WELCOME TO THE SIXTH DISTRICT COURT OF APPEAL

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If you haven't heard yet, we are moving. After 67 years of being part of the Second District Court of Appeal, the Twentieth Judicial Circuit will be moving to the newly created Sixth District Court of Appeal on January 1, 2023.

These are exciting times. For many of us, a move like this happens once in a lifetime. In fact, since the District Courts were created in 1956, only two new ones have previously been created: the Fourth District in 1965 and the Fifth District in 1979.

The speed at which this new appellate court is moving from legislative paper to operation is also wild. Passed into law by the Governor on June 2, 2022, the new court was given essentially six months to become operational.

Therefore, while this discusses the new Court's ins and outs and attempts to answer some of your burning questions, keep in mind that the court is "still under construction." So, many questions may not have answers yet. Indeed, some questions–like which law will apply to this new court–may not have answers until the Sixth District decides a case and controversy.

So, pack your bags, fasten your seatbelts, and return your tray table to its upright and locked position as we depart on this once-in-a-lifetime adventure.

History: How Did We Get Here?

Talk of creating a new Sixth District has existed for many years, though previously it was all political chatter. The genesis of the current creation has its political roots in the Space and Location Needs Study for the Second District Court of Appeal, which the Legislature commissioned in 2016 to determine where the Second District's new building should be located. That study recommended relocating all Second District operations from Lakeland to a newly constructed building in the Hillsborough or Pinellas County area. Years later, after much political posturing, the Legislature approved a $50 million facility for the Second District in Pinellas County. Fla. Leg., SB 2500 at 417.

A month after this Legislative approval, the Florida Supreme Court commissioned a Workload and Jurisdiction Assessment Committee per its constitutional authority to continually improve the judicial process by increasing, decreasing, or redefining appellate districts and judicial circuits. Art. V, § 9, Fla. Const. This workgroup then solicited input from judges, practitioners, and the public concerning the current system's effectiveness, efficiency, access, professionalism, and public trust and confidence.

The committee ultimately recommended creating at least one new District Court of Appeal. Its primary rationale for doing so was that it would promote public trust and confidence. The committee's full report can be found here: www.flcourts.org/content/download/791118/file/dca-assessment-Committee-Final-Report.pdf. The Florida Supreme Court adopted the committee's recommendation and made its own recommendation to the Legislature to create a new Sixth District Court of Appeal and realign the existing Districts. In re Redefinition of Appellate Districts & Certification of Need for Additional Appellate Judges (*Redefinition*), 46 Fla. L. Weekly S355 (Fla. Nov. 24, 2021).

Notably, however, not everyone favored this creation. Justice Polston dissented, finding "there is not a compelling need or significant improvement to the judicial process...." Id. (Polston, J., dissenting). He also noted that the committee's recommendation was not supported by the five District Court's Chief Judges. Id.

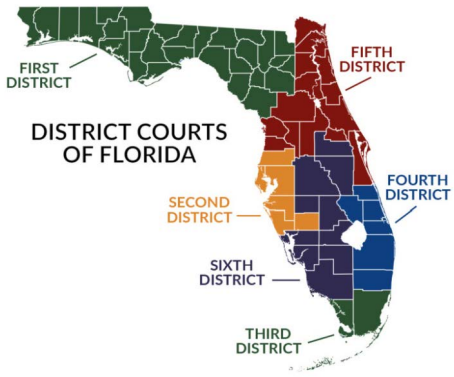
Nevertheless, the Legislature approved the Sixth District's creation, the realignment of several Districts, and the creation of several new judicial positions in HB 7027. As part of this creation, it amended section 35.05(1) to make Lakeland, Florida the Sixth District's headquarters and appropriated $50 million to construct a facility. Although the Governor signed the new appellate court's creation into law on June 2, 2022, he vetoed the $50 million facility appropriation.

Location: Which Circuit Went Where?

