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The Honorable Chief Judge Gary Farmer:

A Study in Contradictions or Original Thinker?

by Dorothy F. Easley

Judge Gary Farmer is like the fabric of a rich character in a timeless novel. He speaks of his personal life with the same detached candor of one of the many great leaders he admires: John F. Kennedy.

Judge Farmer was born and raised in the Midwest, in Toledo, Ohio. After Judge Farmer's father and mother divorced, his father, a bus driver, raised him, along with his sister and two brothers. A devout Irish Catholic, his father sent all of his children to parochial school for good, Catholic educations.

Judge Farmer, however, was predisposed to constant questioning and challenging of authority. This did not match well with the Catholic school where he was enrolled. Eventually, he became too much for the school's Monsignor to handle. He was asked to leave as a teenager and forced to enroll in public school. There, Judge Farmer was again asked to leave for

See "Judge Farmer," page 10

Message From the Chair:

Second DCA Opens Tampa Law Center

by Jack Aiello

I am writing this from the Tampa International Airport on a Friday night, suffering in the throes of bad advice from a travel agent as I await a ten o'clock flight home to West Palm Beach. It is for the best. I am several days past my *firm* copy deadline, and this shouldn't wait until tomorrow. I zipped over to Tampa today to attend the "Grand Opening" of the Tampa division of the Second District Court of Appeal's new home at the Stetson College of Law (The Tampa Law Center) in downtown Tampa. I saw a few of you here, but was happy to serve as the representative for the rest of you. The festivities included the first-ever oral argument in the Second DCA's new courtroom, followed immediately by a reception on the Second DCA's dedicated third floor, which the Appellate Practice Section agreed to sponsor, boosted by a generous subsidy from Tampa's Fowler, White law firm.

The trip started off a little rocky, with the Southwest commuter flight departing fifty minutes late. I was pleased to arrive un-bruised. The flight was completely full; I was in Group C and dead last to board the plane. All that remained were a couple of middle seats, so I chose one. The one I chose was between two very large people of opposite genders. Only after I sat down in the middle

see "Message from the Chair," page 2

INSIDE:

04/04

MESSAGE FROM THE CHAIR
from page 1

seat, which the man gladly facilitated, did I realize that I was in the eye of a small hurricane. As the woman in the window seat used her eyes to bore a hole through my head, I realized that these two people were "together" and that the husband, when posed the choice of aisle seat or seat by wife, made the poorest of judgment decisions. I endured a little bickering as I slunk in the seat and then offered that they choose any two of the three seats they wanted and I would take whatever was left over. That, inadvertently, shined a colossal spotlight on the now-whipped hubby – which is how I scored an aisle seat.

After a cab ride from the airport with a taxi driver who swore that he knew every square inch of downtown Tampa but had no idea where the college of law was or the 1700 block on North Tampa Street, I arrived to see the decked out new building that houses the Stetson College of Law and, now, the Second District Court of Appeal's Tampa location. The Second DCA's new courtroom is a first-floor teaching courtroom, which will be used as such when the Court does not have oral arguments. The courtroom is well-appointed, appearing to hold at least 120 people, each with padded chairs and bar-desks, complete with data ports and electrical outlets for each seat, and two large overhead video screens on which to watch the proceedings (for those who prefer 2-D). Judge Altenbernd presided over the first oral argument, flanked by Judge Stringer and Judge Allen (from the 1st DCA). I missed the first few minutes of the oral argument because of the flight and don't know what, if any, opening remarks were made by the Court to commemorate the first oral argument. Nevertheless, the argument was a criminal matter which seemed to have it all: well prepared prosecutor and criminal defense attorney, well prepared panel with pointed and helpful questions, and, after a few snafus in the speaker system, the opportunity to hear a portion of a 911 tape which was of critical significance at trial, it was alleged, and on appeal. The room was full of local lawyers, politicians, law students, the other Second DCA judges (in the jury box), former Second DCA judge and current Supreme Court Justice Peggy Quince, Supreme Court Clerk Tom Hall, some of you, and your's truly. The arguments were ideal for the audience, including such law school staples as the excited utterance exception to the hearsay rule, prior consistent statement to rebut a charge of recent fabrication, the harmless error rule, and a waiver of objection to closing argument issue. At the conclusion of the argument, Judge Altenbernd said what all would probably agree with: that the appeal was well-argued by both sides and set a high standard for future arguments at the Second DCA. But, no, the first oral argument in the new digs did not result in a ruling from the bench.

The reception to follow — and the part of the proceedings as to which Hala Sandridge graciously and gracefully shepherded the Appellate Practice Section contribution – was, to say the least, well done. The reception was on the third floor, which houses the judges' offices. What a thrill it should be for the law students to attend school in the same building where many of the Second DCA judges have their offices, creating the opportunity for interaction with the judges. Somewhat different from our annual dessert reception, this reception included hors d'oeuvres and small entree items in addition to mini-desserts. (Also, unlike our last dessert reception, there was food left over at the end of the reception, even withstanding the significant dent I put in that status after inadvertently discovering a ziploc bag in my brief case just before I left). I tried to resolve the crucial issue – in case any of you would later ask – of how many mini-eclairs it takes to equal one regulation-sized eclair. I'd say it's six. And, the mushroom and cheese on melba hors d'oeuvres, together with the chicken/mushroom/mini-dumpling in white wine sauce thing, is making this long airport layover much easier to endure.

At the reception, there was much celebration and discussion of how this most needed and well-deserved upgrade was achieved for the Second DCA. Judge Altenbernd gave an award to a local politician instrumental in making it all come to pass and expressed a debt of thanks to other people, including various court personnel who worked so hard on the project for so many years.

The bottom line is that the Section contributed to a worthy cause and that, next time you have an argument at the Tampa division of the Second DCA, even though it may not be followed by a reception tantamount to that which took place today, you will have the opportunity to ply your trade in a higher-tech, spiffy-clean, up-to-the task environment – perhaps, in front of an audience of law students. I look forward to seeing you at future Bar functions and Section meetings. And – for those who have begun to rely – as I write this, there are but 124 days until the next Dessert Reception.

Chief Judge Altenbernd stands in front of the Stetson Law Center, the new home of the Second District Court of Appeal in Tampa.

