From Judge to Counselor, Justice Bell is Still Just “Kenny”

Surveying the lawyers and parties gathered around the table, the circuit court mediator suggested each person introduce themselves by their first names to ease comfortably into the mediation. One North Florida lawyer was there working on his certification to be a circuit court mediator. When his turn came to make an introduction, he said with an easy southern grace, “Please call me Ken.”

The attorney for the other party shifted, slightly uncomfortable. Bound by canon to respect those usually garbed in black robes, the lawyer said, “Well, Judge, that’s going to be real hard to do.” Laughter reverberated in the conference room, and just as the mediator hoped, the initial ice was broken.

This is just one of Justice Kenneth Bell’s perspectives on moving from the judiciary into the private sector. Preparing for the next step in a career can be difficult - even armed with the distinguished resume of Justice Kenneth Bell. For Justice Bell, the daunting shadow of the black robes from his past employment will linger after he steps down from the Florida Supreme Court bench in October.

“There is a separation,” Justice Bell said, reflecting on the effect of his judicial position on his relationships. “You are known by your title, particularly once you become known as a Justice.”

The type to always engage hands-on, this respect sometimes overshadowed Justice Bell’s community involvement. In Tallahassee, every activity was defined by his status as a Justice. In the city that raised him, however, they don’t let the gavel go to his head.

“In Pensacola, I’m still Kenny, Reed’s son, Brad’s Dad, Vicky’s husband,” Justice Bell said. This openness allows him to become deeply involved in community activities without the judicial title affecting his participation.

“In my home community, I’m more able to have appropriately frank discussions with members of the community. It keeps me more grounded in reality,” said Justice Bell.

It is easy to picture Justice Bell strolling through historic downtown Pensacola, stopping often to greet friends and loved ones. The Bell family planted roots in the Panhandle in the 1800s, when Florida was colonized by Spain. Though Bell was born in Houston, Texas, his family returned to Pensacola for his father to pursue training in pediatric endocrinology. One of six children, Justice Bell’s family tree has already welcomed 21 grandchildren to its branches. Though most of the family sought degrees at collegiate institutions across the coun-

See “Justice Bell” page 7
Parting Thoughts - A View Upon Leaving The Bench - Justice Raoul G. Cantero

By Caryn L. Bellus

As Justice Cantero prepared to complete his last few weeks on the Florida Supreme Court, I had the privilege and the opportunity to speak with him about his experience on the bench. I wanted to get his parting advice for practicing appellate attorneys, and for those of you who may be thinking about applying for a seat on the court.

Some advice for lawyers who appear before the Supreme Court.

1. Be brief.

Most of us do not realize the immense amount of paperwork and reading that the Justices have to do. According to his calculations, the Justices have to read on average about 3000 pages of briefs per week, before taking into account the record and oral argument summaries prepared by the law clerks. Thus, his first recommendation to appellate attorneys: be concise in your briefs and get right to the point. A short brief is “refreshing.” The court looks at it as an “asset” for a lawyer to be able to write a brief that does not use the full page limit permitted by the appellate rules. Along those lines, Justice Cantero finds that many lawyers fail to pay attention to the importance of drafting a really strong statement of the case and facts, and that many lawyers include matters which are irrelevant to the issues on appeal. Thus, he sees the statement of the case and facts as a key place where lawyers can cut the length of their brief.

2. Prepare for oral argument.

Justice Cantero also could not stress enough the importance of preparing for oral argument and trying to anticipate the difficult questions the court may ask. Although the law may not be on your side, you must not be caught off guard. Rather, take the time beforehand to think about how to respond to the tough questions.

3. Expect jurisdictional questions.

At oral argument, be prepared to discuss jurisdiction. Too often, lawyers make the mistake of thinking that the court has already decided the jurisdictional question prior to oral argument, and are surprised when these questions are posed. Frequently, the court carries the jurisdictional issue with the brief and often discharges the case because of a lack of jurisdiction.

Even on certified conflict questions, be prepared to discuss why conflict exists. Just because the district court certifies the question does not mean that a conflict actually exists. In too many cases, lawyers argue that conflict exists when it really does not. Justice Cantero estimates that in less than 1 in 10 cases presented to the court, conflict actually exists. This brings him to another recommendation: be sure to advise your clients of the small chance that the court will find it has jurisdiction based upon a conflict. Do not waste the client’s money with the expense of preparing substantive briefs and having oral argument. If no conflict exists, eventually the court will notice and discharge the case.

4. Be candid.

Point out the facts or cases which may exist against your position. This does not hurt your case - the court will find the bad things anyway. If anything, your honesty will improve your position with the court. In a similar vein, Justice Cantero feels that lawyers need to be more candid with what they want the court to do and how it fits into the jurisprudence of Florida and the United States. If you are asking the court to follow a minority position, explain that it is the minority position and why it is necessary for the court to adopt it.

A few surprises...

Justice Cantero shared a few of the things which surprised him once he became a Justice. His biggest surprise after getting on the court was how much time the Justices spend on things other than evaluating cases and preparing for oral argument. A significant amount of time is spent traveling and speaking with various groups including lawyer’s groups, local bars, judges, and schools from high schools to law schools. When he joined the court, his personal philosophy was that he would speak to anyone who asked, but could not spend more than one week a month away from the court. During his tenure on the court, he has spent 3-5 days a month traveling and speaking to these groups. On top of that, the Justices spend a great amount of time on bar committees, judicial committees, court administration committees, and handling behind the scenes administrative matters.

With regard to the cases presented to the court, Justice Cantero was most surprised about the number of lawyer disciplinary cases the court sees. Many of these cases are discussed at the court’s weekly Wednes-

See “Parting Thoughts” page 18
Message from the Chair
By Siobhan Helene Shea

A central theme of my service as your Chair will be to reinvigorate the Pro Bono Committee. Past Chair Steve Brannock’s last message encouraged members of the Section to undertake more pro bono appellate work. That message could not have come at a better time, as members have responded to the call and are joining the ranks of a growing committee under the leadership of Bryan Gowdy, who has generously agreed to serve as Chair of the Pro Bono Committee. As the recipient of the first annual Appellate Practice Section Pro Bono Award, I heartily recommend that you volunteer your time to undertake at least one pro bono case this year, and do so through the Pro Bono Committee. Some of my most memorable cases have been pro bono, and now more than ever, there is a huge need for skilled appellate pro bono representation in Florida.

The Section has been extremely fortunate to have the continued involvement of our state’s finest appellate jurists and court staff. This is especially appreciated in light of funding cuts to the judiciary. We applaud the installation of one of our Judicial Representatives, the Honorable Peggy A. Quince as Chief Justice of the Supreme Court of Florida. And we welcome the return to leadership of Vice Chair of the Section retiring Supreme Court Justice Raoul G. Cantero, III.

The Appellate Practice Section’s legislative and policy agenda this year continues to support the need for maintaining an independent judiciary with funding for appellate judges and support personnel consistent with the Florida Supreme Court’s budget requests. This continues to be an area in which the Section’s leadership is necessitated by the underfunding of the judicial branch. If you wish to be involved in the Section’s Legislative Committee, please contact its Chair, Tom Warner, who has kindly agreed to continue leading that committee.

The Section is looking for more ways to serve you better, get new and passive members involved, and to help train a diverse number of appellate lawyers for leadership in the Section. If you would like to get involved in the Section and don’t know where to start, please contact Outreach Chair Gwendolyn Powell Braswell or Leadership Chair Angela Flowers.

The Publications Committee, chaired by Caryn Bellus, has successfully put the Guide online, under the Editorship of Rebecca Steele, along with the assistance of Website Chair Henry Gyden and Website Vice-Chair Jonathan Streisfeld. Look for that and other improvements to the website promised by the website committee.

