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Judge Linda Ann Wells of the Third District Court of Appeal

by Rima Y. Mullins[1]

Judge
Linda Ann Wells

"This is my dream job," Judge Linda Ann Wells says about her appointment to the Third District Court of Appeal. Since taking the bench in January 2003, she has thoroughly enjoyed her new role deciding appeals, rather than arguing them.

An (almost) native of South Florida, Judge Wells moved to Hialeah as a toddler. Growing up, she never considered law as a possible career path. "In those days," Judge Wells explains, "women didn't become lawyers."

Judge Wells attended the University of Florida, majoring in Medical Technology and graduating with high honors in 1969. After college came a stint as an Army wife. "My husband, Robert, graduated from West Point and served for five years in the Army," says Judge Wells. "It was a wonderful experience. He was stationed in Europe and we were able to travel and see the world."

By the time they were ready to return to the United States in the early 1970's, attitudes towards women entering professional school had begun

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Message from the Chair

by John G. Crabtree

As some of you already know, the Section has begun work on a series of articles for trial lawyers under the banner "Your Appellate Lawyer: A User's Guide." From this core, we will have specialized pieces directed to the different species of trial lawyers that refer work to us. We will have, for example, "Your Appellate Lawyer: A User's Guide for Family Lawyers," "Your Appellate Lawyer: A User's Guide for Personal Injury Lawyers," and "Your Appellate Lawyer: A User's Guide for Criminal Defense Lawyers."

I am excited about the series and think it will do much to improve appellate practice in Florida. But it strikes me that, before embarking on telling trial lawyers how they should work with us, we should consider how we work with them, particularly how we work with them at the trial level when we are brought on board in complex cases.

By our nature, appellate lawyers tend—with some notable exceptions—to be the wallflowers of the litigation ball. While trial lawyers exude confidence and charm, we exude something else: intellectual honesty if we are lucky; intellectual superiority if not. (I was once helping a friend with an arbitration in California. When the arbitrator learned that my day job kept me in the appellate courts, he gratuitously remarked that I was "very nice, especially for an appellate lawyer.").

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MESSAGE FROM THE CHAIR

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We are not seen as one of *them*. We are something else. Some trial lawyers, in fact, look at us as something to be kept away, preferably in a glass cage that is broken "only in a case of emergency." That's a shame.

While our job is often to clean up train wrecks, we can usually do a better job if trial counsel consults us before things go completely off the rails. So, how do we work more effectively with trial counsel? For one thing, we must be careful to define the boundaries of our duties so that everyone does what he or she does best, and nothing falls through the cracks.

An appellate colleague just shared a too-common horror story about a trial lawyer who asked for help with just "the dispositive legal issues" at the trial level in a personal injury case. They agreed that, since her trial-level work was to be very limited, her percentage of any recovery for that work would be small. As the case progressed, trial counsel piled more and more work on her. Her share of the fees, however, did not change.

Eventually, she confronted the lawyer, explained that they apparently had a different understanding of what "dispositive legal issues" meant, and that she did not think handling depositions fell into that category. The lawyer was not upset. He did not scream or shout. He simply asked what she thought *would be* fair.

At this point, the appellate lawyer did something that every specialist without a serious grounding in trial practice should do: She said that she did appellate work, not discovery. She explained that she would be happy to work on the otherwise attractive case, but that she would prefer to stick to what she knew and receive the fee she negotiated, rather than seek a greater percentage for work she was not qualified to handle. She resisted temptation.

Not all trial lawyers are so reasonable, of course. Some will exploit the fact that our legal duties in litigation are inherently more fluid than the percentages we agree to for the acceptance of those duties.

But most simply want the best representation for their client. That's why they hire appellate lawyers, to give their clients the best representation possible. When they do—regardless of whether the case is civil, criminal or administrative—we can help more if we get on board earlier, and if we define our role as clearly as possible.

JUDGE WELLS

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to change, and Judge Wells decided to apply to law school. She graduated from Florida State University with her J.D. in 1976 and joined the Miami firm of Fine, Jacobson, Schwartz, Nash & Block in 1977, where she practiced for seventeen years.

"Fine, Jacobson was like a family to me," Judge Wells recalls; "They really took me under their wing and trained me." Although she was one of the first women attorneys at the firm, and often the only woman in court, she never felt that her arguments were discounted because she was a woman. At Fine, Jacobson, Judge Wells started her practice working on divorce cases, but early on in her career she realized that appellate work was her true calling. Fortunately, the firm made an effort to accommodate her interest, and she was able to develop an active appellate practice. Later in her tenure at Fine, Jacobson, Judge Wells had the opportunity to handle appeals with former Florida Supreme Court Justice, Arthur England, an experience she describes as "incredible."

In 1994, Judge Wells joined Holland & Knight LLP as a partner in the appellate practice area, where she worked with another former jurist, former Third District Court of Appeal Judge Daniel Pearson. Seeking a change from big firm practice, in 1996, she joined Elizabeth Russo to create the law firm of Russo, Wells & Associates, a boutique firm specializing in appellate work. That same year, Judge Wells became a board certified appellate attorney. "I have been fortunate throughout my career," she reflects, "to have practiced with, and against, some of the finest attorneys in South Florida."

As a young attorney at Fine, Jacobson, Judge Wells learned the importance of public service and recognized that attorneys, who have so much, have an obligation to give back to the community. In 1999, she was given a unique opportunity to put those beliefs to the test. Judge Wells was asked by the Florida Department of Children and Family Services to serve as its Chief District Legal Counsel in Miami-Dade and Monroe counties. Although taking the position meant leaving her established practice to join an embattled agency, she did not hesitate. "I always believed that one should be involved in the community. The work I did at DCF, providing legal advice on the wide range of issues faced by that agency, was very different from my previous practice. It was the most challenging job I have held in my legal career, but it was also incredibly rewarding to know that I was having a direct and meaningful effect on people's lives. As difficult as it was, if faced with the decision today, I would do it again."

After three years at DCF, Judge Wells was appointed to the Third District Court of Appeal, her "dream job." "I love to research and write, so this position is tailor made for me," Judge Wells explains. "Many days I become so engrossed in the briefs and arguments that we are considering that I do not even notice the time. The wonderful thing about my job is that it is never dull. There is always a new legal issue or a novel factual scenario to consider." Although she has law clerks at her disposal, Judge Wells does legal research, following up on arguments made in briefs. "But I think my favorite part of being an appellate judge," Judge Wells says, "is writing opinions."

Judge Wells is an avid reader in her off-hours as well. She also enjoys gardening and home improvement projects. She proudly displays on the sofa in her office, three beautiful, handmade tapestry pillows.

Since joining the Third District Court Appeal, Judge Wells has been very impressed by the preparation level of the judges. "The judges on this bench take their jobs very seriously. They have read the briefs and most likely reviewed the record and transcript," Judge Wells states. In addition to their professionalism,

Judge Wells has been struck by the collegiality between the judges. "Although we don't necessarily agree with each other on all issues, all of the judges get along very well." She has also been impressed by the level of practice before the Court. "For the most part," Judge Wells says, "the briefings to the Court are excellent and very helpful."

Having appeared now on both sides of the bench, Judge Wells recommends that attorneys always avail themselves of the right to oral argument. Judges appreciate oral argument because it gives them the chance to confirm what they believe a party's position to be, or to clarify questions raised by the briefings. The general policy of the Third District Court of Appeal is to grant oral argument to any party who requests it. "Oral argument gives you one more chance to present your position to the panel and get as much information before them so they may make the proper ruling. Litigants should not pass up this opportunity," Judge Wells states.

One final word of advice. Although she acknowledges that as a practitioner she routinely hit page limits, Judge Wells advises, "When filing briefs, shorter is better."

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Recent Appellate Decisions on the Legal Sufficiency of Petitions for Administrative Hearing: "The Rules Have Changed"

by Gregory J. Philo[1]

A. Introduction

Before 1998, a petitioner's general assertion disputing all of an administrative agency's material factual allegations was legally sufficient to obtain an administrative hearing on final agency action.[2] But in that year, the controlling statutes and rule were amended to impose much stricter requirements in this regard. Disputes over these new, stricter requirements took a few years to make their way up to the appellate level. Just last year, the Third District Court of Appeal confirmed beyond question that, indeed, "[t]he rules have changed."[3] And changed dramatically, at that.

B. The 1998 Amendments

Specifically, the legislature in 1998 amended § 120.54(5)(b), Fla. Stat. (1997) ("Uniform Rules"), to add the following subsection regarding what the uniform rules of procedure shall include:

> 4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall include:
>
> a. The identification of the petitioner.
>
> b. A statement of when and how the petitioner received notice of the agency's action or proposed action.
>
> c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.
>
> d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.
>
> e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.
>
> f. A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action.
>
> g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.[4]

In the very next section of the same act, the legislature relatedly amended section 120.569(2), Fla. Stat. (1997) ("Decisions which affect substantial interests"), to add the following subsections:

> (c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a

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Ethical and Strategic Dilemmas Posed by Federal Appellate Bars to Plain Error Consideration of Newly-Available Claims: The Rule 52(b) Response to a "Catch-22"

by Richard C. Klugh, Jr.[1]

A. Introduction

Like the fairy tale kiss of a princess turning a frog into a prince, watershed changes in decisional law occasionally convert non-issues into clear winners while an appeal is pending. Where trial counsel has foreseen the possibility of such supervening changes and appellate counsel follows through by pursuing the issue in the initial brief, application of the intervening decision, if it occurs before the appeal is final, is assured. If such issues were not preserved in the trial court (and usually they are not), then even appellate counsel who thereafter anticipates a change in the law and raises the issue must confront the plain error rule,[2] the burdens of which cannot logically be satisfied until a supervening decision is actually rendered.

But the ethical bar on frivolous arguments impedes making contrary-to-reality plain error claims on appeal–such as arguing that an issue presently foreclosed by precedent somehow constitutes a plain and obvious error. And apart from direct ethical concerns, even where trial counsel had the foresight to anticipate a sea-change decision and preserved the issue for review, the strategic limitations of appellate briefing and effective argument frequently do not allow for inclusion of these hoped-for legal developments. Both strategy and ethics thus seem to squeeze out from appellate briefing fundamental components of law in the making. How then does one ethically and effectively raise such anticipated issues on appeal? And if the changes are unanticipated or unpreserved in briefing, how can counsel protect the appellant or appellee from abandonment of the right to consideration of the supervening change in the law?

One answer, supported by criminal practitioners in the wake of the recent federal sentencing law decision, *Blakely v. Washington*, 124 S. Ct. 2531 (2004),[3] is that plain error review is an independent obligation of both trial and appellate courts. Thus, when a fundamental case law shift such as *Blakely* occurs, the court may *sua sponte* notice the error–even if never previously raised–or may, at the least, notice the error upon filing of supplemental authority or a supplemental brief. But this approach has recently been rejected in a series of decisions by the U.S. Court of Appeals for the Eleventh Circuit, leaving appellate attorneys scratching their heads as to what to do. This article briefly traces the development of Eleventh Circuit law on this question, and suggests that the ethical and practical concerns arising from a narrow reading of the plain error rule warrant reconsideration of that position and adoption of the consensus view that the plain error rule applies equally to all courts, at both the trial and appellate levels.

B. The Development of the Eleventh Circuit's Approach to Consideration of Supplemental Issues Not Raised in the Initial Brief.

Before the year 2000, precedent of the Eleventh Circuit and the former Fifth Circuit frowned upon, but did not bar, the consideration of supplemental issues not presented in appellate briefing. For example, in *McGinnis v. Ingram Equipment Co.*, 918 F.2d 1491, 1496 (11th Cir. 1990), the Eleventh Circuit recognized that a waiver rule "normally" applies to issues not raised in the initial brief on appeal, but that the court of appeals has the authority to accept supplemental briefing on a newly-raised issue not included in the initial or reply briefs in order to correct a manifest injustice.[4] This flexible approach, while not expressly referring to the plain error rule applicable to criminal cases, reflects civil procedure congruence with the concepts underling criminal law plain error analysis.[5]

This pragmatic approach, akin to the precepts of the plain error rule, began to fall by the wayside only after June 26, 2000, when the Supreme Court issued its momentous criminal law decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that the jury verdict sets the limit of the statutory maximum sentence available upon a criminal conviction. Previously, federal courts (and many state courts) had treated certain maximum sentence-gradation provisions in the criminal code–particularly those relating to drug quantity–as "sentencing factors" to be constitutionally distinguished from ordinary offense elements that must be submitted to the jury. But in *Apprendi*, the Supreme Court explained that if the statutory maximum rises as a result of fact finding, the defendant has the right to jury determination of the relevant facts. Because many federal criminal sentences are longer than 20 years of imprisonment–the default statutory maximum for most drug crimes[6]–federal appellate courts were quickly confronted with numerous claims of sentence illegality under *Apprendi*. But because both trial and appellate criminal practitioners failed to anticipate *Apprendi*, the claims were often raised in supplemental briefs. While the Eleventh Circuit heard most of these supplemental claims on a plain error basis, in some cases the court blocked even plain error review, deeming the issue forfeited.

In *United States v. Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), the Eleventh Circuit began to redefine the Circuit's approach to untimely-raised arguments, holding that such supplemental issues would not be considered on appeal where appellant's

counsel had proceeded, without leave of court, to add supplemental *Apprendi* issues on appeal, providing no opportunity for appellee's counsel to respond. In *Nealy*, the appellant had raised the Sixth Amendment component of the *Apprendi* issue and was granted leave to file a supplemental brief as to that claim; his supplemental brief sought to broaden the issue to include Fifth Amendment arguments arising out of post-*Apprendi* case law. The *Nealy* decision did not purport to bar all supplemental briefs on intervening issues, nor was Nealy nominally more than a discretionary application of then-existing local Eleventh Circuit rules concerning supplemental authority and related briefs.[7]

Thus, while the Court concluded that "parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority," the Court merely declined to consider the supplemental brief given the procedural history in that case.[8] And the *Nealy* response to the *Apprendi* "emergency"–the threat of windfall sentences of less than twenty years for federal drug offenders–was not immediately interpreted to *prohibit* supplemental briefing on supervening issues not previously briefed, but rather to authorize and encourage the striking of such briefs.