"Judicious Breakfast" Appeals to Dade Bar Appellate Lawyers

by Edward Guedes

Last year the Appellate Court Committee of the Dade County Bar Association decided to try something new. They created a Judicious Breakfast Program to provide an opportunity for appellate practitioners to meet with members of the state and federal appellate bench in a more informal setting, and without the fear of being "peppered" with difficult questions. The breakfasts take place early in the morning for one hour and are hosted on a rotating basis by different law firms. The program generally consists of fifteen to twenty minutes of light breakfast fare and socializing, followed by a fifteen to twenty minute presentation by the visiting judge, followed by another fifteen to twenty minutes of questions and answers. The topics of the presentations have varied widely from substantive discussions of appellate procedure to personalized views of what constitutes effective advocacy in both the state and federal appellate courts.

In its first year, the program focused primarily on judges sitting at the Third District Court of Appeal, including Chief Judge Alan Schwartz (who was the inaugural speaker) and Judges Gerald Cope, Mario Goderich, Melvia Green and Linda Wells. The program was also fortunate to have the participation of Judge Peter Fay from the Eleventh Circuit Court of Appeals and former Florida Supreme Court Justice, Gerald Kogan. Still in its fledgling stages, the program this year has continued its focus on Third District judges (Judges John Fletcher, Juan Ramirez, David Levy and the court's most recent appointment, Frank Shepherd). However the committee members expanded the focus somewhat to include luncheons intended to facilitate the participation of judges from other appellate courts who would otherwise find it difficult to attend an early morning breakfast. In the first luncheon program, Chief Judge Gary Farmer of the Fourth District Court of Appeal gave a fascinating presentation on the abuse of discretion standard. Next, Judge Fred Hazouri provided participants with valuable insight into effective advocacy before the Fourth District Court of Appeal.

Another highlight of this season's program was the participation in February of Judge Rosemary Barkett, currently on the Eleventh Circuit Court of Appeals and formerly a justice of the Florida Supreme Court. Judge Barkett discussed some of the differences she perceives in appellate practice before an intermediate appellate court like the Eleventh Circuit, and a court of final appellate authority, like the Supreme Court of Florida.

If the success of the program may be fairly gauged by attendance at the events, then the program has clearly established itself as a mainstay of the Miami-Dade legal community. While attendance at some of the initial events in the inaugural season was somewhat low, this year's events are consistently attended at maximum capacity with numerous attorneys on waiting lists hoping for a last minute cancellation. The Appellate Court Committee appreciates the participation of so many attorneys who have braved the early morning hours to attend, and who have expressed support for the program, its expansion, and continuation. The Committee also extends its sincere appreciation to all the law firms that have hosted the breakfast and luncheon meetings so as to allow for the presentation of the program at no cost to attending attorneys.

Edward Guedes *is a board certified appellate lawyer with the firm Weiss Serota Helfan in Miami.*

The Florida Bar's Annual Meeting

June 23 - 26, 2004
Boca Raton Resort & Club

Watch your Bar Journal and News for more information.

The Florida Bar Appellate Practice Section
Annual Meeting Schedule

June 24, 2004
Boca Raton Resort and Club

8:30 a.m. – 10:00 a.m.	Committee Meetings
10:00 a.m. – 12:00 p.m.	Section Meeting
3:30 p.m. – 4:30 p.m.	Discussion With The Florida Supreme Court
9:30 p.m. – 11:00 p.m.	Dessert Reception

Rule 1.525: A 'Bright-Line' Rule of 'Unpleasantness' and 'Inequity'– *And An Appellate Lawyer's Relief Act?*

by Evan J. Langbein

Introduction

Following January 1, 2001 and the promulgation of Florida Rule of Civil Procedure 1.525, litigants and trial lawyers need appellate experts to preserve entitlement to attorney's fees awards.

The 2001 Amendments to Rule 1.525 and the Problems They Present

Rule 1.525 states:

> Any party seeking a judgment taxing costs, attorney's fees, or both shall serve a motion within 30 days after filing of the ***judgment***, including a ***judgment*** of dismissal, or the service of a ***notice*** of voluntary dismissal.

(emphasis added).

The Second District held "[w]ith some reluctance" in *Gulf Landings Ass'n., Inc. v. Hershberger*,[1] that Rule 1.525 caused a "bright line" to be strictly enforced.[2] The Third District, however, held in *E & A Produce Corp. v. Superior Garlic Int'l., Inc.*,[3] that Rule 1.525 applied to judgments or notices of dismissal only; it did not apply to single-count dismissals. The party seeking fees under a single count dismissal only had to move for fees within a reasonable time, the pre-existing standard before Rule 1.525 took effect.[4]

Two recent decisions have applied Rule 1.525 in family law matters. In *Mook v. Mook*,[5] the Second District's decision principally turned on the fact that the husband never pleaded entitlement to fees at the pre-judgment stage. The Fourth District's decision in *Gosselin v. Gosselin*,[6] is significant because it, like the Third District in *E & A Produce Corp.*, held that Rule 1.525 can apply to merely a judgment or a notice of voluntary dismissal. *Gosselin* also holds that the rule applies to just one judgment, not a series of judgments. Thus, in *Gosselin*, the court held the rule does not apply to post-decretal orders in dissolution of marriage cases. Further dimming Rule 1.525's "bright line" application are decisions holding that entitlement to fees may be determined by orders (or settlements or other forms of notices other than voluntary dismissals), which are not merits determinations.[7]

In *Fisher v. John Carter & Associates, Inc.*,[8] the Fourth District rejected an apparent conflicting holding of the Fifth District in *Wentworth v. Johnson*,[9] and relied on the Florida Supreme Court's holding in *Gulliver Academy, Inc. v. Bodek*,[10] to conclude that a reservation of jurisdiction provision–in a final judgment–to determine entitlement to attorney's fees enlarged the time to file a motion seeking those fees. *Fisher* followed *Bodek*'s reasoning that an inflexible application of a 30-daytime requirement would nullify the court's reservation provision in the judgment, and create a procedural trap for the unwary litigant or lawyer lulled into a sense of security that the court's own reservation of jurisdiction adequately safeguarded later substantive proceedings in quest of a fee award.