The Appellate Practice Section’s CLE Committee got this year off to a big start with the Advanced Appellate Advocacy Seminar, which was moved this year to Coastal Law School in Jacksonville under the leadership of Co-Chairs John Mills and Celene Humphries. In October, the Section is co-sponsoring this year’s Eleventh Circuit Appellate Practice Institute in Atlanta under the leadership of Treasurer/Secretary Matt Conigliaro. Our monthly telephonic CLEs continue to be a popular and convenient way to hone appellate practice skills from the office. This year the Section, under the leadership of CLE Chair Betsy Gallagher, is re-evaluating ways to improve our CLE programs by making them easier to attend and giving members CLE in the appellate practice areas they want. Section members will continue to receive e-mail updates both from the Section and the Bar about relevant appellate practice CLE. Towards that end, we welcome hearing from members about the CLE and information we are providing.

Thankfully, Jack R. Reiter has graciously agreed to serve as Editor of the Record for another term. This is a generous service to the Section and a great opportunity for publishing and getting up to date articles on appellate practice and Section news. Other publishing opportunities for Section members exist in the Florida Bar Journal, edited by Tracy Raffles Gunn, and the Pro Se Appellate Handbook updates, edited by Chair Elect Dorothy Easley and Vice Chair of the Handbook Kimberly Jones.

The budget continues to be an area of focus for the Executive Council, as we continue to reassess the impact of the change in the splits from revenues with the Bar. We are looking for ways to increase our revenues and make Section projects self-sustaining. This provides potential marketing opportunities for firms and select vendors. If you or your firm is interested in sponsorship opportunities with the Section, please contact Treasurer/Secretary Matt Conigliaro.

Finally, for the end of this year, we will be planning the fourth Appellate Practice Section Retreat. If you are interested in getting involved in the retreat planning or other Section events, contact Programs Chair Ceci Berman, who is Vice Chair of the Retreat, along with Past-Section Chair Hala Sandridge. Part of the Retreat Agenda will be to refine our Internal Operating Procedures and maintain the Section’s history. Our Section has a rich tradition of involvement of the pre-eminent appellate lawyers and jurists in the state. To preserve that history, we are collecting historical notes and photos from the Section and would love to hear from you if you have anything you think should be included in the IOP or the Appellate Practice Section History.

It is a great honor to serve as Chair and I welcome your suggestions and feedback.
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Pro Bono Opportunities for Appellate Attorneys

By Alina Alonso

In this issue, Section Chair Siobhan Shea discusses the significance of providing pro bono services, as did immediate past Chair Steven Brannock in his Spring 2008 message. The Section is actively encouraging pro bono work by its members. Accordingly, to make it easier for appellate attorneys to locate pro bono opportunities, the following is a list of organizations in Florida that are in need of attorneys to assist with appeals.

The programs included on the list are seeking appellate attorneys for a wide range of roles — from research and support to lead counsel — in both civil and criminal pro bono appeals. For more information on a program and to offer your services, call or email the listed contact.

Finally, although our district courts of appeal do not have formal pro bono programs, the Section’s Pro Bono Subcommittee is working with these courts to create a system matching attorneys and pro bono clients. A liaison will be assigned to each appellate district and the Eleventh Circuit. Persons willing to serve as liaison or to help compile a list of appellate attorneys willing to handle pro bono cases should contact Bryan Gowdy at bgowdy@appellate-firm.com.

Alina Alonso is a shareholder in the Appellate and Trial Support Practice Group at Carlton Fields’ Miami office. From 1999-2001, she was Chief Justice R. Fred Lewis’ law clerk.

Endnote:
1 The programs listed herein represent those organizations who responded to our requests for information and is not exhaustive. The Record does not endorse any particular organization over another.

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<thead>
<tr>
<th>Florida</th>
<th>Contact</th>
<th>More information</th>
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<tr>
<td>Bay Area Volunteer Lawyers</td>
<td>Sheila Seig</td>
<td>Provides free legal services to low income families in Florida’s Bay Area. Needs occasional appellate support for staff attorneys. Volunteer application online at <a href="http://www.bals.org">www.bals.org</a> as well as links to other pro bono opportunities in the area.</td>
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<tr>
<td>Community Legal Services of Mid-Florida</td>
<td>Lena Smith</td>
<td>Matches private attorneys in Central Florida with low-income individuals in need of civil assistance, including civil appeals.</td>
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<tr>
<td>Florida Guardian Ad Litem Program</td>
<td>Deborah Moore</td>
<td>Serves abused and neglected children throughout Florida. The Program recruits attorneys to represent teens in foster care, children in attorney-client relationships and to assist in advocating for the child’s legal needs utilizing an attorney’s legal expertise.</td>
</tr>
<tr>
<td>Florida Institutional Legal Services</td>
<td>Cassandra Capobianco</td>
<td>Represents individuals currently in, or recently released from, state institutions. Needs appellate attorneys as counsel statewide and to advise on preserving the record.</td>
</tr>
<tr>
<td>Innocence Project Florida</td>
<td>Seth Miller</td>
<td>Uses DNA testing for exoneration purposes. Pro bono attorneys used as counsel, co-counsel and for research.</td>
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<tr>
<td>Jacksonville Area Legal Aid</td>
<td>Sarah Fowler</td>
<td>Provides civil legal assistance to low-income persons in Duval County.</td>
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<tr>
<td>Legal Aid Society of Palm Beach County</td>
<td>Kimberly Rommel-Enright</td>
<td>Handles limited appeals; maintains a list of appellate attorneys willing to provide pro bono representation.</td>
</tr>
<tr>
<td>Legal Services of North Florida</td>
<td>John Fenno</td>
<td>Provides legal assistance to low income clients through legal clinics, telephone hotline, and case representation. Volunteer attorneys needed to assist staff on a wide range of civil appeals.</td>
</tr>
<tr>
<td>Put Something Back Pro Bono Project</td>
<td>Karen Ladis</td>
<td>Sponsored by the 11th Judicial Circuit and Dade County Bar Association to defend low-income clients in civil litigation.</td>
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<th>National</th>
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<tr>
<td>Institute for Justice</td>
<td>Krisssy Keys</td>
<td>Public interest law firm with a focus on civil liberties and first amendment rights. Send resume to Krisssy Keys.</td>
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<tr>
<th>Court-Sponsored</th>
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<th>More information</th>
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<tr>
<td>US Court of Appeals, 11th Circuit</td>
<td>Thomas Kahn, Clerk of Court</td>
<td>No formal program but Court sometimes appoints counsel. Call for details.</td>
</tr>
<tr>
<td>Florida Supreme Court</td>
<td>Tanya Carroll</td>
<td>Call to be included on the Court’s list of pro bono attorneys. 80% of cases assigned are criminal appeals.</td>
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How to Interpret Statutes — Or Not: Pursuing the Phantom of Plain Meaning(s)

By Steve Wisotsky

In 1926, the Government alleged that Timothy McBoyle hired a pilot to steal an airplane and fly it from Ottawa, Illinois to Guymon, Oklahoma. Although he denied the charge, the jury convicted him of interstate transportation of a stolen “motor vehicle” in violation of a federal statute. The operative language of the National Motor Vehicle Theft Act of 1919 defined “motor vehicle” to include “an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails.” McBoyle v. United States, 43 F.2d 273, 274 (10th Cir. 1930).

On appeal, the Tenth Circuit affirmed the conviction, rejecting McBoyle’s contention that “the word ‘vehicle’ includes only conveyances that travel on the ground; that an airplane is not a vehicle but a ship; and that, under the doctrine of ejusdem generis, the phrase ‘any other self-propelled vehicle’ cannot be construed to include an airplane.” Id.

Canvassing several dictionaries, the court of appeals determined that “vehicle” means “[a]ny receptacle, or means of transport, in which something is carried or conveyed, or travels.” Id. It concluded that “the derivation and the definition of the word ‘vehicle’ indicate that it is sufficiently broad to include any means or device by which persons or things are carried or transported, and it is not limited to instrumentalities used for traveling on land . . .” Id.

The court acknowledged ambiguity in the statute insofar as a land-based vehicle “may be the limited or special meaning of the word.” Id. But, “[w]e do not think it would be inaccurate to say that a ship or vessel is a vehicle of commerce.” Id.

