The Record

JOURNAL OF THE APPELLATE PRACTICE AND ADVOCACY SECTION

Volume VI, No. 3 **THE FLORIDA BAR** **March 1998**

Inside the District Court of Appeal, *The Second District*

by Roy D. Wasson, Miami
Executive Council, Appellate Practice & Advocacy Section
with assistance from William A. Haddad, Clerk of Court
Updated by Tracy Raffles Gunn, Tampa.

Introduction

"Each court has its own personality," observed Second District Judge Edward Threadgill in an interview given for this article. This is the second in a series of articles intended to teach appellate attorneys something more about the inner workings of each of Florida's five District Courts of Appeal.[1] The hallmark of this series is the behind-the-scenes vantage point, made uniquely possible by contributions from the judges and staffs of the courts. My collaborator this issue is the Clerk of the Second District Court, William A. Haddad. Bill is an attorney whose duties at the Second District are more diverse than the usual administrative role of court clerks in general. In addition to being the Court Clerk, Bill also takes on Staff Attorney duties, addressing the substance of many cases. Bill, a longtime member of the Bar's Appellate Rules Committee, is very knowledgeable about the practical problems of the attorney in appellate practice; he has long been very active in writing and educating practitioners in appellate practice and procedure. Special thanks go to the following judges for their valuable insights and assistance with this article: Judges Threadgill, Frank, Danahy, Blue, Altenbernd, Quince, and Fulmer. No doubt every judge would have contributed, but there was insufficient time to reach each one before the deadline for publishing this issue.

History and Jurisdiction of the Second District

The Second District Court was one of the original three district courts of appeal created pursuant to the 1956 constitutional amendment restruc-

See "Second District," page 15

Message from the Chair
We need you!

Over the course of our Section's young history, we have been fortunate to have been surrounded with extremely hard-working members. In just a few years, these members turned a fledgling group into a solid organization with active committees and exciting programs. Our journal, *The Record*, continues to be a quality publication, and we have produced for two straight years our *Appellate Practice Guide*, a valuable resource for our members as well as any attorney conducting appellate practice in our state. In addition, our various programs and CLE presentations continue to garner rave reviews and grow in attendance. In short, we've come a long way in a very short time.

However, we are approaching a crossroad. Many of the founding members, many of whom were principally responsible for making our Section what it is today, are reaching the stage where they (including myself) soon will be stepping back to let

continued, page 2

INSIDE:

CHAIR'S MESSAGE
from page 1

the next group of members have a turn. Here's where we need your help. There are many newer faces that have become active over the past two years in both Committee and Executive Council matters, but there simply are too few new faces. Now that our section boasts nearly 1,000 members, I for one would like to see a much broader base of active members. We have many programs that could use the assistance of just a few more people to make them even better. We also have many ideas on the drawing board that will never leave the slate unless we have more people power.

Thus, if you have not already volunteered and participated on any projects or committees, please consider taking the time to do so. Despite our recent growth, there is still considerable opportunity for hard-working members to attain leadership positions very quickly. If you have the desire to achieve and make your Bar membership worthwhile, please get involved.

The Award of Attorneys Fees on Appeal

by Lauri Waldman Ross
Miami, Florida

The purpose of this article is to provide the appellate practitioner with an overview of the substantive basis for an award of appellate attorney's fees and the procedural requisites that must be followed before an appellate court will grant an award of fees.

Attorneys fees are not taxable and will be granted against the other side only when specifically authorized by statute or contract. General principles of "equity" will not suffice.[1] The authorization to assess attorney's fees on appeal is found in § 59.46, Fla. Stat. (1995), which provides as follows:

> In the absence of an expressed contrary intent, any provision of a statute or of a contract entered into after October 1, 1977,[2] providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal.

If an award of appellate attorney's fees is based on contract, the contract must be in writing and the suit instituted must be based on the contract that provides for an award of fees.[3] Further, if the contract contains a provision authorizing attorney's fees to a party required to enforce the contract, reasonable attorneys fees may also be awarded to the other party when he or she prevails.[4]

Under § 59.46, Fla. Stat., the "prevailing party" on appeal has been generally defined as the party prevailing on the significant issues in the litigation.[5] The issue of attorney's fees is not based on the form of the action chosen by either party. Accordingly, a declaratory judgment action may now constitute an "enforcement action" triggering an attorney's fee provision under a contract.[6]

Two other statutes frequently provide a basis for an award of attorney's fees on appeal. First, § 57.105, Fla. Stat., when read in conjunction with § 59.46, Fla. Stat., provides for an award of appellate attorney's fees for frivolous appeals.[7] Section 57.105, Fla. Stat., provides that "the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney[8] in any civil action in which the court finds that there was a complete absence of justifiable issue of either law or fact . . . ." § 57.105, Fla. Stat. (1995). The losing party's attorney will not be held personally liable if he has acted in good faith, based on the representations of his client.[9] § 57.105, Fla. Stat. (1995).

Pursuant to § 57.105, Fla. Stat., when an appellate court reverses a ruling of the lower court, attorney's fees will not be awarded to the appellant pursuant to § 57.105, Fla. Stat., because appellee's position carried a presumption of correctness and was therefore justiciable.[10] However, if an appeal raises a meritorious issue at the time it is taken, but becomes non-justiciable before the briefs are due (or while the appeal is pending) courts are divided on whether an award of frivolous attorney's fees is in order.[11]

Secondly, the appellate courts of this State have uniformly held that a party is entitled to recover appellate attorney's fees pursuant to § 768.79, Fla. Stat.[12] Section 768.79, Fla. Stat., provides for an automatic entitlement to attorney's fees if the defendant's offer of judgment is one of no liability or the judgment obtained by the plaintiff is at least 25% less than the offer. Furthermore, if the plaintiff files a demand for judgment and recovers a judgment in an amount at least 25% greater than the demand, the plaintiff will be entitled to attorney's fees.[13] The Florida Supreme Court has recently clarified that § 768.79, Fla. Stat., does not provide a basis for an award of attorney's fees and costs in the event of a voluntary dismissal unless the dismissal is "with prejudice."[14]

The question of whether a party is entitled to attorney's fees on appeal is the prerogative of the appellate court. A trial court may not award appellate attorney's fees in the absence of an appellate court mandate.[15] Thus, a trial court cannot award fees following denial by the appellate court, nor can a trial court deny fees after an appellate court has granted entitlement.[16]

In order to perfect the right to an award of fees, the party seeking fees must file a motion for appellate fees pursuant to Fla. R. App. P. 9.400. Pursuant to Fla. R. App. P. 9.400, a motion for appellate attorney's fees *must* be filed with the appellate court "no later than the time for service of the reply brief".[17] A motion for appellate attorney's fees should state: 1) the contractual or statutory basis for the award; 2) why the opposing party should be required to pay the award; and 3) the obligation of the movant to pay his or her attorney.

If appellate counsel receives a motion for appellate fees and there is a valid basis for objecting to the award of attorney's fees on appeal, an objec-

tion should be raised prior to the appellate court's determination that an award is proper.[18] A general claim for attorney's fees which does not set forth the specific contractual or statutory basis for fees is insufficient.[19] Citation to the wrong statute is also a basis for denial.[20] Finally, failure to timely comply with Fla. R. App. P. 9.400 is a valid justification for denying attorney's fees.[21]

However, appellate courts, acting within their discretion, may still award appellate attorney's fees based upon an untimely motion. In *Ankeny v. Palm Beach County School Board*,[22] the appellant, nine months after filing her reply brief, filed a request for leave to file an untimely motion citing "clerical error." Appellant not only prevailed on the appeal, she was awarded fees by the majority over a dissent complaining that the justification was inadequate and would nullify Rule 9.400.

After the appellate court determines entitlement to fees, either the appellate court or trial court can determine the reasonable amount of fees to be awarded. Prior to 1987, appellate courts could, in their discretion, award such fees without any evidentiary support. However, in *Sierra v. Sierra*,[23] the Florida Supreme Court put an end to this practice and held that there must be competent evidence in the record to support the award. Competent evidence can be established through filing stipulations or affidavits with the appellate court. Alternatively, if either party objects to proceeding by stipulation or affidavit, or if the appellate court is requested to do so, it may remand to the trial court for an evidentiary hearing on the amount.[24]

If the case is remanded to the trial for a determination of the amount of attorney's fees incurred on appeal, the standard set forth in *Florida Patient's Compensation Fund v. Rowe*,[25] as modified by *Standard Guaranty Insurance Co. v. Quanstrom*,[26] will apply to determine the amount of fees to be awarded.[27] Under *Rowe*, the court awarding a fee may consider exceptional as well as unsuccessful results; it may not, however, reduce the fee based upon a simple *ratio* of successful results to issues raised.[28]

When an attorney represents a client who seeks vindication for a private, as well as public wrong, the amount of attorney's fees recovered is not limited by any contingent fee agreement.[29] To date, only one case in Florida has expressly addressed the applicability of a multiplier to appellate attorney's fees. In *Stack v. Lewis*,[30] the trial court enhanced the lodestar for trial fees by a multiplier of 2.0, due to "the substantial uncertainty of prevailing, the substantial uncertainty of collecting and because the result obtained was the maximum possible result." The appellee was then awarded appellate fees with a 2.0 multiplier for successful defense of the appeal.

The appropriate method for review of an appellate fee award is by filing a motion in the appellate court, rather than by separate appeal.[31] Failure to follow the procedure authorized in Rule 9.400 can cost a party its right of review.[32]

If a decree is manifestly against the weight of the evidence, or contrary to the legal effect of the evidence, it is the duty of the appellate court to reverse the award.[33] This is particularly true with respect to attorney's fees which the profession and the courts are particularly concerned.[34] An attorney's fee award which is out of line with the actual services performed will court reversal even if there is some expert willing to opine that it is reasonable.[35]

One way to determine if a fee is excessive is to examine a gross disparity in time billed by the respective parties.[36] In addition, by their very nature, certain areas of the law are fraught with the potential for abuse. Thus, courts are looking with heightened suspicion at fee awards which are out of line with either the nature of the case or the services reasonably rendered, even if supported by expert testimony.[37] As Judge Alan Schwartz has written, "The existence of such evidence does not require that we abandon our own expertise, much less our common sense."[38]

If the appellate court reverses the amount of attorney's fees awarded, the appellate court will issue a mandate requiring the lower court to fix an amount in compliance with the court's order. In the truly extraordinary case where a trial court declines to follow an appellate mandate, it is within the appellate court's authority to ensure that it does.

In *Zelman v. Metropolitan Dade County*,[39] a recalcitrant judge refused to award a special assistant public defender more than $40 to $50 per hour for successfully handling a death penalty appeal, despite two prior appellate opinions holding the amount awarded to be inadequate. Drawing upon the expertise it had in reducing exorbitant awards, the appellate court took the unusual step of itself setting the value of the attorneys' efforts, based upon the undisputed evidence of record. Three separate Zelman hearings had resulted in the same award, and the Third District, clearly fed up, proclaimed that "There will be no Zelman IV."

In summary, when an appeal is filed, the appellate practitioner should first determine whether the law provides for a basis for an award of attorneys fees. If a statutory or contractual basis exists, a timely motion for appellate fees must be filed with the appellate court setting forth the grounds for the award. The appellate court can set the amount of appellate attorney's fees if the parties provide competent evidence of the amount through stipulation or affidavit. However, if either party objects to this procedure, or if the court is requested to do so, the case will be remanded to the trial court for a determination of the amount of fees to be awarded. Once the amount of the fee is established, the party adversely affected can seek review of the amount awarded by filing a motion in the appellate court.

Lauri Waldman Ross *practices law in Miami where she has her own law firm, specializing in Appellate Practice. She graduated from the University of Florida with high honors in 1977 and received her law degree from the University of Miami cum laude in 1980. She is a former research aide to the Honorable Phillip Hubbart, Third District Court of Appeal (retired) and has been a frequent lecturer on appellate attorney's fees since 1989.*

Endnotes:

[1] *See Coral Springs Roofing Co. v. Campagna*, 528 So. 2d 557 (Fla. 4th DCA 1988).

