The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

JUDICIARY
Senator Flores, Chair
Senator Joyner, Vice Chair

MEETING DATE: Tuesday, January 25, 2011
TIME: 10:45 a.m.—12:45 p.m.
PLACE: *Toni Jennings Committee Room,* 110 Senate Office Building

MEMBERS: Senator Flores, Chair; Senator Joyner, Vice Chair; Senators Bogdanoff, Richter, Simmons, and Thrasher

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 172** Bennett (Identical H 93)	Security Cameras; Reenacts a specified provision relating to prohibited standards for security cameras. Provides for retroactive operation of the act. Provides for an exception under specified circumstances. CA 01/11/2011 Favorable JU 01/25/2011 BC	
2	Presentation from the Chief Justice of the Florida Supreme Court on state courts system issues and priorties		
3	Presentation on the statewide e-portal for the state courts system		
	Distribution of, and Chair's comments regarding, the following interim projects:		
4	**Interim Project 2011-127** (Review the Procedures and Standards for Securing Protective Injunctions)		
5	**Interim Project 2011-128** (Review the Procedures and Standards Governing Judicial Disqualification)		
6	**Interim Project 2011-129** (Review the Use and Enforceability of Arbitration Agreements in the Medical Services and Nursing Home Care Contexts)		

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	SB 172
INTRODUCER:	Senator Bennett
SUBJECT:	Security Cameras
DATE:	January 24, 2011
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wolfgang	Yeatman	CA	**Favorable**
2.	O'Connor	Maclure	JU	**Pre-meeting**
3.			BC	
4.				
5.				
6.				

I. Summary:

In response to ongoing litigation, this bill reenacts a section of law created by ch. 2009-96, Laws of Fla., (SB 360 (2009 Regular Session)) to eliminate any possible question that it could be subjected to a single-subject[1] challenge or struck down as an unconstitutional unfunded mandate.[2] The bill does not change the law, but reaffirms the change to the law made in 2009 by SB 360 that prevents local governments from requiring that a business spend funds for security cameras. The section does not limit the ability of a county, municipality, airport, seaport, or other local governmental entity to adopt standards for security cameras.

This bill reenacts section 163.31802, Florida Statutes.

II. Present Situation:

In 2009, the Legislature passed, and the Governor signed into law, Senate Bill 360, titled "An act relating to growth management" or the "Community Renewal Act" (SB 360).[3] This bill made a wide array of changes to Florida's growth management laws. A number of local governments challenged the law on constitutional grounds. Specifically, the complaint raises two counts: first, that SB 360 violates the single-subject provision of the Florida Constitution; and, second, that the bill is an unfunded mandate on local governments.[4] The circuit court found that the single-subject issue was moot but granted a verdict of summary judgment striking down SB 360 as an

[1] FLA. CONST. art. III, s. 6.
[2] FLA. CONST. art. VII, s. 18(a).
[3] Chapter 2009-96, Laws of Fla.
[4] *City of Weston v. Crist*, Case No. 09-CA-2639 (Fla. 2d Jud. Cir. 2010).

unconstitutional mandate.[5] The court ordered the Secretary of State to expunge the law from the official records of the state. The case is being appealed to the First District Court of Appeal, and the law is in effect while the appeal is pending. A motion to expedite the proceedings has been granted.[6]

Single-Subject Rule

Article III, Section 6 of the State Constitution requires every law to "embrace but one subject and matter properly connected therewith." The subject shall be briefly expressed in the title.[7] The purpose of this requirement is to prevent logrolling, which combines multiple unrelated measures in one bill in order to secure passage of a measure that is unlikely to pass on its own merits.[8] The requirement does not unduly restrict the scope or operation of a law. The single subject may be as broad as the Legislature chooses if the matters contained in the law have a natural or logical connection.[9] The requirement is violated if a law is written to accomplish separate and disassociated objects of legislative intent.[10] A violation of the one-subject limitation renders inoperative any provision contained in an act which is not fairly included in the subject expressed in the title or which is not properly connected with that subject.[11] Among the multitude of cases on the subject, the Florida Supreme Court has held that tort law and motor-vehicle-insurance law were sufficiently related to be included in one act without violating the one-subject limitation,[12] but that a law containing changes in the workers' compensation law and legislation concerning comprehensive economic development violated the one-subject limitation.[13]

The Florida Supreme Court has held that the adoption of the Florida Statutes as the official statutory law of the state cures any violation of the multiple-subject limitation which is contained in a law compiled in the Florida Statutes.[14] The Florida Statutes are adopted annually during each regular session through an adoption act.[15] The litigants in the SB 360 case argued that the three subjects in the bill are: growth management, security cameras, and affordable housing.[16] During the 2010 Regular Session, SB 1780 adopted the Florida Statutes. Therefore, the circuit court determined that the single-subject challenge to SB 360 was rendered moot.[17]

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[5] *Id.*
[6] *Atwater v. City of Weston*, Case No. 1D10-5094 (Fla. 1st DCA 2010).
[7] *Franklin v. State*, 887 So. 2d 1063, 1072 (Fla. 2004).
[8] *Santos v. State*, 380 So. 2d 1284 (Fla. 1980).
[9] *Board of Public Instruction of Broward County v. Doran*, 224 So. 2d 693 (Fla. 1969).
[10] *State ex rel. Landis v. Thompson*, 163 So. 270 (Fla. 1935).
[11] *Ex parte Knight*, 41 So. 786 (Fla. 1906).
[12] *State v. Lee*, 356 So. 2d 276 (Fla. 1978).
[13] *Martinez v. Scanlan*, 582 So. 2d 1167 (Fla. 1991).
[14] *State v. Combs*, 388 So. 2d 1029 (Fla. 1980), and *State v. Johnson*, 616 So. 2d 1 (Fla. 1993).
[15] Senate Committee on Rules, *Senate Bill 1780 Analysis* (Feb. 10, 2010), *available at* http://www.flsenate.gov/data/session/2010/Senate/bills/analysis/pdf/2010s1780.rc.pdf (last visited Jan. 19, 2011).
[16] *City of Weston v. Crist*, Case No. 09-CA-2639 (Fla. 2d Jud. Cir. 2010).
[17] *Id.*

Mandates

Article VII, Section 18(a) of the Florida Constitution states that no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and it meets one of these exceptions:

- The Legislature appropriates funds or provides a funding source not available for such county or municipality on February 1, 1989;
- The expenditure is required to comply with a law that applies to all persons similarly situated, including the state and local governments; or
- The law is required to comply with a federal requirement.

Subsection (d) provides a number of exemptions. If none of the constitutional exceptions or exemptions apply, and if the bill becomes law, cities and counties are not bound by the law[18] unless the Legislature has determined that the bill fulfills an important state interest and approves the bill by a two-thirds vote of the membership of each house.

At issue in the SB 360 challenge is the exemption for an insignificant fiscal impact. The Legislature interprets insignificant fiscal impact to mean an amount not greater than the average statewide population for the applicable fiscal year times 10 cents; the average fiscal impact, including any offsetting effects over the long term, is also considered.[19]

On a motion for summary judgment, the circuit court of the Second Judicial Circuit decided that SB 360 violated the mandate provision of the Florida Constitution because certain local governments would be required to amend their comprehensive plans within two years to incorporate land use and transportation strategies to support and fund mobility.

Preemption

Under their broad home rule powers, municipalities and charter counties may legislate concurrently with the Legislature on any subject that has not been expressly preempted to the state.[20] Express preemption of a municipality's power to legislate requires a specific statement; preemption cannot be made by implication nor by inference.[21] A local government cannot forbid what the Legislature has expressly licensed, authorized, or required, nor may it authorize what

[18] Although the constitution says "[n]o county or municipality shall be bound by any general law" that is a mandate, the circuit court's ruling was much broader in that it ordered SB 360 expunged completely from the official records of the state.
[19] Guidelines issued in 1991 by then Senate President Margolis and Speaker of the House Wetherell (1991); Comm. on Comprehensive Planning, Local and Military Affairs, The Florida Senate, *Review of Legislative Staff Guidelines for Screening Bills for Mandates on Florida Counties and Municipalities* (Interim Report 2000-24) (Sept. 1999), *available at* http://www.flsenate.gov/data/Publications/2000/Senate/reports/interim_reports/pdf/00-24ca.pdf (last visited Jan. 19, 2011).
[20] *See, e.g., City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).
[21] *Id.*

the Legislature has expressly forbidden.[22] The Legislature can preempt counties' broad authority to enact ordinances and may do so either expressly or by implication.[23]

Local Ordinances Requiring Security Cameras

The Convenience Business Security Act[24] creates security standards for late-night convenience businesses, including the requirement that every convenience business[25] shall be equipped with a "security camera system capable of recording and retrieving an image to assist in offender identification and apprehension."[26] A political subdivision of this state may not adopt, for convenience businesses, security standards that differ from the statutory requirement in the provisions of the Act. All differing standards are preempted and superseded by general law.[27]

Section 163.31802, F.S., created by SB 360, preempts local governments from having in place ordinances or rules requiring that a business expend funds for security cameras unless specifically required by general law. The section does not limit the ability of a county, municipality, airport, seaport, or other local governmental entity to adopt standards for security cameras. The preemption is broader than the Convenience Business Security Act in that it targets all businesses, but narrower in that it only stops local governments from requiring businesses to expend funds on security cameras (whereas the Act applies to a wider array of security requirements). Therefore, under the law as amended by SB 360, convenience businesses have a statutory requirement to have security cameras, but local governments could not require other businesses to pay for security cameras. Some local governments did have ordinances in place at the time that may be interpreted as requiring security cameras for more than just convenience businesses.[28]

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[22] *Rinzler v. Carson*, 262 So. 2d 661 (Fla. 1972); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).
[23] *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005).
[24] Sections 812.1701-812.175, F.S.
[25] Section 812.171, F.S., defines a "convenience business" as "any place of business that is primarily engaged in the retail sale of groceries, or both groceries and gasoline, and that is open for business at any time between the hours of 11 p.m. and 5 a.m. The term 'convenience business' does not include: (1) A business that is solely or primarily a restaurant. (2) A business that always has at least five employees on the premises after 11 p.m. and before 5 a.m. (3) A business that has at least 10,000 square feet of retail floor space. The term 'convenience business' does not include any business in which the owner or members of his or her family work between the hours of 11 p.m. and 5 a.m."
[26] Section 812.173, F.S.
[27] Section 812.1725, F.S.
[28] There are several local governments that have ordinances that are not explicitly limited to convenience stores: Boca Raton Ordinances Part II, s. 4-6 (requiring security cameras for nightclubs); DeBary Ordinances Art. II, s. 18-34 (requiring security cameras for late-night businesses); Deltona Ordinances Art. II, s. 22-33 (requiring security cameras for late-night businesses); Fort Pierce Regulations Art. XIII, s. 9-367 (requiring security cameras in all late night stores); Homestead Ordinances Art. I, s. 16-5 (requiring security cameras for small late-night restaurants); Jacksonville Ordinances Title V, s. 177-301 (requiring security cameras for grocery stores and restaurants); Jacksonville Ordinances Title VI, s. 111-310 (enabling Sheriff to purchase cameras for small businesses to meet requirements of Chapter 177); Oakland Park Ordinances Art. III, s. 24-39 (requiring security cameras for new and existing hotels); Orange County Ordinances Art. IV, s. 38-79 (requiring security cameras for freestanding carwashes); Sunrise Ordinances Art. II, s. 3-11 (requiring security cameras to obtain an extended hours license for food service establishments); Volusia County Ordinances Art. II, s. 26-36 (requiring security cameras for all late-night businesses, stores, or operations); West Melbourne Ordinances Art. III, s. 98-362 (requiring security cameras for nightclubs); West Melbourne Ordinances Art. IV, s. 98-963 (requiring interior and exterior security cameras for nightclubs).

III. Effect of Proposed Changes:

Litigation has called into question the constitutional validity of SB 360 (2009 Regular Session), which made many changes to Florida's growth management laws. This bill retains the 2010 statutes in their current state and reenacts the provision of SB 360 (the creation of s. 163.31802, F.S.) related to security cameras. Senate Bills 174 and 176 reenact the other parts of SB 360. By reenacting these bills separately, clearly adhering to the constitutional requirements, the Legislature hopes to cure any specter of a single-subject violation. More specifically, the bill reenacts the provisions adopted in 2009 that prevent local governments from requiring that a business spend funds for security cameras. The bill will take effect upon becoming a law and shall operate retroactively to June 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill is not a mandate as it reenacts current law. The original security-camera provision in SB 360 did not require local governments to spend funds and, therefore, was not a mandate. As noted in the Present Situation portion of this bill analysis, however, a circuit court granted a verdict of summary judgment striking down SB 360 in its entirety as an unconstitutional mandate because, under the measure, certain local governments would be required to amend their comprehensive plans within two years to incorporate land use and transportation strategies to support and fund mobility. The case is being appealed to the First District Court of Appeal.[29]

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill specifically applies its provisions retroactively to June 1, 2009, the effective date of SB 360 (2009 Regular Session). Retroactive operation is disfavored by courts and generally "statutes are prospective, and will not be construed to have retroactive operation unless the language employed in the enactment is so clear it will admit of no other construction."[30] The Florida Supreme Court has articulated four issues to consider when determining whether a statute may be retroactively applied:

[29] One of the issues raised on appeal is that the trial court erroneously declared SB 360 unconstitutional in its entirety and should have severed only the offending language. Brief for Appellants at 26, *Atwater v. City of Weston,* Case No. 1D10-5094 (Fla. 1st DCA 2010).

[30] Norman J. Singer and J.D. Shambie Singer, *Prospective or retroactive interpretation,* 2 SUTHERLAND STATUTORY CONSTR. s. 41:4 (6th ed. 2009).

- Is the statute procedural or substantive?
- Was there an unambiguous legislative intent for retroactive application?
- Was a person's right vested or inchoate?
- Is the application of the statute to these facts unconstitutionally retroactive?[31]

The general rule of statutory construction is that a procedural or remedial statute may operate retroactively, but that a substantive statute may not operate retroactively without clear legislative intent. Substantive laws either create or impose a new obligation or duty, or impair or destroy existing rights, and procedural laws enforce those rights or obligations.[32]

Notwithstanding a determination of whether the provisions in the bill are procedural or substantive, the bill makes it clear that it is the Legislature's intent to apply the law retroactively. "Where a statute expresses clear legislative intent for retroactive application, courts will apply the provision retroactively."[33] A court will not follow this rationale, however, if applying a statute retroactively will impair vested rights, create new obligations, or impose new penalties.[34] A court would be unlikely to bar the retroactive application of this section as impairing vested rights, creating new obligations, or imposing new penalties because it reenacts current law. As an additional protection, the bill specifies that if retroactive application were held unconstitutional by a court of last resort, it would then apply prospectively.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[31] *Weingrad v. Miles*, 29 So. 3d 406, 409 (Fla. 3d DCA 2010) (internal citations omitted).
[32] *See Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994); *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65, 65 (Fla. 1972).
[33] *Weingrad*, 29 So. 3d at 410.
[34] *Id.* at 411.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

Chief Justice Charles T. Canady
the Florida Supreme Court[1]

Chief Justice Charles Canady was born in Lakeland, Florida, in 1954. He is married to Jennifer Houghton, and they have two children. He received his B.A. from Haverford College in 1976 and his J.D. from the Yale Law School in 1979.

Justice Canady practiced law with the firm of Holland and Knight in Lakeland from 1979 through 1982. He practiced with the firm of Lane, Trohn, et al., from 1983 through 1992.

From November 1984 to November 1990, Justice Canady served three terms in the Florida House of Representatives, and from January 1993 to January 2001, he served four terms in the United States House of Representatives. Throughout his service in Congress, Justice Canady was a member of the House Judiciary Committee. For three terms, from January 1995 to January 2001, Justice Canady was the Chairman of the House Judiciary Subcommittee on the Constitution.

Upon leaving Congress, Justice Canady became General Counsel to Governor Jeb Bush. He was appointed by Governor Bush to the Second District Court of Appeal for a term beginning November 20, 2002. On August 28, 2008, Justice Canady was appointed to the Florida Supreme Court by Governor Charlie Crist and took office on September 8, 2008.

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[1] Republished from the website of the Florida Supreme Court, http://www.floridasupremecourt.org/justices/canady.shtml (last visited Jan. 22, 2011).

State Courts System [1]

The Supreme Court of Florida

The highest Court in Florida is the Supreme Court, which is composed of seven Justices. At least five Justices must participate in every case and at least four must agree for a decision to be reached. The Court's official headquarters is the Supreme Court Building in Tallahassee.

To be eligible for the office of Justice, a person must be a registered voter who resides in Florida and must have been admitted to the practice of law in Florida for the preceding 10 years.

For most of Florida's history, all judges were chosen by direct election of the people. The only exception was when a vacancy occurred on a court between elections. In that case, the Governor appointed a replacement to serve until the next election was held.

This election of appellate judges led to many problems. They had to raise campaign money, which often was donated by the same attorneys who practiced before the Court. By the mid-1970s, the problem became even more serious after several Florida appellate judges were charged with violations of ethics.

In 1971, Governor Reubin Askew took the first step toward reforming the system. That year he instituted a system called "merit selection." Under this system, the Governor referred a Court vacancy to an impartial panel, which suggested names of possible appointees. The Governor then selected a name from the list. In 1974, Justice Ben F. Overton became the first Supreme Court Justice chosen by this method.

Leaders knew, however, that a more complete change still was needed, because judges still faced periodic elections after appointment. The effort to do this was spearheaded by Governor Reubin Askew, Chief Justice Overton, and State Rep. Talbot "Sandy" D'Alemberte, among others.

As a result, Florida voters amended the Constitution in 1976 to create a "merit retention" system for Florida's appellate judges. This system was meant to eliminate the many problems caused by judges running for office in an election.

When there is a vacancy on the Court today, this system means that the Governor chooses the next Justice from a list of between three and six qualified persons recommended by the Judicial Nominating Commission. When Justices' terms expire, their names will appear on the general election ballot for a merit retention vote, if they wish to remain in office.

Under this system, the voters have eliminated contested elections in which appellate Justices and judges campaign against other candidates. Instead, the question on the ballot is: "Shall Justice _____ be retained in office?"

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[1] This information is republished from the website of the Florida Supreme Court. See Fla. Supreme Court, Public Information, *About the Court: State Courts System*, http://www.floridasupremecourt.org/pub_info/system2.shtml (last visited Dec. 5, 2010).

If a majority of the votes cast are not in favor of retaining the incumbent Justice, the Governor appoints another person to fill the vacancy. This person is chosen from a list of individuals whose applications have been reviewed and who have been found qualified by the Judicial Nominating Commission.

The Chief Justice

By a majority vote of the Justices, one of the Justices is elected to serve as Chief Justice, an office that is rotated every two years. The Chief Justice presides at all proceedings of the Court. If the Chief Justice is absent from Court, the most senior Justice present becomes acting Chief Justice. By longstanding tradition, the most senior Justice who has not yet served as Chief Justice is elected to the top post in every even-numbered year.

As chief administrative officer of the judicial branch of government, the Chief Justice assigns Justices and judges, including retired Justices and judges who consent and are approved by the Court to serve, to duty in courts that require temporary assistance. The Chief Justice also supervises the compilation and presentation of the judicial budget to the Legislature.

Among other constitutional duties, the Chief Justice presides or designates another Justice to preside over impeachment proceedings in the Senate. The Chief Justice is assisted in the performance of administrative tasks by the State Courts Administrator and an Inspector General.

The Chief Justice also is frequently called upon to swear in state officers. By longstanding custom, the Chief Justice swears in each newly elected Governor. From around 1905 to 1937, a single Bible was used to swear in all Governors. That Bible now is on display in a glass case in the Supreme Court Library.

Jurisdiction

The jurisdiction of the Supreme Court is set out in the Constitution with some degree of flexibility by which the Legislature may add or take away certain categories of cases. The Court must review final orders imposing death sentences, district court decisions declaring a State statute or provision of the State Constitution invalid, bond validations, and certain orders of the Public Service Commission on utility rates and services.

In addition to these forms of mandatory review authority, if discretionary review is sought by a party, the Court at its discretion may review any decision of a district court of appeal that expressly declares valid a state statute, construes a provision of the state or federal constitution, affects a class of constitutional or state officers, or directly conflicts with a decision of another district court or of the Supreme Court on the same question of law.

The Supreme Court may review certain categories of judgments, decisions, and questions of law certified to it by the district courts of appeal and federal appellate courts.

The Supreme Court has the constitutional authority to issue the extraordinary writs of prohibition, mandamus, quo warranto, and habeas corpus and to issue all other writs necessary to

the complete exercise of its jurisdiction. These writs, which bear names as ancient as their common-law origins, have been considered indispensable to our legal system, and the Constitution specifically authorizes their issuance in a proper case without the necessity of having to proceed initially to trial.

They are by nature "extraordinary," and for that reason are not available as an alternative to the usual trial and appeal. Both by their historical development and by current judicial decisions, the writs are made available only in a narrow class of exceptional cases.

Probably the best-known writ is habeas corpus, which may be invoked by any person who seeks release from custody or confinement which is asserted to be unlawful. Upon application to any Justice or judge, the persons may test the legality of their detention, not as to guilt or innocence, but solely as to whether the commitment to custody was lawful and the retention in custody is in accordance with the requirements of due process.

Two closely related writs are the writ of prohibition, by which a court may prevent a lower tribunal from acting upon matters that are not within its jurisdiction or from exceeding its lawful powers, and the writ of mandamus, by which a court may compel an official to perform a duty the law requires but that the official has failed or refused to perform.