An airplane is self-propelled, by means of a gasoline motor. It is designed to carry passengers and freight from place to place. It runs partly on the ground but principally in the air. It furnishes a rapid means for transportation of persons and comparatively light articles of freight and express. It therefore serves the same general purpose as an automobile, automobile truck, or motorcycle. It is of the same general kind or class as the motor vehicles specifically enumerated in the statutory definition and, therefore, construing an airplane to come within the general term, ‘any other self-propelled vehicle,’ does not offend against the maxim of ejusdem generis.

Id. at 274 (emphasis added).

The Supreme Court granted certiorari and reversed the court of appeals. McBoyle v. United States, 283 U.S. 25, 27 (1931). Justice Oliver Wendell Holmes, writing for a unanimous court, held that the statute making it a federal crime to move a stolen “motor vehicle” in interstate commerce did not apply to a stolen airplane. “No doubt etymologically it is possible to use the word [vehicle] to signify a conveyance working on land, water or air . . .” Id. at 26. Indeed, the Tenth Circuit had found that is the “plain meaning” of the word vehicle by both “derivation and definition.” 43 F.2d at 274. But the Supreme Court was otherwise persuaded: “It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class.” 283 U.S. at 27.

In an opinion that is a model of brevity, if not perfect clarity, the Court alluded to, but did not explicitly invoke, familiar maxims or canons of construction that were seemingly applicable. It did not, for example, directly apply the rule of ejusdem generis to narrow the broad language “any other self-propelled vehicle” to the class or kind of ground-based vehicles enumerated by the statute. And despite its finding “etymologically” both a broad and narrow meaning, it did not explicitly invoke the rule or resort to legislative history to interpret ambiguous statutes; there is only a passing observation that airplanes “were not mentioned in the reports or in the debates in Congress.” 283 U.S. at 26. Nor did it explicitly invoke the familiar rule of lenity to resolve a statutory double meaning against the Government in a criminal prosecution although the dissenting judge on the court of appeals had done so. 43 F.3d at 276 (Cotleral, J., dissenting).
try, each member eventually found their way home to the Panhandle.

Justice Bell also left Pensacola for higher studies. After graduating from Booker T. Washington High School, Bell relocated to North Carolina to obtain a Bachelor of Arts degree in History from Davidson College. He returned to Florida for law school, graduating cum laude from Florida State University.

Before his second year of law school, Justice Bell received a job offer at a firm with a primary practice in real estate. Based on the firm’s focus, he naturally gravitated to commercial and residential real estate law where he developed an expertise that led to teaching many CLE courses on real estate law topics.

He left private practice in 1991, to become the youngest circuit judge in the First Judicial Circuit. “I loved being a trial judge,” Justice Bell said. “It was one of the highlights of my career. Being a Justice was a privilege and achievement, but being a trial judge was one of the best jobs in the world.”

The trial court allowed him to interact with his courtroom in a way that his next job at the Florida Supreme Court would not. Besides presiding over more than 27,000 circuit court cases, he opened the first “child witness room” in the First Circuit and trained guardian ad litem volunteers. At the Supreme Court, however, Justice Bell invokes the common adage of the appellate judge that “the phone never rings. Even when you have activity in a court at oral argument, it is a less dynamic process than at a trial.”

Still, he was honored to be appointed by Governor Jeb Bush in 2002 as the 81st Justice of the Florida Supreme Court.

“Serving in the judiciary has been the highlight of my professional life, and it’s a tremendous honor and responsibility. Being the final arbiter of people’s disputes is a tremendous trust invested in an individual or a collegial court at our level,” said Justice Bell. “It’s the epitome of the practice of law.”

His profile on the Florida Supreme Court website details Bell’s leadership as the first attorney in Escambia and Santa Rosa Counties to be Board Certified by The Florida Bar in Real Estate in 1989; the first Justice from west of Tallahassee since 1917; and the first graduate of FSU Law to serve on the court. As the first Justice to represent the far western Panhandle in more than a century, Bell hopes that his successor also hails from that region.

To serve on the court, Bell uprooted his family from Pensacola to Tallahassee. This meant leaving behind his church, professional associations, and relatives. For several years, Bell’s family made a home in the capital city but eventually needed to return to Pensacola. Like Justice Cantero, who also submitted his resignation from the court this year, Justice Bell struggled to balance commitment to the public through service on the court with his family obligations.

Then Hurricane Ivan came in 2004. As the storm winds continued east, four of the twelve Bell-family homes were left in ruin. The need to return to his devastated community was compelling. He relocated his family back to Pensacola in the summer of 2005 and began the weekly commute. Over the most recent 22-months, he put a mere 57,000 miles on his car. The travel expenses came out of his pocket, as the legislature did not provide reimbursement for that type of travel expense.

Although submitted to Governor Crist six weeks after Justice Cantero’s announcement, Justice Bell’s resignation was not contingent upon or sparked by Justice Cantero’s departure. He knew after the continued failure to get pay increases or reimbursement for travel expenses that he had no other economic choice but to resign. With his family residing in Pensacola for the past three years and without reimbursement for expenses, Justice Bell’s compensation was less than what he made as a circuit court judge. Bell acknowledges that the Justices receive good compensation in relative terms, but compared to the equivalent salaries for the average partner in a law firm, or even those of first year associates, being a jurist can be a financially difficult compromise.

One example of this compromise is the overwhelming expenses of being a father. Justice Bell has four children, of which only one is “off the payroll.” His three other children are approaching college age.

continued, next page
“I will miss it greatly,” said Justice Bell on his position at the court. “But the economics and requirements to live in Tallahassee do not make it practical for me.”

Justice Bell notes there is some truth to the belief that you have to already be independently wealthy to serve on the court. Had the legislature raised judicial compensation or provided reimbursements normative with incurred travel expenses, Justice Bell may have been able to stay. After Justice Cantero announced his retirement, Bell said the legislature did make efforts to put money in the budget to provide for reimbursement of travel expenses. But facing an economic crisis in Florida’s judicial system, the Supreme Court chose to allocate that money for other purposes.

These are serious considerations for those attorneys considering applying for Bell’s job. In the coming months, Governor Crist will appoint three new justices to the court – in addition to the recent appointment of Justice Canady. In discussing how to generate the most diverse and qualified applicant pool, Justice Bell agreed that opening up the residency requirement would “absolutely” help increase the ability for some lawyers to seek the position. When he was applying for the position in 2001, he encouraged some judges that he believed were well qualified to also apply. The common refrain he received was, “I’d love to serve but I just don’t want to live in Tallahassee full time.”

Bell has talked to the chief justices of several state supreme courts, like Virginia, New York, Tennessee, California, and Alaska. “They will all tell you that they wouldn’t have the quality of jurists they have on their court if the judges were required to live in the capital city,” said Bell.

In his informal research, he discovered that telecommuting or working from hometowns is normative among state supreme court justices. In many states, justices can live in their home cities and still serve. He notes that Florida is abnormal in its expectation that justices reside primarily in Tallahassee. He understands that previously, it was more difficult to communicate unless the judges resided in the same city. Also, fewer issues were involved with moving to the capital city because of family-work arrangements. But with the opening of communication tools and many spouses pursuing their own careers, it is now an even greater sacrifice than it used to be to have an attorney pull up roots, especially when on average, a supreme court justice serves less than 10 years.

To those attorneys considering applying for one of the three upcoming vacancies, applicants also must understand the economic sacrifice, which as Justice Bell notes for many can be very significant.

Beyond economic sacrifice, prospective jurists should understand that life at the top of the judicial branch can be isolating. “It requires a sacrifice of friendships and a limitation of your circle of friendships. You have to maintain your neutrality. The higher you go up in the judicial chain the more isolated you become.”

Most importantly, Justice Bell advises them to, “Be ready to work hard and make extremely difficult decisions. You work in an area that is typically very grey, very challenging, which is part of the excitement and the difficulty.”

On the other hand, he greatly respects the judiciary and the special opportunities donning the robe offers. Unlike the attorney who must advocate a position to the judge, Justice Bells said, “The advantage the judge has, and what I love is, you are more free to do what is right.”

