

**MEETING MINUTES OF APPELLATE PRACTICE SECTION MEETING ON
JANUARY 18, 2007**

In attendance were:

Susan Whaley Fox, Chair
Steven L. Brannock, Chair-Elect [Excused Absence]
Siobhan Helene Shea, Vice Chair
Dorothy Frances Easley, Secretary
Matthew John Conigliaro, Treasurer
Benedict P. Kuehne, Board Liaison
Thomas Hall, Immediate Past Chair
Jack Reiter, Editor-in-Chief, THE RECORD
Jack Aiello
Shannon Carlyle [Excused Absence]
John G. Crabtree [Excused Absence]
Judge Rosemary Barkett
Caryn Lynn Bellus
Barbara Eagan
Angela Flowers
June M. Galkoski
Betsy Gallagher
Henry Gyden
Valeria Hendricks [Excused Absence]
Celene Humphries [Excused Absence]
Calianne Lantz
Judge Charles Lawson
Wendy Loquasto
Roberta Mandel
Lucretia Pitts
Judge Mark Polen
Harvey Sepler
Judge Morris Silberman
Judge Richard Suarez
Marianne Trussell
Tom Warner
Judge Peter Webster

I. CALL TO ORDER – SUSAN FOX, CHAIR

Chair Fox called the meeting to order.

II. INTRODUCTIONS

Chair Fox completed introductions, then proceeded to business.

III. APPROVAL OF MINUTES FROM SEPTEMBER 14, 2006

The September 14, 2006 Meeting Minutes were approved subject to corrections.

IV. CHAIR'S REPORT

A. Today's Section Events

Fox discussed dinner to be held that evening at Los Ranchos restaurant in Coral Gables, with attendance open to all in the Appellate Practice Section and the Appellate Court Rules Committee.

B. PRACTICE MANAGEMENT CORRESPONDENCE AND CLE AVAILABILITY

Fox stated that if anyone was interested in the law office management materials, Fox will provide.

C. FLORIDA BAR JOURNAL SPECIAL EDITION ON APPELLATE PRACTICE – APRIL 2007

A Special Edition on Appellate Practice for April 2007 was approved about two and one-half years ago by the Florida Bar Editorial Board. May Cain and Bill Schneider will be presenting articles and the Appellate Practice Section will have a meaningful presence in this edition, including introductory articles about the Section, and articles from Tom Elligett, a former APS chair, current APS chair-elect, Steve Brannock, and APS members Harvey Sepler and Kristin Norse.

V. Treasurer's Report – Matt Conigliaro

A. Monthly Statement of Operations (B)

Austin Newberry presented the budget, with two points to pay close attention to: **Exhibit B**–the Statement of Operations for November, with the current APS budget of 69,349–and **Exhibit C**: the Proposed Budget for approval. What is important to note is that now, for first time, next year's budget has a budgeted deficit, so that we are not caught off guard.

Fox commented that Matt Conigliaro will have the Treasurer's and Secretary's job next year when those two offices are combined, he will review the budget and report back to us.

Tom Hall recalled at one point, that the Board would not allow us to budget a deficit. Newberry stated that this was not policy in the 8 years he had been working as liason. Newberry explained that the Florida Bar's method of charging has changed, with a change in the CLE split; our expenditures have gone up because we're being charged more.

Fox further explained that we are utilizing our Section money more aggressively to fund our appellate conferences, with excellent substance and turnout. Last year, we gave \$10,000 to the Chief Justice for the Chief Judge's Conference when it had to be relocated at the last minute from New Orleans to Florida. We also funded the Appellate Justice Conference. We also need to look at these funding areas and other important events that we want to continue to support. In light of the Bar's new funding and charging system, however, we need to anticipate the size of the reserve we will need.

Jack Aiello commented that, as former chair, he was never troubled over accounting balances, because we need a cushion but do not need a large surplus. If we get down to \$20,000, however, that is of concern. Siobhan Shea discussed the history that we previously had discussed a separate operating reserve. How that is to be created/organized, needs to do with the committee that the Section formed at the retreat last year.

