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## Benefitting from *Bonner*: The Enduring Significance of Former Fifth Circuit Decisions in Eleventh Circuit Jurisprudence

By Andrew L. Adler



A. ADLER

On October 1, 1981, Congress divided the U.S. Court of Appeals for the Fifth Circuit into two Circuits: the current U.S. Court of Appeals for the Fifth Circuit, hearing appeals from Louisiana, Mississippi, and Texas; and the U.S. Court of Appeals for the Eleventh Circuit, hearing appeals from Alabama, Florida, and Georgia.<sup>1</sup> The very first decision issued by the newly-established Eleventh Circuit was *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981). Sitting en banc, the Court's first order of business was to determine "whether [it should] adopt some established body of law as its body of precedent, and if so, effective as of its coming into existence, what established body of law will be chosen."<sup>2</sup> The Court ultimately chose to adopt as binding precedent all decisions of the former Fifth Circuit handed down before the close of business on September 30, 1981.<sup>3</sup>

In addition to being the Eleventh

Circuit's very first decision, *Bonner* has also become its most cited. Any practitioner that has conducted legal research in the Eleventh Circuit has likely come across the following statement, usually expressed in a footnote appended to a former Fifth Circuit citation: "In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981."<sup>4</sup> In the last three decades, the Eleventh Circuit has included this reference to *Bonner* (or some slight variation thereof) in nearly 3,000 cases.<sup>5</sup> And these references show no sign of slowing down. To the contrary, the *Bonner* footnote appears to be increasing in frequency. While the Court's caseload has decreased over the last ten years,<sup>6</sup> its citations to *Bonner* have almost tripled during this time period.<sup>7</sup>

From a practitioner's perspective, the frequency with which the Eleventh Circuit cites *Bonner* should be highly instructive. Binding precedent is an essential ingredient of persuasive appel-

*See "Benefitting from Bonner" next page*

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late argument. Seasoned appellate practitioners know that relying on even the most compelling non-binding case law or policy arguments is likely to fall on deaf judicial ears if it conflicts with binding precedent. Only in the absence of such precedent will non-binding decisions and policy arguments take on dispositive importance. Like other appellate courts, the Eleventh Circuit strictly adheres to this principle of decision-making.

By recognizing former Fifth Circuit decisions as binding precedent in the Eleventh Circuit, *Bonner* practically commands appellate practitioners to rely on such decisions. However, many practitioners appear to be either unaware of *Bonner's* practical import or reluctant to embrace it. For whatever reason, many practitioners appear to operate under the assumption that former Fifth Circuit decisions are somehow less precedential than Eleventh Circuit decisions. Having served as a staff attorney and a law clerk for Judges on the Court, the author wishes to dispel any such assumption here. As demonstrated below, former Fifth Circuit decisions continue to receive the same precedential treatment as any other published, binding Eleventh Circuit panel decision. As a result, practitioners should confidently rely on former Fifth Circuit

decisions whenever they are applicable and remain good law.

One does not have to look far to find examples illustrating the enduring vitality of former Fifth Circuit decisions. To take one recent example, the Eleventh Circuit last year sat en banc in *Coffin v. Brandau*, 642 F.3d 999 (11th Cir. 2011), to consider whether law enforcement officers violated the plaintiffs' Fourth Amendment rights by entering their garage without a warrant and, if so, whether those rights were clearly established, thus entitling the officers to qualified immunity. Central to the Court's analysis was its determination that two former Fifth Circuit decisions from 1938 and 1971—affording garages Fourth Amendment protection—were factually distinguishable. Rather than suggesting that these cases were too old or otherwise not precedential, the en banc majority engaged in a vigorous substantive debate with the dissent about the meaning of these cases.<sup>8</sup>

The Eleventh Circuit also continues to use former Fifth Circuit decisions in more subtle ways. For example, in *Shurick v. Boeing Co.*, 623 F.3d 1114 (11th Cir. 2010), the Court held that, under the doctrine of claim preclusion, a final judgment entered in a related case barred the plaintiff's whistleblower claim. Significantly,

the panel raised the claim preclusion issue *sua sponte*, whereas the district court had denied the claim on the merits.<sup>9</sup> In a footnote, the Court cited a former Fifth Circuit decision for the proposition that, although claim preclusion was an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure, it could be raised by the Court *sua sponte*.<sup>10</sup>

Similar examples abound. Indeed, former Fifth Circuit decisions continue to play a role in virtually every area of the law. To list just a few examples from 2011 alone, the Eleventh Circuit relied on former Fifth Circuit decisions to: articulate standards of review in direct criminal appeals,<sup>11</sup> bankruptcy appeals,<sup>12</sup> and appeals from the imposition of sanctions;<sup>13</sup> interpret criminal statutes,<sup>14</sup> jurisdictional statutes,<sup>15</sup> and collective bargaining agreements;<sup>16</sup> and analyze issues related to the exclusion of evidence,<sup>17</sup> the law of the case doctrine,<sup>18</sup> the enforcement of arbitral awards,<sup>19</sup> and certifying questions to a state's highest court.<sup>20</sup>

