

Summer 1990

Stare Decisis among and within Florida's District Courts of Appeal

Taylor Mattis

Southern Illinois School of Law

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

Recommended Citation

Taylor Mattis, *Stare Decisis among and within Florida's District Courts of Appeal*, 18 Fla. St. U. L. Rev. 143 (2017) .
<http://ir.law.fsu.edu/lr/vol18/iss1/6>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

STARE DECISIS AMONG AND WITHIN FLORIDA'S DISTRICT COURTS OF APPEAL

TAYLOR MATTIS*

WHENEVER a judicial system employs a three-tiered judicial structure with trial courts, an intermediate appellate court, and a high court, the issue arises of what precedential value shall be accorded decisions of the intermediate court. Florida initiated a three-tiered structure in 1956 with the revision of the judiciary article of the Florida constitution by the establishment of district courts of appeal.¹ Much has been written about Florida's judicial system and conflict resolution within that system. This Article focuses on the application of the principle of stare decisis to decisions of the district courts of appeal and how this principle operates among the five district courts, upon the trial courts of the state, and within the district courts.

This Article presupposes a working knowledge of the general concept of stare decisis, a concept used here synonymously with precedent, as the principle that a court will stand by its own decisions as well as by those of a higher court in a given judicial hierarchy.² Of course, modern stare decisis does not mean that a decided point of law is settled for all time. It does mean that a decision will be followed, distinguished, or overruled by the deciding court, as well as followed by lower courts in the same judicial system.

The doctrine of stare decisis takes on added dimensions when it is applied to decisions of intermediate courts rather than to the high court in a judicial system. In common-law jurisdictions, decisions of the high court bind all subordinate courts in the judicial hierarchy for which it is the summit.³ This aspect of the doctrine may be termed vertical stare decisis. The question of lower court deference arises in

* Professor of Law, Southern Illinois University, School of Law; B.A., 1960, University of Alabama; J.D., 1963, University of Miami; LL.M., 1969, Yale University. Member of Illinois and Florida Bars. The author acknowledges the contribution of Melissa Gasser Math, who as a law student at Southern Illinois University School of Law served as a research assistant to the author.

1. FLA. CONST. art. V, § 4.

2. "This doctrine embodies a judicial policy that a 'determination of a point of law by a court will generally be followed by a court of the same . . . rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case.' 'The rationale behind the policy is the need to promote certainty, stability, and predictability of the law.'" *Brewer's Dairy v. Dolloff*, 268 A.2d 636, 638 (Me. 1970) (citations omitted).

3. See *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973).

connection with a study of intermediate as well as high courts. Intermediate courts may sit in defined geographic districts, with jurisdiction over appeals only from decisions of lower courts within that district.⁴ A decision of such a court may bind only those lower courts within the district. We might refer to this phenomenon as pure vertical or geographic vertical stare decisis.⁵ On the other hand, a decision of such a court may bind all lower courts within the state, even those in other districts. That type of vertical stare decisis is analogous to the spines of an umbrella: all the trial courts fall under the precedential web of each intermediate appellate court regardless of geographic location.

A dimension of the principle of stare decisis that is unique to the study of intermediate appellate court decisions is their effect upon coordinate courts or panels.⁶ Of course, decisions of a high court serve as precedent in the deciding court until they are overruled in view of changed circumstances. The precedential issue to which we here refer, however, arises only where the judicial structure contains several courts, panels, divisions, districts, or subdivisions of whatever name, of the same level or dignity in the hierarchy. This aspect of the principle may be termed "horizontal stare decisis."⁷

This Article will explore the stare decisis effect of decisions of the District Courts of Appeal of Florida: on each other (horizontal), on lower courts (vertical), and on other panels of the deciding court (horizontal, intradistrict). At the outset, a brief review of the relevant structure of Florida's judicial system is in order.

I. STRUCTURE

The judicial system of the state of Florida has been the object of more thoughtful attention from the bench, bar, and laity than that of most other states. Major public debates occurred before the district courts of appeal were created by revision of the judiciary article of the

4. This is the structure in Florida, in marked contrast to Michigan, for example, where the intermediate court, the Court of Appeals of Michigan, is unitary, with each judge sitting on a panel with every other judge with equal frequency. Appeals from lower tribunals throughout the state are filed in a central clerk's office in Lansing. MICH. CONST. art VI, §§ 1, 8; MICH. R. Cr. 7.201.

5. The federal judicial structure furnishes the most familiar example of the geographic approach, with its "law of the circuit" doctrine enunciated by the United States Courts of Appeals. See Schaefer, *Foreword: Stare Decisis and the "Law of the Circuit,"* 28 DE PAUL L. REV. 565 (1979).

6. In Florida one court of appeal will often refer to another as a sister court.

7. See generally Mattis & Yalowitz, *Stare Decisis Among [Sic] the Appellate Court of Illinois,* 28 DE PAUL L. REV. 571 (1979) (applying concepts similar to those discussed in this introduction to the unitary intermediate appellate court in Illinois).

constitution in 1956⁸ and before a further major constitutional amendment in 1980 to revise the jurisdiction of the supreme court.⁹ The issue of uniformity of state law and how to deal with conflicting decisions of the courts of appeal was central throughout the public debates and informational literature attending these revisions. What emerged is a unique¹⁰ appellate court structure in Florida having these features:

1. a supreme court having constitutionally limited, as opposed to unlimited, discretionary review of intermediate appellate court decisions; and
2. finality of decisions in the district courts of appeal, with further review by the supreme court . . . based on the statewide importance of legal issues and the relative availability of the [supreme] [c]ourt's time to resolve cases promptly.¹¹

Whether one takes the position that Florida's judicial system is better or worse than it might be, one must acknowledge that its development during the latter half of the twentieth century has been deliberate (and deliberated) rather than haphazard.

8. The integrated Florida Bar, through its legislative committee, fostered legislation in 1953 creating a Judicial Council. It differed from similar bodies in other states in the remarkable respect that a majority of its personnel were not members of the legal profession. The Judicial Council was comprised of a justice of the supreme court, the attorney general or one of his assistants, two judges, four lawyers and nine non-lawyers. *Lake v. Lake*, 103 So. 2d 639, 640-41 (Fla. 1958). For about eighteen months after its creation, the council, in periodic meetings, debated and deliberated the method which might most effectively modernize a system that by overloading had ceased to function as it should. It studied the systems of other states as well as Florida's, and considered and rejected numerous possibilities, such as increasing the number of judges on the supreme court. It proposed revising the judiciary article of Florida's constitution to create separate courts of appeal and to limit the jurisdiction of the supreme court to review their decisions so that to a large extent their decisions were final. The courts of appeal created by the 1956 constitutional revision of the judiciary article were emphatically "*meant to be courts of final, appellate jurisdiction.*" *Id.* at 641, 642 (emphasis in original).

9. In 1979 the supreme court urged the legislature, meeting in special session, to enact a proposed amendment to the judiciary article to limit the jurisdiction of the supreme court. "Times were not unlike the year 1956 when the challenge confronting the drafters . . . was . . . 'difficult, complicated, tedious and onerous. Yet the determination was not lacking . . .'" *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980) (quoting *Lake*, 103 So. 2d at 640-41). Interested organizations as diverse as the League of Women Voters, newspaper and television editorial boards, condominium associations, and the American Bar Association's Committee to Implement Standards of Judicial Administration, joined the bench and bar in public debate and discussion about the proposed amendment. *Jenkins*, 385 So. 2d at 1362 (England, C.J., concurring specially). "There can be little doubt that the electorate was informed as to this matter." *Id.* at 1359.

10. Scheb, *Florida's Courts of Appeal: Intermediate Courts Become Final*, 13 STETSON L. REV. 479, 480 (1984).

11. *Jenkins*, 385 So. 2d at 1363 (England, C.J., concurring specially).

From the time of the authorization for district courts of appeal in Florida in 1956, it has been clear that they are separate courts.¹² The structure is analogous to the federal system, with its separate courts of appeal, and in sharp contrast to the unitary system of states that have a single intermediate appellate court sitting in districts, divisions, or panels.

Florida legal scholars, judges, and practitioners would be quick to correct any statement that Florida's district courts of appeal are intermediate appellate courts. With a few exceptions, the district courts are courts of last resort,¹³ as the supreme court has quite limited jurisdiction to review their decisions.¹⁴

Pursuant to the 1956 revision of the judiciary article of the constitution, which took effect in 1957, the legislature divided the state into three appellate districts of contiguous counties and organized an ap-

12. The 1956 revision of the judiciary article for the first time included "district courts of appeal" in the list of courts in which the judicial power was vested. FLA. CONST. art. V, § 1 (1956). "From 1845, the year of Florida's admission into the union, until 1957, jurisdiction for all appeals from courts of general jurisdiction was vested in the supreme court." Scheb, *supra* note 10, at 480.

FLA. CONST. art. V, § 4(a) provides: "There shall be a district court of appeal serving each appellate district."

FLA. STAT. ch. 35 (1989) treats the courts of appeal as separate. *E.g.*, FLA. STAT. § 35.06 (1989) provides: "A district court of appeal shall be organized in each of the five appellate districts to be named District Court of Appeal, _____District."

13. Scheb, *supra* note 10, at 480; 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*, 35 U. FLA. L. REV. 80, 80 n.5 (1983); *Jenkins*, 385 So. 2d at 1357 ("It was never intended that the district courts of appeal should be intermediate courts.") (quoting *Ansinn v. Thurston*, 101 So. 2d 808, 810 (Fla. 1958)); *Id.* at 1363 ("[T]he district courts [are] truly final in the bulk of matters brought to Florida's appellate courts.") (England, C.J., concurring specially); *Lake v. Lake*, 103 So. 2d 639, 642 (Fla. 1958).

14. The supreme court's mandatory jurisdiction to review district court decisions is now limited to those declaring invalid a state statute or a provision of the state constitution. FLA. CONST. art. V, § 3(b)(1). Its discretionary jurisdiction to review district court decisions, other than conflicts, *see infra*, is now limited to decisions that: expressly declare valid a state statute; expressly construe a provision of the state or federal constitution; expressly affect a class of constitutional or state officers, FLA. CONST. art. V, § 3(b)(3); or pass upon a question certified by the district court to be of great public importance. *Id.* at § 3(b)(4).

