Florida Association of County Attorneys
2019 Midyear CLE Seminar Program
November 21, 2019
1:00 – 5:00 pm
Fort Lauderdale Marriott Harbor Beach Resort & Spa
Broward County | *Grand B-D*
(4.5 CLE Hours)

1:00 p.m.	**Opening Remarks and Welcome** Mark Lapp, Hendry County FACA President
1:00 p.m. to 1:45 p.m.	**2020 Legislative Preview** *Laura Youmans, Esq.* *FAC Legislative Counsel*
1:45 p.m. to 2:30 p.m.	**New Developments in ADA Litigation and Making Documents on County Websites ADA Compliant** *Evan Rosenthal, Esq.* *Nabors, Giblin & Nickerson, P.A.* *Andrea Combs* *CommonLook Representative*
2:30 p.m. to 2:45 p.m.	**Refreshment Break**
2:45 p.m. to 3:15 p.m.	**Drafting Contracts to Shift Liability** *Jeffrey Hochman, Esq.* *Johnson, Anselmo, Murdoch, Burke, Piper & Hochman*
3:15 p.m. to 4:15 p.m.	**SB 1000 "Advanced Wireless Deployment Act": Communications Infrastructure in the Rights-of-Way** *Industry Panel Representatives* *Ian Cotner/Tracy Hatch* *AT&T* *De O'Roark* *Verizon* *Charlie Dudley* *Florida Internet & Television Association* *Tony McDowell/Jose Delgado* *T-Mobile*
4:15 pm to 5:00 pm	**Professionalism and Civility in Local Government and the Legal Profession** *Jamie Cole, Esq.* *Weiss Serota Helfman Cole & Bierman*
5:00 p.m.	**Closing Remarks** Mark Lapp, Hendry County Attorney FACA President

FAC
FLORIDA
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COUNTIES
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2019 LEGISLATIVE
CONFERENCE
Wednesday, November 20 - Friday, November 22, 2019
Fort Lauderdale Marriott Harbor Beach Resort | Broward County

FAC Session Communications

***New* Bill Tracker**

Legislative Bulletin – Weekly on Fridays

Blasts – As needed

Targeted Requests for Information

Overview

2020 Budget Overview

Teacher Pay

Sadowski Trust Fund

FRS

Bills To-be-filed

Communications Services Tax "Reform"

Affordable Housing

Air BnB

QTI

FTA Bills

HB 159/SB 126 Sales and Use Tax
Sponsors: Clemons/Gruters

Status: Support
Applies Florida's sale and use tax laws to online/e-commerce sales from out-of-state retailers to comply with SCOTUS ruling in *Wayfair v. South Dakota*. The ruling declares that states may impose taxes on entities that have a "substantial nexus" to the taxing state regardless of whether the entity has a physical presence within that state; revises definitions of "retail sale" to include a sale facilitated through a marketplace; renames the term "mail order sale" to "remote sale" and revises the definition to include sales ordered by telephone and the Internet; revises conditions under which certain dealers are subject to sales tax levies and collection; Last session, similar legislation projected the value of the out-of-state collections to be $702 million per year recurring in state and local revenues, with a $148.3 million impact to local government sales tax revenue. Effective Date: Except as otherwise expressly provided in this act and except for this section, which shall take effect upon this act becoming a law, this act shall take effect 7/1/2020

10/15/19 SB 126 - Senate Commerce & Tourism, 5-0

FTA Bills

HB 113/SB 172 Florida Drug and Cosmetic Act

Sponsors: Roach and Bradley

Co-Sponsor: Sabatini

Status: Oppose

Preempts to the state the regulation of over-the-counter proprietary drugs and cosmetics. Specifically, the bill prohibits local ordinances banning the sale of certain sunscreen products deemed harmful to marine habitats/coral reefs.

10/14/19 SB 172 - Senate Community Affairs, 3-1

11/4/19 SB 172 - Senate Innovation, Industry, and Technology, 8-2

11/6/19 HB 113 - House Health Quality, 8-5

FTA Bills

SB 162 Public Records

Sponsor: Perry

Status: Oppose

In actions initiated by the local government, the bill requires local governments to cover the other party's attorney's fees when a court determines that certain records must be disclosed pursuant to public records law; Effective Date: 7/1/2020

10/14/19 SB 162 - Senate Government Oversight & Accountability, 5-0

11/5/19 SB 162 - Senate Judiciary, 6-0

FTA Bills

HB 195 Public Records
Sponsor: Rodrigues (R)
Status: Oppose
Prohibits an agency or local government from responding to a public records request by filing a civil action against the individual or entity making the request
10/24/19 HB 195 - House Oversight, 12-0

SB 162 Public Records
Sponsor: Perry
Status: Oppose, FACA Oppose
In actions initiated by the local government, the bill requires local governments to cover the other party's attorney's fees when a court determines that certain records must be disclosed pursuant to public records law; Effective Date: 7/1/2020
10/14/19 SB 162 - Senate Government Oversight & Accountability, 5-0
11/5/19 SB 162 - Senate Judiciary, 6-0

FTA Bills

HB 213/SB 362 Florida Tourism Marketing
Sponsor: Ponder/Hooper
Co-Sponsors: Ausley, Fernández, Hogan Johnson, Polo, Santiago, Stone; Baxley, Harrell, Stewart, Torres
Status: Support
Saves from repeal the Florida Tourism Industry Marketing Corporation, Visit Florida; Repeal date is changed from 7/1/2020 to 10/1/2028
11/5/19 SB 362 - Senate Commerce and Tourism, 5-0

FTA Bills

HB 279/SB 504 Local Government Public Construction Works

Sponsor: Smith (D)/Perry

Co-Sponsor: Sabatini

Status: Monitor

Requires local governing board to consider estimated costs of certain projects using cost-accounting principles when making a determination to use own services; requires local government that performs project using its own services, employees, & equipment to disclose costs of project after completion to Auditor General; requires Auditor General to review such disclosures as part of routine audits of local governments. Effective Date: July 1, 2020.

Senate bill also includes language that if the project requires an increase in the number of government employees or an increase in such capital expenditures, the local government may not perform the project using its own services, employees, and equipment.

FTA Bills

SB 426 Regional Rural Development Grants Program

Sponsor: Montford

Co-Sponsor: Albritton

Status: Support

Modifies the grant program to reduce matching requirements, increases the maximum grant to RAOs from $150,000 to $250,000, and allows grant funds to build the professional capacity of Opportunity Florida, Florida's Heartland Economic Region of Opportunity, and North Florida Economic Development Partnership.

11/5/19 SB 426 - Senate Commerce and Tourism, 5-0

FTA Bills

HB 441/SB 506 Public Procurement Services

Sponsor: DiCeglie/Perry

Increases the dollar amount not to exceed $5 million or the adjusted amount for continuing contracts

Requires Department of Management Services to adjust the statutory maximum dollar amounts for continuing contracts based on Engineering News-Record's Construction Cost Index. Adjustment to be made July 1.

FTA Bills

HB 477 Supermajority Vote Required to Impose, Authorize, or Raise Local Taxes or Fees

Sponsor: Rommel

Status: Oppose

Proposes an amendment to the state constitution to prohibit municipality, county, school board, or special district from imposing, authorizing, or raising local tax or fee except by vote approved by two-thirds of membership (supermajority) & requires any such proposed local tax or fee imposition or increase to be contained in separate resolution or ordinance (single subject).

FTA Bills

HB 497/SB 530 Entertainment Industry

Sponsor: Buchanan/Gruters

Co-Sponsors: Duran, Fitzenhagen, Grieco, Raschein, Silvers; Berman, Bracy, Cruz, Farmer, Flores, Gibson, Harrell, Pizzo, Rouson, Stewart

Status: Support

Creating the Film, Television, and Digital Media Targeted Rebate Program within the Department of Economic Opportunity under the supervision of the Commissioner of Film and Entertainment; authorizing applicants to receive rebates up to 20% of qualified expenditures; requiring an applicant that receives funding to make a good faith effort to use existing providers of infrastructure or equipment in this state and to employ residents of this state; requiring the Florida Film and Entertainment Advisory Council to determine a score for each qualified project using specified criteria.

FTA Bills

HB 537 /SB 778 Home-Based Businesses
Sponsor: Donalds/Perry
Status: Oppose

Allows home-based businesses to operate in any area zoned for residential use. Preempts local governments from licensing and regulating home-based businesses, prohibiting local governments from enacting or enforcing any ordinance, regulation, or policy, or talk any action to license or otherwise regulate a home-based business. Defines "home-based' business as one that operates from a residential property, where employees reside in the dwelling or are related to a resident, parking meets the zoning requirements, and the business does not substantially increase traffic, noise, waste or recycling, as viewed from the street the property is consistent with the uses of the residential areas that surround the property, the activities are secondary to the property's use as a residential dwelling.

FTA Bills

HB 537 /SB 778 Home-Based Businesses
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GATE Bills

HB 73/SB 326 Environmental Regulation

Sponsor: Overdorf/Perry

Status: Monitor

Requires counties and cities to address the contamination of recyclable material in contracts entered into for the collection, transport and processing of residential recycling materials. The contracts must define "contaminated recyclable material" in a manner that is appropriate for the local community. The bill applies to contracts executed or renewed after 10/1/2020. There is an amendment removing language that the agreed upon definition in a contract consider available markets for material and waste composition studies.

10/16/19 HB 73 - House Agriculture & Natural Resources, 14-0

11/04/19 SB 326 - Senate Environment and Natural Resources, 5-0

GATE Bills

HB 203/SB 410 Growth Management
Sponsor: McClain/Perry
Co-Sponsors: Sabatini
Status: Monitor...mandate
Requires local governments to include a private property rights element in their comprehensive plan. Provides a model example that may be adopted. Self-formulated elements may not conflict with the example provided. Must be adopted by local governments by 7/1/2023. Requires local land development regulations consider pre-existing personal property development orders. Effective Date: 7/1/2020
10/23/19 HB 203 - Local, Federal, & Veterans Affairs, 9-5

GATE Bills

HB 377/SB 478 Motor Vehicle Rentals

Sponsor: Latvala/Perry

Status: Support

The bills define various terms related to "peer-to-peer vehicle sharing," and clarify that the $2/day surcharge that is imposed on motor vehicle rentals also applies to rentals facilitated through a peer-to-peer vehicle sharing platform. The bills also include provisions related to insurance liability, recall requirements, and recordkeeping.

