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Chair's Message:

This Is the Best of Times!

by Benedict P. Kuehne, Chair

What a glorious time to be an appellate practitioner! Since the unprecedented November 7 presidential election, Florida's appellate courts and especially its appellate lawyers have taken center stage. The public has gained more knowledge of the vital function of appellate courts and the role of appellate lawyers in our society. Lawyers, too, have a newfound respect for the unique and essential ingredients that appellate lawyers bring to the resolution of cases. These are very good developments, and the Appellate Practice Section is continuing its leadership on issues of importance to our system of appellate advocacy. In keeping with that higher profile, the Section and several of its members received well-deserved attention when a statewide publication, *Florida Lawyer*, recently explored the expanding presence of appellate specialists within law firms.

The Section has remained in the vanguard of efforts to protect our system of justice from unfair and outrageous attack. During recent legislative efforts to recast the role of courts and lawyers in our society, I attended a number of legislative meetings and hearings in order to set the record straight about the valuable role of appellate lawyers and the need for an independent judiciary. The efforts of the organized Bar were quite successful in preserving an effective justice system that well serves the public interest. We must be always diligent in protecting our system of justice from future attacks.

The first full Bar year in the new millennium has been an eventful one for the Section, with continued our growth and influence both within and outside the Bar. Our members continue to display the dedication that comes from being leaders in the profession and in their communities. We should be proud that Section membership and Board Certification are now essential credentials for appellate lawyers.

The Section's programs are constantly receiving accolades. Consider our ***Appellate Practice Workshop***. Under the leadership of Florida Supreme Court Clerk Tom Hall and our very able CLE Committee, the Appellate Practice Workshop summer program at Stetson Law School is again providing a select group of appellate practitioners with the opportunity to enhance appellate advocacy skills in a high-powered but collegial environment. Similarly, our ***CLE*** programs have reached new heights. Under the guidance of Steven L. Brannock, our CLE guru, the committee members have designed exciting seminar offerings enhancing the professional expertise of Florida's lawyers. Our acclaimed *Inside the Eleventh Circuit* featured a "heavy hitter" cast of Circuit Judges Tjoflat, Wilson, and Hill, Clerk Thomas Kahn, and Circuit Mediator Stephen Kinnard. This has become yet another "must attend" event. Our *Hot Topics in Appellate Practice* and the *Appellate Certification Review Course* also have become vital education for appellate lawyers.

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INSIDE:

06/01

From the Editor's Desk

by Susan W. Fox, Editor

Myths About Involvement in the Appellate Practice Section:

1. *It's hard to get involved.* Absolutely untrue, it is painless and easy. Just show up at any meeting -- committee, executive council, whatever -- stick out your hand and say "Hi, I want to be involved in the section." We do the rest.

2. *You have to be an appellate "expert".* Totally false. We all learn as we go. Younger section members as well as late converts to the appellate way of life can be our most enthusiastic contributors. (Just between you and me, some of us don't know any more than you do. Shhh!)

3. *The fun jobs are already taken*. No way! We have a variety of plum leadership assignments just waiting for the next unsuspecting, er, uh, *underutilized* member. Everything from planning events to writing for The Florida Bar *Journal*.

4. *The people aren't friendly.* This is the biggest misconception of all. Appellate lawyers are the nicest people around, try us and see.

5. *You have to associate with appellate judges.* Actually, this is not a myth at all, this one is true. Many of them are former appellate lawyers, ergo, *great people*.

6. *The committee meetings are early in the morning*. Uh, well, that one's true too. But we have to take the meeting slots the Bar gives us. And we try to make it worth your while. Free coffee.

7. *The Appellate Section doesn't provide member benefits.* Nope, wrong again. If you write for the section, either for *The Record* or The Florida Bar *Journal*, you can apply for free CLE credit (up to 25 credits toward certification). Same for CLE lecturing, and you get to attend the seminar for free. And don't forget about the benefits already mentioned: good fellowship, recognition, free coffee and judicial face time.

So, we want to see YOU at our Annual meeting! The Publications and CLE Committees will be meeting at 8 a.m. on June 21, 2001 at the Orlando World Center Marriot, the Executive Council at 9 a.m.

And don't forget the **"Discussion with the Supreme Court"** at 3:30 p.m. and the **Dessert Reception with presentation of the Adkins Award** at 9 p.m. See you there!

A Panel Discussion with

THE JUSTICES OF THE FLORIDA SUPREME COURT

Sponsored by

THE APPELLATE PRACTICE SECTION

In conjunction with the

ANNUAL MEETING OF THE FLORIDA BAR

June 21, 2001
3:30 - 4:30 p.m.

Get your

Just Desserts

at the

Annual Meeting of The Florida Bar

Reception Sponsored by
the Appellate Practice Section
of The Florida Bar

June 21, 2001
9:00 p.m.
Orlando World Center Marriott

Bring the Family!

Shrinking a Brief: How to Brief a Case within the Page Limits

by Robert S. Glazier

Life has become more difficult for Florida's appellate lawyers. The amount of text permitted in appellate briefs has been reduced by 10% to 20%.

Until recently, the Supreme Court of Florida accepted briefs in 13-point proportionally-spaced type, and the district courts of appeal would accept briefs with 12-point proportionally-spaced type. Effective January 1, 2001, though, briefs must be submitted in Times New Roman 14-point font, or in Courier New 12-point font.[1] Those attorneys who previously filed their briefs in a 12-point proportionally spaced font will find that their real-world page limits have been significantly lessened. A fifty-page brief under the new type requirement contains only as much content as would have filled a forty-page brief under the old rule.

In light of this *de facto* reduction of the page limits, what is a lawyer to do?

Outline and Edit

The easiest way to meet the new page requirement is simple: outline your brief ahead of time, write concisely, and edit viciously.

The reality is that almost never does a brief need to be as long as fifty pages. In my career, I can recall filing only a handful of briefs which were as long as fifty pages. Without exception, those briefs were as long as they were because they were team efforts in which egos prevented necessary editing. Outside of the criminal defense lawyers who must raise issues because of possible ineffective assistance claims, I believe that almost never should a lawyer need forty pages, much less fifty.

In my experience, the only brief in which length is likely to be a legitimate problem is a reply brief, which is limited to fifteen pages. If the appellee raises many issues that need to be responded to, or if there are several appellees, it may be very difficult to fit everything into a reply brief of fifteen pages.

So the best way to fit within the page limits is to write short briefs.

Learn to count

The first way to get more text in a brief is to be sure that you are counting pages correctly. Rule 9.210(a)(5) provides that the table of contents and table of authorities are *not* included within the page limits. In practice, many lawyers do not include the certificate of service or certificate of type compliance within the page limits.

Page design

The general appearance of appellate briefs is fairly standardized—8 ½ x 11 inch white paper, one-inch margins, black type, section headings, no photos. But there is some room for variation in page design.

The principal goal of page design should be to make the brief easier to read. However, when the page limit is a problem, the page can be designed to increase the amount of text contained within the page limits.

Page numbers in margin. The rules require a one-inch margin. Some people have one inch between the bottom of the page, and then another inch from the page number to the text. A better format is to have one inch from the bottom of the page to the text, with the page number in that one-inch margin. This looks fine, and saves about a line a page.

Space between sections. Good page design often leads people to add white space between sections of the brief. When space is at a premium, these white spaces can be eliminated.

Block quotes. Some space can be saved by placing quotations in block quotes, single spaced.

Section numbers and letters next to heading. People often put the section number or letter on one line, and the heading on another line. For example:

II.
The trial court erred in granting summary judgment

Space can be saved by placing the number and heading on one line:

II. The trial court erred in granting summary judgment

Typography

There are certain typographic changes that word processors can easily handle that save space. For example, auto-hyphenation should be turned on, as this can put the text on fewer lines. Also, the indentation at the beginning of paragraphs can be lessened.

There are certain subtle typographic changes that are *not* permis-

continued, next page

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SHRINKING A BRIEF
from page 3

sible. Line spacing has to be at least 2.0. Spacing of 1.9 is not permissible. Letters cannot be placed closer together through "kerning." And you definitely cannot use the "make it fit" function on your word processor. That is cheating.

Using shorthand

There are certain common terms that can be used in place of longer terms. Rather than Government Employees Insurance Company, refer to GEICO. Rather than Mutual of New York, refer to MONY. After the first references, refer to the parties by a clear, useful shorthand.

If you are desperate for space, you can use acronyms for familiar concepts, but be careful that it does not interfere with the reader's ability to follow the brief. In a criminal case, BOLO is probably an acceptable substitution for "be on the look out." In workers compensation, terms such as MMI and CSE may or may not be obvious to the reader. IIED is a lot shorter than Intentional Infliction of Emotional Distress, but you may lose the reader.