The writ of quo warranto, although rarely sought, is available to challenge the right of public officials to hold the offices to which they claim entitlement.

The Supreme Court also renders advisory opinions to the Governor, upon request, on questions relating to the Governor's constitutional duties and powers. As the state's highest tribunal, the Supreme Court possesses distinctive powers that are essential to the exercise of the state's judicial power but that are not, strictly speaking, decision-making powers in contested cases.

The Court promulgates rules governing the practice and procedure in all Florida courts, subject to the power of the Legislature to repeal any rule by a two-thirds vote of its membership, and the Court has the authority to repeal (if five Justices concur) any rule adopted by the Judicial Qualifications Commission.

The Court has exclusive authority to regulate the admission and discipline of lawyers in Florida. To assist in the performance of those regulatory powers, the Court has adopted a code of professional conduct, established the Florida Board of Bar Examiners to administer the admissions process, and created The Florida Bar to superintend bar governance.

The Court has been assigned the responsibility to discipline and remove judicial officers. The Court has adopted a Code of Judicial Conduct, and upon the recommendation of the Judicial Qualifications Commission, it may discipline or remove any Justice or judge who is found to have violated code standards.

No single aspect of the Court's jurisdiction receives more public notice than the death penalty cases. Most people are unaware that the Court is strictly required to follow a procedure dictated by the United States Supreme Court. Under this procedure, the Court must look at what are

called "aggravating" and "mitigating" factors. Aggravating factors include the fact that a murder was "execution-style" or was very torturous. Mitigating factors can include mental illness, contributions to the community during life, or the fact the murderer was very young. The death sentence can never be imposed if there are no aggravating factors.

If at least one aggravating factor exists, the Court then must see how it weighs against the mitigating factors. If the aggravating factors outweigh the mitigating factors, then death is a legal penalty.

People sometimes ask where death chamber chair is housed. It is not located in Tallahassee, but is kept in a State prison in a rural area between Jacksonville and Gainesville. Florida has no permanent executioner, but allows residents of the State to qualify as a "volunteer" for this role. Each executioner is paid a small amount for the effort. Identities of the executioners are never revealed.

When the day of execution arrives, the Court also plays another role. By longstanding tradition, one Justice will be present at the Court at the time of execution. An open phone line is maintained between the Governor's office and the Court. Another open phone line is maintained between the Governor's office and the state prison.

The Clerk

Article V, section 3(c) of the Florida Constitution authorizes the Supreme Court to appoint a clerk who holds office at the pleasure of the Court. All papers, records, files, and the seal of the Supreme Court are kept in the custody of the clerk. The clerk receives all documents filed in cases, circulates that material to the Justices, and releases orders and opinions of the Court to the public.

The clerk appoints a chief deputy clerk to discharge the duties of the office in the clerk's absence.

The Marshal

Under Article V, section 3(c) of the Florida Constitution, the Supreme Court appoints a marshal to serve at the pleasure of the Court. The marshal has the power to execute the process of the Court throughout the state and to deputize the sheriff or a deputy sheriff of any county to assist in those duties. The marshal also orders and distributes supplies used by the Justices and their staff, serves as custodian of the Supreme Court Building and grounds, and supervises security for the Court.

Supreme Court Library

Early Court records indicate the Supreme Court Library, which is located in the south wing of the Supreme Court Building, has been continuously in existence since 1845. The Library -- the oldest state-supported library in Florida -- primarily exists for legal research. It was originally designed for the use of the Supreme Court and the attorneys who practice before it.

Until the Constitution of 1885 was amended in 1956, the clerk of the Supreme Court also served as librarian. Since 1956, the Supreme Court has had a librarian whose sole responsibility is administering the library.

Law books may be divided into two general classes: primary and secondary sources. Primary sources are court decisions, acts of legislative assemblies, official statutes, rules and regulations of governmental agencies, and similar pronouncements in published form.

Secondary sources are works that attempt to explain, rationalize or discuss specific aspects of the law, or that are aids in the search for primary sources.

The library has been designated a federal depository library for legal materials published by the Government Printing Office. The collections include practically all of the reported decisions of all American courts. In addition to the 50 states, the library has reports for courts of the Virgin Islands, Puerto Rico, the Panama Canal Zone, England, Canada, Australia, Ireland, and Scotland. The library also has current statute law for all 50 states plus the United Kingdom and Canada. In addition, the Supreme Court Library houses many historical documents related to the development of the Florida Supreme Court and the Florida Constitution. These include a number of rare books that detail the development of Florida law.

The library occupies floor space on five levels of the Supreme Court Building. It is open from 8 a.m. to 5 p.m., Monday through Friday, and it is closed on holidays when the Supreme Court Building is closed.

Public Information Office

In 1996, the Court created its first public information office primarily to handle relations between the Supreme Court and the media. The Court's public information officer currently serves as media liaison, a deputy webmaster helping maintain these Webpages, and communications counsel to the Court.

Florida Supreme Court Historical Society

One of the newest agencies assisting the Court is the Florida Supreme Court Historical Society. The society was reactivated in 1983 through the efforts of Delphene Strickland, with the support of Justice Ben F. Overton, Chesterfield Smith, Reese Smith, Talbot "Sandy" D'Alemberte, Bob Ervin, and Lewis Hall. The Society serves the primary function of collecting and preserving materials relevant to the Court's lengthy history.

The Society has had considerable success. Its members and officers have contacted the families of former Justices, have obtained gifts of historical materials, and have conducted oral histories to further preserve the Court's rich history, among other endeavors.

One example of the Society's work is the Waterbury Clock located on the Library's main level. This instrument was manufactured around 1910-1919, and most likely was purchased by the Court for the previous Supreme Court building constructed in 1912. The clock later was

purchased from the Court by Justice T. Frank Hobson, who served from 1948 until his retirement in 1962. In 1986, the Hobson family returned the clock to the Court in memory of Justice Hobson.

Other activities of the Society have included the regular publication of a newsletter, the presentation of oral history programs throughout the state, the compiling and publication of historical materials, and the presentation of exhibits in the Supreme Court rotunda, in the Historic Old Capitol building and at The Florida Bar Conventions. The Society also has published a history of the Court from territorial days until 1917. The Society can be reached by calling (850) 222-3703.

The newest project of the Society is the Supreme Court Docent Program, which will increase public access to the Court by providing tours and other informational services. As part of the project, the Society has developed and published a book entitled The Supreme Court of Florida, which is the source of some of the material on these Internet home pages.

The Legal Profession

The Florida Bar

The Florida Bar, with executive offices in Tallahassee, is a state-wide professional organization of lawyers. Since 1949, Florida has an "integrated bar," which means all lawyers admitted to the practice of law in Florida must be members of this official professional association.

The authority for the establishment and maintenance of the Bar as an integrated bar association is a 1949 rule of the Supreme Court based on the Court's constitutional authority to regulate the practice of law in Florida. The rule was adopted in an opinion written by Justice Glenn Terrell in which he made the often-quoted observation that lawyers owe a special duty to our society's democratic ideals.

The Bar assists the Court by recommending disciplinary action in grievance proceedings against lawyers and in cases of complaints of the practice of law by unauthorized persons. Committees of the Bar frequently draft, and propose to the Court, amendments to Court rules of procedure. The Florida Bar, with the cooperation of 63 local bar associations, conducts public information programs, assists in providing legal aid to people who are unable to pay legal fees, and provides educational services to members and the public through seminars and publications.

The governing body of the Bar is the Board of Governors, whose members are elected by members of the Bar.

The Board of Bar Examiners

The Florida Board of Bar Examiners, located in Tallahassee, is an instrument of the Supreme Court designed to assure that only qualified persons will be admitted to the practice of law. Created by a 1955 rule of the Court, it is composed of three non-lawyer members who serve

three-year terms and 12 members of the Bar who serve staggered, five-year terms. Members are usually selected by the Court from slates of nominees submitted by the Board of Governors.

The board's functions are to determine the professional competence of applicants for admission to practice by conducting written examinations in subjects determined by the Court, to investigate the character and other qualifications of applicants, and to submit to the Supreme Court the names of all applicants who are deemed fully qualified for admission to practice. Admission to the Bar is finally accomplished by rule of the Court.

The Office of the State Courts Administrator

On July 1, 1972, the Office of the State Courts Administrator (OSCA) was created with initial emphasis on the development of a uniform case reporting system to provide information on activity in the judiciary in the preparation of its operating budget and in projecting the need for judges and specialized court divisions.

The State Courts Administrator serves as the liaison between the judicial branch and the legislative branch, the executive branch, the auxiliary agencies of the Court, and national court research and planning agencies. The OSCA's legislative and communication functions are handled directly by the State Courts Administrator and his or her executive staff.

The District Courts of Appeal

Organization

The bulk of trial court decisions that are appealed are never heard by the Supreme Court. Rather, they are reviewed by three-judge panels of the district courts of appeal. Florida did not have district courts of appeal until 1957.

Until that time, all appeals were heard solely by the Supreme Court. As Florida grew rapidly in the twentieth century, however, the Supreme Court's docket became badly congested. Justice Elwyn Thomas with help from other members of the Court perceived the problem and successfully lobbied for the creation of the district-court system to provide intermediate appellate courts.

The Constitution now provides that the Legislature shall divide the State into appellate court districts and that there shall be a district court of appeal (DCA) serving each district. There are five such districts that are headquartered in Tallahassee, Lakeland, Miami, West Palm Beach, and Daytona Beach.

DCA judges must meet the same eligibility requirements for appointment to office, and they are subject to the same procedures and conditions for discipline and removal from office, as Justices of the Supreme Court. Like Supreme Court Justices, district court judges also serve terms of six years and will be eligible for successive terms under a merit retention vote of the electors in their districts.

In each district court, a chief judge, who is selected by the district court judges within the district, is responsible for the administrative duties of the court.

Jurisdiction

The district courts of appeal can hear appeals from final judgments and can review certain non-final orders. By general law, the district courts have been granted the power to review final actions taken by state agencies in carrying out the duties of the executive branch of government.

Finally, the district courts have been granted constitutional authority to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, as well as all other writs necessary to the complete exercise of their jurisdiction.

As a general rule, decisions of the district courts of appeal represent the final appellate review of litigated cases. A person who is displeased with a district court's express decision may ask for review in the Florida Supreme Court and then in the United States Supreme Court, but neither tribunal is required to accept the case for further review. Most are denied.

The Circuit Courts

Overview

Until 1973, Florida had more different kinds of trial courts than any state except New York. A movement developed in the late 1960s to reform this confusing system. As a result, Florida now has a simple two-tiered trial court system. A temporary exception was the municipal court, which was not abolished until January 1, 1977. Most of these courts in major population areas were abolished on January 1, 1973.

The majority of jury trials in Florida take place before one judge sitting as judge of the circuit court. The circuit courts are sometimes referred to as courts of general jurisdiction, in recognition of the fact that most criminal and civil cases originate at this level.

Organization

The Constitution provides that a circuit court shall be established to serve each judicial circuit established by the Legislature, of which there are twenty. Within each circuit, there may be any number of judges, depending upon the population and caseload of the particular area.

To be eligible for the office of circuit judge, a person must be a registered voter in a county within the circuit and must have been admitted to the practice of law in the state for the preceding five years.

Circuit court judges are elected by the voters of the circuits in nonpartisan, contested elections against other persons who choose to qualify as candidates for the position. Circuit court judges serve for six-year terms, and they are subject to the same disciplinary standards and procedures as Supreme Court Justices and district court judges.

A chief judge is chosen from among the circuit judges and county judges in each judicial circuit to carry out administrative responsibilities for all trial courts (both circuit and county courts) within the circuit.

Jurisdiction

Circuit courts have general trial jurisdiction over matters not assigned by statute to the county courts and also hear appeals from county court cases. Thus, circuit courts are simultaneously the highest trial courts and the lowest appellate courts in Florida's judicial system.

The trial jurisdiction of circuit courts includes, among other matters, original jurisdiction over civil disputes involving more than $15,000; controversies involving the estates of decedents, minors, and persons adjudicated as incapacitated; cases relating to juveniles; criminal prosecutions for all felonies; tax disputes; actions to determine the title and boundaries of real property; suits for declaratory judgments that is, to determine the legal rights or responsibilities of parties under the terms of written instruments, laws, or regulations before a dispute arises and leads to litigation; and requests for injunctions to prevent persons or entities from acting in a manner that is asserted to be unlawful.

Lastly, circuit courts are also granted the power to issue the extraordinary writs of certiorari, prohibition, mandamus, quo warranto, and habeas corpus, and all other writs necessary to the complete exercise of their jurisdiction.

The County Courts

Organization

The Constitution establishes a county court in each of Florida's 67 counties. The number of judges in each county court varies with the population and caseload of the county. To be eligible for the office of county judge, a person must be an elector of the county and must have been a member of The Florida Bar for five years; in counties with a population of 40,000 or less, a person must only be a member of The Florida Bar.

County judges are eligible for assignment to circuit court, and they are frequently assigned as such within the judicial circuit that embraces their counties.

County judges serve six-year terms, and they are subject to the same disciplinary standards, and to the jurisdiction of the Judicial Qualifications Commission, as all other judicial officers.

Jurisdiction

The trial jurisdiction of county courts is established by statute. The jurisdiction of county courts extends to civil disputes involving $15,000 or less.

The majority of non-jury trials in Florida take place before one judge sitting as a judge of the county court. The county courts are sometimes referred to as "the people's courts," probably because a large part of the courts' work involves voluminous citizen disputes, such as traffic offenses, less serious criminal matters (misdemeanors), and relatively small monetary disputes.

Other Officials

The Constitution creates official positions outside the judicial branch essential to the administration of justice and to the operation of the state's judicial system. Clerks of courts are county officers whose duties include the management and preservation of the records of judicial proceedings.

In each of the 20 judicial circuits, a State Attorney is elected for a term of four years to prosecute persons charged with criminal conduct. The 1963 Legislature established the office of Public Defender in each circuit to defend indigent criminal defendants in all but a small number of minor matters. Public Defenders are also elected for a term of four years.

January 15, 2011

E-filing open for business

The new service is being phased in slowly

By Gary Blankenship
Senior Editor

Florida's giant leap into electronic filing for the Florida court system began with some careful baby steps this month, as service was phased in for nine counties in the first days of the new year.

The first case was filed Tuesday, January 4, a probate and guardian case in Lake County. Columbia County got its first case the following morning.

"I was contacted by the local clerk, Neil Kelly, just before the holidays, and he asked me if I would be interested in testing it out and seeing how it worked and then getting back to them," said Eustis attorney Michael J. Rogers. He said he had worked with the clerk's office before on a program that put public records online.

He said his paralegal, Betty Radecki, did most of the work, and he bought a scanner to help with the process.

"I'm not a technical person, so I was a little bit reluctant, but so far so good," he said.

Radecki said she worked with Denise Bell in the clerk's office who provided step-by-step guidance on the registration and filing process, which she found easy. One issue arose over the quality of a notary stamp.

"We resolved that issue and all of that was part of the testing phase before we actually sent the document itself. Once we resolved that issue, it was very simple, very easy, and very quick. I received both my confirmation and acceptance [from the clerk] in a very short time

and was able — in a matter of minutes — to go in through the website and see my document," Radecki said. "It was very exciting."

Kelly, the Lake County clerk, said, "Tuesday afternoon was an exciting time in the Lake County Clerk's Office as we accepted our first electronic court filing. It is great to see the tremendous amount of work on the part of so many partners come to fruition. The e-filing process is going to be more efficient and cost-effective for everyone."

Aside from Lake and Columbia counties, court clerks in Duval, Gulf, Holmes, Lee, Miami-Dade, Putnam, and Walton counties were the ones who initially signed on for the e-filing program. The Legislature mandated that e-filing begin by January 1, and Florida courts and clerks have worked together to establish a statewide Internet portal through which the filings can be accomplished. Not all of the nine counties were immediately accepting cases when the portal opened, as some were being phased in during the first week.

Miami-Dade, Walton, and Putnam counties were getting ready to receive cases as of January 6, as this *News* went to press. More counties are expected to be added to the e-filing service soon. For the first 90 days, cases must be filed by paper as well as electronically in case there are glitches with the system.

As of early January, more than 550 attorneys had set up e-filing accounts. Many attorneys have registered so that they are ready when the counties they practice in most are added to the portal.

The portal is run by the Florida Courts E-Filing Authority, under a joint agreement between the courts and the Florida Association of Court Clerks.

"On behalf of the Florida Courts E-Filing Authority, I am pleased to announce to Florida that the portal is up and running. It works, and that is a tribute to all those who have worked on this effort — from the courts, to the clerks, the association technical staff, and really, the local lawyers who had the faith to be among the first in the state to try out this new process. We believe the 90-day paper follow-up period, as required by rule 2.525, is helpful to allow us to check what was filed, but that time will pass quickly," said P. Dewitt Cason, Columbia clerk of the court and chair of the Florida Courts E-Filing Authority.

The Florida E-Filing Authority was scheduled to meet January 11 to discuss the initial e-filing implementation.

Staffing and technical support for the authority and the portal are being provided by the Florida Association of Court Clerks. The Supreme Court's Florida Court Technology Commission oversees standards for filing, designing a process that captures essential data so clerks and judges can manage cases and court records. So far, the FCTC has cleared five of the 10 trial court divisions to accept e-filed cases: circuit civil, county civil, probate, family, and juvenile dependency.

Columbia and Duval are accepting filings in probate only, Gulf in all five areas, Holmes in all five, Lake initially in probate and then expanding to others, Lee in all probate and some civil, Miami-Dade in all five, Putnam in all five, and Walton in all five.

Clerks in the designated counties have been working with selected attorneys — such as Rogers — as "pilot filers" to smooth out the process.

The portal can be found online at www.myflcourtaccess.com. Users must register, and after registration, a page will tell attorneys which counties are accepting e-filing and what kinds of cases they are accepting. Lawyers will also be kept apprised via the portal as more and more counties join the e-filing system and more divisions are added to the program.

The portal has a support e-mail for lawyers to use, but officials said the focus now is on getting the system operational and working with the local "test" firms. They also asked that lawyers not contact support services merely to ask when their county will join the e-filing system, as notices will be posted online.

News HOME
[Revised: 01-22-2011]

Electronic Filing Process

Chapter 2009-61, Laws of Florida (CS/SB 1718, 2009 Reg. Sess.)

Section 16. Each clerk of court shall implement an electronic filing process. The purpose of the electronic filing process is to reduce judicial costs in the office of the clerk and the judiciary, increase timeliness in the processing of cases, and provide the judiciary with case-related information to allow for improved judicial case management. The Legislature requests that, no later than July 1, 2009, the Supreme Court set statewide standards for electronic filing to be used by the clerks of court to implement electronic filing. The standards should specify the required information for the duties of the clerks of court and the judiciary for case management. The clerks of court shall begin implementation no later than October 1, 2009. The Florida Clerks of Court Operations Corporation shall report to the President of the Senate and the Speaker of the House of Representatives by March 1, 2010, on the status of implementing electronic filing. The report shall include the detailed status of each clerk office's implementation of an electronic filing process, and for those clerks who have not fully implemented electronic filing by March 1, 2010, a description of the additional steps needed and a projected timeline for full implementation. Revenues provided to counties and the clerk of court under s. 28.24(12)(e), Florida Statutes, for information technology may also be used to implement electronic filing processes.

Section 22. Except as otherwise expressly provided in this act and except for this section, which shall take effect June 1, 2009, this act shall take effect July 1, 2009.

Approved by the Governor May 27, 2009.
Filed in Office Secretary of State May 27, 2009.

Florida ePortal and eFiling: Frequently Asked Questions (FAQs)[1]

ePortal Users FAQs

Q: What is the ePortal?

The ePortal is a web site that provides eFiling and eRecording capability to users with a single statewide login. Users may utilize the ePortal web interface to submit documents to Clerks and Recorders. The ePortal also supports automated interfaces with other submitter systems. The ePortal supports transmissions to/from the local case/recording systems using national XML standards. The ePortal also provides electronic notifications and service on behalf of filers.

Q: Who is allowed to use eFiling (title companies, law firms, business, etc.)?

Any party on the case is allowed to efile. Your role (attorney, pro se, etc) will be defined in your user profile.

Q: How will users of the ePortal be authenticated?

Individual Florida Bar members will register to use this system and receive authentication credentials (login ID, password) upon validation of their online registration. Upon receipt of the completed Online Electronic Filing Registration, the system will verify that the attorney is admitted to practice and in good standing with The Florida Bar. A combination including but not limited to name, e-mail and Florida Bar Number, obtained during registration, will be validated against an electronic list provided by the Florida Bar. The attorney will be able to designate their user name and password. Email notification will be sent to the attorney at their identified e-mail account reflecting either approval or denial of the account. The selected user name and password will enable the attorney to retrieve and file documents electronically and to receive the Notice of Electronic Filing. The person to whom the user name and password is assigned is responsible for any documents filed using that user name and password. Each local Clerk's office may opt to participate in the authentication of the user accounts if they choose to do so.

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[1] Republished from the website of the Florida eFiling Authority, *Florida eFiling FAQs,* http://www.flclerks.com/eFiling_faq.html (last visited Jan. 22, 2011).

Q: Does the ePortal support pro-se filers?

Pro-se litigants will access the ePortal in a similar manner as attorneys. However, the user application process will have to utilize a different authentication process utilizing a government issued ID. All documents requiring a signature will need to be scanned by the filer at 300dpi resolution and attached as part of their electronic submission.

Q: Is special software required?

No, the only requirement will be an internet connection and a browser.

Q: What document types does the ePortal support?

