The Record

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The Undeniable Appeal of Attorney Fee Orders

by Charles Tyler Cone

Aside from zealously advocating the interests of their clients, nothing is so important to attorneys as their fees. Thankfully, at least in the context of fee-shifting awards, the two go hand in hand.

This happy coincidence of interests is not without its price. The trial attorney seeking to offset the shock of his bill with a healthy fee award must often muddle through the intricacies of "prevailing parties" jurisprudence and cases deciding whether a $100 offer of judgment was made in good faith. Fortunately, all that is beyond the scope of this article.

Instead, this article wrestles with a much more manageable (but equally important) question: Are orders awarding or denying attorney fees appealable?

The answer (yes) is deceptively simple. The difficulty comes in determining how and why they are appealable, and the consequences that follow.

Avenues of Review

There are a couple of potential jurisdictional bases for review of a typical attorney fees order in a civil case. First, there is the District Court's jurisdiction over most final orders.[1] Second, the District Courts have jurisdiction over non-final orders which determine "the issue of liability in favor of a party seeking affirmative relief."[2] Finally, review may be available under Florida Rule of Appellate

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Message from the Chair

Error Contributing to a Verdict Equals a Miscarriage of Justice

by Roy D. Wasson

This is supposed to be the column in which I thank everybody for all their hard work this past year and look forward to greater things in the future for the Section. And that's about all that usually appears in a Section Chair's last column. But, most of you know me well enough to know that I tend to buck tradition. So, having gotten out of the way the obligatory thanks for all your hard work (without mentioning any names lest I omit someone important), let me buck tradition and exercise a point of personal privilege to mention an issue which is dear to my heart. That is the issue of harmless error in the appellate process.

I have been threatening for several years to write a comprehensive article (and eventually a treatise) on the doctrine of harmless error. I have failed so far. The issue has been growing and changing for more than 164 years. *See e.g., Crease v. Barret*, 1 C.N.&R. 919, 149 Eng. Rep. 1335 (Ex. 1835). Over the generations, the rule has swung between two extremes. Sometimes courts get in the mood to reverse judgments for even trivial errors which could not possibly have affected the outcome of the case below. At other times, courts use the

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Procedure 9.130(a)(4): "Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule."

The Non-Final Approach

The availability of these jurisdictional hooks will depend on the type of order involved. For example, review under Rule 9.130(a)(3)(C)(iv) is not available for an order denying attorney fees; such an order resolves the issue against, not in favor of, the party seeking the fees. Likewise, Rule 9.130(a)(4) can't be used to seek review of an attorney fee order before the lower court enters final judgment (or some other final order).[3]

One type of fee order has given rise to a substantial jurisprudence. An attorney fee order determining that a party is entitled to fees, but not determining the amount of the award, could conceivably come within the ambit of both Rule 9.130(a)(3)(C)(iv) and Rule 9.130(a)(4). That is, such an order could be — at least in some circumstances — a non-final order determining liability for fees in favor of a party seeking them; or a non-final order entered pursuant to an authorized post-judgment motion for fees.

In *Winkelman v. Toll*,[4] the Fourth District rejected both arguments. First, the court held that Rule 9.130(a)(3)(C)(iv) was not available to review a post-judgment order determining only that the appellee was entitled to fees.[5] The court's conclusion was based on the fact that entitlement to fees was, in its view, only "an" issue of liability (as opposed to "the" issue of liability).[6] This, plus the restricted scope of the rule, led the court to conclude that Rule 9.130(a)(3)(C)(iv) did not authorize the appeal.[7]

The Fourth District then rejected Rule 9.130(a)(4) as a jurisdictional basis. The court held that, because an attorney fee order would not necessarily result from a post-judgment motion, such an order was not within the rule's scope.[8] The court did not mention whether the fee order before it had been entered pursuant to a post-judgment motion.

Winkelman is not so much an analysis of Rule 9.130 as an effort to limit the use of interlocutory appeals. That is, a court could easily conclude that an order granting fees without setting amount is an order determining "the issue of liability in favor of a party seeking affirmative relief."[9] Similarly, a fee order will sometimes be entered pursuant to an authorized post-judgment motion.

Empiricism, not legal theory, drives *Winkelman*. As the court points out, an order determining entitlement to fees "is merely prefatory to another order" determining amount.[10] In many cases, this second order will either require a second appeal or moot the first. To the *Winkelman* court, at least, these cases outweigh those in which a prompt appeal of the entitlement issue will forestall the need for a determination of amount in the first place. Thus, the most efficient use of judicial resources is to resolve both issues in a single appeal. Where an order entered after final judgment is merely prefatory to another order which will be appealable either as a final judgment or an order on an authorized motion under rule 9.130(a)(4), review of the correctness of the prefatory order is available when the ultimate order is appealed.[11]

The Final Approach

Of course, there's no point in trying to force your attorney fee order into the narrow confines of interlocutory review if the order is final. All final orders are immediately appealable.[12] But is an order on attorney fees final?

Again, the answer depends on the type of order. Unsurprisingly, a *Winkelman*-type order (one awarding fees without setting amount) is not final; it is "merely prefatory to another order."[13] As such, it does not complete the judicial labor on the attorney fee issue, and therefore does not satisfy the orthodox judicial definition of finality.[14] On the other hand, an order denying fees (or granting fees and determining amount) does complete the "judicial labor" on the issue of attorney fees. In theory, then, such an order is final (and therefore appealable).

Timing is Everything

Maybe. Sort of. Most of the time. Despite the fact that a pre-judgment order denying fees (or granting fees and determining amount) puts an end to the same judicial labor as a post-judgment order, both are not necessarily "final" for purposes of appeal.

Pre-judgment Orders

Many of you are no doubt thinking: "Duh!" After all, the test for finality is not whether the order completely resolves an issue, but whether it completely resolves the case.[15] Obviously, a pre-judgment attorney fee order does not satisfy this test.

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There is a hitch, however, and this hitch has a name — *Mendez*.[16] In *Mendez*, the Florida Supreme Court relaxed the definition of finality to allow for an appeal of a partial summary judgment that resolved less than all of the parties' claims.[17] The court based its decision on the fact that the remaining claims were legally and factually independent of the claim resolved: "The judicial labor at the trial court level had ended thereon completely without delay."[18]

Mendez might easily apply to pre-judgment attorney fee orders, especifically since the issue of attorney fees is so often viewed as collateral to the main litigation.[19] For example, consider the following: Plaintiff files a personal injury suit and simultaneously files a *lis pendens* on property owned by defendant. There is, needless to say, absolutely no basis for the *lis pendens*.

Defendant's counsel figures this out, and, pursuant to Section 57.105, Fla. Stat. (1998), moves for taxation of the fees incurred by her client in obtaining the discharge of the *lis pendens*. The lower court denies the motion for fees, and defendant appeals.

This was the situation presented to the Fifth District Court of Appeal in *Red Bird Laundry v. Parks*.[20] The court dismissed the appeal, concluding that it had no jurisdiction over the pre-judgment order denying fees.[21] Given the fact that the attorney fee issue (whether the *lis pendens* was frivolous) was completely unrelated to the principal litigation, however, *Mendez* might support jurisdiction.

Haas v. Roe[22] bolsters this conclusion. In *Haas*, the Second District faced two attorney fee orders determining both entitlement and amount.[23] Despite the fact that the orders were entered prior to final judgment on all of the main claims, the court held that they were final orders.[24]

Like *Winkelman*, *Red Bird Laundry* is probably best seen as a case about preventing piecemeal review. Although the fee issue in *Red Bird Laundry* was collateral to the main clam, it involved the same parties and a denial of fees.[25] The court may have concluded that postponing the appeal until resolution of the main claims could do no harm, and could in fact conserve judicial resources if the ultimate final judgment resulted in another appeal. In *Haas*, by contrast, the fee orders took the form of executable final judgments running in favor of individuals no longer parties to the litigation.[26] In those circumstances, the costs of delay (potential execution of an erroneous judgment) may easily have outweighed to costs of multiple appeals.

Post-judgment Orders

A post-judgment order denying attorney fees (or granting them and establishing amount) is appealable. In *Clearwater Federal Savings & Loan Ass'n v. Sampson*,[27] the Florida Supreme Court explained:

Where an order after judgment is dispositive of any question, it becomes a final post decretal order. To the extent that it completes the judicial labor on that portion of the cause after judgment, it becomes final as to that portion and should be treated as a final judgment...[28]

Two district courts of appeal have relied on *Sampson* to hold that post-judgment attorney fee orders are appealable as final orders.[29] In *Hubert*, the Second District receded from earlier precedent holding that post-judgment cost orders were reviewable solely by interlocutory appeal.[30] In the *Hubert* court's view, *Craft* did not survive *Sampson*.[31]

Again, this consensus about the appealability of post-judgment fee orders makes sense. Post-judgment orders occur, by definition, after the entry of final judgment. At this point in the litigation, preventing piecemeal review is largely a lost cause.[32]

The consensus on post-judgment, non-*Winkelman* orders is not quite perfect. While the Fourth District agrees that such orders are appealable, the court treats them as non-final, but appealable, orders under Rule 9.130(a)(4).[33] This contrasts with both *Hubert* and *Altamonte Hitch*, in which the Second and Fifth Districts, respectively, expressly treat a post-judgment order on attorney fees as a final order.[34]

In theory, an important consequence follows from this difference in treatment. Because motions for rehearing of non-final, interlocutory orders are not "authorized," such a motion does not toll the time for appealing the order.[35] *Sampson*, however, reaches the opposite conclusion: "Post-decretal orders are not true interlocutory orders, and perhaps the term 'interlocutory' is a misnomer."[36] Thus, a post-judgment order denying fees, or granting them and determining their amount, will support a motion for rehearing, which will in turn suspend rendition of the order.[37]

The Fourth District has recognized this principle in another context.[38] There is no reason to think that the court would not also recognize the force of *Sampson* in the context of post-judgment attorney fee orders. Nevertheless, the court apparently continues to treat appeals of such orders as non-final appeals under Rule 9.130(a)(4).

Sampson notwithstanding, there might be a practical reason for handling appeals from post-judgment attorney fee orders under Rule 9.130(a)(4). Interlocutory appeals are

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Seeking Amicus Issues

The Section's Amicus Curiae Committee participates in cases presenting appellate issues that are "procedurally significant, but substantively neutral."

