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The Supreme Court Series, Part IV

The Jurisdiction of the Florida Supreme Court

by Gerald Kogan and Robert Craig Waters

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I. Discretionary Jurisdiction

The Florida Supreme Court's discretionary review jurisdiction accounts for the largest share of the petitions that it receives. This type of jurisdiction is "discretionary" because the Court, in every instance, can decline to hear a case without reason, and in some instances must decline because the law restricts discretion. All cases brought under this type of jurisdiction technically are called "reviews," as distinguished from "appeals," though lawyers and justices alike sometimes use the terms interchangeably. The distinction between the terms in found in the constitution itself.[1] In a more colloquial sense, "reviews" in this category do, in fact, constitute a type of "appellate" jurisdiction because the Court is reviewing actions taken by lower courts.

Jurisdiction over discretionary review cases is invoked when a party files two copies of a notice that review is being sought, which must be done within thirty days of rendition[2] of the order in the case.[3] The notice must be filed with the clerk of the district court, must be accompanied by the proper fee, and must be in the form prescribed by rule.[4] Briefing on jurisdiction is allowed in all cases except where the district court has cer-

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Message From The Chair

Who Is Out of Touch?

by Raymond T. (Tom) Elligett, Jr.
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It has become popular in some circles to suggest that judges, and especially appellate judges, are "out of touch." The November, 1996 *ABA Journal* cover story ("Taking Aim") addressed concerted efforts to unseat some appellate judges in retention elections.

We have seen such efforts in Florida after the Florida Supreme Court decided Florida's Constitution precluded certain statutory limitations on abortion. Justice Shaw observed that he made a conscious decision to appear as the author of the opinion, rather than have it issued per curiam. He prevailed despite vigorous opposition in the next retention election. So did former Justice (now Eleventh Circuit Judge) Barkett, after that decision and in the next retention election (where opponents selectively attacked her opinion in certain criminal decisions, even though she had voted to affirm in over 200 death penalty cases).

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tified a question of great public importance, or has certified that the case is in direct conflict with the decision of another district court.[5]

A. Declaration of Statutory Validity

The first type of discretionary review jurisdiction governs district court decisions expressly declaring a state statute valid.[6] For jurisdiction to exist, the decision under review must contain some statement to the effect that a specified statute is valid or enforceable.[7] The constitution does not directly say whether the statement must be necessary to the result reached. In a highly analogous context, however, the Court has expressly premised its jurisdiction on statements that were dicta.[8]

This conclusion is justifiable in the sense that dicta have persuasive force. At first blush, however, it does seem somewhat at odds with the constitution's requirement that jurisdiction be based on a "decision."[9] At least in other contexts, the decision is the result reached and is not gratuitous dicta in the opinion.[10] However, the Florida Supreme Court has indicated that the term "decision," as used in the constitution's jurisdictional sections, encompasses not merely the result but also the entire opinion.[11] In any event, the fact that a statute is declared valid in dicta may lessen the desire of the Court to exercise its discretion over the case, unless perhaps some injustice may result if the dicta are given effect by other courts.

Historically, the 1980 jurisdictional amendments overruled the so-called "inherency doctrine"[12] by which review might be had if the Court found that an opinion tacitly found a statute valid. This might occur, for example, where the opinion applied that statute as though it were valid but did not directly make a finding of validity. Following the 1980 amendments, the inherency doctrine has not been mentioned or used, and obviously is no longer viable.

B. Construction of State or Federal Constitutions

The second form of discretionary jurisdiction arises when the decision of the district court below expressly construes a provision of the state or federal constitutions.[13] The operative phrase "construes a provision" was imported into the 1980 jurisdictional reforms essentially unchanged from what had existed previously, with the word "expressly" being an addition. Commentators in 1980 stated their view that the new requirement of "expressness" merely codified prior case law, a view the Court apparently has neither accepted nor rejected. However, it does seem likely that pre-1980 case law on this type of jurisdiction remains persuasive at least to some extent.

Prior to the 1980 reforms, the Court held that the inherency doctrine does not apply to this type of jurisdiction.[14] Rather, the decision under review had to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision."[15] The key word was "doubts": The opinion under review had to contain a statement recognizing or purporting to resolve some doubt about a constitutional provision. Moreover, this statement had to be a "ruling"[16] that was more than a mere application of a settled constitutional principle.[17] Absent the obligatory act of construction, it was not enough that a petitioner simply alleged an unconstitutional result.[18] Commentators called this the "explain or amplify" requirement.[19]

On policy grounds, this entire analysis still makes good sense. The Florida Supreme Court is the one state court that can resolve legal doubts on a statewide basis. Resolving constitutional doubts is a highly important function because it results in more predictable organic law. No similar purpose is served by the Court hearing a case that has merely reiterated settled principles. The Court's function, in other words, is to say whether an evolution in constitutional law developed by the lower appellate courts is proper,[20] or to resolve a doubt those courts have expressly noted.[21] The Court's recent cases on this form of jurisdiction seem to be in accord with the pre-1980 analysis outlined above.[22]

There are a few problems, however. For one thing, the line that separates "explain or amplify" from "mere application" has sometimes been hard to see. In the 1975 case *Potvin v. Keller*,[23] for example, the Court's majority reviewed a district court opinion that merely mentioned the appellants' Fourteenth Amendment argument, and then affirmed the trial court's order without stating whether the Fourteenth Amendment had any bearing on the decision.[24] The Florida Supreme Court's majority in *Potvin* buttressed its jurisdiction with the following explanation: The district court had "ruled" that "no constitutional infirmity" existed based on the specific facts at hand.[25]

Later in the opinion's analysis, the majority also noted that the district court's opinion "may" have overstated federal case law when talking about constitutional and statutory rights that were not further identified.[26] Thus, the district court arguably had tried to eliminate a doubt about the Fourteenth Amendment. A misapplication of settled law obviously can be viewed as an evolutionary development deserving correction; but on *Potvin*'s peculiar facts, some straining was needed to reach so far, especially because the lower court's result was affirmed.

The strain is especially evident when a second question is posed: How specifically must the district court identify a constitutional provision it is construing? The district court in *Potvin* did not premise its actual holding on any specific provision, though the court probably misconstrued a federal case dealing with the Fourteenth Amendment. In other words a reader could not finally determine that the Fourteenth Amendment was being construed in *Potvin* without reading, or having prior knowledge of, the federal case cited therein.[27]

This analysis risks creating a kind of "cross-reference" jurisdiction any time an opinion cites to materials analyzing a constitutional provision. Such a possibility is very difficult to square with the requirement that the construction must be "express." *Potvin* probably is best understood as a dated and marginal case in which the Florida Supreme Court stretched the envelope of its jurisdiction to correct a deficient lower court analysis that, nevertheless, had reached a cor-

rect result. Moreover, the 1980 jurisdiction amendments could be viewed as superseding *Potvin* by adding the requirement that constitutional construction be "express."[28]

The better approach is the one suggested in the Court's earlier cases. For jurisdiction to exist, the district court's opinion must explain or amplify some identifiable constitutional provision in a way that is an evolutionary development in the law or that expresses doubt about some legal point.[29] Misapplication of earlier law could rise to this level to the extent that it can be considered an evolutionary development; but even then, the decision under review should at least be grounded in the discussion of a specific constitutional provision. Obviously, it would be needlessly bureaucratic to require a formal method of citation. Any reference sufficient to identify some constitutional provision ought to qualify, even a clipped reference like "full faith and credit."[30]

It remains to be seen whether dicta can be a sufficient basis for jurisdiction in cases of this type. The Court has expressly used dicta to establish jurisdiction in analogous contexts,[31] and thus, probably could do so here as well. Dicta establishing some new principle of constitutional law would have persuasive value, though perhaps not quite amounting to "rulings."[32] Review might be justified on that basis, especially where the dicta could be disruptive. But in any event, jurisdiction remains discretionary and could be declined if the dicta seem harmless.

C. Opinions Affecting Constitutional or State Officers

The third basis of discretionary review jurisdiction exists when a decision of a district court expressly affects a class of constitutional or state officers.[33] Again, the operative language here was imported nearly unchanged from the pre-1980 constitution, but with the word "expressly" added. Commentators in 1980 noted that the "expressness" requirement had the principle purpose of foreclosing any review of a district court decision issued without opinion. The Court has adopted this view.[34] Other than that, the pre-1980 case law was largely unaffected and probably remains persuasive.

In 1974, the Court held that a decision does not fall within this type of jurisdiction unless it meets a very restrictive test; it must "directly and, in some way, exclusively affect the duties, powers, validity, formation, termination, or regulation of a particular class of constitutional or state officers."[35] Thus, the decision must do more than simply modify, construe, or add to the general body of Florida law. If other criteria are met, it is not necessarily dispositive that members of a valid class were or were not litigants in the district court.[36] The Court has also said that jurisdiction could exist even where no class members were parties to the action, provided the decision affects the entire class in some way "unrelated to the specific facts of that case."[37]

Most of the cases seem to assume that the parties to the proceedings below are the ones allowed to seek review in the Florida Supreme Court, even though they may not be members of the "affected class." However, this has not always been true. One case, *In re Order on Prosecution of Criminal Appeals*,[38] allowed jurisdiction even though review was sought by governmental agencies not actually a party in the proceedings below. In any event, the case had very unusual facts, and may have been erroneously assigned to this particular subcategory of jurisdiction.

The case arose in 1990 when a district court entered a sua sponte order prohibiting a public defender from bringing appeals arising outside his own circuit. The incidental effect was to require public defenders in other circuits to handle their own appeals; and because the other circuits lacked adequate resources, county governments would be forced to pay for court-appointed private lawyers. After the order was entered, several county governments then filed a "motion for rehearing," which was summarily denied. The county governments next obtained review in the Florida Supreme Court based not on their own constitutional status, but on the fact that the district court's order incidentally affected the duties of public defenders.[39]

Presumably the act of filing the "motion for rehearing" somehow made the county governments a "party," but this is not at all clear. The summary order of dismissal is equally consistent with the view that the district court refused to recognize the county governments as a party. Moreover, it appears that no one raised or argued any objections to jurisdiction when the matter was brought to the Florida Supreme Court. It thus seems highly unlikely that the Court was creating any form of "third-party standing."

Whatever the case, *In re Order on Prosecution of Criminal Appeals* probably is better characterized as an exercise of the Court's "all writs" jurisdiction. "All writs" review previously has been allowed to bring serious governmental crises for expedited review where some factual or procedural

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quirk threatens to deprive the Court of its "ultimate jurisdiction."[40] That situation almost certainly existed here, where a technical lack of standing might have frustrated the Florida Supreme Court's ultimate ability to review the case. On the whole, *In re Order on Prosecution of Criminal Appeals* probably is better characterized as an all-writs case in which the wrong basis of jurisdiction was cited.

Another problem in this form of jurisdiction is the definition of the phrase "class of constitutional or state officers." The Court has held that the word "class" at the very least means there must be more than one officer of the type in question.[41] As a result, a decision affecting only the State Treasurer or only the Secretary of State does not establish jurisdiction. Likewise, there is no jurisdiction over a decision affecting only a single board with multiple members where the sole powers affected are those of the board as a single entity.[42] In such a situation, the entity constitutes only one "officer."[43]

The fact that an office or board is unique, thus, almost always means there is no jurisdiction.[44] But jurisdiction would exist, for example, where a decision affects every board of county commissioners in the state in some way peculiar to them as a class. At a minimum, there must be two or more officers or entities who separately and independently exercise identical powers of government that are peculiarly affected by the district court's decision.[45]

The Court apparently has rejected the view that the "class" requirement applies only to constitutional officers, not to state officers.[46] Indeed, the Court has never clearly distinguished the two types of officers. It is clear from the language of the cases that the Court considers a "constitutional officer" to include any office of public trust actually created by the constitution itself.[47] But it is apparently insufficient that the officer or entity is merely named in the constitution in an indirect or general way.[48]

The term "state officer" remains somewhat vague. It apparently does not include purely local entities not created by the constitution itself.[49] Beyond that, the Court has said little. There has been no definitive statement that all local officials and entities are excluded if they fail to qualify as constitutional officers. A good argument can be made that a "class of state officers" should include offices of trust created by statute and authorized to independently exercise identical powers of government are part of some larger statewide scheme.[50] Examples might include the governing boards of Florida's water management districts.[51] However, this is an issue that remains undecided.

Finally, dicta theoretically might constitute a basis for exercising this type of jurisdiction. But in practice, the prerequisites for review here are so rigorous that dicta rarely would qualify. Dicta by definition are not binding,[52] and a petitioner presumably would need to show some real likelihood that the dicta could be enforced against the "affected" class. A scholarly court opinion, for example, sometimes might pose such a threat. Otherwise, there would be no actual effect on a class of constitutional or state officers, and thus no discretion to hear the case.

D. Express and Direct Conflict

By far the largest and most disputatious subcategory is jurisdiction premised on express and direct conflict,[53] usually called simple "conflict jurisdiction."[54] Jurisdiction of this type exists where the decision of the district court expressly and directly conflicts with a decision[55] of another district court of appeal or of the Florida Supreme Court on the same question of law.[56] This relatively straightforward statement has taken on great complexity in practice. Conflict jurisdiction also is the subcategory most affected by the somewhat arcane distinction between "jurisdiction" and "discretion."

Historically, the 1980 jurisdictional reforms had one of the greatest effects on this type of jurisdiction. Prior to the amendments, a much broader form of conflict jurisdiction existed. It had come into existence in 1965 when a divided Florida Supreme Court held that conflict jurisdiction could exist over decisions affirming the trial court without opinion, in which the entire opinion usually said nothing but "PER CURIAM. AFFIRMED."[57] (These opinions often are identified by the acronym "PCA.")[58] Obviously, the determination of "conflict" in such cases only could be made by looking at the record, not from a review of the opinion under review.

By definition, a PCA establishes no precedent beyond the specific case, and Florida Supreme Court review thus, was of questionable utility. Through the years, the ability to review PCAs grew increasingly onerous and was sternly criticized, even by members of the Court.[59] The criticisms, along with the Court's overburdened docket, led directly to the 1980 constitutional reforms.

1. The Elements of Obtaining Conflict Review

As a result of the 1980 reforms and the cases construing them, the Court potentially has conflict jurisdiction only over a district court decision containing at least a statement by a majority[60] (however short) or a majority citation to authority.[61] If there is any question, petitions seeking jurisdiction are brought to the justices and their staffs. At this point, there must be some further examination to determine if several threshold requirements have been met.

