



# The Record

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## INSIDE :

Message from the Chair .....2

Discussion with the Supreme Court.....5

Preserving Error: How High Is the Bar?.....10

2010 Palm Beach Bench Bar Conference A Success .....11

Judicial Profiles .....12

Remembering Judge Fletcher.....15

First DCA Expands Access to Electronically Filed Briefs .....18

The First District's Appellate Inn of Court.....19

Tallahassee Outreach Holds 3 CLE Lunches.....20

**Coming up:**  
**CLE:**  
**"Government Lawyers - Practicing Before the Florida Supreme Court"**

**June 10**  
**Florida Supreme Court**  
**Tallahassee, Fla.**  
**See page 22-23.**

## Motions for Rehearing and Rehearing *En Banc*: Tips for the Trade

By Carlos F. Gonzalez and Gerardo J. Rodriguez-Albizu



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Litigation – whether at the appellate or trial court level – is a zero-sum game. There is always a proverbial “winner” and “loser.” Of course, advocates always desire to be on the winning side of the equation. In a final attempt to persuade the appellate court as to the correctness of an advocate’s position, appellate counsel frequently file a motion for rehearing or rehearing *en banc*.<sup>1</sup> Aside from a bruised ego, there are other reasons for filing a rehearing motion. Chief among them may be client relations. It is certainly easier to tell the client “I did everything possible, it just didn’t work out” after counsel has exhausted all remedies afforded by the Rules of Appellate Procedure. This may be especially true when the client is a fruitful source of work (think trial counsel).

For over half a century, appellate courts have complained that the bar abuses

rehearing motion practice. Beginning in *State ex rel. Jaytex Realty Co. v. Green*,<sup>2</sup> Judge Wigginton lamented that “[t]he experience of this court indicates that there is prevalent in the bar an opinion that the filing of a petition for rehearing is a routine step in every case decided by an appellate court.”<sup>3</sup> Expressing his frustration with this practice, Judge Wigginton further commented that it was “not a compliment to the intelligence, the competency or the industry of the court for it to be told in each case which it decides that it has ‘overlooked and failed to consider’ from three to twenty matters which, had they been given proper weight, would have necessitated a different decision.”<sup>4</sup> Apparently Judge Wigginton’s plea to the bar has fallen on deaf ears.<sup>5</sup>

Florida Rule of Appellate Procedure 9.330 provides that a party may file a motion for rehearing within fifteen days of the court’s order. Such a motion, however, must “state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues previously raised in the proceeding.”<sup>6</sup> A cursory review of the law interpreting Rule 9.330 demonstrates that counsel frequently run afoul of the latter requirement.<sup>7</sup>

See “Rehearing” page 5

# Message from the Chair

## 2009-10 Report of the Appellate Practice Section and a Warm Thank You for the Opportunity to Serve This Year

We have been honored to see our Judicial Representative, the Honorable Peggy A. Quince installed as Chief Justice of the Supreme Court of Florida and the installation of many of our members to the appellate judiciary. Returning as Chair Elect of the Section was retiring Supreme Court Justice Raoul G. Cantero, III, who has been extremely active as an officer of the Section and as Liaison to the Supreme Court's Historical Society. Retiring Supreme Court Justice Kenneth Bell joined the Section and serves as our Liaison to the Real Property Section.

As part of our Section's effort to improve and expand the quality of its appellate education for its members, the Section moved in two directions this year: it strengthened its relationship with the American Bar Association Appellate Judges Conference, which covers the ABA Appellate Judges, ABA Council of Appellate Lawyers and ABA Council of Appellate Staff Attorneys, and strengthened the Section's relationship with Florida appellate judges.

As to the first prong, in November 2009, the Section hosted a Joint ABA-APS Welcome Reception and heavily participated in the ABA Appellate Judges Education Institute Summit ("AJEIS"), under the leadership of our Programs Chair, June Hoffman, and our Joint ABA-APS Liaison Co-Chairs, Harvey Sepler and Siobhan Shea. In November, more than 300 appellate judges, staff attorneys, and appellate practitioners from around the country met in Orlando, Florida, for the Summit. The ABA's Appellate Judges' Conference, the Council of Appellate Staff Attorneys, and the

Council of Appellate Lawyers developed the annual four-day summit. Our Fourth District Court of Appeal Judge Martha Warner chaired the ABA Appellate Judges Conference. The Section hosted a Joint "AJEIS-Florida APS Welcome Reception" to 325 attendees, including state and federal appellate judges from Arkansas, Arizona, California, Colorado,



Delaware, the District of Columbia, Florida, Indiana, Kansas, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nebraska, New York, North Carolina, Ohio, Oklahoma, Texas, Virginia, Washington, the Sixth, Seventh, Ninth, and Eleventh Circuit Courts of Appeals, and appellate judges and justices traveling as far as Guam, Trinidad and Tobago. Our Section also had a strong showing at the Summit, both in attendance and in speaker presentations from our Section members, our Florida District Court of Appeal Judges and Florida Supreme Court Justices, including five of Florida's seven Supreme Court justices, and most of Florida's District Court of Appeal judges, including all 12 judges from the Fourth District, 11 of the 14 judges from the Second

District, and more than half of the judges from the First, Third and Fifth Districts.

Building on that outreach momentum, the Section is currently working with the Florida Appellate Judges Conference to advance a similar format to promote greater appellate educational efforts with the Florida appellate judges for the coming 2010-11 year.

Also to that end, the Florida appellate judges have been active in the Section, most notably in the area of continuing appellate legal education. Under the leadership of Henry Gyden, chair of the Appellate Telephone Seminar Series subcommittee, we have hosted Seminars every month this year, and in addition, we have been enormously grateful for the regular participation of our Florida appellate judges in our continuing appellate legal education seminars, which Ceci Berman chairs, and Telephone Seminars this educational year for our Members, including CLEs on Appellate Ethics, Appeals of Post-Judgment Orders, Appeals of Orders Denying the Workers' Compensation Immunity Defense, other Workers Compensation Appeals Issues, Pass-Through Jurisdiction of Florida's Appellate Courts, Premature Appeals and Abandonment of Post-Trial Motions, Federal Appellate Issues, Federal and State Criminal Appeals, Preservation of Error, Better Appellate Brief Writing and Oral Arguments.

Last July, recently retired Florida Supreme Court Justice Raoul G. Cantero, III, spoke on Ethics in Appellate Practice. In August, Judge William

*See "Chair's Message," next page*

## CHAIR'S MESSAGE

*from previous page*

D. Palmer of the Fifth District Court of Appeal, who serves as Chair of the Supreme Court Committee on Alternative Dispute Resolution Rules and Policy, discussed the proposed changes on Appellate Mediation in Florida, as well as providing information on the appellate mediation program in effect in the Fifth District since 2001.

In October 2009, Deputy Chief Judge of Compensation Claims David W. Langham, Judge of Compensation Claims John J. Lazzara, Tallahassee District, Judge of Compensation Claims, Kathryn Pecko, Fort Lauderdale District, Judge of Compensation Claims Thomas W. Sculco, Orlando District, and Judge Charles Kahn and Judge Peter Webster, First District Court of Appeal, spoke in Tampa on The Art of Appellate Advocacy in Workers' Compensation, as well as via a live Webcast.

In February 2010, Chief Judge Paul Hawkes of the First District Court of Appeal spoke on Updates at the First District Court of Appeal. Also in February 2010, Chief Judge Hawkes of the First District spoke on the first of a two-part series on electronic filing in Florida's Courts, with an emphasis on e-filing in the First District Court of Appeal. And in February, our Section produced its Advanced Appellate Practice Certification Review Course for all Section members.

In March, Tom Hall, Clerk of the Florida Supreme Court, spoke on Florida Supreme Court Jurisdiction. Also in March, 2010, we had the participation and instruction from almost the entire Fifth District Court of Appeal, Chief Judge David Monaco, Judge Jay Cohen, Judge Kerry Evander, Judge Alan Lawson, Judge Richard Orfinger, Judge William Palmer, Judge Thomas Sawaya, Retired Judge Robert Pleus, Jr., and the Clerk of the Fifth District Court of Appeal, Hon. Susan, Wright, who taught us about Practice Before the Fifth District Court of Appeal.

In April, Judge Judith Kreeger and Clerk of the Florida Supreme Court, Tom Hall spoke on the second of the two-part e-filing series regarding developments in a state-wide portal on e-filing.

Following that, in May, Judge Judith Kreeger and Clerk of the Florida Supreme Court, Tom Hall, spoke on the second of the two-part e-filing series regarding developments in a state-wide portal on e-filing. We also had the participation of Florida appellate judges from around the State teaching us about The Art of Objecting: A Trial Lawyer's Guide to Preserving Error for Appeal, including, in order of speaker appearance, Chief Judge David Monaco, Fifth District Court of Appeal, Judge Melanie May, Fourth District, Judge Edward LaRose, Second District, Judge Mark Polen, Fourth District, Judge Bradford Thomas, First District, and Judge Alan Lawson, Fifth District. Also in May, Former Supreme Court Justices Charles Wells and Raoul Cantero educated us about Practice Before the Supreme Court and about Discretionary Review Proceedings.

In June, the Florida Supreme Court Justices have approved a revised format to our Annual Discussion with the Florida Supreme Court, and the Justices will be educating us on issues concerning (1) the future of court funding; (2) the status of e-filing for the appellate courts and the court system in general; (3) how can we improve or streamline the process of amending the rules of procedure; (4) recent trends in lawyer discipline; and (5) recent trends in death penalty appeals. We are looking forward to the Annual Discussion with the Supreme Court and the Dessert Reception and Awards at the Annual Meeting of The Florida Bar.

The Appellate Practice Section has energized its CLEs. Under the leadership of CLE Chair, Ceci Berman, and her subcommittee chair, Henry Gyden, the Section is improving its

CLEs and Appellate Telephone Seminars through better use of technology, moving toward more cutting edge topics, in addition to our customary, vital topics on appellate practice. We are reaching out more to the District Courts of Appeal regarding topics and speakers to keep our CLEs interesting, appellate-appropriate and timely.

