The Record

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Chair's Message:

Pro Bono and the Appellate Practitioner

Any one who knows me well will not be surprised that I chose pro bono as my next topic for my chair's message. This is my prime soapbox, not because I believe that attorneys do not do enough of it, but because I find that attorneys honestly don't know how to provide efficient pro bono services. The following views are mine alone; I only hope that my opinions provide you with a new perspective when you consider how best to reach your aspirational pro bono goals.

I personally believe that lawyers and law firms should focus not only on providing pro bono services, but also providing **efficient** pro bono services. While it may be good for the legal profession to provide pro bono services, is it always good for the recipients to receive these services? In our haste to comply with our ethical obligation to provide pro bono services, lawyers and law firms have generally overlooked this point. This may be a controversial statement, so let me explain.

The field of law is increasingly specialized. For instance, I provide appellate services to my clients. My clients can afford to pay for my specialization. Yet the need for pro bono services is generally in areas **other** than appellate practice, such as family law. The unfortunate result is that attorneys are providing services outside their areas of specialty.

Is this fair to the indigent person who receives these services?

Some more callous persons might suggest that you "get what you pay for." Perhaps others might claim that it is better than nothing at all. I, on the other hand, suggest that the legal community must focus on this remaining hurdle to fully comply with our pro bono obligations.

My law firm's experience bears this out. Our attorneys provided thousands of free hours assisting Hillsborough County residents with pro se lawsuits. From this pro bono experience, we soon learned that local residents needed the most help in areas in which our firm's attorneys do not specialize. Most pro se lawsuits we encountered involved family law matters -- divorces, custody matters and visitation issues -- which require the assistance of family law experts.

While we did help many needy individuals with their family law matters, we never reached the **efficiency** we hoped to achieve. The problem stemmed directly from our lack of family law expertise. After further discussions, we provided funds to hire an experienced family law attorney and endowed a position to our local legal services organization.

There will be nay sayers of this idea, but I have comments to any obstacles raised. To those who might say it does not look good to "pay-off" your ethical obligation to provide legal services, I ask them to focus upon the end product, rather than the publicity aspect of providing pro bono services. The most important reason

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INSIDE:

National Appellate Bench/Bar Conference Convened in New York

by Siobhan Helene Shea, Co-Editor

A hush settled over the room in downtown Manhattan, as Judith Kaye, Chief Judge of New York's Court of Appeals described first hand how judges, attorneys, jurors, court personnel, and litigants are dealing with the aftermath of September 11, 2001. Chief judges and appellate attorneys from all over the nation converged in New York three weeks after the bombing of the World Trade Center for the first Annual Meeting of the Council of Appellate Lawyers, which was held with the National Meeting of Chief Judges.

Lucinda Hofmann, former Chair of the Appellate Practice Section of the Florida Bar, was elected Chair Elect of the Council of Appellate Lawyers. I was also voted to serve on the Executive Board. Florida's Appellate Practice Section was well-represented. Honorable Mark Polen, Chief Judge of the Fourth District Court of Appeal and a member of the Section's Executive Board was there. So was Steve Brannock, Chair of the CLE Committee. Also in attendance were Chief Judge Alan Schwartz, of the Third District Court of Appeal, Richard Bartmon, Shannon Carlyle, Marjorie Gadarian Graham, and Karol Williams.

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In between honing appellate skills and meeting appellate judges and practitioners from all over the country, there was time for sightseeing in the city. The leaves in Central Park were turning and the weather was crisp for a hansom cab ride before a final reception at the New York Bar Office in downtown Manhattan. New Yorkers were especially gracious and receptive to visitors, as conference participants took in Broadway shows, fine restaurants and shopping.

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See application, page

CHAIR'S MESSAGE
from page 1

we provide pro bono services is to give those in need a service they would not otherwise receive.

Lawyers who provide financial assistance to hire specialized attorneys should not conclude that their entire pro bono obligation is over. The next step in the process is to utilize your lawyers' areas of specialization. For instance, my local legal services organization employs me if they need an appellate specialist to work with their trial lawyers. I have handled several appeals for them by co-counseling with their attorneys. In short, we are supplementing, not substituting, the provision of pro bono services.