If you have, or know of, an appropriate case, it is essential for amicus participation that you notify the Committee as early as possible. You may reach the chair, John G. Crabtree, at (352) 401-9507 or e-mail at crabtree@atlantic.net

intended to be relatively quick and streamlined.[39] It might make sense to use this expedited procedure to review attorney fee orders, which, by definition, will raise only one issue, and will not generally entail the time and effort required for a plenary appeal.[40]

Conclusion

Behind the simple answer to the question, "Are attorney fee orders appealable?" lies a complex web of cases which distinguish between orders granting fees and orders denying them, between pre-judgment orders and post-judgment ones, between interlocutory appeals and

[3] *See Red Bird Laundry v. Parks*, 24 Fla. L. Weekly D898 (Fla. 5th DCA April 9, 1999).
[4] 632 So.2d 130 (Fla. 4th DCA 1994).
[5] *Id.* at 131.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 132.
[9] The Third District just reached such a conclusion in *Blattman v. Williams Island Assocs.*, 592 So.2d 269 (Fla. 3d DCA 1991).
[10] *Winkelman*, 632 So.2d at 132.
[11] *Id.* The *Winkelman* court's view of the world is evidently a common one, as every other district agrees that orders determining only entitlement to fees are non-final and non-appealable. *See Wometco Enter v. Cordoves*, 650 So.2d 1117 (Fla. 1st DCA 1995); *Hunt v. Hunt*, 648 So.2d 764 (Fla. 2d DCA 1994); *Trans Atlantic Distribs., L.P. v. Whiland & Co.*, 646 So.2d 752 (Fla. 5th DCA 1994); *Gonzalez Eng'g, Inc. v. Miami Pump & Supply Co.*, 641 So.2d 474 (Fla. 3d DCA 1994) (receding from its contrary conclusion in *Blattman*).
[12] *See* Art. V, § 4(b)(1), Fla. Const.; Fla. R. App. P. 9.030(b)(1)(A).
[13] *Winkelman*, 632 So.2d at 131, *see e.g., Hamm v. Eckler*, 712 So.2d 770 (Fla. 5th DCA other basis for jurisdiction appears." *Id. But cf. State, Dep't of Citrus v. Griffin*, 332 So.2d 54 (Fla. 2d DCA 1976) (treating an attorney fee order as an appealable final order even in the absence of a final judgment). *Griffin*, however, is expressly limited to the class-action context. Id. at 57.
[22] 696 So.2d 1254 (Fla. 2d DCA 1997).
[23] *Id.*
[24] *Id.* at 1254 & n.1 (Citing cases, including *Webb*).
[25] *See* 24 Fla. L. Weekly at D898.
[26] *See* 696 So.2d at 1254.
[27] 336 So.2d 78 (Fla. 1976).
[28] *Id.* at 79.
[29] *See Altamonte Hitch & Trailer Serv., Inc. v. U-Haul Co.*, 483 So.2d 852, 853 (Fla. 5th DCA 1986); *Hubert v. Division of Admin., State Dep't of Transp.*, 425 So.2d 671, 672 (Fla. 2d DCA 1983). In addition, the Third District has impliedly recognized the effect of *Sampson* on post-judgment attorney fee orders. *See Utterback v. Starkey*, 669 So.2d 304, 306 n.2 (Fla. 3d DCA 1996).
[30] *See* 425 So.2d at 671-672 (citing *Craft v. Clarembeaux*, 162 So.2d 325 (Fla. 2d DCA 1964).
[31] *Id.* at 672

Inside the Eleventh Circuit Court of Appeals

by Frederick H. Nelson, Orlando[1]

Introduction

The purpose of this article is to supply the federal appellate practitioner with some practical guidelines on how to proceed with a civil appeal[2] before the Eleventh Circuit Court of Appeals.[3] The most significant contribution to your federal practice will be the explanation of the Eleventh Circuit Rules and Internal Operating Procedures ("I.O.P.") which make practice before the Eleventh Circuit unique. On December 1, 1998, and April 1, 1999, major revisions to the rules of procedure were implemented. This article is current through the rule revisions adopted on April 1, 1999. All rules and procedures are also available on the Internet at *www.ca11.uscourts.gov.*

Practice before the Eleventh Circuit

Upon reaching the decision to appeal from one of the three federal districts within Florida,[4] the appellant must file a notice of appeal at the federal district court level especially noting that the additional time for mailing does not apply to the time calculation.[5] The contents of a notice of appeal are very specific and a form is provided for convenience of counsel.[6]

The Federal Rules of Appellate Procedure require that an appeal be filed within thirty (30) days after the date of entry of the Judgment or Order appealed from unless the United States is a party in which case either party has sixty (60) days.[7] The filing deadline is jurisdictional and strictly construed.[8] However, a few specific motions will toll the deadline until entry of an Order dispensing with the motion.[9]

Additionally, the court may grant a motion to extend the time to file a notice of appeal upon a showing of excusable neglect or good cause.[10] As with appellate practice in Florida's state court system, the notice of appeal should never be filed with the appellate court.[11] A filing fee[12] must also be submitted with the notice of appeal.[13]

Although not required by the court, the Federal Rules of Appellate Procedure allow the district court to impose a bond for costs on appeal in civil cases.[14] While rarely assessed, the district court may require the appellant to post such a bond when an appellee could be harmed by future nonpayment. Bond requirements are more typically associated with requests for injunctive relief pending an appeal.[15]

Any party to an appeal may seek a stay or injunction pending the appeal.[16] However, the Federal Rules of Appellate Procedure dictate that a motion for stay or injunction pending the appeal should be made to the district court first, unless filing the motion with the district court is impractical, or state that the district court has denied an application, or has failed to provide the relief requested.[17] In such circumstances, a motion for stay or injunction may be made directly to the Eleventh Circuit, but the motion must include the reasons given by the district court for its action.[18]

Regardless of where the motion is first filed, the motion must show the reasons for the relief requested and the facts relied upon, and if the facts are in dispute the motion must be supported by relevant portions of the record and any necessary affidavits.[19] Eleventh Circuit Rule 8-1 also requires that all motions for stay or injunction be accompanied by a copy of the Judgment or Order from which relief is sought and any opinion or findings of the district court.[20] The Federal Rules of Appellate Procedure demand that all other parties be given "reasonable notice" of the motion for stay or injunction.[21] Eleventh Circuit Internal Operating Procedures further require that all motions for stay or injunction include proof of service on all parties appearing below.[22]

In every appeal, the appellant must assist the district court clerk in compiling the record for the appeal.[23] The record of every appeal typically consists of "the original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court."[24]

As a practical matter, once an appeal is anticipated, each party should immediately request a copy of the district court docket sheet to assure that all items necessary to support the appeal have been filed with the district court.[25] This practice will assist the practitioner in guaranteeing that a complete record is before the appellate court and no significant items are missing[26] thereby avoiding the need to hurry through the docket sheet supplied by the clerk when the record is later compiled.[27]

In assembling the record, the Federal Rules of Appellate Procedure diverge slightly from the Eleventh Circuit Rules regarding ordering transcripts. The Federal Rules of Appellate Procedure state that within ten (10) days after filing the notice of appeal or entry of an Order dispensing with a motion pursuant to Rule 4(a)(4), the appellant must place an Order for transcripts of any necessary hearings and/or trial.[28] Eleventh Circuit Rule 10-1 states that in addition to placing an order for transcripts the appellant must file the original order form with the clerk of the district court within ten (10) days after filing the notice of appeal or entry of an Order dispensing with a motion pursuant to Rule 4(a)(4) and

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serve the necessary copies upon the court reporter, the clerk of the Eleventh Circuit, and all other parties.[29] Eleventh Circuit Internal Operating Procedures dictate that an "Transcript Information Form"[30] must be utilized to place all transcript orders.[31] A separate "Transcript Information Form" must be completed for each court reporter involved in the case. In addition, a copy of the "Transcript Information Form" must be served on all parties,[32] and one copy must be filed with the clerk of the court of appeals.[33]

Eleventh Circuit Internal Operat[illegible]

clerk will mail to all parties an "Appearance of Counsel Form" that requests each counsel to indicate which party the counsel represents on appeal.[42] Each counsel is expected to return the "Appearance of Counsel Form" to the Eleventh Circuit's clerk within fourteen (14) days after it is mailed to counsel.[43]

An additional immediate requirement which appears only in the Eleventh Circuit Rules relates to the filing of the "Civil Appeal Statement" form.[44] Pursuant to Eleventh Circuit Rule 33-1(a)(1), the "Civil Appeal Statement" fo[illegible]

script with the district court.[57] In an appeal in which there was no hearing below (including summary judgment appeals), or when all necessary transcripts are already on file, or when a transcript is not ordered, the record is deemed completed and filed on the date the appeal is docketed in the court of appeals pursuant to Federal Rule of Civil Procedure 12(a).[58]

Upon the district court clerk's creation of the necessary record compilation, the volume and page numbers created by the clerk will be utilized in briefs for citations to the record.[59]

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the brief is either "mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid"; or dispatched to the clerk for delivery within three calendar days by a third-party commercial carrier.[71]

Brief writing must adhere to numerous rules which were revised on December 1, 1998, to create uniformity between the circuits. To aid counsel, sample briefs and record excerpts are available upon request.[72] The Eleventh Circuit Rules are very specific with regard to the form of the brief. Most notably, Eleventh Circuit Rule 32-3 limits single-spaced text in briefs to the cover page, the certificate of service, direct quotes and headings and footnotes.[73] *All other text* must be double-spaced.[74] This requirement for double-spacing applies also to the Table of Contents and Table of Citations.[75] Each typed brief must be presented on 8 ½" x 11" paper with typed matter only on one side of the page.[76] Typefaces may be either 14-point or larger proportionally spaced (utilizing serifs) or monospaced face with no more than 10 and ½ characters per inch.[77] If the proportionally spaced option is utilized, sans-serif type may be used in headings and captions.[78] The brief must be set in "plain, roman style, although italics and boldface may be used for emphasis."[79] Case names must be italicized or underlined.[80]