The Appellate Practice Section has also reinvigorated its Appellate Pro Bono Committee. Under the leadership of Pro Bono Committee Chair, Bryan Gowdy, the Pro Bono Committee has expanded its network of appellate lawyers willing to undertake pro bono representation in all the District Courts and the Supreme Court. These appellate lawyers represent a diverse array of appellate expertise, from across the state. The clerks of all the appellate courts, were contacted to inform them of the availability of these volunteers for pro bono appellate representation, and have increasingly directed more pro bono appeals to our Committee. The Pro Bono Committee is also exploring working with a pro bono clinic at Florida law schools.

The Appellate Practice Section has further renovated our website. Under the leadership of Website Committee Chair, Jonathan Streisfeld, we are successfully expanding ways of providing electronic access to the Section's information and CLE. We successfully completed our second CLE webinar, and our monthly telephonic CLEs are more expansive now and continue to be a way of providing continuing appellate legal education to lawyers and judges throughout the state. To reduce printing costs and make the Guide more accessible and up to date, we are producing the Appellate Practice Guide online, under the Editorship of Rebecca Creed. The Section saves substantial printing expenses by making *The Record*, our primary publication, entirely

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## CHAIR'S MESSAGE

*from previous page*

electronic. *The Record*, along with the Guide, is also online through our website, as is the Section's Pro Se Appellate Handbook, which our volunteers continue to update, and which is translated into Spanish and Creole with grant assistance from the Florida Bar Foundation. We are also exploring production all of our CLE materials electronically, rather than hardcopy printing to save costs and be more eco-friendly.

Consistent with the Section's own cost saving measures, we have also adopted a resolution to restore plans for statewide electronic filings in appeals. To that end, the Section is also working on a proposal with the Chief Judge of each of the five District Courts of Appeal and with local law schools, to increase the use of videoconferencing for meetings and for inexpensive alternatives to hold our live CLEs.

The Appellate Practice Section has called upon its members to take action in the current budget cuts and freezes directed to "elected officials," which predominantly affect our judges, budgets and pensions. In March, the Section, after researching this issue through The Bar and the Office of State Court Administrators (OSCA), circulated contact information of Florida House and Senate Leadership for individual Section members to reach out to our Legislature regarding further reductions to judicial salaries and benefits.

We also voted as a Section to support the Florida Law Related Education's Moot Court program, both with funding and volunteer appellate lawyers to serve as judges. We continue to support that each year. We are working with the Florida High School Moot Court Competition, specifically Annette Boyd-Pitts, and with the Young Lawyers Division to expand and participate with an even more supportive, collaborative role in their respective Moot Court Competitions.

With continued tightened state court budgets, the Section has further

encouraged the continued participation of our judicial representatives and government lawyers. To continue the participation of judges after the courts' budget cuts and freezes on travel, the Section voted to allow a limited stipend for judges to attend The Florida Bar's Annual Meeting. The Section also approved scholarships for government and legal aid attorneys to attend the Advanced Appellate Advocacy CLE and reduced rates for other CLE. The Section also provides further support with attendance by telephone with the use of better technology.

To that end, the Section had its fourth Appellate Practice Section Retreat using a different, more cost-effective format. As a cost-saving measure and to address current economic constraints, the Appellate Practice Section divided our tri-annual retreat into a two part mini-retreat coinciding with our regular meetings, for which Hala Sandridge served as our Retreat Committee Chair. Our goal was to encourage our appellate practitioners and judiciary to engage in vision-building for the future of our Section without the time and costs attendant to a stand-alone retreat. On September 10, 2009, we held Part I of the Mini-Retreat at the midyear meeting in Tampa. It was an incredible success, with a great mix of appellate judges and appellate practitioners. After a delicious buffet working-lunch, three prior Section chairs facilitated a discussion of the hottest issues facing our Section: (1) Section Leadership and Goals; (2) Section Finances; and (3) Technology and E-filing. A lively discussion ensued, from which we obtained detailed feedback from the judiciary and attorneys about these specific issues. On January 21, 2010, Part II of the Mini-Retreat continued at the Bar's Mid-Year meeting in Orlando. We had an amazing turnout of Section members and each attendee received CLE credit. During another Italian working-lunch buffet, we had

three break-out groups to vet these ideas generated from the previous Mini-Retreat Part I. We assigned information gathering tasks to be reported at the June Annual Meeting for further action.

The Section is also reaching out to younger members and engaging in targeted efforts to reinvigorate its membership. The Section has completed and obtained approval for a bylaw change. The change now allows law students and law professors to join the Section's Affiliate Membership. To implement the bylaws amendment, the Section has established liaisons for the Florida Law Schools, as well as liaisons to each of the Sections, which have been established over the course of this year to promote networking and communication among with the other sections. The Section is further evaluating its bylaws to improve clarity in procedures for meeting and voting electronically.

It has been a great honor and wonderful learning experience to serve as Chair of the Appellate Practice Section. Though far too many names to list, I must thank the Section members who have actively participated to make this year, despite significant economic hurdles, an incredible success. I would like to also recognize our Section Liaison, Valerie Yarbrough for all her hard work this year. I have had the benefit of a great team of seasoned appellate lawyers and jurists on my Board: Past Chair Siobhan Shea, Chair-Elect Raoul Cantero, Vice Chair Matt Conigliaro, Secretary Treasurer Jack Reiter and Editor of *The Record*, Alina Alonso. I am especially proud of the commitment the Board has demonstrated to The Bar, to the administration of justice, and to the advancement of appellate practice in our State. I know I leave the Section in very able hands.

Respectfully submitted,

— *Dorothy F. Easley, Chair  
Appellate Practice Section*

## REHEARING

from page 1

Rule 9.331, in turn, governs motions for rehearing *en banc*. Such motions may only be filed when, in counsel's opinion, the case is of "exceptional importance" or reconsideration is "necessary to maintain the uniformity in the court's decisions."<sup>8</sup> The Rule also requires counsel to certify that the grounds for filing a motion for rehearing *en banc* are present.<sup>9</sup> Similar to motions for rehearing under Rule 9.330, the District Courts "perceive an undisciplined practice of some appellate counsel to seek *en banc* review of arguments rejected in panel decisions."<sup>10</sup>

Perhaps in an attempt to curb rehearing motion practice, the District Courts of Appeal have recently moved towards sanctioning counsel for violating Rule 9.330's strictures.<sup>11</sup> Such sanctions include ordering counsel to show cause in writing, awarding attorneys' fees to the opposing party, and even instructing the Clerk of the Court to deliver a copy of the opinion to The Florida Bar.<sup>12</sup>

For example, in *Unifirst Corp. v. City of Jacksonville*, the First District explained that section 57.105, Florida Statutes, could serve as a basis for awarding appellate attorneys' fees

against a party who improvidently moves the court for rehearing.<sup>13</sup> There, the appellant filed a motion for rehearing pursuant to Rule 9.330 in response to the court's *per curiam* opinion.<sup>14</sup> The appellee responded and also filed a motion for fees pursuant to section 57.105. Importantly, the First District noted the appellee's motion for sanctions was improperly filed because the appellee failed to comply with the 21-day safe harbor provision contained in section 57.105(4).<sup>15</sup> The appellee's failure, however, was due to the operation of Rule 9.330 itself,

*continued, next page*

## DISCUSSION WITH THE SUPREME COURT

Newly Revised Format\*

Please join us for the Annual Young Lawyers Division/Appellate Practice Section Robert Orseck Moot Court Competition and Discussion with the Florida Supreme Court.



June 24, 2010 at 2:00 p.m. – 4:30 p.m.  
Boca Raton Resort & Club  
Royal Palm Ballroom V/VI  
501 East Camino Real, Boca Raton, Florida 33432

\* **Revised Format:** The Supreme Court will judge the final round of the competition. Following APS Chair Dorothy F. Easley and YLD President RJ Haughey's brief opening remarks, the Justices will discuss cutting-edge topics important to us all: (1) the future of court funding, (2) the status of e-filing for appellate courts and the court system in general, (3) streamlining the process of amending the rules of procedure, (4) recent trends in lawyer discipline and (5) death penalty appeals issues. The APS Chair-Elect, Former Supreme Court Justice Raoul G. Cantero and Vice-Chair Matthew J. Conigliaro will serve as moderators for audience questions. The winners of the competition will be announced and recognized after the Discussion with the Supreme Court.

Advance questions for the Supreme Court are encouraged to be submitted to: [info\\_eap@bellsouth.net](mailto:info_eap@bellsouth.net).

which requires a response to a motion for rehearing within ten days. The First District nonetheless concluded the court could award attorneys' fees on its own initiative pursuant to section 57.105(1).<sup>16</sup>

Consequently, prior to filing a motion for rehearing, clarification, or rehearing *en banc*, counsel should carefully ensure that a good faith basis for filing the motion is present.

### The Dreaded PCA Opinion – “Affirmed”

Frequently advocates file rehearing motions in response to a *per curiam* affirmance opinion. Learning that the appellate court simply “affirmed” the trial court without further elaboration becomes a difficult pill to swallow after months of poring over appellate records, researching authorities, drafting and revising briefs, and preparing for oral argument.