[2] The October 1, 1977 date applies only to contracts entered after that date, and not

continued...

statutes promulgated after that date.

[3] *Villas of St. George v. Newton*, 531 So. 2d 1051 (Fla. 1st DCA 1988) (oral agreement insufficient): *see Elliot v. Pallotti*, 664 So. 2d 1300 (Fla. 5th DCA 1995) (where complaint asserted other causes of action, but none for breach of contract, claim for fees properly denied).

[4] § 57.105(2), Fla. Stat. (1989) (effective 10/1/88 and applicable to contracts entered into on effective date and thereafter).

[5] *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807 (Fla. 1992); *Berryer v. Hertz*, 522 So. 2d 510 (Fla. 3d DCA 1988) (suit for fees pursuant to contract as counterclaim to legal malpractice); *McClung v. Posey*, 514 So. 2d 1139 (Fla. 5th DCA 1987), pet. for rev. den., 523 So. 2d 578 (Fla. 1988) (provisions of note and mortgage); *Quick & Reilly, Inc. v. Perlin*, 411 So. 2d 978 (Fla. 3d DCA 1982) (securities violation statute); *Friedman v. Backman*, 453 So. 2d 938 (Fla. 4th DCA 1984) (frivolous attorney's fees statute). *See generally* Annotation, 78 A.L.R. 3d 1119 (1977).

[6] *Careers USA, Inc. v. Sanctuary of Boca, Inc.*, 23 Fla. L. Weekly S31 (Fla. 1998).

[7] *T.I.E. Communications, Inc. v. Toyota Motors Center, Inc.*, 391 So. 2d 697 (Fla. 3d DCA 1980); *see also New England Rare Coin Galleries, Inc. v. Robertson*, 506 So. 2d 1161, 1162 (Fla. 3d DCA 1987).

[8] Previous § 57.105, Fla. Stat. simply awarded such fees to the prevailing party without assessment against the opposing lawyers. § 57.105, Fla. Stat., (1985).

[9] In assessing the amount to be awarded in a motion to obtain fees based solely on § 57.105, Fla. Stat., the moving party is *not* entitled to a contingency risk multiplier. *Swortz v. Southern Rainbow Corp.*, 603 So. 2d 107 (Fla. 3d DCA 1992); *Transflorida Bank v. Miller*, 576 So. 2d 752, 753 (Fla. 4th DCA 1991) ("A case that is so patently frivolous as to cause counsel to undertake litigation for a fee that is solely contingent on a section 57.105 recovery cannot reasonably be treated as involving a risk that would support a multiplier").

[10] *Coral Springs Roofing Co. v. Campagna*, 528 So. 2d 557, 558 (Fla. 4th DCA 1988); *McNee v. Biz*, 473 So. 2d 5 (Fla. 4th DCA 1985).

[11] *Compare Mazzorana v. Mazzorana*, 23 Fla. L. Weekly D67 (Fla. 3d DCA 1998) (appeal not frivolous unless plaintiff's action frivolous at inception; fact that events during the course of lawsuit reveal that plaintiff's complaint is not sustainable do not necessarily warrant fees under § 57.105), with *Sykes v. St. Andrews School*, 625 So. 2d 1317 (Fla. 4th DCA 1993) (appeal frivolous where no justiciable issues were present at the time of filing the initial brief because of new appellate decision).

[12] *Lantigua v. Lopez*, 696 So. 2d 532 (Fla. 3d DCA 1997); *Westfield Ins. Co. v. Mendolera*, 647 So. 2d 223 (Fla. 2d DCA 1994); *Mark C. Arnold Constr. v. National Lumber Brokers, Inc.*, 642 So. 2d 576 (Fla. 1st DCA 1994); *Schmidt v. Fortner*, 629 So. 2d 1036, 1043 n.10 (Fla. 4th DCA 1993); *Williams v. Brochu*, 578 So. 2d 491 (Fla. 5th DCA 1991).

[13] *TGI Friday's Inc. v. Dvorak*, 663 So. 2d 606 (Fla. 1995).

[14] *MX Investments, Inc. v. Crawford*, 22 Fla. L. Weekly S530 (Fla. 1997).

[15] *LeGrand v. Dean*, 598 So. 2d 218 (Fla. 5th DCA 1992); *Schere v. Z.F., Inc.*, 578 So. 2d 739 (Fla. 3d DCA 1991); *Real Estate Apartments, Ltd. v. Bayshore Garden Apts., Ltd.*, 530 So. 2d 977 (Fla. 2d DCA 1988); *Hornsby v. Newman*, 444 So. 2d 90 (Fla. 4th DCA 1984); *Scutti v. Daniel E. Adache & Associates Architects, P.A.*, 515 So. 2d 1023 (Fla. 4th DCA 1987); *rev. denied*, 528 So. 2d 1183 (Fla. 1988).

[16] *See Salta Investment Inc. v. Silva*, 584 So. 2d 172 (Fla. 3d DCA 1991). *Jacobson v. Humana Medical Plan, Inc.*, 636 So. 2d 120 (Fla. 3d DCA 1994).

[17] *Fla. Dept. of Commerce v. Davies*, 379 So. 2d 1313 (Fla. 1st DCA 1980) (holding that it is improper to raise the issue in your brief); *see also Miller v. Miller*, 602 So. 2d 591 (Fla. 5th DCA 1992) (Sharp, J. dissenting).

[18] *Green Cos. v. Kendall Racquetball Investment, Ltd*, 658 So. 2d 1119 (Fla. 3d DCA 1995); *Homestead Ins. Co. v. Poole, Masters & Goldstein, CPA, P.A.*, 604 So. 2d 825 (Fla. 4th DCA 1992), *rev. denied*, 604 So. 2d 487 (Fla. 1992) (appellees' failure to respond to motion for appellate attorneys fees precluded belated attack on motion for rehearing); *Special Disability Trust Fund v. Wareham*, 381 So. 2d 257 (Fla. 1st DCA 1980).

[19] *See Dealers Ins. Co. v. Haidco Investment Enters., Inc.*, 638 So. 2d 127 (Fla. 3d DCA 1994); *United Pacific Ins. Co. v. Berryhill*, 620 So. 2d 1077 (Fla. 5th DCA 1993) (party seeking fees must plead correct ground for entitlement).

[20] *See Southern Erectors, Inc. v. Gay*, 558 So. 2d 1099 (Fla. 1st DCA 1990) (precluding counsel for appellee from charging his client for appeal in workers compensation case, where counsel cited inapplicable insurance statute rather than applicable workers compensation statute in fee motion, thereby prompting its denial).

[21] *Salley v. St. Petersburg*, 511 So. 2d 975 (Fla. 1987): *see Joseph Land & Co. v. Green*, 486 So. 2d 87 (Fla. 1st DCA 1986) (two weeks after mandate untimely); *Lobel v. Southgate Condominium Ass'n, Inc.*, 436 So. 2d 170 (Fla. 4th DCA 1983) (four months after reply brief untimely).

[22] 643 So. 2d 1127 (Fla. 1st DCA 1994).

[23] 505 So. 2d 432 (Fla. 1987).

[24] *Manz v. Manz*, 518 So. 2d 392 (Fla. 1st DCA 1987); *Powers v. Berti-Ferguson of Fla.*, 510 So. 2d 1185 (Fla. 1st DCA 1987).

[25] 472 So. 2d 1145 (Fla. 1985).

[26] 555 So. 2d 828 (Fla. 1990).

[27] While contemporaneously kept time records are preferable, they are not required for enhancement. *Baskin v. Guardianship of Baskin*, 535 So. 2d 306 (Fla. 2d DCA 1988), *pet. for rev. den.*, 544 So. 2d 199 (Fla. 1989) (computer printout sufficient); *The Glades, Inc. v. The Glades Country Club Apartments Assoc., Inc.*, 534 So. 2d 723 (Fla. 2d DCA 1988), *pet. for rev. dism.* 571 So. 2d 1308 (Fla. 1991); *City of Miami v. Harris*, 490 So. 2d 69 (Fla. 3d DCA 1985), *cert. den.*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (Fla. 1987). Woeful inadequacy of time records may, however, constitute a basis for reduction of the award. *Hensley v. Eckerhart*, 461 U.S. 414, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) ("Where the documentation of hours is inadequate, the district court may reduce the award accordingly."); *Brevard County School Board v. Walters*, 396 So. 2d 1197, 1198 (Fla. 1st DCA 1981).

[28] *Fashion Tile & Marble, Inc. v. Alpha One Const. & Associates, Inc.*, 532 So. 2d 1306 (Fla. 2d DCA 1988). *See also Beisswenger v. Omicron Construction & Development Co.*, 552 So. 2d 240 (Fla. 4th DCA 1989) (reduction of lodestar amount requires specific reasons).

[29] *D & A Excavating Service v. J.I. Case Co.*, 555 So. 2d 1256 (Fla. 4th DCA 1989) (amount sought under misleading advertising statutes).

[30] 641 So. 2d 969 (Fla. 1st DCA 1994).

[31] Fla. R. Civ. P. 9.400(c).

[32] *USB Acquisition Co. v. Stamm*, 695 So. 2d 373 (Fla. 4th DCA 1997). On December 12, 1997, the Florida Supreme Court granted a petition to review this decision.

[33] *Florida National Bank of Gainesville v. Sherouse*, 80 Fla. 405, 406, 86 So. 279 (1920).

[34] *See Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

[35] *See, e.g., Whitney v. Whitney*, 638 So. 2d 517 (Fla. 3d DCA 1994) (fee of $14,000 on single issue modification of child support reversed with directions to award no more than $7,000); *Miller v. First American Bank and Trust*, 607 So. 2d 483 (Fla. 4th DCA 1992) (award of $240,000 dollars reversed for 1600 hours purportedly expended by twenty attorneys, paralegals and legal assistants in mortgage foreclosure case resolved by summary judgment and which ended in *per curiam affirmance* on appeal); *Dalia v. Alvarez*, 605 So. 2d 1282 (Fla. 3d DCA 1992) (reduction of appellate fee from $10,000 to $5,000 on appeal where "there was nothing complex about the case that an experienced attorney could not have handled in one-half the time claimed"); *Travieso v. Travieso*, 447 So. 2d 940 (Fla. 3d DCA 1984), *aff'd in part, quashed in part*, 474 So. 2d 1184 (Fla. 1985) ($27,000 fee award reduced to $9,000 in modification proceeding where fee awarded exceeded husband's net worth and he had insufficient ability to pay); *Schreiber v. Palmer*, 427 So. 2d 235 (Fla. 3d DCA 1983) (fee of $18,000 in probate matter reversed with instructions to reduce to $9,375 where "there was nothing complex about the case, as admitted, which an attorney, even one inexperienced in the subject matter could not have concluded in one-half the 150 hours appellee claims were required"); *Guthrie v. Guthrie*, 357 So. 2d 247 (Fla. 4th DCA 1978) (award of $8,000 in attorneys fees for 91 hours of time spent in handling simple appeal reduced to $5,000, where the issues raised were routine).

[36] *See Miller v. First American Bank & Trust*, 607 So. 2d 483 (Fla. 4th DCA 1992), (1600 hours compared to 35 hours expended by defense counsel); *Nisbeth v. Nisbeth*, 568 So. 2d 461 (Fla. 3d DCA 1990) (wife claimed $30,000 to be assessed against husband, while husband's own fees were only $9,000).

[37] *See, e.g., Whitney v. Whitney*, 638 So. 2d 517 (Fla. 3d DCA 1994); *Tomaino v. Tomaino*, 629 So. 2d 874 (Fla. 4th DCA 1993); *Dralus v. Dralus*, 627 So. 2d 505 (Fla. 2d DCA 1993); *Wrona v. Wrona*, 592 So. 2d 694, 697 (Fla. 2d DCA 1991).

[38] *Miller v. First American Bank & Trust*, 607 So. 2d at 485.