Absent *prior* permission from the court,[81] the maximum length allowed for the initial brief is thirty (30) pages.[82] Eleventh Circuit Rule 32-4 states that all motions for leave to file in excess of the limitations set forth in Fed.R.App.P. 32(a)(7) must be filed "at least" seven (7) days in advance of the due date of the brief.[83] Such a motion will be denied unless counsel can submit "extraordinary and compelling reasons".[84] An exception to the thirty (30) page limitation is allowed by use of a word or line counting method.[85] Under the alternative method, the initial brief cannot exceed 14,000 words or 1,300 lines of monospaced face.[86] When utilizing this alternative method, a Certificate of Compliance must be included which states either the number of words in the brief or the number of lines of monospaced type used in the brief.[87]

The original and six (6) copies of the initial brief must be filed with the Eleventh Circuit.[88] The Eleventh Circuit now permits the filing of "Electronic Briefs" and Internet uploading concurrently with the filing of the paper brief.[89] The filing of an Electronic Brief is not permitted without consent of all parties when a party is appearing *pro se*.[90] The submission of an Electronic Brief does not modify any obligations to comply with all procedural rules.[91] Two copies of the initial brief must be served upon each opposing party separately represented.[92]

The initial brief must be covered (front and back) in durable blue cover stock paper (at least 90#) and bound with three heavy staples or other secure binding device along the left-hand margin.[93] Exposed metal fasteners are specifically prohibited.[94] The cover page must contain the specific elements listed in Eleventh Circuit Rule 28-2(a).[95] The initial brief must contain a Certificate of Interested Persons;[96] and Corporate Disclosure Statement;[97] a Statement Regarding Oral Argument;[98] a Table of Contents;[99] a Table of Citations (with an asterisk marking each case counsel primarily relies upon);[100] a Statement Regarding Adoption of Briefs of Other Parties (if adopting);[101] a Statement of Jurisdiction;[102] a Statement of the Issues;[103] a Statement of the Case;[104] a Summary of the Argument;[105] the Argument and Citations of Authority;[106] a Conclusion;[107] a Certificate of Compliance with the word or line limitations *only* when utilizing the alternative method;[108] and a Certificate of Service.[109]

At the time the initial brief is due, the appellant must also file and serve the record excerpts.[110] The record excerpts must be covered (front and back) in durable white cover stock paper (at least 90#) and bound along the top with a secure fastener.[111] The record excerpts must contain an index identifying each document in the record excerpts by its tab number;[112] the docket sheet obtained from district court;[113] the complaint or petition (as amended);[114] the answer, response counterclaim, cross-claim and replies;[115] any pretrial Order relative to the issues on appeal;[116] the Judgment and/or Order on appeal;[117] any other Orders sought to be reviewed;[118] any supporting opinions, findings of fact, and conclusions of law filed with the district court or delivered orally;[119] if jury instructions are at issue, copies must be furnished along with the jury charge;[120] the magistrate's report and recommendation (if adopted in whole or in part by the district court judge);[121] any administrative findings and/or Orders;[122] and under the new rule revisions counsel must also include "the relevant parts of any document, such as a plea agreement, insurance policy, other contract, or ERISA plan, whose interpretation is central to the issues on appeal."[123] Transcripts are only permitted in the record excerpts to the extent the portions included have some information bearing on some finding of fact or conclusion of law delivered orally by the trial court or reflect a jury charge provided by the trial court.[124]

The record excerpts should be arranged so that each document in the record excerpts is tabbed on the first page of the document's right-hand margin.[125] The tabs must extend beyond the edge of the page and must be staggered in numbered sequence from top to bottom.[126] The tab numbers must correspond to the original document numbers assigned by the district court as noted on the docket sheet.[127] Each number must appear on the index to the record excerpts along with a description of the document.[128] Five (5) copies of the record excerpts must be filed with the Eleventh Circuit.[129] One (1) copy of the record excerpts must be served upon each opposing party separately represented in the appeal.[130]

The Federal Rules of Appellate Procedure are distinctly different from the Eleventh Circuit Rules regarding the answer brief. The Federal Rules of Appellate Procedure state that the answer brief may eliminate much of the content required of the initial brief.[131] The Eleventh Circuit Rules state that the answer brief must contain all the same contents as the initial brief.[132] The only difference is cosmetic. The answer brief must be covered (front and back) in durable red cover stock paper (at least 90#).[133] All other requirements remain the same as the initial brief. As with the initial brief, two copies of the an-

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swer brief must be served upon each opposing party separately represented.[134]

The appellant is permitted, but not required, to file a reply brief.[135] Like the Federal Rules of Appellate Procedure, the Eleventh Circuit Rules limit the contents of the reply brief to certain limited sections.[136] The Eleventh Circuit Rules state that the reply brief must be covered (front and back) in durable grey cover stock paper (at least 90#);[137] must include only a Table of Contents;[138] a Table of Citations;[139] the Argument and Citations of Authority;[140] a Certificate of Compliance with the word or line limitations;[141] and a Certificate of Service.[142] The maximum length allowed for the reply brief is fifteen (15) pages[143] or no more than 7,000 words or 650 lines of monospaced face.[144] The original and six (6) copies of the reply brief must be filed with the Eleventh Circuit.[145] Two copies of the reply brief must be served upon each party separately represented.[146]

Oral argument is allowed at the Court's discretion.[147] Each principal brief (Initial and Answer) must include a Statement Regarding Oral Argument explaining whether or not oral argument is desired, and if so, the reasons why oral argument should be heard.[148] Counsel may agree to submit the appeal on the briefs without oral argument.[149]

If the Court determines oral argument is warranted, the clerk will calendar the date for argument[150] and also forward a notice to counsel at least three weeks in advance.[151] The time allotted for argument by each side will be indicated on the notice sent to counsel when oral argument is scheduled.[152] The Court expects all counsel to make reasonable efforts to appear as scheduled and disfavors motions and requests for continuance.[153]

On the day of hearing, counsel should check in with the clerk's office at least thirty (30) minutes in advance of the convening of the court.[154] The Court expects counsel to answer questions, not to read from briefs or recite lengthy quotations from cases or record materials.[155] An essay entitled *Twenty Pages and Twenty Minutes Revisited* by Senior Judge John C. Godbold is available from the clerk to aid in preparing a concise oral argument.[156]

In closing, counsel would be wise to heed the advice so often repeated by our distinguished jurists. Persuasion is lost when one repeats the same argument and creates a lengthy brief by mere redundancy. Brevity wins. Use plain, simple language instead of obscure verbiage. Get to the point. Finally, use candor in briefs and at oral argument. Slanting the record only distorts your credibility.

The Judges of the Eleventh Circuit

This section of the article will introduce readers to the judges of the Eleventh Circuit and provide small 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 to a better understanding of each judge. The author apologizes in advance for omitting many material matters. The judges are listed in order of seniority beginning with the most senior Circuit Judges and then beginning again with the most senior Senior Judges.

On May 15, 1999, **Judge Joseph W. Hatchett** retired as Chief Judge. This article is dedicated to his long service to the public and in recognition of his efforts to bring justice to all. With longtime roots in the Florida legal community, we give special recognition to Judge Hatchett for his service. A special devotional to Judge Hatchett begins this section of the article.

Joseph W. Hatchett served as Chief Judge for the Eleventh Circuit from October 1, 1996 - May 14, 1999. After receiving his A.B. from Florida A & M University in 1954, Judge Hatchett began military service with the Army. He then received his J.D. from Howard University in 1959, and later joined the J.A.G. Corps as a reservist with the United States Marines. Following his military service, Judge Hatchett enjoyed a successful solo practice from 1959-1966. During this time, he also served as the Special Assistant to the City Attorney in Daytona Beach, Florida. He then joined the United States Attorney's Office until his appointment in 1971 as a United States Magistrate Judge for the Middle District of Florida. Judge Hatchett's excellent jurist skills were soon rewarded by his appointment to the Supreme Court of Florida in 1975 where he served as the first African-American appointed to our state's highest court. His qualities were soon recognized again and in 1979 he was appointed by President Carter to the Eleventh Circuit. Coming up through the ranks, Judge Hatchett was elevated to Chief Judge in 1996 as the first African-American appointed to the Eleventh Circuit's highest post. The brevity of this article prohibits elucidation of all Judge Hatchett's myriad of accomplishments so the author will not even attempt to list them all. Rather, we say with gratitude and appreciation a warm salute and farewell to one of the court's finest jurists.

Circuit Judges

Chief Judge R. Lanier Anderson III ascended to the position of Chief Judge on May 15, 1999. An ivy-league graduate, Chief Judge Anderson carries credentials from Yale University where he accepted his A.B. in 1958. Moving on from Yale, he received his LL.B. from Harvard University in 1961. Traveling south after graduation, Chief Judge Anderson began his blossoming legal career as an Associate with a firm in Macon, Georgia. In just a few short years, he joined the partnership of Anderson, Walker & Reichert. Chief Judge Anderson was called away from his successful private practice in 1979 upon his appointment to the Eleventh Circuit by President Carter. Among his many publications and honors, Chief Judge Anderson can list his acclaim as "Lawyer of the Year" bestowed upon him by the Macon Bar Association.

Judge Gerald Bard Tjoflat continues his membership in the Florida Bar and still hears some oral arguments in Jacksonville, Florida. An undergraduate student at the University of Cincinnati until 1952, Judge Tjoflat attained his LL.B. from Duke University in 1957. His marriage to Sarah Pfohl (who passed away on March 16, 1997) brought forth two children, Gerald Bard, Jr., and Marie Elizabeth. Judge Tjoflat later met and married his current wife, Marcia Penman Parker. Judge Tjoflat's public service began when he joined the

Army at the age of twenty-four. Upon completing his military service, he joined Howell & Kirby in Jacksonville, Florida. The makings of a distinguished judicial career began in 1968 when Judge Tjoflat was appointed to the Fourth Judicial Circuit in Jacksonville, Florida. He then moved to the federal arena with his selection for the United States District Court for the Middle District of Florida in 1970. His appointment by President Ford to the Eleventh Circuit came through in 1975. Most notable is the multiple benevolent service appointments on charitable boards and his pro bono activities. Judge Tjoflat's life in the public sector is broad and diverse recognizing an emphasis on helping our community grow stronger through service to others.

