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Message from the Chair

Mark your calendars and make plans to be in Orlando for this year's annual meeting! This year's annual meeting promises to be even better than those before for our Section. For the first time, we will be having committee meetings on the Wednesday of Annual Meeting Week. The Civil Appellate Practice Committee meets Wednesday afternoon, at 2:00 p.m. If you are on that committee, or would like to join that committee, I urge you to contact John Crabtree, and plan to attend. Or, if you happen to be in Orlando early, drop by and check out what's happening.

Thursday promises to be a busy day for Section members. In the morning, many of our committees will be meeting immediately prior to the Section's annual meeting. The annual meeting will be held at 10:00 a.m., in connection with the Executive Council meeting. A list of the committees meeting can be found on page 23. Our annual "Discussion with the Court" program begins at 4:00 p.m. As most of you know, the Florida Supreme Court has again agreed to allow us to present this program, which is an open microphone question and answer session with all of the members of the Court. You should make special plans to attend this event, if nothing else. Finally, we cap off the evening with what has become our Section's signature event at annual meeting — the Dessert Reception. At the reception, we plan to announce the 4th annual James C. Adkins Award recipient. As in years past, we expect this to be a memorable occasion. I hope all of you can attend this year. My thanks to Bonnie Brown for putting together such a great program of events.

As my year as Chair comes to a close, I am happy to reflect on your countless efforts in support of our Section and in furthering the quality and recognition of appellate practice in this state. It is hard to believe that it was only a few years ago that a dozen of us sat together in a conference room fleshing out the beginnings of what has become a growing, thriving section of the Bar. This year we have made great strides in building upon those foundations. Through the tireless efforts of Nancy

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Inside the Third District Court of Appeal

The Third DCA[1]

Introduction

Known for its long standing custom of granting oral argument in every appeal where it is requested, its liberality in granting extensions of time, and its low-key approach to enforcement of mere procedural technicalities, the Third District's credo is that each case should be decided on its merits instead of by some "gotcha" device. Practitioners before the Third District can be certain of three things: oral argument in any appeal (final and non-final) in which it is requested; adequate time to research the issues and to prepare their briefs; and consideration of the substance of their arguments, absent a jurisdictional impediment or flagrant or repeated procedural violations. This article will discuss those characteristics of the Third District in greater detail, provide a glimpse of the Court's history, provide practice pointers for attorneys who may appear before the Court, and look ahead to some areas of possible future concern for the Court.

This article was updated with the assistance of Joanne Sargent, whose title is Career Attorney, but whose job

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INSIDE:

First District Court of Appeal Appellate Mediation Program

by Donna Riselli Gebhart, Court Mediation Officer, Tallahassee

The purpose of this Article is to give the appellate practitioner an overview of appellate mediation in the First District Court of Appeal. Presently, the First District Court of Appeal is the only appellate court in the State of Florida that has instituted an appellate mediation program.[1] The appellate mediation program at the First District was established by Administrative Order 96-3 and commenced on July 1, 1996. The objective of the appellate mediation program is to attempt to assist the parties and their counsel in negotiating a mutually satisfactory compromise of their dispute as early in the process as possible in order to save the parties and the court time and money.

During the first year of the appellate mediation program, 174 cases were selected and set for mediation. Of the 174 cases selected for mediation, 125 cases were actually mediated. Sixty three percent of the cases selected for mediation settled. Fifty three percent of the cases that were conferenced settled.[2] Due to the success of the appellate mediation program, the First District hopes to expand the program to enable more cases to be mediated at the appellate level.

Not all cases are eligible for mediation. The case must involve an appeal from a final order in the civil, administrative or workers' compensation arena (with the exception of cases relating to domestic violence, IV-D dependency, and unemployment compensation) and must be fully counseled. Because the First District's Appellate Mediation Program did not commence until July 1, 1996, the mediator will not, without a written request from counsel for all parties, set a case for mediation that was filed prior to July 1, 1996. Thus, if you desire mediation in a case filed before July 1, 1996, contact your opposing counsel and, if you both agree to mediation, write a letter to the mediator requesting mediation.

If your case meets the basic eligibility requirements, a Preliminary Mediation Information form will be served upon the parties after the filing of a Notice of Appeal. The parties are required to respond to the form within ten (10) days. The Preliminary Mediation Information form requests that the Appellant provide a statement of the appellate issues, the type of case being appealed and any other pending appellate cases that may ultimately affect the resolution of the appeal.

Both the Appellant and Appellee are required to provide a detailed statement giving specific reasons why the case is or is not appropriate for appellate mediation. These responses are not disclosed to opposing counsel. The Preliminary Mediation Information Form also requests that copies of the Notice of Appeal and order appealed from be attached to the form. If the order appealed from is not detailed or informative, the Appellant should attach underlying motions or orders. These documents are of vital importance in the selection process.

Once the Preliminary Mediation Information Forms are received, the court mediator selects the cases appropriate for mediation. The Court is unaware of which cases are selected for mediation or are in the process of mediation. The mediation office operates independently of the court, and everything related to the mediation process is completely confidential. Cases are selected on a case by case basis based upon the mediator's perception of the appropriateness of the case for mediation after consideration of the facts, the order appealed from, the applicable legal authority and standard of appellate review.

After a case has been selected for mediation, a Notice of Mediation Conference is sent to the parties. The parties are notified of the date and time of the mediation conference. A case will be mediated by telephone conference if the parties and counsel are not within a 75 mile radius.[3] Participation in the mediation process is mandatory and there is no cost to the parties for the mediation services. The court mediator will mediate all appellate matters unless the parties request a private mediator. If a Notice of Mediation Conference is not received, the case has not been selected for mediation.

If a case is selected for mediation, attempts to facilitate a mediated settlement occur simultaneously with the uninterrupted appeal process. The fact that a case has been selected for mediation does not alter or extend the briefing process. Counsel may not cite mediation as a reason for an extension of time to file briefs and may not mention mediation in any motion or pleading filed with the clerk's office.

A mediation summary setting forth the facts of the case and assessing the legal merits, with citations to any statutory code or case law authority, is required prior to the mediation. The success and effectiveness of the process is facilitated by the mediator having a clear concept of the parties position prior to the mediation conference. The summaries are carefully reviewed and all case law and other legal authority are read and analyzed prior to the conference.

In preparing for the mediation, the selection of a proper party representative is critical. Where the party is a corporation or other business entity, it is vital that the attorney select the party representative with the greatest amount of knowledge and authority to participate in the mediation conference. Where an insurance company is a party, selection of the company's in-house counsel rather than an adjuster to be the party participant is generally a better choice. In-house counsel generally will provide better participation during the reality testing phase of the mediation conference.

The attorney should also describe the appellate mediation process and its objective to the client. The client

should be aware that the mediation process is informal, confidential and designed to assist them in making their own determination about the outcome of their dispute. The mediator exists solely to aid the participants in reaching their own decision and not to decide the case for them. The mediation should be viewed as a "team approach." The client should be informed that the attorney will be protecting the client's interest during the mediation but that being argumentative and adversarial is inconsistent with and counter-productive to the goals of the process.

It is important to have the attorney most knowledgeable about the appellate process attend the mediation. However, trial counsel, who generally has the most meaningful attorney-client relationship should participate in the mediation. It is essential that the client have the ability to confer with the attorney whose judgment is most trusted.

Active participation of the parties to the appeal is required at the mediation. Because mediation is a process that belongs to the parties, and the objective of mediation is to enable the parties to make their own decisions about the outcome of their dispute, it is essential that the parties themselves be directly involved and interact both with one another and with the mediator. The parties must come to the mediation with full settlement authority. All communications in the mediation conference are strictly confidential.

The initial mediation conference is 2.5 hours. The initial conference begins with a joint session, during which the mediator introduces herself and explains the nature of the process and how it will be conducted. It is critical that the parties understand that for purposes of the mediation everyone is on the same team working toward the common goal of reaching a mutually acceptable resolution to the dispute. The parties then proceed in joint session, after which the mediator meets separately with the parties in caucuses to perform reality testing with each side.

The mediator's role changes from joint session to caucus, but at no time does the mediator have any decision-making authority. During joint sessions, the mediator's role is to facilitate communications between the parties and their respective counsel. In separate caucus with each of the parties, the mediator functions as a reality tester and as a negotiator.

The First District utilizes a combination of the facilitative and evaluative mediation approaches. During joint sessions, the approach is typically facilitative and during separate sessions, it is largely evaluative, with some overlap depending upon the circumstances of the case and the relationship between the parties.

Facilitative mediation is mediation style by which the mediator acts as a facilitator of communications between the parties and assists them in: 1) determining what each side wants, prioritizing those factors and determining what is at the heart of the controversy; and 2) fashioning creative resolutions that enable the parties to achieve their desired result while compromising or even sacrificing the less important results.

Evaluative mediation is a mediation style by which the mediator acts as a reality tester. The mediator assists the parties in evaluating the strengths and weaknesses of their positions based upon the facts and supporting legal authority. The mediator also assists the parties in assessing the best and worst case scenario, thus enabling them to make a more informed judgment as to whether it is preferable to settle their case or to rely upon the litigation process. Evaluative mediation is essential in appellate mediation, particularly in those instances where "de novo" or "plenary" review is not the appropriate standard of review.

If the case does not settle after the initial mediation conference, an additional mediation conference may be scheduled if some progress has been made at the initial session and the mediator feels that one or more follow up sessions will be beneficial. Generally, the follow up conferences are much shorter in duration than the initial conference.[4] If the mediation process reaches an impasse, the appeal will proceed forward for a resolution on the merits.

Appellate mediation has proven to be an effective tool in resolving disputes at the appellate level. Appellate mediation has been effective even when pre-trial efforts were unavailing. The standard of review on appeal and the resultant limitations on the scope of the appellate court's review has a significant impact on the posture of the parties. Except in those rare instances when the applicable standard of review is *de novo* or *plenary*, the appellate court will not retry the case on its merits. This has become a vital factor in reaching a resolution of the dispute in the mediation process.

Appellate attorneys who practice before the First District can be assured that sooner or later their case will be selected for appellate mediation. Hopefully, this article has provided the appellate practitioner with an overview of the mediation process employed by the First District so that both the attorney and their client can approach the mediation with an informed insight.

Endnotes

[1] The Fourth District has proposed a mediation program but the program has not yet been established. It has requested two mediators to initiate the program and will also encourage private mediation.

[2] These statistics were referenced in *The Record*, Vol. VI, No. 3, March 1998 at page 12.

[3] Telephone conference mediations have been successful in the Eleventh Circuit Court of Appeals for the past five years. The majority of its mediations are conducted by telephone call. The First District Court of Appeal has sophisticated conference phone equipment with capacity for six outside lines, the same equipment utilized at the Eleventh Circuit.

[4] The attorneys should have their calendars to schedule a follow-up conference.

Information About the Judicial Management Council

The Judicial Management Council was created under rule 2.125, Florida Rules of Judicial Administration. The Council provides recommendations and guidance to the chief justice and the Supreme Court on issues having statewide impact. The Council is chaired by Chief Justice Kogan and consists of nearly 30 members who represent a cross-section of disciplines.

