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District Courts of Appeal: Courts of Final Jurisdiction with Two Responsibilities--An Expanded Power to Certify Questions and Authority to Sit En Banc

Ben F. Overton

DISTRICT COURTS OF APPEAL: COURTS OF FINAL JURISDICTION WITH TWO NEW RESPONSIBILITIES—AN EXPANDED POWER TO CERTIFY QUESTIONS AND AUTHORITY TO SIT EN BANC

BEN F. OVERTON*

This article will address two important new responsibilities of the district courts of appeal under the 1980 amendment to article V, section 3, of the Florida Constitution and the new appellate rules.[1] The first is the expanded authority of the district courts to certify questions to the supreme court, resulting in the district courts being a screening body for identifying important issues for supreme court resolution.[2] The second is the authority of the district courts to sit en banc.[3]

Although the 1980 amendment was, and still is, criticized as unnecessarily limiting the supreme court's jurisdiction, initial experience indicates that the amendment has provided the supreme court with a more effective means of addressing issues of jurisprudential significance and that the supreme court actually wrote more opinions on the merits in 1981 than it did in previous years under the prior constitutional provisions.[4] Before specifically addressing the district court's two new responsibilities, the history and purpose of Florida's present appellate structure, as well as the functions of Florida's appellate courts, should be reviewed.

When the district courts were created in 1957, they were intended to be final appellate courts for most cases.[5] By judicial decision, particularly *Foley v. Weaver Drugs*,[6] the district courts were largely reduced to the position of non-final intermediate appellate courts. As a result, the district courts became

*Justice of the Supreme Court of Florida, 1974 to date (Chief Justice 1976-1978). B.S., 1949, University of Florida; J.D., 1952.

1. *See* Fla. S. J. Res. 20-C (proposing the amendment to FLA. CONST. art. V, § 3(b)), reproduced in appendix A.

2. FLA. CONST. art. V, § 3(b)(4), (5).

3. *See* FLA. R. APP. P. 9.331.

4. A statistical comparison of the years 1979 and 1981 was compiled from the records of the Clerk of the Florida Supreme Court. These records were used to determine the jurisdictional basis on which cases were filed with the supreme court and the disposition of these cases. In 1979, 417 opinions were written on the merits; in 1981, 463 opinions were written by the supreme court.

5. According to the *Judicial Council of Florida Second Annual Report*, (1955) at 3, "[i]n order to avoid any possibility that the creation of these courts would simply afford an additional appeal, the Council thought that it was wise to have the jurisdiction of the Supreme Court clearly defined and restricted." *Id.*

6. 177 So. 2d 221 (Fla. 1965). In *Foley*, the Florida Supreme Court held that it "may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record proper discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of this court or another district court of appeal." *Id.* at 225.

Justice Thornal dissented in *Foley*, stating:

characterized as no more than way-stations in the appellate process. The 1980 amendment to the supreme court's jurisdiction has, however, substantially reinforced the role of the district courts as final appellate courts in Florida's judicial system.[7]

Although the justification for the 1980 amendment was the need to reduce the supreme court's workload by limiting its jurisdiction,[8] it should be recognized that the amendment was part of a substantial reform of Florida's appellate court structure designed to improve the state's judicial system.[9] This reform was accomplished not only with the amendment,[10] but also with statutory changes providing for increased district court judicial personnel[11] and with jurisdictional changes in the review process,[12] together with rule

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> [A]ll of this simply means that the District Court decisions are *no longer final* under any circumstances. It appears to me that the majority view is an open invitation to every litigant who loses in the District Court, to come on up to the Supreme Court and be granted a second appeal — the very thing . . . which we assured the people of this state would *not* happen when the judiciary article was amended in 1956.

Id. at 234 (Thornal, J., dissenting) (emphasis in original).

See generally Freidin, *Conflict Certiorari: Is the Supreme Court of Florida Following Its Constitutional Mandate?*, 32 U. MIAMI L. REV. 435 (1978).

7. *See* Alderman, *Proposed Constitutional Amendment Number Two Will Modify the Jurisdiction of the Supreme Court*, SHERIFF'S STAR 8 (1980); England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980); England & Williams, *Florida Appellate Reform One Year Later*, 9 FLA. ST. U.L. REV. 223 (1981).

8. In an explanation of the proposed 1980 amendment prepared by then Chief Justice Arthur England, Justice England indicated that the major purpose of the amendment was to "alter the Court's jurisdiction to resolve its uncontrollable caseload."

9. *See Report of the Supreme Court Commission on the Florida Appellate Court Structure*, 53 FLA. B.J. 274 (1979) [hereinafter cited as *Appellate Structure Commission Report*]. The Commission was established by Chief Justice Arthur England in 1978 and given the responsibility of recommending measures to improve Florida's appellate structure. The Commission was chaired by Justice Ben F. Overton and composed of district, circuit, and county court judges, legislators, laymen, and members of the bar. The Commission submitted eight recommendations to the supreme court. (1) The establishment of the Fifth District Court of Appeal. *Id.* at 276. (2) The adoption of an en banc rule authorizing the district courts to sit en banc to resolve intra-district decisional conflict or to consider cases of exceptional importance. *Id.* at 279. (3) A revision of the then-existing workers' compensation system. *Id.* at 280. (4) That the supreme court control its jurisdiction through changes in the appellate rules. *Id.* at 282. (5) That the chief judge of each circuit be authorized to designate either a single circuit judge or a panel of three circuit judges to hear appeals from county courts. *Id.* at 288. (6) That county court jurisdiction be expanded. *Id.* at 289. (7) That review of Public Service Commission orders be transferred from the supreme court to the district courts except in cases involving companies providing electricity, telephone or telegraph services, or natural gas. *Id.* (8) The institution of a pilot program designed to expedite criminal appeals. *Id.* at 290.