By issuing a PCA opinion, counsel frequently argue in their rehearing motion, the appellate court has thwarted the party's right to obtain review from the Florida Supreme Court. In *Whipple v. State*,<sup>17</sup> the court addressed this very issue. There, the court noted that a party does not have a “right” to obtain review by the Supreme Court.<sup>18</sup> The Florida constitution merely guarantees a litigant a right of review.<sup>19</sup> “If every litigant had a right of review in the supreme court,” the Second District explained, “the court would be so overwhelmed that it could not possibly focus on the important cases.”<sup>20</sup>

In response to the Supreme Court's overwhelming caseload, the District Courts of Appeal were created in 1957 through an amendment to Article V of the Florida constitution. It was originally intended that the District Courts of Appeal would have final appellate jurisdiction in most cases. This finality, however, eroded as the Supreme Court began looking at trial court records in lieu of district

court holdings to determine conflict jurisdiction. As a result, the Supreme Court's caseload once again became unmanageable.<sup>21</sup> In 1980, the Florida constitution was amended a second time to limit the Supreme Court's jurisdiction to better effectuate the intentions of the original amendment which created the District Courts.<sup>22</sup>

Under the present constitutional scheme, the District Courts are tasked with ensuring that every litigant receives a fair trial through its so-called “error-correcting function.”<sup>23</sup> This enables the Supreme Court to focus its attention on its judicial policy-making function by clarifying the law and promulgating new rules of law. To further this purpose, the District Courts of Appeal are empowered with the ability to certify matters “of great public importance” or decisions which are in “direct conflict” with another District Court.<sup>24</sup>

The District Courts are certainly cognizant of the fact that by issue of a PCA opinion, a party is deprived of further review in the Supreme Court. For this reason the District Courts endeavor to write an opinion whenever there is a colorable argument that review may be obtained before the High Court. Nevertheless, according to the courts, “[t]he fact remains . . . that most of the cases cited by zealous advocates as being in direct conflict with our PCA decisions are simply not close enough to write about.”<sup>25</sup>

The District Courts of Appeal certainly have good reason for discouraging unnecessary rehearing motion practice. According to the Office of the State Courts Administrator's September 2005 report on Judicial Certification Statistics for Criteria Proposed by the Commission on District Court of Appeal Performance and Accountability,<sup>26</sup> in the fiscal year 2004-2005 there were on average of 396.2 cases filed per appellate judge. Florida Rule of Judicial Administration 2.250(a)(2) provides that a decision should be rendered within 180 days of either

oral argument or the submission of the case to the panel without oral argument. Considering the heavy caseload the District Courts of Appeal manage, and the relatively quick turnaround time required by the Rules of Judicial Administration, it is understandable that appellate judges lament the routine practice of counsel filing motions for rehearing.

### Tips For The Trade

The District Courts have uniformly cautioned that a rehearing motion should only be filed if a party believes that a reasonable and objective basis exists for filing such a motion. “It is only those instances in which this analysis leads to an honest conviction that the court did in fact fail to consider (as distinguished from agreeing with) a question of law of fact which, had it been considered, would require a different decision, that a petition for rehearing should be filed.”<sup>27</sup>

An advocate should therefore refrain from filing a rehearing motion that simply asserts the arguments made in a party's merits briefs. In *Unifirst Corp.*, for example, the First District awarded monetary sanctions against the appellant in part for presenting issues initially argued in the appellant's merits brief and at oral argument.<sup>28</sup> Asking a friend or colleague to review a proposed rehearing motion may assist counsel in obtaining an objective assessment of the motion's propriety prior to filing. Counsel should also carefully reflect on the arguments made in the merits briefs and gauge the court's temperature during oral argument in assessing whether a rehearing motion is warranted.<sup>29</sup>

When filing a motion for rehearing *en banc*, the motion should make clear “that the case, rather than an issue in the case, is of exceptional importance.”<sup>30</sup> According to Judge Shepherd, *en banc* review is only appropriate when:

*continued, next page*

(1) the outcome of the case (or its notoriety) is of greater moment or impact within the community rather than its effect upon the law of the state **and** either (a) the case is important beyond the effect it will have on the litigants or (b) will affect the ability of other potential litigants to seek their own remedies, **or** (2) the outcome of the case may reasonably and negatively influence the public's perception of the judiciary's ability to render meaningful justice.<sup>31</sup>

As with motions for rehearing under Rule 9.330, motions for rehearing *en banc* should similarly be viewed from an objective basis to determine whether a Rule 9.331 motion is warranted.

### Concluding Remarks

The District Courts' patience with the bar regarding motions for rehearing and rehearing *en banc* has run thin. Advocates who frequently file such motions as a matter of course do so not only to their detriment, but to the Bar's as well.<sup>32</sup> Rehearing motions, however, are the exception to the norm and should only be filed under very limited circumstances. The possibility of sanctions, or worse, potential disciplinary action from the Florida Bar, awaits counsel who improvidently files a rehearing motion.

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\* \* \*

### Endnotes:

- 1 See, e.g., *Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1101 (Fla. 4th DCA 1993) ("It appears that counsel are utilizing the motion for rehearing and/or clarification as a last resort to persuade this court to change its mind, or to express displeasure with this court's conclusion.")
- 2 105 So. 2d 817 (Fla. 1st DCA 1958).
- 3 *Id.* at 818.
- 4 *Id.*
- 5 See *Amador v. Walker*, 862 So. 2d 729, 733 (Fla. 5th DCA 2003) ("Although much has been written to discourage the use of rehearing motions [to reargue the merits of an unsuccessful appeal], apparently the written word is not penetrating enough to get the point across.") (collecting cases); *Lawyers Title*, 631 So. 2d at 1100 ("Despite all that has been written to discourage the abuse of motion practice, motions for rehearing continue to occupy a singular status of abuse in our court system.") (quoting *Parker v. Baker*, 499 So. 2d 843, 847 (Fla. 2d DCA 1986)).
- 6 Fla. R. App. P. 9.330(a).
- 7 See, e.g., *Unifirst Corp. v. City of Jacksonville, Tax Collector's Office*, No. 1D09-0820, 2010 WL 1076234, at \*1 (Fla. 1st DCA March 25, 2010) (noting that appellant's motion for rehearing advance arguments which "were raised in Appellant's Initial Brief and extensively ad-

dressed during oral argument; rearguing these points was improper"); *Amador*, 862 So. 2d at 733 ("As a final point, we wish to address the procedural propriety of the various motions filed by Plaintiff. The Motion for Rehearing simply re-argues the merits of the court's opinion, in violation of Rule 9.330(a), Florida Rules of Appellate Procedure."); *Lawyers Title Ins. Corp.*, 631 So. 2d at 1100 ("We find nothing in the instant motion for rehearing that appellant did not argue in his briefs of in oral argument."); *Whipple v. State*, 431 So. 2d 1011, 1013 (Fla. 2d DCA 1983) ("From our experience, most motions for rehearing or clarification contain a condensed version of all or some of the points previously argued."); *Sherwood v. State*, 111 So. 2d 96, 97 (Fla. 3d DCA 1959) ("A cursory examination of [the petition for rehearing] show that it is an attempted reargument of the case, largely on new theories, taking up certain of the points which were argued in the appellant's brief and rearguing them with citation of authorities.")

- 8 Fla. R. App. P. 9.331(d).
- 9 Fla. R. App. P. 9.331(d)(2).
- 10 *Univ. of Miami v. Wilson*, 948 So. 2d 774, 787 (Fla. 3d DCA 2006).
- 11 See, e.g., *Unifirst Corp.*, 2010 WL 1076234, at \*2 (awarding attorneys' fees pursuant to section 57.105(1)(b), Florida Statutes, for violating Rule 9.330); *Banderas v. Advance Petroleum, Inc.*, 716 So. 2d 876, 877-78 (Fla. 3d DCA 1998) (ordering counsel to show cause in writing why sanctions should not be imposed and directing that the Clerk of the Court provide a copy of the court's opinion to the Florida Bar); *Lawyers Title*, 631 So. 2d at 1101 (ordering counsel to show cause why monetary sanctions should not be imposed for violating Rule 9.330).
- 12 See *supra* note 10.
- 13 2010 WL 1076234, at \*1.
- 14 *Id.*

*continued, next page*

THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR  
PREPARES AND PUBLISHES THIS JOURNAL

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Unless expressly stated otherwise, The Record's articles reflect only the opinions and ideas of The Record's authors.

## REHEARING

from preceding page

15 *Id.*

16 *Id.* Section 57.105(1) provides that a court may render an award of reasonable attorneys' fees when "the court finds that the losing party or the losing party's attorney knew or should have known that a claim . . . when initially presented to the court . . . (b) Would not be supported by the application of then-existing law to those material facts." Section 57.105(1), Florida Statutes.

17 431 So. 2d 1011 (Fla. 2d DCA 1983).

18 *Id.* at 1013.

19 *Id.*

20 *Id.*

21 *See id.* at 1014 (noting that the Supreme Court's caseload in 1959 had decreased to 555 cases, and by fiscal year 1978-1979 had increased to a staggering 2,676 cases).

22 *See id.*

23 *Id.*

24 *Id.* at 1014-15.

25 *Id.* at 1015.

26 Office of the State Courts Administrator, Judicial Certification Statistics for Criteria Proposed by the Commission on District Court of Appeal Performance and Accountability, September 2005, available at [http://www.flcourts.org/gen\\_public/programs.shtml](http://www.flcourts.org/gen_public/programs.shtml) (last visited April 27, 2010).

27 *Jaytex Realty Co.*, 105 So. 2d at 819.

28 2010 WL 426380, at \*1. According to the court, the appellant "compounded its error by including in its motion new arguments related to an issue already addressed in its briefs and at oral argument" which was, of course, improper. *Id.* at \*2.

29 For example in *Amador v. Walker*, 862 So. 2d 729 (Fla. 5th DCA 2003), the court's decision hinged on the interpretation of a recent Supreme Court decision, *White v. Steak & Ale of Florida, Inc.*, 816 So. 2d 546 (Fla. 2002). The court ultimately affirmed the trial court in a PCA opinion citing *White*. Appellant nonethe-

less filed a motion for rehearing, clarification, and for a written opinion. In a scathing opinion denying the rehearing motion, the court noted that "it should have been obvious" that the court agreed with appellee's interpretation of *White* based on the PCA opinion. The court then ordered the appellant's counsel to show cause in writing why monetary or other sanctions should not be imposed for filing the improvident rehearing motion and further directed the clerk of the court to provide a copy of the opinion to The Florida Bar.

30 *Univ. of Miami*, 948 So. 2d at 788.

31 *Id.* at 791.