So, what can you do as an **appellate** attorney?

First, be financially generous to your legal services organization. They need your money to fund positions required to assist the bulk of their work.

Second, support the current initiative to funnel more state funds to legal services organizations. This type of funding benefits all of our citizens, not just a select few.

Finally, donate your **appellate** expertise to those in need. Because this is your area of specialization, you will enjoy it, and those in need will benefit the most.

— Hala Sandridge, Chair

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The Curious Case of *Browning v. New Hope South*

by Valeria Hendricks

Every member of the Appellate Practice Section should know that if a party seeks an improper appellate remedy, then Article V, section 2(a) of the Florida Constitution and Florida Rule of Appellate Procedure 9.040(c) require a court to treat the cause as if the proper remedy had been sought. Without citation to the Florida Constitution or Rule 9.040(c), however, a two-judge majority panel of the First District Court of Appeal earlier this year dismissed an appeal where the party sought the wrong remedy.

In *Browning v. New Hope South*, 785 So. 2d 732 (Fla. 1st DCA 2001), the First District relates that in an earlier appeal, it had affirmed an order awarding workers' compensation benefits to the claimant, and in an unpublished order relinquished jurisdiction to the judge of compensation claims to determine the claimant's appellate attorney's fee. The unpublished order also provided that review of the appellate attorney's fee award would be pursuant to Rule 9.400(c).

The lower tribunal rendered its fee award, which the claimant attempted to challenge. Instead of filing a motion for review, as provided in Rule 9.400(c), as well as Rule 9.180(i)(4), and as the First District panel directed in its unpublished order, however, the claimant filed a timely notice of appeal, which was assigned a new case number. In response to the First District's order on seeking an improper remedy, the claimant filed a motion to review in the original appeal. The First District denied the motion for review as untimely, and dismissed the new appeal, flatly rejecting the claimant's argument that the improper, but timely notice of appeal should be treated as the correct Rule 9.400(c) motion for review:

> Despite a clear direction from this court regarding review of the JCC's order in the order awarding a fee in the original case, appellant initiated a new appellate proceeding rather than properly moving for review.[1]

Citing prior precedent of the court, the dissent in *Browning* stated that because the panel had denied review of the attorney's fee award in the original appeal, the merits of that award should be considered in the new appeal. Among the cases on which the dissent relied is *Pellar v. Granger Asphalt Paving, Inc.*, 687 So. 2d 282 (Fla. 1st DCA 1997). In that case, the successful appellants in a prior proceeding filed a timely notice of appeal to review an appellate fee award in that prior proceeding. Applying Rule 9.040(c), the First District panel in *Pellar* treated that timely notice of appeal as a Rule 9.400(c) motion to review, and affirmed the attorney's fee award. In so doing, the court stated: "The notice of appeal was filed within the time for filing a motion for review and the error in the form of the remedy did not prejudice the rights of any party."[2]

Perhaps the most important question the majority's opinion in *Browning* raises is why it failed to follow its own precedent in *Pellar*, as acknowledged in the dissenting opinion. The majority in *Browning* reasoned that treating the notice of appeal as a motion to review would not cure the claimant's failure to seek the proper remedy because the notice– which did not offer why the attorney's fee order was reversible– was facially insufficient.[3] This reasoning, however, did not prevent the *Pellar* panel from following Rule 9.040(c) and treating the notice of appeal in that case as a motion to review. Further, even where notices of appeal have not facially disclosed why an order departed from the essential requirements of the law, the First District has treated such improperly-filed notices as petitions for writs of certiorari.[4]

So why was the successful workers' compensation claimant denied review of an attorney's fee award while the successful party to a contract dispute was afforded review, even when both parties filed notices of appeal rather than Rule 9.400(c) motions for review?

One answer could be that the claimant's attorney in *Browning* disregarded an order expressly stating the method for review of the fee award. But, an attorney's inadvertence, incompetence, or arrogance should not deprive an innocent party of a rightful remedy. Instead of punishing the claimant, the First District in *Browning* could have appropriately sanctioned the attorney for failure to comply with the court's order.