The Florida Supreme Court's conflict jurisdiction is discretionary. The court may choose to review any district court decision "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.* at § 3(b)(3), or any district court decision "that is certified by it to be in direct conflict with a decision of *another* district court of appeal." *Id.* at § 3(b)(4) (emphasis added in both quotes). The wording of these two subsections, § 3(b)(3) and § 3(b)(4), allows parties to seek discretionary review of a district court decision that "expressly and directly" conflicts with a decision of another district court of appeal and also allows district courts to certify in order to give the supreme court discretionary jurisdiction over a district court decision that is in "direct conflict with a decision of another district court of appeal."

pellate court in each district.¹⁵ The appellate court system in Florida has expanded steadily since its inception. In 1965 the constitution was amended to provide that the legislature divide the state into four or more appellate districts.¹⁶ There were four districts from 1965 to 1979,¹⁷ and five thereafter.¹⁸ The Florida constitution requires that each district court of appeal consist of at least three judges, but the legislature is empowered to provide for additional judges.¹⁹ Pursuant to this power, the Florida legislature has repeatedly increased the number of judges of each district court of appeal so that the First District presently has twelve judges, the Second District has twelve judges, the Third District has ten judges, the Fourth District has twelve judges, and the Fifth District has seven judges.²⁰

Each district court of appeal has its own chief judge,²¹ its own clerk,²² its own marshal,²³ and its own seal.²⁴ Subject to the power of the supreme court to make rules of practice and procedure, the district courts of appeal may make such regulations as are necessary for the internal government of the court.²⁵

II. HORIZONTAL STARE DECISIS AMONG THE DISTRICT COURTS OF APPEAL

Decisions of one district court of appeal do not bind other district courts of appeal, but are merely persuasive. Horizontal stare decisis was apparently never intended to be part of Florida's appellate struc-

15. FLA. STAT. § 35.01-.05 (1957), enacted pursuant to FLA. CONST. art. V, § 5 (1956).

The first appellate district was headquartered in Tallahassee, the second in Lakeland, and the third in Dade County. FLA. STAT. § 35.05 (1957).

16. FLA. CONST. art. V, § 5 (1965).

17. Eleven counties formerly in the second district were removed to form the fourth district. FLA. STAT. § 35.042 (1965). The fourth district court of appeal was headquartered in Palm Beach County. FLA. STAT. § 35.05 (1967).

18. FLA. STAT. § 35.01 (1979). The four former district headquarters did not change, and the fifth appellate district's headquarters was placed in Daytona Beach. FLA. STAT. § 35.05 (1979).

19. FLA. CONST. art. V, § 4(a) (originally, in 1956 revision, § 5(2)).

20. FLA. STAT. § 35.06 (1989).

21. FLA. CONST. art. V, § 2(c); FLA. STAT. § 35.12 (1989).

22. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.21 (1989). The respective clerk's offices are located at the headquarters of each district court of appeal. FLA. STAT. § 35.23 (1989).

23. FLA. CONST. art. V, § 4(c); FLA. STAT. § 35.26 (1989).

Interestingly enough, article V, section 4(c) of the constitution as amended in 1980 provides that the marshal shall have the power to execute the process of the court "throughout the territorial jurisdiction of the court." The statute, cited above, provides that the marshal shall have the power to execute the process of the court "throughout the state." Before the 1980 amendment the constitution had used the language "throughout the state."

24. FLA. STAT. § 35.09 (1989).

25. FLA. STAT. § 35.07 (1989).

ture. This is logically consistent with the establishment of multiple appellate courts sitting in defined geographical regions.²⁶

A. Supreme Court Cases

The first time the supreme court commented on the precedential value of decisions of district courts of appeal it said: "Within their sphere . . . District Courts of Appeal are courts of last resort. . . . As such, they draw for precedent on their own prior decisions and on decisions this Court handed down before they were in existence."²⁷ A few years later the supreme court stated more broadly that "decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by this Court."²⁸ That statement provided the foundation for the supreme court's holding in 1985, in *Weiman v. McHaffie*,²⁹ that Florida was a "window period" state under the Garn-St. Germain Depository Institutions Act of 1982.³⁰ Although the primary thrust of that decision concerns the applicability of a federal statute to mortgage foreclosures, the holding has important ramifications in state law regarding the precedential effect of decisions of district courts of appeal.

The federal statute in *Weiman* preempted the application of state law that would restrict the enforcement of due-on-sale³¹ clauses in mortgages, whether held by state or federal financial institutions or lenders. However, in order to protect mortgagors or their assignees who relied on state law restricting enforcement of due-on-sale clauses when they mortgaged or assumed a mortgage, the Act allowed state law to continue to apply until 1985 if the mortgage was entered into during a "window period." The window period was:

26. Whether it is consistent with sound jurisprudence and equal protection concepts is not so clear. Cf. Schaefer, *supra* note 5 (wherein a former justice of the Supreme Court of Illinois suggests that when a court deliberately refuses to follow the earlier ruling of a court of coordinate authority, it creates an unconstitutional discrimination).

27. *Morgan v. State*, 337 So. 2d 951, 953 n.6 (Fla. 1976) (citations omitted).

28. *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980). The statement was made in the context of the court's noting that a party had reasonably relied on several consistent district court decisions where there were no conflicting ones. The *Stanfill* court cited *Johns v. Wainwright*, 253 So. 2d 873 (Fla. 1971), and *Ansın v. Thurston*, 101 So.2d 808 (Fla. 1958), which state that district courts were never intended to be intermediate courts, and that their decisions are, in most cases, final and absolute.

29. 470 So. 2d 682 (Fla. 1985).

30. 12 U.S.C. § 1701j-3(c) (1982) cited in *Weiman*, 470 So. 2d at 683.

31. A due-on-sale or due-on-transfer clause in a note or mortgage is a type of acceleration clause giving the mortgagee the privilege of declaring the entire principle due immediately should the mortgagor sell or transfer any interest in the mortgaged property without the consent of the mortgagee. See BLACK'S LAW DICTIONARY 449 (5th ed. 1979). Mortgagors have objected to its enforcement as an unreasonable restraint on alienation, especially when it is used by mortgagees as a device to increase interest rates on older loans (portfolio maintenance).

the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on October 15, 1982. . . .³²

At the time the parties in the *Weiman* case entered into the mortgage, a Florida district court of appeal case, *First Federal Savings & Loan Association v. Lockwood*,³³ required that a lender show impairment of security before foreclosure under a due-on-sale clause would be permitted. Thus, if the appellate court's decision applied state-wide, then the mortgage would fall within the window period. The supreme court held that the district court decision applied statewide:

No conflicting district court decisions existed on this point of law. This Court had no jurisdiction to review *Lockwood* without decisional conflict or some other constitutional basis for review. District court decisions "represent the law of Florida unless and until they are overruled by this Court." *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980). *Lockwood's* restriction of due-on-sale clause enforcement had a binding effect on all Florida trial courts and a persuasive effect on sister district courts.³⁴

Interestingly enough, the United States Senate report accompanying its bill had concluded that Florida was a state having a "next highest appellate court" whose decisions do *not* apply statewide, and therefore would not be a window period state.³⁵ The Supreme Court of Florida in *Weiman* found that conclusion was "predicated on a misinterpretation of the finality of district court decisions and the constitutional limitations on our power to review those decisions."³⁶

That "misinterpretation" may well have been the result of the position taken by the district courts themselves prior to Garn-St. Germain, when there was scant Florida supreme court authority on the state-wide application of decisions of district courts of appeal. That posi-

32. 12 U.S.C. § 1701j-3(c) (1982).

33. 385 So. 2d 156 (Fla. 2d DCA 1980), *overruled by*, *Weiman v. McHaffie*, 470 So. 2d 682 (Fla. 1985).

34. *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985).

35. S. REP. NO. 536, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 3054, 3077.

36. *Weiman*, 470 So. 2d at 684. Ironically, the supreme court went on to overrule *Lockwood* and hold that a mortgage lender need not show impairment of security before enforcing a due-on-sale clause, consistent with the policy of Garn-St. Germain.

tion persists, with the district courts generally speaking and acting as separate courts not bound by each others decisions.

B. Cases Decided by District Courts of Appeal

In commenting on the stare decisis effect of a coordinate court's decision, the First District Court of Appeal in 1964 initially stated that a prior decision from the Second District "was one of first impression in Florida and is entitled to great weight,"³⁷ then rejected it. Over the years the district courts of appeal have followed cases they deemed persuasive from other districts, or decided cases contrary to decisions from other districts without any suggestion that the latter overrules the former.³⁸ This "law of the district" notion is as entrenched in Florida as the "law of the circuit" is in the federal system. Cases cited to a district court of appeal from another district may be persuasive or not, much as cases cited from another state or any common-law jurisdiction.³⁹ The perceived safety net is the supreme court's discretionary jurisdiction to resolve conflicts between districts, should an aggrieved party choose and be able to seek such review.⁴⁰

The absence of horizontal stare decisis in Florida is captured in a 1988 Second District opinion:

We begin our analysis of the instant case by noting that this court is not bound by the decision of a sister district court. *State v. Hayes*, 333 So. 2d 51, 54 (Fla. 4th DCA 1976).^[41] The opinion of a court at

37. *Spencer Ladd's, Inc. v. Lehman*, 167 So. 2d 731, 735 (Fla. 1st DCA 1964), *modified on different grounds*, 182 So. 2d 402 (Fla. 1965).

38. *See, e.g., McDonald's Corp. v. Department of Transp.*, 535 So. 2d 323 (Fla. 2d DCA 1988); *Industrial Fire & Casualty. Co. v. Acquesta*, 448 So. 2d 1122 (Fla. 4th DCA 1984), *aff'd*, 467 So. 2d 284 (1985); *Johnson v. State*, 436 So. 2d 248 (Fla. 5th DCA 1983) (per curiam, with special concurrence); *State v. Cruz*, 426 So. 2d 1308 (Fla. 2d DCA 1983), *rev'd*, 465 So. 2d 516 (Fla. 1985), *cert. denied*, 473 U.S. 905 (1985); *State v. Kopulos*, 413 So. 2d 1195 (Fla. 2d DCA 1982); *Chapman v. Pinellas County*, 423 So. 2d 578 (Fla. 2d DCA 1982); *State v. Steffani*, 398 So. 2d 475 (Fla. 3d DCA 1981), *aff'd*, 419 So. 2d 323 (Fla. 1982); *State v. Brady*, 379 So. 2d 1294 (Fla. 4th DCA 1980), *aff'd*, 406 So. 2d 1093 (Fla. 1981), *modified*, 467 U.S. 1201 (1984); *Holmes v. Blazer Fin. Servs., Inc.*, 369 So. 2d 987 (Fla. 4th DCA 1979); *State v. Hayes*, 333 So. 2d 51 (Fla. 4th DCA 1976); *Spencer Ladd's, Inc. v. Lehman*, 167 So. 2d 731 (Fla. 1st DCA 1964), *modified on different grounds*, 182 So. 2d 402 (Fla. 1965).

39. The substantial disadvantage that inheres in this geographic, or territorial, approach (so labelled in P. CARRINGTON, D. MEADOR, & M. ROSENBERG, *JUSTICE ON APPEAL* 154-55 (1976) (hereinafter *JUSTICE ON APPEAL*)) is discussed *infra* text accompanying notes 200-203.

40. Justice Schaefer cautions that rules recognizing the existence of a conflict among the intermediate courts as a ground for review by the top court "were designed to eliminate conflicts, not to stimulate them." Schaefer, *supra* note 5, at 566.

