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**Message from
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Judge Thomas D. Sawaya: Chief Judge of the Fifth District Court of Appeal

by Susan S. Lerner¹



Judge Sawaya

Developing a great mind does not require you to travel great distances. And so it has been with The Honorable Thomas D. Sawaya, the seventeenth judge appointed to serve on our state's Fifth District Court of Appeal. Judge Sawaya

was born in Ocala on July 10, 1952. He has lived his entire life, educated himself, practiced law, raised a family, and served on three courts all within a 100-mile radius of where his ancestors settled over 120 years ago.

The year was 1883. Judge Sawaya's great uncle arrived in Marion County Florida to begin work as a hunting and fishing guide, after migrating to Cuba from Italy. Judge Sawaya's grandfather

See "Chief Judge Sawaya," page 16

Chief Judge David L. Levy: Giving His Regards to Broadway

by Edward G. Guedes¹



Chief Judge David L. Levy

"What are you going to believe... what you see with your own eyes or what I tell you?"

With those words, then-Judge, now-Chief Judge David L. Levy of the Third District Court of Appeal, opened the majority opinion in the 2003 case of *Act Realty Co., Inc. v. Rotemi Realty, Inc.*² If you ask him, he will tell you that the use of that quotation reflects his true personality. Suffice it to say that no

other opinion of the Third District has ever quoted a Broadway musical. The quotation reflects at once both Chief Judge Levy's sense of humor and his earnest desire to see past the trappings of the law in order to effectuate real justice and "to promote and protect the integrity of government and, ultimately, the best interests of the public at large."³ Even a cursory review of Chief Judge Levy's impressive résumé reveals that his commitment is not mere lip service and that he has always dedicated himself to promoting the public good.

Chief Judge Levy is a Miami native and a proud product of its public school system. He graduated from Miami Senior High

See "Chief Judge Levy," page 17

Message from the Chair: And the Survey Says...

by John Crabtree



To better serve its members, the Appellate Practice Section needs to know who its members are – how much of their work is appellate, how long they have been practicing, how they handle the business side of their practice, and what they think about the Section's activities and services. To learn the answers to these (and other) exciting questions, we conducted a survey. Over 200 Section members participated. While the complete results will be published on our website, www.flabarappellate.org, here are some highlights:

The survey's respondents were 54 percent male and 46 percent female. Most had been in practice for some time: 31 percent for 10 or fewer years, and 67 percent for 11 and more years, with 31 percent of those in practice for more than 20 years.

While 19 percent of the total respondents were board certified in appellate practice, the likelihood of a respondent being board certified increased with years in practice—except for those lawyers who had been practicing more than 30 years. (An increasing majority of the respondents practicing 16-30 years were

board certified, but only a quarter of those practicing more than 30 years were.)

The survey asked a series of business of law questions—sizes of firms, workloads of lawyers, types of fee arrangements and hourly rates.

Contrary to the lone-wolf image of appellate lawyers, less than half (45 percent) of the respondents said that they practice in firms of 5 or fewer lawyers, and only half of *them* were solo practitioners. While 34 percent said they practice in firms of 6-40 lawyers, 5 percent practice in firms of 41-100 lawyers, and 16 percent practice in firms of over 100 lawyers.

Most respondents handled over 20 appeals a year, though a majority did not limit their practice to the appellate courts. It appeared instead that most respondents spent a substantial amount of their time providing trial support—handling motions, memoranda and jury instructions, and giving general legal advice to trial lawyers.

Over 80 percent of the respondents said they handled appeals on an hourly basis—with an average statewide rate exceeding \$250 an hour. (The survey unfortunately did not discern the effect of board certification, years in practice, or geographic region). As for alternative billing arrangements, 46 percent of respondents handled appeals on a flat fee

basis, and slightly more than one-third (34 percent) handled appeals on a contingency fee basis

It was reassuring that 80 percent of the survey's respondents were "satisfied" with the Appellate Practice Section, and less than 1 percent were actually "dissatisfied" with the Section.

Most of the respondents (62 percent) had used the Section's website, and 93 percent of them found it useful. While almost all the respondents (96 percent) read *The Record*, only 75 percent of the respondents used the Section's guide to Florida's appellate courts—the Florida Appellate Practice Guide.

Almost all of the respondents who either read *The Record* or used the Guide (97 percent) found the publication useful, suggesting that we need to do a slightly better job of getting out the Guide and increasing members' awareness of it. Since 65 percent of the respondents said they would like to receive their updates to the Guide by email, future distribution should be easy and inexpensive.

Perhaps the most interesting statistic—at least for the Section's Programs and CLE committees—was that 90 percent of the respondents said they had learned about Section events after the fact and that they would have attended had they known about them before the events occurred. This was consistent with the discovery that, while only 5 percent of the respondents had attended the last Section retreat, 54 percent said they were interested in attending the next retreat. To close the gap between interest and attendance, we must obviously give earlier and better notice: 55 percent of the respondents said they wanted notice 1-3 months in advance.

On a personal note, I would like to thank the Section for allowing me to chair the organization for the past year. With the information we gained from the survey, the focus of the Section should be clear. And with Tom Hall, Susan Fox, Siobhan Shea, and Steve Brannock in line to lead, the future of the Section looks very bright indeed.

THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR PREPARES AND PUBLISHES THIS JOURNAL

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The Florida Bar's "Successful Appellate Advocacy Seminar"—An Invaluable, Long-Term Investment

by Celene Humphries¹

Anyone reading this article knows that most Appellate Practice Continuing Legal Education (CLE) seminars are pure lecture. Participants sit and listen to multiple presentations made by knowledgeable appellate judges and attorneys. The assumption is that each member of the audience will apply the newly gained knowledge of appellate law principles to their cases. While very valuable, these standard-format seminars neglect the "doing" aspect of appellate practice. There is much more to being an appellate lawyer than knowing the law. To be effective, an appellate lawyer must hone his/her appellate brief-writing and oral argument skills. An upcoming CLE seminar offers just that opportunity.

On July 20, 2005, Stetson College of Law and the Appellate Practice Section of the Florida Bar are presenting the annual three-day Successful Appellate Advocacy seminar. It will be held at Stetson's Tampa Law Center, adjacent to downtown Tampa. The tuition for the workshop is \$750 for members of the Florida Bar's Appellate Practice Section or \$795 for non-members. Tuition scholarships may be available. The tuition includes course materials, including the newly updated edition of *FLORIDA APPELLATE PRACTICE AND ADVOCACY* (4th ed. 2005) authored by Raymond "Tom" Elligett, Jr., and the Honorable John M. Scheb. The tuition also includes the opening night reception, breakfasts, lunches and refreshment breaks.

The Florida Bar traditionally awards a significant amount of CLE credits to participants of the seminar. In 2003, the participants, including me, received 20.5 general credits and 2.5 ethics credits. Enrollment is limited to 40 people, and registrants are accepted on a first-come, first-served basis.

Each year, the Successful Appellate Advocacy Seminar boasts a formidable list of Florida's top appellate judges and lawyers. This year is no exception. The scheduled program

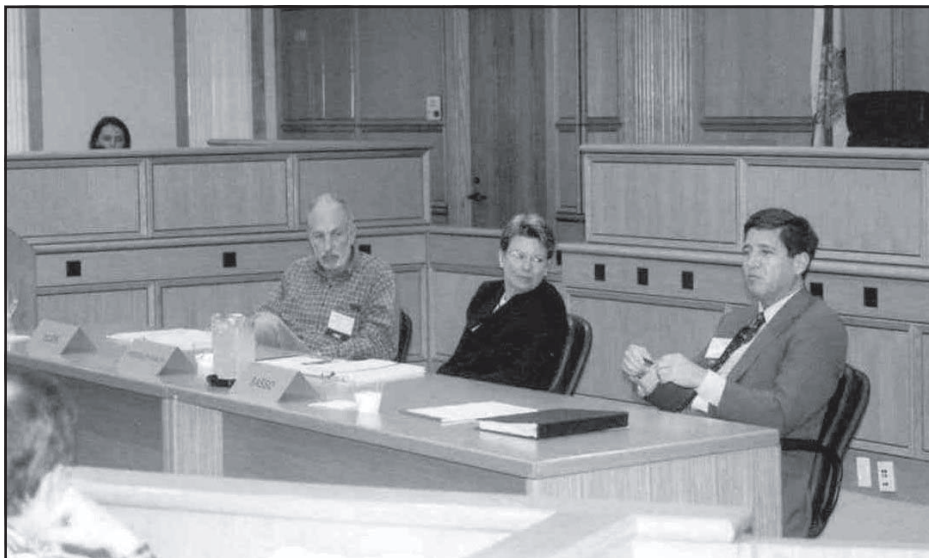
faculty will include: The Honorable Charles Wilson, Eleventh Circuit Court of Appeals; The Honorable William A. Van Nortwick, Jr., First District Court of Appeal; The Honorable Chris W. Altenbernd, Chief Judge, Second District Court of Appeal; The Honorable Larry A. Klein, Fourth District Court of Appeal; The Honorable Jacqueline R. Griffin, Fifth District Court of Appeal; The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida; Steven L. Brannock, Holland & Knight LLP; Raymond T. Elligett, Jr., Schropp, Buell &

Elligett, P.A.; Jane Kreuzler-Walsh, Jane Kreuzler-Walsh, P.A.; Gary L. Sasso, Carlton Fields; and Rodolfo Sorondo, Jr., former Judge of the Third District Court of Appeal and now with Holland & Knight LLP.

The format of the seminar is this: Prior to arrival, each participant writes an appellate brief on a problem chosen by the seminar organizers. The participant then comes to the seminar prepared to present oral argument on the issue.

Yes, participants must take on the

continued next page



SUCCESSFUL SEMINAR

from preceding page

task of writing an appellate brief. But, don't let that fact deter you from taking advantage of this opportunity. In fact, it should be one of the main reasons lawyers sign on for this adventure. Skilled appellate judges—the very judges who evaluate our appellate briefs in real cases—carefully read these briefs and offer their comments to the participants during the seminar. I found this portion of the seminar remarkably valuable and very interesting. In my case, Judge Van Nortwick of the First District Court of Appeal and Judge Melvia

Green of the Third District Court of Appeal offered very helpful advice on appellate brief-writing and made constructive comments about my writing. Never before or since have I had such direct feedback regarding my appellate brief-writing skills. Both judges returned the written briefs, complete with written suggestions and comments, to each of the participants in the group.

Fortunately, the program organizers take a lot of the pain out of the appellate brief-writing process. The faculty provides the relevant facts through an exceptionally short record. In my experience, all of the research was limited to a relatively short list of cases. In fact, no further

research was permitted. That is because the seminar focuses on offering guidance in appellate brief-writing, not research techniques.

On top of that, the chosen issues were very interesting, debatable and timely. Usually, one of the organizers has learned of a debated question of law as a result of his/her appellate work. When I participated, the issue was whether an arbitration provision in a contract can be separately enforced while the viability of the arbitration provision is being challenged in a state court action. My suspicion is that Steve Brannock of Holland and Knight, LLP suggested the topic as a result of his involvement in *John B. Goodman Ltd Partnership v. THF Const., Inc.*, 321 F.3d 1094 (11th Cir. 2003). The Supreme Court of Florida recently issued a divided decision addressing this very topic. See *Cardegna v. Buckeye Check Cashing, Inc.*, 894 So. 2d 860 (Fla. 2005). My experience at the seminar working on the issue addressed by the supreme court enabled me to understand the issues on appeal and the implications of the various opinions issued by the members of the supreme court.