Judge J. L. Edmondson is a graduate of Emory University (B.A. 1971) and the University of Georgia (J.D. 1971). Adding to his legal education in 1990, he received the Master of Laws in Judicial Process from the University of Virginia. His beginning as a Law Clerk for Judge Sidney Smith in the Northern District of Georgia impressed the young Edmondson with a vision of possibilities in judicial service. After some ten-plus years in successful private practice and as an Instructor at the University of Georgia School of Law, President Reagan gave Judge Edmondson his position in the Eleventh Circuit in 1986. One of Judge Edmondson's most notable opinions, *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830 (11th Cir. 1991), held that because one of three arbitrators was disqualified prior to the conclusion the hearings the arbitration was invalid.

Judge Emmett Ripley Cox received both his A.B. (1957) and LL.B. (1959) at the University of Alabama. Judge Cox joined the Air National Guard in 1959 where he served for almost six years. Twenty-something years in private practice helped prepare Judge Cox for his first judicial appointment to the United States District Court for the Southern District of Alabama in 1981. Following seven years in the District Court, President Reagan appointed Judge Cox to the Eleventh Circuit in 1988. Judge Cox serves on several professional associations and has been chair of the Committee on Defender Services since 1995.

Judge Stanley Francis Birch, Jr., graduated from the University of Virginia (B.A. 1967) and then accepted both his J.D. (1970) and his LL.B. (1976) from Emory University School of Law. His legal career began in the United States Army in 1970. After the military, Judge Birch prepared for his future jurist career as a Law Clerk for Judge Sidney Smith in the Northern District of Georgia until moving to private practice in Gainesville, Georgia, and then to Atlanta in 1985. President Bush gave Judge Birch his position in the Eleventh Circuit in 1990. Among his many honors and accomplishments is a publication in the National Law Journal, January 23, 1989, *Copyright Protection for Attorney Work Product and Client Information.*

Judge Joel F. Dubina received his undergraduate education from the University of Alabama with a B.A. in 1970. In 1973, he completed his legal studies at Cumberland School of Law with a J.D. Judge Dubina started down the road to judicial service as a Law Clerk for Judge Robert E. Varner of the United States District Court for the Middle District of Florida. After ten years in private practice, he returned to the federal courts as a District Judge in the Middle District of Florida where he served from 1986 - 1990. His appointment to the Eleventh Circuit came in 1990 by President Bush. Judge Dubina's pro bono activity includes assisting in providing legal services to the less fortunate though The Lighthouse organization. He also serves through several federal bar professional associations.

Judge Susan Harrell Black studied at Florida State University where she received her B.A. in 1965. The University of Florida presented her a J.D. in 1967 and she later added to her legal education at the University of Virginia with the LL.M. in 1984. Judge Black hails from a prestigious background of Florida judgeships beginning in 1973 with her appointment to the Duval County Court. Following six years in the state court system, Judge Black transferred to the federal courts by joining the Middle District of Florida in 1979 where she served as Chief Judge from 1990 - 1992. Her appointment to the Eleventh Circuit came by President Bush in 1992. Judge Black's activities and honors include a long list of pro bono undertakings and professional associations in service to The Florida Bar.

Judge Edward Earl Carnes began his education at the University of Alabama where he received his B.S. in 1972. He won the approval of the faculty at Harvard Law School and accepted his J.D. in 1975. Moving south again, he labored as the Assistant Alabama Attorney General from 1975 - 1992. Upon his appointment to the Eleventh Circuit in 1992 by President Bush, Judge Carnes continues his public service through several committees and advisory boards. Judge Carnes' public service emphasis has already contributed greatly to improving our court system by working to revise rules and assist with efficient court practice.

Judge Rosemary Barkett traveled a very unique path on her way to the bench. Following her graduation from St. Joseph's College (A.A. 1959), Judge Barkett kept order over her charges in elementary and junior high school while a teacher with the Sisters of St. Joseph of St. Augustine, Florida, from 1960 - 1968. Returning to further her education, she graduated from Spring Hill College (B.S. 1967) and the University of Florida (J.D. 1970). From 1971 - 1978, Judge Barkett worked with Farish & Farish until engaging her own successful private practice in West Palm Beach. 1979 launched Judge Barkett into the judiciary when she became a trial judge in the Fifteenth Judicial Circuit where she later served as Chief Judge. The Florida Fourth District Court of Appeal enjoyed one short year (1984 - 1985) with Judge Barkett until she was elevated to the Supreme Court of Florida in 1985. Following almost ten years with the Supreme Court of Florida, part of which saw her serving as Chief Justice, Judge Barkett was appointed to the Eleventh Circuit in 1994 by Presi-

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dent Clinton. Throughout her career, Judge Barkett has continued with her love for teaching by serving several universities nationwide.

Judge Frank Mays Hull received her B.A. in 1970 from Randolph-Macon Women's College and her J.D. in 1973 from Emory University. Like many of her contemporaries, she investigated the possibilities of a career with the federal judiciary as a Law Clerk for Judge Elbert Tuttle at the United States Court of Appeals for the Fifth Circuit. After her clerking position, Judge Hull joined an Atlanta firm where she remained until resigning her partnership in 1984 to join the bench of Fulton County, Georgia. From 1984 - 1994, Judge Hull continued in the state court judicial system. Her move to the United States District Court for the Northern District of Georgia lasted from 1994 - 1997 at which time President Clinton selected her for appointment to the Eleventh Circuit. Judge Hull remains very active in numerous professional associations evidencing her willingness to work hard for positive change in our community and judicial system.

Judge Stanley Marcus began his education at Queens College of the City of New York which granted his B.A. in 1967. Harvard University bestowed his J.D. in 1971 which provided the strong foundation for his future as a jurist. The United States Army had its turn with Judge Marcus from 1968 - 1974 (some while in reserve) until he joined Botein, Hays, Sklar & Herzberg in New York City. Judge Marcus also served as Law Clerk to Judge John Bartels of the United States District Court for the Eastern District of New York. Soon Judge Marcus transferred his energies to government service by enrolling with the United States Attorney's Office where he prosecuted political corruption and major crimes. A shift westward moved Judge Marcus into the United States Organized Crime and Racketeering Section in Detroit, Michigan, where he remained until finally reaching Florida in 1982. From 1982 - 1985, Judge Marcus served in the United States Attorney's Office in the Southern District of Florida. His skills were rewarded with a position as District Judge for the United States District Court for the Southern District of Florida from 1985 - 1997. Judge Marcus was appointed to the Eleventh Circuit by President Clinton in 1997 where he continues his service to the public through several rules committees and advisory committees.

Senior Judges

Judge John C. Godbold received his B.A. (1940) from Auburn University and his J.D. (1948) from Harvard University. He also accepted three LL.D. parchments – one from Samford University (1981), one from his alma mater Auburn University (1988), and one from Stetson University (1994). Prior to obtaining his legal training at Harvard, Judge Godbold served the United States Army during the war from1941 - 1946. After serving as a math instructor at Auburn, Judge Godbold began his legal career with Richard T. Rives in Montgomery, Alabama, where he later accepted a partnership. Judge Godbold resigned his lucrative position in private practice in 1966 upon his appointment to the Eleventh Circuit by President Johnson. After taking senior status, Judge Godbold served as Director of the Federal Judicial Center from 1987 - 1990. He continues to serve on several committees to advance the efficient operation of the federal courts.

Judge Paul H. Roney studied at the Wharton School, University of Pennsylvania, which conferred his B.S. in 1942. His formal legal education began at Harvard where he received his LL.B. in 1948 and ended when he returned to the University of Virginia (LL.M. 1984). Judge Roney served in the United States Army from 1943 - 1946, following his graduation from Wharton. After completing Harvard, Judge Roney joined a New York City firm before moving south to St. Petersburg in 1950. He enjoyed a successful private practice for twenty years before his appointment to the Eleventh Circuit in 1970 by President Nixon. Numerous professional associations absorb Judge Roney's time and efforts and he has left his mark in the many committees he has served.

Judge James C. Hill was educated by the University of South Carolina until the war interrupted his college career. During the war, Judge Hill served in the U.S.A.F. from 1943 - 1945. Following the war, Judge Hill completed his instruction at the University of South Carolina and received his B.S. in 1948 along with his J.D. from Emory University that same year (in light of the interrupted classes of 1944). From 1948 - 1974, Judge Hill engaged in private practice in Atlanta, Georgia. His first jurist position found him at the United States District Court for the Northern District of Georgia where he remained until receiving his appointment to the Eleventh Circuit in 1976 by President Ford. A diverse background allows Judge Hill service opportunities in various committees along with his work as President of the Atlanta Legal Aid Society in 1964.

Judge Peter T. Fay studied at Rollins College where he accepted his B.A. in 1951 and at the University of Florida which granted his J.D. in 1956. Three years in the United States Air Force preceded the completion of his legal education and awarded him the rank of 1st Lieutenant. Judge Fay began and ended his fourteen-year private practice career in Miami. In 1970, he accepted his first bench post at the United States District Court for the Southern District of Florida which he held until his appointment to the Eleventh Circuit in 1976 by President Ford. A consummate lecturer, Judge Fay also worked tirelessly in pro bono activities while in Miami.

Judge Phyllis A. Kravitch schooled at Goucher College where she received her B.A. in 1941. The University of Pennsylvania then conferred her LL.B. in 1943 where Judge Kravitch labored on the Board of Editors of the University of Pennsylvania Law Review. Judge Kravitch held positions with private firms in Savannah, Georgia, from 1944 - 1970 before striking out into her own prosperous practice. In 1977, Judge Kravitch was positioned as a jurist with the Superior Court, Eastern Judicial Circuit in Georgia. Her appointment to the Eleventh Circuit came by President Carter in 1979. Judge Kravitch continues her many activi-

ties on committees designed to revise rules of practice and procedure as well as her scholarly pursuits with the likes of the Selection Committee for Truman Scholars.

Judge Frank M. Johnson, Jr., graduated from Gulf Coast Military Academy in 1935 and then received degrees from both the Massey Business College in Birmingham, Alabama, (1937) and the University of Alabama (LL.B. 1943). Having joined the United States Army (1943 - 1946), Judge Johnson was awarded the Purple Heart with Oak Leaf Cluster and the Bronze Star for his service to our country during the war. After his military service, Judge Johnson worked in private practice before joining the United States Attorney's Office in 1953. A judicial appointment soon followed and from 1955 - 1979 Judge Johnson served the United States District Court for the Middle District of Alabama, reaching Chief Judge from 1966 - 1979. In 1979, President Carter selected Judge Johnson for the Eleventh Circuit. Honors and awards decorate Judge Johnson's office in recognition of his years of service including chairing several committees and advisory boards.