In its omission to explain why it was not following its prior precedents– which are in conformity with the state constitution and appellate rules– the majority of the First District panel in *Browning* has violated a cardinal rule of stare decisis: to maintain certainty in the law. Appellate practitioners and litigants in the First District can only hope that *Browning v. New Hope South* is just an abberation. To be safe, however, practitioners should make sure the remedy sought is the proper one, *and* if the court does happen to tell you how to seek review, make sure you heed that advice.

Endnotes:

1. 785 So. 2d at 733 (footnotes omitted).
2. 687 So. 2d at 284.
3. 785 So. 2d at 733.
4. *See, e.g.*, *Brown v. Walton County*, 667 So. 2d 376 (Fla. 1st DCA 1995) (treating notice of appeal from circuit court order affirming decision of county grievance committee as petition for writ of certiorari); *Batavia, Ltd. v. United States, Dep=t of Treasury*, 393 So. 2d 1207 (Fla. 1st DCA 1980) (treating notice of interlocutory appeal from order staying prosecution of mortgage foreclosure as petition for writ of certiorari).

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Brief Thoughts

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Civility and Professionalism in Appellate Practice

by Patricia Kelly

The topics of civility and professionalism are often treated separately, but in truth, civility is an essential quality of professionalism. Civility is defined as "politeness, especially in a merely formal way."[1] Many, if not most, actions characterized as unprofessional would not occur if attorneys treated each other and the court civilly.

The heartening news is that civility, and professionalism, are alive and well in the appellate arena. This probably does not come as a surprise to most appellate practitioners – many of us picked this specialty because it was so civilized. In fact, in preparing to write this article, I contacted a handful of appellate court judges to solicit their views on the subject, and the consensus was that the level of civility in their respective courts was quite high. Judge Altenbernd at the Second District Court of Appeal attributed this to the fact that for appellate lawyers "the duties of professionalism never create dilemmas for you. Sometimes even good trial lawyers are torn between using tactics that are unprofessional, but effective, or taking the high road. For appellate lawyers, the low road is simply bad advocacy. If you want to be an effective appellate lawyer, you must take the high road."

Given that most experienced appellate lawyers apparently do take the "high road," writing this article feels a lot like "preaching to the choir." However, for those of you who may be new to appellate practice, perhaps this article can give you some insight into what is and is not considered either civil or professional in appellate practice.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.[2]

Many writers have addressed the pitfalls awaiting an unwary trial lawyer who decides to handle an appeal.[3] One obvious hazard in this increasingly specialized area of practice is lack of familiarity with the appellate rules and the case law interpreting those rules. Less obvious perhaps is the difficulty many trial lawyers have in being objective about their case. Also, significant amounts of uninterrupted time are needed to properly prepare a brief, and many lawyers who try to manage a busy litigation case load while simultaneously prosecuting or defending an appeal may find it difficult or impossible to devote the time and attention necessary to craft an effective brief.

A lawyer shall act with reasonable diligence and promptness in representing a client.[4]

Before accepting an appeal, you should consider whether you have the time to diligently pursue it. If you are the appellant, not only are you obligated to file a brief in a timely fashion, you are also responsible for making sure the record is prepared in a timely fashion. In Stewart v. State, 490 So. 2d 166 (Fla. 2d DCA 1986), the court sanctioned a lawyer who, among other things, failed to have the record prepared in a timely fashion and was over six months late filing a brief. When the court ordered him to appear and show cause why the case should not be dismissed, he responded by explaining he could not because he was spending six weeks in Chicago trying a case. The moral of the story is that if you do not have the time to prosecute your client's appeal diligently, then you should not take the case.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.[5]

Traditionally, appellate courts have placed this burden on an appellant's counsel**,** with the admonition that they are obligated to make a good faith determination that an appeal should be taken. Counsel for appellees should note, however, that the rule also references controverting an issue. While case law in the past has insulated appellees from liability for defending an erroneous trial court decision,[6] the tide may be turning. In *Forum v. Boca Burger*, 788 So. 2d 1055 (Fla. 4th DCA 2001), the court, citing amendments to section 57.105, Florida Statutes, ordered *appellee's* counsel to pay appellate attorney's fees because he "persisted in defending the trial court's patently erroneous decision." The court also took the attorney to task for leading the trial court into making the erroneous decision to begin with.

