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The Appellate Practice Section Moves to Alleviate Explosive Appellate Nightmare; Publishing *The Pro Se Appellate Handbook*

by Dorothy F. Easley[1]

While there are no published "hard numbers" yet on the percentage of appeals proceeding *pro se* in Florida's courts, the Honorable Tom Hall, Clerk of the Florida Supreme Court and Vice Chair of the Section's Executive Council, identified a First District Court of Appeal of Florida special report finding that fifty-seven percent of all First District cases in 2002 had at least one *pro se* party. Even for the most seasoned practitioner, working through the appellate labyrinth can be a daunting challenge. How can we expect *pro se* litigants to do this?

These sobering numbers mirror those in federal appellate courts. According to one study of the U.S. Courts of Appeals Administrative Office, some courts of appeals reported that *pro se* cases almost completely occupied their central staff attorneys. Litigants who chose to serve as their

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Message from the Chair

by Angela C. Flowers

We have arrived at that time of the year when, as chair, I have begun to reflect on the section's activities over the past year. At this time, I would like to thank all of you who helped to make this year a success. As a section, we have accomplished a great deal. We have both maintained our long-standing projects and initiated significant new programs. While there is insufficient space to discuss every activity in detail, I would like to recognize several meaningful developments.

Under the guidance of Tom Hall, the section voted this past June to create a handbook designed to explain the basics of the appellate process. The handbook will be made available to pro se litigants and others needing assistance when navigating the appellate system. The committee is comprised of appellate practitioners from all areas of practice who are contributing their various talents to the project. This group has worked tirelessly and exceeded expectations in the progress of this enormous task. You can read more about the details of this program elsewhere in this issue of The Record.

As part of our mission, the section has needed for many years to create a peer to peer support system for appellate practitioners. Susan Fox accepted the invitation to chair this valuable program. Her committee has designed a mentor program to assist young lawyers, the occasional practitioner, and experienced appellate lawyers venturing into new practice areas. The committee has developed a proposal that is now in the implementation stages. Attorneys will be able to request assistance

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own attorneys in appeals imposed special demands on court staff and the appellate system. The Administrative Office for the Courts of Appeals report found that in a period of just two years (from 1991 to 1993) the number of *pro se* litigants increased forty-nine percent. Eighty-eight percent of all prisoner petition appeals filed were *pro se*. Of the *pro se* prisoner petition appeals filed, fifty-five percent were civil rights appeals, and twenty-nine percent were *habeas corpus* appeals. In fact, *pro se* appeals made up forty-one percent of *all* federal civil rights appeals (***excluding*** prisoner civil rights petitions) and seven percent of *all* contract actions appealed. These numbers don't even include appeals in the family law area, where many litigants choose or are forced to litigate cases themselves.

Equally alarming is that, in comparison with counseled appeals, a larger percentage of *pro se* appeals were resolved procedurally (e.g., dismissals for untimely appeals) rather than on the merits. To remedy that, courts of appeals indicated in one study that they devoted a great deal of time and effort to reviewing *pro se* cases and separating frivolous cases from those with merit. Some federal courts even devised special procedures to handle *pro se* appeals. Federal courts have addressed the problems with standard form briefs to assist *pro se* litigants. They have created and funded an entire *pro se* unit of staff attorneys to review *pro se* appeals for jurisdiction and issues being raised, to recommend a method of disposition consistent with court rules, such as with or without court argument. Several federal courts have created local rules of practice that allow summary dismissal of appeals without oral arguments, and prevent abuse of appeals filed by limiting the number of appeals that may be filed by litigants who frequently bring frivolous appeals. Some federal courts have dedicated entire calendars to enable judges to review *pro se* appeals over several days every month.

The Appellate Practice Section is facing the problem of *pro se* appeals "head on" by creating and disseminating a *Pro Se Appellate Handbook* to aid Florida's courts and citizens.

Under the direction of the Honorable Tom Hall, Clerk of the Supreme Court of Florida, *The Handbook* is unashamedly ambitious. It balances between "leaving no stone unturned" and overwhelming parties representing themselves with too much information in an area of law that frustrates and perplexes even the most experienced of nonspecialist attorneys. *The Handbook* is dedicated to communicating the concepts and procedures of appellate practice as simply as possible to reach and educate the largest number of Florida citizens about the appellate process.

To that end, *The Handbook* is written in a conversational style and is comprised of sections on key aspects of civil appeals, ranging from what makes final orders "final" to preparing appellate briefs and presenting oral arguments. It tackles whether and how to file post-decision motions. It contains sections on the jurisdiction of the Supreme Court of Florida and the appellate courts and on seeking further review. It will have sections on extraordinary writs and on criminal appeals, particularly in the area of collateral motions.

Our goal for *The Handbook* is to widely disseminate it by 2004 by sending it first to the place most *pro se* appellate parties will first go for information: the Clerk of the Courts offices in all lower courts throughout Florida. Ultimately, we hope to make these materials available on the internet for all Florida citizens to access, in the same way that those materials have been made available in federal courts across the country.

The Handbook breaks down this highly specialized field for would-be *pro se* appellate parties while making no pretense of *The Handbook* being a "cure-all" or remedy for all appellate issues. In fact, The Honorable Kathryn Pecko, Judge of Compensation Claims in Miami, begins *The Handbook* with an appropriately hefty disclaimer, cautioning parties against self-representation in appellate practice and the risk that doing so will expose them to having to pay substantial appellate fee and cost awards. Jennifer Winegardner, Staff Attorney of the Florida Supreme Court, and I have prepared timetables and a flowchart of the appellate process for *pro se* appellate parties who are surely new to appeals. I've prepared a section introducing the concepts underlying appellate review and how to best use *The Handbook*, along with a section on "finality" and the procedure for initiating an appeal from a "final order". Bianca Liston and Valeria Hendricks have prepared a comprehensive section on writing appellate briefs. Beth Coleman has written a section exclusively dedicated to the art of appellate oral arguments. I have also written a section on post-decision motions, currently titled "*What Do You Do if You Lose the Appeal?*" And Liston further addresses that issue in her section on how to seek review in the Supreme Court of Florida. Quite appropriately, Tom Hall is writing a section on seeking review to the United States Supreme Court.