Judge Thomas A. Clark attained his scholarship from Washington and Lee University (B.S. 1942) and the University of Georgia (LL.B. 1949). The navy reserves enjoyed Judge Clark's services from 1942 - 1946 while he captained others as a Lieutenant Commander. Never afraid of a challenge, Judge Clark began his legal career as a sole practitioner until merging his lucrative practice with a well-established firm in Georgia. Moving to Florida in 1957, Judge Clark joined the Tampa branch of Fowler, White, Gillen, Humkey & Trenman. Following eighteen years with Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Judge Clark was appointed to the Eleventh Circuit in 1979 by President Carter. Judge Clark's professional associations and activities reflect a career tempered by exceptional service to the public through rules committees and commissions to further the legal profession.

Endnotes:

[1] Frederick H. Nelson chairs the Federal Appellate Practice Committee for the Florida Bar. Rick is president of the Law Offices of Frederick H. Nelson, P.A., with a nationwide constitutional law/civil rights practice in federal trial and appellate courts.

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TIME FOR ACTS UNDER THE FEDERAL AND ELEVENTH CIRCUIT RULES OF APPELLATE PROCEDURE

I. COMMENCEMENT - Fed.R.App.P. 3(a) and 4(a)	
Filing of notice of appeal (days from entry of Judgement or Order being appealed)	30 days for private parties 60 days if government is party
II. BRIEFS - Fed.R.App.P. 31(a)	
a. Initial Brief (days from filing the record)	40 days - 11th Cir. R. 31-1(a)
b. Answer Brief (days from initial brief)	30 days - 11th Cir. R. 31-1(a)
c. Reply Brief (days from answer brief)	14 days - 11th Cir. R. 31-1(a)
III. RECORD & TRANSCRIPT - Fed.R.App.P. 10(b)(3)	
a. Deadline to file "Transcript Information Form" with clerk (days from entry of Judgment or Order on post-trial motions). If no transcript is ordered, must certify to clerk.	10 days - 11th Cir. R. 10-1
b. Designation of additional parts by appellee, if necessary (days from service of "Transcript Information Form")	10 days - Fed.R.App.P. 10(b)(3)
c. Additional portions to be ordered by appellee or appellant if under court Order (days from designation)	10 days - Fed.R.App.P. 10(b)(3)
d. Court reporter to deliver transcript to clerk (days from receipt of "Transcript Information Form")	30 days - Fed.R.App.P. 11(b); and 11th Cir. R. 11-1

[2] Due to space limitations, this article will address an "appeal as of right" from civil judgments. Criminal appeals, appeals from Tax Courts, bankruptcy appeals, etc., and an "appeal by permission" will not be covered in this article.

[3] The scope of this article is limited to the Eleventh Circuit Court of Appeals because Florida is entirely within the Eleventh Circuit's jurisdiction.

[4] Florida contains three federal districts classified as the Northern District, Middle District and Southern District.

[5] Eleventh Circuit Internal Operating Procedures supplementing Fed.R.App.P. 4(a) require that the notice of appeal be actually "filed" with the clerk by the deadline while specially noting to the practitioner that the "mailing" provisions of Fed.R.App.P. 25(a) do not apply.

[6] Fed.R.App.P. 3(c). The Federal Rules of Appellate Procedure provide an example of the content requirements in Form 1 in the Appendix of Forms.

[7] Fed.R.App.P. 4(a)(1). An exception to the time requirement of Fed.R.App.P. 4(a)(1) states that the notice of appeal must be filed within sixty (60) days after the date of entry of the Judgment or Order appealed from if the United States is a party in the action.

[8] The Federal Rules of Appellate Procedure do allow limited extensions upon a showing of excusable neglect or good cause. Fed.R.App.P. 4(a)(5) and 4(a)(6). *C.f.* Fed.R.App.P. 1(b) regarding jurisdiction.

[9] Fed.R.App.P. 4(a)(4).

[10] Fed.R.App.P. 4(a)(5).

[11] Fed.R.App.P. 3(a). If a notice of appeal is mistakenly filed in the Eleventh Circuit, the Eleventh Circuit's clerk shall note the date it was filed and forward the notice of appeal to the district court clerk. This mistake is not fatal and will secure the Eleventh Circuit's jurisdiction if the notice of appeal was timely filed with the Eleventh Circuit. Fed.R.App.P. 4(a)(1).

[12] Fed.R.App.P. 3(e). At the time of writing this article, the filing fee for a civil appeal is $105.00 in each of the three Florida federal districts. Eleventh Circuit I.O.P. supplementing Fed.R.App.P. 3(e).

[13] Fed.R.App.P. 3(e). Eleventh Circuit Internal Operating Procedures require that all fees be paid to the clerk of the district court with the notice of appeal. Eleventh Circuit I.O.P. supplementing Fed.R.App.P. 3(e).

[14] Fed.R.App.P. 7.

[15] Fed.R.App.P. 8(b).

[16] Fed.R.App.P. 8(a).

[17] Fed.R.App.P. 10(b)(3).

[18] Fed.R.App.P. 10(b)(3).

[19] Fed.R.App.P. 10(b)(3).

[20] Fed.R.App.P. 10(b)(3). Eleventh Circuit I.O.P. supplementing Fed.R.App.P. 10(b)(3).

[21] 11th Cir.R. 28-1(i).

[22] Fed.R.App.P. 31(a) and 11th Cir.R. 31-1(a).

ment as to the record on appeal" pursuant to Fed.R.App.P. 10(d).

[23] Under normal procedures, the district court will not forward a copy of the docket sheet until after the record is completely assembled. 11th Cir.R. 11-2 and Eleventh Circuit I.O.P. - 2 supplementing 11th Cir.R. 11-2. Failure to order and review the docket sheet prior to the complete assembly of the record will coerce the practitioner into a hurried review of the docket sheet after the district court has already finished compiling the record on appeal and also compel the additional task of supplementing the record.

[24] This is especially important because discovery materials are not filed with the district court. If counsel wish to rely upon interrogatories, requests for production and/or requests for admission which were not entered into evidence during a hearing or trial, counsel must be sure to file these materials with the district court. Eleventh Circuit I.O.P. - 3 supplementing 11th Cir.R. 11-4.

[25] Once the record is assembled, the parties by stipulation, or the district court of its own initiative, may supplement the record with additional materials if an item was not included because of error or accident. This may occur before or after the record is forwarded to the Eleventh Circuit. Fed.R.App.P. 10(e).

[26] Fed.R.App.P. 10(b)(1).

[27] 11th Cir.R. 10-1.

[28] The "Transcript Information Form" form is prescribed by 11th Cir.R. 10-1.

[29] Copies of the "Transcript Information Form" may be obtained from the district court clerk. Eleventh Circuit I.O.P. supplementing 11th Cir.R. 10-1.

[30] The appellee must be certain to review the "Transcript Information Form" to assure the appellant has included transcripts of any necessary hearings and/or trial. 11th Cir.R. 10-1.

[31] 11th Cir.R. 10-1.

[32] Eleventh Circuit I.O.P. supplementing 11th Cir.R. 10-1 and Fed.R.App.P. 10(b)(4).

[33] If the appellant intends to assert that the district court's findings and/or conclusions are not supported by the evidence, the appellant must order any transcript(s) which are relevant to such an assertion on appeal. Fed.R.App.P. 10(b)(2).

[34] 11th Cir.R. 10-1.

is incarcerated; in habeas corpus actions under 28 U.S.C. §§ 2241, 2254, and 2255; and, when the Immigration and Naturalization Service is a party. 11th Cir.R. 33-1(a)(3).

[46] Eleventh Circuit Rule 33-1(a)(2) creates different requirements for appeals from a tax court or administrative agency. 11th Cir.R. 33-1(a)(2).

[47] 11th Cir.R. 33-1(a)(1).

[48] 11th Cir.R. 33-1(b)(1)(i).

[49] 11th Cir.R. 33-1(b)(1)(ii).

[50] 11th Cir.R. 33-1(b)(1)(iii).

[51] 11th Cir.R. 33-1(b)(1)(iv).

[52] 11th Cir.R. 33-1(b)(1)(v).

[53] 11th Cir.R. 33-1(a)(1). The appellee is not required to file a response to the "Civil Appeal Statement" form unless disagreement is noted with the appellant's filing.

[54] 11th Cir.R. 33-1(f)(1).

[55] 11th Cir.R. 33-1(f)(2).

[56] Fed.R.App.P. 11(b) and 11th Cir.R. 11-1.

[57] 11th Cir.R. 12-1.

[58] 11th Cir.R. 12-1. Counsel would be wise to obtain an initial copy of the docket sheet well ahead of this time to assure the record contains all necessary materials.

[59] Eleventh Circuit I.O.P. - 2 supplementing 11th Cir.R. 11-4.

[60] 11th Cir.R. 28-4. For example, the reference R4-9-6 indicates:

R 4-9- 6
record volume # document#
page#
reference

[61] 11th Cir.R. 28-4. For example, the reference R8-32 indicates:

R 8 32
record volume # page#
reference

NOTE: DO NOT REFER TO TRANSCRIPTS BY THE VOLUME NUMBER WHICH WAS ASSIGNED BY THE COURT REPORTER. You *must* use the volume number assigned by the district court and written in the margin next to the docket entry filing the transcript. Transcript numbers usually follow in sequence *after* the final volume of pleadings and other court papers and are numbered in chronological order by date of *hearing*. Duplicate transcripts (including excerpts when a transcript of the entire proceeding or trial is later filed) are ordinarily excluded from the record.

[62] 11th Cir.R. 28-4.