[39] 645 So. 2d 57 (Fla. 3rd DCA 1994).

book review

Reviewed by Scott D. Makar

"Florida Appellate Practice"

by Judge Philip J. Padovano

Since 1988, attorneys seeking quick and succinct answers to Florida appellate practice questions have turned to *Florida Appellate Practice* by Judge Philip J. Padovano. My copy has become a good friend, whose pages are dog-eared and emblazoned with yellow-highlighting and cryptic hand-written notes. Frequently consulted portions are color-tagged for quick reference. The inch-thick and somewhat unwieldy 1996 pocket part, however, was becoming the proverbial tail (at 328-pages) that was waging the dog (the main volume is 738 pages). Bulky pocket parts aside, the body of appellate rules and caselaw that has sprouted in the last decade signaled the need for a major update.

Indeed, Judge Padovano's revised and restructured treatise is a refined golden nugget (West 1997 $80.00). Like its predecessor, it is an exceptionally well-organized and well-written exposition of the law. It is an example of clear and effective legal writing in the "plain english" mode. The treatise contains six new chapters and two that are restructured. Judge Padovano states that "these new and revised chapters address the subjects of invoking jurisdiction, rules of procedure, appellate courts, preservation of error, standards of review, initiating review, workers' compensation appeals, and juvenile court appeals."

The chapter on invoking jurisdiction discusses the triggering event for appellate review — the rendition of an order — along with motions that extend rendition and premature appeals. The chapter discussing the rules of procedure is a handy reference for common questions that arise regarding how appellate rules are interpreted and applied. In particular, it discusses one of the most important questions for practitioners — the computation of time for the filing and service of motions and briefs. It also addresses the issue of sanctions for noncompliance with appellate rules.

A previously neglected topic is covered in the chapter on the standards of appellate review. As Judge Padovano points out, the "[e]arly identification of the proper standard of review is important because the applicable standard determines the level of persuasion required to demonstrate reversible error, and thus, the likelihood of success on appeal." He points out that most trial level decisions fall into one of three general categories: (1) decisions of law; (2) discretionary decisions; and (3) decisions of fact. He then discusses in detail the applicable standards of review in these contexts.

This chapter also discusses two important appellate concepts: harmless error and the two-issue rule. Practitioners must always consider that error at the trial level can be harmless, and Judge Padovano provides an interesting discussion of the statutory and decisional basis for the doctrine. The two issue rule provides that a general verdict of damages based on two or more issues is not reversible simply because error is demonstrated as to one issue. "The rule was adopted as a matter of policy to simplify the work of the trial courts and to limit the scope of proceedings on review. Application of the rule will result in approval of a verdict that *might* have been produced as a result of a trial error, but this harsh possibility can be avoided by submitting multiple theory cases to the jury on a special verdict form." The doctrine is discussed in *First Interstate Develop. Corp. v. Ablenado*, 511 So. 2d 536 (Fla. 1987).

Finally, the chapter on initiating review focuses on questions such as the proper forum for an appeal, the remedy sought on appeal, and the procedure for properly initiating an appeal. Other topics include discretionary review, the nature of original proceedings, consolidation, and proceedings by indigents.

Judge Padovano's treatise should be on every Florida appellate practitioner's bookshelf. It is a manageably-sized exposition of the law that provides ready answers to common questions and direction for further inquiry for those that are more complex. One feature that would be helpful is a cross-reference guide to the first edition so that compulsive appellate practitioners (myself included) can transfer their scribblings, colored tabs, and highlighting to the new edition for future reference. Because it is so well-written, the second edition will undoubtedly become the standard by which other treatise's in West's Florida Practice Series are judged.

1998 Adkins Award Nominations Now Being Accepted

Nominations are being sought for the Appellate Practice and Advocacy Section's annual James C. Adkins Award, established in 1995 to honor those who have made significant contributions to the field of appellate practice in Florida.

The 1998 Adkins Award will be presented at the Section Dessert Reception, June 18 at the Buena Vista Palace.

Nominations may be submitted by April 24, 1998, to Jackie Werndli, The Florida Bar, 650 Apalachee Parkway, Tallahassee 32399-2300.

book review

Reviewed by Scott D. Makar

"Judges on Judging: Views from the Bench"

Edited by David M. O'Brien

Another recent updated book is *Judges on Judging: Views From The Bench* (1997 $24.95, Chatham House), which was originally released in 1985 as simply *Views From The Bench*. This updated version merely adds a few new essays (republished from law reviews) and deletes a few others. *Judges on Judging* explores the concepts of judicial review, the dynamics of the judicial process, the judiciary and the Constitution, statutory construction, the Bill of Rights and the states, and the judicial role in a litigious society.

The articles in both the prior and new editions are very topical and interesting. The list of authors in the new edition reads like a judicial "Who's Who." It includes Supreme Court Justices Warren Burger, William Rehnquist, Lewis Powell, Jr., Robert H. Jackson, John Paul Stevens, John M. Harlan, Jr., Thurgood Marshall, William J. Brennan, Jr., Antonin Scalia, Felix Frankfurter, Hugo L. Black, and Sandra Day O'Connor. It also includes federal circuit court judges Roger J. Miner, Alex Kozinski, Stephen Reinhardt, J. Clifford Wallace, Richard A. Posner, Frank Easterbrook, Ruggero J. Aldisert, and Henry J. Friendly. *Judges on Judging* is worth its price simply to have a compendium of articles by these judicial luminaries.

My only criticism is that I purchased *Judges on Judging* without knowing it was an update of *Views from the Bench*. The books look different and have somewhat different names. In addition, I could locate no reference whatsoever to *Views on the Bench* in my copy of *Judges on Judging*. For these reasons, if you already have a copy of *Views on the Bench*, you may want to consider whether the price of the new edition is worth the nine new articles it contains. In any case, *Judges on Judging* makes a great gift for lawyers, law students, and others who want a resource that contains a multitude of interesting articles by some of the nations most prominent judicial thinkers.

Scott D. Makar *is an attorney in the Jacksonville office of Holland & Knight LLP. His practice includes trial and appellate litigation as well as administrative and legislative matters.*

Federal Criminal Appellate Update

by Janice S. Burton Sharpstein

Recent Amendments Impact Federal Evidence Rules

Several amendments to the Federal Rules of Evidence became effective last month. One is Rule 801(d)(2)(E). The other is Rule 804(b)(6). Both involve the realm of hearsay. Both limit defense objections.

The first amendment aligns the federal evidence rules with *Bourjaily v. United States*, 483 U.S. 171 (1987). Now, under 801(d)(2)(E) "(t)he *contents* of (a co-conspirator) statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered . . . ." Rule 801(d)(2)(E). Apparently, defense objections are now limited to sufficiency. Use of the contents alone is no longer open to question.

The second amendment bars defendants from objecting to use of statements by an "unavailable" witness, when "unavailability" was caused by the defendant. Newly adopted Rule 804(b)(6) Fed. R. Evid., provides in essence, that a defendant forfeits his right to object to statements of an "unavailable" witness if the defendant, "engaged or acquiesced in wrongdoing that was intended to and did, procure the unavailability of the declarant as a witness."

While the amendment is certainly understandable, it raises more questions than it answers. For example, (1) When must the intent to introduce such statements be disclosed?; (2) Once disclosed, what type of proceeding should establish their admissibility?; (3) Should there be an evidentiary hearing (out of the jury's presence) to establish the condition precedent? (i.e. that defendant "engaged or acquiesced in wrongdoing ... and did procure unavailability"); (4) If so, what level of proof is necessary?; (5) Can such proof be established from other statements of the now unavailable witness? (i.e., witness had expressed fear, or possible threats from defendant); and finally, (6) If multiple defendants are involved in the trial but did not participate in acts which rendered the witness unavailable, does such a highly prejudicial spill-over effect result (because harm to witness is in no way related to co-defendants) that severance should be granted?

All such questions should be raised by defense counsel and addressed by district courts so that we can get some guidance at the appellate level. For starters, it may be helpful to look at the procedure utilized in other evidentiary matters such as adoptive admissions. *See United States v. Kishor Joshi*, 896 F.2d 1303 (11th Cir. 1990).

Recent Supreme Court Opinion Reaffirms Standard of Review for Evidentiary Ruling on Scientific Evidence

In *General Electric Company v. Joiner*, 118 S. Ct. 512, 66 U.S.L.W. 4036, the Supreme Court reversed an Eleventh Circuit opinion (78 F.3d 524) and held: (1) that the court erred in its review of the district court's exclusion of scientific expert opinion; (2) that it applied an "overly 'stringent' review to that ruling"; (3) that it "failed to give the trial court the deference that is the hallmark of abuse of discretion; and, (4) that the abuse of discretion standard of review must apply to all rulings on the admissibility of scientific evidence regardless of whether such rulings may be dispositive of the case. *Id*. at 118 S. Ct. at 517.

Although this case arose in the civil arena, it should be noted by criminal practitioners for two reasons: (1) because the development of scientific evidence continues to impact the field of criminal law at an accelerated rate; and, (2) because the Supreme Court cited its recent opinion in *Koon v. United States*,[1] as authority for the deference to be afforded to district courts.

Recent Grants of Petition for Certiorari Show Continued Interest in Sentencing Issues

The Supreme Court recently granted certiorari to *United States v. Edwards*, 105 F.3d 1179 (7th Cir. 1997) and *Monge v. California*, 16 Cal. 4th 826, 941 P2d 1121 (1997). Both cases involve questions of judicial discretion. Both address the ability of a trial court to act as a trier of fact. And, both impact sentencing. Each is discussed as follows.

Edwards v. United States, 118 S. Ct. 334, 139 L. Ed.2d 259, 66 U.S.L.W. 3291.

In *Edwards,* defendants were charged with conspiring to distribute "cocaine and cocaine base". They were ultimately convicted. Convictions, however, did not distinguish which of the "conspiratorial objectives the jury found beyond a reasonable doubt." *Id*. at 1179. As a result, the defendants' argued at sentencing that the trial judge must impose sentence as if all the cocaine (involved in the conspiracy) were cocaine powder and not crack cocaine.

The district court disagreed. So did the appellate court. It reasoned that the sentencing guidelines allow the judge alone, "to determine which drug" and "in what quantity" it was distributed when imposing a sentence. Therefore, it held that the judge could make that factual determination and sentence accordingly. The court was not required to sentence the defendants as if the organization distributed only the drug carrying the lower penalty.

Monge v. California, 1998 W.L. 12429 (U.S. Cal.)

In *Monge*, the defendant was charged with multiple drug offenses. He was also targeted as a prior felon under the "three strikes" law. Consequently, the state sought an enhanced sentence. At trial, the defendant requested a bifurcated proceeding. He waived his right to a jury trial on the prior conviction and prison term allegations. He proceeded to a jury trial on the drug charges. He was convicted. Thereafter, in a non-capital proceeding, the trial court: (1) found him "guilty" of a prior serious felony conviction and prison term; and, (2) imposed an enhanced sentence.

On appeal the defendant raised double jeopardy concerns and questioned whether prohibitions against double jeopardy applied to the trial court's determination of the "truth" of a prior serious felony allegation. The California Supreme Court held it did not. Although the prior felony determination involved, "some factual points relating to the prior crime . . . (it was) not like 'the trial' on guilt." Therefore, double jeopardy did not apply and the trial court was free to impose the enhanced sentence.

Just last week the Supreme Court granted certiorari on the following question: "Does the Double Jeopardy Clause apply to noncapital sentencing proceedings that have the hallmarks of a trial or guilt or innocence?" 1998 W.L. at 12429. Though it will be interesting to see what develops, the clear trend seems to be a recognition of judicial discretion to resolve issues of fact which primarily impact sentencing. *See United States v. Ross*, 131 F.3d 970, 989 (11th Cir. 1997)(which: (1) reviewed a case involving one conspiracy with two objectives; (2) upheld sentencing guidelines that permit the trial court to factually determine "objects" of the conspiracy and sentence accordingly; but, (3) noted that had defendants requested a "special verdict that would have required the *jury* to specify the *objects* of the conspiracy" then the court would not have had to make the determination). So, defense counsel beware, when a defendant is charged with a conspiracy with two or more objects, do not accept a general verdict form. If you do, you may leave your client open to a sentence in which the district court treats a conviction on one count of conspiracy with two objectives as a determination of guilt for several counts of conspiracy, one for each object alleged.

