# The Record

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# The Accidental Jurist[1]

## Suggestions for the Reluctant Traveler to the Appellate Forum

**by David W. Henry**

The internal procedures[2] of the Florida Supreme Court, the appellate decisionmaking process,[3] and jurisdiction[4] in the appellate courts are well noted. However, as a result of the 1980 amendments to the Florida Constitution, the district courts of appeal are often the first and last stop on the appellate monorail,[5] and, therefore, unlike past works, this article eschews academic concerns and focuses on winning at the district court of appeal.

Perhaps nowhere in the judicial system are good writing and speaking skills more richly rewarded than in the domain of the appellate arena. An appellate judge never witnesses a stinging cross examination, never is entertained or disgruntled by a trial lawyer's histrionics, rarely has occasion to bang a gavel. Absent is the interplay of lawyer, witness, judge and jury.

An appellate judge reads: Motions, decisions, initial briefs, answer briefs, reply briefs, memoranda. Oral argument is a perfunctory diversion. Brevity, clarity, and precision tri-

*continued, page 2*

# Message from the Chair

**by Anthony C. Musto, Chair**
**Appellate Practice and Advocacy Section**

A cross-stitch sampler on my office wall reads, "Old lawyers never die. They just lose their appeal."

I hope this maxim will comfort me throughout the rest of my career since I just hit a milestone that demonstrated to me that I am indeed an "old lawyer." There have now been more volumes of the Southern Reporter, Second Series, published since my name first appeared in its pages than had been published prior to that time. (I was spared the ignominy of achieving the same distinction with regard to the Federal Reporter only by the institution of that series' third edition.)

As our executive council dealt with a number of issues of significance to appellate practitioners at its January meeting, I looked back as an old lawyer and realized that the field of appellate practice in Florida is in the midst of a period of great change.

Until a few years ago, appellate practice wasn't a lot different than it had been when I was admitted to the bar. Sure, assignments of error were abolished (a good change), the Florida Supreme Court lost its *Foley* jurisdiction (arguably good, arguably bad) and our federal appeals started going to Atlanta, instead of New Orleans (a disaster—nothing against Atlanta, but New Orleans is—well, it's New Orleans and you can't find a better place to combine a weekend with an oral argument). Still, the basics of our practice remained the same.

As Bob Dylan sang, however, "The times, they are a-changin'." The First District Court of Appeal has clearly been the appellate court most willing to experiment with new ideas. Last year, it split into divisions, creating a general and an administrative division. Recently, it asked the supreme court to allow it to add a criminal division. Additionally, that court has instituted a system for oral argument by teleconference, eliminating the need for attorneys who do not practice near the court to travel to Tallahassee.

The First District has also fol-

*continued, page 4*

## INSIDE:

umph here; verbosity, ambiguity and superficiality mark the path of defeat. Yet, the infrequent appellate practitioner should not be quick to conclude that appellate practice is no more than a combination of two tools: writing and speaking. Rather, there is among the best appellate advocates, I believe, an understanding of the appellate forum, and an awareness of the unwritten rules and nuances of the appellate court. An appellate lawyer should understand the appellate court as otologically distinct from the trial court venue.

The institutional differences between appellate and trial courts are, I submit, largely unappreciated. Some of the differences stem from the cloister-like environment at the district court, the day-to-day conferencing and interaction among the judges at the appellate court, the role of the law clerks, and the inherent doctrinal tensions attendant to an intermediate court of appeal.

Although some circuit court decisions now appear in the Florida Law Weekly, circuit judges are rarely confronted with their own prior holdings. Unlike trial courts, the district courts must wrestle with the desire to do "substantial justice" without sacrificing stability, consistency or the presumptive validity of lower court rulings. The institutional biases, mores, and interpersonal dynamics all influence the way argument is received and analyzed, the way precedent is handled, and ultimately how cases are resolved.

No article can attempt to describe the many ways these socio-doctrinal-institutional concerns manifest themselves. The goals of this article is necessarily more modest. By focusing here on the two primary tasks of an appellate lawyer, writing and speaking, it is hoped that these tasks will be more proficiently performed for the benefit of the appellate panel. If the obligatory tasks are well-performed and understood, a lawyer can more incisively focus on the intangible institutional factors, persuasive subtleties, word choice, and similar details which distinguish excellence from mere competence.

Turning first to the tasks of writing, the appellate brief must be short and persuasive. Choose words and select cases with surgical precision. The vacationer's rule—decide on what to bring and then cut it in half—could well serve many appellate practitioners in determining the page length of appellate briefs. Bring only what fits under a single staple.

Checking out your page length is a sign of trouble. Do not file a 50-page initial brief and a 15-page reply brief on venue. Too often, lengthy briefs work only as obfuscatory anesthesia.

Nothing hinders appellate review more perniciously than muddled thinking leading the court down intellectual detours. The worst briefs have numerous indented paragraphs, excessive underlining, needlessly duplicative citations, and dwell on tangentially relevant decisions. Stylistic affection never cures anemic thinking. Underlining, indenting, italicizing, and footnoting are usually symptoms of a single infirmity— an ill-conceived argument.

At the district court of appeal, every case is assigned a primary judge who is responsible for drafting the initial opinion of the court. Each judge has two or more law clerks who draft a memorandum summarizing facts and points of law raised in the briefs. Consequently, the brief writer should not assume the reader well understands the area of law involved. Organization is the key. Use subsections in your brief. Discuss threshold issues first, *i.e.*, standing, mootness, and jurisdiction. Clearly separate each ground for affirmance or reversal, and delineate the different intellectual paths which may be traveled to arrive at the ruling you seek. Never intertwine arguments.

Properly reciting the facts is crucial. In addition to creating ethical violations,[6] factual misrepresentations or unsubstantiated factual allegations destroy credibility and are irksome. "A subway is not an underground train . . . Don't say restroom, say toilet."[7] Factual oversights and misstatements disenfranchise one from the judge's trust.[8] The facts are in the record. The findings of the trier of fact are all you need, and indeed all that an appellate court may properly consider. Cite to the record on appeal as paginated by the clerk of the court. Proper citation to the record is required under Rule 9.210(b)(3). Failure to cite to the record may lead to the brief being stricken by motion or sua sponte. *See Island Harbor Beach Club Ltd. v. Department of Natural Resources*, 471 So. 2d 1380 (Fla. 1st DCA 1985).

The Florida Supreme Court and one commentator suggest that the answer brief be organized on a point by point basis in response to the opponent's brief.[9] *See Dania Jai Alai Pallace v. Sykes*, 450 So. 2d 1114 (Fla. 1984). This practice assumes the opponent understands the issues—an assumption, like an Italian train schedule, which frequently departs from reality. No special deference should be afforded the initial brief because it was the first submitted. Every appellate attorney must construct his or her own intellectual algorithm before writing. One logically

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presented brief is more helpful than several complimentary yet befuddling efforts.

Do not abuse the hospitality of the appellate court. Your invitation to argue is only as broad as the order appealed from in the notice of appeal. Do not ask the appellate court to "balance equities" or engage in other discretionary tasks within the province of the trial court. Only trial courts seek truth, appellate courts seek out error. Do not parenthetically allude to unassigned errors and minor trivialities floating within the record. If some fact is not directly related to a preserved point on appeal, then it is flotsam. Do not ask the district court of appeal to distinguish a controlling Florida Supreme Court decision on the ground that it is "over 40 years old."

Briefing an appellate issue means thinking and writing. Writing must include editing and rewriting. "Woe to the advocate who believes he can salvage a poor brief with a stunning oral argument."[10] Proofread. Turgenev reportedly rewrote *Fathers and Sons* seven times; your client's right to acquittal or last chance for victory deserves at least a second draft. Miscitations and other manifestations of carelessness are inexcusable insults to the tribunal.

Do not use footnotes in a brief. There are only two exceptions to this rule. Use a footnote in place of a lengthy citation to preserve the persuasive affect of a sentence. Footnotes are also permissible when arguing for an extension or significant change in the law where public policy is at issue and where scholarly efforts buttress debatable positions.

Good oral argument is conversational, careful, but not stilted. The questions from the panel of judges should be your paramount concern. Questions are not obstacles in the path of advocacy, they are the stepping stones to victory, and opportunity to correct a misapprehension, or to seize upon a dispositive fact or principle. Several questions from the court concerning the proceedings below suggest inadequate presentation of the facts in the brief. *See generally* Philip Padovano, *Florida Appellate Practice* §13.1 (1988).

For the same reason that one should not purchase Kentucky Fried Chicken in Stockholm,[11] one should not object during oral argument. Do not waste time by steadfastly refusing to concede the obvious. Because the lawyer is charged with knowledge of the facts in the record, the response, "I was not trial counsel," is never well received. An answer to a question calling for a yes or no response should not begin, "Well, . . ." Nor should a damaging concession be left unmitigated; follow-up with an equally compelling and countervailing fact or principle.

Appellate lawyering should not be reduced to brief writing and oral argument. However, these skills must be mastered, must become second nature, so as to afford one the time and intellectual breathing room needed to appreciate the subtle aspects of the appellate forum in the same way that a mathematician must have a thorough understanding of calculus, differential equations, and the like, before turning to the philosophical plateaus of that discipline.