32 *See, e.g., Lawyers Title Ins. Corp.*, 631 So. 2d at 1101 (noting that if the "abuse of motion practice preservers, 'the fear might arise that all motions for rehearing would, at least initially, be viewed with skepticism by a busy court'" (quoting *Parker v. Baker*, 499 So. 2d 843, 848 (Fla. 2d DCA 1986)).

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## Building a Better Practice

# The Third District Court of Appeal's 27th Annual Seminar

By Anne C. Sullivan



Appellate practitioners in South Florida can look forward each year to the Third District Court of Appeal's Fall Seminar on Ethics and Professionalism, and each Spring to the Annual Seminar. Each yearly event offers attorneys the opportunity to obtain two hours of CLE credit—including the ever-elusive ethics credit hour—and, in most instances, an hour or two of credit toward appellate practice and criminal appellate certification.

This Spring, the Court considered "Appellate Accidents: What To Do When Things Go Wrong." The event, at which Chief Judge Juan Ramirez, Jr., Judge David M. Gersten, and Judge Richard J. Suarez spoke, was hosted at the Thomas Barkdull Third District Court of Appeal building by the Dade County Bar Association on March 26, 2010. It was co-chaired by Jack R. Reiter of Adorno & Yoss in Miami, and Kimberly J. Kanoff, Staff Attorney to Judge Gersten, and introduced by Stephen P. Befera, President of the Dade County Bar Association.

True to past such seminars at the Third DCA, the event was interactive and attorney attendees were encour-

aged to participate in a give-and-take with the court members. The topic at hand was close to the heart of most attendees, many of whom "owned up" to having had at least one thing in one appeal "go wrong" in the course of their practice. The consensus of all present seemed to be that, in such a situation, the best course of action is to (a) alert the court and (b) alert opposing counsel, and ask for the indulgence of both or either.

For example, practitioners were advised to simply call the court if they were running late for oral argument. By the same token, the court members encouraged attorneys to show restraint and patience toward opposing counsel in such circumstances, and not to insist upon one's right to oral argument on-the-spot when, by waiting 15 minutes, one could accommodate the other side.

Another topic considered was what to do if one has filed the notice of appeal timely, but in the wrong court. Opinions varied on the matter and the comments flew. An additional area of debate concerned when, if ever, to move to recuse a (trial court or appellate)

judge and/or file a petition for writ of prohibition. The consensus seemed to be: very rarely, and only upon irrefutable proof of a total inability on the part of the judge to be impartial.

Following the seminar, attendees were treated to a reception in the hall of the court building, breaking with the tradition of an outdoor reception in the courtyard on account of the prospect of rain. This gave attendees the chance to enjoy the recently-overhauled attorney's lounge area of the court.



A. SULLIVAN

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# Preserving Error: How High Is the Bar?

By Kristin A. Norse



K. NORSE

A recent Florida Supreme Court case may result in more heartburn for trial lawyers. In *Aills v. Boemi*, 29 So. 3d 1105 (Fla. 2010), the Court quashed a Second District decision because it concluded the error asserted to the Second District was not properly preserved by a less-specific objection at trial. The Court's decision is a stark reminder that objections at trial must be precise.

*Aills* involved a medical malpractice claim arising out of a surgery-gone-awry. According to the Second District's decision, prior to trial the plaintiff pleaded and developed three theories of negligence: (1) that the doctor had negligently failed to obtain informed consent; (2) that the doctor had negligently performed the surgical procedures; and (3) that the doctor's design of the surgical procedure was flawed. *Aills v. Boemi*, 990 So. 2d 540, 543 (Fla. 2d DCA 2008). At trial, the plaintiff's expert witnesses testified as to these three theories and did not advance any additional theories of negligence. *See id.* at 543-44. During closing arguments, however, the plaintiff's attorney began to argue that the doctor was also negligent in his postoperative care of the plaintiff. *See id.* at 544-45.

Defense counsel objected to this argument. At a sidebar conference he stated the argument was improper because: "To argue that the postoperative care was negligent and that there was evidence to support that it would have made a difference, there's no basis in the record." *Aills*, 29 So. 3d at 1109. The objection was overruled, the case proceeded to the jury, and the jury returned an \$8,250,000 verdict in favor of the plaintiff. *See id.* at 1107.

In posttrial motions the trial court ordered a remittitur or new trial on damages. *See id.* The plaintiff refused the remittitur and the court issued an order for new trial on damages only. *See id.* Both parties appealed to the Second District.

The Second District reversed. *Aills*, 990 So. 2d at 542. It concluded that the issue of postoperative negligence was neither properly pled nor tried by consent. *See id.* at 546-48. In addition, the court found no expert testimony was presented to support the theory that the doctor was negligent in his postoperative care of the plaintiff. *See id.* at 547-48. As a result, the Second District held the trial court abused its discretion in denying defense counsel's motion for new trial based on the improper closing argument, and remanded for a new trial on both liability and damages. *See id.* at 550.

The plaintiff sought review in the Florida Supreme Court, which exercised discretionary jurisdiction over the case based on express or direct conflict.<sup>1</sup> *Aills*, 29 So. 3d at 1107 n.1. The Supreme Court quashed the Second District's decision. It concluded the error raised on appeal and addressed by the court was not properly preserved by the objection made at trial. *See id.* at 1109-10. Citing the oft-quoted principle that an argument is not preserved for appeal unless it was "the specific contention asserted as a legal ground for the objection, exception, or motion below," the Court held that the defense counsel's objection that there was "no basis in the record" for the challenged argument was not sufficiently specific to inform the court of the concern that postoperative negligence was not pled or tried by consent. *Id.* at 1108-10. "Rather," the court stated, "we find that his objection to the closing remarks was directed solely at the insufficiency of the evidence." *Id.* at 1110. The Su-

preme Court remanded the case to the Second District to consider other arguments raised by each party.

The Supreme Court's opinion in *Aills* applies a strict standard: the argument made on appeal must be precisely tied to the objection made at trial. But the opinion raises some unanswered questions.

First, the Supreme Court does not address the specific objection made by defense counsel at trial. The Second District held that there was "no evidence presented to support the theory of postoperative negligence." *Aills*, 990 So. 2d at 548. Although the Supreme Court interpreted counsel's objection to apply only to the insufficiency of the evidence, the Court never addressed whether the plaintiff in fact presented sufficient evidence to argue this theory to the jury. *Aills*, 29 So. 3d at 1109-10.

Second, neither the Supreme Court nor the Second District address the contents of defense counsel's motion for new trial. As such, it is unclear whether the motion built upon the contemporaneous objection—or whether that would have made any difference in determining whether the issue was properly preserved for appeal.

In that regard, the Florida Supreme Court's decision also omits any discussion of fundamental error or its decision in *Murphy v. International Robotic Systems, Inc.*, 766 So. 2d 1010 (Fla. 2000). In *Murphy*, the Supreme Court held that a new trial could be ordered based on improper but unobjected-to remarks during closing argument if the complaining party established that the argument was (1) improper, (2) harmful, (3) incurable, and (4) so damaging to the fairness of the trial that the public's interest in our system of justice requires a new trial. *Id.* at 1027, 1031. No doubt the *Murphy* standard is a high one, and

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## PRESERVING ERROR

from previous page

the trial court's denial of Boemi's motion for new trial would require an abuse of discretion standard on review. But if plaintiff's counsel was able to successfully argue a theory to the jury that was neither pleaded nor tried by consent, this might implicate the basic fairness of the trial.

In recent years there has been increasing emphasis on preservation of error. In the criminal context, the passing of the Criminal Appeal Reform Act ushered in a renewed adherence to the

rules of preservation. *See, e.g., Maddox v. State*, 760 So. 2d 89 (Fla. 2000). *Aills* suggests this trend applies equally, if not with greater force, in the civil context. If that's true, a trial attorney making an objection must remember: Close may only count in horseshoes and hand grenades.

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### Endnotes:

1 The nature of the conflict is not revealed in the Supreme Court's opinion.

## 2010 Palm Beach Bench Bar Conference A Success

By Rob Hauser



R. HAUSER

The 2010 Palm Beach County Bench Bar Conference was held on February 19, 2010 at the Palm Beach County Convention Center with over 1,000 attendees registered to participate. For appellate lawyers and judges,

the Conference began with a luncheon and a keynote address by Chief Judge Peter Blanc of the 15th Judicial Circuit, followed by two afternoon sessions with specialized content geared to appellate practitioners.

The first appellate session, the "Speed Tables," was an opportunity for registered attorneys to sit face to face with eight of the judges from the Fourth District Court of Appeal. Attendees sat at eight round tables seating eight-to-ten persons, including one appellate judge. Each "Speed Table" discussion lasted for approximately five minutes. After five minutes, the judges rotated to a new table of lawyers. Participating in this event

were Judge W. Matthew Stevenson, Judge Carole Y. Taylor, Judge Fred A. Hazouri, Judge Melanie G. May, Judge Dorian K. Damoorgian, Judge Cory J. Ciklin, Judge Jonathan D. Gerber, and Judge Spencer D. Levine.

The second appellate session featured a panel discussion of various ethics-related hypothetical scenarios with Chief Judge Robert M. Gross and Judge Damoorgian. The discussion was moderated by Section member Jack Aiello of Gunster Yoakley, in West Palm Beach. Among the ethics problems discussed were conflicts of interest, candor to the tribunal and ethical billing practices.

According to the 2010 Bench Bar Conference chairperson, Appellate Practice Section member Robin Bresky, "the 2010 Bench Bar Conference was, by all accounts, a tremendous success. The Bench Bar Conference is a unique opportunity for judges and lawyers to learn from each other, exchange ideas and improve the judicial process in a constructive way. More lawyers attended this year's conference than ever before." Bresky noted that a successful

conference would not be possible without the cooperation of the participating trial and appellate judges. Feedback regarding the event was positive. The Bench Bar conference concluded with a cocktail reception.