In *P. R. Smith Corp. v. Goyarrola*, the Third District held that because the rule is silent as to the timing of the filing of the supporting documentation, the trial court erred by striking the appellant's motion based solely upon the failure to file supporting documentation within thirty days of the filing of the final judgment.[11] *Goyarrola* is written from a different perspective than the Second District's decision in *Diaz v. Bowen*, that "[t]o recover fees and costs, a party must file a posttrial pleading and supporting proof. Rule 1.525 was created to establish a bright-line rule to resolve the uncertainty surrounding the timing of these posttrial motions."[12]

These decisions reflect how appellate lawyers may significantly assist trial lawyers and litigants seeking to avoid potentially disastrous procedural traps created by an inflexible interpretation of Rule 1.525's thirty-day period as a "bright line" requirement. Because these traps could divest parties and their lawyers of their substantive entitlement to reimbursement or compensation for litigation expenses, special care should be taken to avoid the Rule 1.525 bar.

Efforts to Remedy Ambiguities in What Is a "Judgment" Versus a "Notice of Dismissal"

The appellate lawyer can assist litigants and their trial attorneys by ensuring compliance with Rule 1.525. For example, orders granting a motion to dismiss (with or without prejudice) are neither a judgment nor a final dismissal.[13] Thus, for a court's order, to be a judgment of dismissal, it must dismiss the complaint without leave to amend.[14] Likewise, if an order does not dismiss the complaint, but only grants a motion to dismiss (or simply grants a motion for summary judgment or judgment on the pleadings), it is *not* a "judgment"; and the provisions of Rule 1.525 should not govern, any more than a notice of appeal could invoke the appellate court's jurisdiction. Accordingly, even where a party or the court, or both, intend to dismiss a complaint, but fail to state so in the order or notice, the rule should not be interpreted to exclude a motion for fees, served within a reasonable time, but beyond the 30-day "bright line." Conversely, when the court or party drafts an order or notice dismissing the complaint without prejudice, intending or contem-

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Evan J. Langbein *is a board certified appellate lawyer, practicing with his wife, Leslie Langbein, in the firm of Langbein & Langbein, P.A. in Miami. He handles state and federal appeals in civil, administrative, employment and family matters.*

plating amendment, but failing to state so, then Rule 1.525 should be applied.

Whether particular orders are final or non-final, either authorizing, or not authorizing, timely motions for rehearing are issues with which appellate lawyers constantly struggle.[15] Now, finality is also a potentially critical issue under Rule 1.525 to preserve entitlement to fees. A party may seek fees under either or both Rule 1.525 and Rule 1.530(g) after a final order.[16] The request under Rule 1.525 must be made within thirty days of (1) a judgment, (2) an order dismissing an action, or (3) a notice of voluntary dismissal. Under Rule 1.530(g), the request for fees must be made within ten days.[17]

The Eleventh Circuit's decision in *Members First Federal Credit Union, Louisville, KY v. Members First Federal Credit Union of Fla.*,[18] is instructive. There, the court held that a motion for fees served thirteen days after denial of a timely served motion to alter and amend judgment was also timely served. The Eleventh Circuit reversed the trial court's ruling that the motion for fees failed to meet the requirements of a local rule that such motion be filed no later than 30 days after judgment. The court reasoned that a post-judgment motion suspended and postponed finality of a judgment.

Another Potential Problem: Which Judgment Activates Rule 1.525?

Rule 1.525 does not define *which* judgment starts the clock. If there are successive judgments, is it the first one or a later one? If there is a judgment and a notice, which starts the time period? What is the effect of an authorized versus an unauthorized motion for rehearing? Nor does the rule address the effect, if any, of a pending counterclaim under Florida Rule of Civil Procedure. 1.420(a)(2). Rule 1.525 may actually create new issues rather than establish the bright line that was intended.

The Second District's decision in *Graef v. Dames & Moore Group, Inc.*,[19] illustrates this point. In that case, the starting date used to calculate the time to file a post-judgment motion for attorney's fees was the date the first judgment was entered in favor of a defendant, not a second judgment entered a year later. The *Graef* court recognized Rule 1.525 only in dicta since pre-2001 law applied. The court held under pre-2001 law that waiting 18 months after a first summary judgment to file a motion for attorney's fees initially was unreasonable. The court rejected the moving party's argument that the delay was reasonable because a second summary judgment had been entered just six months before its motion was filed. The *Graef* court observed the first judgment "marked the end of Graef's lawsuit and the beginning of post-judgment proceedings between these parties."

Rule 1.525's Purpose

Rule 1.525 is patterned after Federal Rule of Civil Procedure 54(d)(2)(B), which only allows a fourteen-day period after judgment to file a motion for attorney's fees. The federal rule, however, enables the district courts, through its local rules, to pre-empt the time period. Two of Florida's district courts have by local rule permitted a thirty-day "bright-line" which is the same as Rule 1.525.[20]

Patterning a state court rule of procedure after a federal procedural rule on attorney's fees is somewhat akin to fitting Cinderella's slipper on her sisters. Federal courts do not always require hearings or experts to determine fees. Florida state courts, however, require that fees be determined after an evidentiary hearing, where testimony of experts is used.[21] Additionally, federal courts have never imposed the strict pleading requirements for fees that Florida state courts impose under *Stockman v. Downs*, 573 So. 2d 835 (Fla. 1991).[22]

There also are also *substantive differences* in the manner in which fees are considered in federal court. For example, in federal court, fee liability created by contract is deemed an element of damages, which may be tried by jury, and not necessarily deferred as an ancillary monetary claim, determined solely by the court.[23] A party in federal court may recover attorney's fees as damages for breach of contract under Rule 54(c) "even if the party has not demanded such relief in the party's pleadings." As such, a "bright line" time requirement to move for fees post-judgment in federal court serves different objectives. In Florida state courts, however, an attorney's fee authorized by a contract is not considered "damages," and thus, the determination of entitlement to and amount of attorney's fee award are not jury issues. Instead, reimbursement for litigation expenses is an issue reserved exclusively for the trial court after a prevailing party is determined.[24]

Rule 1.525's Multiple Paradoxes

Green v. Sun Harbor Homeowners' Ass'n., Inc.,[25] foretold Rule 1.525's problems. In *Green*, the Florida Supreme Court referred to the Civil Procedure Rules Committee "the question of whether there should be included in the Florida Rules of Civil Procedure a specific rule pertaining to claiming attorney's fees." *Green* held "that a defendant's claim for attorney's fees is to be made either in the defendant's motion to dismiss

continued next page

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RULE 1.525
from preceding page

or by a separate motion which must be filed within thirty days following a dismissal of the action."