During the seminar, the participants are divided into groups of seven or fewer, and each group is allocated a private room with at least two appellate judges. The judges first discuss the participants' briefs. Then, the attention of the small group turns to oral arguments. For me, this was when the fun began. When I participated, we were required to present oral argument three times. After each argument, the appellate judges offered very detailed and helpful evaluations and suggestions. We were given a VHS tape of one of those arguments so that, in the privacy of our offices or homes, we could learn from watching ourselves deliver the oral argument.

The Successful Appellate Advocacy Seminar offers a unique twist on the oral argument exercise that makes the experience even more valuable. When I participated, we presented the first two arguments to the judges assigned to our small group, arguing the position we had briefed. Then, on the last day of the seminar, the participants returned to argue the other side to a panel of three different judges. This was the pivotal moment for me.



I vividly remember driving from Stetson's Gulfport campus to my home in Riverview. Crossing the Sunshine Skyway Bridge, I thought there was no way that I could argue the losing side. After all, I had read all the cases and listened to the losing argument twice. In fact, if an appellate court adopted that argument, I might very well doubt whether the court fully understood the issue. As you might have guessed, when I returned across the Skyway the following morning, it was with the realization that I had been arguing the wrong side all along. I wrote the wrong argument and argued it twice. Now, I was prepared to forcefully advocate the correct position. After all was said and done, this was my most important lesson during the experience. I realized that, when I appear on behalf of a client, I am always an advocate. Of course, I am mindful of my role as an officer of the court and endeavor to behave professionally and ethically. But, in the end, my focus is on making the argument that wins the case for my client.

This is the main lesson I learned from the seminar: I need to be vigilant of the fact that my role as an advocate for one side presents the risk that I may lose perspective on the correct application of the law. More frankly put, I learned to be aware that the loss of an appeal does not necessarily mean that the appellate court was wrong. Judge Griffin commented on this fact when she addressed the seminar participants. She explained that her first lesson as an appellate judge was that she was no longer an advocate taking a party's side. Her job is to properly decide the issue presented by applying the law.

The seminar also includes lectures regarding appellate practice skills, a panel question and answer segment, and an oral argument demonstration by top Florida appellate judges and lawyers. The year I attended, many participants agreed this was the most entertaining portion of the seminar. Those who demonstrate the art of oral argument do a wonderful job of showing what to do and what **not** to do during an argument.

Finally, for those of you reading who might wonder if this experience is really for you, I can offer one more tidbit from my experience. Although this is an intermediate level seminar,



the participants in my class had varying levels of appellate experience. In the audience, I saw top-notch appellate practitioners, whom I would put on my list of Who's Who in appellate practice. While some of the lawyers confessed that they took the seminar because the substantial number of CLE credits earned helped them to meet their Florida Bar appellate certification requirements, they also agreed that they left the seminar with a better awareness of how Florida appellate judges view the written and oral craft of appellate advocacy.

The audience also contained attorneys who were contemplating a change in their legal careers to the

land of appellate practice. They saw this seminar as an opportunity to learn more about appellate work. And, of course, many in the audience were somewhere in between these two extremes. So, my advice would be that, no matter what your experience level may be in appellate practice, if you are interested in learning or fine-tuning your appellate advocacy skills, this seminar is invaluable.

(Endnotes)

¹ Celene Humphries, is a member of the Appellate Practice Section at Swope, Rodante P.A., where she focuses her practice on personal injury and insurance bad faith. She earned her Bachelor of Arts degree at Tulane University, and her Juris Doctor degree at Tulane University.

A Practical Guide to Conflict Review in the Supreme Court of Florida

by Kathleen M. O'Connor¹

I. Introduction

The most frequently traveled avenue for seeking review in the Supreme Court of Florida is a claim of decisional "conflict."² The supreme court has discretionary jurisdiction to review two categories of conflicting decisions: (1) a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law,³ and (2) a decision of a district court of appeal that is certified by it to be in direct conflict with a decision of another district court of appeal.⁴ A petitioner seeking the first type of review faces a formidable uphill battle because review is denied in the vast

majority of cases where "express and direct" conflict is claimed.⁵ Even if a conflict is "certified" by the district court of appeal, review is not guaranteed because the supreme court may decide a conflict does not in fact exist and dismiss the case.⁶ This article will provide an overview of conflict jurisdiction and give pointers for seeking review.

II. Review of "Express and Direct" Conflict Pursuant to Article V, § 3(b)(3).

A. The Constitutional Provisions

Article V, § 3(b) of the Florida Constitution sets forth the mandatory, discretionary and original jurisdiction of the Supreme Court of Florida.⁷ Effective April 1, 1980, Article V was amended to modify the supreme court's jurisdiction.⁸ The "most radical change" was to the Court's discretionary jurisdiction. See *In re Emergency Amendments to Rules of Appellate Procedure*, 381 So. 2d 1370, 1374 (Fla. 1980). Previously, Article V gave the supreme court power to review district court decisions in direct conflict with a decision of any district court of appeal or of the supreme court on the same point of law. Conflict cases comprised the "overwhelming bulk" of the court's caseload. *Id.* at 1374.

In *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221, 223-24 (Fla. 1965), the supreme court ruled that discretionary review was available for per curiam affirmances if a conflict could be found by examining the "record proper." This dramatically increased the Court's workload. As amended in 1980, Article V, § 3(b)(3) abolished the "record proper" doctrine by requiring an "express," as well as a "direct," conflict of decisions. See *In re Emergency Amendments*, 380 So. 2d at 1375.⁹ This narrowing of the Court's discretionary conflict jurisdiction was intended to allow the supreme court to function more efficiently and to reinforce the role of the district courts of appeal as final decision-makers in most cases.

B. Invoking the Supreme Court's Jurisdiction

The supreme court's jurisdiction is invoked by filing two copies of a notice, accompanied by applicable filing fees, with the clerk of the district court within thirty days of rendition of the order to be reviewed. Fla. R. App. P. 9.120(b). The notice should be in the form prescribed by Fla. R. App. P. 9.900(d) ("Notice to Invoke Discretionary Jurisdiction of Supreme Court"). The notice must contain the date of rendition of the order to be reviewed and the basis for invoking the Court's jurisdiction. Fla. R. App. P. 9.120(c).

C. Identifying the Conflict: The "Four Corners" Rule

The conflict alleged as a basis for jurisdiction must exist within the "four corners" of the district court's decision. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986). References in a jurisdictional brief to the record in the appellate court are, therefore, improper.

D. "Express and Direct" Conflict: The Requirement of an Opinion

1. A "PCA" or a "PCD" is Ordinarily Insufficient

A district court decision that simply affirms the result below ("Per Curiam. Affirmed."), commonly known as a "PCA," is not reviewable by the Supreme Court of Florida. *Grate v. State*, 750 So. 2d 625, 626 (Fla. 1999); *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). Similarly, an unelaborated denial of relief on an extraordinary writ petition ("Per Curiam, Denied"), a "PCD," is not reviewable. *Stallworth v. Moore*, 827 So. 2d 974, 978 (Fla. 2002). Even a PCA or a PCD with citations is not reviewable in most instances. *Gandy v. State*, 846 So. 2d 1141, 1144 (Fla. 2003); *Persaud v. State*, 838 So. 2d 529, 531 (Fla. 2003); *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So. 2d 1369 (Fla. 1980).¹⁰

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The End of an Era at the Third District Court of Appeal: The Retirement of Judge Robert L. Shevin, Judge Mario P. Goderich and Chief Judge Alan R. Schwartz

by Roberta G. Mandel¹

I am a long time appellate practitioner and, like other appellate practitioners, appreciate the vital role that our appellate judges play in not just the formation, but “legal memory”, of Florida jurisprudence. In addition, appellate practitioners develop a deep bond with those before whom we regularly present our arguments and advocate for our clients, usually with deep commitment and sometimes with downright emotion. So it seems almost incomprehensible that three stalwarts of the Third District Court of Appeal have retired at the same time: Judge Robert L. Shevin, Judge Mario P. Goderich and former Chief Judge Alan R. Schwartz. I recently had the opportunity to interview each of these well-known and highly respected jurists.

A. Judge Robert L. Shevin



H a v i n g served as an Assistant Attorney General myself for over 15 years, it was an enormous privilege for me to be able to talk at length with Florida's former Attorney

General, the Honorable Robert Shevin. I was eager to learn more about a man I greatly admire.

The State of Florida was privileged to have the legal expertise of Judge Shevin in all three branches of government. Judge Shevin explained that no other Floridian living today has served in all three branches of government. He served in the Florida House of Representatives from 1964-66, the State Senate from 1966-70 and as Florida Attorney General from 1971-79. He joined

the Third District Court of Appeal in 1996. When asked which branch of government he enjoyed the most, Judge Shevin, the ideal of public servant, responded he found each branch of government “meaningful and gratifying.”

Beyond being a public servant, Judge Shevin is also a legal scholar. After graduating college in 1955, he graduated second in his law school class, *magna cum laude* from the University of Miami School of Law in 1957. While in law school, he served as a member of the Law School Law Review. Later, in private practice, he argued cases in the Northern, Southern and Middle District Courts, the U.S. Court of Appeals in the Fifth, Eleventh and District of Columbia Circuits. He also argued, and won, three cases in the U.S. Supreme Court.

Judge Shevin has fond memories of his days as Florida's Attorney General, the constitutionally designated “chief legal officer” for the State of Florida. The Florida Attorney General's office has many divisions and programs, lending itself to a broad variety of fascinating legal issues, he explained. As Attorney General, he represented the prosecution in all criminal appeals in state and federal courts. But he also prosecuted and defended civil litigation cases on behalf of State entities and officials in federal and state trial and appellate courts, and before administrative bodies across Florida.

When asked about the best part of serving on the Third District Court of Appeal, Judge Shevin responded that all of the judges on the Third District got along with one another very well and it was that collegiality between the judges that made his tenure on the Court the most pleasurable. He also greatly

enjoyed the variety of cases he heard while serving on the appellate bench.

When asked if he had any suggestions for attorneys who practice in the Third District Court of Appeal, Judge Shevin responded that attorneys should always come into Court well prepared. One of the biggest mistakes that he witnessed while serving on the bench was that lawyers occasionally were not as prepared as they should be in Court. However, he quickly added that most of the attorneys were extremely well prepared. With regard to brief writing, Judge Shevin advised that attorneys should not feel as though they have to file 50-page briefs. He cautions that it is much more important to raise meritorious claims accurately.

Judge Shevin further reflected that appellate attorneys should always ask for oral argument so the Court has the opportunity to ask the parties questions about the case. When asked if a trial attorney is better prepared to argue the appeal of a case that he/she handled at the trial level, he quickly responded that generally speaking, appeals are best left to those who specialize in appellate law. He added that the trial attorney on the case should always make himself or herself available to assist the appellate attorney.

I ended our interview with one question: how would Judge Shevin like people to remember him. He responded that he would like to be remembered as a judge who always tried to be well prepared and respectful to each attorney who appeared before him. Speaking from my own experience and probably speaking for many appellate practitioners who have appeared before him, that will surely be the case.

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END OF AN ERA

from previous page

B. Judge Mario P. Goderich



It was always a pleasure for me to argue a case before Judge Mario P. Goderich. Judge Goderich was always pleasant and always a gentleman. He treated every attorney who appeared before him with courtesy and respect.

