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INSIDE:

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03/12

What Constitutes "Tolling" Motions?

Does a Motion for Rehearing or Reconsideration of an Interlocutory Order Operate as a "Tolling" Motion for Purposes of the Deadline to File a Notice of Appeal?

By Paul A. Avron

P. AVRON

It is common knowledge that motions seeking a new trial or to amend a judgment pursuant to Federal Rule 59(e), or relief from judgment pursuant to Federal Rule 60(b), are "tolling" motions for purposes of the deadline to file notices of appeal.[1] But what may not be common knowledge is whether motions for rehearing or reconsideration of interlocutory orders constitute tolling motions. This article addresses that issue.

Case law holds that Rule 59(e) and 60(b), Federal Rules of Civil Procedure, apply only to final orders and judgments.[2] The case law is clear that trial courts, including bankruptcy courts, have the "inherent power to reconsider and modify an interlocutory order"[3] prior to entry of final judgment. Motions for rehearing or reconsideration of interlocutory orders are routinely filed pursuant to one of these rules, or without citation to any rule. Labels assigned to a motion for rehearing or reconsideration, if made, are not controlling. With respect to whether relief is sought pursuant to Federal Rule 59 or 60, the Eleventh Circuit Court of Appeals has stated that "[n]omenclature does not control the legal status of a post-trial motion," "[i]nstead, the court will conduct an independent determination of what type of motion was before the district court."[4] Similarly, sometimes trial courts consider motions made pursuant to Rule 59 or 60 as actually asking them to exercise their inherent power to revisit an interlocutory order prior to final judgment.[5]

In at least two Eleventh Circuit cases, the court, in different procedural contexts, held that a motion for rehearing or reconsideration constituted a tolling motion. In *Mike v. Glendale Federal Savings & Loan Association* (*In re Mike*),[6] the Eleventh Circuit held that a motion for rehearing, filed without citation to any rule of procedure, from an order dismissing the appellant/debtor's chapter 13 case tolled the time for the filing of a notice of appeal until the district court adjudicated the motion. Analogizing the motion to one filed under Rule 59, the court rejected the appellee/creditor's argument that the appeal should have been dismissed as untimely because the appellant/debtor filed the notice of appeal outside the then 10-day deadline contemplated by Bankruptcy Rule 8002. In so ruling, the court

See "Tolling Motion" next page

relied on the fact that the appellant/debtor filed a notice of appeal after the bankruptcy court denied the motion for rehearing but before the order was entered on the court's docket.

In *Shin v. Cobb County Board of Education*,[7] the Eleventh Circuit addressed the issue of whether a motion for reconsideration tolled the time to file a Federal Rule 23(f) petition for permission to appeal denial of a request for certification of a class to bring suit over a system used to calculate pay for teachers in Cobb County, Georgia. The court first noted that it considered the motion for reconsideration under Rule 5, Federal Rule of Appellate Procedure, because a Rule 23(f) petition to appeal under Rule 5 is permissive and interlocutory. Next, the court held that where the motion for reconsideration is timely filed the time to file the Rule 23(f) petition does not start to run until the district court adjudicates the motion.

The issue of whether motions for rehearing or reconsideration constitute tolling motions was addressed by District Court Judge Alan Gold in *Colonial Bank v. Freeman* (*In re Pacific Forest Products Corp.*).[8] The issue before Judge Gold was whether he had subject matter jurisdiction over the motion for leave to appeal the bankruptcy court's order granting the trustee/plaintiff's motion for partial summary judgment in a fraudulent transfer case. The defendants/appellants argued that their motions for rehearing were Federal Rule 59(e) motions such that they tolled the time to move for leave to appeal. Judge Gold stated that it did not appear that the motions for rehearing were untimely because bankruptcy courts have the inherent power to revisit interlocutory orders prior to entry of final judgment. The trustee/plaintiff relied on cases holding that Rule 59(e) does not apply to motions for reconsideration for which no immediate appeal may be taken and, therefore, the deadline to file a notice of appeal had expired. Judge Gold rejected those cases as not involving the issue of whether a motion for reconsideration constituted a tolling motion. He explained that "courts routinely characterize motions to rehear/reconsider interlocutory orders as Rule 59(e) motions."[9]

He relied on cases holding that Federal Rule 59(e) does not apply to motions for reconsideration for which no immediate appeal may be taken and, therefore, such motions do not constitute tolling motions on policy grounds. He explained that that analysis was not supported by case law but it lacked credibility from a policy perspective. Specifically, Judge Gold explained that if the trustee/plaintiff's argument were adopted, "then a party would be forced to move for both rehearing and leave to appeal within ten days of entry of an interlocutory order. The party would essentially lose the procedural right to rehearing unless it could somehow compel the lower court to rule before the tenth day after entry of its order."[10] Judge Gold contrasted this with the argument presented by the defendants/appellants, characterizing that argument as "more sensible. It allows a lower court to review its own decision before a party can seek relief from that decision on appeal."[11] Continuing, Judge Gold explained that the position articulated by the defendants/appellants reinforces the proposition "that there is 'no useful purpose in requiring an appeal to be filed where a motion for reconsideration, which may obviate the need for an appeal, has been brought within the time period to take an appeal.'"[12]

In sum, prevailing case law, at least in the Eleventh Circuit, appears to hold that a motion for rehearing or reconsideration of an interlocutory order constitutes a tolling motion for purposes of appeal despite the fact that each of Rule 59(e) and Rule 60(b) is recognized as only applying to final orders or judgments.

