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Judge Frank A. Shepherd – Learning from Veterans

by Edward M. Mullins[1]

Judge Shepherd

If anyone had told a young lawyer named Frank Shepherd, who arrived in Miami in the early 1970s, that he would end up on the bench of the Third District Court of Appeal, he would not have believed them. "I certainly do not have a resume that jumps out at you, 'Hey this guy ought to be an appellate judge!,'" Judge Shepherd jokes.

Appellate lawyers in Miami-Dade County had a unique opportunity to have an informal breakfast with the Third District's latest addition to the bench at this season's final Judicious Breakfast, sponsored by the Miami-Dade County Bar Appellate Courts Committee. Judge Shepherd used the occasion to provide his audience with an explanation of how he became an appellate judge and, perhaps inadvertently, illustrated how important mentoring can be to a novice.

"I arrived in Miami thirty years ago, and started at the law firm of Bradford, Williams, McKay, Kimbell, Hamann and Jennings. It was then

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Message From the Chair:

by John G. Crabtree

The Appellate Practice Section celebrates a ten-year history. That history, and our success in growing to a 1400-member organization, invites a question that is important to the direction of the Section: we are ten years old, but who are "we"?

A friend once quipped that appellate lawyers are the last generalists in the legal profession. And that is true, up to a point. But it is also true that our craft has become—and continues to become—more and more specialized.

Appellate lawyers focus on civil, criminal or administrative appeals, and within each of these appellate spheres our members tend to toil in one or two limited areas of practice. In civil practice, for example, appellate lawyers work predominantly on commercial, constitutional, employment, family law, personal injury, or trust and estates appeals. Within these areas, there are those whose appellate practices are even more focused—like the employment lawyer handling discrimination appeals, but no workers' compensation or unemployment appeals, which both begin as administrative proceedings.

There is also a stereotype about appellate lawyers, that they are the wizened veterans of the courts. While we do have a number of outstanding appellate lawyers who have been practicing for years, we have a surprisingly large number of new law-

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yers in our ranks: over one-third of our members are also members of the Young Lawyers Division.

What does this presence of new lawyers tell us? Perhaps it means that, when starting their careers and pursuing what they really want, new lawyers want to be appellate practitioners. Perhaps it is simply a consequence of the Bar's rule permitting free membership in up to two sections during a lawyer's first licensed year. Or perhaps it means that new law school graduates view appellate practice like my friend does, as a generalist's area of work, yet one that is both similar to their recent background and also a nuts-and-bolts application of the academic to the world of the practitioner.

What does all this say about appellate practice in the Section? While we know the various areas of practice that our members engage in, we do not know how many members practice in any given area. While we know how many new lawyers we have, we do not know why they are members. Without that knowledge, it is difficult for the Section to ensure that it is adequately addressing the needs and desires of its members. If the Section is to serve its membership, it must know more.

That is why the Section will be sending an email questionnaire to its members. Please read it and respond. Without knowing who "we" really are, the Section cannot plan for the next ten years.

2004 Adkins Award and Pro Bono Award Winners

by Jack Aiello[1]

Against the backdrop of the unique jazz stylings of the Tony Sono Trio, and amidst enough confectionary delights to hyper-activate an entire Bar Convention, the Section distributed its annual awards. The Appellate Practice Section presented its Tenth Annual James C. Adkins Award to Arthur England at this year's Dessert Reception at the Boca Raton Resort & Hotel. The Appellate Section awarded its 2004 Pro Bono Award jointly to Stephen F. Hanlon and Susan Kelsey.

The James C. Adkins Award is named for Florida Supreme Court Justice James Adkins, who passed away in 1994. Justice Adkins was a popular member of the Florida Supreme Court for eighteen years in the 1970s and 1980s, and was the Chief Justice during the mid-1970s. The Award is made annually to a member of the Florida Bar who has made significant contributions to the field of appellate practice in Florida.

The winner of this year's Award served, like Justice Adkins, as a Justice on the Florida Supreme Court and also as the Chief Justice. In fact, Arthur England joined the Court when Justice Adkins was serving in 1975. As a member of the Florida Supreme Court, then-Justice England authored many decisions, on a wide variety of important topics in Florida's jurisprudence.

Today, Mr. England is a shareholder in Greenberg Traurig, P.A.'s Miami office. He is the Chairman of the Firm's Appellate Department.

Mr. England's experience is varied, having served as Special Counsel for the Governor of Florida and Special Tax Counsel for the Florida House of Representatives. He is the author of the well-known, multi-volume, Florida Appellate Practice Manual.

A Life Member of the American Law Institute, Mr. England has received several previous awards, including the American Bar Association's Pro Bono Publico Award and the Florida Bar Foundation's Medal of Honor. He was the Charter Chair of the prestigious American Academy of Appellate Lawyers, and is nationally respected in the Appellate Bar. Arthur England is honored as one of the practitioners in our trade who has helped take our appellate specialty from obscurity into widespread acceptance.

The Appellate Section awarded its 2004 Pro Bono Award jointly to two lawyers who work together as a significant part of a team providing representation to people, groups and causes that otherwise could not afford it. The winners, Stephen F. Hanlon and Susan Kelsey, are both partners with the Holland & Knight law firm.

Steve Hanlon practices in Holland & Knight's Washington, D.C. office. He has practiced in Florida since 1976, after approximately ten years in the practice of law in Missouri. He manages Holland & Knight's Community Services Team, which the Wall Street Journal has described as "the region's most extensive program for handling public interest cases." He has been active for a long time in Florida Bar and American Bar Association committees related to his work.

Steve's major civil rights work has included challenges to high-stakes testing; challenges to indigent defense systems; a claims bill in the Florida Legislature for the survivors of the Town of Rosewood; housing, employment and AIDS discrimination; death penalty litigation; voting

This newsletter is prepared and published by
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rights; and unconsented medical experimentation. He has previously been honored by many organizations, including the Nelson Poynter Award from the ACLU of Florida for his commitment to civil liberties and civil rights, the Steven M. Goldstein Criminal Justice Award from the Florida Association of Criminal Lawyers, the "Keep the Dream Alive" Award from the Dr. Martin Luther King Commemorative Committee in Hillsborough County, and several other distinctions.