Endnote:

[1] *Koon* involved the sentencing of police officers convicted in the Rodney King case. It reviewed the district court's discretion to depart downward in sentencing convicted police officers and held that: (1) appellate courts must acknowledge the importance of trial court's discretion to evaluate every individual and case over which it presides; and, (2) such discretion was entitled to due deference.

State Civil Appellate Update

by Keith Hope, Miami

It has been a while since I last did this column, so lets get right to some subjects that are near and dear to all appellate lawyers: (1) Appellate Attorneys' Fees (yea!); and (2) dismissals of appeals (aaaargh!).

Florida Supreme Court

Review of appellate attorneys' fees: by motion or appeal? And how about a contingency risk multiplier for appellate attorneys' fees in contract cases?

U.S.B. Acquisition Co. v. Stamm, 695 So. 2d 373 (Fla. 4th DCA 1997) (on reh'g), *review granted*, (Fla. Dec. 12, 1997) (oral argument Feb. 5, 1998).

In its original decision, the district court affirmed on the main appeal, reversed on the cross appeal, granted a motion for appellate attorneys' fees and remanded to the trial court for entry of judgment in favor of appellee and to fix the amount of appellate attorneys' fees. The trial court entered two separate final orders awarding attorneys' fees—one for the trial attorneys and one for the appellate attorney. The payor of the fees timely filed a single notice of appeal seeking review of both orders and the appellate lawyer filed a motion under rule 9.400(c) for review of his award. The district court granted review of the appellate fee award and affirmed it.

The payor then moved for rehearing and for consolidation with its pending appeal of the trial court fees, arguing that the district court's affirmance of the appellate fee award pursuant to the motion for review cut off its separate appeal of such award. The appellate attorney also moved for certification to the Supreme Court on whether or not a contingency risk multiplier can be considered in assessing appellate attorneys' fees in a contract case.

The payor's argument was based on two previous Fourth District decisions which had permitted review of appellate fees as part of a plenary appeal. In this case, the district court denied the payor's rehearing motion stressing that review of appellate attorneys' fees awards is strictly under rule 9.400(c), rather than by separate appeal. The Court explained that its previous cases recognized a limited exception that permitted review of appellate fees via plenary appeal *only* when the *same parties* are involved in a *single* judgment after remand that includes *both* an appellate fees issue and another issue, and one party seeks review of both issues at the same time.

In this case, the payor's appeal did not fit the exception since there were different parties (trial attorneys/appellate attorney) and two separate final orders. The Court also stressed the important policies behind rule 9.400(c): (1) review by motion is faster and less costly than an appeal; and (2) finality. Tip: If your payor files an appeal from a trial court order granting your motion for appellate fees and you have an interest in speed, costs and finality, file a motion for review under the rule and (hopefully) get a quicker ruling.

On the multiplier question, the Court noted that in a previous case it had ruled that a contingency multiplier is not applicable where the only basis for the award is a contract and not a statute. The Court had certified the question to the Supreme Court in that case but the parties did not seek review so the issue has never been resolved. (Don't you just hate it when that happens?). Thus, the Court certified the same question in this case which was argued in the Supreme Court on February 5, 1998. I'll keep you posted.

District Courts of Appeal

For whom the bell tolls: Motion to relinquish jurisdiction, late preparation of record, confusion abounding about date brief due = unwarranted dismissal of appeal as sanction.

Magier v. Solomon & Benedict, P.A., 23 Fla. L. Weekly D40 (Fla. 2d DCA Dec. 19, 1997).

Who among us has not been confused on occasion as to the due date for a brief and worried (probably needlessly) about it? In this case, the county court entered a default judgment against petitioners on December 31, 1996, and the petitioners thereafter filed motions for rehearing and to set aside the judgment. Before the trial court ruled on the motions, the petitioners appealed the judgment to the circuit court on January 13, 1997, because, as the district court stated, "these motions would not suspend rendition[.]"

By its terms, a motion under rule 1.540(b) to set aside a judgment does not affect the finality of a judgment. But, why, you may wonder, (I did), did the motion for rehearing of a *judgment*, not suspend rendition per rule 9.020(h)? To discover the answer, I followed the district court's advice and had a "simple telephone conversation" with petitioners' appellate attorney and learned that because the default judgment had been mailed by the trial court over the holidays, it was not received by petitioners' counsel in time to make a *timely* motion for rehearing. Only a timely motion for rehearing, of course, suspends rendition.

On February 27, 1997, petitioners filed a motion in the circuit court to relinquish jurisdiction to the county court to rule on the post-judgment motions and the circuit court denied the motion on March 31, 1997. The clerk prepared the record on appeal on April 24, 1997, and the respondents moved to dismiss the appeal on the grounds that the petitioners' initial brief had been due on March 24, 1997—70 days from the filing of the notice of appeal (and, a month before the record was prepared!). The district court noted that this motion: (1) did not consider that the motion to relinquish jurisdiction *tolled* the time for briefing; (2) did not disclose the late preparation of the record by the clerk; and (3), did not follow the recommendation in rule 9.300(a) to contact opposing counsel prior to filing the motion.

In response to the motion to dismiss, on May 6, 1997, the petitioners filed a motion for an extension of time to May 31, 1997 and served their initial brief on May 30, 1997. The circuit court dismissed the appeal finding that the brief and the motion for extension had been filed untimely. The petitioners then filed a timely

motion for rehearing explaining why they thought the brief had been due on May 5, 1997, because of the tolling and mailing periods. The circuit court denied this motion too. *Can you believe it* ?!

The petitioners filed a timely writ of certiorari, and the district court granted the writ, showing us once again why we need appellate courts. The court noted that petitioners had ample reason to be confused about when their brief was due and that it could have been clarified by a simple phone call between the lawyers. The case, at worst, involved the filing of a brief a few days late because of confusion. Nobody disobeyed an order to file a brief on a date certain. The district court held that because the circuit court failed to follow prior Second District precedent, its dismissal of the appeal "was an unwarranted sanction that resulted in a clear departure from the essential requirements of the law." *Id*.

For whom the bell tolls II: On the other hand, it tolleth not for one who appeals within 30 days of an order denying a motion for rehearing of a trial court non-final order. Moreover, (I think moreover is overused), an order denying a summary judgment in a "dec" action coverage case is not appealable.

National Assurance Underwriters, Inc. v. Kelley, 23 Fla. L. Weekly D17 (Fla. 4th DCA Dec. 17, 1997).

In a declaratory judgment action, the insurer who had sought a ruling that it no longer owed a duty of defense to the insured, suffered a denial of its motion for summary judgment, and a denial of its motion for rehearing, and appealed both orders. The district court *sua sponte* dismissed the appeal as untimely and because the orders were nonappealable non-final orders.

I am constantly amazed that this issue continues to crop up. Hello out there, a motion for rehearing directed to a trial court *non-final* order (as opposed to a final order) DOES NOT SUSPEND RENDITION! The decision was written by Justice Barbara Pariente in one of her last opinions in the district court. She also explained that even if the notice of appeal had been timely, the court would have lacked jurisdiction because the original order was not an appealable non-final order. The insurer relied on *Canal Ins. Co. v. Reed*, 666 So. 2d 888 (Fla. 1996)(declaratory judgment within a third party negligence action is separately appealable as a final order). But, the district court noted that nothing in *Canal* suggests that an order denying summary judgment is reviewable on appeal.

The keyword here, folks, is "judgment." Rule 9.110(n) provides for review by non-final appeal of "*Judgments* that determine the existence or non-existence of insurance coverage [.]" As the court put it, "[a]n order denying summary judgment is not, by any stretch, a 'judgment.'" *Id*. While rule 9.020(f) defines an "order" to include a "judgment", a judgment, nevertheless, "does not equate with a non-final order denying summary judgment." *Id*. at n. 1.

Rendition, what a concept. It sometimes pays to read [and understand] the committee notes.

Tyler v. State of Florida—Governor Lawton Chiles, 22 Fla. L. Weekly D2659 (Fla. 2d DCA Nov. 28, 1997).

Tyler filed his notice of appeal on September 30, 1996, from an order dismissing his second amended complaint with prejudice filed on February 23, 1996. Ah hah, you say, untimely, but, when was the February order "rendered"? Ah hah, says Tyler, I filed a timely motion for clarification on February 28, 1996 which suspended rendition. Ah hah, says the district court—the motion may have been timely, but was it "authorized?" Ah hah, says Tyler, rule 9.020(h) provides that a timely filed motion for clarification, among other authorized motions, suspends rendition until the motion is ruled upon. I think you may guess what's coming: But, says the district court, the motion for clarification listed in rule 9.020(h) only refers to a motion for clarification filed in the *appellate court* pursuant to rule 9.330, *not* to one filed in the trial court, because the civil rules of procedure do not authorize the filing of a motion for clarification.

The court noted that the rule (then numbered 9.020(g)) was amended in 1992 to include a motion for clarification to the list of motions that delay rendition, and cited the Committee Notes. The Committee Notes do not specifically mention a motion for clarification, but they do say the following: "Rendition of a final order can be postponed only by an 'authorized' motion, and whether any of the listed motions is an 'authorized' motion *depends on the rules of procedure governing the proceeding in which the final order is entered*." (e.s.). Rule 1.530 of the civil rules does not authorize a motion for clarification to be filed in the trial court, although such motions are common. However, such motions do not suspend rendition.

The district court went on to discuss whether or not the motion could be authorized by deeming it a motion for rehearing, but concluded it could not because Tyler's motion "failed to raise any matters that were not previously considered." The matter of what can properly be argued in a motion for rehearing in appellate courts has been the subject of a recent proposed amendment by the Appellate Court Rules Committee. I'll keep you posted on that one. Meanwhile, perhaps the Civil Rules Committee should also take a look at it. After all, if you cannot raise an issue in a motion for rehearing not previously raised, and if you cannot raise an issue previously raised, then what can you raise?

And finally, it's also important for an appellate lawyer to know what not to do: don't do this!

5-H Corp. v. Padovano, 22 Fla. L. Weekly S724 (Fla. Nov. 25, 1997)(writ of prohibition against entire 1st DCA denied where writ based on bias allegedly existing because of petitioner's attorney's own ill-advised acts).

Well, folks, that's all for now. I'll be doing this column (unless fired) twice a year, so if any of you know about a decision which involves an appellate issue that would be of interest to our members—especially in the family law and worker's compensation areas—please let me know. My new phone number in Tallahassee is not yet known, but you can e-mail me at *hopeapp@aol.com*, or correspond the old fashioned way via: Keith Hope P.A., The Bowen House, 325 North Calhoun Street, Tallahassee, FL 32301.

committee reports

Legislation

This year appears to be a particularly active one concerning pre-filed bills in the legislature. The Legislation Committee has reviewed summaries of literally hundreds of bills that have been pre-filed in the Florida House and Senate. Each member of the Committee receives copies of the summaries and analyzes them to see if they may have any direct impact on the appellate practitioner.

To date, although hundreds of bills have been pre-filed, we have not identified a single bill that would have any type of adverse impact upon the Florida appellate practitioner. We anticipate that there will be a great many more bills filed, particularly on the civil side pertaining to tort reform, and we will watch those bills very closely so we can alert the Section to any bill that would be of significance to appellate lawyers in the state.

Publications

The Record

Editor Angela Flowers and Executive Editor Kim Staffa reported on the status of the upcoming March issue of *The Record*. Topics and articles for future issues of *The Record* were identified, as were potential authors and other contributors. The deadline for submitting articles, book reviews and other contributions for publication in the June issue is March 15, 1998. Please contact Angela Flowers at (305) 982-6636.

The Appellate Practice Guide

Editor Nancy Copperthwaite was unable to attend the Committee meeting but has reported that all articles and submissions have been edited and are ready to submit for publication in the *Guide* and distribution to Section members. A number of advertisements were solicited bringing in revenue to help defray the cost of producing this valuable tool for our members.

The Florida Bar *Journal*

Two Section members, Raoul Cantero and Tom Elligget, have had their articles published in *The Florida Bar Journal* this year. The next article will be submitted by Hala Sandridge, and two more articles are planned for the Fall issues, one by Tracy Gunn and the other by Jennifer Carroll. Articles must be submitted to Editor Jackie Shapiro at least two and one-half months before publication.

