by Diana L. Martin and Robin I. Bresky

Taking the Pathway of Discretionary Review Toward Florida's Highest Court

Your client is on the losing end of an opinion issued by one of Florida's five district courts of appeal and wants to know whether there is hope of having that opinion overturned by the state's highest court. Given that the Florida Supreme Court's jurisdiction to hear cases is limited and primarily discretionary, you will likely have to explain to your client that the Florida Supreme Court can review the lower court's opinion only if it meets certain criteria and only if the court so chooses. Although divining in which cases the court will grant review is an impossible task, the following will aide in advising your client.

Under Fla. Const. art. V, §3(b), the Florida Supreme Court has five categories of jurisdiction: mandatory appellate jurisdiction, discretionary review jurisdiction, discretionary original jurisdiction, exclusive jurisdiction, and jurisdiction to issue certain advisory opinions.[1] Since the constitutional amendment in 1980,[2] the bulk of the Supreme Court's jurisdiction is discretionary.[3] This article focuses on cases that seek discretionary review (as opposed to petitions for the exercise of original jurisdiction, *e.g.*, the issuance of writs).

Procedure for Invoking Discretionary Review

The procedure for invoking the Florida Supreme Court's discretionary review is outlined in the Rules of Appellate Procedure.[4] In most cases, the party seeking review must file a notice in the district court within 30 days of rendition of the order to be reviewed, followed by a jurisdictional brief in the Supreme Court within 10 days.[5] Jurisdictional briefs are not required in cases involving a decision that certifies a question of great public importance, a trial court order or judgment that is certified by a district court as requiring immediate resolution by the Supreme Court, or a question certified by a federal appellate court.[6]

Prior to filing a notice of review, however, the petitioner must make sure the opinion is subject to the Supreme Court's jurisdiction. The court will administratively dismiss notices to review per curiam affirmances that do not contain a written opinion or at least cite to a case that has been quashed or reversed by the court, statute, or a rule of procedure.[7] A party seeking to review an opinion that falls into one of these categories would first need to obtain a written opinion from the district court.[8]

Method for Determining Whether to Grant Review

Being a court of limited review, the power of the Florida Supreme Court to exercise jurisdiction over a case is strictly construed and there is a heavy burden against the exercise of jurisdiction.[9] In most cases, after the parties have filed their jurisdictional briefs, the clerk's office assigns each case to a panel of five justices, one of whom oversees preparation of a memorandum analyzing whether there is a basis for the court's exercise of discretionary jurisdiction.[10] After reviewing the memorandum, the panel votes whether to accept discretionary review.[11] If four justices agree on a jurisdictional disposition of the case (whether to grant review with or without oral argument or deny review), the parties are notified of the court's decision and the case proceeds accordingly.[12] In the event of a 3-2 split, the case is sent to the remaining two justices and the majority vote of the entire court determines whether the request for discretionary review is granted.[13]

Because no jurisdictional briefs are required if a party is seeking review in a case in which there is a question certified as being of great public importance, the notice and district court opinion are reviewed by a panel of five justices who vote whether to accept review in the same manner described above.[14] In cases in which a district court certified a trial court order as requiring immediate resolution by the Supreme Court, the entire court, rather than an assigned panel, determines at its next conference whether to accept jurisdiction.[15] And in cases involving a question certified by one of the federal appellate courts, the chief justice decides after the merits briefs have been filed whether the case should be placed on the oral argument calendar or assigned to a justice's office for preparation of a memorandum that will be circulated to the other justices before they conference to consider the case.[16]

Types of Discretionary Review Jurisdiction

- *Express Declaration of Statutory Validity* — The Florida Supreme Court has the discretion to review district court decisions that expressly declare valid a state statute — as opposed to declarations that a statute

is *invalid*, over which the court has mandatory jurisdiction.[17] While the district court decision must directly discuss or make a finding of statutory validity,[18] such a finding may be dicta.[19] Nevertheless, the practice of the court demonstrates its selectivity in reviewing these types of cases.[20]

• *Express Construction of State or Federal Constitution* — District court decisions that expressly construe a provision of the state or federal constitution also fall under the discretionary review jurisdiction of the Supreme Court.[21] It is not sufficient that a district court decision merely construe a provision of state or federal law; the decision must "'explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.'"[22] Of the 20 cases seeking this type of review in 2008, the court exercised its discretion to grant review in only a single case.[23]