This examination is constrained by the "four-corners" rule: Conflict must "appear within the four corners of the majority decision" brought for review.[62] There can be no examination of the record, no second-guessing of the facts stated in the majority decision, and no use of extrinsic materials to clarify what the majority decision means. In the vast majority of cases, the Court strictly honors the four-corners rule, though there are rare cases difficult to square with it.

Within the constraints of the four-corners rule, review will be allowed only if the following questions are all answered in the affirmative: (a) does jurisdiction actually exist?; (b) does discretion exist?; and, (c) is the case significant enough to be heard? The three elements are easy to see in some types of cases, harder in others.

a. Does Jurisdiction Exist?

The most obvious effect of the 1980 reforms was to eliminate completely the Court's jurisdiction over a large number of PCAs—those issued without statement oar citation. If a PCA includes no statement by a majority (however short) and no majority citation to authority, then the Court com-

pletely lacks jurisdiction to review the case.[63] Statements in a separate opinion, whether dissenting or concurring, are not sufficient if there is no majority statement or citation.[64]

It deserves to be stressed that jurisdiction is completely absent in these cases; it is not that the Court simply lacks discretion to hear the cause.[65] As a result, the Clerk of the court routinely issues a form summary denial in most cases brought for review to the Court based on a PCA that lacks a majority statement or citation to authority. The justices and their staffs usually do not review these petitions, and filing them thus is a complete waste of time, resources, and money.

The case law has established only one other category of district court opinions over which the Court may completely lack conflict jurisdiction.[66] These are PCAs that contain nothing but a citation to authority (called "citation PCAs"). In 1988, the Court distilled much of its earlier law on this question into a single formula. In *The Florida Star v. B.J.F.*,[67] the Court said that there is no jurisdiction over a citation PCA unless "one of the cases cited as controlling authority is pending before this Court, or has been reversed on appeal or review, or receded from by this Court, or unless the citation explicitly notes a contrary holding of another district court."[68] The failure to meet any of these requirements strips the Court of all jurisdiction, which can have significant consequences when further appeal may be sought in the United States Supreme Court.

As is apparent from the language quoted here, the citation to authority must be to a case[69] issued by a Florida district court of appeal or by the Florida Supreme Court.[70] A citation to a statute, administrative or court rule, federal case, or case from another jurisdiction is insufficient in itself to establish discretion for a review.

Citation to a case from the same district court of appeal can establish jurisdiction only if that case is pending for review in or has been reversed by the Florida Supreme Court.[71] Thus, a "contra" or "but see" citation to an opinion of the same district court would not in itself establish conflict. This rests on a simple rationale. The fact that a district court decides to expressly or silently depart from its own case law does not establish conflict, because there is no such thing as "intradistrict conflict" as a basis for supreme court jurisdiction. The latest inconsistent opinion is deemed to overrule the earlier.[72]

On the other hand, jurisdiction exists if there is any notation in a citation PCA (or any other type of opinion, for that matter) of contrary case law issued by another district court of appeal or the Florida Supreme Court.[73] This may be as simple as a citation beginning with the signals "contra" or "but see,"[74] because they indicate contradiction. A citation beginning with "but cf." may be insufficient[75] because the signal indicates contradiction only by analogy,[76] which may not meet the constitutional requirement of "direct" conflict.[77]

Often, a citation PCA may include a parenthetical statement that conflict exists. The statement can establish jurisdiction only if it is accurate[78] and identifies a specific opinion of another district court or the Florida Supreme Court as the basis for conflict. But when this happens, it is possible that jurisdiction may exist on a completely independent basis—the Court's "certified conflict" jurisdiction, discussed below. The possibility always should be considered, because "certified conflict" is a less restrictive form of jurisdiction.

b. Does Discretion Exist?

Except for PCAs that fail to meet the criteria outlined above, the Florida Supreme Court technically has jurisdiction over all other district court opinions. However, that is not the end of the matter. The Court may still lack discretion to hear the particular case.[79] As noted earlier, the distinction between "jurisdiction" and "discretion" is somewhat arcane and really is relevant only in determining the time to bring appeals to the United States Supreme Court. So, in common usage, lawyers and justices often tend to speak of both under the rubric "jurisdiction."

Nevertheless, in 1988, the Court indicated that, apart from the special rules governing PCAs, the problem of "conflict" involves a constitutional limit on the Court's discretion to hear a case, not a limit on jurisdiction.[80] If there is no conflict, then there is no discretion, and the petition for review must be denied or dismissed on that basis.[81] Thus, the existence of conflict is an absolute prerequisite for a review.[82] In addition, conflict cannot be "derivative." It is insufficient that a decision cites as controlling authority a completely separate decision that supposedly is in conflict with a third decision,[83] unless some other basis for jurisdiction exists. In other words, there is no such thing as "daisy-chain" conflict.

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Appellate Practice and Advocacy Section

1997 Annual Meeting Activities

June 26, 1997
Walt Disney World Dolphin

8:30 - 9:30 a.m.	• Appellate Certification Liaison Committee • Appellate Court Liaison Committee • CLE Committee • Appellate Rules Liaison Committee • Appellate Mediation Committee
9:30 - 11:30 a.m.	Executive Council\Section Annual Meeting
2:00 - 3:00 p.m.	• Civil Appellate Practice Committee
2:00 - 3:00 p.m.	• Amicus Curiae Committee
2:30 - 3:45 p.m.	• Administrative Appellate Practice Committee
4:00 - 5:30 p.m.	Discussion with the Court
9:30 - 11:30 p.m.	Dessert Reception and Presentation of James C. Adkins Award

The jurisdiction/discretion distinction has prompted "creative" efforts to expand conflict jurisdiction, which the Court consistently has declined to entertain. After *The Florida Star* established the distinction, some parties seized upon language in that opinion to argue that conflict jurisdiction can be merely "hypothetical." This was a misreading of the opinion of *The Florida Star* and a misapprehension of the difference between "jurisdiction" and "discretion."

In *the Florida Star*, the Court said that jurisdiction exists if a district court decision contains any statement or citation that "hypothetically could create conflict if there were another opinion reaching a contrary result."[84] However, discretion is still limited by the conflict requirement;[85] a petitioner, therefore, must also establish that discretion to hear the case genuinely exists. Any petition arguing "hypothetical conflict" alone would fail to address the discretion problem, and could be denied on that basis.

In a larger sense, the overriding purpose of conflict review remains the elimination of inconsistent views about the same question of law.[86] But this does not necessarily mean the Court can review a case only when necessary to resolve a conflict of holdings. Many conflict cases accepted by the Court fall within this last grouping, but not all do. Part of the reason is that a genuine "conflict" can be manifested in more than just a holding. The result is that several types of conflict have been recognized. In actual practice, the Court tends to accept cases that fall into four broad and sometimes overlapping categories: (1) "holding" conflict, (ii) misapplication conflict, (iii) apparent conflict; and, (iv) "piggyback" conflict.

(i) "Holding" Conflict

The most obvious conflict cases involve "holding conflict": The majority decision below contains a holding of law that is in irreconcilable conflict with a holding of law in a majority opinion of another district court or of the Florida Supreme Court. In other words, there is an actual conflict of controlling, binding precedent. Where this is true, conflict jurisdiction unquestionably exists.

For example, a district court in 1992 issued an opinion expressly applying the doctrine of interspousal immunity in a particular case.[87] While review was pending, the Florida Supreme Court issued an opinion in another case holding that the doctrine of interspousal immunity no longer existed in Florida.[88] These two opinions are in actual and irreconcilable conflict with one another, because the holding of one cannot stand if the other is true. Conflict jurisdiction therefore exists.

Conflict is not always so plain as this example, however. The cases in question may be factually distinguishable to a greater or lesser extent. As a result, the "holding conflict" category probably should not be considered entirely discrete from other categories. "Holding conflict" sometimes may blur into the next two kinds of conflict, which themselves are not entirely distinct.

(ii) Misapplication Conflict

A separate kind of conflict occurs when the decision of the district court misapplies controlling precedent.[89] "Misapplication conflict" thus is not precisely the same as "holding conflict," because the cases involved are distinguishable. The conflict arises because the district court has failed to distinguish the cases properly. In other words, no conflict would have existed had controlling precedent been read and applied properly. Misapplication conflict comes in three varieties: "erroneous reading" of precedent, "erroneous extension" of precedent, and "erroneous use" of facts.

"Erroneous reading" cases are the most clearly justifiable of the three because they involve a purely legal problem: Was the law properly stated? Thus, they sometimes verge on being "holding conflict" cases. For example, in 1982, the Court confronted a case in which the district court first had misinterpreted controlling precedent on awards of punitive damages and then had applied the misinterpretation to the case. The Florida Supreme Court accepted jurisdiction expressly because of misapplication conflict.[90] This was not precisely a "holding conflict" case, however. Two dissenting justices argued that the district court actually had read the precedent correctly.[91] In other words, misapplication was not necessarily clear until the Court's majority decided the matter.

"Erroneous extension" cases are those in which the district court correctly states a rule of law but then proceeds to apply the rule to a set of facts for which it was not intended. In other words, the district court stated the law correctly and framed the facts accurately, but it should never have linked the two. This type of conflict is easily masked as some other type of conflict, and for that reason is seldom expressly discussed in majority opinions. The fact of the erroneous extension is occasionally noted in opinions dissenting as to a denial of jurisdiction.[92] Prior to 1980, the Court expressly had recognized "erroneous extension" as a valid basis of conflict jurisdiction.[93]

"Erroneous use" cases are those in which the district court misapplies a rule of law based on its own misperception of the facts.[94] This is the most troublesome form of misapplication conflict, because it often tests the strength of the four-corners rule. Sometimes the factual error may be evidence on the face of the opinion, but often it is not. For example, in 1985, the Court accepted jurisdiction in a case where the district court had "overlooked" a relevant factual finding of the trial court. Although controlling law was stated properly, the district court's opinion improperly applied the law because of the overlooked finding.[95]

The discretion to review such cases really is only justifiable where the factual error is apparent within the four corners of the opinion being reviewed.[96] The justification becomes tenuous otherwise. In *State v. Stacey*,[97] for example, the district court opinion did in fact "overlook" the relevant finding. At best, the possibility of the error could be inferred from the district court opinion, but the facts stated therein were not complete enough to show that error was clear. "Inferential" factual error is a very slim reed to support a finding of express and direct conflict.[98] Obviously, the justification for a review becomes even less justifiable if the existence of the error cannot even be inferred from material contained within the four corners of the district court opinion. Thus, to some extent the Florida Supreme Court violated the four-corners rule in accepting jurisdiction; and that case is probably

best understood as marginal and anomalous.

Finally, there is a possibility that a case may involve an alleged misapplication of dicta. In 1984, the Court accepted a case based on conflict with dicta in a prior Florida Supreme Court opinion, although the Florida Supreme Court overruled the dicta rather than the district court.[99] If "dicta conflict" existed in that context, it probably also could exist as a form of misapplication conflict. Dicta conflict can be justified in light of the fact that the Florida Supreme Court elsewhere has suggested that its jurisdiction over "decisions" can rest on anything in a written opinion, not merely a judgment or result.[100]

For example, a scholarly opinion may make broad statements of law that are actually dicta, yet these statements express an opinion about some legal point. Later a district court conceivably could find the dicta persuasive and then misapply them. In such a situation, all the reasons justifying review of misapplication conflict also would apply: Review would be warranted to the extent the misapplication may create confusion in the law or reach an incorrect or unfair result.

(iii) Apparent Conflict

Another category is "apparent conflict," which arises when a district court opinion only seems to be in conflict, though there may be some reasonable way to reconcile it with the case law. A cramped reading of the constitution might suggest that discretion should not be allowed here.[101] However, such an approach ignores the real problem. Until the Florida Supreme Court harmonizes cases that seem to be in conflict, for all intents and purposes, there is an actual conflict. The mere fact that conflict can be eliminated on review does not resolve the conflict retroactively.

Moreover, it would be bad practice to deprive the Court of discretion merely because there is some way to harmonize cases without overruling any of them. This amounts to saying that the Court, in conflict cases, can review only if it negates, which will not always be desirable policy. The Florida Supreme Court should not be forced either to decline jurisdiction or overrule essentially sound decisional law whose relation to other cases is simply uncertain.

In any event, review of apparent conflict cases is now a well established feature of Florida Supreme Court jurisdiction, and it may or may not result in the overruling of precedent from a Florida appellate court. This can include "receding" from the Court's own cases.[102] In 1991, for example, the Court accepted jurisdiction to resolve an apparent conflict with overbroad statements of law that it had made in one of its own opinions two years earlier.[103] The Court ultimately receded from those statements, but without actually reversing the result it previously had reached; then the Court approved the district court's decision, harmonizing the cases and eliminating the apparent conflict.[104]

Apparent conflict sometimes may arise from a prior district court opinion that simply is not very precise. In 1988, for example, the Court accepted a case based on apparent conflict with another district court opinion that had not stated sufficient facts for anyone to determine whether the ruling was correct.[105] In that sense, the earlier case could be considered overbroad, but was not necessarily so. The Florida Supreme Court resolved the apparent conflict by disapproving the earlier case "only to extent that it may be inconsistent" with the correct and complete statement of the relevant law.[106] In a similar case, the Court said that conflict exists if a rule of law is stated vaguely or imprecisely enough to create a "fair implication" of conflict.[107]

Of course, the Court need not overrule anything. In a sizable number of apparent conflict cases, the Court harmonizes all the "conflicting" cases, thus completely eliminating any possible conflict.[108] In 1990, for example, the Court accepted review in a case "because of apparent conflict with the decisions of several district courts of appeal."[109] The Court then engaged in an extensive examination of these cases, harmonized them, and made a holding without overruling anything.

In a sense, dicta conflict can be viewed as a type of apparent conflict because dicta are not binding precedent; and thus, there cannot be an actual conflict of holdings. As noted above, however, the Court has accepted review based on dicta conflict, although these cases seem more than the exception than the rule.[110] Dicta conflict also may blur into the category of misapplication conflict.

(iv) "Piggyback" Conflict

The final category of conflict is "piggyback" conflict. Discretion over these cases arises because: (a) they cite as controlling precedent a decision of a district court that is pending for review in, or has been overruled by, the Florida Supreme Court; or (b) they cite as controlling precedent a decision of the Florida Supreme Court from which the Court now has receded.[111] A considerable number of cases falling within this category are citation PCAs, but not all are. The district courts sometimes issue lengthy opinions resting on precedent that is pending review in the Florida Supreme Court or precedent that this later overruled.

