PROTECTING RIGHTS • PURSUING JUSTICE • PROMOTING PROFESSIONALISM

The Record

JOURNAL • OF • THE • APPELLATE • PRACTICE • SECTION

www.flabarappellate.org

Volume XIII, No. 2 **THE FLORIDA BAR** **Fall 2004**

Chief Justice Barbara Pariente: A Woman of Talent, Diligence and Energy

by Jack Shaw[1]

Chief Justice Pariente

It takes only a moment in Chief Justice Pariente's presence to appreciate her nearly-unbounded energy and enthusiasm. In reviewing her credentials, one sees even sooner that she is a person of enormous talent, who has worked hard and remains very involved in her community.

Though she claims not to be an outdoorsman, she loves the outdoors, and enjoys biking, walking, and kayaking–what she calls the "safe sports". She also enjoys photography, travel, movies, and reading. Although she has found she has less time for these interests than she used to, she has still managed to recently read biographies of John Marshall and John Adams, and recommends "Reading Lolita in Tehran", an account of teaching young women in a culture that discourages it.

Born in New York City on Christmas Eve, 1948, Chief Justice Pariente attended public schools in New York through the fourth grade. Her family then moved "across the bridge" to New Jersey, where she continued to

See "Chief Justice Pariente," page 2

Message From the Chair:

by John G. Crabtree

My theme for the Appellate Practice Section this year is *focus*—a focus on who we *are* and what we *do*. Our website says that the Section "is a 1400-person organization devoted to promoting excellence in Florida's state and federal appellate courts." So, in the last edition of the Record, I asked who the 1400-person "we" *is*? That is a question the Section's email survey should soon answer. This Message is directed to what we *do*, because some members do not realize, and thus cannot take advantage of, the breadth of the Section's activities and the opportunities the Section provides its members.

The Appellate Practice Section operates through a variety of committees, and those committees serve the Section and the general Bar in the following ways:

— The **Publications Committee** is responsible for The Record, The Florida Appellate Practice Guide, and the Section's numerous appellate practice articles for the Florida Bar Journal. If you are reading now, you know what The Record is, but you may not be aware that the past editions of The Record are available on the Section's website at www.flabarappellate.org/asp/record.asp.

The Florida Appellate Practice Guide brings together a collection of articles, information and local rules concerning Florida's state and federal appellate courts, along with a complete listing of Section member-

see "Message from the Chair," page 2

INSIDE:

08/04

MESSAGE FROM THE CHAIR

from page 1

ship. It is an invaluable resource.

As for the articles we publish through the Florida Bar Journal, the Section selects articles based on their benefit to appellate specialists. However, those articles are also selected based on their value to those trial lawyers who occasionally handle their own appeals.

— Every year, the **CLE Committee** provides Section members and the Bar at large three to five seminars. Those include popular programs like the Annual Appellate Certification Review Course and the semiannual Hot Topics program. Our programs co-sponsored with other sections include presentations aimed at trial lawyers, worker's compensation lawyers, family lawyers and federal court litigators. The Section also sponsors a telephone seminar series to meet, in a convenient forum, the needs of appellate lawyers who practice at intermediate or advanced levels. And, every other year, the CLE Committee sponsors the Appellate Practice Workshop at Stetson University.

— The ***Pro Bono* Committee** encourages and enables members of the Section to give their time and talents to those individuals who would otherwise be unrepresented in Florida's state and federal appellate courts.

— The ***Pro Se* Handbook Committee** is a project headed by Tom Hall, Clerk of the Supreme Court of Florida and Chair-Elect of this Section. When released, the Handbook will provide fundamental appellate guidance to lay litigants and be the product of over twenty skilled appellate lawyers.

— The **Mentor Committee** serves as a conduit between appellate lawyers who are very experienced (and willing to give of their time) and lawyers who are relatively inexperienced in the appellate arena. Those seeking guidance in an appeal need only contact the committee chair, Jack Shaw (jack@moteslaw.com), and the chair will assign them a mentor—usually one who has handled appellate work in the same, discrete substantive area as their case.

— Unlike most committees, the **Website Committee's** product, www.flabarappellate.org, is always readily available for all to see. It is not only a dynamic resource; it is a living statement of what the Section is and does. Members should visit it regularly to stay current on the Section's activities.

— The **Programs Committee** is well-loved, for it is the force behind the Section's annual Dessert Reception at the Bar's June meeting. It is also responsible for the outstanding Discussions with the Supreme Court of Florida and our triennial Section retreats.

— The **Outreach Committee** is the public relations arm of Florida's appellate bar. The committee is currently producing "Who's *Your* Appellate: A User's Guide"—a series of articles for trial lawyers that will be published in the Florida Bar Journal and various sections' publications, depending on the nature and scope of the article.

— The **Legislative Committee** operates on an *ad hoc* basis. It exists to present the Section's positions on legislation that would, if enacted, impact appellate practice in Florida.

— The **Leadership Committee** is reevaluating the Section's leadership structure, to see if the Section can improve that structure to ensure that new members will continue to become involved in guiding the Section's activities and operations.

While many members take advantage of one or two of the Section's services, too few realize the full benefits of our organization and what we *do*. This summary of Section committees and projects gives only an abbreviated version of the variety of opportunities and services available to our Section members. Since we are always looking for new leadership, I also hope that—if you have not already done so—you will consider becoming actively involved in the Section.

CHIEF JUSTICE PARIENTE

from page 1

attend public school until her graduation in 1966.

Her father worked in sales, as a food broker specializing in cocoa, and in business with her grandfather. He was also a voracious reader, reading the New York Times from cover to cover on a daily basis. Her mother, who had worked in various administrative and secretarial positions, decided to assume the role of full-time homemaker when Chief Justice Pariente was born—but as a harbinger of her daughter's life, also did extensive volunteer work. Both her parents were "children of the depression" and of the World War II era. She has one younger sister, and an uncle, a prominent antitrust lawyer who served in the Eisenhower administration and authored a text on antitrust law.

Chief Justice Pariente was the first in her family to go to college. Like most things in her life, she did it with flair. She graduated in 1970 with highest honors from Boston University, majoring in communications. During the summers, she worked as a secretary. Her intended career as a journalist became sidetracked, however, when she worked on a documentary about Harvard Legal Services. Her feeling that she had an obligation to make a difference, fueled in part by the optimism of the Kennedy years and the Civil Rights movement challenges, and her desire to empower people made legal services very appealing to her.

Acting on that desire, she worked for a summer at New York Legal Services. There, she quickly recognized that the system did not work well for children of divorce. Nor did it work well in other areas where dysfunctional families were the root causes. This recognition was later reinforced and expanded into the areas of dependency, delinquency, and child support while she served on the Fourth District Court of Appeal.

Her experiences at New York Legal Services with the new, no-fault divorce law triggered her desire to work in the area of legal services for the poor. She attended George Washington University Law School, where she also spent time working at various clinics and in the District of Columbia Public Defender's office. She graduated fifth in her class in 1973, with highest honors, and was inducted into the Order of the Coif.

After graduating from law school,

she moved to Fort Lauderdale in 1973 for a two year clerkship with U.S. District Judge Norman C. Roettger of the Southern District of Florida. That experience gave her the opportunity to watch trials involving some truly excellent lawyers, and to learn, first hand, how a trial was conducted by truly professional advocates.

Although Chief Justice Pariente still wanted to specialize in legal services for the poor, she felt she, first, needed further trial experience. After researching the firms in the West Palm Beach area that would fit her needs, she selected Cone, Wagner, Nugent from among the offers she had. She joined that firm in 1975, and became a partner just two years later in 1977. In keeping with the firm's tradition of community involvement, she quickly became active in the Palm Beach County Bar. It was there that she met a senior litigator and occasional mentor, Fred Hazouri. He eventually became her husband, and also became a judge at the Fourth District Court of Appeal.

In 1983, she and a partner formed their own law firm, Pariente & Silber, P.A., where she continued to specialize in civil litigation, largely on behalf of plaintiffs in personal injury and product liability cases. She also worked in crop damage litigation, representing both commercial interests and individuals.

While in private practice, she became Board Certified as a Civil Trial Lawyer both by the Florida Bar and by the National Board of Trial Advocacy, and attained an AV rating by Martindale-Hubbel. She also served on the 15th Circuit Grievance Committee and the 15th Circuit Judicial Nominating Commission, as well as on the Florida Bar's Civil Rules Committee. She is a founding member and master of the Palm Beach County Chapter of the American Inns of Court, and long time member of the Board of Directors of the Legal Aid Society of Palm Beach County.

Chief Justice Pariente was appointed to the Fourth District Court of Appeal in September 1993. Just four years later, she was appointed to the Supreme Court of Florida on December 10, 1997, becoming, at that time, only the second woman ever appointed to that Court. And on July 2, 2004, she was sworn in as the Court's Chief Justice.

In her tenure on the Supreme Court, she has served as chair of the Court's Steering Committee on Families and Children in the Courts, as a member of the Florida Bar Commission on the Needs of Children, and on the Governor's Advisory Committee on Character Education. She has also served as liaison to the Court's Task Force on Treatment-Based Drug Courts, and is a member of the Access to Justice Task Force, and faculty member of the Court's Justice Teaching Institute. She was appointed to the ABA Coalition for Justice. She has also acted as a mentor to students in Take Stock in Children.

Among the differences Chief Justice Pariente has noticed between serving on the Fourth District Court of Appeal and serving on the Florida Supreme Court, she notes the different dynamics of an *en banc* court of seven Justices rather than three judges, and the fact that the district courts of appeal tend to get a broader spectrum of cases, while the Supreme Court may, for instance, only get one dissolution of marriage case each year. On the other hand, the Supreme Court, she says, feels a responsibility to write an opinion in every case, which can be an enormous expenditure of time. Additionally, there is the ongoing issue of jurisdiction in every case—which occasionally surprises an advocate at oral argument, who may have thought that the jurisdictional question was already answered and is, accordingly, insufficiently prepared to address it. Also, Justices of the Florida Supreme Court have an enormous breadth of responsibilities beyond just deciding cases. Those include responsibility for the administration of the court system, the various rules committees of the Florida Bar, lawyer discipline, and numerous speaking engagements.

She observes that disciplinary problems are most often the result of lawyers either taking on cases in areas with which they are unfamiliar, then wishing the case would "go away", or not communicating timely and forthrightly with their clients, especially over adverse developments in the case.

Pointing out that this is "an exciting time to be in the justice system" in light of the challenges of Revision Seven, Chief Justice Pariente also notes that technology is "critical" to helping courts handle their workloads efficiently and smoothly. She feels that the court system is behind the curve, but catching up, in its efforts to achieve an effective e-filing and document management system, noting that when the Second District Court of Appeal had to close down its Lakeland offices due to asbestos problems, they were able to transfer their *entire* records electronically in a matter of *hours*. The challenge the courts face, she says, is to create a system that works efficiently for both the courts and the practitioners, while at the same time including appropriate safeguards for privacy concerns.

Chief Justice Pariente states that, overall, the great majority of lawyers appearing before the Court are wholly professional and of great as-

continued next page

CHIEF JUSTICE PARIENTE
from previous page

sistance to the Court. In some cases, however, lawyers are not as prepared as they should be, especially on the issue of jurisdiction; and do not fully appreciate the key role of answering questions from the bench, rather than simply giving prepared remarks. She also notes that amicus curiae briefs are too often little more than "me, too" efforts, which do not aid the Court. She notes that amicus briefs are supposed to give the Court a different perspective on the issues presented by the case, or to assist the Court in learning how other courts around the country have dealt with the same issues.

Chief Justice Pariente's many awards and recognitions include the Florida Bar Committee on Professionalism's 2004 William M. Hoeveler Judicial Professionalism Award, the Family Law Section's 2004 Visionary Award, the Jewish Museum of Florida's 2002 Breaking the Glass Ceiling Award, the 2001 Florida Association of Women Lawyers' Award for her lifelong dedication to the success of women in the law, the Florida Council on Crime and Delinquency's 2000 Distinguished Judicial Service Award, and the 1998 ABA Law Day Speech Award.

Her many publications include a contribution to Women Trial Lawyers: How They Succeed in Practice and in the Courtroom, *Teaching Them a Lesson* 77 Fla. B.J. 6 (June 2003), and *A Profession for the New Millenium: Restoring Public Trust and Confidence in Our System of Justice* 74 Fla. B.J. 50 (Jan. 2000).

Among her many roles, Chief Justice Pariente perceives a responsibility to improve legal education through special emphasis on practical training, so that new law school graduates will be better prepared for some of the practical aspects of the practice that more traditional, theory-based law school instruction doesn't spend much time teaching. In Chief Justice Pariente's days as a recent graduate, there were few women in private practice, and none on the bench. She saw some of the stereotypical thinking of the time, including the assumption that she was Al Cone's secretary, rather than a lawyer working with him. She was told to wear her hair back, rather than down, in trial, so that any women on the jury would feel less threatened by her.

She firmly believes in the mentoring process for teaching young lawyers the profession. She notes that many larger firms have either formal or informal mentoring programs; but that it is difficult for a small firm to do so, and when recent law school graduates "hang out their own shingle" there may no mentoring resources available to them. She, herself, had no formal mentors, though the Cone, Wagner firm had an excellent informal system. Through that informal system, she was also able to connect with some other young women lawyers, including former Florida Supreme Court Justice and now-Eleventh Circuit Court of Appeals Judge Rosemary Barkett.

Today, Chief Justice Pariente has three grown children and six grandchildren. Her daughter, following in her grandmother's footsteps, is a full-time mother of five. Both of Chief Justice Pariente's sons, however, have followed the path of their mother, pursuing law careers. Her elder son is a commercial litigator in Miami. Her younger son is in his second year of law school at the University of Florida, after graduating from Tufts University in 1999, and then working for a congresswoman.

If talent, enthusiasm, and boundless energy are the attributes of a Chief Justice, Florida is indeed fortunate to have Barbara Pariente holding that office.

Endnotes

[1] Jack Shaw is a shareholder in the Orlando office of Motes, Shaw, Sears, Sturgess & Williams, P.A. A former member of the Florida Bar Appellate Court Rules Committee and former Chair of the Amicus Curiae Committee of the Florida Defense Lawyers Association, he is currently a member of the Appellate Practice Section the Executive Council, as well as serving on various Section committees, and of the Board of Directors of the Florida Defense Lawyers Association. He concentrates his practice in the area of appeals.

Your Help Is Needed!

The Florida Bar Young Lawyers Division in Cooperation with the ABA and FEMA sponsors a pro bono legal hotline for victims of the hurricanes which have effected almost every section of the state. Staff members at The Florida Bar complete intake forms, which are then faxed to volunteer lawyers who call the victims and offer legal advice. If any members of the Appellate Practice Section have experience in landlord/tenant, insurance or employment law and would like to volunteer, please send an email with your fax number and the legal area(s) in which you feel comfortable offering advice to: Austin Newberry at anewberry@flabar.org.

Review of Non-Final Orders

by Jack R. Reiter[1]

A. Introduction

Non-final orders are like chameleons. They are constantly changing their appearance based upon surrounding circumstances and are often difficult to identify. Many orders that appear to be non-final and insulated from immediate review are revealed to be immediately reviewable upon close scrutiny.

Under Florida law, an order typically must be final before a party can invoke the jurisdiction of an appellate court. This is consistent with the role of the lower tribunal juxtaposed with the role of the appellate forum, serving as a court of review, not to address matters in the first instance. Because maintaining divergent roles between the trial and appellate courts is a critical component of our jurisprudence, disrupting a lower court's authority over a matter for an immediate appeal is disfavored and only permissible in very narrow circumstances. Therefore, appellate review of non-final orders is authorized only when expressly provided by Florida rules or law, or when a departure from the essential requirements of law exists that warrants a higher court's extension of original writ jurisdiction.[2] This article explains these principles, and the nature of non-final appeals.

B. Jurisdiction to Review Non-final Orders

When a litigant seeks review of a non-final order, the lower tribunal and the appellate forum share a certain level of jurisdiction over the controversy. "The jurisdiction of the appellate court is exclusive only as to the subject matter of the appeal."[3] While a non-final order is pending review, in the absence of a stay, the lower tribunal can take any action to advance the cause with two exceptions.

First, the trial court cannot enter a final order disposing of the case. Second, the trial court cannot enter any order that interferes with the appellate court's authority over the matter pending review.[4] Thus, the lower court may allow a case to proceed to trial and verdict or even enter an order granting a summary judgment while the non-final order is pending on appeal, but cannot enter a final judgment or dispose of the case. Furthermore, as explained below, appeals of certain non-final orders warrant a stay of lower court proceedings because the mere exercise of jurisdiction over the parties and subjecting them to the judicial process interferes, at least theoretically, with the appellate court's disposition of the order pending review.[5]

1. Florida Supreme Court jurisdiction

Until recently, the Florida Supreme Court had no direct authority to review non-final orders. Nonetheless, the Court had previously extended review over certain non-final orders originating in matters for which it ultimately obtained mandatory jurisdiction, such as when the death penalty had been imposed. In *Trepal v. State,* 745 So. 2d 702 (Fla. 2000), the Florida Supreme Court recognized that it had been "less than precise" in identifying a legal basis for its review over non-final orders.[6] The Court then juxtaposed its exclusive authority over certain categories of orders with the district courts' authority to issue writs of certiorari to identify the method through which it entertained non-final discovery orders that threatened a litigant's privileged communications.

The *Trepal* Court concluded that it had jurisdiction under Article 5, § 3(b) (1) of the Florida Constitution to review non-final discovery orders that may be reviewed in post-conviction proceedings following imposition of the death penalty; and outlined a scope of review similar to the way a district court issues a writ of certiorari. The Florida Supreme Court recently amended appellate rules of procedure to codify this procedure.[7]

Although Florida Supreme Court review of non-final orders in civil cases is not expressly outlined in the appellate rules, a district court can certify a question of great public importance or inter-district conflict to the Florida Supreme Court from an order originating in the lower tribunal as a non-final appeal. That is particularly true if it involves the constitutionality of a statute or otherwise falls squarely within the Florida Supreme Court's jurisdiction.