Judge Goderich is best described as a scholar. He graduated from the University of Havana, Havana, Cuba in 1952. He attended law school at the University of Havana, where he graduated as a Doctor of Civil Law in 1957. He practiced law in Cuba before coming to the United States in 1961. Upon arriving in the United States, he worked in all types of odd jobs to advance himself and his family. Possessing a keen legal mind, however, he wanted to resume his career as an attorney. He enrolled in law school at the University of Miami in 1963, and graduated in 1966. When Judge Goderich graduated from law school, he still was not able to return to the practice of law because he was not a U.S. citizen. So he took a position as the law librarian at the University of Miami School of Law. He also worked as a law professor at the Law School.

Judge Goderich eventually was able to return to the practice of law. He became one of the founders of the Cuban American Bar Association (CABA) in 1974, and served as its first President. He quipped that his campaign for President of CABA was the only one of his campaigns in which he drew an opponent.

Judge Goderich was appointed as an Industrial Claims Judge in 1975, where he remained until 1978. In 1978, he was appointed to the position of Circuit Court Judge by Governor Reubin Askew. He served on the Circuit Court bench until 1990. He never faced opposition in any of his re-elections to the bench.

In 1990, Judge Goderich was appointed to the Third District Court of Appeal. He was the first Cuban-

American judge appointed to serve on all three courts. When asked which court he enjoyed most, Judge Goderich responded that he "loved" all three courts. But he found the Third District Court of Appeal the most "relaxed" at the same time that it was the most "challenging."

In 1997, Judge Goderich became the first recipient of the Francisco Garcia-Amador Award, Center for Hispanic and Caribbean Legal Studies, University of Miami School of Law for his contributions to the law.

When asked what advice he would give someone just graduating from law school about the actual practice of law, Judge Goderich recommended that a lawyer always act professionally and always be well prepared. As for oral argument, he maintained that a lawyer should get a "feel" for the way the argument is progressing. He contended that if the court is not agreeing with an attorney's argument or position, the attorney should move on to his/her next point.

Upon his retirement from the Third District, the law firm of Gunster, Yoakley & Stewart tapped Judge Goderich's experience and expertise for their law firm. Judge Goderich has now left his role as jurist and advisor as Senior Attorney to the law firm's litigation department. In that law firm role, he brings nearly fifty years of legal experience with him. He now concentrates his attention on arbitration, mediation, and, of course, appellate matters. In addition to assisting clients, he will, undoubtedly, be in a position to educate the firm's associates and shareholders. He describes the firm as a "magnificent law firm with an outstanding reputation." This certainly matches Judge Goderich, himself a magnificent human being with an outstanding, firmly-deserved reputation.

When asked how he would like the world to remember Judge Mario P. Goderich, not surprisingly he humbly responded, "There is no immortality, I will not be remembered." With all due respect to Judge Goderich, I don't agree. While there is no immortality, those who have had the privilege of appearing before Judge Goderich will remember his legal expertise, his warmth and his gentlemanly personality.

I also asked Judge Goderich whether he would choose the same

career path again, if he had the opportunity. He quickly responded he would, adding that he truly has lived "the American dream."

C. Judge Alan R. Schwartz



As an Assistant Attorney General based in Miami, I had the privilege of arguing hundreds of cases before former Chief Judge Alan Schwartz. This is not to suggest that my arguments were always well received, but I never had any

doubt about whether Judge Schwartz agreed/disagreed with my position, as he always clearly articulated his thoughts and views.

As far as this writer is aware, there is no other jurist who has inspired the formation of a new terminology: "to be Schwartzed" or "to get Schwartzed" or "passing the Schwartz test." Anyone who has ever argued an appeal before Judge Schwartz is intimately familiar with these terms. In fact, during my interview with Judge Schwartz, I reminded him that I had been the recipient of his wrath many years earlier. Without missing a beat, Judge Schwartz responded, "yes that was your heinous crime argument." It is amazing to me that after authoring over seven thousand opinions in his long legal career, Judge Schwartz recalled that argument, from 1990, in a case that was ultimately reversed for prosecutorial misconduct. I still remember that day. I started my argument with a description of the defendant's crime as "heinous." I "got Schwartzed" for it. And in hindsight, Judge Schwartz was absolutely right to be upset with my terminology; the nature of the crime (shaking a baby to death) was not relevant to whether or not reversible error had occurred in the case. I learned a brutal, but valuable, lesson from that experience. And fortunately I was *never* "Schwartzed" again.

Judge Schwartz graduated from Harvard College *magna cum laude* in 1955 and Harvard Law School *cum laude* in 1958. When asked why he chose the law as a career, he quipped that he had to go into law, "since he was a smart Jewish boy who hated the sight of blood."

Judge Schwartz was appointed Circuit Court Judge by Governor Reubin Askew in 1973 and re-elected, without opposition, in 1974. In 1978, Governor Askew appointed Judge Schwartz to the Third District Court of Appeal. His colleagues elected him Chief Judge in 1983, and had such respect from his peers that he was continuously re-elected to serve as Chief Judge from that point until his retirement.

As a practicing attorney, Judge Schwartz had the self-proclaimed title: "Emperor of Extensions." Ironically, as part of his responsibility as Chief Judge, he reviewed each Motion for Extension of Time filed in the Court. Perhaps remembering his days as the "Emperor of Extensions," the Court has the reputation of generously granting multiple Motions for Extension of Time.

Judge Schwartz defines a brief as an "instrument of advocacy." "A good brief is the opinion that you would like the Court to write in your case," he explains.

Twice nominated for the Fifth Circuit Court of Appeals, Judge Schwartz was also nominated four times by the

Judicial Nominating Commission for the Supreme Court of Florida. He was also nominated for the Second District Court of Appeal.

Like many in the appellate community, Judge Schwartz is also a firm believer that the Florida Constitution should be amended to extend the retirement age of state court judges. He noted that fifty years ago, when the Florida Constitution was written, life expectancy was much lower than it is today. "Today, seventy is not old," opined Judge Schwartz. Given the wealth of knowledge that is lost with the premature retirement of vigorous, highly experienced jurists, this constitutional provision would seem to warrant re-examination.

Though Judge Schwartz did not always agree with my arguments, Judge Schwartz was always my first choice to hear an appeal of mine. He always knew the record and the issues in the case, in addition to knowing the law. Our arguments were, therefore, on the finer points of the appeal or the law as they might impact other cases. He also would invariably ask poignant, thought-provoking questions.

Unquestionably, Judge Schwartz

has one of the finest legal minds in the State of Florida, if not the country. His commitment and dedication to the legal system is beyond reproach. And on April 22, 2005 Judge Schwartz's years of commitment were honored at the Twenty Second Annual Third District Court Seminar and Reception with the naming of the "Alan R. Schwartz Third District Court of Appeal Law Library."

Although Judge Schwartz has "officially" retired, he is still serving the judiciary as a Senior Judge. When asked how he would like the world to remember him many years from now, he responded that he wants to be remembered as a "person who took no guff." Speaking for those who have appeared before Judge Schwartz, I think we can safely say that he will be remembered for his strong and forthright nature.

(Endnotes)

¹ Roberta Mandel is the head of the appellate department of Houck, Hamilton & Anderson P.A., and a member of the firm. She served as an Assistant Attorney General for over 15 years, and has successfully argued more than 500 appeals in the state and federal court systems.

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Learning to Put Yourself in the Best Position to Win on Appeal: A Young Lawyer's Perspective

by Cory W. Eichhorn¹

From a young lawyer's perspective, appellate practice may appear to be an intimidating field of law. It requires diligence and precision in understanding and complying with rules of procedure, as well as an ability to think outside the box while writing briefs and analyzing the law. Appellate practice also provides an invaluable means of experiencing and directly affecting how the law is being shaped, while at the same time interacting with a tribunal of judges in an intimate setting.

For a young practitioner, the purpose of appellate law presents a unique intellectual challenge and learning experience:

A reviewing court is . . . important to coordinate divergent legal contentions and to establish principles and precedents to guide the course of future cases dealing with all subjects. An appeal then becomes desirable for two reasons, first to test the correctness of the proceeding when a litigant feels that he has not been afforded justice under the law and, second to record and give sanction to correct rules of law as it conforms to changing conditions. Without some central review, the divergent opinions of numerous trial courts would become confusion compounded.²

Being part of this process makes appellate practice a humbling and rewarding experience. Life as a young appellate attorney does, however, take hard work and a willingness to accept new opportunities — both of which require a young practitioner to understand that appeals will be won and lost. Learning from successes and failures is key to becoming a better appellate practitioner.

In my young career as an appellate practitioner, I have tried to follow these guidelines:

1. Obtain Litigation Experience

To understand and comprehend what happens at the appellate level, a young lawyer should have a fundamental knowledge of the events leading up to that appeal at the trial level. That doesn't necessarily mean that a young appellate practitioner must try a jury trial before making an oral argument. A young attorney can obtain litigation experience in other ways, *i.e.*, taking depositions and attending hearings. These experiences, however, reveal how the process of appellate law works in practice. For example, what facts *are* necessary to support a legal position or the reasoning behind a trial judge's decision? First-hand understanding of the process and mechanism of litigation will be an invaluable asset when writing a brief or making an oral argument.

2. Become Involved

Join appellate organizations and meet as many different appellate practitioners as possible. Many interesting appellate organizations exist, from the Appellate Practice Section of the Florida Bar to appellate practice divisions of various county bars. Interacting with experienced appellate practitioners outside your law firm will expose a young attorney to

different methods of thinking as they relate to appellate practice. This will allow a young appellate practitioner to broaden his or her horizons and should ultimately create a learning environment. In addition, attending seminars is an invaluable way to become a better appellate practitioner, while at the same time meeting new appellate lawyers with different backgrounds and experience levels.

For example, the Appellate Practice Section of the Florida Bar sponsors an intensive three-day seminar at Stetson University Law School. That seminar provides lawyers an opportunity to write a mock appellate brief and argue mock oral arguments. The faculty at this seminar is beyond reproach: numerous appellate judges from district courts of appeal and the Eleventh Circuit, as well as respected and experienced appellate practitioners from around the community. This seminar is a rare opportunity to interact with appellate judges and practitioners outside the framework of "real world" proceedings and to gain valuable insight into the major and minor details involved in the day to day practice of appellate law. This seminar also affords valuable constructive criticism that can be readily applied to your next brief or oral argument.

I attended this seminar about two weeks before my first oral argument in the Second District Court of Appeal. I found the experience challenging, rewarding and humbling, but I truly felt it prepared me for the types of questions and issues that the Second District ultimately focused on. It also provided an opportunity to interact with judges and gave me a first-hand look at just how well prepared even a "mock" appellate panel can be. The entire seminar experience made me more comfortable presenting an oral argument, and more confident in my brief writing. This year, the seminar will be held July 20 through 22, 2005 at the new Stetson University downtown Tampa law school campus.

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More information about the seminar is appearing in this issue of the Record and on the Appellate Practice Section's website.

As for my first oral argument, it was an exciting, enjoyable experience. Presenting an argument on behalf of the appellee, I found the Second District to be extremely well versed in the record. At one point, the Court even questioned appellant's counsel as to why certain documents related to his argument were not included in the record. Truth be told, I was somewhat nervous during my introduction to the Court. From that point forward, I felt confident and well prepared. At times, the Court posed questions and focused on issues that I expected, and at other times the Court moved into areas that were not so expected. Whether the questions were expected or unexpected, however, I focused on the issues that the Court raised and addressed them to the best of my ability. Through it all, I somehow survived to argue another day.