There are good reasons for allowing this type of discretion. For example, the lower appellate courts often have a large number of cases before them dealing with the same legal issue. To save both time and resources, one case is selected as the "lead case" to be decided with a full opinion, while the others are resolved in short opinions that often do little more than cite to the lead case. It is illogical and unfair to say the Florida Supreme Court has discretion to take the lead case but not the "companion" cases. For this reason, the Court accepts the bulk of "piggyback" cases for review, though these often are handled as no request cases.

It is worth noting, however, that "piggyback" conflict sometimes may be only an inchoate, unrealized possibility at the time when review must be sought. For example, the Florida Supreme Court may be uncertain for a time whether it will accept a lead case for review. Perhaps the justices are divided on the correctness of the lead case or they are uncertain as to whether they have discretion to hear it. During the interim, jurisdiction remains inchoate.

In such instances, the Court typically follows a practice of postponing its decision on jurisdiction and sometimes permits parties to brief the substantive issues in the interim.[112] Once the lead case is accepted for review, the companion cases may be accepted, except on some occasions

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when "piggyback" cases actually reached the correct result. A denial of jurisdiction in the lead case eliminates "piggyback" jurisdiction, meaning that review will be declined in the companion cases unless some other basis for jurisdiction exists.

c. Is the Case Significant Enough?

The final element in obtaining review of a conflict case is a showing that the issues are significant enough for the Court to exercise its discretion. Often the importance or insignificance of the case is obvious to everyone. At other times, a case may seem trivial at first blush, yet in fact involves a potential for serious disruption. For that reason, person trying to invoke the Court's conflict jurisdiction are well advised to explain why the case is important enough to be heard. Conflict jurisdiction is discretionary. Even if discretion exists, the Court is free to deny the petition if the issues seem unimportant or the result essentially fair or correct,[113] among other reasons.

It is worth noting that the act of accepting review based on conflict vests the Court with power to hear every issue in the case, not merely the conflict issues.[114] As a result, these "nonconflict" issues sometimes may weigh with the Court in deciding whether to accept review. However, the fact that these issues may seem important will not cure a lack of conflict. Finally, the Court also has inherent authority not to address nonconflict issues if it chooses.[115] Doing so establishes no supreme court precedent as to these issues.

2. Briefing on Conflict Jurisdiction

For parties to invoke the Court's conflict jurisdiction, they must file jurisdictional briefs with the Court. The Rules of Court limit these briefs to ten pages.[116] However, the best briefs on conflict jurisdiction are shorter and make their points with direct, plain language. If conflict truly exists, all the brief need do is quote something from the district court opinion, show how it conflicts with a statement in another proper case, and then explain the importance of the case. For "piggyback" jurisdiction, it is sufficient (and imperative) to note the fact that a case cited in the district court opinion is pending review or has been disapproved or receded from.

In many cases, the actual point of the jurisdictional brief usually can be established in two pages or less per conflict issue[117] (not including appendices) if conflict genuinely is clear. Of course, the existence of conflict often is not so certain, meaning that a brief must engage in a lengthier and more convoluted argument to establish the Court's discretion over the case. Within the ten-page limit, the Court will not reject a petition simply because it is longer or wordy. However, the justices almost always view lengthier petitions as a kind of tacit concession that the alleged conflict is not clear. Attorneys who could make their points with less verbiage should consider whether they want to handicap their case with a longer brief.

Appendices should consist only of a copy of the decision below and a copy of the alleged conflict cases. Anything else is irrelevant and will be ignored, especially copies of material from the record. Under the four-corners rule, the record cannot be used to establish conflict, and attorneys who ignore this fact do themselves and their clients a disservice. The Court sometimes receives voluminous appendices that obviously cost a good deal to compile, reproduce, and bind. This is a pity, because such material has no purpose other than adding to the Court's drive to collect recyclable paper.[118]

Except for some PCAs in which jurisdiction is clearly lacking, nearly all jurisdictional briefs are handled and decided by the justices. Some justices routines have their law clerks and interns prepare a brief memorandum summarizing relevant facts and holdings and making a recommendation. Other justices handle all "determinations of jurisdiction" ("DOJs") by themselves, on the theory that a law clerk memorandum simply duplicates effort. However, new law clerks and new interns are almost always assigned a stack of DOJs as their first task, on the theory that jurisdiction is the first thing a new law clerk or intern must learn. In a few offices, all DOJs are reviewed by the law clerks and interns before going to the justices.

When the justices' staff prepares memoranda on DOJs, these necessarily must focus on the three questions relevant to conflict cases: (a) does jurisdiction exist?; (b) does the Court have discretion to hear the case?; and, (c) why should the discretion of exercised? As noted earlier, a case can be accepted for renew only upon the affirmative vote of at least four justices, though the decision whether to grant oral argument sometimes can be determined by fewer votes or by the chief justice.

3. Opinion Writing in Conflict Cases

Conflict cases are treated the same as other causes for purposes of opinion writing. There is one important point, however. A well-written conflict opinion should do one of three things before it concludes: disapprove a district court decision in whole or in part, recede from a Florida Supreme Court decision in whole or in part, or harmonize cases. This arises form the very nature of conflict jurisdiction, which exists only when two or more relevant cases directly or apparently are irreconcilable. Thus, for jurisdiction to exist, something must be wrong that needs "fixing." Fixing always requires that at least one previous statement of law be overruled or harmonized.

E. Certified Questions of Great Public Importance

The next subcategory of discretionary review jurisdiction exists when a decision of a district court passes upon a question certified by it to be of great public importance.[119] Commentators have noted that the operative language essentially was unchanged by the 1980 reforms, although the pre-1980 constitution specified that the question be one of great public "interest." This last change, however, may only have been semantic. Even prior to 1980, certified questions routinely involved important issues in which the general public had little "interest," generally speaking.[120]

Justices of the Court sometimes have argued that certified questions should not be reviewed unless the case involves some minimum level of immediacy.[121] That view was silently rejected when first made after the 1980 reforms,[122] and has never gained

acceptance since. In practice, the Court reviews the majority of certified questions properly brought for review by the parties, even some of relatively minor importance. A large number, however, often are summarily disposed of, and the Court has shown no unwillingness to brand a certified question "irrelevant."[123]

The decision to certify falls within the absolute discretion of the district court,[124] and thus cannot be required or undone by the Florida Supreme Court. Jurisdiction over cases in this subcategory is absolutely dependent on the act of certification by a district court, which operates as a condition precedent. Once the case is certified, the condition precedent has been fully met, and no review or redetermination of the point is necessary or proper.[125]

As a corollary, the failure to certify a question creates a binding presumption that the case does not pass upon a matter amendable to this type of review. Thus, once a district court opinion becomes final and is not subject to rehearing or to clarification, the time has passed for a question to be certified.[126] Any purported certification occurring thereafter presumably would be treated as a nullity. However, the Florida Supreme Court has indicated that "any interested person" can ask for a certification by the district court at any time before the opinion becomes final.[127]

Nevertheless, certification does not create mandatory jurisdiction. The Florida Supreme Court has discretion to decline review, such as where the question is irrelevant, or where answering it would serve no purpose.[128] On occasion, the Court also seems to have declined to answer questions it regarded as too insignificant.[129] However, the Court has announced that jurisdiction is "particularly applicable" to cases of first impression,[130] perhaps implying a greater presumption that review should be granted.

Under the pre-1980 constitution, the common practice for many years was for the district courts simply to certify the case without actually framing a question. Later, the Florida Supreme Court urged the district courts to state the question being posed.[131] Though there has never been an absolute requirement to this effect.[132] Framing the question now has become the most common practice,[133] though the district courts sometimes still resort to the earlier habit of leaving the question unstated. When questions actually are framed, the Court sometimes rephrases them in a manner that better suits the purposes of review.[134]

When the question is left unframed, the Florida Supreme Court sometimes proceeds to discuss the issue without actually framing it.[135] At other times, the Court will frame the question at the start of an opinion, though occasionally it may not be entirely clear what the question is.[136] One case was accepted for review even though the district court had issued its opinion as a summary PCA and then certified the "question."[137] This prompted an exasperated dissent from one justice who argued that the Court should decline to review PCAs, even if certified, because the unstated "question" simply was not clear.[138]

There is a special problem that sometimes arises in cases involving certified questions: The losing party fails to seek Florida Supreme Court review. When this happens, the Court has ruled that the party who prevailed on the issue embodied in a certified question cannot seek review solely on that basis. In other words, the Court lacks jurisdiction of the case if the losing party on the certified question does not petition for review, unless some other basis of jurisdiction exists.[139]

Jurisdiction may also be lost over an otherwise valid certified question in another way. When a certified question is properly brought by the parties, they sometimes ask the Florida Supreme Court to relinquish jurisdiction to the district court for some reason.[140] In one such case, upon relinquishment, the district court granted rehearing and issued a new opinion that failed to include a certified question. The Florida Supreme Court dismissed the case when it came back for review, apparently for want of jurisdiction.[141]

F. Certified Conflict

Discretionary review jurisdiction also exists when the district court certifies that its decision is in direct conflict with a decision of another district court of appeal.[142] This form of jurisdiction was created by the 1980 constitutional reforms and had no earlier analogue.

Case law on certified conflict has done little to illuminate its scope, though (with some early exceptions) the district court opinions accepted in this way almost uniformly meet two requirements: (1) they use the word "certify" or some variation of the root word "certif-"[143] in connection with the word "conflict;" and (2) they indicate a decision from another district court upon which the conflict is based. the Court sometimes has accepted jurisdiction even if some study of the district court opinion is needed to find the exact conflict case.[144]

The required use of the root word "certif-" has not arisen from decisional law but from the custom of the supreme court clerk's office,[145] which determines the category of jurisdiction before sending the case to the justices. Thus, strictly speaking, this form of jurisdiction effectively does not exist if conflict is merely "acknowledged," "recognized," "noted," or some other variation on the theme. With few exceptions,[146] all of these "acknowledged conflict" cases are treated as petitions for "express and direct" conflict, though many are accepted for review on that basis. The distinction between "acknowledged conflict" and "express conflict" can have an important consequence, however, because express and direct conflict is subject to more rigorous requirements.

In other words, to certify conflict properly, the district court must use the root work "certif-." This requirement may seem needlessly bureaucratic, but it serves a useful function. Any other rule would allow the categories of certified conflict and "express and direct" conflict to blur together. Thus, some "acknowledged" conflict cases might be accepted on one basis of jurisdiction while a similar case might not. The Clerk's bright-line rule avoids such arbitrariness.

Certified conflict cases differ in two important ways from the "express and direct" conflict subcategory, discussed above. First, no briefing on jurisdiction is permitted[147] because the cases are accepted routinely. Second, the Court has found discretion

continued...

to hear them even if there is actually no conflict, something that cannot be done for express and direct conflict.[148] In one 1993 case, for example, the Florida Supreme Court reviewed a certified conflict but then harmonized the cases.[149] The policy for accepting such cases, of course, is that the very act of certifying conflict creates confusion or uncertainty in the law that should be resolved by the Court. In sum, review is easier to obtain for certified conflict than for "express and direct" conflict.

Finally, there is one important procedural fact that could deprive the Florida Supreme Court of jurisdiction even where conflict is properly certified. As with certified questions, the party who prevailed on the "certified conflict" issue cannot seek review based on this form of jurisdiction. In other words, the Court lacks jurisdiction of the case if the losing party does not petition for review, except where some independent basis for jurisdiction exists.[150] This situation most often will arise when the party who prevailed on the conflict issue disagrees with some other aspect of the district court opinion.

G. "Pass-Through" Jurisdiction

The next subcategory of discretionary review jurisdiction has been identified by the informal name "pass-through jurisdiction."[151] It essentially is a variation of a certified question for very important and pressing cases. The principle feature is that the case "passes through" the district court without being heard and is sent directly to the Florida Supreme Court for immediate resolution. This substantially speeds the appellate process.

The Florida Supreme Court can hear such cases only if: (1) an appeal is pending in the district court brought from a trial court's order or judgment: (2) the district court certifies that the case is of great public importance or may have great effect on the proper administration of justice throughout the state; and, (3) the district court certifies that immediate resolution by the Florida Supreme Court is required.[152] Certification can occur on the district court's own motion, or at the suggestion of a party if done with ten days of appealing to the district court.[153]

While the three elements above appear mandatory from the constitutional language, the Florida Supreme Court has been lenient in accepting district court certifications fairly susceptible of meeting the requirements. The root word "certif-" probably should be used by the district court, but it is doubtful that a case of obvious importance would be refused for failure to do so. Typically, the district courts scrupulously meet the certification requirement.[154]

The Florida Supreme Court's jurisdiction over pass-through cases attaches immediately on rendition[155] of the district court order certifying the case.[156] Thus, the district court loses jurisdiction at that point unless the Florida Supreme Court relinquishes its jurisdiction.[157] In theory, a defective certification would not actually divest the district court of jurisdiction nor vest the supreme court with jurisdiction. For that reason, the parties and the district court should pay some attention to insure that certification is done properly.

There is no requirement that the district court frame a question, although a minority of the courts do so.[158] Framing a question may be useful, but these cases almost always involve questions that are apparent to everyone. Where a question is framed, the Florida Supreme Court usually quotes it.[159] If no question is framed, the Court sometimes states the issue to be reviewed[160] and sometimes does not.[161] In any event, the presence or absence of a framed question makes no difference, though it can serve a useful purpose when the parties disagree on the exact nature of the question being decided.[162]

Pass-through cases fall within the Court's discretionary jurisdiction and theoretically could be refused. In practice, the cases are always heard, frequently (but not always) on a expedited basis. The Court once admonished the district courts not to use pass-through jurisdiction "as a device for avoiding difficult issues by passing them through to this Court."[163] This hints that jurisdiction might be declined if pass-through was abused, but on the whole, the cases certified in this manner genuinely are pressing. These cases most commonly involve urgent questions of governmental authority,[164] constitutional rights that could be undermined if the case is not expedited,[165] or personal liberties that could be jeopardized by a lengthy appeal.[166] With rare exceptions,[167] all these cases involved a significant level of immediacy.

H. Questions Certified by Federal Appellate Courts

The final subcategory of discretionary review jurisdiction is cases involving a question of law certified by the federal appellate courts. Jurisdiction is allowed here only if: (1) the United States Supreme Court or a federal court of appeals certifies a question; (2) the question is determinative of "the cause;" and, (3) there is no controlling precedent of the Florida Supreme Court.[168] This language is mandatory, and therefore, all three elements must be present. By rule, the federal court is required to issue a "certificate" containing the style of the case, a statement of the facts showing the nature of the cause and the circumstances form which the questions of law arose, and the questions to be answered. The certificate must be certified to the Florida Supreme Court by the federal court clerk.[169]

The jurisdiction granted here was not a part of the pre-1980 constitution. However, much the same process had arisen earlier by court rule and from decisional law.[170] Thus, the 1980 reforms largely codified these procedures within the constitution.