[74] 11th Cir.R. 32-3.
[75] 11th Cir.R. 32-3.
[76] Fed.R.App.P. 32(a)(4).
[77] Fed.R.App.P. 32(a)(5).
[78] Fed.R.App.P. 32(a)(5).
[79] Fed.R.App.P. 32(a)(6).
[80] Fed.R.App.P. 32(a)(6).
[81] 11th Cir.R. 32-4.
[82] Fed.R.App.P. 32(a)(7)(A).
[83] 11th Cir.R. 32-4.
[84] 11th Cir.R. 32-4.
[85] Fed.R.App.P. 32(a)(7)(B).
[86] Fed.R.App.P. 32(a)(7)(B)(i).
[87] Fed.R.App.P. 32(a)(7)(C).
[88] 11th Cir.R. 31-2.
[89] 11th Cir.R. 31-4.
[90] 11th Cir.R. 31-4.
[91] 11th Cir.R. 31-4.
[92] 11th Cir.R. 31-2.
[93] 11th Cir.R. 32-2 and Eleventh Circuit I.O.P. - 1 supplementing Fed.R.App.P. 32(a).
[94] 11th Cir.R. 32-2.
[95] 11th Cir.R. 28-1(a) and Fed.R.App.P. 32(a)(2).
[96] 11th Cir.R. 26.1-1 *Certificate of Interested Persons and Corporate Disclosure Statement: Contents.* A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% of more of the party's stock, and other identifiable legal entities related to a party. In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victims(s). In bankruptcy appeals, the certificate shall also identify the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings.

11th Cir.R. 26.1-2 *Certificate of Interested Persons and Corporate Disclosure Statement: Time for Filing.* The certificate described in 11th Cir.R. 26.1-1 shall be included within the principal brief filed by any party and shall also be included within any petition, answer, motion or response filed by any party (except for unopposed motions for procedural orders as described in 11th Cir.R. 27-1(c)). The clerk is not authorized to submit to the court any brief (except for the reply brief of an appellant or cross-appellant), petition, answer, motion or response which does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate.

11th Cir.R. 26.1-3 *Certificate of Interested Persons and Corporate Disclosure Statement: Format.* The certificate described in 11th Cir.R. 26.1-1 shall immediately follow the cover page within a brief, and shall precede the text in a petition, answer, motion, or response. The certificate shall list persons and entities in alphabetical order, have only one column, and be double-spaced. At the top of each page the court of appeals docket number and short style shall be noted (name of first-listed plaintiff or petitioner v. name of first-listed defendant or respondent). Each page of the certificate shall be separately sequentially numbered to indicate the total number of pages comprising the certificate (e.g., C-1 of 3, C-2 of 3, C-3 of 3). These pages do not count against any page limitations imposed on the papers filed.

[97] "Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock." Fed.R.App.P. 26.1(a).

[98] 11th Cir.R. 28-1(c).

[99] Eleventh Circuit Rule 28-1(d) requires that the Table of Contents include specific page references to *each heading or subheading* of each issue argued.

[100] In addition to providing page numbers for each case cited, Eleventh Circuit Rule 28-1(e) requires that the Table of Citations also identify with asterisks in the margin the citations upon which the party primarily relies.

[101] 11th Cir.R. 28-1(f).
[102] 11th Cir.R. 28-1(g).
[103] 11th Cir.R. 28-1(h).

[104] Eleventh Circuit Rule 28-1(i) requires this section to include the course of the proceedings, a statement of the facts, and the standard or scope of review.

[105] 11th Cir.R. 28-1(j).
[106] 11th Cir.R. 28-1(k).

[107] 11th Cir.R. 28-1(l). The Federal Rules of Appellate Procedure state the Conclusion should be short and state the precise relief sought. Fed.R.App.P. 28(a)(10).

[108] 11th Cir.R. 28-1(m). The Federal Rules of Appellate Procedure do not require the Certificate of Compliance if utilizing the page limitations of Rule 32(a)(7)(A).

[109] 11th Cir.R. 28-1(n).

[110] 11th Cir.R. 30-1. The record excerpts is filed in lieu of the appendix required pursuant to Fed.R.App.P. 30.

[111] *See* paragraph supplementing 11th Cir.R. 30-1.

[112] *See* paragraph supplementing 11th Cir.R. 30-1.

[113] 11th Cir.R. 30-1(a).
[114] 11th Cir.R. 30-1(b).
[115] 11th Cir.R. 30-1(c).
[116] 11th Cir.R. 30-1(d).
[117] 11th Cir.R. 30-1(e).
[118] 11th Cir.R. 30-1(f).
[119] 11th Cir.R. 30-1(g).
[120] 11th Cir.R. 30-1(h).
[121] 11th Cir.R. 30-1(i).
[122] 11th Cir.R. 30-1(j).
[123] 11th Cir.R. 30-1(k).
[124] Eleventh Circuit I.O.P. - 3 supplementing 11th Cir.R. 30-1.
[125] Eleventh Circuit I.O.P. - 1 supplementing 11th Cir.R. 30-1 and paragraph supplementing 11th Cir.R. 30-1.
[126] Eleventh Circuit I.O.P. - 1 supplementing 11th Cir.R. 30-1 and paragraph supplementing 11th Cir.R. 30-1.
[127] Eleventh Circuit I.O.P. - 1 supplementing 11th Cir.R. 30-1 and paragraph supplementing 11th Cir.R. 30-1.
[128] Eleventh Circuit I.O.P. - 1 supplementing 11th Cir.R. 30-1 and paragraph supplementing 11th Cir.R. 30-1.
[129] 11th Cir.R. 30-1.
[130] *See* paragraph supplementing 11th Cir.R. 30-1.
[131] Fed.R.App.P. 28(b).
[132] 11th Cir.R. 28-1.
[133] 11th Cir.R. 32-2 and Eleventh Circuit I.O.P. - 1 supplementing Fed.R.App.P. 32(a).
[134] 11th Cir.R. 31-2.
[135] Eleventh Circuit I.O.P. - 4 supplementing 11th Cir.R. 28-2 states that the appellant may file a notice waiving the reply brief to expedite submission to the court.
[136] Fed.R.App.P. 28(c) and 11th Cir.R. 28-2.
[137] 11th Cir.R. 32-2 and Eleventh Circuit I.O.P. - 1 supplementing Fed.R.App.P. 32(a).
[138] 11th Cir.R. 28-2.
[139] 11th Cir.R. 28-2.
[140] 11th Cir.R. 28-2.
[141] 11th Cir.R. 28-2.
[142] 11th Cir.R. 28-2.
[143] Fed.R.App.P. 32(a)(7)(A).
[144] Fed.R.App.P. 32(a)(7)(B)(i).
[145] 11th Cir.R. 31-2.
[146] 11th Cir.R. 31-2.
[147] 11th Cir.R. 28-1(c).
[148] 11th Cir.R. 28-1(c).
[149] 11th Cir.R. 34-3(d).
[150] 11th Cir.R. 34-4(a).
[151] Eleventh Circuit I.O.P. - 3(c) supplementing 11th Cir.R. 34-4.
[152] Eleventh Circuit I.O.P. - 10 supplementing 11th Cir.R. 34-4.
[153] Eleventh Circuit I.O.P. - 3(e) supplementing 11th Cir.R. 34-4.
[154] Eleventh Circuit I.O.P. - 8 supplementing 11th Cir.R. 34-4.
[155] Eleventh Circuit I.O.P. - 13 supplementing 11th Cir.R. 34-4.
[156] Eleventh Circuit I.O.P. - 13 supplementing 11th Cir.R. 34-4.

COMMITTEE REPORTS

Appellate Court Rules Liaison Committee

At its January meeting, the Appellate Court Rules Committee of *The Florida Bar* recommended that rule 9.210(b) be amended to require that the briefs include an explanation of the applicable standard of review on appeal. The Committee also recommended a change to rule 9.210(a)(2) to allow briefs to be submitted in 13-point type. Finally, the Committee recommended a change to rule 9.140(b)(1) to allow a defendant to appeal from a final order withholding adjudication after a finding of guilt and orders denying relief under Florida Rule of Criminal Procedure 3.800(a) or 3.850.

Appellate Mediation Subcommittee

The Appellate Mediation Subcommittee of the Appellate Practice and Advocacy Section will be meeting at The Florida Bar Association's 1999 Annual Meeting. The meeting is scheduled for Thursday, June 24, 1999, from 3:00 to 4:00 p.m., at the Boca Raton Resort and Club, Boca Raton, Florida.

CLE Committee

Appellate Section's "Flagship" Seminar

The seminar, entitled **"May it Please the Court: Hot Topics in Appellate Practice,"** was successfully held on October 29, 1998, in Tampa. The turnout was a good one, with 73 people attending the live session and a total of 150 signed up thus far, including the taped sessions. The slate of speakers was comprised entirely of appellate judges. Based upon the comments of the attendees, the speakers and course materials were very well received. This seminar will be held every other year, and will next be held in the year 2000 with a similar format planned.

Appellate Practice Certification Exam Review Course

This year's course was held in Tampa on February 5, 1999. Jennifer Carroll served as the Chair of the Steering Committee. The course included some new speakers. The course was successful once again this year with 45 attendees.

Federal Appellate Seminar

The **Federal Appellate Seminar,** which will be held every other year, was held in 1998 and will be held again in the year 2000.

Appellate Practice Workshop

The 1998 Appellate Practice Workshop, which was held in July, was very successful. The Section has received its share of the proceeds. The program will be held again this year at Stetson University during the last week of July. Minor changes are being made based upon comments from the participants in the hopes of tweaking an already very successful program. Once again, the program will not be co-sponsored with The Florida Bar so the Section can take advantage of the opportunity for increased revenues. Tom Hall, who served as the Chair of the Steering Committee for the 1998 program, is again working on this program.

Joint Seminar with Trial Lawyers Section

The sub-committee on alternative seminars has been developing a fall seminar to hold in alternate years when the "Hot Topics" is not held. This year's program will be a joint seminar with the Trial Lawyers Section, on October 14, 1999. The program will address some aspects of appellate practice and procedure for trial lawyers, including an analysis of the various phases of a trial from an appellate perspective. It is anticipated that the program will be of interest to both trial lawyers and appellate lawyers. Scheduled topics include jury selection; pleadings, discovery, pre-trial motions, and interlocutory review; evidentiary issues; working with appellate lawyers at the trial level; closing arguments, jury instructions, verdict forms, and verdicts; and post-trial motions. An impressive slate of speakers is being assembled, including 4th DCA Judge Larry Klein, 3rd DCA Judge Gerald B. Cope, Jr., and 2nd DCA Judge Carolyn Fulmer. The Steering Committee includes co-chairs Steve Stark and Robert Glazier, Tom Elligett, Susan Fox, Allison Hochman, and Steve Wisotsky.