Notwithstanding *Nealy*, *Apprendi* issues raised solely in supplemental appellate briefs were heard by the Eleventh Circuit in numerous published and unpublished cases.[9] Similarly, the other circuits all permitted supplemental briefing based upon *Apprendi*.[10]

The *Nealy* issue took a new turn when the Eleventh Circuit examined an appellant's failure to raise an *Apprendi* issue at any time before filing a petition for writ of certiorari to the United States Supreme Court. In *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001), the panel held that even though the Supreme Court had remanded for consideration of an *Apprendi* claim raised on certiorari by the illegally-sentenced defendant, the rationale of *Nealy* allowed the court, even on remand, to fail to notice plain error in the sentence imposed.[11] The *Ardley* panel decision provoked *en banc* rehearing requests, but the majority of the court voted to let the decision stand without rehearing.[12] Judge Tjoflat dissented from the denial of rehearing in *Ardley* and took exception to the view that appellate courts can avoid applying supervening changes in constitutional law to correct an error. *Id*. at 999 n.6 (Tjoflat, J., dissenting from the denial of rehearing *en banc*) ("[A]pplying a plain error analysis, even though it is a more narrow review, allows the court, in at least some instances, to implement the new constitutional rule."). In an opinion concurring in the denial of rehearing *en banc*, four judges reiterated the reliance on *Nealy* as foreclosing appellate consideration of newly-raised issues in supplemental briefs, for to do so would vitiate the time deadlines for briefing under the federal and local Eleventh Circuit rules. *Id*. at 992 (Carnes, J., concurring in the denial of rehearing *en banc*) ("If the dissent's position were adopted, no procedural bar could ever be enforced because doing so would undermine or frustrate whatever values or doctrines underlie the constitutional or statutory provisions being belatedly asserted.")

Following the denial of rehearing *en banc* in *Ardley*, no further clarification of the *Nealy* interpretation of supplemental briefing rules was provided until the new emergency created by the *Blakely* decision. Unlike *Apprendi*, the principal effects of which were ultimately found to be limited to a small range of drug cases, *Blakely's* impact on federal sentencing is virtually limitless, because the federal sentencing guidelines (and many states' guideline systems), unlike sentence maxima in the criminal code, are only tenuously tied to the offense of conviction and depend instead on a range of uncharged "relevant conduct." The *Blakely* emergency was even greater than the *Apprendi* emergency, with a flood of supplemental *Blakely* claims in appellate courts–both state and federal–around the country.

In the immediate wake of *Blakely*, a few Eleventh Circuit judges initially proposed to allow "re-briefing" in which the initial briefs were to be stricken and new briefs filed so that *Blakely* claims could be fully addressed. But those single-judge decisions proved short-lived when, addressing the flood of supplemental *Blakely* claims, the Eleventh Circuit–unlike other circuits–took a step beyond the holding in *Nealy* and held that no panel of the court had the discretion to permit supplemental briefing on an issue not raised in the initial briefing. In *United States v. Levy*, 379 F.3d 1241 (11th Cir. 2004), the court characterized the issue abandonment rule as preclusive of any opportunity to file a supplemental brief raising a new issue based on a supervening change in the law.

> To allow a new issue to be raised in a petition for rehearing, or a supplemental brief, or a reply brief circumvents Federal Rule of Appellate Procedure 28(a) (5), which requires that an appellant's initial brief must contain "a statement of the issues presented for review." . . . [A]n appellant's supplemental authority must relate to an issue previously raised in a proper fashion, and . . . an appellant cannot raise a wholly new issue in a supplemental authority letter or brief. Levy does cite a few decisions where this Court apparently

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Deadlines for Serving Briefs: What Florida's Appellate Courts Should Consider in Phrasing Orders Granting Enlargements of Time

by Roy D. Wasson[1]

A. Introduction

I write my article in my role as an unsolicited Friend of the Court speaking to a routine (but significant) administrative matter applicable to many cases, and as a self-appointed representative of appellate practitioners statewide, who frequently lament that the change proposed here should be instituted. I respectfully suggest that Florida's appellate judges and court clerks review their phrasing of orders granting extensions of time for principal briefs, and (where necessary) modify the standard phraseology of such orders to reflect that the act to be performed on the extended date is the "***service***" of the brief, rather than its "***filing***."

Some districts[2] often (or usually) issue orders granting motions for enlargement of time that require briefs to be "filed" on the same date that they are due to be "served."[3] Such a practice needlessly accelerates the deadline for submission of original briefs for filing with the court clerk, making briefs untimely unless received by the clerks several days *before* the dates on which they would be due to be filed under the Florida Rules of Appellate Procedure, as the Rules have been applied by controlling case law.

As will be shown, the practice of setting a deadline for the clerk's receipt of principal briefs earlier than the Rules of Appellate Procedure require does not advance appeals on courts' dockets, because the deadline for opposing counsel to complete the brief which follows runs from the date on the certificate of service of the earlier brief, not from the date of its filing. It does not speed the appellate court's decision of a case to have the initial brief arrive in the clerk's office before it is due under the Appellate Rules, because the courts do not review initial briefs until the answer brief has been submitted. The practice of setting a filing deadline does not place a brief in the hands of opposing counsel any faster than it otherwise would be. In short, there is nothing to be gained by setting a firm date for briefs to be filed. Worse yet, orders that establish such filing deadlines likely increase courts' workloads.

B. The Appellate Rules Do Not Contain Filing Deadlines for Briefs

There is no appellate rule setting a due date for the "***filing***" of appellate briefs, because the various rules setting the times for completion of briefs speak only in terms of when briefs "shall be ***served***."[4] Those deadlines for service of briefs do not impose any due date for receipt of briefs by the court clerk for filing. "Service by mail shall be complete upon ***mailing***," not upon delivery to the court, or upon postmarking, or on any other event; so briefs deposited into a corner mailbox anytime before midnight on the date prescribed for service are timely served. *See* Fla. R. App. P. 9.420(c)(i).

The only rule that mentions any time frame for "filing" of briefs and other papers–Fla. R. App. P. 9.420(b)–does not set a firm deadline for receipt of the items by the clerk. Rule 9.420(b) is a flexible rule that uses language the courts have interpreted to permit documents to be filed several days after they are served, even where the date for service is jurisdictional.

Rule 9.420(b) requires that "[a]ll original papers shall be ***filed*** either before service or ***immediately thereafter***." (Emphasis added). That language is the same as it appears in Fla. R. Civ. P. 1.080(d). Analysis of the cases involving the question of the timeliness of trial court pleadings filed days after their "service" deadlines compels the conclusion that briefs received by the clerk for filing a few business days after their certificate of service date are timely, as having been filed "immediately thereafter." There is nothing in the appellate rules (nor in the Rules of Civil Procedure) that expressly or impliedly requires filing on the same day of service, or even on the next day.

The controlling case on this subject is forty years old, but still good law. In *Miami Transit Co. v. Ford*, 155 So. 2d 360 (Fla. 1963), the unsuccessful litigant in a trial court proceeding timely served its motion for new trial nine days after the verdict, but did not file that motion until six days after it was served, or fifteen days after the verdict. The Third District held that the motion for new trial was not timely, but the Florida Supreme Court reversed. In that thoughtful decision, which analyzes the difference between service and filing, the supreme court concludes that there is no deadline for filing the motion other than "reasonable promptness."[5]

It should be emphasized that the motion for new trial in the *Ford* case was subject to a jurisdictional deadline, not a discretionary deadline like that applicable to service of an appellate brief. Inasmuch as the *Ford* Court held that the filing of a motion for new trial can lag behind the date such a motion is served by several days, the date that the clerk receives an appellate brief for filing must be at least equally flexible.

A more recent Fifth District case applies the same rule of law to determine the timeliness of a motion subject to a jurisdictional deadline for "service," and not filing:

> Under the provisions of Rule 9.110(b), Florida Rules of Appellate Procedure, notices of appeal seeking review of final orders of lower tribunals must be filed within 30 days of rendition of the order to be reviewed unless rendition is suspended by 'an authorized and timely' motion for new trial or rehearing as provided by Florida Rule of Appellate Procedure 9.020(g). In order to be 'authorized and timely' under Rule 1.530(b), Florida Rules of Civil Procedure, a motion for new trial or rehearing must be ***served*** no

later than ten days after the date of verdict or date of the filing of the judgment. . . . Several cases have arisen involving service within ten days but filing beyond ten days. ***It is clear that filing beyond ten days is of no consequence as long as service is timely.*** *Behm v. Division of Administration*, 288 So. 2d 476, 479-80 (Fla. 1974). Although it may be counter-intuitive for civil lawyers to view service as an event of jurisdictional dimension, in the case of this particular rule, timely filing is of no moment, timely service is everything.[6]

There is no provision in the Florida Rules of Appellate Procedure requiring a brief be filed on any given date, much less on the same day it is due to be served. An enlargement of the due date for a brief should not result in a court-imposed deadline for filing of that brief with the court clerk on the same day it is due to be served, especially when counsel is hundreds of miles from the court and is using U.S. Mail for service.

C. "Filing" Deadlines Shorten Available Briefing Times by Several Days

When courts impose deadlines for receipt by the clerk of a brief ("filing"), as opposed to setting a deadline for serving the brief, the appellate attorney writing the brief must complete it days before it is due to ensure that the brief reaches the court file in time. That conclusion is supported by the practical example that a brief served on counsel by mail late at night (mailing at 11:59 p.m. is timely service) and simultaneously delivered to the Federal Express drop box (or that of another overnight delivery service) for dispatch to the court, will not depart the originating city until the day following "service," and cannot be delivered to the court for filing until at least the second day after service.

One situation that arises is where the time for a brief to be served is extended by court order until the Tuesday (the first work day) after a three-day weekend. If the court's order also provides that the brief must be filed on the date of service, then the brief will have to go out by expedited delivery[7] on the Friday before that Tuesday. For those of us used to working weekends and nights, that order setting the Tuesday deadline for filing has reduced the available time to work on the brief by four full days. That is a hardship on the attorney, and potentially prejudicial to the client.

D. Adding a Deadline for "Filing" of Briefs to Orders Granting Extensions for "Service" Does Not Hasten the Resolution of Appeals

Based on the understanding of this author, there would seem to be no reason to require filing of an initial brief before the date it would reach the court file through the normal mailing process, because appellate judges in Florida do not customarily review an initial brief until the answer brief is received by the court. Likewise, some appellate courts wait until the reply brief is filed to deem the appeal perfected.[8] The fact that the answer brief reaches the court file on the same day it is served by mail to other counsel does not hasten the court's consideration of the appeal.

Because initial briefs are not likely to be reviewed as soon as they are filed, then it would seem to make no difference that an initial brief is filed a few days after it is served, in the overall scheme of things. The appeal is not going to be decided any faster; the court is going to await the answer brief (and in some courts the reply brief) before addressing the merits of the appeal.

Similarly, a requirement of filing an initial brief on the same day it is served is not going to put the initial brief copy in the hands of appellee's counsel any faster than it would be otherwise, because the appellee's copy still will be delivered by regular mail, regardless of when the original and court's copies of the brief are filed.[9] The time for the appellee's brief will not be any different if the initial brief is filed on the date of service, or even several days later.

E. Filing Deadlines Add to "Motion Sickness"

One very practical reason the appellate courts should cease imposing filing deadlines is that they are bound to result in increased incidents of the three strains of "acute motion sickness."[10] One variety of that ailment is caused by the motions seeking the additional three or four days previously consumed by the court's imposition of the filing deadline itself. A second strain of motion sickness will result from the inevitable motions to dismiss (or to strike answer briefs) in those appeals in which briefs are timely served, but do not reach the court file by the unnecessary deadline for filing. Third will be the motions—other than motions for extensions of time—seeking some relief not really needed, filed only to automatically toll the prematurely-imposed filing deadline under Fla. R. App. P. 9.300(b).[11]

Conclusion

A day or two (or three or four) difference in the date of filing the brief has little, if any, effect on when the opposing brief is completed, nor on when the appeal is perfected and decided. But those few extra days can mean the difference of nights without rest to a solo practitioner working into the wee hours (decades after losing the stamina once used for all-night college exam cramming). It can mean the difference between thoroughly and adequately representing the interests of one's client, and rushing to catch the courier at the last minute with a product less than fully helpful to the court. Therefore, this author respectfully submits that appellate court extension orders should recite that the extended time deadline is for service of a brief, not a deadline for filing.

Endnotes

1. Roy D. Wasson is a Florida Bar board certified appellate practitioner, a former Chairman of the Appellate Court Rules Committee, former Chairman of the Appellate Practice Section of the Florida Bar, and shareholder in Wasson & Associates, Chartered in Miami.
2. Judge Winifred Sharp of the Fifth District Court of Appeal, in a conversation with the author at the Florida Bar Annual Meeting on June 23, 2004, informed the author that her court had voted to adopt the suggestion made in this article in response to a memo from the author, which was in essence a draft of this article.
3. Of course, many lawyers handling the occasional appeal will unthinkingly file motions seeking an enlargement of time in which to "file" a brief, so orders which set filing deadlines in response are only giving those parties what their attorneys asked for. This article addresses only the situation in which skilled appellate lawyers move to extend the time to "serve" their briefs, and are met with an order purportedly granting their motion, but then effectively shortening the agreed-upon due date by setting a date the brief must be "filed."
4. *See* Fla. R. App. P. 9.110(f) ("initial brief shall be ***served*** within 70 days of filing the

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notice" in final civil and probate appeals); Fla. R. App. P. 9.130(e) ("initial brief . . . shall be ***served*** within 15 days of filing the notice" in non-final appeals); Fla. R. App. P. 9.210(f) ("answer brief shall be ***served*** within 20 days after ***service*** of the initial brief"); Fla. R. App. P. 9.140(g) ("Initial briefs shall be ***served*** within 30 days after service of the record" in criminal appeals); Fla. R. App. P. 9.150(d) ("brief of the . . . moving party shall be served within 20 days after filing of the certificate" in questions certified by federal courts) (emphasis added).

[5]. 155 So. 2d at 363; *see also, e.g., Poulsen v. Lenzi*, 869 So. 2d 658 (Fla. 4th DCA 2004).

[6]. *Pennington v. Waldheim*, 695 So. 2d 1269, 1270-71 (Fla. 5th DCA 1997) (emphasis added).

[7]. This example assumes the situation where the appellate attorney's office is too far from the appellate court to hand-deliver the brief for filing on the same date as it is served, common indeed when a relative handful of appellate practitioners handle a large percentage of the appeals throughout the state.

[8]. In the Third District Court of Appeal, the appeal is deemed ripe for assignment to a merits panel and setting of oral argument when the answer brief is filed. Other districts wait to receive the reply brief, rendering immaterial (for calculating perfection dates) the date that the preceding brief was filed.