The first Bench Bar conference occurred on December 1, 1979, chaired by present-day Justice Barbara J. Pariente, who was in private practice at the time. Since then, the event has consistently grown in attendance. For the last 10 years, the Bench Bar Conference has been held every year and is the Palm Beach County Bar Association's most well-attended event.

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# JUDICIAL PROFILES

## Two New Judges at the First DCA: T. Kent Wetherell, II, and Lori Sellers Rowe

By Wendy S. Loquasto

When the back-to-back retirements of Judges Edwin B. Browning, Jr., and Michael E. Allen were announced in the summer of 2009, DOAH Judge T. Kent Wetherell, II, and Deputy Chief of Staff Lori Sellers Rowe began the nomination process that ended with them being simultaneously appointed by Governor Crist to the First District Court of Appeal, with Judge Wetherell starting work on October 1, 2009, and Judge Rowe making her official start a month later.

The two judges have a lot in common. They were both 39 years old when they were appointed, Judge Rowe being the senior by 21 days. Both obtained their JDs from FSU College of Law -- Judge Wetherell in 1995 and Judge Rowe in 1997. Both also have backgrounds working in the private sector and government. And both really love their new jobs!



### Judge Wetherell

Judge Wetherell is a third-generation Floridian and a native of Daytona Beach. He is the son of T.K. Wetherell,

former FSU President and Speaker of the Florida House. His mother, Peggy Cobb, is a retired teacher who still lives in the Daytona Beach area.

David Powell, the senior partner who worked with Judge Wetherell when he began his career as an associate at Hopping Green Sams & Smith, P.A., in Tallahassee, admitted during the investiture ceremony that he had some initial doubts about Judge Wetherell based upon his “famous” father. He soon learned, however, that Judge Wetherell possessed the intelligence, keen legal insight, ability, work ethic, and problem-solving skills to make him an excellent lawyer, successful in his own right. All those who have worked with him over the years uniformly praise his thoughtful and thorough approach in crafting workable solutions, independent judgment, ability to master complex issues and cases, clarity in writing, and his focus, concentration, and unflappable nerves.

Judge Wetherell received his B.S. in Accounting from FSU, *magna cum laude*, in 1992. He served on Law Review and graduated, with honors, in the top 10 percent of his law school class.

He made the decision to attend law school after an internship with the state Auditor General’s office during his senior year, which made him realize that he did not want to be a CPA. It was during a law school internship with the Florida House Judiciary Committee that Judge Wetherell decided he wanted to practice law in and around government in Tallahassee.

Judge Wetherell’s career includes practicing land use and administrative law for four years in the private

sector from 1995-1999. He answered the call to public service and began work as a Deputy Solicitor General in 1999, where he handled civil appeals in cases involving significant public policy issues. Three years later, his career path brought him to the Division of Administrative Hearings, where, as an Administrative Law Judge, he presided over a vast array of cases around the state from 2002-2009. Judge Wetherell’s resume boasts an impressive list of published articles. It is also filled with thoughtful orders in the cases he judged for DOAH.

Being at the First DCA is, in Judge Wetherell’s words, “a dream job” and “a lot of fun.” He says it is everything he expected and more. He finds many similarities to his work at DOAH, but there are real differences and he is enjoying this new chapter in his career and the challenges it brings.

Judge Wetherell dealt with a wide variety of cases at DOAH, and the First DCA shares that variety, but then adds criminal law, post-conviction work, family law, and workers’ compensation cases—which he had not previously done—to the list. The Judge also sees a similarity in the number of *pro se* appeals at the DCA, and he laments that he does not have the same opportunity to fully explain his reasoning and decisions to the *pro se* parties on appeal, as he did at DOAH to ensure they understood the result.

Working at the First DCA has had its share of surprises, too. After having been immersed in administrative law, he finds it a bit surprising that administrative appeals (excluding unemployment compensation appeals)

*continued, next page*



# JUDICIAL PROFILES

constitute less than 10 percent of the court's case load. Although he was aware that criminal appeals would be the most numerous, the number of post-conviction appeals has been eye-opening. As for the volume of cases, Judge Wetherell was aware of the numbers, but actually seeing and handling all the cases gives him a new understanding of the court's workload.

The decision-making and writing processes also differ. As a DOAH judge, he was the fact-finder and wrote detailed orders explaining those findings and making recommendations to the agencies. As a DCA judge, there is no fact-finding and the decision-making process involves three judges exchanging their ideas and hashing out the result. Consequently, he has had to adjust his reasoning and writing skills to fit this new role as an appellate court judge. He has also had to adjust to the lag time between decision and release to the public. Unlike his DOAH experience, when orders were released immediately, at the DCA the decisions are circulated internally for ten days before release, and he will have moved on and dealt with numerous other cases before the decision in a particular case is released. Another big difference is that he is now writing for publication in So.3d, as opposed to authoring DOAH orders often seen by few other than the parties.

Support staff at the DCA is a much appreciated difference. Judge Wetherell did not have any law clerks at DOAH, so it has been a welcome change for him to have two experienced clerks to assist with research and drafting opinions. He has also been impressed with the attorneys working for the court's central staff and workers' compensation unit.

Judge Wetherell enjoys oral argument. He is somewhat surprised by how few requests are made for oral argument. He noted that in 2009,

there were over 6,600 cases filed, yet only 594 requests for oral argument were made. Judge Wetherell likes the opportunity to discuss the cases with the lawyers and he tends to ask a lot of questions. He encourages all lawyers to ask for oral argument because it is a great opportunity for advocacy and provides extra time to convince the judges of the rightness of your case. He has been very impressed with his colleagues during oral argument, and hopes that lawyers will leave oral argument knowing the judges have read everything and been prepared.

As for his colleagues on the bench, Judge Wetherell has found them to be open and receptive. He enjoys attending the weekly lunches organized by Judge Thomas, which build collegiality. He remarked that it is a very diverse court, both in demographics and experience, noting that there is a good mix of judges with prior experience in the legislative, executive, and judicial branches that make for well-reasoned decisions.

Judge Wetherell's advice to lawyers when filing motions for rehearing *en banc* is to attach an appendix to the motion with any key documents, or at least the panel opinion. Only the three original panel members will be familiar with the case at that stage, and an appendix with the motion will provide useful information to the other 12 judges who were not previously privy to the case. He also encourages the use of an appendix with briefs as a means of putting key documents in the judges' hands.

On the personal side, Judge Wetherell describes himself as a "Type A" personality with few hobbies outside of the law and his family. He enjoys college sports (particularly FSU football) and NASCAR racing. He is married to Edie Wetherell, who is a stay-at-home mom for their two children, 11-year-old Emily, whom he describes as "100 percent girl," and seven-year-old Ty, who is equally "all

boy." His DOAH job required a lot of travel, and the family is enjoying the added time together that his new job has provided.



## Judge Rowe

Judge Rowe is the daughter of John Sellers, who served over 20 years in the Air Force, and Ann Sellers, a stay-at-home mother who supported her husband's military career as it took them around the world, and who made each new post a home for the family. Through this upbringing, Judge Rowe developed the skills to become comfortable in new environments and make new friends, but it also instilled in her a desire to set down roots, which she did 18 years ago when she came to Tallahassee. She deepened her Tallahassee roots when she married Rich Rowe, a contractor in his third-generation, family-owned water well construction company, Rowe Drilling.

Although she had no lawyers in her family, Judge Rowe knew by the time she was 13 years old that law would be her career. She was active in student government in junior high and high school and, in her role as student senator she came to Tallahassee to experience state government. Although her studies in Classical Languages

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# JUDICIAL PROFILES

at Vanderbilt took her away from Tallahassee, she returned to obtain a combination MBA and JD from FSU College of Law in 1997. The commitment to public service was instilled in her through her father's military service and it made government service at the Florida Attorney General's Office a natural career step.

Judge Rowe's service in the AG's Office began in the Antitrust Section, and she became board certified in Antitrust and Trade Regulation in 2004. A former AG colleague, Peter Antonacci, recruited her as an associate at Gray, Harris & Robinson, P.A., where she worked for three years from 2000-2003 doing employment discrimination law from both the plaintiff and defense perspective. But the AG's Office saw her return as Director of Multistate Litigation in 2003, Assistant Deputy in 2004, and then Executive Deputy Attorney General in 2005. This sharp legal mind and dedicated, tireless public servant was someone Charlie Crist wanted on his team when he went from Attorney General to Florida Governor. Judge Rowe answered his call by becoming Deputy Director of the Crist-Kottcamp Transition Team and then Deputy Chief of Staff in the Executive Office of the Governor from 2007 until 2009 and her appointment to the First DCA.

Being a judge at the First DCA is a dream come true for Judge Rowe. "I can't believe I get to wake up every morning and come to work here!" She has always been an avid reader and enjoyed writing, and she is thrilled to have the opportunity to put those skills to new use at the court. "A well-written brief is a joy to read," according to Judge Rowe. She enjoys reading the opinions written by the other judges at the court and considers it a "gift" to have the opportunity to think about the law and its development as part of her job.

When asked about what surprises

her new job has brought her, Judge Rowe's immediate thought is the post-conviction work. She likes it—she did not realize how much she would enjoy doing it. There's a story in every case: a divorce, an injury, economics, lack of education. She sees similarity with her former work as a plaintiff's lawyer in employment discrimination and understands the personal investment lawyers take in those cases.

Judge Rowe's sense of justice includes the belief that it is important to write opinions to inform the parties about the reason for the disposition in their cases. She is surprised, therefore, that there are fewer written opinions than she expected. Experience has already supplied the main reason: many of the court's cases turn on well-settled areas of the law.

Judge Rowe thinks the electronic records system at the court is fabulous. The case summaries prepared by court staff include hyperlinks to the cases and cites to the record are hyperlinked to the electronic record so she can quickly see the recited fact in context. It's a very efficient system and an important tool in enabling her to handle the high volume of cases the court processes.