The Handbook doesn't overlook the practical "nuts and bolts" of an appeal either. Jack Shaw has prepared a section in *The Handbook* de-

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tailing all contact information for key court departments, both at the trial and appellate levels. This gives *pro se* litigants ready access to court personnel and to information on the appellate process. Valeria Hendricks has also written a section on ordering and preparing the record on appeal and securing transcripts for that record. The Honorable Judge Patricia Kelly of the Second District Court of Appeal and Valeria Hendricks have even prepared an appellate checklist, including everything from page length to font requirements. (This will be useful to even the most sophisticated practitioners).

To further assist *pro se* parties coming out of the trial forum, who might continue to file motions in a "trial-court style",Coleman has written a chapter explaining how trial and appellate motions and motions practice differ. Tom Elligett is soon completing a section on stays in lower courts, review of stay orders, staying issuance of the mandate and appellate bonds. Finally, the Honorable Judge Marguerite Davis of the First District Court of Appeal has prepared a robust section on attorneys' fees and costs and their special significance to *pro se* litigants.

Preparation of *The Handbook* is ahead of its projected publication date of 2004. It is already in its final drafting stages, and will soon enter its first editing stages (lasting 4-6 weeks) – all of which should hopefully conclude by May, 2003. Tom Hall and Hala Sandridge will be spending the next months editing each of *The Handbook* sections and returning their edited versions to the original drafters for final comments. Once that process has been completed, Bob Sturgess will be preparing the Glossary for *The Handbook*, defining *The Handbook*'s uniquely appellate terms.

During this entire process, Harvey Sepler will be acting as liaison to the Florida Bar Foundation to help secure funding. Pury Santiago, of the Office of the Comptroller, Florida Department of Banking & Finance, will be translating each of the drafts from English into Spanish, ensuring that *The Handbook* remains accessible to Florida's diverse community. We're committed to having *The Handbook* translated into other languages spoken in Florida's international community and welcome attorneys who can volunteer for that important goal.

Our Section has committed a great deal of energy and effort to this project. It will hopefully serve as a model for what all members can contribute, in both a reactive and proactive way, to ensure the openness and fairness of our judicial system at all levels for all people. In this sense, *The Handbook* is further testimony to success of The Florida Bar's Dignity in the Law Campaign. For anyone wishing to contribute, please feel free to contact *The Pro Se Handbook* Committee members:

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MESSAGE FROM THE CHAIR
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through the section's website and be referred to an appropriate volunteer mentor. In January, the executive council voted to form an annual committee to carry on this project.

Over this past year, the section has continued to provide instructive and scholarly information to our members through our publications. The document you are holding, The Record, continues to be a top notch publication thanks to our excellent editors and contributors. Once again, the section, led by Steve Brannock, has presented a number of superior CLE opportunities for appellate practitioners, including the Hot Topics Seminar and the Appellate Certification Review Course. In the upcoming months, you will have the opportunity to attend seminars on Inside the 11th Circuit and Practice Before the Florida Supreme Court.

The section, through the executive council, embraced the Dignity in Law campaign and provided moral and financial support to the Bar in its project to improve the public's perception of lawyers. On an administrative level, a review of our bylaws led to proposed amendments to remove certain ambiguities and establish the website committee as a permanent standing committee to be chaired by the section's treasurer.

At this time, we are focused on the upcoming Section Retreat scheduled for May 1–3, 2003. The Retreat will take place at the Don CeSar Resort at St. Pete Beach, Florida. This strategic planning meeting is intended to identify goals, set priorities and elicit commitments to carry the section through the next few years. I hope that you will participate in this very important gathering. However, if you are not able to attend the Retreat, you can still be a part of the process and join in the implementation stage. Every member will receive a post-Retreat electronic report mapping the section's goals. Please review these materials and identify a role you can play in the section's future.

Finally, there is much yet to come. Our section celebrates many yearly events at the annual Florida Bar meeting. The annual meeting will take place in Orlando, Florida June 24 through 28, 2003, at the Marriott Orlando World Center. The Appellate Section events will take place on Thursday June 26. We will hold both our annual meeting and executive council meetings in the morning. At 3:30 p.m. we will present the annual Discussion with the Florida Supreme Court. The day will culminate with our evening Dessert Reception where the section will present the annual Adkins Award in recognition of significant contributions to the field of appellate practice in Florida and the Pro Bono Award for outstanding pro bono efforts in appellate matters. We hope to see many of you at the annual meeting in Orlando.

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

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Siobhan Shea, Editor, P.O. Box 2436, Palm Beach, FL 33480, or e-mail to *Shea@sheappeals.com*

Third DCA Chief Judge Alan Schwartz — "A Most Happy Fella"

by Betsy Gallagher[1]

While there is no requirement that judges write entertaining opinions, humor and laughter give texture to life's experiences. (Lengthy string cite omitted). Humor has a long history in jurisprudence[2] and its use can make opinions more reader-friendly. It's no secret to appellate lawyers that the Honorable Alan Schwartz, Chief Judge of the Third District Court of Appeal, uses humor and artful writing to flavor appellate opinions from time to time.

Judge Schwartz graduated magna cum laude and Phi Beta Kappa from Harvard College in 1955 and received his LL.B. cum laude from Harvard Law School in 1958. He practiced with the firm Nichols, Gaither, Green, Frates & Beckham and later as a member of the firm of Horton, Schwartz and Perse. Governor Askew appointed him to the Circuit Court in 1973, and he was appointed to the Third District Court of Appeal in 1978. He has continuously served as Chief Judge of that court since 1983.

For almost thirty years, Judge Schwartz' wry sense of humor and demand for professionalism have found a place in some of his opinions. Judge Schwartz says his style was influenced by the opinions of the late Judge Robert T. Mann of the Second District Court of Appeal, whose writing he admired.[3] Judge Schwartz, however, is quick to point out that humor and wit should be used carefully in appropriate cases. His assessments frequently combine cleverness with irony.