[9]. Opposing appellate counsel have no reason to care what date a brief reaches the court file. The appellate Bar of Florida widely (if not universally) share puzzlement why—when the lawyers on both sides have explicitly agreed that the deadline for service of one of their briefs should be extended by "x" days, and "service" (not filing) is the act described in the agreed motion to be extended until the new deadline—some courts' orders overlook the agreement and impose a useless deadline for filing instead. Setting a filing deadline is not in any way protecting the opposing party from any risk of harm.

[10]. *See generally Dubowitz v. Century Village East, Inc.*, 381 So. 2d 252, 253 (Fla. 4th DCA 1979)("This Court is being deluged nowadays with a plethora of pleadings which have no place in any appellate court and which are causing a distressing waste of time. We are in truth suffering from acute motion sickness.").

[11]. Counsel caught short by an overlooked deadline to file a brief which he or she thought only had to be served on a given date may be disposed to inventing a request for relief other than a motion for the additional few days which are needed, out of fear that the court's *sua sponte* shortening of the requested service deadline was a conscious expression of disapproval of the parties' agreed-upon due date for service of the brief.

State Civil Case Update

by Keith Hope[1]

I used to write this column back in the old days after the Section was formed. It's "'*deja vu* all over again.'" John Fogarty (quoting Yogi Berra). Here are some cases involving appellate practice that came down over the last six months.

Express mail is a useful tool, but mistakes happen and "filing" is not the same as "mailing" for jurisdictional purposes although, perhaps, in some cases it should be. Harrell v. Harrell, 879 So. 2d 87 (Fla. 4th DCA 2004).

In a visitation and child custody case, Appellant, a pro se party in West Virginia, mailed her notice of appeal by express (overnight) mail on the twenty-ninth day after entry of the order. The post office's label indicated "second day delivery" and the notice was received and file-stamped by the clerk (in West Palm Beach) on the thirty-second day. Timely mailing, the court noted, does not confer jurisdiction on a state appellate court; rather, "filing" of a notice of appeal means delivery to and receipt by a proper official. Thus, since the notice was stamped filed on the thirty-second day, her appeal was dismissed as untimely.

In dissent, Judge Farmer detailed the facts from appellant's response to the court's order to show cause. She knew her notice had to reach the trial court in Florida by May 5th and she mailed it at the post office by express (overnight) mail on May 4th. The postal clerk mistakenly marked the label for "second day" delivery instead of overnight. Nonetheless, appellant called the post office tracking number and learned that the notice was indeed delivered at 12:47pm on May 5th to a satellite office of the circuit court clerk's office in Del Ray Beach.

The dissent surmised that what might have happened was that the clerk at the satellite office sent the notice (unstamped) to the main office where it was eventually file-stamped on May 7th. He noted that appellate courts are not generally fact-finders, but that a remand to the trial court for an evidentiary hearing on when the notice was actually delivered to and received by the clerk was a possible solution.

Moreover, the dissent noted that the rigid rule on the filing of a notice of appeal has been made subject to a judge-made mailbox exception involving primarily the filing of post-conviction relief motions by prisoners in criminal cases. While the rationale for the exception—constitutional access to courts—originated in cases involving habeas corpus and illegal confinement, the dissent noted that the mailbox exception has not been confined solely to such cases but has also been applied to (1) a prisoner's common law replevin action; (2) a nonpayment of child support case; and (3) a prisoner's civil right's action—all civil matters and none of which involved claims of illegal confinement. The dissent noted that the holdings in these latter cases suggest that the mailbox exception is as strongly based on the constitutional right of access to the courts by civil litigants as it is on the right to habeas corpus by prisoners. The dissent is well written and makes a strong case.[2]

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Inadequate findings of fact in dissolution cases must be brought to the trial court's attention via a motion for rehearing to preserve such error for appeal. Mathieu v. Mathieu, 877 So. 2d 740 (Fla. 5th DCA 2004).

After a final judgment in a dissolution of marriage case, the husband filed a detailed motion for rehearing raising five issues of law and, in addition, asserted that several of the court's findings of fact on the single issue of attorney's fees were not supported by the record. In a case of first impression, the court followed a Third District case and held that a party cannot complain about inadequate findings of fact in a dissolution case unless such defect was brought to the trial court's attention in a motion for rehearing. Since the issue of "findings of fact" was only raised as to attorney's fees, the issue was not preserved for appeal as to the other issues raised. The court noted that its holding was subject to the caveat that since the main reason for adequate findings is to allow for meaningful appellate review, if the court determines in a particular case that its review is hampered by lack of adequate findings, it may in its discretion remand to the trial court for such findings.

Don't let the magic words "without prejudice" fool you: they do not necessarily make a final order non-final for purposes of appeal. Delgado v. J. Byrons, Inc., 877 So. 2d 822 (Fla. 4th DCA 2004).

This case involves a recurring issue that is a trap for the unwary appellate practitioner. In a negligence case, the trial court entered an order on February 13, 2003, granting defendant's motion to strike plaintiff's pleadings and for sanctions based on discovery violations. The order stated in part: "Plaintiff's pleadings are stricken and cause dismissed w/o prejudice." Thereafter, defendant sought attorney's fees based on a proposal for settlement and entry of final judgment.

The trial court awarded such fees and entered final judgment on September 9, 2003. Plaintiff then filed a notice of appeal from both the February and September orders. The court noted that while the phrase "without prejudice" normally indicates an order is not final, nonetheless, if the effect of the order is to dismiss the case, such language does not affect the finality of the order. In other words, dismissal without prejudice is final where its effect is to "bring an end to judicial labor." The first order ended the judicial labor on the merits of the case and required plaintiff to file a new action to re-initiate it. But since the four-year statute of limitations had run, she could not do so. Therefore, the "without prejudice" language did not prevent the first order from being a final, appealable order. Since the first order was not timely appealed, the appeal was dismissed as to the propriety of the dismissal.

Although unstated, it helps to understand the result to know that the issue of attorneys' fees is considered in Florida to be a collateral issue, i.e, even though there was still "judicial labor" to be done on that issue, as well as the entry of the final judgment, actual judicial labor on the merits ended when the trial court entered its order in February dismissing the case.

Authorized motions for rehearing of final orders suspend rendition of such orders during such motions' pendency—motions for rehearing of interlocutory, non-final orders are not "authorized" and do not suspend rendition. E-Z Marine Supply, Inc. v. Wachovia Commercial Mortg., Inc., 875 So. 2d 729 (Fla. 4th DCA 2004) (On Motion for Rehearing).

I remember writing about this issue constantly in this column years ago, and it's still with us, but shouldn't be. In a mortgage foreclosure case the trial court issued a non-final order entered on November 21, 2003, compelling a commercial mortgagor to make payments and obtain insurance on certain property pending foreclosure. Within ten days of such order, appellants filed a motion for rehearing, and almost four months later, on March 3, 2004, appellants filed a notice of appeal, presumably after an order denying their motion was filed. Florida Rule of Civil Procedure 1.530(b) permits the filing of a motion for rehearing within ten days after the "filing of the judgment in a non-jury action." The court noted that this Rule has been consistently construed to authorize rehearings only of final orders and judgments. Since the order in this case was not final in nature, the motion for rehearing was unauthorized, it did not toll the time for filing the notice of appeal, and the notice was thus untimely.

Perhaps it would help if lawyers thought of and styled motions directed to non-final orders as "motions for reconsideration" and not as motions for "rehearing," and remem-

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bered that regardless of when the court rules on the motion for "reconsideration," no tolling occurs and they only have thirty days to appeal from the non-final order.

When is getting a motion for extension to file a brief granted a pyrrhic victory? Paul Revere Life Ins. Co. v. Kahn, 873 So. 2d 595 (Fla. 3d DCA 2004).

Besides winning and getting paid, nothing is more important to appellate practitioners than having motions for extensions to file briefs granted. In this case, the circuit court appellate division granted such a motion but only up to the day the trial transcript was to be completed. Noting that it is fundamentally unfair to require a party to prepare a brief without the benefit of a transcript, and that Florida's long-standing policy is in favor of deciding cases on the merits, the Third District held that the appellate division's miserly grant of the extension only until the transcript was prepared departed from the essential requirements of law. The court granted the unopposed petition for certiorari, and quashed the order with instructions to give the party an additional eighteen day extension to file the brief.

In calculating the thirty-day time for filing the notice of appeal, be wary of multiple file-stamped dates! And again, don't get too hung up on the presence or absence of the phrase "without prejudice." Pompi v. City of Jacksonville, 872 So. 2d 931 (Fla. 1st DCA 2004).

Appellants were landowners in an eminent domain case in which the trial court rendered a final judgment on a jury verdict. The judgment contained two clerk stamps. One titled "Filed" ran along the right edge of the page, was legible upon close examination, but not easy to read, and stated that the judgment was filed on January 24, 2003. The other stamp on the judgment titled "Filed & Recorded," ran horizontally, was printed in a recognizable typeface, was easier to read and revealed that the judgment was filed and recorded on January 30, 2003.

A secretary for appellants' counsel called the clerk and was informed that the judgment had been rendered on January 30, 2003, and the secretary made a memorandum of such conversation. Appellants' counsel calendared the appeal time from January 30th and filed the notice of appeal on February 28, 2003.

The appellee filed a motion to dismiss the appeal as untimely and the court issued an order to show cause. In response, appellants requested that the time for appeal be recalculated from January 30th or in the alternative, that the court dismiss without prejudice to their right to file a rule 1.540(b) motion in the trial court. The court issued a PCA that simply stated "Dismissed."

The landowners then filed the rule 1.540(b) motion in the trial court contending that the judgment should be vacated on the ground of excusable neglect. The trial court denied the motion ruling that the earlier dated file stamp governed over the later one but also ruled that relief was barred by the law of the case doctrine. The trial court reasoned that further litigation on the issue was precluded because the appellate court had declined to dismiss the appeal "without prejudice." The landowners then filed a timely notice of appeal from the order denying their rule 1.540 motion.

First, the appellate court noted that the law of the case doctrine is based on the appellate court's decision, not its opinion. For this reason, courts have held that such a decision with only the word "Affirmed" is the law of the case because an affirmance, even if unaccompanied by an opinion, is a decision on the merits. The same does not hold, however, for an unexplained dismissal because, by

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Are Remand Orders by District Courts to Bankruptcy Courts in the Eleventh Circuit "Final" Orders for Purposes of Appeal?

by Paul A. Avron[1]

A. Introduction

A U.S. Bankruptcy Court is considered a "unit" of the U.S. District Court. 28 U.S.C. § 151. However, in bankruptcy appeals, the District Court functions as an appellate court.[2] Meaning, under 28 U.S.C. § 158(a), "[t]he district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees issues under section 1121(d) of title 11 [the Bankruptcy Code] increasing or reducing the time periods referred to in section 1121 of such title [regarding the filing of a chapter 11 plan of reorganization]; and (3) with leave of the court, from other interlocutory orders and decrees; of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving." This means that a court of appeals functions as the second reviewing court.[3]

"Although a district court, in its discretion, may review interlocutory judgments and orders of a bankruptcy court, *see* 28 U.S.C. § 158(a), a court of appeals has jurisdiction over only final judgments and orders entered by a district court or a bankruptcy appellate panel sitting in review of a bankruptcy court, *see* § 158(d)."[4] This is so, unless some exception, such as the *Cohen* collateral order doctrine, to the final judgment rule applies.[5]

This article addresses the issue of whether an order by a U.S. District Court remanding a matter to a Bankruptcy Court within the Eleventh Circuit is a "final" order for purposes of appeal. In the Eleventh Circuit, the answer depends on the scope of the duties that the Bankruptcy Court is to exercise on remand.

B. "Finality" in Federal Court

According to the Supreme Court, a "final" order "is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[6] The Eleventh Circuit has followed this formulation in both bankruptcy and non-bankruptcy appeals.[7]

C. The Eleventh Circuit's Position on "Finality" in Bankruptcy Proceedings

However, like other circuits,[8] the Eleventh Circuit has recognized that the concept of finality in bankruptcy proceedings is somewhat more flexible.[9] "'In bankruptcy proceedings, it is generally the particular adversary proceeding or controversy that must be fully resolved rather than the entire bankruptcy litigation.'"[10] "Courts 'consistently consider[] finality in a more pragmatic and less technical way in bankruptcy cases than in other situations.'"[11]

The Eleventh Circuit addressed the issue of whether orders by District Courts remanding matters to Bankruptcy Courts are "final" orders for purposes of appeal in *Jove Eng'g*, stating that remand orders in bankruptcy proceedings could be final, so long as the remaining duties were ministerial:

> A district court's order is not deprived of its finality merely because it remands to the bankruptcy court. This court has consistently recognized that a district court order that remands to the bankruptcy court may be a final decision if all that remains to be done by the bankruptcy court regarding the order is a ministerial duty that does not require significant judicial activity involving considerable discretion.[12]

Several bankruptcy-related decisions from the Eleventh Circuit illustrate this rule of practicality.[13] In *Delta Resources*, Inc., 54 F.3d at 727, the Eleventh Circuit held that a District Court order that determined that a creditor was entitled to post-petition interest as part of adequate protection and calculated that interest and remanded the matter to the Bankruptcy Court with direction for the debtor to make that monthly payment to the creditor was final for purposes of appeal, where the Bankruptcy Court was not required to determine anything on remand, factually or legally. Likewise, in *T & B Scottdale Contractors, Inc. v. United States*, 866 F.2d 1372, 1375 (11th Cir.), *cert. denied*, 493 U.S. 846 (1989), the Eleventh Circuit held that a District Court order that found that certain funds constituted property of the debtor's bankruptcy estate and remanding to the Bankruptcy Court for administration was final, because the Bankruptcy Court could not exercise any discretion in implementing the District Court's order.

