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The Record

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The Per Curiam Affirmance: A Therapeutic Jurisprudence Critique

Amy D. Ronner[1] and Bruce J. Winick[2]

Introduction

Therapeutic jurisprudence is a relatively new field of legal studies that already has had an important impact on the courts.[1] The basic insight of therapeutic jurisprudence is that the law often "function[s] as a kind of therapist or therapeutic agent" and that "legal procedures . . . constitute social forces that, whether intended or not, often produce therapeutic or antitherapeutic consequences."[2] The *Seattle University Law Review* is devoting an issue to therapeutic jurisprudence and we have contributed an article on the antitherapeutic consequences of the per curiam affirmance ("PCA"). While we do not seek to reproduce the entire article here, we have accepted this offer to share some of our analysis and conclusions. For a more developed discussion, we invite you to read the full article, which will appear in 24 *Seattle University Law Review* at 491 (2000).

The PCA

As most of the readers of *The Record* know, when an appellate court issues a PCA, it simply says one word: "affirmed." PCA decisions are generally accepted and often justified.[3] In cases warranting a PCA, the application of legal precedent to the facts of the case seems straightforward to the appellate court, thus justifying the savings of appellate resources that the preparation of an appellate opinion would entail. In addition, because the case makes no new law, further savings can be achieved by dispensing with the publication of a full decision, which would further clutter the already voluminous official report of decisions. Because it is generally thought that "[t]he parties themselves have no right to an opinion,"[4]considerations of appellate efficiency and economy are invoked to justify what appears to be an increasing practice. Since it contains no discussion of facts, no disclosure of the court's reasoning, and violates the appealing party's need for what social scientists call voice and validation, the PCA is antitherapeutic. Not only has the appellant lost the appeal, but he or she is left with the feeling (correct or incorrect) that the court did not take the contentions made (at considerable expense) with any degree of seriousness. Usually, for the typical appellant, contentions in the appeal deserve a reasoned response, rather than a summary dismissal.

Voice and Validation

There are quite a few empirical studies dealing with how litigants experience the litigation process. These studies essentially agree that litigants place great importance on the process itself, and on the dignitary value of a hearing.[5] When litigants feel that the system has treated them with fairness, respect and dignity, they experience greater satisfaction, are more able to accept the decision, and are more willing to comply with it. They highly value a sense of "voice," or an opportunity to tell their story to a decision maker.[6] They also value validation, or the feeling that the tribunal has really listened to, heard, and taken seriously the litigants' stories.[7]

When litigants emerge from a legal proceeding with a sense of voice

See "Per Curiam Affirmances" page 16

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Chair's Message:

Disorder in the Court?

by Benedict P. Kuehne, Chair

After the presidential election recount litigation, in which the legal profession and the judicial system, especially in Florida, occupied center stage, we would have expected that the national rehabilitation of lawyers had begun. After all, it was noted commentator William Safire who explained: "In other countries in times like these, they turn to their generals. We turn to our lawyers." Yes, America looks to its lawyers to protect our fundamental values and way of life.

Yet, come the first of March an entirely different perspective is being played out in the Sunshine State's capital. Yes, appellate practitioners, the very future of both our time honored legal profession and the foundation of our independent judiciary is at risk. The micromanaging and blame game is upon us. Now is the time for all lawyers, especially Florida's skilled appellate advocates, to use those persuasive talents and enviable advocacy skills to protect and defend the legal system from assault.

While these so called *reforms* are being touted as well-intentioned efforts to restore accountability for the courts, they are actually little more than an exercise in controlling the independence of lawyers and judges. On the table this legislative session are proposals to dismantle the merit selection process and pack the Judicial Nominating Commissions by terminating current appointments to the JNCs. The pending proposal would give the Governor the exclusive power to appoint all members of each JNC, thereby depriving The Florida Bar of any role in a process through which the Bar's non-partisan input has brought our State many of the true giants of modern day judges. This is especially troubling when seen in the context of the current attack on the American Bar Association's role in reviewing the professional qualifications of nominees to the federal bench.

And that is just the start. The effort to dismantle the legal system includes proposed constitutional amendments to eliminate merit selection and retention, to require that judges and justices be retained by a two-thirds vote of the people (try *that* with any sitting legislator!), to impose term limits for judges, to limit the jurisdiction of the courts, and to give the Legislature control over court rules and procedures. Just as devastating is a proposal to remove Supreme Court jurisdiction over lawyer regulation, a concept that undoubtedly would lead to a deterioration of our high professional standards. Left to languish on the sidelines will be citizens' fair access to the courts. Judges will be forced to navigate the political shoals of their correct but controversial decisions.

The people of Florida need you to speak out about the dangers of these misguided proposals. Let me remind you that your duty to insure the constitutional balance of our third branch of government is not a partisan one. Joined in opposition to these revisions are lawyers from both sides of the *Bush v. Gore* litigation, perhaps the best indication that disastrous consequences await. So, now, today, before you do anything else, fire off a letter, make that telephone call, or visit your local legislators to make clear that this bad law is simply unacceptable. Tomorrow may be too late.

Section Educates its Members

Two of the most exciting and well regarded Appellate Section programs are right around the corner. Our esteemed *Inside the Eleventh Circuit* seminar kicks off June 1 in Tampa. The much imitated but never equaled *Successful Appellate Advocacy Workshop* comes to Stetson Law School July 25-27. Tom Hall has once again drafted an enviable faculty of state and federal judges to assist a select group of appellate lawyers in sharpening their appellate skills. Sign up now, before only the waiting list remains.

E-Communication for Appellate Practitioners

The Section's new listserve is a communication tool you will not want to miss. Contact Section Administrator Austin Newberry (850/561-5624 or *anewberry@flabar.org)* to join this modern-day bulletin board to exchange appellate ideas and join your colleagues in stimulating conversation.

This newsletter is prepared and published by
the Appellate Practice and Advocacy Section of The Florida Bar.

The Appellate Practice Section Gathers at the Midyear Meeting of The Florida Bar

January 18, 2001, Miami

Section Chair Ben Keuhne leads the Executive Council meeting.

Steve Stark comments on the Section budget.

Florida Bar President-elect, Terry Russell, 1st DCA Judge William VanNortwick, and Cindy Hoffman enjoy the reception.

3rd DCA Judge Robert Shevin, Tom Hall, and Ben Keuhne at the reception.

2nd DCA Judge David Patterson, Vee Hendricks, Tom Elligett, and Judge Peter Webster at the reception.

The ABA's New Council of Appellate Lawyers Is Looking for Members

by Lucinda A. Hofmann

A group of appellate lawyers and judges from across the country have formed the Council of Appellate Lawyers— an entity of the Appellate Judges Conference of the American Bar Association— to assist in the professional development of lawyers who practice appellate law and to foster a creative dialogue between those lawyers and state and federal appellate judges. Justice John M. Greaney of Massachusetts, chair of the ABA Judicial Division Appellate Judges Conference, described the new council as "an organization, the formation of which was long overdue, because there is a serious need, on a national level, to bring appellate judges and lawyers together, to discuss common issues and to advance appellate practice and procedure, an overlooked, but now recognized specialty." George T. Patton Jr., an appellate attorney in Washington, D.C., is the first chair of the new council, and Florida appellate lawyer, Cindy Hofmann, has been elected to the Council's first executive board.