In response to *Green*, the Civil Rules Committee created a broad rule that embraced all cases (except as it has been seen above, in certain post-decretal family law cases). The Committee promulgated "procedure" to affect "substantive" claims, and required instead of either a pre-judgment or post-judgment pleading for fees – **both** of them.[26]

The problem is that a Rule 1.525 motion is part of supplemental proceedings under Florida Rule of Civil Procedure 1.110(h).[27] In both *White v. New Hampshire Dept. of Employment Security*,[28] and *Finkelstein v. North Broward Hospital District*,[29] the United State Supreme Court and the Florida Supreme Court held that a post-judgment "motion for prevailing party attorney's fees raises a 'collateral and independent' claim. . . ." Accordingly, Rule 1.525 (or Rule 1.530(g)) contemplates an independent claim by pleading entitlement to fees within a thirty-day period.

The confusion does not end there. The Second District in *Diaz* went so far as to state: "To recover fees and costs, a party must file a post-trial pleading and supporting proof." Rule 1.525 only refers to the timing of a motion. Motions are not pleadings.[30] Moreover, Rule 1.525 does not require supporting proofs, as referred to in *Diaz*.[31] While those advocating post-trial "certainty" may have desired a rule that required detailed proof of fees to be "served" within thirty days of judgment, Rule 1.525 contains no such requirement.

Conclusion

The application of Rule 1.525 by the district courts is replete with incongruities and poses multiple traps for the unwary. Appellate lawyers, because of their experience in navigating these land mines in other contexts, can assist trial lawyers and litigants seeking to protect their attorney's fees claims.

Endnotes:

1. 845 So. 2d 344 (Fla. 2d DCA 2003).
2. The *Hershberger* court admitted it found the Rule "unpleasant. . .to strictly enforce", adding there is "little question that bright-line rules [like Rule 1.525] can create inequities like those apparent in this case."
3. 864 So. 2d 449 (Fla. 3d DCA 2003).
4. *E & A Produce Corp. v. Superior Garlic Int'l., Inc.*, 864 So. 2d 449 (Fla. 3d DCA 2003) (citing *Folta v. Bolton*, 493 So. 2d 440, 444 (Fla. 1986)); *Finkelstein v. N. Broward Hosp. Dist.*, 484 So. 2d 1241, 1243 (Fla. 1986); *see also White v. New Hampshire Dept. of Employment Sec.*, 455 U.S. 445 (1982).
5. 2004 WL 590583 (Fla. 2d DCA Mar. 26, 2004).
6. 2004 WL 626103 (Fla. 4th DCA Mar. 31, 2004).
7. *E.g., Quijano v. Florida Patient's Compensation Fund*, 520 So. 2d 656, 658 (Fla. 3d DCA 1988); *Metropolitan Dade County v. Evans*, 474 So. 2d 392 (Fla. 3d DCA 1985); *State Dept. of HRS v. Hall*, 409 So. 2d 193, 195 (Fla. 3d DCA 1982).
8. 864 So. 2d 493 (Fla. 4th DCA 2004).
9. 845 So. 2d 296 (Fla. 5th DCA 2003).
10. 694 So. 2d 675 (Fla. 1997).
11. *P & R Smith Corp. v. Goyarrola*, 864 So. 2d 584 (Fla. 3d DCA).
12. *Diaz v. Bowen*, 832 So. 2d 200, 201 (Fla. 2d DCA 2002) (citing *Shipley v. Belleair Group, Inc.*,759 So. 2d 28, 30 (Fla. 2d DCA 2000), for usefulness of bright-line rule for timing requirements).
13. *LTC. Allen v. Florida Dept. of Military Affairs*, 576 So. 2d 971, 972 (Fla. 5th DCA 1991) (citing *Gries Inv. Co. v. Chelton*, 388 So. 2d 1281 (Fla. 3d DCA 1980)0; *see also XO Communications, Inc. v. Dept. of Revenue*, 851 So. 2d 883 (Fla. 1st DCA 2003); *Preferred Pools & Spa of Naples, Inc. v. Beachtree Homes, Inc.*, 825 So. 2d 531, 532 (Fla. 2d DCA 2002); *Hoffman v. Hall*, 817 So. 2d 1057 (Fla. 1st DCA 2002).
14. *Board of County Commissioners of Madison County v. Grice*, 438 So. 2d 392 (Fla. 1983); *K.W. Brown & Co. v. McCutcheon*, 819 So. 2d 977, 979, n.1 (Fla. 4th DCA 2002) (dismissal of complaint "without prejudice" is sufficiently final when it is "without leave to amend" the complaint); *Martinez v. Collier County Public Schools*, 804 So. 2d 559, 560 (Fla. 1st DCA 2002); *Hayward & Assocs., Inc. v. Hoffman*, 793 So. 2d 89 (Fla. 2d DCA 2001); *Hollingsworth v. Brown*, 788 So. 2d 1078 (Fla. 1st DCA 2001); *Palm AFC Holdings, Inc. v. Minto Communities, Inc.*, 766 So. 2d 436 (Fla. 4th DCA 2000) (words "with prejudice" in order dismissing a complaint "are redundant"); *Silvers v. Wal Mart*, 763 So. 2d 1086 (Fla. 4th DCA 1999).
15. *E.g., Wagner v. Beiley, Wagner & Associates, Inc.*, 263 So. 2d 1 (Fla. 1972); *see also Caufield v. Cantele*, 837 So. 2d 371, 376 (Fla. 2002).
16. *See Harbor Bay Condominiums, Inc. v. Basabe*, 856 So. 2d 1067, 1069 (Fla. 3d DCA 2003).
17. *Id.*
18. 244 F. 3d 806 (11th Cir. 2001).
19. 857 So. 2d 257 (Fla. 2d DCA 2003).
20. *See Members First Fed. Credit Union, Louisville, Ky. v. Members First Fed. Cr. Union of Fla.*, 244 F. 3d 806 (11th Cir. 2001); Local Rule 54.1(A), N.D. Fla.; Local Rule 7.3(A), S.D. Fla.
21. *See Sierra v. Sierra*, 505 So. 2d 432 (Fla. 1987); *Rakusin v. Christiansen & Jacknin, P.A.*, 863 So. 2d 442 (Fla. 4th DCA 2004).
22. *See Capital Asset Research Corp. v. Finnegan*, 216 F. 3d 1268 (11th Cir. 2000).
23. *Finnegan*,216 F. 3d 1268. *See also Drill South, Inc. v. Int'l. Fidelity Ins. Co.*, 234 F. 3d 1232, 1240, n.13 (11th Cir. 2000); *Engel v. Teleprompter, Corp.*, 732 F. 2d 1238 (5th Cir. 1984); *Klarman v. Santini*, 503 F. 2d 29, 36 (2d Cir. 1974).
24. *See Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987); *Parham v. Price*, 499 So. 2d 830 (Fla. 1986).
25. 730 So. 2d 1261, 1263 n.4 (Fla. 1998).
26. *Compare Bodek,*, 694 So. 2d 675 *with Finkelstein v. North Broward Hosp. District*, 484 So. 2d 1241, 1243 (1986) (noting the holding in *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982)).
27. *See Diaz v. Bowen*, 832 So. 2d 200, 201 (Fla. 2d DCA 2002); *see also Gulf Landings Ass'n., Inc. v. Hershberger*,845 So. 2d 344.
28. 455 U.S. 445 (1982).
29. 484 So. 2d 1241, 1243 (Fla. 1986).
30. *See, e.g., Harris v. Lewis State Bank*, 436 So. 2d 338, 340, n.1 (Fla. 1st DCA 1983).
31. *See P&R Smith Corp. v. Goyarrola*, 864 So. 2d 584.