There is also no prohibition in the rules regarding a district court's authority to certify a final order or non-final appealable order to the Florida Supreme Court as presenting a question of great public importance that will have a great effect on the proper administration of justice throughout the state. This is referred to as "pass-through" jurisdiction.[8] This can theoretically result in immediate jurisdiction in the Florida Supreme Court of a non-final appealable order, albeit through a circuitous route.[9]

2. District Court jurisdiction

Jurisdiction to appeal a non-final order to the district court is found in Rule 9.030, Fla. R. App. P., which outlines jurisdiction as authorized by the Florida Supreme Court through the power vested therein by the Florida Constitution:

> District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.[10]

Because the Florida Supreme Court has exclusive authority to dictate district court jurisdiction over review of non-final orders emanating in circuit courts, sporadic efforts by the Florida legislature to expand such jurisdiction through various statutes purporting to create rights of immediate review have been rejected.[11] Legislative attempts to expand district court jurisdiction over non-final orders violate principles of separation of powers and impermissibly encroach upon the Florida Supreme Court's authority over district court appellate jurisdiction.[12]

The rules authorize district courts to review non-final orders rendered by administrative agencies as authorized under general law, such as the Administrative Procedure Act ("APA").[13] If an administrative agency is not governed by the APA,

continued page 15

Thinking About Becoming Board Certified in Appellate Practice?

CERTIFIED
The Florida Bar
APPELLATE PRACTICE

Certification can help you by giving you a way to make known your experience to the public and other lawyers. Certification also improves competence by requiring continuing legal education in a specialty field.

If you would like to become Board Certified in Appellate Practice or would like more complete information, please contact the area's staff liaison below:

Carol Vaught
Legal Specialization & Education
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
800/342-8060, ext. 5738 or 850/561-5738

cvaught@flabar.org

Certification is granted for five years. To be recertified, requirements similar to those for initial certification must be met.

PROTECTING RIGHTS • PURSUING JUSTICE • PROMOTING PROFESSIONALISM

THE FLORIDA BAR

For more information, visit our website at

www. FLABAR.org

Click "member services," then "certification."

There are many benefits to becoming Board Certified in Appellate Practice such as:

- ★ Malpractice carriers discounts.
- ★ Advances the importance and significance of certification to large malpractice carriers.
- ★ Good source of referrals from both attorneys and the general public.
- ★ Ability to advertise yourself as a "certified specialist" in your chosen area of practice.
- ★ Young lawyers are seeking certification as a means of expediting their professional advancement.
- ★ Name is listed in the Directory issue of The Florida Bar *Journal* in the Certified Lawyers' section.

The application filing period is July 1 - August 31 of each year. Applications may be requested year-round, but only filed during this two month period.

All requirements must be met by the August 31st filing deadline of the year in which you apply.

Your application must be approved before you become eligible to sit for the examination, usually given in March.

What are the requirements?

- ☞ Have been engaged in the practice of law for at least five years prior to the date of the application.
- ☞ Demonstrate substantial involvement in the practice of appellate practice during the three years immediately preceding the date of application. (Substantial involvement is defined as devoting not less than 30% in direct participation and sole or primary responsibility for 25 appellate actions including 5 oral arguments.)
- ☞ Complete at least 45 hours of continuing legal education (CLE) in appellate practice activities within the three year period immediately preceding the date of application.
- ☞ Submit the names of four attorneys and two judges who can attest to your reputation for knowledge, skills, proficiency and substantial involvement as well as your character, ethics and reputation for professionalism in the field of appellate practice.
- ☞ Pass a written examination demonstrating special knowledge, skills and proficiency in appellate practice.

Certification Statistics

There are currently 155 attorneys Board Certified in Appellate Practice. The area was started in 1993. Certified attorneys make up approximately 6% of The Florida Bar's total membership.

Preservation of the Record in Administrative Proceedings

by Katherine E. Giddings[1] and Kirby G. Oberdorfer[2]

A. Introduction

A fundamental precept of appellate law is that appellate courts cannot review decisions of lower tribunals for error, absent an adequate record of the lower tribunal proceedings.[3] This basic rule applies with equal force to appellate review of an administrative tribunal's final agency action.[4] Significant distinctions exist, however, between the preservation and preparation of the record in a civil appeal and an administrative appeal.

B. The Differences in Record Content of Civil and Administrative Appeals

In a civil action, the procedure for preparing the record on appeal is set forth in Fla. R. App. P. 9.200. Rule 9.200 imposes upon the clerk of the lower tribunal the duty to prepare the record on appeal, and delineates what items are automatically to be included in and excluded from the record.[5]

Under Fla. R. App. P. 9.200(a)(3), no later than ten days after filing of the notice of appeal, the appellant may direct the clerk to include or exclude other documents or exhibits filed in the lower tribunal.[6] Within twenty days of filing the notice, an appellee may direct likewise.[7] Additionally, no later than ten days after filing of the notice of appeal, the appellant has the burden of designating for transcription any portions of the proceedings not on file with the lower court that are necessary for the appeal.[8] An appellee may designate additional portions of the proceedings to be transcribed within twenty days of filing the notice of appeal.[9]

Rule 9.190(c) governs the record on appeal in administrative proceedings. Although §§ 120.57(1) and (2) of the Administrative Procedure Act ("APA") generally identify what constitutes the record in various types of administrative proceedings, Fla. R. App. P. 9.190(c) was adopted to more clearly identify what constitutes the record in appeals from such proceedings.[10]

Specifically, Rule 9.190(c)(1) provides that the "record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court."[11] The Rule further provides that the contents of the record may be modified as provided in Fla. R. App. P. 9.200(a)(3), which, as noted above, allows the appellant to direct the clerk to include documents or exhibits filed in the lower tribunal other than those listed in Fla. R. App. P. 9.190(c), or to exclude documents specified in the rule.[12]

C. The Differences in Record Preparation Between Civil and Administrative Appeals

At first blush, it might appear that the preparation of the record in administrative proceedings differs little from the preparation of the record in civil actions. A review of the unique administrative process, however, establishes the fallacy of this assumption.

Generally, under the APA,[13] where disputed issues of material fact exist, a party may challenge agency action by filing a request with the agency for a formal hearing before the Division of Administrative Hearings ("DOAH").[14] If the agency refers the matter to DOAH, an administrative law judge ("ALJ") is assigned to preside over the formal administrative hearing process and issue a recommended order to the agency (or agency board) for final disposition.[15]

Following the submission of the recommended order by the ALJ, each party may submit to the agency exceptions to the recommended order.[16] Thereafter, the agency may, with certain limitations, adopt the recommended order as the final order, or reject or modify the findings of facts or conclusions of law set forth in the recommended order.[17]

An agency's review of a recommended order is analogous to an appellate proceeding.[18] After the agency issues a final order, a party may appeal an adverse agency decision to the appropriate district court of appeal.[19] If an agency's final order is appealed, the agency's clerk prepares the record on appeal, which is limited to materials filed with the agency, not DOAH.[20]

Alternatively, some proceedings, such as rule challenges, are filed directly with DOAH and the ALJ's order is final.[21] In these types of cases, the DOAH clerk prepares the record on appeal.[22] Only documents filed with DOAH during the DOAH proceedings comprise the DOAH record.

As of January 1, 2003, DOAH is a paperless court.[23] That means that the official record from DOAH is the electronic docket.[24] All documents of record must be retrieved from DOAH's website, which are uploaded daily, in ".pdf" format.[25]

In formal § 120.57(1), Fla. Stat., proceedings involving disputed issues of material fact, the agency is charged with "accurately and completely preserv[ing] all testimony" from the hearing.[26] This does not mean, however, that the agency is required to provide a transcript of the proceedings. Any party desiring a transcript of the testimony must order the transcript at the party's own expense.[27]

Sometimes, a party orders the transcript to assist in preparing a proposed recommended order. In those cases, the transcript is filed with DOAH. Upon issuance of the ALJ's recommended order, the DOAH clerk sends the agency the recommended order along with any exhibits and transcripts filed at DOAH. The DOAH clerk *does not* send any other documents to the agency and does not prepare any record for review by the agency. Instead, the parties must assemble the record anew at the agency level.

Once the ALJ issues the recommended order, the burden is on the party challenging the recommended order to present to the agency all evidence offered at the DOAH hearing supporting the exceptions to the recommended order.[28]

The agency may not reject or modify an ALJ's findings of fact, unless the agency first determines, from a review of the entire record, and

continued next page

states with particularity in the order that the findings of fact were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.[29] However, the agency must first have before it a record to review. Thus, it is imperative that the party challenging an administrative agency's final decision provide all evidence in support of the party's exceptions to the recommended order.

This means that the party also must ensure that a transcript of the hearing is made and provided to the agency. This is generally accomplished by filing the necessary documents as part of the party's exceptions to the ALJ's recommended order, or through a stipulation of the parties as to the documents to be considered by the agency. Practitioners should note that, when an appellant has failed to file exceptions to an ALJ's recommended order with the agency, the appellant fails to preserve the issue for appeal.[30]

Two First District Court of Appeal decisions illustrate the duty of the party challenging a recommended order to prepare the record for possible appeal. In *Florida Department of Corrections v. Bradley*,[31] the First District granted the appellee's motion to strike the initial brief of the appellant as improper because it contained evidence that was outside the record, as the information had not been submitted to or considered by the administrative agency. The appellee, a correctional officer whom the appellant Department of Corrections employed, sought review of his 15-day suspension to the Public Employees Relations Commission (the "Commission").[32]

After a formal hearing, where both the Department and the officer presented testimony, the Commission hearing officer issued a recommended order, recommending that the Commission not uphold the appellee's suspension.[33] The Commission issued its final order, adopting the hearing officer's recommended order.[34]

On appeal, the Department filed a motion with the First District Court of Appeal to supplement the record with a copy of the hearing transcript that included testimony favorable to the Department.[35] The Department cited to the transcript in the argument section of its initial brief, and the officer moved to strike the Department's brief.[36] In granting the officer's motion to strike, the First District cited with approval the officer's argument:

> [W]here an agency acts on a recommended order . . . and the transcript is not filed nor the agency's attention otherwise drawn to the record made of the hearing prior to issuance of a final order, the party seeking appellate relief cannot rely on the transcript in arguing that the agency erred if it accepts the recommended order's findings of fact in its final order.[37]

The First District then held:

> [W]e find that in administrative proceedings where a hearing is held before a hearing officer and a recommended order is submitted to the agency for consideration and issuance of a final order, a party which is unwilling to accept the finding of facts made in the recommended order must ensure that the agency has before it a record of the hearing prior to the time the final order is issued and must alert the agency to any perceived defects in the hearing procedures or the hearing officer's fact findings. Failure to do so, in cases where the agency accepts the hearing officer's findings of fact, will result in exclusion of the transcript from the record, will bar an appellant from presenting a version of the facts different from that recited in the final order, and will preclude any argument on appeal that the agency erred in accepting the facts as set forth in the recommended order.[38]

In the second case, *Booker Creek Preservation, Inc. v. State of Florida Department of Environmental Regulation*,[39] the appellant challenged the appellee department's policy of dismissing exceptions to factual findings contained in a recommended order when the challenging party failed to present the hearing transcript to the agency for review.[40] On appeal, the court held that "the burden of furnishing a transcript is on the party seeking review at the agency level," despite § 120.57's mandate that the agency has a duty to accurately and completely preserve all testimony in hearings involving disputed issues of material fact.[41]

Conclusion

Unlike civil actions, which involve only *one* record before *one* lower tribunal, administrative proceedings on disputed facts involve *two* distinct records. The first is the record before the administrative law judge at DOAH. The second is the record before the agency that makes the final determination in a matter. The record in an administrative appeal is limited to the record before the agency. Accordingly, counsel challenging the recommended order must ensure that (a) the agency receives a proper record from the DOAH proceedings in support of exceptions being filed to the recommended order, and (b) it does so *before* the agency rules on the exceptions and takes final agency action.

Failure to preserve the record before an administrative tribunal could have dire consequences for a party. Those can include the appellate court striking a brief or appendix of a party that includes evidence not in the record before the administrative tribunal for final agency action, or the appellate court affirming the agency's final decision.[42]

ENDNOTES

[1] Katherine E. Giddings is a shareholder with Akerman Senterfitt's Tallahassee office, where she concentrates her practice in the area of civil and administrative appellate law. She is a member of the Florida Bar's Appellate Practice Section and the Appellate Court Rules Committee, which she chaired in 2002-2003.

[2] Kirby G. Oberdorfer is an associate with Akerman Senterfitt's Jacksonville office, where she concentrates her practice in the areas of civil litigation and appellate law. She is a member of the Florida Bar's Appellate Practice Section and the Jacksonville Bar Association's Young Lawyers Section Board of Governors.

[3] *See* Philip J. Padovano, FLORIDA APPELLATE PRACTICE § 13.2 (3d ed. 2004) (hereinafter "Padovano").

[4] *See* Padovano at § 23.8.

[5] Fla. R. App. P. 9.200(a)(1), (d).

[6] Fla. R. App. P. 9.200(a)(3).

[7] *Id.*

[8] Fla. R. App. P. 9.200(b)(1).

[9] *Id.*

[10] *See* Fla. R. App. P. 9.190, 1996 comm. notes.

[11] Fla. R. App. P. 9.190(c)(1). The Florida Supreme Court adopted Fla. R. App. P. 9.190 in 1996 upon petition by the Appellate Court Rules Committee of the Florida Bar ("Committee"). *See Amendment to Fla. R. App. P. 9.020(a) & Adoption of Fla. R. App. P. 9.190*, 681 So. 2d 1132, 1132 (Fla. 1996). The Com-

mittee drafted Rule 9.190 in response to the Florida Legislature's 1996 overhaul of the Administrative Procedure Act. *Id*. As the Florida Supreme Court noted, "[a]reas of primary concern included appeal and review commencement provisions and the record on appeal." *Id*.; *see also* § 120.68(4), Fla. Stat. (2003) (providing that "[j]udicial review of any agency action shall be confined to the record transmitted.").
[12] Fla. R. App. P. 9.200(c)(6).
[13] Ch. 120, Fla. Stat. (2003).
[14] § 120.569(2)(a), Fla. Stat. (2003).
[15] §§ 120.569(2)(d), 120.57(1)(a), (k), Fla. Stat. (2003). Under the unique administrative process, the agency acts as both the prosecutor and the decision-maker. The decision-maker is generally the agency head or board within the agency. Under such circumstances, however, the attorney representing the interests of the agency cannot act as both prosecutor for and advisor to the decision maker. *See, e.g.*, § 455.211(2)("Department of Business and Professional Regulation may employ or utilize the legal services of outside counsel . . . . However, no attorney employed or used by the department shall prosecute a matter and provide legal services to the board with respect to the same matter."). Frequently, an agency uses an employee attorney to prosecute a case and retains the services of an assistant attorney general to provide legal services to the board. *See, e.g.*, § 455.211(1) ("The department shall provide board counsel for boards within the department by contracting with the Department of Legal Affairs, by retaining private counsel . . . or by providing department staff counsel.").
[16] § 120.57(k), Fla. Stat. (2003).
[17] § 120.57(l), Fla. Stat. (2003).
[18] § 4.45, Fla. Admin. Practice (7 ed. 2004).
[19] *See* § 120.68(2)(a), Fla. Stat. (2003).
[20] Fla. R. App. P. 9.110(e).
[21] *See, e.g.*, § 120.56(c), (e), Fla. Stat. (2003).
[22] Fla. R. App. P. 9.100(e).
[23] Internal policy set by the Director and Chief ALJ of DOAH.
[24] Internal policy set by the Director and Chief ALJ of DOAH.
[25] *See* http://www.doah.state.fl.us/internet/default.cfm.
[26] § 120.57(1)(g), Fla. Stat. (2003)
[27] *Booker Creek Pres., Inc. v. Fla. Dep't of Envtl. Regulation*, 415 So. 2d 750, 751 (Fla. 1st DCA 1982); Fla. Admin. Code R. 28-106.214(2).
[28] *See Resort Sales Int'l, Inc. v. Fla. Dep't of Bus. & Prof'l Regulation*, 795 So. 2d 1040, 1042 (Fla. 1st DCA 2001).
[29] § 120.57(1)(l), Fla. Stat. (2003).
[30] *See, e.g., Comm'n on Ethics v. Barker*, 677 So. 2d 254 (Fla. 1996); *Mehl v. Office of Fin. Regulation*, 859 So. 2d 1260, 1263 (Fla. 1st DCA 2003) (when an appellant does not file exceptions to findings of fact set forth in the ALJ's recommended order so as to trigger agency review of the record, the appellant waives its right to challenge the order's findings of fact in a subsequent appeal).
[31] 510 So. 2d 1122, 1124 (Fla. 1st DCA 1987).
[32] *See id*. at 1122.
[33] *See id*.
[34] *See id*. at 1123.
[35] *See id*.
[36] *See id*.
[37] *Id*.
[38] *Id*. at 1124 (emphasis added).
[39] 415 So. 2d 750 (Fla. 1st DCA 1982).
[40] *See id*. at 750.
[41] *Id*. at 750-51. Section 120.57(1)(g) now provides that the "agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost."
[42] *See Pinelli v. Dep't of Children & Families*, 878 So.2d 49 (Fla. 1st DCA 2004) (affirming final order issued by Florida Department of Children and Families because of appellant's failure to provide any record of the proceedings before the agency); *Cuebas v. Unemployment Appeals Comm'n*, 765 So. 2d 882, 883 (Fla. 2d DCA 2000) (recognizing that a party that does not furnish the appellate court with a transcript of the proceedings before the hearing officer cannot prevail); *Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc.*, 617 So. 2d 385, 389 (Fla. 1st DCA 1993) (striking evidence contained in appendix of petitioner's reply brief because such evidence was not admitted into evidence before the Division of Administrative Hearings); *Edwards v. Dep't of Health & Rehabilitative Serv.*, 592 So. 2d 1249, 1250 (Fla. 4th DCA 1992) (holding that appellant's failure to provide "this court with a transcript of the evidentiary hearing held before the hearing officer precludes his argument that the commission erred in accepting the facts set forth in the hearing officer's recommended order"); *Bradley*, 510 So. 2d at 1124 (striking appellant's initial brief that contained references to hearing transcript not included in record before administrative agency); *Arlotta v. Fla. Parole & Probation Comm'n*, 419 So. 2d 1159, 1160 (Fla. 1st DCA 1982) (striking appendix attached to appellant's initial brief that contained documents not introduced before the administrative agency on grounds that "[d]ocuments not made part of the record and not presented to the agency for consideration cannot be considered by this Court.").

Writ of Prohibition: Its Use After Denial of Judicial Disqualification

by Allison E. Butler[1]

I. Introduction

Florida courts have routinely held that the extraordinary writ of prohibition is the proper legal procedure to use after denial of a motion to disqualify a trial judge.[2] This article examines this writ and its function in the court system as it directly relates to a recusal of a judge. Additionally, this article presents a brief overview of the procedure necessary to achieve proper consideration before the reviewing tribunal. Finally, this article discusses the legal effect of the reviewing court's ruling, to ensure that counsel properly evaluates his/her options before electing to file a writ of prohibition.