She has enjoyed the three oral argument panels on which she has served to date. She was lucky to start this process as the junior judge on panels with more experienced, seasoned judges. She admits she may have over-prepared for these oral arguments, but in doing so she learned that her colleagues are always well-prepared. Although she has found the attorneys who have argued to be of high caliber, she advises lawyers to spend the time to be very well prepared for oral argument. Concede error when you can, because that commands credibility and makes the point you are advocating stronger.

Judge Rowe is quietly settling into her new role. Both she and Judge Wetherell recently attended

the New Judges College, which includes segments on legal writing and substantive law. Writing style is a matter of great interest to Judge Rowe. She reads opinions with an eye toward style and appreciates the craft. Although her immediate focus is mastering new areas of the law in which she has not previously worked and getting the substance right, she and her staff discuss matters of writing style. Will she champion Bryan Garner's controversial suggestion to put all record cites and case law citations in footnotes? No, she is not ready to enter that fray, but she thinks his suggestion makes good sense and better reading.

As for her colleagues, Judge Rowe has found them to be generous of their time and assistance whether on the panel or not. She is learning each judge's individual areas of expertise and tapping into them. She is treated with respect even by the most senior of her colleagues. Her mind has been changed through their exchanges, and she's been able to change a few minds herself as they work together in a collaborative body. And she, like Judge Wetherell, is enjoying the weekly judges' lunches, where she gets to know her colleagues on a more personal level.

She also finds the judicial staff to be the excellent: their work is exceptional and they are among the best lawyers with whom she has ever worked.

Judge Rowe's advice to appellate practitioners includes the often-repeated tip to keep your briefs short. Appellate judges and clerks are busy people with hundreds of briefs to read. Briefs need to be concise and well-written. Attorneys should spend the time to edit and hone their product, condense their thoughts, and focus only on the important law and facts. A poorly prepared brief reflects badly on its writer and its cause. Attorneys should think twice about the

*continued, next page*



# JUDICIAL PROFILES

necessity of footnotes; if the material is important, it should be in the brief; if it is just interesting, it should be omitted. Attorneys should also consider whether they are too invested in the work they did on the case at the trial level, which can cause them to include more than is necessary and not focus on the salient facts and arguments, and, ultimately, to produce a brief that detracts from the arguments that can be won on appeal.

On a personal note, Judge Rowe and her husband Rich have two children, Jackson, age 4, and Caroline,

who is eight months old. Judge Rowe was, in fact, nearly full-term in her pregnancy when she interviewed for the First DCA, which made finding that perfect interview suit a challenge. She enjoys running and can often be seen doing so with the stroller. She has been active in the Junior League and was an avid fundraiser for children's causes before her appointment. Judge Rowe has adopted a one-year rule not to jump into new activities as she learns her new job, but she promises to find a way to be an impactful judge who will be effec-

tive for children around the state.



W. LOQUASTO

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## Remembering Judge Fletcher

By Jeffrey S. Bass

Loss is the foundational condition of being an appellate lawyer – it animates all that we do; yet, appellate lawyers – as a rule – do not naturally accept loss well. The Honorable John G. Fletcher (affectionately, “Fletcher”) accomplished many notable things in his career as a lawyer and a judge. He possessed an unrivaled ability to quickly deconstruct complex matters into simple and short incontestable propositions. He was a minimalist in all respects and could make even the most dizzying concepts seem easy and obvious. I was privileged to learn many valuable lessons from Fletcher. On the occasion of his death it seems only appropriate that I begin this remembrance with perhaps the most important life lesson that he taught me – the selfsame lesson that I must now apply – how to make sense of loss.

I saw Fletcher one night before he went on the bench. I was deep in the dyspeptic despair one suffers on the wrong end of an inscrutable *per curiam* denial. I mandered on about what I did wrong or what I could have done differently to perhaps alter



the inexplicable (and unexplained) adverse outcome. Fletcher listened quietly as he always did. There was a stillness and quietness to Fletcher – the type of stillness that characterizes prayer – or, perhaps more appropriately, the eye of a storm. Like a good friend, he let me talk myself tired. He nodded intermittently more to show that he was listening than to indicate that he agreed with what I

was saying. At precisely the right moment, with an exacting dose of asperity, he said: “*Kid, sometimes you lose because you’re wrong. Sometimes you lose because you lose. Different things – don’t forget that.*”

I never did.

Fletcher gave a voice to a large and vital population of litigants who (before Fletcher) frequently struggled to be heard in the complex, high-stakes, politicized arena commonly referred to as “land use.” Historically, skilled land use lawyers exclusively represented the interests of developers. Neighborhood groups, homeowners associations, and individual property owners were hard pressed to find expert land use counsel to represent their interests if and when they sought to challenge new development proposals. All of that changed when Fletcher left the Dade County Attorney’s office to enter private practice. The opening of the Law Offices of John G. Fletcher ushered in a new regime in land use law; the playing field tilted back towards level; neighborhood groups found a lawyer; and,

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# JUDICIAL PROFILES

with that lawyer, they found their voice.

To have a voice is one thing; to have that voice heard is something else; to have that voice make a legal difference in the outcome of a zoning case is what Fletcher accomplished in the landmark decision of *Metropolitan Dade County v. Blumenthal*.<sup>1</sup> The evidentiary value of lay citizen (neighbor) testimony was one of the vital legal issues presented in *Blumenthal*. Fletcher argued that neighbors challenging a zoning application were perfectly qualified to offer testimony about the incompatibility of a land use proposal with the character of their neighborhood. Fletcher further argued that this testimony – when fact based and relevant – can constitute the competent, substantial evidence necessary to support a zoning decision.

I can hear him say, “*Who is more qualified to testify about the character of a neighborhood than the people who live there? Fact-based lay testimony is perfectly permissible in a host of legal contexts – this context is no different.*” The Third District decided *Blumenthal* in Fletcher’s favor; the field continued to tilt towards level; the rule of law announced in *Blumenthal* empowered neighborhood groups to formidably battle on a limited budget against development applications and the professional experts who were retained by developers to present the proposals. Due to the increased ability of neighborhood groups to represent themselves – and be heard in a meaningful way – developers were suddenly incentivized to gather neighborhood support for their projects. Some would argue (including me) that *Blumenthal* is a case that substantially realigned the balance of power between developers and neighborhood groups. As a result of that realignment, people playing on opposite sides in the zoning game started talking in earnest with one

another and development projects – overall – got better.

If you are fortunate enough to live in a neighborhood that is special to you, then you are undoubtedly the beneficiary of Fletcher’s work in the seminal decision of *Machado v. Musgrove*.<sup>2</sup> If you know nothing about land use planning, or zoning, or never realized that there is a difference between these two exercises of municipal power – read *Machado*. It is a crash course that remains current to this day.

*Machado* is a masterstroke decision about smart growth. The decision reined in the otherwise broad zoning powers of local government. In *Machado*, the Third District explained in detail how a comprehensive land use plan operates to limit zoning decisions. The court likened a comprehensive plan to a constitution that mandates orderly growth. Like a constitution, government can take no action inconsistent with it. To ensure consistency (and avoid municipal monkey-business), the court adopted a “strict scrutiny” review standard. It explained that standard this way:

The test in reviewing a challenge to a zoning action on grounds that it is inconsistent with the comprehensive land use plan is whether the zoning authority’s determination that a proposed development conforms to each element and objectives of the land use is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.

Strict scrutiny is not defined in the land use cases which use the phrase but its meaning can be ascertained from the common definition of the separate words. Strict implies rigid exactness, or precision. A thing scrutinized has been subjected to minute investigation. Strict scrutiny is thus the process by which a court

makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review.<sup>3</sup>

The *Machado* decision addressed the issue of “neighborhood studies” and ruled that when and if a neighborhood study is adopted by ordinance, “it becomes an integral element of a land use plan.” Thus, *Machado* provided double-barreled protection to neighborhoods and neighborhood groups: first, the decision resulted in the application of the “strict scrutiny” test to ensure consistency with adopted comprehensive plans; and, second, the court ruled that neighborhood studies – when adopted by ordinance – become a legal part of a comprehensive plan. Those protections endure to this day.

In the twin decisions of *Maturo v. City of Coral Gables*,<sup>4</sup> and *Herrera v. City of Miami*.<sup>5</sup> Fletcher drilled down with precision on the appropriate legal standard that governs the decision to grant a variance from the existing zoning. A variance is a relaxation of the strict terms of a zoning ordinance. Variances permit the use of land in manner not authorized by the existing zoning restrictions for a neighborhood. Technically, a variance should not be granted unless the applicant can show a legal zoning hardship. This technical requirement was frequently lost on local government. All too frequently local governments abused the “variance” power – granting or denying them based on a host of subjective and legally impermissible bases. *Maturo* and *Herrera* set out the exacting standard that a variance seeker must meet. An applicant seeking a variance must show – by competent, substantial evidence – that it is virtually impossible to use the land without a variance.<sup>6</sup>

*continued, next page*



# JUDICIAL PROFILES

Again, these decisions served to rein in zoning decisions and remove from them the element of favoritism that sometimes influenced who received a variance and who did not. A sea change occurred in the wake of these decisions. Developers – as counseled by their lawyers – began to redesign projects to eliminate variances wherever possible.

To read *Jennings v. Dade County*<sup>7</sup> is to understand Fletcher’s creative (some might affectionately say devious) talent to meld his client’s tactical objective together with a winning procedural argument of irresistible appeal. In *Jennings*, Fletcher argued that because zoning authorities exercise “quasi-judicial” powers, ex parte communications with the zoning authorities carried with them the same presumptions of prejudice that would attach to ex parte communications with a judge. “*Wrong there. Just as wrong here.*”

With *Jennings*, Fletcher sought to neutralize the behind-the-scenes impact of lobbyists on the zoning decision-making process. The Third District announced the rule that “[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable.”<sup>8</sup> To put teeth behind the ruling, the court held that “the allegation of prejudice resulting from ex parte contacts with the decision makers in a quasi-judicial proceeding states a cause of action.”<sup>9</sup> The *Jennings* rule lives on to this day. Certain municipalities have attempted to legislate around the force of *Jennings* by adopting ordinances that allow ex parte contacts. Others require a disclosure by all commissioners of all communications that they have received on a particular matter. While there is great debate about the efficacy of *Jennings*, it is my opinion that the fear-factor of a *Jennings* suit has served to modify

municipal behavior in a very positive way by curbing the collective appetite for improper ex parte communications.