41. Don't miss the irony of a court's citing "foreign" precedent in support of its statement that it is not bound.

the same level is merely persuasive. *Id.* Conflicts between the district courts are resolved by the Florida Supreme Court. *Id.*

* * * *

We decline to follow, and in so doing state we are in conflict with, our sister court's decision in *Eddy*. . . .⁴²

C. Resolution of Interdistrict Conflicts by the Supreme Court

The jurisdiction of the Supreme Court of Florida to resolve conflicts among the district courts of appeal is discretionary. Conflicts jurisdiction may be asserted only where the decision of the district court sought to be reviewed "expressly and directly conflicts with a decision of another district court of appeal"⁴³ or where the district court certifies its decision as in direct conflict with a decision of another district court of appeal.⁴⁴ It is, therefore, within the power of a district court panel to prevent supreme court review by refraining from expressing in its opinion the conflict between its decision and that of another district and by refusing to certify its decision to the supreme court. This potential for preserving unresolved conflicts, as well as other issues, such as limited access to the supreme court, has led to some discontent with Florida's judicial system since the 1980 amendment.⁴⁵

This aspect of the system came about as a result of historical developments. At the outset, in 1956, the constitution provided for discretionary review by the supreme court of any decision of a district court of appeal that was "in direct conflict" with a decision of another district court of appeal or of the supreme court.⁴⁶ Two years later a situation appeared that divided the supreme court, generated some defiance by district judges,⁴⁷ and ultimately resulted in a constitutional amendment. The situation arose in *Lake v. Lake*⁴⁸ in which a district court of appeal disposed of an appeal by a single word decision: "Af-

42. *McDonald's Corp. v. Department of Transp.*, 535 So. 2d 323, 325, 326 (Fla. 2d DCA 1988).

43. FLA. CONST. art. V, § 3(b)(3).

44. *Id.* at § 3(b)(4).

45. See Scheb, *supra* note 10, at 511. Opposition to a precursor to the 1980 constitutional amendment "developed from attorneys who expressed a lack of trust in district court judges, or at least in their ability or willingness to recognize, concede, and certify conflicting decisions." *Jenkins v. State*, 385 So. 2d 1356, 1361 (Fla. 1980) (England, C.J., concurring specially).

46. FLA. CONST. art. V, § 4(2) (1956).

47. See *Barns & Mattis, Appellate Procedure*, 22 U. MIAMI L. REV. 348, 351 (1967).

48. 103 So. 2d 639 (Fla. 1958).

firmed.” The losing party sought review in the supreme court by contending that the result of the decision was contrary to that of a prior supreme court opinion, so that a direct conflict had been created, giving the supreme court jurisdiction. The supreme court discharged the writ of certiorari, holding that:

a ‘per curiam’ decision without opinion of a district court of appeal would not be reviewed by the supreme court based on [its] ‘direct conflict’ jurisdiction except in those rare cases where the ‘restricted examination required in proceedings in certiorari’ revealed that ‘a conflict had arisen with resulting injustice to the immediate litigant.’⁴⁹

The *Lake* court so held after balancing the need for uniform state law against the structure of the Florida judiciary in which the district courts of appeal “are and were meant to be courts of final, appellate jurisdiction.”⁵⁰

During the seven years after *Lake*, before it was modified in *Foley v. Weaver Drugs, Inc.*,⁵¹ hundreds of decisions of district courts of appeal, many of them per curiam decisions, were brought to the supreme court for review under its “direct conflict” jurisdiction.⁵² The rule of *Lake* was eroded *de facto* if not *de jure* by subsequent actions of the supreme court.⁵³ The supreme court found that in actual practice the court had not been relieved of any substantial portion of its workload by the policy announced in *Lake* respecting per curiam decisions. Deciding whether the rule or the exception enunciated in *Lake* was applicable made any practical distinction between review of per

49. This statement of the holding in *Lake* is taken from the opinion written seven years later that receded from *Lake*. *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 222 (Fla. 1965).

50. *Lake*, 103 So. 2d at 642 (emphasis in original). With regard to the former consideration, the supreme court said:

To remain stable, the law administered by the Supreme Court and the district courts of appeal must be harmonious and uniform. Were there not a central authority to keep it so it could happen that a district court of appeal would decide a given question of law one way and another district court of appeal another way, or one of them contrary to a former decision of the Supreme Court, through oversight or inadvertence, resulting in obvious confusion. To forestall any uncertainty that might derive from such situations, however infrequent, the provision was included in the [judiciary article] amendment [in 1956].

This uniformity and harmony of decisions is necessary, too, to litigants of the future for upon the decisions of the past they must rely.

Id. at 642-43.

51. 177 So. 2d 221 (Fla. 1965).

52. *Id.* at 223.

53. *Jenkins v. State*, 385 So. 2d 1356, 1358 (Fla. 1980).

curiam decisions without opinions and review of decisions with opinions negligible.⁵⁴

Moreover, in some cases the *Lake* approach had made the work of the supreme court more onerous in that, in attempting to ascertain whether there was a direct conflict, the supreme court had remanded the cause to the appellate court with the request that an opinion be written setting forth the reasoning upon which it based its per curiam judgment. That request had been made in *Foley* and "surprisingly" the Third District Court of Appeal refused the request.⁵⁵ The supreme court then, again emphasizing the need for uniformity and harmony in the decisions of the courts of appeal, modified the policy regarding per curiam decisions announced in *Lake*, and held that it "may review by conflict certiorari a per curiam judgment of affirmance without opinion where an examination of the record discloses that the legal effect of such per curiam affirmance is to create conflict with a decision of [the supreme] court or another district court of appeal."⁵⁶ Three of the justices of the supreme court dissented, on the basis that the decision detracted from the courts of appeal as courts of final appellate jurisdiction in most cases and would result in more overburdening of the supreme court.⁵⁷

During the ensuing fifteen years, several members of the supreme court brought into question the wisdom of the jurisdictional policies expressed in *Foley*. Likewise, the wisdom of another supreme court case holding that jurisdiction might be founded in a dissenting opinion to a per curiam majority decision rendered without opinion⁵⁸ was questioned. The primary thrust of the criticism of those policies was that they contributed to the overloading of the system. The constitutional amendment of 1980 was largely a response to such criticism and dissatisfaction.⁵⁹

54. *Foley*, 177 So. 2d at 223-24.

55. *Id.* at 226.

56. *Id.* at 225.

57. *Id.* at 231-35 (Thornal, J., dissenting).

The jurisdiction of the supreme court was further expanded by a 1972 constitutional amendment giving it the power to 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) (emphasis supplied). During the time this provision was in effect, from 1972 to 1980, the fact that a conflict was between two decisions of the same district court of appeal did not prevent the supreme court from taking jurisdiction. *See, e.g., David v. State*, 369 So. 2d 943 (Fla. 1979). The 1980 amendment to the judiciary article of the constitution ended supreme court jurisdiction over intradistrict conflicts, the resolution of which is now addressed in the en banc rule, FLA. R. APP. P. 9.331.

58. *Huguley v. Hall*, 157 So. 2d 417 (Fla. 1963).

59. *See Jenkins v. State*, 385 So. 2d 1356, 1357-59 (Sundberg, J.), 1360-63 (England, C.J., concurring specially) (Fla. 1980).

Soon after passage of the 1980 amendment, the supreme court held that under article V, section 3(b)(3), it lacks jurisdiction to review a per curiam decision of a district court of appeal rendered without opinion, regardless of whether it is 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.⁶⁰ "This Court may only review a decision of a district court of appeal that expressly and directly conflicts The dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.' Expressly is defined: 'in an express manner.'"⁶¹ It is now clear that a district court's declining to write an opinion expressing or certifying a direct conflict forecloses a party from review by the supreme court.⁶²

Lack of horizontal stare decisis and the creation of interdistrict conflicts has not been disapproved by the supreme court or any district court. In *Weiman* the supreme court did say that district court deci-

60. *Jenkins*, 385 So. 2d at 1359. *But cf.* *Stevens v. Jefferson*, 436 So. 2d 33 (Fla. 1983) (where the supreme court found conflict jurisdiction over a per curiam affirmance that merely listed two cases "which we deem to be in conflict with this decision").

Justice Adkins dissented in *Jenkins v. State* because he objected to the balance being struck in favor of finality of district court of appeal decisions at the expense of uniformity and certainty. He stated:

[T]he great bulk of litigants are allowed to founder on rocks of uncertainty and trial judges steer their course over a chaotic reef as they attempt to apply "Per Curiam Affirmed" decisions. When the constitutional amendment is considered in light of historical development of the decisional law (as suggested by the majority), we find regression instead of progression.

Id. at 1363.

Judge Adkins quoted Judge Drew's specially concurring opinion in *Foley v. Weaver Drugs, Inc.*, 177 So. 2d 221, 230 (Fla. 1965):

A different rule of law could prevail in every appellate district without the possibility of correction. The history of similar courts in this country leads to the conclusion that some of such courts have proven unsatisfactory simply because of the impossibility of maintaining uniformity in the decisional law of such state.

Id. at 1364. The Judge concluded by stating that "the decisions of the five district courts of appeal will be in hopeless conflict." *Id.* at 1363, 1364 (Adkins, J., dissenting).

61. *Id.* at 1359, quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 803 (1961 ed. unab.).

62. *See Whipple v. State*, 431 So. 2d 1011, 1015 (Fla. 2d DCA 1983) ("We recognize that if we decide a case without writing an opinion, the losing party will be unable to obtain further review in the supreme court.").

See also Dodi Publishing Co. v. Editorial Am., S.A., 385 So. 2d 1369 (Fla. 1980) (The issue to be decided on a petition for conflict review is whether there is express and direct conflict in the decision of the district court before the supreme court for review, not whether there is a conflict in a prior written opinion presently cited for authority; that is, the supreme court will not re-examine a case cited in a per curiam affirmed decision of a district court to determine if the contents of that cited case now conflict with other appellate decisions.).

See generally England, Hunter & Williams, *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. FLA. L. REV. 147 (1980).

sions have "a persuasive effect" on sister district courts. Nevertheless, district courts freely and frequently rule contrary to other district courts, with no suggestion of overruling the prior decision. The "law of the district" concept is well entrenched in Florida.

III. VERTICAL STARE DECISIS

Trial courts are bound by decisions of district courts of appeal; however, the question is *which* trial courts are bound by *which* appellate courts. The weight of authority is that vertical stare decisis of the umbrella type, unlike the federal system, controls in the state of Florida. Under the purely geographical, or federal, approach to stare decisis, trial courts are not bound by decisions of "foreign" district courts of appeal. Most of the Florida authority, however, is to the effect that a decision of a district court is binding not only on the trial courts within that district but also on all trial courts in the state when there is no conflicting district court opinion. The 1985 supreme court opinion in *Weiman v. McHaffie*⁶³ probably established this, if the 1980 supreme court statement in *Stanfill v. State*⁶⁴ did not.