II. Writ of Prohibition Defined

A writ of prohibition is the proceeding that a superior court uses to prohibit a lower court from exercising its authority.[3] The writ is preventative, not corrective, in nature.[4] Therefore, it cannot be utilized to revoke an order already entered.[5] This extraordinary writ is not of absolute right; the granting of such writ lies within the discretion of the court.[6] However, if a basis for disqualification of a trial judge is established, the writ of prohibition has been held to be the appropriate and necessary remedy.[7]

III. Procedure

In filing a writ of prohibition, the party or the relator seeking the writ has the burden to allege facts sufficient to establish that the judge either exceeded or lacked jurisdiction to determine a matter.[8] Therefore, an appendix is necessary to show this; a record is not required unless ordered.[9]

Fla. R.App. P. 9.100(e) sets forth the procedure for filing a writ of prohibition. With regard to a denial of a recusal, the petitioner omits the name of the judge or lower tribunal from the caption, but includes the judge in the body of the petition as a formal party.[10] The caption must bear the name of the petitioner. The other parties to the proceeding in the lower tribunal who are not a petitioner are named in the caption as respondents by operation of rule.[11] The petition is served on all parties, including the judge or lower tribunal.[12] A review proceeding filed in circuit court has additional requirements.[13]

continued next page

According to Fla.R.App.P. 9.100(g), all writs of prohibition shall not exceed fifty pages and must contain the following:

A) The basis for invoking the jurisdiction of the court;

B) The facts on which the petitioner relies;

C) The nature of the relief sought; and,

D) Argument in support of the petition, with appropriate citations of authority.

A. Basis for Invoking Jurisdiction

As a general rule, the petition for writ of prohibition is filed in the court having direct appellate and supervisory jurisdiction over the subject matter. Therefore, counsel must reference in the petition the basis for invoking jurisdiction and cite applicable case law. Because jurisdictional issues are relevant, a cautious practitioner should thoroughly review the matter to identify the proper reviewing court before filing the writ of prohibition.

Article V, § 3(b)(7) of the Florida Constitution authorizes writs of prohibition to the Florida Supreme Court. The Florida Supreme Court has jurisdiction to issue writs of prohibition to circuit courts only when the supreme court would have had appellate or discretionary jurisdiction over the matter in the first place.[14]

Writs of prohibition to the district courts of appeal are authorized by Article V, § 4(b)(3) of the Florida Constitution and Fla. R.App. P. 9.030(b)(3).[15] Notably, district courts of appeal have the power to issue writs of prohibition to lower tribunals, as well as administrative agencies.[16]

Article V, § 5(b) of the Florida Constitution authorizes circuit courts to issue writs of prohibition. However, the petition must establish subject matter and territorial jurisdiction in order for the circuit court to exercise such power.[17]

B. Factual Statement

The petition must concisely set forth the facts of the case. In particular, this section should not contain any argument. References to the Appendix should be facilitated to ensure accuracy.[18]

C. Nature of the Relief Sought

This section should briefly set forth the relief requested. When seeking recusal, for example, such language might straightforwardly state, "By this petition, petitioner seeks a writ prohibiting the Honorable Judge XYZ from presiding over this case."

D. Argument

The legal argument must include relevant case law and applicable statutory authority. Apply the factual pattern to the law and clearly illustrate the error committed by the residing judge.[19] With regard to recusal of a judge, the law provides that a judge must enter an order granting disqualification if the motion to disqualify is "legally sufficient."[20] The motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.[21] A motion to disqualify a judge must be well-founded, and contain facts germane to the judge's undue bias, prejudice or sympathy.[22]

A basic tenet in disqualification proceedings is that "[j]ustice must satisfy the appearance of justice."[23] This tenet must be followed even if the record lacks any actual bias or prejudice on the judge's part, and "even though this 'stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'"[24] The judge has no authority to pass on the truth of the facts alleged in the motion, or to make any other decision concerning the merits of the motion.[25]

IV. Judicial Determination

If the petition demonstrates a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal, or that review of final administrative action would not provide an adequate remedy, the reviewing court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted.[26] In prohibition proceedings, such orders shall stay further proceedings in the lower tribunal.[27] The responsibility to respond to an order to show cause is that of the litigant opposing the relief requested in the petition.[28] Notably, the judge or lower tribunal has no obligation to file a response unless directed to do so by the reviewing court.[29] Moreover, the absence of a separate response by the judge or lower tribunal is not deemed an admission to the allegations of the petition.[30] However, a court may treat the lack of response by other parties to the action as an admission to the allegations of the petition.[31]

Within the time set by the court, the respondent may serve a response, which must not exceed fifty pages in length and which must include argument in support of the response, appropriate citations of authority, and references to the supporting pages of the appendices. Within twenty days thereafter, or such other time set by the court, the petitioner may serve a reply, which shall not exceed fifteen pages, and a supplemental appendix.

All petitions, responses and replies must be lettered in black and distinct type, doubled-spaced, with at least one inch margins. Computer-generated petitions, responses, and replies must be submitted in either Times New Roman 14-point font or Courier New 12-point font, and accompanied with a certificate of compliance that must immediately follow the certificate of service.

If the writ is granted, the residing judge may not take any further action in the case.[32]

If the petition fails to demonstrate a preliminary basis for relief, the writ will be denied. Notably, the wording of the Order of Denial determines whether the denial acts as *res judicata*. In *Topps v. State*,[33] the Florida Supreme Court specifically ruled that unelaborated orders denying relief in connection with any type of extraordinary writ petition issued by Florida courts shall *not* be deemed to be decisions on the merits which would later bar the litigant from presenting the issue under the doctrines of res judicata or collateral estoppel, unless there is a citation to authority or other statement that clearly shows that the issue was considered by the court on the merits and relief was denied. "*To ensure that litigants and courts alike are clear as to the legal effect of unelaborated denial orders, henceforth, if a Florida court denies a writ petition with the intent that the denial is on the merits, language to that effect must be included in the order.*" Therefore, the ruling of *Topps* clarifies the consequence of a denial of a writ of prohibition based on the language inserted by the reviewing court. *Topps*, however, leaves unanswered just what is, and what is not, within the scope of an unelaborated order of "denial on the merits" that might later otherwise preclude consideration on *res judicata* grounds.

Conclusion

The procedure for obtaining a writ of prohibition theoretically begins when an attorney is informed by his/her client of bias or prejudice of the presiding judge. It is at such time that counsel should inform his/her client of the complete process, including the client's right to seek a writ of prohibition if the motion for recusal is denied. Moreover, even if the writ of prohibition is denied, the client still might be able to retain the argument provided the reviewing court does not rule on the merits with elaboration. Hence, the writ of prohibition can act as a safety net, to ensure that the client's case is heard by a neutral judge.

ENDNOTES

[1] Allison E. Butler is an appellate attorney working in a variety of substantive areas of law in Martin County, Florida. She is a nationally and internationally published author in various subjects, including insurance defense and international sales law. Ms. Butler received her B.A., with honors, from the University of South Florida and her J.D. from Loyola University.

[2] *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978); *Castro v. Luce*, 650 So. 2d 1067 (Fla. 2d DCA 1995); *Holmes v. Goldstein*, 650 So. 2d 87 (Fla. 4th DCA 1995); *Time Warner Entertainment Co. v. Baker*, 647 So. 2d 1070 (Fla. 5th DCA 1994); *State v. Shaw*, 643 So. 2d 1163 (Fla. 4th DCA 1994); *Deberry v. Ward*, 625 So. 2d 992 (Fla. 4th DCA 1993); *Sperber v. Sperber*, 608 So. 2d 145 (Fla. 4th DCA 1992); *Rollins* v. Baker, 683 So. 2d 1138 (Fla. 5th DCA 1996); *Bay Bank & Trust Co. v. Lewis*, 634 So. 2d 672 (Fla. 1st DCA 1994); *Gieseke v. Grossman*, 418 So. 2d 1055 (Fla. 4th DCA 1982); *Moody v. Moody*, 705 So. 2d 708 (Fla. 1st DCA 1998); *Pinfield v. State*, 710 So. 2d 201 (Fla. 5th DCA 1998).

[3] *English v. McCary*, 348 So. 2d 293 (Fla. 1977); *State ex. rel. Sarasota Cty. v. Boyer*, 360 So. 2d 388 (Fla. 1978); *SKFW Mgmt. Corp. v. Dept. of Revenue*, 867 So. 2d 1232 (Fla. 5th DCA 2004).

[4] *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1977). Notably, a prohibition is a discretionary remedy and is not by right. *Southern Records & Tape Service v. Goldman*, 502 So. 2d 413 (Fla. 1986).

[5] *Sparkman v. McClure*, 498 So. 2d 892 (Fla. 1986); *Bender v. First Fid. Sav. & Loan Ass'n of Winter Park*, 463 So. 2d 445 (Fla. 4th DCA 1985), *approved*, 491 So. 2d 276 (Fla.1986).

[6] *Topps v. State*, 865 So. 2d 1253 (Fla. 2004).

[7] *Chervony v. Estate of Brikman*, 753 So. 2d 96 (Fla. 3d DCA 1999). *See also*, note 2, *supra*. *But see Moody v. Moody*, 705 So. 2d 708 (Fla. 1st DCA 1998) (holding a writ of mandamus is the proper remedy to compel a lower court to rule in a timely fashion on a motion for disqualification of a trial judge); *D.W.H. v. Dept. of Children & Families*, 815 So. 2d 732 (Fla. 5th DCA 2002).

[8] *State ex. rel. Roose v. Vordermeier*, 209 So. 2d 685 (Fla. 4th DCA 1968).

[9] Fla. R. App. P. 9.100(g); *see also* Fla. R. App. P. 9.220 and 9.100(i).

[10] Fla. R. App. P. 9.100(e)(1)(2); *Cascone v. the Honorable Robert M. Foster*, 774 So. 2d 773, 774, n.1 (Fla. 1st DCA 200) (acknowledging that a petition for writ of prohibition directed to a trial judge should be captioned in the name of the parties in the lower tribunal and not in the name of the judge).

[11] *Id.*

[12] *Id.*

[13] *See generally* Fla. R. App. P. 9.100(f).

[14] *See* Philip J. Padovano, FLORIDA APPELLATE PRACTICE, § 28.3 (2d ed. 1997) (hereinafter "Padovano").

[15] *Lee v. Campion*, 823 So. 2d 159 (Fla. 4th DCA 2002).

[16] *Hoover v. Department of Professional Regulation*, 620 So. 2d 805 (Fla. 5th DCA 1993).

[17] Padovano, *supra*, notes 6 & 13.

[18] Fla.R.App.P. 9.220 provides an appendix must be bound separately or separated by an appropriate divider or tab and must contain an index.

[19] *De novo* standard of review is applied when a reviewing court is determining whether a motion to disqualify is legally sufficient *City of Hollywood v. Witt*, 868 So. 2d 1214 (Fla. 4th DCA 2004) citing *Peterson v. Asklipious*, 833 So. 2d 262, 263 (Fla. 4th DCA 2002).

[20] Fla.R. Jud.Admin. 2.160(f).

[21] *Mackenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332 (Fla. 1990); *Rodgers v. State*, 630 So. 2d 513, 515 (Fla. 1993); *Pearson v. Pearson*, 2004 LEXIS 3862 (Fla. 2d DCA 2004); *Collado v. Collado*, 858 So. 2d 1255 (Fla. 5th DCA 2003); *Sherrod v. Berg*, 865 So. 2d 689 (Fla. 5th DCA 2004); *Estate of Owens v. Liberty Assisted Living Ctrs., Ltd.*, 826 So. 2d 485 (Fla. 1st DCA 2002); *Barrett v. Barrett*, 851 So. 2d 799 (Fla. 4th DCA 2003);

[22] *Rivera v. State*, 717 So. 2d 477, 480-81 (Fla. 1998) (quoting *Jackson v. State*, 599 So.2d 103, 107 (Fla. 1992), *cert. den'd*, 506 U.S. 1004 (1992).

[23] *Atkinson Dredging Co. v. Henning*, 631 So. 2d 1129, 1130 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

[24] *Id.* at 1130 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

[25] Fla.R.Jud.Admin. 1.160; *Brown v. St. George Island, Ltd.*, 561 So. 2d 253, 255 (Fla. 1990); *Hayslip v. Douglas*, 400 So. 2d 553, 555-56 (Fla. 4th DCA 1981).

[26] Fla. R. App. P. 9.100(h).

[27] *Id.*; *Harrell v. State*, 721 So.2d 1185 (Fla. 5th DCA 1998) (stating that a petition for writ of prohibition divests a trial court of jurisdiction at the time the district court issues a show cause order); *Leslie v. Leslie*, 840 So. 2d 1097, 1099 (Fla. 4th DCA 2003); *Brinson v. State*, 789 So. 2d 1125, 1126 (Fla. 2d DCA 2001).

[28] Fla. R. App. P. 9.100(e)(3).

[29] *Id.*

[30] *Id.; see also, Ellis v. Henning*, 678 So. 2d 825 (Fla. 4th DCA 1996) (holding Assistant Attorney General can file on behalf of judge).

[31] *Daugherty v. McNeal*, 643 So. 2d 665 (Fla. 5th DCA 1994); *Paulson v. Evander*, 633 So. 2d 540 (Fla. 4th DCA 1994).

[32] *See* Fla.R.Jud.Admin. 2.160(f); *Bolt v. Smith*, 594 So. 2d 864 (Fla. 5th DCA 1992); *McKay v. McKay*, 488 So. 2d 898 (Fla. 3d DCA 1986); *but see, Cascone v. Cascone*, 774 So. 2d 773 (Fla. 1st DCA 2000).

[33] 865 So. 2d 1253 (Fla. 2004)." Florida Rule of Appellate Procedure 9.100. At that time, the Florida Supreme Court proposed a new subdivision 9.100(l), Disposition of Writ Petitions. Under the proposed subdivision at that time, an unelaborated denial would have been considered a decision on the merits. The proposed amendments were submitted to The Florida Bar's Appellate Court Rules Committee (Committee) for consideration. The Committee subsequently presented the supreme court with a petition to amend the rules but, contrary to the proposal as submitted by the Court, the Committee's proposed amendments totally reversed the approach and provided that an unelaborated denial of an extraordinary writ petition would *not* be a decision on the merits. At that time, the Court denied the Committee's petition, rejected the Committee's proposal, and directed publication of the Court's proposed amendments as originally drafted in *The Florida Bar News*. The records reflect that, after reviewing the proposals and the comments received related to the Court's proposed amendments, none of which were in support of the Court's proposed amendments, the Court determined that it would be better to approach a remedy for the lack of uniformity in the district courts with regard to the effect of an unelaborated denial of a writ petition by opinion when the appropriate case was presented to this Court for consideration." *Id.* at 1256-57.

Extraordinary Writs of Certiorari and Mandamus: Standards in Review

by Paul A. Avron[1] and Ilyse M. Homer[2]

This article analyzes the standards for the exercise of certiorari jurisdiction by Florida District Courts of Appeal, and the standards applicable to writs of mandamus, both in Florida and Federal courts.

A. Certiorari Review by Florida District Courts of Appeal

Florida Rule of Appellate Procedure 9.100(c)(1) requires that a petition for writ of certiorari be filed "within 30 days of rendition of the order to be reviewed."[3] "Second-tier certiorari review of a circuit court's decision is not a matter of right. . . ."[4]

> When considering such a petition for writ of certiorari, the court has only two options–it may either deny the petition or grant it, and quash the order at which the petition is directed. It may not enter judgment on the merits, or direct the lower tribunal to enter any particular order.[5]

In *Allstate Insurance Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003), the Florida Supreme Court explained that the "nature and scope of certiorari review in Florida has been refined over the years." The Court stated that "certiorari review is 'appellate in character in the sense that it involves a limited review of the proceedings of an inferior jurisdiction.'"[6] "While certiorari proceedings have taken on the character of appellate review proceedings in the district courts of appeal, they are still properly considered original extraordinary writ proceedings."[7] Continuing, the *Kaklamanos* court stated that "certiorari should not be used to grant a second appeal, but instead is limited to those instances where the lower court did not afford procedural due process or departed from the essential requirements of law."[8]

> [T]he departure from the essential requirements of law necessary for the issuance of a writ of certiorari is something more than a simple legal error. A district court should exercise its discretion to grant certiorari review *only* when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.[9]

"A failure to observe the 'essential requirements of law' has been held synonymous with a failure to apply 'the correct law'", as opposed to incorrectly applying the correct law.[10]

After reviewing prior district court case law, the Florida Supreme Court stated that "clearly established law" for purposes of certiorari review:

> can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law. Thus, in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review.[11]

In his dissent, Justice Wells stated that the majority's holding that "in addition to case law dealing with the same issue of law, an interpretation or application of a statute, a procedural rule, or a constitutional provision may be the basis for granting certiorari review," above, was contradictory to the Court's prior holding in *Ivey v. Allstate Insurance Co.*, 774 So. 2d 679, 683 (Fla. 2000). In *Ivey*, Justice Wells explained, the Court held that mere disagreement by a district court of a decision by a circuit court is an improper basis for common law certiorari.[12] Justice Wells cautioned that the Court "should abide by its own admonition" stated in *Ivey*:

> If a problem is occurring in our current appellate system because a large number of circuit court decisions are unreported, then perhaps the issue should be addressed and resolved. The solution is not, however, a second level of appellate review when a district court simply disagrees with the decision of a circuit court sitting in its appellate capacity. The concept of certiorari review should have a recognized uniformity of application. Thus, we conclude that the district court below inappropriately exercised certiorari review.[13]

B. Mandamus Under Florida Law

Unlike certiorari, mandamus has no thirty-day time restriction. A petition for writ of mandamus is considered "a civil action."[14] While certiorari is available to remedy irreparable harm and the departure from the essential requirements of law, "[m]andamus is a common law remedy used to enforce an established legal right by compelling a person in an official capacity to perform an undisputably ministerial duty required by law."[15]

Mandamus "may only be granted if there is a clear legal obligation to perform a duty in a prescribed manner."[16] "The petitioner must have a clear legal right, and the respondent must have an indisputable legal duty."[17] "A duty or act is ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law."[18] "[T]he purpose of mandamus is not to establish a legal right, but is instead to enforce a right that is already clearly established by law. . . ."[19]

C. Mandamus Under Federal Law

Mandamus writs under federal law are narrower than under Florida law. "The peremptory writ of mandamus has traditionally been used in federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'"[20] "The writ of mandamus is an order directing a public official . . .to perform a duty exacted by law,"[21] and "will not issue to correct a duty that is to any degree debatable."[22]

"[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[23] "[M]andamus lies only to confine a lower court to its jurisdiction or to compel it to perform minis-

terial functions over which it has no discretion."[24]

Mandamus is not to be a substitute for an appeal.[25] As stated in *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394, 402-03 (1976), there is "good reason" why mandamus in the federal court system is treated as an "extraordinary remedy," i.e., it is contrary to the general rule that appellate review should be postponed until after the trial court has ruled.

