Profile of Judge Vance Salter - the Newest Member of the Third District Court of Appeal

By James D. Rowlee

Florida Governor Charlie Crist appointed Vance E. Salter, a thirty-year Miami commercial litigation practitioner, to the Miami-based Third District Court of Appeal on June 22, 2007. Salter's appointment fills the judicial vacancy created by the retirement of Judge John G. Fletcher. Salter's tenure on the Third DCA officially began on August 1, 2007, and his investiture ceremony took place in October.

"I'm very honored," Salter said. "Becoming an appellate judge has been a dream of mine since I started practicing law in the 1970's."

Gerald Wald, a Miami attorney and Chair of the Third DCA Judicial Nominating Commission, interviewed Salter for the judicial position. "Vance is a superb lawyer and an even finer human being," Wald said. "Our community is blessed with an excellent addition to the appellate bench." Third DCA Judge, Richard J. Suarez, concurs in that assessment. "Vance is an excellent lawyer and all around great person," Judge Suarez said. "We are happy to have him as a new member of our team."

Salter is renowned in the Miami community for the extensive pro bono legal services he has provided to the poor and disadvantaged throughout his legal career. Governor Crist, in announcing Salter's Third DCA appointment, praised his "commitment to public service" and his "dedication to serving others."

Since 1988, Salter has served as an officer and Board member of Legal Services of Greater Miami, Inc. ("LSGMI"), the main provider of civil legal services to the less fortunate communities in Miami-Dade and Monroe Counties. Salter has devoted hundreds of hours of his time counseling that organization and representing its needy clients. In one of the cases he handled for LSGMI, Salter sued a slum landlord who evicted thirty-seven tenants from their Miami apartment complex in the wake of the housing shortage following Hurricane Andrew. The tenants lost their personal belongings in the course of the evictions, and Salter, in a complex legal battle, successfully obtained compensation from the landlord for the value of the tenants' lost belongings.

In 1995, Salter worked with LSGMI Executive Director Marcia Cypen to lead the "Campaign for Justice" program, raising enough money for LSGMI to purchase the building it was leasing. That purchase freed-up funds, allowing the agency to hire more attorneys to represent the disadvantaged. It also avoided the disruption of moves every few years as rent increased or landlords changed. In addition to his work with LSGMI, Salter has served on the Boards of the Catholic Charities Legal Services, an organization that provides free and discounted legal services to refugees and migrants, and Professor Salter, the Newest Member of the Third District Court of Appeal

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The Learning Experience, a school for children and young adults with developmental disabilities.

Salter's pro bono activities encompass a broad range of legal services for the poor. Much of his work has focused on helping individuals and families in distress, including assisting a quadriplegic Vietnam War combat veteran with mortgage, tax, and credit issues; persuading a woman's windstorm insurer to replace her hurricane-damaged roof; representing his law office's Haitian cleaning lady in deportation proceedings; helping a woman obtain the insurance benefits necessary to provide ongoing, in-home care for her permanently disabled husband; and successfully defending a paralegal charged with the unauthorized practice of law for serving as an advocate for parents and their special needs children in exceptional student education proceedings, a highly specialized area in which most parents are unable to afford the services of a private attorney. Many of Salter's clients have been women of modest means who received Salter's free assistance in getting divorces from derelict husbands, obtaining custody of their children, restructuring debt, and saving their homes from foreclosure.

One of Salter's more recent pro bono cases involved helping a daughter establish a guardianship over her mother, who became mentally incapacitated herself some years after her only son committed suicide. Although the mother owned her home free and clear, mistakenly signed papers to convey the home to an unscrupulous investor promising “to save her home from foreclosure.” After Salter stepped-in and challenged the conveyance, the “investor” backed away, preventing the loss of the home. In another recent high-profile pro bono case, Salter performed post-conviction work on behalf of an Alabama death-row inmate seeking to overturn his sentence in light of the United States Supreme Court's 2002 decision in Atkins v. Virginia, 536 U.S. 304 (2002), which prohibits the execution of mentally retarded defendants. That case is still pending before the Alabama Court of Criminal Appeals, and is now being handled by Salter's former law partner, Tom Cottingham. These cases are just a small sampling of the literally hundreds of matters Salter has handled on behalf of those without the means to afford a private attorney.

It is not only the countless hours Salter has devoted to helping the needy, it is his deep compassion for, and steadfast commitment to, his clients that has earned him the respect and admiration of his peers. For example, one of Salter's pro bono clients, a man with serious medical and cognitive disabilities for whom Salter serves as guardian, lived with the Salter family for ten weeks until he was able to get back on his feet. Salter obtained Medicare benefits for the man’s medical care and prescription medications, arranged for him to receive vocational training, and visits his apartment each Saturday morning to deliver his weekly food and expense allocation.

Salter credits his parents for instilling in him the importance of helping those in need. “They taught me it was simply the right thing to do,” Salter said. “Not only is it the right thing to do, all Florida attorneys have an obligation, based on the oath they took in becoming members of the Florida Bar, to provide pro bono legal services to the poor.” It is an oath Salter has honored throughout his entire legal career.

Salter has obtained state and national recognition for his significant pro bono contributions. In 1998, Salter received the American Bar Association's Pro Bono Publico Award in recognition for his “extraordinarily noteworthy contributions in extending legal services to the poor and disadvantaged.” That same year, Salter received the Florida Supreme Court's prestigious Tobias Simon Pro Bono Service Award, which honors attorneys who exemplify “the highest ideals of the profession in assuring the availability of legal services to the poor.” In 2000, Pope John Paul II made Salter a “Knight of St. Gregory” in recognition for his work on behalf of poor immigrants. When asked what a knighthood entails in today's modern world, Salter replied, “The battle now is for peace and justice, and the weapons are time, compassion, money, medicine, and advocacy.”