3. Don't Be Afraid to Take Chances

Although a young lawyer may not have many opportunities to become involved in appellate law on a daily basis, there are numerous opportunities to become more exposed. For example, the Appellate Practice Section offers a mentoring program that will assist young practitioners with questions about appellate procedure and appellate law. In addition, there are numerous opportunities within the appellate pro bono arena to gain appellate experience, both at the state and federal level.

4. Ask Questions

When initially embarking on a career in appellate law, do not be afraid to ask questions about appellate procedure or substantive appellate law. Asking law firm partners and/or supervisors questions about matters you are working on not only shows your willingness to learn; but makes you a better lawyer and hopefully reduces, if not altogether avoids, mistakes. In addition, asking questions may resolve issues on a broader scale related to standards of review and preservation of error that a young appellate

lawyer could apply in the future.

5. Welcome New Opportunities

In the same vein as asking questions, offering to become involved in appellate matters — even on a discrete legal research issue — may open the door to more substantive appellate work, perhaps writing a brief in a smaller matter or attending an oral argument. Even if you feel that your first appellate case is not as intellectually challenging as you might have hoped, being involved in any case at the appellate level provides a base from which a young lawyer can broaden his experience within the field. Working on a smaller matter also allows a younger attorney to learn the rules of appellate practice and procedure, the mechanisms for how an appeal is initiated, and the process in which the record on appeal is prepared. In addition, just preparing the notice of appeal and record will give a young lawyer the right experience in appellate law from the ground level, so that in the future, you can correct possible mistakes made that could make a difference in the outcome of an appeal. Understanding appellate practice in its entirety — not just writing briefs and attending oral arguments — will also make the young lawyer a more well rounded and better appellate practitioner.

6. Know Your Role as an Appellate Lawyer

Although a primary component of appellate practice occurs at the appellate level, appellate practitioners are becoming increasingly involved in advising lawyers and clients at the trial level. From advice regarding preservation of error issues to the drafting of jury instructions, appellate lawyers can and do provide important analysis at the trial level. Embracing this role will not only broaden your horizons and expand your utility as an appellate lawyer; it will also assist you in an understanding of the issues that will arise on appeal — which makes identifying arguments and drafting briefs a more streamlined process.

7. Be Prepared

Above all, be prepared. Take the

time to analyze your record, have an intimate knowledge of the pleadings, correspondence or transcript testimony that you are relying on in your briefs and at oral argument. That initial preparation allows an appellate lawyer to be flexible and creative: both in drafting the brief and at oral argument.

Familiarity with the record and law will also allow a prepared appellate lawyer to respond in a more effective way to many of the questions posed by the tribunal at oral argument. It may also assist in identifying complicated issues related to standards of review that an opponent may not necessarily spot. This attention to detail — without losing the forest for the trees — generally puts the appellate court in a better position to understand your argument. That, in turn, gives you a greater chance of prevailing on appeal. In sum, an appellate practitioner can never be too familiar with the record or the law involved in his or her case.

Of course, the recommendations discussed above are only guidelines that should be applied within the framework of a young attorney's style and work habits. Moreover, each case may require a different approach and an ability to be flexible. In this regard, appellate practice is a learning process that has improved my critical thinking and legal analysis. It provides me with new and exciting experiences every day. As a young attorney, opportunities abound in the field of law. Take a chance. Welcome new experiences. Write a brief. Make an oral argument. You may learn something new.

(Endnotes)

¹ Cory W. Eichhorn is an associate at Proskauer Rose LLP in Boca Raton, Florida. He is a member of Proskauer's litigation department, where he focuses his practice on commercial litigation and appellate practice.

² *Village of Commercial Point v. Branson*, 251 N.E. 2d 705, 707 (C.P. 1969) (quoting LEE K. SKEEL, OHIO APPELLATE LAW 7 (2d ed. 1969)).

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The Roots of Preservation

by Jack J. Aiello¹

A. Introduction

An understanding of the public policy underlying any substantive rule of law is a useful aid to advocacy about the application of that rule of law. In the same way, an understanding of the policy underlying the procedural rules governing the preservation of error can aid in advocacy about the application of those rules, both in trial and appellate courts. A typical instance might be arguing either side of an issue of whether trial counsel's words of "objection" sufficiently satisfied the policy to preserve the appellate record. The purpose of this article (aside from satisfying a commitment that I made) is to explore this underlying policy and to observe its relationship to the rules of preservation that have evolved in pursuit of it. Thus, this article will discuss examples of certain trial court preservation issues, but will not serve as a checklist or survey of specific preservation requirements in all of the many common circumstances that arise at the trial court level.

B. The Basic Reasons for Appellate Review

Appellate courts perform two important functions: 1) they review and correct, as necessary, decisions of

lower tribunals; and 2) they confirm, clarify, and develop the law for the benefit of all.² It is a fundamental tenet of our constitutional form of government that no branch of government or class of participants should have autonomous power over material matters of substance and that checks and balances be provided within the system to minimize that danger.

In that sense, one way that the review role of the appellate courts has been viewed is as a check on the power of judges and juries. More purely, in fact, the appellate court system serves as a check on the power of *judges*, because, except for those very few instances of fundamental error, appellate review is limited to decisions made by the judge of the lower tribunal. For example, even where one challenges the sufficiency of the evidence upon which a jury rendered a verdict, the appellate challenge is to the decision of the *trial court* not to direct a verdict or grant a new trial.

C. Preservation Requirements Seek to Promote Fairness, Judicial Efficiency and Limits on Notions of Appealability of Every Decision

Because it was never contemplated that the appellate system

would support a re-trial of every decision or event that occurs in the lower court, a crucial limiting device has been developed in the common law and in procedural rules to determine and limit appealability. That device is the contemporaneous objection rule.

The contemporaneous objection rule requires, just as its name suggests, that in order to preserve an issue for appeal, an objection must be made at or reasonably near the time that the objectionable decision or event occurred. The rule also requires that a decision on the objection be obtained.

The contemporaneous objection rule is "based on practical necessity and basic fairness in the operation of the judicial system."³ The rule is essential to basic fairness in the operation of the judicial system because a timely, proper objection places the trial judge on notice of the possibility of error and provides the judge the opportunity to correct it. That opportunity serves not only the objective of fairness to the judge, but of fairness to the parties, with the hoped-for result that many material errors are corrected and trials are able to progress more smoothly.

The second part of the rule—that a decision is actually obtained on the objection—is necessary to satisfy the

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Senior Judges, Mandatory Retirement, and the Freedom to Choose to Continue Contributing

by Dorothy F. Easley¹



“In many circuits and districts, senior judges are indispensable to the proper conduct of judicial business.’ In fact the federal Judiciary depends on its senior judges to

such a degree that if tomorrow all the senior judges decided to catch up on their lost leisure, the courts would need an additional 100 active judges to compensate for the loss of the senior judges. If Congress and the President chose not to create the new judgeships, the federal courts would grind to a halt.”²

A. Introduction

Article V, §8 of the Florida Constitution provides that “[n]o justice or judge shall serve after attaining the age of seventy years except upon temporary assignment or to complete a term, one-half of which has been served.” As appellate practitioners, many of us have noted with great regret the number of justices and appellate judges “at the top of their game” who have retired under this constitutional mandate. That regret is not simply out of a growing affection for our judiciary, before whom we have appeared and learned to refine our arguments, but a desire to retain the seasoned judicial scholarship that only comes with time, continued study and experience. The training, in other words, is mutual.

This article touches on some of the issues surrounding mandatory retirement, and the seeming contradiction it presents: that we have decreed retirement of a sector of our judicial branch that modern study after modern study has demonstrated is a sector proving itself to have tremendous productivity, knowledge and, perhaps most important, innovate views. The contradiction does not end there. The

same Florida Constitution that says a judge, because of age, must leave the bench, allows that same judge, the following week, to be assigned to proceed to adjudge the same, oftentimes very complicated case precisely because of his/her expertise.

There are many examples of innovation in the older of us. Take for example, Giuseppe Verdi’s composition of Otello, Mary Baker Eddy’s founding of the Christian Science Monitor and Frank Lloyd Wright’s design and construction of the New York City’s Guggenheim Museum.³ All of these masterpieces were created by adults between the ages of 70 and 91.⁴ Yet, despite our better education, we are a culture that remains obsessed with staying young, missing “the most important part of getting old: the brain’s physiology changes in ways that promote the person’s need for reflection, insight, and innovation.”⁵ Those are also key attributes of judicial wisdom.

B. Some Facts Reflecting Greater Productivity, Reliability and Innovation in Our Senior Judges

Take for example, U. S. District Judge Joe Fisher, a President Dwight D. Eisenhower judicial nominee to the U.S. District Court for the Eastern District of Texas, who served 41 years on the federal bench.⁶ He was 90 years old.⁷ And up until two weeks before his death, he carried nearly *half* the caseload of an active judge.⁸ Those are amazing statistics for a judge who, under the Florida Constitution, is presumptively unqualified to continue as a fully active judge because of a numeric value. Yet, Judge Fisher was one of a growing number of judges “across the country who, when they could opt for fishing trips and wintering in Florida or just plain doing nothing, continue[d] to handle substantial court caseloads. It is fortunate for the Judiciary and taxpayers that these judges do.”⁹

At more than 90 years of age, Third Circuit Court of Appeals Judge Max Rosenn chose to continue his

public service by staying on the bench.¹⁰ Judge Rosenn has been a senior judge for nearly 20 years, and does more work now as a senior judge than when he came on the court in 1970.¹¹ “The courts run much more efficiently,” said Judge Rosenn.¹² “There’s better planning and accelerated production. With technology such as computers, we get out a whole lot more cases.” Judge Rosenn enjoys working as a judge: “I get a great deal of satisfaction in doing something useful.”¹³

At almost 95, Judge Joseph P. Kinneary of the U.S. District Court for the Southern District of Ohio was the oldest working senior judge in the country.¹⁴ Judge Kinneary took a 100 percent draw on criminal cases (because he liked them) and an 80 percent draw on civil cases.¹⁵

And there is the case of Southern District of New York Senior Judge Milton Pollack: “The lawyers tell me they need more time, but I tell them I really don’t have a lot of time at 93 1/2 years old.”¹⁶ Judge Pollack, who served on the court 34 years before his death at 97 years, further explained: “I’m known for taking over long-delayed reassigned cases and telling the attorneys to come in next Monday and be ready for trial.”¹⁷ Judge Pollack was highly regarded for being able to clear up civil cases, particularly securities and trust cases that had been pending for protracted periods.¹⁸ “His philosophy [wa]s that the harder you work, the longer you live.”¹⁹

At more than 80 years of age, Judge Anthony Alaimo (S.D. Ga.) also remained very active; only a year before turning 80, he handled a global settlement for about 900 plaintiffs in a class action suit.²⁰ He feels no difference between senior judge and active judge, except that in certain instances in some courts, senior judges don’t retain their voting rights on administrative matters.²¹ “I think I try more cases than some active judges,” he said.²² He carried a full caseload by choice: “I’m like the old prize fighter. . . every time the bell rings I

continued next page

SENIOR JUDGES

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come out of my corner.”²³

On the federal side, senior judge contributions have increased just about yearly.²⁴ Even in 1999, 273 senior district judges completed more than 17 percent of all civil and criminal defendant cases and conducted 19 percent of all trials.²⁵ Eighty-six senior appellate judges handled 15 percent of all oral arguments and briefs submissions.²⁶