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Endnotes:

1 Fed. R. App. P. 4(a)(4)(iv) (to alter or amend a judgment under Rule 59), (a)(4)(v) (for a new trial under Rule 59), and (a)(4)(vi) (for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered); Fed. R. Bankr. P. 8002(b)(2) (to alter or amend the judgment under Bankruptcy Rule 9023, which incorporates Federal Rule of Civil Procedure 59), (b)(3) (for a new trial under Bankruptcy Rule 9023, which incorporates Federal Rule of Civil Procedure 59) and (b)(4) (for relief under Bankruptcy Rule 9024, which incorporates Federal Rule of Civil Procedure 60, if the motion is filed no later than 14 days after the entry of judgment).

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2 *See, e.g., Gallien v. Washington Mut. Home Loans, Inc.,* 294 Fed. App'x 882, 2008 WL 4410441, *1 (5th Cir. Sept. 30, 2008) ("Rule 60 does not apply to interlocutory orders…."); Nieves-Luciano v. Hernandez-Torres, 397 F.3d 1, 4 (1st Cir. 2005) ("Rule 59(e) does not apply to motions for reconsideration of interlocutory orders….").

3 *Bon Air Hotel, Inc. v. Time, Inc.,* 426 F.2d 858, 862 (5th Cir. 1970) ("because the order was interlocutory, 'the [trial] court at any time before final decree (could) modify or rescind it.'") (quoting *John Simmons Co. v. Grier Brothers Co.,* 258 U.S. 82, 88 (1922)); *Coty, Inc. v. C Lenu, Inc.*, Case No. 10-21812-CIV, 2011 WL 573837, *2 (S.D. Fla. Feb. 15, 2011) ("A district court, in its discretion, can modify or vacate a non-final order at any point prior to the entry of a final judgment.") (citing Fed. R. Civ. P. 54(b)); *Bankhead v. WRP Enterprises, Inc.*, Case No. 6:07- cv-Orl-19GJK, 2009 WL 4372845, *3 (M.D. Fla. Sept. 24, 2008) ("The Court has the inherent power to reconsider interlocutory orders… before entry of a final judgment.") (citations omitted); *Colonial Bank v. Freeman* (*In re Pacific Forest Products Corp.*), 335 B.R. 910, 916 (S.D. Fla. 2005) ("It is well-established that it is within a bankruptcy judge's discretion to reconsider any interlocutory order made prior to the entry of final judgment.") (citations omitted).

4 *Livernois v. Medical Disposables, Inc.,* 837 F.2d 1018, 1020 (11th Cir. 1988); *see also United States v. Eastern Air Lines, Inc.,* 792 F.2d 1560, 1562 (11th Cir. 1986) (in holding that a notice of appeal filed 60 days after a summary judgment order was not untimely the court rejected the argument that the motion to reconsider did not act as a tolling motion because it was not made pursuant to Rule 59).

5 *See, e.g., Delta Health Group. Inc. v. United States Dept. of Health and Human Servcs.*,459 F. Supp. 2d 1207, 1228 (N.D. Fla. 2006) ("Thus, though presented as a Rule 60(b) motion, Defendants are really asking that the Court exercise its 'inherent power' to revise the Order….").

6 796 F.2d 382 (11th Cir. 1986).

7 248 F.3d 1061 (11th Cir. 2001).

8 335 B.R. 910 (S.D. Fla. 2005).

9 Id. at 917 (citations omitted).

10 *Id.* at 918.

11 *Id.*

12 *Id. Accord Bigelow v. Stoltenberg* (*In re Weston*), 41 F.3d 493, 495 (9th Cir. 1994) (same).