But in *Barclays-American/Business Credit, Inc. v. Radio WBHP, Inc. (In re Dixie Broadcasting, Inc.)*, 871 F.2d 1023, 1029 (11th Cir.), *cert. denied*, 493 U.S. 853 (1989), the Eleventh Circuit dismissed an appeal of that part of a District Court order that included remand to the Bankruptcy Court for a determination of whether filing of a chapter 11 bankruptcy case was done in bad faith, which required an "evaluative process" that involved more than ministerial duties. And in *In re Ben Hyman & Co., Inc.*, 577 F.2d 966 (5th Cir. 1978),[14] the former Fifth Circuit concluded that a District Court order that remanded for a determination of whether a bank was entitled to exercise the right of setoff was not final for purposes of appeal.[15]

Conclusion

These decisions show that, in the Eleventh Circuit, to the extent a District Court order remands a matter to the Bankruptcy Court that requires "significant judicial activity," that is, the exercise of discretion or the making of further findings of fact or conclusions of law, it will be found to be an order that is not final for purposes of appeal. If, however, the order leaves only ministerial acts, then it will be deemed final for pur-

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poses of appellate review. Practitioners, therefore, must be careful when reviewing remand orders in bankruptcy for finality purposes, to pay close attention to whether there is significant judicial activity that remains on remand.

Endnotes

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

[2]. *United States Trustee v. Fishback (In re Glados, Inc.)*, 83 F.3d 1360, 1362 (11th Cir. 1996).

[3]. *Fishback*, 83 F.3d at 1362 ("Because the district court functions as an appellate court in reviewing bankruptcy court decisions, this court is the second appellate court to review bankruptcy court cases."); 28 U.S.C. § 158(d) ("The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsection (a) [regarding appeals from District Courts] and (b) [regarding appeals from Bankruptcy Appellate Panels ("BAP")] of this section." Section (b) is inapplicable in the Eleventh Circuit which does not use a BAP; thus appeals from Bankruptcy Courts proceed first to the District Court and then to the Eleventh Circuit.).

[4]. *Lockwood v. Snookies, Inc. (In re F.D.R. Hickory House, Inc.)*, 60 F.3d 724, 725 (11th Cir. 1995).

[5]. *Delta Resources, Inc. ORIX Credit Alliance, Inc. (In re Delta Resources, Inc.)*, 54 F.3d 722, 726 (11th Cir.) (for circuit court to have appellate jurisdiction over district court order in bankruptcy, district court's order must be final or some exception to final judgment rule, i.e., the collateral order doctrine, *see Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949), must apply), *cert. denied*, 516 U.S. 980 (1995).

[6]. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

[7]. *See, e.g., Commodore Holdings, Inc. v. Exxon Mobil Corp.*, 331 F. 3d 1257, 1259 (11th Cir. 2003) (bankruptcy); *Delaney's, Inc. v. Illinois Union Ins. Co.*, 894 F.2d 1300, 1304 (11th Cir. 1990) (non-bankruptcy).

[8]. *See, e.g., Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning)*, 86 F.3d 482, 488 (6th Cir. 1996); *In re Amatex Corp.*, 755 F. 2d 1034, 1039 (3d Cir. 1985).

[9]. *Commodore Holdings, Inc.*, 331 F.3d at 1259.

[10]. *Id.* (quoting *In re Charter Co.*, 778 F. 2d 617, 621 (11th Cir. 1985)).

[11]. *Jove Eng'g v. Internal Revenue Service*, 92 F.3d 1539, 1547 (11th Cir. 1996) (quoting *In re Amatex Corp.*, 755 F. 2d 1034, 1039 (3d Cir. 1985)); *see also Dzikowski v. Boomer's Sports & Recreation Center, Inc. (In re Boca Arena, Inc.)*, 184 F. 3d 1285, 1286 (11th Cir. 1999) (to be final for purposes of appeal Bankruptcy Court order "need not be the last order concluding the bankruptcy proceeding as a whole," but it must "finally resolve an adversary proceeding, controversy, or entire bankruptcy proceeding on the merits and leave nothing for the court to do but execute its judgment.").

[12]. *Jove Eng'g*, 92 F.3d at 1548 (citing cases, including *Howard Johnson Co., Inc. v. Khimani*, 892 F. 2d 1512, 1516 (11th Cir. 1990), for the proposition that a similar rule applies in non-bankruptcy matters); *see also Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925) (act of rendering judgment for sums set forth in stipulations was ministerial duty); *Turner v. Orr*, 759 F.2d 817, 820 (11th Cir. 1985) (act of calculating back-pay and seniority of Air Force civilian employee was ministerial duty), *cert. denied*, 478 U.S. 1020 (1986).

[13]. *See, e.g., Jove Eng'g*, 92 F.3d at 1548 (court held that remand order was final for purposes of appeal where on remand Bankruptcy Court was only going to "perform the ministerial duty of offsetting up to $50 against any claim of [the] IRS without exercising any discretion or making any further factual or legal findings.").

[14]. This case constitutes binding Eleventh Circuit authority pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

[15]. *See also Miscott Corp. v. Zaremba Walden Co. (In re Miscott Corp.)*, 848 F.2d 1190, 1192-93 (11th Cir. 1988) (district court order which included remand to Bankruptcy Court for determination of whether a bona fide settlement offer was made and rejected thereby entitling offeror to award of attorneys' fees required evidentiary hearing, consideration of fact issues, entry of findings of fact which "raise[d] the responsibility of the bankruptcy court out of the realm of ministerial duties."); *Briglevich v. Rees (In re Briglevich)*, 847 F.2d 759, 761 (11th Cir. 1988) (court dismissed appeal of district court order that included remand directing Bankruptcy Court to recalculate damages arising from a construction contract which contemplated judicial action beyond "merely mechanical or ministerial findings"); *TCL Investors v. Brookside Savings & Loan Ass'n (In re TLC Investors)*, 775 F.2d 1516, 1519 (11th Cir. 1985) (court dismissed appeal of District Court order remanding to Bankruptcy Court matter requiring hearing at which it would have to determine whether the debtor would be required to sell certain real property); *Growth Realty Companies v. Regency Woods Apts. (In re Regency Woods Apts.)*, 686 F.2d 899, 901 (11th Cir. 1982) (District Court order finding that creditors were not adequately protected and remanding to Bankruptcy Court to establish adequate protection was not final for purposes of appeal).

Setting the Standard: A Fresh Look at Finding the Right Standard of Review

by Betsy Ellwanger Gallagher[1]

A. Introduction

The concept of standard of review has been closely scrutinized.[2] An additional short article surely seems unwarranted, since it may be impossible to come up with an original thought on the concept.[3] However, it is a subject that historically has been much too overlooked[4] by many, since the Florida Rules of Appellate Procedure did not require briefs to include the applicable standard of review until 2000.[5] More than a passing thought should be given to the applicable standard, as your chances for success depend heavily on the standard applied.[6] The time and effort put into the preparation of an appellate brief could be for naught if the appropriate standard of review is not applied by the court.

B. Setting the Proper Standard

The application of the proper standard of review should occur at two steps of the appellate process: (1) at the outset, when you are evaluating your client's chances for success in an appeal; and (2) when you are presenting your case to the appellate court.[7] Evaluation of the prospects for success of an appeal is very often dependent on the applicable standard of review for each issue in your case.

The *de novo,* abuse of discretion, and clearly erroneous standards of review are most often applied, and one commentator has documented over thirty variations of these standards.[8] Statistically, a party to an appeal does better when the appellate court is addressing a pure question of law (*de novo* review) than when the court has to "overturn a judge's decision or a jury's verdict based on factual arguments."[9] When an appellate court is free to reject the trial court's application of the law, as is the case with *de novo* review, it is more likely to overturn a trial court's decision. Therefore, it makes sense to be completely sure that, for example, the abuse of discretion standard applies before conceding the issue.

A potential party to an appeal, however, should not automatically evaluate her prospects for a reversal as "zilch", just because the abuse of discretion standard applies. Although the standard is quite amorphous, Chief Judge Alan Schwartz of the Third District Court of Appeal recommended the "gut reaction" test for determining whether or not the abuse of discretion standard applies in his dissenting opinion in *Montgomery Ward & Co. v. Pope*, 532 So. 2d 722, 723 (Fla. 3d DCA 1988). In applying that test in that case, Judge Schwartz stated: "Having duly considered, then, both the record and the state of my internal organs, I conclude ... [that the jury's verdict on damages] fell well within the jury's province... ." The Schwartz "gut reaction" test has been approved and since applied by several Florida courts.[10]

For example, in *Miller v. First American Bank and Trust*, 607 So. 2d 483 (Fla. 4th DCA 1992), the Fourth District rejected the appellees' argument that the application of the abuse of discretion standard required affirmance in a case involving the issue of whether an attorney's fee award of $242,550.15 was excessive. In writing for the court, Associate Judge Alan R. Schwartz, perhaps dusting off an old favorite,[11] pointed out: "On the face of it, the order embodies an unacceptable, even incredible result. No court is obliged to approve a judgment which so obviously offends even the most hardened appellate conscience and which is so obviously contrary to the manifest justice of the case."[12]

C. Abandoning Traditional Standards

It is also important to give more than a passing thought to the question of whether it really makes sense to use a standard of review that has been applied routinely by courts. Recently, Chief Judge Gary Farmer, of the Fourth District Court of Appeal advocated the application of different standards, rather than the blanket application of the abuse of discretion standard, to the review of evidentiary rulings in his dissenting opinion in *Eliakim v. State*.[13] While Judge Farmer obviously did not win over his peers, the opinion merits attention and underscores the point that more attention should be given to the applicable standard of review. Judge Farmer points out that, although "there are any number of supreme court holdings", that abuse of discretion is the standard to be applied in reviewing evidence rulings:

> I have come to believe that the standard of review for rulings on evidence ought to be primarily *de novo* or, under certain circumstances, a mixture of *de novo* and abuse of discretion. This conclu-

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Midyear Meeting Schedule – January 20, 2005

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Committee Meetings — 10:00 a.m. - 12:00 p.m
Lunch — 12:00 p.m - 1:30 p.m.
Executive Council — 2:00 p.m. - 4:00 p.m.

sion emerges from a consideration of the unique role of evidence. . . .

It is time to retreat from the notion of broad discretion in trial judges and to adopt a standard recognizing that most evidence decisions express a system-wide application as to what is permissible evidence in our courtrooms. In doing so, the [Florida Supreme C]ourt should also consider why it believes that it is better for most evidence applications to be developed by trial judges without meaningful resort to the additional resources and differing perspectives that appellate judges bring.

Judge Farmer asserts that individual decisions on evidence are preferable to the "the system of broad appellate deference"–"If there are good reasons for admitting or excluding a piece of evidence, the reasons should be equally good in most, even if not all, cases having the same of similar circumstances." The Chief Judge went on to quote from a California decision[14] that discusses why collective appellate court decisions "as a general rule" are preferable to the "product of any single panel member. . . ." That dissenting opinion underscores the necessity of continuing to scrutinize, with a fresh eye, the applicable standard of review in each appellate case.

Conclusion

Do not assume, without careful consideration, that a certain standard of review applies. Putting time into finding the best possible standard of review for your client's position can make the difference between winning or losing an appeal. Since appellate briefs are now required to include the applicable standard of review, it is imperative that appellate practitioners devote time to finding the right standard of review. In some instances, the portion of the brief addressing standard of review could be the most important part of the entire brief. If you can convince the court to apply a less stringent standard of review, your odds of prevailing could improve. This important exercise should not be overlooked. Sometimes careful thought (and perhaps a little courage) may be the catalyst for an innovative and successful challenge to the application of an otherwise tougher standard of review.[15]

Endnotes

[1] Betsy Gallagher practices appellate law at Cole, Scott & Kissane, P.A., in Tampa, Florida. She is a Member of The Florida Bar Appellate Court Rules Committee, 1979-1981, and again since 2004, of The Florida Bar Grievance Committee, of The Florida Bar Appellate Practice and Advocacy Section since 1993, Member of The Florida Bar Appellate Practice Section Executive Council since 2004, and Member of The Florida Bar Legal Needs of Children Committee since 2003. She is also an Assistant Editor of The Record.

[2] Here's a sampling: Nancy Ryan, *Containing Canakaris: Tailoring Florida's One-Size-Fits Most Standard of Review*, 78 FLA. B.J. 40 (Apr. 2004); Paul A. Avron, *Federal Standards of Review for Appeals in the Eleventh Circuit*, THE RECORD, J. APP. PRAC. SECTION (Spring 2003); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM & MARY L. REV. 679 (Dec. 2002), Lisa Litwiller, *Re-examining Gasperini: Damages Assessments and Standards of Review*, 28 OHIO N.U. L. Rev. 381 (2002); Richard H.W. Maloy, '*Standards of Review' – Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603 (2000); Harvey J. Sepler, *Appellate Standards of Review*, 73 FLA. B.J. 48 (DEC. 1999); Michael R. Bosse, *Standards of Review: The Meaning of Words*, 49 ME. L. REV. 367 (1997); Raymond T. Elliget, Jr. & John M Scheb, *Appellate Standards of Review - How Important Are They?*, 70 FLA. B.J. 33 (1996); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEATTLE U.L. REV. 11 (1994); Ronald R. Hofer, *Standards of Review–Looking Beyond the Labels*, 74 MARQ. L. REV. 231 (1991); Steven Alan Childress, *Standards of Review in Eleventh Circuit Civil Appeals*, 9 NOVA L.J. 257 257 (1985); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635 (1971); Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 CORNELL L.Q. 1 (1958).

[3] This brings to mind the quote of Thomas Carlyle: "The man is most original who can adapt from the greatest number of sources."

[4] The irony is that this was probably not a problem for anyone taking the time to read this.

[5] *Amendments to Florida Rules of Appellate Procedure*, 780 So. 2d 834, 838 (Fla. 2000); FLA. R. APP. P. 9.210(b)(5). The Federal Rules of Appellate Procedure also require that the argument section of every appellant's brief contain "for each issue, a concise statement of the applicable standard of review... ."Fed. R. App. P. 28(a)(9). Some of the United States Circuit Courts of Appeals have local rules with the same requirement.

[6] Although there have always been those who believe opinions are driven by result and/or that the concept is just fiction–*see Metropolitan Dade County v. Fuller*, 515 So. 2d 1312, 1314 n.4 (Fla. 3d DCA 1987)—most agree that "understanding and applying the proper standard of review will lead to the result that you want." Morris Silberman, *A View from the Bench*, March 2003 PARACLETE 4 (St. Petersburg Bar Ass'n).

[7] As Chief Judge Chris W. Altenbernd of the Second District Court of Appeal points out, the first step to writing an effective brief is to establish "the proper frame of mind. ... Remember: ... Appellate courts are lawfully constrained by: ... the proper scope of review." The standard of review should be the cornerstone for the statement of the facts and argument. Chris W. Altenbernd, *Brief Writing: True Confessions of a Legal Grease Monkey*, THE RECORD, J. FLA. BAR APP. PRAC. SECTION (Summer, 2002).