10. *See supra* note 1.

11. *See In re* The Creation of the District Court of Appeal, Fifth District, 374 So. 2d 972 (Fla. 1979). In addition to the Fifth District Court of Appeal, eleven new district court judgeships were established. *See* 1979 Fla. Laws 413, § 3.

12. Direct supreme court review in workers' compensation cases was eliminated. *See* 1979 Fla. Laws 312, § 1. The supreme court's jurisdiction to review Public Service Commission actions was limited by the 1980 amendment. *See* FLA. CONST. art. V, § 3(b)(2).

changes by the supreme court to implement the constitutional and statutory changes.[13]

The 1980 amendment was intended to bring the supreme court's workload to a manageable level. It was recognized that the supreme court could not realistically review a significant portion of the more than 13,000 cases now being decided by the district courts in addition to reviewing cases within its mandatory jurisdiction.[14] The amendment also was intended to reinforce the district courts' role as final appellate courts for most legal matters within each district, in accordance with their original function.[15] The appellate structure reform of 1979-80 sought to provide a process free of unnecessary appellate proceedings, in which judges, when making decisions, could remain deliberative, expeditiously resolve decisional conflict, and better address important legal issues.[16]

Florida is not the only jurisdiction to face substantially increased caseloads. Other jurisdictions have experienced similar increases in case volume and have implemented various screening methods for determining which cases the state supreme court should accept on the merits. The use of central staffs or law clerks as a screening mechanism has been accepted in some jurisdictions.[17] Where used, central staff attorneys screen petitions for review when they are initially filed in the appellate court. They prepare recommendations as to whether a case should be considered on the merits and, if so, whether to grant or deny oral argument. In some instances, central staff attorneys also prepare proposed opinions. While central staff attorneys are responsible to the court as a whole, rather than to any individual judge, a law clerk may, of course, be used in the same manner.[18]

Justice John Paul Stevens generated considerable public interest in the screening process when he explained in a speech to the American Judicature Society that he must depend almost exclusively on his law clerks to screen petitions for certiorari filed with the United States Supreme Court. Justice Stevens stated:[19]

> I have found it necessary to delegate a great deal of responsibility in the review of petitions to my law clerks. They examine them all and select a small minority that they believe I should read myself. As a result, I do not even look at the papers in over eighty percent of the cases that are filed.

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13. *See In re* Emergency Amendments to Rules of Appellate Procedure, 381 So. 2d 1370 (Fla. 1980).

14. According to statistics filed with the Clerk of the Supreme Court by the clerks of the district courts, 13,800 cases were filed in the district courts in 1981. Cases disposed of totaled 13,657, with 4,345 opinions being rendered by the district courts.

15. *See supra* note 5.

16. *See supra* note 9.

17. *See* P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 44-55 (1976) [hereinafter cited as P. CARRINGTON]. *See generally* Cameron, *The Central Staff: A New Solution to an Old Problem*, 23 U.C.L.A. L. REV. 465 (1975).

18. *See* Cameron, *supra* note 17, at 468-69.

19. Address by Justice Stevens, American Judicature Society (Aug. 6, 1982).

The use of central staff attorneys or law clerks to make these types of decisions has been criticized as placing substantial power in sometimes young and inexperienced lawyer personnel. One commentator has expressed the view that a central staff is a "cancerous growth"[20] that should be controlled, and another has stated that central staff attorneys are, in reality, the "hidden judiciary."[21]

Given the caseload existing in 1979 and as projected for later years, the Florida Supreme Court would have been forced to employ some variation of the central staff approach to screening cases for review if the jurisdiction of the court were not substantially changed. One of the key philosophical determinations made by the supreme court in recommending the 1980 jurisdictional amendment to the legislature was the rejection of the central staff approach. It expected that under the new amendment a part of the screening responsibility would be exercised by the district courts under their expanded certification power.

For the appellate structure reform to succeed, there must be full utilization of the district courts' increased certification powers and their new authority to sit en banc. The certification powers provide the supreme court with a viable screening mechanism for determining those issues the supreme court should decide on the merits. The en banc authority allows the district courts to clearly establish the law within each district. Before addressing these two district court responsibilities, it is appropriate to identify the functions performed by the appellate courts in the judicial process.

Functions of Appellate Courts

The right to one appeal is ordinarily considered sufficient to ensure justice between litigants. A process that routinely allows a second full appeal results in substantial delay, lack of finality, and increased costs to the litigants and to the government. There is no right to an appeal under the provisions of the United States Constitution, and states may make the first appeal a matter of discretion,[22] as it is in England,[23] rather than a matter of right. Many states with small populations have only one appellate court[24] and, therefore, litigants have only one appeal. Providing a second appeal was clearly not the purpose for creating Florida's district courts. There are two distinctive functions exercised by appellate courts, and it is important to understand how these functions are carried out in Florida's two-tier appellate process.

20. McCree, *Bureaucratic Justice: An Early Warning*, 129 U. Pa L. Rev. 777, 787 (1981). Wade McCree is a former Solicitor General of the United States.