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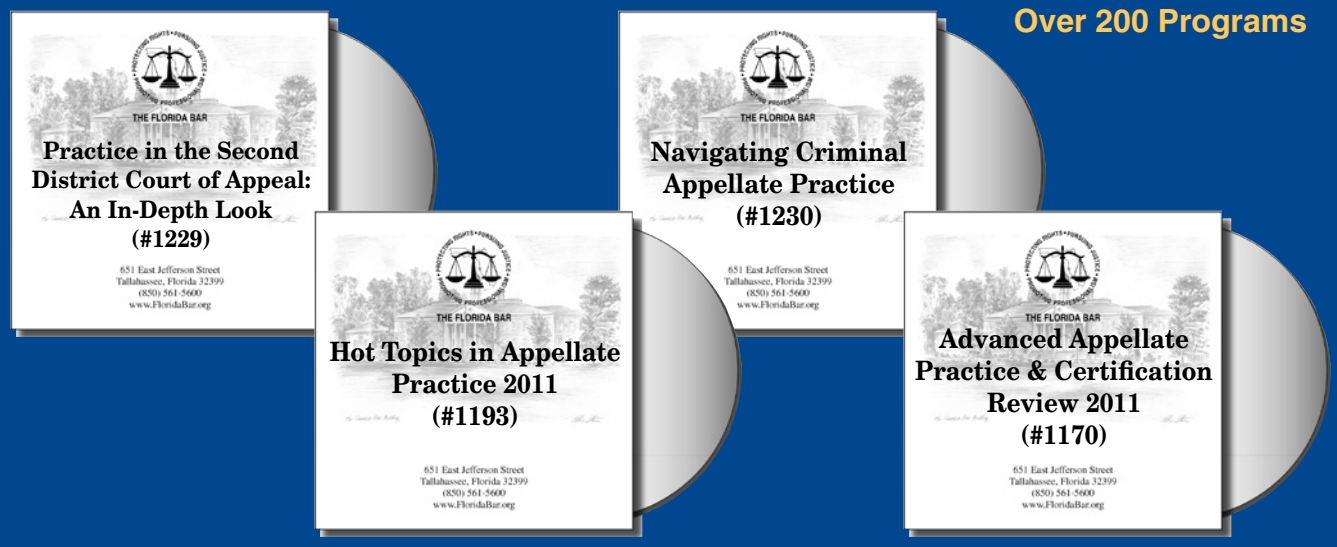

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Chair's Message:

Consider This Your Invitation

By Matthew J. Conigliaro

I remember my first Executive Council meeting. I could not find a familiar face in the room, and after the meeting began and introductions were underway, I quickly convinced myself that I was not supposed to be seated at the table where I sat. I tried not to worry about it—one of the benefits of being unknown is that your gaffes go largely unnoticed.

A letter the Section's leadership sent to one of my mentors prompted me to attend. It said the Section's original leadership was ready to pass the torch to a new generation, and the Section was looking for new torchbearers. I had spent my first years in law as a judicial law clerk and then an associate with a large firm. Both situations offered priceless learning opportunities—behind the scenes. I was ready to start building my own identity. I just had to overcome a few obstacles, starting with the troubling reality that no one knew me or anything about me.

So there I sat. The meeting involved issues that seemed familiar to everyone but me. Several folks said hello, and I appreciated their kindness, but I mostly watched quietly, just as I had done when I attended committee meetings earlier that morning. That happens to be my style. When I am new somewhere, I prefer to sit quietly and observe. In time, I try to find my place.

Attending Executive Council meetings informed me about the Section's business and the issues of the day, but my route to meaningful Section involvement came through committee work. I made the CLE committee my primary focus but took on other projects as well. Looking back, that involvement led to an invitation to join the Executive Council, and then to chair the CLE committee, and then to become an officer. Today, I am privileged to serve as Chair of the Section, and I am honored to work with so many exceptional appellate attorneys and judges.

I still recall how it felt to be new to it all, and I smile when I see new folks arrive at meetings wearing the look I once wore. For them, and for others considering becoming active in the Section, consider this your invitation to join us, along with some information about how the Section operates.

The Section is led by its Executive Council, which consists of four officers, the immediate past chair, seven judicial representatives, the editor of *The Record*, former chairs who agree to participate, and 15 at-large members who must include attorneys from all five appellate districts. The council meets at least three times each bar year. The bar year begins July 1, and the meetings generally occur in September, January, and June, with the last meeting also serving as the Section's annual meeting and coinciding with the bar's annual meeting.

The Section's work is primarily divided among committees, with the largest two being Publications and CLE. The Pro Bono, Outreach, Programs, Pro Se Handbook, Website, and the highly ambitious Public Education & Legislation Committees also offer tremendous opportunities. The committee chairs are listed on the Section's web site, and joining is as simple as completing the online committee preference form or contacting a committee chair. When the Executive Council meets in person, many committee meetings are held earlier in the day, usually during a 90-minute window that gives everyone a chance to explore committee options. At the Executive Council meetings, the table is indeed intended for council members, but other seating is always available, and Section members are encouraged to attend and participate.