The Honorable Gerald K. Wetherington described Fletcher’s animating energy this way: “John Fletcher was conscientiously opposed to the exercise of arbitrary power and was fearless in combating those who would victimize others by its use.” The *Jennings* case puts an exclamation point on that assessment.

Fletcher practiced law in his own unique and frequently discomfiting, minimalist way. Former Miami-Dade County Attorney Robert Ginsburg (a friend, former colleague, and frequent Fletcher adversary) described Fletcher’s appellate advocacy this way, “His briefs were devastatingly short. He would sometimes make his major argument with a single sentence with a citation to a single case.” Frequent Fletcher adversary and close friend Stanley Price summed it up like this: “John was a master at finding a weakness in his opponent’s case. He would then proceed to drive a Hummer through it.”

When Fletcher went onto the bench, he wrote a special concurring opinion in a case that I believe provides great insight into the way he thought (and wrote):

Here I am caught between two jurisprudential philosophies, the first of which would require our following the law as commanded while the second would have us act in defiance of the law based on “common sense.”

It was Florida Justice Glenn Terrell who wrote “When the law and common sense are in conflict, the law must yield.” Apparently, the dissent agrees. I cannot join with Justice Terrell as the law as a body is *uncommon* sense, having been forged, molded, and refined for generations, each adding its hard-

earned lessons to the progress of the law. While I understand one’s desire to function based on one’s own “common sense,” I distrust common sense as it is only too often wrong. The classic example of common sense in error is the belief once held that the sun circles the earth – which made common sense as the earth was “obviously” a stable platform on which one could safely stand and watch the sun rise and set (a healthy belief although wrong as the Inquisition was in full swing and its CEO did not take kindly to contrary views.)

The highly regarded jurist Jeremy Bentham, might agree with the dissent, having quipped “The law is the science of being methodically ignorant of what everybody knows.” Whatever. I chose the law over somebody else’s common sense. Hence, I concur with Judge Shepherd’s opinion.<sup>10</sup>

That’s Fletcher being Fletcher.

Fletcher practiced law in South Miami, Florida. Although Fletcher was a solo practitioner for most of his career – he was almost never solo; his life love, Donna, worked beside him. They were a magical team, each centering and complementing the other. Donna – with displays of virtuosity equal to Fletcher’s legal skills – handled all aspects of running the law office. Their office was close to their home, a luxury that allowed them to eat dinner together with their two children, Becky and Johnny, each night. Even before long and contentious all-night zoning hearings, John would eat dinner at home with his family. One could readily list this as one of his greatest accomplishments.

A unique thing about Fletcher is that I never knew him to hurry or rush anything. He worked at his own pace; he set his own schedule; and, although he was frequently out-

*continued, next page*



# JUDICIAL PROFILES

numbered by the teams of lawyers working against him, nothing seemed to get to him.

I called Fletcher one afternoon at about 3:30 in the afternoon. He couldn't talk because he was on his way out the door to see a movie with Donna.

Me: John, you're going to a movie – it's Wednesday afternoon.

Fletcher: A perfect time for a movie.

Me: How do you find the time to go to a movie during the week?

Fletcher: I make the time. I put it in my calendar, 'take Donna to movie.'

Me: What? You put movies in your calendar?

Fletcher: *Kid, control your calendar or it will control you.*

I was privileged to have Fletcher as a friend and a mentor. If you are reading this, and you have the ability to befriend and mentor a young lawyer, please do. Teach that young lawyer how to practice with skill, with integrity, and how to live a balanced life. It is through such teaching that we bind new generations of lawyers to the rich traditions of our profession. My life is richer because I knew Fletcher. At this moment, it is that richness that countervails the sadness I feel for the loss of a great mentor and a great friend.

*Jeffrey S. Bass is a founding partner in the law firm of Shubin & Bass located in Miami, Florida. The firm handles complicated commercial litigation and appeals with a particular emphasis on land use and municipal law.*

### Endnotes:

1 675 So. 2d 598 (Fla. 3d DCA 1995), reh'g

denied, 680 So. 2d 421 (Fla. 1996).

2 519 So. 2d 629 (Fla. 3d DCA 1987) reh'g denied, 529 So. 2d 694 (Fla. 1988).

3 *Machado*, 519 So. 2d at 631

4 619 So. 2d 455 (Fla. 3d DCA 1993)

5 600 So. 2d 561 (Fla. 3d DCA 1992)

6 *Herrera*, 600 So. 2d at 562-63

7 589 So. 2d 1337 (Fla. 3d DCA 1991), reh'g granted \_\_\_\_\_.

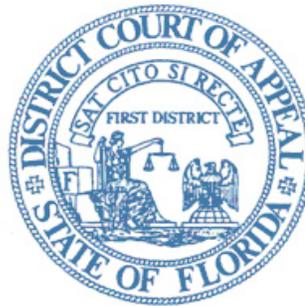
8 589 So. 2d at 1341.

9 *Id.*

10 *Langdon v. State*, 947 So. 2d 460, 461-2 (Fla. 3d DCA 2006)

## Important News!

# *First DCA Expands Access to Electronically Filed Briefs*



**The First District Court of Appeal has requested that the Section notify members of an improvement made to its electronic filing system. In response to the user survey conducted by the First DCA about its e-filing system, registered attorney-users of eDCA are now able to view briefs electronically filed in cases other than their own. This added feature is under the "Briefs in Other Cases" tab on the eDCA menu bar.**

**For those who have yet to register, the website address is <https://edca.1dca.org>.**

# The First District's Appellate Inn of Court

By Rebecca Bowen Creed

Founded in 2008, the First District Appellate American Inn of Court was only the third appellate inn ever to be recognized by the national organization of the American Inns of Court and remains one of just a handful in the country. The First District's Inn allows law students, appellate practitioners and appellate judges alike to learn from one another.

Judge James R. Wolf of the First District Court of Appeal led the way for the Inn's creation. As an active member of a local trial court inn, Judge Wolf saw firsthand its benefits: promotion of the ethical and competent practice of law, fellowship among lawyers and opportunities for mentoring. Judge Wolf set about to bring an inn of court to the First District that reflected all aspects of the court's appellate jurisdiction, from administrative and worker's compensation appeals to civil, criminal and family law appeals. He worked for six months to solicit interest among lawyers who practice before the court and to obtain the approval of the national organization, describing the process as "a lot of footwork." In June 2008, the American Inns of Court, headquartered in Alexandria, Virginia, chartered the First District's Inn.

The Inn consists of 65 members and includes the same categories of active membership found in other inns of court (master, barrister, associate, and pupil). Through an association with Florida State University College of Law, the Inn offers membership to ten law students each year, often students who participate on the law school's moot court teams or who otherwise demonstrate an aptitude for legal research and writing. Other than the law students, whose term as a pupil is limited to one year, members may remain active indefinitely.

Members are divided into five "pupilage" teams, which combine individuals from each of the membership categories. Each team is led by a First District judge. Team leaders have included Judge Wolf, Judge Charles J. Kahn, Jr., Judge Bradford L. Thomas, Judge William A. Van Nortwick, Jr., and Judge Peter D. Webster. Judge Nikki Ann Clark, one of the newest First District judges, will replace Judge Wolf as a team leader this fall. Typically, each team prepares one presentation each year for the entire membership, focusing on different areas of appellate practice. Favorites have included an appellate "Family Feud"-style game show, which revealed responses from appellate judges surveyed throughout the state, and a presentation using videotaped oral arguments for review and critique.

The Inn has had no trouble maintaining its membership as interest among appellate lawyers and law students has grown. The Inn considers applications for membership once each year. Applicants must be recommended by an active member.

The Inn includes appellate lawyers practicing in Jacksonville, Tallahassee and Pensacola and represents the diversity of practice before the Court. Although law students and young lawyers often are the first to acknowledge the Inn's positive impact, Judge Wolf believes that participation in the Inn benefits even experienced appellate practitioners and appellate judges. Thanks to the efforts of Judge Wolf, the First District's Inn affords lawyers yet another opportunity to teach and to learn, enhancing professionalism in appellate practice.



R. BOWEN CREED

For more information about the First District's Inn, or to apply for membership, please contact Judge Wolf or Judge Kahn, the Inn's president-elect, at the First District Court of Appeal.

*Rebecca Bowen Creed is an appellate lawyer with Mills Creed & Gowdy, P.A. She earned her undergraduate degree from the University of Virginia and attended law school at the University of North Carolina at Chapel Hill, where she graduated with honors. She is board certified in appellate practice by The Florida Bar.*

# Tallahassee Outreach Holds 3 CLE Lunches

By Wendy Loquasto, Tallahassee Outreach Subcommittee Chair

On January 29, 2010, Bryan Gowdy, partner with Mills, Creed & Gowdy, P.A., gave Tallahassee appellate attorneys the “inside scoop” on his trip to the United States Supreme Court in *Graham v. Florida*, Case No. 08-7412, which he argued on November 9, 2009.

His nine-page petition for certiorari in that case, which some in the media labeled as “spare,” presented the question of whether life imprisonment without any possibility of parole was a cruel and unusual punishment for a juvenile offender who has not committed a homicide. Although Bryan labored long and hard over the question presented, the real work started when the petition was granted, which resulted in a barrage of phone calls and e-mails from attorneys and law firms in Washington, D.C. and elsewhere, who volunteered their *pro bono* services to help with the appeal.