Tony Musto expressed the importance of the Section continuing to do its good work, but to not let other sections profit unfairly from that benefit. Musto spoke of the need to set up an independent foundation, as other sections had done, for long-term protection of the Section's hard work and money produced from that hard work.

Hall commented that, what is troubling is each year, the APS has generated a surplus, so we had been spending money out of our fund balance; but we should be funding out of our operating balance. Upon attending many Board of Governor's meetings, we were assured that the Bar was not after our fund balances, but agreed with Musto that our fund balances had been

affected by these new rules. Now, we don't have that. We are looking, for the first time, at having a deficit in the Section. We need to revisit how we do the budget.

B. 2007/2008 Budget Approval (C)

Hall moved to approve the Exhibit C proposed 2007-08 budget as reflected as Exhibit C, Dorothy Easley seconded, and it was so approved.

VII. OLD BUSINESS

A. APPELLATE PRACTICE BOARD CERTIFICATION RULE CHANGES – DOROTHY EASLEY, SUB. COMMITTEE CHAIR

Dorothy Easley stated that the Appellate Recertification APS Special Subcommittee, also including Susan Fox, John Crabtree and John Mills, met on 10-31-06, conferenced via multiple emails, thereafter, and met further on 11-04-06 Report and Proposed Language concerning the recertification requirements.

The discussions initially focused on the October 20, 2006 email from Ben Kuehne re: administrative law appellate practice and what constitutes appellate action. All agreed that appellate action in the administrative law context should relate to administrative law appeals, such as final appeals from final appealable orders. Discussion, thereafter, took place re: the waiver rule for recertification. All agreed that the rules as currently written created a disparate impact on older appellate lawyers who had practiced appellate law for decades but who had moved into a primarily supervisory role and/or who were winding down their practices.

To address these issues, the subcommittee concluded that “primary responsibility” should be clarified by way of amendment to the language or a committee note to reflect “substantially responsible” or “substantial responsibility” to reflect the reality of senior appellate lawyers engaged in a significant part of the appellate advocacy process. The subcommittee further agreed that the waiver rule should be clarified as to what constitutes good cause shown, to introduce more specific criteria, without removing recertification committee discretion to evaluate unique or

unusual facts of a given application. All agreed that more emphasis should be placed on the number of years in appellate practice, CLE requirements, satisfying subsections b and c, what criteria constitutes good cause shown. The subcommittee proposed and submitted the following language to the Certification Committee for the 14-year waiver rule:

RULE 6-13.4 RECERTIFICATION

Recertification shall be pursuant to the following standards:

(a) Substantial Involvement Requirement: From the period starting from the last date of certification, the applicant shall have spent at least 30 percent of the applicant's practice of law in substantial and direct involvement in appellate practice sufficient to demonstrate special competence as an appellate lawyer.

(b) Appellate Action Requirement: The applicant shall have had sole or primary responsibility in at least 15 appellate actions during the period since filing the last application for certification.

* * *

(g) Alternative Requirements for Long-Time Certified Applicants. For an applicant who has been (i) continuously certified as an appellate lawyer for a period of 14 years of more and (ii) spent at least fifty percent of his or her continuous and substantial involvement in the practice of law in actual participation in appellate practice through the period since the last date of certification, the sole or primary responsibility requirements for appellate actions and oral arguments may also be satisfied for appellate actions and oral arguments in which the applicant had supervisory responsibility. Supervisory responsibility means that the applicant appeared as counsel in the appellate action and had direct and substantial involvement in advising the primarily responsible lawyer. Applicants proceeding

under this subdivision shall certify that they have handled or supervised at least fifteen appellate actions since their last date of certification, but shall not otherwise be required to document their compliance with subdivision 6-3.13(b) beyond listing those actions by case name and number.

Chair Fox reported that the Committee is favorably disposed to this proposed language, but was not certain it was yet resolved. Angela Flowers reported that this language was still under review. Fox invited further comments for anyone wanting to do so.