Salter is known as a quiet, unassuming man who leads by example and deflects attention away from himself. “Vance is one of the most humble and self-effacing people I know,” said Rosemary Barkett, a federal appellate judge who sits on the United States Court of Appeals for the Eleventh Circuit. “He does not seek self-promotion or recognition and his humility is a wonderful example of goodness for
My first message as Chair of the Appellate Practice Section is simple: Get involved in the section. Presumably you are already a receptive audience. You’re reading my column, so chances are you are either browsing the appellate section website (www.flabarappellate.org) or eyeing the latest issue of The Record, the section’s publication. That’s a good start, but you’re missing most of the benefits of the section if all you do is browse the website occasionally, read our publications, or attend our seminars. The greatest benefit of being a member of the section is getting to know your fellow members from around the state.

It’s easy. In the Fall 2006 issue of The Record (available on the appellate section website), immediate past Chair Susan Fox dispelled the common myths about section participation. As she proved, there is nothing to it. Show up at one of our meetings and you will be welcomed instantly into a fraternity of fellow professionals who can help your practice every day. Raise your hand and you’ll be called upon for any number of interesting projects that will raise your profile and make you a better appellate lawyer. Show up and raise your hand consistently and before you know it, you’ll be in the leadership of the section. It’s that simple.

But why do it? Why get involved? First and foremost, it’s the people you will meet and the networking opportunities that you will create. Around ten years ago, I showed up at my first appellate section committee meeting in Miami knowing almost no one except the lawyers I happened to meet as part of my practice. Now I count among my friends, a large group of fellow professionals from every corner of the state. Do I need to know about a particular trial or appellate judge? No problem, I know just whom in the section to call. Do I have a strange procedural question about administrative appeals? Once again, the answer is likely just a phone call or email away. Where is the best place to stay for oral argument, the best restaurant in town, or where to park? An expert is always available to steer me in the right direction.

Even though I come from a big firm practice and already have the luxury of colleagues from around the state, I still find myself utilizing nearly every week the appellate network of friends I have developed over the years. Just think how valuable this network could be for a solo practitioner or a lawyer from a small firm. Take advantage!

And it is not just other appellate lawyers you will be meeting. Many appellate judges around the state are active in the section. Come to our meetings and you will be serving with these judges on committees. With that service comes the opportunity to get to know these judges on a far more personal level. Think how much easier your first argument in a particular appellate court might be if you already know and feel comfortable around the judges of that court.

There are other selfish reasons. All of us are constantly involved in practice development, whether it be inside our own firms or in the marketplace. Participating in the section is an important way to raise your profile, build your resume, and to enhance your credibility as you sell yourself as an appellate practitioner. With increased activity in the section comes opportunities and responsibilities which will help demonstrate your commitment to the appellate practice. Perhaps you’ll have the opportunity to publish an article or to speak at a statewide seminar. Perhaps you’ll chair an important committee. All of these activities enhance your reputation, and there is no easier way to get these opportunities than to join the section.

Once you become involved, there is plenty to do. Join the publications subcommittee and soon you’ll be writing an article for The Record or for the Florida Bar Journal. Perhaps you will get the chance to edit the work of other appellate lawyers. Join the CLE Committee and soon you will be helping to organize an appellate seminar. Perhaps you will even get the opportunity to speak at one of our seminars. Join the Programs Committee and you can help stage one of our signature events such as our Dessert Reception at the June Annual Meeting and then disco or salsa the night away.

There are lots of exciting new opportunities on the horizon. Think about the web. The section is going to focus hard on developing the section’s website into a powerful tool for our members. We are initiating discussion groups and establishing mentoring opportunities on the web. We may be taking the “Bible” of most appellate practitioners, the Guide, and moving it on the web. We need lots of volunteers to assist, particularly you younger and more tech-savvy members.

You can organize pro bono work.

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section is working to strengthen its commitment to pro bono service. We have many section members who are interested in pro bono appellate service and numerous potential pro bono clients who need our services. We need volunteers to help us make the connection between our lawyers and potential clients.

You can be a mentor or mentee. We are working to make it easier for new lawyers to find senior lawyers to talk about appellate practice. We also will be participating in a statewide appellate moot court contest for high school students. Perhaps you could grade briefs or coach an oral argument or serve as a judge in a local competition or a practice round.

You can write or edit a chapter in an important treatise. For example, we need volunteers to become involved as an author or editor of the section’s Pro Se Appellate Handbook, a major treatise just published by the section. The Handbook is drafted to guide pro se litigants through the maze of appellate practice and procedure. The brainchild of past chair Tom Hall, the Handbook was a massive undertaking, coordinated by Vice Chair Dorothy Easley, but completed with the participation of many members of the section. But the work is just beginning. Now that the manual has been published, it will constantly be in need of updating and improvement and we will need your help. There is no better way to learn the ins and outs of appellate practice and procedure than to teach them to someone else.

You can help determine the future of the Appellate Justice Conference. This conference, which the Appellate Section has sponsored since its inception two years ago, is a meeting of appellate judges and practitioners to discuss issues relevant to the appellate process. The conference has been a big hit, but we need help in figuring out how to fund it and how to staff it with volunteers to keep it alive and well.

In short, there is no shortage of interesting and rewarding projects.

To get involved, just email me at steve.brannock@hklaw.com and I will set you up right away. Alternatively, show up at one of our upcoming meetings. Our next meeting is on June 19, 2008 at the annual meeting in Boca Raton. On September 11, 2008 we meet in Tampa at the Tampa Airport Marriott. Attend either of these gatherings of the Bar, wander into the Section meeting room, join a table, raise your hand, and you’re in. We look forward to seeing you there!

JUDGE SALTER
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its own sake.” Don Horn, a Miami attorney who served as an LSGMI Board member with Salter, echoed Judge Barkett’s observation. “After doing all of these wonderful things, he shies away from any effort to place him in the spotlight to thank him for his unselfish contributions,” Horn said.

The significant amount of time Salter has dedicated to representing the poor is particularly noteworthy given that Salter has had to balance his pro bono activities with the heavy responsibilities of running a 30-year successful corporate litigation practice. “The enormous amount of pro bono work Vance has performed, while simultaneously representing and meeting the demands of large corporate clients, is simply extraordinary,” Wald said. “We all try to do pro bono work, but Vance has really made it an integral part of his professional life.” Salter attributes his efficient time management skills to cutting television out of his life. “I haven’t seen one episode of The Sopranos,” he said.