Citation format

In many briefs, a lot of space is devoted to citations to cases. This is fertile ground for shortening a brief.

First, decide what citations you really need. Do you really need to cite four cases—or even one—for the proposition that summary judgment cannot be granted unless there are no genuine issues of material fact? Look through the brief at string cites, and try to cut them back to a single citation.

Remember that second cites to a case can use a shortened format. Try to use a short but clear citation for subsequent references. But don't go overboard. If the first cite is on page 10, and the next reference is on page 47, you should probably use the full format in both places.

The case names within the citation can frequently be shortened. When citing to *Applegate v. Barnett Bank*, does it really matter that it is Barnett Bank of Tallahassee? Geographic identifiers at the end of citations can often be deleted.

Space can be saved by using abbreviations in case names. You can save space by referring to Fla. Patients' Comp. Fund, or No. Broward Hosp. Dist. I leave it to you whether this is worth the time and the sacrifice to readability. Florida Rule of Appellate Procedure 9.800 provides a uniform citation system. As with all citation matters, temper the rules with common sense.

Stuff text into footnotes. This is perhaps the most effective, but least subtle way of stuffing more text into a brief. It isn't recommended.

Robert S. Glazier is an appellate lawyer in Miami.

Endnotes:

[1].*See* Florida Rule of Appellate Procedure 9.210(a)(2). The Supreme Court's comment to the rule indicates that the strict font requirements were adopted for the most part to ensure compatibility of electronic documents made available on the Internet. If all documents are in the same common font, it will be easier for people to view the documents.

While the goal is admirable, it has been clumsily implemented. A better solution would be to provide the option of allowing briefs to be submitted in Adobe .pdf format. With this format, the brief could be viewed and read by other people, even if the person did not have the same font. This would allow lawyers to submit briefs in attractive fonts, yet still provide for the easy reading of briefs on line.

Bar *Journal* Article Wins Burton Award for Two Section Members

Submitting an article for publication in The Florida Bar *Journal* may be your ticket to Carnegie Hall! On behalf of the Appellate Practice Section, section members Tracy Gunn and Ty Cone submitted *The Two-Issue Rule and Itemized Verdicts: Walking the Tightrope* for publication in The Florida Bar *Journal's* July/August 2000 issue. Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.– the law firm in which Tracy and Ty conduct their appellate practice– then nominated the article for a 2001 Burton Award for Legal Achievement. Tracy and Ty won!

The Burton Awards are given to 15 attorneys in the nation's 250 largest law firms, and to 10 law school students. The awards are part of a not-for-profit program dedicated to the enhancement and enrichment of legal writing.

A panel of scholars on legal writing and research reviewed the submissions and selected the winning authors. Virginia Wise, a lecturer at Harvard Law School, chaired the panel. She was joined by the Honorable Edward Forstenzer of the Superior Court of California; Anne E. Kringle, senior lecturer and legal writing director at the University of Pennsylvania Law School; and William Ryan, former national director of plain-language initiatives for then-Vice President Al Gore (and a direct descendant of Noah Webster).

Tracy and Ty, along with the other 2001 Burton Award winners, will be honored on June 20, 2001, at an exclusive dinner at Carnegie Hall in New York City. Roger Cossack, co-moderator of CNN's "Burden of Proof" and former assistant dean at UCLA Law School, will serve as master of ceremonies.

The Burton Awards were founded by William C. Burton, a partner in the international law firm of D'Amato & Lynch. Burton is a leading advocate of plain language and modernized legal writing. Sponsors for the Burton Awards include West Group (signature partner), Pitney Bowes Management Services and Leeds Morelli & Brown, attorneys-at-law in New York and Washington.

We congratulate Tracy and Ty on this wonderful achievement. Their recognition at the national level just confirms what we in Florida already knew: The Appellate Practice Section of The Florida Bar includes some of the best legal writers in the country!

We're Not Dopes

by Paul Morris

Those of you who try jury cases rarely get insights into what the jurors are thinking. (That doesn't seem to stop you from believing you can divine their thoughts. "This jury loves me". Sure they do. See you in the appellate court as appellant, thank you very much.)

I recently met an attorney who was in the middle of a jury trial. Nothing unusual there -- except he was one of the jurors. He was surprised that neither side excused him. He learned a big lesson. He said that the jurors, including himself, were tired of the lawyers repeating every strong point made during examination of witnesses. "We're not dopes", the attorney as juror told me.

The Dade County Bar Association conducted its annual appellate seminar and reception at the Third District on March 30. I hope next year's is better publicized because this is a rare opportunity to know what appellate judges are thinking. The judges not only make presentations, but open the floor to questioning. Here are a few tips from the judges themselves.

When an appendix is optional, it should be small or not at all. The judges take work home and a cumbersome appendix is inconvenient. The judges have the record on appeal if they need to refer to it. The appendix should contain only crucial items (*e.g.*, the contract in a contractual dispute).

In many cases, particularly criminal appeals, the briefs contain facts that are not relevant to the issues. A judge said: "We don't ordinarily need to know when the defendant was born."

Briefs on disks are helpful to the computer-literate judges and staff, especially those who engage in cutting and pasting.

Some judges appreciate simplicity of language. In a medical malpractice case, for example, you can lose the reader with technical language. Also, beware of abbreviations or acronyms with which you are familiar. Do not assume the reader knows what you mean. To some, BOLO is a cop term for "be on the lookout". For others, it's a heavy knife used in the Philippines. To me, it's that great ham you get in the Latin America Cafeteria sandwiches. Explain which one you mean.

The most interesting factual recitations are those written like a book rather than a chronological summary of each witness' testimony. For some judges, it is the first item they read, so it makes an important impression and sets the tone for what's to come. Write the facts to interest the reader and do not be argumentative. Make sure the facts are written in the light required by the applicable law. Be certain your page citations are correct. If you are the appellee and the appellant's facts are correct, *let it go.*

The Third District is an "informal" court in the sense that it gets to the merits. It is not a "motion to strike" court. If there is such a motion filed, it is generally carried with the briefs and avoided. However, the court does enforce the page limitations of the appellate rules. See Fla. R. App. P. 9.210(a)(5): initial and answer briefs: 50 pages; reply briefs: 15 pages; cross-reply briefs: 15 pages.

If you use demonstrative evidence during the oral argument, make sure it is relevant, large enough for the court to see, and show it to opposing counsel before the argument.

Oral argument in the Third District is set when the appellee's brief is filed. That means if you choose to file a reply brief, you must do so immediately. This is a fast court that keeps up.

Sometimes an important authority not cited in the briefs should be brought to the court's attention before oral argument. That is the office of the notice of supplemental authority. See Fla. R. App. P. 9.225. If a decision is not cited in the brief and a notice of supplemental authority is not filed and served in advance of oral argument, the court will not allow you to argue the decision because that would be unfair to opposing counsel. (The office of the notice of supplemental authority is NOT to let the court know about *Marbury v. Madison* or *Palsgraf.v. Long Island R.R. Co.* or *Holl v. Talcott.*)

Employ civility. Do not engage in name-calling in the briefs or oral argument. Don't call opposing counsel a "liar." Such tactics obscure the issues. Get to the merits.

Finally, one judge remarked that some counsel seem to file lengthy motions, appendices, and briefs in cases involving well-heeled clients whereas similar cases are concisely treated by attorneys representing less financially fortunate clients. The judge remarked: "We're not dopes." Hmmm... heard *that* before.

Paul Morris *practices appellate law in Coral Gables, Florida.*

One Year Later: Retreat Follow-through

by Hala Sandridge, Chair-elect

Imagine, only one year ago our Section held its planning retreat at the Indian River Plantation in South Florida! There, we planned for our Section's future, addressing both immediate needs and long range goals.

To determine our direction, we initially defined our mission. Our leaders ambitiously resolved to advance the goals of justice by promoting high standards of appellate practice. We created four methods of implementation:

* Foster a community of appellate practitioners and judges;
* Provide education and training;
* Facilitate the exchange of information and ideas; and
* Heighten awareness of the special role of the appellate practitioners.

Looking back on this past year, our mission has been wildly successful.

Our Section sponsored our first-ever reception between appellate lawyers and judges at the Section's mid-year Miami meeting. This social reception was well attended and an instant hit. What better way to feel comfortable about where you practice (appellate courts) than to get to know the people who run it (appellate judges). This setting thus allowed us to achieve our goal of fostering a community of appellate practitioners and judges.