The Eleventh Circuit even continues to rely on former Fifth Circuit decisions in areas affected by major legislative activity. For example, the Eleventh Circuit hears many appeals from the denial of post-conviction petitions, which often require the Court to construe and apply legal standards established by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). While AEDPA substantially altered the analytical framework for post-conviction petitions, the Court in such cases continues to rely on former Fifth Circuit decisions addressing underlying issues of criminal procedure.<sup>21</sup> Similarly, immigration law has undergone substantial change since *Bonner* with the enactment of laws such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 and the REAL ID Act of 2005. Nonetheless, the Eleventh Circuit continues to cite former Fifth Circuit decisions

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articulating legal principles that remain unaffected by subsequent legislation.<sup>22</sup>

There are also several important former Fifth Circuit decisions that have not yet been revisited by the Eleventh Circuit. For example, the former Fifth Circuit's decision in *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977) remains the seminal decision interpreting the National Stolen Property Act ("NSPA") in the context of cultural property. In that case, the Court held that, where a foreign nation clearly declares ownership over a cultural object, that object is considered "stolen" for purposes of the NSPA where it is illegally exported from the foreign nation.<sup>23</sup> While litigation in this area has remained sparse, the so-called *McClain* doctrine has supplied federal prosecutors around the country with a legal framework by which to bring *in rem* civil forfeiture actions against cultural property brought into the United States.<sup>24</sup> Sooner or later, the Eleventh Circuit will likely be called upon to revisit *McClain*.

To take another example, the former Fifth Circuit's decision in *Brennan v. Heard*, 491 F.2d 1 (5th Cir. 1974), remains a key precedent interpreting the Fair Labor Standards Act ("FLSA"), the federal law requiring the payment of minimum and overtime wages. In that case, the former Fifth Circuit strongly suggested that FLSA employers may not seek a set-off against back-pay owed to the plaintiff.<sup>25</sup> While the current Fifth Circuit has issued several decisions clarifying *Heard*,<sup>26</sup> the Eleventh Circuit has not yet done so.<sup>27</sup> This issue has recently gained traction in the lower courts within the Eleventh Circuit, and those courts have appropriately recognized *Heard*'s status as binding precedent and debated its meaning.<sup>28</sup> *Heard* and the set-off issue are also likely to be revisited by the Eleventh Circuit in the future.

While hardly comprehensive, the

examples mentioned above are designed to illustrate the enduring significance of *Bonner*. But no discussion of *Bonner* is complete without mentioning *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). While *Stein* is often overlooked, it too expanded the universe of binding precedent in the Eleventh Circuit. In order to understand *Stein*, a brief historical detour is necessary. In response to the addition of several Fifth Circuit Judges in 1978, the former Fifth Circuit Judicial Council, in 1980, administratively divided the Court into Unit A and Unit B panels. When this administrative division became unworkable, Congress divided the Circuit; Unit A became the current Fifth Circuit, and Unit B became the Eleventh Circuit.<sup>29</sup> In *Bonner*, the Court expressly declined to decide what effect should be given to former Fifth Circuit decisions issued after September 30, 1981.<sup>30</sup> In *Stein*, a panel of the Eleventh Circuit clarified that such former Fifth Circuit decisions were non-binding if issued by a Unit A panel, but were precedential if issued by a Unit B panel.<sup>31</sup> Thus, *Stein* further expanded binding precedent in the Eleventh Circuit to include former Fifth Circuit decisions issued by a Unit B panel, even if such decisions were issued after September 30, 1981.<sup>32</sup>

Although the effect of *Stein* pales in comparison to *Bonner*, it did render precedential some important decisions. To take just one example, in *Nettles v. Wainwright*, 677 F.2d 404, 409-10 (5th Cir. Unit B, 1982), a Unit B panel held that, in objecting to a magistrate's report and recommendation on a dispositive matter, a party is required to "pinpoint those portions of the magistrate's report that the district court must specially consider." This holding is significant because, if a party fails to object with such specificity, the magistrate's report and recommendation will effectively become the last word. Although

*Nettles* was subsequently overruled by the current Fifth Circuit sitting en banc, it remains good law in the Eleventh Circuit. Indeed, just two years ago the Eleventh Circuit relied on *Nettles* to conclude that a party did not sufficiently object to a magistrate's ruling.<sup>33</sup> In doing so, moreover, the Eleventh Circuit reaffirmed the proposition that former Fifth Circuit decisions remain binding precedent in the Eleventh Circuit even if they are subsequently overruled by the current Fifth Circuit.<sup>34</sup>

Of course, former Fifth Circuit decisions can be overruled or abrogated by a subsequent Supreme Court decision or en banc Eleventh Circuit decision.<sup>35</sup> The passage of time may make such abrogation a distinct possibility, and practitioners must therefore take care to ensure that former Fifth Circuit decisions remain good law. At the same time, practitioners must always be sure to do so before relying on any panel opinion, whether it is a former Fifth Circuit decision from the early 20th century or an Eleventh Circuit panel decision from a few months earlier. It must also be emphasized that, under the prior panel precedent rule, a subsequent panel decision cannot overrule a prior panel decision.<sup>36</sup> In this respect, former Fifth Circuit panel decisions are actually *more* authoritative than subsequent Eleventh Circuit panel decisions; in the event of a conflict, the earlier decision controls.<sup>37</sup>

To conclude, this article, at its most basic, is intended to reiterate the age-old importance of binding precedent in appellate practice. Seasoned appellate practitioners need no such reminder, but this concept can sometimes be difficult to accept. Those accustomed to trial work have more occasions to rely on non-binding authority, and shelving such authority on appeal can be difficult when it strongly favors the client's position. But it bears repeating that appellate courts will generally consider

such non-binding authority only in the absence of binding precedent. And, in the Eleventh Circuit, binding precedent includes decisions by the former Fifth Circuit.