The ePortal will accept filings in Word or PDF formats. All documents will be converted to PDF formats by the ePortal. By default, the ePortal will provide the PDF format to the local record system. Each county will also have the option to receive the original Word document if available. The ePortal can also provide the conversion to tiff upon request if the local DMS cannot.

Q: Are all types of documents accepted?

Certain types of documents (wills, etc) will still require a paper filing for the time being.

Q: Will there be any charges for users of the ePortal?

Authorized filers may access the ePortal and file documents at no charge above the statutory filing fee. If a filer chooses to pay statutory fees using a credit card, they will be charged an additional credit card transaction fee which will be used to cover the associated banking and merchant fees as allowed by Florida Statutes.

Q: What electronic notifications will be supported by the ePortal?

The ePortal will support the following electronic notifications:

- Receipt of subscriber application
- Acceptance/activation of subscriber account
- Change of subscriber profile including login credentials
- Receipt of filing including filing id number
- Acceptance of filing including filing id number and case identification data
- Rejection of filing including filing id number, case identification data and rejection reason

Q: How will the ePortal store the filing time and time stamping of filings?

All dates and times, including when the filing is received at the ePortal and accepted/rejected by the clerk, are stored in the ePortal database to ensure the accuracy and consistency of when the

event took place. An electronic filing may be submitted to the portal at any time of the day or night, twenty four (24) hours a day, seven days a week. For purposes of determining timeliness, an accepted filing shall be deemed filed on the date and time when the electronic filing is received at the ePortal.

Q: How will the ePortal provide access to filings once they are accepted by the local Clerk/Recorder?

The ePortal provides access to filings "in progress" only. Once the filing is accepted and filed in the local CMS/DMS, this becomes the official court record just like the current paper process. Original filings are retained at the portal for a brief period and then removed. Permanent access to these documents will be provided through existing methods – local web sites and CCIS links. Per AOSC04-04, filers will only be able to access cases of which they are a party of record. This access will be provided through a secured link to the existing CCIS database and links. When a county implements ICD Version 2.00 of CCIS, the Bar ID will be linked to each case in CCIS. When an attorney of record registers on the Portal with their Bar ID, they will be able to see any case linked to their Bar ID via a secured link to the existing CCIS database.

Q: What happens if a filing occurs on the ePortal and the local system is down?

If the local record keeping system is down or otherwise not available, then any process that depends on the availability of the local record keeping system will not be available. Filings that are 'waiting to be filed' will continue to wait and the re-try mechanism will continue to re-try. Once the local record keeping system is back up, the filings are filed and notifications are sent.

Q: How will the ePortal be integrated with local record keeping systems?

The ePortal is capable of interfacing with other electronic filing service provider systems through the use of Secured Web Services. This functionality allows for system to system interaction with existing and new systems. The ePortal is capable of sending and receiving standard pre-packaged transactions in accordance with current XML standards known as the Electronic Court Filing (ECF) Version 4.0. This standard utilizes other existing XML standards such as National Information Exchange Model (NIEM) and Oasis Legal XML. This standard allows for interfaces with providers and large law firms with the capability of ECF 4.0 XML compliant output. The ePortal provides a common entry point for court electronic filings in the State of Florida and has been developed in compliance with eFiling rules as set forth in Florida Rule of Judicial Administration 2.525 as well as standards set forth by the Supreme Court's eFiling Committee and subsequently approved by the Supreme Court in AO 09-30. The ePortal's electronic filing implementation is based on implementation of each Major Design Element (MDE) as defined in "Oasis LegalXML Electronic Court Filing Specification Version 4.0 (ECF 4.0 Specification)". The ePortal provides the Filing Assembly, Filing Review and Service MDE's. The Courts Record MDE is implemented by each Clerk-specific Case Maintenance System application. The Courts Record MDE provides the primary interface to integrate the ePortal eFiling transactions with the official case record of the court (i.e. Clerk's Case Maintenance System). The ePortal uses an adapter pattern to interface with Court Record MDE operations. Interfaces specific to a county case maintenance systems are loaded dynamically at runtime. Components implementing

the "Court Record MDE operations" are deployed into the same networking environment as underlying CMS and must be accessible over a public network or via a proxy accessible over a public network. Application Adaptors may be necessary for Court Record MDE implementations that are not complaint with ECF 4.0 specifications.

Q: What steps do we need to take to begin?

Your local clerk will provide you with assistance regarding how to log in and use the portal when the portal becomes fully operational.

Clerk's Office FAQs

Q: What is the testing process for individual counties to integrate their local systems with the ePortal?

A test site (**test.myflcourtsaccess.com**) exists for this purpose and is supported by the FACC Service Center (**support@flclerks.com**). FACC development and testing team will work with local CMS application development and testing team directly during the integration testing phase. A set of "Test Cases" created by the Portal team will be shared with CMS application team, are used as base line for integration testing of CMS Interface. During the integration testing the portal team is responsible for generating the fillings sent to the CMS interface. Once integration aspects of the interface are tested, then additional testing can take place without involving the portal team.

Q: Does an individual Clerk's office have to use the ePortal Review Client?

No, the ePortal supports two modes of a Filing Review Process: "Portal Review" and "Local Review". The "Review Process Mode" is configured at each organization (Clerk) level. In "Portal Review" mode, filings submitted by the filers are stored at the ePortal. Reviewers (i.e. County Clerk Staff) sign on to the ePortal and utilize applications provided by the ePortal to review these filings. Upon completion of the review process, filings are sent to local record keeping systems for docketing. In this mode, all functions of filing review process (receiving, presenting, and managing the filings) are handled at the ePortal level by ePortal provided components. In "Local Review Mode"(also called a non-ePortal Review), filings submitted by the filers are initially stored at the ePortal and immediately forwarded to local record keeping systems for review and docketing. In this mode, applications to review the filings and forwarding accepted filings for docketing are handled by third party applications. In this mode, the ePortal handles the receiving part and the third party application handles the presentation part of the Filing Review MDE. Management activities the of Filing Review MDE are split between the ePortal and the third party application.

Florida eFiling Authority Board[2]

The Board of Directors of the Florida eFiling Authority consists of eight Circuit Court Clerks and the Clerk of the Florida Supreme Court. The Authority provides the governance for the Florida eFiling Portal, found at **www.myflcourtaccess.com**, including the design, development, implementation, operation, upgrading, support and maintenance of the portal. The Authority is also responsible for providing the most economic and efficient method for the e-filing of court records.

[2] Republished from the website of the Florida eFiling Authority, *eFiling Authority Home*, http://www.flclerks.com/eFiling_authority.html (last visited Jan. 22, 2011).

The Florida Senate

Interim Report 2011-127 *January 2011*

Committee on Judiciary

REVIEW THE PROCEDURES AND STANDARDS FOR SECURING PROTECTIVE INJUNCTIONS

Issue Description

The Florida Statutes authorize distinct types of orders of protection against violence, including injunctions for protection against domestic violence, repeat violence, sexual violence, and dating violence. An injunction is secured through a civil proceeding governed by the Florida Family Law Rules of Procedure. For example, some of the elements in the process for securing a domestic violence injunction include: filing a sworn petition that alleges the existence of domestic violence and includes specific facts upon which relief is sought; an ex parte review by a judge; potential awarding of a temporary injunction; the scheduling of a return hearing; personal service on the respondent with a copy of the petition; and issuance or denial of a final injunction.

Although in general the orders play an important role in helping to protect individuals from harm, legal scholarship notes that misuse of orders of protection against violence does occur through the filing of false petitions. For example, an abuser may file a false petition against his or her victim, perhaps to intimidate the victim or exclude the victim from a shared residence. In other cases, a person who is not truly a victim of violence, or who does not have reasonable cause to believe that he or she is in imminent danger of becoming a victim of violence, may file a petition in order to harass the respondent or to gain an advantage over the respondent in a related family law matter, such as a divorce or child custody proceeding. Misuse of the process can thwart the public-safety purposes underlying the injunctions and can result in inefficiencies and costs for the state courts system.

This report reviews the current procedures and standards governing the award of injunctions for protection against domestic violence, repeat violence, sexual violence, and dating violence, in an effort to identify the extent to which misuse of the process is occurring, or may occur, and to identify enhancements to the statutory and court-rule framework.

Background

An injunction for protection is a civil order that provides protection from abuse by certain people. An injunction can order the abuser to do certain things (such as moving out of the house) or not do certain things (such as contacting someone), or it can give the victim certain rights (such as temporary custody of any children).[1] In the 1970s, states began creating laws to help stop domestic violence and provide relief to victims. Today all 50 states have laws providing for domestic violence injunctions,[2] and many states also protect against dating violence, sexual violence, repeat violence, and stalking. In 1979, the Florida Legislature created a cause of action for an injunction for protection against domestic violence, and starting in 1988 it also created separate causes of action for an injunction for protection against repeat violence, sexual violence, or dating violence.[3]

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[1] WomensLaw.org, *Know the Laws (Florida): Injunctions for Protection Against Domestic Violence* (Feb. 3, 2010), http://www.womenslaw.org/laws_state_type.php?id=496&state_code=FL (last visited Dec. 14, 2010).

[2] David H. Taylor et al., *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 84 (Fall 2008) (citing Catherine F. Klein and Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 810 (Summer 1993)).

[3] See chs. 79-402, s. 1, and 88-344, s. 1, Laws of Fla.

Injunction for Protection against Domestic Violence

In 2005, it was estimated that more than 1.5 million adults in the United States are victims of domestic violence each year, and more than 85 percent of the victims are women.[4] In Florida, 113,123 incidents of domestic violence were reported in 2008, 1.8 percent fewer than reported in 2007.[5]

Under Florida's legal framework, a victim of domestic violence,[6] or a person who has reasonable cause to believe that he or she is in imminent danger of becoming a victim of domestic violence, may seek injunctive relief.[7] In seeking a protective injunction, a person must file a sworn petition with the court that alleges the existence of domestic violence and includes specific facts and circumstances upon which relief is sought.[8] The court must set a hearing at the earliest possible time after a petition is filed.[9] The respondent must be personally served with a copy of the petition, financial affidavit, Uniform Child Custody Jurisdiction and Enforcement Act affidavit, if any, notice of hearing, and any temporary injunction that has been issued.[10]

The court may grant a temporary ex parte injunction if it finds that there is an immediate and present danger of domestic violence. When issuing a temporary injunction, the court must rely solely on the four corners of the petition and may not consider other evidence, unless the respondent has been given reasonable notice of the hearing. If the court denies a temporary injunction because there was no finding of immediate danger, the court must schedule a follow-up hearing at the earliest possible time. There are statutory criteria that a court must consider when determining whether a petitioner is in "imminent danger" of becoming a victim of domestic violence.[11] If a temporary injunction is granted, it is effective for a period of 15 days, in which time a full hearing must be held. Either party may move the court to modify or dissolve an injunction at any time.[12]

Section 741.31, F.S., provides that it is a first-degree misdemeanor[13] for a person willfully to violate an injunction for protection against domestic violence. The court can enforce a violation of an injunction through a civil or criminal contempt proceeding, or the state attorney may prosecute it as a criminal violation.[14] Any person who suffers as a result of a violation of an injunction for protection against domestic violence may be awarded economic damages, including costs and attorney's fees, for the injury or loss suffered.[15]

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[4] Margaret Graham Tebo, *When Home Comes to Work*, ABA JOURNAL (Sept. 2005), *available at* http://www.abajournal.com/magazine/when_home_comes_to_work/ (last visited Dec. 14, 2010) (citing statistics from Legal Momentum, an advocacy and research organization based in New York, N.Y.); *see also* Nat'l Coalition Against Domestic Violence, *Domestic Violence Facts*, http://www.ncadv.org/files/DomesticViolenceFactSheet(National).pdf (last visited Dec. 14, 2010).

[5] Florida Dep't of Law Enforcement, *Crime in Florida* (Jan.-Dec. 2008), http://www.fdle.state.fl.us/Content/getdoc/4f6a6cd0-6479-4f4f-a5a4-cd260e4119d8/CIF_Annual08.aspx (last visited Dec. 14, 2010).

[6] Domestic violence is defined as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member." Section 741.28(2), F.S.

[7] Section 741.30(1), F.S.

[8] Section 741.30(3), F.S.

[9] Section 741.30(4), F.S.

[10] *Id.* When an immediate and present danger of domestic violence exists, the court may grant a temporary injunction ex parte, pending a full hearing. Section 741.30(5), F.S.

[11] Section 741.30(6)(b), F.S.

[12] Section 741.30(10), F.S.

[13] A first-degree misdemeanor is punishable by a term of imprisonment not exceeding one year or a fine not exceeding $1,000, or both. See ss. 775.082(4) and 775.083(1), F.S.

[14] Section 741.30(9), F.S.

[15] Section 741.31(6), F.S.

Injunctions for Protection against Repeat Violence, Sexual Violence, or Dating Violence

Data from the National Women's Study and the National Violence Against Women Survey indicate that 13.4 percent of adult women in the United States have been victims of a forcible rape sometime during their lifetime.[16] Based on this national data, one report found:

> [A]pproximately 11.1% of adult women in Florida have been victims of one or more completed forcible rapes during their lifetime. According to the 2000 Census, there are about 6.4 million women age 18 or older living in Florida. This means that the estimated number of adult women in Florida who have ever been raped is nearly 713,000.[17]

Additionally, statistics show that one in five high school girls has reported being physically or sexually abused by a dating partner, and females ages 16 through 24 are three times more vulnerable for partner violence than any other age group.[18]

Section 784.046, F.S., governs the issuance of injunctions for protection against repeat violence,[19] dating violence,[20] and sexual violence.[21] The statute specifies the following:

- Petitions for injunctions for protection must allege the incidents of repeat violence, sexual violence, or dating violence and must include the specific facts and circumstances that form the basis upon which relief is sought.[22]
- Upon the filing of the petition, the court must set a hearing to be held at the earliest possible time. The respondent must be personally served with a copy of the petition, notice of hearing, and temporary injunction, if any, prior to the hearing.[23]
- When it appears to the court that an immediate and present danger of violence exists, the court may grant a temporary injunction, which may be granted in an ex parte hearing, pending a full hearing, and may grant such relief as the court deems proper.[24]
- The court shall enforce, through a civil or criminal contempt proceeding, a violation of an injunction for protection.[25]
- The petitioner or the respondent may move the court to modify or dissolve an injunction at any time.[26]

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[16] Kenneth J. Ruggiero and Dean G. Kilpatrick, *Rape in Florida: A Report to the State, One in Nine*, NAT'L VIOLENCE AGAINST WOMEN PREVENTION RESEARCH CTR., 1 (May 15, 2003), *available at* http://www.doh.state.fl.us/Family/svpp/planning/Rape_in_Florida.pdf (last visited Dec. 14, 2010).
[17] *Id*. at 2.
[18] American Bar Association, *Teen Dating Violence Facts* (2006), http://www.abanet.org/unmet/teendating/facts.pdf (last visited Dec. 14, 2010).
[19] Section 784.046(1)(b), F.S., defines repeat violence as "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member."
[20] Dating violence is defined as "violence between individuals who have or have had a continuing and significant relationship of a romantic or intimate nature." The following factors come into play when determining the existence of such a relationship: (1) a dating relationship must have existed within the past six months; (2) the nature of the relationship must have been characterized by the expectation of affection or sexual involvement between the parties; and (3) the persons involved in the relationship must have been involved over time and on a continuous basis during the course of the relationship. Dating violence does not include violence in a casual acquaintanceship or between individuals who have only engaged in ordinary fraternization. Section 784.046(1)(d), F.S.
[21] Sexual violence is defined as any one incident of "1. Sexual battery, as defined in chapter 794; 2. A lewd or lascivious act, as defined in chapter 800, committed upon or in the presence of a person younger than 16 years of age; 3. Luring or enticing a child, as described in chapter 787; 4. Sexual performance by a child, as described in chapter 827; or 5. Any other forcible felony wherein a sexual act is committed or attempted." For purposes of this definition, it does not matter whether criminal charges based on the incident were filed, reduced, or dismissed by the state attorney. Section 784.046(1)(c), F.S.
[22] Section 784.046(4), F.S.
[23] Section 784.046(5), F.S.
[24] Section 784.046(6), F.S.
[25] Section 784.046(9), F.S.
[26] Section 784.046(10), F.S.

There are statutory provisions governing enforcement and what constitutes a violation of these injunctions, similar to those governing a domestic violence injunction.[27]

Statistics on Protective Injunctions and Filings

One report found that approximately 600,000 to 700,000 permanent protection orders are entered each year into the registry of restraining orders within the National Crime Information Center (NCIC) of the Federal Bureau of Investigation.[28] However, the actual number of permanent protection orders entered each year may be higher due to the fact that many jurisdictions do not contribute to the NCIC protection order file.[29]

According to statistics from the Florida Office of the State Courts Administrator, in recent years the annual number of domestic violence case filings, which includes domestic violence, repeat violence, sexual violence, and dating violence, has ranged from 88,259 to 96,113, with no consistent pattern of increase or decrease. (See the table below.) There were 92,924 domestic violence case filings during the 2008-2009 fiscal year, which was more filings than any other circuit family court category that same year.[30] Of that number, 31,201 of the filings were specifically related to repeat violence petitions.[31]

Case Type	FY 2005-06	FY 2006-07	FY 2007-08	FY 2008-09	FY 2009-10
Simplified Dissolution	5,185	5,092	5,264	5,542	n/a
Dissolution	92,015	91,860	88,297	82,597	n/a
Child Support	34,790	34,100	35,966	37,111	n/a
Other Domestic Relations	45,500	40,035	40,509	40,611	n/a
Domestic Violence	**95,785**	**96,113**	**95,936**	**92,924**	**88,259**
Juvenile Delinquency	74,187	72,462	70,284	64,585	n/a
Juvenile Dependency	18,006	16,823	14,221	12,484	n/a

Potential Misuse of the Protective Injunction Process

Although data shows the need for and benefit of protective injunctions, legal scholarship notes that misuse of orders of protection against violence does occur through the filing of false petitions. For example, an abuser may precede a victim to the courthouse and obtain an ex parte protective injunction, which leads to the actual victim being removed from the home and unable to see his or her children. This scenario is illustrated in a Missouri case in which, after a year of a tumultuous marriage, the battering husband obtained an ex parte order for protection that prohibited his wife from entering or staying in their apartment. Additionally, the husband signed a power of attorney authorizing his parents to make decisions on behalf of the couple's child. After a routine visit, the wife tried to keep the child, and the paternal grandparents called the police. Although the order of protection did not

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[27] *See* s. 784.047, F.S.
[28] Respecting Accuracy in Domestic Abuse Reporting, *Without Restraint: The Use and Abuse of Domestic Restraining Orders,* 8 (2008), *available at* http://www.mediaradar.org/docs/RADARreport-VAWA-Restraining-Orders.pdf (last visited Dec. 14, 2010).
[29] *Id.*; *see also* Sexual Violence Justice Inst., *Enforcement of Protection Orders Across State Lines*, *available at* http://www.mncasa.org/documents/svji_fact_sheets/Full%20Faith%20and%20Credit%20for%20Protection%20Orders.pdf (last visited Dec. 14, 2010).
[30] Office of the State Courts Adm'r, *Florida's Trial Court Statistical Reference Guide, FY 2008-09*, 6-2 (Jan. 2010), *available at* http://www.flcourts.org/gen_public/stats/reference_guide08_09.shtml (last visited Sept. 4, 2010).
[31] *Id.*

address custody, the police ordered the wife to return the child to the grandparents. Having no job, no car, and no house, the wife moved to Florida to live with her mother. After the husband was incarcerated for unrelated issues, the wife attempted to obtain custody of the child. However, the court awarded custody to the paternal grandparents since the child had been living with them as primary caregivers. Essentially, by being the first person to the courthouse for an injunction, the abuser in this situation managed to exclude his wife from the home and make it difficult for her to visit their child.[32]

Additionally, misuse of the process can occur when a person files a petition to accomplish something outside the scope of the protective injunction statutes. For example, potential areas of misuse could involve a party filing a petition to gain an advantage in a related family law matter, neighbors filing a petition for repeat violence to harass each other, or landlords filing a petition as a means to evict a tenant. When misuse occurs, it not only damages the credibility the protective injunction process, to the detriment of true victims of abuse, but it also wastes judicial resources, as well as the time of law enforcement, prosecutors, and advocates for victims of domestic violence.[33]

Findings and/or Conclusions

Securing Injunctions in Practice

The Legislature has created separate causes of action for an injunction for protection against domestic violence, repeat violence, sexual violence, and dating violence.[34] The Florida Supreme Court has promulgated forms under the Florida Family Law Rules of Procedure for use in petitioning for an injunction. The petition for securing an injunction for protection against domestic violence, for example, is nine pages and has seven sections. The petition requires certain personal information about the petitioner and the respondent, along with any case history and the reason for the injunction. The petitioner is asked to describe any other court case that is pending currently or that happened in the past between the petitioner and respondent. The petition provides a list of reasons for the petitioner to check for why he or she is a victim of domestic violence or has reasonable cause to believe he or she is in imminent danger of becoming a victim of domestic violence. The petition also provides a narrative section for the petitioner to describe the latest act or threat of violence. Finally, the petition includes sections regarding use and possession of the home, temporary time-sharing, and temporary financial support. The petitioner must sign the petition under penalty of perjury in front of a notary public or the clerk of the court.

Attached to the petition for an injunction for protection are instructions related to filling out the petition. The instructions explain when the form should be used, what happens if the judge grants or denies the petition, and where the petitioner can go for more information. The instructions also provide additional information on whether a Uniform Child Custody Jurisdiction and Enforcement Act affidavit, family law financial affidavit, or child support guidelines worksheet is needed.