To educate and train, our Section sponsored numerous seminars, including the Appellate Practice Workshop, the Hot Topics Seminar, and the Appellate Certification Review Course. Among other things, these courses provided our members with vital material and information needed to become board certified in appellate practice. practitioners were board certified this year.

We have undertaken numerous efforts to facilitate and exchange information and ideas. The Record, published four times this bar year, provided our members with invaluable information about appellate practice. And, through our well-attended Section meetings, our members exchanged ideas that led to numerous and productive subcommittees.

Finally, we have continued to heighten the awareness of the special role of the appellate practitioners through various means. Several members authored articles published in the Record or Bar Journal explaining the value of involving appellate specialists in the appellate process. Through these articles, Florida Bar members now know what we can do for them, and why they should use us.

Where will we go this upcoming year? Our mission will likely stay the same. So, most of the tools we have employed to attain the goals established in our mission statement will remain our mainstays.

Regarding new projects, we may want to follow the leadership of our Bar, and consider two laudable goals, pro bono work and achieving diversity. We once had a wonderful pro bono program in place for appellate practitioners, the appellate guardian ad litem program. Through the coordination of Section member Tracy Carlin in Jacksonville, our members handled appeals for guardian ad litem's on a pro bono basis. I handled one of those appeals some time ago and it was quite rewarding. By coordinating with other branches of the Florida Bar, our Section could ensure that the pro bono needs of the appellate system are addressed.

Diversity is a looming issue. I recently attended the 2001 All Bar Conference on Diversity and, frankly, got a good dose of reality. While our Section is clearly diverse (many women and ethnic groups hold leadership positions in our Section), we might want to more closely examine our internal procedures to ensure we actively promote diversity, especially in leadership roles.

Another potential goal is a workshop for the appellate clerks of our circuit courts. While our appellate court clerks are familiar with appellate procedure, there is rampant inconsistency in the circuit courts' approach to appellate proceedings. For instance, some circuit court clerks permit a supersedeas bond to be filed before filing an appeal notice. Others will not. What a wonderful legacy it would be if our Section could ensure that appellate practitioners encounter consistent appellate procedure in our circuit courts.

Some of the above ideas could be debated in another retreat. At our April 2000 retreat, we agreed to reassemble in April 2002 to reassess our goals. While we have yet to commit to this concept, if we do, I promise you will love the next location and resort!

We continue to make great strides in achieving the goals set forth in our mission statement. We cannot, however, fall into a false sense of security. Our members must stay involved, and help run this Section. New blood creates new ideas. Consider attending our annual or mid-year meetings, the Spring 2002 retreat, or becoming involved in our many committees. Better yet, let us know what we can do to make the Section serve you. E-mail me your ideas, hsandrid@folwerwhite.com. I would love to hear from you.

Moving?

Need to update your address?

The Florida Bar's website (www.FLABAR.org) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically) at this time, but addresses are processed timely. The address form can be found on the website through "Find a Lawyer" and then "Attorney Search." It can also be found under "Member Services."

"Fixing" the Unbroken Judicial Nominating Commissions– View from a Survivor of the 2001 Legislative Session

by Valeria Hendricks

The May sweeps are over in the outback of Australia and in Tallahassee. The tribes and alliances have spoken. It is doubtful that the Appellate Practice Section has any official interest in the ultimate survivor of the Australian contest. The Section, as well as Florida's citizens and its judiciary, however, does have a stake in the laws that survived the 2001 session of the Florida Legislature which govern appointments to as well as the operation of the Judicial Nominating Commissions (JNC).

In 1972, the Florida Constitution was amended to create judicial nominating commissions for each circuit court, each district court of appeal, and the Florida Supreme Court. These commissions nominate candidates to the governor to fill vacancies in the judiciary. Under Article V, section 20(c) of the Florida Constitution, each JNC is to be composed of nine members. The Florida Bar Board of Governors appoints three licensed attorneys actively practicing law in the territorial jurisdiction of the affected court. The governor chooses three electors residing in the jurisdiction of the affected court. Finally, a majority of the six JNC members appoint three electors residing in the affected court's jurisdiction who are not members of the Florida Bar. In 1977, the enabling legislation, section 43.29, Florida Statutes, was amended to limit JNC members to nonconsecutive four-year terms. Section 43.29 was further amended in 1991 to provide that at least one of the three members in the three sets of commissioners, i.e., Florida Bar appointees, governor appointees, or JNC appointees, "must be a member of a racial or ethnic minority group or a woman." In *Mallory v. Harkness*, 895 F. Supp. 1556 (S.D. Fla. 1995), a federal district court in the Southern District of Florida struck this amendment as a quota requirement in violation of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

Since Governor Jeb Bush's election in 1998, several unsuccessful legislative efforts have been proposed to "fix" not only Florida's judiciary, but also the commissions that nominate judicial candidates for the governor's appointment. In the 1999 legislative session, the House and Senate both proposed legislation that would have made the gubernatorial appointments to the JNCs to begin July 1 following the governor's election and to end June 30 following the expiration of the appointing governor's term. Senate Bill 2000, as amended, died. House Bill 2013, as amended, which Representative Fred Brummer sponsored apparently at the behest of the Christian Coalition of Florida,[1] passed in that chamber, but then died in the Senate. Critics of the legislation called it "radical and probably unprecedented" and warned that such measure would inject politics into and result in stacking the judiciary.[2]

In the 2000 legislative session, there were similar bills sponsored in the House and Senate that proposed even more radical changes to the method by which members of the JNCs are appointed. Both House Bill 1035 and Senate Bills 398 and 826 would have kept the Florida Bar's appointees to the JNCs at three attorneys, but would have given the governor four appointments to each JNC and one additional appointment for an "alternate" member for each circuit court JNC. One of the two remaining slots on the JNCs would have

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Brief Thoughts

by Bonnie Kneeland Brown

"Your Input Requested"

When we first conceived of this column in committee, its purpose was to prompt input from the members of the section. We hoped it would be a forum for sharing thoughts regarding briefing and the appellate process. The last four columns reflect some "brief" thoughts that I have had with regard to practicing as an appellate attorney.

Now it is your turn. We are hopeful that future columns will reflect your views and your insights. Consequently, at the end of this column you will find my fax number and e-mail address so that your ideas will be reflected in this space in the future.

So, the next time you are sitting at your desk ruminating about the pleasures and perils of the appellate lawyer's profession, jot down some notes and fax them or e-mail them to me with your name. You do not have to write an "article" or even write in complete sentences! We would just like to have your "brief" thoughts so that the purpose of this column is fulfilled. We look forward to your input.

Note: BRIEF THOUGHTS is a running column in The Record *that comments– briefly– on various matters pertaining to appellate advocacy. Your own "brief" thoughts and suggestions for future columns are requested and should be directed to Bonnie Brown (at Fowler, White, Gillen, Boggs, Villareal & Banker, P.A. in Tampa), fax: 813 229-8313; e-mail: bbrown@fowlerwhite.com.*

been appointed by the Senate President, and the Speaker of the House would have appointed the other. The bills also would have cured the quota problems by adding aspirational language that the racial, ethnic, gender, and geographical distribution of the JNC's jurisdiction should be reflected in the appointees. The legislation would have ousted the gubernatorial members then on the JNCs, and replaced them by the new method. The House measure died on calendar and the combined Senate bills died in committee.

Another proposed measure that did not survive the 2000 legislative session would have opened the JNCs' deliberations to the public and would have deleted the JNCs' limit of sending three to six nominees to the governor, but would have also required the JNCs to rank those nominees in order of qualification.

Representative Brummer began the 2001 session by sponsoring bills that would significantly alter the appointment method for members of the JNCs. He also proposed to substantially amend article V, section 20 of the Florida Constitution. Both measures took power from The Florida Bar and placed it in the governor's office. For example, the proposed House Joint Resolution 627 sought an amendment to the Florida Constitution that eliminated JNCs and vested the governor with the power to nominate judicial candidates, with confirmation by the Senate. Under House Joint Resolution 827, the Florida Constitution would still confer the governor with the power to nominate and the senate to confirm judicial candidate, but JNCs would still be kept to certify to the governor a list of all qualified candidates. Additionally, the resolution granted the governor, instead of the supreme court, the power to establish uniform rules of procedure for the JNCs. Finally, this legislation would have made the JNC deliberations public. Both House Joint Resolutions 627 and 827 died in the Judicial Oversight Committee.

Both chambers of the legislature, however, did pass House Bill 367. Under this measure, the Florida Bar kept four active members practicing in the affected jurisdiction on each JNC. The Board of Governors, however, only *nominates* three members for each of its four JNC seats. The governor then appoints to the JNC the Florida Bar member from the Board of Governor nominees. The governor appoints five residents of the affected JNC's jurisdiction, two of whom are active members of the Florida Bar. The gubernatorial JNC appointments serve during the same term of office as the appointing governor. House Bill 367 contains the aspirational goal for the governor to ensure appointments to the JNCs reflect the racial, ethnic, gender, and geographic distribution of the jurisdiction.