The Council is already planning a meeting and program to be held October 5-6 in New York City in conjunction with the annual meeting of the Council of Chief Judges of Courts of Appeal. Cindy Hofmann serves as Chair of the Programs Committee. The October program will include the opportunity for dialogue between judges and lawyers on their different perspectives on a wide range of topics through joint educational programs and social events. The program will also include an educational program directed solely to appellate practitioners and the Council's first annual business meeting.

Membership in the Council of Appellate Lawyers is open to any lawyer who practices, teaches or has an interest in appellate law and procedure. Dues are $35 plus ABA dues. To become a member, fill out the Membership Application on pages 18 & 19 of this issue and send it with your check to Melissa Sehstedt at the ABA.

Membership application on pages 18 & 19

Coming in June:

" Inside the 11th Circuit"

Plan to attend **"Inside the 11th Circuit,"** a one-day seminar to be held on Friday, June 1st at the Adam's Mark Orlando, 1500 Sand Lake Road, Orlando, FL 32809, phone 407/859-1500, fax: 407/855-9863.

Judges Tjoflat, Wilson and Hill will each present lectures and then participate in a panel discussion to answer questions. The Clerk of the Court will also be present to provide practice points and an overview of any new rules of procedure in a presentation titled: 2001-- The Clerk's Office Perspective for Practitioners."

A representative from the Court's Mediation Office will present insights into efficient and effective mediation tactics to lessen the Court's case load.

For more information, call Rick Nelson (407/786-3880.) Watch The Florida Bar *News f*or details and registration forms.

Office of the Solicitor General of Florida: An Overview

by Paul Arron

In July, 1999, Tom Warner was appointed to serve as Florida's first Solicitor General. The Solicitor General represents the State of Florida in the Florida Supreme Court and the United States Supreme Court on primarily civil matters[1] that involve constitutional issues and that are otherwise of great importance to the State. In creating this position, modeled after the Office of the Solicitor General of the United States, it is anticipated that the Solicitor General will serve a term of at least two but not more than four years. It is also anticipated that because of the temporary nature of the position, the person selected by the Attorney General as Solicitor General will maintain ties to his or her private practice during his or her tenure. However, continuation of the Solicitor General's private practice must be maintained during non-business hours or leave from the position and cannot be conducted in a manner that will affect the performance of his or her duties or be in conflict with the interests of the State of Florida.

Tom Warner brings a combination of private practice and public service to the Office of the Solicitor General. After graduating from the University of Florida in 1970 with a B.A. in Finance and Investments, Tom received his law degree from the University of Florida in 1973. From 1974-1999, he was in private practice in Stuart, Florida. In 1992, Tom was elected to the Florida House of Representatives and served as part of that legislative body until his appointment as Solicitor General. During his service in the Florida Legislature, Tom was Chairman of the House Judiciary Committee (then known as the Civil Justice and Claims Committee); the Procedural Council (where he co-authored the new Procedural Rules governing the House in 1996); and the Civil Justice Council, overseeing all law related committees from 1996 to 1998. He also Chaired the Tort Reform Conference Committee in 1997 and served as a member of Select Committees including Juvenile Justice Reform, Workers Compensation, Telecommunications and the Governor's Commission on Education.

Tom Warner, Solicitor General of Florida

The Solicitor General is appointed by and reports to the Attorney General, who is the chief legal officer for the State of Florida.[2] As part of his position as Solicitor General, Tom teaches at FSU law school and attempts to involve students in pending matters, particularly maters involving issues of constitutional law. The Solicitor General's primary duty is to supervise representation of the State of Florida in significant litigation that affects the powers, duties and responsibilities of all three branches of government. An important part of the position is the determination, subject to review by the Attorney General, of which cases to appeal either to the Florida Supreme Court, the United States Court of Appeals or the United States Supreme Court. The determination as to whether to file an amicus brief is also an important function and responsibility of the Solicitor General. As Solicitor General, Tom determines whether to intervene in cases at the appellate level where the State of Florida is not involved, but where there are issues of constitutional law or matters of great public importance. In making decisions as to which matters to become involved with, Tom also determines which person(s) will handle particular appeals. Outside counsel is not to be utilized without prior consent of the Attorney General.

Approximately fifty percent of the work-load of the Office of the Solicitor General relates to matters before the United States Supreme Court.[3] For example, on November 8, 2000, Tom Warner, as Solicitor General, on behalf of Robert Butterworth, the State Attorney General, joined other attorney generals as amici[4] requesting that the Supreme Court grant a petition for certiorari to the Tenth Circuit Court of Appeals as requested by the State of Kansas in *Pierce v. Sac & Fox Nation of Missouri*. Below, the Tenth Circuit held that the Eleventh Amendment does not bar an Indian Tribe's suit against a State for money damages pursuant to 28 U.S.C. § 1362 so long as the United States could have brought suit on behalf of the Tribe. *Sac & Fox Nation of Missouri v. Pierce,* 213 F.3d 566 (10th Cir. 2000).

Tom Warner, acting on behalf of Attorney General Robert Butterworth, and the other amici argued, *inter alia*, that the Tenth Circuit's holding conflicted with prior Supreme Court precedent,[5] and precedent from other Circuit Courts,[6] including the Eleventh Circuit Court of Appeals in *Miccosukee Tribe of Indians v. State Athletic Commission*, 226 F.3d 1226 (11th Cir. 2000), wherein the Court held that a suit by an Indian Tribe against a State in Federal Court over a tax issue was barred by the Eleventh Amendment. The concern prompting the amicus filing was that the Tenth Circuit's decision effectively abrogated the states' Eleventh Amendment immunity in the context of suits brought in Federal Court which would subject the States to suits by Indian Tribes for not only injunctive relief pursuant to the *Ex Parte Young* doctrine but also to suits for money damages

pursuant to Section 1362.

Another matter before the Supreme Court on a petition for certiorari which the Office of the Solicitor General is involved was the Ninth Circuit Court of Appeal's decision in *Murphy v. Shaw*, 195 F.3d 1121 (9th Cir. 1999), *cert. granted*, __ U.S. __, 121 S. Ct. 27 (2000).[7] Below, the Ninth Circuit held, *inter alia*, that the First Amendment rights of an inmate at the Montana State Prison were violated when he was disciplined for providing legal assistance to another inmate. Specifically, the Ninth Circuit found that the prison's discipline of the inmate constituted "an exaggerated response" to otherwise legitimate security concerns such that the First Amendment rights of the inmate, who was found to be acting as an "inmate law clerk," were violated.

As an example of State court litigation in which the Office of the Solicitor General participated, *see Armstrong v. Harris*, 2000 Fla. LEXIS 1764 (Fla. Sept. 7, 2000), in which a private citizen challenged the 1998 amendment to article I, section 17 of the Florida Constitution based upon its allegedly defective ballot title and summary. The amendment sought to "preserve the death penalty" and was approved by 72% of the electors. The Solicitor General was granted special leave of Court to file a brief *after oral argument* to address issues raised by the Court during oral argument. It is uncommon for the Court to accept unsolicited post-argument briefs. Although the Court ultimately invalidated the constitutional provision by a 4 to 3 vote, the issues briefed by the Solicitor General were the focus of the Court's opinion and upon which the majority and dissent disagreed.

As the State's first Solicitor General, Tom Warner has done an exemplary job in getting the Office of the Solicitor General off to a good start and representing the State of Florida on issues of great public import. The members of the Appellate Section of the Florida Bar are confident that the remainder of Tom's term as Solicitor General will be as productive as his tenure to date.