During the 2002 Regular Session, the Legislature amended s. 741.30, F.S., to eliminate the requirement of a filing fee for a petition for protection against domestic violence.[35] A year later, the Legislature also prohibited the clerk of the court from charging a filing fee for a petition for protection against repeat violence, sexual violence, or dating violence.[36]

After a petition is filed, the clerk of court provides it to the judge for a determination of whether an ex parte temporary injunction should be granted. In some cases, the petition is accompanied by additional information, such as criminal reports or information related to other cases involving the petitioner and respondent, which may be gathered by a case manager. Even if additional information is presented to the judge, the judge must rely solely on the four corners of the petition to determine whether or not to grant a temporary injunction, unless the

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[32] Nina W. Tarr, *The Cost to Children When Batterers Misuse Order for Protection Statutes in Child Custody Cases*, 13 S. CAL. REV. L. & WOMEN'S STUD. 35, 48-50 (Fall 2003).
[33] *See id.* at 38.
[34] See ss. 741.30(1) and 784.046(2), F.S.
[35] Chapter 2002-55, s. 12, Laws of Fla.
[36] Chapter 2003-117, s. 2, Laws of Fla.

respondent appears at the hearing or has received reasonable notice of it.[37] If the court issues a temporary injunction, pending a full hearing within 15 days, it may enter relief as it deems proper, including:

- Restraining the respondent from committing any acts of domestic violence;
- Awarding to the petitioner temporary exclusive use and possession of the dwelling that the parties share or excluding the respondent from the residence of the petitioner; or
- Providing the petitioner a temporary parenting plan, including a time-sharing schedule.[38]

Within 15 days, unless an extension has been obtained, the court must hold a full hearing on the injunction. For example, in Leon county full hearings are held two days a week on Mondays and Thursdays. Each case is heard separately in front of the judge, and the petitioners and respondents wait outside the courtroom with a bailiff until their case is called. If the petition is granted, the respondent must wait in the courtroom while the petitioner leaves and, regardless of the outcome, both parties are given the final order prior to leaving.

Concerns with the Injunction Process

A recent national study that examined different perspectives on civil protection orders in domestic violence cases found that protective orders do work and make victims feel safer for the time the orders are in place. Specifically, 50 percent of victims experienced no violations of the protection order during a six-month follow-up period, and, for those victims who experienced violations, the violence was significantly reduced.[39] Also according to the study, Kentucky saved approximately $85 million over a one-year period because of declines in violence.[40]

Despite the benefits of protective injunctions, legal scholarship and anecdotal information indicate that misuse of the system may be occurring, which may affect persons falsely accused of violence, victims of violence when abusers use the process against them, and victims of violence generally if the credibility of the injunction process is harmed. In 1995, the Massachusetts Trial Court reviewed domestic violence injunctions issued in the state and found that less than half of the orders involved an allegation of violence.[41] More recently, Campbell County, West Virginia, completed an analysis of domestic violence injunctions issued in 2006 and concluded that 81 percent were unnecessary or false.[42]

Research for this interim report did not find a comparable analysis of protective injunctions in Florida. However, Senate professional staff sent a questionnaire to all 20 judicial circuits, as well as the circuit and county conferences, to solicit input from judges who work with the domestic violence docket to gauge their experiences with the standards and procedures for obtaining an injunction for protection. The majority of responses indicated that judges believe that misuse of the system occurs frequently, primarily in the area of repeat violence or in domestic violence in order to gain an advantage in a family law matter. In particular, 14 out of 33 survey respondents suggested that the greatest misuse of the system is in repeat violence cases. One judge estimated that, at least in his circuit, 30 to 40 percent of repeat violence petitions have no merit. Some examples cited by judges of situations in which repeat violence is alleged are:

- Feuding neighbors filing petitions against each other;
- Issues of possible trespass;
- Residents of condominium associations filing against each other;
- Filings by former boyfriends and girlfriends against one another, or filings by a person's current boyfriend or girlfriend against the person's former boyfriend or girlfriend; and
- Landlords filing against tenants to avoid the lawful eviction process.

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[37] Section 741.30(5)(b), F.S.
[38] Section 741.30(5)(a), F.S.
[39] Nikki Hawkins, Nat'l Institute of Justice, *Perspectives on Civil Protective Orders in Domestic Violence Cases: The Rural and Urban Divide*, NIJ Journal No. 266 (June 2010), *available at* http://www.ojp.usdoj.gov/nij/journals/266/perspectives.htm (last visited Sept. 15, 2010).
[40] *Id*.
[41] Respecting Accuracy in Domestic Abuse Reporting, *supra* note 28, at 9.
[42] *Id*.

Additionally, many judges cited examples of domestic violence injunctions being used to address issues that should be addressed in family court. For example, one judge commented that:

> The domestic violence injunctive process is also being used as a means of dealing with acrimony caused by the inability of parties to resolve issues concerning time sharing, support and other issues which should be addressed in Family Court. Many of the litigants I see in Domestic Violence Court indicate that they cannot or have not been able to file a dissolution action because they cannot afford the filing fee. Failure to file the action and thus settle their affairs often leaves these issues, which are generally highly emotional to begin with, unresolved. In other situations, the parties have filed a dissolution action but cannot get a hearing quickly enough to resolve the issues. The volatility caused by the inability to resolve these issues expeditiously often escalates to violence. Domestic Violence Court then becomes a viable avenue for these litigants to address issues that should really have been addressed in Family Court.

One judge noted that petitioners often use the injunction process to enforce child support or time-sharing issues. For example, one judge stated: "I have also seen, not infrequently, where ex parte injunctions are obtained on the eve of, or commensurate with, the filing of a petition to dissolve a marriage with the intent [to] get a 'jump' on issues involving children or exclusive use of a marital residence. It is also unfortunately not uncommon where the ex parte injunction process is used to circumvent or vary existing court orders in dissolution or paternity cases pertaining to minor children."

The extent to which the court should address collateral issues and for what period of time is a potential challenge for judges in the case of legitimate petition filings as well. In awarding a domestic violence injunction, a judge may feel it is necessary also to address support or time-sharing issues related to any minor children of the petitioner and respondent, at least in a preliminary fashion. However, because these issues have been addressed as part of the protective injunction process, the parties may not have an incentive to pursue proceedings through the traditional family court docket, which is the more appropriate forum for addressing these matters in a long-term and comprehensive fashion.

Although the majority of respondents to the questionnaire stated that there is significant misuse of the current system, some felt that the misuse was not necessarily intentional, but rather reflected a lack of understanding by petitioners – most of them pro se[43] – as to what is legally required for an order for protection. Suggestions for addressing this issue included: rewriting the petitions using simple, understandable wording; providing additional explanations and definitions on the petitions; having the instructions and petitions available in multiple languages; and using intake officers to help petitioners fill out the petition accurately. A few of the respondents suggested providing education to the public as well as to law enforcement and other agencies, such as the Department of Children and Families, on when an order for protection is the correct course of conduct. Comparably, advocates on behalf of victims of domestic violence interviewed for this report stressed additional education for judges hearing protective injunction cases.

Some other recommendations from the judicial community to help curb misuse of the system are to put time limits on certain provisions in an injunction, such as the time-sharing or child support issues, in order to motivate litigants to raise those issues in family court; to follow through with swift prosecution of petitioners found to have lied in a petition; to amend the statute to authorize the judge to consider evidence beyond the pleadings when determining whether to grant a temporary ex parte injunction; to revise the injunction process in ch. 39, F.S., so that petitions alleging child abuse are brought in family court, where the Department of Children and Families can investigate and a guardian ad litem can be appointed, rather than in domestic violence court; and to create a separate injunction for stalking and impose a filing fee for repeat violence petitions. Of all the recommendations provided by judges throughout the state, the overwhelming suggestion was to institute a filing fee or sanctions in all protective injunction cases.

[43] A pro se petitioner is one without representation by an attorney. See BLACK'S LAW DICTIONARY (9th ed. 2009).

Violence Against Women Act; Filing Fee Limitations

The policy recommendation of imposing a filing fee or sanctions for misuse of the system may have fiscal consequences for the state because of funding conditions under the federal Violence Against Women Act (VAWA). The U.S. Department of Justice describes VAWA as a comprehensive policy "designed to improve criminal justice responses to domestic violence, sexual assault, and stalking to increase the availability of services for victims of these crimes."[44]

In addition to creating an approach to help end violence against women, VAWA authorizes grant programs. In order for a state to receive funding under VAWA, the state must certify that it does not require a victim of domestic violence, stalking, or sexual assault to bear "the costs associated with the filing, issuance, registration, or service of a . . . protection order [or] petition for a protection order."[45] States applying for VAWA funding had to be in compliance with the new law by the end of 2003. According to the federal Office on Violence Against Women, charging victims (the petitioner) a filing fee and then offering a fee waiver based on indigent status or providing reimbursement for legitimate petitions is not allowed.[46] However, a state may charge the petitioner a fee if the court finds that the person was not a victim of domestic violence, sexual assault, or stalking.[47]

During fiscal year 2009, 22 programs in Florida received funding from the Office on Violence Against Women, totaling more than $18 million in grant funding.[48] Although a common suggestion for curbing misuse of the protective order process has been to institute a filing fee, if the Legislature chooses to do so Florida may be at risk for losing millions of dollars in federal funding from VAWA. However, it appears based on a review of VAWA guidelines that the Legislature may authorize court-imposed sanctions for frivolous petitions or institute a filing fee for repeat violence petitions, as long as petitioners do not have to pay a fee to file a petition for stalking.

Repeat Violence as an Area of Concern

As mentioned previously in this report, many judges reported that the most misused injunction is the repeat violence injunction. According to the Office of the State Courts Administrator, approximately 58 percent of petitions for repeat violence are dismissed.[49]

The Legislature in 1988 created the cause of action for an injunction for protection for repeat violence, which is codified in s. 784.046, F.S.[50] The Legislature has amended the statute multiple times, including in 1995, when it included stalking in the definition of repeat violence, and in 2002 and 2003, when it added causes of action for an injunction for protection in cases of dating and sexual violence to s. 784.046, F.S.[51] Repeat violence is defined in statute as "two incidents of violence or stalking committed by the respondent, one of which must have been within 6 months of the filing of the petition, which are directed against the petitioner or the petitioner's immediate family member."[52]

Many of the respondents to the questionnaire from Senate professional staff opined that instituting a filing fee – especially in repeat violence situations – may cut down on the misuse of the protective order process. However, as discussed previously, instituting a filing fee for all protective orders may jeopardize federal funding under VAWA. In response to federal funding concerns, several judges, as well as other professionals interviewed for

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[44] Office on Violence Against Women Act, Dep't of Justice, *The Facts about the Violence Against Women Act*, *available at* http://www.ovw.usdoj.gov/docs/vawa.pdf (last visited Sept. 21, 2010).
[45] 42 U.S.C. s. 3796gg-5(a).
[46] Office on Violence Against Women Act, Dep't of Justice, *Frequently Asked Questions on the VAWA 2000 Requirement Regarding Costs for Criminal Charges and Protection Orders*, http://www.ovw.usdoj.gov/faqvawa2000.htm (last visited Sept. 22, 2010).
[47] *Id*.
[48] Office on Violence Against Women Act, Dep't of Justice, *FY 2009 Office on Violence Against Women Grant Awards by State*, http://www.ovw.usdoj.gov/grant2009.htm (last visited Sept. 22, 2010).
[49] Conversation with staff from the Office of the State Courts Adm'r (Aug. 3, 2010).
[50] Ch. 88-344, s. 1, Laws of Fla.
[51] See chs. 95-195, s. 13; 2002-55, s. 21; and 2003-117, s. 2, Laws of Fla.
[52] Section 784.046(1), F.S.

this report, suggested removing stalking from repeat violence and creating new statutory criteria for stalking and then charging a filing fee for repeat violence petitions. Under VAWA, a state may not charge a fee in connection with the filing of a protection order, or a petition for a protection order, for domestic violence, stalking, or sexual assault.[53] Accordingly, a critical step in charging a filing fee for a repeat violence protection order would be to separate stalking from the definition of repeat violence in order to be in compliance with federal law.

During the 2009 Regular Session, HB 5117 attempted to institute a filing fee for repeat violence. The bill amended s. 28.241, F.S., relating to filing fees for trial and appellate proceedings, and provided that the person instituting an action for an injunction against repeat violence shall pay a $200 filing fee to the clerk of the court.[54] The Office of the State Courts Administrator estimated that, for fiscal year 2009-10, a $200 filing fee for petitions for repeat violence injunctions would have generated approximately $1.6 million to $2.7 million.[55] However, this provision was removed from HB 5117 before it passed the House of Representatives.

In addition to removing stalking from repeat violence, the Legislature may also need to consider amending the definition of "violence" under s. 784.046, F.S., in order not to jeopardize federal funding under VAWA. Section 784.046(1), F.S., defines "violence" as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, or false imprisonment, or any criminal offense resulting in physical injury or death, by a person against any other person." This definition of violence is incorporated into the definition of "repeat violence."[56] According to the Office on Violence Against Women, jurisdictions may charge a fee for a repeat violence protection order as long as the applicant is not a victim of domestic violence, sexual assault, or stalking.[57] Although Florida has a separate cause of action for a protective order for sexual violence, it is unclear whether the current definition of repeat violence would jeopardize Florida's federal funding from VAWA. However, according to one judge, the definition of repeat violence may not need to be changed because Florida has a separate cause of action for a protective injunction for sexual assault.[58] Accordingly, because victims of sexual assault by family or household members can file for a domestic violence or sexual assault injunction, and victims of sexual assault by a stranger can file for a sexual assault injunction, the fact that sexual assault is encompassed in the definition of repeat violence may not be of significance.

Education, Training, and Intake Assistance

Judges and advocates on behalf of domestic violence victims also recommended training for all parties involved in cases related to protective injunctions. Representatives of the legal community that serve victims of domestic violence stress the importance of judicial education. For example, many domestic violence advocates mentioned that it would be beneficial for judges to understand the characteristics and perspective of a domestic violence victim. Having that knowledge may help judges understand why victims respond in certain ways, such as voluntarily dismissing his or her case.

Almost all of the judges responding to the questionnaire sent by professional staff of the Judiciary Committee stated that aside from Florida Judicial College, which provides a total of 3.5 hours of education on the topic of protective injunctions, there is no required training for judges related to protective injunctions. All judges do receive Florida's Domestic Violence Benchbook, which was developed by the Office of the State Courts Administrator (OSCA) "to address the highly litigated legal issues in domestic violence cases."[59]

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[53] 42 U.S.C. s. 3796gg-5(a).
[54] See HB 5117 (2009 Reg. Session), *available at* http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=_h5117__.xml&DocumentType=Bill&BillNumber=5117&Session=2009 (last visited Sept. 27, 1010).
[55] Office of the State Courts Adm'r, *Repeat Violence Filing Fee/Court Cost* (on file with the Senate Committee on Judiciary).
[56] See s. 784.046(1)(b), F.S. (repeat violence means two incidents of violence or stalking).
[57] *Frequently Asked Questions on the VAWA 2000 Requirement Regarding Costs for Criminal Charges and Protection Orders*, *supra* note 46.
[58] E-mail from Judge Carroll Kelly, Administrative Judge, Domestic Violence Division, to Professional Staff of the Senate Committee on Judiciary (Sept. 24, 2010) (on file with the Senate Committee on Judiciary).
[59] Office of the State Courts Adm'r, *Florida's Domestic Violence Benchbook*, 3 (Sept. 2008), *available at* http://www.flcourts.org/gen_public/family/bin/DV%20bench%20book%202008(try%202).pdf (last visited Sept. 17).

The Office of Court Improvement (OCI) within OSCA develops programs to improve Florida's courts. One of the newest programs created by OCI is the domestic violence online training site. The program "is designed to introduce judges and court staff to issues and challenges that typically arise in civil domestic violence cases. . . . This training program presents video scenarios and pertinent documents related to pro se parties engaged in a civil domestic violence injunction case."[60] According to OCI, more than 160 judges have used this free interactive program since it was introduced a year and a half ago.[61] The OCI also intends to implement a test at the end of the training program to assess how much information the person using the program is absorbing.[62] However, all training offered to judges through OCI is discretionary.

In addition to judicial education, it may be beneficial to have education available for state agency personnel as well as the public in general. For example, providing additional instructions and definitions on the petitions for a protective injunction may help petitioners complete the petition more accurately. Additionally, having separate intake counselors or advocates who can assist petitioners in filling out the forms and advise them of the requirements under the law may help ensure that judges receive specific and legible petitions. One judge suggested that the petition should direct the parties to be more specific about the elements that need to be alleged under the law because often petitioners write too much information, much of which is not pertinent to the injunction. Another judge stated that "[a]ny additional failure in the process when filing the petition is generally due to the lack of detail contained in the recitation of the facts supporting the petition. This issue can be addressed through appropriate training of those charged with processing the petitions before review." Other suggestions included providing the petitions in multiple languages, offering an informational video to petitioners before they apply for an injunction, and promoting continued education of law enforcement[63] and the Department of Children and Families on the proper legal basis for obtaining an injunction.

Operational Factors Affecting Injunction Workload

A procedural element to the protective injunction process that may be increasing judicial workload relates to the initial denial of an injunction at the ex-parte stage. The statute provides that, if the only ground for denial of a domestic violence injunction is no appearance of an immediate and present danger of domestic violence, the court *shall* set a hearing on the petition at the earliest possible time.[64] The statute does not explicitly authorize the petitioner to decline the return hearing. In cases of legitimate danger, the petitioner may prefer to decline the return hearing rather than risk having the respondent be served with notice of the hearing when there is no protective injunction in place. Additionally, there may be instances in which a person who files a petition that is not meritorious would, upon reflection, accept the decision and voluntarily decline the hearing. Explicitly providing for a decline of the return hearing may help petitioners avoid risk of physical harm or may save resources expended in scheduling and planning hearings that arguably are not necessary.

Frustrations with the injunction process may arise from challenges in contacting a person who secures a protective injunction when further court proceedings are necessary. When a petition is granted, it is important that the clerk of court be able to contact the petitioner if the respondent moves at a future date to have the injunction dissolved or its terms modified. Some practitioners noted that the process is complicated when the petitioner has relocated following the award of the original injunction but has not notified the clerk of his or her new address.

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[60] Florida State Courts, *Domestic Violence – Online Training*, http://virtualcourt.flcourts.org/ (last visited Oct. 18, 2010).
[61] Conversation with Rose Patterson, Chief of Court Improvement, Office of Court Improvement (Sept. 2, 2010).
[62] *Id*.
[63] Some practitioners who provided information for this report raised concerns that in some cases law enforcement officers may be inappropriately directing individuals to the protective injunction process. Representatives of law enforcement noted that officers currently receive training under a statute that requires "uniform statewide policies and procedures to be incorporated into required courses of basic law enforcement training and continuing education." Section 943.1701, F.S. Among the required elements are techniques for handling domestic violence disputes and legal rights and remedies available to victims. See *id*. Law enforcement officers are required by statute to provide victims of domestic violence and dating violence immediate notice of the legal rights and remedies available on a standard form developed and distributed by the Department of Law Enforcement. Sections 741.29(1) and 784.046(11), F.S.
[64] Section 741.30(5)(b), F.S.

Child Abuse Injunctions

The Florida Statutes prescribe a specific process for obtaining an injunction against child abuse. Under s. 39.504, F.S., the court may issue an injunction to prevent child abuse upon the request of certain entities at any time after a protective investigation has been initiated. The parties must be provided notice unless the child is found to be in imminent danger. If that is the case, a judge may issue an emergency injunction; however the court must hold a hearing on the next business day to dissolve the emergency injunction or to continue or modify it.[65] When issuing an injunction, the court can order the alleged offender to:

- Refrain from further abuse;
- Participate in a specialized treatment program;
- Limit contact or communication with the child;
- Refrain from contacting the child;
- Have limited or supervised visitation with the child;
- Pay temporary support or the costs of medical, psychiatric, and psychological treatment for the child or other family members; or
- Vacate the home in which the child resides.[66]

The petitioner, respondent, or caregiver may move to modify or dissolve the injunction at any time. The injunction remains in effect until dissolved or modified by the court.

Several practitioners with whom Senate professional staff spoke suggested that a possible area for improvement – which may help with the judicial workload on the domestic violence docket – is the ch. 39, F.S., injunction process. According to some practitioners, often in child abuse situations the Department of Children and Families (DCF) may suggest to the non-abusing parent that he or she needs to file a domestic violence injunction against the abuser on behalf of the child. However, a ch. 39, F.S., injunction is usually more appropriate because DCF can provide services to the family, a guardian ad litem (GAL) is appointed, and reunification is often the goal. In contrast, with a traditional domestic violence injunction, no contact is allowed at all by the abuser, a GAL is not appointed to speak on behalf of the child, and DCF does not have to stay involved in the case. Additionally, according to one judge, the parent filing for the domestic violence injunction will often tell the court that he or she does not actually want the injunction but filed for it out of fear that DCF would take away the children otherwise. In situations like this, the petitioner will most likely not enforce the injunction, and the children may still be at risk.

Practitioners with whom Senate professional staff spoke offered two areas of concern that may explain why the injunction process in ch. 39, F.S., is not utilized more often. The first concern is the turnaround time for a hearing. Section 39.504(2), F.S., requires the court to hold a hearing the next business day after an emergency injunction is issued. One judge mentioned that it is often impossible to hold a hearing so soon after the emergency injunction is issued. One suggestion for fixing this problem is to increase the time period for holding a full hearing to 15 days from the date of the emergency injunction – similar to a domestic violence injunction.