CHAIR'S MESSAGE

from page 1

Copperthwaite, Cindy Hofmann, Angela Flowers, and Chris Ng, we were able to bring you another excellent edition of the Florida Appellate Practice Guide. Chris, as many of you may remember, has been a tremendous contributor to the Section, starting with the very first edition of *The Record*. Since she gave up the reins of that publication, several have followed to continue producing a journal of exceptional quality. This year, Angela Flowers and Kim Staffa have upheld Chris's example and produced some of the best editions ever. Our CLE committee was able to bring back the "Inside the Eleventh Circuit" program, after a year hiatus. Through the efforts of Judge Kathryn ("Kitty") Pecko and her steering committee, I understand this program was a smashing success. If you missed it this year, be sure to sign up for the next installment. In addition, the CLE committee, through the leadership of Jack Aiello, developed and improved our co-sponsorship programs held in conjunction with other sections of the Bar. Thanks, Jack, for all of your efforts.

Next year kicks off early, with the Section's appellate workshop to be held at Stetson University College of Law. Through the hard work of Tom Hall, Judge Peter Webster, and the rest of the steering committee, I am proud to predict that this program will be hailed as groundbreaking. If you did not get to sign up for it this year, be sure to clear your calendar for next summer.

It has been a pleasure getting to know you all during the creation and development of the Section over the past several years; I thank all of you for your interest and efforts in helping make this Section what it is today, and for supporting me in my efforts to improve the caliber and professionalism of practice in the appellate courts.

INSIDE THE THIRD DCA

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description includes three distinct functions. As Career Attorney, Ms. Sargent serves as the attorney for the Third District, handling its day-to-day legal matters. She also serves as the Information Systems Administrator, which means that she coordinates matters concerning computer systems at the Court. If those tasks were not enough, Ms. Sargent also serves as the Third District's librarian. Ms. Sargent received her B.A. from Florida State University and her J.D. from Vermont Law School. Being admitted to practice in Vermont, Florida, and the District of Columbia and in several federal courts, Ms. Sargent practiced law for about five years, specializing in litigation of international trade matters, intellectual property law, and commercial law before joining the Court in 1990.

As remarked by the original author of this article, Roy D. Wasson, I found the Third District to be exceptionally helpful and open in updating the information contained in this article. On behalf of all appellate attorneys, I thank the entire court for their sage instruction and guidance in the art of appellate advocacy, which they freely dispense at frequent seminars and in countless opinions throughout the year. I also thank Mr. Wasson for writing such an exceptional article, and Ms. Sargent for her assistance in its update.

History and Jurisdiction of the Third District

The Third District Court of Appeal was one of the original three District Courts created by the Florida Legislature in 1957. The first judges on the Court were Tillman Pearson, Mallory Horton, and the late Charles Carroll. The Court convened in classroom facilities at the University of Miami while waiting for a new building the original judges thought was to be constructed with funds approved by the Legislature. However, the early Third District found itself caught in the cross fire between the faction that wanted the Second District to be located in Lakeland and the one that wanted the court to be headquartered in Orlando. Fears arose among the pro-Lakeland faction that — unless the money that the Legislature had set aside for building an appellate courthouse was used for constructing the Second District's building in Lakeland (instead of the Third District's building) — political pressures would result in the Second District being situated in Orlando. So the funds that the Third District had expected to be available for its building were used for the Second District instead, and the Third District convened in borrowed quarters at the University of Miami until 1960.

In 1960, the Third District moved into the top floor of the State Office Building on Northwest 12th Avenue in Miami, where it remained until 1976. There was discussion for a time of the Court moving in or near the County Courthouse in downtown Miami, but the judges decided against the move. In 1972, interested parties prevailed upon Dade County to donate to the State of Florida land in Tamiami Park, along Southwest 117th Avenue, next to the southern campus of Florida International University. A year or so later, the State budgeted funds for construction of a permanent building for the Court, and the Third District moved to its present location on July 1, 1976. A new wing was added to the building beginning in 1990.

While the Court's mailing address is 117th Avenue, a short turn onto Thomas Barkdull Way will take you into the Court's parking lot. The Third District is the only structure on Barkdull Way, the intersection of which with 117th Avenue is marked by a traffic signal and a distinctive street sign erected in celebration of Judge Barkdull's 30th anniversary

with the Court.

Although the state's largest single metropolitan area of Greater Miami is within its jurisdiction, the Third District comprises only two counties — Dade and Monroe — the fewest of any of the five districts. The Court does not have any permanent location other than in Miami. However, cases arising in Monroe County are sometimes set for argument in Key West or at Plantation Key and oral argument calendars are sometimes set at an area law school. Twelve judges now sit on the Court, including Judge Barkdull, who sits as a Senior Judge. A brief sketch of the historical background of all the district courts of appeal and the Florida Supreme Court may be found on the internet at "http://justice.courts.state.fl.us/courts."

Practice Before the Third District

Appellate attorneys who practice before the Third District regularly, should take pride in the response Roy D. Wasson received from the judges responding to the interview questions about what made the Third District unique among the DCAs. Of six judges who expressed a belief that there was some distinguishing characteristic about their Court, three said it was the superior quality of the appellate Bar practicing before it. The other three judges responding on that point mentioned the Court's liberality in granting oral argument and extensions of time, and the Court's greater focus on the merits of the issues over mere technicalities.

While new filings at the Third District dropped for a while in recent years, the numbers were up in 1993 when 3,018 new cases were filed and old cases reinstated. For each of the eleven judges on the Court during 1993, an average of 273 cases were disposed of, for a total disposition of 3,002. The Court is also busied by pre-decision motions, 10,580 of which were filed and decided that year.

In 1994, the Third District had 3,102 filings with 3,023 dispositions. In 1995, the Court's workload continued to increase with 3,772 new filings and 3,484 dispositions. The number of pre-decision motions also increased with 10,344 motions in 1994 and 11,578 motions in 1995.

The upward trend in filings steadied itself in 1996, with the clerk reporting 3,608 new filings excluding reinstatements. Of those cases, 3,565 reached final disposition. The number of motions for 1997 was 10,657, a significant drop from previous years.

Cases are assigned to a merits panel upon receipt of the record, the initial brief and the answer brief. You can find out who is on your merits panel when you arrive for oral argument on the morning it is scheduled and not before. Prior to that time, matters relating to cases are handled by the Chief Judge, a motion panel assigned to rule on matters arising before assignment to the merits panel, or the Clerk of the Court. Motions of a procedural nature (for example, motions to consolidate cases or for extensions of time) may be decided by the Chief Judge. Motions of a substantive nature (for example, motions to dismiss) are decided by a three-panel motion panel.

The Clerk of the Third District has the authority to dispose of certain unopposed routine motions for extensions of time. However, all matters of substance are ruled upon only by judges. For example, while research assistants summarize the parties' briefs, they are not permitted to opine on the merit (or lack thereof) of a party's position. The judges assigned to the case are sole decisionmakers on the questions of the correctness of a given proposition of law.

The practitioner before the Third District will enjoy enough time to adequately review the record, research the issues and prepare his or her principal brief, although the Court has taken steps to limit abusive delays in briefing cases, such as criminal cases involving short sentences. Absent abuse, the Third District recognizes time constraints imposed by other courts and other difficult circumstances under which appellate attorneys operate, and seems to view reasonable requests for extensions as in keeping with the policy of deciding cases on their merits. The Third District has admonished counsel for opposing without good cause reasonable requests for additional time. Therefore, attorneys "directed" by their clients to oppose all requests for extension would do well to consent to reasonable requests for extension (especially the first) anyway.

Further reflective of the Third District's policy of deciding cases on their merits, briefs will not be stricken — nor will appeals be dismissed — for harmless or trivial deviations from the Rules of Appellate Procedure. Unlike some other districts, the Third does not screen briefs for compliance with the typeface and spacing requirements of the Rules of Appellate Procedure. Therefore, readers are encouraged to overlook minor missteps by their adversaries and to address the substance of their cases, instead of cluttering the Court's files with motions for sanctions and the like which seek final decisions on matters other than the merits. Indeed, the latest drop in motion practice may well signal the success of the Court's unique approach to appellate practice.

However, the Third District's seemingly relaxed approach to such matters should not be misconstrued as a license (much less an invitation) to ignore the Rules of Appellate Procedure. One of the judges from the Third District interviewed counseled practitioners that the technical requirements for briefs and other provisions of the appellate rules generally are written to ease the judges' task of reading and understanding the briefs, and that practitioners would be well-advised to follow the Rules' requirements to facilitate the Court's consideration of each case on its merits. Compliance with such requirements carries with it the practical advantage of enhancing the judges' consideration of the substance of the case, so the Rules should be followed if for that reason alone. Judge Barkdull also noted that the most readable and polished of briefs are those that are professionally printed. Readers should consider filing printed briefs, especially where longer briefs are necessary.

Although already appreciative of the caliber of the appellate Bar and the quality of work generally before them, several of the Third District judges provided a number of useful hints in brief writing, presentation of oral argument, and other areas that

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may be of aid to the practitioner appearing before the Court. Meeting the Third District's judges' expectations in brief writing is not much different from writing briefs for any of the other Districts Courts of Appeal. Judge Nesbitt encourages the practitioner to take the time in brief writing to edit thoroughly, removing unnecessary materials and distilling the product into the shortest possible document that still conveys the message that must be presented to the Court. Judge Nesbitt reminds the brief writer to be creative in crafting the brief, observing that there is "no limitation upon the innovation and imagination of good lawyers, within good taste and reason," in creating a brief to make it interesting and informative.

Those judges of the Third District expressing an opinion on the subject share the belief held by appellate judges from other courts that shorter briefs are generally preferable over longer ones. More than one of the Third District judges discussing the subject agreed that three points on appeal are enough in the typical case.

Aside from the length of briefs and the number of issues addressed, judges made other suggestions for making briefs more readable. One practical suggestion is that the practitioner review each of the copies of a brief filed with the court, not just the original. Judge Jorgenson related that it is not an uncommon experience for copies of briefs to be filed with missing or juxtaposed pages, notations not intended for review by the Court, and other conditions not conducive to persuading the reader.

Two judges noted that the Third District is liberal in permitting appellees to restate facts in their answer briefs. The practitioner should not just correct erroneous facts, but restate enough of the uncontested facts to place corrections in context.

One judge has expressed his suggestion in numerous seminars that the most important section of the brief remains the summary of the argument. It should be written first, partly because it serves as an an outline for the balance of the brief, and partly because it serves to sharpen the focus of the writer thereby enhancing persuasion. Finally, on the topic of briefs, Judge Nesbitt reminds us that the practitioner must state with precision each form of relief sought and not assume that the Court knows what he or she wants to occur after a decision is reached.

In addition to preparing succinct and polished briefs, there are other practical ways of assisting the judges in performing their function. A practical pointer from Judge Barkdull is that attorneys should be selective about what materials are requested to be included in the record. There is no need in most cases to direct the clerk to include all papers filed in the lower tribunal, the weight and bulk of unnecessary filings renders it unduly burdensome for a judge to review the pertinent materials. The longer the judge spends wading through irrelevant documents, the less time remains to consider the part of the record that supports the position of the advocate.

Similar suggestions from more than one of the judges are that the practitioner use discretion in including items in the appendix, and to separate the appendix from the brief, rather than filing both documents in a single bound volume. That request makes it easier for the judges to carry your brief with them and easier to find important papers in the appendix, thereby increasing the likelihood that they will be read at a convenient time and place, and increasing the impact of the written presentation.