A. *Development of the Rule*

The earliest discussion of the binding effect of district court decisions on trial courts was in dictum in 1975 in *Bunn v. Bunn*.⁶⁵ While admonishing against relying on obiter dictum as precedent, the Fourth District Court stated:

Necessarily, the views and decisions of an appellate court on issues which are properly raised and decided in disposing of the case are, unless reversed or modified by a higher court, binding on the lower court as the law of the case. Additionally, under the doctrine of stare decisis, an appellate court's decision on issues properly before it and decided in disposing of the case, are, until overruled by a subsequent case, binding as precedent on courts of lesser jurisdiction.⁶⁶

Unfortunately, it is not clear from this language whether trial courts outside the district of the appellate court rendering the decision were to be bound by the decision. A year after this decision, a prosecuting

63. 470 So. 2d 682 (Fla. 1985). See *supra* notes 27-34 and accompanying text.

64. 384 So. 2d 141, 143 (Fla. 1980). See *supra* note 28 and accompanying text. There was no vertical stare decisis question involved in *Stanfill*, so it was not determinative of the issue at hand.

65. 311 So. 2d 387 (Fla. 4th DCA 1975).

66. *Id.* at 389.

attorney lamented that nearly twenty-five years after Florida's appellate system was established this issue had not been addressed head-on.⁶⁷ Then to add to the confusion, the first two decisions considering the question were in direct conflict.

In *State v. Hayes*⁶⁸ the Fourth District Court of Appeal, surprised that there was any uncertainty in this issue among trial judges, held that a trial court was bound by the decision of a "foreign" district in the absence of a conflicting decision from the trial court's own court of appeal.⁶⁹ The opinion discussed New York, Illinois, and California decisions reaching similar results, and reasoned that this rule was necessary to promote stability and predictability in the law.⁷⁰ The *Hayes* court also noted that on appeal the district court is free to adopt the rule of the "foreign" district or "to go a different route," since a district court is not bound by a decision of a sister district court.⁷¹ The Fourth District Court thus introduced the umbrella type vertical stare decisis in Florida.

The First District Court of Appeal reached the opposite result in *Smith v. Venus Condominium Associates*.⁷² The court referred to the idea of a trial court's being bound by decisions of other district courts as "novel, though without merit" and refused to hold that failure to follow decisions of other district courts required reversal. The court said:

Such a holding could lead to utter chaos were two of our sister courts to be in conflict on a point of law raised in a trial court in this district. Also, an anomalous situation would result were we to reverse a trial court in this district for failing to follow a decision of one of our sister courts with which we disagreed.⁷³

The First District Court in *Venus Condominium* adopted the geographical approach to vertical stare decisis, the view that trial courts are bound only by decisions of the appellate court in that district. Thus, a conflict developed between the First and Fourth Districts as to

67. McGill, *Stare Decisis*, 50 FLA. B.J. 58 (1976).

68. 333 So. 2d 51 (Fla. 4th DCA 1976).

69. *Id.* at 53. The court also stated that if an issue had already been decided by the appellate court of the district in which the trial court is located, the trial court must follow that decision. *Id.*

70. *Id.*

71. *Id.* at 54 (citing *Spencer Ladd's Inc. v. Lehman*, 167 So. 2d 731 (Fla. 1st DCA 1964), modified on different grounds, 182 So. 2d 402 (Fla. 1965)).

72. 343 So. 2d 1284 (Fla. 1st DCA 1976), quashed and remanded, 352 So. 2d 1169 (Fla. 1977) (without comment upon the stare decisis point).

73. *Venus Condominium*, 343 So. 2d at 1285.

the precedential effect of decisions of Florida's district courts of appeal on trial courts. Nine years later the supreme court in *Weiman v. McHaffie*,⁷⁴ the Garn-St. Germain Act case, apparently approved the umbrella approach enunciated by the Fourth District Court in *Hayes*.

B. *The Rule in Operation*

Following this initial conflict and uncertainty regarding vertical stare decisis, the rule in *Hayes* was generally adhered to in the Fourth District, adopted in the Fifth and Second Districts, and recognized, at least by trial courts, in the Third District. The First District Court of Appeal still holds out, recognizing no district court decisions as binding on "its" trial courts except First District decisions.

The continued insistence of the Fourth District Court of Appeal that trial courts defer to other districts (absent conflict) is shown in *Holmes v. Blazer Financial Services, Inc.*⁷⁵ There the substantive issue was whether wages directly deposited in a bank account were exempt from garnishment. After a county court in the Fourth District refused to follow a First District Court decision which held that the money was not exempt, the circuit court in its appellate capacity reversed the county court pursuant to *Hayes*.⁷⁶ The Fourth District Court of Appeal noted that it was "proper" for the circuit court to act as it did, and denied the petition for writ of certiorari.⁷⁷

A Fifth District opinion, *Dillon v. Chapman*, clearly held that all trial courts are bound by a non-conflicting court of appeal decision from any district.⁷⁸ In *Dillon*, the district court declared Florida's no-fault insurance law unconstitutional. A motion for a stay pending supreme court review alleged that the stay was warranted "to avoid conflict between and chaos among the trial courts of the Fifth District and the trial courts of sister districts within which this court's judgment is persuasive only."⁷⁹ Citing *Holmes* and *Hayes* as authority, the Fifth District Court denied the motion, because: "[a] trial court not in this district is obliged to follow the dictates of our decision until told otherwise by its own district court or the supreme court."⁸⁰

74. 470 So. 2d 682 (Fla. 1985). See *supra* notes 27-34 and accompanying text.

75. 369 So. 2d 987 (Fla. 4th DCA 1979).

76. *Id.* at 988.

77. *Id.* at 988, 990.

78. 404 So. 2d 354 (Fla. 5th DCA 1981), *rev'd on other grounds*, 415 So. 2d 12 (Fla. 1982).

79. 404 So. 2d at 359.

80. *Id.*

The Second District Court of Appeal adopted the *Hayes* rule in *Chapman v. Pinellas County*.⁸¹ In a wrongful death action against the county, a trial court in the Second District rejected a decision from the Third District Court of Appeal,⁸² which held that a county did not have statutory immunity under the circumstances. The trial court held instead that the county was immune from suit.⁸³ The Second District Court of Appeal agreed with the Third District and reversed the trial court. The opinion pointedly noted that the trial court was incorrect in rejecting the Third District's decision, which it was "obliged" to follow since there was no controlling precedent from the supreme court or the Second District Court of Appeal.⁸⁴

The Second District Court of Appeal again illustrated the rule in *State v. Kopulos*,⁸⁵ wherein the trial court in the Second District had followed a 1980 Third District case.⁸⁶ On appeal the Second District Court found that a 1977 Second District case should have been followed. The appellate court did not openly chastise the trial court, but stated its disagreement with the Third District case, discussed the relevant Second District authority, and reversed.⁸⁷ Trial courts are obligated to follow the decisions of the court of appeal in their territorial district, regardless of any conflict with decisions of other districts. Only if the trial court cannot find relevant case law in its own district should it turn to the decisions of "foreign" districts.

Two cases arose in the Third District in which the trial judges could find no applicable decisions of the Third District Court of Appeal. Those cases indicate that the *Hayes* rule is recognized, at least by trial courts, in the Third District. In one case the trial judge's following a decision from a "foreign" district was deemed admirable by the appellate court;⁸⁸ in the other it was considered as perhaps discretionary.⁸⁹

81. 423 So. 2d 578 (Fla. 2d DCA 1982).

82. Metropolitan Dade County v. Yelvington, 392 So. 2d 911 (Fla. 3d DCA), *pet. for rev. denied*, 389 So. 2d 1113 (Fla. 1980).

83. 423 So. 2d at 579.

84. *Id.* at 580. The court cited as supporting authority *Stanfill v. State*, 384 So. 2d 141 (Fla. 1980); *Dillon v. Chapman*, 404 So. 2d 354 (Fla. 5th DCA 1981), *rev'd on other grounds*, 415 So. 2d 12 (Fla. 1982); *State v. Hayes*, 333 So. 2d 51 (Fla. 4th DCA 1976). It cited with a "but see" introductory signal *Smith v. Venus Condominium Ass'n*, 343 So. 2d 51, (Fla. 1st DCA 1976), *vacated on other grounds*, 352 So. 2d 1169 (Fla. 1977).

85. 413 So. 2d 1195 (Fla. 2d DCA 1982).

86. *Cappetta v. State*, 380 So. 2d 1303 (Fla. 3d DCA 1980), *overruled by York v. State*, 432 So. 2d 51 (Fla. 1983).

87. *Kopulos*, 413 So. 2d at 1195-96.

88. *State v. Steffani*, 398 So. 2d 475 (Fla. 3d DCA 1981), *aff'd*, 419 So. 2d 323 (Fla. 1982). For further discussion see *infra* notes 113-16 and accompanying text.

89. In *Gonzalez v. Garcia*, 417 So. 2d 780 (Fla. 3d DCA 1982), the trial court relied upon

The First District Court of Appeal is firm in its position that trial courts in the First District are bound only by decisions from the First District Court of Appeal or the supreme court.⁹⁰ A trial judge in the First District commits no error in “declin[ing]” to follow cases from two other districts “conceded” to be on point, where, on appeal, the First District Court decides that the two other district cases are “incorrect.” In *Shands Teaching Hospital & Clinics, Inc. v. Smith*,⁹¹ the trial court dismissed a complaint against a wife for payment of medical bills incurred by her husband because she had never agreed to pay them. In its order, the trial court conceded that two recent district court cases, one from the Second District⁹² and one from the Third,⁹³ held to the contrary—that a wife is responsible for her husband’s medical bills even in the absence of a contract.⁹⁴ The trial court declined to follow that authority, however, because it “found that the common law imposes no liability on a wife for the necessities of her husband; therefore the only way that a wife can be held responsible for the medical bills of her husband is by contract.”⁹⁵ The First District Court of Appeal affirmed, agreeing with the trial court on the merits.⁹⁶ A concurring opinion referred obliquely to the stare decisis issue. The concurring district judge implied that what the trial judge did was right because he guessed right: “The trial court correctly found that there was no legal basis for the liability claimed by appellant. . . . Because we are of the opinion that the decisions in *Manatee* and *Parkway* are incorrect, we find no error in the trial court’s failure to follow that authority.”⁹⁷

Chapman v. Dillon, 404 So. 2d 354 (Fla. 5th DCA 1981) (see *supra* text accompanying note 78), and refused to give a jury instruction on the Florida “no fault” threshold held unconstitutional by that Fifth District opinion. The Third District Court of Appeal reversed. “Although the trial court *may* have been within its *discretion* at the time of the ruling, after the Supreme Court of Florida quashed the above cited opinion in Chapman v. Dillon, 415 So. 2d 12 (Fla. 1982), the denial of the instruction requested was error; therefore, the final judgment under review is reversed.” *Gonzalez*, 417 So. 2d at 780 (emphasis added).

90. The First District Court of Appeal is also firm in binding trial judges within the district to its own decisions. In *El-Ra-Sul v. State*, 456 So. 2d 1244 (Fla. 1st DCA 1984), a trial judge in the first district “found as a matter of law that *Phillips* [a First District Court decision] was not binding since the issue in *Phillips* had been certified to the Florida Supreme Court for resolution.” *Id.* at 1245. The First District Court of Appeal reversed the trial judge because of the “error in failure to follow *Phillips*,” which was still unresolved by the supreme court. *Id.*

91. 480 So. 2d 1366 (Fla. 1st DCA 1985), *aff’d*, 497 So. 2d 644 (Fla. 1986).