Under House Bill 367, the terms of the current gubernatorial appointees to each JNC will be terminated upon the bill becoming law. The Florida Bar Board of Governors' appointees will continue to serve the JNC until their terms expire.

Governor Bush is not expected to veto House Bill 367, which will take effect upon his signature. As one of the three surviving members of the JNC for the Second District Court of Appeal, I am grateful that I will continue to serve the district until my term expires in 2004. As an attorney, I am concerned that the JNCs will apparently be more politicized–although a political scientist might argue that they always have been, only the balance of power has changed. As a voting citizen, I will watch with interest when a new administration assumes power in Tallahassee to see if the new methods by which members of the JNCs are selected are once again "fixed."

Valeria Hendricks *is the head of the appellate and law department of Davis & Harmon, P.A. Prior to entering private practice, she served as a staff attorney to the Second District Court of Appeal, the last six years of which were spent as senior staff attorney to Judge Chris Altenbernd. The Florida Bar Board of Governors appointed Ms. Hendricks to the Second District Court of Appeal Judicial Nominating Commission in 2000.*

Endnotes:

[1] *See House passes bill to change how judges are picked*, Associated Press, Apr. 29, 1999.

[2] *Id.* (quoting Representative Curt Levine, D-Boca Raton, and Senator Daryl Jones, D-Miami).

Coming in June:

"Inside the 11th Circuit"

Plan to attend **"Inside the 11th Circuit,"** a one-day seminar to be held on Friday, June 1st at the Adam's Mark Orlando, 1500 Sand Lake Road, Orlando, FL 32809, phone 407/859-1500, fax: 407/855-9863.

Judges Tjoflat, Wilson and Hill will each present lectures and then participate in a panel discussion to answer questions. The Clerk of the Court will also be present to provide practice points and an overview of any new rules of procedure in a presentation titled: "2001-- The Clerk's Office Perspective for Practitioners."

A representative from the Court's Mediation Office will present insights into efficient and effective mediation tactics to lessen the Court's case load.

For more information, call Rick Nelson (407/786-3880.) Watch The Florida Bar *News f*or details and registration forms.

Eleventh Circuit Update

by Rebecca Harrison Steele

In a year that included not only the case of Elian Gonzalez but also the presidential election cases, the Eleventh Circuit has been hard at work. And while addressing these and many other cases, the court found time to tackle issues that are *really* important–further refinements in the "final judgment" rule, excusable neglect in filing a late notice of appeal, and other topics of great interest to appellate lawyers. Here are some recent developments:

Finality of Order

The Eleventh Circuit frowns on appellants who try to "manufacture" appellate jurisdiction over non-final orders. For example, if an appellant tries to create a final judgment by voluntarily dismissing the remainder of a case left undecided by the trial court, the Eleventh Circuit will normally refuse to consider the judgment final.[1] What happens, however, if two parties manufacture "non-appealability" and freeze an unfortunate third party out of its appeal? That is what happened in *CSX Transportation, Inc.v. City of Garden City*.[2] CSX sued Garden City, which in turn filed a third-party claim against one of its contractors.[3] The trial court granted summary judgment for the city against CSX on immunity grounds. Because the third-party claim was still pending, the case stayed open. Subsequently, the city voluntarily dismissed its third-party claim without prejudice. CSX appealed.

The Eleventh Circuit noted that normally the voluntary dismissal would not render the partial summary judgment final and appealable. But here CSX was not guilty of "manufacturing jurisdiction"–to the contrary, it was helpless to control what the other two parties chose to do. The court ruled the order final, noting, "If there is no final appealable order in the case, CSX will be deprived of any appellate review of the dismissal of its lawsuit and will be left holding the proverbial (and unenviable) 'bag.'"[4]

In *Crawford & Co. v. Apfel*,[5] an employer sought to intervene in an ex-employee's Social Security disability proceeding. The trial court ruled that the employer was not a proper party to the proceeding. The Eleventh Circuit found "jurisdiction present under the *Cohen* collateral order doctrine" because (1) whether corporations could participate in the disability hearing was "a structural matter unrelated to the merits of the individual's disability claim;" (2) the issue was important because the trial court's unprecedented ruling "would create a fundamental change in the social security disability hearing;" and (3) "the issue would be otherwise unreviewable."[6]

Speaking of collateral orders, the court met an issue of first impression in the circuit in *Singleton v. Apfel*.[7] The district court ruled a plaintiff's Equal Access to Justice Act fee application untimely; even though the plaintiff could have filed for fees immediately upon remand, she had waited until after her interlocutory appeal. The circuit court reversed, noting: "Just as courts cannot rely on the [collateral order] doctrine to require a litigant to file an interlocutory appeal, they cannot likewise employ the doctrine to require a litigant to file an EAJA fee application pending appeal in the action out of which those fees arise."

Jurisdiction

Rembert v. Apfel[8] was an appeal from a magistrate judge's opinion and order. The case found its way to a magistrate judge through the standard practice of the district court, which was to issue orders inviting the parties to consent through inaction to allow final disposition of their cases by magistrate judges. The Eleventh Circuit ruled that civil litigants must consent to magistrate judges expressly. Because the plaintiff "did nothing affirmatively to indicate her express consent on the record, we do not have appellate jurisdiction."

The very interesting case of *Made in the USA Foundation v. United States* presented the question of whether NAFTA was void because it did not receive the two-thirds majority approval of the Senate required under the Treaty Clause of the Constitution.[9] The Eleventh Circuit ruled that "the question of just what constitutes a 'treaty' requiring Senate ratification presents a nonjusticiable political question."[10] Finding itself without jurisdiction, the court dismissed the appeal and remanded with instructions to vacate the decision of the district court.

In *IAL Aircraft Holding, Inc. v. Federal Aviation Administration*,[11] the court recalled its mandate because the case had become moot before the court issued its decision. Although it is uncommon for the court to recall its mandate, it did so here because it was clear that events had rendered the court's decision moot before the opinion had been rendered.

On the flip side, in *United States v. Dunham*,[12] the court ruled that filing of a notice of appeal deprived the district court of jurisdiction to entertain a § 2255 motion seeking to set aside a sentence, pending appeal of the sentence in the circuit court.

Notice of Appeal

In *United States v. Phillips*,[13] Phillips filed a § 2255 motion challenging his sentence because he was never informed of his right to file an appeal *in forma pauperis*. The district court agreed that an out-of-time appeal was the proper remedy. But how to accomplish it? The Eleventh Circuit noted that Rule 4 did not cover the situation.[14] The proper procedure is this: (1) the district court should vacate the criminal judgment the prisoner wishes to challenge on appeal; (2) the court should then reimpose the same sentence, advising the defendant of his appeal rights; and (3) the court should tell the defendant that the time for filing a notice of appeal from the new judgment is ten days.[15]

Not having had the benefit of the Eleventh Circuit's guidance, the district court had not followed this procedure with respect to Phillips. All was not lost for him, however. The court prescribed that Phillips should file, and the district court should grant, a Rule 60(b)(6) motion for relief from that portion of the § 2255

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judgment that put forward an ineffective remedy.[16]

Williams v. EMC Mortgage Corp. (In re Williams)[17] is a classic "ouch!"case. After the bankruptcy court dismissed Williams's petition for bankruptcy, Williams moved for reconsideration. The court denied his motion. He filed a notice of appeal seventeen days later. Because Federal Rule of Bankruptcy P. 8002(a) requires a notice of appeal to be filed within 10 days of entry of the court's order, his appeal was dismissed as untimely. The Eleventh Circuit ruled that (1) the 10-day period ran from entry of the order, not from when Williams received it;[18] (2) Federal Rule of Civil Procedure 6, excluding weekend days from computation, did not apply and 10 days meant 10 calendar days;[19] (3) unlike Federal Rule of Appellate Procedure 4(a)(6), Bankruptcy Rule 8002 does not provide for the reopening of the time to file a notice of appeal if an appellant does not receive notice of the entry of the order.[20] The Eleventh Circuit refused to treat the late notice of appeal as a Bankruptcy Rule 8002(c)(2) motion to extend the time to file an appeal due to excusable neglect. The rule only allows a party to seek an extension of time through a motion, and a notice of appeal is not a motion.[21]