Endnotes:

[1]. While it is true that the bulk of the cases with which the Solicitor General is involved are civil, there is the possibility that criminal cases can be, and have been, specially assigned to the Office of the Solicitor General. For example, the Solicitor General provided comments to the Florida Supreme Court on the amendments to Fla. R. Crim. P. 3.851, 3.852 and 3.993 proposed by the Court concurrent with its decision in *Allen v. Butterworth*, 25 Fla. L. Weekly S__ (Fla. Apr. 14, 2000)(invalidating the Death Penalty Reform Act). The Solicitor General argued that the Legislature's failure to amend the Public Records Act exemptions did not preclude the Court from implementing a "dual track" system for post-conviction relief consistent with the intent of the Death Penalty Reform Act. In its opinion postponing adoption of new rules, the Court specifically acknowledged the need to "give adequate consideration to the Solicitor General's suggestion that this Court has authority to adopt a rule of discovery requiring disclosure of records prior to the conviction and sentence of death becoming final, notwithstanding the continued existence of the public records exemptions." *In re Amendments to Florida Rules of Civil Procedure*, 25 Fla. L. Weekly S__ (Fla. July 14, 2000).

[2]. As the chief legal officer for the State, *Fla. Stat.* § 16.01 *et seq.*, the Attorney General is empowered to intervene and represent the State in all trial and appellate courts, both State and Federal, where he determines that the State has an interest. *State ex rel Shevin v. Kerwin*, 279 So. 2d 836 (Fla. 1973); *State ex rel Shevin v. Yarborough*, 257 So. 2d 891 (Fla. 1972). Tom's position as Solicitor General, as it relates to the fact that his office is within the Office of the Attorney General, contemplates that he will try to bring consistency and coordination to the State's legal efforts. In that regard, Tom is expected to coordinate with the multitude of other State agencies regarding pending legal matters.

[3]. On average, the office receives one to two requests per week to file amicus briefs with the Supreme Court.

[4]. The Office of the Solicitor General is responsible for coordination with the National Association of Attorneys General on Amicus requests from other States. In that regard, the Office of the Solicitor General is likewise responsible for the design and implementation of procedures and criteria with which to determine whether to accept or reject such Amicus requests.

[5].*I daho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe, Blatchford v. Native Village of Noatak & Circle Village*, 501 U.S. 775 (1991).

[6]. *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041 (9th Cir. 2000); *Mille Lacs Band of Chippewa Indians v. Minnesota*, 124 F.3d 904 (8th Cir. 1997); *Seneca Nation v. State of New York*, 26 F. Supp. 2d 555 (W.D.N.Y. 1998), *aff'd*, 178 F.3d 95 (2d Cir. 1999).

[7]. This matter is presently pending before the Court.

* * *

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"The Record, Counsel, Just the Record"– A Matter of Professionalism

by Evan J. Langbein

In the TV series "*Dragnet*," Sgt. Joe Friday tersely requested: "The facts, ma'am, just the facts." Appellate courts likewise seek: "The record, counsel, just the record."

Unfortunately, detours and departure from the record have become an ever-increasing occurrence. Zealous appellate advocates inject trial tactics into the appellate forum, trying to get "into evidence" facts which were not established or introduced in the lower tribunal. Yet, lawyers who attempt such tactics not only are subject to sanctions, but loss of credibility as well.

The Record – A Means to an End?

Appellate lawyers and judges instinctively cherish "...ancient standards of appellate procedure." *Mitchell v. Gillespie*, 161 So.2d 842, 844 (Fla.1st DCA 1964) [Chief Judge Sturgis, concurring in part, dissenting in part]. Perhaps the most valued standard is honest presentation of the record on appeal. Experienced appellate lawyers and judges understand that the fastest way to lose credibility in an appellate tribunal is to venture beyond the record or to misstate its contents.

Appellate attorneys owe a duty of faithfulness to the record. This duty to the court is paramount, superseding even loyalty to the appellate client. "*Ethical Concerns in Civil Appellate Advocacy*", 43 S.W. L. Journal 677, 694 (1989) [hereafter "*Ethical Concerns*"; see also, *Polansky v. CNA*, 852 F.2d 626, 632-33 (1st Cir.1988); *Steinle v. Warren*, 765 F.2d 95, 101-102 (7th Cir. 1985).

The Court addressed the issue of confining appellate presentation to the record in the lower tribunal in *Altchiler v. State, Dept. Of Prof. Reg.*, 442 So.2d 349, 350 (Fla.1st DCA 1983):

> "...That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court. *See Mann v. State Road Dept.*, 223 So.2d 383 (Fla.1st DCA 1969)...."

See also, *Thornber v. City of Fort Walton Beach*, 534 So.2d 754, 756 (Fla.1st DCA 1988).

Despite this well-established "elemental" obligation, appellate courts continue to grapple with "attempts" to skirt the record. Since appellate courts are vested with inherent power to enforce allegiance through sanctions and referral to the Florida Bar, counsel are well-advised to consider their *ethical responsibilities* when undertaking an appeal.

Consideration of this issue begins with the Florida Bar's Rules of Professional Conduct. Rule 4-3.4(c) provides that a lawyer shall not "...knowingly disobey an obligation under the rules of a tribunal..." The attorney who injects into an appellate proceeding matters not contained in the record on appeal violates this rule. The rule falls under the heading "*Fairness to Opposing Party and Counsel*" [if not the tribunal itself]!

Strictly speaking, Rule 3-4(e) applies to trial attorneys, forbidding them from alluding "...to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence...." An appeal is *not* an evidentiary proceeding. *E.I. Du Pont De Nemours v. Native Hammock*, 698 So.2d 267, 270 (Fla.3d DCA 1997). The appellate court does not receive new evidence, but only considers evidence presented to a lower tribunal. *Tyson v. Aikman*, 159 Fla. 273, 31 So.2d 272 (1947); *Kelley v. Kelley*, 75 So.2d 191, 193 (Fla.1954). An attorney who introduces "evidence" not before the lower tribunal when it entered the order which is subject to appellate review violates this rule, since he or she necessarily presents "evidence". Cf., *Maercks v. Birchansky*, 549 So.2d 199 (Fla.3d DCA 1989)[improper to display "evidence" never admitted into evidence].

Rule 4-3.5(a) falls under the heading of "Impartiality and decorum of the tribunal". The rule forbids a lawyer from seeking "...to influence a judge... or other decision maker except as permitted by law or the rules of court." Violation of this rule, as well as Rule 4-3.4(c), were the reasons the Court imposed sanctions in *Rampart Life Associates, Inc. v. Turkish*, 730 So.2d 384 (Fla.4th DCA 1999).

In that case, an attorney argued in a footnote of the brief the substance of a deposition taken *after* commencement of a non-final appeal. The appellate court already had denied the attorney's motion to supplement the record because the deposition testimony was not introduced before the trial court when it ruled. The attorney was ordered to pay opposing counsel a fee of $500.00 as sanctions.

The court stated "[i]t would have been bad enough if counsel...had included the information in [the] brief without moving to supplement the record..." (730 So.2d at 385) However, counsel made "matters worse" because the information was contained in the brief "after we denied [the] motion to supplement the record. In doing so [counsel] violated two ethical rules..." [Rules 4-3.5(a), supra, and 4-3.4(c), which the court quoted].

While this case presents one common violation of fidelity to the record on appeal, it is worthy to review more of the body of decisions as a tool to avoid trespass of the boundaries to the record.