Because of this general rule, the party seeking mandamus must show that it has no other adequate means to obtain the relief sought.[26] In other words, "[a] writ of mandamus is unavailable where there is another means to obtain adequate review."[27] The party seeking mandamus bears the burden of proof to demonstrate "that its right to issuance of the writ is 'clear and indisputable.'"[28]

Conclusion

The standards for certiorari review in Florida and writ of mandamus both in Florida and federal courts have evolved over the years. Recent case law along with application of appropriate statutes and rules provide the basis for understanding those standards and implementing the law accordingly. Practitioners are, therefore, urged to review the latest case law in conjunction with the statutes and rules before proceeding in these areas.

ENDNOTES

[1] Paul A. Avron practices bankruptcy and appellate law at Berger Singerman, P.A. in Miami, Florida. He is a member of the Appellate Practice Section of The Florida Bar.

[2] Ilyse M. Homer practices bankruptcy and appellate law at Berger Singerman, P.A. in Miami, Florida. She is a member of the Appellate Practice Section of The Florida Bar.

[3]. *See, e.g., State v. Wagner*, 863 So. 2d 1224, 1226 n.4 (Fla. 2004).

[4]. *Miami-Dade County v. Omnipoint Holdings, Inc.* 863 So. 2d 195, 199 (Fla. 2003).

[5]. *Tedder v. Fla. Parole Comm'n*, 842 So. 2d 1022, 1024 (Fla. 1st DCA 2003).

[6]. *Kaklamanos*, 843 So. 2d at 889 (quoting *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 525 (Fla. 1995)).

[7]. *Stallworth v. Moore*, 827 So. 2d 974, 976-77 n.3 (Fla. 2002) (citing Philip J. Padovano, FLORIDA APPELLATE PRACTICE § 28.1, at 597 (2d ed. 1997)).

[8]. *Kaklamanos*, 843 So. 2d at 889 (citing *Haines City*, 658 So. 2d at 526). *Cf. Combs v. State*, 436 So. 2d 93, 95-96 (Fla. 1983) (holding that in considering common law certiorari, district courts of appeal should be primarily concerned with seriousness of the error, not the mere existence of error, and should grant certiorari when there has been a violation of clearly established principles of law resulting in a miscarriage of justice).

[9]. *Kaklamanos*, 843 So. 2d at 889 (citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 682 (Fla. 2000)); *see also Ross v. State*, 876 So. 2d 684, 685 (Fla. 4th DCA 2004).

[10]. *Hous. Auth. of the City of Tampa v. Burton*, 874 So. 2d 6, 8 (Fla. 2d DCA 2004) (quoting *Haines City*, 658 So. 2d at 530).

[11]. *Kaklamanos*, 843 So. 2d at 890; *see also Ross*, 876 So. 2d at 686.

[12]. *Kaklamanos*, 843 So. 2d at 897-98.

[13]. *Id.* at 898 (quoting *Ivey*, 774 So. 2d at 683).

[14]. *Weeks v. Golden*, 764 So. 2d 633, 635 (Fla. 1st DCA 2000) (citing Fla. R. Civ. P. 1.040, 1.630)).

[15]. *Austin v. Crosby*, 866 So. 2d 742, 744 (Fla. 5th DCA 2004) (citing *Milanick v. Town of Beverly Beach*, 820 So. 2d 317, 320 (Fla. 5th DCA 2001). *Accord Jackson v. State*, 802 So. 2d 1213, 1218 (Fla. 2d DCA 2002) ("[T]he issuing of a writ of mandamus is an appropriate remedy 'to enforce an established legal right by compelling a public officer or agency to perform a duty required by law.'" (quoting *Lee County v. State Farm Mut. Auto. Ins.*, 634 So. 2d 250, 251 (Fla. 2d DCA 1994))).

[16]. *Austin*, 866 So. 2d at 744 (citation omitted). *Accord Dep't of Children & Family Servs. v. Burton*, 802 So. 2d 467, 469 (Fla. 2d DCA 2001) ("A writ of mandamus is available 'to coerce an official to perform a clear legal duty.'" (quoting *Sica v. Singletary*, 714 So. 2d 1111, 1112 (Fla. 2d DCA 1998))).

[17]. *Jackson*, 802 So. 2d at 1218 (citing *Lee County*, 634 So. 2d at 251).

[18]. *Austin*, 866 So. 2d at 744 (citations omitted).

[19]. *Id.* (citations omitted).

[20]. *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)).

[21]. *United States v. Denson*, 603 F.2d 1143, 1146 (5th Cir. 1979). This case constitutes binding Eleventh Circuit case law pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

[22]. *Denson*, 603 F.2d at 1148 n.2.

[23]. *Will*, 389 U.S. at 95 (quoting *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945)). *Accord Allied Chem. Corp., v. Daiflon, Inc.*, 449 U.S. 33, 34-35 (1980) ("[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations....Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy.").

[24]. *In re Evans*, 524 F.2d 1004, 1007 (5th Cir. 1975). This case constitutes binding Eleventh Circuit case law pursuant to *Bonner*, 661 F.2d at 1209; *see also United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 420 (1931) ("Under the established rule, the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory and plainly defined. The law must not only authorize the demanded action but require it; the duty must be clear and indisputable.") (citations omitted).

[25]. *See Will*, 389 U.S. at 97.

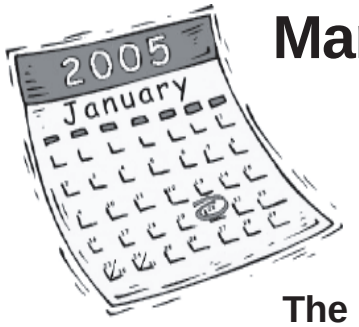
[26]. *Kerr*, 426 U.S. at 403.

[27]. *In re Bethesda Mem'l Hosp., Inc.*, 123 F.3d 1407, 1408 (11th Cir. 1997) (citing *Helstoski v. Meanor*, 442 U.S. 500, 505 (1979)).

[28]. *Will*, 389 U.S. at 96 (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953)); *Miller v. French*, 530 U.S. 327, 339 (2000) (reiterating "clear and indisputable" standard) (citation omitted); *In re BellSouth Corp.*, 334 F.3d 941, 953 (11th Cir. 2003) (same) (citation omitted).

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

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Dorothy Easley, Editor, Steven M. Ziegler, P.A., 4000 Hollywood Blvd., Suite 375 South, Hollywood, FL, or email to dfeasley@bellsouth.net



Mark Your Calendars!

Appellate Practice Section Committee Meetings, Luncheon & Executive Council Meeting

The Florida Bar Midyear Meeting
January 20, 2005
Hyatt Regency Downtown Miami

Book Reviews: "Florida Appellate Practice and Advocacy" and "Professional Judgment on Appeal"

Reviewed by Scott D. Makar[1]

Two books on appellate practice are quite different in their approaches. Yet, together, they work like peanut butter and jelly.

Readers are undoubtedly familiar with *Florida Appellate Practice and Advocacy* (Stetson University 2003, paperback, $59.00)–now in its Third Edition–by Tampa appellate specialist Raymond "Tom" Elligett, Jr. and Judge John M. Scheb, formerly a judge on the Second District Court of Appeal. This now 344-page volume has developed over the past five years from materials first used for an appellate advocacy course at Stetson University College of Law. It has become an increasingly useful handbook with "how-tos" and insightful practice pointers. Its focus is on fundamental principles of appellate practice, with emphasis on the nuances of Florida state and federal court appellate decisions. This edition, like its predecessor, contains a CD-Rom of the book in searchable ".pdf" format.

In its first review, *Florida Appellate Practice and Advocacy* fared quite well.[2] Upon second review, a successor reviewer likened the authors to "Richie Cunningham" of *Happy Days* fame and a judicial incarnation of insurance salesman Jim Anderson (aka "Father") of *Father Knows Best* fame.[3] Thankfully, attorney Elligett and Judge Scheb personify the fictional characters' better attributes![4] The more important question is: who might be the appellate equivalent of Fonzie? Imagine the Fonz appearing at oral argument in his leather jacket giving the appellate judge his trademarked "thumbs up"! But I digress.

Upon this third review, the authors have streamlined the text with thoughtful edits and numerous additional pages of substantive material. The CD-Rom is searchable (though not "cut-and-paste"-able). And like its predecessors, it continues to add leading cases and articles that are cited with great frequency. It also has a webpage where updates can be found. *See* http://www.law.stetson.edu/cle/appellate.htm.

Perhaps the best edit in this edition comes with the elimination of a short passage from an article in the *University of Florida Journal of Law and Public Policy* by former Supreme Court of Florida Justice Stephen Grimes, which is otherwise liberally reproduced throughout *Florida Appellate Practice and Advocacy*. While the authors retain from earlier editions much of what Justice Grimes said in his 1987 article, they took out the portion that contained a typo (for which this reviewer has taken some heat over the years as the editor-in-chief for the *Journal* at that time) that misstated the motto of the Supreme Court of Florida as "Soon Enough Is Correct" rather than "Soon Enough, If Correct." Justice Grimes's article is thereby spared the "sic" treatment from the Second Edition, and this reviewer need not see this editing oversight perpetuated. Thank you, Tom and Judge Scheb.

Next, *Professional Judgment on Appeal* (Carolina Academic Press 2002, $75.00/$50.00 students) by Professor Steven Wisotsky of Nova Southeastern College of Law is the fine toothcomb that sifts through the chaff for the golden nuggets. *Professional Judgment on Appeal*, as its title suggests, highlights the ethical dimension of the appellate process, emphasizing from the outset the nature of a principled appellate practice.

On page one, the author begins with a quote from Justice Ruth Bader Ginsburg: "My first words of caution to lawyers contemplating an appeal: perhaps you shouldn't." Flowing from this principle of restraint (reflected by an 85 percent+ affirmance rate by appellate courts) is the notion that the decision of whether to appeal and what transpires, thereafter, requires "sophisticated judgments", if one is to succeed as an appellate practitioner. Indeed, *Professional Judgment On Appeal* is infused with insights and wisdom gleaned from appellate judges and practitioners on what constitutes grounds for appeal, what makes an exceptional appellate brief, and what traps and foibles await the unwary appellate practitioner.

The chapter on appellate malpractice is an all too familiar reminder that appellate lawyers are to be on their guard in exercising their professional judgment. Professor Wisotsky catalogues the types of appellate malpractice claims that often arise, such as those involving (a) failure to raise an issue on appeal, (b) failure to timely file an appeal, (c) failure to perfect an appeal (for example, by failing to ensure the record or briefs are filed timely) and (d) failure to keep the client informed.

What about the role of professional judgment in deciding, for example, to forego a cross-appeal? Or to raise some, but not all, issues in an appeal? Or to simply misconstrue or misunderstand unsettled law? When should an appellate lawyer inform a client about malpractice at the trial level? Professor Wisotsky's chapter addresses each of these difficult topics.

Professional Judgment on Appeal includes chapters on appellate mediation, finality and appealability, preservation of error, standards of review on appeal, harmless error, post-decision practice, frivolous appeals, and violations of appellate rules and orders. One chapter, devoted to "Predicting Outcomes" in appellate courts, is particularly relevant in today's judicial process. Is there a growing "indeterminacy" in appellate decisions that makes it increasingly difficult for appellate practitioners to advise clients on whether to appeal and what issues to raise? What forces make the process more stable with predictable outcomes (e.g., collegiality of a court) versus more uncertain with unforeseeable results (larger courts with hundreds of potential panels of three)? Is the adjudication process "result-oriented" or is such a claim "horse manure" (as Judge Alex Kozinski has responded)? Read *Professional Judgment on Appeal* for interesting discussion of these and other questions.

Finally, as a general note, appellate practitioners should get a copy of Volume 32 (Winter 2003) of the Stetson Law Review, which is devoted to an "Appellate Advocacy Symposium", containing eight feature articles on topics such as opinion writing, amicus briefs, motions practice, original proceedings, confronting per curiam affirmed decisions, interpreting and enforcing appellate mandates, and responding to appellate practitioners who "cross the line." The authors are top-flight lawyers and judges, and their writings are pertinent and insightful for the appellate practitioner.

One of my favorites is the article by Steve Brannock (my former partner) and Sarah Weinzierl (now Sarah C. Pellenbarg) entitled, *Confronting a PCA: Finding a Path around a Brick Wall*. Steve is a *rara avis* among appellate practitioners because he has turned a few PCAs against his clients into reversals in their favor through the rehearing process. It was not by magic, but instead a combination of good judgment, credibility, and exceptional writing in using the rehearing process for only those truly rare PCAs where it is warranted.

Another favorite is the article on amicus briefs by Sylvia Walbolt and Joseph Lang. Too often "friend of the court" briefs are "me too", "friends of a party" briefs that add little to the judicial process. The authors use thorough research and a number of personal interviews with prominent judges and appellate practitioners to determine the parameters of the proper role of amicus briefs. They also propose that Florida's appellate rules be changed to: (a) permit filing of a short notice at the jurisdictional stage in the Supreme Court of Florida that potential amici intend to file briefs if jurisdiction is accepted (thereby signaling the importance of the case without burdening the court with briefs at that point); (b) preclude amicus briefs from including extra-record facts in the particular case (but allowing inclusion of other extra-record information to enable a broader societal perspective of the case); and (c) require disclosure of the funding and authorship of such briefs. Thanks to Stetson Law Review for all of the articles in this relevant and useful symposium issue.

ENDNOTES

[1] Scott D. Makar is Chief of the Appellate Division, Office of General Counsel, City of Jacksonville, Florida.

[2]. *See* Scott Makar, *Book Reviews*, THE RECORD: J. FLA. BAR APP. PRAC. SECTION (MARCH 1999).

[3]. *See* Valeria Hendricks, *Book Review*, THE RECORD: J. FLA. BAR. APP. PRAC. SECTION (Fall 2002).

[4]. One website states that Richie Cunningham "was the kind of son every parent wants. He was exceedingly wholesome and, with his red hair and freckles, he bore more than a passing resemblance to Howdy Doody. Occasionally he got into trouble, usually in some scheme designed to attract women, but the guy didn't have a malicious bone in his body." *See* "TV Shows Happy Days, Richie Cunningham," at http://www.tvland.com/shows/happydays/character7.jhtml (visited Jan. 19, 2004). Regarding the *Father Knows Best* show, actor Robert Young won two Emmys for the sitcom and "went on to later success in the long-running series *Marcus Welby, M.D.*, which may have been more appropriately called 'Dr. Knows Best.'" *See Father Knows Best*, (U.S. Domestic Comedy) at http://www.museum.tv/archives/etv/F/htmlF/fatherknows/fatherknows.htm (visited January 19, 2004). Ironically, the campy sitcom has become a somewhat derogatory euphemism for a paternal-centric world despite "Father" actually being "wrong" quite often and the women of the house outdoing the men. *Id*. (Although wife Margaret Anderson, played by Jane Wyatt, was stuck in the drudgery of domestic servitude, she was nobody's fool, often besting her husband and son, Bud (played by Billy Gray). Daughter Betty Anderson (Elinor Donahue)–known affectionately to her father as Princess–could also take the male Andersons to task, as could the precocious Kathy (Lauren Chapin), the baby of the family.").

NON-FINAL ORDERS
from page 5

but engages in quasi-judicial action, a non-final order rendered therein will be reviewable to a circuit court sitting in its appellate capacity.

3. Circuit court jurisdiction

Circuit court jurisdiction is identified under the Florida Rules of Appellate Procedure, but only exists to the extent created by general law.[14] This is because of the dichotomy that exists between district court and circuit court appellate jurisdiction created by the Florida Constitution and recognized by Florida courts.[15]

Jurisdictionally, there is a difference between the circuit court's appellate authority and its original jurisdiction to grant a common law writ. The Florida Constitution grants circuit courts appellate authority under general law, but recognizes those courts' inherent common law authority to issue writs, such as certiorari. Thus, the Florida Supreme Court dictates the circuit courts' original writ power and outlines the procedures for seeking such review from non-final orders entered by county courts, and administrative or quasi-judicial agency actions that are not otherwise provided for by statute. For example, § 682.20(1)(a) and (b), Fla. Stat. (2003), provide for immediate appeal from a county court decision denying or compelling arbitration. Thus, a non-final order denying a motion to compel arbitration would be reviewed by appeal to the circuit court.

If an appeal of a non-final order rendered in a county court or administrative forum is not authorized under general law, the circuit courts have the power to review such non-final orders through their original writ jurisdiction. Fla. R. App. P. 9.130, 9.100, and 9.190 must be read together to identify the procedures for reviewing such non-final orders.[16]

C. Application of Rule 9.130

When an order is non-final, it typically evades review until the conclusion of the case, at which point it merges into the final judgment and may be reviewed on plenary appeal.[17] Fla. R. App. P. 9.130 outlines the method for appealing a non-final order to a district court, and is strictly construed. "The thrust of rule 9.130 is to restrict the number of appealable non-final orders. The theory underlying the more restrictive rule is that appellate review of non-final judgments serves to waste court resources and needlessly delays final judgment."[18] "Piecemeal review of non-final orders prior to final disposition of all issues must be strictly limited as much as possible to conserve the sparse judicial resources available at the appellate level."[19]

If a non-final circuit court order is not one of the orders listed in Rule 9.130, it is not appealable, although review may be attained through an original writ proceeding. Because of

continued next page

the disruption of a lower tribunal's disposition of a matter, every aspect of non-final order review, such as an expedited briefing schedule and the absence of a record, is streamlined.[20] The various categories of appealable, non-final orders reflect circumstances that logically, although not necessarily, should be reviewed at the time they are rendered. However, the appellant retains the option of immediately appealing or waiting until final judgment at the conclusion of the case–a strategic litigation decision.

1. What constitutes "finality"?

Examining the nuances surrounding review of non-final orders requires an understanding of the concept of "finality". Identifying finality is the first step toward recognizing non-final orders and discerning whether such non-final orders are immediately appealable. The well-settled definition of finality is seemingly straightforward:

> [T]he test employed by the appellate court to determine finality of an order, judgment or decree is whether the order in question constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected.[21]

This definition, however, is far more elusive in practice than it first appears on paper.