Another concern that was raised regarding the ch. 39, F.S., injunction is when a court actually has jurisdiction. Section 39.013, F.S., provides that the circuit court has original jurisdiction over all proceedings in ch. 39, F.S. Jurisdiction attaches with the filing of a shelter petition, dependency petition, or termination of parental rights petition. Based on the statutory language, some professionals believe that the court's jurisdiction to issue an injunction does not attach until either a dependency, child abuse, or some other equivalent petition has been filed.

During the 2009 Regular Session, Senate Bill 2288 addressed both of these concerns with the ch. 39, F.S., injunction process. First, the bill amended s. 39.013, F.S., to provide that jurisdiction also attaches when a petition for an injunction issued pursuant to s. 39.504, F.S., is filed. Additionally, the bill amended s. 39.504, F.S., to provide that upon the filing of a petition for injunction, the court must set a hearing at the earliest possible time,

[65] Section 39.504(2), F.S.
[66] Section 39.504(3)(a), F.S.

but no later than 15 days after the temporary ex parte injunction is issued. Senate Bill 2288 died in the Senate Committee on Children, Families, and Elder Affairs.

Options and/or Recommendations

Research for this interim report reveals that protective injunctions play an important role in helping to promote the safety of individuals exposed to or at risk of violence. However, the research also reveals potential for the protective injunction process to be misused by some individuals, either through the assertion of false allegations of violence or the seeking of injunctions, particularly injunctions against protection from repeat violence, for civil disputes beyond the scope of the governing statutes. Aside from intentional misuse of the process, the research also reveals judicial frustration with presentation of incomplete or irrelevant information in the filing of potentially legitimate petitions for protection. Based on that research, this review identifies changes that the Legislature and the state courts system could consider making to the protective injunction process in Florida.

In particular, this report recommends the following changes to the current framework to deter misuse of the process and protect true victims of violence:

- Remove stalking from the current repeat violence definition and create a separate cause of action for an injunction for protection against stalking. Additionally, institute a filing fee for the filing of a petition for repeat violence. The Legislature may wish to effectuate this recommendation carefully to ensure that the policy change does not jeopardize grant funding under the Violence Against Women Act, which requires state grant recipients to certify that the state does not require a victim of domestic violence, stalking, or sexual assault to bear the costs associated with the filing of a protection order.
- Amend Florida's child abuse injunction statute to allow jurisdiction to attach without requiring a dependency petition (or other equivalent petition) to be pending and provide that a hearing must be held within 15 days – rather than 24 hours – of a judge issuing an emergency child abuse injunction.

Additionally, to the extent judges are frustrated with the current injunction process, the following are some reforms that may help ensure that legitimate petitions are processed efficiently and that petitions that are not meritorious are discouraged:

- Redesign the petitions to provide additional instructions to petitioners on the proper legal requirements for an injunction and, if resources allow, provide intake counselors or advocates who can assist petitioners in filling out the petitions.
- To the extent resources are available, promote additional opportunities for judicial education.
- Prescribe a time limit for the portions of a domestic violence injunction that should be brought as part of the traditional family court docket. For example, when a judge issues a domestic violence injunction that also orders time-sharing or child support, those portions of the injunction would expire in 90 days in order to direct people into the proper court for those issues.
- Allow a petitioner to decline the return hearing if the court denies his or her ex parte petition solely on the ground that there is no appearance of an immediate and present danger of domestic violence.
- Require a petitioner who is granted a permanent injunction to notify the clerk of court if her or his address changes.

The Florida Senate

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Committee on Judiciary

REVIEW THE PROCEDURES AND STANDARDS GOVERNING JUDICIAL DISQUALIFICATION

Issue Description

Judicial impartiality is a core principle of the administration of justice in civil and criminal matters in the United States. Thus, state judicial systems provide mechanisms for a judge to be disqualified from a matter if a legally sufficient argument can be made that the judge's continued participation would prevent a party from receiving a fair hearing.

In Florida, disqualification of a trial judge is governed by statutory provisions and by rules of court, as well as by the Code of Judicial Conduct. A judge may disqualify himself or herself, or a party may formally move for disqualification. Under the Florida Rules of Judicial Administration, a motion to disqualify a trial judge must be in writing and specifically allege the facts and reasons that are the basis for disqualification. In addition, the motion must be sworn to by the moving party by signing the motion under oath or by a separate affidavit. Further, the attorney for the moving party must separately certify that the motion and the client's statements are made in good faith. Grounds for granting a motion to disqualify a judge include: (1) that the party fears he or she will not receive a fair trial or hearing due to judicial prejudice or bias; or (2) that the judge has an interest in the outcome of the matter, is related to one of the attorneys, or is a material witness.

This interim report examines the statutory, court rule, and case law framework governing disqualification of judges in civil and criminal matters in Florida. The report identifies any procedural or substantive elements of judicial disqualification that may merit revision by the Legislature through changes to statute or by the Supreme Court through changes to court rules, and it examines other jurisdictions' practices relating to judicial disqualification.

Background

Origins of Judicial Disqualification

The concept that judges should be fair and impartial dates back to the inception of the courts, and edicts designed to facilitate judicial impartiality have existed since ancient times.[1] Judicial disqualification[2] is "[r]ooted in the ancient maxim that judges should stand apart from the matter before them."[3] Early Jewish law and the Roman Code of Justinian contemplated the removal of judges on the suspicion of bias.[4] Litigants in early times enjoyed an expansive power to disqualify or recuse judges that "formed the basis for the broad disqualification statutes which generally still prevail in civil-law countries."[5]

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[1] Richard C. Flamm, *Judicial Disqualification in Florida*, 70 FLA. B.J. 58, 58 (Feb. 1996).

[2] The terms "disqualification" and "recusal" are used interchangeably throughout this report. Typically, "recusal" refers to a judge's decision to withdraw from presiding over a case on his or her own volition. "Disqualification" usually refers to a judge's withdrawal from a case at the request of one or more parties. However, in Florida, as well as in other jurisdictions, the terms "disqualification" and "recusal" are sometimes used interchangeably in practice, case law, statutes, rules, and ethical canons.

[3] John A. Meiser, *The (Non)Problem of a Limited Due Process Right to Judicial Disqualification*, 84 NOTRE DAME L. REV. 1799, 1803 (Apr. 2009).

[4] Flamm, *supra* note 1, at 58.

[5] *Id.*

Development of Judicial Disqualification in the United States

Judicial disqualification law in the United States is derived from the English common law, and the rule that "no man shall be a judge in his own case" was accepted in English law as early as the 17th century.[6] However, this concept was often limited in its application – resulting in the disqualification of judges in only those cases in which the judge had a direct pecuniary interest.[7] As a result of this strict application, English courts initially rejected disqualification premised upon a familial relationship to one of the parties in the case.[8]

Congress enacted the first recusal statute within three years following the ratification of the United States Constitution.[9] This law (the Act of May 8, 1792) "allowed federal district court judges to be disqualified if they had a financial interest in the litigation or had served as counsel to either party."[10] Over time, federal and state courts broadened application of disqualification and recusal standards, and by the turn of the 19th century "both federal and state governments began attempts to restrain judicial bias through statutory control."[11]

Current federal law – a derivative of the 1792 statute – provides specific and general grounds for recusal and disqualification by building upon the pecuniary-interest standard by adding "bias-based restrictions" on a federal judge's ability to preside over certain cases.[12] One statute includes a waivable catch-all provision, which mandates that a federal justice, judge, or magistrate remove himself from any litigation "in which 'his impartiality might reasonably be questioned.'"[13] The statute also delineates particular, unwaivable scenarios in which "perceived conflicts of interest require a judge to step down from a case," notwithstanding the judge's assessment of whether an actual conflict exists.[14]

Most states have enacted judicial disqualification statutes akin to the federal laws.[15] However, state disqualification laws may be difficult to characterize "because, within a given state, constitutional provisions, statutes, court rules, judge-made doctrine, codes of judicial conduct . . . , ethics board rulings, and administrative directives may all provide legal authority for removing a judge."[16] In every state, a judge is subject to removal for at least a demonstration of good cause.[17] In a minority of states, a judge may be removed on a peremptory basis without any demonstration of bias or other cause. Specific judicial disqualification procedures and standards from particular states are presented throughout the "Findings" section of this report.

ABA Model Code of Judicial Conduct

In 1972, the American Bar Association (ABA) drafted its Model Code of Judicial Conduct (Model Code), which has been adopted in some form in almost every state and by Congress.[18] The Model Code recognizes that an "independent, fair and impartial judiciary is indispensable to our system of justice."[19] Rule 2.11 of the Model

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[6] Amanda Frost, *Keeping Up Appearances: A Process-Oriented Approach to Judicial Recusal*, 53 U. KAN. L. REV. 531, 538-39 (Apr. 2005).
[7] *Id.* at 539.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] Meiser, *supra* note 3, at 1804. These provisions prohibited judges from hearing the appeal of cases in which the judge actually tried the lower case and allowed disqualification for bias or prejudice upon a party's demonstration of bias or prejudice in an affidavit. *See* Act of Mar. 3, 1911, ch. 231, s. 22, 36 Stat. 1087, 1090.
[12] *Id.* at 1805. *See* 28 U.S.C. s. 455.
[13] *Id.* (quoting 28 U.S.C. s 455(a)).
[14] *Id.* at 1806 (citing 28 U.S.C. s. 455(b)).
[15] At the federal level, judicial disqualification is governed by the following statutes: 28 U.S.C. s. 144, 28 U.S.C. s. 455, and 28 U.S.C. s 47.
[16] Deborah Goldberg et al., *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 516 (2010), *available at* http://www.washburnlaw.edu/wlj/46-3/articles/goldberg-deborah.pdf (last visited Sept. 30, 2010).
[17] Meiser, *supra* note 3, at 1806.
[18] Goldberg, *supra* note 16, at 513.
[19] MODEL CODE OF JUDICIAL CONDUCT (2007), pmbl.

Code's Canon 2 provides that a "judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned."[20] Specific grounds for disqualification include scenarios in which:

- The judge has a personal bias or prejudice concerning a party or party's lawyer;
- The judge has personal knowledge of disputed evidentiary facts;
- The judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning the matter;
- The judge knows that he or she or the judge's spouse, domestic partner, parent, or child has an economic interest in the subject matter in controversy;
- The judge, the judge's spouse, domestic partner, or family member within the third degree of relationship is:
    - A party to the proceeding;
    - A lawyer in the proceeding;
    - Known by the judge to have any interest affected by the proceeding; or
    - Likely to be a material witness in the proceeding;
- The judge learns that a party, a party's lawyer, or the law firm of a party's lawyer has made contributions to the judge's campaign in a delineated amount; or
- The judge, while a judge or candidate for public office, has made a public statement that commits, or appears to commit, the judge with respect to an issue or controversy in the proceeding.[21]

Under this rule, a judge is disqualified if the judge's impartiality might reasonably be questioned, regardless of whether any of the specific criteria for disqualification apply.[22] Canon 2 (formerly Canon 3E) of the Model Code is the cornerstone of the current disqualification laws in the United States.[23]

Judicial Disqualification in Florida

Judicial disqualification in Florida is governed by statute, court rule, and ethical canons modeled after the Model Code of Judicial Conduct. Some of these provisions overlap, while some provisions provide independent bases for disqualification of a judge.

Statutory Provisions

There are two primary statutory provisions governing judicial disqualification.[24] The first statutory provision provides that a party may pursue disqualification of a judge by a "suggestion" that the judge, or someone related to the judge, is a party or is interested in the result of the case, the judge is related to one of the attorneys, or the judge is a material witness in the case.[25] If the judge determines that the truth of the suggestion appears from the record, he or she must enter an order of disqualification. If the truth of the suggestion is not readily apparent from the record, the judge may request affidavits to assist in the determination of the need for disqualification.[26]

The second statutory provision is more commonly utilized for disqualification in Florida.[27] Under this provision, litigants have a substantive right to seek disqualification of a judge for perceived prejudice or bias.[28] A party must file a motion with an affidavit stating "fear that he or she will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of that court against the applicant or in favor of the adverse

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[20] MODEL CODE OF JUDICIAL CONDUCT (2007), Rule 2.11.
[21] *Id.*
[22] *Id.,* Comment.
[23] Goldberg, *supra* note 16, at 514.
[24] Sections 38.02 and 38.10, F.S.
[25] Section 38.02, F.S. Under the statute, the judge must be related to the party or attorney by "consanguinity or affinity within the third degree." *Id.* The "suggestion" must be filed within 30 days after the party or the party's attorney learned of the grounds for disqualification. *Id.* In practice, the "suggestion" is a written motion filed by the party.
[26] *Id.*
[27] Flamm, *supra* note 1, at 59.
[28] Section 38.10, F.S.

party."[29] The statute specifies that, upon the filing of the motion, the judge can proceed no further, and another judge will be immediately substituted. Despite the wording of the statute, the Florida Rules of Judicial Administration require the judge to make an initial determination of the legal sufficiency of the motion. The rule is discussed in greater detail below. Two other statutes related to judicial disqualification are less frequently used and relate to disqualification when a judge is a party to the suit and disqualification on the judge's own initiative if the judge discovers any ground for recusal.[30]

Florida Rules of Judicial Administration

Florida Rule of Judicial Administration 2.330 prescribes the procedures for disqualification of county and circuit judges in all divisions of court, which are similar to the procedures contemplated by statute.[31] Under the rule, any party, including the state, may move to disqualify a judge on grounds provided by rule, by statute, or by the Code of Judicial Conduct.[32] The motion must be in writing, allege specific facts and rationale for the disqualification, be sworn to under oath or by separate affidavit, and include the dates of all previously granted motions to disqualify filed under the rule.[33] In addition, the party's attorney must also separately certify that the motion and the client's statements are made in good faith.

The rule also sets forth the following grounds for disqualification, which differ only slightly from those provided in statute:

- The party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge;
- The judge has an interest in the matter or is related to a party or the party's attorney, or to someone who has an interest in the outcome of the matter; or
- The judge is a material witness in the matter.[34]

Under the rule, the party must file the motion to disqualify within 10 days after the discovery of the facts constituting the grounds for disqualification.[35] After the filing of the motion, the judge must determine if the motion is legally sufficient and is not allowed to comment on the truth of the facts alleged in the motion. If the motion is legally sufficient, the judge must immediately enter an order granting disqualification. Conversely, if the motion is legally insufficient, the judge must immediately enter an order denying the motion.[36] The standard for review of a motion to disqualify is whether the facts alleged, which must be assumed to be true, would cause the movant to have a well-grounded fear that he or she will not receive a fair trial at the hands of the judge.[37] The rationale for the movant's fear of judicial prejudice or bias must be "objectively reasonable."[38]

Additional motions to disqualify a successor judge by the same party in the same case or proceeding are treated differently. Under the rule, if a judge has been previously disqualified, a successor judge may not be disqualified

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[29] *Id.* The statute requires that the affidavit contain the facts and the reasons for the belief that the bias or prejudice exists and must be accompanied by a certificate of counsel of record that the affidavit and application are made in good faith.
[30] Sections 38.01 and 38.05, F.S.
[31] Fla. R. Jud. Admin. 2.330(a).
[32] Fla. R. Jud. Admin. 2.330(b).
[33] Fla. R. Jud. Admin. 2.330(c).
[34] Fla. R. Jud. Admin. 2.330(d). The rule also states that the judge must be related to the party or attorney by "consanguinity or affinity within the third degree."
[35] Fla. R. Jud. Admin. 2.330(e).
[36] Fla. R. Jud. Admin. 2.330(f). The judge may not otherwise comment on the merits of the motion upon the entry of the order denying the motion. Even when the allegations are untrue, outrageous, or scandalous, judges should not try to defend their honor or reputation when reviewing and ruling upon motions for disqualification. *Hill v. Feder*, 564 So. 2d 609 (Fla. 3d DCA 1990). The judge must rule on the motion to disqualify within 30 days of service. Fla. R. Jud. Admin. 2.330(j).
[37] *Livingston v. State*, 441 So. 2d 1083 (Fla. 1983).
[38] *State v. Shaw*, 643 So. 2d 1163, 1164 (Fla. 4th DCA 1994).

by the same party unless the successor judge rules that he or she is in fact not fair or impartial.[39] The successor judge is allowed to rule on the truth of the facts alleged in support of the motion to disqualify.[40]

Code of Judicial Conduct

The Florida Code of Judicial Conduct (Code), which regulates conduct of Florida trial and appellate judges, also provides an independent basis for disqualification.[41] Florida Canon 3E requires a judge to disqualify himself or herself from a proceeding if "the judge's impartiality might reasonably be questioned." This canon delineates specific criteria requiring disqualification that are similar to the criteria contained in the Florida Statutes and the Florida Rules of Judicial Administration. However, Canon 3E contains an additional ground for disqualification including scenarios in which a judge, while a candidate for office, has made a public statement that commits, or appears to commit, the judge with respect to parties or classes of parties in the proceeding, or to an issue or controversy in the proceeding.[42] The canon also imposes a duty on a judge to keep informed about his or her personal and fiduciary economic interests, and make a reasonable effort to keep abreast of the economic interests of the judge's spouse and minor children.

In addition to setting forth certain standards for recusal, the Code provides that a judge should "disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification."[43] The fact that the judge discloses information related to disqualification does not automatically require the judge to be disqualified, but the issue should be determined on a case-by-case basis.[44] After the judge's disclosure on the record, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification.[45]

Disqualification of Appellate Judges

With regard to Supreme Court justices and district court of appeal judges in Florida, the Rules of Appellate Procedure do not explicitly address disqualification. A distinct standard for disqualification has developed in case law. Under this standard, each justice or judge must determine for himself or herself both the legal sufficiency of a request seeking his or her disqualification and the propriety of withdrawing in any particular circumstances.[46] In addition to this standard, appellate judges are also subject to the disqualification standards prescribed in the Florida Code of Judicial Conduct.[47]

Judicial Disqualification Reforms

Nationally, concerns about some high-profile disqualification cases have served as the catalyst for judicial disqualification reform. For example, in *Cheney v. United States District Court for the District of Columbia*, Justice Antonin Scalia chose to remain on this case although he had vacationed with Vice President Cheney shortly after the U.S. Supreme Court chose to hear the matter.[48] This debate focused not only on "whether Justice Scalia would in fact be biased in Cheney's favor as a result of their social contact, but also whether the trip would create the appearance that he might be."[49] Justice Scalia delivered a 21-page opinion defending his decision to remain on the case, relying primarily upon his assurances that the case was never discussed and that he was never alone with Vice President Cheney.

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[39] Fla. R. Jud. Admin. 2.330(g).
[40] *Id.*
[41] Flamm*, supra* note 1, at 58.
[42] FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3E(1)(f).
[43] FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3E(1) comment.
[44] *Id.*
[45] FLORIDA CODE OF JUDICIAL CONDUCT, Canon 3F.
[46] *Clarendon Nat'l Ins. Co. v. Shogreen*, 990 So. 2d 1231, 1233 (Fla. 3d DCA 2008).
[47] *See* FLORIDA CODE OF JUDICIAL CONDUCT, *Application of the Code of Judicial Conduct* (stating that the Code "applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts").
[48] *Cheney v. U.S. Dist. Ct. for the District of Columbia*, 541 U.S. 913 (2004).
[49] Frost, *supra* note 6, at 532.

In West Virginia, despite several motions to disqualify him, state Supreme Court Justice Brent D. Benjamin cast a deciding vote to overturn a $50 million dollar verdict against a coal company whose chief executive officer had donated more than $3 million dollars to Justice Benjamin's election bid.[50] The U.S. Supreme Court determined that Justice Benjamin should have been disqualified and stated that "more stringent state judicial conduct rules are '[t]he principal safeguard against judicial campaign abuses' that threaten to imperil 'public confidence in the fairness and integrity of the nation's elected judges.'"[51] Both this case and the *Cheney* decision have prompted national movements to develop additional safeguards to enhance impartiality in the judiciary by modifying current statutes, rules, and judicial canons to achieve this result.

Findings and/or Conclusions

To gauge how the judicial disqualification and recusal framework is functioning in Florida and to identify possible enhancements to the process, Senate professional staff consulted with trial, appellate, and retired judges; practitioners; academicians; clerks of court; and pertinent committees of The Florida Bar. Although research and interviews revealed that judicial disqualification in trial courts functions fairly well in Florida under the current framework, many of those interviewed identified some potential enhancements to the judicial disqualification process to strengthen the public's faith in the impartiality of the judiciary, and to improve the process for the overall benefit of judges, attorneys, and litigants. Although standards of judicial disqualification and recusal at the appellate level are similar to those for trial judges, there were no reports of problems with or necessary enhancements to judicial disqualification at the appellate level. As a result, this report focuses on the framework for judicial disqualification of county and circuit judges at the trial level.

Florida Bar Task Force on Judicial Disqualification

In 2008, The Florida Bar's Committee on Judicial Administration and Evaluation, in conjunction with the Rules of Judicial Administration Committee, formed a Joint Task Force to evaluate Florida's current judicial disqualification and recusal process. The Joint Task Force expressed concerns regarding the perceived unfairness related to asking a judge who is subject to a motion to disqualify to rule on the motion. The Joint Task Force also expressed concern regarding the public's unfavorable perception of a judge making such a ruling. Further, the Joint Task Force noted that the system can be abused by judges and litigants to complicate and create unnecessary expenses in litigation. The Joint Task Force also expressed concern that the various provisions in Florida governing judicial disqualification appear to overlap.[52] The Florida Bar's Committee on Judicial Administration and Evaluation reports that it remains interested in judicial disqualification reforms and will continue to explore potential enhancements to the disqualification framework. However, it does not anticipate that recommendations for revisions to the process will be made prior to the 2011 Regular Session of the Legislature.