[8] *Maloy, 'Standards of Review' – Just a Tip of the Icicle*, 77 U. DET. MERCY L. REV. at 610-11.

[9] Raymond T. Elligett, Jr. and John M. Scheb, FLORIDA APPELLATE PRACTICE AND ADVOCACY 288 (1998).

[10] *See, e.g., ITT Hartford Ins. Co. of the Southeast v. Owens*, 816 So. 2d 572, 575 (Fla. 2002); *Poole v. Veterans Auto Sales and Leasing Co., Inc.*, 668 So. 2d 189, 191 (Fla. 1996); *Florida Power Corp. v. Coppola*, 765 So. 2d 858, 859 (Fla. 5th DCA 2000); *Veterans Auto Sales and Leasing Co. v. Poole*, 683 So. 2d 567, 568 (Fla. 5th DCA 1996); *Rety v. Green*, 646 So. 2d 410, 419 (Fla. 3d DCA 1989).

[11] Chief Judge Schwartz of the Third District Court of Appeal sat as an Associate Judge for the Fourth District on the case.

[12] *See also PICI v. First Union National Bank of Florida*, 705 So. 2d 50 (Fla. 2d DCA 1997) (wherein court reversed an attorney's fees award without any discussion of standard of review finding that the award exceeded "any definition of reasonableness... .").

[13] 884 So. 2d 57 (Fla. 4th DCA 2004).

[14] *Hurtado v. Statewide Home Loan Co.*, 167 Cal.App.3d 1019, 1024, 213 Cal.Rptr. 712 (Cal.App. 1985).

[15] If you chose this route you may wish to invest in knee pads or a prayer rug.

petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).[5]

The Uniform Rules of Procedure essentially combined these two amendments; and they were, themselves, amended to provide for more specific, stringent requirements:

(1) Unless otherwise provided by statute, initiation of proceedings shall be made by written petition to the agency responsible for rendering final agency action. The term "petition" includes any document that requests an evidentiary proceeding and asserts the existence of a disputed issue of material fact. Each petition shall be legible and on 8 1/2 by 11 inch white paper. Unless printed, the impression shall be on one side of the paper only and lines shall be double-spaced.

(2) All petitions filed under these rules shall contain:

(a) The name and address of each agency affected and each agency's file or identification number, if known;

(b) The name, address, and telephone number of the petitioner; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency determination;

(c) A statement of when and how the petitioner received notice of the agency decision;

(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;

(e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;

(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action; and

(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

(3) Upon receipt of a petition involving disputed issues of material fact, the agency shall grant or deny the petition, and if granted shall, unless otherwise provided by law, refer the matter to the Division of Administrative Hearings with a request that an administrative law judge be assigned to conduct the hearing. The request shall be accompanied by a copy of the petition and a copy of the notice of agency action.

(4) A petition shall be dismissed if it is not in substantial compliance with subsection (2) of this rule or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

(5) The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable.[6]

C. The Third District's Brookwood Decision

In 2003, *Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration*, 870 So. 2d 834 (Fla. 3d DCA 2003),[7] was the case that brought these new stricter administrative hearing petition requirements to a focused head. In *Brookwood*, a nursing home facility ("the facility") filed an administrative hearing petition in which it generally denied "each and every factual allegation set forth in the. . . Administrative Complaint" and related documents issued against the facility by the Agency for Health Care Administration ("the Agency"); attached the referenced administrative complaint and related documents; and alleged "that the ultimate facts will show that at all times pertinent to the licensure survey [the facility] was in compliance with all aplicable [sic] laws and regulations."[8] The Agency responded in a show cause order that the facility's petition "failed to satisfy the requirements of Rule 28-106.201(2) of the Florida Administrative Code, which requires that formal hearing requests contain 'a statement of all disputed issues of material fact' and a 'concise statement of the ultimate facts. . . including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action. '"[9]

Instead of amending its administrative hearing petition to satisfy the requirements of Rule 28-106.201, the facility sent the Agency a letter taking issue with the Agency's demands.[10] In response, the Agency issued an amended show cause order again advising the facility that "it had to comply with the requirements of Rule 28-106.201(2) or its petition would be dismissed."[11] The facility replied by filing an administrative hearing petition virtually identical to its first "bare-bones" petition, prefacing it with the assertion that, among other things, the Agency was simply "attempting to deny [the facility's] right to a hearing based on legal pleading technicalities."[12] The Agency denied the petition, and the facility appealed to the Third District Court of Appeal ("Third DCA").[13]

On appeal, the facility claimed that its denial of all the facts alleged in the administrative complaint and related documents and its statement that all of the facts detailed in those documents were "untrue and warranted reversal," combined with its attachment and incorporation of those documents to its administrative hearing petition, constituted

continued next page

"*substantial* compliance with the requirements of subparagraph 120.54(5)(b)4 of the Florida Statutes and Rule 28-106.101(2) of the Florida Administrative Code."[14] "They do not," held the Third DCA.

The Third DCA went on to block quote the statutes and rules at issue and elaborate on them at length:

> [The Agency] relies on the above stated rules and statutory provisions as supporting its decision. [The facility's] counsel answers with a recalcitrant insistence that in previous years the unrefined denials such as the one he asserted below sufficed to secure hearings on agency actions. The simple answer to this is that the rules have changed. In 1998, the Florida Legislature amended section 120.54 to add subparagraph (5)(b)4. See ch. 98-200, § 3, at 1830-31, Laws of Fla. Section 120.569, was likewise amended at that time to reflect the mandatory nature of section 120.54. The agency thereafter amended its rules. The amended statute and rules are crystal clear. In a proceeding governed by Rule 28-106.201, the burden is now on the person or entity petitioning for an administrative hearing to state the ultimate facts, to identify the facts that are in dispute, and to allege the facts that warrant, in the petitioner's opinion, reversal. General denials and non-specific allegations of compliance will no longer suffice.[15]

The Third DCA likewise considered as "behind the times" the facility's suggestion that, rather than dismissing its administrative hearing petition, the Agency should have passed it on to the Division of Administrative Hearings ("DOAH") to permit DOAH to rule on the sufficiency of the petition.[16] Specifically, the Third DCA recognized that, "[a]lthough more latitude previously had been given, 1998 revisions to the [Administrative Procedure Act] now require agencies to review petitions for compliance with these requirements before forwarding them to DOAH" and that "[b]efore the 1998 revisions, agencies commonly would refer deficient petitions to DOAH and address defects through motions to the administrative law judge," but that "[t]his procedure is no longer allowed."[17] The Third DCA, thus, held that the Agency "properly refused to pass [the facility's] deficient petition on to DOAH."[18]

The facility's "final salvo" was that "the discovery necessary to draft a petition for a hearing with the specificity required in the uniform rules and Rule 28-106.201(2), has not yet occurred at the early stage of the proceedings . . . when the petition is required" (i.e., within 21 days of receipt of written notice of the Agency's decision) "thus making the task impossible and illogical."[19] The Third DCA explained that the response to this point is two fold: "First, a time extension is generally available to permit the investigation necessary to draft a petition . . . [a]nd statements made at this point of entry into the proceedings generally will not bar subsequent amendment of the petition."[20]

"Second," the Third DCA continued, "there will in most instances be at least some factual determinations undisputed by the petitioner seeking a hearing."[21] "Just as the agency is obligated to give citizenry 'fair notice' of the charges being faced, it is fair to narrow the factual matters in dispute and alert the agency to the undisputed aspects of the charges at issue."[22] Thus, the Third DCA reasoned, "[c]onsidering the costs associated with any agency action, an effort to tailor those expenses while still providing a full and fair opportunity to be heard, cannot be faulted."[23] The Third DCA accordingly found "application of the rule both logical and entirely capable of being accomplished."[24] "In sum," the Court concluded,

> [the Agency] properly found [the facility's] hearing request to be legally insufficient. [The facility's] initial hearing request amounted to no more than a conclusory statement disputing every fact and legal conclusion no matter how perfunctory. Its amended request did little more than reiterate its earlier response. While a petitioner's efforts to comply with the above stated statutory requirements should be viewed for substantial compliance so as to allow the opportunity for a hearing and resolution of the matter on its merits, the agency in this case was faced with no more than a Petitioner's insistent refusal to follow the above stated statutory provisions.[25]

Despite the facility's noncompliance, the Third DCA further concluded that the facility should be accorded the opportunity to conform its petition to the uniform rules.[26] "Section 120.569 authorizes such action, as it instructs '[d]ismissal of a petition shall, *at least once*, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured."[27] The Third DCA continued:

> Here, the action was dismissed only once, that being after issuance of the second (the amended) order to show cause and the amended response. [The facility] is, therefore, still entitled to one more chance to comply with the rules. Taking [the facility's] counsel at his word, the petition's insufficiencies were the result of counsel's past experience as to the showing necessary to secure a hearing, rather than any effort to thwart, violate, or evade the law.[28]

The Third DCA thus reversed and remanded for the facility "to file a petition for hearing in compliance with subparagraph 120.54(5)(b)4, Rule 28-106.201, and the statements made herein."[29]

D. Other District Courts Follow Suit

In a bundle of five similar cases, the First District Court of Appeal ("First DCA") earlier this year cited the *Brookwood* decision, and likewise "[r]eversed and remanded for petitioner to file an amended petition for hearing in compliance with section 120.54(5)(b)4., Florida Statutes, and Rule 28-106.201, Florida Administrative Code."[30] Also citing the *Brookwood* decision, the Fourth District Court of Appeal ("Fourth DCA") this year followed suit in *Blackwood v. Agency for Health Care Administration*, 869 So. 2d 656 (Fla. 4th DCA 2004).

In the Fourth DCA's *Blackwood* decision, the Agency sent to the operator of an assisted living facility ("the petitioner") notice that her li-

cense renewal application was denied, specifying that, pursuant to an applicable statute, "you do not meet the level 2 background screening requirements under section 435.04(4)(a), F.S., as evidenced by your being listed as a confirmed perpetrator of abuse, neglect or exploitation in Department of Children and Family Services, Final Order Case No. 98-3320C . . . dated August 20, 1999."[31] The Agency stated in its notice that the petitioner's request for an administrative hearing "must conform to the requirements in [rule] 28-106.201 . . ., and must state the material facts [she] dispute[s]."[32]

The petitioner requested a formal administrative hearing, and later filed an amended request in response to a show cause order issued by the Agency.[33] The petitioner's amended request failed to provide a "concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action."[34] "In neither her original request for hearing, nor her amended request, did [the petitioner] address the specific statement in the notice of intent to deny, which stated that she was a confirmed perpetrator of abuse, neglect, or exploitation."[35]

The Agency entered a final order denying the petitioner's request for hearing, stating in pertinent part that her response to the Agency's show cause order did not cure the noted defects.[36] The petitioner appealed to the Fourth DCA, which affirmed.[37] The Fourth DCA held that the Agency "was required to deny a hearing because the request was legally insufficient", and thus that the Agency "properly denied [the petitioner's] request for a hearing" under the authorities discussed above.[38]

Conclusion

In short, "the rules *have* changed."[39] If there was ever any doubt on the matter, it has now been held that "[t]he amended statute and rules are crystal clear."[40] Increased specificity is required in administrative hearing petitions in proceedings governed by Rule 28-106.201. Agencies must dismiss deficient petitions without prejudice at least once. After that, they may then dismiss those petitions with prejudice if the deficiency is not cured. Petitioners, their attorneys, and agencies alike need to take heed of these requirements to ensure that only legally sufficient administrative hearing petitions properly make their way to DOAH.

Endnotes

[1] Gregory J. Philo presently serves as Chief Appellate Counsel for the Agency for Health Care Administration, and is a member of the Appellate Practice Section of the Florida Bar and the Appellate Court Rules Committee. He previously clerked for the Honorable Anne C. Booth at the First District Court of Appeal for two years, and served as a Central Staff Attorney at the Florida Supreme Court for five years. Mr. Philo received his law degree from Florida State University College of Law in 1993, and lives in Tallahassee with his wife and step-daughter. The views expressed by the author are not necessarily those of his present employer, the Agency for Health Care Administration.

[2] *See, e.g., Iazzo v. Dep't of Prof'l Regulation*, 638 So. 2d 583, 585 (Fla. 1st DCA 1994) (reversing denial of hearing request as legally insufficient for lack of specificity where "[n]othing in [the statutes and rule in effect in 1987-88] imposes a requirement that a party must specifically identify and separately dispute each factual allegation for it to be considered a disputed factual issue entitling that party to a formal hearing").

[3] *Brookwood Extended Care Ctr. of Homestead, LLP v. Agency for Health Care Admin.*, 870 So. 2d 834, 839 (Fla. 3d DCA 2003).

[4] Ch. 98-200, § 3, at 1830-31, Laws of Fla. (underscoring and strike-through type omitted). In 2003, the legislature further amended § 120.54(5)(b)4.f. to even more specifically provide that the Uniform Rules "shall require the petition to include . . . [a] statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes." Ch. 2003-94, § 2, at 673-74, Laws of Fla. (underscoring original).

[5] Ch. 98-200, § 4, at 1830, Laws of Fla. (underscoring and strike-through type omitted).

[6] Fla. Admin. Code R. 28-106.201 ("Initiation of Proceedings").

[7] *See also Cann v. Dep't of Children and Family Servs.*, 813 So. 2d 237 (Fla. 2d DCA 2002) (addressing affect of the 1998 amendments at issue on timeliness of administrative hearing petitions), and its progeny.

[8] *Brookwood*, 870 So. 2d at 836-37.

[9] *Id. at 837*.

[10] *See id*. (pertinent text of facility's letter reproduced).

[11] *Id*. at 838.

[12] *Id*.

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> considered a new issue raised in a supplemental brief. . . . However, these decisions do not mention, much less discuss . . . any of the binding, prior panel precedents, which *preclude* the raising of new issues in rehearing petitions and in supplemental and reply briefs.[13]

Following *Levy*, Eleventh Circuit judges who had authorized re-briefing to include newly-raised *Blakely* issues vacated their orders, and appellate cases even partially briefed before June 24, 2004 were walled off from *Blakely*.[14] Other circuits–both those finding *Blakely* applicable to the federal sentencing guidelines and those finding *Blakely* inapplicable–have permitted appellants to raise and argue *Blakely* sentencing challenges in supplemental briefs.[15] There is, moreover, an indication of an intra-circuit conflict on the issue in the Eleventh Circuit. *See Thomas v. Crosby*, 371 F.3d 782, 784 (11th Cir. 2004) (even if this Court erred by *sua sponte* asking the parties to proceed on a different issue than that raised in the briefs, "any such error was not jurisdictional"); *id.* at 793 (Tjoflat, J., specially concurring) (drawing parallel between appellate court's power, when justice requires, to raise new issues, and power to notice "plain error"; "scope of a petitioner's *rights* has no bearing on this court's *power*") (emphasis in original).

