPLIANCE SPECIAL MAGISTRATE TO INITIATE INJUNCTIVE RELIEF FOR NON-COMPLIANT PROPERTIES, FORECLOSURE AND/OR MONEY JUDGMENT ACTIONS FOR COLLECTION OF UNPAID FINES AND/OR COSTS FROM A PROPERTY OWNER; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, Section 162.09(1), Florida Statutes and Monroe County Code Section 8-31(a) give the Special Magistrate appointed to hear Code Compliance cases the authority to impose fines and costs including the cost of repairs if the County is forced to make repairs, after a finding that the property owner has violated the Monroe County Code(s); and

WHEREAS, pursuant to Section 162.09(3), Florida Statutes and Monroe County Code 8-31(e), a certified copy of an Order imposing a fine or a fine plus repair costs may be recorded in the public records and thereafter constitute a lien against the land on which the violation exists and upon any other real or personal property owned by the violator; and

WHEREAS, a certified copy of the Order imposing the fines and costs becomes a lien on all real and personal property owned by the violator once recorded with the County Clerk; and

WHEREAS, the County has the authority to initiate litigation to enforce its codes and recorded liens; and

WHEREAS, the initiation of litigation may be the only incentive for some property owners to gain compliance; and

WHEREAS, the Board of County Commissioners finds it in the public's interest to have a formalized written procedure to be used after a Final Order has been rendered by the Code Compliance Special Magistrate to initiate injunctive relief on non-compliant properties, foreclosure and/or money judgment actions for collection of unpaid fines and/or costs from a property owner;

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MONROE COUNTY:

Section 1: The County's formal procedure is hereby adopted as set forth in **Attachment A: PROCEDURES TO BE USED AFTER A FINAL ORDER HAS BEEN RENDERED BY THE CODE COMPLIANCE SPECIAL MAGISTRATE TO INITIATE INJUNCTIVE RELIEF FOR NON-COMPLIANT PROPERTIES, FORECLOSURE AND/OR MONEY JUDGMENT ACTIONS FOR COLLECTION OF UNPAID FINES AND/OR COSTS FROM A PROPERTY OWNER.**

Section 2: This resolution and the incorporated policies shall become effective upon adoption by the County Commission.

PASSED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS of Monroe County, Florida, at a regular meeting of said board held on the 19th of March, 2014.

Mayor Sylvia Murphy	Yes
Mayor *pro tem* Danny L. Kolhage	Yes
Commissioner Heather Carruthers	Yes
Commissioner George Neugent	Yes
Commissioner David Rice	Yes

BOARD OF COUNTY COMMISSIONERS
OF MONROE COUNTY, FLORIDA

BY: Sylvia J. Murphy
Mayor Sylvia Murphy

(SEAL)
ATTEST: AMY HEAVILIN, CLERK

Deputy Clerk

MONROE COUNTY ATTORNEY
APPROVED AS TO FORM:
LISA GRANGER
ASSISTANT COUNTY ATTORNEY
Date 3/3/14

FILED FOR RECORD
2014 APR -3 PM 1:45
MONROE

ATTACHMENT A

PROCEDURES TO BE USED AFTER A FINAL ORDER HAS BEEN RENDERED BY THE CODE COMPLIANCE SPECIAL MAGISTRATE TO INITIATE INJUNCTIVE RELIEF FOR NON-COMPLIANT PROPERTIES, FORECLOSURE AND/OR MONEY JUDGMENT ACTIONS FOR COLLECTION OF UNPAID FINES AND/OR COSTS FROM A PROPERTY OWNER

1. Special Magistrate (SM) enters a Final Order imposing a compliance date, fines and/or costs after a finding of violation of Monroe County Code(s) by property owner (violator) or approving a Stipulated Agreement with an agreed upon compliance date and fine amounts. The Final Order of SM providing the compliance date, and imposing fines and/or costs is provided to the property owner as soon as practicable. Referrals, if not made previously, are made to other agencies in appropriate circumstances.

2. The Final Order of the SM is recorded by Code Compliance (CC) as a lien by Code Compliance within 14 days after the compliance date for those cases that have not achieved compliance.

3. The Final Order of the SM is recorded as a lien by CC within 45 days after the compliance date for those cases that have achieved compliance by the compliance date but have outstanding costs in excess of $200.

4. If compliance is not achieved within 75 days of the recording of the lien, then a re-inspection of the property is completed by the Code Inspector assigned to the case. If the property is still not in compliance then a demand letter including the current amount of fines and/or costs is sent to the property owner.

5. If compliance is not achieved within 90 days of the recording of the lien and/or the lien is not satisfied, then CC will research the subject property to determine:

   i. if the subject property is homesteaded;
   ii. if the subject property is the only property owned by property owner/violator;
   iii. what efforts, if any, the property owner has made to achieve compliance;
   iv. the amount of the lien accrued to date; and
   v. any other relevant factors, including but not limited to researching the status of the property owner, i.e. any Lis Pendens filed against the property or property owner, any pending or closed foreclosure actions, any open, pending or discharged Bankruptcy petitions.

6. CC staff shall provide a written memo or email to the County Attorney's Office (CAY) with the results of the research outlined and requested further action.

7. The CAY will review the information provided by CC staff.

8. The CAY will move the SM per F.S. 162.09 for an Order authorizing foreclosure or a money judgment action; and,

i. The Code Compliance Liaison (Liaison) will schedule the motion for the next available SM hearing for a Motion for approval to proceed with a foreclosure and/or money judgment action;
ii. The Liaison will mail a Notice of Hearing and Notice of Motion prepared by the Liaison and signed by the CAY to the property owner by certified mail noticing the owner of the date, time, place and the substance (collection action, foreclosure and/or money judgment and/or writ of attachment) of the motion;
iii. The Liaison will email/calendar a re-inspection request to the assigned Inspector to conduct inspection prior to the next available SM hearing;
iv. The Motion hearing is heard by SM on the specified date;
v. If SM finds foreclosure or money judgment is appropriate, the Liaison will notice the property owner of the SM's ruling and email/calendar a re-inspection request to the assigned Inspector to conduct an inspection within 30 days of the SM ruling;
vi. CAY will seek permission from the Board of County Commissioners to file for foreclosure or money judgment in court;
vii. The assigned Code Inspector will continue to monitor the property for compliance through re-inspections every 90 days and attempts to notify the owner by a quick email letter, telephone call or demand letter every 90 days to inform them that the property is not in compliance and fines are running. The assigned Code Inspector will provide written updates to the CAY every 90 days.

9. Subsequent to the SM's ruling on the Motion, the CAY will place an item on the Commission's agenda seeking the Board's direction and authorization on further enforcement and collection efforts. Potential options for litigation include seeking injunctive relief, a money judgment for the unpaid fines, foreclosure, or other relief. Potential non-litigation options include referral to another agency, allowing liens to accrue, or other relief.

10. If the recommended legal action is referral to another agency, release of lien, or allowing liens to accrue, CAY will send a written memo or email to the Director of Code Compliance outlining recommendation.

11. Once authority is granted by SM and/ or Board of County Commissioners, CC will order a title search on non-homesteaded properties, and the assigned Code Inspector will conduct a re-inspection after receipt of the title search. Litigation will commence after the title search is completed and a current re-inspection is completed. The assigned Code Inspector will continue to monitor the property for compliance through re-inspections every 90 days and attempts to contact the property owner by a quick email letter, telephone call or demand letter every 90 days that the property is not in compliance and fines are running. The assigned Inspector will provide written updates to the CAY every 90 days.

12. If the Board decides not to authorize injunction or enforcement litigation, a decision from the Board could include direction to:

    i. Allow lien to remain filed and accrue interest until sale or refinancing; or
    ii. Release the lien; or
    iii. Request CC staff to provide a progress report on compliance efforts annually at the March BOCC meeting.

Exception –If a violation poses a serious threat to the public health, safety & welfare then immediate permission to file an action for an inspection warrant, injunction and/or demolition may be sought with BOCC direction.

1) Final Order

   a) Non-compliant: Code files lien within 14 days of compliance date;

   b) Compliant: Code files lien within 45 days of compliance date if compliant, but have unpaid costs of $200.00;

2) Liened Property – Code Staff

   a) Non-compliant: Within 75 days of lien recordation, site is re-inspected and demand letter sent, including current fines and costs;

   b) 90 days Non-Compliant: If still non-compliant, code will verify:

      i. Homestead status;

      ii. Only property owned by violator?

      iii. Efforts to achieve compliance?

      iv. Amount of fines accrued to date?

      v. All else (including Lis Pendens, pending bank actions, bankruptcy);

   c) Memo to County Attorney's Office outlining above research;

3) Collections Hearing

a) County will motion the Special Magistrate for an order authorizing foreclosure or money judgment based upon information from 2)b) i.)—v.);

i. Code Inspector to re-inspect premises within 30 days of collections hearing;

b) County Attorney, upon finding of appropriateness by the Special Magistrate, then seeks permission from the Board of County Commissioners to file for foreclosure or money judgment in Circuit Court. The County Commissioners direct litigation seeking injunctive relief, money judgment for unpaid fines, or foreclosure. Litigation options include referral to another agency, allowing fines to accrue, or other relief;

c) Code Inspector continues to monitor property for compliance every 90 days;

4) County Commission Hearing

a) County Commission provides direction for litigation or non-litigation;

b) If litigation is directed, a title search is to be performed and a re-inspection must be completed;

c) If litigation is not filed:

i. The lien is allowed to remain until resale or refinancing; or,

ii. Release the lien; or,

iii. Request periodic staff updates;

5) Exception

a) If a violation is a public health, safety and welfare concern, then immediate permission to file an action for an inspection warrant, injunction and/or demolition may be sought, with County Commission approval;

Questions?

Williams-Steve@monroecounty-fl.gov

Shillinger-Bob@monroecounty-fl.gov

(305) 292-3470

PILOT Agreements Have Lift Off

Florida Association of County Attorneys (FACA) Annual CLE
June 27, 2018

Bryant Miller Olive

OUR NAME IS EASY TO REMEMBER. OUR WORK IS HARD TO FORGET.

PILOT AGREEMENTS

- PILOT = Payment in lieu of taxes
- Voluntary Agreements
- Validity in Florida - *City of Largo v. AHF-Bay Fund LLC*, 215 So.3d 10 (Fla. 2017).

What happened?

Financing the Project

Brittany Bay Apartments Conversion Project

PILOT Agreement

- Payment in lieu of taxes = the City would have otherwise received if the property remained taxable
- Annual payment based on City millage rate x value as determined by the property appraiser
- Covenant running with the land
- Binding unless property ceases to be: (1) operated as affordable housing, or (2) owned by non-profit
- No payments to other taxing entities

What REALLY happened?

The War Story

- Trial Court: Motion for Summary Judgment
- District Court of Appeal: Reversed (with a silver lining)
- Florida Supreme Court: Hurricane Hermine

KEY TAKEAWAYS

- Ad valorem tax exemptions are not sacred; waivable
- Payments under a PILOT can equal tax that would otherwise be due-not a tax
- PILOTs entered into in proprietary capacity– not governmental

QUESTIONS?

The Impacts of Federal Tax Reform on Local Government Borrowing

Mark T. Mustian
Nabors, Giblin & Nickerson, P.A.

1. Different types of bonds

    - revenue
    - general obligation

2. Who purchases bonds?

    - general public, via underwriting
    - financial institutions in private placements

3. What are private activity bonds?

    - Examples: airports, ports, hospitals, affordable housing

4. What did federal tax reform do?

    - What did it not do?
        - eliminate private activity bonds

    - What it did do:
        - prohibit advance refundings
        - what is an advance refunding?

    - Lower corporate tax rates
        - tax-exempt bonds less attractive for banks
        - predicted exodus of banks from market

5. What does the future hold?

    - in this climate, who knows?
    - as long as tax revenue is needed, tax-exempt bonds will be a potential bargaining chip

"(I) by substituting 'more than 50 percent' for 'at least 80 percent' each place it appears, and

"(II) without regard to paragraphs (2) and (3) of section 1504(b).

"(ii) CONTROL OF NON-CORPORATE ENTITIES.—A partnership or any other entity (other than a corporation) shall be treated as a member of an expanded affiliated group if such entity is controlled (within the meaning of section 954(d)(3)) by members of such group (including any entity treated as a member of such group by reason of this clause).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13532. REPEAL OF ADVANCE REFUNDING BONDS.

(a) IN GENERAL.—Paragraph (1) of section 149(d) is amended by striking "as part of an issue described in paragraph (2), (3), or (4)." and inserting "to advance refund another bond.".

(b) CONFORMING AMENDMENTS.—

(1) Section 149(d) is amended by striking paragraphs (2), (3), (4), and (6) and by redesignating paragraphs (5) and (7) as paragraphs (2) and (3).

(2) Section 148(f)(4)(C) is amended by striking clause (xiv) and by redesignating clauses (xv) to (xvii) as clauses (xiv) to (xvi).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to advance refunding bonds issued after December 31, 2017.

Subpart D—S Corporations

SEC. 13541. EXPANSION OF QUALIFYING BENEFICIARIES OF AN ELECTING SMALL BUSINESS TRUST.

(a) NO LOOK-THROUGH FOR ELIGIBILITY PURPOSES.—Section 1361(c)(2)(B)(v) is amended by adding at the end the following new sentence: "This clause shall not apply for purposes of subsection (b)(1)(C).".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on January 1, 2018.

SEC. 13542. CHARITABLE CONTRIBUTION DEDUCTION FOR ELECTING SMALL BUSINESS TRUSTS.

(a) IN GENERAL.—Section 641(c)(2) is amended by inserting after subparagraph (D) the following new subparagraph:

"(E)(i) Section 642(c) shall not apply.

"(ii) For purposes of section 170(b)(1)(G), adjusted gross income shall be computed in the same manner as in the case of an individual, except that the deductions for costs which are paid or incurred in connection with the administration of the trust and which would not have been incurred if the property were not held in such trust shall be treated as allowable in arriving at adjusted gross income.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2017.

are substituted under subparagraph (A) and adjusted under this subparagraph.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

Subtitle C—Business-related Provisions

PART I—CORPORATE PROVISIONS

SEC. 13001. 21-PERCENT CORPORATE TAX RATE.

(a) IN GENERAL.—Subsection (b) of section 11 is amended to read as follows:

"(b) AMOUNT OF TAX.—The amount of the tax imposed by subsection (a) shall be 21 percent of taxable income.".

(b) CONFORMING AMENDMENTS.—

(1) The following sections are each amended by striking "section 11(b)(1)" and inserting "section 11(b)":

(A) Section 280C(c)(3)(B)(ii)(II).

(B) Paragraphs (2)(B) and (6)(A)(ii) of section 860E(e).

(C) Section 7874(e)(1)(B).

(2)(A) Part I of subchapter P of chapter 1 is amended by striking section 1201 (and by striking the item relating to such section in the table of sections for such part).

(B) Section 12 is amended by striking paragraphs (4) and (6), and by redesignating paragraph (5) as paragraph (4).

(C) Section 453A(c)(3) is amended by striking "or 1201 (whichever is appropriate)".

(D) Section 527(b) is amended—

(i) by striking paragraph (2), and

(ii) by striking all that precedes "is hereby imposed" and inserting:

"(b) TAX IMPOSED.—A tax".

(E) Sections 594(a) is amended by striking "taxes imposed by section 11 or 1201(a)" and inserting "tax imposed by section 11".

(F) Section 691(c)(4) is amended by striking "1201,".

(G) Section 801(a) is amended—

(i) by striking paragraph (2), and

(ii) by striking all that precedes "is hereby imposed" and inserting:

"(a) TAX IMPOSED.—A tax".

(H) Section 831(e) is amended by striking paragraph (1) and by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(I) Sections 832(c)(5) and 834(b)(1)(D) are each amended by striking "sec. 1201 and following,".

(J) Section 852(b)(3)(A) is amended by striking "section 1201(a)" and inserting "section 11(b)".

(K) Section 857(b)(3) is amended—

(i) by striking subparagraph (A) and redesignating subparagraphs (B) through (F) as subparagraphs (A) through (E), respectively,

(ii) in subparagraph (C), as so redesignated—

(I) by striking "subparagraph (A)(ii)" in clause (i) thereof and inserting "paragraph (1)",

THE BOND BUYER

Vol. 390 No. 34908 N.Y., N.Y. | THE DAILY NEWSPAPER OF PUBLIC FINANCE | Thursday, May 10, 2018

THURSDAY

www.bondbuyer.com

WEB EXCLUSIVES

STRONG CASH RESERVES COMBINED with support from the state and federal government should help Hawaii and its counties financially weather damage caused by a spring spate of natural disasters.

TERRY STONE OF HANOVER COUNTY Public Schools in Virginia is president-elect of the Government Finance Officers Association while Steven Gibson of Rock Hill, S.C., is president.

SEAN CRAWFORD WILL BEGIN MONDAY as chief investment officer of the $34 billion Connecticut Retirement Plans and Trust Funds, state Treasurer Denise Nappier announced.

AFTER WINNING STRONG VOTER support for six bond propositions totaling $400 million, Fort Worth, Texas, is mapping out its issuance plans over the next five years.

SCHOOL BONDS WERE DECIDED IN Michigan, Indiana and Ohio on Tuesday with favorable results for the biggest three proposals.

THE NEW YORK CITY COUNCIL highlighted five areas of concern in its preliminary response to Mayor Bill de Blasio's $45.9 billion capital budget for Fiscal 2019-2022 and accompanying $79.6 billion capital commitment plan for Fiscal 2018-2022.

Gun Policy An Issue In Louisana

By Shelly Sigo

A new solicitation procedure in Louisiana that puts the gun-control policies of bond underwriting firms under the microscope could mean higher borrowing costs for the state as it prepares to sell Garvees for the first time.

The new process was sparked by lending restrictions imposed by Citi and Bank of America Merrill Lynch on some of their clients in the wake of the Feb. 14 gun massacre of 14 students and three adults at Marjory Stoneman Douglas High School in Parkland, Florida.

The banks' policies have angered Second Amendment supporters, including U.S. Sen. John Kennedy, R-La.

Kennedy wrote to state Treasurer John Schroder before the April 26 State Bond Commission meeting, urging Schroder to determine if Citi and BAML have business dealings with the commission or the state.

"There is no reason for these banks to profit from taxpayer-funded contracts while excluding Louisiana businesses from their banking services," said Kennedy, who was the state treasurer for 17 years before taking the Senate seat in 2017.

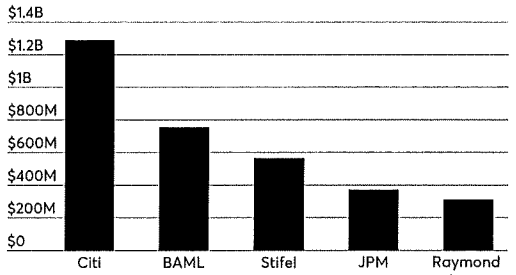
Kennedy's request led the Bond Commission to approve a new solicitation procedure for the upcoming sale of up to $650 million of grant anticipation revenue vehicle bonds to finance four major transportation projects in the cash-strapped state.

Underwriters interested in work-

*Turn to **Gun Control** page 4*

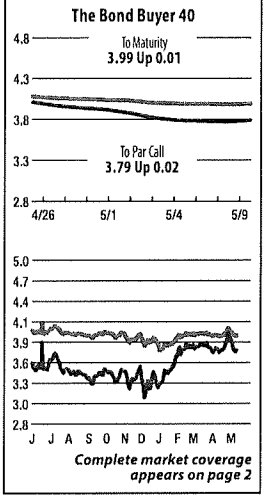
Arms race

2017 top senior manager underwriters on Louisiana state and local bond deals



Source: Thomson Reuters

WEDNESDAY'S YIELDS



Complete market coverage appears on page 2

Municipal Market is Recovering From 1st-Qtr Drop in Issuance

By Brian Tumulty

ST. LOUIS – The municipal bond market is adjusting and surviving the negative aspects of tax reform, panelists said Tuesday at the annual meeting of the Government Finance Officers Association.

April was a "pretty good" month for the municipal bond market following the 30% drop in first quarter issuance, said George Friedlander, managing partner at Court Street Group Research.

April issuance was down only about 4%, he said during a discussion on the impact of recent legislative and regulatory changes.

"There hasn't been the disruption in the market we were concerned about partly because total issuance is down and partly because we are getting some support from retail and some support from foreign investors," Friedlander said.

The drop in issuance at the beginning of the year was expected by many muni market participants because of the year-end rush to complete deals before tax reform was enacted.

The Tax Cuts and Jobs Act prohibited advance refundings after Dec. 31 and also threatened the continuation of tax-exempt

*Turn to **President** page 3*

SEC Hits Texas MA in Muni Case

By Kyle Glazier

WASHINGTON -- Mario Hinojosa and his muni advisory firm Barcelona Strategies have agreed to pay nearly $600,000 in disgorgement of ill-gotten gains and civil penalties to settle Securities and Exchange Commission charges of defrauding a south Texas school district and violating its fiduciary duty.

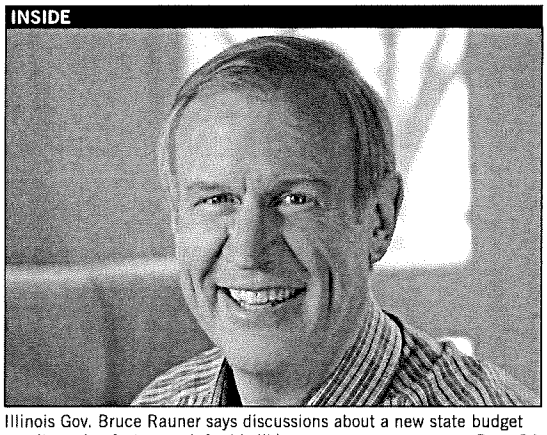
Hinojosa, 57, also agreed to be barred from the industry. He and the firm neither admitted nor denied the SEC's findings.

The SEC announced Wednesday that Barcelona and Hinojosa had agreed to settle charges that the Edinburg, Texas-based firm violated its fiduciary duty by lying to the La Joya Independent School District in connection with three bond offerings between January 2013 and December 2014.

The SEC charged that Barcelona broke the federal securities laws and the Municipal Securities Rulemaking Board's fair-dealing rule because it made false statements to win the school district's business and failed to disclose a conflict of interest.

*Turn to **MA** page 3*

INSIDE



Illinois Gov. Bruce Rauner says discussions about a new state budget aren't moving fast enough for his liking. Page 24

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MA Charged With Violating Fiduciary Duty

Continued from page 1

Under federal law already in force since the Dodd-Frank Act's passage in 2010, municipal advisors have had a fiduciary duty to put their clients' interests ahead of their own. Market observers have said since then that the SEC would likely use the fiduciary duty to levy charges, and it has done so repeatedly since it first charged a Kansas-based firm in March 2016.

"Municipal advisors owe a fiduciary duty to their municipal clients, who rely on advisors to make important financial decisions," said Shamoil T. Shipchandler, director of the SEC's Fort Worth Regional Office. "Undisclosed conflicts of interest can lead to significant investment losses, and prevent municipal entities from making informed decisions in their selection of municipal advisors. As described in today's order, Barcelona fell well short of its obligations to this school district client."

According to the SEC, Hinojosa, the sole employee and owner of Barcelona, began his business in June 2012 at the suggestion of an attorney, Sergio Munoz, Jr., for whom Hinojosa had been performing paralegal and administrative services since 2009.

Munoz Jr.'s firm, Munoz & Frankel, regularly worked as bond counsel including to the La Joya Independent School District (LJISD). Hinojosa continued working for Munoz & Frankel and Barcelona was sharing office space with the law firm, the SEC found. Munoz & Frankel also shared office space with another firm, Munoz & Associates, which was also run by Munoz Jr.

Hinojosa was an employee at Munoz & Frankel from 2009-2014 and at Munoz & Associates from 2012 until the present, the SEC said.

The commission alleged that despite having no advisory experience, Hinojosa produced and circulated to prospective municipal clients a misleading brochure that claimed he had four years of muni finance experience and that the "professionals" at Barcelona had participated in several muni offerings. The brochure also listed Hinojosa's home address as Barcelona's office address instead of using its actual location—the office it shared with Munoz & Frankel as well as Munoz & Associates.

> "Undisclosed conflicts of interest can lead to significant investment losses, and prevent municipal entities from making informed decisions in their selection of municipal advisors," said Shamoil T. Shipchandler of the SEC's Fort Worth Regional Office.

Barcelona ultimately served as LJISD's municipal advisor for three bond refundings -- two that closed in 2013 and one that closed in 2014. LJISD paid Barcelona $386,876.52 in municipal advisory fees on these transactions. Munoz & Frankel was bond counsel on all those transactions, yet the SEC found that Hinojosa never disclosed his continuing employment at the law firm and his resulting financial interest in the deals to the school district.

In addition to violating the Securities and Exchange Act of 1934 as amended by Dodd-Frank, the conduct also violated the MSRB's Rule G-17 on fair dealing, the SEC said. That rule requires all MSRB registrants to "deal fairly with all persons and "not engage in any deceptive, dishonest, or unfair practice."

The defendants agreed to disgorge $362,606.91 and prejudgment interest of $19,514.37 to the commission, as well as pay a civil money penalty of $160,000 for Barcelona and $20,000 for Hinojosa.

Hinojosa could not be reached for comment.

Robert Doty, president and proprietor at muni bond consulting firm AGFS, noted that the fiduciary duty is a broad concept, and said that the matters raised by the commission in this enforcement action are important facets of it.

"Accurate advertising is an important issue, and conflicts of issue are an important issue," Doty said.

The MSRB adopted additional rules on these matters that were not in force at the time of the alleged conduct but aspects of which were considered to be law already under Dodd-Frank.

The firm's Rule G-42 on the duties of non-solicitor municipal advisors provides, among other things, for the disclosure of conflicts of interest and was approved in January 2016. Earlier this week, the SEC approved the MSRB's proposal for a new muni advisor advertising rule that will become effective on Feb. 7, 2019. ❑

Market Has Survived Tax Reform Without Much Disruption

Continued from page 1

private activity bonds until the final bill was negotiated.

Since the start of 2018, some issuers have used shorter call dates for new issues of munis since they won't be able to advance refund them.

Wisconsin, for instance, issued bonds in February with a five-year call date.

Florida has stuck with a 10-year call date. "I am loath to pay a higher interest rate today," Ben Watkins, director of Florida's Division of Bond Finance, said during the panel discussion.

Watkins, a member of GFOA's Committee on Governmental Debt Management, said there is "no consensus yet" on alternatives to advance refundings, but some issuers have been doing taxable refundings and current refundings.

"I think swaps are a four-letter word and I stay away from them," Watkins added.

On the demand side, the significant cut in the corporate tax rate to 21% from 35% was widely expected to reduce the market for munis among banks.

"It's happening," Friedlander said. Although the drop in demand by banks hasn't been quantified yet, he said, it's a substantial part of the "massive decline in private purchases." Holdings by property and casualty insurers will trend downward and retail purchases will "probably not" make up the difference, he said.

"There is good news," Friedlander said. "The individual investor is massively over-liquid."

There is more than $12 trillion invested in CDs, money market accounts and short Treasuries compared to only about $1.6 trillion in municipals and $600 billion or so in corporate debt, Friedlander said.

"Over time, that over-liquidity will help," he said.

Another source of demand will be foreign investors because of low interest rates in Europe and other developed nations.

"They are more interested in municipals now than they use to [be] because they see U.S. corporate buyers are less of a factor," Friedlander said.

COMMENT
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BREAKFAST WITH BERT

Jeff Hinds

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HINDS & THOMPSON
TRIAL ATTORNEYS

The Scourge of Florida Counties

Jeff Hinds

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1. BERT HARRIS BASICS
2. ISSUES RESOLVED
3. RECENT TRENDS
4. QUIZ

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2. ISSUES RESOLVED
3. RECENT TRENDS
4. QUIZ


Jeff Hinds
BREAKFAST
WITH BERT

(2) WHEN A SPECIFIC ACTION OF A GOVERNMENTAL ENTITY HAS INORDINATELY BURDENED AN EXISTING USE OF REAL PROPERTY OR A VESTED RIGHT TO A SPECIFIC USE OF REAL PROPERTY, THE PROPERTY OWNER OF THAT REAL PROPERTY IS ENTITLED TO RELIEF, WHICH MAY INCLUDE COMPENSATION FOR THE ACTUAL LOSS TO THE FAIR MARKET VALUE OF THE REAL PROPERTY CAUSED BY THE ACTION OF GOVERNMENT, AS PROVIDED IN THIS SECTION.

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CONDITIONS PRECEDENT

1. Landowner "must present the claim in writing to the head of the governmental entity,"
2. Landowner must present a "bona fide, valid appraisal that supports the claim and demonstrates the loss in fair market value to the real property."

1. BERT HARRIS BASICS
2. ISSUES RESOLVED
3. RECENT TRENDS
4. QUIZ

"AS APPLIED"

1. Does a landowner actually have to apply for a development order (and be rejected) to have a valid BH claim?
2. Does a claimant's property need to be the one targeted by an allegedly offending regulation to have the regulation "applied" to it?

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Halls River

Halls River

M&H

Halls River

M&H

Hussey

Halls River
M&H
Hussey

Legislative Changes of 2011

"AS APPLIED"

1. Does a landowner actually have to apply for a development order (and be rejected) to have a valid BH claim?
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"AS APPLIED"

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Smith

Smith

FINR II

Smith

FINR II

FINR II

Smith

FINR II

FINR II

Legislative Changes of 2015

OTHER ISSUES RESOLVED

(10)(b) FEMA/FIR Maps *as to counties only*

OTHER ISSUES RESOLVED

§70.45, Florida Statutes
Governmental exactions

1. BERT HARRIS BASICS
2. ISSUES RESOLVED
3. RECENT TRENDS
4. QUIZ

RECENT TRENDS

1. Improper Bundling
2. Ownership at time of Resolution
3. “As Applied” repackaged as Futility

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RECENT TRENDS

Improper Bundling

RECENT TRENDS

Improper Bundling

TURKALI

RECENT TRENDS

Improper Bundling

TURKALI

WENDLER

RECENT TRENDS

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RECENT TRENDS

Ownership at time of Resolution

RECENT TRENDS

Ownership at time of Resolution

PALM BEACH POLO

RECENT TRENDS

Ownership at time of Resolution

PALM BEACH POLO

COFFIELD

RECENT TRENDS

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“As Applied” repackaged as Futility

RECENT TRENDS

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GSK

RECENT TRENDS

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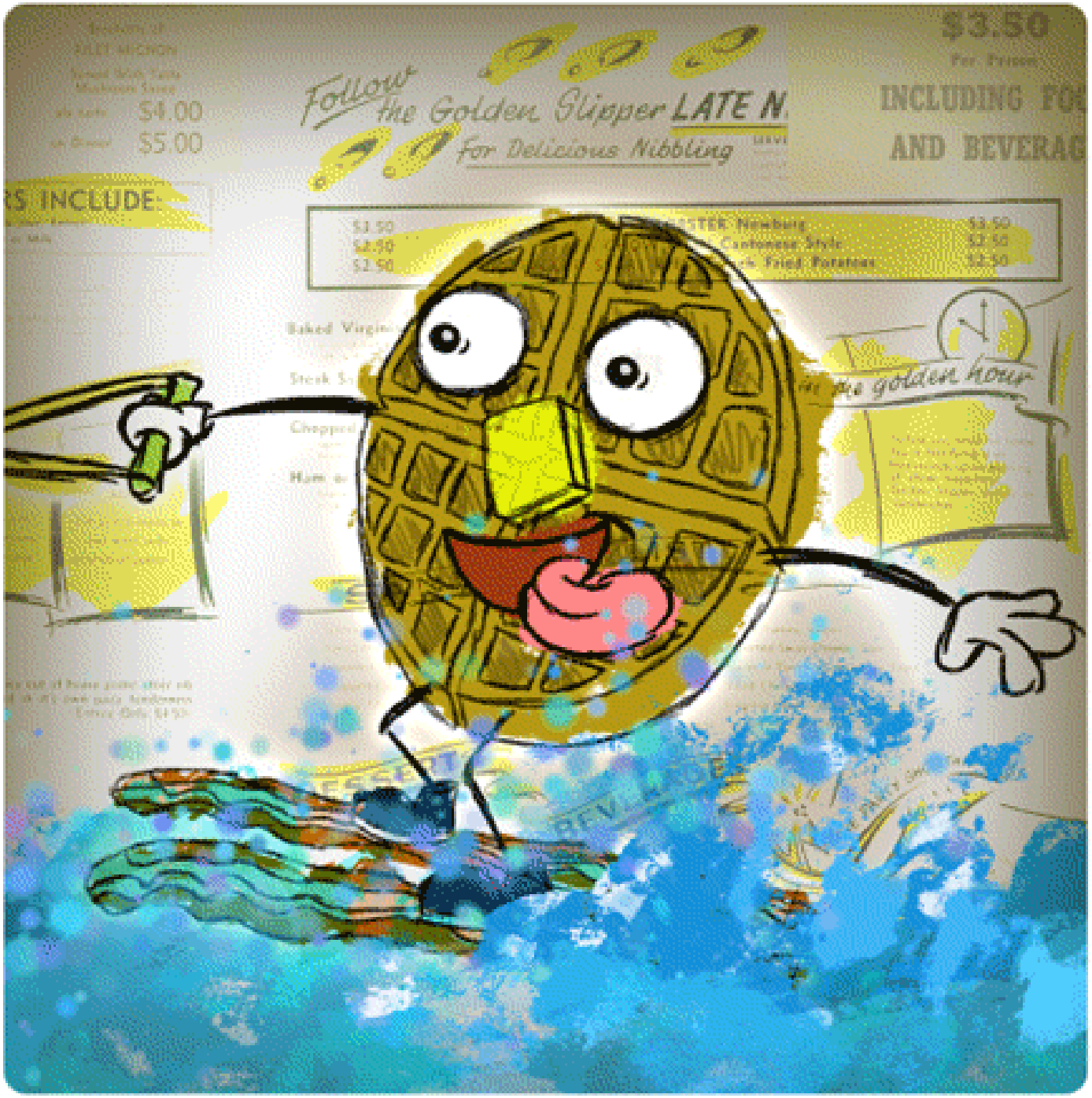
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INCLUDING
AND BEVERAG
$4.00
$5.00
the golden hour

Celebrity Wrestling Death Match:
Florida Counties v. FEMA
Epic Battle for Disaster Funding

June 28, 2018

Heather Encinosa
& Kerry Parsons

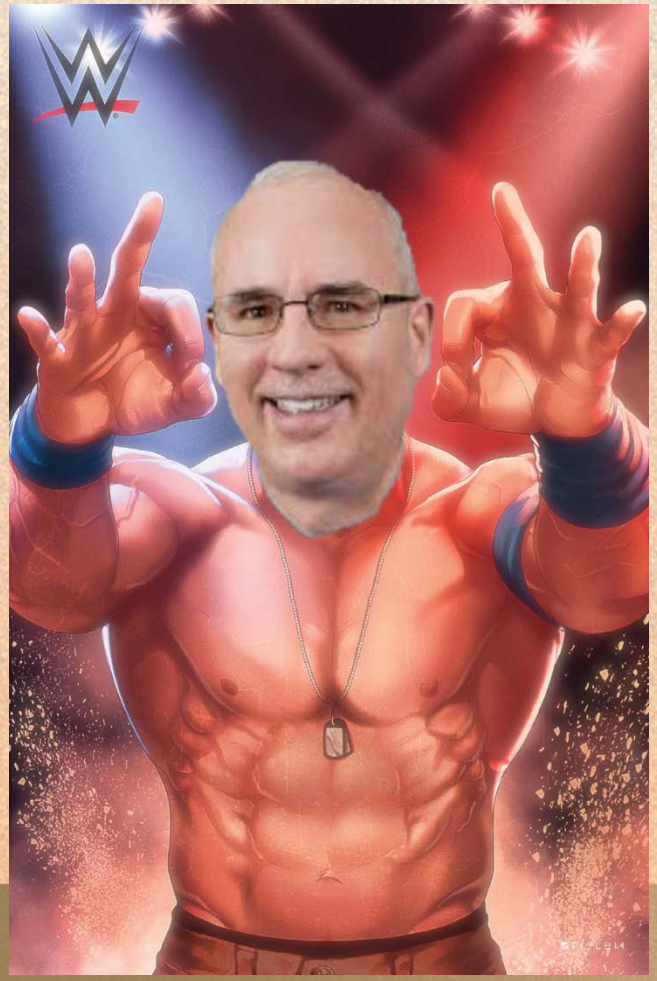
Nabors Giblin & Nickerson P.A.