Consolidation of Statutes and Rules

One of the issues the Joint Task Force of The Florida Bar examined was the relationship between the rules and statutes governing disqualification. The Joint Task Force observed that "[o]n the substantive side, a major concern was identified regarding nebulous substantive grounds and standards for disqualification, and inconsistent application of the multiple provisions of various statutes and rules on judicial disqualification."[53] In Florida, the statutes provide the substantive right for the disqualification of a judge, while the Florida Rules of Judicial Administration govern the procedures related to the disqualification of a judge.[54] In the Joint Task Force's draft changes to the Florida statutes governing disqualification, the existing statutes were repealed in their entirety, with a proposed new statute drafted consolidating the various substantive standards for disqualification of a judge (e.g., prejudice or bias, kinship to a party or attorney, serving as a lawyer in the lower tribunal, etc.). To complement

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[50] Meiser, *supra* note 3, at 1799-1800.
[51] James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 789 (Spring 2010) (quoting *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009)).
[52] Joint Task Force of The Florida Bar Judicial Administration and Evaluation Committee and Florida Rules of Judicial Administration Committee, *Disqualification Proposal – Introduction and Explanation* (2009) (on file with the Senate Committee on Judiciary).
[53] *Id.*
[54] *Cave v. State*, 660 So. 2d 705, 707 (Fla. 1995).

the proposed new statute, the Joint Task Force revised Rule 2.330 of the Florida Rules of Judicial Administration to prescribe the procedures related to filing of a motion to disqualify a judge (e.g., timing of the motion, contents of the motion, affidavit requirement, etc.).

The statutes related to judicial disqualification were enacted in the early 1900s and have retained much of the original, antiquated language that is initially difficult to digest. Moreover, some of the provisions in statute and rule overlap, with both covering procedural and substantive aspects of disqualification. In some instances, there may be minor conflicts between the statutes and the rule. For example, s. 38.02, F.S., governing disqualification because of kinship to a party or attorney, provides that a "suggestion" to disqualify must be filed within 30 days after the party filing the suggestion, or the party's attorney, learns of the kinship. In contrast, the rule governing disqualification provides that the disqualification motion must be filed "within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion."[55] Additionally, s. 38.10, F.S., appears to require "automatic" disqualification once the motion is filed, while the rule requires a determination of the legal sufficiency of the motion by the judge.

To aid litigants, attorneys, and judges in navigating the provisions governing judicial disqualification, the Legislature could consider repealing the current statutes governing judicial disqualification and consolidating all of the substantive grounds for disqualification into one, modernized statute. In conjunction with this change, the Legislature could encourage the Florida Supreme Court to evaluate the current rule governing judicial disqualification and make any changes to remove any substantive provisions in the statute and to otherwise harmonize the existing rule with the new statute.

Specificity in Motions to Disqualify

Because there is no independent evaluation of the veracity of the facts alleged regarding judicial disqualification, the motion itself is the central component of the judicial disqualification process in Florida. Although the current rule governing disqualification requires that the motion "allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification," many judges reported that, in practice, motions to disqualify are often very brief, containing only general allegations with no specificity as to the basis for disqualification.[56] Senate professional staff reviewed several disqualification motions filed in Florida courts and also noted that many of the motions contained very general allegations. Some judges reported that they often rule that these general motions are legally sufficient even though it is difficult to discern whether there is an actual basis for disqualification due to the bare pleadings.

To remedy concerns with ruling on motions containing only general allegations, some judges have suggested that the rules or statutes should be amended to provide that a motion to disqualify may be dismissed if the motion does not contain specific allegations demonstrating bias or prejudice. Sometimes motions to disqualify are premised upon statements by judges outside of the courtroom or during a hearing or other proceeding before the court. Some judges have suggested that movants should be required to allege when the statements occurred, where the statements were made, the substance of those statements, and who was present when the statements were made. With regard to statements made by the judge in court, some have suggested that the movant should be required to attach a transcript of that proceeding with the motion and identify within the transcript those statements supporting the assertion that the judge is prejudiced or biased. However, some judges did point out that the specificity requirement may facilitate inclusion of more outrageous allegations in motions, which the judge cannot deny or address under the current disqualification framework. The Legislature may wish to consider encouraging the Florida Supreme Court to evaluate the need to require more specificity in pleadings or to require movants to attach relevant portions of transcripts to the motions.

Judges' Comments on Allegations

Senate professional staff reviewed comments provided to the Joint Task Force of The Florida Bar by judges regarding draft changes to the statutes and rules governing judicial disqualification in Florida. The chief complaint in those comments was the current prohibition against a judge commenting on or refuting, in any

[55] Fla. R. Jud. Admin. 2.330(e).
[56] *See* Fla. R. Jud. Admin. 2.330(c)(2).

manner, an allegation or assertion in a motion to disqualify. Some judges expressed concern that this prohibition facilitates harm to the reputation of the judge and may also facilitate harm to a judge's future political pursuits if there is no record of the judge refuting an outrageous or unsubstantiated allegation. Conversely, some judges assert that this prohibition is in place to ensure that an adversarial relationship between the judge and a party is not created by a judge's statement refuting allegations in a motion.

In one comment, a judge suggested that allowing judges to make a general denial of the allegations in the complaint could alleviate some of the reputational harm associated with outrageous and unfounded allegations. For example, an order granting a motion to disqualify could read:

> Although the undersigned judge denies the allegations supporting the motion, under the appropriate standard of review, the allegations are legally sufficient and, therefore, the motion for disqualification is granted.

However, if the judge denies the motion on the grounds that it is legally insufficient, a similar general denial of the facts could result in the formation of an adversarial relationship between the judge and a party because the judge has expressly denied assertions of a party but will continue to preside over the case.

In Nevada, upon the filing of a motion to disqualify, a judge has two options: (1) he or she can immediately transfer the case to another judge; or (2) he or she can file a written answer with the clerk within two days after the motion is filed, admitting or denying the allegations and setting forth any additional facts that bear on the question of the judge's disqualification.[57] The question of the judge's disqualification is then heard by another judge. This affords the judge who is the subject of the motion the opportunity to respond to allegations that he or she deems to be outrageous or unfounded. Otherwise, the judge is allowed to transfer the case without the need for a response to the allegations contained in the motion.

If the Legislature wishes to afford a judge the opportunity to deny outrageous or unfounded allegations contained in motions to disqualify, it could consider authorizing judges to include a general denial of the allegations in an order granting disqualification. Alternatively, the Legislature could consider enacting a statute such as Nevada's by allowing a judge to file a written answer denying or admitting certain allegations and providing additional details, and then allowing another judge to decide the motion to disqualify. Arguably, an adversarial relationship could be created between the judge and the party if the judge is allowed to file a written response to the motion, another judge hears arguments pertinent to the party's motion, and the motion to disqualify is denied.

Judicial Disqualification Determinations

One of the paramount concerns related to judicial disqualification is the public's perception that it is inequitable for a judge subject to a motion to disqualify to rule on the motion. As some authors noted, in essence, "[t]he fact that judges in many jurisdictions decide on their own recusal challenges, with little to no prospect of immediate review, is one of the most heavily criticized features of United States disqualification law."[58] Some jurists have asserted that because the question of impartiality or bias is an objective question, a judge whose impartiality is the subject of a disqualification motion should not be in a position to determine whether his or her disqualification is warranted.[59] Counter to this argument, others assert that the judge subject to the disqualification motion is the person with the best knowledge of the facts and circumstances supporting disqualification and that the "single-judge procedure" aids in judicial efficiency by eliminating the need for prolonged hearings and further delays.[60] To address perceived inequities with the single-judge procedure, some states have adopted alternative methods for determining disqualification, such as peremptory challenges and independent adjudication of disqualification motions.

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[57] NEV. REV. STAT. ANN. s. 1.235.

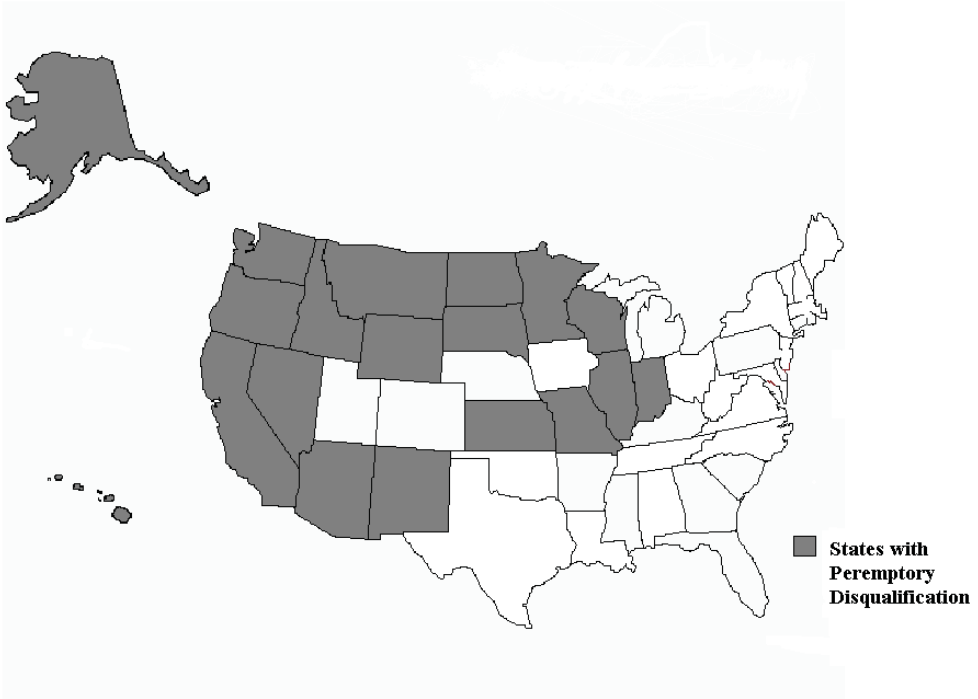
[58] James Sample et al., Brennan Center for Justice, *Fair Courts: Setting Recusal Standards*, 31 (2008) (citing Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, s. 6.4.1, at ch. 12 (1996)), *available at* http://www.ajs.org/ethics/pdfs/Brennancenterrecusalreport.pdf (last visited Oct. 1, 2010).

[59] *Id.* (citations omitted).

[60] *Id*. at 32.

Peremptory Disqualification

Some states have adopted laws allowing litigants to exercise peremptory challenges to disqualify judges. These laws authorize litigants to obtain disqualification without demonstrating any grounds for disqualification such as prejudice or bias. The party simply requests that a new judge be assigned to the case, and the case is reassigned without any legal determination or further inquiry. To date, 19 states have adopted laws allowing peremptory disqualification of judges.[61] The following figure illustrates those states with peremptory disqualification procedures:[62]



Of those states adopting peremptory challenges, most limit the challenge to one per party, with a maximum of two challenges per case. For example, Nevada allows one peremptory challenge for each "side" in any civil action pending in the district court, with each action having only two "sides."[63] The Nevada rules provide that the party filing the peremptory strike must pay a $300 filing fee with the motion to cover some of the costs associated with the transfer of the case to a new district judge. In Wyoming, the rules allow a party to peremptorily disqualify a judge from acting in a case in which a felony is charged by simply filing a motion.[64] The rule limits the party to filing only one time and against only one judge. After a judge has been peremptorily disqualified upon the motion of a party, the opposing party may file a motion for peremptory disqualification of the new judge within five days of assignment of the new judge.

Proponents of peremptory disqualification argue that this disqualification method alleviates concern with judges ruling on their own qualifications to hear cases, as well as allows parties to "secure an unbiased judge without the expense, unseemliness, and retribution risk of a disqualification challenge."[65] However, of those judges providing comments on potential disqualification changes to The Florida Bar, the majority of those responding were opposed to the adoption of peremptory challenges in Florida. Similarly, in professional staff interviews with trial and appellate judges and practitioners, most believed that use of the peremptory challenge model would promote judge shopping and would increase the frequency of disqualification. In addition, judges also opined that the peremptory challenge method would create hardships on small judicial circuits with few judges available for reassignment of cases. Professor Charles Geyh, a national expert on judicial disqualification, asserted that those

[61] Charles Geyh, *Report of the Judicial Disqualification Project*, 29 (Draft, Sept. 2008), *available at* http://www.ajs.org/ethics/pdfs/ABAJudicialdisqualificationprojectreport.pdf (last visited Oct. 1, 2010).
[62] Sample, *supra* note 58, at 26.
[63] Nev. S. Ct. R. 48.1.
[64] Wyo. R. Crim. P. 21.1.
[65] Sample, *supra* note 58, at 26.

states employing the peremptory disqualification method typically report that it is working favorably, while many jurisdictions not employing this method are opposed to enacting it.[66]

Independent Adjudication of Disqualification Motions

As an alternative to the peremptory challenge model, some jurisdictions have adopted a method in which an independent judge rules on a motion to disqualify rather than the judge subject to the motion. Under this model, the movant retains the duty to include factual allegations of impartiality or bias. Several states require someone other than the target judge to decide all aspects of the motion to disqualify.[67] In some states, the target judge may initially review the motion for legal sufficiency, but then transfer the motion to another judge if the motion satisfies the legal-sufficiency inquiry.

In California, a judge who refuses to recuse himself or herself "shall not pass upon his or her own disqualification."[68] The California statute provides that the question of disqualification must be heard by another judge agreed upon by all of the parties, or, if agreement cannot be reached, the chairperson of the Judicial Council will select a judge. In adjudicating the motion, a judge will:

> decide the question on the basis of the statement of disqualification and answer and any written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact. [69]

The rule governing judicial disqualification in Texas allows a judge subject to the motion to make an initial determination of whether to grant the motion.[70] If the judge declines to recuse himself or herself, the judge must forward the motion to the presiding judge of the judicial district, who, in turn, will set the motion for hearing before himself or herself or another appointed judge.[71]

Some of the advantages and disadvantages of the independent adjudication model mirror those relating to the peremptory challenge model. This method alleviates concern with judges determining their own fitness to hear a matter, but could encourage the filing of disqualification motions and may create staffing issues for smaller circuits with few judges. Unlike the peremptory challenge model, the judge is afforded an opportunity to address the allegations presented in the motion and refute any outrageous or unfounded assertions. However, many judges and practitioners pointed out in interviews that these hearings by independent judges would continue to foster an adversarial relationship between the judge and the party and would contravene a judge's duty to be perceived as independent, fair, and impartial.

Of those judges interviewed by Senate professional staff, approximately half believed that independent evaluation would be an enhancement to the judicial disqualification process, while the other half asserted that this method would cause undue delays and other logistical problems for trial judges. Some judges also pointed out that this model would place judges in the precarious position of ruling on the fitness of their colleagues. Those judges commenting to the Joint Task Force of The Florida Bar expressed that this approach could remedy some problems associated with disqualification, but could also create additional delay and expense in litigation.

If the Legislature determines that judges subject to disqualification motions should not adjudicate the motions, the Legislature could adopt the peremptory challenge model by creating a right for litigants to strike a judge without cause. The Legislature could limit this right to one time per party, or determine to utilize this method in criminal cases only or civil cases only. Alternatively, the Legislature could enact an approach in which an independent judge rules on the motion to disqualify with or without an evidentiary hearing. The Legislature also could employ

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[66] Telephone interview with Professor Charles Geyh, Indiana University School of Law (Aug. 4, 2010).
[67] Some of these states include: Alaska, Arizona, North Dakota, Ohio, Oregon, Utah, Vermont, and Virginia.
[68] CALIF. CODE OF CIV. P. s. 170.3(c)(5).
[69] CALIF. CODE OF CIV. P. s. 170.3(c)(6).
[70] Tex. R. Civ. P. 18a.
[71] Tex. R. Civ. P. 18a(c).

a blended approach in which the judge subject to the motion initially determines the legal sufficiency of the motion, and then transfers the case to another judge if he or she wishes to deny the disqualification. As discussed above, there are advantages and disadvantages associated with these approaches. Because there currently is no filing fee associated with the filing of a motion to disqualify in Florida, the Legislature may also wish to consider requiring the payment of a filing fee with the filing of a motion to disqualify if it chooses to adopt one of these alternative models in order to offset costs associated with transferring the case to another judge.

Sanctions for Abuse of Judicial Disqualification

In addition to perceived inherent inequities associated with judicial disqualification, abuse of the judicial disqualification process may be occurring in limited contexts. Although the majority of judges interviewed reported that they have not experienced significant abuse of the process, some judges did report that litigants utilize disqualification motions for certain tactical advantages such as delay of the litigation, as well as to retaliate against a judge after an adverse ruling. For example, one judge recalled a case in which litigants engaged in discovery and other trial preparation for approximately two years, and then, on the eve of trial, one party filed a motion to disqualify the judge. The judge perceived that the motion was filed because the party was not adequately prepared to proceed to trial. The motion was legally sufficient, and the judge had no choice but to grant the motion.

To address frivolous motions to disqualify, some states have enacted legislation to provide sanctions for frivolous motions designed to delay or hinder the judicial process. For example, a Texas law provides that a judge may award sanctions, in the interest of justice, for any motion to disqualify that "is brought solely for the purpose of delay and without sufficient cause."[72] In Vermont, a motion for disqualification must be filed as soon as practicable after the cause or ground for disqualification becomes known to the movant.[73] If a party fails to satisfy this requirement, the court may, in its discretion, sanction the attorney or the party filing the motion.[74]

Comparable to Texas and Vermont, Montana allows the court to award sanctions against a party who brings an improper motion for disqualification.[75] The Montana statute provides:

> The judge appointed to preside at a disqualification proceeding may assess attorneys fees, costs and damages against any party or his attorney who files such disqualification without reasonable cause and thereby hinders, delays or takes unconscionable advantage of any other party, or the court.[76]

However, one state, Nevada, expressly precludes an award of sanctions associated with the filing of a motion to disqualify a judge.[77]

Some judges asserted that sanctions or the threat of sanctions may prove to be a valuable tool in curbing frivolous disqualification motions. However, some of these judges noted that sanctions should not be awarded automatically, and should be awarded at the discretion of the court to enable the court to evaluate the motives for the filing of a motion on a case-by-case basis. Conversely, other judges argued that a sanctions provision in the context of judicial disqualification would only serve to chill disqualification filings because parties and attorneys may fear being subject to sanctions. To buttress this assertion, some of these judges also argued that ensuring the impartiality of the judiciary trumps punishing litigants who abuse the judicial disqualification framework. Moreover, others asserted that the court currently has the authority to award sanctions when a party asserts unsupported claims or files pleadings "taken primarily for the purpose of unreasonable delay."[78]

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[72] Tex. R. Civ. P. 18a. The rule expressly provides that sanctions may be awarded as authorized by Tex. R. Civ. P. 215.2(b). Those sanctions include charging all or any portion of the taxable court costs and attorney's fees associated with the motion to the party seeking disqualification.
[73] Vt. R. Civ. P. 40(e)(1).
[74] *Id.*
[75] MONT. CODE ANN. s. 3-1-805(1.)(d).
[76] *Id.*
[77] NEV. REV. STAT. s. 1.225(6.).
[78] Section 57.105, F.S.

To alleviate concerns associated with disqualification motions filed after unfavorable rulings by a judge and other timing issues, some states have adopted rules or enacted statutes designed to discourage such abuse. For instance, Oregon law provides that a motion to disqualify a judge may not be filed after the judge has ruled on any petition, demurrer, or motion, other than a motion to extend time in the proceeding.[79] Such an approach may have the unintended consequence of barring legitimate disqualification motions when sufficient grounds for the motion were discovered by a party after a judge ruled on an initial motion in the case. The Legislature could consider precluding the filing of a motion to disqualify within a prescribed number of days after an adverse ruling on a motion in the case. However, such an approach may also unintentionally bar legitimate motions to disqualify.

Disqualification for Campaign Contributions

Following West Virginia Supreme Court Justice Brent Benjamin's refusal to recuse himself from a matter in which the chief executive officer of a party donated significant amounts of money to the Justice's campaign, many opined that "[t]he improper appearance created by money in judicial elections is one of the most important issues facing our judicial system today."[80] One article noted that "[a] line needs to be drawn somewhere to prevent a judge from hearing cases involving a person who has made massive campaign contributions to benefit the judge."[81] The rationale supporting and undermining the need for such a provision creates a conundrum for judges. On one hand, the press and the public are critical of judges who rule in cases involving campaign contributors. However, judges are reluctant to withdraw from cases because of fear that such a decision will validate the "public suspicion that judges are beholden to their benefactors."[82]

The American Bar Association includes a provision in the Model Code of Judicial Conduct requiring automatic disqualification if:

> [t]he judge knows or learns by means of a timely motion that a party, a party's lawyer, or the law firm of a party's lawyer has within the previous [insert number] year[s] made aggregate contributions to the judge's campaign in an amount that is greater than [$[insert amount] for an individual or $[insert amount] for an entity] [is reasonable and appropriate for an individual or an entity].[83]

Only a few states have adopted a comparable disqualification provision related to campaign finance. Consequently, if a motion to disqualify is premised upon the fact that a party has contributed to a judge's campaign, the ruling on the motion will likely turn on a general inquiry into whether the judge's impartiality might reasonably be questioned.[84] In 2010, the California Legislature passed a bill requiring California trial judges to recuse automatically if one of the parties or attorneys in a case contributed $1,500 or more to the judge's previous election campaign, if the campaign took place within the previous six years, or if the contribution was received prior to an upcoming election.[85] Governor Schwarzenegger signed this bill into law on September 30, 2010.