Steve's pro bono and public interest efforts in Florida's state appellate courts and federal appellate courts have essentially run the gamut of public interest issues in the last twenty-eight years. Indeed, when the courts of Florida, including the Florida Supreme Court have needed assistance from counsel on a pro bono basis, Steve Hanlon frequently gets and typically accepts the call.

Susan Kelsey, Mr. Hanlon's partner, works in Holland & Knight's Tallahassee office. She has been similarly handling pro bono and public interest matters for that law firm for sixteen years. She is an integral part of the Community Services Team managed by Steve Hanlon. Susan has worked closely with Mr. Hanlon in demonstrating her unfailing willingness to lend pro bono services to a wide variety of causes, starting within weeks after joining the law firm. The Appellate Section was pleased and honored to present the Pro Bono Award jointly to recipients as deserving as Stephen Hanlon and Susan Kelsey at the Dessert Reception in June.

[1]***Jack Aiello,*** *a Florida Bar board certified Appellate practitioner, is the Immediate Past-Chair of the Appellate Practice Section, and is a partner with Gunster Yoakley & Stewart, P.A. in West Palm Beach.*

Jack Aiello presents Adkins Award to Arthur England

2004 Adkins Award Winner

Arthur England

2004 Pro Bono Award Winners

Susan Kelsey

Stephen Hanlon

Appellate Practice Telephonic Seminars

Third Tuesday of Every Month
(Except June and December)
12:10 p.m - 1:00 p.m.

Registration Information Available At:
www.flabarappellate.org

This Year's Discussion with the Florida Supreme Court Is "Standing Room Only" Event

by Jack Shaw[1]

Continuing what has become a proud tradition at the mid-year Bar Convention, the Appellate Section of the Florida Bar once again presented the annual "Discussion with the Court;" the time when the Justices of the Florida Supreme Court make themselves available to answer questions from members of the Bar. This year, we were fortunate to have five of the Florida Supreme Court Justices present for this session, despite many constraints on their time and availability. The Section thanks Chief Justice Anstead, incoming Chief Justice Pariente, Justices Wells, Cantero, and Bell for their time and participation, and for giving members of the Bar the opportunity to inquire into numerous areas of interest and concern.

Reflecting the growing interest in this opportunity, this year's Discussion was a "standing room only" event, also demonstrating that the Section has been more successful in "spreading the word" that the Justices of the Court were taking time from their busy schedules to discuss issues of interest and concern to all members of the Bar. Due to the size of the audience, the Court limited questions to one per individual, with the caveat that, if time permitted, a follow-up question would be allowed after everyone else had been given an opportunity to present their inquiry. As it turned out, time did not permit any follow-up questions.

In what has become an unintended tradition, the first question dealt with the status of "PCA" opinions. Justice Wells, after noting that, unlike lawyers appearing before the Court, the Court was not obliged to answer questions, discussed the role of the per curiam affirmance and its counterparts in other jurisdictions. Justice Wells further noted the recent revision in the Florida Rules of Appellate Procedure, which now permits the recipient of a PCA to request the District Court to issue a written opinion in certain circumstances.

Another issue raised was the suggestion that the time had come for the addition of a Sixth District Court of Appeal. The Court noted that this issue had been studied a number of times, but that the suggestion had never made it past the subcommittee level on the judicial side of government. The Justices explained that, among the factors to be considered in analyzing this issue, are the caseload of District Court Judges, both in terms of filings per Judge and merit dispositions per Judge, the maximum effective size of a collegial appellate court, and the extent to which technology and other resources could be used to allow the courts to deal with cases more efficiently.

Practitioners also asked numerous questions concerning the "nuts and bolts" of appellate practice. For example, Tony Musto raised the question of how the Court decides which of two or more companion cases will be the "lead" case. Justice Pariente responded by explaining that it was normally the first of the cases to be filed with the Court, although other factors might change that result in particular situations.

Valeria Hendricks raised the issue of the proper and effective use of a motion for rehearing, given the restriction that it should not be a reargument of issues already raised, and also should not be a matter not previously raised. Justice Cantero noted that, while he was in appellate practice, he had often used a motion for clarification when he felt that the Court had not addressed certain issues. Chief Justice Anstead and Justice Bell noted that motions for rehearing were most useful to the Court when they pointed out a specific misstatement of fact or an ambiguity in an opinion, but that motions which merely served to tell the Court that it had made the wrong decision were of no value whatsoever.

Lawyers also questioned the Florida Supreme Court Justices about their views on the propriety of splitting a side's oral argument among two presenters. Justice Wells noted that, although this may be appropriate when counsel have agreed to a division of issues between themselves, the danger was the risk of losing limited

Do you like to WRITE? Write for *The Record*!!!

The Record relies on submission of articles by members of the Section. Please submit your articles on issues of interest to appellate practitioners to Dorothy Easley, Editor, Steven M. Ziegler, P.A., 4000 Hollywood Blvd., Suite 375 South, Hollywood, FL, or email to dfeasley@bellsouth.net

oral argument time and continuity in the presentation. Justice Pariente asked when the last time an attorney arguing before the Court had time to actually make a planned presentation without being inundated by questions from the bench. The question answered itself.

Among the many other questions raised were: whether the Court had seen an increase in motions for sanctions for raising frivolous issues, how the Court determined which cases will be slotted for oral argument, whether (and in what circumstances) an amicus curiae brief was helpful to the Court, the extent to which the Court would address "other" issues when jurisdiction was based on a certified question or an express and direct conflict of decisions, and what steps, if any, an attorney could properly take if there were a seemingly protracted delay in the issuance of an opinion after a case has been submitted for decision.

The Section expresses sincere gratitude to the Florida Supreme Court Justices for, once again, making themselves available to answer questions and entertain vigorous discussion on a wide variety of issues, despite substantial constraints on the Justices' time, and for the Justices participating in this year's Discussion. The members of the Section, and the Florida Bar, look forward to next year's Discussion.

[1] **Jack Shaw** is a shareholder in the Orlando office of Motes, Shaw, Sears, Sturgess & Williams, P.A. A former member of the Florida Bar Appellate Court Rules Committee and former Chair of the Amicus Curiae Committee of the Florida Defense Lawyers Association, he is currently a member of the Executive Council of the Appellate Practice Section and of the Board of Directors of the Florida Defense Lawyers Association. He concentrates his practice in the area of appeals.