Discussion Topics

- Pre-Disaster Planning
- Procurement and Contracts
- Debris Removal, Management, Disposal Sites, and Private Property
- Reimbursements, Insurance, Record Keeping
- Clawbacks

Pre-Disaster Planning:

Preparing for Battle



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Stafford Disaster Relief and Emergency Assistance Act

- 42 U.S.C. § 5121 et seq.
- Authorizes federal assistance for declared disasters
- Magnitude of incident exceeds state and local government abilities to respond
- Grants to enable state, tribal, and local governments to quickly respond and recover

FEMA Grants

Supplemental disaster assistance for:

- Debris removal
- Emergency protective measures
- Repair, Replacement, or Restoration of public facilities
- Future Hazard Mitigation

Federal share is not less than 75% of eligible cost.

Public Assistance

- Reimbursement basis
- Emergency Work
  - Debris
  - Emergency Protective Measures
- Permanent Work
  - Roads and Bridges
  - Water Control
  - Buildings and Equipment
  - Utilities
  - Parks, Recreation and Other Facilities

Emergency Management Act

- Chapter 252, Part I, Florida Statutes
- County Emergency Management Agency
- Director
- Cooperatively plan, coordinate emergency management activities, and liaison to the state for county and cities

Section 252.38, Florida Statutes

- To appropriate and expend funds;
- Make contracts;
- Obtain and distribute equipment, materials, and supplies for emergency management purposes;
- Provide for the health and safety of persons and property, including emergency assistance to the victims of any emergency;
- Direct and coordinate the development of emergency management plans and programs in accordance with the policies and plans set by the federal and state emergency management agencies.
- To establish emergency operating centers to provide continuity of government and direction and control of emergency operations.
- To request state assistance or invoke emergency-related mutual-aid assistance by declaring a state of local emergency in the event of an emergency affecting only one political subdivision.

Emergency Declaration Authority

- Section 252.38, Florida Statutes
- The duration of each state of emergency declared locally is limited to 7 days; it may be extended, as necessary, in 7-day increments.

Declared Emergencies

County may waive certain procedures and formalities otherwise required by law pertaining to:

- Contracting
- Employment of workers
- Rental of Equipment
- Appropriation and expenditure of federal funds
- Incurring obligations
- Utilization of volunteers
- Acquisition and distribution of supplies, materials, and facilities

Comprehensive Emergency Management Plan

- Chapter 27P-6, F.A.C.
- Each County emergency management agency must develop and adopt
- Must be coordinated and consistent with the State Comprehensive Emergency Management Plan
- Addresses responses and actions in the event of an emergency

Plan Components

- Minimum of two components:
  - -Basic Plan
    - - Recovery
    - - Mitigation
  - - Capability Assessment
- Address county agencies and resources and any municipal agencies and resources
- Detailed description of the process to follow in the event of an emergency
- Reviewed and adopted every 4 years, R. 27P-6.006, FAC

Procurement and Contracting:
Don Your Battle Armor

Nabors Giblin & Nickerson P.A.

2 CFR Part 200

- Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.
- 2 C.F.R. Part 200 effective date and applicability; 2 C.F.R. § 200.110.
- Grace Period is coming to an end.

Methods of Procurement
2 CFR § 200.320

- Micro-Purchases ($3,500.00)
- Small Purchases
- Simplified Acquisition Threshold ($150,000.00)
- Sealed Bids
- Competitive Proposals
- Non-Competitive Proposals

How many contractors does the County want on standby for different services, such as debris removal?

Justification and Documentation

- Creating records and documenting all actions taken by the County is key to a successful audit years down the road.
- Pre-Procurement Justifications
  - (2 CFR §200.318)
- Independent Cost Analysis
  - (2 CFR §200.323)
- Post Procurement Cost Justifications

Procurement Requirements

- Full and Open Competition
- W/MBE inclusions
- Certifications
- Oversight – Risk Assessments
- Conflict of Interest standards

Procurement Pitfalls

- Unreasonable Qualification Requirements
- Unnecessary Experience
- Excessive Bonding
- Noncompetitive Pricing Practices
- Noncompetitive contracts
- Organizational Conflicts of Interest
- Brand Name
- Other arbitrary actions in procurement
- Contractor involvement in SOW
- Local Preference

Types of Contracts & Treatment by FEMA

- Fixed Price
- Cost Reimbursement
- Time & Material Contracts – 2 CFR §200.318 (j)(1)(i) and (ii)
- Piggyback Contracts – 2 CFR §200.318(e)
- Pre-position Contracts
- Cost Plus a Percentage of Cost – prohibited! – 2 CFR § 200.323 (d).

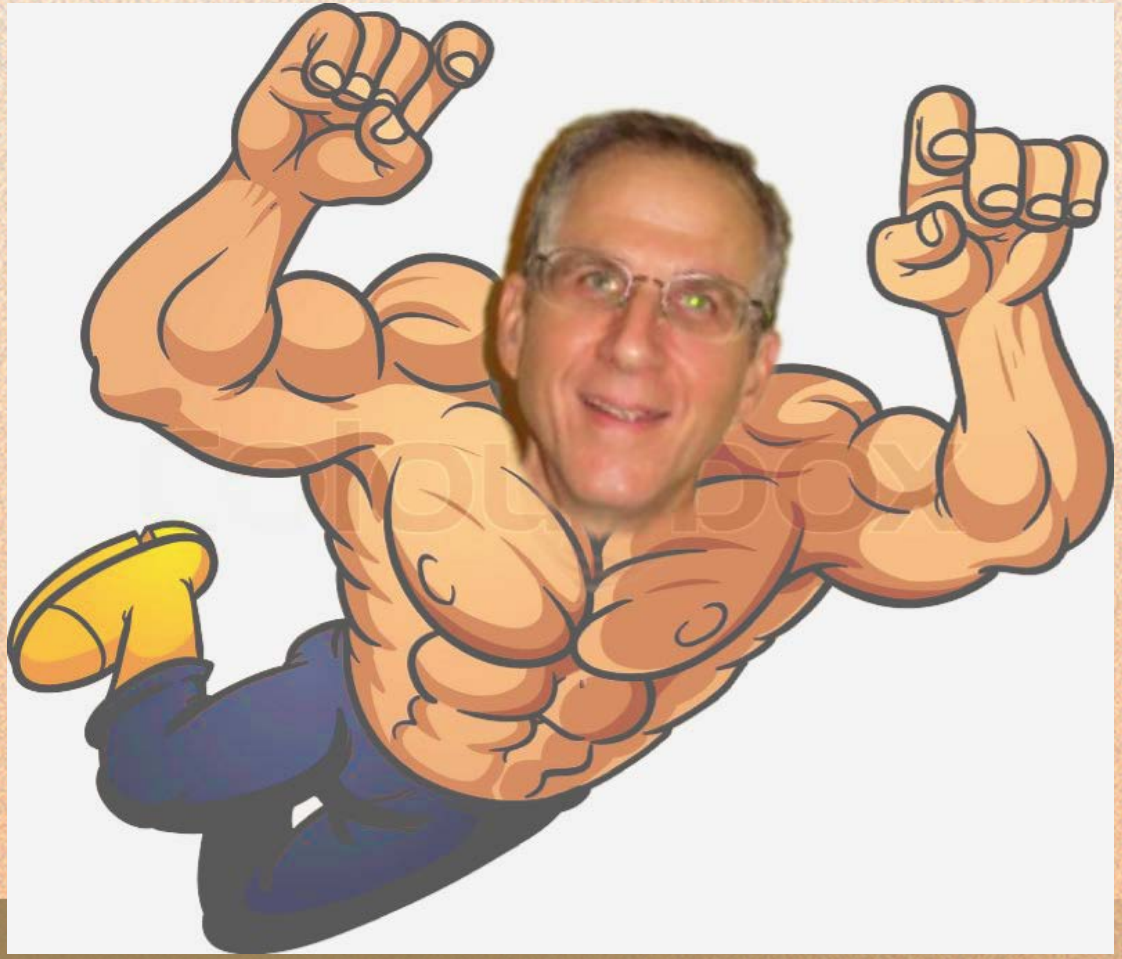
Contracts

- Minimum required provisions: Appendix II
- Federal Bonding requirements
- Audit Provisions
- Breach and Penalty Provisions
- Options (a/k/a renewals)
- Remedies for breach
- Termination provisions
- Recycled Materials
- EEO Clause
- Davis Bacon
- Copeland Anti-Kickback
- Contract Work Hours and Safety Standards
- Rights to Invention
- Clean Air and Water
- Energy Efficiency
- Suspension and Debarment
- Byrd Anti-Lobbying

Emergency Procurements

- 2 CFR §200.320(f)(2)
- What is an emergency according to FEMA?
- Public exigency will not permit a delay resulting from competitive solicitation.
- Limited Time
- Emergency Justification in Procurement File

Storm Debris:
Trash Talking in the Ring



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Debris Management

- In-house/outsource
- No affiliation with the debris remover
- Lock down the prices now for the future (Atty General Investigations)
- Staging
- Allowable costs

Debris Removal

- Initial/first push debris removal (reasonable time) versus the rest of the debris
- Multiple on standby
- Requirements in contracting

Debris Disposal Sites

- Emergency Planning
- Approval of Sites by FEMA procedures:
  - Must fill out a FEMA application;
  - Must have all Federal, State and Local permits;
  - Must conduct an analysis on the Environmental and Historical Preservation of the Site (some cases a study);
  - Must justify Leasing v. Ownership of a site;
  - Must be inspected by FEMA field staff (est. at least 2 weeks)

Private Property

- What must be in place to be able to potentially (rarely) obtain funds from FEMA for removal of debris from private property?
  - Stafford Act § 407, 42 U.S.C. § 5173, and 44 CFR § 206.224(b)
- How long can FEMA approval take?
  - 2 weeks

Reimbursements, Insurance, Record Keeping:

Pinning Your Opponent

Nabors Giblin & Nickerson P.A.

Reimbursements

- Document Everything!!!
- FEMA will not be held accountable for statements written or verbal made by its field employees, including initial approvals of Project Worksheets (PWs).

Insurance Proceeds
44 CFR §§ 206.250, 206.525, and 206.253

- Deductibles
- Duplication of Benefits (42 U.S.C. § 5155)
- Settlements and Justifications
  - Hawaii v. FEMA, 294 F. 3d 1152 (9th Cir. 2002); University of Houston, FEMA-1791 (2nd Appeal, July 28, 2017); City of Orlando, FEMA-1539/1561 (2nd Appeal, March 22, 2017)

Record Keeping

- When three (3) years does not truly mean three (3) years.
- Retention time: eternity!
- Cost analysis, procurement and contract justification, contractor selection, basis of contract price

Clawbacks:
Evading the Federal Iron Claw

Deobligation of Funds

- Notice: Eligibility Determination Letter
- How the Deobligation takes place

Common Reasons Identified by FEMA OIG

- Ineligible work
- Unreasonable costs
- Improper procurement

Nabors Giblin & Nickerson P.A.

Appeals and Mediations

- Two (2) opportunities for Appeal (44 CFR Part 206)
- Mediation: FEMA Alternative Dispute Resolution Process

Defenses

- Direct Challenge of OIG finding for deobligation
- Section 705 of the Stafford Act
  - Statute of Limitations
  - Presumption of Record Maintenance
  - Binding Nature of Grant Requirements

Questions?

Thank you from:

Heather “Crazy Steel” Encinosa
& Kerry “Wild Poseidon” Parsons

Nabors Giblin & Nickerson P.A.

Emergency Power Plans and Recovery

LAKE COUNTY
FLORIDA

DIANA JOHNSON | ***Senior Assistant County Attorney***
County Attorney's Office
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Emergency Power Plans

https://flgov.smugmug.com/GovernorRickScott/September-2017/9-5-2017-Tallahassee-EOC/i-J7Lnn23/A

- Press Release by the Governor directing the issuance of emergency rules.
- Keep Floridians safe in health care facilities.

Emergency Rules: Section 120.54(4), Florida Statutes

If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances.

- Assisted Living Facility is a residential care facility that provides housing, meals, personal care and supportive services to older persons and disabled adults who are unable to live independently
- Nursing Home Facility is a facility which provides nursing services as defined in Chapter 464, Florida Statutes.

Emergency Power Plan Rules

- Governor directs two emergency rules to be implemented:
  - Assisted Living Emergency Rule (58AER17-2)
  - Nursing Home Emergency Rule (59AER17-2)

Procedures Regarding Emergency Environmental Control for Assisted Living Facilities (ALF) 58AER17-1

- Extreme shortage of power jeopardizes the health, safety and welfare of ALF residents.
- Florida has the highest percentage of people over the age of 64 and older in the United States.
- ALF must develop and implement a plan to ensure ambient temperatures will be maintained at or below 80°F or less for minimum of 96 hours in the event of loss of power to the ALF.

ALF: 58AER17-1

1) ALF shall within 45 days of the rule provide in writing a detailed plan to the Agency and local agency for review and approval, including:
   a) Acquisition of sufficient generator; and
   b) Acquisition and safe maintenance of sufficient fuel for the generator for at least 96 hours; and
   c) Acquisition of services necessary to install, maintain and test the equipment that is installed.
2) ALF shall implement plan within 60 days of the rule.

ALF: 58AER17-1

3) If facility's plan is denied, the local agency shall report the denial to the Florida Division of Emergency Management within 48 hours.
4) Within 10 days of the denial, the facility must resubmit their plan to the local agency.
5) If plan is approved by the local agency, the local agency will post on its website and notify AHCA.
6) Fire Marshal must inspect the generator within 15 days of installation.

Procedures Regarding Emergency Environmental Control for Nursing Homes (NH) 59AER17-1

1) NH shall within 45 days of rule, provide a written detailed plan to the AHCA and to the local agency for review and approval, including:
   a) Acquisition of sufficient generator to ensure ambient temperatures will be maintained at or below 80°F or less for minimum of 96 hours in the event of loss of power to the NH; and
   b) Acquisition and safe maintenance of sufficient fuel for the generator for at least 96 hours; and
   c) Acquisition of services necessary to install, maintain and test the equipment that is installed.
2) NH shall implement plan within 60 days of the rule.

NH: 59AER17-1

3) If facility's plan is denied, the local agency shall report the denial to the Florida Division of Emergency Management within 48 hours.
4) Within 10 days of the denial, the facility must resubmit their plan.
5) If plan approved by local agency, the local agency will post on its website and notify AHCA.
6) Fire Marshal must inspect the generator within 15 days of installation.

Non-Compliance

- Subject to a fine $1,000 per day and possible revocation of facility's license for failure to comply.
- Subject to posting on website by local agency and the state of those facilities that do not comply.

Problem?


LAKE COUNTY
EMERGENCY COMMUNICATIONS
AND OPERATIONS CENTER

Problem?

- EOC staffed by County employees.
- 3,800 assisted living facilities and nursing homes across Florida.

Review and Approval

- Create criteria for the plan.
- Ask the County's Building Services Division for assistance.
- Created a chart mandatory changes.
- Draft and send correspondence, including denial letters.

Review and Approval

- Disclosure: The review and approval of a plan by the Lake County Office of Emergency Management does not guarantee that the Assisted Living Facility or Nursing Home will be adequately prepared in the event of a natural disaster or other emergency. Further, satisfaction of the above criteria and requirements of the Office of Emergency Management does not guarantee approval of the plan by the relevant State of Florida agencies and departments. It is the responsibility of the facility to notify the Office of Emergency Management of any changes to the facility's plan and to submit a plan for review on an annual basis or as otherwise required by law.

Non-Compliance

- Agency for Health Care Administration started sending out violation letters to the entities and posting online those facilities in violation.
- ‘Status of Compliance’ for Nursing Homes and Assisted Living Facilities.

- **Florida Association of Homes and Services for the Aging, Inc. d/b/a Leadingage Florida v. Agency for Health Care Administration, and Department of Elder Affairs**

DOAH

- “Presence of elderly populations in Florida is not an emergency situation.”
- “[D]id not consider whether it was realistic to expect that ALFs could comply….”
- These were not generators that could be “pulled off the shelf….”
- Rules are an “…invalid exercises of delegated legislative authority.”

Stay or No Stay?

- Facilities believe that DOAH's ruling places a hold on their requirement to comply with the emergency rules.
- Facilities sought clarification from DOAH Administrative Law Judge Chisenhall.

Stay or No Stay?

- Press Release from Governor stating First District Court of Appeal denied challenges to the rule by the facilities.
- “Anyone who ignores this rule is potentially endangering the lives of the residents whose safety and well-being they are charged with protecting.” - Jeffrey Bragg, Secretary FL Dept. Elder Affairs

DISTRICT COURT OF APPEAL, FIRST DISTRICT
2000 Drayton Drive
Tallahassee, Florida 32399-0950
Telephone No. (850)488-6151

November 14, 2017

CASE NO.: 1D17-4534
L.T. No.: 17-5409RE
17-5445RE

Agency For Health Administration et al. v. Florida Association of Homes and Services etc. et al.

Appellant / Petitioner(s), Appellee / Respondent(s)

BY ORDER OF THE COURT:

Appellees have filed an "Emergency Joint Motion to Vacate Stay Claimed By Appellants," seeking relief "from an automatic stay Appellants claim is in effect." Because Appellees have not demonstrated the existence of an actual automatic stay, we deny the motion.

New Rules

- Rule 58A-5.036 Emergency Environmental Control for Assisted Living Facilities

- Rule 59A-4.1265 Emergency Environmental Control for Nursing Homes

- ✓ Requires facilities to create a detailed plan in the event of loss of electricity.
- ✓ Requires ambient temperature to be maintained below 81° for minimum of 96 hours in the event of loss of power.
- ✓ Must have a plan for acquiring fuel, but do not have to keep all fuel at the facility site.
- ✓ Allows natural gas to be a fuel source.

- ✓ Facility must comply with state and local regulations on fuel storage.
- ✓ Requires inspection by Fire Marshal.
- ✓ Plan must be in effect by June 1, 2018, but an extension may be granted until January 2019.
- ✓ Provides sales tax exemption for purchase of generators by ALF and NH.

New Rules

- Senate Bill 7028 and HB 7099 signed by Governor Scott on March 26, 2018.
- Ratifies the emergency power plan rules; making them ‘permanent’.

Plan Submittal

- Facility floor plan designating ‘cooled area’.
- Letter attesting the alternate power source is sufficient to operate.
- Fuel agreement.

Special Needs Registry

- Registry of persons with special needs maintained locally, with coordination of the Florida Division of Emergency Management.
- Plan for those who need assistance during evacuations and sheltering.
- Information furnished for the registry is exempt from public records law (F.S.§252.355).

Special Needs Registry

- HB 7085 attempted to designate the State of Florida, Department of Health as lead agency responsible for registration and special needs shelters and:
  1. Creates a statewide Special Needs Shelter Registration Program to be maintained by the State of Florida Department of Health.
  2. Prohibits local agencies from maintaining a special needs registry separate from a statewide registry.
  3. Creates a statewide Special Needs Shelter Registry Work Group.

DIANA JOHNSON | *Senior Assistant County Attorney*

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2018 Legislative Update:
We Don't Need Any Stinking Counties

June 28 | **Laura Youmans**

2018 Session Overview

- What did we think would happen:
  - Based on 2017 session: More fiscal constraints Amendment 1-light and “Transparency and Accountability”
- What actually happened:
  - Hurricane Irma cancels first committee week
  - Two key legislators fall due to “me too” moment
  - Parkland overwhelms final weeks of session
- Result: Fewest number of bills passed in at least 21 years – 192. Very few impacting local governments.

Bills that Passed/Failed/Constitutional Amendments

- Page 8 – HB 1149/SB 1308 - VETOED
- Organized by policy area, clustered to correlate to FAC policy committees and lobbyist:
  - Laura Youmans – Finance, Tax, Administration, Economic Development
  - Susan Harbin – Growth Management, Agriculture, Transportation, Environment
  - Robert Brown – Health and Safety

What does it all mean?

- Looking at Florida bills that passed and failed, CRC proposals that passed and failed, national trends.

- Trends:
  - "Transparency and Accountability"
  - Regulatory Preemption
  - Legislative Interference in Local Inter-Government Relationships
  - Fiscal Constrains

“Transparency” and “Accountability”

- Bills that passed
  - Data Focused bills
    - SB 1392 – p 16
      - Brandes bill – arrest and incarceration statistics
        - » Ultimate goal is criminal justice reform, including sending some state prisoners to county jails
      - Measures for Justice
    - HB 1073 – p 2
      - Hager bill
      - XBRL – Extensible Business Reporting Language
      - In conjunction with a planned upgrade to the Local Government Electronic Reporting System (LOGER) handled by DFS
- Amendment 12 – p29- CRC proposal “Lobbying and Abuse of Office”

Transparency and Accountability

- Bills that failed – starting at page 18
  - More advertising in newspapers
  - More public meetings
  - Video taping all public meetings (even advisory boards like TDC meetings)
  - Commandeering county websites
    - Required posting of notices, documents, videos, agendas
    - Creation of new budget documents
  - Metrics – uniform financial ratios to compare across local governments
  - Ethics, disclosures, lobbying registrations
  - Travel restrictions
  - Higher voting thresholds

Preemptions

- Business focus of incoming leadership make the likelihood of success greater
- “Super Preemptions”
  - Aimed at plastic ban and Styrofoam bans; minimum wage and other employment focused ordinances
  - HB 17 from 2017 – sought to invert Homerule
  - Federal and State efforts to create intra-state commerce clause
    - U.S. Farm bill language
    - CRC Proposal 95
    - Florida Senate Proposal from 2017

Preemptions

- More likely – Narrow Preemptions
- Firearm regulation and litigation
- Passed- p 11 - Customary Use HB 631
  - Preempted ordinances establishing public access by customary use
  - Created a judicial process to establish instead
  - Federal Lawsuit filed against Walton County asking court to declare customary use doctrine unconstitutional
- Failed but likely to reappear
  - Vacation Rental Preemptions – p 22 – SB 1400 and 773
  - Dockless Bike – HB 1033
  - Retail Sale of Pets
    - Tax package proposal tied to sales taxed items
    - Ohio example

Interference with Intralocal Relationships

- School Safety – p 12 – unfunded mandates
- Amendment 5 – Supermajority vote of Legislature to pass tax or fee increase
- Courthouse Security
  - Dispute between Sheriff and Chief Judge about who has control over courthouse security
  - CRC Proposal 17 – gave all power to sheriffs
  - HB 7087/ SB 1218 – compromise language – operational control but acknowledges county fiscal authority

Interference with Intralocal Relationships

- Amendment 10 – Charter County Constitutional Officers
  - Effects
  - Attempts to allow term limits but would prohibit term limits and recall
  - Litigation
- Clerks of Court generally
  - Broward Clerk successfully argued at the trial level that Legislative underfunding was unconstitutional
  - Maloy v. Seminole
  - Could see some legislative action

Fiscal Constraints

- Amendments 1 and 2
- Tax package – HB 7087- p 1- audit requirement for new sales tax referenda
- Tourist Development Taxes – HB 585/SB 658 – p 1
  - Initially an expansion of authority but as passed very prescriptive
- Increasing hurdles to raise revenue
  - Time of local referenda – p 18 – HB 317/SB 272
  - HB 7 – p 19- increase vote threshold and extend timeline to take on debt

Thank you!

2018 FACA Legislative Update

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FACA 2018 Annual CLE Seminar
June 27 -28, 2018
Hyatt Regency Orlando
Orange County

Bills that Passed
Finance, Tax, Administration, and Economic Development

Discretionary Sales Surtax
HB 243 (Avila) (passed as amendment 844462 of HB 7087, Taxation)
Requires that at least 60 days prior to a referendum on a new discretionary sales surtax, a performance audit of the program associated with the surtax adoption must be made available to the public. The audit must be done by a CPA procured by the Office of Program Policy Analysis and Government Accountability.

Tourist Development Taxes
HB 585/SB 658 (Fine/Brandes) (passed as amendment 844462 to HB 7087, Taxation)
Counties that received at least $10 million in tourism development tax revenues during the previous year and which spends at least 40% of its TDT dollars to promote and advertise tourism could use TDT dollars to fund up to 70% of the cost of tourism-related public infrastructure, if approved by a 2/3 vote of the governing board provided that an independent professional analysis performed at the expense of the Tourism Development Council has demonstrated that the infrastructure will have a positive impact on tourism-related businesses in the county.
Legislative Approval of Tax Increases

Supermajority Vote of Legislature to Increase Tax
HJR 7001 (Ways and Means Committee)
This bill proposes an amendment to Florida's Constitution to require that a state tax or fee imposed, authorized, or raised by the Legislature, be approved by two-thirds of the membership of each house of the Legislature. If approved by sixty percent the voters in November, this amendment will take Impact on January 8, 2019.

Elections - Resign to Run
SB 186 (Hutson)
The bill requires an elected or appointed officer who qualifies for federal public office to resign from his or her current office if the terms of the current office and the federal office run concurrently. The resignation deadline is 10-days before qualifying for the federal office. The bill

specifies the timeframes and manner for submission of a resignation and procedures for filling a vacancy created by a resignation.

Write-In Candidates
HB 6009 (Geller)
The bill repeals section 99.0615, F.S, which required write-in candidates to reside within the district represented by the office sought at the time of the candidate's qualification for office. In 2016, the Florida Supreme Court invalidated the statute on grounds it conflicted with candidate residency requirements of the Florida Constitution for legislators, county commissioners, members of the judiciary, and the Governor and Cabinet, which require residency within the district at the time of election or at the time the candidate assumes office.

Department of Financial Services
CS/CS/CS/HB 1073 (Hager)
The bill creates the Florida Open Financial Statement System, an interactive repository for governmental financial statements. The bill specifies the Chief Financial Officer ("CFO") may consult with stakeholders to obtain input on its design and implementation, including a representative of a municipality or county, a special district, a municipal bond investor, and an information technology professional employed privately. The CFO may choose contractors to build Business Reporting Language technology suitable for state, county, municipal, and special district financial filings and must require all work products be completed no later than December 31, 2021. If the CFO deems the work products adequate, all local governmental financial statements for fiscal years ending on or after September 1, 2022 must be filed in a specified format.

Clerks of Court
CS/CS/HB 1361 (Judiciary Committee)
The bill amends procedures for surplus funds disbursement after a foreclosure, treating unclaimed foreclosure surpluses like any other unclaimed property. The bill repeals the statutory authorization for surplus trustees.

The bill extends the claim period for subordinate lienholders, allowing any party claiming entitlement to the surplus to file a claim with the court at any time up to the point where the clerk transmits the funds to the Department of Financial Services ("DFS"). Once transmitted to DFS, the bill specifies only the owner of record may claim the surplus.

Homestead Waivers
CS/SB 512 (Young)
The bill provides form language that a spouse may include in a deed to demonstrate that he or she knowingly waives the right to inherit homestead property. The bill provides that a spouse

waives his or her rights as a surviving spouse regarding the devise restrictions contained in the Florida Constitution if certain language, or substantially similar language, is included in a deed. Such waiver language is not a waiver of the protection against the owner's creditor claims during the owner's lifetime and after death. Additionally, the language is not a waiver of the restrictions against alienation by mortgage, sale, gift, or deed without the joinder of the owner's spouse.

Tax Assessment of Agricultural Property
CS/CS/SB 740 (Stargel)
The bill addresses the various duties and authority of the Department of Agriculture and Consumer Services and modifies provisions of law concerning the tax assessment of agricultural lands. It allows, under specified conditions, certain lands classified as agricultural for tax purposes to continue to be classified as such for five years after being damaged by a natural disaster. This provision applies retroactively to lands damaged by a natural disaster on or after July 1, 2017. The bill also provides that screened structures used in horticulture for pest exclusion under specified conditions have no separately assessed value for purposes of ad valorem taxation. An additional provision in the bill of interest to local government clarifies current law by expressly preempting the regulation of "seed" to the Department.

Tax Deed Sales
CS/CS/HB 1383 (Government Accountability Committee)
The bill makes significant changes to the tax deed application and sale process, including notice requirements. For purposes of determining who must be noticed under new notice provisions, the tax collector must contract with a title company or an abstract company to provide a property information report as defined in s. 627.7843(1), F.S.

The bill provides an opening bid on county-held certificates on nonhomestead property shall be the sum of the value of all outstanding certificates against the property, plus omitted years' taxes, delinquent taxes, current taxes, if due, interest, and all costs and fees paid by the counties. The bill adds a requirement that any additional fees or costs incurred by the clerk and any current taxes, if due, must be included on an individual tax certificate. Applies to tax deed applications filed on or after October 1, 2018, with the tax collector pursuant to s. 197.502, F.S.

Procurement - Prohibition Against Contracting with Scrutinized Companies
HB 545 (Fine)
The bill provides a company is ineligible to and may not bid on, submit a proposal for, or enter or renew a contract with, an agency or local government entity for goods or services of any amount if, at the time of bidding on or submitting the proposal the company is on the Scrutinized Companies that Boycott Israel List. A company must certify that it is not participating in a boycott of Israel at the time a company submits a bid or proposal for a contract or before the company enters or renews a contract with an agency or local governmental entity for goods or services of

any amount. Any contract with an agency or local governmental entity for goods or services of $1 million or more entered on or after July 1, 2018 must contain a provision that allows for the termination of such contract at the option of the awarding body under enumerated circumstances.

Workers' Compensation Insurance
SB 376/HB 227 (Book/Willhite)
Allows first responders that meet certain conditions to access indemnity and medical benefits for Post-Traumatic Stress Disorder (PTSD) without an accompanying physical injury when the PTSD results from witnessing a qualifying event related to minors or other specified incidents.

To receive indemnity benefits absent a physical injury, the PTSD must have resulted from the first responder acting within the scope of his or her employment and the first responder must have been examined and subsequently diagnosed with PTSD by a licensed psychiatrist due to one of exposure to a traumatic event (enumerated). The bill requires a diagnosis of PTSD by a licensed psychiatrist by clear and convincing medical evidence. The diagnosis of PTSD must be within 30 days of the qualifying event or 30 days from the manifestation of the disorder, whichever is later, but it cannot occur more than a year after the qualifying event.

Public Records Exemptions

Public Guardians/Employees with Fiduciary Responsibility/Exemption
CS/CS/CS/SB 268 (Passidomo)
The bill provides an exemption from the public records law for certain identifying and location information of current and former public guardians, employees with fiduciary responsibility, and the spouses and children of such persons. It defines "employee with fiduciary responsibility" as an employee of a public guardian who has the ability to direct any transactions of a ward's assets, who manages care of the ward, or who makes any health care decision on behalf of the ward. Impactive date: July 1, 2018 but applies retroactively to protected information held by any agency before the Impactive date.

Fire Safety Systems/Exemption
CS/HB 411 (Clemons)
The bill creates public record and public meeting exemptions for firesafety system plans and information relating to firesafety systems that are identical to current law exemptions for security system plans and information. Such plans and information are confidential and exempt if the plan or information is for any property owned or leased to the state or any of its political subdivisions, or for any privately owned or leased property.

Child Advocacy Center Personnel & Child Protection Team Members/Exemption
CS/HB 417 (Jenne)
The bill provides an exemption from the public records law for certain identifying and location information of current or former child advocacy center personnel and child protection team members, and the spouses and children of such personnel and members.

Health Care Facilities/Exemption
CS/CS/HB 551 (Burton)
Current law provides an exemption from the public records law for building plans, blueprints and other schematics that depict the internal layout of various facilities held by an agency. The bill expands this existing exemption to include hospitals, ambulatory surgical centers, nursing homes, hospices, or intermediate care facilities for the developmentally disabled.

National Public Safety Broadband Network/Exemption
CS/HB 755 (Williamson)
The bill creates an exemption from the public records law for certain information relating to the National Public Safety Broadband Network held by an agency, if release of such information would reveal specified information about network facilities and infrastructure, network coverage, network services provided to first responders and other network users, network devices, and network security.

Addiction Treatment Facility Personnel/Exemption
CS/HB 1055 (DuBose)
The bill provides an exemption from the public records law for certain personal and identifying information of addiction treatment facility personnel, their spouses and children. Addiction treatment facility is defined in the bill as a county government or agency thereof, that is licensed pursuant to section 397.401, F.S., and provides substance abuse prevention, intervention, or clinical treatment.

School Safety/Exemption
SB 1940 (Galvano)
The bill creates public records and public meetings exemptions for certain information relating to school safety and is linked to provisions of law created in SB 7026 relating to Public Safety (discussed *infra*). Specifically, the bill exempts the following: the identity of a party making a report of suspicious activity through the "mobile suspicious activity reporting tool" of a School Safety Awareness Program, which is held by the Florida Department of Law Enforcement, a law enforcement agency or school officials; a portion of a meeting of the Marjory Stoneman Douglas High School Public Safety Commission at which exempt or confidential and exempt information is discussed; and information held by a law enforcement agency, school district, or charter school that would identify whether a particular individual has been appointed as a "safe-school officer."

Victim of an Incident of Mass Violence/Exemption
SB 7024 (Rules Committee)
The bill provides the address of a victim of an incident of mass violence is exempt from the public records law. "Incident of mass violence" is defined as an incident in which four or more people, not including the perpetrator, are severely injured or killed by an intentional and indiscriminate act on violence of another. "Victim" is defined as a person killed or injured during such an incident, not including the perpetrator.

Ethics Complaints & Investigations/Exemption
HB 7041 (Oversight, Transparency & Administration Subcommittee)
The bill reauthorizes exemptions from the public records and public meetings laws for certain records and proceedings relating to a complaint or any preliminary investigation by state and local ethics agencies.

United States Census Bureau/Exemption
HB 7053 (Oversight, Transparency & Administration Subcommittee)
The bill creates an exemption from the public records law for U.S. Census Bureau address information and for agency records that verify addresses or identify address errors or omissions, which are held by an agency pursuant to the Local Update of Census Bureau Addresses Program (LUCA). The U.S. Census Bureau's LUCA Program enables states and local governments to update address information to help increase accuracy of census information. The bill provides that an agency may release such records to another agency or governmental entity in furtherance of its duties under the LUCA Program, and provides that an agency performing duties under the LUCA Program shall have access to any other confidential or exempt information held by another agency if such access is necessary for it to perform its duties under the program.