21. Bird, *The Hidden Judiciary*, 6 Judge's J. 4 (1977). Rose Bird is the Chief Justice of the California Supreme Court.

22. *See, e.g.*, United States v. Young, 544 F.2d 415, 416 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976).

23. *See, e.g.*, Meador, *English Appellate Judges from an American Perspective*, 66 Geo. L.J. 1349, 1363-64, 1367 (1978). *See also* Rules of the Supreme Court, 1977, order No. 53.

24. States having no intermediate appellate courts include: Alaska, Delaware, Hawaii, Idaho, Maine, Mississippi, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia and Wyoming. Washington Legal Foundation, Court Watch Manual: A Citizen's Guide to Judicial Accountability 23 (1982).

The Error-Correcting Function

The majority of cases appealed to the district courts fall into the error-correcting category.[25] In these cases, the district court reviews trial court proceedings to determine whether proper trial procedure was used and whether settled law was correctly applied to the facts as reflected in the record. Policy considerations as to what the law is or ought to be are not part of the error-correcting function. The supreme court also performs this error-correcting function in those cases which come to the supreme court directly, such as death penalty cases, bond validation proceedings, and certain public utility matters.

The Judicial Law-Making Function

Generally, the principal function of a state's highest court is to maintain doctrinal harmony and give authoritative expression to the law of that state. In regard to this judicial law-making function,[26] the Florida Supreme Court's responsibility is to resolve conflict among the five district courts, provide uniform constitutional construction, make final determinations as to the validity of statutes, and establish or modify legal principles. Although the supreme court occupies the primary law-making role, the district courts are not totally removed from the law-making function. While the supreme court has stated that the district courts should refrain from changing existing law,[27] they should not refrain from providing the supreme court with opportunities to make needed changes in the law or from suggesting innovations in the law.[28] The district courts have the initial opportunity to determine the validity of statutes and to construe the constitution, and they exercise a law-making function when considering questions of first impression. The district courts may also influence the supreme court by the questions of public importance they certify for review, as well as by the accompanying opinions. With this new certification authority, the district courts now have a means for increased participation in the supreme court's law-making function.

EXPANDED CERTIFICATION POWERS IN THE DISTRICT COURTS OF APPEAL

The 1980 amendment, as intended, has dramatically changed the manner in which cases are brought to the supreme court for resolution on the merits. It must be strongly emphasized, however, that it has not reduced the number of district court cases the supreme court accepts for review or the number of

25. The functions of appellate courts are more fully expressed in P. CARRINGTON, *supra* note 17, at 2-7; R. LEFLAR, INTERNAL OPERATING PROCEDURES OF APPELLATE COURTS 1-12 (1976).

26. *See* R. LEFLAR, *supra* note 25, at 4-5.

27. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). In *Hoffman*, the Florida Supreme Court held "that a District Court of Appeal does not have the authority to overrule a decision of the Supreme Court of Florida." *Id.* at 440.

28. Although the Florida Supreme Court in *Hoffman* held that a district court may not overrule a decision of the supreme court, *Hoffman* can be read as encouraging the district courts to suggest changes in the law. *Id.* at 434. *See, e.g.*, State v. Tsavaris, 382 So. 2d 56, 65 (2d D.C.A. 1980), *aff'd*, 394 So. 2d 418 (Fla. 1981). *Cf.* Johnson v. Bathey, 350 So. 2d 545, 548 (2d D.C.A. 1977), *aff'd*, 376 So. 2d 848 (Fla. 1979).

opinions rendered on the merits. In fact, a statistical comparison of the years 1979 and 1981 reveals that the supreme court is resolving more district court cases on the merits, as well as more cases overall, subsequent to the passage of the 1980 amendment than it did prior to the adoption of the amendment.[29] The real effect of the amendment is the substantial reduction in the amount of time the supreme court now spends on its screening responsibility.

Under the pre-1980 jurisdictional provision, the certified question process was used in a very limited manner. In 1979, for example, only seven cases were certified by the district courts; six of those cases were accepted for review. In that same year, the court received 1,265 petitions for certiorari to district courts to review for conflict. The court rendered opinions on the merits in 65 district court cases, including the six certified question cases. In order to review the 65 certiorari cases on the merits, it was necessary for the supreme court to screen the 1,265 petitions to determine if the required conflict existed.[30] As a result, the supreme court spent a substantial portion of its time screening cases for conflict jurisdiction. Further, in 1979, it was anticipated that within five years the number of petitions for certiorari on conflict grounds would increase substantially. It should be noted that in 1979 a significant portion of the cases the supreme court considered on the merits came to the court under the direct review jurisdiction of the 1972 constitutional amendment.[31]

In comparison, in 1981, the first full year following the adoption of the 1980 amendment, the supreme court rendered 132 opinions on the merits in district court cases; forty-six additional cases were accepted by the court and are pending decision.[32] In accepting these cases, the supreme court had to screen only 539 petitions for conflict and 88 petitions filed under the certification authority of the district courts.[33] Obviously, the time spent by the supreme court in screening cases has been substantially lessened by the 1980 amendment, thereby allowing the court more time to render decisions on the merits. As important is the fact that, in 1981, almost fifty percent of the district court cases accepted by the supreme court and considered on the merits came to the court via the certified question process. This indicates the new screening method is providing an excellent means for the supreme court to receive important legal issues for resolution. To emphasize the importance placed on this expanded certification power by the supreme court, it should be noted that all of the certified question petitions filed in 1981 were accepted for review.