Statistics show that only about 1.6 percent of judges eligible for retirement choose full retirement before reaching 15 years of service in active status.²⁷ Even fewer choose full retirement instead of senior status when they are eligible.²⁸ A little more than half of all federal judges accepts senior status within one month after becoming eligible.²⁹ Seventy-five percent accept senior status within a year.³⁰

But more than 8 percent work more than 20 years before taking senior status.³¹ And some judges, such as Federal Circuit Court of Appeals Judge Giles Rich, do not even accept

senior status at eligibility.³² Judge Rich served as an active judge for more than 40 years, and at age 95 became the oldest active judge in history.³³ In 2003, upon learning of the death of Judge Rich, who even then was still working with active judge status, Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks, Q. Todd Dickinson stated: “Judge Rich was the single most important figure in twentieth century intellectual property law. . . . He devoted his career to protecting and nurturing the genius behind the technology that advanced this nation from the Industrial Age to the Age of Information. . . . At the time of his death, Judge Rich was the oldest active federal judge in U.S. history. His age, however, was never reflected in his opinions. His view on the patentability of software, one of today’s most contentious patent issues, was far more expansive than that of younger colleagues’ scores. Judge Rich leaves a rich legacy in his voluminous body of judicial opinions and in the 1952 Patent Act which he helped to draft. We have lost the dean of the twentieth century patent system.”³⁴

C. Modern Statistics Suggest the Senior of Us Are Generally Highly Productive, Collaborative and Better Decisionmakers.

That these active senior judges are going strong and working well into their 90s is consistent with modern statistics on the population as a whole. For example, the Australian Government dismissed the myths surrounding older employees, and cited to a study by Rhodes, who examined *185 research studies* and found that internal work motivation, overall job satisfaction and job involvement were positively, rather than negatively, associated with age.³⁵ Reark Research also concluded that older workers could be counted on in crisis situations, were more dependable, did a better quality job and cooperated more on the job.³⁶

Further, to get a more realistic picture of cognitive functioning in older adults, Dr. Thomas Hess, professor of psychology at N.C. State University (Raleigh), and “his researchers have emphasized social contexts and the real-life settings in which seniors engage their minds in their memory studies.”³⁷ Dr. Hess’ research into social cognition and aging, funded by a \$1 million grant from the National Institute on Aging, also reflects that “older adults perform as well or better than younger adults in tasks that involve making objective decisions and assessing people’s character.”³⁸

Dr. Hess further determined in one study that “if the information was relevant to older adults, they could focus their cognitive resources,” and “performed almost exactly like younger adults. Older adults tended to focus on the argument that was made rather than on who made it, which is the way we would think an informed decision-maker would go about making a decision.”³⁹

In another study, Dr. Hess “presented groups of older and younger adults with positive and negative descriptions of fictitious individuals and asked the subjects to evaluate the honesty and intelligence of those individuals.”⁴⁰ “[O]lder adults were better than younger adults at judging a person’s character and competence.”⁴¹ “Middle-aged and older adults make more complex judgments because they focus on the most



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meaningful factors that could impact an individual's behavior," Dr. Hess explained.⁴² The senior sector of our population appreciates "what is important in assessing character because of their years of experience and social expertise. Young people haven't had as much experience in the social world, and they haven't had as much time to learn about the many factors that relate to behavior, so they tend to focus on qualities that are somewhat superficial."⁴³

Conclusion

F. Scott Fitzgerald once wrote that "[t]he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function. One should, for example, be able to see that things are hopeless and yet be determined to make them otherwise." In the face of modern research, it would appear that forced retirement based on constitutional disqualification because of a numeric value, rather than performance and productivity, misses the mark. It presents the very real and significant risk that we are forcing out the most experienced, wisest, productive, reliable, and even healthiest of our judges because of an arbitrary number and unsubstantiated stereotypes.

While there may have been rational reasons at one time for the 65 versus 70 versus 71 mandatory retirement age designation, in a population living longer than ever before, current facts bear out that the arguments previously advanced in defense of mandatory retirement of our judges (the stereotypes of deteriorating health, reduced productivity, burnout and mental decline with age) no longer apply and do not make economic sense. In the face of current facts, the question becomes, on what rational basis today can mandatory, versus voluntary or graduated, retirement at the magical age of "70 years" rest? Perhaps the issues surrounding mandatory retirement are better addressed on a judge-by-judge basis by the Judicial Qualifications Commission. Perhaps, for the benefit of Florida's citizens and for the Bench and Bar, mandatory retirement is an issue worth revisiting.

(Endnotes)

¹ Dorothy F. Easley, M.S. & J.D., is a partner and a Florida Bar board certified appellate practitioner with Steven M. Ziegler, P.A., the firm specializing in managed care, health law, employment practice, general liability, insurance and appellate. She serves as an elected member of the Section's Executive Council and on its various committees. She also serves on the Appellate Court Rules Committee of the Florida Bar.

² *Senior Judges Give New Meaning to "Volunteer"* (quoting Federal Judiciary Administrative Office Director Leonidas Ralph Mecham), The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

³ David Solie, M.S., P.A., *The Myth of "Diminished Capacity"* (Dec. 22, 2004), website address: <http://www.healthandage.com/Home/gm=0!gc=37!l=2!gid2=2936>. Source: David Solie, MS, PA. *How to Say It to Seniors: Closing the Communications Gap with our Elders*. (2004) Prentice Hall Press, New York.

⁴ *Id.*

⁵ *Id.*

⁶ *Senior Judges Give New Meaning to "Volunteer"*, quoting Federal Courts Administrative Office Director Leonidas Ralph Mecham, The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Senior Judges Give New Meaning to "Volunteer"*, quoting Federal Courts Administrative Office Director Leonidas Ralph Mecham, The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Senior Judges Give New Meaning to "Volunteer"*, quoting Federal Courts Administrative Office Director Leonidas Ralph Mecham, The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

¹⁸ *Id.*

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²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Senior Judges Give New Meaning to "Volunteer"*, quoting Federal Courts Administrative Office Director Leonidas Ralph Mecham, The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Senior Judges Give New Meaning to "Volunteer"*, quoting Federal Courts Administrative Office Director Leonidas Ralph Mecham, The Third Branch, Newsletter of the Federal Courts Vol. 32(7) (July 2000), website address: <http://www.uscourts.gov/ttb/july00ttb/july00ttb.html>.

³³ *Id.*

³⁴ Patent and Trademark Office Mourns Death of Judge Giles S. Rich, Press Release #99-14 (June 10, 1999), website address: <http://www.uspto.gov/web/offices/com/speeches/99-14.htm>.

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³⁶ *Id.*

³⁷ North Carolina State University, Dr. Thomas Hess, *Studies Suggest Seniors' Memories Might Not Be So Bad, After All* (May 21, 2003), website address: <http://www.nfbnet.org/pipermail/nosb/2005-February/000153.html>.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² North Carolina State University, Dr. Thomas Hess, *Studies Suggest Seniors' Memories Might Not Be So Bad, After All* (May 21, 2003), website address: <http://www.nfbnet.org/pipermail/nosb/2005-February/000153.html>.

⁴³ *Id.*



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CHIEF JUDGE SAWAYA

from cover

soon followed and settled in Ocala. He owned and operated a grocery store and boarding house in Marion County. Chief Judge Sawaya's father carried on the family's entrepreneurial tradition with the first Chrysler-Plymouth new car dealership in the area.

Thus, in the era of muscle cars, young Judge Sawaya's playground was the auto service department at his father's dealership. He reminisces that the hobby he had as a child was one that most boys his age could only dream of having. Always the quick study, Chief Judge Sawaya became a certified mechanic at the age of 15. When he was old enough to drive on his own, he bought a brand new orange AMX two-seater sports car. Its previous owner had driven only 50 miles in the car before totaling it, and the owner's insurance company sold the sports car to Chief Judge Sawaya as salvage for \$500. Chief Judge Sawaya spent the next two years rebuilding it.

But, even with wheels of his own, Chief Judge Sawaya stayed close to home. After graduating from Blessed Trinity Catholic School in 1969, he headed west a hundred miles to the University of South Florida, where he received his undergraduate degree. He then traveled a short distance back

east to Stetson University College of Law, where he finished an impressive fourth in his law school graduating class in 1977.

Chief Judge Sawaya returned home to Ocala and maintained a general law practice there until 1986, when he threw his hat in the ring in a three-way race for a newly-created county court slot, emerging victorious. As a county court judge, he tried civil cases and handled dependency hearings in circuit court.

In 1990, he ran unopposed for another new position, this time in circuit court, where he served for ten years. His judicial mentor was the late Honorable Wallace Sturgis. Chief Judge Sawaya remembers that Judge Sturgis was always fair, with no distinction for the hometown you came from to plead your client's case or the number of years as a lawyer you had under your belt.

In looking back on his time as a trial judge, Chief Judge Sawaya recalls how he really enjoyed the jury trials more than anything else. He also especially misses the people he worked with everyday in his office and in the Marion County clerk's office, including the bailiffs, the local attorneys and the court reporters. Even during his circuit court tenure, Chief Judge Sawaya eagerly accepted the honor of serving as an associate judge on the Fifth District Court of Appeal. There, he realized that the research and writing work of an appellate court judge suited him well.

In late 1999, a new seat on the Fifth District Court of Appeal opened that gave Chief Judge Sawaya another opportunity to use his talents. His colleagues and friends encouraged him to apply, which he did, and in February 2000, Governor Jeb Bush elevated Circuit Court Judge Thomas D. Sawaya to the appellate bench. Chief Judge Sawaya is just starting his sixth year there, and for the past two years, has served as the Fifth District Court's Chief Judge. He is also the current Chair of the Technology Committee for all the Florida District Courts of Appeal, no small task considering that the committee is constantly looking into the latest technology. While acknowledging the challenge of the job, Chief Judge Sawaya loves working at the Court and is very fond of his fellow judges, whom he describes as extremely col-

legial.

During the work week, Chief Judge Sawaya commutes to the Fifth District courthouse in Daytona Beach from a family home in Winter Park. He spends his weekends with his family in Ocala. He also enjoys reading nonfiction, mostly historical biographies, and occasionally fishes.

Chief Judge Sawaya and his wife Jeannie have been married since 1980. They have three children. Their youngest, a daughter, is the valedictorian of her class and has set her sights on becoming an attorney. The Sawayas' oldest son has just graduated from college and is starting his own business, and their middle child, a freshman at Florida State University, intends to pursue a career in medicine.

Chief Judge Sawaya tries to be as good an influence on his children as his parents were on him. His father, who is 91 and still lives in Ocala, remains the most influential person in Judge Sawaya's life. His father taught him the importance of working hard, being honest, and taking pride in whatever work you do. Even as a young attorney, Chief Judge Sawaya took his father's lessons to heart by editing every letter before he signed off to make sure that it read well.

Chief Judge Sawaya's attention to detail and outstanding writing skills are evident in his long list of legal articles, which includes a 27-chapter West publication entitled, "*Florida Personal Injury and Wrongful Death Actions*," and the hundreds of published legal opinions that he has authored. The Supreme Court of Florida has quoted from and expressly adopted Judge Sawaya's opinions in its written opinions. In a special concurrence, Chief Justice Anstead stated, "I particularly commend the thoroughness of Judge Sawaya's opinion for the Fifth District which we approve today." *Bellsouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 293 (Fla. 2003).