Agency Employee Misconduct/Exemption
HB 7077 (Oversight, Transparency & Administration Subcommittee)
The bill reauthorizes an existing exemption from the public records law for complaints of misconduct filed with an agency against an agency employee and information obtained from an investigation by the agency of the complaint. The records remain exempt until the investigation ceases to be active or has concluded with notice to the employee of intent to proceed or not to proceed.

Local Government Electric Utilities/Exemption
HB 7095 (Government Accountability Committee)
The bill renews an existing exemption from the public records law for proprietary confidential business information held by a local government electric utility in conjunction with a review of a project to improve the delivery, cost, or diversification of fuel or renewable energy sources.

Growth Management, Agriculture, Transportation, and Environment Bills that Passed

Beach Management Funding
SB 174/HB 131 (Hukill/Peters)
The coastal management bills would have revised beach nourishment project funding criteria, and dedicated an annual appropriation from the Land Acquisition Trust Fund to beach projects. While the substantive bills did not pass, the Legislature did approve the equivalent amount of funding ($50 million) for the beach program in the final budget.

Turnpike Projects
CS/CS/HB 141 (Harrison)
The bill authorizes the Department of Transportation ("DOT") to enter a contract with any local governmental entity for the design, right-of-way acquisition, transfer, purchase, sale, acquisition, or other conveyance of the ownership, operation, maintenance, or construction of any turnpike project which the Legislature has approved. Previously, DOT was only authorized to enter such contracts for the design and right-of-way acquisition of a turnpike project which the Legislature had approved.

The bill authorizes local governmental entities to negotiate and contract with DOT for the design, right-of-way acquisition, transfer, purchase, sale, acquisition, or other conveyance of the ownership, operation, maintenance, or construction of any section of the turnpike project within areas of their respective jurisdictions or within counties which they have interlocal agreements. Previously, local governmental entities were only permitted to negotiate with DOT for the design and right-of-way acquisition and construction of any section of the turnpike project within areas of their respective jurisdictions or within counties with which they have interlocal agreements.

Mobile Carriers
HB 215 (Payne)
The bill authorizes a mobile carrier to be operated on sidewalks and crosswalks within a county or municipality when such use is permissible under federal law. The bill defines "mobile carrier" as an electronically powered device that:

- Is operated on sidewalks and crosswalks and is intended primarily for transporting property;
- Weights less than 80 pounds, excluding cargo;
- Has a maximum speed of 12.5 mph; and

- Is equipped with a technology to transport personal property with the active monitoring of a property owner, and primarily designed to remain within 25 feet of the property owner.

The bill prohibits a local government from preventing motor vehicle use or access to an existing transportation facility or corridor if such facility or corridor is the only point or one of only two points of ingress to and egress from a state university. The prohibition does not apply when a law enforcement agency prevents use or access to a facility or corridor in an emergency or to temporary closures necessary for maintenance or repairs.

Trespass on Airport Property
HB 523 (Cortes)
The bill prescribes a felony of the third degree if a person trespasses on property other than a structure or conveyance when the person intends to injure another person, damage property, or impede the operation or use of an aircraft, runway, taxiway, ramp, or apron area. The bill specifies the person must have trespassed on property that is within the operational area of an airport and is legally posted and substantially identified in a specified manner. The bill defines the term "operational area of an airport" as any portion of an airport to which access by the public is prohibited by fences or appropriate signs and includes

Environmental Regulation
HB 1149/SB 1308 (Payne/Perry)
The bill amends current law regarding local government recycling responsibilities, reuse of reclaimed water, wastewater treatment facilities, and projects exempt from state environmental resource permit requirements.

Recycling:
Residential recycling containers often contain amounts of solid waste and other non-recyclable materials. These materials can potentially "contaminate" the remaining recyclables in the container or the truckload. The bill directs local governments to address contamination in residential recycling loads and containers in contracts for the collection and processing of residential recyclables. The bill specifies that contracts between local governments and vendors for the collection, transport and processing of residential recycling materials must include terms and conditions to define and reduce levels of contamination, but it does not dictate specific terms, numbers or requirements. Each contract is required to define contaminated recyclable material in a manner that is appropriate for the local community, based on available markets and other relevant factors. Contracts must include provisions for identifying and documenting contamination, as well as the respective obligations of the parties regarding education and enforcement. A recyclable materials collector or facility is not required to collect, transport or

process “contaminated recyclable material,” as defined in the contract. The bill’s requirements apply to new contracts and contracts extended after July 1, 2018.

Reclaimed Water:
The reuse of reclaimed water can reduce or eliminate harmful impacts to ground or surface water that would otherwise occur through permitted withdrawals from these sources. The bill recognizes the benefit of these impact “offsets” and provides additional incentives for reclaimed water use by directing the Department of Environmental Protection (DEP) to develop a uniform rule for incorporating offsets and credits into water use permits. The bill expressly encourages the development of aquifer recharge for reuse implementation. The bill directs DEP and the water management districts to streamline their respective permit reviews by developing a memorandum of agreement that provides, upon request by an applicant, for coordinated review of any reclaimed water facility permit, an underground injection control permit, and a consumptive use permit.

Wastewater Utilities:
The bill creates a voluntary incentive-based program for wastewater utilities to implement practices to reduce sanitary sewer overflows. Practices include: periodic system assessment, maintenance, replacement; rate of reinvestment into maintenance & replacement program; code enforcement program addressing private pump stations and lateral lines; schedule for pump station upgrades; and a power outage contingency plan. Utilities that meet standards established by DEP may be certified under the “Blue Star Collection System Assessment and Maintenance Program,” and may be entitled to specified benefits, including permit extensions, lowered penalties for overflows, and a presumption of compliance with water quality standards for pathogens.

Environmental Resource Permits:
Current law provides exemptions from state Environmental Resource Permits for various projects. The bill clarifies that local governments may not require a person to provide additional verification from DEP of entitlement to such an exemption. In addition, the bill modifies an existing state permit exemption for the replacement and repair of existing docks and piers (within 5 feet of same location, no larger than existing dock or pier, and no additional aquatic resources may be adversely and permanently impacted). The bill also requires an environmental resource permit to be reissued to the original applicant or to a new property owner if specified criteria are met and if no more than 3 years have passed since expiration of the original permit.

Linear Facilities
HB 405 (Williamson)
"Development,” is defined in current law sections 163.3221 and 380.04, F.S. Activities that constitute development as defined must comply with various state and local regulations,

including local government comprehensive plans and development regulations. Under the Power Plant Siting Act, the application for certification of a site and associated facilities must include a statement of consistency of the site and any facilities that constitute "development" with applicable local government land use and zoning plans. Current law provides various exemptions from the definition of development, including an exemption for work by any utility engaged in transmission and distribution on established rights of way to construct pipes, cables, power lines, poles, etc. HB 405 revises this exemption by specifying that it applies to rights of way and corridors *yet to be* established, and to the *creation* of distribution and transmission line corridors. The bill also specifies the standard to be used in authorizing variances from applicable local government ordinances in a site certification is the standard contained in section 403.201, F.S. Finally, the bill provides that the Power Plant Siting Act and the Transmission Line Siting Act cannot in any way affect the Public Service Commission's exclusive jurisdiction to require transmission lines be located underground.

Growth Management - Hurricane Preparedness
CS/CS/HB 1173 (Raschein)
The bill includes requirements for lands used for governmental purposes, and includes several recommendations from the January 16, 2018, Final Report of the Florida House of Representatives Select Committee on Hurricane Response & Preparedness.

The bill revises requirements for the selection, purchase, lease, or conveyance of lands under the state's Military Base Protection Program, which is intended to buffer military installations against encroachment. It also changes qualifications and methods for the state Board of Trustees of the Internal Improvement Trust Fund to purchase land within an Area of Critical State Concern, and authorizes land authorities to use tourist impact tax revenues to pay costs related to affordable housing projects anywhere in the county within an Area of Critical State Concern.

With respect to the Select Committee on Hurricane Response & Preparedness, the bill adds criteria that must be included in the evaluation of proposed Florida Forever Program projects to include consideration of whether a project will mitigate the Impacts of natural disasters and floods in developed areas. The bill requires urban greenways and open space projects undertaken by the Florida Communities Trust Program to provide recreational opportunities, promote community interaction, and connect communities, and further specifies that such projects may also serve dual functions as "flow ways" or temporary water storage areas to mitigate natural disasters and floods.

Developments of Regional Impact
HB 1151/SB 1244 (La Rosa/Lee)
The bill substantially revises and limits the statewide guidelines and standards for developments previously approved as "developments of regional impact" (DRIs) pursuant to section 380.06, F.S.

Section 380.06 provided an extensive review and approval process for DRIs -- developments that, because of their size, character or location, are expected to have multi-jurisdictional impacts. In 2015, the legislature essentially eliminated the DRI program and specified new DRI-scale developments must be approved by amendment to the applicable local government comprehensive plan pursuant to the "state coordinated review process" in 163.3183(2)(c), F.S. CS/CS/HB 1151 eliminates state and regional review of existing, approved DRIs and eliminates the Florida Quality Developments Program (FQD).

The bill transfers responsibility for implementation of, and amendments to, DRI and FQD development orders to local governments. It preserves all entitlements, vested rights and other protections for existing DRIs. It specifies that amendments to a DRI development order do not alter credits for exactions or fees, or the date agreed to by the local government not to impose downzoning, density or intensity reductions on the development. The bill eliminates statutory substantial deviation criteria used to determine whether changes to a DRI necessitates additional DRI review. It ends all DRI appeals to the Florida Land and Water Adjudicatory Commission except for decisions by local governments to abandon an approved DRI.

Dredge & Fill Permit Authority
HB 7043 (Natural Resources & Public Lands Subcommittee)
The bill authorizes the Department of Environmental Protection (DEP) to adopt rules to assume and implement the Section 404 dredge and fill permitting program pursuant to the federal Clean Water Act, in conjunction with DEP's Environmental Resource Permitting program. The bill specifies that such rules shall not become Impactive until the U.S. Environmental Protection Agency approves of Florida's assumption application.

Customary Use Ordinances
HB 631/SB 804 (Edwards-Walpole/Passidomo)
The bill amends provisions of law controlling ejectment, unlawful and forcible entry, and unlawful detainer actions. A provision of specific interest to local governments creates section 163.035, F.S., concerning "customary use" of private property for public use. Customary use is a common law doctrine recognizing the public's ability to acquire rights to use the dry sand areas of a beach that are otherwise privately owned. The bill establishes a process by which a governmental entity may seek judicial determination of customary use, and prohibits governmental entities from adopting or maintaining an ordinance based upon customary use, unless such ordinance is based upon such judicial determination. The process addresses requirements for notice and public hearing by the local government, the filing of a Complaint for Declaration of Recreational Customary Use in circuit court, and evidentiary standards and applicable burden of proof. Governmental entities having customary use ordinances or rules in Impact prior to January 1, 2016, are exempt from the new process. The bill does not deprive a governmental entity from

raising customary use as an affirmative defense in challenges to ordinances adopted prior to July 1, 2018.

Coral Reefs
HB 53/SB 232 (Jacobs/Book)
Establishes the Southeast Florida Coral Reef Ecosystem Conservation Area, including areas offshore Broward, Martin, Miami-Dade, and Palm Beach Counties.

Health and Safety
Bills that Passed

Health Care Facility Regulation
CS/CS/SB 622 (Grimsley)
The bill amends numerous provisions related to the regulation of health care facilities by the Agency for Health Care Administration ("AHCA").
As it relates to local governments, the bill provides that any designated facility owned or operated by a public health trust and located within the boundaries of a municipality is under the exclusive jurisdiction of the county creating the public health trust and is not within the jurisdiction of the municipality. The bill requires any county health department conducting a testing program for acquired immune deficiency syndrome or HIV status to have all laboratory procedures performed in a laboratory appropriately certified by the Centers for Medicare and Medicaid Services under the federal Clinical Laboratory Improvement Amendments and the federal rules adopted thereunder.

Opioid Abuse
HB 21/SB 8 (Boyd/Benacquisto)
Imposes new restrictions on prescriptions, calls for $53.5 million in state and federal grant funding for treatment programs and updates the state's prescription database. Most initial prescriptions would have a limit of three days, but doctors could prescribe up to seven days for acute pain exceptions. It does not place medication limits for trauma cases, chronic pain or cancer.

School Safety – Marjory Stoneman Douglas School Public Safety Act
SB 7026 (Rules Committee)
Safe School Officers and School Guardians - The bill amends s. 1006.12, F.S., relating to safe school officers, to provide that each district school board and school district superintendent shall partner with law enforcement agencies to establish or assign one or more safe school officers at each school facility within the district by implementing any combination of the following options which best meets the needs of the district:

1) Establish School Resource Officer (SRO) programs through cooperative agreements with law enforcement agencies.

2) Commission one or more school safety officers for the protection and safety of school personnel, property, and students within the school district. The district school superintendent may recommend, and the district school board may appoint, one or more school safety officers.

3) At the school district's discretion, participate in the Guardian Program, if such program is established by the sheriff, to meet the requirement of establishing a safe school officer at each school facility.

Coach Aaron Feis Guardian Program - The bill permits a sheriff to establish a Coach Aaron Feis Guardian Program to aid in the prevention or abatement of active assailant incidents on school premises. The bill allows school districts to decide whether to participate in the school guardian program if it is available in their county. A school guardian must complete 132 hours of comprehensive firearm safety and proficiency training, 12 hours of diversity training, pass a psychological evaluation, and initial drug test and subsequent random drug tests. No teacher will be required to participate. In fact, the legislation provides that personnel that are strictly classroom teachers with no other responsibilities cannot participate, with specified exceptions.

Appropriates $400 million in funding ($200 recurring and $200 nonrecurring) to expand the number of school resource officers, to increase security at schools, and to enhance mental health training, screening, and counseling services in schools.

Seizure of Firearms & Ammunition/Baker Act:

- Authorizes a law enforcement officer who is taking a person into custody for an involuntary examination under the Baker Act to seize and hold a firearm or ammunition the person possesses at the time of being taken into custody, if the person poses a potential danger to himself or herself or others and has made a credible threat of violence against another person.

    - Allows an officer who is taking a person into custody at his or her residence to seek the voluntary surrender of firearms or ammunition kept in the residence not already seized. If such items are not voluntarily surrendered, or if the person has other such items that were not seized or surrendered when taken into custody, an officer may petition the appropriate court for a risk protection order under section 790.401, F.S. Items seized pursuant to these provisions must be available for return no later than 24 hours after the person is no longer subject to involuntary examination or treatment, unless a risk protection order entered

under section 790.401 specifies otherwise. The process for return may not exceed seven days.

- Prohibits a person who has been adjudicated mentally defective or who has been committed to a mental institution from owning or possessing a firearm until a court orders otherwise (process for obtaining a petition for relief set forth in s. 790.065(2)), F.S.

Purchase & Possession Restrictions:

- Requires a waiting period between the purchase and delivery of all firearms, which is the later of three days or upon the completion of a records check pursuant to s. 790.065, F.S. Provides exceptions (including for holders of concealed weapons permits and for purchases of rifles or shotguns upon completion of hunter safety course and certification).
- Prohibits a person under 21 years of age from purchasing any firearm.
- Prohibits a bump-fire stock from being imported, transferred, distributed, transported, sold, keeping for sale, offering or exposing for sale, or given away within the state.

Risk Protection Orders for Surrender of Firearms & Ammunition:

- Creates section 790.401, F.S., establishing a process for a law enforcement officer or law enforcement agency to petition a court for a "risk protection order" to temporarily prevent persons who are at high risk of harming themselves or others from accessing firearms when they pose a significant danger to themselves or others, including significant danger as a result of a mental health crisis or violent behavior.
- Establishes requirements for a petition for risk protection order, notice and hearing requirements, grounds for issuance of order, and service of order.
- A court may issue a risk protection order for up to 12 months.
- A court may issue temporary ex parte risk protection order in certain circumstances.
- Requires the immediate surrender of all firearms and ammunition, including any license to carry a concealed weapon or firearm, if a risk protection order or ex parte risk protection order is issued.
- Authorizes law enforcement to seek a search warrant if the officer has probable cause to believe there are firearms or ammunition that have not been surrendered.
- Authorizes a respondent to elect to transfer firearms and ammunition to a person meeting specified conditions in lieu of surrender to law enforcement.
- Provides a process for a risk protection order to be vacated or extended.

Written Threats to Conduct Mass Shootings or Acts of Terrorism
CS/CS/CS/HB 165 (McClain)

The bill provides that any person who makes, posts, or transmits a threat in writing or other record, including an electronic record, to conduct a mass shooting or an act of terrorism, in any manner that would allow another person to view the threat commits a felony of the second degree.

The bill specifies that it does not impose liability on a provider of an interactive computer service, communications service, commercial mobile service, or information service such as an Internet service provider or hosting service provider, if it provides the transmission, storage, or caching of electronic information.

Persons Authorized to Visit Juvenile Facilities
CS/HB 361 (Richardson)
The bill provides the certain persons may not be prohibited from visiting all facilities housing juveniles which are operated or overseen by the Department of Juvenile Justice (the "Department") or a county between the hours of 6 a.m. and 11 p.m. The bill applies to the following officials: the Governor; a Cabinet member; a member of the Legislature; a judge of a state court; a state attorney; a public defender; or a person authorized by the secretary of the Department

Reports Concerning Seized or Forfeited Property
CS/HB 547 (Killebrew)

The bill requires a law enforcement agency receiving or expending forfeited property or proceeds from the sale of forfeited property in accordance with the Florida Contraband Forfeiture Act to submit a completed annual report to the Florida Department of Law Enforcement by December 1 that documents the receipts and expenditures of the agency.

Sexual Offenders and Predators
CS/HB 1301 (Fitzenhagen)

The bill prescribes penalties for a sexual predator who commits a felony violation on or after July 1, 2018, for failing to register as a sexual predator, failing to maintain, acquire, or renew a driver license, failing to provide required location information, or failing to disclose certain information required under the Florida Sexual Predators Act. If the court does not impose a prison sentence for such a felony, the bill requires a court to impose a mandatory minimum term of community control. The bill reduces the aggregate and consecutive number of days to determine residency from five to three for sexual predator or sexual offender registration purposes.

Education for Prisoners
CS/CS/HB 1201 (Ahern)
The bill authorizes each county to contract with a district school board, the Florida Virtual School, or a charter school to provide educational services for inmates at county detention facilities. The education services may include any educational, career, or vocational training that is authorized by the sheriff or chief correctional officer, or his or her designee.

The bill prohibits state funds provided for the operation of postsecondary workforce programs from being expended for the education of state inmates with more than 24 months of time remaining to serve on their sentence or for federal inmates.

Fire Safety
CS/SB 394 (Bracy)
The bill requires the Division of State Fire Marshal to establish courses to provide training for career and volunteer firefighters related to cancer and mental health risks within the fire service. The bill makes such training a requirement for obtaining a Firefighter Certificate of Compliance, Volunteer Firefighter Certificate of Completion, or Special Certificate of Compliance.

Prearrest Diversion Programs
SB 1392/HB 1192 (Brandes/Ahern)
The bill permits local communities and public or private educational institutions to adopt a model prearrest diversion program for adults and requires a civil citation or similar prearrest diversion program for juveniles to be established in each judicial circuit in the state. The bill outlines criteria that each civil citation of similar prearrest diversion program must specify in developing these programs.

The bill addresses data and reporting obligations of criminal justice agencies and prearrest diversion programs for adults and juveniles.

Data Collection & Reporting Requirements
The bill creates section 900.05, F.S., which establishes data collection and reporting requirements for local and state criminal justice agencies. Specifically, the bill requires each clerk of court to collect certain data for each criminal case and the administrator of each county detention facility to collect certain data relating to capacity and detention center population information

Beginning January 1, 2019, these entities are required to collect this data biweekly, and report it monthly to the Florida Department of Law Enforcement. An entity that fails to comply with these reporting requirements is ineligible to receive funding from the General Appropriations Act or any state grant program for 5 years after the date of noncompliance.

The bill creates a pilot project in the Sixth Judicial Circuit to improve criminal justice data transparency and to ensure data submitted pursuant to newly created s. 900.05, F.S., is accurate, valid, reliable, and structured.

Adult Prearrest Diversion Programs
The bill authorizes local communities to adopt an adult prearrest diversion program in which:

- law enforcement officers, at their sole discretion, may issue a civil citation or similar prearrest diversion program notice to certain adults who commit a qualifying misdemeanor offense;
- an adult who receives a civil citation or similar notice must be provided appropriate assessment, intervention, education, and behavioral health care services by the program and must complete other specified requirements.

The bill authorizes representatives of a participating law enforcement agency, a representative of the program services provider, the public defender, state attorney, and the clerk of the circuit court to create a prearrest diversion program and develop its policies and procedures.

The bill specifies the program may be operated by an entity such as a law enforcement agency or a county or municipality, or by another entity selected by the county or municipality. The bill specifies a county or municipality is not preempted from enacting noncriminal sanctions for a violation of an ordinance or other violation, and it does not preempt a county, a municipality, or a public or private educational institution from creating its own model for a prearrest diversion program for adults.

Juvenile Prearrest Diversion Programs
The bill requires each judicial circuit in the state to establish a civil citation or similar prearrest diversion program for misdemeanor offenses committed by juveniles. In creating the program, the bill authorizes the state attorney, public defender, clerk of court for each county in the circuit, and representatives of participating law enforcement agencies located in the circuit to develop the program's policies and procedures.

The bill requires the state attorney of each circuit to operate a civil citation or similar prearrest diversion program while also permitting a sheriff, police department, county, municipality, or public or private educational institution to continue to operate its own independent civil citation or similar prearrest diversion program that is in operation as of October 1, 2018, if, the independent program is determined by the state attorney to be substantially similar to the circuit's own program.

Under the juvenile civil citation or similar prearrest diversion program, if a juvenile does not successfully complete the program, the arresting law enforcement officer shall determine if there is good cause to arrest the juvenile for the original misdemeanor offense and refer the case to the state attorney to determine if prosecution is appropriate or whether the juvenile should continue in the program.

Animal Welfare
CS/CS/SB 1576 (Steube)
The bill requires public and private animal shelters that take in lost or stray dogs or cats to adopt written policies and procedures to ensure that every reasonable effort is made to return owned animals to their owners. The bill specifies minimum requirements for such policies, including intake screening of animals for identification, public notice of animals received, reasonable efforts to notify identified owners, notice to public of the shelter's location, hours and return processes, access opportunities for owners, direct return-to-owner protocols for animal control officers, procedural safeguards to minimize euthanasia of owned animals, and temporary extension of minimum stray hold periods after a disaster or state of emergency. The bill specifies that records of shelters, organizations or agencies related to these requirements shall be made available to the public pursuant to chapter 119, F.S. The bill increases the severity ranking for animal cruelty from a level three to a level five on the offense severity chart of the Criminal Punishment Code. The bill also authorizes a court to prohibit persons convicted of animal cruelty from owning, possessing, or having control over any animal for a period determined by the court.

Bills that Failed

Finance, Tax, Administration, and Economic Development

Taxes
Local Tax Referenda
HB 317/SB 272 (Ingoglia/Brandes)
Would have prohibited a vote on a sales tax referenda at any election other than the general election.

Government Accountability
HB 11/SB 354 (Lee/Stargel)
Would have created a state-wide travel reporting system, requiring detailed monthly reporting of all county official and employee travel to the Department of Management Services. Among other provisions related to county audits, it would have required that charter county audit committees include constitutional officers. During its last committee stop, SB 354 was amended to require all counties (other than those whose charters designate an official other than the clerk of court as the county comptroller), cities, special districts, school districts, and water

management districts to provide digital copies of their budgets and other financial information to the clerk of the court. Failure to do so would have mandated that the clerk require that the salary of the head of the local government be withheld.

Local Fiscal Transparency
HB 7/SB 1426 (Burton/Lee)
Would have created additional voting and notice requirements when counties issue debt. The bill would require the creation of a "debt affordability analysis" to be published in a newspaper prior to the consideration of the issuance of new debt, would require that two public hearings be held prior to issuance of debt or increases in local option sales taxes, and would require that vote counts be maintained for tax increases or issuance of tax supported debt for 5 years on the county's website, and would require additional auditing and remedial measures.

County and Municipal Officer Transparency
HB 815 (Avila)
This bill would have required additional authorization for county or municipal public officers to travel outside of the state:

- Requires such travel to be on the official business of the county or municipality and must be approved by the governing body at a regularly scheduled meeting prior to the officer's travel, unless ratified for good cause at the next regularly scheduled meeting.
- Requires all travel approved in accordance with the bill to be posted to the county's or municipality's website until the end of the next calendar quarter

As filed, would have prohibited travel expenses of county or municipal public officers for foreign travel under any circumstances. Exempted county constitutional officers from the aforementioned requirements. The bill passed off the House floor but was not considered by the Senate.

Financial Reporting
HB 1019 (La Rosa)
This bill would have required local governments to post annual budgets to the website for five year; provide an electronic copy of their budgets to EDR on specified forms; provide a copy of their budget and a certification of timely filing to the clerk of the court; and file annual financial reports and audit reports within six months of the end of the fiscal year.

County and Municipal Public Officer Transparency
HB 815/SB 1180 (Avila/Steube)
These bills would have required all elected county officers to get out-of-state and foreign travel approved by the Board of County Commissioners at a regularly scheduled public meeting before the travel occurs, or after the travel occurs if good cause is shown why the travel could not be approved before occurring.

Local Economic Development and Tourism Promotion Agencies
HB 3/SB 1714 (Grant/Perry)
Economic Development and Tourism Promotion Accountability – These bills would have placed significant additional requirements on county economic development and tourist development functions and as well as those entities that contract with counties to provide services related to tourism development and economic development. HB 3 passed the House early in Session. SB 1714 was significantly amended at its first committee stop in the Senate to address some local concerns, but was not heard in subsequent Senate committees of reference.

Preemption – Prohibition on Banning Products Subject to Sales Tax
7087 (House Tax Package)
Would have preempted cities or counties from prohibiting the sale or offering for sale of any tangible personal property subject to sales tax.

Fire Fighters
SB 900/HB 695 (Flores/Latvala)
These bills would have required fire service employers of full-time firefighters to offer cancer insurance coverage to its firefighter employees. The bills provided that upon a diagnosis of cancer, a firefighter is entitled to certain benefits if the firefighter has been employed by his or her employer for at least 5 continuous years, has not used tobacco products for at least the preceding 5 years, and has not been employed in any other position in the preceding years which is proven to create a higher risk for cancer. HB 695 was workshopped in one committee but never received a vote, and SB 900 stalled in its final committee.

Public Records Exemption - Emergency Shelter Records
HB 7079 (Pub. Rec./Disaster Response)
This bill provides a public records exemption for the name, address, and telephone number of a person which is collected by a public shelter during an emergency. It also provides a public records exemption for the name, address, and telephone number of a homeowner or a tenant which is held by an agency for the purpose of providing damage assessment data following a disaster. HB 7079 passed the full House but was not considered by the Senate.

Public Records Exemptions – Trade Secrets
HB 459 (Massullo)
This bill would have made broad changes to the public records exemption for trade secrets for those entities that contract with public agencies, including counties. The bill passed off the House floor but was not considered by the Senate.

Public Records – Civil Actions
HB 273/SB 750 (Rodriguez/Perry)
These bills would have prohibited a county that received a request to inspect or copy a record from responding to such request by filing a civil action against the individual or entity making the request.

Public Meetings
HB 79/SB 192 (Roth/Baxley)
These bills codified judicial interpretation of Florida's Sunshine law. Specifically, the proposals defined the terms "de facto meeting", "discussion", "meeting", "official act", and "public business". The bills also provided that notice is not required when two or more members of a board are gathered if no official acts are taken and no public business is discussed. SB 192 passed off Senate floor and was reported favorably through all House committee but was not taken up on the House floor.

Building Permit Fees
HB 725/SB 1144 (Williamson/Perry)
These bills would have required building departments to adopt fee schedules on their websites in conjunction with Building Permit Utilization Reports which include budgetary information regarding the building departments.

Local Government Ethics Reform
HB 7003 (Public Integrity & Ethics Committee)
This bill would have created a local government lobbyist registration system which all local government lobbyists would be required to use to register to lobby any local government, created additional requirements for public officers when reporting potential conflicts of interest. HB 7003 passed the House floor but was not heard in the Senate.

Economic Development – Regional Rural Development Grants
HB 1103/SB 1646 (Albritton/Montford)
An item in FAC's Action Plan, these bills would have increased the amount each Rural Area of Opportunity may receive in state dollars to $250,000 and decreases the local match to 25% of the state contribution. The bills also would have removed a requirement that grants from the Rural Infrastructure Fund be limited to 40% of the total cost of catalyst site projects and increased the maximum amount that DEO could award for non-catalyst site projects from 30 % to 50% of the cost of the project. The bills were amended to require that use of grant funds to expand broadband be available only for telecommunications providers that are registered providers of communications services with the state Department of Revenue and to add the SITES program under the auspices of DEO. The bills were reported favorably at all committee stops in both chambers and on the Senate floor but, without time for its final reading, died on the House floor.

Economic Development - Film
SB 1606 (Taddeo)
This bill would have created the Florida Motion Picture Capital Corporation to encourage development of scripted productions in the State. The bill passed favorably through it first Senate committee stop, but did not receive any other hearing.

Bills that Failed
Growth Management, Agriculture, Transportation, and Environment

Vacation Rentals
SB 1400 (Stuebe/Simmons)
This bill would have preempted regulation and control of vacation rentals to the state, conferring exclusive regulatory authority over such rentals to DBPR's Division of Hotels and Restaurants. Vacation rentals would have been required to obtain annual, non-transferrable licenses from the Division. The bill would have grandfathered ordinances adopted prior to June 1, 2011, and allowed grandfathered ordinances to be amended to be less restrictive.

Vacation Rentals
HB 773 (La Rosa)
This bill would have prohibited counties and cities from establishing ordinances specific to short-term vacation rentals and would have instead required that local regulations of activities associated with vacation rentals be applied uniformly to all residential properties. The bill would have allowed counties with vacation rental ordinances in place prior to June 1, 2011, to amend their ordinances, provided that such amendment made the regulation of vacation rentals less restrictive.

Preemption – Land Use
HB 833 (Ingoglia)
Initially a four-page bill dealing with establishment of community development districts. In its final committee, a nearly 200-page amendment was added, which substantially expanded the scope of the proposal. Specifically, the amendment added language requiring local urban or rural development boundaries established by initiative or referendum to be reauthorized by voters every ten years. The bill also added controversial language regarding Community Development Agencies (CRAs), including a provision stating that new CRAs could only be established by Special Act of the Legislature.

On third reading on the House floor, the bill was further amended to prohibit parcels from being classified as rural land if they are located within three miles of any state university main campus.

Such parcels would be deemed to be within an urban service area or within an urban development boundary, despite existing local land use designations.

Preemption – Tree Trimming
SB 574/HB 521 (Stuebe/Edwards-Walpole)
As originally filed, these bills would have prohibited local governments from regulating the trimming, removal or harvesting of trees and timber on private property or requiring mitigation for tree removal or harvesting on private property. While the House bill passed after being narrowed to apply only to activities in areas under the management of the state, water management districts, and drainage control districts, the Senate bill stalled after only passing one committee by a 3-2 vote.

Preemption – Dockless Bikes
SB 1304/HB 1033 (Young/Toledo)
These bills would have largely preempted regulation of dockless sharing companies to the state, specifically prohibiting local governments from imposing taxes or requiring business licenses. The bill also attempted to prohibit exclusive agreements between bike sharing companies and local governments. FAC worked with cities and other stakeholders to narrow the preemption; however, the bill ultimately stalled in the Senate. FAC anticipates that as this emerging industry continues to grow and evolve, legislation will likely return next year.

Impact Fees
SB 324/HB 697 (Young/Miller)
As originally filed, these bills simply addressed the timing of collection of impact fees. FAC worked with the sponsors and stakeholders to amend the bill to address concerns on the impact fee sections and clarify that it did not apply to water and sewer connection fees, and was ultimately neutral on that section of the bill. During final committee stops, the bills were amended substantially to include language regarding sector plans. FAC and counties with sector plans had concerns with this language, although these concerns were mitigated by a floor amendment. Nevertheless, these bills stalled in the Senate and ultimately did not pass.

Affordable Housing
SB 1328/HB 987 (Perry/B. Cortes)
These bills were aimed at expediting and incentivizing development of affordable housing, with focus on hurricane recovery housing. Of concern to local governments was language that would have prohibited local governments from imposing mobility fees or impact fees for affordable housing development for a five-year period beginning July 2018. Ultimately this prohibition was removed from both bills, although there were still increased reporting requirements related to impact fees. HB 987 passed in the House, but ultimately stalled in Senate messages.

Land Acquisition Trust Fund
SB 370/HB 1353 (Bradley/Beshears)
These bills would have dedicated an annual appropriation of $100 million from the LATF to the Florida Forever Trust Fund. SB 370 passed the Senate unanimously, but was not considered by the House. Though the final budget does include just over $100 million for the Florida Forever land acquisition programs.

Bills that Failed
Health and Safety

Texting While Driving
SB 90/HB 33 (Perry/Toledo)
The measures would have upgraded texting while driving from a secondary offense to a primary offense did not make it to the Governor Rick Scott's desk this year. As a secondary offense, police officers must see another violation such as speeding before they cite a driver for texting. Florida is only one of four states that currently charges texting while driving as a secondary offense instead of primary. The Florida House voted 112-2 in support of making texting while driving a primary offense, however there has been opposition from the Senate and their version stalled in Appropriations, with the chair of that committee citing concerns about racial profiling and giving police the ability to look through personal cell phones.

Contraband in County Detention Facilites
SB 1886/HB 733 (Brandes/Sullivan)
The bills would have added cellular telephones and other portable communication devices to the definition of contraband in a county detention facility. HB 733 was voted up on the House floor, 80-35, and was sent to the Senate. The Senate version was amended onto several bills late in the process in hopes to pass, but it ultimately did not.

Courthouse Security
HB 7089/SB 1218 (Judiciary Committee/Brandes)
The bills would have amended state law to require the county sheriffs to provide security for trial court facilities. They clarified that county sheriffs and their deputies, employees, and contractors are officers of the court when providing security for court facilities. These bills would have given sheriffs the operational control over the manner in which security is provided, directing the sheriff to coordinate with the chief judge on all matters of security for trial court facilities. This bill's language was added to HB 7061, which bounced back from the House to Senate on the final day of Session, ultimately stalling and dying in the Senate.

Drones
HB 471/SB 624 (Yarborough/Young)
These bills would have prohibited drone operation over, in contact with, or near a critical infrastructure facility such as state or private correctional institutions, secure and nonsecure juvenile residential facilities and detention centers, and county jails or detention facilities. The bills also would have prohibited using a drone to introduce contraband into a critical infrastructure facility, making such an offense a second degree felony. HB 471 was voted up on the House floor, 114-1 and was sent to the Senate. SB 624 stalled in Senate Rules and never made it to the floor.

State Prisoners in County Jails
SB 484 (Bradley): Criminal Justice
Would have authorized a court to sentence a person for up to twenty-four months in the county jail in the county where the offense was committed, under certain circumstances; one prerequisite would be the existence of a contractual agreement between the county and the Florida Department of Corrections. SB 484 did not have a House companion and ultimately stalled on the Senate floor.

Emergency Management – Special Needs Shelters
HB 7085 (Health and Human Services Committee)
Health Care Disaster Preparedness and Response – The bill would have required the Department of Health (DOH), rather than the Division of Emergency Management, to establish a uniform statewide special needs shelter registry, mandating local emergency management agencies to use it, rather than local registries. It also would have required local emergency management agencies to establish eligibility criteria for local special needs shelter and procedures to allow health care facility staff to travel to and from work during declared curfews. HB 7085 was voted up on the House floor, 114-0 and was sent to the Senate, who did not consider the bill.