Of those judges interviewed by professional staff of the committee, the majority did not believe that adoption of this provision in Florida is necessary. Most cited the fact that these provisions most notably affect bias and prejudice associated with appellate judges and that Florida's appellate judges are not elected. Furthermore, some judges asserted that Florida campaign finance disclosure laws and campaign contribution limitations alleviate any concern with prejudice and bias in the trial court judiciary.[86] However, some judges did opine that law firm

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[79] ORE. REV. STAT. s. 14.260(3).
[80] James Sample, *Caperton: Correct Today, Compelling Tomorrow,* 60 SYRACUSE L. REV. 293, 293 (2010) (citation omitted).
[81] *Id.*
[82] Geyh, *supra* note 61, at 40.
[83] MODEL CODE OF JUDICIAL CONDUCT (2007), Rule 2.11.
[84] Geyh, *supra* note 61, at 39.
[85] California Assembly Bill No. 2487 (2010).
[86] Pursuant to Florida law, each campaign treasurer must file a report of all campaign contributions received, and all expenditures made, by or on behalf of a candidate or political committee. Section 106.07(1), F.S. These reports are open to public inspection. Section 106.07(2)(a)1., F.S. With regard to campaign contribution limitations, except for political parties, no person, political committee, or committee of continuous existence may, in any election, make contributions in excess of

contributions collectively could be viewed critically by the public when lawyers from the firm appear before a judge. If the Legislature determines that it is concerned with judicial bias in trial courts associated with campaign contributions, it could enact a provision requiring automatic disqualification if a party or a party's attorney has donated a specified amount to the judge's campaign. Determining a benchmark contribution amount may pose some challenges. It may be difficult to determine a threshold contribution amount that directly correlates with the possibility of influencing a judge's rulings in a case in which a campaign contributor is a party.

Options and/or Recommendations

This report illustrates a number of potential enhancements to the judicial disqualification process in Florida. Some of these options are substantive in nature and could be enacted by the Legislature, while other options are procedural and fall within the ambit of the Florida Supreme Court.[87] Among the options available to the Legislature and the Supreme Court are:

- Delaying any action until The Florida Bar completes its study of judicial disqualification and recommends changes to the process;
- Repealing the current statutes governing judicial disqualification and consolidating all of the substantive grounds for disqualification into one, modernized statute;
- Revising the Florida Rules of Judicial Administration to delineate the procedures associated with disqualification and to eliminate substantive grounds for disqualification;
- Heightening the pleading requirements for motions to disqualify by requiring more specific factual allegations and attachment of transcripts or other documents to the motion when necessary;
- Authorizing judges to include a general denial of the allegations in an order granting disqualification;
- Allowing judges to file a written answer denying or admitting certain allegations and providing additional details, and then allowing another judge to decide the motion to disqualify;
- Enacting a provision requiring automatic disqualification if a party or a party's attorney has donated a specified amount to the judge's campaign; or
- Creating sanctions for frivolous disqualification motions designed to delay proceedings.

If the Legislature determines that judges subject to motions to disqualify should not adjudicate those motions, policy options include:

- Creating a right for litigants to exercise a peremptory strike of a judge without cause;
- Allowing a motion to disqualify to be assigned to a third-party judge;
- Allowing the judge subject to the motion to make an initial determination as to legal sufficiency and then refer the motion to another judge; or
- Requiring a filing fee with motions to disqualify to cover costs associated with transferring the matter to a different judge.

As addressed in the "Findings and/or Conclusions" section of this report, each option presents issues that the Legislature and the Supreme Court may wish to consider carefully in their evaluation.

$500 to any candidate for election to or retention in office or to any political committee supporting or opposing one or more candidates. Section 106.08(1), F.S. *See also* ss. 105.071 and 105.08, F.S., governing candidates for judicial office and campaign contributions.

[87] *See* text accompanying note 54.

The Florida Senate

Interim Report 2011-129 *October 2010*

Committee on Judiciary

REVIEW THE USE AND ENFORCEABILITY OF ARBITRATION AGREEMENTS IN THE MEDICAL SERVICES AND NURSING HOME CARE CONTEXTS

Issue Description

Florida traditionally has favored arbitration. In 1957, the Legislature enacted the Florida Arbitration Code, which prescribes a framework governing the rights and procedures under arbitration agreements, including the enforceability of arbitration agreements. Alternative dispute resolution has been recognized as a viable alternative to litigation in a court or jury trial, and it historically has been attractive for the resolution of commercial business disputes.

In recent years, businesses have promoted binding arbitration in contracts to resolve disputes or claims between businesses and consumers before any actual conflict. For various reasons, health care providers, including nursing homes, have been securing agreements from consumers to submit future claims involving medical services to arbitration for resolution. Arbitration agreements are contracts, and, generally, contract law governs issues relating to any objections to the use of this method of alternative dispute resolution. Under applicable federal law, courts must compel arbitration unless a party objects and demonstrates that grounds exist under state law for the revocation of the arbitration provisions.

Under varying circumstances, consumers sign arbitration agreements prior to treatment where they have not had an opportunity to negotiate or may not fully appreciate the legal implication of submitting future claims to arbitration. In response, state legislatures have enacted legislation prescribing certain safeguards for patients and consumers of medical and health care services when considering arbitration as an alternative forum to a court or jury trial. State legislation adopted to prescribe safeguards may be subject to federal preemption.

Several bills have been filed but not enacted in recent years in Florida to address consumer arbitration issues. In 2008, legislation was filed to create a "Florida Consumer Arbitration Act," which would create disclosure and disqualification requirements on the arbitration industry when administering consumer arbitration. In 2010, legislation was introduced to create certain safeguards for patients and consumers dealing with the use and enforceability of arbitration agreements involving medical services.

This report provides background information and highlights some of the issues under federal and state law on consumer arbitration, with a focus on arbitration agreements in the medical services and nursing home care contexts.

Background

Arbitration Generally

Arbitration is an alternative dispute resolution process in which parties "subm[it] a dispute to one or more impartial persons for a final and binding decision."[1] Arbitration is intended to be a speedy and economic alternative to court litigation, which is often slow, time-consuming, and expensive.[2] Parties to arbitration voluntarily give up substantial safeguards that court litigants enjoy, which may include the discovery process

[1] See the definition of "arbitration" at the website of the American Arbitration Association, http://www.adr.org/sp.asp?id=28749 (last visited Sept. 24, 2010).
[2] *ManorCare Health Services, Inc. v. Stiehl*, 22 So. 3d 96, 105 (Fla. 2d DCA 2009).

where parties obtain information from one another.[3] Because an arbitration agreement is a contract, the rights and obligations of the parties are determined under contract law.[4]

Agreements for pre-dispute arbitration involve those contracts where parties agree in advance of any dispute or claim that a party, for any future claim that arises, must use arbitration rather than a court as a forum. In contrast, post-dispute arbitration involves a scenario where two parties to an existing dispute agree after the dispute arises to submit the dispute to arbitration. A pre-dispute binding arbitration agreement differs significantly from a post-dispute arbitration agreement because it is entered into before an actual conflict has arisen and generally is irrevocable. Pre-dispute arbitration clauses are now common in a number of standard form contracts such as credit card agreements, long-term care facility agreements, insurance contracts, mobile phone contracts, real estate agreements, and car purchase agreements. This report limits its discussion to pre-dispute arbitration unless stated otherwise.

Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to establish, in part, the enforceability of pre-dispute arbitration agreements involving interstate commerce.[5] The United States Supreme Court has recognized that with the passage of the FAA, Congress expressed intent for courts to enforce arbitration agreements and to place these agreements on an equal footing with other contracts.[6] The FAA established a federal policy that favors and encourages the use of arbitration to resolve disputes. Due to this federal policy, the use of pre-dispute arbitration agreements has expanded beyond use in commercial contexts between large businesses and those with equal bargaining power, to use in noncommercial consumer contracts.[7]

Florida Litigation Reform/Use of Arbitration

With the threat of litigation, nursing homes, assisted living facilities, physicians, and insurance companies have been using binding arbitration contracts more frequently with patients and consumers.[8] In response to a 2006 ruling of the Florida Supreme Court that patients could waive a constitutional cap on plaintiff attorney's fees in medical liability cases, the Florida Medical Association through its continuing medical education programs began to circulate a model arbitration agreement for physicians to ask their patients to sign which limits noneconomic damages to $250,000.[9]

The use of binding arbitration in nursing home admissions was extensively discussed in the context of nursing home insurance coverage and tort reform by individuals who testified in 2002 and 2003 before the Joint Select Committee on Nursing Homes. The presiding officers of the Legislature appointed the committee in December 2002 to address the continuing crisis facing Florida's nursing homes in both obtaining and maintaining adequate insurance coverage.[10] In November 2003, the presiding officers of the Legislature re-appointed the select committee to reconsider issues regarding the continuing liability insurance and lawsuit crisis facing Florida's

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[3] Amanda Perwin, *Mandatory Binding Arbitration: Civil Injustice By Corporate America*, White Paper for the Center for Justice & Democracy, No. 13 (August 2005), *available at* http://www.centerjd.org/archives/issues-facts/ArbitrationWhitePaper.pdf (last visited Sept. 24, 2010).

[4] Marjorie A. Shields, *Validity, Construction, and Application of Arbitration Agreement in Contract for Admission to Nursing Home*, 50 A.L.R. 6th 187 (2009).

[5] See 9 U.S.C.A. ss. 1-16.

[6] *Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 270-271 (1995).

[7] Shelley McGill, *Consumer Arbitration Clause Enforcement: A Balanced Legislative Response*, 47 AM. BUS. L.J. 361 (Fall 2010).

[8] Amy Lynn Sorrel, *Arbitrate, Not Litigate: A Growing and Popular Alternative to Lawsuits*, AMERICAN MEDICAL NEWS (Aug. 27, 2007), and Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate,* 14 ELDER L.J. 453 (2006).

[9] Sorrel, *supra* note 8; s*ee* Kenneth A. DeVille, *The Jury is Out: Pre-dispute Binding Arbitration Agreements for Medical Malpractice Claims*, 28 J. LEGAL MED. 333 (2007) (citing Tanya Albert, *Patients in Liability Hot Spots Asked to Arbitrate, Not Litigate,* AMERICAN MEDICAL NEWS (Feb. 10, 2003)).

[10] Joint Select Committee on Nursing Homes, The Florida Legislature, *Report of the Joint Select Committee on Nursing Homes* (March 1, 2004).

long-term care facilities and to assess the impact of the reforms passed by Legislature in 2001.[11] The 2001 legislation dealt with the quality of care, tort reform, and insurance coverage in the nursing home industry.[12]

The committee heard testimony from nursing home residents, long-term care facilities, and insurers of long-term care facilities on the use of binding arbitration agreements with nursing home admissions. Residents testified that many nursing home agreements "include binding arbitration clauses with very low caps on damages which must be signed as a prerequisite to admission."[13] A number of legislative actions were proposed by residents or facilities who testified before the committee relating to the use of binding arbitration in nursing home admissions: eliminate binding arbitration clauses in admissions contracts (residents); develop a statewide standardized nursing home admission contract (residents); and require voluntary binding arbitration with caps on noneconomic damages with or without a cap on punitive damages (facilities).[14] The committee did not recommend any legislation.

Findings and/or Conclusions

Florida Arbitration Code

The Florida Arbitration Code[15] (FAC) is applicable to arbitration agreements that do not involve interstate commerce.[16] The FAC governs the arbitration process, including the scope and enforceability of arbitration agreements, the appointment of arbitrators, arbitration hearing procedures, the entry and enforcement of arbitral awards, and any appeals of awards. Under the FAC, Florida courts have held that the determination of whether any dispute is subject to arbitration should be resolved in favor of arbitration.[17] A court's role in deciding whether to compel arbitration is limited to three gateway issues to determine the enforceability of an arbitration agreement: (1) whether a valid written agreement to arbitrate exists; (2) whether an arbitrable issue exists; and (3) whether the right to arbitration has been waived.[18] The FAC applies in arbitration cases only to the extent that it is not in conflict with federal law.[19]

Federal Preemption

The Federal Arbitration Act (FAA) governs the enforcement of arbitration agreements in contracts involving interstate commerce. The FAA embodies a liberal federal policy favoring arbitration agreements.[20] Arbitration agreements within the scope of the FAA are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[21] The FAA creates a body of federal substantive law that applies in state as well as federal courts.[22] The FAA preempts any inconsistent state law that stands as an obstacle to the enforcement of arbitration agreements except for grounds as exist at law or in equity for the revocation of any contract.[23] As a matter of federal law, any doubts regarding whether an agreement to arbitrate is subject to arbitration should be resolved in favor of arbitration.[24]

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[11] *Id.*
[12] See CS/CS/CS/SB 1202 (2001 Reg. Sess.); ch. 2001-45, Laws of Fla.
[13] Joint Select Committee on Nursing Homes, *supra* note 10, at 10.
[14] *Id.* at 17-18.
[15] Sections 682.01-682.22, F.S.
[16] Michael Cavendish, *The Concept of Arbitrability Under the Florida Arbitration Code*, 82 FLA. B.J. 18, 19 (Nov. 2008) (citing *O'Keefe Architects, Inc. v. CED Construction Partners, Ltd.*, 944 So. 2d 181, 184 (Fla. 2006)).
[17] Cavendish, *supra* note 16, at 20 (citing *Waterhouse Constr. Group, Inc v. 5891 S.W. 64th Street, LLC*, 949 So. 2d 1095, 1099 (Fla. 3d DCA 2007)).
[18] *Seifert v. U.S. Home Corp*., 750 So. 2d 633, 636 (Fla. 1999).
[19] *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 573 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000), and *Florida Power Corp. v. Casselberry*, 793 So. 2d 1174, 1179 (Fla. 5th DCA 2001).
[20] *Randolph v. Green Tree Fin. Corp.*, 244 F.3d 814, 818 (11th Cir. 2001).
[21] Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 399-401 (2004).
[22] *Southland Corp. v. Keating*, 465 U.S. 1 (1984).
[23] *Powertel,* 743 So. 2d at 574, and see *Southland*, 465 U.S. at 10-17.
[24] *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp*., 460 U.S. 1 (1983).

Enforceability of Arbitration Agreements

Long-term Care Facilities

Recently, courts have been dealing with litigation regarding the enforceability of pre-dispute arbitration agreements between residents and long-term care facilities, including nursing homes.[25] Although some long-term care facilities may require it as a condition of admission, other facilities may simply request that a resident, at the time of admission, sign an agreement to arbitrate any future disputes between the facility and resident. Mandatory arbitration usually involves a "take it or leave it" agreement drafted by the facility to resolve any future dispute. Persons in favor of the use of mandatory arbitration to resolve nursing home disputes argue that it is economically efficient for the financial survival of the long-term care industry in response to an escalation of litigation costs to cover general and professional liability.[26]

In some cases, residents who have a legal dispute with a facility may find themselves opposing the facility's desire to arbitrate the legal claim. The initial burden of establishing the existence of a valid arbitration agreement falls on the party (facility) moving to compel arbitration, and once satisfied the burden shifts to the resident to establish the absence of a valid or enforceable arbitration agreement. The arbitration agreement requires any future disputes between a resident and the nursing home to be resolved through binding arbitration. The arbitration agreement designates an alternative forum to a judicial proceeding to resolve the dispute.

The rise in litigation is due in part to the nursing home admissions process where persons representing a nursing home may require arbitration agreements to be signed by a resident, relative, or other person on behalf of the resident. Common legal issues that arise in litigation due to the use of arbitration agreements in the nursing home context involve the validity of or the authority of the person who signed, or the capacity or competency of the resident to sign the required documents.[27]

Although states may not impose any special limitations on the use of arbitration clauses, the question of the validity of an arbitration clause is one of state law.[28] State courts struggling with the enforceability of arbitration agreements have to find grounds as exist at law or in equity for the revocation of any contract to remain in harmony with the FAA and state law policy, which favor the enforcement of arbitration.

When a party challenges the validity of an agreement to arbitrate, he or she must assert contract defenses applicable to all contracts, such as fraud, duress, or unconscionability.[29] To analyze unconscionability, courts look at the relative bargaining power of the parties and the terms of the agreement. Procedural unconscionability refers to the specific circumstances under which the contract is entered, while substantive unconscionability deals with the unreasonableness or unfairness of the contractual terms.[30]

Courts have also invalidated contracts, including arbitration agreements, on public policy grounds.[31] In contracts that contain remedial limitations on the rights of nursing home residents, courts have rendered such arbitration agreements void and unenforceable as against public policy.[32]

Although state contract law may be used to interpret and enforce arbitration agreements, if the state law makes the arbitration void or is inconsistent with federal policy to favor arbitration, it may be susceptible to a preemption argument under the FAA. Georgia and Illinois have laws that impose limitations on arbitration clauses. The

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[25] Reed R. Bates & Stephen W. Stills, Jr., *Arbitration in Nursing Home Cases: Trends, Issues, and a Glance Into the Future*, 76 DEF. COUNS. J. 282 (July 2009).
[26] Katherine Palm, *Arbitration Clauses in Nursing Home Admission Agreements: Framing the Debate*, 14 ELDER L.J. 453, 473-475 (2006).
[27] Bates, *supra* note 25, at 282-284.
[28] *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. 1st DCA 1999), *review denied*, 763 So. 2d 1044 (Fla. 2000).
[29] *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392, 397 (Fla. 2005).
[30] *Romano v. Manor Care, Inc.*, 861 So. 2d 59, 62 (Fla. 4th DCA 2003) (citing *Kohl v. Bay Colony Club Condo., Inc.*, 398 So. 2d 865, 867 (Fla. 4th DCA 1981)).
[31] See *Jaylene, Inc*. v. *Steuer,* 22 So. 3d 711, 714 (Fla. 2d DCA 2009) (Northcutt, J., concurring) (citing E. Allan Farnsworth, *Unenforceability on Grounds of Public Policy, in Contracts* ch. 5 (2d ed. 1990)).
[32] *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296 (Fla. 4th DCA 2005), *review denied*, 917 So. 2d 195 (Fla. 2005).

Georgia law provides that "no agreement to arbitrate shall be enforceable unless the agreement was made subsequent to the alleged malpractice and after a dispute or controversy has occurred and unless the claimant is represented by an attorney at law at the time the agreement is entered into."[33] The Georgia statute has been found to be preempted by the FAA.[34] Illinois has adopted statutes that make any waiver by a nursing home resident or his or her legal representative of the right to commence an action under the Illinois Nursing Home Care Act, whether oral or in writing, void and without legal force or effect. The Illinois law also provides that any party to an action under the Illinois Nursing Home Care Act must be entitled to a trial by jury and that any waiver of that right before the commencement of an action, whether oral or in writing, must be void and without legal force and effect.[35] However, the Illinois Supreme Court has held that the public policy behind the antiwaiver provisions of the Illinois Nursing Home Care Act is not a valid contract defense to avoid preemption by the FAA.[36]

Florida Nursing Home Experience

Florida jurists have expressed concern regarding the volume of cases involving pre-dispute agreements to arbitrate used by nursing homes and the potential effect on the rights of nursing home residents in Florida.[37] More than 35 opinions written by Florida appellate courts have addressed nursing home admissions contracts containing agreements to arbitrate.[38] The use of nursing home agreements containing "form" arbitration provisions has become routine throughout Florida, as evidenced by the litigation regarding these provisions in all five of the district courts of appeal.[39]

Courts recognize that nursing home agreements containing pre-dispute arbitration provisions are drafted in favor of nursing homes.[40] One appellate judge pointed out that "[a] careful review of the agreement causes one to wonder why any resident who actually understood the agreement…would ever sign such a one-sided arrangement."[41] Nursing home residents may be significantly incapacitated, incompetent to sign, dependent on a relative, and often under time constraints to find a safe facility during an emotional time when dealing with a "form contract applicable to a large group of senior citizens."[42] Also, this contract may address "special rights created by the [L]egislature for the protection of the elderly, and when the contract is not a unique contract negotiated on a level playing field."[43]

In addition, some Florida courts allow an arbitrator to make decisions about the enforceability of clauses in an arbitration agreement, including cases when those clauses limit or eliminate rights specially created by the Legislature to protect nursing home residents.[44] Other Florida courts have allowed trial courts rather than an arbitrator to rule on the enforceability of restrictive clauses that would eliminate statutory substantive rights and remedies enacted for elderly and vulnerable individuals.[45] Two cases involving nursing home arbitration provisions that limit statutory rights are pending before the Florida Supreme Court.[46]

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[33] GA. CODE ANN. s. 9-9-62 (2007).
[34] *Triad Health Management of Georgia, III, LLC v. Johnson*, 679 S.E.2d 785 (Ga. Ct. App. 2009).
[35] 210 ILL. COMP. STAT. ss. 45/3-606, 45/3-607 (West 2008).
[36] *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207 (Ill. 2010).
[37] See the concurring opinion in *Blankfeld v. Richmond Health Care, Inc.*, 902 So. 2d 296, 301-309 (Fla. 4th DCA 2005), *review denied*, 917 So. 2d 195 (Fla. 2005).
[38] See the concurring opinion by Judge Altenbernd in *ManorCare Health Servs., Inc. v. Stiehl*, 22 So. 3d 96, 104 n. 7 (Fla. 2d DCA 2009).
[39] *Blankfeld*, 902 So. 2d at 307.
[40] Judge Altenbernd, s*upra* note 38, at 101-109; *Blankfeld*, 902 So. 2d at 307-308.
[41] Judge Altenbernd, s*upra* note 38, at 101-102.
[42] *Id.* at 103.
[43] *Id.*
[44] *See Jaylene, Inc*. v. *Steuer,* 22 So. 3d 711, 713 (Fla. 2d DCA 2009) (citing *Rollins, Inc. v. Lighthouse Bay Holdings, Ltd.*, 898 So. 2d 86, 87 (Fla. 2d DCA 2005)).
[45] Judge Altenbernd, *supra* note 38, 101(citing *Alterra Healthcare Corp. v. Estate of Linton ex rel. Graham*, 953 So. 2d 574 (Fla. 1st DCA 2007); *SA-PG-Ocala, LLC v. Stokes*, 935 So. 2d 1242 (Fla. 5th DCA 2006); *Lacey v. Healthcare & Ret. Corp. of Am.*, 918 So. 2d 333, 335 (Fla. 4th DCA 2005)).
[46] *Gessa v. Manorcare of Florida*, *Inc.,* SC09-768, and *Shotts v. OP Winter Haven*, *Inc.*, SC08-1774.