Prior to his judicial appointment, Salter worked as a partner at three different downtown Miami law firms. Salter first practiced with Steel Hector & Davis, before moving to Collins Davidson Carter Smith Salter & Barkett, and then to Hunton & Williams, where he was a commercial litigator, specializing in complex real estate disputes and construction claims. He has represented large national and international financial institutions, insurance companies and Fortune 500 companies in complex legal matters, and he handled the Miami Center office building and hotel bankruptcy litigation which made its way to the United States Supreme Court in 1992. He is named in the 2007 edition of the “Best Lawyers in America,” and has been listed among the Florida lawyers “held in the highest regard” in the Florida Trend and Florida Super Lawyers magazines.

Salter is as a consummate professional, treating his clients and adversaries with the utmost dignity and respect. “I have known Vance in a number of different capacities over the years—as his opposing counsel, as an arbitrator before whom he appeared, and as a fellow parent whose children attended the same high school,” Wald said. “In each and every one of those capacities, Vance consistently demonstrated civility of the highest order. He is one of the most decent and humble people I have had the pleasure of knowing.”

Salter, 59, is the son of career military parents, from whom he inherited his strong work ethic. He was born in Pasadena, California, but his parents’ military career forced the family to frequently move throughout the country. In the late 1950’s, the family was relocated to a military base in Northern Alabama, where Salter was exposed to two very different worlds: the racially integrated environment of life on the military base and the system of racial segregation that existed outside the base. Salter’s exposure to the South’s deep racial divisions planted the seeds of his lifetime commitment to racial and social justice.

Following high school, Salter attended Brown University, where he obtained his Bachelor of Arts degree in History in 1969, the same year he enlisted in the U.S. Army and married his high school sweetheart and wife of 37 years, Mary. He was stationed in Germany during the Vietnam War and, when his active service duty ended in 1973, he attended the University of Virginia School of Law in Charlottesville. His favorite subjects in law school were Property and Real Estate.

Before obtaining his law degree in

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1976, Salter and his wife took a vacation to visit Salter’s parents who were on military assignment in Miami-Dade. After spending an enjoyable week in South Florida, during which they visited the Everglades and John Pennekamp Park in the Keys, the Salters relocated to Miami-Dade in 1977, where they raised their four children. Three of their children -- Robert (36), Amanda (34) and Nicholas (28) -- are attorneys in the Denver and Atlanta areas. Their youngest child, James (17), who has Down Syndrome, is a student at the Learning Experience School in Miami. “From him we have of course learned incredible lessons ourselves about disabilities and the varieties of human experience,” Salter said.

After assisting three children with college and law school tuitions, doing the financial planning for the fourth child’s special needs, and helping with cars, weddings, and downpayments on homes, Salter and his wife Mary are now able to make the financial sacrifice involved with leaving a very successful commercial litigation practice to take a seat on the state appellate bench. Appellate attorneys be prepared: Salter expects a high degree of professionalism from those appearing before the Court. Emotionally charged rhetoric, strident advocacy, and ad hominem attacks directed at opposing counsel will be frowned upon.

As an appellate judge, Salter intends to carry on his mission of ensuring equal access to justice for both rich and poor alike. “I think it is especially important to have practiced in both worlds-- on behalf of the public company and the wealthy, but also for the marginalized-- and I would devote the balance of my career to being sure that both worlds get the same justice and the same open door to the courthouse,” Salter said in his application for the appointment.

(Endnotes)
1 James ("Jim") Rowlee is a Board Certified Appellate Attorney and member of the Florida Bar Appellate Practice Section. He is an Assistant County Attorney with the Broward County Attorney’s Office, focusing on appellate, employment, constitutional and election law.

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– Florida Bar President Francisco R. Angones

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Annual Appellate Practice Section Dinner at Chair Steve Brannock’s house

(L to R) Natalie J. Carlos, Jack Aiello, Stephanie Kolman, Florida Supreme Court Justice Raoul G. Cantero, Jack R. Reiter, Celene Humphries, and Pamela Jo Hatley

Caliannne Lantz and Ceci Berman
Gwendolyn Braswell and Susan Fox

Fifth District Court of Appeal Judge Alan Lawson and Second District Court of Appeal Judge Charles T. Canady
Appellate Court Rules Committee Update
By Dorothy F. Easley

Your Appellate Court Rules Committee (“ACRC”) strives to remain responsive to your concerns, from appellate judges and practitioners alike, and to address matters of importance to all affected by the appellate process. Making the appellate rules better, more comprehensive and fairer for everyone is a continuing work in progress. To that end, anyone seeing a troublesome interpretation in an appellate rule or seeing an area that the appellate rules do not adequately address is encouraged to come forward with his/her concern. This may be done merely by writing a letter to the ACRC chair, which is currently Steven Brannock of Tampa. That proposal will, thereafter, be routed to the appropriate subcommittee.

To aid appellate practitioners, I offer this brief update from your Appellate Court Rules Committee, which previews significant rule changes, many initiated by these kinds of letters, that may be coming our way in the near future.

The ACRC’s reporting period was moved from 2006 to 2008. However, in terms of new projects, the Supreme Court requested that the ACRC study and address several issues. The ACRC has also addressed a number of issues from referrals to the Committee.

Rule 9.050 -- Maintaining Privacy of Personal Data.

The ACRC worked on implementing the recommendations of the Supreme Court Special Commission on Privacy and Court Records. The ACRC proposed a new rule, Rule 9.050, entitled Maintaining Privacy of Personal Data. The proposed rule provides that documents that are within the appellate practitioner’s control, such as briefs, responses, and attachments must exclude all unnecessary personal and financial data. The need for Rule 9.050 is driven by privacy concerns prompted by the advent of electronic filing in the appellate courts on a wide scale and specific concerns over identity theft. The Rule does not apply to appellate records or appendices. The Rule passed nearly unanimously and the committee submitted its report to the court in April 2007, after it was approved unanimously by The Florida Bar Board of Governors.