Chief Judge Sawaya modestly declined to point to any one opinion as standing out, but most students of Florida's appellate courts would likely cite *Campus Communications, Inc. v. Earnhardt*, 821 So. 2d 388 (Fla. 5th DCA 2002), *rev. denied*, 848 So. 2d 1153 (Fla.), *cert. denied*, 540 U.S. 1049 (2003), as the most notable reported decision that Chief Judge Sawaya has authored to date, a case that involved



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a myriad of issues such as free speech, individual privacy rights, retroactivity, and statutory construction.

In *Earnhardt*, the Fifth District Court of Appeal upheld the constitutionality of the Earnhardt Family Protection Act, which made photographs and videotapes of autopsies confidential and exempt from Florida's public records act. The events surrounding the decision captured international and national attention. The opinion itself has been cited in several other judicial decisions and law review articles. In deciding the complex issues that the Court faced, Chief Judge Sawaya, writing the unanimous panel decision, explained:

"The Florida Constitution gives every citizen the right to inspect and copy public records so that all may have the opportunity to see and know how the government functions. It is also a declared constitutional principle that every individual has a right of privacy, and while our constitution does not catalogue every matter that one can hold as private, autopsy pho-

tographs which display the remains of a deceased human being is certainly one of them. But we need not say so because the Legislature has said so and that is its prerogative, not ours." 821 So. 2d at 402.

All of the attention surrounding *Earnhardt* notwithstanding, each type of appeal is interesting to Chief Judge Sawaya. When he writes an opinion, he starts from scratch, conducting his own research and reviewing the record on appeal to ensure the opinions are complete and correct. If there is precedent for a primary premise, he uses string citations in his opinion for guidance and as a research tool for attorneys.

Chief Judge Sawaya also has pointers for practitioners. His definition of a good brief is one that gets to the heart of the case and gives the court the issues and the relevant research. A good brief should also discuss the pertinent cases on both sides of an issue and then articulate a reason for following the position that the advocate is proposing. Chief Judge Sawaya

is not opposed to a long brief provided it meets these criteria. He defines a good oral argument as one that gets right to the point and one in which the lawyer is willing to concede the weak part of his or her case.

At the end of the day though, hard work, honesty, and integrity are a lawyer's stock in trade, Chief Judge Sawaya believes. These attributes have guided him through his career, and although Chief Judge Sawaya has not strayed very far from his roots, his impact on the law has gone far indeed.

(Endnotes)

¹ Susan Scrivani Lerner has been Florida Bar board certified in appellate practice since 1996. Upon graduating from the University of Florida School of Law in 1982, Ms. Lerner clerked for two of the original judges on the Fifth District Court of Appeal, the Honorable Warren H. Cobb and the Honorable Winifred J. Sharp. Ms. Lerner is in private practice with the Law Firm of Josephs, Jack & Miranda, P.A. in Miami, Florida. The firm handles commercial, personal injury, wrongful death, product liability, insurance law, extra-contractual liability law, plaintiff and defense, in the state and federal trial and appellate courts.

CHIEF JUDGE LEVY

from cover

School in 1961, then attended the University of Miami where he obtained his undergraduate degree with a major in Government and a minor in History. After completing his stint at the University of Miami, Chief Judge Levy attended the University of Tulsa College of Law, where he received his law degree and was named to the Dean's Honor Roll.

Perhaps foreshadowing his later passion for teaching, Chief Judge Levy did not immediately begin practicing law after graduating from law school. Instead, for two years, he served as a full-time junior high school teacher instructing students in history, geography, civics and mathematics. After two years, though, Chief Judge Levy entered the legal profession as an Assistant State Attorney in the Eleventh Judicial Circuit of Florida (Miami-Dade County) in the office of the State Attorney Richard E. Gerstein. He served the public in this capacity for almost eight years, during which he was appointed sequentially to the positions of Chief Prosecutor of the Criminal Division and Chief Prosecutor of the Organized

Crime and Public Corruption Prosecution Unit. His dedication to the public interest earned him the attention of Governor Reuben Askew, who in 1978 appointed him to the position of Circuit Court Judge in the Eleventh Judicial Circuit of Florida.

Ten months after being appointed to the bench, Chief Judge Levy was re-elected as Circuit Court Judge for a six-year term. The first three years of his tenure he spent in the criminal division of the Circuit Court where, notwithstanding what defense attorneys might have expected from his eight years of experience as a prosecutor, he earned a reputation with practitioners as an intelligent, well-prepared and even-handed jurist. Chief Judge Levy's time in the criminal division was brief however, for in 1980 he was transferred to the civil division where he remained until his elevation to the Third District Court of Appeal in 1989. It was during this time, though, that Chief Judge Levy got his first taste for being an appellate judge. He was assigned by the Chief Judge of the Eleventh Judicial Circuit to serve as a member of the Appellate Division of the Circuit Court. He also continued to explore his interests in education by serving eight years on the Judicial Educational Committee

of the Eleventh Judicial Circuit.

In 1984, Chief Judge Levy was re-elected to a second, full term as Circuit Court judge, but his term was cut short in January 1989 when Governor Bob Martinez appointed Chief Judge Levy to serve on the Third District Court of Appeal. Chief Judge Levy has served on the Third District for the past 16 years, during which he has been retained by the electorate in three general elections. Chief Judge Levy has remained actively involved in efforts to improve the judiciary of the State of Florida, serving on the Supreme Court Committee on Standards of Conduct Governing Judges and the Education Committee of the Florida Conference of District Court of Appeal Judges.

Chief Judge Levy's tenure on the Third District culminated this year with his unanimous election to the position of Chief Judge of the court. With the retirement of Judge Alan Schwartz on January 1, 2005, the court found itself with a change in chief judges for the first time in more than two decades. While Chief Judge Levy was not the most senior judge sitting on the court at the time – Judge Gerald Cope predated Chief Judge Levy on the court by a little less than one month – Chief Judge Levy's

continued next page

CHIEF JUDGE LEVY

from previous page

prior indication that he intended to retire from the bench in the near future led his colleagues unanimously to elect him as Chief Judge so that he would enjoy the honor of the position, albeit for only six months.

At a recent breakfast of the Dade County Bar Association's Judicious Breakfast Series in Miami, Chief Judge Levy indicated that practitioners should not expect any revolutionary changes at the Third District now that he has become Chief Judge. He expressed his gratitude to Judge Schwartz for the latter's efforts on behalf of the Court and indicated that the Court's current practices and procedures would remain in effect, including the Court's liberal policy with respect to being afforded oral argument. Chief Judge Levy even hinted that extensions of time, already known to be generously granted at the Third District, might become more generous under appropriate circumstances.

Were the foregoing history the entirety of Chief Judge Levy's professional career, it would be more than most accomplish in a lifetime. However, being a judge has only partially informed Chief Judge Levy's perspective on the world. As previously indicated, Chief Judge Levy has always had a passion for teaching. In addition to the various educational posts he held as a circuit court and appellate judge, Chief Judge Levy also balanced the grueling demands of being a judge with the equally grueling demands of being an educator at numerous colleges and universities in South Florida. His credentials as an educator are dizzying, particular when one considers that he obtained them while serving as a full-time judge.

From 1977 to 1979, Chief Judge

Levy served as an adjunct professor in the Criminal Justice Program at Nova University, where he taught courses in history, government and the American legal system. For the past 22 years, however, Chief Judge Levy has found his home away from home, as it were, as an adjunct professor at St. Thomas University. At St. Thomas, he has taught undergraduate courses dealing with subjects such as constitutional law, state and local government, law and the justice system, organized crime, the court system, American history, the sociology of law and the legal profession. At the St. Thomas University School of Law, he has served in a similar and contemporaneous capacity teaching courses in professional responsibility and legal ethics, criminal procedure, constitutional procedure, courtroom procedure and white collar crime.

Not content with reserving his teaching prowess for one institution, Chief Judge Levy has at various times during the past 20 years, simultaneously served as adjunct professor at Florida International University, where he has taught courses in contracts, legal research and the justice system, University of Miami, where he has taught criminal law, legal research and civil procedure, and Miami-Dade College, where he taught trial practice and appeals, family law, contracts, trial preparation and criminal law. He managed to do all this while also serving on the Advisory Board of the legal assistant program of Miami-Dade College. In short, Chief Judge Levy has demonstrated a seemingly inexhaustible capacity to teach the future leaders of our community.

During his distinguished career, Chief Judge Levy has earned innumerable accolades and honors from educational institutions and professional and civic organizations

throughout South Florida. The one closest to his heart, perhaps, is the one conferred on him by St. Thomas University in December 2003, when he was named Outstanding Jurist of the Year. Chief Judge Levy has indicated that St. Thomas University will continue to play a prominent role in his life, even after he retires from the bench.

While Chief Judge Levy's time as Chief Judge will be a short one, the legal community is fortunate to have his stewardship during this critical time as the composition of the Third District changes. With five of the eleven sitting judges having been appointed during the past fifteen months, practitioners can rest assured that a steady hand is at the rudder. Chief Judge Levy will continue the traditions of professionalism and collegiality, which make practicing before the Third District such an enjoyable experience. And as the inevitable date of self-imposed retirement looms ever closer for Chief Judge Levy, the legal profession and the community at large can take solace in knowing that he will continue to play an important role as educator in shaping the minds of future generations of lawyers in our community.

(Endnotes)

¹ Mr. Guedes is a shareholder in the Miami office of Greenberg, Traurig Appellate Practice Group. He obtained his law degree from the Harvard Law School and is presently board certified by the Florida Bar in appellate practice. Mr. Guedes is currently Co-Chair of the Third District Court of Appeal 50th Anniversary Committee and serves on the Appellate Court Rules Committee of the Florida Bar, where he is chair of the *Amicus Curiae* subcommittee.

² 863 So. 2d 334 (Fla. 3d DCA 2003). The quotation is from the musical, *Chicago*, and is uttered by a character caught by his wife, in *flagrante delicto*, being unfaithful to her with not one, but two women at the same time.

³ *Id.* at 335-36.



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PCAs and PCDs fail the jurisdictional test for express and direct conflict because review is only available under Article V, § 3(b)(3) if a district court decision contains “some statement,” indicating that it has “expressly address[ed] a question of law within the four corners of the opinion itself,” which could “hypothetically ... create conflict if there were another opinion reaching a contrary result.” *Gandy*, 846 So. 2d at 1144, quoting *Florida Star v. B.J.F.*, 530 So. 2d 286, 288 (Fla. 1988).¹¹ The supreme court has noted on a number of occasions that conflict review manifests a “concern with decisions as precedents as opposed to adjudications of the rights of particular litigants.” *Ansin v. Thurston*, 101 So. 2d 808, 811 (Fla. 1958). A decision that does not expressly address a question of law has no precedential value and “does not create discord in the decisional law of this state.” *Mystan Marine, Inc. v. Harrington*, 339 So. 2d 200, 201-02 (Fla. 1976). Accordingly, those decisions are beyond the scope of the supreme court’s conflict jurisdiction.