Perhaps the most significant requirement, other than the detailed formal certificate,[171] is that there must be a "cause" from which the certified questions arise.[172] This means that the Florida Supreme Court can-

not accept questions in the abstract, but only if they are "determinative" of a particular case. In practice, this means that there must be an actual suit pending review in the federal appellate courts. Thus, certified questions do not actually ask the Florida Supreme Court to issue an advisory opinion. The federal courts are bound to honor and to apply the response given by the Florida Supreme Court. All such cases involve an actual application of Florida law, often in cases premised on federal diversity jurisdiction.[173]

Certified questions accepted from federal courts are answered by way of a formal opinion, a requirement that stems in part from state statute.[174] The holdings of that opinion can become precedent for future cases, on the theory that the Florida Supreme Court's opinion actually resolves controlling questions. In answering the questions, however, the Court does not "remand"[175] the cause to a federal court as it would to an inferior court. Some Florida Supreme Court opinions misuse the word "remand" in this way, but the better practice is for the Court to "transmit" or "return" the cause to the federal court for further proceedings.[176]

The Court has obvious discretion to decline to answer a federal certified question. However, in practice, the federal appellate courts have been conscientious in confining certification to cases that genuinely meet the rather strict constitutional requirements. Review might be declined, for example, where a federal appellate court was unaware that there is controlling precedent previously made by the Florida Supreme Court. In that situation, the most constructive response would be for the Court to cite the controlling precedent in the order declining review.[177]

Next Issue: The Final Chapter

The Supreme Court Series, Part V—Discretionary Original Jurisdiction of the Florida Supreme Court

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Endnotes:

1 *See* Fla.Const. art. V, §3(b).

2 Rendition occurs when a signed, written order if filed with the clerk of the lower tribunal, subject to some exceptions. *See* Fla.R.App.P. 9.020(g).

3 *Id.* at 9.120(b).

4 *See id.* at 9.200(b-c), 9.900.

5 *Id.* at 9.120(d).

6 Fla. Const. art. V, §3(b)(3).

7 *See Cantor v. Davis*, 489 So.2d 18 (Fla. 1986).

8 *Watson Realty Corp. v. Quinn*, 452 So.2d 568, 569 (Fla. 1984) (involving express and direct conflict of decisions).

9 *See* Fla. Const. art. V, §3(b)(3).

10 The Court has recognized the importance of the distinction in analogous contexts. *See Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980) (jurisdiction based on express and direct conflict of decisions of different courts of appeal or the supreme court).

11 *Seaboard Air Line R.R. v. Branham*, 104 So.2d 356, 258 (Fla. 1958).

12 *See Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Auth.*, 111 So.2d 439 (Fla. 1959).

13 Fla. Const. art. V, §3(b)(3).

14 *Ogle v. Pepin*, 273 So.2d 391, 392 (Fla. 1973).

15 *Id.* (quoting *Armstrong v. City of Tampa*, 106 So.2d 407, 409 (Fla. 1958)).

16 *Dykman v. State*, 294 So.2d 633, 635 (Fla. 1973), *cert. denied*, 419 U.S. 1105 (1975).

17 *Rojas v. State*, 288 So.2d 234, 236 (Fla. 1973), *cert. denied*, 419 U.S. 851 (1974).

18 *Carmazi v. Board of County Comm'rs*, 104 So.2d 727, 728-29 (Fla. 1958).

19 Arthur J. England, Jr., et al., *Florida Appellate Reform One Year Later*, 9 Fla.St.U.L.Rev. 221, 240 (1981).

20 Any evolution in law by a lower court inherently creates a "doubt": Is the new principle or the new application correct?

21 A district court sometimes may outline its doubts about what appears to be a settled constitutional principle it is applying. The statement of doubt creates an issue that sometimes may deserve resolution by the Florida Supreme Court.

22 *E.g., Foster v. State*, 613 So.2d 454 (Fla. 1993); *City of Ocala v. Nye*, 608 So.2d 15 (Fla. 1992); *City Nat'l Bank v. Tescher*, 578 So.2d 701 (Fla. 1991).

23 313 So.2d 703 (Fla. 1975), *aff'g* 299 So.2d 149 (Fla. 3d DCA 1974).

24 *Id.* at 704 & n.1.

25 *Id.* at n.1.

26 *Id.* at 705 & n.4.

27 *See Potvin v. Keller*, 299 So.2d 149, 151 (Fla. 3d DCA 1974) (citing *In re Gault*, 387 U.S. 1(1967)).

28 Fla. Const. art. V, §3(b)(3).

29 *Ogle*, 273 So.2d at 391; *Dykman*, 294 So.2d at 633.

30 *See Holbein v. Rigot*, 245 So.2d 57, 59 (Fla. 1971).

31 *Watson Realty Corp. v. Quinn*, 452 So.2d 568, 569 (Fla. 1984).

32 *See Dykman*, 294 So.2d at 635. *But cf. Seaboard Air Line R.R.*, 104 So.2d at 358 (term "decision" as used in the constitution's jurisdictional provisions includes the entire written opinion).

33 Fla. Const. art. V, §3(b)(3).

34 *See School Bd. of Pinellas County v. District Court of Appeal*, 467 So.2d 985, 986 (Fla. 1985).

35 *Spradley v. State*, 293 So.2d 697, 701 (Fla. 1974).

36 *Id.*

37 *Id.*

38 561 So.2d 1130 (Fla. 1990).

39 *Id.* at 1131-33; *see* Brief on Jurisdiction of Collier County, *In re Order on Prosecution of Criminal Appeals*, 561 So.2d 1130 (Fla. 1990) (No. 74,574).

40 *E.g., Florida Senate v. Graham*, 412 So.2d 360, 361 (Fla. 1982).

41 *Florida State Bd. of Health v. Lewis*, 149 So.2d 41, 43 (Fla. 1963).

42 *Id.*

43 *Id.*

44 The opinion in *State v. Bowman*, 437 So.2d 1095 (Fla. 1983), at first blush, seems to reach a contrary result: the district court's opinion primarily affected the Attorney General, a unique office. Moreover, the Attorney General was the one who brought the case to the Florida Supreme Court. However, *Bowman* involved a question of whether a particular duty fell to the Attorney General or to the various State Attorneys throughout Florida. Thus, there was a "class" of constitutional officers whose duties were at stake. *Bowman* may be significant in that sense because the district court's opinion had determined that the duty in question fell to the Attorney General, not to

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the State Attorneys. Thus, *Bowman* tacitly recognizes jurisdiction where the district court's decision holds that the "class" of officers has no duty to act in a particular situation. *Bowman* is also significant in that it tacitly recognizes jurisdiction even where the petition for review is not brought by a member of the affected class—a conclusion supported by other cases. *See In re Order on Prosecution of Criminal Appeals*, 561 So.2d at 1130.

[45] *Lewis*, 149 So.2d at 43.

[46] *See Larson v. Harrison*, 142 So.2d 727, 728 (Fla. 1962) (Drew, J., concurring specially).

[47] *E.g., Skitka v. State*, 579 So.2d 102 (Fla. 1991) (stating that public defenders, created by the Florida Constitution, article V, section 18, are constitutional officers); *Ramer v. State*, 530 So.2d 915 (Fla. 1988) (stating that sheriffs, created by Florida Constitution, article VIII, section 8(1)(d), are constitutional officer); *Bystrom v. Whitman*, 488 So.2d 520 (Fla. 1986) (stating that property appraisers, created by the Florida Constitution, article VIII, section 1(d), are constitutional officers); *Jenny v. State*, 447 So.2d 1351 (Fla. 1984) (stating that state attorneys, created by the Florida Constitution, article V, section 17, are constitutional officers); *Taylor v. Tampa Elec. Co.*, 356 So.2d 260 (Fla. 1978) (stating that clerks of the circuit court, created by the Florida Constitution, article VIII, section 1(d), are constitutional officers).

[48] For example, the Florida Constitution mentions "municipal legislative bodies." Fla. Const. art. VIII, §2(b). Yet, the case law indicates that a city official is not a constitutional or state officer. *Estes v. City of North Miami Beach*, 227 So.2d 33, 34 (Fla. 1969).

[49] *Estes*, 227 So.2d at 34; *Hakam v. City of Miami Beach*, 108 So.2d 608 (Fla. 1959) (holding that a police officer is not a constitutional or state officer).

[50] The constitution juxtaposes "constitutional officers" with "state officers." If a constitutional office is one created by the constitution, then it is reasonable to say that a state office is one created by statute. The "class" requirement obviously suggests that the office must exist in more than one location throughout the state. Unique local offices would not qualify. Finally, the rationale for exercising jurisdiction over a constitutional class of officers applies with equal force to a statutory class of officers: A district court opinion affecting either class could result in serious disruption of governmental services, requiring resolution by the state's highest court. On the whole, both the language of the constitution and public policy considerations support jurisdiction over a statutory class of officers that meet the other criteria.

[51] *See* Fla. Stat. §§373.069-.073 (1991) (creating districts and governing boards).

[52] *See Watson Realty Corp. v. Quinn*, 452 So.2d 568, 569 (Fla. 1984) (stating that language in a previous case was simply obiter dicta and should not be relied upon as case authority).

[53] Fla. Const. art. V, §3(b)(3).

[54] The term "conflict jurisdiction" is almost never used to refer to "certified conflict," which is a separate subcategory.

[55] The term "decision" has been held to include both the judgment and opinion for purposes of the Florida Supreme Court's jurisdiction over "decisions." *Seaboard Air Line R.R.*, 104 So.2d at 358.

[56] Fla. Const. art. V, §3(b)(3).

[57] *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), *overruling Lake v. Lake*, 103 So.2d 639 (Fla. 1958).

[58] PCAs should be distinguished from "per curiam opinions issued by the Florida Supreme Court, which are very different in nature.

[59] *E.g., Florida Greyhound Owners & Breeders Ass'n v. West Flagler Assocs.*, 347 So.2d 408, 410-12 (Fla. 1977) (England, J., concurring).

[60] The Court has held that discussion of the "legal principles which the court applied supplies a sufficient basis for a petition for conflict review." *Ford Motor Co. v. Kikis*, 401 So.2d 1341, 1342 (Fla. 1981). There is no requirement that the district court opinion must explicitly identify conflicting decisions. *Id.*

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

[62] *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986). Here, the Court clearly is using the term "decision" to encompass both the result and the entire opinion. *Accord Seaboard Air Line R.R.*, 104 So.2d at 358.

[63] *Jenkins v. State*, 385 So.2d 1356, 1359 (Fla. 1980).

[64] *Id.*

[65] *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n.3 (Fla. 1988). In other words, any further appeal from a PCA issued without a majority statement or citation can be had only in the United States Supreme Court, in its discretion. Attempting to bring the case for review in the Florida Supreme Court may have the effect of barring an appeal to the United States Supreme Court, because the time to file the appeal most likely will be consumed. *Id.*

[66] Theoretically, there could be another: PCAs that contain only a statement insufficient to establish a point of law, without citation. The Court apparently has never addressed this question.

[67] 530 So.2d at 286.

[68] *Id.* at 288 n.3 (citing *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981)).

[69] *The Florida Star*, 530 So.2d at 288 n.3 (citing *Jollie*, 405 So.2d at 420).

[70] Fla. Const. art. V, §3(b)(3).

[71] *Jollie*, 405 So.2d at 420.

[72] *State v. Walker*, 593 So.2d 1049, 1049 (Fla. 1992).

[73] *See Stevens v. Jefferson*, 436 So.2d 33, 34 & n.* (Fla. 1983), *aff'g* 408 So.2d 634 (Fla. 5th DCA 1981). A district court may seem foolish recognizing contrary authority from the Florida Supreme Court, but this sometimes happens with good reason. In *Watson Realty Corp. v. Quinn*, 435 So.2d 950 (Fla. 1st DCA 1983), the First District Court of Appeal noted that it was departing from dicta issued by the Florida Supreme Court in *Canal Authority v. Ocala Manufacturing, Ice & Packing Co.*, 332 So.2d 321 (Fla. 1976). The district court believed the dicta to be incorrect, and the Florida Supreme Court later agreed. *Watson Realty Corp. v. Quinn*, 452 So.2d 568 (Fla. 1984).

[74] *See Frederick v. State*, 472 So.2d 463 (Fla. 1985), *aff'g* 472 So.2d 463 (1985).

[75] Such citations are rare. *See, e.g., Cherry v. State*, 618 So.2d 255 (Fla. 1st DCA 1993); *Phelps v. State*, 368 So.2d 950 (Fla. 2d DCA 1979). No further review was taken in either of these cases.

[76] *See The Bluebook: A Uniform System of Citation* rule 1.2, at 23 (15th ed. 1991).

[77] Fla. Const. art. V, §3(b)(3).

[78] The accuracy requirement arises from the plain language of the constitution that there must be express and direct conflict appearing on the face of the decision below. Fla. Const. art. V, §3(b)(3). The fact that the parties assert conflict in their jurisdictional briefs will not supply this requirement, even if both parties erroneously conclude that conflict exists.

[79] *The Florida Star*, 530 So.2d at 288-89.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Dodi Publishing Co. v. Editorial Am., S.A.*, 385 So.2d 1369, 1369 (Fla. 1980).

[84] *The Florida Star*, 530 So.2d at 288.

[85] *Id.*

[86] *E.g., Wainwright v. Taylor*, 476 So.2d 669, 670 (Fla. 1985); *see* Fla. Const. art. V, §3(b)(3).

[87] *McAdam v. Thom*, 610 So.2d 510 (Fla. 3d DCA 1992), *quashed*, 626 So.2d 184 (Fla. 1993).

[88] *Waite v. Waite*, 618 So.2d 1360 (Fla. 1993).

[89] *E.g., Acensio v. State*, 497 So.2d 640, 641 (Fla. 1986).

[90] *Arab Termite & Pest Control of Fla., Inc. v. Jenkins*, 409 So.2d 1039, 1041 (Fla. 1982).

[91] *Id.* at 1043 (Sundberg, C.J., dissenting, joined by Adkins, J.).

[92] *E.g., Salser v. State*, 613 So.2d 471, 473 (Fla. 1993) (Kogan, J., dissenting).

[93] *Sacks v. Sacks*, 267 So.2d 73, 75 (Fla. 1972).

[94] *E.g., Acensio*, 497 So.2d at 640.

[95] *State v. Stacey*, 482 So.2d 1350, 1351 (Fla. 1985).