Who's Your Appellate Lawyer? Spotlight on Fox & Loquasto, P.A.

by Susan W. Fox

The "Who's Your Appellate Lawyer?" Spotlight is a series focusing on attorneys who specialize in appellate practice. "Who's Your Appellate Lawyer" is the slogan of the Appellate Practice Section and is designed to create awareness of the need for appellate specialists. This series looks at practice development as an appellate specialist, by spotlighting successful appellate practitioners.

On December 1, 2003, Fox & Loquasto ("F&L") came into being as an appellate boutique law firm with offices in Tampa and Tallahassee. In the first month, F&L became counsel of record in twenty-three appellate proceedings, and in another twenty-nine appeals during the ensuing six months. These included appellate proceedings in all but one of the state appellate courts and the United States Supreme Court, and covered the gamut of civil, criminal, administrative, worker's compensation, traffic/DUI, public utilities, probate and family.

F&L's principal attorneys, Susan W. Fox and Wendy S. Loquasto, believe theirs is the first appellate firm to offer comprehensive, statewide coverage of all types of appeals in all Florida courts. This approach, however, was a natural outgrowth of their different backgrounds, broad experience, and geographic locations. This article describes the evolution of the founders of F&L into appellate practitioners, and provides guidance to attorneys who may wish to follow a similar path.

A. Becoming Appellate Lawyers

Susan Fox's destiny of becoming an appellate lawyer was settled while attending the University of Florida, College of Law ("UF"), from 1974 to 1976. During law school, she was on the Editorial Board of the Law Review, and taught legal research and writing.

More fatefully, however, she took an appellate law course taught by Robert T. Mann, who had recently retired as Chief Judge of the Second District Court of Appeal. Mann encouraged Susan to pursue an interest in appellate practice, and took her to meetings of the Appellate Court Rules Committee, of which he was Vice Chair. Other Committee members besides Mann included legendary lawyers such as the late Tobias Simon and Judge Raymond Nathan, as well as Adkins Award winners Arthur England and William Haddad. The Committee was then in the midst of its historic revision of the old Florida Appellate Rules, and was writing the present Florida Rules of Appellate Procedure. Robert Mann enlisted Susan to perform legal research for the Committee, with the promise that he would help her publish an article when the Rule revisions were finalized.

Susan's father, Hamilton H. Whaley delivered a further nudge to Susan in the direction of appellate practice. Mr. Whaley came to UF one fall weekend for a football game. There, he deposited Susan in the library, along with a file for Susan to write her first appellate brief on a case that he had lost at trial. Since he represented the appellant, the chances of victory were not great, but he liked Susan's brief so much that he filed it verbatim.

Upon graduation from UF, Susan became an all-purpose associate at Macfarlane Ferguson & McMullen in the summer of 1977. A chance to specialize in appeals was not handed to her on a silver platter. Despite winning her father's appeal, being appointed to the Appellate Rules Committee immediately upon graduation, and publishing an article about the new appellate rules with Judge Mann in the Florida Bar Journal in 1978, she was given only limited opportunities to try her hand at appeals during her early years. The law firm already had an established appellate department that did not enthusiastically share its business with the young upstart.

Instead, most of the appeals assigned to Susan came through the

continued next page

law firm's workers' compensation department, which included her father. As a result of his praise of her appellate skills, she began doing appeals for the law firm's defense clients. More significantly for her practice today, she developed a small following of claimants' attorneys who became acquainted with her as opposing counsel, and who then turned to her to handle their own appeals. This following grew over the years.

Ultimately, Susan became an integral part of the appellate department at Macfarlane Ferguson. She headed the Macfarlane Ferguson appellate department from 1996 until she left to start F&L. The referral bases she had built over the years became the portable business that allowed the F&L firm to be established.

Also during that time, Susan served several terms on the Appellate Court Rules Committee, including six years as the Committee's Secretary. She became Committee Chair in 1999. She also became active in the Appellate Practice Section, serving as Editor in Chief of The Record for two years, and maintains an active role in the Section's leadership.

Wendy Loquasto's path to appellate practitioner arises from a more academic history. Like Susan, Wendy was on Law Review from 1986 to 1988, while she attended Stetson University College of Law ("Stetson"). She was also a teaching fellow, assisting in the instruction of first year law students in their legal research and writing course. The seeds of Wendy's career in appellate practice were sown during her own first-year experience, when she received the awards for "Best Oralist" and "Best Brief" in her legal research and writing class.

Upon graduating from Stetson in 1988, Wendy began her clerkship with the Honorable Richard W. Ervin, III, at the First District Court of Appeal. Sixteen years later, one could say, "and the rest is history." At the time, Judge Ervin had been at the appellate court for nearly twelve years, and under his mentorship, as well as that provided by the other judges and law clerks, Wendy's love of appellate law blossomed.

Wendy became immersed in appellate law while at the First District Court of Appeal, a court with the most varied caseload of all of Florida's appellate courts. She worked on the usual civil and criminal cases and extraordinary writs; but due to the court's Tallahassee location, she also worked on many state agency appeals, as well as workers' compensation appeals, over which the First District has exclusive jurisdiction.

Also, like most appellate courts, the majority of the cases filed at the First District were (and still are) criminal appeals. Wendy came to relish *Anders* appeals because, through the process of reviewing the record to search for error, she experienced an inkling of what it would mean to be an appellate advocate.

While Wendy worked anonymously on the First District's appeals, she resolved to remain in the appellate law system. After remaining with the First District for more than fifteen years, she feared that opportunities in private practice had passed her by. The opportunity to form an appellate practice law firm with Susan represented Wendy's chance to realize her long-held dream.

Since leaving the court and forming F&L in December 2003, local attorneys have been eager to tap Wendy as an appellate resource. Because of Wendy's fifteen years at the First District, she developed a unique knowledge of the workings of an appellate court, as well as appellate law and rules. Those attorneys not practicing in the area of appellate law refer their clients needing to file an appeal to Wendy. They do so, confident that they have placed their clients in capable hands.

B. The Mechanics of F&L's Statewide Practice

With Susan in Tampa and Wendy in Tallahassee, F&L faces both logistical opportunities and challenges. Although they have secretarial support in both offices, Tampa is the main office, out of which they bind and send all their briefs. They divide the cases based on their interests, skills, and work load. They capitalize on their respective appellate expertise by always exchanging drafts during the week preceding the due date, for additional appellate "checks and balances". Both appreciate the critical analysis the other provides.