Book Reviews:
Advocacy on Appeal and *Florida Civil Procedure*

By Scott D. Makar

No matter how long a lawyer has been in the business of writing appellate briefs and arguing in appellate courts, it is never a bad idea to return to the basics. The "first principles" of appellate practice -- such as having a coherent theme, knowing your audience, etc. -- are oftentimes lost in the hectic pace of meeting deadlines, conferring with clients and other counsel, and so on. A compact handbook that provides a succinct statement of such principles in a structured and reader-friendly way is always a welcome addition to the appellate bookshelf.

Enter "Advocacy on Appeal" (West Group 2001) (204 pages) authored by Professor Bradley G. Clary (Clinical Professor and Director of Legal Writing), Associate Dean Sharon Reich Paulsen, and Adjunct Professor Michael J. Vanselow, all of the University of Minnesota Law School.

The key difference between "Advocacy on Appeal" and other appellate practice materials is its limited, but highly important, scope. It is not an exhaustive treatise or text. It does not explain local rules or how to preserve error at trial. It does not analyze complex jurisdictional issues. None of these is its purpose.

Instead, it offers -- in the authors' words -- a "cookbook" or "formula" for constructing and presenting appellate arguments. While it may seem obvious, the "basic recipe" for appellate advocacy is to (1) "Decide where you are going"; (2) "Give the court a reason to want to go there"; and (3) "Give the court a permissible legal route to go there." Simple, right?

Well, according to the authors (who have 59 years of collective experience in observing appellate advocacy), the "single biggest defect in ineffective arguments is that the advocate never fully decided what to say; so ultimately the advocate did not say it." This problem can manifest itself in a number of ways, such as trying to make too many points on appeal, raising a number of points but only arguing some, having a key point but getting bogged down in unnecessary minutiae, and so on.

What to do? Pull out the cookbook! Use the ingredients you have (applicable facts/law) to craft an "argument which (like a good meal) your audience will eagerly consume." Chef Emeril Lagasse, look out!

"Advocacy on Appeal" also has useful "guidelines" in preparing briefs and oral arguments, such as a "Do" and "Don't" list. A sort of "Goofus and Gallant" of Highlights© fame for appellate lawyers. For example, it may seem obvious that one should "Stop mid-sentence if a judge interrupts." But, how often have we seen others not follow this maxim? The authors say that pens or "loose papers" should not be brought to the podium. Many of us do so, but - upon reflection - I can't recall the last time I had time to write something down during the argument itself. Before argument in my case was called or during opposing counsel's argument, but not during my argument. Loose papers, of course, are simply an invitation for an embarrassing episode of "52 Card Pickup." A copy of "Advocacy on Appeal" is an excellent reality check that provides lots of great practical tips, as well as useful exercises in preparing your next case.

Okay, now that you've got a good appellate cookbook on your shelf, why would you need a Florida Civil Procedure treatise? The answer is that effective appellate practitioners must have a working knowledge of procedural rules in the lower courts. An excellent and useful addition to the marketplace is Bruce J. Berman's "Florida Civil Procedure" (West 2003) (958 pages). Mr. Berman, with able insights and assistance from distinguished appellate judges and civil practitioners, has produced a well-researched and practical guide to the civil rules and their history and nuances.

"Florida Civil Procedure" has a number of features that distinguish it. One is an index that leads readers quickly to relevant sections. Another is useful appendices of rules and mediation/arbitration provisions as well as a table of "time frames" for determining compliance with the Rules and a "tracing table" that correlates the Florida Rules to the Federal Civil Rules.

The most notable aspect of the book is its detailed focus on the historical development of the Rules. Insights into "how" and "why" specific rules have been amended are referenced in footnotes and text. The author, who serves on the Florida Bar's Civil Procedure Rules Committee, has accumulated a wealth of knowledge and perspective into the evolution of particular rules as they have been amended and judicially construed over the years. In doing so, he has done extensive research as well as gathered wisdom from judges and practitioners who have served on the Committee.

The net result is a concise and useful publication that is conveniently softbound to fit in a briefcase or bookcase. From an appellate practitioner's perspective, "Florida Civil Procedure" has a number of index entries regarding appeals and review of trial court orders. Its greater importance is that it is a well-written and well-researched presentation of the Rules synthesized from the perspective of an experienced and thoughtful practitioner. Those who have worked with or served on committees with Mr. Berman can attest that his analysis of a legal topic is methodical and meticulous. "Florida Civil Practice" reflects those virtues.