From time to time, Judge Schwartz has used levity to highlight the absurdity of certain legal positions and interpersonal disputes. *Carrazana v, Coca Cola Bottling Co.,* 375 So.2d 345 (Fla. 3d DCA 1979) hints at such inspiration. The appellee argued that testimony that a red truck which caused the injury had the "common and familiar white Coca Cola insignia painted on its side" was insufficient to establish a prima facie case of liability against Coca Cola. Rejecting the position, Judge Schwartz observed:

> Simply stated, we think that the jury had the right to draw the common sense conclusion, particularly in the absence of any evidence even of the existence of another entity which bears the name of Coca Cola, that what looked and acted like a Coca Cola truck was a Coca Cola truck owned and operated by the "Coca Cola Bottling Company." It would be for the defendant, during the presentation of its case, to attempt to demonstrate, if it can, that the truck involved in the accident was, or even might have been, owned by some other Coca Cola entity or that it was really a Pepsi Cola truck traveling under false colors.

Another signature feature of Judge Schwartz' opinions is his unique use of metaphors and similes. In the *City of Miami v. Dyer,* 671 So.2d 174 (Fla. 3d DCA 1996), the court reversed a judgment against the city which required it to pay Dyer sums for a city service-connected disability. The judgment erroneously added years Dyer had served in the military to those that he worked for the city. Judge Schwartz wrote:

> By requiring the adding of years of service to a calculation which, by law, is unrelated to that issue, the trial court created a legal centaur which, however happily it may have cantered in the fields of mythology or in Fantasia, cannot survive in the real world.[4]

Dealing with an unlawful search of a hollowed out watermelon, Judge Schwartz added as a footnote: "We have not resisted the glorious opportunity to characterize the issue in this case as one which involves the fruit of the poisonous vine." *State v. Rodriquez,* 515 So.2d 330 n. 1 (Fla. 3d DCA 1987). Another time, Judge Schwartz referred to a technical error as a "meaningless procedural hiccup."[5] The jurist also has pointed out: "Compliance with the terms of a letter of credit is not like pitching horseshoes. No points are awarded for being close."[6]

Sometimes when facts are applied to legal principles, Judge Schwartz taps into other talents. In *Jackson v. Hertz Corp.,* 590 So.2d 929, 942-943 (Fla. 3d DCA 1990)(see appendix), *rev'd,* 617 So.2d 1051 (Fla. 1993), he noted that while an action for conversion lies against a person who gets goods by fraud or duress, such an action does not lie "against one who innocently buys the chattel in question from the defrauder." Judge Schwartz illustrated the principle by unveiling an operetta titled "A, Most Happy Sella" which he had written as a Harvard student.[7]

Notwithstanding his own creative talent, he is also known to credit the work of others. In *Sachse v. Tampa Music Co., Inc.,* 289 So.2d 785, 786 (Fla. 2d DCA 1974), the court reversed a summary judgment for the music company which had previously been reversed on the dismissal of a "Sixth (!) Amended Complaint." Judge Schwartz wrote:

> Despite the overlong, even tortuous history of this case, we were compelled to say, as Count Basie was importuned so often, "One More Time." May we express the hope, however, that this next time will be the last.

In the accompanying footnote, he stated:

> The writer confesses to a momentary but suppressed urge to employ another musically-related cliche in the preparation of this opinion. The trouble is that, Woody Allen and the belief of countless thousands to the contrary notwithstanding, nobody in Casablanca ever actually said "Play it Again, Sam. "

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Of course, this article would be incomplete if it did not mention *Robertson v. Florida Parole and Probabion Commission,* 407 So.2d 1044, 1046 n.4 (Fla. 3d DCA 1981). Judge Schwartz, in rejecting the "sort of result-oriented definitional process" relied on by a sister court, analogized the other court's reasoning to that applied to a problem confronted in a story from I.B. Singer's When Schlemiel Went to Warsaw & Other Stories (1968). In the story, the Elders of Chelm had a shortage of a necessary ingredient (sour cream) for a holiday dish. They agreed to solve the problem by adopting a law "that water is to be called sour cream and sour cream is to be called water. Since there is plenty of water in the wells of Chelm, each housewife will have a full barrel of sour cream." Of course, this resulted in a shortage of water which "was an entirely new problem to be solved after the holidays."

The Chief Judge has also been a consistent proponent of professionalism. Some of his "Schwartizms" are revealed in cases addressing this topic. In partially dissenting in *Goldfisher v. Ivax Corp.,* 827 So.2d 1110, 1111-1112 (Fla. 3d DCA 2002), he was compelled to write:

> In my opinion, the action brought below by the aptly named plaintiff Goldfisher is an awful example of litigation maintained only for the extortionate purpose of securing attorney's fees for those who brought it.

In another case which reversed a large attorney's fee ("around $242,550.15, to be exact,") Judge Scwartz pointed out:

> no court is obliged to approve a judgment which so obviously offends even the most hardened appellate conscience. . . This is especially true with respect to attorney's fees . . . even more so since the case involves the notorious "billable hours" syndrome, with its multiple evils of exaggeration, duplication and invention.[8]

Judge Schwartz is a true wordsmith. In a recent dissenting opinion, he criticized the majority and a sister court for taking an approach to insurance policy interpretation which embodies the kind of pettifoggery and hairsplitting which would have undoubtedly delighted Miss Snow, my seventh grade English teacher, who taught us how to rip sentences into unrecognizable (but diagrammable) shreds. It is, unfortunately, completely contrary to the way insurance contracts are supposed to be construed. [9]

The dissenting opinion was persuasive to his colleagues who changed the court's position on rehearing en banc.[10]

In *Mizell v. State,* (Fla. 3d DCA 1998), the court "declined . . . to involve ourselves in this fratricidal warfare."

In one of his earliest appellate decisions, [11] Judge Schwartz wrote:

> As Churchill might have put it had he been considering the fascinating and monumental verities of Florida post-trial procedural law and practice rather than merely the prosaic question of Chinese[12] politics, the result we reach in this case represents an incongruity arising out of an imbroglio and caused by an anomaly.