**Rule 9.130 – Amending to specify that forum non conveniens orders are immediately appealable.**

The issue of amending Rule 9.130 is a continuation of an issue the ACRC had last year, in light of Weg Industrias, S.A. v. Compania de Seguros, 937 So. 2d 248 (Fla. 3d DCA 2006), wherein the Third District Court of Appeal suggested “that Florida Rule of Appellate Procedure 9.130 be clarified to reflect the reality that orders granting or denying motions to dismiss complaints on grounds of forum non conveniens have been sub silentio reviewed as non-final orders for more than a few legal generations.” The ACRC passed an amendment to Rule 9.130(a)(3)(C) that proposes to specify that forum non conveniens orders are immediately appealable.

As for further amendments to Rule 9.130(a), the amendments to that Rule were previously published in the ACRC 2006 regular cycle report and the Florida Supreme Court deferred any decision on that Rule pending a study report. The study has now been completed, the report submitted and this Rule is now joining the Cycle Reports, to be filed with the three-year cycle proposals on February 1, 2008.

**Rule 9.130(a)(3)(C)(iii) -- interlocutory appeals in dependency and TPR proceedings**

Rule 9.130(a)(3)(C)(iii), concerning interlocutory appeals in dependency and TPR proceedings, was in the comment process. That Rule is going to the Florida Supreme Court after all comments were received.

**Rule 9.142(c) -- amendment to address the recently amended Fla. R. Crim. P. 3.851 appeals in capital cases.**

The ACRC voted unanimously in favor of an amendment to Rule 9.142(c) to address appeals in capital cases where the defendant has been convicted and sentenced to death and waives all post-conviction proceedings and has counsel discharged. The proposed amendment to 9.142(c) would apply when the circuit court enters an order dismissing post-conviction proceedings and discharging counsel pursuant to Florida Rule of Criminal Procedure 3.851(i), and sets forth a procedure following the rendition of the order of dismissal and discharge.

**Rule 9.141(e)(4)(B) -- amending to more clearly set forth time limits on petitions to appellate courts in non-capital cases alleging ineffective assistance of counsel on appeal.**

The ACRC voted in favor of amending Rule 9.141(c)(4)(B) to address the concern regarding the situation of affirmation of the sentence and conviction, when the time begins to run for alleging ineffective assistance of counsel on appeal. The proposed amendment strives to clarify that a petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence becomes final on direct review, unless there is a specific allegation under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

**Rule 9.310 -- whether amendment is needed in light of the recently passed statute, Section 45.045, Florida Statute (2006).**

The first issue the ACRC addressed was whether an amendment to Rule 9.310 was needed in light of the recently passed statute, section 45.045, which, except for class actions, sets a limit on supersedeas bonds of $50 million and allows the trial court discretion to lower the amount of a supersedeas bond under certain circumstances. Ultimately, after much hard work and debate, the full ACRC voted on whether the Rule 9.310 needed to be amended. The majority voted that it did not, given that the committee twice previously had rejected similar amendments and because
there was a question as to whether section 45.045 was constitutional. As was discussed in advance, the ACRC Chair provided all the ACRC's work product to the supreme court. The Supreme Court, thereafter, issued a notice stating that it is considering adopting an amended Rule 9.310. The supreme court invited the ACRC to argue both its minority and majority positions. Numerous comments were submitted, the ACRC briefed its minority and majority positions, and the supreme court heard oral argument on the issue in September 2007. On October 19, 2007, the supreme court issued its order after "[h]aving considered the proposed amendments to Rule of Appellate Procedure 9.310, . . .[and] determine[d] that no revision [would] be made at this time."

Rule 9.310(b)(2)—eliminating the automatic stay pending review when the state files a notice of appeal.

As to administrative law practice, the ACRC unanimously passed an amendment to Rule 9.310(b)(2) that would eliminate the automatic stay pending review when a notice is filed by the state that pertains to an administrative action. The proposed amended rule is in conformity with the Administrative Procedure Act.

Rule 9.330—to prohibit the filing of a motion for rehearing or clarification in the supreme court that attempts to invoke the Court's mandatory jurisdiction.

The ACRC also passed unanimously a proposed amendment to Rule 9.330 that would prohibit the filing of a motion for rehearing or clarification in the supreme court that attempts to invoke the court's mandatory jurisdiction for the dismissal of an appeal when it seeks review of a district court decision without opinion. This amendment was based on a request from the court to implement Jackson v. State, 926 So. 2d 1262 (Fla. 2006).

Rule 9.370—proposed amendment to the amicus curiae rule to allow potential amici to file a notice of their intent to file an amicus brief on the merits.

The Florida Supreme Court asked the ACRC to propose an amendment to the appellate rules to allow potential amici to file a notice of their intent to file an amicus brief on the merits in a case in which a district court has certified one or more questions of great public importance. The ACRC passed a proposed amendment to Rule 9.370 to address the court's request. If the Florida Supreme Court takes jurisdiction, amici can still seek permission to submit an amicus brief.

Rules 9.410, 9.300 and 9.400—recommended amendments to these Rules to permit parties to move for attorneys' fees mandated by Section 57.105, Florida Statutes after the deadline imposed by Rule 9.400.

The ACRC passed an amendment to Rule 9.410(b) that seeks to make it consistent with section 57.105, Florida Statute, and sets forth a procedure for sanctions motions under section 57.105. The ACRC also passed a proposed amendment to 9.400(b) to permit parties to move for attorneys' fees mandated by Section 57.105, after the deadline imposed by Rule 9.400. The proposed Rule 9.400(b) will provide that, with the exception of motions filed pursuant to Rule 9.410(b), a motion for attorneys' fees may be served not later than the time for service of the reply brief and shall state the grounds on which recovery is sought. The ACRC has passed a proposed amendment to Rule 9.300 that will provide that, with the exception of motions filed pursuant to Rule 9.410(b), a party may serve 1 response to a motion within 10 days of service of the motion. The ACRC passed these amendments to the appellate rules to address the conflict between the requirements for serving a Rule 57.105 motion, the time requirements of Rule 9.400, and the deadline for responding to a motion imposed by Rule 9.300.