In this respect, this article is further intended to assuage any concerns or fears that former Fifth Circuit decisions somehow constitute a subordinate or secondary form of precedent. Again, such decisions stand on equal footing with Eleventh Circuit panel decisions, and the former will trump the latter in the event of a conflict. The examples discussed above have been selected at random in order to illustrate that, although three decades have passed since the Fifth Circuit split, a plethora of former Fifth Circuit decisions remain good law. These decisions constitute binding precedent in the truest sense, and they will continue to influence Eleventh Circuit jurisprudence in the years to come. For this reason, appellate practitioners would do well to seek out such decisions whenever applicable and rely on them with confidence. Only then will the potential benefits of *Bonner* (and *Stein*) be fully realized.

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#### Endnotes:

- 1 Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.
- 2 *Bonner*, 661 F.2d at 1209.
- 3 *Id.* at 1207, 1209.
- 4 *E.g.*, *Maldonado v. U.S. Att’y Gen.*, 664 F.3d 1369, 1375 n.8 (11th Cir. 2011).
- 5 In the “Cta11” Westlaw database, the author searched for: “Bonner”/p “precedent!” On February 20, 2012, the search yielded 2,810 results.
- 6 See United States Courts, Caseload Statistics,

Table B-1, U.S. Court of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2001 (7,162 cases commenced in the Eleventh Circuit, and 4,023 cases terminated on the merits), available at <http://www.uscourts.gov/uscourts/Statistics/FederalJudicialCaseloadStatistics/2001/tables/b01mar01.pdf>; United States Courts, Caseload Statistics, Table B-1, U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Circuit, During the 12-Month Period Ending March 31, 2011 (6,290 cases commenced in the Eleventh Circuit, and 3,007 cases terminated on the merits), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/B01Mar11.pdf>.

7 In the “Cta11” Westlaw database, the author searched a particular year for: “Bonner”/p “precedent!” That search yielded the following results: 2001—47 citations; 2002—50 citations; 2003—61 citations; 2004—62 citations; 2005—101 citations; 2006—93 citations; 2007—107 citations; 2008—124 citations; 2009—113 citations; 2010—131 citations; 2011—126 citations.

8 See *Coffin*, 642 F.3d at 1010-11 & n.14, 1014, 1018 n.17 (discussing *Kauz v. U.S.*, 95 F.2d 473 (5th Cir. 1938) and *U.S. v. Sokolow*, 450 F.3d 324 (5th Cir. 1971)).

9 *Shurick*, 623 F.3d at 1116.

10 *Id.* at 1116 n.2 (citing *Boone v. Kurtz*, 617 F.2d 435, 436 (5th Cir. 1980)).

11 *U.S. v. Perez*, 661 F.3d 568, 580 (11th Cir. 2011) (citing *U.S. v. Van Deever*, 577 F.2d 1016, 1018 (5th Cir. 1978)).

12 *In re Lett*, 632 F.3d 1216, 1227 (11th Cir. 2011) (citing *Martinez v. Matthews*, 544 F.3d 1233, 1237 (5th Cir. 1976)).

13 *Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1313 (11th Cir. 2011) (citing *Dorey v. Dorey*, 609 F.2d 1128, 1135-36 (5th Cir. 1980)).

14 *U.S. v. Brown*, 665 F.3d 1239, 1251-52 (11th Cir. 2011) (relying on *U.S. v. Robinson*, 553 F.2d 429, 431 (5th Cir. 1977)).

15 *City of Riviera Beach v. That Certain Unnamed Gray, Two Story Vessel Approximately Fifty-Seven Feet in Length*, 649 F.3d 1259, 1266-67 (11th Cir. 2011) (discussing *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955), and *Miami River Boat Yard, Inc. v. 60’ Houseboat*, Serial No. SC-40-2860-3-62, 390 F.2d 596 (5th Cir. 1968)).

16 *Jim Walter Res., Inc. v. United Mine Workers*, 663 F.3d 1322, 1327-28 (11th Cir. 2011) (relying on *Firestone Tire & Rubber Co. v. Int’l Union of United Rubber, Cork, Linoleum & Plastic Workers*, 476 F.2d 603 (5th Cir. 1973), and *Friedrich v. Local Union No. 780*, 515 F.2d 225 (5th Cir. 1975)).

17 *Walter Int’l Prods. v. Salinas*, 650 F.3d 1402, 1416 (11th Cir. 2011) (citing *U.S. v. Stokes*, 506 F.2d 771, 777 (5th Cir. 1975)).

18 *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 891 (11th Cir. 2011) (quoting *Doran v. Petroleum Mgmt. Corp.*, 576 F.2d 91, 93 (5th Cir. 1978)).