Co-Sponsorships

The Appellate Section and the Family Law Section will co-sponsor an appellate seminar scheduled for September 23 & 24, 1999, in Miami and Tampa, respectively. Debra Sutton is coordinating the program

Congratulations to
William Haddad
Recipient of the 1999 Adkins Award

on behalf of the Appellate Section. The Appellate Section and the Family Law Section will split the proceeds of the program. The program will include five segments on appellate topics with a focus upon family law practitioners. The Committee is presently inviting speakers and anticipates that at least one Supreme Court justice will participate. The Section is exploring the possibility of co-sponsoring seminars with other sections of The Florida Bar, including the Government Lawyers Section.

Committee Membership

The Committee is seeking a few new members who are willing to play an assisting role with respect to one of our seminars for the 1999-2000 year. Anyone who is interested in serving on the Committee should contact Jack Aiello at 561-650-0716 or Roy Wasson at 305-666-5053.

The next meeting of the CLE Committee will be at the Bar's Annual Meeting in June in Boca Raton. The exact time and place will be announced shortly.

Long-Range Planning Committee

The Long-Range Planning Committee met again on Wednesday, March 31, 1999 at 2:00 p.m. The meeting was attended by the Section's new administrator, Austin Newberry, as well as our administrator emeritus, Jackie Werndli. Cindy reported that the Indian River Plantation Marriott in Stuart, Florida could accommodate the first Section Retreat on Friday-Sunday, April 28-30, 2000. The Marriott quoted a group room rate of $119.00 per night for single or double occupancy. Tom Hall reported that Judge Padovano has agreed to be our keynote speaker at the Friday night dinner. Jack Aiello reported that Paul Remillard has several prepared CLE courses dealing with professionalism available, but that none dealt specifically with appellate advocacy issues. Tony Musto suggested that Section members assist Paul in developing a professionalism CLE course geared to appellate practitioners. Jack volunteered to discuss this option with Paul and to offer the time and talent of the members of his CLE committee. Tom Elligett will send Paul and Jack a copy of the chapter in his book on this subject. Jackie and Tony had suggestions for possible facilitators for Saturday's planning meeting. Further research and comparison shopping will be undertaken.

The next Long-Range Planning Committee meeting will be held at the annual meeting of The Florida Bar at 2:30 p.m. on Thursday, June 24, 1999.

Message from the Chair

from page 1

harmless error doctrine to ignore serious errors which reasonably could have contributed to the verdict and judgment. I think we are closer to that extreme during this generation, and I want to urge the appellate judges of Florida to reevaluate their approach toward the applying the harmless error rule in that way.

The letter of Florida law permits appellate courts to turn a blind eye to established trial error, where the final result of the proceeding below is to the liking of appellate judges. For example, §59.041, Fla. Stat. essentially allows courts to overlook errors (even those which could have contributed to the verdict) unless "it appears that the error complained of has resulted in a miscarriage of justice." Obviously, if the verdict is one to the liking of the appellate panel based on the facts of that case, they will not be inclined to find a "miscarriage of justice" warranting reversal, even for errors which could

a way makes appellate judges assume the role of weighers of the evidence. That is not right.

One fact-finder's miscarriage of justice may be another fact-finder's just result. Appellate judges are not suppose to be the finders or weighers of fact, but the appliers of law to those facts.

I have no doubt but that all of the appellate judges in Florida during this time in our history are doing their best to reach just results and almost always are totally correct in their application of the harmless error doctrine. However, I am concerned that application of the doctrine in such a way as to allow individual evaluations of whether there was a miscarriage of justice may at some time in the future do harm to the rule of law.

Proponents of a harmless error test which permits affirmance notwithstanding error which could have contributed to the result "readily concede that in equating a correct result with justice, an appellate court necessarily envisages what result it would have reached as a trier of fact,

ror, 18 (1970).

Time, space, and my lack of thorough research prohibit me from presenting here the proposal I am developing for a harmless error doctrine in Florida. But, in overview, the gist of what I someday hope to say on the subject is that an error which contributed to the verdict below should be held to be a miscarriage of justice, whether or not the verdict below is the one I would view as correct. This is a blunt call for the appellate judges of Florida to reject the temptation to affirm where the result is to their liking, if it is quite possible that an error led to that result. Go ahead and reverse. If the result which you as a judge think was correct indeed is just and in keeping with the law, then it should be repeated upon retrial without the taint of the error. If that result might not be reached absent the error, then the harmless error doctrine should not be applied to affirm that result.

Having reached the end of my term as Chair of the Section, and having probably alienated all the appellate judges in the state, I now will

State Criminal Appellate Law Update

by Roberta G. Mandel

***Scott v. Butterworth*, 24 Fla. L. Weekly S195 (Fla. April 29, 1999)**

There is no error in denying the request of a death-sentenced defendant for disclosure of records by the Attorney General's office which consisted of almost entirely handwritten notes and drafts of pleadings, on the ground that the records were either exempt from disclosure as clemency materials or were not public records.

***Lima v. State*, 24 Fla. L. Weekly D988 (Fla. 3d DCA April 21, 1999)**

Both prongs of the procedure set forth in *Harrell v. State*, 709 So.2d 1364 (Fla.), *cert. denied*, U.S., 119 S.Ct. 236 (1998) were met where a witness who lives in another state had suffered serious injuries which impaired her ability to travel so that she was unable to attend the hearing, and where the witness' testimony was material and necessary in order to prevent a failure of justice, the testimony of the witness via satellite constituted a permissible exception to the Confrontation Clause.

***State v. Williams*, 24 Fla. L. Weekly S119 (Fla. March 4, 1999)**

Does the 1997 amendment to the Florida Rule of Criminal Procedure 3.180(b) apply retroactively?

No. A defendant waives his right to be present from a bench conference where defense counsel affirmatively states that he personally discussed the defendant's right to be present at the bench during jury selection and the defendant waived the right.

***Henderson v. State*, 24 Fla. L. Weekly S90 (Fla. February 18, 1999)**

Does a criminal defendant's request of nonexempt public records trigger the reciprocal discovery obligation contained in Florida Rule of Criminal Procedure 3.220(a)? Yes, the Florida Supreme Court in answering the question in the affirmative, amended Florida Rule of Criminal Procedure 3.220(a). The Court held that a criminal defendant's filing of a public records request for nonexempt law enforcement records relating to the defendant's pending prosecution shall be deemed an election to participate in discovery which triggers reciprocal discovery obligation. Florida Rule of Criminal Procedure 3.220(a) amended, effective immediately, now includes a defendant's filing of a public records request as an election to participate in discovery which triggers the reciprocal discovery obligation.

***Scoggins v. State*, 24 Fla. L. Weekly S43 (Fla. January 21, 1999)**

It is error for trial courts to inquire into jury's numerical division on the verdict during deliberation. Such error, however, doesn't constitute fundamental error and require reversal where, as in this case, there was no objection and the totality of the circumstances didn't support a conclusion that there was a coercive influence on the jury's verdict.

***Morris v. State*, 23 Fla. L. Weekly S620 (Fla. December 10, 1998)**

Florida Supreme Court interpreted Florida Rule of Criminal Procedure 3.380(b), and held that once a motion for judgment of acquittal has been made at the close of a state's case and brought to the trial court's attention, the issue should be considered preserved for appellate review. It is therefore unnecessary for the defendant to renew the motion at the close of all the evidence.

***Amendment to Florida Rule of Criminal Procedure 3.380(b)*, 23 Fla. L. Weekly S623 (Fla. December 10, 1998)**

Florida Supreme Court on the Court's own motion, consistent with the Court's reasoning in *Morris v. State*, No. 90,427 (Fla. Dec. 10, 1998), amended Rule 3.380(b) of the Florida Rules of Criminal Procedure with regard to its provision requiring that a motion for judgment of acquittal be renewed at the close of all the evidence. The amendment became effective immediately.

***State v. Walters*, 719 So.2d 1027 (Fla. 3d DCA 1998)**

Section 90.408 of the Florida Evidence Code excluding evidence of an offer to compromise a claim applies only in civil cases and is inapplicable in criminal cases. The defendant's statements to an insurance adjuster as part of an offer to settle insurance claim were therefore, admissible in prosecution for filing a false and fraudulent insurance claim.

***Brown v. State*, 718 So.2d 882 (Fla. 1998)**

Florida Supreme Court answered the following certified question in the affirmative: Should the decision in *Parker v. State*, 408 So.2d 1037 (Fla. 1982), be overruled in favor of the analysis of the evidentiary requirements for proof of convicted felon status in firearm violation cases established for federal courts in *Old Chief v. United States*, 519 U.S. 172, 117 S. Ct. 644, 136 L.Ed. 2d 574 (1997).

The Court held that when a criminal defendant offers to stipulate to the convicted felon element of the felon-in-possession of a firearm charge, the court must accept that stipulation conditioned by an on-the-record colloquy with the defendant acknowledging the underlying prior felony conviction(s) and acceding to the stipulation. The Court further held that the State should be allowed to place into evidence for record purposes only, the actual judgment(s) and sentence(s) of the previous conviction(s) used to substantiate the prior convicted felon element of the charge. Neither the documents placed by the State in the record nor the number and nature of the prior convictions should be disclosed to the jury. The Court maintained that a judge may instruct the jury that it can consider the convicted felon status element of the crime as proven by agreement of the parties in the form of a stipulation.

***State v. Raydo*, 713 So.2d 996 (Fla. 1998)**

When a defendant does not testify, is a ruling regarding impeachment of a defendant pursuant to Section 906.610(1), Florida Statutes (1995), preserved for review?

The Florida Supreme Court answered the question in the negative and adopted the reasoning of the United States Supreme Court in *Luce v. United States*, 469 U.S. 38 (1984) and held that a defendant must testify at trial in order to preserve for appeal a claim of improper impeachment with a prior conviction. The Court reasoned that because Raydo did not testify, the substance of his testimony was unknown and the impeachment evidence claimed to be impermissible was never introduced into evidence.