Although a statewide appellate practice would have been unthinkable in years past, with overnight mail delivery, and with electronic filing soon to become a reality in some courts, an appellate attorney's physical location places no limitation on the practice area.

The broad spectrum of appeals that F&L handles might seem unusual to many appellate practitioners, since most focus on either civil or criminal appeals. Because Susan and Wendy have decades of combined appellate experience, however, they have come to find that the steps and critical analysis necessary to handle any kind of appeal are essentially the same. They, therefore, feel comfortable handling an appeal of any topic, although they do draw on each other's subject matter expertise.

While Susan's practice has been largely in the civil and administrative areas, Wendy, through her work at the First District, has gained substantial experience in criminal appeals. So, the decision to include criminal appeals in F&L's portfolio was also a natural one.

The appellate boutique practice also has several advantages over the large firm practice that is more traditional for appellate lawyers. For attorneys that rely on a referral base, as Susan has, a large firm imposes many conflicts of interest that require potential appeals to be turned away. In the boutique practice, on the other hand, conflicts are rare. Also, outside attorneys who would not refer appeals to an appellate attorney in a competing large firm, might be more willing to refer to an appellate boutique because there is no risk of losing the client's business on other matters. The large firm practice requires a fairly high overhead, which can be an unnecessary burden on an appellate practice that requires minimal overhead.

F&L's all inclusive approach to appeals also has advantages. Referral attorneys don't encounter a negative response to the question, "Do you handle [whatever type] appeals?" Few appeals are rejected out of hand. Screening appeals is still required, of course, for jurisdiction and merit, and fee arrangements must be worked out. Fee arrangements are generally flexible because of the variety of ap-

peals. For example, in some appeals, such as workers' compensation, statutory fees are contingent. Criminal appeals are usually performed on a flat-rate basis. Other appeals are often done on an hourly basis.

C. Suggestions for Developing an Appellate Practice

To those wanting to start working more in appellate law, or embark on their own appellate practice, Susan and Wendy impart the following wisdom.

1. Find a Mentor. As Susan's story shows, many successful appellate attorneys have had the benefit of a mentor who helped to guide and groom them. Some young attorneys today prefer peer-to-peer counseling, and do not desire the inferior status that comes with being a protégé of a successful person. While recognizing this path is not for everyone and that some young lawyers never get the opportunity to learn from a master, the opportunity, if it comes, should not be rejected lightly.

2. Develop Skills. Although on-the-job learning opportunities do arise, most successful appellate practitioners do not get paid to learn their skills. They, in fact, develop their strongest and most-important skills through Bar committee work, CLE workshops, observing role models, and pro bono projects. Performing free research and legwork for a key committee, as Susan did in 1976, can open doors of opportunity, as well as provide a chance to work with the greatest members of the profession.

Through Bar and pro bono activities, budding appellate lawyers can make contact with others, who will be available to provide advice, or who might be willing to provide consultation on arcane points of appellate procedure, proofread a brief or article, or participate in a moot court before oral argument.

To learn appellate procedure, service on the Appellate Court Rules Committee and its sub-committees is one of the best ways to do that. Likewise, service in the Appellate Practice Section, particularly the Publications or CLE Committees, can be invaluable for overall appellate learning.

3. Develop Credentials. Credential development comes primarily through Bar service. Bar service leads to opportunities for writing and lecturing. Don't wait until you already feel that you know it all before volunteering, as this will only delay your development. If you are uncertain of what you have to offer, attend the meetings until you find some way to volunteer to serve. All Bar committees are hungry for fresh recruits.

4. Cultivate Opposing Counsel. While keeping a certain professional distance from opposing counsel is always appropriate, a courteous relationship has many rewards. The most obvious of these is cooperation through the course of the proceeding, resulting in fewer delays, decreased motions practice, and less stress and aggravation. Also, by doing a good job for your client without unnecessary animosity, your opposing counsel might become a referral source and ally in future cases.

5. Build Relationships and Develop a Reputation for Reliability. Most attorneys who refer appeals want to be able to feel confident that the case will be in good hands, and not require them to further monitor or follow-up. They want to refer the case to someone who will accept it. Therefore, be prepared to say "yes" to opportunities.

While we all must sometimes reject appeals that fail to meet finality or jurisdictional requirements or lack merit, be sure to give your referral source an opportunity to explain to you why he/she believes this appeal is worthy of your attention. This is true whether the referring attorney is your law partner, a regular referral source, or someone you met recently at a Bar function. Give them no reason to feel reluctant to call you in the future. Your desire is to become their "go to" person, who can be viewed as someone they can count on in appellate emergencies.

Relationships and reputations built outside the appellate arena are also useful in appellate practice. Wendy, for example, impressed many people with her work as the lead researcher and compiler of FAWL's First 150 Women Lawyer's Project, and later in assisting in completing FAWL's 50-Year history book. Susan was FAWL's Journal Editor during the First 150 Women Lawyer's Project, and FAWL's President during the 50th Anniversary year. Through this experience, FAWL's President learned that she could count on Wendy to complete difficult projects. And when the time came to bring Wendy's talents into the appellate arena, Susan did not hesitate to do so. Through Bar work, lawyers learn who they can, and cannot, count on.

6. Be Patient. Few, if any, of us are handed the appellate opportunities of our dreams, or given major lucrative appeals on a silver platter. We are more likely to get a chance, as Susan did, to try our hand at a perceived long shot; to take on a type of appeal that no one else wants, and then to wait patiently for additional opportunities. While waiting, absorb everything you can about the process. No one starts at the top.

Susan Fox is a Florida Bar Board Certified appellate practitioner with her law firm, Fox & Loquasto, P.A., in Tallahassee and Tampa, Florida. She is currently Vice-Chair of the Appellate Practice Section, former Chair of The Florida Bar, Appellate Court Rules Committee, former Editor of The Record, Journal of the Appellate Practice and Advocacy Section, and former President of Florida Association for Women Lawyers.

The Section's Tenth Anniversary Dessert Reception Swings New Orleans Style

by June G. Hoffman[1]

The Appellate Practice Section enthusiastically celebrated its Tenth Anniversary "New Orleans Mardi Gras" style at its signature Dessert Reception, hosted each year during the Annual Meeting of the Florida Bar. Despite the popular, but erroneous, perception that appellate attorneys and jurists are too cerebral to have any *fun*, attendees donned feathered masks, tiaras, jester hats and metallic beads, as they perused and sampled a gorgeous array of dessert delicacies in the "French Quarter", prepared by the Boca Raton Resort & Club. Many guests also sauntered over to "Bourbon Street" to enjoy a celebratory cordial, while swaying to the jazzy tunes of a fabulous, live-jazz trio.