To create the Sixth District, the Legislature moved the Ninth Circuit out of the Fifth District and moved the Tenth Circuit and Twentieth Circuit out of the Second District. So, when the dust settles, the Sixth District will be comprised of the Ninth, Tenth, and Twentieth Circuits, while the Second District will shrink to only the Sixth, Twelfth, and Thirteenth Circuits. HB 7027.

But this was not the only realignment. Indeed, an important reason behind the Supreme Court's recommendation was the "serious underrepresentation among district court judges of judges from within the Fourth Judicial Circuit, which contains Jacksonville, one of Florida's largest metropolitan areas." Redefinition, 46 Fla. L. Weekly S355. So, per the Supreme Court's recommendation, the Legislature moved the Fourth Circuit out of the First District and into the Fifth District since it had just lost the Ninth Circuit to the Sixth District. HB 7027.

Only the Third and Fourth Districts were unaffected by this realignment. Here is where each county falls after this realignment:



Judges: Who Went Where?

As part of these changes, the Legislature reallocated the number of judges in the First, Second, and Fifth Districts and created a total of seven new judicial positions. The First District went from 15 judges to 13 judges. The Second District went from 16 judges to 15 judges. The Fifth District gained a position, making it a 12-member court. And the Sixth District will have nine total judges. HB 7027.

Another important feature of the Supreme Court's recommendation was that no sitting judge lose their position due to the realignment, which the Legislature adopted.

As a result, Judge John K. Stargel, who is presently in the Second District, but who resides in Lakeland, will become part of the Sixth District. Similarly, five current Fifth District judges who reside in Orlando will join the Sixth District, including Judges Jay P. Cohen, Meredith L. Sasso, Dan Traver, Mary Alice Nardella, and Carrie Ann Wozniak. This then leaves three new positions for the Governor to fill.

It's worth noting that not only is the Sixth District the newest Florida Court, but five of the six existing judges are also relatively new appellate judges given that they were appointed in the last three years. Judge Cohen has the most seniority, having been appointed to the Fifth District in January 2008 and having served as its Chief Judge from January 2017 to December 2018.

Nevertheless, the sitting judges comprising the Sixth District do have a breadth of prior experiences. Three were previously circuit judges (Judges Cohen, Traver, & Stargel), and one of those began as a county judge (Judge Cohen). Three others were appointed from the bar with experiences in complex civil litigation (Judge Sasso), commercial litigation and trusts and estates (Judge Nardella), and appellate law (Judge Wozniak).

Operation: Who will be running the Court and where will it operate?

Given that HB 7027 was only signed by the Governor on June 2, 2022 and its changes become effective on January 1, 2023, this means Florida must realign the existing appellate courts and create a new one from scratch in six months. To accomplish this herculean task, the Supreme Court commissioned a workgroup comprised of the current incoming Sixth District Judges and several judges from the other affected courts. *Workgroup on the Implementation of an Additional District Court of Appeal*, No. AOSC22-18 (Fla. Jun. 7, 2022).

The workgroup's task was to figure out the logistics of creating a new appellate court from scratch, including issues like "human resources; interim and permanent facilities; equipment; technology, security, fiscal, and administrative services; case processing and disposition; and interim governance issues." Id. at 3.

In just over 60 days, the workgroup has made significant strides. For example, the Sixth District's judges have elected Meredith L. Sasso as their new Chief Judge. They have already started ironing out their internal operating procedures, including whether to have a stipulated extension-of-time procedure like the other District Courts and whether to have mandatory appellate mediation in civil cases like the Fifth District has had since 2006.