We encourage all Section members to submit articles for publication, and we welcome any assistance you can provide as an editor or solicitor of contributions or advertisements. Please get involved in our Section through the Publications Committee by contacting Committee Chair Cindy Hofmann at (305) 789-7729 to volunteer your time and talent.

Long Range Planning

The Long Range Planning Committee met at the Midyear Meeting in Miami on January 22, 1998. Topics discussed at the meeting included developing new leadership for the Section while maintaining involvement of our past leaders, exchanging ideas for programs and services with other state bar appellate organizations developing a long-range plan for the Section's publications effort, and coordinating member services and administration through greater communication between committees.

The first issue addressed at the meeting was a proposal by Tony Musto for increasing the opportunities for leadership involvement by our members while retaining the involvement of our past leaders. Tony noted that several of our Executive Council seats were filled by former Chairs of the Section, and noted that the trend had the practical effect of limiting the number of Executive Council seats available for new leaders.

A motion was made and seconded that the Committee recommend an amendment to the bylaws to provide permanent seats on the Executive Council for former chairs, freeing-up elected Council seats for new leadership. Included in the motion was a provision that the Council seats represented by former chairs would not count toward the requirement for attaining a quorum, so the absences of numerous former leaders would not disable the Executive Council from taking action. The motion carried. This proposal, if approved by the Executive Council and enacted by Section membership, will open the door for new leadership to sit on the Executive Council, while still permitting the active involvement of our past leadership.

The next issue raised concerned contacting appellate sections within other state bar organizations to exchange information and ideas. The Committee will attempt to contact appellate organizations in other states to learn from the mistakes of others, provide useful information to

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

appellate groups elsewhere, and help plan for the future.

The third issue addressed was the topic of long range plans for our publications: *The Record*, the Section's column in The Florida Bar *Journal*, and the annual *Appellate Practice Guide*. The question arose whether these publications should be maintained in their current form, and whether additional publications should be offered. The Committee will seek input from the Publications Committee on this question, and continue to analyze the long range goals objections of the Section's efforts to publish and communicate with our membership.

The last major topic which was addressed was the involvement of other Committee chairs in the long range plans of our Section. The consensus of the Committee was that the Section should request all Committee chairs to attend at least one Long Range Planning Committee meeting annually to report on matters which would affect the long-range planning of our Section.

Other issues were discussed informally, including long range plans for membership recruiting and services, long range plans for our CLE Program, and other topics. The Long Range Planning Committee actively seeks the input from all Section members and Committees concerning goals and plans for the Section. Please communicate any ideas for the Long Range Planning Committee to Committee Chair Roy D. Wasson.

Appellate Rules Liaison

The Florida Bar Appellate Court Rules Committee filed its proposed four-year cycle amendments with the Florida Supreme Court in January 1996, and we are now in a new four-year cycle. The Appellate Court Rules Committee has adopted several proposed additional changes to the appellate rules thus far. These proposed changes are discussed in articles written by members of our committee which are contained in the last two issues of *The Record*.

The Appellate Rules Liaison Committee present role is to disseminate information on changes now being proposed by the Appellate Court Rules Committee so that all members of the Section are afforded sufficient notice to allow their input on the new proposals to the rules. This committee is available to transmit concerns regarding the proposed rules or suggestions for appellate rule amendments to the Appellate Court Rules Committee.

CLE

Appellate Section's "Flagship" Seminar

The Section's Flagship seminar, entitled Hot Topics in Florida Appellate Practice, was held on December 3, 1997, in Tampa. The total number of attendees, including those signed up for the taped showings, is approximately 130, with at least a few more expected to sign up. The total turnout was a little bit better than expected. The Committee discussed whether this seminar should be held on an annual basis or alternate it with a seminar involving a slightly different theme.

Some concerns were expressed about the numerous competing seminars from other organizations. Two new subcommittees were formed to deal with these issues. First, a subcommittee was formed to assist in creating better coordination among appellate seminars held by all organizations in Florida with the goal of obtaining earlier and better information about potentially competitive seminars. Steve Wisotsky is the Chair of that subcommittee. Second, an exploratory committee on seminar alternatives was formed to consider alternative seminars in alternating years to balance against both the Hot Topics Seminar and the Section's Federal Appellate Seminar. Steven Stark is the Chair of that subcommittee.

The Committee will discuss these issues again at the end-of-year meetings in June. Presently, however, the Committee favors holding the Hot Topics Seminar again during the 1998-1999 year.

Appellate Practice Certification Exam Review Course

The course was held on January 30, 1998, in Tampa. Cindy Hoffmann was the Chair of the Steering Committee and Jennifer Carroll was Vice-chair.

Federal Appellate Seminar

The Federal Appellate Seminar is scheduled for April 17, 1998, in Tampa. A co-sponsorship has been arranged with the Out-of-State Practitioners Division which will provide additional revenues to the Section. The majority of speakers for the seminar are set, and the Steering Committee is working to finalize the slate. As with the Hot Topics Seminar, the Committee is studying whether this seminar should be held every two years rather than every year, as at present, and alternate it with another appellate seminar. Steven Stark's subcommittee is presently examining that issue.

Appellate Practice Workshop

The Committee received an excellent report on the progress of the Appellate Practice Workshop. It is scheduled for July 22-25, 1998. Tom Hall is the Chair of the Steering Committee and Jan Majewski is the on-sight administrator for Stetson University where the workshop will be held. Participation will be limited to forty students, and the enrollment is going very well. Anyone interested in participating in the Appellate Practice Workshop should enroll very soon.

In concept, the program is aimed at lawyers with zero to five years experience who are interested in appeals but it is open to everyone, and it is anticipated that it will be the type of program that will be beneficial to lawyers of various experience levels. There will be eight core instructors, all but one of which will be current or former appellate judges. The planned segments include brief-writing with an assignment, oral argument and critique, incorporated lectures and a professionalism panel. The program will not be co-sponsored with The Florida Bar creating an opportunity for increased revenues for the Section.

Co-Sponsorships

As in the past, the Section is actively seeking co-sponsorships with other Sections to take advantage of the opportunity to "spread the appellate message" and to achieve the financial benefits, that co-sponsorships provide. Various steering committees have been formed and will continue to be formed when op-

continued...

portunities present themselves for co-sponsorship.

Committee Membership

The Committee is seeking at least four or five new members who are willing to assist in organizing one of our seminars for the 1998-99 year. Anyone who is interested in serving on the Committee should contact Jack Aiello at (561) 650-0716 or Jackie Werndli at (850) 561-5623.

The next meeting of the CLE Committee will be at The Bar's Annual Meeting in Orlando. The exact time and place will be announced soon.

Appellate Mediation

On January 22, 1998, the Appellate Mediation Subcommittee met at the Midyear Meeting of The Florida Bar in Miami. Last year, the Committee initiated a discussion regarding whether it would be appropriate to pursue the establishment of certification standards for appellate mediators. At the Midyear Meeting, the Committee heard presentations from two speakers. Judge James R. Wolf, of the First District Court of Appeal, made a presentation regarding the status of the Appellate Mediation Program at the First District. That program has been operating for a little over a year. The Director of the program is Donna Riselli Gebhart.

During the first year of program operation, 174 cases were selected and set for mediation. One hundred and twenty five cases were actually mediated. Sixty-two per cent of those cases which were selected and set for mediation (and which were not transferred to private mediation, or terminated either administratively, or by the mediator) were settled. Of the cases which were actually conferenced, fifty-three per cent settled. Additionally, sixty-eight trial court cases were settled by global settlement agreements reached during the appellate mediation process. Three hundred and sixteen cases were identified by the Court Mediation Officer as appropriate for mediation, but were not selected due to time/scheduling constraints. For this reason, the First District hopes to expand its mediation program.

The Fourth District has also proposed an appellate mediation program which they envision as being similar to the program in place at the First District. They have a current budget request for two mediators to initiate this program. They will also encourage private mediation.

Lastly, the subcommittee heard a presentation from Ms. Kimberly Ann Kosch, a Senior Program Specialist at the Dispute Resolution Center. Ms. Kosch spoke about applicable procedures and time lines which might apply in the event that the process for establishing a certification requirement for appellate mediators were to be initiated.

After hearing the presentations, the subcommittee moved to recommend to the Executive Council that further study and experience with court-annexed appellate mediation programs take place prior to pursuing any appellate mediation certification requirements. The subcommittee also suggested that it would be helpful, as part of a seminar or workshop presented by the Section, if attorneys could have an opportunity to participate in a mock appellate mediation to familiarize themselves with the process. The Subcommittee welcomes any input on these matters.

Civil Appellate Practice

The Civil Appellate Practice Committee's Midyear meeting was attended by Justice Wells from the Florida Supreme Court and Judge Wolf from the First District Court of Appeal. They explained and enthusiastically endorsed the progress and results of the mediation program at the First District Court of Appeal. Judge Wolf invited inquiries to his chambers if appellate attorneys have questions about the mediation program and the statistics he has developed regarding the program. There was a consensus among the meeting's attendees that the Committee should find a way to assist the court in educating attorneys about their clients and their own preparations for appellate mediation. The attorney's or client's lack of understanding about the nature and process of appellate mediation was identified as a recurring problem.

The Committee's primary focus at this point is the establishment of a guardian ad litem pro bono appellate program. In addition to providing a worthwhile public service, such a program could also assist appellate attorneys in fulfilling their pro bono requirements and appellate certification requirements. Following an article in the last issue of *The Record*, the Committee received approximately 15 volunteers throughout the State. According to Ms. Tracy Carlin, the chair of the subcommittee advancing the project, the program now has enough volunteers to get the program started.

Ms. Carlin will work through the Court Administrator to notify the guardian ad litem circuit directors of the available volunteers. The project obtained a small funding source at the Executive Council meeting. Anyone wishing to volunteer their services may contact Ms. Carlin at (904) 359-2000.

Appellate Court Liaison

A Judicial Evaluation plan has recently been implemented, and applies to the appellate courts as well as the trial courts. At the most recent meeting of the Executive Council, the Appellate Court Liaison Committee was requested to take on the task of "spreading the word" about this plan and its importance and to urge attorney participation and candor.

We have contacted the various District Courts of Appeal and Supreme Court to determine if there have been any "procedural" problems identified so far. After the plan has been in operation for some time, we anticipate following up with the various appellate courts to try to evaluate how the plan is working, the extent of the attorney participation, any additional "procedural" problems, and to determine if there are any suggestions for improvement.

At the appellate level, counsel of record in each appeal are sent a judicial evaluation form at the time the Court's opinion is issued. The form is a fairly simple two page form which should not take too much time to complete, although we certainly hope that counsel takes time to think about their responses rather than using the form to express their delight at winning their case or displeasure at losing.

There are very specific instructions on how the forms are to be completed and returned in order to preserve confidentiality. Unfortunately, at least one District Court of Appeal has encountered a number of instances where instructions were not complied with which may result in the form being discarded.

The responses are periodically directed to the particular judge so that he or she may benefit from the anonymous feedback of lawyers appearing before the Court. This will hopefully permit the individual judge to better know how he or she is perceived by the attorneys appearing before the Court and permit the judge to improve judicial performance. Thus, the plan is quite different than traditional bar approval polls and is more akin to a "suggestion box" in which both favorable and unfavorable comments are necessary.

This plan appears to have great potential for helping appellate judges obtain a candid and unbiased assessment of their judicial performance and for assisting them in identifying any areas of perceived weakness. However, it will only work properly if attorneys provide thoughtful responses each time they receive an evaluation form. We encourage you to do so, and also to contact us with any suggestions you might have for potential improvements of the plan.

Criminal Appellate Practice

The committee met on Thursday, January 22, 1998 during the Midyear Meeting of The Florida Bar. It was a good meeting and we had very good attendance. We have joined forces with the Criminal Appeals Committee of the Criminal Law Section and, while we are independent entities, both committees will work on shared projects this year.