A lawyer has a duty of candor to the tribunal.[7]

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- **CLE Committee: 9:00 a.m.**
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A lawyer's duty of candor in appellate proceeding is twofold. First, the lawyer has a duty to provide the appellate court with a complete, accurate, and objective statement of the facts. Courts have stricken briefs that violate this rule, and in severe cases they have imposed sanctions.[8] A lawyer is also obligated to know and to inform the court of the applicable law.[9] In particular, a lawyer must disclose to the court legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to her client's position if not disclosed by the adverse party.[10] It should be evident that violation of this duty is not only unethical, it is foolish. Nevertheless, one court, noting that compliance with this professional responsibility was more the exception than the rule, found it fitting to compliment counsel for having fulfilled this duty.[11]

Too much candor – disparaging opposing counsel or the court.

It should go without saying that it is neither civil nor professional to disparage opposing counsel, the trial court, or the appellate court. In spite of that, the case law contains a surprising number of examples of attorneys who took the notion of candor too far.[12] For example, in *5-H Corporation v. Padovano*, 708 So. 2d 244 (Fla. 1997), an appellate court referred an attorney to the bar after he filed a motion for rehearing stating that "what is truly appalling is . . . that the panel in the instant appeal would buy such nonsense and give credence to such 'total b[---]-s[---].'" He also characterized opposing counsel's argument as "ridiculous" and "a joke," and accused the panel of hating his client, discriminating against Miami lawyers, and favoring opposing counsel.[13] As one court noted on this subject, "[y]ou can think it, but you'd better not say it."[14]

This is not an exhaustive list of the opportunities an appellate lawyer has to behave badly, just a discussion of some of the most serious breaches of civility and professionalism. To stay out of trouble on less serious matters, just remember the golden rule when you interact with the court and with opposing counsel, and you should have no trouble staying on the "high road."

Endnotes:

[1] Webster's New World College Dictionary 268 (4th ed. 2000).
[2] R. Regulating Fla. Bar 4-1.1
[3] *See e.g.*, Jennifer S. Carroll, *Appellate Specialization and the Art of Appellate Advocacy*, 74 Fla. B. J. 107 (June 2000); Raymond T. Elligett, Jr. *Top 10 Appellate Mistakes (Or Why You Need an Appellate Specialist)*, 72 Fla. B. J. 41 (January 1998); Scott Patrick Stolley, *Appeal in Error: Common Mistakes on Appeal*, For the Defense, December 1998, at 12.
[4] R. Regulating Fla. Bar 4-1.3.
[5] R. Regulating Fla. Bar 4-3.1.
[6] *Dept. of Highway Safety and Motor Vehicles v. Salter*, 710 So. 2d 1039 (Fla. 2d DCA 1998).
[7] R. Regulating Fla. Bar 4-3.3.
[8] *Sabawi v. Carpentier*, 767 So. 2d 585 (Fla. 5th DCA 2000); *Thompson v. State*, 588 So. 2d 687 (Fla. 1st DCA 1991); *Hutchins v. Hutchins*, 401 So. 2d 722 (Fla. 5th DCA 1987).
[9] *Dilallo v. Riding Safely, Inc.*, 687 So. 2d 353 (Fla. 4th DCA 1997).
[10] R. Regulating Fla. Bar 4-3.3.
[11] *Lassiter Construction Co., Inc., v. American States Insurance Company*, 699 So. 2d 768 (Fla. 4th DCA 1997).
[12] *See* e.g., *Banderas v. Advance Petroleum, Inc.*, 716 So. 2d 876 (Fla. 3d DCA 1998)(among other things, attorney called the court's per curiam affirmance a "travesty of justice" and a "cop-out."); *Patton v. State Department of Health and Rehabilitative Services*, 597 So. 2d 302 (Fla. 2d DCA 1991) (attorney accused the court of committing a "judicial sin" and of violating his client's human rights when it issued a PCA).
[13] Almost as startling as the conduct described in this case is the fact that the Florida Bar ultimately dismissed the complaint it had instituted against the attorney upon a finding of "no probable cause."
[14] *Vandenberg v. Poole*, 163 So. 2d 51 (Fla. 2d DCA 1964).

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