“No, Dorothy, we’re not in Kansas anymore” is a saying that springs to mind when considering the unique and different nature of U.S. Supreme Court appeals as compared to other appeals. Sifting through the offers to co-counsel and selecting a co-counsel (Morrison Foerster); finding someone to coordinate the *amicus curiae* (15 in all) and handle the media; compiling a long list of 50-state legal research projects and recruiting a staff of law students and attorneys to handle the research; and working with counsel in the companion case, *Sullivan v. Florida*, 08-7621, which was argued immediately after *Graham*, were all tasks Bryan handled in this case. Filing 40 copies of the brief (which was printed by a company selected by the court because of petitioner’s indigent status) and trips to Washington kept him busy; reviewing a moot oral argument of *Graham* conducted for a William & Mary Law School CLE program that was aired on C-SPAN, and participating in three moot courts

himself, readied him for the argument. In his “leisure” time and for “beach reading” on his family vacation, Bryan read up on the Justices and the court with the aim of crafting the most persuasive argument to “win over” potentially critical Justices.

Perhaps only a roomful of appellate lawyers could sit glued in their seats drinking in all the details of Bryan’s experience. Bryan happily answered a myriad of questions, and, in the end, I felt I had vicariously been part of Bryan’s team.

So, great job, Bryan! (Update: On May 17, 2010 the U.S. Supreme Court decided the case in favor of Bryan’s client).

\* \* \*

First District Court of Appeal **Judge Paul M. Hawkes** was the featured speaker at the second Tally Outreach CLE held on February 25, 2010, and entitled “Electronic Filing & What’s New at the First DCA.” If you practice in the First DCA, you know that the court launched its electronic filing system, “eDCA,” on October 26, 2009, and it has been going strong and expanding ever since.

Judge Hawkes explained the iDCA system, which is the court’s internal digital document system that interfaces with the court’s existing case-management system. It allows all the pertinent documents, a case summary, and the record pertaining to a case to be viewed electronically by multiple users at the same time and even remotely when judges are away from their offices. There are already 95,000 documents and over 1.5 million pages loaded into iDCA.

The eDCA system, meanwhile, is the court’s external electronic document system, which includes the eDCA portal through which attorneys file their briefs and petitions. There are over 1,100 registered users of eDCA and many agencies and circuit courts are transmitting electronic

records to the First DCA. Although eDCA is currently limited to briefs and petitions, plans are underway to expand e-filing to motions and other documents filed in cases.

Chief Judge Hawkes proudly pointed out the advantages to electronic filing, which include immediate party and attorney access, ease of dissemination, elimination of the need for a huge paper storage-and-moving infrastructure, and ending the need to “go get the file,” and especially helpful in avoiding instances when the file cannot be located.

The court has found that attorneys are supportive of electronic filing. A recent survey showed 88% of users reported eDCA was easy to use, 76% reported accessing eDCA continually as their cases progress, 94% appreciated the 24 hour-a-day/7 day-a-week access, 70% reported viewing multiple documents on eDCA, and 54% of the users reported using eDCA more than they expected they would. And attorneys reported wanting more: 70% want to move to a system that avoids filing multiple copies of the briefs and petitions, and 74% want immediate notification when a document is filed in one of their cases. In response to comments made by eDCA users in a survey, the First DCA recently upgraded the service to allow registered attorneys to view briefs filed in all cases before the court and to file their docketing statements on-line.

What is the future of electronic filing in Florida? Judge Hawkes met with the Fifth DCA judges in February and they unanimously agreed to move forward with the same system. He met with the other DCAs in March and the response is the same. Look for eDCA to be coming to your DCA soon!

\* \* \*

**Florida Supreme Court Clerk Thomas D. Hall** presented at the last installment of the Tallahassee

*continued, next page*

Outreach Program on March 19, 2010, entitled “Florida Supreme Court Jurisdiction.” Discretionary review and getting your case heard by the court were major topics of discussion, as well as some great tips from Mr. Hall on mistakes commonly made by those who practice at the court.

He presented a goldmine of court statistics concerning discretionary review over the years, which demonstrated that not only are less cases being filed, but also that less cases are being accepted for review. For instance, there were 1073 discretionary review cases filed in 2006 and of those 152, or 14%, were accepted. In 2008, there were only 942 discretionary review cases filed, of which 81, or 8%, were accepted. There were only 810 cases filed in 2009, of which 100, or 12%, were accepted. Why is there a decline in discretionary review cases? Statistics show that the District Courts of Appeal simply are not certifying questions of great public importance as often as they did in the past. In 2009, for example, the case filings included only 27 cases that were certified with questions of great public importance, and only 22 direct-conflict cases were certified. So, what

can a practitioner do in an attempt to get a case heard by the Florida Supreme Court? Quite simply, ask the DCAs in your briefs and motions filed under Florida Rule of Appellate Procedure 9.330 to certify questions and ask them to explain why they are doing so in their opinions.

As for common mistakes made by practitioners, Tom commented that emergency motions ought to include the word “emergency” in their title; that the important date involved, if any, should be included in the first paragraph of the motion; and that all parties should be served by the same method as the court, or at least some method that allows receipt of the document on the same day the court receives it. Motions for extension of time MUST include the opposing counsel’s position, and jurisdictional briefs are limited to ten pages – no enlargements are EVER granted. The court regularly strikes supplemental authority that includes argument, so he stressed the “NO ARGUMENT” aspect of these documents.

Tom also alerted the audience to a new rule placing an affirmative duty on attorneys to inform the clerk of court about confidential information

in court records. *See In re Amendments to Florida Rule of Judicial Administration 2.420*, \_\_ So.3d \_\_, 2010 WL 958075 (Fla. March 18, 2010). There are 19 different categories of confidential information listed in the rule, which mandates: “Any person filing any document containing confidential information shall, at the time of filing, file with the clerk a ‘Notice of Confidential Information within Court Filing’ in order to: (A) indicate that confidential information described in subdivision (d)(1)(B) of this rule is included within the document being filed; (B) identify the provision of subdivision (d)(1)(B) of this rule that applies to the identified information; and (C) identify the precise location of the confidential information within the document being filed.”

Tom closed with a prediction that electronically-filed documents will soon need to be ADA compliant based on a rule currently in the pipeline that will require ADA accessibility for electronic records. He assured us, however, that there is software that easily completes this function, which will relieve practitioners of some worry no doubt.

\* \* \*

The Appellate Practice Section’s Outreach Committee reaches out to appellate attorneys with the aim of recruiting new members for the APS. In Tallahassee—which had no specialty bar or group for appellate lawyers when the outreach first began in 2006—the goal is to provide high-quality CLEs for the area’s appellate attorneys, with particular outreach to the many government lawyers who practice in Tallahassee. Gwendolyn Powell Braswell and Betsy Gallagher co-chair the Outreach Committee.

*Wendy S. Loquasto is the managing partner of the Tallahassee office of Fox & Loquasto, P.A. She is board certified in Appellate Practice and serves on the Executive Council of The Florida Bar Appellate Practice Section and Appel-*

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The Florida Bar Continuing Legal Education Committee,  
the Appellate Practice Section and the Government Lawyer Section present

# Practicing Before the Supreme Court

COURSE CLASSIFICATION: ADVANCED LEVEL

Live Presentation: Thursday, June 10, 2010

The Florida Supreme Court • 500 Duval Street • Tallahassee, FL • 850/488-0125

**Business attire required. No late registration will be allowed due to security procedures. Please plan to arrive promptly at 8:00 a.m.**

Course No. 1034R

This seminar offers a unique opportunity for attorneys to interact with the Justices of the Florida Supreme Court. You will first listen to an Oral Argument followed by a discussion with the arguing attorneys moderated by Justice Charles T. Wells. Register now as space is limited.

Registrants will receive a link to the case via email two days before this seminar date. This case will be the discussion topic. You may print out the case from the link provided or review on your computer prior to the scheduled live presentation, June 10. If The Florida Bar does not have your email address, please contact the Order Entry Department at 850-561-5831, two days prior for the case information.

Due to the nature of this course, there will not be a course book.

8:00 a.m. – 8:30 a.m.

**Registration and Continental Breakfast**

8:30 a.m. – 9:00 a.m.

**Opening Remarks**

*Joseph Mellichamp, Tallahassee – Program Chair*

9:00 a.m. – 10:00 a.m.

**Observation of One Oral Argument**

Courtroom Chamber

10:00 a.m. – 10:20 a.m.

**Discussion of Arguing Attorneys**

Conference Room

*Facilitator, Honorable Charles T. Wells, Tallahassee*

10:20 a.m. – 11:10 a.m.

**Panel on Oral Argument**

*Moderator, Honorable Charles T. Wells, Tallahassee*

*Solicitor General, Scott Makar, Tallahassee*

*Barry S. Richard, Tallahassee*

*Bruce S. Rogow, Fort Lauderdale*

11:10 a.m. – 12:00 p.m.

**Panel Discussion on Briefs in Support and in Opposition to Requests for Discretionary Review**

*Moderator, Bruce S. Rogow, Fort Lauderdale*

*Steven L. Brannock, Tampa*

*Susan Kelsey, Tallahassee*

*Matthew J. Conigliaro, St. Petersburg*

12:00 p.m. – 1:30 p.m.

**Lunch (included in registration)**

**Discussion with the Clerk**

*Moderator, Thomas D. Hall, Clerk, Tallahassee*

1:30 p.m. – 2:00 p.m.

**Discussion with the Court**

*Moderator, Thomas D. Hall, Clerk, Tallahassee*

2:00 p.m. – 2:50 p.m.

**Discussion of Professionalism**

*Justice R. Fred Lewis, Tallahassee*

2:50 p.m. – 3:05 p.m.

**Break**

3:05 p.m. – 3:55 p.m.

**Panel on Merit Briefs**

*Moderator, Paul Morris, Miami*

*Katherine E. Giddings, Tallahassee*

*Christine R. Davis, Tallahassee*

3:55 p.m. – 4:45 p.m.

**Panel on Amicus Briefs**

*Moderator, Solicitor General Scott Makar, Tallahassee*

*Lynn C. Hearn, Tallahassee*

*James A. McKee, Tallahassee*

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**ONE LOCATION: (006) FLORIDA SUPREME COURT BUILDING, TALLAHASSEE (THURSDAY, JUNE 10, 2010)**

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