We are pursuing five projects and have established subcommittees for each. First, we are studying discrepancies in the way county to circuit appeals are administered in the different circuits. Some circuits have carved out internal administrative practices for county to circuit appeals that are not consistent with other circuits, depart from established appellate timetables, suggest potential conflicts of interest and often result in confusion for the appellate practitioners. In this vein, we are also looking into the need for — and viability of — uniform procedures for processing extraordinary writs and holding *en banc* hearings or rehearings among circuits that vary in geographic size, population and the number of available circuit judges.

Second, we are studying the viability of appellate mediation in criminal cases (e.g., in sentencing matters). At least two districts have expressed interest in such a program and it is an on-going effort in other states. We hope to be able to recommend considerations — from the practitioner's perspective — to be incorporated here if Florida ultimately adopts such a program.

Third, we are hoping to develop a videotaped, CLE, appellate program that is different from the appellate seminars currently offered by the Bar. The general design of our program is to invite recognized appellate attorneys from around the state to participate in mock oral arguments before district courts of appeal judges or Florida Supreme Court justices and then review with them, and the court, how well the attorneys were able to anticipate problems with their cases and strategies the oral argument to answer the courts' concerns and still obtain a successful result. This format allows practitioners around the state to model their own techniques, where appropriate, after the techniques used in the mock oral arguments.

Fourth, we have formed a subcommittee to make recommendations for the ongoing effort to adopt minimum standards for court-appointed appellate attorneys in noncapital cases. As you know, there has been considerable interest in developing standards in the capital area. This same interest is beginning to surface for noncapital cases, and we hope to have input into such an effort.

Finally, several members of our two committees have expressed an interest in the current debate over *per curiam* opinions, with special emphasis on criminal appellate law. We have formed a subcommittee to review the recommendations of Florida's Judicial Management Council and other sources.

Programs

The Programs Committee is looking forward to presenting several programs at the Annual Meeting to be held at the Buena Vista Palace in Orlando, Florida, in June, 1998. First, we will be presenting a "Discussion with the Court," featuring the justices of the Florida Supreme Court, on Thursday, June 18, 1998. The discussion, which is scheduled for 4:00-5:30 p.m., is a unique opportunity to directly question the justices. Justice Wells is our contact on the Florida Supreme Court with regard to this program.

We are also hoping to have another successful Dessert Reception this year. The reception is scheduled for June 18, 1998, from 9:30-11:30 p.m. Again, we will be requesting law firms throughout Florida to assist us by sponsoring this program through donations. As before, these law firms will receive public recognition, both at the program and in *The Record*.

Appellate Practice and Advocacy Section

1998 Annual Meeting Activities

Buena Vista Palace

June 17, 1998

2:00 p.m. - 5:00
Civil Appellate Practice Committee

June 18, 1998

8:30 a.m. - 9:30 a.m.
Appellate Rules Liaison Committee

8:30 a.m. - 10:00 a.m.
CLE Committee

9:00 a.m. - 10:00 a.m.
Appellate Certification Liaison Committee

10:00 a.m. - 12:00 noon
Executive Council/Section Annual Meeting

2:00 p.m. - 3:45 p.m.
Appellate Court Liaison Committee

2:00 p.m. - 3:45 p.m.
Federal Appellate Practice Committee

2:30 p.m. - 3:30 p.m.
Publications Committee

2:45 p.m. - 4:30 p.m.
Criminal Appellate Practice Committee

4:00 p.m. - 5:30 p.m.
Discussion With The Court

9:30 p.m. - 11:30 p.m.
Dessert Reception - Adkins Award Presentation

turing the Florida judicial system. Prior to the creation of the Fourth District in West Palm Beach and the Fifth District in Daytona, the Second District encompassed twenty-eight counties, and ranged from Lake County, to the north of Orlando, southeast to Broward County (Fort Lauderdale), and across the Everglades to Collier County (Naples). At the time the first three district court's were created, each had only three judges, and it is said that the Governor carefully selected nine of the most extremely well-qualified applicants in the state.

Apparently a power struggle developed between those who wanted the Second District to be located in Orlando and the supporters of Lakeland. Judge Robert Pleus, a strong advocate for the Orlando venue, met an untimely death in 1957. Perhaps if he had lived longer the Court would have been situated in Orange County, changing not only the site of the Second District, but possibly even the boundaries of the later districts as well.

Even after the creation of the Fourth and Fifth Districts, in 1965 and 1979 respectively, the Second District remained large geographically and is currently the *largest* appellate jurisdiction by population in the State of Florida. Fourteen counties comprise the court's territory, from Pasco in the north, down through the west-central part of Florida to the southwest coast of Lee and Collier Counties. With its high-density population centers in Pinellas (St. Petersburg), Hillsbor-ough (Tampa), and rapidly growing cities such as Sarasota, Fort Myers, and Naples, it is only slightly surprising that the 4 million-plus population of the Second District surpasses that of any other district, Miami and the Third District included.

Practice Before the Second District

Cases before the Second District are not assigned to merits panels until they are ripe, that is, when the briefs are filed and preliminary matters have been addressed and concluded. Therefore, for the bulk of the time that most cases are pending, matters relating to those cases are handled by the Clerk of Court, other staff members, and motions panels assigned to rule on matters arising before assignment to the merits panel.

As the Clerk of the Second District who doubles as a Staff Attorney, Bill Haddad has the authority of the Court to dispose of unopposed routine procedural matters, such as unopposed motions for first extensions of time (thirty days or less) to file briefs. Other motions of a procedural nature, such as consolidation of cases and opposed extensions of time, are routed to one-judge motions panels for disposition. All motions of a substantive nature are routed to two-judge motions panels, with the exception of case-dispositive motions (such as motions to dismiss), which are heard by three-judge panels. After a case becomes ripe and is assigned to a merits panel, all motions are handled by that panel.

Most of the filing requirements of the Second District are either already spelled-out in the Rules of Appellate Procedure or are simply common sense requirements shared by other districts. However, Bill Haddad makes the following recommendations based on frequently encountered trouble spots:

1. The Second District requires completion of a Docketing Statement which identifies all parties, the trial judge, all attorneys, pending and related cases, a summary of post-judgment proceedings, transcript ordering information, and identifies the issues by use of codes. After filing a Notice of Appeal, be sure to obtain and complete the Docketing Statement.

2. When filing motions, whenever possible recite whether your opponent has an objection to the motion, even for those motions on which the Rules of Appellate Procedure do not require such a certificate, unless it is obvious from the nature of the relief sought.

3. The Second District prepares its own orders. Do not provide proposed orders when filing motions, but do supply return envelopes for all counsel of record.

4. When filing motions, provide the Court with an original and one photocopy of each motion.

5. The Court will not routinely mail written confirmation of receipt of filings after the Notice of Appeal. If acknowledgment of receipt is desired, this author suggests you provide the Clerk with a pre-addressed return postcard or a typed receipt accompanied by a stamped envelope.

6. Do not designate dangerous items, contraband, large or heavy exhibits as part of the record on appeal without the prior approval of the Court.

7. Failure to comply with Rule 9.210(b)(3) by referring to appropriate pages of the record in the statement of the case and facts may result in the striking of the brief, even in the absence of a motion filed by the opposing party.

8. Any color binder is permitted on briefs. While the Court has no rule regarding types of binders, the judges seem to like the ones which stay open to a given page when being read.

9. One thirty-day extension of time for filing a brief will be granted. No further extensions will be granted absent unanticipated extreme hardship or emergency.

10. It would assist the Court if attorneys with the technological capability would provide computer diskettes containing their briefs, identified according to a method which may be obtained from the Clerk's office.

11. When filing a Motion for Rehearing, the motion must be received by the Court by the fifteenth day from the date of the decision, unless a motion to enlarge time received within the fifteen days is granted. In other words, there is no additional time for filing a Motion for Rehearing when the decision as to which rehearing is sought is sent to counsel by mail.

12. Filing by telecopied facsimile is not permitted in the absence of a genuine emergency not self-created. The title should reflect that it is a genuine emergency matter, and a telephone call to the Clerk's office is warranted where the moving party believes a true emergency exists, prior to filing by facsimile.

Oral argument before the Court is a real pleasure for the prepared prac-

continued...

titioner. The judges pride themselves on being a "hot bench" which has read the briefs and record and is prepared to address the intricacies of the case. The Second District's distinct personality is reflected by its practice of granting argument routinely in any final appeal in which it is requested, but denying argument just as routinely in all non-final appeals, extraordinary writ cases, Rule 3.850 appeals, and unemployment compensation cases.

None of the sources for this article suggested that the practitioner should seek argument routinely in non-final appeals. To the contrary, those judges who addressed the issue reiterated their beliefs that argument is unnecessary in the vast majority of such cases. Even in final appeals, there are cases in which oral argument is requested out of habit or for reasons other than a real need to explain the argument in person. Judge Threadgill, when asked whether the absence of a Request for Oral Argument sent a negative message about the case, commented: "I think we pay as much attention, and give as much consideration, maybe more, to cases submitted without oral argument, as to those which are argued."

While not wanting to stimulate a spate of Requests for Oral Argument in non-final cases, Judge Chris Altenbernd suggested that—in the uncommon non-final case where you feel that argument is essential—you consider filing a more detailed request than usual, stating the specific grounds why the Court should make an exception to its customary policy in that particular case.

The Second District often hears oral arguments in several locales within the district, such as Bradenton, Clearwater, Sarasota, and New Port Richey, and even occasionally in rural Hardee County. For the benefit of law students, the Court also conducts oral argument sessions at the only law school within the Second District: Stetson University College of Law in St. Petersburg.

If you receive an order calendaring oral argument, but you have a preexisting commitment weighty enough to ask three judges to accommodate your schedule (those conflicts are rare), file a motion requesting rescheduling immediately, stating whether your adversary opposes the motion. If the date of the argument is not a problem at first, but an unexpected emergency occurs after argument is set, file a motion to reschedule the argument as soon as you can after learning of the problem, again reciting whether your opponent agrees to the resetting of argument.

Unique among the five district courts, the Second District maintains permanent courtrooms in two cities: Lakeland and Tampa. Although the usual criterion for assignment of cases for oral argument in either city is the location of counsel for the parties, any case before the Second District may be set for oral argument in either city.

A simple but vital practice tip which was echoed by several of the sources for this article is this: Upon receipt of the order scheduling oral argument, make note of the city where it will be held, and go to the courtroom in that city at the appointed time. While this may seem self-evident, enough people mentioned the misdirection of participants in past oral arguments that the problem seems to be more than an isolated occurrence. Don't be the first to appear in the wrong courtroom after this warning has been printed!

On the subject of the Court's two locations, two more matters are worth mentioning. First, while several of the Second District judges have their offices in Tampa, there is no one assigned to that location from the Clerk's office to accept filings. The Lakeland headquarters is the only location for practitioners' purposes other than oral argument. Please do not send briefs and petitions to the Tampa branch. Second, while some of the judges' offices are in Lakeland and the others are in Tampa, please note that the fact that your argument is set in one of those cities does not necessarily mean that you will appear before the judges whose offices are in that city. The judges all rotate on argument panels by random selection to ensure that each judge sits with all of the others on the entire court. In other words, if you are from Tampa and feel slighted because your case was set in Lakeland, be comforted by the probability that one or more members of your panel will be sharing the drive with you.

At least three of the judges expressed the desire that the average practitioner at oral argument be fully familiar with the record, to assist the court with questions and to focus the issues at argument. While none of the sources of information for this article said so directly, we all have seen arguments where a friendly question was asked which gave an attorney the opportunity to fire a rifle shot to the heart of the issue, if only he or she had a ready response which required complete familiarity with the record. It is frustrating to the panel member whose friendly question goes unanswered, and it may be more frustrating to you when you fail to take advantage of an opportunity to persuade the questioner's colleagues. Read the record until you know it cold.

Some of the other pet peeves of the members of the Court are the same as those heard over and over from other judges at appellate seminars and in articles such as this one, but they bear repeating until the message is received. They dislike too long briefs which repeat the same message, say the same thing twice, are redundant, contain repetitious arguments, restate matters set forth previously, and utilize obfuscatory verbiage instead of plain and simple words. Get the picture? Seriously, a long and dull brief will not be as persuasive as one which is short and to the point. It is high time we took that message to heart.