Federal Immigration Enforcement
HB 9/SB 308 (Metz/Bean)
Would have required county governments and law enforcement agencies, including their officials, agents, and employees, to support and cooperate with federal immigration enforcement. Specifically, the bills would prohibit a county government or law enforcement agency from having a law, policy, practice, procedure, or custom which impedes a law enforcement officer from communicating or cooperating with a federal immigration agency. The bills also required any sanctuary policies currently in Impact to be repealed within 90 days of the Act becoming law. If found in violation of the Act, a county or law enforcement agency could be fined by the State or subject to a suspension of state grant funding eligibility for 5 years.

Proposed 2018 Constitutional Amendments

1. **Increased Homestead Property Tax Exemption**
   Legislative Proposal (2017 HJR 7105)
   Removes the assessed value of a homestead between $100,000 and up to $125,000 from the calculation of non-school property taxes.

   Local Government Impact: Estimated $600 million recurring reduction to non-school local government property tax revenue based on 2017 values.

2. **Limitations on Property Tax Assessments**
   Legislative Proposal (2017 HJR 21)
   Retains a 10% cap on the amount that non-school property taxes can annually increase for non-homestead property (business, rental, second homes)

   Local Government Impact: Estimated value of capped increase over 10 years is estimated $700 million non-school property tax savings to non-homestead property at 2017 property values.

3. **Voter Control of Gambling in Florida**
   Citizen Initiative
   This amendment ensures that Florida voters shall have the exclusive right to decide whether to authorize casino gambling by requiring that for casino gambling to be authorized under Florida law, it must be proposed through the citizen initiative process to amend the constitution and then approved by 60% of the voters.

   Local Government Impact: Under current law, the Legislature must authorize slots in those counties that have approved them-Brevard, Duval, Gadsden, Hamilton, Lee, Palm Beach, St. Lucie and Washington. Authorizing gambling in these counties would violate the compact between the Seminole tribe and the State (authorized by the Legislature) which is valued at $250 million a year. This amendment would require that the county voters' decisions would have to be approved by 60% of the voters state-wide after being placed on the ballot by citizen initiative, not by Legislative proposal.

4. **Voting Restoration Amendment**
   Citizen Initiative
   This amendment restores the voting rights of Floridians with felony convictions after they complete all terms of their sentence including parole or probation. The amendment would not apply to those convicted of murder or sexual offenses, who would continue to be

permanently barred from voting unless the Governor and Cabinet vote to restore their voting rights on a case by case basis.

5. **Supermajority Vote Required to Impose, Authorize, or Raise State Taxes or Fees**
   Legislative Proposal (2018 HJR 7001)
   Would require the Legislature to approve a tax or fee increase by 2/3 vote of each chamber

   Local Government Impact: If approved, the number of legislators that would have to vote to raise a state tax would be the same as the number of legislators required to pass an unfunded mandate and make local governments provide the funding or service, this increases the incentive for legislators to shift costs to local governments rather than face the political consequences of acknowledging increased taxes at the state level.

6. **Rights of Crime Victims; Judges**
   Constitutional Revision Commission (Proposal 6001)
   Would entitle victims of crimes to certain rights in the criminal justice system, including the right to be notified of major developments in criminal cases and the right to be heard in legal proceedings. It would also increase the mandatory retirement age for judges from 70 to 75 years old and would prohibit judges and hearing officers from deferring to an agency's interpretation of a statute or rule and requiring that the agency's interpretation be reviewed de novo, essentially constitutionally superseding the Chevron Doctrine.

   Local Government Impact: The change in the deference to agency decisions only applies to state agencies, so would lower the legal threshold that a local government would need to meet when challenging an agency's interpretation, but this lowered threshold would decrease the ability of local governments to confidently rely on state agency decisions.

7. **First Responder and Military Member Survivor Benefits; Public Colleges and Universities**
   Constitutional Revision Commission (CRC Proposal 6002)
   Would require the payment of death benefits when law enforcement officers, paramedics, correction officers, and other first responders are killed while performing their official duties. It also would apply to Florida National Guard and active-duty military members stationed in Florida. The proposal would establish a governance system for the 28 state and community colleges. It would also require a supermajority vote by university boards of trustees and the university system's Board of Governors when raising student fees.

   Local Government Impact: May increase costs to local governments that fund benefits for first responders.

8. Public Schools

Constitutional Revision Commission (Proposal 6003)

Creates a term limit of eight consecutive years for school board members and requires the legislature to provide for the promotion of civic literacy in public schools. Currently, district school boards have a constitutional duty to operate, control, and supervise all public schools. The amendment maintains a school board's duties to public schools it establishes, but permits the state to operate, control, and supervise public schools not established by the school board.

Local Government Impact: Proposal would prospectively impose an eight-year term limit on school board members. Would empower the legislature to create an alternative governance structure outside of the purview of local school boards for some public schools, such as charter schools.

9. Prohibits Offshore Oil and Gas Drilling; Prohibits Vaping in Enclosed Indoor Workplaces

Constitutional Revision Commission (CRC Proposal 6004)

Prohibits drilling for the exploration or extraction of oil and natural gas beneath all state-owned waters between the mean high-water line and the state's outermost territorial boundaries. Adds use of vapor generating electronic devices to current prohibition of tobacco smoking in enclosed indoor workplaces with exceptions; permits more restrictive local ordinances.

Local Government Impact: Preserves current local authority to regulate tobacco products

10. State and Local Government Structure and Operation

Constitutional Revision Commission (CRC Proposal 6005)

Requires legislature to retain department of veterans' affairs. Removes county charters' ability to abolish, change term, transfer duties, or eliminate election of sheriffs, property appraisers, supervisors of elections, tax collectors, and clerks of court in all counties. Changes annual legislative session commencement date in even numbered years from March to January; removes legislature's authorization to fix another date. Creates office of domestic security and counterterrorism within department of law enforcement.

Local Government Impact: Would require all county officers to be elected and prevent the transfer of their duties or elimination of the office. Overrides existing provisions in county charters doing so and removes authority of legislature to abolish or change office or changes manner of selections, except as to clerks of courts functions as the county clerk.

11. Property Rights; Removal of Obsolete Provision; Criminal Statutes

Constitutional Revision Commission (Proposal 6006)

Removes discriminatory language related to real property rights. Removes obsolete language repealed by voters. Deletes provision that amendment of a criminal statute will not affect prosecution or penalties for a crime committed before the amendment; retains current provision allowing prosecution of a crime committed before the repeal of a criminal statute.

12. Lobbying and Abuse of Office by Public Officials

Constitutional Revision Commission (Proposal 6007)

Expands current restrictions on lobbying for compensation by former public officers; creates restrictions on lobbying for compensation by serving public officers; provides exceptions; prohibits certain abuses of public office for personal benefit.

Local Government Impact: The proposal would impose a six-year lobbying ban on former state elected officials, state agency heads and local elected officials. Would prevent any local elected official from representing another person of entity for compensation before any federal agency, the legislature, and state government body or agency, other than judicial tribunals, or any political subdivision of the state while in office. It would also create a new ethics standard that would prohibit public officials from obtaining a 'disproportionate benefit" from the actions while in office.

13. Dog Racing

Constitutional Revision Commission (CRC Proposal 6012)

Prohibits gaming or pari-mutuel entities from racing dogs in connection with wagering; eligibility of such entities to conduct other authorized pari-mutuel and gaming activities is not affected; prohibits wagering on outcome of in state live dog races.

Municipalities and the Opioid Crisis

Erich Eiselt, IMLA Assistant General Counsel

Presented to
Florida Association of County Attorneys
Orlando, Florida – June 28, 2018

Municipalities and the Opioid Crisis

- A Brief History
- The Litigation—State and Federal
- Whether to File, and Where
- Attacking the Problem

Brief History: Runaway Success

- 1980: Purdue brings MS Contin to market
- 1980: Porter and Jick study (less than 1% addiction)
- 1996: Purdue brings OxyContin to market
- 1996: American Pain Society adds “Pain” to 4 vital signs (pulse, temperature, blood pressure, respiration rate)
- 2001/2002: Oxy sales reach $3 Billion (1996-$44 Million)
- 2003: more than half of Oxy prescribers are primary care doctors (not end-of-life or acute pain specialists)

Brief History: Marketing Strategies

- Advertising in medical journals: aura of legitimacy
- Key Opinion Leaders: national experts
- Conference sessions: continuing medical education
- Local influencers: paid to attend
- Off-label promotions: beyond FDA-approved statements
- “Pseudo-addiction”: withdrawal requires greater doses

Brief History: Repeated Violations

- 2007: Purdue pleads guilty to understating OxyContin's potential for addiction--$634 million in penalties
- 2008: McKesson and Cardinal cited by DEA for under-reporting "suspicious orders"--$48.5 million in fines
- 2016: Cardinal again cited--$44 million in fines
- 2017: Mallinkrodt cited--$35 million in fines
- 2017: McKesson again cited--$150 million in fines (only reported 16 orders out of 1.6 million)

Brief History: Sobering Facts

- US opioid prescriptions in 2012: 282 million
- Doses to Kermit, WV (pop. 292) during 2 years: 9 million
- FL overdose deaths in 2015: 7,293
- US overdose deaths in 2016: 64,000
- Americans addicted to opioids in 2017: 2.1 million
- 70% of heroin addicts begin with opioids
- Palm Beach cost to respond to overdose: $1,500
- National Economic burden: Over $500 Billion/year (CEA)

Opioid Litigation: Who are the Plaintiffs?

- Municipalities: States, Counties, Cities, Townships, Fire Districts
- Third Party Payors: Unions, Healthcare plans, Risk Pools
- Healthcare Providers: Hospitals, EMS
- Tribes: Cherokee, Choctaw, Arapaho
- Individuals

Opioid Litigation: Who are the Defendants?

- Manufacturers: Purdue, J&J/Janssen, Endo, Cephalon/Teva, Allergan/Actavis, Insys
- Distributors: AmerisourceBergen, Cardinal, McKesson
- Pharmacies: CVS, Walgreens, Costco
- PBMs: Express Scripts, Caremark, Optum
- Experts: Dr. Webster, Dr. Portenoy
- Non-Profits: AAPM, JCAHO
- Sackler family: individuals and estates

Opioid Litigation: What are the Claims?

- Nuisance: injury to community, rehabilitation costs, EMS, crime, child protective care, worker's comp
- Negligence: allowed diversion of opioids
- Consumer fraud/deceptive practices: deceived consumers/prescribers, promoted off-label use
- False claims: obtained reimbursement for ineffective/improper products
- Conspiracy/RICO: collusion among manufacturers, distributors, experts, others

Opioid Litigation: What are the Defenses?

- No proximate cause: too many intervening factors
- Statute of limitations: time has expired to bring claims
- Preemption: FDA approved opioids, still controls them
- Safe harbor: State laws exempt liability for drugs
- Learned intermediary: doctors made own decisions
- Statewide concern: municipalities have no authority
- Contingency fees: ethical breach by municipal lawyers

Opioid Litigation: State Courts

- Nationally, hundreds of municipal filings in state courts
- FL - Pam Bondi files in Pasco County 5/15/2018; same day as AGs from TX, TN, NV, NC and ND file in-state
- TX - 16 municipal cases moved into Texas MDL
- AR - Omnibus complaint: AG/75 counties/210+ cities
- OK - AG case on track for trial by 5/2019
- NY - “mini-MDL” - all cases go to Supreme Court, Suffolk County (denied manufacturers’ MTDs 6/18/2018)

Opioid Litigation: State Courts-Jurisdictional War

- Removal if “complete diversity”(28 U.S.C. § 1332)
- Defendants are citizens where incorporated and where home office located (CA, PA, DE, NY, TX, etc.)
- Plaintiffs add in-state defendants (doctors, clinics)
  - Fraudulent joinder: added party has nothing to do with case, or no possibility of recovery
  - Fraudulent misjoinder: added party is connected to case, but not needed to resolve this action
  - Inconsistent results (e.g. WV, Fourth Circuit)

Opioid Litigation: State Courts-Jurisdictional War

- Even if no "complete diversity," AG's *parens patriae* suit avoids federal removal (*AU Optronics,* SCOTUS 2014); *however--*
- Removal if "Federal Question"- "arising under the . . . laws . . . of the United States" (28 U.S.C. §1331)
  - OK AG battling FQ removal – referenced CSA
  - AGs in NM, DE and WV have all defeated FQ removal
- "Federal Person"- suit is essentially action against federal entity (ie VA purchased and distributed opioids)

Opioid Litigation: The Federal MDL

- 2014-Chicago first large city to file (removed to N.D. Ill.)
- 2017-Dozens of cases, MDL formed: *In re National Prescription Opiate Litigation* (17-md-2804, N.D. Oh.)
- Judge Dan Aaron Polster – activist, seeking resolution
  - Structure: 3 co-leads, 16-member PEC, liaison group
  - Early push for settlement talks, including state AGs
  - At 6/26/2018, 40 CTOs: 857 federal cases to MDL*
    - MDL stays local cases, except remand actions

Opioid Litigation: MDL Case Management-Evidence

- DEA "ARCOS" Data (2006 - 2014) provided to all parties
- *City of Chicago* documents/ESI from all defendants provided to all parties
- Depositions: strict calendar, limits-number and time
- Coordination: "this Court intends to coordinate with State courts . . . to the fullest extent possible" including "coordination of written discovery and deposition protocols and cross-noticing of depositions."

Opioid Litigation: MDL Case Management-Timing

- "Track One" - 3 Ohio cases (*Summit, Cuyahoga, Cleveland*): trial begins 3/1/2019
- Ohio and Illinois (*Summit, Chicago*): complaints by 4/25/2018, motions to dismiss by 5/25/2018
- West Virginia, Michigan and Florida (*Cabell, Monroe, Broward*): complaints 4/25/2018, MTD 6/8/2018
- Alabama: complaint 5/9/2018, MTD 6/18/2018
- Tribes: complaint 7/9/2018, MTD 8/6/2018
- Hospitals/Third-Party Payors: select by 5/11/2018

Opioid Litigation: MDL Motions to Dismiss- Statewide Concern (*Broward County*)

"Municipal corporations are established for purposes of local government, and, in the absence of specific delegation of power, cannot engage in any undertakings not directed immediately to the accomplishment of those purposes." *City of Miami Beach v. Fleetwood Hotel, Inc.,* 261 So.2d 801 (Fla. 1972).

Opioid Litigation: MDL Motions to Dismiss- Statewide Concern (*Broward County*)

"Just as these principles preclude local ordinances that seek to regulate matters of statewide concern, the same limitations apply equally to *litigation* brought by political subdivisions. . . . The Florida AG "cited [the statewide concern] in initiating her own lawsuit against manufacturers and distributors of opioids. Through that suit, the AG seeks to vindicate the interests of Florida and its citizens."

Opioid Litigation: MDL Motions to Dismiss- Municipal Cost Recovery (*Broward County*)

"Even if Plaintiff's claims were otherwise viable, the municipal cost recovery rule forbids Broward County from recovering the damages that it seeks. Plaintiff's claimed damages are textbook examples of the costs that a government entity may not recover through litigation: the costs of police, fire, and emergency services; expenses incurred providing residents with medical care; and the burden on the judicial system."

Opioid Litigation: MDL Motions to Dismiss- Municipal Cost Recovery (*Broward County*)

"In Florida, as elsewhere, the government may not seek 'reimbursement for expenditures made in its performance of governmental functions' absent 'express legislative authorization.'" (*Penelas v. Arms Tech., Inc.*, 1999 WL 1204353, at *4 (Fla. Cir. Ct. Dec. 13, 1999), aff'd, 778 So.2d 1042 (Fla. Dist. Ct. App. 2001).

Opioid Litigation: MDL Motions to Dismiss-Fraud (*Broward County*)

"[T]he County fails . . . to identify any County prescriber who was exposed to the . . . alleged deceptive marketing; . . . to identify when or by whom any alleged misrepresentation or omission was made to any County prescriber; and to identify any County prescriber who wrote an allegedly harmful or medically unnecessary opioid prescription as a result of the alleged deceptive marketing."

Opioid Litigation: MDL Motions to Dismiss- Statutory Immunity (*Monroe County, MI*)

"MCL § 600.2946(5) provides broad immunity . . . sellers of prescription drugs are immune from all tort liability, so long as "the drug was approved for safety and efficacy by the [FDA], and the drug and its labeling were in compliance with the [FDA's] approval at the time the drug left the control of the manufacturer or seller." "[A] manufacturer or seller of a drug . . . approved by the FDA has an absolute defense to a products liability claim."

Opioid Litigation: MDL - Early Indications?

6/18/2018: NY 'MDL' (Judge Garguilo) denies MTDs:

- **Fraud: "defendants' argument that the plaintiffs must allege and prove a particular misstatement led a specific physician to write a particular opioid prescription for a patient is rejected."**
- **Preemption: "the FDA's approval of opioids . . . does not mean that . . . the plaintiffs herein may not seek to protect their residents from the unlawful activities of defendants concerning those drugs . . ."**

Opioid Litigation: MDL - Early Indications?

6/18/2018: NY 'MDL' (Judge Garguilo) orders, cont'd:

- Public nuisance: claims can proceed--public health can be a right "common to the general public"
- Municipal cost recovery: defendants cite no case where governments are prevented from suing "to remedy public harm caused by intentional, persistent course of deceptive conduct"- "to do so would distort the doctrine beyond recognition."

Whether to File

- Has the municipality been damaged?
- Is there an insurer or third party payor?
- Are there sufficient records? (MDL requires "Government Plaintiff Fact Sheet"—back to 2008)
- Are there resources/processes to marshal the data?
- Effect on operations? (litigation hold, etc.)
- Will the municipality actually receive funds for use in attacking the problem (Tobacco MDL-funds not sent to localities, low percentage used to curb smoking)

Where to File

- **In-state advantages:**
  - **Familiarity with local courts and judges**
  - **Sympathetic jurors, drawn from small area**
  - **Jury unanimity not required in all states**
  - **State-specific fraud and false claims laws**
  - **Not lost among 1000+ plaintiffs-differing size/damages**
  - **More direct contact with defense counsel**

Where to File

- **In-state disadvantages:**
  - **Unless consolidated with other state actions (as in AR, TX, NY, CT), results in dozens of duplicative and competing suits**
  - **MDL will still exert influence**
  - **Smallest jurisdictions cannot afford own actions**
  - **Local counsel may not have experience or resources**
  - **If AG action, will recovery get to municipalities?**

Where to File

- **Federal/MDL advantages:**
  - **Judge Polster's activist approach—first trials set for March 2019, rigorous push for settlement**
  - **Reduces duplicative discovery and pleadings**
  - **Participation by US as Friend of Court**
  - **Federal RICO-treble damages**
  - **Defendants' focus, ahead of/in lieu of state actions**
  - **Most experienced/qualified plaintiffs' counsel**
  - **Subsequent filers can mimic/join action**

Where to File

- **Federal/MDL disadvantages:**
  - **Generalizes/merges disparate claims and damages**
  - **Handful of firms control process and govern outcome**
  - **Smaller jurisdictions have little voice or influence**
  - **Might forego benefits of state-specific fraud and false claims protections**
  - **Will recovery be divided equitably among all municipalities?**
  - **Juries from large Districts, must be unanimous**

Attacking the Problem: Federal

- White House - “public health crisis” 10/2017; set up Commission. 3/2018 - death penalty for dealers
- DEA - Move fentanyl and analogues to Schedule I
- FDA - Remove opioid ads from social media
- Congress - CARA 2.0-Comprehensive Addiction/Recovery Act

Attacking the Problem: Federal

CARA 2.0-Comprehensive Addiction/Recovery Act

- **3-day limit on initial opioid prescriptions**
- **PAs/nurses can prescribe buprenorphine**
- **Doctors/pharmacists must use PDMPs**
- **Increased penalties re: Suspicious Order Reports**
- **National standard for addiction recovery housing**

Supported by Sens. Portman (R-OH), Whitehouse (D-RI), Capito (R-WV), Klobuchar (D-MN), Sullivan (R-AK), Hassan (D-NH), Cassidy (R-LA), Cantwell (D-WA).

Attacking the Problem: Federal

- CARA - $1 Billion divided among:
  - $300 million-medications for opioid addiction
  - $300 million-first responder training/naloxone
  - $200 million-long-term recovery programs
  - $100 million-pregnant/postpartum women
  - $100 million-criminal justice and education

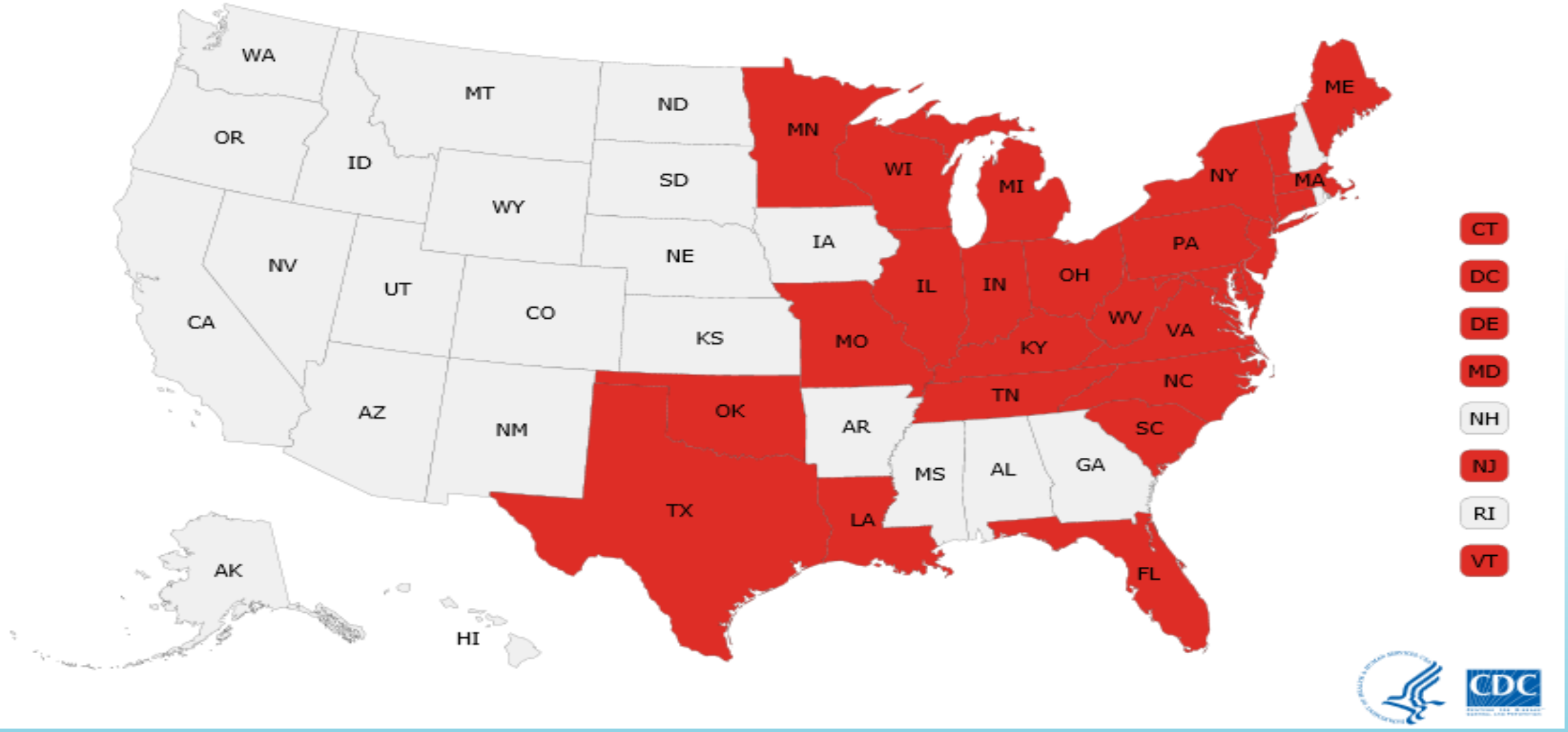
Attacking the Problem: Federal

- How to Spend $100 Billion on the Opioid Crisis
  - Treatment - 47%
  - Demand - 27%
  - Harm Reduction - 15%
  - Supply - 11%

Josh Katz, “How a Police Chief, a Governor, and a Sociologist Would Spend $100 Billion to Solve the Opioid Crisis” NEW YORK TIMES, Feb. 14, 2018.

Attacking the Problem: States

States with significant opioid death increase 2015-2016:



Attacking the Problem: States

- State Solutions
  - 6 states including FL declared public health crisis
  - AL-State of Alabama Opioid Action Plan 12/2017 http://www.mh.alabama.gov/Downloads/CO/AlabamaOpioidOverdose_AddictionCouncilReport.pdf
  - NJ-Gov. Christie initiatives
  - NY-“Healing New York” program
  - DE-Opioid Guidelines for Healthcare Providers http://www.helpisherede.com/Content/Documents/Prescription_Opioid_Fact_Sheet_for_Providers.pdf

Attacking the Problem: States

- State Solutions
  - 49 states now require PDMPs (except MO)
  - 28 states now impose caps on opioid prescriptions
  - NE - HB 931: 7 day maximum for 18 and under
  - TN - 5 day maximum new patients, 40 MMEs /day
  - MI – SB 274: 7 day maximum beginning 7/1/2018
  - http://www.affirmhealth.com/blog/opioid-prescribing-guidelines-a-state-by-state-overview

Attacking the Problem: States

- Florida Solutions
  - 2009-PDMP law: prescribers must report in 7 days- but do not have to consult PDMP before prescribing
  - 2010-FL was home to 98 of top 100 prescribers (DEA)
  - 2018-HB 21 - E-FORCSE: beginning 7/1/2018, dispensers must report by close of next business day; prescribers must consult PDMP for age 16 and older
  - Must designate “acute pain” or “nonacute pain” - 3-day limit for acute (7 days via “special exception”)

Attacking the Problem: States

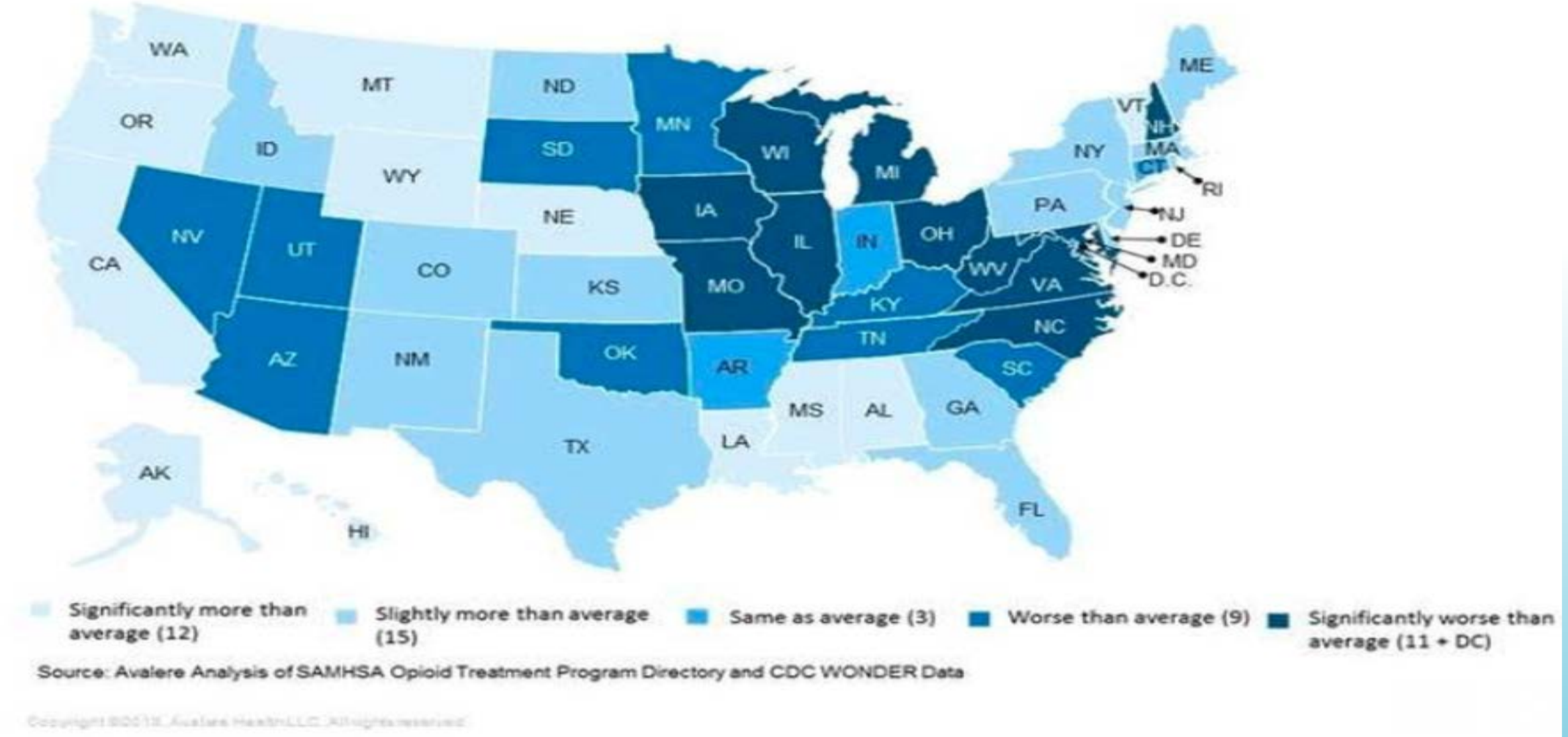
- Florida Solutions, cont'd
  - For traumatic injury, must also prescribe opioid "agonist" (methadone, buprenorphine)--binds to receptor and produces serotonin, but less addictive
  - No limit on prescriptions for chronic pain
  - Effective 1/1/2019, pain clinics (dispense opioids to more than 50% of clients in any month) must register or file for exemption (previously, no need to file)
  - https://flmedical.org/Florida/Florida_Public/Docs/FMA-Opioid-HB21.pdf

Attacking the Problem: States

Opioid prescriptions declined more than 10% in 2017

Work to be Done:

Ratio of buprenorphine providers to overdose deaths



Work to be Done:

Work to be Done:

Counties with highest PDMP utilization rates

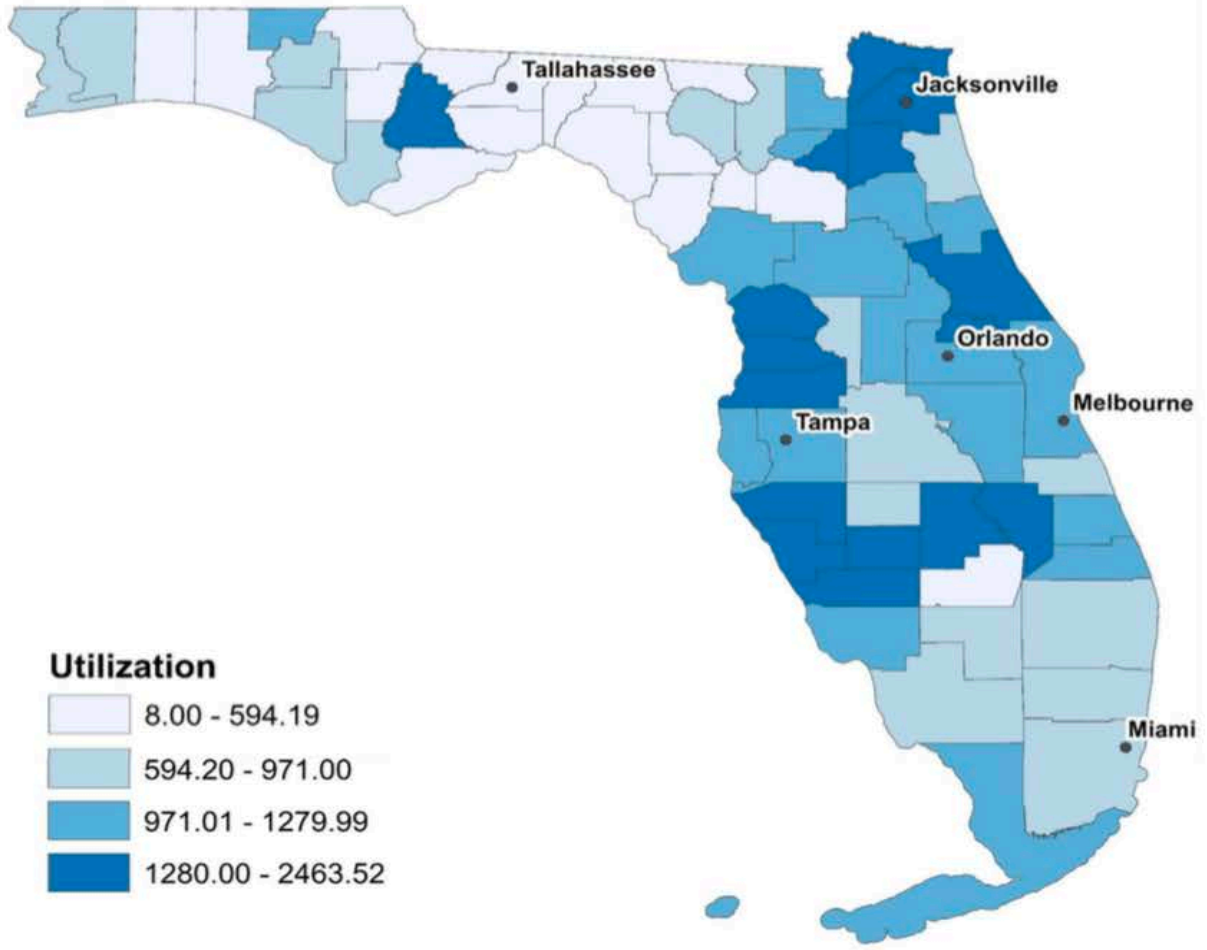


Figure 4(e) The highest PDMP utilization rates are concentrated in urban areas and near large health systems.