This year, the ACRC also appointed liaison to work with the Probate Rules and the Rules of Judicial Administration committees on a proposed appellate rule codifying when an order is final for appeal and a proposed appellate rule governing requests to seal appellate court records. The Joint Subcommittee of the Rules of Judicial Administration Committee and the Appellate Court Rules Committee considered the need for rules governing requests to seal appellate court records, and proposed an amendment to the Rule of Judicial Administration 2.420(d), that would treat records of a lower tribunal made confidential by that tribunal as confidential during any review proceedings. The proposed amendment further provided that, where an order making court records confidential remains in effect as of the time of an appeal, the clerk's index must include a statement that an order making court records confidential has been entered in the matter and must identify such order by date or docket number. On June 28, 2007, the Rules of Judicial Administration unanimously approved the joint subcommittee's proposed recommendations.

Above are some of the amendments that you may see in the very near future. As these proposed amendments make clear, the appellate rules are not fixed and not immune from scrutiny or criticism, irrespective of potential controversy. The ACRC remains committed to improving the appellate process through improvements in the appellate rules. Appellate practitioners are encouraged, therefore, to apply for appointment to this important committee and to submit any issues they deem important to continuing to improve the appellate process for all. Meanwhile, we will watch and pay close attention to what develops from this latest group of proposed amendments submitted to the Florida Supreme Court.

(Endnotes)

1 Dorothy F. Easley is President of Easley Appellate Practice, P.L.L.C., Miami, a statewide appellate firm advancing federal and state appeals. She is the Secretary 2007-08 of the Appellate Court Rules Committee, board certified in Appellate Practice by The Florida Bar, A.V.-rated by Martindale-Hubbell, listed as a Top Appellate Lawyer since 2005-06 South Florida Legal Guide, listed as a Florida Super Lawyer since 2005-06, published on numerous appellate issues, frequently lectured at the University of Miami School of Law on appellate advocacy and is an adjunct professor at the School of Law for 2007-08. Ms. Easley is Vice Chair of the Appellate Practice Section of the Florida Bar 2007-08, Chair of the Self-Represented Appellate Practice Section Service Awards. She practices in Florida's District Courts of Appeal, as well as the Supreme Court of Florida, the U.S. Court of Appeals for the Eleventh Circuit, the U.S. Supreme Court and the U.S. District Courts for the Middle and Southern Districts of Florida. She earned her J.D. cum laude from the State University of New York/CESF at Syracuse and her M.S. cum laude from the University of Miami.

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THE SECOND DISTRICT COURT OF APPEAL CELEBRATES ITS GOLDEN ANNIVERSARY

By Richard Swank

On the clear hot day of July 1, 1957, a new era dawned for the Florida judiciary. On that date, in the basement of a county building formerly utilized by the Florida Citrus Commission, at the corner of Massachusetts Avenue and Main Street in Lakeland, Florida, the Second District Court of Appeal first became operational. The Second District’s three judge appellate panel at that time consisted of judges appointed by then-Governor LeRoy Collins in June 1957. These were Circuit Judge Abram Otto Kanner of Stuart, Circuit Judge William P. Allen of Bartow, and former President of the Florida State Bar Association, Robert J. Pleus of Orlando. Judge Kanner was chosen to act as the first chief judge. The original three judges were sworn in by Justice E. Harris Drew at Lakeland’s new civic center. Judge Pleus died unexpectedly during the Thanksgiving break in 1957 and was replaced by leading Tampa trial attorney George T. Shannon. In the past 50 years, the Second District has had a total of forty-six judges.

The Second District Court of Appeal’s jurisdiction initially consisted of twenty-eight counties ranging from Lake County in the north to Collier and Broward County in the south. In 1965, the Fourth District Court of Appeal was established, reducing the Second District’s jurisdiction by ten counties. Establishment of the Fifth District in 1979 reduced this number by an additional four counties. The Second District currently has jurisdiction over fourteen counties with a population of over five million people. The court’s first published opinion was Andrews v. Cardosa, 97 So. 2d 43 (Fla. 2d DCA 1957). In 1958, the court’s first full year of operation, 210 cases were filed. Currently, there are fourteen judges on the court carrying a caseload of 6,000 filings per year. This is one of the largest caseloads carried by a state appellate court in the country.

In 1961, the court moved into its current Lakeland headquarters at the corner of Memorial Boulevard and Ingraham Avenue. The Lakeland headquarters has seen numerous renovations and expansions and was dedicated as the Lawton M. Chiles, Jr. Courthouse in June 2001. As the court’s caseload grew, it also established a branch headquarters in Tampa. Since 2004, the Tampa branch has been located at the new Stetson University Law School Building, which serves as the chambers for eight judges.

On October 25, 2007, at the Hyatt Regency in downtown Tampa, the Second District Court of Appeal officially celebrated its golden anniversary. The Second District Court of Appeal Historical Society presented the gala event, which Treasurer Celene Humphries explained was just the first step in recognizing the court’s history.

After opening remarks by Historical Society Secretary Katherine Earle Yanes, Society President Henry G. Gyden presented the court with two paintings done by attorney Brandon Vesely, a former Second District Clerk who worked for Judge Parker. The paintings portrayed the Second District’s current courthouse in Lakeland, as well as Tampa’s Stetson University Law School Building. Stephen Brandon of the Appellate Practice Section followed this with a presentation to Second District Chief Judge Stevan T. Northcutt of a plaque commemorating the court’s golden anniversary.

After receiving the commemorative plaque, Judge Northcutt made brief remarks to note the occasion. He recalled how his very first oral arguments as a young attorney had been conducted before the evening’s keynote speaker, the Honorable Stephen H. Grimes. He described the people he works with at the Second District Court of Appeal, staff and judges alike, as a lucky “accident of history” and expressed his admiration for their efforts and abilities. He compared the court to a family and noted many of the personal interests that make working for the court as its Chief Judge such a pleasure for him.