GATE Bills

HB 459 Building Design
Sponsor: Overdorf
Status: Monitor

Preempts local zoning and development regulations relating to building design elements from being applied to one- or two- family dwellings. Design standards for historic properties and to implement the NFIP would still apply. Changes the manner by which local amendments to the Florida Building Code are adopted, including allowing for a "substantially affected party" to submit to the Florida Building Commission any local government regulation, including law, ordinance, policy, amendment, land use or zoning provision, that the party believes to be a technical amendment to the Florida Building Code. Allows the Florida Building Commission to invalidate a local provision that it deems to be a technical amendment until such regulation is adopted in accordance with the process to adopt local amendments.

GATE Bills

HB 519 Private Property Rights Protection

Sponsor: Grant (J)

Revises notice of claim requirements for property owners; revises procedures for determination of compensation; creates presumption that certain settlements of claims apply to all similarly situated residential properties within political subdivision under certain circumstances; authorizes property owners to bring claims against governmental entities in certain circumstances; provides that property owners are not required to submit formal development applications or proceed through formal application processes to bring claims in specified circumstances; authorizes property owners to bring actions to declare prohibited exactions invalid; requires DOT to afford right of first refusal to previous property owner before disposing of property in certain circumstances

CHS Bills

HB 131/SB 118 Security in Trial Court Facilities

Sponsors: McClain/Gruters

Status: Support

Local sheriffs would be required to coordinate with their respective board of county commissioners to provide security for trial court facilities. Comprehensive safety planning would be required between the relevant law enforcement, county, and judicial officials. Judges would still retain a certain amount of authority, and deputies would be considered officers of the court in the course of their duties.

Questions?

Nabors Giblin & Nickerson P.A.
ATTORNEYS AT LAW

+

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New Developments in ADA Litigation and Making Documents on County Websites ADA Compliant

November 21, 2019

Introductions

Evan J. Rosenthal, Esq.
Nabors, Giblin & Nickerson
Attorneys at Law

Andrea Combs
Senior Document Accessibility Consultant
CommonLook

Beckman, Price, Gil, Sierra, Gomez . . .

- Two “flavors” of website accessibility cases under the Title II of the ADA:
  1. Website/Documents not accessible with screen reader.
  2. Videos not captioned or insufficiently captioned.

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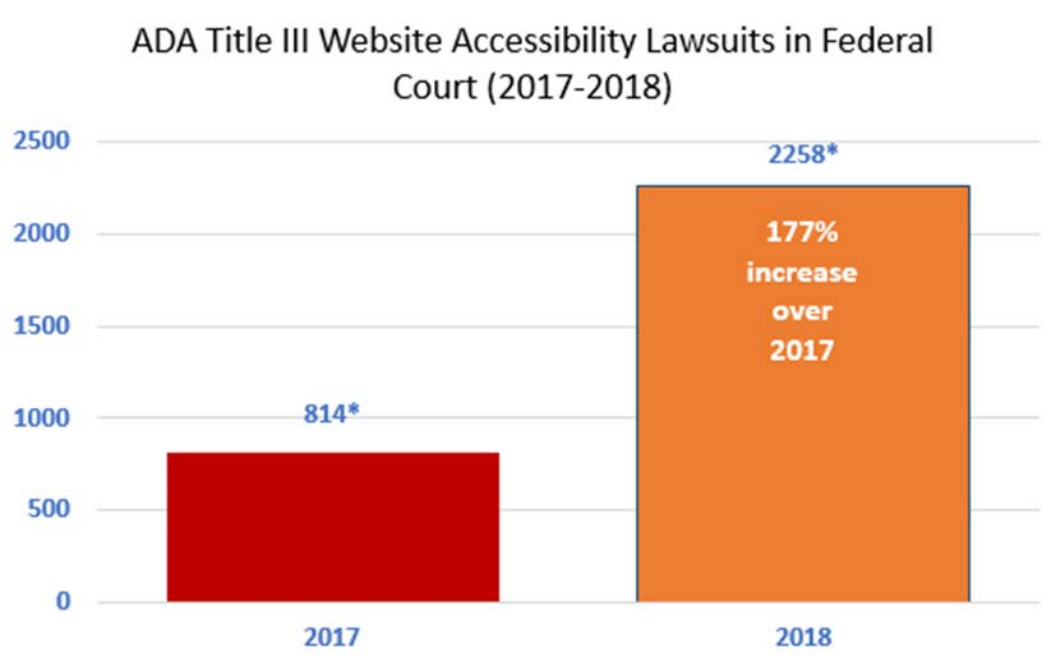
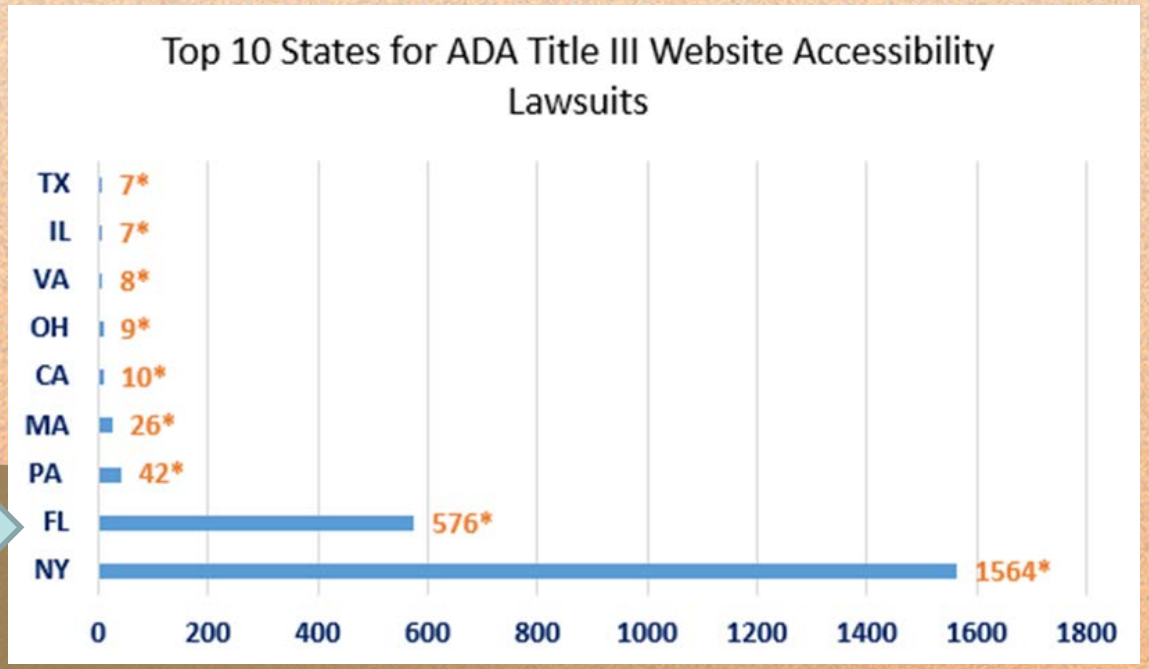


Title II

In 2018, there were over 160 website accessibility cases filed against governmental entities in Florida alone.

*and ADA litigation



One Minute ADA Summary

- ADA Title II – Applies to Government Entities. "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."
- ADA Title III – Applies to Private Entities. "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity . . . ."
- Title III requires nexus between discriminatory conduct and goods/services offered at a "brick and mortar" physical location. Andrews v. Blick Art Materials, LLC, 268 F. Supp. 3d 381(E.D.N.Y 2017).
- Title II has no "public accommodation" element, applies to all "services, programs, or activities."

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Title II

- Protection afforded by the ADA is characterized as a guarantee of "meaningful access" to government benefits and programs.
- "Meaningful access" means an equal opportunity to gain an equal benefit, not equal results.
- Communications with disabled persons must be "as effective" as communications with others.
- To establish a claim under Title II, a plaintiff must show:
  1. that he/she is a qualified individual with a disability;
  2. that he/she was excluded from participating in, or denied the benefits of a public entity's services, programs, or activities or was otherwise discriminated against; and
  3. that such exclusion, denial of benefits, or discrimination was by reason of his/her disability.

Where are the Regulators?

- DOJ has regulatory authority as to both Title II and III of the ADA.
- 2010 – DOJ initiates website accessibility rulemaking.
- 2015 – DOJ creates separate processes for Title II and III related to development of web accessibility regulations.
- 2016 – DOJ seeks additional public input on Title II web accessibility rules.
- January 2017 – Executive Order 13771 is issued, constraining regulatory authority of Federal agencies.
- December 2017 – DOJ formally withdraws Title II website accessibility rulemaking.
- Despite bipartisan pressure from members of Congress, DOJ has not taken any steps toward rulemaking.
- "The lack of web accessibility regulations remains the most significant gap in DOJ's ADA regulatory requirements." National Council on Disability Oct. 31, 2019 Report.

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Status of Litigation

- Confusion as to application of Title III cases to Title II. C.f. Gil v. Broward Cty., 2018 WL 4941108 (S.D. Fla. May 7, 2018); Price v. City of Ocala, 375 F. Supp. 3d 1264 (M.D. Fla. April 22, 2019).
- No Title II website accessibility ADA cases have reached the merits.
- Recently several local governments have succeeded in getting cases dismissed.