19 *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1263 (11th Cir. 2011) (citing *Imperial Ethiopian Gov’t v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976)).

20 *Royal Capital Dev., LLC v. Md Cas. Co.*, 659 F.3d 1050, 1055 (11th Cir. 2011) (quoting *Fla. ex. rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-75 (5th Cir. 1976)).

21 *E.g.*, *Guzman v. Sec’y, Dep’t of Corrs.*, 663 F.3d 1336, 1351 (11th Cir. 2011) (citing *U.S. v. Sanfilippo*, 564 F.2d 176, 178 (5th Cir. 1977)); *Delgado v. Fla. Dep’t of Corrs.*, 659 F.3d 1311, 1329-30 (11th Cir. 2011) (citing *U.S. v. Larkin*, 605 F.2d 1360, 1367-68 (5th Cir. 1979)).

22 *E.g.*, *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1308 (11th Cir. 2011) (relying in part on *U.S. ex. rel. McKenzie v. Savoretti*, 200 F.2d 546, 548 (5th Cir. 1952)).

23 *McClain*, 545 F.2d at 1000-01.

24 See Andrew L. Adler & Stephen K. Urice, *Resolving the Disjunction Between Cultural Property Policy and Law: A Call for Reform*, 64 RUTGERS L. REV. 117, 125-136 (2011).

25 See *Brennan*, 491 F.2d at 3-4.

26 See *Martin v. PepsiAmericas, Inc.*, 628 F.3d 738, 741-42 (5th Cir. 2010); *Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1043 (5th Cir. 2010); *Singer v. City of Waco, Tex.*, 324 F.3d 813, 826-28 & n.9 (5th Cir. 2003).

27 But see *Kohlheim v. Glynn County, Ga.*, 915 F.2d 1473, 1481 (11th Cir. 1990) (briefly discussing an FLSA set-off without discussing *Heard*).

28 See, e.g., *Hutton v. Grumpie’s Pizza & Subs, Inc.*, No. 07-81228-CIV, 2008 WL 1995091, at \*3-4 (S.D. Fla., May 7, 2008) (citing cases).

29 See Thomas E. Baker, *A Primer on Precedent in the Eleventh Circuit*, 34 MERCER L. REV. 1175, 1178-80 (1983).

30 *Bonner*, 661 F.2d at 1209 n.5.

31 *Stein*, 667 F.2d at 34.

32 Should one encounter a situation where it is unclear whether a former Fifth Circuit decision is precedential, the author recommends the article by Professor Thomas E. Baker cited in note 29. For those interested in a more thorough treatment on the subject, including the historical background of the Fifth Circuit split, the author recommends several additional articles by Professor Baker. Thomas E. Baker, *A Legislative History of the Creation of the Eleventh Circuit*, 364 GA. ST. U. L. REV. 363 (1992); Thomas E. Baker, *A Postscript on Precedent in the Divided Fifth Circuit*, 36 SW. L. J. 725 (1982); Thomas E. Baker, *Precedent Times Three: Stare Decisis in the Divided Fifth Circuit*, 35 SW. L. J. 687 (1981).

33 *U.S. v. Schultz*, 565 F.3d 1353, 1360-62 (11th Cir. 2009).

34 See *id.* at 1360 n.4.

35 *E.g.*, *U.S. v. Hogan*, 986 F.2d 1364, 1369 (11th Cir. 1993).

36 *Id.*

37 See *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1278 (11th Cir. 2011).

# *Incoming Chair's Message:* **This is your Section - Be a Part of It**

By Jack R. Reiter



J. REITER

This year commemorates the 20th year of the Appellate Practice Section's creation. I am excited to be part of the Section, and I am honored to be its Chair.

Although I have been an appellate practitioner since 1996, I was not always an active member of the Section. One of the questions I hear regularly is, "how do I become more involved in the Section?" My response is to encourage people to attend our meetings and to learn just how much our Section offers its members and the appellate community at large. In 2003, I decided to become more involved. I attended a Section committee meeting, introduced myself, and listened to the more experienced members talk about the Section and its function. I did not expect that one day I would have the privilege of serving as Chair, and I did not know then how much the Section offers its members and members of the bar, both professionally and personally.

Our Section regularly organizes and presents seminars on appellate practice, assists members in publishing articles in the *Florida Bar Journal*, and, when called upon to do so, can serve as a liaison between the Florida courts of appeal and appellate practitioners. Our Section also has judicial representatives from Florida appellate courts who regularly attend our meetings and advise the Section as to issues or developments at the courts of appeal. The Section has been involved in creating and disseminating *The Guide*, which virtually every appellate practitioner has consulted at one time or another. The Section also publishes *The Record* to address both substantive and newsworthy topics relating to appellate practice and developments. The Section also created the *Pro Se Handbook* and conducts monthly telephonic continuing legal education credits. The Section also assists in

organizing and facilitating the annual discussion with the Florida Supreme Court and, of course, hosts an incredible dessert reception each year at the annual meeting of the Florida Bar.

When I attended my first meeting, I volunteered to write an article for the *Florida Bar Journal* on stays pending review under Florida Rule of Appellate Procedure 9.310. After several months, I was excited to see my first article in print, and from that moment forward, the Section has become an integral aspect of my professional life -- and one of the most rewarding professional endeavors I have ever undertaken. As I have since learned, the Section not only serves as a professional committee but also builds lasting friendships and generates an incredible camaraderie among its members.