Current Second District Judge Chris W. Altenbernd then introduced Justice Grimes, whom he acknowledged was the oldest surviving member of the Second District judiciary. Judge Altenbernd commented on the manner in which the District Courts of Appeal had relieved part of the burden of the Florida Supreme Court’s extensive caseload, without lessening the Florida judiciary’s authority. Judge Altenbernd noted that Justice Grimes had had no small role in this, as he had acted as a Second District Judge during very turbulent times for Florida’s judiciary. Judge Altenbernd also noted that Justice Grimes had acted not only as the Florida Supreme Court’s Chief Justice, but also the Chief Judge of the Second District.

During his keynote speech, Justice Grimes traced the history of Florida’s judiciary and the District Courts of Appeal, beginning with Florida’s rapid growth after World War II. He detailed the Second District’s growth and subsequent division into the Fourth and Fifth Districts.

Finally, Justice Grimes noted how, immediately after the District Courts’ implementation, many enterprising attorneys sought to get a second bite at the apple through further appeal to the Florida Supreme Court. However, further precedent had confirmed that, with a few limited jurisdictional exceptions, the District Courts of Appeal are intended to be Florida’s courts of last resort. Justice Grimes recalled that when he had been appointed to Florida’s Supreme Court, he had accepted with mixed emotions because he recognized that the Courts of Appeal are where most of the “action” takes place.

The Second District gala presented a wonderful celebration honoring the Court’s fiftieth anniversary and its dedicated Judges.

(Endnotes)
1 Richard Swank is an associate with the firm of Litchford & Christopher in Orlando. Richard clerked for two years at Florida’s First District Court of Appeal for the Honorable Robert T. Benton II. Richard currently practices commercial litigation with a focus on state and federal appellate practice.
2 The Old Farmer’s Almanac.
3 For all historical information, the author is indebted to the Honorable Emiliano Jose (E.J.) Salcines, the Honorable Stephen H. Grimes and the Second District Court of Appeal Historical Society.
Judge Chris Altenbernd introduces Justice Stephen Grimes

Treasurer Celene H. Humphries describes the role of the Second District Court of Appeal Historical Society

Appellate Section Chair Steven L. Brannock presents commemorative plaque to Chief Judge Stevan Northcutt

President Henry Gyden presents paintings to Chief Judge Stevan Northcutt

Justice Stephen Grimes presents commemorative plaque to Chief Judge Stevan Northcutt

Justice Stephen Grimes

Treasurer Celene H. Humphries describes the role of the Second District Court of Appeal Historical Society
A Primer on the Effect of Post-Trial Motions For Attorneys’ Fees, Pre-Judgment Interest, and Costs in Federal Court on Previously-Issued Money Judgments

By Paul A. Avron

This article presents a short primer on the effect, if any, of post-judgment motions for attorneys’ fees, pre-judgment interest, and costs on the finality of previously-issued money judgments. With one limited exception, post-judgment motions for attorneys’ fees do not affect the finality of a previously-issued money judgment. In other words, such a motion does not constitute a Rule 59(e) tolling motion. A post-judgment motion for pre-judgment interest is considered a Rule 59(e) tolling motion, while a post-judgment motion for costs is not. Fortunately for the practitioner, there is substantial guidance on these issues.

A. Attorneys’ Fees

In Budinich v. Becton Dickinson & Co., the Supreme Court held that the imposition and amount of attorneys’ fees are always collateral to the merits of an action. Explaining that a “bright-line rule” would serve litigants and courts best, the Budinich Court held that for purposes of appeal pursuant to 28 U.S.C. § 1291, a decision by a district court on the merits was a final decision “whether or not there remains for adjudication a request for attorneys’ fees attributable to the case.”

The underlying reason why requests for post-judgment attorneys’ fees do not deprive a prior judgment of finality is because such requests are “not part of the merits of the action to which the fees pertain.”

The Court premised its holding on its prior decision in White v. New Hampshire Dept. of Employment Security, in which it concluded that a request for attorneys’ fees made pursuant to 42 U.S.C. § 1988 was not a Rule 59(e) motion for reconsideration. The Court explained that a post-judgment motion for attorneys’ fees would not be considered a motion for reconsideration since such a motion does not involve “reconsideration of matters properly encompassed in a decision on the merits.” “[A] request for attorney’s fees...raises legal issues collateral to the main cause of action, issues to which Rule 59(e) was never meant to apply.” The Court quoted from a pre-split Fifth Circuit case as follows: “[A] motion for attorney’s fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e).”

Notwithstanding the rule enunciated by the Supreme Court that attorneys’ fees are always collateral to the merits of an action, several lower courts have concluded otherwise where attorneys’ fees are deemed to be inseparable from the merits. See, e.g., Carolina Power & Light Co. v. Dynegy Marketing & Trade, 415 F.3d 354, 360-62 (4th Cir. 2005) (holding that if a “stand alone” claim for attorneys’ fees that could be brought as an independent claim remains unresolved, a district court’s decision is not final for purposes of appeal); Lampkin v. Int’l Union, United Auto Workers, 154 F.3d 1136, 1140 (10th Cir. 1998) (noting that the rule enunciated in Budinich “is not universally applicable,” and holding that on the facts before it, the award of attorneys’ fees constituted an award of compensatory damages that only “incidentally” happened to be measured by the attorneys’ fees incurred by the plaintiff); Holmes v. J. Ray McDermott & Co., 682 F.2d 1143, 1146 (5th Cir. 1982) (“When...attorney’s fees are an integral part of the merits of the case and the scope of relief, they cannot be characterized as costs or as collateral and their determination is a part of any final, appealable judgment.”).

B. Pre-judgment Interest

In Osterneck v. Ernst & Whinney, the Supreme Court distinguished post-judgment motions for pre-judgment interest from post-judgment motions for attorneys’ fees, holding that the former did, in fact, constitute a Rule 59(e) motion for reconsideration because “prejudgment interest traditionally has been considered part of the compensation for plaintiff.” The Osterneck Court explained that because the determination as to whether to award pre-judgment interest can require an examination of matters like the availability of alternative investments and a plaintiff’s delay in bringing suit, this determination is not “wholly collateral to the judgment in the main cause of action.”