Anyone who enjoys appellate practice can find something valuable in the Section's work. The Section is filled with good, hard-working, and intelligent people who care about the appellate system and the many constituencies it serves. As a member, I met colleagues from across the state and built lasting relationships. As a leader, I have had the fortune of following an extraordinary set of predecessors, and I see outstanding leadership in our future.

Consider becoming active, or more active, in the Section. Whether you are a recent graduate or a seasoned practitioner expanding your horizons, the Appellate Practice Section will welcome you. Your insights and suggestions will be appreciated, and your efforts will be recognized.

Getting started is easy. Contact me or any officer or committee chair at any time, or just come to Gaylord Palms in Orlando on June 21, when a full day of appellate-related events will include the Section's committee meetings, its Executive Council and annual meeting, the Chair's reception, and the Section's famous nightcap: its dessert reception.

If I spot you sitting there quietly, expect me to smile and welcome you. I have seen a glimpse of what your future may hold.

The 2011 Successful Appellate Advocacy Workshop: An Attendee's Perspective

By Sarah Lahlou-Amine

As an attendee of the 2011 Successful Appellate Advocacy Workshop at the Stetson University College of Law, I am delighted to have the opportunity to share my valuable experience. In addition to hosting excellent speakers with impressive expertise, this workshop, the only one of its kind, allowed attendees the rare opportunity to have their writing and oral advocacy skills critiqued by appellate judges and experienced appellate practitioners.

In preparing for the workshop, all attendees received a record on appeal, which was taken from a case pending before the Florida Supreme Court (attendees were instructed not to read the briefs or view the oral argument on the Court's website). Several weeks before the workshop began, attendees were asked to submit a mock initial brief to be reviewed and critiqued by appellate judges and practitioners. Attendees were also asked to be ready to present two mock oral arguments during the workshop, one for the appellant and one for the appellee.

The workshop began with a warm welcome from Stetson's Interim Dean, Professor Royal C. Gardner. The first topic of discussion was appellate brief writing. The lively discussion prepared attendees for a breakout session on the same topic. Two faculty members joined each small group in the breakout session. The small group setting provided an ideal environment for an exchange of ideas and an open discussion about effective appellate brief writing. After this discussion, the faculty members provided individualized feedback based on a thorough and thoughtful review of the attendees' mock briefs.

The second part of the workshop began with a seminar about appellate oral arguments. This seminar finished with a comedic skit featuring judges and practitioners entitled, How NOT to Do Oral Arguments. While all of the stars of this skit showcased impressive acting skills, the Honorable Jacqueline R. Griffin's portrayal of Petunia Pickle, a rambunctious client who pulled out all the comedic stops, was particularly unforgettable.

Attendees first presented a short oral argument to the faculty members with whom they worked during the brief-writing phase of the workshop. These oral arguments were recorded to allow attendees the opportunity to review their performance that evening before presenting their full-length oral arguments for the opposing side the following day. The faculty members provided feedback to help attendees prepare for their main oral argument presentations.

The main oral argument was conducted much like a real appellate oral argument. After the attendees finished their presentations, the faculty members who served as their judges provided more feedback on each attendee's performance.

In addition to receiving valuable feedback from appellate judges and experienced practitioners, attendees benefitted from a great networking environment. Daily lunches and a cocktail reception provided ideal opportunities for attendees to get to know the faculty members and each other.

The Appellate Practice Section of The Florida Bar is fortunate to have such skilled and experienced appellate judges and practitioners willing to serve as educators for this workshop. The workshop's success is a credit to the outstanding faculty, to Steve Brannock and Celene Humphries of Brannock and Humphries in Tampa who organized and coordinated a seamless event, and to Stetson University College of Law. Planning for the next workshop is underway, and I highly encourage anyone interested to attend.

Sarah Lahou-Amine *is an associate in the Tampa Office of Fowler White Boggs P.A. She practices in all areas of state and federal appellate litigation and insurance coverage litigation. In addition to* The Record, *Ms. Lahou-Amine has published articles in* The Florida Bar Journal, Trial Advocate Quarterly, *the* Stetson Law Review, *and* HCBA Lawyer. *She stays involved in her local community through pro bono work, volunteering, and serving as a board member for SERVE-Volunteers in Education.*

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Historical Society and Dade County Bar Honor Third District Court of Appeal Judge David M. Gersten

By Gabrielle Raemy Charest


Judge David M. Gersten

Undeterred by the thunderstorms, a standing-room-only crowd attended the farewell ceremony honoring Judge David M. Gersten. The Third District Court of Appeal and the Dade County Bar Association hosted the ceremony on Thursday, June 30, 2011. When he retired from the Court, Judge Gersten was the most senior judge on the Third District Court of Appeal. After thirty-one years serving the people of the State of Florida as a judge, including serving as a member of the Third District Court of Appeal for over twenty-two years, Judge Gersten joined private practice to chair the appellate group of Miami law firm Bilzin Sumberg Baena Price & Axelrod, LLP. Judge Gersten's students, colleagues, family, friends, and the Miami legal community came out to recognize and thank Judge Gersten.