Work to be Done:

Counties with highest controlled substance prescribing

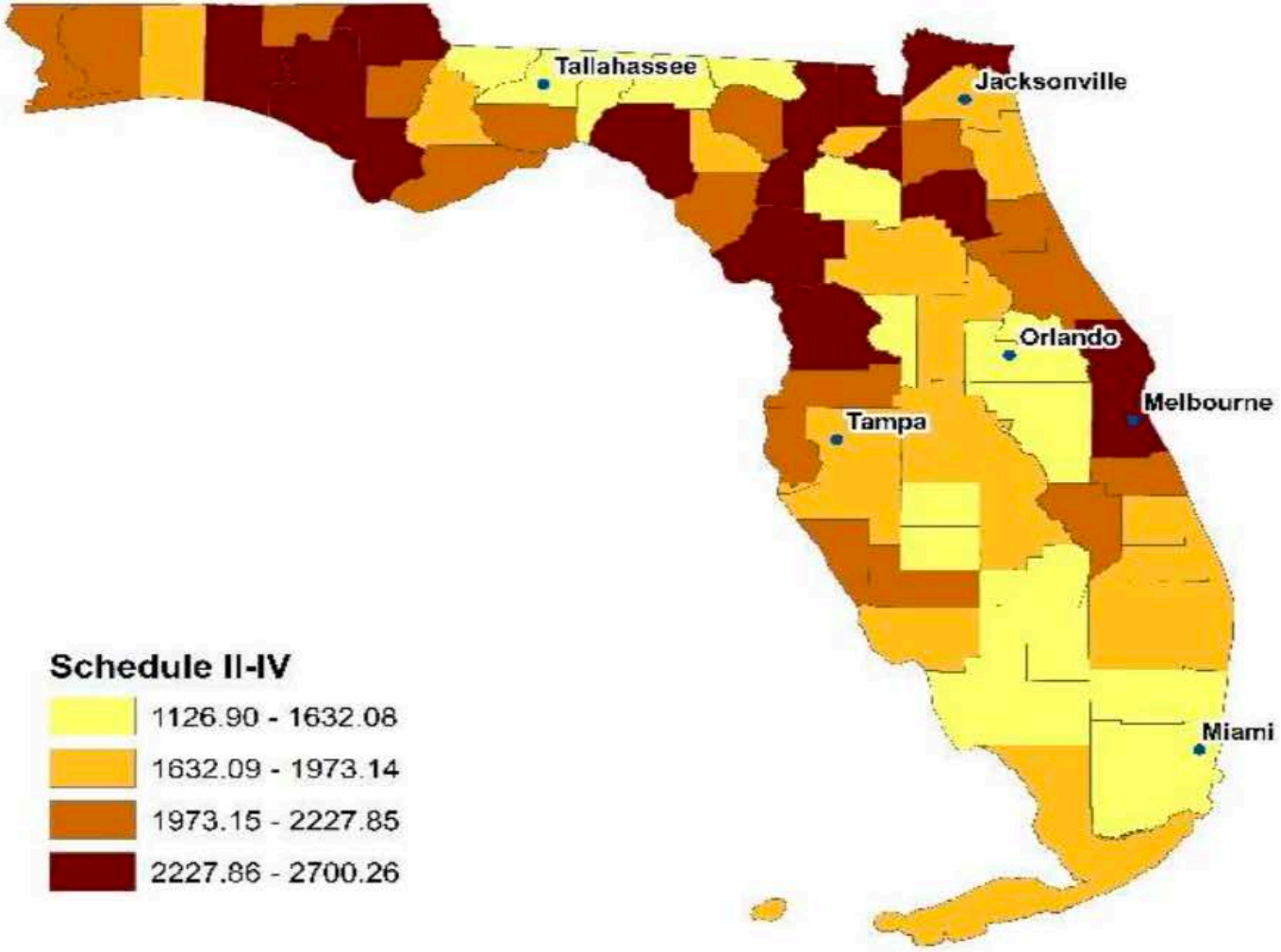


Figure 4(a) Schedule II-IV controlled substance prescribing is highest in the Panhandle, rural areas of north Florida and the Melbourne area.

Work to be Done:

How Much Will Kill You? Photo Courtesy Bruce Taylor, New Hampshire State Police Forensics Laboratory

Work to be Done:

Municipalities have a major role to play in reversing the damage done to American society by the opioid epidemic.

Thank you-

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THE JOURNAL OF LOCAL GOVERNMENT LAW

Too Much of a Bad Thing: Municipalities and the Opioid Curse

By: Erich R. Eiselt, IMLA Assistant General Counsel

America's opioid crisis is overwhelming Main Streets across the nation. Municipalities are engaged in a massive effort to hold the pharmaceutical industry accountable– and to craft solutions that will save lives.

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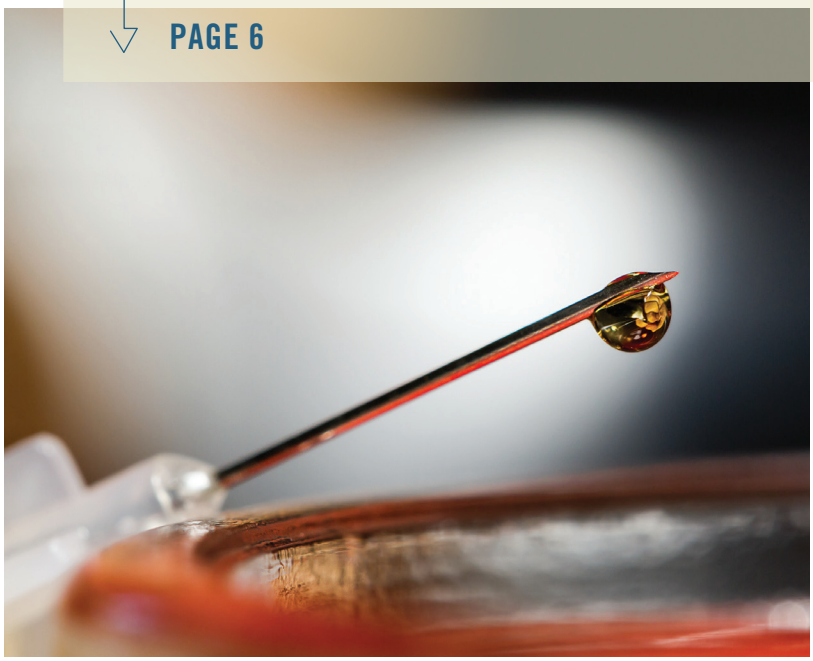

X Does Not Marcus the Spot: Preventing and Handling Workplace Harassment in 2018

By: Lawrence Lee and Michelle Faulkner, Stinson Leonard Street LLP

A multi-faceted harassment problem is silently taking shape inside your governmental offices. What actions are you, as the municipal attorney, called upon to take?

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Too Much of a Bad Thing: Municipalities and the Opioid Curse

By: Erich Eiselt, IMLA Assistant General Counsel

Almost Heaven, But Not: Residents of "wild and wonderful" West Virginia are blessed with spectacular geography. They are also apparently wracked with unimaginable levels of pain. Between 2007 and 2012, America's pharmaceutical industry shipped more than 780 million opioid tablets into the Mountain State.[1] That quantity, 433 pills per person, would have been sufficient to medicate all 1.8 million of its residents–men, women and children–continuously for nearly seven months. Not surprisingly, West Virginia suffers today from the highest rate of overdose deaths in the country, in recent years losing more lives to drugs than to traffic accidents and firearms combined.[2]

The opioid curse is hardly confined to one sparsely-populated state in the Appalachians. Although it got its initial foothold in Eastern communities left barren by the departure of coal mining and manufacturing jobs, the crisis is now engulfing municipalities across the country, large and small, wealthy and impoverished. Its spread has been enabled in large measure by the irresponsible behavior of prescription drug makers, distributors, prescribers, pain clinics, retailers—and the lobbyists, lawyers and public relations professionals who defend and massage the facts of their damaging behavior. In 2016, more than 64,000 Americans died from drug overdose—a figure greater than the toll from the entire Viet Nam war—and the pace is increasing.[3]

The dead are the most brutal casualties of the crisis, but only a small segment. More than two million[4] of our fellow citizens have fallen into addiction, ceasing to be productive members of society, driven by insatiable drug dependency to abandon schooling and careers, concoct disabilities, avoid parental duties, and commit fraud, petty thievery and violent crime—overtaxing the services of emergency, law enforcement, correction, rehabilitation and child protective workers. The burden on local government is staggering.

Today, nearly 400 cities, counties, townships, hospitals, insurers, tribes, unions, states and other plaintiffs seek legal recourse against the opioid industry in a federal courthouse in Cleveland. Scores of similar suits are making their way through state courts across the land. At stake are many billions of dollars in damages, a change in the way opioids are allowed to be marketed and prescribed, and the safekeeping of countless lives that stand in harm's way as the epidemic rolls on.

The Opioid Flood: The path to this crisis is rich in irony. Fifty years ago, physicians were loath to prescribe narcotics, including opioids—pain relievers derived from opium—believing that the risks of addiction outweighed the benefit to patients. Only those with cancer or on death's doorstep were given an allotment to quell excruciating agony.

The evolution to a society obsessed with pain and its treatment resulted from a conjunction of science and commerce. The name Sackler may be known to many; it adorns the Smithsonian Institute and the Metropolitan Museum of Art, the Sackler Museum in Beijing, art endowments at Princeton and Harvard, and medical facilities around the world. And for good reason: Arthur M. Sackler was a medical researcher, adman, entrepreneur, and one of the great benefactors of our time. Born in Brooklyn and raised during the Depression, he pursued the same avocation as his father—medicine. In 1942, he began helping to pay his school debt by taking a copywriting job at a small advertising firm specializing in the medical field.[5] As an ad agency employee, Sackler saw the opportunity to augment traditional door-to-door doctors' office sales calls with glossy, authoritative advertisements in physician-oriented journals and testimonials from domain experts. His particular gift would be to demystify and popularize drugs that were regarded as risky.

Sackler's business prowess was such that he took ownership of the advertising agency. In 1952, he convinced the staid *Journal of the American Medical Association* to include a splashy pharma advertorial among its pages.[6] That same year, Sackler and his two brothers acquired one of the firm's clients, the Purdue Frederick Company.

Purdue Frederick had long been a low-profile producer of unexciting necessities such as laxatives. But in 1980, the company developed a new mechanism for the continuous release of a morphine compound, "MS Contin." Purdue's messaging—that the newly-constituted opioid could safely be used for a broader spectrum of pain—was delivered to the medical community through a variety of vehicles, including to the 600,000 physicians who received Arthur Sackler's weekly newspaper, *Medical Tribune*, which effectively merged marketing and scholarship.[7] MS Contin became Purdue's best-seller and made the Sackler brothers multimillionaires, funding their global museum endowments and medical school generosity.

Arthur Sackler died in 1987 at the age of 73. His obituary in the *New York Times* makes extensive mention of his massive art collections and charitable activities

but barely references his links to a drug company.[8] That business, although already successful, had just begun the trajectory that would lead it to preeminence in America's opioid culture. It was better known as Purdue Pharma.

As the patents for MS Contin began to expire, Purdue looked for alternatives. In the mid-1990's it developed "OxyContin," a continuous-release oxycodone pain product. Although Sackler had died a decade earlier, the company deployed his direct-to-doctors sales strategies to the fullest. In addition to publishing targeted journals, the company sponsored or financed thousands of continuing medical education (CME) events,[9] barraging attendees with superlatives about OxyContin. Wary of the restrictions on branded advertising, Purdue also produced unbranded ads which promoted the benefits of opioids generally, flying under regulatory radar. It gathered "Key Opinion Leaders"—ostensibly independent and respected members of the medical community—who would further proselytize for its oxycodone product. And the firm's gregarious sales representatives were ever-present in doctors' offices, armed with persuasive collateral and pitches.

One key to the Purdue advertising campaign was an innocuous 1980 submission by a pair of researchers to the *New England Journal of Medicine*. The now-infamous "Porter and Jick" letter was captioned "Addiction Rare in Patients Treated with Narcotics." It described the authors' analysis of more than 11,000 hospital stays in which narcotics had been administered and their conclusion that addiction resulted in fewer than one percent of the cases.[10] Purdue and its sales force ambitiously converted that one-paragraph letter, which related only to bed-ridden recipients in a controlled hospital setting where medications were sparingly administered for short increments of time, into a wholesale endorsement for the use of opioids outside the hospital for long-term relief of chronic pain.

The strategy worked. Despite what they might have been taught in medical school, physicians came to believe that they could now treat chronic back pain, fibromyalgia, diabetic discomfort and the like by writing prescriptions for a month's supply of opioid narcotics—or half a year's—without fear of causing addiction.

That shift in prescribing behavior coincided with another emerging vector in American medicine—the elevation of "pain" treatment to previously unheralded primacy. The pharmaceutical industry was benefited when the American Pain Society, in 1996, augmented the empirical "four vital signs" of a patient's well-being (pulse, blood pressure, respiration rate and body temperature) with a new, fifth vital sign—pain.[11] By the early 2000s, it had become standard protocol for doctors, in addition to examining the traditional four indicia of a subject's health, to ask if the patient was experiencing pain. Upon hearing that their clients were feeling unacceptable levels of discomfort, medical professionals now felt pressured to solve the problem.

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Purdue Pharma provided an answer. As a 2000 internal marketing memo exhorted, "Dedicate 70% of your time selling Oxycontin!!!!!!!!!!"[12] Purdue's sales force expanded far beyond the narrow band of doctors focused on cancer and end of life palliative care, and spread the OxyContin gospel to an exponentially larger cohort—primary care practitioners. By 2003, fully half of all those prescribing Oxy were primary care physicians. The company was able to utilize government-maintained data to determine exactly which doctors were high prescribers, and target them with multiple sales calls per year. Purdue aided their cause by providing thousands of sampler coupons giving patients up to 30 days of Oxy for free.[14] Sales rocketed from $44 million (316,000 prescriptions) in 1996 to combined 2001 and 2002 sales of nearly $3 billion (more than 14 million prescriptions).[15] The company's sales representatives, whose salaries averaged around $55,000 per year, were rewarded with more than $40 million in bonuses in 2001 alone.[16]

It would be a disservice to imply that Purdue was alone in practicing such dishonesty. Other defendants were equally adept. In December 2009, for example, pharma giant Endo paid roughly $45,000 to create a CME entitled the *Pharmacological Management of Persistent Pain in Older Persons*. The CME presented guidelines which misleadingly claimed that "the risks [of addiction] are exceedingly low in older patients with no current or past history of substance abuse," and falsely stated that "[a]ll patients with moderate to severe pain . . . should be considered for opioid therapy . . . ."[17]

While some doctors resisted these messages, the momentum towards more liberal use of narcotic medications was virtually insuperable. Many physicians simply joined the accelerating opioid parade and wrote multi-week or multi-month prescriptions for patients they had examined and had reasonably concluded were suffering from actual pain. This may have been defensible as a good faith practice supported by what appeared to be scientific validation, but it placed far too many opiates in public hands. Some of their patients would experience pain much earlier that the 12-hours-per-tablet relief promised by OxyContin, and took too many pills, too soon. Some patients merely continued to take them long after real pain had ended. Regardless, legitimate practitioners led many in their care to the same end point--physical dependence, marked by severe and debilitating withdrawal once their allotments were finished. (Purdue even provided physicians with an answer for this dilemma, garbling the Hippocratic Oath by citing pain management publications promoting the view that withdrawal behavior was actually "pseudo-addiction," best remedied by even more generous doses of Oxy.)[18]

Other doctors were grotesquely less principled. They saw the opportunity to climb aboard an opiate tsunami and ride it. "Pain clinics" began to sprout, first in Southern Ohio and West Virginia, where opioids were prescribed by medical charlatans after a brief "consultation,"

sometimes no more than 90 seconds in duration. "Patients" flooded these places, paying hundreds of dollars, often in cash, for a visit and a prescription that would authorize the purchase of tens or even hundreds of opioids. The pill mills and their operators made millions of dollars. Many prescription recipients were also complicit, indiscriminately reselling pills at a markup to anyone with cash.

After Appalachian jurisdictions began to track individual patients' prescription records, making it impossible to visit multiple pain clinics in the same day or week, Florida became a new destination of choice. A fifteen-hour drive south could yield upward of 500 opioid tablets; if purchased at low cost with a Medicaid card, the pills would generate a five-fold profit, making a single trip to the Sunshine State worth thousands of dollars. (It would not be until 2009 that Florida finally instituted tracking of individual patient opioid activity—but unlike 27 other states that make the reporting mandatory, Florida is alone in allowing voluntary tracking, which may explain why fewer than one-quarter of the state's doctors and only half of its pharmacies were tracking opioid prescriptions as of late 2017,[19] and why Florida became for a time America's favorite opioid supply house).

Whether legitimate or fraudulent, these prescribers and their patients formed the headwaters for a massive river of opiates that began to flood America. And the source for the deluge was a handful of billion-dollar pharmaceutical manufacturers and distributors, who profited abundantly. None was a more successful opioid font than Purdue Pharma. Between 1996 and 2017, it sold more than $35 billion of opioids to American users.[20] While Purdue kept the profits, quietly placing the reclusive Sackler brothers among the twenty wealthiest families in the nation, the externalities of that activity would be borne by America's taxpayers. In 2015 alone, according to a report by the American Enterprise Institute, the epidemic cost the nation over $500 billion.[21]

A Lethal Convergence: If the opioid saga merely culminated with the pharma industry's rise, it would be tragic enough. But there is more to the story. As Sam Quinones describes in exquisite detail in his award-winning book *Dreamland – The True Story of America's Opioid Crisis*, the explosion in opiate abuse originating from West Virginia, Kentucky, Ohio, North Carolina and other Eastern states coincided with—and facilitated—the flourishing of an even worse substance seeping northward across the nation's southern border: black tar heroin. The black tar enterprise, centered in the tiny opium-rich Nayarit district on Mexico's western coast, had revolutionized the delivery infrastructure of heroin in the US.

The Nayarit dealers established operations stealthily, operating amidst burgeoning Mexican immigrant communities in mid-tier Eastern cities like Columbus, Ohio and Charlotte, North Carolina. Instead of requiring buyers to approach dealers in dangerous surroundings, the Nayarit vendors used cars and beepers to locate dial-in customers and deliver the goods directly to their clientele. They carried only tiny amounts of heroin at one time, sometimes packaged in miniscule balloons which could easily be swallowed at the sight of law enforcement. Their drug was an able competitor to the white powder heroin already being peddled east of the Mississippi. Not only that, the Mexican black tar species was cheaper—cheaper than East Coast heroin and much cheaper, in many cases, than opioids.[22]

As Quinones tells it, that convergence, of an America becoming increasingly addicted to opioids and a virtually invisible network of entrepreneurs conveniently delivering a more addictive product at a lower price, created a perfect and lethal storm.

The more recent emergence of fentanyl on the menu--a synthetic opioid far more potent than oxycodone or heroin--has rapidly worsened the crisis, particularly across New England. Originally used only as an anesthetic, fentanyl is up to 100 times more powerful than morphine; a tiny dose of only three milligrams is enough to kill a full grown adult.[23] In 2016, fentanyl was involved in fully one-third of all opioid deaths, up an astonishing 540% in three years.[24] Again, dishonesty by pharma and medical professionals played a role: the CEO and other executives of Insys Therapeutics, the maker of Subsys, an under-the-tongue spray containing fentanyl, have been charged with providing enticements to doctors who would prescribe their drug to non-cancer patients. And last year, two Insys saleswomen pleaded guilty to paying kickbacks; one of them induced a physician's assistant to author, single-handedly, some 84% of all fentanyl prescriptions in New Hampshire over a two-year period.[25]

The opioid sellers are not alone in profiting from addiction. Another sad chapter in the narrative is now developing, revealing again how truly amoral the opioid profiteers can be. Amidst the many well-meaning and bona fide drug rehabilitation facilities nationwide, a new species of opportunistic depravity is emerging: the phony "sober house," where operators grab millions of governmental dollars but fail to benefit those in their care, sometimes even facilitating continued addiction to assure a steady flow of funds.[26]

How much will kill you ? A comparison of lethal doses of heroin versus fentanyl.

Photo courtesy of Bruce Taylor, New Hampshire State Police Forensic Lab

Washington's Role. Unlike the obscure sourcing of black tar heroin, the opioids—OxyContin, Percoset, Vicodin, Fentora, and a dozen more named in this epidemic—came to market only after passing rigorous testing by the United States Food and Drug Administration. While the pharma industry has seized upon FDA oversight as evidence that their products were safe when used as intended (and as grounds for dismissal of municipal suits due to federal preemption), a close study of early warnings on OxyContin suggests a lack of regulatory vigor.

The FDA approved OxyContin's original package insert in 1995. Amid the drug's clinical study information and side effect profile, the insert carried a crucial sentence: "Delayed absorption as provided by OxyContin tablets, is believed to reduce the abuse liability of a drug."[27] Purdue's marketing machine relied on that sentence to promote Oxy's non-addictive character, asserting that a 12-hour, gradual release pain medication would avoid immediate "highs" and deter would-be addicts. (The company later completely bypassed the FDA in 1998, distributing to doctors 15,000 OxyContin marketing videos which had never been submitted for regulatory review).[28] Such claims about reduced risks of addiction were completely unsupported, as subsequent depositions of Purdue officials in 2004 would reveal—the company had never confirmed any such "belief" through clinical testing. How that statement was allowed to survive FDA scrutiny is still obscure. One factor may have been the prodigious mismatch at the time between Food and Drug's staffing (39 reviewers) and their work load (more than 34,000 pharma marketing pieces per year).[29] Regardless, the dishonesty remained a part of the OxyContin packaging until 2001.[30]

That inaccuracy did not go unrebutted forever. In 2007, a DOJ prosecutor in tiny Abingdon, near coal country in southwest Virginia, extracted Purdue's guilty plea in federal court. The company admitted to falsely understating the addictive nature of OxyContin on the aforementioned labels, and to promoting the idea that Oxy's coating made it less susceptible to abuse. (Purdue's own internal research showed that tablets could easily be crushed to harvest nearly 70% of the pills' pure oxycodone—which was readily diluted in water, drawn into a syringe and injected). Purdue's CEO, General Counsel and Chief Science Officer were convicted and paid $34.5 million in penalties, while the company handed over a record $600 million.[31] Greater oversight by the FDA might have saved the DOJ thousands of hours spent in litigation and made such sanctions unnecessary.

> In an era when, as the *Charleston Gazette Mail* exposed, distributors funneled nine million opioid doses to a single pharmacy in Kermit, West Virginia (population 392) over a two-year span and individual pill mill doctors were routinely writing hundreds of prescriptions a day, it is evident that far more than 16 out of 1.6 million orders (.001%) should have been flagged as "suspicious."

The FDA is not the only federal entity with a critical role in curbing opioid abuse. The Drug Enforcement Agency, in addition to interdicting illegal drugs, is responsible for monitoring the flow of legal but dangerous prescription medications. Known to be addictive, prescription opioids fit that parameter—they are categorized as "Class II" under the federal Controlled Substances Act.[32] Accordingly, enterprises involved in the manufacture and shipment of opioids have long been required to keep records of where their products are being sent, and to flag "suspicious orders." The DEA has the power to revoke the authority of irresponsible makers and shippers of Class II drugs.

The pharma industry has not been overly cooperative in this endeavor, benefiting from silence and under-reporting of incongruities in the opioid trade. A decade ago, the DEA assisted the DOJ in bringing to terms McKesson Corporation and Cardinal Health, two of the country's three major pharmaceutical distribution firms. McKesson paid a modest $13.5 million fine and signed a 2008 administrative agreement committing to institute tighter reporting policies.[33] Cardinal Health also settled, paying $34 million and agreeing to similar compliance.

The DEA could hardly have been more explicit in laying out its expectations going forward. A 2007 letter to the pharma industry stated:

> Registrants are reminded that their responsibility does not end merely with the filing of a suspicious order report. Registrants must conduct an independent analysis of suspicious orders prior to completing a sale to determine whether the controlled substances are likely to be diverted from legitimate channels. Reporting an order as suspicious will not absolve the registrant of responsibility if the registrant knew, or should have known, that the controlled substances were being diverted. The regulation specifically states that suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of an unusual frequency. . . .
>
> Likewise, a registrant need not wait for a "normal pattern" to develop over time before determining whether a particular order is suspicious. The size of an order alone, whether or not it deviates from a normal pattern, is enough to trigger the registrant's responsibility to report the order as suspicious. The determination of whether an order is suspicious depends not only on the ordering patterns of the particular customer, but also on the patterns of the registrant's customer base and the pattern throughout the segment of the regulated industry.[34]

The industry continued to resist. Mallinkrodt, a large manufacturer of generic oxycodone, paid $35 million after being found culpable for years of under-reporting suspicious orders.[35] In 2016, Cardinal was again cited for non-compliance, paying a $44 million settlement. And in early 2017, McKesson made a second, more punitive $150 million payment. While announcing that settlement, the DOJ documented the distributor's abysmal track record:

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> The government's investigation developed evidence that even after designing a compliance program after the 2008 settlement, McKesson did not fully implement or adhere to its own program. In Colorado, for example, McKesson processed more than 1.6 million orders for controlled substances from June 2008 through May 2013, but reported just 16 orders as suspicious, all connected to one instance related to a recently terminated customer.[36]

In an era when, as the *Charleston Gazette Mail* exposed, distributors funneled nine million opioid doses to a single pharmacy in Kermit, West Virginia (population 392) over a two-year span[37] and individual pill mill doctors were routinely writing hundreds of prescriptions a day, it is evident that far more than 16 out of 1.6 million orders (. 001%) should have been flagged as "suspicious." One is left to conjecture how many new addicts, and additional deaths, resulted during this period of lassitude by McKesson, and why the DEA did not exercise more initiative to offset McKesson's flagrant lack of suspicion.

As if the pharma industry's obstinacy was not enough to blunt the DEA's effectiveness, Congress took action that further muted the agency. In 2014, the FDA had implemented measures to reduce the duration of opioid prescriptions—from six months down to three—based on data indicating that the average patient needed relief for only 14 days, which left dangerous supplies of unused opioids for resale or consumption by other family members.[38] That type of limitation spurred pharma industry lobbyists to sound the alarm that overregulation was impeding the flow of pain relief to legitimate patients. Capitol Hill acquiesced, throwing Purdue, et al a lifeline in the form of the virtuously-named "Ensuring Patient Access and Effective Drug Enforcement Act."[39]

Ensuring Patient Access seriously hobbled the DEA, virtually halting its efforts to track and penalize suspicious opioid shipments. The law required the DEA to show cause before it denied, revoked or suspended a registration for a Controlled Substances Act violation. The show cause order had to state specifically the legal basis for the DEA's action and provide the registrant an opportunity to submit a corrective action plan.

In a November 2017 letter to Congress, a bipartisan group of 44 Attorneys General sought repeal of Ensuring Patient Access. They objected to the law's removal of a critical DEA tool—immediate suspension orders against manufacturers or distributors whose conduct posed an imminent danger to public safety. The AGs' letter quoted DEA Chief Administrative Law Judge John J. Mulrooney, II, who described the Ensuring Patient Access structure as "akin to a state legislature mandating [that] law enforcement authorities allow shoplifting suspects caught in the act to outline how they intend to replace purloined items on store shelves, or allow bank robbers to round up and return ink-stained money and agree not to rob any more banks."[40]

This legislative sabotage was just one surgical strike in a much more sustained war. A 2016 study by the Associated Press and the Center for Public Integrity determined that during the prior decade, pharmaceutical interests launched an army of 1,350 lobbyists and spent nearly $900 million to safeguard opioids, supporting some 7,100 candidates in state races around the country. In contrast, groups seeking restraints on opioids had deployed a mere $4 million.[41] (The complex interaction between politics and public safety is nowhere seen more clearly than in West Virginia itself. The state's Attorney General, Patrick Morrissey, is now tasked with protecting West Virginians from the epidemic. He previously ran a pharma lobbying firm and his wife was a lobbyist for opioid distributor Cardinal Health).[42]

To this day, the pharma industry public relations machinery continues to downplay the problem. For example, a Janssen Pharmaceuticals webpage titled "PrescribeResponsibly" continues to stress that, while "physical dependence" may result from lengthy opiate use, "addiction" is an entirely different matter: "Physical dependence with long-term use of opioids should be expected. It is important to note that physical dependence is not the same as addiction."[43] In November 2017, the American Academy of Pain Management, a pharma-funded group, wrote the FDA to rebuff consumer group initiatives which would remove extra-high octane opioids from the market.[44]

More remarkable was Purdue's full page ad in leading newspapers two weeks before Christmas 2017. Its heading was "We manufacture prescription opioids. How could we not help fight the prescription and opioid abuse crisis?" The body of the letter, while not mentioning "addiction" (and obviously omitting reference to Purdue's guilty pleas for false marketing), made the astonishing statement that "Patients' needs and safety have guided our steps." And as if to obscure the fact that, in lawsuits from coast to coast, it is resisting any payment toward remediation of the overdose epidemic, the company presented itself as an ally: "No one solution will end the crisis, but multiple, overlapping efforts will. We want everyone engaged to know you have a partner in Purdue Pharma. This is our fight too."[45]

Even Purdue's vastly enhanced warnings about OxyContin appear to reveal continued hesitancy to set the record straight. To be sure, prescribers are now alerted with this unambiguous language: "As an opioid, OXYCONTIN exposes users to the risks of addiction, abuse, and misuse. Because extended-release products such as OXYCONTIN deliver the opioid over an extended period of time, there is a greater risk for overdose and death due to the larger amount of oxycodone present . . . ." However, the same information packet does not reveal that there is no evidence showing that opioids are appropriate for long-term pain; in fact, it seems to advise the opposite: "The potential for these risks should not, however, prevent the proper management of pain in any given patient."

The Municipal Call to Arms: As the opioid industry has barreled ahead, barely blunted by a handful of settlements with federal authorities and state Attorneys General, the costs to American society spiral out of control. Much of the damage is being sustained at the local level, and municipal governments are no longer sitting idly by. One of the first to move was Chicago. In June 2014, it filed in the Circuit Court of Cook County against Purdue and four other opioid producers—Endo (maker of Opana ER and Percocet), Actavis/Allergan (Kadian), the Janssen division of Johnson & Johnson (Vicodin, Duragesic, Nucynta) and Teva/Cephalon (Actiq, Fentora).

That case was rapidly removed to Illinois' Northern District on diversity grounds. The City's (third amended) 345-page complaint sets forth the case against the manufacturers, detailing a pattern of understating the addictive propensities

of opioids, exaggerating the downside of NSAID pain relievers (nonsteroidal anti-inflammatory drugs), and in the case of Purdue, falsely stating that OxyContin tablets provided 12 hours of continuous relief. Due to defendants' misleading and fraudulent direct marketing, the complaint states, doctors improperly prescribed opioids for long term chronic pain. One harm to the City, a self-insured entity, was the purchase of nearly $14 million of opioids in fulfillment of some 400,000 spurious prescriptions.[46]

Santa Clara and Orange Counties also filed in mid-2014, against the same five manufacturers. That litigation remained in California courts, except for the action against Cephalon which was settled for a $1.6 million payment by the opioid maker to fund municipal rehabilitation facilities.[47]

A torrent of governmental suits has quickly followed. States, cities, counties, hospitals, healthcare consortia, tribes, unions and others have filed actions across the country, naming the aforementioned five manufacturers and several other makers including Mallinkrodt (producer of Exalgo). Also named are the three major pharma distributors, Cardinal Health, AmerisourceBergen, and McKesson, as well as pharmacies such as CVS, Costco and Walgreens, who too often filled prescriptions with few questions asked. A few suits have named the Joint Commission on Accreditation of Healthcare Organizations (JCAHO), which implicitly condoned hospital prescribing practices, and the pharmacy benefits managers (PBMs), who determined the types of pain relief which would be included in health plan formularies and would qualify for reimbursement to millions of insureds. Some have named individual doctors who were compensated by the pharma industry to promote inaccurate information about the risks of opioids.[48]

A spectrum of claims are asserted by the municipalities:

- false advertising, misrepresentation and consumer fraud by manufacturers through understating opioids' propensity for addiction, overstating their effectiveness, promoting unreliable clinical reports and compensating allegedly unbiased domain experts;
- fraud on Medicare/Medicaid and state/local medical programs by inducing the purchase and/or reimbursement of costs for opioids which were inappropriate for patients' needs;
- nuisance, including costs of emergency response, law enforcement, rehabilitation, child protective services, foster care, and so on;
- failure to track and report orders and delivery patterns which were obviously suspect;
- negligence in enabling the diversion of opioids for non-medical use; misfeasance by PBMs by not populating their formulary menus with less addictive alternatives to "main stream" opioids; and
- collusion among manufacturers, distributors and others to perpetuate misrepresentation, unnecessary sales, unavailability of alternatives, diversion and withholding data.

The issue of proximate cause will no doubt be hotly debated. In that regard, it is interesting to note a September 2017 refusal by the Western District of Washington to grant a proximate-cause-based motion to dismiss, even where intervening Los Angeles gang activity had made the opioids available on the streets of plaintiff Everett, Washington.

These complaints seek billions in damages. Many also demand changes in the way opioids are promoted and sold.

For their part, the defendants deny responsibility for the deaths and addictions. They point to the fact that the FDA approved their opioid products, which were packaged with explicit instructions about proper usage. This not only supports an argument that they acted with appropriate care, but that the entire debate is foreclosed by the FDA's preemptive authority over the question. To quote from Purdue's answer in the Chicago litigation:

> Federal law authorized Purdue to promote its opioid medications for their FDA-approved indications. . . . To the extent Plaintiff's claims seek to hold Purdue liable for promoting Purdue's opioid medications for their FDA-approved uses, the claims are preempted. Granting such relief would impede, impair, frustrate, or burden the effectiveness of federal law and would violate the Supremacy Clause (Art. VI, cl. 2) of the United States Constitution. To the extent Plaintiff's claims are inconsistent with the determinations of FDA based on the information provided to FDA, or otherwise assert that incorrect, incomplete or inaccurate information was provided to FDA, the claims are also preempted.[49]

(An early harbinger of the preemption outcome may have appeared in Oklahoma in early December, where a state court refused to grant Purdue's FDA preemption-based motion to dismiss and its related request that trial be delayed until Food & Drug could complete further research into the merits and dangers of opioids.)[50]

Purdue also cited statutes of limitation, failure to join indispensable parties and an absence of proximate causation, pointing to the large number of intervening actors—and actions—between themselves and the ultimate harm to localities.

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The pharma defendants uniformly raise the argument that correlation (an increase in deaths as opioid sales rose) does not equal causation. This stance seems belied by the facts: for example, among new initiates to illicit drug use in 2005, a total of 2.1 million reported prescription opioids as the first drug they had tried, more than for marijuana and almost equal to the number of new cigarette smokers (2.3 million).[52] More significantly, US government statistics show that nearly 75% of heroin addicts cite non-medical use of prescription opiates as their first introduction

to drug abuse.[53]

The pharma defendants have adopted other novel arguments, including challenging the legality of municipally-retained contingency litigators. In a New Hampshire case brought by the state's Attorney General, they asserted that "[w]hen a private lawyer represents the State in a matter in which the lawyer has a personal interest, that interest compromises the 'impartiality' required of all government lawyers and creates at least the appearance of impropriety." That gambit failed. Unanimously reversing the trial court, the New Hampshire Supreme Court rejected the pharma industry's contention that Cohen, Milstein, the state's contingent fee law firm, was "vested with a governmental function and in a position of public trust where its financial stake will create a conflict of interest," finding instead that "because the contingency fee agreement provides for the OAG to retain ultimate control over the investigation, the agreement does not violate due process."[54]

Still another pharma escape attempt has been rebuffed in California, although the consequences may not necessarily be advantageous for opioid plaintiffs. In a case brought by Santa Clara and Orange counties, the court refused to construe the defendants' opioid practices as "accidental" for insurance purposes.[55]

Seeking Resolution in Cleveland: In 2017, the pace of municipal opioid filings accelerated dramatically, crowding dockets across the country. The cases were all brought on a contingency basis, granting 30% or more of any recovery to law firms who would shoulder the up-front expense of taking on the challenge. (Those expenses, unless part of the firms' overhead, would be recouped from the municipalities' ultimate share). While many local firms participated, based on familiarity with municipal counsel, most cases ultimately linked to a number of select national litigation firms with significant experience in mass tort warfare. The complaints presented a similar menu of facts, citing statistics of opioid sales and deaths in their jurisdictions, and pointing to fraud, negligence, unjust enrichment, violation of consumer protections, and other tortious behavior by a common slate of defendants.