A candidate for the appellate moot court team at the University of Florida once asked a team member, "What does it take to make the team, how do I prepare for oral argument?" After the perfunctory comments concerning preparation, the team member told the candidate, "moot court is really an attitude." That rejoinder, however simplistic, does at least reveal an appreciation for the unarticulable and intangible aspects of appellate practice beyond a knowledge of the case law.

Understand that the ruling you seek must be defensible both doctrinally and systemically. Doctrinally means in accordance with past precedent, and if different, then not premised upon a tenuous factual distinction merely to rationalize a result-oriented jurisprudence. Appellate judges are rightfully hesitant to draw distinctions on slender factual reads. Too often those distinctions prove unworkable in subsequent cases. Witness the difficulty encountered by the district courts of appeal in attempting to distinguish admissible "corroborative" evidence from inadmissible propensity evidence after two Florida Supreme Court opinions involving testimony regarding prior bad acts of the defendant in sexual battery cases. *See Beasley v. State*, 518 So. 2d 917 (Fla. 1988); *Anderson v. State*, 549 So. 2d 807 (Fla. 5th DCA 1989).

Systemically defensible means the ruling you seek must not usurp the presumptive validity of lower court rulings in the area of law involved, nor impinge upon the legitimate spheres of activity entrusted to coordinate branches of government. This concern is evident, for example, in appeals from alimony awards where the appellant frequently asks the appellate panel to revisit the trial judge's equitable distribution plan. *See, e.g., Canakaris v. Canakaris*, 87 So. 2d 197 (Fla. 1979) ("the appellate court must fully recognize the superior vantage point of the trial judge"); *Murphy v. Murphy,* 475 So. 2d 1253, 1255 (Fla. 5th DCA 1985) ("we will not disturb the delicate balancing of equities in the final judgment"); *cf. Tuller v Tuller*, 469 So. 2d 212, 214 (Fla. 5th DCA 1985) (Cowart, J., dissenting) ("the husband was badly shortchanged").

The scope or standard of appellate review governing a particular case is fundamentally important, and too often ignored. That standard should not be treated as a procedural footnote to the substantive grounds. The standard of review is substantive. It answers a question of public policy asking who is best entrusted with the ultimate decisional authority. To whom shall we allocate power within the system? Who shall be the lawgiver? Be prepared to explain to the court the rational for the standard of

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## Section Plans Flagship Seminar for 1996

The Section's CLE Committee is planning the inaugural Section Seminar, **"Hot Topics and Issues in Appellate Practice"** for November 1996. We need your suggestions for topics and speakers. Please contact:

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| Jack Aiello | 407/650-0716 |
| FAX: | 407/650-0665 |
| Tom Hall | 904/488-4965 |
| FAX: | 904/488-7989 |

## ACCIDENTAL JURIST

*from page 3*

review. Answering that question may well provide the appellate advocate with the strongest argument available when faced with a case largely indefensible on the merits.

### Conclusion

Because the only characters an appellate judge ever sees are the ones generated by a word processor, choose words as a virtuoso painter would the colors on his palette. While clear analytical thinking, concise writing, and the deft handling of questions in oral argument are the cornerstones of appellate advocacy, one should be sensitive to the institutional, systemic, and intangible forces that impact appellate level decisionmaking. Be mindful of how the holding you seek impacts or modifies other areas of the law. Consider what public policy is being furthered or undermined by the ruling you desire. Ask yourself if you would want your name on the opinion you are asking the court to publish.

***David W. Henry*** *is a former law clerk at the Fifth District Court of Appeal, and is an attorney with Taraska, Grower & Ketcham in Orlando, Florida.* *The author wishes to thank Leslie King O'Neal for her valuable assistance in the preparation of this article. This article first appeared in, "The Briefs" published by the Orange County Bar Association.*

**Endnotes:**

[1] With apologies to Anne Tyler, author of *The Accidental Tourist* (1985).

[2] A. England and R. Williams, "Florida Appellate Reform One Year Later," 9 Fla.St.L.Rev. 221 (1981); G. Borgognoni and M. Keane, "Practice Before the Supreme Court of Florida: A Practical Analysis," 8 Stet.L.Rev. 318 (1979) [hereinafter "Practice Before the Supreme Court of Florida"]; Judge T. Boyer, "Appellate Mystique," 51 FlaB.J. 506 (1977).

[3] Brown and Haddad, "Judicial Decision-Making on the Florida Supreme Court: An Introductory Behavioral Study," 19 Univ.Fla.L.Rev. 566 (1966); *see also* Boyer, *supra* note 2.

[4] *Se, e.g.*, R. Mann, "Scope of the All Writs Power," 10 Fla.St.L.Rev. 197 (1982); G. Borgognoni and M. Keane, "Filing Briefs on Jurisdiction in the Supreme Court of Florida," 54 Fla. B.J. 510 (1980).

[5] "The 1980 [amendments to the Florida Constitution have] substantially reinforced the role of the district courts as final appellate courts in Florida judicial system" B. Overton, "District Courts of Appeal: Courts of Final Jurisdiction With Two New Responsibilities—And Expanded Power To Certify Questions and Authority To Sit En Banc," 35 Univ.Fla.L.Rev. 80, 81 (Winter 1983)

[6] *See* Florida Rules of Professional Conduct, 4-33—Candor Toward the Tribunal (1989).

[7] *The Accidental Tourist*, *supra* note 1, at 6.

[8] "Nothing will forfeit confidence of the court more effectively than the misstatement of the record or the statement of fact off the record." Wilkins, "The Argument of an Appeal," 33 Cornell Law Quarterly 42 (1947), *quoted in* Borgognoni and Keane, *supra* note 2, at 366 n. 274.

[9] E. Anderson, "Four Unwritten Rules," 51 Fla.B.J. at 88, 90 (Feb. 1977).

[10] *Id.* at 90.

[11] *See The Accidental Tourist*, *supra* note 1, at 13.

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## CHAIR'S MESSAGE

*from page 1*

lowed in the footsteps of the Fourth District in establishing an appellate mediation program. It is hoped that such programs, which have been successful in the federal Eleventh Circuit Court of Appeals and elsewhere, will reduce court backlogs and enable parties to reach quick and equitable dispositions of their cases.

It is likely that by this time next year, Florida's appellate rules will have undergone a metamorphosis. The 4-year cycle report of the Appellate Court Rules Committee, which will soon be submitted to the supreme court, recommends encompassing within the rules many provisions that are presently located within the civil, criminal, juvenile, workers' compensation and other sets of rules. If the court adopts the committee's recommendations, appellate practice should become considerably less confusing.

Appellate certification came into existence a few years ago, bringing with it the many benefits that had previously related only to other areas of the law. At about the same time, the Appellate Practice and Advocacy Section was created, establishing a forum for appellate practitioners to interact with each other and with the bench, to educate themselves on the latest developments and to have input on pending issues.

The creation of the section occurred at a good time, because it coincided with a growing willingness of appellate judges to become more accessible to the bar. One supreme court justice remarked to me that a program like the supreme court question and answer session that the section sponsored at last June's bar convention (and will sponsor again this year) would have been unthinkable 20 years ago. Those of you who have attended any executive council meetings have seen that our judicial members have brought invaluable perspectives to the council's discussions.

What will the future hold? I recently served as a member of the appellate courts focus group at the Judicial Management Council's Long Range/Strategic Planning Conference. We were asked to come up with visions for what the appellate courts could look like in 25 years. Our scenarios included statewide speciality appellate courts that would hear only cases in particular subject areas and that would conduct oral argument primarily by teleconference; transmission of electronic records and transcripts immediately after notices of appeal are filed; the availability of appellate judges to accept computer transmitted arguments and immediately review important issues prior to or during trial; increased research and filing capabilities that will enable attorneys to conduct much of their practice from a boat in the Bahamas; and the increased use of alternative dispute resolution processes to lower the caseloads of the appellate courts.

An ancient Chinese proverb reads, "May you live in interesting times." Some claim that the proverb was meant as a curse, some say a blessing. In any event, it is clear that this is an interesting time for appellate practitioners and for the section. I hope it proves to be a blessing for us all.

# From the Chair-elect

**by Raymond T. (Tom) Elligett, Jr.**
**Schropp, Buell & Elligett, P.A.**

## Professional Appellate Courts

Justice Wells addressed the Hillsborough County Bar Association at one of our fall luncheon meetings. I had just argued before the Florida Supreme Court the prior week.

When I said hello to Justice Wells, he said with a smile that he hoped "we" weren't too hard on you last week. "No," I said, "I've been treated much worse."

Thinking about it later, it struck me how well I and all the attorneys who argued before the Court that day (and on my prior visits) had been treated.

Sure, there are tough questions on the positions counsel are advocating. That's to be expected (and welcomed, oral argument articles often tell us).

But the dignified and polite manner the justices pose those questions and conduct the discourse with the lawyers sets the tenor of the arguments. It also exemplifies the professionalism we should all aspire to when appearing before any court, and in dealing with opposing counsel and our clients.