The workgroup has also started hiring for their core nonjudicial positions. In this latter area, the new Court will have a surprising amount of experience and expertise. For example, the current marshal of the Fifth District Court of Appeal, Charles R. Crawford, was selected as the Court's first marshal. Mr. Crawford has an extensive law-enforcement background and has served as the Fifth District's marshal for the past ten years. Stacey Pectol was hired as the Court's first clerk. She also has an impressive resume, having previously served as the Arkansas Supreme Court's clerk for the past eight years. And Sarah Corbett was hired as the Court's first director of central staff. Ms. Corbett has almost 20 years' experience with the Second District Court of Appeal, having served in its central staff and as a law clerk for three separate Second District judges.

In the coming weeks, the Court will continue to hire top talent, including a director of information technology, deputy clerks, legal assistants, and staff attorneys. For example, right now Judges Traver and Wozniak are accepting applications for staff attorneys in their suites. More information on those position can be found on the Fifth District's website here: www.5dca.org/About-the-Court/Employment (as the Sixth District's website is not up yet).

The workgroup is still considering its facility options, however. Lakeland is the Court's official headquarters, though the $50 million appropriation for a new Sixth District courthouse was unfortunately vetoed. So, like the Second District for many years, the Sixth District will not have a permanent home initially, though there is already talk about appropriating funding again next legislative session.

In the meantime, the Sixth District's clerk's office will take over the lease space in Lakeland that the Second District has been using for its clerk's office, which is a retail space near Lakeland's downtown. In fact, many of the deputy clerks who have worked for years in the Second District's clerk's office have opted to join the Sixth District's clerk's office, which only further illustrates the high level of experience that the Sixth District will have when its doors open.

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But it is unclear, as of this article, where the judge's chambers will be located and where oral argument will be held. There are essentially three options: Rent further space somewhere within the District, travel the circuits like days' old, or work remotely, including Zoom oral arguments.

The workgroup is considering establishing a satellite office in Orlando that would serve as judicial chambers for the five Orlando-based judges. Whether to rent space for a courtroom–and where to do it–is still up in the air. My personal opinion is that the Court will likely do a mix of traveling the circuits and Zoom oral arguments. Traveling the circuits will increase the public's awareness, familiarity, and confidence in the new Court and its judges. And using Zoom will decrease expenses for everyone and is consistent with the Supreme Court's recent rule amendment, which encourages the use of remote proceedings. *See In re Amendments to Florida Rules of Civil Procedure, Florida Rules of Gen. Practice & Judicial Admin., Florida Rules of Criminal Procedure, Florida Prob. Rules, Florida Rules of Traffic Court, Florida Small Claims Rules, & Florida Rules of Appellate Procedure, 47* Fla. L. Weekly S187 (Fla. July 14, 2022).

Processing: Will these changes delay resolution of my current appeal?

As the old adage goes, justice delayed is justice denied. In theory, however, no case's resolution will be delayed due to these amendments. But January 1, 2023, is a hard deadline. So any appeal presently pending in the First, Second, and Fifth District that are affected by HB 7027's realignment and new-court creation will automatically have to be transferred to the new court with jurisdiction over the circuits from which the appeal originated.

To avoid potential delays in cases originating in the Ninth Circuit, the Fifth District is diligently working to resolve those cases before January 1, 2023 or is assigning them to the five Fifth District Judges who will become Sixth District Judges in the new year.

That plan won't necessarily work for Tenth and Twentieth Circuit cases given that only one Second District Judge is moving to the new court. The Second District has been bird-dogging Tenth and Twentieth Circuit cases to ensure that as many as possible are resolved before the end of the year.

But still, what about those cases that cannot be resolved before January 1st despite being fully briefed? Or what about cases that have oral argument between now and December 31st, but that cannot be resolved by January 1st? Or what about those cases that are resolved, but a rehearing or post-opinion motion is filed–maybe even on December 31st?

Candidly, neither the Supreme Court nor its workgroup have resolved these questions. What will likely happen, however, is that any appeal perfected, heard by oral argument, or for which a post-opinion motion is pending will continue to be decided by the originally assigned panel of judges, who will simply sit by designation as associate judges of the Sixth District.