Because a written opinion is crucial to further review, effective January 1, 2003, the Florida Rules of Appellate Procedure were amended to allow a party to seek a written opinion. See Fla. R. App. P. 9.330(a). As amended, Rule 9.330(a), which applies to motions for rehearing, clarification and certification, provides that “[w]hen a decision is entered without opinion, and a party believes that a written opinion would provide a legitimate basis for supreme court review, the motion may include a request that the court issue a written opinion.” The request must include a signed statement of the party’s attorney certifying a belief that the opinion would provide a legitimate basis for supreme court review and stating specific reasons why the supreme court would likely grant review if an opinion were written.

An exception to the general rule that precludes review of PCAs and PCDs exists if the decision cites, as controlling precedent, a case that: (1) is pending in the supreme court; (2) has been reversed on appeal or review; or (3) has been receded from by the supreme court. *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981); see also *Gandy*,

846 So. 2d at 1143.¹² The citation to the pending or reversed case is “prima facie express conflict” that allows the supreme court to exercise its jurisdiction. *Jollie*, 405 So. 2d at 420.

2. Decision of a Majority Is Required

The decision for which review is sought must be a majority decision. A plurality opinion cannot serve as a basis for supreme court review. *Kennedy v. Kennedy*, 641 So. 2d 408, 409 (Fla. 1994). Statements in dissenting or concurring opinions cannot furnish the basis for conflict jurisdiction. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980). In addition, the conflict must be with a decision of another district court of appeal or the supreme court. Intradistrict conflicts are not reviewable by the supreme court under article V, § 3(b)(3).¹³

3. Review Cannot Be Based on Conflict with a Rule or Statute

Because the Florida Constitution specifically provides for discretionary review of decisions of district courts that expressly and directly conflict with “a decision” of another district court or the supreme court, there is no jurisdiction to review a decision that allegedly conflicts with a rule or a statute. *Persaud*, 838 So. 2d at 532; *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 n.1 (Fla. 1995).

E. Types of Express and Direct Conflict

The supreme court has found “express and direct” conflict in a number of different contexts. The following list includes many of the areas that have been identified by the court. Some of the categories necessarily overlap.¹⁴

1. Adopting an Opposing Rule of Law

A classic conflict arises from adopting an opposing rule of law. *Florida Power & Light Co. v. Bell*, 113 So.2d 697, 698 (Fla. 1959). These decisions are “in collision” and create a conflict of authority on a point of law. *Bell*, 113 So. 2d at 698. Although a conflict must be “express,” it is not necessary for the district court to specifically identify conflicting decisions in its opinion.

Ford Motor Co. v. Kikis, 401 So. 2d 1341, 1342 (Fla. 1981). The district court’s discussion of the legal principles it applied is a sufficient basis for conflict review. *Id.* On the other hand, a conflict that is merely “inherent” or “implied” is insufficient. See *Dep’t of Health and Rehab. Serv. v. Nat’l Adoption Counseling Serv., Inc.*, 498 So. 2d 888, 889 (Fla. 1986).

Because a “conflict” is required, a case of “first impression” is necessarily unreviewable in the absence of a certification or another constitutional ground of jurisdiction. *Ellsworth v. Nash Miami Motors, Inc.*, 142 So. 2d 733, 734 (Fla. 1962).

2. Misapplying Supreme Court Precedent

In a number of recent cases the supreme court found conflict where a district court misapplied supreme court precedent. See, e.g., *Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002).¹⁵ The misapplication of binding precedent creates conflict with the precedent itself. *Robertson*, 829 So. 2d at 904. In this situation, the district court misreads or misapprehends a supreme court decision.¹⁶ The conflict may result from reading the precedent too broadly or too narrowly.

3. Failing to Apply Precedent to Same or Similar Facts

A conflict exists if a district court reaches a different result in a case that involves substantially the same controlling facts as those involved in a prior case decided by another district court of appeal or the supreme court. See *Crossley v. State*, 596 So. 2d 447, 449 (Fla. 1992); *Nielsen v. City of Sarasota*, 117 So. 2d 731, 73 (Fla. 1960).

4. Applying Precedent to Materially Different Facts

An “express and direct” conflict may also arise if a district court applies a precedent to a case involving a materially different factual situation. See *Dep’t of Transp. v. Anglin*, 502 So. 2d 896, 897 (Fla. 1987).

5. Apparent Conflict

The supreme court has accepted cases based on “apparent conflict” with a decision of another district

continued next page

court of appeal, see *Fitzgerald v. Cestari*, 569 So. 2d 1258 (Fla. 1990); *D'Oleo-Valdez v. State*, 531 So. 2d 1347 (Fla. 1988), or a decision of the supreme court, see *Public Health Trust of Dade County v. Menendez*, 584 So. 2d 567 (Fla. 1991). In *Menendez*, the district court held that a medical malpractice action against a public hospital was governed by the four year statute of limitations for actions against a state agency, rather than the statute applicable to medical malpractice actions. This created an “apparent conflict” with the Supreme Court’s prior decision in *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989), where the Court, in an action against a public hospital, addressed the constitutionality of the medical malpractice statute of limitations and repose, without discussing whether that statute prevailed over the statute of limitations applicable to suits against state agencies. The supreme court resolved the apparent conflict by holding that the statute of limitations for suits against state agencies applied and limited *Carr* to its holding that the medical malpractice statute of limitations and repose is constitutional.

6. Dicta Conflict

Express and direct conflict may be founded upon a district court ruling that conflicts with dicta in a decision of the supreme court or another district court of appeal. See *Cowan Liebowitz & Latman, P.C. v. Kaplan*, 30 Fla. L. Weekly S155, S155 (Fla. Mar. 17, 2005) (accepting jurisdiction where district court’s holding expressly and directly conflicted with statements, “albeit in dictum,” in prior supreme court decisions); see also *Garcia v. Cedars of Lebanon Hosp. Corp.*, 444 So. 2d 538, 539 n.3 (Fla. 3d DCA 1984) (recognizing that interdistrict conflict for supreme court jurisdiction may be based on dicta).

7. “Tag Along” Conflict

This type of conflict arises when a district court cites as controlling precedent a decision that has been accepted for review or overruled by the

supreme court.¹⁷ These cases typically, but not always, involve citation PCAs.

F. Discretion to Review

Conflict review is discretionary, not mandatory. Even if a conflict exists, the supreme court may decline to exercise its jurisdiction, particularly if it appears that the issue involved is unlikely to recur. The 1977 Committee Notes to Fla. R. App. P. 9.120 address this issue and provide that the petitioner may wish to include in the jurisdictional brief a short statement of why the supreme court should exercise its discretion and accept review if it finds that it has jurisdiction. This is typically accomplished by including a section toward the end of the argument section of the jurisdictional brief entitled “Statement of Reasons Why Review Should Be Granted.” Obvious reasons include the confusion created by conflicting precedents, the effect of the district court’s decision on a large number of cases or a broad category of cases, and the likelihood the same issue will arise in future cases.

G. Scope of Review

Once the supreme court accepts conflict jurisdiction, it has jurisdiction over all issues in the case. *Murray v. Regier*, 872 So. 2d 217, 223 n. 5 (Fla. 2002). The court has discretionary authority to consider issues outside the scope of the conflict if the issues have been briefed and argued and are dispositive of the case. *Savona v. Prudential Ins. Co. of America*, 648 So. 2d 705, 707 (Fla. 1995). The Court exercises its discretion sparingly and it is unusual for the Court to consider issues outside the scope of the conflict. See, e.g., *State v. Castillo*, 877 So. 2d 690, 692 n.3 (Fla. 2004) (declining to address issue that was not integral to the conflict issues); *Heidbreder v. State*, 613 So. 2d 1322 (Fla. 1993).

H. The Briefs on Jurisdiction

The petitioner’s brief on jurisdiction must be served within 10 days of filing the notice to invoke. See Fla. R. App. P. 9.120(d). The brief, which cannot exceed 10 pages, is to be accompanied by an appendix containing only a conformed copy of the decision of the district court for which review is sought. *Id.*; see also Fla. R. App. P.

9.210(a)(5). The respondent’s brief on jurisdiction shall be served within 20 days after service of the petitioner’s brief. The briefs must comply with formal requirements of Fla. R. App. P. 9.210. No reply brief is permitted. There is no provision in the rules for *amicus curiae* briefs on jurisdiction.¹⁸

The supreme court may postpone a ruling on jurisdiction until after briefing on the merits. A ruling on jurisdiction will issue in most cases within three to six months. Motions for rehearing addressed to the supreme court’s grant or denial of a request to exercise its discretionary jurisdiction are not permitted. See Fla. R. App. P. 9.330(d).

If a practitioner has not filed jurisdictional briefs in some time, it may be beneficial to look at recent briefs on the supreme court’s website. Briefs filed since August of 2000 are available at <http://www.floridasupremecourt.org/clerk/briefs/index.shtml>. The briefs are indexed by case number.

III. Review of a “Certified” Conflict Pursuant to Art. V, § 3(b)(4)

A. The Constitutional Provision

Pursuant to the 1980 amendments to Article V, the Supreme Court of Florida may review any decision of a district court of appeal “that is certified by it to be in direct conflict with a decision of another district court of appeal.” Art. V, § 3(b)(4), Fla. Const.¹⁹ The district court may certify the conflict on its own or pursuant to the request of a party. See Fla. R. App. P. 9.330(a).

B. The Certification

The district court decision should actually certify a conflict with an identified decision from another district court of appeal. A vague reference to another case is generally not enough.²⁰ In the absence of a certification, the case would likely be subject to the more rigorous standard applied to cases involving “express and direct” conflict.²¹

C. Invoking the Supreme Court’s Jurisdiction

Review of a certified conflict is not

automatic. As with other types of discretionary review, the petitioner must invoke the supreme court's jurisdiction by filing two copies of a notice accompanied by applicable filing fees, with the clerk of the district court within thirty days of the order certifying conflict. Fla. R. App. P. 9.120(b). It is important to note that, in cases of certified conflict, no briefs on jurisdiction are permitted. Fla. R. App. P. 9.120(d).

D. "Direct" Conflict With Decision of Another District Court of Appeal

For certified conflicts, the constitution requires only a "direct," but not an "express" conflict with a decision of another district court of appeal. Thus, the certification and citation to conflicting authority may be sufficient, without a detailed discussion of the conflict. This type of review is limited to conflict with decisions of other district courts of appeal. That is because a district court has no authority to decide a case in conflict with a decision of the supreme court and accordingly there would be no need to certify a conflict with a decision of the supreme court.

E. Briefing in Certified Conflict Cases

Although briefs on jurisdiction are not permitted, in preparing a brief on the merits, it is prudent to address the jurisdictional issue of conflict. This is because the supreme court does not always agree with a district court's conclusion on the existence of a conflict.

Conclusion

If a conflict exists with a decision of another district court of appeal, the adverse party in the district court should seek a certification from the district court to facilitate review by the supreme court. If that avenue fails, or if a conflict exists with a decision of the supreme court, then review must be sought based on "express and direct" conflict. While obtaining review is difficult, following the correct procedures and understanding the meaning of "conflict" will enhance a party's chances of success.

(Endnotes)

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² See Gerald Kogan and Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1201 (1994) (hereinafter "Kogan and Waters") (noting that "the largest single category of petitions for review allege that jurisdiction exists because the opinion under review conflicts with an opinion of another Florida appellate court").

³ See Art. V, § 3(b)(3), Fla. Const.

⁴ See Art. V, § 3(b)(4), Fla. Const.