Tony Musto discussed the possibility of automatic recertification, as the above proposed language seemed to reflect a totally different sentiment from the original automatic recertification language. Easley agreed there appears to be a sentiment to move away from automatic recertification, but to moved in the direction of having the rules support recertification based on the reality that appellate attorneys who have been board certified for more than 14 years are likely acting in supervisory role. Fox confirmed that these issues will be discussed later. Fox recognized Easley for her excellent work.

B. AWARDS & NOMINATIONS COMMITTEE AND APPLICATION FORM – TOM HALL, CHAIR

Tom Hall reported that the need to come up with a Nominations Committee and Form to standardize the process came up at the last retreat. This is being completed and will have these completed for the next edition of The Record, with nominations being accepted starting March 1, 2007. Fox thanked Hall for his excellent work.

C. 2007 APPELLATE JUSTICE CONFERENCE – CELENE HUMPHRIES

Celene Humphries was unable to attend, and Siobhan Shea reported for her. The Appellate Justice Conference received a grant from the Florida Bar Foundation. The idea it to try to make this an annual event. This year's conference will be held during the Florida Bar annual meeting.

VI. NEW BUSINESS

A. 2007 APPELLATE JUSTICE WORKSHOP SPONSORSHIP REQUEST, RECEPTION SPONSORSHIP REQUEST

The Section has a request from the Appellate Justice Conference committee to again sponsor the Conference. Last year, the Section approved \$2,850, all of which was refunded back to the Section. The Conference is requesting an increase to \$3,500 dollars. The funds will be used for the Section following the Conference. The topic this year is Balancing Independence and Accountability in Florida's Appellate Courts, and there will be CLE credits.

Shea moved for budget approval of conference. June Hoffman-Galkoski asked whether the committee considered approaching law firms for sponsorship. Shea responded that this conference would more appropriately not receive law firm sponsorship, particularly in light of its topic: judicial independence and accountability. Shea further noted that this was another reason that the Florida Bar Foundation was such an important source of funding. Shea further explained that the conference will be held at the Bar annual meeting. The same people will not be invited, to keep mixing in new people.

Fox commented that the conference was in keeping with the kinds of events the APS sponsors, as it presented a solid member benefit. Shea moved for funding approval. Hall seconded. The motion carried. There was no opposition. Funding was so approved.

B. POSSIBLE LAPTOP/PALM PILOT PURCHASE FOR AUSTIN NEWBERRY, PROGRAM ADMINISTRATOR (D)

Chair Fox explained that the palm pilot is intended to keep Austin Newberry available even when Newberry is traveling and when there is an inquiry which can only be answered by Newberry. The palm pilot would help us manage our business more efficiently. Newberry explained that the Bar does not provide him with a laptop or cell phone right now. Newberry cannot, under Bar policy, provide us with his own cell phone. We can, however, request a cell

phone or blackberry and Newberry can make that available to us. Tom Warner agreed that Newberry should have a cell or laptop and moved for the approval of same. Hall seconded. Henry Gyden asked if we could split cost. Newberry stated that other section for which Newberry is a Bar Liason, the Business Law Section, might be willing to split that costs, 50:50.

Warner and Hall amended the motion to be that the chair negotiate with the Business Law Section to obtain a cell phone or palm pilot for Newberry. Gyden seconded. There was no opposition, and the motion carried.

Hall also revisited the issue of the rule to allow trial judges to fine attorneys, and explained that the proposal was withdrawn by the sponsors.

C. DISTRICT COURT OF APPEAL 50TH ANNIVERSARY CELEBRATIONS SPONSORSHIP

Chair Fox discussed the various District Court of Appeals that will be celebrating their 50th Anniversary and the importance of an APS presence at these events. Betsy Gallagher moved that the Section donate to each District Court of Appeal \$500 plus a gift. Shea seconded. Fox will appoint a subcommittee. Musto amended the motion to be a plaque/gift, plus a monetary contribution up to \$700. Shea seconded that motion.