Section members who had the privilege of attending the Supreme Court program at the 1995 Florida Bar Convention know Florida lawyers are blessed with a court that is accessible and committed to our profession.

My experience in each of our five District Courts of Appeal mirrors the Supreme Court, both in their approach to oral arguments and their willingness to participate in local bar seminars and programs.

Many have written much about professionalism in the practice of law during the last few years. We are fortunate to have appellate courts which provide a role model.

## Got any good ideas?

By the time you receive this, we will be in the midst of planning for the Section's 1996-97 year. Following Steve Stark and Tony Musto will be a mixed blessing.

They have both done phenomenal jobs and the Section has many fine projects and events already established or in the works. These include the *The Record*, the Adkins award, the appellate seminars and the Bar Convention judicial reception.

Thus, it should be easy to shepard the continuation of these good works. But the Section's accomplishments also present a challenge to come up with innovative additional projects.

So, if you have any ideas for new Section projects, please write me directly at 401 E. Jackson Street, Suite 2600, Tampa, Fl. 33602. I welcome and look forward to your assistance.

# Social Security Appeals

**by Barbara Arlene Fink**

Lawyers who enjoy the congenial, low-keyed nature of appellate practice might also find themselves attracted to the somewhat quirky world of Social Security appeals. Practice before the Social Security Administration is informal and non-adversarial, but the only attorneys who get paid are the attorneys who win.

To represent a client before the Social Security Administration, the practitioner must file Form Number SSA-1696-U4. The form serves as a letter of appointment which is signed by both the claimant and the attorney. Payment for legal services will be withheld from the claimant's past due benefits and sent directly to the attorney unless counsel waives this right on the appointment form. Appointment must be approved by the Secretary of Health and Human Services. In general, any attorney who has been admitted to practice before the highest state court or before any federal court may represent a claimant before the Social Security Administration.

To obtain fees, counsel must file Form Number SSA-1560-U4 in accordance with 20 C.F.R. 404.1725(a) and 20 C.F.R. 416.1525(a). The Social Security Administration can award a prevailing attorney up to 25% of the past due benefits. 20 C.F.R. 404.1730.

Proceedings before the Social Security Administration are considered non-adversarial. For this reason, the Equal Access to Justice Act does not apply to work attorneys perform before the agency, and it is not considered a violation of due process for a claimant to represent oneself before the Social Security Administration.

Should the appeals process progress from the administrative agency to the federal district court, however, the attorney may seek compensation under the Equal Access to Justice Act. 5 U.S.C. 504; 28 U.S.C. 2412. This is so because once the action is filed in federal court, the Social Security Administration is represented by counsel, and the action becomes an adversarial proceeding. 5 U.S.C. 504(b)(1)(c).

Before the cause is heard by the federal district court, the claimant must complete four stages of hearings at the administrative level. At the first stage, the claimant applies for benefits at a local Social Security office. Once the claim is filed, the Social Security office obtains necessary records and issues its initial determination. A claimant has 60 days to seek reconsideration of an unfavorable decision. Reconsideration is handled at the Social Security District Office where the case is reviewed by persons other than those who made the initial determination. The claimant may seek a hearing before an Administrative Law Judge within 60 days of an unfavorable reconsideration. In most instances, the

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**SOCIAL SECURITY APPEALS**
*from page 5*

hearing before the Administrative Law Judge is the earliest stage at which an attorney becomes involved. A claimant who is dissatisfied with the decision of the Administrative Law Judge has 60 days within which to appeal to the Review Council of the Social Security Administration. 42 U.S.C. 401-0431 (Disability Benefits); 42 U.S.C. §§1381-1383 (Supplemental Security Income): 20 C.F.R. 401-404.2127 (Disability); 20 C.F.R. 416.101-416.2227 (S.S.I.).

As with judicial appeals, administrative reviews must be requested within the appropriate time period. However, in contrast to the stylized formalities of judicial appeals, administrative appeals are informal procedures. The parties in administrative appeals are not considered adversaries. Rather, they are engaged in a fact finding process, and the claimant is encouraged to present new evidence at any stage. Additionally, if a claimant has failed to preserve his or her rights by missing a deadline, the claimant may, in many instances, file a new claim.

A claim may be reopened upon a showing of "good cause." Good cause may be found if new and material evidence is presented, if a clerical error is made in the computation or recomputation of benefits, or if there is a clear showing on the face of the previously considered evidence that an error was made. A claimant has four years to reopen a disability claim. 20 C.F.R. 404.989. An S.S.I. claim may be reopened within two years of the initial determination. 20 C.F.R. 416.1489.

Once a claim has passed through the four administrative stages, a claimant may seek relief in the federal district court. The District Court record consists of all proceedings before the Social Security Administration. It is the agency's duty to transcribe and index the record. Both parties submit briefs, and for the first time in the process, no new evidence may be submitted. Appeal can be taken from the federal district court to the federal circuit court, and finally to the U.S. Supreme Court.

The unusual aspects of Social Security practice are among its most attractive attributes. It is one of the few areas of law in which even the opposing party can be happy for your client if he or she wins.

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***Barbara Fink*** *is a sole practitioner in Daytona Beach.*

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# Executive Council Update

*The Executive Council of the Appellate Practice and Advocacy Section, at its January 11, 1996, meeting, took the following positions:*

1. The Council voted 15-3 to oppose Recommendation 6 of the Article V Task Force, which would allow separate appellate court judicial nominating commissions to submit no fewer than three nor more than six persons to the governor for each vacancy on the bench. The Council believed that the commissions should continue to be limited to three names in order to ensure that only the most qualified individuals are nominated. It was also noted that one of the reasons for the existence of judicial nominating commissions is to limit the discretion of the governor in making appointments. Expanding the number of nominees would expand the governor's discretion and thus, in the Council's opinion, increase the possibility of political influences coming into play in the selection process.

2. The Council voted 9-7 to oppose Recommendation 15, which would specifically authorize parties to file motions for written opinions after the issuance of per curiam affirmances without opinion. The Council believed that there would be an extremely small number of cases in which such motions would be appropriate. The Council's vote was based in large part on the fact that the courts are aware from the briefs and arguments of the facts and issues and the Council's belief that the courts are properly basing their determinations as to whether to write an opinion on those factors. Given these facts, the Council felt that this recommendation would generate a large number of groundless motions without a significant benefit to the system. It was also noted that in the few cases in which a motion of this nature would be appropriate, such as when a decision of another court is rendered shortly after the affirmance, a request for a written opinion can be included in a motion for rehearing under the present rule.

3. The Council voted 10-9 to support the request of the First District Court of Appeal to create a criminal division, but also voted by unanimous voice vote to express its concerns over potential problems with en banc cases if such a division is created.

As reflected by the close vote, there was a strong difference of opinion among the members of the Council on this matter.

The majority believed that the creation of a criminal division would allow judges sitting in that division to develop a particular expertise in criminal law and that it would foster uniformity in decision making, particularly with regard to recurring issues, such as search and seizure issues. The majority also pointed out that they were not aware of any problems that have arisen since the First District was split into administrative and general divisions and that none should therefore be anticipated for the proposed criminal division.

The minority countered that because judges would rotate among the divisions, the benefits seen by the majority would not be substantial and would not outweigh the benefit of having the perspective of a greater number of judges on both criminal and civil matters. Members of the minority also expressed the belief that the proposal was primarily an effort to handle cases more efficiently and that this goal could be better met by better case management and in-

creased use of summary procedures.

It is probably fair to say that the determining factor in the Council's vote was the belief that, because the concept of a criminal division has never been tried in Florida, deference should be given to the First District's determination that such a division is needed. It was generally believed that after the division has been in existence for two years, the matter should again be reviewed in light of the court's experiences over that time.

Although the Council was sharply divided on the question of whether a criminal division should be created, it was unanimous in its belief that the creation of such a division has the potential to create problems with regard to the consideration of en banc matters.

It was noted that approval of the present proposal would likely result in three five-judge divisions in the First District. Under these circumstances, the potential problems discussed in Justice Anstead's dissenting opinion in *In re Amendments to Florida Rules of Appellate Procedure 9.331(b)*, 646 So. 2d 730 (Fla. 1994), would become more likely to occur. In that opinion, Justice Anstead noted that three judges in a five-judge division can control an en banc decision. The Council recognized this fact and noted that if three divisions of five judges each are created, every unanimous panel decision will in effect be an en banc decision. The Council also pointed out that the concern discussed by Justice Anstead with regard to the consistency and stability of en banc decisions being affected by the rotation of judges will be even more acute with the increased rotation contemplated by the present proposal.

In addition, the Council identified another potential problem with regard to en banc matters. Presently, en banc cases are heard by the entire court only when they involve "matters of general application." Florida Rule of Appellate Procedure 9.331(b). The Council foresees situations in which issues would affect two of the three divisions, such as issues relating to rules of evidence that apply in court cases, both civil and criminal, but not to administrative matters. Such cases would not be of general application, but would affect cases in more than one division. Among the possible ways of dealing with this potential problem would be allowing consideration by the full court in such circumstances, allowing the court total discretion as to which cases the full court should hear, allowing judges from two of the three divisions to hear matters en banc when appropriate and requiring that all en banc matters be heard by the full court, rather than just by judges in a particular division.