Unlike some of the other districts, the Third District has no official policy on any sort of brief binding or fastener to be used. With one exception, those judges who discussed the issue — like most of those from other districts who had commented on the question — agreed that brief covers that permit briefs to remain open at any page are the preferable type, especially compared to those brief covers that require manual pressure to keep the briefs open. In a long dissenting position set forth at a meeting of the Appellate Rules Committee (obviously intended to poke good-natured fun at all the time and energy being expended on the great brief-binding controversy), Chief Judge Schwartz expressed his preference for a single large staple inserted through the dead center of each copy of the brief (not the top center, the left center, right center, nor the bottom center, mind you!).

Returning to the serious, Joanne Sargent reminds the readers that most filing requirements of the Third District are either spelled out in the Rules of Appellate Procedure or are simply common sense requirements shared by other districts. However, she notes the following, based on frequently encountered trouble spots:

1. When filing a Notice of Appeal file the original and one copy in the lower court with a $250.00 filing fee payable to the Clerk, Third District Court of Appeal, or include a Certificate of Insolvency. Include the lower court number and judge's name in the upper right hand corner. Be sure to include a conformed copy of the order under review. There is also a fee for the lower court, payable to the lower court.

2. When filing a petition for an original writ, file the original and three copies in the Third District with a $250.00 filing fee payable to Clerk, Third District Court of Appeal. All petitions for original writs should include addressed, stamped envelopes for all parties including yourself. Habeas Corpus petitions or appeals therefrom do not require a filing fee.

3. When filing a Notice to Invoke the jurisdiction of the Supreme Court, file the original and two copies, a copy of the opinion and the order denying rehearing, and a $250.00 filing fee payable to Clerk, Supreme Court.

4. File an original and three copies of the appendix, securely bound. Do not attach the appendix to the brief. Be sure to index the appendix.

5. In all filings, include a certificate of service, indicating the name of the attorneys, their firms and who represents whom. Also, include The Florida Bar number of the filing attorney.

6. When filing a motion for extension of time, provide the court with the original and copies of the motion for all counsel involved, including addressed, stamped envelopes. The purpose of the copies on a motion for extension is to enable the Court to

note the disposition of the motion directly on the copy and to mail it to record counsel, without tying up the Clerk in preparing separate orders.

7. All motions other than motions for extensions require only the original to be filed. The Third District prepares its own orders. Do not provide proposed orders when filing motions, but do include addressed, stamped envelopes for all counsel involved.

8. When filing motions, recite whether your opponent has an objection to the motion.

9. On motions to withdraw, the attorneys filing the motion must be sure to serve the party being represented.

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

11. When providing directions for inclusion of exhibits in the record on appeal, do not designate any tangible evidence without prior permission of the Court. This applies especially to drugs, firearms, explosives, x-rays, and heavy or bulky items such as large maps, photographs and graphs.

12. Copies are made by court personnel only. Please call to be sure that the file is available for viewing. The copying fee is $1.00 per page. The Court does not make change, so exact change or a law firm check is required. The Court does not mail copies without prepayment of both the copies and postage. When visiting the Court to make copies, it is preferred that you come in the afternoon to have copies made.

Oral argument is virtually a matter of right in the Third District. The judges frequently comment that oral argument helps the Court keep current in its disposition of cases, providing a point in time at which each judge on the panel is simultaneously familiar with the case and the law applicable to it. Merits panels at the Third District do not "pre-conference" cases; that is, they do not meet to make a preliminary decision on the case before oral argument. Thus, while the individual judges no doubt have some preliminary opinions at the time of argument, there has been no tentative vote taken and the appellate attorney has a clean slate upon which to draw for the panel as a whole at the time of oral argument.

The Chief Judge screens each case in which a request for oral argument is made — not to determine which appeals will be set for argument, but to determine the amount of time that will be allotted (ten, fifteen, or twenty minutes) — depending upon such matters as the complexity of the case and the number of issues presented. Other cases in which no argument has been requested by either party may be set for argument anyway.

The practitioner can expect that each case in which argument is requested will be scheduled for the next available argument calendar following the time the answer brief is filed. Sometimes the next available date is less than a month away, so the appellant's attorney should plan on filing his or her reply brief (if any) promptly in a case in which argument has been requested.

Oral argument before the Third District should be viewed as a welcome opportunity to answer questions from the bench, rather than a mere regurgitation of the contents of the written presentation. Chief Judge Schwartz relates that the Third District has evolved from one of the "coldest" benches in Florida (asking few questions during argument) to one of the warmest. The advocate must view each question as an opportunity to educate not only the questioner, but the other panel members for whose benefit the question may have been posed in the first place. One of the sources for the article quoted another member of the Third District as counseling oral advocates as follows: "Your task is to capture the imagination of one of the members of the panel . . . and make him [or her] your advocate."

Judge Nesbitt provided good advice for conducting oral argument before the Third District: "Your oral presentation should be an informal matter. Just imagine that you are standing at your backyard fence, talking to three fairly intelligent neighbors, and tell them how your client has been aggrieved and what should be done about it."

Judge Levy also suggests that counsel avoid using a great deal of time on the facts of the case. Each of the judges on your panel has read the briefs and is familiar with your case, so a short recitation of the nature of your case is generally sufficient to remind the panel what case you are arguing and to set the stage for discussion of the legal issues. If you should run out of time before you are finished due to questions from the bench and not because you have wasted your time, the Court generally will entertain a request for a minute or two more to make your final points, but it is preferable to limit the factual recitation to a minimum to conserve your available minutes.

The Future and Concerns of the Court

Despite a steady level of filings in recent years, the Court is immensely concerned with the general increase in the number of filings across Florida. Moreover, with the Constitution Revision Commission considering proposing new jurisdictional boundaries and new and expanded rights, it is inevitable that increased litigation will affect appellate courts. The impending revision of the Consitution portends an active appellate Bar.

Florida boasts the largest number of appeals filed as a matter of right of any state, behind only California. Rapidly changing laws seem to be as much a factor underlying the large number of appeals as any factor. For example, the enactment of and amendments to sentencing guidelines is said to have increased appellate filings by fifteen percent. The Third District has the physical space to house up to six more judges to cope with future growth, although the maximum number of judges thought to be able to operate as a collegial body is fifteen.

The Third District is positioning itself to be aware of and have input in proposals for change in the appellate process being discussed across the state. Indeed, Judge Barkdull serves on the current Florida Constitution Revision Commission. Judge Barkdull has also, as a member of the Article V Task Force created by the 1994 Legislature to study and recom-

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mend changes to the judicial system, proposed changes that will assuredly impact the appellate courts. Judge Cope heads the Appellate Rules Committee. Judge Schwartz serves as a member of the Civil Procedure Rules Committee, and is very active in issues affecting the judiciary. The Court also boasts a former Attorney General in Judge Shevin, which could only increase the already lofty stature of the Court. These are just a few examples. It must be noted that the other judges are equally involved in myriad committees seeking as a goal the improvement of the administration of justice in Florida. Thus, with a keen eye on the future, this Court has truly placed itself on the forefront of impending changes in the appellate process.

The Judges of the Third District

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

Thomas Barkdull, Jr., is truly the Dean of appellate judges in Florida, having served on the Third District longer than any other appellate judge in any court in the State. In December 1996, Judge Barkdull retired but was reappointed the following month at the request of Chief Judge Schwartz to serve at the Third District as a Senior Judge, an appropriated position available to requesting courts. When Judge Barkdull joined the Third District in 1961, there were only fourteen DCA judges in Florida. Judge Barkdull was born in Miami and received his law degree from the University of Florida in 1949, after undergraduate studies at the University of Tennessee and the University of Florida, and after having served in World War II as a member of the United States Army Air Corps. He practiced law on Miami Beach from the time of his admission to the Bar until appointed to the Third District in 1961. During his practice, he was a partner with the late Marion E. Sibley, the late Darrey Davis and with the former Chief Judge of the Federal District Court, Southern District of Florida, Judge James Lawrence King. While in practice, Judge Barkdull was admitted to the United States Supreme Court, the original Fifth Circuit Court of Appeals and several federal district courts. He served as counsel to the Dade County Commission, was counsel to the Rules and Calendar Committee of the House of Representatives of the Florida Legislature and was a member of the Board of Governors of the Florida Bar. After appointment in 1961, Judge Barkdull was elected to the Court in 1966 and 1972, and was retained as a judge in merit elections in 1978, 1984 and 1990. He was elected chief judge by his colleagues in 1963, 1972, 1973 and 1975. He resigned as chief judge in 1977 after the main building of the present Third District Court of Appeal complex was completed, and has declined to be considered as chief judge since that time. While serving on the Court, Judge Barkdull has been chairman of the Appellate Judges Conference, a member of the Judicial Qualifications Commission for 25 years and has served as its chair. He was appointed by the Florida Supreme Court to the Constitution Revision Commissions of 1965-68, 1977-78 and 1997-98. He also has been appointed by the Supreme Court to the Special Committee to Implement the Standards for Criminal Justice, the Court Efficiency Committee and the Judicial Council. He was appointed by the Governor to the Task Force for the Review of the Criminal Justice and Corrections Systems, created by the 1994 Legislature. He is a founding member of the American Inn of Court at St. Thomas University. He has received the Good Government Award from the State Junior Chamber of Commerce, the Distinguished Service Award on two occasions from the Miami Beach Bar Association and Distinguished Service Award from the Florida Bar Foundation Medal of Honor in 1994. He has been a guest lecturer at the University of Florida College of Law, the University of Miami School of Law, Stetson University College of Law and the Law School at Yale University.

Gerald B. Cope, Jr., married and the father of one daughter, was appointed to the Third District Court of Appeal in December of 1988. Before his appointment, he practiced law at Greer, Homer, Cope & Bonner, P.A., and Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. Judge Cope has held administrative positions in the Florida Division of Youth Services and the Florida Department of Health and Rehabilitative Services. Judge Cope is a member of the Eugene P. Spellman American Inn of Court, which is affiliated with the University of Miami School of Law. He serves as the Chair of the Appellate Court Rules Committee. He received his undergraduate degree from Yale University and his J.D. degree from Florida State University College of Law. He was elected to the Order of the Coif and served as Editor-in-Chief of the Florida State University Law Review. Judge Cope participated in the University of Virginia Graduate Program for Judges, and received his L.L.M. from the University of Virginia Law School.

John G. Fletcher was admitted to The Florida Bar in 1962. He joined the Pinellas County Attorney's office where he practiced as an assistant county attorney (and chief assistant) until August 1967. While in the Pinellas County Attorney's office, he was admitted to the United States District Court for the Middle District of Florida, and the Florida Public Service Commission. In August 1967, he joined the Dade County Attorney's office as an assistant county attorney (later a first assistant), practicing there until August 1973. While there, he was admitted to the United States District Court for the Southern District of Florida, the United States Fifth Circuit Court of Appeals, and the United States Supreme Court. Judge Fletcher began his own practice in 1973, remaining a sole practitioner until Governor Lawton Chiles appointed him to the Third District Court of Appeal in 1996. During his private practice, he was the City At-

torney for the City of Naples and the City of Sweetwater, and represented various governmental agencies as special counsel, including the municipalities of North Miami, Miami Beach, Hialeah, Hialeah Gardens, Miami Springs, and North Bay Village. He was also special counsel to the Dade County School Board and to the Broward County Expressway Authority. Judge Fletcher taught state and local taxation as an assistant adjunct professor at the University of Miami from 1971 to 1973. He also lectured at various continuing legal education seminars on local government, environmental law, land use law and professional ethics. Since 1989, he has been listed in the Best Lawyers in America. Born in Philadelphia, Pennsylvania, in 1937, Judge Fletcher moved with his parents to Dunedin, Florida in 1952. He graduated from Clearwater High School in 1955, received his B.A. from the University of Miami in 1959, and his law degree from the University of Florida in 1962. He married Donna Gould Fletcher in 1965 and they have two children, John G. Fletcher, III, and Rebecca L. Fletcher.