Roberta Mandel suggested that it would be more appropriate for us to give a plaque, as there are firms already supporting this and some DCAs may not require any monetary support. Hall agreed; we should approach the committees and ask if we can help. Wendy Loquasto explained that the First DCA committee may have an interest in APS involvement.

All agreed to the motion that the APS award a plaque/gift, plus, if help is needed, a monetary contribution of up to \$700, with one opposition, and the motion carried.

VIII. COMMITTEE REPORTS

(Standing)

A. CONTINUING LEGAL EDUCATION – BETSY GALLAGHER

Betsy Gallagher thanked Austin Newberry and Matt Conigliaro for their contributions. Gallagher wants to make this a two-year position. Reporting on 2007 Seminars –

Advanced App Practice and Certification Review in February 2007 at Miami Lakes.

Bankruptcy Seminar in March 2007 in Tampa.

Preservation of Error Seminar in March 2007.

Criminal Appeals – sponsored by the Appellate Practice and Criminal Law Sections in April, 2007.

While we do not vote on pricing, for information purposes, the fee for the Telephone Appellate Seminar fees have been raised to \$25/hour effective June 2007 for APS members, \$35/hour for nonmembers and \$150 if a participant subscribes to all of the seminars.

There have been some discussions regarding a Family Law CLE course. At Siobhan Shea's suggestions, Rebecca Creed agreed to prepare the announcement of CLE events, and have those posted on the Section website and in the Record. CLE also decided to do a survey on CLE to adapt to the changing times. Fox recognized Gallagher for her excellent work.

B. PROGRAMS – CELENE HUMPHRIES

Jack Aiello reported for Celene Humphries, who could not attend the Section meeting, on the status of the Stetson Appellate Workshop. Since 1998, the workshop had been held at Stetson University, and was successful. Because of changes at Stetson and their concern over lack of profits, it was suggested the program be shortened. A committee was assembled and approached other law schools. The next Appellate Workshop will be in 2008, capped at 40 people and should be about 2-2.5 days. Celene Humphries is putting together a proposal and, working with faculty, a decision will be made regarding which law school will host the Appellate Workshop in 2008.

Siobhan Shea also reported for Celene Humphries that other programs are underway.

C. PUBLIC ADVOCACY/LEGISLATION – TOM WARNER

Tom Warner reported that the Committee met to discuss several issues, including four issues submitted to and approved by the Executive Council, which voted via email in favor of these issues. The excerpt from the email circulated to the Executive Council on January 10, 2007 on legislative positions is as follows:

"The positions, the Florida Bar's current legislative position and my brief summary as to the EC's past discussions are as follows:

1. support legislation consistent with the recommendations of the DCA Workload and Assessment Committee chaired by Judge Padovano and the recommendations of the Supreme Court in the Certification Opinion as to additional judges; i.e., support creation of one additional judicial position in 2nd and 4th DCAs, but oppose creation of new DCAs or changing of the boundaries of the current courts. (The Florida Bar currently has no stated position on this issue.) EC voted in August via email to support this position before the DCA Workload committee.

2. support pay raises for appellate judges and support personnel. (The Florida Bar's position supports "adequate funding");

3. support maintaining judicial independence (. . .The Florida Bar has no stated position on this);

4. oppose changes in Supreme Court rulemaking authority (The Florida Bar already has a legislative position in favor of this position).

2, 3 & 4 were discussed by the EC at the retreat as reasons for establishing the Public Advocacy and Legislation Committee

5. support the recommendations of the Trial Court Performance and Accountability Commission, particularly with regard to post-conviction and

appellate matters. (The Florida Bar has no stated position on this);

6. support resolution of funding ambiguities for court appointed counsel and records on appeal in publicly funded cases. (The Florida Bar has no stated position on this);

5 & 6 are positions the Committee is recommending but that have not been discussed at the EC level. These would be deferred to the Jan 18th meeting

Susan Fox"

As to positions 1-4, there were 21 affirmative votes in with the positions 1-4 approved by the Executive Council by more than the required 2/3 majority by January 11, 2007.