• *Opinions Affecting Constitutional or State Officers* — The Supreme Court has discretionary review jurisdiction over district court decisions that expressly affect a class of constitutional or state officers.[24] The court has explained that a decision must directly affect the "duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers" to be subject to review.[25] This means the decision must be "in a case in which the class, or some of its members, is directly involved as a party" or one that "generally affects the entire class in some way unrelated to the specific facts of that case."[26] A decision that inherently affects a class of officers, without expressing an intention to do so, is not subject to the court's discretionary review.[27] In any event, discretionary review on this ground is rare.[28]

• *Express and Direct Conflict on Same Question of Law* — The Supreme Court has discretion to review decisions of district courts of appeal that "expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."[29] This form of discretionary review, commonly referred to as "conflict jurisdiction," is by far the type most requested.[30] Of the 947 requests for discretionary review made in 2008, 832 of those requests were made under the court's conflict jurisdiction.[31]

For the Supreme Court to have conflict jurisdiction, there must be a district court decision that is something more than a per curiam affirmance.[32] The conflict should be demonstrated by a majority statement or majority citation to authority[33] that is apparent on the face of the opinion,[34] but it is not necessary that the district court explicitly note the conflict.[35] Thus, it can be enough that an opinion merely cites to a case that has been overruled or receded from or that is already pending before the Supreme Court.[36] The conflict, however, must be with a decision of the Supreme Court or another district court of appeal — not a conflict with a statute, rule, federal law, or a district court's decision to recede from its own prior decisions/case law.[37]

There are at least four types of conflict. "Holding conflict"[38] exists when the challenged decision announces "a rule of law that conflicts with a rule previously announced by [the Supreme Court] or another district court; or [applies] a rule of law to produce a different result in a case that involves substantially similar controlling facts as a prior case disposed of by [the Supreme Court] or another district court."[39] "Misapplication conflict"[40] exists when a decision misapplies precedent,[41] which occurs because of an erroneous reading of precedent, an erroneous extension of precedent, or an erroneous use of facts.[42] An "apparent conflict" can exist when "a district court opinion only seems to be in conflict, even though there actually may be some reasonable way to reconcile it with the case law."[43] And "piggyback conflict" occurs when the challenged district court opinion "cite[s] as controlling precedent a decision of a district court that is pending for review in, or has been subsequently overruled by, the Florida Supreme Court; or [cites] as controlling precedent a decision of the Florida Supreme Court from which the [c]ourt has subsequently receded."[44]

Although the Supreme Court's conflict jurisdiction is the type most often requested, it is rarely obtained. Less than two percent of the requests for conflict review made in 2008 have been granted.[45] Therefore, although the parties are directed to initially file only jurisdictional briefs when seeking this type of discretionary review,[46] the party seeking review should attempt to persuade the justices that the case is so significant or important on the merits that review should be granted.[47]

• *Certified Questions of Great Public Importance* — The Supreme Court has discretion to review decisions of district courts of appeal that "pass upon a question certified to be of great public importance."[48] The district court decision being challenged must satisfy several criteria to warrant review under this category. The foremost is that the district court actually certify that an issue is of great public importance; the Supreme Court does not have jurisdiction over a case in which only the parties contend an issue of great public importance exists.[49] If the district court does not certify a question in its opinion, a party has 15 days to move for certification in the district court.[50] But the majority of certified questions the Supreme Court decides to consider were certified by the district court initially, without a party moving for certification.[51]

The district court must also *pass upon* the question it certifies[52] by answering it in order to dispose of the case.[53] Additionally, the majority must have reached a decision on the merits.[54] And, finally, the actual question of great public importance must be certified by a majority decision, *i.e.*, "a majority of those judges participating in the case [must] concur in the decision to certify."[55]

Case law demonstrates ways in which the Supreme Court has decided to limit its discretion to review questions certified to be of great public importance. The court has denied review in cases in which it found the question presented dealt with only a narrow principle of law[56] or a narrow issue with unique facts.[57] Although the court does not always accept review of cases involving certified

questions, it granted approximately 42 percent of the requests for review made in 2008.[58]