Some of Judge Schwartz' opinions are just plain funny. [13] In *Rudy's Glass Construction Co. v. E.F. Johnson Co.,* 404 So.2d 1087 (Fla. 3d DCA 1981), the judge wrote a dissenting opinion which argued that the written disclaimer addressed in the case was "inconspicuous as a matter of law." Judge Schwartz wrote:

> I do not believe that microscopic printing becomes conspicuous merely because it is placed next to submicroscopic printing, unless the consumer happens to have a microscope. Since the appellants did not, I would reverse.

Judge Schwartz has referred to a mashed potato which caused a slip and fall accident as "the offending tuber."[14] He has referred to a situation of reversed priorities as a situation where "the dog has been permitted to swallow his master."[15] More recently, he referred to the "growing acceptance of the view that trial judges are there only to referee and, rather than to do justice, to avoid error" as the "potted palm or Mount Rushmore" view of the proper role of the trial judge.[16]

My favorite Judge Schwartz opinion is *Commercial Carrier Corp v. Rockhead,* 639 So.2d 660 (Fla. 3d DCA 1994). In that case the surname "Schwartz" also applied to the lawyer for each side of the appeal. Commenting on the coincidence, Judge Schwartz wrote the following footnote: "Like a pride of lions, and an exaltation of larks, this case involves an intelligence of (unrelated) Schwartzes." Ironically, this decision was disapproved by the Supreme Court of Florida.[17]

There is ample room for humor in everyone's lives. Humor in legal opinions can demonstrate that judges and lawyers don't always have to take themselves too seriously. Of course, a quality opinion is never written just to entertain. The opinion must make a genuine point. But Judge Schwartz' penchant for placing appropriate wit into some of his opinions puts smiles on the face of this reader. There isn't anything wrong with that.

[1] Betsy Ellwanger Gallagher is a partner specializing in appellate practice with the Tampa firm of Gallagher & Howard, P.A. She received her B.S. degree from Cornell University and graduated with honors from the University of Florida College of Law.

[2] See Marshall Rudoph, Note, Judicial Humor: A Laughing Matter, 41 HAST.L.J. 175 (1989).

[3] One of Judge Schwartz' favorite opinions drafted by Judge Mann is: *State v. Eitel,* 227 So.2d 489, 491 (Fla. 1969)(writing as a District Court Judge). Rejecting a motorcyclist's contention that he had a constitutional right to ride the highways without a helmet, goggles or face mask in contravention of a state statute, Judge Mann quoted John Stuart Mill's Essay on Liberty and stated:

> no person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself, without mischief reaching at least to his near connections, and often far beyond them.

[4] In a related footnote, the judge added that he would have used the equally appropriate word "oxymoron," instead of the word "centaur" had another judge not already used the word "in a way impossible to follow."

[5] *Weiss v. State,* 720 So.2d 1113, 1115 (Fla. 3d DCA 1998).

[6] *Fidelity National Bank of South Miami v. Dade County,* 371 So.2d 545 (Fla. 3d DCA 1979).

[7] The full text of the operetta is

A, Most Happy Sella

The curtain rises to reveal three persons wearing tee shirts prominently labeled A, B, and C, respectively. C (carrying various boxes of unknown contents, sings to the tune of "I'm an Old Cowhand")

I'm a B F P
On a buying spree
When I get the yen
I buy from con men
'Cause a con man
Seems a trustworthy B
When I buy from him
I'm a bona fide C
All of poor A's rights are in equity
And are lost to me-ee,
No trover for me.

B (wearing a serape and sombrero, then comes forward, and sings to the tune of "South of the Border")

South of the Border
Down Mexico way
That's where I spend the dough
I get for goods
I steal from A
C was so happy He got such a buy
But he is so sappy
A converter am I

C (Hearing this, the previously joyful C becomes noticeably concerned and asks B) "Just a minute, when you snookered these goods from A, you were there in person, weren't you?"

B (snickers in response) "No" (and continues his song)

I sent A a letter
And said to him please
Send me the goods right quick
And you will see
I'll pay with ease But I didn't sign my name
I'm too smart a guy
I said to him "A, pal,
J.P. Morgan am I"

(C slinks off in defeat.)

A (previously morose, now-victorious sings to the Tune of "Happy Days are Here Again")

Happy A will rise again
A case in trover lies again
C will have no starry eyes again
Happy A will rise gain
The BFP is defeated
He'll win no suit from now on His legal rights are
unseated
So I am singing this song
Happy A will rise gain
A case in trover lies again
C will have no starry eyes again
Happy A will rise again
Curtain

[8] *Miller v. First American Bank & Trust,* 607 So.2d 483-85 (Fla. 4th DCA 1992).

[9] *Lincoln Insurance Co. v. Home Emergency Services, Inc.,* 812 So.2d 433 (Fla. 3d DCA 2001)(dissenting opinion). As an aside Judge Schwartz noted that St. Thomas Aquinas and Judge Chris W. Altenbernd of the Second District would also enjoy the majority's hairsplitting" approach to policy interpretation. 812 So.2d at 436 n.1.

[10] 812 So.2d 433, 437-4430

[11] *Mendelson v. Mendelson,* 341 So.2d 811 (Fla. 2d DCA 1977)(as Associate Judge)(emphasis added). *See also Contos v. Lipsky,* 433 So.2d 1242, 1247-1248 (Fla. 3d DCA 1983)(dissenting opinion wherein the Judge refers to "legal congnoscenti" and "recondite doctrine")

[12] Uncharacteristically, Judge Schwartz inadvertently referred to China instead of Russia when referring to this Churchill observation: "I cannot forecast to you the action of Russia. It is a riddle wrapped in a mystery inside an enigma." (from a radio broadcast Winston Churchill gave on October 1, 1939).