Under the previous jurisdictional provision, the district courts could only certify questions "of great public interest."[34] The 1980 amendment, although restricting the supreme court's discretionary review of district court decisions to written opinions,[35] substantially expanded the certification power of the

29. *See supra* note 4.

30. *Id.*

31. *See* FLA. CONST. art. V, § 3(b)(1), (2) (1972). In 1979, 366 direct review cases were filed in the supreme court. Opinions were rendered in 205 of these cases.

32. *See supra* note 4.

33. *Id.*

34. FLA. CONST. art. V, § 3(b)(3) (1972).

35. *See* Dodi Publishing Co. v. Editorial Am., 385 So. 2d 1369 (Fla. 1980); Jenkins v.

district courts.

Under the 1980 amendment, the district courts may certify three types of matters to the supreme court: (1) a question certified to be "of great public importance,"[36] (2) a decision certified to be "in direct conflict with a decision of another district court of appeal,"[37] and, (3) a judgment of a trial court pending before the district court certified to be "of great public importance, *or* to have a great effect on the proper administration of justice throughout the state," which needs "immediate resolution by the Supreme Court."[38] This latter provision is sometimes referred to as the "pass through" provision.

Questions of Great Public Importance

At first glance, the provision authorizing district courts to certify questions of "great public importance"[39] appears to be almost identical to the previous jurisdictional provision, which allowed for certification of questions "of great public interest."[40] The Appellate Structure Commission suggested replacing the word "interest" with "importance" because most district court judges were under the impression that the phrase "great public interest" required that the public actually know of and be interested in the legal issue to be certified.[41] This construction was never judicially tested.

The use of "great public importance" as a standard for certification was intended to eliminate the perceived requirement that the public have knowledge of and interest in the issue.[42] The change has had a significant effect on the use of certified questions as a screening mechanism for the supreme court. In 1979 only seven cases were certified to the court, while in 1981, seventy-one cases were certified as being of great public importance. Of these

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State, 385 So. 2d 1356 (Fla. 1980). In *Dodi,* the Florida Supreme Court held that "[t]he issue to be decided from a petition for conflict review is whether there is express and direct conflict in the decision of the district court before us for review, not whether there is conflict in a prior written opinion . . . cited for authority." 385 So. 2d 1369. In *Jenkins,* the supreme court held that it "lacks jurisdiction to review per curiam decisions rendered without opinion, regardless of whether they are accompanied by a dissenting or concurring opinion, when the basis for such review is an alleged conflict of that decision with a decision of another district court of appeal or of the Supreme Court." 385 So. 2d at 1359.

36. FLA. CONST. art. V, § 3(b)(4).

37. *Id.*

38. *Id.* § 3(b)(5).

39. *Id.* § 3(b)(4).

40. *Id.* § 3(b)(3) (1972).

41. The suggestion to substitute "importance" for "interest" was not in the Appellate Structure Commission's official report. The Commission's official report to the Florida Supreme Court recommended that the court control its jurisdiction by rule changes rather than by constitutional amendment. When the court adopted the constitutional amendment approach, however, the Commission was asked to reconvene and make suggestions concerning the terminology of the amendment. According to the commentary to FLA. R. APP. P. 9.030, "[t]he change [from interest to importance] was to recognize the fact that some legal issues may have 'great public importance' but may not be sufficiently known by the public to have 'great public interest.' " The rule changes were implemented by the Florida Supreme Court in an order reported at 381 So. 2d 1370 (Fla. 1980).

42. 381 So. 2d at 1375.

seventy-one cases there have been sixty opinions rendered on the merits and eleven have been accepted and are pending decision.[43]

Certified Conflict

Certified conflict is a new grant of authority created by the 1980 amendment that allows a district court to certify that a decision it has rendered conflicts with a decision of another district court or of the supreme court on the same question of law.[44] Whenever divergent views exhibiting conflict are contained in written opinions, district courts should not be reluctant to certify the issue to the supreme court for resolution. In 1981, fourteen decisions were certified as conflicting.[45]

It is important to note that this provision applies to asserted conflict with supreme court decisions as well as with district court decisions. The certification of conflict with a supreme court case is not inconsistent with the supreme court's direction that district courts follow the law as expressed in supreme court decisions.[46] There may well be instances when, for example, because a statute has been modified or because substantially different facts exist, the district court believes a supreme court decision does not apply, but recognizes that there may be an arguable claim of conflict. This provision affords the district court panel a means of certifying the possible conflict to avoid any potential disharmony.

When district courts disagree with sister district courts on the principle of law which should apply to similar sets of facts, or recognize disharmony in the law, the court should certify the issue to the supreme court for resolution. Consistency in the law is essential not only to assure justice in a particular case, but also to avoid unnecessary and costly litigation in the future. When judges at the district court level recognize and certify conflict, the supreme court spends less judicial time determining which cases should be heard on the merits because the initial screening has been done by district court judges who have an intimate knowledge of the case. Almost all certified conflict cases are accepted for review on the merits.[47]

"Pass Through" Certification

The "pass through" provision of the 1980 amendment allows the supreme court, upon certification by a district court, to expeditiously consider cases pending in the district court that need immediate resolution.[48] While it is generally beneficial for the supreme court to have the advice of the district courts' written opinions, there are cases in which the delay occasioned by

43. *See supra* note 4.