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Arguments on Motion to Dismiss

- Websites not Covered Under ADA Absent Nexus to Physical Facilities.
- Failure to Exhaust Administrative Remedies (See Sierra v. City of Hallandale Beach 11th Cir. Decision).
- Primary Jurisdiction (See Robles v. Domino's 9th Cir. Decision).
- Sovereign Immunity (for States only).
- Article III Standing.

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The Price is Right – Price v. City of Ocala

- Court addresses Title III standing cases, notes problems with application to Title II website cases.
- Court develops 3 factor test for standing under Title II:
  1. Plaintiff's connection to government entity.
  2. Nature of information alleged to be inaccessible (current services/programs vs. archival).
  3. Relation between the inaccessibility and Plaintiff's future harm.
- Held: Plaintiff failed to satisfy any of the 3 elements.

Recent Cases Applying Price v. Ocala

- Gil v. City of Pensacola, 2019 U.S. Dist. LEXIS 145843 (N. D. Fla. August 22, 2019) (Plaintiff failed to satisfy any of the 3 factors).
- Gomez v. Marion Cty.,2019 U.S. Dist. LEXIS 89917 (May 10, 2019) (Plaintiff failed to satisfy and of the 3 factors).
- Price v. Escalante - Black Diamond Golf Club LLC, 2019 U.S. Dist. LEXIS 76288 (April 29, 2019) (Title III case, applied standing factors which court noted "have broad application in both Title II and III ADA website cases.").

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Johnson v. Ocaris Management Group, Case No. 18-CV-24586-PCH (S.D. Fla. 2019)

- Order Imposing Sanctions entered against Plaintiff and his Attorney on August 23, 2019.
- "29 years ago, Congress passed the ADA in an effort to remove and prevent barriers for the disabled . . . Lawyers who champion these cases are granted reasonable attorney's fees for advancing Congress' laudable goal of protecting the disabled community. This is not one of those cases.
- This case reveals an illicit joint enterprise between Plaintiff . . . and his attorney . . . to dishonestly line their pockets with attorneys' fees from hapless defendants under the sanctimonious guise of serving the interests of the disabled community.
- Through this illicit joint enterprise, [Plaintiff and their Attorney] filed numerous frivolous claims, knowingly misrepresented the billable time expended to litigate these claims, made numerous other misrepresentations to the Court, and improperly shared attorneys' fees . . . all done without regard to the interests of those with disabilities."

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Johnson v. Ocaris Management Group, Case No. 18-CV-24586-PCH (S.D. Fla. 2019)

- Per Order Imposing Sanctions, Plaintiff and Plaintiff's Attorney Ordered to:
  - Disgorge all fees and costs recovered in gas station cases.
  - Pay penalty of $59,900 or alternatively perform 400 hours of community service benefiting disabled community.
  - Enjoined from filing other ADA cases without obtaining permission of Court.
  - Plaintiff's Attorney required to file Order in every other ADA case that he has filed within the last 24 months.
  - Plaintiff's Attorney referred to Grievance Committee and Florida Bar for further investigation.
- Order Imposing Sanctions is currently up on appeal at the 11th Circuit.

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Achieving ADA Compliance

- Uncertainty as to applicable standards.
- Courts have referenced WCAG 2.0 guidelines as "industry standards for website accessibility." Robles v. Domino's Pizza, 913 F.3d 898 (9th Cir. 2019).
- DOJ has required WCAG 2.0 Level AA in consent decrees and settlement agreements.
- Section 508 of Rehabilitation Act (applicable to Federal agencies) requires compliance with WCAG 2.0 Level AA.

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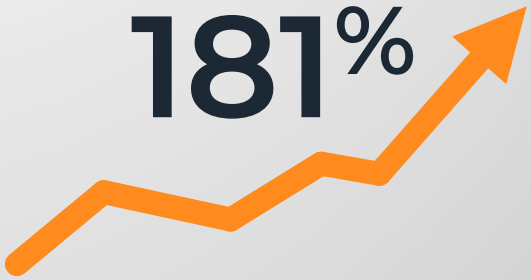
Massive quantities of documents are added to websites each year. PDFs remain the most popular “final-form” electronic format.

Documents authored using Microsoft Office are also pervasive.

The critical challenge is in ensuring that documents are accessible and usable by everyone.

The Risk of Non-Compliance

The rise in ADA lawsuits and the demand for document accessibility and visibility in all public and commercial sectors make document accessibility a critical focus in 2019.



Increase in ADA Website Accessibility Lawsuits from 2017 to 2018

ADA-Accessibility Standards

- Documents must be remediated for accessibility
- Multiple standards but for most municipalities this means to the Federal Section 508 requirements (WCAG 2.0 AA) or PDF/UA
- Some organizations are also requiring **WCAG 2.1AA** which includes support for cognitive disabilities.
- We recommend PDF/UA as it is the strictest standard

Myths and Facts about Document Accessibility

PDFS CAN'T BE MADE ACCESSIBLE.

They CAN!
In fact, oftentimes more accessible than Word.

"Providing an alternate version is a fallback option for conformance to WCAG and the preferred method of conformance is to make all content directly accessible."

~ Understanding Conformance, W3C

There are some instances with web pages where this might be true. For PDFs, it's not the case because they can be made accessible.

You can have inaccessible content on your site as long as there's a phone number to call or an "alternative format."

Tips for Document Accessibility Success

Multi-Phase Document Accessibility Plan

Assess and Plan

- Review goals, business environment, and requirements
- Select standard(s) to test for compliance
- Audit/test digital assets against standard(s)
- Set priorities for document remediation
- Develop document accessibility policy for future

Fix Errors

- Leverage Phase 1 data
- How document accessibility and compliance is attained
- Decide internal, outsourced, or hybrid remediation approach
- Acquire tools and training OR begin work with vendor

Be Proactive

- Integrate accessibility into design, development, and testing process
- Prepare best practice document accessibility checklists and processes

Train and Expand

- Scale up document accessibility program
- (Perhaps) increase strength of internal solutions
- Increase capacity through training
- Raise exposure and awareness through communications
- Provide accessibility guidance to other departments, etc.

Monitor, Always

- Continue to monitor for compliance with accessibility laws, standards, and regulations
- Test and report on PDF holdings: # of PDFs and % in compliance
- Reports will guide document creation and future remediation projects

What is involved in Remediating a PDF for Accessibility?

- Adding Tags (tags are what are “read” by a screen reader) – But this in ONLY step #1 – Beware of Auto Tagging as a complete remediation solution!
- Tags are properly labeled and in the correct reading order
- Alt-text descriptions are added to all images that convey information to readers
- Difficult content like, Forms, Tables and Lists need to be correctly tagged with the proper format to be read correctly by a screen reader
- Content needs to be reviewed manually to ensure proper use of color, and color contrast is correct as well as to ensure alt-text descriptions properly describe images used in the document
- Finally, the document needs to be certified as compliant using a tool that generates a check point by check point report showing 100% compliance with the standard (WCAG or PDF/UA)
- Testing with a screen reader to ensure full accessibility is also a good idea (i.e. JAWS / NVDA)

Isn't Adobe Acrobat Pro Enough?

While Acrobat has an "Accessibility Full Check" report, the Acrobat checker is not a complete test and is not a complete remediation solution.

- Passing the Acrobat checker does not guarantee compliance with any standards.
- Acrobat will even let you save a compliance report, but that report does not warrant your work meets 100% of the checkpoints of Section 508, WCAG 2.0 AA, HHS or PDF/UA.
- Counting on Adobe Acrobat alone is a huge mistake. Instead, use one of the proven third-party testing tools that guarantee you'll meet these standards.

PDF Testing Tools

PAC3	CommonLook Validator*	CommonLook PDF*
A free tool that can be downloaded and installed for testing PDF documents. It lets you test PDF documents against the PDF/UA standard (only) and provides an accessibility report. The PDF report that is produced is not PDF/UA compliant.	Free tool that works as a plugin for Adobe Acrobat Pro. Provides a full listing of the accessibility checkpoints that passed or failed so you can quickly drill down to the areas that need to be addressed.	Not a free tool, but well worth the investment. Allows you to fix many of the issues right in the tool. Provides specialized tools to ensure PDFs are meeting compliance standards. Generates a full accessibility report to the standard of your choice.