Of course, the majority of Section members do not regularly attend our meetings. In fact, of our approximately 1400 members, we typically see only 40 or 50 members at our Executive Council meetings, which are open to all Section members who are encouraged to voice their thoughts and ideas. One of my goals as Chair of this awesome Section is to increase active participation and involvement from our members, particularly those of you who may have only recently started practicing law or who have an interest in developing a broader interest in appellate practice.

As with many organizations, it is true in this case -- the more you put into the Section, the more you can derive from it. Take advantage of your Section and recognize the many great benefits of involvement across its levels. I invite all of you to become more involved by attending meetings if you are able to do so, taking advantage of our monthly telephonic seminars and other continuing legal education events, and writing for the *Florida Bar Journal* or *The Record* on appellate issues.

This is your Section -- be a part of it.

# *Message from the Outgoing Chair*

## Here's How We All Can Help, and Why We Should

By Matthew J. Conigliaro



M. CONIGLIARO

The Appellate Practice Section needs our help. Like most entities, our Section is surrounded by inescapable fiscal realities. We not only survive but do the many good things we do because our financial house is in order. Maintaining that order, and building our future, are goals toward which we can all contribute. Here, I offer all Section members two simple suggestions that, if followed, could lift the Section to new heights. I also attempt to make a case for why we should try to do so.

For nearly 20 years, the Section has united all who share an interest in Florida's appellate courts. The Section has focused largely on practitioners' needs and providing a structure around which a collegial appellate bar can coalesce. From this publication to *The Guide*, and from educational programs to meetings and social events, the Section allows young attorneys to develop relationships with mentors and allows all attorneys to interact and stay current regarding the practice.

But the Section's aims have hardly been limited to helping practitioners. The Section has sponsored or contributed its resources to a variety of activities, including local and national judicial conferences and moot court competitions for high school and law school students. In fact, one would be hard pressed to picture a more selfless undertaking for a group of appellate attorneys than the creation of *The Pro Se Appellate Handbook*, the Section's comprehensive and multilingual tome aimed at helping persons without counsel navigate Florida's appellate process.

These endeavors strike me as the tip of the iceberg. There is much

more the Section could do to advance the cause of appellate practice. Just let your imagination run wild with thoughts of creating physical and virtual mock argument facilities, and making them truly available, not just to well heeled counsel and parties, but to all whose cases or practices might benefit from such sophisticated preparation.

Imagine the Section helping improve, or in some cases helping restore, attorney's lounges in the appellate court buildings. Picture an oral argument video collection searchable by subject, party, attorney, or judge. Consider the scholarship programs the Section could sponsor, and outreach beyond the bar to help educate the public on the appellate judicial system.

The possibilities are incredible. They are realistic, too, if the Section survives and thrives, which brings me back around to finances. Roughly 40-50 percent of the Section's annual net revenues come from dues, 30-50 percent come from continuing legal education courses, and 10-15 percent come from firm sponsorships. These amounts, and others such as investment income from the Section's reserves, have varied wildly in recent years.

The Section needs a certain baseline of revenue just to operate, with the most significant expenses currently being the costs associated with meetings, programs, and the Section's web site. Not surprisingly, failing to meet the baseline risks the Section's future, while exceeding the baseline moves us closer to the day when a fiscally fortified Section can embark on grand efforts such as those mentioned above.

Some may be surprised to learn that the Section would far exceed its goals if all members merely follow two simple steps. First, and at the risk of stating the obvious, remain a

member, and encourage like-minded colleagues to become members. Membership is critical, and its importance cannot be overstated. The Section's annual dues (currently \$40) are basically middle-of-the-pack for bar sections, and membership offers many enriching opportunities through publications, resources, meetings, and events.

Second, and equally critical, order or attend just one Section-sponsored CLE event each year—be it full day, half day, or even one of the monthly lunchtime telephonic programs, which at \$30 are among the best CLE bargains anywhere. The business world and bar associations from coast to coast have caught on to the revenue-generating potential of CLE programming, leading to the barrage of CLE advertisements we all face. To say the least, cheap CLE is ubiquitous, even if quality CLE is not. The Section's CLE events are consistently top notch and are presented by leading attorneys and judges.

We all need CLE, and helping the Section by sometimes choosing one of its programs is an incredibly easy way to help ensure the Section meets its goals. If you have never thought about your CLE selections in terms of helping an organization you care about, perhaps this request will prompt you to do so.

Maintaining your membership and taking just one Section-sponsored CLE per year are steps we can all take with hardly any extra effort. If we do, what a Section we will continue to build together. As outgoing chair, I cannot wait to watch it happen.