In light of the lack of time to fully consider this matter, the Council did not take a position as to which, if any, of the above suggestions should be implemented. It did, however, unanimously recommend that, if the Florida Supreme Court allows the creation of a criminal division, it should take the concerns about en banc cases into account and take such action as it deems appropriate to prevent problems in that regard.

# Shaping Appellate Opinions: The Appellate Role

**by David A. Davis, Assistant Public Defender, Second Judicial Circuit**

*The role of an advocate in appellate procedures should not be denigrated. . . . [W]e will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.*

***Wilson v. Wainwright***, 474 So.2d 1162, 1165 (Fla. 1985).

Many of us have wondered just how much influence we have on the court's decision. Occasionally, the majority's opinion will have lifted entire sections from your brief—or your opponent's. More frequently, cases you relied on appear in the opinion.

To help shed some light on counsel's role in the appellate process, let us review *Saffor v. State*, 20 Fla. L. Weekly S335 (Fla. July 13, 1995), a case brought to the Florida Supreme Court by a certified question from the First District Court of Appeal. In this article, I will examine how the district court treated Saffor's claims and the State's response. Then, I will discuss how defense counsel and the State presented the issue in the Florida Supreme Court.

## Round One.

The State charged Ramon Saffor with sexual battery of a child under 12. The evidence showed that the Defendant had lived with the victim's mother, and had fathered two of her children. One night, Saffor slept in the same bed with 10-year-old Jason and allegedly sodomized the boy.

Over defense objection, the trial court allowed evidence that four years earlier Saffor was convicted of a lewd assault on his niece, who was 12 at the time. The girl stayed at her aunt's house one night, during which Saffor came into her room and put his hand on her vagina. He stopped when she told him to leave.

Saffor was convicted of the sexual battery of Jason, and appealed to the First District Court of Appeal. *Saffor v. State*, 625 So.2d 31 (Fla. 1st DCA 1993). He raised only a routine *Williams* rule issue, as modified by *Heuring v. State*, 513 So.2d 122 (Fla. 1987). Saffor quoted a key portion of *Heuring* in his Initial Brief in which the Supreme Court noted that to minimize the unfair advantage similar "bad act" evidence gave the prosecution, it

> must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or com-

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> bination of characteristics which sets them apart from other offenses.

*Id*. at 124.

The quoted language laid out the course of Saffor's argument. Typically, when that issue arises, the Appellant cites the *Williams* rule, quotes section 90.404(2), Florida Statutes, which codified it, presents some cases for and against admitting this evidence, and analyzes the facts showing why he should win. Saffor essentially did that. He simply laid out the differences between the charged offense and the crime he had committed years earlier: one involved a male, another a female; one victim's protest was heeded, the other's was not; one involved intercourse, the other fondling.

In its Answer Brief, the State initially noted that similar fact act evidence is admissible if relevant to prove a pattern of criminality. The State did not tie this proposition to the familial situation arguably presented in Saffor's case. Perhaps the State recognized it had stronger material to work with because it did little to push that argument beyond stating the law.

Instead, like Saffor, the State relied on *Heuring*, but for a different reason:

> Cases involving sexual battery committed within the familial context present special problems. . . . We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.

*Id*. at 124-25.

However, the State never developed anything from that quoted portion of *Heuring*. It merely accepted Saffor's interpretation of the Supreme Court's opinion and followed the same analytical path trod by the Appellant. That is, it related the similarities and differences between the two factual scenarios: both victims were children over whom Saffor had some familial authority—one child was under his direct control, the other was his niece; both were young—one was 10, the other 12; both acts took place in the home while the children were asleep.

Almost tangentially, the State noted that exact similarity between the incidents was not required. It did little to develop that idea beyond emphasizing that the earlier act corroborated the latest child victim's testimony, as *Heuring* permitted. The State's brief also included the standard complaints that the defendant had not preserved the point for appeal, the lower court's ruling was discretionary, and whatever error occurred was harmless.

Neither party's brief questioned either that the incident had occurred in a familial context or that Saffor had an authoritative relationship with either child, a prerequisite *Heuring* clearly required. Neither questioned how similar the similar fact evidence must be under *Heuring* to be admissible. Each side simply looked at the facts, found similarities or distinctions, and drew their respective conclusions.

Neither the State or Saffor could have anticipated the flurry of judicial activity this case created at the First District Court. That court had been troubled by *Heuring*, and the more recent case of *Beasley v. State*, 518 So.2d 917 (Fla. 1988), in which the state high court reaffirmed *Heuring*, and "determined that the collateral crime evidence was corroborative because it demonstrated what some commentators have described as 'deprave sexual propensity.'" What obviously troubled the court was the *Heuring* requirement of strict similarity of facts in familial situations where identity was not an issue. Why should that be required when the prior bad acts only corroborated the child victim's testimony? In short, how could a reviewing court reconcile the language of the *Heuring* quote cited by the State from the *Heuring* quote cited by Saffor.

Judge Wolf, writing for the majority of the en banc court, heavily relied on *Calloway v. State*, 520 So.2d 655 (Fla. 1st DCA 1988), a case neither party had cited, for the proposition that a "less rigid standard of similarity" was required to admit similar fact evidence in a familial setting. The opinions of two other district courts were also cited in support of the majority's position. *Bierer v. State*, 582 So.2d 1230 (Fla. 3d DCA), *review denied*, 591 So.2d 180 (Fla. 1991); *Gould v. State*, 558 So.2d 481 (Fla. 2d DCA 1990). Thus, in reaching this conclusion, the court relied on one of the two cases the state had cited but not discussed in its brief.

The majority further strengthened its conclusion by stating that if strict similarities are required, "[t]he similarity of the method of attack in this case outweighs any dissimilarity." *Saffor*, 625 So.2d at 34. Finally, picking up on one of the State's standard arguments, the court concluded by noting that the trial court's decision was subject to an abuse of discretion standard that in this case was not abused.

Judge Ervin wrote a concurring and dissenting opinion focusing on an issue neither party had spotted. He argued that the record contained insufficient evidence that Saffor engaged in a "familial-type relationship," the preliminary fact needed before *Heuring* could be applied. Once that hurdle was overcome, however, "the important similarity between the charged and collateral crimes is that the child victim in each situation is placed in an extremely vulnerable position, which makes him or her far more susceptible to the dissolute influence of adult family-type members, and such differences as gender, location, types of offense are simply immaterial to a reasoned decision regarding the admissibility of collateral crime-evidence under such circumstances." *Saffor*, 625 So.2d at 38 (Ervin, J. concurring in part and dissenting in part).

Saffor had not advanced that threshold argument in his brief. Yet, neither had the State taken such an extreme position or even hinted at it in its Answer Brief. The evidence of Saffor's relationship with the victim seemed to preclude the argument.

Judge Allen, in dissent, used the *Heuring* language Saffor had relied on and argued that the collateral crime evidence needed striking similarities before it could be admitted. He did admit, though, that *Heuring* provided no guidance on "how much or how little the collateral crime must resemble the charged offense to be admissible for the purpose of cor-

roborating the victim's testimony." *Saffor*, 625 So.2d at 40 (Allen, J., dissenting).

This, then, became the crux of the First District's problem: *Heuring*, as that court read the opinion, provided a dim beacon to guide the lower courts in admitting collateral crimes that occurred in familial settings.

The briefs submitted only marginally helped the court. Saffor had no reason to argue Judge Ervin's point, first because he had not presented it to the trial court, and more importantly, as Judge Miner pointed out in his concurring opinion, the evidence supported a finding that Saffor had a familial or authoritative relationship with the child victim.

Predictably, the State's brief cast the evidence as relevant under the reduced standard of admissibility *Heuring* allowed when offenses arose in a family context. Accepting Saffor's focus on *Heuring*, it merely analyzed the factual similarities and differences between the two criminal incidents.

Thus, although the parties' briefs triggered the First District Court's discussion in *Saffor*, they did little to help the court resolve the issues that case and "many serious cases brought before the appellate courts of this state" had raised. Obviously, the judges had wrestled with the implications of *Heuring* for a long time. *Saffor* appeared to present precisely the problem the First District believed *Heuring* had created, but the court was left to its own ingenuity to sort it out.

The First District's problem, however, was more subtle than interpreting a Supreme Court opinion. It had to deal with the "striking similarity" language found in the opinion, which the district court obviously did not like. A lower appellate court cannot "overrule" a supreme court decision. *Hoffman v. Jones*, 280 So.2d 431 (Fla. 1973). So the First District had to diplomatically tell the Supreme Court that *Heuring*'s strict similarity requirement was incorrect. That is why Judge Wolf used cases from other District Courts to bolster the First District's position. He strengthened his position by declaring that such rulings were, in any event, subject to an abuse of discretion standard. Thus, while the certified question suggested the First District Court wanted more guidance, the majority's opinion strongly indicated what it wanted the state high court to decide.

Saffor, therefore, failed to convince the First District Court his case presented nothing more than a *Williams* rule type issue. That court was looking for more than simply a factual analysis of the evidence. On the other hand, the State never clearly focused on the significant implications the familial custody requirement would have for the First District. The "similar" crime could have dissimilarities, but if it and the charged offense arose in the familial context, the differences were either overlooked or were irrelevant.