Scott D. Makar *is an Assistant General Counsel in the Office of General Counsel, Appellate and Local Government Section, City of Jacksonville, Florida.*

Preservation in Federal Appeals: Untangling the Web

By Paul A. Avron and Brian G. Rich

In *Valdez v. Feltman (In re Worldwide Web Systems, Inc.)*,[1] the Eleventh Circuit held that a litigant's failure to raise in the trial court the argument that a default judgment is void for insufficiency of service of process waives that issue for appellate review.

The *Valdez* opinion discloses that a Chapter Eleven trustee brought suit in bankruptcy court against Valdez and Worldstar Communications Corp. ("Worldstar"), a corporation Valdez controlled, for allegedly having received a fraudulent transfer from the debtor.[2] For reasons not relevant to the decision, neither defendant filed answers or otherwise responded; thus, default judgments were entered against them.[3] Valdez sought to vacate the default judgment under Federal Rule of Civil Procedure 60(b)(1) for his "excusable neglect," but did not seek relief under Rule 60(b)(4) for insufficient service of process.[4] On appeal to the federal district court, Valdez again argued that the default judgment should be vacated based upon the existence of "excusable neglect," but for the first time, he added that under rule 60(b)(4), the default judgment should be vacated for insufficient service of process.[5] The district court affirmed the denial of the motion to vacate the default judgment.[6] On further appeal to the Eleventh Circuit, Valdez argued that the lower courts erred in not vacating the adverse default judgment based upon Rule 60(b)(1) and (b)(4).[7]

Initially, the Eleventh Circuit observed that, although it reviewed a trial court's decision on a Rule 60(b)(4) motion for an abuse of discretion, insufficient process under that rule "implicates personal jurisdiction and due process concerns."[8] The court recognized the general rule that "where service of process is insufficient, the court has no power to render judgment and the judgment is void."[9] Nevertheless, it also noted that objections to personal jurisdiction (unlike subject matter jurisdiction) can be waived, citing *Pardazi v. Culman Medical Center* [10], a 1990 decision in which it concluded that a party's right to challenge personal jurisdiction on the basis of insufficiency of service of process is waived if not initially asserted in that party's first Rule 12 motion, other initial pleading or general appearance.

Although the Eleventh Circuit had not previously addressed whether its holding in *Pardazi* was applicable when a party failed to raise insufficiency of service of process in a Rule 60(b) motion,[11] the court relied on the Seventh Circuit's prior decision in *Swaim v. Moltan Co.*,[12] which held that a party's failure to raise the lack of *in personam* jurisdiction before the trial court in a Rule 60(b) motion challenging a default judgment constitutes a waiver.[13] The Eleventh Circuit agreed with the Seventh Circuit's reasoning in *Swaim*:

> when a party chooses to utilize the attention and limited resources of a district court in a motion under *Rule 60(b)*, we think it just and proper that it be required to put before the district court whatever infirmities support setting aside the default judgment [because it] brings to bear the district court's factfinding function and unique knowledge of the case and maintains the court of appeals' role as resolving disputed questions of law--not fact.[14]

The Eleventh Circuit concluded that absent a compelling reason for the court to make an exception to the general rule that issues not presented to the trial court are waived for purposes of appeal,[15] "challenges under *Rule 60(b)(4)* on insufficient service of process grounds are waived if not squarely raised."[16]

In support of its decision, the court recognized that it had previously declined to address issues not raised before bankruptcy courts "because an alternate course would 'delay the disposition of bankruptcy cases' and permit a party objecting to the default judgment to 'say nothing to the bankruptcy court, await its ruling, bypass that judgment, and for the first time take that objection to the district court.'"[17] The Eleventh Circuit further relied on the holdings of its sister circuits that the failure to raise a claim in bankruptcy court "generally constitutes waiver of that claim."[18]

After examining the five exceptions to the general rule on issue preservation for appellate review, the court could not discern any of those exceptions in the facts before it.[19] The Eleventh Circuit concluded that Valdez's failure to raise insufficient process in his Rule 60(b) motion filed with the trial (bankruptcy)

Appellate Telephonic Seminars

Two more opportunities remain to participate in the Spring series of one hour telephonic CLE seminars; April 20, 2004 and May 18, 2004. The seminars begin at 12:10 p.m. and last for 50 minutes to an hour. One hour of CLE credit is offered for these informative seminars. For more information, please go to the Appellate Practice Section website at www.flabarappellate.org. The 2004/2005 series is scheduled to begin July 20, 2004 and will continue on the third Tuesday of every month, (except December), through May 17, 2005.

court constituted a waiver thereof for purposes of appeal. Accordingly, it affirmed the district court's affirmance of the bankruptcy court's denial of Valdez's motion to vacate the default judgment.

The Eleventh Circuit's decision is consistent with the well-accepted general principle of appellate review that matters not raised before the trial court will not be considered on appeal, and controlling case law from the Supreme Court recognizing that the right to challenge *in personam* jurisdiction, as opposed to subject matter jurisdiction, can be waived if not properly preserved in the trial court.

Paul A. Avron *and* ***Brian G. Rich*** *practice appellate law at Berger Singerman, P.A., Miami, and litigated this matter on behalf of the chapter 11 trustee, James S. Feltman, up to and including the Eleventh Circuit appeal discussed above.*

Endnotes:

[1] 328 F.3d 1291 (11th Cir. 2003).
[2] *Id.* at 1294. The primary basis for the allegation was testimony given by the appellant's brother (the debtor's principal) at the debtor's first meeting of creditors, 11 U.S.C. § 341(a). *Id.* at 1296 n.6
[3] *Id.* at 1294.
[4] *Id.* The appellant raised a claim under Fed. R. Civ. P. 60(b)(6) before the Bankruptcy Court but not the District Court, sitting as the first appellate court; therefore, the Eleventh Circuit declined to address that claim. *See id.* n.4.
[5] *Id.* at 1295.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 1299
[9] *Id.* (citing *Varnes v. Local 91 Glass Bottle Blowers Ass'n,* 674 F.2d 1365, 1368 (11th Cir. 1982) and *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950)). *Accord Davies v. Midwestern Corp.,* 214 F.R.D. 699, 701 (M.D. Fla. 2003) (same).
[10] 328 F.3d at 1299-1300 (citing *Pardazi v. Cullman Med. Ctr.,* 896 F.2d 1313, 1317 (11th Cir. 1990)).
[11] *Id.* at 1300.
[12] 73 F.3d 711 (7th Cir. 1996).
[13] 328 F.3d at 1300 (citing *Swaim,* 73 F.3d at 718)).
[14] *Id.* (quoting *Swaim,* 73 F.3d at 719) (italics in original).
[15] *Id.* (citing *Dean Witter Reynolds, Inc. v. Fernandez,* 741 F.2d 355, 360-61 (11th Cir. 1984) (setting forth five exceptions to the general rule that an appellate court will not address issues not raised before a trial court)).
[16] *Id.* (italics in original).
[17] *Id.* (quoting *In re Daikin Miami Overseas, Inc.,* 868 F.2d 1201, 1208 (11th Cir. 1989)).
[18] *Id.*at 1300-01 (citing *In re Hemingway Transp., Inc.,* 993 F.2d 915, 935 (1st Cir. 1993) and *In re Kieslich,* 258 F.3d 968, 971 (9th Cir. 2001)).
[19] *Id.* at 1301-02.

JUDGE FARMER
from page 1

the same reasons. Teetering on the edge of problems with the juvenile system, Judge Farmer was given a choice that would change his life: enlist in the Marine Corps. or spend time in a juvenile institution. Judge Farmer chose the Marines.

Stationed in Jacksonville, North Carolina from 1958 for bootcamp training, followed by fourteen months in Okinawa, where he attended school for radio telegraph/teletype operators, Judge Farmer was assigned to different units in the 3d Marines and rose from enlisted Private to Lance-Corporal. He spent his last fifteen months in North Carolina until 1961. Judge Farmer remained a Marine in the Reserves for several more years. In the rigors of discipline, he also cultivated his thirst for knowledge and understanding, and obtained his high school equivalency degree. A Marine radio telegraph/teletype operator, he remains fluent today in the Morse Code he learned more than forty years ago.

He followed his Marine Corp. years with enrollment in Broward Community College, where he modeled his education after John F. Kennedy's broad education in humanities. And like John Kennedy, he pursued history. After receiving an Associate of Arts degree with highest honors in December 1968, he obtained his Bachelor of Arts degree in history at Florida Atlantic University in June 1970. He also pursued intensive course work in philosophy, French and Latin. Even today, Judge Farmer fluidly cites historical events to give context to today's laws, speaks French with a Parisian accent, and quotes Shakespeare, in addition to numerous other great literary works that would render this article well over the word limit.

Judge Farmer also speaks with detached candor about declining a Woodrow Wilson Fellowship in history to pursue law instead. He returned home to begin law school at the University of Toledo College of Law to face and succeed in the place where he had failed before, this time for his family to see. He was also taken by the newness of law school and the different composition of the students there, many anti-war, and others, war veterans. Judge Farmer, with his military haircut and mannerisms of discipline, was often misjudged for being conservative and narrow. (In law school, he authored, *Conscientious Objection: In-Service Discharges and Procedural Due Process*, 4 U. Tol. L. Rev. 58 (1972)). This produced an environment of constant debate that intrigued him.

So it was no surprise that Judge Farmer, after receiving his Juris Doctor degree from the University of Toledo College of Law in June 1973, clerked for the Honorable Nicholas J. Walinski, Jr., U.S. District Judge for the Northern District of Ohio in 1973, and decided then that he would work in appellate law. And appellate work he did. Judge Farmer found appellate practice similar to preparing his thesis in history: formulating an hypothesis, marshaling facts to support or reject it, and grabbing the many opportunities to think about issues both in their direct implications and "out on the edges." He worked in civil trial and appellate practice at Abrams, Anton, Robbins, Resnick & Schneider P.A., Hollywood, Florida, from 1975-82, becoming Partner there, and, again, at Goldberg, Young & Borkson, P.A., Fort Lauderdale, from 1982-84. He then formed his own successful appellate practice, Gary M. Farmer, P.A., also in Fort Lauderdale, from 1984-91. He attributes the success of his law practice to Mrs. Farmer's management expertise.

Joining the bench of the Fourth District Court of Appeal in 1991, Judge Farmer's appellate experience has given him well-defined views on the attributes of a good appellate judge. He speaks with great admiration for his colleagues at the Fourth, and their mutual allegiance to advancing good law. He speaks with equal admiration of other appellate judges and justices. But he also notes that today, in our legal, political and social sectors, it is no longer fashionable to accept responsibility for our actions; yet, a good appellate judge has to have both a good legal mind to decide cases and the "better angels of our nature." He references Shakespeare's 144th Sonnet, which Abraham Lincoln also referenced in his First Inaugural Address, to explain:

> *Two loves I have of comfort and despair,*
>
> *Which like two spirits do suggest me still:*
>
> *The better angel is a man right fair,*
>
> *The worser spirit a woman colour'd ill.*
>
> *To win me soon to hell, my female evil*
>
> *Tempteth my better angel from my side,*
>
> *And would corrupt my saint to be a devil,*
>
> *Wooing his purity with her foul pride.*
>
> *And whether that my angel be turn'd fiend*
>
> *Suspect I may, but not directly tell;*
>
> *But being both from me, both to each friend,*
>
> *I guess one angel in another's hell:*
>
> *Yet this shall I ne'er know, but live in doubt,*
>
> *Till my bad angel fire my good one out.*

Judge Farmer uses history and literature to explain that judges are people, just people, with great power, who should be in the "internal struggle of recognizing the bad angels" that we, as people, have, and to "follow the better angels of our nature" to treat colleagues and advocates with respect.

Judge Farmer also has well defined

views on the attributes of a good appellate lawyer. He speaks with great admiration for the appellate lawyers' powers of persuasion, intellects, what he calls "mountains of integrity", strong work ethics, and the daunting challenge to balance the extensive demands of appellate practice against family time. However, he finds lying among some lawyers or indifference to advancing good law, wholly unacceptable and intolerable. He is also impatient with an appellate lawyer's unwillingness to admit the obvious, either in the record or in the law, or worse, to lie about it. And he does not tolerate the use of personal attacks among appellate lawyers. Judge Farmer further observes that he has never been moved by an appellate argument that a decision has to be upheld because it advances the exigencies of a crowded trial docket. Returning to history to complete his explanation, Judge Farmer cites to one of Kennedy's greatest strengths: his ability to detatch himself from his objectives. Appellate lawyers need to practice that same detachment.