*Matthew J. Conigliaro is board certified in Appellate Practice and a shareholder with Carlton Fields, P.A., in St. Petersburg. He is the Section's Immediate Past Chair.*

# *Discussion with the Florida Supreme Court:* **A Reminder of Our Responsibilities as Florida Lawyers**

By Rebecca Bowen Creed

Continuing a long-standing tradition, the entire Florida Supreme Court heard the final round of the Robert Orseck Memorial Moot Court Competition at the Florida Bar's annual meeting, held June 23, 2012. The competition, now in its forty-fourth year, is presented by The Florida Bar Young Lawyers Division. The issues centered around the First Amendment rights of students who wished to wear a particular logo, neatly embroidered on the sleeves of the students' otherwise dress code-compliant polo shirts, in violation of a fictional school district's prohibition against any clothing promoting religious discrimination. The moot court competition began like any other, but after the law students' arguments – and before the Court's "ruling" – the lawyers and law students in attendance heard the Court's views on more practical matters in an informal seminar entitled "Discussion With the Florida Supreme Court."

Incoming Chair of the Appellate Practice Section, Jack Reiter, began the seminar by thanking the Court for its time. Chief Justice Charles Canady graciously voiced his appreciation for the work of the Appellate Practice Section and the role of the Young Lawyers' Section of The Florida Bar in organizing and promoting the discussion. Reiter then introduced Caryn Bellus, Chair-Elect of the Appellate Practice Section, who led a lively discussion, posing a number of questions to the justices.

Bellus first asked each justice to give his or her professional background before being appointed to the Court. Notable among the anecdotes told by the justices were the stories of success and failure that each experienced



along the way. The justices were also asked to describe their responsibilities at the Court, apart from deciding cases. The justices' many roles range from exercising rule-making authority to imposing discipline, and from serving on Bar and Court committees to volunteering within their own communities. Chief Justice Canady serves as the chief administrative officer of the entire Florida court system, which often requires trouble-shooting and solving problems.

When asked the toughest part of the job of being a Florida Supreme Court justice, several justices mentioned the tedium associated with the Court's rule-making authority. The justices also highlighted the differences between the Court and the three-judge panels of the district courts of appeal. Given the sheer number of cases before the Court, all of which must be decided en banc by the Court's seven members, the justices noted that it can sometimes be difficult to convince another justice to vote for a particular outcome. While the caseload can be demanding, and the work unrelenting, the justices greatly value their role in the judicial process. Justice

Jorge LaBarga opined that being a supreme court justice was the best job of all.

The invitation to the justices to "describe your pet peeves" resulted in the usual responses: overly-long briefs and lawyers who do not know or – worse, still – misrepresent the record. Chief Justice Canady mentioned that he finds any attempt by lawyers to denigrate opposing counsel or the lower tribunal to be especially counterproductive; Justice Ricky Polston was surprised to find that some lawyers will actually interrupt the justices at argu-

ment. The justices emphasized that although appellate counsel should always know the record, it is far better to admit that you don't know an answer to a question than to misrepresent the record at oral argument.

The justices were then asked whether they had any advice for nervous lawyers arguing before the Court. Justice Peggy Quince responded that as a young appellate lawyer, she always welcomed questions from the court. She emphasized that lawyers should listen to the questions asked by the justices, as those questions often give the lawyers insight into the Court's concerns.

With the exception of legally and factually complex appeals – like the recent redistricting cases – the Court does not often extend the length of time granted for oral argument. While the Court does consider motions to extend the time for argument, those motions are rarely granted.

Questions as to the potential impact of budget cuts on the courts had no easy answer. The justices noted that the statewide budget for the clerks of court had been cut by \$30 million. This reduction, the Court believed,

## DISCUSSION WITH THE SUPREME COURT, *from preceding page*

would affect the clerks' abilities to fulfill their duties, even as the clerks tried to minimize the impact.

The justices cautiously broached the sensitive question of merit retention. Education is key. The justices urged Florida lawyers to take responsibility for educating the voters, few of whom understand the history of the merit retention system and its importance in maintaining an independent judiciary. The lawyers in attendance were reminded, once again, that practicing law is a privilege, and one we must act to protect.

Judge Canady concluded the discussion with his thanks – which included thanking the moderator for choosing “easy questions” for the justices. He

announced the winner of the moot court competition as the appellee, the fictional Sunshine County School Board. Representing the appellee, the audience learned, was the moot court team from Nova Southeastern University. The justices also congratulated the team from Florida Coastal (which represented the fictional appellant parents challenging the school board's policy) for its performance in a difficult competition. Echoing Justice Canady's appreciation for the law students' presentations, Justice Pariente noted that both teams demonstrated great responsiveness to the questions asked from the bench, and emphasized that honestly conceding a minor point at oral argument can

enhance an advocate's credibility with the Court. And, with that one last reminder to advocate professionally on behalf of your clients (whether fictional or otherwise), the justices concluded another successful and informative “Discussion with the Florida Supreme Court.”