44. FLA. CONST. art. V, § 3(b)(4).

45. *See supra* note 4.

46. *See* United States v. Young, 544 F.2d 415, 416 (9th Cir.), *cert. denied*, 429 U.S. 1024 (1976).

47. In 1981, of the 14 cases filed under FLA. CONST. art. V, § 3(b)(4), 10 were accepted for review on the merits, 2 were denied review, and 2 were dismissed.

48. *Id.* § 3(b)(5).

district court review adversely affects the administration of justice. The need for the "pass through" provision was illustrated in two cases occurring just prior to the adoption of the amendment. The first arose when the supreme court declared unconstitutional a statute directing that a portion of collected traffic fines be used to fund the Crimes Compensation Commission.[49] Because of the lengthy time involved in the ordinary legal process, substantial funds had been collected under the statute which could not reasonably be refunded. The second case concerned a statute bifurcating criminal proceedings when a defendant asserted the defense of insanity.[50] The statute was eventually held unconstitutional, but a number of retrials were required because of the delayed appellate procedure. These problems could have been avoided if an expedited procedure had existed allowing an immediate review before the supreme court.

The new "pass through" provision was intended to solve these types of problems but was expected to be used sparingly.[51] It has been effectively used by the district courts in certifying the few important issues requiring immediate resolution. From the amendment's adoption in 1980 to November, 1982, five cases were certified under the "pass through" provision, all of which the supreme court accepted for review.[52] One of the recent 1982 cases concerned the removal of a constitutional amendment from the 1982 general election ballot because of misleading language.[53] The entire legal process, from the filing of the complaint through the circuit court trial and the rendering of a supreme court opinion after oral argument, took a total of thirty-six days.

As previously noted, the supreme court's role is principally that of a law-harmonizer and policy-maker. The certification authority granted the district courts in the 1980 amendment aids the supreme court in its law-making function by making the district courts part of the process of screening those cases which the supreme court should decide on the merits. Consequently, the district courts, while carrying out their error-correcting function, have a significant role in the law-making function. District court judges must recognize that this certification authority places them in an important position in Florida's appellate scheme. In the past, the supreme court could basically use only decisional conflict as a means of obtaining jurisdiction to address important legal issues which did not come to the court on direct review.[54] The subterfuge of

49. State v. Champe, 373 So. 2d 874 (Fla. 1978).

50. State *ex rel.* Boyd v. Green, 355 So. 2d 789 (Fla. 1978).

51. England, Hunter & Williams, *supra* note 7, at 195-96.

52. In 1980, two cases, Department of Ins. v. Liberty Mut. Fire Ins. Co., Case No. 59,352 and Department of Ins. v. Government Employees Ins. Co., Case No. 59,353, were filed for review under FLA. CONST. art. V, § 3(b)(5). Both, however, were voluntarily dismissed before the supreme court could determine whether to accept the cases for decision on the merits. In 1981, three cases were filed for review under this provision. These cases, all of which were accepted for review, were Department of Educ. v. Lewis, 416 So. 2d 455 (Fla. 1982); Department of Ins. v. Teachers Ins. Co., 404 So. 2d 735 (Fla. 1981); and McPherson v. Flynn, 397 So. 2d 665 (Fla. 1981). In 1982, two cases were filed for review under FLA. CONST. art. V, § 3(b)(5). These cases were Askew v. Firestone, 421 So. 2d 151 (Fla. 1982), and Grosse v. Firestone, 422 So. 2d 303 (Fla. 1982).

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

54. Finding decisional conflict was necessary because of the limited use of certified questions prior to the 1980 amendment. *See supra* note 41 and accompanying text.

finding conflict to address a truly important legal issue when no real conflict existed was not then, nor is it now, justified or authorized. Certification provides a realistic means to easily bring important issues to the supreme court for resolution.

Florida is apparently the only state to use an expanded certification authority as a screening mechanism for its supreme court. Certification provides a viable alternative to the use of central staffs to screen cases and allows independent judicial participation in the screening process. Florida is not, however, the first jurisdiction to use lower court judges to assist in making the screening decisions. English appellate procedure provides a screening process whereby a single lower court judge determines the cases in which leave to appeal should be granted.[55] Early experience under the 1980 amendment reflects that Florida's district courts are properly using their certification authority, and this new screening mechanism may well be a model for other jurisdictions.

District Courts of Appeal Sitting En Banc

The en banc rule[56] and the 1980 amendment are directly interrelated. The rule is an essential part of the constitutional scheme as well as of the appellate structure, because under the 1980 amendment the supreme court no longer has jurisdiction to review intra-district decisional conflict.[57] The Appellate Structure Commission, in its 1979 report, recommended that intra-district conflict be resolved by the district courts sitting en banc rather than by the supreme court.[58] The Commission also recommended that in addition to resolving intra-district conflicts the district courts should hear matters of exceptional importance en banc.[59]

Although the Commission recognized that there might be a question as to whether the Florida Constitution authorized a district court to make a judicial decision when sitting in other than a three-judge panel, it was the opinion of the Commission that the district courts were not constitutionally limited from

55. *See supra* note 18.