Finality does not fall directly within a categorical framework; it must instead be examined on a case-by-case basis. When evaluating an order to assess its reviewability, one must determine the order's actual impact upon the controversy and avoid placing too great of an emphasis on terms such as "with prejudice" or "go hence without day." While the foregoing usually reflect finality, the absence of such terms does not, *ipso facto,* render an order non-final. An order dismissing a case without prejudice will typically be non-final.[22] Because substance over form controls, however, the words "without prejudice" can be dangerously misleading if the order actually brings an end to all judicial labor, or if the applicable statute of limitations has expired.[23]

Similarly, if an order dismisses a case "without prejudice", but issues a legal conclusion that is fatal to the litigant's claim and cannot be corrected by amendment, the order is final.[24] Conversely, an order granting a motion for summary judgment, without entering summary judgment, will not be appealable unless the actual effect of the order is the entry of final judgment.[25] Likewise, an order identified as a final judgment will not be appealable if it resolves one element of a claim relating to the same transaction, condition or occurrence and is not distinct and severable from the remaining claims.[26]

This is why the impact of the order must be evaluated. As one court concluded when it dismissed an appeal as untimely because it was not filed within thirty days from an order characterized as granting a motion for summary judgment, but which actually entered final judgment in the cause: "This case is a good example of why it is important to understand what a court order does and not focus only on how the order is labeled."[27]

Like final orders, non-final appealable orders defy ready definition. Unlike their counterparts, non-final appealable orders do not reflect an end to judicial labor, yet they immediately impact the disposition of the litigation and the parties' rights. Also unlike a final order, invoking an appellate court's jurisdiction to review a non-final appealable order does not empower the appellate court to hear other non-final orders that are not independently reviewable.[28] Non-final review is appropriately tailored to the specific order that is made appealable by Fla. R. App. P. 9.130. Review of other non-final non-appealable orders that fall outside Rule 9.130 must wait until the end of the case, unless they independently warrant extraordinary writ review.

2. Partial final judgments and multiple parties or causes of action

It is important to distinguish certain orders that appear to be non-final, but actually constitute exceptions to finality and are treated as final orders for purposes of appeal. The appellate rules do not define a partial final judgment, but indicate that such judgments are immediately appealable or can be reviewed at the conclusion of the case on plenary appeal.[29] A partial final judgment completely disposes of one of multiple causes of action that is severable from the remaining counts; but an order identified as a partial final judgment will not be immediately appealable if the order's substance is non-final.[30]

Like non-final orders, a partial final judgment will be strictly construed to avoid disruption of a lower court's jurisdiction. "An appeal from an order dismissing a count of a complaint, where other counts against the same parties remain, is authorized only when the dismissed count arises from a separate and distinct transaction independent of the other pending, pleaded claims."[31] Similarly, a summary judgment entered on one of two counts is immediately appealable as a final order, if the judgment arises out of distinct facts that are not interrelated with the remaining counts.[32]

Analyzing whether a partial judgment is immediately appealable depends on whether the claims are interdependent. "An analysis of interdependence requires the court to look primarily to the facts upon which the claims are based. If the claims arise out of the same incident, the order dismissing some, but not all, of the counts will not constitute a final appeal, even if the counts involve separate and severable legal theories."[33]

The same principle applies to counterclaims. If a counterclaim is compulsory–intertwined and interrelated with the main claim–a summary judgment on the compulsory counterclaim will not render the primary action final for appeal purposes.[34]

An order that completely disposes of an action as to one of multiple parties is not a partial judgment, but is final as to that party, and must be immediately appealed.[35] The failure to appeal such a final judgment will preclude review, and the right will not be resurrected upon entry of a final judgment as to the remaining parties in the action.[36]

3. Existence of insurance coverage

Another order that appears to be non-final, but is actually identified as

an exception to finality, is one that determines the existence or nonexistence of insurance coverage in a case in which a claim has been made against an insured and coverage is disputed by the insurer.[37] The order must be one that determines an insurer's coverage liability; an order that determines only an insurer's obligation to defend is not immediately appealable under this Rule.[38]

The Rule provides that such an order may be reviewed either as a final judgment or as a non-final order under Fla. R. App. P. 9.130. This exception is grounded in public policy, following the Florida Supreme Court's suggestion that a rule provide for immediate review of such orders.[39] As the Florida Supreme Court explained, "[W]e acknowledge that it would be in the best interests of all the parties for coverage issues to be resolved as soon as possible. We therefore suggest that the district courts expedite review of appeals involving the sole issue of coverage. We also suggest that the Appellate Court Rules Committee consider an appropriate method for providing expedited review of these cases to avoid unnecessary delays in the final resolution of the underlying actions."[40] The Rules Committee responded by amending the Rule to reflect the Court's observation.[41]

4. Motions for rehearing

Based upon the interplay between Fla. R. App. P. 9.020, 9.030, 9.130 and Fla. R. Civ. P. 1.530, only authorized motions for rehearing will toll the time for perfecting an appeal. Rule 9.020 defines rendition of an order for purposes of timing the appeal; and that Rule specifies that only an "authorized" motion will toll the time for seeking review. Fla. R. Civ. P. 1.530 identifies the authorized tolling motions, which are specifically mentioned solely in connection with final orders. Therefore, a motion for rehearing or other tolling motion will not toll rendition of a non-final order for purposes of seeking review.[42] This doctrine is consistent with the overriding intent to streamline trial court proceedings. Requiring a litigant to seek review of a non-final order within thirty days minimizes trial court delays.

Arguably, because a trial court has the inherent authority to reconsider a prior ruling, there is no express prohibition against filing a motion for rehearing of a non-final order;[43] however, even if the trial court reconsiders a non-final order or entertains a hearing thereon, it will not toll the time for filing a notice of appeal because the rehearing motion remains unauthorized. Therefore, even if such a motion is pending, the litigant should file the notice of appeal before thirty days lapse.

Ordinarily, a notice of appeal divests the trial court of jurisdiction to consider a pending motion for rehearing; but in the case of an unauthorized motion directed toward a non-final order, the notice of appeal will not automatically have this effect because, as a legal matter, the rehearing motion is a nullity.

Nonetheless, a litigant who has invoked the appellate court's jurisdiction through a timely-filed notice of appeal, but who has also filed a motion for rehearing and has an indication that the trial court will entertain it, is not prohibited from requesting the appellate court to relinquish jurisdiction to allow the trial court to rule on the motion for rehearing. An appellate court retains the authority to relinquish jurisdiction, and may be inclined to do so if there is a possibility that the trial court will revisit an issue and obviate an appeal, thereby preserving judicial economy.

A partial final judgment or order dismissing an entire case as to a party is subject to a motion for rehearing; this is because those kinds of orders are final.[44] As the Florida Supreme Court held, addressing this issue under a previous version of the Rule, "'We must conclude, then, that a motion for rehearing tolls the time for taking an appeal from a summary judgment, whether it resolves all or only a part of the issues between the parties.'"[45]

Even if an order is final, great care must still be taken to ensure that a motion for rehearing is authorized within the subject venue.[46] This issue may arise when a case is pending in a quasi-judicial municipal forum, for which review is authorized by way of common law certiorari and must be sought within thirty days.[47] If the municipal code or quasi-judicial rules do not authorize a motion for rehearing, such a motion may not toll the time for seeking review before a circuit court and, unless expressly authorized, should not be relied upon to toll rendition of the final order.

This presents a quandary. Certain courts have suggested that an administrative agency acting as a quasi-judicial forum has the inherent right to reconsider its orders. "The general rule holds that administrative agencies have inherent or implied power, comparable to that possessed by courts, to rehear or reopen a cause and reconsider its action or determination therein, where the proceeding is in essence a judicial one."[48] This leaves open the question of whether a rehearing motion will toll rendition of final agency action if the agency has no provision for rehearing, or if it expressly disallows rehearing.

Moreover, even if a motion for rehearing tolls the time for seeking review of an administrative agency's final order, there is no authority for the proposition that a non-final order will be similarly tolled. The suggestion that the administrative agency, in a quasi-judicial capacity, has the inherent power to reconsider an order may blur the scope of the right and the tolling impact on a non-final order. Additionally, the inherent right of an administrative agency to reconsider an order does not make such a motion "authorized" as outlined under rules of rendition, any more than a trial court's inherent power to revisit a non-final ruling does. Thus, a motion for rehearing should not be considered as tolling non-final agency action.

5. Non-final review and the "acceptance of benefits" doctrine

Under the "acceptance of benefits" doctrine, a party cannot accept the benefits of a judgment and then appeal from it when the effect would be to amend the judgment as a whole.[49] "When a party recovers a judgment and accepts the benefits thereof, he/she is, on appeal, estopped to seek a reversal of that judgment."[50] However, courts have concluded that the acceptance of benefits doctrine does not apply to the review of non-final orders.[51]

D. Categories of Appealable Non-Final Orders

While the appellate rules clearly outline the categories of immediately appealable non-final orders, clarity

continued next page

does not always equate to simplicity in application. The following explores certain nuances of some of the categories of immediately appealable orders enumerated in Fla. R. App. P. 9.130.

1. Venue

Orders determining venue are immediately appealable if they actually determine the action's location.[52] Accordingly, an order transferring venue or denying a motion to transfer venue will be immediately appealable. On the other hand, a collateral matter is not appealable as a venue decision–even if it impacts venue, but does not expressly decide the locus of the action.[53] Also, an order dismissing a case for improper venue or for *forum non conveniens,* rather than transferring a case, may be treated as either a final or non-final order, which would affect the right to file a motion for rehearing and otherwise impact the briefing process.[54] If an order dismissing a case for improper venue expressly indicates that it is without prejudice, however, then the order may more likely be treated as a non-final order reviewable under Rule 9.130.

When appealing a transfer order, such review is presented to the district court overseeing the transferor court.[55] If other orders are entered contemporaneously with the entry of the transfer order, and such orders are independently appealable, those orders will also be appealed to the transferor court's district court of appeal. If an independently appealable non-final order is entered after the entry of the order transferring venue, review is taken to the district court overseeing the transferee court.[56] It is theoretically possible, therefore, to have multiple appeals pending simultaneously in two different district courts arising from one lower court case.

2. Injunction orders

Injunction orders are immediately appealable, whether they grant, dissolve or modify an injunction.[57] "Even if an order does not expressly grant or deny injunctive relief, however, it may still be immediately appealable if its practical impact is to enjoin or mandate certain action."[58] For example, courts have found orders requiring execution of a satisfaction of mortgage[59] or requiring the deposit of funds into the court registry prior to final judgment[60] to constitute orders that are in the nature of an injunction and, therefore, immediately reviewable under Rule 9.130.

The Third District Court of Appeal articulated a three-part test used to evaluate whether an order that is not characterized as an injunction order will nonetheless be immediately reviewable.[61] As the Third District explained, to be immediately reviewable, the order must 1) have the practical effect of granting or denying an injunction, 2) have serious, possibly irreparable consequences, and 3) can only be effectively challenged by immediate appeal.[62] Courts will narrowly construe such orders to avoid an exception that swallows the rule that orders not falling directly within the enumerated categories are not immediately appealable.[63]

3. Personal jurisdiction

Orders determining the jurisdiction of the person are immediately reviewable; they will typically arise in connection with orders that refer "to service of process or the applicability of the long arm statute to nonresidents."[64] An order quashing service of process is immediately reviewable; however, an order denying a motion to dismiss for untimely service is not immediately appealable because it does not actually resolve the jurisdictional issue, even if it impacts the trial court's authority over a person.[65]

As the Florida Supreme Court explained when it dismissed review of an appeal from an order denying a motion to dismiss for untimely service of process, "In considering this issue, we remain vigilant in guarding the policy underlying Rule 9.130 restricting piecemeal review of non-final orders because allowing such a review, in most cases, only serves to waste court resources and needlessly delay final judgment."[66] Because the service of process rule vests broad discretion in the trial court to extend the period for service or take other action if service is untimely, the Florida Supreme Court concluded that an order denying a motion to dismiss under Fla. R. Civ. P. 1.070(j) cannot be deemed an order that determines the jurisdictional question.[67]

Although personal jurisdiction orders are immediately appealable, the rules do not authorize immediate appeal of an order relating to subject matter jurisdiction.[68] This may appear inconsistent at first glance, since subject matter jurisdiction affects the lower court's fundamental authority over a matter. However, it is well-settled that subject matter jurisdiction cannot be conferred upon a court, and a challenge to subject matter jurisdiction cannot be waived. Accordingly, attempting to impose a 30-day time limitation upon the right to seek review of an order pertaining to subject matter jurisdiction would contradict the principle that a challenge to such jurisdiction can be raised at any time. Thus, while an order regarding this critical doctrine is not immediately appealable, a party can challenge subject matter jurisdiction through a petition for writ of prohibition, which has no time limit. The Committee Notes to the 1977 amendment to Rule 9.130 acknowledge the availability of a writ of prohibition to challenge subject matter jurisdiction, and explain the absence of any provision for subject matter jurisdiction appeals in the rules.[69]

4. The right to immediate possession of property

The next category of appealable non-final orders concerns those determining the right to immediate possession of property.[70] The subject order need not actually transfer or deny ownership or possession of property; it need only determine the right to such possession.[71]

The property at issue can be real or personal. An order vacating a certificate of title, for example, is immediately appealable under this Rule.[72] Eminent domain orders may also be immediately reviewable under this Rule.[73] Also immediately appealable is an order denying a motion to dismiss a forfeiture or an order requiring payment of rent proceeds into the court registry.[74] Under such circumstances, money can be deemed property.

Appealable non-final orders under this category will often involve ac-

tions seeking attachment, replevin, or garnishment.[75] There has been some confusion regarding garnishment orders. Although an order denying a motion to dissolve a writ of garnishment seems to fall directly within this appellate rule, courts have disagreed on its application. In *5361 North Dixie Highway, Inc. v. Capital Bank*, 658 So. 2d 1037 (Fla. 4th DCA 1995), the Fourth District Court of Appeal found an order denying a motion to dissolve a writ of garnishment order to be immediately appealable, and acknowledged a possible conflict with the Fifth District Court of Appeal in *Ramseyer v. Williamson*, 639 So. 2d 205 (Fla. 5th DCA 1994), which had rejected the immediate appealability of an order denying motion to dissolve a writ of garnishment.

Another area of confusion concerns orders relating to the Bert J. Harris, Jr. Private Property Rights Protection Act (the "Harris Act"), which specifically authorizes an immediate appeal of a non-final order relating to certain legal conclusions.[76] In *Osceola County v. Best Diversified, Inc.*, 830 So. 2d 139 (Fla. 5th DCA 2000), the Fifth District Court of Appeal rejected jurisdiction over the denial of a zoning application resulting in a property owner's claim that it had been inordinately burdened as defined under the Harris Act. The court concluded that the inordinate burden of property did not equate to an order determining a right to immediate possession of property, and noted the then-recent amendment to Rule 9.130 eliminating the right to immediate review of orders determining a party's right to affirmative relief.[77] It also concluded that the statute's authorization for immediate review constituted a violation of separation of powers, and improperly encroached on the Florida Supreme Court's exclusive authority to promulgate jurisdictional rules.[78] The Fifth District identified the statute as declaring legislative policy, noting that unless and until the Florida Supreme Court incorporates the statement of legislative purpose into the rules, it would not provide a right to immediate review.[79] The court did not, however, declare the statute unconstitutional, and the statute remains unchanged, announcing a so-called right to appellate review that does not currently exist.[80]

Contempt orders represent another example of inconsistent treatment. A contempt order does not fall within any category under Rule 9.130; yet, certain courts have authorized immediate appeals under that Rule. For example, in *Knorr v. Knorr*, 751 So. 2d 64, 65 (Fla. 2d DCA 1999), the Second District Court of Appeal noted that the district courts of appeal disagree on whether contempt orders are reviewable by certiorari or as a non-final order pursuant to Rule 9.130; yet, it did not certify a conflict to the Florida Supreme Court.[81]

In *Alves v. Barnett Mortg. Co.*, 688 So. 2d 459, 460 n.1 (Fla. 4th DCA 1997), the Fourth District Court of Appeal extended jurisdiction over a challenge to a contempt order as a non-final appeal under Rule 9.130(a)(3)(C), albeit without designating the relevant subcategory. In a special concurrence, Judge Farmer opined that, while contempt orders should be immediately reviewable, such orders do not fall within Rule 9.130. Even if the underlying order that was violated and which gave rise to the contempt order fell within Rule 9.130, Judge Farmer concluded that this should not be used to shoehorn the contempt order into the Rule. He then raised the possibility of amending Rule 9.130 to allow for immediate review. *Id.* at 462. The appropriate method for reviewing contempt orders remains unresolved.

5. Right to immediate monetary relief or child custody in family law matters

An order determining the right to immediate monetary relief or child custody in a family law matter is also immediately appealable.[82] The custody decision can be either temporary or permanent.[83] The Rule only applies strictly to family law matters, and does not apply to dependency proceedings.[84] Collateral orders that relate to custody, but do not decide the issue, are not appealable.[85]

6. Entitlement to arbitration, worker's compensation immunity, and qualified immunity in a civil rights claim arising under federal law.