An arbitrator faces a difficult choice when an agreement to arbitrate limits relief mandated by statute and becomes part of a dispute to be settled in arbitration.[47] Federal courts have also struggled with the choice to sever illegal provisions or void the entire arbitration clause.[48] The U.S. Court of Appeals for the Eleventh Circuit has held that an arbitration agreement in an employment discrimination claim containing provisions that defeat a federal statute's remedial purpose is not enforceable.[49]

Health Consumer Arbitration-Industry Standard

Representatives of the American Arbitration Association (AAA), the American Bar Association, and the American Medical Association have jointly created a due process protocol for resolution of health care disputes to address perceived inequities in the use of pre-dispute arbitration involving individual patients.[50] In addition, the AAA, the world's largest provider of alternative dispute resolution services, as of January 1, 2003, announced that it will no longer accept the administration of cases involving individual patients without a *post-dispute* agreement to arbitrate.[51] The AAA policy recognizes that individual patients without the appropriate due process safeguards may not be in an equal bargaining position with a health care institution when the parties agree in advance to use arbitration to resolve disputes and are bound by the outcome of the arbitration.[52]

The American Health Lawyers Association (AHLA) provides alternative dispute resolution services. The AHLA amended its rules for consumer health care liability claims filed with its arbitration service after January 1, 2004, to provide that it will only administer such claims if an agreement to arbitrate was entered into by the parties in writing after the injury had occurred or a judge orders that AHLA administer an arbitration under the terms of a pre-injury agreement.[53]

Physician-Patient Arbitration Agreements

In addition to nursing homes, insurance companies and physicians have frequently requested that patients enter into binding pre-dispute arbitration agreements. Some malpractice insurers, such as First Professionals Insurance Company (FPIC), have encouraged insured physicians to use agreements to arbitrate liability claims with their patients.[54] In 2009, FPIC had 23.5 percent of the malpractice insurance market in Florida,[55] and currently 184 of 6,600 physicians insured by FPIC participate in its arbitration program.[56]

Under contract law, state courts review the arbitration agreements to determine whether or not they are unenforceable contracts of adhesion or contain illegal provisions that would make them void as against public policy. State courts have both upheld[57] and rejected binding pre-dispute agreements to arbitrate liability claims.[58] Even though physician-patient agreements have been enforced by some state courts as not void against public

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[47] Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 565 (Spring 2009).
[48] *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1058 (11th Cir. 1998).
[49] *Id.* at 1062.
[50] American Arbitration Association, American Bar Association, and American Medical Association, DUE PROCESS PROTOCOL FOR RESOLUTION OF HEALTH CARE DISPUTES (1998), *available at* http://www.adr.org/sp.asp?id=28633 (last visited Sept. 24, 2010).
[51] See American Arbitration Association, HEALTHCARE POLICY STATEMENT, http://www.adr.org/sp.asp?id=32192 (last visited Sept. 24, 2010).
[52] *Id.*
[53] This rule became effective June 2006. See American Health Lawyers Association rule amendments, http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx (last visited Sept. 24, 2010). http://www.firstprofessionals.com/RiskManagement/Prevention/ArbitrationProgram/default.aspx (last visited Sept. 24, 2010).
[55] Florida Office of Insurance Regulation, *2009 Annual Report on Medical Malpractice Financial Information Closed Claim Database and Rate Filings,* 10 (Sept. 30, 2009), http://www.floir.com/pdf/MedicaMalReport10012009.pdf (last visited Sept. 23, 2010).
[56] Source: First Professionals Insurance Company.
[57] See *Jonathan M. Frantz, M.D., P.A. v. Shedden*, 974 So. 2d 1193 (Fla. 2d DCA 2008), and *Buraczynski v. Eyring,* 919 S.W.2d 314 (Tenn. 1996).
[58] See *Broemmer v. Abortion Services of Phoenix Ltd.*, 840 P.2d 1013 (Ariz. 1992).

policy, the enforceability of pre-dispute arbitration in this context is still developing, as states adopt requirements to safeguard consumers when entering these agreements to arbitrate.

The proliferation of arbitration for medical malpractice, as one legal scholar has noted, is typically addressed within the context of "public policy doctrine" in the courts or the regulatory authority of state legislatures. However, under current legal requirements imposed by the preemptive protection of the FAA, such agreements will likely proliferate and "no state legal body can act to remedy the ills of pre-dispute binding arbitration."[59] The FAA expresses Congressional support and intent to prevent state legislatures and courts, both federal and state, from failing to enforce arbitration agreements.

Some physician-patient arbitration agreements have been held to be unenforceable under state laws governing the use of agreements to arbitrate disputes between physicians and patients if the agreements fail to meet notice and other procedural requirements prescribed in the laws.[60] Physician-patient arbitration agreements may withstand contract defenses of unconscionability when state law establishes a uniform procedure for providers and patients to agree to submit medical services disputes to arbitration. Under these state laws, patients are usually given an opportunity to unilaterally revoke the arbitration agreement. California and Ohio both impose special requirements on binding arbitration contracts for medical services. For an arbitration agreement to be valid under the Ohio law, it must give the patient a right to withdraw within 60 days of signing and must meet additional requirements specified in the law. The Ohio law also requires the agreement to state that the continued provision of medical services is not contingent on the patient's agreement for claims to be resolved in arbitration.[61]

The California law passed as part of a comprehensive litigation reform package as a statutory endorsement of physician-patient arbitration. Patients and their health care providers may agree that any future dispute may be resolved through binding arbitration. The California law requires specific language for arbitration agreements involving medical services and also provides that such agreements be revocable within 30 days. The California law requires agreements to arbitrate disputes over medical services to provide notice to a patient that he or she is giving up the right to a jury or court trial, and a court has found that the notice requirement may not be waived.[62] The California law functions to facilitate agreements to resolve medical malpractice disputes in advance by providing criteria for uniform language and conspicuous appearance of any arbitration provisions in medical services agreements.[63] To the extent the California law promotes a voluntary binding arbitration process for the resolution of medical malpractice, the notice requirement alerts consumers that they may be waiving a constitutional right to a jury or court trial and thereby avoids any challenges to the procedure under which the waiver occurred.

Louisiana and Arizona prohibit arbitration agreements that require the patient to select a physician who serves as an arbitrator in physician-patient arbitration agreements.[64] Some states, like Colorado, provide that a patient has a specified number of days to rescind an arbitration agreement after execution and that no health care provider may refuse services if the patient refuses to execute the agreement or exercises the right to rescind the agreement.[65]

The U.S. Supreme Court has held that the FAA preempts state law requiring specific notice requirements for arbitration agreements.[66] Despite this ruling, various states have enacted notice and other requirements governing

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[59] DeVille, *supra* note 9, at 366.
[60] Timothy F. McCurdy, *The Doctor Will See You Now (If You Signed the Arbitration Agreement)*, 65 J. MO. B. 232, 233 (September-October 2009).
[61] OHIO REV. CODE ss. 2711.22 and 2711.23(A)-(J).
[62] CAL. CIV. PROC. CODE s. 1295(a) and (b) and *Rosenfield v. Superior Court*, 143 Cal. App. 3d 198 (Cal. Dist Ct. App. 1983).
[63] Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 39 (February 2004) (citing *County of Contra Costa v. Kaiser Found. Health Plan, Inc*., 54 Cal. Rptr. 2d 628, 634 (Cal. Ct. App. 1996)).
[64] *Broemmer,* 840 P.2d at 1018, and LA. REV. STAT. ANN. s. 9:4233 (2009).
[65] See COLO. REV. STAT. ANN. s. 13-64-403, which may be preempted by the FAA. See *Allen v. Pacheco*, 71 P.3d 375, 383-384 (Colo. 2003), which acknowledges that the FAA may preempt the arbitration provisions of the Colorado law.
[66] *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996).

arbitration agreements between health care providers and patients which remain unchallenged on the issue of federal preemption under the FAA.

Some case law suggests that a state statute that regulates the business of insurance and imposes notice requirements inconsistent with the FAA may be reverse-preempted under the federal McCarran-Ferguson Act.[67] The McCarran-Ferguson Act provides that an act of Congress may not be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance.[68] Under this scenario, the state law is challenged as being preempted by the FAA, and if the state law relates to the regulation of the business of insurance it may be saved from the preemptive effects of the FAA when the McCarran-Ferguson Act applies. There is a three-part test to establish whether the McCarran-Ferguson Act applies: (1) whether the federal law (e.g., the FAA) relates specifically to bar the application of a state law; (2) whether the state law was specifically enacted to regulate the business of insurance; and (3) whether the state law would be impaired, invalidated, or superseded by application of federal law (e.g., the FAA).[69]

Consumer Safeguards with Arbitration

Standard Nursing Home Admissions Agreements

Some states have established standard nursing home admissions agreements to provide procedural fairness for nursing home residents.[70] California requires all nursing homes to use a new standard admissions agreement.[71] As a part of this framework, the law provides that all arbitration clauses must be included on a form separate from the rest of the nursing home admissions contract and requires all contracts containing arbitration clauses to indicate that the agreement to arbitrate is not a precondition for medical treatment or for admission to the facility. These safeguards are an attempt to ensure that consumers voluntarily and knowingly agree to any arbitration provisions to settle future disputes. The use of a standard nursing home admissions agreement may simplify the process and reduce the chances of procedural unfairness in the presentation of arbitration agreements. Additionally, more consumers may make better informed choices to accept or reject arbitration agreements to resolve nursing home disputes.

The regulations for a standard nursing home admissions agreement were adopted, and then a legal challenge was filed.[72] The challenge included an allegation that the regulations interfered with the enforceability of otherwise valid agreements to arbitrate disputes between nursing homes and residents and therefore were preempted by the FAA.[73] Although the court rejected the preemption argument, the court in its order required the California Department of Health Services to modify the regulations to address other issues that were raised in the challenge. As a result, the original regulations have not been enforced and will not be enforced until the modified regulations are adopted.[74]

Regulation of Consumer Arbitration

In addition to enacting legislation to provide for uniform procedures in the use of consumer arbitration provisions in medical services and nursing home agreements, states are adopting laws to curtail perceived abuses against consumers within the arbitration industry. A new approach is emerging among states to provide consumer safeguards by regulation of the arbitration industry.[75] This new approach has not yet been fully litigated and appears to be inconsistent with the FAA's central purpose to ensure that private agreements to arbitrate are enforced with the same deference granted to contracts generally. To the extent that the laws providing safeguards for consumer arbitration are inconsistent with the FAA, these laws may be subject to preemption challenges. Despite the inconsistency, state legislatures are adopting laws to directly regulate the arbitration industry. One

[67] 15 U.S.C. ss. 1011-1015, 1012(b); and *Allen,* 71 P.3d 375.
[68] 15 U.S.C. s. 1012(b).
[69] *Moore v. Liberty Nat'l Life Ins. Co.*, 267 F.3d 1209, 1220 (11th Cir. 2001).
[70] Palm, *supra* note 26, at 482.
[71] CAL. HEALTH & SAFETY CODE s. 1599.61.
[72] *Parkside Special Care Center, Inc. v. Shewry*, Case No. GIC 860574 (March 21, 2007).
[73] Correspondence from staff of the California Office of the Attorney General.
[74] Correspondence from staff of the California Department of Public Health.
[75] Drahozal, *supra* note 21, at 393-395.

focus of these laws appears to ensure that adequate safeguards exist to protect consumers from unnegotiated arbitration clauses in form contracts. These laws also ensure that consumers gain knowledge regarding any potential bias that arbitrators may hold for consumers or an industry.[76]

New Mexico regulates arbitration to give a consumer a legal remedy to void a clause in a form contract that modifies or limits procedural rights against the consumer when resolving a dispute in arbitration.[77] The New Mexico arbitration law defines "disabling civil dispute clause" to include any provision found in a form contract requiring arbitration which would typically diminish consumer rights relating to: the choice of a forum to settle a dispute; discovery requirements; participation in a class action; appeal of a decision; and the awarding of attorney fees, civil penalties, or multiple damages.[78]

California has stringent disclosure requirements for arbitrators. Arbitrators must disclose "all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial."[79] The existence of any ground that could disqualify a judge must be disclosed by the arbitrator. Other disclosures include: specified information relating to noncollective bargaining cases, any names and attorney-client relationship the proposed neutral arbitrator has or had with any party or lawyer to the arbitration proceeding, and any professional or significant personal relationships the arbitrator or his or her spouse or minor child has or had with any party or lawyer to the arbitration.[80] Arbitrators in California must comply with ethical standards, which include disclosures required in all arbitration proceedings.[81]

California imposes additional disclosure and disqualification requirements on arbitrators and private arbitrating companies. A proposed neutral arbitrator must be disqualified for failure to comply with the disclosure requirements, and any party who fails to receive the disclosures may serve a notice of disqualification within 15 calendar days after the proposed arbitrator fails to do so.[82] A private arbitration company may not administer consumer arbitration services if the company has a financial interest in any party to a proposed arbitration.[83]

Private arbitration companies in both California[84]and the District of Columbia[85] must annually collect and make available certain information regarding consumer arbitration in a computer-searchable database. The District of Columbia requires any arbitration organization that administers 50 or more consumer arbitrations annually to collect, publish at least quarterly, and make available to the public specified information in a computer-searchable database.[86]

The regulation of the arbitration process or industry may curb inappropriate conduct between arbitrators and parties to consumer arbitration. Mandated disclosure and disqualification requirements may better educate consumers regarding the impartiality of arbitrators and reduce the instances of unprofessional or unethical conduct. Despite these potential positive outcomes for consumer arbitration, increased regulation of the arbitration industry may not be welcomed by business interests. Some legal scholars question the effectiveness of the state reforms to regulate the conduct of all arbitrators out of concerns that such regulation may create a hostile

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[76] *Id.*
[77] N.M. STAT. ANN. s. 44-7A-5.
[78] N.M. STAT. ANN. s. 44-7A-1(4).
[79] CAL. CIV. PROC. CODE s. 1281.9(a). Montana has a similar arbitrator disclosure law. See MONT. CODE ANN. s. 27-5-116.
[80] CAL. CIV. PROC. CODE s. 1281.9
[81] See *Cal. Ethics Standards For Neutral Arbitrators In Contractual Arbitration*, http://www.courtinfo.ca.gov/rules/documents/pdfFiles/ethics_standards_neutral_arbitrators.pdf (last visited Sept. 24, 2010).
[82] CAL. CIV. PROC. CODE s. 1281.91
[83] CAL. CIV. PROC. CODE s. 1281.92
[84] CAL. CIV. PROC. CODE s. 1281.96.
[85] DC ST s. 16-4430.
[86] DC ST s. 16-4430. The information includes but is not limited to: the name of the business that is a party to the arbitration; a description of the dispute; whether the consumer was the prevailing party; the number of occasions the business has been a party to arbitration administered by the arbitration organization; the disposition of the dispute; the amount of the claim, award, or other relief granted; the name of the arbitrator; the arbitrator's fee; and the percentage of the arbitrator's fee allocated to each party.

environment for the use of arbitration to settle commercial disputes.[87] These scholars believe that the regulation may bring unintended results such as an increased risk of delays in getting an arbitration award and greater transaction costs for businesses that have traditionally resolved disputes using arbitration.[88] The focus of the reforms is on consumer arbitration; however, the reforms' disclosure and disqualification requirements may burden commercial arbitration with the possibility of additional means for arbitration awards to be vacated.[89] Under California's disclosure laws, even when commercial parties have agreed to waive the statutory disclosure requirements, a court held that disclosure requirements may not be waived.[90]

Additionally, some of the reforms may be preempted by federal law. As an example, courts recognize significant preemption issues for California's disclosure and disqualification requirements with the disclosure and challenge requirements of the U.S. Securities and Exchange Commission.[91]

Federal Legislation

In recent years, legislation has been introduced in Congress to provide additional safeguards to consumers who enter pre-dispute arbitration agreements. The Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong., makes pre-dispute mandatory arbitration agreements between residents of a long-term care facility and the facility unenforceable.[92] The legislation applies only to a dispute or claim that arises on or after its effective date. The Congressional report of the bill in the Senate Judiciary Committee notes that attempts under state law to limit or void the enforceability of pre-dispute mandatory arbitration agreements in nursing home cases have been found by courts to be preempted by the FAA.[93] The bill was placed on the Senate legislative calendar but did not pass the Senate.

The Arbitration Fairness Act of 2007, S. 1782, 110th Cong., provides that no pre-dispute arbitration agreement may be valid or enforceable if it requires arbitration of an employment, consumer, or franchise dispute. The legislation also invalidates any dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The legislation provides, further, that the validity or enforceability of an agreement to arbitrate shall be determined by a court, under federal law, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement. The legislation exempts arbitration provisions in collective bargaining agreements from its requirements. The bill did not pass, and similar legislation has been filed in the 111th Congress.[94]

Additional federal legislation introduced addressing pre-dispute arbitration includes the Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009), which prohibits pre-dispute arbitration agreements in consumer contracts.[95]

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[87] See Jaimie Kent, *The Debate In California Over and Implications of New Ethical Standards for Arbitrator Disclosure: Are the Changes Valid or Appropriate?,* 17 GEO. J. LEGAL ETHICS 903 (Summer 2004) (citing Ruth V. Glick, *Should California's Ethics Rules be Adopted Nationwide? No! They Are Overbroad and Likely to Discourage Use of Arbitration,* 9(1) DISP. RESOL. MAG. 13, 15 (2002)).

[88] See Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 40-44 (2010).

[89] *Id.*

[90] *Id.* at 42 (citing *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 149-151 (Cal. Ct. App. 2004)).

[91] *See, e.g.*, *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097 (N.D. Cal. 2003).

[92] Similar federal legislation was introduced during 2009 in the 111th Congress. See the Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (Senator Martinez) and H.R. 1237.

[93] Senate Committee on Judiciary, Fairness in Nursing Home Arbitration Act, 110th Cong. 2d sess., 2009, S. Rep. 110-518, *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_reports&docid=f:sr518.110.pdf (last visited Sept. 24, 2010).

[94] See Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009), referred to the Committee on Judiciary, and H.R. 1020, 111th Cong. (2009), referred to the Subcommittee on Commercial and Administrative Law of the Committee on Judiciary and discharged from the Subcommittee on Commercial and Administrative Law on Jun. 21, 2009.

[95] See Consumer Fairness Act of 2009, H.R. 991, 111th Cong. (2009), referred to the House Committee on Financial Services on Feb. 11, 2009. A related Senate bill has not been filed.

Options and/or Recommendations

This report does not offer recommendations for action by the Florida Legislature. Rather, the report provides an overview of legal parameters relating to the use, enforceability, and regulation of consumer arbitration, particularly in the medical services and long-term care fields. Based on the research and findings presented in this report, there are approaches the Legislature could consider if it wishes to enact policy in this area, recognizing that some of the approaches may face preemption challenges under federal law. Among the measures that some other states have adopted to address the use of pre-dispute arbitration provisions in consumer contracts are:

- Impose disclosure and disqualification requirements on arbitrators administering consumer arbitration;
- Establish notice requirements for arbitration clauses in agreements for medical services;
- Adopt a uniform standardized nursing home admissions agreement and impose notice and procedural requirements for arbitration provisions of nursing home claims and disputes; and
- Give consumers a legal remedy to void a clause in a form contract that modifies or limits procedural rights against the consumer when resolving a dispute in arbitration.

The law on the use and enforcement of pre-dispute arbitration agreements requiring mandatory binding arbitration to resolve disputes involving medical services is not yet settled. State legislatures have passed laws to protect consumers by imposing minimum requirements for health care providers who in advance of any conflict request patients or consumers to submit in arbitration any medical service claims or disputes. State courts must enforce arbitration agreements unless a consumer challenges the agreement under a valid contract defense. Contract defenses arguing unconscionability where the parties show unfair circumstances surrounding the manner of how the agreement was reached or that the agreement overwhelmingly favored one party have been used successfully to invalidate arbitration agreements.

Nursing homes and other health care providers argue a valid need for the use of arbitration as a tool to rein in their potential risk of loss for expenses relating to litigation. Consumer groups argue that consumers are waiving a valuable constitutional right to trial without any meaningful choice.

State attempts to invalidate potentially over-reaching arbitration agreements between consumers and the health care industry continue to be subject to preemption arguments under federal arbitration law. As an alternative approach, several states are regulating the arbitration industry to require stringent disclosures and disqualification standards for consumer arbitration. Although disclosure provides additional information to consumers, there is disagreement on the effect such requirements may have on continued use of commercial arbitration and other alternative dispute resolution models used in business. Additionally, to the extent that such disclosure and disqualification requirements conflict with federal law, there may be significant preemption issues.