David M. Gersten attended the University of Florida, where he earned his B.A. in 1973 and his J.D. in 1975. He continued his education with courses and seminars at the University of Nevada and Harvard University. He was admitted to The Florida Bar in 1975, the United States District Court, Southern District of Florida in 1976, and the Colorado Bar in 1989. Judge Gersten was in private practice from 1975 until 1980, when he was elected to the Dade County Court. In 1982, he was elected as a Circuit Court Judge for the Eleventh Judicial Circuit and was subsequently reelected in 1988. In 1989, he was appointed to the Third District Court of Appeal. Judge Gersten serves the community in various legal organizations and civic programs. His activities in the past and present include memberships with The Florida Bar's Judicial Administration Selection and Tenure Committee, and the Government Lawyer's Section; the Florida Association for Women Lawyers, the American Trial Lawyers Association and B'Nai B'rith's Bench and Bar Division. Judge Gersten has been honored by Boy Scouts of America's District Award of Merit (1991); Deed Club Children's Cancer Clinic's Deed Award (1978-84); Grand Founder's Award (1988); The Benjamin Franklin Society's Library Award (1987); and South Florida Magazine Best Judge Award (1985). He was admitted to the Florida Blue Key Honor Society, University of Florida, in 1972. In addition, Judge Gersten has lectured and published articles in various legal topics. His lectures have included : "Elderly Offenders — Their Frequency and Patterns, and What to Do With Them" (1984); "Oral Argument" for the Dade County Bar Appellate Court Committee Seminar (May 1990); and "Lawyers on the Judicial Selection Process", for the Florida Association of Woman Lawyers Seminar (May 1990). His publications in The Florida Bar Journal: "A Consensus of Morality in Ethics — Toward a Comprehensive Code of Professional Ethics" (1991), and "Manifest Necessity — A Trial Judge's Responsibility to Assure Justice" (1989). Most recently, Judge Gersten authored "Florida Civil Procedure, Authority and Forms — From Start to Finish," available only on Matthew Bender CD-Rom.

Mario P. Goderich was born in Santiago de Cuba, Oriente, Cuba. He has a son Mario and a daughter Marcia. He came to the United States in 1961 and has resided in the Miami area since that time. He graduated from the University of Miami Law School with a J.D. in 1966. Judge Goderich was Associate Law Librarian at the University of Miami when he graduated from law school, and later became the University of Miami Law Librarian. Prior to his arrival in the United States, Judge Goderich earned his Doctor of Civil Laws Degree from the University of Havana in Cuba and was a partner in the Havana law firm of Castellanos & Goderich. He was also a Professor of Law before being appointed a Judge of Industrial Claims Court in 1975 by Governor Reuben Askew. In 1978, he was appointed as Circuit Court Judge for the Eleventh Judicial Circuit by Governor Reuben Askew and was reelected unopposed in 1986. In March of 1986, he was presented "The Lawyer of the Americas Award" by the University of Miami InterAmerican Law Review. Throughout his career he has published several works on international law, legal research and comparative law. Judge Goderich was appointed to the Third District Court of Appeal by Governor Bob Martinez for a term beginning January 2, 1990. He is currently a member of The Florida Bar and the Cuban American Bar Association.

Melvia B. Green was appointed to the Third District in April 1994. Before joining the Court, Judge Green sat with the Dade Circuit Court from 1989 until April of 1994 and was a County Court judge from 1987 to 1989. Before becoming a judge, she was a litigator with the Miami Office of Morgan, Lewis & Bockius, served as an Assistant United States Attorney, and gained experience as a Staff Attorney for the Florida Power Corporation. Judge Green has been active with the Eugene P. Spellman Inn of Court, a faculty advisor for the National Judicial College, and has been a member of numerous civic and Bar organizations. Judge Green received her J.D. degree from the University of Miami School of Law in 1978, where she was honored as a member of the Dean's List and received a Senior Academic Scholarship. She was awarded her Bachelor of Science degree from Northwestern University in 1975, where she was a member of Alpha Lambda Delta, was on the Dean's List for all four years, and recipient of an academic scholarship. Judge Green has one child. She balances motherhood with numerous activities, having received honors including the 1990 Outstanding Government Model, the 1990 Outstanding Community Leader in the Judicial System, the 1989 Achievement Award presented by the Negro Business and Professional Women's Association, and was named an Outstanding Young Woman of America in 1985.

James R. Jorgenson was born in Kansas City, Missouri, and has been a resident of Miami for over 40 years. He is married and has three sons and one daughter, and three granddaughters. He served with the United States Air Force between 1957 and 1960. While a police officer with Metro Dade Police Department, he received his A.S. degree from Miami

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Dade Community College. Judge Jorgenson graduated from Florida State University with a B.S. in Criminology in 1966. In 1968, he received his law degree from Florida State University College of Law. Following law school, Judge Jorgenson was a Ford Fellow at Northwestern University. He worked as an attorney for the Metro Dade Police Department from 1969 through 1976. He was in private practice with Kreeger & Kreeger between 1976 and 1977 and then joined the Office of the Dade County Attorney as an Assistant County Attorney. In 1977, he was appointed a Dade County Court Judge and, in 1978, was elected to that position. Judge Jorgenson was appointed to the Circuit Court for the Eleventh Judicial Circuit in 1979, and then elected circuit judge in 1980. He served as the administrative judge of that court's criminal division between 1980 and 1981. Governor Bob Graham appointed him to the Third District Court of Appeal in 1981. Judge Jorgenson received an L.L.M. in 1984 from the University of Virginia School of Law. He is a member of the American Law Institute, the American Judicature Society, the Institute of Judicial Administration and the American Bar Association. Within the ABA, Judge Jorgenson belongs to the Judicial Administration Division and the Criminal Law Section. He served as a member of the Advisory Committee of the ABA Standards of Criminal Justice. He chairs the Conference of Appellate Judges' Security Committee and is a member of the Project Management Committee.

David L. Levy, married and the father of three, was born and raised in Miami, Florida. He attended Florida schools through the university level, receiving a B.A. in Government from the University of Miami in 1965. He obtained his J.D. from the University of Tulsa College of Law in 1968 where he was named to the Dean's Honor Roll. Judge Levy began his professional career in 1968 working as a full time junior high school teacher. In 1970, he was appointed to the position of Assistant State Attorney for the Eleventh Judicial Circuit of Florida and served there for eight years in a variety of capacities. He was Chief Prosecutor for the Organized Crimes and Public Corruption Prosecution Unit from 1973 to 1978. In January of 1978, Judge Levy was appointed to the position of Circuit Judge for the Eleventh Judicial Circuit and served in the criminal division for three years. In 1980, he was assigned to the General Jurisdiction Division of the Circuit Court, which encompassed civil and family law matters. In addition to those responsibilities, he was assigned, in 1979, to serve on the Appellate Division of the Circuit Court where he remained until 1989. He was also appointed to serve as an Associate Judge of the Fourth District Court of Appeal in 1985 and 1986. In January 1989, he was appointed to the Third District Court of Appeal. Judge Levy's commitment and strong interest in teaching is very evident. He has taught as Adjunct Professor at several Florida colleges continually since 1977. Some of the courses he taught include Criminal Law, Family Law, Trial Preparation, Business Law, Professional Responsibility and Trial Practice and Appeals. Judge Levy's professional achievements have been recognized by a variety of civic organizations. He has also consistently received favorable ratings of 90% or better in polls conducted by The Florida Bar, the Dade County Bar and the Cuban American Bar for being a qualified jurist. In addition, he was named as a member of Who's Who of Florida in 1982.

Joseph Nesbitt was born in Leesburg, Florida. The Judge and his wife, the Honorable Lenore Carrero Nesbitt, have two children. Judge Nesbitt earned his B.A. degree from the University of Florida in 1951 and his L.L.B. from the University of Miami in 1957. Judge Nesbitt served in the United States Army from 1952 to 1954. He practiced law with his wife until he was appointed to the Eleventh Judicial Circuit, where he presided in the general jurisdiction and probate division. Judge Nesbitt was appointed to the Third District Court of Appeal in 1979. Since that time, he has represented the district courts on various committees and also has served as Chairman of the Conference of District Judges.

Alan R. Schwartz was born in Pittsburgh, Pennsylvania and is the married father of three children. He graduated magna cum laude and Phi Beta Kappa from Harvard College, receiving his L.L.B in 1958. He practiced with the law firm of Nichols, Gaither, Green, Frates & Beckham and successors from 1958 through 1965. Thereafter, he was a member of the firm of Horton, Schwartz & Perse, which specialized primarily in appellate practice, from 1965 through 1973. In 1973, Governor Reubin Askew appointed Judge Schwartz to the Circuit Court. He was re-elected without opposition in 1974 and served there until 1978 when he was appointed to the Third District Court of Appeal. Judge Schwartz was elected Chief Judge by his colleagues in 1983 and has been continually been re-elected as the Chief Judge. Throughout his legal career, Judge Schwartz has been involved in many professional organizations and committees. He served as President of the Conference of Florida District Court of Appeal Judges in 1982. He has been a member of the University of Miami School of Law Visiting Committee since 1982, as well as the Florida Commission of Matrimonial Law. Judge Schwartz also served as President of the Harvard Law School Association of Florida from 1981 through 1982. He has been a member of the American Law Institute since 1987, and the Judges Consultative Group on Principles of the Law of Family Dissolution since 1990. In 1983, he received the Outstanding Jurist Award from the American Academy of Matrimonial Lawyers. Judge Schwartz served on the Florida Bar Civil Procedure Rules Committee from 1963 through 1967, and from 1988 to the present. He has served on the Appellate Rules Committee.