Another recurring theme was the need for absolute accuracy, candor, and fairness in stating the content of the record and the reasonable inferences to be drawn therefrom. The Second District is much like any other appellate court—no one will ever get away with misstating the record deliberately, nor win a case by unfairly slanting facts or failing to acknowledge negative matters in the record. On the other hand, the credibility lost by misciting the record, misquoting the evidence, or omitting material matters from a brief will not soon (if ever) be regained.

Asked for constructive criticism, the judges often answered with compliments for the attorneys who appear before the Second District. Judge Danahy, for one, praised the frequent

practitioners before his Court, characterizing them as an "exceptionally good appellate bar." That benchmark is one which may require the infrequent visitor to the Second District to work extra hard to match, but this article provides some ideas which may help you meet the Court's level of expectations.

Future and Concerns of the Court

As one might expect from the district with the largest population of any in the state, the Second District is the busiest appellate court in Florida. In 1993, there were 4,386 new cases filed and 10 cases reinstated, for a total of 4,396 files opened, 57.4% of which were criminal appeals. That filing figure computes to 367 new cases per judge in 1993. Dispositions kept pace with filings: 4,392 cases were concluded by decision or order during the year, or 366 per judge. Written opinions were rendered in fully 35% of those cases disposed of by decisions: 1,046 opinions out of 2,984 decisions. Oral arguments were conducted in 592 cases during the year.

In 1994, there were 4,648 new filings and 4,340 dispositions. The number of filings increased again in 1995 with 5,288 new filings and 5,270 dispositions. The percentage of criminal filings remained at approximately 60%. In 1996, there were 5,323 new filings, not including reinstatements, and 4,844 total dispositions. These figures compute to 380 new filings per judge in 1997.

Most judges interviewed reacted stoically to this situation. One judge said simply: "I don't have a problem with an overload." Another replied with understatement: "It's steady work [but] we don't have a crisis." With great respect to those distinguished jurists, the burden on each of the members of the Court of disposing of more than a case a day, seven days a week, for the entire fifty-two weeks of the year, is potentially a serious problem, if not a current crisis.

At fourteen judges and with no signs of a permanent reduction in filings, some thinking has gone into the problem of the Second District's caseload. That number of judges is important because there are practical limits to the size of a court. Even if there were buildings which could house more judges, fifteen is the widely-accepted maximum number of judges which can exist together on a collegial court. The certainty of intra-district conflict and difficulty of *en banc* resolution by more than fifteen judges is a practical cap on the size of a court more compelling than the limit on the physical space in a building.

Some discussion began a couple of years ago about ceding two of the Second District's fourteen counties to the Third District. The reaction from the organized Bars of the two affected counties, Lee (Fort Myers) and Collier (Naples), was overwhelming opposition. The proposal died. Also quiet in recent days is the talk of a sixth district court to alleviate the burden on the busiest districts. However, the Judicial Management Council, reconstituted by the Florida Supreme Court in 1995, is re-evaluating these and other proposals.

Judge Frank, noting that his district already has the greatest caseload of the five district courts, hopes that the Second District will be able to face its future without further growth in judges beyond fourteen. Aside from the loss of collegiality and risk of conflict within the Court, the administrative efforts required to manage a body that large are enormous. Judge Frank mentioned that one possibility would be for the Rules of Judicial Administration to be amended to provide for an office of Court Administrator at the district court level. That would give the Chief Judge more time to address the merits of cases and write opinions. If readers agree with that idea, make mental notes to pursue the subject in the future.

One area in which readers can be of immediate assistance to the Second District in reducing its workload is to reduce the numbers of Motions for Rehearing and Motions for Rehearing *En Banc* being filed. As reported in the last issue, the First District suffers from rehearing motions being filed in 55% of the cases in which opinions were rendered. Likewise, such motions are filed more than half the time the Second District writes an opinion. Judge Altenbernd suggests that you be especially deliberative before certifying that a panel decision is of exceptional importance in your quest for *en banc* reconsideration. Such cases are very rare indeed.

The Judges of the Second District

This section of the article will introduce readers to the judges of the Second District and provide glimpses of each judge's background. Space constraints prohibit the listing of numerous significant accomplishments in the life of each judge. This is simply a sampling of activities and attainments to help readers to a better understanding of each judge. The author apologizes in advance for omitting many material matters. The judges are listed in alphabetical order.

Chris W. Altenbernd took the bench in early 1989. Judge Altenbernd practiced civil trial and appellate litigation as a member of a major Tampa law firm prior to being appointed to the Second District. He was active in *pro bono* matters while in practice, including handling appeals on a *pro bono* basis. He received his J.D. from Harvard Law School, having studied as an undergraduate at Harvard before receiving his B.A. with honors from the University of Missouri. Judge Altenbernd is a member of the American Board of Trial Advocates and is a past-president of the William Glenn Terrell Inn of Court. He is a former member of the Florida Defense Lawyers Association and the International Association of Defense Counsel. He is a member of the Supreme Court's Committee on Standard Jury Instructions in Civil Cases, has lectured at various CLE programs of *The Florida Bar*, and has published chapters in Bar publications on Appellate Practice and Insurance Law.

John R. Blue received his B.S. degree from Florida State University in 1958 and his J.D. from Stetson in 1963. From 1954-1956, Judge Blue was on active duty in the Army. Upon graduation from law school, Judge Blue began the private practice of law as a named partner with the first of two law firms in Bradenton. He was very active with local Bar associations and with *The Florida Bar*; Judge

continued...

Blue chaired the Local Bar Liaison Committee of *The Florida Bar*, is a past-President of the Manatee County Bar Association, served on the 12th Circuit Judicial Nominating Commission and Grievance Committee, and was a member of the Florida Bar Board of Governors. Being active in community college affairs since 1976, Judge Blue's leadership and organizational skills are exemplified by a project he engineered in 1983 in his role as Director of the Division of Community Colleges while on a leave of absence from his law practice: He coordinated the entire legislative program for the State Community College Coordinating Board and the presidents of the state's twenty-eight community colleges. Governor Graham appointed Judge Blue to the circuit court bench in 1986, where he served until Governor Chiles elevated him to the Second District in April of 1992. Judge Blue and his wife have three daughters.

Monterey Campbell received his undergraduate and law degrees from the University of Florida in 1952 and 1954 respectively. From 1954 to 1956, Judge Campbell served on active duty as an officer in the Air Force. From 1956 to 1980, he practiced law as a member of a general practice firm which emphasized civil trial practice, while serving as an Associate City Attorney and City Prosecutor in Bartow and as a part-time Chief Assistant State Attorney. From 1971-1977, his duties as a prosecutor included advising the Grand Jury and trying major criminal cases. Prior to taking the bench, Judge Campbell also was General Counsel to the Florida Citrus Commission. His Bar activities before taking the bench included serving several successive terms as Chair of the 10th Judicial Circuit's Grievance Committee. Governor Graham appointed Judge Campbell to the Second District in 1980. During his tenure on the Court, Judge Campbell has served as Chief Judge from 1988-1990, been a member of the Judicial Administration Selection and Tenure Committee and the Executive Council of the General Practice Section of *The Florida Bar*, and has chaired the Supreme Court's Advisory Committee on Local Rules. Judge Campbell's leadership is illustrated by being elected to represent the Florida Conference of District Court of Appeal Judges before the Florida Judicial Conference. Judge Campbell and his wife have three children.

Paul W. Danahy, Jr., a married father of three, has been a member of the Second District bench since 1977. Judge Danahy received his undergraduate degree from the University of Tampa in 1951, where he has since served on the Board of Trustees. He enlisted in the Army during the Korean War, then earned his J.D. degree from the University of Florida in 1957. Judge Danahy practiced law in Tampa prior to going on the Hillsborough Circuit Court bench by appointment in 1975. He won reelection to a full term in 1976, but was soon thereafter appointed to the Second District. His public service endeavors include having served as an Assistant Florida Attorney General, a U.S. Commissioner for the Middle District of Florida, and as a member of the Florida House of Representatives. Judge Danahy's many Bar activities include having been a member of the 13th Judicial Circuit Grievance Committee and being elected to the Board of Directors of the Hillsborough County Bar Association. Judge Danahy has published several notes and articles on legal subjects, and has served as an Adjunct Professor at Stetson Law School. Judge Danahy was Chief Judge of the Second District from 1986 to 1988.

Richard H. Frank is the father of three. Chief Judge Frank is a World War II veteran who earned both his undergraduate and law degrees from Georgetown University. He practiced law privately and with a federal agency in Washington, then moved to Florida where he practiced privately in Tampa from 1962 to 1985, when he was appointed by Governor Graham to the Second District. A prolific writer with editorial experience, he has written numerous articles published nationally, has taught as an adjunct professor at the University of South Florida, and has lectured in law at Stetson, Florida State, and the University of Florida. Judge Frank is active in bench and bar groups, having chaired the Supreme Court Committee on Standards of Conduct Governing Judges, served as a member of the Supreme Court's Committee on Standard Jury Instructions in Civil Cases, as a Designated Director of the Florida Bar Foundation, and is currently serving on the Judicial Qualifications Commission.

Carolyn G. Fulmer, mother of two, received her B.A. degree from the University of South Florida, followed by an M.S. in 1970 and J.D. in 1975, both from Florida State University. Judge Fulmer served as an Assistant County Attorney in Polk County until being appointed to the county court bench by Governor Graham in 1981. In 1983, Governor Graham appointed her to the Circuit Court for the 10th Circuit, where she served in every division. While on the circuit court bench, Judge Fulmer became active with the Florida Court Education Council and served as co-chair of the Education Section of the Florida Conference of Circuit Judges. She served as Director of the Florida Judiciary Mentor Program and was the Editor-in-Chief of the Trial Judge's Bench Manual. Judge Fulmer continues to serve as a faculty member on the Florida Judicial College. Other of her many bench and bar activities include having served as a member of the Criminal Rules Committee and the Executive Council of the Criminal Law Section of The Florida Bar, the Supreme Court Ad Hoc Committee on the Unauthorized Practice of Law by HRS, and on the Commission on Family Courts. Judge Fulmer's civic and social activities include participation in Leadership Lakeland, Junior League of Lakeland Board of Advisors, and the President's Council of 100. She is one of the newer members of the Second District, having been appointed for a term beginning on January 4, 1994.

Stevan T. Northcutt was born August 1, 1954 in Tallahassee, Florida. He was married to the former Susan K. Schubele from 1976 until 1993, and he has a daughter, Rachel Claire Northcutt.

Judge Northcutt attended the University of South Florida in Tampa, where he received a B.A. in Mass Communi-cations in 1975. He earned his law degree from the Florida State University College of Law in 1978.

In the early and mid-1970s Judge Northcutt worked as a journalist,

both freelance and in the employ of *The Tampa Times*, *The Tampa Tribune*, and the Washington, D.C. bureau of *The Chicago Times*.

In 1976 Judge Northcutt was awarded a Florida Legislative Fellowship, and for the next two years he served on the staff of the Florida House Judiciary Committee. In that capacity he served the full committee; its Subcommittee on Consumer, Family, and Probate Law; and its Subcommittee on Court Systems. During that period Judge Northcutt was also selected to staff the House Select Subcommittee on the Florida Evidence Code, the House Select Subcommittee on the Impeachment of Circuit Judge Sam Smith, and the House Board of Managers, which prosecuted the resulting impeachment action before the Florida Senate.

Judge Northcutt entered the private practice of law in November 1978, as an associate at Levine, Freedman, Hirsch & Levinson, P.A., in Tampa. He attained partnership in that firm in 1984. Two years later, he helped form Levine, Hirsch, Segall & Northcutt, P.A., and practiced as a shareholder in that firm until his appointment to the bench.