Judge Farmer also prepares intensely for the oral arguments before him, reviewing the appellate briefs, the memoranda of law prepared by the judicial clerks, and conducting his own online legal research. He describes the preparation in the Fourth District Court of Appeal as really beginning two months before oral argument, at the time the appeal is screened for assignment. As batches of cases are assigned, they develop tentative opinions about them and the necessity for oral argument. A substantial percentage of the cases, Judge Farmer explains, are based on settled law to which oral argument would add little. Oral argument is reserved for those cases where, first, it is requested and, second, the law is unsettled, the law should be revisited, or the facts are highly disputed. His judicial experience has helped him see the enormous importance of oral argument in judicial understanding and decision-making.

Like other appellate judges questioned on this topic, Judge Farmer describes oral argument as affecting the outcome in possibly as many as ten percent of the cases argued. As a result of the importance of oral argument, the Court's screening process has evolved to allowing more oral arguments with less time allotted, even in some extraordinary writ petitions where oral arguments have historically not been granted.

Judge Farmer is also advancing the Fourth District's pilot E-Filing Program to serve as the test site for moving Florida's appellate courts toward becoming paperless courts. Judge Farmer sees the issue as not whether we will become paperless; the only question is how and how soon; we either "get on board or get left behind" the rest of the courts in the country. The Fourth District even now permits the electronic filing of briefs, but only one-third of the Court's roughly 5,000 cases are paid filing fee cases. The Court does not yet have a document management system to manage all documents electronically. To ensure that a system gets in place that works for everyone, the Court has created a committee of lawyers to work with members of the Court, Judge Warner in particular, to address practitioner issues and the particular items needed. Judge Farmer expresses great pride in the support the project is receiving from Mike Love, Director of Information Services for the Office of the State Court Administrator in Tallahassee. If the Legislature approves supplemental funding by July 2004, the Court will start then with the help of its lawyers committee to choose among competing document management software programs and begin the process of adapting those programs to the Court's unique needs. An experimental or "trial" version of e-filing should then be ready for testing by early 2005.

Judge Farmer approaches the writing of his opinions with the same independent thinking he applies to the Court's operation. He writes and computerizes all of his own opinions. He even formats them "ready for publication." But he also employs time-tested tradition. Like the other Fourth District Court of Appeal judges, he seeks out the input of his colleagues in a large percentage of cases. The Fourth District judges, he explains, are in many ways no different from appellate practitioners who debate appellate issues with others, and explore controversial ideas and interpretations. Also no different from appellate practitioners, these debates can become passionate, sometimes ending in respectful disagreement and dissent. Judge Farmer likens being on the Court to being in a "healthy marriage to eleven people." He is openly proud of his colleagues on the Court and the fact that their differences promote vigorous debate.

Beyond the transformation in Judge Farmer's education, in the summer of 1962, Judge Farmer made other important "life" decisions. He decided to travel to Fort Lauderdale to visit family. There, he met and was immediately taken by his future wife (and law office manager until he joined the Fourth District Court of Appeal), JoAnn Hines, an Irish beauty and former homecoming queen, who also happened to be visiting. They were married one year later in October 1963, and produced a son, Gary M. Farmer, Jr., also an accomplished appellate and trial lawyer and father of two girls, Hannah and Abigail. And they also had a daughter, Linda Farmer, who works with oncologists and is an expert in medical billing. Judge Farmer describes his children and grandchildren with unrestrained pride, depicting his son as an extraordinary father and appellate lawyer, and his daughter as exceptionally creative in poetry and music, with "the soul of a poet". Judge and Mrs. Farmer celebrate their fortieth wedding anniversary this October.

Now a lifelong student, Judge

continued next page

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JUDGE FARMER
from page 5

Farmer has also obtained his Master of Laws, LL.M., in Judicial Process, in May 2001, at the University of Virginia School of Law. He speaks proudly of Florida's national leadership in facilitating the continued education of its judiciary by outstanding gifted teachers in the processes of the law. He has also pursued his cooking interest, completing courses at the Florida Culinary Institute of West Palm Beach. And like any serious cook, Judge Farmer keeps his collection of special metal kitchen knives razor sharp, maintains a culinary herb garden, and boasts an extensive collection of cookbooks, alongside his library of great literature. He savors great Broadway musicals, Frank Sinatra, and the great songwriters of the golden age of Tin Pan Alley, like Cole Porter and Irving Berlin.

So Judge Farmer is an avid historian, herb gardener, lover of Broadway musicals, son of a Irish Catholic bus driver, gourmet cook, technology pioneer and Chief Judge of the Fourth District Court of Appeal, who reminds his two young granddaughters that "questioning is good" and "coloring outside the box is a good thing".

Dorothy Easley, M.S., J.D., *is a board-certified appellate attorney. She is in-house appellate counsel for Steven M. Ziegler, P.A., Hollywood, Florida, specializing in health and managed care law. She serves on the Appellate Practice Section Pro Se Handbook Committee and received the 2002-03 Service Award for her contributions to that Handbook. She now serves on the Section's Executive Council and Publications Committee.*

Appellate Practice Section Awards

Adkins Award

Nominations are being sought for the Appellate Practice Section's annual Adkins Award, established in 1995 to honor those who have made significant contributions to the field of appellate practice in Florida. The award, presented at the section's annual dessert reception on Thursday, June 24, 2004 in Boca Raton, celebrates the memory of James C. Adkins. Please send a letter describing the nominee's contributions to appellate practice to The Appellate Practice Section, c/o Austin Newberry, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300. Nominations may also be e-mailed to anewberry@flabar.org or faxed to 850-561-5825. All nomination should be received no later than 5:00 p.m. on Monday, May, 24, 2004.

Appellate Practice Pro Bono Award

Nominations are being sought for the Appellate Practice Section's 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, FL 32399-2300. Nominations may also be e-mailed to anewberry@flabar.org or faxed to 850-561-5825. All nominations should be received no later than 5:00 p.m. on Monday, May, 24, 2004. The award will be presented at the Section's annual dessert reception on Thursday, June 24, 2004 in Boca Raton.

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