92. *Manatee Convalescent Center, Inc. v. McDonald*, 392 So. 2d 1356 (Fla. 2d DCA 1980), *overruled by Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986).

93. *Parkway Gen. Hosp., Inc. v. Stern*, 400 So. 2d 166 (Fla. 3d DCA 1981), *overruled by Shands Teaching Hosp. and Clinics, Inc. v. Smith*, 497 So. 2d 644 (Fla. 1986).

94. *Shands*, 480 So. 2d at 1366.

95. *Id.*

96. *Id.*

97. *Id.* at 1369 (Barfield, J., concurring).

In affirming the First District, the supreme court did not mention the vertical stare decisis issue, other than to state factually what the trial court had decided.⁹⁸ The silence of the supreme court in this post-*Weiman* decision might make one wonder how seriously it expects lower Florida courts to take its pronouncements in *Weiman*.⁹⁹ Further concern comes from a comment of a supreme court justice four months after *Weiman* that: "[t]he courts of appeal establish a coherent and consistent body of precedent for the courts in that district."¹⁰⁰

Nevertheless, the Supreme Court of Florida has held that district court decisions are the law of the state unless and until overruled by the supreme court; that a district court decision binds all Florida trial courts and is persuasive to sister district courts.¹⁰¹ Three district courts of appeal (the Second, Fourth, and Fifth) hold that all trial courts are bound by the decision of a "foreign" district, unless there is a conflicting decision from the trial court's own court of appeal in which case the latter must be followed.¹⁰² The First District Court of Appeal takes the position that trial courts need not follow decisions of "foreign" district courts. First District trial courts must follow First District decisions; and where there is no First District precedent, trial courts should decide substantively correctly, as the First District Court of Appeal will decide if the case is appealed.¹⁰³ The position of the Third District is not clear, as it has not touched upon the issue since the supreme court's pronouncements in *Weiman*.

C. *Anomalous Situations in the Operation of Vertical Stare Decisis, Florida Style*

One of the ironies that make Florida's umbrella type stare decisis approach difficult for trial judges is that a trial judge with no precedent from the local district and conflicting decisions from "foreign" districts is forced to choose between the existing precedents. There are several ways to make the decision: if there are three or more decisions,

98. *Shands Teaching Hosp. & Clinics, Inc. v. Smith*, 497 So. 2d 644, 645 (Fla. 1986) ("The trial court declined to follow these authorities and dismissed the suit, finding that the common law imposed no liability on a wife for the necessities of her husband.').

99. See *supra* notes 27-34 and accompanying text.

100. *Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 105 (Fla. 1985) (Ehrlich, J., concurring in part and dissenting in part) (emphasis added).

101. See *supra* text accompanying note 34.

102. See *supra* notes 75-87 and accompanying text.

103. The First District saga of *Shands Teaching Hospital*, *supra* notes 91-97 and accompanying text, leads to the cynical conclusion that it is hard to quarrel with success. The trial court was ultimately affirmed on the merits by the supreme court, with no criticism from the First District Court of Appeal or the supreme court for not following decisions of other districts.

the trial judge could follow the majority;¹⁰⁴ the judge could follow the most recent "foreign" decision; the judge could decide which decision is "best," and follow that one; or the judge could choose the decision with which the judge thinks the local district court of appeal would be most likely to agree.¹⁰⁵ Faced with this quandary, the trial judge in *Smith v. Hindery* combined two of the methods and followed the most recent decision, with which he agreed.¹⁰⁶ The First District Court of Appeal did not specifically object to this method, but did reverse the lower court's decision because it found the most recent case inapplicable and agreed with the older decision.¹⁰⁷

The umbrella type vertical stare decisis within Florida's judicial system has led to the ironic situation in which a district court of appeal commends a trial judge for following precedent, and promptly reverses the trial judge's decision because the appellate court does not agree with the precedent.¹⁰⁸ In *State v. Brady*¹⁰⁹ the trial court in the Fourth District followed a First District case that interpreted a new statute to mean that mere possession of *any* amount of cannabis over five grams, without intent to sell, was only a third degree felony. The Fourth District Court of Appeal disagreed and held that under the new statute, mere possession of over 100 pounds of cannabis was a second degree felony.¹¹⁰ Although the appellate court reversed the decision, it stated: "we cannot blame the Trial Judge for following [the First District decision], since we at the Fourth District had not spoken on the subject. However, we disagree"¹¹¹ As a result of the lack of horizontal stare decisis, the trial court's territorial district court had the choice to follow the "foreign" precedent, which the trial court

104. If this were the approach taken, notice that a decision of one district court *could overrule* another. For example, case one from the court of appeal of district one holds *X*. The law binding all trial courts through the state is now *X*. Case two from district two holds *Y*. Case one is now overruled in district two. Case three from district three holds *Y*. Case one is now overruled in districts four and five if the trial courts follow the majority.

105. When the trial judge makes this decision the judge will not know which panel of the district court will decide the case if appealed. See, e.g., FOURTH DISTRICT COURT OF APPEAL, MANUAL OF INTERNAL OPERATING PROCEDURES Rules 5.1, 7.2; and Haddad, Rhodes, Spallone, & Heath, *Internal Organization of the District Courts of Appeal*, in THE FLORIDA BAR CONTINUING LEGAL EDUCATION, FLORIDA APPELLATE PRACTICE §§ 8.11, .12, .17 (1978). Hence, a judge's decision based on chances of affirmance would be just a guess.

106. 454 So. 2d 663, 672 (Fla. 1st DCA 1984).

107. *Id.* at 670-71 (Zehmer, J., concurring specially).

108. See the court's comment in text accompanying note 73.

109. 379 So. 2d 1294 (Fla. 4th DCA 1980), *aff'd*, 406 So. 2d 1093 (Fla. 1981), *vacated and remanded*, 467 U.S. 1201 (1984).

110. 379 So. 2d at 1297.

111. *Id.* at 1296.

was obliged to do, or to "go a different route" (as noted in *Hayes*¹¹²), since the First District's opinion was merely persuasive.

The trial judge in *State v. Steffani*¹¹³ found no local Third District case law on the point in issue, arising under Florida's "knock and announce" statute. Therefore, the trial judge followed the most recent precedent, provided by the Fourth District, but clearly indicated his disagreement and provided his reasoning.¹¹⁴ The Third District Court of Appeal deemed the trial court's opinion admirable because it represented a "conscious determination" to follow the available precedent when none existed in the Third District, even though the trial judge personally disagreed.¹¹⁵ The appellate court then reversed the trial judge's decision because it agreed with his disagreement.¹¹⁶

Similarly, in *State v. Cruz*¹¹⁷ and *Industrial Fire & Casualty Co. v. Acquesta*,¹¹⁸ the trial judges decided the cases according to the binding precedents of other districts. The appellate courts recognized that the trial judges were correct in ruling according to precedent, but reversed because they disagreed with their sister districts.¹¹⁹

The umbrella type vertical stare decisis has led to the flip-side of that ironic situation: a trial judge fails to follow controlling precedent of another district court of appeal and is affirmed by her appellate court, without mention of the trial judge's apparent error. In a Fifth District case, *Johnson v. State*,¹²⁰ the defendant fired a pistol into and through a vehicle while attempting to shoot his intended victim who was keeping the car between himself and his aggressor. The trial judge "declined" to follow an often-cited first district case, *Golden v. State*,¹²¹ which holds that the statute regarding wanton or malicious shooting is not violated when the shooting at or into an object is merely incidental to an intent to shoot at a human target. On appeal, the majority merely affirmed per curiam.¹²² In a special concurrence, one judge noted that the trial judge departed from *Golden* and that the Fifth District's holding therefore conflicted with the First District

112. *Smith v. Hayes*, 333 So. 2d 51, 54 (Fla. 4th DCA 1976).

113. 398 So. 2d 475 (Fla. 3d DCA 1981), *aff'd*, 419 So. 2d 323 (Fla. 1982).

114. *Id.* at 476 & n.1.

115. *Id.*

116. *Id.* at 475.

117. 426 So. 2d 1308 (Fla. 2d DCA 1983), *rev'd*, 465 So. 2d 516 (Fla.), *cert. denied*, 473 U.S. 905 (1985).

118. 448 So. 2d 1122 (Fla. 4th DCA 1984), *aff'd*, 467 So. 2d 284 (Fla. 1985).

119. *Cruz*, 426 So. 2d at 1308; *Acquesta*, 448 So. 2d at 1123.

120. 436 So. 2d 248 (Fla. 5th DCA 1983).

121. 120 So. 2d 651 (Fla. 1st DCA 1960).

122. *Johnson*, 436 So. 2d at 248.

decision.¹²³ However, there was no mention of the trial judge's blatant failure to follow existing "foreign" precedent, although the Fifth District may have reversed the trial judge had he followed it. Still, the case shows that not all trial judges believe that they are inescapably bound by the precedent of other districts. There is no subsequent history to the *Johnson* case because even if the defendant had sought to invoke the supreme court's conflict jurisdiction there would have been none, according to the precepts of *Jenkins v. State*.¹²⁴

IV. INTRADISTRICT CONFLICTS

A recurring difficulty in Florida's judicial system is that of conflicts between and among panels of the same district court. Uniformity of decisions is certainly desirable, if not necessary,¹²⁵ and a variety of methods have been used to maintain certainty and uniformity. In 1968 the supreme court determined that when two decisions of the same district conflict, the later simply overrules the earlier as the decisional law in that district.¹²⁶ In 1972 a constitutional amendment gave the supreme court discretionary jurisdiction to resolve intradistrict conflicts.¹²⁷ This amendment authorized the supreme court to harmonize conflicts within, as well as among, the district courts of appeal and remained in effect until 1980.¹²⁸ During this time, a district court likewise had and exercised the power to overrule its own earlier decisions.¹²⁹

In 1979 the Florida Appellate Structure Commission recommended that the supreme court adopt a new rule of appellate procedure authorizing each district court of appeal to sit en banc to resolve intra-

123. *Id.* at 250 (Coward, J., concurring specially).

124. *See supra* note 60 and accompanying text.

125. Otherwise, "totally inconsistent decisions could be left standing and litigants left in doubt as to the state of the law." *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, 1128 (Fla. 1982).

126. *Little v. State*, 206 So. 2d 9 (Fla. 1968). This was before the 1972 constitutional amendment which gave the supreme court jurisdiction based on intradistrict conflicts. *See supra* note 57.

127. FLA. CONST. art. V § 3(b)(3).

128. *See supra* notes 14, 57.