Non-final orders relating to entitlement to arbitration and certain forms of qualified immunity fit within a similar framework, since each one concerns a litigant's right to be free from having to litigate in a judicial forum.[86] Arbitration is historically favored under Florida law, and a litigant's agreement to arbitrate a dispute enhances judicial economy.[87] As one court explained, "[o]nce the parties agree to submit to arbitration, the [arbitration] code limits the authority of the court to interfere in the process prematurely."[88]

A party's entitlement to arbitration does not divest the trial court of jurisdiction to consider a dispute.[89] Instead, immediate appealability acknowledges that alternative dispute resolution is favored as a matter of contract right and public policy.[90] Even before the Florida Supreme Court enacted a rule authorizing immediate review of arbitration orders, courts reviewed such orders through certiorari.[91]

While an order determining entitlement to arbitration is immediately appealable, collateral orders entered by an arbitrator do not become reviewable under this Rule simply because the order was entered in connection with an arbitration. As one court explained, Rule 9.130 only authorizes review from the very limited issue of entitlement to arbitration. Therefore, a discovery order entered by an arbitrator is not appealable, although it may be reviewable by a petition for certiorari.[92]

Orders requiring or denying an appraisal under an insurance policy are no longer immediately appealable. Several courts had previously concluded that an order requiring an insurer to submit to an appraisal constituted an order akin to entitlement to arbitration, and declared such an order immediately appealable.[93] The Florida Supreme Court recently held that an appraisal provision in an insurance policy could not be deemed an agreement to arbitrate, effectively overruling prior inconsistent precedent.[94]

Orders determining that a party is not entitled to workers' compensation or qualified immunity in a civil rights lawsuit are immediately appealable to preserve an appellant's right to be free from facing a lawsuit. Just as a party to an arbitration agreement has a contractual right to

continued next page

NON-FINAL ORDERS
from previous page

avoid being subjected to a judicial forum that is supported by public policy, a person who is protected by qualified immunity enjoys freedom from suit, not merely freedom from potential liability. "Because of the nature and purpose of the claim of qualified immunity, an appeal after final judgment would hardly constitute a full and adequate remedy, for once the protection of immunity is lost and trial ensues, there is no means of re-immunizing the party."[95]

Although not expressed in Rule 9.130, a qualified immunity decision is only appealable if the trial court concludes that a party is not entitled to such immunity as a matter of law.[96] On the other hand, if the denial of privilege depends upon disputed issues of material fact or upon allegations in a complaint and the existence of undeveloped facts, an order denying a motion for summary judgment or to dismiss will not be immediately appealable.[97]

Additionally, a privilege decision, even as a matter of law, rendered in an action that does not arise under federal law or does not specifically assert a civil rights claim, will not be immediately appealable. The Fourth District Court of Appeal found an order denying immunity to a public official under the Eleventh Amendment in a claim brought under the Equal Pay Act fell outside the narrow limitations of non-final review.[98] The Fourth District articulated its intention to narrowly construe Rule 9.130, and to avoid expanding jurisdiction when not expressly provided under the Rule.[99]

7. Class certification and appointment or termination of a receivership

Orders that grant or deny class certification are immediately appealable, as are orders that grant or terminate appointment of a receivership.[100]

8. Non-final orders entered after final order

Those orders entered after a final order on authorized motions are reviewable under Fla. R. App. P. 9.130.[101] Non-final orders entered on motions that suspend rendition, however, are not independently reviewable, but instead toll rendition of the final order for purposes of review under Fla. R. App. P. 9.110.[102] Thus, when a trial court enters a final order, a timely-served motion for rehearing tolls rendition of the order until disposition of the tolling motion. Once the trial court rules on the tolling motion, it renders the prior order and makes it final for purposes of appeal.

An order *granting* a motion for new trial is an exception to this; it is a non-final order on a tolling motion that is reviewed as a final judgment under Rule 9.110.[103] Orders granting a new trial motion are hybrids: they are non-final in form, yet immediately appealable as a final order.[104] However, an order *denying* a motion for new trial is considered neither a final order nor an appealable non-final order.[105] Because the order granting a new trial motion is deemed non-final, a motion for rehearing is not authorized, and will not toll the time for seeking review.[106]

Additionally, certain post-judgment orders may fall beyond Fla. R. App. P. 9.130, if the proceeding necessarily contemplates further judicial labor that will result in yet another final order. As one court explained, "where a post-judgment motion in effect initiates a new proceeding which will culminate in a new final order, the non-final orders entered in the new proceeding must be considered non-final orders entered prior to final order, not after final order, and accordingly are not appealable as 'non-final orders entered after final order' under Fla. R. App. P. 9.130(a)(4)."[107]

A modification proceeding in a dissolution of marriage case is one example. Although modification proceedings are not initiated like new proceedings and do not require formal service of process, the Fourth District Court of Appeal has concluded that an order in a modification proceeding must be reviewed on plenary appeal as a final order, and is tolled by a motion for rehearing.[108]

9. Orders on motions for relief from judgment under Fla. R. Civ. P. 1.540, Small Claims Rule 7.190, and Fla. Fam. Law R. 12.540.

Orders in the general category of motions that seek relief from entry of judgment are reviewable in the nature of non-final orders.[109] But an order entered on a Fla. R. Civ. P. 1.540 motion will not be immediately reviewable if it merely reinstates an order previously rendered that would not have been reviewable.

For example, a denial of a motion to dismiss for lack of prosecution is a non-final, non-appealable order. Thus, an order setting aside a prior order dismissing a case for failure to prosecute under Rule 1.540 is not made appealable merely because the court addressed a Rule 1.540 motion.[110] As the Fifth District Court of Appeal opined, aligning itself with the Third District Court of Appeal, "it would be anomalous if we were to allow this appeal simply because the decision to deny the motion to dismiss was made after rehearing when an appeal following an initial denial of the motion to dismiss for lack of prosecution would not be allowed."[111]

Moreover, a motion to vacate directed toward a non-final order will not alter the nature of the order–

even if the lower court addresses the motion. "An order entered on a motion to vacate a non-final order, even where the motion mislabels the non-final order as final, is not reviewable under Fla. R. App. P. 9.130(a)(5)."[112]

E. Non-Final Review in Administrative Agency Action

In addition to authorizing final appellate review of final agency orders, the appellate rules also authorize review of administrative agencies' non-final orders through the procedures set forth in Fla. R. App. P. 9.100 relating to original writs if a party cannot obtain adequate remedy on appeal from a final order.[113] Those non-final orders entered by administrative agencies governed by the APA will be reviewed by the district court of appeal that would have jurisdiction to review the decision upon entry of a final order.[114] A *non*-final order entered by a quasi-judicial administrative agency not governed by the APA, and for which review is not otherwise provided by general law, is reviewed by certiorari to a circuit court. Whether the original writ is reviewed by a district or circuit court (sitting as an appellate court), the procedure for such review is outlined in Fla. R. App. P. 9.100, which must be read in conjunction with Fla. R. App. P. 9.190.

F. Stays Pending Review

To stay lower court proceedings pending review, a litigant must file a motion before the lower tribunal, subject to review by the appellate court.[115] Unless a government or administrative agency is seeking review, a stay will not be automatic and will be subject to the trial court's discretion.[116]

Because the lower tribunal cannot take action that will interfere with the appellate court's review, stays are favored when a litigant appeals certain orders. As the Third District explained, concluding that a party could not be compelled to produce discovery while the appeal of a non-final order denying a motion to dismiss for lack of personal jurisdiction remained pending:

> [I]nasmuch as the subject matter of such an interlocutory appeal is the very question of the trial court's right to proceed with an exercise of jurisdiction over the defendant, the trial court has a right to proceed with the cause but not to destroy the subject matter.[117]

Orders concerning personal jurisdiction, the right to arbitration, or qualified immunity pertain to the right of a litigant to be free from suit or to avoid a judicial forum altogether.[118] Therefore, a trial court should grant a stay on relatively liberal conditions when a litigant seeks review of the foregoing.

Conclusion

As the rules and cases construing them illuminate, non-final orders are only reviewable under narrow circumstances. While some non-final orders fall directly within Fla. R. App. P. 9.130, others are more difficult to characterize. The overriding principle remains that appellate courts will construe matters to limit immediate appealability and enable the orderly and expedient completion of trial court proceedings. This, coupled with the general principle that judicial labor before the trial court must conclude before appellate review can begin, maintains the necessary equilibrium between trial and appellate jurisdiction, and avoids piecemeal review arising out of a lower court proceeding.

ENDNOTES

[1] Jack R. Reiter is board certified in Appellate Practice, and a shareholder with the law firm of Adorno & Yoss, P.A., where he heads the Appellate Department. He is current Vice-Chair of the Florida Appellate Court Rules Committee, and a member of the Appellate Practice Section of the Florida Bar and of the Dade County Bar Association. Mr. Reiter graduated from the University of Florida College of Law with High Honors, and is a member of the Order of the Coif.

[2] This article addresses only appeals of civil non-final appealable orders and certiorari review (quasi-appeals) of non-final administrative orders. Extraordinary writs and non-final orders in criminal appeals governed by Fla. R. App. P. 9.140 are beyond the scope of this article.

[3] *Dade Cty. v. Davidson*, 418 So. 2d 1231, 1232 (Fla. 3d DCA 1982).

[4] Fla. R. App. P. 9.130(f); *Nielsen v. Joannou*, 861 So. 2d 1283, 1284 (Fla. 5th DCA 2004) (concluding that trial court erred by entering final summary judgment while appeal of non-final order remained pending). *Cf. Davidson, supra*, 418 So. 2d at 1231 (noting that trial court had the authority to enter collateral costs award because it would not interfere with appellate court's disposition over the matter on appeal).

[5] *See, e.g., Far Out Music, Inc. v. Jordan*, 438 So. 2d 912, 913 (Fla. 3d DCA 1983) (holding that discovery would not be permitted while appeal relating to personal jurisdiction over parties remained pending).

[6] *Trepal*, 754 So. 2d at 706 (explaining that "[t]he current practice for this Court is to occasionally grant review of interlocutory orders in cases involving death-sentenced defendants, but we have been less than precise in defining our authority to grant such review.").

[7] *Id.* at 707. The Court promulgated Fla. R. App. P. 9.142, authorizing review of non-final orders in post-conviction proceedings and explaining that such review would be in the nature of an original writ petition. *See Amendment to the Florida Rules of Appellate Procedure (9.142)*, 837 So. 2d 911 (Fla. 2002).

[8] Fla. R. App. P. 9.125 (authorizing a district court to certify a final order or appealable non-final order to the Florida Supreme Court for immediate consideration).

[9] *See, e.g., Harris v. Coalition to Reduce Class Size*, 824 So. 2d 245, 246 (Fla. 1st DCA 2002) (suggesting appeal to Florida Supreme Court pursuant to Fla. R. App. P. 9.125 that originated as an injunction order declaring a statute unconstitutional).

[10] Art. 5, Fla. Const.

[11] *See, e.g., State v. Gaines*, 770 So. 2d 1221 (Fla. 2000) (rejecting as unconstitutional a statute that sought to make certain criminal orders by circuit courts immediately appealable).

[12] *Gaines, supra*, 770 So. 2d at 1225; *see also Osceola County v. Best Diversified, Inc*, discussed *infra* at 77.

[13] Fla. R. App. P. 9.030(b) (1) (C); Art. 5, § 4(b)(2), Fla. Const.

[14] Art. 5, § 5, Fla. Const.; *see Blore v. Fiero*, 636 So. 2d 1329 (Fla. 1994) (acknowledging the Constitutional distinction between circuit and district court jurisdiction and noting that circuit court appellate jurisdiction is governed by the legislature pursuant to the Florida Constitution).

[15] *See, e.g., Biore, supra.*

[16] Fla. R. App. P. 9.130(a)(1).

[17] Fla. R. App. P. 9.130(g).

[18] *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 961 (Fla. 1984).

[19] *BE & K, Inc. v. Seminole Kraft Corp.*, 583 So. 2d 361, 364 (Fla. 1st DCA 1991).

[20] Pursuant to appellate rules, an initial brief is due fifteen days after filing a notice of appeal and an appendix is used instead of a record on appeal. Fla. R. App. P. 9.130(b)(2)(d) and (e).

[21] *S.L.T. Warehouse Co. v. Webb*, 304 So. 2d 97, 99 (Fla. 1974).

[22] *See Augustin v. Blount, Inc.*, 573 So. 2d 104 (Fla. 1st DCA 1991) (noting that generally, dismissal without prejudice is a non-final order).

[23] *See, e.g., Walden v. Adekola*, 773 So. 2d 1218, 1219 (Fla. 3d DCA 2000) ("However, as plaintiff points out, the statute of limitations has expired so that the dismissal is, as a practical matter, with prejudice.").

[24] *See, e.g., Peterson Homes, Inc. v. Johnson*, 691 So. 2d 563, 546 (Fla. 5th DCA 1997).

[25] *See, e.g., McQuaig v. Walmart*, 789 So. 2d 1215 (Fla. 1st DCA 2001).

[26] *See, e.g., One Thousand Oaks, Inc. v. Dade Savings & Loan Assoc.*, 417 So. 2d 1135, 1136 (Fla. 5th DCA 1982); *see also Couch v. Tropical Breeze Resort Assoc., Inc.*, 867 So. 2d 1219 (Fla. 1st DCA 2004) (holding that order labeled as final judgment was not final when related counts remained pending); *Eagle v. Eagle*, 632 So. 2d 122 (Fla. 1st DCA 1994) (noting that order dismissing case "without preju-

continued next page

NON-FINAL ORDERS
from previous page

dice" is final for appeal purposes if the case is disposed of by the order and no issues remain open for judicial determination).
[27] *Boyd v. Goff*, 828 So. 2d 468, 469 (Fla. 5th DCA 2002).
[28] *RD&G Leasing, Inc. v. Stebnicki*, 626 So. 2d 1002 (Fla. 3d DCA 1993); *Supal v. Pelot*, 469 So. 2d 949 (Fla. 5th DCA 1985).
[29] Fla. R. App. P. 9.110(k).
[30] *Shephard v. Ouellete*, 854 So. 2d 251, 252 (Fla. 5th DCA 2003).
[31] *Biasetti v. Palm Beach Blood Bank*, 654 So. 2d 237, 238 (Fla. 4th DCA 1995) (citing *Mendez v. West Flagler Family Ass'n, Inc.*, 303 So. 2d 1, 5 (Fla.1974)).
[32] *See, e.g., Roessler v. Novak, M.D.*, 858 So. 2d 1158, 1160 n.1 (Fla. 2d DCA 2003) (holding that partial final summary judgment was an appealable final order because the causes of action set forth in count one, involving vicarious liability for alleged negligence, and count two, spoliation of evidence, were distinct claims which were not interrelated under the facts of the case).
[33] *Biasetti, supra*, 654 So. 2d at 238.
[34] *Key Credit, Inc. v. Espirito Santo Bank of Fla.*, 610 So. 2d 568, 569 (Fla. 3d DCA 1992).
[35] Fla. R. App. P. 9.110(k).
[36] *See, e.g., Niesz v. R.P. Morgan Bldg, Co., Inc.*, 401 So. 2d 822 (Fla. 5th DCA 1981) (holding that portion of order dismissing plaintiff from all claims was final and constituted end of all judicial labor as to that party, making the order immediately appealable).
[37] Fla. R. App. P. 9.110(m).
[38] *See, e.g., Nationwide Mut. Ins. Co. v. Harrick*, 763 So. 2d 1133, 1134 (Fla. 4th DCA 1999).
[39] *Canal Ins. Co. v. Reed*, 666 So. 2d 888 (Fla. 1996).
[40] *Canal Ins. Co., supra*, 666 So. 2d at 892.
[41] *See* Committee Notes to Rule 9.110(n), later changed to Rule 9.110(m).
[42] *Nationwide Ins. Co. v. Forrest*, 682 So. 2d 672 (Fla. 4th DCA 1996); *Manna Provisions Co. v. Blume*, 417 So. 2d 832 (Fla. 1st DCA 1982).
[43] *Mason v. E. Speer & Assoc., Inc.*, 846 So. 2d 529, 536 (Fla. 4th DCA 2003) (noting trial court's inherent authority to reconsider its non-final order).
[44] *Wilson v. Woodward*, 602 So. 2d 547, 549 (Fla. 2d DCA 1992) (noting that lower court should have granted rehearing motion directed toward partial summary judgment).
[45] *Mendez v. West Flagler Family Ass'n, Inc.*, 303 So. 2d 1, 4 (Fla. 1974) (quoting *Dewitt v. Seaboard Coast Line Railroad*, 268 So. 2d 177, 178-79 (Fla. 2d DCA 1972)). The Court further noted, consistent with the interpretation of the current Rule, that a partial final judgment is only immediately appealable if it is distinct and severable from the remaining claims. *Mendez*, 303 So. 2d at 4 (citations omitted).
[46] *See, e.g., Systems Management Assocs. v. State, Dep't of H.R.S.*, 391 So. 2d 688 (Fla. 1st DCA 1980) (noting that a motion for rehearing does not suspend rendition in administrative proceedings where such motions are not authorized).
[47] Fla. R. App. P. 9100 and 9.190.
[48] *Smull v. Town of Jupiter*, 854 So. 2d 780, 781 (Fla. 4th DCA 2003) (citations omitted).
[49] *Erwin v. Brooks*, 297 So. 2d 314 (Fla. 2d DCA 1974); *Niles v. County of Volusia*, 405 So. 2d 1046 (Fla. 5th DCA 1981) (referencing eminent domain statute and concluding that one may not accept the benefits of a judgment while appealing it); § 73.012, Fla. Stat. (1981).
[50] *Dance v. Tatum*, 629 So. 2d 127, 129 (Fla. 1993).
[51] *See, e.g., Niles, supr*, 405 So. 2d at 1047; *see also Barnett Bank of Martin Cty., N.A. v. RGA Dev. Co.*, 606 So. 2d 1258, 1259 (Fla. 4th DCA 1992) (holding that acceptance of benefits doctrine only applies to final adjudications on the merits).
[52] Fla. R. App. P. 9.130(a)(3)(A).
[53] *See, e.g., Wetherington v. State Farm*, 661 So. 2d 1276 (Fla. 2d DCA 1995).
[54] *See, e.g., Grice v. Bd. of Cty. Cmmsr's of Madison Cty,*. 400 So. 2d 801 (Fla. 1st DCA 1981).
[55] Fla. R. App. P. 9.040(b)(2)(A).
[56] Fla. R. App. P. 9.040(b)(2)(B).
[57] Fla. R. App. P. 9.130(a)(3)(B).
[58] *Array, et al. v. Aberigi*, 832 So. 2d 873 (Fla. 5th DCA 2002).
[59] *Array*, 832 So. 2d at 874.
[60] *CMR Dist., Inc. v. R.T.C.*, 593 So. 2d 593 (Fla. 3d DCA 1992).
[61] *Miami Heat Ltd. Partnership v. Leahy*, 682 So. 2d 198, 201 (Fla. 3d DCA 1996).
[62] *Miami Heat Ltd. Partnership, supra*, 682 So. 2d at 201.
[63] *See, e.g., Judicial Watch, Inc. v. Carroll*, 776 So. 2d 300, 302 (Fla. 4th DCA 2002) (rejecting reviewability of an order that merely required notice to be given before allowing an inspection in connection with an election contest).
[64] Rule 9.130(a)(3)(c)(i), Fla. R. App. P.; *see Fisher v. Int'l Longshoremen's Assoc.*, 827 So. 2d 1096, 1097 (Fla. 1st DCA 2002) (concluding that the term "jurisdiction of the person refers to service of process or to the applicability of the long arm statute to nonresidents.").
[65] *Thomas v. Silvers*, 748 So. 2d 263 (Fla. 1999) (considering conflict among districts and concluding that order denying motion to dismiss based upon untimely service is not immediately appealable); *Jennings v. Montenegro*, 792 So. 2d 1258, 1261 (Fla. 4th DCA 2001) (noting that order denying motion to quash for failure to serve process does not actually determine jurisdiction of the person and is not immediately appealable).
[66] *Thomas, supra*, 748 So. 2d at 264.
[67] *Id.* at 265.
[68] *Fiocchi v. Trainello*, 566 So. 2d 904 (Fla. 4th DCA 1990) (noting that the rules do not authorize an immediate appeal of an order denying a motion to dismiss for lack of subject matter jurisdiction).
[69] As the Committee Notes to the 1977 amendment provide, "Item (C)(1) has been limited to jurisdiction over the person because the writ of prohibition provides an adequate remedy in cases involving jurisdiction of the subject matter."
[70] Fla. R. App. P. 9.130(a)(3)(c)(ii).
[71] *See, e.g., Security Management Corp. v. Dep't of Trans.*, 718 So. 2d 339, 340 (Fla. 4th DCA 1998) (concluding that taking order was immediately appealable because it determines right to immediate possession of property).
[72] *Household Finance and Mortgage Co. v. Osta, et al.*, 862 So. 2d 885, 886 (Fla. 5th DCA 2003).
[73] *Niles, supra*, 405 So. 2d at 1047 (noting that order allowing condemnor to take immediate possession and title to real property is an appealable non-final order); *see also Hanover v. Vasquez*, 848 So. 2d 1188, 1189 (Fla. 3d DCA 2003) (finding order denying motion for default and writ of possession to be immediately appealable as determining the right to immediate possession of property).
[74] *Fed. Home Loan Mortg. Corp. v. Molko*, 584 So. 2d 76, 77 (Fla. 3d DCA 1991) (concluding that order determining right to immediate possession of rents under a mortgage constitutes an appealable, non-final order); *see Chuck v. In re Forfeiture of $380,015, in U.S. Currency*, 2002 WL 31159461 (Fla. 3d DCA Sept. 30, 2002) (holding that order denying motion to dismiss forfeiture was reviewable under this Rule).
[75] *See, e.g., Midway Man. Co. v. Family Fun Corp.*, 668 So. 2d 327 (Fla. 4th DCA 1996) (holding that order denying replevin writ is immediately appealable under this Rule); *Cerna v. Swiss Bank Corp.*, 503 So. 2d 1297 (Fla. 3d DCA 1987) (holding that order on a motion for prejudgment writ of attachment is appealable as determining right to immediate possession of personal property).
[76] § 70.001, Fla. Stat. (2002).
[77] The Court compared the Harris Act to an inverse condemnation order, noting that such orders were previously reviewed as orders determining a party's right to immediate relief– a provision deleted from the appellate rules in 2000. *Osceola County, supra*, 830 So. 2d at 130.
[78] *Id.* at 140.
[79] *Id.*
[80] As the statute provides, in pertinent part, "A governmental entity may take an interlocutory appeal of the court's determination that the action of the governmental entity has resulted in an inordinate burden. An interlocutory appeal does not automatically stay the proceedings; however, the court may stay the proceedings during the pendency of the interlocutory appeal." § 70.001(d)(6)(a), Fla. Stat. (2004). This confusion may soon be resolved, however, based upon a proposed amendment to the Florida Rules of Appellate Procedure that, if adopted, will codify a right to appeal such non-final orders so as to be consistent with the statute. *See In Re: Amendments to Florida Rules of Appellate Procedure, Two-year Cycle Report of the Appellate Court Rules Committee*. http://www.flcourts.org/sct/sctdocs/probin/sc04-108_report.pdf.
[81] *See also Caruso v. Super Vision Int'l, Inc.*, 845 So. 2d 947 (Fla. 5th DCA 2003) (rejecting claim that contempt order is reviewable as a non-final order in the nature of determining right to immediate possession of property and treating appeal as petition for writ of certiorari); *Dep't of Health and Rehab. Serv. v. Beckwith*, 624 So. 2d 395, 397 (Fla. 5th DCA 1993) (reviewing contempt order through certiorari petition and not as appealable non-final order).
[82] Fla. R. App. P. 9.130(a)(3)(C)(iii).
[83] *Nicholson v. Nicholson*, 671 So. 2d 821 (Fla. 1st DCA 1996).
[84] *See, e.g., B.A.G. v. Dep't of Children and Families*, 860 So. 2d 498, 500 (Fla. 1st DCA 2004) (noting that a custody determination in a dependency proceeding would be reviewed as a petition for writ of certiorari and not as