Courts May Bypass the "Record", Too

In *Kelley v. Kelley*, supra, a wife sought to set aside a divorce judgment because her former husband's affidavit in support of constructive service of process was false and fraudulent. The trial court dismissed the complaint based on *findings of fact* predicated on the record of a prior *criminal* proceeding against the ex-husband. He had been acquitted

continued, next page

of perjury before the same trial judge for the same alleged acts at issue in the divorce case.

The trial court made its findings of fact from evidence in the prior criminal case, not evidence in the record in the divorce case.

The Florida Supreme Court reversed on appeal, finding that all the fact findings "were in the mind and memory" of the trial judge, but ***not*** in the record the judge was considering or the one before the reviewing court. The Court said, "It is elemental that in reviewing the actions of Circuit Courts, we are confined to the record produced here. It is from *that record* that we must determine whether the judgment of the lower court is lawful..." (Italics added) [75 So.2d at 193].

In *Kelley*, supra, the Court quoted its earlier holding in *Atlas Land Corp. v. Norman*, 116 Fla.800, 156 So. 885 (Fla.1934)[hereafter *Atlas*]. In *Atlas*, the Supreme Court denied a motion to add a transcript of a "main proceeding" to the record on appeal of appeal from an "ancillary and supplementary" order appointing a receiver. The Court observed that orders which are appealed "...are to be supported, as well as tested, by what its record in the particular case may show, not what its records at large may disclose." (156 So. at 886)

Were the rule different, the correctness of an order appealed might depend on "some secret knowledge" of the trial judge, amounting "to a matter in pais" [taken without legal proceedings]. *Ibid*. The Court in *Atlas* added that courts "should not be required nor permitted to browse amongst its own records" to create "an extraneous record", not the one presented to the lower tribunal, resulting in the particular order subject to appellate review.

One Court Does Not Review Record of Another

Atlas, supra, also was quoted in *Hillsborough County Board of County Commissioners v. PERC*, 424 So.2d 132 (Fla.1st DCA 1982) [hereafter *PERC*]. An amicus curiae filed a brief in the First District asking it to take "judicial notice" of material in the court file of the *Second* District Court of Appeal as "other authority". As in *Kelley*, supra, the Court struck such reference and denied "judicial notice".

The First District noted in *PERC*, supra, that an appeal "has never been an evidentiary proceeding..." Thus, "judicial notice" provisions of the Florida Evidence Code do not apply to appeals. Further, the Court noted its function "...is to determine whether the lower tribunal committed error *based on the issues and evidence before it.*" (Citations omitted) [Italics added]. Since the lower tribunal had not decided the case based on any of the proffered material from the court file of another District Court, it was inappropriate to consider it as part of the record in a separate proceeding. See also, *Department of Revenue v. Young American Builders*, 358 So.2d 1096, 1100 (Fla.1st DCA 1978); *State v. A.D.H.*, 429 So.2d 1316, 1319 (Fla.5th DCA 1983).

It is equally inappropriate to present matter from an earlier District Court file to "prove" to another District Court how badly *that Court* "misapprehended" the written decision of its sister District Court. See, *Weintraub v. Weintraub*, 756 So.2d 1092 (Fla.3d DCA 2000), citing *PERC*, supra.

The First District's decision in *PERC*, supra, shows the tendency of modern appellate courts to strictly enforce limitations upon the record on appeal. In *Mitchell v. Gillespie*, supra, the First District earlier had observed that it was "common practice" for courts to "consult" the records of the Supreme Court to glean meaning of its "published decisions". (161 So.2d 842). The Court allowed a transcript of an earlier Supreme Court case to be included in the brief of the pending appeal. The reasoning was that the transcript *might* be needed "to determine the similarity of the factual situation present in that case to the one present in this case,..."

The dissent in *Mitchell v. Gillespie*, supra, declared that the court's ruling was a "precedent of first impression" in Florida, and a "bad one". (161 So.2d at 844). The dissent noted the "precedent" would give certain parties to appeals a procedural "advantage". Further, it would require attorneys and courts to comb through records of prior appellate cases in *every* jurisdiction of Florida.

The dissenting opinion in *Mitchell v. Gillespie*, supra, was prescient, correct, and consistent with the Supreme Court's holding in *Atlas*, supra, which may be why the First District implicitly receded from *Mitchell v. Gillespie*, supra, in *PERC*, supra. The Court commented in *PERC*, supra, that "...we have discovered few cases in which an appellate court has found it permissible to take judicial

notice of the records of another court in a totally separate and distinct case."

The potential for abuse of "judicial notice" to expand the record on appeal is shown in *Poteat v. Guardianship of Willie Florence Poteat*, 25 Fla.L.Weekly D2421 (Fla.4th DCA, filed October 11, 2000). The day before oral argument, counsel for appellants moved to supplement the record on appeal with a complaint filed in *another* circuit court proceeding, four days earlier. Counsel sought appellate judicial notice of this "evidence" (never produced in the trial court) to obtain an appellate reversal. Not surprisingly, the motion to supplement was stricken. The court greeted it as a "flagrant violation" of Fla.R.App.P. 9.200(f). The court added that the "creation" of such appellate proof by counsel for one of the appealing parties is "highly unprofessional".

Appellate "Judicial Notice" Is Improper

Another type of appellate "amendment" was sought in *Thornber v. City of Fort Walton Beach*, 534 So.2d 754 (Fla.1st DCA 1988). Appellant's counsel moved to include newspaper articles and minutes of a city counsel meeting in the record on appeal. The minutes showed the trial judge had appeared at the council meeting, and the newspaper articles concerned that same council meeting and the lower tribunal's ruling in the case.

In response, the appellate court not only denied the motion, but issued a rule to show cause why counsel should not be sanctioned for "disregard" of the appellate rules. In reply to the "show cause" order, counsel continued argument to the court that the proffered documents could properly be included in the record on appeal. The appellate court was not persuaded, and counsel was publicly reprimanded, and warned against such repeat violations.

A series of newspaper articles also were proffered for the appellate court's consideration shortly before oral argument of *Rosenberg v. Rosenberg*, 511 So.2d 593, 595, fn. 3 (Fla.3d DCA 1987). The court denied the motion to add the articles to the record and struck them with directions to the clerk "to return same to appellant's counsel." The court sternly advised:

> "...Appellate review is limited to the record as made before the trial court at the time of entry of a final judgment or orders complained of. It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court..."

The court noted that for events subsequent to entry of a final order subject to appellate review there are appropriate procedures [such as a motion under Fla.R.Civ.P. 1.540] to bring the matter to the attention of the trial court in the first instance.

Also, in cases when a party believes the trial court improperly takes "judicial notice" of facts outside the record in the lower tribunal, it is incumbent that this fact be demonstrated in the record on appeal. *City of Miami v. St. Joe Paper Co.*, 347 So.2d 622, 624 (Fla.3d DCA 1977).

Judicial Notice of Court's Own File May Be Taken

As with most general rules, there is an exception. An appellate court ***may*** take judicial notice of its ***own*** case files. *Daoud v. City of Miami Beach*, 150 Fla. 395, 7 So.2d 585 (Fla.1942)[judicial notice of another case within same term of court]; *Stark v. Frayer*, 67 So.2d 237 (Fla.1953) [judicial notice of "companion case"]; *Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So.2d 310, 313 (Fla.1983) [approving judicial notice of court's own file of related cases]; *Gulf Coast Home Health Services of Fla., Inc. v. Dept. of Health and Rehabilitative Services*, 503 So.2d 415, 417 (Fla.1st DCA 1987) [judicial notice of court's own pending or closed files "...which bear a relationship to the car at bar..."]; *Lagarde v. Outdoor Resorts, Inc.*, 428 So.2d 669 (Fla.2d DCA 1982) [judicial notice of briefs in court's own former appeal]; *St. Joseph's Hospital of Charlotte, Florida, Inc. v. Dept. of Health and Rehabilitative Services*, 559 So.2d 595 (Fla.1st DCA 1989); *Falls v. National Environmental Products*, 665 So.2d 320 (Fla.4th DCA 1995); *Miami Stage Lighting, Inc. v. Budget Rent-A-Car*, 712 So.2d 1135 (Fla.3d DCA 1998), *review denied*, 728 So.2d 200 (Fla.1998).