*Rebecca Bowen Creed is an appellate lawyer with 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 and a member of the Section's Executive Council.*



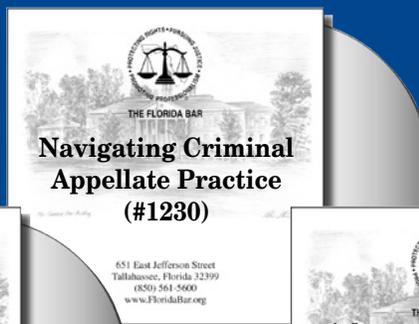
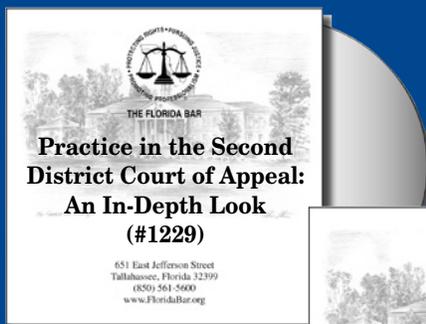
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# Appellate Attorneys Take Their Chances at the 'CASINO ROYALE'

**June Hoffman** has done it again. Like 'M,' the head of Her Majesty's Secret Service, she orchestrates every detail to pull off ever more elaborate and decadent dessert receptions each year. Like 'Q,' she calls upon a secret cache of gadgets and gizmos to transform a rather plain hotel ballroom into a sight of intrigue and danger—this year, the Casino Royale in Montenegro. Judges and appellate practitioners and their guests became persons of intrigue, filling the poker and roulette tables, sipping martinis and wine, and furtively snacking on exclusive Vesper Martinis, Godiva chocolate fondue, and red velvet cake pops.

Everyone knows the Appellate Practice Section's Dessert Reception is the place to see and be seen at the Bar's annual convention. This year was no different, with approximately 100 attendees who social-



ized, gambled, and yes, even danced.

The event is not only a chance for Section members and other members of the Bar to mingle and enjoy themselves, it is also an opportunity for the Section to recognize the winners of two Section awards.

**Sarah Lahlou Amine** was awarded the Appellate Practice Section's **Pro Bono award** for her tireless efforts heading the Section's pro bono committee and in personally performing pro bono work. Because of Sarah's outreach efforts, every legal aid organization in the state now knows to contact the Section's pro bono committee if a legal aid client needs representation in an appeal. Sarah has also personally performed well over 200 hours of direct pro bono representation.

Past-chair **Steve Brannock** was awarded the **James C. Adkins Award** for his significant contributions to the field of appellate practice in Florida. Steve's accomplishments are many, and include simultaneously chairing the Section *and* the Appellate Court Rules Committee. As Chair Matt Conigliaro explained in presenting the award, Steve is an "extremely distinguished and well respected appellate specialist who has selflessly devoted himself and his time to the Bar as a leader, speaker, and mentor."



The Appellate Section thanks the sponsors of the reception who make the event possible. The Section also thanks June Hoffman for her tireless efforts in organizing this event. Will she do it next year? *Never say never again!*



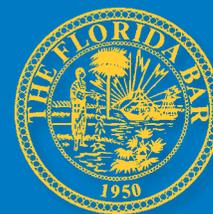
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# JUDICIAL PROFILES

## Third District Court of Appeal Judge Juan Ramirez, Jr., Honored in Retirement Ceremony

By Kerry Cooper Collins



Judge Juan Ramirez, Jr.

After twenty-four years on the bench, on May 25, 2012, Third District Court of Appeal Judge Juan Ramirez, Jr. retired in a ceremony hosted by the Historical

Society and Dade County Bar Association at the Third District Court of Appeal in Miami, Florida. The two organizations recognized Judge Ramirez' distinguished service, as well as his outstanding contributions to the legal profession over the tenure of his career. Presiding Vice-Chair of the Historical Society, Ms. Alina Alonso Rodriguez, Esquire, stated, "The Court's Historical Society was honored to have the opportunity to organize and help celebrate Judge Ramirez' extensive public service to our legal community."

The Honorable Linda Ann Wells, Chief Judge of the Third District Court of Appeal, opened the ceremony with a warm welcome and introductions. Ms. Rodriguez, then gave remarks on behalf of the Historical Society, followed by Ms. Andrea Hartley, Esquire, President of the Dade County Bar Association. Mr. Rodolfo Sorondo, Jr., Esquire, also participated in the ceremony by speaking about his years on the court with Judge Ramirez. Judge Ramirez then gave his concluding thoughts on his legal career thus far, and his tenure as

a Judge. The ceremony was followed by a reception at the district court.

Judge Ramirez' career as a judge has been long and distinguished. "I was a trial judge for twelve years, and an appellate judge for another twelve years and it was a very rewarding career," said Judge Ramirez in a telephone interview. He continued, "As someone who was basically an immigrant, the opportunity to be a judge has been rewarding in every way, as well as to have had the opportunity to contribute to the laws of Florida." But his career is not over yet, according to the man himself. After serving as an appellate court, circuit court and county court judge, Judge Ramirez is ready to pursue other opportunities.

As he moves forward, Judge Ramirez will continue to teach and write. In addition, he will take on a new title, that of "neutral" with Judicial Arbitration and Mediation Services, Inc. ("JAMS"). JAMS is the largest private alternative dispute resolution ("ADR") provider in the world. In addition, it is a nationwide organization that operates in twenty-six cities, and has recently opened its first office in Miami, Florida. "Working with JAMS will give me the ability to mediate and arbitrate for an unlimited amount of time and I can have a flexible schedule to fit my life," said Judge Ramirez. When the opportunity came along to work with JAMS, Judge Ramirez knew it was time to hang up the robe and take control of his future.