This created obvious judicial inefficiency. In October 2017, a West Virginia law firm representing some 40 municipalities moved to have all the federal opioid actions consolidated before a single court. That request went to the Judicial Panel on Multidistrict Litigation in Washington DC, a forum of seven judges whose chair is appointed by the Chief Justice.[56] In December, the JPML directed that the federal opioid cases could most effectively be litigated in a single court via multidistrict litigation. *In re: National Prescription Opiate Litigation* (17-MDL-2804) was docketed in the Northern District of Ohio on December 12, 2017, on the following rationale:

> All of the actions can be expected to implicate common fact questions as to the allegedly improper marketing and widespread diversion of prescription opiates into states, counties and cities across the nation, and discovery likely will be voluminous. Although individualized factual issues may arise in each action, such issues do not – especially at this early stage of litigation – negate the efficiencies to be gained by centralization.[57]

In its order forming the opioid MDL, the JPML transferred 62 cases to the Ohio court and appointed Judge Dan Aaron Polster, a well-respected jurist with substantial MDL experience, to oversee the opioid MDL.[58] He wasted no time in taking action. Acting on competing propositions from the 100 or more law firms already retained in various local suits, Judge Polster rapidly fashioned the architecture that will govern the process going forward.[59] At the apex of the structure are three Lead Counsel who will represent the plaintiffs. Two of these are from major class action and mass tort firms: Paul Hanly of Simmons, Hanly and Joe Rice of Motley Rice. The third, Paul Farrell, is a partner at Greene Ketchum, a five-person Huntington, West Virginia personal injury practice. Seasoned MDL lawyers from another 13 firms make up the plaintiffs' Executive Committee, with still other firms providing attorneys who serve as plaintiffs' Liaison.

Responding to initial criticisms that the original slate of plaintiffs' counsel was too narrow, Judge Polster established separate counsel roles in the MDL structure for municipalities, third party payers, Native American tribes, unions and hospitals. He has expressed a willingness to carve out additional particularized slots if other plaintiffs groups emerge and has allowed several actions by individual estates to join. The defendants also have separate counsel channels in the MDL, for manufacturers, distributors and retail pharmacy defendants.

With the MDL formed, Judge Polster has aggressively continued to consolidate the federal opioid caseload. Through March 1, 2018, he had issued nine more CTOs and moved another 310 "tag along" actions to Ohio's Northern District, bringing the total before him to nearly 370 cases.

As stated in the original Transfer Order, much of the opioid litigation will be determined within the same cluster of operative facts. The MDL should expedite and make more efficient the compilation of a record by eliminating the need for repetitious depositions and discovery requests. It should also facilitate settlement discussions; Judge Polster has made it clear that rapid resolution is his primary goal. He has expressed a mandate to avoid delaying tactics and to press onward until a full factual record has been derived, doubting that financial settlements alone are adequate. In a January 9, 2018 initial address to more than 150 lawyers gathered before him, he had this to say about the opioid crisis:

> In my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payers and individuals. . . .
>
> [W]hat I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now. So that's what I want to accomplish. And then we'll deal with the money.[60]

Polster has continued his drive. Three weeks after making his noteworthy opening comments, he had convened his first closed-door settlement session, described by seasoned litigators as highly unusual in its urgency. He has now identified individual lawyers, including two Attorneys General, who will drive future settlement discussions on behalf of stakeholders. And he has commented that, if all else fails, he will begin hearing Ohio's suit against the pharma defendants in late 2019.

The opioid MDL is reminiscent of the largest such judicial undertaking to date– the massive tobacco multi-district litigation of the 1990s, brought by 46 states against

big tobacco. Some of the same lawyers are involved, including a celebrated plaintiff's counsel in that case—Mississippian Mike Moore, former Attorney General of the state, who was drawn into the action after confronting the near-death of his nephew following a fentanyl overdose. Despite some familiar earmarks, the pharma defendants will argue that there are salient differences. For one, opioids were subjected to far greater regulatory scrutiny than tobacco. And smokers became ill while using cigarettes as intended, while opioid users often did not follow recommended dosages. But the general parameters of that war look familiar; governmental entities sued with the goal of addressing a public health crisis and imposing reform on an industry which had obscured the damaging effects of its products.

The tobacco MDL resulted not only in $246 billion in damages, but in forcing more responsible marketing practices on cigarette makers.[61] This included an explicit admission required by the tobacco MDL court and appearing even today in television and online advertising spots: "Lorillard, Altria, Philip Morris and R.J. Reynolds Tobacco intentionally designed cigarettes to make them more addictive. . . . When you smoke, the nicotine actually changes the brain. That's why quitting is so hard." That statement is only a part of a massive educational campaign to reveal the true hazards of smoking, a message aimed particularly at young audiences. It has been paid for in full by the tobacco industry.

Such a result—massive financial recovery and changes in marketing—would be a clear success for municipalities around the country, particularly if the funding were directly applied to remediate the opioid scourge. Exactly what such corrective mechanisms would be is not yet clear, as Judge Polster has recognized. Perhaps plaintiffs in the national MDL could take a page from New York City's "Healing NYC" program which articulates some of the steps needed to turn back the opioid tide. Its recommendations stretch from far-reaching educational initiatives for grade schoolers to supplying substantial amount of naloxone (an opioid antagonist which rapidly ameliorates the effects of an opioid overdose) to the City's police force.[62]

Education of prescribers to undo the mythology perpetuated by big pharma will clearly need to be a priority. A study published in the *American Journal of Public Health* indicates the challenges to reversing medical misconceptions: although a sustained campaign of "reverse detailing" among a group of New York prescribers made significant progress, nearly 40% still did not know that there is no evidence showing opioids to be effective for chronic pain—or the daily opioid "methadone milligram equivalent" (MME) maximum which should not be exceeded to avoid addiction.[63] Confusion and misperception continues among the medical community, despite the significantly heightened warnings which now accompany prescription opioids.

> [W]hat I'm interested in doing is not just moving money around, because this is an ongoing crisis. What we've got to do is dramatically reduce the number of the pills that are out there and make sure that the pills that are out there are being used properly. Because we all know that a whole lot of them have gone walking and with devastating results. And that's happening right now. So that's what I want to accomplish. And then we'll deal with the money.

On a broader scale, additional remedial actions might include:

- Further changes to the labeling of opioid products, expressly discouraging their use for long term chronic relief—coupled with far-reaching educational campaigns to restrict opioid use by the medical community;
- More rigorous review by the FDA and other regulatory bodies of pharmaceutical marketing activities, including pharma-sponsored CME events, particularly with respect to interpretation of test data;
- Development of a nationwide database linking state-based records of opiod prescribers and their clientele;
- Encouraging the disposal of unused opioids, along the lines of the national initiative just announced by Walmart;[64]
- Creation of safe injection spaces where those already addicted can obtain clean needles and reduce the hazards of infection and disease (the first such program was announced by Philadelphia's mayor in January 2018, albeit not welcomed unanimously);[65]
- Restoration of DEA powers, including the roll back of Ensuring Patient Access provisions--making real the obligation by makers and distributors to track and report suspicious orders;
- A sustained information campaign about the addictive potential and lethality of opioids, aimed particularly at young people, introduced across broadcast, print and social media channels;
- Expanded programs to rehabilitate the addicted, via the orderly and controlled dissemination of methadone, buprenorphine[66] and other approved opioid antagonists—coupled with cognitive-behavioral therapy and contingency management techniques;[67]
- Broader availability of naloxone and other contra-overdose weapons to law enforcement, EMS, college and high school personnel—and to the public on an over-the-counter basis (in fact, some pharmacy chains have begun to sell both nasal and injectable naloxone without a prescription in 45 states, but this information is not widely disseminated);[68] and
- Diversion programs which move drug addicts, where appropriate, out of the criminal justice system and into rehabilitation programs.

Other remedial steps--although clearly outside the purview of Judge Polster--might include criminal penalties, including jail time, on those who intentionally perpetrate fraud regarding narcotic pharmaceuticals and enable their diversion, and to expanded availability of medical marijuana to quell pain. Various studies have confirmed a drop in opioid deaths in jurisdictions where medical cannabis has been legalized, which would be undermined by the recently-announced federal initiative to enforce strictly the CSA proscriptions against marijuana. The DEA (or if necessary, Congress) could require a re-evaluation of the relative merits and detriments of cannabis, authorizing and funding wide-

scale clinical studies which might change its CSA status.

There are tangible examples of how opioid settlement dollars might be beneficially deployed. One is seen in New Jersey. Last April, Governor Christie initiated a $15 million broadcast campaign featuring accounts by those who fell prey to opioid addiction--and were able to survive through state-provided rehabilitation efforts.[70] The spots have been ubiquitous through the state and end with Christie himself imploring those at risk to call "844-REACHNJ" for help. In February 2018, the campaign was extended. And in West Virginia, $20.8 million recovered by the state in opioid settlements is being used to expand operations at nine treatment centers around the state. [71]

Where to File? While the MDL is now moving with its own momentum, it is not the only forum in which to proceed. Numerous municipalities around the country have opted to file in state court. Where there is statutory bias preserving state jurisdiction or diversity is incomplete, state actions will survive removal to the MDL (giving plaintiffs who file in-state in Delaware, California, Missouri, New Jersey, New York, Ohio and Pennsylvania, where the manufacturers and distributors are incorporated or maintain corporate headquarters,[72] virtual certitude of avoiding federal court). But why would a local government want to reamain in-state rather than become part of the ground-breaking and ambitious process being driven by Judge Polster?

The answers are many: a partiality for jurors drawn from a local county rather than the larger federal district; a preference for non-unanimous verdicts rather than the federal requirement for jury unanimity; the desire to maintain closer control over their action; and the reduced burden of litigating nearby rather than traveling halfway across the country. Some localities may worry that their outside counsel is not among the roster of key spokespeople elevated by the MDL judge. And some municipal attorneys may be apprehensive that particularly egregious wrongdoing and compelling injuries documented within their communities' claims will be overlooked in the grand scheme of the MDL as it strives to develop a unitary and comprehensive factual record. (This concern is among a litany of criticisms some have leveled at MDLs generally[73] and seems particularly real for smaller jurisdictions given the fact that there are no population-based classes in Judge Polster's structure).

There is also the possibility that a local action will be fast-tracked, proceeding more rapidly than the MDL: for example, in *State of Oklahoma v. Purdue Pharma L.P.*, a case brought under the Oklahoma State False Claims Act, the judge has already announced May 28, 2019 as the start date for trial.[74] And although the MDL is ostensibly only a discovery mechanism, which then remands cases to their local federal court for actual litigation, the fact is that more than 95% of all MDL cases never return to their originating jurisdictions. [75]

But there are also detriments to avoiding federal jurisdiction. Unless state law provides otherwise, home-grown fraud and conspiracy claims may lack the treble-damage punch of federal RICO statutes. Oklahoma's action, which is based solely on state law and has avoided removal to federal court, cites $52 million in unwarranted state medicaid payments for opiods a figure that will not be trebled.[75] Where the locality's fact pattern and claim is not sui generis, it may be more efficient to have a nationally-known mass tort powerhouse arguing on its behalf in the Northern District of Ohio rather than facing the defendants' considerable machinery—even if the locality's individual voice is lost in the MDL chorus.

Among the many localities opting to avoid the MDL and remain in-state is New York City. It filed a claim against the opioid defendants in late January 2018—in the Supreme Court of New York County, Manhattan's trial-level tribunal. Naming six makers and three distributors of opioids, New York alleges "hundreds of millions of dollars" in damages and specifically references a $160 million cost to fund the aforementioned HealingNYC program over the next five years. The City's complaint will likely join those of another 20 New York jurisdictions which have been consolidated before a single judge in Suffolk County—a virtual "in-state MDL." The judge presiding over those cases has invoked urgency analogous to that of Judge Polster, taking the unorthodox step of refusing to stay plaintiffs' discovery even though the pharma defendants' motions to dismiss are still pending.[76] In New York, the plaintiffs' in-state claim will not be blunted by the absence of the federal RICO count, because the behavior complained of violates New York Social Services Law section 145(b) – which allows treble damages.[77]

Apart from the state court versus federal court issue is the more seminal question of whether to file at all. Smaller localities may not have sustained injury sufficient to support their own suits and may be better served by supporting a statewide action brought in *in parens patriae* by their Attorney General, although resulting recovery may not ultimately make its way to the local municipality's treasury. Other jurisdictions will not easily be able to shoulder the substantial document marshaling and database production responsibilities of an opioid plaintiff. In some cases, contingency firms will take on the cost of document production for their clients, but that possibility may diminish dramatically for smaller-sized municipalities or those with fewer appreciable damages. (For example, some contingency agreements specify that electronic document handling and storage is an additional expense not covered within the law firm's overhead, meaning it will be deducted from the municipality's recovery).

There are various sources of data to help a locality determine its odds. In terms of documenting the defendants' misdeeds, information about geographic opioid sales is available from the Centers for Disease Control.[78] More granular statistics—the chain from manufacturer to ultimate purchaser, including opioid sales by individual pharmacies—is held in the DEA's ARCOS (Automation of Reports and Consolidated Orders System) database.[79] While the agency has resisted wholesale production of that data, seeking to protect ongoing investigatory work, Judge Polster has explicitly ordered that plaintiffs' counsel and the DEA agree on whatever redactions and protective language is necessary to make the ARCOS data broadly available.[80]

As important as documenting the pharma industry's misdeeds is the plaintiff's requirement to substantiate its own damages. These consist of payments for opioids—whether the municipality purchased them directly or reimbursed such purchases by healthcare providers, pharmacies and insurers. Also included may be worker's compensation costs and expenses for addiction treatment and rehabilitation. Nuisance costs might include law enforcement, EMS, hospitalization, foster care and the like—although defendants may raise the municipal cost recovery rule, which has been held to bar damages for functions which the municipality is already obligated to provide.[81] And plaintiffs which are not self-insured may face difficulty in demonstrating

actual compensable costs; that right will more properly accrue to their third party payers and insurers.

Moving Forward: A thorough evaluation of these data is critical. One set of facts may lead only to fruitless and burdensome litigation, while another may culminate in significant recovery that can help the municipality remediate its opioid tragedy. The responsibility of municipal attorneys to assess their localities' prospects, to discern the optimal avenue to obtain recourse, and to select the outside counsel best positioned to handle its case, is daunting.

It seems beyond question that, whether they move in federal court or at their local judiciary, many more of the nation's 35,000 municipal governments will be taking action against the opioid defendants. Their spotlight on the industry's reckless and fraudulent activity is helping American society to de-stigmatize those who succumb to the epidemic. The courage of parents and partners, be they in underprivileged neighborhoods or wealthy enclaves, to admit and to publicize the fact that their loved ones have died of an opioid-related overdose is significantly amplifying the urgency for resolution.

Regardless of the pharmaceutical industry's assertions of innocence and well-financed defensive stratagems, there can be little doubt that the war being prosecuted by municipalities will have a major impact in bringing about change. One minor indicia of success was Purdue's announcement, on February 10, 2018, that it would no longer promote OxyContin to America's doctors and was laying off half of its sales force.[82] That step will be mirrored, hopefully, by other pharma defendants and could begin to contain the crisis going forward. Unfortunately it can do nothing for the nation's already-addicted.

Another potential step forward—although of unknown import at this time—was contained in an announcement by Attorney General Sessions on February 27, 2018. He asserted that the federal government is continuing to take bold actions to counter the epidemic, including an aggressive campaign to stop internet-based sales of fentanyl and other opioids, a "surge" of DEA agents to target pharmacies and prescribers exhibiting unusual dispensing patterns, and the placement of all fentanyl analogues into Schedule I of the CSA, and announced that the United States will be filing a Statement of Interest in the opioid MDL.

Whether transformational solutions to the opioid curse will arise from municipal litigation in a Cleveland courtroom remains to be seen. But as Judge Polster repeatedly reminds his audience, every day another 150 Americans are dying of overdose. There is no time to lose.

Notes

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22. The market price for opioids was as much as $1 per milligram of active ingredient, meaning an OxyContin 120 might sell $80 or more on the street. In 2011, black tar heroin was selling in

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site did not have the proper safety fence, and no permit from the City had been issued. As a result of the Plaintiff's inaction to reduce the danger on the property, the SCO hired a third-party contractor to erect a safety fence and secure the wall of the Plaintiff's building. The work by the third-party contractor cost approximately $17,000 which the City levied against the Plaintiff's property. The Plaintiff claimed that he was owed a duty of care by the City and the City breached that duty, and as a result the Plaintiff suffered damages.

HELD: Claim dismissed.

DISCUSSION: The City's defence was that it did not owe the Plaintiff a duty of care, and even if the Court found there was, the City did not breach it. In particular the City relied on its authority under s. 551(1) of the *Municipal Government Act*, RSA 2000 which provides a municipality the ability to take whatever actions necessary to eliminate an emergency, and s. 47(1) of the *Safety Codes Act*, RSA 2000 (*Act*) authorizing an SCO faced with an imminent serious danger to take action to remove the danger.

The Plaintiff argued that the SCO acting for the City had a duty of care to inform him of the requirements be followed so as to comply with the *Act* and the *Alberta Building Code 2014* as well as educate the public on these requirements. The Court found that the legislation stated the contrary. The *Act* put the onus on the owners of the property to ensure that all of their activity met the requirements of the Act and there was no obligation on the SCO. Therefore, no duty of care was owed.

The Plaintiff further unsuccessfully argued that once the SCO found the Plaintiff was not in compliance with the *Act* the SCO had a duty to issue an order that outlined the steps to comply. The legislation did not support such a claim. The *Act* states that the SCO may~ but is not required to~issue an order and as a result, the City's SCO was not obligated to take such action. The Court found that the SCO acted accordingly under the *Act* by hiring the third-party contractor to reduce the danger posed by the Plaintiff. In referencing the exclusion of liability clause in the *Act*, the Court found that even if it erred in finding that the no standard of care was owed, the City would not be liable if it had acted in good faith [*Condominium Corporation No. 9813678 v. Statesman Corporation* ABQB 493]. The Plaintiff did not prove that the City acted in bad faith when it hired the third-party contractors. The claim was dismissed. ML

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29. *Id.*
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Continued on page 34

Too Much of a Bad Thing Cont'd from page 33

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ML

TRIALS & TRIBULATIONS OF BEING THE COUNTY ATTORNEY

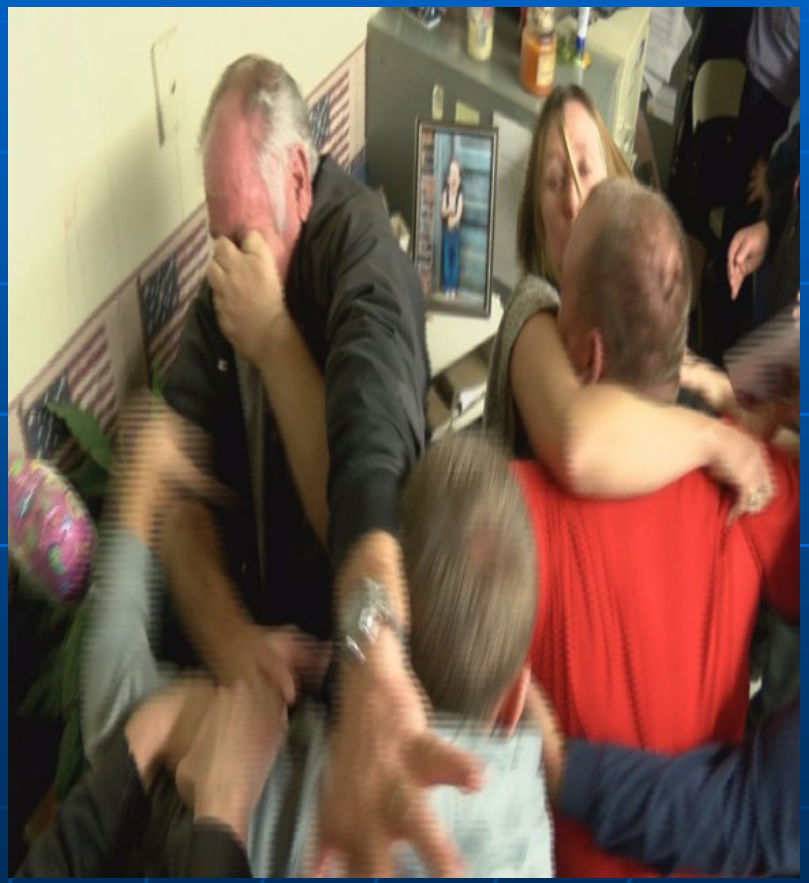
DECORUM

(NOT THIS!)

- Mayor & city councilman in Birmingham, Alabama fight over a personal matter

- Punches were thrown by town marshal & others in Hymera, Indiana; video went viral

- Mayor in Alexander City, Alabama punched councilman for swearing at mayor's wife; mayor's wife kicked the councilman



Rules of procedure for conducting county commission meetings can help

Order must be preserved... no person shall, by speech or otherwise, delay or interrupt the proceedings or the peace of the commission, or disturb any person having the floor

If chairperson or board declares an individual out of order, he or she will be requested to relinquish the podium

If the person does not do so, he or she is subject to removal from the commission chambers or other meeting room and may be arrested by the Sheriff

REMOVALS?

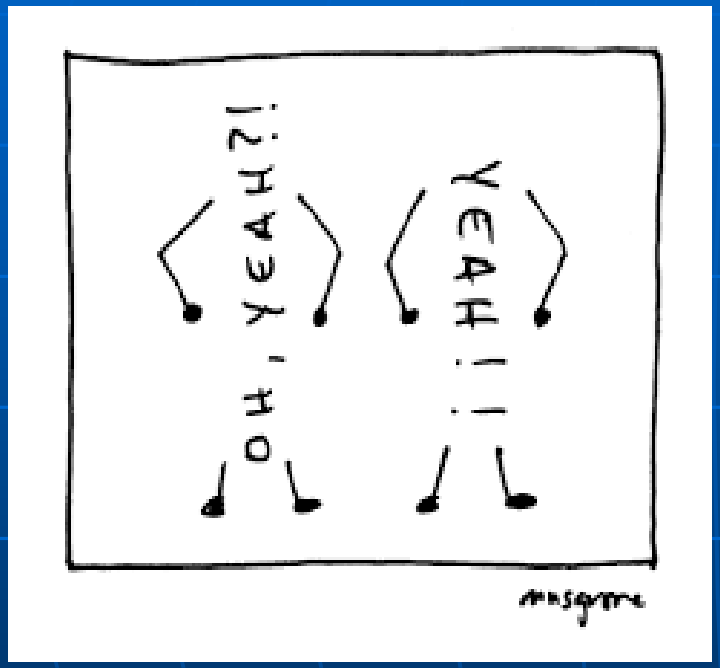
In *Jones v. Heyman*, the mayor's actions in attempting to confine a speaker to the designated topic on the agenda, & then having the speaker removed when the speaker became disruptive, were reasonable & did not violate the citizen's First Amendment rights

Removals are subject to "content-neutral" and "content-based" restrictions

A *content-neutral restriction* is unrelated to the content of the speech. Examples of acceptable content-neutral restrictions would be: setting time limits for speaking on an agenda item, requiring sign-in sheets or speaker cards, & restricting the speech to the topic being discussed

A *content-based restriction* is based on the meaning or message being conveyed by the expression of speech. For example, a citizen can be removed from a meeting based on disruptive conduct or the utterance of "fighting words"

“Fighting Words”



Those which by their very utterance inflict injury or tend to incite an immediate breach of the peace, having direct tendency to cause acts of violence by the persons to whom, individually, [the] remark is addressed

Black’s Law Dictionary
(6th ed., West 1990)

Hear Ye!

Section 286.0114, F.S. was enacted in 2013

Was known as the “anti-shushing” bill

Requires a board to give the public a “reasonable opportunity to be heard on a proposition” that is before the board

The opportunity to be heard does not have to occur at the same meeting when the board takes official action (just during the decision making process & within reasonable proximity in time before said meeting)

Exemptions: emergency situations, ministerial acts (i.e., approval of minutes, ceremonial proclamations), quasi-judicial proceedings

Rules can be adopted to require speaker cards, impose time limits on speaking, have a representative of a group to speak (rather than all members of the group), & designate a specific time period during the meeting for public comment

Parliamentary Procedure

County Attorney = Designated Parliamentarian

Advises the board chairperson on the correct rules of procedure

Answer questions regarding specific rule application

May call to the chairperson's attention any errors in the proceedings which may affect the substantive rights of any member or otherwise do harm

Sometimes the best course of action is to temporarily suspend or waive the rules of parliamentary procedure

Question: Can the Chairman second a motion?

Yes, at least for small boards (boards that consist of twelve or fewer members) & subject to the rules/customs of the board

NOTE: Straying from parliamentary rules will not invalidate a board's action

"Parliamentary rules not adopted as part of a governmental body's organic law may be waived or disregarded, and courts will not enforce their observance"

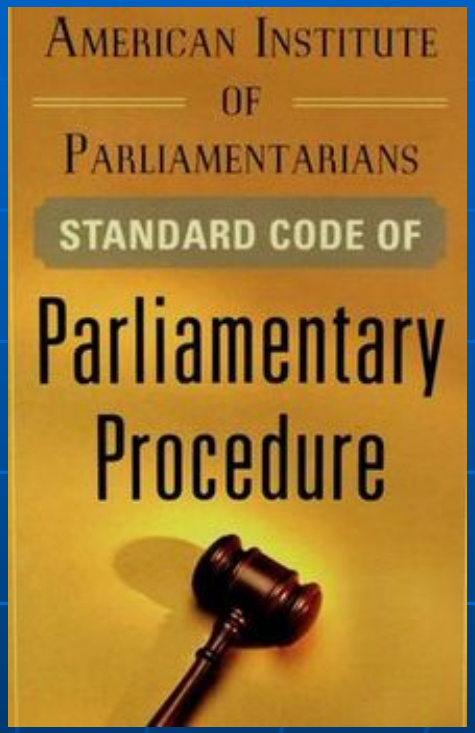
"Mere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members has agreed to the particular measure"

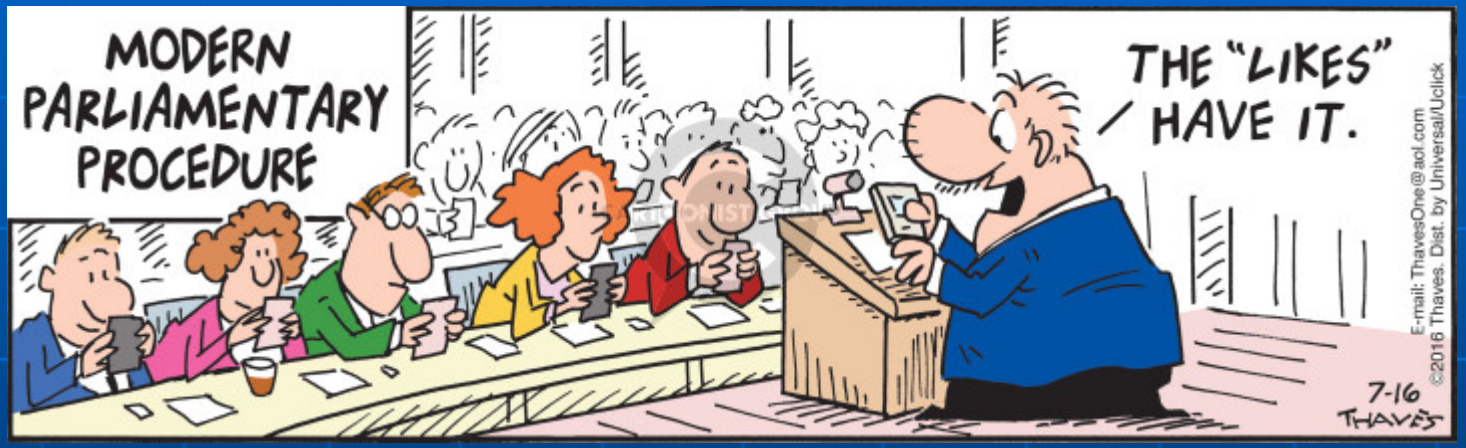
Robert's Rules of Order is not the only guide on parliamentary procedure

Standard Code of Parliamentary Procedure (formerly the *Sturgis Standard Code of Parliamentary Procedure*) – used by medical, dental & library organizations

Demeter's Manual of Parliamentary Law and Procedure – used by unions

Many state legislatures use *Mason's Manual of Legislative Procedure*




MODERN PARLIAMENTARY PROCEDURE
THE "LIKES" / HAVE IT.
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7-16
THAVES

Conflicts of Interest

"That's three 'Ayes,' two 'Nays,' one abstention, and one 'Go jump in the lake'."

A vote must be recorded & counted for each board member who is present at a board meeting, unless a conflict of interest exists (or appears to exist)

Board member may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest

In the event of a conflict of interest (or appearance of same) board member must publicly disclose the reasons for not voting, not vote, & then file a Memorandum of Voting Conflict with the clerk of the board within 15 days

FORM 8B MEMORANDUM OF VOTING CONFLICT FOR COUNTY, MUNICIPAL, AND OTHER LOCAL PUBLIC OFFICERS

LAST NAME—FIRST NAME—MIDDLE NAME	NAME OF BOARD, COUNCIL, COMMISSION, AUTHORITY, OR COMMITTEE
MAILING ADDRESS	THE BOARD, COUNCIL, COMMISSION, AUTHORITY OR COMMITTEE ON WHICH I SERVE IS A UNIT OF: ☐ CITY ☐ COUNTY ☐ OTHER LOCAL AGENCY
CITY COUNTY	NAME OF POLITICAL SUBDIVISION:
DATE ON WHICH VOTE OCCURRED	MY POSITION IS: ☐ ELECTIVE ☐ APPOINTIVE

What if a board member is in attendance at a board meeting, but happens to be out of chambers during the vote on an issue in which the board member has or appears to have a conflict of interest?

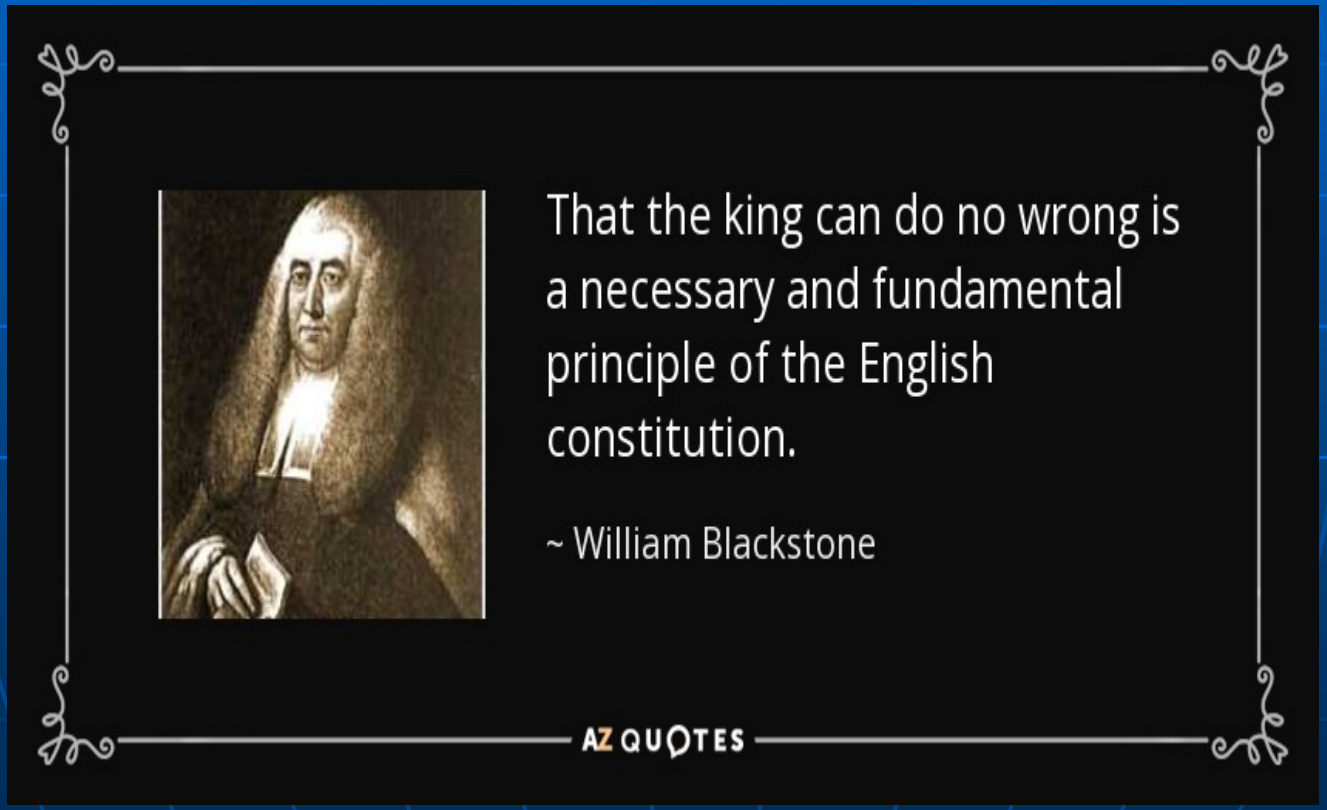
Florida Commission on Ethics Opinion (CEO) 88-3 says that a board member would be required to publicly announce the basis of a conflict of interest and file a Memorandum of Voting Conflict even if the board member was in attendance but temporarily absent from that portion of the meeting when the board considered the matter of conflict

Statutory duty to vote may not be avoided by a “temporary” absence of a member during the vote on a matter which comes before the board during a meeting at which he is present (AG0 074-289)

What if the County Attorney has a conflict of interest on a matter being considered at a board meeting?

Solution could be to have an outside attorney serve as the acting county attorney for the duration of the particular agenda item

Immunity


That the king can do no wrong is a necessary and fundamental principle of the English constitution.
~ William Blackstone
AZ QUOTES

Sovereign immunity is the legal doctrine which precludes bringing a lawsuit against a government entity without the entity's consent

Bars holding the government or its political subdivisions liable for the torts (civil wrongs or injuries) of its officers or agents unless the immunity is expressly waived by legislative enactment

Qualified immunity is the affirmative defense which shields a public official, who is performing discretionary functions, from civil damages if the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known

Pursuant to Section 768.28(1), Florida Statutes:

the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act...

Examples

Breaux v. City of Miami Beach, 899 So.2d 1059 (Fla. 2005)

When a municipality operates a public beach as a swimming area (by having public restrooms, showers, water fountains, parking, and a beach concessionaire from which it derives revenues), the municipality has a duty to exercise reasonable care to the foreseeable users of that swimming area. City had a duty of care to warn of dangers that were known or should have been known, and was not shielded from liability as a matter of law based on sovereign immunity.

Slonin v. City of West Palm Beach, Florida
896 So. 2d 882 (Fla. 4th DCA 2005)

Allegedly, a code inspector went to a motel to issue a building code citation & the motel owner threw the citation on the ground. Code inspector allegedly picked up the citation, shoved the motel owner, & said, "**I'll kick your ass**." Owner sued.

Circuit court granted City's motion to dismiss negligent hiring, training, supervision, & retention claims, finding that such claims fell within the City's planning level function, which was protected by sovereign immunity.

Jury returned a verdict in favor of the City & code inspector as to the assault and battery claims.

On appeal, the Fourth District Court of Appeal affirmed all issues, but reversed the dismissal of the negligent supervision & retention claim.

Court of Appeal found there was no sovereign immunity barrier to making a claim against a governmental agency for negligent supervision & retention.