In 1993, Fed. R. App. P. 4(a)(4) was amended to include a motion for attorneys’ fees among those that will toll the time for filing a notice of appeal if the district court extends that deadline pursuant to Rule 58. Thus, notwithstanding the rule of law enunciated by prior Supreme Court precedent, a post-judgment motion for attorneys’ fees would toll the time to file a notice of appeal like a Rule 59(e) motion if the district court extends the time to file same pursuant to Rule 58.

Specifically, Rule 58(c)(1) provides, in relevant part, that entry of a money judgment may not be delayed, nor the time to file a notice of appeal extended, in order to tax costs or award attorneys’ fees, except as provided by Rule 58(c)(2). Rule 58(c)(2), in turn, provides...
vides the limited circumstance where a post-judgment motion for attorneys’ fees can extend the time for filing a notice of appeal.16

C. Costs

Post-judgment motions seeking costs do not affect the finality of a previously-issued money judgment. In Buchanan v. Stanships, Inc.,17 the Supreme Court recalled its holding in White, supra, and concluded that the post-judgment motion to tax costs at issue sought what “was due because of the judgment.”18 The Court explained that an assessment of costs sought pursuant to Rule 54(d) does not “involves reconsideration of any aspect of the decision on the merits.”19 In further support of its conclusion that a post-judgment motion for costs did not constitute a Rule 59(e) tolling motion, the Court cited FCC v. League of Women Voters, 468 U.S. 364, 373-74 n.10 (1984) and Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 172 (1974), both of which deemed motions to tax costs “collateral” to the judgment on the merits.

In Moody National Bank, supra, the Fifth Circuit found significant the omission of any reference to a motion to tax costs in Rule 58(c)(2), which, as discussed above, provides the basis upon which a post-judgment motion for attorneys’ fees might be deemed a Rule 59(e) tolling motion. There is other recent case law holding that post-judgment motions to tax costs do not constitute Rule 59(e) tolling motions.20

D. Conclusion

While the general rule is that post-judgment motions for attorneys’ fees are always collateral to the merits and, therefore, not considered Rule 59(e) tolling motions, if the attorneys’ fees are inseparable from the merits then the previously-issued judgment will not be considered final for purposes of appeal. A post-judgment motion for pre-judgment interest, unlike a post-judgment motion to tax costs, is deemed a Rule 59(e) tolling motion. Litigants faced with these issues should start their analysis, and possibly end it, with the above-discussed Supreme Court case law.

(Endnotes)

1 Mr. Avron is an attorney with the law firm of Berger Singerman, P.A. and a resident of the firm’s Boca Raton office. Mr. Avron’s primary practice areas are corporate reorganization and appellate litigation.
3 Id. at 202-03.
4 Id. at 200.
6 Id. at 451 (citing Browder v. Director, Illinois Dept. of Corrections, 434 U.S. 257 (1978)).
7 Id. (footnote omitted).
8 Id. (quoting Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980)).
11 489. U.S. at 176.
12 Crowe v. Bolduc, 365 F.3d 86, 92-93 (1st Cir. 2004).  
14 See Id.
15 Fed. R. Civ. P. 58(c)(1); Moody Nat’l Bank, 383 F.3d at 252.
18 Id. (italics in original).
19 Id.

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Review Of Florida’s Third District Court of Appeal Balancing Justice 50 Years 1957-2007
By Roberta G. Mandel

Florida’s Third District Court of Appeal celebrated its 50th Anniversary on July 1, 2007. The Third District Court of Appeal 50th Anniversary Committee, a distinguished legal panel headed by co-chairs Kathleen O’Connor and Edward G. Guedes, worked for more than two years assembling a historical collection of materials about the Court that will be preserved for future generations. The Committee’s hard work culminated in a celebratory gala banquet attended by more than 800 persons at The Parrot Jungle.

The Anniversary Committee also produced a museum quality book entitled “Florida’s Third District Court of Appeal Balancing Justice 50 Years 1957-2007.” The 185-page book provides an in-depth look at the Court from inception through 2007. The book is carefully documented and illustrated. It includes more than 150 photographs and provides a comprehensive portrait of the Court’s unique contribution to Florida’s democratic process. The Committee also produced a 40-minute DVD documentary that chronicles the history of the Court as it parallels the history of South Florida. The DVD includes commentary by many of the judges who have served on the Third District.

“Florida’s Third District Court of Appeal Balancing Justice 50 Years 1957-2007” details the creation and evolution of Florida’s appellate court system, focusing on the Third District Court of Appeal. Historians and lawyers trace the origins of the Third District and recall its landmark decisions. Narratives from both former and current judges offer an insider’s view of the Court, sharing their memories and insights.

For five decades, in a community sometimes rocked by scandal, the Third District Court of Appeal has maintained a stellar reputation, serving as a beacon of integrity. “We who have the honor to be part of the district court of appeal—whether as judges, law clerks or staff—strive to achieve the high standards of excellence that the founders of the system had in mind,” writes Gerald B. Cope, Jr., former Chief Judge of the Third District Court of Appeal, 2005-2007. “This book stands as a fitting tribute to those whose foresight and initiative fifty years ago led to the creation of a new public institution in Florida.”

Chapter Four of the book is entitled “Remembrance and Reflection: The Honorable Alan R. Schwartz Looks Back.” Written by Kathleen M. O’Connor, it provides an insightful look at the Third District’s longest-serving Chief Judge: Alan R. Schwartz. Judge Schwartz was elected Chief Judge by his colleagues in 1983 and was re-elected to ten additional terms, until he reached mandatory retirement age in 2004.

Ms. O’Connor writes that Judge Schwartz has never forgotten what it was like to be an appellate attorney. “Being an appellate lawyer and writing briefs,” Judge Schwartz reflects: “is the hardest thing going.” Judge Schwartz confessed: “I hated to write and still do.” That being said, it should immediately be noted that Judge Schwartz is a prolific writer, having authored nearly two-thousand opinions.