In other words, undecided appeals originating in the Tenth and Twentieth Circuits that have already been assigned a panel of Second District judges will still, jurisdictionally speaking, transfer automatically to the Sixth District, but the assigned Second District judges will likely continue to decide the appeal, but as associate judges of the Sixth District.

This is the procedure that the Supreme Court used when the Fifth District was created in 1979. I*n the Matter of the Creation of the Dist. Court of Appeal, Fifth Dist.*, 374 So. 2d 972, 973–74 (Fla. 1979) (*"Fifth DCA's Creation"*). And a search of Westlaw shows that the Fifth District started issuing opinions within two days of it commencing operation on August 5, 1979. *Compare id.* at 972–73, *with Saxon v. Saxon*, 375 So. 2d 921 (Fla. 5th DCA Aug. 7, 1979). In fact, Westlaw reflects that the Fifth DCA decided 30 cases in its first month of operation.

So, HB 7027's changes really shouldn't, in theory, cause anyone's appeal to be delayed. Appeals perfected or orally heard between now and the end of the year will likely still be decided by the same panel of Second District judges who would have decided it even if the case wasn't moving to the Sixth District. Appeals not been perfected before January 1, 2023, will automatically transfer to the Sixth District and be processed like any other case. Just remember though, on January 1, 2023, any new notice of appeal being filed from the Twentieth Circuit cases must refer to the Sixth District and all new filings from that circuit must be filed in the Sixth District through the portal.

Stare Decisis: What caselaw applies to my case and binds this Circuit?

This is the question on everyone's mind, and it has essentially three subquestions: (1) What caselaw applies to cases presently pending on appeal that were already decided by the Twentieth Judicial Circuit under Second District caselaw? (2) What caselaw binds this Circuit's judges going forward? And (3) Who decides these questions?

These important questions have no clear answers. There's not even clear Florida precedent on them because the Supreme Court's order addressing the Fifth District's 1979 creation did not address these issues. *See, e.g., Fifth DCA's Creation*, 374 So. 2d at 972–74. Nor could the author find any Fifth District decision addressing these issues. This is likely due to the fact that a new appellate court could only bind all future panels to another District's substantive precedent if it sat en banc. But the Supreme Court did not create en banc procedures until a month after the Fifth District's creation, and even then, the procedures only allowed en banc review to resolve intradistrict conflicts, which a new appellate court would not initially have. *See In re Florida Rules of Appellate Procedure*, 374 So. 2d 992, 993–94 (Fla. 1979), *modified sub nom. In re Rule 9.331, Determination of Causes, 377* So. 2d 700 (Fla. 1979)

Although further research and analysis is needed, I theorize that there are essentially two options for establishing Sixth District precedent.

The first option would be the approach that the Eleventh Federal Circuit took when it adopted the Fifth Federal Circuit's precedent in the first case after its creation in *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981). Under this option, either the Second District or Fifth District's precedent could become the Sixth District's precedent on day one until overruled by the Sixth District sitting en banc. Stability and predictability favor this approach. Not to mention, adopting Fifth District precedent may come naturally to the five Fifth District judges who will become Sixth District judges.

But there are at least three reasons why *Bonner's* approach may not occur here. First, the Eleventh Circuit was wholly created from one Circuit–not two different appellate courts like here. *Id.* at 1207. Second, precedent existed in the federal system for a new circuit to adopt the engendering circuit's stare decisis. Id. at 1210. That's not the case in Florida. Finally, the new Sixth District judges may not want to be restrained by the Second or Fifth District's precedent. Unlike in *Bonner's* context where all Eleventh Circuit's judges were previous Fifth Circuit judges who had helped established that circuit's precedent, this is not the case here, particularly given that all but one Sixth District judge will have been appointed within the past three years.