C. Another Look at the Plain Error Rule

The bright-line nature of the holdings and analysis in *Levy* and its progeny has brought to the forefront significant questions regarding the adequacy of criminal defense representation,[16] and has brought into focus appellate limitations on plain error review in all federal appeals, both criminal and civil. Given the abandonment theory's cut-off date for seeking application on appeal of the plain error rule to supervening legal developments, appellate counsel could never obtain even plain error review of newly-arising claims–whether the issues were preserved below or not–unless the issues were already prematurely included in the briefs.

For criminal cases, the impact of a broad prohibition on supplemental briefing is linked to a heightened enforcement of waiver and default principles used to bar not only appellate relief, but collateral relief under habeas corpus doctrines. For if an issue is deemed waived on appeal, usually only ineffective assistance of counsel will excuse the default on habeas review, absent a showing of actual innocence–a rare occurrence in federal court.[17]

But the plain error rule was not meant–as habeas default rules are–to shut courthouse doors. Rather, it was intended to insure that manifest injustice not go unnoticed, even if not brought to the attention of the court.[18]

As Judge Tjoflat's concurring opinion in *Thomas* explains, the plain error doctrine is inconsistent with a bar to consideration of claims not raised by the parties in initial briefing.[19] Federal Rule of Criminal Procedure 52(b) (emphasis added) states: "A plain error that affects substantial rights may be considered even though it was not brought to *the court's* attention." The "court" referenced in the rule can be an appellate court, not just a trial court.[20] Further, *Johnson v. United States*, 520 U.S. 461, 468 (1997), held that an error is considered "plain" if it is plain at the time of appeal.[21]

Rule 52(b) delegates to courts the discretion to notice "plain error." While discretionary, Rule 52(b) responsibility is left to all courts hearing criminal cases–trials or appeals–without regard to the adequacy of briefing.[22]

Conclusion

The merits of the plain error approach and rejection of the strict abandonment theory include: consistency from court to court in the interpretation of the plain error rule and adherence to the plain meaning of the rule; avoidance of ethical dilemmas for counsel who do not wish to waste a court's time by presenting contrary-to-present-reality, lottery-type claims; and enhancing the perception of judicial institutions as being the repositories of justice. If the only function of the contrary interpretation–that issue waiver invalidates the plain error rule–is to avoid correcting manifest injustice, that interpretation comes at too high a price for both the perception and reality of justice.

Endnotes

[1]. Richard C. Klugh, Jr. is Deputy Chief of Appeals, Federal Public Defender's Office, Southern District of Florida, where he has worked since 1986. A graduate of Harvard Law School, Mr. Klugh was a law clerk to the late Hon. Eugene P. Spellman, U.S. District Judge, Southern District of Florida.

[2]. For federal criminal cases, Fed. R. Crim. P. 52(b) provides: "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." In federal civil cases, the plain error rule is not textual, but is nevertheless applied. *See SEC v. Diversified Corporate Consulting Group*, 378 F.3d 1219, 1227 n.14 (11th Cir. 2004) ("In an exceptional civil case, we might entertain the objection by noticing plain error. 'Although the Civil Rules, unlike the Criminal Rules, do not contain a formal provision allowing the appellate courts to notice plain error, the appellate courts have held in a few cases that despite the absence of an objection they may consider an error so fundamental that it may have resulted in a miscarriage of justice.'") (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2472 (2d ed.1995) (internal alteration omitted)).

[3]. In *Blakely*, decided on June 24, 2004, the Supreme Court held that the term "statutory maximum," i.e., the maximum sentence to which a defendant is exposed by virtue of a conviction of any given criminal offense, refers not merely to traditional statutory offense definitions and sentence limits, but also to sentencing guidelines, if the sentencing court is constrained by law from imposing a sentence beyond the guideline maximum unless additional facts–not within the four corners of the crime of conviction–must be determined by the judge rather than proven beyond a reasonable doubt to a jury. 124 S. Ct. at 2537 ("In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.") (emphasis in original). Such a transfer of fact-finding authority from a jury to a judge, without the consent of the defendant, violates the Sixth Amendment jury trial guarantee. *Id.* at 2538. And in the federal system, precedent indicates, if not compels, that such sentence-maximum increasing facts must also be pled in the indictment. *See United States v. Cotton*, 535 U.S. 625, 632 (2002) (accepting government's concession that sentencing beyond statutory maximum based on unindicted element of offense plainly violates Fifth Amendment's Grand Jury Clause; holding plain error review applicable where issue not previously raised); *In re Winship*, 397 U.S. 358 (1970) (constitutional right to trial by jury and proof beyond a reasonable doubt applies to all elements of the offense).

Blakely likely renders the United States Sentencing Guidelines, as presently administered, unconstitutional. The issue of whether *Blakely* applies to the federal guidelines is currently pending before the Supreme Court, which heard oral argument on October 4, 2004, in two consolidated cases in which lower courts invalidated sentencing enhancements. *See United States v. Booker*, 375 F.3d 508 (7th Cir.

2004), *cert. granted*, 125 S. Ct. 11 (U.S. 2004); *Fanfan v. United States*, No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004), *cert. granted*, No. 04-105 (U.S. Aug. 2, 2004). Media accounts, and independent review of a transcript, of the oral argument reflect that a majority of the Court views *Blakely* as applicable to the federal sentencing guidelines. *See* Linda Greenhouse, *Justices Show Inclination to Scrap Sentencing Rules*, N.Y. Times, Oct. 5, 2004, at A13 (available at www.nytimes.com/2004/10/05/politics/05scotus.html) ("Most of the justices on Monday appeared prepared to apply that decision [*Blakely v. Washington*] to the federal guidelines, despite the vigorous effort of Paul D. Clement, the acting solicitor general, to persuade the court otherwise."); Charles Lane, *Sentencing Rules Get Hearing*, Washington Post, Oct. 5, 2004 at A03 (available at www.washingtonpost.com/ac2/wp-dyn/A7004/2004Oct4) ("The Supreme Court gave a cool reception to the Bush administration's plea to save the rules that federal judges use in sentencing offenders yesterday, with a slim but firm majority of the court casting doubt on the guidelines' constitutionality during a special two-hour oral argument").

[4]. *See McGinnis*, 918 F.2d at 1496 (deciding not to allow supplemental briefing where "there would be no manifest injustice if we decline to address" such new arguments); *see also FSLIC v. Haralson*, 813 F.2d 370, 373 (11th Cir.1987) ("[W]e decline to apply the waiver rule. . . on the specific facts of this case because we find that the purposes of that rule would not be served.").

[5]. *See SEC v. Diversified Corporate Consulting Group*, 378 F.3d at 1227 n.14.

[6]. The default statutory maximum applies where no additional factual findings are made, apart from occurrence of the drug offense itself.

[7]. The language of 11th Cir. R. 28-1, IOP 6, on which the *Nealy* court principally relied for its interpretation of supplemental briefing rules as extending only to issues previously briefed and not applicable to newly-raised issues, is no longer in the present version of the rule, and the inferences drawn from that language are therefore subject to question, particularly where the Federal Rules of Appellate Procedure do not restrict supplemental briefing to issues available to appellants at the time of initial briefing. *See* Fed. R. App. P. 28(c). Similarly, Federal Rule of Appellate Procedure P. 28(j) now authorizes parties to "promptly" advise the appellate court of "pertinent and significant authorities" which come to the parties' attention after the brief has been filed, without limitation as to whether new issues may arise from such decisions. *Cf. Thomas v. Arn*, 474 U.S. 140 (1985) (a circuit court rule is valid if it complies with the Constitution).

[8]. 232 F.3d at 830-31 n.6.

[9]. *See, e.g., United States v. Gerrow*, 232 F.3d 831 (11th Cir. 2000) (addressing *Apprendi* issue raised by way of supplemental brief under "plain error" standard); *United States v. Thomas*, 242 F.3d 1028 (11th Cir. 2001) (addressing the merits of an *Apprendi* issue raised for first time in supplemental brief (located at 2000 WL 33977923); initial brief (located at 2000 WL 33989638) had simply challenged evidentiary ruling at trial, and denial of acceptance of responsibility)); *United States v. Diaz*, 248 F.3d 1065, 1104 (11th Cir. 2001) (addressing *Apprendi* issue raised by way of supplemental brief, but finding it moot in light of decision on separate ground to vacate sentences and remand for resentencing); *United States v. Audain*, 254 F.3d 1286, 1288 (11th Cir. 2001) (government conceded *Apprendi* violation and need for resentencing based on argument raised for first time in supplemental brief); cf. *United States v. Gray*, 260 F.3d 1267, 1282-84 (11th Cir. 2001) (court may itself *sua sponte* raise and address issues the parties themselves neglected to raise during the initial full round of briefing).

[10]. *See, e.g., United States v. White*, 238 F.3d 537, 541 (4th Cir. 2001) (reviewing an *Apprendi* claim for plain error where the defendant first raised the claim in a supplemental brief); *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001) (same); *United States v. Mietus*, 237 F.3d 866, 875 (7th Cir. 2001) (reviewing a defendant's *Apprendi* claims for plain error after the defendant "waived" the claims below by failing to object at trial; the defendant raised *Apprendi*-type claims for the first time in supplemental briefs five days before oral argument); *United States v. Poulack*, 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing an *Apprendi* claim for plain error where the defendant first raised the claim in a "supplemental brief"); *United States v. Cernobyl*, 255 F.3d 1215 (10th Cir. 2001) (same).

[11]. *Ardley*, 242 F.3d. at 990 ("In the absence of any requirement to the contrary in either *Apprendi* or in the order remanding this case to us, we apply our well-established rule that issues and contentions not timely raised in the briefs are deemed abandoned.").

[12]. *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) (*en banc*).

[13]. *Levy* 379 F.3d. at 1244 (emphasis added). The Eleventh Circuit has recently issued a decision in *Levy* considering and denying *en banc* relief. *United States v. Levy*, No. 01-17133, 2004 WL 2755633 (11th Cir. Dec. 3, 2004) (denying suggestion of rehearing *en banc*). Lengthy and scholarly dissents by Circuit Judges Tjoflat (joined by Judge Wilson) and Barkett expound on a number of the same themes involving plain error review and the efficient use of judicial resources as those discussed in this article.

[14]. *See United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) (relying on *Levy* as foreclosing supplemental briefs on new issues; *Levy* explained the "long-standing rule in this circuit, as well as in the federal rules themselves, that issues not raised by a defendant in his initial brief on appeal are deemed waived"; denying permission to file supplemental brief raising *Blakely* claim); *United States v. Reese*, 382 F.3d 1308, 1309 n.1 (11th Cir. 2004) (following *Curtis;* holding that appellant could not file supplemental brief challenging sentencing enhancement as violation of *Blakely*, when it was not raised in initial brief); *United States v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (motion to file supplemental brief on *Blakely* grounds deemed impermissible); *United States v. Duncan*, 381 F.3d 1070 (11th Cir. 2004) (order denying motion to permit supplemental brief raising *Blakely* issue; *Blakely* challenge has been abandoned).

[15]. *See Burrell v. United States*, 384 F.3d 22 (2d Cir. 2004) (merits analysis of *pro se* supplemental brief newly raising *Blakely* claim in 28 U.S.C. § 2255 appeal from denial of motion not accepted because Second Circuit determined that *Apprendi* was not retroactive, and this appeal was from collateral proceedings); *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004) (*en banc*) (appellant permitted to file supplemental brief on *Blakely* grounds); *United States v. Giddings*, 107 Fed. Appx. 420 (5th Cir. 2004) (supplemental briefs claiming sentences unlawful under *Blakely* accepted and issue considered on merits); *United States v. Schafer*, 384 F.3d 326 (7th Cir. 2004) (allowing supplemental brief arguing *Blakley*; remanded for resentencing); *United States v. Castro*, 382 F.3d 927 (9th Cir. 2004) ("we have the authority to identify and consider such sentencing issues *sua sponte* [and] it would be appropriate for parties with pending cases to inform this court by letter at any time . . . when a potential *Blakely* . . . issue exists"); *United States v. Cortes*, 107 Fed. Appx. 760 (9th Cir. 2004) (considering *Blakely* supplemental brief).

[16]. A defendant has a constitutional right under *Griffith v. Kentucky*, 479 U.S. 314 (1987), to application of a favorable constitutional rule of procedure established by the Supreme Court while his or her case is pending on direct appeal. *Griffith* reiterated the fundamental principle of "constitutional adjudication" that an appellate court may not "disregard current law, when it adjudicates a case pending before it on direct review." 479 U.S. at 322, 326; *see also Griffith*, 107 S. Ct. at 713 ("failure to apply a

continued next page

newly declared constitutional rule to cases pending on direct review violates basic norms of constitutional adjudication"). According to *Griffith*, "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"–even where the new rule "constitutes a 'clear break' with the past." 479 U.S. at 326-28.

[17]. In recent years, the Eleventh Circuit's application of court-imposed limitations on the exercise of appellate jurisdiction have been the subject of considerable litigation. *See, e.g., Gonzalez v. Dep't of Corrections*, 366 F.3d 1253 (11th Cir.) (*en banc*) (finding that certificate of appealability requirement applies to review of district court order on motion for relief from judgment under Fed. R. Civ. P. 60(b) in habeas cases), *pet. for cert. filed* (July 22, 2004) (No. 04-6432); *United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002) (holding that appellate court lacks jurisdiction to review magistrate ruling where no objection filed in district court), *vacated, Brown v. United States*, 538 U.S. 1010 (2003) (remanding to court of appeals based on concession of error by Solicitor General), *reinstated on remand, United States v. Brown*, 342 F.3d 1245 (11th Cir. 2003) (opinion reinstated in light of pending criminal rule change addressing issue); *Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (reversing Eleventh Circuit rule of automatic dismissal of appeals under former-fugitive disentitlement doctrine).