On behalf of the Appellate Practice Section, outgoing-Chair, Jack Aiello, also bestowed the Judge Adkins Award on Arthur England and the Pro Bono Award jointly on Stephen F. Hanlon and Susan Kelsey. As the festivities wound down, attendees departed with a memento of their evening in "New Orleans", consisting of a handsome, Appellate Practice Section coffee mug, complete with French Market coffee and an Aunt Sally's praline to enjoy in the morning.

[1] **June Galkoski Hoffman** is a shareholder in the Appellate Group of Fowler White Burnett, P.A. in Miami, and is board certified in Appellate Practice by the Florida Bar.

The Appellate Practice Section gratefully acknowledges and sincerely appreciates the generous support of the following law firms, who made the Section's Tenth Anniversary Dessert Reception the most successful ever:

Fowler White Burnett, P.A.
Adorno & Yoss
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John Crabtree, P.A.
Fox & Loquasto
Gunster Yoakley
Kubicki Draper
Mills & Carlin
Weiss Serota et al.

June Hoffman, Program Committee Chair, greets those arriving for the Dessert Reception

Appellate Practice Section General Meeting

September 9, 2004

10:00 a.m. - 12:00 p.m. - Committee Meetings

2:00 p.m. - 4:00 p.m. - Executive Council Meeting

4:30 p.m. - 6:00 p.m. - Reception

Appellate Dessert Reception Highlights

Judge Kathryn Pecko

Shannon Carlyle and John Mills

Jack Reiter, Justice Raoul Cantero and John Crabtree

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the third largest firm in town. We had all of 17 lawyers, and that included the five of us that joined that year," he laughs. Judge Shepherd was in great company with those young lawyers, which included former United States District Judge and United States Attorney Thomas Scott.

For his part, Judge Shepherd had taken a roundabout trip from his native Florida. Born and raised in Palm Beach County, Judge Shepherd attended the University of Florida, where he graduated in 1968. From there, Judge Shepherd attended the University of Massachusetts and graduated in 1970 with a Master of Arts Degree in Government. He then decided to attend law school, graduating from the University of Michigan Law School in 1972. "I am not sure why they let me in," Judge Shepherd states with his trademark modesty.

Yet, it was joining Bradford Williams that would turn out to be the best decision for the young litigator. "Bradford, Williams, Kimball, Hamann: all of these guys were veterans of World War II. They had flown missions over Europe. Going to trial was nothing to them; they had no fear," Judge Shepherd recalled.

That confidence–and perspective on the practice of law–spilled over to Judge Shepherd, who soon found himself trying personal injury and commercial cases. Ironic for a future appellate judge, Judge Shepherd, while earning some appellate experience, mainly focused on trial practice. "I did not have time to do a lot of appeals; we were too busy trying cases. But, I enjoyed the appeals I did have a chance to do," he remembers.

Judge Shepherd practiced at Bradford Williams for 19 years, until 1981 when he was appointed by President Reagan to serve as the Associate Administrator for Legal Counsel and Enforcement for the United States Environmental Protection Agency. In 1990, Judge Shepherd became the founding managing partner of the Miami office of the national law firm, Popham, Haik, Schnobrich and Kaufman, P.A., where he practiced for seven years, before leaving in 1997 to form Weisman, Dervishi, Shepherd, Borgo & Norland, P.A.

A few years later, Judge Shepherd's road to the Court took another turn: the former trial lawyer found himself practicing as a full-time appellate lawyer as a senior attorney for the Pacific Legal Foundation. It was that role–arguing constitutional takings cases before the Florida appellate courts, federal appellate courts, and the United States Supreme Court–that was perhaps his most satisfying, before his current position. "That was a tremendous experience," Judge Shepherd recalls, "and great preparation for my next job."

That job, of course, was to become the Third District's latest jurist in September, 2003. When asked what was most surprising about his latest vocation, Judge Shepherd stated how easy it was for him to fit in with the jurists, before whom he had argued and for whom he had great respect. Doing what he has done his entire legal career, Judge Shepherd has taken the opportunity to learn from these legal veterans, including Chief Judge Alan Schwartz and retired Judge Thomas Barkdull.

"Judge Barkdull, who is really the dean of the Third District, sits on the panels two or thee times a year. We figured out that he had sat with every single judge, ever, on the Third District, with the exception of us last few appointees. We arranged the panel schedules to allow us latest members a chance to sit with Judge Barkdull," Judge Shepherd says.

Judge Barkdull provided a valuable lesson to the new jurist. "He came by my office, and asked me if I had ever heard of the *Ansin v. Thurston*[2] opinion. I had not," Judge Shepherd confides; "but when Judge Barkdull talks, you listen." "He gave me a copy and said, 'See where it says that a district court of appeal is not an intermediate appellate court.'" "Always remember," he urged, "'this is a court of last resort.'" "Your job is not to pass cases through to the Florida Supreme Court. So, don't ever call this Court an intermediate appellate court.'" (Barkdull should know: As a young member of the Florida Bar Board of Governors in 1954 and 1955, he had considerable input into the formation of the District Courts of Appeal, and has served on every constitutional revision commission since that time.)

At the Third District Court of Appeal, Judge Shepherd has taken that advice to heart, where he already has earned a reputation of being thoroughly prepared for oral arguments. "I already have learned how to get to the appellate record in the basement after closing time. I really like to get a feel for the record myself," he told the audience. Yet, he appreciates assistance from practitioners appearing before him. "I find appendices, with only the key documents attached, very helpful for an appeal," he says. On citing to the record, Judge Shepherd has his own words of advice. "It may be obvious, but don't misstate or exaggerate the record. You may have to take an appeal of a tough case, but do not tarnish your reputation by misrepresenting the facts. It ain't worth it," he warns.

Judge Shepherd also advises lawyers appearing before the Court to grab the Panel's attention at the outset. "You have to understand, we have nearly 3,500 filings in our Court, which translates into roughly 900 files before each of us. In your brief, you want to be clear to the Court about what you want the Court to do; be succinct and to the point," he counsels. "The same is true at oral argument. Ask yourself what it is you want us to remember about your position after we are done with our arguments for the day and we are in caucus." This is sage advice for lawyers appearing before this veteran lawyer and soon-to-be veteran jurist.