⁵ Kogan and Waters, *supra* note 2, at 1199 (stating that "the bulk" of petitions seeking to establish jurisdiction based on "express and direct conflict of decisions" are "summarily denied."). Even if the Court initially accepts jurisdiction, it may decide after consideration of briefs on the merits that no "express and direct" conflict exists. See, e.g., *Stine v. Jain*, 873 So. 2d 326 (Fla. 2004).

⁶ See, e.g., *Famiglietti v. State*, 838 So. 2d 528 (Fla. 2003) (in case of certified conflict, supreme court determined jurisdiction was improvidently granted and dismissed cause); *Vega v. Independent Fire Ins. Co.*, 666 So. 2d 897 (Fla. 1996) (Court determined after oral argument that case in which district court certified conflict should be dismissed because jurisdiction was improvidently granted).

⁷ Fla. R. App. P. 9.030(a) paraphrases the supreme court's jurisdiction.

⁸ See Arthur J. England, Jr., et al., *Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform*, 32 U. Fla. L. Rev. 147 (1980). For an abbreviated summary of the history of the 1980 amendment, see *Jenkins v. State*, 385 So. 2d 1356, 1360-63 (Fla. 1980) (England, C.J. concurring specially).

⁹ See generally Gerald B. Cope, Jr., *Discretionary Review of the Decisions of Intermedi-*

ate Appellate Courts: A Comparison of Florida's System with those of the Other States and the Federal System, 45 Fla. L. Rev. 21 (1993).

¹⁰ See generally Steven Brannock & Sarah Weinzierl, *Confronting a PCA: Finding a Path Around a Brick Wall*, 32 Stetson L. Rev. 367 (2003).

¹¹ The rule precluding review of PCAs cannot be circumvented by filing an extraordinary writ petition. *Persaud*, 838 So. 2d at 533.

¹² Review is available pursuant to Art. V, § 3(b)(4) if the district court explicitly notes a direct conflict of decisions.

¹³ An intradistrict conflict is to be resolved by the rehearing en banc procedure in the district court of appeal. Fla. R. App. P. 9.331.

¹⁴ Kogan and Waters, *supra* note 2, at 1231-36. The authors note "four broad and sometimes overlapping categories" of (i) holding conflict, (ii) misapplication conflict, (iii) apparent conflict, and (iv) piggyback conflict. *Id.* Within the area of misapplication conflict, the authors cite to three subcategories: (a) erroneous reading of precedent, (b) erroneous extension of precedent and (c) erroneous use of facts. *Id.* at 1232.

¹⁵ See also *Knowles v. State*, 848 So. 2d 1055, 1056 (Fla. 2003); *Rosen v. Fla. Ins. Guar. Ass'n*, 802 So. 2d 291, 292 (Fla. 2001); *Fla. Dept. of Transp. v. Juliano*, 801 So. 2d 101, 103 (Fla. 2001); *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1272 (Fla. 2000).

¹⁶ *Arab Termite and Pest Control of Fla., Inc. v. Jenkins*, 409 So. 2d 1039, 1041 (Fla. 1982) (finding conflict created by district court's "erroneous reading" of supreme court precedent).

¹⁷ *Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981).

¹⁸ See Fla. R. App. P. 9.370; see also Sylvia H. Walbolt & Joseph H. Lang, Jr., *Amicus Briefs: Friend or Foe of Florida Courts?*, 32 Stetson L. Rev. 269, 280 (2003).

¹⁹ The amended constitution also provides for discretionary review of a question certified by the district court of appeal to be of "great public importance." See Raoul G. Cantero III, *Certifying Questions to the Florida Supreme Court: What's So Important*, 76 Fla. B.J. 40 (May 2002).

²⁰ Kogan and Waters, *supra* note 2, at 1242.

²¹ *Id.*

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ROOTS OF PRESERVATION

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objective that the trial judge make a ruling in the context of the trial court proceeding. In other words, if the litigant does not secure a ruling, there is no “decision” of the trial court for the appellate court to review.⁴

Another rule that bears on the nature of the objection necessary to preserve the record is the harmless error rule. Essentially, the appellate court will not reverse a decision of a trial court for an error that has not materially affected the proceedings, even if the error was preserved.⁵ For example, if the alleged trial court error is the refusal to permit certain testimony, the complaining litigant must do more than simply protest; the testimony must be proffered. The proffer will give the appellate court some substance to analyze in the context of the rest of the record to determine whether, if error, it was harmful.

As suggested above, these preservation rules not only serve the purpose of fairness to the judge and the opposing party, but also help to control the flow of cases to the appellate courts. In that way, preservation law can be seen as helping to strike the balance between protecting the validity of one’s day in court and constitutional right to review, and judicial efficiency.

As a (hopefully) interesting aside, the well-settled “Topsy Coachman” rule exemplifies this objective of judicial efficiency and is, in one respect, the flip side of the contemporaneous objection rule. The Topsy Coachman rule provides that the appellate court may affirm the trial court decision even if the court’s legal basis was incorrect, so long as there is an alternative basis in the record that would support the judgment.⁶ In fact, for purposes of judicial efficiency — and just the opposite of the contemporaneous objection rule — the prevailing party need not have even raised the legal issue upon which the appellate court may base an affirmance.

For that reason, the rule may be thought of as the “Inspector Clouseau” rule, under which the appellate court will protect the litigant and judge who, in effect, bumble their way to the right result. Without such a rule, there would be many more

reversals.

The court system does not have the luxury of an overabundance of judicial resources to permit it to remand cases only for judges to correct their reasoning in an already-correct decision. So, in order to promote one of the objectives of the contemporaneous objection rule, the Topsy Coachman rule evolved as an *exception* to the obligation to object.

D. The Preservation Rules in Action

With the policy underlying the rules of preservation in full view, the vast majority of the decisions on preservation issues make logical sense and show that an understanding of this policy can reward counsel who is advocating a preservation issue either in trial or appellate court. For example, a contemporaneous objection to the admissibility of evidence or to an improper question readily furthers the policy of the rules. The objection affords the trial judge an opportunity to think about the prospective evidence in the context of the trial and decide whether it truly is admissible, and affords the opponent an opportunity to consider whether to withdraw that evidence rather than risk creating reversible error.⁷ Similarly, an objection to an arguably improper question affords the judge the same review opportunity and the opponent the opportunity to withdraw or re-phrase the question.

When the trial court chooses to exclude evidence at trial, the preservation rules require that the proponent proffer the evidence.⁸ That rule serves the purpose of permitting the trial judge to hear the evidence and to decide whether, in the context of the case, it should be admitted. The rule serves a second purpose of providing a record for the appellate court to analyze in deciding whether the exclusion of that evidence was both erroneous and harmful.

The long-time requirement that a party whose motion in limine is denied must again object to the evidence when offered at trial in order to preserve the error serves the policy of the preservation rules, although it has been a subject of recent change and debate. That common law rule recognizes the difficulties facing a trial judge in deciding a motion in limine

and that the judge can often benefit from hearing other evidence in the case and then deciding the evidentiary objection in context. Just how much preservation should be required has been thrown into debate by a legislative change to the rules of evidence that became effective in 2003. That rule change provides that if the judge has made a definitive ruling either excluding evidence or permitting it, at or before trial, the opposing party need not re-raise the objection at trial to preserve the issue.⁹ It is inevitable that there will be differences of opinion about whether this statute furthers the policy of the preservation rule and how liberally it should be enforced.¹⁰

The requirement of presenting the trial court with a motion for a new trial or for directed verdict before challenging the sufficiency of the evidence on appeal serves the policy of the contemporaneous objection rule. It does so by affording the trial judge the opportunity to consider all of the evidence or objectionable event and determine, from her advantageous vantage point, whether a new trial is warranted.¹¹ The trial judge’s decision (and observations, if the motion is granted) become valuable to the appellate court in reviewing the legal correctness of the trial court ruling.

The inconsistent verdict rule is also in harmony with the contemporaneous objection rule. When a jury finds on multiple issues inconsistently—for example, when the jury finds no liability, but nevertheless awards damages—the law requires the would-be appellant to object in the lower tribunal before the jury is discharged.¹² With a timely objection in hand, the trial court can re-assign the jury to an immediate encore deliberation of the pertinent issues. And, as a final example, the requirement that a party must offer a written jury instruction to preserve the court’s refusal to give an instruction is, in essence, a “proffer of law”, which, much like the proffer of evidence, gives the trial court a fair opportunity to reconsider its ruling and the appellate court a fair opportunity to review the decision for error.¹³

Conclusion

The contemporaneous objection rule serves the laudable purposes of

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providing basic fairness to both the judge and the party opposing an eventual appeal and of restricting the flow of cases to the appellate courts. That rule underlies and has spawned numerous rules of law specifying the minimum procedures for preserving appellate issues. Although there are certain limited circumstances in which the rules of law that have evolved are only debatably consistent with the contemporaneous objection policy, the policy serves as a fairly reliable predictor of what the requirements will be in a given circumstance. Therefore, an understanding of that policy can be useful to a trial lawyer or appellate practitioner in advocating preservation issues.

(Endnotes)

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² For a brief discussion of the history of appellate courts in the United States and Florida, see Raymond T. Elligett and Judge John M. Scheb, *FLORIDA APPELLATE PRACTICE AND ADVOCACY*, ch. 1. (1998).

³ See *Castor v. State*, 365 So. 2d 701, 703 (Fla. 1978). The rule is practically necessary because without it, it is likely that the appellate courts would grind to a halt, inundated with appeals over issues the parties showed no concern about below and with efforts to determine whether the errors newly complained of were harmful or harmless (in the absence of any discussion of them on the record, proffers, etc.). As the supreme court observed, "Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." *Id.*

⁴ See, e.g., *Fleming v. People's First Financial Savings & Loan Ass'n*, 667 So. 2d 273, 274 (Fla. 1st DCA 1995) (where trial court did not expressly rule on a motion for leave to amend a counterclaim and no implied denial of the motion appeared in the record, the appellate court ruled that there was nothing for the court to review).

⁵ Section 59.041, Fla. Stat., (2004), is the test of the footnote.

⁶ *Dade County School Board v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999).

⁷ *Dowd v. Star Mfg Co.*, 385 So. 2d 179, 181

(Fla. 3d DCA 1980).

⁸ *Key v. Angrand*, 630 So. 2d 646, 648-49 (Fla. 3d DCA 1994).

⁹ See § 90.104(1)(b), Fla. Stat. (2004), which was amended in 2003 with the following sentence: "If the court has made a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

¹⁰ In one recent Third DCA case, the court ruled that the objecting party was required to re-raise the objection at trial, although the opinion does not mention the new statute. *Philip Morris, Inc., etc. v. Lynn French*, 30 Fla. L. Weekly D48, 52 (Fla. 3d DCA Dec. 22, 2004). In a recent Fourth DCA decision, Judge Klein expressed the view that the statute serves the important purpose of reducing the number of certain post-conviction proceedings, such as claims of ineffective assistance of counsel, in criminal cases. *Mallory v. State of Florida*, 866 So. 2d 127, 128 (Fla. 4th DCA 2004).

¹¹ *Shofner v. Giles*, 579 So. 2d 861, 862 (Fla. 4th DCA 1991).

¹² See, e.g., *Lindquist v. Covert*, 279 So. 2d 44, 45 (Fla. 4th DCA 1973) (rule applied in case where jury rendered verdict finding defendant negligent on the plaintiff's claim, but also finding the defendant not to be negligent on the cross-claim).

¹³ *Luthi v. Owen-Corning Fiberglass Corp.*, 672 So. 2d 650, 651 (Fla. 4th DCA 1996).

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