There are practical reasons for recognizing this exception to the general proposition "...that the appellate courts do not create records, nor do statements of counsel serve to create a record...." See, *Hill v. State*, 471 So.2d 567, 568 (Fla.1st DCA 1985). For example, an issue before the appellate court may involve "estoppel by judgment" or one of "issue preclusion", when access to the prior *related* file is critical. See, *Falls v. National Environmental Products*, 665 So.2d 320 (Fla.4th DCA 1995).

Or, an appellate court may believe, on its own motion or that of a party, that access to a pending or earlier file generated within the same court is essential to clarify factual or legal questions related to the appeal under submission. Appellate courts, in such instances, take notice of their own files to avoid "handicapping" the process with "tunnel vision". *Gulf Coast Home Health Services of Fla., Inc. v. Dept. of Health and Rehabilitative Services*, supra, 503 So.2d at 417.

Great precaution and discretion should be exercised, however, in seeking judicial notice *even of the court's own file.* Counsel should *always* first file a motion requesting an appellate court to take judicial notice of its own file and carefully explain the relationship between the present and pending or prior appeal. It should always be remembered that appellate courts do not even allow *trial courts* to take judicial notice of its *own records* in a different case pending or disposed of "...in the same court but outside of the record in the case before it." *Atlas Land Corp. v. Norman*, supra; *Kostecos v. Johnson*, 85 So.2d 594 (Fla.1956); *In Re Freeman's Adoption*, 90 So.2d 109, 110-111 (Fla.1956); *City of Coral Gables v. Brasher*, 132 So.2d 442, 445 (Fla.3d DCA 1961); *Matthews v. Matthews*, 133 So.2d 90, 96-97 (Fla.2d DCA 1961); *Gann v. Levitt & Sons of Fla., Inc.*, 193 So.2d 200, 201 (Fla.4th DCA 1967); *Novack v. Novack*, 196 So.2d 499 (Fla.3d DCA), *cert. denied*, 196 So.2d 926 (Fla.1967); *duPont v. Rubin*, 237 So.2d 795, 796, fn. 1 (Fla.3d DCA 1970); *Bergeron Land Dev., Inc. v. Knight*, 307 So.2d 240 (Fla.4th DCA 1975). To *prove* some matter contained in the file of another case be-

continued, next page

ing litigated in the trial court, either the other file must be offered into evidence or certified copies of portions offered into evidence. *In Re Freeman's Adoption*, supra; *Matthews v. Matthews,* supra; *Bergeron Land Dev., Inc. v. Knight,* supra; *Abichandani v. Related Homes of Tampa, Inc.,* 696 So.2d 802, 803 (Fla.2d DCA 1997).

The Florida Supreme Court indirectly approved the rule disallowing judicial notice of the appellate file of *another appellate court* in *Dept of Legal Affairs v. Dist. Ct. of Appeal, 5th Dist.*, supra, 434 So.2d at 312, fn. 3. The Court squarely held that a PCA of one district court of appeal cannot be cited as precedent in another district court.

Frequent use of judicial notice on appeal would be unfair, impractical or misleading in many instances when perhaps counsel for both parties do not have equal access to the appellate file being "noticed", or such notice might lead to appellate decisions based on something truly outside of the record on appeal. Judicial notice of "excerpted" portions of the prior or pending case also might be fallacious, or even deceptive. Therefore, the practice of taking judicial notice even of the court's own file in a pending or prior appeal should be employed sparingly.

Not Everything "Of Record" Is the "Record"

There also are papers and documents which, although filed "of record", are inappropriate for consideration on appeal, since they were not matters of "...record as made before the trial court *at the time of entry of a final judgment or orders complained of."* [Italics added]. *Rosenberg,* supra. *First National Bank in Fort Lauderdale v. Hunt,* 244 So.2d 481 (Fla.4th DCA 1971), is an example. The Court stated that "extensive references" in an appellate brief to "facts allegedly shown by various exhibits which were filed as attachments to a motion for summary judgment" served "only to hinder" the Court's determination of whether the record contained a "proper factual basis for the trial court's findings". The "various exhibits" had never been introduced into evidence at the trial which produced the trial court's findings. Material such as pre-trial discovery, including answers to interrogatories, depositions and responses to discovery requests "...are not judicially before the [appellate] court merely because they were filed..." of "record". *Watson v. Williams*, 227 So.2d 226 (Fla.1st DCA 1969); *Parker v. Parker*, 109 So.2d 893 (Fla.2d DCA 1959); see also, *Rampart Life Associates, Inc. v. Turkish*, supra.

Such pre-trial discovery, properly filed of record, may be considered part of the record if the appeal is from a "pretrial judgment" (such as a summary judgment), but not from a "post-trial judgment" ..."unless properly offered and received into evidence." *Coca-Cola Bottling Co. v. Clark*, 299 So.2d 78, 82 (Fla.1st DCA 1974). Appeals from "pre-trial judgments" will be reviewed by appellate courts based only on pre-trial discovery and other papers "properly made a part of the trial record". *Cos v. Transportation Services, Inc.*, 526 So.2d 961 (Fla.4th DCA 1988).

With advanced technology and videotaped depositions comes another problem of presenting a proper record on appeal. The submission of videotaped depositions at trial in lieu of a full transcript of that deposition on appeal is not authorized by the appellate rules, is counter-productive to efficient appellate review, and may result in the appellate court rejecting review of the facts adduced in such a deposition. *Travieso v. Golden*, 643 So.2d 1134, 1136 (Fla.4th DCA 1994); *Matson v. Wilco Office Supply & Equipment Co.,* 541 So.2d 767 (Fla.1st DCA 1989).

Ancillary Records Are Inappropriate

Another example of material filed "of record", but not properly included in the appellate tribunal's "record" are matters filed in *post-judgment* "ancillary" and "supplementary" proceedings to a "main claim". A party may then attempt to "supplement" the "record" from the order in the "main claim" with a "record" of the ancillary proceedings. See, *Atlas,* supra; *Rampart Life Associates, Inc. v. Turkish,* supra. For instance, post-judgment evidentiary proceedings to consider a motion for attorney's fees are "a collateral and independent claim", separate and distinct from the "record" in the main case. *Finkelstein v. North Broward Hospital District*, 484 So.2d 1241 (Fla.1986); *Holm v. Sharp,* 715 So.2d 1159, 1160 (Fla.5th DCA 1998).

However, to the zealous attorney, unmindful of restraints upon an appellate "record", the "facts" adduced at such "collateral" hearings may hatch the opportunity to "re-try" the main case on appeal. Such attorneys may seek to "supplement" or "consolidate" post-judgment or "ancillary" "records" to unfairly include material never before the trial court when she (or he) entered the final judgment on appeal.