Fortunately for Saffor, the First District Court decided to seek further clarification from the Supreme Court about the meaning of *Heuring*. With that issue clearly framed, Saffor could respond with greater force than he had done before the First District.

## Saffor Strikes Back

When Saffor took his case to the Florida Supreme Court his job was, in some respects, easier than in the First District Court. The district court had specifically identified the question for review, and within a strict reading all Saffor and the State had to do was present reasons why the Supreme Court should or should not follow the district court's reasoning. Additionally, because the intermediate court had certified the question, Saffor avoided the need for a jurisdictional brief, often a significant hurdle aggrieved parties must overcome if they want to take their case to the supreme court.

Rather than directly attacking the First District's ruling or answering the certified question, Saffor cast the issue before the Supreme Court in broader terms. *Heuring*, he argued, had affirmed the need for strict similarities in cases of child sexual abuse crimes between the charged crime and the collateral bad act, but it had relaxed that requirement somewhat when both offenses occurred in a familial setting. It did so because corroborating the child's victim's claims was important. Saffor contended that the use of such proof to bolster the credibility of a child victim was novel. Before this latest case, collateral crimes evidence was admissible to establish some element of the charged offense, not to bolster credibility. Relevancy, as defined by section 90.401, Florida Statutes, was evidence which tended to prove or disprove a material fact. Materiality, in turn, looked to the elements of the charged offense. Since credibility was not an element, corroborating it was therefore irrelevant.

Saffor then focussed on the use of collateral crimes evidence in a familial setting. If identity is not an issue, the presumption in such cases, then the State's case ultimately hinges on its ability to corroborate the child victim's testimony. But if credibility is not a material issue, as Saffor contended, then evidence used to bolster it, should be irrelevant. Said another way, such evidence, establishing the accused's character by specific acts, exhibited only the defendant's propensity to commit such crimes.

Saffor's novel argument was problematic. True, the Florida Evidence Code, unlike its federal counterpart, has no definition of materiality, and the charges define the extent of relevant evidence. One would be hard pressed, however, to agree that credibility of a witness is never an issue at trial. To the contrary, as Professor Ehrhardt states, "credibility of witnesses is always an issue, even though credibility is not raised by the pleadings." Charles Ehrhardt, *Florida Evidence* § 401.1 (1995 ed.).

Saffor presented an even more troubling argument when he contended that admitting evidence of crimes done to other victims as corroborative evidence amounted to nothing more than allowing the State to exhibit the defendant's propensity to commit such crimes. As such, he claimed *Heuring* clearly violated section 90.402(2)(a), which proscribed admitting evidence solely for that purpose.

This high level attack challenged not only the First District's opinion in his case, but the basis on which it had ruled. Saffor wanted the Florida Supreme Court not only to reverse the district court's opinion in his case, he sought to have *Heuring* overruled or at least distinguished into oblivion. In terms of sheer bravado,

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## THE APPELLATE ROLE

*from page 9*

Saffor's approach was amazing. As amazing, the State never recognized the obvious, fatal problems with Saffor's approach.

In *Heuring*, the Supreme Court stated that evidence of similar acts committed in a familial setting was relevant because it "corroborated" the most recent alleged victim's credibility. "Corroborate" was a carefully chosen word because traditional *Williams* rule law, and section 90.402, excluded similar fact evidence if its sole purpose showed the defendant's **propensity** to commit some crime. Propensity—corroboration—Saffor saw little to distinguish the two words, and he told the Supreme Court as much. In support, he cited cases from other states that had no similar qualms in admitting other similar fact evidence for to show propensity. For those states, propensity or corroboration, it was all the same to them.

If so, Saffor argued, Florida should recognize the sham of its artificial distinction. The problem, of course, was that the court might have agreed with him but also approved of what the other states had done. It was a risk, but such an approach was less harrowing than it might initially appear.

First, the law that developed after *Williams* has consistently adhered to its propensity rationale, and no opinion or even any justice has seriously questioned the need to exclude evidence to show the defendant acted in character when he committed both crimes. Second, section 90.402 specifically excluded such evidence, and the court, if it wanted to follow what other states had decided, would have to explicitly rewrite that statute, something the court obviously would be loathe to do.

Thus, Saffor's argument itself took on constitutional proportions because he attacked *Heuring*'s "corroboration" rationale as nothing more than allowing propensity evidence. Since the legislature had explicitly prohibited similar fact evidence to be used in that fashion, the *Heuring* opinion was an unconstitutional infringement on the legislature's right to make law.

At the end, Saffor returned to the certified question, accepted *Heuring*'s rationale, and used Judge Allen's strict similarities requirement to show that the trial court erred in admitting the collateral crimes evidence. First, as Judge Ervin had done in his separate opinion, Saffor argued that the State had not proven Saffor committed his crimes in a familial setting. He did so without much gusto, perhaps because he, like everyone else except Judge Ervin, recognized the offenses as having occurred when Saffor exercised some "familial authority" over his victim. He pushed his strict similarity position much more forcefully, concluding that even in a familial setting, the similarities between the two events were too few and too general and the dissimilarities were too many. Returning to his initial point, he concluded by claiming the collateral crimes evidence served only to establish Saffor's propensity to commit sexual batteries on children.

The State, early in its brief, argued that the child victim's credibility not only was an issue in this case, it was the only question the jury had to decide. It quoted the First District's opinion in *Saffor* holding that strict similarity of collateral crimes evidence was not required, and it noted that the concurring opinions had agreed with the majority on that point.

The State then spent a considerable part of its brief analyzing the facts in *Heuring* and *State v. Williams*, 110 So. 2d 659 (Fla. 1959), the case which gave rise to the *Williams* rule. It responded to Saffor's argument that corroborative evidence was nothing more than propensity spelled differently by noting that the latter type evidence was admissible if that was not the only reason for admitting it. It argued that the relaxed standard adopted by the First District applied only in cases where identity was not at issue. In other situations, strict similarity was required.

The State then sought to widen the *Heuring* rule by claiming that as long as the evidence was relevant it was admissible. That is, courts have for a long time recognized that no *Williams* rule problem is presented if evidence of some other crime is relevant for reasons other than those articulated in *Williams*. For example, the State can introduce evidence that the defendant stole a gun earlier in the day to prove it was the same one he used in a robbery later that night. No *Williams* rule question arises in that context. The only issue is relevancy.

Thus, the State's ploy was simple: If the evidence of some earlier sexual crime was relevant it should be admitted regardless of the limiting language of *Williams* and *Heuring*. If the State's argument on this point were adopted, it would expand both *Williams* and *Heuring* beyond recognition.

The Florida Supreme Court rejected both extreme positions in its opinion in *Saffor*, 20 Fla. L. Weekly S335 (Fla. July 13, 1995). From its silence, it appears the court saw no constitutional problems with *Heuring*. It was not going to re-examine that case, and it saw the certified question in this case as nothing more than an opportunity to clarify the law in this area.

Likewise, the court rejected the State's invitation to abandon the law in *Williams* and section 90.402. Instead, the court approached the case as if it were merely fine-tuning a piano that already sounded reasonably good. Saffor's case would establish no sweeping changes. It would merely clarify what the Supreme Court thought was already clear.

The court first dealt with Judge Ervin's argument that Saffor's crimes had not been committed in a familial setting. It took judicial notice of sorts that "[i]n today's society, the parameters of the traditional family have become much less clearly defined. Many children live in situations involving broken homes, where multiple residences and stepparents or live-in partners are the norm." It did little to clarify what facts are relevant in determining what constitutes a family relationship, trading "familial setting" for the equally ambiguous phrases, "bonds of trust," "continuing contact of a familial nature," and "family-type relationship." Paraphrasing Justice Stewart's famous definition of obscenity, they knew what a fam-

ily was, they just could not define it. Stay tuned for further litigation on that point.

The court ultimately settled for a position between Judge Allen's strict similarities argument and Judge Ervin's very liberal admissibility requirement. It still demanded that the state provide strict similarities between the charged offense and the collateral crime, but it held that one such point would be that the crimes were committed in a family setting. "We hold instead that when the collateral sex crime and the charged offense both occur in the familial context, this constitutes a significant similarity for purposes of the *Williams* rule, but that these facts, standing alone, are insufficient to authorize admission of the collateral sex crime evidence." That significant similarity, however, was not enough in *Saffor*, and more was needed where there were also significant dissimilarities between the two incidents. When the high court thus analyzed the facts in Saffor's case, it found them insufficient to justify the collateral crime, and it reversed for a new trial.

Justice Anstead, concurring, would have adopted Judge Allen's approach to the problem. Justice Shaw, concurring and dissenting found sufficient points of similarity to justify admission.

What is amazing about the Florida Supreme Court's opinion is that it, like Saffor and the State, largely ignored the district court's majority opinion in *Saffor*. Rather, it perceived the problem as reconciling Judge Allen's and Judge Ervin's positions.