Warner added that, as to legislative position number 1, he is developing and circulating a proposed letter to advance that. As to the "judicial independence" issue, judicial impartiality is considered the better public rule, and Warner recommended the exec council consider recommend this issue to the Bar in those terms. Chair Fox recommended and all approved that change from judicial independence to "maintaining fair and impartial courts".

As to the judicial accountability issue, Judge Webster and Tom Warner chair that committee, the APS is invited to attend those presentations regarding the judicial performance evaluations.

Warner discussed additional issues. First, is the issue of getting circuits in state to adopt procedures for 3-judge panels from appeals from county courts. Some circuits are not doing that. Discussion regarding whether there should be 3-judge panels to hear appeals from county court. Appeals from county court may not be complex, but circuit judges also sit on zoning and other complex issues. So this merits consideration. The committee decided to study this and will collect information from the Florida Supreme Court.

Judge Webster discussed that the Florida Supreme Court asked the Rules of Judicial Administration to look at this several years ago, and they collected data from every circuit. Based on that, the Rules of Judicial Administration recommended that we not try to impose by court rule a uniform system because several circuits using one-judge appellate processes seemed to be doing it quite effectively and, as such, was a more effective use of judicial resources.

Tom Hall added that the general practice section used to look at this issue every year. Hall has a current list of what each is doing and will provide Warner with that information. Fox added that the APS has adopted the position that it promotes the use of 3-judge panels, and Betsy Gallagher agreed. Warner explained that his committee was not espousing a position for or against, but would be collecting information from the various courts and doing research to determine the current status of what counties are doing and why. Then the committee will have a telephonic meeting to discuss and make some recommendations, which may ultimately be the same as those of the Rules of Judicial Administration, but with the information we have today.

The second issue concerns advocating the appointment of more appellate attorneys to more JNCs. Part of that issue is the appointments themselves under our new Governor for the

appointment of more appellate attorneys to JNCs, and will send general letters to the Governor directly. He is a Governor who will listen to these recommendations and their respective counsel. The committee also discussed the need to identify appellate attorneys applying for JNC appointments to ensure they get the support. Fox added that if anyone identifies an appellate attorney who is applying for a JNC position, Fox will write letters of support. Loquasto added, and Hall agreed, that the Board of Governors will support that as well, and the key is to get applicants.

The second part of that issue is that there was a change by the past Governor to give the governor virtual control over who would be appointed. Warner suggested we explore.

Warner addressed an additional issue, which was the public funding of record transcripts in publicly funded appeals. There is no more money to pay for transcripts in publicly funded appeals. Warner's committee analyzed this issue and recommended the executive council make the recommendation and advocate the legislative position that the legislature provide a line item budget appropriation to cover funding of costs of transcripts on appeal in publicly funded appeals. Fox and Hall agreed. The Executive Committee unanimously approved. Fox recognized Warner for his excellent work.

D. PUBLICATIONS – CARYN BELLUS

Caryn Bellus stated that the publications committee is on track.

1. EDITOR'S REPORT FOR THE RECORD – JACK REITER

Jack Reiter summarized the publications in the Record, and that the next issue is also going to be timely published. Reiter invited more publications. Fox recognized Reiter for already producing 2 excellent issues.

2. THE GUIDE – VALERIA HENDRICKS

Caryn Bellus reported for Valeria Hendricks, who could not attend the meeting, that all was on track for the Guide. Membership updates were being disseminated, and articles on each court updated.

3. PRO SE HANDBOOK – DOROTHY EASLEY

The Handbook committee has continued to conference via emails and has completed final edits on 21 chapters and a hefty disclaimer. Siobhan Shea and I have extensively edited for clarity and uniformity among chapters. It has been a detailed, time consuming process. We are now at the glossary stage of defining legal terms for the reader, Robert Sturgess will resume this month. To expedite that process, Siobhan Shea and Caryn Bellus will be working with Robert Sturgess to complete the glossary in what we hope is one to two more months. While they are working on the glossary, Pury Santiago will begin translating chapters.