Appellants, can, however take comfort from two cases where the Eleventh Circuit did find excusable neglect. In *Cannabis Action Network, Inc. v. City of Gainesville*, the court affirmed the district court's grant of an extension of time when CAN filed a premature notice of appeal followed by post-judgment rulings that were confusing and ambiguous.[22] And in *In re Old Naples Securities, Inc.*, the appellants mistakenly filed their notice of appeal with the bankruptcy court, not the district court. Because the notice was timely filed, the mistake was apparently due to clerical error, and the notice of appeal made its way to the district court only one day late,

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preme Court held that the right to trial by jury forbids a judge from increasing the penalty for a crime beyond a statutory maximum, if the reason for the increase was that the judge relied at sentencing on facts that were not presented to the jury and proved beyond a reasonable doubt.[37] In the wake of *Apprendi*, the circuit courts have been hit with numerous challenges to sentences. Since many of the appellants did not have the benefit of *Apprendi* during their trials, an important aspect of these challenges is whether they will be reviewed for plain error or for preserved error. In *United States v. Candelario*,[38] the Eleventh Circuit clarified when it considers an *Apprendi* issue preserved. First, the defendant must make a constitutional objection.[39] Second, it must be timely.[40]

The issue is important because the Eleventh Circuit reviews preserved *Apprendi* objections *de novo*.[41] Plain error, on the other hand, will not be reversed unless there is error that is plain, affects substantial rights, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings."[42] In the *Apprendi* context, there is error if the sentence exceeds the statutory maximum. The error is plain, if the increase is based on the quantity of drugs, unless the jury made a finding as to the quantity involved. The error may affect a defendant's substantial rights if he can show that a rational jury could have found him guilty of the lesser quantity of drugs. If the defendant meets these three elements, he must still show that the sentence undermines the integrity, fairness, or public reputation of judicial proceedings.[43]

Scope of Appeal

In *Chapman v. AI Transport*,[44] the plaintiff sued under both the ADA and ADEA. The district court granted summary judgment against the plaintiff on his ADEA claims. The ADA case went to trial. On appeal, the plaintiff argued that the district court should not have granted summary judgment on his ADEA claim. To support his argument that the employer's behavior was pretextual, the plaintiff cited heavily from evidence presented at his ADA trial. In reviewing the partial summary judgment, the Eleventh Circuit refused to consider the trial testimony. The court noted that "[i]t would seriously impair the ability of district courts to pare down the issues in multi-claim civil cases if we required them to revisit and re-evaluate a summary judgment previously granted on one claim because of evidence that comes out later at the trial of other claims."[45] Further, "any evidence offered at trial is not relevant to our review of the ADEA summary judgment and we will not consider it."

Law of the Case

In dealing with the aftermath of a PCA decision, it helps to be a circuit judge. In *Oladeinde v. City of Birmingham*,[46] the case first found its way to the Eleventh Circuit after the district court denied a motion for summary judgment on qualified immunity grounds. The Eleventh Circuit summarily affirmed and remanded for trial. At trial, new evidence surfaced, leading to the conclusion that the defendants were entitled to qualified immunity. The plaintiff tried to argue that the PCA was law of the case that the defendants were not entitled to qualified immunity. The Eleventh Circuit ruled that "[w]here a previous panel has given no explanation for its decision, a subsequent appellate court panel is 'not bound by any "law of the case" unless a determination by us concerning the propriety of [the district court's order] is necessarily inconsistent with every possible correct basis for the earlier rulings of this court.'"[47] Because the previous panel could have affirmed simply because an issue of material fact existed, the court ruled "we are not bound by the law of the case doctrine in deciding whether the individual defendants were entitled to qualified immunity."[48]

Jones v. United States[49] shows that persistence pays off. The appellant moved to vacate or correct his sentence under 28 U.S.C. §2255. The district court denied his motion and certified two issues for appeal. However, it did not certify the prisoner's claim that he had received ineffective assistance of counsel with respect to a wiretap issue. Jones appealed and moved for an enlargement of time to raise the wiretap issue. A single judge of the Eleventh Circuit denied the motion. Jones moved for panel reconsideration and applied to expand his certificate of appealability. A two-judge panel ordered that the motion for reconsideration be carried with the case. Later, a three-judge panel denied the motion for reconsideration. The case was set for oral argument. Jones asked the merits panel to consider the wiretap issue. The government argued that Jones should be bound by the decision of the motions panel that denied reconsideration of the order limiting Jones to two issues. The court ruled for Jones and addressed the wiretap issue, noting that "the motion panel's denial does not bind the panel hearing the case on the merits. . . . In other words, the 'law of the case' doctrine does not apply to an administrative ruling issued pending oral argument."[50]

Binding Authority

Unlike Eleventh Circuit panels, which cannot overrule a previous panel, district courts are not required to follow the ruling or reasoning of another district court. *See Fishman & Tobin, Inc. v. Tropical Shipping & Const. Co., Ltd.*[51] (holding that while district court may use "intra-court comity" to ensure a uniform application of the law, it need not do so).

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Endnotes:

1. *See, e.g., State Treasurer v. Barry*, 168 F.3d 8, 11-13 (11th Cir. 1999); *Ryan v. Occidental Petroleum Corp.*, 577 F.2d 298, 302-03 (5th Cir. 1978).
2. 235 F.3d 1325 (11th Cir. 2000).
3. 235 F.3d at 1326-27.
4. *Id.* at 1328.
5. 235 F.3d 1298 (11th Cir. 2000).
6. 235 F.3d at 1303 (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). Because the order was an appealable collateral order, the court did not reach the "jurisdictional issue of first impression" of whether the order was appealable under 42 U.S.C. § 405(g). *Id.* at 1302.
7. 231 F.3d 853, 856-57 (11th Cir. 2000).
8. 213 F.3d 1331 (11th Cir. 2000).
9. 242 F.3d 1300 (11th Cir. 2001).
10. *Id.*
11. 216 F.3d 1304 (11th Cir. 2000).
12. 240 F.3d 1328 (11th Cir. 2001).
13. 225 F.3d 1198 (11th Cir. 2000).
14. *Id.* at 1200.
15. *Id.* at 1201.
16. *Id.* (noting that "[t]his is one of those rare instances in which Rule 60(b) relief is available in regard to an order entered in a § 2255 proceeding").

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11TH CIRCUIT UPDATE
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[17].216 F.3d 1295 (11th Cir. 2000).
[18].216 F.3d at 1297 n.3.
[19].*Id.* (By contrast, weekends and holidays are not counted in computing the 10-day period to file a Rule 23(f) petition to appeal a class certification decision. *Shin v. Cobb County Bd. of Educ.*, 2001 U.S. App. LEXIS 6474 (Apr. 17, 2001).
[20].*Id.* n.4.
[21].*Id.* at 1297.
[22].231 F.3d 761, 767-68 (11th Cir. 2000).
[23].223 F.3d 12996, 1302 n.7 (11th Cir. 2000).
[24].224 F.3d 1251 (11th Cir. 2000).
[25].224 F.3d at 1255 and nn. 8 and 9.
[26].2001 U.S. App. LEXIS 7599 (11th Cir. Apr. 26, 2001).
[27].*Shin v. Cobb County Bd. of Educ.*, 2001 U.S. App. LEXIS 6474 (11th Cir. Apr. 17, 2001).
[28].221 F.3d 1266 (11th Cir. 2000).
[29].221 F.3d at 1274.
[30].*Id.* at 1274-75 (noting that review is usually unwarranted if the petitioner merely shows that the court's decision is questionable).
[31].*Id.* at 1275.
[32].*Id.* at 1276.
[33].*Id.*
[34].*See, e.g., Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001) (declining to address issue mentioned in brief but not supported by any elaboration or citation of authority); *Randolph v. Green Tree Financial Corp.*, 2001 WL 245727 (11th Cir. Mar. 13, 2001) (upon remand from Supreme Court, appellant cannot raise arguments abandoned in earlier briefs).
[35].217 F.3d 1321 (11th Cir. 2001).
[36].237 F.3d 1273, 1276 (11th Cir. 2001).
[37].530 U.S. 466 (2000) (the exception to this rule is that a judge may rely on the fact of a previous conviction).
[38].240 F.3d 1300 (11th Cir. 2001).
[39].For example, the defendant could argue that before he could receive a sentencing enhancement based on the amount of drugs in question, the quantity of drugs would have to be determined by a jury. *Id.* at 1304.
[40].*Id.* An objection is timely if made at sentencing.
[41].*Id.* at 1306. The court must then determine whether the error was harmless under Fed. R. Crim. P. 52(a). *Id.* at 1307. The court must ask "whether the 'omitted elements is supported by uncontroverted evidence'" and if "'the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.'" *Id.* at 1308 (citation omitted).
[42].*Id.* at 1309 (citation omitted).
[43].*Id.* at 1309-11.
[44].229 F.3d 1012 (11th Cir. 2000) (en banc).
[45].*Id.* at 1027.
[46].230 F.3d 1275 (11th Cir. 2000).
[47].*Id.* at 1289-90 (citation omitted).
[48].*Id.* at 1290.
[49].224 F.3d 1251 (11th Cir. 2000).
[50].224 F.3d 1251, 1256 (citing 11th Cir. R. 27-1(g)). Considering the merits, the court ruled that Jones had indeed received ineffective assistance of counsel with respect to the suppression of wiretap evidence.
[51].240 F.3d 956, 965 (11th Cir. 2001).