Thus, the parties provided as little help to the Supreme Court in resolving the issue as that court saw it as they did at the district court level. The Supreme Court was satisfied with the rule announced in *Heuring* and saw little reason to change it. The State provided scant reasons to the court to follow the First District's opinion, merely repeating what the Supreme Court or the district court had said without much analysis.

*Saffor* shows how counsel can be out of step with the courts. At the district court level, both Saffor and the State saw the collateral crimes evidence as nothing more than a routine application of *Heuring*. By contrast, the First District saw that case as an opportunity to vent its largely self-induced frustration in applying that case, and it sought a broad ruling allowing easier admissibility of evidence of a defendant's earlier similar bad acts.

At the Supreme Court level, Saffor and the State followed the district court's lead, and tried to use the case as a landmark for a major change in interpreting *Heuring*. The state high court refused to follow that lead, and decided the certified question on narrow grounds. It had no desire to make a major change in the law, only to clarify what it probably thought was already clear.

How should Saffor and the State have better argued their positions before the Supreme Court? In hindsight the answer is clear—but then it usually is. As obvious as it sounds, parties need to answer the question certified. Here, neither side really did. Saffor fished for bigger game by trying to get the court to overrule *Heuring*. The First District, however, had never directly or expressly discussed the problems Saffor saw. The Florida Supreme Court ignored Saffor's arguments probably because they were not presented to the district court for them first to consider. This amounts to an appellate "contemporaneous objection" rule, and here the Supreme Court felt no compunction to follow a path blazed only by Saffor.

The State likewise never made a sustained argument supporting the district court's ruling. Nor did it ever expose the legal and logical holes in Saffor's contentions. It merely presented the facts and holdings in some well-settled cases without any argument to tie them to this case. Conclusory nuggets had to suffice.

The Supreme Court then had to fashion its own solution to a problem it probably never considered when it wrote *Heuring*. The First District understood that case, and what standards it created. It just did not like the results the case forced them to accept. So, it fashioned a certified question to tag along with an opinion that, if adopted, would have significantly expanded *Heuring*'s scope. If read that way, perhaps Saffor was justified in taking a similarly broad, fundamental approach to that case. Likewise, one has a hard time faulting the State for returning to the original *Williams* case to cast its discussion for sustaining the lower court's opinion. If either party or the district court erred, it was in failing to perceive that the Florida Supreme Court was satisfied with *Heuring*, and was disinclined to alter that law.

# Committee Updates

## CLE Committee

### Co-sponsorship with Criminal Lawyer Section.

Stuart Markman is chairing this program. He has arranged a 50/50 split with the criminal lawyer section. We are to get three speakers; they will get three also. It is scheduled for May 2, 1996, live in Miami, and May 3, 1996, live and taped in Tampa. The topic is "Advanced Criminal Law Appellate Practice Update." So far, Stuart has obtained Judge Peggy Quince of the Second District Court of Appeal, formerly with the Attorney General's Office. Judge Lazzara, who was booked to be a speaker for our Section had to withdraw because of his recent appointment. Judge Rosemary Barkett of the Eleventh Circuit is pending, as is Magistrate Tom Wilson of the Middle District. Stuart is in the process of contacting several more individuals for speaking positions.

### Co-Sponsorship with Government Lawyers Section.

Jack Aiello is the chair for this program. He has confirmed that we will be receiving 5% for use of our section name in the co-sponsorship. At this time, we are not required to provide any speakers unless there is

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a panel discussion at the end of the program, in which case we would provide one appellate speaker. The seminar, which is entitled "Forfeiture," is scheduled for April 17, 1996, live and taped in Tampa, and April 18, 1996 in Miami.

### "Hot-Topics in Appellate Law."

Our flagship program, "Hot-Topics in Appellate Law" is co-chaired by Tom Hall and Jack Aiello and is tentatively scheduled for November 1996. Hopefully, the new appellate rules will be approved by then. If not, the rules will still be a topic based on what has been submitted for approval. Roy Wassen suggested that we invite someone from the appellate rules committee to speak on that topic. The steering committee has discussed suggestions for topics. Some of the suggestions to date include the certification process; appellate attorney's fees; appellate "nonos"; closing arguments and fundamental error; judicial activism (judges deciding cases on issues not briefed); the new rules in state appellate court; and the new rules in federal appellate court. Everyone is invited to submit any additional ideas to Tom Hall or Jack Aiello.

In a related area concerning the "Hot-Topics," the Government Lawyers Section wants us to co-sponsor another program in January or February 1997 on the revisions of these rules. Therefore, we are considering including the Government Lawyers Section in our hot-topics seminar to get more revenue. We can use speakers on the rules from our seminar as a contribution to their seminar.

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## Civil Appellate Practice Committee

Members of the Civil Practice Committee of the Section met to conduct business at the mid-year meeting. Bob Sturgess, the committee chair, suggested that the committee arrive at a statement of purpose. After much discussion amongst the members, the committee decided upon the following statement of purpose:

*The purpose of the Civil Appellate Practice Committee of the Appellate Practice and Advocacy Section of The Florida Bar is to promote and improve the perception of appellate practice as a specialty to the trial bar and the general public, and to promote excellence before the appellate tribunals.*

Upon motion to approve the statement of purpose, the motion was passed. The committee also decided that it would submit articles for publication in *The Record* that were of general interest to civil appellate practitioners. One member proposed that interviews with "seasoned" appellate practitioners may be of interest to Section members.

The members then discussed establishing a "hotline" for young lawyers to contact experienced appellate practitioners with general appellate questions. One member submitted that the "Bridge the Gap" course and material would be an ideal place to distribute this information. A discussion followed concerning potential malpractice and referral issues. A subcommittee was formed to address these concerns and to implement the project.

The committee next debated submitting amicus curiae briefs on issues of interest to the Section. Two concerns were raised pertaining to the committee's involvement in such an effort. First, the members questioned how topics would be chosen. Second, concerns were voiced over the required approval process. This subcommittee's work is ongoing.

The committee then discussed the concept of polling our Florida appellate judges concerning their views of appellate practitioners. If such a poll were conducted, the results could be published (hopefully in The Florida Bar *Journal*) and used by appellate practitioners as marketing material. A subcommittee was created to implement this project.

Another subcommittee was formed to explore the creation of a "brief bank" which would contain what our appellate judges believe are exemplary briefs. These briefs could be used as models for all appellate practitioners to better understand what is both helpful to and persuasive in our appellate courts.

The committee discussed the recurring problem of low meeting attendance. Those in attendance expressed concern that persons who did not actively participate on the committee, nor have a valid excuse for non-participation, should not receive credit for committee participation. A motion was made and passed that a letter would be sent to all committee members advising them that failure to attend meetings and refusal to participate on a subcommittee would result in their name being stricken from the committee member roster.

# Bylaws of the Appellate Practice and Advocacy Section

*A Bylaw revision regarding dues (Article II, Section 2) was approved by the Executive Council meeting on January 11, 1996. This revision will be voted upon at the Section Annual Meeting in June 1996.*

## ARTICLE I
### Name and Purpose

Section 1. This section shall be known as the Appellate Practice and Advocacy Section, The Florida Bar.

Section 2. The purpose of this section shall be to enhance the role and skills of members of The Florida Bar who are engaged in appellate practice through study, continuing legal education, the dissemination of materials on matters of interest and concern to the membership, and through the exchange of ideas among the membership of the section. It shall also be the purpose of the section to cooperate with other sections, otherwise to promote the objectives of The Florida Bar, and to encourage participation with the bar by appellate practitioners.

## Article II
### MEMBERSHIP AND DUES

Section 1. Any member in good standing of The Florida Bar interested in the purposes of this section is eligible for membership upon application and payment of this section's annual dues. Any member who ceases to be a member of The Florida Bar shall no longer be a member of the section.

Section 2. The amount of the dues shall be ~~$ 25.00 per annum~~ set by the executive council, payable on or before the first day of July of each year.

## Article III
### OFFICERS AND EXECUTIVE COUNCIL

Section 1. The officers of the section shall be the chair, chair-elect, vice-chair, secretary, and treasurer.

Section 2. The officers, together with the immediate past chair, the editor of the section's newsletter, and 21 other members (comprising 1 attorney representative from each of Florida's 5 judicial districts, 1 judicial representative from each of Florida's 5 district courts of appeal, plus 1 judicial representative from the United States Court of Appeals, Eleventh Circuit, plus 10 at-large members to be elected by the section as hereinafter provided) shall comprise the executive council. The president and president-elect of The Florida Bar shall be ex-officio members of the executive council.

## Article IV
### DUTIES AND POWER OF OFFICERS

Section 1. The chair (or successively, the chair-elect or vice-chair, in the absence of the chair) shall preside at all meetings of the section, and of the executive council. The chair shall schedule the meetings of the executive council in accordance with the provisions of these bylaws. The chair shall formulate and present at the annual meeting of the section a report of the work of the section for the preceding year. The chair shall appoint the chairs and members of all committees of the section who are to hold office during the chair's term. The chair shall plan and supervise the program of the section at the annual meeting of the section during the chair's term, subject to the directions and approval of the executive council. The chair shall oversee the performance of all activities of the section. The chair shall keep the executive council duly informed and carry out its decisions. The chair shall perform such other duties as usually pertain to the office of chair or as may be designated by the executive council. The chair shall be an ex-officio member of each committee of the section.