56. Fla. R. App. P. 9.331, reproduced at app. B.

57. The 1980 amendment removed from the supreme court's jurisdiction the authority to review intra-district decisional conflict. Prior to the 1980 amendment, the supreme court could review "any decision of a district court of appeal . . . that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law. . . ." Fla. Const. art. V, § 3(b)(3) (1972). Under the 1980 amendment, however, the supreme court may only review a "decision of a district court of appeal . . . that expressly and directly conflicts . . . with a decision of another district court of appeal or of the supreme court on the same question of law. . . ." *Id.* (1980). By requiring inter-district conflict, the 1980 amendment restored the supreme court's conflict jurisdiction to what it was intended to be when the district courts were created. England, Hunter & Williams, *supra* note 7, at 187-91.

58. The Appellate Structure Commission recommended the adoption of an appellate rule authorizing the district courts to sit en banc to resolve intra-district decisional conflicts or to consider cases of exceptional importance. *Appellate Structure Commission Report, supra* note 9, at 279. When the rule was ultimately adopted, the authority of the district courts to sit en banc was limited to resolving intra-district decisional conflict. Fla. R. App. P. 9.331, reproduced at app. B.

59. *Appellate Structure Commission Report, supra* note 9, at 279.

sitting en banc when authorized by appropriate court rule. The Commission based its conclusion in part on a United States Supreme Court decision interpreting language in the congressional act establishing the United States Circuit Courts of Appeals[60] which is almost identical to that in the Florida Constitution. The Florida Supreme Court initially adopted the en banc rule in 1979, prior to the adoption of the 1980 amendment,[61] agreeing with the Commission that the rule was appropriate and constitutional for our present appellate structure.[62] The supreme court limited its application, however, to the resolution of intra-district conflict, rejecting the inclusion of cases of exceptional importance.[63]

The 1980 amendment was drafted and submitted to the legislature with the clear understanding that the district courts could sit en banc to resolve intra-district conflict. The purpose of the en banc rule as adopted was to provide a means of assuring decisional uniformity within each district. It was intended to provide litigants with a clear statement of the law within a given district and to eliminate the need for the supreme court to resolve intra-district conflict. The philosophy was based on the principle that, if district courts were to be courts of finality within their own districts, they should be able to resolve their own conflicts. There are presently divergent views among judges in one district court as to the appropriate standard for determining conflict or a lack of uniformity in decisions.[64]

En banc proceedings in intermediate appellate courts are authorized in some jurisdictions. The federal circuit courts are authorized to sit en banc,[65] although the ninth circuit, because of its size (twenty-three judges), sits en banc in an eleven-member panel consisting of the chief judge and ten additional judges drawn by lot.[66] The en banc decision, however, governs that circuit, but,

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60. FLA. CONST. art. V, § 4(a) (1972) provides: "*Organization* — There shall be a district court of appeal serving each appellate district. Each district court of appeal shall consist of at least three judges. Three judges shall consider each cause and the concurrence of two shall be necessary to a decision." Justice Boyd dissented in the adoption of the en banc rule, believing an en banc rule to be unconstitutional in light of this provision. *In re* Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 374 So. 2d 992, *modified*, 377 So. 2d 700 (Fla. 1979) [hereinafter cited as *In re* Rule 9.331].

In making its en banc rule recommendation, the Appellate Structure Commission relied, in part, on a memorandum to the district court judges from Judge Charles A. Carroll. In the memorandum, dated June 2, 1961, Judge Carroll noted that in Textile Mills Sec. Corp. V. Commissioner, 314 U.S. 326 (1941), the United States Supreme Court held that a circuit court of appeals may be composed of all the judges of the circuit in active service sitting en banc. Judge Carroll concluded, on the basis of *Textile Mills*, that an en banc process could be used in Florida as well. The three-judge rule, he argued, was merely a minimum constitutional standard which did not prohibit an en banc rule.

61. *In re* Rule 9.331, 374 So. 2d 992, *modified*, 377 So. 2d 700 (Fla. 1979). *See also In re* Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127 (Fla. 1982) [hereinafter cited as *In re* Rule 9.331 II].

62. *See supra* note 60.

63. *In re* Rule 9.331, 374 So. 2d 992, *modified*, 377 So. 2d 700 (Fla. 1979).

64. *See* Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So. 2d 911 (Fla. 3d D.C.A. 1982).

65. FED. R. APP. P. 35.

66. 9TH CIR. R. 25.

when appropriate, a second en banc hearing may be held before the entire court.[67] The Pennsylvania Superior Court is a unitary intermediate appellate court consisting of sixteen judges. It may sit en banc but with only seven judges selected by the chief judge.[68] In these jurisdictions, the purpose of en banc proceedings is not only to resolve intra-district conflicts but also to consider issues of significant precedential value within the jurisdiction.[69] Other intermediate courts of appeal do not sit en banc, and, in most of those jurisdictions, the state's highest court has broad authority to review the decisions of the intermediate appellate courts.[70]

The main purpose of an en banc rule is to ensure uniformity of decisions. Under Florida's present appellate structure scheme, it is important that each three-judge panel recognize its responsibility to maintain uniform decisions for its district and recognize that its decision is for the district court as a whole. The view that one panel is independent of other panels on the same court is contrary to Florida's present appellate scheme and to the obligation of the district court judges to work as a collegial body. As expressed by Judge Coffin, the members of an appellate court come to that body with "differing biases, values, and philosophies, but they share the common discipline of the law and a single fidelity – to their court and their joint product, the law it makes."[71] District court judges must have primary fidelity to the court as a whole, not just to the members of the panels on which they sit because their work product is the law for the entire court. The judges in a district must work together as a collegial whole to attain both finality and uniformity of the law within the district, and the en banc rule provides the vehicle for fulfilling this goal.