***Tests to any required PDF standard including Section 508**, WCAG 2.0 AA, HHS and PDF/UA as well as ISO32000-1:2008.**

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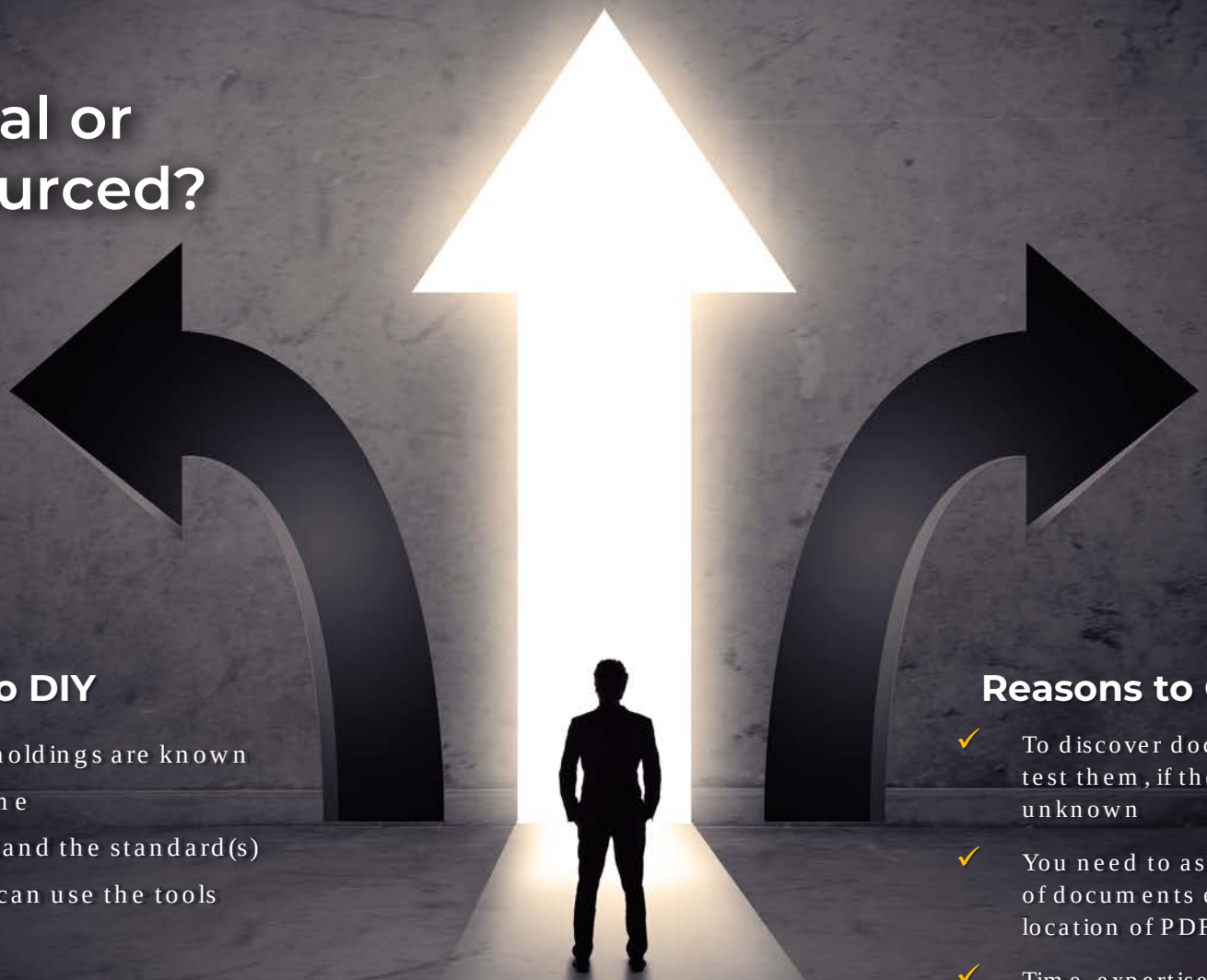
Internal or Outsourced?



Reasons to DIY

- ✓ Document holdings are known
- ✓ You have time
- ✓ You understand the standard(s)
- ✓ You know / can use the tools

Reasons to Outsource

- ✓ To discover documents and then test them, if their locations are unknown
- ✓ You need to assess large volumes of documents even if number and location of PDFs are known
- ✓ Time, expertise, knowledge of software/ standards is lacking

Key Outsourcing Takeaways

- Do not use price alone to select remediation vendors; you get what you pay for!
- Understand what you need and publish RFPs that vendors can accurately respond to
- Insist on 100% compliance, 80% compliance is still a legal liability, like a wheelchair ramp that only goes partially up to the entrance of your building
- Ask for a report to prove compliance for each file remediated
- Use only vendors that guarantee compliance and will fix any errors found
- Consider getting a 3rd party to do QA to ensure compliance rather than trust your vendor to do the testing

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Q & A

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Drafting Contracts to Shift Liability

Florida Association of County Attorneys
2019 Midyear CLE Seminar Program
November 21, 2019

Materials presented by
Jeffrey L. Hochman, Esq., and
Duchant Johnson, Esq.
JOHNSON, ANSELMO, MURDOCH, BURKE,
PIPER & HOCHMAN, P.A.
2455 East Sunrise Blvd., Suite 1000
Ft. Lauderdale, FL 33304
(954) 463-0100
Hochman@jambg.com
Dujohnson@jambg.com

Drafting Contracts to Shift Liability

I. Background Concepts

A. Common law indemnity allows the party that is entirely faultless and whose exposure is purely vicarious, constructive, derivative, or technical to shift the risk to another party. Houdaille Indus., Inc. v. Edwards, 374 So. 2d 490, 492 (Fla. 1979).

B. Need for a special relationship: employer/employee; auto owner/driver; principal/agent, etc.

C. Collection of attorney's fees? Under Florida law, "an indemnitee is entitled to indemnification not only for the judgment entered against it, but also for attorney's fees and court costs." Hiller Group, Inc. v. Redwing Carriers, Inc., 779 So. 2d 602, 604 (Fla. 2d DCA 2001). But what about the attorney's fees and costs in securing the right to be indemnified?

D. Indemnity is different than subrogation. Allstate Insurance Co. v. Metropolitan Dade County, 436 So. 2d 976, 978 (Fla. 3d DCA 1983) rev. denied, 447 So. 2d 885 (Fla. 1984)("Subrogation is designed to afford relief when one is required to pay a legal obligation which ought to be met, either wholly or partially, by another."). Typically, contractual subrogation is an insurance company's remedy against a tortfeasor after the insurance company pays benefits to its insured for a loss caused by that tortfeasor. See id. at 979. Typically, equitable subrogation is an initial tortfeasor's typical remedy against a subsequent tortfeasor when the initial tortfeasor pays all of the damages caused by both parties' tortious conduct and seeks reimbursement for the overpayment against the subsequent tortfeasor (as in the case of a negligent driver who pays a judgment which included the damages caused both by the initial accident and also the damages caused by the treating doctor's post-accident malpractice). See Underwriters at Lloyds v. City of Lauderdale Lakes, 382 So. 2d 702, 704 (Fla. 1980).

II. Common Law Indemnity Is Not Enough

A. What if the plaintiff includes allegations of direct fault? Insurance Co. of N. Am. v. King, 340 So. 2d 1175, 1176 (Fla. 4th DCA 1976) ("A plaintiff should not be able to arbitrarily deprive a defendant of his right to indemnification from a third party by alleging that he was actively negligent when in fact that defendant is found not to have been actively negligent."). But to be "found" without negligence requires defending the claim and establishing the County's proper status under Houdaille Industries, Inc. as having exposure which is merely "vicarious," "constructive," etc.

B. What kinds of alleged misconduct must be alleged to trigger right to indemnity? Active negligence; premises liability; gross negligence; intentional tort; willful misconduct; agent/employee misconduct?

C. Who defends against the claim, me or you?

D. Who has the authority to settle?

E. Who pays for the defense during the course of the case?

F. Who selects the defense attorney?

G. What billable rate is paid to the attorney?

H. Is there unlimited exposure to damages or a cap?

I. Is there unlimited exposure to attorney's fees or a cap?

III. Shifting Exposure by Contract

A. Contractual indemnification shifts the risk of loss from the party that is initially required to defend against and pay the claim (the indemnitee) to another party that has assumed a contractual duty to defend against and to pay the claim (the indemnitor).

B. While the type of "fault" is irrelevant, the "category" of the alleged misconduct is relevant because the "special relationship" analysis has been replaced with the terms of the indemnity contract.

C. The contractual "menu" of benefits and obligations needs consideration.

IV. The Benefits To Be Considered Under Contractual Indemnification

A. Clarity about possible claims that trigger an obligation to defend and the County's right to "advancement." See "Indemnification Is Good, But Advancement Is Even Better: Make Sure You Know The Difference And Level The Playing Field From The Start," Fla. Bar. Journal, Vol. 93, No. 6, November/December 2019, p. 8.

B. Clarity about defense issues: who defends; who has control; who has authority to settle; who pays initially; are benefits subject to any monetary caps?

C. Procedure for resolving disputes about indemnification obligations.

D. Clarity about attorney's fees and costs.

E. Two categories of attorney's fees: (1) Main action and (2) Indemnification action.

F. Fees for litigating the amount of attorney's fees in both categories.

V. Considerations for Contractual Indemnification

A. Is the language clear and unequivocal? Is the following language sufficient to protect the County?

1. "The Pavilion User agrees to defend, indemnify, and hold the County harmless from and against any and all liability, damages, and claims, arising from the Pavilion User's conduct."

2. "The Pavilion User assumes all risks and liabilities for, and agrees to indemnify the County, and the County's agents, against all claims, actions, suits, expenses, and liabilities, including attorney's fees, for injuries or deaths of any persons and for damage to any property, howsoever arising or incurred, from or incident to the use of the Pavilion, unless such claims, actions, suits, expenses, or liabilities are caused solely by the intentional conduct of the County or its agents."

3. "The Pavilion User shall indemnify, protect, and hold harmless the County from and against liabilities, losses, and claims of any kind or nature imposed on, incurred by, or asserted against the County arising out of the active or passive negligence of the Pavilion User in any way connected with the use of the Pavilion."

B. Does the language survive a strict construction against the County? Boden Industries Inc. v. Brown, 645 So. 2d 33, 36 (Fla. 5th DCA 1994).

C. Does the language express the intentions of the parties? Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 643 (Fla. 1999)("Because the terms of the [indemnification] agreement are ambiguous and the record does not contain sufficient evidence to resolve the dispute, summary judgment was improper.")(alteration added).

D. Is there clear consideration to support the contract of indemnification? Matey v. Pruitt, 510 So. 2d 351, 353 (Fla. 2d DCA 1987).

E. Are there specific benefits the County wants?

Consider: (1) survival of indemnification rights after termination of the agreement; (2) identifying the County's employees, agents, and representatives as additional recipients of the right to be indemnified; (3) right of the County to defend itself using County Attorney; (4) right of the Count to be reimbursed for attorney's fees at a specified billing rate; (5) methods for notifying of a claim, securing a defense, and confirming acceptance of the obligation to indemnify the County.

F. Is the indemnification provision set forth within a construction contract? If the work satisfies the statutory definition, the provision needs to comply with section 725.06, Florida Statutes, which makes the provision "void and unenforceable unless the contract contains a monetary limitation on the extent of the indemnification that bears a reasonable commercial relationship to the contract and is part of the project specifications or bid documents, if any." Griswold Ready Mix Concrete, Inc. v. Tony Reddick, & Pumpco, Inc., 134 So. 3d 985, 987 (Fla. 1st DCA 2012), but see Blok Builders, LLC v. Katryniok, 245 So. 3d 779, 783 (Fla. 4th DCA 2018) (excavation project which was not tied to a building was not governed by statutory text); Kone, Inc. v. Robinson, 937 So. 2d 238, 241 (Fla. 1st DCA. 2006) (elevator maintenance agreement was not governed by the statutory text).