[96] The Court elsewhere has said that in determining conflict there can be no consideration of facts outside the four corners of the opinion. *Hardee v. State*, 534 So.2d 706, 708 (Fla. 1988).

[97] 482 So.2d 1350 (Fla. 1985).

[98] *See Department of Health & Rehab. Servs. v. National Adoption Counseling Serv.*, 498 So.2d 888, 889 (Fla. 1986) (conflict cannot be inferred or implied).

[99] *Watson Realty Corp.*, 452 So.2d at 568.

[100] *Seaboard Air Line R.R. v. Branham*, 104 So.2d 356, 358 (Fla. 1958).

[101] *See* Fla. Const. art. V, §3(b)(3).

[102] "Recede" is the term of art used when the Court overrules its own decisions in whole or in part.

[103] *Public Health Trust v. Menendez*, 584 So.2d 567 (Fla. 1991).

[104] *Id.* at 569-70.

[105] *D'Oleo-Valdez v. State*, 531 So.2d 1347 (Fla. 1988).

[106] *Id.* at 1348.

[107] *Hardee*, 534 So.2d at 708. These examples also demonstrate applications of the four-corners rule: The Court should confine its determination to the four corners of the conflicting district court opinions, making no

attempt to review the record. The decision whether discretion exists must be made based on the facts as stated in the four corners of the "conflicting opinions." *Id.*

[108] *E.g., Fitzgerald v. Cestari*, 569 So.2d 1258 (Fla. 1990); *Cross v. State*, 560 So.2d 228 (Fla. 1990); *Balthazar v. State*, 549 So.2d 661 (Fla. 1989); *Conway Land, Inc. v. Terry*, 542 So.2d 362 (Fla. 1989).

[109] *Fitzgerald*, 569 So.2d at 1258.

[110] *Watson Realty Corp.*, 452 So.2d at 568.

[111] *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 n.3 (Fla. 1988) (citing *Jollie v. State*, 405 So.2d 418, 420 (Fla. 1981)).

[112] Fla.R.App.P. 9.120(e).

[113] *See Wainwright v. Taylor*, 476 So.2d 669, 670-71 (Fla. 1985) (petition dismissed in interests of judicial economy where outcome would not be different and where erroneous statement of law had been corrected by other means).

[114] *Bankers Multiple Line Ins. Co. v. Farish*, 464 So.2d 530, 531 (Fla. 1985); *Savoie v. State*, 422 So.2d 308, 310 (Fla. 1982).

[115] *See, e.g., Thom v. McAdam*, 626 So.2d 184 (Fla. 1993).

[116] Fla.R.App.P. 9.210(a)(5).

[117] Sometimes multiple conflict exists.

[118] The Court has instituted a very successful paper recycling program in recent years.

[119] *See* Fla. Const. art. V, §3(b)(4).

[120] Fla.R.App.P. 9.030 (1980 amendment committee notes).

[121] *Department of Ins. v. Teachers Ins. Co.*, 404 So.2d 735, 736-37 (Fla. 1981) (England, J., dissenting as to jurisdiction).

[122] *Id.* (majority opinion).

[123] *Fawcett v. State*, 615 So.2d 691, 692 (Fla. 1993).

[124] *Rupp v. Jackson*, 238 So.2d 86, 89 (Fla. 1970).

[125] *Susco Car Rental Sys. v. Leonard*, 112 So.2d 832, 834-35 (Fla. 1959).

[126] *Whitaker v. Jacksonville Expressway Auth.*, 131 So.2d 22, 24 (Fla. 1961).

[127] *Id.*

[128] *Zirin v. Charles Phizer & Co.*, 128 So.2d 594, 597 (Fla. 1961).

[129] *Stein v. Darby*, 134 So.2d 232, 237 (Fla. 1961).

[130] *Duggan v. Tomlinson*, 174 So.2d 393, 393 (Fla. 1965).

[131] *Id.* at 394.

[132] *E.g., Rupp*, 238 So.2d at 89.

[133] *See, e.g., Reed v. State*, 470 So.2d 1382, 1383 (Fla. 1985) (quoting question as framed); *Holly v. Auld*, 450 So.2d 217, 218 (Fla. 1984) (quoting question as framed).

[134] *E.g., Waite v. Waite*, 618 So.2d 1360 (Fla. 1993).

[135] *E.g., Trushin v. State*, 425 So.2d 1126, 1127-28 (Fla. 1982).

[136] *See, e.g., Radiation Technology, Inc. v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983).

[137] *Id.* at 329.

[138] *Id.* at 332-33 (Alderman, C.J., dissenting).

[139] *See Petrik v. new Hampshire Ins. Co.*, 400 So.2d 8, 9-10 (Fla. 1981); *Taggart Corp. v. Benzing*, 434 So.2d 964, 966 (Fla. 4th DCA 1983).

[140] Relinquishment is governed by rule. *See* Fla.R.App.P. 9.110, 9.600.

[141] *State v. Smulowitz*, 486 So.2d 587, 588 (Fla. 1986).

[142] Fla. Const. art. V, §3(b)(4).

[143] One district court used the words "certificate of direct conflict." *State v. Dodd*, 396 So.2d 1205, 1208 n.7 (Fla. 3d DCA 1981), *approved*, 419 So.2d 333, 336 (Fla. 1982).

[144] *E.g., Hannewacker v. City of Jacksonville Beach*, 402 So.2d 1294, 1296 (Fla. 1st DCA 1981), *approved as modified*, 419 So.2d 308, 312 (Fla. 1982).

[145] The custom has not always been strictly followed. In one early case, the Court accepted "certified conflict" solely because a citation PCA contained a "contra" cite. *See Parker v. State*, 406 So.2d 1089, 1090 (Fla. 1981), *rev'g*, 386 So.2d 1297 (Fla. 5th DCA 1980). This practice has not been observed in recent years.

[146] Some cases may slip through the initial review process.

[147] Fla.R.App.P. 9.120(d).

[148] Actual conflict must exist in "express and direct" cases for the Court to have discretion to hear the case.

[149] *Harmon v. Williams*, 615 So.2d 681, 683 (Fla. 1993).

[150] *See Davis v. Mandau*, 410 So.2d 915, 915 (Fla. 1981).

[151] For an opinion using the informal name, see *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1146 (Fla. 1985).

[152] Fla. Const. art. V., §3(b)(5).

[153] Fla.R.App.P. 9.125(a). This method of making and filing a "suggestion" is heavily regulated by rule. *See* Fla.R.App.P. 9.125(c)-(f).

[154] In the "Baby Theresa" case, for example, the Fourth District Court of Appeal issued the following certificate:

We hereby certify to the Florida Supreme Court that the order of the trial court of March 27, 1992, requires immediate resolution by the Supreme Court, because it rules on an issue of great public importance and because the relief sought in the trial court may be mooted by the natural death of the infant child of appellants.

In re Pearson, Case No. 92-0942 (Fla. 4th DCA March 30, 1992) (unpublished order).

[155] Rendition occurs when a signed, written order is filed with the clerk of the lower tribunal, subject to a few exceptions usually not applicable in these cases. *See* Fla.R.App.P. 9.020(g).

[156] Fla.R.App.P. 9.125(g).

[157] Relinquishment is governed by rule. *See* Fla.R.App.P. 9.110, 9.600.

[158] *See, e.g., Department of Corrections v. Florida Nurses Ass'n*, 508 So.2d 317, 317 (Fla. 1987); *Division of Pari-Mutuel Wagering v. Florida Horse Council, Inc.*, 464 So.2d 128, 129 (Fla. 1985).

[159] *See, e.g., Department of Corrections*, 508 So.2d at 317.

[160] *E.g., In re T.A.C.P.*, 609 So.2d 588, 589 (Fla. 1992).

[161] *Chiles v. United Faculty of Fla.*, 615 So.2d 671 (Fla. 1993).

[162] For example, *In re T.A.C.P.* presented a situation in which some parties and amici curiae not only disagreed about the nature of a relevant medical syndrome (anencephaly), but also framed the issues in widely differing ways. 609 So.2d at 589. Some saw the issue as whether organs could be "harvested" from a living child, while others saw the issue as whether there was a right of privacy in deciding what would happen to the body of a child who was, for all intents and purposes, dead. *Id.* When the Court framed the issue at the start of the opinion, it signaled the true scope of what was being decided. *Id.* at 589.

[163] *Carawan v. State*, 515 So.2d 161, 162 n.1 (Fla. 1967). The district court in *Carawan* had declined to rule on the case because it found that the applicable law had become "curiouser and curiouser." *Id.* at 163.

[164] *E.g., Chiles*, 615 So.2d at 671 (constitutionality of legislature abrogating state employees' collective bargaining agreement).

[165] *State v.Dodd*, 561 So.2d 263 (Fla. 1990) (constitutionality of statute restricting political contributions when election was nearing).

[166] *In re T.A.C.P.*, 609 So.2d at 588 (right to donate organs of child soon to die, where death would make organs undonatable).

[167] *See, e.g., Carawan*, 515 So.2d at 161.

[168] Fla. Const. art. V, §3(b)(6).

[169] Fla.R.App.P. 9.150(b).

[170] *E.g., Gaston v. Pittman*, 224 So.2d 326 (Fla. 1969).

[171] For an example of a certificate see *Aldrich v. Aldrich*, 375 U.S. 249 (1963).

[172] *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735, 741 (Fla. 1961).

[173] *E.g., Allen v. Estate of Carmen*, 486 F.2d 490, 492 (5th Cir. 1973).

[174] Fla. Stat. §25.031 (1991). There is no requirement to accept the case, only to issue an opinion once the case is accepted. *Id.*

[175] The term "remand" implies mandate and therefore suggests a direction to an inferior court. *See Black's Law Dictionary* 1293 (6th ed. 1991). The federal appellate courts are not inferior to the Florida Supreme Court.

[176] *E.g., Dorse v. Armstrong World Indus., Inc.*, 513 So.2d 1265, 1270 (Fla. 1987); *Bates v. Cook, Inc.*, 509 So.2d 1112, 1115 (Fla. 1987).

[177] The Court probably would lack jurisdiction, not merely discretion, in this situation. The constitution's strict language suggests that it is not enough for the federal appellate court to certify the case; there also must be an actual lack of controlling precedent of the Florida Supreme Court. Fla. Const. art. V, §3(b)(6). In any event, whether the case was dismissed for lack of jurisdiction or lack of discretion would make no difference here.

The Bluebook Signals a New Era and Other Changes in the 16th Edition of Uniform System of Citation

by Susan W. Fox

The new 16th Edition *Bluebook* has just come out. Most of the changes are of more interest to appellate attorneys and those who write for publication than to the everyday practitioner. But there is something here for every legal writer. After all, almost every lawyer writes the occasional legal memorandum, and there is virtually nothing that can make us look more foolish and uninformed than using sloppy or out-of-date citation form.

The new *Bluebook* retains the same basic approach established by its predecessors. In addition to the modifications of citation form to be expected from a new edition, the 16th Edition reflects the expanding range of authorities used in legal writings, particularly those now available from the Internet. The most significant changes in the latest edition relate to the use of introductory signals and official public domain cites, and the elimination of citations for denials of certiorari in all but the most recent cases.

This article will address the significant changes for appellate practitioners. Changes are listed in sequential order, not necessarily in order of importance.

Introductory Signals—Rule 1.2

The Preface to the 16th Edition announces that the number of introductory signals has been reduced, and the distinction between signals has been simplified. While this may be true, the changes are bound to cause confusion until practitioners become familiar with them. Drastic changes have been made to the following introductory signals: "[no signal]," "*e.g.*," and "*contra*." Minor changes have been made to others.

You can no longer cite a case without an introductory signal; i.e., you cannot use the "[no signal]" signal to indicate that the case supports the proposition you have just stated. The "[no signal]" introductory signal in citing a case means *only* that the case identifies the source of a quotation or an authority referred to in the text. To indicate that the case "clearly states" the proposition addressed in the text, you now must use "*see*" as the introductory signal. The "clearly states" function has been transferred entirely to the "*see*" signal in the 16th Edition. In prior editions, "*see*" *could* be used for "clearly states" but was used instead of "[no signal]" primarily when the proposition was not directly stated in the authority but logically followed from another principle stated in it.

The "[no signal]" signal now cannot appropriately be used in advance of a string citation, since it can identify only a quotation or authority from a single source. Under the new citation rule, a string citation with no introductory signal would be an obvious error, no matter now clearly the string of cases cited support the stated proposition.

The function of "*e.g.*" has also changed. "*E.g.*" has been eliminated altogether as a stand-alone signal, and can now be used only in combination with other signals. Under the old system, the "*e.g.*" signal meant that the writer could cite many authorities for the proposition, but was naming just a few.

In one of the new edition's more quizzical technicalities, a signal which can now be combined with "*e.g.*" is the "[no signal]" signal. This, of course, would result absurdly in the use of "*e.g.*" all by itself, which seems to restore "*e.g.*" as a stand-alone signal. To those "in the know," however, such use would only be appropriate if, for example, the text contained an oft-quoted statement

Highlights of Bluebook 16th Edition:

1. When citing cases in direct support of textual statements, always use "*See*" as the introductory signal.
2. Citation to an authority with no introductory signal should be strictly limited to a single source quoted or referred to in text.
3. Never use string citation without an introductory signal.
4. Use "*e.g.*" only with other signals.
5. Eliminate all use of "*contra*."
6. Parenthetical information about cases should begin with a present participle and not begin with a capital letter.
7. Use an official public domain citation to a case instead of a regional reporter if such a cite is available.
8. Omit denial of certiorari from citation unless the decision is less than two years old, or the denial is particularly relevant.
9. Consult Table Six for expanded list of abbreviations.

that the writer chose to cite to only one source by way of example.

"*Contra*" has been eliminated entirely as a signal, its function having been transferred to the "*but see*" signal. While "*contra*" had been used to show authority directly contrary to the cited proposition, just as "[no signal]" would be used for direct support, it has now been removed from the lexicon. Thus, the most common past usages of both "*contra*" (direct contradiction) and "[no signal]" (direct support) have been merged into "*but see*" and "*see*" respectively.

In a frustrating omission, the editors of the *Bluebook* no longer tell us how to signal that the stated proposition obviously follows from the cited authority (with an inferential step), although not directly stated in it. In the old system, "*see*" was commonly used as this signal, but "*see*" is now limited to direct or clear support, and the book is silent on indirect support. Writers will be left to make the judgment call as to whether the authority's support is direct enough to warrant use of "*see*," or is so indirect as to require the vague "*Cf.*" Since the only two other signals that show support, "*see also*" and "*accord*," are clearly limited (consistent with prior editions) to citations of additional authority where a primary case has already been cited, the elimination of a method of citing indirect support creates a troubling lack of guidance.