Forging back into private practice will not deter Justice Bell’s goal of doing what is right. His father, a retired pediatric endocrinologist, is still his hero. He plans to assess the areas and needs of children before launching any new programs to improve the relationship between children and the court system, like the child witness room.

Bell expressed a commitment to continue advocating for attorneys to volunteer more pro bono hours. “It’s critical that I continue to play a role that is public but it will be from a private perspective, meaning that I will serve as a role model to lawyers that they get involved in their community, like with issues such as affordable housing,” said Justice Bell. He understands volunteering is difficult with the time demands and pressures facing members of the Bar, but thinks “there needs to be a constant encouragement for each generation to do that.”

Although his original practice area was real estate, he plans to return to private practice in the Pensacola area, focusing on arbitration, mediation, and appellate work. He hopes to maintain relationships across the state and have a statewide regional practice.

One advantage Bell thinks his judicial experience will bring to private practice is the unique ability to advise his clients on the perspective of the jurist. Because he served as a judge for the past 18 years, he has invaluable knowledge from presiding over more trials than the average attorney has been involved in. His experience also allows him to advise clients on a wide range of different matters.

With 18 years passing since Justice Bell worked in the private sector, he is unsure whether he will prefer it to being in the judiciary. “Call me back in a few years and I’ll let you know,” he laughs.

Ethics Questions?
Call The Florida Bar’s
ETHICS HOTLINE
1/800/235-8619
As appellate lawyers, we all get those calls. You know the ones. The woman who called about an appeal from county to circuit court regarding a dog her daughter bought a year ago, but which was taken back by the previous owner. Heartbroken, yes. Able or willing to pay an appellate lawyer to brief the case? No.

Or what about those poor souls who lost their unemployment cases? They are already destitute after losing their jobs. How can they afford an appellate lawyer?

If you handle criminal appeals, you also receive calls from defendants and their families when an Anders brief is filed. The defendant is usually in prison and indigent, and the families are often faced with the difficult choice of caring for and feeding the defendant’s children or paying an appellate lawyer.

Since we cannot stay in business if our only business is pro bono, we must, sadly, turn some of these people away. Happily, we can now offer them a great tool to help themselves through the complexity of appellate process – The Pro Se (Self-Represented) Appellate Handbook!

Most likely, you have read about the pro se handbook in prior issues of The Record or The Florida Bar News. Former Chair Tom Hall, Clerk of the Florida Supreme Court, knows that over 60 percent of all appeals filed in Florida’s appellate courts involve pro se litigants. Accordingly, he saw the need for the pro se handbook, particularly from the court’s perspective. While Tom served as Section Chair, he wisely chose Dorothy Easley to Chair the Pro Se Handbook Committee. Section members toiled over the next three years to write the 21 chapters in the handbook, edit the handbook for conformity and 8th grade reading level, compile a user-friendly glossary for laypersons, and address concerns about the handbook being used for the unlicensed practice of law.

In its current edition, the pro se handbook includes chapters on the nuts and bolts of appeals including attorney’s fees and costs; pulling together the record; motion practice; writing an appellate brief; checklists for briefs and timelines for appeals; summaries of the process for appeals from final orders, nonfinal orders, and extraordinary writs; stays; oral argument; post-decision motions; and Florida Supreme Court and United States Supreme Court review.

There are also chapters addressing several substantive areas that often involve pro se litigants, including pro se Anders appeals, postconviction, administrative, unemployment, and workers’ compensation appeals. The committee is currently working on chapters for juvenile, dependency and termination of parental rights appeals.

The handbook was completed last year in English and this year, by virtue of a grant from The Florida Bar Foundation secured through the intervention of Harvey Sepler, the handbook was translated into Spanish and French-Creole. Bound volumes are now available in all three languages in every court, law school, legal aid office, and prison library in Florida.

The pro se handbook is also available on-line, thanks to the efforts of Appellate Practice Section web guru Jonathan Streisfeld and Henry Gyden, at www.flabarappellate.org/pdf/ProSeAppellate_Handbook0508.pdf. Thanks to both Jonathan and Henry, the handbook also has an ADA-compliant version that interacts on-line with those with hearing and vision impairments.

Dorothy will be the first to say that no undertaking of this magnitude could have been accomplished without the time, talent and dedication of many, many people. In addition to Tom Hall, Dorothy points to former Chairs Susan Fox and Steve Brannock, who shepherded the handbook through birth to publication.

Those who authored, contributed and edited the chapters include: Ceci C. Berman, Allison Bernstein, Yasir Biloo, Steven L. Brannock, David M. Caldevilla, Tracy Carlin, Beth Coleman, Wendie Michelle Cooper, Honorable Marguerite Davis, Dorothy F. Easley, Carlos Gonzalez, Barbara Green, Valeria Hendricks, Christopher Hopkins, Maria Kayanan, Kimberly Jones, Honorable Patricia Kelly, Bianca Liston, Wendy Loquasto, Roberta Mandel, John Mills, Kristin
Torcino have agreed to write chapters in juvenile, dependency, and termination appeals.

Dorothy continues to steer the pro se handbook ship this year, but she is training the committee’s new vice chair, Kimberly Jones, whose enthusiasm and dedication for the project is as boundless as Dorothy’s.

So, next time you get one of those calls from someone who needs an appellate lawyer but who can’t afford one, refer them to The Pro Se (Self-Represented) Appellate Handbook. You will be doing them a favor by providing them with a valuable tool to navigate through the appellate court system.

Wendy S. Loquasto is a partner with Fox & Loquasto, P.A., a statewide appellate practice firm with offices in Tampa and Tallahassee. She is board-certified in appellate practice and focuses her practice on workers’ compensation, family law, dependency and termination of parental rights appeals. Before entering private practice in 2003, she worked for 15 years as a law clerk to The Hon. Richard W. Ervin, III. Wendy is a member of the Executive Council of the Appellate Practice Section and serves on the Outreach and Publications Committee. She is also a former president of the Florida Association for Women Lawyers and Tallahassee Women Lawyers.

Endnote:
1. As a result of her efforts, the Section awarded Dorothy this year’s pro bono award. See infra at 11.

Appellate Section Awards Justice Raoul Cantero the Adkins Award

By Ceci Berman

The James Adkins Award is one of the most prestigious awards presented by the Appellate Practice Section. Created in honor of Florida Supreme Court Justice James Adkins, the Adkins Award honors a member of the Section showing a passionate commitment to appellate practice. The honoree is always one who has made significant contributions to Florida appellate practice.

This year, the Appellate Practice Section proudly named Justice Raoul G. Cantero, III as the 2008 award recipient. Justice Cantero earned his law degree at Harvard Law School, cum laude. He received a Bachelor of Arts degree, summa cum laude, in English and Business from Florida State University. He then clerked for the Honorable Edward B. Davis, United States District Court for the Southern District of Florida. He then practiced in Miami, where he chaired the Appellate Division at Adorno & Yoss. In 2002, Governor Jeb Bush appointed him to the Florida Supreme Court.

While in private practice, Justice Cantero handled over 250 appeals and more than 100 oral arguments. He was a member of the Florida Bar’s Appellate Rules Committee, serving as secretary from 1997-1999 and as vice-chair from 1999 to 2002. He was also a member of the Eleventh Circuit Judicial Nominating Commission from 2001 to 2002. He served as chair of the Dade County Bar Association’s Appellate Court Committee from 1998 to 1999. Finally, he was treasurer of the Florida Bar’s Appellate Practice Section from 1999 to 2000, secretary from 2000 to 2001, and vice-chair from 2001 to 2002. Upon leaving the bench in fall 2008, Justice Cantero will resume his position as Vice-Chair of the Appellate Practice Section.

Justice Cantero is also known for, among other things, his leadership within the Appellate Practice Section and his work on and participation in continuing legal education courses on appellate advocacy and professionalism.

On that note, professionalism in the practice of law is particularly important to Justice Cantero. He chaired the Florida Supreme Court’s Commission on Professionalism, and he has vigorously promoted improved professionalism, both before and during his tenure on the Florida Supreme Court. Justice Cantero epitomizes the caliber of individual who meets the Adkins Award criteria, and the Appellate Practice Section congratulates him on this recognition.