an appealable non-final order); *see also Dep't of Health & Rehab. Serv v. Honeycutt*, 609 So. 2d 596 (Fla. 1992) (holding that review of child custody decision in dependency proceeding is not through an appeal as a non-final order).

[85] *See, e.g., Grasso v. Mulholland*, 835 So. 2d 361 (Fla. 5th DCA 2003) (holding that order denying objection to a hearing to alter, modify or extend visitation is a non-final, non-appealable order).

[86] Fla. R. App. P. 9.130(a)(3)(iv), (v), and (vii).

[87] *Seifert v. U.S. Home Corp.*, 750 So. 2d 633, 636 (Fla. 1999) (noting that courts favor agreements to arbitrate).

[88] *Air Conditioning Equip., Inc. v. Rogers*, 551 So. 2d 554, 557 (Fla. 4th DCA 1989).

[89] *See Tenet Healthcare Corp. v. Maharaj*, 859 So. 2d 1209, 1212 n.2 (Fla. 4th DCA 2003) (noting that arbitration decision is not a question of jurisdiction, but contract).

[90] *But see Curtis v. Olson*, 837 So. 2d 1155, 1157 (Fla. 1st DCA 2003) (referring to a dispute over entitlement to arbitration as a jurisdictional dispute). Entitlement to arbitrations seems to fall within the parameters of contract and policy, rather than jurisdiction. Indeed, if the decision went to the jurisdiction of the court, then there would be no need for an appellate rule, as a petition for writ of prohibition would suffice to challenge the trial court's jurisdiction.

[91] *Vic Potamkin Chevrolet, Inc. v. Bloom*, 386 So. 2d 286 (Fla. 3d DCA 1980) (holding that order denying motion to compel arbitration reviewable by common law certiorari).

[92] *Tenet Healthcare Corp. v. Maharaj, supra*.

[93] *See, e.g., United Serv. Auto Ass'n v. Modregon*, 818 So. 2d 562 (Fla. 2d DCA 2002); *Delisfort v. Progressive Express Ins. Co.*, 785 So. 2d 734 (Fla. 4th DCA 2001).

[94] *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762 (Fla. 2002); *see also Nationwide Mut. Fire Ins. Co. v. Schweitzer*, 2004 WL 515547 (Fla. 4th DCA 2004) (relying on *Suarez* to confirm that an order denying an appraisal is not immediately appealable in the nature of an arbitration order).

[95] *Tucker v. Resha*, 610 So. 2d 460, 464 (Fla. 1st DCA 1992), *quashed on other grounds*, 648 So. 2d 1187 (Fla. 1994)

[96] *See Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1099 (Fla. 1987) (holding that non-final order granting summary judgment on a worker's compensation claim is immediately appealable if the lower court decides that the worker's compensation liability defense is not available as a matter of law); *94th Aero Squadron of Miami, Inc. v. Colon*, 862 So. 2d 806 (Fla. 3d DCA 2004) (same); *Bd. of Regents v. Snyder*, 826 So. 2d 382, 386 (Fla. 2d DCA 2002) (concluding that denial of summary judgment as to qualified immunity was not immediately appealable, but reviewing subject order through its original writ power).

[97] *See, e.g., Bd. of Regents of State v. Snyder*, 826 So. 2d 382 (Fla. 2d DCA 2002) (order denying summary judgment on qualified privilege claim was not immediately appealable when it concluded that it was premature to address questions of law).

[98] *Jenne v. Maranto*, 825 So. 2d 409, 414 (Fla. 4th DCA 2002).

[99] *Jenne, supra*, 825 So. 2d at 414. Ironically, the Fourth District criticized the Rule as too narrow and accepted review of the order through its common law certiorari authority. As the court concluded, "Hence if the affirmative defense of immunity of individual public officials compels non-final review when it is denied, surely the pure constitutional immunity of the States claimed here would, even more so, require interlocutory review."*Id.*

[100] Fla. R. App. P. 9.130(a)(3)(c)(vi) and (a)(6) and Fla. R. App. P. 9.130(a)(D).

[101] Fla. R. App. P. 9.130(a)(4).

[102] *See Skaf v. Skaf*, 491 So. 2d 1265 (Fla. 4th DCA 1986) (noting that courts do not have the authority to review order denying non-final, tolling motion). *But see Marsh and Mclennan, Inc. v. Aerolineas Nationales del Ecuador*, 537 So. 2d 971 (Fla. 3d DCA 1988) (suggesting that court should have considered any order denying a motion that suspends rendition as a final order).

[103] *Id.*

[104] As one court explained, "[i]n this state, the case law has developed that an order granting new trial is neither "interlocutory in nature nor a final order for all purposes." *Polk Cty. v. Sofka*, 730 So. 2d 389, 393 (Fla. 2d DCA 1999) (internal citations omitted).

[105] *Maxwell v. Nugget Oil, Inc.*, 744 So. 2d 1203 (Fla. 1st DCA 1999).

[106] *Frazier v. Seaboard Sys. R.R., Inc.*, 508 So. 2d 345 (Fla. 1987); *see Tedder, PhD v. Visually Impaired Persons of S.W. Fla.*, 819 So. 2d 274 (Fla. 2d DCA 2002) (noting that "absent fraud or clerical error, a new trial order is not subject to a motion for rehearing or reconsideration.").

[107] *Philip Morris Inc., et al. v. Jett*, 802 So. 2d 353, 355 (Fla. 3d DCA 2001).

[108] *Roshkind v. Roshkind*, 717 So. 2d 544 (Fla. 4th DCA 1997).

[109] Fla. R. App. P. 9.130(a)(5).

[110] *Cape Royal Realty Inc. v. Kroll*, 804 So. 2d 605, 606 (Fla. 5th DCA 2002).

[111] *Cape Royal Realty, supra*, 804 So. 2d at 606 (citing *Marsh & McLennan, Inc. v. Aero Lineas Nacionales Del Ecuador*, 530 So. 2d 971, 973 (Fla. 3d DCA 1988)).

[112] *Bennett's Leasing, Inc. v. First St. Mortg.*, 870 So. 2d 93, 98 (Fla. 1st DCA 2003).

[113] § 120.68(1), Fla. Stat. (2004) (establishing that a preliminary, procedural, or intermediate order of an agency or Administrative Law Judge is immediately reviewable if review of a final agency decision would not provide an adequate remedy).

[114] § 120.56, Fla. Stat. (2003).

[115] Fla. R. App. P. 9.310.

[116] Fla. R. App. P. 9.130(f).

[117] *Far Out Music, Inc., supra*, 438 So. 2d at 913 (citations omitted).

[118] *See supra* at 19.

Editor's Column: The Proposed Sixth District Court of Appeal: Real Need or Proverbial "Cutting Butter with a Chain Saw"?

by Dorothy F. Easley[1]

A. Introduction

Under article V, § 9 of the Florida Constitution, the Florida Supreme Court is responsible for determining the need for increasing or decreasing the number of judges deciding cases. To make that determination, the Court looks at case filings, disposition data, other qualitative components, and requests from the courts themselves to capture important data otherwise missed.

Although the Florida Supreme Court certified the need for 88 new judges in the trial and appellate courts of the state in 2004 (4 appellate judges, 51 circuit court judges, and 33 county court judges), once again the judicial system got no new judges. The reason the legislature granted none was because the Florida Supreme Court did not approve the creation of a new Sixth District Court of Appeal, which the House made a condition for the funding of new judgeships.[2] A new Sixth District would have had a total fiscal impact for year 2004-05 of roughly $4.7 million and was to be based in Tampa. The Sixth District would have reconfigured the existing Second, Fourth and Fifth Districts, perhaps causing judges in those districts to be moved to other districts, or at least their homes relocated.

Because the creation of a Sixth District Court of Appeal has implications that would impact all of us in the appellate community, I asked the Honorable Judge Jacqueline Griffin of the Fifth District Court of Appeal and the Honorable Chris Altenbernd, Chief Judge of the Second District Court of Appeal, to share their views and information to help us understand the issues better.

B. Judge Griffin Shared a Report Commissioned by the Florida Supreme Court, Finding that There Is Currently Little, if Any, Present Need for Creating a Sixth District, and that Appellate Court Congestion, to the Extent It Exists, Is Better Resolved by Adding More Appellate Judges to the Existing District Courts.

On August 30, 2002, the Florida Supreme Court appointed the Commission on District Court of Appeal Performance and Accountability.[2] Judge Martha C. Warner of the Fourth District Court of Appeal chaired this Commission. On December 23, 2002, then-Chief Justice Anstead supplemented the Commission's charge and asked the Commission to study the effect of court size on collegiality and court performance.

Through multiple video conferences over 1.5 years, the Commission examined current court performance data of the Florida District Courts; conducted a survey of Florida District Court judges; researched the current literature on court size and performance among the federal courts; and interviewed the presiding judges of large intermediate courts in other states around the country. After gathering the data, the Commission issued its Report on Court Size as It Affects Collegiality and Court Performance, June 2004, (the "2004 Report"), to aid the Florida Supreme Court's deliberations on the certification of new appellate judges and future discussions of the structure of district courts of appeal in Florida. Judge Griffin, a member of the Commission, graciously shared the findings in that 2004 Report.

The Commission concluded that, while two recent studies of Florida's appellate courts[4] implicitly posited that smaller courts (no greater than twelve judges) operated more effectively than larger courts, those results were not born out by the 2004 Commission's survey results.[5] They were also not born out by the Commission's research of the existing literature on court size in other state and federal jurisdictions across the country.[6]

Pertinent to the issues surrounding the creation of a Sixth District Court of Appeal, the Commission concluded that Florida's District Courts of Appeal are currently performing effectively and within the accepted measures of performance, and that any current differences in performance do not appear to correlate to differences in court size. For example, Florida's appellate courts do not have severe case back logs, deciding cases at or near 100 percent within the same year on the average. Also, the data suggest little correlation between the size of each of Florida's intermediate appellate courts and the time that each takes to dispose of its cases.[7]

The 2004 Report also concluded that, based on the experiences of courts across the country that are larger than those in Florida, collegiality is not reduced with growth in court size.[8] Unitary courts[9] developing a culture of collegiality keep that culture–even when those courts get bigger.[10] Efficient court performance is also less a function of court size and more a function of strong leadership, good case management practices, a manageable caseload per judge, and the availability of adequate support resources. Large courts can and do function as well as small courts when these conditions are present.[11]

The 2004 Report also noted that not all appellate courts surveyed across the country have been obligated to maintain consistency in the decisions coming out of their respective districts.[12] For example, California's First, Second and Fourth Districts, with 20, 32 and 25 appellate judges, respectively,[13] have no conflict resolution mechanism, and conflicts between those districts are resolved by their respective supreme court, if at all. Moreover, it "is not unusual to have division disagreements, and this is considered simply part of the process. The chief judge of the First District reports that he has never heard of lawyers complaining about this. . . .[T]he Second District's experience is that there are fewer conflicts than there were fifteen years ago. In the Fourth District panels generally defer to the opinion of another panel in the division out of respect, but there is no obligation to do so."[14]

On the other hand, there are appel-

late courts that have a duty to maintain consistency in the opinions of the court.[15] For those courts, the consistency of the law has become a prime value that the appellate courts surveyed are continuing to foster.[16]

The 2004 Report also concluded that the larger the court the greater the risk of intra-court inconsistency in opinions; however, those courts are currently advancing and maintaining consistency through either a formal or informal *en banc* procedure to resolve intra-court conflicts.[17] Although many of the large, state intermediate courts of appeal do not have any mechanism to resolve intra-court conflicts, of those that do, none use a full *en banc* process.[18] Where consistency is addressed informally, such as through the circulation of opinions to all of the judges for comment before release, at some point the process becomes burdensome because of the number of opinions each judge is expected to review.[19]

The Florida courts, on the other hand, the 2004 Report continued, are successfully using the full *en banc* process to resolve inconsistencies. Also, it does not appear that the current size of the courts is an impediment to resolving intra-district inconsistency in the law.[20]

Nationally, chambers dispersion, (i.e. district courts with branches in different geographical locations), has become less of an impediment to collegiality and court performance. This is due, in large part, to the advances in communication and document management technology, particularly the use of e-mail and the internet.[21] The 2004 Report noted that Florida's Second District Court of Appeal has had dispersed chambers in Tampa and Lakeland, approximately 50 miles apart, for twenty-five years. The judges of that court report that this dispersion had little effect on collegiality on the court. The Second District's experience, however, does not speak to what would be the effect of more locations or more distant locations on collegiality.[22]

C. Second District Court Chief Judge Altenbernd's Views Are Consistent with Findings and Conclusions in the 2004 Report of the Commission on District Court of Appeal Performance and Accountability.[23]

1. Certification of Need: Background

In our interview, the Second District's Chief Judge Altenbernd explained that the Second District, while not ruling out the need for one, never asked for the creation of a Sixth District Court of Appeal. Neither did the Fourth and Fifth Districts, which were also affected by last year's proposal. The Second District had never requested the addition of the number of appellate judges required to fill a Sixth District Court of Appeal.

In the last two years, the Second District requested the certification of only two new judges.[24] Both times, the Florida Supreme Court certified the need for those two judges to the Florida Legislature. The legislature did not authorize funding.[25]

Judge Altenbernd explained that this year the Second District intends to only request one new judge and to seek instead approval for additional staff to meet the Second District's needs. The reason for this small request is threefold. First, more judges create the problem of lining up space for new offices, no different from opening a new law office. Second, the Second District has become aware that much of the growth in caseload has occurred in prison writs and pro se litigation. The Second District is of the opinion that its judges can handle a larger number of these cases, so long as its judges have sufficient legal and administrative staff to assist. Finally, there are difficulties with "training up" new appellate judges and their new staff. The Court prefers to bring on one new judge at a time, making an assessment, thereafter, of workload and the need for additional growth.