Courts recognize that motions to consolidate [or to "supplement" or "amend"] may be a product of "strategy or tactics" improperly motivated by a desire to delay or unfairly prejudice by introducing irrelevant facts. See, *Pages v. Dominguez,* 652 So.2d 864, 868 (Fla.4th DCA 1995). The ethical appellate lawyer will never "consolidate" or "supplement" an appellate record when the only motive is to introduce irrelevant, confusing or unfairly prejudicial "collateral" facts, never considered by the trial court when entering its final order.

Another type of "ancillary" record is one that an attorney may try to self-create, relying on "facts" the lawyer has stated in pleadings or memoranda filed in the lower tribunal. "...[U]nproven utterances documented only by an attorney are not *facts* that a trial court or this [appellate] court can acknowledge." *Schneider v. Currey*, 584 So.2d 86, 87 (Fla.2d DCA 1991); *Blimpie Capital Venture, Inc. v. Palms Plaza Partners, Ltd.,* 636 So.2d 838, 840 (Fla.2d DCA 1994).

The Record on Appeal Is "Presumed"

As the Supreme Court stated in *Atlas*, supra, an order under appellate review "...must find its support in the record of the controversy being appealed, ***and that alone...***" (Italics added) (156 So. at 887). It follows that pleadings, papers, briefs

and appendices filed "of record" in the appellate court "must find its support in the record of the controversy being appealed, and that alone." *Ibid.*

Appellate courts will *presume* "...that the record transmitted [by the clerk of the lower tribunal] contains all proceedings in the lower court material to the points presented for decision..." on appeal See, e.g., *Maistrosky v. Harvey*, 133 So.2d 103, 105 (Fla.2d DCA 1961) [portions of brief stricken for referring to matter not transmitted in the record]; *Sheldon v. Tiernan*, 147 So.2d 593 (Fla.2d DCA 1962)[same]; *Finchum v. Vogel*, 194 So.2d 49, 51 (Fla.4th DCA 1966) [release document never "offered, received or in any way made part of the trial record", but included in an appendix to an appellate brief stricken] ; *Mann v. State Road Dept.*, 223 So.2d 383 (Fla.1st DCA 1969) [placing "certain excerpts" of resolutions of the Trustees of the Internal Improvement Fund of Florida in an appendix to the brief when "[n]othing pertaining to these excerpts was before the lower court"... was "contrary to all rules of [appellate] procedural and stricken]; *Seashole v. F& H of Jacksonville, Inc.*, 258 So.2d 316 (Fla.1st DCA 1972) [striking from an appendix affidavits and copies of correspondence and other matters not included in the transmitted record and argument in the brief based on those non-record documents]; *Gilman v. Dozier*, 388 So.2d 294, 296 (Fla.1st DCA 1980) [striking and disregarding a statement, outside the record, that father's son is in the Air Force and self-supporting].

Even in appeals from non-final orders, attempts to inject non-record matter may adversely affect success in the appeal. See, *Keller Industries, Inc. v. Yoder*, 625 So.2d 82, fn.1 (Fla.3d DCA 1993) [striking tabs 1-9 of respondents' appendix "never submitted to the trial court and ... presented here for the first time on certiorari review...", and quashing an order denying an attorney's *pro hac vice* appearance]; *Fine v. Carney Bank of Broward County*, 508 So.2d 558 (Fla.4th DCA 1987) [rejecting "an affidavit contained in appellant's brief" not considered by the trial court, affirming order denying motion to dismiss for improper venue].

The Record Will Be Enforced

Even if the opposing party does not formally move to strike references to documents or facts outside the record, the appellate court effectively might on its own motion. E.g., *Levy v. Baptist Hospital of Miami, Inc.*, 210 So.2d 730, 731 (Fla.3d DCA 1968) [refusing to consider argument on matters outside of the record on court's own motion]; *Von Eiff v. Azicri*, 699 So.2d 772, 779, fn. 14 (Fla.3d DCA), Judge Green dissenting, *reversed*, 720 So.2d 510 (Fla.1998) [noting the impropriety of factual statement that adoptive parents "divorced after the commencement of this appeal"]; *Permenter v. Bank of Green Cove Springs*, 136 So.2d 377 (Fla.1st DCA 1962)[court refused to consider facts regarding venue of a corporation which did not appear in the record before the trial court].

Ardent counsel also are well-advised to abide by the appellate court's determination that material is outside of the record. For instance, in *Altchiler v. State Dept. of Prof. Reg.*, supra, counsel was publicly reprimanded and warned that future violation of the appellate rules and orders of the appellate court might result in a finding of contempt. (442 So.2d at 351).

The First District struck a brief and appendix containing material not in the record on appeal and argument based on the non-record material. An amended brief was filed referring to the "*...same matters that the court had ordered stricken from the appendix and original initial brief." (Ibid. at 350)* Undaunted, counsel responded to a second motion to strike by asserting the non-record material was "entirely proper", adding that to exclude it from the court's consideration "would be a disservice...." The Court was not entertained by counsel's failure "...to recognize that the order of this court striking the initial brief and the appendix resolved the issue." See also, *Thornber v. City of Fort Walton*

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Beach, supra,(534 So.2d at 755); *Rampart Life Associates, Inc. v. Turkish*, supra [sanctions imposed for arguing material in a brief after court *denies* motion to supplement the record].

Jonathan Swift's *Gulliver's Travels* is quoted in *Ethical Concerns*, supra, 43 S.W. Law J. at 677:

> "It is likewise to be observed, that this society [of lawyers] hath a peculiar cant and jargon of their own, that no other mortal man can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood."

To "multiply" the appellate record, briefs or appendices with material or statement of facts not before the lower tribunal when it entered the order appealed, "confound[s] the very essence of truth and falsehood" on appeal. It hinders the process of appropriate review of orders under scrutiny by the reviewing court.

And while some appellate lawyers add or multiply to the appellate record, others in their vigor to win, divide or subtract, excluding material prejudicial to their appeal. "Selective cropping" of the appellate record is unethical. *Ethical Concerns*, 43 S.W. Law J. at 700, citing, *Amstar Corp. v. Envirotech Corp.*, 730 F.2d 1476 (D.C.Cir. 1984), *cert. denied*, 469 U.S. 924 (1984) [case history deleted in order to bolster a claim]. Selective enlargement or expansion of the record on appeal misleads, confuses and distorts as much as selective deletion from the record.

Conclusion

At a time when the term "legal ethics" is deemed an oxymoron, the appellate advocate must remain mindful of her or his dual trust. *Ethical Concerns*, 43 S.W. Law J. at 677 & 694. One is owed to the client, but the other, more important, trust is to the Court. When the latter trust is maintained, more often than not, the former trust owed to the client also is fulfilled. In the final analysis, the appellate attorney's credibility exceeds prevailing in any particular appeal. Thus, the temptation to add [or subtract] from an appellate record should be avoided just as much as affirmative misrepresentation of the record to the appellate court in written briefs. In the final analysis, it is a matter of simple fairness to the parties, the trial judge, the appellate panel and to the process.

Evan J. Langbein *practices with the law firm of Langbein & Langbein, P.A. in Miami. He handles state and federal civil, administrative and family appeals. He graduated with honors from the University of Florida Law School in 1973. Mr. Langbein is board certified in appellate practice.*

The author gratefully acknowledges the contribution of Susan W. Fox, Esquire, Chairperson of the Publications Committee of the Appellate Practice Section and Editor of The Record, *to the preparation of this article.*

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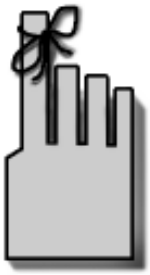

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A Dictionary of Modern American Usage

by Bryan A. Garner
Reviewed by Scott D. Makar

An e-mail recently shot across the computer screens of the thousand or so attorneys who work at my law firm. The sender was searching for an expert in grammar to assist with a confounding statutory interpretation issue. I was out of my office at that time, but when I returned I had a message that a transactional lawyer had recommended ***me*** due to her perception that I wrote well and could probably be of assistance.