Meet the "New" Appellate Judges of the First and Second District Courts of Appeal

by Paul Avron

Joseph Lewis, Jr. had an extensive government background prior to ascending to the First District Court of Appeal, including serving as the Bureau Chief, Employment Litigation Section, in the Office of the Attorney General from 1995 to 2000. Prior to that Judge Lewis served as the Senior Attorney, General Civil Litigation Section, also in the Office of the Attorney General, from 1981 to 1995. Judge Lewis' tenure with the Office of the Attorney General afforded him the opportunity to practice before the U.S. District Courts for the Southern, Middle and Northern Districts of Florida and the U.S. Court of Appeals for the Eleventh Circuit.

Prior to his tenure with the Office of the Attorney General, Judge Lewis served as an Assistant Public Defender for the Second Judicial Circuit from 1978 to 1981 and prior to his tenure at the Office of the Public Defender, Judge Lewis served as a Judicial Research Aide with the Florida Industrial Relations Committee. Judge Lewis received his B.S. Degree from the University of Montana and his J.D. Degree from Florida State University.

Judge Lewis has received numerous honors and awards, including the Claude Pepper Outstanding Government Lawyer of The Florida Bar for 1995 and the Community Service Award, Neighborhood Justice Center and Legal Services of North Florida, Inc. and the Second Judicial Circuit for 1994. Likewise, Judge Lewis has been and continues to be active in community affairs. For example, Judge Lewis is presently associated with the Tampa Urban League and has previously served as a member of the Board of Directors of the Boys and Girls Club of the Bend and a Parent-Volunteer, PGA Junior Golf Association.

Judge Lewis has also been and continues to be active with The Florida Bar including serving as the Chair of the Second Circuit Fee Arbitration Fee Committee from 2000 to date, as a member of the Board of Directors of the Tallahassee Bar Association from 1999 to date and as a member of the Labor and Employment Section of The Florida Bar from 1999-2000. Judge Davis has also been involved with CLE, preparing materials relating to the subject of Prosecutorial Immunity.

Ricky Polston ascended to the First District Court of Appeal on January 2, 2001. Prior to taking the bench, Judge Polston was in private practice from1987-2000. Prior to working as an attorney Judge Polston worked as an Audit Manager with the accounting firm of Deloitte, Haskins & Sells, C.P.A.'s from 1977-1984.

Judge Polston has been a certified public accountant since 1978. He graduated from Florida State University with a B.S. Degree in 1977. Subsequently, Judge Polston received a J.D. Degree from Florida State University in 1986. Judge Polston has been a certified circuit court mediator since 1997. Judge Polston, who is married and has four daughters, is involved in various legal activities beyond serving as a Judge with the First District Court of Appeal. For example, Judge Polston is a member of the Tallahassee Bar Association, the American Bar Association and the Tallahassee Inn of Court where he served as the former treasurer. Judge Polston is also a member of the Florida Institute of C.P.A.'s and the American Institute of C.P.A.'s. Judge Polston is also involved with the Celebration Baptist Church and Christian Heritage Church.

Charles A. Davis, Jr. was appointed to the Second District Court of Appeal on April 1, 1999. Judge Davis graduated from Trevecca

Nazerene College with a B.A. Degree with a History major and then from University of Cincinnati with a M.A. Degree. Judge Davis received his J.D. Degree from the University of Florida. Prior to his appointment to the Second District Court of Appeal, Judge Davis served as the Chief Judge of the Tenth Judicial Circuit, based in Polk County, Florida. Judge Davis served as a Circuit Judge for the Tenth Judicial Circuit from 1985 through 1995 when he ascended to the Chief Judgeship.

During his tenure on the Polk County Circuit Court, which he described as having a true "rotation system," Judge Davis sat in all divisions. For example, Judge Davis sat in the felony, family, civil, probate and juvenile divisions. Judge Davis described his tenure in the juvenile division as the "most fulfilling" in that he was able to make a difference in childrens' lives. Judge Davis stated that while his tenure on the juvenile division was the most rewarding, it was also the most challenging but that the system has since improved as a result of having better resources at the Court's disposal. Prior to being elevated to the Tenth Judicial Circuit, Judge Davis served as a County Court Judge for Polk County. Between 1981 and 1983, prior to taking the bench, Judge Davis served with the Public Defender's Office for Polk County and before that Judge Davis was in private practice.

Interestingly, Judge Davis served as Mayor/Commissioner, for the City of Winter Haven, Florida from 1978 to 1979. While he certainly enjoyed being part of the trial court, Judge Davis equally enjoys his present position as an appellate Judge, noting the significant differences between the trial and appellate processes, and how that experience has helped him in his present position. Judge Davis is active in many community and professional organizations too extensive to list.

Morris Silberman began serving on the Second District Court of Appeal on January 2, 2001. Prior to taking the bench, Judge Silberman was in private practice and since 1988 worked as a solo practitioner. His private practice focused primarily upon general civil litigation, corporate and partnership law.

Judge Silberman's wife, Nelly N. Khouzman, is a Circuit Judge sitting on the Sixth Judicial Circuit. Judge Silberman received his B.A. Degree in Political Science and Philosophy from Tulane University and his J.D. Degree from the University of Florida. After graduating from law school Judge Silberman served as a law clerk to Judge Herboth S. Ryder, now retired from the Second District Court of Appeal, for one and one-half years. This experience fostered a desire to serve as an appellate judge. Judge Silberman, serving as judge for the first time, stated that he finds being an appellate judge "very rewarding." Speaking of the Florida Judicial College, which he referred to as the "new judge's school," Judge Silberman stated that the focus of the appellate portion of the school was on jurisdiction, the standard and scope of review (issues presented for review).

Speaking about the often-discussed issue of per curiam opinions, Judge Silberman explained that where a particular case is not different or unusual, the applicable law is clear and the trial court's opinion is going to be affirmed, a per curiam opinion may well be in order. He noted that because of the case load, the majority of which involves criminal law, if opinions were written on every appeal it would take much longer to issue decisions and that many decisions would not add to the existing body of case law.

Judge Silberman served as President of the Clearwater Bar Association from 1993-94 and as a member of the Board of Directors for several years. He also served on The Florida Bar Board of Governors from 1996 to 2000. During his tenure on the Board of Governors, Judge Silberman served two terms on the Executive Committee, the Election Reform Special Committee and the Members Benefits Program. Judge Silberman is currently a member of the Appellate Court Rules Committee and was an author and co-editor for *Business Litigation in Florida*, a publication of The Florida Bar.

Paul A. Avron *is an associate with Berger Singerman in Miami, Florida and specializes in bankruptcy law and appellate litigation.*

Thinking About Becoming Board Certified in Appellate Practice?

The application filing period for board certification is fast approaching. The application filing period for the March 2002 examination starts on July 1 and ends on August 31, 2001. The following minimum requirements must be met by August 31, 2001: a minimum of 5 years in the practice of law; demonstrate substantial involvement (defined as devoting no less than 30% in direct participation and sole or primary responsibility for 25 appellate actions including 5 oral arguments) in the practice of appellate practice law during the 3 years immediately preceding the date of application; completion of at least 45 continuing legal education hours in appellate practice activities within the 3 year period preceding the date of application; peer review of 4 attorneys and 2 judges who can attest to your reputation for knowledge, skills, proficiency and substantial involvement as well as your character, ethics and professionalism in the field of appellate practice. You must also pass an examination applied uniformly to all applicants.

You can obtain an application by downloading a copy from the Bar's website (www.FLABAR.org). Click on the *Member Services* link, then *Certification*. You can also request an application by writing to: The Florida Bar, Legal Specialization and Education, 650 Apalachee Parkway, Tallahassee, FL 32399-2300. Please read the standards for appellate practice certification located in your September 2000 issue of The Florida Bar *Journal* or you may access the rule (Chapter 6-13) on the Bar's website.

Questions? Please call the Legal Specialization and Education Department at (850)561-5842.