The second option–which I presently believe is the more likely one–is that the Sixth District will decide each case anew working from a clean slate, relying on other Districts as nonbinding, persuasive authority. This option appears to be what the Fifth District did in 1979. So, there is at least some precedent for it in Florida. The new-ish judges of this new court–many of whom are textualist–may also prefer the freedom and flexibility this option offers.

This option has the added benefit of avoiding the thorny question of who decides which stare decisis governs. The Legislature did not address the issue in HB 7027 and likely could not have without violating the separation-of-powers doctrine. Art. II, § 3, Fla. Const.

It is not even clear whether the Supreme Court could decide this issue for the Sixth District. Although the Supreme Court has constitutional rule-making authority over Florida's courts, that's limited to "practice and procedure"–which is generally different than substantive law. *See* Art. V, § 2, Fla. Const. The Supreme Court's jurisdiction over substantive issues is expressly limited to the categories identified in article V, section 3(b), Florida Constitution, such as resolving individual conflicts between districts. It does not include compelling one District Court to wholesale adopt another District's substantive caselaw. And even if the Supreme Court had that authority, the Sixth District could, in theory, change that decision in its first case by sitting en banc.

But it is also really not even clear whether the Sixth District itself could decide to wholesale adopt another District's stare decisis–even sitting en banc. For starters, some have questioned the en banc procedure's constitutionality. *State v. Petagine*, 290 So. 3d 1106, 1109–13 (Fla. 1st DCA 2020) (Tanenbaum, J., concurring in rehearing en banc denial). Florida Rule of Appellate Procedure 9.331(a) also limits en banc review to either intradistrict conflicts and when a "case or issue is of exceptional importance…." The first would not apply on day one. The second might apply, but it's still questionable whether that procedure could be used in one case to wholesale adopt another District's stare decisis for all cases and all types of issues. After all, Florida appellate courts do not generally have authority to give advisory opinions and gratuitous comments about the state of the law in a different case or involving a different factual situation would be nonbinding dicta. *See, e.g., Northwoods Sports Med. & Physical Rehab., Inc. v. State Farm Mut. Auto. Ins. Co.*, 137 So. 3d 1049, 1054 (Fla. 4th DCA 2014) (advisory opinions); *State v. Yule*, 905 So. 2d 251, 260 (Fla. 2d DCA 2005) (Canady, J., concurring) (explaining difference between holdings and dicta).

Deciding each case on a clean slate based on the facts and law relevant to the case avoids this thorny question. It's also most consistent with the constitution's requirement for appeals to be decided by three judge panels. Art. V, § 4(a), Fla. Const. ("Three judges shall consider each case and the concurrence of two shall be necessary to a decision.").

As for stability and predictability, neither would be substantially impacted by the clean-slate option because of *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992). That case already binds trial courts within the Sixth District to the decisions of all district courts unless and until the Sixth District or the Supreme Court rule differently on an issue. The only instance that is not the case is when two non-Sixth District cases are in conflict. Then the trial court can pick which district to follow until either the Sixth District decides the matter differently or the Supreme Court resolves the conflict. So, stability and predictability is already built into the system under *Pardo*.

Conclusion

This article just scratches the surface of the exciting times we are living in. For more information, the Office of State Court Administrators has an information webpage that it updates regularly, which can be found here: www.flcourts.org/6DCA

I also encourage everyone to attend the Collier County Bar Association's Annual District Court of Appeal Dinner on October 27th at Imperial Golf Club. Register for that here: www.colliercountybar.org/events/EventDetails.aspx?id=1669183&group=.

Not only will this be the last dinner we host for the Second District Court of Appeal, but this year's panel of judges will be a mix of Second District judges and incoming Sixth District Judges, including: Chief Judge Robert Morris of the Second District, incoming Chief Judge Meredith L. Sasso of the Sixth District, and incoming Judge John K. Stargel of the Sixth District. The two Chief Judges will both no doubt speak and offer additional information on this transition and then the panel will hear cases the following morning on October 28th at the Collier County Courthouse. I hope to see everyone there.