Well, first of all, it was flattering (I think) that someone thought of me in the category as "grammar expert." Of course, I am far, far, far from being a grammarian let alone an authority on the subject. I do know how to use "that" versus "which" (which took quite a bit of practice to master). But, I have no doubt that I would crumble under the singe of cross-examination on topics such as subordinate clauses and intransitive verb usage.

I wondered what had left the impression that I knew something about grammar? Was it that, like many appellate lawyers, I enjoy language and the use of words? Or, maybe that I write law review articles for fun? I concluded it could only be one thing: the dozens of dictionaries, language guides, and other linguistic manuals that are in my office. Anyone who has *Strunk & White* sandwiched between the *Shorter Oxford Dictionary* and the *Historical Dictionary of American Slang*, which props up the *Associated Press Style Guide* that neighbors the *Bias-Free Word Finder* that mocks the *Official Politically Correct Dictionary and Handbook* – all framed by the *Dictionary of Modern Legal Usage*, *Burton's Legal Thesaurus*, the *Oxford Dictionary of American Legal Quotes*, and a book entitled *The Footnote: A Curious History* – is likely to be perceived as a legal language geek. And the step from legal language geek to perceived grammar expert is not a big one.

The truth is that any perceived knowledge of grammar and legal usage is due, in large part, to my proximity to a broad range of handbooks, dictionaries, and other linguistic resources. Admittedly, I am a bibliophile (if not a bibliomaniac) as well as a word-freak (am I the only one who likes finding interesting new words in the dictionary?). Given this "gentle madness," it is hard not to have the latest, greatest books on the use of English language on my bookshelf.

Now, just when I thought that my personal library was adequate, along comes another great one: *A Dictionary of Modern English Usage* (Oxford University, 1998, $35.00) ("*Modern English Usage*"). The book is by Bryan Garner, who is a lawyer/lexicographer and the president of a Dallas-based company, Lawprose, Inc., which provides CLE seminars and other related services nationwide. Mr. Garner is the Richard Posner of the legal language industry. Much as Judge Posner made the law and economics movement fashionable and useful, Mr. Garner has taken the art of legal writing and made it interesting and pragmatic. And, Mr. Garner's publication record – although not quite as prodigious as Judge Posner's output – is quite impressive. His prior books include *A Dictionary of Modern Legal Usage* ("*Modern Legal Usage*") and *The Elements of Legal Style*. He is also the editor-in-chief of the Seventh Edition of *Black's Legal Dictionary*.

A distinguishing characteristic of *Modern American Usage* is the author's explanation of his approach in creating the dictionary, which authors generally never do. Up front, Mr. Garner discloses the ten principles that guided his task. First, the purpose of his dictionary is to help writers and others use language effectively. Second, language recommendations must be realistic, recognizing current language and fostering reasonable editorial solutions. Third, "linguistic simplicity" – the choosing of the simple versus complex way of expressing a thought – is vital. Fourth, use common sense – good writing is easy to follow, bad is not. Fifth, brevity of expression is important, provided it is accurate. Sixth, undesirable words – those that are "newfangled," defy logic, blur a useful concept, or arise from misuse or misunderstanding – are to be avoided. Seventh, slipshod or loose extensions of words are discouraged. Eighth, steer clear of needless variants of words. Ninth, where two constructions of a word or phrase are in current use, avoid the one that authorities condemn. Finally, actual usage by educated speakers and writers should guide correctness. These are Garner's ten canons of language usage.

All these principles considered, can it be said that one form of language is better than that of another? Mr. Garner believes so, describing himself as a "prescriptionist" – i.e., linguists who "want to figure out the most effective uses of language, both grammatically and rhetorically." He asserts that "usage dictionaries got hijacked by the descriptive linguists, who observe language scientifically." These "dry as dust" tomes are for a limited audience, and are primarily useful in recording language use rather than stating preferred practices.

In contrast, Mr. Garner makes clear that he doesn't "shy away from making judgments." He states: "I can't imagine that most readers would want me to. Linguists don't like it, of course, because judgment involves subjectivity. It isn't scientific. But rhetoric and usage, in the view of most professional writers, aren't scientific endeavors. You don't want dispassionate descriptions; you want sound guidance. And that requires judgment."

Modern American Usage delivers

precisely what Mr. Garner promises: a simple, entertaining, and user-friendly volume that educates its users while assisting them find the preferred answers to all too common language mistakes. He quotes a long-time editor of the *The American Scholar* who states, "The English language is one vast San Andreas fault, where things are slipping and sliding every moment." Because of the constant shifting in the language terrain, Mr. Garner notes that English usage has become "so challenging that even experienced writers need guidance now and then." *Modern American Usage* provides that guidance.

Why have *Modern American Usage* on your shelf if you already have *Modern Legal Usage*? Many reasons. Both are very useful and have little overlap. You'll find interesting entries on the use of the term "enbancworthy" and "Lawyers, Derogatory Names For" in the latter, but not the former; you'll find entries on "animal adjectives" (asinine, bovine, etc.) and "Sesquipedality" (the "use of big words, literally those that are 'a foot and a half' long.") in the former, but not the latter (in fairness, Mr. Garner does have plenty of entries in *Modern Legal Usage* on the many ways that lawyers misuse archaic, vague, or technical words). Even basic entries like the ones on "affect" versus "effect" are somewhat different, the one in *Modern American Usage* having a more detailed exposition. And yes, both have entries on the use of "which" versus "that." They are highly complementary works, which is a compliment to Mr. Garner.

Scott D. Makar is a partner in the Jacksonville office of Holland & Knight LLP. His practice includes trial and appellate litigation.

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and validation, they are often satisfied with the result - - even an adverse result.[8] When they have voice and validation and feel that they have been treated fairly and in good faith, participants also tend to find the results of the proceeding to be noncoercive, and feel as if they were voluntary participants in the ultimate judicial pronouncement.[9] Satisfaction of these participatory or dignitary values can engender healing and more effective behavior in the future.[10] In general, people feel better about making their own decisions rather than having things imposed upon them by others and exercising a degree of control and self-determination in significant aspects of one's life may be an important component of psychological wellbeing[11].

On appeal, as in the trial itself, the lawyer typically functions as the instrument of the client's voice.[12] In the context of the brief and oral argument, it is the lawyer who tells the client's story and advances the client's position[13]. Appellate lawyers can be more effective, and can produce greater client satisfaction by making certain that they really understand their client's stories, and what is it their clients wish to convey.[14] While the appellate process has its inherent limitations, and is, of course, not a forum for a retrial, there are, of course, ways of integrating the client's concerns into the communication with the court.[15]

Appellate courts can also be more effective by being good listeners. Even if they must, due to the constraints of the law, issue a decision adverse to a litigant, there are still ways to express empathy, let individuals know that they have been heard, and let individuals know that their arguments have been fairly and fully considered. The PCA does not accomplish this.

The Speaking (or Therapeutic) Affirmance

What could replace the cold and silent per curiam affirmance is an order essentially reciting the salient facts of the case and mentioning the arguments. Even if the court feels bound by authority to decide a case adversely to the litigant, it could communicate this and still send out a message that the participants in the process have been heard. Such speaking (or therapeutic) affirmances would not consume considerably more time than a PCA, and could be essentially constructed from a law clerk's case summary or memorandum.