2. Certification of Need: Judge Altenbernd's Views on the Second District's Caseload and Other Indicators of Need

Judge Altenbernd was also not entirely persuaded that the Second District's case load justified creating an entirely new Sixth District Court of Appeal in 2004 for the following reasons. First, in the 2003-04 fiscal year, the Second District had 5826 filings. That is the largest volume of filings in Florida. The First District, which has only one more judge than the Second District, was in second place with 5725 filings, and the Fourth District was third at a little more than 5000 filings.[26] Notwithstanding the large number of filings in the Second District, the Court's dispositions to filings ratio runs timely and close to the other appellate courts, between 96 and 102 percent in a given year.[27]

Second, the caseload in the Second District is the upshot of two fairly stable attributes. Neither area population nor the number of circuit court judges within the Second District seem to be growing at such a rate to warrant the creation of an entirely new district court of appeal. In terms of population, the Second District has roughly 4,700,000 people, growing about 1-2 percent per year. By way of contrast, Miami-Dade County, located in the Third District, has over 2.3 million inhabitants, but is one of the top 5 immigrant destinations within the United States,[28] and has added the most new residents, (more than 92,000), between 2000 and 2003, at a growth rate of 4.1 percent.[29]

Third, the Second District's current case load is determined by the number of circuit court judges within the District. Judge Altenbernd explained, "There is a positive correlation between the number of circuit court judges and district court filings; the greater the number of circuit judges, generally the greater the number of appellate case filings. A good appellate court judge to circuit court judge ratio is 1:8. If there is 1:10, then the appellate court is struggling to keep up."

In the Second District, with fourteen appellate judges, there are 142 circuit court judges. Thus, the ratio is 1 appellate judge to 10.1 circuit court judges, putting the Second District at or near its maximum capacity. This ratio runs slightly higher than the Fourth District with only 12 appellate judges and 102 circuit court judges; a ratio of 1 appellate judge to almost nine circuit court judges. The Fourth District is significantly higher than the Third District, with only 10 appellate judges and 78 circuit court judges; a ratio of 1 appellate judge to almost eight circuit court judges.[30] Judge Altenbernd is concerned that a sizable growth in the number of circuit court judges will eventually make a redistricting process inevitable.

Other factors affecting the Second District are the number of filings in a given year, which obviously increase or decrease the appellate court's case load, particularly in a given subject area of law. By contrast, the number or original proceedings, i.e. extraordinary writs, in the appellate courts are much fewer, which present a smaller administrative burden on all the appellate courts.

Civil appeals in the Second District

continued next page

are now expected to remain at or near their current level, and range from 950 to 1000 per year, with more than 80 percent of those being paid filing fee appeals. Alternative dispute mechanisms appear to have limited the growth of civil appeals, and the Second District believes this trend is likely to continue for the next five to ten years. Civil appeals do not impose as great an administrative burden on the Second District. With only modest growth– less than 30 percent because of the increasing use of alternative dispute resolution–a minor increase is predicted to continue. Probate and guardianship appeals also present few administrative burdens for the Second District, representing only 40-50 appeals per year.

Administrative appeals, which can include unemployment appeals, average 150 filings per year. If the appellant is indigent, he can pay no filing fee and be entitled to a free transcript. These factors increase the burdens on the Second District, as well as Florida's other appellate courts. There has been a recent shift in the filing of administrative appeals, and most unemployment appeals are now being filed in the First District.

Criminal post-conviction Rule 3.800 and 3.850 appeals are also a growing area that present a growing administrative burden for the Second District and for most appellate courts. In 2003, there were about 5200 post-conviction appeals statewide and growing. While the number of post-conviction appeals "wax and wane" with the issue, in 2003-2004 the Second District had 1500 such appeals, 1800 the year before, and roughly 450 ten years ago.

One of the critical reasons for the administrative burden that post-conviction appeals present, Judge Altenbernd explained, is that 98 percent of Rule 3.800 and 3.850 appeals are *pro se*, since there is no constitutional right to counsel in post-conviction proceedings. As a result, these cases are more likely to come to the Second District subject to jurisdictional bars or riddled with jurisdictional or other threshold problems. These problems consume the Second District's staff resources to resolve them, no different from the demands they place on the other appellate court staff. For example, Judge Altenbernd explained, 8 staff attorneys currently comprise the Second District's central staff. *Pro se* appeals consume roughly two-thirds of their time precisely because they are *pro se*.

In contrast to the demands that post-conviction appeals place on the Second District's staff attorneys, traditional criminal appeals, though similar in number at 1700 filings in 2003 and growing, place fewer administrative demands. Judge Altenbernd credits this lighter load to the representation by competent appellate counsel of the criminal appellate parties–the Attorney General and Public Defender Appeals Divisions–with an already existing base of substantive criminal and appellate law expertise.

Family law appeals also impose administrative burdens on the Second District. While they average only 166 filings in a given year, Judge Altenbernd estimates that roughly two-thirds of those appeals involve at least one *pro se* appellate litigant with, therefore, more frequent jurisdictional or perfection of appeal problems. Adding to that, the Second District is concerned about the overall quality of those appeals and the fundamental issues they may present. For example, unlike *Anders* situations in criminal appeals, wherein appellate courts are required to look for issues, appellate courts are not required to look for issues in civil appeals; so, any issues that *pro se* litigants do not raise in family law appeals are lost, with the exception of fundamental issues such as those raised in child custody cases.

Juvenile appeals also present special administrative burdens. Judge Altenbernd observed that, while there were only 325 such appeals in 2003, and only 280 the year before, appellate courts are required to expedite many of those appeals. He explained that termination of parental rights, for example, require expedited appellate review. Adoption cases are even more expedited because the process of adoption cannot proceed until the appeal is final.

Currently, the Court is processing these appeals in 210-220 days. The Court hopes to further expedite this process, but court reporter problems and the supply of lawyers handling these cases make it difficult to improve this statistic. Meaning, the number of lawyers able to handle juvenile appeals is small. So, because those appeals are expedited at the same time that the number of lawyers able to handle them remain few, there is a constant struggle to keep up with those appeals. That, in turn, creates an even greater burden on the appellate courts to aggressively "case manage" those appeals. To further address that problem, there is also a pilot program at the Thirteenth Judicial Circuit Court to order a status conference immediately upon the filing of the notice of appeal to make sure the record on appeal is being obtained and assembled promptly.

Judge Altenbernd also noted other qualitative burdens on the Second District, similar to the burdens on the other appellate courts, that place greater constraints on the Court's time, and that are not addressed through the creation of a wholly new appellate court. One is the Court's long tradition of granting oral arguments in all cases, similar to the Third District Court of Appeal. Preparing for and hearing oral arguments takes more of the Court's time.

In addition, appellate judges are assigned to work on statewide committees concerning a myriad of administrative problems. Yet, the appellate work comes first, with the committee appointments always falling second.

3. Further Computerization Is Also Not the "Silver Bullet" for Expediting What Remains a Human Decision-Making Process

Judge Altenbernd noted that computerization in the Second District, like other appellate courts, has allowed appellate judges to process more cases than ever before. He also noted that the respective clerks' offices are able to better monitor cases with greater computerization. "Each case is resolved by three judges. While processing 1100 cases ten years ago would have been too much for any judge on the Second District, with adequate staff, computers allow each judge on the Court to resolve between 1100 and 1200 cases," he explained.

Judge Altenbernd cautions, however, that Florida's appellate courts today are already running at or close to their maximum capacity. This is because computers cannot further accelerate the process by which judges decide cases, maintain existing law and advance new, adequately debated law. Appellate judges decide cases within multi-faceted criteria and considerations. "Good, deliberative decisions can only be made so quickly," he explains.

D. Creating a Whole New Sixth District Court of Appeal Presents Potential Problems.

Upon reviewing the Commission's Report and discussing the issues on multiple levels with Judge Altenbernd, it is clear that the drags described above that affect case disposition are not unique to the Second District Court of Appeal. All of the district courts are near or at their maximum capacity. Based on this information, it would also appear that, while the clerks' offices around the state might benefit from being larger, perhaps even being centralized for economy of scale, the creation of a Sixth District at this time does not necessarily solve the problems the appellate judges are currently facing.

While a Sixth District may, indeed, solve court congestion in the future, there would appear to be little wisdom for specially creating at this time an entirely new Sixth District Court of Appeal, in lieu of approving a small number of additional appellate judges and staff to all existing district courts. In addition to the reasons and facts cited above, there are additional, qualitative reasons for working within the existing district courts.

First, the numbers needed to fill a new district court of appeal are far in excess of what Judge Altenbernd has requested and what the Supreme Court of Florida has certified in past years. As a practical matter, those numbers were presumably generated after thoughtful study and considerations that have, perhaps, not been entirely explored by proponents of a Sixth District, despite the best of intentions. "The Second District only grew by two judges in the last eleven years," and there is "no reason why the Second District should not continue in that trend," Judge Altenbernd explains. Based on this information, an entirely new Sixth District presents more than a doubling of the number of judges historically needed for the Court to remain on task and effective.

But also troubling is that the Sixth District represents new expenses to Florida's taxpayers in a time when court budgets are restricted and court services to Florida's citizens are being reduced.[31] "Salaries for a new clerk of court and a new marshall, other court staff, and the expense of a new building present a front-end expense of roughly $10-12 million, just to create a Sixth District. Then, there is the roughly $1 million per year to operate that new court," Judge Altenbernd said.[32]

On top of the financial burdens an entirely new district court would logically impose, there are also the "bramble bush" issues a Sixth District poses that merit further deliberation. Suppose, for example, that a Sixth District is created now. Since new appellate judges and experienced appellate judges must be blended to promote decisional continuity, how are the appellate judges going to be reconfigured? How are existing staff to be reconfigured? How are new staff to be "trained up"? And how is this all to be done at the same time that Florida's appellate courts strive to maintain decision-making consistency?

Judge Altenbernd also notes that "a Sixth District creates 'domino effects' on the other appellate courts and the Florida Supreme Court, all of which must be carefully and objectively evaluated." "For example," he explains, "any new appellate court creates more certified and conflict questions for the Florida Supreme Court. The increase in certified and conflict questions for the Florida Supreme Court also means an increase in the Florida Supreme Court's work load."

"In addition, under the Florida Constitution, at least one judge from each District Court must be appointed to the Florida Supreme Court, which means that a new judge from the new Sixth District would be appointed to the Florida Supreme Court. If a Seventh District were created, every justice would come from a designated district, and no justice would ever be selected statewide. That is simply not, " Judge Altenbernd observes, "the best method for selecting Supreme Court Justices."

E. If Not a Sixth District Court of Appeal or Greater Computerization, Then *What*?

The Commission's Report and Judge Altenbernd's facts and observations lead to the conclusion that, while a Sixth District may be a good, perhaps even excellent, solution for the future, there are currently better, less invasive ways to solve the current Second District administrative burdens that will minimize forseeable and unforeseeable ripples within the Second District and among the other appellate courts. First, the Second District might address, as Judge Altenbernd originally requested, much of that Court's current burdens with simply one new judge, two more unassigned staff attorneys and one secretary, to help with prisoner appeals and writs. "If prisoner cases are worked up by staff attorneys," he explains, "then they can work those up with more independence because prisoner cases, often with jurisdictional bars, warrant fewer written opinions, unlike civil appeals."

Also, with greater staff, Judge Altenbernd sees using more circuit court judges sitting by special designation as panel members in addition to the appellate judges. "Adding a 15th circuit judge to the Court allows more cases to be resolved without having to add more senior staff," he said. "Because we sit in groups of three, we can maximize the number of cases we review when the number of judges is divisible by three."

Judge Altenbernd also sees ways to reduce the number of post-conviction appeals. For example, "If a prisoner files a post-conviction motion that is denied as facially insufficient, the current appellate rules provide for an appeal of that order. However, the appellate courts remand those kinds of orders to be decided upon a facially sufficient motion. The number of post-conviction motions could be significantly reduced if the rules were amended to remove the appealability of those orders, and the lower courts, instead, denied those motions without prejudice to the prisoner to amend and make their motion facially sufficient, before those became appealable orders." Removing wholly unripe and unnecessary appeals will leave more time for the appeals that are ripe and intended for higher court review, he proposed.

Conclusion

The issues surrounding the creation of a Sixth District Court of Appeal are still unresolved. But efforts to resolve these issues continue, and get better with each study. As of the publishing of this column on the Sixth District, the Supreme Court of Florida is considering further study by the Commission to get more and better information so that the Court and the Florida Legislature can find a meaningful solution to keep Florida's courts strong and effective for all citizens, rich and poor, heeding the brutal candor of fellow jurist Judge Stephen Reinhardt:

> We federal judges are simply unable to abandon our notion of the appellate courts as small, cohesive entities operating in a pristine and sheltered atmosphere. It appears that, rather than surrender this wholly unrealistic and outdated vision of the federal judiciary, many of us

continued next page

> are willing to ration justice, to eliminate some of the best qualities we once associated with appellate decision[-]making, and to shut the doors of the courts to the American people by severely restricting our jurisdiction.[33]

Judge Altenbernd confirmed that the Court's most recent commissioned work will be underway in the very near future.

ENDNOTES

[1] Dorothy F. Easley is a Florida Bar board certified appellate practitioner and partner with Steven M. Ziegler, P.A., specializing in health and managed care law and state and federal appeals. She is currently a member of the Executive Council of the Appellate Practice Section and its various committees, and member of the Florida Bar Appellate Court Rules Committee. She received her M.S. *summa cum laude* from SUNY/CESF, in Syracuse, New York, in 1986, and her J.D. *cum laude* from the University of Miami School of Law in 1994. She is the recipient of the Appellate Practice Section's Service Award in 2002-03 for her work of the *Pro Se* Appellate Handbook and in 2003-04 for her work on the Section's website.

[2]. *Compare* Fla. House Rep. Bill No. HB-1849 *with* Fla. Senate Bill No. SB 1688; *see also* House of Rep. Staff Analysis, Bill No. HB-1849; Florida Supreme Court Judicial Certification History Tables at website: http://www.flcourts.org/osca/divisions/statistics/hist_cert.html. HB 1846 would have created 29 new circuit judge positions, 18 new county court judge positions, and 4 new district court judge positions, along with a new Sixth District Court of Appeal.

[3]. Order AOSC02-25, dated August 30, 2002, chaired by the Honorable Judge Martha C. Warner of the Fourth District Court of Appeal. The Commission members were as follows: Judge Martha C. Warner, Chair, Fourth District Court of Appeal; Judge William A. Van Nortwick, First District Court of Appeal; Chief Judge Chris W. Altenbernd, Second District Court of Appeal; Judge David Gersten, Third District Court of Appeal; Ms. Mary Cay Blanks, Clerk, Third District Court of Appeal; Judge Jacqueline R. Griffin, Fifth District Court of Appeal; Mr. Ty W. Berdeaux, Marshall, Fifth District Court of Appeal; Mr. Thomas D. Hall, Clerk, Supreme Court of Florida. The staff of the Office of the State Courts Administrator, including Peggy Horvath, Steve Henley, and Jo Suhr of the Strategic Planning Unit, W. Clyde Conrad of Information Systems Services, and Patty Harris of Court Services aided the Commission in its efforts.

[4]. *See* 2004 Report at 1-3 (discussing and citing REPORT OF THE JUDICIAL MGMT. COUNCIL COMM. ON APPELLATE COURT WORKLOAD & JURISDICTION, at 13 (May 1997); REPORT OF THE JUDICIAL MGMT. COUNCIL COMM. TO STUDY THE NEED FOR ADDITIONAL DISTRICT COURTS OF APPEAL, at 9 (Dec. 1998)).

[5]. *See id.* at 1-6.

[6]. *See id.* at 1-6.

[7]. *See* 2004 Report and Comparative Data therein at 7-15, 16-24.

[8]. *See* 2004 Report and Comparative Data therein at 7-15, 16-24.

[9]. The Commission defined "unitary courts" as "courts which do not divide themselves into divisions." *See* 2004 Report at 5 n.4.

[10]. *See* 2004 Report and Comparative Data therein at 18-19.

[11]. *See* 2004 Report and Comparative Data therein at 19-21.

[12]A significant concern expressed by commentators and judges is the ability of large courts to remain consistent in their opinions so that a coherent and predictable body of law develops. Interestingly, many of the large courts do not maintain complete consistency, because most do not have a formal mechanism to retain consistency by reconciling or resolving inconsistent opinions, such as through an *en banc* process. *See* 2004 Report and Comparative Data at 22.

[13]. *See* 2004 Report and Comparative Data at 16.

[14]. *See* 2004 Report and Comparative Data at 22-24.

[15]. *See* 2004 Report and Comparative Data at 23-24.

[16]. *See* 2004 Report and Comparative Data at 23-24.

[17]. *See* 2004 Report and Comparative Data at 23-25.

[18]. *See* 2004 Report and Comparative Data at 23-25.

[19]. *See* 2004 Report and Comparative Data at 23-25.

[20]. *See* 2004 Report and Comparative Data at 28-30.

[21]. *See* 2004 Report and Comparative Data at 16-19.

[22]. *See* 2004 Report and Comparative Data at 6.

[23]. Telephone Interview with Judge Chris W. Altenbernd, Chief Judge, Florida District Court of Appeal, Second District, (Jul. 16, 2004). Unless otherwise noted, the cited facts and information are the result of that July 16, 2004 telephone interview.

[24]. *See also* Nat'l Center for State Courts, Florida Delphi-Based Weighted Case Load Project, Office of State Courts Administrator (Jan. 2000) (and data tables presented therein).

[25]. *See also* Nat'l Center for State Courts, Florida Delphi-Based Weighted Case Load Project, Office of State Courts Administrator (Jan. 2000) (and data tables presented therein).

[26]. *See also* 2004 Report and Comparative Data at 25-29.

[27]. *See also* 2004 Report and Comparative Data at 25-29.

[28]. *See* Wikipedia Encyclopedia at website address: http://www.ebroadcast.com.au/lookup/encyclopedia/fl/Florida.html.

[29]. Florida Legislature Office of Economic and Demographic Research, *Demographic Information for Members and Staff* (Feb. 2004) at website address: www.state.fl.us/edr/population/newsletter.pdf.

[30]. *See also* Nat'l Center for State Courts, Florida Delphi-Based Weighted Case Load Project, Office of State Courts Administrator (Jan. 2000) (and data tables presented therein).

[31]. Concerned over the explosive growth in *pro se* appeals and lack of appellate court resources to handle the administrative demands that *pro se* appeals present, the Appellate Practice Section's *Pro Se* Appellate Handbook Committee, Chaired by Thomas Hall, Clerk of the Supreme Court of Florida, has been writing and is now editing the Section's first *Pro Se* Appellate Handbook.

[32] While estimates of the expense vary, the overriding message is that a Sixth District at this time would appear to far exceed the expense of adding a new appellate judge and additional staff for each aooellate court.

[33]. William Richman & William Reynolds, *Elitism, Expediency, and The New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 338-39 (Jan. 1996) (quoting Stephen Reinhardt, *Surveys Without Solutions: Another Study of the United States Courts of Appeals*, 73 TEX. L. REV. 1505, 1513 (May 1995)).

The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

PRESORTED
FORST CLASS
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43