Robert L. Shevin was appointed to the Third District Court by Governor Chiles in 1996. Judge Shevin was a senior litigation partner in the Miami office of Stroock & Lavan prior to being appointed to the Court. Judge Shevin entered the public arena in 1964, when he was elected a member of Florida's House of Representatives. From 1966 to 1970, Judge Shevin served as a Florida

State Senator representing Dade and Monroe Counties, and chaired the Florida Legislature's Select Committee to Investigate Organized Crime and Law Enforcement. Judge Shevin was elected Attorney General of the State of Florida in 1970 and was re-elected, without opposition, to a second four-year term in 1974. He was the first Attorney General to argue and try cases on behalf of the State of Florida before the United States Supreme Court, the Florida Supreme Court , the United States Court of Appeals, the United States District Courts, and various Florida District Courts of Appeal. He personally argued and won two cases in the United States Supreme Court, one upholding the constitutionality of Florida's death penalty law, and the other upholding the constitutionality of Florida's far reaching Oil Spill Prevention Act. In 1979, Judge Shevin resumed the private practice of law. He also served as the City Attorney for the City of Miami Beach from 1979 to 1980. From January 1979 to February 1988, he was a shareholder in the firm of Spaerber, Shevin, Rosen, Shapo & Heilbronner. He then moved to Stroock & Stroock & Lavan. Judge Shevin maintains memberships in Florida, Dade County, American, and International Bar Associations. He is also a member of the American Trial Lawyers Association, the Society of Attorneys General Emeritus, and the American Judicature Society. An active community leader, Judge Shevin has served as Chair of the Housing Finance Authority of Dade County, and Chair of the Florida State Athletic Commission. He also served on the Board of Dade Partners for Safe Neighborhoods. Judge Shevin has been a member of the Legislature's Interim Study Committee on Urban Affairs, the Florida Tax Reform Commission, the Florida Constitution Revision Commission, Florida Citizens Against Crime, Florida Crime Commission, Judicial Reform Committee, Florida Senate's Sunshine Advisory Committee, Board of Trustees, Beacon Council, the Federal Judicial Nominating Commission of Florida (1995-1996), Florida Bar Judicial Administration, Selection and Tenure Committee (1995-99). Judge Shevin was born in Miami, Florida on January 19, 1934. He is married to Myrna Bressack. They have three children, Laura, Hilary, and Harry, and three grandsons. Judge Shevin earned his B.A. from the University of Florida in 1955, and graduated magna cum laude in 1957 from the University of Miami School of Law. While at the University of Florida, he was a member of Florida Blue Key and the Hall of Fame. At the University of Miami, he was President of the Student Bar Association, a moot court competition winner, an editor of the University of Miami Law Review, and a member of Phi Delta Phi Law Fraternity and Iron Arrow.

Rodolfo Sorondo, Jr., was appointed in January 1997 by Governor Lawton Chiles to the Third District Court of Appeal. In 1975, Judge Sorondo received his undergraduate degree from the University of Miami. In 1978, he received his Juris Doctor degree from the University of Illinois. Judge Sorondo's legal career began at the Dade County State Attorney's Office, where he served as an Assistant State Attorney from 1978 to 1980. He was in private practice until 1992, when Governor Chiles appointed him to the circuit bench where he remained until his appointment to the Third District. Judge Sorondo is a member of the United States District Court, Southern District of Florida, Fifth Circuit Court of Appeal, Eleventh Circuit Court of Appeal, United States Supreme Court, Cuban American Bar Association and the Dade County Bar Association. He is also an Adjunct Professor at the University of Miami School of Law, and a Faculty Member of the College for Advanced Judicial Studies. Judge Sorondo is married and has two children.

In Memoriam

Any update of this article would be remiss if it did not mark the passing of the late judge Natalie Baskin, who served the Court with distinction from 1980 until her untimely death on March 11, 1996. Aside from being the first woman appointed to the Third District, she also distinguished herself as a champion for individual rights, leaving an indelible imprint on the State's jurisprudence. For example, in 1994, Judge Baskin authored the opinion that allowed flight attendants to sue tobacco companies over the effects of second-hand smoke. In 1991, Judge Baskin, breaking with the common law, boldly fashioned a sharp decision establishing under Florida law the right of a woman to sue her husband for abusive conduct.

Born in Brooklyn, N.Y. during the Depression, she would later move to Miami in 1948, where she married Leonard Baskin. Remarkably, in the early 1960s, at a time when here were few female law students, Judge Baskin enrolled and graduated from the University of Miami School of Law. For nine years, she would practice criminal and civil law before being elected a circuit judge in 1974. A scant six years later, she was appointed by Governor Bob Graham to the Third District Court of Appeal, where she was well-loved and respected by her peers and practitioners before that court. Her colleagues and, indeed, the entire appellate Bar continue to mourn her passing.

Conclusion

Whether you are one of the "regulars" often seen in the mornings turning from 117 Avenue onto Thomas Barkdull Way for an oral argument before the Third District, or as yet a stranger to Court, this article should provide more of an understanding of the composition and unique characteristics of the Third District Court of Appeal. Easygoing on extensions and technical requirements, yet no-nonsense when it comes to addressing the merits of each case, the Third District is truly one of a kind.

Endnotes

[1] The original version of this article appeared in the August 1994 edition of The Record and was prepared by Roy D. Wasson of Miami with assistance from Joanne Sargent, Third DCA Career Attorney. This version of the article was updated by Alberto Gayoso of Miami, also with assistance from Ms. Sargent.

Impressive Legalese

by Paul Morris

Although reading The Record shows you specialize and must know your stuff, in today's competitive legal world, it is simply not enough. You should also master the difference between "good legalese" and "bad legalese." Here is an example of "bad legalese": "The plaintiffs sued the defendants." Now, contrast that with this example of "good legalese": "*Sub judice*, the plaintiffs, *etc., et alia*, brought the *qui tam* cause of action, *vel non*, *e.g., per diem veni vidi vici*." The difference should be obvious. The sentence with the "good legalese" has italicized words.

Most attorneys are unfamiliar with such "good legalese" either because: (a) they are not appellate judges or appellate lawyers; (b) they have never read appellate decisions; or (c) they have not yet disparaged opposing counsel in writing either with quotes from Alice in Wonderland or by using the word "arcane."

One puzzled board-certified appellate attorney recently lost a prospective client to a non-certified attorney. When by chance he later saw the client, he asked how the choice of counsel was made. The certified attorney was surprised at the client's answer: "You have a great reputation, and it's true you are board certified, but when I learned how many more italicized words were being used by your competition, the decision became obvious."

This glossary will give you the powerful good legalese expected of an appellate attorney. These words and phrases will also make you more persuasive in the eyes of trial judges who will discern from your language that you have the means for obtaining reversals from the appellate courts. Be sure to notice how many of these words look good in italics no matter how inappropriate.

Infra, contra, supra and accord: These words are mistakenly used interchangeably but actually have different meanings. The first means "look somewhere else in this document." The second has something to do with Nicaragua and is controversial so don't use it. The others are Japanese automobiles. Watch for the latest sport utility vehicle, the Mercedes *Pauperis*.

In loco parentis: how teens view their mothers and fathers.

Mandamus: not to be confused with that movie "Mandingo," where prizefighter Ken Norton commenced his spectacular film career. However, you are just as likely to obtain judicial relief from filing a petition for writ of mandamus as you are renting the movie "Mandingo."

Federal habeas corpus: thanks to the presently-composed Supreme Court of the United States, this phrase is now an oxymoron.

Oral argument: an opportunity for the appellate judges to give false hope to the losing party.

En banc oral argument: an opportunity for the judges on the original panel to explain to the other judges why they were correct.

Rehearing: a synonym for "denied."

Conflict certiorari: what the Supreme Court of Florida says it is exercising when it disagrees with a district court opinion.

Certified question of great public interest: when you win in the district court of appeal and your client cannot afford any further review, the district court of appeal "certifies the question" to the Supreme Court of Florida for you (where, by the way, you will lose). See *pro bono*.

Pendente lite: A hanging ornament with fewer calories.

Sui generis: Those heaping portions served at Chinese restaurants.

Sub silentio: Literally "quiet submarine." Use this term when analogizing to Tom Clancy or Jules Vernes' books.

Pro bono: derived from a phrase that means "as Cher's first husband and business partner, the late great Sonny Bono, did for her." For example, if a lawyer says: "Your Honor, I am representing this client pro bono," the lawyer is actually saying: "Your Honor, I am selflessly helping the client, the client will come into lots of money after I have finished with the case, the client will never appreciate what I have done, and I can get elected mayor in a rich seaside town in California."

Et al.: This is obvious. For example: "When Joe and Al went shark fishing and Al fell overboard, the shark *et al*."

Writ of coram nobis: Disposing of a very expensive watch, as in: "I went broke so I got writ of my coram nobis."

Writ of prohibition: What the 21st amendment got.

Rule of lenity: This is what happens whenever you ask the surly waitress if the pastrami is lean. The surly waitress will always respond: "If you want lean, order something like corned beef." See also "equitable lean."

Ne exeat: This is the command you give to a horse named "Exeat" when you want him to speak. I once placed a bet on "Exeat." (The horse is presently in a children's petting zoo).

You have just read the most critical words and phrases expected of an appellate specialist. You might want to clip this glossary and keep it on your person for easy reference. On the other hand, it is not too late to make more money and be more appreciated (*e.g.*, *i.e.*, take the plumber's exam).

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Remembering Bertha Claire Lee: A Lawyer's Lawyer

by Keith Hope, Tallahassee

Florida is blessed to have a large number of appellate lawyers, many very good ones, and a few who are or were truly great and who deserve to be called "a lawyer's lawyer." Bertha Claire Lee of Miami, who died on December 27, 1997, was one of the truly great. Her talent, ability, determination, and dedication to excellence in appellate practice was admired by many of the bench and bar who had the privilege to work with her and read her briefs. This article is written both as a tribute to her and her career and for those of you who never knew her but who aspire to be great appellate lawyers. Her life and career serve as an example and an inspiration to all of us.

Bertha was a second generation Floridian, a child of a pioneer family which settled in Key West in the early 1890's. Her family moved to South Florida in 1919. Her parents were founding members of Temple Israel, where she was a member of the first Confirmation class in 1927. After graduating in the first class of Miami Senior High School, she attended and received her BA degree from Vanderbuilt University, following a family tradition of higher education. She also pursued graduate studies at Colombia University. She was a school teacher until her marriage, at which time she became a full-time housewife and mother of two children.

After a bitter divorce and child custody dispute, she, like other women of the '50's and '60's, became disenchanted with the legal system believing that they had been treated poorly at the courthouse by lawyers and judges in divorce matters. Bertha decided to do something about it and enrolled in the University of Miami Law School in 1955 at age 41. At that time the law school had 300 students and Bertha was one of only four women—one of whom became her close friend, the Honorable Lenore C. Nesbitt, United States District Judge for the Southern District of Florida.

With her undaunted spirit, superior intellect and enthusiasm, she took on her legal studies with a vengeance. She also possessed a memorable feminine flair — she wore beautiful clothes, high heels and fine jewelry to class, seeing no reason to dress like a traditional student. Bertha had an outstanding law school career, became editor in chief of the law quarterly and received other prestigious legal awards. Her law review article on libel caught the attention of Melvin Belli, the self-proclaimed "King of Torts."[1] While still a law student, she helped him and her cousin, Paul A. Louis, prepare for the trial of a libel case and Belli was greatly impressed with the quality of her work.[2]

Upon graduation, Belli persuaded Bertha to join his San Francisco firm. After a year, she missed her children and family too much and returned to Miami where she practiced for the next 10 years with her cousin Louis. Bertha did both trial work and appeals in a broad spectrum of cases, from criminal to all kinds of civil cases in both state and federal courts.

She then joined the prestigious Miami law firm of Frates, Fay, Floyd & Pearson, becoming that firm's first woman partner in 1974. She worked closely with many of the excellent lawyers of that firm who comprise a long list of prominent lawyers in South Florida and they all recognized her many talents and admired her work ethic and work product.

In 1973, she ghost-wrote a brief, for the only time, in a personal injury case which had been tried by Belli and Louis.[3] The appellant hired the legendary Sam Daniels — the Dean of the great Florida appellate lawyers — who wrote one of his legendary 15 page briefs. The single issue was whether workers' compensation was the exclusive remedy. Belli and Louis hired the acknowledged leading expert on workers' compensation to write their brief but found it to be too professorial and brought in Bertha. When she sent the brief to Belli he wrote back to Louis and said: "My office tells me your brief is the 'best thing they have ever read.' That comes from the sharpest boys in the law in California: I have four of them who were judges, clerks, law review, etc." The judgment for the plaintiff was affirmed, although years later, the Florida Supreme Court changed the law.