Section 2. The chair-elect shall, in consultation with the chair, arrange for the appointment of the chairs and members of all committees who are to hold office during the chair-elect's term as chair. The chair-elect shall aid the chair in the performance of the chair's responsibilities in such manner and to such extent as the chair may request. The chair-elect shall perform such further duties and have such further powers as usually pertain to the office of chair-elect or as may be designated by the executive council or the chair. The chair-elect shall be an ex-officio member of each committee of the section.

Section 3. The vice-chair shall be responsible for the procuring and publishing of suitable articles to advance the purpose of the section, in consultation with the chair of appropriate committees and other officers of the section. The vice-chair shall aid the chair and the chair-elect in the performance of their responsibilities in such manner and to such extent as either may request. The vice-chair shall perform such further duties and have such further powers as usually pertain to the office of vice-chair or as may be designated by the executive council or the chair. The vice-chair shall be an ex-officio member of each committee of the section.

Section 4. The secretary shall consult with and assist the chair, chair-elect, and vice-chair of the section as to the work of the section generally, in such manner and to such extent as they may request. The secretary shall be the custodian of all books, papers, documents, and other property of the section. The secretary shall keep a true record of the proceedings of all meetings of the section and of the executive council, whether assembled or acting under submission. The secretary shall assist the chair in the preparation of the section's annual report submitted in the spring of each year for publication in The Florida Bar Journal, describing the activities and plans of the section. The secretary, in conjunction with the chair, as authorized by the executive council, shall attend generally to the business of the section. The secretary shall be an ex-

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officio member of each committee of the section.

Section 5. The treasurer shall consult with and assist all the officers of the section as to the work of the section generally, in such manner and to such extent as they may request. The treasurer shall monitor all accounts, reports, and other documents prepared as to section funds, revenues, and expenditures to make certain that all accounts, reports, and other documents are accurate, and shall confer with employees of The Florida Bar in the proper disbursements of section funds. The treasurer shall report on the section's present and projected financial condition upon request of the chair or other members of the executive council. The treasurer, in conjunction with the chair, as authorized by the executive council, shall attend generally to the business of the section. The treasurer shall be an ex-officio member of each committee of the section.

## Article V
### DUTIES AND POWER OF EXECUTIVE COUNCIL

Section 1. The executive council shall have general supervision and control of the affairs of the section, subject to the provisions of the Rules Regulating The Florida Bar, the policies adopted by the Board of Governors of The Florida Bar, and these bylaws.

Section 2. The executive council shall authorize all commitments or contracts that entail the payment of money, and it shall authorize the expenditures of all section funds.

Section 3. Except where otherwise provided in these bylaws, all binding action of the executive council shall be by majority vote of those present and voting, provided that a quorum shall consist of not less than a majority of the voting members. Members of the executive council shall vote in person.

Section 4. Upon taking the office of chair, the chair shall schedule at least 3 meetings of the executive council annually, and the executive council shall meet at least annually and as often in addition as the reasonable needs of the section require. Advance written notice of no less than 10 days of meetings other than the 3 aforementioned meetings shall be given to all members of the executive council by either the chair or the secretary.

Section 5. The provisions of section 3 notwithstanding, the chair and at least 2 other officers of the section may, and upon the written request of a majority of the executive council shall, submit or cause to be submitted in writing, to each member of the executive council, any proposition upon which the executive council may be authorized to act, and the members of the executive council may vote upon such proposition so submitted by communicating their vote, in writing over their respective signatures, to the secretary, who shall record in the minutes of the section the text of the proposition so submitted, that it was submitted to all members of the executive council in writing without a meeting, and the vote thereon. Binding action of the executive council shall be by majority of the executive council.

## Article VI
### MEETINGS OF THE SECTION

Section 1. The section shall hold an annual meeting of the section, at a time and location as may be arranged by the executive council, and with such program and order of business as may be arranged by the executive council.

Section 2. Special meetings of the section may be called by the chair, upon approval of the executive council, at such time and place as the executive council shall determine. Reasonable notice of any such special meeting shall be given to all members of the section.

Section 3. The members of the section present at any meeting shall constitute a quorum for the transaction of business.

Section 4. All binding action of the section shall be by majority vote of the members present.

Section 5. The procedure of all meetings of this section shall be governed by Robert's Rules of Order Revised unless otherwise provided herein.

Section 6. The section hereby delegates to the executive council authority to act for the section as to all matters whatsoever which may come before the section during intervals between the annual and special meetings of the section.

Section 7. The executive council may direct that a matter be submitted in writing to the members of the section for vote by mail. The members of the section may vote upon such proposition so submitted by communicating their vote, in writing over their respective signatures within a reasonable time prescribed by the executive council, to the secretary who shall record in the minutes of the section the text of the proposition so submitted, that it was submitted to all members of the section in writing without a meeting, and the vote thereon. Binding action of the section shall be by a majority of the votes received in accordance with the provisions of these bylaws.

## Article VII
### ELECTIONS

Section 1. The officers, other than the chair, shall be elected at the annual meeting of the section. They shall serve 1-year terms,[1] beginning at the adjournment of the annual meeting at which they are elected, or until their successors have been elected and qualified. The chair-elect shall become chair upon adjournment of the annual meeting concluding the chair-elect's term as chair-elect.

Section 2. Five members of the executive council, other than the officers of the section and the judicial representatives, shall be elected at the annual meeting of the section.[2] They shall serve 3-year terms, beginning at the adjournment of the annual meeting at which they are elected and qualified.

(a) Judicial representatives from Florida district courts and from the United States Court of Appeals, Eleventh Circuit, shall be appointed by the chief judge of each respective court. The judicial representatives shall serve 3-year terms, beginning at the adjournment of the annual meeting at which their appointments are presented.

(b) Nothing in these bylaws shall be construed as precluding a member of the section who is also a member of the judiciary from seek-

ing an elected position on the executive council, or as an officer.

Section 3. Prior to each annual meeting of the section, the chair shall appoint a nominating committee of not less than 3 members of the section, which shall make and report nominations to the section for such officers and executive council members as are scheduled to be elected at the annual meeting. No nominee shall be reported to the section who has not agreed to serve if elected. Other nominations for the same offices may be made from the floor at the annual meeting, provided the nominee has agreed to serve if elected.

## Article VIII
### SUCCESSION OF OFFICERS AND VACANCIES

Section 1. The chair-elect shall, unless prevented by death or disability from being able, or having refused, to act as chair-elect, automatically assume the office of chair at the end of the annual meeting concluding the chair elect's term as chair-elect. The chair shall serve a term of 1 year.

Section 2. In the event of the death, disability or refusal of the chair to serve a full term, the chair-elect shall perform the duties of the chair for the remainder of the chair's term or disability, as the case may be.

Section 3. In the event of the death, disability or refusal of the chair-elect to serve a full term, the vice-chair shall perform the duties of the chair for the remainder of the chair's term or disability, as the case may be.

Section 4. In the event of the death, disability or refusal of the vice-chair to serve a full term, the secretary shall perform the duties of the vice-chair for the remainder of the vice-chair's term or disability, as the case may be.

Section 5. In the event of the death, disability or refusal of the secretary to serve a full term, the treasurer shall perform the duties of the secretary for the remainder of the secretary's term or disability, as the case may be.

Section 6. The executive council, during the interim between annual meetings of the section, may fill vacancies in its own membership, or in the office of treasurer. Members of the executive council and officers so selected shall serve until the close of the next annual meeting of the section. The remainder of any executive council member's unexpired term shall be filled by election at the next annual meeting, as provided in Article VII of these bylaws.

Section 6. If any elected member of the executive council shall fail to attend 2 executive council meetings in any fiscal year, the member shall be subject to immediate removal from office, pursuant to action by vote of the other members of the executive council, and the vacancy shall be filled according to the applicable provisions of these bylaws.

Section 7. At the end of the chair's term in office as chair, the immediate past chair shall serve as a member of the executive council for a term of 1 year.

## Article IX
### COMMITTEES

Section 1. Except as otherwise provided in these bylaws, all committees shall be appointed in accordance with the provisions of Article IV, and any member of the section, including officers and members of the executive council, may serve as chair or as a member of a committee.

Section 2. Standing committees of the section shall be:

1. Nominating (mentioned in Article VII of these bylaws);
2. Membership;
3. Criminal Appellate Practice;
4. Civil Appellate Practice;
5. Administrative Appellate Practice;
6. Appellate Court Liaison;
7. Continuing Legal Education;
8. Programs;
9. Appellate Rules Committee Liaison;
10. Appellate Certification Liaison;
11. Legislation; and
12. Publications.

Any of these committees may work jointly as the need to do so may from time to time arise.

Section 3. Special committees shall be appointed, as provided herein, as the need to do so may from time to time arise.

## Article X
### LEGISLATIVE POLICIES

Section 1. The section may be involved in legislative (or judicial or administrative) action that is significant to the judiciary, the administration of justice, the fundamental legal rights of the public or the interests of the section or its programs or functions, so long as that involvement is consistent with the policies outlined in these bylaws and consistent with the policies promulgated by the Board of Governors of The Florida Bar.