When asked why he chose JAMS as his next endeavor, Judge Ramirez stated that he believes he will be an asset to JAMS because of his years

of experience as a judge, where he operated in a neutral capacity. His bilingual ability will also enhance the already impressive skills he brings to the table. He hopes these skills may even enable JAMS to expand internationally.

Judge Ramirez earned his law degree, with honors, from the University of Connecticut School of Law in 1975. He also has B.A. and M.A. degrees from Vanderbilt University. He has served as a county court judge (1988-1990), a circuit court judge (1990-1999), and a district court judge (2000-2012). On July 1, 2009 he served as the Chief Judge of the Third District Court of Appeal until his term expired on June 30, 2011. Judge Ramirez is a published author and has written multiple three-volume treatises which have been published by Lexis. In addition to supplementing his treatises, he has also written for numerous Florida Bar publications and has written a casebook which was published by Carolina Academic Press. Judge Ramirez is also a teacher. He has taught numerous law school courses as an adjunct professor at Florida International University, University of Miami School of Law, St. Thomas University School of Law and Nova Southeastern University School of Law. Judge Ramirez was born in Havana, Cuba and has been married to his wife, Josie, since 1979. They have two sons.

*Kerry Cooper Collins is an attorney in Jacksonville, Florida. She practices in the areas of appellate law continues, next page*

and civil litigation. Previously, she participated in a judicial externship with the Florida Supreme Court. She earned her J.D. from the University of

Florida, Levin College of Law; M.B.A. from the University of North Florida; and B.A., from Flagler College in St. Augustine, Florida. She is licensed

to practice in Florida and Nebraska and is currently seeking to expand her appellate practice. She can be reached at [kerryccollins@gmail.com](mailto:kerryccollins@gmail.com).

# Remembering Judge Dell

## The Honorable John W. Dell

Dec. 17, 1931 – Feb. 18, 2012



The Honorable John W. Dell, who retired in 2001 after twenty years of service on the Fourth District Court of Appeal, passed away February 18, 2012. Judge

Dell was born in Dubuque, Iowa where he spent most of his young adult life as a lineman, construction worker, and owner of one of the first television repair shops. In 1951, he married Regina (Jean) Winders. He also served in the United States Air Force during the Korean War. After the War, Judge Dell enrolled in Loras College where he earned a B.A. in Business Administration in 1958. Judge Dell graduated from law school at the University of Notre Dame, earning an LLB and a JD in 1962. After graduation from Notre Dame, the young Dell and his wife Jean moved to West Palm Beach, where they became active parishioners in St. Juliana's Church.

Judge Dell began his legal career as an associate and later a partner at Miller, Cone, Owen, Wagner and Nugent (1962-71). In 1971, he joined Dell, Smith and Casey, P.A. as a named partner, and he remained

there until 1981. In 1981, then Governor Bob Graham appointed Judge Dell to the Fourth District Court of Appeal where he remained for 20 years, presiding as Chief Justice from 1993-95. During his time on the bench, Judge Dell remained active in the legal community. He served on the Florida Supreme Court Judicial Ethics Advisory Committee from 1983-99; the Florida Conference of District Court of Appeal Judges as president from 1993-94; the Conference of Appellate Judges Executive Committee from 1992-94; the Judicial Management Council of Florida from 1995-98; and he served on numerous Florida Bar Committees including the Grievance, the Rules of Judicial Administration, and the Appellate Rules Committees. Judge Dell was also active in his local Palm Beach County Bar Association, serving on the Medical Legal Committee from 1967-69; the Circuit Court Advisory Committee from 1969-81 (chair 1972-81); the Committee for the Needs of Children (chair 1984-86); and the Historical Committee. In 1981, Judge Dell was recognized as Man of the Year by the Notre Dame Club of Palm Beach County. And in 1986, he received the Msgr. Jeremiah P. Mahoney Award for Outstanding Catholic Lawyer for his service to the community, bar, and judiciary.

Judge Dell worked and played hard his entire life. He loved driving home

to visit friends and family. His friends and neighbors could always count on his help, particularly when it came to home and yard maintenance. He was always available to his colleagues when asked for his opinions and guidance. In later years, he enjoyed playing cards and visiting his extended family in Dubuque. He was a caring and devoted husband, father, grandfather, brother, and uncle. He will be remembered for his honesty, dedication, and commitment as an attorney and appellate court judge.

Judge Dell joins his beloved wife and soul mate of fifty-nine years, Jean Winders Dell; his parents, John Dell and Ethel Grimmell Keller; and sisters, Shirley (Keller) Mehrl and Judy (Keller) Mueller. He is survived by four children: Deborah, Steven (wife Pamela), Douglas, and Gina, along with three grandchildren: Steven II (wife J'aime), Brent (wife Stephanie), and Jacob. Judge Dell is also survived by a large extended family including three brothers: Richard Keller, Ernest (Butch) Keller, Kenneth Keller and their wives; his in-laws: Nick Mueller and Joseph Olinger, and numerous nieces and nephews, many of whom were frequently by his side since the loss of his beloved "Mrs." in 2010. Donations can be made in Judge Dell's memory to the Sorin Society of the University of Notre Dame, Donor Services, Attention: Carol Hennion, 1100 Grace Hall, Notre Dame, IN 46656.