CHAIR'S MESSAGE
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By enhancing its cosponsorship with the Trial Lawyers Section, the Section co-produced a cutting edge litigation program, and co-hosted *Practice Before the Supreme Court* with the Government Lawyers Section.

Our Section's listserve adds email addresses almost every day. Apparently, our Section members are in the forefront of technology developments. I recently presented a paper at the 2001 LegalWorks 2001 Conference, and was amazed at the growth of user-friendly technology available for appellate and trial advocates. The Section will keep its members abreast of these developments.

The ***Appellate Practice Guide***, directed by John Crabtree and his committee, has achieved the lofty status of a necessary deskbook for all appellate lawyers. The *Guide* remains another valuable resource for Section membership. Susan Fox, our editor of *The Record (Journal of the Appellate Practice Section)*, has continued an outstanding Section tradition of providing timely, informative, and provocative articles which are "must read" for appellate lawyers and judges.

The Section was also asked to provide valuable input and advice to the Supreme Court Workload Study Commission as it gathered information and made recommendations concerning Florida's appellate court structure. Section members were instrumental in developing practical information supporting the fair and efficient operation of our courts. Similarly, I am proud that Section members continue to receive appointments to serve in advisory capacities on Judicial Management Commission committees as well as invitations to address government committees, community organizations, and professional programs. The Section stands ready, willing, and able to provide its thoughtful opinion and advice on the important issues of the day.

As we look toward another year of progress, the Section remains indebted to our irreplaceable administrator, Austin Newberry, whose dedication has enabled the Section to plan, promote, and present high quality programs and services. I am ready to pass the gavel to Hala A. Sandridge, who will continue to lead the Section to greatness. The valuable volunteer efforts of all Section officers, committee chairs, and membership remains a remarkable tribute to the professionalism of Florida's appellate practitioners.

BOOK REVIEW:

"Blackie, The Talking Cat"

by West Publishing

Reviewed by Scott D. Makar

One of the best years of my legal career was spent in Atlanta, Georgia working for Judge Thomas A. Clark of the United States Court of Appeals, Eleventh Circuit. I was encouraged to apply to Judge Clark because of his reputation as a bright and kind man who took a sincere interest in the professional and personal development of his law clerks. Picking up the phone and accepting his offer to join his "family" of current and former law clerks was only the start of a wonderful relationship, not only with the Judge, but also with his wonderful wife, Betty, his staff, my co-clerks, and the courthouse personnel. It was also an opportunity to meet first-hand some of the icons of Fifth and Eleventh Circuit lore.

In preparing for the judicial clerkship, I wanted to find out all I could about the Eleventh Circuit's history, which naturally includes that of the "old" Fifth Circuit from which it separated in 1981. I picked up copies of *Unlikely Heroes* by Jack Bass, *A History of the Fifth Circuit, 1891-1981* by Harvey C. Couch, and *A Complete Turn of the Wheel* by Dean Frank Read. As I read these superb books, I became increasingly aware of the Fifth Circuit's remarkable history and the role its extraordinary jurists played in shaping the law in the Deep South during some of the region's most difficult times.

For instance, I came to understand the quiet valor of Elbert Parr Tuttle, who was not only a war hero but also a leader of the court through the desegregation era. Judge Tuttle was one of the four white, male Republican judges (dubbed "The Four") who formed the majority coalition that enforced the dictates of *Brown v. Board of Education* in the South (thus the title to Bass's book). What a blessing that his chambers were next to Judge Clark's so that I, along with the other law clerks, had the honor to lunch with him and hear his stories of a past oftentimes forgotten. He had taken senior status in 1968, but continued to work heartily into the 1980s. The year I clerked, 1988-89, he was 91 years old, but his spirit and mind where that of a much, much younger man. He died in 1996 – 98 years after his birth in Hawaii and many decades after he unflinchingly led the Fifth Circuit during the early 1960s as its chief judicial officer.

I also learned of the masterful opinion writing of a number of the court's judges, some with a marvelous wit and humor like Judges Irvine L. Goldberg and John R. Brown as well as Judge Peter Fay, known fondly as a poet-in-a-robe. What a pleasure to read a judicial opinion filled with intelligence and wit, the latter used just enough to be humorous without insulting the losing party.[1]

And then one day I came across one of the classic opinions of all-time from this Circuit: *Miles v. City Council of Augusta, Georgia*, 701 F.2d 1542 (11th Cir. 1983).[2] The issue before the court was whether an Augusta business license ordinance for a "talking cat" was void for vagueness or overbroad, or violated free speech or association rights. The dispute centered on Carl and Elaine Miles, who – according to Carl – were approached in a South Carolina rooming house by a girl with a box of kittens. He turned down her offer for a free one, but as he walked away a "voice" spoke to him and said "Take the black kitten." He did so. About five months later, he was playing with the cat when the voice again appeared and said, "The cat is trying to talk to you." According to Mr. Miles, this "voice was the voice of God."

Before long, "Blackie the Talking Cat" was "catapulted into public prominence" on radio and television where he spoke for a fee including shows like "That's Incredible." The Miles "capitalized on Blackie's linguistic skills" resulting in much public affection. Even the district judge who heard the case had met Blackie, as the Eleventh Circuit recounted: "As the District Court observed in his published opinion, Blackie even purred 'I love you' to him when he encountered Blackie on the street one day."[3]

Sadly, Blackie's fame subsided and the Miles family took to the street by taking contributions from "Augusta passersby" who "paid to hear Blackie talk." Some humorless persons complained, the Miles were forced to pay $50 for a city business license (due to the City's "doggedly" insistence), and a controversy of constitutional dimension reared its ugly head.

The Miles filed suit and claimed that the ordinance did not apply because it "nowhere lists cats with forensic prowess." Both the district judge and the appellate panel rejected the claim that Blackie's "speaking engagements" did not constitute an "occupation" or a "business." The courts viewed the "contributions" that the Miles family had solicited as "elocutionary endeavors [that] were intended for pecuniary enrichment and were indubitably commercial." On this point, the panel opinion supported its view by pointing out that "Blackie would become catatonic and refuse to speak whenever the audience neglected to make a contribution."

And, in what was to become an historic footnote in Eleventh Circuit history,[4] the panel opinion took up the weighty question of feline free speech rights.

> This Court will not hear a claim that Blackie's right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, he cannot be considered a "person" and is therefore not protected by the Bill of Rights. Second, even if Blackie had such a right, we see no need for appellant to assert his right jus tertii. Blackie can clearly speak for himself.

This footnote spawned one of the more humorous keynotes ever: "Talking cat could not be considered a 'per-

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BLACKIE, THE TALKING CAT
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son' and therefore was not protected by Bill of Rights."

The *Miles* decision is the inspiration for a book, *Blackie the Talking Cat (and other favorite judicial opinions)* (West Pub. 1996), published by the editors at West Publishing. A letter was sent to judges and law professor across the country seeking their "favorite" opinions. The response was "overwhelming" with "some people ha[ving] a difficult time choosing just one opinion, so they sent several. As a result, hundreds of cases were submitted covering almost every facet of law."

Opinions of all types were reviewed, most humorous or entertaining, some eloquent or powerfully written, and others simply for their intrinsic value as vehicles for learning and sharing the law. The editors made final decisions "based on popularity, general interest, variety and readability." The result is eleven chapters of the most memorable opinions in American jurisprudence.

Each chapter is theme-based. For example, Chapter 1 – "All Creatures Great and Small" – has the *Miles* decision as well as others involving animals, pets, and other "wonderful creatures" that became the focus of legal disputes. Chapter 3's cases involve unusual legal questions such as "Whether a girdle is a burglar's tool?" (Answer: No. *In the Matter of Charlotte K*, 427 N.Y.S.2d 370 (Family Ct., Richmond County April 21, 1980) (holding that girdle used like a kangaroo pouch to hide shoplifted items not a burglar tool within meaning of penal code).