To assure uniformity, the federal courts of appeals, by case law, have established the principle that one three-judge panel cannot overrule or recede from a prior decision of another three-judge panel of the same court on the same point of law. The only way a rule of law established by a prior panel can be reversed is through an en banc proceeding.[72]

The chief judges of Florida's district courts suggested in 1982 that the supreme court adopt a rule for the district courts similar to this federal case law. The supreme court rejected this suggestion, without addressing possible constitutional infirmities, reasoning that such a rule may unduly restrict a panel when factual circumstances are clearly distinguishable or issues are raised which were not raised in the prior case.[73] The supreme court expressed con-

67. *Id.*

68. PA. R. APP. P. 3103.

69. *Id.*

70. Michigan's intermediate court, the court of appeals, is unitary in its operation and does not sit en banc. Consequently, the state supreme court has broad authority to review court of appeals decisions. *See* R. LEFLAR, *supra* note 25, at 69.

71. F. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE APPELLATE BENCH 171 (1980).

72. *See, e.g.*, United States v. Adamson, 665 F.2d 649 (5th Cir. 1982); Board of Educ. v. Hufstedler, 641 F.2d 68 (2d Cir. 1981); Caldwell v. Ogden Sea Transp., Inc., 618 F.2d 1037 (4th Cir. 1980); Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978), *rev'd*, 441 U.S. 780 (1979); United States v. Bryant, 471 F.2d 1040 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1112 (1973).

73. *In re* Rule 9.331 II, 416 So. 2d 1127, 1128 (Fla. 1982).

fidence that the judges of the district courts would be responsible and would not be reluctant to proceed with en banc hearings whenever there was a possibility of inconsistent decisions from their district court.[74] Clearly, inconsistency in the law, or decisions which breed inconsistency, causes unnecessary and costly litigation, and our appellate courts must avoid putting litigants to this expense.

The Present En Banc Rule

Rule of Appellate Procedure 9.331, Florida's en banc rule, provides for two types of en banc proceedings: an en banc hearing initiated by the court on its own motion without knowledge or suggestion of counsel, and, a rehearing en banc of a proceeding in which a decision has been previously rendered. Subparagraph (a) of Rule 9.331 only authorizes en banc proceedings "to maintain uniformity in the court's decisions." The rule does not authorize en banc hearings for issues which may be of great public importance or of significant precedential value. The district courts may, of course, confer en banc on administrative matters without the necessity of a rule.

Under the rule, a majority of the district court judges in regular active service who are participating in the case may order an en banc hearing or rehearing and may also decide the merits of the issue. A retired or temporarily assigned judge is not eligible to participate in any part of the en banc process. The rule was recently modified to clarify that a majority of the regular active judges actually participating in deciding a particular case was all that was necessary to call an en banc hearing, as well as to reach a decision on the merits.[75] It had been suggested that, in order to have a valid en banc decision, a majority of all the active judges on the district court would have to support the majority view, regardless of whether some were disqualified or otherwise unable to participate in deciding the case. The supreme court rejected this view as placing an unjustified burden on litigants by possibly requiring an extraordinary majority when the circumstances of disqualification, illness, or vacancy were not in the litigant's control. The supreme court recognized that it was important that only active, sitting judges participate in an en banc proceeding, but concluded that the vote required should be a majority of those actually participating in the case both to grant an en banc hearing and to decide the case on the merits.[76]

Since a majority vote is required to call an en banc hearing, a tie vote necessarily results in denial of the hearing. A tie vote on the merits leaves the panel decision standing except where there is no panel decision, in which event the trial court decision is affirmed. The supreme court has suggested that if there were such "divergent views culminating in a tie vote of the en banc court," the district court should strongly consider certifying the issue to the supreme court for resolution as a question of great public importance.[77]

74. *Id.*
75. 416 So. 2d at 729.
76. *Id.*
77. *Id.*

Subparagraph (b) of the rule authorizes district courts to have hearings en banc.[78] Under subparagraph (b), when a district court panel recognizes, before rendering a decision, that its view conflicts with another decision of the court, one or more members of the panel can suggest that the court vote to have a hearing en banc to resolve the possible conflict. This provides a method for the en banc court to recede from or to avoid conflict with a prior decision rendered by the district court. It is important to note that a party may not request this type of proceeding, the impetus must come solely from the district court judges. When the rule was adopted, it was expected that most en banc hearings would be initiated under subparagraph (b).

Subsection (c) of the rule[79] provides for rehearings en banc and establishes a method for counsel to advise the court that the panel's decision conflicts with another decision of the same court. As expressed in the commentary to the rule, a party's request for rehearing en banc can only be "on the ground that intra-district conflict of decisions exists."[80] As previously explained, the rule does not allow for rehearing en banc on the grounds that the issue is one of first impression or of great public importance. Further, any motion for rehearing must be timely filed in conjunction with a traditional motion for rehearing filed under Rule 9.330.[81] No order from the district court is required to deny a request for rehearing en banc because, under the rule, the motion is deemed denied when the traditional motion for rehearing is denied.[82] It is important to note, however, that a vote on an en banc rehearing motion may be initiated by any judge on the court, whether or not the judge sat on the panel rendering the decision.[83] On the other hand, nonpanel judges do not have to consider an en banc rehearing motion until one judge asks for the vote of the court on the motion.[84]

The ability of a district court to act en banc to resolve its disputes is important to the court as an institution and should strengthen it as a final appellate body. The five district courts, collectively, have had only twenty-six en banc hearings from January 1, 1980, to November 1, 1982.[85] One district court has reported no en banc hearings.[86] Although the small number of en banc hearings could reflect a reluctance on the part of the district courts to use the en banc process, the mere availability of the en banc process could have a strong influence in maintaining uniformity of decisions.