[1] Edward M. Mullins is a founding shareholder at Astigarraga Davis, focusing his practice on international commercial litigation and arbitration at the trial and appellate court levels . He is also experienced in class action defense and intellectual property litigation/media. He is former Chair of the Appellate Courts Committee of the Dade County Bar Association, and is current Secretary of the Appellate Court Rules Committee of the Florida Bar.

[2] *Ansin v. Thurston* 101 So. 2d 808 (Fla. 1958).

Jacksonville Appellate Lawyers Strengthen Connections Between the Appellate Bench and Bar

by John S. Mills[1]

For the past several years, the Appellate Practice Section of the Jacksonville Bar Association has hosted dinners with the state and federal appellate panels sitting in Jacksonville. Panels for the First District Court of Appeal sit in Jacksonville at least twice a year. Each time, the Section hosts a formal dinner with the three-judge panel and clerk. The Section also hosts a visiting Eleventh Circuit Court of Appeals panel and the Jacksonville-area resident judges on that court once each year.

The dinners have been well attended, with very positive feedback from the bench and bar. In addition to improving bench-bar relations through the social interaction, the dinners provide an excellent forum for the exchange of ideas and "war stories."

Judge Peter Webster and Judge William Van Nortwick, First District Court of Appeal Judges and former Jacksonville attorneys, are active participants (by telephone) in the Section's monthly meetings. The Eleventh Circuit Court of Appeals Judge Gerald Tjoflat has also been active.

These kinds of exchanges are very enjoyable. They also help to improve the quality of the lawyers' appellate skills.

[1] **John S. Mills** is a board certified appellate lawyer, handling both civil and criminal appeals. He is a partner with the law firm of Mills & Carlin, P.A.

Educating The Vote

by Raymond T. (Tom) Elligett, Jr.[1]

Politicians talk about "getting the vote out." Fortunately with merit retention, our appellate judges no longer have to run in traditional contested elections (a change that followed charges of improper behavior against some elected justices thirty-plus-years ago). But there is still a need to "educate the vote."

Our appellate judges have to stand for retention elections. Consider having the question of whether you could continue your chosen career decided by the vote in a general election, where the voters are focused on other races and have little knowledge or interest in the merits of retaining appellate judges.

Unless they have declared opposition, our appellate judges are precluded from campaigning. However, the absence of formal opposition does not mean they have nothing to fear. To date, no Florida appellate judge has been voted out, but there has been a very close call in one district, where a judge's name followed a list of unpopular proposed constitutional amendments; and some counties routinely vote very closely, or even vote not to retain. In another instance, a person or group posted signs urging a "no" vote in the day or two before the election, without prior notice. Appellate judges in other states have been voted out altogether.

There is also a danger that our judges get caught up in a term-limit or "throw the rascals out" mentality. Many in the general populace have forgotten their basic civics–that the judiciary is designed to be an independent, third branch of government, charged with protecting the rights of those not in political power at the moment.

By definition, when protecting the rights of individuals or businesses, the courts may make decisions that are not popular. It is appropriate to remember this year, for example, that *Brown v. Board of Education*[2] was one such unpopular opinion in many areas of our country (so much so that President Eisenhower had to employ the National Guard to enforce it). Being a good judge requires having the courage to make the decision the judge concludes is legally correct, even though it may not be popular with the general public or another branch of government.

So, what should we do as appellate practitioners who do understand and appreciate the importance of our appellate judges? We should speak up. Many of our family, friends, and clients will look to us and listen when we urge them to retain the appellate judges on the ballot this fall. We may be the only contact many voters have with our legal system and the appellate courts.

There is a story attributed to former speaker of the House Tip O'Neill, who after being reelected, thanked his neighbor. The neighbor said there was no need to thank him, as he had not voted for O'Neill. Surprised, O'Neill exclaimed they had been neighbors for years and asked why the man had not voted for him. "The other candidate asked me to vote for him, and you didn't," was the response.

Our appellate judges cannot formally ask the voters to vote for them. But we can and should. For most, just asking that they vote to retain should be enough; if you catch any static, you can use the civics lesson. Do your part to educate the vote to retain our appellate judges.

[1] Raymond T. (Tom) Elligett, Jr. is board certified in appellate practice, and is an adjunct professor, teaching appellate practice at Stetson University College of Law. He is a past Chair of the Florida Bar Appellate Practice and Advocacy Section, and was President of the Hillsborough County Bar Association in 1997-98. He is a Master in the Justice William Glenn Terrell Inn of Court.

[2]. *Brown v. Board of Education*, 347 U.S. 483 (1954).

The Editor's Column: Dr. Bethany Dumas Speaks On Helping Jurors Understand the Law

by Dorothy Easley[1]

As appellate practitioners, we have all, at times, challenged the clarity, the organization, even the understandability of jury instructions (both civil and criminal). Most of us have confronted jury instruction issues, either as part of our work while sitting as appellate-chair at trials, or as part of our appeals. Recently, a movement in the legal community that focuses on improving juror understanding, overall, beyond the jury instructions, has begun to take root. Florida has yet to be an active participant in those kinds of programs; but perhaps we, as appellate lawyers, may want to encourage and support widespread changes in standard and special jury instructions and programs that enhance juror understanding. We are, after all, specialists in communication of the law.

John F. Kennedy once said that "[t]he great enemy of the truth is very often not the lie— deliberate, contrived and dishonest—but the myth—persistent, persuasive, and unrealistic."[2] I have lately wondered if it is a "myth" that we are doing enough, beyond just getting the instructions right, to communicate to jurors the law they are to apply. So, I decided to interview one of the most productive advocates for helping jurors understand the law, Dr. Bethany Dumas.[3]

To those unfamiliar with the name, Dr. Dumas is a like a "Michael Jordan of Linguistics" in law today. As she speaks in a distinctive Southwestern drawl, it is clear that she is an extremely well educated, powerhouse communicator. She received, first, her B.A. from Lamar University in Beaumont, Texas, then, her M.A. and, finally, her Ph.D. in English and Linguistics from the University of Arkansas, in 1961. As if that were not enough, Dr. Dumas pursued post-doctoral work in Swahili at the School of Oriental and African Studies at the University of London, followed by more post-doctoral work at the University of Hawaii, Linguistic Society of America Summer Institute, the City University of NY Graduate Center, Linguistic Society of America Summer Institute, and Stanford University, Linguistic Society of America Summer Institute.