Costs of Defense

Section 111.07, Florida Statutes authorizes the county to:

Provide an attorney to defend any civil action for damages or injury resulting from any act or omission of its officers & employees arising out of, and in the scope of, his or her employment or functions

Recover attorney's fees paid from public funds, should the officer or employee be found personally liable, or was acting in bad faith or malicious purpose

Reimburse court costs and reasonable attorney's fees of officers or employees who prevail in the civil action

"Do you promise to pay the bill,
the whole bill and nothing but the bill?"

Thornber Case

- Florida Supreme Court set forth the following general rule:

- Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials performing their duties properly and diligently. This entitlement to attorney's fees arises independent of statute, ordinance, or charter. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose.

Sansom Case

On February 26, 2015, a non-jury trial was held in Tallahassee concerning the payment of legal fees incurred in the defense of Raymond Sansom

Sansom, who served briefly as the Speaker of the Florida House of Representatives, had been charged with official misconduct, perjury, theft and conspiracy to commit theft, but the charges were dropped

Judge ruled that the state must pay the legal fees incurred by Sansom to defend the charges

Parties agreed to settle the matter for $600,000

Leon County Cases

Maloy v. Board of County Commissioners of Leon County, 946 So. 2d 1260 (Fla. 1st DCA 2007), *rev*. *den*. 962 So. 2d 337 (Fla. 2007)

- Although the commissioner was successful in defending an ethics charge, his conduct did not serve a public purpose and the County did not have to pay his attorney's fees

Leon County v. Stephen S. Dobson, III, P.A., 957 So. 2d 12 (Fla. 1st DCA 2007), *rev*. *den*. 962 So. 2d 337 (Fla. 2007)

- Commissioner was successful in defending criminal charges arising out of official duties and was entitled to payment of his attorney's fees

Flagler County - Part I

Involved ethics complaints by citizens against Flagler County Attorney and County Commissioner; both complaints were dismissed by the Commission on Ethics as legally insufficient

The officials sought attorneys' fees and costs from those who filed the complaints, but the requests were dismissed by COE as legally insufficient; on appeal the First District Court of Appeal agreed

Even if knowingly false allegations were maliciously made to injure the officials, the allegations were <u>not</u> material to any purported ethics violations

Florida law does provide for an award of costs and attorney's fees against persons who file knowingly false ethics complaints against public officials and employees; however, the complaint must contain false statements that are "material to a violation" of the Ethics Code

The First DCA concluded its opinion as follows:

This result may seem odd. Hundreds of pages of inflammatory language in ethics complaints are directed at public officials, who prevail on the merits, but they can't recover costs or fees against their tormentors? The answer is that the statute is narrowly-drawn and allows recovery only in very limited situations; it doesn't permit recovery where knowingly false allegations are maliciously made to injure a public official's reputation on matters *immaterial* to an ethics violation, at least in this context. Awards of costs and attorney's fees are a matter of legislative grace and the dividing line the Legislature has drawn here does not extend to the actions of [the two citizens] in filing meritless ethics complaints; had they made a knowingly false allegation as to a material fact in an attempt to cause reputational harm, the statute would apply.

Flagler County - Part II

However, in five other ethics complaints filed against Flagler County elected officials, an Administrative Law Judge (ALJ) found that the complaints were filed against the officials with a malicious intent to damage their reputations, and that the complainants knowingly made one or more false allegations or made an allegation with reckless disregard for its truth or falsity

ALJ recommended that the Commission on Ethics enter final orders granting the payment of attorneys fees and costs to the elected officials; Commission on Ethics agreed

Attorneys fees and costs totaled $311,666.33!

Sunshine Law

Meetings of public boards or commissions must be open to the public

Reasonable notice of the meetings must be given

No resolution, rule, or formal action shall be considered binding except one that is taken or made at an open meeting

Purpose of the Sunshine Law

Protects the public from “closed door” politics

Prevents at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance

Covers any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken by the board

A meeting is either fully open or fully closed; there is no middle ground

(NOT THIS!)


ALL THOSE IN FAVOR OF WHAT WE DISCUSSED IN OUR E-MAIL THREAD AND AT LARRY'S SON'S BIRTHDAY PARTY SAY "AYE"
"AYE"
"AYE"
"AYE"
I
... HAVE NO IDEA WHAT'S GOING ON
I THOUGHT THIS MEETING WAS OPEN?
LANDGREN

Private discussions via e-mail and text messaging between board members about board business are prohibited under the Sunshine Law. *See* AGO 89-39.

The use of a website blog or message board to solicit comments from other members of the board by their responses on issues that would come before the board would trigger the requirements of the Sunshine Law. *See* AGO 08-07.

There is nothing prohibiting a board member from posting comments on the local government's Facebook page… but members must not engage in any discussions of matters that could foreseeably come before the board for official action. *See* AGO 2009-19.

Electronic Attendance?

Sunshine Law does not prohibit a board member from participating in a board meeting by telephone or electronic means

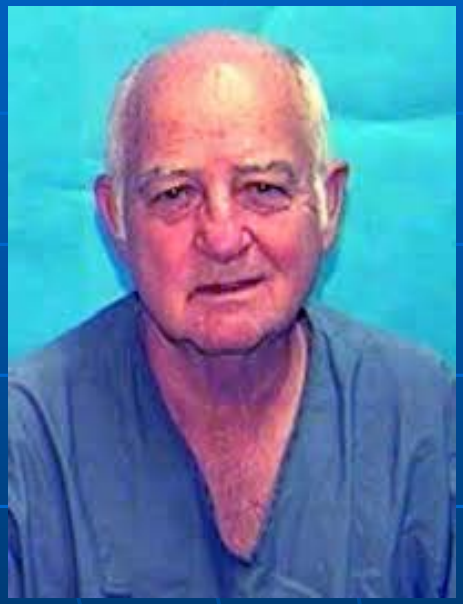
Board may agree to allow a board member to participate via speaker phone or interactive media so long as the discussions can be heard by all of the other board members & the public, & provided the meeting is otherwise open to the public

Must be a quorum of members physically present at the meeting site

Penalties for Violations

Section 286.011(3), Florida Statutes:

Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of the Sunshine Law by discussing public business in private with other members is guilty of a misdemeanor of the second degree, punishable by a $500 fine or 60 days in jail



W.D. CHILDERS, former president of the Florida Senate and chairman of the Escambia County Commission…

Convicted by a jury in 2003 of Sunshine Law violations for discussing public business in private with other commissioners; served 49 days in jail; ordered to pay $500 fine plus $3,603.85 court costs

Also found guilty in 2006 of two charges of bribery and unlawful compensation; served 3-1/2 years in prison

www.TALLAHASSEE.com LOCAL/FLORIDA Tallahassee Democrat • Tuesday, May 13, 2003 3B

Childers gets jail for Sunshine violation

By Bill Kenzor
The Associated Press

PENSACOLA — Former Florida Senate President W.D. Childers received a maximum 60 days in jail Monday for one count of violating the state's open-government Sunshine Law. The suspended Escambia County commissioner could get a similar sentence next week.

A second Sunshine Law count drew a $500 fine, also the maximum, and orders to pay $476 for court costs and $2,220.85 to cover investigation and prosecution expenses.

Childers looked grim but said nothing in court as Okaloosa County Judge T. Patterson Maney imposed sentence. As before, Childers flashed a smile and said, "No comment." Maney denied any appeal bond and ordered Childers to turn himself in at 8 a.m. CDT today to begin his sentence.

Outside, his defense lawyer blasted the bond denial.

"This is a good man who did not deserve to go to jail on a highly disputed issue of law as to whether or not his conduct was legal or illegal," said defense lawyer Richard Littlin. "When you file an appeal it becomes meaningless if you have already served your time."

Former Escambia Commissioner Mike Bass also was sentenced for two Sunshine law offenses. He escaped jail but was ordered to pay $4,143.69 in court costs. Maney also withheld adjudication, meaning Bass, who pleaded no contest, will have no criminal record.

Childers

Bass and Childers both Republicans were accused of discussing public business in private with other commissioners. The maximum penalty for both was 120 days in jail — 60 days per count.

Maney said Childers' crimes were more serious because he "ignored advice from the county attorney, played a leadership role, he was the leader although he had vast political experience." Childers served in the Senate 10 years until 2000 when he was forced out by term limits and ran for county commissioner.

A Pensacola jury convicted Childers on one Sunshine Law count, acquitted him on two others and hung on a fourth. He later pleaded no contest to the last charge while reserving the right to appeal it, and the conviction.

Childers also plans to appeal his felony extortion, kickback, bribery and unlawful compensation for official behavior. He could get up to 10 years in prison for each charge — Friday in Okaloosa, where that trial was moved because of extensive news coverage.

According to Okaloosa County Judge T. Patterson Maney:

Childers' crimes were more serious because he ignored advice from the county attorney, played a leadership role, & had vast political experience…

(What *Not* To Do!)

- Restroom Conversation Between Lake Wales Officials Raises Sunshine Question

- LAKE WALES | Two city commissioners in Lake Wales may have tread over the line drawn by the Sunshine law by talking about a land purchase in a place not accessible to women - a men's restroom in Lake Wales City Hall. A reporter walked in on the discussion Tuesday night in the men's room after the monthly Community Redevelopment Agency board meeting. Mayor Mike Carter and City Commissioner John Paul Rogers were discussing a proposed purchase of property for a city gateway, including a sign announcing Lake Wales. [TheLedger.com]

In February of 2011, Governor Rick Scott removed Wauchula City Commissioner Daniel A. Graham from office for violations of the Sunshine Law

Also, Wauchula Mayor David Royal and City Commissioners Valentine Patarini III, Jerry Conerly and Clarence Bolin all resigned from office after an investigation revealed that they discussed city issues in two separate private meetings

Each elected official pled no contest to violating the Sunshine Law, but the judge withheld a formal finding of guilt

The officials had to pay fines and court costs

Public Records Law

"Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body…"

"It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency"

Unless there is a specific exemption to disclosure, "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records"

Definition

- 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

- Any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type

Penalties for Violations

The penalty for violating the public records law varies depending on the nature of the violation

At the minimum it is a noncriminal infraction punishable by up to a $500 fine

However, a willful or knowing violation of the public records law is a first degree misdemeanor, punishable by a $1,000 fine or one-year imprisonment, and may result in suspension or removal from office

State v. Webb

Florida Supreme Court found that “dilatory responses” by school board member to public records requests did not comport with the requirement for “reasonable” access to public records

Board member responded to records request 1-1/2 months later, & did not schedule a time for review of the documents for 4 months

Requestor was allowed one hour to review the records, then allowed two more 1-hour review sessions 5 weeks later, & board member terminated the records review after the third session

Board member did not provide all of the public records until she received a request from the grand jury, nearly 7 months after the initial request

Board member was convicted of first-degree misdemeanor, but only spent 7 days in jail & the charges were later dropped

Oh, My…

- Martin County commissioners charged with violating Florida's public records law for allegedly failing to respond to public records requests
- Rock quarry company requested relevant emails of commissioners, including relevant emails in personal email accounts
- Commissioner said she could not turn over the emails from her personal account because her account had been hacked and the emails were deleted

The Trouble with Texts

Local newspaper filed lawsuit after City of Tallahassee could not respond to public records request

Former City Manager apparently deleted text messages exchanged with lobbyist on his personal cell phone & City could not retrieve the deleted messages

City admitted to the public records violations & entered into a Final Stipulated Judgment on January 29, 2018

City adopted a new public records policy & installed software that captures text messages sent to or from City-issued cell phones. The new policy provides that:

Transmission of any public record via text message over private cellular phone is prohibited (unless the communication is captured and retained by the City)

Transmission of any public record via email over private email server is prohibited

Transmission of any public record via electronic means (e.g., instant messaging or personal messaging such as Facebook or Twitter, etc.), where communication is not captured and retained by City, is prohibited

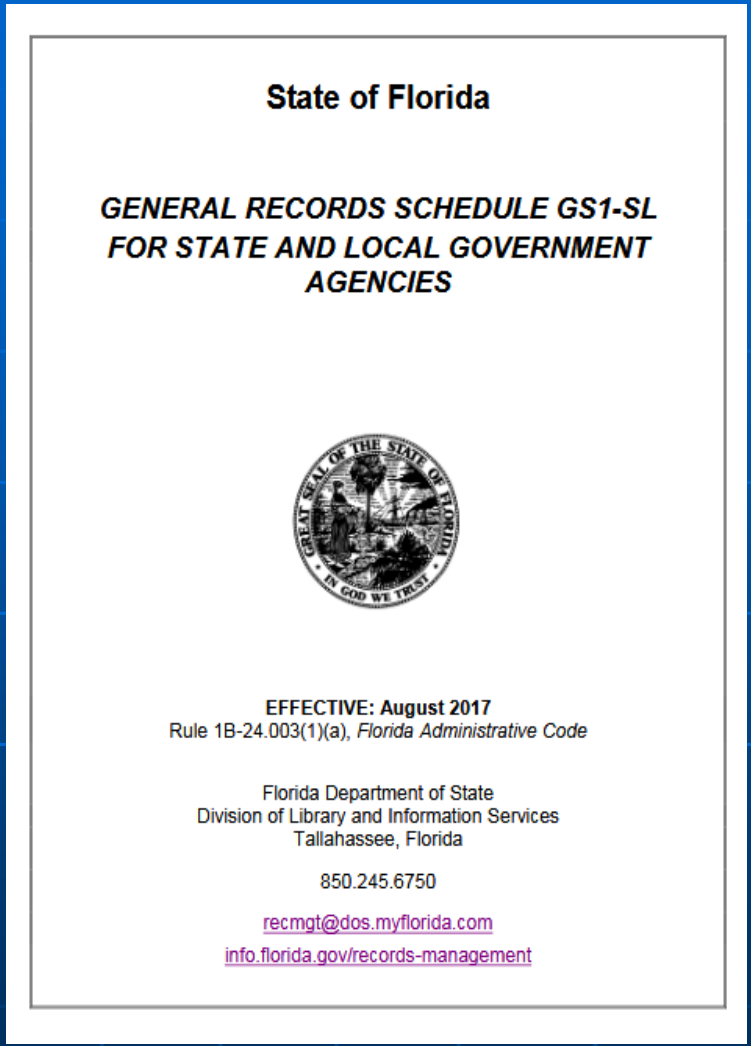
All text messages transmitted or received over City-provided cellular phones will be captured & retained (on Smarsh or equivalent)

Violation of the public records law, or city policies concerning public records, shall be grounds for disciplinary action

State of Florida General Records Schedule GS1-SL for State and Local Government Agencies, states that “records created or maintained in electronic format must be retained in accordance with the minimum retention requirements”

Includes e-mail, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device

Printouts of electronic communications may be retained in lieu of the actual electronic files



State of Florida

GENERAL RECORDS SCHEDULE GS1-SL FOR STATE AND LOCAL GOVERNMENT AGENCIES

EFFECTIVE: August 2017
Rule 1B-24.003(1)(a), *Florida Administrative Code*

Florida Department of State
Division of Library and Information Services
Tallahassee, Florida

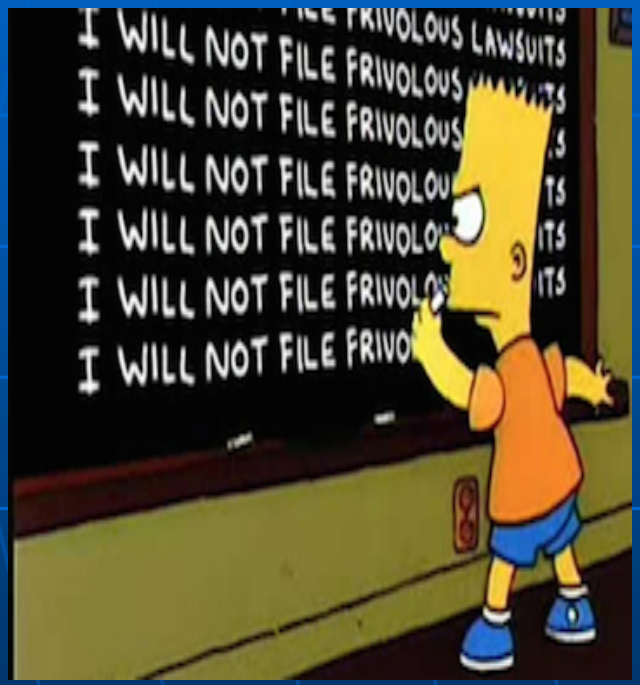
850.245.6750

recmgt@dos.myflorida.com
info.florida.gov/records-management

Personal e-mails that are not created or received in connection with the official business of the local government do not qualify as “public records” even if the personal e-mails are on a government-owned computer system

Also, private or personal telephone records that are not created or received in connection with the official business of the local government are not considered to be public records

Sham Requests



In 2017 the Florida Legislature amended Section 119.12, Florida Statutes to address problems with sham public records requests

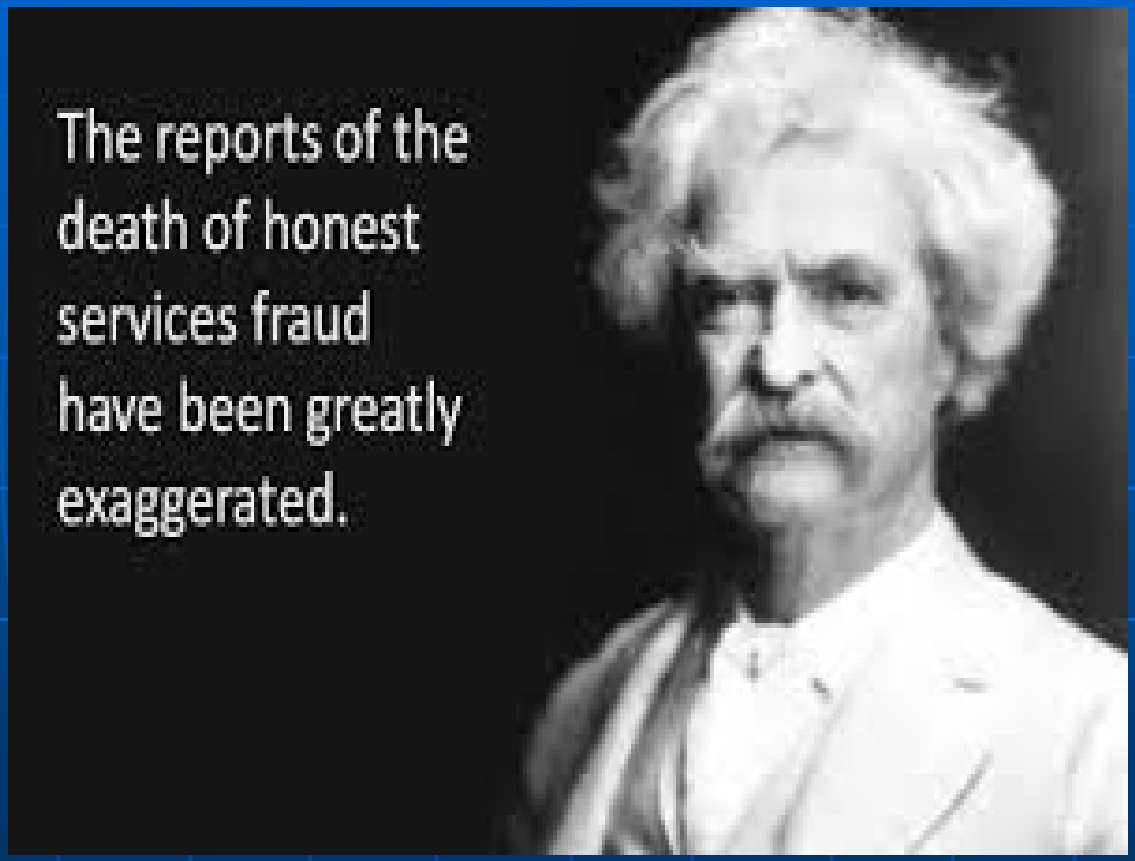
Why? Because, unfortunately, over the past few years some local governments have been subjected to public records lawsuits that were apparently motivated solely to generate attorney's fees

To be entitled to an award of attorney's fees, the complainant (person requesting the records) must provide written notice of the public records request to the records custodian;

The complainant must not have requested to inspect or copy public records or participated in the civil action for an "improper purpose"; and

If there is an "improper purpose" (as determined by the court), the complainant may not recover any costs or attorney's fees or costs, and is responsible for paying the government entity's attorney's fees and costs.

"Improper purpose" is defined as "a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of [Chapter 119] or for a frivolous purpose." *See* § 119.12(3), Fla. Stat. (2017).


The reports of the death of honest services fraud have been greatly exaggerated.

Honest Services Act

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of mail, wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both (18 U.S.C. §§ 1341 & 1343)

"Scheme or artifice to defraud" was defined by Congress in 1988 as "a scheme or artifice to deprive another of the intangible right of *honest services*" (18 U.S.C. § 1346)

Then Came Skilling

Jeffrey K. Skilling, former Enron CEO…

At its height, Enron was worth over $60 billion and its stock sold at $90 per share, but fraud and faulty accounting led to the 6th largest bankruptcy in U.S. history

Skilling was convicted of one count of conspiracy (premised on honest services fraud), 12 counts of securities fraud, 5 counts of making false representations to Enron's auditors, & 1 count of insider trading

He appealed his convictions, arguing that the honest services law was unconstitutionally vague…

Supreme Court Decision

In Skilling v. United States, 130 S. Ct. 2896 (2010), the U.S. Supreme Court held that § 1346 (mail fraud statute) criminalizes ***only*** those schemes that involve bribes or kickbacks

Court narrowed the scope of the Honest Services Act

Non-disclosure of a conflict of interest (or undisclosed self-dealing/self-enrichment) is ***not*** a violation of the Act if there is no underlying bribe or kickback from a third party


CONFLICT OF INTEREST
DOES NOT EQUAL
HONEST-SERVICES
FRAUD.
Jerry Bernstein
QUOTEHD.COM

Skilling Epilogue

Despite the Supreme Court's ruling, Mr. Skilling's convictions were reaffirmed on all counts

Skilling has been in prison since 2006, but his sentence has been reduced from 24 years to 14 years

Was also ordered to forfeit $42 million to be applied toward restitution for the victims of the Enron collapse

The McDonnell Case

In 2014 former Virginia Governor Robert F. (Bob) McDonnell and his wife, Maureen G. McDonnell, were found guilty of several counts of public corruption

Allegedly participated in a scheme to use his official position to obtain over $170,000 in loans & gifts, including cash, golf outings & equipment, Rolex watch, designer clothes, trips, etc., from a businessman in exchange for promoting diet supplements

He was sentenced to 2 years; she was sentenced to one year and a day

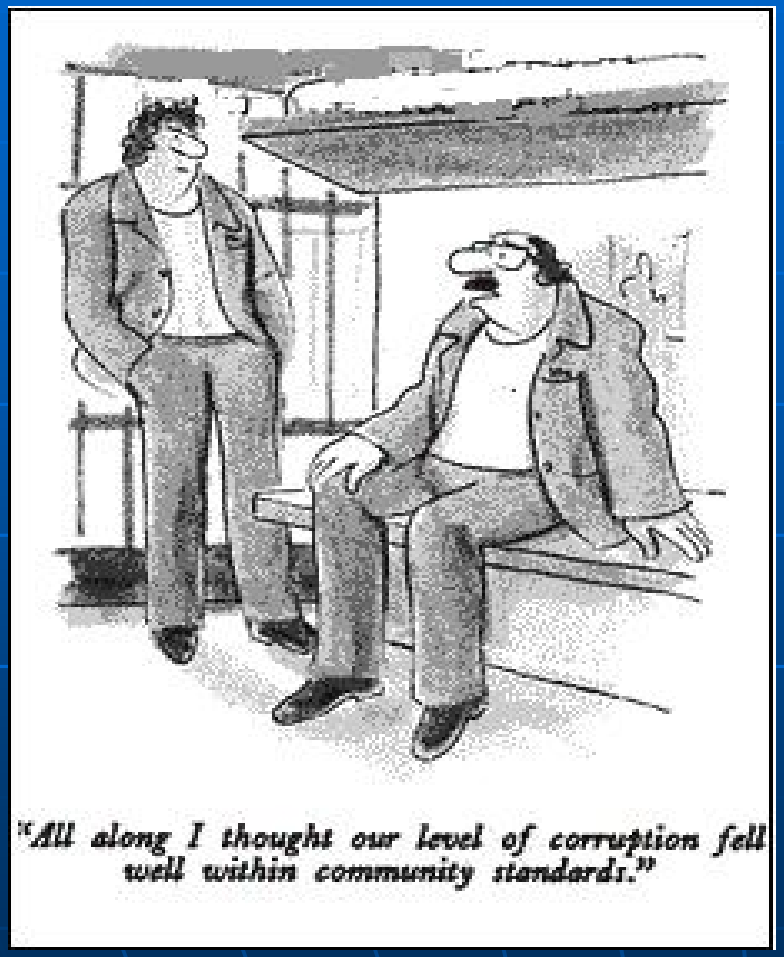
BUT, upon appeal, the U.S. Supreme Court vacated the Governor's convictions due to incorrect jury instructions concerning the term "official act"

"Official act" is more than just setting up a meeting, calling another public official or hosting an event to discuss a particular issue on behalf of a benefactor

Supreme Court said the following:

There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

Epilogue: The convictions were vacated & charges dismissed



Federal Public Corruption Convictions from 2003-2013

Texas: 870

California: 678

Florida: 622

Florida Cases

In 2017 Corrine Brown, the former U.S. Congresswoman from Jacksonville, was sentenced to five years in prison after being found guilty of numerous charges for her participation in a fraudulent education charity, concealing material facts on required financial disclosure forms, obstructing the due administration of the internal revenue laws, and filing false tax returns

It was alleged that Ms. Brown and others solicited and received donations to “One Door for Education,” a supposedly charitable organization that was established to provide scholarships and to buy computers for schools

However, the money was diverted to personal and professional enrichment, such as personal expenses, plane tickets, personal automobile repairs, vacations, receptions, and luxury boxes at a Beyoncé concert and NFL game, among other things

Dwayne L. Taylor, former member of the Florida House of Representatives from Daytona Beach, found guilty of nine counts of wire fraud

During his re-election campaigns, Mr. Taylor misappropriated $60,000 in campaign funds for personal uses unrelated to campaign expenses

Was sentenced to 13 months in federal prison

what are other words for misappropriation?

embezzlement, defalcation, peculation, misapplication, theft, misuse, stealing, mishandling, pilfering

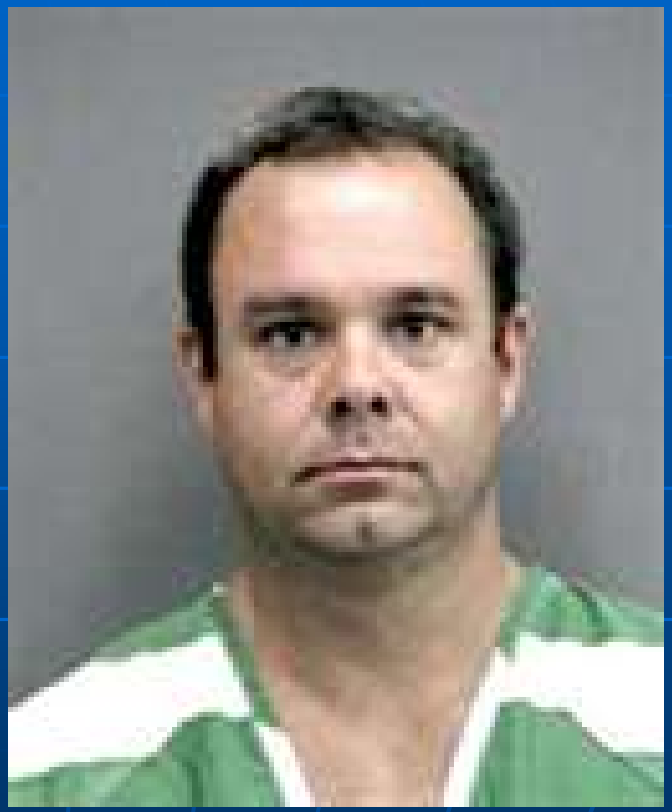
Thesaurus.plus

Former Dixie County Attorney JOSEPH T. (JOEY) LANDER…

Convicted of six felony counts of mail fraud & 11 felony counts of money laundering, for requiring developers to pay him personally for performance bonds… also used his position to entice others to invest in his start-up vitamin business

He was sentenced to 87 months in federal prison & ordered to pay $50,000 fine, $1,600 in court costs, & forfeit co-ownership in local newspaper

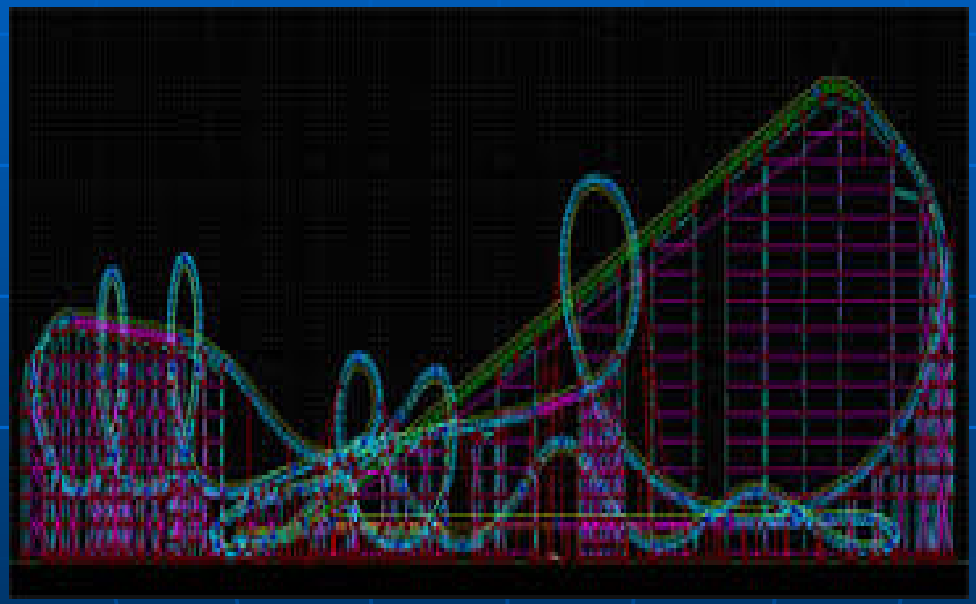
Successfully appealed 12 of the convictions, but not the mail fraud conviction for the vitamin company scheme



FORMER PALM BEACH COUNTY COMMISSIONERS

- Anthony R. Masilotti
- Warren H. Newell
- Mary B. McCarty

What a Ride!



TRIALS AND TRIBULATIONS OF BEING THE COUNTY ATTORNEY

Herbert W. A. Thiele, Esq.
County Attorney
Leon County, Florida

The purpose of this presentation is to provide an overview of various topics of interest, and perhaps share a few light-hearted thoughts and reflections, from the perspective of a long-serving county attorney.

DECORUM

Thankfully, the following headlines have not (yet!) appeared in our local newspaper!

.

> *"Mayor, councilman brawl at meeting."* This very thing did occur in Birmingham, Alabama. The fight apparently concerned a personal matter, and both the mayor and city councilman sustained minor injuries and were taken to the hospital. The mayor charged the councilman with third degree assault, but dropped the charges, and two days later the men made amends and publicly apologized.
>
> *"Fist fight erupts at town hall meeting."* In the small town of Hymera, Indiana, tempers boiled over the firing of the town marshal and fisticuffs ensued between the town marshal, his son, and others. The fight was caught on video and went viral. The town marshal pled guilty to a misdemeanor battery charge and was sentenced to 8 days in jail plus 170 days probation. His son was sentenced to three days in jail.
>
> *"City council brawl breaks out in Alabama town."* At a city council meeting in the small town of Alexander City, Alabama, the mayor punched a councilman twice in the face after the councilman swore at the mayor's wife. The mayor's wife also got into the action, and kicked the councilman. Fortunately, no one was seriously hurt. However, the mayor was subsequently found guilty of a misdemeanor third-degree assault charge. He received a 30-day suspended jail sentence, was ordered to serve 12 months of unsupervised probation, and had to pay a $250 fine plus court fees. His wife was found not guilty.

There are plenty of examples of local government meetings that got a bit "out of hand." Here are some clips from You Tube.

> Denton, Texas Planning and Zoning Commission (2011)
> "Mic Check Against Fracking"
> https://www.youtube.com/watch?v=cYeDMh48Jmk

Sunbury, PA City Council (2015)
"Sunbury City Council Gets Heated"
https://www.youtube.com/watch?v=s7JDrQlpsyk

Detroit City Council (2008)
"Detroit City Council Hearing Adjourned Amid Shouting Match"
https://www.youtube.com/watch?v=qqOSNI7l0bQ&app=desktop

Santa Clarita, CA City Council (2015)
"Santa Clarita City Council: Strip Clubs and McRibs"
https://www.youtube.com/watch?v=1Kuy1thqcvI

Oshawa, Ontario City Council (2013)
"Oshawa Mayor has residents arrested for clapping"
https://www.youtube.com/watch?v=9ywjYTxTUcc

Bloomington, Illinois City Council (2015)
"Citizen's hilarious rant at Bloomington, IL city council meeting"
https://www.youtube.com/watch?v=6GHJm5Yfek0

Tallahassee, Florida City Commission (2017)
"Spectacle at City Hall: Jackson Tosses Cash to Commissioners"
http://www.tallahassee.com/videos/news/politics/2017/09/28/watch-jackson-tosses-cash-commissioners/106071538/?for-guid=3193C796-9A28-E411-B216-90B11C3D62C5

Policies. Having policies and written rules of procedure for conducting county commission meetings will go a long way toward ensuring order and professionalism and promoting civility in board meetings. (But not always.) A few suggestions are as follows:

1. Order must be preserved. No person shall, by speech or otherwise, delay or interrupt the proceedings or the peace of the commission, or disturb any person having the floor. No person shall refuse to obey the orders of the chairperson or the commission. Any person making irrelevant, impertinent, or slanderous remarks or who becomes boisterous while addressing the commission shall not be considered orderly or decorous. Any person who becomes disorderly or who fails to confine remarks to the identified subject or business at hand shall be cautioned by the chairperson and given the opportunity to conclude remarks on the subject in a decorous manner and within the designated time limit. Any person failing to comply as cautioned shall be barred from making any additional comments during the meeting by the chairperson, unless permission to continue or again address the commission is granted by the majority of the commission members present.

2. If the chairperson or the commission declares an individual out of order, he or she will be requested to relinquish the podium. If the person does not do so, he or she is subject to

removal from the commission chambers or other meeting room and may be arrested by the Sheriff subject to Section 810.08(1), Florida Statutes.

3. Any person who becomes disruptive or interferes with the orderly business of the commission may be removed from the commission chambers or other meeting room for the remainder of the meeting.

See Leon County Policy No. 01-05.

REMOVALS?

Maintaining decorum at commission meetings is considered to be a significant governmental interest. As determined by the Court in *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989), a mayor's actions in attempting to confine a speaker to the designated topic on the agenda, and then having the speaker removed when the speaker became disruptive, were reasonable and did not violate the citizen's First Amendment rights. Thus, when faced with an unruly citizen who is disrupting the orderly progression of a commission meeting, the presiding officer may have such person removed. (It can, and does, happen.) Such removals are subject to "content-neutral" and "content-based" restrictions.

A content-neutral restriction is unrelated to the content of the speech. Examples of acceptable content-neutral restrictions would be setting time limits for speaking on an agenda item, requiring sign-in sheets or speaker cards, and restricting the speech to the topic being discussed.