129. *See Stanfill v. State*, 360 So. 2d 128 (Fla. 1st DCA 1978), *remanded with directions*, 384 So. 2d 141 (Fla. 1980). In *Stanfill* the First District Court of Appeal receded from its previous decisions in two prior decisions regarding the construction of a statute. *See State ex rel. Seal v. Shepard*, 229 So. 2d 644 (Fla. 1st DCA 1974); *and Holmes v. State*, 342 So. 2d 134 (Fla. 1st DCA 1977). The First District's decision in *Stanfill* then conflicted with two Second District decisions. *State ex rel. Miller v. Patterson*, 284 So. 2d 9 (Fla. 2d DCA 1973); *Diggs v. State*, 334 So. 2d 333 (Fla. 2d DCA 1976). The supreme court took jurisdiction. It approved the First District's construction of the statute in the case under review, 384 So. 2d at 143, and disapproved the contrary Second District decisions. *Id.*

district conflicts of decisions.¹³⁰ Proceeding on the tacit premise that such conflicts are inevitable, the supreme court adopted the en banc mechanism for resolving them.¹³¹ The en banc rule, Rule 9.331 of the Florida Rules of Appellate Procedure, "is an essential part of the philosophy of the constitutional scheme embodied in the new [1980] amendment because the Supreme Court no longer has jurisdiction under the amendment to review *intra*-district conflict."¹³² The rule was promulgated to reduce the supreme court's workload and restore the appellate courts to what they were originally intended to be: courts of last resort, with a few narrow exceptions.¹³³

The constitutional scheme embodied in the 1980 amendment limits the supreme court's conflict jurisdiction to the review of district court decisions in conflict with decisions of the supreme court or with *another* district court decision.¹³⁴ Under the 1980 amendment the supreme court no longer has jurisdiction to review intradistrict decisions based on their conflict with each other:¹³⁵

[A] direct and important interrelationship exists between the en banc rule and the new constitutional amendment which limits Supreme Court jurisdiction.

* * * *

In fact, under the new amendment, if *intra*-district conflict is not resolved within the district courts by en banc decision, totally inconsistent decisions could be left standing and litigants left in doubt as to the state of law. The new appellate structural scheme, including the en banc process, was intended to solve that problem and to provide litigants with a clear statement of the law within any given district.¹³⁶

Florida Rule of Appellate Procedure 9.331, effective in 1980, provides that a district court of appeal may sit en banc when "necessary

130. *Report of the Supreme Court Commission on the Florida Appellate Structure*, 53 FLA. B.J. 274, 279 (1979).

131. *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 (Fla. 1979). The intent of the commission's proposal was to formalize the district courts' present process of holding ad hoc conferences to resolve conflicts between panels. *Id.* Additionally, the court put the district courts on notice that they should develop their own concepts of decisional uniformity. *Id.* at 993-94.

132. *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, 1127 (Fla. 1982) (emphasis in original).

133. *Id.*

134. FLA. CONST. art. V, § 3(b)(3).

135. Overton, *supra* note 13, at 89. The 1980 amendment reverted to the rule as it was before the 1972 amendment. Only between 1972 and 1980 did the supreme court have power to review intradistrict conflicts. See *Little v. State*, 206 So. 2d 9 (Fla. 1968).

136. *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, 1127-28 (Fla. 1982).

to maintain uniformity in the court's decisions."¹³⁷ Implicit in this rule is the precept that the district court sitting en banc has the power to overrule its prior decision, as well as to vacate a panel decision in a case under review and make it consistent with the prior decision. The bench, bar, and scholars of Florida have written extensively about the en banc rule.¹³⁸ Its operation is discussed herein only insofar as it impacts on stare decisis.

The opinion accompanying the 1982 modification addressed an issue of horizontal stare decisis inherent whenever a court sits in panels, as each Florida district court of appeals does.¹³⁹ Despite the availability of en banc hearings and rehearings to resolve conflicts, if that procedure is not utilized and one panel does decide contrary to a previous panel, what is the effect of the later decision upon the earlier? The chief judges of the district courts raised the question for resolution by the supreme court. The question was phrased: "whether one three-judge panel can expressly overrule or recede from a prior decision of a three-judge panel of the same court on the same point of law."¹⁴⁰

The supreme court concluded that it could not "accept the chief judges' suggestion that we should prohibit that action by court rule."¹⁴¹ The court, speaking through Justice Overton, found that a strict rule of procedure would be "unworkable and inappropriate under the circumstances" for two reasons: "[1] factual circumstances are different and cases may be distinguishable on that basis, and [2] the issues raised and argued in a prior case may not be the same as issues raised and argued in the case under review."¹⁴²

137. FLA. R. APP. P. 9.331(a). It has been amended three times in accordance with suggestions submitted, once before the rule became effective, once two years later to address practical problems that arose in the use of the en banc rule, and three years after that to add a provision that a district court could sit en banc in cases that are "of exceptional importance." *In re* Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure, 377 So. 2d 700 (Fla. 1979) (per curiam) (stylistic rather than substantive modifications were set out in this clarifying promulgation); *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); The Florida Bar Re: Rules of Appellate Procedure 463 So. 2d 1114 (Fla. 1984).

138. See, e.g., Booth & Clarkson, *The Florida En Banc Rule*, 36 U. FLA. L. REV. 71 (1984); Overton, *supra* note 13; Schreiber v. Chase Fed. Sav. & Loan Ass'n, 422 So. 2d 911, 917-22 (Fla. 3d DCA 1982) (Hubbart, C.J., dissenting and examining the history of Rule 9.331), *quashed and remanded with directions*, 479 So. 2d 90 (Fla. 1985), *cert. denied*, 476 U.S. 1160 (1986); Sepler, *En Banc Review in Florida Appellate Courts*, 62 FLA. B.J. 37 (1988).

139. "Each district court of appeal shall consist of at least three judges. Three judges shall consider each case and the concurrence of two shall be necessary to a decision." FLA. CONST. art. V, § 4(a). The number of judges on each district court ranges from seven to twelve. See *supra* text accompanying note 20.

140. *In re* Rule 9.331, 416 So. 2d at 1128.

141. *Id.*

142. *Id.*

It should be pointed out that these reasons are not theoretically responsive to the question of whether a panel can overrule another. Where facts are different and cases are distinguishable on that basis, there is no overruling; both cases can stand as good law. Furthermore, where issues raised in the case under review were not raised in the prior case, no violence is done to principles of stare decisis by deciding the later case differently in view of those issues. It is a well established doctrine that when a decision is rendered per incuriam, without consideration of a relevant constitutional provision or statute, or in ignorance of the authority of a relevant case, it is not binding.¹⁴³

Nevertheless, Justice Overton's finding that it would be unworkable and inappropriate to prohibit one panel from overruling a decision of a panel in the same district is perceptive. It corresponds with the premise that conflicting decisions (non-distinguishable, on the identical point of law) are inevitable. When they occur within a district, the later decision, even though not en banc, overrules the earlier one.¹⁴⁴

Justice Overton's admonition to district judges to refrain, when sitting in panels, from overruling or receding from district precedent merits quoting at length:

Under our appellate structural scheme, each three-judge panel of a district court of appeal should not consider itself an independent court unto itself, with no responsibility to the district court as a whole. . . . [T]he suggestion that each three-judge panel may rule indiscriminately without regard to previous decisions of the same court is totally inconsistent with the philosophy of a strong district court of appeal which possesses the responsibility to set the law within its district.

. . . .
We have full confidence that the district court of appeal judges, with a full understanding of our new appellate structural scheme, will endeavor to carry out their responsibility to make the law consistent within their district in accordance with that intent. We

143. "It is axiomatic that no decision is authority on any question not raised and considered, although it may be involved in the facts of the case." *State ex rel. Christian v. Austin*, 302 So. 2d 811, 818 (Fla. 1st DCA 1974), *quashed in part, cause remanded*, 310 So. 2d 289 (Fla. 1975). *Accord*, *Young v. Bristol Aeroplane Co.*, [1944] K.B. 718; R. CROSS, *PRECEDENT IN ENGLISH LAW* 134, 136, 143-44, 146-48 (3d ed. 1977); Schmitthoff, *Should Precedents Be Binding?*, J. BUS. L. 290, 294 n.14 (1982). It has been suggested that even lower courts should not be bound by an appellate decision per incuriam. B. Mattis, *Punitive and Compensatory Damages in Illinois Insurance Cases: Some Constitutional Questions*, 73 ILL. B.J. 206, 210 (1984).

144. *Cf. Little v. State*, 206 So. 2d 9, 10 (Fla. 1968) (Where the supreme court had no jurisdiction under the constitutional provision then in effect to review an intra-district conflict, the result of conflict would be that the decision later in point of time would overrule the former as the decisional law in the district.).

would expect that, in most instances, a three-judge panel confronted with precedent with which it disagrees will suggest an en banc hearing. As an alternative, the district court panel could, of course, certify the issue to this Court for resolution.^[145] Consistency of law within a district is essential to avoid unnecessary and costly litigation. We conclude that the district court judges, through their opinions, will adopt principles to ensure this result.¹⁴⁶

There is some indication that district judges do heed this admonition and accept horizontal stare decisis within a district, even though they do not accept collateral decisions from other districts. In *Izaak Walton League of America v. Monroe County*¹⁴⁷ a Third District panel said: "We are unable to distinguish [a prior Third District decision] on any principled basis. Since, under the present circumstances, we are bound to follow it [citing authorities], the judgment below is affirmed solely on the authority of [that prior decision.]"¹⁴⁸ The panel, of course, could have suggested an en banc hearing if it disagreed with the previous decision. Instead, it certified the question to the supreme court as one of great public importance.¹⁴⁹ Similarly, a Fifth District panel said: "Because we are bound by the prior decision of this court . . . , we must affirm."¹⁵⁰ Likewise, it then certified the question to the supreme court as one of great public importance.¹⁵¹

On the other hand, district judges in some cases have resolved intradistrict conflicts without invoking the en banc rule at all, but by choosing to follow one line of cases in the conflict and receding from the cases contrary to the newly adopted line. In the year after the en

145. Apparently Justice Overton was referring to the supreme court's jurisdiction to review district court decisions that pass upon a question certified by the district court to be of great public importance. FLA. CONST. art. V, § 3(b)(4). In Justice Overton's 1983 law review article, he omitted the reference to certification as an alternative. See Overton, *supra* note 13.

146. *In re Rule 9.331*, 416 So. 2d at 1128.

147. 448 So. 2d 1170 (Fla. 3d DCA 1984).

148. *Id.* at 1174, citing, in addition to Justice Overton's opinion in *In re Rule 9.331*, State v. Whitehead, 443 So. 2d 196 (Fla. 3d DCA 1983) (Schwartz, C.J., specially concurring). In *Whitehead*, Chief Judge Schwartz concurred with the per curiam decision of the panel only because of the existence of a prior Third District case "about which I have already expressed my doubts [in an en banc special concurrence], and which—were I free to do so—I would, at the least, very critically reconsider." *Id.* at 197 (emphasis added).

149. 448 So. 2d at 1174. Shepard's Citator shows no supreme court review. See, however, the companion case, *Windley Key, Ltd. v. Department of Community Affairs*, 456 So. 2d 489 (Fla. 3D DCA 1984). The question certified was whether a representative group such as the Izaak Walton League has standing to maintain an appeal of a zoning decision of a lower tribunal to the governing board of a county or municipality.