[13] In commenting on the liability of a bank, Judge Schwartz wrote: ...[T]he bank may and should be held liable for gratuitously, officiously, and affirmatively–a surfeit of adverbs never hurt anyone–telling the government how to place its grasp upon its customer's funds." *Shuster v. Banco De Iberoamerica, S.A.,* 476 So.2d 253, 255 (Fla. 3d DCA 1985)(dissenting opinion).

[14] *Colon v. Outback Steakhouse of Florida, Inc.,* 721 So.2d 769, 771 (Fla.1998)(concurring opinion).

[15] *Summit Chase Condominium Assoc. Inc. v. Protean Investors, Inc.,* 421 So.2d 562, 565 (Fla. 3d DCA 1982).

[16] *Kopel v. Kopel,* 2202 WL 31926830 (Fla. 3d DCA 2002)(concurring opinion)(Judge Schwartz also equated the "potted palm" view with the "appellate attitude that a trial judge may, if sufficiently unobtrusive, be seen, but rarely heard".).

[17] *Globe Newspaper Co. v. King,* 658 So.2d 518 (Fla. 1995).

Section Seeks Comment for Court on Electronic Filing

by Siobhan Helene Shea, Editor

The Supreme Court of Florida recently wrote to the Appellate Practice Section asking for comments on two matters with regard to the electronic format for briefs filed at the Court.

By administrative order the Court requires, briefs be submitted in WordPerfect version 5.1 or higher. The Court would like the Section to comment on whether parties should also be able to file briefs in Word. The Section has also been invited to comment on what additional burdens would be encountered if the Court required that the briefs be filed in PDF format. The Court some years ago adopted the PDF standard for electronic filing.

In response to the Court's request, Angela Flowers, Chair of the Appellate Practice Section, has asked me to chair a Subcommittee on Electronic Filing to report back to the Court.

If you have comments you would like included in the Section's Report, they should be submitted to the Committee on Electronic Filing by May 15, 2003. Comments may be sent by email to Siobhan Helene Shea, at shea@sheappeals.com. If you are not able to send comments by electronic mail, they may be sent by surface mail to Siobhan Helene Shea, Box 2436, Palm Beach, Florida 33480.

Proposed Revisions To Appellate Practice Section Bylaws

Written notice is hereby being provided to the Section membership of proposed revisions to the Appellate Practice Section by-laws. The essential purpose of the proposed revisions is to solidify the presence of the Section's website and to better provide for the website's development and maintenance. The proposed revisions would add the Website Committee as a standing committee of the Appellate Practice Section and would clarify certain sections of the by-laws relating to the creation of annual committees and the amendment of these by-laws. The clarification revisions are not intended to change the intent of the by-laws on the issues addressed but only to state them more clearly. In addition, a separate proposed revision would designate the Treasurer as the Chair of the Website Committee, with the objective of having an officer be ultimately responsible for the continued maintenance and development of the website.

The proposed revisions, as required by Article XII of the by-laws, have been approved by a majority of the Executive Council and are being submitted by this notice to the membership at least thirty days prior to the annual meeting, at which a vote of the members of the Section present will be taken in accordance with Article XII. The annual meeting will be held on June 26, 2003, at the Marriott World Center in Orlando.

I. Website Committee - Related Changes and Renumbering of Paragraphs

Article VI, Section 7 (Together with proposed change to Article XII, clarification of only way to amend by-laws): Insert phrase at the beginning of the section as follows: "Unless otherwise specified herein, [t]he . . ."

Article IX, Section 2 (Identification of Standing Committees): To the list of standing committees add "Website" as the sixth listed standing committee. The word "and" should be moved from item number four to item number five to accommodate this change.

Article IX, Section 3 (Redrafting for clarification of section relating to creation and deletion of annual committees): Replace Section III in its entirety with the following redrafted language: "Other committees intended to be created for a period of one year or more, shall be identified as annual committees. Annual committees may be created in two ways: 1) recommendation of the chair-elect or chair made at any meeting of the executive council of the section and approval by a majority vote of the members of the executive council then present and voting; or 2) by the executive council upon proper motion, second, and a majority vote. The term of each annual committee shall commence immediately upon creation and shall be deemed to automatically renew for each following section year until deleted. An annual committee may be deleted by the same two methods by which an annual committee may be created, as described above.

Article XII (Clarification of when and how by-laws may be amended): The beginning of the Article is changed to read: "These by-laws may be amended only at the annual meeting of the section . . ."

II. For Separate Consideration, Designation of Treasurer as Chair of the Website Committee

Article IV, Section 5 (Duties and Power of Treasurer): Insert sentence immediately before the last two sentences in the section as follows: "The Treasurer shall serve as the chair of the website committee and shall supervise the development and maintenance of the section's website to advance the purposes of the section."

Appellate Practice Pro Bono Award

Nominations are being sought for the Appellate Practice Section's second annual Pro Bono Award. This award was created to honor the extensive contributions of time and skill made by appellate practitioners on behalf of Florida's poor. Please send a letter describing the nominee's appellate pro bono activities to The Appellate Practice Section, c/o Austin Newberry, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300. Nominations may also be faxed to Austin Newberry at (850) 561-5825. All nominations should be received no later than 5:00 p.m. on Tuesday, May 27, 2003.

Federal Standards of Review for Appeals in the Eleventh Circuit

by Paul A. Avron

The applicable standard of review is critical when drafting an appellate brief. It is the means by which an appellate court reviews a trial court's decision, including subsidiary findings of fact, if any. The drafter should apply the standard of review to the particular legal issues and facts in question and present argument accordingly. Below are some general statements of law concerning well-known standards of review and examples of types of cases falling under each standard. This article is by no means meant to be an exhaustive statement of the various types of appeals and is meant for background and informational purposes only.

Credibility determinations made by the trial court are entitled to great deference and are reviewed for clear error. *United States v. Novation,* 271 F.3d 968, 1001 (11th Cir. 2001). This deference is afforded because a trial judge has a recognized superiority in making credibility determinations, *Anderson v. City of Bessemer City,* 470 U.S. 564, 574 (1985), largely based upon his or her experience and first-hand opportunity to observe a witnesses' demeanor and candor. *Stell v. Savannah-Chatham Cty. Bd. of Education,* 888 F.2d 82, 84 (11th Cir. 1989); *Brock v. Norman's Country Market, Inc.,* 835 F.2d 823, 826 (11th Cir. 1988).