VI. Indemnification Agreement Samples: What's missing? What Could Be Improved?

A. Lease

"Tenant shall protect, indemnify, and hold harmless the County for, from, and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and reasonable expenses (including, without limitation, reasonable attorney's fees), to the maximum extent permitted by law, imposed upon, incurred by, or asserted against the County by reason of: (a) any accident, injury to, or death of persons, or loss of or damage to property of third parties, occurring during the Term of the Lease on or about the Leased Property or the adjoining sidewalks or rights-of-way under Tenant's control, and/or (b) any use, misuse, condition, management, maintenance, or repair by Tenant or anyone claiming under Tenant of the Leased Property during the Term of the Lease, expect that Tenant's obligations hereunder shall not apply to any liability, obligation, claim, damage, penalty, cause of action, cost, or expense arising from any gross negligence or willful misconduct of the County, its employees, agents, contractors, or invitees. Tenant, at its own expense, shall defend any such claim, action, or proceeding asserted or instituted against the County which is covered under this indemnity or may compromise or otherwise dispose of the same. The obligations of the Tenant under this section shall survive the termination of this Lease."

B. Pavilion

"The Pavilion User shall indemnify and hold the County harmless and shall defend the County and the County's officers, employees, agents, and representatives from and against any and all damages, lawsuits, liabilities, claims, costs and expenses, including reasonable attorney's fees ("Losses") arising in whole or in part from the occupation, use, or misuse of the Pavilion by the Pavilion User, including all individuals and entities invited to use the Pavilion by the Pavilion User. The scope of the obligations created in this paragraph include the obligation to indemnify and hold the County harmless and to defend against Losses caused by the negligence of the County, but not Losses which arise solely from the intentional misconduct of the County. Additionally, in the event the County is required to enforce the obligations set forth in this paragraph against the Pavilion User, the court shall award the County the County's costs and expenses, including reasonable attorney's fees, at all levels, incurred in such enforcement effort.

C. Land Use

"In the event that a determination by the County to approve the site plan for the Project becomes the subject of an appeal or the subject of any effort to seek judicial review ("Review Action"), the Applicant will hold the County harmless for and indemnify the County against the litigation costs and the reasonable attorney's fees, at all levels, incurred by the County in addressing and defending against such Review Action or, at the County's option, the Applicant will engage an attorney to address and defend against such Review Action on behalf of the County, and all litigation costs and attorney's fees charged by such attorney in connection with such Review Action such be paid, on an ongoing basis, by the Applicant."

VII. Special Issues

A. Government to Government

Section 786.28(19), Florida Statutes addresses indemnification agreements between governmental entities: "Neither the state nor any agency or subdivision of the state waives any defense of sovereign immunity, or increases the limits of its liability, upon entering into a contractual relationship with another agency or subdivision of the state. Such a contract must not contain any provision that requires one party to indemnify or insure the other party for the **other party's negligence** or to assume any liability for the other party's negligence. This does not preclude a party from requiring a **nongovernmental entity** to provide such indemnification or insurance."

Indemnification agreements between public entities are not prohibited by the statute, only agreements to indemnify another government entity for the **other entity's negligence**, or to assume any liability for the **other entity's negligence**. Florida Dept. of Natural Resources v. Garcia, 753 So. 2d 72, 77 (Fla. 2000).

In most cases, however, a governmental entity should avoid entering into agreements under which it indemnifies any other party. Florida Dept. of Transp. v. Schwefringhaus, 188 So. 3d 840, 846 (Fla. 2016) (confirming that sovereign immunity against tort claims and the statutory cap on tort liability under section 768.28(5), Florida Statutes, are both waived if tort liability is assumed indirectly through contractual indemnification); Am. Home Assurance Co. v. Nat'l R.R. Passenger Corp., 908 So. 2d 459, 474 (Fla. 2005); but see Op. Att'y Gen. Fla. 2000-22 (2000) (advising county that it may not agree to indemnify another party to a contract or alter the state's waiver of sovereign immunity beyond the limits established in section 768.28 "Accordingly, the county may agree to indemnify another party for the county's own negligence, but may not otherwise alter the extent of its liability under section 768.28, Florida Statutes.") and compare Am. Home Assurance Co., 908 So. 2d at 473-74 ("However, the Attorney General opinions cited … have ignored the plain language of section 768.28 and do not apply under these circumstances, where the contracting party is a municipality, not a state agency. Thus, we do not find the Attorney General opinions to be 'highly persuasive' in this case.").

B. Attorney's Fees Issues

Section 57.105(7), Florida Statutes, provides: "If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court **may also allow** reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract." (emphasis added).

Op. Att'y Gen. Fla. 2000-22 (2000) ("Thus, a county may not enter into an agreement that attorney's fees and costs will be paid to the prevailing party in a dispute arising from a contract to the extent such an agreement alters the limits of liability established in section 768.28, Florida Statutes.").

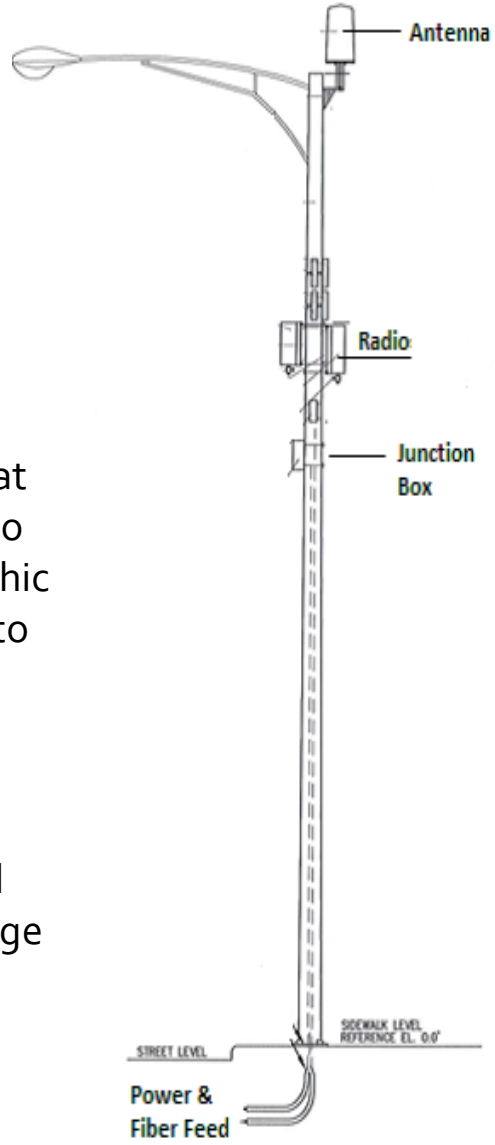
SB 1000 “Advanced Wireless Deployment Act”: Communications Infrastructure in the Rights-of-Way

Communications Industry Presentation
Florida Association of County Attorneys Mid-Year CLE
Thursday, November 21, 2019
Fort Lauderdale, Florida

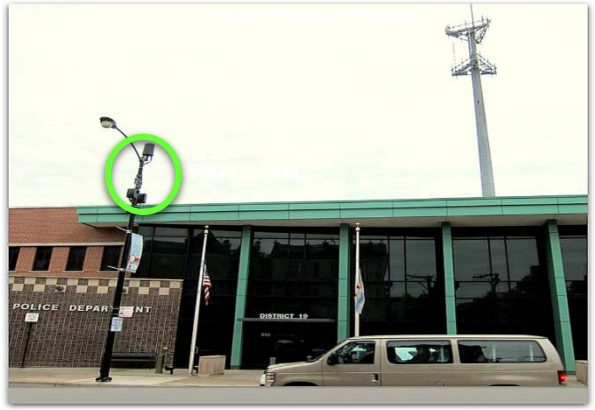
What are small cells?

Small cells are short range cell sites that use small radios and a single antenna to provide coverage to a smaller geographic area ranging from a few hundred feet to upwards of 1,000 feet.

Small cells are used to complement macro sites. Macro sites are traditional cell sites or towers that provide coverage to a broad area, up to several miles.

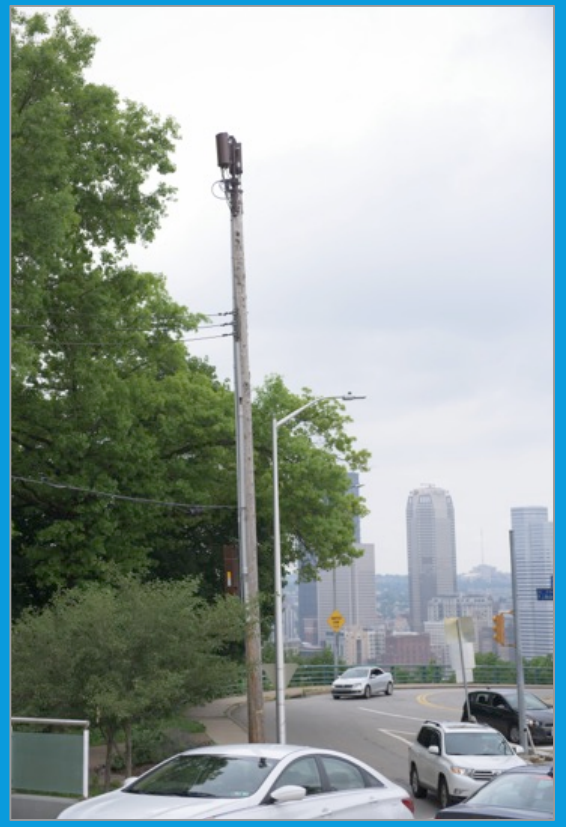


Unlike traditional cell towers, small cells are designed to blend into the existing environment as much as possible, making them less obtrusive and more aesthetically pleasing.