During her long career with the Frates firm, she achieved a stellar record of victories in many appeals. Of all her cases, however, the ones she was most proud of — indeed, the ones she considered her legacy — were those which involved obtaining, protecting or using land for the benefit of the people of Florida. One of those cases involved a dispute where developers desired to build high rise condominiums on the Cocoplum Beach property.[4] The City attempted to submit a zoning change ordinance to a referendum vote for approval but, at the 11th hour, the developers obtained a restraining order and eventually a permanent injunction blocking the referendum. On appeal, Bertha and Alan G. Greer obtained a reversal after which the developers caved in and Cocoplum was developed in the beautiful manner in which it now exists.

Another one of Bertha's favorite cases involved a long dispute (1964-1981), over ownership of two blocks of vacant, unimproved ocean front beach property which the City of Hollywood claimed was dedicated to the public.[5] After a non-jury trial where important evidence relevant to ownership and intent was excluded, the trial court entered a final judgment determining that the beach property did not belong to the City. On appeal, Bertha, Ray H. Pearson and Larry S. Stewart obtained a reversal with a remand for a new trial. The district court also held, however, that the City was not entitled to a jury trial on remand. On certiorari review, the Florida Supreme Court affirmed the reversal for new trial but quashed the decision below on the jury trial issue, holding that the City did not waive its right to a jury trial and that the

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denial of same was an abuse of discretion. On remand, after a successful jury trial and a final judgment for the City, Bertha, Pearson and Stewart again won the appeal.[6] The majority opinion, written by now United States District Judge Daniel T. K. Hurley and joined by now Florida Supreme Court Justice Harry Lee Anstead, held that the evidence supported the jury's finding of dedication of the property to the City and that maintenance of the property as a beach was consistent with the dedicated purpose and was not adverse to the interest of the corporation.

Yet another one of Bertha's most significant victories entailed a lengthy battle (over 10 years; five appeals) involving the City of Miami's attempts to acquire the land and docks for an expansion of Bayfront Park from the Florida East Coast Railway Company.[7] The City eventually won. Bertha worked with William Snow Frates and Stephen N. Zack on this case, and while she did not work on all the appeals, on the ones she did, the City won. Bertha believed passionately in these cases involving the use of land for the public good. She was saddened and outraged when the new basketball arena for the Miami Heat was approved to be built on the waterfront park land she had fought to protect so long and hard.

In October 1990, Steve Zack, along with Michael A. Hanzman and S. Daniel Ponce, left the old Frates firm and started a new firm. Bertha went with them as a founding partner. For the next seven years, until the very end at age 83, Bertha worked long and hard on a rich variety of cases. Although the passage of time and disease slowed her down to where she worked on only one case at a time, her dedication to her profession and pride in her work caused her to come to the office every day where her efforts were a constant source of amazement and inspiration to those who worked with her. In the last week of her life, she was working from home, burning up the phone lines with requests for documents and copies of cases to be delivered to her.

She left as she had lived — a winner. Her last appeal involved a claim by a broker seeking a $5.5 million commission for the sale of Univision, a Spanish language television network. Bertha represented one of the three purchasers. Although in poor health, she reviewed hundreds of thousands of documents, thoroughly researched the law of sales commissions and wrote a summary judgment memorandum of law for the trial court. After hearing argument, and after reading Bertha's memo for the second time, the trial judge granted summary judgment for the defendants. On appeal, two weeks before Bertha died, the Third District affirmed.[8] After the appeal was over, the trial judge told Steve Zack that Bertha's memorandum "read like a novel." Indeed, Bertha's writing was excellent, eloquent and compelling.

At the memorial service held in Miami in January 1998, filled to overflowing with attorneys, judges, friends and family, Judge Nesbitt spoke fondly about Bertha and her writing.

> She always wrote beautifully. Her law review comments and casenotes, just as her briefs, were always written out in longhand with a pen and a yellow pad. She never took to a typewriter, oral dictator or a computer. She once told me she liked to write out the words to see how they flowed by her own hand. I remember seeing her in the law review office, or later in her law office, with a pen and yellow pad polishing and perfecting the words, phrases, and sentences of her craft as if she were a diamond cutter entrusted with a rare jewel. She crossed out, reworked and recast her writing until they were gems. When you read them, they were the essence of clarity, brevity and most importantly, accuracy. She never took liberties with the record and called to task with the court, any lawyer who did.
>
> * * *
>
> People often speak of a "Renaissance Man." To me, Bert was a "Renaissance Woman." She had style and grace, loved to travel, appreciated the arts, theater, literature — she was a vociferous reader — and all about life that reflected grace and beauty. She often said the law had been good to her. Bert loved the law, and it loved her. She loved life, and life loved her, giving to her richly and fully these many years.

This writer was very fortunate to have had the privilege of working with Bertha for the last six years. The standards she set for herself and demanded of all who worked with her were impossibly high, but she was tenacious in demanding that they be met. As a former schoolteacher, she knew how to motivate, stroke and praise good efforts, and how to scold without hurting when those who worked with her fell short. She believed that to be a good writer, you must be a good reader and she read widely and constantly her whole life. She never relied on anyone to do her research or to review the record — she did it herself. But, when she wrote the brief, she wrote from an informed knowledge and understanding of the record and the law and it showed. She never took shortcuts — she was thorough. Her briefs were great reads — full of insight, humor, "Berthaisms" and relevance to the larger issues and important values of our culture. Best of all, her briefs were persuasive and compelling. When you finished reading Bertha's brief, you understood the case and were convinced of the correct and just outcome.

Because the generation she came from has largely passed away, we may never see her likes again. I for one, however, hope we do. I hope that somewhere out there is a young student or lawyer that has the talent, intelligence, dedication, perseverance and inspiration to "be like Bertha." I shall continue to be inspired every day for the rest of my life by her example. She was a lawyer's lawyer.

Endnotes:

[1] Bertha C. Freidus, *Query: To the Critics of Fair Comment—What About the Public?*, 12 U. Miami L. R. 89 (1957).

[2] *Miami Herald Publishing Co. v. Brautigam*, 127 So. 2d 718 (Fla. 3d DCA 1961), *cert. denied*, 135 So. 2d 741 (Fla. 1961), *cert. denied*, 369 U.S. 821 (1962).

[3] *Florida Power & Light Co. v. Brown*, 274 So. 2d 558 (Fla. 3d DCA 1973), *disapproved*, 550 So. 2d 1117 (Fla. 1989).

[4] *City of Coral Gables v. Carmichael*, 256 So. 2d 404 (Fla. 3d DCA), *cert. discharged*, 268 So. 2d 1 (Fla. 1972).

[5] *City of Hollywood v. Zinkil*, 283 So. 2d 581 (Fla. 4th DCA 1973), *aff'd sub nom, Hollywood, Inc. v. City of Hollywood*, 321 So. 2d 65 (Fla. 1975).

[6] *Hollywood, Inc. v. Zinkil*, 403 So. 2d 528 (Fla. 4th DCA 1981).

[7] *See City of Miami v. Florida East Coast Railway Co.*, 428 So. 2d 674 (Fla. 3d DCA 1983); for a history and list of the state court appeals, see also *City of Miami v. Interstate Commerce Commission*, 669 F.2d 219 (5th Cir. 1982).

[8] *Rumbaut & Associates, Inc. v. Venevision International, Inc.*, 701 So. 2d 1270 (Fla. 3d DCA 1997).

Keith Hope, *formerly of Miami, practices law in Tallahassee where he has his own firm concentrating in appellate practice and litigation support. He is a member of the Appellate Court Rules Committee and writes the State Civil Appellate Update for* The Record. *He would like to thank the many people who assisted in providing information for this article, especially Judge Lenore C. Nesbitt, Paul A. Louis and Stephen N. Zack.*

Florida Criminal Law Update

by Paul Morris

Henny Youngman, king of the one-liners, just passed away. Here is one his classics. Whenever he walked into a restaurant, he would say: "I'd like to have a table near a waiter." With apologies to Mr. Youngman, to all of you defendants facing sentencing in a Florida state court, I suggest you say to the sentencing judge: "I'd like to have a lawyer who objects." You might think that "nonfundamental sentencing error" should take its place among other oxymorons such as "rush hour," "legal ethics," "jumbo shrimp," "military intelligence" (or if you are not chuckling yet, how about "appellate humor"). But the phrase "nonfundamental sentencing error," which first appeared in Judge Cowart's analysis of the applicability of the contemporaneous objection rule to sentencing errors in *Walcott v. State*, 460 So. 2d 915 (Fla. 5th DCA 1984) (Cowart, J., concurring), *approved, State v. Walcott*, 472 So. 2d 741 (Fla. 1985), is back, and with renewed vigor.

In *Chojnowski v. State*, 705 So. 2d 915 (Fla. 2d DCA 1997), the Second District held that a defendant must timely file in the trial court a rule 3.800(b) motion to correct sentence in order to present a claim for additional jail time credit. The court noted that such a motion is due within 10 days after sentencing and that Fla.R.App.P. 9.020(g) was amended to provide that a final order (e.g., sentence) is not rendered until disposition of a rule 3.800 motion in order to ensure a defendant can raise sentencing errors on appeal after preservation.

In *Thompson v. State*, 23 Fla. L. Weekly D216 (Fla. 4th DCA Jan. 14, 1998), the defendant pled guilty and was sentenced to twelve years incarceration followed by three years probation. On appeal, he challenged the sentence on two grounds: the trial court failed to reduce to writing its decision to impose adult sanctions and he was sentenced by a judge other than the one who accepted the guilty plea. The Fourth District held, consistent with *Cargle v. State*, 701 So. 2d 359 (Fla. 1st DCA 1997) that the claimed errors were not preserved for appeal via a timely objection or motion to correct sentence. The court also held (and certified to the supreme court) that the failure to preserve a nonfundamental sentencing error for appeal following a guilty plea is not a jurisdictional bar to appeal mandating dismissal but is a non-jurisdictional bar mandating affirmance.

But in *Green v. State*, 700 So. 2d 384 (Fla. 1st DCA 1997), the defendant was allowed to challenge on appeal the circuit court's imposition of a sentence exceeding his plea agreement without affording him an opportunity to withdraw the plea. The court reasoned that this was not a "sentencing error" requiring preservation of the issue.

Note that rule 3.800 and 3.850 motions serve different purposes in sentencing attacks. In *State v. Mancino*, 705 So. 2d 1379 (Fla. 1998), the Supreme Court held that a timely (i.e., within two years) rule 3.850 motion was the proper procedural vehicle to challenge a three-year minimum mandatory sentence for possession of a firearm during the commission of a felony on the ground that the firearm was not possessed during the commission of one of the statutorily designated felonies. Rule 3.800 motions, the court reiterated, are limited to sentencing issues that can be resolved as a matter of law without an evidentiary determination.

In other appellate news, the Second District has held that an order designating a defendant as a sexual predator pursuant to section 775.21, Fla Stat. (Supp.1996), is appealable under this provision. *Downs v. State*, 700 So. 2d 789 (Fla. 2d DCA 1997).

In *Gentzen v. State*, 689 So. 2d 1178 (Fla. 1st DCA 1997), the First District held that a defendant may not appeal an order finding him incompetent but can file for habeas corpus relief in the circuit court.