The threshold question before the Court was whether Raydo's constitutional right to testify was violated by the trial court's decision to permit the State to impeach him with a *nolo contendere* plea. The Florida Supreme Court, held that a trial court's ruling on an impeachment issue, such as the scope of Section 90.610(1) impeachment, that might influence a defendant not to testify does not amount to a constitutional violation, unless the subject of the ruling itself has constitutional implications. The Florida Supreme Court stated that a trial court's ruling on a Section 90.610(1) issue, even if erroneous, does not rise to an unconstitutional infringement on the right to testify. Therefore, where Raydo elected not to testify after the trial court's ruling that the *nolo contendere plea* could not be used for impeachment, and impeachment evidence was never introduced, Raydo's claim of improper impeachment was not preserved for appellate review.

Roberta G. Mandel graduated from the University of Miami School of Law in 1984. She is employed as a Senior Assistant Attorney General in the Criminal Appeals Division of the Florida Attorney General's Office.

Appellate Practice and Advocacy Section

Minutes of the Executive Council Meeting

Held on January 21, 1999, Wyndham Biscayne Bay Hotel, Miami, Florida

Call to Order

The Executive Council Meeting was called to order by section chair Roy Wasson at 2:40 p.m. Jackie Werndli (who needed no introduction) was introduced as the Section's interim administrator and announced the resignation of Jamela Abaied.

Approval of Minutes

The minutes of the previous meeting were approved as corrected.

Chair's Report

Due to amount of business to be conducted, Roy omitted the Chair's Report.

Morris Silberman, the Section's Board of Governors Liaison, briefly addressed the Executive Council.

Roy then introduced Michael L. Richmond, Professor of Law at the Shepard Broad Law Center at Nova Southeastern University. Prof. Richmond reported on the November 1998 Moot Court Competition, which was held in Atlanta. He then reported on his plans for the November 1999 Competition, which will be held in Florida on November 12 & 13. Prof. Richmond described how the competition will be organized and the nature of the assistance he will need from the Appellate Section. Basically, he needs 45 attorneys to act as judges on Friday, November 12 and fifteen attorney-judges on Saturday morning, November 13. He will need approximately 6-9 appellate judges to judge the finals on Saturday. He also needs about 4-6 appellate attorneys to grade briefs.

Prof. Richmond also requested that the Section underwrite the cost of the awards that will be presented to the finalists and the cost of the reception to be held on Friday night.

Bob Sturgess volunteered the members of the Civil Appellate Practice Committee to recruit appellate attorneys from around the state to act as argument judges and brief graders. Angela Flowers agreed to raise money for prizes and the reception. Raoul Cantero and Judge Cope agreed to contact each of the Florida law schools to make them aware that a law school host will be needed for the November 2001 competition. Prof. Richmond will supply the names of the law school contacts.

Tony Musto moved that the Section sponsor the awards for the Best Brief and the Winning Team at a cost of $200.00. The motion was seconded and carried.

Committee Reports

Programs Committee

Ty Cone reported for Bonnie Brown that plans for the Supreme Court Panel and dessert reception are proceeding on schedule.

CLE Committee

Jack Aiello, Chair of the CLE Committee, reported on several CLE courses: Hot Topics, held on October 29, 1998, was well attended (73 at the live session) possibly because the faculty were state appellate judges. By the time the taped sessions are aired, it is expected that 150 will have attended. Hot Topics will not be offered in the Fall of 1999. Instead, the CLE Committee (with Steve Stark and Robert Glazier as co-program chairs) is planning a seminar on appellate issues at trial which will be co-sponsored with the Trial Lawyers Section.

Jack reported that the annual Certification Review Course will be held in Tampa on February 5, 1999. Jennifer Carroll was the Course's program chair. Jack also reported on an upcoming co-sponsorship with the Family Law Section scheduled for September 23 & 24.

And lastly, Jack reported on the successful first Appellate Practice Workshop held in July. Jan Majewski of Stetson presented Jack and the Section a check for $3,005.00 as the Section's portion of the profit from

continued, next page

the course. This year the Workshop will be held on July 28-30.

Membership

Judge Polen reported that he had consulted with the Family Law Section about a joint dues program. They were not interested. Jackie Werndli reported that, as of January 1, 1999, the Section's membership numbered 1,036.

Civil Appellate Practice Committee

Bob Sturgess, Chair of the Committee, reported on an article authored by Committee member Jennifer Carroll and on plans to write another article on appellate departments in large law firms. He also reported that the Committee's guardian ad litem program had five favorable results in Miami. The Miami coordinator will be communicating with the coordinators of the other DCAs. The Committee is going to keep a brief bank.

Amicus Curiae

John Crabtree reported that the court reporter fee issue has been "punted" over to the Appellate Rules Committee, and that Nancy Gregoire has put this issue on the Committee's agenda. John moved that the Section take the position that court reporters in Florida charge the same rate for deposition and trial transcripts and not require multiple copies to be ordered. The motion was seconded and carried.

John also reported that the Committee had voted at today's meeting to expand its mandate to write briefs for the Florida Bar Board of Governors when it decided to take an amicus position in a case in which the Florida Bar was not a party. John moved that this option be presented to the Board of Governors for its consideration. The motion was seconded and carried.

Appellate Rules Liaison Committee

Raoul Cantero reported on the Committee's Mission Statement. Raoul mentioned the difficulty of conveying rule change issues because the Appellate Rules Committee meets the day after the Executive Council meeting. John Crabtree suggested that the committee digest the agenda of the Rules Committee and present it to the Council so that the Council can be informed of what is on the agenda and can take a position if so desired. A motion was made and later withdrawn to take a position on the issue of whether briefs should include a separate section on the applicable standard of review. Raoul then reported on rules passed at the last meeting now being considered by the Florida Supreme Court.

Appellate Certification Liaison Committee

Tony Musto reported on the activities of the Certification Committee. The Committee met yesterday to review exam questions. The exam is scheduled for March 12, 1999. Twenty-four people are registered to take it. He also mentioned that recertification of the first class certified will take place in 1999. Re-certification applications will be mailed in the next month and the application period expires on May 31, 1999. The expiration period is tolled if an application has been filed.

Federal Appellate Practice Committee

No report.

Criminal Appellate Practice Committee

Harvey Sepler, Chair of the Committee, reported on its projects: (1) canvasing circuit court judges to determine common problems with county court to circuit court appeals; and (2) establishing a mock oral argument to take place around the state using two outstanding appellate attorneys from that part of the state to make the argument to the district court in that area. The idea would be to tape the argument, the lawyers discussing the strong and weak points of their arguments, and a discussion with the judges about the argument.

Appellate Mediation Committee

No report.

Legislation

No report.

Long-Range Planning Committee

Cindy Hofmann reported that the Long-Range Planning Committee had met and had discussed plans for the Section's first retreat. Each member of the Committee accepted a task related to planning the retreat (for example, getting a guest speaker, finding a CLE course to offer, and finding a hotel/resort). The Committee will meet again in mid-March to continue the planning effort.

Publications Committee

It was announced that the Guide will be published in the fall of 1999 as the 1999-2000 Guide. This will become the new schedule so that relatively soon after renewing or becoming a member, the Section membership will receive a new edition. It was also announced that Tom Elligett had recently submitted an article for publication in The Florida Bar *Journal*.

Old Business

Section Website

Steve Stark reported his progress on getting a Section website up and running. He plans to have a flowchart prepared by March 1, 1999 showing what the website will look like. By March 15, 1999, he hopes to have a beta version that Section members can view. He would like all committee chairs to appoint a website liaison to identify what needs to be put on the site. By the June meeting he will have a complete proposal, including the costs of maintaining the site, for a vote of the Section.

National Moot Court

This was discussed at the beginning of the meeting.

Practice Before the Florida Supreme Court

Tony announced that this CLE seminar was being co-sponsored between the Government Lawyers and FSU law school. It will be presented on June 11, 1999. There will be one-on-one contact with the Supreme Court justices. Space is limited.

Bylaw Amendment

Roy raised the issue of amending the bylaws to provide for continued participation of past Section chairs. Discussion was had on the pros and cons of making the past chair positions into voting member positions for an infinite period of time. As more past chairs come into existence, their presence at council meetings may dilute the voting power of the regular

Executive Council members. Tony suggested an opt-in provision so that only past-chairs that express an interest would be given a seat on the Council. Steve volunteered to rewrite the bylaw based on the discussion. Any member with comments was asked to give them to Steve, who will create a new bylaw amendment for discussion at the June meeting. Angela Flowers and John Crabtree joined Steve as members of the ad hoc bylaw subcommittee.

New Business

1999-2000 Section Budget

The budget was approved with the addition of a $3,000 line item to cover the cost of the planned retreat to be held in the spring of 2000.

Section Name Change

Roy invited discussion on changing the name of the Section. He reported that he had sent out a questionnaire asking for input on this issue. John moved that the name of the Section be changed to the Appellate Practice Section. Any change requires a bylaw amendment, which has to be submitted to the Board of Governors and then goes to the Florida Supreme Court for approval. The Executive Council, by a vote of 8 for and 6 against, voted to recommend the bylaw change.

It was recommended that both bylaw amendments (1) voting power and Executive Council seats for past chairs, and (2) Section name change (to be drafted by Bob Sturgess) be published in the March/April issue of *The Record*.

Adjournment

The meeting was adjourned at 5:26 p.m. The next meeting will be held on Thursday, June 24, 1999 at 10:00 a.m. - 12:00 noon.

MEMBERS PRESENT:
Jack Aiello
Caryn Bellus-Lewis
Raoul Cantero
Jennifer Carroll
Ty Cone
John G. Crabtree
Judge Gerald B. Cope, Jr.
Judge Marguerite H. Davis
Angela Flowers
Robert Glazier
Cindy Hofmann
Ben Kuehne
Tony Musto
Judge Kathryn Pecko
Harvey Sepler
Steve Stark
Bob Sturgess
Roy D. Wasson
Judge Peter D. Webster

MEMBERS ABSENT:
Bonnie Kneeland Brown
Judge Richard H. Frank
Judge Charles M. Harris
Stuart Markman
Hala Sandridge
Jack W. Shaw, Jr.
Judge Gerald B. Tjoflat
George Vaka

OTHER ATTENDEES:
Jackie Werndli
Michael L. Richmond
Morris Silverman

APPELLATE PRACTICE & ADVOCACY SECTION MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Appellate Practice & Advocacy Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Appellate Practice. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to APPELLATE PRACTICE AND ADVOCACY SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME _____ ATTORNEY NO. _____

OFFICE ADDRESS _____

CITY/STATE/ ZIP _____

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

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300