Ceci Culpepper Berman is a Board Certified appellate lawyer at Fowler White Boggs Banker, in Tampa, Florida. Her practice involves all aspects of federal and state appellate litigation, with a focus on commercial litigation appeals. She also has extensive experience handling federal bankruptcy appeals and family law appeals.
The Section Awards Dorothy Easley the Pro Bono Award

By Kimberly Gracia Jones

Each year, the Appellate Practice Section presents the Pro Bono Award to an appellate practitioner who provided representation to people, groups, and causes that otherwise could not afford such representation. Dorothy Easley exemplifies the balance of a skilled attorney who devotes significant non-billable hours to making the law accessible and navigable for those without a lawyer. Dorothy has the unique ability to note and recognize the hard work of others. Just watch her introduce a colleague to a fellow attorney. Not the type to cite her own achievements, she will instead introduce that person with a passionate slew of adjectives touting the attorney’s accomplishments. To be introduced by Dorothy is to be reflected in the most flattering light possible.

That is why if you were to ask Dorothy about the Pro Se Self-Represented Appellate Handbook, she would immediately praise the people who helped her along the way. In the sleepless nights preparing for the launch of the Handbook as an interactive electronic version and as a hardbound copy at the Annual Meeting, Dorothy repeatedly expressed concern that the committee members receive recognition for their work. She attended the Section’s Annual Dessert Reception in anticipation of presenting certificates to the committee members. Even upon the realization that the Section selected her as this year’s recipient of the Pro Bono Award, Dorothy credited Thomas D. Hall, Clerk of the Florida Supreme Court, for initiating the project and thanked each member of the Section who contributed to its creation.

Although honored to receive the award, Dorothy remained humble. As she expressed:

I truly believe that this is an award for the entire Committee, and I mean no disrespect to those who have honored me with this award. It’s just that this serves as a perfect example of how insignificant my achievements would have been had I been working in isolation and how much more was achieved working together, with lots of give and take, healthy discord and questioning among some very bright and talented people, toward a common goal that we believe in. And that common goal is that we want to make a contribution that helps the courts and a sector of our citizens in need. So the award is a great feeling and I’ll savor it for many years on many levels.

In 2002 to 2003, Thomas Hall formed a committee to create a handbook that would explain the appellate process to those without counsel. While preparing for the board certification exam, Dorothy volunteered to write some chapters of the Handbook as another method of preparing for the exam. The Handbook seeks to navigate the appellate process from preparing the record on appeal to writing a brief.

Upon becoming APS Chair in 2005, Tom appointed Dorothy as Chair of the Handbook Committee. Dorothy and her team devoted the next year to editing the chapters for an 8th grade reading level and melding them into a cohesive publication. Dorothy recruited many members of the Section into the project, which expanded from a document linked on the Section’s website to a bound book this year. In discussing her involvement with the Handbook, Dorothy spends much of the time talking about each Section member who worked on the project, taking a moment to recognize each person’s contribution. This attitude further exemplifies Dorothy’s dedication to the publication and to her committee members.

“Seeing that level of support over the long haul, my involvement with the Handbook continued and it became impossible for me to quit, despite the many weekends and vacations that I put into the project, until we saw this through.” Dorothy said. Over Thanksgiving dinners, her family would also review drafts of the Handbook.

This year, largely in part to Dorothy’s efforts, the Handbook was translated and bound in French-Creole and Spanish. Additionally, an ADA compliant version was created that interacts with online readers for the vision and hearing impaired. The Handbook is being distributed in hard copy to every court, law school, legal aid office, and prison library in Florida. “In the back of my mind, I always had this voice telling me not to let Tom Hall down!” Dorothy said.

The Record lacks enough pages to list all of Dorothy’s achievements. Besides her role as Chair of the Self-Represented Appellate Handbook Committee and Editor-in-Chief of the publication, Dorothy is President of Easley Appellate Practice, P.L.L.C., Miami, a statewide appellate firm advancing federal and state appeals. She is a board certified appellate practitioner. When not writing briefs for both federal and state appellate courts, she serves as the 2008-2009 Vice Chair of the Appellate Court Rules Committee and is Chair-Elect of the Appellate Practice Section. She graduated cum laude from the University of Miami School of Law and remains an active alum teaching classes in legal writing. She is

continued, next page
And Thus, The Third District Court of Appeal Historical Society Is Born
By Edward G. Guedes

A little less than one year after the Third District Court of Appeal celebrated, in grand fashion, its 50th anniversary on July 1, 2007, the members of the committee who labored so intently for more than two years to bring the celebration to fruition voted unanimously to convert the existing not-for-profit entity into the Third District Court of Appeal Historical Society. In the course of producing the Third District’s new written history, as well as the accompanying video documentary, the anniversary committee came to realize the importance of preserving the court’s important historical records.

The Society’s president, Kathleen M. O’Connor, observed that “it was so disappointing to discover, as we put together the court’s written history, that so many materials had been lost to time. Despite our best efforts, we were unable to locate any photographs of some important events, such as the dedication of the courthouse.” It was that realization that ultimately led to the formation of the Society and prompted a change in policy at the court regarding preservation of historical records and contemporaneous memorialization of important events in the court’s history. It is now standard practice, for example, to have a court photographer at every event that might arguably be viewed as historically significant, such as when the first all-female panel heard oral argument on February 16, 2005, or when the first all-Hispanic panel did the same a few months later on October 3, 2005. All existing photographs of individual judges, as well as those of the court’s ever-changing roster over the years, have been scanned and preserved on disk, as well as on the court’s computer system. Video interviews with most of the judges who have served on the court, including Judge Tillman Pearson, one of the court’s first three judges, have been preserved and are available to the public for viewing.

The Society’s primary purpose will be to assist the court in preserving historical records and educating the public about the court’s history and its role in the judicial branch of government. Since it was his foresight that initially was the impetus for the anniversary celebration, it is particularly fitting that Judge Frank A. Shepherd – who served as the court’s liaison to the anniversary committee – will continue to serve in a similar capacity with the Society. The remaining initial members of the Society’s board of directors are president-elect, Elizabeth Rodriguez, secretary-treasurer, Lucinda Hofmann, and members Lincoln Connolly, Edward Guedes, Lisette Reid, Jack Reiter, Lauri Ross and Roy Wasson.

Editor’s Note – Immediately following this article is a form to apply for an annual membership for those who are interested in assisting and supporting the Society’s efforts.

Edward Guedes is a partner with Greenberg Traurig and has concentrated his practice in the areas of appellate litigation, employment and labor law and land use law, and is Board Certified by The Florida Bar in the field of Appellate Practice. Edward also has extensive experience with the implementation and application of the American with Disabilities Act and Family and Medical Leave Act. Edward lectures frequently to local governmental employers and other attorneys in the fields of appeals and litigation support and employment and labor matters.

PRO BONO AWARD
from previous page

also a dedicated mother, supporting her daughter’s burgeoning theatrical career.

“I am thrilled that Dorothy received the Section’s Pro Bono Award this year—the year in which the culmination of her leadership of the Pro Bono Appellate Handbook project has come to fruition,” said Valeria Hendricks, an active member of the Executive Council of the Appellate Practice Section. “She accepted this challenging endeavor and followed through in her organized and collegial manner. Dorothy’s enthusiasm and joy in guiding the Section in this project inspired us all in fulfilling our professional duties for the good of the public.”

The Appellate Practice Section congratulates Dorothy Easley and thanks her for her endless dedication to aiding self-represented clients through the maze of appellate litigation.

Kimberly Gracia Jones is a senior staff attorney for the Honorable R. Fred Lewis, Justice of the Florida Supreme Court and is currently Vice-Chair of the Appellate Practice Section’s Self-Represented Appellate Handbook Committee. Prior to joining Justice Lewis’ staff, she was a staff attorney for the Honorable Chris Altenbernd, Judge of the Second District Court of Appeal. She graduated cum laude from Boston University School of Law with a concentration in Litigation and Dispute Resolution.
Third District Court of Appeal
Historical Society

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Immediate past-Chair Steven L. Brannock awards the Pro Bono Award to Dorothy Easley.