In the realm of extraordinary writs, the Fourth District has recognized again that prohibition lies to adjudicate speedy trial issues. *Hobbs v. State*, 689 So. 2d 1249 (Fla. 4th DCA 1997). Remember, that a denial of the petition for writ of prohibition, unless otherwise specified by the court, is a ruling on the merits and thus constitutes the "law of the case." *Barwick v. State*, 660 So. 2d 685, 691 (Fla. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 823, 133 L.Ed.2d 766 (1996); *Hobbs v. State*, *supra*.

Mandamus traditionally lies to compel a judge to exercise discretion required by law. In *Martin v. Circuit Court*, 690 So. 2d 674 (Fla. 4th DCA 1997), the court held that mandamus lies to compel a trial judge to rule on a bond motion. Mandamus also lies to compel the department of corrections to grant gain time. *Department of Corrections v. Mattress*, 686 So. 2d 740 (Fla. 5th DCA 1997).

Finally, coram nobis lies to correct fundamental errors of fact. However, in *Peart v. State*, 705 So. 2d 1059 (Fla. 3d DCA 1998) (en banc), the Third District held that coram nobis does not lie to attack a conviction based upon the trial court's failure to apprise a defendant of deportation consequences of a plea pursuant to rule 3.172(c)(8). The proper vehicle is a timely (again watch out for the two-year deadline) motion under rule 3.850 (which is not available for those not in "custody" within the meaning of the rule).

Timetable for Appeal of Non-Final Orders from Florida Circuit Court to District Court of Appeal

by Christopher L. Kurzner
Revised by Lucinda A. Hofmann
March 10, 1998

Step	Action	Rule	Time Limit	Date Due	Date Filed/ Served
1.	Non-final order rendered.	9.130(a)	Only orders reviewable are those concerning venue or those addressing injunctions, or those dealing with personal jurisdiction, right to immediate possession of property, right to immediate monetary relief or custody in family matter, liability in favor of party seeking affirmative relief, whether party gets arbitration, entitlement to workers' compensation immunity, class certification, immunity in civil rights claim, or appointment of receiver.		
2.	Motion for relief from judgment.	1.540(a)*	Clerical: at any time.		
		1.540(b)*	Other: within reasonable time, but no more than one year for mistake, newly discovered evidence, or fraud. Motion does not affect finality of judgment or suspend its operation.		
		1.540**	No time limit for motions based on fraudulent financial affidavits in marital cases.		
3.	**Notice of Appeal.**	**9.130(b)**	**Filed in circuit clerk's office no later than 30 days after step 1 or 2.**		
		9.130(c)	**Designate as non-final. Attach order unless criminal case. Pay filing fees.**		
4.	Motion for stay; supersedeas bond (to trial court).	1.550(b)* 9.310	To circuit court, upon or after notice of appeal (step 3), effective upon court approval.		
5.	Record transmitted.	9.130(d)	No record transmitted unless court ordered.		
6.	**Appellant's brief.**	**9.130(e)**	**Served within 15 days after notice of appeal (step 3).**		

continued...

Step	Action	Rule	Time Limit	Date Due	Date Filed/ Served
	a. Request for oral argument.	9.320	Separate paper must be served within latter of 15 days after notice of appeal (step 3) or time to serve reply brief, if filed.		
7.	Appendix.	9.130(e)	Must serve with brief. Must have index and order to be reviewed.		
8.	**Appellee's Brief.+**	**9.210(f)**	**Served within 20 days after service of appellant's brief (step 6).**		
	a. Request for oral argument.	**9.320**	Separate paper must be served at same time as appellee's brief.		
9.	Motion for attorney's fees.	9.400	Served no later than date for service of reply brief (step 10).		
10.	**Reply Brief.+**	**9.210(f)**	**Served within 20 days after service of appellee's brief (step 8).**		
11.	Brief of Amicus Curiae.	9.370	May file with written consent of all parties or by order or request of the court. Must file and serve within time prescribed for briefs of party whose position is supported.		
12.	Extensions.	9.300	Must file and serve motion. Must contain certificate.		
		9.300(d)	Motion for extension tolls schedule of proceedings until disposition, except for motions filed in the supreme court if unaccompanied by a separate request to toll time, or for stay pending appeal, or for those relating to: post-trial release, oral argument, joinder and substitution of parties, amicus curiae, attorney's fees on appeal, service, admission or withdrawal of attorneys, or expediting appeal.		
13.	Motions.	9.300	***		
14.	Response to motion.+	9.300	Serve within 10 days after service of motion (step 13).		
15.	**Oral argument.**	**9.320**	**Set by court action.**		
16.	Entry of appellate court's opinion or order.	***	Set by court action.		

Step	Action	Rule	Time Limit	Date Due	Date Filed/ Served
17.	Motion for rehearing; clarification; certification.	9.330(a)	Must be filed within 15 days after order, or within such other time set by the court.		
		9.300(d)	Serve reply within 10 days of motion.		
18.	Rehearing en banc.	9.331(d)	Court's own motion, or motion of party.		
		9.331(d)(1)	File motion within 15 days of order and in conjunction with motion for rehearing.		
		9.331(d)(2)	Motion must contain statement by attorney.		
19.	Issuance of mandate.	9.340(a)	15 days after entry of order or decision, unless shortened or enlarged by court order.		
		9.340(b)	Motion for rehearing, certification, or clarification (step 17) will stay mandate until 15 days after rendition of order denying motion or, if granted, 15 days after cause fully determined.		
20.	Bill of Costs; objections.	9.400(a)	To tax costs, must serve motion in circuit court within 30 days after issuance of mandate (step 19). Proof of service required; bill must be itemized and verified. Objections to bill of costs must be filed within 10 days of service on party against whom costs are to be taxed unless time extended by court.		
21.	**Notice to invoke discretionary jurisdiction of supreme court.**	**9.120(b)**	**File notice with DCA within 30 days after rendition of order to be reviewed. Filing fees**.		
		9.120(c)	Notice must contain basis for invoking jurisdiction.		
		9.900	If there has been filed a timely petition for rehearing (step 17), time for filing notice runs from the date of denial of motion for rehearing or entry of subsequent order.		

ENDNOTES:

* Refers to Fla. R. Civ. P. All other references are to Fla. R. App. P., unless otherwise noted.

** Refers to Fla. Fam. L.R.P.

+ Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon that party and the paper is served by mail, add 5 days to the prescribed period. Fla. R. App. P. 9.420(d).

Federal Civil Case Law Update

By Beverly A. Pohl

Advanced Estimating System, Inc. v. Riney, 130 F.3d 996 (11th Cir. 1997) (Notice of Appeal – Timeliness Requirement)

Applying the "excusable neglect" standards articulated in *Pioneer Investment Serv. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498 (1993), the court held that a lawyer's failure to read or understand the pertinent rules regarding post-trial motions tolling finality is not excusable neglect which would excuse the untimely filing of a notice of appeal under Rule 4, Fed.R.App.P. After a jury verdict for plaintiff, defendant's counsel miscalculated the 10-day period for filing post-trial motions, misreading Rules 59 and 60, Fed.R.Civ.P. His notice of appeal was about three weeks late. The district court found excusable neglect, but the 11th Circuit reversed, joining other circuits in applying the *Pioneer* test and holding that "an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of the consequences of failing to comply with a statutory deadline." Because a timely filing of a notice of appeal is a "mandatory prerequisite" to the exercise of federal appellate jurisdiction, counsel's error resulted in the dismissal of his client's appeal.

Sosa v. Airprint Systems, Inc., 133 F.3d 1417 (11th Cir. 1998) (Failure to Comply with Scheduling Order; Untimely Amendment of Complaint)

An age discrimination complaint was dismissed because the named employer/defendant had too few employees under the Age Discrimination in Employment Act (ADEA) and the Florida Civil Rights Act (Ch. 760). Plaintiff sought to amend and to name another defendant, on the theory that the two defendants constituted an "integrated enterprise," and together they had the requisite number of employees to be subject to the age discrimination laws. But the motion for leave to amend was filed well after the time for amendments prescribed in the scheduling order, and was denied as untimely. On appeal from that order, the 11th Circuit held that where non-compliance with the pre-trial order was the result of a "lack of diligence," the appellant failed to show "good cause" under Rule 16(b), Fed.R.Civ.P. Thus, applying the "abuse of discretion" standard of review the court affirmed the district court's decision not to permit the tardy amendment to the complaint.

Thomason v. Russell Corp., 132 F.3d 632 (11th Cir. 1998) (No Appellate Jurisdiction to Review Order, Despite its Being Called an "Injunction")

Title 28 U.S.C. § 1292(a)(1) provides appellate jurisdiction over interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. In this class action Title VII and 42 U.S.C. § 1981 case alleging racial discrimination by an employer, the parties entered into a Supplemental Consent Decree requiring certain remedial measures by the employer. The Decree was to expire December 6, 1995. In October 1995 a class member moved to enforce the Decree, claiming that the employer had not complied with all its conditions. The district court, in order to ensure that it would have sufficient time to rule on the "motion to enforce," issued a "preliminary injunction" extending the dissolution date of the decree indefinitely.

The employer appealed from that "preliminary injunction," claiming there was no evidentiary basis for the preliminary injunction, and asserting interlocutory appellate jurisdiction under 28 U.S.C. § 1292(a)(1). The 11th Circuit dismissed the appeal for lack of jurisdiction, holding that "the order before us does not qualify as a preliminary injunction," despite its characterization as such by the district court. The court of appeals viewed the Order as "nothing more than an observation by the district court that the Decree's expiration date does not preclude the court from passing on a motion, filed prior to the expiration date, alleging that Russell [the employer] has violated the Decree's mandate." The court further noted that the "motion to enforce" was not the proper way to challenge the employer's noncompliance with the Decree, but that a motion for an order to show cause why the employer should not be held in contempt should have been filed. That motion would have received a prompt hearing, and would have avoided the improper appeal from the "preliminary injunction" which was not, according to the appellate court, in fact an injunction.

Peterson v. BMI Refractories, 132 F.3d 1405 (11th Cir. 1998) ("Without Prejudice" Order was "Final" Under 28 U.S.C. § 1291)

The courts of appeal have jurisdiction to review "final decisions" of the district courts, pursuant to 28 U.S.C. § 1291. In some contexts, an order of dismissal "without prejudice" fails to put an end to the judicial labor in a case, and lacks the requisite finality for federal appellate jurisdiction. In this Title VII employment discrimination case, placing substance over form, the 11th Circuit held that an order dismissing an action "WITHOUT PREJUDICE to the right of any party to reopen the action following completion of the grievance and arbitration proceedings, should there remain any issues unresolved by arbitration," was a final order appealable under 28 U.S.C. § 1291, despite its "without prejudice" caveat. The 11th Circuit has previously held that a district court's dismissal of a case without prejudice for failure to exhaust administrative remedies is a final order, giving an appellate court jurisdiction under § 1291. This is such a case, because the practical effect of the district court's order was to deny the plaintiffs judicial relief until they had exhausted administrative remedies.

Talavera v. School Board of Palm Beach County, 129 F.3d 1214 (11th Cir. 1997) (ADA Claims not Estopped by Social Security Disability Claims)

In a case of first impression, the 11th Circuit joined the majority of other circuits which have held that a plaintiff's certification on an application for Social Security Disability

continued...

benefits that she is totally disabled does not *per se* bar her from asserting in a subsequent claim under the Americans with Disabilities Act that she is capable, with reasonable accommodation, of performing the essential functions of her job. The court reversed the district court's finding that the plaintiff was "judicially estopped" from making contradictory claims of total disability and able-to-work with accommodations. The 11th Circuit found the claims "not inherently inconsistent," but allowed that the facts of each case must be considered.