[18]. The Supreme Court's decision in *Anders v. California*, 386 U.S. 738 (1967), provides an analogy in criminal law. *Anders* holds that when defense counsel finds no non-frivolous issue to raise on appeal, the appellate court must review the entire record of the trial court proceedings to determine whether counsel is correct in finding no colorable issue. The irony of the *Nealy/Levy/Curtis* approach is that a defendant whose counsel failed to find any issue on appeal would receive the benefit of independent court review for plain error in light of a supervening decision after counsel's motion to withdraw is filed, but the defendant whose counsel proceeds to raise an issue on appeal loses the right to plain error review.

[19]. *Thomas*, 371 F3d at 793 (Tjoflat, J., concurring).

[20]. *See Bhd. of Carpenters & Joiners of Am. v. United States*, 330 U.S. 395, 412 (1947) ("We have the power to notice a 'plain error' though it is not assigned or specified."); *see also* Fed. R. Crim. P. 52(b), Advisory Committee's Note.

[21]. *See also United States v. Kramer*, 73 F.3d 1067, 1074 n.16 (11th Cir. 1996) ("We conclude that error is 'plain' under [*United States v.*] *Olano*, [507 U.S. 725 (1993),] where the 'plainness' of error becomes apparent on direct review.").

[22]. *See, e.g., Macer v. United States*, 538 U.S. 500, 508 (2003) (recognizing appellate court's authority to raise *sua sponte* issues not briefed by counsel, including issue of counsel's ineffectiveness; "There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*.").

Editor's Column: Bryan Garner Counsels Appellate Lawyers and Judges on Effective Legal Writing

by Dorothy F. Easley[1]

"Appeals are won or lost in the briefs. The rules provide the framework, the standard of review controls the method of decision, and the record provides the fertile grounds for relief. You need to know them all. But writing the brief of the appellant is the most important task in pursuing an appeal. You get the job done in the brief–or you lose the appeal."[2]

As appellate practitioners, we have all experienced first-hand the agony of a disastrous oral argument because we failed to heed this advice. We all recognize that it is critical that we use our appellate briefs to set forth our most persuasive and comprehensive statement of our position, the law, the facts and, ultimately, the arguments in support of those. The usual ten or fifteen minutes we are allotted for productive appellate oral arguments are mere races to clarity, where questions and answers are directed to the appeal's details about finer points of law and fact, which a poorly written brief can prevent the courts from ever reaching. Yet, despite its importance, appellate brief-writing has been largely self-taught, until now.

Bryan Garner is the president of LawProse, Inc., in Dallas, Texas. He has developed his vision of helping the appellate community rethink our traditional approaches to brief-writing through decades of hard work and careful study. He was gracious enough to share with me his work and views on appellate brief-writing.

Reviewing all of Mr. Garner's credentials would consume this entire column, but we can safely describe him as one of the "high-ranking gurus" of appellate brief-writing. After earning his juris doctor from the University of Texas at Austin, Mr. Garner clerked for Fifth Circuit Judge Thomas M. Reavley from 1984 to 1985, worked in private practice at Dallas' Carrington Coleman firm from 1985 to 1988, and worked as visiting professor of law at the University of Texas from 1988 to 1990. Since 1990, he has been an adjunct professor of law at Southern Methodist University School of Law, and has given CLE workshops on legal writing and editing, legal drafting, and judicial writing to thousands of lawyers and judges across the country every year.

Mr. Garner has written more than a dozen highly respected books on legal writing, all of which are available through major bookstores, from the publishers directly, or online from Amazon.com and Barnes&Noble.com.[3]

He has also served as a drafting consultant to rules committees, most recently the Supreme Court of Texas on the Texas Rules of Appellate Procedure, the Judicial Conference of the United States on restyling amendments to the federal rules, and the Supreme Court of Delaware on restyling that state's civil and criminal jury charges.

Q: We all know your credentials as a fine lawyer. So what prompted you to shift to making legal writing your primary career?

A: Writing and language have been my all-consuming passions from the time I was fifteen or sixteen. As a teenager, I idealistically thought that law would be the perfect profession for someone committed to excellence in the written and spoken word, so I planned to become a lawyer. Then, as an undergraduate, when I began writing scholarly articles on Shakespearean linguistics, my mentors in the English department at the University of Texas were urging me to pursue a Ph.D. in English. I thought hard about it but stuck to my original plan and entered law school at Texas right after getting my B.A. (The Dean of Liberal Arts at the time said that I

had sold out.)

During my first week of law school, I began writing *A Dictionary of Modern Legal Usage*, and I worked on it steadily as a law student. When Oxford decided to publish it a few years later, all sorts of doors opened for me.

Meanwhile, I was on the regular law-firm track that so many other law graduates take, and my goal as a practicing lawyer was to make partner at my firm. But when the books began to blossom, I realized that I might be able to do something very different and, for me, much more meaningful.

Q: Have you always been a strong writer?

A: Relative to my peers, yes. But there have certainly been times, in high school and as an undergraduate, when I overestimated my writing skills. It took some English professors to mark up my papers thoroughly to show that I wasn't being as clear and cogent as I thought I'd been. Meanwhile, though, in my spare time I'd pretty much memorized H.W. Fowler's *Modern English Usage*, Wilson Follett's *Modern American Usage*, and Bergen Evans and Cornelia Evans's *Dictionary of Contemporary American Usage*.[4] So, in terms of grammatical knowledge, I was unusually advanced as an undergraduate. Two of my English professors openly said I should be teaching their classes.

Q: Do you still practice law?

A: Yes, I practice, but it's an unusual sort of law practice. For the past decade, I've been hired by courts to help rewrite their rules and jury instructions. At the federal level, this resulted in the publication of my booklet, *Guidelines for Drafting and Editing Court Rules* (1995). I also work on two or three major briefs each year.

Q: Today, do you consider yourself an appellate lawyer or a writer, or both?

A: In about equal measure, I'm a lawyer, a lexicographer, an author, a grammarian, and a teacher. Last week when I came back from England, I filled in the immigration form by putting "teacher/writer."

Q: Do you think the IRAC method of argument is the most effective method in an appellate brief?

A: It never has been, except for filling up bluebooks in law-school exams. Actually, the way I teach issue-framing, the issue consists of rule-application-conclusion followed by a question mark. Part of the problem with "IRAC" is that it postulates a highly superficial issue statement.

One of my more original contributions to the field of written advocacy is to advocate the use of the multisentence issue statement of no more than seventy-five words, written in the form of a syllogism with a concrete minor premise and ending with a question mark. I call it the "deep issue," and the advantage is that anyone can pick it up, read it, and understand it. Even nonlawyers.

The deep issue promotes clear thinking. We really must get away from this IRAC nonsense.

Q: Do great lawyers still outline their appellate briefs?

A: Yes, and always before they begin writing in earnest.

Q: What are the critical methods to good appellate brief writing?

A: Take time to think hard about what you want to say and why. Plan your beginning, middle, and end. Write swiftly, without stopping to edit. Revise, and enlist as many good editors as you can.

Q: Is it practical in appellate briefs to put case citations in footnotes, as you advocate, rather than in the body of the brief?

A: It's a lightning-rod issue, of course. The answer is that of course it's practical, and many lawyers that I consider really good writers do it routinely. The key is to say in the text what the authority is, and to discuss the cases contextually so that no one ever has to glance down at the bottom of the page to know what case you're talking about or what court decided it. I'm strongly against anything but reference notes. I don't want people looking down at footnotes to get context. I want the authority up, but the volume numbers and page numbers down.

Q: Do most appellate courts favor it?

A: Well, judges around the country have begun doing it in their judicial opinions; for example, look at the reports for decisions in Alaska, Delaware, Ohio, and Texas. Every time I take a vote, having explained my position fully, most judges in judicial-writing seminars vote to begin doing it.

Q: Why is the change necessary?

A: It allows you to remedy the non-paragraphs that are endemic in our profession (string citations followed by parentheticals); shorten your average sentence length; vary your sentence patterns; write good, meaty paragraphs; at the same time, write shorter paragraphs; avoid the unsightliness of letting volume numbers and page numbers pockmark the text; check your citations for accuracy more readily; and maintain a cleaner narrative line in the prose. In other words, this change in convention can allow you to start writing better.

One last note of caution: don't say anything substantive in a footnote except in a life-threatening circumstance.

Q: What tips do you have for minimizing harmful facts in appellate briefs?

A: Don't let your opponent bring them up for the first time. You get them out on the table in the middle of your argument (not at the beginning or end) and show why they shouldn't affect the result.

Q: What tips do you have for organizing briefs into their most readable form?

A: Organize around deep issues. These are the points of decision for the court expressed in a way that your nonlawyer relatives would understand. Figure out how many of those points there are and what they are, then order them logically from strongest to weakest. Narrow them down to three or four points if possible. Jettison the truly weak points. Then write good point headings corresponding to the issues you're going to include. That gives you a good outline and a working table of contents.

Q: What is the average number of revisions you'd expect an appellate brief to go through?

A: I can't imagine filing a brief without at least three; I've done as many as sixty-five. But it all depends on how we're counting. If each little change that you save on the computer counts as another "version" of the document, then it could go into hundreds. For major revisions in which several team members are involved, I imagine three could be adequate.

Q: I've heard of Justice Thurgood Marshall's famous ten-page briefs, before he became a Supreme Court Justice. Can a 10- or 15-page brief in 14-point font sufficiently cover

one complex legal issue?
A: In the hands of a skillful thinker who also knows how to write, I think it typically can. But advocates often mistakenly want to fill all the available space.

Q: What jurists do you think are outstanding writers today?
A: Judge Frank Easterbrook has extraordinary flair with the written word. So does Judge Alex Kozinski. Although I admire Justice Antonin Scalia's rhetorical deftness, no one on the Supreme Court today is as masterly as Justice Robert H. Jackson was in the mid-20th century.

Q: Have you seen work of certain appellate lawyers that you think was especially outstanding?
A: Yes. Anyone who's looked at my books will see that I favorably quote from the work of Beverly Ray Burlingame of Dallas (clean, tightly reasoned arguments); Steven Hirsch of San Francisco (great introductions); Steven Shapiro of Chicago (great introductions); and, of course, Theodore Olson of Washington, D.C. (terrific overall). There are certainly others whose work I admire: Terence G. Conner of Miami; Mike Hatchell of Tyler, Texas; Evan Tager of Washington, D.C.; and Steven Wallach of New York City. I'm fortunate to see the work each year of some superb advocates.

Q: Are law schools today doing a better job of producing lawyers who can write?
A: Yes, but . . . oh, there's so much to say here, and it would overwhelm the rest of the piece. The law schools are better than they used to be. But we must remember that almost all highly effective writers are to a great degree self-taught. So it's not as if your schooling marks an end with this type of skill.

Q: How far have we come in legal writing in the last ten years?
A: I see improvements, but they're glacial, in that they are very slow-moving.

Q: What more is needed to improve writing in law?
A: In law schools, hiring for legal-writing positions needs to be on a par with hiring for torts or contracts professors; there need to be chairs and professorships in the subject to attract the best minds. In practice, lawyers as a whole need to view themselves as professional workers in words. They need to study the literature on effective writing and speaking–the old-fashioned arts of rhetoric–to hone their skills.

They also need to be less self-satisfied, and to realize that no matter how adept they think they already are, they've barely scratched the surface. There's an enormous body of knowledge that they need to master, and few have come close. It's partly a matter of not letting your previous schooling get in the way of your ongoing education.

Q: What do you recommend lawyers read in their free time to improve their writing?
A: Start with reading John Trimble's book, then Sheridan Baker's, then perhaps my Elements book. Round out the first year of reading with William Zinsser's work.[5] Seriously, I recommend that lawyers read at least one book each quarter on language and writing.

Q: What projects are you spending most of your professional time on these days?
A: I've just finished the big new eighth edition of the unabridged Black's Law Dictionary,[6] as well as The Rules of Golf in Plain English.[7] Now that I have fourteen or so books in print, my workdays are often a matter of trying to keep these books up to date. So at any given time I'm working on improvements to future editions of one book or another. And then of course I'm teaching seminars for lawyers and judges week after week.

Q: What are some of your upcoming projects?
A: I'll soon be starting a new slate of seminars, mostly on the West Coast. I will be returning to Florida in February or March of 2005. You can find out the locations by checking lawprose.org.[8]

Conclusion

A California state appellate court underscored the vital nature of high-quality appellate brief-writing this way:

> The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them into an appellate brief, is producing a substandard product. Rather than being a rehash of trial level points and authorities, the appellate brief offers counsel probably their best opportunity to craft work of original, professional, and, on occasion, literary value.[9]

Anyone familiar with the works of Bryan Garner knows that he is revolutionizing appellate brief-writing to help the appellate community do just that.

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, employment 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.

[2]. Dennis Owens, *Appellate Brief Writing in the Eighth Circuit*, Mo. Bar. J. (Mar./Apr. 2001). Dennis Owens of Kansas City, a Fellow of the American Academy of Appellate Lawyers, has been editor-in-chief of the American Bar Association's Appellate Practice Journal since 1988.

[3]. Bryan Garner's books include: *Black's Law Dictionary* (West, most recently the 8th ed. 2004); *Garner's Modern American Usage* (Oxford Univ. Press, 2003); *The Elements of Legal Style* (Oxford Univ. Press, 2002); *A Dictionary of Modern Legal Usage* (2d ed., Oxford Univ. Press, 1995); *The Winning Brief* (Oxford Univ. Press, 1999); *A Handbook of Basic Law Terms* (West, 1999); *A Handbook of Business Law Terms* (West, 1999); *Securities Disclosure in Plain English* (CCH, 1999); *The Oxford Dictionary of American Usage and Style* (Oxford Univ. Press, 2000); *A Handbook of Criminal Law Terms* (West, 2000); *A Handbook of Family Law Terms* (West Group, 2000); *Legal Writing in Plain English* (Univ. Chicago Press, 2001); *The Redbook: A Manual on Legal Style* (West, 2002); *Guidelines for Drafting and Editing Court Rules* (Admin. Office U.S. Courts, 1996); *Chapter 5, The Chicago Manual of Style* (Univ. Chicago Press, 2003); *The Elements of Legal Drafting* (Oxford Univ. Press, in progress).

[4]. H.W. Fowler, *Modern English Usage* (2d ed. 1965); Wilson Follett, *Modern American Usage* (1966); Bergen Evans and Cornelia Evans, *Dictionary of Contemporary American Usage* (1957).

[5] The published works are: John Trimble, *Writing with Style* (2d ed. 2000); Sheridan Baker, *The Practical Stylist* (8th ed. 1998); Bryan Garner, *The Elements of Legal Style* (2d ed. 2002); William Zinsser, *On Writing Well* (6th ed. 1998).