Chair Siobhan Shea addresses the Section

Roberta Mandel, Steven Brannock, and Judge Morris Silberman

Chair Siobhan Shea awards the Adkins Award to Justice Raoul G. Cantero, III.
Justice Raoul G. Cantero, III addresses the audience after receiving the Adkins Award.

Section members Valeria Hendricks, Steven L. Brannock, Siobhan Shea, and Matthew Conigliaro

Contributors to the Pro Se Handbook
(back row - left to right) Caryn Bellus, Harvey Sepler, Wendy Loquasto, Tom Hall, Marianne Trussell, Jonathon Streisfeld, Jack Reiter, Roberta Mandel.
(front row - left to right) Dorothy Easley, Kimberly Jones, Ceci Berman, Siobhan Shea
The Appellate Practice Section congratulates Justice Quince on becoming the Chief Justice of the Florida Supreme Court.

Dear Mr. Brannock,

Please accept, and extend to the members of the Appellate Practice Section, my sincere thanks and appreciation for the good wishes and the thoughtful gift. The beautiful hybrid orchid continues to grace my chambers and has received many compliments. Your kindness is deeply appreciated.

Sincerely,

Justice Quince
Another Successful Moot Court Competition and Discussion with Florida Supreme Court

By Ceci Berman

At the Florida Bar’s annual June meeting in Boca Raton, the Appellate Practice Section once again paired with the Young Lawyers Division of the Florida Bar to host the Robert Orseck moot court competition. Following the competition, which six of the seven Florida Supreme Court Justices judged, attendees engaged in an annual “conversation with the Court.” Audience members enthusiastically participated in the informative and open question-and-answer session with the Justices.

The afternoon adhered to its traditional program. The Justices arrived at the competition after their attendance at the Judicial Luncheon. Teams from Florida Coastal School of Law and the University of St. Thomas School of Law remained as the finalists for the last round of the moot court competition.

The competition involved a thorny, four-part hypothetical fact pattern. The hypothetical tangentially related to Archdiocese of Miami, Inc. v. Minagorri, 954 So. 2d 640 (Fla. 3d DCA 2007), which the Florida Supreme Court heard about one week before the moot court competition. In the hypothetical, the parties included the First Church of the Watchers of the Rocks and Jasmine Quartz, a teacher at the Church’s school. Quartz sued the Church under her employment contract after the Church fired her.

Three of the four issues concerned the “ministerial exception.” That exception precludes subject matter jurisdiction over actions by clergy members against religious organizations for employment decisions related to the hiring, firing, suspension, and placement of clergy. First, the court had to decide whether the Church was a religious entity entitled to First Amendment protection under the exception. Second, the court tackled the issue of whether Jasmine Quartz, a teacher at the church’s school, was clergy, a necessary finding before the exception applied to bar her claim. Third, the court determined whether Quartz’s breach of contract claims could be decided by a court without violating the ministerial exception. Fourth, the court listened to argument regarding whether the Statute of Frauds barred the breach of contract action.

In the final round, St. Thomas argued on behalf of Quartz, and Florida Coastal argued on behalf of the Church. After spirited debate and outstanding advocacy on both sides, St. Thomas prevailed. Team members included Ryan Webb, Lee Patten, Schuyler Smith, and Therese Savona. Savona acted as student coach, Smith assisted in writing the brief, and Webb and Patten presented the oral arguments. Howard K. Blumberg, a member of the Appellate Division of the Miami-Dade County Public Defender’s Office and an adjunct professor who teaches the Appellate Litigation Clinic at St. Thomas, coached the student team.

After the absorbing competition, the audience and the court left hypotheticals and entered the real world for a gripping discussion with the court. While the audience asked a variety of questions, some of them lighthearted, budget cuts remained the focus of the conversation. The Justices reiterated their seemingly collective position that budget cuts facing the judiciary are detrimental to Floridians and members of the courts. Particularly, the District Courts of Appeal face an uphill battle of trying to balance effective case management with inadequate staff and funds. Former Chief Justice Lewis spoke passionately on this topic, both at the discussion following the competition and the Judicial Luncheon beforehand. All in all, the attendees watched a riveting presentation during the competition and engaged in a sobering, important conversation with the court.

Do you like to WRITE? Write for The Record!!!

The Record is actively welcoming articles on a wide variety of appellate issues. Please submit your articles to:

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day meeting and addressed without oral argument. The vast majority of these actions are decided by unpublished orders.

Taking this all into account, it was a great surprise to him how little time the court has to write opinions. One week per month the Court holds oral arguments, and about one half of the prior week is spent preparing. Every Wednesday, the court holds a conference on cases which will be decided without oral argument and administrative issues. It takes the Justices about half a day to prepare for that conference. Then, there are the 3-5 days per month spent traveling and speaking. During his tenure on the court, Justice Cantero has spent more time traveling than he “ever did as a lawyer.”

Additionally, a lot of time is spent reading drafts of opinions written by other Justices, and reviewing jurisdictional briefs and deciding what cases to take.

The best things about being a Florida Supreme Court Justice?

Working on some of the most important cases in the state and being in the middle of issues that will affect a lot of people. Also, having the opportunity to speak with students of all ages and young lawyers. Justice Cantero has especially enjoyed speaking with high school students about the work of the court and having the ability to develop their interest in the legal and judicial system.

Getting to know the system behind the scenes...

Justice Cantero has developed a lot of respect for the Office of The State Court Administrator; an entity which exists without much thanks or notice from lawyers. This office “keeps the judiciary going” and ensures that the Court fulfills its responsibilities and keeps running.

Anything he would change?

Justice Cantero suggests that it may be necessary to revisit the concept of having all death penalty cases reviewed in the Supreme Court. He was surprised by the amount of time the court spends on death penalty cases. About half of the court’s oral argument calendar is dedicated to such cases, during which each side gets 30 minutes to present their case. Plus, each party gets a 100 page limit per brief and most cases address as many as 15-20 issues and use the full page limit. Because of the amount of time spent on these cases, the court has that much less time to spend on other cases. Without offering an opinion as to which would be best, he sees three options:

1. Have the death penalty cases go to the DCAs like other cases;
2. Designate a separate Supreme Court to handle these cases similar to what is done in Texas; or
3. Do away with the death penalty.

Perhaps doing one of these things would result in the court being able to take more cases under its discretionary review power. Justice Cantero estimates that when he joined the court six years ago, 90% of the cases in which a DCA certified a question were accepted for review by the Supreme Court. Now, he estimates that less than 50% of the certified question cases are accepted for review.

Justice Cantero also thinks that appellate judges should be paid more than is permitted on the current pay schedule. This keeps qualified people from applying. He also thinks the time is coming where it will be decided that the Justices do not have to live in Tallahassee. Unfortunately, the location of the court keeps many qualified people who live south of Orlando from applying to the Court because the distances are so great it is difficult to get home often.

As to qualifications for those of you who are thinking of someday applying to be a Justice?

Write well, have an intellect for the law, enjoy reading, get along well with others, and be exceptionally able to listen to other people’s opinions. Be able to state your opinion in a reasonable and intellectual way, but be able to lose arguments without taking it personally. At the Supreme Court level, collegiality is paramount because the judges sit en banc one week each month and have weekly court conferences.

You must also have humility—both personally and institutionally. A friend once remarked to him “being a judge magnifies your personality.” So, if you were humble before, you will be a very humble Justice, but if you were arrogant before, you will be a very arrogant Justice. Thus, it is especially important that while you take your work seriously, remain humble so that you do not get carried away by the power of the court.

You must also have a sense of humor. While the cases and the work are serious, if you lose your sense of humor or take yourself too seriously, you will think more of yourself than you should.

Justice Cantero is most looking forward to returning to the camaraderie of his fellow lawyer friends, including those in our Section. As a judge and especially as a Supreme Court Justice, you become very isolated. He cannot wait to get involved again with lawyers, our Section, and various community activities.