A content-based restriction is based on the meaning or message being conveyed by the expression of speech. For example, a citizen can be removed from a meeting based on disruptive conduct or the utterance of "fighting words." *See Jones v. Heyman*, 888 F.2d. 1328; *Beebe v. Foster*, 661 So.2d 401 (Fla. 1st DCA 1995).

HEAR YE!

Under Section 286.0114, Florida Statutes, a board or commission is now required to give the public a "reasonable opportunity to be heard on a proposition" that is before the commission. This opportunity to be heard need not occur at the same meeting when the commission takes official action, just at some meeting "during the decision making process" and "within reasonable proximity in time" before the actual meeting when the commission does take official action. § 286.0114(2), Fla. Stat. (2017).

This statute does not prohibit a board from maintaining orderly conduct and proper decorum at a meeting. Also, there are exceptions to the opportunity to be heard requirement, including emergency situations, the performance of ministerial acts (such as approving minutes and ceremonial proclamations), and quasi-judicial hearings.

Moreover, a board may adopt rules or policies that govern the opportunity to be heard, including:

(a) limiting the amount of time an individual has to speak;

(b) prescribing procedures for a representative of a group to speak, rather than all members of the group;

(c) requiring speakers to fill out speaker forms; and

(d) designating a specific period of time during a meeting for public comment.

§ 286.0114(4), Fla. Stat. (2017).

PARLIAMENTARY PROCEDURE

It is common for the local government lawyer to be the designated parliamentarian at commission meetings. The parliamentarian advises the board chairman on the correct rules of procedure and answers questions regarding specific rule application. In addition, the parliamentarian may call to the chairman's attention any errors in the proceedings that may affect the substantive rights of any member or otherwise do harm.

Sometimes the best course of action is a motion to temporarily suspend or waive the rules. *Robert's Rules of Order Newly Revised* states that, "[w]hen it is desired that the assembly take up a question or do something that would be in violation of a rule that applies, it can be proposed in some cases to *Suspend the Rules* to permit accomplishment of the desired purpose." (10th ed., p. 68) (emphasis in text; citation omitted). (Been there, done that.)

Question: Can the Chairman second a motion? Yes, it does appear so, at least for small boards (boards that consist of twelve or fewer members), and subject to the rules or customs within the particular board. See *Robert's Rules of Order Newly Revised* (10th ed., pp. 470-71) (chairman of a small board can speak in discussion and, subject to rule or custom, usually can make motions).

Also, it is noteworthy that straying from *Robert's Rules of Order* will not invalidate a board's action. For example, in Battaglia Fruit Co. v. City of Maitland, 530 So. 2d 940, 942 (Fla. 5th DCA 1988), cause dismissed 537 So. 2d 568 (Fla. 1988), the Florida Fifth DCA held that the Orange County Board of County Commissioners' failure to observe the general rule of parliamentary procedure did not violate anyone's procedural due process rights. In making this ruling, the Court specifically found that "[p]arliamentary rules not adopted as part of a governmental body's organic law may be waived or disregarded, and courts will not enforce their observance." Id. at 942 (citation omitted). See also McQuillin Municipal Corporations § 13.42.10 (3rd ed.) ("[m]ere failure to conform to parliamentary usage will not invalidate the action when the requisite number of members has agreed to the particular measure").

In addition to *Robert's Rules of Order*, other parliamentary procedure guides that are used by various organizations include *The Standard Code of Parliamentary Procedure* (formerly known as the

Sturgis Standard Code of Parliamentary Procedure, used by some medical, dental and library organizations) and *Demeter's Manual of Parliamentary Law and Procedure* (used by some unions). Many state legislatures use *Mason's Manual of Legislative Procedure*.

CONFLICTS OF INTEREST AT MEETINGS

Pursuant to Section 286.012, Florida Statutes, a vote is to be recorded and counted for each state, county, or municipal government board member who is present at a board meeting. However, if a conflict of interest exists (or appears to exist) under the Code of Ethics for Public Officers and Employees (Chapter 112, Part III, Florida Statutes), the board member should:

(1) prior to the vote being taken, publicly state his or her reasons for abstaining from voting;

(2) abstain from voting on the matter; and

(3) file a Memorandum of Voting Conflict (Commission on Ethics Form 8B) with the clerk of the board within 15 days.

See § 112.3143(3)(a), Florida Statutes (2017). Even if the board member happens to be out of chambers during the vote on an issue in which the commissioner has (or appears to have) a conflict of interest, the commissioner should still announce the conflict of interest and file a Memorandum of Voting Conflict. *See* Florida Commission on Ethics Opinion 88-3; Fla. Atty. Gen. Op. 074-289 (the statutory duty to vote "may not be avoided by the 'temporary' absence of a member during the vote on a particular matter which comes before the body of which he is a member during a meeting at which he is present").

In *George v. City of Cocoa*, 78 F.3d 494 (11th Cir. 1996), the court held that a city councilman's possible run for a seat based on a redistricting plan did not require him to abstain from voting on the redistricting plan. In fact, the court said that under Florida law, elected officials have an affirmative duty to vote on all matters before them, and that abstaining from a vote is prohibited unless there is or appears to be a conflict of interest. *Id*. at 496. *See also* Fla. Atty. Gen. Op. 87-17 (1987) (county commissioner may abstain from voting on a measure to avoid creating an appearance of impropriety only where such impropriety amounts to a conflict of interest).

Also, pursuant to Section 286.012, Florida Statutes, a board member may abstain from voting on a matter before the board if there is, or appears to be, a possible conflict of interest under a locally adopted code of ethics. If the conflict arises under the local code of ethics, then the board member would follow the disclosure requirements specified in the local code of ethics. In addition, Section 286.012 allows a board member to abstain from voting on a matter in a quasi-judicial proceeding "if the abstention is to assure a fair proceeding free from potential bias or prejudice." (Please do not wait until the meeting is in progress to ask.)

What if the *county attorney* has a conflict of interest concerning a matter being considered at a board meeting? A solution could be to have an outside attorney serve as the acting county attorney for the duration of the particular agenda item. (Recently done.)

IMMUNITY AND DEFENSE OF ACTIONS

Sovereign immunity is founded on the ancient principle that "the King can do no wrong" and is the legal doctrine which precludes bringing a lawsuit against a government entity without the entity's consent. It bars holding government entities liable for the torts (civil wrongs or injuries) of its officers or agents unless the immunity is expressly waived by legislative enactment. *See Black's Law Dictionary* 1396 (6th ed., West 1990). (It has been around since we were colonies, so let's not ruin it now.)

Qualified immunity is the affirmative defense which shields a public official, who is performing discretionary functions, from civil damages if the official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Black's Law Dictionary* 751 (6th ed., West 1990).

Most states, including Florida, have waived sovereign immunity to various degrees. Pursuant to Section 768.28(1), Florida Statutes (2017):

> the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act...

As has been explained:

> To render a municipal corporation liable for the tortuous act of an officer or servant, the act must have been performed within the scope of employment. Although generally liable for a tortuous act of a servant performed within the scope of his or her duties, in the absence of written law expressly declaring liability, the general rule is that a municipal corporation is not liable to civil action for the completely personal torts of its officers, employees or agents, and that if the wrongful or negligent act was outside the scope of [the] officer's or servant's duties, and was not ratified by the municipality, it is not liable.

McQuillin, *The Law of Municipal Corporations* § 53.69 (3rd ed., West 2000).

For example, in the case of *Breaux v. City of Miami Beach*, 899 So.2d 1059 (Fla. 2005), two swimmers at a public beach area were overcome by rip currents and drowned. The estates of each decedent brought wrongful death actions against the City. The Florida Supreme Court held that when a municipality operates a public beach as a swimming area -- by having public restrooms, showers, water fountains, parking, and a beach concessionaire from which it derives revenues -- the municipality has a duty to exercise reasonable care to the foreseeable users of that swimming area. Thus, the City had a duty of care to warn of dangers that were known or should have been known, and was not shielded from liability as a matter of law based on sovereign immunity.

One of my favorite cases to use at code enforcement presentations is *Slonin v. City of West Palm Beach, Florida*, 896 So. 2d 882 (Fla. 4th DCA 2005). The plaintiff, who was the owner of a motel in West Palm Beach, brought an action against both the City and the City building code inspector for assault and battery, and against the City for negligent hiring, training, supervision, and retention of the code inspector. The allegations were as follows. A code inspector went to the motel to issue a building code citation, whereupon the motel owner threw the citation on the ground. The code inspector picked up the citation and shoved the motel owner, saying, "I'll kick your ass," and the owner sued. The circuit court granted the City's motion to dismiss the negligent hiring, training, supervision, and retention claims, finding that the claims fell within the City's planning level function, which was protected by sovereign immunity. The jury subsequently returned a verdict in favor of the City and the code inspector as to the assault and battery claims. The plaintiff appealed. On appeal, the Fourth District Court of Appeal affirmed all issues, except for the dismissal of the negligent supervision and retention claim, which was reversed and remanded. The Court of Appeal noted that the circuit court erred in dismissing that claim, as there was no sovereign immunity barrier to making a claim against a governmental agency for negligent supervision and retention.

Section 111.07, Florida Statutes, provides for the defense of civil actions against public officers, employees, or agents. Pursuant to Section 111.07, Florida Statutes, any agency of the state, or any county, municipality or political subdivision of the state is authorized to:

(1) provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of any of its officers, employees, or agents arising out of and in the scope of his or her employment or function;

(2) recover any attorney's fees paid from public funds, should the officer, employee, or agent be found to be personally liable by virtue of acting outside the scope of his or her employment, or was acting in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property; or

(3) reimburse such person who prevails in the action for court costs and reasonable attorney's fees, should the county be authorized to provide an attorney to defend the civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents, and the county fails to provide such attorney.

Moreover, in the case of *Thornber v. City of Ft. Walton Beach*, 568 So.2d 914 (Fla. 1990), the Florida Supreme Court set forth the following general rule:

> Florida courts have long recognized that public officials are entitled to legal representation at public expense to defend themselves against litigation arising from the performance of their official duties while serving a public purpose. The purpose of this common law rule is to avoid the chilling effect that a denial of representation might have on public officials performing their duties properly and diligently. This entitlement to attorney's fees arises independent of statute, ordinance, or charter. For public officials to be entitled to representation at public expense, the litigation must (1) arise out of or in connection with the performance of their official duties and (2) serve a public purpose.

568 So.2d at 916-917. (Citations omitted.) The *Thornber* case involved a claim by three city council members for the reimbursement of attorneys' fees expended in successfully enjoining a recall petition and successfully defending a civil rights action. The Supreme Court found that the city council members met the two-pronged test and were thus entitled to the reimbursement.

Without the protections sustained under Section 111.07, there could be a chilling effect on public service and participation in local government.

Sansom case. On February 26, 2015, a non-jury trial was held in Tallahassee concerning the payment of legal fees incurred in the defense of Raymond Sansom, who served briefly as the Speaker of the Florida House of Representatives. He was charged with official misconduct, perjury, theft and conspiracy to commit theft, but all of the charges were eventually dropped. The Court ruled that the State had to pay the legal fees that Mr. Sansom incurred to defend the charges against him, which came to $692,797.50 plus $117,677.98 in pre-judgment interest. The State appealed the ruling, and the parties ultimately agreed to settle the matter for $600,000.

Maloy cases. In 2007 the Florida First District Court of Appeal issued opinions in two cases involving former Leon County Commissioner Rudy Maloy. Both cases emanated from requests by Mr. Maloy for reimbursement of attorney's fees and costs. In the first case, Mr. Maloy had successfully defended ethics charges against him, but the County decided not to pay his attorney's fees and costs. The Court agreed with the County's position, finding that even though Mr. Maloy was cleared of the ethics charges, his conduct did not serve a public purpose.

The second case involved a request by former Commissioner Maloy for reimbursement of attorney's fees incurred in defending criminal charges against him. Mr. Maloy was found not guilty of the charges, but the County decided not to reimburse his attorney's fees and costs. The First District Court of Appeal determined that the award of attorney's fees, which was $238,836.98 plus post-judgment interest, was finding that Mr. Maloy's actions did arise out of his official duties and while serving a public purpose.

Hadeed case. In a more recent case, *Hadeed v. State*, 208 So. 3d 782 (Fla. 1st DCA 2016), two citizens filed ethics complaints against the County Attorney and a County Commissioner for Flagler County. The Commission on Ethics dismissed both complaints as legally insufficient, finding that neither complaint established the grounds for an ethics violation. Pursuant to Section 112.317, Florida Statutes, the two officials sought attorneys' fees and costs from the citizens, citing that the complaints were filed maliciously and contained knowingly false allegations that were material to the ethics violations. However, the requests for attorney's fees and costs were dismissed as legally insufficient, and the two officials appealed to the First District Court of Appeal. The First DCA agreed with the Commission on Ethics, finding that even if knowingly false allegations were maliciously made to injure the two officials, the allegations were not material to any purported ethics violations. Although Florida law does provide for an award of costs and attorney's fees against persons who file knowingly false ethics complaints against public officials and employees, the complaint must contain false statements that are "material to a violation" of the Ethics Code, which was not the case herein. The First DCA concluded its opinion as follows:

> This result may seem odd. Hundreds of pages of inflammatory language in ethics complaints are directed at public officials, who prevail on the merits, but they can't recover costs or fees against their tormentors? The answer is that the statute is narrowly-drawn and allows recovery only in very limited situations; it doesn't permit recovery where knowingly false allegations are maliciously made to injure a public official's reputation on matters *immaterial* to an ethics violation, at least in this context. Awards of costs and attorney's fees are a matter of legislative grace and the dividing line the Legislature has drawn here does not extend to the actions of [the two citizens] in filing meritless ethics complaints; had they made a knowingly false allegation as to a material fact in an attempt to cause reputational harm, the statute would apply.

Hadeed v. State, 208 So. 3d at 785 (emphasis in text).

However, in five other ethics complaints that were filed against elected Flagler County officials, there was a different result. An Administrative Law Judge found that the complaints were filed with a malicious intent to damage the reputations of the officials, and that the complainants knowingly made one or more false allegations against the officials, or made an allegation with reckless disregard for its truth or falsity. Thus, the ALJ recommended that the Commission on Ethics enter final orders granting the payment of attorneys' fees and costs to the elected officials. At its meeting on December 8, 2017, the Commission on Ethics agreed with the ALJ's recommendation, and the complainants will be required to pay the attorneys' fees and costs incurred by the elected officials to defend the cases. The total award was $311,666.33!

SUNSHINE LAW

(Social media meets Sunshine… Film at 11!) The Sunshine Law provides that all meetings of any local governing board (which can include an intergovernmental entity, not just the county

commission) at which official acts are to be taken are to be public meetings open to the public at all times. The board must provide reasonable notice of the meeting, and no resolution, rule, or formal action shall be considered binding except one that is taken or made at said meeting. § 286.011(1), Fla. Stat. (2017).

The purpose of the Sunshine Law is "to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974). The Sunshine Law covers "any gathering of some of the members of a public board where those members discuss some matters on which foreseeable action may be taken by the board." *Hough v. Steinbridge*, 278 So. 2d 288, 289 (Fla. 3d Dist. App. 1973).

The Attorney General's Office has also determined that private discussions via e-mail between board members about board business are prohibited under the Sunshine Law. *See* Fla. Atty. Gen. Op. 89-39 (1989). The same would be true of board members texting each other about board business. The use of a website blog or message board to solicit comments from other members of the board by their responses on issues that would come before the board would trigger the requirements of the Sunshine Law. *See* Fla. Atty. Gen. Op. 08-07 (2008). Also, while there is nothing prohibiting a board member from posting comments on the local government's Facebook page, members must not engage in any discussions of matters that could foreseeably come before the board for official action. *See* Fla. Atty. Gen. Op. 2009-19 (2009).

Electronic attendance? Sometimes an elected official is unable to be in physical attendance a scheduled board meeting. The Sunshine Law does not prohibit a member from participating in the meeting by telephone or electronic means. The board may agree to allow a board member to participate via speaker phone or electronically so long as the discussions can be heard by all of the other board members and the public, and provided the meeting is otherwise open to the public. See Fla. Atty. Gen. Op. 94-55. See also Fla. Atty. Gen. Op. 92-44 (ill county commissioner may participate and vote in commission meetings through use of interactive video and telephone system that permitted the commissioner to see and hear the other members of the board and audience.) Also, there must be a quorum of members physically present at the meeting. See Fla. Atty. Gen. Op. 02-82 (physically disabled members of a board may participate and vote on board matters by electronic means if they are unable to attend a public meeting, so long as a quorum of the members is physically present at the meeting site); Fla. Atty. Gen. Op. 03-41 (participation by telephone by an absent member in a public meeting should be permitted only in extraordinary circumstances and when a quorum of the board members is physically present at the meeting).

Penalties. Section 286.011(3), Florida Statutes provides that any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of the Sunshine Law by discussing public business in private with other members is guilty of a misdemeanor of the second degree, punishable by a $500 fine or 60 days in jail. For example, during 2014 two former members of the Orlando Orange County Expressway Authority (which handles the operation of toll roads) received fines for Sunshine Law violations. One board member pleaded guilty to violating the Sunshine Law and was fined $500, and another board member pleaded no contest and was fined $9,808.

Section 286.011(4) also provides that whenever a Sunshine Law action has been filed against a board or commission or its members, the court may assess reasonable attorney's fees against the agency if the members are found to have acted in violation of this section. However, the court may also assess a reasonable attorney's fee against the individual filing such an action if the court finds the action was filed in bad faith or was frivolous.

Jail time? Yes, it can happen. Former Florida Senate president W. D. Childers was the first public official to serve actual jail time for violating the open meetings section of the Florida Government-in-the-Sunshine Law. Childers, who, at the time, was serving as Chairman of the Escambia County Commission, was convicted by a jury in 2003 of Sunshine Law violations for discussing public business in private with other commissioners. Childers was sentenced to 60 days in jail and ordered to pay a $500 fine, plus $3,603.85 in court costs and investigation and prosecution expenses.

Oh, my…. A few years ago the rather embarrassing headline "Restroom Conversation Between Lake Wales Officials Raises Sunshine Question" was posted on The Ledger.com. Apparently, the mayor and a city commissioner were discussing city business in the men's room when a reporter walked in. Because the item of discussion had already been decided by the commission, the city attorney did not consider the restroom discussion to be a Sunshine Law violation, but did acknowledge that it only took the appearance of impropriety for someone to assert a violation.

In February of 2011, Governor Rick Scott removed Wauchula City Commissioner Daniel A. Graham from office for violations of the Sunshine Law. In addition, Mayor David Royal and City Commissioners Valentine Patarini III, Jerry Conerly and Clarence Bolin all resigned from office after an investigation revealed that they discussed city issues in two separate private meetings. Each elected official pled no contest to violating the Sunshine Law, but the judge withheld a formal finding of guilt. The officials had to pay fines and court costs.

PUBLIC RECORDS

Under Article I, Section 24(a) of the Florida Constitution, "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Also, Section 119.01(1), 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," and "[e]very person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records."

"Public records" are defined as "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." § 119.011(11), Fla. Stat. (2017).

In *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980), the court construed the statutory definition of a "public record" to be "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type."

In general, all public records are open for public inspection and copying, unless the Legislature has specifically exempted them from disclosure or the records have been made confidential by law. Under Section 119.07(1)(d), Florida Statutes, the records custodian shall redact only that portion of the record for which an exemption has been asserted and validly applies, and shall produce the remainder of the record for inspection. Further, the records custodian must state the basis for the exemption, including the statutory citation, and if requested, provide in writing and with particularity the reasons for concluding that the record is exempt. Fla. Stat. §§ 119.07(1)(e); 119.07(1)(f).

Penalties. The penalty for violating the public records law varies depending on the nature of the violation. At the minimum it is a noncriminal infraction punishable by up to a $500 fine. However, a willful or knowing violation of the public records law is a first degree misdemeanor, punishable by a $1,000 fine or one-year imprisonment, and may result in suspension or removal from office. § 119.10, Fla. Stat. (2017).

In the case of *State v. Webb*, 786 So.2d 602 (Fla. 1st DCA 2001*), rev. den.* 807 So.2d 656 (Fla. 2002), the Florida Supreme Court concluded that the dilatory responses of a school board member to the public records requests of a parent did not comport with the requirement for the "reasonable" access to public records. In this case, the board member responded to the initial public records request one and one-half months later, but did not schedule a time for the parent to review the documents until four months had passed. At that time, the parent was only allowed one hour to review a large stack of documents, and then allowed only two additional one-hour review sessions some five weeks later. The board member terminated the parent's review of the records after the third session. The board member did not provide all of the public records requested until after she received a request from the grand jury, nearly seven months after the initial request. The jury subsequently convicted the board member of a first-degree misdemeanor charge. After being found guilty, the school board member filed a motion to arrest judgment and vacate the conviction, which was granted by the county court. However, on appeal, the First DCA reversed the county court's decision. Ultimately, the board member only served seven days in jail and the charges were later dropped.

In November of 2017 Martin County Commissioners Ed Fielding and Sarah Heard, as well as former Commissioner Ann Scott, were charged with violating Florida's public records law for allegedly failing to respond to public records requests. The charges stemmed from a high profile civil case for breach of contract and public records law violations that was instituted against Martin County by Lake Point, a rock quarry company that had plans to become a water company. Lake Point had requested production of relevant emails of the commissioners, including any relevant emails in personal email accounts. However, Commissioner Heard stated that she could not turn over any emails from her personal account because it had been hacked and all of the emails deleted. The court-appointed arbitrator in the civil case stated that he found "the testimony of Commissioner

Heard regarding the loss of emails due to the alleged 'hacking event' to be suspicious, bizarre and less than credible." The arbitrator also concluded that Martin County "engaged in a pattern of violating the public records act" by attempting to hide that they were using private email accounts to communicate about public business. As part of a settlement with Lake Point, the County admitted that the use of private email accounts for public purposes by certain commissioners had become too commonplace, and promised to fix the problem with new policies and practices. It is estimated that the lawsuit will ultimately cost Martin County between $12 to $20 million in settlement costs and legal fees.

The trouble with texts. (Social media meets Chapter 119.) In November of 2017 Federated Publications, Inc., d/b/a the *Tallahassee Democrat* filed a lawsuit against the City of Tallahassee concerning text messages of its public officials and employees. The suit ensued after the City could not respond to a public records request for text messages exchanged between the city manager and a lobbyist, because the city manager had apparently deleted the messages from his personal cell phone and the City could not retrieve them.

The City admitted to the public records violations and entered into a Final Stipulated Judgment on January 29, 2018. The City has since adopted a new public records policy and has installed software that captures text messages sent to or from City-issued cell phones. The City's new policy provides that:

- Transmission of any public record via text message over private cellular phone is prohibited (unless the communication is captured and retained by City system, e.g., transmission to City-owned cellular phone and transmission captured by Smarsh or equivalent).

- Transmission of any public record via email over private email server (e.g., @gmail.com, @yahoo.com) is prohibited.

- Transmission of any public record via electronic means (e.g., instant messaging or personal messaging such as Facebook or Twitter, etc.), where communication is not captured and retained by City, is prohibited.

- All text messages transmitted or received over City-provided cellular phones will be captured and retained system-wide (Smarsh system or equivalent).

- Any public record transmitted, sent or received via text message or email shall be retained in City system.

- Violation of the public records law, or city policies concerning public records, shall be grounds for disciplinary action. Repeated violations or flagrant abuses shall be grounds for termination.

Retention. The State of Florida General Records Schedule GS1-SL for State and Local Government Agencies, states that "records created or maintained in electronic format must be retained in accordance with the minimum retention requirements." This includes e-mail, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device. Printouts of electronic communications may be retained in lieu of the actual electronic files.

Personal records. There are some records that do not meet the definition of "public records" and thus do not have to be disclosed. For example, in *Times Publishing Company v. City of Clearwater*, 830 So.2d 844 (Fla. 2d DCA 2002), the Second District Court of Appeal held that the personal e-mail of city employees did not qualify as public records subject to disclosure under the public records statute. Because the personal e-mails were not created or received in connection with the official business of the city, or in connection with the transaction of the city's official business, the personal e-mails did not qualify as "public records." The Florida Supreme Court approved the ruling and further held that personal e-mails did not fall within the definition of public records by virtue of their placement on a government-owned computer system. *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).

In another case, the Fourth District Court of Appeal held that an email sent by an elected official from a personal account using a personal computer and copied to friends and supporters, was not a public record, because the email communication was not made in connection with official agency business. Butler v. City of Hallandale Beach, 68 So.3d 278 (Fla. 4th DCA 2011).

Also, private or personal telephone records are not considered public records. For example, in *Media General Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. 1st Dist. App. 2003), *rev. den*. 857 So. 2d 196 (Fla. 2003), the First District Court of Appeal held that the private or personal cellular telephone calls of five staff employees of the House of Representatives, which calls were contained in billing records, were not public records subject to disclosure and therefore could be redacted. However, the actual telephone numbers called in connection with official state business were public records that should be disclosed, even though disclosure of the numbers might result in unreasonable consequences to the persons called.

Sham requests. During the 2017 Legislative Session, Section 119.12, Florida Statutes was amended to address problems with sham public records requests. This was in response to public records lawsuits against governmental entities that were apparently motivated solely to generate attorney's fees. Section 119.12(3), Florida Statutes now provides the following protections:

1. To be entitled to an award of attorney's fees, the complainant (person requesting the records) must provide written notice of the public records request to the records custodian;

2. The complainant must not have requested to inspect or copy public records or participated in the civil action for an "improper purpose"; and

3. If there is an "improper purpose" (as determined by the court), the complainant may not recover any costs or attorney's fees or costs and is responsible for paying the government entity's attorney's fees and costs.

"Improper purpose" is defined as "a request to inspect or copy a public record or to participate in the civil action primarily to cause a violation of [Chapter 119] or for a frivolous purpose." *See* § 119.12(3), Fla. Stat. (2017).

HONEST SERVICES ACT – YES, IT IS STILL AROUND!

The federal mail fraud statutes, which have been around since the 1870's, provide that "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted" by means of mail, wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined or imprisoned for not more than 20 years, or both. 18 U.S.C. §§ 1341 and 1343. The phrase "scheme or artifice to defraud" is defined as a scheme or artifice to deprive another of the intangible right of "honest services." 18 U.S.C. § 1346.

The term "honest services" is not defined by statute but has nevertheless withstood numerous court challenges, including the high profile case of involving former Enron CEO Jeffrey K. Skilling. At its height, Enron was the seventh largest revenue producing company in America and its stock sold at $90 per share. However, fraud and faulty accounting sunk the company and triggered the sixth largest bankruptcy in U.S. history. In 2006 a jury convicted Mr. Skilling of one count of conspiracy, twelve counts of securities fraud, five counts of making false representations to auditors, and one count of insider trading. Part of the conspiracy conviction was premised on honest services fraud. He subsequently appealed his convictions all the way to the U.S. Supreme Court. Although the Supreme Court did once again uphold the honest services statute, the Court did narrow its scope by finding that the nondisclosure of a conflict of interest (or undisclosed self-dealing/self-enrichment) was <u>not</u> a violation if there was no underlying bribe or kickback from a third party. *Skilling v. United States*, 130 S. Ct. 2896 (2010).

For Jeffrey Skilling, this ruling meant that his alleged misconduct did not fall within the proscription of honest services fraud because prosecutors did not allege or show that he engaged in a bribery or kickback scheme. (In other words, it was not alleged or shown that Mr. Skilling solicited or accepted side payments from a third party in exchange for misrepresenting Enron's financial position.) Nevertheless, the Supreme Court did not reverse any of Mr. Skilling's convictions, but remanded the case to the Fifth Circuit Court of Appeals to determine whether the instructions to the jury about honest services amounted to harmless error. Ultimately, the Court of Appeals affirmed Mr. Skilling's convictions on all counts. He was originally sentenced to 24 years in prison, but after years of legal wrangling, his sentence was reduced and he is scheduled for release in February of 2019.

A more recent case involving former Virginia Governor Robert F. (Bob) McDonnell and his wife, Maureen G. McDonnell, has had a significant impact on cases concerning the Honest Services Act. In the McDonnell case, it was alleged that the Governor and his wife used the Governor's official position to enrich themselves by soliciting and obtaining $175,000 in loans and gifts from the former CEO of a company that sold dietary supplements. In exchange for cash, loans, golf outings, golf equipment, luxury goods, designer clothes, trips, and private plane rides, the former Governor allegedly performed official actions to help legitimize, promote, and obtain research studies for the dietary supplements. The former Governor and his wife were found guilty of several counts of public corruption, including honest services wire fraud and conspiracy to commit honest services wire fraud.

However, Mr. McDonnell appealed his convictions all the way to the U.S. Supreme Court. Although the Supreme Court did, once again, reject arguments that the Honest Services Act was unconstitutionally vague, the Court found that the jury instructions concerning the meaning of the term "official act" were incorrect, which may have led the jury to convict Mr. McDonnell for conduct that was not unlawful. Further, the Supreme Court adopted a more limited interpretation of an "official act," finding that setting up a meeting, calling another public official, or hosting an event on behalf of a benefactor does not, standing alone, qualify as an "official act." *McDonnell v. United States*, 136 S. Ct. 2355, 2367-68 (2016). Rather, to convict Mr. McDonnell of bribery, the jury had to determine that, in exchange for loans and gifts, he took action, or agreed to take action, for the benefactor, such as exerting pressure on other public officials to initiate research studies on the dietary supplements. The Supreme Court concluded as follows:

> There is no doubt that this case is distasteful; it may be worse than that. But our concern is not with tawdry tales of Ferraris, Rolexes, and ball gowns. It is instead with the broader legal implications of the Government's boundless interpretation of the federal bribery statute. A more limited interpretation of the term "official act" leaves ample room for prosecuting corruption, while comporting with the text of the statute and the precedent of this Court.

136 S. Ct. at 2375. The Supreme Court vacated the convictions, the Justice Department decided against retrial, and the charges were dismissed.

Florida examples. In Florida, honest services fraud has been a hot topic for several years. In fact, Florida used to lead the nation in the number of federal public corruption convictions, but "dropped" to third in that category. According to Integrity Florida, the three most politically corrupt states for the time period 2003 through 2013 were: (1) Texas, with 870 federal public corruption convictions; (2) California, with 678 convictions; and (3) Florida, with 622 convictions.

In December of 2017, Corrine Brown, the former U.S. Congresswoman from Jacksonville, was sentenced to five years in federal prison after being found guilty of 18 charges stemming from her participation in a fraudulent education charity, concealing material facts on required financial disclosure forms, obstructing the due administration of the internal revenue laws, and filing false tax returns. It was alleged that Ms. Brown and others solicited and received donations to One Door for

Education, a supposedly charitable organization that was established to provide scholarships and buy computers for schools, but diverted the funds for their own personal and professional enrichment. One Door for Education, which was never registered as a 501(c)(3) tax exempt charitable organization, received some $800,000 in contributions, of which only $1,200 was actually spent on scholarships. Rather, the money was used for personal expenses, plane tickets, personal automobile repairs, vacations, receptions, and luxury boxes at a Beyoncé concert and NFL game, among other things. Following her conviction, Ms. Brown requested, but was denied, a new trial after a juror (who said the Holy Spirit told him that Ms. Brown was innocent) was dismissed. One day after the juror was dismissed, the jury found her guilty. Although she appealed her sentence, she was nevertheless ordered to report to the Bureau of Prisons on January 29, 2018.

In December of 2017, Dwayne L. Taylor, former member of the Florida House of Representatives from Daytona Beach, was sentenced to 13 months in federal prison after being found guilty of nine counts of wire fraud. During his re-election campaigns in 2012 and 2014, Mr. Taylor misappropriated $60,000 in campaign funds for personal uses unrelated to the campaigns.

What *not* to do as a county attorney! On October 9, 2009, former Dixie County Attorney Joseph T. (Joey) Lander was convicted of six felony counts of mail fraud and 11 felony counts of money laundering, for fraudulently requiring developers to pay him personally for performance bonds for developments, plus using his position to entice others to invest in his start-up vitamin business. It was estimated that he pocketed over $1 million during a period of 18 months. He was sentenced to 87 months in federal prison plus probation, ordered to pay a $50,000 fine and $1,600 in court costs, and had to forfeit his co-ownership in a local weekly newspaper.

However, Landers was successful in appealing 12 of his convictions. On February 2, 2012, the Eleventh Circuit Court of Appeals reversed the convictions pertaining to the land development project. The Court concluded that there was a material variance between the proof offered by the Government at trial and the allegations contained in the superseding indictment, which substantially prejudiced Lander. The Court did affirm the mail fraud convictions pertaining to the vitamin company scheme, but vacated the sentences for same and remanded for resentencing.

Palm Beach County. In June 2007 the former chairman of the Palm Beach County Commission, Anthony R. Masilotti, pleaded guilty for his involvement in a public corruption conspiracy stemming from the unlawful use of his elected position to promote and conceal significant financial ventures, including land deals which netted him millions of dollars. He also accepted significant travel gratuities, including free airfare valued at approximately $100,000, from a developer in return for voting favorably on measures for the developer. He was convicted of a single count of honest services fraud and sentenced to prison for five years. He was also ordered to forfeit two parcels of real estate worth approximately $9 million, as well as $175,000 in cash. Following the U.S. Supreme Court's ruling in the Skilling case, Mr. Masilotti challenged his honest services fraud conviction in the U.S. District Court for the Southern District of Florida, but was unsuccessful. Mr. Masilotti served 37 months of his 5-year sentence.

Mr. Masilotti's ex-wife also had to forfeit $400,000 in cash, which she received in a divorce settlement, as the money came from one of the tainted land deals brokered by Masilotti. In addition, William Boose, a former land use attorney and lobbyist from Palm Beach, pleaded guilty for his involvement in the land deals, and served 15 months in federal prison. Rather than being disbarred, Mr. Boose was suspended from the practice of law for three years.

In 2008, another former Palm Beach County commissioner, Warren H. Newell, was sentenced to five years in prison, for conspiracy to commit honest services fraud. Newell concealed his financial interest in a "success fee contract" relating to the sale of certain property for a regional water storage project. The "success fee contract" netted him approximately $366,000. In addition, on another project that came before the county commission involving the purchase of a waterfront preservation easement for a yacht center, Mr. Newell concealed that he had docked his boat at the yacht center for free. He also concealed his financial interest in another land deal which came before the commission. Newell's sentence was subsequently reduced by two years for providing evidence against former Palm Beach County Commissioner Mary McCarty. Mr. Newell attempted to get his felony convictions overturned but was unsuccessful.

On January 8, 2009, Palm Beach County Commissioner Mary B. McCarty resigned her post, stating that she had failed to disclose free and discounted hotel rooms provided to her by a company doing business with the county, and also had failed to recuse herself on county bond issues that benefited companies that employed her husband. The benefits to the McCarty's were reported to be in the amount of $300,000. Mrs. McCarty pleaded guilty to depriving the public of her honest services, and was sentenced to a prison term of 42 months, followed by three years of supervised release, and fined $100,000. Her husband was sentenced to a prison term of eight months. The McCarty's also had to forfeit $272,000 to the U.S. government. (A presentation was given at an IMLA conference by county attorneys and Mary McCarty.)

SPIRIT OF COOPERATION

As this is a FACA seminar, this long-serving county attorney wishes to take a moment to acknowledge and express deep appreciation for the helpful spirit of cooperation that exists among the county attorney offices in our sister counties. It has been a great ride!