Generally, findings of fact are reviewed for clear error. *Miles v. Naval Aviation Museum Found, Inc.,* 289 F.3d 715, 720 (11th Cir. 2002). A finding of fact is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the firm and definite conviction that a mistake has been committed, *United States v. Gypsum,* 333 U.S. 364, 395 (1948); *Johnson & Johnson Vision Care, Inc. v. 1-800 Contracts, Inc.,* 299 F.3d 1242, 1246 (11th Cir. 2002), or where the trial judge's version of the facts is implausible. *Anderson,* 470 U.S. at 573-74. When there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. *Id.* at 574; *United States v. Yellow Cab Co.,* 338 U.S. 338, 342 (1949). The test for clear error is not whether a different conclusion from the evidence is appropriate, but whether there is sufficient evidence in the record to prevent clear error in the trial judge's findings. *Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.),* 913 F.2d 873, 879 (11th Cir. 1990); *Highland Village Bank v. Bardwell,* 610 F.2d 228, 230 (5th Cir. 1980).

Conclusions of law are reviewed *de novo*. *Miles,* 289 F.3d at 720. *De novo* review requires an appellate court to make an independent review without deference to a lower court's analysis and decision. *Kaiser Aerospace & Elec. Corp. v. Teledyne Indus. (In re Piper Aircraft Corp.),* 244 F.3d 1289, 1295 (11th Cir. 2001). This standard of review applies to numerous types of appeals. For example, *de novo* review applies to decisions interpreting statutes, *United States v. Hooshmand,* 931 F.2d 725, 731 (11th Cir. 1991), construing written contracts, *National Fire Ins. Co. of Hartford v. Fortune Constr. Co.,* 2003 U.S. App. LEXIS 2164, *14-15 (11th Cir. Feb. 7, 2003); granting or denying summary judgment, *Dahl v. Holley,* 312 F.3d 1228, 1233 (11th Cir. 2002); *Gary v. Manklow (In re Optical Technologies, Inc.),* 246 F.3d 1332, 1334-35 (11th Cir. 2001), motions for judgment on the pleadings, *Horsely v. Rivera,* 292 F.3d 695, 700 (11th Cir. 2002), motions to dismiss for failure to state a claim, *Trawinski v. United Technologies,* 313 F.3d 1295, 1297 (11th Cir. 2002), motions to dismiss for lack of personal jurisdiction, *Meier v. Sun Int'l Hotels,* 288 F.3d 1264, 1268 (11th Cir. 2002), motions to dismiss for lack of subject matter jurisdiction, *Williams v. Best Buy Co.,* 269 F.3d 1316, 1318 (11th Cir. 2001), motions to compel arbitration, *Davis v. Southern Energy Homes, Inc.,* 305 F.3d 1268, 1270 (11th Cir. 2002), motions to intervene as of right, *Georgia v. United States Army Corp. of Engineers,* 302 F.3d 1242, 1249 (11th Cir. 2002), petitions for habeas corpus, including rulings on procedural defaults, *Fortenberry v. Haley*, 297 F.3d 1213, 1219-20 (11th Cir. 2002), legal conclusions of an administrative law judge, *Bianco v. Georgia Pacific Corp.,* 304 F.3d 1053, 1056-57 (11th Cir. 2002), motions for remand, *Behlen v. Merrill Lynch et al.,* 311 F.3d 1087, 1090 (11th Cir. 2002) and interpretation of federal procedural rules, *Vencor Hospitals v. Standard Life & Accident Ins. Co.,* 279 F.3d 1306, 1308 (11th Cir. 2002).

Certain types of decisions are within the trial court's discretion and will not be reversed absent an abuse of that discretion. An abuse of discretion occurs if the trial judge fails to apply the proper legal standard or to follow proper procedure. *Boyes v. Shell Oil Products Co.,* 199 F.3d 1260, 1265 (11th Cir. 2000); *American Civil Liberties Union of Georgia v. Barnes,* 168 F.3d 423, 427 (11th Cir. 1999). Various matters are reviewed under the deferential abuse of discretion standard including motions to vacate default judgments, *Gibbs v. Air Canada,* 810 F.2d 1529, 1537 (11th Cir. 1987), motions seeking preliminary injunctions, *Johnson & Johnson,* 299 F.3d at 1246 discovery orders, *Walker v. Prudential Property & Cas. Ins. Co.,* 286 F.3d 1270, 1274 (11th Cir. 2002), applications for awards of back-pay in employment cases, *Equal Employment Opportunity Comm'n v. Joe's Stone Crabs, Inc.,* 296 F.3d 1265, 1271 (11th Cir. 2002), whether to admit expert testimony, including whether such testimony is admissible over hearsay objections, *General Elec. Co. v. Joiner,* 522 U.S. 136, 138-39 (1997); *United States v. Floyd,* 281 F.3d 1346, 1348 (11th Cir. 2002), application of judicial estoppel, *Burnes v. Pemco Aeroplex, Inc.,* 292 F.3d 1282, 1284 (11th Cir. 2002), rulings on post-judgment motions, including motions for new trials, *Green v. Union Foundry Co.,* 281 F.3d 1229, 1233 (11th Cir. 2002); *Jones v. CSX Transp.,* 287 F.3d 1341, 1344 (11th Cir. 2002), denial of

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Judicial Review of Florida's Tort Reform Act[1]

by Anthony J. Russo[2]

In May, 1999 Governor Bush signed into law Chapter 99-225, Laws of Fla., otherwise known as the Tort Reform Act of 1999. This self-styled "Act relating to civil actions" provides for a multiplicity of changes related to the substance and procedure of tort actions. For example, the Act changes rules for note-taking by juries, requires mediation in certain civil cases, provides for "voluntary trial resolution" procedures, revises the standards for imposing fees under section 57.105, Fla. Stat., permits the assessment of damages for unreasonable delays in litigation, changes how verdict forms can be itemized, specifies venue rules on certain types of lawsuits, alters the way the 12-year statute of repose operates as to certain products, limits the admissibility of certain evidence of remedial measures, affords for a "government rule" defense and so on. A quick count shows more than a dozen chapters and statutes are affected by the legislation.