Justice Cantero will be joining the firm of White & Case. While his retirement from the court is a loss to the judiciary, the judiciary’s loss is our Section’s gain as Justice Cantero is returning to the Section as Vice-Chair, the position he held when he ascended to the bench. We welcome you back, Justice Cantero, and look forward to getting to spend more time with you again!

Caryn L. Bellus is a shareholder at the law firm of Kubicki Draper where she practices in the areas of civil appeals, civil litigation support and insurance coverage. She is board certified by The Florida Bar in Appellate Practice, a member of the executive council of The Florida Bar’s Appellate Practice Section and is the chair of the section’s Publications’ Committee, and the Chair of the Florida Defense Lawyer’s Amicus Curiae Committee. She can be reached at cb@kubickidraper.com.
The Supreme Court settled on the rationale that contemporary usage had effectively narrowed the “plain meaning” of motor vehicle in the dictionary sense to land-based vehicles: “But in everyday speech ‘vehicle’ calls up the picture of a thing moving on land.” 283 U.S. at 26. Building on that linguistic premise, the Court relied additionally upon the principle of fair play:

It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used.

Id. at 27.

The argument based on unfairness to McBoyle as an individual is tenuous because he clearly knew that he was conspiring to commit and committing (as an aider and abettor) the ancient common law crime of larceny. Larceny is *malum in se*, a “Ten Commandments” crime (Deuteronomy 5:17, “Neither shalt thou steal”). See *Foster v. State*, 596 So. 2d 1099, 1103 & n. 2 (5th DCA 1992) (Cowart, J. dissenting). Every sane person, child or adult, knows that it is wrong to steal. The only colorable point about lack of notice was whether a reasonable person would know that he was committing a crime against the United States *in addition to* the crime(s) against state law. Analogy from other (later) contexts suggests that knowledge of the federal character of the offense is irrelevant, as a mere “jurisdictional” aspect of the statute, not an element for which *mens rea* is required. Cf. *United States v. Feola*, 420 U.S. 671 (1975) (holding that crime of assaulting a federal officer does not require proof that defendant knew victim was a federal officer and that there is “no risk of unfairness” in such rule). The only solid basis for the Court’s decision is the one grounded in the apparent legislative intent underlying “motor vehicle” as gleaned from the statutory context.²

Now, there are several lessons to be drawn from this opinion. The first is that superficially clear statutory language may upon probing prove ambiguous, so that even a phrase as simple and familiar as “motor vehicle” referring to a tangible object rather than an abstraction is subject to interpretation. The second is that in the search for statutory meaning, context trumps “plain meaning.” Or, more precisely, there is no “plain meaning” without context. This latter point helps to make sense out of what is otherwise the dialectical inconclusiveness of the canons of statutory interpretation.³ By way of example, a few familiar dueling maxims are adduced below.

**CANONS OF CONSTRUCTION**

**The Plain Meaning of a Statute Controls – or Not**

The plain meaning of a statute controls “unless this leads to an unreasonable result or a result contrary to legislative intent.” *Cherry v. State*, 959 So. 2d 702, 713 (Fla. 2007); see also *Jackson County Hosp. Corp. v. Aldrich*, 835 So. 2d 318, 329 (Fla. 1st DCA 2002).

“**Shall** is Mandatory, “**May**” is Permissive – or Not

The plain meaning of “may” denotes a permissive term, but if reading “may” as permissive leads to an unreasonable result or one contrary to legislative intent, courts may look to the context in which “may” is used and the legislature’s intent to determine whether “may” should be read as a mandatory term. See *Shands Teaching Hosp. & Clinics, Inc. v. Sidney*, M.D., 936 So. 2d 715, 721 (Fla. 4th DCA 2006).

continued on next page
“And” is Conjunctive or Disjunctive – Or Not

“In its elementary sense the word ‘or’ is a disjunctive particle that marks an alternative, generally corresponding to ‘either,’ as ‘either this or that.’...” Pompano Horse Club v. State, 111 So. 801, 805 (Fla. 1927). But we also have recognized some situations “in which the conjunction ‘or’ is held equivalent in meaning to the copulative conjunction ‘and.’” Id.

The fatal flaw in these paired directives, however earnest they may be, is that there is no built-in mechanism for determining which is which, i.e., whether the putative “rule” applies or its “exception.” One cannot tell without resort to an extrinsic guide or standard whether “shall” is to be read as “may”; whether “and” is to be read as “or.” Therefore, it is impossible for the advocate to know in advance whether the canons of construction will predict decision, as distinguished from explaining it after the fact. And a judge is left at sea without reliance upon something more.

This insight is not original to the author, who learned it in law school under the tutelage of Dean Soia Menteshkoff. It was first published nearly 70 years ago by Karl Llewellyn in a law journal, and later reproduced as Appendix C to his classic work Deciding Appeals: The Common Law Tradition (1960), a book described by former Yale Law School Dean Anthony Kronman as “the best account of common-law adjudication that any American has ever offered ...” The Lost Lawyer 211 (1993).

The Dualistic Nature of Statutory Interpretation

On this dualistic nature of the standard tools of statutory interpretation, Llewellyn was quite blunt about what in terms of Legal Realism could be termed judge-speak: “... the accepted convention still, unhappily, requires discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point.” Llewellyn, supra at 521. In other words, like a variant of Newton’s Third Law of Motion, for every canon there is an equal and opposite canon. The state of the analytical art has not advanced beyond this dialectical paradigm. As Llewellyn said, the canons are “still needed tools of argument” and every lawyer must know them all. Id. But they do not, they cannot, decide the difficult cases.

In this regard, appellate opinions have been on the whole remarkably unreflective about the inherent ambiguity of written language. Oral, in-person communication is infinitely richer in nuance and detail arising from the meaning(s) imparted by the personae and relationship of the speakers, body language, facial expression, proximity, gestures, tone of voice, rhythm, pauses, pacing, inflection, and more. Additionally, although much oral communication relates to simple subjects or tasks, even on complex and sustained presentations like a law school lecture, a speaker receives almost instantaneous signals of comprehension, confusion or doubt from his interlocutors. Thus, even if only one person is speaking, oral communication is reciprocal, an ongoing feedback loop of communication.

A written text, by contrast, is much more unilateral and sequential. “The printed word is presented to us in a linear way, with syntax supreme in conveying the sense of the words in their order. We read privately, mentally listening to the writer’s voice and translating the writer’s thoughts.” Lynne Truss, Eats, Shoots & Leaves 180 (2003). Statutes face the additional expressive challenge of universality, in other words, trying to regulate (or exempt) every foreseeable occurrence or omission of a certain kind or class.

The reticence of judges to be more explicit about the interpretive process and their reliance upon “accepted conventional vocabulary,” Llewellyn, supra at 521, is no doubt traditional. It is also professional. Judges are not linguists, grammarians or semioticians, although they are of necessity arbiters of language. Social and political constraints apply. Black-letter civics, reinforced by contemporary political debate and commentary, emphasizes a rather mechanical separation of powers in which judges merely apply positive law. Judicial lawmaking has fallen, especially since the Warren Court, into political disrepute. Our inheritance of centuries of judge-made common law on the most fundamental matters of life and death is largely forgotten.

A more candid evaluation of the challenge of interpreting statutes would acknowledge that precision in statutory drafting is more aspiration than reality, becoming more difficult as the complexity of the subject under regulation increases. Judges are necessary as translators of the statutory language in each case-specific context as it arises. They mediate the meaning of statutes, as any reader must do. There is no other possibility. How, then, should they proceed?

Finding Meaning Necessitates an Understanding of Context

In truth, all meaning is contextual. The meaning of individual words may, of course, be clear: “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” Perrin v. United States, 444 U.S. 37, 42 (1979). But meaning arises also from syntax, the interrelationship of words living “a communal existence.” In Judge Learned Hand’s phrase, the meaning of each word informing the others and “all in their aggregate taking[ing] their purport from the setting in which they are used.” N.L.R.B. v. Federbush Co., 121 F.2d 954, 957 (2d Cir. 1941). Thus, the overall meaning of the sentences, sections and paragraphs of a statute may with clear words still be ambiguous in application, as amply demonstrated by the National Motor Vehicle Theft Act as applied to McBoyle’s theft of an airplane.