Of lesser note, the punctuation of "Compare . . [and] . . . with . . . [and] . . ." has changed. Examples are given in the 16th Edition and should be referred to before using this signal.

Parenthetical Information — Rule 1.5

The latest Bluebook continues to recommend parenthetical information when the relevance of a cited authority might not otherwise be clear to the reader. It differs in now demanding that such parentheticals begin with a present participle and not begin with a capital letter: *But see Flanigan v. United States*, 465 U.S. 259, 264 (1989) (explaining that the final judgment rule reduces the potential for parties to "clog the courts" through a succession of time-consuming appeals). The examples given for parenthetical information now suggest use "a," "and" and "the" by including them where they had been dropped in the same examples in the 15th Edition. This suggests a trend away from legalese toward readability.

"*Supra*" and "*Hereinafter*" — Rule 4.2

Caution should be used in the application of the still ubiquitous "*supra*" and the less common "*hereinafter*." The 15th Edition proscribed the use of "*supra*" and "*hereinafter*" to refer to cases, statutes, or constitutions, these being important enough to warrant repetition of the cite unless a short form were appropriate and the full citation immediately apparent. The new Rule 4.2 extends this prohibition to other materials.

Official Public Domain Citations—Rule 10.3

The use of an official public domain citation is now preferred when available. The new rule reflects a trend among courts to upload their opinions to a source available on the Internet. This public domain citation (also referred to as medium neutral citations) source has become the citation of choice by the *Bluebook* editors, who instruct use of this cite "instead" of the regional citations. In parallel cites, official and regional reporters are still required, but if a public domain citation exists, it should be cited, and the other citations are then optional.

The method for citing decisions available in public domain format is to include: case name, year of decision as volume number, name of court issuing the decision (using the appropriate abbreviations used parentheticals for regional cites), and the sequential number of decision. When referencing specific materials, pinpoint cites with paragraph symbols to the paragraph number of the text are required. Since new public domain citation services are coming online every day in varying formats, the methodology citation remains somewhat flexible. The *Bluebook* gives two fictitious examples: "*Stevens v. State*, 1996 S.D. 1, ¶217, and *Jenkins v. Patterson*, 1997 Wis. Ct. App. 45, ¶157, 600 N.W. 2d 435." The parenthetical date and name of court references are deleted as unnecessary, since both have been revealed in the public domain citation itself.

Subsequent History—Rule 10.7

The most dramatic change in case citation, other than the directive to check for and cite to public domain sources, is the directive to omit denials of certiorari in describing subsequent history, "unless the decision is less than two years old or the denial is particularly relevant." *Bluebook* at 66. Especially for Florida practitioners dealing with conflict between districts, the "relevance" of the denial of certiorari will, without a doubt, depend on whether the writer is urging the court to follow or depart from the cited authority.

Other Rules for Citing Cases

Although the other rules for citing cases to regional reporters are much the same as before, one change worth noting is the expanded list of abbreviations in case names when not used as grammatical parts of a sen-

continued...

Table 6: Case Names — New Additions

Word	Abbreviation
Advertising	Adver.
Bankruptcy	Bankr.
Broadcast[-ing]	Broad.
Business	Bus.
Casualty	Cas.
Director	Dir.
Econom[-ic, -ical, -y]	Econ.
Equality	Equal.
Examiner	Exam'r
Medic[-al,-ine]	Med.
Memorial	Mem'l
Pharmaceutic[-s, -al]	Pharm.
Professional	Prof'l
Publishing	Publ'g
Regional	Reg'l
Social	Soc.
Subcommittee	Subcomm.
Technology	Tech.
Telecommunication	Telecomm.
Temporary	Temp.
Transcontinental	Transcon.
Uniform	Unif.

tence. The first word of either party's name is not abbreviated, but thereafter, "always abbreviate any word listed in Table 6" (see reprint in box below for recent additions).

Rule 10.5 now requires an exact date for all unreported cases and cases cited to a loose leaf service, slip opinion, electronic data base or newspaper. (Note: The exact date was already required in Florida under Rule 9.800, Florida Rules of Appellate Procedure.)

* * *

The 16th Edition contains many other changes of interest mainly to law review editors that have not been discussed here. In addition, there are dramatic changes to the method of citing federal legislative materials, for which this publication lacks space to describe in detail.

As explained at the beginning, these changes, while of primary interest to appellate lawyers, are useful to all. You can do your partners and associates a good service by presenting a summary of the changes at one of your upcoming brown-bag lunches, and circulating an outline of the points that will come up frequently in common legal writing. We all need a refresher on these points from time to time.

Susan W. Fox *is an appellate attorney with Macfarlane, Ferguson & McMullen in Tampa. She is Board Certified in Appellate Practice, and Secretary of the Appellate Court Rules Committee.*

Complete Meeting Information and Reservation/Registration forms are in the May *Florida Bar Journal. (Schedule available at http://www.flabar.org).*

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Interview of Chief Judge Joseph W. Hatchett of the United States Court of Appeals for the Eleventh Circuit

Chief Judge Hatchett received his J.D. from Howard University in 1959. While he briefly engaged in private practice following graduation from law school, Chief Judge Hatchett has spent most of his legal career serving in governmental positions. He served as a United States Magistrate Judge in the Middle District of Florida from 1971-1975 and was a Justice of the Florida Supreme Court from 1975-1979. In 1979, President Carter appointed Chief Judge Hatchett to serve as a Circuit Judge of the United States Court of Appeals for the Eleventh Circuit. Recently, Chief Judge Hatchett was appointed to serve as Chief Judge. The Appellate Practice and Advocacy Section of The Florida Bar greatly appreciates Chief Judge Hatchett sharing his views with us on appellate practice in the Eleventh Circuit.

Q. *As Chief Judge of the Eleventh Circuit, what are your responsibilities and how do they differ from the other judges presiding in the Eleventh Circuit?*
A. As Chief Judge of the Eleventh Circuit, it is my responsibility to work with the circuit executive, the circuit staff and the judges of the court to formulate, implement and evaluate policies. Although the other judges of the court help in the formulation of policies, the administration of the court from day to day is the Chief Judge's responsibility.

Q. *You are in the unique position of having practiced as both a state appellate judge and federal appellate judge. What are some of the significant differences between the state and federal appellate court systems? More particularly, how do the duties and responsibilities of a Justice of the Florida Supreme Court differ from the duties and responsibilities of a federal appellate judge?*
A. Although the Florida Supreme Court and the Eleventh Circuit Court of Appeals are both appellate courts, due to their constitutional and statutory mandates, the responsibilities of the justices and judges are quite different. Because the Florida Supreme Court is the highest court of the state of Florida, that court's jurisdiction covers matters of great importance to all of the people of the state of Florida. On the other hand, the Eleventh Circuit Court of Appeals reviews all cases with final judgments and a few other cases primarily for the correction of error. Although the Eleventh Circuit Court of Appeals has a significant lawmaking function, its responsibilities are similar to those of a state district court of appeal.

Q. *What significant developments and/or changes in the Eleventh Circuit do you foresee in the near future?*
A. I don't envision any significant changes in the Eleventh Circuit within the next two to three years. If I had to predict areas in which changes would occur in four to five years, I would guess that federal courts will begin handling more criminal matters that were once thought to be only proper for state court consideration. Additionally, because almost a third of the cases in federal courts are prisoner inmate instituted, I would expect some legislation requiring more exhaustion of claims in state courts or agencies before prison inmates could bring lawsuits in federal courts.

Q. *What are the most important things practitioners should know about practicing before the Eleventh Circuit?*
A. The most important thing a practitioner should know about practicing before the Eleventh Circuit is the importance of writing a thorough, well-reasoned brief. About 68% of the cases decided in the Eleventh Circuit are decided without oral argument. Consequently, what the judge learns about the contentions of the parties and the supporting case law is gained from the briefs—not at an oral argument session.

Q. *What are the most common mistakes that practitioners make when practicing before the Eleventh Circuit?*
A. One common mistake practitioners make in practicing before the Eleventh Circuit is failing to prepare good briefs. A second common mistake is seeking to argue an issue or theory on appeal that was not presented or preserved in the district court or federal agency.

Q. *How do the Eleventh Circuit Judges prepare for oral argument?*
A. Eleventh Circuit judges prepare for oral argument by reading the briefs, the record excerpts, the controlling precedent and, in some offices, through discussions with law clerks.

Q. *How often do you find your preliminary view of a case changed by oral argument?*
A. I seldom find my preliminary view of a case changed through oral argument. That is not to say that oral argument is not useful. Oral argument often helps in convincing me that my preliminary view is the correct one.

Q. *Could you describe your discussions after oral argument and what follows those discussions with regard to opinion writing?*
A. After oral argument, the cases are always thoroughly discussed. The course of the discussion is determined by the personalities of the judges on the panel and the complexity and difficulty of the case.

Q. *What significant developments have you seen in appellate practice during your tenure on both the Florida Supreme Court and Eleventh Circuit?*
A. The most significant change that I have seen in appellate practice during my tenure as an appellate judge over the past 21 years is the trend toward decisionmaking without oral argument and summary dispositions without full written opinions.

Committee Updates

Appellate Court Liaison Committee

The main project of the Appellate Court Liaison Committee this past quarter has been putting on a roundtable discussion, at the Bar's Mid Year Meeting in Miami, on the topic of Per Curiam Affirmances. We were fortunate enough to have three sitting District Court judges agree to participate in the panel discussion and question and answer session, along with a former DCA judge who has returned to private practice and two top flight appellate practitioners.

The panel discussion covered why particular cases are chosen for PCAs, what functions they serve in conserving court time and avoiding having to write decisions that don't say anything new, and what alternative devices (such as unpublished opinions) are available to serve the same purposes, among other topics. A great number of interesting questions were raised from the floor by those in attendance.

Currently, the Committee is looking into the question of whether there is a need for some organized group to be able to set the record straight if the judge running for merit retention is unfairly attacked. If there is a perceived need for such a group, the Committee will then look into how the Section could help such a group. We hope to have something to report by the next meeting of the executive council.

Appellate Rules Liaison Committee

The Florida Bar Appellate Court Rules Committee filed its proposed four year cycle amendments with the Florida Supreme Court in January 1996. For the most part, the Appellate Rules Liaison Committee supported these amendments. The proposed amendments were the result of studied consideration by members of the Appellate Court Rules Committee and other members of The Florida Bar having expertise in the different legal subject matter areas studied by the Committee. Approximately 75 lawyers and judges were appointed to serve on these seven practice area subcommittees including: Civil, Criminal, Workers' Compensation, Probate, Juvenile, Family Law, and Administrative matters. The Appellate Court Rules Committee recognized a need to bring consistency, where possible, to the procedures for handling appeals in these areas of substantive law; to carefully delineate differences in procedure where such different procedures are needed; and to include all rules relating to appellate review in the Rules of Appellate Procedure.

In an opinion dated September 27, 1996, the Court adopted emergency amendments to the Rules to take effect October 1, 1996, necessitated by extensive changes to Florida's Administrative Procedures Act. In an opinion dated November 22, 1996, which was modified, for technical revisions only, in an opinion dated December 26, 1996, the Florida Supreme Court adopted amendments to the Florida Rules of Appellate Procedure to take effect January 1, 1997. The combination of these amendments created the most extensive rewrite of the Rules of Appellate Procedure since the Rules were completely rewritten in 1977. A complete copy of the rules with the changes highlighted can be obtained via the internet at http://justice.courts.state.fl.us/courts/supct/rules.html#appellate. In addition to adopting the rules, the Court receded from its opinion in *State v. Creighton*, 469 So. 2d 735 (Fla. 1985), and held that the language in the 1972 revision to article V of Florida's Constitution which provides that "appeals, that may be taken as a matter of right, from final judgments or orders" did not alter a Florida citizen's right to appeal from all final judgments or decrees.

A significant revision to the rules was an amendment to Rule 9.010, which now provides that the Rules of Appellate Procedure shall supercede all conflicting statutes and, as provided in Florida Rule of Judicial Administration, *all conflicting rules of procedure.* The purpose of this rule is to clarify that in appellate proceedings the Rules of Appellate Procedure control. The Appellate Court Rules Committee identified a number of different conflicts between the appellate rules and the other rules of procedure and this change was needed to clarify that the appellate rules control.

The Appellate Rules Liaison Committee played a role in making recommendations regarding these rule changes. Its present role is to disseminate the information on the changes to the appellate rules adopted by the Supreme Court effective October 1, 1996, and January 1, 1997, and to review and make recommendations on the new proposals being suggested as amendments by the Appellate Rules Committee for the next four year cycle submission.

Civil Appellate Practice Committee

Two new projects have been undertaken by the Civil Appellate Practice Committee this year. The first is a program to provide guardian ad litem appellate services throughout the state. This subcommittee is presently coordinating the project with existing guardian ad litem programs and seeking ways to efficiently offer appellate services to the programs and individuals who want or require assistance in the district courts. At our January 1996 meeting in Miami, the Committee was in agreement that this project is not only worthwhile, but also represents our young Committee's first opportunity to provide a public service.

The proponent of the idea to establish an appellate guardian ad litem program is Tracy Carlin of Foley & Lardner's Jacksonville office. She is also the Chair of our newly formed subcommittee. We urge all members of the Appellate Practice & Advocacy Section to assist in Tracy's efforts. If you are willing to consider participating in guardian ad litem appellate services, or if you want more information, please contact Tracy at (904) 359-2000.

The second new project of our

continued...

Committee is geared more directly toward a potential minefield for almost all appellate practitioners. The issue presented is when or whether an appellate attorney should be held vicariously liable for the actions of trial counsel. In other words, if an appellate lawyer's role is designated or limited to certain specialized areas (by the client, trial counsel, or otherwise), should the appellate lawyer be liable for acts not within the ambit of his or her responsibilities?

The scope of this issue ranges from a mere discussion of whether appellate practice is indeed a specialty to whether the Florida Supreme Court should establish rules that define and recognize the specialty of appellate practice as an endeavor so isolated from the trial lawyer's role that it deserves some sort of protection from liability resulting from non-assigned tasks.

Ted Bartelstone of Hollander & Bartelstone in Miami is the Chair of the subcommittee addressing this issue. If you have any thoughts or ideas for Ted, his phone number is (305) 358-4633. In particular, Ted would appreciate feedback on your working definitions of the appellate practitioner's role and/or duties at the trial level. Even more particularly, if any Section member has excerpts of fee agreements dealing with the role of appellate counsel at the trial level, the subcommittee preliminarily intends to collect these clauses to formulate a model provision for all appellate practitioners.