150. State v. Johnson, 516 So. 2d 1015, 1016 (Fla. 5th DCA 1987).

151. The question involved the use of profiles of similarities of drug couriers to justify a law enforcement officer's investigatory stop. *Id.* at 1021.

banc rule became effective, a Fourth District panel in *State v. Schwartz*¹⁵² found that "this Court has had substantial difficulty reconciling several previous decisions which we have rendered involving similar factual situations" interpreting the "knock and announce" statute. It cited five Fourth District decisions rendered from 1972 to 1980 and adopted a concurring opinion in one of them. It then held that to the extent the other cases hold to the contrary, "we recede from them."¹⁵³

A Third District panel in *Blue v. Weinstein*¹⁵⁴ found that three Third District cases decided from 1970 to 1975¹⁵⁵ had held that the tort of abuse of process may not be brought as a counterclaim when directed against process served in the pending main action, on the grounds that termination of such action in favor of the counterclaimant is an essential precondition to the bringing of such claim. The panel recognized that the Third District had also held in a 1968 case,¹⁵⁶ contrary to that line of cases, that termination of the action in favor of the person against whom process is served is not an essential element of the tort of abuse of process.¹⁵⁷ The panel decided: "We must resolve the above conflict in our decisions and we do so by adhering to the rule announced in [the 1968 decision] and by receding from" the rule announced in the other three decisions.¹⁵⁸

The panels in *Schwartz* and *Blue* ignored the rule for en banc procedure. Those cases were decided, however, before the supreme court's statement that "a three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an identical point of law" even though it had the power to do so.¹⁵⁹ Moreover, the district judges in *Schwartz* and *Blue* did not violate principles of horizontal

152. 398 So. 2d 460, 461 (Fla. 4th DCA 1981).

153. *Id.* at 461.

154. 381 So. 2d 308 (Fla. 3d DCA 1980). The en banc rule became effective January 1, 1980, and this case was decided on March 18, 1980.

155. *Bieley v. duPont, Glore, Forgan, Inc.*, 316 So. 2d 66 (Fla. 3d DCA 1975); *American Salvage & Jobbing Co. v. Solomon*, 295 So. 2d 710 (Fla. 3d DCA 1974); *Marcoux v. Davis*, 230 So. 2d 485 (Fla. 3d DCA 1970).

156. *Cline v. Flagler Sales Corp.*, 207 So. 2d 709 (Fla. 3d DCA 1968).

157. 381 So. 2d at 310.

158. *Id.*

159. *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, 1128 (Fla. 1982). In harmony with that supreme court statement, the Fourth District has adopted the policy that "no panel of judges shall be authorized to recede from, overrule or otherwise cause conflict with a prior ruling of this court and that such a result may only be achieved by the en banc procedure." FOURTH DISTRICT COURT OF APPEAL, MANUAL OF INTERNAL OPERATING PROCEDURES, Rule 10(a). See also *id.* at Rule 11(b) (providing for en banc conference when two panels of the court have concurrently reached conflicting opinions).

stare decisis in overruling prior inconsistent decisions. Those principles do not require that a court forever follow its prior decisions, but do require that if an indistinguishable decision is not followed, it be overruled.¹⁶⁰ The least defensible decision is one that rules contrary to other precedent in a given jurisdiction and either ignores the contrary precedent or purports to leave it standing. Trial courts, litigants, and counsellors are then in an impossible quandary.

A district court may consider conducting a hearing en banc¹⁶¹ or a rehearing en banc¹⁶² out of necessity "to maintain uniformity in the court's decisions."¹⁶³ The procedures might at first blush appear straightforward and easy to implement. The court must first determine whether a sufficient intradistrict conflict exists to authorize en banc consideration, and if so, then it must examine the conflicting decisions to decide which opinion or opinions should be vacated or overruled.¹⁶⁴ A review of Florida en banc case law reveals that, in practice, the en banc rule has not been uniformly applied and may not be easy to implement.

The various district courts and even the judges within those district courts do not agree with each other on the primary question of what constitutes intradistrict conflict sufficient to authorize an en banc hearing or rehearing.¹⁶⁵ Indeed, in one instance the judges could not agree on which was the "prior" decision, to say nothing of whether it was conflicting.¹⁶⁶ It is ironic that a supreme court rule intended to assure decisional uniformity is itself the subject, and perhaps the source of, conflicting interpretations. The only standards given in the rule are that: (1) "En banc hearings and rehearings shall not be ordered unless the case is of exceptional importance or unless *necessary to maintain uniformity in the court's decisions*,"¹⁶⁷ and (2) "A rehearing en banc is an extraordinary proceeding."¹⁶⁸ The Commentary provides: "The ground, maintenance of uniformity in the court's decisions, is the equivalent of decisional conflict as developed by supreme court precedent in the exercise of its conflict jurisdiction. The

160. See generally Mattis & Yalowitz, *Stare Decisis Among [sic] the Appellate Court of Illinois*, 28 DEPAUL L. REV. 571, 572 (1979).

161. On its own motion, FLA. R. APP. P. 9.331(b).

162. On its own motion or on motion of a party, FLA. R. APP. P. 9.331(c).

163. FLA. R. APP. P. 9.331(a).

164. See, e.g., *Finney v. State*, 420 So. 2d 639, 641 (Fla. 3d DCA 1982).

165. Sepler, *En Banc Review in Florida Appellate Courts*, 62 FLA. B.J. 37, 38-39 nn. 11-13 (1988) (cites a dozen cases representing all districts utilizing what Sepler analyzes as three parallel tests for decisional uniformity in the en banc context).

166. *Finney v. State*, 420 So. 2d 639, 641, 646 (Fla. 3d DCA 1982).

167. FLA. R. APP. P. 9.331(a) (emphasis added).

168. FLA. R. APP. P. 9.331(c)(2).

district courts are free, however, to develop their own concept of decisional uniformity."¹⁶⁹ Those two sentences in the Commentary are ambiguous. Following the first directive some district judges have concluded that the tests articulated for supreme court conflict jurisdiction limit the types of conflict required to authorize en banc procedure in the district courts.¹⁷⁰ The judges in the Third District believed they were obligated to follow the definition of decisional conflict established by the supreme court in *Nielsen v. City of Sarasota*¹⁷¹ as (1) the announcement of a rule of law which conflicts with a rule previously announced, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same controlling facts as a prior case.¹⁷² Other judges concluded that "decisions lack uniformity whenever it appears that they are so inconsistent and disharmonious that they would not have been rendered by the same panel of the court."¹⁷³ The latter standard is considered a "practical" test.¹⁷⁴

In 1982 the Third District sitting en banc in *Schreiber v. Chase Federal Savings & Loan Association*¹⁷⁵ was badly divided on the standard for en banc review. Three judges concurred in Judge Schwartz's opinion, holding that the practical test for uniformity was proper and was met.¹⁷⁶ Four judges believed that strict decisional conflict, as that concept defines the supreme court's authority to review district court decisions, was required and was not met.¹⁷⁷ One judge believed the strict conflict standard was proper and was met.¹⁷⁸ The question was certi-

169. *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, 1130 (Fla. 1982).

170. *Finney v. State*, 420 So. 2d 639, 641 (Fla. 3d DCA 1982) (Nesbitt, J., writing for the majority). Judge Schwartz specially concurred because he saw no reason for the discussion of the en banc rule where "en banc treatment is obviously justified on any standard." *Id.* at 646.

171. 117 So. 2d 731 (Fla. 1960).

172. *Finney*, 420 So. 2d at 641. The test has been elaborated to include a decision so disharmonious with a prior decision on the same point that the latter may be said to have overruled the former. *Id.* at n.1.

173. *Schreiber v. Chase Fed. Sav. & Loan Ass'n*, 422 So. 2d 911, 912 n.1 (Fla. 3d DCA 1982) (opinion of Schwartz, J., in which three other judges concurred), *quashed*, 479 So. 2d 90 (Fla. 1985), *cert. denied*, 476 U.S. 1160 (1986).

Sepler, *supra* note 165, at 39 n.12, comments that generally en banc cases of this sort are described either as involving *potential* conflicts between cases, e.g., *Mohican Valley, Inc. v. MacDonald*, 443 So. 2d 479, 480 (Fla. 5th DCA 1984); *Ocala Pavers, Inc. v. Florida-Georgia Tractor Co.*, 434 So. 2d 34, 35 (Fla. 5th DCA 1983), or *apparent* conflicts between cases within a district, e.g., *Pape v. Pape*, 444 So. 2d 1058, 1060 (Fla. 1st DCA 1984).

174. 422 So. 2d at 912 n.1.

175. *Id.* at 912.

176. *Id.* at 912-13.

177. See Judge Nesbitt's dissent, with which Chief Judge Hubbard and Judges Barkdull and Baskin concur. *Id.* at 914-16.

178. *Id.* at 913-14 (Ferguson, J., concurring in part and dissenting in part).

fied to the supreme court: "What is the proper scope of review for district courts of appeal in granting rehearings en banc?"¹⁷⁹ The supreme court held that district courts in exercising their en banc power are not limited by the standards adopted by the supreme court in the exercise of its discretionary conflict jurisdiction.¹⁸⁰ It further held that district courts are free to develop their own concepts of decisional uniformity.¹⁸¹ Thus, standards in one district may properly be different from standards in another, apparently without creating a conflict between district court decisions to activate supreme court conflict jurisdiction.¹⁸² It approved the practical test as an appropriate standard, in that it agreed with Judge Schwartz that it would be difficult for the legal profession to harmonize the original panel decision under review with a prior Third District decision.¹⁸³ The supreme court emphasized that the procedure was designed to "assure harmonious decisions within the courts' geographic boundaries, and to develop predictability of the law within their jurisdictions."¹⁸⁴

179. *Chase Fed. Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 91 (Fla. 1985). The supreme court responded in 1985, but during the interim the controversy fermented. *See, e.g., Taylor v. State*, 436 So. 2d 124 (Fla. 3d DCA 1983) (en banc).

180. 479 So. 2d at 91.

181. The supreme court quashed the decision of the Third District majority in its holding that strict conflict was required. The supreme court said:

[T]he district court of appeal, in implementing the provisions of appellate procedure rule 9.331, has authority to adopt the standard of conflict it believes necessary or appropriate in order to harmonize the decisions of the court and avoid costly relitigation of similar issues within its appellate district. We therefore quash the decision of the district court of appeal to the contrary.

Id. at 94.

182. *See* opinion of Ehrlich, J., concurring in part and dissenting in part in *Schreiber*, 479 So. 2d at 104-05.

183. *Id.* at 94. Justice Ehrlich, concurring in part and dissenting in part, believed that "taking it upon ourselves to define intra-district conflict for the districts themselves would be overreaching and presumptuous." *Id.* at 105.