Former Chief Judge Phillip A. Hubbart, (1980-1983), authored Chapter Five of the book which is entitled “My Memories Of Working As A Judge On The Third District Court Of Appeal.” Judge Hubbart starts the chapter by noting that the highlight of his over forty-year membership in the Florida Bar (1963 to date) was the nineteen years (1977 to 1996) that he spent as a judge on the Third District Court of Appeal. The chapter provides an excellent overview of the Third District Court of Appeal. Judge Hubbart states that he genuinely liked every judge that he worked with on the Third District. He then goes on to discuss each one of his former colleagues on the Bench. Judge Hubbart describes former Judge Barkdull as “an historic figure: the real pillar of the Court.” He aptly refers to former Chief Judge Schwartz as “a towering figure in the history of the Third District.” Former Chief Judge Cope is described as “the hardest-working judge” and “a lawyer’s absolute dream of an appellate judge.” Judge Hubbart also reminisces about Judge Mario Goderich. “Practically every afternoon I would wander down the hall to talk about cases and shoot the breeze with him or throw darts at the Fidel Castro dart board that hung in his office. I loved to hear his accounts of his family in Cuba and their escape from Castro.” Judge Hubbart concludes the chapter by noting that he will always be grateful for the wonderful opportunity that he had to serve as a judge on the Third District Court of Appeal.

Chief Judge David M. Gersten, a third-generation jurist, invites the reader to “travel a day in [his] shoes, as an appellate judge in Chapter Six of the book which is aptly titled “A Day In The Life Of A Third District Judge: The Inner Sanctum.” Judge Gersten concludes by noting that although the opinion-writing process never ends, “it is part of what makes this job the most exciting and best job in the world. So much so that I cannot wait to get back to the office and begin the daily cycle anew.”

Judge Linda Ann Wells provides an excellent prospective tracing the history of The Thomas H. Barkdull, Jr. District Courthouse, the Alan R. Schwartz Law Library and the James R. Jorgenson Gardens in

continued, next page
Chapter Seven of the book.

The Third District Court of Appeal Anniversary Committee should be commended for all of their outstanding hard work. “Florida’s Third District Court Of Appeal Balancing Justice 50 Years 1957-2007” provides a fascinating inside look at the Third District Court of Appeal. The book does an exemplary job of explaining the entire appellate process.

The Third District is a source of great pride for every attorney who has had the privilege of stepping up to the podium of that great Court to utter the words: “May It Please The Court.” The book provides a wonderful opportunity for readers to learn all about the institutional history of the Third District and its fine jurists.

(Endnotes)
1 Roberta G. Mandel is a partner at Stephens Lynn Klein LaCava Hoffman & Puya, P.A., where she heads the appellate department. Ms. Mandel is a member of the Florida Bar’s Appellate Court Rules Committee and the Executive Council of the Appellate Practice Section. Ms. Mandel is also on the Board of Directors of the Miami-Dade Chapter of the Florida Association of Women Lawyers.
2 To purchase the book and DVD package, contact Kathleen O’Connor at 305-278-9596, or mail the request and $35.00 check payable to Third DCA 50th Anniversary Committee, Inc., to 7445 S.W. 147th Street, Palmetto Bay, Florida 33158.
Members of the judiciary presented an interactive multimedia “extravaganza” on November 9, 2007, at the Third District Court of Appeal. Chief Judge David M. Gersten created the continuing legal education presentation, titled “Ethics Raw: Director’s Cut,” to explore the ambiguous territory where ethics, decorum, and zealous advocacy collide. According to Chief Judge Gersten, this is the Third District’s “first ever non-appellate lawyer seminar,” and was meant to be all-inclusive of South Florida’s legal community. The seminar was inspired by a compilation of the Chief Judge’s discussions with judges and lawyers over the course of several years. The main question the Chief Judge sought to explore was “how far should judges go in enforcing the ethical and professional rules that we all have to follow.”

The distinguished panel that led the discussion consisted of Chief Judge Gersten and Judge Linda A. Wells of the Third District Court of Appeal, Judge Orlando Prescott of the Eleventh Judicial Circuit’s Criminal Division, Judge Victoria Sigler of the Eleventh Judicial Circuit’s General Jurisdiction Division, and Judges Rosa Figarola and Amy Karan of the County Court Domestic Violence Division.

The panel engaged the audience in a lively discussion, tackling a number of ethical dilemmas that practicing lawyers frequently encounter but seldom discuss. Rather than lecturing the audience on appropriate behavior for lawyers, the panel presented real-world scenarios and challenged the audience to locate and define the bounds of appropriate behavior. The panel engaged the audience in a number of ways, e.g., through a mini-hardball argument and by asking the audience to react to a number of hypothetical scenarios. The panel guided the audience through a discussion of appropriate behavior for litigants as well as judges.

The panel suggested several rules of thumb: know the rules of conduct, know how to research ethics, and educate and inform your employees. As a practical matter, though, the panel suggested an even simpler method for finding ethical problems – the smell test. The panel also suggested the “mom test” as another real-world tip: if you are not sure whether behavior is appropriate, ask yourself what your mother would think.

Overall, the audience wanted judges to step in and take a more proactive role in enforcing ethical rules. Chief Judge Gersten was surprised that the majority of attendees wanted judges to “be more forceful to make sure we all follow the rules, and to actually call the lawyer out when there is something wrong.” Audience participation was so lively that the panel covered less than half the planned material. Chief Judge Gersten hopes the ethics seminar will become an annual Third District event that will open the court to the entire bar and remind lawyers that the Third District is part of the legal community.

(Endnotes)
1 Erin Kinney is an associate in the Appellate & Trial Support Practice Group at Carlton Fields, PA. (Miami). Erin’s prior experience includes service as a law clerk to Chief Judge David M. Gersten and Judge Richard J. Suarez of the Third District Court of Appeal, as well as several years as an Assistant Attorney General.
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Notice of Correction

From the article titled “50 Years of the First DCA”, in the Summer 2007 issue of The Record, there were two typographical errors.

Robert Plois should be Robert Pleus
and
Justice Thomas Elwyn should be Justice Elwyn Thomas.

We apologize for any confusion this may have caused.