Section 2. Any legislative, judicial, or administrative position of the section ("Legislative Position") must be adopted in accordance with the provisions of this article. During the course of the section's activities, and as promptly as possible, the chair or the chair's designee shall notify the executive director of The Florida Bar of any new or current section-approved legislative positions. In July of each year, prior to the next regularly scheduled meeting of the Board of Governors of The Florida Bar, the chair of the section or the chair's designee shall notify the executive director of The Florida Bar of any new or current section approved legislative positions then in effect. Such legislative positions will be clearly identified as legislative positions of the section only, at all appropriate times before legislative bodies or its members, unless otherwise authorized by the Board of Governors of The Florida Bar.

Section 3. The section's legislation committee shall be composed of the section officers and such members as may be appointed by the chair of the section, consistent with the standing policies of The Florida Bar Board of Governors. Whenever because of time constraints the executive council cannot meet to adopt a legislative position prior to the time when legislative (or judicial or administrative) action is expected or required, the legislation committee has the authority to adopt the legislative position of the section with respect to pending legislation. Any position that is thus taken must be reported to the executive council's next scheduled meeting and may be approved or rescinded in accordance with this

*continued, next page*

policy.

Section 4.

(a) Any proposed legislative position and the recommendations of the initiating committee of the section will be made agenda items and copies will be affixed to the agenda for distribution to all executive council members at least 1 week prior to the executive council meeting. No proposed legislative position will be considered at the executive council meeting unless the section legislative committee or the section chair requests waiver of the rule and such waiver is approved by a vote of 2/3 of the members of the executive council present and voting. Legislative positions initiated by a committee of the section will be considered in the same manner as any other matter for which a decision is requested of executive council by a member of the executive council.

(b) The section's position on legislation not initiated by a committee of the section will be considered under the following procedure:

(i) The legislation committee will review all proposed legislative positions, and, subject to the approval of the section chair, the legislation committee has the discretion to remove any item of proposed legislation from consideration by the executive council if the legislation committee finds that such proposed legislative position is not concerned with a matter within this policy.

(ii) All proposed legislative positions which the legislation committee decides should be considered by the executive council will be forwarded by the legislation committee chair to the chair of the section committee, which, in the opinion of the legislation committee chair, is most concerned with the subject matter of such proposed legislation. The legislation committee chair will request a written report from that committee, reporting the decision which the committee recommends to the executive council, and designating a contact person to confer with the chair of the legislation committee and the executive council.

Section 5. In order to adopt any proposed legislative position, the executive council, by a 2/3 vote of the members present, must find that the proposed legislative position is within the scope of these bylaws and within policies as may be adopted by the Board of Governors. In order to adopt any proposed legislative position, the executive council, by a majority vote of the members present, must also approve the substance of the legislative position presented. Any legislative position taken shall be in accordance with standing policies regarding legislative actions promulgated by the Board of Governors of The Florida Bar. When time constraints with respect to legislative positions of the section require prompt action, the officers of the section may act in lieu of a vote of the executive council. Once approved by the Board of Governors or the board's executive committee, a legislative position of the section shall remain for the full biannual session during which the Board of Governors approved the position, unless otherwise reversed or rescinded by them, or by a 2/3 vote of the executive council of the section.

In lieu of, or in addition to, giving approval to support or oppose a particular legislative position, the executive council may, after debate and consideration of the legislative position, adopt a concept of the position the section favors, and report this concept to the Florida Legislature.

Section 6. The expenses incurred by members of the section in connection with the legislative positions of the section shall generally be borne by the individual member, provided, however, the chair may request the appearance of section members to attend legislative functions or to appear before various committees of the Florida Legislature to testify concerning proposed legislation, with the member's expenses to be paid by the section in accordance with its budgetary policies. The expenses of such member's appearances shall be approved in advance by the section chair. Such expenditures shall be consistent with other section policies, and the treasurer shall be promptly notified of the amount of such expenditure.

## Article XI
### MISCELLANEOUS PROVISIONS

Section 1. The fiscal year of the section shall be the same as that of The Florida Bar.

Section 2. No salary or compensation shall be paid to any officer of the section, member of the executive council, or member of a committee, provided, however, that officers and members of the executive council shall be entitled to reimbursement for expenses ordinarily, reasonably and necessarily incurred on behalf of the section upon submission to the treasurer of appropriate requests with receipts.

Section 3. No action by this section shall become effective as the action of The Florida Bar until it is approved by the Board of Governors of The Florida Bar. Any resolution adopted or action taken by the section may, on request of the section, be reported by the chair of the section to the annual meeting of The Florida Bar for action by its Board of Governors.

Section 4. These bylaws shall become effective upon their approval by the Board of Governors of The Florida Bar and by the section.

## Article XII
### AMENDMENTS

These bylaws may be amended at any annual meeting of the section by a majority vote of the members of the section present and voting, provided any proposed amendment shall first have been approved by a majority of the executive council and written notice of the proposed amendment shall have been provided to all members of the section at least 30 days prior to such annual meeting, and provided further that no amendment so adopted shall become effective until approved by the Board of Governors of The Florida Bar.

The initial officers shall be approved by the Board of Governors of The Florida Bar, based upon the recommendation of the Ad Hoc Committee to Establish The Florida Bar Appellate Practice and Advocacy Section, and they shall serve a term of no less than 1 full fiscal year; i.e., if the officers are appointed during the interim of a fiscal year, the offic-

ers shall retain their offices through the initial annual meeting until the subsequent annual meeting. This provision shall be deemed deleted from this article following the second annual meeting of the section.

Fifteen members of the council, other than the officers of the section, shall be approved by the Board of Governors of The Florida Bar, upon recommendation of the Ad Hoc Committee to Establish The Florida Bar Appellate Practice and Advocacy Section, and those members shall draw lots after their approval to determine who shall serve full terms and who shall serve terms of less than the full length, in order that membership on the council might thereafter be staggered. This provision shall be deemed deleted from this article upon its execution.

**Endnotes:**

[1] The initial officers shall be approved by the Board of Governors of The Florida Bar, based upon the recommendation of the Ad Hoc Committee to Establish The Florida Bar Appellate Practice and Advocacy Section, and they shall serve a term of no less than 1 full fiscal year; i.e., if the officers are appointed during the interim of a fiscal year, the officers shall retain their offices through the initial annual meeting until the subsequent annual meeting. This provision shall be deemed deleted from this article following the second annual meeting of the section.

[2] Fifteen members of the council, other than the officers of the section, shall be approved by the Board of Governors of The Florida Bar, upon recommendation of the Ad Hoc Committee to Establish The Florida Bar Appellate Practice and Advocacy Section, and those members shall draw lots after their approval to determine who shall serve full terms and who shall serve terms of less than the full length, in order that membership on the council might thereafter be staggered. This provision shall be deemed deleted from this article upon its execution.

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**Late Registration**

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**Introductory Remarks**
*Juan Ramirez, Jr., Miami*
*Stuart C. Markman, Tampa*

8:30 a.m. – 9:20 a.m.
**Frequently Asked Questions in Criminal Appellate Practice**
Criminal appellate practice requires extensive knowledge in many different practice areas. This presentation reviews recent developments of importance to the criminal appellate practitioner, and surveys the body of knowledge which can make a difference in appellate litigation. Looking at direct appeals, interlocutory matters, and post conviction proceedings, this program will benefit every appellate and trial practitioner.
*Benedict P. Kuehne, Miami*

9:20 a.m. – 10:10 a.m.
**Supreme Court Update**
An overview of recent Supreme Court cases of constitutional significance, including Fourth, Fifth and Sixth Amendment issues, habeas corpus, and other decisions have a profound impact on criminal law.
*Milton Hirsch, Miami*

10:10 a.m. – 10:20 a.m.
**Refreshment Break**

10:20 a.m. – 11:10 a.m.
**DUI Update**
A thorough review of DUI law, including recent court decisions, legislative amendments, regulatory modifications, and ethical considerations. In short, all the law you need to know and that your client should have known.
*Robert Reiff, Miami*

11:10 a.m. – 12:00 noon
**Evidence: Tools At Your Disposal**
Developments in the law of evidence, including statutory amendments, differences between Florida and Federal Rules, exploring particular decisions, and using the rules to master your case. This discussion includes a look at ethical considerations.
*Charles W. Ehrhardt, Tallahassee*
*Professor, Florida State University College of Law*

12:00 noon – 12:50 p.m.
**Post Conviction Relief**
*Judge Peggy Ann Quince, 2nd DCA*

12:50 p.m. – 2:00 p.m.
**Lunch Break** (on your own)

2:00 p.m. – 2:50 p.m.
**Neil Challenges in Jury Selection**
*William P. Cervone, Assistant State Attorney, Gainesville*

2:50 p.m. – 3:40 p.m.
**Client Participation in Trial Process**
*Craig C. DeThomasis, Gainesville*

3:40 p.m. – 4:30 p.m.
**Preserving the Record in Capital Cases, Second Phase and Appellate Litigation**
*Patrick D. Doherty, Esq., Clearwater*

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