Small cells can typically be installed atop existing structures such as utility poles, transit poles, street lights, signs, and signal light poles.

Camouflaged Antenna on Streetlight with Radios in Pole-Mounted Shroud



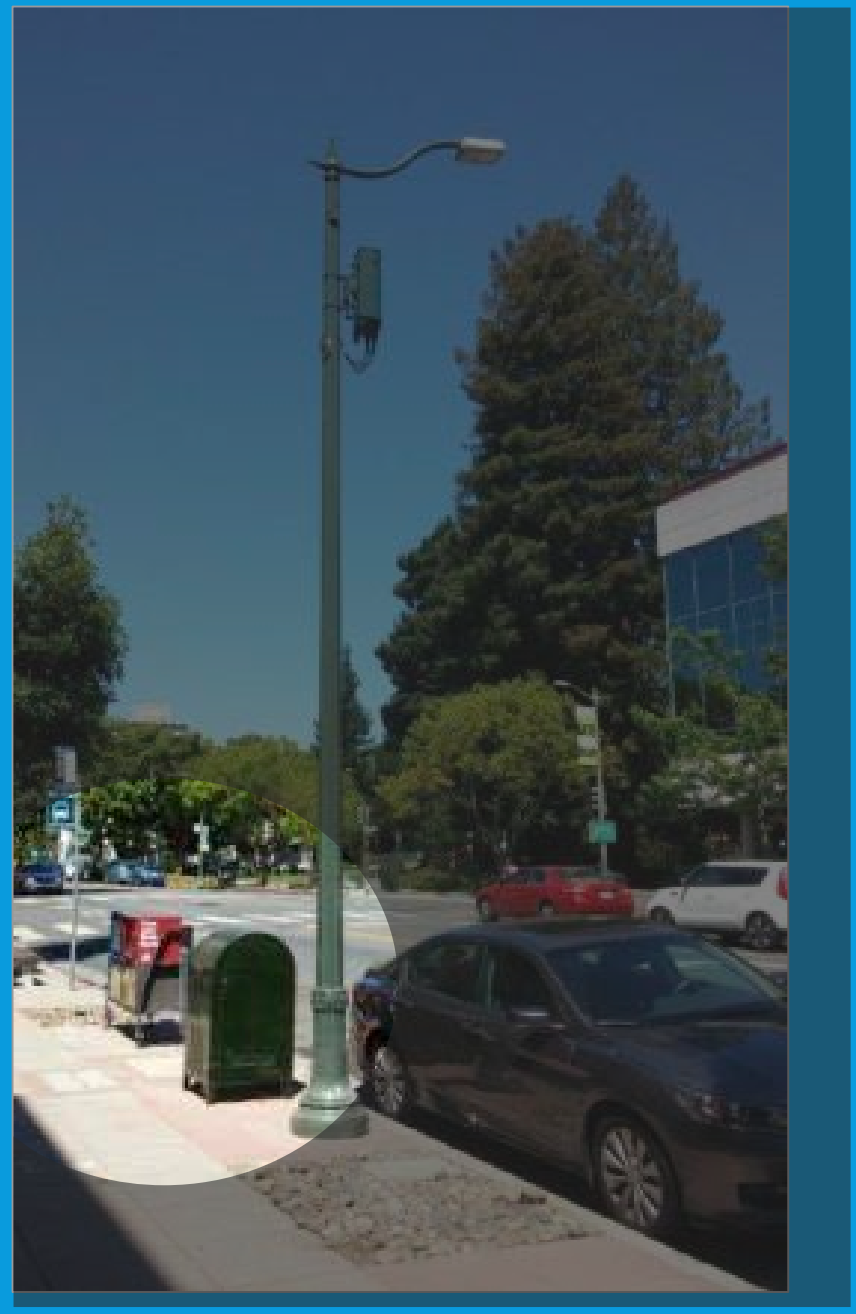
Wood utility pole

Metal pole

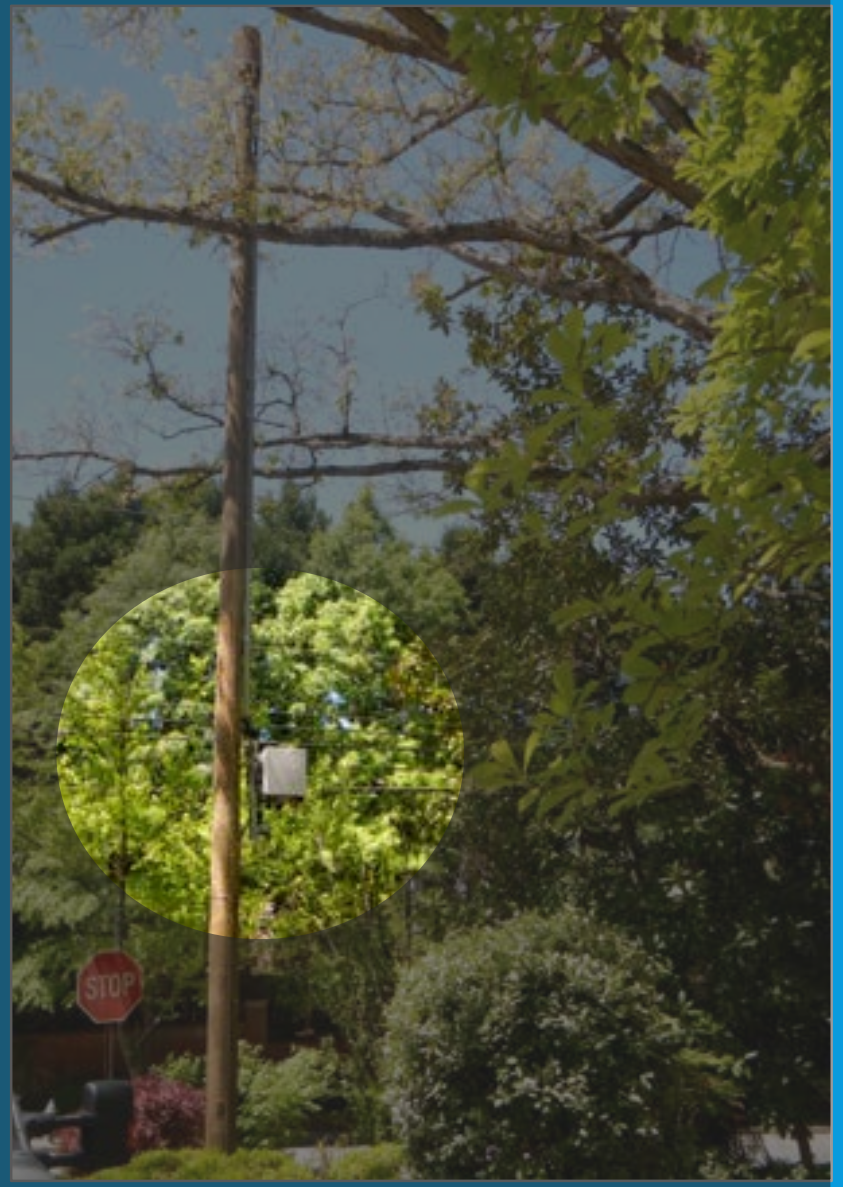
Strand mount on utility cable

Camouflaged Antenna on Streetlight

Camouflage antennae, and other creative design solutions help us provide necessary infrastructure that doesn’t distract from local aesthetics



Faux mailbox



Wooden pole with equipment shroud

Equipment on lamp of streetlight

Paint color, antenna coverings, and pole types can be chosen to blend with other adjacent communications equipment and infrastructure.

Small Cells Serve Two Primary Purposes

Network Densification

- Needed to accommodate increases in data traffic (projected to grow 5x from 2017 to 2022)
- Small cells can be placed in areas with high wireless traffic volumes
- Decreases need for additional cell towers

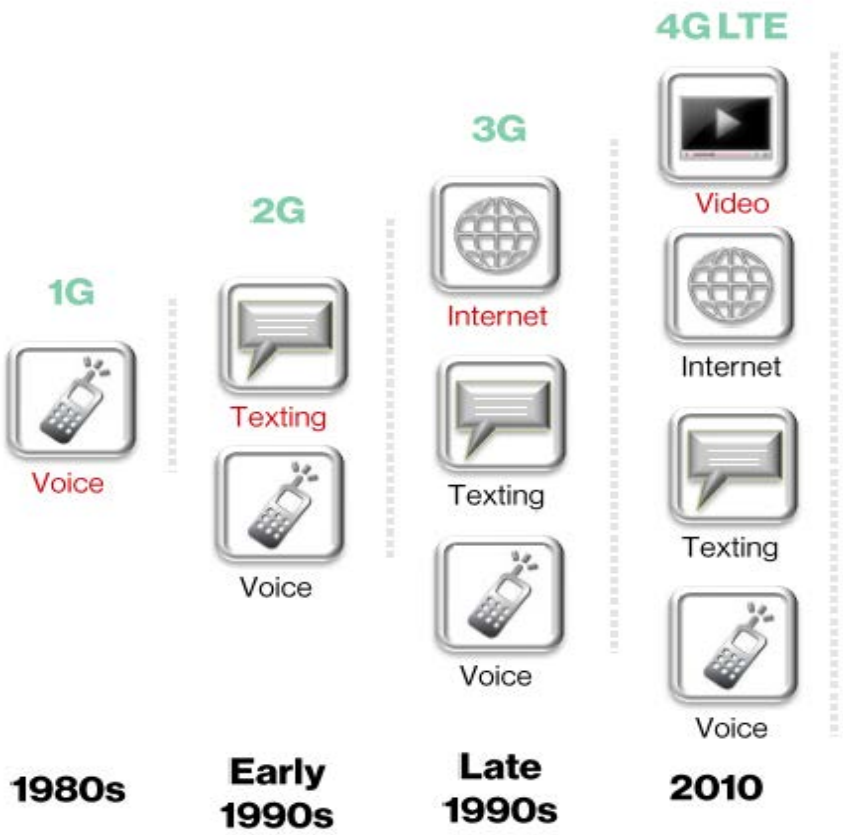
5G: Next Generation Technology

The Race to 5G

America's wireless companies are beginning to invest an estimated $275 billion into building 5G networks. This will create three million new jobs and add $500 billion to the economy.