Provisions of this Act, codified, are implemented in the course of litigation in the trial courts. Litigants challenge the constitutionality, the application, and the construction of the new laws and ultimately, rulings on those challenges percolate first to the District Courts of Appeal, and then to Florida's Supreme Court. Only now, years after enactment, has that ultimate judicial forum the opportunity to review the merits of what our legislature wrought years ago. Study of the process by which these issues arise and percolate, and the way in which the arguments are developed and refined, reveal both our judicial system's strengths (consideration by multiple parties and courts in multiple real world fact situations) and weaknesses (delay). Three principle cases to date demonstrate these points.

State of Florida et al. v. Florida Consumer Action Network, et al., 830 So. 2d 148 (Fla 1st DCA 2002), *reh'g denied,* November 15, 2002 (question certified). The Florida Consumer Action Network, the Florida Academy of Trial Lawyers, an individual lawyer and ten other organizations composed of consumers and taxpayers, sued Governor Bush in his official capacity (later dismissing him) along with the State of Florida, in a declaratory action arguing that Ch. 99-225 violates the "single subject rule" embedded in our State's constitution at Article III, Section 6. At least sixteen businesses or business associations joined in the suit on the side of the state. The state moved to be dismissed from the case, arguing it was not a proper party. But Circuit Judge Nikki Ann Clark denied its motion, and the First District Court of Appeal refused to grant certiorari to review that denial. *See Bush v. Florida Consumer Action Network*, 774 So. 2d 695 (Fla. 1st DCA 2000).

Thereafter Judge Clark, on February 9, 2001 [*see* 2001 WL 1921989] ruled that Ch. 99-225 "embraces more than one subject in violation of the Florida constitution . . . and is declared unconstitutional." Judge Clark reasoned that by adopting Article III, section 6 of the Florida Constitution, "the people of the State of Florida declared that all laws enacted by the Legislature should embrace but one subject." The State and the intervenors thereafter appealed that decision to the First District Court of Appeal. The First District certified the case for immediate resolution by the Florida Supreme Court pursuant to Rule 9.125, Fla. R. App. P. But the certification was declined. *State of Florida v. Florida Consumer Action Network*, 789 So. 2d 348 (Fla. 2001) without comment. The briefing on the merits continued in District Court which announced its decision on October 9, 2002.

The First District reversed Judge Clark's judgment. The District Court held that the plaintiffs could not "make out a proper case for the exercise of a court's declaratory judgment power." *State of Florida, et al. v. Florida Consumer Action Network, et al.,* 830 So. 2d 148, 154(Fla. 1st DCA 2002). The plaintiffs' interest was expressed only as a "doubt whether they have to obey the laws that they contend affect them because in their opinion, the legislation is unconstitutional." *Id.* This, the District Court held, was an insufficient antagonistic interest to support a declaratory action. The First District ordered a remand of the case with directions to dismiss the complaint with prejudice. It also certified as a question of great public importance to the Florida Supreme Court whether the requirement of a justiciable issue between adverse parties is less stringent when a statute is contested on a single subject challenge. The plaintiffs took up the opportunity to seek review in the Florida Supreme Court where case no. SC02-2598 is now in the early stages of the briefing process.

But another case containing a challenge to the Tort Reform Act is already poised for Supreme Court review, *Forum v. Boca Burger, Inc.*, 788 So. 2d 1055(Fla. 4th DCA 2001), *reh'g denied,* Aug 1, 2001, *review granted,* 817 So. 2d 844(2002). In *Boca Burger, Inc.*, the Fourth District reversed an order that dismissed a complaint. The district court also imposed an award of trial and appellate fees against the appellee under section 57.105, as revised by the Tort Reform Act. That fee award was made because the appellee "persisted in trying to uphold [a] patently erroneous decision." *Id.* at 1062. The petitioner challenges the legitimacy of both the award and the reformulated section 57.105, on the grounds that Chapter 99-225, which reformulated that statute, is unconstitutional.

Boca Burger, Inc. is fully briefed on the merits in the Florida Supreme Court. The same coterie of amici appearing in the *Florida Consumer Action Network* case in the First District have sided variously with the Petitioner and Respondent in *Boca Burger, Inc*. It is not clear if or how the Supreme Court would combine its consideration of *State v. Florida Consumer Action Network* with *Boca Burger, Inc.* In the meantime, courts continue to decide issues related to the constitutionality of Ch. 99-225,

the Tort Reform Act.

Enterprise Leasing Co. v. Hughes, 833 So. 2d 832 (Fla. 1st DCA December 12, 2002). Circuit Judge Michael C. Overstreet, Jr., in Bay County, was faced with a challenge to the constitutionality of Ch. 99-225, which amended section 324.021, Fla. Stat. This statute limits the liability of short-term motor vehicle lessors like Enterprise. The plaintiffs won a judgment against a negligent driver of a car leased from Enterprise. Plaintiffs sought to impose this liability vicariously on Enterprise through the dangerous instrumentality doctrine. Defendants moved to limit damages that could be imposed on Enterprise pursuant to the reformulated section 324.021. Judge Overstreet denied Enterprise's motion ruling that Ch. 99-225 unconstitutionally violated the single subject rule. But the First District has reversed that judgment holding that "each section of the Act is logically and naturally connected to the subject expressed in the title . . . The sections are necessary incidents to this subject and promote the object of the Act." *Id.* at 835.

Two district court decisions now have upheld the constitutionality of the Act, impliedly in the case of *Boca Burger, Inc*. and expressly in the case of *Enterprise Leasing*. These two cases should go far to providing guidance and precedent for Florida's circuit courts. But this certainty is offset by the pendency of *Boca Burger* and *Florida Consumer Action Network* in the Supreme Court. On the positive side, the Supreme Court will decide two well-developed controversies, in terms of factual record, proven adversity and ripeness, and it will have the benefit of a district court's prior review and decision. But on the negative, these decisions will not be announced before the four-year anniversary for enactment of Ch. 99-225. Let's hope the result proves the maxim that "delay is preferable to error."