Aside from the Committee's two new projects, two ongoing projects deserve an update. First, the amicus curiae subcommittee has been elevated to an ad hoc Committee of the Section to draw input from the entire Section. The Chair of the new Committee is John Crabtree of Greenberg Traurig in Miami, at (305) 579-0567. John has diligently pursued the idea that the Section should participate as amicus curiae on issues which are substantively neutral, but procedurally significant. The importance of John's idea became apparent upon implementation of the new Appellate Rules.

We encourage all members of the Section to contact John if you can assist him in any way, not the least of which would be to volunteer as a writer on one of these inevitable issues. It is also imperative that all members of the Section be aware that John's subcommittee will at some point need assistance in quickly identifying appeals with procedurally significant appellate issues before the district courts.

Finally, our Committee is still planning to publish an article addressing the scope and practicalities of appellate practice as a specialty. We recently completed a poll of Florida's district court judges regarding the value of appellate specialists. Having concluded this broad based opinion poll, we now intend to interview appellate practitioners and heads of various appellate departments of well-established law firms. If you have contributions or enthusiasm towards this project, please contact Jennifer Carroll of Metzger Sonneborn in West Palm Beach at (561) 684-2000. We would particularly like a copy of any published article similar to the one we intend to publish.

CLE Committee

The Committee met at the Bar's Mid-year Meeting on January 23, 1997 and discussed the following:

Appellate Section's "Flagship" Seminar—The Committee determined to postpone this seminar when it became clear that the new rules, which would be the subject of a large portion of the seminar, would not be approved in time. After considering various options, the decision was made to postpone the seminar until Fall 1997, probably in October. Tom Hall has agreed to remain as the chair of the Steering Committee. It is anticipated that the seminar will still include similar topics and a segment, albeit a shorter one, to discuss the new rules and, by that time, some of the first opinions discussing the new rules.

Appellate Practice Certification Exam Review Course—Bonnie Kneeland served as the chair of the Steering Committee, and Cindy Hofmann served as her back-up/trainee, with the intention that Cindy serve as the chair next year. The course is all set, scheduled to take place on February 14, 1997, in Orlando. Cindy Hofmann will serve as the master of ceremonies. Cindy Hofmann's back-up/trainee for next year will be Jennifer Carroll. The Committee discussed several issues relating to the course, including the concept that it may be of great benefit each year to include speakers who have more recent experience with the exam. On that basis, it was suggested that both the Committee and the current speakers should think about appropriate future speakers.

Federal Appellate Seminar—The seminar is all set to take place on March 21, 1997, in Orlando. Kathryn Pecko, co-chair of the Steering Committee, reported that all speakers and topics had been selected and arranged. Included among the speakers are Bruce Rogow, Miguel Cortez, Jr., Judge Gerald B. Tjoflat, Judge Joseph W. Hatchett, Mori Irvine, Steve Wisotsky, and Sylvia Walbolt. The seminar will take place at the Hotel Royal Plaza at Lake Buena Vista and is being co-sponsored by the Out-of-State Division.

Co-Sponsorships — The Appellate Section will be co-sponsoring the Government Lawyers "1997 Rules of Court" seminar to be held on March 12 and 13, 1997, in Tallahassee, Orlando, and Miami. The seminar is one-half day, and the Appellate Section will contribute a speaker to each of the live presentations. The appellate speakers are Judge Davis, Judge Northcutt, and Roy Wassen. The Appellate Section will also co-sponsor the Government Lawyers Forfeiture Seminar as it did last year. That seminar will take place on May 8 in Miami and May 9 in Tampa. The Appellate Section will provide a speaker for a thirty minute topic on each day. Cindy Hofmann has taken the laboring oar on the Steering Committee in coordinating and negotiating this co-sponsorship. The Section will also co-sponsor the Criminal Law Update Seminar to be held on June 6 in Tampa. Speakers and topics are pending. Finally, the Appellate Section will be involved in the Appellate Practice for General Practitioners Seminar, through a steering committee chaired by Cindy Hofmann. That seminar is presently scheduled for April 18, 1997. Tentative speakers include Sharon Steadman, Tom Hall, Judge Griffin,

Jim Cheek, Tom Elligett, Justice Overton, and Justice Anstead. The Appellate Section continues to seek other opportunities for co-sponsorships and recognizes that it is a relatively efficient way to raise additional revenues for the Section.

Other Business—Tom Elligett reported to the Committee that the All Bar Conference would like the Appellate Section to hold a program regarding trial issues. Judge Robbie Barr is our probable contact and is expected to contact the CLE Committee to discuss the length and format of such a program. On another matter, Tom Hall reported further on the idea for a NITA-style "learning-by-doing" appellate seminar. Tom reported that Stetson University recently sponsored a First DCA program and had 250 attendees. Stetson has approached the Committee to co-sponsor the proposed seminar with the Appellate Section. Tentatively, subject to further discussion, the Program would not be co-sponsored with The Florida Bar, creating both increased responsibility and opportunity for revenues for the Section.

The next meeting of the CLE Committee will be at The Bar's Annual Meeting on June 26, 1997, in Orlando. The exact time and place will be announced later.

Membership Committee

The Membership Committee met several times during the year by telephone. The Committee consisted of the following members: Thomas Elligett, Section Chair, Raoul G. Cantero, III, Chair, Lucinda Ann Hofmann, Georgina Jimenez-Orosa, Judith Williford Simmons, Dennis Parker Waggoner, Shirley Faircloth, Ester Galicia, Cheryl Lynn Virta, Allen Wachs, Rebecca B. Creed, and Marie A. Borland.

The Committee's project for the year was to identify from the Florida Law Weekly issues those attorneys who had been involved in an appeal in the last year, but were not members of the Section. The members of the Committee combed through over 200 issues of the Florida Law Weekly and identified over 3,000 attorneys who had been involved in an appeal but were not yet members of the Section. the Committee compiled a database of these attorneys and forwarded the list to Jackie Werndli. Tom Elligett, as Section Chair, and I wrote a letter of all these attorneys, inviting them to join the Section. As of this date, about 115 new members have joined the Section solely in response to this letter. We believe our efforts were successful, and we thank Jackie Werndli and members of the Bar's staff for their enthusiastic assistance with this project.

Programs Committee

The Programs Committee is currently planning numerous events for the Florida Bar Annual Convention. One of the highlights of this Convention will be the Supreme Court discussion to be held on Thursday, June 26, 1997 at 4 p.m. This will be the third time that the Appellate Practice & Advocacy Section has sponsored an open question and answer session affording Florida lawyers an opportunity to ask questions of Florida's Supreme Court justices about issues facing the legal profession and the Court's decisionmaking process. In the past, the Court has fielded questions about professionalism, pro bono, mediation and how best to present a case to the court. This even is expected to be one of the highlights of the Annual Convention.

The Appellate Section Annual Dessert Reception will follow in the evening at 9:30 p.m. During the reception, the Appellate Section will present the Third Annual James C. Adkins Award. The award honors former Florida Supreme Court Justice James C. Adkins and was established to honor those individuals who contribute significantly to appellate practice in Florida. Past recipients of the award have included Justice james C. Adkins, posthumously, and Judge Thomas H. Barkdull, Jr.. All of the Appellate Practice and Advocacy Section events will be held at the convention site.

Appellate Practice and Advocacy Proposed Section Budget 1997-98

REVENUE		Meeting Travel	150
Dues	$20,000	Council Meetings	500
Dues Retained by Bar	10,000	Bar Annual Meeting	4,000
Net Dues	10,000	Awards	600
Directory Ads	1,200	Comittee Expense	500
Reception Sponsor	2,000	Council of Sections	300
Videotape Sales	800	Staff Travel	943
Audiotape Sales	2,000	Directory	9,700
CLE Courses	4,500	Section Service Program	1,000
Interest	1,286	Legislative Travel	200
Material Sales	250	Operating Reserve	2,229
TOTAL REVENUE	**$22,036**	**TOTAL EXPENSES**	**$24,522**
EXPENSES		Beginning Fund Bal.	$25,716
Postage	1,200	Plus Revenues	$22,036
Printing	250	Less Expenses	$24,522
Newsletter	2,000	Plus Net from	
Membership	500	Other Center	$1,604
Photocopying	150	**Ending Fund Bal.**	**$24,834**
Officer Travel	300		

CHAIR'S MESSAGE
from page 1

The *ABA Journal* article notes the California Judges Association has formed a program where judges evaluate the complaints of fellow judges who believe they have been wrongly attacked, and respond if they find the judge's complaint has merit.

I've asked Jack Shaw to have his Liaison Committee evaluate if our Section should act as the catalyst for forming an organization to respond when opponents attack appellate judges (such an organization would likely be set up outside The Florida Bar).

But let's return to the questions of who is "out of touch," and out of touch with what? The author of one letter responding to the *ABA Journal* article referred to "the fact that many judges are out of touch with reality" and the people are sending a message to "climb down from your ivory towers and start judging in the real world."

The *Journal* article noted that when some people say they want judges who will follow the law, they really mean "I want judges who will decide cases the way I want them decided." The letter writer obviously assumes his view of "reality" is the only view judges should be permitted to operate under.

Does this sound reminiscent of those who believe there should be only their religion, their political party, their version of the truth, etc.?

Those who call for judges to be more "responsive" to public opinion often couch their argument in terms of being responsive to victims' rights. This simplistic sentiment appeals to a gut level desire for revenge. And this sentiment embraces the same rationale used to justify lynch mobs. But this attitude ignores our Constitution's protections.

Those mouthing such platitudes also fail to appreciate the fundamental distinction in the role of judges as the balancing factor in our third branch of government. Our courts and our judges often stand as the only protection for the rights of those who may not be empowered at a given time (either because of race, sex, wealth, nationality, age, disabilities, religion, etc.).

There is another problem with those who mouth the "out of touch" criticism. Viewed objectively, they—and not our judges—are much more likely to be out of touch.

Our appellate judges review thousands of cases during their six year terms: thousands they sit on and thousands more for which they review circulating and published opinions. Our judges have a much better vantage point for what is going on in our trial courts and our communities than those who get their "knowledge" of the "real world" from skimming headlines in the local paper or hearing a news bite on the TV or radio.

These critics ignore that our judges also read and see the news. And our judges are not like the former Chinese emperors who did live in a palace, insulated from the real world. Our judges live in the same society we live in. They and their spouses shop in the same stores we do, drive the same streets, etc.

Even a non-judge lawyer who read every reported opinion would lack the perspective gained from the review of the records and briefs in cases in which the judge participated, as well as that gained from the judges' consideration of cases where no opinion is published.

Failure to appreciate the foregoing fuels the fire of groups who want to seize on a particular opinion as an excuse to try to oust a judge they hope will be replaced with one more responsive to their agenda. They are the ones who are out of touch with the role of our judicial system and our judges.

I don't know where the Liaison Committee and our Section will come down with respect to an organized response when our judges are unfairly attacked. But individually, we can and should speak up when we hear these unwarranted attacks.

Thanks

By the time you read this my term as Chair will be nearing a close. The Section has been blessed to have so many hard working members. There is not room to thank them all here, but I will attempt to list a few:

Our Section Administrator Jackie Werndli, immediate past chair Tony Musto, and chair-elect Chris "Tex" Kurzner.

The CLE efforts of chair Jack Aiello, vice-chair Judge Kitty Pecko, and all of the program chairs and speakers.

Record editor Hala Sandridge, with great help from Chris Ng, Kim Staffa, Donna Koch and Pat Kelly. Guide editor Tamara Scrudders. Publications chair and section vice-chair Roy Wasson, and Jacqueline Shapiro, our *Journal* articles editor.

Membership Chair Raoul Cantero and his committee for the 3,000 letters they sent out to attorneys culled from the Florida Law Weeklies (and at least one non-attorney who called me asking if she could join).

Programs chair Angela Flowers and vice-chair Bonnie Kneeland.

Liaison chair Jack Shaw for his energy and courage in putting on the PCA Roundtable program.

Secretary and all-purpose worker Cindy Hofmann, who also sat on the Council of Sections, co-chaired the certification review course, worked on membership, got married, etc.

To our executive council, other committee chairs and members, and to the entire section for the honor of serving as you chair this year. It has been a privilege. Thank you.

Changes to Rules of Appellate Procedure

by Marguerite H. Davis

RULE NUMBER	SUBJECT	EXPLANATION OF CHANGE
9.010	Effective Date and Scope	Provides that the Rules of Appellate Procedure shall supercede all conflicting statutes and, as provided in Rule of Judicial Administration 2.135, all conflicting rules of procedure.
9.020(a)	Definitions, Administration Action	Redefines agency action — the old definition was outdated and inaccurate.
9.020(a)(2)	Definitions, Administration Action	Adds non-final action "by an agency or administrative law judge" to definition of administrative action.
9.020(d)	Definitions, Family Law Matter	A new rule defining a family law matter. This rule required by the passage of the new Family Law Rules of Procedure.
9.020(e)	Definitions, Lower Tribunal	Adds Judge of Compensation Claims to the definition of lower tribunal. Necessitated by the addition of workers' compensation appellate rules to the general Appellate Rules.
9.020(h)(3)	Definitions, Rendition — Sentencing Errors	Rendition is tolled in criminal cases for timely filed motions to correct an error in sentence or order of probation.
9.020(i)	Definitions, Rendition — Family Law Matters	New definition clarifying when rendition is tolled for certain family law matters.
9.100(c)(1)(2) and (3)	Original Proceedings, Exceptions; Petitions for Certiorari	Primarily technical changes. Clarifies that 30 day time limit applies to all petitions for certiorari and not just common law certiorari.
9.100(c)(4)	Original Proceedings, Prisoner Disciplinary Proceedings	Rectifies inconsistency between rules and recent addition of section 95.11(8), Florida Statutes (1995). Specifies that petition challenging prisoner disciplinary proceedings must be filed within 30 days of rendition.
9.100(e)	Original Proceedings, Mandamus; Prohibition	Redefines procedure for mandamus and prohibition directed to judge of a lower tribunal. Clarifies that litigant opposing relief should file response and not the judge. Judge may file a response, but failure to do so does not admit the allegations of the petition. This change is a codification of already existing practice.