Baker v. General Motors Corp., 118 S.Ct. 657 (1998) (Injunction from State Court not Enforceable in Another State)

The Court resolved the tension between a witness subpoena from Missouri and a Michigan injunction precluding that witness from testifying in favor of the subpoena, rejecting the argument that the full faith and credit clause of the Constitution, Art. IV, § 1, required the Missouri court to enforce the Michigan injunction. Although *judgments* from one state must receive full faith and credit in another state, one state need not adopt the other state's means of *enforcing* those judgments. This decision reinforces the principles that enforcement of injunctions is by the court which issued the injunction, and that non-parties to an injunction are not bound by its terms.

A former employee of General Motors — a specialist in vehicular fires whose prior testimony while a GM employee was contradicted by his later testimony implicating GM products in contributing to vehicular fires — settled his wrongful discharge claim against GM, and stipulated to an injunction, signed by a Michigan court, which precluded him from testifying as an expert or otherwise without GM's consent. Later, parties to a Missouri wrongful death case involving a fire in a GM vehicle subpoenaed the former GM employee, and GM claimed the injunction precluded him from testifying. The Supreme Court disagreed, holding that Michigan's power to issue and enforce its injunctions does not reach into a Missouri courtroom to displace that forum's own determination of whether to admit or exclude evidence relevant in the case before it.

Bogan v. Scott-Harris, 118 S.Ct. 966 (1998) (Local Officials Entitled to Legislative Immunity)

The Court for the first time confirmed, in a 42 U.S.C. § 1983 civil rights case, that local officials, like federal, state, and regional legislators, are entitled to absolute legislative immunity from suit when performing legislative functions, regardless of the motive for their actions. The 11th Circuit has long afforded local officials legislative immunity, until now without the imprimatur of the Supreme Court. The Supreme Court noted the fact that local municipalities are subject to civil rights suits, unlike the State and Federal governments which are clothed with sovereign immunity, so those with civil rights claims can obtain relief from the municipality itself.

Legislative functions include, *inter alia*, voting, signing or vetoing legislation, the voting associated with the budget process, and other discretionary, policymaking decisions implicating the services provided to constituents. NOTE: Although distinguishing between legislative functions, for which there is absolute immunity, and executive and ministerial functions, for which there is not immunity, may not always be easy, lawyers who improperly bring suit against local legislators in their individual capacity for clearly legislative functions should be aware that the 11th Circuit has affirmed the imposition of sanctions in such instances. *DeSisto College, Inc. v. Line*, 888 F.2d 755 (11th Cir. 1989).

Comments invited on need for DCAs

The Judicial Management Council's Committee to Study the Need for Additional District Courts of Appeal is chaired by The Honorable Peggy Quince, Appellate Judge, Second District Court of Appeal. The Committee is charged with studying the need for, and location of, additional district courts of appeal. The Committee will consider written comments during its examination of the issue. The Committee's final report will be issued by November 30, 1998, to the Judicial Management Council for its consideration in advance of the 1999 Legislative Session. Anyone wishing to provide input, may direct their comments in writing by July 31, 1998 to:

Committee to Study the Need for
Additional District Courts of Appeal
c/o Sybil Brown
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1900

Appellate Certification Liaison Committee

Appellate practitioners are in the forefront of lawyer certification. As discussed at the Appellate Certification Liaison Committee, more than 110 members of The Florida Bar are now Board Certified in Appellate Practice. This specialty field, established in 1994, continues to attract prominent appellate specialists from all legal fields. As many as 30 lawyers are scheduled for the upcoming certification examination.

The Certification Liaison Committee also discussed and approved the concept of identifying Board Certified lawyers in published court opinions. This concept, which still needs refinement, is another way of identifying certified lawyers.

The Committee discussed the benefits available to certified lawyers. Currently, malpractice premium discounts are available through Florida Lawyers Mutual Insurance Co. (the Bar created carrier). Other insurance carriers are being contacted. Certain state and local governments offer a salary increase for certified lawyers.

The Committee reviewed ways to increase the number of certified appellate attorneys. The Committee approved a mailing to Appellate Practice Section members who are not Board Certified.

The Appellate Certification Examination will include *something new* this year: Performance Testing. The examination will include a practical "how to" assignment requiring applicants to put their appellate skills into practice. This performance test will be closely monitored by the Board of Legal Specialization & Education. The Committee believes this testing methodology is certainly the wave of the future.

The Committee also wants to spread the word that appellate practitioners (particularly Board Certified Appellate Lawyers) should consider submitting proposed examination questions to the Certification Committee (multiple choice, short answer, and essay, with draft answer included). Bonus: You get CLER and Certification credits.

Finally, the Board of Legal Specialization & Education scheduled a Certification Retreat for Certification Committee members. The retreat took place May 13 & 14, 1998, in Tallahassee.

Appellate Rules Liaison Committee

The Appellate Rules Liaison Committee has recommended the following changes to the appellate rules:

Rule 9.130(a)

Like appellate courts, the Appellate Court Rules Committee sometimes rehears rule change recommendations which have previously been passed. At the January 1998 meeting, on recommendation of the Civil Subcommittee, the full Committee voted to recommend retention of both Rule 9.130(a)(3)(C)(viii) — non-final appeals concerning civil rights immunity, and Rule 9.130(a)(3)(C)(vi) — non final appeals concerning workers compensation immunity. The Committee had previously voted to repeal both rules at the September 1997 meeting. *See* previous Committee Report in the December 1997 issue of The Record at 9.

Rule 9.140(i)

The Criminal Subcommittee recommended a change to this rule to address problems that sometimes occur with obtaining transcripts in criminal appeals. The Committee voted to recommend the amendment. The rule as amended would read:

(i) **Appeals from Post-Conviction Relief Proceedings Under Florida Rule of Criminal Procedure 3.800(a) or 3.850.**

(1) **Summary Grant or Denial of Motion Without Hearing.**

(A) When a motion for post-conviction relief under rule 3.800(a) or 3.850 is granted or denied without a hearing, the clerk of the lower tribunal shall, along with the certified copy of the notice of appeal, transmit to the court as the record, copies of the motion, order, motion for rehearing, order thereon, and attachments to any of the foregoing.

(B) The clerk of the lower tribunal shall send a copy of the index to the appellant.

(C) No briefs or oral argument shall be required but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. The Court may request a response from the appellee before ruling.

(D) Upon appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing.

(2) **Grant or Denial of Motion After Hearing.**

(A) In the absence of designations to the court reporter, the notice of appeal filed by an indigent pro se litigant in a nonsummary rule 3.850 appeal shall serve as the designation to the court reporter for the transcript of the evidentiary hearing. The clerk of the lower tribunal shall send the appropriate court reporter the notice and an identification of the date of the evidentiary hearing to be transcribed, together with a copy of this rule within five days of receipt of the notice of appeal.

(B) When a motion for post-conviction relief under rule 3.850 is granted or denied after a hearing, the clerk of the lower tribunal shall transmit to the court as the record, copies of the notice of appeal, motion, order, motion for rehearing, order thereon, and attachments to any of the foregoing, as well as the original transcript of the hearing.

(C) Except as provided in this subdivision, the procedures and time limits for preparing the record and filing briefs shall otherwise apply in the same manner as to an initial appeal of a judgment and sentence.

Rule 9.190(c)(6) — Administrative Appeals

The Committee passed a recommendation to correct the reference in the rule from 9.200(a)(2), to 9.200(a)(3), as follows:

Modified Record. The contents of the record may be modified as provided in Rule 9.200(a)(3).

Anyone wishing to respond or make suggestions to the Appellate Court Rules Committee, should send these to the Chair, the Honorable Gerald B. Cope, Jr., at the Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, FL 33175-1716.

The next Appellate Rules Liason Committee Meeting will be held Thursday, June 18, 1998, at 8:30 a.m. at the Buena Vista Palace in conjunction with The Florida Bar Annual Meeting. All members of the Section as well as members of the Bar are welcome to attend this meeting.

Federal Appellate Practice Committee

The Federal Appellate Practice Committee has met on several occasions by telephone conference over the course of the past year. The committee members determined they would work jointly to create an abbreviated rules of procedures for practice before the federal courts. The committee members are currently preparing guidelines and a checklist to assist members of The Florida Bar practicing before the federal courts to efficiently prosecute a case from the Notice of Appeal through Petition for Rehearing. The anticipated completion date is April 30, 1998. Additionally, the Federal Appellate Practice Committee will present a general article on some of the possible pitfalls within federal practice for publication in *The Record* and/or any other publication wishing to disseminate this information.

The Federal Appellate Practice Committee's long term goals include increasing member involvement and creating closer interaction of The Florida Bar with the Federal Bar. Moreover, the Federal Appellate Practice Committee desires to assist attorneys within Florida in gaining a greater understanding of the nuances and distinctions of federal practice.

Program Committee Report

The Programs Committee is continuing to prepare for the Annual Meeting to be held at the Buena Vista Palace in Orlando, Florida, in June 1998. All of you will want to attend the "Discussion with the Court," featuring the justices of the Florida Supreme Court, on Thursday, June 18, 1998. The discussion, which is scheduled for 4:00-5:30 p.m., is a unique opportunity to directly question the justices.

We are also hoping to have another successful Dessert Reception this year. The reception is scheduled for June 18, 1998, from 9:30-11:30 p.m. The James C. Adkins award will be presented at the reception.

Comments invited on PCA decisions

The Judicial Management Council's Committee on Per Curiam Affirmed Decisions is now accepting written comments about the use of PCAs in Florida.

The committee, chaired by Second DCA Judge Monterey Campbell, is in the midst of a comprehensive study into the practice of issuing PCAs. The study includes the compilation of quantitative data regarding the practice as well as a substantive inquiry into the effects that reliance on per curiam affirmed opinions has on others within the justice system, including civil litigants, criminal defendants, trial courts, the Supreme Court and the Bar.

Comments may be directed to the Committee on PCA Decisions, c/o Gregory Youchock, Supreme Court Building, 500 South Duval Street, Room 241, Tallahassee 32399. Comments should be filed by July 1.

Appellate Practice and Advocacy Section

1998 Annual Meeting Activities

Buena Vista Palace

June 17, 1998

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

June 18, 1998

8:30 a.m. - 10:00 a.m.	Appellate Rules Liaison Committee
8:30 a.m. - 10:00 a.m.	CLE Committee
9:00 a.m. - 10:00 a.m.	Appellate Certification Liaison Committee
9:00 a.m. - 10:00 a.m.	Amicus Curiae Committee
10:00 a.m.-12:00 noon	Executive Council\Section Annual Meeting
2:00 p.m. - 3:45 p.m.	Appellate Court Liaison Committee
2:00 p.m. - 3:45 p.m.	Federal Appellate Practice Committee
2:30 p.m. - 3:30 p.m.	Publications Committee
2:45 p.m. - 4:30 p.m.	Criminal Appellate Practice Committee
4:00 p.m. - 5:30 p.m.	Discussion With The Court
9:30 p.m. - 11:30 p.m.	Dessert Reception — Adkins Award Presentation

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Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.