[1] This article contains material from an earlier article entitled "*The Tort Reform Act on Appeal,*" published in the Hillsborough County Bar Association magazine, *Lawyer*.

[2] Anthony Russo is an appellate attorney with the firm Butler Pappas Weihmuller Katz Craig LLP

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motions to intervene with leave of court, *Georgia v. United States Army Corp. of Engineers,* 302 F.3d at 1249, restitution orders, *United States v. SaberTech, Inc.,* 271 F.3d 1018, 1022 (11th Cir. 2002), fee awards in bankruptcy, *Electro-Wire Products, Inc. v. Sirote & Permutt, P.C. (In re Prince),* 40 F.3d 356, 360 (11th Cir. 1994), class certification, *Piazza v. Ebsco Indus., Inc.,* 273 F.3d 1341, 1345 (11th Cir. 2001), abstention determinations, *Rindley v. Gallagher,* 929 F.2d 1552, 1554 (11th Cir. 1991) and Rule 11 sanction determinations, *Worldwide Primates, Inc. v. McGreal,* 87 F.3d 1252, 1254 (11th Cir. 1996).

Certain matters are reviewed for sufficiency of the evidence, such as jury verdicts, and such decisions will not be overturned unless no rationale trier of fact could have reached the same conclusion based upon evidence in the record. *United States v. Caro,* 319 F.3d 1348, 1351 (11th Cir. 2002).

The brief which provides a correct standard of review for each issue and sub-issue will help the appellate court frame the opinion and provides the appropriate vantage point for the issues presented.

In Memoriam

A Life Dedicated to Gideon

by Valerie Jonas and Beth Weitzner[1]

Louie Campbell was an appellate lawyer for the Public Defender of the Eleventh Judicial Circuit. He died last June at the age of 49 after a courageous fight against cancer. Louie was a courageous fighter all of his life.

Louie was born in Lima, Peru - his father was a mining engineer there. Over the next eighteen years, Louie, along with his six younger brothers and sister, lived in jungles and mining camps throughout Central America and Mexico. He attended a series of small, makeshift schools with the children of the campesinos. It was here, living and learning among the campesinos, that he grew to understand what it meant to be indigent and oppressed. Louie was a scholarly little boy, who read voraciously in a wide variety of subjects, in several different languages. As the eldest of seven children, living in a series of primitive settings, he grew up fast. By the age of sixteen, he was living by himself in a shack, mapping and mining to help support his family. But his early experiences moved him to look for a way to relieve the suffering of the indigent.

As a young man, Louie met a doctor in Honduras, who lived above his medical practice and treated the poor, charging as little as they could pay, sometimes only a chicken. Inspired by the doctor's dedication to the welfare of the indigent, Louie enrolled in McGill University in Canada, as a premed student. After graduating with a degree in biochemistry, he entered medical school in Tegucigalpa, Honduras. Because of political unrest, the school closed down. Louie's commitment to serve the poor then led him to law school at the University of Miami where he interned at the Miami-Dade County public defender's office. He was an amazing intern and an exceptional law student. He was on law review, received Order of the Coif, and graduated cum laude.

Although on graduation he had his pick of blue chip firms, the only job Louie wanted was with the public defender's office. He joined the appellate division in 1990, and remained there 12 years.

As was true of Louie all of his life, Louie was a scholarly and passionate advocate for the rights of his clients. He was a quiet, unassuming person, but when he perceived an injustice he would become deeply passionate. He'd voice his anger and disgust with whomever in the system was responsible. He was an incredibly hard worker, putting in long, solitary hours night after night, year after year. His life was completely devoted to defending his clients. He never married, sharing a simple home with his brother, returning only to rest, read and exchange one raggedy shirt for another.

People who do our work after a while sometimes become defeated by the system, too accepting of the status quo. But Louie never succumbed, he never lost his high ideals of justice. He was like steel. That's one reason why everyone in the public defender's office was so very fond of him.

Louie became a consummate appellate lawyer. Louie's legal writing was brilliant. He had a masterful ability to narrate facts. Louie could make a reader feel compassion towards a client whose acts otherwise appeared unspeakably heinous. He eventually devoted himself to working on very difficult capital appeals. Louie maintained respectful and supportive relationships with his clients. They still write to our office expressing their gratitude for his work and sadness at his passing.

Even after his diagnosis with pancreatic cancer, he continued to work for his clients until he simply could not work any longer. Louie died surrounded by his family. His colleagues at the public defender's office miss him dearly and mourn the loss of someone who so exemplifies the ideals of that office. On this the 40th anniversary of *Gideon v. Wainwright*, it is inspiring to recall a life dedicated to fulfillment of Gideon's promise.

[1] Valerie Jonas and Beth Weitzner are Assistant Public Defenders in the Appellate Division, Office of Public Defender, 11th Judicial Circuit of Florida.

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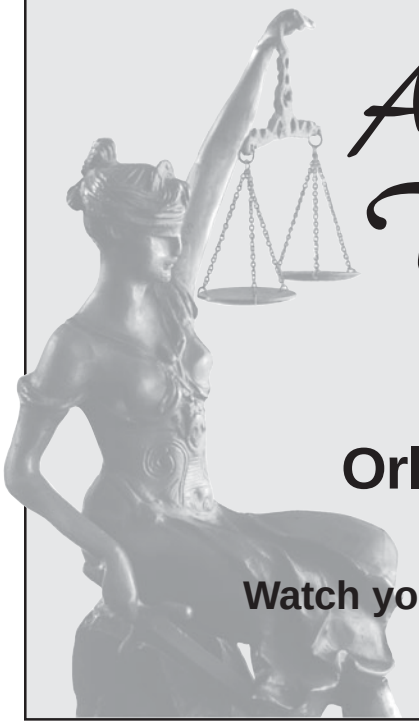

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