The Third District Court of Appeal Chief Judge Juan Ramirez, Jr., welcomed the audience and remarked on the privilege it had been to serve with Judge Gersten for over eleven years. Judge Ramirez praised Judge Gersten's collegiality and enthusiasm.

The Third District Court of Appeal Historical Society President, Lucinda A. Hoffman, opened the ceremony and thanked the speakers. Then, she presented Judge Gersten with an antique map of the State of Florida in honor of his retirement from the Third District Court of Appeal Historical Society, the map was to thank the Judge for his years of service.

The Dade County Bar Association President, Andrea S. Hartley, spoke next. She praised Judge Gersten as a true public servant. On behalf of the Dade County Bar Association, Ms. Hartley gifted the Judge with a plaque from the Appellate Court Committee of the Dade County Bar Association.

The first of Judge Gersten's chosen speakers was his senior law clerk, Kimberly J. Kanoff. In recognition of her Judge, Ms. Kanoff narrated a slideshow that depicted Judge Gersten's active involvement in the community, the court, his family, as well as his varied interests, from his rock band to his cars and scouting.

From the Miami-Dade County Court, Domestic Violence Division, Judge Rosa C. Figarola lauded Judge Gersten for his role as coach to the St. Thomas University School of Law's Mock Trial Team, in addition to his storied career as a trial judge and appellate judge. Also a coach for St. Thomas's mock trial team, Judge Figarola spoke with high praise of Judge Gersten's role as a mentor to the students at St. Thomas, and presented him with a gift on behalf of the students of St. Thomas.

Judge Gersten coached four St. Thomas students to win the national championship at the ABA Mock Trial Team. These students, Lincoln Atten, Bryan Paschal, Joey McCall and Bill McHugh, introduced as the "Four Horsemen," were the undeniable highlight of the ceremony as they each described how Judge Gersten impacted their lives and provided individual guidance that led to their personal and professional development in law school. The incoming coach of the trial team stated that Judge Gersten met the definition of mentor: "trusted friend, counselor, and teacher."

Senior Third District Court of Appeal Judge Alan R. Schwartz (1978-2004) spoke of his lengthy relationship with Judge Gersten. He called Judge Gersten a "thoroughly decent person" and recounted Judge Gersten's lengthy career as a trial judge and appellate judge. Then, Judge Schwartz spun in a humorous fashion the story of Judge Gersten's career to highlight the young age at which Judge Gersten was elected to the bench, bringing home the immense energy Judge Gersten brought to the Court. In reality, Judge Gersten was 29 years old when elected as a Dade County Judge. Two years later, he was elected to the Circuit Court. After seven years as a Circuit Court Judge, conducting more than 400 jury trials, Judge Gersten was appointed to the Third District Court of Appeal at the age of 37.

Judge Gersten's life-long friend, Christopher Gallen, informed the crowd that even from childhood, he knew that Judge Gersten would succeed. He recounted stories of their shared childhood in Miami Beach, and praised the "redwood of a man" into which Judge Gersten had grown.

In response to this outpouring of praise, Judge Gersten thanked the crowd, the speakers, and his many

"families," including his home family, his court family, his St. Thomas family, and all those he had the good fortune to encounter during his career. He praised and thanked all the judges, present and past, responsible for administering the framework of the law. The Judge expressed his "greatest faith in the judicial branch." With that, he looked ahead to his exciting new role in the legal community and committed himself to adding to its fabric. He removed his robe and embraced his family and friends.

Chief Judge-Elect of the Third District Court of Appeal, Judge Linda Ann Wells, concluded the ceremony. She thanked Judge Gersten for his long and loyal service to the Court.

Judge Gersten attended the University of Florida where he earned both his undergraduate degree in 1973 and his law degree in 1975. He was admitted to the Florida Bar in 1975, the United States District Court, Southern District of Florida in 1976, and the Colorado Bar in 1989. From 1975 until his election to the bench in 1980, Judge Gersten worked in private practice. He was elected as a County Court Judge in 1980, a Circuit Court Judge in 1982, and re-elected to the Circuit Court in 1988. In 1989, Governor Bob Martinez appointed Judge Gersten to the Third District Court of Appeal, where he was retained by the voters in 1990, 1996, 2002, and 2008. By unanimous vote of the Judges of the Court, Judge Gersten was elected as Chief Judge and served for a two-year term, from July 1, 2007, until June 30, 2009.