“Our latest research shows the United States leapt up the 5G rankings, we’re tied with China leading the world in 5G. This is great news, but we can't celebrate yet. Our global rivals are committed to 5G. China's ambitions grow day by day. To win, we need a lot of good years.” – CTIA President & CEO, Meredith Attwell Baker

Evolution of Wireless Networks



5G

The Future Possibilities Are Unlimited!

Autonomous Cars

Automated Traffic Control and Driving

Cloud Gaming

Collaborative Robots

Augmented and Virtual Reality

Smart Cities

Ultra High Definition Video

Unmanned Aerial Vehicles (Drones)

5G Expected Capabilities vs. 4G

Peak data rates: Potential >10 Gbps (20x+)

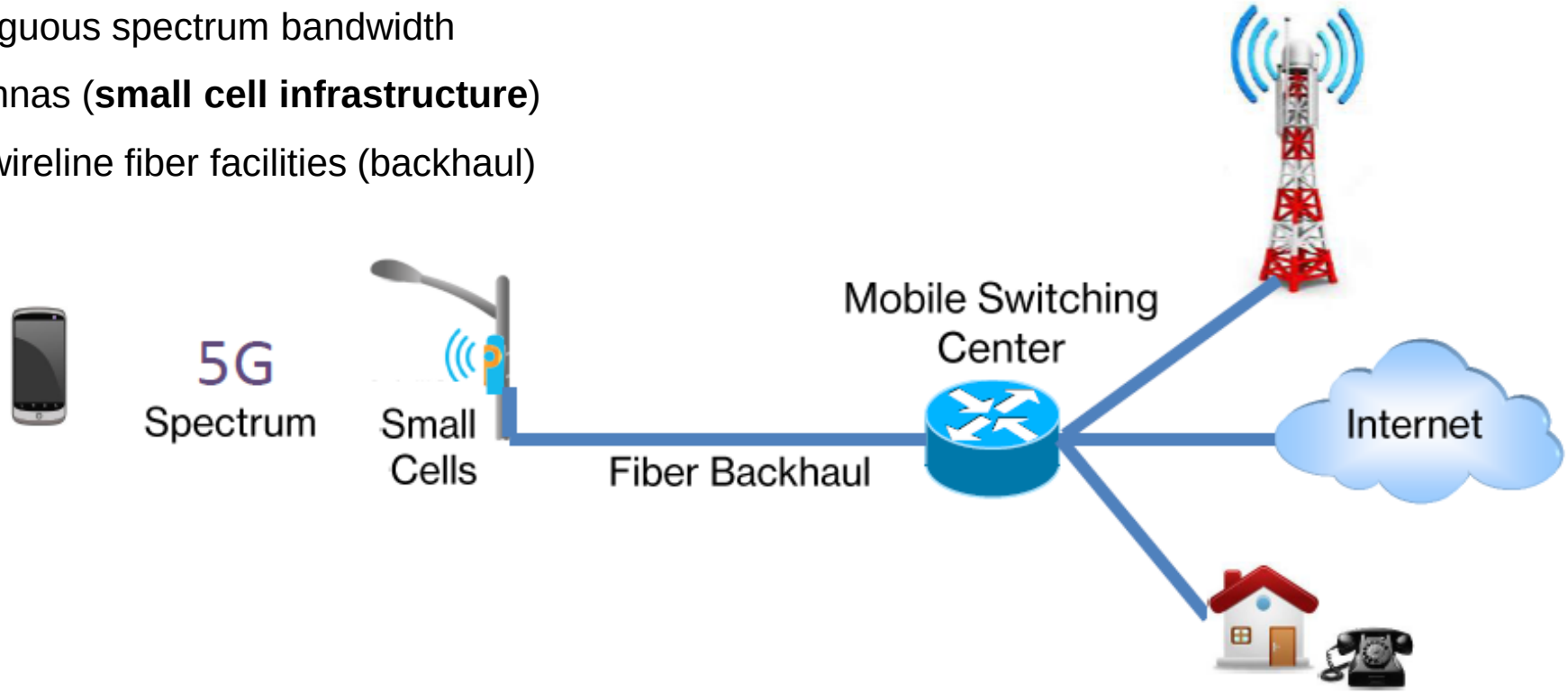
Higher mobile data volumes (1,000x)

Connected devices: 1M/Sq. Km (10-100x)

Latency: <10 ms (0.1x)

Building Blocks for 5G

- Large contiguous spectrum bandwidth
- Small antennas (**small cell infrastructure**)
- Access to wireline fiber facilities (backhaul)



Real World Experiences / Obstacles So Far

- Equipment size provisions
- New poles vs. utility/government owned poles
- Wireless attachment rates
- Permitting process, review & resubmittals
- Site build complications
- Waivers
- Denial of permits
- Prohibiting new small wireless facilities in the ROW
- Review outside of jurisdiction

Current Law and New Legislation

Permits are no longer required for:

- Maintenance
- Repair
- Replacement
- Extensions of facilities on private property
- Upgrade of aerial facilities

Permits may still be required for any activity that involves excavation in the ROW, closure of a sidewalk, vehicular or parking lane.

Shot Clocks for permit applications are applicable to **both** wireless and wireline permit applications.

Local jurisdictions may not apply local permitting requirement to FDOT ROW.

Provisions to reconcile underground utility requirements with permits for small wireless facilities.

Provisions for aesthetics have been expanded and clarified.

Current Law and New Legislation (cont'd)

Registration has been streamlined and simplified and is limited to:

- Name of the Registrant
- Contact information of the Registrant
- Certificates from the Florida PSC (wireline), FCC (wireless), Dept. of State (cable or video)
- Statement of Pass-Through Status
- FEIN
- Proof of Insurance

Registration, Security and Financial Restrictions

- Registration and renewals are for at least 5 years
- An authority may not impose fees, costs or other charges
- An authority may not require “performance bonds or security funds” as part of the permitting process
- Any required construction bond must be limited to 18 months duration after completion of the project
- Provider may use letters of credit or similar instruments to fulfill any lawful financial obligations required by authorities
- Provider may add an authority to any existing bond, insurance, or financial instrument, with no conditions other than local venue for litigation disputes
- An authority may not require provider to indemnify it for its negligence, gross negligence, or willful conduct

Small Wireless Facilities – Deployment Particulars

Local Authority

- SWFs may be placed in Rights-of-Way
- Local Government has authority to adopt rules and regulation for the placement of communications facilities that are necessary to manage the ROW.
- Local government has the authority to require compliance with building, fire, electrical, mechanical, and transportation codes and other codes to prevent injury to persons or destruction of property.
- Local Government has the authority to require compliance with underground utility provisions where all utility lines are required to be placed underground. There must be a vertical structure on which a SWF may reasonably be collocated or a new pole must be allowed.

Small Wireless Facilities – Deployment Particulars

Objective Design Requirements

- A local authority may require:
- That a SWF meet reasonable location, context, color, camouflage and concealment requirements.
- A replacement for an existing utility pole to be substantially similar design, material, and color as the pole replaced.
- A new utility pole used to support a SWF to meet reasonable location context, color, and material of predominant pole type at the proposed location for the new pole.

Small Wireless Facilities – Deployment Particulars

Conditions on Local Authority

- The scope of local authority to regulate the deployment of SWFs is generally limited.
- In particular, a local government may not prohibit the placement of SWFs or new utility poles to support SWFs.
- A local government may not:
- Regulate the size or configuration of SWFs if consistent with the statutory size limits which limit the antenna to 6 cubic feet and the other equipment to 28 cubic feet.
- Require placement of SWFs on a particular pole or a class of poles.
- Impose requirements on ROW not within the control of the authority.
- Require any portion of SWF to be placed underground.
- Require minimum separation distances for SWFs or ground mounted equipment.
- Impose any moratorium, or other delay in the receipt or processing of applications.

Restrictions on Requirements for Authorized Permits and Registrations

- No permitting fees allowed (except three grandfathered jurisdictions – unincorporated areas of Collier and Orange counties, and the city of Bowling Green)
- No inventory or communications facilities, maps, locations of such facilities or other information
- No regulation or other control over providers' choice of equipment or technology
- An authority may require provider to identify at-grade communications facilities within 50 feet of the proposed installation

Shot Clock Controls Permitting Process

- Authority must notify provider within 14 days of filing or the application is deemed complete
- If an application is declared incomplete, the authority must identify any missing information; provider has 30 days to correct and resubmit, starting another clock
- If complete application is not acted upon by the authority within 60 days, it is deemed granted
- Permits are good for 1 year
- If an application is denied, the authority must notify the provider via electronic mail, and state the specific code provision and basis for denial
- Provider has 30 days to cure any deficiency noted by authority
- The authority has 30 days after receipt of the cured application to approve or deny, or the application is deemed granted
- Any administrative review of a denial must be completed within 45 days

- CST – Many counties elected to collect Local Communications Services Tax (CST) in lieu of charging permit fees.
- The CST was created to provide a uniform taxation mechanism that treated all providers of communication services on the same basis. The CST replaced a myriad of state and local taxes and franchise fees with a single tax mechanism that generated approximately the same revenue stream for state and local jurisdictions.
- The CST compensates local governments for use of the ROW the same as the prior franchise fees and local taxes.
- Each local jurisdiction received an increase in CST revenue in return for electing to forego permit fees. (Three exceptions: Unincorporated Orange Co., Unincorporated Collier Co. and Bowling Green)
- Local CST revenues by jurisdiction, local tax rates and permit elections are at: https://floridarevenue.com/taxes/taxesfees/Pages/cst.aspx