Moreover, therapeutic affirmances would not need to be published in the law books, but simply would be sent to the parties and their counsel. They could be short documents that demonstrate the appellate court's understanding of the basic facts of the controversy and the contentions made by the appellant. After reciting the facts and summarizing the arguments, a therapeutic affirmance could simply conclude with a one-sentence statement the reasons why the judgment must be affirmed. For example, the court could say: "While we understand the contentions made by the appellant and that he or she feels that the decision below was erroneous, under our law we must defer to the discretion of the trial judge in matters such as these, and therefore, for the reasons set forth in the appellee's brief, we must affirm." The second portion of this sentence, explaining the basis for the affirmance, of course, could vary based upon the appellate issues presented.

While drafting a brief therapeutic affirmance would involve some appellate court time and effort that a *per curiam* affirmance would render unnecessary, the therapeutic value of trying to satisfy the appellant's need for procedural justice would more than justify these additional expenses. Moreover, these expenses may also be justified by an additional consideration - - increased accuracy in the appellate process. The possibility always exists that the appellate court has misunderstood the issues or facts: indeed, this is the usual basis for a motion for rehearing sometimes filed by a losing party on appeal. If this possibility has occurred, a *per curiam* affirmance will prevent anyone from knowing about it and also will frustrate the losing party's opportunity to seek rehearing in order to correct it. The speaking affirmance will minimize the possibility of such an error.[16]

Conclusion

Even if insufficient to change the result reached the trial court, the therapeutic value of providing the appellant with the assurance that his or her story was heard and understood can be significant. It can help a criminal offender accept the court's conclusion that he has violated the law and is deserving of punishment, thereby increasing the potential for successful rehabilitation and reintegration into the community. It can help parties in civil disputes to get past bad feelings that such disputes inevitably inspire, and that lawsuits frequently exacerbate; such resolution will ease the transition to their post-litigation circumstances. It can

enable parties who have experienced the physical or emotional trauma of an accident, an intentional tort, or a divorce, to begin the healing process. While these emotional and therapeutic dimensions of an appeal have not been regarded as a proper concern of an appellate court, they should be.

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Endnotes:

[1]. *See e.g.,* Conference of Chief Justices & Conference of State Court Administrators, CCJ Resolution 22 & COSCA Resolution 4, *In Support of Problem-Solving Courts* (2000); *Special Issue on Therapeutic Jurisprudence,* 37 COURT REV. 1-68 (Spring 2000); Ronner & Winick, *Silencing the Appellant's Voice: The Antitherapeutic Per Curiam Affirmance,* 24 SEATTLE L. REV. 491 (2000) (including a section on therapeutic jurisprudence and appellate courts). Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV.439 (1999).

[2]. Bruce J. Winick, *The Jurisprudence of Therapeutic Jurisprudence,* 3 PSYCHOL. PUB. POL'Y & L. 184, 185 (1997). Also, see generally LAW IN A THERAPEUTIC KEY (David B. Wexler & Bruce J. Winick eds., 1996). PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION (Dennis P. Stolle, David B Wexler & Bruce J. Winick, eds. 2000).

[3]. *See* FRANK M. COFFIN, ON APPEAL 177 (1994) ("By affirming [a trial court] opinion, with or without some additional comments[,] . . . the court not only saves itself considerable time but shows the trial court that it recognizes work well done.") DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL 323 (2d ed. 1990) ("The principal reasons for dispensing with an opinion or for not publishing it are that a case involves no new questions or applications of law and the decision would have no precedential value").

[4]. KNIBB, *supra* note 3, at 323 ("A judgment entered without [an opinion] is not a denial of due process.")

[5]. For example, see E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); JOHN THIBAULT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 83-84, 94-95 (1975); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990); E. Allen Lind et al., *Voice, Control, and procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments,* 59 J. PERSONALITY & SOC. PSYCHOL. 952 (1990). For applications of these principles to the civil commitment hearing, see Tom R. Tyler, *The Psychological Consequences of Judicial procedures: Implications for Civil Commitment Hearings*, 46 SMU L. REV.433 (1992) [hereinafter Tyler, *The Psychological Consequences of Judicial Procedures*]; Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing,* 10 J. CONTEMP. LEGAL ISSUES 37, 46-47 (1999) (discussing such principles and the role of counsel in civil commitment hearings).

[6]. Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U.L. REV. 1145, 1158 (1997).

[7]. *Id.*

[8]. Winick, *supra* note 5, at 48.

[9]. *Id.* Recent research by the MacArthur Network on Mental Health and the Law on patient perceptions of coercion found that people feel noncoerced even in coercive situations like civil commitment when they perceive the intentions of state actors to be benevolent, and when they are treated with dignity and respect, given voice and validation, and not treated in bad faith. *Id.* at 47-50. *See generally* Nancy S. Bennett et al., *Inclusion, Motivation and Good Faith: The Morality of Coercion in Mental Hospital Admission*, 11 BEHAV. SCI. & L. 295 (1993). Winick, *supra* note 6, at 1158-59 ("Patients who are provided procedural justice in this sense, even if involuntarily committed or pressured by family members and clinicians to be hospitalized, reported experiencing considerably less coercion tha patients who were not afforded procedural justice.").

[10]. *See generally* Winnick, *supra* note 6, at 1158-66.

[11]. BRUCE J. WINICK, THERAPEUTIC JURISPRUDENCE APPLIED 68-83 (1997). Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives,* 37 VILL. L. REV. 1705, 1755-68 (1992).

[12]. *See* Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag,* 45 AM. U. L. REV. 859, 875-76 (1996).

[13]. *See id.* at 875 (Explaining how "storytelling and appellate practice are yokemates on several planes" and that "[i]n every appeal, there is, of course, the client's story."). In order for appellate attorneys to understand their clients' stories, they must develop their listening skills. *See* Steven Keeva, *Beyond the Words: Understanding What Your Client is Really Saying makes for Successful Lawyering,* 85 A.B.A. J. 60, 61 (1999). They must spend time with their clients and create a comfortable psychological environment in which the client can "open up" to the lawyer about what had happened and how he or she feels about it. *See id.* at 63.

[14]. *See* Ronner, *supra* note 12, at 875-76 (discussing how storytelling can "serve to penetrate bias and foster empathy in what can be typical - - a conservative bench, sometimes one with an extreme pro-government and law enforcement perspective. The omnipresent appellate problem of how to release the client's story from what is often the bastille of the record compounds an already difficult task.").

[15]. *See id.* at 873 (discussing the "disquieting missing of making [a] client grasp that retrying his case in the appellate court is a *literal* impossibility and not some covertly hostile unwillingness on our part to help"); *id.* at 876 ("[T]he appellate scop must balance the desire to sing the client's story with the necessity of not doing what dehors the record, which the produce of the story that trial counsel has already told or imposed on the client.").

[16]. As many readers are aware, in Florida, a Judicial Management Council set up a PCA Committee to consider whether to abolish per curiam affirmances. *See* Mark D. Killian, *Judicial management Council Panel Rejects the Abolition of PCAs*, FLA. B. NEWS, July 1, 2000, at 1. After two years of study, the Committee concluded that while there was some merit to requiring written explanations of every decision, there were also some practical countervailing reasons. *Id.* The PCA Committee did, however, issue a set of recommendations to limit the use of the PCA. Needless to say, the speaking affirmance was not one of the recommendations.

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