The chapter on sports has classics like Justice Blackmun's opinion in *Flood v. Kuhn*, 407 U.S. 258 (1972) addressing an antitrust challenge to a "reserve clause" in a player contract. Flood lost his legal challenge and thereby his quest to become a "free agent." But, the decision is widely known because it reads like a lofty essay on the virtues of the national pastime. According to the *Brethren*, Blackmun was dispirited to learn that his colleagues were not pleased with his handiwork, particularly the footnotes containing poems about the game. Justices Burger and White concurred in the decision but refused to join that part of the opinion with Blackmun's tribute to baseball. *Id.* at 285. My favorites in the chapter are those dealing with stray golf balls, a topic near and dear to duffers in Florida, which has its own wacky golf course tort jurisprudence.[5]

Other chapters are chock full of classics from Judges Brown and Goldberg as well as some recent masterpieces such as Judge Kozinski's opinion in *United States v. Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), which involved a civil antitrust action in the film distribution industry. By various accounts, the opinion has more than 200 movie titles embedded in it. For those who aren't movie-buffs or have just given up on finding them all, check out the article, "The *Syufy* Rosetta Stone" at 1992 B.Y.U. Law. Review 457, which purports to locate most of them. Also, Florida Bankruptcy Judge A. Jay Cristol – known for his literary prowess – makes a special appearance to hold a computer in contempt of court. *See In re: Vivian*, 150 B.R. 832 (Bankr. S.D. Fla. 1992) ("Order on Letter from John C. Vivian Dated December 3, 1992 and Marked 'Important' and Determining Rogue Computer in Civil Contempt.").

Finally, no collection of classic judicial opinions would be complete with the famous dissent of wordmaster Justice Musmanno of the Supreme Court of Pennsylvania in *Bosley v. Andrews*, 142 A.2d 263 (Pa. 1958). The majority reversed a verdict for a woman who sought damages for a heart disability resulting from her encounter with the defendant's bull, which did not strike or physically harm her. Justice Musmanno's humorous but compassionate appeal to "law, logic and elementary justice" rejects the "no impact, no harm" rule. And he ends with his now well-cited proclamation "I shall continue to dissent from [the majority opinion] until the cows come home."

Blackie the Talking Cat is a fun book, but has not been widely marketed, which is unfortunate. And, it is difficult to find. Major on-line booksellers list it as out-of-print. It is available, however, through West Publishing online at: *http://store.westgroup.com/store* for $26.95. The website indicates that a "cumulative supplement" is envisioned, which makes sense in light of the editorial department's request that if they "missed *your* favorite opinion, don't hesitate to tell us about it." A sequel – *Blackie the Talking Cat II* – ought to be a big hit if publicized a little more. Send your favorite opinions to: West Publishing, Editorial Department, P.O. Box 64526, St. Paul, MN 55164-0526. Oh, by the way, you can call 1-800-328-9352 to order a copy as well– tell them Blackie the Talking Cat is calling.

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See Aldaberto Jordan, Imagery, Humor and the Judicial Opinion, *41 U. Miami L. Rev. 693 (1987) (article exploring the use of imagery and humor in judicial opinions that "celebrates the prankster and poet in all of us."). The author of this law review article, now a federal district judge in the Southern District of Florida, was a predecessor clerk with Judge Clark and was generous in sharing what he knew of Fifth Circuit judicial humor.*

Endnotes:

[1] The decision is signed "per curiam" but Judge Frank Johnson was its author. *See* Frank Sikora, THE JUDGE: THE LIFE & OPINIONS OF ALABAMA'S FRANK M. JOHNSON, JR., 306-07 (1992) (Judges Tjoflat, Johnson and Hatchett heard the case, but the "matter of writing the opinion fell to me.") (quoting Judge Johnson).

[2] The appellate court was quick to note that "this affectionate encounter occurred before the Judge ruled against Blackie."

[3] Of course, the "*Bonner*" footnote, in which the new Eleventh Circuit adopted the prior precedents of the old Fifth Circuit as binding, is a contender as well. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[4] *See Jesters v. Taylor*, 105 So. 2d 569 (Fla. 1958) ("drive that hit [caddy shagging balls] was described by one witness as a 'low hook-what we call a caddy killer-a low liner.'"); *Miller v. Rollings*, 56 So. 2d 137 (Fla. 1951) (verdict for plaintiff/caddy reversed where issues existed whether caddy knew that defendant was an erratic golfer and whether defendant had given warning after striking the ball); *Brady v. Kane*, 111 So. 2d 472 (Fla. 3d DCA 1959) (judgment for defendant whose practice swing struck plaintiff on the head reversed due to jury questions on defendant's negligence and plaintiff's assumption of the risk); *Panoz v. Gulf and Bay Corp. of Sarasota*, 208 So. 2d 297 (Fla. 2d DCA 1968) (judgment for golf course operator affirmed where plaintiff injured while sitting on bench that toppled; bench was not defective and may have been moved by other players to uneven tee or slope).

Customer Reviews of *Florida Rules of Court: State and Federal*

(a humorous look at customer reviews posted on Amazon.com)

Hard to remember and difficult to forget, March 16, 2001 Reviewer: **Sugar from Miami** FLAs a longstanding fan of the author, it pains me to condemn "Florida" as uncharacteristically ambivalent in flow and scope. Like the author's many other works (notably "Alaska" and "Colorado") "Florida" has as its theme order in human behavior, and the path that we all must take to reach fulfillment through justice. However, taken as a whole this work reads better as a selection of short vignettes than as a 1592 page novel, and the author might better have explored publishing selections in such periodicals as "Florida Trend," "The Tampa Bay Literary Journal" or "South Florida Business Writers Guild."

That lack of flow leaves one questioning where the author is taking us on this journey. While starting out strong with his engaging piece "Evidence," he reaches "Appellate Procedure" in the very middle of the work and then sends the reader back down to the less fulfilling "Statewide Uniform Guidelines for Taxation of Costs." This choice leaves the reader wondering, how did we get here?"

The author's prose is not as poignant or masterly as previous works. For instance, the selection "Florida Probate Rules" conjures up images of well-heeled heiress in West Palm Beach. But instead of giving an insight into the childhood, say, of the poor-little-rich-kid, the author speaks obliquely of caveats and curators. While the ominous reference to "adversary proceedings" might suggest the divorce of the Pulitzer's or the will contest of the duPont scion, the actual presentation is, to say the least, anti-climactic. Likewise, until his January 1, 2001 amendments to the Appellate Rules went into effect, the author left venue at the appellate level entirely up to the reader's imagination. The only exceptions to this disappointing lack of ambiance are the simple but tittilating "Rules of Discipline," which the author wisely saves until the end of the work.

All in all, "Florida" lacks the depth of "California," the quiet wisdom of "Wisconsin" and the unfailing honesty of the beautiful and frightening "New York" -- a work which demonstrates that he has indeed been touched, at times, by the gentle hand of the Almighty. But not here. As one reviewer poignantly put it, "The 'Florida Rules of Court' are both difficult to forget and hard to remember.'"

It should be noted that the author adds, as an encore, his classic Federal Rules -- a moving piece that should be a part of any Rules fan's library, and which almost makes up for the shortcomings of "Florida. But it's segment on "Southern District of Florida" -- promising at first glance -- barely conjures up images of the shimmer of the Everglades , the stillness of downtown Coconut Grove, or the bustle of an Elton John show on South Beach

Respectful disagreement with Sugar, March 8, 2001 Reviewer: **A reader from Tallahassee.** I am writing to lodge my respectful disagreement with Sugar's dismissal of "Florida" as lacking originality and continuity vis-a-vis the other works in the memorable state rules of court series. While lacking the power and insight of many of the author's earlier works (see, e.g., "Washington" and "Alabama"), "Florida" should not be held to the impossibly high standards set by the author's earlier works. Taken as a whole, "Florida" may well be the most profound piece of work in the series.

An understated chronicle of right and wrong, "Florida" makes a truly powerful statement on what some might consider the excrutiating minutiae of an existence those outside the know would be horrified to learn exists. Limits on briefs? Methods of filing petitions and judicial assignment? It's in there. And throughout the reader is left on the edge of her seat wondering where this thrill ride will take her next. While Sugar criticizes what some may consider a scattershot order of the court's rules, those swept into the flow quickly realize that this is one of the book's charms. Just when you think you fully understand Pro Hac Vice Admission in one of Florida's numerous Appellate Divisions, BAM, you are brought without warning into the world of licensing of the court reporter.

The true beauty of this tome lies in the fact that you may never know how the Pro Hac Vice Admissions turn out, or why it matters.

Instead, the reader is again swept into another series of seemingly haphazard dictates on a totally unrelated subject. Never knowing where or how any of it connects or ties in, like Ulysses before it, the reader is left both vaguely unsatisfied and, at the same time, needing more. As page after page is turned, the reader becomes increasingly frustrated by the author's detached voice. Will his true emotions ever show through? What does HE think of this 20 day requirement (add 5 for mailing).

At the end, the reader realizes that little matters other than the rules. Why are they there? Why am I reading them? Why do they matter? Why do I matter? The reader emerges from the book with more questions than answers. And therein lies the true beauty of "Florida".

Susan/ Austin:
Do we want to keep this in? It's a left-over...

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Need to fill...

Susan, in your e-mail to Austin, you mentioned something about the 5th DCA.

Is that something for us to put together?

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