Gabrielle Raemy Charest *is an associate at Hall, Lamb and Hall, P.A. Previously, she served as a staff attorney to Judge Thomas D. Sawaya at Florida's Fifth District Court of Appeal. She has also served as an Assistant State Attorney in the Eleventh Judicial Circuit. She earned her J.D. from Tulane University Law School, and her B.A., magna cum laude, from Albion College.*

A Warm Welcome for Judge Stephanie W. Ray and Judge Ronald V. Swanson to Florida's First District Court of Appeal

By Dawn M. McMahon

JUDGE RAY

JUDGE SWANSON

On June 17, 2011, Governor Rick Scott appointed Judges Stephanie W. Ray and Ronald V. Swanson to Florida's busiest state appellate court, the First District Court of Appeal.

Judge Ray graduated with honors from Florida State University College of Law in 1995. She began her legal career as an associate attorney at Ausley & McMullen, P.A. in Tallahassee, Florida where she gained experience in litigating complex commercial cases under the guidance of Senior Partner Dubose Ausley. In 2000, she accepted a position as the Associate/Assistant Dean at Florida State University College of Law. For the next eight years she worked with Dean Donald J. Weidner who taught her the leadership skills and work ethic that have provided the basis for her great professionalism and personal integrity today. These two special mentors, Duby Ausley and Don Weidner, were invited to speak at Judge Ray's recent investiture.

Since 2008, Judge Ray has been the Chair of the Public Employee Relations Commission, a panel that adjudicates labor and employment disputes between the government and its workers. Her decisions as Chair of PERC gave her valuable, deliberative experience in the quasi-judicial setting, and appeals before the Commission were conducted before a three person panel, much like the collaborative process on the district court.

In addition to her commitment to her career, Judge Ray believes in the importance of giving back to the community. Judge Ray served on the Second Circuit Judicial Nominating Commission from 2002-06 and served as Chair for the Commission from 2005-2006. She actively participates in The Florida Bar Standing Committee on Professionalism, serving as Chair, 2010 to present; and Vice Chair 2008-10; The Florida Bar Labor & Employment Law Section, Executive Council; The Florida Supreme Court Commission on Professionalism; The Florida Bar Appellate Practice Section, Executive Council; The Florida Bar Judicial Nominating Procedures Committee; William H. Stafford Chapter of the American Inns of Court, as Master of the Bench, and before that, Secretary; Tallahassee Women's Lawyers, Board of Directors, Director of Mentoring; Justice Teaching Volunteer for Florida State University Schools; Florida State University College of Law Alumni Association Board of Directors, President-Elect, and before that, Secretary; and the Tallahassee Bar Association.

For fun, Judge Ray enjoys spending time with her husband and two young children. Demonstrating her self-described, "goal oriented" personality in both her professional and personal lives, she somehow finds the time and energy to train for marathons. Judge Ray is an avid runner, and she has completed numerous half marathons and one marathon in the past five years.

Judge Ray's advice to attorneys arguing before her is to listen closely to the judges' questions. "There is a reason behind every question asked by the judges during OA. We come to OA prepared and knowledgeable about the record and legal issues in the case. So if we ask you a question, pay attention to what we are asking you and be sure you answer the question directly." "If you do not know the answer to a question we ask, then just say 'I don't know.'"

Judge Swanson, meanwhile, is the "last guy who thought he would end up as a judge." He attended Florida State University as a young seventeen year old, married upon graduation and began a teaching career alongside of his wife at the Florida School for the Blind. Deciding he wanted to further his education in the study of the law, Judge Swanson obtained his juris doctor from the University of Florida in 1973 and law school "scared him straight." He graduated from law school toward the end of the Vietnam War and felt a strong allegiance to his country, so he joined the United States Navy as a prosecutor.

Judge Swanson served in the United States Navy's Judge Advocate General's Corps for the next twenty years, retiring as a Navy Captain in 1995. Judge Swanson served in numerous active duty assignments, including on ships of the Atlantic Fleet; Special Counsel to the Vice Chief of Naval Operations during the First Gulf War; a 1988 assignment as counsel in the Persian Gulf; duty at Naval Station, Guantanamo Bay, Cuba; and Commanding Officer, Naval Legal Service Office, Central Naval Air Station, Pensacola, Florida.

In his "spare time," Judge Swanson attended post-graduate school at George Washington University where he obtained his Masters in Law and graduated with the highest honors in 1982. From 1982-85, Judge Swanson served as a Military Judge for the Navy and Marine Corps Trial Judiciary. He wryly recalls his first trial as a Military Judge. As a new judge, he felt the need to share his legal knowledge with everyone in the courtroom. When the trial was over, his mentor, Captain Maitland Freed, imparted unforgettable words of wisdom to Judge Swanson: "Ron, you don't get paid by the word. They just want a decision."

Judge Swanson received many military awards and decorations during his time of service, including the Legion of Merit and multiple awards for the Meritorious Service Medal, the Navy Commendation Medal, Navy Achievement Medal, Overseas Service and National Defense Medal.