Easley further added that The Handbook is a work in progress; there are additional chapters that will need to be added over time. But this is a strong first-step that represents the culmination of efforts from many, many appellate lawyers across the state. Fox thanked Easley and all the committee members for their diligence in completing this very large project.

4. BAR JOURNAL – TRACY GUNN

Caryn Bellus reported for Tracy Gunn, who could not attend the meeting, that all was on track for the Bar Journal, with great articles in play, including the special appellate practice issue and column.

E. WEBSITE – HENRY GYDEN

Henry Gyden reported that the website committee had made numerous updates to the website in the last months. The primary feature, through the assistance of Celene Humphries, was the photos the APS collected. Gyden invited all APS members to submit photos.

Gyden also stated the committee was moving forward on website redesign, including a forum board and web address provided. Gyden noted that this may be a good venue for questions and answers, and invited APS members to test it out. Gyden hoped to complete the website redesign with forum board this year. Gyden invited comments and suggestions to improve the website. Gyden recognized Lucretia Pitts, Siobhan Shea and Celene Humphries for all their hard work. Fox thanked and recognized all that Henry Gyden and Lucretia Pitts did on the Section website.

F. GOVERNMENT LAWYER – MARIANNE TRUSSELL

Marianne Trussell reported that her committee has no members. She spoke of a Tallahassee luncheon, which was successful, and would like to do another one in Tallahassee. Trussell will look in the South Florida to explore interest there from government lawyers.

G. HOSPITALITY COMMITTEE – JOHN CRABTREE / BARBARA EAGAN

Barbara Eagan reported that she and John Crabtree will be conferencing telephonically to organize for the next meetings. Fox reported that already 10 new volunteers had come to the Section to volunteer as a result of the committee's work. Fox thanked Eagan and Crabtree for their excellent work.

H. LEADERSHIP COMMITTEE – ANGELA FLOWERS

Angela Flowers reported that the Board of Governors approved the amended by laws and that the committee is moving forward.

I. MENTOR COMMITTEE – JACK AIELLO

Jack Aiello reported that, when he took over this committee, the link on the website was broken and there was no indication that anyone was seeking mentors. The link was fixed. No one is seeking mentors. Aiello recommended we stop the mentor program temporarily and focus on the appellate forum on the website, to see how that develops. All agreed.

J. OUTREACH COMMITTEE – SHANNON CARLYLE

Henry Gyden reported for Shannon Carlyle, who could not attend the meeting, that the committee will produce brochures marketing appellate, 100 for \$25, and brochures for different areas. Gyden will work with Newberry to put a link on the website.

1. TALLAHASSEE LUNCHEON REPORT – WENDY LOQUASTO

Wendy Loquasto reported that the Tallahassee luncheon was a great success, with 5 Florida Supreme Court justices, 5 judges, a number of the APS leaders, and a total of roughly 50 people. Another is held in February or March of this year. Fox added that this is an initiative we want to continue to pursue.

K PRO BONO – TONY MUSTO

Tony Musto reported that all is in place and prepared to handle pro bono across the state.

L. FOUNDATION /FINANCIAL INDEPENDENCE – TONY MUSTO

Tony Musto expressed the importance of getting a foundation set up. Musto called for help from someone who can do this. Hall agreed. Kuehne suggested, since we are starting off small, we should utilize one of the community foundations, such as Dade Community Foundation, as it can become very expensive for us to do it ourselves and we may want the entire operation to be handled by one of these existing foundations. Musto asked, and Kuehne will send the names of those kinds of organizations.

M. BOARD OF GOVERNOR’S LIASON – BEN KUEHNE

Ben Kuehne restated his commitment to the APS and applauded the APS interest in being involved in more legislative matters. He spoke of the APS possibly being involved in looking at research and writing for position papers for upcoming legislation as part of the legislative activities. Kuehne offered to assist APS members at any time, to represent the interests of the Section.

IX. NEXT MEETING: JUNE 28, 2007, ORLANDO MARRIOTT WORLD CENTER

Chair Fox announced the next meeting will be held June 28, 2007 at the Orlando Marriott World Center. The meeting was adjourned.