Throughout his career as an attorney, Judge Northcutt concentrated his practice in the field of appellate advocacy, both civil and criminal, state and federal. He developed a statewide practice, and lectured and published often on topics related to appellate practice and family law. He is a longstanding member of The Florida Bar Appellate Court Rules Committee, and also serves on its Subcommittee on Family Law. He was a charter member of The Florida Bar Appellate Practice and Advocacy Section, and was the first chair of the Section's Civil Appellate Practice Committee. Northcutt is also a member of The Florida Bar Family Law Section, and has chaired its Amicus Curiae Committee.

Other of Judge Northcutt's professional activities have included membership in The Florida Bar Public Interest Section and the Florida Academy of Public Interest Lawyers; service on *The Florida Bar Journal* and *News* Editorial Board; and membership on The Florida Bar Young Lawyer's Section Legislation Committee. He is a member of the Hillsborough County Bar Association, and has served on its Family Law Section Executive Council, on its Appellate Court Liaison Committee, and in its Appellate Practice Section. Judge Northcutt is a master of the bench in the William Glenn Terrell American Inn of Court, in Tampa.

Judge Northcutt has also been active in the Tampa and Hillsborough County communities. The Hillsborough County Commission has appointed him to the County's Charter Review Board, its Citizen's Advisory Committee to the Hillsborough County Commission, and the Arts Council of Hillsborough County. By gubernatorial appointment, Judge Northcutt served on the Hillsborough County Law Library Board.

In the private sector, Judge Northcutt has devoted his energies to organizations involved in aging and end-of-life issues. He once served on the board of directors and was president of Older Adult Services, a Tampa-based private non-profit organization that furnished a variety of services to the frail elderly. For many years Judge Northcutt has volunteered his time to the Hospice of Hillsborough, Inc. He sits on its board of directors, and was its chair from 1994 to 1996.

In September 1996 Governor Lawton Chiles appointed Judge Northcutt to the Second District Court of Appeal beginning January 6, 1997, to fill a vacancy left by the retirement of Hon. Herboth S. Ryder.

Jerry R. Parker, former FBI agent and current Little League umpire, typifies the diversity of experience and depth of interests held by his fellow members of the Second District. This married father of two has educational achievements which include B.S. and J.D. degrees from the University of Oklahoma in 1963 and 1966, respectively, and an L.L.M. in judicial process from the University of Virginia in 1992. Following a seven-year career as a Special Agent with the Federal Bureau of Investigation, Judge Parker became an Assistant State Attorney in Pinellas County, where he stayed until assuming the county court bench in 1977. A civic-minded leader, his activities in the community included Leadership Pinellas, as well as officiating and organizing baseball league activities. In 1981, Judge Parker was appointed by Governor Graham to the circuit court bench, where he served for seven years, assuming the duties of Administrative Judge in the Criminal and Probate Divisions. In 1988, the same year that he joined the Second District, Judge Parker was selected Master of the Bench by the Inns of Court Foundation, Pinellas Chapter. A frequently published writer, Judge Parker is a nationally prominent author of trial practice problems used in mock trial competitions, such as the NITA trial skills competition.

David F. Patterson, who is married and the father of two, received his B.A. degree from the University of Florida in 1962 and his J.D. degree from Stetson in 1964. Judge Patterson practiced civil law as a named partner in his firm until 1973, when he was elected as a Circuit Judge in the 6th Judicial Circuit. He was twice reelected to the circuit court, where he served three terms as Chief Judge of the 6th Circuit. As a Circuit Judge, he served as a member of the Supreme Court Workload and Statistics Committee and chaired several sections of the Florida Conference of Circuit Judges. Governor Martinez appointed Judge Patterson to the Second District for a term beginning in January of 1989. He has since been retained by the electorate. Judge Patterson has taught law as an adjunct professor at Stetson since 1975, and he has written and lectured extensively elsewhere throughout his career. Stetson recognized his achievements with an honorary Doctor of Laws degree in 1989.

Peggy A. Quince, originally from Norfolk, Virginia, is married and the mother of two daughters. One of the newer members of the Second District, Judge Quince's appointed term commenced on January 4, 1994. Judge Quince received her B.S. from Howard University in 1970 and her J.D. from the Catholic University of America in 1975, where she was active with Phi Alpha Delta and BALSA and received an award for her work with the Neighborhood Legal Services Clinic. She started her legal career hearing disputes as a hearing officer for the Washington, D.C. Rental Accommodations Office, then entered private practice in 1977,

continued...

where she emphasized real estate and domestic relations cases. Judge Quince moved to Bradenton in 1978 and practiced general civil law in her own office there until 1980, when she joined the Attorney General's Office handling appellate matters in criminal cases before numerous courts, state and federal, including the U.S. Supreme Court. Her tenure with the Attorney General's Office included five years as Tampa Bureau Chief. A frequent lecturer on CLE programs including substantive criminal and trial practice subjects, Judge Quince has balanced her other personal and professional duties with numerous voluntary bar association and Florida Bar activities, including membership on the Gender Equality Committee, the Criminal Law Certification Committee and the Executive Committee of the Government Lawyers Section.

Jack R. Schoonover, who received his law degree from the University of Florida in 1962, has served on the Second District since being appointed by Governor Graham in 1981. Prior to joining the court, Judge Schoonover was a Circuit Judge for the 20th Judicial Circuit in Fort Myers, where he sat from 1975-1981. While on the circuit court bench, his experience was varied, taking him from the role of Administrative Judge for Lee County, to acting as a hearing officer for *The Florida Bar*; from serving as an acting United States Magistrate, to presiding over the statewide grand jury. His practice prior to taking the circuit court bench was equally varied. He was senior partner in a firm engaging in civil and criminal trial practice while, at various times, serving as Punta Gorda City Attorney, City Judge, Charlotte County School Board Attorney, and counsel for both the county zoning board and development authority. From 1969-1972, Judge Schoonover served as Special Assistant State Attorney. His many Bar activities included being President of the Charlotte County Bar Association, and memberships on his circuit's UPL Committee and Grievance Committee. Judge Schoonover, married and the father of two, found the time during his practice to teach adult education and community college students, no doubt drawing on the discipline instilled by four years' service in the Air Force during the 1950's.

Edward F. Threadgill, Jr. is originally from Mobile, Alabama. Like several of his brethren on the Second District, Chief Judge Threadgill is a military veteran, having served in the Army during the Korean War from 1951-1954. After discharge, he studied Industrial Engineering at the University of Florida, where he earned his undergraduate degree in 1959. He received his law degree from the University of Florida as well, graduating in 1962. From 1962-1965, Chief Judge Threadgill practiced law with partners in Winter Haven, and he served for three years as a municipal judge. From 1965-1975, he was an Assistant County Solicitor and Assistant State Attorney for the 10th Judicial Circuit. Governor Askew appointed Chief Judge Threadgill to the Polk County

continued...

JUDGES OF THE SECOND DISTRICT COURT OF APPEAL

NAME	TERM OF OFFICE
A.O. Kanner (deceased)	1957-1964
William P. Allen (deceased)	1957-1968
Robert J. Pleus (deceased)	1957
George T. Shannon (deceased)	1958-1968
Jack F. White (deceased)	1961-1965
Sherman N. Smith, Jr.	1961-1965
Charles O. Andrews (deceased)	1964-1965
Woodie A. Liles (deceased)	1965-1973
William C. Pierce (deceased)	1965-1973
T. Frank Hobson, Jr. (deceased)	1965-1984
Robert T. Mann	1968-1974
Joseph P. McNulty (deceased)	1969-1977
Edward F. Boardman (deceased)	1973-1984
Stephen H. Grimes	1973-1987
John M. Scheb	1975-1992
T. Truett Ott	1977-1985
Herboth S. Ryder	1977-1996
Paul W. Danathy, Jr.	1977 to Present
Monterey Campbell	1980 to Present
Jack R. Schoonover	1981 to Present
James E. Lehan (deceased)	1982-1993
Richard H. Frank	1985 to Present
Vincent T. Hall	1985-1994
James B. Sanderin (deceased)	1986-1987
Edward F. Threadgill, Jr.	1987 to Present
Jerry R. Parker	1988 to Present
David F. Patterson	1989 to Present
Chris W. Altenbernd	1989 to Present
John R. Blue	1992 to Present
Richard A. Lazzara	1993-1997
Carolyn K. Fulmer	1994 to Present
Peggy A. Quince	1994 to Present
Steven T. Northcutt	1997 to Present
James W. Whatley	1995 to Present

SECOND APPELLATE DISTRICT: Charlotte, Collier, DeSoto, Glades, Hardee, Hendry, Highlands, Hillsborough, Lee, Manatee, Pasco, Pinellas, Polk, and Sarasota Counties.
Comprising the 6th, 10th, 12th, 13th and 20th Judicial Circuits.

Court in 1975, where he was re-elected and continued to serve until 1981, when Governor Graham elevated him by appointment to the 10th Judicial Circuit bench. Governor Martinez appointed Chief Judge Threadgill to the Second District in 1987, and he weathered a merit retention election in 1988. Judge Threadgill and his wife have two children.

Judge James W. Whatley was born in Miami, Florida on May 12, 1947. He is married to Pamela Fewell, and they have two children—Angela and Derek.

He received his B.B.A. degree in Management from the University of Miami in 1969 and his J.D. from the University of Miami in 1972.

From 1972 to 1981, he was a partner in the Miami firm of Manners, Amoon, Whatley & Tucker. From 1982 to 1988, he was a partner in the Sarasota County firm of Kanetsky, Moore, DeBoer & Whatley.

Judge Whatley was Board Certified in Civil Trial Law by The Florida Bar and is past president of the Venice-Englewood Bar Association. He was also a founding member of the John Scheb American Inn of Court in Sarasota.

Governor Martinez appointed Judge Whatley to the Twelfth Judicial Circuit in January 1989, where he remained in office until he was appointed to the Second District Court of Appeal in January 1995 by Governor Chiles.

Judge Whatley presently serves on the Education Committee of the Court and is the Chair of the Memorials and Retirement Committee.

Conclusion

While forty years of development and the influence of thirty-four judges cannot be fully captured in any single writing, hopefully the reader is closer to knowing the makeup and distinctive personality that is the Second District Court of Appeal.

Featured Web Site for Appellate Lawyers

by Robert S. Glazier

Is there anything worthwhile on the Internet? The purpose of this article—and others to follow—is to demonstrate that there are things on the Internet which are interesting and useful to appellate lawyers.

Perhaps the most valuable web site for Florida appellate lawyers is Gavel to Gavel. The site has information on the Supreme Court of Florida which was previously difficult to obtain. The site contains briefs filed in Supreme Court cases, available for downloading. Briefs are available for cases on the Court's oral argument calendar beginning in late 1997.

Most impressive of all are the site's *audio* and *video* recordings of Supreme Court oral arguments. Cases argued since late 1997 are available for listening and viewing on line. Shortly after each case is argued, the recording is put on line and made available to everybody on the Internet. The sound and picture quality varies based on how busy the Internet is, and how up-to-date your computer equipment is. Audio sounds fairly good on computers with 28.8k modems. To watch the video, you should probably have a 56k modem. A faster Pentium computer would help.

Gavel to Gavel uses technologies called RealAudio and RealVideo. These are part of RealPlayer, a free program available for downloading at www.realaudio.com. The company also provides more powerful versions of the software for sale. The program is not difficult to set up on your computer, but those less comfortable with computers may want to get help from someone a bit more experienced. Gavel to Gavel is provided free of charge by Florida State University's WFSU-TV. The site is located at http://wfsu.org/gavel2gavel.

***Robert S. Glazier** is an appellate lawyer in Miami. He is author (with Michael Graham) of* Handbook of Florida Evidence, *Second Edition (Michie/Lexis Law Publishing). All sites featured in this column, and many more, can be found at his web site, The Florida Lawyer, which is located at http://www.fla-law.com.*

Volunteers Needed!

Appellate Pro Bono Project

Are you interested in obtaining appellate certification and meeting your pro bono obligations? The Civil Appellate Practice Committee is joining with Guardian Ad Litem to find counsel for representation in appeals from dependency and termination of parental rights cases.

If you're interested in volunteering time for Guardian Ad Litem appeals please contact:

Robert Sturgess **(904) 398-1192** **or** **Tracy S. Carlin** **(904) 359-2000**