[6] *Black's Law Dictionary* (West, July 2004).

[7] *The Rules of Golf in Plain English* (Univ. Chicago Press, May 2004)

[8] Anyone wanting more information can reach Bryan Garner through LawProse, Inc., at http://lawprose.org.

[9]. *In re Marriage of Shaban*, 105 Cal. Rptr. 2d 863 (Ct. App. 4th Dist. 2001).

Membership Survey of the Appellate Practice Section of The Florida Bar

This is a confidential survey. It is being conducted by the Appellate Practice Section of The Florida Bar. The Section is conducting this survey to learn more about its membership so that the Section can better serve the needs and interests of its members. For those of you having email and being able to complete the Survey online, if you have not yet received that online Survey via email, please go to the Appellate Practice Section Website Homepage at http://flabarappellate.org/ and click on the Survey Link in the left column and follow all instructions to provide your email address. After you provide your email address, an online Survey will be emailed to you in February, 2005. **For those of you who do not have access to email, please complete the Survey below** and mail your completed Survey to Austin Newberry, Professional Development, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300 or fax to 850-561-5825. Thank you in advance for your feedback.

1. How many lawyers are in your law firm?

- ❑ 1
- ❑ 2-5
- ❑ 6-20
- ❑ 21-40
- ❑ 41-60
- ❑ 61-80
- ❑ 81-100
- ❑ More than 100

2. How many appellate lawyers in your firm?

- ❑ 1
- ❑ 2-5
- ❑ 6-10
- ❑ 11-20
- ❑ More than 20

3. What percentage of your practice is:

Appellate _____
Trial Level Support as Appellate Co-counsel _____
Trial _____
Transactional (or non litigational) _____

4. Do you handle any appeals on a contingency fee basis?

- ❑ YES
- ❑ NO

5. Do you handle any appeals on a fixed or flat fee basis?

- ❑ YES
- ❑ NO

6. Do you handle any appleas on an hourly basis?

- ❑ YES
- ❑ NO

7. What is your standard hourly rate for appellate work?

_____

8. What percentage of your appeals are:

Contingency Fee	_____	Hourly	_____
Fixed or Flat Fee	_____	Combination of Above	_____

9. What percentage of your appeals are:

Civil	_____
Criminal	_____
Family	_____
Administrative	_____
Worker's Compensation	_____
Bankruptcy	_____
Other	_____

10. What percentage of your appeals are:

Federal _____ State _____

11. On average, how many appeals do you handle each year?

_____

12. On average, how many oral arguments do you make each year?

_____

13. On average, how many principal briefs (not counting reply briefs) and original petitions do you file each year.

_____

14. On average, how many extraordinary writs do you file each year?

_____

15. Please check all of the courts in which you have appeared by brief or oral argument.

- ❑ Supreme Court of Florida
- ❑ First District Court of Appeal
- ❑ Second District Court of AppealCircuit
- ❑ Third District Court of Appeal
- ❑ Fourth District Court of Appeal
- ❑Fifth District Court of Appeal
- ❑Supreme Court of the United States
- ❑United States Court of Appeals for the Eleventh
- ❑ Other, Please Specify _____

16. Have you ever filed an amicus curiae brief on behalf of a person, entity, or orgaization?

- ❑ YES
- ❑ NO

17. Are you board certified by The Florida Bar in appellate practice?

- ❑ YES
- ❑ NO

18. Are you board certified by The Florida Bar in any other practice area? If yes, please state which one.

- ❑ YES _____

  _____
- ❑ NO

19. Would you consider yourself an active member of the Section?

- ❑ YES
- ❑ NO

20. Have you participated on one of the Section's committees? If not, why not?

- ❑ YES
- ❑ NO _____

  _____

21. If not, would you like information about involvement in our committees?

- ❑ YES
- ❑ NO

22. What other topics would you suggest we form a committee to address?

_____

_____

23. Have you ever accessed the Section's website, www.flabarappellate.org?

- ❑ YES
- ❑ NO

24. If not, why not? (If so, skip this question and answer the next one.)

_____

_____

25. If so, did you find the website:

- ❑ Very Useful
- ❑ Somewhat Useful
- ❑ Not Useful

26. Do you read The Record?

- ❑ YES
- ❑ NO

27. If not, why not? (If so, skip this question and answer the next one.)

_____

_____

28. If so, do you find The Record:

- ❑ Extremely Informative
- ❑ Informative
- ❑ Neither Informative Nor Not Informative
- ❑ Not Informative
- ❑ Extremely Not Informative

29. What topics would you like to see addressed more frequently in The Record?

_____

_____

30. What topics would you like to see addressed less frequently in The Record?

_____

_____

31. Do you use the Florida Appellate Practice Guide created and updated by the Appellate Section?

- ❑ YES
- ❑ NO

32. If not, why not? (If so, please skip this question and answer the next one.)

_____

_____

33. If so, do you find the Florida Appellate Practice Guide to be:

- ❑ Very Useful
- ❑ Somewhat Useful
- ❑ Not Useful

34. How would you like to receive updates to the Florida Appellate Practice Guide?

- ❑ By U.S. Mail
- ❑ By email in a .pdf format
- ❑ By email in a Word format
- ❑ By email in a Word Perfect format
- ❑ Other, Please Specify _____

35. Overall, how satisfied are you with the Appellate Practice Section?

- ❑ Extremely Satisfied
- ❑ Satisfied
- ❑ Neither Satisfied Nor Dissatisfied
- ❑ Dissatisfied
- ❑ Extremely Dissatisfied

36. Which of the following events have you attended in the past year?

- ❑ Section Committee Meetings
- ❑ Executive Council Meetings
- ❑ Section Reception
- ❑ Dessert Reception
- ❑ Section Luncheon
- ❑ CLE Program Sponsored or Co-Sponsored by the Section
- ❑ Discussion With The Supreme Court
- ❑ Other, Please Specify _____

37. Did you attend the last Section Retreat?

- ❑ YES
- ❑ NO

38. If not, why not? (If so, skip this question and answer the next one.)

_____

_____

39. If so, did you find the Section Retreat to be:

- ❑ Very Worthwhile
- ❑ Somewhat Worthwhile
- ❑ Not Worthwhile

40. Was there any event that you learned about after the fact that you would have attended had you know about it? If so, which one?

- ❑ YES _____
- ❑ NO

41. Are you interested in attending a Section Retreat?

- ❑ YES
- ❑ NO

42. If so, please indicate your preference as to the duration of the retreat.

- ❑ One night
- ❑ Two nights
- ❑ More than two nights
- ❑ Other, Please Specify _____

43. Would you prefer the Section Retreat to be held on

- ❑ Weekend Days Only
- ❑ Week Days Only
- ❑ A Combination of Week Days and Weekend Days

44. Where would you like the Section Retreat to be held? (Please check as many as apply.)

- ❑ Amelia Island, Florida
- ❑ Bahamas
- ❑ Charleston, South Carolina
- ❑ Colorado
- ❑ St. Augustine, Florida
- ❑ Key West, Florida
- ❑ Naples, Florida
- ❑ New Orleans, Louisiana
- ❑ Savannah, Georgia
- ❑ Other, Please Specify _____

45. What time of year would you prefer to attend a Section Retreat?

- ❑ Spring
- ❑ Summer
- ❑ Winter
- ❑ Fall

46. How far in advance do you prefer to receive information about an upcoming event?

_____

47. How far in advance of an event do you usually make a decision to attend?

_____

48. What is your preferred location for Section events?

- ❑ Tampa Area
- ❑ Miami Area
- ❑ Ft. Lauderdale Area
- ❑ Orlando Area
- ❑ Jacksonville Area
- ❑ Other, Please Specify _____

49. What is the highest level of education you have attained.

- ❑ J.D.
- ❑ L.L.M.
- ❑ Other, Please Specify _____

50. Where is your office located?

- ❑ Northwest Florida
- ❑ Northeast Florida
- ❑ Central Florida
- ❑ Southwest Florida
- ❑ Southeast Florida
- ❑ Other, Please Specify _____

51. Where in Florida do you concentrate your practice? (Please check all that apply.)

- ❑ Northwest Florida
- ❑ Northeast Florida
- ❑ Central Florida
- ❑ Southwest Florida
- ❑ Southeast Florida
- ❑ Other, Please Specify _____

52. Do you have any suggestions that would make our Section better?

_____

_____

53. What is your gender?

- ❑ Male
- ❑ Female

54. What is your race?

- ❑ African American
- ❑ Asian American
- ❑ Caucasian
- ❑ Hispanic or Latin American
- ❑ Other, Please Specify _____

55. What is your age?

_____

56. How many years have you been in practice?

- ❑ 0-5
- ❑ 6-10
- ❑ 11-15
- ❑ 16-20
- ❑ 21-25
- ❑ 26-30
- ❑ More than 30

Again, thank you for taking your valuable time to complete this survey that the Appellate Section of The Florida Bar created and sponsored. We believe your participation will help us to better serve you, our membership.

STATE CIVIL CASE UPDATE
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its nature, a dismissal of an appeal signifies that the merits were not reached. Thus, in this case, the court's order dismissing the appeal resolved only the preliminary question of whether the court had judicial power to review the judgment and did not address or adjudicate the merits of the controversy. Moreover, the order had no impact on the landowners' right to seek another remedy in the trial court. Responding to an argument of the City, the court noted that appellate courts do, sometimes, dismiss appeals "without prejudice," but that the phrase is unnecessary and adds nothing to the inherent nature of the order itself: "The dismissal of an appeal for lack of appellate jurisdiction is necessarily a decision made without prejudice to an appellant's right to pursue whatever remedies may still exist."

The appellate court also disagreed with the City's argument on whether excusable neglect had been shown. The court ruled that the stamp marked "Filed" governed over the one marked "Filed & Recorded," but noted that the fact that the clerk made the same mistake as did appellate counsel in choosing the latter stamp as the date for calculating the thirty day period to file the notice was some indication that counsel's error was justifiable. The court reversed the order denying the rule 1.540 motion with instructions to the trial court to vacate the final judgment and render a new one from which the landowners could file a timely appeal.

Endnotes

[1]. Keith Hope, of the Hope Law Firm, P.A., practices in Holmes Beach, Florida, focuses on civil litigation and appeals. Mr. Hope has been a frequent contributor to The Record.

[2]. For anyone who faces this problem in the future, another avenue to pursue is whether clerks have discretion and power to not file stamp papers accepted by them and particularly when important rights such as the right to appeal are involved. In a recent federal appeal I argued successfully that a clerk's refusal to file stamp a motion for rehearing until days after it was accepted was not proper and that such motion tolled the time for filing the notice until the motion was ruled upon.

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[13] *Id.*
[14] *Id.* (emphasis in original).
[15] *Id.* at 838-40 (footnote and citation omitted).
[16] *Id.* at 840.
[17] *Id.* at 840 (quoting The Fla. Bar, Fla. Admin. Practice § 4.7, at 4-11 (6th ed. 2001)) (citations omitted).
[18] *Id.*
[19] *Id.*
[20] *Id.* (citations omitted).
[21] *Id.*
[22] *Id.* (citation omitted).
[23] *Id.* at 840-41.
[24] *Id.* at 841.
[25] *Id.* (footnote omitted); *cf., e.g., Accardi v. Dep't of Envtl. Protection*, 824 So. 2d 992, 996 (Fla. 4th DCA 2002) (finding that the subject petitioners substantially complied with the requirement in rule 28-106.201(2)(f) that the petition specify the rules or statutory provisions requiring reversal or modification of the agency's proposed action where they specified the substance of the administrative code rules allegedly violated); *McIntyre v. Seminole County Sch. Bd.*, 779 So. 2d 639, 643 (Fla. 5th DCA 2001) (where only item employee failed to include in hearing request was how he became aware of School Board's action, the deficiency would not be deemed dispositive, and employee's letter was sufficient to meet the minimum requirements listed in section 120.54(5)(b)4 for a hearing request).
[26] *See Brookwood*, 870 So. 2d at 841.
[27] *Id. Accord* Fla. Admin. Code R. 28-106.201 (similarly providing that dismissal of a petition for non-compliance with the rule shall, "at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect").
[28] *Brookwood*, 870 So. 2d at 841.
[29] *Id.; see also id.* at 841-44 (Shevin, J., concurring) (concurring judge separately writing at length "to address the responsibilities of agencies in considering requests for a formal hearing, and to suggest that the Legislature needs to amend the statute").
[30] *A.D.M.E. Inv. Partners., Ltd. V. Agency for Health Care Admin.*, 866 So. 2d 773 (Fla. 1st DCA 2004); *Brookwood-Extended Care Ctr. of Hialeah Gardens, LLP v. Agency for Health Care Admin.*, 866 So. 2d 189 (Fla. 1st DCA 2004); *Grier v. Agency for Health Care Admin.*, 866 So. 2d 159 (Fla. 1st DCA 2004); *Largo ACLF, Ltd. v. Agency for Health Care Admin.*, 866 So. 2d 156 (Fla. 1st DCA 2004); *Brookwood-Extended Care Ctr. of Hialeah Gardens, LLP v. Agency for Health Care Admin.*, 866 So. 2d 155 (Fla. 1st DCA 2004); *see also Unisource Pharm. Group, Inc. v. Agency for Health Care Admin.*, 799 So. 2d 333 (Fla. 1st DCA 2001) (in earlier case, First DCA citing statutes and rules at issue in affirming agency's dismissal of petitions seeking a § 120.57(1) hearing because the petitions "fail to allege disputed issues of material fact, and instead appear to raise issues regarding [the agency's] interpretation" of a certain statute).
[31] *Blackwood v. Agency for Health Care Admin.*, 869 So. 2d 656, 656-67 (Fla. 4th DCA 2004).
[32] *Id.* at 657.
[33] *See id.*
[34] *Id.* (quoting Fla. Admin. Code R. 28-106.201(2)(e) and citing *Brookwood*).
[35] *Id.*
[36] *See id.*
[37] *Id.* Note that, unlike the First and Third DCAs, the Fourth DCA affirmed, rather than reversing and remanding for the petitioner to file an amended petition.
[38] *Id.* Note that, unlike the 1st and 3d DCAs, the 4th DCA affirmed as opposed to reversing and remanding for the petitioner to file an amended petition.
[39] *Brookwood*, 870 So. 2d at 839.
[40] *Id.* at 840.

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