After his retirement from the United States Navy, Judge Swanson joined the State Attorney's Office in Santa Rosa County, Florida. Appointed to the County Court bench in 2000 by then Governor Jeb Bush, Judge Swanson continued his role in the judiciary in the "people's court." Judge Swanson enjoyed his time on the County Court bench. He learned early in his career that sometimes the smaller issues are the ones that are most important to the litigants. "And if it is an important issue to the litigants then it must be important to you [as a judge]."

In 2003, former Governor Jeb Bush appointed Judge Swanson to the First Judicial Circuit Court where he remained on the bench for the next eight years. As a Circuit Court judge, Judge Swanson strove to remember his roots and incorporate the values of his working class family into his courtroom on a daily basis.

While Judge Swanson has certainly enjoyed his fourteen years of experience on the bench as a trial judge, he looks forward to working as a judge at the appellate level. "As a trial judge you often times have to act as a 'gun fighter' with less than thirty seconds to decide an issue. In the appellate court you have time to research, review, and reflect upon the decision you are making. You have more time to get it right."

As a judge, Ronald Swanson always tries to render fair decisions in a timely manner, based upon what he believes the law to be at the time. His advice to attorneys practicing before him is to "be honest" with the judge and with the court. "There is no one case that is worth the loss of your reputation. The court has to believe that you are advocating with professionalism and integrity."

On behalf of all practicing attorneys in the state of Florida, we welcome Judge Ray and Judge Swanson to the First District Court of Appeal.


D. MCMAHON

Dawn McMahon *is an Associate Attorney at Williams, Leininger & Cosby, P.A., a full-service civil litigation law firm that focuses on trial and appellate matters throughout Florida. Ms. McMahon focuses her practice on the defense of clients in the insurance industry and the governmental sector including employment and civil right claims. She is a member of the Appellate Practice and Young Lawyers Divisions of the Florida Bar.*

Chief Judge Linda Ann Wells Becomes the First Female Chief Judge of the Third District Court of Appeal

By Kristen A. Tajak, Esq.

CHIEFJUDGE WELLS

On July 1, 2011, the Third District Court of Appeal passed the gavel to the Honorable Judge Linda Ann Wells, who is the first female Chief Judge to serve on the Court in its 52-year history. Chief Judge Wells is one of only five women to have served on the Court since its inception, along with the Honorable Judge Barbara Lagoa and the Honorable Judge Leslie Rothenberg, who both also currently serve on the Court.

A "passing the gavel" ceremony honoring Chief Judge Wells and outgoing Chief Judge Juan Ramirez, Jr., was held at the Court on July 14, 2011. This historic event was attended by many of Chief Judge Wells' colleagues, family, and friends. During the ceremony, Chief Judge Wells reminded those present of a time – not very long ago – when few women were admitted to law school, considered for legal jobs, or promoted to judicial or leadership roles. Following a brief quote from the United States Supreme Court case of *Bradwell v. Illinois,*[1] which upheld the right of Illinois to exclude a married woman from the Illinois bar, Chief Judge Wells thanked all of her "sisters in the law" who persevered, despite these ever-present obstacles, to become successful attorneys and leaders, and who ultimately paved the path for her to be selected as the first female Chief Judge of the Third District Court of Appeal. This ceremony was regarded by many as a special and memorable event in the 52-year history of the Court.

Chief Judge Wells' tenure will run through July 2013.

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Endnote:

1. 83 U.S. 130 (1873).

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An Interview with State Court Administrator, Lisa Goodner

By Laura Beth Faragasso


L. GOODNER

If you have ever struggled to balance your checking account, robbed Peter to pay Paul, or endured the "it's not fair" refrain from your kids when snacks/allowances/bedtimes/privileges were the slightest bit disparate, you may have just an inkling of the daily professional challenges met by your State Court Administrator, Lisa Goodner. In a recent interview, Ms. Goodner discussed the joys and challenges of her job; the 2011 legislative Session and her hopes for the 2012 Session; and the ongoing efforts of her office to maintain the integrity and advance the efficiency of our state court system.

The great majority of Ms. Goodner's professional life has been dedicated to the judicial system. From 1990-1993, she served as the Chief of Personnel in the Office of State Courts, and for the next 10 years, she held the position of Deputy State Courts Administrator. Ms. Goodner has been our State Courts Administrator since 2003, serving thus far under five chief justices: Justices Anstead, Pariente, Lewis, Quince and Canady. At the heart of her work is Ms. Goodner's unshakeable conviction that what she and her staff do every day is "not just a job;" rather, the Office of State Courts Administrator ("OSCA") is supporting and "protecting a fundamental aspect of our democracy."