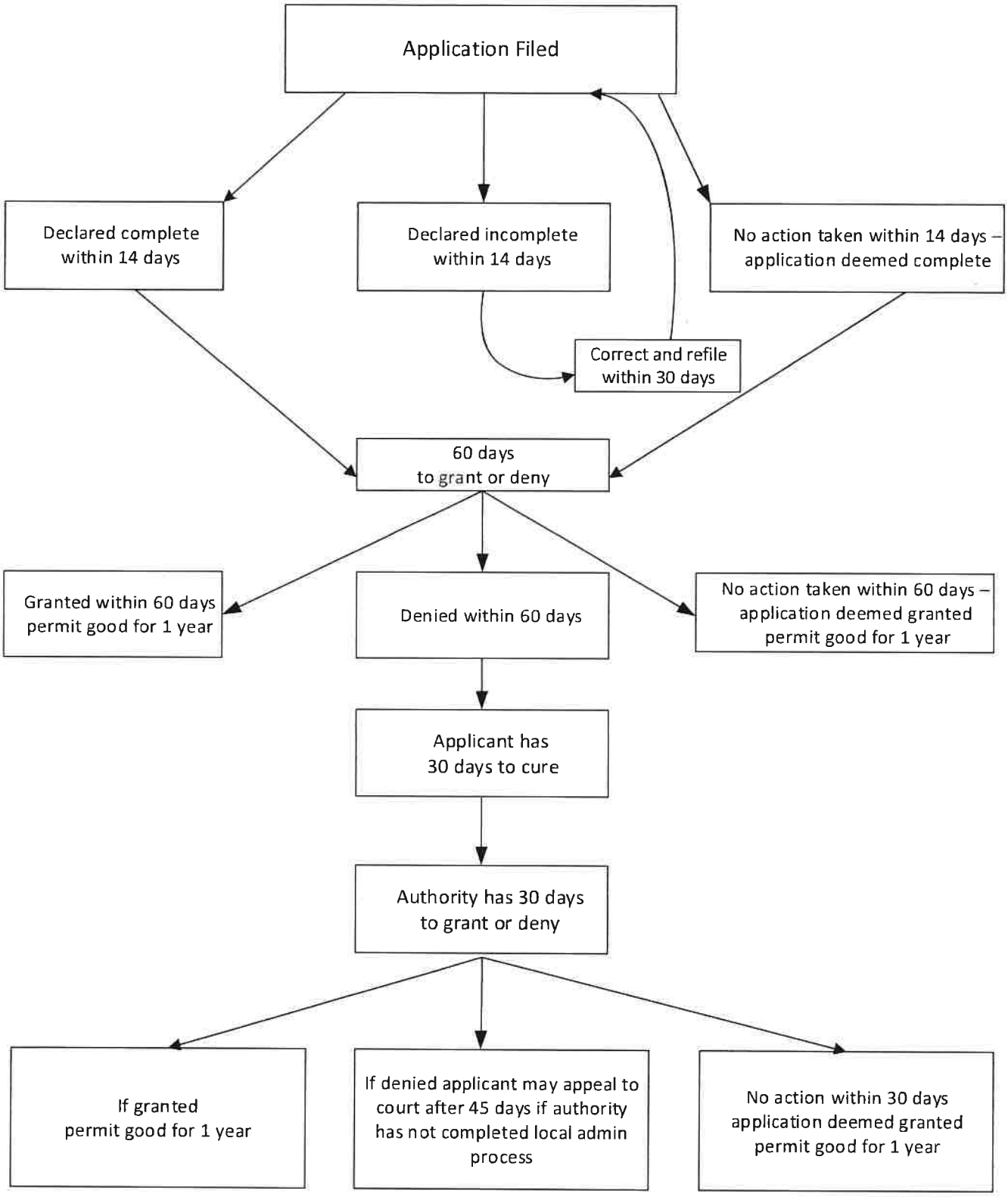
What to expect moving forward?

- Ask your staff the status of your permit process. Are they current? Do they have a backlog?
- Have staff prioritize their understanding of the effect of the new legislation on your permit program.
- Can you agree with your local providers what permits will be covered under the new legislation?
- “Wireless provider" or "wireless infrastructure provider”
- Certain work will no longer require a permit. Do you and your local providers agree on what exactly will be exempt?
- How will you implement the new law without codifying it in your process (i.e. prior to updating your codes)?
- Determine what/when ordinance changes will be required to implement the new law.
- Determine what, if any, process changes will be required.
- Determine what, if any, staffing changes will be required.
- Decide if adopting standards/examples of permit submittals would be helpful to everyone involved.
- Determine how you will handle existing wireline permits (if you have a backlog).
- Face-to-face meetings with industry as you work through issues (e.g. Monthly? Bimonthly?)

Questions?

Mobilizing media and entertainment
Rich user-generated content
Congested environments
High-speed mobility
5G
5G is essential for next generation mobile experiences
• Fiber-like data speeds
• Low latency for real-time interactivity
• More consistent performance
• Massive capacity for unlimited data
Connected cloud computing
Immersive experiences
Connected vehicle
Augmented reality

Florida Shot Clock for Permit Process



[NAME OF JURISDICTION]

MODEL PERMIT APPLICATION & CHECKLIST FOR

SMALL WIRELESS COMMUNICATIONS FACILITIES WITHIN

THE [INSERT JURISDICTION] RIGHT-OF-WAY

PURSUANT TO ORDINANCE XX-XXXX

Permit Application No.: _____

Applicant/Registrant's Name:_____

Project Name & location:_____

Reviewer's Name:_____

Date of Application submission: _____

Check all that apply:

___ Antenna Collocation on Existing Pole

____ Antenna Collocation on Existing City/County Pole

____ Antenna Collocation on New Pole

____ Replace Existing Pole

____ Replace Existing City/Count Pole

____ New Pole

____ At-grade equipment

____ Pole-mounted equipment

	CHECK LIST ITEMS			
Check "Yes" if item is complete **Check "No" if item is incomplete**	**Yes**	**No**	**N/A**	**Comments**
Applicant is registered with the City/County				
Applicant's registration is current				
Engineering plan signed and sealed by a Florida Registered Professional Engineer, or prepared by a person who is exempt from such registration requirements as provided in Sec. 471.003, Fla. Stat.				

	CHECK LIST ITEMS CONTINUED			
Check "Yes" if item is complete Check "No" if item is incomplete	**Yes**	**No**	**N/A**	**Comments**
Plans that identify right-of-way boundaries and location of all at-grade and aerial facilities within 50 feet of proposed facility including existing poles				
Plans identify height of tallest pole within 500 feet of the proposed facility				
Plans identify proposed location of existing pole and replacement pole				
Plans identify proposed location of new pole				
Plans identify proposed location of at-grade equipment				
Plans provides dimensioned elevation of existing, replacement or new pole including any top-mounted or side-mounted antennas and associated equipment				
Plans provide specifications for proposed antennas including size, material, volume, color. Volume for each antenna shall not exceed 6 cubic feet.				
Plans provide specifications for all proposed pole-mounted and at-grade equipment, excluding antennas, including size, material, volume and color. Equipment volume, excluding antennas, electric meters, concealment elements, telecommunications demarcation boxes, ground-based enclosures, grounding equipment, power transfer switches, cutoff switches, vertical cable runs for the connection of power and other services, and utility poles or other support structures, shall not exceed 28 cubic feet.				
Structural statement noting compliance with FBC				
Cost estimate for right-of-way restoration work				
18-month ROW Restoration Construction Bond				

NOTE: If any related permits for electrical, MOT, sidewalk closure or excavation are submitted simultaneously with a corresponding small wireless facility permit, such permits should be processed concurrently in accordance with the streamlined permitting reviews contemplated by 337.401(7), Florida Statutes and recent FCC Declaratory Ruling and 3rd Report & Order approved Sept. 26, 2018.

PROFESSIONALISM AND CIVILITY IN LAW & LOCAL GOVERNMENT

Jamie Cole

Weiss Serota Helfman Cole & Bierman

November 21, 2019

Florida Bar: Attorney oath addition in September 2011

“To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications”

Has the practice of law become less professional and civil?

Florida Bar Survey - 2011

Over two-thirds of responding Florida Bar Members agreed that, in recent years, relationships between attorneys have become more adversarial

The Decline of Civility

Founding Fathers: Hamilton vs. Burr

The Obedient Servant

“I have the honor to be Your Obedient Servant

A.Burr

A.Ham”

Examples of Improper Conduct

- Florida Bar v. Ratiner
- Florida Bar v. Norkin

WHY?

Causes of Incivility in Legal Practice

- Technology
  - The need for speed
  - Lack of relationship building
- Stress/pressure
- Perception that clients want bulldog
- Lack of mentors
- Job dissatisfaction

Causes of Incivility in Legal Practice

- Mental health issues
- Concern that civility appears weak
- Lack of consequences/penalties
- Societal norms

THE CASE FOR CIVILITY

- Better results/outcomes
- Relationship building
- Make more money
- Less stress/more job satisfaction
- The right thing to do

WHAT CAN BE DONE?

- Broward County Special Magistrate Program
- Education and awareness
- Less tolerance in society
- Stricter enforcement by Bar and Courts

LACK OF CIVILITY IN LOCAL GOVERNMENT

SAME QUESTION: Have local government meetings become less civil?

SAME ANSWER: Yes

Causes of Incivility in Local Government

- Role models from Washington
- Political polarization and extremism
- Attribution of bad motivation
- Sunshine Law
- Lack of traditional press coverage
- Twitter/social media

WHAT CAN BE DONE?

- Education and awareness
- Less tolerance by voters
- Rules of decorum and procedures
- Retreats/team building exercises

QUESTIONS?