Dr. Dumas returned to law school and earned her J.D. at the University of Tennessee College of Law in 1985. Since that time, she has consulted on Linguistics with numerous Bar Associations and clients around the country, as well as teaching at the University of Tennessee in four different departments or schools, sitting on nineteen dissertation committees, as well as publishing, working in institutional research, media consulting, and teaching CLE seminars on this subject. Dr. Dumas has also worked with the Tennessee Bar Association to make lawyers and the law more understandable to the jurors deciding those cases.

In early July, Dr. Dumas was gracious enough to grant a telephone interview to share her thoughts and four decades of education and experience on the subject:

Q: What do you see as the five major problems with jury instructions today?

A: The first category is Syntactic Complexity: Studies show that jurors can understand technical terms explained to them. The problems are rooted more in the sentence structures that we use, sometimes using sentences with eight clauses. We need to keep sentences short and simple.

The second category is what I would describe as "Organization or 'Roadmaps'": Our instructions lack roadmaps. Just as law students learn from law professors, or as any student learns, jurors also learn best when we tell them what we're going to be telling them in the instructions, then give them the instructions, and then tell them what we just told them.

The third category would be "Method of Presentation": Jurors like visual aids just like we lawyers do. Yet, our instructions are not written that way. Lawyers love bullets, power point and slide shows; jurors do too. Just as lawyers prefer to analyze the testimony of experts from both sides on a given topic, jurors like to receive testimony that way. Experts should be grouped by issue or topic. When lawyers move to the next issue or topic, those experts should be grouped and regrouped, accordingly.

The fourth category would be one category with two subcategories "Semantic Complexity and Abstract Concept Complexity": Terms must be explained and elements must be defined if we want jurors to understand concepts. Our instructions do not rephrase concepts to help jurors understand. For example, no one can precisely define "reasonable doubt", but we can define what it is not. Abstract concepts must also be defined. For example, in Tennessee, there was a pattern jury instruction that used the word "captious". The average lawyer does not know what that word means. A juror can hardly be expected to know what it means either. "Present cash value" is another example. Why not rephrase that as "the amount of money needed to recover over a period of time"?

The fifth category is what I would call "Timing": Jurors need to get the jury instructions earlier in the case, so that they can hear the evidence with an understanding of what they are hearing and why.

Q: What progress have you seen in these five areas?

A: I have seen significant progress over the last five to ten years. The leaders on this are Arizona, California, Washington, D.C., and New York. In Utah, I gave a four-hour CLE course to those members of the Utah Bar Association responsible for rewriting their jury instructions.

Tennessee looked at these leaders and, in late 1997, the Tennessee Bar Association ("TBA") President-elect Pamela Reeves learned of these efforts and appointed the TBA Commission on Jury Reform to study the Tennessee jury system and make recommendations for improvement. Gail Ashworth of the Nashville Bar and Anna Hinds of the Knoxville Bar chaired that Commission, and judges, lawyers, and lay people who had served as jurors all across Tennessee met for a year to study the issues in detail. Then, in 1999, the Commission recommended a number of procedural and statutory

changes in the use of jurors in Tennessee. The Tennessee Supreme Court ultimately approved a Pilot Project to test the feasibility of thirteen of the Commission's recommended procedural changes. Participants in Pilot Project trials completed questionnaires, which were later evaluated and formalized into proposed criminal and civil rules. The Tennessee Supreme Court also ultimately adopted those proposals with some revisions.

Tennessee's Pilot Project was so successful that it was extended indefinitely to permit the selected courts to continue using the experimental procedures until the legislature had a chance to consider making the procedures a permanent part of Tennessee law. Some of those procedural changes included:

• Jury-oriented scheduling (Amendments to the various Rules of Criminal Procedure and Civil Procedure to minimize the time jurors are not directly involved in the trial.),

• Non-designation of alternate and regular jurors flexibility (To ensure that all jurors pay close attention during trial, Rule 24(e) of the Tennessee Rules of Criminal Procedure gives trial judges the option to choose to treat all jurors [both regular and alternates] as an "all are selected" entity throughout the trial and randomly designate, just before trial ends, which jurors are alternates and "deselect" them.),

• Lawyer's address to jury at beginning of jury selection (Research and experience in some Tennessee and out-of-state courts show that the practice of allowing counsel to make a brief opening statement to potential jurors assists jurors in understanding why they are there, improves their feeling of inclusion in the process, and assists them in responding to voir dire queries.),

• Interim commentary during trial (Trial judges in civil and criminal cases are now given the discretion by rule amendment to allow trial lawyers to make brief statements or "commentary" during the trial, after the ordinary opening statement, to explain how the upcoming testimony fits with the party's burden or theory. Opposing counsel is given a brief opportunity to respond. Time spent during these interim statements is counted against the side's total amount of time and will reduce the time available for opening statement and closing argument.),

• Jury instructions at beginning of trial (New Tennessee Civil Rule 51.03(1) and Criminal Rule 30(d)(1) require trial judges, at the beginning of trial after the jury is sworn, to provide these basic jury instructions on the applicable law to help the jury understand the applicable law as they receive the evidence.),

• Jury instructions before closing argument (A new model, permitted under new Tennessee Civil Rule 51.03(2) and Criminal Rule 30(d)(2), gives the trial court the discretion to deliver the bulk of final jury instructions before closing argument. A second set of final instructions involving various administrative matters and reminding the jury again of basic legal principles governing the case, should be delivered after closing argument. This enables jurors to understand precise legal terms while they are resolving fact questions.),

• Sequence of expert witnesses (New Tennessee Civil Rule 43.03 and Criminal Rule 26.3 allow a trial court to alter the order and presentation of expert testimony "to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony." Because of the potential problems with issues like burden of proof and expert costs, the new rules permit the reordering only with the consent of all parties.).

Georgia has also made improvements. For example, there was a pattern medical malpractice jury instruction that repeated the presumption of innocence principle twice. That instruction was appealed, the argument being that repeating the presumption of innocence principle raised the bar for plaintiffs. The Georgia Supreme Court rejected that argument, but agreed that the instruction needed to be changed.