184. *Id.* at 93. The supreme court elaborated:

Consistency of decisions within each district is essential to the credibility of the district courts. There has been criticism of intermediate appellate courts for their failure to speak with "a single voice of the law." Meador, *An Appellate Court Dilemma and A Solution Through Subject Matter Organization*, 16 U. MICH. L.J. REF. 471, 474 (1983). As judges are added to Florida's district courts to meet expanding caseloads, the resulting increased number of three-judge panels cannot help but increase the number of inconsistent and conflicting decisions. When there is a general rotation of Florida's district court judges among three-judge panels, the increased number of panel combinations compounds the problem. With a five-member court, the number of different panel combinations is ten. With a twelve-member court, however, the number of panel combinations is 220. The en banc process provides a means for Florida's district courts to avoid the perception that each court consists of independent panels speaking with multiple voices with no apparent responsibility to the court as a whole.

Id. at 93-94.

Even after the supreme court decision in *Schreiber*, disagreement about the standards for review and the procedures for en banc hearings continued. In *State v. Navarro*¹⁸⁵ the Third District expanded its test for en banc review to include, in addition to the two-pronged strict standard, the "misappli[cation] of a well-established rule of law of this district."¹⁸⁶ A dissenter complained that the en banc rule was "stood on its head" by this "freewheel[ing]," elusive standard.¹⁸⁷ Thereafter, the Third District Court of Appeal granted rehearing en banc on the ground that the panel holding created "a lack of uniformity with prior decisions of this court."¹⁸⁸ Two judges dissented, maintaining that none of the established en banc standards was met. The dissenters feared that what was emerging in the district was, "in effect, a second en banc appeals court which reviews the merits of panel decisions."¹⁸⁹ The absence of internal rules of procedure for en banc review has also caused disagreement among Third District judges.¹⁹⁰ The First¹⁹¹ and Fourth¹⁹² Districts have adopted their own en banc rules.

While the en banc procedure may be effective in allowing district courts to resolve intradistrict conflict, problems remain with the wide discretion and varying standards for invoking it.¹⁹³

185. 464 So. 2d 137 (Fla. 3d DCA 1985) (en banc).

186. *Id.* at 140.

187. *Id.* at 143 (Ferguson, J., dissenting).

188. *Carroll v. State*, 497 So. 2d 253, 261 (Fla. 3d DCA 1985) (on motions for rehearing en banc, 1986 and 1987), *pet. for review denied*, 511 So. 2d 297 (Fla. 1987).

189. *Id.* at 265. *See also*, *Zabrani v. Cowart*, 502 So. 2d 1257 (Fla. 3d DCA 1986) (en banc), *aff'd*, 506 So. 2d 1035 (Fla. 1987) (in which the same two dissenters believed that the en banc jurisdiction was being invoked unconstitutionally).

190. *Fraga v. Department of Health & Rehabilitative Servs.*, 464 So. 2d 144 (Fla. 3d DCA 1985). In *Fraga*, Baskin, J., wrote the original panel decision in May 1984. Schwartz, C.J., dissented. The losing party filed motions for rehearing and for rehearing en banc. The latter was granted. After the en banc hearing, while the full court was deliberating, the third member of the original panel decided to concur in the opinion of the original dissenter, making the original dissent the panel decision in February 1985. The court then vacated the order granting en banc review. Baskin, J., now dissented, on the merits and on the ground that the procedures employed by the court ignored due process. She called for the adoption and publication of internal rules to answer the many questions raised.

The confusion surrounding *Fraga* is demonstrated by the syllabus which indicates that Baskin, J., dissented from her own opinion.

191. FIRST DISTRICT COURT OF APPEAL, RULES OF INTERNAL GOVERNMENT, Rule 9. *See Crittenden Orange Blossom Fruit v. Stone*, 492 So. 2d 1106, 1107 (Fla. 1st DCA 1986), *aff'd*, 514 So. 2d 351 (Fla. 1987).

192. FOURTH DISTRICT COURT OF APPEAL, MANUAL OF INTERNAL OPERATING PROCEDURES. Rule 11.4 provides for oral argument on the question of "whether conflict in fact exists or would be created by a proposed opinion." Rule 11.5 provides that "en banc consideration shall not be ordered unless the case is of exceptional importance or unless necessary to maintain uniformity in the court's decisions."

193. *See Sepler, supra* note 165, at 39.

V. CONCLUSION AND A MODEST PROPOSAL FOR CONFLICT AVOIDANCE

As one of the most populated and fastest growing states in the union, Florida has appropriately devoted much attention to its judicial system. In theory it should work well in achieving the goal of conflict resolution. Trial courts should, and apparently do, follow decisions of the district court that has the power to reverse them. There should be no intradistrict conflicts of long duration because a district court panel should follow prior decisions of the court of which it is a part, or call for an en banc consideration. In the alternative, a panel could assure intradistrict uniformity by overruling a prior decision of the district court of which the panel is a member, if that prior decision was not rendered en banc. As a further alternative, a panel could certify the cause to the supreme court as involving a question of great public importance. Either of these "end runs" around the en banc procedure is subject to criticism: the first, because the spirit of the en banc rule requires that the entire district court resolve intradistrict conflicts; the second, because the 1984 amendment to the rule specifically made questions of "exceptional importance" appropriate for en banc district court consideration before potential supreme court review. Moreover, en banc consideration even of questions of exceptional importance is consistent with the precept that district courts of appeal are to a great extent courts of last resort, with further review by the supreme court based only on the statewide importance of legal issues and the relative availability of the supreme court's time to resolve cases promptly.¹⁹⁴

In recognition that Florida is a state, not a confederacy of five districts or sub-states, the majority rule is that a trial court should follow appellate court decisions from districts other than its own when there is no controlling local authority.¹⁹⁵ Nevertheless, this umbrella type vertical stare decisis, coupled with Florida's position against horizontal stare decisis among district courts, results in anomalous situations and guessing games by trial judges, as well as unpredictability to litigants and planners with all its attendant detriments.

In further recognition of Florida's statehood, interdistrict conflicts are supposed to be resolved by the supreme court to the end that Florida will not subject its citizens to different rules of law based on the

194. See *Jenkins v. State*, 385 So. 2d 1356, 1363 (Fla. 1980) (England, C.J., concurring specially).

195. One would expect that the First District Court of Appeal would conform to this rule when the issue is presented to it clearly, especially in view of the supreme court decision in *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985), that district court decisions have a binding effect on all Florida trial courts.

location of the litigation. It must be borne in mind, however, that supreme court jurisdiction over district conflicts is not automatic. It depends upon whether the district court writes an opinion that expressly and directly conflicts with a decision of another district court or certifies the decision as in direct conflict with that of another district court.¹⁹⁶ It also depends upon whether the losing party can and will seek review by the supreme court. Finally, it depends upon whether the supreme court decides to exercise its discretionary conflict jurisdiction.

The ease with which a district court shrugs off an apposite decision of a sister court, by finding it not persuasive, does a disservice to the jurisprudence of the state. To paraphrase Chief Justice Boyd: Consistency of decisions within the state is essential to the credibility of the judicial system.¹⁹⁷ The "law of the district" notion is at odds with that credibility and with the other values sought to be protected by stare decisis principles.

"[D]iversity in geographical regions of the state" has been used as a justification for constitutional conflict resolution jurisdiction in the supreme court.¹⁹⁸ Conflict resolution by the supreme court is, of course, necessary and proper. The possibility, or even likelihood, of conflict resolution, however, does not obviate the need for interdistrict conflict avoidance. Conflicting decisions, whether they are resolved quickly, slowly, or not at all, damage the rights of litigants, as well as the fabric of the law itself.¹⁹⁹

The "geographic diversity" approach embraces a substantial theoretical and practical disadvantage, which has been well-articulated by eminent appellate justice scholars:²⁰⁰

That disadvantage is its tendency to reinforce the instinct for autonomy of the intermediate court judges and to promote a form of territorialism that can be debilitating to the system. The theoretical fault of territorialism is that it is fundamentally inconsistent with the idea of law because it accepts differences resulting solely from differences in place with no basis in reason for such divergences. In a pure form, territorialism in the administration of the law is a denial

196. See *supra* notes 13-14 and accompanying text.

197. See *Chase Federal Sav. & Loan Ass'n v. Schreiber*, 479 So. 2d 90, 93 (Fla. 1985).

198. See *Jenkins*, 385 So. 2d at 1362 (England, C.J., concurring specially) (explaining that the American Bar Association's Committee to Implement Standards of Judicial Administration concluded that geographical diversity was one of the unique factors that adequately explained Florida's "deviation from the ABA's model standard of constitutionally unlimited discretionary review").

199. Schaefer, *supra* note 5, at 566.

200. JUSTICE ON APPEAL, *supra* note 39, at 153-55 (1976).

of equal protection in the classical sense. There is confusion in the minds of some observers about this; the confusion mistakes territorialism for legitimate regionalism. It leads those who are thus mistaken to suppose that territorialism is an instrument of democracy, making the legal system more responsive to differences between regions. It is, however, hard to imagine a less effective instrument of democratic government than an intermediate court; these institutions are of low public visibility and their judges are not widely known to any constituency; it is quite inaccurate to think of them as representatives of anything except the whole legal system of which they are part, and of their own consciences.²⁰¹

The state legislature could not enact valid legislation that would bear differently upon state citizens depending upon the intermediate appellate court district in which they happen to sue or be sued.²⁰² Neither should the appellate judiciary lightly enunciate a different rule of law applicable to materially similar facts on the basis that the prior decision was across a district line.

The practical faults of territorialism are that it rewards and encourages appellate forum shopping. The possibility of forum shopping, in turn, promotes uncertainty about the law and thus discourages legal planning. It is economically wasteful and undermines the effectiveness of the law as a means of regulating conduct.²⁰³

The potential availability of supreme court review to resolve inter-district conflicts may have blunted the sensitivity of appellate judges to the disadvantages of territorialism. It is facile for an intermediate court to rationalize its refusal to follow decisions of courts of coordinate authority by mentally passing on to the supreme court the responsibility for resolving conflicts. The acceptance of horizontal stare decisis among the districts would avoid or greatly reduce the number of conflicts.²⁰⁴ Only in the most compelling circumstances, where the deciding court is convinced that following the rule established in the other district would result in substantial injustice, should a conflict be created for potential supreme court resolution. It would require substantial self-discipline of the appellate judges to place the jurisprudential benefits of adherence to precedent above their individual

201. *Id.*

202. See Schaefer, *supra* note 5, at 568; cf. FLA. CONST. art. III, § 11(a), art. X, § 12(g) (providing that there shall be no special law or general law of local application pertaining to various enumerated subjects). See also 10 FLA. JUR. 2D, *Constitutional Law* § 328 (1979).

203. JUSTICE ON APPEAL, *supra* note 39, at 155.

204. Of course, it is not likely that one district court of appeal would or could overrule the decision of another. If it followed a particularly bothersome decision from another district, it could state its rationale in the opinion and certify the question to be of great public importance.

predelections about how they would have decided an issue in the first instance. To the extent that district court judges are willing to do so their decisions will “represent the law of Florida unless and until they are overruled by” the supreme court.²⁰⁵

205. *Stanfill v. State*, 384 So. 2d 141, 143 (Fla. 1980), quoted in *Weiman v. McHaffie*, 470 So. 2d 682, 684 (Fla. 1985).