• *Certified Conflict* — Since the 1980 amendment, the Supreme Court has had discretion to review decisions of district courts of appeal that "are certified to be in direct conflict with decisions of other district courts of appeal."[59] For the Supreme Court to have discretionary jurisdiction to review a decision under this category, the challenged district court decision must be a majority decision[60] and actually *certify* a conflict, not merely "acknowledge, discuss, cite, suggest, or in any other way recognize conflict."[61]

In cases in which the district court has certified conflict, the Supreme Court has jurisdiction per se to exercise review.[62] This means that, unlike cases in which the Supreme Court grants discretionary review on the basis of express and direct conflict, the court may hear cases of certified conflict even if it ultimately determines there is no conflict.[63] Another advantage to having a case postured as a certified — rather than an express and direct — conflict case when presented to the Supreme Court for discretionary review is that, according to the 2008 numbers, the court grants review in approximately 37 percent of the cases.[64] Counsel should, therefore, consider moving for conflict certification in the district court prior to seeking review in the higher court.[65]

• *Pass-through Jurisdiction* — The Supreme Court has discretion to review an order or judgment entered by a trial court that is on appeal and certified by the district court to be either of great public importance or to have a great effect on the proper administration of justice throughout the state, and is certified to require immediate resolution by the Supreme Court.[66] This is commonly called "pass-through jurisdiction."[67] A district court may use this mechanism to bypass the necessity of a district court opinion and send a case directly to the Supreme Court sua sponte or upon the suggestion of a party filed within 10 days of the filing of the notice of appeal.[68]

The Supreme Court has cautioned district courts not to use pass-through jurisdiction as a means to avoid initially addressing difficult questions and to send up only those cases that require immediate resolution by the Supreme Court.[69] Because pass-through jurisdiction bypasses the constitutional right of litigants to have districts review circuit court judgments,[70] its use by the Supreme Court is understandably limited. But the court did grant review in three of the four cases of pass-through jurisdiction it was presented in 2008.[71]

• *Questions Certified by Federal Appellate Courts* — Questions of law certified by the U.S. Supreme Court or a U.S. Court of Appeals are subject to the Supreme Court's discretionary review jurisdiction if the question is determinative of the cause and there is no controlling precedent out of the Florida Supreme Court.[72] To request review, the federal court must issue a certificate setting forth "a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered."[73] The court's internal operating procedures indicate review of these questions, which are infrequently made by the federal appellate courts,[74] is always granted.[75]

Conclusion

While there are many different pathways that lead toward discretionary review in the Florida Supreme Court, most will dead end. Chances for obtaining review improve dramatically upon certification of a question of great public importance or conflict by the district court, but such certification is rare. Counsel should consider, therefore, advising clients at the beginning of the appellate process that Florida's judicial system is structured so that the district courts are often the courts of last resort,[76] and it is the exception that further review will be granted by Florida's highest court.❑

[1] Harry Lee Anstead *et al.*, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 432, 482 (2005), *available at* http://www.floridasupremecourt.org/pub_info/documents/juris.pdf; *see also* FLA. R. CIV. P. 9.030(a).

[2] The 1980 constitutional amendment significantly changed the jurisdiction of the Supreme Court. *See generally* Arthur J. England, Jr. & Richard C. Williams, Jr., *Florida Appellate Reform One Year Later*, 9 FLA. ST. U. L. REV. 221 (1981); Arthur J. England, Jr., *et al.*, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980). Overburdened by cases falling under its mandatory appellate jurisdiction, six of the seven sitting Supreme Court justices, as well as The Florida Bar, supported the amendment because it limited the court's mandatory jurisdiction and eliminated its jurisdiction over district court decisions without written opinions. *1980 Reform* at 151-55, 157-59.

[3] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 464 n.138, 481 (2005).

[4] *See* FLA. R. APP. P. 9.120; 9.125; 9.150.

[5] *See* FLA. R. APP. P. 9.120(b) & (d).

[6] *See* FLA. R. APP. P. 9.120(d); 9.125(b); 9.150; Florida Supreme Court, *Manual of Internal Operating Procedures* (hereinafter "Manual") at 7-9 (Jan. 14, 2009), *available at* http://www.floridasupremecourt.org/pub_info/documents/IOPs.pdf.