One of the greatest struggles in this mission is, of course, a lack of adequate funding for the work of the courts. General appropriations from the legislature for this co-equal branch of government equal .7 of 1% of the total state budget. (Yes, you are reading that correctly: less than 1% of the state's revenues are allocated to support the entire judicial branch of government.). Thus, the biggest issue for the upcoming legislative session will be, as in times past, budgetary concerns and the need to stabilize and protect court funding.

As explained by Ms. Goodner, "Our legislators have a legitimate right and a constitutional duty to make sure taxpayer money is well spent; there is no excuse for any of us to waste taxpayer dollars. However, cuts in recent years have brought the Florida judicial system, which truly is exceptional, and one of the most efficient in the country, to a crisis point. Critical staffing has been lost; many of our buildings are in disrepair; and the ability to move cases through the system fairly and efficiently is being lost." The current challenge is to ascertain, and then protect, a proper funding balance between that which should be borne by the taxpayers in support of this fundamental pillar of our society, and that which should be shouldered by those who directly use the court system, through filing fees.

Approximately one-half of the state courts' budget goes to pay the statutorily established salaries of Florida's 989 judges. The other half is used to fund basic due process needs for indigent litigants, quasi-judicial officers, court administration, and the entire appellate system. Yet about 80% of this budget is dependent upon user fees, a funding paradigm that is unworkable, as perfectly illustrated by the recent foreclosure crisis. In 2008-2009, there was a significant increase in filing fee revenues, due largely to the enormous volume of foreclosure filings. The "solution" for preventing deeper cuts in the courts' budget was the tiering of foreclosure filing fees based on the value of the mortgage at issue. Tremendous revenues were generated when filings were "hot," and for a time there were sufficient funds. However, when a virtual moratorium on the filing of new foreclosure cases occurred due to the well publicized robo-signing scandals and other frauds on the court associated with these massive filings, revenues fell suddenly from $30-$40 million per month to $12-$13 million per month—an unpredictable and unsustainable scenario.

Now, after having to go to the Governor for a "loan" to keep the courts afloat several months ago, Ms. Goodner is encouraged that Governor Scott appreciates the need for a stable funding source. The Office of State Courts Administrator will be making recommendations to the Legislature by November 1, 2011, with two goals in mind for the 2012 session (which will begin in January, rather than March, due to reapportionment): (1) ensuring that user fees are in fact utilized to support user access to the courts; and (2) finding the appropriate funding balance so that the cost of access is borne fairly by both the taxpayers and the users of the system.

Ms. Goodner suggests that we as practitioners can help in this effort by engaging with our local legislative delegations to educate and equip them with an understanding of how vital the funding issue is, not just to the judicial branch in isolation, but to the whole of our society. Remarkably, lawyers currently comprise only slightly more than one-quarter of the total membership of the Florida House of Representatives and Senate. We cannot take it for granted that our elected legislators have an acute or prioritized understanding of the way the judicial branch operates, or of the many ways in which a diminished judiciary adversely impacts the stability of our democratic system of government. Similarly, we

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need to continually remind our business leaders that as court resources become more and more scarce, it is civil cases that will languish as the constitutional imperatives of due process must be met in criminal cases, while cases that involve "only money" can wait … and wait … and wait.

Another priority project for OSCA is forging ahead with the creation of an electronic filing portal for all courts, from the county and circuit courts to the Supreme Court. Many of us may practice in circuits where beta testing has begun or will shortly commence at the trial court level. Ms. Goodner urges enthusiastic participation, practitioner feedback, and patience as this important next step in efficiency is launched and refined over time.

Other current initiatives of Ms. Goodner's office include a civil case management study; improvements in case processing in cases dealing with abused and neglected children; and ongoing monitoring of the foreclosure mediation process. A study which explored ways to strengthen and improve the governance of the court system was recently concluded and is now before the Supreme Court for review.

Ms. Goodner has her finger in each of these projects, while continuing to oversee the day-to-day administrative, legislative, policy and budgeting issues of court operations. She takes great pride in supporting the work of the judiciary, whom she describes as "a dedicated and fascinating group of people." As the self-described "pipeline between the rank-and-file and the Court," Ms. Goodner credits the teamwork of her staff and others with whom she works for the success that OSCA has achieved in maintaining the mission and efficiency of our courts. Ms. Goodner urges Florida's 90,000 lawyers to become engaged as part of this mission-critical team by educating both the general public and our legislators about the paramount importance of an independent and fully funded judicial branch of government.


L. FARAGASSO

Laura Beth Faragasso *is an attorney at the Tallahassee firm of Henry, Buchanan, Hudson, Suber & Carter. She practices primarily in the areas of creditor oriented commercial litigation, medical malpractice defense and employment discrimination defense although a significant amount of her time is dedicated to appellate practice. Ms. Faragasso has argued cases before the Florida District Courts of Appeal, the Florida Supreme Court, and the Eleventh Circuit Court of Appeals. She has also served as an adjunct professor at the Florida State University College of Law.*

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