A more recent case closer to home illustrates the point that statutory language may be plain yet ambiguous. In Kasischke v. State, No. SC07-128, 2008 WL 2678449, at *3 (Fla. July 10, 2008), the Florida Supreme Court held S-2 that “[t]he plain language of the statute could be construed in at
least four ways.” The two dissenters wrote separately to argue that the plain meaning of the statute was unambiguous. See id. at *18, *19 (Lewis & Bell, J.J., dissenting). Plainly, the Court as a whole could not find clear meaning from the statutory language prohibiting the possession of pornography “relevant to the offender’s deviant behavior pattern.” Id. at *2. For that reason, the majority resorted to a variety of canons of construction based on the maxim that “if the language of the statute is unclear, then the rules of statutory construction control.” Id. at *6 (quoting Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)).

In such cases presenting clear language but multiple possible interpretations, the dictionary ceases to determine meaning. More sophisticated analysis is required, and context is king. “Language, of course, cannot be interpreted apart from context. The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it.” Smith v. United States, 508 U.S. 223, 229 (1993); accord, Locascio v. Ashcroft, 543 U.S. 1, 9 (2004). “[I]n ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” Household Credit Services, Inc. v. Pfennning, 541 U.S. 232, 239 (2004) (quoting the appellate court).

Situational Meaning: A Practical Variant of the Plain Meaning Rule

In this sense, “plain meaning” is a misnomer and is better called “situational meaning.” Even a stop sign does not mandate a stop if in a particular situation a traffic officer waves cars through; or if a passenger is in cardiac arrest and requires immediate delivery to a hospital emergency room; or the driver is being threatened and pursued by would-be carjackers. If the plain meaning of a statute was really so plain, would not the appellate opinions explaining them be redundant; would not the cases more properly be decided by a per curiam affirmation? Pushing the point a bit further, would not the losing party be liable for sanctions (a fee award) for pursuing a frivolous appeal where the “plain meaning” was, as the court decided, against the loser’s position? Of course, that is far from reality. How else does one explain a five-to-four decision turning on words so apparently simple? “The Court today ignores the plain meaning of the Federal Service Labor-Management Relations Statute....” Nat’l Fed. Of Federal Employees, Local 1309 v. Dept. of Interior, 526 U.S. 86, 101 (1999) (O’Connor, J., dissenting).

The fact is that plain meaning is riddled with exceptions and doubts:

In Church of the Holy Trinity v. United States... this Court conceded that a church’s act of contracting with a prospective rector fell within the plain meaning of a federal labor statute, but nevertheless did not apply the statute to the church: “It is a familiar rule,” the Court pronounced, “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” Zuni Public Schools Dist. No. 89 v. Dept. of Educ., 127 S.Ct. 1534, 1551 (2007) (Scalia, J., dissenting) (citations omitted).

There is, furthermore, a split among jurists in finding statutory meaning. Some reject the idea that a putative plain meaning should foreclose consideration of legislative history or other sources. “Believers in plain meaning might be excused for thinking that the text answers the question. But history may have something to say about what is plain, and here history is not silent.” United States v. Mezzanotto, 513 U.S. 196, 212 (1995) (Souter, J., dissenting).6 “It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.” Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff’d, 326 U.S. 404 (1945). The plain-meaning rule is “rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.” Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) (Holmes, J.). See also United States v. American Trucking Assns., Inc., 310 U.S. 534, 543-544 (1940) (“When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ‘rule of law’ which forbids its use, however clear the words may appear on ‘superficial examination’.” (citations omitted)).

Finding a Sensible Result

Summing up, what the courts have told the bench and bar is, in effect, to read statutes as one reads most texts, following dictionary definitions (except for terms of art), and rules of syntax, grammar, and punctuation where they work to produce a sensible result -- the most plausible interpretation of the language in question. Excessive literalism is to be avoided. Thus courts should “disregard the punctuation, or repunctuate, if need be, to render the true meaning of the statute.” Hammock v. Farmers’ Loan and Trust Co., 105 U.S. 77, 84-85 (1882) (internal quotation marks and citation omitted). Why? “Statutory construction is a holistic endeavor.” United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371 (1988). It must account for a statute’s “object and policy.” United States v. Heirs of Boisdore, 49 U.S. 113, 122 (1849) (quoted in more than a dozen cases).

Often, “plain meaning” will be plain enough using common sense and common understanding. But it is the difficult cases, the ones that justify a reasoned appellate opinion or second tier review, that truly illuminate the unavoidable judicial choices in the decision-making process and the limited utility of the canons of construction. In such cases, the search for plain meaning devolves to a choice among competing options

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to arrive at the most plausible meaning among the several alternatives.

**ADVOCACY**

The advocate’s job, whether at trial or on appeal, is to advance the interpretation of the statute most beneficial to his/her client’s position as the one that is also the most consistent with the common sense of the statute. Plain meaning and other canons can facilitate argument but not decide it conclusively. “Llewellyn stresses that cases cannot be decided merely by identifying the controlling rules of law, the ‘paper’ rules, as he dismissively describes them. The decision of a case always requires a choice among alternatives, hence an exercise of will.” Kronman, *supra* at 196.

Hence:

[T]o make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language.

Llewellyn, *supra* at 521 (emphasis in original). Mutatis mutandis, the task for judges in the search for law and justice in a case of statutory interpretation is ultimately the same, attainable by what Judge Richard Posner calls the exercise of “sound judgment.” Kronman, *supra* at 231.7

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**Endnotes:**

1. It would have had to contradict the Tenth Circuit’s conclusion on that point that planes were of “the general class as an automobile and a motorcycle.” *F.E.2d at 274.

2. The Court’s conclusion is consistent with an earlier decision: “[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.” *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892), quoted in *Public Citizen v. U.S. Dept of Justice*, 491 U.S. 440, 454 (1989).

3. The same principles generally apply to the interpretation of other forms of positive law, be they constitutions, administrative regulations, etc. “The rules used in construing statutes are in general applicable in construing the provisions of a constitution.” *See State ex rel. McKoy v. Keller*, 191 So. 542, 545 (Fla. 1939). “The basic rule requiring that the intent of the framers and adopters be given effect equally controls in construing constitutional provisions. *See State ex rel. Dade County v. Dickinson*, 230 So. 2d 130, 135 [Fla.1969].” “[W]e have consistently held that in order to determine intent we must give effect to the plain meaning of the words actually used in the Constitution” *Coastal Fla. Police Benevolent Ass’n, Inc. v. Williams*, 838 So. 2d 543, 548 (2003). Accord, *City of Tampa v. City Nat. Bank of Florida*, 974 So. 2d 408 (Fla. 2d DCA 2007) (administrative regulation).

4. Compare the simplicity of the crime of murder (the unlawful killing of a human being with malice aforethought) with the multi-part, multi-page, densely cross referenced RICO statute, 18 U.S.C. §§ 1961 et seq., creating criminal and civil liabilities based on violations of both state and federal laws.

5. “Readers attend to the text. They create images and verbal transformations to represent its meaning. Most impressively, they generate meaning as they read by constructing relations between their knowledge, their memories of experience, and the written sentences, paragraphs and passages.” Alberto Manguel, *A History of Reading* 39 (1996) quoting Lewin C. Wittrock, “Reading Comprehension” in Neuropsychological and Cognitive Processes in Reading (Oxford, 1981): Reading is a “generative process that reflects the reader’s disciplined attempt to construct one or meanings within the rules of language.”

6. Justice Souter, in a case without dissents, wryly alluded to this jurisprudential split by beginning a paragraph “For those of us who accept help from legislative history ...” *Sabri v. United States*, 541 U.S. 600, 606 (2004).

7. The editorial assistance of NSU Law Center student Matthew Moore is gratefully acknowledged.

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