[7] *Manual* at 6-7. Prior to the 1980 constitutional amendment, the Supreme Court had conflict jurisdiction over per curiam affirmances (decisions issued without statement or citation), as demonstrated by *Foley v. Weaver Drugs, Inc.*, 168 So. 2d 749 (Fla. 1964). *See also* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 511 (2005). Because it no longer has such jurisdiction, the only possible appellate review of a PCA issued by a Florida district court will be by the U.S. Supreme Court. *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988).

[8] Florida Rule of Appellate Procedure 9.330(a) allows a party moving for rehearing, clarification, or certification to request that the district court issue a written opinion upon counsel's certification that a written opinion would provide a legitimate basis for Supreme Court review. The decision to grant the request and issue a written opinion is entirely within the discretion of the district court. *R.J. Reynolds Tobacco Co. v. Kenyon*, 882 So. 2d 986, 989 (Fla. 2004).

[9] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 483 (2005).

[10] *Manual* at 7-9.

[11] *Id.*

[12] *Id.*

[13] *Id.*; Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 481 (2005).

[14] *Manual* at 8.

[15] *Id.* at 9.

[16] *Id.*

[17] FLA. CONST. art. V, §3(b)(1) & (3); FLA. R. APP. P. 9.030(a)(1)(A)(ii) & (2)(A)(i).

[18] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 503 (2005). Prior to

the 1980 constitutional amendment, the Supreme Court had jurisdiction to review decisions in which a determination of statutory validity was inherent in the district court's decision, even though not actually addressed in the opinion. *See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So. 2d 439 (Fla. 1959).

[19] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 503 (2005).

[20] Of the 11 notices to invoke the court's discretionary review on this ground filed in 2008, the court chose not to exercise its discretionary review in a single one. *Compare* Florida Supreme Court, *Filing and Disposition Report: 01/01/2008 – 12/31/2008* (2/18/09) (unpublished report obtained from Craig Waters, director of Public Information Office, Florida Supreme Court and available from the authors) (listing cases added to the court's docket during 2008) ("Docket Report"), *and* Florida Supreme Court, Review Granted Orders, http://www.floridasupremecourt.org/clerk/review_granted/index.shtml (listing cases in which the court granted review) ("List").

[21] FLA. CONST. art. V, §3(b)(3); FLA. R. APP. P. 9.030(a)(2)(A)(ii).

[22] *Ogle v. Pepin*, 273 So. 2d 391, 392 (Fla. 1973) (quoting, *Armstrong v. Tampa*, 106 So. 2d 407, 409 (Fla. 1958)).

[23] *See* Docket Report and List, *supra* note 20.

[24] FLA. CONST. art. V, § 3(b)(3); FLA. R. APP. P. 9.030(a)(2)(A)(iii).

[25] *Spradley v. State*, 293 So. 2d 697, 701 (Fla. 1974).

[26] *Id.*

[27] *Id.*

[28] None of the seven requests seeking discretionary review on this ground filed in 2008 were granted. *See* Docket Report and List, *supra* note 20.

[29] FLA. CONST. art. V, §3(b)(3); FLA. R. APP. P. 9.030(a)(2)(A)(iv).

[30] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 511 (2005).

[31] *See* Docket Report, *supra* note 20.

[32] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 513-515 (2005).

[33] *See id.* at 513.

[34] *Hardee v. State*, 534 So. 2d 706, 708 n.* (Fla. 1988).

[35] *Ford Motor Co. v. Kikis*, 401 So. 2d 1341, 1342 (Fla. 1981).

[36] *The Florida Star v. B.J.F.*, 530 So. 2d 286, 288 n.3 (Fla. 1988) (citation omitted).

[37] *See* Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 513-515 (2005).

[38] *Id.* at 516-517.

[39] *Wallace v. Dean*, 3 So. 3d 1035, 1039 n.4 (Fla. 2009) (citing, *Nielsen v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960)).

[40] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 517-518 (2005).

[41] *Wallace*, 3 So. 2d at 1040 (citations omitted).

[42] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 517 (2005).

[43] *Id.* at 520.

[44] *Id.* at 521-522 (citation omitted).