CONCLUSION

Our free society depends to a large extent upon the prompt resolution of important legal issues and upon uniformity and consistency in the law. The

78. FLA. R. APP. P. 9.331(b), reproduced at app. B.
79. *Id.* 9.331(c), reproduced at app. B.
80. *Id.* (commentary to *id.* 9.331(c)).
81. State v. Kilpatrick, 420 So. 2d 868 (Fla. 1982).
82. *Id.* at 869.
83. FLA. R. APP. P. 9.331(c)(1), reproduced in app. B.
84. *Id.*
85. Statistics concerning district court en banc hearings were compiled by the Clerk of the Florida Supreme Court.
86. The Second District Court of Appeal reported no en banc hearings.

expanded certification authority and the newly-adopted en banc rule, when fully utilized by the district courts, will improve the ability of Florida's appellate courts to attain these goals.

The expanded certification authority of the district courts of appeal provides a progressive screening mechanism by which significant legal problems may be presented to the supreme court for resolution. Early experience indicates that the district courts of appeal recognize the importance of this new certification authority and are using it effectively. In the future, the phrase "great public importance" may possibly be changed to emphasize that the district courts may certify any issue deemed by them to be important enough to merit supreme court review.

The en banc rule permits the district courts to act as collegial bodies to ensure uniformity of the law within their respective districts. The responsibility to sit en banc as one court is a new experience for our district court judges. Though it has seen limited use thus far, this rule should be an important means to avoid conflict and uncertainty in the law and thereby help instill public confidence in the ability of Florida's legal system to dispense justice in a uniform manner.

APPENDIX A

Fla. Const. art. V, § 3(b) (1980 Amendment as proposed in Florida Senate Joint Resolution 20-C).

(b) JURISDICTION. -- The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from ~~orders of trial courts and~~ decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution ~~initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.~~

(2) When provided by general law, shall hear appeals from final judgments ~~and orders of trial courts imposing life imprisonment or final judgments~~ entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telephone service.

(3) May review ~~by certiorari~~ any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, ~~--that passes upon a question certified by a district court of appeal to be of great public interest,~~ or that expressly and directly conflicts ~~that is in direct conflict~~ with a decision of another ~~any~~ district court of appeal or of the supreme court on the same question of law, ~~--and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court, and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.~~

(4) May review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.

(5) May review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and cer-

tified to require immediate resolution by the supreme court.

(6) May review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida.

(7) ~~(4)~~ May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review; and all writs necessary to the complete exercise of its jurisdiction.

(8) ~~(5)~~ May issue writs of mandamus and quo warranto to state officers and state agencies.

(9) ~~(6)~~ May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

~~(7) Shall have the power of direct review of administrative action prescribed by general law.~~

APPENDIX B

Rule 9.331. Determination of Causes in a District Court of Appeal En Banc

(a) En Banc Proceedings: Generally. A majority of the judges of a district court of appeal may order a proceeding pending before the court to be determined en banc. A district court of appeal en banc shall consist of the judges in regular active service on the court. En banc hearings and rehearings shall not be ordered unless necessary to maintain uniformity in the court's decisions.

(b) Hearings En Banc. A hearing en banc may be ordered only by a district court of appeal on its own motion. A party may not request an en banc hearing. A motion seeking the hearing shall be stricken.

(c) Rehearings En Banc.

(1) Generally. A rehearing en banc may be ordered by a district court of appeal on its own motion or on motion of a party. Within the time prescribed by Rule 9.330 and in conjunction with the motion for rehearing, a party may move for an en banc rehearing solely on the ground that such consideration is necessary to maintain uniformity in the court's decisions. A motion based on any other ground shall be stricken. A vote will not be taken on the motion unless requested by a judge on the panel that heard the proceeding, or by any judge in regular active service on the court. Judges who did not sit on the panel are under no obligation to consider the motion unless a vote is requested.

(2) Required Statement for Rehearing En Banc. A rehearing en banc is an extraordinary proceeding. In every case the duty of counsel is discharged without filing a motion for rehearing en banc unless the ground set forth in (1) is clearly met. When filed by an attorney, the motion shall contain the following statement:

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of this court and that a consideration by the full court is necessary to maintain uniformity of decisions in this court: (citing specifically the case or cases).
>
> /s/_____

(3) Formal Order on Motion for Rehearing En Banc. An order on a motion for rehearing en banc shall be deemed denied upon a denial of rehearing or a grant of rehearing without en banc consideration. If rehearing en banc is granted, the court may limit the issues to be reheard, require the filing of additional briefs, and may require additional argument.
Added Sept. 20, 1979, effective Jan. 1, 1980 (374 So. 2d 992); amended Dec. 6, 1979, effective Jan. 1, 1980 (377 So. 2d 700).