9.100(f)	Original Proceedings, Review Proceedings in Circuit Court	Clarifies procedure for original writs filed in circuit court when seeking review of lower tribunal action. This change, in conjunction with Rules 2.135 and 9.010, is designed to eliminate the conflict between Rules 9.100 and 1.630.
9.110(a)(2)	Appeal Proceedings of Final Orders, Probate and Guardianship	Clarifies what probate and guardianship matters are appealable as final orders. Compare with Rule 5.100.
9.110(c)	Appeal Proceedings of Final Orders, Administrative Action	Clarifies procedure for filing notice of appeal of administrative action. Clarifies that filing fee is filed with the appellate court.
9.110(n)	Appeal Final Orders, Insurance Coverage Appeals	Provides method for expedited review of orders determining insurance coverage as required by Florida Supreme Court in *Canal Insurance Co. v. Reed*, 666 So. 2d 999 (Fla. 1996). Proceedings to be conducted pursuant to 9.130 procedure.
9.130(a)(3)(C)(iii)	Proceedings to Review Non-Final Orders, Family Law	Technical change based on new family law rules.
9.130(a)(3)(c)(vi)	Proceedings to Review Non-Final Orders, Workers' Compensation Immunity	Clarifies ambiguity in rule governing proceedings to review non-final orders by moving the phrase "as a matter of law."
9.130(a)(3)(C)(viii)	Proceedings to Review Non-Final Orders, Absolute or Qualified Immunity in Civil Rights Cases	New rule allowing appeal of non-final order determining as a matter of law a party is not entitled to absolute or qualified immunity in a civil rights claim arising under federal law. The Florida Supreme Court requested this new rule. *Tucker v. Resha*, 648 So. 2d 1187 (Fla. 1994).
9.130(h)	Proceedings to Review Non-Final Orders, Scope of Review	Clarifies that multiple non-final orders can be appealed in one notice of appeal if the notice is timely as to each order.
9.140	Appeal Proceedings in Criminal Cases [Criminal Appeals]	Extensive changes primarily to reflect actual state of current law; new rules allow defendant to cross-appeal in certain circumstances when state appeals a non-final order; new subsection incorporates the text of Rule 3.851 into appellate rules; allows parties in criminal cases, as in civil cases, to make their own copies of the transcripts; returns petitions for belated appeals to appellate courts and establishes two-year time limit; places two-year time limit on claims for ineffective assistance of appellate counsel and sets new procedure for filing such petitions.

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9.140(b)(2)	Appeal Proceedings in Criminal Cases, Appeals by Defendant — Pleas	Consistent with case law, new rule relates to appeals following a plea of guilty or nolo contendere which specifies issues which may be presented following a plea. Defendant may assert on appeal: (1) error in a dispositive order entered prior to the plea if the defendant's plea was entered with an express reservation of the right to appeal the order; (2) the trial court's lack of subject matter jurisdiction; (3) a sentencing error, if preserved by a rule 3.800(b) motion to correct the sentencing error; (4) a violation of the plea agreement, if preserved by a motion to withdraw the plea; (5) an involuntary plea, if preserved by a motion to withdraw the plea; and (6) other issues as provided by law.
9.140(b)(2)(c)	Appeal Proceedings in Criminal Cases, Appeals by Defendant — Record	Specifies the contents of record on appeal following a plea of guilty or nolo contendere.
9.140(b)(4)	Appeal Proceedings in Criminal Cases, Appeals by Defendant — Cross-Appeal	When state appeals a pretrial order, the defendant may cross-appeal rulings on related issues resolved in same order. Defendant is not required to cross-appeal, however.
9.140(d)	Appeal Proceedings in Criminal Cases, Sentencing Errors	Provides that sentencing errors may be asserted on direct appeal only where the asserted error has been brought to attention of trial court at time of sentencing or by motion pursuant to rule 3.800(b), Florida Rules of Criminal Procedure
9.140(e)	Appeal Proceedings in Criminal Cases, Record	New provisions relating to preparation and service of appellate record including transcripts on criminal appeals.
9.140(j)	Appeal Proceedings in Criminal Cases, Petitions Seeking Belated Appeal or Alleging Ineffective Assistance of Appellate Counsel	All petitions for belated appeals are to be filed in appellate courts within two years after expiration of time for filing notice of appeal from final order, unless petition alleges that the petitioner was unaware an appeal had not been timely filed or was not advised of the right to appeal and that petitioner should not have ascertained such facts by exercise of reasonable diligence. Grace period: time periods do not begin to run prior to January 1, 1997.

9.140(j)(3)(B)	Appeal Proceedings in Criminal Cases, Petitions Seeking Belated Appeal or Alleging Ineffective Assistance of Appellate Counsel — Time Limits	A petition alleging ineffective assistance of appeal counsel must be filed within two years after conviction becomes final on direct review unless it contains a specific sworn allegation that petitioner was affirmatively misled by counsel regarding results of the appeal.
9.145	Appeal Proceedings in Juvenile Delinquency Cases	Entire new rule of procedure for appeals in juvenile delinquency cases. Consistent with applicable statute. Rule requested by the Florida Supreme Court.
9.146	Appeal Proceedings in Juvenile Delinquency and Termination of Parental Rights Cases and Cases Involving Families and Children in Need of Services	Entire new rule of procedure for appeals in juvenile dependency and termination of parental rights cases. Consistent with applicable statute. Rule requested by the Florida Supreme Court.
9.180	Appeal Proceedings to Review Workers' Compensation Cases	Moves newly adopted rules for appeals in workers' compensation cases from workers' compensation rules to appellate rules. Eliminates duplication.
9.180(a) formerly 4.156	Appeal Proceedings to Review Workers' Compensation Cases, Applicability	Appellate review proceedings in workers' compensation cases shall be governed by the Florida Rules of Appellate Procedure (civil) except as specifically modified by the rules of appellate procedure; it clarifies that the appellate rules apply except in the limited circumstances specifically identified in rule 9.180.
9.180(b) formerly 4.160(a)(1)	Appeal Proceedings to Review Workers' Compensation Cases, Jurisdiction	The district court *shall* review any final order and any *nonfinal order of a judge* that adjudicates jurisdiction, venue or compensability. Jurisdiction includes jurisdiction over the person as well as jurisdiction over the subject matter.
9.180(b)(2) formerly 4.165(a)	Appeal Proceedings to Review Workers' Compensation Cases, Commencement	Limits the place for the filing of the notice of appeal to the lower tribunal that entered the order and not any JCC as the former rule provided. Notice must be filed, not mailed, within thirty days. It must be received by the JCC within thirty days of the date of mailing of the final order.

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9.180(c) formerly 4.160(c)	Appeal Proceedings to Review Workers' Compensation Cases, Jurisdiction of Lower Tribunal	Makes clear that when interlocutory appeal is being taken, the JCC retains jurisdiction to decide issues that have not been adjudicated and are not the subject of pending appellate review. Any time before the record on appeal is filed with the first district, the JCC has the authority to approve settlements or to correct clerical errors in the order appeal.
9.180(c)(3) formerly 4.160(d)	Appeal Proceedings to Review Workers' Compensation Cases, Relinquishment of Jurisdiction by Court to Consider Settlement	Now reads as it formerly read before it was amended and provides that the JCC has jurisdiction after an appeal has been filed but before the record has been certified to this court to approve a settlement.
9.180(c)(3)(A)	Appeal Proceedings to Review Workers' Compensation Cases, Settlement and Relinquishment	A joint notice of disposition with a conformed copy of the order approving the settlement must be filed with the first district.
9.180(c)(3)(B) formerly 4.160(f)(3)	Appeal Proceedings to Review Workers' Compensation Cases, Costs	Any order approving a settlement must provide for appellate costs.
9.180(d)(1) formerly 4.161(b)	Appeal Proceedings to Review Workers' Compensation Cases, Abandonment	The first district will now make determination of abandonment of issues. It will evaluate briefs and notice to determine abandonment. "If there is a dispute as to whether a challenge to certain benefits has been abandoned, the DCA upon proper motion shall make the determination."
4.165(a) has been subsumed by 9.110	Appeal Proceedings to Review Workers' Compensation Cases, Conformed Copy of Order — Notice of Appeal	Requires that a conformed copy of the order be attached to notice of appeal.
9.110(g) formerly 4.165(g)	Appeal Proceedings to Review Workers' Compensation Cases, Cross-Appeals	Cross-appeals must be filed with the DCA, rather than the JCC, within ten days of service of the notice of appeal.
9.180(e) formerly 4.166	Appeal Proceedings to Review Workers' Compensation Cases, Intervention by Division	Intervention by the Division of Labor can no longer be mandated, but the district court can request participation and the Division may do so upon its own request. A motion to intervene under this rule is to be filed with the district court. If review of an order of the first district is sought to the supreme court, the Division may intervene in accordance with these rules.

9.180(g) formerly 4.180(f)	Appeal Proceedings to Review Workers' Compensation Cases, Relief from Filing Fee and Preparing Costs of Record on Appeal	Substantially changes the process for seeking relief from the filing fee and from the record costs. Importantly the rule sets forth separate procedures for being relieved from the filing fee under subsection (1) and for being relieved from the costs of preparation of the record under subsection (2). The judge must make findings as to each separately. Petition or motion must include the basis of appellant's inability to pay the fee and request an order or certificate of indigency from the JCC; supporting financial affidavit of the appellant claiming the affiant is indigent and unable to pay the charges, costs, or fees required by law for filing an appeal.
9.180(h) formerly 4.220	Appeal Proceedings to Review Workers' Compensation Cases, Briefs and Motions Directed to Briefs	Establishes a briefing schedule for nonfinal order appeals analogous to the schedule contained in Florida Rule of Appellate Procedure 9.130. Continues to provide that within thirty days after the JCC certifies the record to the district court, the appellant shall serve an original and three copies of the initial brief with the district court. A copy shall be served on the appellee. Additional briefs shall be served as prescribed by rule 9.210. 9.180(h)(2) provides that motions to strike are not allowed, but permits a suggestion of noncompliance where no further appellate brief is authorized.
9.180(i) formerly 4.265	Appeal Proceedings to Review Workers' Compensation Cases, Attorneys' Fees and Appellate Costs	Taxable costs shall include charges for a transcript included in an appendix as part of an appeal of a nonfinal order. Appellate costs shall be taxed as provided by law.

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9.190(b)(3)	Judicial Review of Administrative Action, Commencement (effective date October 1, 1996)	Appeals which fall within the exception included in subdivision (b)(3) are commenced in accordance with subdivision (b)(1). Therefore, administrative action by appeal in a circuit court, if prescribed by general law, is commenced pursuant to subdivision (b)(1). Unless review of administrative action in circuit court is prescribed by general law to be by appeal, review in circuit court is by petition for an extraordinary writ commenced pursuant to subdivision (b)(3). *See Board of County Commissioners v. Snyder*, 627 So. 2d 469 (Fla. 1993); *Grace v. Town of Palm Beach*, 656 So. 2d 945 (Fla. 4th DCA 1995). Subdivision (b)(3) supersedes all local government charters, ordinances, rules and regulations which purport to provide a method of review in conflict herewith.
9.190(c)	Judicial Review of Administrative Action, The Record	Identifies clearly what constitutes the record in appeals from differing types of administrative proceedings. The Florida Administrative Procedure Act, as revised in 1996, designates what constitutes the record in certain types of proceedings, and this rule incorporates that statutory language. The rule makes clear that the record shall include only materials that were furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed. The intent of this statement is to avoid the inclusion of extraneous materials in the record that were never reviewed by the lower tribunal.
9.190(c)(2)(A)	Judicial Review of Administrative Action, The Record — Review of Final Action Pursuant to the Administrative Procedure Act	Governs record from proceedings conducted pursuant to section 120.56 and sections 120.569 and 120.57(1), Florida Statutes, because section 120.56(1)(e), Florida Statutes, states that hearings under section 120.56, Florida Statutes, shall be conducted in the same manner as provided by sections 120.569 and 120.57, Florida Statutes.
9.190(c)(2)(B)	Judicial Review of Administrative Action, The Record — Review of Final Action Pursuant to the Administrative Procedure Act	Lists the provisions of section 120.57(2)(b), Florida Statutes. Subdivision (c)(2)(B)(vii), which refers to "any decision, opinion, order, or report by the presiding officer," was added by the committee to the list of statutory requirements.

9.200(a)(1)	The Record.	Clarifies that parties have the right to designate less than the entire trial record as the record on appeal.
9.200(a)(2)	The Record, Family Law Cases	New rule clarifying that in family law matters the trial court retains original of the record.
9.200(a)(3), (b)(1)-(3), (c), and (d)(1)(A)	The Record, Transcript of Proceedings	Clarifies procedure for inclusion of trial transcript in record.
9.210(a)(3)	Briefs	Requires that bound briefs must lie flat when opened. Allows briefs to be stapled in upper left hand corner.
9.210(b)(3)	Briefs, Contents of Initial Brief	Requires citations to record, in briefs, to specify volume number of record as well as page number.
9.210(c)	Briefs, Contents of Answer Brief	Allows appellees to file their own statement of the case and facts and eliminates requirement to clearly specify areas of disagreement.
9.210(g)	Briefs, Notice of Supplemental Authority	Deletes notice of supplemental authority rule from brief rule and puts it in new rule.
9.225	Notice of Supplemental Authority	New rule on supplemental authority.
9.300(d)(9)	Motions, Motions not Tolling Time, Motions Relating to Expediting the Appeal	Adds an additional circumstance where motion filed does *not* automatically extend other times, i.e., motion to expedite the appeal.
9.310(b)(3)	Stay Pending Review, Exceptions — Judge of Compensation Claims Awards	Deletes rule relating to stay in birth-related-injury appeals from orders entered by judges of compensation claims. These matters no longer handled by JCCs.
9.315	Summary Disposition	Changes language in summary affirmance rule to eliminate impression that parties cannot move to expedite appeal.
9.400(c)	Costs and Attorneys' Fees, Review	Clarifies that amount of appellate attorney fees awards determined by lower tribunal after remand are reviewed by motion.
9.420(c)(2)	Filing; Service of Copies; Computation of Time, Method and Proof of Service — Certificate of Service	Requires that certificate of service specify the party each attorney represents.
9.600(c)	Jurisdiction of Lower Tribunal Pending Review, Family Law Matters	Clarifies that lower tribunal, in family law matters, retains jurisdiction to modify awards to protect the interests of the parties during appeal.

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9.600(d)	Jurisdiction of Lower Tribunal Pending Review, Criminal Cases	Clarifies that lower tribunal, in criminal cases, retains jurisdiction to rule on Rule 3.800(a) motions for post-conviction relief. Requires successful movant to promptly notify appellate court of any order granting relief.
9.700	Guide to Times for Acts Under Rules	Deletion of chart required because rule changes made the chart inaccurate.
9.800	Uniform Citation System	Technical changes primarily adding citation forms for new rules.

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