Q: What do you see as the barriers to making jury instructions clear?

A: The problem is that jury instructions represent a double-edge sword. One edge is what I call the "problem of breaking the mold." Jury instructions represent one of the biggest areas for reversal on appeal. Pattern jury instructions are all based on appellate opinions. Trial judges know that if they use those instructions, they will not be reversed on appeal. So, trial judges want to always use pattern jury instructions because they know that those instructions protect them.

The conflict arises when attorneys try to take those pattern instructions and make them more specific to the case or more comprehensive, because that presents a risk to the trial judge that they may get reversed on appeal. But the problem is that "pattern" is simply that: a pattern. Pattern instructions are not designed to be case-specific.

For example, I know of a very fine, innovative magistrate judge in Tennessee. During his tenure on both the state and federal bench, he has been rewriting pattern jury instructions for years, and has never been reversed by the appellate courts. He even includes narratives based on facts that are completely different from the facts of the case being tried to illustrate terms and concepts, such as proximate cause. One example of that judge's narrative on proximate cause in a medical malpractice case might be something very conversational and illustrative like:

"Let me explain proximate cause to you, jurors, by telling you what it is not. If you're driving your car on slick tires and you skid and run into a car in front of you and cause an accident, then that could be said to be proximate cause. But, if you're stopped at a red light and you're in your car with slick tires and someone runs into the back of your car, your slick tires are not the proximate cause of your being rear-ended. The slick tires in that example are irrelevant."

So getting trial judges to rethink and allow rewriting or customizing of pattern jury instructions is a continuing challenge.

The other "edge of the sword" or reason for inertia is what I call the issue of advocacy. Sometimes the facts of a case are so bad or the law so unfavorable for one side that the lawyers may not want the jurors to really understand the law they are to apply to the facts of the case. Those lawyers do not want the instructions to be clear because, if they are, jurors will better understand the issues and that may actually harm their client. So, making jury instructions clear and comprehensive can implicate sometimes the lawyer's ethical responsibilities to the client.

Q: What do you recommend to appellate lawyers crafting jury instructions?

A: I recommend what I recommend to all lawyers. I teach courses at the University of Tennessee, and Georgetown University and other law schools on language and the law. As part of that course, I require my students to interview judges and lawyers about the law. One of the questions I always have my students ask those judges and lawyers is: "What do they

continued next page

think law schools do not teach enough of?" Every year, my students get the same answer: writing.

Q: Do you see writing clear jury instructions as a professional responsibility of appellate lawyers called in to work on these instructions?

A: Yes, I do see it as the appellate lawyer's professional responsibility, as the one crafting the instructions, to make them so clear and comprehensive that they can be understood. But I see it as the professional responsibility of all lawyers.

Dr. Dumas ends her interview with the following wisdom: "Clear writing is hard. Yet, it is the key to everything we do in law. Clarity is the key to success with a jury on all levels."

[1] **Dorothy F. Easley**, is a Florida Bar board certified appellate practitioner with Steven M. Ziegler, P.A., specializing in health and managed care law. She is currently a member of the Executive Council of the Appellate Practice Section and the Florida Bar Appellate Court Rules Committee. She is the recipient of the Appellate Practice Section Service Award for 2002-03 and for 2003-04. Ms. Easley handles state and federal appeals, and also appears as appellate (second) chair in state and federal trials.

[2]. Commencement address, Yale University, New Haven, Connecticut (June 11, 1962).

[3]. For anyone wanting more information, Dr. Bethany Dumas may be contacted through her email address: dumasb@utkux.utcc.utk.edu. You may also write to her at: Department of English, University of Tennessee, Knoxville, Tennessee 37996-0430.

2003 - 2004 Final Budget / 2004 - 2005 Budget (Approved, January 2004)
Appellate Practice Section

Income	**Actual**	**Budget**	**04-05 Budget**
Dues	16,110	16,875	16,875
Cert. Review	4,124	6,950	7,100
CLE	699	2,100	3,000
Audio Tapes	7,219	3,700	3,500
Videotapes	74	200	0
Materials	60	0	0
Book Sales	180	200	0
Sponsorships (Other)	1,483	1,000	0
Sponsorships (Reception)	1,650	5,000	5,000
Sponsorships (The Guide)	0	1,000	1,000
Member Service Program	505	1,000	1,000
Credit Card Fees	(7)	0	0
Investments	6,486	0	4,637
Total	**38,583**	**38,025**	**42,112**

Expenses	**Actual**	**Budget**	**04-05 Budget**
Cert. Review	4,454	5,436	5,826
Employee Travel	830	1,494	999
Postage	432	500	500
Printing	82	250	200
Newsletter	2,455	2,800	3,000
Membership	205	250	250
Photocopies	51	300	300
Officer Travel	0	250	700
Meeting Travel	510	400	0
Committee Exp.	811	600	600
Public Info	1,089	1,100	0
General Mtg.	1,281	1,200	1,300
Board or Council Mtg.	32	0	0
Annual Mtg.	11,294	10,500	7,500
Midyear Mtg.	1,465	1,300	1,500
Section Service	915	1,000	1,500
Directory	10,245	12,000	5,000
Awards	488	500	600
Scholarships	0	0	2,000
Website	4,513	6,000	4,000
Legislative Travel	0	200	200
Council of Sections	0	300	300
Reserve	0	0	3,055
Misc.	514	100	100
Total	**41,666**	**54,320**	**39,430**
Net	**-3,083**	**-2,499**	**2,682**
Fund Balance	**86,194**	**99,501**	**95,417**

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What are the requirements?

- ☞ Have been engaged in the practice of law for at least five years prior to the date of the application.
- ☞ Demonstrate substantial involvement in the practice of appellate practice during the three years immediately preceding the date of application. (Substantial involvement is defined as devoting not less than 30% in direct participation and sole or primary responsibility for 25 appellate actions including 5 oral arguments.)
- ☞ Complete at least 45 hours of continuing legal education (CLE) in appellate practice activities within the three year period immediately preceding the date of application.
- ☞ Submit the names of four attorneys and two judges who can attest to your reputation for knowledge, skills, proficiency and substantial involvement as well as your character, ethics and reputation for professionalism in the field of appellate practice.
- ☞ Pass a written examination demonstrating special knowledge, skills and proficiency in appellate practice.

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