[45] *See* Docket Report and List, *supra* note 20.

[46] *See* FLA. R. APP. P. 9.120(d) & (f).

[47] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 523-524 (2005).

[48] FLA. R. APP. P. 9.030(a)(2)(A)(v); FLA. CONST. art. V, §3(b)(4).

[49] *Allstate Ins. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995).

[50] FLA. R. APP. P. 9.330(a). For a discussion of various rationale behind district court certification of questions of great public importance *see* Raoul G. Cantero, III, *Certifying Questions to the Florida Supreme Court: What's So Important?*, 76 FLA. B. J. 40 (May 2002).

[51] *See* Docket Report and List, *supra* note 20. Of the 33 certified questions presented by the district courts in 2008, the Supreme Court granted review of 14, 10 of which involved questions certified by the district courts sua sponte. *Id.*

[52] *Floridians for a Level Playing Field v. Floridians Against Expanded Gambling*, 967 So. 2d 832, 833 (Fla. 2007).

[53] *Revitz v. Baya*, 355 So. 2d 1170, 1171 (Fla. 1977).

[54] *Floridians for a Level Playing Field*, 967 So. 2d at 833; *see also State v. Schebel*, 723 So. 2d 830, 830-31 (Fla. 1999) (holding jurisdiction improvidently granted where facts were so speculative that district court was unable to reach decision on the merits and any Supreme Court opinion would be advisory).

[55] *Floridians for a Level Playing Field*, 967 So. 2d at 833.

[56] *State v. Sowell*, 734 So. 2d 421, 422 (Fla. 1999).

[57] *State v. Brooks*, 788 So. 2d 247, 247 (Fla. 2001); *Dade County Prop. Appraiser v. Lisboa*, 737 So. 2d 1078, 1078 (Fla. 1999).

[58] *See* Docket Report and List, *supra* note 20. Of the 33 certified questions presented by the district courts in 2008, the Supreme Court granted review of 14, 10 of which involved questions certified by the district courts sua sponte.

[59] FLA. R. APP. P. 9.030(a)(2)(A)(vi); FLA. CONST. art. V, §3(b)(4); Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 529 (2005).

[60] *See Floridians for a Level Playing Field*, 967 So. 2d at 833.

[61] *State v. Vickery*, 961 So. 2d 309, 311 (Fla. 2007).

[62] *Vickery*, 961 So. 2d at 312.

[63] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 530 (2005).

[64] Of the 35 district court cases certifying conflict noticed in the Supreme Court for discretionary review in 2008, the Supreme Court granted review in 13 cases. Docket Report and List, *supra* note 20.

[65] *See* FLA. R. APP. P. 9.330(a) ("A motion for . . . certification may be filed within 15 days of an order. . . .)." Each of the 2008 certified conflict cases taken up by the Supreme Court, however, involved questions certified by the district courts sua sponte, not certifications made on motion. Docket Report and List, *supra* note 20.

[66] FLA. CONST. art. V, §3(b)(5); FLA. R. APP. P. 9.030(a)(2)(B).

[67] Anstead, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 531 (2005). For a discussion of pass-through jurisdiction, *see* Tracy S. Carlin, *The Ins and Outs of Pass-Through Jurisdiction*, 80 FLA. B. J. 42 (Dec. 2006).

[68] FLA. R. APP. P. 9.125(a) & (c). The form of a party's suggestion is dictated by 9.125(e).

[69] *Carawan v. State*, 515 So. 2d 161, 162 n.1 (Fla. 1987).

[70] *Fla. Dep't of Agric. & Consumer Servs. v. Haire*, 832 So. 2d 778, 781 (Fla. 2002).

[71] Docket Report and List, *supra* note 20.

[72] FLA. CONST. art. V, §3(b)(6); FLA. R. APP. P. 9.030(a)(2)(C).

[73] FLA. R. APP. P. 9.150(b); Anstead *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. at 534 (2005).

[74] In 2008, only five certified questions were posed to the Supreme Court by federal courts of appeal. Docket Report and List, *supra* note 20.

[75] *See supra* note 16 and accompanying text.

[76] *Univ. of Miami v. Wilson*, 948 So. 2d 774, 789 (Fla. 3d D.C.A. 2006) (Shepherd, J., concurring).

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